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**CRIMINAL LIABILITY**

Two Venable LLP attorneys discuss the recent appellate ruling upholding the convictions and sentences of executives stemming from a widespread salmonella outbreak that led to nine deaths. The authors warn that those in the food industry—and their outside legal and compliance advisors—should study the case as a model of the significant risk a company and its executives run by not being serious about food safety.

## The 11th Circuit Upholds Longest Sentences Ever Imposed In Food Safety Prosecution—What Can We Learn from the Case?



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An extraordinary food safety calamity demanded an extraordinary response. That is clearly how the Department of Justice viewed a salmonella outbreak caused by the Peanut Corp. of America (PCA). The DOJ's investigation and prosecution of the individuals deemed responsible for the outbreak, which sickened an estimated 22,000 people and killed nine, broke new ground. Those in the food industry—and their outside legal and compliance advisors—would be well served to study the case as a model of the significant risk a company and its executives run by not being serious about food safety.

The recently issued opinion from the U.S. Court of Appeals for the Eleventh Circuit, which upheld the convictions and sentences of three PCA officials, presents an opportunity to reexamine the import of the PCA case. The unprecedented outbreak that gave rise to the case prompted the government to entirely revamp the nation's system of food regulation. The evidence underlying the prosecution was shocking. Scores of emails revealed corporate officials so callous in their disregard of food safety as to give whole new meaning to the clichéd phrase that they “put profits over people.” And the sentences meted out by the court were stunning in their severity. Stewart Parnell, PCA's president, is serving 28 years in prison; his brother Michael, a food broker who worked on behalf of PCA, is serving 20.

Much of the PCA case—especially the conduct itself—is unique. But the case highlights more than a few issues that are likely to be repeated in food safety cases going forward. Three merit attention here. First, the DOJ signaled that it will use all the instruments in its tool box to investigate and prosecute food safety matters. It will not, in other words, treat these cases as mere regulatory violations. Second, the highly public nature of food-borne illness outbreaks poses a difficult challenge for prosecutors and defense attorneys. In PCA, the courts showed great confidence in jurors—and the jury system more generally—to deal with so-called extrinsic evidence. Third, and finally, too often lost in

the headlines about the Parnell brothers is the sentence imposed on Mary Wilkerson, the third defendant in the PCA trial. Convicted of telling one lie to a government inspector, Wilkerson received a five-year prison term. Her fate is a cautionary tale for any corporate official who is responsible for interfacing with government inspectors.

## The Outbreak

Public health officials noticed something amiss in early November 2008. There was a small but dispersed cluster of salmonella isolates, with an unusual DNA fingerprint, reported from 12 states. By December, the Centers for Disease Control (CDC) identified a second cluster with the same unusual fingerprint, which these officials had never seen before. Thus began the public health investigation.

The CDC quickly identified peanut butter as the likely source of the contamination. By January 2009, the CDC and state officials confirmed that some of the contamination came from a particular brand of peanut butter. They then traced the source of that particular peanut butter to the PCA.

As a check, public health officials conducted phone interviews of ill consumers. They soon confirmed that these consumers were similarly sickened by peanut butter, though from different brands of products. Each of these products could be traced to PCA.

By the end of January 2009, PCA recalled all of the products it had produced in its Blakely, Ga., plant. That recall grew to more than 3,900 different peanut butter-containing products. It was one of the largest food recalls in U.S. history, and resulted in an estimated \$1 billion loss in peanut sales generally.

The outbreak itself was devastating. The CDC tallied 714 reports of salmonella infection from 46 states. Of those 714, 166 were hospitalized and nine died. Generally recognized public health statistical methods suggest that 22,000 people were stricken, as many people do not report salmonella illness.

The outbreak is generally recognized as one of the worst cases of food-borne illness ever recorded.

## Legislative Action

It came as no surprise, then, that Congress and the administration took notice. In the midst of the outbreak, then President Obama lamented that the government should be able keep kids safe when they eat peanut butter; after all, it's what his daughter ate for lunch three times a week. Congress, too, responded. A series of hearings about food safety, some of them featuring Stewart Parnell invoking his Fifth Amendment right to refuse to answer questions, followed.

It all led to the enactment, in early 2011, of the Food Safety Modernization Act. FSMA, as the statute is now commonly known, was the most comprehensive reshaping of federal oversight of the food industry since the 1938 passage of the Federal Food, Drug, and Cosmetic Act.

## Criminal Charges

After nearly four years of investigation, on Feb. 15, 2013, the DOJ announced criminal charges against

five PCA officials. Charged in the indictment were Stewart Parnell, PCA's owner and president; Michael Parnell, Stewart's brother and the owner of a food brokerage business that serviced PCA; Samuel Lightsey, operations manager at a PCA plant; and Mary Wilkerson, quality assurance manager at a PCA plant. Daniel Kilgore, operations manager at a PCA plant, was charged separately by information and pleaded guilty the same day.

The charging documents themselves sent unmistakable signals that the government was viewing this case in an unusual light. This was no mere regulatory violation that the government was prosecuting. Of course, the indictment described the failure of PCA to follow food safety practices. It noted leaky roofs, improperly validated peanut roasters, and rodents. (Indictment at ¶ 37, p. 19). But it went much further—this was a fraud case. At its core, the prosecution was about the ways in which PCA lied to its commercial customers. Those lies centered on Certificates of Analysis, or COAs, that PCA provided to its commercial customers. These COAs purported to verify that PCA had tested the peanut products and the tests were negative for salmonella or other contaminants. (Indictment at ¶ 26, p. 12). The government alleged that, in providing these COAs to its customers, PCA concealed the presence of pathogens in its products by falsifying COAs. By doing so, it sold millions of dollars of product to its unsuspecting commercial customers.

Despite the advances in food safety law brought about by FSMA, the statute did not govern the prosecution. The government, then, was applying garden variety commercial fraud concepts to a food safety case. As obvious as that approach sounds now, in hindsight it was the key innovation in the PCA case.

## The Trial

The trial lasted seven weeks. Much of that time was spent on the government's painstaking presentation of countless email exchanges among the defendants. These business records were the bulk of the prosecution's case. They described PCA's business practices in detail, demonstrating that certain defendants falsified COAs and other documents. It was these emails, the defendants' own words, that were most damning to the defense.

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The defendants' emails painted an appalling picture of corporate greed run amok. "[S]hit, just ship it. I cannot afford to loose [sic] another customer[.]" Stewart Parnell wrote in an email in response to a notification that the testing on a particular lot of product was going to be delayed. (Indictment at ¶ 16, p. 28). The emails did not just demonstrate ambivalence about the outcomes of tests, but actual knowledge that shipments had been exposed to "dust and rat crap." (Indictment at ¶ 19, p. 29). Parnell's response was an instruction to "Clean em [sic] all up and ship them. . ." (*Id.*). Moreover, the jury saw emails in which Parnell blatantly misled customers, falsely saying in response to positive salmonella testing done independently by a customer, "*I am dumbfounded by what you have found. It is the first time in my over 26 years in the peanut business that I have ever seen any instance of this. . .*" (emphasis in original) (Indictment at ¶ 11, p. 26). Furthermore, the emails amply demonstrated the complicity of the other PCA executives in the crimes, who knowingly altered documents (Indictment at ¶ 30, p. 16), repackaged contaminated goods (Indictment at ¶ 13, p. 27), and ignored the abhorrent conditions at the plants (Indictment at ¶ 19, p. 29).

Of course, the government presented evidence about salmonella and its effects, but this evidence was not at the heart of the government's case. An expert from CDC, for instance, testified that salmonella can have devastating effects on its victims, that hundreds of cases had been reported that could be traced to PCA product, and that the widespread effects of the outbreak were likely far greater than even the reported figure. One such victim was put on the stand, an elderly woman who testified in graphic detail of the symptoms she endured, including bloody bowel movements and vomiting that required multiple hospitalizations.

Importantly, however, the government did not introduce evidence of the 9 deaths that occurred as a result of the outbreak. It was a tactical risk—setting aside powerful, compelling evidence is no easy decision for any trial attorney—but one that fit well within the government's overall strategy. Again, this was a fraud case. The prosecutors seemed to recognize that the likely evidentiary fights over scientific causation, relevance, and undue prejudice could distract the jury from the focus on fraud and might unnecessarily introduce issues for appeal.

## The Result

After 2 days of deliberation, the jury returned a mixed verdict. Stewart Parnell was found guilty on 72 counts of fraud, conspiracy, and the introduction of adulterated food into interstate commerce for his actions as CEO. Michael Parnell was found guilty on multiple counts related to the falsification of COAs, but not of actually shipping the contaminated product. And Mary Wilkerson was found guilty of only a single count of obstruction of justice for her role in responding to the FDA's investigation. Samuel Lightsey had separately pleaded guilty to 7 of the counts against him, including fraud, before the trial.

During sentencing, the government focused its argument for stiff prison sentences on the scale of the fraud loss. It introduced evidence gathered from former PCA customers regarding their monetary damages. Those damages included the costs to these food companies

arising from the recall itself. Again, the government treated the prosecution as it would treat any fraud case. The defendants were convicted of selling their customers a defective product and lying about it. That the product was food rather than widgets was of little import; the sentencing calculation was the same. And, under that calculation, the sentencing guidelines laid out a 22-level sentencing enhancement.

Although the weight of the monetary loss was compelling, arguably the greatest challenge for the defense was not the validity of the financial losses, but the fact that 9 people were now dead. Operating within the relaxed rules of evidence operable during sentencing, the government went all in on victim testimony. The prosecution introduced evidence of the 9 deaths caused by the outbreak, allowing the families of the deceased to put into words the magnitude of the losses they had suffered.

The government's strategy paid off. It had reserved arguably the most powerful evidence in the case—certainly the most emotional—for sentencing. The government thus pivoted from a commercial fraud case to a personal injury case. And, given the fraud loss calculation, the court had great latitude to hand down a sentence as harsh as it saw fit. Stewart Parnell received the harshest sentence for a corporate executive ever involved in an adulterated food case—28 years. Michael Parnell was sentenced to 20 years in prison for his role in promulgating the shipping of tainted PCA product. Samuel Lightsey received three years in prison after entering into a plea agreement with the government. Daniel Kilgore received a six-year prison term.

As harsh as the Parnells' sentences were, it would be a mistake to overlook Wilkerson's sentence. Wilkerson was convicted solely of lying to the FDA—not for her alleged role in the fraud or shipment of adulterated food that led to the outbreak. Her conviction was based on a single answer to a single question: when asked by an FDA inspector whether she knew of positive salmonella tests at PCA, she answered that she was not aware of any. For that one false statement, she was sentenced to five years in prison.

## After the Trial

The defendants vigorously appealed their convictions and sentences on several grounds. The most challenging of those grounds—and the one we will address here—involved allegations of juror misconduct. After the trial, a juror encountered Wilkerson, and told her that she felt responsible for her conviction, explaining that the other jurors had pre-judged her and the other defendants based upon knowledge that the outbreak had killed 9 people. This was a serious allegation.

Jury misconduct based on juror taint is an issue in all high-profile criminal cases because of the prevalence of media coverage. Jurors having pre-existing knowledge of a case is, at times, an unavoidable challenge. It was a challenge that the parties in the PCA case anticipated. The defendants and the government sought to meet the challenge by excluding evidence of the 9 deaths at trial, though they were willing to accept jurors who, during *voir dire*, revealed that they were aware of the fatalities caused by the outbreak. The parties were apparently comfortable that the jurors would heed the standard warning that they were not to let their pre-existing knowledge affect their judgment of the evidence actually presented.

The allegations required the District Court to conduct thorough post-trial hearings, including individual interviews and credibility assessments of all the jurors. The District Court denied the defendants' motions. In large part, it based its decision on its conclusion that any discussion by the jury of victim deaths was a misunderstanding of the evidence actually presented. That is, any such discussion was not based on extrinsic knowledge, but on a juror's mis-hearing of testimony from the CDC about illnesses.

The 11th Circuit upheld the District Court's ruling. Interestingly, it approached the problem from a slightly different perspective. It assumed, *arguendo*, that the jury had been exposed to extrinsic evidence. Still, it found for the government. The 11th Circuit trusted that the jurors focused on the evidence presented and held that even if the deaths were discussed, it was unlikely

to have been highly prejudicial, considering the strength of the government's case.

## Conclusion

There are many lessons to be learned from the PCA case. Here, we suggest three. First, the government will be aggressive in prosecuting food safety cases. The message sent by a 28-year prison sentence is unmistakable. Second, courts maintain firm confidence in the jury system and have a deep trust that jurors will decide cases on the facts presented to them, without bias. This trust holds even in highly publicized cases about which jurors may have some background knowledge. Third, anyone interacting with government investigators, of any type, must take extreme care. A false answer to an investigator's question puts corporate employees at extreme risk.