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Plant Based “Milk” Labeling

by

Cash Barker

Research Fellow, National Agricultural Law Center

&

Rusty Rumley

Senior Staff Attorney, National Agricultural Law Center



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Senior Staff Attorney

For years a quiet battle has ensued over the term “milk.” The dairy industry and advocates for plant-based products such as soy, almond, hemp, and others have been at odds because the dairy industry has insisted that the FDA ban terms such as “soy milk.”¹ The Soyfood Association of North America created a citizen petition back in 1997 requesting that the FDA recognize the term “soymilk” through a “common or usual name regulation.”² Neither approach was adopted by the FDA. In the past few years, the federal government has begun to address this unresolved issue by proposing legislation and agency action. In early 2017, Senator Tammy Baldwin from Wisconsin introduced a bill entitled the “Dairy PRIDE Act.”³ The act’s focus was to ensure that the legal definition of milk, for labeling purposes, is stated as “obtained by the complete milking of one or more hooved mammals.”⁴ Recently, Scott Gottlieb, FDA Commissioner, has stated that banning the word “milk” for plant-based products would provide more clarity and prevent consumer confusion.⁵ If the FDA does in fact follow the dairy industry’s wishes, plant-based milk alternative advocates have indicated that they will file suit.⁶

The FDA has defined milk as “the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows. Milk that is in final package form for beverage use shall have been pasteurized or ultra-pasteurized, and shall contain not less than 81/4 percent milk solids not fat and not less than 31/4 percent milkfat. Milk may have been adjusted by separating part of the milkfat therefrom, or by adding thereto cream, concentrated milk, dry whole milk, skim milk, concentrated skim milk, or nonfat dry milk. Milk may be homogenized.”⁷

While the definition clearly shows no language to suggest that milk from plant-based products falls in line with the FDA standard on milk there are still issues that are unresolved. In

¹ Emily Atkin, *The War of Soy Milk*, NEW REPUBLIC (Jul. 20, 2018), <https://newrepublic.com/article/150006/war-soy-milk>.

² Citizen Petition, Recognized the Term “Soymilk” as the Established Common of [sic] Usual Name, FDA-1997-P-0016 (Feb. 28, 1997), available at <https://www.regulations.gov/docket?D=FDA-1997-P-0016>

³ Defending Against Imitations and Replacements of Yogurt, Milk, and Cheese To Promote Regular Intake of Dairy Everyday Act, S. 130 115th Cong. (2017).

⁴ *Id.*

⁵ Kate Gibson, *Label change for plant-based “milk” could boost dairy industry*, CBS (Jul. 27, 2018, 5:15 a.m.), <https://www.cbsnews.com/news/label-change-for-plant-based-milk-could-boost-dairy-industry/>.

⁶ Atkin, *supra* note 1.

⁷ 21 C.F.R. § 131.110(a).

2013, a group of plaintiffs filed suit against Whitewave Foods Company for misbranding products that contained evaporated cane juice, soymilk, almond milk, low-fat milk, and yogurt products.⁸ In *Ang v. Whitewave Foods Co.*, the plaintiffs specifically alleged that using names like “soymilk”, “almond milk”, and other plant-based products were misbranded and consequently lead to misleading and false advertising as well as in violation of California’s consumer production act.⁹ The defendants in this case argued that the Food Drug, and Cosmetic Act (FDCA) includes a preemption provision that prohibits states from imposing requirements regarding the standard of identity that does not fall in line to the federal requirements.¹⁰

The FDCA requires that food be identified by “the common or usual name of the food, if any there be.”¹¹ Further, the FDA requires that a “statement of identity” must be in terms such as:

- (1) the food name prescribed by federal law or regulation;
- (2) the common name of the food; or, absent thereof,
- (3) an appropriate descriptive term, when the nature of the food is obvious to the public, or a commonly used name by the public.¹²

The court noted that the FDA has yet to create a name for products like skim milk and therefore the common name for those type of foods controls.¹³ The court found that the defendants’ classification for “soymilk” falls in line with the FDA regulations and that the plaintiffs’ claims were preempted by the statute.¹⁴ The court stated that FDA regulations provide that common names for a food “shall accurately identify or describe, in as simple terms as possible, the basic nature of the food or its characterizing properties or ingredients.”¹⁵

Ang is one of many cases from California that holds that the FDCA preempts states and other bodies of government from passing laws that contradict the FDA’s rules under the FDCA.¹⁶ These cases also hold that the word “milk” used in products such as “almond milk” and “soymilk” does not create consumer confusion and is in fact an accurate identifier for charactering such products.¹⁷ Until the FDA addresses this issue, it is unlikely that advocates against the use of such labels will find relief in court. However, this is not the only burden groups like the dairy industry face given the strong First Amendment argument for commercial speech as seen in a recent Florida court.

In *Ocheesee Creamery LLC v. Putnam*, the court determined whether a local dairy that sold all-natural skim milk violated a Florida statute regulating milk and milk products.¹⁸ The Florida

⁸ *Ang v. WhiteWave Foods Co.*, No. 13-CV-1953, 2013 WL 6492353 (N.D. Cal. Dec. 1, 2015).

⁹ *Id.* at *3.

¹⁰ *Id.* at *9-10; 21 U.S.C. § 343-1(a)

¹¹ 21 U.S.C. § 343(i).

¹² 21 C.F.R. § 101.3(b).

¹³ *Ang*, No. 13-cv-1953, 2013 WL 6492353, at *12; 21 U.S.C. § 343(i).

¹⁴ *Id.* at *13.

¹⁵ *Id.* at *12-13; 21; C.F.R. § 102.5(a)

¹⁶ *Ang v. Whitewave Foods Co.*, No. 13-CV-1953, 2013 WL 6492353, at *14 (N.D. Cal. Dec. 1, 2015); *Gitson v. Trader Joe’s*, No. 13-cv-01333-VC, 2015 WL 9121232, *22-23 (N.D. Cal. Dec. 1, 2015); *Painter v. Blue Diamond Growers*, No. 2:17-cv-02235, Doc. 21, p. 5-7 (C.D. Cal. May 24, 2017).

¹⁷ *Id.*

¹⁸ *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1231 (11th Cir. 2017).

statute stated that milk and milk products that were not Grade A, which must contain vitamin A, were prohibited for sale to the public.¹⁹ The creamery sold its products for over three years before Florida issued two stop sale orders to the creamery's skim milk and then told the creamery that they may continue to sell the product so long as it named the product "imitation milk product".²⁰

The creamery argued that the Florida statute violated its First and Fourteenth Amendment rights because businesses are entitled to protection under these amendments in relation to commercial speech.²¹ The court stated that challenges to commercial speech must meet the threshold question along with a three-prong test with the threshold question being "whether the expression is protected by the First Amendment."²² The court stated that to determine whether commercial speech is entitled to First Amendment protection, the speech must not concern an unlawful activity nor can the speech be false or misleading.²³ If the speech passes the threshold question, the government has the burden in showing that the governmental interest in prohibiting such speech is substantial.²⁴ The two remaining questions are whether the regulation directly advances the governmental interest alleged and whether the regulation narrowly achieves to serve that interest without being more extensive.²⁵

The court found that the threshold question was not met and that the speech did not involve an unlawful activity nor did the speech mislead.²⁶ The court held that the speech did not involve an unlawful activity because both parties agreed that the creamery was free to sell its natural skim milk: the only unlawful activity was the speech itself and not the actual activity and therefore Florida could not meet its burden.²⁷ The court also found that the creamery's use of the term "skim milk" did not mislead consumers because the creamery's use of the term is an objective fact and one that falls in line with consumer expectations.²⁸ Finally, the court stated that while Florida does have a substantial interest in protecting its consumers from deceptive products, the regulation was clearly held to be more extensive than necessary to achieve that result.²⁹

State governments may have a difficult time in avoiding the preemption clause in the FDCA and proponents for strict milk labeling may have a difficult burden in establishing that such speech is not protected by the First Amendment and even further that such regulations on plant-based products meet the burden of intermediate scrutiny. Though the government has a right to protect consumers from misleading labeling, it may be difficult to prove that a complete ban on the term "milk" will be the narrowest action toward that interest. The trend of the case law shows that the FDA needs to decide its stance on plant-based products and its use of the term "milk." Commercial plant-based alternatives to milk have existed for well over two decades and the courts

¹⁹ *Id* at 1231; Fla. Stat. § 502.091.

²⁰ *Id* at 1232.

²¹ *Id* at 1234.

²² *Id* at 1234; *Central Hudson Gas & Elec. Corp. v. Public Service Comms.*, 447 U.S. 557, 566 (1980).

²³ *Id* at 1235.

²⁴ *Id*; *Central Hudson*, 447 U.S. at 566.

²⁵ *Id*.

²⁶ *Id* at 1236-39.

²⁷ *Id* at 1237-38.

²⁸ *Id* at 1239.

²⁹ *Id* at 1240.

have used the FDA's inaction and silence as a basis that milk labeling restrictions are not applicable to products who use the term within their labels (such as soymilk), but instead only apply to products wanting to be passed off as what we traditionally know as milk.

This dispute will require action from the FDA, and most likely, the courts to determine whether plant-based products can share the term "milk" in their labels. Both sides have valid arguments and have something at stake. For years the FDA has allowed plant-based products to use the term without any hint of government intervention; however, this may no longer be the case. In early June, FDA Administrator Scott Gottlieb announced that FDA will begin to look into the issue, but will not change the definition of "milk" without a deliberative process which may include rule making.³⁰

In the absence of action from FDA some states, such as North Carolina,³¹ have enacted legislation regarding milk labeling; however preemption will still be an issue for the courts to resolve.

³⁰ *Gottlieb: FDA won't change milk definition, enforcement without process*, (June 7, 2018), <https://www.idfa.org/news-views/headline-news/article/2018/06/07/gottlieb-fda-won-t-change-milk-definition-enforcement-without-process>.

³¹ Session Law 2018-113 Sect. 6 (N.C. 2018), available at <https://www.ncleg.net/Sessions/2017/Bills/Senate/PDF/S711v8.pdf>.