



# The Franchise Valuations Reporter

## Our Expertise

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

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



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## 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](#).

## DISCLAIMER

## Valuations

### *Recession Worries Impacting Small Biz Valuations*

Over half (53%) of business brokers surveyed say a recession is the biggest concern affecting business valuations in the U.S., according to the Q3 2019 Market Pulse Report. According to Craig Everett, Ph.D., director of the Pepperdine Private Capital Markets Project. "Small business owners are worried that a recession is coming, and trade issues are causing volatility. All that nervous energy means buyers are dialing back a bit-particularly on smaller market deals." Uncertainty over the upcoming presidential election and the trade wars with China are also having an impact on small businesses but less so than a potential recession. The Q3 2019 survey was conducted in early October and was completed by 236 business brokers and M&A advisors.

## Joint Employer, Independent Contractor, Vicarious Liability

### *Department of Labor Joint Employer Rule Awaits Final Review*

The Department of Labor (DOL) has transferred a draft joint employer final rule to the White House Office of Information and Regulatory Affairs which is expected soon. Under a proposed version of the DOL rule issued in April, the Wage and Hour Division said it would weigh four factors to determine whether one company is a joint employer of another company's workers: the ability to hire and fire; to supervise and control schedules; to set pay rates; and to maintain employment records. The proposal said all four factors would be considered collectively. The rule would basically return the joint employer standard to its historical precedent before the 2015 *Browning-Ferris* decision.

### *New York Assembly Labor Committee Holds Hearing on "ABC-Test" Legislative Proposals*

On December 5, the New York Assembly Labor Committee held a hearing to "examine various legislative proposals that aim to extend labor rights and protections to workers in the gig economy in New York state". Oral testimony at the hearing was given by: Service Employees International Union (SEIU); The Internet Association; TechNet; Handy.com; New York Workers Compensation Alliance; New York Legal Aid; Travel Agent Association; freelance writers; livery drivers; and various organizations who 'represent' drivers/gig workers.

## CCH Antitrust Law Daily and IP Daily

### *Top Antitrust and Intellectual Property Law Developments for November 2019*

This is another unsolicited testimonial for CCH's daily reporters: Antitrust Law Daily and IP Law Daily. In case you missed the highlights from the November issues, you can see synopses for [Antitrust Law Daily here](#) and for

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. provides such expert advice on the topics addressed herein.

Please visit our website at [www.FranchiseValuations.com](http://www.FranchiseValuations.com)

[IP Law Daily here.](#)

## Goodwill Accounting

### ***Goodwill Impairments Up 125% in 2018: D&P Study***

Total goodwill impairment soared to \$78.9 billion in 2018, up 125% over the prior year, according to the 2019 U.S. Goodwill Impairment Study by Duff & Phelps. The study examines general and industry goodwill impairment trends of more than 8,800 U.S. publicly traded companies through December 2018. The hardest hit industry was the industrials sector, with an aggregate goodwill impairment of \$25.1 billion in 2018, although \$22.1 billion of that total was from GE alone. Healthcare, consumer staples, and energy also had large increases in goodwill impairment. The outlook for 2019 is for overall goodwill impairment to see a significant decrease, the study says.

### ***Washington Appeals Court Rules on Entity Goodwill***

In a recent case focusing on a dissolution of an oral surgery practice, the Washington Court of Appeals ruled on whether a professional limited liability company (PLLC) can have goodwill separate from the goodwill of the professionals. The appeals court concluded that, in this specific case, the PLLC did have entity goodwill noting that it maintained locations and a website in its name and it had its own phone number patients called. Also, since it was the PLLC that employed the staff, the court held that the entity, not the individual doctors, possessed and maintained patient files (*McLelland v. Paxton*, 2019 Wash. App. LEXIS 2960 (Nov. 21, 2019)).

## Attorneys' Fees - Prevailing Party

### ***Final Fee Award Granted in Decade-Long Airline Price-Fixing Class Action***

In *In re Transpacific Passenger Air Transportation Antitrust Litigation*[1], attorneys representing consumer air passengers were awarded over \$14 million in fees and unreimbursed expenses for their work in reaching a \$58 million settlement with All Nippon Airways (ANA), the final air carrier to settle a price fixing lawsuit following 12 years of antitrust litigation. The fee award was less than the nearly \$19 million sought and was adjusted downward to reflect fees already awarded for settlements reached with the other trans-Pacific air carrier defendants, the reduced financial burden and risk faced by the class plaintiffs in the final settlement, and empirical data suggesting smaller percentage fees associated with larger settlement awards. However, despite previous awards for the same overall work, the federal district court determined that the benefit of the final settlement and the overall outcome of the litigation was significant and justified a final award equal to the circuit benchmark of 25 percent of the total net settlement fund across all three settlements.

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[1](November 26, 2019, Breyer, C.). Case No. 3:07-cv-05634-CRB, MDL No. 1913

## Wrongful Termination

### ***Nissan Failed to Establish Good Cause to Terminate Texas Dealer***

In *Nissan North America, Inc. v. Texas Department of Motor Vehicles*[1], a Texas state trial court found that franchisor Nissan North America did not have good cause under the meaning of the Texas motor vehicle dealer law to terminate one of its Texas dealers, and a Texas appellate court sustained the

ruling. The franchisor's arguments on appeal - that the lower court erred in interpreting the sixth statutory good cause factor (the parties' compliance with their franchise agreement) - were rejected. Nissan argued that the dealer's poor sales performance and violation of accepted accounting practices constituted good cause to terminate the Agreement. The court disagreed, finding that the single performance sales metric Nissan relied on was not a reasonable criterion for measuring performance in this instance and Nissan did not present any evidence to establish that the dealer failed to substantially fulfill other contractual requirements. The dealer's accounting errors were not willful, as they were based on what the dealer's tax preparer had indicated would be an acceptable strategy to write-down vehicle values. And consideration of the dealer's performance after the notice of termination was given was acceptable because under Texas law, the good-cause determination for franchise termination is not limited to consideration of circumstances existing at the time of the notice of termination.

### ***7-Eleven Exposed to Franchisee's Tortious Interference Claim***

The franchisee submitted several prospective purchasers of its franchise goodwill but the franchisor allegedly wrongfully rejected or discouraged them from continuing the application process. In a dispute involving a settlement agreement between 7-Eleven and a Pennsylvania franchisee in which the franchisee was given 180 days pending termination of the franchise agreement to sell the store's goodwill, the franchisee adequately stated a cause of action against 7-Eleven for tortious interference with his efforts to sell the goodwill, the federal district court in Pittsburgh has ruled. The court, however, dismissed the counts for lack of pleading specificity the franchisee's counts for breach of contract and defamation, while granting the franchisee leave to amend those claims (*Guvenal v. 7-Eleven, Inc.*, December 3, 2019, Dodge, P.).

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[1] (November 22, 2019, Burgess, R.). In The Court of Appeals Sixth Appellate District of Texas at Texarkana, No. 06-19-00007-CV

## **Lost Future Royalties**

### ***Franchisor Awarded Damages In Default Judgment***

Auto maintenance and repair shop franchisor Maaco won damages for unpaid royalties, advertising expenses, point of sale fees, future lost royalties, future advertising contributions, and attorney fees for the franchisees' breach of the franchise agreement in a default judgment. Maaco established future damages through calculations using data specific to those franchises based on a historical analysis of actual revenues. The court awarded approximately \$460,000 in past due accounts receivable and \$449,000 in lost future royalties for the four franchise locations at issue.[1]

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[1] *Maaco Franchisor SPV, LLC v. Cruce*, U.S. District Court, W.D. North Carolina, Charlotte Division. No. 3:18cv361. Dated October 18, 2019, CCH Business Franchise ¶16,538.

## **Obituaries**

**Gahan Wilson** - Award-winning cartoonist for *The New Yorker* and *Playboy* who specialized in the very weird.

**Robert K. Massie** - Award-winning historian of Peter the Great, Catherine the Great and Dreadnoughts - a past president of the Writers' Guild.

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