

GMO LITIGATION

J PETE LANEY

The Law Offices of J Pete Laney
Westgate Building
1122 Colorado Street, Suite 111
jpete@jpetelaneylaw.com

State Bar of Texas

10th ANNUAL

JOHN HUFFAKER AGRICULTURAL LAW COURSE

May 26-27, 2016

Lubbock

CHAPTER 11



The LAW OFFICES OF
J PETE LANEY

SHORT BIO

J Pete Laney is a practicing attorney primarily handling litigation, administrative law matters, and governmental and legislative affairs.

In his trial practice, Mr. Laney handles cases in both state and federal court throughout Texas in a wide variety of matters involving agricultural law, oil and gas, business disputes, and matters regarding landowner rights. Mr. Laney has represented farmers, ranchers, Fortune 500 companies, as well as small businesses.

Mr. Laney represents clients before the Texas Legislature and state agencies on public policy and regulatory matters. Over the past decade, he has been involved in drafting and advocating major pieces of legislation and changes to regulations in the areas of agricultural law, water, healthcare, and others.

In his administrative law practice, Mr. Laney is active in representing clients in a wide array of licensing and regulatory matters at various state agencies, and routinely tries cases at the State Office of Administrative Hearings, and handles administrative appeals in State District Court and the Court of Appeals.

Mr. Laney has been named a Rising Star in Texas Law and Politics published by Texas Monthly. He is a Fellow of the Texas State Bar Foundation, one of the highest honors that can be bestowed upon a member of the Texas Bar, and has served on several State Bar Planning Committees. Mr. Laney also has been a guest speaker at Baylor University School of Law, the University of Texas School of Law, and has made numerous presentations regarding the practice of law and governmental affairs.

Mr. Laney grew up in Hale Center, Texas and earned a Bachelor of Science in Agricultural Communications from Texas Tech University, and his law degree from Baylor University School of Law.

If you would like more information, please contact Mr. Laney at 512-473-0404 or by email at jpete@jpetelaneylaw.com

###

TABLE OF CONTENTS

1. WHAT IS GENETICALLY MODIFIED ORGANISMS “GMO” LITIGATION?	1
A. Labeling requirements for products containing GMO’s	1
B. Regulations regarding the use of GMO’s.....	1
C. Misrepresenting the menu of your menu?	1
2. MARKET CLOSURE LITIGATION	2
A. Background of Syngenta Lawsuits	2
B. Potential Causes of Action in Syngenta Litigation	3
C. Damages, Damage Models and Experts	4
CONCLUSION	5

1. What is genetically modified organisms “GMO” litigation?

GMO litigation can take many different forms. Currently, there is litigation regarding the ability for governmental entities to regulate GMO's. Regulation may come in the form of restrictions or labeling. There is also litigation dealing with representation of Non-GMO ingredients. Perhaps the biggest litigation going on now, in terms of damages, deals with what I will refer to as “Market Closure Litigation.” While this paper focuses mainly on Market Closure Litigation, it is important to keep in mind that the growing use of GMO's will likely continue to spur new types of litigation down the road. Here are a few examples of recent areas of litigation.

A. Labeling requirements for products containing GMO's

Perhaps one of the most talked about GMO issue in recent years is Vermont's labeling requirement. The Vermont legislature passed a provision requiring labels for products containing GMO's. This law is set to take effect July 1, 2016. The Grocery Manufacture's Association is challenging the law based on various grounds, including the Frist Amendment and claiming the law is unconstitutionally vague. In April 2016, as part of the lawsuit the Vermont Attorney General subpoenaed records from agriculture related companies such as Monsanto Co., DuPont Co., Syngenta AG, and others, seeking their research into the potential health and environmental impacts of the GMO's in their products. As of the date of this paper, the litigation is still ongoing.

B. Regulations regarding the use of GMO's

In 2015, a Federal Court struck down Maui County, Hawaii's referendum led moratorium on GMO farming. Monsanto Co., filed suit to invalidate the law, and the Court found that the moratorium was preempted by state and federal law, and therefore invalid and unenforceable. While this was the second case in Hawaii that struck down either a partial ban or absolute ban on GMO's, you can bet it will not be the last attempt at regulation resulting a lawsuit.

C. Misrepresenting the menu of your menu?

With the desire of some eating establishments to cater to the anti-GMO crowd, or whatever their intentions, they have indeed gotten some unwanted attention and at least one has found itself in the courthouse. The out front and outspoken Chipotle is having its No-GMO ingredients menu questioned in litigation. In a lawsuit filed in Federal Court in Florida, the plaintiff claims that the restaurant chain is misrepresenting its No-GMO menu because the dairy, poultry, and meat products sold in its stores were likely fed feed containing GMO's. In April 2016, the Court denied Chipotle's Motion to Dismiss and the case moves forward as the plaintiff seeks class certification. No matter how this case goes, the litigation will impact what businesses include on their menus.

2. Market Closure Litigation

Market Closure Litigation is where you have an adverse impact on a commodity market(s). In what is likely the largest agriculture litigation in history, thousands of farmers and others across the country are currently taking part in what has become commonly known as the Syngenta Lawsuits. Damages have been estimated at \$1.2 billion to \$3.4 billion, and could be much more.¹

A. Background of Syngenta Lawsuits

In 2011, Syngenta AG, a Swiss-based company that owns Syngenta Seeds, Inc., introduced Agrisure Viptera MIR 162 seed into the United States corn supply. China, a large export market for U.S. corn, had not approved MIR 162 for import into China. Despite the lack of approval, Syngenta began marketing the seed and later in 2014 began marketing its new Agrisure Duracade 5307, again before China had granted import approval.

In November 2013, China detected MIR 162 in U.S. corn shipments.² A zero-tolerance policy was put in place, and China started rejecting shipments of U.S. corn and cancelling contracts.³ Shipments of distillers dried grains with solubles (“DDGS”), which is a by-product of ethanol production, were also rejected.

Corn farmers, exporters, grain elevators, ethanol producers, and others have brought a list of claims against Syngenta and its subsidiaries. The claims include negligence, public and private nuisance, strict products liability, and other claims for damages. There is precedence for these types of cases, which serves as the backdrop for current litigation.

a. StarLink Corn Lawsuits

Corn farmers, grain elevators, and consumers filed class action lawsuits in 2000, against Aventis CropScience USA, Inc. The suits were brought after the FDA issued a recall of the StarLink corn variety that was discovered in consumer corn products, but not approved for human consumption. The damage claims arose out of the impact on the corn market and increased production costs.⁴

In denying Aventis’ Motion to Dismiss, the Court found that at least some of the claims were not preempted by federal law, and Plaintiffs’ pleadings supported claims for crop contamination damages, negligence, and public and

¹ 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.

² *Id.*

³ *Id.*

⁴ *In re: StarLink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828 (N.D. Ill. 2002)

private nuisance.⁵ In February 2003, the parties agreed to settle the case for \$110 million.⁶

b. Bayer Rice Lawsuits

In 2006, the USDA announced that unapproved GMO rice, Bayer's Liberty Link 601, had been found in the U.S. Long-grain rice supply.⁷ The seed had been field tested in prior years, but had never been submitted for approval, and thus not approved for sale, cultivation, or human consumption.⁸ The discovery had a negative impact on the rice market, and Japan suspended imports of long-grain rice from the U.S.⁹ European markets required all long-grain rice imported from the U.S. to test free of Liberty Link 601.¹⁰

Rice producers, and others involved in the industry, filed thousands of suits across the Country. The causes of action included negligence, gross negligence, fraudulent concealment, trespass, conversion, and private nuisance against Bayer for contamination of the market. The cases were consolidated into multidistrict litigation ("MDL") in the U.S. District Court for the Eastern District of Missouri.¹¹ Although class certification was sought, it was denied due in part to the variation in Plaintiffs' damages.¹² Some of the cases were remanded back to state court in Arkansas, where there was a jury trial against Bayer and an Arkansas-based rice marketing company.¹³ After successful jury verdicts in Arkansas state court, and victories in three bellwether state court trials from the MDL, the plaintiffs in those six cases were awarded around \$54 million in damages.¹⁴ Following the verdicts, Bayer entered into a \$750 million global settlement agreement with the remaining plaintiffs, and was reported to be the largest agricultural settlement in U.S. history.¹⁵

B. Potential Causes of Action in Syngenta Litigation

The current Syngenta Lawsuits build on the lessons learned in the prior Market Closure Litigation. A variety of state court and federal causes of action have been pled in

⁵ *Id.* at 852.

⁶ FEDERATION OF AMERICAN SCIENTISTS, *STARLINK CORN: A CAUTIONARY TALE*, *supra*.

⁷ USDA Office of Communications, Statement by Agricultural Secretary Mike Johanns Regarding Genetically Engineered Rice (200), available at <http://www.usda.gov/wps/protral/usda/usdamediafb?contentid=2006/08/0307.xmo&printable=true&contentifonly=true>.

⁸ Second Amended Complaint at ¶ 17, *Lenny Joe Kyle, et al. v. Bayer AG, et al.*, No. CV-2008-107 (Cir. Ct. Woodruff Co. Ark. Jan. 18, 2010).

⁹ *Id.* At ¶ 26.

¹⁰ *Id.*

¹¹ *In re: Genetically Modified Rice Litigation*, MDL No. 1811 (E.D. Mo.).

¹² *Id.*

¹³ *Lenny Joe Kyle, et al. v. Bayer AG, et al.*, No. CV-2008-107 (Cir. Ct. Woodruff Co. Ark.)

¹⁴ Robert Patrick, *Genetic Rice Lawsuit in St. Louis Settled for \$750 Million*, St. Louis Post-Dispatch (July 2, 2011)

¹⁵ *Id.*

the Syngenta cases. The claims include negligence, violations of State Consumer Protection Acts, tortious interference, trespass to chattels, private and public nuisances, strict products liability, failure to warn, and violations of the Lanham Act.

C. Damages, Damage Models and Experts

In addition to punitive damages, corn producers and non-producers claim two general categories of damages as a result of Syngenta's premature marketing and release of MIR162 corn seed into the U.S. corn supply: (1) market loss damages, and (2) additional individual loss damages.

a. Market Losses

Preliminary market loss calculations reported by the NGFA in April 2014 are a conservative estimate of the overall economic impact of Syngenta's conduct on the U.S. corn industry.¹⁶ The damage model and market loss analysis proposed by plaintiffs' experts in the Syngenta Corn Litigation will utilize farm-level data to reflect each plaintiffs' real and individual losses. Plaintiffs' economic experts will apply the forecast method to determine individual price impact for each plaintiff, which involves comparing the unit-value per bushel forecast price for corn to actual prices received for every affected year. Plaintiffs' economic experts will also assess sources of risk and uncertainty and calculate the price loss per bushel associated with exposure to those future market risks.

b. Additional Losses

In addition to market loss damages, Syngenta's premature release of unapproved GMO corn has uniquely impacted each corn farmer, grain elevator, exporter, and other non-producers. These additional losses are incurred in varying degrees—every corn farmer and farming operation is different, just as every exporter, grain elevator, ethanol plant and non-producer conducts business differently.

Additional individual losses to consider may include:

Cleaning/Decontamination Costs. Plaintiffs may have incurred, or will incur, costs for cleaning equipment and storage bins above and beyond what would have been necessary but for Syngenta's premature release of unapproved corn seed. Additional labor is required to thoroughly clean storage bins, tractors, trucks, and all harvest equipment to prevent further contamination. A farmer may incur substantial costs related to baling and/or disking his field more than once and treating it with Roundup several times to prevent regrowth of volunteer corn.

¹⁶ 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.

GMO Testing Costs. Exporters retain GMO testing services to test corn samples at each stage of the production chain, from seed to field, to bin, to shipping.

Transportation Costs. Producers and non-producers incur costs for transportation or hauling of deferred or rejected deliveries and shipment. Additional costs may include fuel, labor, freight charges and truck rental associated with transport of rejected corn deliveries to alternative markets.

Storage Costs. Producers and exporters were forced to store their corn for additional time, incurring additional costs, until they could find an alternative market to sell their corn and minimize their losses. The additional storage time also results in fumigation costs to combat insect infestation, which requires fuel and labor costs.

Lost Acreage. Some farmers would have planted more corn acreage in 2015 but for the introduction of unapproved corn seed into the U.S. corn seed market. Instead, these farmers planted more costly and less profitable crops, or bore chemical, fertilizer and labor expenses to prepare their fields for these alternate crops.

Lost Income/Assets. Depressed corn prices may have caused some plaintiffs to default on loan payments, sell off their land or assets, or lose contracts.

As the Syngenta cases progress there will likely be other claims made by the plaintiffs, as well as defenses raised by the defendants. The first trial date is set in June, 2017.

Conclusion

With the fast pace of technology and the growing number of GMO's on the market, this is sure to be a growing area of the law and litigation. Much of the litigation in this area may involve new regulations. In regards to improper actions impacting the markets, litigation may be the only protection and recourse until the farmers and associated non-producers are relieved of the risks placed on them by the GMO seed manufactures.

####

