

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.

Bruce S. Schaeffer, Editor
Bruce@FranchiseValuations.com
845.386.9622

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,

Valuation

Most Business Appraisers Are Generalists

According to Business Valuation Wire, during a recent webinar for BV professionals, the audience was asked: Do you specialize within a particular industry? Three-quarters of respondents said that they are generalists and have little or no industry specialization. One in five (20%) said that they do specialize and mainly work in a few (from two to five) industries, and 6% said they mainly work in one industry. Our practice specializes in franchises, dealerships and distributorships.

A Lack of Marketability Discount for Controlling Interests

The IRS has offered a well-written analysis of the application of discounts for lack of marketability (DLOM) to the valuation of controlling ownership interests in privately held companies. According to the IRS publication, "There is little dispute that minority interests in non-publicly traded entities lose value due to lack of marketability. However, the issue of applying a discount for lack of marketability to a controlling interest is a controversial issue amongst valuers. Some believe that there should be little or no discount for lack of marketability on a controlling interest, while others believe there should be a discount applied. Most agree that any marketability discount for a controlling interest should be less than the discount for a minority interest in the same entity."

A review of Tax Court cases on DLOMs shows that they are not limited to minority holdings in business entities, but rather have been allowed for controlling interests as well on several occasions.[1]

go to the [Wolters Kluwer Law & Business web page here.](#)

California Court of Appeal Allows a Discount for Lack of Control in the Buyout of 25% Interests in an LLC

In *Cheng v. Coastal Lb Assocs.*^[2], the court ruled that an appraisal award did not improperly discount the FMV of the LLC interests for lack of control [DLOC or Discount for Lack of Control and/or DMIN for minority interest] which the court held was a commonly understood term in the appraisal industry. A majority of the appraisers agreed that the FMV standard required consideration of discounts and that 27% was a reasonable discount to be applied to the LLC interests.

Letter Sent to Congress Regarding Valuation Discounts

The American Society of Appraisers and over 100 other business groups and organizations sent a letter to Rep. Neal (D-Mass.) and Sen. Wyden (D-Ore.) urging exclusion of any tax proposals that would impact family businesses and farms, such as eliminating discounts for lack of control or marketability. Proposals such as taxing unrealized gains, halving the estate tax exemption, limits to grantor trusts, and changes to valuation discounts are not in the current framework of the Build Back Better Act—for now, the ASA points out.

[1] See e.g., *Estate of Dougherty*, TCM 1990-274; *Estate of Jephson*, 87 TC 297 (1986); *Estate of Bennett*, TCM 1993-34. For another worthwhile study on the topic see, Dennis Bingham and KC Conrad “An Analysis of Discount For Lack of Marketability Models and Studies.”

[2] 2021 Cal. App. Unpub. LEXIS 5655; 2021 WL 3909726 (Sept. 1, 2021).

Expert Testimony

Expert on Antitrust Economics Allowed to Testify Because Her Opinions Were Within Accepted Methodology

The plaintiffs’ antitrust economics expert will be allowed to testify that an alleged conspiracy among aluminum, tantalum, and film capacitor suppliers raised prices 16.4% to 18.9% above what they would have been without the conspiracy because her use of a specific type of price index and her use of a starting point for the annual cartel indicator variable were well within the accepted methodology in the field.^[1] While allowing her to testify as an antitrust expert, the court also, however, ruled that she would not be permitted to testify about legal matters such as collusion, violations of antitrust law, or anticompetitive actions allegedly undertaken by the parties.

Most Testimony From Vyera Expert Blocked in Trial Over Alleged Control of Market for Specific Drug

The bulk of testimony offered by the former FDA chief counsel on behalf of Daraprim manufacturer Vyera was blocked as improper summary or because he was unqualified to offer opinions on business decisions made by generic drug manufacturers.[2]

Expert Testimony on False Confession and Cross-Racial Identification/Misidentification Properly Precluded

The New York Court of Appeals, over a three-judge dissent, determined a trial judge, after a *Frye* hearing, properly precluded expert testimony on false confessions.[3] In addition, the trial court properly precluded expert testimony on cross-racial identification/misidentification: “On this record, ... the proffered testimony would not have aided the jury. Although Dr. Redlich is an impressively credentialed researcher, properly qualified by the trial court as an expert in her field, the trial court found that her testimony at the *Frye* hearing revealed her difficulty in linking her research on the possible causes of false confessions to the case at hand.”

[1] *In re Capacitors Antitrust Litigation*, November 18, 2021, Donato, J.

[2] *FTC v. Vyera Pharmaceuticals, LLC*, November 16, 2021, Cote, D.

[3] *People v. Powell*, 2021 N.Y. Slip Op. 06424, CtApp 11-18-21

Joint Employer/Independent Contractor Sexual Harassment Claims Against McDonald’s Brought By Employees of Franchisee Fail

Sexual harassment claims brought against McDonald’s, LLC and McDonald’s Corporation by former employees of a McDonald’s franchise were dismissed. A federal district court in Michigan 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. McDonald’s 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.[1]

Subway Employees Granted Partial Summary Judgment in Overtime Liability Case

Employees of two Subway franchise locations were granted partial summary judgment on their claims that they were not paid for overtime they had worked. The owners of the franchise locations failed to produce any record of the hours worked by them. Moreover, the court rejected the employers’ arguments that the stores were exempt from the FLSA, finding a common enterprise with a combined annual revenue exceeding \$500,000.[2]

[1] *Ries v. McDonald’s USA, LLC*, December 6, 2021, Jarbou, H.

[2] *Vashisht v. Sidhu Subs, LLC*, November 10, 2021, Horan, M.

Attorneys' Fees

\$115M Awarded To Class Counsel in \$345M Approved Settlement with Pfizer Over EpiPen Monopolization

A federal district court in Kansas^[1] ended the long EpiPen antitrust litigation and entered a final order approving the \$345 million settlement between consumer and third-party payor plaintiffs and Pfizer defendants (Pfizer, Inc., King Pharmaceuticals, Inc., and Meridian Medical Technologies, Inc.). The Plaintiffs claimed that EpiPen manufacturer Pfizer and marketer Mylan had devised an illegal scheme to monopolize the market for epinephrine auto-injector (EAI) devices. The court awarded a **one-third fee of \$115M** to the attorneys and nearly \$10M in expenses. The rest of the \$345 million settlement fund will be allocated 80% to third party payors, 20% to consumers.

[1] In re EpiPen [Epinephrine Injection, USP] Marketing, Sales Practices and Antitrust Litigation, November 17, 2021, Crabtree, D.

Quotations

Mort Sahl (RIP) Quotes and Sayings

“I've arranged with my executor to be buried in Chicago. Because when I die, I want to still remain active politically.”

“There were four million people in the American Colonies and we had Jefferson and Franklin. Now we have over 300 million and the two top guys are [Biden] and [Trump]. What can you draw from this? Darwin was wrong!”

FranchiseValuations.com

Franchise Valuations Ltd | 529 Mountain Road, Bloomingburg, NY 12721

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