



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

Connecticut Appellate Court Rejects "Tax Affecting" in Valuation of S Corporations

In the recent case of *R.D. Clark & Sons, Inc. v. Clark*, 194 Conn. App. 690 (Dec. 10, 2019), a buyout dispute involving a Connecticut family business, the appellate court upheld the trial court's decision not to tax affect the earnings of the company in a fair value proceeding concerning an oppressed shareholder, even though experts for both sides had tax affected.[1] The Court cited *Gross v Commissioner*[2] as the only appellate decision on the issue and that it had rejected tax affecting. The Court emphasized that before it was a "fair value" rather than a "fair market value" proceeding and that influenced its rejection of "tax affecting". As is common in "fair value" proceedings, the Court also rejected discounts for minority (DMIN) and for lack of marketability (DLOM). It must be noted that this decision did not address the two recent Federal decisions affirming the use of tax affecting.[3]

Appraisal Foundation Pleaded Congress Requested GAO Study of Real Estate Appraisal Exemptions

The Government Accountability Office (GAO) has been tasked by Congress to conduct a study pertaining to the law that set up appraisal regulations, Title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). The study, which will focus on federal practices that exempt many real estate transactions from appraisals, is a first step to help protect taxpayers and homebuyers according to the Foundation. Obviously, a group that represents appraisers is in favor of requiring them.

"Cannabis and Hemp Valuations: A Market Analysis"

Business Valuation Resources is offering a [new study](#) by industry experts Ryan Cram and Ron Seigneur who present an empirically-based alternative to the "one-size-fits-all" application of the market approach in this budding industry.

Advisers Urge Family Biz Owners To Sell Now

Amid a booming economy with easy capital and political uncertainty, wealth advisers are encouraging family-owned businesses to sell before the "party ends," according to an article in Bloomberg. Wealth advisers are promoting the thesis that if Democrats prevail in the next election, taxes on the rich are likely to go up.

[1] On appeal the corporation argued that "[b]ecause both experts applied a tax adjustment, it was error for the trial court to substitute its own judgment and fail to apply any tax adjustment." The Court blew this away saying the argument is belied by the axiomatic principle that the court is not bound by the opinions of expert witnesses. See, *e.g.*, *Johnson v. Healy*, 183 Conn. 514, 516-17, 440 A.2d 765 (1981).

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.

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[2]CA6, 272 F3d 333

[3]In *Kress v US*, USDC ED WI, Case No. 16-C-795 (March 25, 2019, Griesbach, Chief Judge) and *Estate of Aaron Jones*, US Tax Court, (TC Memo 2019-101, August 19, 2019) a federal district court and one judge from the Tax Court in a Tax Court Memorandum decision, held that tax affecting can be appropriate.

Damages

Lanham Act Disgorgement Damages Split Among All Competitors in False Advertising Case

In *Boltex Mfg. Co. v. Ulma Piping U.S. Corp.*, [1] the Court ruled that while disgorgement was appropriate, the amount of damages was reduced as the profits from misconduct were gained at the expense of all competitors, not simply the two plaintiffs. A finding that Ulma Piping USA Corp. committed false advertising under the Lanham Act in connection with the forged flanges it manufactures was affirmed, but the damages awarded by a jury to the two plaintiffs were reduced. The court scaled back the amount of damages, noting that Plaintiffs were merely two of the players in the marketplace harmed by Ulma's false advertising.

[1]USDC SD TX Case 4:17-CV-01400, February 7, 2020, Hanen, A.

Joint Employer, Independent Contractor, Vicarious Liability

No Retroactive Effect of Oklahoma Law Exempting Franchisors from Being Joint Employers

In *Mardis v Jackson Hewitt*, [1], the Court in New Jersey rejected the franchisor Jackson Hewitt's argument that Oklahoma's recently enacted law (which specifically exempts a franchisor from being considered a Joint Employer) should not be applied retroactively. The effective date of the statute was November 1, 2016 and most of plaintiff's claims arose before that date.

Hotel Franchisor Not a Joint Employer

In *DiFlavis v. Choice Hotels International, Inc* [2] it was held that a housekeeper could not sue the franchisor, and could not pursue her overtime claims against the franchisee on a collective basis. A hotel franchisor was held not to be the plaintiff's joint employer, according to the federal district court in Philadelphia, granting summary judgment in the franchisor's favor.

Uber and Postmates Denied Preliminary Injunction Barring Enforcement of California's Independent Contractor Law

Uber and Postmates, along with a pair of rideshare and delivery drivers, were denied a preliminary injunction barring the enforcement of California's AB 5, the California law enacted last year creating a presumption that workers were properly "employees". In *Olson v. State of California* [3] the court found the plaintiffs failed to show a likelihood of success on the merits on their Equal Protection, Due Process and Contract Clause claims because AB 5 is rationally related to a legitimate state interest, does not target gig economy companies, and does not unconstitutionally impair their contracts.

In September 2019, the State of California enacted AB 5, which codifies the state's Supreme Court holding in *Dynamex Operations West, Inc. v. Superior*

Court,^[4] and adopts the ABC test for all provisions of the California Labor Code, the Unemployment Insurance Code, and IWC wage orders, with numerous exemptions. AB 5 went into effect on January 1, 2020.

House Advances Bill That Incorporates 'ABC test' While IFA Voices Opposition

On February 6, the US House of Representatives passed the controversial Protecting the Right to Organize (PRO) Act in a 224-194 mostly party-line vote that nonetheless saw seven Democrats join Republicans to vote against the measure, and five Republicans join Democrats to favor it. The International Franchise Association (IFA) reacted negatively to the passage news, stating that the bill would codify a vague joint employment standard and wreak havoc for the franchise business model.

[1]2019 WL 7207551 (DC NJ, Dec. 26, 2019)

[2]US DC ED PA NO. 18-3914, February 3, 2020, Pratter, G

[3](USDC CA, Case 2:19-cv-10956-DMG-RAO, February 10, 2020, Gee, D.).

[4] Cal Sup Court, 2018 CCH Business Franchise Guide ¶ 16,182

Federal Taxes

IRS Releases New Standard Mileage Rates

The IRS has released the optional standard mileage rates for 2020.^[1] Most taxpayers may use these rates to compute deductible costs of operating vehicles for business, medical, and charitable purposes. They are:

- 57.5 cents per mile for business uses;
- 17 cents per mile for medical uses; and
- 14 cents per mile for charitable uses.

[1]Notice 2020-5; IR-2019-215

Attorneys' Fees: "Fair Value" Proceeding

Oppressed Shareholder Granted Attorney Fees But Not At Contingent Fee Cost

Another aspect of *R.D. Clark & Sons, Inc. v. Clark*, 194 Conn. App. 690 (Dec. 10, 2019), discussed above under "tax affecting", was the Court's decision with respect to the attorneys' fees properly awarded under the Connecticut version of the oppressed shareholder statute. The Court held that although the oppressed shareholder's contingency fee agreement was valid and enforceable between attorney and client, still it would be unjust to charge the losing party legal fees at greater than the hourly rate.

Quotations

It was said of Mussolini: ***"He made the trains run on time."***

It was said of Hitler: ***"He made good on some of his promises and all of***

his threats."
