The Franchise Valuations Reporter

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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?

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 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.

Valuation

The New York Yankees, a Franchise, Hits $6 Billion in Value

"Holy Cow" is what the legendary New York Yankees announcer Phil Rizzuto would have said. The New York Yankees are Major League Baseball's (MLB) most valuable team, according to *Forbes'* latest rankings. The Bronx Bombers have become the first MLB team to hit a $6 billion valuation. It is the second most valuable franchise in U.S. sports, eclipsed only by the National Football League's Dallas Cowboys ($6.5 billion). While the Yankees lead MLB in overall value, *Forbes* says that the second-ranked Los Angeles Dodgers ($4.08 billion) received the highest local-TV rights revenue, with $189 million as compared to the Yankees reportedly bringing in $135 million in local broadcast rights fees.

Appeals Court Vacates Going-Concern Valuation For Firm Being Wound Down

In *In Re Riddle*,[1] an Arizona divorce case, the couple owned a business that was being phased out. The husband had bought out the wife's share and stopped operating the business—and started a new business in the same line of work. But the valuator of the wife's interest assumed a going concern value for the business, and the trial court accepted that valuation. The appellate court noted that the husband had not given the expert sufficient information that would have showed that the business was being wound down. Therefore, the trial court's determination of value was vacated and remanded because a going concern has a higher valuation than a liquidation sale.

Use of the 'Blue-Sky Method,' a Rule of Thumb, to Value a Minority Interest in a Car Dealership Oppression Case Affirmed

In *Buckley v Carlock,* 2022 Tenn. App. LEXIS 75; 2022 WL 593549 (Feb. 28, 2022) the Court arrived at valuation of an oppressed shareholder dispute equal to 8 times the "blue

sky" earnings plus half the value of enterprise's net assets (cut baby in half). Generally, "Blue sky" represents the intangible value of a car dealership. A blue-sky multiple is applied to normalized earnings, and then the tangible net assets are added in to get the fair market value of the entire enterprise.

"Tax Affecting" – In Flux Again

Many of our readers are familiar with the issue of "tax affecting" (taking a deduction for fictional taxes by "pass thru entities" such as partnerships and S corporations). It has reared its ugly head again in the Delaware Chancery Court. *In Re Cellular Tel. P'ship Litig.*; 2022 Del. Ch. LEXIS 56 (*Cellular)*, just came down and found there should be no tax affecting – which was the opinion of this writer for 20 years since the *Gross* decision (1999). The case is long and will be discussed in detail in the next issue of this newsletter.

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[1] 2022 Ariz. App. Unpub. LEXIS 304

Attorneys' Fees

Media Company Awarded Attorney Fees in Case Involving Fair Use of Cardi B Photo

In (*Walsh v. Townsquare Media, Inc.*, May 2, 2022, Broderick, V.) a photographer sued an online media company for copyright infringement, after the company published an online article featuring one of the photographer's pictures. The claim was previously dismissed on fair use grounds. The court granted the media company's motion for attorney fees, holding that the photographer, through her counsel, was objectively unreasonable in pursuit of the litigation, made grossly overinflated settlement demands, and pursued the claim under circumstances indicating improper motivations.

Expert Testimony

'Daubert Motion' Under FRCP Amendment Will Be New Rule 702 (1) Motion

Changes to Federal Rule of Evidence 702 are likely coming soon. Last year, the Advisory Committee on Evidence Rules unanimously approved a proposal to amend Rule 702. The comment period for the amendment to the federal evidence rule closed last month, and all signs indicate that the changes, which would clearly establish the standard for admissibility of expert testimony, will be approved by the Supreme Court soon and take effect Dec. 1, 2023. Two new changes to the text of Rule 702 should be noted: the proponent of the expert testimony must show admissibility by a preponderance of the evidence, and the expert's opinion must be reliable in light of the facts and applicable principles or methodology.

Study Says There Is 'Clear Evidence' of Bias Among BV Experts

As reported by the Business Valuation Wire, in a paper entitled “Are Business Valuators Biased? A Psychological Perspective on the Causes of Valuation Disputes” by Marc J. R. Broekema, Niek Strohmaier, Jan A. A. Adriaanse, and Jean-Pierre I. van der Rest (all of Leiden University), the authors say they have found “clear evidence for the existence of … engagement bias” in valuation professionals who were assigned randomly to perform valuation tasks on behalf of a buyer or a seller. The study which has been published in the *Journal of Behavioral Finance* states that “valuators appear to be affected by their clients’ interests . . . [and] that a valuation should be adjusted in accordance with their clients’ interests. Specifically, when they represent a buyer and therefore have an incentive to lower the value of the shares, they also indicate the valuation should be adjusted downwards more heavily and also indicate a lower value range for the true value of the company. The opposite is the case when they represented the seller.” Also, the study found that experts exhibited a “blind spot” for their own potential bias: “Whereas 58.7% believed the valuator representing the opposing party was biased, only 25.1% believed they themselves were biased.”.

Joint Employer/Independent Contractor

Distributors Settle Independent Contractor Class Action Case Against Bakery

In *Noll v. Flowers Foods Inc.*, May 3, 2022, Walker, L., a federal district court gave final approval to a class action settlement in a dispute filed by independent baked goods distributors against Lepage Bakeries Park Street, Lepage’s corporate parent Flowers Foods, and a related entity (together, Lepage). The settlement covered injunctive relief in the form of Lepage’s agreement to repurchase the distribution rights of distributors and hire distributors as employees in the position of route sales representative.

Court Denies Franchisor Summary Judgment on Employment Claims

In *Ward v. Cottman Transmission Sys., LLC*,[1] a New Jersey District Court refused to grant summary judgment to a franchisor on racial discrimination and other employment-related claims asserted by its franchisee’s employee. The plaintiff worked at a franchised Cottman Transmission center and claimed that the franchise owner racially harassed him and forced him to work over fifty hours per week without paying him overtime. Following discovery, the franchisor moved for summary judgment, arguing that it had no liability to Ward because it was not his employer. The court denied the motion, principally because disputed issues of fact precluded a determination as to whether the franchisor qualified as Ward’s employer under governing law. The record demonstrated that the franchisor had not been involved in hiring or firing Ward, did not pay him, and was not even aware of his employment. However, the court pointed to various franchise agreement provisions showing possible theoretical franchisor control over franchisee employees, such as those mandating hours of operation or suggesting how employees might better perform certain tasks.

Franchisee Employee’s Hostile Work Environment Claims Against Franchisor Dismissed

In *Budzyn v. KFC Corp.*[2], a district court in Illinois dismissed a franchisee employee’s Title VII hostile work environment and related Illinois state-law claims against the franchisor. The plaintiff made claims against KFC for violation of Title VII, negligent retention, willful and wanton supervision, assault and battery, infliction of emotional distress, and false imprisonment arising from claimed sexual harassment and rape by her manager at a franchisee. Budzyn contended she was employed by KFC as well as the franchisee and asserted her claims against KFC directly. Budzyn claimed that KFC had the ability to control her work environment;

The court rejected this argument because Budzyn could not show that KFC controlled the franchise's day-to-day operations and did not allege that KFC could hire or fire her or direct her work.

Claims Against Hotel Franchisor for Personal Injury at Franchisee's Hotel Dismissed

In *Lacertosa v. Days Inns Worldwide, Inc.*,[3] a Connecticut court granted summary judgment to Days Inns Worldwide, Inc. in a slip and fall case. A guest at a franchised hotel, tripped on a tile by the pool and fell. He alleged that Days Inns oversaw the premises through its agents, the franchisee and its employees. Days Inns argued that a franchisor has no legal duty to a franchisee's guest and cannot be held liable for defects in the franchisee's property. The court granted summary judgment on all counts holding that the franchisee was not an agent, but an independent contractor of Days Inns, according to the language of the franchise agreement. The court also held that that certain provisions in the franchise agreement that could implicate a franchisor's responsibilities were standard reservations of rights common in franchising and necessary to safeguard the franchisor's brand and trademarks.

ADA Claims Against Franchisor Dismissed

In *Zuchengno v. FQSR, LLC*,[4] Yum! Brands' motion to dismiss ADA and New York State Human Rights Law claims brought against it by a customer of a Kentucky Fried Chicken franchise were granted. The plaintiff alleged that the franchisee and Yum! had failed to provide an accommodation that would enable him, as a deaf individual, to utilize the drive-thru.The court held that the plaintiff had failed to plead facts sufficient to show that Yum! owned, leased, or operated the restaurant at issue, holding that the complaint could only survive a motion to dismiss where it alleged facts sufficient to demonstrate that Yum! controlled the specific instrumentality at issue in the case, namely, those aspects of the franchised business relating to accessibility.

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[1] 2022 WL 909637 (D.N.J. Mar. 29, 2022)
[2] 2022 WL 952746 (N.D. Ill., Mar. 30, 2022)
[3] 2022 WL 1051147 (Sup. Ct. Conn. Mar. 30, 2022)
[4] 2022 WL 1214406 (W.D.N.Y. Apr. 25, 2022)

Quotations

***"Success isn't owned, it's leased and rent is due every day!"* -** NFL superstar, Arizona Cardinals defensive end JJ Watt

***"Slava Ukraini! Heroyam Slava."* -** A chant for the Ukrainian people that stems back to the Ukraine war of Independence over a century ago and has become synonymous with Ukraine's pride. It means "Glory to Ukraine – Glory to the heroes."

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