



Biotech Corn, Exports to China and Midwestern Litigation

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Bunge North America, a major buyer and exporter of grain and oilseeds, recently announced a purchasing policy in which it will [not accept](#) the Agrisure® Viptera™ – MIR162 biotech corn variety developed by Syngenta. The rationale behind this decision is the regulatory approval status of the product in the global marketplace—specifically, China. Although already approved for import into several nations (Canada, Argentina, Brazil, Australia, Mexico, New Zealand, the Philippines, Korea and Taiwan), Chinese approval is not expected until 2012. As the seventh largest export destination of U.S. corn (and expected to grow significantly this year from [1.5 to 2.0 million metric tons](#)), Bunge elected to forego purchasing of the Viptera™ variety due to concerns of product commingling and the potential loss of the commercially important Chinese market.

On August 22, [Syngenta filed suit](#) in the United States District Court, Northern District of Iowa, seeking to force Bunge to accept delivery of the Viptera™ corn variety. In its seventeen page Complaint, Syngenta alleges that Bunge falsely represented the facts surrounding the Viptera™ variety in violation of the federal Lanham Act and various state unfair trade practice statutes, violated both federal and state Warehouse Acts, injured business reputation, and, among other claims, intentionally interfered with contractual relations between Syngenta and the farmers who purchased Viptera™ seed.

Not surprisingly, [Bunge strongly refutes these claims](#), arguing that it “must protect the integrity of [its] export supply chain by not accepting Agrisure Viptera™ and other varieties that do not have major export market approval.” Bunge reasons that it must protect its farmer-customer’s ability to provide access to the global marketplace (and the accompanying price benefits) and, therefore, could not accept the Viptera™ product.

This lawsuit exemplifies the long-running tension between the grain handling industry and seed developers since biotech emerged 20 years ago. Although Bunge has supported the deployment of genetically engineered seeds, the commingling of seed varieties unapproved for major export markets injects significant risk into its business operations—risk that may be difficult or expensive to insure against. Seed developers, on the other hand, face strong innovation pressures and a ticking clock for intellectual property protection attached to new seed varieties. Delays incurred while waiting for product approval for all major export markets imposes significant reductions in the innovator’s return on investment, as each lost growing season spent waiting for product approval is one less year of intellectual property protection and the attendant monopoly pricing attributed to that seed variety.

To solve this tension, one leading lawyer has opined that the [doctrine of anticipatory nuisance](#) could be asserted as a means to prevent the commercialization of biotech varieties not yet approved for major export markets (see page 41 in the linked article). For example, the initial proposal to commercialize Liberty Link soybeans was [scuttled](#) due to a [threatened lawsuit](#) based on anticipatory nuisance theories.

But competing lawsuits generally are inefficient methods to resolve business disputes—especially among large entities such as Bunge and Syngenta. Therefore, the Biotechnology Industry Organization (BIO), in 2007, [brokered a multi-industry deal](#) in which biotech companies pledged to not commercialize new seed varieties until they had received regulatory approval in the major export markets. At the time, China, a notoriously difficult regulatory regime, did not qualify as a major export market for corn. But as noted above, China is now importing larger quantities of corn each year, raising the question of what constitutes a major export market. Until this is sorted out—either through litigation, compromise or clarification of the BIO product commercialization guidelines—the unapproved for export issues raised in the current Bunge-Syngenta dispute are [likely to spread into other new biotech seed varieties](#) and further disrupt available marketing channels for the farmer caught in the crossfire between input suppliers and grain purchasers.