Georgia State University Law Review

Volume 27
Issue 1 *Fall 2010*

Article 4

9-1-2010

FOOD, DRUGS, AND COSMETICS Standards, Labeling, and Adulteration of Food

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Recommended Citation
(2010) "FOOD, DRUGS, AND COSMETICS Standards, Labeling, and Adulteration of Food," *Georgia State University Law Review*: Vol. 27: Iss. 1, Article 4.
Available at: http://scholarworks.gsu.edu/gsulr/vol27/iss1/4

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FOOD, DRUGS, AND COSMETICS

Standards, Labeling, and Adulteration of Food: Provide for a Short Title; Amend Section 27.1 of Article 2 of Chapter 2 of Title 26, of the Official Code of Georgia Annotated, Relating to Testing of Specimens from Food Processing Centers, so as to Provide the Commissioner of Agriculture With Certain Authority Regarding Food Safety Plans; Mandate Certain Written Safety Plans; Provide for Civil and Criminal Penalties; Provide for Review of Civil Penalties; Provide for Related Matters; Provide an Effective Date; Repeal Conflicting Laws; and for Other Purposes.

CODE SECTION:	O.C.G.A. § 26-2-27.1 (amended)
BILL NUMBER:	HB 883
ACT NUMBER:	466
GEORGIA LAWS:	2010 Ga. Laws 465
SUMMARY:	The Act requires food processors to maintain food safety plans and conduct tests on their food products before sending them into commerce and allows the Commissioner of Agriculture to define what standards the food safety plans need to comply with. The Act provides for civil and criminal penalties for violating the Act. Specifically, if the company does not file a food processing plan, the company will be exposed to a $5,000 fine. If the company intentionally fails to report a written food safety plan to the Department of Agriculture, the company will be exposed to a $7,500 fine. The Act provides for both misdemeanors and felonies. A person is guilty of a misdemeanor if they fail to report a positive test for adulterated food or if they fail to keep records of their tests in their food processing

plant. If a person knowingly introduces adulterated food into the stream of commerce, they are guilty of a felony.

EFFECTIVE DATE: May 25, 2010

History

Between November 19 and December 30, 2008, the Peanut Corporation of America (PCA) shipped three shipments of peanuts from its Blakely, Georgia facility to Westco Fruit and Nuts, Inc. (Westco/Westcott).[1] "On March 23, 2009, [the Food and Drug Administration (FDA)] formally requested Westco/Westcott to voluntarily recall all of its products containing peanuts from the PCA because such products may be contaminated with salmonella."[2] At least 691 people from forty-six different states were infected with a strain of salmonella from consuming these peanuts.[3] Nine deaths may have occurred from this salmonella outbreak.[4] Salmonella symptoms often include "fever, diarrhea, nausea, vomiting, and abdominal pain" and could cause more serious illnesses such as arterial infections.[5] However, even more troubling was that the President of the PCA, Stewart Parnell, knew that the peanuts had failed food safety tests and instructed his employees to ship the poisoned products anyway.[6]

As a result of this devastating outbreak, "senior congressional and state officials called . . . for a federal probe of possible criminal violations" at the plant where the peanuts originated.[7] The PCA disaster was especially troubling for the Georgia General Assembly when they discovered that, under Georgia law, the PCA was not required to report the status of their food processing. Specifically,

1. Press Release, U.S. Food and Drug Administration, FDA Warns Against Consuming Peanuts and Peanut Products Sold by Westco Fruit and Nuts Inc. (March 23, 2009), http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2009/ucm149549.htm.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Interview with Kathy Kuzava, President, Georgia Food Indus. Ass'n, in Atlanta, Ga. (Apr. 13, 2010) [hereinafter Kuzava Interview].

7. Elizabeth Weise & Julie Schmit, *Officials Call for Criminal Probe into Salmonella Recall*, USA TODAY, Jan. 28, 2009, *available at* http://www.usatoday.com/news/health/2009-01-27-peanut-salmonella_N.htm.

there was no requirement for food processing plants to have written food safety plans in place, or to report to the Department of Agriculture if they got a positive test for adulterated food in their products.[8] Thus, even though the President of the PCA knowingly shipped adulterated food, there was no penalty for his actions under Georgia law at the time.[9]

In response to these findings, the chairman of the Senate Agriculture and Consumer Affairs Committee, Senator John Bulloch (R-11th) introduced "Senate Bill (SB) 80, which was designed as a model for the other states in how it requires food processing plants to have written food safety plans in place to report if they get a positive test for food or agriculture."[10] SB 80 became effective on May 1, 2009.[11] Shortly after the passage of SB 80, Representative Kevin Levitas (D-82nd) was approached by a reporter asking about criminal provisions in the bill.[12] In response to this concern, Representative Levitas stated, "It seemed to me, especially in a case like we had down in Blakely where it resulted in the death and sickness of so many people, that we needed to not only make it clear in the code section what the penalties were but really to make those have some teeth into them."[13] Realizing the need for some clarity and enforcement sections, Representative Levitas began working on HB 883.

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8. Interview with Rep. Kevin Levitas (D-82nd) in Atlanta, Ga. (Apr. 1, 2010) [hereinafter Levitas Interview].

9. Stewart Parnell's knowledge was proven in several emails in which he "ordered products identified with salmonella to be shipped" and said that the tests discovering the contaminated food were costing the company "huge" money. Ricardo Alonso-Zaldivar & Brett J. Blackledge, *Stewart Parnell, Peanut Corp Owner, Refuses to Testify to Congress in Salmonella Hearing,* HUFFINGTON POST, Feb. 11, 2009, http://www.huffingtonpost.com/2009/02/11/stewart-parnell-peanut-co_n_166058.html; *see also* Kuzava Interview, *supra* note 6.

10. Levitas Interview, *supra* note 8; O.C.G.A. § 26-2-27.1 (2003) (providing for: "requirements for testing of samples or specimens of foods and ingredients of food processing plants for the presence of poisonous or deleterious substances or other contaminants . . . food safety plans . . . reports and records . . . rules and regulations; chang[ing] certain provisions relating to right of entry in food establishments and transport vehicles and examination of samples obtained . . . [and] provide for inspections."

11. State of Georgia Final Composite Status Sheet, SB 80, April 4, 2009.

12. Video Recording of House Agriculture and Consumer Affairs Committee Meeting, Feb. 3, 2010 at 47 min., 2 sec. (remarks by Rep. Levitas (D-82nd)), http://www.legis.ga.gov/legis/2009_10/house/Committees/agriculture/agArchives.htm [hereinafter House Committee Video].

13. *Id.*

Bill Tracking of HB 883

Consideration and Passage by the House

Representatives Kevin Levitas (D-82nd), Tom McCall (R-30th), Terry England (R-108th), Jay Roberts (R-154th), Jon Burns (R-157th), and Ellis Black (R-174th), respectively, sponsored HB 883.[14] The House of Representatives read the bill for the first time on January 13, 2010, and for the second time the following day.[15] Speaker of the House David Ralston (R-7th) assigned it to the House Committee on Agriculture and Consumer Affairs.[16]

The bill was designed to clarify SB 80 and provide for civil and criminal penalties for violating the statute.[17] The bill allowed the Commissioner of the Department of Agriculture to decide what the appropriate schedule for reporting is and impose civil fines for not having a written food safety plan.[18] HB 883 also laid out further penalties and contained a felony provision for knowingly violating the Act.[19] The bill was recommitted on February 9, 2010, for a technical matter as some section numbers needed to be rearranged to line up with the code sections.[20] The House Committee favorably reported the bill on February 11, 2010, and House Bill 883 was read for the third time on March 9, 2010.[21] On that same day, the House of Representative passed HB 883 by a vote of 142 to 20 without debate.[22] On April 14, 2010, after the Senate passed the bill by substitute and with amendments by a vote of 47 to 0, the House

14. *See* HB 883, as introduced, 2010 Ga. Gen. Assem; Georgia General Assembly, HB 883, Bill Tracking, http://www.legis.state.ga.us/legis/2009_10/sum/hb883.htm; Georgia General Assembly, HB 883, Bill Tracking, http://www.legis.state.ga.us/legis/2009_10/sum/hb883.htm.

15. State of Georgia Final Composite Status Sheet, HB 883, June 22, 2010.

16. *Id.*

17. *See* Levitas Interview, *supra* note 8.

18. *Id.*

19. *See* HB 883, as introduced, 2010 Ga. Gen. Assem.

20. Telephone Interview with Brett Cranfield, House Communications (Feb. 4, 2010). Mr. Cranfield stated that there was a technical issue with the bill that caused it to be recommitted; the section numbers needed to be lined up with the code sections pursuant to LC294140(f). *Id.*

21. Georgia General Assembly, HB 883, Bill Tracking, http://www.legis.state.ga.us/legis/2009_10/sum/hb883.htm.

22. Georgia House of Representatives Voting Record, HB 883 (Mar. 9, 2010). There was no debate on the Bill when it passed through the House. None of the dissenting representatives responded to phone calls or emails concerning the reasons for their dissent.

passed the bill as amended by the Senate by a vote of 142 in favor and 14 in opposition.[23]

Consideration and Passage by the Senate

On March 10, 2010, the Senate first read HB 883, and Senator President Pro Tempore Tommie Williams (R-19th) referred it to the Senate Committee on Agriculture and Consumer Affairs.[24] In committee, there was little discussion, and it was favorably reported on April 1, 2010.[25] Then on April 12, 2010, the Senate read the bill for a second time.[26] On April 14, 2010, the Senate read the bill for the third and final time.[27] Senator John Bulloch (R-11th) proposed an amendment on the Senate floor to amend the bill by replacing "plant containing" with "plant knowing" on line 82.[28] Senator Bulloch offered his remarks that HB 883 merely built upon last year's SB 80 so that penalties would be imposed on companies that "knowingly introduced adulterated foods or finished food ingredients into the food game."[29] His amendment clarified that if a food processing plant received an infected ingredient from a manufacturer, and it was the manufacturer who was responsible for the infection and knowingly shipped the product, the manufacturer is held liable—not the plant.[30]

After Senator Bulloch's remarks, the Senate President Pro Tempore Williams recognized Senator Steve Henson (D-41st) for a question. The senator expressed concerns that, by putting the word "knowingly" into the bill, the Assembly would be lessening the standard.[31] Senator Bulloch responded by stating that was not true and that HB 883 merely allowed for a criminal penalty for someone

23. Georgia Senate Voting Record, HB 883 (Apr. 14, 2010); Georgia House of Representatives Voting Record, HB 883 (Apr. 21, 2010).

24. Georgia General Assembly, HB 883, Bill Tracking, http://www.legis.state.ga.us/legis/2009_10/sum/hb883.htm; Georgia Senate Voting Record, HB 883 (Apr. 14, 2010).

25. *Id.*

26. *Id.*

27. *Id.*

28. Video Recording of Senate Proceedings, Apr. 14, 2010 at 4 min., 40 sec. (remarks by Sen. John Bullock (R-11th)), http://mediam1.gpb.org/ga/leg/2010/ga-leg-senate_041410_PM.wmv [hereinafter Senate Floor Video].

29. *Id.* at 5 min., 43 sec.; *see* O.C.G.A. § 26-2-26 (Supp. 2009).

30. Senate Floor Video, *supra* note 28, at 5 min., 43 sec.

31. *Id.* at 7 min., 21 sec.

who knowingly shipped an infected product.[32] Senator Henson asked Senator Bulloch two further questions. First, he asked for confirmation that the author of the bill, Representative Kevin Levitas (D-82nd), was in agreement on the amendment to which Senator Bulloch confirmed.[33] Second, he inquired whether the Senate Agriculture and Consumer Affairs committee had discussed the amendment and the result of any such discussion.[34] Senator Bulloch assured the senator that the author of the bill also authored the amendment and that there was a committee substitute that incorporated the amendment, which was passed unanimously by the committee.[35]

Subsequently, there were no further questions, and the President put the question of the amendment and the bill on the Senate floor.[36] The Senate approved both the amendment and the bill by a vote of 47 in favor and 0 in opposition.[37] On April 21, 2010, the House agreed to the Senate amendment or substitute.[38] Governor Sonny Perdue signed the bill into law on May 25, 2010.[39]

The Act

The Act amends Code section 26-2-27.1[40] to create penalties for violating the requirements created by the Georgia Department of Agriculture for food processors.

Section 2 states that the Commissioner of the Georgia Department of Agriculture will establish the regular testing requirements for food by food processing plants for the presence of substances that are injurious to health.[41] This section also states that the Commissioner

32. *Id.* at 7 min., 30 sec.
33. *Id.* at 8 min., 6 sec.
34. *Id.*
35. Senate Floor Video, *supra* note 28, at 8 min., 27 sec.
36. *Id.* at 8 min., 54 sec.
37. Georgia Senate Voting Record, HB 883 (Apr. 14, 2010).
38. Georgia Senate Voting Record, HB 883 (Apr. 21, 2010).
39. Georgia General Assembly, HB 883, Bill Tracking, http://www.legis.state.ga.us/legis/2009_10/sum/hb883.htm.
40. *See* O.C.G.A. § 26-2-27.1 (Supp. 2010).
41. *See id.*

will establish the requirements for a written food safety plan.[42] The Act amends Subsection (b), providing that the Commissioner will impose a civil penalty for a violation of this section.[43] The amendment provides that the civil penalties will not exceed $5,000, but if the food processing plant knowingly fails to comply with the requirement to maintain a written food safety plan, the plant will be punished by the imposition of a $7,500 civil penalty.[44] This subsection also states that, in addition to paying the civil penalty, the food processing plant must also submit to the Commissioner a written plan within thirty days of the determination by the Commissioner that such violation occurred.[45]

Section 3 states that any person or firm who, while operating their food processing plant, obtains information from testing that indicates the presence of adulterated food must report such results to the Department of Agriculture within twenty-four hours.[46] The Act's amendment to this section adds that any person who knowingly fails to make the report is guilty of a misdemeanor.[47] This section also states that any person who does not keep the results of any test required by the Code for a period of two years and make them available to the Department of Agriculture is guilty of a misdemeanor.[48]

Section 4 is an amendment to the Act that provides that any person who knowingly introduces food into commerce, knowing that it contains adulterated substances, is guilty of a felony.[49] This felony, upon conviction, is punishable by one to twenty years imprisonment, a fine not to exceed $20,000, or both.[50]

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42. *See id.*; *see also* Video Recording of House Floor Debate, Mar. 9, 2010 at 1 hr, 30 min., 20 sec. (remarks by Rep. Levitas (D-82nd)), [hereinafter House Floor Video].

43. *See* O.C.G.A. § 26-2-27.1(b) (Supp. 2010).

44. *See id.*

45. *See id.*

46. *See id.* § 26-2-27.1(e).

47. *See id.*

48. *See id.* § 26-2-27.1(f).

49. *See* O.C.G.A. § 26-2-27.1(h) (Supp. 2010). This is the section that was enacted as a direct result of what happened at Blakely where the President of PCA knew that the peanuts were tainted and sent them into commerce anyway. *See also* House Floor Debate, *supra* note 42.

50. *See* O.C.G.A. § 26-2-27.1(h) (Supp. 2010).

Analysis

Relationship to SB 80

Prior to SB 80, there was no requirement in Georgia for food processors to have a written food safety plan.[51] The food industry generally supported SB 80 because it did not want to be associated with poor quality food or bad actors who would taint the whole industry.[52] Companies understand that customers react to food safety concerns by avoiding a category of food products, even if a company was not involved with a recalled product.[53] During the PCA crisis, all sales of peanuts and peanut butter dropped drastically, and the industry was slow to recover its reputation.[54] These companies pride themselves on their reputations as "consumer-product-oriented compan[ies]."[55] These food processors "were very much involved in getting [SB 80] passed because [they] think that food safety is [their] primary goal."[56]

Working Closely with the Food Industry

HB 883 was enacted to make clear what the penalties were for violating SB 80. Prior to HB 883, the only remedy available for violating SB 80 was a false swearing felony for falsely filling out documentation.[57] According to Representative Kevin Levitas (D-82nd), the author of HB 883, "What the SAFE act tried to do is tie very specific penalties to different divisions of the law."[58] While drafting the language of HB 883, Representative Levitas tried to

51. SB 80, as passed, 2009 Ga. Gen. Assem.; *see also* Levitas Interview, *supra* note 8.
52. *See generally* Kuzava Interview, *supra* note 6.
53. Interview with Kathy Kuzava, President, Georgia Food Indus. Ass'n, in Atlanta, Ga. (October 26, 2010).
54. *Id.*
55. *See generally* Kuzava Interview, *supra* note 6.
56. *See id.*
57. *See* Levitas Interview, *supra* note 8. See also O.C.G.A. § 16-10-71(a) defining false swearing as a person to whom a lawful oath or affirmation has been administered or who executes a document knowing that it purports to be an acknowledgment of a lawful oath or affirmation commits the offense of false swearing when, in any matter or thing other than a judicial proceeding, he knowingly and willfully makes a false statement.
58. *See* Levitas Interview, *supra* note 8.

work closely with the same companies in the food industry who were involved with the drafting of SB 80.[59] For example, one food processing plant manager actually wanted to transfer out of Georgia "because he was so scared that if he got caught for an accident or was negligent, [] he could go to jail for a misdemeanor."[60] To address this concern, the drafters made sure the Act stated that a person has to "knowingly" violate the provisions before exposing themselves to criminal penalties.[61]

In addition, HB 883 gives the Commissioner of the Georgia Department of Agriculture more power and discretion. Under the language of SB 80, the Commissioner can set the standards for the food processing safety plans and the regulations.[62] HB 883 gives the Commissioner power to impose civil penalties for not having a written food safety plan.[63] The Department of Agriculture also realizes that SB 80 is the result of one bad actor and that most companies are very diligent about having thorough food safety plans.[64]

Because the drafters of HB 883 were working closely with the food industry, no one foresees any unexpected litigation to occur after the passage of the Act.[65] In fact, Representative Levitas stated, "This is one of the good times where you don't really have opposition. No one is really pro-poisoned tainted food."[66] In fact, HB 883 passed unanimously in the Senate, and there were only nine

59. *See* Levitas Interview, *supra* note 8*; see also* Kuzava Interview, *supra* note 6. Ms. Kuzava stated that after the bill passed through the House, some companies were still concerned with some of the language. Kuzava Interview, *supra* note 6. They were concerned because they thought that it said "knowingly ship" and that it should say instead: "knowing that you manufactured it and then ship." *Id.* "So one of our companies [was] afraid [] that if you were the general manager of the company and you ship[ped] the product and then you found out a week later that it was bad, well you knowingly shipped it, but you didn't know it was harmful when you shipped it." *Id.* Rep. Levitas agreed that this change was consistent with his intent, so he made the amendment to the Senate substitute when it came back through the House after the Senate voted on it with the changes. *Id.*

60. *See* Levitas Interview, *supra* note 8.

61. *See* O.C.G.A. § 26-2-27.1(f) (Supp. 2010).

62. O.C.G.A. § 26-2-20 (2003).

63. *See* Levitas Interview, *supra* note 8.

64. *See* Kuzava Interview, *supra* note 6.

65. *See* Levitas Interview, *supra* note 8.

66. *Id.*

Representatives who voted against HB 883 both times it came through the House.[67]

Effect of HB 883 on Federal and Other State Legislation

Georgia has long been considered one of the states with the toughest standards in the country for food safety.[68] In fact, Georgia is considered "the gold standard for agriculture across the country."[69] The combination of SB 80 and HB 883 makes Georgia a model for other states in how to regulate their food processing industries, because these Acts are currently the toughest in the country for food processors.[70] Thus, the drafters of SB 80 and HB 883 expect these Acts to be a model for other states when passing similar legislation.[71]

Currently, each state has different bills regarding food processors and food safety, but "when you have piecemeal bills from state to state it makes it hard on companies that manufacture products to do things in different ways in different states."[72] Accordingly, industry members believe food safety should be a federal issue.[73] Although there is federal legislation concerning food safety currently before Congress, it is not moving quickly.[74] Thus, the Georgia Legislature thought it necessary to pass SB 80 and HB 883 now to make sure that this state never has another Blakely incident.[75] Hopefully, Congress will pass the federal food safety bill and "all fifty states can have the same bill, [which will] definitely [be] better for everybody who manufactures."[76]

Until the federal law is passed, HB 883 will govern food safety in the State of Georgia. Under HB 883, individuals like the President of

67. None of the dissenting representatives responded to phone calls or emails concerning the reasons for their dissent. However, on the House Floor, there was no debate or questions concerning the Act prior to passage. Georgia House of Representatives Voting Record, HB 883 (Mar. 9, 2010); *see supra* text accompanying notes 13–20.

68. *See* Levitas Interview, *supra* note 8.

69. *Id.*

70. *See* Kuzava Interview, *supra* note 6.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* Ms. Kuzava stated that the bill was not moving quickly enough through Congress because of all the debate surrounding the health care issue. *Id.*

75. *Id.*

76. *See* Kuzava Interview, *supra* note 6.

PCA will be imprisoned for knowingly sending adulterated food into the stream of commerce. Prior to the passage of HB 883, only the manufacturer could face liability in a civil suit.[77] Now, however, the companies who violate the reporting requirements of HB 883 will be subject to civil penalties, and the people who knowingly manufacturer and ship the poisoned food will be exposed to criminal penalties as well.[78] Specifically, HB 883 provides for penalties for anyone who knowingly introduces adulterated food into the stream of commerce as described in the Act section above.[79]

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77. *See generally* Levitas Interview, *supra* note 8.
78. *See id*.
79. *See* O.C.G.A. § 26-2-27.1; *see also* House Floor Video, *supra* note 42, at 1 hr, 30 min., 20 sec. (remarks by Rep. Levitas (D-82nd)).