

“UDDERLY” DRAINED: HOW PLANT-BASED BEVERAGES ARE HURTING AMERICAN DAIRY FARMERS

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I. INTRODUCTION

Over the last decade, there has been an extraordinary increase in the consumption of non-dairy, plant-based beverages.¹ Coffee shops and grocery stores alike are stocked with almond, oat, coconut, and even pea dairy-free beverage alternatives.² Research suggests a variety of reasons for the shift to non-dairy, including environmental sustainability, lactose intolerances, and appealing

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1. Christopher A. Wolf et al., *Beverage Milk Consumption Patterns in the United States: Who is Substituting from Dairy to Plant-based Beverages?*, 103 J. DAIRY SCI. 11209, 11209 (2020).

2. *Id.*

marketing strategies.³ While there are several reasons consumers are opting for a plant-based alternative over cow's milk, the effect these choices are having on dairy as a whole remains steady: the industry is suffering.

In this new age of dairy-free, American dairy farmers are struggling to stay afloat.⁴ With sales and consumption down, regulation and governmental assistance are necessary to prevent farmers from facing the same fate as several big-name dairy corporations—closing their doors. After a discussion of why consumers are passing on cow's milk, this Note delves into the ways the government can, and must, aid American dairy producers. To help consumers get the nutrients they need and to ensure the jobs and livelihood of farmers, as well as to sustain the large dairy market, legislation and regulation must be implemented.

II. MILK DOWN, PLANTS UP: FACTORS CONTRIBUTING TO THE DECREASE IN DAIRY CONSUMPTION

Research shows that the decreasing consumption of dairy milk is not directly correlated to the increasing consumption of plant-based milk. In fact, there has been a steady decline in the consumption of dairy in the United States since 1975.⁵ However, the vastly-growing market of plant-based alternative beverages exacerbates the decrease due to the increasing consumption of said beverages over dairy milk.⁶ The relationship between the introduction of plant-based beverages and the reduction of the market share that dairy milk producers now have warrants further discussion.

A. Environmental Concerns

Studies indicate that a 7-ounce glass of dairy milk produces almost three times more greenhouse gas emissions than a glass of rice, oat, soy, or almond milk.⁷ That same glass of dairy milk also requires 10 times as much land as oat

3. See MINTEL, NON-DAIRY MILK – US – SEPTEMBER 2017 (2017), [https://perma.cc/ZX34-X3JZ].

4. See Marian Bull, *The Milk Situation*, N.Y. TIMES (Mar. 16, 2020), [https://www.nytimes.com/2020/03/14/style/milk-dairy-marketing.html] [https://perma.cc/SF9Z-EHV6] (“Since 1975, milk consumption per capita has dipped roughly 40 percent, . . . and between 2010 and 2018, sales of milk dropped by 13 percent.”).

5. *Id.*; Wolf et al., *supra* note 1, at 11211.

6. Wolf et al., *supra* note 1, at 11209.

7. Jodi Helmer, *Creative Programs Help Dairy Farmers Transition to Plant-Based Milk*, MINNPOST (Sept. 3, 2020), [https://www.minnpost.com/other-nonprofit-media/2020/09/creative-programs-help-dairy-farmers-transition-to-plant-based-milks/] [https://perma.cc/WBC5-YC4N].

milk.⁸ Even more astounding, research shows that “meat and dairy together use 83% of the world’s farmland and produce 60% of agriculture’s greenhouse gas emissions while supplying only 18% of calories and 37% of protein consumed by humans.”⁹ Undoubtedly, dairy production’s harmful impact on the environment represents one of the reasons consumers have chosen to switch to plant-based alternatives. In short, the energy required to operate dairy farms and the waste produced from that energy consumption is much higher than facilities that produce plant-based beverages.¹⁰ The Natural Resources Defense Council (NRDC) points out the required resources to raise dairy cows: grain to feed, water to hydrate, vast land, and constant electricity to sustain the animal.¹¹ The grain itself requires both water and pesticides, which furthers its harmful effect on the environment.¹² Additionally, these cows release massive amounts of greenhouse gases, including methane and nitrous oxide, through their manure.¹³

A growing number of Americans are choosing to follow a vegetarian lifestyle by abstaining from the consumption of meat, or a vegan lifestyle that involves cutting out animal products completely.¹⁴ A 2018 Oxford University study found the best way for an individual to reduce their environmental impact is to simply avoid purchasing animal products.¹⁵ Some consumers have chosen a vegetarian or vegan lifestyle to lessen their carbon footprint while others have made smaller and less restrictive changes like drinking plant-based milk.¹⁶

8. *Id.*

9. Brian Kateman, *Non-Dairy Milk Alternatives Are Experiencing A ‘Holy Cow!’ Moment*, FORBES (Aug. 19, 2019), <https://www.forbes.com/sites/briankateman/2019/08/19/non-dairy-milk-alternatives-are-experiencing-a-holy-cow-moment/?sh=499293d04c44> [https://perma.cc/UJC9-QXKS].

10. Jenny Shalant, *To Shrink Your Carbon Footprint, Ease Up on the Dairy*, NRDC (June 2, 2017), <https://www.nrdc.org/stories/shrink-your-carbon-footprint-ease-dairy> [https://perma.cc/K5RT-D43A].

11. *Id.*; Sophie Hirsh, *The Most Eco-Friendly Non-Dairy Milks*, GREEN MATTERS (Jan. 17, 2020), <https://www.greenmatters.com/p/eco-friendly-non-dairy-milks> [https://perma.cc/W6VU-N3VD].

12. Shalant, *supra* note 10.

13. Hirsh, *supra* note 11.

14. Rasha Ali, *Meat-free and plant-based diets are gaining popularity. Here’s what you need to know*, USA TODAY (Feb. 26, 2019), <https://www.usatoday.com/story/life/2019/02/26/vegan-vegetarian-pescatarian-flexitarian-plant-based-no-meat-diets-compared/2949993002/> [https://perma.cc/2FES-J3WM].

15. J. Poore & T. Nemecek, *Reducing Food’s Environmental Impacts Through Producers and Consumers*, 360 SCIENCE 987, 987 (2018).

16. Ali, *supra* note 14.

Regardless, a greater public adherence to environmental sustainability practices is a substantial factor in the shift to non-dairy products.¹⁷

Despite consumers cutting out dairy due to its harmful effects on the environment, research shows many plant-based industries may not be as eco-friendly as one might think. For example, recent studies show that certain pesticides used to grow almonds kill honeybees, which are needed to pollinate almond trees.¹⁸ The almond industry has become an enormous money-making opportunity for beekeepers who deliver “pollination services” to almond growers in California.¹⁹ For the 1,500 beekeepers offering this service, 60 percent of their annual income is raked in through this operation alone, which has proved to be more lucrative than simply selling the honey they produce.²⁰

The finding that pesticides are potentially causing bees to die off in this pollination process led to investigations of this practice. Following their own investigation, the Pollinator Stewardship Council blames the cocktail of pesticides almond growers use—insecticides and fungicides—for being toxic to the honeybees.²¹ Honeybees are widely known to be the world’s most important pollinator of food crops, which is why this is of grave concern.

Plant-based production’s harmful impact on the environment is not exclusive to the almond industry. Coconut milk, among others, is shown to exploit workers in tropical climates and rice milk is said to be a “water-guzzler.”²² Studies show, however, that all plant-based milk is a better choice for the environment when compared to dairy milk due to dairy production’s egregious amounts of greenhouse gas emissions.

Despite the aforementioned negative impacts that some plant-based milks have on the environment, all of them have less of an impact on the climate and

17. *Id.*

18. See Tom Philpott, *Are Your Delicious, Healthy Almonds Killing Bees?*, MOTHER JONES (Apr. 29, 2014), <https://www.motherjones.com/food/2014/04/california-almond-farms-blamed-honeybee-die/> [https://perma.cc/9YXF-QHD4].

19. *Id.*

20. *Id.*

21. *Id.*

22. Annette McGivney, *Almonds are out. Dairy is a disaster. So what milk should we drink?*, GUARDIAN (Jan. 29, 2020, 1:00 PM), <https://www.theguardian.com/environment/2020/jan/28/what-plant-milk-should-i-drink-almond-killing-bees-aoe> [https://perma.cc/BZR7-3EM6].

require less overall land than dairy milk.²³ One study compared the carbon intensity of a variety of dairy-free milks against one another and regular old cow's milk.²⁴ The results showed that there was not much of a difference between the emissions produced by almond, soy, and pea milks; the carbon dioxide emissions created by making one liter of each came out to 397 grams, 396 grams, and 387 grams, respectively.²⁵ Producing one liter of dairy milk, however, was found to result in a whopping 1,467 grams of carbon dioxide.²⁶ Additional studies have shown that up to 50 percent of the emissions produced when making almond milk can be offset by storing carbon in soil and trees—showing that the emissions produced by plant-based milks are less, and can essentially be recycled, making it a win-win for environmental impact.²⁷

Consumers of plant-based milk have also turned to making the beverage in their very own kitchens.²⁸ Doing so cuts out one large part of the process of distributing any milk, plant-based or not: packaging and shipping.²⁹ Oat milk, almond milk, cashew milk, and more can be made in minutes with a little water and the help of a blender.³⁰ One study found that packaging alone contributes to 45 percent of the global warming potential of California's almond milk.³¹ The choice to make the beverage instead of purchasing it from a grocery store seems the most eco-friendly way to consume. Nevertheless, consumers who opt for plant-

23. Lisa Elaine Held, *Which Plant-Based Milk is Best for the Environment?*, FOODPRINT (Feb. 18, 2020), <https://foodprint.org/blog/which-plant-based-milk-is-best-for-the-environment/> [https://perma.cc/482S-9F32].

24. Estelle Rayburn, *Research Shows No Matter Which Plant-Based Milk You Try, It Will Always Be More Environmentally-Friendly Than Dairy*, ONEGREENPLANET (Jan. 11, 2022, 3:27 PM), <https://www.onegreenplanet.org/news/plant-based-milk-try-will-always-environmentally-friendly-dairy/> [https://perma.cc/QT58-DG7M].

25. *Id.*

26. *Id.*

27. *Id.*

28. Held, *supra* note 23.

29. *Id.*

30. Cait Corcoran, *Make Creamy, Nutritious Plant-Based Milk at Home with these Ingredients*, ONEGREENPLANET (Jan. 11, 2022, 3:22 PM), <https://www.onegreenplanet.org/vegan-food/make-creamy-nutritious-plant-based-milk-home-ingredients/> [https://perma.cc/8AQZ-H4ZA].

31. Dora Marinova & Diana Bogueva, *Which 'milk' is best for the environment? We compared dairy, nut, soy, hemp and grain milks*, THE CONVERSATION (Jan. 11, 2022, 3:26 PM), <https://theconversation.com/which-milk-is-best-for-the-environment-we-compared-dairy-nut-soy-hemp-and-grain-milks-147660#> [https://perma.cc/8TNY-5WGH].

based milk over dairy milk, even if it is not made in their own kitchen, and no matter what kind, are making a more sustainable choice for the environment.³²

B. Lactose Intolerance

Another reason for the shift away from the consumption of dairy milk is due to lactose intolerance. According to the United States National Library of Medicine, approximately 30 million American adults have some degree of lactose intolerance by age 20.³³ According to the National Library of Medicine, “65 percent of the human population has a reduced ability to digest lactose after infancy.”³⁴ Lactose is a sugar found naturally in the milk of most mammals.³⁵ An individual who is lactose intolerant may experience symptoms such as bloating, nausea, vomiting, diarrhea, skin conditions, and unexplained tiredness.³⁶ These symptoms are a result of the body having trouble breaking down the sugar during digestion.³⁷ Reasons for the appearance of an increase in the number of lactose intolerant individuals amongst the population are not due to environmental or genetic factors. Rather, sources point to better diagnostic tools and greater awareness of symptoms leading to higher amounts of diagnoses.³⁸

C. A Closer Look at the Nutritional Label

Perhaps the most intriguing reason for the growing consumption of plant-based beverages over dairy milk is the belief that the non-dairy option is healthier for the human body.³⁹ The United States Non-Dairy Milk Industry Report shows that nearly one in five adults are consuming less dairy to stay healthy, although

32. Cameron Alvar, *You've Ditched Dairy. But Which Plant-Based Milk is Best for the Environment?*, THE BEET. (Oct. 27, 2020), <https://thebeet.com/youve-ditched-dairy-but-which-plant-based-milk-is-best-for-the-environment/> [<https://perma.cc/NDE9-P289>]; see also Held, *supra* note 23.

33. *Lactose Intolerance*, MEDLINEPLUS (Jan. 11, 2022, 3:35 PM), <https://medlineplus.gov/ency/article/000276.htm> [<https://perma.cc/QVW7-73RV>].

34. *Lactose Intolerance*, MEDLINEPLUS (March 13, 2022, 7:09 PM), <https://medlineplus.gov/genetics/condition/lactose-intolerance/#frequency> [<https://perma.cc/TW5F-GELS>].

35. *Lactose Intolerance*, *supra* note 33.

36. *Id.*

37. *Id.*

38. See generally Anna Schardt Baker, *Milk Allergy 101: High Rates in Kids, Strict Avoidance and Future Therapies*, ALLERGIC LIVING (Jan. 22, 2020), <https://www.allergicliving.com/2020/01/22/milk-allergy-101-high-rates-in-kids-strict-avoidance-and-future-therapies/> [<https://perma.cc/7B4M-CM4A>].

39. MINTEL, *supra* note 3.

this statistic considers all dairy products as opposed to cow's milk specifically.⁴⁰ Studies show consumers are mistakenly of the belief that plant-based beverages have the same nutritional content as dairy milk.⁴¹ When asked about protein, 77% of survey respondents thought plant-based beverages had the same or more protein than dairy milk.⁴² Due to this misconception, nutritionists are advising consumers to compare nutrition labels for Vitamin D, calcium, and other nutrients.⁴³

A 2017 study looked at the reasons why both dairy and non-dairy milk consumers pick their beverage of choice.⁴⁴ The study found fat content, package size, and label claims were the most important attributes for dairy milk purchasers.⁴⁵ Alternatively, sugar level, plant source, and package size were the most important attributes for non-dairy milk consumers.⁴⁶ Taste also plays a role in the consumption of plant-based beverages.⁴⁷ Interestingly, a 2015 study found that the number one reason surveyed participants purchased plant-based beverages over dairy milk is because they "liked the taste."⁴⁸

Recent research has also been conducted to look at the household consumption of plant-based milk consumers.⁴⁹ A 2020 survey found 61.6% of households consumed dairy milk with some regularity and little to no plant-based beverages; 15.6% of households frequently consumed many types of dairy and non-dairy beverages alike; and 22.8% of households consumed almost exclusively plant-based beverages.⁵⁰

40. *Id.*

41. Marsha Mercer, *Stop Milking It, Dairy Farmers Tell Plant-Based Competitors*, PEW (March 2, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/03/02/stop-milking-it-dairy-farmers-tell-plant-based-competitors> [<https://perma.cc/BE2U-WYCL>].

42. *Id.*

43. *Id.*

44. See K.S. McCarthy et al., *Drivers of Choice for Fluid Milk Versus Plant-Based Alternatives: What Are Consumer Perceptions of Fluid Milk?*, 100 J. DAIRY SCI. 6125, 6125 (2017).

45. *Id.* at 6130.

46. *Id.*

47. *Id.* at 6131.

48. ERNICA SANON, CLAREMONT COLLS., SCRIPPS SENIOR THESES 1147, *THE ECONOMIC IMPACT OF NON-DAIRY ALTERNATIVE MILK BEVERAGES ON THE UNITED STATES DAIRY INDUSTRY* 24 (2018).

49. Wolf et al., *supra* note 1, at 11210.

50. *Id.* at 11214.

D. Mindful Marketing

The marketing tactics used by plant-based beverage companies prove more powerful than those used by dairy milk companies—but the dairy industry is not without its efforts. Americans likely agree the “Got Milk?” campaign was hard to miss from its launch in 1993 through the early 2000s.⁵¹ The campaign, which encouraged the consumption of milk, was created by the advertising agency Goodby Silverstein & Partners for the California Milk Processor Board.⁵² It was later licensed for use by milk processors and dairy farmers.⁵³ Despite its widespread reach, statistics show the milk-mustache adorned celebrities plastered across billboards, school cafeterias, and television sets did not convince people to buy milk.⁵⁴ Notwithstanding its low success rate, most Americans vividly remember the campaign.⁵⁵ Perhaps this is why Chobani—a company widely known for giving Greek yogurt its popularity back in 2010—decided to run with the memorable milk mustache.⁵⁶ The company replaced the Got Milk? slogan with “Almost Milk Mustache? Almost Milk!”⁵⁷ One of Chobani’s ads featured a 20-something year-old-man with a white-beverage mustache on full display, holding a glass of white liquid, then a carton of Chobani oat milk, accompanied by the aforementioned slogan.⁵⁸

Chobani is not the only company to take part in appealing advertising. Oatly, a 25-year-old food and beverage company founded in Sweden, has reworked its image over the last decade as a way to attract consumers.⁵⁹ From graphic packaging to sleek commercials, a lot of thought has gone into the brand’s success.⁶⁰ Instead of distributing to grocery stores, the company first brought its oat beverage to specialty coffee shops, where “baristas could act as oat-milk ambassadors to customers and other professionals within the brewing and roasting

51. Matthew Daddona, *Got Milk? How the Iconic Campaign Came to Be, 25 Years Ago*, FAST CO. (June 13, 2018), <https://www.fastcompany.com/40556502/got-milk-how-the-iconic-campaign-came-to-be-25-years-ago> [https://perma.cc/5S5Y-7LSS].

52. *Id.*

53. *Id.*

54. Marian Bull, *supra* note 4.

55. *See id.*

56. *Id.*

57. *Id.*

58. *See id.*

59. Bonnie Wertheim, *The Humble Ascent of Oat Milk*, N.Y. TIMES (Jan. 19, 2018), <https://www.nytimes.com/2018/01/19/style/oat-milk-coffee-oatly.html> [https://perma.cc/EQP6-V852]; *see also* Bull, *supra* note 4.

60. Wertheim, *supra* note 59.

communities.”⁶¹ In one year, Oatly went from being stocked in just 10 locations in New York to more than 1,000 locations nationwide.⁶²

At this point, folks in the dairy industry have admitted their lack of creativity: “[W]e’ve done a poor job of innovation in selling our products. We’re still selling milk in that plain, simple gallon jug.”⁶³ This simpleness appears true, in terms of the packaging. The coolers at the grocery store tend to get “louder and more colorful once [you] move to the organic shelves—and then even more so once the dairy gives way to the sparkle of almond, oat and soy milk.”⁶⁴

It is fair to conclude powerful marketing is among the factors for the increasing consumption of plant-based beverages, but that is not to say the dairy industry is paying it no mind. In January of 2021, General Mills partnered with the Milk Processor Education Program (MilkPEP), a company funded by the nation’s milk companies and dedicated to both educating consumers and increasing the consumption of dairy milk.⁶⁵ This partnership aims to promote the benefits of the cereal and milk “dynamic duo.”⁶⁶ General Mills will debut limited-edition packaging on well-known cereals featuring famous characters, like Trix the Rabbit and Lucky the Leprechaun, donning the Got Milk? mustache.⁶⁷ The boxes will even include coupons on the back providing shoppers with a \$2 rebate when they buy two gallons of dairy milk and two boxes of General Mills cereal.⁶⁸

Amy Cohn, senior nutrition manager at General Mills, discussed the amount of nutrients kids get from milk and cereal: “[F]or kids who eat cereal, 53% of their daily milk consumption comes from pouring milk and cereal together . . . we’re thrilled to officially come together to share this important message through our iconic characters.”⁶⁹ According to MilkPEP’s CEO, Yin Woon Rani, the company’s goal is to provide the tools and inspiration to parents to help make breakfast-time fun and nutritious.⁷⁰ This type of partnership is one example of how

61. *Id.*

62. *Id.*

63. Bull, *supra* note 4.

64. *Id.*

65. *About*, MILK PROCESSOR EDUC. PROGRAM (Jan. 11, 2022, 3:47 PM), <https://milkpep.org/about/> [<https://perma.cc/5VMC-RANU>].

66. Carol Ryan Dumas, *General Mills Partners with ‘got milk?’*, CAP. PRESS (Jan. 6, 2021), https://www.capitalpress.com/ag_sectors/dairy/general-mills-partners-with-got-milk/article_db89e912-506b-11eb-b3bf-0fb7ad4b5b56.html [<https://perma.cc/W2VL-366M>].

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

the dairy industry is recognizing the history of its sub-par marketing and is making the change to better attract consumers. There is no denying, however, that most milk jugs still exist colorless and plain inside grocery store coolers.

III. IMPACT ON AMERICAN FARMERS

What does this all mean for American farmers? The truth of the matter is that dairy farmers are suffering, in more ways than one. The lessening demand and generally lower prices paid to farmers for dairy milk have forced many to leave the business.⁷¹ Nationally, the number of dairy farms has fallen from 64,098 in 2012 to 54,999 in 2017—a near 15% decline in just five years, according to the USDA.⁷² Economically speaking, sales of cow's milk dropped by nearly \$15 billion from 2015 to 2019.⁷³ On January 6, 2020, Borden Dairy Company, one of the nation's oldest American dairy processors and distributors, founded in 1865, filed for bankruptcy.⁷⁴

Small dairy farmers are taking the brunt of the hit.⁷⁵ While larger dairy corporations have lower production costs, therefore retaining more net sales as profit, smaller farms are struggling to get by.⁷⁶ Research shows larger companies are also receiving higher amounts of government subsidies because subsidies are based on farm size and grains produced.⁷⁷ The driving competition is pushing small farms further down.

The shutting down of farms is not the greatest concern when it comes to American farmers. Reality paints a much more morbid picture. The Center for Disease Control and Prevention (CDC) reported that rate of death by suicide for farmers is the fourth-highest among occupations in the United States.⁷⁸ The rate is comparable to the high suicide rates among military veterans.⁷⁹

71. Mercer, *supra* note 41.

72. *Id.*

73. Nadra Nittle, *The Plant-Based Movement to Transition Farmers Away from Meat and Dairy Production*, CIVIL EATS (Jan. 13, 2020), <https://civileats.com/2020/01/13/the-plant-based-movement-to-transition-farmers-away-from-meat-and-dairy-production/> [<https://perma.cc/4W2U-E3SA>].

74. *Id.*

75. SANON, *supra* note 48, at 32.

76. *Id.*

77. *Id.*

78. Lisa Held, *Suicide Rates Among Farmers are Alarming High. Can Federal Legislation Help?*, CIVIL EATS (Apr. 16, 2018), <https://civileats.com/2018/04/16/suicide-rates-among-farmers-are-alarming-high-can-federal-legislation-help/> [<https://perma.cc/DP67-8KRV>].

79. *Id.*

There are several risk factors that must be taken into account to understand this alarming rate: isolation in rural areas, lack of control, and lack of access to behavioral health services.⁸⁰ However, most farmers and advocates point to “extreme financial stressors” as the most detrimental factor.⁸¹ Dairy farmer Brenda Cochran has been milking cows since 1975 and now operates a dairy farm with her husband in Pennsylvania.⁸² In 2018, Cochran reported a recent delivery in which she and her husband were paid \$14.39 per hundredweight, which equated to losing about \$7 per hundredweight.⁸³ Through this transaction, they made only one-third of their production costs.⁸⁴ Because the federal government sets the price of milk—which has consistently declined—these dairy farmers cannot turn a profit.⁸⁵ When asked about the suicide rates among farmers, Cochran responded, “[w]e can’t solve this problem on our own because everyone is depressed, everyone is broken. I understand why farmers are committing suicide. It’s been going on for so long. You are talking to a depressed farmer right now.”⁸⁶

IV. CURRENT PROGRAMS IN PLACE

Fortunately, some financial protections for farmers exist through the United States Department of Agriculture. Farmers can receive one type of protection through the Dairy Margin Coverage (DMC) program.⁸⁷ This program is voluntary and provides dairy producers with risk management coverage.⁸⁸ Funds are disbursed to producers when the margin—the difference between the national price of milk and the average cost of feed—falls below a certain level.⁸⁹ This level is selected by program participants, who must register and pay an annual

80. Katie Wedell et al., *Midwest farmers face a crisis. Hundreds are dying by suicide.*, USA TODAY (March 9, 2020, 5:00 AM), <https://www.usatoday.com/in-depth/news/investigations/2020/03/09/climate-tariffs-debt-and-isolation-drive-some-farmers-suicide/4955865002/#> [<https://perma.cc/4Q6D-J8B7>].

81. *Id.*

82. Held, *supra* note 78.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. See generally, *Dairy Margin Coverage Program*, U.S. DEP’T OF AGRIC. (June 2019), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/FactSheets/2019/dairy_margin_coverage_program-june_2019_fact_sheet.pdf [<https://perma.cc/CMK6-FS3T>].

88. *Id.*

89. *Id.*

administrative fee.⁹⁰ Coverage levels range from \$4.00–\$9.50 per hundredweight in \$0.50 increments.⁹¹

The Livestock Gross Margin Insurance Plan for Dairy Cattle (LGM-Dairy) also protects producers when feed costs rise or milk prices drop.⁹² Milk sold for commercial or private sale and primarily intended for human consumption is eligible for coverage, and there is no minimum or maximum number of hundredweights that may be insured.⁹³ Prices for LGM-Dairy are based on averages of Chicago Mercantile Exchange Group future contract daily settlement prices.⁹⁴

Because these programs provide a type of insurance, premium payments are required for most relief.⁹⁵ While supporters fought for low, affordable premiums, and there seemed to be a positive outlook for the funding for the year of 2020, the COVID-19 pandemic disrupted the dairy industry and resulted in a lack of payments to recipients.⁹⁶ This was likely due to a combination of time lags in the reporting of prices, negative producer price differentials, and the general dairy market's reaction to the pandemic.⁹⁷ While no market or industry could have predicted the effects of a global pandemic, these coverage programs were not enough to begin with. Further assistance is crucial to allow American dairy farmers to compete with the growing plant-based industry.

V. A CALL FOR HELP – GREATER REGULATION AND IMPLEMENTATION

In today's economy, the increasing hardships faced by American farmers call for greater government assistance. While there are programs and legislation which have already been implemented, there is more progress to be made to support farmers in their pursuit of a consistent profit, thereby helping to improve their overall well-being.

90. *Id.*

91. *Id.*

92. *Livestock Gross Margin Insurance Dairy Cattle*, U.S. DEP'T OF AGRIC. (May 2021), <https://www.rma.usda.gov/en/Fact-Sheets/National-Fact-Sheets/Livestock-Gross-Margin-Insurance-Dairy-Cattle> [<https://perma.cc/FB7J-39S3>].

93. *Id.*

94. *Id.*

95. *See Dairy Margin Coverage Program*, *supra* note 87; *id.*

96. Michael Nepveux, *Lack of DMC Payments Does Not Reflect Dairy Farmers' Difficulties*, AM. FARM BUREAU FED'N (Aug. 12, 2020), <https://www.fb.org/market-intel/lack-of-dmc-payments-does-not-reflect-dairy-farmers-difficulties2> [<https://perma.cc/934F-VPWJ>].

97. *Id.*

A. Making Less is Not the Answer

In relation to the economic crisis, we must first confront the over-simplified, easy fix rationale: make less milk. For starters, the United States did in fact try to do this through a production control plan in the 1980s called the Dairy Production Stabilization Act of 1983.⁹⁸ The plan did not work well long-term.⁹⁹ One of the problems with this type of system comes down to the fact that farmers must make decisions at the farm level.¹⁰⁰ Farmers, especially small dairy farmers, are not thinking about the “world around them and all the mechanisms at play.”¹⁰¹ When milk is selling at low prices, the dairy farmer’s natural instinct is to make more milk to sell more milk and try to make up for the low return price.¹⁰² When the price of milk is high, farmers continue to produce more milk so they can make up for what was lost when things were bad.¹⁰³ It seems to be a never-ending cycle. So, what can be done instead?

B. Encourage Agritourism

Some American farmers have made the decision to open their farms to tourists as a way to make a living.¹⁰⁴ Farmers are taking advantage of their land and their “picturesque pastime” professions to draw in urbanites for an agricultural retreat.¹⁰⁵ Farmhouses are being rented on Airbnb to welcome folks for days filled with fresh ice-cream, tractor rides, and classes to learn about everything farm life.¹⁰⁶

Such an endeavor, however, does not come cheap. Carl Chaney and his family have managed to turn their failing dairy business out of Bowling Green, Kentucky into this type of tourist attraction.¹⁰⁷ While trying to make ends meet, the family took even more risk by investing their money in agritourism with the hopes of turning a profit.¹⁰⁸ As alluded to, this option is not always economically

98. 7 U.S.C. § 4504(b).

99. See Rachel Wagoner, *How Did We Get Here?*, FARM & DAIRY (Jan. 12, 2020), <https://www.farmanddairy.com/top-stories/how-did-we-get-here-2/592294.html> [<https://perma.cc/R8SL-YJC8>].

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. See Bull, *supra* note 4.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

feasible. Investing in the farm to attract tourists may appear a risky endeavor, and, as such, this particular “solution” may only be appropriate for a handful of farmers.¹⁰⁹

C. The Dairy Pride Act

Dairy farmers across the nation agree that there is one step in particular the government should take that would help the industry: restrict the use of the word “milk.”¹¹⁰ The battle of whether something that comes from plants should be labeled as milk for sale has sparked debate and legislation.¹¹¹ In 2017, The Dairy Pride Act (the Act) was introduced in Congress but failed to pass.¹¹² The bill was reintroduced to the House of Representatives on March 14, 2019, but once again failed to pass.¹¹³ The Act would have designated foods that make inaccurate claims about milk contents as misbranded, and, therefore, subject to enforcement of labeling rules.¹¹⁴ A memo sponsored by Senator Tammy Baldwin describes the importance of the bill:

Dairy products are an important part of a healthy diet for both children and adults . . . most Americans are not meeting the recommended intake for the dairy food group . . . the labeling of plant-based alternatives as ‘milk’ conveys a nutritional equivalency that is not accurate.¹¹⁵

Beyond its negative nutritional effect on Americans, the mislabeling of these products is hurting farmers who work “tirelessly to ensure their dairy products meet FDA standards and provide the public with nutritious food.”¹¹⁶

109. Peggy Kirk Hall, *Agritourism and Insurance*, NAT’L AGRIC. L. CTR. (Jan. 9, 2019), <https://nationalaglawcenter.org/wp-content/uploads/assets/articles/Agritourism-series-Insurance.pdf> [<https://perma.cc/J9MM-ZCBG>].

110. Mercer, *supra* note 41.

111. See generally Giuliana D’Esopo, *Don’t Cry over Plant-Based Milk: Why the Use of the Term “Milk” on Non-Dairy Beverages Does Not Constitute “Misbranded” under the Federal Food, Drug, and Cosmetic Act*, 14 J. HEALTH & BIOMEDICAL L. 481, 482 (2018).

112. Beth Newhart, *US Dairy Groups Press Congress on Dairy Pride Act*, DAIRYREPORTER.COM (Feb. 6, 2020, 10:02 AM), <https://www.dairyreporter.com/Article/2020/02/06/US-dairy-groups-press-Congress-on-Dairy-Pride-Act> [<https://perma.cc/F45E-YYCH>].

113. See Dairy Pride Act of 2019, H.R. 1769, 116th Cong. (2019); see also *id.*

114. Newhart, *supra* note 112.

115. Tammy Baldwin, *The DAIRY PRIDE Act*, NAT’L MILK PRODUCERS FED’N (Jan. 11, 2022, 4:04 PM), <https://www.nmpf.org/wp-content/uploads/2017/01/DAIRY-PRIDE-Act-One-Pager.pdf> [<https://perma.cc/P32Q-ERTS>].

116. *Id.*

In 2017, a class-action lawsuit was filed against WWF Operating Company targeting their Silk Almond Milk beverage.¹¹⁷ Plaintiffs alleged the defendant falsely advertised its Silk almond milk beverage as nutritionally equivalent, or even nutritionally superior, to traditional dairy milk.¹¹⁸ The case provided a side-by-side comparison of Silk almond milk to traditional skim milk and found the latter provided a higher concentration of protein and 10 vitamins and minerals.¹¹⁹

The plaintiffs in this lawsuit further argued the use of the word milk in the beverage's name was false advertising in itself—an argument that directly aligns with the initiative behind the Dairy Pride Act.¹²⁰ The defendant moved to dismiss the case and responded that the claim against their product was nothing more than “an attack on the entire plant-based beverage industry.”¹²¹ The Court deferred the matter to the Food and Drug Administration, which has yet to provide a decision.¹²²

Those in the plant-based business have expressed frustration with the proposed Act.¹²³ The Plant Based Foods Association released a statement in which it claims the “marketplace disruption being pushed by the dairy lobby would hinder innovation, create untenable costs for our members, and ultimately be found unconstitutional, making the entire effort a waste of everybody's time and resources.”¹²⁴

Despite this known opposition, leading dairy supporters are pushing for the passing of the Act.¹²⁵ In the meantime, some organizations are taking matters into their own hands to fight against plant-based labeling.¹²⁶ The National Milk Producers Federation has taken ownership of The REAL Seal, a trademark developed in 1976 originally meant to combat the use of imitation cheeses on

117. *Kelley v. WWF Operating Co.*, No. 1:17-CV-117-LJO-BAM, 2017 WL 2445836, at *1 (E.D. Cal. June 6, 2017).

118. *Id.*

119. Paul Tassin, *Silk Almond Milk Class Action Challenges Nutritional Claims*, TOP CLASS ACTIONS (Jan. 27, 2017), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/451078-silk-almond-milk-class-action-challenges-nutritional-claims/> [<https://perma.cc/W68M-9HJE>].

120. *Kelley*, 2017 WL 2445836, at *2.

121. Notice of Motion and Motion to Dismiss Class Action Complaint at 3, *Kelley v. WWF Operating Co.*, No. 1:17-CV-00117-LJO-BAM (E.D. Cal. Mar. 22, 2017).

122. *Kelley*, 2017 WL 2445836, at *7.

123. *See, e.g.*, Newhart, *supra* note 112.

124. *Id.*

125. *Dairy Labeling & Food Standards*, NAT'L MILK PRODUCERS FED'N (Jan. 11, 2022, 3:24 PM), https://www.nmpf.org/policy_priorities/dairy-labeling-food-standards/ [<https://perma.cc/XX7U-6XFU>].

126. *Id.*

pizza.¹²⁷ The REAL Seal is a stamp that appears on dairy products meant to let consumers know the item is genuine, quality dairy.¹²⁸

While a shiny seal may help consumers know that they are buying real dairy, however, it does not stop plant-based businesses from using the beloved milk name. The Dairy Pride Act would ensure consumers know what it is they are buying and, more importantly, what they are putting into their bodies. By setting clear standards, farmers and consumers alike can be confident that there will be no confusion between the real and the fake dairy products.

D. At-Risk Farmer & Rancher Diversification & Transitioning Act

The Agriculture Fairness Alliance (AFA) has proposed legislation that will assist animal farmers transition to growing plants for human consumption, or to other sustainable businesses.¹²⁹ The At-Risk Farmer & Rancher Diversification & Transitioning Act aims to help farmers get out of their consolidating industries and move into lucrative plant-based protein production.¹³⁰ The AFA claims such a regulation will be much more efficient in contrast to government subsidies, which cause farmers to get stuck wastefully and chronically oversupplying.¹³¹ Gene Baur, President of Farm Sanctuary and an Associate Professor at John Hopkins Bloomberg School of Public Health, furthered this point in an article for *The Washington Post* saying, “[r]ather than perpetuating a dysfunctional system, propping up a declining industry predicated on overproduction, and wasting billions of dollars every year, the best way for the government to help dairy farmers would be by helping them get out of the dairy business.”¹³²

Passing this bill would establish in the Department of Agriculture a pilot program to last three years to assist “eligible producers” in adapting plant-based

127. *The REAL Seal Story*, REAL (Jan. 11, 2022, 3:58 PM), <https://www.realseal.com/the-real-story/> [<https://perma.cc/35CE-T4MZ>].

128. *Id.*

129. *See AFA Legislation*, AGRIC. FAIRNESS ALL. (Jan. 11, 2022, 2:53 PM), <https://www.agriculturefairnessalliance.org/legislation> [<https://perma.cc/R2L6-AUFQ>].

130. *At-Risk Farmer & Rancher Diversification Pilot Program*, AGRIC. FAIRNESS ALL. (Jan. 19, 2022, 11:37 AM), <https://www.agriculturefairnessalliance.org/docs/at-risk-farmer/1-AFA-Proposal-Detail.pdf> [<https://perma.cc/RZ8F-N8MG>].

131. *AFA Legislation*, *supra* note 129.

132. Gene Baur, *The Best Way to Help Dairy Farmers is to Get Them Out of Dairy Farming*, WASH. POST (June 12, 2019), <https://www.washingtonpost.com/opinions/2019/06/12/best-way-help-dairy-farmers-is-get-them-out-dairy-farming/> [<https://perma.cc/EB4R-ADZZ>].

agriculture systems.¹³³ Several factors are to be considered when disbursing funds but priority is given to socially disadvantaged farmers and veteran farmers.¹³⁴ The program budget is set for \$5 million per year for three years.¹³⁵ Applicants may receive up to \$250,000 per year.¹³⁶

VI. THE BEST OPTIONS FOR THE INDUSTRY

The Dairy Pride Act and At-Risk Farmer & Rancher Diversification & Transitioning Act are the best ways to uplift dairy producers. These two pieces of legislation do not ignore the rapidly growing plant-based industry. Rather, the Dairy Pride Act simply calls for an even playing field, limiting the use of what can rightfully be called milk.¹³⁷ This will ensure transparency when consumers are making the decision to purchase dairy milk or a plant-based beverage.¹³⁸ Not only will this lead to higher sales of dairy milk, but it will also help boost dairy milk consumption that will aid Americans in getting the vital nutrients milk possesses.¹³⁹ Despite opposition from the plant-based industry, this labeling standard would fairly articulate the contents of milk-like beverages while still allowing their sale alongside dairy milk in stores.

The AFA considers the decline of the dairy industry and aims to provide producers with a way out.¹⁴⁰ Supporters of the At-Risk Farmers Act point out the wasteful and oversupplying practices that result from government subsidies, and also stress the importance of more sustainable, environmentally-friendly agricultural systems.¹⁴¹ This type of program recognizes a shift in the market and offers an approach other than simply providing a handout. Instead it provides farmers with the funds and direction to move towards a more promising system.¹⁴²

133. *Farm and Ranch Mobility for Sustainability Program*, AGRIC. FAIRNESS ALL. (Jan. 19, 2022, 11:36 AM), <https://www.agriculturefairnessalliance.org/news/wp-content/uploads/2021/06/FARMS-AFA-organic-logofooter.pdf> [<https://perma.cc/M5BU-XHS8>].

134. *At-Risk Farmer & Rancher Diversification Pilot Program*, *supra* note 130.

135. *Id.*

136. *Farm and Ranch Mobility for Sustainability Program*, *supra* note 133.

137. Dairy Pride Act of 2019, H.R. 1769, 116th Cong. (2019).

138. Newhart, *supra* note 112.

139. McCarthy et al., *supra* note 44, at 6128.

140. *AFA Legislation*, *supra* note 129.

141. *Id.*

142. Anna Starostinetskaya, *New Proposed Legislation Aims to Help At-Risk Farmers Switch from Animal to Plant-Based Agriculture*, VEGNEWS (May 12, 2020), <https://vegnews.com/2020/5/new-proposed-legislation-aims-to-help-at-risk-farmers-switch-from-animal-to-plant-based-agriculture> [<https://perma.cc/3DK4-W3PH>].

VII. CONCLUSION

Our society is seeing an influx of plant-based products on the market today, growing by nearly half a billion dollars each year since 2017.¹⁴³ Due to environmental sustainability, strong marketing tactics, dairy intolerances, and the perception that plant-based beverages are just as nutritious as dairy milk, the dairy industry as a whole is suffering as consumers shift to non-dairy products.¹⁴⁴ American farmers are under immense economic stress which has led to alarming suicide rates among the profession.¹⁴⁵ The industry is in demand of regulation and implementation beyond subsidies.

While the plant-based industry has attributed some of its success to explosive and creative marketing campaigns and designs, encouraging dairy corporations to engage in similar practices is not the end all solution. Organizations have already begun to take part in these practices, by partnering with powerhouse General Mills and creating a dairy “real seal,” which will likely be helpful in the long run.¹⁴⁶ The answer to the economic crisis of the dairy industry, however, is not simply tell these corporations to sell their product better.

The Dairy Pride Act ensures labeling guidelines set by the FDA are followed accordingly to allow for food ingredient transparency.¹⁴⁷ The Act gives the dairy industry a fighting chance and allows it to reclaim the name of milk.¹⁴⁸ The At-Risk Farmer & Rancher Diversification & Transitioning Act provides another option for dairy producers, aiding the transition to a plant-based system.¹⁴⁹ Both of these pieces of legislation will make for a better tomorrow for the dairy industry, and ultimately create a more fortified market for dairy and non-dairy consumers alike.

143. See generally *U.S. Retail Market Data for the Plant-Based Industry*, THE GOOD FOOD MARKET INST. (Jan. 11, 2022, 3:53 PM), <https://www.gfi.org/marketresearch> [<https://perma.cc/8HRF-6HQ5>].

144. See MINTEL, *supra* note 3; Bull, *supra* note 4; Owen, *supra* note 34.

145. Held, *supra* note 78.

146. See *The REAL Seal Story*, *supra* note 127; Dumas, *supra* note 66.

147. Newhart, *supra* note 112.

148. Dairy Pride Act of 2019, H.R. 1769, 116th Cong. (2019).

149. AFA Legislation, *supra* note 129.