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Excerpt from:

Business Valuation Case Law  
**YEARBOOK**

In-depth analysis for business valuation case law.

**BVR**  
What It's Worth



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# Business Valuation Case Law Yearbook 2017 Edition

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**What It's Worth**

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## **What It's Worth**

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## Introduction

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Dear Reader,

Valuation and damages represent two of the most hotly contested issues in civil litigation, as the cases derived from BVLaw<sup>1</sup> and featured in this annual compendium show. They cover all areas of law: bankruptcy, damages, divorce, ESOP, patent disputes, and tax disputes. And they make it clear that financial experts are critical to the success (or failure) of a case and judges are becoming more sophisticated (and assertive) in examining valuation- and damages-related claims.

All the cases impart lessons—about applicable legal principles, approved and discredited valuation methodology, and the act (art) of presenting expert opinions. Therefore, this collection benefits both the generalist as well as the specialist.

By way of sneak preview, some of the most talked-about cases arose in the statutory fair value context, with several pivoting on the applicability of the discount for marketability (DLOM).

At the cusp of 2015, New Jersey issued its third appellate decision in the *Wisniewski v. Walsh* case. This long and acrimonious dispute among the family members of a trucking business featured luminaries of the valuation world squaring off over the best method for determining the value of the dissenting (selling) shareholder's interest. What makes the case even spicier is the court's early decision to employ the DLOM as a way of punishing the oppressor, that is, the dissenting shareholder. The later rounds of litigation focused on the issue of whether the prevailing discounted cash flow analysis included the requisite DLOM. The court's appellate division agreed with the trial court that it did not and affirmed the lower court's DLOM rate. The decision has triggered a spirited discussion as to whether the court "got it right" in terms of the facts of the case and the use of a valuation tool such as DLOM to impose a legal sanction.

A decision in the spring of 2016 from the Delaware Court of Chancery has proven just as controversial. In *In re Appraisal of Dell*, the Chancery concluded the merger consideration did not represent fair value even though the company's board took great pains to stage a sound sales process. As if it were anticipating the reaction from financial experts and other commentators, the court went

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<sup>1</sup> This book features the court cases that were analyzed and presented in the BVLaw database in 2016. BVLaw, published by Business Valuation Resources, is an exclusive collection of 3,700-plus court cases and accompanying analysis concerning business valuation issues including economic damages, lost profits, estate and gift tax, divorce, shareholder repression, partnership dissolution, securities litigation, and more. Every day, BVLaw legal experts track published decisions from the courts in all 50 U.S. states and federal jurisdictions—including the Delaware Court of Chancery and U.S. Tax Courts—guaranteeing that you stay current on all the very latest valuation law.

through great length (115 pages) to explain its reasoning. Its opinion resembles a treatise on appraisal jurisprudence and is a must-read for any expert practicing in front of the Chancery. *Dell* is one of the several key Chancery decisions appearing in this yearbook.

In the bankruptcy area, two decisions in particular were noteworthy for their differing take on the issue of equity committee. Given the tough legal standard, equity holders rarely succeed in persuading the court that a formal committee is necessary to represent their interests in reorganization discussion. However, they succeeded in *In re Horsehead Holding Corp.* After hearing testimony from equity holders, as well as lawyers for the debtors and creditors, the court decided something did not smell right about the valuations the debtor had presented and said it was willing to “go[], frankly, out on a limb” in terms of the legal requirements that shareholders show a substantial likelihood of recovery to equity. A transcript of the court hearing offers valuable insight into the arguments the equity holders (all sophisticated investors) and lawyers made to bolster their positions. The *Horsehead* decision also stands in marked contrast to the “no-equity-committee” approach the court in *In re Sunedison* took. The latter case is also included in this book.

In 2016, several divorce cases dealt with the issue of how to treat any appreciation in value for separate or gifted assets. One that stands out is *In re Marriage of Kerkhoff*, an Iowa case, in which the chief judge of the Court of Appeal wrote a dissenting opinion saying this was “a troublesome issue throughout the country.” Different states, the judge noted, handle appreciation differently, and the results have been “chaotic and inconsistent.” The dissenting opinion offers a recommendation for simplifying the appreciation analysis in order to achieve a fairer outcome.

Readers of this book also will see there was no shortage of economic damages disputes, some of them raising *Daubert* issues. A perfect example is *Washington v. Kellwood Co.*, a lost profits case involving an upstart sportswear apparel company that sought millions of dollars in damages based on the defendant marketing company’s breaches of promises. The plaintiff expert based his calculation on a problematic yardstick analysis. Although his analysis survived a *Daubert* challenge, the court (a different judge) post-trial struck down the jury’s multimillion-dollar award, which was rooted in the very expert opinion the court earlier had admitted. The court’s thoughtful post-trial decisions explain in great detail why an expert’s opinion might be admissible but represent insufficient evidence of lost profits.

This book has more in store, including an analysis of the years’ most impactful ESOP and intellectual property cases, and enables readers to up their game by developing a deeper understanding of the current litigation landscape.

Sincerely,



Sylvia Golden, Esq.  
Executive Legal Editor



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