

Syngenta GMO Corn Lawsuits and Their Effect on Farmers



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UPDATE MAY 2017: *In a Memorandum and Order written April 5, 2017, U.S. District Judge John W. Lungstrum rejected the basis for a nationwide class based on plaintiffs' Lanham Act claim. The Lanham Act is a federal statute that governs, among other things, unfair competition. Specifically, the Act "provides for liability of one who makes false or misleading representations in commercial advertising or promotion." Judge Lungstrum wrote that the plaintiffs could not show that a 2011 letter from a Syngenta employee to growers, which stated that Syngenta expected import approval from China for Viptera in March 2012, was enough to support its false advertising claim under the Lanham Act or that "the impact of the letter was great enough to cause the embargo that allegedly caused the price drop in this country." However, farmers must understand that while there is no federal class, states may still form classes to join the multidistrict litigation, or MDL. So far, eight states, including Kansas, have been certified as statewide classes. It is also important to understand that the trial in Kansas scheduled by Judge Lungstrum to commence June 5 is a "test trial" designed to help the parties gauge the strengths and weaknesses of the claims and determine if settlement is an option. Please see "What Options Are Available to New York Farmers?" below. Further, it is possible for the Judge's decision in the federal class matter to be appealed. We will keep NYFB members apprised.*

UPDATE FEBRUARY 2017: *A trial date of June 5 has been scheduled in this matter at the federal courthouse in Kansas City. Farmers must decide BY APRIL 1, 2017 whether they will remain in the class (which requires taking no action) or if they wish to "opt out" of the class action (which requires submitting a letter containing specific information). Please see the official (court-ordered) website at <http://syngentacornclassaction.com>. On the right-side of the screen, click on "Exclusion Deadline April 1, 2017" for specific information on remaining in or opting out of the suit. If you wish to be excluded from the class action and hire your own attorney, you must include specific information in your letter to the Court.*

UPDATE DECEMBER 2016: *A class-action lawsuit filed by corn growers against Syngenta over corn exports that were rejected by China should go to trial next year, as scheduled, after the 10th Circuit Court of Appeals declined to review the lower court's certification order. Syngenta had petitioned the appeals court to hear arguments challenging U.S. District Judge John W. Lungstrum's decision to certify two classes of corn farmers who are seeking damages for lost sales in 2013 or later. On December 7, a three-judge panel of the appeals court in Denver ruled that Judge Lungstrum's opinion was "well-researched and reasoned, and, if any rulings are in error, those errors can be addressed on appeal, if necessary."*

UPDATE October 2016: *U.S. District Court of Kansas Judge John Lungstrum has granted class action status to at least 440,000 farmers accusing Syngenta of selling genetically modified corn seeds and costing them billions of dollars in lost revenue due to China resisting imports of U.S. corn. This class action includes several "classes," including a nationwide class of corn producers who DID NOT plant Viptera or Duracade corn seed. This class action status will make it easier and less expensive for farmers to pursue their claims against Syngenta. Syngenta has said it may appeal the district court's decision. The court will authorize mailing of a notice to corn producers within the class describing the benefits and consequences of remaining in the class. NYFB members considering whether to retain an individual attorney are urged to review and discuss with any prospective attorney the information on the class action before making a decision. The court has not set a deadline for farmers to decide whether they want to be excluded from the class. A trial is currently set for June 2017. NYFB will keep its members apprised of developments as they occur. For information on the status of the lawsuit, please visit <http://www.ksd.uscourts.gov/syngenta-ag-mir162-corn-litigation/>.*

What is Syngenta Accused of Doing?

In 2011, Syngenta, a Swiss-based agribusiness that conducts genomic research and produces agrochemicals and seeds, released a genetically modified corn seed known as Agrisure Viptera, which was genetically engineered to protect corn against damage from

insects such as the corn borer and corn rootworm. When this product was released for farmers to purchase, it had been approved for sale in the United States, but had not yet been approved by several foreign countries, including China and the European Union. The lawsuits allege that, despite lacking international approval, Syngenta sold the GMO corn seed to hundreds of U.S. farmers leading to an estimated 3% of the current corn crop being grown from the engineered seed.

How Did China React?

In November 2013, China, one of the world's largest corn importers, detected Viptera corn in a shipment from the United States and consequently rejected the shipment. The methods by which American crops are gathered and distributed do not allow for the segregation of the unapproved GMO corn from approved corn. From the first refused shipment until February 2014, China rejected the majority of American corn. China then imposed a complete ban on the import of American corn, turning away nearly 3.37 million tons of corn. However, China was not the only country that rejected this GMO corn; 3.3 million metric tons of U.S. corn were rejected globally as of March 2014.

What Resulted?

China's decision to reject the shipments had consequences for corn farmers. According to the various lawsuits against Syngenta, there are claims that this resulted in a global collapse in corn prices. The lawsuits argue that any corn grower, regardless of whether or not they planted Viptera, may have been impacted by the global dip in corn prices, along with grain elevators, distributors, exporters, and transporters.

Cargill Enters the Fray

In September 2014, Cargill filed a lawsuit against Syngenta Seeds, Inc. in Louisiana state court, seeking damages from Syngenta for commercializing its Agrisure Viptera (MIR 162) corn seed before the product obtained import approval from China. (Cargill's grain export facilities in Reserve and Westwego, La. had loaded the vessels that were destined for and subsequently rejected by China.)

What is the Current Status of Litigation?

In a Memorandum and Order written April 5, 2017, U.S. District Judge John W. Lungstrum rejected the basis for a nationwide class based on plaintiffs' Lanham Act claim. The Lanham Act is a federal statute that governs, among other things, unfair competition. Specifically, the Act "provides for liability of one who makes false or misleading representations in commercial advertising or promotion." Judge Lungstrum wrote that the plaintiffs could not show that a 2011 letter from a Syngenta employee to growers, which stated that Syngenta expected import approval from China for Viptera in March 2012, was enough to support its false advertising claim under the Lanham Act or that "the impact of the letter was great enough to cause the embargo that allegedly caused the price drop in this country." However, farmers must understand that while there is no federal class, states may still form classes to join the multidistrict litigation, or MDL. So far, eight states, including Kansas, have been certified as statewide classes. It is also important to understand that the trial in Kansas scheduled by Judge Lungstrum to commence June 5 is a "test trial" designed to help the parties gauge the strengths and weaknesses of the claims and determine if settlement is an option. Please see "What Options Are Available to New York Farmers?" below.

What is the Difference Between a Class Action and Multidistrict Litigation?

A **class-action lawsuit** involves similar claims by a group of people injured by one or more common defendants. Rather than go it alone, the plaintiffs choose to join others in a class action. An individual or small group of plaintiffs acts as a leader for a larger group of injured people. Class action lawsuits protect the interests of absent plaintiffs, allow the distribution of litigation costs among a large number of plaintiffs, and save resources for all parties involved. Class-action lawsuits can end in settlements for all members before going to trial.

In the federal system, there exists the **Judicial Panel on Multidistrict Litigation (MDL)**. Multidistrict litigation is a special procedure in which federal civil cases from around the country are transferred to one court. The cases must have one or more questions of fact (issues to be determined by looking at the evidence) in common. One judge manages the litigation during the pretrial and discovery process. This allows the court to address common issues that affect many cases at once. **That is what has occurred in the Syngenta corn matter.**

A class action is a single lawsuit with several similar claimants. **MDL cases, sometimes referred to as "mass actions," remain separate lawsuits.** MDL cases are not consolidated for a common outcome in the same way that class-action members share in the same settlement or verdict. **However, companies may choose to settle multiple MDL cases based on early trial results.** Any firm that has contacted you will have the most up-to-date information about the status of cases already in the judicial pipeline.

What Options Are Available to New York Farmers?

Those who suffered financial losses due to the decline in corn prices as a result of Syngenta's alleged actions may be able to file suit. While there is no federal class, states may still form classes to join the multidistrict litigation, or MDL. So far, eight states,

including Kansas, have been certified as statewide classes. Several law firms throughout the country have dedicated time, effort, and staff to these suits, and many of our members have already heard from them. It is imperative to understand that many of these firms will charge farmer plaintiffs a fee equal to a large percentage of the award. We have seen firms charging a contingency fee of up to 40% for services in this matter.

Farmers can also retain a private attorney to join the suit. NYFB members can contact the Legal Affairs Department at 1-800-342-4143 for a referral to an attorney in our Legal Referral Service.

When approached by any firm to sign up as a client in this case, it is important to ask all the same questions you would ask when hiring someone to provide a service on your farm:

- Are you licensed to practice in New York State?
- What is your experience in cases like this?
- What legal fees do you charge in a case like this?
- Will I be responsible for paying any other expenses related to preparing, filing, and pursuing my case, (i.e. filing fees, administrative charges, experts, etc.)? (These costs may be outside the contingency fees that are due to the firm if the lawsuit results in financial payment to the farmer.)
- If so, what do you estimate these expenses to cost?
- How long will this case take?

It is important our members understand that because each case is unique and each matter is a separate suit, we are unable to answer specific questions or advise on how to proceed.

It is imperative that you get the answers to your questions in writing in the form of a retainer agreement from the law firm that wishes to represent you. The New York State Bar Association makes available an informative brochure on working with an attorney. *You and Your Attorney* is available at <http://www.nysba.org/yourlawyer/>, or we can send you a copy.

Special Note:

UPDATE MAY 2017: In April, 2017 China's Ministry of Commerce approved China National Chemical Corporation's (ChemChina) planned takeover of Syngenta. That was quickly followed by approval from the U.S. ChemChina is still awaiting word from the European Union, India, and Mexico.

UPDATE FEBRUARY 2017: In August, 2016 the U.S. national security regulator approved China National Chemical Corporation's planned takeover of Syngenta. In October, the European Union antitrust regulators opened an in-depth investigation, and in January 2017 both China National Chemical Corporation and Syngenta submitted formal remedies to the EU in their bid to win regulatory approval. In early February, China National Chemical Corporation was expected to secure conditional EU antitrust approval, although the deal is still to be finalized. It remains unclear at this time if or how these events might affect the lawsuit.

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