

# The Texas Lawbook

## How the Government's Case Against Blue Bell's Ex-CEO Melted

AUGUST 17, 2022 MICHELLE CASADY

Ten members of a 12-person jury would have found the former CEO of Blue Bell not guilty of the felony fraud and conspiracy charges the government brought against him stemming from a 2015 deadly listeria outbreak linked to the company's creameries.

A mistrial was declared on Monday in the prosecution of Paul Kruse after jurors who deliberated for four days after hearing a week of testimony failed to reach consensus. An expert in food safety litigation and Kruse's defense attorney, Chris Flood of Flood & Flood, told *The Texas Lawbook* in recent interviews that prosecutorial overreach in charging Kruse was likely the cause of the mistrial.

"The government overcharged the case and didn't realize there was never any intent to defraud anyone," Flood said.

The government hasn't publicly disclosed whether it will retry the case, and the Department of Justice attorneys representing the United States did not respond to a request for comment.

"I hope they look at the split being 10 not guilty and just realize that Paul Kruse has suffered enough and Paul Kruse certainly is not a felon," Flood said.

Bill Marler of Marler Clark, who specializes in food safety litigation, told *The Texas Lawbook* that for the government to criminally prosecute someone over food safety is "exceedingly rare" but said the government's loss in this case should be viewed as an anomaly.

"I think this, candidly, is kind of a one-off because of how they charged him," he said. "It was not necessarily under the [Federal] Food, Drug and Cosmetic Act; they charged him under straight-up fraud. I'm trying to think of a prosecution in a food case that involved felony prosecution of fraud, and in 30 years I cannot think of one."

Marler said his takeaway is that the government likely could have easily secured a conviction had they charged Kruse under the misdemeanor section of the Food Drug and Cosmetic Act. That was the law used to criminally prosecute Blue Bell and in September 2020 resulted in what was at the time the largest-ever criminal penalty in a food safety case: \$17.25 million.

“That may not have put him in jail for a long time or maybe even at all, but they would have gotten a conviction,” he said. “This was a unique situation where the government decided to charge someone with a felony outside the FDCA. So, if I was a CEO or in-house counsel I wouldn’t be going ‘oh, well, we’re going to be fine.’ The lesson still is don’t poison your customers.”

Marler represented two clients involved in Blue Bell’s listeria outbreak, one who died and one who was sickened after eating the company’s ice cream, and both cases settled in 2016, he said.

Kruse was accused of covering up the outbreak and was indicted in October 2020 on one count of attempt and conspiracy to commit mail fraud and six counts of fraud by wire, radio or television. The government alleged Kruse crafted a written statement that concealed the company’s knowledge that its products tested positive for listeria and instructed his employees to distribute the statement to anyone who asked about the removal of products from shelves.

The wire fraud counts stem from the six emails sent by Blue Bell sales employees to customers who asked why the products had been removed from shelves between Feb. 19 and April 7 of 2015.

In pretrial rulings, U.S. District Judge Robert Pitman issued an order denying Kruse’s request to prevent the government from presenting evidence or argument about sanitation issues at the creameries, writing that “the allegations and evidence related to sanitation issues are admissible both as intrinsic to the alleged scheme to defraud and under Federal Rule of Evidence 404.”

“The court agrees with the government that the allegations related to sanitation are ‘inextricably intertwined’ with the alleged scheme and constitute ‘necessary preliminaries’ to the charged fraud,” he wrote. “These allegations are arguably related to the origins of defendant’s response to the 2015 outbreak and his practices with respect to providing information to customers.”

Flood — who put on no witnesses after the government rested its case — said the basic fraud theory presented to the jurors “was crazy.”

“The charged conduct, the object of the conspiracy, was to cheat Blue Bell customers out of money,” he said, explaining how the government relied on alleged false statements in the emails to customers as the basis for the charge. “They were emails to individuals who had products picked up that were not yet determined to be contaminated, but Blue Bell picked them up out of an abundance of caution.”

The government contended those communications, which did not mention listeria but cited manufacturing issues with machinery, were false.

“But the jurors realized that Blue Bell was actually being proactive with customers in that respect by picking up product that had not yet tested positive,” Flood said.

Had Kruse been convicted of fraud, which carries a maximum 20-year sentence per count, his prison time would have depended in part on the calculations of loss, which Flood said would have been an issue for the government because “nobody lost money.”

“The government’s theory is you essentially deprived this customer of the right to know. It’s you sold them good product but deprived them of the ability to make a more informed decision — deprived them of the ability to overreact,” Flood said. “Strangely enough, that’s what it is.”

That deprivation doesn’t amount to money or property under the law, Flood said, and determining the loss attributable to an “intangible right to know” would be difficult.

“If Blue Bell sold people product they knew was contaminated ... that would be intending to defraud,” Flood said. “But the government’s own witnesses said they never intended to defraud customers.”

Flood said he told the jury his client informed the Food and Drug Administration of the positive tests within five hours of learning about it, well ahead of the 24-hour requirement. Kruse worked in conjunction with the FDA and the Texas Department of State Health Services throughout the outbreak, Flood said, and both agencies had the power to tell Blue Bell it wasn’t responding appropriately and to take action.

“But each one said it’s doing fine. We have an email from a regulator saying Blue Bell is doing fine,” Flood said. “The government did not call one FDA witness who was involved in the whole process. We had one ready to testify favorably for us, but there was no need to.”

Marler said perhaps the current low public opinion of government generally had an impact on the jury’s decision. He noted that the relationship between government regulators and industry can be “complex” because of the practice that businesses should be given an opportunity to make corrections voluntarily.

“For the government, it should underscore the fact that their focus should be on public health and not bending over backwards to give them an opportunity to try and do the right thing,” Marler said. “If you were a juror you could say ‘gosh, the government didn’t think this was a big deal, why are they trying to put this guy in jail now?’”

“Maybe the jury was swayed by the fact that the government seemed to drag their feet, too,” Marler said. “That may have had some impact.”

Matthew Joseph Lash, Patrick Hearn, Anthony J. Nardoizzi, Kathryn A. Schmidt and Tara M. Shinnick prosecuted the case for the government.

Kruse is represented by Flood and John D. Cline of Law Office of John D. Cline.

The cause number is 1:20-cr-00249.

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