



# 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 and E-discovery of Electronically Stored Information

We offer a free initial consultation. If any readers have questions, you are welcome to email or phone us and we will provide our best answer as quickly as possible.

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## Franchise Technology Risk Management

Our franchise law and computer forensics experts provide consulting and implementation of all aspects of cyber security, ESI management and e-discovery for franchise systems - from preparation of cyber security and ESI-related policies and procedures manuals through collection, preservation, processing, production and presentation.

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## Expert Testimony

### *Judge Excludes Opinion on Causation Offered By "Certified" Damages Expert*

As many of FVR's readers know, I have a problem with all the so-called "certifications" offered by the many valuation organizations. As far as I am concerned, an accounting or tax degree is generally qualification enough for an expert on damages or valuations. The alphabet soup of nine US and fourteen Canadian certifications should not really carry much weight because, like it or not, the rules about damages and valuations are made by judges and courts - not by any certifying organization.

Proof of that can be found in the recent case of *Rowe v. DPI Specialty Foods*[1] where the rebuttal expert, Derk G. Rasmussen, had an MBA and a CPA. In addition, the court noted:

[He] has earned credentials from the American Institute of Certified Public Accounts (the Accredited in Business Valuation and Certified in Financial Forensics), the American Society of Appraisers (Accredited Senior Appraiser designation), and the Association of Certified Fraud Examiners (designation of Certified Fraud Examiner). He is also a member of the Association of Certified Fraud Examiners and the American Society of Appraisers. Mr. Rasmussen reports having "over thirty years of experience in performing assignments involving forensic/investigative accounting, business valuations, economic damages, and reviewing the reports of others in [his] field," and his resume documents 127 separate engagements as an expert witness. [footnotes omitted]

Well you have to wonder what they have been teaching him because he had an incredibly bloated idea about his function as an expert. He concocted a made-up difference between so called "economic causation" and "legal causation" and opined that, as an expert, "[w]hen evaluating a damage claim, one must ensure that each claimed economic impact can be traced back to the incident. This is where the concept of causation or causal link is integrated into the analysis of economic damages."

The Court totally disagreed with him, writing:

Mr. Rasmussen cites three editions of the same Litigations Service Handbook to support his theory that the topic of causation "continues to be expanded," and notes . . . that "the [economic expert] should not blindly accept the conclusions of others without exercising due professional skepticism in applying these conclusions to the facts of the case." However, he twists this citation about blind acceptance of others' conclusions into the assertion that "an expert has a duty to understand and prove that a causal link exists between the incident and each of the damages elements," and that "an expert is specifically precluded from relying upon an assumption that economic causation exists." His assumption of a duty to "prove" is unfounded. [footnotes omitted]

## We Write the Book

**Franchise Regulation and Damages**, the only treatise that covers 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](#).

## 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.

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And the Court went on:

Mr. Rasmussen's misreading of the texts he cites is very troubling. But significantly more troubling are his assumptions about his role in the courtroom. An expert witness has no duty to prove causal links between incident and damages. An expert opines on facts which the expert assumes will be proven, and an expert can explain the bases for an opinion. But an expert is not to opine on the weight of the facts or take a principal role in sifting, weighing and reciting them for the jury.

The Court's condemnation of the expert continued:

- Not only does he wrongly believe he has a duty to analyze evidence and prove causation, he believes there is virtually no limit to the breadth of his review.
- In his deposition, Mr. Rasmussen testified that he is not an authorized interpreter of testimony but that his role as an assessor of economic causation gives him license to weigh and compare facts and reliability of witnesses "because all of that has bearing on causation."
- In his expert report, Mr. Rasmussen writes consistent with his theory of his role. Of the twenty pages of his report, about seven pages are direct recitations of deposition testimony, which he weighs and critiques. Furthermore, about three pages are summary or characterization of facts as he sees them based on the record. Mr. Rasmussen also spends about four pages to incorrectly state his role as an expert witness.

The Court closed by adding another restriction: "He cannot evaluate what he is not competent to do. His evaluation of damages may not extend to secondguessing the determinations and assumptions underlying the opinions of experts on issues entirely outside of his qualifications." Accordingly, Mr. Rasmussen's testimony was excluded with the court ruling an expert "should understand causation and base his opinions on sound causation but is not to argue causation or prove it."

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[1]2015 U.S. Dist. LEXIS 110605 (Aug. 19, 2015)

## Nexus

### ***Washington Business and Occupation Tax: Franchisee Fees Paid for Advertising, Not Use of Trade Name, So Higher Tax***

Fees collected from restaurant franchisees for local and national advertising were subject to Washington business and occupation (B&O) tax under the "service and other activities" classification - a higher tax rate - and not the "royalty" classification because the fees were paid by the franchisees for advertising and not for the use of a trade name or trademark. For gross income to qualify as income from royalties, it must be received for the use of intangible property such as copyrights, patents, etc. Here, the fees received were used for marketing and national and local advertising. *Determination No. 14-0224*, Washington Department of Revenue, August 31, 2015.

### ***California Income Tax: Petition for Review of Nexus Decision Denied***

The California Supreme Court has denied a taxpayer's petition for review of a decision in which a California court of appeal held that the taxpayer's two

special purpose entity subsidiaries had sufficient nexus with California for corporation franchise and income tax purposes to overcome Due Process and Commerce Clause limitations on taxing foreign entities. The separate issue in the case, whether California's combined reporting scheme discriminates against interstate commerce in violation of the Commerce Clause, was previously remanded by the court of appeal to the trial court for a determination as to whether the scheme withstands strict scrutiny (i.e., whether it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives"). *Harley-Davidson, Inc. v. Franchise Tax Board*, California Supreme Court, No. S227652, petition for review denied, September 16, 2015.

## Arbitration

### ***New York Times Exposé Warns "Beware the Fine Print"***

Arbitration was supposed to be a fast and cheap way of resolving disputes but now it is neither leading many of its earliest proponents to become disillusioned. According to a 3-part series written by *New York Times* reporters Jessica Silver-Greenberg and Robert Gebeloffit, arbitration has become primarily an old boys' network and a tool to keep confidential the misdeeds of the more powerful. The series reveals the many abuses in the process although not really focusing on commercial arbitration between businesses.

[Part 1: Stacking the Deck](#)

[Part 2: Privatization of the Justice System](#)

[Part 3: Religious Arbitration](#)

## Cybersecurity

### ***It's Not Just Criminals***

A British cybersecurity expert cites current and former staff members as the "[biggest cyber threat to your business.](#)" Negligence and accidental disclosure are more common than malicious intent according to the author.

### ***Millions At Risk In Thefts of Employee Data***

While many businesses go to great lengths to protect customer data and trade secrets from hacker attacks, huge troves of employee data remain at risk. According to an [article in Lexology by Ann M. Caresani and Christine M. Snyder](#), sensitive employee data may be hidden in places that a business may not necessary think to look.

### ***Cyber Claims Study Details Rising Costs***

The fourth annual [NetDiligence Cyber Claims Study](#) uses actual cyber liability insurance reported claims to illuminate the real costs of incidents from an insurer's perspective. The study examined 117 actual claims submitted to underwriters in 2013 representing 5 to 10 percent of total claims. Among the findings:

3,500 = Median number of records lost

2.4 million = Average number of records lost

\$19.84 = Median cost per record

\$956.21 = Average cost per record

\$283,300 = Median cost for legal defense

\$609,797 = Average cost for legal defense