Product Liability - USA

Genetically engineered food labelling bill moves through legislature

Contributed by **Morrison & Foerster LLP**

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Litigation made easier
Defences narrowed
Exemptions added

SB 1381, California's revived genetically engineered food labelling bill, has passed through the California Senate Judiciary Committee. If enacted, SB 1381 would take effect on January 1 2016. As the bill has moved through the legislature since it was introduced in February 2014, various amendments have been introduced that could significantly affect the food industry.

Litigation made easier

Perhaps the most noticeable change in the bill is an expansion of the enforcement provision. As originally drafted, the enforcement provisions of SB 1381 closely resembled those of California's Proposition 65. One noted distinction was the requirement of an injury in order for citizens to bring suit.

The revised bill eliminates any injury requirement. After an earlier amendment suggested that an 'injury' meant nothing more than the purchase of a misbranded product, the bill was rewritten to exclude that requirement altogether. By eliminating any injury requirement, the bill makes it possible for anyone – whether injured or not – to bring suit to enforce the requirements through the injunctive relief provisions of the California Sherman Food, Drug, and Cosmetic Law (Sections 109875 and following of the Health and Safety Code). Under the Sherman Law, any person may bring an action for injunctive relief without any requirement to show unique or special individual injury or damages. The potential for litigation has been further expanded by eliminating the requirement of a 60-day notice or any right to cure a violation. Unsurprisingly, attorneys' fees may still be awarded.

Defences narrowed

Another significant change in the bill is the alteration of the potential 'knowing and wilful' defence to liability.

Previously, SB 1381 allowed a defence for a retailer that did not knowingly and wilfully fail to provide labelling for a genetically engineered raw agricultural product. Again, this would have been a difficult standard to meet.

SB 1381 has been revised to eliminate even this limited defence. It is no longer a defence for retailers to "reasonably" rely on the representations of wholesalers or distributors or their sworn statements. Instead, the revised SB 1381 has a new section outlining a potential constructive knowledge defence: manufacturers and retailers will not be found to have violated the law if they were relying in good faith on the representations of farmers, producers or suppliers, unless the manufacturers and retailers knew or should have known that the product that they were selling was genetically engineered food. In effect, whereas the previous standard for retailers was whether their reliance on the representations of suppliers was reasonable, the burden is now to disprove constructive knowledge. This makes defending such lawsuits even more difficult.

Exemptions added

Two new exemptions have been added to SB 1381. Previously, SB 1381 did not contain an exemption for alcoholic beverages; the amended bill would exempt from the labelling requirement all alcoholic beverages subject to the Alcoholic Beverage Control Act. Second, labelling would not be required for foods sold at farmers' markets, field retail stands or farm stands.

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The bill also continues to use language that suggests that farmers are not targeted by the law. However, while the law itself does not put farmers directly in the crosshairs, the only realistic way for retailers and manufacturers to comply with the law is to require their suppliers to provide assurances that their products are properly characterised.

If the key question in a lawsuit against a retailer is whether it reasonably relied on the representations of farmers, those farmers will be front and centre. When (not if) a manufacturer or retailer is sued, farmers may expect to be dragged into the litigation on the basis of their contracts with their customers.

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