Client Alert

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More Expansive GMO Labeling Bill Moving Through Legislature

By Michael Steel and Alejandro Bras

Last week, SB 1381, California's revived genetically engineered (GE) food labeling bill, 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 impact the food industry. A summary of some of those amendments follows.

LITIGATION MADE EASIER

Perhaps the most noticeable change in the bill is an expansion of the enforcement provision. As originally drafted [see our previous client alert for more information], the enforcement provisions of SB 1381 closely resembled those of California's notorious 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 California's Sherman Food, Drug, and Cosmetic Law (Health and Safety Code sections 109875 *et seq.*). 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 author further expanded the potential for litigation by eliminating the requirement of a 60-day notice or any right to cure a violation. Unsurprisingly, attorneys' fees may still be awarded.

DEFENSES NARROWED

Another significant change in the bill is the alteration of the potential "knowing and willful" defense to liability. Previously, SB 1381 allowed a defense for a retailer who did not knowingly and willfully fail to provide labeling for a GE raw agricultural product. Again, as we have previously noted, this would have been a difficult standard to meet.

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

EXEMPTIONS ADDED

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

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

Contact:

Michael Steel
(415) 268-7350
msteel@mofo.com

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