

Back on the front burner

After years of lawsuits with conflicting outcomes, issue of Burger King franchisee rights heads for federal appeals court

BY MARY HLADKY

Review Staff

Franchise-holders around the country cheered in 1992 when a federal judge in Miami ruled that Burger King does not have the right to open restaurants anywhere it wants.

Franchisees have long contended that they lose money or are even forced out of business when a new Burger King or McDonald's opens near an existing one. The practice, known as encroachment, is one of the hottest issues in the franchise industry.

"I think every franchisee conference I have gone to ... has dealt with encroachment," said Miami lawyer Don L. Horn of Gallwey, Gillman, Curtis, Vento & Horn, who represents Burger King. "A great number of the franchisers have attempted to come up with different practices and procedures for dealing with encroachment claims and modifying what they have done in the past, in hope of encouraging better relationships with their franchisees."

U.S. District Judge William M. Hoeverler's 1992 ruling against Burger King came on a pre-trial motion in a suit brought by a Massachusetts franchiseholder who claimed his business was ruined when a Burger King opened two miles from one of his restaurants. In 1995 Burger King agreed to pay him \$4 million, and the case settled. As a result, it was never heard by an appeals court.

Since then, courts have divided on encroachment. Last year, a federal appeals court in California relied on Hoeverler's ruling in a pro-franchisee decision, while two of his colleagues in Miami reached opposite conclusions, leaving the issue as hotly disputed as ever.

Now, however, the federal appellate court with jurisdiction over Florida, the 11th U.S. Circuit Court of Appeals, is poised to take up the issue.



CONSIDER EXISTING RELATIONSHIPS: Robert Zarco, franchisees attorney, says franchisers shouldn't be able to 'saturate the markets [without] considering the impact the placement of a new unit will have on another existing franchise.'

And both franchisees and franchisers are awaiting the results with trepidation.

"A tremendous amount is at stake," said Robert Zarco, a Miami lawyer who exclusively represents franchisees, including the one whose case was before Hoeverler.

Franchisers, Zarco said, should not be able to "saturate the markets considering their own selfish, profit-driven greed as opposed to considering the impact the placement of a new unit will have on another existing franchise."

Not surprisingly, New York lawyer Howard S. Wolfson, who with Horn represents Burger King in two cases this year in Miami, sees the consequences differently. Franchisers, said Wolfson, should have the right "to determine how best to grow and expand a franchising system — a right that is extremely important to franchisers who know their business, know how to grow it, have in mind what is best for all franchisees and do in general what they think is best for the success of all franchisees."

The issues extend beyond Burger King, he said. "I think other franchisers often face similar issues, whether it is the hotel industry or something else."

In the 1992 case that gave franchise-holders cause for celebration, restaurateur Steven A. Scheck claimed Burger King violated the "implied duty of good faith and fair dealing" by letting a new Burger King open too close to his.

Burger King argued that its franchise agreement specifically did not "grant or imply" to Scheck any area, market or territorial rights.

But a year before, Hoeveler had written, "The express denial of an exclusive territorial interest to Scheck does not necessarily imply a wholly different right to Burger King — the right to open other proximate franchises at will regardless of their effect on [Scheck's] operations.

"It is clear that, while Scheck is not entitled to an exclusive territory, he is entitled to expect that Burger King will not act to destroy the right of the franchisee to enjoy the fruits of the contract."

In July, the U.S. 9th Circuit in California relied on Hoeveler's opinion in *In re Vylene Enterprises Inc.*, upholding a bankruptcy court ruling that a franchiser wrongly opened a restaurant too close to an existing franchisee.

But two other Miami federal judges have reached different conclusions in two other cases involving Burger King.

On Oct. 22, Judge Stanley Marcus ordered former franchisee Art Weaver to pay Burger King \$4.9 million. Marcus had ruled in 1995 that Burger King had not violated its agreement with Weaver by opening another restaurant nearby.

Because Weaver had continued to operate his restaurants as Burger Kings even though his franchise had been terminated, he was ordered to pay damages as well as the \$2.1 million in profits he had earned after the franchise was ended.

In March, U.S. District Judge Ursula Ungaro-Benages largely tracked Marcus in *Barnes v. Burger King*, saying that Burger King's franchise agreements do not give a franchisee an exclusive area.

Says Burger King's attorney: 'Burger King believes its franchise agreement and uniform franchise offering circular are clear on the parties' respective rights.'

While Burger King attorneys hail the *Weaver* and *Barnes* decisions, plaintiffs lawyer Zarco contends the decisions are grossly unfair.

"The franchise agreements are written

strictly for the benefit of the franchiser," he said. "The Hoeveler opinion helps balance the inequities. The *Weaver* and *Barnes* decisions simply escalate the inequities and in essence grant the franchisers a license to kill the franchisees."

Weaver has since filed for bankruptcy, although he is seeking the 11th Circuit's permission to proceed with an appeal. *Barnes* is on appeal.

"Hopefully, the 11th Circuit will put the issue to rest," Burger King attorney Wolfson said. "Burger King believes its franchise agreement and uniform franchise offering circular are clear on the parties' respective rights."

The 11th Circuit, said Boca Raton lawyer Keith Kanouse, who chairs the fair franchising standards committee of the American Association of Franchisees and Dealers, will have a chance "to try to make some analysis and differentiation between *Scheck* and *Weaver* and *Barnes*."

"I am hoping they will be consistent with [the California decision in] *Vylene*," he added. "If not, that will create sufficient conflict between the two circuits that maybe the U.S. Supreme Court will be interested in hearing the issue." ■