Study looks at credibility of expert valuation evidence

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It was found that, while the courts do support a thorough and detailed scope of work to the extent that it is relevant and needed to support the expert’s opinion, it is more important that the ‘big picture’ conclusions are reasonable and accord with common sense and commercial reality.

Relevance of expert evidence, independence and objectivity

The Henein-Lobo study confirmed that courts do rely upon the insights and analyses provided by valuation experts in terms of assessing financial loss or business value, particularly in cases where the determination of damages is complex, comprised of significant dollar amounts or in dispute. However, the study emphasized that, in order to consider valuation evidence to be relevant, it was of paramount importance that the court find the valuation expert to be independent and objective “in spirit and substance,” and that courts are generally going to greater lengths to scrutinize and validate expert witnesses in this regard, including voir dire examinations and reviewing experts’ working papers and correspondence.

Courts have stressed that an expert’s foremost duty is to assist the court. Experts who refuse to acknowledge weaknesses in their position, or the impacts of alternative viewpoints and assumptions on their conclusions, might be viewed as advocates with little to offer the court. Courts place greater value on experts who are willing to consider the implications of reasonable alternatives to their own positions.

Proper use of assumptions and requesting relevant information: The Henein-Lobo study found that the inappropriate use of and reliance upon assumptions is one of the most frequently cited points of criticism by courts. Assumptions are appropriate when facts are unavailable, unclear, contradictory, or if they relate to all legal theories to be proven in court. However, experts must ensure that they have made reasonable attempts to obtain required factual information before reverting to assumptions. Courts take a dim view of experts that make assumptions in place of factual information where the information was available. Courts also do not favour experts that present various hypothetical scenarios based on speculation rather than verifiable facts, or experts that do not explain as to which scenario is the most relevant but rather leave this matter for the court to decide.

Not surprisingly, courts have clearly indicated that when assumptions are used, experts should undertake adequate due diligence to test their assumptions for reasonability, technical accuracy and factual consistency. It is also necessary for experts to disclose scope limitations in their reports without making efforts to ask for required information. If requested information is not provided or not available, courts are clear that valuation experts should take steps to otherwise obtain the required information from other sources or by alternate means. It is also recommended that experts exercise caution when using or adapting financial models provided by clients and that these models be thoroughly reviewed and checked before experts rely on them.

Importance of being organized

The study found that courts tend to favourably view valuation evidence that is well organized and presented in a methodical fashion. It is also clear from case law that logical and succinct articulation of key valuation concepts and calculations is extremely important, particularly during oral testimony, and is often a distinguishing factor in leading the court to preferring one expert’s evidence over another.