

Top franchise legal decisions to watch

By Ron Ruggless

ATLANTA (Jan. 21, 2010) Decisions in franchise-related law in 2009 produced new frameworks under which franchisors and franchisees will be doing business in the year ahead, and beyond.

Citing four restaurant-industry cases, litigators in the Atlanta-based DLA Piper LLP international law firm this week offered the "Top Nine for '09" legal decisions that they think will be affecting franchisor-franchisee agreements.

"The 2009 cases reinforce the importance of franchisors keeping up with the latest developments in franchise cases because legal rulings often provide guidance to changes that franchisors should consider making to their operations, their decisions and their legal documents," said Barry Heller, the franchise litigation partner in DLA Piper's Virginia office.

Heller said "the most troubling" case from 2009 was one involving an Atlanta Bread Co. franchisee who created his own concept, P.J.'s Coffee & Lounge. Atlanta Bread terminated his five franchise agreements, claiming the franchisee created a competing business that violated terms of the franchise agreements. The Georgia Supreme Court ruled last year in favor of the former franchisee.

"By striking the in-term covenant involved in that case (which contained fairly typical in-term covenant language)," Heller said, "it theoretically would allow Georgia franchisees of restaurant franchisors with similar in-term covenants to operate a competitive business while remaining a franchisee of that franchisor."

Georgia voters will consider a constitutional amendment in November that would allow the state's jurists to consider parts – or to "blue-pencil" – franchise agreements without ruling against the whole contract.

Among the other cases featured in DLA Piper's Top 9 case list were rulings on supplier mandates and corporate disclosures. "How significant certain cases may be often depends upon your particular franchise system," Heller noted.

Restaurant cases in DLA Piper's "Top Nine Cases of '09" included:

Supplier issues. In *Burda v. Wendy's International*, an Ohio case in which a franchisee sued against the franchisor's mandate for use of one supplier as a source of hamburger buns, courts found in favor of the franchisee, who had previously been allowed to select from several suppliers.

Scott McIntosh of DLA Piper's Washington, D.C., office said franchisors need to write broad rights into franchise agreements when it comes to designating suppliers and rights on earning fees and imposing surcharges on purchases from approved suppliers. McIntosh said this allows "for maximum flexibility in structuring supply issues within the franchise system."

Employee discrimination claims. In a Florida case, *Equal Employment Opportunity v. Papin Enterprises Inc.*, a Subway franchisee was sued by an employee who had been fired after failing to remove a nose ring. The employee alleged religious discrimination, but never provided a religious text or note from a pastor.

The court found "a degree of control that Doctor's Associates exercised over the employment practice" and provided joint-employer liability. A subsequent jury trial found that the employee did not have a "religious accommodation" claim.



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1 | 2 [NEXT PAGE >>](#)