



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

Damages

Dunkin' Donuts Significantly Narrows Franchisee Claims

In *Airport Mart Inc. v. Dunkin' Donuts Franchising LLC* (September 16, 2019, Karas, K.) the franchise agreement's waiver of a jury demand and waiver of the right to seek punitive damages or lost profits were deemed valid because they were genuinely negotiated at arm's length. Dunkin' Donuts succeeded in obtaining at the motion-to-dismiss stage: (1) dismissal of the jury demand and any claim for punitive damages or lost profits, (2) dismissal of the claim for fraud in the inducement and intentional misrepresentation, except for the allegation that Dunkin' Donuts misrepresented that the franchisee could bake and sell goods on its own premises with the equipment it was required to purchase, and (3) dismissal of a claim that Dunkin' Donuts violated the New York deceptive practices law.

Court Whittles Down Over-Valuation Damages in ESOP Case

A trial court sided with the Department of Labor finding that in *Pizzella v. Vinoskey* (earlier *Acosta v. Vinoskey*), 2019 U.S. Dist. LEXIS 129579 (Aug. 2, 2019) the sale by the owner of his remaining 52% stock in the company to the ESOP at \$406 per share while a 2009 appraisal valued the stock at \$285 per share meant that: the transaction price exceeded fair market value (FMV), the trustee had breached its fiduciary duties to the plan by causing it to overpay for company stock, and the owner had accepted a price he knew exceeded fair market value.

Under controlling law, to determine the loss to the ESOP, "a court typically subtracts the stock's fair market value, as determined by the court, from the inflated price paid by the ESOP," the court explained. One expert, using a DCF analysis, identified errors in the ESOP appraisal and calculated discrete damages amounts related to each of the claimed errors, opining that the total amount, \$11.5 million, represented the overpayment. The court made adjustments to the DOL expert's DCF-based calculation, and reduced damages to \$7.8 million. But, ultimately the court decided to base damages on the capitalization of cash flow method. According to the DOL expert, the "reworked" appraisal resulted in \$7.5 million in overpayment. "Like all methods of valuing stock, this method is imperfect," the court said. "In recognition of these imperfections," the court made certain adjustments that increased the per-share value and reduced the amount of overpayment (damages) to \$6.5 million.

Valuations

Valuation vs Calculation

Under the standards set forth by the National Association of Certified Valuators and Analysts (NACVA) and the AICPA, there are two types of valuation estimates: (1) valuation engagements and (2) calculation engagements. Both require the analyst to apply professional judgement, obtain enough relevant data, exercise due professional care, remain objective, and maintain professional integrity. However, the significant difference between a valuation and a calculation is that a calculation is

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limited to specific approaches and methods while a valuation is not. The Court decisions with respect to calculations have varied with practically all coming in divorce cases. Some "valuation experts" have decried the "calculation creep" but some - though few - courts have accepted expert testimony in the form of calculation engagements because the AICPA accepts them.

Business Valuation Resources EBITDA Multiples

According to a recent release from BVR, enterprise valuations determined by EBITDA multiples are highest for the information sector (11.1x) and the mining, quarrying, and oil and gas extraction sector (8.3x). Meanwhile, the lowest EBITDA multiples are in the accommodation and food services (2.6x) and the other services sectors (3.0x). The median EBITDA multiple across all industry sectors is 4.4x

Joint Employer, Independent Contractor

In Wage-Hour Lawsuit Alleging Misclassified Franchisees, 7-Eleven Counterclaims Survive

In a wage-hour class action brought by 7-Eleven franchisees alleging they were misclassified as employees, 7-Eleven counterclaimed and their causes of action survived a motion to dismiss. The federal district court allowed the counterclaims to advance, finding in particular that dismissal of a breach of contract claim would be premature since the underlying dispute -- whether plaintiffs were independent contractors or employees -- required some factual inquiry into the parties' employment relationships (*Patel v. 7-Eleven, Inc.*, September 6, 2019, Gorton, N.).

Question Whether Dynamex Applies Retroactively in Jan-Pro Franchisee Suit Certified to California High Court

In view of the Ninth Circuit's rejection of Jan-Pro's argument that the doctrines of *res judicata* and law of the case bar the plaintiffs from contending they are employees under the ABC test, the question of whether *Dynamex* applies retroactively "could determine the outcome" of this appeal. (*Vazquez v. Jan-Pro Franchising International, Inc.*, September 24, 2019, *per curiam*). Following up on that, the Ninth Circuit has certified to the California Supreme Court the question whether the decision in *Dynamex Operations West, Inc. v. Superior Court* applies retroactively. In *Dynamex*, the California high court adopted the ABC test for determining whether workers are independent contractors or employees under California wage orders.

The Court ruled that in resolving the parties' competing contentions, as a federal court sitting in diversity, the court's role was "to approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum." Since the question of *Dynamex*'s retroactive application has not been answered by the California Supreme Court and given the potential importance of the retroactivity issue to California businesses and workers, the Ninth Circuit held that the California Supreme Court, should answer the certified question.

McDonald's Was Not a Joint Employer Says 9th Circuit

Companies doing business in California and elsewhere scored a victory in one of the major areas of dispute in employment law - joint employment claims - when the U.S. Court of Appeals for the 9th Circuit ruled that McDonald's Corporation was not liable as a joint employer for the alleged wage and hour violations of its franchisees. The ruling is important for any

company with business relationships with other entities that could expose it to joint employer claims.

The case's outcome turned on what McDonald's requires its franchisees to do and (as importantly) not do under the terms of its franchise agreement. In particular, the franchisees (and not McDonald's) are responsible for interviewing, hiring, training and paying all of their employees. The franchisees are also responsible for the employees' work schedules, and for all hiring and disciplinary decisions. In contrast, McDonald's requires the franchisees to use specific computer systems, and further requires franchisees to send managers to McDonald's-sponsored trainings, including on wage and hour laws. On top of this, the plaintiffs argued that certain timekeeping anomalies in McDonald's computer system caused them to miss out on overtime pay but the 9th Circuit held that these facts did not create an employment relationship.

Deductions for Captive Insurance

Don't Do It - And If You Did Give it Up

According to a [New York Times article](#), the IRS is on a winning streak and looking for additional taxes from users of a tax dodge which has been severely abused - captive insurance companies, which are taxpayer owned and insure against low probability problems. In one case, a dentist created a "captive" to insure against his office's being attacked by terrorists. In another, a Phoenix jeweler used a "captive" to insure against damage caused by radioactivity from a dirty bomb or nuclear waste.

The Internal Revenue Service has won in Court and as an act of grace has offered a small group of taxpayers a deal it hopes they won't refuse: Pay all their back taxes, plus interest, and their case will be closed without penalties. Several of the managers that promoted these captives have already been sued. Artex Risk Solutions, which is now owned by Arthur J. Gallagher & Company, was sued last year by people who used Artex to set up their captives and are now under investigation by the I.R.S. Firms like Artex charged around \$50,000 to set up captives and about \$50,000 annually to run them. In its offer the I.R.S. is rejecting the deductibility of those fees as well as the alleged premiums paid.

Attorneys' Fees - Prevailing Party

Fee Award For Litigation Misconduct Reversed After Judgment on Merits Was Vacated

In many litigations the "prevailing party" is entitled to an award of legal fees and costs. But in *UCP International Company Ltd v. Balsam Brands, Inc.* (September 19, 2019, Clevenger, R.) because the Federal Circuit had vacated a lower court's ruling that a manufacturer of artificial Christmas trees was entitled to judgment of non-infringement of asserted patent claims, the manufacturer was held to be no longer a "prevailing party."

The U.S. Court of Appeals for the Federal Circuit reversed a district court's award of attorney fees after it vacated, in a separate opinion, the district court's decision on the merits that a Chinese manufacturer was entitled to a declaration of non-infringement. The district court had awarded limited attorney fees under Section 285 of the Patent Act with respect to the patent holder's litigation misconduct, but had denied the request for a full award of fees because, in its view, the case was not otherwise "exceptional." After the Federal Circuit's decision vacating the district court's ruling on the merits, the manufacturer was no longer a "prevailing party" for purposes of Section

285's fee-shifting provision. For the same reason, the manufacturer was not entitled to fees incurred in defending a customer in another lawsuit involving the same patentee.

Quotations from Franklin Delano Roosevelt

"Human kindness has never weakened the stamina or softened the fiber of a free people. A nation does not have to be cruel to be tough."

"A nation that destroys its soils destroys itself. Forests are the lungs of our land, purifying the air and giving fresh strength to our people."

"Democracy cannot succeed unless those who express their choice are prepared to choose wisely. The real safeguard of democracy, therefore, is education."