

Speaker 1: [inaudible]

Speaker 2: Hello and welcome to legal food talk. I'm your host, Justin Prochnow, a shareholder in the Denver office of the international law firm, Greenberg Traurig. And this is a podcast brought to you by our food beverage and agribusiness practice. To give you some insights [00:00:30] and knowledge about the world of food, beverage and activism. Welcome everyone to another edition of Greenberg Traurig legal food talk today. I'm excited to be joined by my colleague and friend Wil Wagner from our Sacramento office. Hello Wil Hey Justin, how are you today? I'm doing well. Thanks for joining us today before we get [00:01:00] into it. Uh, uh, the common question that a lot of people like to ask is what interesting things have you done during COVID? I know in particular you had an interesting thing happened a couple of months ago. How's life with another new baby in the house.

Speaker 3: Yeah, I had, uh, I had my second child, um, in mid January, which, uh, has been a lot of fun and, you know, other than the lack of sleep and the adjustment to, you know, [00:01:30] having to play man on man coverage with two kids, rather than zone coverage of one, it's been great. And I, you know, I think there are advantages to, to dealing with, you know, a wife's pregnancy dying during a pandemic versus real life where you don't have as many opportunities to go and do things anyway. So it's been good.

Speaker 2: There you go. Well, I think you'll find also as the kids get on in years, definitely, uh, helpful to have two cause they can occupy each other some of the time, maybe not right [00:02:00] now, but certainly as, as things move forward, I'm looking forward to that day. Well, today we're going to, we've covered a variety of different topics ranging from immunity claims during COVID to hemp and CBD to weight loss management. And today we're going to talk about something near and dear to your heart. Something that you do a lot on a daily basis. I know because we work [00:02:30] together on a lot of these matters and that's good old proposition, 65 in California. Um, so maybe you could start by just telling us what is prop 65, a lot of people, uh, we hear about it. A lot of people see it, um, but they don't really know what it is. So start off by just telling us what is prop 65, other than the bane of existence for many companies in California,

Speaker 3: Prop 60 was, uh, [00:03:00] uh, an initiative petition that was passed in 1986 by the California voters and essentially, uh, the most common variant of prop 65 requires, uh, a clear and reasonable warning to any listed chemical prior to a person in California being exposed to that chemical above certain regulatory thresholds. So it is a government enforcement action. It's not a class action lawsuit or something like that. What makes prop [00:03:30] 65 unique and different and really causes a lot of the issues related to it is that in addition to it being a government enforcement action, there's also a private enforcement scheme attached to it. So for what was really advertised to the voters in the eighties as being, you know, the government being able to watch over and make sure you're not being exposed to harmful chemicals has turned into a cottage industry for plaintiff's lawyers in which they issue notices of violation, just [00:04:00] alleging the presence of any of 900 listed chemicals. Once a plaintiff establishes that there is a listed chemical in the product, the burden of proof shifts to the defendant to prove that the

level of exposure is under whatever the regulatory safe Harbor is. So in, in practice, that means that defense is very expensive and cost prohibitive to most. And that of course leads most companies to settle these as quickly and as efficiently as possible. And Justin, [00:04:30] as you know, there are now, you know, 15 or 20 regular bounty hunting plaintiffs out there that are taking advantage of the statutes.

Speaker 2: Sure. Well, let me go back a little bit here. So you said this was something passed in California in the eighties and you mentioned 900 different chemicals. I mean, we're not talking necessarily about very, you know, really chemically sounding ingredients. Some of these are vitamins [00:05:00] or not vitamins, but minerals and other substances that you wouldn't, you wouldn't typically think of as necessarily being chemical substances. How, how did something initially get on the prop 65 list and how does something get added to the prop 65 lists now?

Speaker 3: Yeah, that, that's a good question. Unsurprisingly, California is very liberal and adding chemicals or substances to the prop 65 list. [00:05:30] And there are several mechanisms through which California can add chemicals. Uh, the, the initial list was very short, you know, 10 or 20 chemicals and it's slowly built over time. There was an authoritative bodies listing. Um, if something is, is, uh, listed under hazard communication standards, then it's going to eventually be deemed listed under prop 65. And then there, there is a carcinogenic and a reproductive toxicity committee, [00:06:00] um, under, under Cali PA that we'll catch additional chemicals and substances and eventually add them to the list. And like you said, there are, uh, this isn't just scary sounding chemicals. You see some really, really common every day substances that are also listed. And I, I think the best example of that is led of course, led is very prevalent in the Earth's crust and unsurprisingly that that led led easily makes its way into [00:06:30] our supply chain, especially the food supply chain, because food is grown from the ground. It's really, it's really that simple. Um, and, and unsurprisingly led is one of the primary targets of bounty hunters as a result.

Speaker 2: So led is good. One to talk about as an example, and goes back to what you were saying about the burden shifting to the companies that are challenged under this prop 65. It's my understanding that [00:07:00] there is a naturally occurring exception to the prop 65 rule that was intended to exclude ingredients that had naturally occurring elements that might be on the prop 65 list. Uh, but it's also my understanding that this exception there are obstacles to it that really make it impractical for companies to actually take advantage of that exemption. So can you talk a little bit about that naturally occurring [00:07:30] exemption and why it doesn't really have much value these days?

Speaker 3: Yeah, that's right. So the naturally occurring exemption is recognized in prop 65 regulation. Unfortunately it is an affirmative defense. It's not a barrier that the plaintiff has to overcome to state their initial case. So in reality, that means the defendant has to prove that whatever substances that issue is naturally occurring, uh, that can be a really, [00:08:00] really complicated endeavor. And, you know, the companies that have really tried to use that defense in the past have spent a lot of money on the defense and haven't succeeded. And the reason is, is that you have to disqualify any potential human cause of whatever the chemical is and that, and that's very difficult. So lead for example,

um, you have to prove that the lead naturally occurred in whatever region that specific crop was grown in versus, you know, the factory a couple miles away [00:08:30] admitting, admitting exhaust that causes the lead to, to go to the ground. So, and, and that's the, you know, you have to go from basically crop to crop throughout the world of wherever you're sourcing your ingredient from to, to prove that all of the lead is naturally occurring. So in reality, it's cost prohibitive for most to take that position and litigate. Got

Speaker 2: It. Yeah. That makes sense. Now, as you indicated, this was initially intended [00:09:00] to be a government, uh, you know, eight regulation or state passed. Is it a regulation or a statute? I guess I don't even know

Speaker 3: It's a statute, it's a statute then with promulgated regulations under it by,

Speaker 2: So it was intended to be enforced by the government, but as we've talked about, it's really enforced by a growing number of [00:09:30] what are referred to as prop 65 bounty hunters, um, that enforce these. How often if ever, does the state actually take up these prop 65 cases?

Speaker 3: Very, very rarely. Does the state take up a prop 65 case? I would say about one out of a hundred, if that, that might be, that might be generous. So the, the original statute does allow for the private enforcement mechanism, but you know, when, when they were advertising the initiative [00:10:00] to the public that wasn't emphasized, you know, I don't, I don't think the public really understood what it was signing up for when this initiative was passed in the eighties. And I doubt it would be approved with Eva, even in California with, with what we know today about it.

Speaker 2: Well, I know we were discussing with another client, uh, a couple of days ago that actually prop 65 was probably single-handedly responsible for some of the natural litigation and the non-GMO litigation [00:10:30] to fail in California because the opponents of it just pointed the prop 65 and said, do you want another prop 65 here in California? And that was about all they needed to, to defeat those, uh, sounds right to me. So let's talk a little bit, uh, you know, companies that have products and, and, and again, to clarify, this is only for products that are being sold into California. Uh, it doesn't affect any of the [00:11:00] other 49 states. So it's only for a company in, in theory, but obviously because the repercussions, because it's very hard for companies to label products for one state and then differently for the other 49 states. So it ends up look, you're in California.

Speaker 2: Um, a lot of people listening to this are in California. They've probably seen prop 65 warnings on just about everything that [00:11:30] they see it's on the, on the door or inside the door of most fast food places and coffee places and restaurants. And it's in parking garages and it's at amusement parks and it's everywhere in California. So that the typical California person probably doesn't even think twice about it. But when you have people in other states that are consuming products and see on their label, that this product might contain a chemical [00:12:00] that has been determined by the state of California to cause cancer or the birth defects or other reproductive issues, all of a

sudden they're like, whoa, what what's going on here? And so, you know, that's the effect on all of the other states. So let's talk a little bit about the warning as I think there are common misconceptions about prop 65. Let's talk a little bit. What is the specific requirement? Is there a requirement that I have a warning on the packaging of my product?

Speaker 3: [00:12:30] Yeah. So prop 65 regulates exposures, not chemical or substance concentration. So there are for most listed chemicals. So going back to lead the lead is a good example. The lowest safe Harbor for lead is 0.5 micrograms a day. If a product causes an exposure over that level, then a warning is required that warning can take several different forms. [00:13:00] Um, there are promulgated regulations that set forth safe Harbor warnings. If a safe Harbor warning is provided, then, uh, a bounty hunter cannot take the position that warning is not sufficient. It is, it is deemed sufficient and is, uh, absolutely preclusive to any sort of enforcement action. There is a long form and a short form variation of that warning that you need to get, right? If you, if that's what you're intending [00:13:30] to provide, uh, the long form variation requires that you identify a chemical for each end point.

Speaker 3: And what I mean by end point is prop 65 regulates carcinogens and reproductive toxicants. Those are the only two endpoints. It regulates. So you need a chemical, if you want a completely protective warning, and you're using a long form warning, you need a chemical, that's both a reproductive toxicant and a carcinogen under the prop 65 list, [00:14:00] or you need two chemicals. One that covers each endpoint. The short form warning has kind of been the saving grace the last couple of years to a lot of companies that, you know, don't have the resources to implement a full compliance program and figure out where their products are compliant and where they aren't. And it stress said warning cancer and reproductive harm, and then provides a hyperlink to the prop 65 website. Uh, of course in the, in the middle of a global pandemic, uh, Cali PA [00:14:30] has proposed new short four mornings in which, uh, companies would actually have to identify specific chemicals, which of course makes the, the exercise of, of providing a compliant, learning a lot more difficult.

Speaker 3: It's not clear whether the sh those new regulations are going to go through and everybody's going to have to rethink their short form again. Uh, but it, my, my guess is that it will, um, and, and there's going to be a year sell through period where companies are going to have to take another look [00:15:00] at their warnings and make sure that they're providing a safe Harbor warning. Otherwise, the statute says a warning has to be quote unquote, clear and reasonable. Um, so you don't have to provide a safe Harbor step, uh, regulatory warning. But if you don't, it's possible that a bounty hunter is going to argue with you that it's not clear and reasonable and, and try to see you over that.

Speaker 2: Okay. And obviously one of the options is to place it on my label. It doesn't [00:15:30] necessarily have to be on the label, correct. It could be on the shelf where a product is being sold.

Speaker 3: That's correct. So shelf tags, or, you know, if you, if a retailer has figured out a system where they can put the warning on the cash register at the point of checkout, and it just

automatically populates when certain skews are scanned, um, that would also be safe Harbor, uh, in, in practice. Most retailers won't put up short form or won't put up shelf tag warnings, [00:16:00] right. Um, it's, it's really difficult for them to do now. Now, you know, the, the advantage to a shelf tag warning, or some other point of sale warning is that you can really specifically target that warning to California, and you don't have to put it on the label that goes nation or worldwide, but, you know, retailers don't want to take responsibility for whether a warning is provided or not, and they don't want, you know, tags all over their store that, that provide prop 65 warning. So, um, in practice, [00:16:30] you're not going to see very many shelf tags

Speaker 2: Unless your a, a, a brand who is retailing it yourself, where you control both the retailer and that, or there have been some limited time circumstances, I believe when BPA audited for hands, that there was a short-term warning, uh, that basically directed, [00:17:00] uh, retailers to provide a, a warning near checkout. I believe that talked about BPA and then individual companies didn't have to put it on their labels because the retailers were actually directed to do it, but that's,

Speaker 3: But yeah, that's, that's right. And you'll still see that everywhere in California,

Speaker 2: Um, warning, I mean, that, that time expired for that.

Speaker 3: Right. Right. So the warning you will [00:17:30] see all the time in California at checkout is the alcohol warning. So you don't see prop 65 warnings on your, on your beer or your wine, or your, or your hard alcohol, even though ethyl alcohol is listed. And, you know, I, I, I think it's pretty well known that alcohol is a carcinogen and it certainly reproductive toxicant. Um, and the reason for that is there, there are some preemption issues. So because of the way the government regulates alcoholic beverages, it, you know, would more [00:18:00] or less preclude a warning from being on the label. So as a compromise, there's a safe Harbor regulation that allows anybody selling out call to put up a warning kind of at the front or in their alcohol section. And then you don't have to individually lay, you know, private label on each, each unit of alcoholic beverage.

Speaker 2: I want to talk about a few of the kind of main ingredients or some of the main chemicals, the main types of products [00:18:30] that we have run into that are kind of on the radar of prop 65 bounty hunters of late. And then maybe we can talk a little bit about some of the, you know, preemptive, proactive type of steps that companies can take, but let's talk a little bit about some of the, the products and, and, uh, chemicals that we see more often, um, the most at the top of the list, as you said, was led. So because of the influence [00:19:00] and the influx of, uh, especially plant-based products, it seems like we're seeing more of that, uh, because when you have a plant-based protein, when you have tea, when you have any sort of, uh, product with, you know, botanicals or other ingredients, as you said, coming from the ground, there's a fairly decent likelihood that they're going to absorb at least some amount of lead into the product. So are there particular types of products in [00:19:30] addition to, or along with those that you've seen a lot of actions with respect to lead?

Speaker 3: Yeah, sure. So I would group lead into the heavy metals, so lead cadmium, arsenic, and mercury with, with lead being the lead risk and cadmium, as you know, for particular products being another risk, um, and, and arsenic and mercury occasionally causing problems, but for lead in particular, like you said, any sort of supplement product [00:20:00] with, with plant-based ingredients, you should always run a lead test. Cassava flour has been a major target recently, which is, which is interesting, um, and has caused a lot of issues in the supply chain, but any product that's using cassava flour, you're going to want to take a look at, I would say to any food manufacturer that is using an ingredient grown in the ground, you should run a heavy metal panel on your product. It's just, it's a good compliance practice, [00:20:30] and you should do it fairly regularly, um, because lead or, or heavy metal content will vary over time, depending on where you're sourcing it from. And even if you're sourcing it from the same place, you're going to see some variation.

Speaker 2: And that's a test that most labs are running pretty regularly now.

Speaker 3: Yeah, that's right. Most labs do run it, but you want to be selective about the lab that you're choosing in particular. You want to make sure it has sufficient sensitivity. So if, if they're going to give you a reporting [00:21:00] limit of one part per million, now that doesn't sound like a lot, but that would be a lot of lead in a PR in a food product in particular. Um, so that, so you're going to get a non-detect at one part per million and say, well, I'm okay. You need to be able to get down to one part per billion would be the best reporting limit. Although 10 parts per billion will work for most products, but if you're not getting that level of sensitivity, uh, the lab probably is not of sufficient quality for you to determine your prop 65 compliance [00:21:30] to heavy metal

Speaker 2: To characterize it for everyone to kind of understand. I mean, if your one part per million would be one microgram per one gram, right? So, you know, if you've got a one gram product and you're only testing the one, one microgram, you're not even testing to what the prop 65 threshold limit is. So, um, you know, that's not going to cut it for your tests yet. I mean, it's certainly something that we can advise [00:22:00] people on. And obviously that, that we do all the time is help them direct it. And depending on the situation, you know, have that testing come through us, uh, as opposed through other means to potentially protect the confidentiality of that testing.

Speaker 3: And the one other thing I wanted to say about lead in particular, and this is true for the other heavy metals too, but, you know, it's kind of goes hand in hand with that recent, [00:22:30] uh, congressional baby food report. Um, people just can't believe that they see, you know, 50 parts per billion of arsenic in baby food, but, but what most people don't understand is if you go buy an apple or banana off the shelf of your local supermarket and send it in for analysis, you're going to find detectable heavy metals in every single piece of produce that you test. So it's not surprising at all to me. And it doesn't mean that these companies are adding heavy metals to the product [00:23:00] they're using. What's grown in the ground and humans have always been exposed to trace levels of heavy metals. It's a part of the human condition. There's no way around it.

Speaker 2: Let's talk about a few of the other, um, kind of main ingredients. One of them that has come up a lot, it came up in the context of both coffee and also kind of fried baked products is acrylamides. So can you tell us a little bit about the state of acrylamides, um, actions? Sure.

Speaker 3: [00:23:30] Uh, acrylamide is, uh, is a very complicated one. So I'll do my best to cover as much as I can in a short amount of time, um, acrylamides forms during the cooking process, you're going to often see it in kind of starchy products. So you will, you will see it in other products too. You'll see it in flour based products, seed products, anything that's cooked. And the reason that coffee has acrylamides is that you roast the coffee beans. So if you are cooking a product or frying a product, uh, [00:24:00] you should be doing some acrylamide work to determine how much acrylamide formation occurs while you produce your product. There is significant uncertainty surrounding acrylamide right now. And the reason for that is that the safe Harbor, uh, for acrylamide, uh, rallies for the carcinogenic end point is 0.2 micrograms a day, which is extremely low.

Speaker 3: Most cooked foods are going to have an issue there. So as a result, and a [00:24:30] lot of foods can't do anything about it, or, or can't lower acrylamide content to a level that would be considered compliant with that 0.2 micrograms a day safe Harbor. So what's happened over the last decade or so, is that, uh, the, the attorney General's office and the private bounty hunters have, uh, have agreed to concentration levels for acrylamide than that in effect are well above the safe Harbor. So potato chips were the, the [00:25:00] standard for potato chips is about 350 parts per billion. There's a lot of other examples out there. There's, there's a cookie there there's kind of a cookie standard. There's a prune juice standard. Uh, you know, you can go through the various categories of cooked foods and probably find, uh, an acrylamides standard that's in a concentration and has really no bearing on the safe Harbor warning as a result, uh, Cali PA has proposed and accrual admired regulation in which it carves out the safe [00:25:30] Harbor amounts and basically tells plaintiffs they can not pursue actions unless they have testing above a certain amount for a certain product category.

Speaker 3: Um, we'll see if that regulation goes through and if it does, it'll be I think, a step in the right direction, um, in terms of, of, uh, preventing frivolous enforcement, the other major, uh, development in the acrylamide world is that Cal chamber has filed a first amendment action [00:26:00] in federal court in Sacramento, um, where they're arguing that it is a violation of the first amendment to compel a cancer warning for acrylamides given the current state of, uh, toxicology. There's a lot of evidence that currently suggests that acrylamide is not toxic to humans in the amount that is consumed in a diet. Um, you know, our body naturally creates several micrograms of acrylamide [00:26:30] every single day. And so the, the current thinking is that acrylamide as a, as a, uh, a step carcinogen, not a linear carcinogen. And what I mean by that is you have to have a really, really high dose of it for it to actually be a carcinogen to a human well above what we'd get in our diet. So that's the basis of the first amendment suit. We're expecting a preliminary injunction decision anytime, and that could really be a game changer for the industry if the court grants that preliminary injunction

Speaker 2: Just further emphasizes [00:27:00] just some of the, for lack of a better word, craziness in how prop 65 applies to California, but nowhere else in the country. Um, and again, as you said, not surprising, the California was decided they know better than everyone else about some of these things, but, um, one last ingredient. And then, and then we'll kind of wrap up, um, one that's on the topic of, [00:27:30] uh, on the tip of tongues of a lot of people. Um, and that's, uh, THC, um, because it has obviously a big effect on the, both the marijuana and the CBD kind of hemp, uh, business side of things, January. I think it was January 3rd, 2020 THC was added to the prop 65 list, uh, allowing for a one year kind of a get yourselves in line period and starting January 3rd, 2021, [00:28:00] you know, it was an actionable item. And I believe, you know, within days some levels started going out from bounty hunters for January 6th was the first one yet. So what, is there a threshold for THC, if not, is that being considered, and I guess along with that, if you don't know, is there, well, why don't you first answer, answer that and then I'll go,

Speaker 3: Yeah. So, [00:28:30] so THC does not have a promulgated safe Harbor, and I've heard absolutely nothing about [inaudible] stating that it intends to ensure order promulgated a safe Harbor. Um, I have spoken with several toxicologists about what we believe that safe Harbor would be and what a defensible safe Harbor is in litigation. Um, I'm not going to comment on that right now, but I, I think it might be high enough to where companies would have a viable defense if they are hit by [00:29:00] it by a THC, no,

Speaker 2: To be clear, it's a different consideration than like the farm bill, which has, you know, 0.3% or less THC, uh, you know, exempts it from being a controlled substance. I think there's some confusion from people because when I talked to them, they say, oh, well, it's below the 0.3 10. I mean, what prop 65 and what Ohio is looking at has nothing to do with whether it's a controlled substance under the farm bill or not.

Speaker 3: Yeah, [00:29:30] that's right. So just because the product is not a controlled substance under the farm bill does not mean you should just assume it's compliant with prop 65. In fact, the standard prop 65 is going to be orders of magnitude lower than that 0.3% standard.

Speaker 2: So, so right now, if you're selling a, a cannabis or a hemp product in California, and there's any amount of THC in it, you [00:30:00] need to provide some sort of warning under prop 65. Well,

Speaker 3: There, there is another option, um, because I think that the market is going to develop because, you know, a lot of these companies are putting THC warnings on, on products. Now, I think a market will develop for THC products that do not have a warning because some consumers are going to prefer that product. So if a, if a company wants to go that direction, they need to do an assessment of their product and an assessment of the safe Harbor and make sure that they, [00:30:30] you know, are, are in line to defend a potential notice because, you know, I, I could certainly see the situation for the right product in which it's, it's worth the risk and it's worth the compliance time to, to go through and, and ensure your, you know, figure out what the THC safe Harbor should be and, and determine whether there's a violation or not. So you have that in your back pocket, if you ever receive a notice.

Speaker 2: So let me ask you this, does, does prop 65 cover even [00:31:00] trace amounts of something? So, you know, one of the things I get in, especially because there's so much testing involved with, with cannabis products and THC, you know, a lot of times companies will say 0% THC, but then they'll include like a disclaimer that says, you know, pursuant to HBO LLC, or, you know, to, to point, you know, uh, [00:31:30] tested 2.002% or something like that. So let's say someone does a test and they get 0.0 0, 0, 0 1% of THC is that bill technically covered under prop 65. Yep.

Speaker 3: That's enough for a plaintiff to issue a notice of violation. So any amount of a listed substance, even if it's that, even if the plaintiff is able to achieve a, maybe an unscientifically, low [00:32:00] reporting limit and reports right above that limit at, you know, point 0.1 parts per billion or something like that, that's still enough to issue a notice of violation. Unfortunately. So yeah, they, you know, that, that doesn't mean they have a meritorious case, but you're, you know, the defendant's going to have the burden to, to make that proof in court.

Speaker 2: Okay. Well, we're, we're reaching the end here. If you're doing a 30 minute spin class, you're already, uh, over it. Although I don't know if this is how you want to [00:32:30] spend the 30 minute spin class working in the prop 65, but, but as we wind up, I know you mentioned, uh, you know, doing, uh, kind of proactive testing of your products. Anything else that companies can do or should keep in mind as kind of takeaways from this regarding prop 65?

Speaker 3: Yeah. I, I think that companies, especially in the food space need to, um, somewhat track trends of enforcement, enlist, enlisted [00:33:00] chemicals, uh, good examples for that would be for, for all alcohol and fear on now, there haven't been too many notices yet, but those are two, two chemicals that occur in similar, in a similar way as acrylamides and that they formed during mainly during cooking. So everybody's concerned that those are going to be the next two acrylamides under prop 65. Uh, so I, you know, I, I wouldn't even suggest necessarily that companies add warnings for those right now, but it's something to start thinking about and [00:33:30] maybe doing some testing on. Um, but, but beyond, you know, running your regular heavy metal tests and your acrylamide tests, you know, just, just making sure you're keeping your eye on the ball and seeing what the potential new developments are, and you're going to be in a pretty good space.

Speaker 2: And of course they can always talk to you and, uh, you can, uh, kind of give them the rundown and also kind of advise them on what, what steps might be right for their products.

Speaker 3: Absolutely. Always happy to do that.

Speaker 2: So if [00:34:00] you want to get in touch with Wil, you can contact him, uh, by email. Uh, his email is Wagner w@gtlaw.com as always. You can catch me at ProchnowJJ that's P R O C H N O W J j@gtlaw.com. We hope you learned some things about prop 65 here today. If you liked the podcast, please give us a favorable review on whatever [00:34:30]

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Thank you. Thanks for having me.