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YEARBOOK

In-depth analysis for business
valuation case law.

BVR
What It's Worth

BVR Legal & Court Case Yearbook 2016



What It's Worth

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What It's Worth

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Introduction

Dear Reader,

Valuation now plays a role in most civil litigation. Appraisers testify in divorce cases, contract disputes, bankruptcy proceedings, statutory appraisal actions, patent litigation, and a host of other suits. All of this activity produces a wealth of case law, which the *BVR Legal & Court Case Yearbook 2016* perfectly captures.

Although no practitioner can be an expert in everything, there are great benefits to reviewing cases from subject areas other than one's own to see how different courts and different experts deal with common valuation problems. This publication is a compendium of legal cases and analysis that puts the year's most meaningful valuation-related cases within easy reach.

Few areas of law are as dynamic as divorce cases, at least when it comes to valuation issues. At the center of many of the disputes discussed in this publication are the evergreen issues of goodwill (personal versus enterprise) and double dipping. A case of first impression from the South Carolina Supreme Court on enterprise goodwill was one of the year's highlights. *Moore v. Moore* centered on the valuation of a light fixtures retail store that the wife had built and, later, with some help from the husband, had transformed into a successful Internet business. Illustrious experts for both sides argued over the value of personal goodwill attributable to the wife, and the parties subsequently argued over whether the remaining enterprise goodwill was a marital asset subject to division. In answering the question with a hesitant "yes," the state Supreme Court provides a thorough review of goodwill jurisprudence across the country and also discusses issues such as the discount for lack of marketability and the appropriate valuation date.

In terms of double dipping, the court to follow has been the Ohio Court of Appeals. It made news in 2008 with its *Heller* decision, prohibiting double counting. Early in 2015, however, the court issued in quick succession two decisions that announced its retreat from *Heller* and the double dip framework. The cases, *Bohme v. Bohme* and *Gallo v. Gallo*, offer complementary analyses that any practitioner in family law cases should know. But the Ohio appeals court has not been able to put the double dip issue to rest, as several subsequent cases, which are all available in the compendium, make clear.

One of the most industrious courts is the Delaware Court of Chancery. Its judges distinguish themselves with their understanding of valuation. During the summer, when one might expect activity to slow down, the court issued a number of long and deep decisions in dissenting shareholder lawsuits, which are discussed in this book. In line with the court's 2014 *HuffFund* decision, the court in several instances decided the merger price was a more reliable indicator of value than standard valuation techniques, including the generally favored discounted cash flow analysis. But leave it to the court's new chief, Chancellor Andre Bouchard, to upend the trend. In *Owen v. Cannon*, he performed his own DCF analysis, based on expert testimony, and in so doing also explored the issue of tax affecting and the continuing significance of the *Kessler* model.

Daubert cases are a dime a dozen, but occasionally one stands out. In 2015, it was *Washington v. Kellwood*, in which an aspiring entrepreneur sued a marketing and branding company for breach of a licensing agreement that he hoped would lead to success in the sports apparel market along the lines of the leading "Under Armour" brand. Facing a dearth of financial evidence on which to base damages, the plaintiff's expert performed a yardstick analysis using sales figures from Under Armour. The expert's conclusions may be "improbable," the court said, but the analysis is good enough to warrant admission under *Daubert*. However, as the compendium also shows, other courts are not so liberal in their interpretation of *Daubert*.

Patent litigation slowed in 2014 but gathered speed in 2015. In terms of damages, questions as to how to interpret the entire market value rule (EMVR) and how to apportion continue to dominate the conversation. The cases featured in this book—many of which ended up at the Court of Appeals for the Federal Circuit—illustrate how plaintiff's experts wrestle with damages calculations involving high-tech devices that contain a multitude of components beside the patented feature. The question is no longer simply "is the patent-related feature the basis for customer demand," but "what value the protected feature is able to add to what component of the accused device."

But do concepts such as EMVR and apportionment have a role to play in big pharmaceutical patent infringement cases? That was the question at the heart of *AstraZeneca v. Apotex*, which revolved around AstraZeneca's drug "Prilosec." The Federal Circuit's opinion explains why EMVR is inapplicable in the case but does not endorse the proposition that EMVR is per se inapplicable in the pharmaceutical context. Stay tuned.

This introduction only provides a snapshot of the valuation cases that have shaped the past year. Financial experts wanting a more complete picture of the litigation landscape need only dive into the *BVR Legal & Court Case Yearbook 2016*.

Sincerely,



Sylvia Golden, Esq.
Executive Legal Editor

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