



Our Expertise



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

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

Have a Question About Succession Planning for Franchise Owners?

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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.](#)

Taxation and PPP Loans

Possible Disallowance of Income Tax Deductions from PPP Loans

When the pandemic first struck Congress established a generous paycheck protection program (PPP) under which taxpayers could obtain loans which would easily qualify for tax-free forgiveness. And, to the extent that the taxpayer's spent the money they borrowed they could deduct such expenses. The IRS was against the double benefit from the beginning. The service promptly issued a notice denying deductions for PPP expenses. Congress stepped in and overrode the IRS ruling PPP expenses would be deductible. However, the service is attempting to do an end run around that holding by declaring the PPP loan forgiveness to be subject to section 265 (a). Under that provision deductions are denied to the extent they are paid for with tax-free income, and the Service is arguing that loan forgiveness creates tax-free income.

The issue is discussed in the Fall 2021 issue of the Tax Lawyer, "Section 265 disallowance and the PPP expense nightmare" by Amandeep Grewal.

Valuation

Expert Testimony - Overcoming the Perception of an Expert Witness as “A Man You Pay To Say Your Way.”^[1]

As often discussed in this newsletter, the question frequently comes up: “How can two qualified and experienced business valuation experts analyze the same company and come up with widely disparate values?” (e. g. the recent case of *Estate of Michael Jackson*: estate’s expert = \$4 million; IRS expert = \$164 million. Estate prevailed.) Some people may think the answer is “hired gun” or a faulty analysis, but legitimate reasons can cause two experts to be far apart, as a new case illustrates. In *Cain v. Cain*, 2022 Neb. App. LEXIS 18; 2022 WL 287918, a marital dissolution matter in Nebraska, the expert for the husband valued his interest in his business at \$494,000, while the wife’s expert came up with a value that was almost four times higher (\$1,830,500).

Both experts used the income approach but relied on different assumptions: For example, when averaging five years of historical earnings, one expert disregarded two years because he felt they were anomalies, while the other expert disagreed and included those two years in his analysis. They also disagreed on normalization adjustments and used cap rates that were significantly different. In the end, the district court found the wife’s expert’s valuation to be more credible and accepted his value of \$1,830,500. On appeal, the appellate court said the lower court did not “abuse its discretion” by siding 100% with one expert over the other noting that the two different valuations were not due to any “foundational flaw” in the analyses—they were due to differences in “professional judgment.” Thus, it was not the appellate court’s role to second-guess the district court’s determinations of weight and credibility and the the lower court decision was upheld.

^[1]As spoken by Federal Judge Robert Hemphill in 1978. An even more cynical appreciation of experts has been put thusly: “Experts in other fields see lawyers as unprincipled manipulators of their disciplines, and lawyers and experts alike see expert witnesses—those members of other learned professions who will consort with lawyers—as whores.” Samuel R. Gross, *Expert Evidence*, 1991 Wis. L. Rev. 1113, 1115 (1991).

Valuation Discounts

Two Cases on Trapped-In Gains Tax—With Opposite Outcomes

In a case we discussed in last month’s newsletter, (a California divorce matter, *Harvey v. Harvey (In re Michael S.)*, 2021 Cal. App. Unpub. LEXIS 7867; 2021 WL 5934472), the appeals court held that a discount for a non-current tax liability was improperly taken and remanded the case. Even more recently, however, in Nebraska, the state’s Supreme Court came to the opposite conclusion.^[1] Experts for both sides in that case allowed some amount for the potential future liability of tax for trapped-in gains. But the court never mentioned the issue of immediacy and certainty in allowing the estimated present value of potential future taxes on trapped-in gains

^[1] *Bohac v. Benes Serv. Co.*, 310 Neb. 722; 2022 Neb. LEXIS 5

Lost Profits Damages

Highlighted Cases From the March 2022 Supplement of Robert L. Dunn, “Recovery of Damages for Lost Profits”

1. *Hewlett-Packard v Oracle*, 65 Cal. App. 5th 506, 280 Cal. Rptr. 3d 121 (2021) where lost profits awarded by a jury of \$3.014 billion was upheld
2. *Reid Hospital v Conifer*, 8 F4th 642 (CA 7, 2021) where claim for lost revenue was not barred by clause “excluding consequential damages”;
3. *Jacobson Warehouse v. Schnuck Markets*, 13 F4th 659 (CA8, 2021) where money spent to recover sales and mitigate damages to inventory were held to be “consequential damages”.

Damages

Ninth Circuit Vacates Whale-Watching False Advertising Verdict on Basis of Wrong Jury Instruction on Damages

Jury instructions given during a trial over whether a whale-watching company and its affiliates violated the Lanham Act by engaging in materially false or misleading advertising about their business failed to provide the correct legal standard, according to the CA 9. Instead of stating that a defendant’s mental state was an important factor in whether or not to award profits, the instruction given stated that the defendants must have been shown to have acted willfully in order to award profits. Thus, the judgment was reversed and remanded for a new trial on that issue (*Harbor Breeze Corp. v. Newport Landing Sportfishing, Inc.*, March 7, 2022, Collins, D.).

Harbor Breeze Corp. and its affiliate sued Newport Landing Sportfishing, Inc., and its affiliates for engaging in materially false or misleading advertising cruise business in violation of the Lanham Act. The jury found that the defendants had engaged in materially false or misleading advertising, but the jury awarded \$0 in actual damages and also declined to award the equitable remedy of disgorgement of profits. The plaintiffs appealed.

Joint Employer/Independent Contractor

Sexual harassment Claims Against McDonald’s Brought By Employees of Franchisee Fail

In *Ries v. McDonald’s USA, LLC*, W.D. Mich., CCH Business Franchise Guide ¶17,008 sexual harassment claims brought against McDonald’s, LLC and McDonald’s Corporation by former employees of a McDonald’s franchise were rejected. A group of women alleged that a manager at a franchisee location repeatedly harassed them, both physically and verbally. The former employees contended that McDonald’s was liable for two reasons: (1) it retained sufficient control over their employment conditions to qualify as a “joint employer”; and (2) McDonald’s caused them to believe that the franchisee was an agent of McDonald’s. McDonald’s moved for summary judgment and it was granted. A federal district court ruled that no reasonable juror could find that McDonald’s acted as employer or agent subject to liability under Title VII or Michigan’s civil rights law. The franchisor did not meaningfully participate in employment decisions or possess sufficient control over the terms of employment to qualify as a joint employer. Nor did McDonald’s face liability under Title VII merely because the former employees wrongly believed that McDonald’s was their employer or that it could control the conditions of their employment.

Encroachment - Exclusive Territory

Bottler's Claims Against Wholesalers Intruding on Its Exclusive Territory Survive Dismissal

In *Brown Bottling Group, Inc. v. Imperial Trading Co., LLC*, (March 4, 2022, Wingate, H.) a bottler, distributor, and licensee of Pepsi-Cola and Dr. Pepper products covering territory in parts of Mississippi and Alabama sufficiently stated claims for tortious interference, declaratory judgment, and false affiliation against various wholesale distribution companies that were allegedly selling those soft drink products to retailers within its exclusive territory. The Court rejected arguments by the defending wholesalers that the bottler could not establish a viable cause of action to maintain its declaratory judgment claim, that its tortious interference claim required illegality, that the bottler had not pled through its allegations of “transshipping”, that it had not pleaded any misrepresentation as required under the Lanham Act, and that the bottler failed to join an indispensable party. All the defendants’ motions to dismiss were denied.

Quotations

Destiny may ride with us today, but there is no reason for it to interfere with lunch. - Peter the Great

There are decades where nothing happens; and there are weeks where decades happen. – Vladimir Lenin

A lie told often enough becomes the truth. – Vladimir Lenin