



MEMORANDUM

TO: Members of the Assembly State and Local Government Committee
FROM: Alida Kass, Chief Counsel
SUBJECT: Assembly Bill 1359
DATE: October 9, 2014

The New Jersey Civil Justice Institute is a statewide, bipartisan coalition of the state's largest employers, small businesses, and leading trade associations advocating for a fair and predictable civil justice system in New Jersey. On behalf of our members, **we respectfully urge amendments to A-1359.**

Apart from policy merits of the labeling requirements under A-1359, we are concerned that the legislation would create a significant risk of new liability under existing law.

The schedule of fines is unlikely to be the main enforcement mechanism. Although there is no direct private cause of action on the face of this bill, it is more likely that plaintiffs will seek the mandatory triple damages plus attorney's fees and court costs of New Jersey's Consumer Fraud Act.

This bill would establish a new labeling standard with respect to GMO content as a matter of law. That standard would effectively be imported into the labeling requirements of the CFA. The danger is that in conjunction with the CFA, this bill would trigger significant new food liability – potentially even more dangerous than the ongoing litigation over the use of “natural” in food labeling.

Under the terms of this bill, any food product offered for sale, containing one percent or more of genetically modified material, must be labeled to indicate that the product contains genetically modified material. The bill would further require that the labeling be “conspicuous and easily understandable to consumers.” Food that is not so labeled is to be considered “misbranded” as a matter of law.

The New Jersey Consumer Fraud Act provides that the "omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice."

To the extent that state law has mandated a form of labeling and specified that the failure to comply renders the product “misbranded,” this legislation would effectively elevate GMO content to the level of a material fact as a matter of state law. Even the failure to disclose the information in a sufficiently “conspicuous and easily understandable” way could trigger liability under the CFA.

Though actual damages for such a failure would likely be small, the CFA provides for attorney’s fees and court costs that would dwarf the dollar value of the actual injury. The bill also could open the door to the class action litigation that has been growing in the area of food litigation, as experienced recently by Campbell’s under the CFA for suggesting the heart healthiness of their soup. New Jersey already ranks second for food litigation, this bill would likely make that worse.

To ensure that no new liability is created, we would suggest language that would specify that this bill does not establish a standard or obligation that would generate liability under any other bill.

Proposed Liability Language

2. c. For each third and every subsequent offense a penalty of \$1,000.

Any penalties imposed under this [subsection] Act shall be recovered in accordance with the provisions of R.S.24:17-1 et seq. An action to recover a penalty under this Act may not be maintained as a class action.

d. The penalty described in this section shall be the sole remedy provided for violations of this act. A violation of this Act shall not form a basis for a cause of action under any other statute. Nothing set forth in this act shall be construed as creating or establishing a standard of disclosure or duty for labeling with respect to any other law. Nor shall evidence that a food product label is in violation, or is alleged to be in violation, of the provisions of this Act, be admissible or discoverable in any legal proceeding with respect to any law or claim other than a proceeding to enforce the provisions of this Act.

We would respectfully request adoption of this language. Barring that, we would encourage the committee to hold the bill.