

# 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,

## Valuations

### *Informal Divorce Valuation Is Not Adequate*

This is another in a spate of recent cases where one side either did not engage a valuation expert or did not use the expert to the best advantage. In *Pemberton v. Pemberton*, 2023 Minn. App. Unpub. LEXIS 485; 2023 WL 4066631, a Minnesota divorce case, the husband, who owned interests in two real estate businesses, engaged an expert but not to perform formal business valuations. Rather the expert's comments were of a general nature and not specific to the subject businesses.

The wife's expert did do formal valuations, and the court based its opinion solely on that expert's valuations. The husband appealed, but the appellate court affirmed the lower court's opinion.

### *Known or Knowable at the Valuation Date*

"Known or knowable" refers to facts or assumptions that are revealed to the Valuator as of the specific date chosen for the valuation report (the "Effective Date"). Because the valuation process is typically completed after the Effective Date, there may be subsequent events or circumstances that could impact value which take place after the valuation date. For a concise review of this issue (whether or not to take such events into consideration in the valuation report) see [Ashley DeCress, CPA, ABV, CVA "Why Does "Known or Knowable" Matter in Valuation?"](#)

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

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## Discount for Tax Affecting

### *Results of Poll of Valuators on Tax Affecting*

According to Business Valuation Resources, during a recent webinar on gift and estate tax valuations, the audience was asked a question regarding “tax affecting” income for pass-through entities. About half (48%) of the respondents said they “always tax affect,” and 6% said they “never tax affect.” But 42% said “it depends,”. The host, Jim Hitchner (Financial Valuation Advisors) said “I for one, almost, if not always, make an adjustment to income based on the cash flow used to pay distributions for shareholder taxes. I do not understand why ‘it depends’ has such a high percentage.”

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## Damages

### *Measure of Damages in Fraud Action: Out-of-Pocket or Benefit of the Bargain*

There are two generally accepted measures of fraud damages: Out-of-Pocket and Benefit of the Bargain. Major commentators and the Restatement describe the Out-of-Pocket rule as the minority position with most states adopting the benefit of the bargain measure (but not New York or California). In *Stout v. Turney*, 22 Cal. 3d 718, 725 (1978) the California Supreme Court compared the two measures as follows:

[t]he assessment of fraud [damages in California] in property transactions has been the so-called out-of-pocket rule. This rule is . . . directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received. The “benefit of the bargain” measure, on the other hand, is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive.

An example: In *Burke v. Harman* 6 Neb. App. 309 (1998) Plaintiff purchased a blanket at an antique mall for \$115. It was represented by its owner as “a 1930s Southwest wool handwoven throw”. Plaintiff sold it to defendant for \$1,000 but it turned out to be “a Navajo chief’s blanket, first phase, Ute style” and Defendant sold it to a New York collector for \$290,000. Plaintiff sued for benefit of the bargain damages of \$289,000 but was awarded only out of pocket damages of \$115.

### *Damages Waiver Precludes Lost Profits Claim*

In *Endless River Techs. LLC v. Trans Union LLC*, 2023 U.S. Dist. LEXIS 725; 2023 WL 24101, a contract for consulting services for an online platform was terminated and the terminating party was supposed to return the source code to the other party but did not,

breaching the contract. The plaintiff (a startup) sued for lost profits based on what it would have earned had it been able to monetize the platform. A jury awarded the plaintiff \$18.3 million in lost profits damages. But the defendant then filed a motion for a judgment as a matter of law, and the court overturned the award because the contract waived liability for “consequential” (indirect) lost profit damages, as opposed to “direct” damages, which would be recoverable.

As a general rule, the difference between direct and consequential damages in breach of contract claims lies in the degree to which the damages are foreseeable and highly probable, the court noted. Also, Illinois law does not permit recovery of expected profits for a new commercial business (new business rule). But, since the damages were considered consequential and barred by the contract, there was no need for the court to address that issue.

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## Expert Testimony

### *Opposition to Expert Rejected*

In an excellent article by *Michael J. Molder, JD, CPA, CFE, CVA, MAFF* “FRE 702—[Challenging the Expert Witness: White Buffalo Environmental, Inc. v. Hungry Horse, LLC](#)”, 2023 U.S. District LEXIS 48355 (D.N.M. March 22, 2023)[1] the author offers the following with respect to the judge’s decision:

#### **Conclusion**

Judge Browning devoted a significant portion of his ruling decrying the general proliferation of unwarranted motion practice, particularly motions to strike expert witnesses, in modern litigation. He clearly thought this was a prime example and ruled, essentially, that because a party disagrees with the analysis and conclusions of an opposing expert is not sufficient to exclude the expert’s testimony. Absent evidence that the proffered expert’s methodology was contrary to the standards of the profession, the moving party’s expert opinion that the analysis should be done differently, alone, is insufficient, and the court should not strike the expert witness. More particularly to issues for valuation and financial forensics experts, it is not inappropriate to rely on the financial data provided by the litigants, and experts are not required to conduct independent verification of that data.

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## Wrongful Termination

### *Beer Distributor's Injunction Against Termination of Distributorship Reversed*

In *City Beverages, LLC v. Crown Imports, LLC*, July 20, 2023, Graber, S., the U.S. Court of Appeals in San Francisco reversed and remanded a preliminary injunction obtained by a beverage distributor against a beer supplier’s termination of a territorial distribution agreement. The supplier terminated a distributorship relationship of nearly 20 years without giving any cause as a result of which the district court enjoined the termination pending the outcome of the lawsuit. On appeal, the circuit court vacated the preliminary injunction, finding that the distributor failed to show a likelihood of success on the merits, and remanded the case for further proceedings because the contract specifically allowed the supplier to

terminate the distribution agreement without cause, and limited the remedy to damages forgoing any need for an injunction.

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## Attorneys' Fees

### *Mexican Restaurant Chain Entitled To Profits and Attorney Fees for Competitor's Infringing Use of 'La Bamba' Name*

In *La Bamba Licensing, LLC v. La Bamba Authentic Mexican Cuisine, Inc.*, July 27, 2023, Larsen, J. the U.S. Court of Appeals in Cincinnati ruled that a district court did not abuse its discretion in awarding profits and attorney fees to a Mexican cuisine restaurant chain that prevailed on its trademark infringement and unfair competition claims against a competitor that used its registered LA BAMBA marks. The district court's factual findings after considering the factors of the defendant's intent to deceive and the public interest in making the misconduct unprofitable supported such an award. Thus, the district court's award of the defendant's profits and of attorney fees was affirmed.

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## Quotations About Summer

But tomorrow may rain, so I'll follow the sun. --The Beatles

Cause I got that sunshine in my pocket, got that good song in my feet.-- Justin Timberlake

To plant a garden is to believe in tomorrow. -- Audrey Hepburn

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