

**ALMONDS AND CONFUSION IN THE DAIRY
INDUSTRY: IF ALMONDS AND WATER EQUAL
MILK, DO ALMONDS EQUAL DAIRY?**

by

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Sales of dairy milk decreased by roughly 15 percent over the five-year period between 2012 and 2017.¹ Meanwhile, sales of non-dairy food products such as almond milk, yogurt, ice cream and plant-based meat alternatives continue to gain market share.² As an example, in 2018 plant-based milk sales were 1.6 billion dollars which is a nine percent increase over the prior year.³ During that same time period, sales of cow's milk were down 6 percent.⁴ The focus of this paper is a discussion of the war the dairy industry is waging against non-dairy alternatives. However, it is important to note that there are other, more substantial factors affecting dairy sales.

I. REASONS FOR DECREASE IN DAIRY SALES

The decrease in dairy sales is due to many factors. These factors include an oversupply of milk which leads to falling milk prices.⁵ For example, milk prices have declined from \$26 per hundred pounds to less than \$17 per pound over the last five years.⁶ Another factor impacting dairy sales is the almost 30 percent decline in milk consumption since the 1970s.⁷ Statistics show that each successive generation consumes less milk.⁸

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Erratic trade policies such as retaliatory tariffs and lack of passage of a new North American trade deal have also contributed to the decline in dairy sales.

When President Trump introduced tariffs on foreign steel imports in order to help the U.S. manufacturing sector, other countries, including Mexico, Canada, Europe and China implemented retaliatory tariffs on American goods.⁹ Tariffs imposed by Mexico and China included tariffs on certain dairy products.¹⁰ Mexico imposed a 25 percent tariff on dairy products^{11,12} and China imposed tariffs on milk and cream ranging from 35 to 40 percent.¹³ In general, retaliatory tariffs increase the cost of importing the products which leads to less demand by the foreign consumer. In turn, income for the dairy farmer can be negatively impacted.¹⁴

In the past, international markets accounted for approximately 20 percent of the dairy industry's market.¹⁵ But trade wars have harmed many of these business relationships. Trade wars have also pushed the dairy industry into a longer than normal downward business cycle. Historically, that cycle lasts for three years, but trade wars have expanded that cycle to five straight years.¹⁶

Immigration policies have also made it difficult for farmers, including dairy farmers, to get reliable workers.¹⁷ Changes in state and federal funding subsidies for dairy farmers have also affected revenues.¹⁸ Finally, as mentioned earlier, competition from non-dairy alternatives to cow's milk also plays a small role in the decrease in revenue for dairy farms. Non-dairy alternatives account for about 1.8 billion dollars of the total milk market while cow's milk represents about 12 billion dollars of that market.¹⁹

II. BATTLES OVER NON-DAIRY ALTERNATIVES TO COW'S MILK

A non-exclusive list of non-dairy alternatives to cow's milk include almond, coconut, soy, pea, oat and hemp milks.²⁰ The dairy industry has argued that these plant-based alternatives should not be called "milk."²¹ A National Milk Federation spokesperson stated "you don't got milk if it comes from a nut or a seed or a grain or a weed."²² Some also argue that labeling these products as "milk" misleads consumers into thinking that the plant-based alternatives are nutritionally similar to dairy products.²³

In *Gitson v. Trader Joe's Co.*,²⁴ plaintiffs purchased several products at Trader Joe's grocery including nonfat and low-fat yogurts as well as organic soymilk and organic chocolate soymilk. Plaintiffs alleged that several Trader Joe's products, including its soymilk product, were either misbranded or contained misleading labels. Specifically concerning the soymilk, the plaintiffs argued that they were misled because Trader Joe's labeled its "soy beverage" as "milk." However, plaintiffs contend that the soy beverage didn't meet the definition of milk contained in the Food, Drug and Cosmetic Act.²⁵ As such, plaintiffs argued that the Company's labeling violated the California Unfair Competition Law.²⁶

The Court in *Gitson* looked to the Food, Drug and Cosmetic Act to determine whether the term "soymilk" could be considered false or misleading.²⁷ The U.S. Food and Drug Administration (FDA) issued guidance in 2002 on the types of health claims that can be made on food labels.²⁸ Since December 2002, the FDA has followed the FTC's "reasonable consumer standard" in determining whether a food labeling claim is misleading.²⁹ The reasonable consumer uses common sense and judgement.³⁰ According to the *Gitson* court, a reasonable

consumer (as well as a least sophisticated consumer³¹) doesn't think soymilk comes from a cow. As a result, the court held that calling the product "soymilk" was not misleading.

Next, plaintiffs argued that the word "soymilk" was misleading because by including the word "milk" in the title it implies that the product has a similar nutritional makeup as dairy milk. The court dismissed this argument stating a reasonable consumer would not assume the products had the same nutritional values. Moreover, "if the consumer cared about the nutritional content, she would consult the label."³²

A few years before *Gitson* a U.S. District Court heard a similar case. In *Ang. v. Whitewave Foods Co.*,³³ plaintiffs argued that the manufacturers of Silk© brand soy and almond milks violated the standard of identity for milk. In other words, the products do not meet the FDA's definition for milk which states that milk "comes from the lacteal secretions of healthy cows."³⁴ But the court stated that the names accurately conveyed "the content of the beverages, while clearly distinguishing them from milk that is derived from dairy cows."³⁵ The court also determined that as a matter of law, plaintiffs' claims were implausible because a reasonable consumer would not see the word "soymilk" or "almond milk" and disregard the first part of the word and assume the products were dairy milk that came from cows.³⁶

More recently, the Ninth Circuit similarly found that "almond milk" was not mislabeled simply because it has the term "milk" in its title.³⁷ Plaintiffs in *Painter v. Blue Diamond Growers*³⁸ argued that because almond milk is "nutritionally inferior" to dairy milk it should be labeled "imitation milk." The court states that in order to require the term "imitation," the product would have to involve substituting inferior ingredients for the ingredients in dairy milk. Almond milk, the court notes,

is not a “substitute” for dairy milk. Instead, according to the court, it’s a separate and distinct food. The court gave a comparison to a case involving jam in order to illustrate the distinction.³⁹ In *62 Cases of Jam v. U.S.*,⁴⁰ a product substituted the fruit in fruit jam with pectin. The pectin or gelatin solution made the product an imitation of jam. Similarly, imitation vanilla can be used as a less expensive alternative for vanilla extract. The Blue Diamond court went on to address Painter’s claim that almond milk is nutritionally inferior. The court concluded that a reasonable consumer would not be misled and would not assume that two distinct products have the same nutritional content.⁴¹ Like the court stated in *Gitson*, the consumer can simply read the label.⁴²

There have been hundreds of class action lawsuits filed against food and beverage manufacturers and Cary Silverman discusses them in an article about the reasonable consumer.⁴³ For example, Silverman asks whether workers on their lunch break are duped into believe that Subway’s “Footlong” sandwiches are precisely twelve inches long. Or, “do consumers buy glazed ‘raspberry filled’ or ‘blueberry cake’ donuts for the cancer-fighting benefits of real fruit?”⁴⁴

Some writers suggest that if non-dairy product names are misleading, then many other products would have to change their name too. For example, milk of magnesia, cocoa butter, cream of wheat and peanut butter would all need to change their names.⁴⁵ Although one distinction is that milk of magnesia and cocoa are not generally found in the dairy aisle while non-dairy and dairy milks and butters are usually found near each other in the dairy aisle, most people understand the distinction between milk from a cow and other non-dairy alternatives. As a matter of fact, the common definition of “milk” includes more than the product produced by lactating cows. According to the *Cambridge Dictionary*, milk is (1) the white liquid produced by

cows, goats and sheep... Milk is also defined as (2) the white liquid produced by women and other female mammals as food for their young and finally, the definition includes (3) *the white liquid produced by some plants and trees such as coconut milk (emphasis supplied)*.⁴⁶

III. THE HEALTH-CONSCIOUS MOVEMENT TOWARDS MORE WHOLE, PLANT- BASED FOODS

In her law review comment, *Incentivizing Transparency: Agricultural Benefit Corporations to Improve Consumer Trust*, Kathryn Smith notes that denying non-dairy products the label “milk” would only serve to confuse customers at this point. Many health-conscious consumers of non-dairy products specifically choose to purchase almond or soy or oat or coconut milk and are well-aware of what they are purchasing.⁴⁷ The author notes that the concern should be focused on issues such as hormone and non-hormone treated milk. This is an area where the milk products do not have the same nutritional content, yet the different products are not clearly labeled as such.⁴⁸

In another law review article about the neuroscience of nutrition, the author talks about the relationship between food, health and the impact diet can have on cognitive decline for lawyers. Diets such as the Mediterranean, and whole foods plant-based diets help to prevent depression and Alzheimer’s disease.⁴⁹ The article discusses research involving whole foods, plant-based diets and points out that lawyers who follow a diet rich in plant-based whole foods lower the risk of cognitive decline while diets higher in processed foods increase the risk of cognitive decline.⁵⁰ It is such health and nutrition research that has led to an increase in the number of consumers making healthier food choices. People are seeking out information and choosing to replace meat and dairy with vegetables, fruits beans

and whole grains.⁵¹ It is for these perceived health benefits that many consumers choose to purchase plant-based dairy alternatives such as almond or soymilk.⁵²

IV. LONG STANDING GOVERNMENT SUPPORT OF THE DAIRY INDUSTRY

Despite the research findings supporting whole foods, plant-based diets, state and federal governments strongly and continuously support the powerful dairy industry.⁵³ At the federal level, examples of government protection for the dairy industry include promoting milk through federal nutrition assistance programs such as food stamps and school lunch programs. For example, federal assistance in providing milk to school children began in June 1940 with a federally subsidized program in low income Chicago neighborhoods.⁵⁴ The program expanded to several other cities. The way the program operated was dairies submitted bids to the U.S. Department of Agriculture (USDA). Schools collected one cent per half pint and paid it directly to the dairies. The difference between the one cent paid to the dairy farmer by the school and the cost of the milk was paid to the dairies by the USDA on a monthly basis.⁵⁵ Eventually, in 1946, the milk for the school children program became part of the National School Lunch Program.⁵⁶ After several years, milk consumption began to wane. To encourage the consumption of milk among school children, the 83rd Congress authorized the government to reimburse schools for milk served over and above the usual amount consumed. Reimbursement was at the rate of 4 cents per half pint over and above what was normally consumed.⁵⁷ Eligibility was broadened to include child care centers, nursery schools, summer camps and other nonprofits that provided care for children.⁵⁸ The program has required that milk be offered in order to receive federal reimbursement for meals.⁵⁹ Federally subsidized school meals account for 7.6 percent of total fluid

milk sales.⁶⁰ On the other hand, at least one study found that “people who drank three glasses of milk a day had a higher risk of dying over 20 years than those who drank one glass per day.”⁶¹ There is a growing recognition among doctors that high dairy intake can increase risks of heart disease, cancer, and weight gain according to a recent *Bloomberg Businessweek* article.⁶² The requirement mandating milk as part of the school lunch program exists despite the fact the majority of Native, Asian and African Americans are lactose intolerant⁶³ and despite the growing evidence that dairy may not be as healthy as traditionally thought.⁶⁴

Research findings suggest benefits to eating whole food, plant-based diets that do not use animal products, but the dairy industry⁶⁵ as well as some state and federal legislators, continue to challenge plant-based foods.⁶⁶ Tammy Baldwin, Senator from the dairy-rich state of Wisconsin, introduced the “*Defending Against Imitation Replacements of Yogurt, Milk and Cheese to Promote Regular Intake of Dairy Everyday Act*” (The Dairy Pride Act) in 2017 and reintroduced the bill on March 14, 2019.⁶⁷ The Bill would require that the FDA enforce the legal definition of milk and prohibit plant-based alternatives from using terms such as milk, cheese and yogurt.⁶⁸

A similar measure was introduced as a legislative resolution in Nebraska.⁶⁹ The resolution urges the U.S. Government to establish and enforce labeling rules for plant-based “imitation milk” that is truthful, not misleading and that differentiates between dairy products and non-dairy beverages.

On March 21, 2017 Michael Dykes, the CEO of the International Dairy Foods Association (IDFA), testified before the House Agriculture Committee about *the Dairy Pride Act*. During his testimony, Dykes indicated that he no longer supported the bill. He stated that the labeling issue “is probably

an issue that needs to be resolved in the marketplace,” and also stated that “the FDA has not concluded these [labels] are misleading and there have been court challenges and the courts have not concluded that they have been misleading.”⁷⁰

V. NUTRITION LABELS, HORMONES, AND FREE SPEECH

When it comes to discussing health benefits of foods, the FDAs labeling laws seem outdated and are nonresponsive to consumer demand.⁷¹ Hormone treated cow’s milk is a good example. If a consumer wants to know whether the milk she is drinking contains hormones, FDA regulations make it difficult to find out the truth.⁷² The FDA’s Guidance states that there is “no significant difference between milk from treated and untreated cows.” The Agency therefore asserts that it does not have authority to require special labeling for hormone-treated milk.⁷³ In addition, the Agency also believes that since there is some naturally occurring bST (hormones) in cow’s milk, labeling even untreated milk as hormone free would be untruthful.⁷⁴ The state of Vermont passed a law requiring hormone containing milk to state so on the label.⁷⁵ However, the dairy industry challenged the requirement on compelled speech grounds, arguing that the statute infringed on their right not to speak. The Second Circuit agreed with the challengers and the Vermont statute was ruled unconstitutional.⁷⁶

Instead of the dairy industry raising free speech issues, some writers have suggested that plant-based alternative producers may raise free speech challenges if they are required to stop using the term milk or are required to use words such as “imitation.”⁷⁷ In comments submitted to the FDA, the Institute for Justice stated that a labeling ban “would confuse consumers, harm small businesses across the country, and raise serious First Amendment concerns.”⁷⁸ In support of its First Amendment

argument, the Institute referenced the *Ocheesee Creamery v. Putnam* case.

In *Ocheesee*, plaintiff is a small dairy creamery located in Florida. It sells all-natural dairy products including cream and skim milk. The cream is made according to industry standard by skimming the cream off the top of the milk. The leftover product is sold as skim milk. One of the side effects of the skimming process is that it removes almost all the vitamin A naturally present in whole milk. This is because vitamin A is fat-soluble, so it is removed along with the cream. Because the Creamery prides itself on selling only all-natural products without additives, it refused to replace the vitamin A. Its product contains no ingredients other than skim milk. Florida law prohibits the sale of skim milk that does not replace the vitamin A lost during skimming. Because the creamery sells all-natural products, it refused. The state of Florida told Creamery that it could either put the vitamin A in or label its product “imitation skim milk,” or “milk product.”

The court applied the four-point test of *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*,⁷⁹ to determine if the state’s regulation of Creamery’s commercial advertising was proper. Here, the court found that Creamery’s use of the word “skim milk” to describe its milk was not inherently misleading. In applying the remaining prongs of *Central Hudson*, the court found that the State had a substantial interest in establishing nutritional standards for milk. It also assumed that the restriction directly advanced the states interest. However, the court ruled that the regulation was more extensive than necessary and there were less restrictive ways of regulating the product. For example, the state could have allowed use of the term skim milk with a disclaimer stating that the product lacked vitamin A.

Similar to the *Ocheesee* case, the FDA in the case of plant-based milk products can permit consumers to compare the nutrient labels to ascertain the nutrition of the dairy versus non-dairy products. Moreover, use of the term “milk” would likely not cause confusion as buyers understand that almond milk is made from almonds and not from a lactating cow. As the court in *Ang* noted, under [that] logic, a reasonable consumer might also believe that veggie bacon contains pork, that flourless chocolate cake contains flour, or that e-books are made out of paper.⁸⁰

VI. COMPETITION AND MARGARINE WARS

The dairy industry’s challenge against competitors is nothing new. As far back as 1886, margarine manufacturers faced similar challenges from the dairy industry through passage of the Oleomargarine Act of 1886.⁸¹ Under the so-called “margarine wars” campaigns at both the state and federal levels fought to either outright prevent butter substitutes or to regulate the substitutes, sometimes to the point of extinction.

People v Marx,⁸² challenged New York state’s outright ban on the sale of margarine. The law carried a very high penalty, especially for 1885. In New York State, selling margarine carried a penalty of one year in jail, a \$ 1,000 fine, or both for each offense. However, the court held that the law was unconstitutional because the law was really prohibiting the sale of any butter substitute. The law’s aim was to protect the dairy industry rather than protect consumers from fraud or deceit.⁸³

In *Powell v. Pennsylvania*,⁸⁴ the state legislature passed a law banning the manufacture or sale of any product designed to take the place of butter or cheese unless the product was made from milk or cream. In contrast to the earlier New York case, Pennsylvania used its police powers to determine that the sale or

intent to sell margarine is fraudulent because it is designed to take the place of butter. Moreover, the state determined that margarine is harmful to the health of its citizens. Because it was within the state's police powers to protect its citizens, the U.S. Supreme Court upheld the conviction.⁸⁵ By 1897, the U.S. Congress had recognized margarine as a healthy and nutritious product that could be an item of interstate commerce.⁸⁶ As a result, the court in *Schollenberger v. Pennsylvania*⁸⁷ held that the state could not use its police powers to prevent a dealer from bringing his margarine into Pennsylvania through interstate travels and selling it in Pennsylvania.⁸⁸

In lieu of outright bans on the sale of margarine, there were drives at both the state and federal levels to regulate the color of margarine, such as prohibiting it from being yellow or mandating that it be colored pink.⁸⁹ Of course, most consumers wouldn't want to buy pink margarine, so the law would in reality severely diminish the company's business.⁹⁰ At the federal level, a prohibitive tax was imposed on yellow (or colored) margarine.⁹¹ The law basically required that margarine "sold in interstate commerce" remain "natural" (white) in color.⁹² Margarine manufacturers such as Fleishman's began adding a package of special fats that when squeezed by the consumer would give the margarine a yellow tinge.⁹³ Simultaneously, the dairy industry continued its assault on margarine manufacturers including publishing false and horrifying rumors about how margarine was produced.⁹⁴ It was not until the 1950's that war-on-margarine type laws were abolished and free and open competition was permitted.⁹⁵ Today, butter has a larger market share than margarine and more consumers prefer creamy butter to the margarine counterpart.⁹⁶

VII. ALTERNATIVES FOR DAIRY FARMERS

Financial assistance should be available to help America's dairy farmers pursue alternatives including growing different crops including whole foods used in making dairy alternatives.⁹⁷ For example, in Finland the government assisted dairy farmers by helping them switch to berry farming.⁹⁸ As the world faces environmental and sustainability issues, governments should assist farmers in creating alternatives. Methane gas digesters that allow dairy farmers to capture methane gas and use it to generate electricity is one example that helps the environment and produces an alternate source of revenue for our farmers.⁹⁹

VIII. CONCLUSION

Dairy market revenues are declining, in part due to consumers turning to plant-based alternatives. Waging war over the use of the word "milk" by manufacturers of non-dairy alternatives is misplaced. Courts have repeatedly held that the reasonable consumer is not misled by the term almond or soymilk. Consumers do not believe the non-dairy alternative comes from a cow. Similarly, courts have found that the argument about the differing nutritional values does not cause consumer confusion. Consumers interested in the nutritional content will read the nutrition label. It seems that more focus should be spent on the deeper issues affecting dairy farmers including lack of trade agreements, lack of subsidies and lack of assistance in helping dairy farmers pursue alternatives including growing different crops including whole foods used in making dairy alternatives.

¹ *U.S. Non-Dairy Milk Sales Grow 61% Over the Last 5 Years*, MINTEL REPORT, (June 4, 2018), <https://www.mintel.com/press-centre/food-and-drink/us-non-dairy-milk-sales-grow-61-over-the-last-five-years>.

² Janet Forgive, *Plant-Based Food Sales Continue To Grow By Double Digits, Fueled By Shift In Grocery Store Placement*, FORBES (July 16, 2019, 9:00 am), <https://www.forbes.com/sites/janetforgive/2019/07/16/plant-based-food-sales-pick-up-the-pace-as-product-placement-shifts/#1b2eae314f75>.

³ Nellie Bowles, *Got Milk? Or Was That Really a Plant Beverage?*, N.Y. TIMES (August 31, 2018), <https://www.nytimes.com/2018/08/31/business/milk-nut-juice-plant-beverage-label.html>.

⁴ Deena Shanker, *Plant Based Foods Are Finding an Omnivorous Customer Base: Almond Milk and Veggie Burgers Aren't Just for Hippies Anymore*, BLOOMBERG (July 30, 2018, 5:00 am), <https://www.bloomberg.com/news/articles/2018-07-30/plant-based-foods-are-finding-an-omnivorous-customer-base> (last accessed February 21, 2019).

⁵ Alan Rappeport, *Stung by Trump's Trade Wars, Wisconsin's Milk Farmers Face Extinction*, N.Y. TIMES (April 26, 2019), <https://www.nytimes.com/2019/04/26/us/politics/trump-trade-war-wisconsin-dairy.html>. (wherein the author notes that large corporate farms and more efficient milking processes have led to an oversupply of milk). *See also*, Heather Haddon, *Got Milk? Too Much Of It Say U.S. Dairy Farmers*, MARKET WATCH (May 21, 2017 4:07 pm), <https://www.marketwatch.com/story/got-milk-too-much-of-it-say-us-dairy-farmers-2017-05-21> (the author discusses a downswing in foreign imports of dairy products combined with an increase in the value of the dollar (causing U.S. imports to be more expensive and less competitive) as other causes for the oversupply of milk).

⁶ Rappeport, *Stung by Trump's Trade Wars, Wisconsin's Milk Farmers Face Extinction* (noting an almost 30% decline in the price of milk over the last five years).

⁷ Stewart, Hayden, Diansheng Dong, and Andrea Carlson, *Why Are Americans Consuming Less Fluid Milk? A Look at Generational Differences in Intake Frequency*, ERR-149, U.S. Department of Agriculture, Economic Research Service (May 2013), https://www.ers.usda.gov/webdocs/publications/45073/37651_err149.pdf?v=41423. (discussing how Americans are not consuming as much milk).

Since the 1940s, each generation has consumed less milk. The authors report that since the 1970s consumption of milk has decreased from .96 to .91 cup equivalents, or almost a 38% decrease).

⁸ *Id.*

⁹ Anita Regmi, *Retaliatory Tariffs and U.S. Agriculture*, R 45903, CONGRESSIONAL RESEARCH SERVICE REPORT, 9 (September 13, 2019), <https://fas.org/sgp/crs/misc/R45903.pdf>.

¹⁰ *Id.*

¹¹ *Id.* at 10

¹² The United States removed the tariffs on U.S. steel imports from Mexico and Canada on May 17, 2019 in order to facilitate the passage of the new NAFTA — known as the U.S. Mexico Canada Agreement (USMCA). In turn, those countries removed tariffs on U.S. products including dairy. *Id.* at 11.

¹³ USDA Foreign Agricultural Service, Gun Report, CH 19051, *China Announces Increases to Additional Tariffs*, 8-9, (August 28, 2019).

¹⁴ Congressional Research Report, *supra* note 7, at 3.

¹⁵ *Farmer's in Distress* Before the Conn. Gen. Assembly Rural Caucus, 2019 Leg., 2019 Sess. (Conn. 2019) (Statement of Joan Nichols, Executive Director, Connecticut Farm Bureau) (on file with the author).

¹⁶ *Id.*

¹⁷ *Reviewing the State of the Dairy Economy* Before the U.S. H. Comm. on Agric., Subcomm. on Livestock and Foreign Agric., 116th Cong. (2019). (Statement of Mike McMahon, Dairy Farmer EZ Acres, LLC). (noting that “local labor doesn't want to work on a dairy. A 2017 Texas A&M study found that 79% of the U.S. milk supply is harvested by Hispanic workers. Agriculture needs a way to secure American workforce that is willing, able and legal. I realize that immigration from top is a difficult topic, but agriculture's need for immigrant labor is undeniable.”), *available at* <https://www.dairyherd.com/article/farmers-discuss-state-dairy-economy-washington>.

¹⁸ *See, e.g.*, Nichols *supra* note 13 (In Connecticut for example, dairy farmers receive some funding from the Community Investment Act Dairy Fund. However, on several occasions the funds were raided and used to shore up the state general fund to meet other state obligations. At the federal level, the government established a program to relieve some of the pressure dairy farmers face due to the trade wars. However, farmers received pennies on the dollar (“\$370,560 to replace \$5,800,000 in market disruption”).

¹⁹ Amelia Lucas, *5 Charts That Show How Milk Sales Changed and Made It Tough For Dean Foods To Avert Bankruptcy*, CNBC (November 13, 2019

3:00 pm), <https://www.cnn.com/2019/11/13/5-charts-that-show-how-milk-sales-have-changed.html>.

²⁰ Jaclyn London, *The Best Milk Alternatives To Pour In Your Coffee, Cereal, And Smoothies, According To A Dietitian*, GOOD HOUSEKEEPING (September 18, 2019), <https://www.goodhousekeeping.com/health/diet-nutrition/g27128821/best-milk-alternative-substitutes/>.

²¹ Bowles, *Got Milk?* *supra* note 3.

²² *Id.*

²³ Anahad O'Connor, *Got Almond Milk? Dairy Farms Protest Milk Label on Nondairy Drinks*, N.Y. TIMES (February 13, 2017), <https://www.nytimes.com/2017/02/13/well/eat/got-almond-milk-dairy-farms-protest-milk-label-on-nondairy-drinks.html>.

²⁴ *Gitson v. Trader Joe's Co.*, No. 13-cv-01333-VC, 2015 U.S. Dist. LEXIS 170401 (N.D. Cal. 2015).

²⁵ 21 C.F.R. § 131.110 (a) (2001) defines "milk" as the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows.

²⁶ Plaintiffs cannot sue directly under the Food, Drug and Cosmetics Act because it does not create a private right of action. *Gitson* at 2.

²⁷ 21 U.S.C. § 343(a) (2012) defines false or misleading.

²⁸ U.S. Food & Drug Admin., *Guidance: Interim Procedures For Qualified Health Claims In The Labeling Of Conventional Human Food And Human Dietary Supplements*, Docket No. 2013-S-0610 (FDA July 2003), available at <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-interim-procedures-qualified-health-claims-labeling-conventional-human-food-and>.

²⁹ Timothy Ernst, *Advertising Food Products: Understanding the Regulatory Mix*, A.B.A. BUS. L. TODAY, May/June 2009, <https://apps.americanbar.org/buslaw/blt/2009-05-06/ernst.shtml>.

³⁰ *U.S. v 88 Cases*, 187 F. 2d. 967, 971 (3d. Cir. 1951). See also, *Guidance for Industry: Qualified Health Claims in the Labeling of Conventional Foods and Dietary Supplements*, 67 Fed. Reg. 78,002, 78,004 (December 20, 2002), (where the FDA discusses how courts have applied differing standards including the ignorant and unthinking consumer standard as well as the reasonable consumer standard. The FDA, *citing U.S. v. 88 Cases*, states that the reasonable consumer standard more accurately reflects its viewpoint).

³¹ *Id.* (Sometimes referred to as "the ignorant, the unthinking, and the credulous" consumer. See, e.g., *United States v. EIO-Pathic Pharmacy*, 192 F.2d 62, 75 (9th Cir. 1951)).

³² *Gitson supra* note 21, at 5.

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- ³³ *Ang. v. Whitewave Foods Co.*, No. 13-cv-1953, 2013, U.S. Dist. LEXIS 173185 (N.D. Cal. Dec. 10, 2013).
- ³⁴ 21 C.F.R. § 131.110 (a).
- ³⁵ *Ang.* at 12.
- ³⁶ *Id.* at 13.
- ³⁷ *Painter v. Blue Diamond Growers*, No. 17-55901, 2018 U.S. App. LEXIS 35939 (9th Cir. 2018).
- ³⁸ *Id.*
- ³⁹ *62 Cases of Jam v. U.S.*, 340 U.S. 593, 600 (1951).
- ⁴⁰ *Id.*
- ⁴¹ *Blue Diamond* at 4.
- ⁴² *Gitson supra* note 21, at 5.
- ⁴³ Silverman, *In Search of The Reasonable Consumer: When Courts Find Food Class Action Litigation Goes Too Far*, 86 U. CIN. L. REV. 1 (2018).
- ⁴⁴ *Id.*
- ⁴⁵ *See, e.g. O'Connor, supra* note 20.
- ⁴⁶ The Cambridge Dictionary, CAMBRIDGE UNIVERSITY PRESS (2019), available at <https://dictionary.cambridge.org/dictionary/english/milk>.
- ⁴⁷ 55 SAN DIEGO L. REV. 888, 905 (2018).
- ⁴⁸ *Id.*
- ⁴⁹ Debra Austin, *Food for Thought: The Neuroscience of Nutrition to Fuel Cognitive Performance*, 95 OR. L. REV. 425 (2017).
- ⁵⁰ *Id.* at 498.
- ⁵¹ R. Wes Harrison, *U.S. Consumers' Demand for Healthy, Nutritious Foods*, LA. AGRIC. MAG. (December 3, 2013), <https://www.lsuagcenter.com/portals/communications/publications/agmag/archive/2013/fall/us-consumers-demand-for-healthy-nutritious-foods>.
- ⁵² Elaine Watson, *Why Do Consumers Buy Plant-Based Dairy Alternatives And What Do Formulators Need To Work On?*, FOOD NAVIGATOR-USA.COM (February 8, 2018), <https://www.foodnavigator-usa.com/Article/2018/02/08/Significant-percentage-of-consumers-buy-plant-based-dairy-alternatives-because-they-think-they-are-healthier-reveals-Comax-study>.
- ⁵³ Christopher Wolf and Glynn Tonsor, *Dairy Farmer Policy Preferences*, 38 J. Agric. & Resource Econ., No. 2 (2013).
- ⁵⁴ Gordon Gunderson, *School Milk Programs*, FOOD AND NUTRITION SERVICE (U.S.D.A. 2019), https://www.fns.usda.gov/nslp/history_11.
- ⁵⁵ *Id.*
- ⁵⁶ *Id.*
- ⁵⁷ P.L. 690, 83rd Cong., 68 Stat. 900 (August 28, 1954).

⁵⁸ P.L. 752, 84th Cong., 70 Stat. 596 (July 20, 1956).

⁵⁹ See, Matilde Cohen, *Milk and the Constitution*, 40 HARV. J. L. & GENDER 115, 155 (2017).

⁶⁰ Peter Robinson and Lydia Mulvany, *Big Dairy is About to Flood America's School Lunches with Milk*, BLOOMBERG BUSINESSWEEK (January 9, 2019), <https://www.bloomberg.com/news/features/2019-01-09/big-dairy-is-about-to-flood-america-s-school-lunches-with-milk>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Cohen, *supra* note 56, at 119. (noting that The National Dairy Council recognizes that between 80 to 100 percent of Native Americans, Asian Americans and African Americans are lactose intolerant. As well, over 50 percent of Hispanics are also lactose intolerant).

⁶⁴ *Id.*

⁶⁵ and, in some cases government agencies themselves.

⁶⁶ See, e.g., Dairy Pride Act, S. 130, 115th Cong. (2017), *reintroduced as S. 792*, 116th Cong. (2019).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Neb. L. Res. 13, 160th Leg., 1st Sess. (2019), *available at* <https://nebraskalegislature.gov/FloorDocs/106/PDF/Intro/LR13.pdf>.

⁷⁰ Michele Simon, *Dairy Lobbying Group Backs Down on "Dairy Pride" Act*, Plant Based Foods Association (March 22, 2017), <https://plantbasedfoods.org/dairy-lobbying-group-backs-dairy-pride-act/>.

⁷¹ Martha Dragich, *Do You Know What's On Your Plate?: The Importance of Regulating the Processes of Food Production*, 28 J. ENVTL. L. & LITG. 385, 414 (2013) (citing The FDA's Interim Guidance on the Voluntary Labeling of Milk and Milk Products from Cows that Have Not Been Treated with Recombinant Bovine Somatotropin, 59 Fed. Reg. 6279, 6279-80 (Feb. 10, 1994).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ VT. STAT. ANN. tit. 6, § 2754(c) (repealed 1998).

⁷⁶ *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 69-70 (2d Cir. 1996)(holding Vermont's statute requiring notification and labeling unconstitutional).

⁷⁷ See, e.g., Nick Sibilla, *FDA Crackdown on calling Almond Milk "Milk" Could Violate the First Amendment*, FORBES (January 31, 2019), <https://www.forbes.com/sites/nicksibilla/2019/01/31/fda-crackdown-on->

calling-almond-milk-milk-could-violate-the-first-amendment/#4d160f8f7b70.

⁷⁸ <https://ij.org/press-release/ij-to-fda-milk-doesnt-have-to-come-from-cows-to-be-called-milk/>

⁷⁹ 447 U.S. 557, 563–64, 100 S. Ct. 2343, 2350 (1980) (describing the four-part test wherein speech cannot be misleading or unlawful. In addition, the government must have a substantial interest, the regulation must advance that interest and the regulation must be narrowly tailored).

⁸⁰ *Ang* at 14.

⁸¹ Oleomargarine Act of 1886 (32 Stat. 194), as amended by Act of May 9, 1902 (R.S. § 3224).

⁸² 99 N.Y. 377 (1885).

⁸³ *Id.*

⁸⁴ 127 U.S. 678 (1887).

⁸⁵ *Id.* at 684.

⁸⁶ *Schollenberger v. Pennsylvania*, 171 U.S. 1 (1897).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See, e.g., *Collins v. New Hampshire*, 171 U.S. 30 (May 23, 1898) (a state law prohibiting the sale of margarine unless it was pink in color was declared prohibitory and therefore unconstitutional).

⁹⁰ See, Geoffrey Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CALIF. L. REV. 83, 84 (1989).

⁹¹ Federal Oleomargarine Act of 1902, 57 P.L. 110, 32 Stat. 193, 57 Cong. Sess. 1, Ch. 784 (subjecting margarine manufacturers to the jurisdiction of every state in which it sells margarine and imposing a tax on all sales including a penalty for any margarine colored yellow).

⁹² *Id.*

⁹³ Ethan Trex, *The Surprisingly Interesting History of Margarine*, MENTAL FLOSS, (August 31, 2010),

<https://mentalfloss.com/article/25638/surprisingly-interesting-history-margarine>. (There was no reason why the manufacturer couldn't simultaneously sell consumers margarine and yellow dye. When you bought a block or tube of margarine, you also got a packet of food coloring that could be kneaded into the margarine by hand).

⁹⁴ Margarine was described as containing a compound of diseased or putrid beef, dead horses, dead hogs, dead or mad dogs and drowned sheep. There were also reports that claimed workers lost toenails because of the margarine manufacturing process. See, Miller, *supra* note 90, at 115. See, also, Adam Young, *The War on Margarine*, Foundation for Economic Education (June 1, 2002) citing Celia Bergoffen, "Margarine Wars,"

AUDACITY: THE MAGAZINE OF BUSINESS EXPERIENCE (Summer 1995) p. 55, <https://fee.org/articles/the-war-on-margarine/>.

⁹⁵ In some heavy dairy industry states restrictive margarine laws lasted into the 1960's, with the dairy-rich state of Wisconsin not repealing restrictions until 1967. See, Adam Young, *The War on Margarine*.

⁹⁶ Mary Beth Quirk, *Spreads Are Dead: No One Likes Eating Margarine Anymore*, CONSUMER REPORTS (July 20, 2017), <https://www.consumerreports.org/consumerist/spreads-are-dead-no-one-likes-eating-margarine-anymore/>.

⁹⁷ See, e.g. Jeff Herman, *Saving U.S. Dietary Advice From Conflicts of Interest*, 65 FOOD & DRUG L.J. 285, 293 (2010) (wherein the author points out that in Finland, the Government recognized that dairy farmers might suffer when people adopted healthy lifestyles and changed their dietary habits by reducing saturated fats, especially from dairy sources. The government therefore helped many farmers switch from dairy farming to berry farming. Between 1969 and 1995, mortality rate from heart disease fell 65.9% in Finland).

⁹⁸ *Id.*

⁹⁹ Dairy cows produce methane gas and utility companies need renewable gas sources for energy. Building a system to deliver the gas while giving dairies credit for reducing emissions is one example of environmental strategies being pursued. *Pipelines for Dairy Waste Digesters The Next Logical Step*, NORTHWEST RENEWABLE NEWS (December 31, 2008), <https://nwrenewablenews.wordpress.com/2008/12/31/pipelines-for-dairy-waste-digesters-the-next-logical-step/>.