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Excerpt from:

Business Valuation Case Law

YEARBOOK

Business Valuation Case Law Yearbook 2020 Edition



**111 SW Columbia Street, Suite 750, Portland, OR 97201
(503) 479-8200 • www.bvresources.com**



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Print/PDF ISBN: 978-1-62150-188-6
EPUB ISBN: 978-1-62150-189-3
ISSN: 2689-971X (Print)
ISSN: 2689-9728 (Online)

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Introduction

Dear Reader,

Valuation and damages issues are key components of civil litigation. Savvy financial experts know that, to succeed in court, they must stay informed about case law developments. Moreover, valuers who show a familiarity with legal issues and court rulings have instant credibility with potential attorney clients.

BVLaw tracks cases in many areas of law, including shareholder and business partner disputes, ESOP, federal tax disputes, bankruptcy, contract litigation, intellectual property disputes, and divorce proceedings. *BVLaw's* yearly compendium is a repository of key court decisions that came out in a given year and is an easy-to-use and time-saving resource for experts of all backgrounds as well as attorneys.

Here is a quick look at some of the case discussions that appear in the new compendium.

Two gift tax cases commanded the attention of valuers in 2019, and they both focused on tax affecting—although, it bears pointing out, tax affecting is not the only issue that makes both court decisions noteworthy. In late March 2019, a federal district court in Wisconsin issued its opinion in *Kress v. United States*. In valuing gifted minority shares in an S corporation, experts for both parties tax affected, and the court readily accepted the practice. The government's expert also proposed an S corp premium, but the court found this was not warranted under the facts of the case. Valuers who long have argued in favor of tax affecting when valuing pass-through entities see the court's stance toward tax affecting as a vindication.

Their victory was even sweeter when, following *Kress*, the U.S. Tax Court, in *Estate of Aaron Jones v. Commissioner*, a gift tax case that involved the decedent's two related PTEs, adopted all of the taxpayer expert's valuation decisions and conclusions, including tax affecting. It's important to note that the Tax Court, in validating tax affecting, did not overturn *Gross* but distinguished that precedent and subsequent cases based on *Gross* on the facts. The *Business Valuation Case Law Yearbook*, 2020 edition, contains digests of both cases.

ESOP appraisers, however, found little to celebrate in 2019. First, in *Brundle v. Wilmington Trust*, the 4th Circuit Court of Appeals ended an acrimonious dispute by affirming the district court's liability and damages rulings against the trustee. The reviewing court found the trustee

violated its duty to act “solely in the interest of the [plan] participants” and the trustee did not “thoroughly probe[] the gaps and internal inconsistencies in [the appraiser’s] report.”

Next, in a highly awaited trial court decision, a federal district court, also in the 4th Circuit, used the *Brundle* framework to find the trustee liable for breach of fiduciary duties and the owner liable for participating in a transaction that he knew or should have known overvalued the stock he sold to the ESOP. The court’s long, and controversial, opinion pivoted on a few key facts, which, the court believed, indicated the valuation underlying the contested transaction was manipulated to achieve a predetermined outcome. A digest detailing the court’s findings is included in the *Business Valuation Case Law Yearbook*, 2020 edition.

ESOP litigations have taken yet another turn, with trustees beset by lawsuits suing co-fiduciaries and nonfiduciaries, including ESOP appraisers, for indemnification and/or contribution. In a bit of good news for ESOP appraisers, in *Remy v. Lubbock Nat’l Bank*, a district court (again from the 4th Circuit) found ERISA does not provide for a right to contribution against a nonfiduciary ESOP appraiser. Accordingly, the court dismissed the trustee’s third-party complaint against the ESOP appraiser. *BVLaw* will continue to monitor this area of law for other developments.

The Delaware Court of Chancery saw much activity in 2019. The court issued three long statutory appraisal rulings in which it tried to “apply the teachings” of the Delaware Supreme Court’s 2017 decisions in *DFC Global*, *Dell*, and *Aruba Networks*. In each of the Supreme Court rulings, the high court overturned the Court of Chancery’s fair value determinations and urged, but did not categorically order, the use of the transaction price as the indicator of fair value. The high court’s rationale was that, when dealing with a publicly traded company and an efficient market, it is sound to assume that the price that many investors pay for company stock is a more reliable indication of the worth of the company than a post-transaction discounted cash flow analysis (DCF) done by a party expert in the context of litigation.

Since the use of the transaction price requires a sound sale process, the Court of Chancery in recent cases focused most of its attention on the circumstances of the transaction. The questions were whether the sale process was compromised and whether the deal qualified as an arm’s-length transaction. Vice Chancellor Laster, in two key decisions, *In re Appraisal of Columbia Pipeline Grp., Inc.* and *In re Stillwater Mining Co.*, performed an extensive review of the facts related to the parties’ negotiations and the key players against the backdrop of the Supreme Court’s controlling decisions. The vice chancellor, in both cases, found the sale process, although not without problems, was sound enough to justify reliance on the transaction price.

In contrast, in a third case, *In re Appraisal of Jarden Corp.*, the court (Vice Chancellor Slight’s adjudicating) found the sale process was too compromised and it adopted the unaffected market price. A takeaway from these decisions is that, when dealing with a publicly traded company, the Delaware Court of Chancery is inclined to use the transaction price as fair value and is unlikely to look to the party experts’ DCF. Digests of the Court of Chancery decisions are included in *Business Valuation Case Law Yearbook*, 2020 edition, and provide an in-depth discussion of the applicable legal principles and the court’s reasoning in each of these cases.

Goodwill is an evergreen topic in valuation, and this issue featured prominently in a number of marriage cases as well as in a business divorce case. Two Florida divorce cases, *In re Marriage of Cooksey* and *Muszynski v. Muszynski*, are notable in that the experts for the prevailing parties took a different view of how to treat certain identifiable intangibles, but both experts used the “with/without” method to quantify the owner’s separate personal goodwill. Digests of both cases can be found in the new compendium.

The *Business Valuation Case Law Yearbook*, 2020 edition, also includes a digest analyzing a business dissolution case that arose in Washington state and centered on the goodwill of the litigants’ professional limited liability company. In *McLelland v. Paxton*, the state Court of Appeals used the opportunity to answer a number of questions as to the existence of entity goodwill in general and entity goodwill under the facts of the case. In doing so, the court provided a review of relevant case law, including divorce cases, from Washington state as well as other jurisdictions. Valuers and attorneys, no matter in which jurisdiction they usually practice, will benefit from the court’s analysis.

Finally, throughout the year, *BVLaw* kept an eye on *Daubert* cases, intellectual property disputes that have raised damages issues, as well as discovery disputes in various legal fields that have turned on valuation and damages evidence.

Financial experts and attorneys looking for an efficient tool to gain an understanding of the 2019 legal landscape as it relates to business valuation and economic damages will find it in the *Business Valuation Case Law Yearbook*, 2020 edition.

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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