

The Franchise Valuations Reporter



November 2021 | Vol. 13 - Issue 11

Our Expertise



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

- Valuations
- Damages
- Expert Testimony
- Finance, Accounting & Tax

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,

Valuation *S Corporation Valuations*

For an interesting article on S Corp valuations discussing the alternative theories and studies I recommend [this report by Robert Castro](#). The author discusses four models: 1) the *Fannon Model*; 2) the *Van Vleet SEAM Model*; 3) the *Delaware MRI*; and 4) the *Treharne Model*.

Appraising Real Estate Centered Business Enterprises

In an [interesting article available here](#), the author, Bruce E. Jones, argues that, "Real Estate Centered Business Enterprises (RECEs) commonly sell as real property going concerns with elements of real estate, personal property and a business enterprise component. Business appraisers face several challenges with these assignments due to the interdependence of the business with the other assets. Another key challenge for business appraisers with these types of assignments is relying on separately completed real estate appraisals that are frequently incorrectly developed based on an inappropriate premise of value." This is an issue that comes up regularly in franchise operations.

Managing Expectations of Sellers and Buyers Using the Right Standard of Value

In "[Eight Ways of Valuing a Family Owned Business](#)" the author, Edward Mendlowitz, presents eight standards of value that a valuation analyst may need to consider and discuss with a client. Each standard has a different set of rules and the valuations can vary greatly. The author, a practitioner for more than 40 years, makes clear that valuing a business is an art – not a science – even though careful calculations are made to arrive at an appraisal of the business. The eight methods are:

go to the [Wolters Kluwer Law & Business web page here.](#)

- • Fair Market Value
- • Standards in a Divorce
- • Selling the Business
- • Buying the Business as an Investment
- • Job Value to the Buyer
- • Strategic Value
- • Partners', Members', or Shareholders' Agreements
- • Valuation in a Personal Financial Plan

Deal Stats Value Index Q4 2021

According to Business Valuation Resources, “The trend of having EBITDA multiples rebound and rise in the third quarter, most notable from 2016 to 2018, has seemingly ended, as the third-quarter multiple remained unchanged in 2021, at 4.0x. In the third quarter of 2021, the continued spread of the coronavirus, in addition to rising inflationary pressures as well as supply chain bottlenecks, have created an environment of economic uncertainty, thus making it challenging to forecast whether this is “business as usual” or when the pandemic will end and alleviate the ongoing concerns of small businesses. Ironically, in the period highlighted from the fourth quarter of 2015 through 2019 (the period prior to the coronavirus pandemic), EBITDA multiples experienced more volatility. During this time, the EBITDA multiple saw larger swings—ranging from 3.5x to 5.6x—during what appears to be a more “stable” period. In contrast, during the pandemic, the multiple changed little, ranging from 3.3x to 4.3x.”

Estate Tax Filings

On October 21, 2021, the IRS released the statistics for 2020 estate filings, which are available at [www.irs.gov/statistics/...](http://www.irs.gov/statistics/) There were only 3,441 estate tax returns filed of which only 1,275 showed a tax liability (taxable estate greater than \$5.5 million). The number of individuals who passed away in 2020 with taxable estates were thus substantially less than one tenth of a percent of the 3 million people who died in 2019 (slightly less than 3 million) or 2020 (slightly more than 3 million). Clearly the estate tax is now of very narrow application.

IRS Sending Agents to NACVA's Business Valuation Training

The IRS is sending 79 agents to business valuation training provided by the National Association of Certified Valuators and Analysts (NACVA), according to former IRS manager Michael Gregory. He noted that the past few

years have been tough for the IRS. The government shutdown, budget cutbacks, and the pandemic have created a staff shortage, so the agency now has much fewer agents doing valuation work—about half of what it had back during the 2008 economic downturn. The IRS must meet quantity goals in terms of audits, but, with less staff, the quality of the audits will suffer. Auditors will target low-hanging fruit—the No. 1 target is the discount for lack of marketability (DLOM), especially if DLOMs are being increased without adequate explanation. Also on the agency’s radar are reasonable compensation and tax affecting pass-through entities.

Damages

Arbitration Award Upheld

The federal district court in White Plains, New York, confirmed an arbitration award finding Golden Krust Franchising, Inc. (“GKF”), the franchisor of Golden Krust Caribbean Bakery & Grill restaurants, liable to two Florida-based franchisees for breaches of their franchise agreements and violations of the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”). Because the Court did not buy into GKF’s arguments that the award was (1) internally inconsistent and (2) made in “manifest disregard of the law,” it affirmed the approximately \$1.6 million arbitration award and declined to vacate or remand it for clarification, and instead granted the franchisees’ cross-motion to confirm the award (*Golden Krust Franchising, Inc. v. Auctus Restaurant Group, Inc.*, October 26, 2021, Karas, K.). We provided the damages opinion in the arbitration.

As clear proof that the Court did its own research the court disposed of GKF’s argument that the arbitration award should be vacated on grounds of manifest disregard of the law because of the franchisor’s contention that the award of lost last profits to the franchisees was a manifest disregard of the law, since “lost past profits are not recoverable under [FDUTPA],” ignored the fact that courts in the Eleventh Circuit are split on that issue. Citing *Goldman v. Architectural Iron Co.*, 306 F.3d 1214, (2nd Cir. 2002), the court explained that manifest disregard could be established “only where a governing legal principle is well defined, explicit, and clearly applicable to the case, and where the arbitrator ignored it after it was brought to the arbitrator’s attention in a way that assures that the arbitrator knew its controlling nature.” Where an arbitrator picks one side to “resolv[e] the conflicting precedent . . . , the arbitral decision cannot be said to have exhibited a manifest disregard of the law[.]” the court added.

Joint Employer/Independent Contractor

Pizza Hut Not Liable for Assault by Franchisee's Delivery Driver

Negligence claims brought by the customer of a pizza restaurant franchisee against the franchisor, Pizza Hut, and its corporate parent YUM! Brands (together Pizza Hut) in connection with an alleged sexual assault by one of the franchisee’s delivery drivers failed, a

Texas state appellate court has determined. The plaintiff, Jane Doe, failed to provide more than a scintilla of evidence to support her vicarious liability theory that Pizza Hut had the right to control the franchisee with respect to the details of its pizza delivery operations. Alternatively, Pizza Hut was not liable for the franchisee's actions under a theory of ostensible agency. Finally, Doe failed to raise a genuine issue of material fact showing that Pizza Hut was grossly negligent. As to Doe's claims against the franchisee, MUY, they were also without merit. Thus, a decision by a Texas state trial court granting summary judgment to all of the defendants was affirmed (*Doe v. Yum! Brands, Inc.*, November 4, 2021, Molloy, V.).

To determine whether a franchisor is liable vicariously for a franchisee's conduct, "we consider whether the franchisor has the right to control the franchisee with respect to the details of that conduct," the appellate court noted. (See *Domino's Pizza, L.L.C. v. Reddy*). The right of control test remains the "the keystone" for imposing liability on a franchisor based on the actions of a franchisee or the franchisee's employees and the right to control must extend to the specific activity from which the injury arose.

Here, the fact that Pizza Hut retained the right to terminate the franchise agreement or require MUY to comply with Pizza Hut's procedures was not evidence of control, according to the appellate court. Similarly, Pizza Hut's right to modify its own standards or impose new ones was not the type of supervisory control sufficient to impose a duty on Pizza Hut. That Pizza Hut sets general minimum operational standards for its franchisees did not establish Pizza Hut has the right to control MUY in the details of its operations.

Tax Proposals

Damodaran on Proposed Billionaire Tax

"A boon for appraisers and accountants," but it is one of the worst tax proposals ever, said the very well-respected Aswath Damodaran (New York University Stern School of Business), in an [appearance on CNBC](#). He was referring to the Democratic proposal to tax the unrealized capital gains of people with either \$1 billion or more in assets or three consecutive years of income of at least \$100 million.

Quotations

Thoughts of William Goldman

"Cynics are simply thwarted romantics."

"When I was your age, television was called books."

"Follow the money" [which he inserted into his screenplay of *All the President's Men*]

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