

## ***Security interest in farm equipment remains perfected despite erroneous termination of financing statement***

The U.S. Bankruptcy Court for the Eastern District of Arkansas, has ruled that a filing officer's erroneous termination of a properly filed financing statement filed by the Farm Service Agency ("FSA") did not cause the FSA's secured claim to become an unsecured claim, and therefore avoidable by the bankruptcy trustee. *In re Masters*, 273 B.R. 773 (Bankr. E.D. Ark. 2002).

Prior to filing his Chapter 13 bankruptcy petition, the debtor signed two promissory notes payable to the FSA. *Id.* at 774. The debtor later converted his case to a Chapter 7 bankruptcy. *Id.* Thereafter, the trustee for the Chapter 7 bankruptcy conducted a UCC lien search in the appropriate county office. *Id.* at 775. Because this office had erroneously terminated the FSA's financing statement several months earlier, the trustee did not locate any record of an outstanding perfected lien in the FSA's favor. *Id.* The FSA did not learn that the financing statement had been terminated until after the bankruptcy filing and the trustee's subsequent lien search. *Id.* After learning of the error, the FSA re-recorded its own copy of the original financing statement, which showed the original filing date. *Id.*

The farm equipment and vehicles in which the FSA claimed a lien had already been sold by the trustee in accordance with an order of the bankruptcy court. *Id.* The trustee retained \$41,453.09 from the sale of the collateral, an amount which was less than what the debtor allegedly owed to the FSA. *Id.* The \$41,453.09 was also subject to the estate's claim for administrative expenses and a first lien claimed by another entity for \$14,000.00. *Id.*

The FSA argued that under Arkansas law a secured party does not bear the burden created in the event that an error is made by a filing officer when filing a financing statement. *Id.* Specifically, the FSA relied on Ark. Code Ann. § 4-9-401(1) (Michie Supp. 1999) which stated that, "presentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer constitutes filing under this chapter." *Id.* The trustee argued that when the financing statement was terminated by the filing officer, the FSA's claim became unperfected, and could therefore be avoided pursuant to 11 U.S.C. § 544 (1994). *Id.* The trustee also argued that it would be more equitable to rule in his favor "because [the] FSA has other remedies to recover its loss as compared to the bankruptcy estate, which would have no standing to seek relief against any other entity or person." *Id.* at 777.

The bankruptcy court premised its analysis on the rule that questions arising in bankruptcy pertaining to the "validity, nature, and effect of liens are governed by the law of the state where the property is situated." *Id.* at 775 (citing *In re SIN Enter, Inc.*, 45 B.R. 959, 962 (Bankr. D. Vt. 1985)). The bankruptcy court noted that the parties had not cited any controlling precedent by either the Arkansas Supreme Court or the Eighth Circuit Court of Appeals that interpreted § 4-9-401(1) in relation to clerical mistake. *Id.* The court did, however, point out that the Arkansas Supreme Court had previously relied on the Official Comments to Article 9 of the Uniform Commercial Code as persuasive authority. *Id.* at 775-776 (citing *Herringer v. Mercantile Bank of Jonesboro*, 315 Ark. 218 (1993) (citing with approval official comments to UCC Article 9 enacted as Ark. Code Ann. § 4-9-204)).

Specifically, the court noted that Ark. Code Ann. § 4-9-401(1) mirrored § 9-403 of the Uniform Commercial Code, and that the official comments to § 9-407 state that "under § 9-403(1) the secured party does not bear the risk that the filing officer will not properly perform his duties: under that section the secured party has complied with the filing requirements when he presents his financing statement for filing and the filing fee has been tendered or the statement accepted by the filing officer." *Id.* at 775 (quoting U.C.C. § 9-407 cmt. (1) (1972)). The bankruptcy court also cited treatise materials, case law from other circuits, and case law from other bankruptcy courts to support this view. *Id.* at 776.

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## **IN FUTURE ISSUES**

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The bankruptcy court dismissed the trustee's equity argument by relying on a Second Circuit decision stating that "[i]f one balances interests between a creditor who does his best to file and is prevented by the clerk from doing so, and another who does his best to search and is prevented by the clerk from finding what he is looking for, the loss may well be held to fall on the second creditor rather than the first because of first creditor's priority of effort." *Id.* at 777 (quoting *Ex-Cello Corp. v. Oneida Nat'l Bank & Trust Co. of Cent. New York (In re Mut. Bd. & Packaging Corp.)* 342 F.2d 294, 297-98 (2d Cir.1965)).

— Harrison M. Pittman, Staff Attorney, National Center for Agricultural Law Research and Information, University of Arkansas School of Law. This material is based upon work supported by the U.S. Department of Agriculture, under Agreement No. 59-8201-9-115. Any opinions, findings, conclusions, or recommendations expressed in this publication are those of the author and do not necessarily reflect the view of the U.S. Department of Agriculture.

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# Managing agricultural risks after Starlink™: the role of injunctions and contracts in containing biotech crop risks

By Thomas P. Redick and John T. Walsh.

As is the case with many traumatic episodes in the growth of strategic industries, agricultural biotechnology has weathered the storm from Starlink™ corn, the transgenic, potentially allergenic variety of biotech crop that ended up in corn flakes and taco shells across the Midwest in 2000. While many commentators have addressed the legal theories underlying the Starlink™ litigation—nuisance law, consumer fraud and other theories—this article will address the complex questions of agricultural management that permit problems like Starlink™ to be nipped in the bud. We will also describe the civil litigation “hammer” for requiring adherence to sound agricultural management methods (what responsible life sciences companies call “stewardship”).<sup>1</sup>

Perhaps the most remarkable untold story behind the Starlink™ corn saga is its sister crop in the Aventis product “pipeline”—the Liberty Link™ soybean—that never made it to commercial launch. This article will tell a “tale of two seeds” (the Aventis Liberty Link™ soybean produced by Aventis CropSciences, Inc.) and its corporate sister, Starlink™ Corn (also produced by Aventis), and discuss the legal tools for reducing the risk of billion dollar liabilities. While both Starlink™ and Liberty Link™ were driven from the market by lawyers armed with lawsuits, one of those lawsuits was never filed (Liberty Link™ wilted under the threat of injunctive relief). The other lawsuit against Starlink™ corn is still proceeding, enriching both defense and plaintiff lawyers. Given the wide variation in the cost of prevention (Liberty Link™ model) as opposed to the cost of a cure (the Starlink™ model), there can be little doubt that there is a “market” for more cost-effective approaches to agricultural management like the Liberty Link™ model. Over time, the injunction model may be supplanted by efforts at legislative creation of particular growers

districts restricting the comingling of biotech and traditional crops. Until growers’ districts are established, civil lawsuits seeking injunctions may provide a tool for enforcing standards for agricultural management (or if adequate, industry stewardship).

Since the Starlink™ recall, biotech industry stewardship has progressed to address the appropriate level of agricultural management for biotech crops that cannot be comingled with food crops. New “planting distances” have been recommended by authorities such as the American Seed Trade Association (“ASTA”). At the same time, however, many new biotech crops containing industrial or pharmaceutical applications have entered the agricultural marketplace (including some non-biotech versions that lack significant premarket regulatory review). These crops are not invariably adhering to the newly adopted planting distances, according to internal industry sources.

Injunctive relief stands as a viable option for limiting the spread of biotech or other industrial/pharmaceutical crops that have not followed careful agricultural management practices. Industry stewardship models do not always provide a clear contractual mandate to take all necessary steps to avoid comingling of these crops with food crops. Under the threat of an injunction, however, industry stewardship can be improved to meet the standard of care appropriate to a particular biotech crop and local conditions.

Arbitration under the rules established by the American Seed Trade Association can provide one alternative to costly litigation. These rules tend to be written by seed companies to protect their own interests, however, so as to keep the costs of seed marketing under control. Defending thousands of complex warranty claims would drive some seeds off the market because of resulting low profit margins. ASTA seed arbitration rules can promote innovation by reducing seed company costs in resolving warranty claims.

This arbitration system can also lead to unjust results, however, whenever a seed marketing practice has the potential to cause an economic cataclysm like the Starlink™ recall. As a result, a necessary companion to the ASTA arbitration system is the threat of injunctive relief under consumer fraud statutes and nuisance law. As an adjunct to ASTA arbitration, injunctive relief (or the threat of it, made in confidential negotiations with the offending seed company) can restrain any seed marketing practices that border upon “the next Starlink™”

(whether biotech seeds or non-biotech seeds—any crop that cannot be comingled with food).

## The Starlink™ litigation revisited

The Starlink™ recall led to the filing of a number of putative class actions. As these cases proceed, plaintiffs’ attorney will try to prove that Aventis produced Starlink™ with knowledge that its corn could become comingled, causing massive recalls and loss of export markets. Starlink™ corn was approved for animal feed by the EPA, but not for food uses. As a condition of approval, Aventis was asked to maintain an adequate identity preservation program to keep Starlink™ out of the food supply. Aventis apparently thought that comingling problems, should they arise, would be worked out with food regulators to allow some percentage of unapproved Starlink™ in food (a “tolerance”).

After the corn was comingled with other corn bound for food use, the EPA’s scientific advisory panel imposed a zero tolerance standard for the comingling of Starlink™ during the recall. The EPA has admitted that it made a mistake when it approved Starlink™ for “feed only” without providing adequate identity preservation measures. This mistake was compounded by the decisions to impose “zero tolerance” for the recall from food supplies. The result was a recall of Starlink™ whose cost has reportedly exceeded one billion dollars by many estimates. The litigation will continue to work its way through the courts, and costs may continue to rise if new Starlink™ corn plants sprout and comingle with each growing season.

The health risks of Starlink™ are still being assessed by regulators, who have not identified any actual cases of personal injuries. Allegations abound, including one case of anaphylactic shock allegedly caused by Starlink™ in a wrongful death lawsuit pending in California. Consumers are suing in putative class actions pending in various courts (many are consolidated in Chicago under federal Multidistrict Litigation Rules), and some are suing for a refund of their money spent in buying food tainted with Starlink™. These cases will delve further into the health effects of Starlink™ while farmers pursue the economic impacts with nuisance cases.

## Nipping a billion dollar debacle in the bud—the Liberty Link™ soybean

In stark contrast to Starlink™, Aventis chose a commendable level of caution when it agreed not to market a soybean that might have caused an economic cata-

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clysm (by commingling with export markets). The threat of injunctive relief by soybean growers helped Aventis to see the light, and prevented a potential trade loss in excess of two billion dollars per year.

The story begins with an alert growers' association. The American Soybean Association ("ASA") realized in late 1997 that the European Union ("EU") had no present intention of approving new varieties of genetically enhanced ("GE") crops for import. Corn shipments to the EU were being channeled away from export shipments in the hope of preserving the flow of corn export to the EU. To prevent commingling of unapproved-in-EU varieties of GE soybeans, ASA called upon eleven biotech seed companies to refrain from marketing any new variety of GE soybean that lacked approval in major overseas markets, in particular the lucrative EU market.<sup>2</sup>

Aventis disregarded this request at first, proceeding with plans to market the Liberty Link™ soybean (which had no approval for export to the EU after harvest). ASA entered into several months of negotiations to educate Aventis (its corporate predecessor AgrEvo USA) about the potential risk of pollen transfer or movement of seeds between fields (a potential private nuisance) and post-harvest commingling in the soybean export market (a potential public nuisance). ASA asked Aventis to follow a detailed identity preservation system, including the contested items of a high premium for growers, dedicated domestic facilities to divert the GE soybeans away from export channels, and an assumption of liability for any nuisances or other liability that growers and Aventis might jointly cause.<sup>3</sup>

Aventis did not market the Liberty Link soybean, announcing in press releases that it was serving the public interest by acting to protect export markets. ASA agreed in its own public statements that Aventis had acted responsibly and commended Aventis publicly for its discretion. The business press reported the Aventis had invested millions of dollars in developing Liberty Link soybean, which it has now all but abandoned.

The threat of injunctive relief was used to restrain the sale of Liberty Link™ soybeans, and it could have easily been used to prevent the sale of Starlink™. While there are many claims now being made to seek compensation for the losses caused by Starlink™, those predictable losses might also have created sufficient threat of "irreparable harm" to merit an injunction against Starlink™ prior to sale. Starlink™ corn was clearly sold without a full disclosure to growers of the risks of commingling, creating a consumer fraud that could be actionable under statutes protecting consumers.

Given the magnitude of the economic harm that can be caused by an unapproved variety, an attorney general seeking to apply public nuisance law should have little difficulty persuading a sympathetic state or federal court judge to declare the sale a public nuisance.<sup>4</sup> Given the added element of inadequate disclosure to farmers that may be present, the consumer fraud statutes of many states might also be invoked.<sup>5</sup>

### **The threat posed by industrial and pharmaceutical crop varieties**

For those who have long supported innovation in agricultural biotechnology, the arrival of a second wave of "output" traits seems a blessed event—those crops with features that benefit end users and consumers, not just the growers (who adopted lowered-input-cost biotech crops in rapid-fire fashion, finding herbicide resistant soybeans and B.t. corn to reduce costs and chemical usage). If these new crops are managed well and kept out of the food supply, they could usher in a new era of increased consumer acceptance of biotech crops.

If even one of these crops were to cause a recall that is one-tenth the size of the billion-dollar-and-rising Starlink™ recall, investors in this second wave of biotech crops will pull back and leave them for a less fearful generation to attempt to market. There is very little room for error in the post-Starlink™ world. This is due in part to Starlink™ leaving behind a legacy of low tolerance for traces of biotech crops in food products.

As this article went to press, there were troubling reports of plans by growers of new pharmaceutical applications of agricultural biotechnology. The trade journal *Feedstuffs* reported that an Iowa farmer plans to grow a new seed containing a pharmaceutical protein that will treat cystic fibrosis ("CF corn"). See, Robert Heuer, *Cooperatives at a Crossroads: Challenge Will Be How to Expand Search for Capital*, *Feedstuffs* (May 20, 2002). This grower reports a quarter mile separation distance for this corn, which would violate industry standards for safe planting distances to adjacent corn that may be destined for food uses. The American Seed Trade Association, in consultation with the federal agency APHIS (United States Agricultural Plant Health Inspection Service), has set a one mile planting distance for corn that seeks to avoid problematic commingling of pharmaceutical proteins with the food supply. See, *Information of (sic) Field Testing of Pharmaceutical Plants in 2002* (May 21, 2002) <<http://www.aphis.usda.gov/ppq/biotech/>> (Site visited June 10, 2002).

The farmer interviewed in *Feedstuffs* is quoted as setting a separation distance

of one quarter mile around his open fields of a biotech CF corn. This corn would provide enormous benefits, if produced without food commingling, after it is purified and used to treat cystic fibrosis patients. While over 100 acres of this new biotech corn will reportedly be grown in Iowa during 2003, USDA officials have informed grain industry sources that measures are being implemented to ensure male sterility, adequate planting distances, segregated harvesting processes and machinery, and other measures designed to prevent the potential for commingling with food.

Moreover, if the APHIS distance is not followed to the letter, this "IMO event" might have to be reported under the biosafety protocol's "may contain IMO" standard for all commodities shipments from the US that "may contain" that IMO (including non-corn shipments that may contain corn as foreign material). Moreover, if the pattern from Starlink™ corn were to repeat itself, there would be an FDA-mandated recall of any corn products that are produced from corn that cross-pollinated with CF corn.

### **Lessons learned: seed company stewardship and ASTA arbitration**

The lessons from Starlink™ and Liberty Link™ for biotech companies are clear. While these seeds were state of the art and would have promoted sustainable reductions in soil loss (through herbicide resistance and "no till" production), they posed a threat to other crops' marketability because these newcomers lacked regulatory approval.

While growers threatening injunctions can manage risks that elude the attention of seed companies, most risks of biotech crops can be better managed by the seed companies themselves. Two tools lie at their disposal—one is the arbitration rules established by the American Seed Trade Association ("ASTA"). Second, the company can establish "stewardship" programs to ensure that growers understand the need to avoid commingling of certain unapproved crops with food or export supply of other crops.

#### *Arbitration and injunctions using ASTA rules*

The ASTA Rules are designed to promote and simplify the seed trade, making some of the UCC requirements more streamlined and tailored to seed marketing practices. This includes a short time frame for orders to be open (three days, not ten under the UCC). Also, brokers can bind the grower and seed company.

To ensure prompt reporting of claims, claims regarding quality (excluding genetic quality claims) must be made within three days of discovery or forty-five days of sale (180 days for genetic quality). The

*Cont. on p.6*

binding nature of ASTA Rules arbitration should be confirmed in writing by the parties. While somewhat ambiguous, the rules appear to allow appeal to the courts from a decision under ASTA arbitration. These rules, properly applied, can help parties quickly resolve quality allegations. In cases involving biotech cotton performance problems, seed arbitration has been used extensively.

The use of arbitration does not preclude issuance of an injunction, if that is a necessary component of the relief to be provided to growers and their customers (e.g., the grain traders whose livelihood may be threatened by unapproved varieties). The Federal Arbitration Act<sup>6</sup> arguably allows a preliminary injunction to be issued in an arbitrable dispute. *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 47 (1st Cir. 1986). The sole restriction that the Arbitration Act places on courts is the requirement that courts stay the trial of the action until arbitration has been had in accordance with the parties' agreement. 9 U.S.C. §3.

The First, Second, Third, Fourth, Seventh, and Ninth Circuits have all upheld preliminary injunctions in arbitrable disputes when the trial court found injunctive relief to be necessary. "[T]he right to arbitrate and to seek injunctive relief are not incompatible, ... a plaintiff should not be obliged to abandon one in order to pursue the other." *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir. 1983). See *Ortho Pharmaceutical Corp. v. Amgen, Inc.*, 882 F.2d 806 (3d Cir. 1989) (if existing status quo is currently causing one of the parties irreparable injury and thereby threatens to nullify arbitration process, then it is necessary to alter the situation to prevent injury); *Bercovitch v. Baldwin School*, 964 F. Supp. 597, 604 (D. Puerto Rico 1997) (in the absence of injunctive relief, student who was indefinitely suspended from school would still be out of school and would have lost opportunity to finish sixth grade with his class if he had to await the outcome of arbitration; arbitration would have rendered student's claim futile), *rev'd on other grounds*, 133 F.3d 141 (1st Cir. 1998).

One Eighth Circuit decision stands alone in denying injunctive relief in arbitration. *Merrill Lynch, Pierce, Fenner & Smith v. Hovey*, 726 F.2d 1286, 1291-92 (8th Cir. 1984). Two months after the *Hovey* decision, however, a different panel of Eighth Circuit judges affirmed the grant of a preliminary injunction in an arbitrable dispute. *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589 (8th Cir. 1984). The district court found that Ferry-Morse demonstrated that it would suffer irreparable harm if, during the pendency of the proceedings or arbitration proceedings, it was deprived of the opportunity

to market the seed corn that was the subject of the dispute. The district court found that the immediate need for relief was demonstrated by testimony that in order for Ferry-Morse to make deliveries for the 1983 growing season, the seed corn needed to be in the hands of farmers by the middle of April. The evidence indicated that the packaging and processing time required by Ferry-Morse after it received the corn and before delivery to farmers was at least thirty days. The district court ordered Food Corn to promptly deliver seed corn to Ferry-Morse as required by the exclusive license agreement. On appeal, the Eighth Circuit affirmed, allowing injunctive relief to avoid economic losses.

Other courts have granted preliminary relief without regard to establishing the status quo, as long as there was a showing of potential irreparable harm and at other times, as long as the injunction creates a common sense *modus vivendi* to keep peace between the contracting parties, and avoids unnecessary economic waste until the case is adjudicated. *Id.* at 593.

In sum, ASTA arbitration of claims arising from seed sales and injunctive relief against the sale of certain seeds that should not be marketed can co-exist and provide an alternative to waiting for commingling incidents to cause mass torts, as occurred with Starlink™ corn.

#### *Industry stewardship program for commingling risks*

Standards for controlling pollen drift are in a state of continuous flux, as the American Seed Trade Association and seed certifying agencies,<sup>7</sup> accustomed to tolerances at 2% for unapproved content, struggle to address market request for "zero" or 1% tolerances.<sup>8</sup> Planting distances to avoid pollen drift are a function of the percentage tolerance—the lower the tolerance, the farther the distance to avoid pollen drift. The planting distances necessary to meet those tolerances involved with seed adjust to new information.

The Monsanto program for grower stewardship in the Roundup Ready Corn™ program provides a "State of the Art" model for biotech company stewardship in the post-Starlink era. This program includes instructions on "channeling" requirements, and solicits contact information from the grower to allow notifications to go to them regarding "regulatory status" and other issues.

For commingling risks, the form provided to growers has fine print as follows: HARVESTED GRAIN ADVISORY: Grain/commodities harvested from Roundup Ready® Corn...is approved for U.S. food and feed use, but not yet approved in certain export markets where approval is not likely to be re-

ceived before the end of 2001. As a result, the grower is restricted from introducing such grain/commodities into channels of trade where the potential for export to such markets exists. The grower must channel such grain/commodities for feeding on farm, use in domestic feed lots or other uses in domestic markets only. *Growers should refer to page 27 of Monsanto's Technology Use Guide for information on crop stewardship regarding the potential movement of pollen to neighboring crops.* (Emphasis added).<sup>9</sup>

The success or failure of channeling programs for Roundup Ready Corn and the forthcoming "Roundup Ready Wheat" will help to move Monsanto and the other companies with products emerging from development forward toward a future where high-premium output traits are grown without unintended commingling in food supplies. Starlink™'s legacy has sensitized many growers, and alerted many attorneys to the risks posed by commingling of unapproved varieties of biotech crops. In Canada, for example, plaintiff growers are seeking an injunction against Monsanto's proposal to market Roundup Ready Wheat.<sup>10</sup>

#### *Grower's districts*

The states have broad powers to regulate agriculture within their borders.<sup>11</sup> These powers include the abatement of public nuisances, including specific threats that come to the attention of the legislature.<sup>12</sup> As an adjunct to this broad power, state legislatures may create agricultural districts with various powers defined by statute.<sup>13</sup> Cross-pollination of varieties that would be better off separated is not a new problem—"grower's districts" in various jurisdictions across the United States could emerge as tools to control agricultural nuisances from GMOs.<sup>14</sup> Districts can be declared off-limits to certain varieties that are likely to render the dominant crops in a region less marketable and can also provide a protective function in preventing private nuisance lawsuits.<sup>15</sup> The public entity responsible will have broad discretion to take measures necessary to abate a living threat to agriculture and will be exempted from the law of trespass for actions taken to protect life, health, or property.<sup>16</sup>

The California Legislature recently took steps to create a "non-biotech" growers district—for rice only—in the entire state of California. Assembly Bill 2622 established standards for keeping different varieties of rice separate from each other while imposing fees on the sale of rice seeds that pose economic risks. Dubbed the "Trojan Horse" by some biotech supporters, the bill did not specifically mention biotechnology or genetic engineer-

ing.<sup>17</sup> The stated purpose of the bill is to avoid the economic impacts of rice that cannot be exported (which currently means biotech rice, but might also mean rice that harbors diseases). This will help California rice growers market their products worldwide; some in the biotech industry believe the measure is targeted at them. The California Rice Commission, a trade group representing growers and millers, led the crusade to pass this bill. California exports nearly 40 percent of its rice crop (over \$320 million annually). Japan takes delivery of most of this, and its laws on biotech approvals are strict. Aventis had no approval in Japan for Liberty Link™ rice when the bill was passed. Rice industry experts appointed by the California secretary of food and agriculture will appoint experts (with input from the rice commission) and will use all available legal mechanisms to enforce the standards. Biotech rice will have to be separated from conventional rice during production, distribution and particularly export. Special fees apply to rice seed that is deemed to have "characteristics of commercial impact." Fees range as high as \$5 for every hundred pounds of seed, leading to \$8 per acre planted. The California Rice Commission believes these fees will cover the costs of enforcing identity preservation standards, but will not prevent seed buyers from using the latest innovations in agricultural biotechnology.

## Conclusion

There are many lessons that Starlink™ corn and the Liberty Link™ rice and soybean controls can teach for companies willing to learn. With careful stewardship and arbitration, future matters should avoid class action status and the huge costs that entails. The threat of injunctive relief can also help to prevent future Starlink™ in progress.

Agricultural biotechnology potentially provides beneficial enhancements to food safety, environmental protection, and industrial and medical applications (using agriculture as a low-cost production system). The pipeline of agricultural innovation has to be protected from explosive mass tort litigation; in some instances, injunctive relief against a biotech company's marketing plan may, ironically enough, prevent that unwilling defendant and unwitting tortfeasor from causing economic losses in excess of one billion dollars.

<sup>1</sup> See, e.g., Thomas Carato, *The Process of Agricultural Genetic Engineering regulation, Stewardship or Liability*, Presentation to the Third Annual ABA/CAST/AAIA/ACP Biotechnology Roundtable, Liability and Liability of Genetically Modified Organisms, St. Louis, MO (May 26, 1999) (on file with author) (summary at <http://www.cast-science.org/roundtable.htm> - site visited June 9, 2002).

<sup>2</sup> Stephen Gensky of the American Soybean Association

*Improving Communication From Seed Production Through Retail*, Presentation to the Third Annual ABA/CAST/AAIA/ACP Biotechnology Roundtable on the Liability and Labeling Genetically Modified Organisms, in St. Louis, MO (May 26, 1999) (summarized on the NewsCAST website at <http://www.cast-science.org/0002abab.htm>.) (visited June 11, 2002).

<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., Public nuisances in agriculture defined by California Agriculture Code §§5904, 5951-52, 5985, 6171-77, 7301, 9621 (infested plants, black currant, Meyer lemon plants, non-complying honey, et al.). Thomas P. Redick and Christina G. Bernstein, *Nuisance Law and the Reversion of "Genetic Pollution": Declining a Dinner Date with Danocles*, 30 *ELR* 10328, 10334 (May, 2000).

<sup>5</sup> See, e.g., Cal. Bus. & Prof. Code §17200 (Deering Supp. 2000); *Stolber v. Henschel*, 101 Cal. App. 3d 903, 927, 162 Cal. Rptr. 194, 206-07 (Cal. Ct. App. 1980) (prohibiting "wrongful business conduct in whatever context such activity might occur").

<sup>6</sup> Title 9, US Code, Section 1-14, first enacted February 12, 1925 (43 Stat. 883).

<sup>7</sup> For a comprehensive list of seed certifying agencies, see <http://www.dstate.edu/ag/ocia/certagencies.html> (site visited September 13, 2001).

<sup>8</sup> The leader in the U.S. has been the American Organization of Seed Certifying Agencies, which is creating an "identity preserved" ("IP") logo for use in markets requiring segregated crops. <http://www.aosca.org/ip.html> (site visited September 13, 2001). The move to a tolerance of 1% is driven by European politics, which appear to be settling down to 1% tolerances at the time this article went to press. See Electronic mail memorandum from Mark Mansour, Keller & Heckman, to Thomas Redick regarding presentation by Commissioner Byrne stating that "one percent is what current science indicates but that he stands by his word that the level should be lowered if the scientists would recommend a change" (not a particularly comforting reassurance). (Copy on file with author).

<sup>9</sup> Instructions for Growers Intending to Plant Roundup Ready Corn or Roundup Ready Corn with Yieldgard Stacked (Monsanto Company 004-01-0006), copy on file with author.

<sup>10</sup> *It's official, Sasatchwan organic growers are suing Monsanto, Aventis over GM contamination*, CropChoice news (January 10, 2002) ("The plaintiffs will also seek an injunction to halt Monsanto from introducing Roundup Ready wheat, engineered to resist the herbicide Roundup (glyphosate)") (<http://www.cropchoice.com/industry.asp?recID=553>) (visited June 11, 2002).

<sup>11</sup> States or provinces in overseas markets with federal systems may exercise authority to ban GMOs, thereby adding another layer of regulatory complexity to a complex situation. There are reports that Brazil's largest agricultural region (Rio del Grande Sul) is trying to make itself GMO free. This raises the specter of U.S. leading competitors in soy exports using non-GMO demand to take the market share from U.S. growers unable to segregate to the specifications of the EU, Japan, or other markets. Untitled, Reuters Newswire, Sept. 28, 1999.

<sup>12</sup> *Id.* At 5401.

<sup>13</sup> See, e.g., Cal. Food & Agric. Code §§52851, 52901 et seq., (Deering 1997) ("unapproved" varieties of cotton require permit to protect "integrity of approved Acala or Pima cotton" in single variety cotton districts.)

<sup>14</sup> See Farmland Information Library's State Farmland Protection Database at <http://www.farmlandinfo.org/fic/laws/ivadis.html> for an excellent listing of districts and other statutes affecting farmland. Various states take differing approaches to districting and Internet data: see, e.g., the Ohio enabling statute (Ohio Rev. Code Ann. §8929.01 et seq. (Banks-Baldwin Supp. 1999) available at <http://oc.ohio.gov/title9/sect-8929/index.html>); the Texas map of agricultural statistical districts at <http://www.io.com/~tass/distmap.htm> and the North Carolina summary of commodities by county at <http://www.ag.state.nc.us/stats/countysum/index.htm>.

<sup>15</sup> See Farmland Information Library's State Farmland Protection Database at <http://www.farmlandinfo.org/fic/laws/ivadis.html>. (Benefits of district may include "pro-

tection against unreasonable government regulation and private nuisance lawsuits").

<sup>16</sup> *Irvine v. Citrus Rest. Dist.*, 62 Cal. App. 2d 378, 144 P.2d 857 (Cal. Ct. App. 1944).

<sup>17</sup> The complete text of the law follows:

§ 55040 *Food & Agric.* The powers and duties of the committee under this chapter shall include, but not be limited to, all of the following: (a) Identifying rices that have characteristics of commercial impact. (b) Recommending to the secretary proposed regulations establishing terms and conditions for planting, producing, harvesting, transporting, drying, storing, or otherwise handling rice identified pursuant to subdivision (a), including, but not limited to, seed application requirements, field buffer zones, handling requirements, and identity preservation requirements. All rice identified pursuant to subdivision (a) shall be subject to an identity preservation program. (c) Reviewing the efficacy of terms, conditions, and identity preservation programs imposed on the planting, producing, harvesting, transporting, drying, storing, or otherwise handling of rice identified pursuant to subdivision (a) using the most current industry standards and generally accepted scientific principles. (d) Recommending to the secretary on all matters pertaining to this chapter, including, but not limited to, enforcement of this chapter and setting the assessment rates. (e) The committee shall review each rice identified as having characteristics of commercial impact not less often than every two years, or upon receipt of a petition from the purveyor of the rice. No purveyor of a rice identified as having characteristics of commercial impact may file more than one petition on a particular rice in any two-year period. (f) Neither the recommendations of the committee nor any regulation adopted pursuant to this chapter shall be construed as establishing any production, processing, or market tolerance. (Added by Stats. 2000, ch. 579, sec. 1.)

§ 55047 *Food & Agric.* The committee shall recommend to the secretary that regulations be adopted by the secretary that accomplish all of the following purposes: (a) Maintain the integrity and prevent the contamination of rice which has not been identified as having characteristics of commercial impact. (b) Prevent the introduction of disease, weeds, or other pests. (c) Ensure that persons selling, offering for sale, or otherwise distributing seed for the production of rice identified as having characteristics of commercial impact, or that persons bringing rice identified as having characteristics of commercial impact into the state for processing, notify the commission of the location of planting sites and of the dates and procedures for planting, producing, harvesting, transporting, drying, storing, or otherwise handling of rice identified as having characteristics of commercial impact. (d) Ensure that persons receiving rice having been identified as having characteristics of commercial impact produced outside the state for processing notify the commission of the location of the receipt and of the procedures for processing, transporting, drying, storing, or otherwise handling the rice to prevent commercial impact to other rice and the spread of weeds, disease, or other pests. (e) Ensure enforcement of terms and conditions imposed on the planting, producing, harvesting, transporting, drying, storing, or otherwise handling of rice identified as having characteristics of commercial impact. (f) Encourage research and development of new types of rice. (Added by Stats. 2000, ch. 579, sec. 1.)

§ 55060 *Food & Agric.* (a) Any person engaged in the business of selling, offering for sale, or otherwise distributing seed for the production of rice identified as having characteristics of commercial impact, shall annually pay to the commission an assessment in an amount not to exceed five dollars (\$5) per hundredweight (cwt.). (b) The first in-state handler of paddy or brown rice identified as having characteristics of commercial impact, or of seed for the production of rice identified as having characteristics of commercial impact, brought into the state from outside California, shall report the receipt of the rice or seed and pay an assessment to the commission in an amount not to exceed ten cents (\$0.10) per hundredweight (cwt.). The report and payment shall be made in the time and manner specified by the commission.