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When They Don't Want Your Corn: The Most Effective Tort Claims for Plaintiffs Harmed by Seed Companies Whose Genetically Engineered Seeds Produced More Problems Than Profits

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**WHEN THEY DON'T WANT YOUR CORN: THE MOST
EFFECTIVE TORT CLAIMS FOR PLAINTIFFS HARMED BY
SEED COMPANIES WHOSE GENETICALLY ENGINEERED
SEEDS PRODUCED MORE PROBLEMS THAN PROFITS**

*By Sarah Holm**

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I. INTRODUCTION

The genetic engineering of plants began in the 1970s, and the U.S. regulatory and legal systems are still adapting to this new technology.¹ The U.S. agriculture, food, and commodity crop trade industries are not waiting for regulations and laws to catch up; genetically engineered crops are already grown, consumed, and traded throughout the national and international markets in large quantities.² In 2014, 96% of cotton, 94% of soy, and 93% of U.S. grown corn was genetically engineered.³ The sheer prevalence, novelty, and uniqueness of this technology, has created a number of problems. The agricultural, food, and commodity crop trade industries face confusing, disjointed, and contradicting regulations and restrictions on genetic engineering from both the United States and foreign countries.⁴

The current state of affairs, given the combination of a mammoth amount of genetically engineered crops, muddled regulations, and the intricacies of global agricultural commodity trade markets, is a prime set-up for the improper use of genetically engineered crops.⁵ It is of utmost importance that a farmer's genetically engineered seeds are approved for their intended use.⁶ Exporters of genetically engineered crops must navigate around the approximately sixty countries worldwide that have various bans,

¹ See Matthew Rich, *The Debate Over Genetically Modified Crops in the United States: Reassessment of Notions of Harm, Difference, and Choice*, 54 CASE W. RES. L. REV. 889, 890 (2004) (“[G]enetic modification, or genetic engineering, is generally defined as a recombinant DNA (rDNA) technology, whereby a segment of DNA from one organism is extracted and spliced into a recipient organism’s preexisting DNA.”); see also *Diamon v. Chakrabarty*, 447 U.S. 303, 310, 318 (1980) (holding that genetically engineered bacteria could be patented); John Charles Kunich, *Mother Frankenstein, Doctor Nature, And the Environmental Law of Genetic Engineering*, 74 S. CAL. L. REV. 807, 809 (2001) (“[M]odern genetic engineering, i.e., the actual in vitro modification of DNA at the molecular level, was first reported in the scientific literature in 1973.”).

² This article uses the term “genetically engineered.” Genetically engineered crops are also frequently referred to as “bioengineered,” “genetically modified,” “GM,” “GE,” “genetically modified organisms,” “GMO,” and “biotech crops.” Quotations from sources using monikers other than “genetically engineered” will be left as is.

³ USDA Economic Research Service, *Recent Trends in GE Adoption*, <http://www.ers.usda.gov/data-products/adoption-of-genetically-engineered-crops-in-the-us/recent-trends-in-ge-adoption.aspx> (last updated July 14, 2014).

⁴ See generally Sabrina Wilson, *Induced Nuisance: Holding Patent Owners Liable for GMO Cross-Contamination*, 64 EMORY L.J. 169, 172 (2014) (“[A]lthough scholars have suggested that new legislation should be drafted to specifically address the introduction of genetically engineered crops, the federal government has relied on the preexisting framework to regulate new genetic engineering technology. There is no legal framework that directly addresses cross-contamination by GMOS, and the current regulatory framework is not able to prevent GMO cross-contamination of non-GM crops.”).

⁵ *Id.*

⁶ See *infra* Part II (narrating the financial and legal consequences to all parties when a genetically engineered crop is sold for an unapproved use or escapes the control of the seed company).

restrictions, or labeling requirements for genetically engineered foods.⁷ Particularly with commodity crops destined for export, both the farmer and the exporter may lose enormous amounts of time and money if the genetically engineered crop they grew or purchased is not approved for its intended use.⁸

Unfortunately, when genetically engineered crops are improperly used, the legal claims that allow farmers and exporters to successfully recover damages against seed companies are unclear because the case law addressing this issue is limited.⁹ Farmers and exporters need to know what legal remedies exist when, for example, they rely on representations that a genetically engineered corn variety is approved in all foreign markets, only to discover, upon rejection after exportation, that the corn is not approved in Japan.¹⁰ Furthermore, farmers and exporters will likely bring claims against seed companies going forward because both the lax regulations and seed companies' recurrent failures to comply with the regulations show that little incentive exists to exercise caution when selling a newly genetically engineered crop.¹¹

This article focuses on the legal remedies available to farmers and exporters injured by seed companies that (1) provide misleading representations about the proper use of genetically engineered crops or (2) mishandle genetically engineered crops. This article will use the case law from the StarLink corn fiasco of 2000 and the LibertyLink rice debacle of 2006 to present the most effective tort remedies available to farmers and exporters harmed by seed companies.¹² After consulting the case law, the

⁷ E.g., Ctr. for Food Safety, *Map: Genetically Engineered Food Labeling Laws* (Mar. 2013) available at http://www.centerforfoodsafety.org/files/cfs-ge-labeling-map-march-2013_38812.pdf; Non GMO Project, *GMO Facts*, NON GMO PROJECT (last visited Apr. 17, 2015) <http://www.nongmoproject.org/learn-more/>; Organic Consumers Assoc., *Countries & Regions with GE Food/Crop Bans*, *Organic Consumers Association* (last visited Apr. 17, 2015) https://www.organicconsumers.org/old_articles/gefood/countrieswithbans.php.

⁸ See *infra* Part II.A.1.B (explaining how the EPA regulates genetically engineered crops).

⁹ See *infra* Part II.B.C (discussing the two major cases addressing farmers and exporters legal claims for the improper use of genetically engineered crops, *In re Starlink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828, 841–42 (N.D. Ill. 2002) and *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811-CDP (E.D. Mo. 2009) (multidistrict litigation) [hereinafter *LibertyLink Rice*].

¹⁰ See *Starlink Corn*, 212 F. Supp. 2d at 841–42 (identifying four common points at which an unapproved GE crop could enter the food supply and cause harm: (1) farmers purchasing and using seed that they do not know has been contaminated with the GE trait, (2) cross-pollination that contaminated a field with the unapproved GE crop, (3) the unapproved GE crop is mixed in with other crops after harvest during transportation or storage (e.g. at a feed mill), and (4) the unapproved GE crop is mixed with an approved crop by a food manufacturer).

¹¹ See *infra* Part II.C.1 (narrating the post-contamination approval of LibertyLink rice by the U.S. government).

¹² See *infra* Part II; Melinda Fulmer, *Taco Bell Recalls Shells That Used Bioengineered Corn*, L.A. TIMES (Sept. 23, 2000), available at

conclusions are extrapolated and applied to the current litigation surrounding the 2013 Agrisure Viptera and Duracade corn disaster, and to future hypothetical cases.¹³

This article begins with an explanation of the U.S. governmental bodies that regulate genetic engineering because these regulations form the foundation for plaintiffs' legal claims.¹⁴ The discussion of the *Starlink Corn* and *LibertyLink Rice* cases focuses on both the facts of the cases and the claims brought in the lawsuits.¹⁵ After the discussion of past cases, the facts of *Syngenta Corn* are presented as a recent situation where the seed company misrepresented the approval status of Agrisure Viptera and Duracade corn to farmers.¹⁶ The analysis begins by comparing the legal claims brought in *Starlink Corn* and *LibertyLink Rice* with the claims that will likely be brought in *Syngenta Corn*.¹⁷ In sum, this article concludes that plaintiffs are likely to succeed in tort claims that do not require findings of intentional conduct by the defendants because showing that seed companies intended to cause harm to the plaintiffs is more difficult than showing that the seed companies' actions resulted in harm to plaintiffs.¹⁸

II. BACKGROUND

A. *The Patchwork System Regulating Genetically Engineered Crops*

The regulation of crops in the United States depends on how the crop is categorized. Agricultural crops in the United States can be categorized into three main types: (1) conventional but not genetically engineered; (2) conventional and genetically engineered; and (3) organic.¹⁹ Of those genetically engineered crops, there are even more sub-categories: (a)

<http://articles.latimes.com/2000/sep/23/news/mn-25314> (reporting the 2000 food recalls because of StarLink corn); Tom Parsons, *Farmers Face Off with Chemical Maker over Rice*, BOSTON.COM (Mar. 28, 2010), http://www.boston.com/business/articles/2010/03/28/farmers_face_off_with_chemical_maker_over_rice/ (reporting the lawsuits filed after the 2006 LibertyLink rice contamination).

¹³ See *infra* Part III.A (comparing and contrasting *Starlink Corn*, *LibertyLink Rice*, and *Syngenta Corn*).

¹⁴ See *infra* Part II.A (outlining the regulatory system that governs genetically engineered crops).

¹⁵ See *infra* Part II.B, II.C (discussing *Starlink Corn* and *LibertyLink Rice*).

¹⁶ See *infra* Part II.D (discussing *Syngenta Corn*).

¹⁷ See *infra* Part III (exploring the commonalities between the claims brought in these suits).

¹⁸ See *infra* Part IV.

¹⁹ See Miles McEvoy, *Organic 101: Can GMOs Be Used In Organic Products?*, USDA BLOG (May 17, 2013), <http://blogs.usda.gov/2013/05/17/organic-101-can-gmos-be-used-in-organic-products/> (explaining that genetic engineering cannot be used in organic production of crops); see also *Biotechnology Frequently Asked Questions, (FAQs)*, USDA (Dec. 29, 2014), <http://www.usda.gov/wps/portal/usda/usdahome?navid=AGRICULTURE&contentid=BiotechnologyFAQs.xml> (explaining the various uses of genetic engineering in conventional cropping systems).

approved for human consumption; (b) not approved for human consumption but approved for other uses (e.g. animal feed and ethanol); (c) approved for export to certain countries; (d) not approved for export to certain countries; (e) approved for experimental use; and (f) not approved for any use at all.²⁰ A genetically engineered crop is often subject to a variety of restrictions and approvals, which differ amongst the numerous countries of the world.²¹ For example, a genetically engineered crop could be approved for all uses in the United States, but only approved as animal feed in the European Union, and not approved at all in Japan.²²

1. The Regulatory Bodies Governing Genetically Engineered Crops

In the United States, three governmental agencies regulate different aspects of genetically engineered crops: the Food and Drug Agency (FDA), the Environmental Protection Agency (EPA), and the U.S. Department of Agriculture (USDA).²³ The FDA's priority is the regulation of genetically engineered foods that may be unsafe for consumer consumption, whereas the USDA focuses on preventing the proliferation of "plant pests," and the EPA only regulates those genetically engineered crops engineered to produce

²⁰ See International Service for the Acquisition of Agri-Biotech Applications, *GM Approval Database | GMO Database | GM Crop Approvals*, ISAAA, <http://www.isaaa.org/gm-approval-database/default.asp> (last visited Feb. 2, 2015) (providing a database of the regulatory status of any genetically engineered crop in all countries); see *infra* Part II.A.1 (explaining how the EPA, USDA, and FDA classify and regulate genetically engineered crops).

²¹ See International Service, *supra* note 20 (providing a global database recording the restrictions and approvals for genetically engineered crops in different countries).

²² Japan is used as an example because it only allows a limited list of genetically engineered crops to be imported and has a zero-tolerance policy for any unapproved genetically engineered crops or foods, meaning that no level of the unapproved genetically engineered material is acceptable. See The Organic and Non-GMO Report, *Japan's Legislation on Labeling of Genetically Engineered Foods* (Feb. 2003), <http://www.non-gmoreport.com/articles/millennium/japanlegislationlabelinggmofoods.php> (describing Japan's regulatory and approval system for genetically engineered foods and chronicling how many crops are approved by Japan).

²³ See generally Rebecca Bratspies, *Myths of Voluntary Compliance: Lessons from the StarLink Corn Fiasco*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 593 (2003) (detailing the regulatory system for genetically engineered foods); Thomas Redick, *Stewardship for Biotech Crops: Strategies For Improving Global Consumer Confidence*, 44 JURIMETRICS J. 5 (2003) (providing more information on the regulation of genetically engineered crops); USDA Animal and Plant Health Inspection Services, *Coordinated Framework* (Dec. 16, 2014), available at http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/biotechnology/sa_regulations/ct_agency_framework_roles!/ut/p/a0/04_Sj9CPyKssy0xPLMnMz0vMAfGjzOK9_D2MDJ0MjDzd3V2dDDz93HwCzL29jAyMTPULsh0VAU1Vels! (providing a copy of the actual statutory schema for regulating genetically engineered crops).

pesticides.²⁴ Each of these regulatory agencies uses different bodies of law to pursue their regulatory objectives.²⁵

i. The FDA

Congress granted the FDA the power to regulate food with the Federal Food, Drug and Cosmetic Act (FFDCA).²⁶ The FDA “has the power to remove unsafe foods from the marketplace and to hold producers legally responsible for the safety of the foods they market.”²⁷ The FDA can seize any genetically engineered food “that causes an allergic reaction or otherwise threatens human health.”²⁸ Ultimately, the FDA regulates genetically engineered crops to ensure that they are safe for human consumption, except for those genetically engineered crops which contain pesticides, which the FDA delegated to the EPA.²⁹

ii The EPA

To regulate genetically engineered foods containing pesticides, the EPA created a system that requires a genetically engineered crop to obtain Federal Insecticide Fungicide and Rodenticide Act (FIFRA) registration in order to be approved for sale.³⁰ The EPA also established a system of exceptions to the FIFRA registration requirement known as tolerances and exemptions.³¹ The EPA regulates those FIFRA-registered pesticides and ensures that any unregistered pesticides are not sold or distributed.³² A pesticide can only be registered under FIFRA if it does “not cause unreasonable adverse effects on the environment.”³³ As noted, *supra*, if the pesticide in question is “used in the production of food or food crops,” it is also regulated under the FFDCA.³⁴ Thus, any owner of a genetically

²⁴ Bratspies, *supra* note 23, at 600, 605, 612.

²⁵ See *infra* Part II A.1.A–C (discussing the USDA, EPA, FDA and the federal statutes that give them authority).

²⁶ Bratspies, *supra* note 23, at 605.

²⁷ *Id.*

²⁸ *Id.* at 609.

²⁹ *Id.* at 606–07 (explaining that the regulatory standard for genetically engineered crops that “involve the addition of genes that code for novel proteins (notably pesticide proteins like Bt)” is different than that for other genetically engineered crops and that the EPA regulates genetically engineered crops only if those crops were genetically engineered “to produce . . . pesticides.”).

³⁰ *Id.* at 611–14 (detailing the EPA’s system for regulating genetically engineered crops).

³¹ Bratspies, *supra* note 23, at 612–13 (stating that in a situation where a genetically engineered crop is expected to cause pesticide “residues to remain on or in food,” the EPA cannot register the crop under FIFRA unless it grants it a tolerance level or an exception).

³² *Id.* at 612.

³³ *Id.*

³⁴ *Id.* at 613.

engineered crop that is in violation of its registration, tolerance level, or exemption would be subject to an enforcement action by the FDA.³⁵ FIFRA does not provide a civil cause of action, but the federal statute does not prevent a state from “creating civil remedies for” violations of FIFRA.³⁶

iii. The USDA

The USDA, on the other hand, has a more narrow focus than the FDA and the EPA. The USDA has the power to regulate the “interstate movement of genetically engineered crops under the Federal Plant Protection Act (“FPPA”),” which it accomplishes through the Animal Health Plant Inspection (APHIS) agency.³⁷ The USDA’s regulation of genetically engineered crops is limited to the narrow question of whether the genetically engineered crop “will itself pose a conventional plant pest risk when introduced into the environment and/or interstate commerce.”³⁸ A “plant pest” is defined as “any living organism that directly or indirectly injures, or causes disease or damage, to a plant.”³⁹ If the USDA decides that the genetically engineered crop is not a plant pest, the crop is assigned “nonregulated” status” by the USDA.⁴⁰ The first step to obtaining nonregulated status is for the developer of a genetically engineered crop to notify the USDA that it intends to conduct a field trial of the crop.⁴¹ The USDA must either approve or disapprove the proposed field trial within ten to thirty days.⁴² After the field trial is complete, the developer can petition the USDA for “nonregulated status and approval for commercial sales.”⁴³ Under the National Environmental Policy Act (NEPA), the USDA must also conduct an environmental assessment of the genetically engineered crop before deciding that it is not a plant pest and granting it nonregulated status.⁴⁴

³⁵ *Id.*

³⁶ *Starlink Corn*, 212 F. Supp. 2d at 836 (citing *Lowe v. Sporicidin Int’l*, 47 F.3d 124 at 128 (4th Cir. 1992) and 7 U.S.C. § 136v(b)) (explaining that although only the EPA has standing to enforce FIFRA, states could create civil remedies for violating FIFRA).

³⁷ Bratspies, *supra* note 23, at 599 (recounting the Reagan Administration’s creation of the Coordinated Framework system to regulate genetically engineered foods and crops); *see also Coordinated Framework*, *supra* note 23 (providing an overview of the role of the regulatory agencies that regulate genetically engineered foods and crops).

³⁸ Bratspies, *supra* note 23, at 602.

³⁹ *Id.* at 602 (citing 7 C.F.R. § 340.1).

⁴⁰ *Id.* at 602, 604–05.

⁴¹ Bratspies, *supra* note 23, at 604.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *See generally Environmental Documents*, USDA ANIMAL AND PLANT INSPECTION SERVICE (Sept. 2, 2014), http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/biotechnology/sa_landing_page/sa_spotlights/ct_submissions_home!/ut/p/a1/jZDLDoIwEEW_yHRseMgSUK81A0Ru2mqYmkChdjqwq8X2IvMb5mYOoqhEVPg3FNzITvFm3KnDkmOM1wFgEkW7AMh53cNMGA7QG4zACpvSwfRn5suRkAWBsMZBvEW9fLAYizLA8_xod_WRBAX7mYS4Q7bmpV1I9OIRqzhu7IIJ1nNRTQfdd6aRojYalTfD9OvaSq0Hj5rVXVuhM

B. StarLink Corn: Not Approved for Human Consumption, Yet in the Food Supply

In spite of the piecemeal structure of the regulations surrounding genetically engineered crops, the regulations are ultimately clear enough for seed companies and others familiar with the industry to understand.⁴⁵ Whether a seed company complies with the regulations is another matter.⁴⁶ Seed companies that fail to comply with regulations or cause their customers to violate regulations should expect lawsuits filed against them.

1. The Facts of Starlink Corn: Aventis' Failure to Inform Farmers of Restrictions and the Ensuing Damage

Starlink Corn was the first case to address the legal remedies for farmers who were sold genetically engineered seeds without warning of their regulatory restrictions.⁴⁷ In 1998, the biotechnology and seed company Aventis CropScience received FIFRA registration from the EPA for its new product, StarLink corn.⁴⁸ StarLink corn was engineered to produce Cry9C, a type of Bt toxin that was toxic to insects.⁴⁹ The EPA restricted StarLink's registration to commercial use, barring it from being sold for human consumption.⁵⁰ However, Aventis failed to instruct farmers of this restriction

6KzZaOsCZizMQEz7_ZtUZSfLPCI9L-VYbgJ/?1dmy&urile=wcm%3apath%3a%2FAPHIS_Content_Library%2FSA_Our_Focus%2FSA_Biotechnology%2FSA_Environmental_Documents%2F (detailing the Environmental Assessment/Environmental Impact report process and requirements).

⁴⁵ See Bratspies, *supra* note 23, at 620 (offering the example of Aventis agreeing to comply with regulations).

⁴⁶ See *infra* Part II.B.1 (narrating Aventis' failure to comply with regulations); Part II.C.1 (narrating Bayer's failure to keep unapproved rice contained as required by regulations); see also *infra* Part II.D.1 (narrating Syngenta's failure to explain to farmers that its genetically engineered corn was not accepted in certain markets).

⁴⁷ *Starlink Corn*, 212 F. Supp. 2d at 835 ("Aventis did not include the EPA-mandated label on some StarLink packages, did not notify, instruct and remind StarLink farmers of the restrictions on StarLink use, proper segregation methods and buffer zone requirements, and did not require StarLink farmers to sign the obligatory contracts.").

⁴⁸ *Id.* at 833; see also Syngenta, *History Recalled of Disappearing Garst Seed*, AGPROFESSIONAL (May 6, 2013), available at <http://www.agprofessional.com/news/History-recalled-of-disappearing-Garst-seed-206365601.html> (explaining that Aventis CropScience sold the seed through its licensee, Garst Seed Company); *Bayer Buys CropScience*, CNN (Oct. 2, 2001, 3:26 PM), available at <http://cnnfn.cnn.com/2001/10/02/europe/bayer/> (explaining that Aventis CropScience was acquired by Bayer, Inc. in 2001 and is now known as Bayer CropScience, Inc.).

⁴⁹ *Starlink Corn*, 212 F. Supp. 2d at 832–38 (noting that Cry9C was similar to "known human allergens"); see also Bratspies, *supra* note 23, at 599 (explaining that Cry9C kills pests by destroying the insect's stomach cells).

⁵⁰ *Starlink Corn*, 212 F. Supp. 2d at 834 (mentioning that StarLink's registration limited it to "animal feed, ethanol production and seed increase."); see also *Starlink Corn Regulatory Information*, ENVTL. PROTECTION AGENCY (last updated Apr. 2008), available at http://www.epa.gov/pesticides/biopesticides/pips/starlink_corn.htm (specifying that "in 1998,

because Aventis thought it would get EPA approval for the use of StarLink for human consumption later.⁵¹ Aventis repeatedly tried to obtain registration for StarLink; it even tried to obtain retroactive approval after the corn was found in human food.⁵² The EPA never gave the expected approval, eliminating Aventis' last excuse for noncompliance.⁵³ StarLink was sold in the United States between May 1998 and October 2000, by the end of which StarLink was being grown on approximately 350,000 acres.⁵⁴

The EPA imposed detailed special regulations and requirements on the cultivation of StarLink.⁵⁵ These restrictions included "mandatory segregation methods" such as a 660-foot "buffer zone" between any StarLink corn and other corn growing in the fields.⁵⁶ The EPA also explicitly made Aventis responsible for these restrictions, obligating it to:

- (a) inform farmers of the EPA's requirements for the planting, cultivation and use of StarLink; (b) instruct farmers growing StarLink how to store and dispose of the StarLink seeds, seed bags, and plant detritus; and (c) ensure that all farmers purchasing StarLink seeds signed a contract binding them to these terms before permitting them to grow StarLink corn.⁵⁷

Aventis' duty to explain to farmers that StarLink could only be used for animal feed and industrial non-food purposes existed at the time of delivery of the seed, prior to planting, prior to harvest, and after harvest.⁵⁸

Aventis' failure to inform farmers of the stringent restrictions on StarLink directly resulted in the contamination of the human food supply.⁵⁹

EPA registered StarLink™ for commercial use, provided that all grain derived from StarLink™ corn was directed to domestic animal feed or to industrial uses (e.g., biofuels).")

⁵¹ See *Starlink Corn*, 212 F. Supp. 2d at 835 ("Prior to the 2000 growing season Aventis allegedly instructed its seed representatives that it was unnecessary for them to advise StarLink farmers to segregate their StarLink crop or create buffer zones because Aventis believe the EPA would amend the registration to permit StarLink use for human consumption.").

⁵² Bratspies, *supra* note 23, at 625–26 ("Aventis sought to deal with the problem of StarLink contamination of the human food supply by requesting that EPA grant CRY9C a limited retroactive tolerance.").

⁵³ *Starlink Corn*, 212 F. Supp. 2d at 835 (noting that in July 2001 the EPA reaffirmed its position that StarLink had allergenic qualities and the FDA declared it to be an adulterant under 21 U.S.C. § 301, *et seq.*).

⁵⁴ *Id.* at 835.

⁵⁵ *Id.* at 834–35 (including requiring Aventis to have growers sign "Grower Agreements" that would give further details on the proper management of StarLink grown, telling growers where to sell their corn so that it would be directed toward appropriate uses and not towards the food supply, and requiring labels on the bags in which the corn was sold).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 835 (noting EPA regulations requiring Aventis to conduct a follow-up survey with growers after harvest).

The EPA had required Aventis to inform growers of the strict restrictions on StarLink corn, but farmers insisted they did not receive notice.⁶⁰ Other farmers said they were informed by Aventis after they had planted the corn but were told not to worry because Aventis expected to receive EPA approval soon.⁶¹ There was also evidence that at least some of the bags containing StarLink corn seed had no labels that informed farmers of the restrictions.⁶²

The first discovery of StarLink corn in human food was in September of 2000, when Friends of the Earth, a consumer group, found traces of it in taco shells sold under the Taco Bell name.⁶³ More detections of the presence of StarLink in human food quickly followed this initial discovery.⁶⁴ Aventis failed to inform farmers that the corn could not be sold for human consumption and to ensure that it was not sold for human consumption.⁶⁵

The news that StarLink corn, unapproved for human consumption, was spread throughout the U.S. corn supply sent shock waves into the corn markets.⁶⁶ Not only did Japan and Europe have a strict policy against importing the corn, but the EPA's concerns about StarLink causing allergic reactions in humans sparked fears in consumers.⁶⁷ Fearful of StarLink

⁵⁹ *Starlink Corn*, 212 F. Supp. 2d at 835.

⁶⁰ Barnaby J. Feder, *Farmers Cite Scarce Data in Corn Mixing*, N.Y. TIMES (Oct. 17, 2000), <http://www.nytimes.com/2000/10/17/business/farmers-cite-scarce-data-in-corn-mixing.html> (reporting the accounts of farmers who say that they were either not informed that the corn was unfit for human consumption, or were informed that it was unfit for human consumption, but that the EPA was going to change the restrictions).

⁶¹ *Id.* at 2 (“[Farmers] said that while they were told last spring that the corn had not been approved by federal regulators for human consumption, they were also told that they need not worry because approval was expected shortly.”).

⁶² *Starlink Corn*, 212 F. Supp. 2d at 834 (“Aventis did not include the EPA-mandated label on some StarLink packages. . .”), *see also* Genetically Engineered Food Alert, *StarLink's Impacts on the Farm Economy*, INST. FOR AGRIC. & TRADE POLICY, http://www.iatp.org/files/StarLinks_Impacts_on_the_Farm_Economy.htm#_ftn1 (last visited Feb. 21, 2015) (reporting in Footnote 1 that the IATP obtained a StarLink bag); Gabriella Flora, *Aventis: Global Compact Violator*, CORPWATCH (June 14, 2001), <http://www.corpwatch.org/article.php?id=621> (reporting in Footnote 13 that author Gabriella Flora obtained a StarLink bag).

⁶³ Marcella S. Kreiter, *StarLink Corn Scandal Continues to Spread*, UNITED PRESS INT'L (Oct. 25, 2000, 12:48 PM), https://www.organicconsumers.org/old_articles/ge/thirdtaco.php.

⁶⁴ *Id.* (reporting that Aventis was unable to account for about 9 million bushels of StarLink in October of 2000).

⁶⁵ *Starlink Corn*, 212 F. Supp. 2d at 835 (“Aventis did not include the EPA-mandated label on some StarLink packages.”).

⁶⁶ *Id.* at 835 (detailing the repercussions from food manufacturers and foreign countries after StarLink was found in the human food supply).

⁶⁷ *See generally* Michael Hansen, *Comments on the Assessment of Scientific Information Concerning StarLink Corn (Cry9C Bt Corn Plant-Pesticide)EPA Docket Number OPP-00688*, CONSUMERSUNION (Nov. 28, 2000), available at <http://consumersunion.org/news/comments-concerning-starlink-corn/> (detailing the Consumers Union's concerns about the Cry9C toxin in a letter to the EPA and asking the EPA to not remove the restrictions

contamination, U.S. food producers began sourcing foreign corn for their products in place of domestic corn.⁶⁸ Foreign importers, including South Korea and Japan, stopped importing or reduced their imports of U.S. corn.⁶⁹ Those businesses involved in buying and selling corn, particularly to foreign markets, were faced with the immense and expensive task of testing their corn for StarLink contamination.⁷⁰

Unsurprisingly, Aventis was inundated with lawsuits.⁷¹ A class action of farmers was consolidated in the Eastern Division of the Northern District Court of Illinois as *In re StarLink Corn Prods. Liability Litigation v. Aventis Crop Science* and was decided on July 11, 2002.⁷² Aventis appealed the trial court's decision in favor of the plaintiffs and ultimately the suit settled out of court for \$110 million in February 2013.⁷³

2. The Legal Claims in Starlink Corn

Although the *Starlink Corn* case settled out of court, the July 11, 2002 district court opinion on Aventis' motion to dismiss in *Starlink Corn* is still valuable for its discussion of the claims put forth in the court's ruling on the motion to dismiss.⁷⁴ Aventis moved to dismiss the class action lawsuit, arguing that FIFRA preempted all of the plaintiffs' state law claims, that the plaintiffs had failed to state a claim, and that the economic loss doctrine barred any recovery for damages.⁷⁵ The court held that the plaintiffs' claims were not preempted by FIFRA, and while the economic loss doctrine was applicable, it did not bar recovery.⁷⁶ The plaintiffs were left with five strong

on the registration of StarLink corn); see also Andrew Pollack, *Altered Corn Surfaced Earlier*, N.Y. TIMES (Sept. 4, 2001), available at <http://www.nytimes.com/2001/09/04/business/04STAR.html> (reporting the public's concerns about allergenic effects of StarLink).

⁶⁸ *Starlink Corn*, 212 F. Supp. 2d at 835.

⁶⁹ *Id.* at 835 ("South Korea, Japan and other foreign countries have terminated or substantially limited imports of U.S. corn.").

⁷⁰ *Id.* ("Grain elevators and transport providers are now mandating expensive testing on all corn shipments.").

⁷¹ See Associated Press, *Taco Bell Sues Over Starlink Corn Fiasco*, ORGANIC CONSUMERS ASSOC. (Sept. 19, 2001), available at https://www.organicconsumers.org/old_articles/gefood/tacobellsues092501.php (noting filing of class action suit by 4,600 Taco Bell restaurants and franchises); Neil E. Harl et al, *The StarLink Situation*, IOWA STATE EXTENSION (Nov. 18, 2003) at 25, available at <http://www.extension.iastate.edu/nr/rdonlyres/2306d560-122d-4993-8cc7-be9e91ca5009/0/0010star> ("On March 7, 2002, the United States District Court for the Northern District of Chicago approved a \$9 million settlement in a class action lawsuit filed on behalf of consumers who said they suffered allergic reactions from eating food products containing StarLink™ corn.").

⁷² *Starlink Corn*, 212 F. Supp. 2d at 828.

⁷³ Paul Elias, *Biotech Firms Will Pay \$110 million to Settle StarLink Corn Lawsuit*, THE TOPEKA CAPITAL-JOURNAL (Feb. 7, 2003), available at http://cjonline.com/stories/020703/usw_biotech.shtml (reporting terms of settlement);

⁷⁴ See generally *Starlink Corn*, 212 F. Supp. 2d at 828–50.

⁷⁵ *Starlink Corn*, 212 F. Supp. 2d at 834.

⁷⁶ *Id.* at 883.

claims: negligence *per se*, negligence, private nuisance, public nuisance, and strict liability.⁷⁷ The court dismissed the plaintiffs' claims for conversion and the North Carolina Unfair Trade Practices Act (NCUTPA) violations, and, so far as they were based on a theory of a failure to warn, the negligence and strict liability claims as well.⁷⁸ The plaintiffs' claims for negligence *per se*, public nuisance, private nuisance, and violations of the Tennessee Consumer Protection Act (TCPA) as well as negligence and strict liability (under new theories) survived Aventis' motion to dismiss.⁷⁹

i. The Economic Loss Doctrine Limits Tort Claims and Damages

The *Starlink Corn* plaintiffs showed they had permissible damages according to the economic loss doctrine, which limits the recoverable damages in tort claims.⁸⁰ According to the economic loss doctrine, “when a defective product causes solely economic loss, the buyer may pursue damages only through contract law . . . [but] if the defective product causes personal injury or property damage, the buyer may pursue damages only through tort law.”⁸¹ The farmers in *Starlink Corn* had permissible tort claims because they had claims to harm to property and had never purchased StarLink corn so they did not have contracts with Aventis that forced them to seek contract remedies.⁸² The plaintiffs' claims survived Aventis' motion to dismiss because the court deemed the alleged contamination was property damage, “either by cross-pollination in the fields or by commingling later in the distribution chain.”⁸³ The court found that the corn, as a defective

⁷⁷ *Id.* at 838–39.

⁷⁸ *Id.* at 852.

⁷⁹ *Id.* at 843–52 (stating that the negligence and strict liability claim survived summary judgment under the new articulation—that Aventis had a “duty to ensure that StarLink did not enter the human food supply, and their failure to do so caused plaintiff's corn to be contaminated.”).

⁸⁰ *Id.* at 838.

⁸¹ Ralph A. Anzivino, *The False Dilemma of the Economic Loss Doctrine*, 93 MARQ. L. REV. 1121, 1121–22 (2010), available at <http://scholarship.law.marquette.edu/mulr/vol93/iss3/5/>.

⁸² See *Starlink Corn*, 212 F. Supp. 2d at 842 (explaining that the plaintiffs include only those farmers who did not purposefully grow StarLink). Plaintiffs in other cases may have to seek contract remedies. However, the contracts (“Grower Agreements”) generally do not involve bargaining between the parties and therefore, frequently favor the seed companies. See Neil D. Hamilton, *Farmer's Legal Guide to Production Contracts*, UNIVERSITY OF ARKANSAS (Jan. 1995) at 6, http://www.nationalaglawcenter.org/wp-content/uploads/assets/articles/hamilton_productioncontracts.pdf (providing a basic overview of grower agreements in order to educate farmers and stating that “producers can find themselves at a disadvantage when bargaining with the company that may have developed the genetics and that controls the end-use market”); generally The Farm Business Development Center, *Grower Agreement*, PRAIRIE CROSSING FARM, <http://www.prairiecrossingfarms.com/groweragreement.pdf> (last visited Feb. 15, 2015) (showing an example of a grower agreement);.

⁸³ *Starlink Corn*, 212 F. Supp. 2d at 842–43.

product, caused harm to the plaintiffs' property, legitimizing the plaintiffs' tort claims.⁸⁴

ii. Negligence Per Se and Avoiding FIFRA Preemption

Plaintiffs' claims may be preempted by FIFRA when the genetically engineered crop in question is regulated by the EPA.⁸⁵ FIFRA does not provide a private cause of action but it does not prevent states from creating their own civil liabilities for FIFRA violations.⁸⁶ FIFRA prevents plaintiffs from suing to enforce FIFRA because it gives the EPA the power to sue to enforce FIFRA.⁸⁷ Hence, in a situation where the defendant has allegedly violated FIFRA, the plaintiff must plead a claim that is not preempted by FIFRA.⁸⁸ The *Starlink Corn* plaintiffs' negligence *per se* claim for Aventis' failure to comply with the EPA and FIFRA regulations was not preempted by FIFRA because it may have existed as a private cause of action under state law.⁸⁹ However, the court did not actually find that a state civil remedy existed.⁹⁰ The court merely found that if a state civil remedy did in fact exist, the plaintiffs had sufficiently pled Aventis' violation of EPA and FIFRA regulations.⁹¹ The *Starlink Corn* plaintiffs were allowed to continue with their "theory that defendants (1) violated duties imposed by the limited registration; (2) made representations to StarLink growers that contradicted the EPA-approved label; and (3) failed to inform parties handling StarLink corn downstream of the EPA-approved warnings."⁹²

The plaintiffs artfully framed their claims to avoid FIFRA preemption.⁹³ For example, the plaintiffs did not claim that Aventis lacked an effective warning label on the corn because FIFRA regulates these warning labels.⁹⁴ If the plaintiffs had argued that Aventis' label was inadequate, the

⁸⁴ *Id.* at 841–843 (“[T]he economic loss [doctrine] . . . does not bar claims for injuries to other property, or claims alleged in combination with non-economic losses. The question then becomes defining ‘other property’”).

⁸⁵ *Overview of FIFRA, Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)*, ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/agriculture/lfra.html> (last updated June 27, 2012) (providing a summary of FIFRA and explaining that FIFRA gives the EPA the authority to regulate pesticides but does not fully preempt state law).

⁸⁶ *Id.*

⁸⁷ WASTE & CHEMICAL ENFORCEMENT DIV., EPA, FIFRA ENFORCEMENT RESPONSE POLICY 4–5 (2009), <http://www2.epa.gov/sites/production/files/documents/fifra-erp1209.pdf> (containing the FIFRA Enforcement Response Policy promulgated by the EPA).

⁸⁸ *Starlink Corn*, 212 F. Supp. 2d at 835–837.

⁸⁹ *Id.* at 836.

⁹⁰ *Id.* at 836 n.3 (“At this point we [the court] express no opinion as to whether the ten jurisdictions in question recognize a civil remedy for the FIFRA violations alleged here.”).

⁹¹ *Id.* at 836–37.

⁹² *Id.* at 838.

⁹³ *Id.* at 835–36 (ruling that FIFRA “prohibits states from imposes any labeling requirements beyond those imposed by the EPA).

⁹⁴ *Starlink Corn*, 212 F. Supp. 2d at 835–36 (citing 7 U.S.C. 136(v)(b)).

plaintiffs' claims would have been preempted under FIFRA.⁹⁵ However, the court suggested that plaintiffs could maintain a private cause of action for false or misleading representations *not* contained on the label, because FIFRA exclusively regulates representations contained on the label itself.⁹⁶

iii. Negligence

The plaintiffs also sought negligence claims against Aventis. The Restatement (Second) of Torts defines negligence as “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.”⁹⁷ The elements of negligence are duty, breach of duty, proximate cause, and damages.⁹⁸ In each individual situation concerning genetically engineered crops, the court will determine the defendant's duty.⁹⁹

In *Starlink Corn*, the court concluded the alleged duty was “Aventis had a duty to ensure that StarLink did not enter the human food supply, and their failure to do so caused plaintiff's corn to be contaminated.”¹⁰⁰ The court rejected Aventis' articulation of the duty alleged as “to preserve the market price of corn,” and instead “read the complaint to allege direct harm to plaintiff's corn.”¹⁰¹ This ruling was based only on the pleadings, so the ruling on the motion to dismiss merely decided that the plaintiffs sufficiently pled the elements of negligence to allow the claim to proceed.¹⁰² If the case had gone to trial, Aventis's duty would have been a factual dispute.¹⁰³ Nevertheless, *Starlink Corn*'s discussion of the duty a seed company owes farmers sheds light on the effectiveness of negligence claims in these scenarios.¹⁰⁴

⁹⁵ *Id.* at 836.

⁹⁶ *Id.* at 837–38 (adding that a plaintiff could also have a private cause of action if the alleged defective design of the product itself and not of the warning label).

⁹⁷ RESTATEMENT (SECOND) OF TORTS § 282 (1965).

⁹⁸ *See Starlink Corn*, 212 F. Supp. 2d at 843 (“Defendants challenge three separate elements: duty, proximate cause and damages.”).

⁹⁹ *See* RESTATEMENT (SECOND) OF TORTS § 285 (1965); *generally* United States v. Carroll Towing Co., 159 F.2d 169 (2d. Cir. 1947) (providing early example of a court determining the duty of the defendant).

¹⁰⁰ *Starlink Corn*, 212 F. Supp. 2d at 843.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

iv. Private Nuisance

The plaintiffs' claim for private nuisance also survived Aventis' motion to dismiss.¹⁰⁵ The plaintiffs alleged that Aventis "created a private nuisance by distributing corn seeds with the Cry9C protein, knowing that they would cross-pollinate with neighboring corn crops."¹⁰⁶ The court defined a private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."¹⁰⁷ The pivotal issue in dispute was whether Aventis could be liable for nuisance for seeds it had sold and no longer controlled.¹⁰⁸ The court found that Aventis could be liable under a "substantial participation" theory, because "one can be liable for nuisance . . . when he participates to a substantial extent in carrying it on."¹⁰⁹ The court found that Aventis could be liable under a substantial participation theory because Aventis had "an affirmative duty to enforce StarLink farmers' compliance with the Grower Agreements."¹¹⁰ This duty, the court held, "arguably gave Aventis some measure of control over StarLink's use, as well as a means to abate any nuisance caused by its misuse."¹¹¹ Additionally, the court found Aventis' failure to provide warnings and its incorrect representations were "arguably the type of culpable conduct" relied upon in another case imposing liability.¹¹² On these grounds, the court allowed the private nuisance claim to move forward and stated that further litigation would reveal whether sufficient facts supported the element of "substantial contribution."¹¹³ The private nuisance claim was effective because under the substantial participation theory of private nuisance, the plaintiffs could show that Aventis not only had a duty to prevent the nuisance, but that Aventis had the ability to mitigate the nuisance.¹¹⁴

¹⁰⁵ *Id.* at 847 (stating the court may not rule in a motion to dismiss on whether the facts alleged equaled "substantial contribution," but ruling that the allegations were sufficient to state a private nuisance claim).

¹⁰⁶ *Starlink Corn*, 212 F. Supp. 2d at 844.

¹⁰⁷ *Id.* at 844–45 (citing the RESTATEMENT (SECOND) OF TORTS § 821D (1979)).

¹⁰⁸ *Id.* at 845–46.

¹⁰⁹ *Id.* at 845 (citing the RESTATEMENT (SECOND) OF TORTS § 834 (1979)).

¹¹⁰ *Id.* at 847.

¹¹¹ *Id.*

¹¹² *Starlink Corn*, 212 F. Supp. 2d at 847 (citing to *Young v. Bryco Arms*, 736 N.E.2d 1, 14 (Ill. Ct. App.2001)).

¹¹³ *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 834 (1979) ("[o]ne is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on").

¹¹⁴ *Starlink Corn*, 212 F. Supp. 2d at 847.

v. *Public Nuisance*

The corn's allergenic nature allowed the plaintiffs to successfully plead the elements of public nuisance.¹¹⁵ The Restatement (Second) of Torts defines a public nuisance as "an unreasonable interference with a right common to the general public."¹¹⁶ The court determined that the public had a right to a food supply free from unapproved substances.¹¹⁷ The plaintiffs also had to show "that they have been harmed differently than the general public" in order to have a private action.¹¹⁸ Here, the plaintiffs experienced "physical harm to chattels" and "pecuniary loss to business," which was distinguishable from the harm to the general public.¹¹⁹ The claim survived the motion to dismiss because the plaintiffs demonstrated that while their damages stemmed from the same nuisance, the damages were distinguishable.¹²⁰

vi. *Conversion*

Meeting the necessary elements of conversion is difficult for plaintiffs in these cases, as demonstrated by the dismissal of the conversion claim in *Starlink Corn*.¹²¹ Generally, the elements of conversion are (i) intentional control over a chattel, (ii) serious interference with another's right of the chattel, such that (iii) justice requires compensation.¹²² The *Starlink Corn* plaintiffs did not have a strong argument for conversion. The court found the plaintiffs' interference argument insufficient because the plaintiffs still had "possession" and "total control over the corn."¹²³ The court determined that while the market was "less hospitable," the corn was "still viable...for sale on the open market," thus the product's "essential character"

¹¹⁵ *Id.* at 848 (noting that releasing the corn with a limited registration presented a nuisance to the public because it contaminated the food supply).

¹¹⁶ RESTATEMENT (SECOND) OF TORTS § 821B (1979). The Restatement of Torts lists circumstances under which an interference could be deemed unreasonable: (a) [w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience; or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right"

¹¹⁷ *Starlink Corn*, 212 F. Supp. 2d at 848.

¹¹⁸ *Id.* The court was careful to note that the harm experienced by the plaintiffs must actually be entirely different from that experienced by the general public. *Id.* For example, a mere "difference in severity" of harm is not a different harm. *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 848 (noting that the public experienced a contaminated food supply, whereas farmers experienced a decrease in prices and lost profits).

¹²¹ *Starlink Corn*, 212 F. Supp. 2d at 844 (dismissing claim for conversion).

¹²² *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 222A (1979)).

¹²³ *Id.* (noting that a chattel can be converted simply through alteration and not by total dominion).

was not changed.¹²⁴ The court felt that the “decrease in market price” could “arguably constitute a trespass to chattels,” but the plaintiffs failed to plead as such.¹²⁵

Furthermore, because the plaintiffs did not allege that Aventis intended to exert control over the corn, they failed to demonstrate “an intentional exercise of dominion.”¹²⁶ The court rejected the plaintiffs’ argument that intent should be inferred from Aventis’ negligence on the grounds that intent, by its nature, does not arise through negligence.¹²⁷

vii. State Consumer Protection Acts: The North Carolina Unfair Trade Practices Act and the Tennessee Consumer Protection Act

Claims under consumer protection statutes may also be a viable option for farmers and agribusinesses seeking relief.¹²⁸ However, because plaintiffs in these class actions come from many different states, standing as a national class under a state’s consumer protection law has proven difficult.¹²⁹ In *Starlink Corn*, the plaintiffs failed to establish standing under the NCUTPA, but they did have standing under the TCPA.¹³⁰ Whether the plaintiffs had standing was a matter of statutory interpretation.¹³¹ The court pointed out that it was necessary for a named plaintiff to “show personal injuries to state a claim” and that none of the named plaintiffs were from North Carolina and the named plaintiffs did not allege that they conducted business in North Carolina.¹³² The plaintiffs argued that “[b]ecause Aventis is headquartered in North Carolina,” North Carolina was the center of any unfair practices.¹³³ However, the court cited to authorities that showed that the plaintiffs must show an in-state injury to have standing to sue.¹³⁴ Because the plaintiffs had not pled any contacts with North Carolina or any in-person harm in North Carolina, their NCUTPA claim failed.¹³⁵

In contrast, the plaintiffs established standing under the TCPA because the statute’s broad language included “Aventis’ licensing of its

¹²⁴ *Starlink Corn*, 212 F. Supp. 2d at 844 (“At worst, StarLink contamination changed plaintiff’s yield from being corn fit for human consumption to corn fit only for domestic or industrial use.”).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *See, e.g., id.* at 848–852.

¹²⁹ *Id.* at 833, 848–852.

¹³⁰ *Starlink Corn*, 212 F. Supp. 2d at 848–852.

¹³¹ *Id.* at 848 (“[T]he dispute here, however, is not over whether any particular practice is illegal under the statute, but the statute’s geographic reach.”).

¹³² *Id.* (holding that named plaintiffs cannot rely on unnamed plaintiffs to show harm).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 849–51.

StarLink process to seed growers.”¹³⁶ The plaintiffs had standing as third parties harmed by Aventis’ deceptive practices, despite no direct engagement in commercial transactions with Aventis in Tennessee.¹³⁷

Starlink Corn is notable for the clear damage done by Aventis to both farmers and to the general public.¹³⁸ Aventis failed to adequately instruct the farmers of the restrictions on the StarLink corn and failed to instruct them and support them in keeping the corn away from the food market.¹³⁹ Aventis’ negligent actions were more egregious in light of the potential allergenic nature of the corn, the EPA’s repeated refusal to deregulate the corn and the EPA’s repeated imposition of new regulations on the corn.¹⁴⁰ These facts combined to make the plaintiffs’ claims for negligence, and private and public nuisance especially effective.¹⁴¹ Additionally, *Starlink Corn* demonstrates the struggle for plaintiffs to show they have standing under state consumer protection statutes.¹⁴²

C. LibertyLink Rice: “Experimental Use Only” Rice Found in the U.S. Rice Supply

1. The Facts of LibertyLink Rice

Another case, *LibertyLink Rice*, developed shortly after the *Starlink Corn* case and involved the same seed company.¹⁴³ In this case, the defendant’s genetically engineered crop was only approved for limited experimental use, but it somehow ended up in the U.S. rice supply.¹⁴⁴ Aventis developed LibertyLink Rice in the early 1990s to resist Aventis’ “Liberty” herbicide, consisting of glufosinate.¹⁴⁵ LibertyLink Rice came in

¹³⁶ *Starlink Corn*, 212 F. Supp. 2d at 849–51.

¹³⁷ *Id.* at 851–52.

¹³⁸ See *supra* text accompanying notes 66–70 (discussing the StarLink contamination of the human food supply and the resulting havoc on corn prices).

¹³⁹ See *supra* text accompanying notes 48–62 (discussing the EPA restrictions for StarLink corn and how Aventis failed to inform farmers of the restrictions).

¹⁴⁰ See *supra* note 67 and accompanying text (describing the EPA’s concerns about the allergenic nature of the corn).

¹⁴¹ *Starlink Corn*, 212 F. Supp. 2d at 847.

¹⁴² See *supra* text accompanying notes 117–27 (discussing the plaintiffs’ efforts to establish standing under the NCTPA and the TCPA).

¹⁴³ In re Genetically Modified Rice Litig., 666 F. Supp. 2d 1004 (E.D. Mo. 2009) (multidistrict litigation).

¹⁴⁴ See *infra* text accompanying notes 149–53 (explaining that LibertyLink Rice was only approved for experimental use but was discovered in the U.S. rice supply).

¹⁴⁵ Joshua B. Cannon, *Statutory Stones and Regulatory Mortar: Using Negligence Per Se to Mend the Wall Between Farmers Growing Genetically Engineered Crops and Their Neighbors*, 67 WASH & LEE L. REV. 653, 672 (2010) (arguing that the USDA should promulgate regulations that would serve as a standard of care for negligence *per se* claims); see also A. Bryan Endres, *Coexistence Strategies, The Common Law of Biotechnology And Economic Liability Risks*, 13 DRAKE J. AGRIC. L. 115, 133 (2008) (arguing that while there are

four strains, two of which were never approved by the USDA but contaminated the markets.¹⁴⁶ Aventis, pursuant to its experimental use permit from the USDA, had been doing field research trials with the LLRICE 601 strain since December of 1998.¹⁴⁷ Bayer CropScience bought Aventis in 2001 as the field trials were ending.¹⁴⁸

Although LLRICE 601 was only approved for experimental use, in January 2006, rice purchaser and exporter Riceland Cooperative discovered traces of LLRICE 601 in the rice in its warehouses.¹⁴⁹ Bayer reported this find to the USDA, which conducted an investigation.¹⁵⁰ In 2007, the other unapproved strain, LLRICE 604, was found in more rice samples, instigating more investigations by the USDA.¹⁵¹ On February 20, 2007, the USDA said it would take no enforcement actions against Bayer because it could not determine how the rice ended up in the U.S. food supply.¹⁵² The USDA deregulated LL601 and approved it for all uses in November 2006.¹⁵³

However, the knowledge that this unapproved genetically engineered crop had been circulating in the U.S. rice supply caused significant damage to the U.S. rice market.¹⁵⁴ Japan halted imports of U.S. long-grain rice, and the European Union started purity testing all rice from the United States.¹⁵⁵ Other countries restricted their imports of U.S. rice.¹⁵⁶ This decline in demand for U.S. rice was arguably related to the price of rice dropping.¹⁵⁷

Farmers and various businesses in the rice industry filed lawsuits against Bayer to recover the money they lost because of the weak price of

signs of policy changes for the regulation of genetically engineered crops, plaintiffs will have to primarily rely on litigation for resolution of their claims).

¹⁴⁶ See Cannon, *infra* note 145, at 672 (noting that Aventis obtained commercial approval for LLRICE06 and LLRICE62).

¹⁴⁷ See Endres, *supra* note 145, at 133 (explaining that Aventis did not seek commercial approval for LLRICE601 as it was conducting the field trials).

¹⁴⁸ See Cannon, *supra* note 145, at 672–73; see also Endres *supra* note 145, at 134; CNN, *Bayer Buys CropScience*, *supra* note 48 (explaining that Aventis CropScience was acquired by Bayer, Inc. in 2001 and is now known as Bayer CropScience, Inc.).

¹⁴⁹ Endres, *supra* note 145, at 134.

¹⁵⁰ Cannon, *supra* note 145, at 673 (noting that the investigation “required 8,500 staff hours in eleven states and Puerto Rico”).

¹⁵¹ *Id.* (noting that the investigation suggested that the contamination was probably not caused by cross-pollination).

¹⁵² USDA, *Report of LibertyLink Rice Incidents*, available at <http://www.aphis.usda.gov/newsroom/content/2007/10/content/printable/RiceReport10-2007.pdf> (last visited Jan. 19, 2015) (summarizing the USDA response to the LibertyLink Rice scenario).

¹⁵³ Cannon, *supra* note 145, at 673 (noting that the USDA decided that the LLRICE601 posed no health risks to humans).

¹⁵⁴ Master Consol. Amended Class Action Compl. at ¶ 110, *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811-CDP, (E.D. Mo. Jan. 5, 2009), available at <http://www.moed.uscourts.gov/sites/default/files/mdl/06-1811/1010.pdf> [hereinafter *LibertyLink Rice Compl.*] (noting damages to farmers, including an approximate \$150 million loss because of the decline in rice prices from simply August 21–22, 2006).

¹⁵⁵ Cannon, *supra* note 145, at 673–74.

¹⁵⁶ Cannon, *supra* note 145, at 674.

¹⁵⁷ *Id.*

rice.¹⁵⁸ When Bayer agreed to a \$750 million settlement in July 2011, “scores of lawsuits” were pending against it in state and federal courts.¹⁵⁹ The settlement terms provided that it would become effective once over 85% of those farmers injured by Bayer’s actions opted into the settlement.¹⁶⁰

2. *The Bellwether Trials*

The settlement for *LibertyLink Rice* came after the conclusion of the five bellwether trials from *LibertyLink Rice*, the multi-district litigation action in the Federal District Court sitting in the Eastern District of Missouri in December 2006.¹⁶¹ Judge Catherine Perry set the five bellwether trials as examples for the various state and federal lawsuits.¹⁶² The trials included cases from Missouri, Arkansas, Louisiana, Mississippi and Texas.¹⁶³ Three of those cases resulted in verdicts in favor of the farmers.¹⁶⁴ Bayer settled

¹⁵⁸ *Id.* Lawsuits were also filed naming Riceland, a large rice cooperative who had discovered the rice contamination, as a defendant. Endres, *supra* note 145, at 134–35.

¹⁵⁹ Bloomberg News, *Bayer Settles with Farmers Over Modified Rice Seeds*, N.Y. TIMES (July 1, 2011), available at http://www.nytimes.com/2011/07/02/business/02rice.html?_r=0 (reporting on the settlement agreement).

¹⁶⁰ MDL Settlement Agreement at 5, *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811-CDP (E.D. Mo., July 2011), available at http://gmricessettlement.com/BY_Un-Secure/MDL_Settlement_Agreement.pdf [hereinafter *LibertyLink Rice Settlement Agreement*] (defining an eligible claimant).

¹⁶¹ Transfer Order at 2, *In re Genetically Modified Rice Litig.*, 466 F.Supp. 2d 1351 (E.D. Mo. Dec. 19, 2006), No. 4:06 MD 01811-CDP, available at <http://www.moed.uscourts.gov/sites/default/files/mdl/06-1811/406MD1811CDP%20Doc1%20MDL%20ORDER.pdf> [hereinafter *LibertyLink Transfer Order*] (transferring litigation over the *LibertyLink* rice contamination to the Eastern District of Missouri); see also David Bennett, *GM Rice: Settlement Construction and Farmer Options*, DELTA Farm Press (July 3, 2011), available at <http://deltafarmpress.com/rice/gm-rice-settlement-construction-and-farmer-options> (discussing the bellwether process in this case). “A bellwether trial is a case that the court and the parties select to test their arguments, with the goal of moving the overall litigation towards resolution.” *What Is a Bellwether Trial*, LIEFF, CABRASER, HEIMANN & BERNSTEIN, available at <http://www.lieffcabraser.com/Personal-Injury/What-is-a-Bellwether-Trial.shtml> (last visited Apr. 17, 2015).

¹⁶² Mem. & Order at 1, *Penn v. Bayer CropScience LP* (E.D. Mo. 2010), No. 4:06 MD 1811 CDP (Second Bellwether Trial), available at <http://www.moed.uscourts.gov/sites/default/files/mdl/06-1811/3181.pdf> [hereinafter *Second Bellwether Trial Order*] (referring parties to the memorandum from the first bellwether trial for further guidance).

¹⁶³ *LibertyLink Transfer Order*, *supra* note 161, at 1.

¹⁶⁴ Mem. & Order at 1, *Bell v. Bayer CropScience LP* (E.D. Mo. 2010), No. 4:06 MD 1811 CDP (First Bellwether Trial) available at <http://www.moed.uscourts.gov/sites/default/files/mdl/06-1811/3180.pdf> [hereinafter *First Bellwether Trial Order*] (refusing to grant new trial to defendant after judgment was entered in favor of plaintiffs); Mem. & Order at 1, *Second Bellwether Trial Order* (refusing to grant new trial to defendant after judgment was entered in favor of plaintiffs); Amended Judgment at 1–2, *Deshotels Farm Mgmt. v. Bayer CropScience LP* (E.D. Mo. 2010), No. 4:06 MD 1811 CDP (Fourth Bellwether Trial), available at <http://www.moed.uscourts.gov/sites/default/files/mdl/06-1811/3329.pdf> [hereinafter *Fourth Bellwether Trial Judgment*] (entering judgment in favor of the plaintiffs).

individually with the plaintiffs in one of the final two bellwether trials, and finally included the plaintiffs in the last bellwether trial in a final \$750 million settlement with all of the eligible rice farmers.¹⁶⁵

The claims in the bellwether trials were very similar to each other.¹⁶⁶ The bellwether trials included claims for negligence, negligence *per se*, public and private nuisance and fraud under their respective state statutes.¹⁶⁷ The plaintiffs in the trials also brought claims for violations of the NCUTPA and tried to impose liability on a negligence *per se* theory for violating the FPPA.¹⁶⁸ Judge Perry produced two memoranda after the first two bellwether trials to detail her decisions in order to provide guidance for the other trials.¹⁶⁹ The memoranda from these cases discuss the claims in general terms and avoid the temptation to become overly immersed in the intricacies of the numerous individual state statutes.¹⁷⁰

i. The Economic Loss Doctrine Did Not Limit Plaintiffs' Recovery of Damages

Missouri recognizes the economic loss doctrine in some scenarios.¹⁷¹ However, Judge Perry held that the doctrine did not apply to this case because there was no contract between the parties, and the farmers were “not claiming damage” to any allegedly defective product; they were claiming “market losses and damage to other property,” permissible damages under the economic loss doctrine.¹⁷² Thus, because the doctrine did not apply, the plaintiffs’ recoverable damages were not limited.¹⁷³

¹⁶⁵ ¹⁶⁵ Order on Joint Motion to Dismiss at 1–3, *Riviana Foods Inc. v. Bayer CropScience LP* (E.D. Mo. 2010), No. 4:06 MD 1811 CDP (Third Bellwether Trial), available at <http://www.moed.uscourts.gov/sites/default/files/mdl/06-1811/2987.pdf> [hereinafter Third Bellwether Trial Dismissal] (dismissing case); see also Allison Grande, *How They Won It: Wolf, Gray Notch \$750M for Rice Farmers*, LAW360.COM (Aug. 16, 2011), available at <http://www.law360.com/articles/263617/how-they-won-it-wolf-gray-notch-750m-for-rice-farmers> (providing additional information in a report on the final settlement).

¹⁶⁶ Mem. & Order at 2–3, *In re Genetically Modified Rice Litig.* (E.D. Mo. 2009), No. 4:06 MD 1811-CDP, available at <http://www.moed.uscourts.gov/sites/default/files/mdl/06-1811/2075.pdf> [hereinafter LibertyLink Rice Dec. 9 Op.] (ruling on summary judgment motion of the second bellwether trial and discussing claims); *In re Genetically Modified Rice Litig.*, 666 F. Supp.2d 1004, 1015, (E.D. Mo. 2009), No. 4:06 MD 1811-CDP [hereinafter LibertyLink Rice Oct. 9 Op.] (discussing claims).

¹⁶⁷ *Id.*

¹⁶⁸ LibertyLink Rice Dec. 9 Op., *supra* note 167, at 2 (discussing claims).

¹⁶⁹ The first memorandum was the October 9, 2009, order ruling on the summary judgment motions in the first bellwether trial. LibertyLink Rice Oct. 9 Op., *supra* note 167. Judge Perry’s Memorandum and Order of Dec. 9, 2009 ruled on the summary judgment motions in the Second Bellwether Trial. See LibertyLink Rice Dec. 9 Op., *supra* note 167.

¹⁷⁰ Mem. & Order at 3, 12, Second Bellwether Trial Order, No. 4:06 MD 1811 CDP (E.D. Mo. 2010) (referring parties to the memorandum from the first bellwether trial for more detailed analysis of law).

¹⁷¹ LibertyLink Rice Oct. 9 Op., *supra* note 166, at 1016.

¹⁷² LibertyLink Rice Oct. 9 Op., *supra* note 166 1016–17; see also *Starlink Corn*, 212 F. Supp.2d at 838 (ruling that recovery is possible when there is harm to “some property

ii. *Negligence Per Se*

Negligence *per se* allows a party's negligence to be "established as a matter of law," that is, a party's actions violating a statute or regulation are deemed negligent *per se*.¹⁷⁴ The plaintiffs' negligence *per se* claims for violations of various state statutes and the FPPA regulations did not survive summary judgment.¹⁷⁵

In the various bellwether trials, the plaintiffs argued, first, FPPA violations, and secondly, that the violations constituted negligence *per se*.¹⁷⁶ The court disagreed, however, and held that the FPPA regulations do not provide a standard of care and that there was "no evidence" that a violation of the regulations would "create strict liability or a private right of action."¹⁷⁷ In other words, Bayer had violated the FPPA, but the violations did not lead to a negligence *per se* claim.¹⁷⁸

The plaintiffs' state law negligence *per se* claims also failed because the statutes required intentional conduct.¹⁷⁹ The plaintiffs only accused Bayer of negligent behavior, which, by definition, is not intentional.¹⁸⁰ In sum, the court held that even if the FPPA was violated, it did not constitute strict liability, and secondly, that the plaintiffs failed to plead the necessary elements for negligence *per se* under their respective state statutes.¹⁸¹

iii. *Negligence*

The negligence claims went to trial for a jury determination of Bayer's standard of care and whether it was met.¹⁸² The court determined that industry standards would be relevant in determining the appropriate standard of care and that expert witnesses should be allowed to testify about industry standards.¹⁸³ The court held that the regulations and "regulatory scheme," did not establish a standard of care on their own, but should be

other than the product itself"); *see also* *Sample v. Monsanto Co.*, 283 F. Supp.2d 1088, 1092–94 (E.D.Mo.2003) (barring recovery of damages under economic loss doctrine pursuant to Iowa and Illinois law).

¹⁷³ *LibertyLink Rice Oct. 9 Op.*, *supra* note 166, at 1017.

¹⁷⁴ BLACK'S LAW DICTIONARY 1135 (10th ed. 2009) (defining "negligence *per se*").

¹⁷⁵ *LibertyLink Rice Oct. 9 Op.*, *supra* note 166, at 1020.

¹⁷⁶ *Id.* at 1021–22.

¹⁷⁷ *Id.* at 1022.

¹⁷⁸ *Id.* at 1022–23.

¹⁷⁹ *Id.* at 1023 (citing Mo. Rev. Stat. §§ 578.416, 537.353); *LibertyLink Rice Oct. 9 Op.*, *supra* 167, at 1023.

¹⁸⁰ *Id.* at 1023.

¹⁸¹ *See supra* text accompanying notes 161–66.

¹⁸² *LibertyLink Rice Oct. 9 Op.*, *supra* 167, at 1023–25 (ruling on the negligence claim in the First Bellwether Trial).

¹⁸³ *Id.*

considered when determining a standard of care.¹⁸⁴ More specifically, the court held Bayer's duty was to ensure that the people or companies it employed to test and handle the rice did so properly.¹⁸⁵

Judge Perry refused to allow Bayer to argue that the plaintiffs could not prove proximate cause, because there was no intervening cause sufficient to remove Bayer from the line of causation.¹⁸⁶ Any negligent conduct was in Bayer's handling of the LibertyLink rice because Bayer was responsible for the rice.¹⁸⁷ Because Bayer was the party responsible for introducing the rice into the environment, Bayer "had the duty to do so without negligence."¹⁸⁸ The risk of the rice escaping was a foreseeable risk that Bayer took upon itself.¹⁸⁹ Any negligence on the part of companies or employees hired by Bayer to handle the rice was negligence "attributable to Bayer," and not an intervening cause.¹⁹⁰

Ultimately, if Bayer negligently caused the contamination of the U.S. rice supply, Bayer could not argue that other parties' "failure to detect the contamination" was an intervening cause breaking the chain of causation.¹⁹¹ Any possible actions by other parties that spread or failed to stop the contamination were "an entirely foreseeable and natural product of the original negligence," and not intervening causes of the damages experienced by the plaintiffs.¹⁹²

iv. Private and Public Nuisance Claims

As for the nuisance claims, Judge Perry allowed the private nuisance claim to go forward to trial, but dismissed the public nuisance claims.¹⁹³ The public nuisance claims were dismissed because, absent evidence that the rice was dangerous to the health of the public, the court could not find that noncompliance with the EPA regulations "posed a danger to public health and safety."¹⁹⁴ Under Missouri law, a public nuisance is "an offense against the public order and economy of the state that violates the public's right to life, health, and the use of property, while, at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or

¹⁸⁴ *Id.* at 1023–24 (adding that "compliance or noncompliance with the regulations" did not determine liability).

¹⁸⁵ *Id.* at 1024.

¹⁸⁶ *Id.* at 1024–25.

¹⁸⁷ *Id.* at 1024.

¹⁸⁸ LibertyLink Rice Oct. 9 Op., *supra* 167, at 1024.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1024–25.

¹⁹² *Id.* at 1024.

¹⁹³ *Id.* at 1018–19.

¹⁹⁴ LibertyLink Rice Oct. 9 Op., *supra* 167, at 1018 (distinguishing StarLink corn, which was not approved for human consumption).

property of the whole community.”¹⁹⁵ The plaintiffs failed to show that the rice was harmful to the larger public.¹⁹⁶

The court sent the private nuisance claim to trial because the plaintiffs sufficiently pled the elements of private nuisance.¹⁹⁷ Under Missouri law, a private nuisance is, “the unreasonable, unusual, or unnatural use of one’s property so that it substantially impairs the right of another to peacefully enjoy his property.”¹⁹⁸ The court determined that at trial, a jury could find that the LibertyLink rice contamination of the farmers’ crops actually interfered with the farmers’ “enjoyment of their land.”¹⁹⁹

v. North Carolina Unfair Trade Practices Act

The court rejected the plaintiffs’ claim for violation of the NCUPTA.²⁰⁰ The plaintiffs did not have standing under the NCUPTA because their claims did not “have a sufficient effect on North Carolina businesses” for the act to apply to them.²⁰¹ As in *Starlink Corn*, the judge determined that an in-state injury was necessary to state a claim under the NCUTPA.²⁰² Specifically, the judge found that the NCUTPA required “an in-state injury to a plaintiff’s in-state business operations.”²⁰³ Ultimately, the NCUTPA protected residents of North Carolina.²⁰⁴ The plaintiffs, who resided in many different states, did not have enough of a connection to North Carolina or “arise mainly from North Carolina activities” to successfully bring a claim under the NCUTPA.²⁰⁵

LibertyLink Rice is notable for the plaintiffs’ success against Bayer despite the fact that the USDA declined to ascribe fault to Bayer.²⁰⁶ The *LibertyLink Rice* plaintiffs convinced the judge and juries that Bayer acted negligently; showing that negligence under state law is an effective claim, although negligence *per se* under the FPPA is not.²⁰⁷

¹⁹⁵ *Id.* at 1018.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 1019.

¹⁹⁸ *Id.* at 1018.

¹⁹⁹ *Id.* at 1019.

²⁰⁰ LibertyLink Rice Oct. 9 Op., *supra* note 167 at 1018.

²⁰¹ *Id.* at 1018.

²⁰² *Id.* at 1017.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 1017–18.

²⁰⁶ USDA, *Report of LibertyLink Rice Incidents*, available at <http://www.aphis.usda.gov/newsroom/content/2007/10/content/printable/RiceReport10-2007.pdf> (last visited Jan. 19, 2015) (summarizing the USDA response to the LibertyLink rice scenario).

²⁰⁷ See *supra* Part II.2.B–C (discussing the negligence claims in *LibertyLink Rice*).

D. Syngenta Corn: Farmers Learn Too Late China Does Not Want Agrisure Corn

Currently, Agrisure Viptera and Duracade corn are the genetically engineered crops making litigation waves. Syngenta, the proprietor of Agrisure Viptera corn, sold the corn seed without informing farmers that the seed was not approved for import by China, a major export market for corn.²⁰⁸ Agrisure Viptera corn, approved by the U.S. government since 2010, is genetically engineered to be insect-resistant.²⁰⁹ Much like StarLink corn, Agrisure Viptera is regulated by the EPA as a pesticide.²¹⁰

1. The Facts of Syngenta Corn

Approved for all uses by the EPA in 2010, Syngenta began selling Agrisure Viptera, with its distinguishing MIR162 gene trait, to farmers in 2010 for the 2011 crop year.²¹¹ Some countries approved Agrisure Viptera for import, but China did not.²¹² Syngenta did not inform its customers that China would not accept the corn, fearing that the information would decrease sales of Agrisure Viptera corn seed.²¹³ Historically, China is not a major importer of foreign corn, but China dramatically increased its imports of U.S. corn in 2011–2012 crop season.²¹⁴ Farmers and exporters who relied on this market were upset when China began to reject loads of corn in November 2013 for containing Viptera corn.²¹⁵ Industry insiders speculated that China

²⁰⁸ David Ranii, *Syngenta Faces Lawsuits Over Genetically Modified Corn*, NEWSOBSERVER.COM (Oct. 27, 2014), available at <http://www.newsobserver.com/2014/10/27/4269355/syngenta-faces-lawsuits-over-genetically.html> (reporting that “Syngenta generated \$14.7 billion in worldwide sales last year, including \$3.2 billion in seed sales.”).

²⁰⁹ *Syngenta Seeds, Inc. v. Bunge N. Am., Inc.*, 820 F.Supp.2d 953, 958 (N.D. Iowa 2011) (noting that Syngenta began selling Agrisure Viptera corn in August of 2010).

²¹⁰ *Bunge*, 820 F. Supp. 2d at 958 (noting the registration of Agrisure Viptera as a pesticide).

²¹¹ See *News Release: Syngenta Receives Chinese Import Approval for Agrisure Viptera Corn Trait*, SYNGENTA (Dec. 22, 2014), available at http://www.syngentacropprotection.com/News_releases/news.aspx?id=187482 (reporting approval by China of the MIR162 trait in 2014).

²¹² *Bunge*, 820 F. Supp. 2d at 961 (discussing China’s zero-tolerance policy).

²¹³ Pls.’ First Am. Class Action Compl. at 2, *Five Star Farms v. Syngenta AG*, No. 2:14-cv-02571-JWL-JPO (D. Kan. 2014) [hereinafter *Five Star Farms Compl.*] (citing the testimony of a Syngenta official in *Bunge* who testified that Syngenta planned to commercialize Agrisure Viptera and Duracade with or without China’s approval).

²¹⁴ See Jacob Bunge, *U.S. Corn Exports to China Dry Up over GMO Concerns*, WSJ, Apr. 11, 2014, <http://www.wsj.com/articles/SB10001424052702303873604579493790405023808> (reporting on the negative effect of Viptera corn to the recently growing Chinese export market).

²¹⁵ Kristine A. Tidgren, *Syngenta Litigation Still Pending Despite China’s Viptera Approval*, IOWA STATE UNIV. CTR. FOR AGRIC. LAW & TAXATION (Dec. 27, 2014), <http://www.calt.iastate.edu/article/syngenta-litigation-still-pending-despite-chinas-viptera-approval> (reporting that China began rejecting the corn in November of 2013); *Bunge*, 820 F.

rejected the corn because its domestic corn crop had increased and it was difficult for Chinese corn growers to compete with the low prices of the imported foreign corn.²¹⁶ China continued to refuse to approve Viptera for importation until December 22, 2014.²¹⁷

Despite clear signals that China would not approve the MIR162 gene, Syngenta moved forward in 2014 with its commercialization of Agrisure Duracade corn, which also contained the MIR162 gene.²¹⁸ Estimates of the economic damage stemming from China's rejection vary, but the National Grain and Feed Association conjectured in April 2014 that the rejected shipments came "to nearly 1.45 million metric tons," causing grain companies to lose about \$427 million, and further estimates put the damages at over \$1 billion.²¹⁹ On April 16, 2015, the association claimed in an economic assessment analysis that "positive detections of MIR 162 . . . has virtually halted U.S. corn trade with China."²²⁰

Because farmers and agribusinesses did not know that China had not approved Agrisure Viptera for import, they did not take precautions, such as utilizing field buffer zones, to prevent the mixing of Agrisure Viptera corn with other corn.²²¹ As a result, Agrisure Viptera corn was present in essentially the entire U.S. corn supply, contaminating it in the eyes of the Chinese government.²²² Much U.S. corn was sold for reduced prices or was

Supp. 2d at 963 (discussing the angry reactions of farmers, including increased phone calls and emails to Syngenta and canceled orders).

²¹⁶ Reuters, *Syngenta Awaits China's Approval For Gene-Modified Corn*, AGWEEK.COM (Jan. 8, 2014, 11:02 AM), <http://www.agweek.com/event/article/id/22430/> (citing to "industry sources" who believe China's rejection of the corn was for protectionist reasons); *but see* Tim Maverick, *China to Become World's No. 1 Corn Importer*, WALLSTREETDAILY.COM (May 18, 2014), <http://www.wallstreetdaily.com/2014/05/18/china-corn/> (arguing that China's rejection of corn was due to because the increased standard of living and desire to eat meat from corn fed animals).

²¹⁷ *Syngenta Receives Chinese Import Approval* *supra* note 211.

²¹⁸ Five Star Farms Compl., *supra* note 213, at 46.

²¹⁹ 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 (Apr. 16, 2014) 1, 1-3, available at <http://ngfa.org/wp-content/uploads/Agrisure-Viptera-MIR-162-Case-Study-An-Economic-Impact-Analysis.pdf-3> (studying "the ramifications of commercialization of crop biotechnology prior to gaining approvals in major U.S. export markets."). The National Grain and Feed Association also estimated that the harm ranged from \$1 billion to \$2.9 billion. Five Star Farms Compl., *supra* note 213, at 3.

²²⁰ Fisher, *supra* note 219, at 2.

²²¹ *See Bunge*, 820 F. Supp.2d at 958 (relating how Syngenta even encouraged farmers to plant non-Agrisure Viptera corn side by side with Agrisure Viptera corn, essentially ensuring cross pollination).

²²² Simmons Hanly Conroy, *Syngenta Corn Farmers Lawsuit*, <http://www.simmonsfirm.com/complex-litigation/gmo-corn-seed-lawsuits/syngenta-corn-farmer-lawsuits/> (last visited Feb. 24, 2015) (stating that "[b]ecause of Syngenta's failure to control how Viptera® corn was planted, the Viptera® corn trait cross pollinated with fields of non-Viptera® corn and introduced MIR 162 into the U.S. general corn supply.").

even destroyed, and many parties blamed Syngenta for corn prices dropping by half since the summer of 2012.²²³

Consequently, numerous lawsuits were filed against Syngenta.²²⁴ Several of these lawsuits were consolidated as —*Syngenta AG MIR162 Corn Litigation*—the multidistrict action pending in the U.S. Federal District Court of Kansas.²²⁵ *Syngenta Corn* is a consolidation of two class actions which were both filed on November 11, 2014: (1) *Five Star Farms, Frahm Farmland, Inc., v. Syngenta AG*, filed in the U.S. District Court, Eastern District of Missouri; and (2) *Wilson Farm Inc. v. Syngenta AG*, filed in the U.S. District Court, District of Kansas.²²⁶ Currently, *Syngenta Corn* is still in the middle of preliminary preparations for trial.²²⁷

While no complaint has been filed for *Syngenta Corn*, the plaintiffs in the underlying actions that make up *Syngenta Corn* filed complaints on December 18, 2014, before their cases were transferred and consolidated.²²⁸ These complaints provide a basic idea of the direction the legal claims in the litigation will take.

²²³ Tidgren, *supra* note 215.

²²⁴ See *id.* Cargill filed a lawsuit against Syngenta on September 12, 2014. Mark Klein, *Cargill Sues Syngenta Over Unapproved Corn Trait*, CARGILL.COM (Sept. 12, 2014), <http://www.cargill.com/news/releases/2014/NA31686255.jsp>. Trans Coastal Supply Company (an exporter) also sued Syngenta. Jacob Bunge, *Grain Shipper Files for Bankruptcy, Citing Biotech-Corn Battle*, WSJ.COM (July 14, 2015) available at <http://www.wsj.com/articles/grain-shipper-files-for-bankruptcy-citing-biotech-corn-battle-1437767340>. Archer Daniels Midland Company (which owns over 200 grain elevators) also filed a lawsuit against Syngenta. Sabrina Canfield, *Archer Daniels Midland Says GMO Corn is Killing Exports to China*, COURTHOUSE NEWS SERV. (Nov. 24, 2014), <http://www.courthousenews.com/2014/11/24/archer-daniels-midland-says-gmo-corn-is-killing-u-s-exports-to-china.htm> (reporting on the various cases filed against Syngenta). Syngenta sued Bunge North America, Inc., a warehouse operator, for Bunge's refusal to accept Viptera corn. *Bunge*, 820 F.Supp.23d at 958.

²²⁵ Transfer Order, In re Syngenta AG MIR162 Corn Litigation, MDL No. 2591 (J.P.M.L. 2014), available at http://www.jpml.uscourts.gov/sites/jpml/files/MDL-2591-Initial_Transfer-12-14.pdf [hereinafter Syngenta Corn Transfer Order] (ordering consolidation of the cases).

²²⁶ *Id.* Other tag-along cases were also consolidated into this MDL. *Id.*

²²⁷ See Order Concerning Appointment of Counsel, In re Syngenta AG MIR162 Corn Litigation, MDL No. 2591 (D. Kan. 2015), available at <http://www.ksd.uscourts.gov/order-concerning-appointment-of-counsel-doc-67/> (appointing counsel as of January 22, 2015).

²²⁸ Pls.' First Am. Class Action Compl., *Wilson Farm Inc. v. Syngenta AG*, No. 4:14-cv-01908 RWS (E.D. Mo. 2014), available at <http://www.syngentacornlitigation.com/portalresource/FirstAmendedClassActionComplaint-Missouri.pdf> [hereinafter Wilson Farm Compl.] (stating claims); *Five Star Farms Compl.*, *supra* note 213.

2. *The Wilson Farm and Five Star Farms Complaints Present the Potential Legal Claims in Syngenta Corn*

Overall, the complaints allege that Syngenta prematurely commercialized Agrisure Viptera corn in spite of the known risk that it was not approved by China, did nothing to ensure that the corn was channeled away from the corn supply destined for China, and continued to sell Viptera corn, as well as Duracade, while misrepresenting the status and importance of Chinese approval.²²⁹ The *Five Star Farms* complaint alleged numerous tort claims under various state laws.²³⁰ The complaints alleged violations of the various state consumer protection acts and the federal Lanham Act, which prohibits false advertising, and stated claims for negligence, trespass to chattels, and private nuisance.²³¹

The complaints defined the class of eligible plaintiffs as “all persons and entities . . . who during the relevant time period, were corn producers in the United States who did not purchase or plant Agrisure Viptera or Duracade corn or corn sold with MIR162 and/or Event 5307 genetically engineered corn traits, and sold their corn after November 18, 2013.”²³² The class specifically excluded farmers who had planted Agrisure Viptera or Duracade because those farmers had potential contract claims, implicating the economic loss doctrine, and precluding those farmers from seeking market damages.²³³ Essentially, any farmer who grew corn, as long as it was not Agrisure Viptera or Duracade corn could join in the class under the theory that all farmers who sold corn, whether domestically or abroad, were harmed by the low corn prices.²³⁴

The *Wilson Farm* class action classified the plaintiffs as a Nationwide Corn Producers Class, and then separately as thirteen classes of farmers from the thirteen different states.²³⁵ The complaint alleged violations of the federal Lanham Act and the Minnesota consumer protection statutes on behalf of the entire nationwide class.²³⁶ The tort claims for the various state classes were negligence, tortious interference, trespass to chattels, and private nuisance.²³⁷

²²⁹ *Wilson Farm Compl.*, *supra* note 228, at 2–4.

²³⁰ *Id.* at 67, 81, 85, 93, 113, 116.

²³¹ *Id.* at 71–88 (citing to 15 U.S.C.A. § 1051 (The Lanham Act)). At the time of *Starlink Corn*, there was a circuit split of authority relating to plaintiff standing under the Lanham Act, which may be why a Lanham Act claim was not brought in *Starlink Corn*. The Supreme Court of the United States resolved the circuit split in 2014, however. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

²³² *Five Star Farms Compl.*, *supra* note 213, at 66.

²³³ *Id.*; *see generally supra* Part II.B.2.A (discussing the economic loss doctrine).

²³⁴ *Five Star Farms Compl.*, *supra* note 213 at 66.

²³⁵ *Wilson Farm Compl.*, *supra* note 228, at 69–70.

²³⁶ *Id.* at 69.

²³⁷ *Id.* at 80–121 (outlining plaintiffs’ negligence, tortious interference, and trespass to chattels claims under various state laws). Tortious interference with business is a tort claim unique to *Syngenta Corn*. *Wilson Farm Compl.*, *supra* note 228, at 93, 95. The

The *Wilson Farm* and *Five Star Farms* complaints strove to paint a picture of reckless negligence on the part of Syngenta. For example, a major factual foundation to the plaintiffs' misrepresentation and negligence claims was Syngenta's claims that it would take steps to channel the corn into the appropriate commercial markets and away from China.²³⁸ In Syngenta's petition for deregulation, it claimed that the stewardship agreements with farmers would require the farmers to channel the corn away from markets where the corn was not approved.²³⁹ Syngenta also pledged to engage in a "wide-ranging grower education campaign" that would teach farmers how to properly channel their corn.²⁴⁰

In reality, the 2010 Stewardship Agreement Syngenta provided to farmers contained no information on the issue and the 2011 Stewardship Agreement merely asked the farmers to recognize that the corn "may" not be approved for export to certain countries, without specifying China.²⁴¹ The Stewardship Agreements also told farmers they could expect to receive a "Stewardship Guide" in the unspecified future and to watch for amendments to the guide, which were promised to be made available either by paper or by a website.²⁴² Plaintiffs argued that the vague statements in the Stewardship Agreements and the referrals to the website were certainly not the educational campaign that Syngenta had promised.²⁴³

The complaints contained lengthy factual allegations that Syngenta's irresponsible rush to commercialize the corn was in stark contrast to Syngenta's repeated public commitments to industry and company standards of stewardship.²⁴⁴ Syngenta belonged to many industry groups that published statements and policies recognizing the importance of caution in commercializing new genetically engineered crops.²⁴⁵ Syngenta's paper

claim was brought by the North Dakota and Oklahoma plaintiffs under their respective state laws. *Id.* It is not discussed at length in this article because it was only brought by two state classes. *Id.*

²³⁸ Five Star Farms Compl., *supra* note 213, at 21–24.

²³⁹ *Id.* at 23.

²⁴⁰ *Id.* (citing MIR162 Deregulation Petition Subsection IX.D).

²⁴¹ *Id.* at 36–37.

²⁴² *Id.* at 36.

²⁴³ Five Star Farms Compl., *supra* note 213, at 36.

²⁴⁴ *Id.* at 11–19.

²⁴⁵ *Id.* at 13–15. Examples of Syngenta's public commitments to stewardship include memberships in Biotechnology Industry Organization, CropLife International, and Excellence Through Stewardship. *Id.* at 13–17. These groups have publically stated that a violation of the zero-tolerance policies of many foreign countries would cause major disruption to trade. Five Star Farms Compl., *supra* note 213, at 13. Additionally, Syngenta's own foundation, The Syngenta Foundation for Sustainable Agriculture, notes the clear risk of trade disruption if a foreign country has not approved a genetically engineered crop and cites stewardship as a way to avoid any disruption to trade. *Id.* at 17; *see also* Syngenta Foundation for Sustainable Agriculture, *Public-Private Partnerships: An Experience Based Tool for Practitioners*, SYNGENTA FOUND., available at <http://www.syngentafoundation.org/index.cfm?pageID=703> (last visited Feb. 24, 2015) (stating under "Biosafety legislation and liability" that, "until a country issues a registration approval for cultivation and/or food and/or

commitment to stewardship appears especially fake in light of the fact that in *Syngenta v. Bunge*, Syngenta confessed that it had planned to sell the corn regardless of approval from China.²⁴⁶

3. The Legal Claims

i. Negligence

State by state classes of plaintiffs brought negligence claims under their respective state laws.²⁴⁷ The numerous state statutes for negligence in the complaints were not identical, but the factual allegations under the statutes were very similar, if not identical.²⁴⁸

The plaintiffs alleged that Syngenta was subject to a duty of reasonable care, which it breached in many ways.²⁴⁹ To begin, the plaintiffs claimed that Syngenta breached the duty of reasonable care by rushing to commercialize Agrisure Viptera and Duracade corn without informing farmers of the “substantial risks that growing Viptera would lead to loss of the Chinese market,” and by misleading the farmers about the importance of the status of the Chinese approval process.²⁵⁰ Allegedly, Syngenta breached its duty by failing to provide an effective stewardship program, and failing to enforce the ineffectual program that it did have.²⁵¹ Further, Syngenta breached its duty of care when it sold the corn to farmers knowing that the farmers were not properly informed or prepared to channel the corn to appropriate trade markets, and failed to “adequately warn and instruct farmers” of the “danger of contamination” of Agrisure Viptera corn with other corn.²⁵² The plaintiffs alleged that their damages were the drop in market price of corn and the loss of the Chinese market for their corn.²⁵³

ii. Private Nuisance

As with the negligence claims, the plaintiffs in *Five Star Farms* and *Wilson Farm* asserted claims for private nuisance as state classes of farmers under their respective state statutes.²⁵⁴ The state statutes had similar definitions of what constitutes a private nuisance, differing mostly in the area

feed consumption, there is a clear responsibility and liability, even if the government scientific assessments show that there are no safety or environmental issues.”).

²⁴⁶ *Bunge*, 762 F3d at 796.

²⁴⁷ *Five Star Farms Compl.*, *supra* note 213 at 78, 84, 87, 90, 94, 97.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 78.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Five Star Farms Compl.*, *supra* note 213, at ¶236.

²⁵⁴ *Id.* at 85, 88, 91 (alleging private nuisance claims under Kansas, Nebraska and North Dakota law); *Wilson Farm Compl.*, *supra* note 228, at 81, 85, 96 (alleging private nuisance claims under Alabama, Arkansas, and Minnesota state law).

of the level of intent required to show defendant's interference with plaintiffs' enjoyment of their property.²⁵⁵ For example, the Kansas private nuisance statute required grossly negligent or unreasonable conduct, whereas the Nebraskan statute required an intentional and unreasonable invasion, or, in the alternative, an unintentional invasion stemming from negligent or reckless conduct.²⁵⁶ The plaintiffs argued that they have a claim for private nuisance because Syngenta interfered with their "quiet use and enjoyment of their land and/or property interests" by "contaminating the U.S. corn supply."²⁵⁷ According to the plaintiffs, this contamination occurred when Syngenta offered Agrisure Viptera and Duracade for sale before it was approved for import to China without proper precautionary measures.²⁵⁸

iii. *Trespass to Chattels*

The *Wilson Farm* and *Five Star Farms* plaintiffs also included claims for trespass to chattels under various state statutes, claims which were untested in both *Starlink Corn* and *LibertyLink Rice*.²⁵⁹ Intent is the key element in a trespass to chattels claim.²⁶⁰

The plaintiffs sought to prove that, by prematurely commercializing its corn and failing to provide "adequate systems to isolate and channel it," Syngenta intended to intermingle Agrisure Viptera and Duracade corn with non-Agrisure Viptera and non Duracade corn.²⁶¹ Without a way to keep the Agrisure Viptera and Duracade corn separate, Syngenta must have known that it was a "substantial certainty" that the U.S. corn supply would be contaminated.²⁶² The plaintiffs argued that because Syngenta had this knowledge, it "intended to intermeddle" with the plaintiffs' corn, in which the plaintiffs had possession or rights of possession.²⁶³ The contamination allegedly resulted in the impaired condition, quality, or value of the corn.²⁶⁴ The success of this claim in *Syngenta Corn* and future cases will heavily

²⁵⁵ *Five Star Farms Compl.*, *supra* note 213 at 85, 88.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 85.

²⁵⁸ *Id.* at ¶¶ 26–29.

²⁵⁹ *Id.* at 82, 86, 89, 94, 96, 98, 101, 104, 111, 114, 117, 120 (alleging trespass to chattels under Alabama, Arkansas, Illinois, Indiana, Iowa, Kentucky, Missouri, Minnesota, Mississippi, Missouri, Tennessee, and Wisconsin state laws); *Wilson Farm Compl.*, *supra* note 228, at 12, 86, 89, 94, 96, 98, 101, 104, 111, 114, 117, 120 (alleging trespass of chattels under Alabama, Arkansas, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Tennessee, and Wisconsin state laws); Part II.B.2 (noting the legal claims in *Starlink Corn*); Part II.C.2 (noting the legal claims in *LibertyLink Rice*).

²⁶⁰ RESTATEMENT (SECOND) OF TORTS § 217 (1965) ("intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another."); *Five Star Farms Compl.*, *supra* note 213, at 83–84, 88–89, 92, 96, 98.

²⁶¹ *Five Star Farms Compl.*, *supra* note 213, at 83.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* at 89.

depend on the ability of the plaintiffs' ability to prove the defendants intended to interfere with the plaintiffs' ownership interest in the crop.

iv. The Lanham Act and State Consumer Protection Statutes

In a departure from the history of *Starlink Corn* and *LibertyLink Rice*, the plaintiffs in *Wilson Farm* and *Five Star Farms* sought damages for the violation of the federal Lanham Act.²⁶⁵ The Lanham Act, which provides a civil remedy, prohibits false advertising.²⁶⁶ The act provides for monetary and injunctive relief.²⁶⁷ The plaintiffs alleged that Syngenta made false and misleading representations in regards to the timeline for Agrisure Viptera corn's approval in China, Syngenta's ability to channel the corn away from China, and the severity of damage that would arise if China were to reject the corn.²⁶⁸

Similar to *Starlink Corn* and *LibertyLink Rice*, the *Wilson Farm* and *Five Star Farms* plaintiffs sought damages under state consumer protection acts.²⁶⁹ However, the *Five Star Farms* plaintiffs departed from the other cases by seeking damages as a nationwide class under the Minnesota consumer protection and trade practices statutes.²⁷⁰ The past cases and complaints where a nationwide or multiple state class of farmers sought damages under a state consumer protection act were all based on the NCUTPA or the TCPA.²⁷¹ Perhaps because of the earlier instances of failure to show standing under the NCUTPA, the *Five Star Farms* and *Wilson Farm* plaintiffs sought out different statutes, notably the Minnesota Unlawful Trade Practices Act (MUTPA).²⁷²

²⁶⁵ *Id.* at 71.

²⁶⁶ 15 U.S.C. § 1125 (1946) (“(a) Civil action (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which-- (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.”).

²⁶⁷ See 15 U.S.C. § 1116 (injunctive relief); 15 U.S.C. § 1117 (monetary relief).

²⁶⁸ *Five Star Farms Compl.*, *supra* note 213, at 73–74.

²⁶⁹ *Starlink Corn*, 212 F. Supp. 2d at 848–52, *LibertyLink Rice* Oct. 9 Op., *supra* 167 at 1018, *Wilson Farm Compl.*, *supra* note 228, at 69, *Five Star Farms Compl.*, *supra* note 213, at 67.

²⁷⁰ *Id.* at 67.

²⁷¹ *Supra* text accompanying notes 120–27 (discussing *Starlink Corn* and the NCUTPA and the TCPA); *supra* text accompanying notes 189–92 (discussing *LibertyLink Rice* and the NCUTPA).

²⁷² *Wilson Farm Compl.*, *supra* note 228, at 69; *Five Star Farms Compl.*, *supra* note 213, at 67.

MUTPA prohibits any person from misrepresenting the nature of merchandise and from using fraud or misrepresentation to sell merchandise.²⁷³ Whether the *Five Star Farms* plaintiffs have standing under the MUTPA is impossible to ascertain at this point, but arguably the language stating “no person” applies to non-Minnesotans.²⁷⁴

As *Five Star Farms* and *Wilson Farm* did not go to trial and were instead consolidated into the pending *Syngenta Corn* litigation, the allegations from these complaints may not be addressed in *Syngenta Corn*.²⁷⁵ *Five Star Farms* and *Wilson Farm* did, however, paint a picture of Syngenta engaged in an irresponsible course of action that harmed farmers, and these allegations, if true, may be sufficient to hold Syngenta accountable for misrepresentation and negligence.²⁷⁶

III. ANALYSIS

This section compares the facts and claims in *Starlink Corn*, *LibertyLink Rice*, and *Syngenta Corn* to argue that the most effective tort claims for class action plaintiffs who wish to recover damages from seed companies are claims based on negligence rather than intent, and claims that do not require an element of intent or negligence, such as public and private nuisance.²⁷⁷

A comparison of these cases reveals several clues as to the effectiveness of plaintiffs’ tort claims. First, the definition of a class in a class action has significant repercussions with regard to standing.²⁷⁸ Standing, as a threshold issue, is especially important and will likely be rigorously contested. Secondly, the nature of the genetically engineered crop has a significant impact on the effectiveness of the tort claims.²⁷⁹ Finally, and

²⁷³ MINN. STAT. § 325D.13 (2014) (stating that, “No person shall, in connection with the sale of merchandise, knowingly misrepresent, directly or indirectly, the true quality, ingredients or origin of such merchandise.”); *see also* The Minnesota Prevention of Consumer Fraud Act (CFA), Minn. Stat. § 325F.69 (2014) (stating that, “the act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoined as provided in section 325F.70”).

²⁷⁴ MINN. STAT. § 325D.13 (2014).

²⁷⁵ *Syngenta Corn Transfer Order*, *supra* note 225 (ordering consolidation of the cases).

²⁷⁶ *Supra* text accompanying notes 211–**Error! Bookmark not defined.** (discussing the facts behind the *Syngenta Corn* litigation).

²⁷⁷ *See infra* text accompanying notes 267–87 (comparing and contrasting the three cases); *see infra* text accompanying notes 310–65 (arguing that negligence and private and public nuisance are the most effective claims for plaintiffs).

²⁷⁸ *See infra* text accompanying notes 285–92 (discussing importance of framing a putative class).

²⁷⁹ *See infra* text accompanying notes 369–378 (arguing that the success of public nuisance claims depends on whether the genetically engineered crop may have negative effects on human health).

this often comes in conjunction with the previous concept, the extent and foundation of the regulations and trade restrictions on the genetically engineered crop in question provide the basis for the plaintiffs arguments about what was violated, what the seed companies knew, what the seed companies should have known about the nature of the crop, and the effects of violating the regulations or trade restrictions.²⁸⁰

The cases discussed *supra*, illustrate how difficult it is for plaintiffs to connect the actions and knowledge of the seed companies with the harm suffered by the plaintiffs.²⁸¹ Simply by the nature of the two concepts, proving negligence is always easier than proving intent.²⁸² In these cases, proving intent is especially difficult because the chain of causation from the seed companies' actions until the alleged damage is long and attenuated.²⁸³ Thus, the plaintiffs' strategy to prove intent necessitates arguing that what the seed company knew, should have known, and did know to create enough inferences to connect to the harm suffered by the plaintiffs.²⁸⁴ Public and private nuisance are also effective claims because they do not generally include an element of intent and these cases lend themselves to facts that are sufficient to meet the elements.²⁸⁵ Plaintiffs should be aware that public nuisance will likely only be an effective remedy if the genetically engineered crop in question has documented health risks for humans.²⁸⁶

A. Comparing StarLink Corn and LibertyLink Rice to Syngenta Corn

The facts of *Syngenta Corn* are similar to the facts of *Starlink Corn* and *LibertyLink Rice* in some ways and quite distinct in others.²⁸⁷ *Syngenta Corn* is similar to *Starlink Corn* in that, in both cases, the seed company was allegedly not forthright and candid with its customers about the limitations on the use of the genetically modified seed it was selling.²⁸⁸ Specifically, in *Starlink Corn*, the seed company Aventis (now Bayer) failed to inform its customers that its seed was not approved by the United States for human

²⁸⁰ See *infra* text accompanying notes 278–281 (demonstrating that whether the genetically engineered crop violated its registration or other regulations significantly impacts what claims will be more effective).

²⁸¹ See *supra* Part II.B–D.

²⁸² See, e.g., *supra* text accompanying notes 184–185.

²⁸³ See *supra* text accompanying notes 213–**Error! Bookmark not defined.** (discussing the correlation between China's rejection of corn and the drop of corn prices).

²⁸⁴ See *infra* text accompanying notes 343–346 (noting what Syngenta knew and did not know in the *Starlink Corn* case).

²⁸⁵ See *infra* text accompanying notes 358–378 (discussing private and public nuisance).

²⁸⁶ See *infra* text accompanying notes 373–376 (noting that plaintiffs in future cases can cite to the success of private nuisance claims in *Starlink Corn* as support in cases where the genetically engineered seed is not approved for human consumption).

²⁸⁷ See *supra* Part II.B–D.

²⁸⁸ See *supra* Part II.B., D. (discussing the facts of *Syngenta Corn* and *Starlink Corn*).

consumption.²⁸⁹ In *Syngenta Corn*, the seed company, Syngenta, did not inform its customers that its seed was not approved by the Chinese government for import into China.²⁹⁰ In both cases, the evidence supports the position that the reticence in communication was not mere oversight or accidental.²⁹¹ In *Starlink Corn*, Aventis explained that its reason for not informing customers of the restriction was that it thought the EPA would change the restriction on the seed.²⁹² Perhaps less culpably, in *Syngenta Corn*, Syngenta advertised its corn as approved for major export markets, when it knew that China (a recent major export market) would not accept it, ostensibly because Syngenta thought it would get approval from China later.²⁹³ However, there is also evidence that Syngenta did not care whether it had Chinese approval.²⁹⁴

In contrast, the facts of *LibertyLink Rice* do not involve misrepresentations by a seed company.²⁹⁵ The seed company, Bayer, had an experimental permit from the USDA for LibertyLink rice and the evidence seems to show that Bayer only used the rice in experimental plots.²⁹⁶ Although the rice got beyond the experimental plots and ended up in the U.S. rice supply, Bayer never misrepresented any facts about the rice because Bayer never offered the rice for sale.²⁹⁷

Syngenta Corn also differs from *LibertyLink Rice* and *Starlink Corn* by the fact that Syngenta did not violate any U.S. regulations by commercializing its corn.²⁹⁸ In *LibertyLink Rice* and *Starlink Corn*, the genetically engineered crops violated their registrations.²⁹⁹ Agrisure Viptera and Duracade corn were simply not approved for import by China.³⁰⁰ Thus,

²⁸⁹ See *supra* text accompanying notes 57–59 (detailing Aventis’ failure to inform farmers that StarLink was not approved for human consumption).

²⁹⁰ See Five Star Farms Compl., *supra* note 213.

²⁹¹ See *supra* text accompanying note 61.

²⁹² See *supra* text accompanying notes 57–59 (detailing Aventis’ failure to inform farmers that StarLink was not approved for human consumption).

²⁹³ See *supra* text accompanying note 213 (noting Syngenta’s failure to inform farmers that China would not accept Agrisure Viptera corn).

²⁹⁴ See *supra* note 213 (citing the testimony of a Syngenta official in *Syngenta v. Bunge* who testified that Syngenta planned to commercialize Agrisure Viptera and Duracade with or without China’s approval).

²⁹⁵ See *supra* Part II.C.1 (illustrating the facts of *LibertyLink Rice*).

²⁹⁶ See *supra* text accompanying notes 137–140 (describing the USDA investigation that failed to show Bayer at fault).

²⁹⁷ See *supra* text accompanying notes 137–140 (noting the discovery of LibertyLink rice in U.S. rice supply, but not as a result of sales).

²⁹⁸ See *supra* text accompanying note 213 (noting that the EPA approved Agrisure Viptera corn for all uses).

²⁹⁹ See *supra* text accompanying notes 44–56 (describing the StarLink corn restrictions and violations); see *supra* text accompanying note 149 (noting that LibertyLink rice was only approved for experimental use, but the rice ended up in the U.S. rice supply).

³⁰⁰ See *supra* text accompanying notes 212, 218 (explaining that China had not approved Agrisure Viptera or Duracade for import).

the question of whether U.S. regulations were violated by Agrisure Viptera and Duracade corn is a non-issue.

Another similarity between the cases is the composition of the classes of plaintiffs.³⁰¹ In *Starlink Corn*, only farmers who did not grow StarLink corn were included in the class.³⁰² By default, *LibertyLink Rice* followed suit.³⁰³ In *LibertyLink Rice*, no farmers purchased Bayer's rice because it was not offered for sale, so any farmer who grew long grain rice and could show market loss was eligible for the settlement money.³⁰⁴ The current structure of the *Syngenta Corn* class action also limits the class of plaintiffs to farmers who did not buy the Agrisure Viptera and Duracade corn.³⁰⁵

B. Tort Claims

The importance of carefully crafting the class of plaintiffs is to ensure that the plaintiffs can seek remedies under tort law and avoid having their damages barred by the economic loss doctrine.³⁰⁶ According to the economic loss doctrine, farmers with contracts must seek contract remedies for their losses and cannot sue for market loss damages.³⁰⁷ The plaintiffs in *Syngenta Corn* and in other future suits should also carefully craft their classes of farmers. The classes must be very narrowly defined so that plaintiffs' tort claims are not barred by the economic loss doctrine.³⁰⁸

For example, the *Wilson Farm* and *Five Star Farms* complaints carefully framed their classes of plaintiffs.³⁰⁹ *Wilson Farm* and *Five Star Farms* did not include farmers who planted Agrisure Viptera or Duracade

³⁰¹ See *infra* text accompanying notes 281–284 (noting the composition of the classes in the three cases).

³⁰² See *supra* text accompanying note 82 (noting the composition of the plaintiffs in *Starlink Corn*).

³⁰³ See *supra* text accompanying 177 (explaining that LibertyLink rice was only used by Aventis for experimental use).

³⁰⁴ See *supra* note 160 and accompanying text (describing the settlement with rice farmers).

³⁰⁵ See *supra* text accompanying notes 232–234 (describing the exclusion of farmers who grew Agrisure Viptera or Duracade corn from the eligible class of plaintiffs in *Wilson Farm* and *Five Star Farms*).

³⁰⁶ See *supra* Part II.B.2.A (explaining the economic loss doctrine in the context of the *Starlink Corn* claims).

³⁰⁷ See *supra* Part II.B.2.A (explaining application of economic loss doctrine to *Starlink Corn* claims); *supra* Part II.C.2.A (explaining that the economic loss doctrine did not limit plaintiff's claims in *LibertyLink Rice*); *supra* Part II.D.3.A (explaining the effect of the economic loss doctrine in *Syngenta Corn*).

³⁰⁸ See *supra* Part II.B.2.A (explaining the economic loss doctrine in the context of the *Starlink Corn* claims); *supra* Part II.C.2.A (explaining that the economic loss doctrine did not limit plaintiff's claims in *LibertyLink Rice*); *supra* Part II.D.3.A. (explaining the effect of the economic loss doctrine in *Syngenta Corn*).

³⁰⁹ See *supra* text accompanying notes 229–232 (describing the composition of the plaintiff classes in *Wilson Farm* and *Five Star Farms*).

because those farmers had contracts with Syngenta and would thus be barred from recovering market loss damages by the economic loss doctrine.³¹⁰

1. Negligence Per Se is an Ineffectual Claim Because it is Difficult to Find a Statute Imposing Strict Liability for Violating Federal Regulations

Plaintiffs face a severe hurdle to when attempting to establish negligence *per se* because they lack a statute that clearly ascribes strict liability for the violation of the federal regulations concerning genetically engineered crops.³¹¹ Plaintiffs have been unsuccessful asserting FIFRA, the FPPA, or EPA and USDA violations to establish strict liability, and only limited success in finding a state law that provides a negligence *per se* civil remedy for violating these federal regulations.³¹² The negligence *per se* claim based on violations of the FPPA in *Starlink Corn* survived the motion to dismiss merely to the extent that the plaintiffs were given the opportunity to show at a later time that they had a state law that imposed strict liability for violating FIFRA.³¹³ Whether the plaintiffs had such a state law available to them never came to light because the parties settled.³¹⁴ Attempts by plaintiffs to argue that a defendant should be held strictly liable for violating FIFRA, FPPA, or EPA and USDA regulations will probably never succeed. The case law clearly holds that the FPPA does not provide for a standard of care, and that there was no congressional intent for a violation of the regulations to create strict liability.³¹⁵

Plaintiffs have also been unsuccessful with their state law negligence *per se* claims.³¹⁶ For example, the *LibertyLink Rice* plaintiffs tried suing under a Missouri statute.³¹⁷ However, the plaintiffs were unable to plead all the necessary elements required for a negligence *per se* claim.³¹⁸ The

³¹⁰ See *supra* text accompanying notes 229–233 (explaining the need to exclude farmers with contracts).

³¹¹ See *supra* Part II.B.2.B (discussing the absence of a statute imposing strict liability in *Starlink Corn*); *supra* Part II.C.2.B (discussing the absence of a statute imposing strict liability in *LibertyLink Rice*).

³¹² *Id.*

³¹³ See *supra* text accompanying notes 88–90 (discussing the court’s decision in *Starlink Corn* to allow the plaintiffs to show later that a state law existed that created a civil remedy for violations of FIFRA).

³¹⁴ See *supra* note 90 and accompanying text (explaining that the court reserved the determination of the existence of such a statute for later).

³¹⁵ See *supra* text accompanying note 184 (noting the ruling in *LibertyLink Rice* that the federal regulations do not provide for a standard of care).

³¹⁶ See *supra* text accompanying notes 179 (explaining that the state negligence *per se* claims in *LibertyLink Rice* failed because the state statutes did not provide a negligence standard of care, but instead required intentional conduct).

³¹⁷ See *supra* text accompanying note 179 (citing Missouri statutes used in *LibertyLink Rice*).

³¹⁸ See *supra* text accompanying notes 181 (discussing the plaintiffs’ failure to plead necessary elements).

Missouri statute required intentional conduct and the plaintiffs only alleged negligent conduct.³¹⁹

In consideration of these past failures, the *Syngenta Corn* plaintiffs and other plaintiffs' negligence *per se* claims are unlikely to be effective unless they can find an appropriate state statute that either provides for strict liability for violating the federal regulations, or prohibits in and of itself the conduct of the defendants.³²⁰ Although more research could be done in this area, the fact that the plaintiffs in *LibertyLink Rice* and *Starlink Corn* were unable to find an effective statute in spite of having plaintiffs from across the country, suggests that such a statute is rare.³²¹

However, in the case of the *Syngenta Corn* plaintiffs, even finding such a state statute would not ensure the success of a negligence *per se* claim. The *Syngenta Corn* plaintiffs lack the argument that Syngenta violated any federal regulations.³²² Agrisure Viptera and Duracade corn varieties were approved in the United States and were in compliance with all regulations; the problem was that the corn varieties were not approved in China.³²³

All things considered, negligence *per se* is not a strong claim for plaintiffs at this time. Negligence *per se* could be a strong remedy for plaintiffs if they could sue under a state statute that automatically makes a seed company negligent if the company violates FIFRA, FPPA, or USDA and EPA regulations and the seed company does in fact violate those regulations.³²⁴ Plaintiffs could also seek out state negligence *per se* statutes like the Missouri statute, but they must be able to satisfy the elements of those statutes.³²⁵

³¹⁹ See *supra* text accompanying note 179–180 (noting that Missouri statutes required intentional conduct).

³²⁰ See *supra* text accompanying notes 89–92 (discussing in *Starlink Corn* the possibility of a state law creating a civil action for violation of federal regulations).

³²¹ See *supra* text accompanying note 82 (describing the composition of *Starlink Corn* plaintiffs); *supra*, text accompanying note 177 (explaining that *LibertyLink Rice* class composition was from any rice farmer injured during the applicable time), *supra* Part II.B.2.A (describing the composition of the *Five Star Farms* and *Wilson Farm* plaintiffs).

³²² See *supra* text accompanying notes 191–192, 208–209 (explaining that Agrisure Viptera corn was approved for use in the U.S. but was not approved by China for import).

³²³ See *supra* text accompanying note 209 (explaining that Agrisure Viptera corn was not approved by China for import).

³²⁴ See *supra* text accompanying notes 299–300 (arguing that a statute ascribing liability is required to establish a negligence *per se* claim).

³²⁵ See *supra* text accompanying note 181 (explaining that the Missouri statutes §§ 578.416, 537.353 prohibiting interference with or destruction of crops require intentional conduct).

2. *Negligence is an Effective Claim if Plaintiffs Can Obtain a Favorable Standard of Care*

In contrast to negligence *per se*, negligence is an effective claim for plaintiffs.³²⁶ The likely success of a negligence claim is demonstrated by the fact that in *Starlink Corn*, the negligence claim survived the motion to dismiss with some modifications, and in the *LibertyLink Rice* bellwether trials, the plaintiffs won their cases primarily on the negligence claims.³²⁷

Of course, a key issue in negligence is the appropriate standard of care that applies to the defendant.³²⁸ When a party's duties are not clearly spelled out in statutes, the appropriate standard of care is an issue for the court to decide.³²⁹ The standard of care applied to the defendant can vary from situation to situation and industry to industry.³³⁰ Courts determine the standard of care that applies after considering all relevant authority, so the *Syngenta Corn* plaintiffs should argue for a standard of care that gives Syngenta a duty to U.S. farmers.³³¹ As in *LibertyLink Rice* and *Starlink Corn*, the *Syngenta Corn* plaintiffs are alleging that Syngenta owed them a duty even though they did not buy the corn from Syngenta.³³²

Plaintiffs have significant precedent they can rely on to support their claim that seed companies should be held to a high duty of care. In *Wilson Farm* and *Five Star Farms*, the plaintiffs proposed a standard of duty based on industry standards, Syngenta's own sustainability standards, and state

³²⁶ See *supra* text accompanying notes 85–96 (describing the difficulty in pleading a successful negligence *per se* claim in *Starlink Corn*); *supra* text accompanying notes 174–181 (describing the dismissal of the negligence *per se* claim in *LibertyLink Rice*); *supra* text accompanying note 102 (describing how the negligence claim survived the motion to dismiss in *Starlink Corn*); *supra* text accompanying notes 164–165, 182–192 (discussing the success of plaintiffs with their negligence claims in the *LibertyLink Rice* bellwether trials).

³²⁷ See *supra* text accompanying note 102 (describing how the negligence claim survived the motion to dismiss in *Starlink Corn*); *supra* text accompanying notes 164–165 (discussing the success of plaintiffs in the *LibertyLink Rice* bellwether trials); *supra* text accompanying 182–192 (discussing the negligence claims in the *LibertyLink Rice* bellwether trials).

³²⁸ See *supra* text accompanying note 230 (discussing *Starlink Corn*'s use of the Restatement (Second) of Tort's definition of negligence); *supra* text accompanying note 98 (describing elements of negligence in *Starlink Corn*).

³²⁹ See *supra* text accompanying notes 97–104 (discussing court's decision about the standard of care in *Starlink Corn* and noting that it would be an issue at trial).

³³⁰ *Id.*

³³¹ See *supra* text accompanying note 183 (describing how the court in *LibertyLink Rice* utilized industry standards in determining an appropriate standard of care).

³³² See *supra* text accompanying note 249 (discussing the *Five Star Farms* and *Wilson Farm* plaintiffs' allegations that Syngenta owed them a duty of reasonable care); *supra* text accompanying notes 185–192 (noting that the court in *LibertyLink Rice* found that Bayer had a duty to ensure its rice was handled properly and not negligently introduced into the environment).

statutes.³³³ The duty the court found in *Starlink Corn* was that Aventis had a duty “to ensure that StarLink did not enter the human food supply.”³³⁴ In *LibertyLink Rice*, the plaintiffs sued under various state negligence statutes.³³⁵ The court considered the statutes as well as industry standards to determine the standard of care for the defendant.³³⁶ For example, the court held that because Bayer was responsible for the LL601 and LL604 rice strains, it had the duty to prevent the known and foreseeable risk of contamination and to introduce the strains into the environment without negligence.³³⁷

Syngenta Corn plaintiffs should argue for a standard of care strict enough to impose a substantial duty on Syngenta. *Syngenta Corn* plaintiffs should not only use industry standards, but also Syngenta’s public commitments to stewardship when arguing for a standard of care favorable to the plaintiff’s chance of recovery.³³⁸ The plaintiffs have a good chance of getting the court to consider Syngenta’s public commitments to stewardship because Syngenta repeatedly spelled out and committed to those duties.³³⁹ Plaintiffs could also cite *Starlink Corn* for the applicable standard of care.³⁴⁰ Once the standard of care is established by the court, the plaintiffs will have to show that the defendant breached its duty under the standard of care.³⁴¹

Breach of duty, is of course, a factual issue for the jury.³⁴² The facts of *Syngenta Corn* give plenty of ammunition to a jury to find a breach. The facts are clear that Syngenta knew the corn was not approved in China and chose to sell it with the full knowledge that the corn would be directed towards foreign markets, including China.³⁴³ Even worse, Syngenta did not advertise the fact that the corn was not approved in China, omitting warnings

³³³ See *supra* text accompanying notes 229–246 (describing Syngenta’s failure to abide by its commitments to stewardship standards in the context of determining a standard of care).

³³⁴ See *supra* text accompanying note 100 (describing court’s ruling in regards to Aventis’ duties in *Starlink Corn*).

³³⁵ See *supra* note 167 and accompanying text (describing the plaintiffs’ state law claims in *LibertyLink Rice*).

³³⁶ See *supra* text accompanying note 183 (describing how the court in *LibertyLink Rice* utilized industry standards to determine an appropriate standard of care).

³³⁷ See *supra* text accompanying notes 182–185 (detailing Bayer’s duty).

³³⁸ See *supra* text and notes accompanying notes 238–240 (describing Syngenta’s public commitments to stewardship standards).

³³⁹ See *supra* text and notes accompanying notes 238–240 (describing Syngenta’s public commitments to stewardship standards).

³⁴⁰ See *supra* text accompanying note 100 (noting the court’s ruling in *Starlink Corn* that Aventis had a duty to not contaminate the human food supply with StarLink corn).

³⁴¹ See *supra* text accompanying note 98 (describing the elements of negligence in *Starlink Corn*).

³⁴² See *supra* text accompanying notes 182–185 (describing the jury’s role in determining negligence in *LibertyLink Rice*).

³⁴³ See *supra* text accompanying notes 222–**Error! Bookmark not defined.** (describing Syngenta’s knowledge of the need to channel Agrisure Viptera corn away from the Chinese market).

from the seed bags and promising to send farmers future information after the farmers had already bought the seeds.³⁴⁴ Not only did Syngenta take no actions to mitigate damage to the corn market, but in 2014 it pushed forward with its commercialization of Agrisure Duracade.³⁴⁵ However, Syngenta could argue that negligence is not as clear here as in the *Starlink Corn* and *LibertyLink Rice* cases because Syngenta's corn was never in violation of U.S. regulations.³⁴⁶

Moreover, in the context of a state claim for negligence, the fact pattern suggests that Syngenta was less negligent than the defendants in *LibertyLink Rice* and *Starlink Corn*.³⁴⁷ The negligence claims in Syngenta are arguably even less persuasive because Syngenta did not violate any U.S. regulations when it sold the corn.³⁴⁸ The crop was approved in the United States; the primary issue was that the corn was sold overseas and mixed with other corn sold overseas, where it was rejected by China.³⁴⁹ Arguably, this long causal chain makes Syngenta less culpable than the Aventis and Bayer corporations, which violated U.S. regulations.³⁵⁰

The final elements of negligence, proximate cause and damages, are also issues for a jury to decide.³⁵¹ The damages alleged by the *Syngenta Corn* plaintiffs are market loss damages, essentially the difference between the price they expected to receive for their corn and the price that they actually received.³⁵² The task of putting a dollar amount on those damages will go to a jury and no doubt require the testimony of expert witnesses.³⁵³ Proximate cause will also be a jury question, but the results for *Syngenta Corn* are relatively predictable from the facts as now known.³⁵⁴ To show proximate cause, plaintiffs will have to tie Syngenta's actions to the drop in price for

³⁴⁴ See *supra* text accompanying notes 224–226 (describing Syngenta's vague and insufficient warnings to farmers that Agrisure Viptera corn was not accepted by China).

³⁴⁵ See *supra* text accompanying note 218 (describing Syngenta's commercialization of Agrisure Duracade).

³⁴⁶ See *supra* text accompanying note 213 (explaining that the EPA approved Agrisure Viptera corn for all uses).

³⁴⁷ See *supra* Part II.B.1 (discussing the facts of *Starlink Corn*); *supra* Part II.C.1 (discussing facts of *LibertyLink Rice*); *supra* Part II.D.1 (discussing the facts of *Syngenta Corn*).

³⁴⁸ See *supra* text accompanying note 211 (noting that Agrisure Duracade corn was approved for all uses in the United States).

³⁴⁹ See *supra* Part II.D.1 (discussing the facts of *Syngenta Corn*).

³⁵⁰ See *supra* Part II.B.1 (discussing the facts of *Starlink Corn*); *supra* Part II.C.1 (discussing the facts of *LibertyLink Rice*); *supra* Part II.D.1 (discussing facts of *Syngenta Corn*).

³⁵¹ See *supra* text accompanying notes 182–185 (describing the jury's role in determining negligence in *LibertyLink Rice*).

³⁵² See *supra* text accompanying notes 231–234 (describing the formation of *Five Star Farms* and *Wilson Farm's* class of plaintiffs in order to seek market loss damages).

³⁵³ See, e.g., *supra* text and accompanying footnotes for notes 224–225 (including estimates from trade industry groups on the damage caused by Agrisure Viptera corn).

³⁵⁴ See *supra* Part II.D.1 (describing the facts of *Syngenta Corn*).

U.S. corn.³⁵⁵ This requirement seems attainable because the decline in the price of corn correlates with the timeframe of China's rejection of Agrisure Viptera corn.³⁵⁶ Of course, correlation is not causation, but plaintiffs should be able to make the correlation look convincing with enough expert witnesses and economic data.

In sum, it seems likely that the *Syngenta Corn* plaintiffs have a strong case for negligence.³⁵⁷ For future plaintiffs, it is vital to show causation and strong economic markers for market loss to successfully recover sufficient damages to cover the plaintiffs' losses.

3. Private Nuisance is an Effective Claim because Defendants Control and Perpetuate the Nuisance in these Cases

The success of the private nuisance claims in *Starlink Corn* and *LibertyLink Rice* shows that it is an effective claim for plaintiffs suing seed companies.³⁵⁸ The elements of private nuisance may vary from state to state, but the Restatement (Second) of Torts' standard provides sufficient guidance for plaintiffs.³⁵⁹ Nuisance claims are effective claims for plaintiffs because they generally do not require a showing of intent.³⁶⁰

The key to liability for a nuisance is proving that the seed company had control over the nuisance.³⁶¹ The seed company's reticence to stop or mitigate the nuisance when it has the power to do so indicates responsibility and culpability.³⁶²

³⁵⁵ See *supra* text accompanying notes 154–158 (discussing how the escape of LibertyLink rice negatively affected the prices for rice, directly causing damage to rice farmers).

³⁵⁶ See *supra* text accompanying notes 223–**Error! Bookmark not defined.** (describing the negative effect on corn prices).

³⁵⁷ See *supra* Part II.D.1 (describing the facts of *Syngenta Corn*); see also Part II.D.2 (describing the allegations in *Five Star Farms* and *Wilson Farm* complaints); Part II.D.3.A (describing the allegations of negligence in *Five Star Farms* and *Wilson Farm* complaints).

³⁵⁸ See *supra* Part II.B.2.D (discussing private nuisance claims in *Starlink Corn*); *supra* Part II.C.2.D (discussing private and public nuisance claims in *LibertyLink Rice*).

³⁵⁹ See *supra* note 107 (citing the RESTATEMENT (SECOND) OF TORTS).

³⁶⁰ See *supra* Part II.B.2.D (discussing private nuisance claims in *Starlink Corn*); *supra* Part II.C.2.D (discussing private and public nuisance claims in *LibertyLink Rice*); *supra* Part II.D.3.B (discussing private nuisance in *Five Star Farms*). To prevail in a private nuisance claim, a plaintiff must prove an invasion or interference with their use and enjoyment of their property or land. See *supra*, note 107 (citing RESTATEMENT (SECOND) OF TORTS).

³⁶¹ See *supra* text accompanying notes 108–109 (noting that the court in *Starlink Corn* found that Aventis was no longer in control of the corn after Aventis sold the corn, but that Aventis was responsible for the nuisance the corn created under a theory of substantial participation).

³⁶² See *supra* Part II.B.2.D, D.3.B (discussing private nuisance claims in *Starlink Corn* and *Five Star Farms*); *supra* Part II.C.2.D (discussing private and public nuisance claims in *LibertyLink Rice*).

Plaintiffs should be prepared to counter the arguments made by the defendants. For example, Aventis, the seed company in *Starlink Corn*, disputed the element of control, arguing that it lost control of the corn after it sold the corn.³⁶³ The court held that control could still be found by Aventis's substantial participation in carrying on the nuisance by selling the corn.³⁶⁴ Substantial participation is a good argument for plaintiffs seeking to hold seed companies responsible for a nuisance.³⁶⁵ The argument is especially effective for *Syngenta Corn* plaintiffs because Syngenta perpetuated the nuisance, not only by continuing to sell Agrisure Viptera after China began rejecting it, but also by beginning to sell Agrisure Duracade corn.³⁶⁶

Plaintiffs can show interference in the use and enjoyment of land or property by pointing to the fact that their crop, previously accepted in all markets, is now only viable for sale in a few.³⁶⁷ The narrowed options for sale certainly interfere with the plaintiffs' use of the crop.³⁶⁸

4. Public Nuisance is an Effective Claim in Instances Where the General Public Experienced Harm

For plaintiffs to win on a public nuisance theory, they must establish both the existence of a nuisance to the general public and that the harm to plaintiffs was different than the harm suffered by the general public.³⁶⁹ The court held in *Starlink Corn* that there was a public nuisance, and that the public experienced the harm of an adulterated food supply, whereas the plaintiffs experienced the loss in value of a crop that was their livelihood.³⁷⁰ In contrast, the *LibertyLink Rice* plaintiffs were unable to establish that the rice was a nuisance.³⁷¹ The difference was that StarLink corn was known by

³⁶³ See *supra* text accompanying notes 108–110 (noting Aventis' losing argument in *Starlink Corn* that it lost control over the corn after it was sold).

³⁶⁴ See *supra* text accompanying note 109 (discussing the United States District Court for the Northern District of Illinois' decision that Aventis was responsible for the corn it sold under the theory of substantial participation).

³⁶⁵ See *supra* Part II.B.2.D (discussing private nuisance claims in *Starlink Corn*).

³⁶⁶ See *supra* Part II.B.2.D (discussing private nuisance claims in *Starlink Corn*); *supra* text accompanying note 218 (describing Syngenta's commercialization of Agrisure Duracade).

³⁶⁷ See *supra* Part II.B.2.D (discussing private nuisance claims in *Starlink Corn*); *supra* Part II.C.2.D (discussing private and public nuisance claims in *LibertyLink Rice*); *supra* Part II.D.3.B (discussing private nuisance in *Five Star Farms*).

³⁶⁸ *Id.*

³⁶⁹ See *supra* Part II.B.2.E (discussing public nuisance claims in *Starlink Corn*); *supra* Part II.C.2.D (discussing public nuisance claims in *LibertyLink Rice*).

³⁷⁰ See *supra* Part II.B.2.E (discussing public nuisance claims in *Starlink Corn*).

³⁷¹ See *supra* Part II.C.2.D (discussing public nuisance claims in *LibertyLink Rice*).

the EPA to cause allergic reactions in some people, whereas no health effects were alleged by the consumption of LibertyLink Rice.³⁷²

Agrisure Viptera and Duracade corn were approved for all uses in the United States and there were no allegations of allergic reactions or other health side effects.³⁷³ Therefore, the plaintiffs in *Syngenta Corn* will probably not succeed on a claim for public nuisance.³⁷⁴ As for harm to the public, there is simply no evidence that the general public was harmed by the corn or by China's rejection of the corn.³⁷⁵

However, in future cases where plaintiffs are suing seed companies, if the crop in question was not approved for human consumption but ended up in the food supply, it should be easy to show a public nuisance existed.³⁷⁶ The plaintiffs can cite to *Starlink Corn* to argue that the public is experiencing harm from the nuisance in the form of an adulterated food supply.³⁷⁷ The rest of the analysis will then depend on whether the plaintiffs can show that they suffered a unique harm.³⁷⁸

5. Conversion is an Ineffective Claim Because the Chattels Are Not Intentionally Converted

Conversion is an ineffectual claim in cases where seed companies misrepresentations harmed plaintiffs because plaintiffs will be hard-pressed to show that a seed company had intentional control over the crop in question.³⁷⁹ In *Starlink Corn*, the plaintiffs failed to plead intent so the claim was dismissed.³⁸⁰ The plaintiffs in *LibertyLink Rice*, *Wilson Farm*, and *Five Star Farms* did not assert a claim of conversion against the defendants.³⁸¹

Syngenta Corn is a testament to plaintiffs' uphill battle to prove the elements of conversion.³⁸² The chattel in question is the corn. However, there

³⁷² See *supra* note 71 (noting a class action settlement with consumers who alleged they suffered allergic effects after consuming StarLink corn); *supra* text accompanying note 156 (noting that LibertyLink rice was retroactively approved for all uses).

³⁷³ See *supra* text accompanying note 213 (explaining that the EPA had approved Agrisure Viptera corn for all uses).

³⁷⁴ See *supra* Part II.B.2.E (discussing public nuisance claims in *Starlink Corn*); *supra* Part II.C.2.D (discussing public nuisance claims in *LibertyLink Rice*).

³⁷⁵ See *supra* text accompanying note 213 (explaining that the EPA had approved Agrisure Viptera corn for all uses).

³⁷⁶ See *supra* Part II.B.2.E (discussing the public nuisance claims in *Starlink Corn*).

³⁷⁷ See *supra* Part II.B.2.E (discussing public nuisance claims in *Starlink Corn*); *supra* Part II.C.2.D (discussing public nuisance claims in *LibertyLink Rice*).

³⁷⁸ *Id.*

³⁷⁹ See *supra* Part II.B.2.F (discussing the required intent element for conversion in *Starlink Corn*).

³⁸⁰ See *supra* Part II.B.2.F (describing *Starlink Corn* plaintiffs' failure to plead the element of intent in their claim for conversion).

³⁸¹ See *supra* Part II.C.2 (declining to claim conversion in *LibertyLink Rice*); *supra* Part II.D.3 (declining to claim conversion in *Wilson Farm* or *Five Star Farms*).

³⁸² See *supra* Part II.D.1 (discussing facts of *Syngenta Corn*).

is no evidence that Syngenta controlled the corn of the plaintiffs, much less intended to control it, particularly in light of the fact that the *Syngenta Corn* plaintiffs never bought Agrisure Viptera or Agrisure Duracade corn.³⁸³ The plaintiffs could show serious interference with their right to sell their corn for the uses they expected to sell it for, but as in *Starlink Corn*, the court will probably find that a decline in market price, regardless of whether or not it was connected to Syngenta's actions, is not interference with control of the corn itself, but merely interference with the price of the market.³⁸⁴ Without those essential elements, justice would not require Syngenta to give compensation to the plaintiffs.³⁸⁵

The *Wilson Farm* and *Five Star Farms* plaintiffs must have taken note of the judge's memo in *Starlink Corn*, noting that the seed company's actions could posit a claim for trespass to chattels, because they brought claims for trespass to chattels.³⁸⁶

6. Trespass to Chattels is Untested in Courts and Plaintiffs May Struggle to Prove the Element of Intent

Similar to conversion, trespass to chattels is not an effective claim for plaintiffs because it requires plaintiffs to prove intent to dispossess or interfere with the plaintiffs' chattels.³⁸⁷ Admittedly, the strength of the claim of trespass to chattels is hard to ascertain because the claim was not pled in *Starlink Corn* or *LibertyLink Rice*.³⁸⁸ The elements of what constitutes trespass to chattels may vary from state to state, but the Restatement definition includes an element of intent.³⁸⁹ Plaintiffs will probably struggle to show that a seed company intended to dispossess or interfere with their chattels.³⁹⁰ Generally, a seed company simply intends to sell seed. For example, if the *Syngenta Corn* plaintiffs argue that Syngenta intentionally dispossessed them of the corn or intentionally used or interfered with the corn, Syngenta will probably respond that it took no further actions after

³⁸³ See *supra* text accompanying note 305 (noting that the *Syngenta Corn* plaintiffs are farmers or farm entities that did not purchase Syngenta's corn).

³⁸⁴ See *supra* Part II.D.1 (discussing facts of *Syngenta Corn*); *supra* text accompanying notes 114–16 (discussing elements of conversion in *Starlink Corn*).

³⁸⁵ See *supra* text accompanying note 122 (explaining when the element of justice is at play).

³⁸⁶ See *supra* Part II.D.3.C (discussing claim for trespass to chattels in *Five Star Farms* and *Wilson Farm*).

³⁸⁷ See *supra* text accompanying note **Error! Bookmark not defined.** (reciting RESTATEMENT (SECOND) OF TORT'S definition of trespass to chattels).

³⁸⁸ See *supra* Part II.B.2 (declining to claim trespass to chattels in *Starlink Corn*); *supra* Part II.C.2 (declining to claim trespass to chattels in *LibertyLink Rice*).

³⁸⁹ See *supra* text accompanying note **Error! Bookmark not defined.** (citing the RESTATEMENT (SECOND) OF TORTS).

³⁹⁰ See *supra* text accompanying notes 261–264 (describing the series of inferences that established the requisite intent in *LibertyLink Rice*).

selling the corn to the plaintiffs.³⁹¹ Demonstrating dispossession is unlikely because seed companies do not physically usurp the seeds; rather, they indirectly do so by limiting the markets the seeds can be sold in.³⁹² Furthermore, Syngenta lost possession of the corn after sale, and as far as plaintiffs who never bought the Agrisure Viptera and Duracade seed, Syngenta never had possession of their corn seed at all.³⁹³ Should the plaintiffs try to show that Syngenta intentionally used or interfered with their corn, Syngenta will probably argue that while it may have intentionally refrained from informing consumers that the corn was not accepted in China, its intent was to continue to sell corn, thus divesting itself of the corn and not retaining use over it.³⁹⁴

Syngenta could also argue that Syngenta's actions may have had a negative effect on the market prices, but that the decline in market price does not equate to Syngenta using the plaintiffs' corn. The plaintiffs can argue that Syngenta's interference with the price, unlike a claim for conversion, does not have to be so serious as to change the product's essential character; it just has to interfere with its normal use.³⁹⁵ The Restatement states that liability may be ascribed if the chattel is "impaired as to its condition, quality, or value."³⁹⁶ Syngenta could argue that the corn itself is not impaired; it is just as sound and nutritious as it was before. To counter, the plaintiffs should argue that the value of the corn changed substantially.³⁹⁷ The corn went from a corn that could be sold in any market, to a corn that could only be sold in select markets.³⁹⁸ Furthermore, those markets that remained were now buying the corn at lower prices.³⁹⁹

To revisit *Starlink Corn*, the plaintiffs could have argued that Aventis's knowledge of the risks of commercializing the corn equated to intent.⁴⁰⁰ The plaintiffs should have argued that when Aventis sold farmers the StarLink corn without properly explaining that the corn was not approved

³⁹¹ See, e.g., text accompanying notes 108–114 (noting Aventis' argument in *Starlink Corn* that it no longer had control over the seed after it sold the seed).

³⁹² See *supra* Part II.D.1 (discussing the facts of *Syngenta Corn*).

³⁹³ See *supra* Part II.D.1 (discussing the facts of *Syngenta Corn*).

³⁹⁴ See *supra* text accompanying note 268 (discussing plaintiffs' reliance on the argument that Syngenta's premature commercialization constituted intent to interfere with plaintiffs' chattels).

³⁹⁵ See *supra* note 124 and accompanying text (stating that the change in price may constitute interference).

³⁹⁶ See *supra* text accompanying note 260 (reciting the RESTATEMENT (SECOND) OF TORT'S definition of trespass to chattels).

³⁹⁷ See *supra* note 124 and accompanying text (stating that the change in price may constitute interference).

³⁹⁸ See *supra* note 124 and accompanying text (stating that the change in price may constitute interference); *supra* Part II.D.1 (discussing facts of *Syngenta Corn*).

³⁹⁹ See *supra* text accompanying notes 211–220 (discussing the drop in market price of corn and limited market after China rejected Agrisure Viptera corn).

⁴⁰⁰ See *supra* text accompanying note 127 (noting that the *Starlink Corn* court ruled that Aventis' negligent behavior was not sufficient to prove intent).

for human consumption, Aventis knew of the risk that the corn could contaminate the rest of the corn supply and end up in the food supply.⁴⁰¹ When Aventis sold the corn anyway, it arguably intentionally subjected farmers to a situation where their corn would lose value and would be unfit for its intended use.⁴⁰²

Ultimately, the value of plaintiffs' claim is unknown until there is case law that specifically speaks to the issue. However, it is probable that courts are unlikely to accept plaintiffs' contention that defendant's knowledge or risk equals intent to cause harm to plaintiffs.⁴⁰³ Overall, plaintiffs in these cases will be more likely to develop strong cases for negligence or nuisance, so the possibility of success on a trespass to chattels claim would be a possible additional claim, but not determinative in whether or not the plaintiffs could recover.⁴⁰⁴

7. Plaintiffs Must Show Standing to Plead Claims Under the Lanham Act and State Consumer Protection Acts

The torts claims presented above are not the entire universe of options available for plaintiffs suing seed companies. Plaintiff can also look to the federal Lanham Act and to state consumer protection statutes.⁴⁰⁵ However, in the cases involving nationwide classes, plaintiff diversity makes it difficult for them to show standing under specific state statutes.⁴⁰⁶ The federal Lanham Act avoids that issue.⁴⁰⁷

i. The Lanham Act

The Lanham Act will come into play whenever the plaintiffs' theory of recovery depends on theories of misrepresentation or false advertising by

⁴⁰¹ See *supra* text accompanying notes 52–58 (describing the EPA restrictions on StarLink corn that Aventis ignored).

⁴⁰² See *supra* text accompanying note 61 (describing how Aventis allegedly told farmers not to follow restrictions).

⁴⁰³ See *supra*, text accompanying note 127 (describing the *Starlink Corn* court's rejection of plaintiffs' argument that the negligent business practices of Aventis could be construed as intent).

⁴⁰⁴ See *supra* Part III.B.2–4 (arguing that negligence and private and public nuisance are the most effective claims for plaintiffs).

⁴⁰⁵ See *supra* Part II.B.2.G (discussing *Starlink Corn* claims under the NCUTPA and the TCPA); *supra* Part II.C.2.E (discussing *LibertyLink Rice* claims under the NCUTPA); *supra* Part II.D.3.D (discussing *Five Star Farms* and *Wilson Farm* claims under the Lanham Act and various state consumer protection acts).

⁴⁰⁶ See *supra* text accompanying notes 130–132 (ruling that the *Starlink Corn* plaintiffs did not have standing under the NCUTPA, but did have it under the TCPA); *supra* text accompanying note 130 (ruling that the *LibertyLink Rice* plaintiffs did not have standing under the NCUTPA because it was meant to protect North Carolinians).

⁴⁰⁷ See *supra* note 266 and accompanying text (explaining that the Lanham Act provides a civil remedy for false advertising).

the defendants.⁴⁰⁸ This is the key issue in *Syngenta Corn*.⁴⁰⁹ Although there were suggestions of misleading advertising in *Starlink Corn*, a claim under the Lanham Act is notably absent.⁴¹⁰ The plaintiffs may not have pursued a claim under the Lanham Act because at the time of the *Starlink Corn* litigation, 2002-2003, there was a split in the circuits over how to determine if a plaintiff had standing to plead a claim under the Lanham Act.⁴¹¹ The violation of the Lanham Act was also not an issue in *LibertyLink Rice* because there were no allegations that Bayer had committed false or misleading advertising.⁴¹²

The Lanham Act will probably be of particular importance in *Syngenta Corn* because the plaintiffs cannot claim that Syngenta violated any U.S. regulations.⁴¹³ The *Syngenta Corn* plaintiffs' argument is that plaintiffs did not know the corn was not approved by import by China until it was too late.⁴¹⁴ The key to the plaintiffs' recovery is to prove that Syngenta was fraudulent or misleading in their representations about the corn and where it could be sold and what it could be used for.⁴¹⁵

The Lanham Act should be a strong remedy for future plaintiffs in a similar position. In light of the unsuccessful attempts to recover damages under state consumer protection statutes prohibiting false or misleading advertising, the Lanham Act is a welcome alternative for future plaintiffs.⁴¹⁶ Especially in a class action, suing under a federal statute for false advertising should be easier for plaintiffs than suing under individual state consumer protection statutes.⁴¹⁷

ii. State Consumer Protection Acts

Apart from the Lanham Act, the plaintiffs' option to address misrepresentation or false advertising is to sue under various state consumer

⁴⁰⁸ *Id.*

⁴⁰⁹ *See supra* text accompanying note 229 (alleging misrepresentation).

⁴¹⁰ *See supra* Part II.B.2 (listing *Starlink Corn*'s legal claims).

⁴¹¹ *See supra* note 231 (describing the Supreme Court's resolution of the circuit split).

⁴¹² *See supra* text accompanying note 149 (explaining that *LibertyLink* rice was never sold, rather, the rice escaped the experimental test plots it had been planted in).

⁴¹³ *See supra* text accompanying note 213 (explaining that the EPA had approved Agrisure Viptera corn for all uses).

⁴¹⁴ *See supra* text accompanying note 241 (describing Syngenta's misrepresentation about the status of *StarLink* corn's approval in major export markets).

⁴¹⁵ *See supra* note 266 and accompanying text (explaining that the Lanham Act provides a civil remedy for false advertising).

⁴¹⁶ *See supra* text accompanying notes 266–71 (discussing the Lanham Act).

⁴¹⁷ *See supra* text accompanying notes 130–137 (noting the United States District Court of the Northern District of Illinois' ruling that the *Starlink Corn* plaintiffs did not have standing under the NCUTPA, but did have it under the TCPA); *see supra* text accompanying notes 200–07 (noting the United States District Court for the Eastern Division of Missouri's ruling that the *LibertyLink Rice* plaintiffs did not have standing under the NCUTPA because it was meant to protect North Carolinians).

protection acts.⁴¹⁸ At this point, plaintiffs have found it hard to prove they have sufficient standing under state laws because these suits are class actions that include plaintiffs from many different states.⁴¹⁹ Plaintiffs have sued as state specific groups under state laws, or attempted to sue as nationwide classes under laws with nationwide reach, such as the NCUTPA and the TCPA.⁴²⁰ However, plaintiffs found that they could not show sufficient standing under NCUTPA because they lacked sufficient contacts with North Carolina.⁴²¹ The TCPA was written more broadly, so it survived the motion to dismiss in *Starlink Corn*.⁴²² Whether plaintiffs will have standing under these state consumer protection acts will be a matter of statutory interpretation.⁴²³ Plaintiffs should analyze case law interpreting standing under specific state consumer protection statutes.⁴²⁴

IV. CONCLUSION

In cases where plaintiffs are harmed by seed companies' misrepresentations, the very nature of the global agricultural industry makes it difficult to prove tort claims that require intent.⁴²⁵ The global commodity crop markets, the ability for genetically engineered genes to escape even strict confines, and the passage of time in a crop season, combine to place both spatial and temporal distance between the actions of the seed companies and the harm experienced by the farmers.⁴²⁶

⁴¹⁸ See *supra* Part II.B.2.G (discussing *Starlink Corn* claims under the NCUTPA and the TCPA); *supra* Part II.C.2.E (discussing *LibertyLink Rice* claims under the NCUTPA), *supra* Part II.D.3.D (discussing *Five Star Farms* and *Wilson Farm* claims under the Lanham Act and various state consumer protection acts).

⁴¹⁹ See *supra* text accompanying note 129 (noting the state classes in *Starlink Corn*); *supra* text accompanying notes 163–167 (noting the state classes in *LibertyLink Rice*).

⁴²⁰ See *supra* Part II.B.2.G (discussing *Starlink Corn* claims under the NCUTPA and the TCPA); *supra* Part II.C.2.E (discussing *LibertyLink Rice* claims under the NCUTPA); *supra* Part II.D.3.D (discussing *Five Star Farms* and *Wilson Farm* claims under various state consumer protection acts).

⁴²¹ See *supra* text accompanying note 129 (noting the United States District Court for the Northern District of Illinois' ruling that the *Starlink Corn* plaintiffs did not have standing under the NCUTPA).

⁴²² See *supra* text accompanying note 130 (noting the United States District Court for the Northern District of Illinois' ruling that *Starlink Corn* plaintiffs had standing under the TCPA).

⁴²³ See *supra* text accompanying notes 129–131 (noting the United States District Court for the Northern District of Illinois' on the standing requirements of the NCUTPA and the TCPA); *supra* text accompanying notes 200–205 (noting the United States District Court for the Northern District of Illinois' ruling on the standing requirements of the NCUTPA).

⁴²⁴ *Id.*

⁴²⁵ See *supra* text accompanying notes 2–8 (describing genetic engineering's challenges against a backdrop of complex commodity system).

⁴²⁶ See *supra* text accompanying notes 2–8 (describing genetic engineering's challenges against a backdrop of complex commodity system); *supra* text accompanying note 124 (describing the escape from test plots of the unapproved *LibertyLink* rice).

Plaintiffs should confidently proceed with these lawsuits because similarly situated plaintiffs have successfully recovered damages.⁴²⁷ The strongest tort claims for farmers and businesses injured by seed companies are negligence, private nuisance, and public nuisance.⁴²⁸ Negligence is an effective claim for plaintiffs because plaintiffs can more easily demonstrate that seed companies caused harm negligently than intentionally.⁴²⁹ By the nature of the concepts, negligence is always easier to prove than intent.⁴³⁰ Intent is particularly hard to find in these cases because of the attenuation between the seed companies' actions and the harm experienced by the plaintiffs.⁴³¹

Private nuisance and public nuisance are effective claims for plaintiffs in specific factual scenarios. Claims of private and public nuisance do not generally require intent on the part of the defendant.⁴³² Private nuisance is an effective claim because plaintiffs in these cases have factual patterns that lend themselves to showing that there was interference with their property that caused harm to the plaintiffs.⁴³³ Public nuisance will be an effective claim if the genetically engineered crop in question is a nuisance to the public and is considered harmful to human health.⁴³⁴

On the other hand, claims of negligence *per se*, trespass to chattels, and conversion are weak claims that are unlikely to be effective remedies for the injured businesses or farmers because they require intentional conduct, a difficult burden to show in these cases.⁴³⁵ There are several difficulties in showing the intent to cause harm. First, the long chain of causation between the seed companies' actions in selling the seed to farmers and the harm experienced by farmers makes it difficult to trace how the seed company's

⁴²⁷ See *supra* text accompanying note 73 (discussing settlement award in *Starlink Corn*); *supra* text accompanying notes 165 (discussing settlement award in *LibertyLink Rice*).

⁴²⁸ See *supra* Part III.B.2–4 (analyzing the success of the negligence, private nuisance, and public nuisance claims in *Starlink Corn* and *LibertyLink Rice*).

⁴²⁹ See *supra* Part III.B.2 (analyzing the success of the negligence claims in *Starlink Corn* and *LibertyLink Rice*).

⁴³⁰ See *supra* text accompanying notes 126–127 (noting that the United States District Court for the Northern District of Illinois declined to find that Aventis acted intentionally but did find Aventis' actions sufficient to find that Aventis acted negligently).

⁴³¹ See *supra* text accompanying notes 214–220 (discussing the circumstances of how China's rejection of Agrisure Viptera corn caused a price in the drop of corn and resulting economic damage).

⁴³² See *supra* text accompanying note 107 (noting the elements of a private nuisance claim in *Starlink Corn*); *supra* text accompanying note 116 (noting the elements of a public nuisance claim in *Starlink Corn*).

⁴³³ See *supra* Part III.B.3 (analyzing the private nuisance claims in *Starlink Corn* and *LibertyLink Rice*).

⁴³⁴ See *supra* Part III.B.4 (analyzing the public nuisance claims in *Starlink Corn* and *LibertyLink Rice*).

⁴³⁵ See *supra* Part III.B.1, 5, 6 (analyzing the negligence *per se*, trespass to chattels, and conversion claims in *Starlink Corn* and *LibertyLink Rice*).

actions caused the harm to the farmers.⁴³⁶ Secondly, although motive is not technically a part of intent, it is difficult to provide a compelling reason for seed companies to intentionally harm farmers.⁴³⁷ Of course, the intention of the seed companies could arguably be construed as a shortsighted intent to maximize profits at the expense of the farmers.⁴³⁸ Intent is certainly an arguable element, and plaintiffs should not entirely throw aside the claims based on proving intent, but the fact remains that the intent is difficult to prove.

The discouraging lesson from *Starlink Corn*, *LibertyLink Rice*, and *Syngenta Corn* is that certain seed companies put profits before caution when it comes to introducing new varieties of genetically engineered crops.⁴³⁹ Even more disappointing and disheartening to the U.S. farmer or exporter is that the seed companies show no signs of changing their behavior. The poster child is Bayer CropScience, the company that negligently allowed the LibertyLink rice to escape test plots and contaminate the U.S. rice supply while wrapping up litigation over the farmers it had harmed with StarLink corn.⁴⁴⁰ The lawsuits filed against these seed companies do not seem to deter seed companies' wild race to market their products.⁴⁴¹

Moreover, the United States' patchwork regulatory system rewards the seed companies' "beg forgiveness later" approach by retroactively approving genetically engineered crops.⁴⁴² This approach may make life easier for the regulatory bodies but it does not instill confidence in farmers and exporters. Unfortunately for the U.S. agricultural industry, there are no signs that the patchwork system that regulates genetic engineering will be reformed.⁴⁴³ Therefore, the likely occurrence of future cases like *Starlink*

⁴³⁶ See, e.g., *supra* text accompanying notes 68–70 (describing effect on the market price of corn and other measures of damage to plaintiffs after Starlink corn was discovered in the human food supply).

⁴³⁷ See, e.g., note 210 and accompanying text (explaining Syngenta's product line and customer base; Syngenta makes billions selling seeds and chemicals to farmers).

⁴³⁸ See *supra* text accompanying note 218 (discussing Syngenta's choice to sell Agrisure Viptera with the knowledge that it was not accepted in China).

⁴³⁹ See *supra* Part II.B.1, C.1, D.1 (presenting the facts in *Starlink Corn*, *LibertyLink Rice* and *Syngenta Corn*).

⁴⁴⁰ See *supra* note 148 and accompanying text (noting that Aventis was acquired by Bayer while Aventis was embroiled in the *Starlink Corn* litigation).

⁴⁴¹ See, e.g., *supra* text accompanying notes 76–77 (describing lawsuits filed against Aventis because of StarLink Corn); *supra* text accompanying notes 166–168 (describing lawsuits filed against Bayer (formerly Aventis) because of LibertyLink rice); *supra* text accompanying notes 214–220 (describing Syngenta's commercialization of Agrisure Duracade despite China's rejection of Agrisure Viptera).

⁴⁴² See *supra* note 52–53 and accompanying text (noting Aventis' efforts to obtain retroactive approval of StarLink Corn); *supra* text accompanying note 153 (noting how LibertyLink rice was retroactively approved). (158).

⁴⁴³ See *supra* note 4 and accompanying text (noting the continued use of a patchwork regulatory system by the United States for genetically engineered crops despite recommendations from scholars)

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Corn, LibertyLink Rice, and Syngenta Corn is not a question of *if*, but one of *when*.