



NEW YORK CITY LAW DEPARTMENT
OFFICE OF THE CORPORATION COUNSEL

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Press Release

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**FEDERAL COURT UPHOLDS
NEW YORK CITY HEALTH CODE PROVISION
REQUIRING CERTAIN RESTAURANTS
TO POST CALORIE INFORMATION ON MENU AND MENU BOARDS**

***RULING IN SUPPORT OF THIS REVISED HEALTH PROVISION
MEANS THAT CONSUMERS WILL HAVE MORE INFORMATION
FOR MAKING HEALTHIER EATING CHOICES***

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New York, April 16, 2008 – Judge Richard J. Holwell of the U.S. District Court for the Southern District of New York issued a 27-page decision in favor of New York City in the “calorie case” today.

The New York State Restaurant Association brought this legal suit challenging a recently revised – and adopted – provision of the New York City Health Code (Section 81.50) that requires certain restaurants to post on menus and menu boards the calorie values of standardized items.

This Health Code provision requires this information to be made readily available to consumers if the restaurant is one of at least 15 establishments doing business nationally. (Editor’s Note: In a prior lawsuit among the parties, Judge Holwell struck down the initial Health Code provision that required the posting of calorie amounts by restaurants that already voluntarily made that information available. However, in that prior ruling, Judge Holwell also indicated that local government provisions could mandate that all restaurants, or a defined group of restaurants, post calorie information. The ruling today is in favor of the City’s revamped health code provision.)

“Today’s decision is a victory which will give New Yorkers the calorie information they need – where they need it – to make informed, healthier choices,” said New York City Health Commissioner Thomas R. Frieden. “We hope these restaurants will accept the judgment and become part of the solution. This regulation could prevent at least 150,000 New Yorkers from becoming obese and prevent at least 30,000 New Yorkers from developing diabetes and other health concerns over the next 5 years.”

“The New York City Health Code provision in dispute -- which makes calorie information available at the point of purchase – is a critical component in the efforts to address the obesity epidemic,” said Corporation Counsel Michael A. Cardozo of the New York City Law Department, which litigated the case on behalf of the Health Department. “We are very pleased that Judge Holwell concluded that this provision is not pre-empted by federal regulations, and that it does not violate the First Amendment. We are confident that Judge Holwell’s ruling will be upheld if it is appealed.”

The Health Code provision advances a compelling public interest in addressing obesity, which has reached epidemic proportions. That is effectively furthered by having restaurants provide – in a meaningful manner – important calorie information. Judge Holwell rejected the Restaurant Association’s

argument that sought a “declaratory judgment” that the Health Code provision was pre-empted by federal Food and Drug Administration regulations. Judge Holwell also rejected the Restaurant Association’s argument that it was entitled to a preliminary injunction on its claim that Health Code 81.50 violates the First Amendment rights of those restaurants that are required to post this calorie information. Judge Holwell’s ruling permits the Department of Health and Mental Hygiene to begin enforcing Health Code 81.50 on Tues., April 22, 2008. However, to permit an orderly transition, the Department will not seek monetary fines for violations of Health Code 81.50 until Wed., June 4, 2008.

“...The Court concludes that regulation 81.50 is not pre-empted by NLEA [Nutrition Labeling and Education Act of 1990] because that statute explicitly leaves to state and local governments the power to impose mandatory nutrition labeling by restaurants. The Court also finds that the required disclosure of caloric information is reasonably related to the government’s interest in providing consumers with accurate nutritional information and therefore does not unduly infringe on the First Amendment rights of NYSRA [New York State Restaurant Association] members,” said Judge Holwell in his ruling.

Senior Counsel Mark Muschenheim of the New York City Law Department’s Administrative Law Division led the legal team, with significant assistance from Fay Ng of the Appeals Division and General Counsel Thomas Merrill of the Health Department. Ad Law’s Gabriel Taussig, Robin Binder and Jacqueline Hui also worked on the case.

“The Court’s ruling advances a significant public health initiative not only in New York City but in numerous other localities that have adopted, or are considering, provisions similar to Health Code 81.50,” noted Muschenheim.

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