



The Franchise Valuations Reporter



Our Expertise

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

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

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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 damages in franchise disputes and valuations of franchises, 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](#).



ABA Forum

Wishing All Attendees the Best - Regrettably I will not be able to attend.

Valuations

Section 2704 Regulations Denying Minority Discounts Withdrawn

The U.S. Treasury Department announced last week that it will withdraw proposed Obama-era regulations that would have made it harder for business owners to avoid estate and gift taxes. [The rules, which were proposed in 2016 but never put into effect](#), targeted valuation discounts such as the minority discount which is based on the idea that a less than controlling interest in a closely held business is harder to sell than a majority position. Business groups had been fighting the proposal. To this author, it seems quite logical to provide for a minority discount as any real-world arm's length buyer would demand such a reduction from the proportionate enterprise value. Only a fool would not.

Management Projections: Impact on Court Decisions

Courts in valuation actions often put emphasis on management projections - sometimes positively and sometimes negatively. Some recent decisions were noted by Business Valuation Resources:

- *In re PetSmart, Inc.*[1]: In an appraisal action, the Court adopted the merger price. It characterized the the management projections as "at best, fanciful" because management had no experience in preparing long-term projections and was pressured by the board to be more aggressive. Projections were not prepared in the ordinary course of business and the court rejected the valuation.
- *Lund v. Lund*[2]: In a court-ordered buyout, a Minnesota trial court performed its own DCF analysis to value a chain of high-end grocery stores finding that management projections had proved reliable in the past, and relied on them.

Two other cases were noted: *Brundle v Wilmington Trust*, (US DC ED VA) 1:15-cv-1494 (LMB/IDD) (March 13, 2017) and *DFC Global Corp. v. Muirfield Value Partners*, Supreme Court of State of Delaware (overturning a Chancery decision) (No. 518, 2016, August 1, 2017)

[1]Court of Chancery Delaware, C.A. No. 10782-VCS (May 26, 2017)

[2]Court of Appeals of North Carolina, No. COA15-175, Decided: December 01, 2015

Tax Nexus for Franchisors: New

DISCLAIMER

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. and Franchise Technology Risk Management provide such expert advice on the topics addressed herein.

Please visit our websites at www.FranchiseValuations.com and www.ftm.biz

Authorities

Franchise Law Journal

In the most recent issue of *Franchise Law Journal* there is an article by Jay Forester and Mike Drumm entitled "Income Tax Nexus: No Physical Presence Necessary"[1] It makes the point that in most jurisdictions "economic nexus" is sufficient to render franchisors liable for the State's income tax even without a "physical presence". That is a point that this newsletter, and my CCH treatise "Franchise Regulation and Damages" have been making for more than a decade. But it is worthwhile for franchisors to be reminded. It is an expensive issue to ignore (See e.g. *KFC v Iowa*) and wishing will not make it go away. Here is a [link to my chapter on state and local tax nexus](#) which was provided in the January 2017 issue of this newsletter.

ABA Tax Lawyer

In the most recent issue of *Tax Lawyer*[2] Eric Smith has an article entitled "Due Process Implications Related to State Notice and Economic Nexus Laws" which focuses on the Due Process aspects of Sales Tax nexus (as opposed to Income Tax Nexus) and makes the point that Justice Kennedy's concurring opinion in *Direct Marketing Association v. Brohl* marked a rare occasion: a Supreme Court Justice urged states to promulgate laws that violate the Commerce Clause. The hope of Justice Kennedy is that the Supreme Court will ultimately have an opportunity to recraft the Commerce Clause analysis in relation to sales and use tax collection. Given the chance, Justice Kennedy would do away with *Quill Corp. v. North Dakota's* "physical presence" standard and replace it, in all likelihood, with some sort of measurement based on an out-of-state vendor's economic presence in the state - similar to the "economic nexus" test in the Income Tax Nexus arena.

ABA Tax Lawyer

And in another *Tax Lawyer* article on a similar subject "The Rising Trend of Sales Tax Nexus Expansion" by Matthew T. Szudajski[3] the author provides a comprehensive examination of post-recession sales tax nexus expansion developments as a primer for anticipated developments and judicial conflict. The article examines issues like click-through nexus, affiliate nexus, and conventional agency nexus, as well as alternative techniques like use tax notice requirements and negotiated presence. Mr. Szudajski argues that moving forward, states are likely to continue to expand sales tax nexus within the bright-line physical presence rule but notes that "Economic nexus" arguments (for sales tax) may be hobbled by ongoing litigation in Alabama and South Dakota.

[1] Volume 37, Number 1, Summer 2017

[2] Volume 70, Number 4, Summer 2017

[3] Volume 70, Number 4, Summer 2017

Expert Testimony

Expert Testimony on Propriety of Actions Excluded

In the never-ending saga of the Bernie Madoff litigation (for which Baker & Hostettler has had fees of \$1 Billion approved) an expert on behalf of one of the feeder funds was denied permission to provide testimony **as to the propriety or impropriety** of transfers, withdrawals, and/or redemptions between, among, or from the Madoff Defendants, Gabriel Capital

Corporation, and/or the accounts of investors in the Merkin Funds. How does one become an expert on "propriety"?

Securitization

How Domino's Cuts Borrowing Costs

It started when David Bowie packaged the rights to his future music royalties and sold them off in a bond offering about twenty years ago. David J. Kaufmann of Kaufmann Gildin has been writing on the use of securitization in franchising for a decade. Now the [Wall Street Journal is reporting](#) that Domino's Pizza is using whole-business securitization, which the company says has saved it millions of dollars in borrowing costs over the last decade.

The article notes that, "This summer, Domino's Pizza Inc. sold \$1.9 billion of bonds backed by essentially all of its revenue streams, including payments from franchisees, intellectual property and license and distribution agreements. The deal, which allowed it to borrow at well below the going rates on junk bonds, was the latest example of firms putting all their cash-generating assets into separate entities that are used to back the debt. The practice, known as whole-business securitization, is enabling companies to issue bonds more cheaply by effectively giving lenders more-direct access to the most valuable pieces of their enterprises. The companies that have done these deals tend to have stable cash flows, but many would likely have trouble getting investment-grade ratings if they wanted to issue typical corporate bonds, market participants say."

Joint Employer and Vicarious Liability

Recent Cases

Joint Employer: In *Harris v. Midas* 2017 WL 3440693 (WD PA Aug 10, 2017) the Federal District Court dismissed Midas as a joint employer in sexual harassment action against a franchisee and its employees. The Court held that Plaintiff failed to demonstrate that the Franchisor had "significant control" over the tortfeasor/employee. Typical controls found in the franchise agreement were not sufficient.

Vicarious Liability: In *McKinnon v. Yum! Brands Inc.* 2017 WL 3659166 (D. Utah Aug 24, 2017) the franchisor was dismissed from vicarious liability claim that an employee of a Taco Bell gave discounts to white customers but not to black customers.

Vicarious Liability: In *C.H. v Pla-Fit Franchise LLC* 2017 IL App. 3d 160378 (Ill App. Ct. Aug 23, 2017) an appellate court upheld dismissal of suit for emotional distress against Planet Fitness franchisee (and the franchisor) by plaintiffs who were filmed in the gym's tanning room without their knowledge or consent. The Court rejected franchisor liability which was based on a claim that the franchisor had "special relationship" with the franchisee.

A Quote for the Geriatric Leadership of Congress

***You have sat too long here for any good you have been doing.
Depart, I say, and let us have done with you. In the name of God, go!***

Originally offered by Oliver Cromwell addressing the Rump Parliament, 20 Apr 1653, but famously repeated in the House of Commons by Leo Amery to Neville Chamberlain, on May 7, 1940, during the "Norway debate", resulting in the appointment of Winston Churchill as Prime Minister on May 10 - the same day the Germans began their attacks in the Battle of France.