

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?

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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](#).

Valuations

Criticism of Guideline Public Company Method

In a [recent article](#) Tomasz Manowiec,^[1] cautions readers to tread carefully using this market-approach valuation method. He writes, "In valuation theory, the market-based approach, being one of the three main valuation approaches, can rely on the guideline private comparable transactions method, suggesting that the results obtained in that way should be treated equally with other valuation approaches and methods. However, the disadvantages of the guideline private comparable transactions method are so consequential that its reliability should be strongly questioned, and the results based on it should be taken with significant caution." His article justifies this opinion by discussing the most important weaknesses of the method.

Dispute Over Company-Specific Risk

In *Koch v. Koch*, 2022 WL 1467980, a Minnesota shareholder buyout matter, the two opposing valuation experts disagreed over the risk associated with customer concentration. One expert did not include any extra risk, while the other expert assigned a 4% risk, noting that two customers account for almost 50% of company revenue. The court was not persuaded that there was higher risk relative to competitors, noting that the expert provided no information about how concentrated the customers are for similarly situated private companies.

An Argument Against Judicial Appraisals

In an interesting article^[2] criticizing judges deciding value in appraisal/fair value disputes, the authors argue, "For many years, we and other commentators have observed the problem with allowing judges wide discretion to fashion appraisal awards to dissenting shareholders based on widely divergent, expert valuation evidence submitted by the litigating parties. The results of this discretionary approach to valuation have been to make appraisal litigation less predictable and therefore more costly and likely. While this has been beneficial to professionals who

profit from corporate valuation litigation, it has been harmful to shareholders, making deals costlier and less likely to be completed.

Personal Goodwill in Divorce

In *Lamm v. Preston*, 2023 Ida. LEXIS , 4, a complex divorce case in Idaho one of the valuation disputes, was the personal vs. enterprise goodwill question. The state's Supreme Court upheld the lower court's ruling that a material amount of value was personal goodwill (as opposed to entity goodwill) and thus excluded from the marital estate. The husband, who was an owner of the firm which had been bought, had a share of the new entity which was at issue, with which he also had an employment contract and a non-compete agreement.

[1] CFA, FCCA, a director responsible for the Corporate Finance department at Baker Tilly TPA, an audit, consulting, and advisory company.

[2] William J. Carney & Keith Sharfman, *The Exit Theory of Judicial Appraisal*, 28 *Fordham J. Corp. & Fin. L.* 1 (2023).

Damages

Appellate Court Rules Sufficient Evidence to Support Future Damages

After trial, in *WL All. LLC v. Precision Testing Grp. Inc.*, 2022 U.S. App. LEXIS 35298; 2022 WL 17830257 (Dec. 21, 2022), a partnership dispute between the plaintiff, WL Alliance, and the defendants, Precision Testing Group Inc. and Glenn Stuckey, the defendants were found liable for \$3.3 million in damages. The defendants appealed, arguing that the damages included lost future profits that were not "reasonably certain" and the damages were not supported by evidence because there was no accounting. However, the court concluded that the damage awards were in accordance with Florida law and were affirmed.

Expert Testimony

U.S. District Court (Texas) Allows Testimony of Damages Expert Despite Alleged 'Flawed Opinions'

In *VeroBlue Farms USA, Inc. v. Wulf*, 465 F. Supp. 3d 633 (N.D. Tex. 2020) 2023 U.S. Dist. LEXIS 9903; 2023 WL 348963 (Jan. 20, 2023), a case that the judge referred to as a "doozy", the judge addressed the issue of whether the damages expert for the plaintiffs should be excluded under *Daubert* and its progeny. The defendants (Founders), filed a motion to exclude the testimony of Brandi Kleinman, CPA, plaintiff VeroBlue Farms USA Inc.'s (VBF) designated damages expert. Kleinman opined that VeroBlue Farms' was the victim of fraud that caused damages to VeroBlue Farms. She added up the equity and debt invested in VeroBlue Farms of nearly \$93 million and opined that VeroBlue Farms has been damaged in that amount. Kleinman did not provide any analysis and concluded that every dollar that came into VeroBlue Farms was lost due to the defendants' misconduct.

But the court concluded that it should not exclude an expert witness's opinion just because it was allegedly not correct, it contradicted other expert testimony, or it did not conclusively prove the proponent's theory of its case holding instead that "VBF has met its burden as to each of Kleinman's damages opinions." There was also an allegation that the opinion constituted "double counting" but the court noted that the issue related to consistency and not reliability, which went to the weight assigned her opinions and not to admissibility. Additionally, the court stated that "these are again challenges based on questions relating to the bases and sources of Kleinman's opinion and her ultimate conclusion on the amount of damages under this model, but they do not render it so unsupported as to create too great an analytical gap between the evidence on which Kleinman relies and her opinion."

Furthermore, and importantly for my practice, the Court held that Kleinman did not need to be an aquaculture expert to testify as to these damages. She was a damages expert and not an aquaculture expert and the court found that she was qualified to testify "by virtue of her knowledge, skill, experience, training, or education as to these damages opinions."

Joint Employer/Independent Contractor

No Franchisor Title VII Liability Under Theory of Joint Employment in Workplace Harassment and Retaliation Case

In *Doe v. Golden Krust Caribbean Bakery & Grill Inc.*, March 27, 2023, Gonzalez, H. the federal district court in Brooklyn, New York, dismissed claims brought against franchisor Golden Krust Caribbean Bakery & Grill and Golden Krust Caribbean Bakery, Inc. for workplace harassment and retaliation. The court held that: (1) the joint employer doctrine did not apply because plaintiff did not allege that the franchisor controlled the "daily employment activities" of the plaintiff; (2) it was declining to exercise supplemental jurisdiction over the New York state claims; and (3) the franchisor did not make the necessary showing to support an award of attorney fees.

Possible Ban on Non-Competes

Finnegan Attorneys Look at Possible Impacts on IP

According to Wolters Kluwer, businesses (including franchise businesses) could have to rethink their strategies if the FTC's proposal to ban most noncompete agreements is put into force. An article^[1] in a recent issue of *IP Litigator* examines the impacts on intellectual property litigation that could be seen as a result of the Federal Trade Commission's proposed ban on most noncompete agreements. "The proposed ban," the authors say, "if established, could necessitate a shift to heavier reliance on other methods of protection like active litigation over breaches of non-disclosure agreements and misappropriation of trade secrets." They recommend that forward-looking businesses examine their existing policies and agreements with the aid of counsel to determine which agreements they could expect to rely on if noncompete agreements are banned.

[1] Brandon Andersen, John Williamson and Daniel Cooley (Finnegan, Henderson, Farabow, Garrett & Dunner, LLP) "How the FTC's Proposed Ban of Non-compete Agreements Could Impact IP Litigation," *IP Litigator*, Vol. 29, No. 2, March/April 2023.

Quotations on Ageing

“Old age is always fifteen years older than I am.” – Oliver Wendell Holmes

“You are only young once, but you can stay immature indefinitely.” – Ogden Nash

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