AALA SESSION #13: Concurrent Breakouts

Genetic Editing in Agriculture -- Will the Cartagena Protocol on Biosafety Restrict Access to Foreign Markets, Causing Litigation over Market Disruption?

MODERATOR OVERVIEW: THE LOOMING THREAT TO INNOVATION IN SYNGENTA PRECEDENT

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This article will sum up the current status of the lawsuits filed against Syngenta for disrupting the U.S. corn export market to China. We will suggest that the outcome of these cases could pose a challenge to the future use of agricultural biotechnology in the United States.

I. Factual Background

Syngenta commercialized its biotech corn trait, Agrisure Viptera® MIR162 ("Viptera") in the United States starting in 2011. Although Syngenta had obtained regulatory approval for the sale of Viptera in the United States, Argentina, Japan, Canada, and the European Union, Syngenta's application for importation and cultivation approval from the Chinese Ministry of Agriculture remained pending since its submission in March 2010. Nevertheless, Syngenta told growers that it expected approval from China in March 2012.[1] In late 2011, however, several major grain trading companies (Bunge and Consolidated Grain & Barge (CGB)) told growers it would not buy Viptera corn, since it saw "market signals" coming from China about its corn needs and anticipated selling corn to China, which had a zero-tolerance policy on the import of genetically-modified corn traits that had not been approved by the Chinese government.

[1] Paul Christensen, Chinese Approval of Syngenta Agrisure Viptera, Seed in Context Blog (February 21, 2012), http://www.intlcorn.com/seedsiteblog/?p=268 (last visited April 28, 2017).

Despite the concerns of the grain trade and China's increasing need for imported corn, Syngenta continued to market Viptera in the United States in 2012. Syngenta's decision not to wait for Chinese approval had the support of the National Corn Growers Association and was consistent with industry precedent. For instance, Monsanto launched several new corn traits (MON89034 in the Genuity VT Triple PRO stack and SmartStax with Dow) without waiting for Chinese approvals in 2010, and these traits were grown on more acres than Syngenta's Viptera traits were grown in 2011.

Syngenta also responded to the grain traders' decision to reject Viptera by suing Bunge for allegedly attempting to illegally block the sale of the Agrisure Viptera trait. Since Viptera was sold in compliance with all U.S. regulatory requirements and longstanding industry guidance in the U.S., Syngenta felt it had a legitimate claim. After a federal court in Iowa denied Syngenta's request for an injunction and dismissed most of Syngenta's claims, Syngenta dismissed the case in December 2014.[2]

Over two years later, China stopped accepting all U.S. corn imports in November 2013 and did not begin importing U.S. corn again until late 2014 after China approved Viptera. Although the adverse economic impact of the 13-month trade disruption will be debated for years, in April 2014, a grain trade association issued a report suggesting multi-billion dollar adverse economic impacts.[3]

[2] Syngenta's decision to ultimately dismiss the case was likely due to the fact that its event was approved in China, and that it would have been hard to prove that a buyer does not have the right to choose not to spend money on crops or other products based on their international regulatory status. Despite the outcome of the case, one should wonder whether Syngenta's decision to sue Bunge made it easier for the other grain traders to decide to sue Syngenta.

[3] *See* Max Fisher, Lack of Chinese Approval for Import of U.S. Agricultural Products Containing Agrisure Viptera™ MIR 162: A Case Study on Economic Impacts in Marketing Year 2013/14, NAT'L GRAIN & FEED ASS'N (April 16, 2014), http://ngfa.org/wp-content/uploads/Agrisure-Viptera-MIR-162-Case-Study-An-Economic-Impact-Analysis.pdf. (last visited April 28, 2017).

In late 2014 and early 2015, grain traders sued Syngenta seeking compensation for lost export markets (measured in millions of dollars) and growers filed class actions seeking billions of dollars for alleged impacts to corn prices quickly thereafter. The plaintiffs claimed that Syngenta failed to follow industry standards for stewardship to keep Viptera out of the export distribution channel and falsely told growers that China would approve the trait in 2012.[4] The growers asserted claims based on public nuisance, negligence, and fraud, while the grain traders brought negligence claims and claims under consumer protection statutes. The federal cases ultimately were consolidated in the U.S. District Court for the District of Kansas in Kansas City.

After dismissing some claims on summary judgment motions, the MDL court certified the class action and Syngenta's interlocutory appeal of the class certification order was denied. A grower[5] wanting to opt out had to send a letter postmarked by April 1, 2017 to be excluded from the class. The first MDL case against Syngenta is set for trial in June 2017.[6]

Parallel actions in state court are also going to trial in 2017. A Minnesota class action case allowed punitive damages. Non-class cases are also pending – some growers opted out of the class, perhaps remembering resentment of the "gift card" settlements in the StarLink™ ("StarLink") corn litigation. One grain trader case is slated for 2021 trial in Wisconsin State.

Now that nearly all the trials of test cases have taken place or reached settlement in state and federal court, attorneys can assess the potential liability in future actions based on similar facts. Rulings made in these cases will define the future boundaries for industry stewardship in

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[4] *See, e.g.*, Hadden Farms Inc. v. Syngenta Corp., No. 3:14-cv-03302-SEM-TSH (C.D. Ill. filed Oct. 3, 2014) (class action complaint for damages and injunctive relief), http://www.fien.com/pdfs/IllinoisvSyngenta.pdf ("Syngenta Corn Class Action"). (last visited April 28, 2017).

[5] USDA estimates around 440,000 farmers grow corn in the United States.

[6] U.S District Judge Certifies Syngenta Corn Case Class Action (Sept. 27, 2016), http://www.syngentacornlitigation.com/2016/09/26/u-s-district-judge-certifies-syngenta-corn-case-class-action/; Order and notice at www.syngentacornlitigation.com/wp-content/uploads/2016/12/Syngenta2016_Notice_v5.pdf. (last visited April 28, 2017).

all commodity crops, with potential negligence for failing to foresee future disruption of a potentially major export market for corn, soy or other exported agricultural products.

II. Litigation Positions

For the first time in the history of litigation over biotech crops, a claim for nuisance or negligence went to trial alleging that a crop that had full approval for marketing in the United States disrupted an overseas market causing economic impact. Given the history of similar litigation involving StarLink corn and LibertyLink® ("LL") rice, the pending Syngenta litigation appears to have expanded the boundaries of common law claims for nuisance and negligence by finding that Syngenta had a duty to seek major market approval (e.g., China, a major market as defined by the grain trade or a court), in terms of foreseeability of harm to growers from loss of a "major" overseas market. Companies making lists of nations where they must seek approval for their new biotech crops may find it challenging to predict which markets may be major in a few years. In some cases, companies may overspend getting approval in more markets than will be required at the time of marketing the crop.

Courts have traditionally adapted common law claims to address novel challenges and economic harms occurring in society, and this case fulfilled a prediction that I made, as counsel to the American Soybean Association, in 1998 in a dispute over major market approval for the AgrEvo Liberty Link Soybean. In that negotiation, without the benefit of current court precedents, my grower clients insisted that unapproved-overseas biotech crops seek a specialized market (e.g., not organic or specialty crops, but one seeking to protect the benefits of export markets). Growers were paid premiums over commodity price to ensure that they took steps to maintain their own identity preserved production (to avoid commingling in an unapproved market overseas).

With an expanded view of what is a "major" market, costs of regulatory approval increase. Since this Syngenta precedent goes beyond what growers have set as "major" in their own stewardship standards after consulting with grain traders, this precedent could cause a seismic shift in biotech crop innovation, shutting down some product lines and limiting others to carefully contained production that does not disrupt trade.

A. Negligence

Plaintiffs' core claim of negligence[7] has survived all motions and could provide the best route to recovery. To prevail on their negligence claim against Syngenta, the plaintiffs will have to prove that Syngenta had a legal duty to avoid disrupting exports to China and that its failure to exercise due care caused plaintiffs to incur actual damages.

In response, Syngenta will argue that it owed no duty to growers or grain traders to wait for approval from China and that segregation for export interests is the growers' challenge, depending on the buyers' needs. In support of its position, Syngenta will likely cite to the National Corn Growers Association's ("NCGA") policy which did not require such approvals before launching Viptera.[8] Syngenta may also seek to rely upon the Biotechnology Industry Association's ("BIO") published standards for stewardship, which discuss the need to seek approval in "major" markets with "functioning" regulatory systems.[9] However, it may be an open question whether the 2011 China export corn market was so minimal that it was not "major" and hence the applicable standard of care would only require approval from Japan.

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[7] *See* Non-Producer Plaintiffs' Third Amended Master Complaint at 93-108, *In re* Syngenta Corn Litig., No. 2:14-md-02591-JWL-JPO (D. Kan. Sept. 19, 2016). Available at http://www.ksd.uscourts.gov/non-producer-plaintiffs-third-amended-master-complaint-doc-2530/.(last visited April 28, 2017).

[8] *See*, NCGA, *Know Before You Grow*, (2015), http://www.ncga.com/for-farmers/know-before-you-grow (last visited May 16, 2015); Biotechnology Industry Organization, EXCELLENCE THROUGH STEWARDSHIP, http://excellencethroughstewardship.org/ (last visited April 28, 2017).

[9] Biotechnology Innovation Organization, Excellence Through Stewardship (2015), http://www.excellencethroughstewardship.org/ (last visited April 28, 2017).

While Syngenta was not a member of BIO, it has been a member of BIO's Excellence Through Stewardship (ETS) program since 2008. ETS is a program that BIO members sign up for, which requires companies to engage in stewardship for exports, including analyses of market acceptance. Syngenta allegedly failed to implement stewardship to protect exports to China by segregating Viptera to domestic uses.

To defeat public nuisance claims, Syngenta will also argue that the benefits of getting corn traits into production outweighed the alleged adverse economic impacts. Its experts may claim that lower corn prices in the U.S. were due to high U.S. corn production and were not caused by Chinese rejection of U.S. corn. Indeed, there is no disputing that China had not made any signals of an intent to buy significant shipments of U.S. corn as of spring 2011 when nationwide planting of Viptera began in the United States.[10]

B. Damages

Experts are testifying in various ways for each side on the subject of damages. If would appear that Syngenta's experts opine that the lower corn prices were not impacted by loss of the Chinese market for around a year during a time of high U.S. corn production. Syngenta can also cite NCGA's policy of only requiring approval from Japan and other markets with functioning regulatory systems and BIO's policy of only requiring approval from Japan and Canada. Plaintiffs experts counter by saying that Syngenta's negligence caused damages up to $5.77 billion for the nationwide class and up to $235.4 million for the Kansas class, based upon

[10] Fisher at 5, supra n. 3. (China imports of US corn dipped below one million metric tons ("1 MMT") from 1.2 MMT in 2009-10 (6th largest) to 980 in 2010-11 (5th largest).

opinions of plaintiffs' damages experts.[11] It remains to be seen whether the pending approval of Syngenta's merger with ChemChina (just approved in April 2017 by the EU antitrust authorities)[12] could lead to settlement after the first few trials test the issues in U.S. courts.

III. Conclusion

As is noted above, the court precedents may mean that any grower or grain trader seeking a specialized market (e.g., the benefits of export markets) should maintain their own identity preserved production (to avoid commingling in an unapproved market overseas). Any failure to implement such self-imposed measures may lead to economic loss, but the court may find this loss cannot be recovered in tort against the seller of a U.S.-approved biotech crop that lacked approval in certain export markets. Any decision from his court could define the boundaries of tort law in agricultural biotechnology for years to come.

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[11] Todd Neeley, Syngenta Trial Set: Viptera Class-Action Case in June, (Feb. 2, 2017), available at,https://www.dtnpf.com/agriculture/web/ag/news/article/2017/02/02/viptera-class-action-case-summer. (last visited Apr. 28, 2017).

[12] Reuters, EU set to approve ChemChina's bid for Syngenta, (February 3, 2017) available at http://www.scmp.com/business/companies/article/2067603/eu-set-approve-chemchinas-bid-syngenta.