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The Missing Link: Farmers' Class Action Against Syngenta May Answer Legal Questions Left After the StarLink and LibertyLink Litigation

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Although the increasingly vocal debate over the labeling of food containing genetically modified (GM) organisms has captured most of the public and agricultural community's recent attention, two other controversies working their way through the court system may have an equally significant impact on farming and coexistence: (1) potential liability traced back to farmers because of unintentional contamination of neighboring fields with pollen from GM plants and (2) trade-related implications of exports containing comingled GM crops that do not have approval in other countries.[1] These two issues are front and center in the class action filed over Syngenta's GM corn Agrisure Viptera® that contains the MIR 162 genetic trait.[2] In its December 11, 2014 decision, the Judicial Panel on Multidistrict Litigation held that based on the common questions of fact, the claims of more than 1,300 farmers from across the United States who filed lawsuits

[1] A number of legal scholars and commentators have written on this issue over the past decade and a brief list of some articles are below. For additional insight, the National Agricultural Law Center maintains a bibliography of agricultural biotechnology legal literature. Thomas P. Redick & Donald L. Uchtmann, *Coexistence Through Contracts: Export-Oriented Stweardship in Agricultural Biotechnology vs. California's Precautionary Containment*, 13 DRAKE J. ARGRIC. L. 207 (Spring 2008); Thomas P. Redick, *The Cartagena Protocol on Biosafety: Precautionary Priority in Biotech Crop Approvals and Containment of Commodities Shipments*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 51 (Winter 2007); Margaret Rosso Grossman, *Genetically Modified Crops in the United States: Federal Regulation and State Tort Liability*, 5 ENVTL. L. R. 86 (2003); Drew L. Kershen, *Of Straying Crops and Patent Rights*, 43 WASHBURN L. J. 575 (2003-2004); Alison Peck, *The New Imperialism: Toward an Advocacy Strategy for GMO Accountability*, 21 GEO. INT'L ENVTL. L. REV. 37 (2008-2009); A. Bryan Endres, *An Evolutionary Approach to Agricultural Biotechnology: Litigation Challenges to the Regulatory and Common Law Regimes for Genetically Engineered Plants*, 4 NORTHEASTERN U. L.J. 59, 59 (2012); A. Bryan Endres & Lisa Schlessinger, *Pollen Drift: Reframing the Biotechnology Liability Debate*, 118 PENN. STATE L.R. 815 (2014); *Biotechnology*, NAT'L AGRIC. LAW CTR., http://nationalaglawcenter.org/ag-law-bibliography/categories/8-biotechnology/ (last visited Feb. 3, 2015).

[2] COMPLAINT, Five Star Farms v. Syngenta AG, U.S. Dist. Ct. for the Dist. Of Kansas, 12/18/14, intro at 2.

against Syngenta should be centralized into a single class action in the District of Kansas.[3] The co-lead counsel for the plaintiffs includes Gray, Ritter & Graham's Don Downing; Gray Reed & McGraw's William Chaney; Hare, Wynn, Newell & Newton's Scott Powell; and Stueve Siegel Hanson's Patrick Stueve.[4]

Background

The use of Agrisure Viptera® by farmers began in the 2010-2011 crop year.[5] At that point Syngenta had secured US approval to commercialize the genetic event, but not other potential export destinations, such as China.[6] This was of particular importance as, prior to the import ban, China comprised the third largest market for U.S. corn exports; almost all of China's corn imports originated from the U.S.; and the U.S. Department of Agriculture projected these imports to expand from 2.7 million metric tons in 2012-13 to 22 million metric tons in 2023/24.[7] Although Syngenta also applied for Chinese approval in 2010, the company expected the approval to take up to forty months.[8] Farmers in the class action allege that although they never knowingly planted the Agrisure Viptera® corn, Syngenta pursuit of commercialization in the face of asynchronous export market approval of the genetic event was irresponsible because of the inevitable admixture with the U.S. corn supply and resulting market price loss for the farmers over the course of thirteen months before China approved the MIR 162 genetic trait.[9]

The potential harm arising from asynchronous approval by regulatory entities has worried not only the biotechnology industry, but also other significant actors in the commodity agricultural supply chain, such as the Biotechnology Industry Organization (BIO),[10] Crop Life International,[11] the National Grain and Feed Association,[12] and the North American Export Grain Association.[13] To mitigate the expected harm, BIO and other industry stakeholders developed various stewardship polices, all of which require approval of new genetic traits in each major export market before commercialization. For example, BIO, the world's largest biotechnology trade association, states that asynchronous approvals combined with zero tolerance policies for GM products not yet authorized in importing countries, can result in major trade disruptions.[14] These stakeholder-derived stewardship policies, of which Syngenta is a member, have created an industry best practices standard,[15] which, plaintiffs claim, require firms to refrain from commercialization before products are approved by all significant importing nations.[16]

As planting of Agrisure Viptera® continued to increase through the 2013 growing season, plaintiffs allege that no procedures were put in place by Syngenta to contain or otherwise segregate this newly approved

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[3] *In Re: Syngenta Ag MIR162 Corn Litigation*, MDL No. 2591 (US. Judicial Panel on Multidistrict Litigation filed Dec. 11, 2014) (order granting transfer of class action to United States District Court of Kansas).

[4] *Selected Counsel to Lead Syngenta Lawsuits,* AGPROFESSIONAL, http://www.agprofessional.com/news/selected-counsel-lead-syngenta-lawsuits (last visited Feb. 4, 2015).

[5] COMPLAINT, at ¶ 93.

[6] COMPLAINT, at ¶68.

[7] COMPLAINT, at ¶171, 179; *USDA Agricultural Projections to 2023,* USDA, http://www.usda.gov/oce/commodity/projections/USDA_Agricultural_Projections_to_2023.pdf (last visited Feb. 4, 2015).

[8] COMPLAINT, at ¶ 70.

[9] COMPLAINT, at ¶ 5-18, 222-386.

[10] COMPLAINT, at ¶31.

[11] COMPLAINT, at ¶33.

[12] COMPLAINT, at ¶37.

[13] COMPLAINT, at ¶38.

[14] COMPLAINT, at ¶31; Biotechnology Industry Organization, Product Launch Stewardship Policy, May 21, 2007, at Annex 1 Introduction.

[15] *See* Redick & Uchtmann, *supra* note 1, at 220.

[16] This was highlighted in the recent case *Syngenta v. Bunge*. Bunge, one of the world's largest agricultural trading houses, refused to handle Agrisure Viptera® because of the risk of admixture with the rest of their corn supply. When Syngenta sued Bunge over the refusal, the court found that Bunge's decision to reject Agrisure Viptera® was a legitimate business decision since comingling would preclude sales to china. In December, 2014, Syngenta dropped its ongoing case against Bunge after China approved MIR 162 and Bunge presumably would begin to accept the grain. *See Syngenta v. Bunge*, 820 F. Supp.2d 953 (N.D. Iowa 2011). *See also* COMPLAINT, at ¶33.

variety, despite the persistent lack of approval for the Chinese market. Perhaps because of pollen drift or the inevitable comingling during harvest, storage, or transportation, in November 2013 China detected MIR 162 and began rejecting shipments of corn from the U.S.[17] China continued to refuse shipments of U.S. corn, until its government approved MIR 162 in late December of 2014. The resulting market loss is estimated at $1 billion to $2.9 billion.[18, 19] In an attempt to recover from the decline in the corn market, the farmers' class action contains twenty-one counts alleging consumer fraud, tortious interference with business, negligence, nuisance, and trespass to chattels.[20]

Past is Prologue

The Syngenta case is not the first of its kind, as it presents issues similar to both the StarLink corn and LibertyLink rice class actions.[21] In 1998, The EPA approved StarLink for animal but not human consumption, and required a 660-foot buffer zone between StarLink and other corn varieties.[22] Despite the buffer, StarLink contaminated the food supply; causing food recalls, loss of export markets to countries such as Japan and Korea[23] where StarLink was not approved for human consumption, and a dramatic drop in corn prices.[24] In a class action on behalf of corn farmers, attorneys successfully argued that pollen drift and post-harvest commingling constituted a physical injury.[25] Negligence and nuisance claims also survived summary judgment as the court determined that the defendant had a duty to prevent the regulated crop from entering the food supply.[26] Aventis, the producers of StarLink, settled the case for $110 Million.[27] While the general facts are somewhat similar, StarLink is distinguishable from the current class action against Syngenta on one potentially crucial issue--Agrisure Viptera® was approved for human consumption in the U.S.

In 2006, a similar contamination scenario impacted the rice market. Riceland foods (a major rice buyer) notified Bayer CropScience (Bayer) that a new and not yet approved genetic event—LLRice 601—was present in the 2005 rice harvest.[28] The contamination of the rice supply caused varied responses from importers of U.S. rice. Reactions included outright bans on U.S. rice in Japan, purity tests of every rice shipments from the U.S. to the E.U., and other restrictions by Russia, Canada, Taiwan, the Philippines, and Iraq.[29] A class action of 11,300 rice producers filed claims against Bayer in the Eastern District of Missouri.[30] After a petition for summary judgment, the plaintiffs were allowed to continue with their claims for negligence and private nuisance, as Bayer had a duty to ensure that experimental field trials did not contaminate other rice fields.[31] Bayer agreed to pay a $750 million settlement to compensate rice farmers for damages arising from the LLRice 601 contamination.[32] Again, this is distinguishable from the current case against Syngenta, because LLRice601 was not approved in the U.S.

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[17] COMPLAINT, intro at 4.
[18] COMPLAINT, intro at 3.
[19] *Syngenta receives Chinese import approval for Agrisure Viptera® corn trait*, SYNGENTA, http://www.syngenta.com/global/corporate/en/news-center/news-releases/Pages/141222.aspx (last visited Feb. 2, 2015).
[20] COMPLAINT, at ¶222-386.
[21] Endres, *supra* note 1, at 74-78; *In re* StarLink Corn Prods. Liab. Litig., 212 F. Supp. 2d 828 (N.D. Ill. 2002); *In re* Genetically Modified Rice Litig., 666 F. Supp. 2d 1004 (E.D. Mo. 2009).
[22] Endres, *supra* note 1 at 74.
[23] *In re* StarLink Corn Prods. Liab. Litig., at 835 (N.D. Ill. 2002).
[24] *Id.*
[25] Endres, *supra* note 1, at 75; *In re* StarLink Corn Prods. Liab. Litig., 212 F. Supp. 2d 828, 841-43 (N.D. Ill. 2002).
[26] Endres, *supra* note 1, at 75 (2012).
[27] *Id*.
[28] *Id*. at 76.
[29] Joshua B. Cannon, *Statutory Stones and Regulatory Mortar: Using Negligence Per Se to Mend the Wall Between Farmers Growing Genetically Engineered Crops and Their Neighbors*, 67 WASH. & LEE L. REV. 653, 673-74 (2010).
[30] Endres, *supra* note 1, at 76 (2012).
[31] *Id.*
[32] *Id.* at 78.

Both the StarLink and LibertyLink cases establish the viability of negligence and nuisance claims for damages arising from contamination of the food supply with GM products that are not yet fully approved for human consumption in the United States.[33] It will be interesting with the Syngenta case to see how courts respond to a market loss caused by contamination from a GM variety that has approval in the U.S., but not in a foreign market.[34]

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[33] *Id.*
[34] *Id*. at 79.