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VALUATION COURT CASE UPDATE FOR 2017-2018

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EXECUTIVE SUMMARY – VALUATION IN THE COURTS 2017-2018

The appraiser/valuation analyst plays a critical role in litigation. Valuations from an independent, professional appraiser should be obtained early in the litigation planning process.

THE FEDERAL COURTS

The taxpayer generally has the burden of adequately disclosing credible evidence in order to establish the taxpayer's valuation position. Without a well-documented, complete, and thorough appraisal report, the taxpayer has no basis to dispute what may be an unrealistic IRS valuation claim upon audit.

The burden of proof shifts to the IRS, however, if the taxpayer satisfies the following conditions:

1. The taxpayer must comply with the substantiation and recordkeeping requirements of the Internal Revenue Code and regulations;

2. The taxpayer must cooperate with reasonable requests by the IRS for witnesses, information, documents, meetings and interviews; and

3. Taxpayers other than individuals must have a net worth of less than $7 million. (I.R.C. §7491)

The existence of a credible valuation report from a qualified appraiser can often prevent a valuation challenge. The Service must make a cost-benefit analysis to determine whether it has a strong case against the taxpayer. A good report makes it more likely that the Service will have to expend more resources to assert its case, and will have a more difficult time trying to show that the taxpayer's position is somehow wrong. With a good report, the chances are higher that the Service will not challenge the valuation.

And if the Service does challenge the valuation report, the burden falls on the IRS to prove its case by retaining its own expert. The courts are now tending to go with the "preponderance of evidence" so that neither party has a clear-cut burden of proof.

FEDERAL COURT VALUATION ISSUES FROM THE IRS PERSPECTIVE

Family "Holding Companies" – Investment Management Entities

The cases discussed represent the IRS current thinking on this issue.
Discussion of standard IRS responses to this issue.

S-Corps and Other Pass-Through Entities

The cases discussed represent the IRS current thinking on this issue.
Discussion of standard IRS responses to this issue.

Buy-Sell Agreements

The cases discussed represent the IRS current thinking on this issue.
Discussion of standard IRS responses to this issue.

Valuation of Intra-Family Notes with AFR Interest Rates

Standard IRS responses to this issue.

Valuation of Split-dollar Intergenerational Life Insurance Contract Advances

The IRS challenges the taxpayers' position on this issue.

The Impact of Subsequent Events

Standard IRS responses to this issue.

Strict Compliance for Disclosure and Reporting Rules

The IRS (and the Courts) will use lack of compliance with reporting and disclosure rules to attack the validity of valuations

THE STATE COURTS

The typical types of valuation cases seen at the state court level are:

- Fair value for dissenters' rights proceedings
- Shareholder oppression matters
- Damages disputes
- Equitable division of business interests in divorce

FEDERAL COURT CASES - IRS

ESTATE OF WILLIAM CECIL V. COMMISSIONER, CAUSE NOS. 14639-14 AND 14640-14 (TRIAL HELD FEBRUARY 2016)

- Estate planning participants are awaiting the outcome of this trial on the issue of "tax affecting" the earnings of an S corporation for estate tax valuation purposes.
- Both the IRS' and the taxpayer's experts used a variation of the SEAM-style analysis that recognized the impact of tax affecting
- The previous significant S corporation valuation case was Estate of Louise Paxton Gallagher, TCM 2011-148

ESTATE OF POWELL V. COMMISSIONER, 148 T.C. NO. (MAY 18, 2017)

- Most significant case in FLPs since Bongard (2005)
- Attack on FLP via Section 2036(a)(2) – the LP "in conjunction with" all other family owners could dissolve the partnership at any time (the transaction also fails under Section 2038)
- No discounts on the transfer of the LP and its assets
- Observers characterized deal as overly aggressive death bed planning using powers of attorney
- This is a different result from the previous case in which the IRS asserted Section 2036 – in Mirowski (2008) the entity was upheld, Section 2036 did not apply, and discounts were allowed

ESTATE OF CAHILL V. COMMISSIONER, T.C. MEMO 2018-84 (JUNE 18, 2018)

- Another perhaps overly aggressive case in which the actions were taken under a power of attorney for a 90-year-old senior generation family member
- Split dollar life insurance agreement between revocable and irrevocable trusts resulted in a $10 million "advance" (i.e., like a zero interest note) being valued at $183,700 for estate tax purposes, due to the long-term nature of the contract's repayment provisions and unlikelihood of an early termination
- This case was on the initial motions to apply/not apply Sections 2036, 2038, and 2703 to this transaction – and the court ruled they would apply
- The Tax Court cited the Powell case
- The advance was not a bona fide note
- Two other intergenerational split dollar life insurance cases are pending: Estate of Morrissette and Estate of Levine

CHET S. HUFFMAN ET AL V. COMMISSIONER, DOCKET NOS. 3255-16, 3256-16, 3261-16 AND 3526-16 (TRIAL HELD MAY

- Gift tax case involving a somewhat unusual buy-sell agreement
- The 1993 buy-sell allowed the son to buy out his parents for no less than $5 million, when their controlling interests in the company were then worth a total of just under $200,000
- When the parents were eventually bought out by the son in 2007, the IRS claimed a gift was made because the company was worth far more than $5 million by then
- The IRS and the taxpayer disagreed over whether the buy-sell met the test under Section 2703(b) that:
- It is a bona fide business arrangement;
- It is not a device the transfer property to family members for less than full and adequate consideration;
- It has terms that are comparable to similar arrangements entered into by persons in an arm's-length transaction
- Would the parents have gotten a rate of return equal to that demanded by arm's-length investors
- Were the acquiring company's projections relevant for determining a 2007 gift value when the company was subsequently bought in 2008

ESTELLE C. GRAINGER V. COMMISSIONER, T. C. MEMO 2018-114 (JULY 30, 2018)

- Charitable gift case which includes almost every way possible to mess up a charitable gift deduction claim
- Bad valuation method
- No independent qualified appraisal
- Forms 8283 filled out incorrectly
- No contemporaneous written acknowledgement from the charity
- Taxpayer represented herself in the proceeding

FEDERAL COURT CASES – OTHER

PEREZ V. FIRST BANKERS TRUST SERVS., 2017 U.S. DIST. LEXIS 52117 (MARCH 31, 2017)

- The Court held the institutional trustee liable for overpaying for the stock purchased by the ESOP for a New Jersey construction company
- Reliance on valuation experts without making "an honest, objective effort" to review the report
- Insufficient effort to question the assumptions and methods of the appraiser
- The trustee and the DOL settled the case for an amount rumored to be about $8 million

ACOSTA V. VINOSKEY, 2018 U.S. DIST. LEXIS 64094 (APRIL 17, 2018)

- This and the following two cases are part of an ongoing series of ESOP litigation in which the DOL has been aggressively going after ESOP trustees when subsequent problems suggest to the DOL that the trustee overpaid for stock in the ESOP
- The DOL alleged that the noninstitutional trustee: (1) allowed the ESOP to pay more than adequate consideration, (2) allowed the share value to decrease, (3) used an attorney who had a conflict of interest (having a longstanding relationship with the selling owners), (4) did not allow sufficient time to complete its work thoroughly, and (5) did not engage in any meaningful negotiations.
- In this case, the ESOP trustee's attorneys were partly successful in a Daubert motion in getting part of the DOL's expert's damages testimony excluded
- The trustee claimed the DOL's expert: (1) was unqualified and (2) his calculation methodology was unreliable
- Expert had no professional designation and was unaware of the standards of practice in the ESOP community, including ERISA fiduciary standards
- The court ultimately accepted the DOL appraiser as qualified, mostly because of his experience
- The court did not accept part of the DOL expert's damages analysis, the guideline public company method, because it only utilized one "comparable"
- However, the claim for damages from overpayment could stand
- The court threw out entirely the expert's "novel" damages calculations regarding how the ESOP share value decreased
- Without viable damages evidence for this aspect of the case, the stock value decrease claim was unsustainable and was excluded
- The overpayment claim damages evidence was allowed, but would be subject to challenge during the trial

BRUNDLE V. WILMINGTON TRUST, N.A., U. S. COURT OF APPEALS, FOURTH CIRCUIT, NO. 17-2224 (JULY 23, 2018)

- This is the on-going appeal of the original Brundle v. Wilmington Trust, N.A., U.S. District Court, Eastern District of Virginia (No. 1:15-cv-01494-LMB-IDD), March 13, 2017 and June 23, 2017
- The Court hit Wilmington Trust with a judgement of approximately $29 million for paying too much for the stock purchased in an ESOP transaction for Constellis Group, Inc., a Virginia-based private security firm
- The appeal is focused on three primary issues:
- Whether the court's judgement is correct that the appraiser (and trustee) blindly accepted management's projections and the trustee did insufficient review and gave "uncritical deference" to the appraiser's opinion
- Whether it was appropriate that the ESOP paid a control premium, even though it did not achieve effective control over the company as it could not appoint a majority of the board members
- Whether the district court correctly held that Wilmington's liability for the ESOP's losses caused by purchasing employer stock at an excessive price may not be offset by the amount the ESOP received when it subsequently sold the stock in an independent transaction
- Two Amicus Curiae briefs have been submitted – one by the American Society of Appraisers (for Wilmington) and one by the Department of Labor (for Brundle)

STATE COURT CASES – FAIR VALUE FOR DISSENTERS

IN RE PETSMART, INC., 2017 DEL. CHANCERY LEXIS 89 (MAY 26, 2017)

- The Delaware Court of Chancery concluded that the deal price was fair value
- Because the sales process was "close to perfection" in producing a reliable indicator
- In contrast, the court found that the other side's expert's discounted cash flow projections had "indicators of unreliability"

DCF GLOBAL CORP. V. MUIRFIELD VALUE PARTNERS, L.P., 2017 DEL. CHANCERY LEXIS 324 (AUGUST 1, 2017)

- The Delaware Supreme Court reversed and remanded the Chancery Court's valuation originally based on (1) a discounted cash flow analysis method, (2) a guideline public company method, (3) the deal price – all equally weighted
- The company went through a two year "robust" and "arm's-length" sale process that involved at least 35 financial bidders and three strategic bidders
- The company urged the court to adopt a bright-line rule that the deal price is the best evidence of fair value if the sale is the product of a robust, conflict-free process
- The Supreme Court refused to do this, because the law states that the courts must consider "all relevant factors"
- But it found that the trial court should have placed most or all the weight on the deal price
- The lower court was also criticized for adopting a high out-years and terminal growth rate in its discounted cash flows, because the company's payday lending industry had gone through a great deal regulatory turmoil and future growth could not be as good as historical growth rates

DELL, INC. V. MAGNETAR GLOBAL EVENT DRIVEN MASTER FUND LTD., 2017 DEL. CHANCERY LEXIS 518 (DECEMBER 17, 2017)

- The Delaware Supreme Court struck down the Chancery Court's 2016 opinion in the Dell case and remanded the case for further deliberation
- Initially, the trial court developed its own discounted cash flow method analysis to conclude the original deal was underpriced
- This was because the trial experts' opinions (also based mainly on discounted cash flow analysis) diverged by a mere $28 billion
- The trial court disregarded the deal price entirely
- The bidding process was deemed to be reasonably fair and those in charge "did many praiseworthy things"

- The fact that no strategic buyer was interested suggested that the deal price (and fair value) would be lower
- The Supreme Court found that the trial court had no justifiable reason to ignore the deal price
- It also criticized several the trial court's discounted cash flow method assumptions, including its treatment of complex tax issues

VERITION PARTNERS MASTER FUND LTD. V. ARUBA NETWORKS, INC., 2018 DEL. CHANCERY LEXIS 52 (FEBRUARY 1, 2018)

- The Court of Chancery decided that the market for Aruba's shares exhibited "attributes" associated with the efficient markets hypothesis
- "[t]he issue in an appraisal is not whether a negotiator has extracted the highest possible bid. Rather, the key inquiry is whether the dissenters got fair value and were not exploited."
- "By awarding fair value based on the unaffected market price, this decision is not interpreting Dell and DFC to hold that market price is now the standard for fair value. Rather, Aruba's unaffected market price provides the best evidence of its going concern value."
- The bidding process was deemed reasonable and the buyer, HP, was a strategic buyer
- The unaffected (by deal synergies) market price is therefore the best indicator of fair value

IN RE AOL INC., 2018 DEL. CHANCERY LEXIS 63 (FEBRUARY 23, 2018)

- The Court of Chancery decided that a discounted cash flow analysis method was a better indicator of fair value than the deal price
- The trial court adjusted its discounted cash flow analysis for several elements and principally relied on the respondent's expert's version of this analysis
- Circumstances in the process of the sale of AOL made reliance on the deal price as fair value not advisable

BLUE BLADE CAPITAL OPPORTUNITIES, LLC ET AL V. NORCRAFT, DEL. CHANCERY, C.A. NO. 11184-CVS (JULY 27, 2018)

- The merger deal price was not an indicator of fair value in this case the Court decided, despite the decisions in DFC, Dell and Aruba (discussed above)
- The court decided there were significant flaws in the sale process
- No pre-signing market check, and the company was focused on a single buyer
- The company's lead negotiator was conflicted, negotiating his own future employment and compensation terms

- The go-shop provision had so many original deal protection measures that it was "ineffective as a price discovery tool"
- Prior to the offer, the company's stock was thinly traded
- The court used various components from the competing experts' discounted cash flow analyses, depending on what it thought was the most credible
- The court considered the $25.50 per share deal price, which was only $0.66 lower than the discounted cash flow method value

ATHLON SPORTS COMMUNICATIONS, INC. V. DUGGAN, 2018 TENNESSEE SUPREME COURT LEXIS 310 (JUNE 8, 2018)

- In a follow-on to the earlier appeal of this fair value case in Tennessee, that state's Supreme Court ruled that more modern valuation methods deserved consideration
- Tennessee had traditionally used the "Delaware Block Method" (DBM) and the appellate court in this case found that DBM was the precedent
- "we see no reason to restrict trial courts to using only the DBM in determining fair value"
- The parties' experts had considered discounted cash flow methods as part of their analysis
- The Supreme Court remanded the case for further revaluation

STATE COURT CASES – OTHER

SLUTSKY V. SLUTSKY, 2017 NEW JERSEY LEXIS 120 (AUGUST 8, 2017)

- The Appeals Court reversed the trial court's findings due to (1) the court's failure to support its conclusions and (2) the inconsistencies in its findings
- The owner-spouse had an equity interest in a large law firm
- Although the law firm had goodwill, the spouse as a minority partner had no separate goodwill from that of the firm
- The Appeals Court asked for the case to be reassigned to a new judge

CARNEY V. CARNEY, 2017 PENNSYLVANIA SUPER. LEXIS 509 (JULY 11, 2017)

- The value of the husband's auto transport business was the issue
- The husband's expert used an income-based approach
- The wife's expert used a net asset-based approach
- The Appeals Court decided that, if the net asset-based approach was selected by the trial court, the court also had to include the effect of selling expenses and taxes related to the sale of the assets
- Tax and expense factors must be considered in the analysis, although such "ramifications need not be immediate and certain" regardless of "whether a sale was likely or not"
- Remanded for further analysis and a hearing

IN RE MARRIAGE OF BROESDER, 2017 MONTANA LEXIS 568 (SEPTEMBER 12, 2017)

- The Montana Supreme Court decided that the family-owned ranching company in which both husband and wife had stock should be valued with an adjustment for the tax consequences of liquidation
- Although the trial court's final judgement did not specifically require the liquidation of the ranch, it "would appear to be a necessity to satisfy the judgement," making a taxable event an "eventuality"
- Equitable division of a marital estate also includes equitable division of tax liabilities

ROHLING V. ROHLING, 2018 ALABAMA CIV. APPEALS LEXIS 94 (JUNE 1, 2018)

- Appeals Court supports trial court's decision to accept and use a calculation report rather than demand an appraisal report

- A calculation report is not inherently “unreliable”
- The trial court properly considered the limitations of a calculation engagement when considering the weight to assign the expert’s testimony

FINAL NOTES - VALUATION ISSUES FROM THE COURT'S PERSPECTIVE

SOME FINAL NOTES – VALUATION IN THE COURTS 2017-2018

- Daubert challenges are now a common tactic
- Courts do their own valuation calculations, especially the discounted cash flow method
- Motions challenges for rehearing or revisions of the court's or prevailing expert's valuation calculations

SUPREME COURT CASES

The cases below confirmed once and for all that the judges' role as gatekeeper applies to *all* expert evidence and testimony, not just "scientific" testimony. Federal Rule of Evidence 704 requires the court to exclude any expert evidence that is not both "reliable" and "relevant."

Daubert v. Merrell Pharmaceuticals, Inc.;[1]
General Electric Company et al. v. Robert K. Joiner et ux.[2]
Kumho Tire Company, Ltd., et al., v. Patrick Carmichael, etc., et al.[3]

In *Daubert*, the Court specified four tests by which to judge experts and their testimony:

- **Testing—**Can the theory or technique be tested, or has it been tested?
- **Peer reviews**—Has the theory been subjected to peer review or publication, which aids in determining flaws in the method?
- **Error rates**—Are there established standards to control the use of the technique?
- **Acceptability**—Is the technique generally accepted in the relevant technical community?[4]

A JUDGE'S VIEW ON FAIR MARKET VALUE AND VALUATION REPORTS

- Each valuation case is unique.[5] Although guidance can be obtained from earlier cases, one case is rarely on point with another, and a significant differentiation of the facts can usually be made.
- In valuation there are no absolutes. There are only general guidelines to which individual judgments must be applied.
- There is no irrefutable "right" answer.

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[1] *Daubert v. Merrell Pharmaceuticals, Inc., 509 U.S. 572 (1993).*
[2] *General Electric Company et al.* v. *Robert K. Joiner et ux.,* 66 U.S.L.W. 4036 (U.S. Dec. 15, 1997).
[3] *Kumho Tire Company, Ltd., et al., v. Patrick Carmichael, etc., et al. 1999 WL 152455 (U.S.).*
[4] Robert F. Reilly, "Supreme Court Applies *Daubert*-type Screening to All Experts' Work," *Shannon Pratt's Business Valuation Update*, July 1999, pp. 1, 3.
[5] Excerpted from a two-part report, "Judge Laro's Views on 'Fair Market Value,'" The Honorable David Laro, Tax Court Judge, *Judges & Lawyers Business Valuation Update*, May 1999, p. 1–3; and "Judge Laro's Views on Discounts & Valuation Reports," The Honorable David Laro, Tax Court Judge, *Judges & Lawyers Business Valuation Update*, June 1999, p. 1–4. The full text of Judge Laro's presentation is on *BVLibrary.com.*

- Experts will and do differ.
- There are available methods which are generally recognized and accepted by the appraisal profession and the courts.
- A marketability discount may inhere in the value of an interest in a corporation regardless of the interest holder's percentage ownership of the ownership stock.
- In a recent survey 65.2 percent of the Tax Court's decisions did not coincide with the conclusions of any of the expert witnesses.
- At trial, two principal inquiries are always before the court.
    - Is the expert qualified?
    - Is the evidence to be admitted relevant and helpful?

- Always read the opinions on valuation that were written by the judge handling the case.
- Read and understand the recent opinions of the Court written by other judges on a related topic.
- Make known clearly the qualifications of the expert.
- Make special efforts to make sure that the expert's data is highly relevant and empirical in nature.
- Make sure the expert prepares a very cogent and credible valuation report.
- If the appraisal reflects real world values and supports its conclusions with relevant empirical data about real world situations, it likely will be accepted.

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PRESENTER'S BIOGRAPHY

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Mr. Kimball has appeared as an expert witness on valuation issues in U.S. District Court, U.S. Tax Court, U.S. Court of Federal Claims, U.S. Bankruptcy Court, and other venues over 70 times. His expert witness appearances include the U. S. Tax Court cases: *Estate of Anna Mirowski* (Mirowski Family Ventures, LLC), *Estate of Georgina T. Gimbel* (Reliance Steel and Aluminum Company), *Estate of H. A. True, Jr. and Jean D. True et al v. Commissioner* (True Ranches and True Oil Company), and *Estate of Harriet Mellinger v. Commissioner* (Frederick's of Hollywood).

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