THE TWISTING PATH OF BIOTECHNOLOGY CROP LIABILITY: EXTENDING THE DUTY OF CARE FOR TRADE DISRUPTION CLAIMS

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The development of biotechnology corn has taken a historically fungible product and transformed it into multiple variants each possessing different genetic traits with real market differences. This distinction between genetic variants is highlighted when products are intended for foreign trade. New genetic traits must receive regulatory approval in each market (country) in which the product will be sold. Because corn has traditionally been sold as a fungible product, it is difficult to maintain strict segregation of varieties of biotech corn once these crops are planted (and cross-pollination can occur) or delivered to grain traders (where commingling can occur). What happens when a biotechnology company markets a product not approved by all of our major market partners and significant cross-pollination or commingling occurs? If a foreign trading partner subsequently rejects shipments of U.S. corn due to evidence of cross-pollination or commingling of non-approved traits, what legal recourse is available to other market participants? The litigation arising from Syngenta's decision to market Agrisure Viptera™ MIR162 ("Viptera™ ")[1] and Agrisure Duracade™, Event 5307 ("Duracade™ ")[2] without first obtaining regulatory approval in China will likely answer some of these questions.

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[1] Syngenta petitioned the United States Department of Agriculture ("USDA") for deregulation of Viptera™ in 2007, and the USDA approved Viptera™ for sale in 2010.
[2] Syngenta petition the USDA for deregulation of Duracade™ in 2011, and the USDA approved Duracade™ for sale in 2013.

Syngenta's marketing of biotech corn not approved for export to China resulted in thousands of claims by other market participants alleging Syngenta disrupted the international corn market. Of particular interest is whether courts will ultimately recognize liability theories brought by third parties for disruption of export trade via claims for negligence, nuisance, or other similar theories of recovery. A ruling rejecting most of Syngenta's motion to dismiss may provide a glimpse into the possible success of these theories. *See In re: Syngenta AG MIR 162 Corn Litigation*, No. 14-md-2591-JWL (D. Kan. Sept. 11, 2015) (*Syngenta Order*), *available at* http://ecf.ksd.uscourts.gov/cgi-bin/show_public_doc?2014md2591-1016 (last visited Sept. 5, 2016).

The Syngenta litigation was brought by three primary groups of plaintiffs: (1) corn producers who did not purchase Viptera™ or Duracade™, but claimed to be damaged due to the infiltration of Syngenta's products in the general domestic corn supply; (2) non-producers who exported, stored, transported or sold corn and claim to be damaged by China's rejection of U.S. corn shipments and (3) and milo producers who claimed the milo market was so closely tied to the corn market they suffered the same harm as the corn producer plaintiffs.. Each group of plaintiffs claimed to be harmed because Syngenta introduced products not approved for import to China and failed to take steps to prevent cross-pollination or commingling resulting in the "contamination" of the general domestic corn supply. As a result, China eventually rejected shipments of U.S. corn and, according to the plaintiffs, caused the market price of U.S. corn to crash.

Syngenta argued that it owed no duty of reasonable care to those who didn't purchase Viptera™ or Duracade™ directly from Syngenta. The court disagreed finding

that Syngenta owed a legal duty to other participants in the interconnected corn market regarding the timing, manner, and scope of Syngenta's commercialization of Viptera™ and Duracade™ . *Syngenta Order* at 8. As the court noted in is 116-page opinion, it did not believe "the risk of a flood of new litigation is sufficiently great and sufficiently unfair to preclude the recognition of a legal duty here." *Id.* at 15. While the legal justification for this decision might be fairly debated, the likelihood this expansion of the duty of care will cause a "flood of new litigation" seems almost certain. The duty to third-parties imposed on Syngenta focuses on how Syngenta released a new biotech variety on the market and the foreseeability of possible harm through cross-pollination and contamination. Put simply, did Syngenta do enough to (a) insure that necessary markets approved their products, and (b) prevent cross-pollination and commingling? The imposition of this obligation will change the landscape of potential liability for biotech companies.[3]

I. Corn Litigation Takes Many Turns in the Maze

The Syngenta litigation raises an important question: did Syngenta have a duty of care to obtain approval from all anticipated major markets before it released a new genetic trait in the market? Syngenta's failure to do so has made it the latest target in mass tort litigation. How Syngenta found itself in this position is a twisted path through a Midwestern corn maze, with choices that Syngenta made along the way dictating its final destination.

Syngenta began this journey with a decision to commercialize Viptera™ in 2010 for planting in 2011. Syngenta applied for and obtained regulatory approval for the sale

[3] Syngenta's attempt to obtain immediate appellate review through an interlocutory appeal of the Syngenta Order was denied.

of Viptera™ in the United States, Argentina, Canada, the European Union, and Japan, but not in China where Syngenta's application for approval remained in "pending" status since its filing in March of 2010.

In late 2011, a leading grain trader, Bunge North America ("Bunge"), told growers it would not buy Viptera™ corn, since it anticipated selling corn to China which maintained a zero-tolerance policy on imports of corn grown from seed with genetically-modified traits not approved by the Chinese government. While China had previously not been a large importer of U.S. corn, in the summer of 2011 China significantly increased the tonnage of corn it imported from the U.S. causing Bunge to treat China as a major export market for domestically grown corn.[4]

To the dismay of an increasing range of grain traders, Syngenta continued to market Viptera™ for planting in 2012 after China ramped up its purchases of U.S. corn and related feed products from 979 thousand metric tons in the 2010-11 trade year to 5.2 million metric tons the following year, even though China's approval of Viptera™ remained in "pending" status.

Despite China's "zero-tolerance policy" for corn with non-approved genetic traits, China did not reject any U.S. imports of corn until November 2013, citing the "contamination" of imports with MIR 162. The grain trade reported this as a multi-billion dollar trade disruption incident. *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

[4] In response to Bunge's decision to reject Viptera™, Syngenta sued Bunge for product disparagement and other related claims. This case was eventually dismissed, and may have had little basis in the law, given the treatment it received from federal courts in Iowa, which dismissed most of the claims before the case was ultimately dismissed by Syngenta.

(Apr. 16, 2014), http://ngfa.org/wp-content/uploads/Agrisure-Viptera-MIR-162-Case-Study-An-Economic-Impact-Analysis.pdf.

China's rejection of millions of metric tons of U.S. corn led two major grain traders, Trans Coastal Supply Co. and Cargill Inc., to sue Syngenta seeking $131 million in damages due to Syngenta's alleged "premature release" of Viptera™ . On December 17, 2014, 1,460 days after Syngenta filed its application, Viptera™ was finally approved for import by the Chinese government.

Before China's rejection of U.S. corn due to contamination concerns, Syngenta doubled down on its strategy of marketing corn not approved in all major markets. In February 2013, Syngenta received approval from the USDA for Duracade™ corn, which was also approved for sale in Canada, Japan, Mexico and South Korea, but not in China or the European Union. Ultimately, Syngenta stopped the sale of Duracade™ in Canada after major corn export trading companies refused to accept Duracade™ corn. Yet, Syngenta continued selling Duracade™ in the U.S., exposing the U.S. export market to China and the European Union to further trade disruption. The Syngenta plaintiffs allege this later introduction of Duracade™ into the U.S. corn supply prolonged the market disruption begun by Viptera™ .

These decisions proved fateful, as Syngenta's conduct invited litigation from both grain traders and class action attorneys. A mass tort lawsuit was filed on behalf of a class of growers over export-related price impacts of an "unapproved" variety of biotech crop. In late 2014 and early 2015, growers and grain traders sued Syngenta seeking compensation for lost export markets and impacts to corn prices, citing a novel theory – that a biotech crop or "genetic event" (MIR 162) approved by the USDA, with due consideration for export impacts, could nevertheless be the subject of common law

claims (negligence, nuisance, fraud, etc.) when export flows of corn were disrupted by a seemingly arbitrary – and certainly sudden and surprising – decision by a major market overseas to stop trade based on the lack of approval of that crop. In selling these traits, Syngenta allegedly failed to follow industry standards for stewardship to keep Viptera™ and Duracade™ out of exports and falsely told growers in late 2011 that China would approve the Viptera™ trait in 2012.

These suits include a mass tort action filed by many growers which was consolidated under Multi-District Litigation ("MDL") rules in the U.S. District Court for the District of Kansas in Kansas City, but has yet to be certified as a class. *See, e.g., Hadden Farms Inc. v. Syngenta Corp.*, No. 3:14-cv-03302-SEM-TSH (C.D. Ill. filed Oct. 3, 2014) *available at* http://www.fien.com/pdfs/IllinoisvSyngenta.pdf. The growers' allegations include public nuisance, negligence, and fraud claims. In state court actions that have resisted being consolidated into the pending MDL, grain traders sued Syngenta under consumer protection statutes and negligence.

II. Evolution of Common Law Toward Protecting Export-related Economic Impacts

Biotech seed companies have long known of the potential for product liability arising from the commingling of a biotech crop with other crops, causing the "adverse" impact of loss of marketing ability. *See, e.g.,* Thomas P. Redick & Christina G. Bernstein, *Nuisance Law and the Prevention of "Genetic Pollution": Declining a Dinner Date with Damocles*, 30 ENVTL. L. REP. 10, 328, 337 (2000) (applying nuisance law to GM varieties not approved in EU, reasoning that a defendant who does not take reasonable steps to prevent an interference with plaintiff's enjoyment of property may be liable in nuisance).

Given this liability risk, however remote, biotech seed companies have generally adopted the stewardship requests of grower associations. For soybeans, the majority of which are exported with half of the exports going to China, there is no question that China is a major market. Grower associations and biotech companies have uniformly required and obtained major market approval prior to commercial launch of a new biotech soybean in the U.S. This has arguably established an industry wide standard of care in the soy industry, the violation of which might be considered to constitute negligence.

The Syngenta court seems receptive to this argument. The court found it significant that "[t]he parties were not strangers, but rather were part of an interconnected industry and market, with expectations on all sides that manufacturers and growers and sellers would act at least in part for the mutual benefit of all in that interconnected web." *Syngenta Order* at 10. The court then viewed Syngenta's conduct through the lens of whether it created an unreasonable risk of harm to others in the market.

Liability law applicable to biotech has evolved in steps. The Starlink corn litigation established that commingling was a "physical" injury giving rise to compensation for economic loss with damages measured by a drop in corn prices alleged to be due to the commingling. Ten years later, the same theory was applied to export related economic impacts in the LL rice contamination trials where commingling was found to trigger a compensable export-related economic impact.

In neither of these cases, however, did the plaintiffs rely on an industry standard of care to determine what constitutes a "major market" to determine where approval would be required prior to releasing a biotech product for sale.

While corn exports to foreign markets have been disrupted due to unapproved-overseas biotech corn events, there have been no successful lawsuits filed on those impacts to date. In the corn industry, the National Corn Growers Association ("NCGA") leaves "major market" decisions to growers and their grain trade customers. When a grain trading company like Bunge limits its purchases of U.S. corn due to market signals coming from China, the chain of U.S. commerce must adjust to avoid trade disruption. Markets have been disrupted, particularly to the EU, but this cost was outweighed by the benefits of having new genetic events to increase yield and reduce pest pressures. Through a "halo effect" noted in some studies, even organic corn growers benefitted from a general regional reduction in pests. Without a clear standard of care, how can a biotech seed company that delivered economic benefits for royalty payments be held responsible for trade disruption, however foreseeable, that depended on the whims of an overseas market?

III. Syngenta's Right to Sell Without "Major Market Approval"

The Syngenta litigation may answer the longstanding question of whether biotech seed companies must seek "major market" approval (as defined by the grain trade or a court) and foresee and prevent future trade disruption under applicable common law principles.

A. Major Market Approval?

To assert that it had no duty to obtain "major market" approval, Syngenta can point to 20 years of a steady stream of biotech corn traits not approved in many major export markets (except for Japan, the largest importer of U.S. corn). Moreover, according to Syngenta, China was not a major market in 2011, and China's need for U.S. corn caused it to ignore the potential presence of an unapproved corn event for two

years. Megan Townsend, *In Launching the Traits of Tomorrow Comes Responsibility*, SEED WORLD (2015), http://seedworld.com/in-launching-the-traits-of-tomorrow-comes-responsibility/.

In the Syngenta litigation, the court recognized there is a countervailing policy to avoid "conflict with the governmental approval of the product," but found that recognizing a new duty here "would not usurp any regulatory agency's function." *Syngenta Order* at 21. Importantly, the regulatory review by USDA of biotech crops has recently included an increasingly detailed discussion of export-related issues, including approval in major markets for corn, soybeans, alfalfa, and other crops. The Syngenta court nevertheless found a common law duty, stating that "plaintiffs have alleged facts showing a relationship between the parties in an interconnected market, as well as representations by Syngenta concerning steps that it would take to protect stakeholders." *Id.*

Citing *Bayer CropScience LP v. Schafer*, Syngenta tried to invoke the "stranger economic loss doctrine" ("SELD"), stating that the corn growers seeking economic loss were remote strangers in the marketplace, as many were not customers of Syngenta. *See Bayer CropScience LP v. Schafer*, 385 S.W.3d 822 (Ark. 2011) (rejecting SELD in strict liability cases). The court, however, found too many facts that could create a "special relationship" between Syngenta and U.S. corn growers and grain traders, whom Syngenta called "stakeholders" and with whom it engaged in "stewardship" discussions over many years.

B. Negligence

Plaintiffs' negligence claim alleges that Syngenta had a duty to seek major market approval after Bunge's 2011 notice and to wait for China's regulatory approval of Viptera™ before marketing it widely. To prevail, Plaintiffs must prove: (1) Syngenta had a legal duty of due care to avoid disrupting export markets; (2) it failed to exercise due care; (3) its failure caused the harm alleged; and (4) plaintiffs suffered actual damages.

Citing NCGA and the Biotechnology Industry Association ("BIO") policies for stewardship that only require approval from Japan, Syngenta will likely argue that it owed no duty to growers or grain traders to wait for approval from China. Inherent in this claim is the argument that responsibility for segregation of varieties for export is the growers' and grain traders' problem, not Syngenta's issue to address. *See,* Biotechnology Industry Organization, EXCELLENCE THROUGH STEWARDSHIP, http://excellencethroughstewardship.org/ (last visited May 16, 2015).

To defeat public nuisance claims, Syngenta will argue that the benefits of getting corn traits into production outweigh the alleged adverse economic impacts. Its experts may claim that lower corn prices were due to high U.S. corn production, not Chinese rejection of U.S. corn. China had not signaled its intent to buy U.S. corn by spring 2011 when nationwide planting of Viptera™ began in the U.S. Fisher, *supra.*

While Syngenta was not a member of BIO, it has been a member of BIO's Excellence Through Stewardship ("ETS") program since 2008. Under ETS, BIO members engage in stewardship for exports, including analyses of market acceptance. *See* Karen Batra, *Biotech Industry Showcases Stewardship Through ETS Program,* BIO (June 17, 2008), https://www.bio.org/media/press-release/biotech-industry-showcases-stewardship-through-ets-program (member listing includes David Nevill, Syngenta Seeds, Inc. - Research Triangle Park, N.C.). Syngenta is alleged to have failed

to implement a duty of stewardship to protect exports to China by segregating Viptera™ and Duracade™ to U.S. domestic uses.

Syngenta has cited its relationship with its seed buyers to reject this duty, stating: "[F]armers don't have any exposure whatsoever to Chinese corn rejection. . . . they sell their corn to the elevator" who sells to a grain trader. SYNGENTA, FIRST QUARTER 2014 SALES TRANSCRIPT 28 (2014), *available at* https://www.syngenta.com/global/corporate/SiteCollectionDocuments/pdf/transcripts/q1-2014-transcript-syngenta.pdf (quoting Michael Mack, Syngenta CEO). Willing growers must decide who to sell to and willing sellers decide who to purchase from.

Growers who know of buyers' export-related expectations arguably have a duty to protect their economic interests. A grower can call Syngenta or check NCGA's "Know Before You Grow" webpage or the International Service for the Acquisition of Agri-biotech Applications ("ISAAA") database for export approval information prior to planting or making sale decisions.

D. Damages

Last, Syngenta's experts may claim that the lower corn prices were not impacted by loss of the Chinese market for roughly one year, during a time of high U.S. corn production. Instead, corn prices declined from oversupply not impacted by loss of China exports.

III. Conclusion

The court may ultimately find that any grower or grain trader seeking a specialized market (e.g., the benefits of export markets) should maintain their own identity preserved production. 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 this court could define the boundaries of tort law in agricultural biotechnology for years to come.

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