



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

New Tax Law

Victory for Franchisors - Nothing for Franchisees

The IRS has just issued final regulations (247 pages) with respect to the "pass thru deduction" allowed under Section 199A of the new tax law. The new pronouncement has a specific franchise example, undoubtedly provided at the request of the International Franchise Association, which makes clear that a franchisor of health services is not providing health services themselves, and therefore, is eligible for the pass thru deduction assuming the franchisor is not a C corporation. The franchisee that actually provides the health services, however, is not eligible for the lower rate.

Another Cashier's Check Fraud

Lawyers Beware

Jay Hack Esq., a partner of the franchise maven David Azrin at Gallet Dreyer and Berkey has posted a cautionary tale about check fraud on the list serve of the NY Bar Association. [It should be read by all.](#)

Sub S or LLC?

Reasons to Prefer Tax Partnerships Over S Corporations

In the New York Business Law Journal (Winter 2018, Vol.22 No. 2), Bradley T. Borden, a professor at Brooklyn Law School offers a series of rationales for preferring LLCs. While offering some positive aspects of S elections, the professor highlights some of the negatives about S corporations such as:

- Shareholders must be individuals and US residents and there can be no more than 100 of them;
- The corporation may not have more than one class of stock, must pay participating shareholders "reasonable compensation" and cannot make "special allocations";
- On a death or sale by a shareholder the new buyer does not get a step up in "inside" basis and corporate debt may not be used as shareholder's basis.

Joint Employer

DC Circuit Remands Browning Ferris to NLRB

In *Browning Ferris v NLRB*, 2018 WL 6816542 (DC CIR, Dec 28, 2018) the DC Circuit Court of Appeals held that Joint Employer issues are for courts to decide, incorporating the "indirect control" and "reserved right" joint employer standards. But it made no specific fact decisions and remanded to the NLRB (which has extended its time for comments on the issue).

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

SDNY Finds Dominos is Not a Joint Employer

In *In re Domino's Pizza, Inc.*, 2018 WL 475944 (SDNY, Sep. 30, 2018) the Sovereign District of New York (ha) held that the franchisor was not a joint employer. In spite of the fact that Domino's established standards and exercised certain oversight of the operation of the stores, the Court found that did not rise to the level of being a joint employer.

IFA Files Amicus Brief in Jani-King Case

The IFA was granted the right to file an amicus brief to the Ninth Circuit in support of Jan-Pro Franchising International Inc. (17-16096 *Gerardo Vazquez, et al v. Jan-Pro Franchising Int'l Inc.*), a case where unit franchisees sued Jan-Pro in 2008 for minimum wages and overtime pay, claiming that they were improperly classified as independent contractors, rather than employees. The IFA's argument was that retroactively applying the ABC test from *Dynamex* would result in the conclusion that every franchisor employs its franchisees; a conclusion that conflicts with multiple state laws and the California Supreme Court's own decision in *Patterson v. Domino's Pizza, LLC*.

Expert Witnesses

New York Court Rules Mixed Purpose Valuation is Discoverable

In a recent New York case the issue was whether a valuation the defendant had commissioned months before the plaintiff filed suit was privileged or protected by the work-product doctrine.[1] The facts were as follows: Two pharmaceutical companies were in a joint venture which they terminated in 2012 but disputed whether the agreement required a valuation of noncash assets to effect the distribution of capital contributions. The plaintiff believed a fair market valuation was needed and by 2015 the defendant agreed and commissioned its own valuation, which, it said, the parties "could use as a starting point" with respect to their negotiations. In 2012, the companies ended their joint venture but years later, they were still at odds.

In March 2016, the parties again met to settle their dispute and the defendant used the valuation to prepare for the meeting. The parties did not settle, and, six months later, the plaintiff sued. The plaintiff asked for the defendant's valuation. The court found it was discoverable finding that the attorney-client privilege did not apply because the valuation was not prepared by an attorney "acting as such," and it did not reflect an attorney's thinking and professional skills. The work-product doctrine did not apply because the valuation was not "created solely and exclusively in anticipation of litigation."

[1]*Noven Pharmaceuticals v Novartis Pharmaceuticals*, 2018 N.Y. Mis. LEXIS 5133 (Nov. 9, 2018)

Key Damages and Valuation Decisions of 2018

Business Valuation Resources Listing

In Franchise Regulation and Damages, the treatise I write and update 3 times a year, we try to cover and highlight annual developments. Business Valuation Resources- an excellent resource - has listed the 2018 decisions it

considered most important which are:

- *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 2017 Del. LEXIS 518 (Dec. 14, 2017) (Dell II); *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 2018 Del. Ch. LEXIS 52 (Feb. 15, 2018); *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 2018 Del. Ch. LEXIS 160 (May 21, 2018); *In re Appraisal of AOL, Inc.*, 2018 Del. Ch. LEXIS 63 (Feb. 23, 2018); and *Mesirov v. Enbridge Energy Co.*, 2018 Del. Ch. LEXIS 294 (Aug. 29, 2018) -- all Delaware Chancery cases focusing on "fair value" in oppressed shareholder situations.
- *Acosta v. Vinoskey*, 2018 U.S. Dist. LEXIS 64094 (April 17, 2018) and *Weinman v. Crowley (In re Blair)*, 2018 Bank. LEXIS 2281 (Aug. 2, 2018) focus on various infirmities of expert witnesses
- *Herbert v. Joubert*, 2018 Va. App. LEXIS 222 (Aug. 14, 2018) and *Jensen v. Jensen*, 2018 Mich. App. LEXIS 40 (Jan. 9, 2018) focus on valuations in divorce proceedings.

Quotations from Yogi Berra

Predictions Are Hard - Especially About the Future.

Nobody Goes There Any More - It's Too Crowded.