The Quiche Brief

Ralph K. Winter

Editor's Note: The following brief of the Federal Quiche Commission in FQC *v.* Left Bank Pizzeria *was provided to* Regulation *by a distinguished federal judge who may or may not hear the case.*

THIS CASE INVOLVES a petition for enforcement brought by the Federal Quiche Commission, an independent regulatory agency in the Department of Agriculture. The Commission seeks to enforce an order against The Left Bank Pizzeria of New Haven, Connecticut, requiring the respondent establishment to conform to the Commission's Uniform Quiche Content, Shape and Labelling Requirements as set out in the Commission's regulations found at 3,410 C.F.R. § 1901 (A)(2)(a).

Drawing by Patrick McDonnell for Regulation

We begin with a first principle of administrative law. The Commission's rulings are entitled to be shown the greatest deference by reviewing courts. That is the import of an unbroken line of 12 Supreme Court decisions, the most recent being *Federal Quiche Commission* v. *Fred's Fine French Fast Foods*, 913 U.S. 595 (1987). Some have argued that the language in these decisions commanding deference by reviewing courts must be viewed with caution in light of the fact that the Supreme Court reversed the Commission in each of those 12 decisions. The Commission believes, however, that those cases, considered in context, are to be regarded as exceptions that prove the rule.

In order to address the principal issue of law raised by this petition, we need sketch out the facts only briefly. This case began when a confidential informant of the Commission entered respondent's place of business and purchased a pie-shaped, hot foodstuff that had a crust of less than O.13-inch thickness and a composition of in excess of 20 percent cheese. Since the respondent did not have on file with the Commission a timely Form 13(Q) applying for a special exemption under 6,714 C.F.R. § 2702 (B)(7)(Y), this single purchase provided probable cause to believe that the respondent was selling unregistered quiche.

Respondent argues strenuously that its product is not subject to the Commission's jurisdiction. That argument is unavailing. It is true that the National Quiche Act of 1975 does not define quiche. Nevertheless, the respondent's product, being circular and capable of holding a variety of fillings, clearly falls within the Commission's discretion-

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ary jurisdiction as established in the case of *Mother's Apple Pie with Cheddar*, 12 FQC 357 (1980).

The Commission would be less than candid if it did not acknowledge that this Court reversed *Mother's Apple Pie*. However, the Commission has expressly declined to follow the rule of this Circuit in the case of *Lindy's Cheesecake*, 14 FQC 204 (1981).

Respondent urges upon this Court speculative hypotheticals that merely underline the weakness of its challenge to Commission authority. It is true that a pepperoni and anchovy quiche may be unusual. Nevertheless, the Commission's regulations do not expressly exclude this possibility. Therefore, it exists. The Commission has ruled on many occasions, for example in the case of *Harry's Frisbees*, 11 FQC 1 (1979), that that which is not excluded by its regulations is included. And, of course, it is hornbook law that an agency's interpretation of its own regulations and interpretive guidelines is entitled to be given great weight by reviewing courts. Respondent goes to great lengths to argue that the Commission's regulations make no sense. Assuming, *arguendo*, that this is the case, it is well established that the greatest deference must be given to an agency's interpretation of its regulations even when those regulations are unintelligible. Indeed, the greater the unintelligibility, the greater the deference which must be accorded the agency's interpretation. Any other standard of review would have the absurd result of denying full scope to agency expertise in precisely those cases where it is most required, and could lead to *lacunae* in program implementation certain to undermine public confidence in the integrity of the regulatory scheme.

Nor is it arbitrary and capricious to extend the Commission's regulatory mission to a pizzeria. The test of whether an agency has acted arbitrarily or capriciously is well established. So long as the agency writes down its policy and applies the policy equally to everybody, it not acting arbitrarily or capriciously. This rule applies with the greatest force in the present case. The Commission has been charged by the Congress with the responsibility to protect consumers from public offerings of unregistered quiche. This mandate cannot be effectively carried out unless evasions of the Commission's regulations, such as those utilized by respondent, are prohibited. If those who make pizza are allowed to sell it without Commission approval simply by utilizing the device of calling it by its name, a vast loophole will have been breached in the carefully crafted congressional scheme through which substance will triumph over form.

We now turn to the facts in more detail. Representatives of the Commission approached respondent's owner and informed him of the prior purchase. As required by the statute, the Commission sought to settle the dispute through conciliation. However, respondent refused to consider the Commission's Safe Harbor offer by eliminating the crust of his product and ceasing to use cheese. *See*, 3,410 C.F.R. § 1901 (A)(2)(F).

On subsequent visits, undercover agents made other purchases of foodstuffs from respondent that were determined to fall within the Commission's regulations. Customers were also observed consuming soft drinks or beer while eating the respondent's products. While this is not made part of the formal charges against respondent, we do note that Informal Commission Opinion 95 strongly recommends a sparkling mineral water or a nice Beaujolais nouveau. Moreover, in the course of the investigation it was discovered that the decor of the establishment was not in compliance with the Commission's new Brick and Fern policies, as set out in the Commission Letter Ruling No. 86-47. Nor was its juke box appropriate within the Commission's Recorded Mood Music policies as detailed in Letter Ruling No. 86-49.

The Commission therefore correctly adopted the Administrative Law Judge's finding that respondent had engaged in a pattern and practice of selling unregistered quiche, as defined in the Commission's decision in the case of *International House of Pancakes*, 9 FQC 613 (1979). This finding was supported by substantial evidence viewing the record as a whole, not withstanding the fact that the ALJ's findings were inconsistent with each other. It is of course well established that the mere fact that an ALJ's findings are inconsistent is not grounds for denying enforcement so long as *each* finding is supported by substantial evidence. As the Commission aptly put it in the case of *Peppermint Patties*, 15 FQC 571 (1982), "The inconsistencies speak for themselves."

We contend, therefore, that the order of the Commission requiring respondent to change its name to The Left Bank Tomato Quicherie be enforced in its entirety and that the deportation of respondent's chief executive officer and chef occur forthwith. ■

New Light on Punitive Damages

William M. Landes and Richard A. Posner

THERE IS MUCH TALK these days about the need to reform the tort system. One frequently urged reform would eliminate or curtail punitive-damage awards, particularly in products liability cases. We have no desire to join the debate over whether this or any other tort reform is feasible or desirable or, if so, whether the mechanism of reform should be state or federal legislation or judicial modification of judge-made doctrines. We do, however, have some interesting data that may be relevant to the debate. Collected in the course of writing our forthcoming book, *The Economic Structure of Tort Law,* these data concern punitive-damage awards in recent reported cases, especially but not exclusively products liability cases, in both state and federal courts. The data suggest—though they certainly do not show conclusively—that concern with the incidence of punitive-damage awards may be exaggerated. Other than in cases of intentional wrongdoing, these awards appear to be rare.

Punitive Damages in Tort Cases

The torts system allows victims of negligence and other civil wrongs to sue the alleged injurer for damages. Injurers' damage payments are usually limited to the losses suffered by victims—medical expenses, lost income, and compensation for "pain and suffering." In some cases, however, injurers may be assessed an additional amount called punitive damages. The "black-letter law" of punitive damages is that they are awarded "where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime," or where it indicates "such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton," or "reckless," which means "proceeding with knowledge that the harm is substantially certain to occur." (These quotations are from the current edition of the leading torts treatise, *Prosser and Keeton on the Law of Torts.*)

In general, punitive damages are appropriate in these circumstances for the same reasons punishment is appropriate for criminal offenses. Intentional harms, such as misappropriation of property and deliberate injuring, are likely to be inflicted for purposes of obtaining some specific gain that could be obtained through a voluntary market transaction; also, because intentional harms are engaged in knowingly, their perpetrators may try to conceal them. Damage awards equal to the victim's damages provide inadequate deterrence against such deliberate, concealed harms, since the wrongdoer's expected damage payment is frequently less than his immediate gain. The current debate over punitive damages does not involve intentional torts. It involves products liability and other accident cases where liability is based on negligence or strict liability—where harm has been done, but not deliberately.

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