Agricultural Law Update

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Top ten agricultural law cases of 2004

With all due respect to David Letterman and everyone who does year-end Top Ten lists, here are our top ten United States agricultural law cases for 2004. There are no set criteria for the list except importance for family farmers. Links to the decisions, where available, are at www.flaginc.org.

1. Captive supplies in the cattle industry

Pickett v. Tyson Fresh Meats, 315 F. Supp. 1172 (U.S. District for the Middle District of Alabama April 23, 2004). A jury found that Tyson violated the federal Packers and Stockyards Act through its use of captive supply contracts in purchasing cattle and awarded cattle farmers and ranchers up to $1.28 billion in damages. Then federal Judge Lyle Strom overturned that verdict, ruling that the evidence was insufficient to support it. The cattle farmers and ranchers appealed to the Eleventh Circuit Court of Appeals. Oral argument was heard on December 17, 2004, and the appeals court decision is expected in 2005.

2. Mad Cow Disease and USDA rulemaking

R-CALF v. USDA, No. CV-04-51-BLG-RFC (U.S. District Court for the District of Montana April 26, 2004). On April 22, 2004, R-CALF filed a motion for a temporary restraining order to prohibit USDA from lifting a ban on importation from Canada of beef and other bovine tissue for human consumption. The ban was in place due to the discovery of bovine spongiform encephalopathy (BSE) or "Mad Cow Disease" in a Canadian-born cow in Alberta, Canada. USDA, without using the notice-and-comment rulemaking process, had issued a memorandum that would have allowed Canadian beef to once again be imported into the United States. Federal Judge Richard Cebull granted R-CALF's motion stopping USDA from reopening the U.S.-Canada border to imports of Canadian beef. In May 2004, the parties reached an agreement that allowed USDA to engage in rulemaking on reopening the border to Canadian beef and, at some point, most likely live cattle. USDA's new rule is to be published in the January 4, 2005, Federal Register.

3. First Amendment challenges to commodity checkoff programs

Cochran v. Veneman, 359 F.3d 263 (Third Circuit Court of Appeals February 24, 2004). 2004 saw a lot of action over the constitutionality of mandatory checkoff programs. In the *Cochran* case, two Pennsylvania dairy farmers successfully challenged the entire Dairy Checkoff Program. The district court held that the dairy checkoff was constitutional, finding that the dairy industry is as heavily regulated as the California tree fruit industry whose marketing order was held constitutional in a 1997 Supreme Court ruling. The Third Circuit reversed the district court. The court concluded that the tree fruit decision was not applicable because the dairy checkoff is a stand-alone program not connected with the federal milk marketing order system or other dairy industry regulatory schemes. The *Cochran* case is being held by the U.S. Supreme Court pending its decision in the Beef Checkoff challenge, *Veneman v. Livestock Marketing Association*, 335 F.3d 711 (Eighth Circuit Court of Appeals July 8, 2003). Also being held pending the Supreme Court's decision in *LMA* are challenges to the Pork Checkoff Program, *Veneman v. Campaign for Family Farms*, 348 F.3d 157 (Sixth Circuit Court of Appeals October 22, 2003) and the Louisiana alligator checkoff, *Pelts & Skins v. Landreneau*, 365 F. 3d 423 (Fifth Circuit Court of Appeals April 2, 2004).

4. Feedlot regulation

Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa Supreme Court June 16, 2004) and *Worth County Friends of Agriculture v. Worth County*, 688 N.W.2d 257 (Iowa Supreme Court October 6, 2004). These two Iowa Supreme Court cases dealt with the conflict between large feedlots and government regulation. In *Gacke*, the Iowa Supreme Court struck down Iowa's right-to-farm law that barred nuisance lawsuits against feedlot owners. The court ruled the law violated Iowa's Constitution because the bar on nuisance

Cont. on page 2

INSIDE

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IN FUTURE ISSUES

claims could allow feedlot owners to take other landowners' private property without just compensation. In *Worth County*, the Iowa Supreme Court struck down a county ordinance that attempted to regulate large feedlots. The court ruled that because the Iowa Legislature had enacted a statute regulating feedlots at the state level, that statute preempted the county ordinance.

The issue of feedlot regulation will likely continue to be contested in courts and legislatures across the country.

5. Corporate farming restrictions

Smithfield Foods v. Miller, 367 F.3d 1061 (Eighth Circuit Court of Appeals May 21, 2004). In 2003, the Eighth Circuit struck down an anti-corporate farming amendment to the South Dakota Constitution—so-called "Amendment E"—because it was held to violate the dormant Commerce Clause of the U.S. Constitution. This put other states' corporate farming restrictions in question. In this case, Smithfield Foods challenged Iowa's law banning packer ownership of livestock. Smithfield challenged the law under the dormant Commerce Clause of the U.S. Constitution and won at the district court. After the district court's ruling, however, the Iowa Legislature amended Iowa's law. The Eighth Circuit decided the district court should take another look at the law in light of the legislative changes and sent the case back to the district court. A trial is expected to begin in early 2005.

6. Discrimination in USDA programs

Garcia v. Veneman, 224 F.R.D. 8 (U.S. District Court for the District of Columbia September 10, 2004) and *Love v. Veneman*, 224 F.R.D. 240 (U.S. District Court for the District of Columbia September 29, 2004). These two cases were brought against USDA for discrimination in USDA programs. *Garcia* was brought on behalf of a class of Hispanic farmers. The district court denied the Hispanic farmers' class certification motion because the court believed each individual farmer had different disputes with USDA and therefore the farmers could not satisfy the commonality requirement for certification. In *Love*, a case brought on behalf of women farmers claiming discrimination on the basis of gender, the same district court denied the women farmers' motion for class certification on the same grounds. The D.C. Circuit Court of Appeals has granted a motion to review the class certification issue in the *Love* case.

7. Seed saving penalties

Monsanto Co. v. McFarling, 363 F.3d 1336 (Federal Circuit Court of Appeals April 9, 2004). The Federal Court of Appeals upheld a finding that a farmer violated his 1998 Technology Agreement with Monsanto by saving seed, but held that because the remedies provisions in the Agreement were "invalid and unenforceable under Missouri law," the $780,000 judgment against the farmer must be vacated. The court reasoned that Monsanto's liquidated damages clause requiring farmers to pay 120 times the applicable technology fee for each bag of seed purchased was not a reasonable estimate of the financial harm Monsanto suffered when the farmer saved seed. Monsanto removed this portion of the remedies clause from its 2005 Technology Agreement.

8. Deceptive herbicide pricing and marketing

Peterson v. BASF Corp., 675 N.W.2d 57 (Minnesota Supreme Court February 19, 2004). The Minnesota Supreme Court unanimously affirmed a jury verdict and entry of a $52 million judgment for a nationwide class of farmers of minor crops who claimed that BASF's herbicide marketing and pricing schemes were deceptive. BASF filed a petition for the U.S. Supreme Court to review the case, which is apparently being held pending that Court's decision in *Bates v. Dow Agrosciences*, 332 F.3d 323 (Fifth Circuit Court of Appeals June 11, 2003). The *Bates* case concerns whether state law product liability claims against a herbicide manufacturer are preempted by the Federal Insecticide, Fungicide and Rodenticide Act and will be heard by the U.S. Supreme Court in January 2005. It is expected that the *Peterson* case will finally be decided by the end of 2005, nearly eight years after it was filed.

9. Binding arbitration in production contracts

Tyson v. Archer, 147 S.W.3d 681 (Arkansas Supreme Court February 19, 2004). The Arkansas Supreme Court ruled that the binding arbitration clause in a Tyson hog production contract was not enforceable because the contract did not impose mutual obligations on Tyson and the farmer. The issue arose when Tyson suddenly terminated contracts of more than 100 hog farmers. The hog farmers sued for compensatory and punitive damages, alleging that they incurred substantial debt to build commercial hog farms that were rendered useless without a contract. Tyson had contended that the contract the hog farmers had signed required disputes to be resolved through binding arbitration instead of litigation. The court found that the contract was unenforceable because the farmers' only remedy was to use arbitration, but Tyson could pursue litigation if it chose to. State and federal legislation has been introduced to address problems with binding arbitration provisions in agricultural contracts.

10. Termination of peanut production quotas

Members of the Peanut Quota Holders Association v. United States, 60 Fed. Cl. 524 (United States Court of Claims April 30, 2004). A group of peanut farmers who held peanut production quotas that were terminated by the 2002 Farm Bill sued for compensation under the Takings Clause of the Fifth Amendment of the U.S. Constitution. The court held that the peanut quota system was created by Congress and Congress has the right to modify or terminate a federal program. Accordingly, the court found that no benefit from such a program would constitute a property interest protected by the Fifth Amendment and it dismissed the peanut farmers' claims. For the first time since 1938, peanut farmers are without a production quota safety net.

Cases to watch in 2005

There are a number of cases farmers should keep in an eye on in 2005. The U.S. Supreme Court will issue at least four decisions that will be important to farmers. In *Veneman v. Livestock Marketing Asso-*

Continued on page 3

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Top ten/ continued from page 2
ciation, the Court will decide whether the federal beef checkoff violates the First Amendment of the U.S. Constitution. In *Bates v. Dow Agrosciences,* the Court will decide whether state law claims based on defective pesticides are preempted by the Federal Insecticide, Fungicide and Rodenticide Act. In *Kelo v. City of New London,* the Court will decide whether government has the power to condemn or take private property for private redevelopment uses. And in *Orff v. United States,* the Court will decide whether farmers have the right to sue the federal government over breach of water rights contracts.

In addition, the First Circuit Court of Appeals in *Harvey v. Veneman* will decide an organic farmer's challenge to rules implementing the Organic Foods Production Act of 1990. There may also be a decision in *Been v. OK Industries*, a case involving the cancellation of more than 400 Oklahoma poultry growers' contracts. The trial in that case is scheduled to begin in Oklahoma state court in March 2005.

FLAG will continue to follow these cases and other legal developments that concern family farmers.

--David R. Moeller, Staff Attorney, Farmers' Legal Action Group; Susan E. Stokes, Legal Director, FLAG

GMO contracts/Cont. from page 7
Roundup Rewards and the program has provided more than $341 million in program benefits. Monsanto Co., *Roundup Rewards*, *available at* http://www.monsanto.com/monsanto/us_ag/layout/crop_pro/r_rewards/default.asp.

[34] Rhonda Brooks, *Revival of the Fittest*, Farm Industry News (Dec. 1, 2001). In the article, a Monsanto market manager is quoted as saying: "We don't cover imitator products. Growers must use our technology for the benefits."

[35] Monsanto Co., *2005 Technology/Stewardship Agreement* at para. 11, Grower's Exclusive Limited Remedy.

[36] For example, the Idaho Supreme Court held that limiting damage awards in an herbicide contract was unconscionable and therefore unenforceable. *Walker v. American Cyanamid Co.*, 948 P.2d 1123, 1130 (Idaho 1999). A Kentucky federal court upheld an herbicide contract provision that limited a farmer's damages because "it is appropriate to shift the risk of loss to the farmer in this situation given the many uncertainties and variables that exist in the farming business." *Gooch v. E.I. Du Pont De Nemours & Co.*, 40 F. Supp. 2d 863, 872 (W.D. Ky. 1999*). See also* Scott S. Partridge, *The Use of the Class Action Device in Agricultural Products Litigation*, 6 Drake J. Agric. L. 175, 188 (2001) (describing why class actions based on GMO technology are difficult to pursue because each farmer has a different set of growing conditions); Gaby R. Jabbour, *Class Certification Order Reversed in Suit Against Monsanto and Others*, National AgLaw Center (June 2003), *available at* http://www.nationalaglawcenter.org/assets/archivecases/monsanto-davis.html (describing a Texas case where class certification was denied due to defenses that were peculiar to individual farmers).

[37] *Monsanto v. McFarling*, 302 F.3d 1291 (Fed. Cir. 2002), *cert. denied,* 537 U.S. 1232 (2003).

[38] *Monsanto v. Swann*, No. 4:00-CV-1481, 2003 U.S. Dist. LEXIS 5338 (E.D. Mo. Jan. 8, 2003) (unpublished) (court applied Missouri law to Monsanto's breach of its Technology Agreement claim); Gaby R. Jabbour, *Monsanto Sues Farmer for Patent Infringement and Breach of Contract*, National AgLaw Center (July 2003), *available at* http://www.nationalaglawcenter.org/assets/archivecases/monsanto-swann.html.

[39] Garry Wills, A Necessary Evil: A History of American Distrust of Government (1999).

[40] Monsanto Co., *2005 Technology/Stewardship Agreement* at para. 3, Forum Selection for Non-Cotton Claims Made by Grower and All Other Claims.

[41] *McNair v. Monsanto,* 279 F. Supp. 2d 1290 (M.D. Ga. 2003) (transferring to Missouri cotton farmers' lawsuit that asserted defects in seed sold by Delta and Pine Land and containing Monsanto technology).

[42] See, for example, *Monsanto v. McFarling*, 302 F.3d 1291 (Fed. Cir. 2002), *cert. denied,* 537 U.S. 1232 (2003) ("McFarling I"); *Ex parte* Monsanto Co., No. 1001766, 2002 Ala. LEXIS 12 (Jan. 18, 2002), *opinion withdrawn*, 2002 Ala. LEXIS 301 (Oct. 1, 2002); *Monsanto v. White*, No. 4:00CV1761, 2001 U.S. Dist. LEXIS 25135 (E.D. Mo. June 22, 2001) (unpublished); *Monsanto v. Dawson*, No. 4:98CV02004, 2000 U.S. Dist. LEXIS 22391 (E.D. Mo. Aug. 18, 2000) (unpublished); *Massey v. Monsanto*, No. 2:99CV218-P-B, 2000 U.S. Dist. LEXIS 11305 (N.D. Miss. June 13, 2000) (unpublished); *Monsanto v. Godfredson*, No. 4:99CV1691, 2000 U.S. Dist. LEXIS 22383 (E.D. Mo. Apr. 13, 2000) (unpublished).

[43] The farmers have a web site about their case, at http://nelsonfarm.net.

[44] *Monsanto v. Nelson*, No. 4:00-CV-1636, 2001 U.S. Dist. LEXIS 25132 (E.D. Mo. Sept. 10, 2001) (unpublished).

[45] CropChoice News, *Monsanto Settles with Nelsons in Soybean Seed Dispute* (Nov. 1, 2001) *at* http://cropchoice.com/leadstry.asp?recid=504. Confidential settlement agreements appear common in disputes between farmers and Monsanto. *See* Todd D. Epp, *Four-Wheeling Through the Soybean Fields of Intellectual Property Law: A Practioner's Perspective*, 43 Washburn L.J. 669, 675-76 (Spring 2004).

[46] *Monsanto v. Bandy*, No. 4:04CV00708 ERW (E.D. Mo. filed June 8, 2004).

[47] Courts have held that binding arbitration provisions are not always enforceable by companies. A recent Arkansas Supreme Court decision held that Tyson's binding arbitration clause in a hog production contract was not enforceable because the contract was too one-sided in favor of Tyson. *Tyson Foods, Inc. v. Archer*, 356 Ark. 136 (Ark. 2004); *Archer v. Tyson Foods*, No. CIV-2002-497 (Ark. Cir. Ct. Feb. 21, 2003), *available at* http://www.hwnn.com/news_articles/order_Arbitration.pdf. *See also Sanderson Farms v. Gatlin*, 848 So.2d 828 (Miss. 2003) (holding that when a chicken processor breached the production contract's arbitration provision, the processor waived its right to arbitration).

[48] Randi Ilyse Roth, *Redressing Unfairness in the New Agricultural Labor Arrangements: An Overview of Litigation Seeking Remedies for Contract Poultry Growers*, 25 U. Mem. L. Rev. 1207, 1230 (Spring 1995).

[49] Monsanto Co., *2005 Technology/Stewardship Agreement* at para. 2, Binding Arbitration for Cotton-Related Claims Made By Growers.

[50] In *Monsanto v. Swann*, a federal court in Missouri held that a provision in Monsanto's 1998 Technology Agreement setting liquidated damages was enforceable and held that the farmer must pay the 1998 technology fee for each misused bag of seed, multiplied by 120. Monsanto v. Swann, No. 4:00-CV-1481, 2003 U.S. Dist. LEXIS 5338 (E.D. Mo. Jan. 8, 2003) (unpublished).

[51] Monsanto Co., *2005 Technology/Stewardship Agreement* at para. 8, Monsanto's Remedies.

[52] In one case involving Roundup Ready cotton, a federal judge determined that Monsanto's total damages and costs for 424.5 bags of cottonseed unlawfully retained was $592,677.89. *In re* Trantham, 286 B.R. 650 (Bankr. W.D. Tenn. 2002), *rev'd* 304 B.R. 298 (B.A.P. 6th Cir. 2004) (holding that Monsanto's entire judgment for willful patent infringement is nondischargeable in bankruptcy). Monsanto lists recent enforcement actions against farmers on its website that include a $1,500,000 settlement agreement and a $780,000 court judgment. Monsanto Co., *Seed Trait Stewardship, at* http://www.monsanto.com/monsanto/us_ag/content/stewardship/training/course/content/lesson2/mon01_l02t02p15.htm

[53] Donald L. Uchtmann, *Can Farmers Save Roundup Ready Beans for Seed?* McFarling *and* Trantham *Cases Say No*, Agric L. Update, Oct. 2002, at 4.

[54] Monsanto Co. v. McFarling, 363 F.3d 1336, 1344 (Fed. Cir. 2004) ("McFarling II"), *petition for cert. filed*, No. 04-31 (U.S. July 6, 2004).

[55] McFarling II, 363 F.3d at 1347-52.

[56] McFarling II, 363 F.3d at 1352.

[57] Robert Schubert, *Mississippi Farmer Gets Big Break From Appeals Court in Monsanto Biotech Seed Case*, CropChoice (April 27, 2004) *at* http://www.cropchoice.com/leadstry.asp?recid=2540.

Farmers' guide to GMO contracts

By David Moeller

This article is drawn from a larger piece entitled Farmers' Guide to GMOs.[1] The article looks at the obligations and legal limitations farmers assume when they sign genetically modified organism (GMO) contracts, such as Monsanto's Technology Agreement. Common obligations include giving up the right to save seed, opening up their fields to inspections by the company, and agreeing that the company will be entitled to specified remedies if the farmer violates the agreement. Under these contracts, farmers typically also agree to a limit on the warranties available for the GM seed and a limit on where they can sue or otherwise seek resolution of a dispute with the company.

To maintain control over GMOs, biotechnology companies and seed companies require farmers to sign grower or technology agreements.[2] These agreements generally give the farmer rights to use, or "license," the GM seed in exchange for complying with all of the company's production methods and management requirements.[3] For example, Monsanto requires that farmers using its GM seeds sign an annual Technology Agreement/ Stewardship Agreement (Technology Agreement). By signing the Technology Agreement, farmers also agree to abide by the Technology Use Guide's (TUG) requirements and guidelines for using Monsanto's products.[4] The farmer will not get an opportunity to negotiate the terms of the Technology Agreement, which is offered on a take-it-or-leave-it basis as part of the seed purchase.[5]

Farmers may also be bound by the terms of Monsanto's Technology Agreement simply by opening and using a bag of seed containing Monsanto technology. Monsanto's Technology Agreement states:

> Grower accepts the terms of the following NOTICE REQUIREMENT, LIMITED WARRANTY AND DISCLAIMER OF WARRANTY AND EXCLUSIVE LIMITED REMEDY by signing this Agreement and/or opening a bag of seed containing Monsanto Technology. If Grower does not agree to be bound by the conditions of purchase or use, Grower agrees to return the unopened bags to Grower's seed dealer.[6]

One court held that a farmer illegally saved Roundup Ready soybean seed—even though the farmer did not sign a Technology Agreement for the two growing seasons in dispute—because he did open and plant some bags of the seed.[7] The bottom line is that farmers who use GMOs, even if they do not sign a contract, may be bound by the terms of the biotechnology companies' contracts.

The companies generally use these agreements to secure a number of protections for themselves.[8] Under a GM seed contract, farmers typically agree to follow specific guidelines about where and how to plant the GM seed; refrain from saving seed from the crop produced from the purchased seed; protect the company's intellectual property rights; sell the commodity in specified, approved markets; and resolve any disputes arising under the contract either through binding arbitration or in a court convenient to the company.[9] The contract may also require the farmer to allow company representatives access to fields to inspect crops and determine if the farmer is in compliance with the contract.

Seed use

Monsanto's 2005 Technology Agreement contains a number of provisions related to the use of seed by farmers. Farmers who sign this contract agree to follow many limits including[10]:

· "To use the seed containing Monsanto Technologies solely for planting a single commercial crop."

· "Not to supply any Seed containing patented Monsanto Technologies to any other person or entity for planting. Not to save any crop produced from Seed for planting and not to supply Seed produced from Seed to anyone for planting."

· "Not to use or to allow others to use Seed containing patented Monsanto Technologies for crop breeding, research, generation of herbicide registration data, or Seed production (unless Grower has entered into a valid, written production agreement with a licensed seed company)."

· "To acquire Seed containing these Monsanto Technologies only from a seed company with required technology license(s) from Monsanto or a licensed company's authorized dealer."

· "To pay the technology fees due to Monsanto that are a part of or collected with the Seed purchase price."

By requiring that farmers use Monsanto patented technology if they are acquired from a license only for a single growing season and not save any of the crop seed, Monsanto is ensuring that farmers purchase new seed with these patented traits each crop year, most likely from Monsanto. The restrictions on the use of Monsanto's products for crop breeding and research mean that any new developments in these products will come only from Monsanto and not through public breeding programs or farmer innovation. Monsanto has had success enforcing its Technology Agreement provision that prohibits farmers from saving their seed, despite legal challenges.

Access to records and enforcement of contracts

Monsanto and other biotechnology companies enforce their technology agreements through multiple methods, including inspecting and auditing farmers' files. Monsanto's Technology Agreement provides that the farmer agrees to

> [u]pon written request, to allow Monsanto to review the [USDA's] Farm Service Agency crop reporting information on any land farmed by Grower including Summary Acreage History Report, Form 578 and corresponding aerial photographs, [USDA's] Risk Management Agency claim documentation, and dealer/retailer invoices for your seed and chemical transactions.

In addition to these specific documents, Monsanto also requires the farmer to agree to: "allow Monsanto to examine and copy any records and receipts that could be relevant to Grower's performance of this Agreement."[11]

There is no time limit in the Technology Agreement, so it is possible that Monsanto could attempt to obtain and review a farmer's documents at any point in the future, even after the farmer stops growing Monsanto's seeds; meaning once a farmer signs Monsanto's Technology Agreement, the farmer could be bound by the agreement's terms indefinitely.

The federal Privacy Act protects farmers from having their government records released to others without written permission from the farmer.[12] However, by entering into a GMO contract with Monsanto and signing the Technology Agreement, a farmer grants permission for USDA to release the farmer's government records to Monsanto. The information in these government records will show how many acres of each crop a farmer is planting and the historic crop yields the farmer receives on those acres. The seed and chemical transaction invoices will show how many bags of seed the farmer purchased and whether the farmer purchases chemicals used on herbicide resistant GMOs. All of this information could be used to determine if a farmer is saving seed. For example, Monsanto may calculate that a farmer purchased only enough Roundup Ready soybean seed to plant 125 acres, while the farmer's FSA records show 265 soybean acres were planted. If additional evidence demonstrates that the farmer purchased enough Roundup or generic glyphosate to spray on these additional

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140 acres, Monsanto may suspect the farmer is saving soybean seed. At that point, Monsanto may ask for additional records and receipts and could use that information to determine whether the farmer has the resources to litigate with Monsanto. Using all of this information, Monsanto may either seek to inspect a farmer's fields or bring a federal lawsuit against the farmer for saving seed.[13]

One reason Monsanto may seek a particular farmer's records is if Monsanto receives information about the farmer from a neighbor or acquaintance. Monsanto's TUG provides contact information for reporting individuals who are "utilizing biotech traits in a manner" that does not meet Monsanto's definition of a good steward.[14] Monsanto will treat information provided as "confidential"—meaning Monsanto will attempt to protect the source's identity unless ordered to reveal it by a court—or "anonymous"—meaning the information is reported in a way that the person reporting cannot be identified, including by telephone or unsigned letter.[15]

EPA field inspections

Another enforcement tool that Monsanto and other companies have at their disposal is to inspect farmers' fields. Besides inspections to check if farmers are saving seed, companies can inspect fields to ensure compliance with EPA regulations requiring use of "refuges" when GMOs that contain pesticides are grown. If all crop acres were planted with GMOs containing pesticides, insects might develop resistance to the incorporated pesticides, making those GMOs (and other forms of the pesticides) ineffective.[16] To minimize development of insect resistance to expressed pesticides, farmers growing GMOs containing pesticides are required to set up "refuges" of varieties that do not contain the pesticides.[17] Monsanto's TUG provides farmers growing Bt crops with refuge configuration options, so long as the farmer has the correct percentage of Bt and non-Bt GMOs. For example, for YieldGard Rootworm corn, up to 80 percent of corn acres on each farm may be planted with YieldGard Rootworm hybrids while at least 20 percent of corn acres must be dedicated to a corn refuge that does not contain Bt technology.[18] Presumably, if Monsanto's technology works to kill rootworm or European corn borers, these insects will survive and thrive in the refuge where the technology is absent. Thriving pest populations naturally cause havoc on a farmers' corn yields. According to some reports, this damage to crop yield is why some farmers do not follow the EPA refuge regulations.[19]

In theory, EPA has the legal authority to enforce its own regulations and ensure that insect resistance does not develop.[20] However, according to Monsanto's TUG, this authority has been delegated to Monsanto:

> Through an agreement with the Environmental Protection Agency, Monsanto, or an approved agent of Monsanto, will monitor refuge management practices. Upon request by Monsanto or its approved agent, grower is to provide the location of all fields planted with YieldGard technologies and the locations of all associated refuge areas, to cooperate fully with any field inspections, and allow Monsanto to inspect all YieldGard fields and refuge areas to ensure an approved insect resistance program has been followed. All inspections will be performed at a reasonable time and arranged in advance with the grower so that the grower can be present if desired.[21]

Besides transferring regulatory enforcement authority to a private company, this purported agreement between EPA and Monsanto arguably lets the fox guard the henhouse, for Monsanto is also legally liable for ensuring its products are used in conformity with EPA regulations. If refuges are not put in place by its farmer customers, Monsanto could be fined $5,000 per offense for violating EPA regulations.[22]

Marketing and channeling grain

GMOs grown in the United States have not received approval in many export markets.[23] Monsanto places the burden of keeping GM grain out of markets where it is not authorized on U.S. farmers:

> Grower Agrees: To direct grain produced from corn containing the Roundup Ready and/or YieldGard Rootworm trait(s) (including stacks) to appropriate markets as necessary to prevent movement to markets within the European Union (until issuance of final approvals).[24]

While efforts have been made by the United States Trade Representative to allow American exports of GMOs to the European Union,[25] the restrictions are still largely in place.[26] Monsanto's Technology Agreement recognizes this market restriction and requires that farmers agree to the following:

> **Grain Marketing:** Grain/commodities harvested from Roundup Ready corn, YieldGard Plus corn, YieldGard plus with Roundup Ready corn, Roundup Ready canola, and YieldGard Rootworm corn are approved for U.S. food and feed use, but not yet approved in certain export markets where approval is not certain to be received before the end of 2005. As a result, Grower must direct those grain/commodities to the following approved market options: feeding on farm, use in domestic feed lots, elevators that agree to accept the grain, or other approved uses in domestic markets only. The American Seed Trade Association web site (www.amseed.org) includes a list of grain handlers' positions on accepting transgenic corn. You must complete and send to Monsanto a Market Choices form.[27]

What this means is that farmers must be sure if they plant any of the above listed crops, that these crops not be commingled with varieties that are approved for export. If farmers attempt to market crops that do not have the necessary export approvals, this could cause entire shipments to be rejected by an importing country.[28] Because of this risk, one farmer's mistake could cause contamination of millions of bushels of grain. Monsanto attempts to limit its liability for such contamination by requiring farmers to complete and send to Monsanto a "Market Choices" form that specifies where, according to the farmer, the grain was used or marketed. However, as was evident with the StarLink corn debacle, it is extremely difficult to segregate different varieties of crops in the current grain handling system.[29]

GMO seed warranties and generic inputs

For Roundup Ready GMO products, Monsanto encourages, but does not require farmers to use Monsanto's Roundup herbicide. Previously, Monsanto required farmers to use only Roundup because Roundup was patented. In 2000, the patent for Roundup expired and other companies began manufacturing and marketing generic glyphosate equivalents of Roundup.[30] Since that time, Monsanto has been informing farmers that Monsanto does not warrant the use of generic products not authorized by Monsanto.

The 2005 Monsanto Technology Agreement provides that the Grower agrees to the following:

> To use on Roundup Ready crops only a Roundup agricultural herbicide or other authorized non-selective herbicide which could not be used in the absence of the Roundup Ready gene (see TUG for details on authorized non-selective products). Use of any selective herbicide labeled for the same crop without the Roundup Ready gene is not restricted by this Agreement. MONSANTO DOES NOT MAKE ANY REPRESENTATIONS, WARRANTIES OR RECOMMENDATIONS CONCERNING THE USE OF PRODUCTS MANUFACTURED OR MARKETED BY OTHER COMPANIES WHICH ARE LABELED FOR USE IN ROUNDUP READY CROP(S). MONSANTO SPECIFICALLY DISCLAIMS ALL RESPONSIBILITY

Cont. on p. 6

GMO contracts/Cont. from p. 5

FOR THE USE OF THESE PRODUCTS IN ROUNDUP READY CROP(S). ALL QUESTIONS AND COMPLAINTS ARISING FROM THE USE OF PRODUCTS MANUFACTURED OR MARKETED BY OTHER COMPANIES SHOULD BE DIRECTED TO THOSE COMPANIES.[31]

In addition to not warranting generic glyphosate products, Monsanto also offers "Roundup Rewards" benefits as an incentive to use Monsanto's Roundup Ready technology instead of one of the generic glyphosate products developed after Monsanto's patent for Roundup expired. To qualify for Roundup Rewards benefits farmers must use labeled Roundup agricultural herbicides for burndown or in-crop applications on any Monsanto trait crops.[32] Examples of Roundup Rewards products are

· Trait Crop Loss Refund
· Trait Replant Refund
· Trait Investment Refund
· 30-Minute Rainfast Warranty
· Roundup WeatherMAX
· Roundup Ready Corn 2 Capped Cost Weed Control
· Roundup Ready WeatherMAX Crop Safety Warranty[33]

While these benefits may provide incentives for farmers to use additional Monsanto products, participation in the Roundup Rewards program means that farmers rely on Monsanto for all crop inputs without the benefit of price or quality comparisons if they want the protection of these additional warranties.[34]

If a farmer wants to challenge the performance of Monsanto's products, because of lower than expected yields or other problems with Monsanto's products, the Technology Agreement attempts to limit Monsanto's liability and resulting damages. The Technology Agreement states that

GROWER'S EXCLUSIVE LIMITED REMEDY: THE EXCLUSIVE REMEDY OF THE GROWER AND THE LIMIT OF THE LIABILITY OF MONSANTO OR ANY SELLER FOR ANY AND ALL LOSSES, INJURY, DAMAGES RESULTING FROM THE USE OR HANDLING OF SEED CONTAINING MONSANTO TECHNOLOGY (INCLUDING CLAIMS BASED IN CONTRACT, NEGLIGENCE, PRODUCT LIABILITY, STRICT LIABILITY, TORT, OR OTHERWISE) SHALL BE THE PRICE PAID BY THE GROWER FOR THE QUANTITY OF THE SEED INVOLVED OR, AT THE ELECTION OF MONSANTO OR THE SEED SELLER, THE REPLACEMENT OF THE SEED. IN NO EVENT SHALL MONSANTO OR ANY SELLER BE LIABLE FOR ANY INCIDENTAL, CONSEQUENTIAL, SPECIAL, OR PUNITIVE DAMAGES.[35]

Whether a court would enforce these limits that, at most, require Monsanto to reimburse farmers for the cost of their seed is an open question,[36] but Monsanto would likely argue that by signing the Technology Agreement, farmers agree to these limitations.

Governing law and forum selection clauses

Monsanto's Technology Agreement contains Governing Law and Forum Selection clauses that have been strictly enforced.[37] The Technology Agreement is governed by the laws of the State of Missouri (Monsanto's headquarters are in St. Louis, Missouri). This means courts are to apply Missouri law and not the law of the state where the farmer resides when interpreting Monsanto's contract.[38]

The Technology Agreement requires that the

PARTIES CONSENT TO THE EXCLUSIVE JURISDICTION AND VENUE OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION, AND THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS, MISSOURI, (ANY LAWSUIT MUST BE FILED IN ST. LOUIS, MO) FOR ALL CLAIMS AND DISPUTES ARISING OUT OF OR CONNECTED IN ANY WAY WITH THIS AGREEMENT AND THE USE OF SEED OR THE MONSANTO TECHNOLOGIES EXCEPT FOR COTTON-RELATED CLAIMS MADE BY GROWER.[40]

This means that if a farmer wants to claim that Monsanto's products are defective (or bring any other claim under the contract), the farmer must bring that lawsuit in Missouri, regardless of where the farmer lives.[41] Also, if Monsanto sues the farmer for any reason under the Technology Agreement, Monsanto can bring that lawsuit in Missouri.

Courts across the nation have consistently upheld Monsanto's forum selection clause.[42] For example, farmers in North Dakota were accused of saving seed illegally and were sued by Monsanto in Missouri federal court.[43] The farmers attempted to have the North Dakota Seed Arbitration Board provide a recommendation on whether any evidence existed that the farmers infringed on Monsanto's patents, but Monsanto argued this was outside the proper venue, and a federal court in Missouri agreed.[44] The farmers have now settled the dispute with a confidential agreement.[45] Furthermore, Monsanto has also taken the far-reaching step of suing farmers in Missouri federal court in response to the farmers filing class action lawsuits again Monsanto in state courts around the nation.[46]

For cotton farmers, Monsanto's Technology Agreement requires that any cotton-related claims or legal disputes be resolved by binding arbitration.[47] The arbitration hearing is to be held in the capital of the farmer's state. Mandatory arbitration clauses limit the remedies available to farmers, including being able to present their case in court to a jury of their peers.[48] Under Monsanto's arbitration clause, the farmer and Monsanto each must pay one half of the arbitrator's fees. Being forced to pay arbitration fees could place a great burden on limited-resource farmers. Another difference between arbitration and judicial review is that under Monsanto's arbitration clause, the "arbitration proceedings and results are to remain confidential and are not to be disclosed without the written agreement of all parties, except to the extent necessary to effectuate the decision or award of the arbitrator(s) or as otherwise required by law."[49] This confidential aspect of arbitration limits information available to other farmers who may have similar claims regarding Monsanto's cotton products, but will never know about other farmers' legal disputes and will not be able to use prior arbitration decisions as precedent for their cases.

Monsanto's remedies under its technology agreement

Monsanto has extensive remedies to punish farmers for violating its Technology Agreement. First, Monsanto has the authority to preclude farmers from ever using Monsanto seed products in the future. Given the large market share Monsanto controls through ownership or license agreements, this could make obtaining seed difficult. Next, Monsanto has the option of suing the farmer for damages, attorneys' fees, and costs of enforcing the Technology Agreement.[50]

The Technology Agreement lists Monsanto's damages:

...
b. Injunction; Infringement and Contract Damages. If Grower is found by any court to have infringed one or more of the U.S. patents listed below, Grower agrees that Monsanto will be entitled to a permanent injunction enjoining Grower from making, using, selling, or offering for sale Seed and patent infringement damages to the full extent authorized by 35 U.S.C. § 283. Grower will also be liable for all breach of contract damages.
c. Attorneys Fees. If Grower is found by any court to have infringed one or more of the U.S. patents listed below or otherwise to have breached this agreement, Grower agrees to pay Monsanto and the licensed Monsanto Technology provider(s) their attorneys fees' and costs.[51]

Under this provision, farmers could be liable for thousands and hundreds of thou-

Continued on page 7

GMO contracts/Cont. from p. 6
sands of dollars in damages and potentially face bankruptcy.[52] This potential for large damage awards may result in many farmers settling with Monsanto instead of litigating claims and allowing a court to decide who is correct.[53]

However, in *Monsanto Co. v. McFarling* a federal appeals court held that Monsanto's remedies provisions from a 1998 Technology Agreement were "invalid and unenforceable under Missouri law" and vacated the $780,000 judgment against the farmer for saving seed.[54] The court reasoned that Monsanto's liquidated damages clause that formerly required farmers to pay 120 times the applicable technology fee times the number of bags of seed purchased is not a reasonable estimate of the financial harm Monsanto would likely suffer if a farmer saved seed and breached its Technology Agreement.[55] The appeals court sent the case back to the district court to compute the actual damages the farmer caused Monsanto "based on the number of bags of seed saved and replanted."[56] According to the farmer's attorney in this case, after the court's ruling the farmer will probably end up paying Monsanto about $10,000 instead of $780,000.[57]

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[1] Farmers' Guide to GMOs was authored by Farmers' Legal Action Group (FLAG) Staff Attorney David Moeller and Rural Advancement Foundation International-USA's Michael Sligh and is available at http://www.flaginc.org. AALA members Peggy Grossman, Neil Harl, Don Uchtmann, and Sarah Vogel provided valuable input, but are of course not responsible for the content of the guide or this article.

[2] Neil Hamilton, *Why Own the Farm If You Can Own the Farmer (and the Crop)?:Contract Production and Intellectual Property Protection of Grain Crops*, 73 Nebr. L. Rev. 48, 89-94 (1994).

[3] According to Monsanto, this is a benefit to both farmers and seed companies. Monsanto Co., *Seed Trait Stewardship*, *at* http://www.monsanto.com/monsanto/us_ag/content/stewardship/training/course/content/lesson3/mon01_l03t02p01.htm.

[4] Monsanto Co., *2005 Technology/Stewardship Agreement* at para. 7, General Terms.

[5] J.W. Looney & Anita K. Poole, *Adhesion Contracts, Bad Faith and Economically Faulty Contracts*, 4 Drake J. Agric. L. 177 (1999).

[6] Monsanto Co., *2005 Technology/Stewardship Agreement*.

[7] *Monsanto v. Dawson*, No. 4:98CV02004, 2000 U.S. Dist. LEXIS 22392 (E.D. Mo. Nov. 24, 2000) (unpublished).

[8] For a good checklist of things farmers should consider before signing a grain contract of any type, *see* Iowa Attorney General's *Grain Production Contract Checklist* (1999), *available at* http://www.state.ia.us/government/ag/working_for_farmers/brochures/grain_production.html.

[9] *See generally* Nicole C. Nachtigal, *A Modern David and Goliath Farmer v. Monsanto: Advising a Grower on the Monsanto Technology Agreement 2001*, 6 Great Plains Nat. Resources J. 50 (2001).

[10] Monsanto Co., *2005 Technology/Stewardship Agreement* at para. 4, Grower Agrees.

[11] Monsanto Co., *2005 Technology/Stewardship Agreement* at para. 4, Grower Agrees.

[12] 5 U.S.C. § 552a(b); *Doe v. Veneman*, 380 F.3d 807 (5th Cir. 2004).

[13] *Monsanto v. Trantham*, 156 F. Supp. 2d 855 (W.D. Tenn. 2001) (holding that a Tennessee cotton and soybean farmer infringed on Monsanto's patent by saving seed).

[14] Monsanto Co., *2005 Technology Use Guide*, at A Message About Seed Stewardship, *at* http://www.monsanto.com/monsanto/us_ag/content/stewardship/tug/tug2005.pdf. Monsanto's 2005 Technology/Stewardship Agreement is currently not yet available on Monsanto's website.

[15] Monsanto claims seed companies receive hundreds of calls each year regarding patent violations. Monsanto Co., *Seed Trait Stewardship*, *at* http://www.monsanto.com/monsanto/us_ag/content/stewardship/training/course/content/lesson2/mon01_l02t01p08.htm (accompanying audio).

[16] National Academy of the Sciences, Genetically Modified Pest-Protected Plants: Science and Regulation § 2.9 (2000), *available at* http://books.nap.edu/books/0309069300/html; Gregory Jaffe, *Planting Trouble: Are Farmers Squandering Bt Corn Technology—An Analysis of USDA Data Showing Significant Noncompliance with EPA's Refuge Requirements*, Center for Science in the Public Interest (June 2003), *available at* http://www.cspinet.org/new/pdf/bt_corn_report.pdf.

[17] For farmers using YieldGard Rootworm corn, Monsanto defines a refuge as "simply a block or strip of corn that does not contain B.t. technology for control of western, northern or Mexican corn rootworm." The TUG does allow the application of some non-Bt insecticides. Monsanto Co., *2005 Technology Use Guide*, at 5.

[18] Monsanto Co., *2005 Technology Use Guide*, at 5.

[19] Justin Gillis, *Some Farmers Not Following Rules For Biotech Corn: Crops' Usefulness Is at Risk,* Washington Post at E4 (June 19, 2003).

[20] Andrew Burchett, *Bt Cops: Seed companies have a new job—policing your use of Bt corn*, Farm Journal at 16 (Feb. 2003). The article describes how EPA is requiring enforcement of Bt crop refuges. If companies do not comply, EPA can withdraw the company's registration, therefore revoking the ability to sell the GMO trait.

[21] Monsanto Co., *2005 Technology Use Guide*, at 1. There is a similar monitoring program in place for Monsanto's Bollgard Cotton. Monsanto Co., *2005 Technology Use Guide*, at 19.

[22] 7 U.S.C. § 136l(a)(1). *See also*, Scott Kilman, *EPA May Fine Units of DuPont, Dow Chemical for Seed Trials in Hawaii*, Wall Street Journal (Aug. 14, 2002) (reporting that DuPont subsidiary Pioneer and Dow Chemical were facing fines of $5,500 each for violating EPA rules on field trials involving pesticide resistant GMOs).

[23] General Accounting Office, *International Trade: Concerns Over Biotechnology Challenge U.S. Agricultural Exports*, GAO-01-727 (June 2001).

[24] Monsanto Co., *2005 Technology/Stewardship Agreement* at para. 7, General Terms.

[25] U.S. Request for WTO Panel on European Biotech Moratorium (Aug. 18, 2003), *available at* http://www.state.gov/e/eb/rls/rm/2003/23372.htm.

[26] Monsanto Co., *2005 Technology Use Guide*, at 15. Monsanto's TUG Grain Stewardship section states: "The United States regulatory agencies granted full approval to corn containing the Roundup Ready, YieldGard Rootworm (including all stacks e.g., YieldGard Plus), traits for commerce within the U.S. including approval for marketing and consumption as food, food ingredients, and feed for livestock. These products also have food and feed approval in Japan and Canada. However, regulatory approval for grain/commodities harvested containing Roundup Ready, YieldGard Rootworm, or YieldGard Plus, is pending in the European Union. As a result, the grower is required to find a market that does not ship this grain or products processed from this grain to the European Union."

[27] Monsanto Co., *2005 Technology/Stewardship Agreement* at para. 6, Grower Understands.

[28] Robert Schubert, *Are Roundup Ready Soybeans Pushing Out Conventional Varieties?*, CropChoice (March 28, 2001) *at* http://cropchoice.com/leadstry.asp?recid=270 (describing the story of Tom and Gail Wiley's market rejection of organic soybeans due to GMO contamination).

[29] Donald L. Uchtmann, *StarLink—A Case Study of Agricultural Biotechnology Regulation*, 7 Drake J. Agric. L. 159 (Spring 2002); Amelia P. Nelson, *Legal Liability in the Wake of StarLink: Who Pays in the End*, 7 Drake J. Agric. L. 241 (Spring 2002); Rebecca M. Bratspies, *Myths of Voluntary Compliance: Lessons from the StarLink Corn Fiasco*, 27 Wm. & Mary Envtl. L & Pol'y Rev. 593 (Spring 2003).

[30] Lonie Boens, *Glyphosate-Resistant Soybeans: An Introduction*, 6 Great Plains Nat. Resources J. 36 (Fall 2001).

[31] Monsanto Co., *2005 Technology/Stewardship Agreement* at para. 4, Grower Agrees.

[32] In addition to Roundup, Monsanto allows select other herbicides to be used and still qualify for Roundup Rewards benefits including Field Master™, Ready Master™ ATZ, RT Master™ and Fallow Master™. Monsanto Co., *2005 Technology Use Guide*, at 24.

[33] Monsanto Roundup Rewards Brochure: 2005 Protecting Your Trait and Herbicide Investments. According to Monsanto's website, since 1997, 180,000 growers have participated in

Cont. on p. 3

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Agricultural Law Update

American Agricultural Law Association News

Editor's note: please note the change of e-mail address for the Editor. The new address is aglawupdate@ev1.net If you have communicated by e-mail with the editor recently and have not received a response, please send a new message. Computer problems have intervened.

Message from the Executive Director

As I look forward to the new year for the association, I plan to focus on increasing the benefits to the members and increasing the awareness of the benefits of membership in the AALA to the agricultural law community. A major source of support for both of these goals is the AALA web site. I receive most of the new membership applications during the year from visitors to the web site. Initially, I am working with a web designer to update the design and administration of the AALA web site. A sample of the first two pages is now available at www.aglaw-assn.org/sample. I encourage all members to view the two sample pages and send me their comments. The pages are supposed to be designed for all computers and all internet browers but there may be some problems that may show up during the test phase, so check out the pages and report any problems to me. In the coming months, the remainder of the site will be redesigned to conform with the sample pages, resulting in faster downloading and easier access and browsing of the entire site. Once the entire site is redesigned, I will begin developing new functions for the site. I encourage members to suggest new functions and content for the site. I also encourage members to send me suggestions for association activities that can increase the benefits to the members.

I have really appreciated all the positive comments I have received from members during my tenure in 2004. I hope I can provide even better service in the new year.

Robert Achenbach, AALA Executive Director
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