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WHAT'S IN YOUR GLASS? WHETHER MILK LABELS SHOULD BE BASED ON CREATION PROCESS OR END PRODUCT (PART III OF III)*

Sam Masters

III. PROPOSAL

The one, and seemingly only, contention that the parties on either side of the product-versus-process debate can agree on is this: Consumers should not be confused when looking at the labels on their food.¹ This blog series proposes a three-part solution that supports consumer clarity, marketability among product competitors, and judicial efficiency. First, the FDA, not individual states, should regulate all milk-like products. Second, the FDA should adopt a new definition for milk that encompasses all milk-like products. Third, a certified lab seal should be created and regulated by the FDA.

A. Time For The Inevitable: Why The FDA Should Act On Milk Labels

For the entirety of the labeling war between plant-based milk and cow's milk, the FDA remained silent and left the issue for the courts to decide.² However, states are swarming with bills restricting meat labels that are proposed as quickly as they are denied, or appealed, and one can presume that the same will happen as bio-identical milk grows in popularity and controversy alike.³ The FDA has a small window of opportunity to implement federal regulations before states begin proposing their own laws that likely take aggressive positions, like

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1. See Real Marketing Edible Artificials Truthfully Act of 2019 (Real MEAT Act), H.R. 4881, 116th Cong. § 2(8) (2019).

2. Kate Yoder, *The FDA is Confused About the Definition of 'Milk,' so We Talked to a Dictionary Expert*, GRIST (July 30, 2018), <https://grist.org/article/the-fda-is-confused-about-the-definition-of-milk-kory-stamper/> [<https://perma.cc/4DJS-E4MV>].

3. See Joshua Pitkoff, *State Bans on Labeling for Alternative Meat Products: Free Speech and Consumer Protection*, 29 N.Y.U. ENV'T L.J. 297 app. at 341–48 (2021).

specifying how the process of making a white, nutritious beverage in a fermentation tank disqualifies it from being called milk regardless of the chemical or biological composition.⁴

Federal regulations would provide consistency nationwide that would benefit consumers by eliminating confusion across state lines about what products are reasonably expected to be labeled as milk.⁵ Additionally, national producers of milk-like products would benefit by not having to delegate resources to qualifying their product under different state labeling guidelines.⁶ Finally, adopting a federal, rather than state, regulation would enhance judicial efficiency by avoiding years of lawsuits against state labeling laws, like those currently being tried against the cultured meat industry.⁷

Federal regulations are feasible to implement. The resources required to bring this proposal to fruition positively outweigh the burden put on the court systems if the FDA once again sits on the sidelines during a labeling war, sending high-profile cases into courts to be settled and decided by judges' discretion.⁸

B. The Exclusivity Ends Now: Milk Comes From Unhealthy Cows, Almonds, And Labs

The FDA should adopt a definition of milk that encompasses all products currently on the market, and in development, that consumers reasonably expect to be labeled as milk. This new definition of milk would be broken down into multiple parts. First, rather than specifying that milk is the lacteal secretion that comes from healthy cows, the definition should be expanded to include the lacteal secretion from

4. See *id.* at 322 (discussing the requirements of sufficiently “qualified label[ing]” such that milk or meat-alternative products are not misleading consumers). States are likely to say that proper qualification of the term milk as it pertains to milk-like products will require notation that it came from a lab and not a cow. See *id.*

5. Eryn Terry, *The Regulation of Commercial Speech: Can Alternative Meat Companies Have Their Beef and Speak it Too?*, 23 VAND. J. ENT. & TECH. L. 227, 248–49 (2020).

6. *Id.* at 249.

7. *Id.* at 248.

8. See Iselin Gambert, *Got Mylk?: The Disruptive Possibilities of Plant Milk*, 84 BROOK. L. REV. 801, 802–04 (2019).

“any hooved mammals.”⁹ The second part of the definition should be “the opaque liquid secreted from nuts, grains, or other whole foods.” This second part would allow products like almond, oat, and banana milk to be legally defined as milk, rather than unappetizing terms like “nut juice” that causes consumer purchasing hesitation. The third part of the definition, then, should extend the label of milk to “products that are not created through traditional means of secretion but have an appreciably similar nutritional and biological composition to that of cow’s milk.” Importantly, this third definition removes the distinction of how the product is processed and instead focuses on the end product. The fourth and final part of the definition should require that “all milk products, with the sole exception of cow’s milk, have a hyphenated, qualifying word(s) of identification (QWOI) immediately preceding the term milk on the packaging.” A QWOI would be defined as “an unambiguous identification of the source from which the product was derived, whether the source is a type of animal, food, or laboratory.”

This new definition recognizes something very important: Consumers are not going to stop calling milk-like products milk, even if the FDA does, and having widespread inconsistency is dangerous in the courtroom and confusing in daily life.¹⁰ The FDA needs to align its definitions with the public’s conceptualization of milk, rather than keeping an outdated definition of a commodity so deeply rooted in this nation’s history. The QWOI requirement decisively excludes cow’s milk in recognition of consumers’ engrained mindsets that if something is labeled milk, it is from a cow.¹¹ This exception will make farmers less resistant to the new definitions as they will not have to change their labeling and can keep some level of exclusivity as the

9. This proposed definition expands on the current definition of milk as provided in 21 C.F.R. § 131.110(a) (2022) by adopting the definition proposed under the Defending Against Imitations and Replacements of Yogurt, Milk, and Cheese to Promote Regular Intake of Dairy Everyday Act, S. 1346, 117th Cong. § 2 ¶ 10 (2021).

10. See Dan Weijers & Nick Munn, *Almonds Don’t Lactate, But That’s No Reason to Start Calling Almond Milk Juice*, CONVERSATION (Aug. 6, 2019), <https://theconversation.com/almonds-dont-lactate-but-thats-no-reason-to-start-calling-almond-milk-juice-121306> [<https://perma.cc/VF7D-XWAD>] (“Even if you don’t like functional definitions, consumers are not being misled by product names like ‘almond milk’. Consumers don’t think that peanut butter has dairy butter in it. They also don’t think that almond milk is cows’ milk with almond flavouring.”).

11. See *id.*

only product without a QWOI. Notably, most, if not all, plant-based products already use QWOIs on their labels, proving the proposed definition would be feasible to adopt. Examples of hyphenated QWOIs are oat-milk, almond-milk, soy-milk, and lab-milk.

These new definitions would be incredibly beneficial to consumers, especially when considered in the context of what could happen if this definition is not adopted. If products that do not currently fit into the FDA definition of milk were enforced as misbranded, consumers would have to learn an entirely new vocabulary of made-up terminology for these products.¹²

This new standard of regulation is also beneficial to the marketability of all milk-like products. Keeping names that are easily understandable, appetizing, and familiar avoids product confusion and mislabeling while also furthering a competitive and fair market. Further, having FDA regulations that are accurate and enforceable when applied in court will provide judicial efficiency by creating consistent outcomes that are based on federal statutes rather than judges' discretion and subjective interpretations of consumer expectations.

C. Another Day, Another Seal: FDA Certified Laboratory-Made Products

“Certified Gluten-Free,” “Animal Welfare Approved,” “USDA: Organic,” and “Non GMO Project Verified”—these are only a few examples of the multitude of certifications that products currently on the market can obtain by following the necessary steps.¹³ Interestingly, these certifications all have different standards and are run by different agencies and private organizations.¹⁴ This blog post proposes that the

12. See Joshua Yeager, *Almond Beverage? Oat Drink? Just Don't Call it 'Milk,'* *Central Valley Dairy Groups Say*, VISALIA TIMES DELTA (Feb. 14, 2020), <https://www.visaliatimesdelta.com/story/news/2020/02/14/almond-beverage-oat-drink-just-dont-call-milk-central-valley-dairy-groups-say/4761447002/> [<https://perma.cc/ED2K-MU83>] (referencing two such made-up terms: “almond beverage” and “oat drink”).

13. *Food Labels Explained*, FARM AID, <https://www.farmaid.org/food-labels-explained/> [<https://perma.cc/452C-NJZD>]; GLUTEN-FREE CERTIFICATION ORG., <https://gfco.org/> [<https://perma.cc/8Z2R-T2HH>].

14. FARM AID, *supra* note 13.

FDA create a certification for milk made in laboratories that mirrors the application and protocol of “USDA: Certified Organic.”¹⁵

This label would read “FDA: Certified Laboratory-Made” and would fulfill two main goals. First, it would provide clear and enforceable regulatory standards for laboratories as they become an integral part of our food production chain. Second, the label would keep products off the market that falsely claim to be laboratory grown or are laboratory grown but do not abide by the certification standards and could create an unsafe product.

The necessary regulations of this certification are beyond the scope of this blog series and will require extensive input from researchers, food scientists, and regulators. However, such a certification is a feasible regulation to implement and would benefit consumers.¹⁶ There is significant fear surrounding and general aversion to laboratory-made products, but this symbolic and regulatory assurance of safety would communicate to consumers that the product was grown in a laboratory in compliance with all necessary FDA standards.

The benefit to the bio-technology industry would outweigh any concern of the need to allocate resources to obtain the certification. The current fear and disgust projected onto lab-grown meat and milk is going to be difficult for the industry to overcome. A widely recognized certification of safety and government promotion could be exactly what the industry needs to jumpstart its introduction into the marketplace.

15. See *Labeling Organic Products*, AGRIC. MKTG. SERV., U.S. DEP'T AGRIC., <https://www.ams.usda.gov/rules-regulations/organic/labeling> [<https://perma.cc/EF99-G33E>]. Organic labeling under the USDA is one of the most prestigious certificates a product can obtain because the agency has an extensive protocol that must be initially met, then continuously sustained. See 7 C.F.R. § 205.406 (2022) (describing the process to maintain organic certification). Having a similar prestige on laboratory meat could not only provide consumers with comfort that they could eat this novel food, but it would also set an incredibly high bar for laboratory companies to meet before their products could be sold.

16. *Benefits of Organic Certification*, AGRIC. MKTG. SERV., U.S. DEP'T AGRIC., <https://www.ams.usda.gov/services/organic-certification/benefits> [<https://perma.cc/5JRA-YTB6>]. The USDA's certified organic seal is recognized for benefiting producers and handlers, finding success in the marketplace, and creating healthier products. *Id.* These multi-functional benefits would transfer to the laboratory-made seal.

CONCLUSION

Through the three-part series, this blog explained why the current milk labeling law is a disservice to consumers, industries, and the judiciary. Additionally, it analyzed the arguments behind the product versus process debate through the lens of the cultured meat industry and applied this framework to the bio-identical dairy industry. Finally, it determined that the FDA should: (1) broaden the definition of milk to include products beyond the secretion of a healthy cow, (2) require hyphenated QWOI to be placed on all milk products besides those derived from a cow, and (3) create a federally regulated seal that certifies laboratory made products.

The positive effect of these changes would benefit consumers by limiting confusion about what a product is and where it came from. Producers would benefit from clear regulations that create products that consumers trust. And finally, the judiciary will benefit because enforceable regulations will ensure consistent results in courtrooms across the country.

Whether opaque liquid comes from cows, coconuts, peas, rice, bananas, fermentation tanks, or a host of other sources, consumers have broadly accepted that these products *are* milk, should be stocked with milk, are usable as milk, and most importantly, should be labeled as milk.