

By: Miller

H.C.R. No. 163

CONCURRENT RESOLUTION

1           WHEREAS, Town Talk Foods, Inc., and Thomas E. Potthoff allege  
2 that:

3           (1) in August 2001, an outbreak of botulism occurred  
4 in North Texas, and an investigation of the botulism outbreak,  
5 including containers of two brands of frozen chili purchased at  
6 Town Talk Foods, Inc., was conducted by the Texas Department of  
7 Health;

8           (2) the Texas Department of Health knew very early in  
9 its investigation that the focus of the outbreak was on only one  
10 instead of two brands of frozen chili and not Town Talk Foods, Inc.,  
11 or Thomas E. Potthoff;

12           (3) on September 4, 2001, the Texas Department of  
13 Health issued an emergency order "prohibit[ing Town Talk Foods,  
14 Inc.,] from operating as a food salvage establishment," and rather  
15 than merely issuing an emergency order limited to "the sale or  
16 distribution of distressed foods" as provided by the Texas Health  
17 and Safety Code, the Texas Department of Health exceeded its  
18 authority by ordering Town Talk Foods, Inc.'s entire facility to be  
19 closed and by ordering that Town Talk Foods, Inc., and Thomas E.  
20 Potthoff be prohibited from selling any merchandise whatsoever,  
21 including all salvaged food, other food items, and all nonfood  
22 merchandise commonly sold at Town Talk Foods, Inc., as set forth in  
23 the emergency order;

24           (4) Town Talk Foods, Inc., remained closed under the

1 excessive emergency order for more than two weeks before it was  
2 allowed to reopen;

3 (5) when the Texas Department of Health allowed Town  
4 Talk Foods, Inc., to reopen, it prohibited Town Talk Foods, Inc.,  
5 and Thomas E. Potthoff from selling any perishable products;

6 (6) more than two months passed between the time the  
7 Texas Department of Health originally closed Town Talk Foods, Inc.,  
8 and the time it was allowed to fully reopen to sell all products;

9 (7) during the investigation, Texas Department of  
10 Health employees told the media, "We don't know how or where that  
11 particular bucket of chili became contaminated. There is also a  
12 concern because it appeared the frozen chili at Town Talk may have  
13 been thawed out and then refrozen";

14 (8) this statement was made despite the fact that the  
15 Texas Department of Health knew the frozen chili had been purchased  
16 from Town Talk Foods, Inc., and that there was no indication that it  
17 had thawed while in Town Talk Foods, Inc.'s, possession;

18 (9) Texas Department of Health employees made  
19 additional statements to the media, stating, "It's important that  
20 people know not to eat anything from that store, especially the  
21 chili," and in a newspaper article, Texas Department of Health  
22 employees were quoted as saying that "[t]he only common link is the  
23 store. It comes back to Town Talk";

24 (10) in addition to press releases and media  
25 statements or stories, the Texas Department of Health made other  
26 similar communications effectively labeling Town Talk Foods, Inc.,  
27 as the botulism store;

1           (11) the above false and defamatory statements, and  
2 others, continued even though the Texas Department of Health had no  
3 evidence that Town Talk Foods, Inc., or Thomas E. Potthoff caused  
4 the botulism, and even though the Texas Department of Health had  
5 reason to believe that other persons and entities caused or  
6 contributed to the botulism;

7           (12) the Texas Department of Health has not tempered  
8 or retracted its press releases or media statements to correctly  
9 state the facts, thus leaving the public with the perception that  
10 Town Talk Foods, Inc., is the botulism store;

11           (13) in addition to the statements to the media and the  
12 press releases, on September 11, 2001, the Texas Department of  
13 Health promised Town Talk Foods, Inc., and Thomas E. Potthoff that  
14 if all perishable food items at Town Talk Foods, Inc., were thrown  
15 away, Town Talk Foods, Inc., would be allowed to fully reopen in two  
16 days, and Town Talk Foods, Inc., and Thomas E. Potthoff agreed;

17           (14) after Town Talk Foods, Inc., and Thomas E.  
18 Potthoff complied with the terms of the agreement and threw away  
19 eight 30-cubic-yard containers or truckloads of frozen and  
20 refrigerated foods in a local landfill, the Texas Department of  
21 Health reneged on its promise and told Thomas E. Potthoff that Town  
22 Talk Foods, Inc., would not be allowed to reopen;

23           (15) the Texas Department of Health breached its  
24 agreement with Town Talk Foods, Inc., and Thomas E. Potthoff when it  
25 failed to allow Town Talk Foods, Inc., to reopen after all of the  
26 frozen and refrigerated foods were destroyed;

27           (16) shortly thereafter, the State of Texas filed suit

1 against Town Talk Foods, Inc., and Thomas E. Potthoff, seeking  
2 civil fines and penalties and temporary and permanent injunctive  
3 relief for alleged violations of the Texas Health and Safety Code,  
4 the Texas Administrative Code, and the Texas Deceptive Trade  
5 Practices-Consumer Protection Act;

6 (17) in response, Town Talk Foods, Inc., and Thomas E.  
7 Potthoff filed a counterclaim and third-party claim against the  
8 State of Texas and four Texas Department of Health employees for  
9 defamation and business disparagement;

10 (18) the Texas Department of Health's acts were  
11 arbitrary and capricious acts without justification under the laws  
12 of this state, the Texas Constitution, and the United States  
13 Constitution, and these arbitrary and capricious acts deprived Town  
14 Talk Foods, Inc., and Thomas E. Potthoff of their constitutionally  
15 protected property rights under the Texas Constitution and the  
16 United States Constitution;

17 (19) in addition, as a result of the Texas Department  
18 of Health's acts, Town Talk Foods, Inc., and Thomas E. Potthoff's  
19 property has been unconstitutionally taken without just  
20 compensation;

21 (20) Town Talk Foods, Inc., and Thomas E. Potthoff  
22 have suffered damages as a result of the actions of the Texas  
23 Department of Health; and

24 (21) Town Talk Foods, Inc., and Thomas E. Potthoff are  
25 entitled to recover any attorney's fees incurred in connection with  
26 this matter by Town Talk Foods, Inc., and Thomas E. Potthoff; now,  
27 therefore, be it

1           RESOLVED by the Legislature of the State of Texas, That Town  
2 Talk Foods, Inc., and Thomas E. Potthoff are granted permission to  
3 sue the State of Texas and the Texas Department of Health for any  
4 and all causes of action, including breach of contract, claims for  
5 relief under the Uniform Declaratory Judgments Act (Chapter 37,  
6 Civil Practice and Remedies Code), and claims for relief under the  
7 Administrative Procedure Act (Chapter 2001, Government Code), that  
8 relate to or arise from the facts and circumstances described in  
9 this resolution, subject to Chapter 107, Civil Practice and  
10 Remedies Code; and, be it further

11           RESOLVED, That the suit authorized by this resolution shall  
12 be brought in Tarrant County; and, be it further

13           RESOLVED, That the total of all damages awarded in the suit  
14 authorized by this resolution, including any court costs and  
15 prejudgment interest, but not including attorney's fees incurred by  
16 Town Talk Foods, Inc., and Thomas E. Potthoff, may not exceed \$3  
17 million; and, be it further

18           RESOLVED, That Town Talk Foods, Inc., and Thomas E. Potthoff  
19 may not plead an amount in excess of \$3 million in a suit authorized  
20 by this resolution, and that this amount, plus attorney's fees is  
21 the total amount that may be recovered with respect to the  
22 occurrence that is the subject of this resolution in all actions  
23 brought with respect to that occurrence; and, be it further

24           RESOLVED, That the commissioner of public health of the Texas  
25 Department of Health be served process as provided by Section  
26 107.002(a)(3), Civil Practice and Remedies Code.