



# The Franchise Lawyer

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## Is Refranchising Right for You?

By Robert A. Lauer

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You are in-house counsel for a large company that owns and operates "units" and franchises rights to develop and operate units to third parties. Your existing unit map reflects pockets of company-owned and franchised units across the country, and your future development map covers area with both company-owned and franchised units (sometimes side-by-side). You spend too much time on unit employee issues and your real estate and FF&E mortgages and leases. To top things off, you have received interest from competitor X and private equity company Y, both of which are interested in acquiring or investing in you-but they are franchise operators, not unit operators. It sounds like you should consider re-franchising.

The term "refranchising" is sometimes used interchangeably with "reselling" (or "jettisoning" for some franchisors!), but the concept is simple in theory: (1) a franchisor has company-owned units; and (2) the franchisor desires to sell one or more (or all) of these company-owned units to a new or existing franchisee who will sign a purchase agreement, franchise agreement and other ancillary documents to transition ownership and continue to operate the unit under the franchisor's brand. There are of course multiple variations, and it is always a little more difficult to implement in practice than in theory, especially when the underlying intent of the franchisor is to relieve itself of obligations concerning units which are sometimes not the most profitable units in the system. Despite these potential barriers, several large and small companies (including companies new to franchising) have announced or implemented formal refranchising programs in the last year and, with the current state of the economy, it is expected that others will follow suit.

### Key Business Structuring Issues

Franchisors arrive at a refranchising strategy from different perspectives and with different goals. Some may want to reduce or eliminate company-owned unit operations or consolidate company-owned unit operations in certain geographic areas and expect to refranchise all levels of performing units. Others may want to refranchise only underperforming units that need an on-site owners' attention, such as an existing general manager or area director. Still others may merely want to sweeten new unit development offers to more sophisticated prospective franchisees by combining the sale of existing units in the territory with rights to develop out a specific territory free from other operators.

Whatever the motivation, franchisors must consider a myriad of initial issues in formulating a refranchising strategy. Some very practical structuring questions that need to be asked, along with some factors to consider in responding to these questions, are as follows:

#### What units are to be refranchised?

Franchisors need a detailed list and map of available units, and must collect all the available financial and contractual information on those units.

#### Who is the ideal refranchising candidate?

Franchisors may target single purchasers for multiple units tied to new unit development rights, or they may

target general managers and other company personnel to become owner-operators of single units. Franchisors may want to target existing franchisees, or even steer clear of existing franchisees to avoid overloading their plates or expanding their "empire".

#### **Who operates the units?**

The franchisor's affiliate or subsidiary may be the actual operator or seller in a refranchising transaction, and there may be a separate operator/seller for each unit. Refranchising multiple units can become a logistical nightmare if real estate, operating permits, liquor licenses and/or vendor contracts are held among a number of affiliates and subsidiaries.

#### **Do you (or current operator/seller) have mortgage or lease assignment rights or limitations that will affect your strategy?**

Whether owned or leased, real estate can be difficult to assign outright if the franchisor does not have a negotiated free right of assignment to a franchisee in its mortgage or lease, especially where the purchaser is not financially sound. Franchisors may have to consider leases, subleases or even remaining on as guarantors to obtain consent from mortgagees and landlords. This could be incentive enough to focus on larger candidates, especially if your goal is to move the units off the books entirely.

#### **Are there employment/benefit or environmental obstacles?**

A franchisor may have an employment or benefits plan that cannot translate to a purchaser, or known environmental issues that will make a sale more difficult. More practically, area directors and unit employees who learn their unit(s) may be for sale might leave.

#### **Are all your company-unit vendor contracts, licenses or permits consolidated, or assignable/ terminable without consent?**

If the franchisor has consolidated vendor contracts with anti-assignment clauses and liquidated damages for early termination, a seemingly small detail can become a big issue. Liquor license transferability issues can also drive timing and transition of units.

#### **What is your ideal pricing and financing strategy?**

A franchisor may be looking to realize profits in owned real estate, or merely move mortgages or leases off its books. A franchisor may be open to offering financing for the purchase price or even the initial fee. When refranchising underperforming units, a franchisor may consider "selling" leased units in single unit transactions to area directors or general managers for a nominal purchase price, or financing a small purchase price and reduced initial fee.

#### **Do you want to tie a remodel program to the sale of refranchised units?**

A franchisor may elect to refranchise units that need updating in lieu of undertaking the updating itself, sweetening the offer to a potential purchaser via a reduced purchase price or fee conditioned on timely remodeling or updating.

### **The Regulatory Basics**

Surprise, surprise, the offer and sale of a company-owned unit along with a franchise to continue to operate the unit under the franchisor's brand is the offer and sale of a franchise under federal and state franchise registration and disclosure law, and entails all the regulatory disclosures and registrations that would be applicable for the offer and sale of a new unit, plus additional requirements in certain circumstances.

Although there is no bright line rule, if the franchisor has announced plans to refranchise or otherwise intends to refranchise as a business strategy (as opposed to a one off or two off transaction), then the franchisor likely has an obligation to describe the refranchising program in its Franchise Disclosure Document (FDD), whether as a stand alone refranchising FDD or a combined FDD for the development of new units. Generally, refranchising-specific disclosure would include describing the refranchising program in the following areas of the FDD: (a) the cover page (the initial investment and fees paid to the franchisor); (b) Item 1 (general description of the refranchising offer); (c) Item 5 (initial fee, purchase price, and/or lease/sublease deposit parameters); (d) Item 6 (lease or sublease rent and other continuing fee parameters); (e) Item 7 (a new Item 7 initial investment chart for refranchised unit); (f) Item 9 (chart notations for ancillary refranchising agreements); (g) Item 10 (terms of any franchisor financing for the purchase price, initial fees and general lease/sublease terms); (h) Item 11 (variations on site selection and training); (i) Item 12 (variations on territory); (j) Item 22 (a refranchising addendum to a standard franchise agreement and ancillary contracts, which may include forms of Purchase Agreement, Lease, Sublease, Lease Assignment,

Promissory Note and/or Security Agreement). Most franchisors that are refranchising only a couple of units as part of a one off transaction will take the position that the refranchising aspects of a transaction are negotiated changes and do not otherwise modify their existing disclosures, this is generally valid. However, franchisors must watch to ensure that refranchising does not become the norm and must pay particular attention to negotiated change requirements in California and North Dakota.

Since no one will buy an existing business without being able to see the books, an earnings claim/financial performance representation analysis is crucial. Thankfully, federal and state disclosure law contemplates refranchising whether or not the franchisor has an Item 19 earnings claim. Pursuant to the new FTC Rule and current UFOC Guidelines, a franchisor offering an existing unit can provide actual operating results for the unit so long as the information (i) only contains the operating results of a specific unit being offered for sale; (ii) only is given to potential purchasers of that unit and (iii) is accompanied by the name and last known address of each owner of the unit during the prior three years. This exemption is crucial for franchisors that do not maintain an earnings claim/financial performance representation, but should not be abused to provide information for numerous units just because a prospect showed general interest in the system. Generally, this information is provided along with introductory overlay and receipt. Importantly, only historical information (and not projections or pro formas related to anticipated future performance) is permitted under the exemption.

Interestingly, one form of refranchising received a nod in the new FTC Rule with the new Item 20 disclosure requiring franchisors selling a previously-owned franchised unit that is now under the franchisor's control to disclose certain additional information for that unit arising during the last five year period, including contact information for previous owners, time periods of their ownership, the reason for their transfer of ownership and the franchisor's length of ownership. Clearly, the FTC was weary of franchisors retaking previously underperforming franchised units and refranchising them to a new franchisee without disclosure of the unit's previous franchise history.

### Conclusion

While this overview only scratches the surface on the business and legal issues involved in refranchising, it is clear that refranchising is here to stay, and as franchisors mature and business focuses continue to shift, it is only a matter of time that we see "re-re-franchising" programs!

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## ***Bores v. Domino's Pizza: The Right Result for All the Right Reasons, Some Expressed and Some Implied***

**By Elizabeth Taylor and Danell Olson**

Faegre & Benson, LLP

When a contract provision is reasonably susceptible of two differing interpretations, hornbook law teaches that the provision should be construed against the drafting party and in favor of the non-drafting party. In a recent opinion, *Bores v. Domino's Pizza*, \_\_\_ F.3d \_\_\_, 2008 WL 2467983 (8th Cir. June 20, 2008), however, the Eighth Circuit reached a different conclusion in the franchise context – holding that a term in a franchise agreement having two possible meanings was not therefore ambiguous, but instead should be construed, in the absence of language in the agreement to the contrary, as having been drafted purposefully to preserve for the franchisor (the drafting party) discretion to invoke either of two alternative meanings in its dealings with its franchisees.

*Bores* involved a challenge brought by Domino's franchisees to a franchisor directive mandating that franchisees had to purchase and install by June 30, 2008, a new "PULSE" point-of-sale system. As described by the Eighth Circuit, the PULSE system is a "proprietary, comprehensive computer system created specifically for Domino's Pizza stores' which 'allows better communication, service, . . . information gathering and reporting, and coordination' among Domino's United States stores." *Id.* at \*1. Domino's designated IBM as the sole source for hardware and designated itself as the sole source of the PULSE software. In their suit, plaintiffs argued that Domino's "mandated the purchase and use of the PULSE system solely to generate additional revenue

from franchisees.” *Id.* at \*1. They further contended that the franchisor’s mandate violated Section 8.2 of the Domino’s Standard Franchise Agreement, which, according to plaintiffs, guaranteed franchisees that the franchisor would provide them with specifications for a variety of items, including software and hardware, which specifications could then be used by the franchisees to buy the items from “any source” and not solely from Domino’s.

Section 8.2 of the Domino’s Franchise Agreement provides:

*We will provide you with specifications for pizza, other authorized food and beverage preparation, dispensing, storage and display equipment, delivery and related motor vehicles, other equipment, fixtures, furniture, computer hardware and software, exterior and interior signs and decorating required by the Store. You may purchase items meeting our specifications from any source.*

*Id.* at \*1 (emphasis supplied by Court). Both sides argued that this language was susceptible to only one reasonable interpretation, while disagreeing as to what that reasonable interpretation was. The Minnesota District Court sided with the franchisees, holding that “specifications” referred to the component parts and technology necessary to construct a product, namely, a computer system and computer software program, and not to a finished product (Domino’s PULSE system). In other words, the Franchise Agreement only allowed Domino’s to mandate a comparable computer system, not a specific computer system.

In addition, the district court concluded that the reference to “from any source” in Section 8.2 would only have meaning if the specified items could be purchased from multiple sources. Because the computer hardware was only available from IBM, and the PULSE software only available from Domino’s, the district court concluded that the agreement had to be interpreted to allow franchisees the ability to put together a comparable system using materials and technology available from multiple sources. Finding that the Franchise Agreement was susceptible to only one reasonable interpretation, the court entered summary judgment for the franchisees.

On appeal, the Eighth Circuit reversed, agreeing with Domino’s that the district court had “relied on an unduly restrictive interpretation of specification.” 2008 WL 2467983 at \*3. Quoting several different dictionary definitions, the Court concluded that it was “apparent” that the “plain and ordinary meaning of specification includes both a list of the component parts necessary to construct or describe an item, as well as a single, finished, product.” *Id.* at \*4. In the appellate court’s view, plaintiffs’ arguments:

unreasonably focus on only one of the commonly understood definitions of specification; nothing in the franchise agreements limits the meaning of specification to a single usage. Applying the commonly understood definition of specification, the agreements permit Domino’s to specify a computer system with comparable capabilities or the PULSE system.

*Id.* (emphasis supplied).

The Court also rejected plaintiffs’ contention—and the district court’s finding – that the language in Section 8.2 permitting franchisees to obtain the specified computer software and hardware “from any source” necessarily meant that Domino’s had to provide standards that could be satisfied by more than one source—thus precluding a finished product specification. Again resorting to the dictionary, the appellate court held that the definition of “any” includes “one, some, every or all.” Thus, “the franchise agreements merely allow plaintiffs to purchase the specified computer system – PULSE – from any available sources, be they one or many.” *Id.*

Based on this straightforward analysis, the appellate court ruled that Domino’s was entitled to judgment of dismissal as a matter of law. In reaching its decision, the court of appeals did not consider whether evidence that an experienced and thoughtful district court judge had reached a different interpretation of the contract provision at issue might itself be probative of ambiguity sufficient to invoke the ambiguity doctrine. Nor was the court persuaded by the district court’s reasoning that language elsewhere in the Franchise Agreements specifically reserving for Domino’s the right to mandate the use of specific products was evidence that the language of Section 8.2 must have been intended to have a different meaning. *See Bores v. Domino’s Pizza*, 489 F. Supp. 2d 940, 948 (D. Minn. 2007). In the appellate court’s view, given the “plain and ordinary” meaning of the words used, there was only one reasonable interpretation of the contract provision.

*Bores* makes sense, considered in context. Devoid of context, a word susceptible of two different definitions might be seen as the epitome of ambiguity. But contracts are construed in context. *See Kjos v. Am. Family Ins.*, No. C6-03-23, 2003 WL 21792115, at \*5 (Minn. App. Aug. 5, 2003) (“a contract should be interpreted in the manner that it would be understood by persons in the business to which the contract relates.”) The question in *Bores* was thus

not how a reasonable person might construe “specifications” in isolation but how a reasonable person would construe the term in a franchise context. In the franchise context—where the essence of a business format franchise is the ability of the franchisor to guarantee uniformity and consistency throughout the franchise system—“specifications” is reasonably understood to give the franchisor some measure of flexibility in achieving those ends. The Eighth Circuit seems implicitly to conclude that, when judged in context, the word “specification” may refer either to a requirement for purchase of a specific finished product or the establishment of standards to be used in producing a finished product. As long as the reasonable construction of the word in context suggests that both dictionary definitions of the word are plausible, *Bores* teaches that there is no ambiguity, and the meaning of the phrase is for the court to decide.

Beyond this, *Bores* provides some valuable lessons for practitioners responsible for drafting and defending franchise agreements.

First, although the Eighth Circuit construed the “specifications” language in the Domino’s Franchise Agreement to encompass specification of a finished product, practitioners wishing to secure this right for franchisors would do well not to assume other courts will do likewise. The best practice is to spell out specifically in the agreement the franchisor’s right to sole source.

Second, it is always difficult to extrapolate from opinions in the franchise area because the holdings appear so often to be driven by the specific facts of a case. (One wonders, for example, if the Eighth Circuit would have reached the same conclusion in *Bores* had Domino’s contended that Section 8.2 allowed it to sole source lettuce as opposed to its PULSE system.) Nonetheless, *Bores* may be useful precedent in another case in defending the reasonableness of allowing a franchisor to sole source complex products or equipment under a franchise agreement with language paralleling that at issue in *Bores*.

Franchisors operate in a highly competitive business environment in which a franchisor’s ability to guarantee consistency and uniform quality control is a crucial component of success. Specifically, as Domino’s argued before the appellate court, “in the modern economy it is widely recognized that a uniform, integrated, system-wide information and computing system can be essential to achieving and maintaining ... consistency.” Domino’s Reply Br. at 8 (2007 WL 4688601). That “entire enterprise is undermined if franchisees attempt to implement varying and disparate systems from a variety of vendors.” *Id.*

As a practical matter, it simply may not be feasible for a franchisor to establish specifications that can be used by an outside vendor to produce an acceptable substitute for the franchisor’s own product, including software. In *Bores*, as part of its order granting summary judgment to the franchisees, the district court directed Domino’s to provide its franchisees with specifications for its PULSE system and to permit them to purchase computer hardware and software meeting those specifications from any source. Domino’s complied, but plaintiffs moved the district court for further relief, asserting that Domino’s specifications were too vague to permit third-party software vendors to satisfy Domino’s actual requirements. *Bores v. Domino’s Pizza*, 2007 WL 3312272 at \*1 (D. Minn. Nov. 6, 2007). In denying plaintiffs’ motion, the district court essentially underscored the near impossibility of the task it had imposed on Domino’s:

The Court strongly suspects that even if Domino’s had provided Plaintiffs with more detailed “mathematical descriptions” for its specifications, Plaintiffs still would have filed the instant Motion. ... Domino’s Chief Information Officer [] stated that Domino’s considered giving Plaintiffs very detailed technical specifications, which would have consisted of “approximately 1000 pages of precise descriptions.” ... If that had been the case, however, Plaintiffs’ software vendors probably would not have been able to adapt off-the-shelf software for use in Domino’s stores; they would have had to create the software from scratch, a costly (and lengthy) proposition. In that instance, Plaintiffs likely would have come into Court arguing that the specifications were *too* specific, rendering it impossible (financially or otherwise) for them to acquire software meeting the specifications from other sources.

*Id.* at \*2.

From a business perspective, franchisors can ill afford the time commitment, the financial commitment, or the distractions (including potential litigation expense) required to devise specifications that could be used by outside vendors to successfully duplicate a product as complex as Domino’s proprietary software. Sole sourcing may be the only cost-effective way to ensure uniformity and consistency in such a circumstance. *Bores* is consistent with, if not an explicit endorsement of, this business reality.

The authors note that, on July 3, 2008, the plaintiffs filed a petition for rehearing en banc, which was still pending at the Eighth Circuit at the time this issue went to press.

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## Are Franchisors More Vulnerable after *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*?

By James M. Susag

Larkin Hoffman Daly & Lindgren, Ltd.

In 2002, a Mack Trucks dealer in Toledo, Ohio ("Toledo Mack") alleged that Mack Trucks, Inc., ("Mack Trucks") was committing an antitrust violation by allowing individual dealers to fix prices on their inventory in an attempt to increase profits. *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, No. 07-1811, 2008 WL 2420729, at \*9 (3d Cir. June 17, 2008). Toledo Mack argued this arrangement amounted to horizontal price-fixing and filed suit against Mack Trucks in federal court. Toledo Mack also alleged that Mack Trucks was participating in an unlawful vertical price-fixing arrangement by (a) assigning each dealer to a designated sales region (referred to within the company as an "Area of Responsibility or AOR"), (b) granting discounts to dealers that complied with the price arrangement in their AOR, and (c) denying discounts (known within the corporation as "sales assistance") to dealers that tried to compete on price and sell vehicles outside of their AOR. Toledo Mack also brought a price discrimination claim under the Robinson-Patman Act. Mack Trucks responded by filing a counterclaim against Toledo Mack for misappropriation of trade secrets. *Id.* at \*7.

In 2005 and again in 2006, the District Court for the Eastern District of Pennsylvania heard the case, ruled in favor of Mack Trucks, and dismissed Toledo Mack's antitrust claim. It found that Toledo Mack had not presented sufficient evidence within the four-year statute of limitations to prove that Mack Trucks was attempting to conspire with other dealers to control prices for its merchandise. *Toledo Mack*, 2008 WL 2420729, at \*7. Recently, the Third Circuit Court of Appeals reviewed the case and reversed the district court, holding that Toledo Mack had raised genuine issues of material fact to bring its antitrust claim before a jury. Specifically, the Third Circuit found that evidence of conduct occurring prior to the statute of limitations was admissible. The court concluded that even though the conduct may have begun prior to the statute of limitations, it persisted during the statute of limitations period, and therefore, was admissible. It also held that the vertical price-fixing claim should be examined under a balancing test.

### The Sherman Act

Since 1890, artificial restrictions on competition have been unlawful under the Sherman Act, federal legislation that prohibits cartels and monopolies. Section One of the Sherman Act prohibits "[e]very contract, combination...or conspiracy, in restraint of trade or commerce among the several States...." 15 U.S.C. § 1. This section was later refined to prohibit any *unreasonable* restraint on trade. *In Re Flatt Glass Antitrust Litig.*, 385 F.3d 350, 356 (3d Cir. 2004) (emphasis in original). If a moving party is successful in proving the other party is engaging in unfair practices, it may be eligible to collect treble damages and attorneys' fees. 15 U.S.C. § 15.

### The Supreme Court's Landmark *Leegin* Case

Until recently, courts interpreted the Sherman Act to outlaw all horizontal and vertical price-fixing schemes that created an unreasonable restraint on trade. Almost a hundred years ago, the Supreme Court held that all agreements between buyers and sellers on the lowest price at which a retailer could re-sell goods are illegal under Section One of the Sherman Act (arrangements commonly referred to as "minimum resale price maintenance" or "RPMs"). *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911). But this long-standing precedent was recently overruled in *Leegin*, where the Supreme Court reversed the *per se* prohibition on RPMs and ruled that vertical price-fixing regimes are not necessarily invalid at first glance, but must be analyzed under a "Rule of Reason" test. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705, 2725 (2007). Horizontal price-fixing regimes among competitors, however, are still *per se* unlawful. *Id.* at 2713 (citing *Texaco Inc. v. Dagher*, 126 S.Ct. 1276 (2006)).

### "Rule of Reason" test as applied in *Leegin*

The Supreme Court did not clearly define which factors are most important to analyze a vertical price-fixing arrangement under the “Rule of Reason” analysis. Instead, it encouraged courts to look at the number of manufacturers within any given industry that make use of the RPM practice at-issue, to examine whether the manufacturer or dealer requested the RPM, and to determine if the manufacturer or dealer has more market power over the other. *Leegin*, 127 S.Ct. at 2719-20. *Leegin* was controversial in that it left many concerned that the Federal Trade Commission and individual states would interpret this decision differently and would lead to unpredictable enforcement. Since *Leegin*, the legal community has been looking for more specific criteria as to how vertical RPMs should be analyzed.

### ***Toledo Mack***

In *Toledo Mack*, the horizontal price-fixing allegation was upheld as *per se* unlawful because Toledo Mack presented evidence from a Mack Trucks consultant and district manager that other Mack Trucks dealers had formed unwritten “gentlemen’s agreements” to abide by the price regime and only sell vehicles and parts within their designated areas. *Toledo Mack*, 2008 WL 2420729, at \*10-11.

It was more difficult for Toledo Mack to prove that Mack Trucks had participated in a vertical price-fixing conspiracy by withholding sales assistance to non-compliant dealers, but ultimately, it was successful. Most heavy-duty truck retailers like Toledo Mack do not carry a large inventory. Customers solicit bids from dealers and trucks are custom-made to meet each customer’s specifications. *Id.* at \*1-2. After trucks have been assembled, dealers are expected to purchase the vehicles and then sell them to the customer. *Id.* at \*1. When customers are considering a purchase, it is a common practice within the industry to obtain bids from several different dealers and companies before ordering a truck. Dealers often rely on sales assistance from Mack Trucks as a means of finalizing a sale because the discount received is a significant factor in determining the final price of the truck. *Id.* at \*2. Toledo Mack presented evidence that its district manager had instructed it not to sell outside of its AOR and a Mack Trucks bulletin implied that sales assistance would be eliminated to dealers that sold vehicles and equipment outside of their AOR. *Id.* at \*12. Mack Trucks also terminated Toledo Mack’s status as an authorized dealer. *Id.* at \*2.

The Third Circuit stated, “[a]lthough Toledo [Mack] claims that the conspiracy began in 1989, long before the limitations period, it presented evidence from which a rational jury could conclude that the unlawful agreements continued in effect through the time of trial in 2002.” *Toledo Mack*, 2008 WL 2420729, at \*8. The Third Circuit agreed, and vacated judgment as a matter of law on the dealer’s antitrust claim and sent the case back for a jury to decide whether a conspiracy existed.

### **Impact of *Toledo Mack***

At this juncture, *Toledo Mack* is only applicable in the Eastern Seaboard states of Pennsylvania, New Jersey, and Delaware. The Supreme Court, however, will likely examine the issues raised in *Leegin* again and may examine the *Toledo Mack* opinion because most publicly-traded companies in the United States have their corporate home in Delaware.

If the Supreme Court follows the rationale in *Toledo Mack*, franchisors that are subject to antitrust claims may be required to respond to evidence that predates the statute of limitations period and be subject to a “Rule of Reason” analysis if a vertical price-fixing scheme is alleged. This potentially opens the door to an array of possibilities for plaintiffs looking to make antitrust claims.

The same debate is appearing in other jurisdictions. For example, plaintiffs in a federal district court case in Pennsylvania were able to prove that Babies “R” Us and Toys “R” Us violated the Sherman Act by forcing manufacturers to enter into RPMs with its franchisees. *Babyage.com, Inc. v. Toys “R” Us, Inc.*, Nos. 05-6792, 06-242, 2008 WL 2120493 (E.D. Pa. May 20, 2008). Further, a federal district court in Wisconsin recently struck down a Wisconsin statute that it found to be a vertical price-fixing regime which required a minimum price for gasoline and also imposed a mandatory minimum markup. *Lotus Bus. Group LLC v. Flying J, Inc.*, 532 F.Supp.2d 1011 (E.D. Wis. 2007).

In summary, if the Supreme Court adopts the reasoning in *Toledo Mack*, it could have a far-reaching, negative impact on franchisors who may be subjected to protracted antitrust suits whereby past conduct could be used to substantiate a current antitrust violation.



## Nomination Report

By Edward Wood Dunham

Forum Chair

I am pleased to let you know that Dennis E. Wieczorek, Chair of the Nominating Committee, has reported the results of the Committee's deliberations. The Committee has nominated Ronald K. Gardner, Jr. of Dady & Garner, P.A. in Minneapolis to succeed me as Chair of the Forum Governing Committee, for a two year term commencing in August 2009, and has nominated Harris J. Chernow of Chernow Katz, LLC in Horsham, PA, Deborah S. Coldwell of Haynes & Boone, LLP in Dallas, and Karen B. Satterlee of Starbucks in Seattle as members of the Governing Committee, each for a two year term commencing in August 2009. Forum members will vote on these nominations during our annual business meeting on Thursday, October 16, 2008 in Austin, Texas.

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