



REGULATORY AND PRODUCT LIABILITY OVERVIEW FOR DISTRIBUTORS OF FOOD PRODUCTS IN CALIFORNIA

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Welcome to California!

California is a great place to live and work, and we are fortunate to call it home. But there is no sugarcoating the fact that California presents unique and daunting challenges to product manufacturers and distributors—particularly those in the food industry. California is one of the most heavily-regulated states in the nation. It is also home to one of the nation's most aggressive plaintiffs' bars. The harsh reality is that, if you manufacture, distribute, or sell food products in California, you *will* get sued. That being said, there are many steps you can take to minimize your risk and limit your exposure. This white paper is intended to give you a broad overview of California regulations and product liability law as they pertain to food distributors. It will also provide you with some concrete steps you can take to minimize your risk.

Potential Pitfalls for Food Distributors

There are many ways that your company can find itself on the bad side of a state regulator or on the wrong end of a lawsuit. Distributors can be fined by state and federal regulators if their product fails to comply with packaging and labeling regulations. If your company distributes contaminated or adulterated food that causes harm to a consumer, the company may be found liable. And if your product's packaging contains false or misleading claims, your company could be hit with an injunction forcing it to halt further sales.

California's Proposition 65

Enacted by voter initiative, "Prop 65" requires the state to publish a list of chemicals known to be carcinogens or to cause reproductive harm. This list is updated each year and has grown to include over *900 chemicals*. Barring a safe harbor protection, if your product contains *any* of the listed chemicals, you *must* provide a warning.

Prop 65 enforcement can be carried out by "private parties acting in the public interest." Failure to comply can result in civil penalties of up to \$2,500 per day in addition to legal fees and costs for plaintiffs' attorneys for litigating a Prop 65 case.

There are some limited defenses available in a Prop 65 case. For example, if a defendant can show that the listed chemical is "naturally occurring," the product may be exempted. As a practical matter, this means that the defendant must prove that manufacturing practices could not have prevented the chemical from being part of the product.

Recent Prop 65 Developments

It is important to keep abreast of the latest developments regarding Prop 65, as it is ever-evolving. Here are some recent developments that impact food distributors:

BPA: In 2015, BPA—which is used in a variety of products, including metal cans for foods and beverages—was added to the Prop 65 list of chemicals. Beginning May 11, 2016, product manufacturers were required to add warning labels if their products contain BPA.

Major Changes to Prop 65 Regulations Coming in 2018: On September 2, 2016, the Office of Environmental Health Hazard Assessment (OEHHA) adopted major changes to the Prop 65 regulations. These proposed changes will take effect on August 30, 2018. These changes include significant modifications to the warning language that must be used on the product's packaging. For Example, product manufacturers and distributors must now identify at least one chemical for which the warning is being provided and the OEHHA website must be included in the warning.

California's Proposition 37

Prop 37, which went before the voters in 2012, would have made California the first state in the nation to require labels on food with genetically-modified ingredients. It failed by a razor-thin margin of 51% to 48%. Given the close vote, we expect this issue to resurface in the coming years.

Federal Regulations

Product distributors must always be mindful of the plethora of federal statutes and regulations pertaining to the growing, packing, labeling, and distribution of food products, such as the Fair Packaging and Labeling Act of 1967; the Federal, Drug, and Cosmetic Act; the Nutrition Labeling and Education Act of 1990; Dietary Supplement Health and Education Act of 1994; and the Food Allergen Labeling and Consumer Protection Act of 2004. Failure to comply with these statutes and regulations can subject the company to hefty fines and, in some cases, even criminal prosecution. Moreover, failure to comply with these regulations could be used to support a plaintiff's tort claims.

- Food Safety Modernization Act (FSMA): in 2013, the FSMA Produce Safety Rule became final. These regulations established minimum standards for the safe growing, harvesting, packing, and holding of fruits and vegetables grown for human consumption.



California Product Liability/Tort Claims

A plaintiff's potential theories of recovery against food distributors in California include:

- **Breach of Implied Warranty:** each sale of food comes with an implied warranty that it is fit for human consumption. If food is contaminated or adulterated, the implied warranty is breached.¹
- **Strict Product Liability- Product Defect:** a food distributor may be found strictly liable if the product in question contains a defect, such as a bacterial contamination.²
- **Strict Product Liability- Failure To Warn:** a food distributor may be found liable for failure to warn of potential risks or side effects associated with consumption of the product.³
- **Failure to Warn of Allergens:** in California, a distributor may be liable to a consumer who suffers an allergic reaction to food if the food (1) contained an ingredient to which a substantial number of people are allergic, (2) the ingredient is either one whose danger is not known or, if known, is one that consumers would reasonably not expect to find in the food, and (3) the defendant knew or should have known of the ingredient's presence and danger.⁴
- **Negligence:** a food distributor may be found liable if it was negligent in preparing, packaging, or distributing the product.⁵

Res ipsa loquitur is a legal theory available to plaintiffs in adulterated food cases. Under a *res ipsa* negligence theory, the plaintiff only need show the injury-producing instrumentality was in defendant's exclusive control and injury would not have occurred if due care had been exercised.⁶

- **Violation of California's Unfair Competition Law and False Advertising Act:** a food distributor may be liable if the packing for the product contains false or fraudulent claims. Remedies include disgorgement of profits and injunctions.

Potential Defenses

All is not lost! There are many defenses available to food distributors under California law. Below are just a few examples.

- **Natural Substance Defense**
There can be no liability on the part of the company if the injury-producing substance is "natural" to the food substance and, by its very nature, is reasonably expected.⁷
- **Lack of Causation**
To recover on breach of warranty or strict liability theory, the plaintiff must show that the food product was a substantial factor in causing the harm – *i.e.*, the plaintiff must show a causal link. Under California law, close proximity of time between the consumption of the food and the onset of the illness is insufficient to show causation.⁸
- **Statute of Limitations**
Subject to some exceptions, the statute of limitations in California for personal injury claims is 2 years.⁹ The statute of limitations for UCL and False Advertising claims is 4 years.¹⁰

Steps You Can Take to Minimize Your Risk

The most important step you can take to minimize your risk of exposure is to hire competent outside counsel that can assist you with navigating the legal and regulatory minefield in California. Here are some other steps you can take to decrease your risk of exposure: (1) purchase product liability insurance, (2) stay abreast of changes to federal and state regulations that apply to your product, (3) know what is in your product, (4) conduct product testing, (5) ensure the integrity of your manufacturing and packaging processes, and (6) make sure any claims about your product that appear on your packaging are accurate.



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¹ See CACI Civil Jury Instruction No. 1233 for the elements required to prove this claim.

² See CACI Civil Jury Instruction No. 1201 for the elements required to prove this claim.

³ See CACI Civil Jury Instruction No. 1205 for the elements required to prove this claim.

⁴ *Livingston v. Marie Callender's, Inc.* (1999) 72 Cal.4th 830, 838-839 (Failure to Warn of MSG in Soup).

⁵ See CACI Civil Jury Instruction No. 400 for the elements required to prove this claim.

⁶ See *Ford v. Miller Meat Co.* (1994) 28 Cal.App.4th 1196, 1202-1203.

⁷ *Mexicali v. Superior Court* (1992) 1 Cal.4th 617, 630.

⁸ See *Sarti v. Salt Creek Ltd.* (2008) 167 Cal.App.4th 1187.

⁹ See *California Code of Civil Procedure* § 335.1

¹⁰ See *California Business & Professions Code* § 17208.