

# **The Supreme Court Eased the Barrier to Minimum Resale Price Maintenance: What Does this Mean to Manufacturers and Franchisors?**

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On June 28, 2007 the U.S. Supreme Court made it easier for manufacturers and franchisors to demand that retailers sell goods at a minimum resale price (“RPM”). This reversal of the 97 year-old law leaves many questions for manufacturers and franchisors to consider. The ruling is not a black and white pronouncement as courts now will use the rule of reason test to evaluate vertical minimum resale price maintenance programs. Under this test, the fact finder weighs all of the competitive circumstances on a case-by-case basis in deciding whether a given RPM practice should be prohibited as imposing an unreasonable restraint on competition.

## What Manufacturers and Franchisors Need to Consider Now

Manufacturers and franchisors need to consider under what circumstances they would or would not want to implement a minimum resale price maintenance requirement.

1. Before implementing any changes to a resale price maintenance policy, companies need to consider:
  - a. State antitrust laws;
  - b. Current contract provisions that are in place governing franchisee or dealer pricing; and
  - c. Good faith and fair dealing limitations.
2. How will this ruling impact minimum advertising policies (MAP) between companies and their dealers or franchisees?
3. It is possible that even with this ruling; there still will be situations in which it is unlawful to implement such programs – e.g., where anticompetitive consequences result from use by a dominant manufacturer; if used to facilitate a retail or manufacturer horizontal cartel, etc.
4. Most manufacturers and franchisors will now be able to specify the minimum prices that their dealers and franchisees must sell their products.

## Franchisees and Dealers May or May Not Like this Ruling

It remains to be seen how the dealers and franchisees will respond to this new ruling. Some points to consider include:

1. Franchisees or dealers of a given product may no longer have to worry about competing with each other on price; instead they will compete on service.
2. Free-riding can be eliminated.
3. Dealers who are discounters will probably be unhappy about this ruling.

This ruling will encourage each company to review the business implications of vertical RPM for the company. Most manufacturers and franchisors will need to review their existing dealer or franchise agreements to determine affect on those contracts and what changes may need to be made for the future.