



# The Franchise Valuations Reporter

## Our Expertise

Within the franchise, distribution and dealership context, we are experts in:



- Valuations, Damages & Expert Testimony
- Finance, Accounting and Tax

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## Have a Question About Succession Planning for Franchise Owners?

Call us for a free, confidential consultation. And we're always interested in your comments about the newsletter.

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## We Write the Book

**Franchise Regulation and Damages**, the only treatise that covers valuations and damages in franchise disputes, is updated 3 times a year.

For more details, to see a Table of Contents or to place an order, go to the Wolters Kluwer Law & Business web page [here](#).

## DISCLAIMER

## Valuations

### *Task List for Clients Selling Their Business*

Edward Mendlowitz, and Louis Young have put together an interesting and [extensive check list](#) for potential sellers of businesses. Buyers can also use the list as a timeline and road map of the steps that are expected to occur and what is expected of them.

### *Real Estate Valuations*

*The Wall Street Journal* reports that that public pension funds that invested in malls, apartments and offices over the last decade in search of higher returns are in trouble. "Now they are grappling with how much those real-estate investments are worth in a world transformed by Covid-19. Pension giant California Public Employees' Retirement System is projecting malls will lose some of their value in the second quarter, according to an internal estimate. The Arizona State Retirement System predicts the value of distribution centers for e-commerce will rise as more people shop online. The investment chief of the Chicago Teachers' Pension Fund is expecting the worth of student housing to drop. 'If you talk to anyone who says that they know exactly where the market is going and that they have all of the answers, they really don't know,' said Chicago Teachers' investment chief Angela Miller-May." Read the [full story here](#). Our estimate is that real estate values declined by 40 percent in the 2nd quarter.

### *Synergistic Attributes*

According to Brandon McFarland, the Delaware Court of Chancery decisions on the treatment of synergistic value in dissenting shareholder appraisal rights cases provide meaningful guidance to valuation analysts, legal counsel, and other courts. In his article, [In Dissenting Shareholder Appraisal Rights Matters \(Part II of II\)](#), he discusses many Delaware "fair value" cases.

## Damages

### *In Lost Profits Claim Plaintiff Must Prove NET Profits: Showing of Only Gross Profits Results in Zero Award*

*In Motion Medical Tech. v. THERMOTEK, INC.* (

875 F.3d 765 (2017)), the Fifth Circuit applying Texas law found that a jury verdict awarding lost profits which were only calculated as Gross Profits (Revenues less Cost of Goods Sold) had to be overturned because it was the Plaintiff's burden to show all costs associated with such Gross Profits to calculate Net Profits which was the ceiling for any lost profits award under a claim for fraud. The Court ruled, "Failure to comply [with the obligation to prove Net Profits] carries harsh consequences in Texas: 'If no evidence is presented to prove lost profits with reasonable certainty, the trial court must render a take-nothing judgment as to lost-profit damages.'"

### *Punitive Damages Can Be Considered for Jurisdiction Based on Amount in Controversy*

The information provided in this newsletter is for informational purposes only and should not be construed as legal or expert advice which can only be obtained from appropriate professionals. Franchise Valuations, Ltd. provides such expert advice on the topics addressed herein.

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In a suit against Harley-Davidson for false price advertising in which the California trial court's decision to remand the case to state court because the plaintiffs failed to satisfy the Class Action Fairness Act's \$5 million amount-in-controversy requirement was appealed, the Ninth Circuit Court of Appeals reversed the decision, ruling that "a defendant that relies on potential punitive damages to satisfy the amount in controversy under CAFA meets that requirement if it shows that the proffered punitive/compensatory damages is reasonably possible." The "reasonably possible" standard can be satisfied by identifying prior cases involving the same cause of action in which juries awarded punitive damages at the same ratio sought in the case. (*Greene v. Harley-Davidson, Inc.*, July 14, 2020, Lee, K.).

## **Joint Employer, Independent Contractor, Vicarious Liability**

### ***7-Eleven Franchise Was Not an Employer-Employee Relationship***

A 7-Eleven franchisee's suit against the franchisor for violations of the Illinois Wage Payment and Collection Act was dismissed with prejudice because the franchise arrangement in which the franchisee paid daily revenues into a 7-Eleven account and from which point 7-Eleven paid a daily draw to the franchisee did not constitute a wage-payment relationship. Rather, the arrangement was one in which, in consideration for being allowed to operate a 7-Eleven store, the franchisee agreed to share profits with 7-Eleven, which were entirely dependent on customer sales (*Patel v. 7-Eleven, Inc.*, June 18, 2020, Rowland, M.).

### ***7-Eleven Not Liable for Vicarious Liability - Franchisor Lacked Sufficient Control Over Franchisee to Establish Duty of Care to Franchisee's Employees***

A federal Court in New Jersey granted summary judgment after finding that the franchisor did not owe a duty of care to the plaintiff, who was shot in an armed robbery at a 7-Eleven store operated by a franchisee. *Boutahli v. 7-Eleven, Inc.*, 2020 WL 3287127 (D.N.J. June 18, 2020). On January 10, 2014, after midnight, two men walked into the store, demanded the contents of the cash register, and pistol-whipped and shot Boutahli four times before fleeing the scene. Boutahli suffered permanent injuries for which he was seeking compensation from various parties, including 7-Eleven. Boutahli argued that 7-Eleven had acted negligently when it failed to protect him adequately from the attack. 7-Eleven moved for summary judgment, arguing that it did not owe any duty of care to Boutahli.

The court held that while 7-Eleven did have certain controls over the store (for example, maintaining certain bookkeeping records, required training, and the right to convert the store into a gas station and to require the store to carry certain products), those controls did not amount to the day-to-day control that would result in 7-Eleven's control over the store. Additionally, the franchise agreement clearly stated the parties were not agents of the other. Accordingly, the court granted 7-Eleven's motion for summary judgement.

### ***IFA To File Response in Joint Employer Case***

The State of New York provided a counter argument in response to the International Franchise Association's and other business groups' intervention in *State of New York, et al, v. Scalia*, a lawsuit where certain state attorneys general are seeking to overturn the U.S. Department of Labor's newly-enacted joint employer rule. The state argued against the timing of the intervention noting that IFA and other business groups should have intervened when the lawsuit was first filed in February.

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## Quotations

A second marriage is a triumph of hope over experience - *Samuel Johnson*

Patriotism is the last refuge of a scoundrel. - *Samuel Johnson*