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The Franchise Valuations Reporter

Season's Greetings

Best wishes for a happy, healthy and prosperous new year.

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The Canadian Donut Wars: Update

Tim Hortons Right to Manage Its System As It Sees Fit Upheld on Appeal

On December 7, 2012, the Court of Appeal for Ontario dismissed the appeal brought by Tim Hortons franchisees from the lower court's decision denying class status and dismissing their suit. With the decision upheld, it is clear now that in Ontario franchisors have a wide scope in implementing changes to their systems, provided that their franchise agreements are properly worded, their changes have reasonable business objectives and their conduct is fair.

For more details regarding the lower court case, please read "Canada's Tim Hortons Case: Lessons Learned About Franchisors' Rights, Class Action Certification and Rules of Expert Testimony" by Ned Levitt and Bruce S. Schaeffer.

Our Expertise

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

Damages: Awarding Attorneys' Fees in Franchise Disputes

An Excerpt from the CCH Treatise "Franchise Regulation and Damages" by Fox & Schaeffer

§19.01 Attorneys' Fees-Generally

Attorneys' fees are generally borne by the parties themselves and are not properly part of damages. However, attorneys' fees may be awarded where provided for by contract, by statute, or a court's discretion.[1]

Some statutes only provide for the award of attorneys' fees to franchisees-not to franchisors. But many statutes and many franchise agreements provide for the payment of attorneys' fees to the "prevailing party." Disputes arise about the definition of "prevailing party"; the allocation of legal fees to issues where a party prevailed vs. causes of action where they were not successful; the effect of frivolous, dismissed, and withdrawn claims on the award of attorneys' fees; and the problem of claims on which the party succeeded which are " inextricably intertwined" with the claims they lost.

Once it is established that a party is entitled to an award of attorneys' fees, the question becomes one of amount. Attorneys petitioning a court for a fee award must show proof in the form of detailed, itemized bills with services allocated to specific causes of action. They should also provide information about charges for comparable legal services in the area.

There are several factors which the courts analyze to determine the reasonable value of legal fees requested by the "prevailing party," such as the experience of the lawyers, the amount at issue and its importance, and the attorney's success or failure. In federal court fee awards are generally determined under the "lodestar" method, which uses the number of hours worked times the hourly fee as a starting point in its determination.

Opposing counsels' attacks on attorneys' fee requests generally focus first on the issue of entitlement. They also contest the prevailing party issue in general, and who was the "prevailing party" on specific causes of action. Defense counsel also try to attack proposed allocations of the expenses, and seek to impugn the skill and standing of the lawyers and the reasonableness of the amount with respect to legal fees sought.

The remainder of the chapter, the outline for which follows, is available here.

§19.02,Elements of Proof

A. Pursuant to Contract
- 1.In Franchise Agreement
- 2.In Ancillary Agreement
- 3.Judge's Discretion Because Amount Is Matter of Law, Not Issue of Fact, and Appellate Review Is De Novo
- 4.Mutuality of Remedy-California Statute

B. Pursuant to
- 1.Petroleum Marketers Protection Act
- 2.New Jersey Franchise Practices Act
- 3.Choice of Law re Availability and Amount of Attorneys' Fees

C. Pursuant to Contract and Statute

D. Prevailing Party
- 1.Definition

- 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.

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2.Unsuccessful and Dismissed Claims Affect Amount of Attorneys' Fees Award
E. Fee Amount
1.Reasonableness of Fee Award
2.Matters Must Be Allocated
3.Factors to Be Considered Under Various Tests
4. "Lodestar" Method
a.Definition
b.Method of Computation
c.Adjustments and Deviations
5. Massachusetts Method
F. Application for Fee Award

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[1]*Lerner v. Ward*, 13 Cal.App.4th 155, 158, (1993) ("Unless authorized by either statute or agreement, attorneys' fees ordinarily are not recoverable as costs.") Federal courts have authority to impose an award of attorneys' fees as part of Rule 11 sanctions *Mariani v. Doctor's Associates* (1st Cir. 1993) CCH Business Franchise Guide ¶10,143. *See also Mt. Hood Beverage v. Constellation Brands* (Wash. S. Ct. 2003) CCH Business Franchise Guide ¶12,516 ("A court may award attorneys' fees and costs to a prevailing party pursuant to a contractual provision, statutory provision, or a well recognized principle of equity").

Valuations, Damages and Experts

Federal Judge Says Lack of Valuation Evidence - and Expert - Is Why Most Plaintiffs LoseTheir Claim For Damages

"The most common reason that civil cases fail is not the failure to establish liability, but the **failure to think about a damages case**," said the Hon. G. Murray Snow, of the U.S. District Court in Arizona, speaking on a panel at the American Society of Appraiser's recent business valuation conference. Judge Snow spoke of two recent cases to illustrate his point.

In the first, one of the two major competitors in an industry accused its opponent of stealing trade secrets. The plaintiff sued "for enough money to put the defendant out of business," Judge Snow said. The lawyers spent "millions" preparing the case for a three-week jury trial and "endless" testimony, none of which included any damages evidence by an expert to explain "what the trade secret loss cost." Instead, the plaintiff presented only corporate insiders and documents to estimate damages. During deliberations, the jury asked, "If we determine that the defendant did steal the trade secrets but we can't determine [the plaintiff] was damaged, what do we do?" Within minutes of receiving an answer, the judge said, the jury returned a verdict for the defendant.

The second case concerned a law firm that "blew up," with several of the partners suing the main principal for breach of fiduciary duty. After the judge issued sanctions preventing the defendant from presenting any evidence in the case-limiting him only to cross-examination-the plaintiffs were "ecstatic." But then they did not present a single witness-including any business appraiser-to calculate the value of the law firm. "The [plaintiff] attorneys told me much later that they couldn't afford a damages expert," Judge Snow said, but that could have been a post-hoc rationale for losing a case they had all but won.

Experts: Draft Reports

Tax Court Excludes Draft Reports From Discovery in Conformity With Federal Rules

The U.S. Tax Court recently amended its Rules of Practice & Procedure to exclude the draft of expert reports from discovery, "regardless of the form in which the draft is recorded." This follows the 2010 amendments to Rule 26 which control in other federal district and circuit courts.The Tax Court's Rule 70 now protects communications between experts and attorneys from discovery, "regardless" of their form, with three important exceptions relating to communications that contain:

- The expert's compensation;
- Facts or data that the attorney identifies for the expert; and
- Assumptions that the attorney provides to the expert.

The new Tax Court rules also protect the reports and opinions of any consulting (non-testifying) experts as well.

Should expert depositions be on an endangered list?
One of the most controversial aspects of the Colorado Civil Access Pilot Project (or CAPP), which began the first of this year, has been the rule limiting "all aspects of the expert's testimony" to the disclosed report and work files so that there would be no depositions of expert witnesses.

The rationale: "The perception was that a fair amount of cost was going into expert depositions," explained the Hon. Rebecca Kourlis, formerly a justice on the Colorado Supreme Court and now the executive director at the Institute for the Advancement of the American Legal System (IAALS), which spearheaded the project. "Depositions in general can be abused," she said, in a special session on national civil litigation reform at a recent AICPA Conference. "They cost too much money and are too long, and can be used for 'gamesmanship' rather than investigating the issues in dispute," she said.

Wrongful Termination

Elements of the Claim Under New Jersey Law

In the recent case of *Oracle America v. Innovative Technology Distributors*,[1] it was ruled that a reseller of technology products could have been a "franchise" under the meaning of the New Jersey Franchise Practices Act (NJFPA) in connection with its relationship with a technology company, Sun, because the reseller could have: (1) been licensed to use Sun's trade name; (2) had a "community of interest" with Sun; and (3) maintained a business in New Jersey, the federal district court in San Jose has decided. Moreover, there were disputed issues of material fact as to whether another technology company, Oracle, which acquired Sun, had "good cause" under the meaning of the NJFPA to terminate the agreement between Sun and the reseller. Thus Oracle's motion for summary judgment was denied. The case is an excellent review of several major elements of a wrongful termination claim.

Trademark License

Oracle argued that the reseller was not granted a trademark license. The reseller presented evidence that at least one of its two primary customers believed that Sun vouched for the activities of the reseller, the court noted.

The perception among customers that the franchisor and franchisee shared a special relationship with the court noting several factors: (1) the reseller presented evidence suggesting that its marketing services were integral to Sun's marketing scheme; (2) the reseller's value-added services appeared as if they were designed to promote the proper functioning of Sun's products; (3) Sun directly warranted all products purchased through the reseller; (4) Sun, rather than the reseller, negotiated the pricing for sales of Sun's products; and (5) the reseller displayed Sun's banner and logo in its corporate offices. In light of these facts, it could not be determined that the reseller did not have a franchise license to use Sun's trademark for the

purposes of the NJFPA, the court held.

"Community of Interest"

In order to find a "community of interest", two requirements must be met: (1) the distributor's investments must have been substantially franchise-specific, and (2) the distributor must have been required to make these investments by the parties' agreement or the nature of the business. The reseller provided evidence showing that it was contractually obligated to make substantial investments in developing Sun-specific knowledge and skills, including server training, software training, partner training, and services training. The reseller also showed that it was required to make other non-transferable investments in order to facilitate its business with Sun. For example, the reseller invested $1 million in a Sun/Oracle specific inventory database and a Sun/Oracle specific warehouse management platform.

The existence of a "community of interest" was also supported by the fact that the reseller received the vast majority of its revenue from sale of Sun products. For example, in 2005, the reseller received 100% of its revenue from its sale of Sun products. Similarly, in 2006, 2007, 2008, 2009, and 2010, the reseller's revenues from its sale of Sun products accounted for 99.86%, 61.83%, 77.22%, 95.15%, and 96.09% of total revenues, respectively. The high percentage of the reseller's revenues attributable to the sale of Sun products was evidence that there was a "community of interest," the court found.

"Place of Business"

The reseller's Edison, New Jersey facility could have constituted a "place of business" under the NJFPA, according to the court. Ordinarily, the place of business requirement demanded something more than an office or a warehouse. However, courts recognized that, under certain circumstances, a commercial office could qualify as a place of business under the Act.

"Good Cause"

There were disputed issues of material fact as to whether Oracle had "good cause" to terminate the agreement between Sun and the reseller. Specifically, there were disputed issues concerning: (1) when Oracle gave notice of its intent to terminate the Sun Agreement, and (2) whether Oracle had good cause to terminate the agreement when notice was given. Oracle sent two letters to the reseller in 2010 purporting to terminate the Sun Agreement; however, neither letter provided any grounds for termination.

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[1]DC Cal., CCH Business Franchise Guide ¶14,924