Client Alert.

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Question of the Week: Under Prop 37, can't grocery stores, delis, convenience stores, and the like avoid litigation by simply obtaining sworn compliance statements from their suppliers?

By Michael Steel

ANSWER: The language of the proposed law could be read as imposing a two-part test for compliance. We expect plaintiffs to argue that the grocer must:

> (1) be able to show that the food was not "knowingly and intentionally" made with genetic engineering; ***and***
>
> (2) have a sworn statement on file from the supplier attesting to the non-GE nature of the food.

This reading would be based upon the language of the initiative, which exempts:

> "A raw agricultural commodity or food derived therefrom that has been grown, raised or produced without the knowing and intentional use of genetically engineered seed or food."

Prop 37 does not say that it applies to a grocer only if he or she "knowingly and intentionally" offers genetically modified food for sale. Instead, it says that any food can be the basis for a lawsuit, unless the food was produced without knowing and intentional genetic engineering. This subtle difference in language could have a major impact on litigation because it could be read to put the burden of proving that there was no "knowing and intentional" use of genetic engineering on the grocer. Proving the negative—that one did not know something—is very difficult.

Plaintiffs' attorneys can be expected to argue that in addition to showing that the food was made without knowing or intentional use of genetic engineering, one must also have a sworn statement on file to support that fact, or the exemption will not apply:

> "Food will be deemed to be described in the preceding sentence ***only if*** the person otherwise responsible for complying with the requirements of subsection (a) of Section 110809 with respect to a raw agricultural commodity or food obtains, from whoever sold the commodity or food to that person, a sworn statement that such commodity or food: (i) has not been knowingly or intentionally genetically engineered; and (ii) has been segregated from, and has not been knowingly or intentionally commingled with, food that may have been genetically engineered at any time." (Emphasis added.)

In effect, read as we expect plaintiffs will read it, the sworn-statement provision is simply an additional requirement tacked on to the first prong of the test: was the food made without knowing and intentionally using genetic engineering? If the farmer, processor, or grocer can make that showing, he or she must also have a sworn statement that no genetic engineering was used in the product. Read this way, the exemption applies only if ***both*** showings can be made.

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Accordingly, in order to take advantage of this exemption, the defendant would first have to submit to discovery on the question of knowledge and intent. In the context of Proposition 65, this is how plaintiffs' attorneys have made their livings; the threat of expensive and time-consuming discovery—depositions, interrogatories, document production, and more—drive settlements that do little more than enrich bounty-hunting lawyers. Only if the defendant could get past this hurdle would the sworn statement come into play as an additional burden that must be met in order to establish the defense.

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Proposition 37 has the potential to be a game-changer for many of our clients, large and small. If you are interested in learning more, we will be providing continuous coverage of Proposition 37 through our website over the next few months. On our Proposition 37 homepage you will be able to find our most up-to-date client alerts, recent news, links to important materials and websites, and contact information for our attorneys, who are monitoring the initiative on a daily basis.

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