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Justin Prochnow: Hello and welcome to Legal Food Talk. [00:00:30] I'm 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 agribusiness practice to give you some insights and knowledge about the world of food, beverage and agribusiness.

Welcome to another edition of Legal Food Talk after another long hiatus. [00:01:00] It seems like every time I start the podcast, I'm talking about the long hiatus from the last podcast. Keep letting work get in the way of doing more podcasting. But today, we're going back in time, podcast, I believe, number six was with my then colleague, a little time off and now current colleague Will Wagner. Will Wagner welcome back to the podcast.

Will Wagner: Thank you for having me, Justin. I'm happy to be here and happy to be back.

Justin Prochnow: [00:01:30] The prodigal son has returned. I'm sure you've heard more than a few times from people back in the fold.

Will Wagner: Indeed, it's very nice to be back at GT and nothing but fond memories and that's why I came back.

Justin Prochnow: We obviously, love having you back and we work together on not an infrequent amount and even more, it seems like, since you've been back. And today, we're going to delve back into [00:02:00] the world of environmental claims and issues affecting companies in the food, beverage, supplement business. Obviously, environmental issues have become a huge focus both from state regulators and others and from our friends, the class action plaintiff lawyers, and as they're more affectionately known in California, the bounty hunters for Prop 65 and [00:02:30] other things. Today, we're going to talk a little bit about that and hopefully give some of our listeners some information and maybe not totally discourage them from continuing to do business.

Will Wagner: That's a tall task when we're talking about Prop 65 and PFAS, but I'll do my best not to scare anybody away.

Justin Prochnow: It is. Let's start there with Prop 65. This is something that you've been working on [00:03:00] for a long time over a variety of different things, and it's certainly morphed over the last number of years. But let's maybe go back to the beginning and maybe you can give everyone just a quick 101 on what is Prop 65 and why is it the bane of everyone's existence?

Will Wagner: Yeah, sure. I'm happy to do that. Prop 65 was an initiative passed by California voters in 1986 that requires warnings [00:03:30] for exposures to certain chemicals, that list of chemicals regulated by Prop 65 has proliferated to approximately 900 chemicals. Thankfully, the list of commonly pursued chemicals under Prop 65 is much narrower than 900. The claims that we regularly see against food companies relate to lack of warnings [00:04:00] for heavy metals most often, and traditionally have been acrylamide for food products, and I know we'll get there in a few minutes. But the plaintiff claims usually center around we tested a product for lead, cadmium, arsenic, or mercury. We found it at a level that we believe is a violation. Because Prop 65 is guilty until proven innocent, it's structurally set up that way such that all the [00:04:30] plaintiff has to do is show the presence of a listed chemical in a product and then the burden of proof shifts to the company or the defendant to show that that level of exposure is below the safe harbor level for Prop 65. Of course, in practice that means defending one of these claims can be very expensive.

Justin Prochnow: You mentioned plaintiff, and of course, [00:05:00] this was a... I guess it's a law, right? Or is it a regulation?

Will Wagner: No, it's a law that was passed initially as an initiative, but it is a statute with a large set of regulations that underlie it.

Justin Prochnow: Essentially, the state of California gets first crack at these cases, don't they?

Will Wagner: That's right. So, this is a government enforcement action first, the attorney general district [00:05:30] attorneys and certain city attorneys can enforce Prop 65, but 99% of activity we see under Prop 65 are from what we call the private plaintiff bounty hunters and private plaintiffs can pursue Prop 65 claims only after they've issued a 60-day notice of violation and provided certain data to the attorney general to show that there's a reasonable basis on which they're pursuing the claim. Only once they have satisfied [00:06:00] those pre-suit obligations, do they gain standing to bring a Prop 65 claim.

Justin Prochnow: I know it started off, there was one organization in particular that seemed to bring about 90% of the cases. I know there's a few more that have been formed, but is it still the case that we're really talking about a half dozen to maybe dozen entities that are bringing the majority of these actions? Or are you seeing it proliferate out more to a larger [00:06:30] group of people?

Will Wagner: Yeah, so you have your about five traditional bounty hunters, and of those five traditional bounty hunters, maybe two or three of them would bring food claims. Now, you're seeing 15 to 20 regular bounty hunters with maybe half of them bringing food claims pretty regularly.

Justin Prochnow: You do a lot of it in different areas. Are food companies one of the [00:07:00] more frequently targeted groups or is it a wide variety of products?

Will Wagner: I would say food is traditionally the most heavily targeted with real enforcement, although over the last three years due to the acrylamide issue, which again, I know we're going to get to in a minute, we've seen a major uptick in notices issued against cosmetic and personal care companies. We [00:07:30] always see these starlight cases against any company who sells plastic packaging into the state of California. And that can be more traditional, non-FDA regulated consumer products, although those tend to be low value, easy to handle cases.

Justin Prochnow: I'm sitting here as a food company and I look at my ingredients list and I've got pea protein and [00:08:00] sugar and a couple other ingredients, but certainly, I'm not adding arsenic to my product.

Will Wagner: [inaudible 00:08:11].

Justin Prochnow: I don't have any of the other ingredients that would be listed on the Prop 65 case. I'm probably thinking I don't have any issues with Prop 65. Obviously, as we know, that's not the case. So, why is [00:08:30] it that so many food companies are getting focused on when they don't actually have any of these ingredients intentionally added to the product in the ingredients list?

Will Wagner: So, heavy metals are ubiquitous in our environment. Lead, cadmium, mercury, arsenic all naturally occur in the earth's crust. And when you are growing any sort of crop, you are going to naturally have trace levels of those elements that wind [00:09:00] up in your ingredients. So, this is not a question of companies intentionally adding lead to their food products. It's a function of, for example, companies adding rice to their food products, which will always contain lead and arsenic at a minimum.

Justin Prochnow: And of course, my understanding that I know has been definitely rectified after many discussions [00:09:30] about this was that there's a naturally occurring exception to Prop 65. So, isn't that naturally occurring if it's just coming in from the rice?

Will Wagner: Good question. Naturally occurring is a defense, which means the burden of proof in litigation is on the defendant to show that all of the chemical at issue, so for example lead is naturally occurring and cannot [00:10:00] be reduced by good agricultural practices. That's a heavy burden to carry in a complicated supply chain for producing food. And just as one example, leaded gasoline can be an issue because of how often leaded gasoline has been used even in the U.S. traditionally and especially in some other countries more recently. When leaded gas exhausts out of a car, it ends up winding up in fields [00:10:30] and in crops. So, whatever portion of the lead comes from something like leaded gasoline, would probably not fit within the naturally occurring regulation.

A defendant in one of these cases would not only have to show, hey, most of the lead in these products is coming from the crop such as the rice or the spinach or whatever you're using in the finished food, but that it was not human

activity of any sort that contributed to that level. It's a heavy [00:11:00] burden to carry in a litigation if you're a defendant. It's not an unwinnable case. It's just expensive and complicated and uncertain.

Justin Prochnow: We could do a whole podcast on Prop 65 but I want to get to some of the key points for companies who may be hearing this and haven't been fortunate not to have experience with this to date. How [00:11:30] do these typically come about? I mean, I get a letter from plaintiff lawyer or a bounty hunter that says, hey, we tested your product, and it has certain amounts of lead above the threshold amounts. That letter typically, if they're doing it correctly in accordance with the law [00:12:00] is the letter notifying the state of California that they have this case and then the state of California has 60 days to decide whether they're going to take on the case or not? As you indicated, 99% of the time they don't do it. But do I just wait 60 days? For a company that gets that letter, what should they be doing?

Will Wagner: Yeah, so the 60-day period is a very, very important period [00:12:30] in assessing these cases to determine one, whether you believe the plaintiffs have made reasonable allegations against your brand or not. Two, whether or not you agree with them to engage with the plaintiff in the merits of the case, you can be almost certain that the attorney general or no other public enforcer is going to take up the case. So, it is to your benefit to have these merits conversations with plaintiff's counsel [00:13:00] early. On occasion, we succeed in talking the plaintiff out of the case entirely. If we don't, then the only way you can do what we call an out-of-court Prop 65 settlement, which tend to be cheaper but are still publicly reported, is if you do the settlement prior to being sued. If you wait to engage with the plaintiff until the notice period has expired and they file a suit, [00:13:30] your options for resolution have narrowed to only a consent judgment, which is one, more expensive, and two, requires court and attorney general approval.

Justin Prochnow: I see. If you settle in the 60 days before they actually file the case, then you don't have to get court approval for that settlement.

Will Wagner: So, you can't settle during the 60-day period because the private plaintiff lacks jurisdiction to settle until the time period elapses. However, if you're [00:14:00] engaging with the plaintiff and having discussions about an out-of-court settlement, you can then, once the time expires, settle out of court, rather than risk having the plaintiff proceed with a lawsuit, which leaves you only the consent judgment mechanism for settling.

Justin Prochnow: Got it. Okay. Maybe I put the cart before the horse here before, before our clients and other companies in the industry get those letters. Are there things companies [00:14:30] should be doing or can be doing to preemptively try to avert these unwelcome letters that they receive?

Will Wagner: Absolutely. I can't tell you the number of times we've got out in front of an issue before and identified it for a client so they could go off and fix it before they

ever received a notice letter. Companies are very, very wise to talk to somebody like you or me [00:15:00] preliminarily and get a quick compliance plan in place that would involve testing, identifying high risk ingredients and being prepared in terms of what your case looks like if you get a notice. And oftentimes, the fix can be as simple as changing your Cinnamon supplier from supplier A to supplier B that can provide a better lead specification. Sometimes it's really that easy and it can save you \$100,000 [00:15:30] by just putting a little bit of time upfront into fixing the issue and identifying the issue, which not many people can do. But if you're regularly defending these cases and interacting with the plaintiff bar, you're going to know exactly what they're after.

Justin Prochnow: I guess thinking about this, one of the things I want to make clear to people is just because you have one of these ingredients in the product, doesn't mean [00:16:00] that your product is unsafe. One of the meanings is that for the purposes of the state of California, which they have decided in its infinite wisdom that people need to at least warn people of that ingredient. But it doesn't necessarily mean that that product is inherently unsafe because the testing that the state of California does [00:16:30] to come up with ingredients being on the list is significantly higher than the amount that has been established as thresholds. Am I right in that thinking?

Will Wagner: Yeah. Let's back up for a second because I didn't do a good enough job at explaining this upfront. Prop 65 does not regulate chemical content in a product. It regulates chemical exposure from a product. [00:17:00] If you're looking at a test result on your food product, let's say it's rice and you're seeing 100 ppb, parts per billion of lead in the product, that doesn't tell you much because that's just giving you a concentration of the lead in the product. You need to take a second step and determine what is the average rate of exposure to a consumer that is ingesting this rice. And that's really where the fight is often in in the [00:17:30] litigation on these cases. What is the average rate of ingestion? Plaintiffs will always take the position, it's the serving sites. The easy way for you to do compliance verification is assume that the average rate of ingestion is a serving every single day unless your label tells consumers to have two or three servings every single day multiplied by whatever your test result is showing in terms [00:18:00] of content and measuring that against the safe harbor levels.

Now to be clear, and this is a very, very important distinction, that is not what the Prop 65 regulations actually say about how you quantify exposure levels under Prop 65. What the regs say is that you need to assess the reasonable rate of intake based on federal databases such as the NHANES database. In subsequent case law [00:18:30] developments courts have said, for example, when you're assessing lead exposures, you should be assessing average exposure over a two-week period. So, if federal data show you have the kind of product that's only ingested once out of every 14 days, you should be taking that into account in doing your exposure calculation.

Justin Prochnow: That makes sense. What about in the case where you have something that doesn't necessarily say take it two to three times a day, [00:19:00] but maybe it's the opposite where it says, do not consume more than three cans per day. Has that been viewed as implying you should take three cans per day or [inaudible 00:19:12]

Will Wagner: Just to be clear, a court has never once in the history of Prop 65 agreed with the plaintiff's way of calculating exposure. Never happened and probably never will happen. Have I seen plaintiffs take the position that you just articulated? Yes, absolutely.

Justin Prochnow: Got it. [00:19:30] Will, I know we want to get to some other things on this call, but I did want to talk one more thing about Prop 65. That's the warning itself. Again, if your product is one that's going to be above the limits and you've determined that you can't make changes to get it under that, then typically, the course of action is to provide a warning. When we're just talking about brick and [00:20:00] mortar, then typically, it has to be on the label of the product. It could be on the store shelf, but no retailer is going to agree to put it out there. Other than a couple of years ago when all the cans became BPA was it put on there and there was a specific provision that allowed stores to put at the checkout corner for every can that was there, that's not a likely scenario.

So, typically people have to put it on the packaging. For online [00:20:30] sales, I believe that it has to be both on the website and accompanying the products. There's a long form warning and a short form warning. My long question is, I know there were some discussions about potentially changing the short form warning. Has anything happened with that? And are there any other big changes to Prop 65 on the horizon that people should be [00:21:00] thinking about? And ultimately, at the end of the day, obviously, the advice is talk to someone who really knows what they're doing with Prop 65, but where are we on warnings these days?

Will Wagner: So, we could spend 15 or 20 minutes just on that question but let me succinctly give a couple very quick updates.

Justin Prochnow: Yeah.

Will Wagner: OEHHA has proposed some new regulations-

Justin Prochnow: And let me interrupt you. You said OEHHA, I think, which probably no another than maybe [00:21:30] the two of us and a few other select people know what that is. So, let's explain what OEHHA is.

Will Wagner: That's the agency that administers Prop 65 in the state of California. It stands for Office of Environmental Health Hazard Assessment. OEHHA has preliminarily suggested a new regulation, and in those regulations, it would permit short form warnings for food [00:22:00] products, which right now is ambiguous, but

you would have to identify the specific chemicals you're warning for in the short form. So, if anybody is using a short form warning on their food product, you need to track what a OEHHA ends up doing with this regulation and what's going to be permitted moving forward. The other really big issue in these regulations is going to be the online warning issue. Currently, the regulations are ambiguous as to whether if you just put a warning on the product label, [00:22:30] are you good or do you also have to add a secondary warning on the product display page or the checkout page of the website? OEHHA is updating the regulation to say that safe harbor protection will only be afforded for online sales if you have it on the website and on the label. Those would be significant changes if you are in fact warning for your food product.

Justin Prochnow: That's been at least the guidance from the state of California.

Will Wagner: That's been [00:23:00] the guidance that I've called an underground regulation for a long time, yeah.

Justin Prochnow: Right. We are familiar with underground regulations as guidance on the Legal Food Talk podcast for sure, whether it's FDA or FTC, a number of different things, regulation by guidance that is not technically the law, but it gets treated as the law as a common staple in the food industry.

Will Wagner: Indeed.

Justin Prochnow: [00:23:30] So much, again, about Prop 65. Questions out there, we're happy to field them separately, but I want to move on to the next area that you've been spending a lot of time with, and that's another three letter acronym of EPR. For those who don't know EPR, it's real, it's coming, it's already here, and most people have no idea what it is, but [00:24:00] people really need to start thinking about it because while it seems far way off in some aspects, in other aspects, it's very near. Maybe you could give us a little intro to EPR of what I'm talking about.

Will Wagner: This is probably my 10th EPR spiel of the day already. It stands for Extended Producer Responsibility. It is the concept that municipalities have traditionally borne the costs of recycling, [00:24:30] and as a result, the United States recycling infrastructure is subpar. The thought process behind EPR laws is that we need to tax or charge fees to producers of packaging so that they can pay for recycling and recycling infrastructure at the municipal level. Of course, some states, like our favorite California, has implemented what we call EPR plus. [00:25:00] That is the fee relating to recyclability of products plus certain goals and objectives for encouraging recyclability content. That's something I personally approve of. But the way that these laws are being implemented is going to cause significant difficulty for anybody selling packaged goods in the United States. For example, in [00:25:30] California's EPR law, they will require all packaging sold into the state as of 2032 to be 100% recyclable or compostable. That is a very, very ambitious goal.

Justin Prochnow: In eight years, which again, seems like a long time, but when you have to come up with something that's totally gone in that amount of [00:26:00] time, it's much sooner. So, right now, there's no federal guidance on this. It's individual states that are [inaudible 00:26:10].

Will Wagner: Yes, there are six states that have passed EPR laws, California, Oregon, Colorado, Minnesota, Maine, and Maryland, and California tends to be the lowest common denominator. That's not true in every respect, but in most respects, it is. Thankfully, [00:26:30] what I'm going to call the Producer Responsibility Organization or the PRO seems to be lining up so that it will be the same organization for all the states, and that's called Circular Action Alliance. For anybody who's listening to this, who's running a consumer packaged goods company, if you do not know what Circular Action Alliance is and you have not signed up, you should probably either call us or go to the CAA website and get on it because registration dates [00:27:00] have come and gone, and it is important that you register for the PRO and become involved in these implementing processes. But to your question, Justin, about federal EPR laws would be, I think it would be great if Congress would act and implement a national recyclability program. I think a lot of the major trade associations would very much support that effort. But Congress is dysfunctional right now, and I don't anticipate that happening.

Justin Prochnow: [00:27:30] This is what happened basically with the non-GMO debate. There were all of these different states that were going to pass non-GMO laws. The first one went into effect, I believe it was New Hampshire. It was either New Hampshire or Vermont, I can't remember which one. And then next thing you knew, Obama signed the federal law pertaining to GMO disclosures. So, bioengineered disclosures [00:28:00] because there was just going to be different laws in every state. And that's always the problem with this.

It's great information to know about the CAA. Think when I first heard about it and I talked with you, clients get this notice, and it seems like they're pitching the service that you may or may not need. It's like getting the pest removal company that comes by your house and says, you need to sign us up for all the pests that are lurking [00:28:30] in your yard or the lawn spraying service, and you don't really need it but they do it. That's what it seen from the email. But it's more of a reality than it may initially seems. They have the contract, right? Are there others out there, or are they really the exclusive one?

Will Wagner: No. So, CAA is the exclusive [00:29:00] PRO for California. I think Colorado might be able to have more than one, but I'm not aware of any others being approved in Colorado. Given CAA's approval in California, it's tough to imagine anybody else nudging their way in. Let me give my pitch real quick on why companies need to worry about this right now and shouldn't worry about this given the 2032 implementation dates in California. First [00:29:30] off, there are interim goals that must be met in California starting in 2028 concerning recyclability and source reduction. These interim goals and the final goals in California are going to substantially impact what kind of materials consumer product companies can

use moving forward for packaging. And those kind of sourcing decisions need to start being considered now. And if you're [00:30:00] getting into 2028 and 2029 and you haven't thought about this, you're going to be too late. The time is now to consider EPR strategy, and if you get on top of it, I am sure you're going to be in a much better position to be paying lower fees and avoiding potential enforcements in five years.

Justin Prochnow: So, right now, this isn't a, there's always litigation risks in everything we do these days, but there's not [00:30:30] a specific law that people need to comply with right now that there's a risk of litigation action on this, or is it still something that plaintiff lawyers, because of these laws coming out, are taking the opportunity to now try to get on the front and say, well, because these are passed, there must be some issues with it.

Will Wagner: Right now, there should not be any lawsuits relating specifically to the EPR laws. And whether there can ever be any lawsuits [00:31:00] relating to the EPR laws is going is an outstanding question. And there's going to be a lot of interest in that topic and I don't know the answer right now. But that is a very good transition to California's SB 343, what I call the Truth in Recycling Act. And that is sort of the sister of law to California's EPR law, which pretty carefully regulates where you can make recycling claims and where you can. And recycling [00:31:30] claims with definitionally within that statute include the chasing arrow symbol. Even if you're just using the chasing arrow symbol to surround or as an identification code under the California Truth in Recycling Act, that is an implication of recyclability. And if the materials you're using in your product, if they qualify as recyclable under that statute, that authorizes a plaintiff to utilize [00:32:00] California's Unfair Competition Law and probably the CLRA, the Consumer Legal Remedies Act, to pursue a class action claim.

Justin Prochnow: Again, probably have a whole podcast on this. We have this little federal organization called the Federal Trade Commission, which regulates environmental claims, has issued the Green Guides, which is one of the few guides that are actually law, because they are specific regulations that have been issued. [00:32:30] They're currently revisiting their green Guides and claims about recycling and others. How is California passing laws about recycling when the Federal Trade Commission has their own stance on recyclable claims?

Will Wagner: If you are complying with the Green Guides, FTC Green Guides, you are deemed to be in compliance with SB 343, the Truth in Recycling Act. That's how they get around that issue. [00:33:00] That is a safe harbor under the law. This is probably my question to you, when are the new Green Guides coming out? But when those amended guides come out, those would still work under the Truth in Recycling Act?

Justin Prochnow: Sure. They said they're going to be looking closely at claims like sustainable, which is another big one. Again, I suppose part of the issue also is with the Green Guides, they're fairly [00:33:30] general statements, hey, you can't make a general claim about something being eco-friendly without specifying in what

way it's eco-friendly. And with recyclable, it basically says you can't say it's recyclable unless, an unqualified recyclable claim, unless it's recyclable in the majority of jurisdictions under regular [inaudible 00:33:59].

Will Wagner: California makes that a [00:34:00] 60% requirement. So, whatever the material is has to be collected and recycled at a 60% rate in California. And CalRecycle is publishing what materials qualify and what materials don't. So, there is going to be objective criteria that companies need to measure against to determine whether they can make recycling claims.

Justin Prochnow: I suppose that's for those constitutionalists out there, there's at least maybe some argument that they're going [00:34:30] beyond what the Green Guides say-

Will Wagner: There's a conflict with the Green Guides.

Justin Prochnow: This happened before with organic, where for cosmetic products, it basically said all or virtually all of the ingredients need to be organic. And then the state of California came up with... Oh, no, made in the USA, sorry. All or virtually all. And then the state of California decided, oh, that means 95%. And then the California Governor Brown [00:35:00] rescinded that a while ago. But it'd be interesting to see whether California's standard of 60% becomes the new standard for what does it mean to have majority of the jurisdictions. California sounds like they're creating their own threshold of what majority of jurisdictions mean.

Will Wagner: Yep. I think that's right. It's going to be interesting [00:35:30] to see how this plays out. So, the only saving grace right now in the Truth in Recycling Act is it doesn't formally go into effect until 18 months after CalRecycle publishes its final characterization study, which is telling us what's recyclable and what isn't. So, we still have at least 18 months before it becomes effective, but we are expecting that CalRecycle study to come out any week now. So, we're about to be on the clock. [00:36:00] I do have one other throwaway point I want to make. There's another sister law to the Truth in Recycling Act that prohibits biodegradable claims and carefully regulates compostability claims. If either of those claims are appearing on packaging, you need to make sure you have cross-referenced the California laws on those topics.

Justin Prochnow: Have they changed that? I thought the California law on biodegradable was you can't make any [00:36:30] biodegradable claim if you have plastic in the product.

Will Wagner: They have changed it. They've expanded it to any product.

Justin Prochnow: To any product. You can't say anything's biodegradable.

Will Wagner: It's blatantly unconstitutional, in my opinion. I'll just say I've had these cases against some California district attorneys, and they would essentially acknowledge as much and say they're using prosecutorial discretion [00:37:00] and not pursuing certain kinds of products. We actually haven't seen the private plaintiff bar be too aggressive on crazy products that could clearly include a biodegradable claim, I don't know, a banana peel.

Justin Prochnow: Right. Interesting. Okay. Yet another fun option for selling products in California. Let's go on briefly to the last topic, which also could be its own podcast, and [00:37:30] that's another acronym. It's an acronym-laden, heavy-laden podcast. And that's PFAS, which for those of you don't know, per and polyfluoroalkyl substances

Justin Prochnow: We're seeing issues both from state regulation of packaging to again, our friends, the class action lawyers. We're not going to spend as much time as it probably deserves, but enough to whet the appetite for everyone as to what they're looking at here. Let's talk a little bit about PFAS. Let's first talk about some of the state regulation of packaging.

Will Wagner: [00:38:30] Yeah, sure. You have to understand this upfront to understand why these regulations are so significant. PFAS is currently being defined as any organic fluorine. That's any carbon fluorine bond in any chemical constituents. It's a very, very broad class of chemicals. There are at least 10,000 chemicals that fit within that definition. When [00:39:00] we're talking about some chemicals that toxicology indicate may have safety concerns and are the subject to significant litigation in NDAs concerning firefighting foam and firefighting equipment. And then on the other end of the spectrum, there are other kinds of chemistries that fall within the definition of PFAS, primarily fluoropolymers, where there's no known toxicological risk. And [00:39:30] that would include chemicals like PTFE has a number of approvals at the federal level for food contact and drug applications and in cosmetics and things like that. So, you're dealing with a very wide and broad form of chemistry that are all being regulated in the same way, and it doesn't make much sense scientifically.

I'm a very part-time lobbyist, and I lobbied [00:40:00] several of these PFAS bills in California where we made that point, and the legislature didn't care and passed state laws including a ban on any PFAS in food packaging. That's any intentional PFAS or any unintentional PFAS at or above a 100 ppm of organic fluorine. That likely conflicts with the federal Food, Drug and Cosmetic Act approvals of certain kinds of PFAS for [00:40:30] food contact. They don't tell us exactly how to test for organic fluorine.

So, California and about a dozen other states have food packaging laws that prohibit PFAS. They're inconsistent with each other. Some are limited to paperboard, some are limited to only food contact materials and some cover all packaging for all purposes. We see many, many, many demand letters [00:41:00] on this issue, less formal litigation, but many demand letters. I'll just say, in a significant number of those demand letters, there is reason to

substantially question the plaintiff testing. I can't get into more detail unless you give me another hour to talk about analytical testing issues, but I'll just say if you get one of those letters, the place to start is on the analytics.

Justin Prochnow: We're even [00:41:30] seeing some letters not just about PFAS in the packaging, but in the product itself.

Will Wagner: I want to say one other thing about [inaudible 00:41:41] and then let's move on to the litigation. There's also laws that regulate juvenile products. So, any product you're marketing to a child of 12 or under, those also have PFAS restrictions. And for food products, there are food products that will fit that bill, obviously, [00:42:00] so you need to be aware of those laws with PFAS prohibitions. But onto the litigation, you are exactly correct there are-

Justin Prochnow: Before you go to litigation, I want to go back one thing. With regard to the laws, one of the things for companies that are listening to this podcast, where you're going to see this come up a lot, is that you're going to get letters from retailers, from distributors and [00:42:30] from other business partners wanting you to confirm that there are no PFAS in your packaging. Sometimes it's worded, no PFAS altogether. Sometimes it's intentionally added PFAS. There's a big reason for this, which is that some of the state laws have an exemption from being held in violation of the laws if you have a statement [00:43:00] from the manufacturer of the packaging indicating that there were no PFAS used in the manufacturing of the product, basically meaning that companies, it would be a big burden to go and test all of your own packaging. So, if you get that letter from your manufacturer that you can rely on that in believing [00:43:30] that you're in compliance.

That is where we've had a lot of clients asking, what is this PFAS thing? Why am I getting this letter? That is why you're getting that is because some states, I know New York is one of them, I think there's others where if you have that statement, so any retailer, any distributor, any of those types of companies, they're routinely sending those out to people to confirm that they're in compliance with the PFAS.

Will Wagner: Let me [00:44:00] take it a step further. If you are a significant food brand, you may want to consider sending your own letters upstream to investigate your supply chain.

Justin Prochnow: Certainly, yep. We've done letters like that for clients as well. Truthfully, once they've gone like, "Well, should I get one myself?" I'm like, "You definitely should. You want it from your packaging person as well, because truthfully, when you get that letter from a retailer or distributor, you don't know whether [00:44:30] you are in compliance unless you have that letter from your packaging manufacturer, or you've gone out and tested your packaging yourself." Life's a little easier if you get that letter from your packaging. You should be checking with your packaging providers, and you really should be getting that affirmation that they are only using packaging that doesn't contain

PFAS, because it's going to be every state. Right now, there's what, 16, 20 states doing it, but it's going [00:45:00] to be everyone. So, it doesn't make any sense to be using packaging that has it, because you're not going to be able to use it hardly anywhere.

Will Wagner: Yep.

Justin Prochnow: Let's briefly talk about the litigation so we can bring the podcast to a close and let people finish their Peloton ride or lightly fall asleep after listening to this podcast.

Will Wagner: OFAS litigation is one of my favorite topics. I've been very, very heavily involved in [00:45:30] both the class action false-

Justin Prochnow: You need to get out more if that's one of your favorite topics of conversation.

Will Wagner: My favorite legal topics.

Justin Prochnow: Thank you.

Will Wagner: I would much rather talk about football, to be fair. In the litigation context, there's the false advertising cases and the Prop 65 cases. The false advertising cases could be premised on that organic fluorine theory we've been talking about, but we've also seen a number of false advertising [00:46:00] cases involving low levels of specific kinds of PFAS found in food products, particularly beverages. And we're talking often about part per trillion levels where a plaintiff tries to argue your safe for intended consumption claim is inconsistent with 10 parts per trillion of a particular PFAS. Then we also see the Prop 65 cases, and Prop [00:46:30] 65 regulates only three specific kinds of PFAS right now, but there are several plaintiffs who are spending significant amounts of time and resources for testing food products and personal care products for trace levels of specific kinds of PFAS.

The case law in the class action context has generally been pretty favorable. There've been many good motion to dismiss decisions. That's not uniform. There's some bad decisions [00:47:00] and some landmines you need to watch out for but the false advertising cases have gone pretty well for food companies. Prop 65 still remains to be seen, and that's going to be an evolving risk over time.

Justin Prochnow: Right now, do you know, do the state laws preventing PFAS have private rights of action, [00:47:30] or are those just being brought under states more broad, like unfair competition laws?

Will Wagner: Yeah. There is not a specific private right of action in any of the PFAS prohibition laws I can recall. But in California, you can use the unfair competition law to pursue any unlawful conduct so long as the plaintiff has been injured. So, that is

the most common demand letter we're [00:48:00] seeing right now is your food packaging has violated California's PFAS law concerning food packaging, and we can pursue that via the UCL.

Justin Prochnow: Got it.

Will Wagner: I have to mention one more thing about Prop 65 before we wrap up because I teased acrylamide several times and then [inaudible 00:48:25]. I'm sure most of you already know this who are listening to this podcast pass, but acrylamide [00:48:30] forms when you cook most forms of food through the Malliard reaction. There is a First Amendment case that has preliminarily barred acrylamide warnings under Prop 65 because the scientific evidence does not support that acrylamide is a carcinogen to humans. The takeaway there is Acrylamide is not presently a problem under Prop 65 for food companies for the most part. You got to track how that case winds [00:49:00] up though. We're still waiting on a summary judgment motion to be filed, and there's no final decision yet.

Justin Prochnow: Outside of Prop 65, PFAS, EPR, anything else... Oh, I know the answer is there's tons of different things. Are those the main environmental issues now, or is there anything else that is taking up the majority of your time outside of those?

Will Wagner: These are the key issues right now.

Justin Prochnow: [00:49:30] For anyone listening, it might not be the most uplifting podcast you've ever heard, but we're here to tell you what's going on and how to deal with it. So, if these issues are affecting you, reach out, find out more about it. Knowledge is key. Knowing what's going on is half the battle and being prepared for these things is really important as you're moving forward because we [00:50:00] want to spend less time and money on litigation and more time on getting those great products out on the market. Will, thanks very much for joining us today. We always appreciate your insights and joining us.

Will Wagner: My pleasure. Thank you for having me.

Justin Prochnow: All right. Thanks to everyone for listening. If you loved it, please like it on whatever platform you're listening to. If you didn't, do as my mom always said, if you don't have something nice to say, don't say anything at all. All right. [00:50:30] Thank you.