



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

Why USPAP Matters

When asked to do a "quick and dirty" valuation of a franchise or other business enterprise, we tend to demur citing adherence to USPAP Rules and Standards. USPAP stands for Uniform Standards of Professional Appraisal Practice. Why is compliance with USPAP the gold standard? Because valuation reports that adhere to USPAP are recognized as credible by courts, the IRS and arbitration panels; are prepared by competent, ethical, qualified professionals; have a consistent format; and lay out all relevant assumptions and limitations.

[The Appraisal Foundation](#) is considered to be one of the foremost authorities on the valuation profession. Through its Appraisal Standards Board (ASB) it provides voluntary guidance on recognized valuation methods and techniques and promotes the ethical and performance obligations of appraisers of property and business assets. The most recent edition of USPAP, known as "2018-2019 Uniform Standards of Professional Appraisal Practice (USPAP)," is effective January 1, 2018 through December 31, 2019. Of the ten USPAP standards, two - Standard 9 and Standard 10 - apply specifically to valuations of business enterprises or intangible assets. The rest apply to real or personal property.

Among the requirements for compliance with USPAP:

- Contingent fee arrangements are not allowed;
- Intended use of the report must be stated;
- Use of discounted cash flow (DCF) analysis requires specialized knowledge and experience;
- Prospective and retrospective aspects of the enterprise must be studied;
- Changes in the financial arena, securities regulation, financial reporting requirements, and law must be taken into account;
- Opinion must be based on judgment not just mathematical processes;
- Assumptions and limiting conditions must be disclosed; and
- All three methods of value - cost, income and market - must be considered and exclusions explained.

Thus, there are no real short cuts to a valuation that serves the client's purpose and can withstand challenges.

Expert Testimony

New Jersey Almost Adopts *Daubert*

In the class action mass tort litigation *In re Accutane Litig.*, 2018 N.J. LEXIS 988 (Aug. 1, 2018) New Jersey pretty much adopted the *Daubert*

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standard for admissibility of expert testimony. But they did not go all the way. The New Jersey Supreme Court, although adopting most of the elements of *Daubert*, still stopped short of declaring New Jersey a "*Daubert* jurisdiction" because it "hesitate[d] to embrace the full body of *Daubert* case law as applied by state and federal courts." Moreover, the court said it would continue to adhere to the general acceptance test (*Frye* standard) for reliability in criminal matters.

NYT Serves Up Scathing Look at Appraisers in Trump Exposé. .But

In an otherwise spectacular exposé in the *New York Times* about President Trump's involvement in "dubious tax schemes" and "outright fraud" to increase the fortune he received from his father, one of the many techniques described was the splitting up of the elder Trump's real estate empire followed by discounting the real estate assets by 45%. But such discounts are neither dubious nor fraudulent. I must point out to the *Times* that such discounts are well within the law in amount and are countenanced in the IRS's own Appellate Guidelines.

How Experts Arrive at DLOM

According to a Business Valuation Resources survey, restricted stock studies and pre-IPO studies remain the most cited methodologies for quantifying a discount for lack of marketability (DLOM). Seventy-five percent of their respondents used restricted stock studies, and 38% used pre-IPO studies. Additionally, nearly all of the respondents quantified separate discounts for a minority interest and lack of marketability. Three quarters of the respondents say that they "routinely" consider the 10 Mandelbaum^[1] factors in determining DLOM. Of all the factors, "restrictions on transferability" and "amount of control in the transferred shares" are the two most cited factors considered. The factor least cited was "costs associated with a public offering." Here are the 10 factors:

1. Private Versus Public Sales of the Stock
2. Financial Statement Analysis
3. Company's Dividend Policy
4. Nature of the Company, Its History, Its Position in the Industry, and Its Economic Outlook.
5. Company's Management
6. Amount of Control in Transferred Shares
7. Restrictions on Transferability of Stock
8. Holding Period for Stock
9. Company's Redemption Policy
10. Costs Associated With Making a Public Offering

[1] *Mandelbaum v. Commissioner*, T.C. Memo. 1995-254, T.C. Memo. 1995-255, (Jun. 12, 1995)

Tax Nexus

No Physical Presence is No Defense to Income Tax Nexus

The Oregon Supreme Court ruled that two banks without physical presence still have income tax nexus in Oregon, impacting the computation of the group's unitary tax liability.^[1]

Wayfair and Sales Tax Nexus

So far, there are 10 states that are beginning enforcement of sales tax nexus in accordance with SCOTUS's *Wayfair* decision on out-of-state franchisors on Oct. 1, 2018: Alabama, Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, North Dakota, Washington and Wisconsin. They join Hawaii, Maine, Mississippi and Vermont, which are already enforcing their *Wayfair* rules. All franchisors should plan for the additional obligation to collect and pay over where appropriate.

[1]*Capital One Auto Finance, Inc. v. Dept. of Revenue*, 363 Or 441 (Ore. Sup. Ct., 08/09/2018).

Joint Employer and Vicarious Liability

Labor Board Moves Anew to Limit Employers' Workplace Liability

According to an [article in the *New York Times*](#), after the National Labor Relations Board was forced to retreat from an effort to make it more difficult to assert joint employer liability, the NLRB is moving to achieve the goal through other means. In September the board announced that it was set to publish a proposed rule redefining a company's responsibility under labor law for workers engaged at arm's length, such as those hired by contractors or franchisees.

Quotes From Thomas Jefferson

"I predict future happiness for Americans, if they can prevent the government from wasting the labors of the people under the pretense of taking care of them."

"Honesty is the first chapter of the book of wisdom."