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Burger King to pay franchisee \$4M

Company settles suit over proximity of restaurants

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BURGER King Corp. has settled a closely watched franchise suit, agreeing to pay \$4 million to a Massachusetts franchise-holder who claimed the company ruined his business by allowing another Burger King to open two miles from one of his restaurants.

Steven A. Scheck, the owner of a Lee, Mass., Burger King, claimed the company didn't deal in good faith when it opened a nearby competing restaurant it allegedly knew "would cannibalize" his business. Scheck sued in federal court in Miami 1989, alleging breach of contract. He later added a fraud count. Scheck has personal and business bankruptcies pending in Massachusetts.

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Of the \$4 million being paid by Burger King, \$2.63 million is going to settle the lawsuit, while \$1.36 million is earmarked for the three stores the company is buying back from Scheck. The settlement was reached last week.

"The successful resolution of this dispute demonstrates and strengthens Burger King Corp.'s commitment to positive franchisee relations," said Mark Giresi, senior vice president and general counsel, in a statement. "This is a win-win situation for Mr. Scheck and for Burger King Corp."

Burger King, the Dade-based subsidiary of Britain's Grand Metropolitan PLC, has had several legal battles with franchisees in recent years over issues of encroachment and franchisee rights. In addition, minority franchisees have sued the company alleging racial discrimination.



FILE PHOTO

Robert Zarco, plaintiff's attorney, calls settlement 'a clear indication that franchisers must tread cautiously.'

Burger King may win points with disgruntled franchisees

The company has sought to improve franchise relations and, last year, unveiled a \$100 million program to offer financial help to bring minority franchisees and suppliers into its system.

Court documents showed that in 1983 Scheck knew that Burger King wanted to convert a Howard Johnson restaurant on the Massachusetts Turnpike into a Burger King. Scheck's nearby restaurant was getting most of its business from turnpike travelers.

When Marriott Corp., another fast-food franchisee, bought the turnpike site, Scheck spent \$691,000 to buy his restaurant outright after Burger King allegedly assured him the turnpike site would not end up being a Burger King.

But in fall 1986, Burger King approved the site as a Marriott-owned Burger King franchise, which opened a year later. Scheck's sales plummeted, costing him \$300,000 a year in revenue, said his lawyer, Robert Zarco, a principal at Zarco & Associates in Miami.

Burger King tried to have Scheck's suit dismissed in 1992, relying on case law that made it difficult for a franchisee to sue over proximity of another restaurant. Franchise contracts used by Burger King and others make it clear that franchisees have no right to exact territory.

Says franchise lawyer
Ronald Fieldstone: 'The money it paid was probably good public relations to its franchise program that has suffered a series of adverse PR in recent years.'

U.S. District Judge William Hoeweler, however, denied Burger King's request to throw out Scheck's suit, and said he was declining to "jump on the precedential bandwagon."

Hoeweler found the case could go to trial on the issue of whether Burger King had breached an implied covenant of good faith.

In 1993, Zarco amended Scheck's complaint, adding allegations of fraud. Scheck alleges Burger King knew all along that it would allow Marriott to open a restaurant and that he would suffer big losses in sales volume as a result. Burger King asked for summary judgment on the fraud count, saying no evidence existed to support the claim.

Hoeweler was expected to rule any day on the motion to strike the fraud count.

If Scheck had succeeded at trial, fran-

chise holders could have gained leverage to challenge actions of their franchisers.

"This is sizable settlement," Zarco said. "The size, now part of the public record, is a clear indication that franchisers must tread cautiously in their future relationships with franchisees."

The Florida case, according to settlement documents on file in bankruptcy court in Massachusetts, has become a cause célèbre of the National Burger King Franchisee Association, a rights group of franchise-holders. Further publicity, according to the settlement documents, would not benefit either side.

"The franchisee argued that they felt Burger King's actions prejudiced them operationally and, as a result, wasn't entitled to get their fees," said Miami franchise lawyer Ronald Fieldstone, a partner with Fieldstone, Lester & Shear.

"The settlement in effect supports the franchisees' position because the fees were waived and Burger King pays a big sum of money," he said.

Burger King might have settled the case as much for political reasons as for its risk in the litigation, said Fieldstone, who was not involved in the case.

"In other words, the money it paid was probably good public relations to its franchise program that has suffered a series of adverse PR in recent years," he said. Additionally, by settling the case, the company forestalled the possibility of punitive damages and a harmful precedent-setting ruling on the fraud allegation.

The last thing Burger King wanted was for the fact pattern alleged in Scheck to go to a jury, said Keith J. Kanouse, a Boca Raton franchise lawyer following the case. He said Scheck incurred hundreds of thousands of dollars in renovation costs only to see his sales plunge 42 percent "as a direct result of the franchiser, who you think is your partner. It's like finding out your wife is cheating on you," Kanouse said. "It appears to be such an act of betrayal, that \$4 million was a lot less than they would have paid had punitive damages stayed in." ■