



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 and E-discovery of Electronically Stored Information

We offer a free initial consultation. If any readers have questions, you are welcome to email or phone us and we will provide our best answer as quickly as possible.

Bruce S. Schaeffer, Editor
Bruce@FranchiseValuations.com
 212.689.0400

We Write the Book

Franchise Regulation and Damages, the only treatise that covers 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 [CCH web page here](#).

Franchise Technology Risk Management

Our franchise law and computer forensics experts provide consulting and implementation of all aspects of cyber security, ESI management and e-discovery for franchise



Robert L. Dunn's Top Ten Damages Cases

Valuation Expert's Picks for 2012

1. *Apple Inc. v. Motorola Inc.*, 2012 WL 1959560 (ND IL May 22, 2012) and 869 F. Supp. 2d 901 (ND IL 2012)
 - a. Daubert motions were made to exclude three experts - two from Motorola and one from Apple - and all motions were granted, i.e. all experts were excluded.
 - b. Then Judge Posner of the 7th Circuit, sitting by designation in District Court, dismissed all the claims and countersuits because there was no expert testimony sufficient to establish damages (as he had excluded it all).
2. *LHC Nashua Partnership, Ltd. v. PDNED Sagamore Nashua, LLC*, 659 F. 3d 450 (CA5 2011): a "new business" that was going to build a shopping center was not entitled to "benefit of the bargain" damages.
3. *Razorback Concrete Co. v. Dement Construction, Inc.*, 688 F. 3d 346 (CA8 2012): on a concrete supplier's claim for lost profits the court held that the supplier had not proven it was a "lost-volume seller" and it bore the burden on that issue.
4. *Andrew v. Power Marketing Direct, Inc.*, ___ Ohio App. 3d ____, 978 NE 2d 974 (2012): even without an expert, a dealership was awarded damages for lost profits and fraud based on pre-litigation profit projections.
5. *Latham Land I, LLC v. TGI Friday's Inc.*, 96 AD 3d 1327, 948 NYS 2d 147 (2012): recovery was allowed for the lost value of a property even though damages for lost profits were barred by contract.
6. *Lesiak v. Central Valley AG Cooperative*, 283 Neb. 103, 808 NW 2d 67 (2012): discusses the "economic loss rule" and attempts by parties to convert breach of contract claims to causes of action sounding in tort.
7. *Martin K. Eby Construction Co. v. LAN/STV*, 350 SW 3d 675 (Tex. App. 2011): holding that only out-of-pocket losses - and not lost profits - are recoverable on a negligent misrepresentation claim.
8. *Gianetti v. Norwalk Hospital*, 304 Conn. 754, 43 A 3d 754 (2012): in a case involving a plastic surgeon's claim against a hospital for wrongful termination held that the "lost-volume seller" doctrine applied to damages claims based on personal services contracts and that damages can be projected from a plaintiff's prior experience.
9. *Echo Inc. v. Timberland Machines & Irrigation, Inc.*, 661 F. 3d 959 (CA7 2011): on the difference between lay and expert testimony which requires disclosure (the plaintiff's president's opinion on lost profits "should be disregarded as based on nothing but ipse dixit").
10. *Maloney Cinque, LLC v. Pacific Insurance Co.* 89 So. 3d 12 (La. App. 2012): an expert, whose fee was related to the results in an insurance case, was excluded.



Robert L. Dunn: RIP

systems - from preparation of cyber security and ESI-related policies and procedures manuals through collection, preservation, processing, production and presentation.

To inquire about our services, please e-mail Henry@FTRM.biz or call (212) 689-0400

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

What a Way to Go! Damages Expert Passes

We here at The Franchise Valuations Reporter were deeply saddened to hear of the sudden passing of one of the country's leading experts on commercial damages. As [reported](#) by the *Marin Independent Journal*, "Corte Madera residents Robert Dunn, 75, and his nephew Dylan Barry, 16, died after their 1996 Ferrari 355 GS struck a tree at about 11 a.m. near Kruse Ranch Road at Salt Point."

I had the pleasure of working with Bob just last year when he published [my article on damages issues in franchising](#). He was the author of several books but is best known for *Recovery of Damages for Lost Profits*, typically referred to as "Dunn on Damages."

Valuation: Discounts for Tax Purposes

Newfound Control Defeats a Claim for a Discount

In *Estate of Koons v. Commissioner* (T.C. Memo. 2013-94, April 8, 2013) the only real issue was the discount to be applied in determining the "fair market value", at the date of his death, of John Koons' 50.5% interest (47% voting) in a company called Central Investment LLC. At the date of Mr. Koons' death, March 3, 2005, the net asset value of Central was \$318 million with cash making up more than 90% of the company's assets, the result of a recent sale by Central of a bottling company to PepsiCo. The estate's expert opined that a 31.7% discount for lack of marketability should be applied.

The IRS' expert opined that only a 5-10% lack-of-marketability discount was warranted primarily because Central had entered into an agreement to redeem the approximately 23% LLC interest held by the four children of John Koons and once the redemption of the children's interests was accomplished, the estate would then be the holder of a majority voting interest which would allow it or a potential buyer to carry out a distribution of Central's assets at will. The Court sided with the IRS and the discount was discounted.

Valuation: Intangibles

Too Often All Intangibles Are Listed Under "Goodwill"

Intangible assets, also referred to as intellectual properties ("IP"), have become the most valuable assets of the 21st Century surpassing the value of hard assets such as factories and equipment as the embodiment of wealth. Today, many companies own intangible assets worth more than the tangibles with IP often accounting for more than 80% of the total enterprise value. In some cases, the value placed on the intangibles by companies with a long history of acquisitions is greater than the entire net worth of the corporation itself.

In 2001 the Financial Accounting Standard Board (FASB) issued FAS 141 on business combinations mandating that certain IP had to be recognized separately from goodwill. To this end, the FASB recently provided a list of 29 different intangible asset categories ranging from commonplace assets such as trade names, patents, and non-compete agreements, to the more esoteric such as song lyrics, ballets, and newspaper mastheads.

Here's a list of broad categories of identifiable, intangible assets that must be valued and accounted for separately:

- Marketing-related Assets: trademarks, trade names, and brand names
- Technology-based Assets: such as patents, trade secrets, proprietary documentation, engineering drawings and schematics

- Data Processing-related Assets: proprietary computer software and databases
- Customer-related Assets: customer lists, relationships, and contracts
- Contract-based Assets: supplier contracts, license agreements, franchise rights and non-compete agreements
- Artistic-related Assets: copyrights, illustrations, and images
- Human Capital-related Assets: employment agreements and assembled workforce
- Location-related Assets: leasehold interests, easements, air rights, and water rights

Nexus: Sales Tax

Senate Approves Internet Sales Tax: Measure Headed to House

As reported by CCH, the U.S. Senate has overwhelmingly, and with strong bipartisan support, passed the Marketplace Fairness Act of 2013 by a vote of 69-27. The bill would allow a state to require certain remote sellers to collect sales and use tax on sales made to customers in the state. States that are members of the Streamlined Sales and Use Tax Agreement (SST) would automatically be granted this authority. States that are not SST members would be required to implement simplification requirements.

The bill provides an exception for businesses with annual remote sales of \$1 million or less. However, it has gone to the House of Representatives where there is little likelihood of swift passage.

More Reasons to Harden Your Network Security

Links to Recent Articles on Cybercrime

[Local Police Get Into Cybercrime Fighting Business](#)

[Cyberattacks Against U.S. Corporations Are on the Rise](#)