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Impact of Supreme Court, FTC rulings to be felt by franchisors

Baltimore Business Journal - by [David L. Cahn](#)

More than 1,600 businesses filed to offer franchises in Maryland in 2006, compared with 1,100 in 2003, according to the Attorney General's office.

And the trend of choosing franchising as a mode to expand business operations is projected to continue as a growing number of baby boomers and others choose to buy franchises.

As a result, the practices of franchisors are getting more attention by the Supreme Court and Federal Trade Commission, which recently issued a major ruling and revised regulations -- and each may impact Maryland businesses and consumers.

One significant ruling, made by the **United States Supreme Court**, may directly affect the prices consumers pay for products when shopping at some franchised businesses.

In the past, it has been unlawful for product manufacturers or distributors to require retailers to re-sell their products at no less a specified minimum price, a practice known as "minimum resale price maintenance," or RPM.

However, in the case of **Leegin Creative Leather Products Inc. v. PSKS Inc.**, the Supreme Court decided last June that RPM is no longer unlawful at all times, or per se. As a result, franchisors and product suppliers can now set minimum and maximum pricing requirements that franchisees and retailers must follow, so long as they are not "anticompetitive."

Courts will consider factors specific to the industry, as well as the "history, nature, and effect" of the restraint to determine whether it is "an unreasonable restraint on competition" -- meaning it is likely to lead to increased prices for certain classes of goods or services, not just some brands within that class.

Product suppliers and franchisors should also keep these important considerations in mind, if they are considering mandating specific retail prices:

- Provisions in their existing franchise agreements may very well prevent the franchisor from imposing minimum price restrictions on its existing franchisees.
- Various state antitrust laws continue to remain in effect and may or may not be interpreted in line

with Leegin.

- Retail price management is still illegal in some foreign jurisdictions.

If a franchisee challenges a franchisor's minimum price requirements, the franchisor may have to affirmatively demonstrate how the "pro-competitive" benefits of the restrictions outweigh the burden of the price increase.

As an example of a pro-competitive benefit of RPM, the Supreme Court cited preventing bargain retailers from taking customers from competing retailers that charge higher prices because they have spent capital developing goodwill in the product supplier's brand. For entrepreneurs involved in franchising, the Federal Trade Commission's revised "Franchise Rule," with which compliance becomes mandatory on July 1, is of particular interest.

The revised rule, which affects how franchises are offered for sale, amends the Uniform Franchise Offering Circular (UFOC) guidelines -- the "rulebook" of franchising -- and requires franchisors to make adjustments to their Franchise Disclosure Document, commonly known as a FDD.

Some of the more noteworthy features of the revised rule include:

- All franchisors may now use electronic means to provide their disclosure documents to prospective franchisees.
- More extensive disclosures concerning a franchisor's parent company may be required, including bankruptcy history, litigation alleging "a violation of a franchise, antitrust, or securities law, or alleging fraud, unfair or deceptive practices, or comparable allegations," and in some cases audited financial statements for the prior three fiscal years.
- All litigation with franchisees during the prior fiscal year, whether initiated by the franchisor or the franchisee, must be disclosed by the franchisor.
- The franchisor must disclose whether it has entered into confidentiality agreements with franchisees restricting them from talking freely about the franchise relationship, such as in settling a dispute.

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