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## BLOGS

### Terminations

# Courts Upholds Termination Despite Passage of Time

In a case that further buttresses the termination rights of franchisors, both a bankruptcy and federal district court upheld such rights despite the fact that more than seven months passed between the date the franchisees had received their notices of termination and the date the franchisor announced that it would seek to enforce them. The franchisee at issue in *In re Making the Dough, Inc.*, 2009 WL 975170 (Bkrtcy. M.D. Pa. Mar. 27, 2009), and *Domino's Pizza Franchising LLC v. Making the Dough, Inc.*, 2009 WL 1011584 (M.D. Pa. Apr. 15, 2009), owned two pizza franchisees near Harrisburg, Pennsylvania. In August 2008, Domino's terminated the franchise agreements because the franchisees had failed to obtain insurance as required, to make timely royalty payments or payments for food and supplies, to install an upgraded computer system, and to submit cash flow statements to the franchisor. The termination notices stated that Domino's would stay enforcement of the terminations for thirty days, to allow the franchisees to sell their locations. Despite the deadline, the franchisor continued to provide food and supplies to the franchisees, who operated their stores until March 2009, at which time the franchisees were informed that the terminations would be enforced. They filed for bankruptcy the next day and, at the same time, for an injunction to stay enforcement of the terminations.

Neither party questioned the validity of Domino's grounds for termination or that the franchisees had failed to cure their numerous defaults. The franchisees claimed, however, that their continued performance of the contracts after receipt of the termination notices created an "implied novation," substituting for the original agreements. They also contended that Domino's had waived the franchisees' performance under the franchise agreements by accepting the continued operation of the stores after serving the termination notices. The bankruptcy court rejected both arguments. With respect to waiver, the court concluded that Domino's had escaped this fate by specifically providing in its notice that it was staying enforcement of the terminations to allow the franchisees to sell their stores. Moreover, the court noted that the franchisees had benefited from Domino's forbearance in allowing them to operate after the termination notices had been issued and that it would be "a gross distortion of the law to find an implied waiver where the party who relied upon a purportedly misleading act or representation by another benefited as a result thereof while only the party who misled them suffered a detriment."

Shortly thereafter, the federal district court in Pennsylvania issued a temporary restraining order terminating the franchise agreements and enforcing the post-termination covenant not to compete.