

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

Come See Our New Website

We invite you to visit our recently updated website at www.franchisevaluations.com. We thought it was time for a fresh-but-not-flashy look and hope you find it functional and easy to navigate.

We have a new page featuring a glossary of selected valuation and damages terms as well as a glossary of financial and estate planning terms. You will also be able to see back issues of **The Franchise Valuations Reporter** going back to 2009.

Have a Question About Succession Planning for Franchise Owners?

Valuations

Capital Asset Pricing Method (CAPM) – Valuations Do Not Offer the Certainty They Purport to Provide

Twenty years ago, it would have been considered heresy to doubt the usefulness of the capital asset pricing model (CAPM) in assessing the cost of capital. Ivo Welch (UCLA Anderson Graduate School of Management) argues that, today, the CAPM should not just be doubted—it should be discarded. He said, “Unfortunately—and I write this with a heavy heart—the CAPM is not just imperfect; it is so badly wrong that it is best ignored”.^[1]

Discounted Cash Flow Method – Terminal Value

When valuing a business using the DCF method, terminal values deserve substantial attention for the reason that that is where (most of) the value is found. Some approaches to terminal value tend to result in higher values, whereas other approaches tend to result in lower values. [An article “Are Terminal Values Typically Too High, Too Low, Or Just Right?”](#) provides insight into the implied assumptions and relative biases of the “Exit Multiple” and “Gordon Growth” approaches.

Beway on Fair Value

According to the valuator, Chris Mercer, who is not a lawyer, the leading appellate level decision on the definition of ‘fair value’ in New York is the *Beway* case (*Friedman v Beway Realty Corp.*, 206 A.D.2d 253, 614 N.Y.S.2d 133 (1st Dept. 1995) which cites the Delaware Supreme Court case of *Cavalier* (*Cavalier Oil Corp. v. Harnett* – 564 A.2d 1137 (Del. 1989), *Beway* discusses several “principles” of law relating to statutory ‘fair value’ determinations, such as:

1. The fair value of a dissenter’s shares is to be determined on their worth in a going concern,

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2. Fair value requires that the dissenting stockholder be paid or his or her *proportionate* interest in the going concern; and
3. Determinations of the fair value of a dissenter's shares are governed by the statutory provisions of the Business Corporation Law that require equal treatment of all shares of the same class of stock.

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](#).

[1] Ivo Welch, "The Cost of Capital: If Not the CAPM, Then What?"

Damages

Franchisor's Damage Award Lost on Appeal

In *Peterbrooke Franchising of America, LLC v. Miami Chocolates, LLC*, (October 11, 2022, *per curiam*), a dispute between a franchisor of chocolate shops and a franchisee, the Eleventh Circuit concluded that a district court in Florida improperly granted summary judgment in favor of the franchisor on breach of contract and unfair competition claims. The appellate court held that a trial is needed because genuine issues of material fact exist whether the franchisee's breach of the franchise agreement concerning its obligation to install a required point of sale (POS) system was material.

Liquidated Damages Awarded Against Coffee Shop Franchisee

In *Sweetwaters Group, LLC v. Rawah Coffeeshop, LLC*, (October 14, 2022, Roberts, V.) a federal district court granted a franchisor's motion for default judgment against a coffee shop franchisee, finding the franchisee discontinued operating the franchise without the franchisor's consent, constituting "abandonment" under the parties' agreements.. The court ordered that the franchisee comply with the post-termination obligations of the franchise agreements, pay liquidated damages under the franchise agreements, and pay attorney fees as required under the franchise agreements. Liquidated damages in the amount of \$67,967.28, were held to be reasonable and not a penalty under Iowa law.

Defamation

Defamation Counterclaim Against Watchmaker Moves Forward

Amazon sellers alleged adequate facts to state a counterclaim for defamation against famous watch manufacturers Michael Kors, which accused them of selling fakes according to the federal district court in New York City.[1] The watchmakers brought a motion to dismiss the defendants' claim alleging that the defamation counterclaim failed as a matter of law for five reasons: (i) it was barred under the *Noerr-Pennington* doctrine; (ii) Plaintiffs' infringement allegations are protected as pre-suit communications under New York's litigation privilege; (iii) Defendant's defamation claim is not cognizable because opinions cannot sustain a defamation claim; (iv) infringement notices are protected by the common interest privilege; and (v) Defendant failed to allege that Plaintiffs filed the infringement notices with "grossly irresponsible intent" as required under New York's *Chapadeau* standard. The Court refuted all Kors' arguments and found that the defamation counterclaim did not fail as a matter of law and the motion to dismiss was denied.

[1] *Fossil Group, Inc. v. Angel Seller LLC*, October 14, 2022, Gonzalez, H.

Tax Changes

IRS Changes Guidelines for Inherited IRAs, Causing Confusion and Pushback

As we reported in our August newsletter the IRS has tried to change the rules on taxation of inherited IRAs. In response to considerable pushback, the Service said recently that it would delay enforcement of new rules for taking required withdrawals from some inherited retirement accounts until 2023. The relief applies to taxpayers who inherited retirement accounts in 2020 or 2021 who the IRS said had to take annual withdrawals right away instead of waiting until the end of a 10-year period to deplete their accounts.

Attorneys' Fees

Ohio Federal Court Grants Franchisor Attorneys' Fees for Successfully Dismissing Fraud Claims Even Though Other Claims Remain Pending

In *CajunLand Pizza, LLC v. Marco's Franchising, LLC*, [1] A federal district court awarded a franchisor attorneys' fees incurred in dismissing its former franchisees' fraud-based claims, even though breach of contract claims remained to be litigated. The parties' franchise agreements provided that the franchisees would pay the franchisor's costs and expenses, including reasonable attorneys' fees, incurred in successfully defending any claim that Marco's defrauded the franchisees into signing the franchise agreement. Because the franchisees' dismissed claims were based on a fraudulent inducement theory, the court found that the provision entitled Marco's to its attorneys' fees for successfully moving to dismiss those claims.

[1] 2022 WL 3960574 (N.D. Ohio Aug. 31, 2022)

Expert Testimony

Expert Can't Testify Regarding Legal and State of Mind Opinions

In [*In re Columbia Pipeline Group*](#), 2022 Del. Ch. LEXIS 180, a case in Delaware Chancery Court concerning breach of fiduciary duty surrounding an acquisition, an expert has had the court partially exclude his testimony. In one aspect of the report he provided his opinions on facts omitted from the proxy statement. The court noted that this amounted to a legal opinion of materiality, which is an issue for the court, so he was precluded from testifying in that regard. Some other aspects of his report fell into a gray area, but it did not provide a meaningful basis for evaluation and was largely personal thinking and judgment, the court noted. That too was excluded.

Wrongful Exclusion of Expert's Testimony

In *Martell v Dorchester Apt. Corp.* 2022 NY Slip Op 05164, a New York appellate court held that although Plaintiff's expert in a stairway slip-and-fall case could not testify the stairway violated any statute or regulation, the expert could have testified the slippery condition violated a custom in the Industry as represented by the American Society for Testing Materials Standards. Thus, the court ruled that the expert should not have been precluded from testifying.

Expert's Testimony Not Excluded

In litigation between bathroom remodeling business franchisor ReBath and its franchisee, HDS,[1] in which they disputed the circumstances surrounding the termination of their franchise agreement, the district court largely declined to exclude the opinions of an expert witness, including most of a rebuttal opinion, because it found the moving party was, on the whole, trying to exclude expert testimony to shape the fact-finding process. The court repeatedly reminded the litigants that the proper mode of evaluating an expert's opinion is to put the expert to the test of "vigorous" cross examination. The court held that optimistic assumptions about lost profits were permissible as long as the expert disclosed the underlying data used and applied discernible methods to it in the context of a complex analysis.

[1] *ReBath LLC v. HD Solutions LLC*, (USDC Arizona), CCH Business Franchise Guide ¶17,133.

Joint Employer/Independent Contractor

Massachusetts Independent Contractor Law Inapplicable to 7-Eleven Franchisees

In *Patel v. 7-Eleven, Inc.*, (September 28, 2022, Gorton, N.) a federal district court in Boston ruled that 7-Eleven franchise owners do not perform services for 7-Eleven, Inc., and thus, do not meet the threshold inquiry for the Massachusetts Independent Contractor Law (ICL) to apply. A group of 7-Eleven franchisees brought a class action alleging that the franchisor misclassified its franchisees as independent contractors instead of employees in violation of the Independent Contractor Statute. The First Circuit certified to the Massachusetts Supreme Court the question: "Whether the three-prong test for independent contractor status set forth in [the independent contractor statute] applies to the relationship between a franchisor and its franchisee, where the franchisor must also comply with the FTC Franchise Rule."

The Massachusetts Supreme Court held that the state's independent contractor statute applied to the franchisor-franchisee relationship and was not in conflict with the franchisor's disclosure

obligations set forth in the FTC Franchise Rule. Based on that guidance, on remand from the First Circuit the federal district court ruled that 7-Eleven does not pay the franchisees for the performance of any alleged obligations but, rather, the opposite is true because 7-Eleven actually provides the franchisees with services in exchange for franchise fees. Thus, the franchisor was entitled to summary judgment on the labor law misclassification claims, and class certification was denied.

Pennsylvania Federal Court Holds Franchisor Is Not Joint Employer

In *Bosley v. Rawden Joint Ventures Corp.*, 2022 WL 3701171 (E.D. Pa. Aug. 26, 2022) a federal court in Pennsylvania granted summary judgment to McDonald's on a joint employer claim brought by a former franchisee employee. McDonald's moved for summary judgment following discovery, arguing that there was no genuine factual dispute as to the joint employer theory. It argued that the evidence in the record showed that McDonald's lacked the authority to hire or fire the employee, did not supervise him on a day-to-day basis, did not set the conditions of his employment, and did not control his employee records. The court sided with McDonald's, holding that the record lacked sufficient evidence to show that McDonald's exercised significant control over the franchisee's employees. The employee's beliefs that McDonald's was his joint employer were irrelevant to the joint employer question.

Quotations

"It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat." — Theodore Roosevelt
