Legal Food Talk Podcast – Episode 29

Justin Prochnow (00:00:00):

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(00:00:26):

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 and knowledge about the world of food, beverage, and agribusiness.

(00:00:55):

Welcome to 2026 and the first episode of the year for Greenberg Traurig's Legal Food Talk. Hope everyone had a great start to the year and we've got a great podcast episode for you today. Not just one, not just two, we have nine different people from the Greenberg Traurig Food Beverage and Agribusiness practice here to give you insights on what's going to be important for people and companies in the industry to think about in 2026. First up on the list, we have Will Wagner. Will Wagner, now our first three-time podcast guest did first podcast, I think it was episode six back in 2021. Even took a sabbatical for a while, went somewhere else, came back and did an episode in October of 2024 on Prop 65. Today, he's here to talk about greenwashing and some specific California laws. So welcome, Will Wagner. What do we have in store for us in 2026?

Will Wagner (00:02:03):

Thank you, Justin. I am honored to be the first three-time participant in the podcast. There is no lack of new and exciting California regulations coming up in 2026. And the one I'm going to focus on today is a greenwashing law that we refer to as SB 343. It's called the Truth in Recycling Act. Before I dive into the specifics of the act, just to orient the audience, when I say greenwashing, I mean the use of environmentally friendly marketing claims in a manner that a plaintiff or a regulator may take the position overstates the environmental impact of the product. So in the recycling context, a company could say, "100% of our packaging is recyclable," when in fact it's made out of a plastic that is commonly known not to be recyclable. That would be an example of a greenwashing claim that a plaintiff or regulator could take issue with.

(00:03:15):

Under SB 343, the Truth in Recycling Act, it's really a game changer and fundamentally is going to alter the way consumer product companies, including food and supplement companies label their products. And the most profound impact is going to be the use of the chasing arrows symbol. The chasing arrows symbol are the three arrows around a resin identification code that is commonly stamped on plastic and paperboard packaging. This law considers just stamping a chasing arrows symbol on a product to be a recycling claim and potential greenwashing.

(00:03:59):

Confusingly, 29 states outside of California require the use of the chasing arrows symbol in various contexts, whereas under SB 343, depending on what material type you're using, the use of the chasing arrows symbol might be prohibited. So we are set up for a substantial conflict and state law issue.

Justin Prochnow (00:04:24):

Will, this is shocking news that California has decided that they know something better and different than all the rest of the states in the country.

Will Wagner (00:04:31):

That's right. It's always the lowest common denominator trying to regulate out in front of everybody. And this is as confusing of a regulation as they have passed given the number of other states that have conflicting laws. I don't remember something with this many conflicting laws. Now there is a little bit of good news. The law is not enforceable until October 2026, and there should be a sell-through under the statute such that this law shouldn't apply to products that are made before October 2026. So there's still some time for companies to go out and adjust packaging and try to become compliant with SB 343. But California has made things even more confusing because the regulatory agency that's in charge of administering SB 343 has published the material characterization study that really does not provide clear guidance about what material types can contain a recycling claim and what can't. So companies are kind of left to guess on many different kinds of material types about whether they can make a recycling claim at all under SB 343.

(00:05:49):

So it's going to be really interesting to see how this unfolds over the next eight months. And unsurprisingly, we're already seeing plaintiffs filing lawsuits asserting violations of SB 343 despite the fact that it should not even be enforceable yet.

Justin Prochnow (00:06:09):

You said it goes into effect on September 1st?

Will Wagner (00:06:13):

I think it's October 4th or October 7th.

Justin Prochnow (00:06:16):

October. Okay. Yeah. I mean, as you said, state law is conflicting. It does take me back a little bit to some of the CBD and hemp type of laws that were being passed in various states where some states required you to declare the amount of THC in the product, but other states would not allow you to state zero THC. So if you have a state that has zero THC, some states were requiring you to declare it, and some states you couldn't say it at all. So a similar type of deal, which will end up in potentially companies having to do a different packaging for California than for anywhere else, much like while there's not a requirement to do it, people end up doing for Prop 65, which we will have one of our colleagues here talking about later in the podcast. But yet another... I mean, and we could do a whole podcast and we might at some point about all the different changes to California law coming up, including best buy dates and used before, as well as numerous other things.

(00:07:35):

So we appreciate the quick insight on that. As we wait that, we're also awaiting the green guides and some updates to the federal green guides on everything from sustainably sourced to all sorts of different greenwashing claims. So these all kind of go hand in hand together as more and more companies are wanting to say things like "sustainably sourced, organic farming," all sorts of these different types of claims.

Will Wagner (00:08:08):

I mean, the last thing I would mention about 343 is given how favorable First Amendment litigation has become for companies, there is clearly a constitutional issue wrapped up in 343. So it will be interesting to see if somebody takes a swing at challenging its constitutionality.

Justin Prochnow (00:08:29):

Thank you, Will. As always, appreciate the updates. We're going to go to another colleague of yours in the Sacramento office, colleague of all of ours, but a fellow Sacramento office. Madeline Orlando here joins us. She's been working with lots of GT clients on the fun topic of EPR. And so for those of you who haven't dealt with EPR, we hope we're not causing more reasons to not sleep tonight, but Madeline will give us the rundown on EPR and what to expect here in 2026.

Madeline Orlando (00:09:09):

Justin, when I was a kid, I really grew up hoping that one day I would be on your podcast talking about EPR. So it's so nice to be here with you today.

(00:09:19):

Yeah, packaging EPR laws continue to be the thorn in the side of many different companies. And just a brief reminder on what we're looking at with these laws, they require certain companies to report and pay fees in different states on the amount of single-use packaging and single-use food service ware that's been distributed into the state in a given reporting year. So there are currently seven states in the US that have these laws. 2025 was the first year that we saw any of these programs fully go into effect. These are concepts that have been around for a while in the EU and Canada, but new to the United States. And in theory, they apply across all sectors, but what we've seen is kind of an outsized impact on the consumer packaged goods and food and beverage sectors, just given the amount of single use packaging and single use for food service ware that those sectors produce.

(00:10:13):

Saying that 2025 was our initial year going through any of the compliance obligations, I think that we definitely had some hurdles that we worked through and some lessons learned. I think one of them just being that this is an odd compliance area and seen on an internal side, companies kind of struggle to find the right place for this. Is this a legal issue? Is this a supply chain operations issue? Is this a tax issue saying that there's fees associated with it? And then two, just that these laws are changing so rapidly that it became hard to keep track of everything, especially as new states came online. But for 2026, I would like to say that I think it's going to get easier, but I'm not really sure that it will be. Part of that being that we now have six states that I've projected to have reporting dates in May of 2026.

(00:11:10):

So unlike in 2025, where we had reports spread across three different states over about six months, we will now have six states that all have reporting dates on the same day in May 2026, and these states all have different laws. They require different data, they require different inputs, and we're kind of looking at materially different obligations. So just thinking about planning early and this big lift as we... Even though we're in January, I think that May deadline is going to come up quick.

(00:11:48):

And the other big trend I want to flag for 2026 in this space is I think as this is no longer an abstract concept and companies are paying invoices in Colorado and Oregon, the money's real, the time, the effort, the energy to submit these reports are real, that this is moving into the business reality of these laws are meant to go on for the foreseeable future. And from a business perspective, how are we paying

for that? How are the costs being allocated? Some states allow these companies to contractually assign these obligations to another party, but other states don't. And so I think in 2026, a bigger topic of discussion from a compliance perspective is really just how are we dealing with this on a business front and how are we preparing the business to move forward with this for the foreseeable future? So really fun conversations that we're having on a day-to-day basis.

Justin Prochnow (00:12:52):

Two quick questions, follow-up questions. One is, what is the end goal of these laws? I mean, why are they being put there? Is it the ultimate goal to get all companies to have all packaging... Or the end goal is to have all packaging recyclable by a certain time? Is that the end goal or what's the real driver here of why all these laws are getting passed?

Madeline Orlando (00:13:18):

I think the policy idea is that once you make these companies that are in theory generating the waste, pay for that, pay for the end of life management for the waste, that they will make changes to their practices, they will use less plastic, they will move to more environmentally friendly, whatever you want to define that as, materials. I'm not really sure in practice if that's what we're going to see, but I think that's the kind of overall policy perspective behind these different laws. And then obviously, as Will mentioned earlier, California tends to just do its own thing. California has its own flavor on this and has implemented other policy goals along with the reporting and fees where they are looking to have material be recyclable, things that are recycled, actual designated rates, and then source reduction on plastic materials.

Justin Prochnow (00:14:13):

I know that there was a particular organization that companies had to register with, or there was a primary one that companies in Colorado and Oregon could register with. Is it the same company for these other states or are there different companies that are now taking on those responsibilities as well?

Madeline Orlando (00:14:34):

So far, there's only one game in town in that Circular Action Alliance. They are the designated producer responsibility organization in almost all of the states. So they're the group that is handling the actual reporting and fee requirements, which is a little bit different than some of the other kind of regulatory compliance schemes that we see where you're interfacing directly with the state. But you're right that it's this third party group that companies are actually submitting reports and paying fees to, and then they handle remitting all of that back to the state after taking their cut off the top.

Justin Prochnow (00:15:09):

Thank you for the update. It looks like Will has something to add to that.

Will Wagner (00:15:13):

I can't help myself. I'm sorry, Justin. I just want to point out that California's EPR law requires an actual recycling rate of 65% by 2032. But remember what I just said about SB 343, companies aren't going to be allowed to market many of their material types as recyclable to consumers. So how are consumer product companies supposed to meet the recycling rate requirements of SB 54, the EPR law, while

they're likewise being prohibited under SB 343 from making the claim? And I will shut up after that. I'm sorry.

Justin Prochnow (00:15:54):

Almost like California didn't even think about those two working together when they had passed it. Madeline, thank you. Thanks for all the work you've done with various clients. A great new client at the end of last year that came in that Maddie worked on, and nothing made Gina happier than for you to say that you grew up hoping to be on my podcast at some point. So thank you for that.

Madeline Orlando (00:16:18):

It's truly a dream. Thank you.

Justin Prochnow (00:16:20):

We are now going to move over to the litigation side of things. The last person who co-hosted the podcast with me, because we failed to put out anything this whole second half of 2025, Stacy Carpenter is going to join us and talk a little bit about some of the litigation issues with front versus back packaging. Stacy?

Stacy Carpenter (00:16:48):

So unlike Maddie, who apparently has been dreaming since she was a child to be on your podcast, I had to marry you to get on your podcast. So I don't know where that leaves me in the hierarchy of the situation.

Justin Prochnow (00:17:00):

Probably less smart than her, but...

Stacy Carpenter (00:17:04):

We are going to stick with our California theme, but in this instance, we've got a situation where some of the California case law might actually be helpful. And I'm talking about this front and back dichotomy because there has been a recent stream of California cases that have been released, including one in December of 2025. And I think in 2026, we will see whether the way the California courts are handling it is going to be applied by other courts across the nation. I also think this case law might be a resurgence for that little key on your typewriter that nobody uses calls the asterisks, and it may be the resurgence of the asterisk in your life.

(00:17:47):

So what we're talking about now from a lawsuit perspective is you get a lawsuit, a class action lawsuit, and it's some sort of deceptive trade practice or false advertising type claim. And generally, the plaintiff will claim that some statement on the front of your packaging is false or likely to deceive a reasonable consumer. And examples would be like a shampoo that says on the front "natural fusion." And when you get that claim, you say, "But wait a second, on the back of my package, I explain that this is not all natural ingredients. So when I say natural fusion on the front, the plaintiff should not be confused and think there's all natural ingredients because if you look at the back, you can see what the ingredients are." And the question is, are you allowed to make a statement on the front of your package that somebody claims is confusing or misleading and then direct the court to your back of the package to explain why it is not confusing or misleading?

(00:18:49):

And the case law that has come out from the California courts, like I said, in about a stream of about four to five different cases starting in the middle of 2023 and continuing up till December of 2025 has ruled that if the front of the package statement is ambiguous, meaning it could mean various different things, then you are allowed to defend yourself by saying, "Look what I say on the back of the package." So when you're looking at something like "nature fusion," what exactly does that mean? Does it mean it's all natural? Does it mean some of it's natural? Does it mean you'll feel like a raccoon out in the forest? Who knows what that means? And so the court said, "Yeah, it's reasonable to then look at the back of the package."

(00:19:36):

But what the courts have made clear is that if the statement on the front of the package, and this is the key language, is so clearly deceptive that a consumer would feel no need to look at the back label, then you don't get to say, "But look at what I said on the back of the package." And the courts have actually given some examples of what they think is so clearly deceptive and they're things like "100% natural, all natural," very definitive statements like that, that if you say them and they're not true, you're not going to get to explain on the back of the package why you didn't mean what you said.

(00:20:19):

So that gets us to our friend, the asterisks. And the asterisk started in an initial case that actually came out in 2008 that involved baby whites and wipes. And the statement on the front of the package was plant-based. And of course, baby wipes are not 100% plant-based. And on the back of the package, of course, it explained that there were synthetic ingredients also in the baby wipes, but in some of the packages where it said plant-based, it also had an asterisk. And then also in that case, it happened to also be on the front of the package. Next to the asterisks, it had a further explanation that said it was only 70% of the product was actually plant-based. And the court held that the products that had the asterisks could not proceed based on the plaintiff's claim that plant-based indicated it was 100% plant-based, and therefore that statement was deceptive because the product was not. Because the asterisks indicated that there was further explanation and no reasonable consumer would be confused.

(00:21:28):

The court allowed the claims based on the products that did not have the asterisks, because in that case, you had a statement on the front that they said could be perceived as false and misleading, only clarified by a statement on the back. So that initial first case, you had the asterisks and the further explanation on the front, but more recently in September of 2024, a California court addressed a case where you had the claim "kills 99.9% of germs" on the front of the package with the asterisks, and the explanation that it only applied to many common harmful germs and not every single kind of germ you can come up with was on the back of the package. And the court held that even that, the asterisk alone on the front of the package was an indication that there was further explanation and the consumer should not be confused, thus you could consider the back of the package.

(00:22:25):

So we've moved from the point of the asterisks having the explanation all being on the front to the asterisk being on the front and the explanation being on the back. You see a lot of cases and class actions across the country that have to do with a statement made on the front of the package and then wanting to point to further explanation on the side, on the back, on the bottom. So it's going to be very interesting in 2026 to see if this California case law gets applied and used throughout the country, and particularly whether other states and other circuit courts are going to allow the concept of an asterisk is

enough to get you into a situation where you put a consumer on notice that whatever statement you are making on the front of the pack is conditional and has further explanation.

Justin Prochnow (00:23:12):

Look, this is something that comes up a lot whenever we're reviewing packaging and labeling and there are these issues. And then someone asks, "Do I have to have that right there next to the claim? Can I have it down below? Can I have it on the back?" And usually what we tell them is, "Look, this is all a matter of risk level, risk tolerance. If you have it right there next to the claim, we're not going to have to worry about the courts taking a look at it because no one's probably going to protest about that. But once you start including it either down below or on the back, the closer to the claim, the better." But it's great to hear that at least the California courts are saying if someone has an asterisk, it should at least put you on notice that there's something else there as opposed to just saying there's no obligation whatsoever to look at the front or back of the package, which is what plaintiff lawyers would like to say is, "Consumers shouldn't have to look at anything other than the front of the package."

Stacy Carpenter (00:24:16):

Well, if it holds true and more courts start holding that an asterisk is enough to put you on notice, it might also save some of the wars between the marketing department and the legal department.

Justin Prochnow (00:24:26):

That's right, because that risk assessment won't play as much. So thank you for that update. We're going to stay on litigation and move to one of our colleagues in our Phoenix office, Sean Newland, who's going to talk about some of the different types of claims we're seeing over natural and other types of natural claims. For years and years, obviously the 100% natural and all natural claims were the ones getting targeted. As companies finally started to realize maybe that's not the best thing to say because of the risk, they've gone to other claims and now it sounds like we're seeing some litigations over those, even though they're not making those types of express claims. So Sean, clue us in a little here on what we can expect coming up here in 2026.

Sean Newland (00:25:23):

Well, thank you, Justin, first. I also did not aspire to be on this podcast as a young man, nor did I aspire to marry you. I do, however, deeply resent that Will has three to my one, so we'll look to making that a 2026 goal.

Justin Prochnow (00:25:38):

Excellent.

Sean Newland (00:25:40):

So as you've summarized, this is not a new claim, just as a general matter. It's existed in various forms and prior years, maybe initially as a target to malic acid, and specifically an arguably synthetic version of a DL malic acid that plaintiffs were arguing the inclusion of that ingredient in products that were making natural claims, specifically definitive natural claims like, "100%, all no, free of," that it was misleading consumers that those products were in fact all natural when they weren't because they contained a synthetic malic acid.

(00:26:20):

Remixing that claim, but transitioning focused to a different form of acid in 2025, we saw a significant amount of litigation or threatened litigation with respect to citric acid in a similar form of argument that plaintiffs were alleging or have been alleging that there is a particular commercial form of citric acid that is made via a fermentation process as opposed to naturally from some sort of citrus fruit or citrus product that is largely included in products that were being labeled, "100%, all, nothing artificial, no artificial, free of." And the inclusion of citric acid and a product otherwise labeled is misleading to consumers who think and are expecting that what they're purchasing is something that is in fact all natural.

(00:27:14):

Again, we saw many of those claims, and unfortunately for companies that had a claim of that kind or a variant of it, the case law on those sorts of claims have not been favorable for companies. They've been favorable for, at least at the motion to dismiss stage. They've been more favorable for plaintiffs.

Justin Prochnow (00:27:35):

Flavorful. Or flavorful. I mean-

Sean Newland (00:27:36):

Yeah, a Freudian slip of flavorful, but those claims still exist. They're still being made. Plaintiffs recognize that when they identify a label that has a very definitive absolute statement such as, "all, 100%, no, free of," and they see citric acid or some form of acid in an ingredient label, they have a claim they could make that is likely to withstand an early challenge in court. What we have been seeing now is a movement towards the very legal term, wishy-washier version of the natural claim, which is to say dropping the, "all, 100, free of, no," and instead targeting things that say, "natural flavors," or, "variants of natural flavors," or, "made with" or versions of "made with." For example, there was a case that targeted a very popular boxed pasta product that said, "Made with real cheese." When in fact, when you looked at the ingredient list, there was a significant number of ingredients that included cheese, albeit at a lesser percentage than the consumer alleged they had expected in the product.

(00:28:59):

So they brought that claim and it was challenged in court and the court said, "No, that statement is saying that is made with some cheese, not necessarily made entirely with cheese." So a reasonable consumer wouldn't be misled, which is the standard that most courts apply is to what a reasonable consumer would expect. Similarly, there have been cases that have been challenging the "natural flavors" or a variant there of "natural flavors, with other natural flavor," and there have been some courts that have concluded what you're seeing there is a statement that it contains some natural flavors, not entirely natural flavors, and there's been some helpful cases in that context. Now, what some courts have been doing is looking at what natural is targeted towards. Is the word natural targeted towards the ingredients, in which case it might be misleading, or is it to the pathway or the mechanism through which the product is working?

(00:29:57):

Like for example, a sleep aid product that says, "Helps you sleep naturally," is not talking necessarily about the ingredient that does it, but the pathway. So we've seen a lot more plaintiffs make inroads towards the non-absolute versions of "natural" and "made with" claims. And albeit with a little bit more success, it's still a very risky claim in court and particularly when it's paired with contextual factors that may lead reasonable consumers to think otherwise. Like for example, if it says "natural flavors" and the front of the product is littered with photos of actual pieces of fruit, a court might be more likely than in

another context to find that a reasonable consumer would be misled. And the expectation is that particularly as companies start to address more absolute statements on the labeling, there will be more litigation in 2026 and beyond about these less absolute statements about "natural flavors" or "made with."

Justin Prochnow (00:30:59):

Mean, this is a huge issue for companies, especially beverage companies, this issue of citric acid. As you know, I mean, this has been an ongoing thing for a couple of years, but it really was focused on malic acid and it drove me crazy because as I would say, "You don't go to the ice cream store to get your malic acid ice cream." No one considers it to be a flavor. You're not ordering malic acid things. It's a flavor enhancer. And in some respects, malic acid was way easier because there's a recognized form, natural form of malic acid and a synthetic form. And so if you're using L-malic acid, it's natural. If it's DL malic acid, it's synthetic. The problem with citric acid is there's not really a recognized form. And while we certainly don't agree with the plaintiff lawyer's assessment that this ingredient is not natural, it hasn't been really decided.

(00:32:00):

And so companies are left with... I mean, in the same way that you said, if there's pictures of fruit on there and you'll only have flavor in there, you're required to qualify it as flavored. But then if you've got citric acid in there, you have to decide, are you going to qualify it as naturally flavored or just flavored or even artificially flavored, which no one wants to do? I think these are real concerns for companies that they're going to have to look at when deciding not only is it legal, because we would probably assert that it is, but are they trying to avoid having to deal with that class action plaintiff letter coming along?

(00:32:43):

So thank you very much, Sean. It's definitely a topic that many companies are going to be having to deal with here in 2026. Along the same lines of natural and GMOs and bioengineering, we have Gina Tincher up here to talk about the recent Ninth Circuit case, taking a look at the USDA's law and rules on bioengineered food. Ms. Tincher?

Gina Tincher (00:33:17):

Well, thanks for having me, Justin. Yeah, like I said, this is hot off the presses. We've got a major decision out of the Ninth Circuit just last week that's going to have major impacts on the disclosure requirements for products containing bioengineered ingredients. Just by way of short history, in 2016, Congress enacted a statute and directed the Secretary of Agriculture to pass a national uniform disclosure standard for bioengineered food products. And the USDA did just that in 2018, and the national standard became effective on January 1st of 2022. After the effective date, a group of grocery chains like natural grocers and other labeling advocate groups brought an action in California federal court challenging three main things about the national standard. And as I said, the decision last week, the Ninth Circuit disagreed with the plaintiffs on one of those three arguments, but agreed with them on the other two.

(00:34:34):

So the first argument they made was that manufacturers should, the agency should have required disclosures to use the term GMO rather than the phrase bioengineered foods. As it stands right now, manufacturers can use GMO, but they have to use the word bioengineered in their disclosures in order to be in compliance with the national standard. The Ninth Circuit disagreed with plaintiffs on that, said that the agency's reasons for requiring bioengineering made sense. It was a consistency argument and

the statute used the word bioengineering. So the Ninth Circuit disagreed with plaintiffs on that. The other two arguments though are the ones that are really important and going to have the big impact. So under the standard, the agency allowed manufacturers to provide these bioengineering disclosures through things like a QR code or via a text message. And what's really interesting about this is that the USDA had actually conducted a study prior to the standard being enacted that the whole purpose of it was to determine the effectiveness of getting the disclosures out to the consumer via things like a QR code or a text message.

(00:36:07):

And that study found that those were going to be ineffective at getting the required disclosures out to consumers, and yet the agency continued to allow manufacturers to choose those as options to make their disclosures. The Ninth Circuit flat, and I think the study had a lot to do with the Ninth Circuit's position on this, it flat out decided that that was an improper action by the agency, and it remanded that portion of the standard back to the district court to prospectively vacate the rules on disclosure format, but it did defer that until after the parties had provided input on the proper form of a prospective vacature of that portion of the rule. So we'll see how long the district court takes to get that input from the parties and vacate that portion of the rule.

(00:37:12):

The last argument that the plaintiffs made was that the standard exempted highly processed foods from the definition of bioengineered foods, because some of those products are so processed that it renders it, the bioengineered materials undetectable through testing. And so the plaintiffs argued that the agency had erred by allowing those highly processed foods to be excluded from bioengineered foods. And essentially the argument was, how can you exclude foods from this classification when the manufacturer knows there's bioengineered ingredients in it, even if later testing can't detect those ingredients? And the Ninth Circuit agreed. And so it has remanded this portion of the rule back to the agency for further consideration, and it has directed the district court to address whether the agency error requires vacancy of a portion of the regulations. So that portion of the decision will take some time. The remand will take some time. The decision by the district court to address whether it has to vacate that portion of the rule will take some time. And so it kind of remains up in the air when product manufacturers are going to have to change their disclosures on these products.

Justin Prochnow (00:38:52):

It's an interesting concept of the whole purpose of the bioengineered law was to disclose... I mean, in some ways it's like now there's laws being passed on AI advertising and you have to disclose if those are AI created images as opposed to something else. The whole purpose was to disclose bioengineered and like you said, but if they did such a good job of processing it's so processed that you can't detect it, then you don't have to declare it. So to some extent, you can understand the argument. And I think part of the natural grocers issue it seemed like also was we've spent all this time and money to identify products that we're not going to allow in here, and now we're going to... But these companies don't even have to disclose it. It doesn't make a lot of sense.

(00:39:48):

It's an interesting decision in what you said that some parts of it could be vacated right away when it gets back to the district court. It's kind of a weird thing to be waiting for a district court to set aside a federal regulation. And then on the other one, they still don't know and they're going to consider it after briefing. So companies don't really know whether they're going to have to, like you said, change their labeling or not and have to wait and see what happens with it.

Gina Tincher (00:40:24):

I think the other interesting point is just going back into when the statute was passed and the rules were promulgated, it was under the first Trump administration. And now, of course, we all know that we're seeing more of a lean towards trying to make products healthier and some decisions by the FDA in that sort of bent. And so I think it's sort of interesting to see whether the Trump administration would take the same path today, excluding highly processed foods from bioengineering disclosure requirements.

Justin Prochnow (00:41:09):

Well, speaking of highly processed foods, it's almost like this was planned, but we have Austin Evans also here from the Denver office next to talk about some of the recent developments on ultra processed foods, litigation and regulations. And obviously it has been a particular point of emphasis for this administration and specifically for the Secretary of Health and Human Services, RFK Jr. So Austin, tell us what we need to know about ultra-processed foods in 2026.

Austin Evans (00:41:47):

Thank you for the introduction, Justin. And yes, Gina's portion was a nice segue into what we're going to discuss here today. Ultra-processed foods have become, certainly in 2025, top of mind for nearly everyone in this space, and that will easily continue through 2026. Justin, as you mentioned, this follows RFK's, I would say, targeting of them and the fact that he has made them a top priority during his tenure at HHS. In the past year, there's been a flurry of activity, both from legislators and from the plaintiff's bar in this space. As most people are aware, in December of last year, plaintiffs filed the first personal injury action in the Philadelphia Court of Common Pleas, and that case is Martinez v. Kraft-Heinz. That complaint was 148 pages, and to be honest, it read more like a press release for plaintiffs than it did a legal complaint.

(00:42:53):

The complaint alleged that defendants implemented the same techniques as big tobacco and filled the food environment with addictive substances that were aggressively marketed towards children. At bottom, the complaint alleged fraud and misrepresentation by defendants, and that supposedly caused Martinez to develop both type two diabetes and non-alcoholic fatty liver disease at age 16. Moving along to August of last year, the Eastern District of Pennsylvania dismissed the case because it, in essence, failed to allege specific causation, including Martinez's specific consumption of products, including both what products Martinez ingested, how often he ingested them, et cetera. The court also ruled it was a shotgun pleading and failed to give notice to the respective defendants of the particular claims against them.

(00:43:49):

Now, following that dismissal in August, plaintiffs moved to reconsider the ruling and amend their pleading. That has not yet been ruled upon. That briefing on that was final towards the end of 2025. And what's interesting is, as a proposed amended complaint, plaintiffs attached to their motion, it is a 2,600 count complaint that is almost 500 pages. Again, the court hasn't yet ruled on it, so we don't yet know what will come of that lawsuit, but that at this time remains the only personal injury case filed to date.

(00:44:27):

Now, last month, almost a year after the filing of Martinez, the city of San Francisco filed a lawsuit against the same defendants alleging, again, fraud, misrepresentation, and taking a page out of the opioid playbook, public nuisance. Not surprisingly, that complaint on behalf of the city of San Francisco was filed by the same plaintiff's firm as Martinez, Morgan & Morgan. Now, that suit is significant

because it's the first of its kind and that it's a governmental agency filing a case against the same corporate defendants. Now, these cases, I believe it would... Well, I will say it will not surprise me to see more of these cases filed in 2026 because for plaintiffs, they're easier to prove. You don't have a requirement for specific causation, which you'll remember was the element that was lacking in the Martinez case. You only have to show general causation.

(00:45:26):

Also, under state consumer protection laws, including in California, there's no need to establish actual harm. All plaintiffs have to do is just prove that the claims were misleading to a reasonable consumer. Finally, as we've seen in the opioids litigation, there are huge penalties at risk. Those include a per violation penalty and potential double or treble damages. Again, no surprising that California is out in front of this charge, but as we look ahead to 2026, it would not surprise me to see other jurisdictions taking the same approach. This is amplified by the fact that outside counsel, when they represent a move on behalf of these governmental entities, do so on a contingency basis, meaning there's typically very little at risk for the governmental entity.

(00:46:19):

It's also worth noting that the regulatory landscape in this space is changing on an almost constant basis. Since the filing of the Martinez case in December of '24, there have been numerous laws either passed or proposed, including California defining ultra-processed foods using the NOVA scale, which was the scale used in both the Martinez case and the city of San Francisco case. That scale has numerous problems and can be challenged interpreted different ways and challenged in other ways as well. You also have in October of 2025, a few months ago, Governor Newsom signing AB 1264, which was a bipartisan first in the nation law to ban ultra processed foods from school lunches. There's a similar law that's been proposed in Arizona setting forth the ultra processed food definition and prohibiting public schools from selling UPFs. Louisiana and Texas have also passed laws requiring certain warnings on packaging.

(00:47:32):

So all in all, another year full of ultra processed foods in the news and keeping clients up at night.

Justin Prochnow (00:47:44):

Where do you expect this to go? I mean, these companies aren't going to just go out of business. Are they going to continue trying to look for alternatives to their things? Is this litigation such that it's going to force them to actually make changes or is this going to be something where they just continue to fight it because they've got these products that are big sellers? And where do they go from here?

Austin Evans (00:48:14):

I think you have two parallel paths here. On the first path, you have companies that are trying to find alternatives, and particularly it becomes particularly pertinent where certain things, red dyes are becoming outlawed and they have to move to find an alternative. What we've also seen is there's been an incredibly huge uptick on the lobbying side for companies trying to do what they can and run these parallel paths. When RFK first got into his role, one of the first things he did was he met with all of the executives from major food companies. And if you'll recall, that was the discussion about red dye. So companies realize what's at risk here, and they're trying to tie the line and say, "Okay, how do we proceed on parallel paths? How do we make sure that we're compliant with the law, compliant with potential packaging requirements?" But also trying to lobby and move for what they believe will be better.

(00:49:17):

A framework that we've seen, or at least that's been reported recently is framing that this is ultimately going to cost the consumer money. And so while the companies themselves seem to be not taking that approach, there is some movement out there that all of these regulations required or contemplated in the MAHA movement will ultimately increase cost for consumers.

Justin Prochnow (00:49:44):

It's certainly something we're going to be keeping a close eye on in 2026. And I know that sometimes when we get together and talk about these things, there'll be some companies listening being like, "Why did I get into the food business? Maybe I'll just go open up a bed and breakfast somewhere or something like that." And the next topic is not going to change that as it's the bane of everyone's existence in California. We have Ally Lizano here also from the Sacramento office to talk about our favorite topic of Prop 65 and what we can expect in 2026.

Ally Lizano (00:50:25):

Thanks, Justin, and thanks for having me on your podcast. I won't say it was a lifelong dream like Maddy's, but I'm still excited to be here.

Justin Prochnow (00:50:33):

Excellent. Thank you.

Ally Lizano (00:50:34):

Yeah, so I will give a quick primer on Prop 65 for those who may not be as familiar. And then I think the best way we can sort of predict what's going to happen in 2026 is by looking back at 2025 and seeing where the enforcement trends were and what can we expect for food companies in 2026. So Proposition 65 is a California law that requires businesses to provide warnings to consumers for exposures to chemicals known to the state of California to cause cancer, birth defects, or other reproductive harm. So the Prop 65 list is really expansive. There are over 900 chemicals on the list and chemicals can be removed, but more often we see them added to the list. And for those who might be unfamiliar with Prop 65 enforcement, as a really high level overview, the Attorney General and other specific public enforcers are authorized to enforce Prop 65, but the law is unique in that any private plaintiff can also enforce it. And the threshold for bringing a case like that is fairly low, which is why we see so much enforcement activity every year.

(00:51:52):

And the first step in a Prop 65 enforcement action is a 60-day notice of violation. And I mentioned that because a lot of the trends that we see, I'm going to be referencing data by the notices. And so that's what we're talking about when we say notices. It's those 60-day notices, the violation that private plaintiffs send out to initiate Prop 65 enforcement. In terms of the food trends that we saw in 2025, which we're able to track because Prop 65 is a public interest statute, so all of those notices, and of course the lawsuits and the settlements are all public information. So that allows us to keep a really close eye on the data and the trends. So I have a couple of statistics I wanted to share from 2025.

(00:52:41):

So over 5,000 notices were issued in 2025. Food accounted for close to half of those notices, so about 2,200 notices were for food products. And based on the attorney general data for 2025, there were 292

consent judgments. That's a type of Prop 65 settlement that requires court approval, totaling about close to $20 million and 1,500 out of court settlements totaling close to $65 million. So those numbers are pretty staggering. And of course, that's for the total of all 5,000 notices, not just specifically food, but it goes to show how much money is really going through Prop 65 enforcement.

(00:53:28):

In terms of the categories that we saw most in 2025, we have our most commonly noticed categories of food products, and that's what I'll call our heavy hitters. Those are just where we see a lot of enforcement activity. So that includes things like dietary supplements, that's your protein powders, your ready to drink protein beverages, powdered supplement products like greens powders or pre and post workout powders. And then we have the prepared foods and snacks, your chips, cookies, crackers, cereals, granolas, stuff like that. The seafood category, seaweed and canned and jarred products like anchovies, tuna, and then the fruits and vegetable category, specifically spinach, kale, mixed vegetables. And that's sort of our heavy hitters category. We see a ton of notices every year. Our honorable mentions category would be things like spices, sauces, teas, things like that, but really the food products can really span quite a few categories in terms of what we see being noticed.

(00:54:40):

In terms of the chemicals that those products are most noticed for, we often see food products associated with notices for heavy metals. So that's lead, cadmium, mercury, sometimes arsenic. And we're starting to see an uptick in PFAS categories too. So there are, I believe it's six specific PFAS chemicals listed on the Proposition 65 list, and we are starting to see more and more notices for PFOA and PFAS, especially across our sort of heavy hitters categories.

(00:55:16):

So moving into 2026, we really expect to see a lot of these trends to continue. I don't expect the heavy hitters category to change, but we do think that there are probably going to be more PFOA and PFAS notices, which are especially challenging because those chemicals are so abundantly found that it's really hard to resolve a case like that. So we expect to see more of that moving into 2026.

Justin Prochnow (00:55:44):

And I know in the last couple years there was discussion about changing the short form and various other proposals. Are there any proposals on changes to Prop 65 in the pipelines here in 2026?

Ally Lizano (00:55:58):

Yeah. So we just had a big change in the Prop 65 regulations relating to the warnings. So there was a recent clarification about short form warnings and probably the most pertinent here was the agency explicitly stating that the short form warnings can be used for food products. So we'll keep an eye on anything that's in the pipeline, but we just had quite a few recent changes.

Justin Prochnow (00:56:24):

Thank you. We certainly have a strong Prop 65 team in Sacramento and elsewhere, and I know spend way more of your day than you would like to dealing with Prop 65. So thank you for those insights.

(00:56:40):

We're going to get here towards the close of our panel of experts here and talking about issues in 2026. And we've got Peter Arhangelsky from the Phoenix office as well to talk a little bit about some of the

practices in advertising to consumers and some of the recent developments in those areas that the FTC and others have been looking at. So Peter, thanks for joining us.

Peter Arhangelsky (00:57:12):

Yeah, of course. For those of us who've made it to the bottom of the hour, I'm going to talk a little bit about what we might call social proof manipulation, which when I'm talking about that, I'm talking about how businesses generate or solicit consumer reviews and ratings and possibly suppress reviews to create a more favorable standing in the market. And I think as you mentioned, Justin, it's definitely more relevant now than ever because the FTC is beginning to enforce its rules in this space. And we're also expecting to see this trickle down. Of course, the plaintiff's bar at some point, and it's already starting with competitor action.

(00:57:52):

So I think I'll start here with the increased focus on incentivized or purchased consumer reviews. And there are algorithms that can help spot these practices. It's really easy obviously just to spot fake reviews, but the schemes to pay for our incentivized reviews can also easily be sniffed out. And one of the obvious ways is where someone is potentially trolling to set up one of these other theories that we've talked about, and maybe they spot your improper review campaign because it could be associated with something that you say to a consumer at the point of purchase or right after. So as I mentioned, some of these are obviously more egregious, like foreign companies operating systems and system-wide practices that result in fake reviews, but some are a little more subtle, and I think that care needs to be had with those advertising campaigns.

(00:58:43):

And so the Federal Trade Commission, they formalize regulation of these practices through what it calls the Consumer Review Rule, and that's in 16 CFR Part 465. And so the rule is now it's black letter law, and it technically carries real risk of enforcement, which at least in theory, could at some point result in civil penalty exposures, but portions like section 465.4 have to be really scrutinized because it punishes compensation or other incentives that are offered in exchange for consumer reviews that express a particular sentiment.

(00:59:26):

So that language is obviously very broad, but it's also a bit subjective and you can cross the line if you're just giving away free product or discounts or rebates or really any other benefit depending on how you're soliciting consumer reviews and ratings. And so it could be something as simple as just offering a gift card in exchange for a five-star review or even saying something to a consumer that's sort of suggestive of how you want them to review something. And the example the FTC gives is saying like, "Hey, tell us how much you loved your visit to the steakhouse and you'll get a $5 coupon." And because that is suggesting or implying a certain type of review that technically violates the law. And what's I think fairly interesting is the FTC has been clear that you can't avoid liability by disclosing the incentive. So it is a violation of the law when it sort of occurs.

(01:00:22):

And I mentioned that the exposure here, obviously we see it with Lanham Act competitor claims because competitors want to protect their markets, but we also see it as an actionable claim under state law theories like the Unfair Competition Law, because the courts have said that FTC guides and rules can potentially serve as predicates under those state bounty hunter statutes. So if you're someone who's planning a campaign that involves any incentive in exchange for reviews or you're trying to build that type of base for your product, it's really important that you evaluate whether that program is going to fit

with FTC's framework. And we've also seen as part of the consumer review rule, the FTC has also been cracking down and focusing on what they call insider reviews or testimonials. There's company controlled review websites, which is where a company misrepresents that a website it controls is providing independent reviews or opinions about its products.

(01:01:25):

Obviously I mentioned review suppression techniques, which is burying negative reviews or selectively reporting them. All those practices that sort of manipulate how consumer sentiment appears is going to be subject to the FTC's rules. And obviously also misuse of fake social media indicators, which would be like using bots or buying followers or views through those types of systems that are now becoming far more prevalent now that we have generative technology. So again, I think we're moving into this phase where I think you're going to start seeing some litigation on these issues. And when that happens, the variations all share the same consumer ratings and reviews. And so an example might be where a chair can come in a blue or white color, you can variate the relationship and it's fine. It's a different skew, but it's technically the same product. But what we see is where a company will try to launch a new product that's materially different, but then list that item as a variant on another successful preexisting product so that the new product reaps all the favorable consumer reviews from the prior product.

(01:02:37):

And that... It is a deceptive practice and it wasn't really on anyone's radar until the FTC brought an enforcement action in 2023 on this exact basis. And I think now a lot of competitors are especially are becoming keen to this and they're trying to protect their markets by at least threatening Lanham Act litigation. So I think in that same vein, I've also seen some risks tied with the practice of what we call conquesting, which is, I think, a form of comparative advertising. And that's where companies will bid on competitor terms and divert traffic to their products based on that type of comparative advertising format so that they're buying keywords and advertising that include, let's say, a competitor's name or brand in the keyword, and then the products are advertised with some superiority claims or status claims like the number one brand or number one product or things of that nature.

(01:03:42):

And while I mean any advertisement flowing from those keywords obviously has to comply with traditional advertising doctrine, the concern that you have with conquesting is that it can become much easier now to show damages and take profits through statutes like the Lanham Act because you're actually directly targeting a competing brand. So a business can learn whether another competitor is conquesting or trying to trade on their brands. And if the ensuing advertisement isn't in bounds, it could spell trouble because that competitor is very likely to then go right to that product page and start taking a really close look at who's taking their business.

(01:04:23):

So those are just some issues I think I see developing in the near future and beyond. And I would say the final point I would make on these points is that if you hear this and you say, "Hmm, I think I know somebody who's doing that," or otherwise, we've had representation where it's not just defensive. We've also had a lot of success with these types of theories and helping our clients protect their markets against the bad actors that are practicing in this space.

Justin Prochnow (01:04:55):

Ironically, one of the reasons the FTC passed this law was because of people using AI to create reviews. And at the same time, AI is probably one of the best forms of trying to see if someone is doing that or not as well. So we're having the robots report on the robots. Thank you, Peter.

(01:05:16):

All right, we've hit... If you're doing the Peloton, you've been able to do a 60-minute ride so far and we've still got some time on. I'm going to give a two-minute quick thing on grass and then get everyone out of here. But grass to me is going to be one of the biggest issues for companies in the food. And I'm not talking about hemp and marijuana. I'm talking about generally recognized as safe. For those in the know, all ingredients in a food or beverage product have to be approved food additives or grass.

(01:05:48):

Grass has become a big focus again of our friends at FDA and RFK Jr. He does not like the grass process. He's made that clear. He's talked about in the enforcement agenda from last October that the FDA is looking at doing away with the self-affirmed grass process. It's an interesting issue because from 1972 to 1997, companies that self-affirmed an ingredient as grass were required to submit that self-affirmed grass dossier to the FDA. The FDA got so backlogged on all of the complaints that they decided to make it voluntary. And now if companies put together a self-affirmed grass dossier, they can submit it to the FDA and the FDA actually won't approve it. They will either say, "We have no comments at the time," or they will have issues with it, or a company can choose not to submit it and just keep it in their back pocket and wait until someone asks about it.

(01:06:50):

And there's actually reasons why companies wouldn't submit it. Because once you submit it, then other companies can take advantage of your grass dossier as long as they manufacture it to the same specifications and use the same processes. So a company could spend $100,000 on a self-affirmed grass dossier, submit it to FDA, and now everyone can take advantage of that without having to spend that $100,000. So a lot of companies are like, "I'm not going to do that. I'm going to keep it proprietary and just wait until someone asks." The problem is if you have big companies, large beverage companies, large food companies, they might say, "We're not going to use that new ingredient until we see that the FDA has had no questions about it." And so you're forced to submit it. So companies have always had this back and forth, but since a lot of companies can't submit it or it's not required, they hold it back.

(01:07:44):

And what we've had is a very big inconsistency in grass dossiers. You'll have the hundred page, $100,000 grass dossier done by a well known third party. And then you'll get, like I get from some companies, they'll say, "Oh yeah, our ingredient supplier said it's grass." And they send me the document and it's a one sentence statement that says, "We self-affirm this is grass." And I always say, and I know Stacy and Gina and others have heard me say this before, reminds me of an episode of The Office where Michael Scott decides he's going to declare bankruptcy. And he steps out of his office and says, "I declare bankruptcy." And then he walks back into his office and then Oscar a few minutes later is like, "You know that it's not just saying that you want to be bankrupt." And he's like, "Well, I declared it." He's like, "It's more than declaring it. You have to fill out forms and you have to do all these things."

(01:08:36):

And sometimes I feel like some of the ingredient suppliers think the same thing like, "Oh, because I've self-affirmed it, I say it is, now it's grass." And that's not how it works. So RFK Jr. is right, to some extent there is a wide range, but to all of a sudden now say, "We're going to require everyone to submit it..." When the new administration came in, they fired half the FDA last year. And while they've hired some of them back, it's not like they've got all of a sudden all this extra personnel to review the number of grass submissions that are going to be required if that becomes a requirement. So we expect this could have a real impact on innovation as companies are coming up with new ingredients and then have to wait a year before the FDA approves it and technically not use it until then.

(01:09:25):

So this continues to be a real big focus, I think, for companies and looking at it and companies, brands looking to use ingredients and really looking to see is this an ingredient that not only has been self-affirmed, but has been submitted to the FDA for no comment? Because that's going to be the clearest pathway to using those ingredients as opposed to potentially them being held up. So certainly something to look for.

(01:09:51):

Obviously, just a few things going on in 2026 in the food and beverage industry. We have a team ready and willing to help everyone on these issues. If any of these issues or any other issues caught your eye, please reach out to us. If you liked the podcast, Peter will give you a free hour of his time if you just submit a positive... Oh, wait, we're not supposed to do that. So if you enjoyed the podcast, please like it. And if you didn't, as my mom used to say, "If you don't have something nice to say, don't say anything at all." Thank you everyone, and we look forward to having you listen in on our next podcast. Thank you.