

Our Expertise

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

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



Valuations

Court Affirms "Calculation" Report in Divorce Case

In *Mikalacki v. Rubezic*, 2022 Ariz. App. Unpub. LEXIS 836; 2022 WL 10219850 a calculation of value, rather than a full "valuation," [1] was ruled acceptable and admissible in a divorce case. The husband and wife were owners of a law firm and the wife's valuation expert used information she provided as well as an analysis of comparable businesses to provide a "calculation". The husband refused to provide any financial information to the expert in a timely manner. During the trial, the husband's attorney did not challenge the methodologies and conclusion of the valuation expert. What's more, the husband did not offer an opposing valuation.

The trial court accepted the wife's expert's valuation, and the husband appealed, arguing that the expert's opinion was deficient because it was a calculation of value report rather than "an opinion of value report." The appellate court noted that the fact-finder need not discount an expert's opinion just because he did not consider every process and procedure that would be included had he conducted a more complete valuation. Plus, the husband's counsel had ample opportunity to challenge the valuation and offer a competing opinion, but he did not.

[1] How is a valuation engagement different from a calculation engagement?

A Valuation Engagement

- Provides an opinion or conclusion by the appraiser.
- Involves the "full" valuation process (i.e., incorporates all methods that will produce credible results).

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.

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](#).

- Results in a detailed or summary report (AICPA), or an appraisal or limited appraisal report (ASA). Both types of reports still require the full valuation process to be completed and documented in a work file.
- Most appropriate for reports for IRS compliance, financial reporting, litigation that will require testimony in court, and certain types of corporate planning.

A Calculation Engagement

- Provides calculated values only. It can be helpful to express value as a range so as not to imply a level of assurance that does not exist.
- Involves a limited scope of work and does not include all the procedures required for an opinion/conclusion of value. Many times the appraiser and client agree on the valuation approaches and methods that will be applied.
- Allowed for by SSVS (AICPA), NACVA/IBA, and ASA.
- Most appropriate for internal company planning, preliminary M&A or transaction analysis, preliminary use for mediation or negotiations in litigation, and buy-sell agreements that specify the use of a formula.

Valuations, cont'd

Discounts for Lack of Marketability (DLOM)

In [this article by Gil Matthews](#), he argues that pre-ipo studies are simply unreliable in calculating the DLOM. Matthews's position is that the two most widely used approaches used by valuers to determine a discount for lack of marketability (DLOM) are restricted stock studies and IPO studies. The restricted stock studies compare transaction prices in restricted shares with contemporaneous trading prices for unrestricted shares. The pre-IPO studies, on the other hand, according to the author, lead to conclusions that are unsound in theory and in practice. In his article, the author discusses six major flaws in the data that, in the author's opinion, make the pre-IPO studies' conclusions totally unreliable for determining discounts for lack of marketability.

Trial Court's Valuation of Law Firm Overturned on Appeal

The shoemaker's children have holes in their shoes. In *Furrer v. Siegel & Rouhana, LLC*, 2022 Md. App. LEXIS 745; 2022 WL 9834101 there was no operating agreement and no buy-sell agreement. That triggered dragged-out fighting when a 26.5% member of a law firm retired from a Maryland LLC. Two years after withdrawing in 2017, the member sued the firm for his share. The appellate court overturned the trial court's finding which had rejected the value the

firm's valuation expert put forth and did its own figuring. The member withdrew on Jan. 9, 2017, and, absent an operating agreement, the court looked to the state's "bare bones" LLC statute, interpreting it as meaning that the member was entitled to his share of the firm's profits through the end of 2017 which was \$319,594, so 26.5% of that was \$84,692. But on appeal the appellate court ruled that the trial court misinterpreted the LLC statute and should not have considered the firm's profits after the date of the member's withdrawal. The case was sent back to the trial court to determine the member's "fair value of assets, profits, losses, and distributions to which he was entitled on January 9, 2017."

Damages

Lost Profits Claims Explained

For an [extensive and comprehensive review of the issues](#) see "Lost Business Profit Damages Claims" (Part 1), "A Review of the Basics for Lost Profits" (Part II), and "A Review of the Basics for Lost Profits" (Part 3) by Allyn Needham, a partner at Shipp Needham Economic Analysis, LLC.

Failure to Mitigate Damages Prevents Default Judgment on Unpaid Future Royalties After Franchisee Breach

In *FloorCoverings International Ltd. v. Needham*, (November 14, 2022, Vazquez, J.) a federal district court granted in part and denied in part a franchisor's motion for default judgment in a flooring installation business franchise abandonment case. The franchisor was entitled to damages for unpaid royalty contributions and resolved warranty claims but was not entitled to recover lost future royalties it sought in the amount of approximately \$170,000 because of a general duty on plaintiffs to mitigate their damages which the franchisor did not meet.

Lanham Act

Damages Determined on Pizza Inn's Contract, Trademark Claims Against Terminated Franchisee

In *Pizza Inn, Inc. v. Odetallah*, (December 6, 2022, Wyrick, P.) a federal district Court determined the damages due in connection with restaurant franchisee Odetallah's breach of his franchise agreement and infringement of franchisor Pizza Inn's trademarks. Here, based on credible information provided by the franchisor's chief financial officer, the court calculated damages of \$27,736 on the breach-of-contract claim. Based in part on profit figures provided by the franchisee in discovery, the court calculated the amount of the disgorgement of profits amount under the Lanham Act of \$51,224. Although the franchisee raised conclusory objections to this amount, he failed to meet his Lanham Act obligation for proving deductions from this amount so the court granted the franchisor summary judgement for a combined total of \$78,960 in damages.

Tax Nexus

Market-Based Sourcing and Economic Nexus: Changing the Way Service Providers Are Taxed

As reviewed in an excellent blurb by [Alan Goldenberg, JD, MBA, LL.M](#) of the Anchin firm the list of states employing income tax economic nexus continues to grow steadily. To meet the “minimal connection” requirement of the Constitution, in order to impose their taxes upon an out-of-state taxpayer economic nexus laws establish this minimum link via a revenue threshold which, if exceeded, is deemed enough of a connection with a jurisdiction to create a tax obligation for the out-of-state taxpayer.

Currently, all 45 states which levy sales taxes have mandated similar nexus rules for purposes of establishing sales tax nexus. Additionally, about a dozen of those states also utilize a receipts threshold test for corporate income taxes (e.g., New York), and/or other tax compliance, such as partnership filings and excise taxes (e.g., California and Washington). This issue is particularly important for service providers due to the shift in state sourcing rules from the cost of performance methodology to the increasingly popular market-based sourcing approach.

Expert Testimony

District Court Properly Excluded Expert Report Based on Inconsistent Construction of Claim Term

In *Treehouse Avatar LLC v. Valve Corp.*, (November 30, 2022, Reyna) a federal district court did not err in granting summary judgment of non-infringement to a maker of video games accused of infringing a networking patent, the U.S. Court of Appeals for the Federal Circuit has held. The patentee's sole evidence of infringement was an expert report which the trial court had properly excluded due to it's being based on a construction of the "claim" language inconsistent with the construction agreed to by the parties and adopted by the court.

Joint Employers/Independent Contractor

Franchisor Dismissed From Suit Alleging Negligent Hiring

In *Root v. Wilmington*, (November 17, 2022, Scott, J.) a federal district court in Delaware dismissed maid services business franchisor MaidPro Franchise, LLC (MaidPro) from a suit alleging respondeat superior/vicarious liability, negligent hiring, civil conspiracy, and intentional/negligent infliction of emotional distress stemming from the criminal activities of a former employee of a franchisee who had committed a home burglary. The court dismissed the claims against the franchisor alleging respondeat superior/vicarious liability, concluding that as the former employee had been fired four months prior to criminal acts, the acts did not occur within the scope of her employment. Further, the court found that a parent company is not responsible for the acts of its subsidiary when it was not shown to have control over the subsidiaries' actions. Additionally, the court dismissed the claims for negligent hiring, indicating that the homeowners failed to allege facts that the parent company MaidPro, had knowledge of any tortious behavior of the former employee of the franchisee. And claims for civil conspiracy,

intentional infliction of emotional distress and negligent infliction of emotional distress, were found to be not adequately pleaded.

Quotations

"The strongest proof of a good heart, is to love dogs and dislike mankind." - General Charles Lee (Washington's cohort) after whom Fort Lee, NJ is named

"When it is to combat evil, 'tis lawful to employ the devil." - President John Adams

FranchiseValuations.com

Franchise Valuations Ltd | 529 Mountain Road, Bloomingburg, NY 12721

[Unsubscribe susan.ogulnick@gmail.com](mailto:susan.ogulnick@gmail.com)

[Update Profile](#) | [Constant Contact Data Notice](#)

Sent by bruce.schaeffer@franchisevaluations.com powered by



ReplyForward