



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

New Tax Law

IFA Seeks Guidance From the Treasury

The International Franchise Association is seeking an explanation from the Treasury Department with respect to new section 199A of the Internal Revenue Code as added by the Tax Cuts and Jobs Act.

In a letter dated June 9, 2018, the IFA sought guidance as to whether the business of franchising meets the definition of a specified service trade or business ("SSTB") under section 199A(d)(2). The issue is important because income derived from an SSTB generally will not be eligible for the section 199A deduction.[1] The IFA is arguing for a determination that franchising does not fall within the SSTB definition - and thereby is eligible for the 20% pass thru deduction.

Soon Alimony Will No Longer Be Tax Deductible

Effective December 31, 2018, under the Tax Cuts and Jobs Act, alimony will no longer be deductible by the payor, nor income to the payee. Perhaps in divorce situations involving franchises, it will make better sense to transfer a portion of the enterprise and its income rather than pay alimony.

Tax Cuts Not So Wise in New Jersey

Corporate tax breaks designed to rescue the State's economy from the recession will result in stripping \$1 billion a year in revenue by 2020.[2] This year the State could lose \$545 million because of grants and tax-credit awards, according to an April memo from the New Jersey Economic Development Authority. Without the giveaways, the State's corporate-tax-revenue growth would be 12% higher, Treasurer Elizabeth Muoio estimated.

[1] Generally 20% of such income

[2] [The Wall Street Journal, "Chris Christie's Corporate Tax Breaks Leave New Jersey With Big Price Tag," June 13, 2018.](#)

Joint Employer and Vicarious Liability

Recent Domino's Case Reads Like a Law School Exam

The decision in *Domino's v. Wiederhold*[1] makes clear that issues like joint employer status and vicarious liability arising from the franchisor-franchisee relationship are very fact specific.

Facts:

In January 2011, Richard Wiederhold swerved into the median to avoid a vehicle that had pulled out in front of him. His vehicle drifted through the median and back across the roadway, flipped over once or twice, and came to rest in a ditch. The collision immediately rendered him a quadriplegic. The

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other vehicle was driven by Jeffrey Kidd, who was delivering pizza for Domino's franchisee, Fischler. One month after the accident, Mr. Wiederhold sued Domino's, Fischler, and Mr. Kidd, claiming that Mr. Kidd negligently caused his injuries and that Fischler and Domino's were vicariously liable. Several months later, Mr. Wiederhold married his girlfriend, who was an uninjured passenger in the accident. In March 2012, Mr. Wiederhold died, and his now-wife, Mrs. Wiederhold, as personal representative of his estate, was substituted as the plaintiff. She then filed an amended complaint to include a claim for wrongful death damages as Mr. Wiederhold's surviving spouse.

Legal Analysis: Is Domino's Vicariously Liable for the Automobile Accident Involving Its Franchisee's Employee?

The Court held that under Florida law, vicarious liability may arise in various ways such as under an agency theory for the tortious acts of a franchisee, or a franchisee's employee, when the franchisor has direct control of, or the right to control, the day-to-day operations of the franchisee. Applying the "control" test to a franchise is not an easy undertaking because franchises have independent aspects to them, but they must also retain some control over the use of their names, goods and services.[2] Whether the franchisor's control is sufficient to establish an agency relationship "depends in each case upon the nature and extent of such control as defined in the agreement or by the actual practice of the parties."

Domino's contended that as a matter of law, it was not vicariously liable for the automobile accident because it had no control over Fischler's day-to-day operations claiming that the only evidence of control amounted to nothing more than "brand maintenance requirements and activities."

But the Court wrote:

While Domino's points to evidence supporting its position that it had no control over Fischler, it ignores abundant evidence of control to the contrary. Domino's argument is simply an invitation for this Court to reweigh the evidence or recharacterize its control as being limited to brand maintenance activities. We decline that invitation. The trial court properly determined that this issue was a question of fact for the jury to resolve.[3]

[1] District Court of Appeal of Florida, Fifth District, (Case No. 5D16-2794 Opinion filed May 11, 2018).

[2]Citing *Font v. Stanley Steamer Int'l, Inc.*, 849 So.2d 1214, 1216 (Fla. 5th DCA 2003).

[3] In the end the decision of the lower court was overturned and a new trial granted because of plaintiff's counsel's prejudicial remarks during closing argument.

Valuations

With Franchise Resales on the Rise Sellers, Buyers & Franchisors Can Turn to Franchise Valuations Ltd For Fair Market Value Expertise

According to FRANdata, franchise resales are proceeding at an increasing rate. In 2016 4.1 percent of franchises were resold, up from 3.5 percent in 2013. The May 2018 issue of *Franchise Times* cites a variety of reasons that lead to resales including "retirement, personal reasons, entrepreneurial

burnout, undercapitalization or the fact that the business simply isn't a good fit for the franchisee."

Among the challenges sellers and buyers must confront before a deal is signed is setting a fair price. In many cases a third-party valuation is called for. **Franchise Valuations Ltd.** can provide such expertise to any of the interested parties: multi-unit operators, potential buyers, franchise systems and lenders.

But even before a specific resale transaction is on the horizon, the *Franchise Times* articles reports, some franchise systems are laying the groundwork for a smooth transition. "Some franchisors are proactive in addressing resales early on with incoming franchisees... [They] embed resale discussions into the franchise system through educational sessions and webinars."

Franchise Valuations Ltd. is available for customized presentations to franchise systems to arm them with practical valuation strategies. You can contact us at 212-689-9499 or bruce@franchisevaluations.com.

How many Business Valuators Does It Take To Screw In a Light Bulb?

Individuals who are members of the four self-regulatory valuation professional organizations hold about 10,050 BV credentials, according to the updated [Business Valuation \(BV\) and Financial Forensics Credential Comparison Chart](#) from the National Association of Certified Valuators and Analysts (NACVA). Of course, some practitioners have multiple credentials, so the 10,050 figure does not equate to an amount of discrete individuals. The credential breakdown is as follows:

- CVA (NACVA), 5,500 (plus 700 designees in progress);
- ABV (AICPA), 2,800;
- ASA (American Society of Appraisers), 1,465; and
- CBA/MCBA (Institute of Business Appraisers), 285 (no longer issued; part of NACVA).

There are also about 100 individuals with the ABAR (Accredited in Business Appraisal Review) designation from NACVA and six with the ARM (Appraisal Review and Management) credential from the ASA. The chart also includes statistics on credentials for financial forensics, fraud, and financial analysts.

Damages

No Damages, No Cause of Action

In *E. & J. Gallo Winery v. Instituut Voor Landbouw - En Visserijonderzoek*[1], although the claims of several plaintiffs against two entities for trade secret misappropriation in violation of the California trade secrets statute survived, one of the plaintiffs failed to plausibly allege that it suffered any damages from the defendants' alleged conduct. Thus, that plaintiff's claims for misappropriation, breach of contract and unfair competition were dismissed. Liability in the air is not enough. Damages must be shown to sustain a claim.

[1] USDC ED CA No. 1:17-cv-00808-DAD-EPG (June 1, 2018, Drozd, D.)

Attorneys' Fees

Preponderance of Evidence Is Proper Standard For Lanham Act "Exceptional Case" Attorney Fee Analysis

The Fourth Circuit Court of Appeals overturned a lower court ruling denying XYZ.com, LLC, a domain name seller, attorney fees after it prevailed on summary judgment in a false advertising case initiated by Verisign, Inc.[1] The appellate tribunal held that the district court abused its discretion when it held that the prevailing party seeking fees must prove its entitlement with clear and convincing evidence, when it should have applied the preponderance of the evidence standard to prove an "exceptional case" under the Lanham Act. The Fourth Circuit also clarified that XYZ does not need to show that Verisign acted in bad faith to meet the exceptional case standard for legal reimbursement.

[1]Verisign, Inc. v. XYZ.COM, LLC, USCA 4 (No. 17-1704, May 29, 2018, Floyd, H.)

Quotations

Be my brother or I'll bash your head in. Nazi Slogan

When the President does it that means that it is not illegal. Richard Nixon