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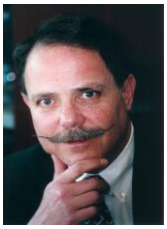
The Franchise Valuations Reporter

Our Expertise



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

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Franchisor-as-Joint-Employer Issue

New York Attorney General Settles with Domino's Franchisees

New York State filed a lawsuit in May 2016 against three franchisees and their franchisor Domino's Pizza, Inc., seeking restitution from Domino's and its franchisees for a number of alleged violations, including violations against minimum wage, overtime, and other basic labor law protections. On March 7, Attorney General Eric T. Schneiderman announced settlements with the three franchisees, totaling $480,000 in restitution to hundreds of workers subject to wage and labor violations at ten different franchise locations. As part of the settlement agreements, the three franchisees will be dismissed from the lawsuit, and only the franchisor Domino's remains as a defendant. The Attorney General has now settled investigations into labor law violations at 71 Domino's franchise locations in New York State, owned by fifteen individual franchisees. These locations comprise more than half of the franchise stores and over a third of the total number of Domino's stores in New York and the AG has secured nearly $2 million in total restitution for Domino's workers.

According to the announcement, the Attorney General has asserted that Domino's was heavily involved in the employment practices of its franchisees and, as a result, is a joint employer of the workers at the franchisees' stores and is responsible for underpaid wages to these workers. The Attorney General has also alleged that Domino's encouraged franchisees to use payroll reports from the company's computer system (called "PULSE"), even though Domino's knew for years that PULSE under-calculated gross wages and that Domino's made multiple updates to PULSE each year, but decided not to fix the flaws that caused underpayments to workers or tell franchisees about the flaws, deeming it a "low priority."

Federal Court Finds No Joint Employer Status

In *Pope v. Espeth*[1]a District Court in Wisconsin granted summary judgment finding that franchisor Fish Window Cleaning Services was not a joint employer under the 4 part test imposed by the Fair Labor Standards Act and Wisconsin law. The factors were: 1) whether the franchisor had the power to hire and fire; 2) whether the franchisor controlled employee work schedules; 3) whether the franchisor controlled the rate or method of payment of franchisee employees; and 4) whether the franchisor maintained employment records.

Appeals Court Wrestles With New Joint-Employer Definition

The D.C. Circuit Court of Appeals is considering whether or not to uphold the National Labor Relations Board (NLRB) ruling in the Browning Ferris case that changed the definition of a joint employer[2]. During oral argument Judge Patricia Millett asked whether such a "joint employer" would have to bargain with employees on everything or only the terms of the labor it controls.

Browning-Ferris Industries (BFI) is challenging the NLRB's 2015 ruling that a company is considered a joint employer with a contractor if it has "indirect"

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control over the terms and conditions of employment or has the "reserved authority to do so." BFI argued that for the past 30 years, a company was only considered a joint employer if it had "direct" or "complete control." Judge Raymond Randolph asked if he'd be considered a joint employer if he owned a restaurant and needed an exterminator to come in, but said the exterminator could only come in when the restaurant is closed. BFI argued that under common law it is "direct" and "immediate" that matters. And that, BFI's attorney claimed, is how Congress understood it when it amended the National Labor Relations Act in 1974, revising the definition of "employee" to exclude independent contractors.

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[1] 2017 WL 108081 (W.D. Wis. Jan 11, 2017)

[2] For a review of the situation in both the US and Canada, see Marrocco, Andrae J., "Moving Forward, Franchisors Should Take a Step Back: How to Avoid the Risk of Being Labelled a Joint Employer."

Valuations

New Jersey Ruling Uses DLOM to Sanction Shareholder Bad Behavior

Courts sometimes use a discount for lack of marketability (DLOM) as punishment against shareholders who act obnoxiously. In *Parker v. Parker*[1], two brothers formed two separate companies, which operated from the same location and shared overhead but were otherwise independent enterprises. Decades later, each brother filed suit against the other, claiming he qualified as an oppressed shareholder. The Supreme Court of New Jersey has previously held that a marketability discount may be appropriate to ensure a shareholder instigating problems does not receive a windfall as a result of his or her conduct.[2] In *Parker*, one brother's expert used a 25% DLOM and a 15% minority discount, saying he believed the other brother to be the oppressed shareholder and discounts "needed to be applied." The court found this was a legal conclusion the expert was not qualified to make but adopted the conclusion just the same with respect to the marketability discount.

De Kooning Daughter Battles $92M Tax Bill Over His Artwork

Death has been a boon for taxpayer-IRS disagreements over valuation. Most recently there have been multi-million dollar disputes in the estates of Michael Jackson, Whitney Houston, the artist known as Prince and others. Two new disputes center on the value of artwork. One is the multi-million valuation difference with respect to the value of paintings by Willem De Kooning that were part of his daughter's estate. De Kooning was a famous Dutch-American abstract expressionist whose "Interchange" is said to be the most expensive painting ever sold, according to court filings. In another case, *Estate of Eva Franzen Kollsman, v. Commissioner*[3], the value of two paintings was calculated based on an expert's report and applying appropriate discounts to reflect the condition of the paintings and the uncertainty of the real painter (Jan Brueghel the Elder, Jan Brueghel the Younger, or a Brueghel studio).

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[1]2016 N.J. Super. Unpub. LEXIS 2720 (Dec. 22, 2016).

[2]See *Wisniewski v Walsh*, 2013 NJ Super. Ct. App Div, April 2, 2013); see also *Congel v Malfitano*, 2016 NY Slip Op 03845 (NY App. Div. May 18, 2016)

[3]U.S. Tax Court, Dkt. No. 26077-09, TC Memo. 2017-40, February 22, 2017

Evidence Rules: Daubert or Not

Florida Supreme Court Rejects Daubert To the Extent It Is "Procedural"

In a 4-2 decision, the Florida Supreme Court last month declined to adopt the *Daubert* rule to replace the *Frye* standard regarding the admissibility of expert opinion evidence. Before this amendment, *Frye* had been the law in Florida on this issue. The majority based its decision on what it characterized as "grave concerns about the constitutionality of the [*Daubert*] amendment." In dissent, Justice Polston, joined by Justice Canady, criticized the characterization that there were any real constitutional issues regarding the amendment, noting that the United States Supreme Court had decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, more than 20 years ago; that federal courts have routinely applied the *Daubert* rule since; and that "36 states have rejected *Frye* in favor of *Daubert* to some extent."[1]

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[1]In Re: Amendments to the Florida Evidence Code, --- So.3d ---- (2017)

Tax Scams for 2017ax

How the 2017 List Compares to the 2016 List

The same items that appeared on the 2016 list also appear on the 2017 list, albeit in a different order, meaning that some items have increased in terms of occurrence. For example, phishing schemes moved from third place last year to first due to the massive increase in reports over the last year. It is estimated that 156 million phishing emails are issued every day. Conversely, identity theft dropped from the top spot to third this year, likely due to the enhanced awareness campaigns, as well as the various safeguards the IRS has established over the last year. The comparison is below:

	2016		2017
1.	Identity Theft	1.	Phishing
2.	Phone Scams	2.	Phone Scams
3.	Phishing	3.	Identity Theft
4.	Tax Return Preparer Fraud	4.	Tax Return Preparer Fraud
5.	Offshore Tax Avoidance	5.	Fake Charities
6.	Inflated Refund Claims	6.	Inflated Refund Claims
7.	Fake Charities	7.	Excessive Claims for Business Credits
8.	Falsely Padding Deductions	8.	Falsely Padding Deductions
9.	Excessive Claims for Business Credits	9.	Falsifying Income to Claim Tax Credits
10.	Falsifying Income to Claim Tax Credits	10.	Hiding Money or Income Offshore

Mandatory Arbitration Clauses

If Not Visible, Not Enforceable

Samsung advertised that the battery in its Galaxy Gear S Smartwatch lasted 24 to 48 hours. After receiving three watches that did not last nearly as long as the advertised 24-48 hours, a consumer filed a class action suit, asserting violations of the New Jersey Consumer Fraud Act for fraudulent and deceptive marketing and pricing. Samsung moved to compel arbitration and to dismiss his class claims. A mandatory arbitration clause included in a 143-page guide that came in the box of Samsung's Smartwatches was not binding on consumers, according to the U.S. Court of Appeals in Philadelphia. The court held that the guide was not a binding contract because there was no mutual assent to the terms, and that Samsung buried the arbitration clause to the point that consumers were unlikely to ever know they had agreed to it. Thus, the district court order denying the defendant's motion to compel arbitration was affirmed.[1]

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[1] *Noble v. Samsung Electronics America, Inc.*, March 3, 2017, Jordan, K., No. 16-1903