



## FOOD LABELING Issue Brief

# Plant-Based Beverages Labeled As “Milk” And the FDA’s Standard of Identity Regulations

Recently, the popularity of plant-based beverages that label themselves as “milk,” e.g., almond milk or soymilk, has skyrocketed.<sup>1</sup> This growing popularity is accompanied by legal controversy. Can these products legally call themselves “milk”? Many have argued they cannot, including the National Milk Producers Federation, the International Dairy Foods Association, and a bi-partisan group of 32 congressmen.<sup>2</sup> Opponents of this labeling practice argue that this is an issue of consumer protection, and that this potential product confusion has nutritional ramifications.<sup>3</sup> This issue brief examines the major legal underpinnings of this debate, and looks at the current developments at the Food and Drug Administration that could definitively address this question.

## Misbranding of Food under the Food, Drug, and Cosmetic Act

The federal Food, Drug, and Cosmetic Act (FDCA) prohibits misbranded food from being introduced or delivered into interstate commerce.<sup>4</sup> A food is considered misbranded if it does not comply with an expansive list of marketing and labeling requirements and restrictions which are focused on ensuring consumers are presented with clear and accurate product information.<sup>5</sup> The misbranding issue at the nexus of the plant-based beverage debate is the concept of standard of identity. A food is considered misbranded “if it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations.”<sup>6</sup> The Food and Drug Administration (FDA) is tasked with creating standards of identity for food whenever it determines this will “promote honesty and fair dealing in the interest of consumers . . . .”<sup>7</sup> Milk has been assigned a standard of identity and is defined as “the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows.”<sup>8</sup> Based on this standard of identity, plant-based beverages labeled as “milk” raise product misbranding questions.<sup>9</sup>



### **Case Law Addressing the Use of the Term “Milk” for Plant-Based Beverages**

The court system has adjudicated the issue of misbranding plant-based beverages based on the standard of identity of milk on several occasions. Specifically, three cases have been brought before the federal district courts in California. While the reasoning varies in each case, the courts repeatedly found that plant-based beverages that use the term “milk” in their product name are not mislabeled under the FDCA.

In *Gitson v. Trader Joe’s Co.*, purchasers of defendant’s plant-based beverages argued that the defendant’s soymilk products were misbranded under the FDCA because they did not meet the standard of identity for milk.<sup>10</sup> The court disagreed with the plaintiff and held that the standard of identity regulation “simply means that a company cannot pass off a product as “milk” if it does not meet the regulatory definition of milk.”<sup>11</sup> The court refuted the assertion that by calling its products “soymilk” Trader Joe’s was attempting to pass it off as the product defined in the FDA’s standard of identity for milk because “it is implausible that the use of the word “soymilk” misleads any consumer into believing the product comes from a cow.”<sup>12</sup>

Again, in *Ang v. Whitewaver Food Co.* purchasers of the defendant’s plant-based beverages used the standard of identity regulations to challenge the use of the term “milk” in the products’ labels.<sup>13</sup> The court rejected the plaintiff’s interpretation and reasoned that the terms “soymilk,” “almond milk,” and “coconut milk” accurately describe the defendant’s products.<sup>14</sup> The court also found that “it is simply implausible that a reasonable consumer would mistake a product like soymilk or almond milk with dairy milk from a cow. The first words in the products’ names should be obvious enough to even the least discerning of consumers.”<sup>15</sup>

Finally, in *Painter v. Blue Diamond Growers*, Cynthia Painter, a purchaser of several of defendant’s “almond milks,” asserted that these products were misbranded under the FDCA.<sup>16</sup> In this case, Ms. Painter argued that the products must be labeled as “imitation milk.”<sup>17</sup> The court rejected this argument, stating that the FDCA requires food to be labeled in a way that accurately describes “the basic nature of the food or its characterizing properties or ingredients.”<sup>18</sup> Interestingly, the regulation the court relied on for its holding, 21 C.F.R §102.5, addresses the general principles for naming of foods that lack a standard of identity.<sup>19</sup> So, rather than focusing on the standard of identity for milk and whether the defendant’s products qualify for this standard of identity, the court looked at whether “almond milk” accurately described the defendant’s products because there is no standard of identity for almond-based beverages. Using the product naming requirements for non-standardized foods, the court found that “almond milk” accurately describes the defendant’s products—which means they were not misbranded under the FDCA.<sup>20</sup>

While these cases do not create precedent outside of the federal district courts of California, they are illustrative of how other courts could interpret the FDCA’s misbranding and standard of identity provisions.



## **FDA Call for Public Comment on Milk Standard of Identity**

In response to the public debate regarding the use of the term “milk,” as well as the terms “yogurt” and “cheese,” the FDA solicited public feedback to help them reevaluate the standard of identity for milk and its relationship to plant-based products.<sup>21</sup> This request for information (RFI) sought input on a broad spectrum of issues. These issues included a better understanding of “consumers’ expectation on these plant-based products compared to dairy products.”<sup>22</sup> The FDA also wanted information from consumers regarding “how they understand terms like “milk” and “cheese” when used to label products made, for example, from soy, peas, or nuts.”<sup>23</sup> The RFI requested information regarding consumers’ understanding of the nutritional differences between dairy products and their plant-based alternatives.<sup>24</sup>

To gather additional public input on the standard of identity for milk, the FDA extended the public comment period from the original comment deadline of November 27, 2018 to January 28, 2019.<sup>25</sup> At the close of the comment period, the FDA had received over 13,000 public comments on the issue.<sup>26</sup>

With the comment period closed, concerned parties must patiently wait for the FDA to review the public’s input and to decide how the agency will address the ongoing controversy surrounding the use of the term “milk” for plant-based beverages.

The Network will be monitoring the situation and will update this brief accordingly.



### **SUPPORTERS**

The Network for Public Health Law is a national initiative of the Robert Wood Johnson Foundation.

This Issue Brief was prepared by Mathew Swinburne, J.D., Associate Director, The Network for Public Health Law – Eastern Region Office. The Network for Public Health Law provides information and technical assistance on issues related to public health. The legal information and assistance provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

Created February 11, 2019.

<sup>1</sup> See Deena Shanker, Plant-Based Foods are Finding an Omnivorous Customer Base, Bloomberg, July 30, 2018 *available at* <https://www.bloomberg.com/news/articles/2018-07-30/plant-based-foods-are-finding-an-omnivorous-customer-base> (explaining that non-dairy milk sales rose 9 percent in 2017 to an estimated \$1.6 billion).

<sup>2</sup> See Letter From Congressman Peter Welch, et al., to FDA Commissioner Robert M. Califf Regarding the Use of the Term "Milk" by Manufacturers of Plant-Based Products (Dec. 16, 2016) *available at* <http://www.nmpf.org/files/Welch-Simpson%20Letter.pdf> ; see also News Release, National Milk Producers Federation and International Dairy Foods Association, Dairy Organizations Applaud Congressional Letter to FDA Asking for Stricter Enforcement of Milk Labeling Standards (Dec. 16, 2016) *available at* <http://www.nmpf.org/files/NMPF-IDFA-Applaud-Letter-on-Milk-Labeling%20121616.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> 21 U.S.C. §331(a).

<sup>5</sup> See 21 U.S.C. §343 (providing the standard for when a food is considered misbranded).

<sup>6</sup> 21 U.S.C. §343(g).

<sup>7</sup> 21 U.S.C. § 341.

<sup>8</sup> 21 CFR §131.110(a).

<sup>9</sup> It is interesting to note that milk from goats and sheep also fail to meet this standard of identity.

<sup>10</sup> *Gitson v. Trader Joe's Co.*, No. 13-cv-01333, 2014 WL 5513711, at \*6 (N.D.Cal. Oct. 4, 2013).

<sup>11</sup> *Gitson v. Trader Joe's Co.*, No. 13-cv-01333, 2015 WL 9121232, at \*2 (N.D.Cal. Dec. 1, 2015).

<sup>12</sup> *Id.*

<sup>13</sup> *Ang v. Whitewave Foods Co.*, No. 13-cv-1953, 2013 WL 6492353, at \*1 (N.D. Cal. Dec. 10, 2013).

<sup>14</sup> *Id.* at \*4.

<sup>15</sup> *Id.*

<sup>16</sup> *Painter v. Blue Diamond Growers*, No. 17-cv-02235, 2017 WL 4766510 at \*2 (C.D. Cal. May 24, 2017).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (quoting 21 C.F.R. §102.5(a)).

<sup>19</sup> *Id.* at \*2.

<sup>20</sup> *Id.*

<sup>21</sup> Statement from FDA Commissioner Scott Gottlieb, M.D., on modernizing standards of identity and the use of dairy names for plant based substitutes, Food and Drug Administration, September 27, 2018 *available at* <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm621824.htm>; see also Use of the Names of Dairy Foods in the Labeling of Plant-Based Products, 83 Fed. Reg. 49103, 49103 (Sept. 28, 2018) *available at* <https://www.regulations.gov/document?D=FDA-2018-N-3522-0001>.

<sup>22</sup> Gottlieb, *supra* note 21.

<sup>23</sup> *Id.*

<sup>24</sup> Use of the Names of Dairy Foods in the Labeling of Plant-Based Products, *supra* note 21.

<sup>25</sup> FDA extends Comment Period on Use of the Names of Dairy Foods in Labeling Plant-Based Products, (November 20, 2018) *available at* <https://www.fda.gov/Food/NewsEvents/ConstituentUpdates/ucm621709.htm>.

<sup>26</sup> See Use of Dairy Terms in Labeling of Plant-Based Products, Federal Register, *available at* <https://www.regulations.gov/docket?D=FDA-2018-N-3522>.