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Excerpt from:

Business Valuation Case Law

Yearbook

Business Valuation Case Law Yearbook 2019 Edition



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Introduction

Dear Reader,

Valuation and damages issues are as much a part of civil litigation as legal issues. Think of corporate disputes in which the ultimate goal is to determine how much a departing member should receive for his or her interest in the business or shareholder disputes in which the dissenters to a transaction ask the court for a fair value determination. In divorce proceedings, more often than not, the flashpoint is the value of a business. Valuation experts come in to educate the court, so it can achieve an equitable distribution of marital property. Parties litigating over the misappropriation of intellectual property cases turn to damages experts to assess reasonable royalties or profits lost because of infringement. The most effective appraisers and damages experts know not only how to perform sound valuations or damages calculations, but they also have a good understanding of the operative law.

BVLaw tracks cases in many legal fields: shareholder disputes, bankruptcy, contract litigation, intellectual property, ESOP, tax disputes, and divorce proceedings. This yearly compendium is a repository of knowledge of the most noteworthy court decisions and allows experts of all stripes to keep up with the holdings, legal principles, valuation methods, and expert performances that have shaped their areas of expertise in a given year.

Here is a sneak preview of what's in the new *Yearbook*.

Throughout 2018, *BVLaw* paid close attention to decisions involving the Delaware Court of Chancery because a lot of corporate disputes are resolved in this court and its rulings exert authority beyond Delaware. In 2017, the Delaware Supreme Court signaled a change in preference concerning the best valuation method to determine fair value. In 2018, the Delaware Court of Chancery, in a number of key decisions (*Aruba Networks*, *In re Appraisal of AOL*, *In re Solera Holdings*, and *Blueblade Capital*), interpreted the directives the high court put forth in its 2017 *DFC Global* and *Dell II* opinions. The 2018 rulings show that the Court of Chancery judges don't necessarily agree on how to read the Supreme Court's pronouncements.

The ESOP area has seen a lot of litigation in recent years, and one important 2017 case, *Brundle v. Wilmington Trust*, is currently on appeal with the 4th Circuit U.S. Court of Appeals. Meanwhile, in a 2018 case, *Acosta v. Vinoskey*, a federal district court issued an important *Daubert* ruling in which it excluded part of the Department of Labor's proposed damages opinion. The exclusion

meant the collapse of one of the government's claims. The court's opinion includes a discussion of the defense argument that the DOL expert lacked the necessary qualifications under Rule 702 of the Federal Rules of Evidence. Although this particular argument had no traction with the *Vinoskey* court, it is a point other litigants and ESOP observers also have made. As this case has gone to trial, the court may issue a decision on the government's overpayment claim in 2019, barring a settlement between the parties.

Daubert challenges have arisen in many different contexts, and all the rulings in this compendium are worth studying for their lessons of what not to do as an expert. For example, in *Weinman v. Crowley (In re Blair)*, a bankruptcy case, the court excoriated the trustee's solvency expert for submitting an opinion that had none of the hallmarks of reliability considering the expert, by his own account, lacked the necessary facts and data to put into operation the selected valuation methodology. Aspects of the expert calculation were "the worst sort of made up 'expert' analysis" that only served to discredit the expert, the court said. In a divorce case, a Florida trial court voiced similar disapprobation regarding the appreciation-of-value analysis the nonowner spouse's expert submitted. The expert failed to adhere to the mandated valuation date, use an acceptable valuation methodology, and follow the professional standards of the AICPA, the court found in *Hebert v. Cote*. Regrettably, the compendium includes too many other cases in which experts seriously underperformed.

In past years, divorce proceedings often revolved around goodwill issues. However, this past year, the focus of a lot of cases was on issues related to the appreciation of value of separate property. Courts dealt with questions of how to classify a contested business, how to allocate the burden of proving that the appreciation of value is or is not marital property between the spouses, and, importantly, how to conduct an appreciation analysis that manages to particularize the value that is a marital asset. A Virginia Court of Appeals decision, *Herbert v. Joubert*, provides a comprehensive discussion of all of these issues.

In the intellectual property area, the Federal Circuit in several opinions dealt with bread-and-butter issues related to damages calculations. In *Finjan, Inc. v. Blue Coat Sys (Finjan II)*, an infringement case involving patents related to computer security, the court again made clear that using the smallest salable unit of an infringing multicomponent product does not necessarily satisfy the apportionment requirement, particularly where that unit itself has multiple components and functions. The Federal Circuit also overturned a jury verdict that relied on damages testimony by the patent holder's expert that employed the entire market value rule (EMVR). Using EMVR was improper, the Federal Circuit found, as it explained the showing the patent holder must make where the accused product has other valuable features besides the patented feature.

Finally, all year long, *BVLaw* kept an eye on a series of cases that fall into their own category. At the core are disagreements among members of business entities over how to determine the buyout value of a departing member's interest. The impetus for the dispute may be the members' failure to exercise a shareholder agreement that stipulates the valuation terms. Alternatively, a controlling agreement exists, but it includes genuinely ambiguous valuation terms. In yet another scenario, a controlling agreement exists, it provides the terms of valuation, a third-party

appraiser performs a valuation, but one of the parties to the agreement declines to accept the valuation. Readers of this *Yearbook* will discover that courts have taken a variety of positions on how to resolve these cases.

Besides the noted cases, the *Business Valuation Case Law Yearbook* includes many more case discussions for financial experts to dive into.

Sincerely,

A handwritten signature in cursive script that reads "Sylvia Golden".

Sylvia Golden, Esq.
Executive Legal Editor

Court Case Summary Table

Presented in order of case type, then by jurisdiction.

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