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$750 Million Settlement in GM Rice Contamination

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Bayer CropSciences recently agreed to a $750 million settlement aimed at compensating long-grain rice farmers for damages they suffered when trace amounts of the company's genetically-modified "Liberty Link" rice was found in the commercial rice supply in 2006. The unapproved for commercial use (and import into Europe) GM variety caused a plunge of nearly 14% in rice futures and the removal of U.S. rice from European store shelves. In the wake of the market collapse, thousands of U.S. rice farmers filed suit against Bayer, alleging that the GM contamination ruined their crops and depressed the worldwide market for rice exports. The settlement comes on the heels of four years' worth of bellwether litigation conducted in state and federal courts throughout the U.S. Each verdict in those cases found Bayer negligent in allowing GM contamination, and several state court juries awarded punitive damages against the company–including a $42 million verdict in Arkansas state court that currently is on appeal.

The $750 million voluntary settlement is an attempt to end any future threat of litigation on the Liberty Link rice by allowing rice farmers to opt into one of three settlement pools. Pool one compensates for "market losses" and is available to any farmer who planted rice between 2006 and 2010. The pool establishes a damages schedule that compensates farmers on a per-acre basis for economic damages incurred as a result of decreased demand in the European market for rice. Farmers can prove their damages simply by producing FSA Form 578 (which lists the number of rice acres planted by that farmer in a given year). Farmers who suffered damages beyond the market losses covered by pool one can recover by opting into one of two other settlement pools with more complex filing requirements.

The voluntary settlement as a whole is premised upon one big condition: farmers who farmed at least 85% of the total acres of rice planted in the United States between 2006 and 2009 must participate in the settlement. If that 85% threshold is not achieved, then Bayer reserves the right to opt out. Of course, this would result in additional, individualized litigation in state and federal courts–litigation that Bayer has yet to win in the tests trials.

The Bayer LibertyLink settlement is reminiscent of the 2002 settlement between Aventis Crop Science USA (now StarLink Logistics, Inc.) and thousands of corn farmers affected by contamination of StarLink GM corn with corn intended for food and export channels. In 1998 and 1999, Aventis received EPA approval, subject to several restrictions, to market the StarLink variety of seed corn. In 2000, numerous reports surfaced that human food products had tested positive for the GM protein found in the StarLink corn variety. Manufacturers issued recalls for products containing corn and fear of contamination

convinced some food processors to replace domestically produced corn with imports. The market price for corn fell and many members of the supply chain required testing of all corn shipments for the presence of StarLink DNA. In subsequent class-action litigation, a federal district court in Illinois ruled that Aventis had a duty to ensure that its GM variety did not enter the food supply (i.e., a duty to abide by the EPA's permit restrictions) and that Aventis breached several of these obligations, which caused the plaintiffs' corn to be contaminated. The court then approved a $110 million class-action settlement designed to compensate farmers for their losses.

The settlement in the GM Liberty Link rice litigation is almost seven times the amount in the StarLink corn class action. Considered together, these two GM contamination cases have established additional certainty in the evolving common law of biotechnology–crop developers will be held responsible for the market losses resulting from the unauthorized commingling of their regulated GM products with conventional crops. Accordingly, firms should take particular precautions to develop and implement coexistence strategies that prevent unwanted commingling. This negligence-based liability, however, may not stop only with the large biotechnology firm. Farmers or other operators within the broader agricultural supply chain could face similar claims if they were to be found negligent in any future crop commingling litigation. Therefore basic precautionary strategies, such as following crop planting or marketing restrictions, should be followed and documented, especially if growing a new biotech variety.