

**Proposition 65 and the Proposed California Right to Know
Genetically Engineered Foods Act:
A Comparison of Litigation Incentives**

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INTRODUCTION & EXECUTIVE SUMMARY

This paper examines the legal differences between the proposed California Right to Know Genetically Engineered Foods Act (“Label GMO”) and the California Safe Drinking Water and Toxic Enforcement Act of 1986 (“Proposition 65”). This paper takes no position on the underlying merits of Label GMO. Rather, it is intended to provide an academic analysis of the relative incentives to engage in abusive litigation under these provisions.

Proposition 65 is a consumer disclosure act. It requires companies to provide warnings to consumers if their products or actions will expose consumers to certain levels of chemicals found by the state of California to cause cancer or to harm reproductive health. Proposition 65 allows private plaintiffs to sue to enforce its provisions, and provides them with a “bounty” of twenty-five percent of civil penalties collected. Further, Proposition 65 defendants routinely settle cases by making payments directly to the defendant “in lieu of civil penalties.”¹ Given its breadth, and the concomitant burden of proving compliance with an uncertain legal standard, commentators have worried that Proposition 65 creates incentives for plaintiffs to engage in abusive litigation designed merely to extort settlements.² Indeed, since its inception, Proposition 65 has spawned numerous lawsuits that have resulted in settlements worth millions of dollars, much of which has gone to attorneys.³

Label GMO also is a consumer disclosure act. Label GMO would require genetically engineered foods to be labeled as such in retail packing or displays, and it would prevent genetically engineered food from being labeled “natural.” Because Label GMO, like Proposition 65, includes a private right of action, some worry that Label GMO will provide another vehicle for plaintiffs’ attorneys to coerce settlements from businesses.

¹ See Letter from California Attorney Gen., Edmund G. Brown, Jr. to Proposition 65 Plaintiffs’ Counsel (Dec. 21, 2010).

² See Anthony T. Caso, *Bounty Hunters and the Public Interest – A Study of California Proposition 65*, Engage, Vol. 13, No. 1 (March 2012), at http://www.fed-soc.org/doclib/20120322_CasoEngage13.1.pdf; see also *Consumer Def. Group v. Rental Hous. Indus.*, 137 Cal. App. 4th 1185 (2006) (describing abusive litigation strategy under Proposition 65).

³ See William W. Funderburk, Jr. & Peter Muthig, *Defense Strategies in Proposition 65 Law Litigation*, Environmental Law Section of the State Bar of California, Vol. 9, No. 2 (Spring 2000), at <http://www.stanzlerlawgroup.com/publications/pub20.htm>; According to the California Attorney General’s Office, the number of private Proposition 65 settlements in 2011 was 327, up from 180 in 2010. The AG’s office settled eleven and seven Proposition 65 cases in 2011 and 2010, respectively. In 2011, 74 percent of total settlements went to attorney fees and costs, See Annual Report of Private Settlements, at http://oag.ca.gov/sites/all/files/pdfs/prop65/Alpert_Report2011.pdf? (2011); http://oag.ca.gov/sites/all/files/pdfs/prop65/Alpert_Report2010.pdf? (2010).

The adoption of Label GMO likely would result in private lawsuits to enforce its provisions. Important differences between Label GMO and Proposition 65, however, substantially reduce the potential that Label GMO will result in the epidemic of abusive private litigation associated with Proposition 65.

- **Label GMO would apply to a much narrower economic sector than Proposition 65.**
 - Proposition 65 applies to all products and industries, and concerns exposure to any one of over 800 chemicals listed by the State.
 - Label GMO applies only to genetically engineered food sold at retail, and specifically exempts medical foods and food prepared for immediate consumption.
 - In this manner, Label GMO simply would generate fewer opportunities for claims to arise.

- **Label GMO would provide businesses with greater legal certainty than Proposition 65.**
 - Because Proposition 65 covers over 800 chemicals and focuses on consumer exposure levels, rather than product composition, businesses often can have difficulty knowing whether they are in compliance with its provisions. Further compounding this legal uncertainty, the California Office of Environmental Health Hazard Assessment (OEHHA) has developed safe harbor exposure levels for only about 300 of the chemicals covered by Proposition 65. In other words, for the remaining 500+ covered chemicals, companies are unaware of the exposure levels permitted, making compliance difficult, if not impossible.
 - Label GMO, on the other hand, provides clear threshold standards, allowing businesses to gauge their compliance with its requirements with certainty.
 - Accordingly, unlike the case of Proposition 65, baseless demand letters from plaintiffs claiming Label GMO violations will be less likely to result in extorted settlements, which will reduce incentives to file such strike suits in the first place.

- **Label GMO would allow businesses more exceptions from its provisions than Proposition 65.**

- Apart from its small (and largely uncertain) *de minimis* threshold exposure exemptions, Proposition 65's only exemptions are for businesses that employ fewer than ten people, federal preemption, and exposure due to chemicals naturally occurring in food (which is difficult to show in practice).
- Label GMO provides an absolute defense for any party that relies on a sworn statement from its supplier that the food in question was not knowingly or intentionally genetically engineered or comingled with genetically engineered food.⁴ This defense allows businesses an inexpensive means to defeat private suits early without having to pay plaintiffs' legal fees, which in turn will discourage private litigation.
- Label GMO provides a precise safe harbor based on product composition rather than public exposure (phased out over seven years). It also provides businesses with several clear-cut exemptions from its labeling requirement, including medical food, and food that is intended for immediate consumption, derived from animals fed genetically engineered foods, or made with genetically engineered processing aids or enzymes. The extent to which these exemptions reduce the probability that a plaintiff will prevail at trial will reduce *ex ante* incentives to bring private suits.
- Label GMO further allows a defendant 30 days to cure a violation, which will bar a suit for damages. Knowing that a defendant can avoid paying damages and attorneys' fees by taking appropriate ameliorative actions will reduce the expected payoff from a suit, and hence incentives to file a suit in the first place.

* * *

In summary, relative to Proposition 65, Label GMO is more narrowly drawn, provides more exemptions from its provisions, and is likely to provide greater certainty for businesses with respect to their compliance. Accordingly, there is reason to believe that these important differences substantially reduce the potential for Label GMO to foster the type of abusive private litigation associated with Proposition 65.

⁴ Importantly, a supplier will not be held to a strict liability standard. Rather, a reasonable mistake of facts on the supplier's part would not appear to prevent reliance on such a statement, or open the supplier up to liability. That is, if the food in question turns out to have been genetically engineered or comingled with genetically engineered food without the supplier's knowledge, the statement would remain valid. See Cal. Pen. Code § 7(5) (defining "knowingly" as "knowledge that the facts exist which bring the act or omission within the provisions of this code.").

I. BACKGROUND

This section provides an overview of the major provisions of Proposition 65 and Label GMO.

A. **Proposition 65**

1. Conduct Prohibited

The California Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65)⁵ requires businesses to provide “clear and reasonable warnings” before “knowingly and intentionally” exposing individuals to chemicals known to cause cancer or reproductive toxicity.⁶ “Knowingly” does not require actual knowledge that “discharge, release, or exposure is unlawful,” only knowledge that the discharge, release or exposure in question is occurring.⁷ “Intentionally” is not defined, but some case law suggests that it requires “control over factors which may give rise to [exposure].”⁸ Acceptable Proposition 65 warnings vary depending on the circumstance, and could take the form of consumer product labeling or posted warnings in the workplace.⁹ Proposition 65 also prohibits businesses from discharging chemicals known to cause cancer or reproductive toxicity into the drinking water.¹⁰

Pursuant to Proposition 65, the California Office of Environmental Health Hazard Assessment (OEHHA) has compiled a list of the chemicals known to cause cancer or reproductive toxicity.¹¹ Currently, there are over 800 chemicals listed.

2. Exemptions

Proposition 65 does not apply to any person employing fewer than ten employees.¹² It also exempts discharges or releases that take place less than twenty months after a chemical is listed, and exposure that takes place less than twelve

⁵ Cal. Health & Safety Code § 25249.5 *et seq.*

⁶ *Id.* at § 25249.6.

⁷ 27 Cal. Code Reg. § 25102(n).

⁸ *See Corp. for Clean Air, Inc. v. Gen. Motors Corp.*, 1998 WL 35229975 (Cal. Sup., Sept. 14, 1998); *see also Nicolle-Wagner v. Deukmejian*, 230 Cal. App. 3d 652, 659-60 (1991) (suggesting that the “knowingly and intentionally” elements require “culpable human activity”).

⁹ The implementing regulations for Proposition 65 provides required warnings. *See* 27 Cal. Code Reg. §§ 25601-25605.2.

¹⁰ Cal. Health & Safety Code § 25249.5.

¹¹ *See* State of California Environmental Protection Agency, Office of Environmental Health Hazard Assessment, Safe Drinking Water and Toxic Enforcement Act of 1986, Chemicals Known to the State to Cause Cancer or Reproductive Toxicity (March 13, 2012), *at* http://oehha.ca.gov/prop65/prop65_list/files/P65single031612.pdf.

¹² Cal. Health & Safety Code § 25249.11(b).

months after a chemical is listed.¹³ A business will also be exempt from Proposition 65's warning provisions if federal warning provisions preempt Proposition 65.¹⁴

Proposition 65 exempts certain *de minimis* discharge and exposure levels. For example, Proposition 65 does not apply to discharges or releases that "will not cause any significant amount of the discharged or released chemical to enter any source of drinking water" and that are otherwise in conformity with the law.¹⁵ Further, Proposition 65 exempts exposure to chemicals listed as causing cancer that "pose[] no significant risk assuming lifetime exposure at the level in question."¹⁶ The "no significant risk" level is defined as a level of exposure that would cause no more than one excess case of cancer per 100,000 persons exposed over a 70-year lifetime. Proposition 65 also exempts exposure to chemicals listed as causing birth defects or reproductive harm that "will have no observable effect assuming exposure at one thousand (1,000) times the level in question."¹⁷ Therefore, businesses subject to Proposition 65 must provide a warning for their product if it exposes consumers to more than 1/1,000 of the "no observable effect" level of a listed chemical.

OEHHA has developed "safe harbor" exposure levels to assist businesses in determining whether their product requires a warning or whether they are prohibited from discharging into drinking water sources.¹⁸ It has established safe harbor levels for about 300 of the listed chemicals. For the remainder of the listed chemicals, the regulations set out methods for establishing exposure and discharge levels below the relevant thresholds.¹⁹

The defendant in a Proposition 65 action bears the burden of proving that the exposure levels in question are below the allowable levels.²⁰ In the case of chemicals for which OEHHA has not established safe harbor levels, this showing can be especially difficult, likely requiring a full-scale scientific study.²¹ Given the factual nature of this defense, moreover, it is unlikely to be useful at the motion-to-dismiss or summary judgment stages of litigation.²²

Proposition 65 also exempts exposure from chemicals naturally occurring in food.²³ As in the case of *de minimis* exposure levels, the defendant bears the burden

¹³ Id. at §§ 25249.9(a), 25240.10(b).

¹⁴ Id. at 25249.10(a),

¹⁵ Id. at § 25249.9(b).

¹⁶ Id. at § 25249.10(c).

¹⁷ Id.

¹⁸ See Proposition 65 Safe Harbor Levels (June 2012), at <http://oehha.ca.gov/prop65/pdf/2012StatusReportJune.pdf>.

¹⁹ See Cal. Code Reg. §§ 25701-25821.

²⁰ See id. at §§ 25249.9(b), 25249.10(c).

²¹ See *Cons. Def. Group.*, 137 Cal. App. 4th at 1215.

²² See id. at 1214-15 (it is nearly impossible to defend a Proposition 65 warning action by showing exposure levels below the allowable thresholds absent a full trial).

²³ Cal. Code Reg. § 25501(a).

of proving this exemption. Because there are no established levels of Proposition 65 chemicals that occur naturally in food, such a showing is also very fact intensive, likely requiring a defendant to carry out an extensive scientific study.²⁴ The fact intensive nature of this showing, moreover, is also likely to limit its usefulness as a defense at pre-trial stages of litigation.

3. Enforcement and Penalties

The California Attorney General's Office, as well as district or city attorneys (for cities with a population greater than 750,000) may enforce Proposition 65.²⁵ Further, an individual "acting in the public interest," may enforce Proposition 65.²⁶ Before commencing a private action, a potential plaintiff must give the Attorney General and relevant district or city attorney, and the alleged violator, sixty-days notice.²⁷ The private litigant may not pursue the case if a public prosecutor decides to commence an action.²⁸ Further, a court must approve any settlement involving private Proposition 65 actions.²⁹

A Proposition 65 violator is potentially liable for up to \$2,500 per day for each violation.³⁰ Further, a defendant losing a Proposition 65 action is liable for court costs and reasonable attorneys fees; indeed, attorneys' fees most often swamp the civil penalties in Proposition 65 settlements. Proposition 65 also provides that a private party bringing an action will receive 25 percent of assessed civil penalties,³¹ and that defendants may make "payments in lieu of civil penalties" for activities that limit toxic exposure.³² In practice, these payments are often made to parties bringing the suits.³³

B. The Proposed California Right to Know Genetically Engineered Food Act

1. Conduct Prohibited

²⁴ See *People v. Tri-Union Seafoods, LLC*, 171 Cal. App. 4th 1549 (2009).

²⁵ *Id.* at § 25249.7(c).

²⁶ *Id.* at § 25249.7(d).

²⁷ *Id.* at § 25249.7(d)(1).

²⁸ *Id.* at § 25249.7(d)(2).

²⁹ *Id.* at § 25249.7(f)(4). The court may approve a settlement only if it finds that (1) any warning required by the settlement conforms with Proposition 65's requirements; (2) any award of attorney's fees is reasonable; and (3) any penalty amount is reasonable. *Id.* A private plaintiff presenting a settlement to a court has the burden of producing "evidence sufficient to sustain" these required findings. *Id.* at § 25249.7(f)(5).

³⁰ *Id.* at § 25249.7(b).

³¹ *Id.* at § 25249.12(d).

³² See Cal. Code Reg. § 3203(b).

³³ See Letter from California Attorney Gen., Edmund G. Brown, Jr. to Proposition 65 Plaintiffs' Counsel (Dec. 21, 2010). The most recent AG report on Proposition 65 settlements shows that civil penalties comprise only 13 percent of the total dollar value of all settlements, whereas attorney's fees and costs and other payments comprise 87 percent.

Broadly, the proposed Label GMO Act would (1) require genetically engineered food retailed in California to be labeled as such;³⁴ and (2) prohibit genetically engineered food from being labeled “natural.”³⁵

2. Exemptions

Label GMO has numerous exemptions from its requirements. First, the defendant will avoid liability if the food in question has been produced “without the knowing and intentional use of genetically engineered seed or food.”³⁶ The person responsible for complying with Label GMO can take advantage of this defense if they receive a sworn statement from their supplier that the food has not been “knowingly or intentionally” genetically engineered or comingled with genetically engineered food.³⁷

Second, Label GMO provides a *de minimis* exception until July 1, 2019. A processed food will be exempt from Label GMO’s labeling requirement as long as it contains no more than ten genetically engineered ingredients that each account for no more than .5 percent of the food’s total weight.³⁸

Label GMO also includes additional exemptions:

- Food from an animal that has been fed or treated with genetically engineered foods or drugs.³⁹
- Food that is subject to Label GMO solely because it includes one or more genetically engineered processing aids or enzymes.⁴⁰
- Alcoholic beverages.⁴¹
- Food that an independent organization has determined not to be knowingly and intentionally produced from, or comingled with, genetically engineered food.⁴²
- Food that has been certified to be labeled “organic” under federal law.⁴³

³⁴ Label GMO, § 110809.

³⁵ Id. § 11809.1.

³⁶ Id. §110809.2(b).

³⁷ *Id.* Importantly, a supplier will not be held to a strict liability standard. Rather, a reasonable mistake of facts on the supplier’s part would not appear to prevent reliance on such a statement, or open the supplier up to liability. That is, if the food in question turns out to have been genetically engineered or comingled with genetically engineered food without the supplier’s knowledge, the statement would remain valid. *See* Cal. Pen. Code § 7(5) (defining “knowingly” as “knowledge that the facts exist which bring the act or omission within the provisions of this code.”).

³⁸ Id. § 110809.2(e).

³⁹ Id. § 110809.2(a).

⁴⁰ Id. § 110809.2(c).

⁴¹ Id. § 110809.2(d).

⁴² Id. § 110809.2(f).

⁴³ Id. § 110809.2(g).

- Food sold in restaurants or that is otherwise prepared for immediate human consumption.⁴⁴
- Medical food.⁴⁵

3. Enforcement and Penalties

Public officials and private citizens can sue to enforce Label GMO through two means. First, Label GMO provides that “any person may bring an action in superior court . . . and the court shall have jurisdiction . . . to grant a temporary or permanent injunction restraining any person from violating any provision [of Label GMO].”⁴⁶ In addition to obtaining injunctive relief, the court may award the person bringing the suit “reasonable attorney’s fees and all reasonable costs incurred in investigation and prosecuting the action as determined by the court.”⁴⁷

Second, a person can bring an action under the California Legal Remedies Act (CLRA) on her own behalf and also on behalf of similarly situated consumers.⁴⁸ Label GMO does not require the plaintiff to “establish specific damage from, or prove any reliance on, the alleged violation.”⁴⁹ Under the CLRA, the plaintiff must provide the defendant notice of the alleged violations, and the defendant has thirty days in which to cure the alleged violation through “correction, repair, replacement, or other remedy.”⁵⁰ If the defendant cures the violation, “no action for damages may be maintained.”⁵¹ Further, a plaintiff cannot collect damages if the defendant’s violation was an accident and the defendant takes appropriate remedial action.⁵²

⁴⁴ Id. § 110809.2(h).

⁴⁵ Id. § 110809.2(i).

⁴⁶ Label GMO, Section 4.

⁴⁷ Id.

⁴⁸ Label GMO § 110809.4. Specifically, Label GMO provides that a violation of the labeling and disclosure requirements shall be deemed a violation of Cal Civ. Code § 1770(a)(5), which prohibits as an unfair or deceptive act or practice “representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have.” The CLRA allows both individual and class actions. *See* Cal. Civ. Code §§ 1780(a), 1781(a). Only consumers have standing to bring a case under the CLRA. *See Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1303 (S.D. Cal. 2003).

⁴⁹ Label GMO § 110809.4.

⁵⁰ Cal. Civ. Code § 1782(a). The notice provision of the CLRA is strictly applied, and if not followed precisely will result in dismissal of a CLRA claim. *See Von Grabe*, 312 F. Supp. 2d at 1303-04; *Outboard Marine Corp. v. Superior Ct.*, 52 Cal. App. 3d 30, 40-41 (1975).

⁵¹ Id. § 1782(b). In the class action context, no action for damages can be maintained if the alleged violator had made reasonable efforts to identify and notify all consumers in the class that they will cure the violation upon their request, the violation has been cured, and the alleged violator has ceased engaging in the alleged illegal acts. *Id.* at § 1782(c)(1)-(4).

⁵² *Id.* § 1784:

No award of damages may be given if the [defendant] proves that such a violation was not intentional and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error; and (b) makes an appropriate correction, repair or replacement or other remedy of the goods and services

As in a direct suit for injunctive relief under Label GMO, a private plaintiff invoking the CLRA has the burden of proving that the food product in question was genetically engineered. Further, all the exceptions provided in Label GMO will apply to an action under the CLRA as well.

In a CLRA action, a defendant is potentially liable for: (1) actual damages; (2) restitution; (3) punitive damages; (4) “any other relief the court deems proper.”⁵³ Label GMO provides that a violation of either provision will “be deemed to cause damages in at least the amount of the actual or offered retail price of each package or product alleged to be in violation.”⁵⁴ Further, the plaintiff can sue to enjoin the practice alleged to violate Label GMO. As in a suit directly under Label GMO, a defendant in a successful CLRA action also will be liable for court costs and the plaintiff’s attorney’s fees.⁵⁵

II. A COMPARISON OF LABEL GMO AND PROPOSITION 65

Label GMO and Proposition 65 are similar in some respects. First, both are designed to increase the amount of information available to consumers. Second, both Label GMO and Proposition 65 provide private rights of action and do not require the plaintiff to prove actual damages. At the same time, however, these two provisions differ in important ways with respect to their breadth and the certainty they provide to businesses. These differences are likely to be highly germane for their relative propensities to spur private litigation.

First, Label GMO would cover a much narrower slice of the economy than Proposition 65. Proposition 65 covers exposure to over 800 chemicals, and it applies to all businesses with respect to their actions as producers and employers. Label GMO, on the other hand, applies only to genetically modified food sold at retail, and excludes medical food and food sold for instant human consumption. Because Label GMO simply would apply to a smaller economic sector and provide more exemptions than Proposition 65, it is likely to generate fewer opportunities for claims to arise.

Second, Label GMO likely would provide greater certainty to businesses with respect to their compliance than Proposition 65. For example, to be assured of compliance with Proposition 65 a business must know the extent to which it is exposing the public to any of more than 800 chemicals, and whether this exposure is above the threshold level. Because OEHHA has provided safe harbor threshold levels for only around 300 of the listed chemicals, even when a business is aware that it may be creating exposure to a listed chemical, it still may not know with

⁵³ Id. § 1780(a).

⁵⁴ Label GMO § 110809.4.

⁵⁵ Cal. Civ. Code § 1780(e).

certainty whether the exposure is either below the “no significant risk” or “no observable effect” levels.⁵⁶ As one court has observed, “in the case of a negligible, even microscopic ‘exposure,’ . . . it may take a full scale scientific study to establish the amount of the carcinogen is so low that there is no need for a warning”⁵⁷

Label GMO, on the other hand, provides specific *product composition* thresholds: up to ten ingredients that contribute no more than .5 percent of total weight until 2019, and zero thereafter. Because thresholds are certain and the focus is on product composition rather than public exposure, testing requirements under Label GMO are more straightforward and therefore will provide businesses with a greater degree of certainty with respect to compliance. What’s more, as discussed above, a party would be able to rely on a sworn statement from a supplier that the food in question has not been knowingly or intentionally genetically modified, in which case the party would not be required to have its product tested.

To the extent that Label GMO provides businesses more certainty with respect to their compliance than Proposition 65, it is likely to stimulate fewer legal actions. If the legal standard is uncertain, a truly non-culpable business will be more likely to settle with a plaintiff because it will erroneously over-discount its probability of prevailing at trial.⁵⁸ This uncertainty is what drives abusive litigation in the Proposition 65 context; confronted with the choice of either risking large damage awards – and even larger attorneys’ fees – on the chance that it can prove exposure levels below an uncertain threshold or settling, the rational business will almost always choose to settle.⁵⁹

On the other hand, when parties know to a high degree of certainty that they are in compliance with a legal standard, they are less likely to settle a baseless claim because they know that are likely to prevail at trial. Aware that defendants are

⁵⁶ For example, sellers of fish oil supplements recently settled with private plaintiffs regarding the presence of PCBs and dioxins in their products. OEHHA did not have safe harbor levels for these chemicals. See GOED, Proposition 65 Settlement Approved for Omega-3 Products (Feb. 4, 2012), at <http://www.goedomega3.com/images/stories/files/prop%2065%20press%20release-1.pdf>.

⁵⁷ *Consumer Def. Group*, 137 Cal. App. 4th at 1215.

⁵⁸ More technically, if the defendant estimates the true position of his case along a continuum of behavior (from legal to illegal) with a large amount of error, he will assign more weight to the probability that his actions are unlawful than if he measures his position accurately. The tendency to settle with uncertain standards and large stakes is exacerbated if the defendant is risk averse.

⁵⁹ As one court noted:

The burden shifting provisions make it virtually impossible for a private defendant to defend a warning action on the theory that the *amount* of carcinogenic exposure is so low as to pose “no significant risk” short of actual trial. . . . Needless to say, these provisions make the instigation of Proposition 65 litigation easy – and almost absurdly easy at the pleading and pretrial stages.

Consumer Def. Group, 137 Cal. App. 4th at 1214-15. See also *id.* at 1210 (referring to the Proposition 65 suit in *Consumers Def. Group* and another case as “extortion” and an attempt to “shake [the defendants] down for attorneys fees”).

likely to know whether they are in compliance, plaintiffs will be less likely to bring claims against non-culpable defendants in the first place. In this manner, there are reasons to believe that Label GMO will stimulate fewer private suits designed only to extort settlements.

Finally, Label GMO has relatively more exemptions than Proposition 65. Apart from the uncertain *de minimis* threshold levels of exposure (discussed above), Proposition 65 provides only three, relatively narrow, exemptions from its otherwise broad reach: businesses employing fewer than ten people; instances where federal warning requirements preempt Proposition 65; and naturally occurring exposure from food, which is difficult to show given the lack of established levels of Proposition 65 chemicals that occur naturally in food.⁶⁰

By contrast, Label GMO provides businesses with several means to avoid suit altogether. For example, Label GMO provides an absolute defense for any party that relies on a sworn statement from its supplier that the food in question was not knowingly or intentionally genetically engineered, or comingled with genetically engineered food. This defense allows businesses that unknowingly mislabel products an inexpensive means to defeat private suits early without having to pay plaintiffs' legal fees.

Similarly, a business that cures its violation – either after receiving notice from a plaintiff or following a violation that results from a “bona fide error” – cannot be sued under Label GMO for damages. That a defendant put on notice of its violation may take ameliorative action to avoid suit – for example, correctly labeling its product or changing its formulation, and providing refunds to consumers who purchased mislabeled products – will reduce *ex ante* incentives for plaintiffs to bring Label GMO actions in the first place.

Label GMO, moreover, exempts food derived from animals fed genetically engineered foods or drugs, or including genetically engineered processing aids or enzymes, food in restaurants, medical food, and food that has been independently certified not to be genetically engineered. In general, the incentive to pursue a claim is motivated by the expected payoff from commencing litigation. The expected payoff is composed of two elements: the expected award and the costs of litigation. The expected award, in turn, is a function both of the probability of prevailing with one's claim and the monetary value of the award.⁶¹ Assuming costs

⁶⁰ The “naturally occurring” exemption appears costly and difficult to show. *See People v. Tri-Union Seafoods, LLC*, 171 Cal. App. 4th 1549, 1575 (2009) (upholding a trial court finding that mercury in tuna was naturally occurring, but noting that because “scientific research on issues such as the source of methylmercury in the ocean is on going” trial court determinations on whether a chemical is naturally occurring for Proposition 65 exemption purposes are limited to “the stated of the scientific inquiry at a given point in time”) (emphasis in original).

⁶¹ More technically, in the case where a successful plaintiff will recover attorney's fees, the expected value of a case for the plaintiff (EV) can be written as:

$$EV = P*D - (1-P)*C,$$

and damages under Proposition 65 and Label GMO are similar, if the numerous exceptions under Label GMO reduce the relative probability of a plaintiff prevailing, these factors will reduce the expected value of a Label GMO suit relative to a Proposition 65 suit. This condition, in turn, will tend to diminish the marginal incentive to bring a suit under Label GMO relative to Proposition 65.⁶²

CONCLUSION

Label GMO and Proposition 65 both are designed to help the public make more informed choices. Like Proposition 65, moreover, Label GMO provides a private right of action to enforce its provisions. Compared to Proposition 65, however, Label GMO covers less economic activity, provides more exemptions from its provisions, and is likely to provide greater certainty for businesses. These important differences substantially reduce the potential for Label GMO to foster the type of abusive private litigation associated with Proposition 65.

where P is the probability that the plaintiff prevails at trial, D are damages collected if the plaintiff wins, and C represents the costs (including attorney's fees) of pursuing a claim.

⁶² Lower awards (D) or higher costs (C) in a Label GMO case relative to a Proposition 65 case will tend to exacerbate this tendency.

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Optimal Privacy Policy with Heterogeneous Costs and Demands

Antitrust Preemption: Rethinking the Notion of Hybrid Restraints

Professional Activities and Awards:

FTC Outstanding Scholarship Award, 2005

Referee for *Antitrust Law Journal*, *Journal of Regulatory Economics*, *Managerial & Decision Economics*, and *Supreme Court Economic Review*

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