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Dear Litigator,

Business valuation is frequently a linchpin in high-stakes commercial litigation and other disputes involving corporate assets. It is with that in mind that BVR Legal has launched *BV LEGALWire™*, a free e-zine that delivers legal news relating to business appraisals and expert witnesses. Whether you have a client who has retained you to litigate a commercial damages claim, defend or contest the value of a business in a divorce, transfer assets in a trust, or take on an acquisition or partnership, you can rely on BVR Legal for important valuation news. Thousands of your peers are reading the premiere issue of *BV LEGALWire*—it's fast, it's free and it's delivered straight to your inbox twice a month. Please feel free to forward *BV LEGALWire* to colleagues and associates interested in valuation litigation topics. Enjoy your first issue!

Sincerely,
Tom Hagy
Publisher, BVR Legal

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'Lost Sales' Damages Valuation Based on Independent Data Verification Prevails

Lyman v. St. Jude Medical S.C., Inc.; 2008 WL 2224352 (U.S. Dist.) or 2008 U.S. Dist. LEXIS 42015

A case from federal court in Wisconsin, involving starkly different approaches to valuing damages in a contract dispute, stresses the importance of independent verification and objective data.

Plaintiff Lyman entered into a 10-year deal with St. Jude Medical to sell pacemakers and defibrillators (CRM products). The agreement contained a four-year guarantee period for which Lyman was to receive \$3 million. After that, compensation was commission-only. St. Jude terminated the agreement after two years. Lyman sued. **Daniel Gotter** with Winter, Kloman, Moter & Repp, the plaintiff's expert, used raw data to prepare five different models of damages projections based on sales quotas; projections calculated by the CFO for St. Jude's parent company; regression analysis of the plaintiff's company's past sales at St. Jude; projected future sales; and projected net sales of the plaintiff's company. The court allowed testimony on all five calculations, saying they would assist the jury in assessing damages.

The defendant's expert, **Randall D. Wilson** with RGL Forensic Accountants & Consultants prepared two sets of projections: one weighted and one unweighted. Both sets were derived from the plaintiff's "alleged sales" during the approximately two years it sold CRM products to St. Jude, the numbers were obtained from one document provided to the expert by St. Jude's counsel. Taking into account the plaintiff's decreased sales performance

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between 2003 and 2004, St. Jude's expert's original regression resulted in a "negative sloping trendline." Because the plaintiff's sales varied widely from month-to-month, the expert weighted the data to obtain a positive trendline for years five through 10 of the agreement.

The court focused not only on the source of the defendant's expert's data, but what he failed to do with it. Contrasted with Gotter's independent valuation of raw data, the court said "the bottom line is that [the defense expert] never talked to anyone at St. Jude to verify the accuracy of the information in any of the documents he reviewed." Finding the basis for his projections unreliable, the court excluded Wilson's projection testimony. The case settled on the eve of trial.

Plaintiff attorneys: **Todd R. Seelman** and **Leslie E. Miller** of Grimshaw & Haring PC, Denver, CO; **Michael J. Cohen** and **Thomas M. Hruz**, Meissner Tierney Fisher & Nichols SC, Milwaukee, WI. Defense counsel: **Brian G. Cahill**, **David J. Turek** and **Paul F. Heaton**, Gass Weber Mullins LLC, Milwaukee, WI.

Both the *Lyman* case abstract and full text of the court's opinion are found in the *Business Valuation Litigation Database (BVLDB)*, available [here](#).

Analysis: Contrasting *Murphy* with *Jelke*

Peter Mahler, Esq. represents clients in the resolution of complex business disputes as a partner in the Commercial Litigation Department at the law firm of *Farrell Fritz* in New York. Mr. Mahler provides these insights on built-in gains and the recent *Murphy* decision.

The discount for built-in gains has captured much interest and controversy in the courts and business valuation community in recent years. All this attention, including that generated by last year's important 11th Circuit decision in *Jelke v. Commissioner* (see the January 2008 issue of the *Business Valuation Update*, available as a Free Download [here](#)), has centered on estate and gift tax matters utilizing a fair market value standard.

A recent valuation decision by a New York trial judge grapples with the BIG discount in a very different setting, arising out of a buy-out in a shareholder oppression case, where by statute, the court must value the company under a fair value standard which assumes a going concern and where, as a matter of policy, the courts are loathe to give the acquiring majority shareholders a "windfall" based on speculative future liabilities. In this case of apparent first impression involving a real estate holding company, *Murphy v. U.S. Dredging Corp.*, the court reconciles the competing considerations by deducting the present value of the tax based on an assumed 19-year holding period based on a number of evidentiary factors reflecting the controlling shareholders' actual investment plans. To that extent, *Murphy* parts ways with *Jelke's* "arbitrary assumption" of liquidation as of the valuation date requiring a 100% discount, and is an important reminder that discounts under the fair market value and fair value standards can differ.

Read Peter's blog on business dissolution and other disputes [here](#).

Quick Hits: Other Recent Business Valuation Cases

- ***Murphy v. United States Dredging Corporation*, 2008 NY Slip Op 31535 (New York) (May 19, 2008)** Fair value award in shareholder oppression case deducts present value of built-in gains tax.
- ***U.S. Salt, Inc. v. Broken Arrow, Inc.*, 2008 WL 2277602 (Minnesota) (May 30, 2008)** Lost profits calculations, based exclusively on management projections, called into question by U.S. District Court.
- ***Statham v. Statham*, 2008 WL 2357353 (Louisiana) (June 11, 2008); 2008 La. App. LEXIS 939 (La.App. 2 Cir. June 11, 2008)** State statute provides guidance on whether goodwill value is treated as marital property; court questions expert's thoroughness.
- ***Waller v. Pidgeon*, 2008 WL 2338217 (Texas) (June 5, 2008); 2008 U.S. Dist. LEXIS 44238 (N.D. Tex. June 5, 2008)** Insolvency of hedge funds turns on book value versus 'fair valuation' of debts.
- ***Cal-City Construction, Inc. v. Wilson, Elser, et al*, 2008 WL 2191141 (California)**

(May 28, 2008); 2008 Cal. App. Unpub. LEXIS 4359 (Cal. App. 2d Dist. 2008)
Construction company sues former lawyers and seeks damages based on potential lost jobs.

- ***In re Houston Drywall***, a case dealing with insolvency in preferential and fraudulent transfers, which has both a *Daubert* angle and relies on the balance sheet method of calculating insolvency.
- ***In re Reading Broadcasting, Inc.***, a case dealing with the valuation of stock options for the determination of an unsecured claim in bankruptcy, which looks to and discusses expert testimony taken in a prior state law case.
- ***Thornton v. J Jargon Co.***, a copyright case which addresses what is needed to calculate lost profits, provides an overview of what is necessary to prove a copyright violation, and provides analysis, including *Daubert*, of what is required to obtain lost profits based on infringer's profits.
- ***MCI v. Mastec***, 2008 Fla. LEXIS 1239 (Fla. July 10, 2008) where the Florida Supreme Court, ruling on certified questions from the Eleventh Circuit, held that under Florida Law a party cannot rely on rental costs for a compromised service if the party did not actually have to rent replacement equipment and customers did not suffer a service interruption.
- ***Blair-Naughton, LLC v. Diner Concepts***, 2008 U.S. Dist. LEXIS 55004 (D. Kan. July 17, 2008) a lost profits case that involves a *Daubert* challenge to an "industry expert" who arrived at projections, which were used by the forensic accountant to calculate damages. Since the industry expert was excluded, so went the forensic accountant who relied on his figures.
- ***Holiday Medical Center, Inc. v. Weisman***, a dissenting shareholder case where the shareholder dissented from a sale of substantially all the business's assets. The court reasoned that the liquidation approach to valuation was inappropriate because it violated the premise of the fair value standard—the dissenting shareholder receives a proportionate share in the business as a going concern and exclusive of appreciation or depreciation in anticipation of the dissented-to event.

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Business Valuation Resources, LLC | 1000 SW Broadway, Suite 1200 | Portland, OR 97205-3035 | (503) 291-7963