

BUSINESS VALUATION UPDATE

TIMELY NEWS, ANALYSIS, AND RESOURCES FOR DEFENSIBLE VALUATIONS

2017's Top Business Valuation and Damages Cases

Valuation and damages issues are integral to civil suits, and, with litigation booming, 2017 offered its share of cases that appraisers and damages experts must or should know. Here is BVLaw's selection of the most educational cases of 2017. Digests and full court opinions for each of these cases are available at www.bvresources.com/bvlaw.

In re PetSmart, Inc., 2017 Del. Ch. LEXIS 89 (May 26, 2017)

In a statutory appraisal decision, the Delaware Court of Chancery decided to "defer" to the deal price because the sales process "came close to perfection to produce a reliable indicator of PetSmart's fair value." In contrast, the court found the projections undergirding the petitioner experts' discounted cash flow analysis had all the "telltale indicators of unreliability."

Lund v. Lund, 27-CV-14-20058 (I. Bernhardson) (District Court, Fourth Judicial District, Hennepin County, Minnesota) (June 2, 2017)

This court-ordered buyout focusing on an upscale Minneapolis supermarket chain temporarily concluded a long-lasting shareholder dispute involving two of the founder's grandchildren. Prominent valuation experts squared off, but the court decided neither testimony was entirely persuasive. The court performed its own DCF analysis, finding, among other things, that the facts did not support the use of a marketability discount.

Brundle v. Wilmington Trust N.A., 2017 U.S. Dist. LEXIS 35811 (March 13, 2017); Brundle v. Wilmington Trust N.A., 2017 U.S. Dist. LEXIS 97752 (June 23, 2017)

This controversial ESOP litigation ended with the trial court's decision that the trustee had failed to engage with the valuation process and caused the ESOP to overpay by \$28 million. The trustee immediately challenged the ruling in a post-trial

motion, but, even though the court conceded it had made some valuation-related errors, it declined to change the outcome of the case. Stay tuned for the appeals court decision.

Perez v. First Bankers Trust Servs., 2017 U.S. Dist. LEXIS 52117 (March 31, 2017)

Not even three weeks after the *Brundle* decision came out, a different trial court adjudicating an ESOP case involving a New Jersey construction company reached the same conclusion: The trustee was liable for overpayment. Reliance on experts "is not a shield," the instant court said, finding the trustee failed to "make an honest, objective effort" to review the valuation report and question any assumptions and methods that did not make sense. Recent reports say the DOL and the trustee have settled the dispute and that First Bankers Trust Services will pay \$8 million to the ESOP.

DFC Global Corp. v. Muirfield Value Partners, L.P., 2017 Del. LEXIS 324 (Aug. 1, 2017)

In overturning a 2016 statutory appraisal decision by the Delaware Court of Chancery, the Delaware Supreme Court questioned the integrity of the Chancery's DCF analysis, particularly in light of the Chancery's post-trial (un-litigated) changes to the projections underlying the analysis. The Supreme Court made its preferred approach clear. "Market prices," it said, "are typically viewed superior to other valuation techniques because, unlike, e.g., a single person's discounted cash

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flow model, the market price should distill the collective judgment of the many.”

***Mentor Graphics Corp. v. EVE-USA Inc.*, 2017 U.S. App. LEXIS 16854 (Sept. 1, 2017) (*Mentor II*); *Mentor Graphics Corp. v. EVE-USA, Inc.*, 851 F.3d 1275 (March 16, 2017)**

In two related decisions, the Federal Circuit found that satisfaction of the *Panduit* test may suffice to meet the apportionment requirement applicable to lost profits and reasonable royalty determinations. A majority of judges agreed that, under the facts of the case, the plaintiff’s ability to meet the *Panduit* factors supported a sizable jury award. Further apportioning between patented and unpatented features was not necessary. A sharp-worded dissent asserted the majority’s ruling meant “true apportionment will never be required for lost profits.” This issue likely will come up again in future cases.

***Slutsky v. Slutsky*, 2017 N.J. LEXIS 120 (Aug. 8, 2017)**

This protracted divorce case raised “the complex question of value surrounding a goodwill component attached to an interest in a law firm.” The husband was an equity partner in a law firm, and the wife claimed she was not only entitled to a portion of the husband’s partnership interest, but also to a portion of the goodwill value attributable to the firm, which she argued existed. The trial court sided with the wife, but its conclusory valuation and equitable distribution findings piqued the appellate panel, which remanded for review by a different trial court judge. A “nuanced methodology is required,” the appellate panel warned.

***Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)*, 2017 Bank. LEXIS 1097 (April 21, 2017)**

This fraudulent transfer case hinged on the management projections supporting a merger that led to the formation of a company that went bankrupt a year later. The litigation trustee argued the seller had manufactured unrealistic projections to extract a higher sales price and

that the merged entity was insolvent under the applicable financial tests. In a lengthy decision, the Bankruptcy Court found the projections aligned with the relevant entities' historical performance, contemporary industry studies, and, crucially, with the financial analyses by the banks underwriting the deal.

Kottayil v. Insys Therapeutics, Inc., 2017 Ariz. App. Unpub. LEXIS 1179 (Aug. 29, 2017)

This shareholder dispute perfectly illustrates the difficulty of valuing a startup, particularly a

pharmaceutical venture that may incur a lot of debt before (if) it ever becomes profitable. Here, the company ultimately succeeded. In seeking to determine the fair value of the minority shareholder's interest in the company at a point prior to the company's success, the trial court found the parties' experts, using "traditional" methods, failed to present meaningful valuations. There was a one-billion-dollar value gap! The court instead relied on an IPO valuation. The trial court "coped admirably with the evidence that was presented," the appeals court said. ♦

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