NEW YORK CITY LAW DEPARTMENT
OFFICE OF THE CORPORATION COUNSEL

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Press Release

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FEDERAL APPEALS COURT UPHOLDS NEW YORK CITY'S LANDMARK HEALTH CODE PROVISION REQUIRING CERTAIN CHAIN RESTAURANTS TO POST CALORIE INFORMATION ON MENUS AND MENU BOARDS

RULING MEANS THAT CONSUMERS WILL HAVE MORE INFORMATION FOR MAKING HEALTHIER EATING CHOICES; GROUNDBREAKING PROVISION IS THE FIRST TO BE IMPLEMENTED IN THE UNITED STATES, WITH OTHER CITIES NOW FOLLOWING SUIT

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New York, Feb. 17, 2009 – The U.S. Court of Appeals for the Second Circuit issued a 35-page decision in favor of New York City in the "calorie case" today, a ruling that will empower consumers to have more nutritional information for making healthier eating selections by requiring certain chain restaurants to post calorie information on menus or menu boards.

New York City's menu labeling provision is the first to be implemented in the United States, and the City is at the forefront of efforts to encourage healthier living. Other localities have followed suit and have recently passed legislation requiring restaurants to disclose nutrition information.

The New York State Restaurant Association (NYSRA), the industry's trade group, brought its legal suit against New York City challenging a provision of the City's Health Code (Section 81.50) that requires certain restaurants to post on menus and menu boards the calorie values of standardized items. Health Code 81.50 states that this information is to be made readily available to consumers if the restaurant is one of at least 15 establishments doing business nationally.

"This is good news for everyone," said Dr. Thomas R. Frieden, New York City Health Commissioner. "Nearly all chain restaurants are now complying with the law. Consumers are learning more about the food before they order, and the market for healthier alternatives is growing. We applaud the court for its decision, and we thank the restaurant industry for living by the rules. New Yorkers will be healthier for it."

"Health Code 81.50 – which requires posting of calorie information at the point of purchase – is a critical component in the City's 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 the federal Appeals Court concluded that this provision is not pre-empted by federal regulations, and that it does not violate the First Amendment."

However, the federal Appeals Court today rejected the Restaurant Association's argument that Health Code 81.50 was pre-empted by federal Food and Drug Administration regulations. The Court also rejected the Restaurant Association's argument that Health Code 81.50 violates the First Amendment rights of its member restaurants by requiring them to post the information when they would rather not "speak."

Rejecting NYSRA's preemption argument, the Second Circuit stated, "It is our view ... that Congress intended to exempt restaurant food from the [federal NLEA] pre-emption sections. In requiring chain restaurants to post calorie information on their menus, New York City merely stepped into a sphere that Congress intentionally left open for state and local governments."

And rejecting NYSRA's First Amendment argument, the Second Circuit stated, "... the First Amendment is not violated, where as here, the law in question mandates a simple factual disclosure of caloric information and is reasonably related to New York City's goal of combating obesity."

Case History

This case has a long and complex history. The matter began in 2007 when the New York City Board of Health adopted a new provision of the Health Code that required the posting of calorie amounts by restaurants that had already voluntarily made nutritional information available. In June 2007, NYSRA brought a lawsuit challenging that requirement. It claimed that existing federal law regarding voluntary food labeling by restaurants foreclosed the City's ability to establish its own requirements in that area. On Sept. 11, 2007, U.S. District Court Judge Richard J. Holwell agreed with NYSRA and struck down the provision.

However, Judge Holwell indicated that local governments *could* mandate that all restaurants, or a defined group of restaurants, post calorie information. So the City revised its provision.

The new calorie disclosure requirement, Section 81.50, was to go into effect on March 31, 2008, but the Restaurant Association sued again and raised the same arguments. However, this time, on April 16, 2008, the U.S. District Court – the lower trial court – upheld New York City's rewritten code. It found that federal law did not foreclose the City from adopting the new mandatory posting requirements. It also rejected the Restaurant Association's request for a "preliminary injunction" (a legal move that would have frozen enforcement of the health regulation) based upon its argument that the posting provision violated the First Amendment rights of restaurant owners.

The following then occurred:

- The Restaurant Association appealed to the midlevel appellate court, the Second Circuit Court of Appeals.
- On April 29, 2008, the Second Circuit denied the Restaurant Association's application to "stay" or temporarily freeze enforcement of Health Code Section 81.50l.
- The City agreed, however, to a grace period until July 18, 2008, during which it would not seek fines in order to give restaurants a chance to comply with posting requirements.
- Thereafter, the Second Circuit denied the plaintiff's application to have the "no-penalty" grace period extended, and enforcement began on July 19, 2008.

Can You Summarize Exactly What Happened Today?

The Restaurant Association had been seeking two things from the midlevel federal appeals court, the Second Circuit Court of Appeals:

- It asked the Court to issue a "preliminary injunction" barring the implementation of the posting requirement while the Court considered its argument that the new law violated the First Amendment rights of restaurant owners. The Court refused that request after finding that the Association was not likely to prevail on that claim.

- It also asked the Court to hold that existing federal law prevented the City from adopting its own calorie posting requirement.

Today, the Second Circuit's decision affirmed that federal law does not prevent the City from adopting its calorie posting requirement and that a preliminary injunction should not be issued because the Association is not likely to win its argument that the calorie posting requirement violates the First Amendment rights of restaurant owners.

And Is the Case Over?

The City is confident that as a result of today's decision, the Association's remaining First Amendment claim will ultimately be dismissed. At this juncture, the plaintiff can ask the three-judge panel that heard the appeal to reconsider its decision, or ask all of the judges from the U.S. Court of Appeals for the Second Circuit to hear the case (known as "*rehearing en banc*"). Additionally, it can ask the U.S. Supreme Court in Washington, D.C., to hear the case (known as a "*certiorari petition*"). Unless the federal Appeals Court or the Supreme Court grants the plaintiff a stay of enforcement, none of these options will affect the implementation and enforcement of section 81.50. So the ruling would stand.

Why Should Restaurants Post Calories?

Health Code 81.50 advances a compelling public interest in addressing obesity rates, which have reached unprecedented levels. That is effectively furthered by having restaurants provide – in a meaningful manner – important calorie information.

Research shows that consumers consistently underestimate the caloric impact of prepared foods. When calorie information is posted on websites and tray liners, it does little to raise awareness (surveys suggest that only 3 percent of patrons even notice it). Consumers are more likely to read calorie information that is displayed at the point of purchase. And recent evidence suggests that those who see it are less likely to overeat.

The City has been inspecting restaurants for compliance with Section 81.50 since May 2008 and started issuing notice of violations and seeking fines from July 19, 2008, onward. The fines start at $200 for a first violation to $2,000, according to the New York City Department of Health and Mental Hygiene.

Legal Team on the Calorie Case

Senior Counsel Fay Ng of the Appeals Division and Senior Counsel Mark Muschenheim of the Administrative Law Division, New York City Law Department, have been working on this case, with close input from General Counsel Thomas Merrill of the Health Department. Ad Law's Gabriel Taussig, Robin Binder and Jacqueline Hui, and Appeals' Len Koerner and Pamela Dolgow also have worked on the case.

"The Court's decision means that this important public health initiative will continue here in New York City, as well as encourage other municipalities to adopt similar disclosure requirements," said Mark Muschenheim, who prevailed in the lower court after the regulation was rewritten.

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