

California's Prop 37: A feast for lawyers

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Prop 37 on this fall's California ballot, pleasantly billed as the Right To Know campaign, would require labeling of food with genetically modified (GMO/GE) ingredients. Backers say Europe already has similar rules and there's no reason California shouldn't follow suit. And even though health fears about GMO/GE products have been debunked by virtually every scientific authority to look into the matter — from the [AMA](#) to the [World Health Organization](#), and including science reporting in such perhaps unexpected venues as [Mother Jones](#) and the [Huffington Post](#) — voters in a new Pepperdine poll still approve of the idea by a lopsided 69 to 22 percent. After all, how much could it cost just to put labels on foods?

We may soon find out. California's fabled Proposition 65, enacted in 1986, requires the labeling of products that expose consumers to substances linked to cancer. That's a pleasant-sounding idea too, but 26 years later the law has benefited almost no one but litigators. Even as cancer remains just as much of a problem in California as elsewhere, a cadre of lawyers in the state have made many, many tens of millions of dollars filing inadequate-labeling suits against purveyors of such products as [candles](#), [fireplace logs](#), [Christmas lights](#), [hammers](#), [billiard cue chalk](#), [matches](#), [grilled chicken](#), [life-saving drugs](#), [brass doorknobs](#), [car exhaust in parking garages](#), and on and on. (Most of the money in the resulting settlements [goes to the lawyers](#), which is one reason defendants often describe [Prop 65 litigation](#) as [legalized extortion](#).)

The official proponent of the new Prop 37 — such a coincidence! — is an [Oakland attorney](#) who's taken in millions in Prop 65 settlements. Maybe that's one reason Prop 37 goes out of its way to impose liability risks on food handlers that go far beyond anything seen in Europe.

What does Prop 37 require? Here's what the state legislative analyst [says in its discussion](#):

*Retailers (such as grocery stores) would be primarily responsible for complying with the measure by ensuring that their food products are correctly labeled. ... For each product that is not labeled as GE, a retailer generally **must be able to document** why that product is exempt from labeling. [emphasis added] There are two main ways in which a retailer could document that a product is exempt: 1) by obtaining a sworn statement from the provider of the product (such as a wholesaler) indicating that the product has not been intentionally or knowingly*

genetically engineered or (2) by receiving independent certification that the product does not include GE ingredients. Other entities throughout the food supply chain (such as farmers and food manufacturers) may also be responsible for maintaining these records.

So suppose you're a small neighborhood or ethnic grocer that handles, say, 2,000 food items. You'll be out of compliance and vulnerable to losing a Prop 37 suit unless, for each and every one of them, you've made sure there's either 1) a Prop 37 label on the product or 2) a sworn statement or certification in hand. If you find it hard to keep track of all these forms, or find that paperwork from small suppliers in other states or countries is sloppily filled out or unintelligible, you might want to ask your lawyer whether it's worth the risk to proceed. To make minor stock changes of the sort a grocer does every week — a new flavor of pita chip, bananas sourced from a different country — you'd better have the new forms in place ahead of time. If a clerk tops up the chickpea bin with five pounds of dried legumes for which you lack the origin paperwork, safer to toss the bin's entire contents — even if no GMO strains of chickpeas are in commercial circulation in the first place — lest someone demand certification.

Then there's liability for inadvertent cross-mixing at the processing stage. A common feature of two-track food distribution systems (such as organic/nonorganic) is that equipment gets shared between both tracks, resulting in a certain quantum of unintended mixing; for example, when a market uses the same grinder for both conventional and organic coffee, some residues of the former will get into the latter.

Freakonomics, which published a [critique](#) of Prop 37 in June, explains how the law purposely sets a low tripwire for violations:

... the California law would impose a nearly twice as stringent purity standard [as Europe's], tolerating only 0.5% GE content in non-GE food.

Such a high purity standard would likely require farmers to invest in separate planting, harvesting, storage, hauling, processing, and packaging equipment for GE production in order to avoid revenue losses and liability from contaminating their non-GE operations or those of competitors.

At this point some Prop 37 advocates will be thinking, "Great! Let them build separate storage and production lines. That'll drive up the price of GE/GMO foods, as it should." Not so fast: the effect cuts both ways, and whether it drives up costs more on one side of the divide or the other depends on, among other factors, economies of scale. By some estimates, 70 percent of the current American food supply would need a "contains GMOs" label. If certified GMO-free products remain a minority taste as to a given food category, middlemen may well balk at setting up a parallel system to handle only, say, one-tenth of the volume. Then it will be the GMO-free producers who get pushed to the margins

and find themselves with a narrower and more expensive choice of processors and distributors, as is already the case with many organic products.

Proponents make much of the fact that snack chip titan PepsiCo is spending heavily to fight the bill. But let's face it: PepsiCo is going to do okay either way. It can slap a boilerplate warning on all its packaging, accept the loss of some small fraction of consumers (many of whom it is already losing to alternatives labeled organic), and its remaining high volume will guarantee it a wide choice of processing and distribution options.

It's makers and distributors who don't label their products who will stumble into lawsuits under bounty-hunter provisions that, as with Prop 65, do not require lawyers on the attack to show that any actual consumers have suffered any harm.

Some California makers of non-GMO foods, including a big organic farm certification group, do support Prop 37, expecting it to give them a competitive edge. But many others quietly or not so quietly oppose it as cunningly designed to expose them to opportunistic litigation in the future, while excluding from the market the sorts of smaller food producers and distributors, including those outside California, who are unwilling to brave the new paperwork, insurance and legal burdens.

As for the Prop 65 lawyers looking for a profitable new line? They're whetting their knives and licking their chops.

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