



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](#).



Expert Testimony

Trial Court Relies on Outside 'Technical Advisor' for Daubert Determination

In what seems to be almost an abdication of the Court's "gatekeeper" function under the *Daubert* test for admissibility of expert testimony, a Mississippi trial court enlisted the help of a peer review service to evaluate the parties' proposed expert testimony with respect to the actions of an auditor for a company that went under. Practitioners should be aware that the use of similar services may become more common in the litigation setting.

The plaintiff presented expert testimony on three issues: the auditing standard of care, causation, and damages. The defendant offered damages testimony. The trial court used JuriLytics, an academic peer review service, as technical advisor to determine whether the individual expert opinions met the requirements of *Daubert*. The trial court ultimately decided the parties' auditing standards and damages testimony was admissible, but that the plaintiff's causation opinion failed to establish the necessary link between the auditor's actions or lack of action and the company's eventual demise. The trial court ruled plaintiff's inability to produce expert testimony on causation meant its claim foundered, and granted the defendant's summary judgment motion.

This is in conflict with many cases finding that proximate cause is not a proper area for expert testimony (with which this newsletter agrees). The plaintiff appealed to the state Supreme Court, arguing the law did not require expert testimony in all malpractice cases and that it was able to show causation by way of lay testimony -- the company owner's statements. The Mississippi Supreme Court agreed with the plaintiff and reversed.[1]

No Work-Product Protection for Experts' Notes

Practitioners should also be aware that in a 2013 case, a plaintiff asked the court to order the production of personal notes from one of the defendant's technical experts as well as that expert's communication with other expert witnesses and some employees who were not attorneys. The court decided the documents were discoverable and the defendant, Chevron, appealed to the 11th Circuit which determined the documents were relevant and then that they were not privileged and had no work-product protection. Thus, they were subject to discovery.

The work-product doctrine, which is incorporated in federal discovery Rule 26(b)(3)(A), protects an attorney's notes, memos, and any writing prepared "in anticipation of litigation" from discovery by the opposing party. Rule 26(b)(3)(A) specifically includes in the protection "consultant, surety, indemnitor, insurer, or agent." However, it does not mention "expert". Rule 26(b)(4) also addresses work-product protection but protects only drafts of expert reports and attorney-expert communication. Accordingly, the appellate court held that Rule 26(b)(3) does not protect the personal notes of an expert or his or her non-attorney communication from discovery.[2]

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

[1] *Republic of Ecuador v. Hinchee*, 2013 U.S. App. LEXIS 25102 (Dec. 18, 2013).

[2] *T.L. Wallace Const. v. McArthur*, 2017 Miss. LEXIS 271 (June 29, 2017)

Cybersecurity

Equifax Breach: What Steps To Take Now

After the news broke on September 7th of a cyberattack on the credit-reporting agency Equifax that targeted the names, addresses and social security numbers of as many as 143 million Americans, the hand-wringing and finger-pointing started. How did this happen? One possibility is that Equifax network administrators failed to install a crucial patch supplied by software provider Apache Struts two months prior to the attack. According to the Ars Technica website, "Thursday's disclosure strongly suggests that Equifax failed to update its Web applications, despite demonstrable proof that the bug gave real-world attackers an easy way to take control of sensitive sites."

Concerned consumers and business-owners have limited recourse but some immediate actions are advisable. The prevailing advice is to seek a credit freeze and a fraud alert by following the instructions on the websites of the three major credit monitoring services: [Equifax](#), [Experian](#) and [TransUnion](#). That puts obstacles in the way of someone who applies for credit using a stolen identity and triggers an alert to you. There may be lawsuits. There may be calls for tougher regulations and punishment. But one thing is certain: the threat of identity theft will hang over most of us for years to come.

Damages: Little FTC Cases

Hard Rock Cafe Did Not Cause Actual Damages in Cancelling Franchise Agreement

The Eleventh Circuit Court of Appeals upheld dismissal of a Florida Deceptive and Unfair Trade Practices Act claim brought by a franchisee against Hard Rock Cafe International (USA), Inc., based on the lack of evidence of actual damages which warranted summary judgment in favor of Hard Rock Café.[1] Florida courts have held that "actual damages" under the FDUTPA are defined as the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties.

Franchisee's Common Law Claims Against Pandora Jewelry Proceed

In another case under the Florida Deceptive and Unfair Trade Practices Act, a Pandora Jewelry franchisee that was allegedly promised a wider product line than called for in its franchise agreement could not pursue claims, but could pursue its common law promissory estoppel and breach of contract claims.[2]

The court explained that the elements of a FDUTPA claim are a deceptive act or unfair practice, causation, and actual damages, the latter being the difference between a product's value under the contract and the market value of the product delivered. Pandora moved to dismiss based on its

assertion that plaintiff failed to allege actual damages, but the plaintiff argued that they had incurred actual damages in the form of the difference in value between the "Concept Store" dealership they had allegedly been promised versus the less valuable "Silver" dealership they had received.

The court found that the complaint had not pleaded actual damages in the form of the difference between the value of a small "Concept Store" dealership and a "Silver" dealership instead, seeking recovery of plaintiff's entire investment. The court therefore dismissed plaintiff's FDUTPA claim, but granted plaintiff leave to amend its FDUTPA claim in order to plead actual damages.

[1]*HRCC, Ltd. v. Hard Rock Cafe International (USA), Inc.*, July 28, 2017, per curiam

[2]*Maurice's Jewelers II, Inc. v. Pandora Jewelry, LLC*, August 30, 2017, Moreno, F.

Valuation

Tax Affecting

A year and a half ago the Tax Court heard a significant case related to S corp "tax affecting" (whether or not to apply a valuation discount to corporations which are pass through entities and do not pay corporate level taxes).

The case, *Cecil et al. v. Commissioner of Internal Revenue*, involves a gift of shares in the Biltmore Co., which operates the famous Biltmore estate, a Gilded Age mansion the Vanderbilts built that is now a tourist attraction. The Cecils (descendants of the Vanderbilts) valued the stock gift at \$20.88 million, but the IRS said those shares are actually worth \$95.29 million. One of the main issues in the case is the "tax affecting" discount.

The issue has been before the Tax Court often (most notably the *Gross* case), and the Delaware Chancery court. In all of the federal cases, and most of the Delaware cases, the Courts have refused to apply "tax affecting". A large part of the valuation community - OTHER THAN YOURS TRULY - disagrees. We await the result in this matter which was heard in February 2016.

Haig Report on Auto Dealerships: Porsche Still Leads in Valuation Multiples

In an excellent, recently issued report, Haig Partners announced that Porsche maintains its "blue sky" multiple range of 7.5x to 9.0x, the best of all auto franchises. The highest value franchises continue to be the luxury imports, with Mercedes Benz, Lexus, BMW, Audi and Jaguar/Land Rover following with valuation multiples of 7 to 8.[1] In the dealership industry, the blue sky multiple (similar to expected pretax earnings) is the most commonly used method for determining value.

[1]Haig Report Second Quarter 2017

Quotes from History's Most Evil

Adolf Hitler: *"The Ten Commandments have lost their validity...Conscience is a Jewish invention. It is a blemish like circumcision... I am liberating man from the degrading chimera known as 'conscience'.."*

Joseph Stalin: When asked, *"Do you know what gratitude is?"* by an old comrade he was about to execute, Stalin replied, *"It's a sickness suffered by dogs."* Stalin also famously said, *"The people who cast the votes don't decide an election, the people who count the votes do."*