

By: Brimer

S.C.R. No. 54

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.