



# 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 of Franchises

### *The Business Exit Tsunami*

In a very well-informed article by Paul Visokey, MBA, president and founder of Stony Hill Advisors, the author claims that 8,000 baby boomers turn 65 every day[1] and that:

- 70% of all businesses with more than one person on the payroll-nearly 4.2 million companies-are owned by people who are age 53 or older
- 7,700 + companies owned by private equity firms are also available for sale

And most importantly the author points out the lack of capital needed to consummate the transactions. Simply put, there is not enough funding available. **If every business owner in the baby boomer demographic were to sell their business, the amount of capital required to close all those transactions is over \$10 trillion and the private equity available is roughly \$535 billion.** That's barely 10% of the deals and private equity fundraising cannot keep up with the demand. The result will be more selective buyers and probably reduced purchase price multiples. First and foremost, the author recommends that owners planning to sell must get a valuation to know what their enterprise is worth.

We do that!

### **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 limited to specific approaches and methods while a valuation is not. There are also litigation and admissibility questions that apply to calculations which would not apply to full-fledged valuations.

[1] I have more often seen 10,000 per day. The article with a wealth of data is available at [here](#).

## IRS Following Up on Cryptocurrency

### **Warning: Come Clean, or Else!**

According to this [Wall Street Journal article](#), the Internal Revenue Service is continuing on the warpath against Americans who haven't reported income from cryptocurrencies like bitcoin. In the last newsletter we reported that the Service had begun sending letters to more than 10,000 cryptocurrency holders, warning about penalties for failing to report income and pay tax on transactions involving virtual currencies. Tax specialists are urging crypto users who aren't in compliance to act quickly. While coming clean involves a

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maze of tricky decisions, ignoring the agency could cost a crypto holder dearly because if the tax people catch you first, the penalties will be far more severe.

## Damages

### ***Dunn on Damages Highlights These Major Cases in Its September 2019 Supplement***

- *IQ Dental Supply, Inc. v. Henry Schein, Inc.*, 924F.3d57, 2019 WL 2063559 (2d Cir. 2019), vacating dismissal of claims for lost profits damages based on alleged interference with plaintiff's business by instigating a boycott in violation of antitrust statutes.
- *Board of Supervisors of Louisiana State University v. Gerson*, 260 So. 3d 634 (La. App. 2018) upholding an award of future lost profits based on plaintiff business owner's income history and providing a detailed discussion of the discounted cash flow method.
- *Lowe v. Elton, B.V.*, 2019WL 493806 (E.D.Tex. 2019), awarding over \$1.3 million in lost profits based on defendants' Lanham Act violations and \$6 million in treble damages for RICO violations that caused plaintiffs to lose military equipment orders.
- *Battle Born Munitions, Inc. v. Dick's Sporting Goods, Inc.*, 2019 WL 1978429 (W.D. Pa. 2019) (Pennsylvania law), applying the economic loss rule and contractual limitations of damages provision to dismiss plaintiff seller's claim of \$5,224,000 in lost profits damages arising from the buyer's alleged delays in accepting and paying for ammunition.

## Expert Testimony

### ***PWC Study Reviews Why Financial Experts Are Being Excluded***

According to a study by PWC, [Daubert Challenges to Financial Experts \(2000-2018\)](#), "Lack of reliability, either on its own or in combination with other factors, has consistently been the main reason for financial expert witness exclusions over the course of our study. This pattern held true for 2018. When excluding testimony due to a lack of reliability, courts most frequently cited a lack of sufficient data or the use of methods that are not generally accepted as reasons for exclusion. The second most common reason for exclusion in 2018 was that the testimony was not considered relevant to the case. This, again, is consistent with historical trends. When a financial expert is excluded for lack of relevance, it is often caused by testimony that was beyond the scope of the financial expert's role (e.g., testimony related to legal matters) or testimony that will not help the trier of fact (e.g., the opinion is not tied to the specific facts of the case)."

## Joint Employer, Independent Contractor

### ***Baked Goods Distributors Were Independent Contractors***

In the New York case of *Franze & Schrufer v. Bimbo Foods Bakeries Distribution*[1], it was held that delivery drivers for a bakery were independent contractors and not employees where they controlled their own

business operations, managed client relationships directly, worked at their own convenience, were free to engage in other employment, did not receive fringe benefits, and did not work on a fixed schedule set by the bakery. Thus, the federal district court in New York City granted the bakery's motion for summary judgment.

### ***Burger King Not Liable For Injured Customer at Franchised Location***

Claims of direct negligence, vicarious liability, and loss of consortium all failed against the franchisor, Burger King. It was held not directly or vicariously liable under New Hampshire law for the injuries a customer suffered at a franchised restaurant due to her fall after getting entangled with an unfortunately placed highchair. Further, the husband of the injured patron could not recover against the franchisor under a loss of consortium theory and the individual managing member of the franchisee where the injury occurred could not be held liable for negligence or loss of consortium for the injuries because of his personal involvement or through the franchise agreement for the restaurant[2].

The plaintiffs alleged that Burger King, based purely on its status as the owner and lessor of the restaurant, owed customers a duty to make sure that the restaurant was free of hazards. New Hampshire law does not impose such an absolute duty on landowners and landlords, particularly where, as here, the premises are controlled by another entity, the court noted. There was no evidence that Burger King was involved in the maintenance of the subject restaurant or that Burger King had any notice of Northeast Foods's placement of the highchairs. The plaintiffs' sole argument, that Burger King had a "non-delegable" duty to ensure that the highchairs were properly stored-was contrary to New Hampshire law. Thus, Burger King was entitled to summary judgment.

### ***Pennsylvania Franchisees Granted Final Approval of \$3.7M Settlement with Jani-King***

The federal district court in Philadelphia has given final approval to a settlement between Jani-King and franchisees of its janitorial business under which Jani-King will pay \$3.7 million. The class action arose out of claims that Jani-King misclassified the franchisees as independent contractors as opposed to employees and improperly deducted from their wages in violation of Pennsylvania wage law. The court approved deductions for \$1.2 million in attorney fees, \$30,000 in service awards to the named plaintiffs, and \$16,757 in costs, leaving approximately \$2.4 million in the settlement fund (*Myers v. Jani-King of Philadelphia, Inc.*, August 26, 2019, Surrick, R.). Out of a class of approximately 290 members, 109 returned claim forms and five members requested to opt-out of the settlement.

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[1]S.D.N.Y.,CCH Business Franchise Guide ¶16,451

[2]*Cram v. Burger King Corp.*, August 29, 2019, McCafferty, L.

## **7-Eleven and Pachelbel's Canonen**

### ***Franchises in Los Angeles and New York City Have Been Using Classical Music to Drive Away Homeless People***

According to [stories in the Los Angeles Times](#) and the [New York Post](#) 7-Eleven franchisees have taken to blasting classical music through franchisor-provided sound systems to drive away homeless people who congregate outside their doors (sometimes holding the door for patrons as shown in pictures). In LA, it seems they frequently use Pachelbel's Canon in C. (For

those accustomed to hearing Pachelbel's Canon in D, it is the same melody and harmony simply played in a lower key). According to the articles it can be problematic though with some stores complaining of an increase in the number of homeless people coming to hear the music.

## **Quotations from Abraham Lincoln**

"After 40 every man gets the face he deserves."

"If I were two-faced, would I be wearing this one?"

"Common looking people are the best in the world: that is the reason the Lord makes so many of them."