

The Franchise Valuations Reporter



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

Tax Changes

IRS Changes Guidelines for Inherited IRAs, Causing Confusion and Pushback

As [reported by the Wall Street Journal](#), “Figuring out the most efficient way to navigate the tax impact of inheriting individual retirement accounts has become more complicated since the Internal Revenue Service issued proposed new rules in February. The rules on inherited IRAs were most recently changed in the 2019 Secure Act, which introduced a new 10-year payout rule for inherited accounts. The previous rule said those who inherited an IRA, Roth IRA or 401(k) could spread out withdrawals over their lifetime.”

Millions of Tax Returns Have Not Been Processed As the I.R.S. Tries To Clear Its Backlog.

There is a lot of discussion over the amount of increased funding the IRS will get under the newly passed legislation. But, as [reported by the New York Times](#), “Millions of 2021 taxpayer returns filed with the Internal Revenue Service have yet to be completed, and the agency is facing a larger-than-normal backlog at this point in the tax season, the Treasury Department announced. More than twice as many tax returns await processing “compared to historical norms at this point in the calendar year,” according to a letter sent to lawmakers by top Treasury and I.R.S. officials.

Damages

A Target's Financial Condition Changed Dramatically After The LOI and buyer Attempted To Renegotiate the Acquisition Terms.

Michael JT. Molder, JD, CPA, has published [an interesting article on “buyer’s remorse” damages](#) (think Elon Musk trying to back out of his Twitter proposal). In *Partner Reinsurance Co. v. RPM Mortg., Inc.*,^[2] PartnerRe acquired Entitle, an Ohio-based title insurance company, in 2012. In 2015, PartnerRe decided that Entitle was doing poorly and they decided to sell it. PartnerRe was looking for \$30 million for Entitle. They explored a deal with RPM, a California-based, family-owned mortgage bank, which believed it could provide Entitle with the volume it needed to be profitable. RPM executed a nonbinding letter of intent (LOI) to buy 100% of Entitle but during RPM’s due diligence, Entitle’s financial performance worsened. Negotiations continued with multiple revisions leading to a second LOI that ultimately formed the basis of the deal and which provided that RPM would acquire 67% of Entitle for \$13 million, adjusted to the extent Entitle’s actual losses through closing exceeded projected losses. PartnerRe would retain the 33% minority interest.

Despite the bad news, RPM proceeded with a definitive Merger Agreement which provided that RPM would acquire Entitle for \$13,125,000 adjusted to the extent that Entitle’s losses from August 1, 2016, through closing exceeded \$208,000 (despite the fact that Entitle had already advised RPM that its anticipated loss would be approximately \$1,500,000 for that period). RPM tried to back out of the deal; they went to court and damages were awarded against RPM. The case is a strong reminder that the negotiated terms of a deal will likely be enforced and provide the basis for valuing any damages arising out of the failure to complete the transaction.

[\[2\] 2022 U.S. Dist. LEXIS 94244](#)

Valuations and Discounts

EBITDA Multiples Increase for 1Q2022

According to Business Valuation Resources, EBITDA multiples were at 4.5x for the first quarter of 2022, which is up from the 3.9x rate in the fourth quarter of 2021, according to the latest issue of the *DealStats Value Index (DVI)*. The DVI calculates valuation multiples and profit margins from closely held companies each quarter.

Attorneys' Fees

Netflix Properly Awarded Attorney Fees For Patent Owner's Impermissible Forum Shopping

The patent owner had initially filed its case in Delaware, voluntarily dismissed the case on the heels of an unfavorable magistrate report and recommendation, then refiled in a California forum after earlier claiming California was inconvenient. The federal district court was not amused and awarded attorney fees under the court’s inherent powers to Netflix, Inc. The Court found there was bad faith “forum shopping” litigation tactics employed by the patent owner in patent litigation that travelled from Delaware to California before the patent owner sought to

dismiss the case voluntarily (for the second time), the United States Court of Appeals for the Federal Circuit upheld the award.^[1]

[1] *Realtime Adaptive Streaming LLC v. Netflix, Inc.*, July 27, 2022, Chen, R.

Expert Testimony

Delaware Court Cites Studies of Appraiser Bias

Valuation experts who testify should not assume that the courts view them as independent parties who are advocates for their opinion rather than for the client. Judges have said they perceive testifying experts to be hired guns, but a recent case actually cites some studies that they believe back up their feelings. In the *Cellular* case (see last month's newsletter), the court wrote: "As this court's experience with appraisal cases demonstrates plainly, valuation professionals reach outcomes that are influenced by the interests of the party that retains them, even when ostensibly acting as disinterested experts. Scholars have reached the same conclusions." The first sentence contained a footnote to the *Dole Food* case (*In re Appraisal of Dole Food Co., Inc.*, 114 A.3d 541, 557 & n.10 (Del. Ch.2014)) that cited cases "recognizing the omnipresent 'widely divergent, litigation-driven expert valuations' this court sees in appraisal proceedings." The second sentence footnoted two studies, "[An Analysis of Private Versus Public Firm Valuations and the Contribution of Financial Experts](#)," and "[On the Added Value of Firm Valuation by Financial Experts](#)," that the court says present evidence of bias in expert valuations.

Later in the *Cellular* opinion, another, more recent, study was cited: "[Are Business Valuators Biased? A Psychological Perspective on the Causes of Valuation Disputes](#)." That study, the court writes, "found 'clear evidence for the existence of ... engagement bias' in purportedly neutral valuation professionals who were assigned randomly to perform valuation tasks on behalf of a buyer or a seller." Unless these studies are refuted, they will keep showing up in future opinions. In the meantime, testifying experts will have to deal with the hired-gun perception a judge may have.

Obituary

Bill Russell, a great man and a great basketball player, passed away on July 31. I am so old that I remember (from my childhood) when he played. I offer some memories:

1. Winningest player in NBA history – had 11 championship rings (all with the Celtics) as a player and player coach.
2. When a man came up to him in a men's room standing at a urinal while he was urinating with his member in his hand and asked him for an autograph, he swore he would never give an autograph again. And he did not do so for decades – not even when his own teammates asked him to sign a championship team ball with all their other signatures.
3. Russell always had to throw up before a game because he felt it made him play better. In one famous episode the guard Bob Cousy (inventor of the behind-the-back pass) had to tell the

team to delay the start of the game because Celtics preparation was not complete: "Russ has to puke first."

4. Racists in Boston once broke into his house (in a fine neighborhood) and defecated in his bed. This was way before Amber Heard.
