



# 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

## Expert Testimony

### *Draft Expert Reports Are Not Discoverable Under the Federal Rules - But What's a Draft?*

In *County of Maricopa v. Office Depot Inc.*, 2019 U.S. Dist. LEXIS 175695 (Oct. 9, 2019) it was conceded that under FRCP 26 "drafts" of expert reports are not discoverable. But the issue was whether a certain spreadsheet with notes prepared by a novice expert was a "draft". The court said "The case law, somewhat surprisingly, provides little guidance when it comes to determining whether an expert's report was a draft or final version," but came to the conclusion that the final submitted "report" which the expert produced was a complete statement of the opinions the expert would express, including the reasons for his opinions. Thus, the earlier notes-containing version was a draft and not subject to discovery.

### *Auditors To Increase Focus On Quality Of Work Of Valuation Experts*

In its new standard concerning the use of specialists, the Public Company Accounting Oversight Board (PCAOB) wants auditors to move away from a checklist mentality and use more professional judgment. The PCAOB says it doesn't want rote procedure; it wants quality. The auditor must still consider factors such as the objectivity and expertise of the expert, but the new standard includes things such as laying out the specific requirements for when an auditor can engage an outside expert; procedures to evaluate a company specialist's use of data, significant assumptions, and methods; as well as the reliability of the specialist's work and its relationship to the relevant assertion.

## Joint Employer, Independent Contractor, Vicarious Liability

### *Uber and Postmates Sue California Over Gig-Worker Rights Law*

[Axios reported](#) that Uber and Postmates are suing California over the law referred to as AB5. One driver from each company joined the suit as plaintiffs, arguing that the measure would breach equal protections provided by the Constitution. The law has been controversial because it essentially implies that workers for gig economy companies like Uber and Postmates should be full employees. AB5 has been controversial in other industries as well. For example, some freelance journalists have expressed frustration with the law's seemingly arbitrary limit of 35 contributions per news outlet annually, and that it risks pushing a number of companies to simply no longer work with California-based writers.

### *Major Win For franchisors As Department Of Labor Issues Final Joint Employer Rule*

In a major win for franchisors, the U.S. Department of Labor issued its final joint employer rule to update the regulations interpreting joint employer status under the Fair Labor Standards Act. The new test is based on determining if both businesses meet the following factors:

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- has the power to hire or fire the employee
- supervises and controls the employee's work schedule or conditions
- determines the employee's pay rate and method of payment
- maintains the worker's employment records

### ***New York Gov. Andrew Cuomo Prepares to Introduce AB5 Copycat Legislation***

On January 8, New York Governor Andrew Cuomo said that making reforms to worker classifications in the gig economy will be among his top priorities for 2020. In September, Cuomo said that New York will likely follow California's lead in reclassifying independent contractors.

## **Wrongful Termination**

### ***Pizza Manufacturer's Relationship With Distributor Was Wisconsin 'Dealership'***

A Wisconsin pizza distributor's relationship with a Minnesota pizza manufacturer was a "dealership" under the meaning of the Wisconsin Fair Dealership Law (WFDL) because no reasonable jury could fail to find that an agreement existed between the parties authorizing the distributor to sell the manufacturer's pizzas under the manufacturer's trade name and that the parties shared a community of interest.[1] However, disputes of material fact precluded determination, on the parties' cross motions for summary judgment, whether the manufacturer violated the WFDL by terminating the dealership without notice, good cause, or right to cure.

The court held that it was undisputed that the parties entered into an oral agreement granting A&B the right to sell Heggie's pizzas and to use Heggie's tradename in advertising in the form of bar signs and menu boards. The court also determined that, as required by the WFDL, a "community of interest" or a continuing financial interest existed between A&B and Heggie's. It was undisputed that the parties had a business arrangement for over thirteen years and that at times, 99% of A&B's business was selling Heggie's pizzas. A&B invested some \$140,500 in distributing Heggie's pizzas by purchasing a new truck and freezer and investing in a storage facility; A&B's owner and sole employee spent almost all of his work time selling Heggie's pizzas; and A&B purchased approximately 65 ovens for \$9,750 to provide customers an easy means to bake Heggie's pizzas onsite.

All of these factors weighed strongly in favor of finding a community of interest, the court held. A&B had spent years building up Heggie's goodwill among its customer base, exactly the kind of sunk investment the WFDL was intended to prevent a grantor from usurping without compensation. Further, the court noted, while the statement was not legally binding, Heggie's attorney, in the notice of termination letter, did in fact admit that the WFDL applied to the business arrangement.

### ***Burner Distributor Not Minnesota Franchisee, Denied Injunction***

A distributor of burners used in the manufacture of boilers was not a franchisee of the burner manufacturer it distributed for under the Minnesota Franchise Act (MFA) and was not entitled to a preliminary injunction enjoining the manufacturer from terminating the parties' business relationship.[2], The MFA did not apply to the parties because the distributor could not demonstrate that it paid the manufacturer a franchise fee, either directly or indirectly. The parties' agreement did not require the distributor to purchase an unreasonable minimum inventory or pay mandatory fees for required training, and the manufacturer charged only wholesale prices for

parts. Because the distributor was not a franchisee, it was not entitled to the presumptions of the MFA and was thus unlikely to succeed on its claim, and it did not otherwise demonstrate that the other relevant factors for its requested preliminary injunction weighed sufficiently in its favor. The court held that although the distributor could suffer irreparable harm without an injunction, because it would go out of business, that harm could be compensated with money damages.

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[1]*A & B Distributing, Inc. v. Heggie's Pizza, LLC*, November 18, 2019, Conley, W.

[2]*Louis DeGidio, Inc. v. Industrial Combustion, LLC*, December 18, 2019, Tunheim, J.

## Attorneys' Fees - Prevailing Party

### ***Attorney Fees Denied To Domain Name Holder Who Was Awarded Declaratory Relief***

A federal district court in San Jose, California has ruled that an adverse determination by a jury, standing alone, is not a basis for finding exceptional circumstances justifying attorney fees under a Lanham Act claim.[1] The decision denied attorney fees to a domain name holder who was awarded declaratory relief in a dispute involving his use of the imi.com domain name. But in the Court's opinion, the domain name holder failed to demonstrate by the preponderance of the evidence that his case was so "exceptional" as to justify an award of fees. Moreover, his own manner of litigation weighed against the award of fees. The court found that the manner in which Black litigated the case militated against attorney fees because throughout the case, the court clearly and unequivocally warned Black that he did not have either a claim for reverse domain name hijacking or any other affirmative claim against Irving. Notwithstanding this fact, Black repeatedly "ignored this warning," which militated against the award of attorney fees. The court held that such behavior was an equitable factor that militated against the award of attorney fees.

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[1]*Black v. Irving Materials, Inc.*, January 6, 2020, Koh, L.

## Inherited IRAs

### ***New Rule On Withdrawals To Limit Heirs' Ability To Stretch Payouts***

According to [an article in The Wall Street Journal](#), one of Congress's pieces of year-end legislation limits the ability of IRA owners to extend the life of their traditional Individual Retirement Accounts and Roth IRAs by leaving the accounts to much younger heirs, such as grandchildren. Until the change, the heirs of traditional or Roth IRAs could take required withdrawals over their lifetimes and receive decades of income-tax-free or tax-deferred compounding after the original IRA owner's death. For example, a 23-year-old heir of her grandfather's IRA could take payouts over about 60 years—hence the name Stretch IRA. But now most IRA beneficiaries will have to withdraw the assets within 10 years, rather than based on their own life expectancy. Many future heirs of IRAs, such as grandchildren, will be required to drain the accounts within 10 years of receiving the IRA, but some will still be able to stretch payouts over decades such as:

- Heirs of IRAs whose original owners died before 2020
- Surviving spouses
- Chronically ill or disabled heirs
- Heirs within 10 years of age of the original owner
- Minor children up to the age of majority, or age 26 if the child is still in school. At that point, the 10-year payout begins

## Quotations

"Trust but Verify" - old Russian proverb "doveryai, no proveryai" which Robert K. Massie's wife, Suzanne Rohrbach, told to Ronald Reagan and which he repeated in a meeting on arms control with the Soviet leader Mikhail S. Gorbachev.

"You tell a big lie often enough and keep repeating it, people will eventually believe it."  
Joseph Goebbels