

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](#).

Damages

North Carolina Juice Cup Distributor Ordered to Pay Over \$21 Million for Unfair Trade Practice Violation

In *Foodbuy, LLC v. Gregory Packaging, Inc.*, (August 3, 2022, Whitney, F.) juice cup manufacturer Gregory Packaging Inc. ("GPI") was entitled to over \$21 million in damages and judgment on its claim that intermediary distributor Foodbuy LLC violated North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA") by systematically charging more than the companies' supplier agreement allowed. Foodbuy's continued overbilling despite representations to the contrary, coupled with Foodbuy's reliance on GPI to identify the overbilling and Foodbuy's subsequent refusal to provide sufficient data for GPI to do so, extended beyond a mere breach of contract and constituted an unfair and deceptive trade practice, in the court's view. The facts of the case collectively demonstrated "substantially aggravating and egregious circumstances" to sufficiently prove a UDTPA violation and that the conduct proximately caused the damages suffered by GPI. Therefore, judgment was entered in favor of GPI on the UDTPA claim and the approximately \$7 million in compensatory damages found by the court were trebled.

Valuations

2022 Pepperdine Report on Private Cost of Capital Released

The "[2022 Private Capital Markets Report](#)" reports that bank loans have the lowest average expected returns (a median return of 4.0% to 6.0% depending on loan size) while capital obtained from angels has the highest expected returns (ranging from a median of 33% for later-stage financing to 43% for seed money). The full report contains details on each type of funding and at various levels.

Car Dealer Blue-Sky Values Remain at Record Levels, Per Haig Report

According to Business Valuation Resources, "Blue sky" values for car dealers are 6% higher than at the end of 2021, and they are at the same level as they were at the end of the first quarter of 2022, according to the Q2 2022 Haig Report. Blue-sky value represents the intangible value of a car dealership. A blue-sky multiple is applied to normalized earnings, and then the tangible net assets are added in to get the fair market value of the entire enterprise. Despite bad news in the economy and weak consumer sentiment, auto dealer profits remained high but growth in profits may be leveling off. M&A activity boomed in the first half of 2022, with 3% more dealerships sold compared to the pace of the first half of 2021.

SME Transaction Values Drop to 2.9x for 2Q2022

[EBITDA multiples were at 2.9x for the second quarter of 2022](#), which was down from the 4.5x rate in the first quarter of 2022, according to the latest issue of the [DealStats Value Index \(DVI\)](#).

Attorneys' Fees

\$26 Million Attorney Fee Award From Optical Disk Drive Settlements Approved

The federal district court in San Francisco awarded attorney fees of \$26,646,000, which included a 20% premium, to plaintiffs' class action attorneys. This multi-district litigation included multiple class action cases that alleged antitrust violations of price-fixing within the Optical Disk Drive (ODD) industry. The plaintiffs included indirect purchasers of ODD products, which are the subject of this fee award. After a decade of litigation, the case was settled. The Ninth Circuit previously held that it would not be an abuse of discretion to award \$26,646,000, which represented a 20% upward departure from the attorneys' fee bid of approximately \$22 million. ([In Re: Optical Disk Drive Products Antitrust Litigation](#), August 8, 2022, Seeborg, R.).

Expert Testimony

Daubert Motions Mostly Denied in Ongoing Medical Device Antitrust Litigation

In *Rebotix Repair LLC v. Intuitive Surgical, Inc.*, (August 10, 2022, Covington, V.) the federal district court in Tampa, Florida issued two separate orders addressing Daubert motions challenging the admissibility of expert testimony in an antitrust dispute. Intuitive's motion to exclude the opinions of Rebotix expert Dr. Russell Lamb, primarily on reliability grounds, was denied. In a separate order, the court granted in part and denied in part, both parties' Daubert motions to exclude the opinions of two other experts Heather Rosecrans and J. Lawrence Stevens. Rosecrans' opinions were allowed in part and denied in part to the extent that Rosecrans was not allowed to give legal opinions as to Rebotix's compliance with regulatory requirements. The court ruled that Stevens' specialized knowledge and experience made him qualified to discuss the FDA's 510(k) procedures and any shortcomings in his experience could be addressed on cross-examination. However, Like Rosecrans, Stevens was not allowed to give an ultimate legal opinion as to Rebotix's compliance with regulatory requirements.

Expert's Testimony Excluded Regarding Licensing Tattoos To Video Games

In *Hayden v. 2k Games, Inc.*, 2022 U.S. Dist. LEXIS 139184, a copyright infringement case in federal court in Ohio, a tattoo artist sued a video game company for depicting NBA players adorned with his copyrighted tattoos. The defendants argued that their use of the tattoos fell under the "fair use" rules, but the court noted that one of the factors to be considered was the "effect of the use upon the potential market for or value of the copyrighted work." There were no incidences in the record of tattoo artists licensing their designs for video games. The plaintiff brought in an expert from a large global consulting firm who was to testify on various matters, including whether the defendants benefited financially from reproduction of the tattoo designs. The expert was also to testify as to the likelihood of new markets forming, but, in a Daubert challenge, the court ruled that he was outside his area of expertise when he opined about the inevitable potential market for the licensing of tattoos for video games. The court excluded any testimony by the expert in regard to that but allowed his testimony on other matters.

Joint Employer/Independent Contractor

Labor Board Proposes to Increase Legal Exposure for Franchised Chains

[According to the New York Times](#) Federal labor regulators proposed a rule that would make more companies legally liable for labor law violations committed by their contractors or franchisees. Under the proposal, which governs when a company is considered a so-called joint employer, the National Labor Relations Board could hold a company like McDonald's liable if one of its franchisees fired workers who tried to unionize, even if the parent company exercised only indirect control over the workers. Indirect control can include requiring the franchisee to use software that locks in certain scheduling practices and setting limits on what the workers can be paid. Under the current approach, adopted in 2020, when the board had a majority of Republican appointees, the parent company could be held liable for such labor law violations only if it exerted direct control over the franchisee's employees — such as directly determining their schedules and pay. The joint-employer rule also determines whether the parent company must bargain with employees of a contractor or franchisee if those employees unionize.

Uber Agrees to Pay N.J. \$100 Million in Dispute Over Drivers' Employment Status

Also, [according to the New York Times](#), Uber has agreed to pay New Jersey \$100 million in back taxes after the state said the ride-hailing company had misclassified its drivers as independent contractors. An audit by the state's Department of Labor and Workforce Development had found that Uber and a subsidiary, Raiser, owed four years of back taxes because they had wrongly classified drivers in the state as contractors rather than employees. On September 12, the department announced that Uber had paid the taxes with interest.

Taxes

IRS Advises Tax Professionals on Signs of Identity Theft

In *IR-2022-144* the IRS has urged tax professionals to be vigilant and look out for the signs of data theft perpetrated by identity thieves and take critical action to protect data. The Information Release alerted tax professionals to watch out for, *inter alia*, the following critical signs:

- e-filed returns that were rejected because the Social Security number was already used on another return;
- more e-filing acknowledgements received than returns filed by the tax professionals;
- taxpayers responded to emails not sent by their tax professional; and
- slow or unexpected computer or network responsiveness, computer cursor moves or numbers changes without touching the mouse or keyboard and getting locked out of a network or computer.

Tax preparers can be pro-active with taxpayers and suggest they obtain an IP PIN or complete the Form 14039, Identity Theft Affidavit.

Quotations

From the Puritans School of Good Manners Before the American Revolution – “Let Thy Recreations Be Lawful, Brief and Seldom”

In light of their recent spectacular victories, we say again “Slava Ukraini! Heroyam slava.” which means “Glory to Ukraine – Glory to the heroes.”