

OUTLINE OF WEBINAR PRESENTATION Thomas P. Redick ¹ and Drew Kershen²

I. Background (Kershen – 7 min.)

- a. Starlink corn
 - i. Illegal in U.S. food supply (massive recall) as well as exports
 - ii. Commingling of Starlink was “physical injury” with economic loss recoverable
- b. Liberty Link rice
 - i. Illegal release from field trials.
 - ii. Key export markets in rice disrupted’
 - iii. No Us recall, USDA promptly approved its release.
 - iv. Motion for summary judgment and trials recognized nuisance and negligence claims.

II. Facts of Viptera Corn Launch by Syngenta Leading up to Litigation (Redick – 10 min.)

- a. Farmers who did not buy from Syngenta were economically harmed by commingling.
- b. Bunge NA warned Syngenta of China becoming potentially “major” market in 2011.
- c. National Corn Growers Association policy allowed sale without China approval given the benefits – corn growers need to fight resistant insects with new modes of action.
- d. Syngenta sued Bunge citing NCGA policy in 2011, nearly all claims dismissed.
- e. China corn buying increases 2011-2013 – importing traces of Viptera for two years.
- f. Nov. 2013 – China turns away US corn citing presence of Viptera.
- g. Nat’l Grain and Feed Ass’n report in 2014 says over \$3 billion in economic loss.
- h. Grain trade and grower class actions filed in Q3 2014.
- i. November 2014 – Syngenta gets China approval for Viptera, dismissed Bunge case.
- j. Syngenta motions for dismissal and summary judgment leave claims for nuisance negligence etc. remaining for trials in 2017.

III. Major Issues to be Raised in 2017 Syngenta Trials (Redick – 10 min)

- a. Negligence – did Syngenta have a duty to third parties to seek approval in major markets before commercial launch?
- b. Nuisance – Does Economic loss related to exports outweigh the economic and agricultural management benefits of fighting insect resistance?
- c. Could Syngenta’s alleged misrepresentations give rise to consumer fraud or punitive damages liability?
- d. Scope and Provability of Damages

IV. Implications of Potential Legal Rulings on Innovation in Biotech Crops (Kershen – 12 min.)

- a. Should biotech seed companies have to wait for major market approval before marketing any biotech crop, disregarding the benefits reaped by willing US growers?
- b. Could such liability risk seriously impede innovation in biotech crops, including the novel plant breeding methods (genetic editing) that are transforming the industry, bringing both benefits and enhanced safety to biotech crops?
- c. Should US policy, including common law claims, allow trading partners like the EU and China dictate what can be grown by U.S. Farmers without raising liability risks?
- d. Will identity-preserved specialty crops grow in closed-loops without overseas approvals?

¹ Thomas P. Redick practices solo international environmental law at Global Environmental Ethics Counsel LLC. in St. Louis MO, where he represents corn and soybean growers as well as high tech clients with liability prevention.

² Drew Kershen is the Earl Sneed Centennial Professor of Law Emeritus, University of Oklahoma, College of Law. He taught agricultural law, with an emphasis since 1997 on agricultural biotechnology, for 40+ years.

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- e. Will anticipatory nuisance and mediation help to contain future liability risks?
- f. Impact on Biotech Innovation beyond GM crops

V. Questions and Discussion – 12 min.)

LIST OF RESOURCES FOR FURTHER READING AND RESEARCH

Bunge Refuses Syngenta Agrisure Viptera, IOWA PUBLIC TELEVISION (AUG. 26, 2011), http://www.iptv.org/mtom/story.cfm/lead/8680/mtom_20110826_3652_lead.

BRYAN ENDRES & RACHEL H. ARMSTRONG, IOWA DIRECT FARM BUSINESS: A LEGAL GUIDE TO MARKET ACCESS 31–33 (2013), available at <http://new.nationalaglawcenter.org/wp-content/uploads/assets/articles/IAirectfarm.pdf> (referencing Iowa laws that will govern the issue). (visited Sept. 7, 2016).

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>.

Grossman, "Anticipatory nuisance and the prevention of environmental harm and economic loss from GMOs in the United States" *Journal of Environmental Law and Practice* 2 (2008).

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In re StarLink Corn Products Liability Litigation, 212 F. Supp. 2d 828 (N.D. Ill. 2002)

In re Genetically Modified Rice Litigation, 666 F. Supp. 2d 1004 (E.D. Mo. 2009), adhered to on reconsideration, 2011 WL 5024548 (E.D. Mo. 2011).

In re Syngenta AG MIR 162 Corn Litigation, Memorandum and Order No. 291, No. 14-md-2591-JWL, (Sept. 26, 2016).

Nicholas Kalaitzandonakes, The Economic Impacts of Asynchronous Authorizations and Low Level Presence: An Overview, International Food & Agricultural Trade Policy Council (October, 2011) <http://www.agritrade.org/Publications/documents/LLPOverview.pdf> (visited September 7, 2016).

Drew L. Kershen, LEGAL LIABILITY ISSUES IN AGRICULTURAL BIOTECHNOLOGY, NAT'L AGRIC. LAW CTR. 1, 10–12 (2002), available at http://nationalaglawcenter.org/wp-content/uploads/assets/articles/kershen_biotech.pdf

Drew Kershen, Legal Liability and Agricultural Biotechnology: Ten Questions, UC-Davis (2009), available at <http://agribiotech.info/details/KershenFinal%2003%20layout.pdf>

Know Before You Grow, NAT'L CORN GROWERS ASS'N, <http://www.ncga.com/for-farmers/know-before-you-grow> (last visited May 16, 2015); EXCELLENCE THROUGH STEWARDSHIP, <http://excellencethroughstewardship.org/> (last visited May 16, 2015).

Marsh v. Baxter, WASC 187 (CIV 1561 of 2012)(2014); See also Rachael Oxborrow, Marsh v Baxter: Organic farmer loses appeal, ordered to pay \$800,000 as pleas grow for farm 'co-existence, Farm Weekly, (September 3, 2015) <https://www.geneticliteracyproject.org/2015/09/03/marsh-v-baxter-organic-farmer-loses-appeal-ordered-pay-800000-pleas-grow-farm-co-existence/> (visited September 7, 2016).

Allison Peck, *Plant Biotechnology Law After Geertson Seed Farms: Potential Impacts on Regulation, Liability, and Coexistence Measures*, NAT'L AGLAW CTR. 11 (2008), available at http://nationalaglawcenter.org/wp-content/uploads/assets/articles/peck_aftergeertson.pdf (visited September 7, 2016).

Mark A. Pollack, Gregory C. Shaffer, WHEN COOPERATION FAILS: THE INTERNATIONAL LAW AND POLITICS OF GENETICALLY MODIFIED FOODS at 296 (Oxford 2009)

Press Release, Syngenta Receives Chinese Import Approval for Agrisure Viptera® Corn Trait (December 22, 2014).

Thomas P. Redick, Liability Prevention for Agricultural Biotechnology, Drake Law Journal 2017 (in press)

Sample v. Monsanto Co., 283 Fed.Supp.2d 1088 (E.D. Mo. 2003) (summary judgment granted on economic loss defense).

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Syngenta AG Case Activity, LAW360, <http://www.law360.com/companies/syngenta-ag/dockets> (last visited May 16, 2015).