# An Impressive End to a Distinguished Career

Review by John Edward Connelly

**Franchise Regulation and Damages**
Byron A. Fox and
Bruce S. Schaeffer
CCH
Loose-leaf, CD-ROM, or Internet updated 3x/annually
$450/year

"Well, it's really a damages case." So utters, or mutters, the defense lawyer, gamely deflecting the client's despair (along with his or her own) over some late-course event in their lawsuit, which began many months ago with a high-spirited first reading of the plaintiff's flimsy complaint and the plotting of the quick and lethal response under Rule 12 (or Rule 11, to go one better). But now the judge has denied summary judgment, and the vice president's deposition transcript still makes them wince, and a field manager's hasty e-mail seems sure to appear at trial on poster board the size of an SUV. Suddenly, "it's really a damages case."

In truth, though, no dispute is ever anything other than a damages case, and no mere merits analysis can ever give the client all it needs to determine what this lawsuit really means for its business. That answer comes only by pursuing the often-shifting answers to three questions:

1. What is the likelihood of success in this forum?
2. What costs (including damages) will result from failure?
3. What costs (in money and otherwise) will be incurred in pursuing the final result?

Our own competitive natures, our law schools, and to some extent the books down the hall in our law libraries all influence us to target the first of these questions, especially early in the lawsuit. The analysis of the last two questions is sometimes no better than perfunctory, at least until the prospect of zeroing out the plaintiff has slipped beyond the range of all rational hope. Sure, it all gets done in time for the expert report. But if we don't think, and think hard, about damages from the start of the lawsuit or earlier, we delay the delivery of the advice that our client needs to make its best decisions.

In *Franchise Regulation and Damages,* the new treatise published by CCH, Byron Fox and Bruce Schaeffer deliver on the title's promise by devoting two of the book's three parts to the often-underdiscussed subjects of (1) damages and (2) valuation and expert testimony. Their intention is "not to add just another franchise treatise covering ground that has been plowed for over 40 years," but "to state the basic rules so that users of the text will be able to understand franchise law concepts and practices and then [to] explain the subjects of damages and valuation if disputes arise."

## Visible, but Not Unsightly, Seams

This they proceed to do, but the finished product is not without some visible seams. Although the damages-related sections (Parts II and III) do follow the franchise section (Part I) sequentially, the effort to integrate the two halves of the book is hit-or-miss. The authors do not deliver (nor, in fairness, did they promise) a purely franchise-specific discussion of damages issues; however, there are many useful franchise examples in these sections.

Somewhat more puzzlingly, the damages sections also contain the book's entire treatment of several areas related to franchise law (including encroachment, Little FTC Acts, fraud, tortious interference, and defamation). The implicit justification for this placement is that some of these alleged wrongs implicate business valuation in the damages analysis. That explanation does not quite hold, and the structure is less than ideal.

That the stitching shows a bit is not so unusual in a treatise, which can be a logistical behemoth to construct and execute. And it is not a serious drawback here. Indeed, the damages sections likely become more useful to a wider audience for their broader focus. Fox and Schaeffer outline all contract theories of damages and then discuss virtually every other concept that might cost a franchise defendant money, including the Lanham Act, regulatory remedies available to the franchisee, antitrust damages, punitives, and attorney fees.

The highlight here is a particularly useful section on lost profits, which illustrates for lawyers who pay little attention to math how simple changes in rates and growth assumptions "can yield dramatic increases in damages claims." After advising that "every possible attack that can be launched on the plaintiff's assumptions should be considered," the authors provide an exhaustive list of examples.

## No Concept Left Untouched

Most valuably, the damages sections of *Franchise Regulation and Damages* carry through the same voice and intelligence on display elsewhere. The voice is practical, experienced, and conversant with the finer points of theory while keeping a sharp eye on the real world. Doing what good lawyers do, in other words.

The following passage from the valuation and expert testimony section, preceded by a cogent description of the three recognized methods of business valuation (cost, income, and market), is typical:

*John Edward Connelly is a partner in the Minneapolis office of Faegre & Benson LLP.*

This review represents the views of the author and not necessarily those of the American Bar Association or its Forum on Franchising regarding "An Impressive End to a Distinguished Career" by John Edward Connelly, published in Franchise Law Journal, Volume 25, No.3, Winter 2006. © 2006 by the American Bar Association. Reprinted with permission. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

> Real world buyers and sellers of mid-size and smaller companies usually don't apply either sophisticated financial theory or business appraisal methodology. . . . Instead, most will judge the value of the business by simple criteria, such as price in relation to:
>
> - revenues
> - earnings
> - cash flow
> - "pay back" period
> - other rules of thumb (or rumors thereof)
> - bad advice

The section moves from there to touch on strategic and synergistic value and other tough-to-quantify concepts. The impression throughout is of knowledgeable authors with much to impart, whose main goal here is to leave no concept, whether highly academic or purely practical, untouched. They are largely successful in the effort; and without dwelling unduly on any one area (except perhaps antitrust),[1] they transmit much of their knowledge along the way.

## The "V-Word"

The book's sensibility is most plainly on display in its breezy, highly informative first chapter, Introduction to Franchising, whose thumbnail history of franchising contains comparisons to the feudal system (not as unflattering as it sounds) and analogies to securities law. The section also makes clear, despite some attention to the franchisee's perspective, that the authors stand with those who view franchisors as unduly constricted by a nonsensical and unnecessary regulatory regime:

> [F]ranchisees do not own their own business in the same sense that a private entrepreneur owns his or her business. Franchisees own only a contract right. . . .
>
> * * * *
>
> [F]ranchise regulation is based solely on the vision of an adhesion contract which assumes a gargantuan franchisor extracting undeserved profits from a small business that trembles under the franchisor's yoke. . . . .
>
> * * * *
>
> [T]he scandals that led to the original enactment of franchise laws have rarely been repeated and hardly justify regulating franchising more stringently than other forms of marketing or distribution. In effect, franchising and franchisors have been victimized by their own success.

When the "V-word" is rolled out to describe franchisors, we know that we are not dealing with a middle-of-the-road perspective. Fox and Schaeffer's view of history is that "business opportunity–type frauds [were] perpetrated on ignorant and hopeful consumers during the 1960s and 1970s," leading to the Federal Trade Commission's then-appropriate Franchise Rule, which "purged from the franchise world many people with criminal records, securities law violations, or any history of unsavory activities." With the industry cleansed of those undesirable elements, "franchising has been more reputable than almost any other marketing arena and is likely to remain so." Nevertheless, the regulatory atmosphere has needlessly expanded and has also shifted its focus from the franchise offering to the franchise relationship, burdening commerce with excessive and cumbersome legal protections for a generally sophisticated pool of potential franchisees ("persons of significant economic means who possess the ability to secure substantial financing") that simply do not need the regulatory protection.

## Too Little, Too Bad

*Franchise Regulation and Damages* has other business to get to, and, unfortunately, it moves quickly onward from these opening statements without substantiation or much further discussion. This brevity is understandable, especially considering the task at hand, but it is also too bad.

It would have been interesting to read Fox and Schaeffer in greater detail in defense of this view, which is of course by no means universal (even in the franchisor community) and which would need ultimately to contend with responsive questions such as "Isn't there some cause-and-effect relationship between the sustained regulatory regime over the last twenty years and the relative health and growth of franchising?" and "If rolling back unnecessarily restrictive franchise relationship laws would advance the overall good, why has this not happened, to a meaningful degree, in the twenty or so states where the laws continue to exist?" To which the obvious rejoinder from Fox and Schaeffer might be thus: "If restrictive franchise relationship laws truly do advance the overall good, then why has their track record in twenty-plus years not brought them onto the books of any of the thirty or so states that resisted the initial regulatory frenzy?"[2]

## Final Achievement

These questions are left for another day. As readers of this *Journal* know, Mr. Fox's recent death has sadly deprived us of any future literary contributions with his clear and trenchant voice. Those among us (the reviewer included) who did not know him are left with *Franchise Regulation and Damages,* which stands as an impressive final achievement in a distinguished career.

## Endnote

1. The book's substantive section on antitrust issues in franchising is exactly 100 percent as long its substantive section on state franchise relationship laws. The reviewer, who is an antitrust practitioner, believes that this continues the tradition of franchise law books, articles, and seminars in which the same academically intriguing antitrust issues and cases (and you know the ones I mean) are discussed beyond all reasonable proportion to their existence or impact in the vast majority of franchise or distribution disputes in the real world.

2. Of course this debate, like many others, lacks any empirically correct result. And although Fox and Schaffer invoke feudalism in describing the franchise system, baseball may provide a sharper analogy for state franchise relationship laws: a radical legislative step was taken in the reform-minded 1970s to remedy an industry with a sinking reputation and popularity; but the reforms achieved only about half of their potential jurisdictional reach despite an initial push and sustained effort in the 1990s to apply the rules universally; and advocates and opponents disagreed over the merit of the rules and virtually everything else, including how much better or worse the game was in the prelegislation era. But this is for another discussion, perhaps entitled "How State Franchise Law Is Like the Designated-Hitter Rule."

This review represents the views of the author and not necessarily those of the American Bar Association or its Forum on Franchising regarding "An Impressive End to a Distinguished Career" by John Edward Connelly, published in Franchise Law Journal, Volume 25, No.3, Winter 2006. © 2006 by the American Bar Association. Reprinted with permission. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.