

## The Latest Labeling Issues For Plant-Based Substitute Foods

By **Joshua Briones and Nicole Ozeran** (September 14, 2020, 1:49 PM EDT)

Beyond Meat Inc.'s stock is up roughly 65.5% this year, having gained a whopping 400% since the company's May 2019 initial public offering at \$25 per share. It is, therefore, no surprise that the trend of plant-based protein — and dairy substitutes — is growing at an exponential rate.

Plant-based substitutes are popping up everywhere — JUST Egg, Brave Robot, Oatly and dozens more — and they are disrupting 100-year-old industries.

However, these protein and dairy substitutes haven't necessarily been welcomed with open arms. Many industries contend that the substitutes are misleading consumers into believing that the substitutes are the real thing, or that the substitutes are better for consumers than the real thing.

In response to concerns, in December of 2019, Sen. Deb Fischer, R-Neb., introduced the Real Marketing Edible Artificials Truthfully Act, also known as the Real Meat Act. The bill is a companion to a U.S. House of Representatives measure introduced in October 2019 by Rep. Roger Marshall, R-Kan. Specifically, the Real Meat Act seeks to:

- Codify the definition of beef for labeling purposes.
- Establish a federal definition of beef that applies to food labels.
- Preserve the congressional intent of the Beef Promotion and Research Act.
- Clarify the imitation nature of alternative protein products.
- Enhance the federal government's ability to enforce the law by requiring the U.S. Food and Drug Administration to notify the U.S. Department of Agriculture if an imitation meat product is determined to be misbranded, and if the FDA fails to undertake enforcement within 30 days of notification, the agriculture secretary is granted authority to seek enforcement action.

"Consumers should be able to rely on the information on food labels they see on the shelves to be truthful and not deceptive," Marshall said. "For years now, alternative protein products have confused many consumers with misleading packaging and creative names for products. With this bill, consumers



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can be sure that the meat products they are buying are indeed real meat."

Multiple states have already sought to impose similar restrictions on labeling of meat-alternative products, including Missouri, Arkansas and Mississippi. However, an injunction has since been entered preventing Arkansas' law from being enforced.

Though the Real Meat Act has stalled, its basic tenants stay on people's and businesses' minds and the lack of legislation hasn't correlated to a lack of litigation.

### **The Other Side of the Cow**

On the flip side, there are concerns when meat-free options confuse consumers looking for vegan options.

In fact, in November 2019, Phillip Williams and six other plaintiffs, who are vegan, filed a class action complaint in Williams v. Burger King Corp. in the U.S. District Court for the Southern District of Florida alleging that Burger King falsely advertised its Impossible Whooper as 0% beef, implying there is no meat and no meat byproducts in the burger. However, the burgers were cooked on the same surface as meat patties and were, therefore, cooked in animal fats.

In July 2020, Burger King was able to secure a dismissal of the suit.[1] U.S. District Judge Raag Singhal found that the plaintiffs did not sufficiently plead that Burger King consumers could be misled into thinking the Impossible Whooper would be cooked on a separate surface than meat products.

However, Judge Singhal gave the plaintiffs leave to amend. The plaintiffs instead filed an appeal that is currently pending before the U.S. Court of Appeals for the Eleventh Circuit.

### **Takeaways**

Burger King's continued battle against false advertising claims and the introduction of the Real Meat Act and similar state bills raise many important questions for plant-based protein and dairy substitute manufacturers and retailers.

Are your advertisements potentially misleading to the reasonable consumer? Does the use of "meaty" or "milky" terms on plant-based products deceive consumers? Does failure to make explicitly clear that products are not entirely free of meat byproducts expose you to liability?

It likely isn't the case that plant-based substitute manufacturers and retailers are trying to trick consumers into believing their products are made of real meat or milk or that — that seems to cut against their entire value proposition, i.e. that they aren't meat or dairy. However, it's important to evaluate product labels from the consumer's perspective: If there's potential for confusion, the company may be exposing itself to liability.

Moreover, in creating labels, it's important to preempt potential legislation and comply with current laws. This will help avoid future label changes and lessen liability exposure.

Therefore, plant-based manufacturers and retailers should consider taking the following steps prior to disseminating advertisements and product labels:

1. Evaluate the need to use terms like meaty or milky. If you can avoid using these descriptors, you will limit your liability exposure.
2. If you cannot avoid using meaty or milky, consider including statements on the product packaging that make clear that the products are not real meat or milk. These terms include "vegan," "100% plant-based," "soy" and "vegetarian."
3. If some ingredients in your final product are vegan or 100% plant-based, but other ingredients are not, make it explicitly clear that the final product is not vegan. Multiple disclaimers in various formats will help ensure that consumers are reasonably aware of the ingredients in your products and are not misled into believing that the products have particular dietary specifications.
4. Finally, if in a service industry, prepare protocols requiring employees to inform consumers that the final product may contain animal byproducts, or alternatively, that the product is vegan. Training manuals and employee scripts will ensure that consumers are aware of the ingredients in your products, helping to avoid potentially misleading consumers.

Following these steps will help avoid exposing your company to liability. If, nonetheless, a suit is brought against your company, they will provide strong affirmative defenses and a basis for early dismissal.

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[1] Williams v. Burger King Corp., No. 19-24755-SINGHAL, 2020 U.S. Dist. LEXIS 158249 (S.D. Fla. July 20, 2020).