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THE STARLINK™ SAGA

— by Neil E. Harl*

Few events have gripped the agricultural sector—indeed the entire food chain—as the StarLink™ controversy has in recent weeks.[1] Starting in mid-September with the recall of taco shells which were found to contain traces of StarLink™, several processors have commenced testing and have rejected loads of corn containing the Cry9C protein in StarLink™.

Limited registration

With ample hind sight, the obvious problem was that the Environmental Protection Agency approved StarLink™ with limited registration. The event was approved for feed use but not for food or for export. The registration contained the following language—

> "It is a violation of Federal Law to use this product in a manner inconsistent with its labeling. Keep out of lakes, ponds or streams. Do not contaminate water by cleaning of equipment or disposal of wastes. All field corn containing the plant-pesticide that is sold or distributed by Aventis CropScience USA LP or a cooperator or licensee of Aventis, must be accompanied by informational material that contains the following….
>
> "Seeds expressing the Cry9C protein should be planted at a maximum of 40,000 seeds per acre on the site. Any seeds, plants or plant materials in the StarLink™ field, or within 660 feet of the field, should be used domestically for animal feed or non-food industrial purposes. None of the seeds, plants or plant materials in the StarLink™ plot, or within 660 feet of the field, may be used for food uses or may enter international commerce."[2]

The tag attached to each bag of seed contained the warning—

> "Prior to planting, read AgrEvo's Grower's Guide for StarLink, Bt insect protection. This guide provides detailed information on product use, integrated pest management, and resistance management."

The bag tag also listed a telephone number to call for more information or a copy of the Grower's Guide.[3]

Apparently, many who planted StarLink™ on an estimated 135,000 acres[4] were not aware of the limitations and did not advise their purchasers, mostly elevators. Moreover, the quantity of StarLink™ corn has been expanded substantially because of pollen drift and by commingling in bins on the farm and at elevators.

The registration of StarLink™ was cancelled on October 12, 2000.[5]

States involved

The states involved with StarLink™ plantings are shown in Figure 1 along with the

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See the back page for details about the

Agricultural Tax and Law Seminar by Dr. Neil Harl and Prof. Roger McEowen, January 9-12, 2001 in St. Augustine, FLorida

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estimated number of acres in each state. The acreage by county in each of the major StarLink™ producing states is available.[6]

Hybrids involved

The National Corn Growers Association has listed 29 hybrids sold by 11 seed companies which had been approved for using the StarLink™ technology:

Brand	Hybrid	Maturity
AgriBioTech, Inc.	HT7707Bt	112
AgriPro Seeds, Inc.	8309GLS/Bt/LL	116
AgriPro Seeds, Inc.	9630Bt/LL	113
AgriPro Seeds, Inc.	8773BLT	99
Bo-Jac Seed Company	353SL	108
Cenex/Croplan Genetics	562Bt/LL	105
Cenex/Croplan Genetics	692Bt/LL	112
Cenex/Croplan Genetics	D5862Bt/LL	87
Curry Seed Co.	EX979	113
Curry Seed Co.	7891	113
Curry Seed Co.	EX869	109
Curry Seed Co.	EX944	106
Fred Gutwein & Sons Inc.	2529Bt/LL	110
Garst	8773BLT	99
Garst	8342GLS/LL	114
Garst	8366Bt/LL	113
Garst	8309Bt/LL	116
Garst	8896BLT	90
Garst	8692BLT	104
Garst	8600BLT	107
Garst	8585GLS/BLT	108
Garst	8481BLT	112
Garst	8539BLT	110
Hoegemeyer Hybrids, Inc.	6SL532Bt	111
Hoegemeyer Hybrids, Inc.	7SL 199Bt	114
Hoegemeyer Hybrids, Inc.	5SL 894Bt	108
Legend Seeds, Inc.	8905Bt	105
NC+ Hybrids	4709MBL	112
Sieben Hybrids	3710SL	111

Aventis response

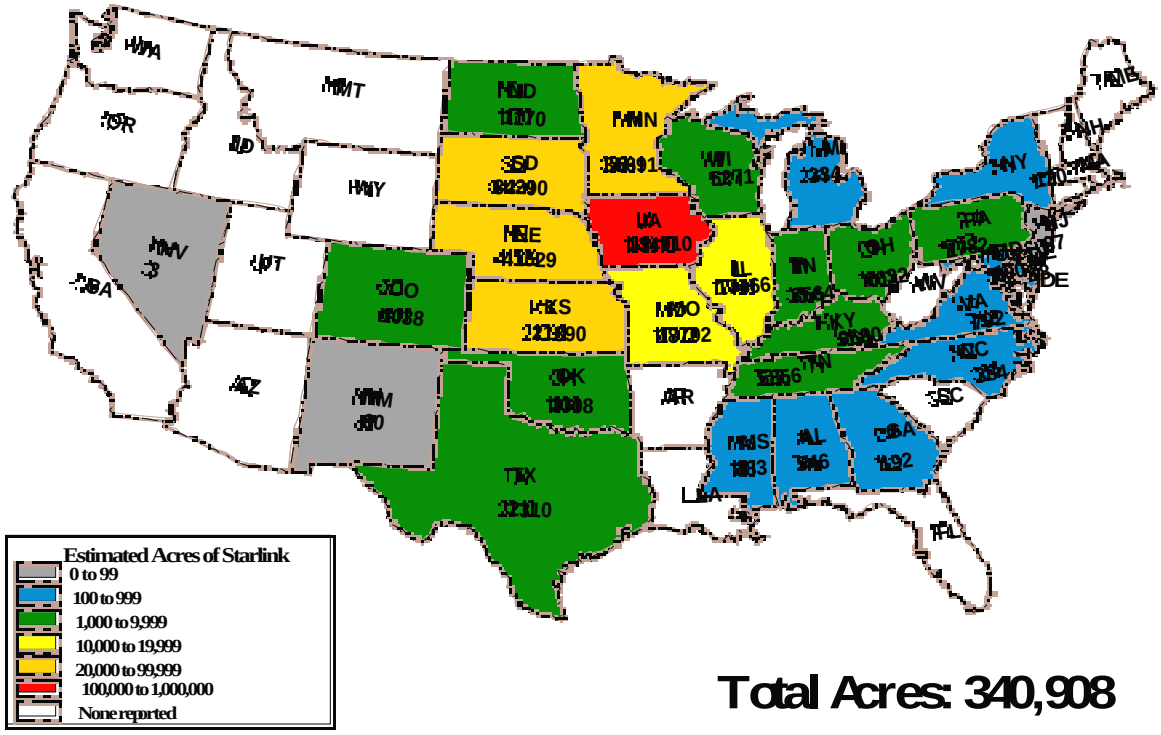
Aventis has agreed to pay growers 25 cents per bushel over the October 2, 2000, posted county price for actual StarLink™ corn and buffer corn. Growers able to verify that they grew corn within 660 feet of StarLink™ corn are eligible to participate in the program.

Aventis indicated that it would "work with grain elevators that receive StarLink™ corn" and would pay "additional transportation, demurrage and testing costs incurred by the grain elevator in directing the…grain to approved channels." Aventis also said that it would "…work with grain elevators to address problems, related to discounts in value for StarLink™ and StarLink™ commingled grain delivered to an approved delivery site."

Duration of the problem

Even if EPA agrees to impose a minimum tolerance for the protein involved, the StarLink™ corn is likely to filter through the food chain over the next several months. EPA has indicated that it will look into the matter of tolerance and has announced hearings on the issue.

Figure 1. Estimated Acres of Starlink™ Corn



Source: Http://www.us.cropscience.aventis.com/AventisUS/CropScience/ (October 12, 2000).

Liability for pollen drift

The StarLink™ controversy has focused attention on pollen drift as a possible explanation for germ plasm from the unapproved GMO hybrid showing up in the taco shells and other products. It poses an important question: who is responsible for pollen drift?[7] Is the producer who creates the offensive condition liable? Or is the producer with the vulnerable crop responsible for creating a buffer zone? If that can be settled, how large a buffer zone is needed?

Thus far, no cases have been located that have been litigated to a court of record on responsibility for pollen drift. But there are some parallel situations that have been litigated.

In a 1977 case, the State of Washington Supreme Court was faced by a complaint involving the aerial spraying of crops.[8] Spray drift had fallen on an organic farm, causing economic loss. The owner of the organic farm sued. The organic farm was vulnerable to spray damage; the firm doing the spraying created an offensive condition.

The court stated that "in the present case, the Langans [the organic producers] were eliminated from the organic food market for 1973 through no fault of their own. If crop dusting continues on the adjoining property, the Langans may never be able to sell their crops to organic food buyers. [The helicopter spray firm and those who hired them], on the other hand, will all profit from the continued application of pesticides. Under these circumstances, there can be an equitable balancing of social interests only if [the spray service is] made to pay for the consequences of their acts."

The spray firm was held liable for the damages caused to the organic producer.

The court noted that Washington courts had adopted the "Restatement of Torts" which states—

> "One who carries on an abnormally dangerous activity is subject to liability …resulting from the activity, although he has exercised the utmost care to prevent such harm."[9]

Is pollen drift likely to be classified as an abnormally dangerous activity? That remains to be seen. If it is perceived as a matter of food safety, it is possible that pollen drift could be so classified.

Even if handled as a negligence, trespass or nuisance issue, the one creating an offensive condition knowing of the vulnerability of nearby crops could be liable.

The answer is likely to come from litigation over the next several years.

FOOTNOTES

1 See Harl, Ginder, Hurburgh and Moline, "The StarLink™ Situation," posted at www.iowagrain.org.

2 Aventis CropScience US ALP, Revised Label, April 3, 2000.

3 See "New StarLink™, the Next Generation of Bt Corn: A Preplanting Guide with Information to Enhance Producer Usage, Insect Control and Insect Resistance Management, 2000 U.S. Edition.

4 See note 1 *supra*.

5 Statement by Stephen Johnson, EPA Deputy Administrator for Pesticides.

6 See note 1 *supra*.

7 See Redick and Bernstein, "Nuisance Law and the Prevention of Genetic Pollution: Declining a Dinner Date with Damocles," 30 *Env. L. Rep.* 10328 (2000).

8 Langan v. Valicopters, Inc., 567 P.2d 218 (Wash. 1977).

9 Restatement (Second) of Torts §§ 519, 520.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

BANKRUPTCY

GENERAL-*ALM* § 13.03.*

DISABILITY OF DEBTOR. In June 1999, a local court appointed two persons to serve as co-conservators for the debtors, husband and wife, because the debtors were disabled by degenerative dementia. The conservatorship order granted the co-conservators broad powers to control the affairs of the debtors but did not specifically grant the co-conservators the authority to file a bankruptcy case for the debtors. In June 2000, the co-conservators filed a Chapter 11 petition on behalf of the debtors. A creditor objected to the petition, arguing that the co-conservators did not have the authority to file the petition. The court held that, under Tennessee law, co-conservators had only the powers enumerated in the order of conservatorship issued by the court; therefore, the co-conservators could not file a bankruptcy petition for the debtors without first obtaining permission from the local court. ***In re* Buda, 252 B.R. 125 (Bankr. E.D. Tenn. 2000)**.

FEDERAL TAX-*ALM* § 13.03[7].*

ADMINSTIRATIVE EXPENSES. The debtor's Chapter 7 estate incurred administrative expenses during the administration of the estate. The trustee filed an income tax return for the estate and claimed the administrative expenses as a deduction from gross income of the estate, resulting in no income tax owed by the estate. The IRS disallowed the deduction except as a miscellaneous deduction, limited to the amount in excess of 2 percent of gross income. The IRS argued that, because the debtor would not be allowed a deduction from gross income for bankruptcy administrative expenses, the bankruptcy estate should not be allowed such a deduction. The court held that I.R.C. § 1398(h)(1) specifically allows bankruptcy estates deductions not otherwise disallowed. The court then looked to I.R.C. § 67 which allows estates and trusts to deduct administrative expenses from income. The court held that I.R.C. § 67 applied to bankruptcy estates. A similar case, *In re Sturgill, 217 B.R. 291 (Bankr. D. Or. 1998)*, held that bankruptcy administrative expenses were not deductible as trade or business expenses. The court noted that I.R.C. § 67 was not raised or discussed in that case. ***In re* Miller, 252 B.R. 110 (Bankr. E.D. Tax. 2000)**.