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Review

Aala-cast roundtable on genetic editing 2017 – Durham NC Syngenta case draws boundaries for biotech crop pipeline

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This article will outline the current status of the lawsuits filed against Syngenta for disrupting the U.S. corn export market to China, and chart the potential barriers that it could create for biotech crops down the road. With new tools for plant breeding arriving in the form of genetic editing, the threat of liability could undermine innovation for years to come.

It is clear that the outcome of this case could pose a challenge to the future use of agricultural biotechnology in the United States.

FACTUAL BACKGROUND – MISLEADING MESSAGES ON CHINA APPROVAL

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 was submitted in March 2010.

Nevertheless, Syngenta told growers that it expected approval from China in March 2012, when it should have known, based on feedback from regulatory agencies in China, that approval would still take a year or two more.[1] Like most nations imposing regulatory approval for biotech crops, China had a zero-tolerance policy on the import of biotech corn traits that had not been approved by the Chinese government. Nevertheless, 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.[2]

In late 2011, citing ““market signals” coming from China about its corn needs and anticipated selling corn to China., several major grain trading companies (Bunge and Consolidated Grain & Barge (CGB)) told growers that they would not buy Viptera corn. They cited potential sales of US corn to China.

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.

In late 2011, Syngenta sued Bunge in response to the grain trader’s decision to reject Viptera by 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 right to sell Viptera corn to willing farmers. 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 following approval of Viptera in China.[3]

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 is debatable given increase in corn yields over the past few years, in April 2014, a grain trade association issued a report suggesting several billions of dollars in adverse economic impacts had been caused by Syngenta's decision to market corn that lacked approval from China.[4]

SUMMARY OF LITIGATION AGAINST SYNGENTA

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.[5] The growers asserted claims based primarily on negligence 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 extraneous claims on summary judgment motions, the MDL court certified the class action. Syngenta's interlocutory appeal of the class certification order was denied.[6] A grower[7] 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 went to trial in June 2017,[8] and the jury returned a unanimous verdict for Plaintiffs (7,343 Kansas farmers). The jury awarded full damages in the amount of $217,700,000 ($217.7 Million).[9] Syngenta filed post-trial motions to dismiss and will appeal the verdict if these motions are denied. Syngenta had been acquired by China National Chemical Corp ("ChemChina") which is finalizing its $43 billion takeover.

Parallel actions in state court are also going to trial in 2017. A Minnesota class action case will also allow punitive damages under a recent ruling, with a jury trial for one Nebraska farmer set in April, 2017 settling out for a confidential amount. Syngenta sought and received a motion to dismiss punitive damages in the Kansas class action, before trial.[10] Syngenta settled with a single Nebraska grower in July, 2017.[11]

A defense verdict for Syngenta was awarded by a state court in Ohio based on the economic loss doctrine defense. As that court explained its verdict, while it found that Syngenta had a duty to prevent "physical harm" to growers, it ruled that the economic loss sought by this class of growers (who did not allege pollen drift) was barred by the "economic loss doctrine" ("ELD"), because "[t]here has been no case from any court in Ohio…to show that Syngenta's duty should extend to economic harm caused by the intended use of its products, and this court declines to invent such a duty."[12] In its post-trial motion to dismiss, Syngenta cites this ELD holding and 'submits that there is a substantial basis for rejecting the conclusion that it was "appropriate for the Court to conclude that a [state] court would apply [the ELD] only . . . when the doctrine's purposes would be served."[13]

Syngenta argues that the very nature of this litigation over the ELD precludes a federal court from reaching decisions on such ELD issues.

The majority rule holds that an integral part of the ELD is the principle that the doctrine should be applied as bright-line rule without case-by-case inquiries into whether the policies behind the doctrine apply on the facts of a particular case. By predicting that the States at issue here would apply the ELD "only . . . when the doctrine's purposes would be served," Order 24 n. 10, the Order effectively predicts that all twenty-two States would reject the rule of the Restatement, which does not permit "case-by-case inquiry into the policies at issue." Restatement (Third) § 7 cmt. b. At a minimum, such a holding raises substantial grounds for a difference of opinion."

As previously noted, if its post-trial motions fail to sway the Kansas court, then Sygenta will appeal to the 10th Circuit Court of Appeals.

Another test trial for class plaintiffs in Minnesota is set for September 2017. 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.[14]

After trial of a few more test cases in state and federal court, attorneys will have a better idea of the potential liability in the class actions. Efforts to settle may wait for final approval of the sale of Syngenta to ChemChina. This sale has cleared the EU's competition scrutiny, and ChinaChem's tender offer for Syngenta shares closed May 4, 2017. Even if Syngenta succeeds in winning defense verdicts in the first test trials, Syngenta may choose to wait for various statutes of limitations in key corn belt states to expire to reach a global settlement. This process could take several years. Rulings made in this case will define the future boundaries for industry stewardship in 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.

LITIGATION POSITIONS

For the first time in the history of litigation over biotech crops,

a claim for nuisance or negligence is going 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 could expand 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). While courts have traditionally adapted common law claims to address novel challenges and economic harms occurring in society, this case 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.

Negligence

Plaintiffs' core claim of negligence[15] 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.[16] 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.[17] 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.

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 negligence 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.

Voluntary Undertaking

As an alternative basis for a duty, plaintiffs alleged that Syngenta owed a duty to them under the voluntary undertaking doctrine. Many states recognize that a duty can arise when a defendant offers to take action to prevent some harm, but negligently fails to fulfill its "voluntary undertaking" (like a "Good Samaritan"). See McGee v. Chalfant, 248 Kan. 434 (1991). If Syngenta offered to render stewardship services but failed to exercise due care in the performance of its stewardship program, it could be liable for the harm caused to the growers and grain traders.

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 into a grain trader. Willing growers must decide which buyer gets their corn."[18] Growers who bought Viptera are excluded from the class, and while they may be the ones whose corn commingled, they have not been sued for causing trade disruption.

Syngenta alleges that growers who know of buyers' export-related expectations arguably have a duty to protect their own 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.

Syngenta's failed efforts to contain its corn could give rise to liability under this "voluntary undertaking" basis for imposing a duty of care. In McGee v. Chalfant, the Kansas Supreme Court held that, even in the absence of a special relationship, "the actor may still be liable to third persons when he negligently performs an undertaking to render services to another which he should recognize as necessary for the protection of third persons," as set forth in Section 324A of the Restatement of Torts. See McGee, 248 Kan. at 438. Plaintiffs argue that Syngenta voluntarily undertook compliance with the BIO Policy concerning the commercialization of new GM products but failed to protect the China export market.

In rejecting this argument, the Court in the Syngenta Corn Class Action agreed with Syngenta, finding that Section 324A cannot apply here. Plaintiffs have not sought to recover for "physical" harm and the Restatement section provides for liability "for physical harm resulting from [the actor's] failure to exercise reasonable care to protect his undertaking," see Restatement (Second) of Torts § 324A. Since the Kansas Supreme Court has specifically held that Section 324A "has application only in cases involving physical harm," Barber v. Williams, 244 Kan. 318, 324 (1989), and the court found no "physical harm" from the decline in prices (as opposed to actual commingling with particular corn), the Court granted Syngenta's motion for summary judgment with respect to any claim of negligence in which liability is based on any alleged misrepresentation, a voluntary undertaking, a failure to warn, or a duty to recall.[19]

Damages

Lastly, Syngenta's experts may claim 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. It will 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 allege that Sygenta'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 opinions of plaintiffs' damages experts.[20] 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)[21] could lead to settlement after the first few trials test the issues in U.S. courts.

On June 23, 2017, the jury rendered a verdict against Syngenta for $217.77 million finding negligence in failing to prevent disruption of the export market for U.S. corn to China.

Settlement of Grower Class Actions

In September 2017, Syngenta reached a settlement in pending grower class action cases, ending pending trials in those cases. The terms are not fully disclosed and require court approval, but the amount is reported at up to $1.5 billion. Other pending cases outside the Multi-District Litigation do not appear to be included –for example, pending cases filed by grain traders Cargill and ADM are reportedly outside the scope of this settlement. The settlement awards in this litigation could define the boundaries of tort law in agricultural biotechnology for years to come.

CONCLUSION

The court may 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.

ACKNOWLEDGEMENTS

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