



# The Franchise Valuations Reporter



## Our Expertise

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

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



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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 damages in franchise disputes and valuations of franchises, 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](#).

## Damages: Proving Lost Profits

### Four Acceptable Methods

The burden of establishing lost profits damages is generally easier to meet in the context of an established national franchise because each store is cast from the same mold and the locations are generally rigidly controlled by the national franchisor. Projections are readily available based on extensive experience in other stores from which sales and profits can be derived with a high degree of certainty. These projections are the basis for the franchisor's selection of the new location and the franchisee's investment in it. If the figures are good enough for the parties to invest their money, it would seem that they should be good enough for the court. [1]

An expert estimating Lost Profits generally has four available approaches[2]:

#### 1. Before and after method

Under the before and after method the plaintiff's profits are analyzed before the wrongful act, during the loss period and after the loss period ends, and estimates are made of the amount by which profits were reduced by the wrongful act.

#### 2. Sales Projection method

Under the sales projection method, the plaintiff estimates sales and profits during the loss period based on what the results would have been but for the defendant's wrongful act. Projected profits are then compared with actual profits to estimate lost profits.

#### 3. Yardstick method

The yardstick method uses a benchmark (comparable companies) to estimate lost sales, profits or value for the subject company. The results of the benchmark companies are compared to the subject company and the difference forms the basis for the loss estimate.

#### 4. Market share method

The market share method calculates lost profits based on the market share the company would have attained but for the wrongful act of the other party. This approach is most appropriate for larger companies owning a reasonable market share for their products.

[1]Dunn on Damages § 4.7 (2005) ("Recovery of Lost Profits of an Unestablished Business") (citing *Smith Dev. Corp. v. Bilow Enters.*, 112 R.I. 203, 214 (1973) (allowing a McDonald's franchisee that was blocked from opening his unit to recover lost profits).

[2] *Pauline's Chicken Villa, Inc. v. KFC Corp.*, 701 S.W.2d 399, 401 (Ky. 1985)).

## DISCLAIMER

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. and Franchise Technology Risk Management provide such expert advice on the topics addressed herein.

Please visit our websites at [www.FranchiseValuations.com](http://www.FranchiseValuations.com) and [www.ftm.biz](http://www.ftm.biz)

## Succession Planning for Franchisees

### *New Article Published by the ABA*

Ten thousand people a day in the US are turning 65 and contemplating retirement. Many of them are franchisees. Eli Akhavan and I have written an article entitled "Succession Planning for Franchisees" which was just published in the most recent issue of *Franchise Law Journal*. If anyone wishes to read it we have provided a [link here](#).

## Joint Employer Update

### *Labor Secretary Withdraws Informal Guidance on Independent Contractors and Joint Employers*

In another win for franchisors, on June 7, new Labor Secretary Andrew Acosta announced that the Department of Labor's 2015 and 2016 informal guidance on joint employment and independent contractors has been withdrawn. Rolling back the Obama-era policies, Acosta has withdrawn Administrator's Interpretation No. 2015-1, issued by former Wage and Hour Division Administrator Dr. David Weil on July 15, 2015. That guidance came down strongly on the side of finding an employment relationship as opposed to an independent contractor one.

Administrator's Interpretation No. 2016-1 on joint employment, issued January 20, 2016, was also withdrawn. Under that informal guidance, the test for joint employment under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) also uses the same expansive "suffer or permit" language found in the FLSA's definition of employment. This test is broader than the common law test, broader than the test under the NLRA and the OSHA test-it "ensures that the scope of employment relationships and joint employment under the FLSA and MSPA is as broad as possible." The International Franchise Association announced its support for withdrawing the guidance, noting that unlimited joint employer liability is one of the most costly and burdensome regulations impacting the franchise business model.

### *Commercial Cleaning Franchise Plan Not Employer of Franchisees*

A national franchisor that created a master franchise plan for commercial cleaning businesses was not the employer of unit franchisee owners under California law. Because the unit franchisees failed to offer any evidence of the franchisor's actual control over their day-to-day activities, or its reserved right to exercise such control, that it controlled their wages, or that it had the authority to stop them from working, the court granted the franchisor's motion for summary judgment.[1]

Jan-Pro contended the California Supreme Court's decision in *Patterson v. Domino's Pizza, LLC*, supplied the relevant standard. *Patterson* noted that "traditional common law principles of agency and respondent superior supply the proper analytical framework under FEHA, as they do for franchising generally." Under *Patterson*, it was not enough for a franchisor to control the "means and manner" of the franchisee's operations to be that franchisee's employer. Instead, a franchisor could become "potentially liable for actions of the franchisee's employees only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees."

The unit franchisees argued that *Martinez v Combs* applied. That decision set forth three alternative definitions of "to employ" under California labor law: "(a) to exercise control over the wages, hours, and working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship." According to the unit franchisees, Jan-Pro was their employer under any of these definitions. In the absence of controlling authority, the court applied the *Martinez* standard, but "with the gloss of *Patterson* when considering the common-law definition of employment," and found that the unit franchisees had not raised a genuine dispute of material fact preventing summary judgment for Jan-Pro. It was a defeat for the eminent Shannon E. Liss-Riordan (Lichten & Liss-Riordan) who has been instrumental in bringing joint employer claims.

### ***New Ontario Report on the Issue***

In a direct response to the Ontario Changing Workplaces Review Final Report ("Final Report"), the Ontario government announced that they are moving forward with significant changes to the province's labour and employment laws. The announcement should be viewed as good news generally for the majority of franchisors and franchisees because the Province will **not** be moving forward with deemed joint or common employer status for franchisors. And contrary to the recommendations in the Final Report, the Ontario government will **not** be going forward with the recommendation that independent unrelated franchisees of one brand in a geographic area can be required to collectively bargain with employees of those multiple franchisees towards one union contract.

### ***On the National Labor Relations Board, Trump Remains Outmanned by Democrats***

According to [an article in The Wall Street Journal](#), President Trump is now in the situation where he can make nominations to tilt the labor board to Republicans, but confirmation could take months. He (and the IFA) seek to overturn what were considered big victories for labor during the Obama administration, including an easier path for employees at franchises like McDonald's to join unions.

"The delays are concerning," the article quotes Robert Cresanti, president of the International Franchise Association as saying. It has resulted in uncertainty about how the board could rule in future cases is keeping firms from expanding and leaving it unclear how much involvement a franchisor can have in its franchisee's employment policies, he added.

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[1] *Roman v. Jan-Pro Franchising International, Inc.*, (May 24, 2017, Alsup, W.).

## **SBA Loans to Franchisees**

### ***Where Are the Statistics on Default Rates for SBA Loans to Franchisees?***

I can't find them. Samuel G. Wieczorek of the Cheng Cohen firm has been kind enough to tell me he can't find them either. Back in 2011 the website [Bluemaumau.org](#) published then-current statistics - so where are they now? Any readers with sources are asked to advise.

## **Cyber Security**

***Settlement: Target to Pay States \$18.5M to Settle Data Breach Case***

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Target Corporation has reached an \$18.5 million settlement with 47 states and the District of Columbia to resolve the states' investigation into the retail company's 2013 data breach, which affected more than 41 million customer payment card accounts and exposed contact information for more than 60 million customers. Target's settlement payout represents the highest valuation of a multi-state data breach investigation to date.

Under the settlement document, Target is required to: develop, implement, and maintain a comprehensive information security program; employ an executive or officer who is responsible for executing the plan; hire an independent, qualified third-party to conduct a comprehensive security assessment; maintain and support software on its network for data security purposes; maintain appropriate encryption policies, particularly as they pertain to cardholder and personal information data; segment its cardholder data environment from the rest of its computer network; and undertake steps to control access to its network, including implementing password rotation policies and two-factor authentication.

## Wisdom from Old Movie Stars

**Paul Newman:** "A man with no enemies is a man with no character."

**Robert Redford:** "Health food may be good for the conscience but Oreos taste a hell of a lot better."