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COURT REJECTS ACTIVISTS' ATTEMPT TO JUDICIALLY MANAGE RESTAURANT'S MENU

by
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Recently, a federal district court turned away a special interest group's effort to enlist the judiciary in its crusade to dictate what Americans eat. In *Hoyte v. Yum! Brands, Inc.*, 2007 WL 1302590 D.D.C., United States District Judge James Robertson dismissed a case brought against YUM! Brands, claiming that its subsidiary, restaurant chain KFC, failed to disclose the presence of trans fat in its food and made misleading statements to the public concerning its content. Ironically, the plaintiff's lawsuit was backed by the Center for Science in the Public Interest (CSPI), an organization that once produced material arguing that trans fats were healthier than other fats. See Elaine Blume, *The Truth About Trans Fat: Hydrogenated Oils Aren't Guilty As Charged*, Nutrition Action Healthletter, Mar., 1988.

The plaintiff presented three claims: 1) KFC committed a breach of both the statutory and common law implied warranty of merchantability; 2) KFC violated the District of Columbia Consumer Protection Procedures Act (DCPPA); and 3) KFC negligently makes material misrepresentations about the quality of its food. While Judge Robertson noted that the plaintiff's claim should be automatically dismissed because of a failure to state an injury, the judge proceeded to analyze the other weaknesses in the plaintiff's case.

First, Dr. Hoyte argued that trans fat was a substance that consumers would not reasonably expect to find in the food served at KFC. Second, the plaintiff claimed that the "material fact" needed to satisfy the DCPPA was the type of oils that KFC used and the fact that KFC failed to disclose this information to consumers. In effect, the plaintiff argued that by its silence, KFC misled its consumers into believing that its food did not contain trans fat. Judge Robertson disagreed with both of these claims noting the plaintiff's brief that said that consumers were becoming "increasingly aware" of trans fat and commenting that "If consumers are increasingly aware of trans fat, where do they expect to find it if not in fast food restaurants?" *Hoyte v. Yum! Brands, Inc.* 2007 WL 1302590, *3 (D.D.C.) (D.D.C. 2007).

Finally, the plaintiff stated that KFC misrepresented its food by stating that the restaurant had the "best food" and assuring customers that it could be eaten as part of a healthy lifestyle. *Id.* at 4. Judge Robertson disagreed with the first part of the claim stating that "KFC's claims that its restaurants serve the "best food" is a non-measurable, "bald statement of superiority" that is "non-actionable puffery." *Id.* Next, Judge Robertson did away with the second part of the claim by explaining that "There is nothing in the statement referring specifically to the KFC items prepared with trans fats, and nothing suggesting how frequently one should eat KFC in order to incorporate it into a healthy lifestyle." *Id.*

CSPI, entirely undeterred by Judge Robertson's emphatic opinion, has now filed an identical lawsuit against Burger King, this time in District of Columbia Superior Court. *Center for Science in the Public Interest v. Burger King Corp.*, Civ. No. 0003363-07 (May 16, 2007). The Superior Court should follow the federal district court's ruling and swiftly dismiss this suit. Activists like CSPI have succeeded in having their previously favored cooking substance banned from restaurants in such places as New York City, Philadelphia, and Montgomery County, Maryland. Regardless of whether one believes this is good public policy, such decisions are properly made by elected officials, not unelected judges.

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