

Speaker 1 ([00:00](#)):

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Justin Prochnow ([00:26](#)):

Hello, and welcome to Legal Food Talk. I am your host, Justin Prochnow, a shareholder in the Denver office of the international law firm, Greenberg Traurig. This is a podcast brought to you by our Food, Beverage and Agri Business practice to give you some insights and knowledge about the world of food, beverage, and agri business.

Justin Prochnow ([00:53](#)):

Welcome listeners, to another edition of GT's Legal Food Talk. I'm joined here today by my colleague and friend, Michael Goodman.

Michael Goodman ([01:03](#)):

Thanks for inviting me on.

Justin Prochnow ([01:04](#)):

Of course. What's new? We'll do a little breakdown here. What have you been watching lately? Or are you going to tell us when I used to do jury trials, that you don't watch television and you only read The New Yorker, and The New York Times?

Michael Goodman ([01:21](#)):

Yeah, no and I give everybody the benefit of the doubt, right?

Justin Prochnow ([01:24](#)):

That's right.

Michael Goodman ([01:26](#)):

I've started wearing a pocket protector again. First time since college. I watched Gattica last night, and then I got into The Mandalorian, which is something you've been pushing on me for two years. So, I'm finally getting into that. I crushed one season in a day. Then we're going to go with the second season tonight.

Justin Prochnow ([01:44](#)):

Excellent. Yes. Mandalorian, for any Star Wars fans out there, is a must read. Star Wars has done a good job lately of expanding out the cannon of Star Wars things to not just the main Skywalker movies, but now they've had The Mandalorian. They just started The Book of Boba Fett. I think we've an Obi-Wan Kanobi series coming up. For a household like ours, which consumes a lot of Star Wars content, including my 12 year old who got the Lego Death Star for Christmas last year, and it's taking up half his room.

Michael Goodman ([02:21](#)):

Wow, it's nice to be young. I'm really excited to talk about this new topic, which is not a new topic. It's been a topic for about 30 years.

Justin Prochnow ([02:29](#)):

Today, we're here to talk a little bit about the world of bio-engineered ingredients, non-GMO, and kind of where we are in the labeling kind of areas of that. Michael, I know that in your past life before becoming a lawyer, you did a lot of work in various areas, and part of it was in this area. So, tell us what your background is coming into this.

Michael Goodman ([02:58](#)):

I have an undergrad and a master's from The Wisconsin Madison in the-

Justin Prochnow ([03:04](#)):

Is that like the Ohio State University-

Michael Goodman ([03:08](#)):

Yeah, yeah, but cooler.

Justin Prochnow ([03:08](#)):

All Big 10 schools have to add "The" to the front now.

Michael Goodman ([03:11](#)):

But colder in [inaudible 00:03:13] isn't quite as [inaudible 00:03:14] every year. So, I did a lot of studying with recombinant DNA, and right up the block was the dreaded Monsanto, one of the facilities. I actually had the pleasure of interviewing and learning from some of their top scientists. The intellectual property is spectacular when it comes to bio-engineered foods.

Michael Goodman ([03:36](#)):

But even more fun than that is the FDA and USDA repercussions and ramifications, which are just snapping into gear right now after 25 years of really back and forth, and in some cases, pretty contentious back and forth between the food industry and interest groups.

Justin Prochnow ([04:01](#)):

Today we're going to talk about the new BE standards that went into effect for good this year. When we talk about that, it's really probably important to talk about how we got here, and the new law passed by Congress, and the new regulations established by the USDA really came as a result of the movement in the early 2010s to have non-GMO labeling requirements.

Justin Prochnow ([04:33](#)):

I remember this back when there was actually a food conference circuit, pre-COVID and everything else, and we were doing all of these shows. It looks like it's starting to get back into the swing of things now. The topic of the non-GMO labeling laws was front and center, especially 2012, 2013, and 2014 where different states were passing laws because there was no federal law governing non-GMO labeling claims.

Justin Prochnow ([05:06](#)):

First, California tried to do it with US Prop 37, and truthfully, thanks to our friends that did Prop 65, that helped defeat Prop 37 because no one wanted another Prop 65 around, so it was narrowly defeated in California, followed up by narrowly being defeated in Washington. Various other states did it. It really kind of culminated with Vermont passing the first law that actually went into effect. We were talking about this last night.

Justin Prochnow ([05:38](#)):

Kind of crazy, a few of the states passed laws, but only contingent on other states other passing laws because they didn't want to be the first one. Connecticut passed a law that said theirs would go into effect I think it was October 1st after at least four other states had passed laws. Then Maine passed a law that said theirs would only go into effect when at least four contiguous states, one of at least touching Maine, which kind of limits the number of states that that would be based on where Maine is for you geographical experts out there, as long as at least one was touching Maine and four contiguous states.

Justin Prochnow ([06:16](#)):

So, no one really wanted to be the first. Vermont decided to take up the mantel, decided to be the first. They passed it and as of July 1, 2016, it became mandatory to include a statement on the label. That lasted for about two weeks, and during some of that time some of the bigger companies started putting it on labels, but at the same time were lobbying Congress, and Congress passed a law signed into effect by President Obama basically establishing national bioengineering labeling laws, and essentially voiding out any other law that was in effect that time.

Justin Prochnow ([07:00](#)):

Vermont had a short-lived and sweet time as the only state passing and implementing a GMO labeling law. So, kind of tell us a little bit about what the USDA did, and what we're looking at now.

Michael Goodman ([07:17](#)):

I kind of want to back up even before the laws.

Justin Prochnow ([07:18](#)):

Sure.

Michael Goodman ([07:18](#)):

And why does this matter. If I were to tell you, in the late 90s, probably even earlier than that, of course the industry was moving towards that perfect crop and science is getting involved. It's not just the farmer planting the seed, and then growing the crop, and then selling the crop at the farmer's market, but everybody wanted that perfect seed. At the same time, you have certain, we'll call them breeders, that really want to sell the seed every year.

Michael Goodman ([07:47](#)):

From a company perspective, you could sell a seed to a farmer every year, and the farmer would have to come back the next year. Now, there are arguments made on both whether that's good or bad, some arguments that it's a burden on the farmer. On the other hand, it gets rid of a lot of genetic anomalies

that happen generation after generation if there are no seeds. So, some of the farmers love the deals because the consumers love the products, and these products were spectacular. They were perfect.

Michael Goodman ([08:28](#)):

What if I told you that the seed was genetically engineered to be perfect? And that seed, again, wouldn't produce any further seeds. So, it's not surprising that that would be genetic engineering. What if I told you that bio-engineered crop was the genetically engineered Terminator seed. Seven years after Terminator Two, the IP owner, or Monsanto, was part of that ownership, brought Arnold back. Justin, do you know what DOA stands for?

Justin Prochnow ([09:06](#)):

I believe I'm familiar with that term, yes.

Michael Goodman ([09:08](#)):

Dead on arrival. When you name a seed that will grow into a crop and people eat, and you call that seed The Terminator Seed, or The Terminator gene, probably not great public relations. What that started, was the merger between the small farmer and science. Unfortunately, people just didn't want to be terminated, whether that be by Arnold or otherwise.

Michael Goodman ([09:34](#)):

Enough of the interest groups started forming, and they put the full court press to make sure that consumers knew whether a food was bio-engineered.

Justin Prochnow ([09:43](#)):

I remember this, because I remember some PowerPoint presentations where they had a tomato with huge Arnold muscles and everything else. It's always an interesting topic for me to think about it, and we won't get into all of those different discussions today about why anyone really cares whether something is a genetically modified or bio-engineered ingredient or not. Is there really science that shows any nutritional difference or any longterm effects? I think the opponents of it would say, "We haven't had enough time to know whether there's any longterm effects or not," but this was the campaign for all of these different laws back in the middle 2000s, was a lot of them were called "The Right to Know" laws.

Justin Prochnow ([10:38](#)):

We don't know, but we want to know whether we have GMOs in our products or not. Of course, that's morphed into other types of litigation regarding all natural and GMOs. That's where we got this. Of course, it's the National Bio-engineered Food Disclosure law, and then the USDA had basically two years to come up with regulations. It was supposed to be done by July 2018. In July 2018, they were kind of scrambling to do it. They issued some proposed regulations.

Justin Prochnow ([11:14](#)):

Finally, December 20, 2018, which has turned out to be a seminal day for lots of things in the health-related space, anyone out there in the hemp and CBD arena might be familiar with the December 20, 2018 date as the day the Farm bill got passed, and truthfully the day that hemp and CBD took on a whole different world after that Farm bill. On that same day, they announced the National Bio-

engineered Food Disclosure Standards, and the USDA implemented them into the Code of Federal Regulations at Part 66.

Justin Prochnow ([11:59](#)):

So, let's get into that a little bit, Michael. What is covered under the National Bio-engineered Standards?

Michael Goodman ([12:08](#)):

In a nutshell, if the food is bio-engineered or genetically modified, then it needs to be reported. We've gone for years talking about GMOs, GMO, non-GMO, yes GMO, no GMO. But we really don't talk about bio-engineered foods. What is the difference between bio-engineered foods, what we're now worried about, and genetically modified organism, or GMOs? Is there a difference?

Justin Prochnow ([12:40](#)):

Yeah, it's a good question, and there are no set regulations that are enforced by the FDA that define GMOs or bio-engineered, or any of those terms. The FDA issued a guidance. It was a while ago, I think back in 2015, they finalized it. Then they since revised it with the flowing title of "Voluntary labeling indicating whether foods have or have not been derived from genetically engineered plants." In that, the FDA basically said they don't really like the term "non-GMO" because they don't think it properly characterized it.

Justin Prochnow ([13:27](#)):

Instead, they talk about it more in terms of food derived from genetically engineered plants, because a lot of times the ingredients might not be GMO, but they came from plants that might have been genetically engineered. So, the FDA basically has said they won't action on GMO claims that are otherwise accurate, but that they would really prefer the term "Genetically Engineered" and then the USDA and what Congress passed is basically using the term "Bio-engineered".

Justin Prochnow ([14:03](#)):

So, there's not really a difference between the two, but regulators would prefer that you use the bio-engineered term.

Michael Goodman ([14:13](#)):

I think the key there is that when we do selective breeding, which every farmer does, every breeder takes the best of the best and mates with the best of the best. Really, technically, by the scientific term "genetically modified organism", that is a genetically modified organism. But that doesn't count here. That's not bio-engineered. That's just mating two best in selective breeding. That doesn't count.

Michael Goodman ([14:43](#)):

What we're really worried about is how much recombinant DNA is in a food, and that recombinant DNA at one point in the life cycle of the seed or the parents had recombinant DNA where it was intentionally added, and then that turns off a gene, turns on a gene, eliminates a gene altogether. That's what we're really worried about here. The question that I get a lot is, "What happens if I'm growing a crop and my crop is not bio-engineered? It is a clean crop, from soil that's never been anywhere near a Monsanto facility or any sort of science at all, but the guy next to me, his crop is genetically engineered/bio-engineered. What happens to my crop when his crop flies over as it will inevitably do, and then I find

that some little bits of my corn are bio-engineered? They're not my crop. They're his crop, and now I'm growing them?"

Michael Goodman ([15:57](#)):

What does that mean? Is there a risk there?

Justin Prochnow ([16:00](#)):

Right, and we're going to talk about that when we get into some of the definitions here. It is interesting in that kind of theory of what happens when you have some cross-pollination, or potential cross-contamination. Ironically, we're seeing that sometimes in the CBD and hemp areas these days, and it has ironically ended up in some marijuana and cannabis growers suing wine and vineyards because you're not allowed any pesticides for the cannabis. You're allowed some certain pesticides on vineyards, and if the pesticide wafts over from the vineyard to the cannabis crop, and now the cannabis crop has this residual pesticide on, is the cannabis crop damaged?

Justin Prochnow ([16:53](#)):

So, you ironically see some cannabis farmers suing vineyards for cross-contamination of pesticides. It's kind of the same general theory here with the bioengineering and [inaudible 00:17:07]. We're going to see that this rule did account for some of those cross-contamination in the definition. Before we get to that, I want to just say that these laws cover food. As defined under the Food, Drug, and Cosmetic Act that's intended for human consumption.

Justin Prochnow ([17:27](#)):

One of the first things to keep in mind is that this bio-engineered standard does not apply to pet foods. It only applies to human foods. It applies to anything that falls under the food umbrella. If we remember from our FDA 101 class, it covers conventional foods, it covers beverages, it covers dietary supplements, it cover processing aides, and it also covers enzymes. What it doesn't cover is food that's not regulated by the FDA, so that would be food regulated by the TTB, so the distilled spirits and wines, or malt beverages that are over 7% alcohol are not covered by this. Things that are 7% or less are still products regulated by the FDA, so they'd be covered.

Justin Prochnow ([18:21](#)):

Also, USDA-regulated products, if the primary ingredient is an ingredient regulated by the USDA, so meat, poultry, or eggs, then it's not covered by this. If the primary ingredient, or it's a type of product that includes those ingredients, but only as smaller ingredients, and it's still a product regulated by the FDA, then you're going to be covered by this. There are some other exemptions, and I'm going to let, Michael, you kind of talk about this a little bit because one of them leads into your discussion here about potential cross contamination.

Michael Goodman ([19:01](#)):

Just to get it out of the way, restaurants are exempt. Restaurants don't need to report whether they're selling bio-engineered food. I think the big thing here... Well, even before the big thing here is that, also very small food manufacturers are not included. That's with annual receipts of \$2.5 million or less do not have to label their products as bio-engineered foods. Anybody over that, has to label them.

Michael Goodman ([19:32](#)):

Really what we're getting to, is that scary part of "What about my crop, and that other guy, that doesn't care, but I care about the not-bio-engineered foods. I don't want to label any of my foods bio-engineered." Well, if you have knowledge, the knowledge element as attorneys we always look to knowledge, is there a knowledge thing? In this case, that matters. If you don't know that your crop has bio-engineered ingredients, or it's not bio-engineered 5% or less of the crop is bio-engineered, then you don't have to report it as bio-engineered.

Michael Goodman ([20:16](#)):

That's a knowledge element. Anything over 5% you have to report. However, if you do know that there is a part of your crop, you know it, and you have that knowledge piece, if you know that part of your crop or all of your crop is bio-engineered, then that 5% drops out. It has to be not detectable. We can talk about not detectable. That's a tough one, because not detectable could mean something today, but mean something totally different tomorrow. It could be less tomorrow.

Justin Prochnow ([20:58](#)):

Let's talk about the non-detectable. One last category of exempt products, or any products, that have been certified organic presumably because the USDA organic program, or the organic certifiers will not certify products that have genetic material in them. Any products certified under the national organic program are not subject to be labeling, presumably because they don't have an amount in there that would need to be declared.

Justin Prochnow ([21:29](#)):

Let's talk a little bit about the not detectable, because I suppose that's kind of another exemption here. The USDA has some very specific requirements related to that under 7 CFR 66.9, which kind of outlines the criteria or thought process in determining whether you need to make a bio-engineered declaration for something that has very minimal amounts of genetic material, and essentially it must be non-detectable.

Justin Prochnow ([22:04](#)):

Michael, take us through those thought processes.

Michael Goodman ([22:08](#)):

You've got three odds on determining detectable ones. The first one is, verify that the food is sourced from a non-bio-engineered proper source. Can you demonstrate that modified genetic material is not detectable by providing records showing that the crops weren't from bio-engineered crops? In other words, do you have contracts with your suppliers? Are your farmers telling you that they're not using bio-engineered seeds that will lead to bio-engineered crops?

Justin Prochnow ([22:44](#)):

Before you go further, because this is a question we have been getting from clients, and of course we regularly counsel clients on these types of issues, but asking what is sufficient substantiation? Is it an email from my supplier? Is it a statement that says "We only use non-bio-engineered crops"? Is it a statement that says "To our knowledge, we don't use any"? Again, you have to look at it from a sufficiency standpoint of is this credible? Would this pass muster? If a judge or a jury were looking at it would they say, "Yeah, that's okay"?

Justin Prochnow (23:21):

I think typically a letter from your ingredient supplier, and that's more and more common these days, that you're getting them. Or a statement that says "We do not use any bio-engineered material", is going to be sufficient for you to have that in your files, and at least if the USDA comes calling sufficient, of course we always have to remember, and we'll talk about it more later, our friends, the class action plaintiff lawyers, who will eventually be looking at this issue, and is that... I go back to yes, my days in college oh so long ago, and when you're trying to get into a bar underage, yes some people do that, some bars require an official driver's license, and some bars would take a note from your mom that says "Justin is 21, signed Justin's mom."

Justin Prochnow (24:22):

Probably need something a little bit more than that note-

Michael Goodman (24:25):

I did.

Justin Prochnow (24:27):

But something that would at least past muster to most people. I think a letter from the ingredient supplier would ideally be what it is, but at the very least, an email exchange which includes a representation from the supplier that they're only using non-BE sources. That's number one. Sorry, go on to number two.

Michael Goodman (24:49):

Yeah. Yeah, and number two is refining. So, refining the product, stripping it of all of its nutrients, and all presence of the genetic material that would otherwise be in the product. If you can strip it out to non-detectable limits, and you have to show that by validated test method or a validated defining process that you're actually stripping it out, then technically you do not have to list that product as bio-engineered because again, the purpose of this law is to let people know what's in their food.

Michael Goodman (25:33):

Well, if it's not in their food, it doesn't really matter. That's something to consider. I know a lot of my clients are not big fans of refinement, but that is certainly one of the options, if that works for your company.

Justin Prochnow (25:48):

This is going to come up a lot in some of the smaller ingredients that are derived from some of these. We're thinking about things like soybean oil, Maltodextrin from corn, where they're using a refine process in the same way makes them not required to be declared from an allergen standpoint because they don't contain protein, also probably make it unlikely that they'll have detectable genetic material. Again, it's not just that it's refined, but you again would probably need to have some sort of representation from the ingredient manufacturer, that they use a process.

Justin Prochnow (26:29):

These are common things. For those of you doing finished products out there, your manufacturers, your ingredient suppliers should not be caught off guard by these types of questions. These are routine

questions that are getting asked, and getting asked by retailers and others as well. Especially for companies who are making ingredients that are in these categories, this is not going to be some new question that they're going to be surprised about. They should have these answers readily available.

Justin Prochnow ([26:58](#)):

If they don't, that probably gives you an indication that maybe you need to look elsewhere, because if they're being surprised about this, they shouldn't be.

Michael Goodman ([27:08](#)):

Yeah, I know, and I always tell my clients it's so important to know what you're putting in your product, and really have the suppliers on lockdown so that you can visit them, see what they're like, see how they operate. Moving on to the third, and probably the most obviously, and I know I sort of alluded to it earlier, is that providing test records. So, actually doing the test yourself, or hiring an analytical testing lab to do the tests to ensure that there is a non-detectable amount of bio-engineered foods.

Michael Goodman ([27:43](#)):

Now, we've all talked about for the last two years, we've talked about PCR, real time PCR, Polymerase Chain Reaction. Well, that's what we're using here too. We check the GM of the crop to see if it has any sort of modifications in that gene. That is real time PCR, and that's really one of... That'll be the key test. There are other tests that can be used, but this is really the key one. The problem with testing is it is only as good as your equipment.

Michael Goodman ([28:15](#)):

The USDA is very opaquely clear about this. They say in their frequently asked questions that they don't want to set a limit of detection. They don't want to set what your equipment needs to be capable of doing, because tomorrow it's going to be capable of doing better. So, you really have to keep that in mind that you may have a product that tested non-detectable, but the next group of products that you test, if they're using a better method, now it's detectable.

Michael Goodman ([28:54](#)):

You have to keep that in mind. Really, my favorite always goes back to the supply chain, what you know about your crop providers, what their suppliers or brokers, that first out is really going to be your best bet. But there is a possibility that you can test yourself.

Justin Prochnow ([29:12](#)):

All right, let's talk a little bit about what types of crops we're talking about, because this isn't really all... You don't have to worry about all products and all ingredients. There are really on a set number of crops that the USDA is particularly worried about, and they do have a list of these products in the Code under 66.6. They will continue to add to it. It's available on their website.

Justin Prochnow ([29:40](#)):

The USDA actually has a really good website on this that includes a 45 minute webinar that they put out when they were first doing it, really good examples actually, and kind of just walks through all of the different elements. They list out there's 13 crops right now, things like alfalfa, canola oil, corn, sugar

beet, soybean, cotton. My daughter sometimes listens to the podcast, so I'll say this for her benefit and the dads around there, perhaps cotton candy might be what they're thinking about here?

Michael Goodman ([30:17](#)):

Perhaps not.

Justin Prochnow ([30:18](#)):

Okay. I don't know what... I assume there's some processing ingredients we're not thinking of related to cotton, but generally cotton at the top of the list of things you're looking at for ingredients in food. Primarily, we're talking about canola, corn, and soybean, sugar beets probably being the four main crops that we're really thinking of when we're deciding whether need to label products.

Justin Prochnow ([30:50](#)):

Take a look at that list, something probably to just keep at least the regulatory department keep around so that you know what products you should be looking at. We've looked at all these things. We've determined that we have to label the product. How does one go about labeling the products, Michael?

Michael Goodman ([31:09](#)):

There are four options. I think two are probably going to be the most common. There's the on package text, which can really say bio-engineered food in text. That's it. The symbols for bio-engineered foods are actually pretty snazzy. There are two types. There's the colored symbol and then the black and white symbol. Don't modify the symbol. Don't make it gray. Don't make it green. If it's colored, definitely use the right symbol, you have two options, and not modifying the colors in it.

Justin Prochnow ([31:47](#)):

It's really similar to the standard for the USDA Organic seal. Again, you can do that on black and white, or use the green, white, and brown one. Similar here, we've got the two... Again, as Michael said, it seems like the text or the seals are going to be one of the two. If you don't love bio-engineered food because it sounds like the whole food... You can also say "contains a bio-engineered food ingredient," if there's just one ingredient on there.

Justin Prochnow ([32:15](#)):

It's got to be on the front panel, or on the information panel next to the name and address. But then we've got two other options which seem a little unlikely. As we were talking about, it seems like a necessary like why would you go to those troubles when these are fairly simple resolutions?

Michael Goodman ([32:35](#)):

Yeah, the other options are electronic or digital disclosure. Now, I'm not really sure what the thinking is here, because the symbol is pretty small, and bio-engineered food using it as text is also pretty small, but you can provide some way to get to a website. So, provide a long list of instructions or... What do they call [crosstalk 00:33:00]-

Justin Prochnow ([32:59](#)):

QR Code.

Michael Goodman ([33:00](#)):

QR Code.

Justin Prochnow ([33:00](#)):

You can do a QR Code, or maybe a short hyperlink to something with some instructions. By the time you're done with that, it seems like it would have been easier to just write "bio-engineered food" on there.

Michael Goodman ([33:11](#)):

Or you can have a text message sent [crosstalk 00:33:14]-

Justin Prochnow ([33:14](#)):

That's right. One of those that you typically get where you have it set up so it's like you text a word, and a five digit code, and it generates a text message. Again, it seems somewhat unnecessary, but I suppose there're situations where a company really doesn't want to say bio-engineered on the label and goes through those other motions. Overall, it doesn't really seem like it makes sense.

Justin Prochnow ([33:46](#)):

A couple of last things as we kind of finish up here, just so people know, there are some record keeping requirements. You're required to keep records related to your decisions. As we talked about, if you're going to say that it's exempt because either it's non-detectable genetic material, you'll want to have appropriate records. Then you'll want to have those. If you have a food that's not on the list of bio-engineered foods, but you have actual knowledge that it is bio-engineered, then you have to maintain records for that type of ingredient as well.

Justin Prochnow ([34:24](#)):

Again, they're set out fairly clearly in the Code of Federal Regulations, but a good idea to know what those records are, especially if you're... I think probably most importantly, if you're looking to use one of the exemptions, you're going to want to have those records available.

Michael Goodman ([34:43](#)):

Justin, this is my favorite part. Well, being the intro, the science part, was my favorite part. Of course, we need to talk about why are we doing this at all? What if I don't do it? What are the penalties?

Justin Prochnow ([34:56](#)):

We talked about it took several years to get these going. Congress passed the law in 2016 in part to void out the laws that were in effect at the time. It was not necessarily immediate changes. It took a couple of years to get the regs in place. Then essentially, the implementation dates for the standard were January 1, 2020 for larger companies. January 1, 2021 for smaller companies. But really, it was until January 1st of this year where it became mandatory for everyone.

Justin Prochnow ([35:33](#)):

So, it's really be in effect for about a month. When you look at what the repercussions are from this, at first glance you look at it and there's very little, if any, repercussions. Of course, the failure to make a required disclosure is prohibited. But what does that really mean here? Companies can make complaints

to the USDA, and they'll kind of determine whether it's warranted. They'll do an audit, if necessary. Then they basically make their findings known on a website.

Justin Prochnow ([36:12](#)):

But there's no actual penalty for this. There's no actual enforcement pathway for the USDA if you don't comply with this. So, again why do it if there's nothing the USDA can actually do about it?

Michael Goodman ([36:29](#)):

I have an idea. I have an idea.

Justin Prochnow ([36:30](#)):

Yes, you there.

Michael Goodman ([36:33](#)):

If the USDA won't do anything about it, who will?

Justin Prochnow ([36:38](#)):

There's a group of people that just fight for the rights of the common man.

Michael Goodman ([36:43](#)):

[crosstalk 00:36:43] the needle.

Justin Prochnow ([36:44](#)):

When our regulators are not doing what they think their job should be, we have this group of people out there that are taking it upon themselves to enforce the law. These are our friends, the class action plaintiff lawyers.

Michael Goodman ([36:58](#)):

What does that look like?

Justin Prochnow ([37:01](#)):

Look, class action plaintiff lawyers, while some might laud their efforts as just defending the common man from those mean companies that are doing terrible things, there are clearly lots of plaintiff lawyers out there that are just looking for their next angle to send out a batch of letters. We've talked about this on other podcasts. There are some plaintiff lawyers out there who just send out 20 letters every Monday morning, trying to see what sticks on the wall, if they can get some settlements from somewhere between \$5-30,000.00, they make 10 of those. They just made \$250,000.00.

Justin Prochnow ([37:38](#)):

So, clearly at some point class action plaintiff lawyers are going to look at this a mis-labeling failure to comply, probably somehow try to make the argument that their client would not have brought this product if they had know it contained a bio-engineered ingredient. Typically, for plaintiff lawyers, their damages are going to be based on sales made with the alleged non-compliant labeling. Since this law

has only been in effect a month, it's probably not attractive enough at this point in time for plaintiff lawyers to really be bringing lots of actions at this point in time.

Justin Prochnow ([38:20](#)):

It probably takes a good four to six months for this to get into effect. But be rest assured, there are at least some plaintiff lawyers out there who are already looking at this, probably putting asterisks next to companies that they believe should be monitoring them to see if they're compliant so that when they believe the sales are appropriately large enough to make it worth it their while, we're going to start seeing these letters.

Justin Prochnow ([38:48](#)):

It's important to get out in front of this to know on the front end whether you need to be compliant so that you're not surprised about it six months down the road when we start seeing these letters from plaintiff lawyers.

Michael Goodman ([39:00](#)):

Yeah, I think that's a good point. I think there will be an onslaught. I think that we'll start getting a lot of demand letters probably in six to 12 months. There are people or companies that sell non-GMO or not bio-engineered foods, do charge more. I think that this is attractive for plaintiff attorneys going forward. It's certainly something to watch out for and take very seriously.

Justin Prochnow ([39:35](#)):

It's actually a good point you raise, Michael, because there is one other avenue of potential risk for companies that don't comply, and that is potential actions from competitors who would file a federal LANAM Act claim for unfair competition saying, "Hey, we have to label our products as bio-engineered. These guys aren't. They're receiving an unfair advantage." So, companies could potentially be at risk for that type of action as well if they're not compliant.

Michael Goodman ([40:08](#)):

Yeah, I think it's a really, despite the USDA creating the rules, it's really a two-headed monster. Again, it's something to really take into account and take very seriously.

Justin Prochnow ([40:21](#)):

As we wrap up, I think the other issue or potential aspect of this that I want to clear up, because we do get questions from this, is that some people who haven't looked at this closely, or that hear different things, are under the impression that this law also prohibits non-GMO labeling. To be clear, this is a requirement to provide an affirmative statement if you do have bio-engineered ingredients.

Justin Prochnow ([40:55](#)):

It does not prohibit making a non-GMO or a non-genetically engineered statement. To date, there is still no law that specifically addresses affirmative statements that you are free of genetically-modified ingredients. So, we look back to that guidance I mentioned again, that was done in 2015, and was revised in 2019 after these new standards issued by the USDA, where the FDA makes at least some suggestions about what they would like to see.

Justin Prochnow ([41:30](#)):

Important to remember, that FDA guidance is not binding law. It provides suggestions on how the FDA is likely to interpret and enforce the law. Again, the FDA said they would prefer to see language like "food derived from genetically-engineered plants" as opposed to non-GMO. They do make a point of stating in that guidance that they will not take action against companies using non-GMO language as long as it's truthful and accurate.

Justin Prochnow ([42:00](#)):

So, it all comes down to, again, being truthful, and not misleading. Of course, we've seen lots of litigation over claims like "all natural" that have non-GMOs in it. When you make that non-GMO claim, you have to make sure, and again to be clear, it's all natural litigation with products containing GMOs, not non-GMOs. You have to think about that non-GMO claim in the context of the entire packaging and labeling, to make sure that it's appropriate and accurate.

Justin Prochnow ([42:36](#)):

Well, that's where we're going to wind up for today. That was a long discussion of a topic, but important for everyone to know because I think it's one that truthfully has kind of slid under the radar a little bit. The deadline caught up to us partly with COVID and everything over the last two years, and lots of other focus on COVID claims and immunity claims. If you want to learn more about immunity claims, check out the first podcast of GT's Legal Food Talk, where we talk about immunity claims during COVID.

Justin Prochnow ([43:11](#)):

It's an important one, and I think it will be gaining importance as this law has more life and goes on, because that's when it's going to start becoming more attractive for plaintiff lawyers to look at it. So, you want to make sure you're on the right side of it now.

Justin Prochnow ([43:29](#)):

Well, Michael, thanks for joining once again.

Michael Goodman ([43:31](#)):

Thanks for having me. Thanks for having me.

Justin Prochnow ([43:32](#)):

Now, a three time podcast participant, and always appreciate our listeners. If you enjoyed it, please make that known on your various platforms you're listening to. We will look forward to talking with you again. Thank you.