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BANKRUPTCY COURT SETS BAR DATE FOR PEANUT CORPORATION OF AMERICA CLAIMS

By Stephen A. Weisbrod and Jonathan M. Cohen

Early this year, following a massive recall of *Salmonella*-contaminated peanut products, Peanut Corporation of America (“PCA”) filed for bankruptcy under Chapter 7 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Western District of Virginia (the “Bankruptcy Court”). Many individuals and entities – including people suffering from *Salmonella* exposure, PCA’s unpaid business partners, and food manufacturers and distributors that incurred losses as a result of PCA’s conduct – have claims against PCA. The Bankruptcy Court has imposed a **deadline of June 15, 2009** for all individuals and entities, except government entities, to file proofs of claim against PCA. (Government units have until August 12, 2009.)

Although many PCA creditors do not know the precise amounts of their losses, and PCA’s bankruptcy estate probably will not contain sufficient assets to make substantial payments on most claims, filing proofs of claim may be prudent. In fact, as discussed below, for food companies that may look to their own insurance policies to cover their PCA-related losses, filing a proof of claim may be important to preserving potential coverage.

PCA’S ASSETS AND LIABILITIES

PCA’s liabilities are likely to exceed its assets by far. PCA’s assets include, among other things, real property, cash, stock, accounts receivable, and manufacturing equipment, as well as insurance.

The value of PCA’s insurance is contingent on the outcome of pending insurance coverage litigation. The Hartford Casualty Insurance Company has sued PCA, seeking a declaration that it owes no coverage at all to PCA under various general liability and umbrella insurance policies. On their faces, those policies have aggregate limits totaling over \$30 million. In addition, Federal Insurance Company issued directors & officers coverage to PCA

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Based in Washington, DC, with an office in Austin, Gilbert LLP is a law firm representing a wide range of clients, including corporations, partnerships, non-profit organizations and individuals in complex disputes, including high-stakes litigation, bankruptcy matters, class actions and ADRs. Best known for representing policyholder interests in insurance coverage matters, Gilbert LLP also has an active public interest practice that specializes in complex multi-plaintiff actions involving cutting-edge issues.

The content of this article is intended to provide a general guide to the subject matter and is not intended to constitute legal advice.

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with an aggregate limit of \$1 million. It is not yet clear how the proceeds from that policy will be allocated. There also may be other relevant insurance coverage.

Meanwhile, PCA's liabilities cannot be quantified yet. Many individuals have sued, or are likely to sue, PCA for personal injuries. In addition, many food companies have claims against PCA for a variety of costs, including recall expenses, lost profits, and amounts incurred in the defense, settlement, or other resolution of tort claims.

For creditors with large claims against PCA, filing a proof of claim may be cost-beneficial, even though the PCA estate may end up paying only pennies on the dollar. For example, if a company has a \$10 million claim against PCA, and PCA ends up paying five cents on the dollar, filing a proof of claim could net the creditor \$500,000. (We do not know whether PCA is likely to pay more or less than five cents on the dollar and used that figure solely for illustrative purposes.)

THE INTERPLAY BETWEEN THE PCA BANKRUPTCY CASE AND FOOD COMPANIES' OWN INSURANCE POLICIES

Many food manufacturers and distributors have insurance coverage of their own, which may cover at least some of their PCA-related losses. The most promising types of insurance for PCA-related losses is found in general liability policies and recall policies, but other types of policies also may cover certain types of PCA-related claims or losses.

Often, the types of policies potentially applicable to PCA-related claims and losses state that policyholders must preserve, and may not impair, the insurer's rights to subrogate to the policyholder's claims against potentially liable third parties. Disputes often arise about what this type of policy condition actually entails, but insurers often contend that if they are going to pay for the policyholder's loss, then the insurers are entitled to the benefit of the policyholder's claims against responsible third parties, such as PCA. Insurers might rely on these subrogation clauses to argue that a policyholder breaches a policy condition if it fails to preserve claims against PCA by failing to file a timely proof of claim. To preempt this potential argument, food manufacturers and distributors may conclude that filing a proof of claim in the PCA bankruptcy case is cost beneficial, even though their recovery out of the PCA bankruptcy estate itself may be very limited.

Gilbert LLP has considerable experience representing companies on the bankruptcy and insurance issues that arise in connection with the recalls of food and other products.