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Department of Agricultural and Consumer Economics, University of Illinois Urbana-Champaign

In re Syngenta AG MIR 162 Corn Litigation: Resolving Questions of Duty

A. Bryan Endres and Lisa Schlessinger

Department of Agricultural and Consumer Economics
University of Illinois

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In a February 25, 2015 update, we discussed the class action lawsuit surrounding Sygenta's genetically modified (GM) corn Agrisure Viptera® and Agrisure Duradade™ (collectively, "Agrisure") that contains the MIR 162 genetic trait. By way of background, we briefly restate some of the facts leading up to this litigation.

Background

The use of Agrisure Viptera® by farmers began in the 2010-2011 crop year.[1] Syngenta had secured approval to commercialize the genetic event in the United States, but not other potential export destinations, such as China.[2] As planting of Agrisure Viptera® continued to increase through the 2013 growing season, plaintiffs allege that Syngenta failed to put in place procedures to contain or otherwise segregate the newly approved variety, despite a persistent lack of approval for the Chinese market. Perhaps because of pollen drift or the inevitable comingling during harvest, storage, or transportation operations, in November 2013 China detected MIR 162 and began rejecting shipments of corn from the U.S.[3] China continued to refuse shipments of U.S. corn, until its government eventually approved MIR 162 in late December of 2014.[4] The resulting market loss is estimated at 1 to 2.9 billion dollars.[5] In an attempt to recover from the decline in the corn market, a class action lawsuit brought by farmers (of both corn and

[1] COMPLAINT, Five Star Farms v. Syngenta AG, U.S. Dist. Ct. for the Dist. Of Kansas, 12/18/14at ¶ 93.
[2] COMPLAINT, at ¶68.
[3] COMPLAINT, intro at 4.
[4] *Syngenta receives Chinese import approval for Agrisure Viptera® corn trait*, SYNGENTA, http://www.syngenta.com/global/corporate/en/news-center/news-releases/Pages/141222.aspx (last visited Sept. 18, 2015).
[5] COMPLAINT, intro at 3.

milo) and elevators, alleged twenty-one counts, including consumer fraud, tortious interference with business, negligence, nuisance, and trespass to chattels.[6] These cases were consolidated into a single proceeding in the U.S. District Court for the District of Kansans.

Previous GM contamination cases in the US (e.g., *In re StarLink Corn Prods. Liability Litigation*, 212 F. Supp. 2d 828 (N.D. Ill. 2002) and *In re Genetically Modified Rice Litigation*, 666 F. Supp. 2d 1004 (E.D. Mo. 2009)) established the viability of negligence and nuisance claims for damages arising from contamination of the food supply with GM products that were *not* yet fully approved for human consumption in the United States. In our February article, we noted that a key and potentially precedent setting question in the Agrisure MIR 162 litigation was how a court would treat a market-based loss caused by contamination from a GM variety that had full approval in the U.S., but not a major foreign market.

A Duty of Care?

Plaintiffs in this case sought to impose a duty of reasonable care on behalf of Syngenta with respect to the timing, manner, and scope of Syngenta's efforts to commercialize new biotech events—in this case corn with the MIR 162 trait. In a Motion to Dismiss prior to the start of the trial, Syngenta challenged this effort on a variety of fronts. Fundamentally, the company argued, it had no post-sale control over how third-parties used its products, and it was the third-party use that may have resulted in contamination of the corn supply chain, not Syngenta's own activities—a similar (and successful) argument used by manufacturers of firearms, cell phones or medications used to make methamphetamine (meth) to defeat claims of responsibility for consumer misuse of their products. In this case, however, the Court rejected Syngenta's argument, noting that the users of the MIR 162 trait planted and harvested the corn exactly as intended by Syngenta and that the harm was not only foreseeable, but specifically anticipated by the company. In sum, the court ruled that as a matter of law, a manufacturer has a duty "to exercise reasonable care not to commercialize and sell its product in a way that creates a risk of widespread harm resulting from the *intended* use of the product by all of its customers."[7] The Court also noted that in the guns, phones or meth cases, the victims of product misuse have no connection to the manufacturer-defendant, thereby exposing the potential defendants to opened-ended liability claims. In the MIR 162 case, on the other hand, the Court noted that the risk of harm was to "participants in an *inter-connected market*, participants whom Syngenta has appeared to embrace as stakeholder, and thus who are especially vulnerable to the wrongful acts alleged by plaintiffs."[8] This notion of an inter-connected market, if adopted by other courts in future cases, could be an important means to frame arguments in other disputes within the agricultural sector (e.g., input suppliers, growers, processors, transporters and retail markets).

Syngenta also sought to dismiss the claims of negligence by arguing that because the products were approved for sale by US regulatory agencies, the company did not owe a subsequent duty to consumers to control commercialization of the MIR 162 product. The Court clearly rejected this argument, holding that the absence of government regulation post-approval did not serve to "immunize Syngenta from any liability for wrongful acts connected to the commercialization of sale of those products."[9] The Court noted with approval the Plaintiffs'' "analogiz[ing] Syngenta's positon to an argument that the receipt of a driver's license immunizes one from any liability for negligent driving."[10] This ruling resolves, at least in-part, a long-standing open issue on the effect governmental product approval (i.e., biotech product deregulation) may have on subsequent claims for damages arising out of the use of the product. And although one should be cautious in reading too much into this preliminary result, it nonetheless establishes an important benchmark in the developing common law of biotechnology in the US.

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[6] COMPLAINT, at ¶222-386.

[7] *In Re*: Syngenta AG MIR 162 Corn Litigation, MDL No. 2591 (Dist. Kansas) Memorandum and Order (Sept. 11, 2015) (emphasis added).

[8] Id. (emphasis added).

[9] Id.

[10] Id.

Next Steps

The rulings described above are a small, but important, part of the Court's comprehensive and expansive 116 page Order regarding Syngenta's Motion to Dismiss the case. A Motion to Dismiss is filed before the trial begins in an attempt to filter meritless cases to avoid wasting the Court's time and resources.[11] While the Court sided with the Plaintiffs on the claims discussed in the previous section, Syngenta prevailed in its effort to dismiss claims regarding failure to warn, trespass to chattels, private nuisance and several other statutory claims.[12] And even on the claims in which the Plaintiffs prevailed, it is important to note that this was a ruling during a pre-trial proceeding, meaning that the claims can go forward, but still must be proven at trial. In sum, this was just one more step on what is likely to be a long and, at times, controversial journey.

References

Schlessinger, L., and A. B. Endres. "The Missing Link: Farmers' Class Action Against Syngenta May Answer Legal Questions Left After the StarLink and LibertyLink Litigation." *farmdoc daily* (5):35, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign, February 25, 2015.

Syngenta receives Chinese import approval for Agrisure Viptera® corn trait, Syngenta. Released December 22, 2014, accessed September 25, 2015. http://www.syngenta.com/global/corporate/en/news-center/news-releases/Pages/141222.aspx

[11] Samuel Issacharoff & Geoffrey Miller, *An Information-Forcing Approach to the Motion to Dismiss,* 5 J. LEGAL ANALYSIS 437, 439 (2013).

[12] The Court did allow Plaintiffs the opportunity to amend many aspects of their Complaint in response to the Order granting dismissal of some counts. Id.