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**Message from the Chair**  
By Ian R. Conner

Welcome to the Fall 2012 edition of the Agriculture and Food Committee Newsletter.

This is the first newsletter published by our new slate of Committee leadership. First, I want to thank three of our former leadership for their contributions to the Committee and its formation. John Shively has stepped down as co-Chair of the Committee after two years. John was instrumental in founding the Committee and, as co-Chair, oversaw the Committee’s membership growth and work with the American Agricultural Law Association among multiple other projects. We wish him all the best and are indebted to him for his work on the Committee. Not one to go without one more contribution, John is still contributing to the upcoming Agriculture and Food Handbook. Also departing is Mark Ryan. Mark was also one of the founders of the Committee and has served as Vice Chair for two years. As those of you who attended our brown bag last summer with Mark know, he is now the Director of Litigation for the Antitrust Division. We thank Mark for his hard work in setting up the Committee and helping to lead it for the past two years. Finally, Frank Qi has ended his term as the Committee’s YLR during which time he created our Facebook page. The Committee will miss these leaders. Founding a new committee is not easy, and most certainly, this newsletter and this Committee would not exist without their efforts.

We now have three new leaders. Kathy Osborn from Faegre Baker Daniels joins the Committee as a Vice Chair, as does George Brennan of Nestle. David Stanoch of Dechert joins the Committee as the new YLR. Les Locke and John Snyder continue on as Vice Chairs of the Committee, as they have since they helped found it. This new leadership team looks forward to another successful year and we hope that you will consider participating in the Committee.

And what a way to start the year off! This newsletter presents several of the most interesting current topics involving

agriculture and antitrust. First, Professor Daryl Lim undertakes an extensive look at the intersection of intellectual property and agriculture, focusing on genetically modified seed and the legal treatment of patenting life. The 2007 Monsanto/Delta & Pine Land merger, which addressed these issues, was one of the drivers behind the creation of the Committee and the debate over competition in genetically-modified seeds continues to rage five years later. Next, Clayton Bailey examines the USDA’s efforts to reverse through regulation multiple appellate courts’ interpretation of the Packers and Stockyards Act. The USDA had sought to change the requirements to bring a suit under § 202 of the PSA in its now-abandoned rule changes, but those efforts did not stop when the proposed rule changes were withdrawn. Bailey’s article looks at all these different efforts. In the updates section, Carmine R. Zarlenga and Phillip R. Dupré update their Winter 2012 newsletter article on GMO food labeling; William Hunter provides an update on the ongoing antitrust litigation in Australia and the U.S. challenging breeding restrictions on the registration of Thoroughbreds and American Quarter Horses, respectively; and Jeremy Suhr offers a concise update on the continuing Southeastern Milk Antitrust litigation.

We hope that you find these articles educational and that they will provoke your comments and further discussion. Please feel free to react on our Agriculture and Food Committee blog (<http://abasalagandfood.wordpress.com>) and join the dialog or you can now also receive the Newsletter on Facebook by “liking” [our new Committee page](#).

If you would like to get involved in the Committee, please contact me at [ian.conner@kirkland.com](mailto:ian.conner@kirkland.com) or any of the Committee leadership.

## REBOOTING THE BEAN

By: Daryl Lim<sup>†</sup>

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### Author's Note:

This Article discusses how the advent of genetically modified seeds challenges competition policy norms at the antitrust-patent interface. Those challenges are illustrated by the patent license restrictions employed by the chief purveyor of this seed technology – Monsanto Company – and the litigation surrounding those restrictions. Monsanto's corporate patent strategy has harried farmers, raised the ire of competitors and attracted the scrutiny of the Justice Department. Yet the judicial decisions to date that have considered certain of the patent restrictions, notably the prohibition on farmers' replanting of progeny seeds, have concluded that they remain within the boundaries of the law, leading some courts and commentators to question whether the rules should be reexamined. The Article considers one of the most critical issues facing the agricultural sector today: have courts gone too far in protecting the patent rights of pioneer biotech companies like Monsanto? The discussion looks at how parallel litigation in industries as diverse as software and pharmaceuticals might inform the debate on balancing the rights of patentees of agricultural inventions against the rights of growers fighting to preserve their time honored rights and competitors locked in a battle for agricultural supremacy for the crop fields of America and beyond.

<sup>†</sup> I am grateful for the invitation to contribute to the ABA Antitrust Section Agriculture and Food Committee e-Bulletin, and to Dean Ralph Ruebner and the John Marshall Law School for the summer grant award. Ava Caffarini provided research assistance. All errors and omissions remain my own.

## I.

### Introduction

Technology and American agriculture have been grafted together from the beginning, shaping the nation's history along the way. Eli Whitney's cotton gin pioneered the mass production of cotton in 1793 and fueled the bloodiest war ever fought on American soil.<sup>1</sup> Thomas Jefferson, founding father, principal author of the Declaration of Independence and Virginia farmer devised an ingenious hillside plow in 1794.<sup>2</sup> John Deere continued improving plow technology and provided farmers with large steel "grasshopper plows" in 1837 designed to cut the tough prairie ground of the mid-west, opening up vast acres of land for useful agriculture in the process.<sup>3</sup> Today, genes within seeds have themselves become the workbenches of biotech companies, allowing farmers to shop for their perfect "designer" seeds in the same way we might pick an entrée combo in our favorite restaurant.

Genetically modified (GM) crops dominate the landscape of American agriculture, and represent more than 90% of soybeans and 65% of corn grown (see Fig. 1).<sup>4</sup> These super-crops resist herbicides, pests and disease, allowing them to thrive under conditions which previously would have decimated entire crop populations.<sup>5</sup> Growers enjoy higher

<sup>1</sup> Martin Kelley, *Top Five Causes of the Civil War*, About.com, [http://americanhistory.about.com/od/civilwar/menu/a/cause\\_civil\\_war.htm](http://americanhistory.about.com/od/civilwar/menu/a/cause_civil_war.htm).

<sup>2</sup> Author Unknown, *Moldboard Plow*, Jefferson's Monticello, <http://www.monticello.org/site/plantation-and-slavery/moldboard-plow>.

<sup>3</sup> Hiram M. Drache, *The Impact of John Deere's Plow*, Illinois Periodicals Online, <http://www.lib.niu.edu/2001/iht810102.html>.

<sup>4</sup> United States Department of Agriculture, *Genetically Engineered (GE) Soybean varieties by State and United States, 2000-2011*, (Jul 5, 2012), <http://www.ers.usda.gov/data-products/adoption-of-genetically-engineered-crops-in-the-us.aspx>.

<sup>5</sup> For example, in 1999 a major freeze cost California's citrus growers \$600 million in

yields and the environment benefits from less degradation.<sup>6</sup> These benefits, however, come with a hefty price tag. Department of Agriculture figures show that inflation adjusted seed prices have risen 135% for corn and 108% for soybeans in the last decade.<sup>7</sup> A significant portion of that increase has been attributed to patent royalties paid to biotech companies.<sup>8</sup>

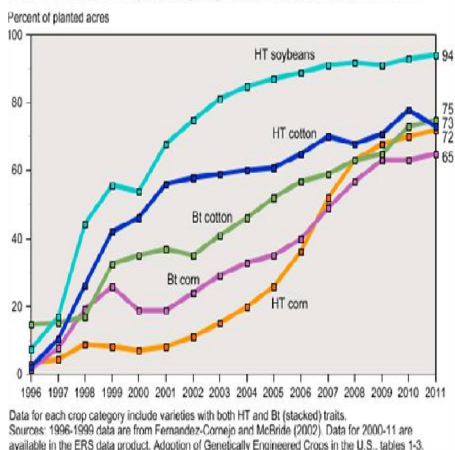
crop losses. See Brief Amicus Curiae of the American Seed Trade Association in Support of Neither Party 6, *Quanta Computer, Inc. v. LG Elecs., Inc.*, 128 S. Ct. 2109 (2008) (No. 06-937), 2007 U.S. S. Ct. Briefs LEXIS 1452, at \*18. While it is also possible to develop these traits through cross-breeding, scientists estimate that it would take upwards of fifteen years. See *id.*, 2007 U.S. S. Ct. Briefs LEXIS 1452, at \*10.

<sup>6</sup> U.S. Dep't of Justice, Competition and Agriculture: Voices From The Workshops On Agriculture and Antitrust Enforcement In Our 21st Century Economy And Thoughts On The Way Forward 2012 WL 1828869 (F.T.C.) (May 2012) at 13. See also Madison Smith, *Who Owns Your Dinner? A Discussion of America's Patented Genetically Engineered Food Sources, and Why Reform Is Necessary*, 23 LOY. CONSUMER L. REV. 182, 196 (2010) ("It has been suggested that use of herbicide tolerant crops can reduce total production costs by 6% in some cases.")

<sup>7</sup> The Consumer Price Index rose 20% in that period. See William Neuman, *Rapid Rise in Seed Prices Draws U.S. Scrutiny*, THE NEW YORK TIMES, March 11, 2010: "Such price increases for seeds — the most important purchase a farmer makes each year — are part of an unprecedented climb that began more than a decade ago, stemming from the advent of genetically engineered crops and the rapid concentration in the seed industry that accompanied it."

<sup>8</sup> Tom Philpott, *Seed Behemoth Monsanto Stumbles into Antitrust Trouble*, Grist, Dec. 17, 2009, <http://grist.org/article/2009-12-15-seed-behemoth-monsanto-stumbles-into-antitrust-trouble/>

**Growth in adoption of genetically engineered crops continues in the U.S.**



**Fig. 1**

**Source:** Economic Research Service, U.S. Department of Agriculture. Available at <http://www.ers.usda.gov/data-products/adoption-of-genetically-engineered-crops-in-the-us/recent-trends-in-ge-adoption.aspx>

In May 2012, the Justice Department released a report highlighting two interrelated concerns. First, farmers are facing high prices and limited options for seeds as a result of a highly concentrated pool of GM seed sellers dominating the market through mergers and acquisitions.<sup>9</sup> Second, patent rights in GM technology have displaced farmers' traditional rights to save and re-plant their own seed, leaving them with only a limited license to use the first generation of purchased GM seeds.<sup>10</sup> Patent law regards progeny seeds as mini-biological factories that produce infringing copies of patented traits and therefore requires fresh licenses for each season of replanting.<sup>11</sup> This confers on patentees a *carte blanche* to demand royalty payments not only from farmers who knowingly save patented progeny seeds for replanting, but even from those who unwittingly save patented progeny seeds by saving seeds from a crop produced from undifferentiated commodity seeds that were purchased from a grain elevator and that, unknown to the purchasing farmers, included GM seeds, or from a non-GM crop that was contaminated by GM seeds through seed

<sup>9</sup> U.S. Dep't of Justice, *supra* note 6, at 13.

<sup>10</sup> *Id.* at 14.

<sup>11</sup> See, e.g., *Monsanto Co. v. Scruggs*, 459 F.3d 1328 (Fed. Cir. 2006).

drift or cross-pollination.<sup>12</sup>

Central to any discussion of GM crops is Monsanto, a virtual monopoly in the GM seed market.<sup>13</sup> Its flagship product is Roundup Ready® (RR), a GM trait engineered to allow seeds to thrive under the application of its Roundup® herbicide.<sup>14</sup> Both are “by far the most widely used” in America making up more than \$11.7 billion or 75% of its net annual income (see Fig. 2).<sup>15</sup> Monsanto owns RR patents on several crops, controlling about 95 percent of the market for cotton traits, 97 percent of the market for soybean traits,

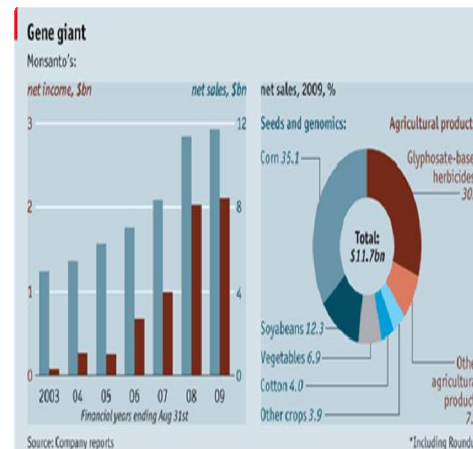
<sup>12</sup> See, e.g., *Monsanto Co. v. Bowman*, 657 F.3d 1341 (Fed. Cir. 2011); *Organic Seed Growers & Trade Ass'n v. Monsanto Co.*, 11 CIV. 2163 (NRB), 2012 WL 607560 (S.D.N.Y. Feb. 24, 2012).

<sup>13</sup> Diana L. Moss, *GM Seed Platforms: Competition Between a Rock and a Hard Place?*, American Antitrust Institute, October 23, 2009, at 1 (“Resulting increases in concentration in affected markets [have] been driven largely by the industry’s dominant firm, Monsanto.”).

<sup>14</sup> Monsanto’s patent is “directed toward insertion of a synthetic gene consisting of a 35S cauliflower mosaic virus promoter, a protein sequence of interest, and a stop signal, into plant DNA to create herbicide resistance.” See *Scruggs*, 459 F.3d at 1332. See also Michael R. Ward, et al., *Patent Exhaustion & Self-Replicating Technologies*, GEN, Aug 1, 2012, <http://www.genengnews.com/gen-articles/patent-exhaustion-self-replicating-technologies/4184/> (“Monsanto’s Roundup Ready technology includes seeds for growing corn, soybeans, and other crops that exhibit resistance to an herbicide known as glyphosate. Because glyphosate is rated ‘least dangerous’ compared to other herbicides and pesticides, it had long been a goal in crop science research to develop crop varieties with glyphosate resistance. Monsanto achieved this in soybeans by using the cauliflower mosaic virus (a virus capable of infecting plants) to create a vector for incorporating chimeric genes into soybean germplasm. The chimeric genes were derived in part from a strain of *Agrobacterium* that exhibited glyphosate resistance. Transgenic plants expressing the chimeric genes are also resistant to glyphosate.”).

<sup>15</sup> The Economist, *Parable of the Sower*, Nov 19, 2009.

and around 75 percent of the market for corn traits.<sup>16</sup> Over the years, Monsanto acquired dozens of companies, expanding its patent portfolio and increasing its market power. For example, Monsanto’s acquisition of Delta and Pine Land Company in 2006 gave it control of over half of the American market for cotton seeds and Delta’s seed trait technologies.<sup>17</sup>



**Fig.2**

**Source:** The Economist, *Parable of the Sower* (Nov 19, 2009)

Monsanto sells its own seed varieties to farmers and also licenses traits to independent seed companies (ISCs) to incorporate into the seeds they sell.<sup>18</sup> Between 2009 and 2010, the price of Monsanto’s seeds rose 42%.<sup>19</sup> A 2009 paper by the American Antitrust Institute (AAI) warned that the conditions in the GM seed industry create “an almost intractable problem for competition.”<sup>20</sup> It observed an absence of competition at an inter-platform level.<sup>21</sup> Like consumers having only one brand of malt beer, growers are left with one brand of seeds –

<sup>16</sup> Moss, *supra* note 13, at 13.

<sup>17</sup> Andrew Pollack, *Monsanto Buys Delta and Pine Land, Top Supplier of Cotton Seeds in U.S.*, THE NEW YORK TIMES, Aug 16, 2006.

<sup>18</sup> Neuman, *supra* note 7.

<sup>19</sup> Jack Kaskey, *Monsanto to Charge as Much as 42% More for New Seeds* (Update3), Bloomberg, Aug. 13, 2009.

<sup>20</sup> Moss, *supra* note 13, at 14.

<sup>21</sup> *Id.* at 12.



Monsanto's.<sup>22</sup> Intra-platform competition – where biotech companies license popular patented traits from patentees to add new traits - has also been impaired according to the AAI paper.<sup>23</sup> This lack of intra-platform competition stems from “high concentration, single-firm dominance, and strategic conduct [that] forecloses rivals from the access to technology that is critical for intra-platform competition.”<sup>24</sup> Patent law confers on Monsanto the ability to charge a toll from those seeking access to its technology. It follows from the ability to exclude that Monsanto can also control who can get access and on what terms. About 75% of agricultural patent cases involve Monsanto, and it aggressively protects its technology by suing competitors and farmers alike for patent infringement.<sup>25</sup> One competitor, DuPont, has accused Monsanto of antitrust violations.<sup>26</sup> The Justice Department is also investigating Monsanto for possible anticompetitive conduct.<sup>27</sup>

At the kernel of the debate lies the question: have courts gone too far in protecting the patent rights of pioneer biotech companies like Monsanto? The first part of the Article examines Monsanto's restrictions preventing farmers from re-planting progeny seeds. Here, the issues of competition policy manifest themselves through the doctrines of patent exhaustion and patent misuse. The second part of the Article examines Monsanto's alleged abuse of its monopoly power through “evergreening” patent rights on RR and imposing restrictions to prevent its

<sup>22</sup> Moss, *supra* note 13, at 11. (“...rivalry is *between* transgenic seed platforms. Seed containing traits that are exclusive to a single firm are the product of such platforms.”)

<sup>23</sup> *Id.* (“Intra-platform competition involves rivalry *within* platforms whereby firms develop new transgenic seed products, in part, by obtaining access to rivals' patented traits.”)

<sup>24</sup> *Id.* at 14.

<sup>25</sup> *Id.* at 25.

<sup>26</sup> *Monsanto Co. v. E.I. du Pont De Nemours & Co.*, 4:09CV00686 ERW, 2009 WL 3012584 (E.D. Mo. Sept. 16, 2009).

<sup>27</sup> Christopher Leonard, *Court Rules for Monsanto, Antitrust Case Remains*, The Seattle Times, January 16, 2010.

competitors from stacking their own traits onto RR. The Article concludes that resolving the balance between access and control goes beyond the immediate interests of Monsanto and its adversaries who have been litigating Monsanto's restrictions. At stake are weightier issues of food security as well as an industry racing to meet the ever greater demands of a hungry world.

## II.

### The Double Helix of Monsanto's Litigation

The patent and antitrust issues involving Monsanto are intertwined. Both regimes recognize that Monsanto deserves to be rewarded for successfully innovating. At the same time, both place a limit on its ability to exploit its technology. Patent exhaustion protects market competition by limiting patentee control to the first sale of the article embodying the technology, thereby protecting against “double-dipping” and encumbering the resale of the article in restraint of trade.<sup>28</sup> Patentees attempting to circumvent this limitation via licensing terms may be found guilty of misuse, rendering the patent unenforceable until the anticompetitive effects have been dissipated, usually when patentees remove the offensive clauses from the license.<sup>29</sup> The antitrust laws prohibit Monsanto from using its market power to cause injury to the competitive process. At a sufficiently high level of abstraction both work to enhance consumer welfare and promote innovation.<sup>30</sup> Each however has a different mandate, and any comprehensive approach requires careful consideration of the issues arising in each sphere.

#### A. Patent Law: The Limits of Exhaustion

Vernon Bowman, a soybean farmer from

<sup>28</sup> Procedurally exhaustion acts as an affirmative defense and denies infringement remedies to the patentee. See *Keeler v. Standard Folding Bed Co.*, 157 U.S. 659, 662, 15 S. Ct. 738, 739, 39 L. Ed. 848 (1895).

<sup>29</sup> *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1372 (Fed. Cir. 1998).

<sup>30</sup> U.S. Dep't of Justice, *supra* note 6, at 16. (“These regimes employ different means to the same ends of enhancing consumer welfare and promoting innovation.”)

Knox County, Indiana bought commodity seeds from a grain elevator for late season planting. The seeds were an undifferentiated mix of seeds that contained Monsanto's RR traits and those that did not. The grain elevator was not required to differentiate them and did not impose restrictions on Bowman when he bought them. Bowman saved the progeny seeds from that harvest and replanted them. Monsanto discovered that some of those seeds contained RR, determined that Bowman was not licensed to use them and promptly sued him for patent infringement. Before the district court and the Federal Circuit on appeal, Bowman argued that Monsanto's patents in the commodity seeds were exhausted when the farmer sold them to the grain elevator, since those sales were authorized under Monsanto's license agreement. Bowman cited *Quanta Computer, Inc. v. L.G. Electronics* where the Supreme Court held that a method patent was exhausted when the item substantially embodying the essential features of the method was sold with the implied authorization of the patentee and did not have any reasonable noninfringing uses.<sup>31</sup> Bowman argued that if his right to use commodity soybeans excluded the right to plant their progeny seeds, the exhaustion doctrine would be eviscerated.<sup>32</sup>

Earlier Federal Circuit precedent refused to find exhaustion or misuse by Monsanto when it sued a farmer for violating his license by saving soybeans from his harvest for replanting.<sup>33</sup> The panel reasoned that exhaustion was not triggered by sales imposing single-use limitations. Since the farmer had not paid Monsanto for the technology contained in the progeny seed, he had no right to use it. In another case, the Federal Circuit again ruled that exhaustion did not apply when the farmer bought RR seed for planting from an authorized distributor even when he had not signed or agreed to Monsanto's restrictions.<sup>34</sup> The panel there found that it was unnecessary for the farmer to have agreed to the license restrictions since the use of the progeny seeds was conditioned on obtaining a license from Monsanto, which the farmer had not done.

<sup>31</sup> 553 U.S. 617 (2008).

<sup>32</sup> *Bowman*, 657 F.3d at 1346.

<sup>33</sup> *McFarling*, 302 F.3d 1291.

<sup>34</sup> *Scruggs*, 459 F.3d 1328.

The *Bowman* panel cited both cases with approval.<sup>35</sup> Distinguishing *Quanta*, it held that Monsanto's license specifically excluded saving seed or providing the seed for replanting. The panel held that Monsanto's right to restrict the scope of use of progeny seeds was unbroken by the sale of first generation seeds to farmers. Consequently, farmers selling progeny seeds could not convey to grain elevators (the buyers) what the farmers did not have. Further, the *Bowman* panel found that unlike the facts in *Quanta*, the commodity soybeans sold to Bowman had "various uses, including use as feed."<sup>36</sup> Since the progeny of the second generation soybeans had not been sold, the principle of patent exhaustion simply did not come into play. Even if exhaustion was triggered, Bowman nonetheless infringed Monsanto's patents by replanting the progeny seeds since they contained the infringing traits. The court reasoned that finding otherwise would eviscerate any meaningful rights possessed by Monsanto over its self-replicating technology.

Mr. Bowman filed a petition for a writ of certiorari to the Supreme Court, placing before the Court two questions for it to consider: "[w]hether the Federal Circuit erred by (1) refusing to find patent exhaustion in patented seeds even after an authorized sale, and by (2) creating an exception to the doctrine of patent exhaustion for self-replicating technologies?"<sup>37</sup>

The *Bowman* case has been identified as one of the most important patent cases before the Supreme Court.<sup>38</sup> One reason for this is that the Federal Circuit's holdings were not merely confined to transgenic seeds but implicate the universe of self-replicating genetic technologies. As commentators caution, "competitors and consumers may be able to avoid patent infringement by growing, or otherwise duplicating a patented article from as little as a single sample purchased in the stream

of commerce."<sup>39</sup> The Court invited the Solicitor General to file a brief expressing the government's views on the issue.<sup>40</sup> Commentators note that this is significant because "[t]he Supreme Court generally only asks for input from the government in cases that are serious candidates for certiorari, and as a statistical matter, the likelihood of review is significantly higher in cases in which the Court has made such an invitation, even if the Solicitor General recommends against review. Consequently, the invitation indicates an increased chance that the *Bowman* case will be heard by the Supreme Court."<sup>41</sup> One patent case where the Supreme Court recently accepted certiorari against the Solicitor General's recommendation was *Laboratory Corp. v. Metabolite Labs., Inc.*<sup>42</sup> While certiorari was ultimately dismissed as improvidently granted in that case, the dissent's analysis paved the way for the Court's landmark decision in *Bilski v. Kappos* four years later.<sup>43</sup>

In his brief on the *Bowman* case, the Solicitor General recommended against

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<sup>39</sup> Michael R. Ward, et al., *Patent Exhaustion & Self-Replicating Technologies*, GEN, Aug 1, 2012 <http://www.genengnews.com/gen-articles/patent-exhaustion-self-replicating-technologies/4184/>

<sup>40</sup> See U.S. Supreme Court Seeks Input from Solicitor General in Monsanto Patent Exhaustion Case, V&E IP Insights E-communication, April 4, 2012. Available at

<http://www.velaw.com/resources/SupremeCourtSeeksInputSolicitorGeneralMonsantoPatentExhaustionCase>.

<sup>41</sup> *Id.*

<sup>42</sup> 548 U.S. 124 (2006). *But see* Breyer, J. (dissenting) ("The Court has dismissed the writ as improvidently granted. In my view, we should not dismiss the writ. The question presented is not unusually difficult. We have the authority to decide it. We said that we would do so. The parties and amici have fully briefed the question. And those who engage in medical research, who practice medicine, and who as patients depend upon proper health care might well benefit from this Court's authoritative answer.") *Id.* at 125-26.

<sup>43</sup> 130 S. Ct. 3218 (2010).

review.<sup>44</sup> The brief warned of "unforeseen consequences" for other self-replicating technologies such as "man-made cell lines, DNA molecules, nanotechnologies, [and] organic computers," advising instead that the Court allow case law to develop further before deciding on the limits of patent exhaustion in this area.<sup>45</sup> Moreover, in the Solicitor General's opinion, Congress was "better equipped" to resolve competing policy considerations presented in *Bowman*.<sup>46</sup> For example, the brief recognized the reality that adopting the view that exhaustion applied to progeny seeds could mean that "[t]he incentive to invest in innovation and research might well be diminished if the patent term for genetically modified crops was effectively reduced from 20 years to a single year or even a single growing season."<sup>47</sup> This perspective may have informed the brief's endorsement of the Federal Circuit's decision and its view that Monsanto's rights extended to progeny seeds even if its rights in the earlier generation of seeds had been exhausted.<sup>48</sup> At the same time, while the Solicitor General did not regard the issue as arising in *Bowman*, the brief implicitly cautioned that the Federal Circuit should scrupulously adopt *Quanta* in favor of the Federal Circuit's own earlier precedent to avoid fueling a petition for review in some future case.<sup>49</sup>

Bowman filed a supplemental brief in response.<sup>50</sup> Amongst the arguments made, two are particularly germane. First, Bowman's brief observed that the Federal Circuit had continued to rely on its conditional sale doctrine post-*Quanta* in affirming the district court's opinion as well as in recognizing the doctrine in a 2010 *en banc* opinion involving patent misuse.<sup>51</sup> The latter is certainly true, but it

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<sup>44</sup> Brief for the United States as Amicus Curiae, *Bowman v. Monsanto Company*, No. 11-796, (August 24, 2012), 2012 WL 3643767 (U.S.).

<sup>45</sup> *Id.* at 19-20.

<sup>46</sup> *Id.* at 18-19.

<sup>47</sup> *Id.* at 19.

<sup>48</sup> *Id.* at 12.

<sup>49</sup> *Id.* at 11.

<sup>50</sup> Supplemental Brief for Vernon Bowman, *Bowman v. Monsanto Co.*, No. 11-796 (September 4, 2012).

<sup>51</sup> *Id.* at 1.

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<sup>35</sup> *Bowman*, 657 F.3d at 1347.

<sup>36</sup> *Id.*

<sup>37</sup> *Bowman v. Monsanto Co., Petition for a Writ of Certiorari*, 2011 WL 6468161 (U.S.).

<sup>38</sup> Harold C. Wegner, *Top Ten Patent Cases*, Jul 23, 2012, <http://www.grayonclaims.com/storage/TopTen2012July23.pdf>

would be a dubious vehicle to carry the doctrine to the Supreme Court for review.<sup>52</sup> As to the former, while the Federal Circuit apparently affirmed the conditional sale doctrine both in its *Bowman* decision and the district court's application of it, it is controversial whether the panel's decision actually turned on the conditional sale doctrine instead of the theory that the creation of new seed from crops grown by the commodity seeds constitutes infringement regardless.<sup>53</sup>

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<sup>52</sup> See *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1328 (Fed. Cir. 2010), cert. denied, 131 S. Ct. 2480, 179 L. Ed. 2d 1209 (2011) (“In *B. Braun Medical, Inc. v. Abbott Laboratories*, 124 F.3d 1419 (Fed. Cir. 1997), and *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 (Fed. Cir. 1992), we explained the rationale underlying the doctrine. As a general matter, the unconditional sale of a patented device exhausts the patentee's right to control the purchaser's use of the device thereafter, on the theory that the patentee has bargained for, and received, the full value of the goods. That ‘exhaustion’ doctrine does not apply, however, to a conditional sale or license, where it is more reasonable to infer that a negotiated price reflects only the value of the ‘use’ rights conferred by the patentee.”).

<sup>53</sup> Compare *Bowman*, 657 F.3d at 1347 (“This court held, based on *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 (Fed. Cir. 1992), that the conditions in Monsanto's Technology Agreement were valid and legal and did not implicate the doctrine of patent exhaustion. *McFarling*, 302 F.3d at 1298–99 . . . . Thus, the doctrine of patent exhaustion did not bar the infringement claims in *McFarling* or *Scruggs*. Similarly, here, patent exhaustion does not bar an infringement action.”), with Kevin E. Noonan, *Bowman Responds to Solicitor General*, Patent Docs, Sept. 12, 2012. Available at

[http://www.patentdocs.org/2012/09/bowman-responds-to-solicitor-general.html?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+PatentDocs+%28Patent+Docs%29](http://www.patentdocs.org/2012/09/bowman-responds-to-solicitor-general.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+PatentDocs+%28Patent+Docs%29)

(“Regardless of whether the Federal Circuit retains any inclination to follow the conditional sale doctrine in the face of the Court's *Quanta* decision, where Bowman's argument fails to hold water is with regard to the grounds of the Federal Circuit's decision in this case. As set forth in the

Second, Bowman criticized the Solicitor General's support for the panel's view that planting progeny seed was an infringement, whether or not Monsanto's rights in the seeds that had been sold to grain elevators were exhausted.<sup>54</sup> This view, according to Bowman, was not supported by statute and untenably extends the doctrine of reconstruction to prevent buyers from exercising their right to use their purchase to the “full extent to which it can be used” in contravention of 150 years of Supreme Court jurisprudence, since “using” the seeds would result in the “making” of new plants.<sup>55</sup> The result was to “exact[] an abhorrent servitude on these items of personal property as they meander through streams of commerce.”<sup>56</sup>

The deeply divided views expressed by Bowman and the Solicitor General in their briefs highlight the limited extent to which the case law on exhaustion and the “repair/reconstruction” doctrine can usefully inform the outcome in cases involving self-replicating technologies. On one hand, there is logical force to Bowman's argument that curtailing the ability of farmers to grow seeds they buy from grain elevators would limit the “full extent” to which the seeds can be used. On the other, allowing that use would irrevocably wrest away Monsanto's ability to meter the use of its technology once the first generation of seeds has been sold. The dichotomy is an old one: the choice between incentivizing pioneering innovation and that pioneer's continued incentive to develop its technology on one hand, and on the other, advancing the potential of others to optimize the technology's use once the pioneer has had a chance to choose the conditions of its first sale. The resolution of that dichotomy, as often is the case in patent law, will likely be guided more by policy priorities of the day than by a faithful adherence to doctrine alone.

Commentators are divided over the appropriate outcome in *Bowman*. Some sympathize with Monsanto, noting that the current system of private ordering supports a mechanism encouraging Monsanto to

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Solicitor General's brief, conditional exhaustion was not the basis for the Federal Circuit's decision in this case.”)

<sup>54</sup> *Id.* at 4.

<sup>55</sup> *Id.* at 5.

<sup>56</sup> *Id.*

invest the billions it does in trait technology.<sup>57</sup> Restraining trade and market competition through licensing restrictions bypasses the public bargain where patentees are allowed to charge only as much as the value of their inventions.<sup>58</sup> Without the ability to control the use of subsequent generations of traited seeds, prices would crash to a point where it would be impossible for Monsanto to recoup its investments.<sup>59</sup> The *Bowman* district court recognized that biotech companies face the challenge that once a seedline is developed, its self-propagation would create a self-sustaining pool of GM seeds for the farmer, rendering the biotech company irrelevant.<sup>60</sup> There is also some force to the argument that licenses confer a limited set of rights on financial terms that farmers and other licensees have agreed upon and they should not later complain about these restrictions merely because they turn out to be inconvenient.<sup>61</sup> Resulting high prices are a function of having a first mover advantage and farmers willing to pay for traits benefit from higher and better yields, as well as saved labor, fuel and machinery costs.<sup>62</sup>

Others oppose the system of private ordering on both legal and policy grounds. At least one court has held that *Quanta* overruled the Federal Circuit's “conditional sale” doctrine that immunizes

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<sup>57</sup> Jeremy Sheff, *Self-Replicating Technologies*, Patently-O, Apr 30, 2012. Available at <http://www.patentlyo.com/patent/2012/04/self-replicating-technologies.html>. Monsanto spent \$6 billion on seed research in the decade through 2008 and \$1 billion yearly since. See Jack Kasey and William McQuillen, *Monsanto's Genetically Modified Seed Patents May Trump Antitrust Claims*, Mar 12, 2012, <http://www.infiniteunknown.net/2010/03/15/monsanto%E2%80%99s-genetically-modified-seed-patents-may-trump-antitrust-claims/>.

<sup>58</sup> Elizabeth I. Winston, *A Patent Misperception*, 16 LEWIS & CLARK L. REV. 289, 292 (2012).

<sup>59</sup> Sheff, *supra*. note 57.

<sup>60</sup> *Id.*

<sup>61</sup> Christopher Leonard, *Court Rules for Monsanto, Antitrust Case Remains*, The Seattle Times, January 16, 2010.

<sup>62</sup> *Id.*

licensing restrictions from patent exhaustion following a sale by a patentee.<sup>63</sup> Commentators such as Professor Herbert Hovenkamp agree that *Quanta* has “reinstated a strict patent ‘exhaustion’ (first-sale) rule against post-sale restraints.”<sup>64</sup> The *Bowman* panel, however, summarily dismissed *Bowman*’s argument that the case fell within the four corners of *Quanta*, on the basis that the transgenic commodity seeds could be used for other purposes such as feed.<sup>65</sup>

In response, commentators have criticized the Federal Circuit for focusing on non-planting uses of Monsanto’s seeds, since the subject of the invention was a genetic trait which “has no benefit to anyone who wishes to use the seed for any purpose other than planting. Indeed, the whole purpose of a seed is to replicate. Given the high cost of Monsanto’s seed, growers would not purchase them to sell as feed or a commodity.”<sup>66</sup> They also point out that the Federal Circuit in *Bowman* failed to recognize that the progeny seeds include all inventive aspects of the patent and growers would be practicing Monsanto’s trait patents as soon as they form and even if they did not use Roundup®.<sup>67</sup> Like the microprocessors in *Quanta*, they had all the components necessary to practice the patents, and simply needed the addition of standard components whether they were memory and buses as in case of *Quanta*, or water, sunlight and nutrients in *Bowman*.<sup>68</sup>

<sup>63</sup> *Static Control Components, Inc. v. Lexmark Intl., Inc.*, 615 F. Supp. 2d 575, 586 (E.D. Ky. 2009) (E.D. Ky. 2009) (holding that after *Quanta*, the single-use restriction was unenforceable through patent exhaustion).

<sup>64</sup> Herbert Hovenkamp *et al.*, *Misuse Beyond Tying*, ANTITRUST LAW - AREEDA AND HOVENKAMP, ¶1782n.205 (2012).

<sup>65</sup> *Monsanto Co. v. Bowman*, 657 F.3d 1341, 1348 (Fed. Cir. 2011).

<sup>66</sup> Brief Of Defendant-Appellant Vernon Hugh Bowman, Monsanto Company And Monsanto Technology LLC, Plaintiffs-Appellees, v. Vernon Hugh Bowman, Defendant-Appellant., 2011 WL 882003 (C.A. Fed.), at 11.

<sup>67</sup> Kevin Rodkey, *Exhaustion and Validity of Single-Use Licenses for GM Seeds in the Wake of Quanta v. LG Electronics*, 19 FED. CIRCUIT B.J. 579, 601 (2010).

<sup>68</sup> *Id.*

No further action was needed by the infringer. Thus if the Federal Circuit is correct that *Bowman* would infringe Monsanto’s patents simply because the progeny seeds contained the patented technology, it cannot also deny the presence of that same technology which would place it within *Quanta*’s ambit.<sup>69</sup>

As a matter of policy, limiting farmers to one growing season effectively means that they never own the seeds that they tend. Because Monsanto retains control over the propagation cycle of its GM seeds, farmers who do not want to use Monsanto’s seed run the risk of infringement simply by purchasing commodity seeds from a grain elevator.<sup>70</sup> This is particularly problematic since there is currently “no worldwide uniform standard about what constitutes an appropriate level of seed purity...[and]...the assumption is that no seed on the market is 100 percent pure.”<sup>71</sup> *Bowman* argued that Monsanto should require commodity seed sellers to distinguish between those that contain RR traits and those that do not. The *Bowman* district court found this argument “compelling” in light of Monsanto’s dominance of the soybean seed market, the regenerating nature of the RR trait and “the lack of any restriction against mixing of soybeans harvested from Roundup Ready crop from those that are harvested from a crop that was not grown from Roundup Ready seed.”<sup>72</sup> However it noted that while it “may disagree with the decision to award unconditional patent protection to Monsanto”, it “does not make policy; rather it interprets and enforces the law.”<sup>73</sup>

In its litigation against organic growers, Monsanto made a commitment that it would not sue farmers who had trace amounts of seeds with patented trait in

<sup>69</sup> *Id.*

<sup>70</sup> Reuters, *Monsanto and DuPont Heat up Rivalry over Seeds*, THE NEW YORK TIMES, Aug. 20, 2009.

<sup>71</sup> Gregory M. Lamb, *Are There Drugs in My Corn Flakes?*, THE CHRISTIAN SCIENCE MONITOR, Mar. 11, 2004, at 15.

<sup>72</sup> *Monsanto Co. v. Bowman*, 686 F. Supp. 2d 834, 836 (S.D. Ind. 2009), *aff’d*, 657 F.3d 1341 (Fed. Cir. 2011).

<sup>73</sup> *Monsanto Co. v. Bowman*, 686 F. Supp. 2d 834, 837 (S.D. Ind. 2009), *aff’d*, 657 F.3d 1341 (Fed. Cir. 2011).

their fields.<sup>74</sup> Some commentators have noted that neither “trace amounts” nor “inadvertent means” are defined, so Monsanto’s right to sue still hangs like the Sword of Damocles over the heads of farmers.<sup>75</sup> Risk-averse farmers may end up having to purchase a bundle of licenses to avoid inadvertent liability for infringement from multiple patentees.<sup>76</sup>

Commentators argue that extinguishing post-sale restrictions would provide a bright line rule, preventing downstream purchasers from being caught unaware by a requirement to pay royalties, reducing the incentive of patentees to litigate against downstream purchasers and increasing the incentive to bargain for a royalty *ex ante* that better reflects the value of that technology.<sup>77</sup> Extinguishing post-sale restrictions would also be consistent with *Quanta*’s concern with “expectations of fairness and justice in the public interest” and not merely to the advancement of innovation.<sup>78</sup>

If exhaustion applied to its progeny seeds, Monsanto could prevent cannibalizing of its sales in traited seed by stacking its GM seeds with a terminator gene, thereby limiting farmers to a single season use. Indeed, a patent was granted to Delta in 1998 for genetic modifications that rendered seeds sterile after planting.<sup>79</sup>

<sup>74</sup> *Organic Seed Growers & Trade Ass’n v. Monsanto Co.*, 11 CIV. 2163 (NRB), 2012 WL 607560, at \*2 (S.D.N.Y. Feb. 24, 2012).

<sup>75</sup> Christina L. Nargolwala, *Renewable Agriculture: GM Contamination and Patent Enforcement Threats*, NAT. RESOURCES & ENV’T Winter 2012, at 2021.

<sup>76</sup> Marcella Downing-Howk, *The Horns of a Dilemma: The Application of the Doctrine of Patent Exhaustion and Licensing of Patented Seeds*, 14 SAN JOAQUIN AGRIC. L. REV. 39, 69 (2004).

<sup>77</sup> Amelia Smith Rinehart, *Contracting Patents: A Modern Patent Exhaustion Doctrine*, 23 HARV. J.L. & TECH. 483, 535 (2010).

<sup>78</sup> *Id.*

<sup>79</sup> U.S. Patent No. 5,723,765 col.36 ll.22-60 (filed June 7, 1995). Elizabeth I. Winston, *A Patent Misperception*, 16 LEWIS & CLARK L. REV. 289, 335 (2012): “This nickname is a misnomer, as the modification is not actually a gene, but

However farmers were outraged that their right to save their seeds was taken from them. Public reaction smothered the commercial future of the terminator gene and it was never introduced.<sup>80</sup> When Bowman raised this argument to the district court, it found no admissible evidence of the gene's existence or its applicability to the case and opined that it was "not the appropriate venue for raising a policy argument with respect to the conditions which should be placed upon an award of a utility patent for genetically altered seed."<sup>81</sup>

Others have argued for farmers to be shielded by patent misuse.<sup>82</sup> Resting at the intersection of the patent and antitrust laws, patent misuse is not infrequently asserted together with antitrust claims, as was the case in the Monsanto-DuPont litigation, discussed below. Misuse guards against patentees whose licensing restrictions exceed the scope of their patents. The success of a misuse defense therefore pivots on how courts interpret the scope of the patent. Yet it is a surprisingly amorphous standard. Because of its roots in equity, development of the doctrine has been piecemeal and its doctrinal boundaries are unclear.<sup>83</sup> Cases over the last 50 years have variously interpreted "scope" to refer to the claims within a patent, the physical invention and the temporal scope.<sup>84</sup> Adding to the

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rather a process for programming a plant's genetic code so that the seed is fertile for only one planting and future generations are sterile."

<sup>80</sup> See Andrea Knox, *A Seed Firm Kills Plan to Use Terminator Gene*, PHILA. INQUIRER, Oct. 10, 1999: "Bowling to mounting pressure, Monsanto Co. last week pledged to call a halt to development of the so-called terminator gene."

<sup>81</sup> *Bowman*, 686 F. Supp. 2d at 837.

<sup>82</sup> Rodkey, *supra* note 67, at 606.

<sup>83</sup> 6 DONALD S. CHISUM, CHISUM ON PATENTS § 19.04 (2011): "[I]t is clear that the courts lack a clear and general theory for resolving that inquiry. Thus, individual problems are resolved in a piecemeal fashion, and it is difficult to harmonize decisions in one area (such as price restrictions) with decisions in another (such as field-of-use restrictions)."

<sup>84</sup> DARYL LIM, PATENT MISUSE AND ANTITRUST: AN EMPIRICAL STUDY (2013,

complexity, courts have turned to patent and antitrust policy to determine that scope.<sup>85</sup> Given that recent cases have conferred a liberal reading of that scope, it seems unlikely that this argument will carry much traction unless the Supreme Court is willing to recalibrate Federal Circuit jurisprudence since the Federal Circuit has declined an invitation to do so itself.<sup>86</sup>

What is clear is that in a post-*Quanta* world, Monsanto may still enforce restrictions even when the transaction was a sale of the patented good and even when the party subject to the restriction was not in contractual privity with the patentee. Taken to its logical conclusion, those who own technology over traits, be they traits in seed, livestock or aquaculture, can exclude any who would make, use, sell, offer for sale or import anything containing the patented trait, even if found in the wild because of genetic contamination through cross-breeding of flora or cross-fertilization of fauna. An outcome like this may be too high a price even for innovation like Monsanto's.

### ***B. Antitrust Law: Of Product Hopping and Software Platforms***

The federal district court in Missouri concluded in January 2010 that under its licensing agreement, DuPont had the right to use Monsanto's RR trait, but not to stack it with other traits as it tried to do with its product known as Optimum GAT. The district court also ruled initially that the agreement contained an implied term prohibiting that sort of trait stacking.<sup>87</sup> On

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forthcoming).

<sup>85</sup> *Id.*

<sup>86</sup> See *Princo Corp., supra*; Daryl Lim, *Misconduct in Standard Setting: The Case for Patent Misuse*, 51 IDEA 559, 604 (2011).

<sup>87</sup> *Monsanto Co. v. E.I. DuPont De Nemours & Co.*, 4:09CV00686 ERW, 2010 WL 234951 (E.D. Mo. Jan. 15, 2010) order vacated in part on reconsideration, *Monsanto Co. v. E.I. Dupont de Nemours & Co.*, 4:09CV00686 ERW, 2010 WL 3039210 (E.D. Mo. July 30, 2010) ("[V]acated to the extent it implied a negative covenant in the license agreements and found that Defendants breached that covenant by producing OGAT/RR stacked seed products" but

August 6, 2012, Monsanto secured a \$1 billion verdict for patent infringement against DuPont.<sup>88</sup> DuPont has stated that it will appeal that decision.<sup>89</sup>

In its antitrust counterclaims, DuPont asserts that Monsanto has "improperly engaged in baseless enforcement of patents and attempted to expand the geographic and temporal scope of that patent."<sup>90</sup>

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maintained "that the license agreements did not grant Defendants a right to create OGAT/RR stacked seed products..."). *Monsanto*, 2010 WL 3039210, at \*5.

<sup>88</sup> The jury returned a verdict for \$1 billion, a dubious result according to commentators like Professor Bernard Chao. Since Monsanto had never accused DuPont of selling any seeds that infringe Monsanto's patent for genetically modified Roundup Ready soybeans, the theory of damages must have been a novel one, but one that was based on evidence filed under seal and therefore remains a mystery. Bernard Chao, *Non-Public Litigation: The Hidden Story of Monsanto v. DuPont*, Patently-O, Aug 11, 2012, <http://www.patentlyo.com/patent/2012/08/non-public-litigation-the-hidden-story-of-monsanto-v-dupont.html>

<sup>89</sup> DuPont has also stated that it would not incur a charge against its earnings because it expects to prevail in its appeal. See Reuters, *Monsanto shares rise after \$1 bln award against DuPont*, Aug 2, 2012, <http://in.reuters.com/article/2012/08/02/m Monsanto-dupont-lawsuit-idINL2E8J28FC20120802>

<sup>90</sup> Reply Memorandum of Law in Support of Dupont's Motion to Bifurcate and Stay Discovery with Respect to Willful Infringement Pursuant to Fed. R. Civ. P. 42(b), *Monsanto Co. et al. v. E.I. Dupont De Nemours & Co. et al.*, 2010 WL 4607125 (E.D. Mo.). Monsanto has also been accused of obtaining RR patents by fraudulent procurement and inequitable conduct, threatening independent seed companies, dealers and farmers against accepting Pioneer's soybeans and restricting competitors from developing alternative traited corn products. See Defendants' Amended Answer and Counterclaims, *Monsanto Company and Monsanto Technology LLC, Plaintiffs, v. E.I. Dupont De Nemours and Company and Pioneer Hi-Bred International, Inc.*, Defendants, 2009 WL 2589331 (E.D. Mo.) (Jul. 10, 2009).



DuPont accuses Monsanto of scheming to monopolize input traits in corn and soybeans, and emerging combinations of input and output traits.<sup>91</sup> Input traits are the first generation technology conferring desirable agronomic characteristics such as resistance to herbicides, insects and frost. The next generation of traits - output traits - confer end-use qualities such as improved nutritional value and can be “stacked” onto input traits. For example, bioengineered “Golden Rice” provides increased amounts of iron and beta carotene not normally present in rice. Others act as agents to deliver vaccines for diseases and other health benefits such as antioxidants and omega-3 fatty acids.<sup>92</sup> Trial has been scheduled for September 2013.<sup>93</sup>

In its pleadings, DuPont has advanced two theories of antitrust liability. First, Monsanto allegedly employed an anticompetitive switching strategy by using new licenses to shift independent seed companies from its RR line, expiring in 2014, to its new Roundup Ready 2 Yield (RR2Y) line to prevent generic entry into the market, thus extending protection until 2020.<sup>94</sup> Second, Monsanto prohibited ISCs from offering GM seeds stacked with both Monsanto and DuPont traits. DuPont asserts that this amounts to unlawful leveraging from the herbicide trait monopoly into the market for stacked traits, preventing the emergence of a product offering better crop yields and herbicide resistance than RR for which Monsanto has offered no substitute.<sup>95</sup>

<sup>91</sup> DuPont’s antitrust allegations involving *Walker Process* fraud sham litigation were dismissed in light of the court finding Monsanto’s patents valid and infringed on Monsanto’s Motion for Partial Judgment. See *Monsanto Co. v. E.I. Dupont de Nemours & Co.*, 4:09CV00686 ERW, 2011 WL 322672 (E.D. Mo. Jan. 31, 2011).

<sup>92</sup> Brief Amicus Curiae of the American Seed Trade Association in Support of Neither Party 6, *Quanta Computer, Inc. v. LG Elecs., Inc.*, 128 S. Ct. 2109 (2008) (No. 06-937).

<sup>93</sup> See Reuters, *supra* note 89.

<sup>94</sup> Defendants’ Amended Answer and Counterclaims, *supra* note 90, at ¶¶ 179 - 185.

<sup>95</sup> *Id.* at ¶ 124 - 130.

### 1. Evergreening Patents: A Leaf from the Pharmaceutical Industry

According to DuPont, RR2Y expresses the same enzyme that confers herbicide resistance in RR, differing only in the use of different promoters, which function as “on switches.”<sup>96</sup> DuPont asserts that these promoters do not enhance either herbicide tolerance or yield. Rather, RR2Y’s enhancements result from non-patent related factors such as the different points on the genome at which the trait is incorporated and Monsanto’s requirement that farmers use its seed treatment.<sup>97</sup> DuPont also asserts that Monsanto forced ISCs to switch from RR to RR2Y ahead of 2014 to ensure that ISCs will offer seeds only with Monsanto’s patented RR2Y trait and not those with a competing generic RR trait, and in doing so foreclose generic entry.<sup>98</sup>

Monsanto CEO Hugh Grant acknowledged the need to convert users in order not to cannibalize profits for RR2Y, which would cost 40 percent more than RR, but that this would be justified by a superior product that could increase yield by 7 - 11 percent.<sup>99</sup> In light of impending generic entry post 2014, such a steep price increase

<sup>96</sup> *Id.* at ¶ 65.

<sup>97</sup> *Id.* at ¶ 66. Michael Stumo, *Anticompetitive Tactics in Ag Biotech Could Stifle Entrance of Generic Traits*, 15 *DRAKE J. AGRIC. L.* 137, 141 (2010): “By using a different promoter, Monsanto can pursue additional patents only for that promoter, enabling it to claim longer patent protection for the identical RR gene. Furthermore, there appears to be no independent evidence, outside of Monsanto assertions, that RR2 offers farmers increased yields or improved tolerance to glyphosate over RR.”

<sup>98</sup> Defendants’ Amended Answer and Counterclaims, *supra* note 90.

<sup>99</sup> Hugh Grant, CEO, Monsanto Co., Monsanto Company F3Q09 (Qtr End 5/31/09) Earnings Call Transcript, June 24, 2009 (emphasis added), [http://www.monsanto.com/pdf/investors/2009/roundup\\_ready2\\_yield.pdf](http://seekingalpha.com/article/152631-monsanto-company-f3q09-qtr-end-5-31-09-earnings-call-transcript?page=1&find=crop%2Band%2Bseeds; Monsanto Co., Monsanto Roundup Ready 2 Yield Investor Presentation (2009), <a href=).

even with the increased yield seems counterintuitive unless Monsanto was confident of being able to exclude that entry through its patents over RR2Y.

Michael Stumo argues that Monsanto’s strategy resembles “product hopping,” practiced by manufacturers of pioneer drugs to delay entry of their generic competitors. Trivial changes are made to the drugs, for example changing a capsule to a tablet. Pioneer drug companies then apply for patents over these new formulations that have marginal or no new benefits solely to delay the competition.<sup>100</sup> In *Abbott Labs v. Teva Pharms. USA, Inc.*, for example, Abbott changed the drug Tricor from a capsule to a tablet and reduced the amount of the drug slightly.<sup>101</sup> Abbott also bought up its old products, destroyed them and listed them as obsolete in a national drug database. As a result, while Teva could sell its generic version of Tricor, it could not take advantage of state generic substitution laws because Abbott’s changes prevented Teva’s drug from being equivalent and required Teva to start over in seeking FDA approval for the modified drug. The court concluded that the alleged manipulative and unjustifiable formulation changes that allegedly blocked generic substitution for Tricor, barred cost-efficient distribution of generic versions of Tricor and prevented consumer choice were sufficient to support Teva’s antitrust claims.<sup>102</sup> Generic entry would have facilitated inter-brand competition. Stumo argues that in the same way, generic entry in the seed trait market would result in “lower prices, increased competition and more choices for farmers.”<sup>103</sup>

<sup>100</sup> Hovenkamp *et al.*, *supra*, note 64, *Private Efforts to Manipulate Regulatory Frameworks as Antitrust Violations*, IP & ANTITRUST, §15.3 (2010).

<sup>101</sup> 432 F. Supp. 2d 408 (D. Del. 2006).

<sup>102</sup> *Id.* at 424.

<sup>103</sup> Stumo, *supra* note 97, at 148. Stumo also notes that Monsanto could protect its monopoly by obstructing the re-importation of generic RR soybeans. About 40% of soybeans produced in the U.S. are exported and grain elevators do not segregate them by destination. These exported soybeans thus represent an alternative source of seeds to farmers. By letting its foreign RR registrations expire or denying access to data required for foreign regulatory approvals for seeds containing RR-traits, Monsanto could cut

Whether Monsanto has introduced RR2Y strategically to block lawful generic substitution for RR remains to be determined at trial, but in 2004, Monsanto was accused by Syngenta AG of employing a similar switching strategy. Syngenta owned a herbicide-tolerant corn trait, GA21, originally licensed to Monsanto by GA21's previous owner.<sup>104</sup> Syngenta alleged that, perceiving Syngenta to be a competitive threat, Monsanto reacted by requiring its licensees then using the GA21 technology to switch to another herbicide tolerant trait that Monsanto owned. Syngenta accused Monsanto of antitrust violations. Syngenta's lawsuit against Monsanto was eventually settled on undisclosed terms.<sup>105</sup>

## 2. Is Roundup Ready® an Essential Facility?

RR is used on approximately 95% of

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off the exportation of those seeds, cutting off its supply at the source. *Id.* This concern has largely been addressed by Monsanto's recent commitment to maintain foreign import approvals during the transition to generic versions of RR through 2017. See Kaskey and McQuillen, *supra* note 57.

<sup>104</sup> Defendants' Amended Answer and Counterclaims, *supra* note 90, at ¶159. See also Paul Christiansen, *Roundup Ready Soybean Patent Infringement Suit Between Monsanto and DuPont: Part I Timeline* (Aug 6, 2012) <http://www.intlcom.com/seedsiteblog/?p=764> ("DEKALB/Monsanto sued Syngenta for use of GA21 patent infringement. Syngenta filed a countersuit against Monsanto alleging antitrust violations. Pattern is similar to the pattern of DuPont's response Monsanto infringement suit in 2009").

<sup>105</sup> See *Monsanto Co. v. Syngenta Seeds, Inc.*, 431 F. Supp. 2d 482 (D. Del. 2006), *aff'd*, 503 F.3d 1352 (Fed. Cir. 2007) (finding that DeKalb Genetics Corporation -- which Monsanto acquired -- had misappropriated the technology). The antitrust suit was settled on undisclosed terms. See *Syngenta Settles with Monsanto*, *The Business Journal*, May 23, 2008, <http://www.bizjournals.com/triad/stories/2008/05/19/daily59.html>. For a full history of the litigation, see Paul Christensen, *GA21's Legal History*, Dec. 21, 2011, <http://intlcom.com/seed%20site%202012/Intellectual%20Property/GA21.html>.

soybean acres in America and Monsanto itself supplies 99.7% of the relevant market for herbicide-tolerant traits in the United States.<sup>106</sup> DuPont's Pioneer division sought to introduce what it claimed were superior input and output traits that Monsanto did not offer.<sup>107</sup> Because of the widespread adoption of RR, DuPont alleges, the commercial viability of these next-generation output traits depends on the biotech company being able to stack these traits on RR.<sup>108</sup> The ubiquity of Monsanto's GM seeds has led commentators to liken Monsanto's GM seed business to "a classic platform monopoly" similar to "AT&T's telephone lines before the company's 1984 breakup or Microsoft Corp.'s Windows operating system in the 1990s."<sup>109</sup> That technology, they argue, is "a facility that competitors need access to, to compete against the monopolist."<sup>110</sup> The American Antitrust Institute paper characterized Monsanto's

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<sup>106</sup> *Monsanto Company and Monsanto Technology LLC, v. E.I. DuPont De Nemours and Company and Pioneer Hi-Bred International, Inc.*, 2009 WL 2589331 (E.D. Mo.).

<sup>107</sup> Pioneer sought to introduce Herculex, an insect resistant trait, in its corn, and offer RR traited soybeans with low linolenic and high oleic traits, which according to DuPont have numerous practical and environmental benefits. See Press Release, *E.I. DuPont de Nemours & Co., DuPont Asserts Anti-Trust, Patent Claims against Monsanto*, June 16, 2009 (characterizing Monsanto's lawsuit as "seek[ing] to block innovative new soybean lines from ... Pioneer Hi-Bred" and asserting that "we believe we have every right through our existing license agreement to 'stack' our Optimum GAT trait Pioneer soybeans already containing a Roundup Ready® trait."). See also Defendants' Amended Answer and Counterclaims, *supra* note 90, at ¶ 162 ("To prevent competition from the introduction of the OGAT corn trait, Monsanto has used its monopoly power in the relevant markets to restrict Pioneer's ability to stack that trait with the Herculex(R) insect-resistant traits that Pioneer co-developed with Dow").

<sup>108</sup> Defendants' Amended Answer and Counterclaims, *supra* note 90, at ¶47.

<sup>109</sup> Kaskey and McQuillen, *supra* note 57.

<sup>110</sup> *Id.*

licensing model as a "closed" platform "designed to frustrate rivals' access to needed technology."<sup>111</sup>

Monsanto argues that such field-of-use restrictions are within the scope of its patents. At the same time, Monsanto points out that competition will increase as the market for GM crops matures.<sup>112</sup> The fact that it is licensing, Monsanto asserts, shows that it is "encouraging, rather than hampering innovation."<sup>113</sup>

Monsanto is partially correct. Antitrust law allows patentees to grant licenses limited to use in a defined field.<sup>114</sup> Antitrust law also generally allows patentees to choose their licensees, licensees are not obliged by antitrust law to assist competitors, and patentees do not violate antitrust law by using patents to entrench themselves.<sup>115</sup> Control over their technology is integral to encouraging patentees to license it and spur further investments in innovation. Monsanto, supporters argue, represents "an IP success to be emulated," rather than "an antitrust culprit to be eliminated."<sup>116</sup>

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<sup>111</sup> In contrast, "open" platforms interoperate with rival technologies. See Moss, *supra* note 13, at 12.

<sup>112</sup> Neuman, *supra* note 7.

<sup>113</sup> *Id.*

<sup>114</sup> *Gen. Talking Pictures Corp. v. W. Elec. Co.*, 304 U.S. 175, 181 (1938), *aff'd on reh'g*, 305 U.S. 124 (1938). The joint IP licensing guidelines issued by the DOJ and FTC in 1995 are consistent with this position. See U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property*, § 2.3 (1995) (noting that field-of-use licenses may increase the patentee's incentive to license by "protecting the licensor from competition in the licensor's own technology in a market niche that it wants to keep to itself").

<sup>115</sup> See *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). See also *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004): "We have been very cautious in recognizing such exceptions [to the right of refusal to deal], because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm."

<sup>116</sup> Ronald A. Cass, *Monsanto's Seeds Of Growth*, *Forbes*, Feb. 11, 2010, <http://www.forbes.com/2010/02/11/antitru>

However, at the same time, antitrust law prohibits patentees from creating or maintaining their monopoly, for example, through limiting access to intellectual property needed to compete in a secondary market.<sup>117</sup> The law is also clear that restrictions may be anticompetitive if used to prevent the emergence of a market for second-hand goods that compete with goods sold by the primary manufacturer.<sup>118</sup>

Barriers to entry are high. An alternative to RR could cost DuPont between \$100 million and \$150 million to develop and commercialize.<sup>119</sup> Moreover, before GM seeds can be commercialized, they need to receive approval from the Agriculture Department, Environmental Protection Agency and Food and Drug Administration. The process of developing new traits can span 10 – 15 years.<sup>120</sup> Because the process is long and costly, farmers cannot turn in the meantime to foreign suppliers that have not already been approved by these regulatory

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[st-intellectual-property-monsanto-dupont-opinions-contributors-ronald-cass\\_print.html](http://st-intellectual-property-monsanto-dupont-opinions-contributors-ronald-cass_print.html).

<sup>117</sup> *United States v. Paramount Pictures*, 334 U.S. 131 (1948) (tying patented machines and copyrighted films); *Image Technical Services v. Eastman Kodak Co.*, 125 F.3d 1195, 1219-20 (9th Cir. 1997) (holding that Kodak's refusal to sell patented parts to ISOs constituted monopoly leveraging from parts to servicing). *But see In re Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322, 1329 (Fed. Cir. 2000) (holding that Xerox's refusal to sell patented parts to ISOs did not violate the antitrust laws).

<sup>118</sup> *See, e.g., United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 346 (D. Mass. 1953), *aff'd mem.*, 347 U.S. 521 (1954).

<sup>119</sup> Doug Cameron, *U.S. Regulators Speed Seed Oversight After Delays - DuPont Executive*, DOW JONES NEWSWIRE, Sept. 2, 2009, <http://english.capital.gr/news.asp?ID=805738>.

<sup>120</sup> Jorge Fernandez-Cornejo, *The Seed Industry in U.S. Agriculture*, U.S. DEPARTMENT OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, AGRICULTURE INFORMATION BULLETIN No. 786, at 51 (2004).

agencies.<sup>121</sup>

Since RR is so popular, other biotech companies desiring to offer seeds with other traits need to include Monsanto's trait to farmers as well. By refusing to license those traits for stacking, DuPont argues, Monsanto unlawfully excludes competition, allowing it to set the minimum prices for GM seed without significant impact on its market share. Commentators also point out that the social waste of duplicating Monsanto's effort makes it more efficient to encourage DuPont and others to invest in other types of traits.<sup>122</sup> Access to RR trait stacking would allow DuPont and others to offer goods in the complementary output trait market. It does not cannibalize on the RR trait market, but instead fosters its growth in the same way that more apps written for a software platform would make that platform more attractive through network effects.<sup>123</sup>

Cases such as *MCI Communications Corp. v. AT&T* recognize that where the owner denies competitors access to an essential facility it controls which cannot be practically or reasonably duplicated, and which it can feasibly provide access to, antitrust law can require compulsory sharing of that facility.<sup>124</sup> Courts are divided on the threshold for access. Some require elimination of downstream competition while for others it is sufficient that duplication is "economically infeasible" and denial inflicts a "severe handicap on potential market entrants."<sup>125</sup>

Despite the Supreme Court's equivocal stance on the essential facilities doctrine, some commentators have argued that it has

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<sup>121</sup> Defendants' Amended Answer and Counterclaims, *supra* note 90, at ¶ 51.

<sup>122</sup> Joseph M. Purcell, Jr., "The 'Essential Facilities' Doctrine in the Sunlight: Stacking Patented Genetic Traits in Agriculture," 85 ST. JOHN'S L. REV. 1251, 1252 (2011).

<sup>123</sup> *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

<sup>124</sup> 708 F.2d 1081, 1132-33 (7th Cir. 1982).

<sup>125</sup> *Compare Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991), *with Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977).

a role here.<sup>126</sup> Others have argued that there is little scope for intervention on competition grounds, noting that "[i]n almost all cases, the courts have come out on the side of intellectual property."<sup>127</sup>

Case law suggests that Monsanto's trait stacking ban constitutes a constructive denial of access to RR.<sup>128</sup> Whether RR is "essential" turns on how the court defines the relevant market. DuPont alleges that the relevant market is herbicide resistant traits for soybeans, in which Monsanto holds a clear monopoly and there are no clear substitutes.<sup>129</sup> It is unusual for a single patent or group of patents to define a relevant product market, but markets have been so defined, for example, when a patent has been incorporated into an industry standard, as was the case with Qualcomm's chipset technology.<sup>130</sup> One commentator therefore cautioned against defining the relevant market occupied by Monsanto according to the technology its products encompass.<sup>131</sup> Further, cases

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<sup>126</sup> Purcell, Jr., *supra* note 122, at 1269.

<sup>127</sup> Kaskey and McQuillen, *supra* note 57.

<sup>128</sup> *See Del. & Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174, 179-80 (2d Cir. 1990): "The [district] court held correctly that there need not be an outright refusal to deal in order to find that denial of an essential facility occurred. It is sufficient if the terms of the offer to deal are unreasonable."

<sup>129</sup> *See, e.g., Defendants' Amended Answer and Counterclaims, supra* note 90, at ¶ 23.

<sup>130</sup> *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007).

<sup>131</sup> Ronald A. Cass, *Monsanto's Seeds of Growth*, *Forbes*, Feb. 11, 2010 ("Obviously, Monsanto dominates that race, just as Coca-Cola dominates sales of soft drinks based on the formula for Coke and Ford dominates sales of cars built around Ford engines. It is hardly a sensible way to define the relevant market, even if it suits the desire to paint Monsanto as a dominant firm."). Areeda & Hovenkamp explain however, that a relevant market may be coterminous with a patented product: "Of course, a patented product and the relevant market may be coterminous, as when only Xerox made plain-paper copiers, which were far more attractive to customers than other copying methods. Xerox had market power and could keep it so long as its patents blocked entry into that market. But that is hardly

caution that mandating forced sharing places a court in an ill-suited role as regulatory agency.<sup>132</sup>

Resolving these and other issues related to the balance between antitrust and intellectual property laws affecting GM seed could have far-reaching impacts. Innovation in seed technology will likely be America's best hope in buffering against a looming global food crisis. Since June this year, prices of corn, soybean and wheat have surged between 30 and 50 percent, surpassing the heights of the 2007-8 food crisis.<sup>133</sup> The worst drought in 50 years continues to force growers to abandon fields larger than Belgium and Luxemburg combined.<sup>134</sup> The future of trait innovation lies in stacked genes, the most important of which will increase yield under increasingly extreme weather conditions.<sup>135</sup> In the face of agricultural disaster, Monsanto's promise of drought resistant crops to be offered sometime this year seems like a serendipitous godsend.<sup>136</sup>

Courts are mindful that the rate at which technological breakthroughs will continue in America may depend significantly on the rules of innovation set by them, and the risk of being seen as the one tripping up

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the usual situation with respect to intellectual property. In most instances, the holder of an intellectual property right has so little power in the first place that the power to prevent others from making or using the patented product or process brings no power to charge substantially supracompetitive prices." IIB P. Areeda, H. Hovenkamp & J. Solow, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 163 (3d ed. 2007).

<sup>132</sup> *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S. Ct. 1109, 1121 (2009).

<sup>133</sup> See Javier Blas, G20 Plans Response to Rising Food Prices, *The Financial Times*, Aug. 12, 2012, <http://www.cnbc.com/id/48641656>

<sup>134</sup> *Id.*

<sup>135</sup> *The Economist, The Parable of the Sower*, Nov. 29, 2009.

<sup>136</sup> *Id.* (noting that Monsanto's technology promises to improve water absorption in plant roots, water loss through leaves by modifying plant genes to allow them to better react to changing water conditions).

the driver of such crucial innovation may push courts towards greater deference than they might otherwise give to dominant firms such as Monsanto.<sup>137</sup> They may question whether farmers are worse off with license restrictions such as those that applied to Bowman. Research indicates that farmers still benefit by "growing the pie." An article in the *American Journal of Agricultural Economics* reported an increase in world surplus of \$240.3 million (in the sale of agriculture produce), of which the largest share went to American farmers.<sup>138</sup>

More broadly, as the world's largest agricultural exporter, the implications of America's domestic patent and antitrust policies will have a palpable impact abroad. The future of GM crops increasingly lies abroad where developing countries account for most of the land where GM seeds are sown.<sup>139</sup> The global market for GM seeds is more than \$25 billion.<sup>140</sup> Monsanto, for example sells more GM cotton in India than in America.<sup>141</sup> Whatever the outcome of

<sup>137</sup> *Id.*

<sup>138</sup> Dagorret Carlos, *Monsanto Anti-trust Case*. Available at <http://www.dagorret.net/monsanto-anti-trust-case/>

<sup>139</sup> *Id.* ("Around 90% of the world's 12m farmers with at least a hectare planted with GM seed are smallholders in developing countries."). See also *The Economist, Taking Root*, Feb 25, 2010: "Despite the decline in food prices and the global economic downturn last year, the use of GM technology increased by about 7%, according to ISAAA [the International Service for the Acquisition of Agri-biotech Applications]. More than three-quarters of the soybeans grown around the world are now genetically modified, as is roughly half the cotton and over a quarter of the maize (corn)."

<sup>140</sup> Michael R. Ward *et al.*, *Patent Exhaustion & Self-Replicating Technologies* GEN, Aug. 1, 2012, <http://www.genengnews.com/gen-articles/patent-exhaustion-self-replicating-technologies/4184/>

<sup>141</sup> *The Economist, The Parable of the Sower*, Nov. 29, 2009: "America has 250,000-300,000 active farmers; India has 15m cotton farmers alone, several million of whom Monsanto says it has reached already."

Monsanto's litigation here, the world will be watching.

### III.

#### Conclusion

The precedents set by Monsanto's litigation will likely impact other forms of self-replicating technology, such as nanomedicine.<sup>142</sup> Cases such as *Bowman* and *DuPont* provide valuable opportunities for courts to clarify how patent and antitrust law should align, and much turns on a principled and transplantable working definition of patent scope. Because the patent law doctrines of exhaustion and misuse, as well as antitrust law are predominantly judge-made, any comprehensive approach requires incisive judicial engineering on both dimensions.

One way to address the patent and antitrust issues could be to tighten the grant of injunctions. Litigation over smartphone technology, for example, has surfaced a movement toward granting injunctions to patentees of standard-essential patents only in rare cases.<sup>143</sup> The reasons for limiting the grant of injunctions in this context are that a patentee can usually be compensated by a judgment for any damage suffered, and withholding injunctions against competitors' use of a patentee's technology helps to preserve intra-brand competition. Applying this approach to GM technology would allow farmers to continue using GM seeds while Monsanto recovers in damages for unlicensed use of its technology.

In cases where damages are awarded, the damages – that is, the royalty -- should be based on a formula accepted by industry and the grower, as in *Bowman*. The *Bowman* court also included the cost of compliance monitoring, since "Monsanto faces constant risk of unauthorized use and must engage in such activities as crop monitoring in order to enforce its patents."<sup>144</sup>

Another approach might be to introduce

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<sup>142</sup> Sheff, *supra* note 57.

<sup>143</sup> Colleen V. Chien and Mark A. Lemley, *Patent and the Public Interest*, *THE NEW YORK TIMES*, Dec. 13, 2011.

<sup>144</sup> *Bowman*, 686 F. Supp. 2d at 840.



legislation to encourage generic challenge similar to the Hatch-Waxman Act, while being mindful to prevent patentees from gaming the system with sham settlements.<sup>145</sup>

Without a thoughtful reconsideration of how traditional competition norms apply to GM seed markets, the trends that the DOJ Report observed will likely become more prominent.<sup>146</sup> Allowing patentees such as Monsanto to control access to and use of its technology, and consequently to charge what the market will bear for access to and use of their technology will clearly encourage risk and innovation. The DOJ Report recognizes as much.<sup>147</sup> At the same time, a generally permissive attitude toward restrictions on access to essential technology will make it difficult for competitors, consumers and antitrust enforcers to check abuses of monopoly power. A permissive attitude also alters the time-honored tradition of allowing farmers to save and reuse their seed.<sup>148</sup> Patents over crops hold both promise and peril for the nation's food supply and make the debate over who should control such a vital commodity complex and controversial, but a vital one to resolve.<sup>149</sup>

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<sup>145</sup> Moss, *supra* note 13, at 27.

<sup>146</sup> Grant Garber, *The Nexus between Antitrust and Biotechnology*, *The Triple Helix*, Fall 2010, at 20, 22. Available at [http://www.asutriplehelix.org/the\\_nexus\\_between\\_antitrust\\_and\\_biotechnology](http://www.asutriplehelix.org/the_nexus_between_antitrust_and_biotechnology).

<sup>147</sup> U.S. Dep't of Justice, *supra* note 6, at 23.

<sup>148</sup> Winston, *supra* note 79, at 309: "Under traditional farming practices, a farmer typically saved seed from the highest yield crop to plant some acreage of that crop the next year, and then purchased new seed to plant the remaining acreage."

<sup>149</sup> Smith, *supra* note 6, at 198.

**THE USDA’S NEW EFFORT TO ROLL BACK THE TIDE OF FEDERAL LAW REQUIRING ANTICOMPETITIVE EFFECTS UNDER § 202 OF THE PACKERS AND STOCKYARDS ACT**

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*Editor’s Note:*

The author represented Pilgrim’s Pride Corporation in *Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355 (5<sup>th</sup> Cir. 2009)(*en banc*), and represents Pilgrim’s Pride and other companies in ongoing matters under the Packers and Stockyards Act. In this article he advocates an industry point of view on initiatives of the Grain Inspection, Packers and Stockyards Administration that affect his clients. The opinions expressed, however, are his own, not the opinions of his clients or of the Agriculture and Food Committee. The newsletter welcomes articles advocating positions on relevant issues consistent with its goal to provide a forum for vigorous, professional, reasoned debate of antitrust and consumer protection legal issues related to agriculture and food.

As children growing up, we heard the famous quote from W.E. Hickson’s short poem “Try (try) again.”<sup>1</sup> Our parents used the quote to teach perseverance in the face of hardship. The United States Department of Agriculture’s (“USDA”) Grain Inspection, Packers and Stockyards Administration (“GIPSA”) appears to have adopted this teaching in its repeated efforts to overcome settled precedent interpreting Section 202(a) of the Packers and Stockyards Act, 1921 (“PSA”).

On December 20, 2011, GIPSA’s deputy administrator signed a complaint initiating an enforcement action against Tyson

Farms, Inc.<sup>2</sup> GIPSA alleges that Tyson Farms engaged in “unfair[.]” and “deceptive[.]” conduct in violation of § 202(a)<sup>3</sup> of the PSA, by comparing poultry growers raising different breeds of chickens when calculating their grower pay.<sup>4</sup> The process of ranking growers against one another for the purpose of determining pay is referred to by some as the “tournament system.” According to GIPSA, growers raising a certain breed of chicken that performed less satisfactorily resulted in those growers receiving less pay in comparison to growers raising a different breed of chicken.<sup>5</sup> In GIPSA’s view, Tyson Farms’ tournament system was “unfair[.]” and “deceptive[.]” and resulted in an underpayment, which, according to GIPSA, activates liability under another provision of the PSA—§ 410.<sup>6</sup> Section 410 requires poultry companies to pay their growers the full amount due within a statutorily-regulated time frame.<sup>7</sup> GIPSA’s complaint, however, does not allege that the challenged conduct results in harm to competition or a likelihood thereof.

To the untrained eye, GIPSA’s complaint alleging underpayments to producers appears to be just another administrative enforcement action against a regulated entity for a claimed violation of the PSA. But to those who study the PSA and monitored the news relating to the USDA’s Proposed GIPSA Rules issued on June 22, 2010,<sup>8</sup> the allegations in the complaint should sound an alarm for at least three reasons. First, GIPSA’s enforcement action against Tyson Farms now constitutes the agency’s third “try”

within the last seven years to eliminate the anticompetitive effect requirement of a PSA § 202 claim. Second, the complaint disregards the U.S. Secretary of Agriculture’s (“Secretary”) limited adjudicatory power over poultry companies. Every federal court addressing this issue has determined that the Secretary lacks jurisdiction to adjudicate PSA § 202 claims against poultry companies, which the PSA defines as “live poultry dealers.”<sup>9</sup> Finally, the pleading is inconsistent with the spirit of Public Law 112-55, in which Congress declared in November 2011 that none of its FY 2012 appropriation to the USDA would be available to “implement” proposed GIPSA rules that (i) attempted to supersede federal judicial holdings that anticompetitive effect is an element of a claim under PSA § 202(a) or (ii) regulated the manner in which tournament systems must be conducted. Congress acted to defund these proposed rules and they do not appear in the Final GIPSA Rules published on December 9, 2011.<sup>10</sup> However, by filing and prosecuting a complaint challenging the manner in which Tyson Farms conducted its tournament system, and claiming a PSA § 202(a) violation without alleging facts showing a competitive injury, GIPSA presumably is using its appropriation to advance through administrative litigation some of the same principles that were embodied in the proposed rule-making that Congress acted to defund.

**1. The PSA and Legal Developments Related to § 202(a)**

The PSA was enacted in 1921<sup>11</sup> and is comprised of numerous provisions regulating the meat industry including § 202, which proscribes certain activities. As originally drafted, subsection (a) prohibited packers of livestock, meat, meat food products, or livestock products from “engag[ing] in or us[ing] any “unfair,

<sup>9</sup> 7 U.S.C. § 182(10).

<sup>10</sup> See Implementation of Regulations Required under Title XI of the Food, Conservation and Energy Act of 2008; Suspension of Delivery of Birds, Additional Capital Investment Criteria, Breach of Contract, and Arbitration (“Final GIPSA Rules”), 76 Fed. Reg. 76,874 *et seq.* (Dec. 9, 2011) (to be codified at 9 C.F.R. pt. 201).

<sup>11</sup> Pub. L. No. 67-51, 42 Stat. 159.

<sup>1</sup> W.E. Hickson, Moral Songs 8 (1857).

<sup>2</sup> Complaint, *In re Tyson Farms, Inc.*, P&S Docket No. D-12-0123, available at <http://www.gipsa.usda.gov/foia/complaints/d-12-123.pdf>. (“Compl.”).

<sup>3</sup> Now codified as 7 U.S.C. § 192(a).

<sup>4</sup> Compl. at §§ II-III.

<sup>5</sup> Compl. § II, ¶¶ (a)-(e).

<sup>6</sup> Compl. § II, ¶ (g), § III.

<sup>7</sup> Now codified as 7 U.S.C. § 228b-1.

<sup>8</sup> See Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act (“Proposed GIPSA Rules”), 75 Fed. Reg. 35338 *et seq.* (proposed June 22, 2010) (to be codified at 9 C.F.R. pt. 201).

unjustly discriminatory, or deceptive practice or device.”

Soon after the PSA became law, the United States Supreme Court acknowledged that § 202 is an antitrust statute enacted for the purpose of preventing anticompetitive behavior in the food production and processing industry.<sup>12</sup> Then-Chief Justice Taft wrote that the “chief evil” at which the PSA was aimed was “the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys.”<sup>13</sup> In one simple and compelling sentence, the Supreme Court described the PSA’s pro-competitive function:

The object to be secured by the [PSA] is the free and unburdened flow of live stock from the ranges and farms . . . through the great stockyards and slaughtering centers . . . and thence in the form of meat products to the consuming cities of the country . . . or, still, as live stock, to the feeding places and fattening farms . . . for further preparation for the market.<sup>14</sup>

In the years following the PSA’s enactment, Congress amended § 202 to cover poultry companies.<sup>15</sup> Few published opinions, however, construed and applied § 202 until the late 1960s. Then, in 1968, the Seventh Circuit Court of Appeals decided *Armour & Company v. United States*<sup>16</sup>, which acknowledged the statute’s antitrust backbone and held that in order to prevail under §§ 202(a) and (b), a plaintiff had to prove an anticompetitive effect.<sup>17</sup> As with other antitrust statutes, the *Armour* court also declared that federal courts should “apply a rule of reason in determining the lawfulness of a particular

practice.”<sup>18</sup>

The *Armour* opinion later served as the basis for numerous opinions barring § 202 claims filed by the USDA or producers against the protein industry. For instance, the Fourth,<sup>19</sup> Eighth<sup>20</sup> and Ninth<sup>21</sup> Circuits issued opinions rejecting § 202 claims filed by the USDA and turkey and chicken growers on grounds that they had not demonstrated proof of harm to competition or a likelihood thereof. This led to federal district courts issuing similar opinions in the swine industry as well.<sup>22</sup>

## 2. The USDA Attempts to Eliminate the PSA § 202(a) Harm-to-Competition Requirement Through the Courts.

As the weight of legal authority requiring harm to competition under § 202 became heavier, GIPSA began appearing as *amicus curiae* in appellate proceedings in circuit courts that were considering the issue for the first time. For instance, the USDA submitted an *amicus* brief and argued before the Eleventh Circuit in *London v. Fieldale Farms, Inc.* in 2005.<sup>23</sup> The USDA also filed briefing and argued before both the initial panel and the Fifth Circuit sitting *en banc* in *Wheeler v. Pilgrim’s Pride Corporation*.<sup>24</sup> In *Wheeler*, the growers’ counsel conceded the majority of their time for oral argument to the USDA’s attorney so the agency could argue in favor of eliminating the competitive harm requirement for § 202(a) and (b) claims.<sup>25</sup> Most recently, the

USDA appeared as *amicus curiae* before the Sixth Circuit in *Terry v. Tyson Farms, Inc.*<sup>26</sup>

Excluding the Fifth Circuit’s initial panel decision in *Wheeler*, the USDA’s position was ultimately rejected by the Eleventh, Fifth and Sixth Circuits in *London*, *Wheeler* and *Terry*. Moreover, in another appeal before the Tenth Circuit where the USDA failed to appear as *amicus curiae*, the court nevertheless considered the government’s arguments as posed in *London* and rejected them.<sup>27</sup>

Moreover, in each instance, the federal circuits declined to afford deference to the USDA’s interpretation of § 202 because, among other things, Congress did not delegate authority to the USDA to adjudicate § 202 claims against poultry companies.<sup>28</sup> The *London* court also disagreed with USDA’s argument that it had “consistently interpreted” § 202 not to require proof of harm to competition. The *London* court wrote:

We note that the Government contends that the Secretary ‘has consistently interpreted the [PSA] to prohibit all unfair practices, regardless of whether those practices cause a competitive injury.’ Gov’t Brief p. 10. In support of this ‘consistent view,’ the Government relies on one agency decision: *In re Ozark County Cattle Co.*, 49 Agric. Dec. 335 (1990). We do not consider one agency decision to establish a ‘consistent view;’ rather, this one agency decision only supports the Government’s litigating position.<sup>29</sup>

By the end of the first decade in the new millennium, the federal appellate courts that had confronted the issue had uniformly held that any plaintiff alleging a

<sup>12</sup> *Stafford v. Wallace*, 258 U.S. 495 (1922).

<sup>13</sup> *Id.* at 514-15.

<sup>14</sup> *Id.* at 514.

<sup>15</sup> Poultry Producers Financial Protection Act of 1987, Pub. L. No. 100-173, 101 Stat. 917 (1987) (changing the language in § 202 to clarify that the PSA applied also to claims “with respect to live poultry”).

<sup>16</sup> 402 F.2d 712 (7th Cir. 1968).

<sup>17</sup> *Id.* at 717.

<sup>18</sup> *Id.*

<sup>19</sup> *Philson v. Goldsboro Milling Co.*, Nos. 96-2542, 96-2631, 1998 U.S. App. LEXIS 24630, at \*11 (4th Cir. Oct. 5, 1998).

<sup>20</sup> *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *IBP, Inc. v. Glickman*, 187 F.3d 974, 976-77 (8th Cir. 1999).

<sup>21</sup> *DeJong Packing Co. v. USDA*, 618 F.2d 1329, 1335 n. 7 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980).

<sup>22</sup> *See, e.g., Griffin v. Smithfield Foods, Inc.*, 183 F. Supp. 2d 824 (E.D. Va. 2002).

<sup>23</sup> 410 F.3d 1295 (11th Cir. 2005).

<sup>24</sup> 536 F.3d 455 (5th Cir. 2008) and 591 F.3d 355 (5th Cir. 2009)(*en banc*).

<sup>25</sup> Recordings of the oral argument in the *Wheeler en banc* appeal can be found at:

<http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx?prid=108723>.

<sup>26</sup> 604 F.3d 272 (6th Cir. 2010).

<sup>27</sup> *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1227 (10th Cir. 2007).

<sup>28</sup> *London*, 410 F.3d at 1304; *Been*, 495 F.3d at 1226-27 & n. 6; *Wheeler*, 591 F.3d at 362.

<sup>29</sup> *London*, 410 F.3d at 1304 n. 7.

§ 202(a) claim had to plead and prove an anticompetitive effect or a likelihood thereof. This is best reflected by the Sixth Circuit’s opinion in *Terry v. Tyson Farms, Inc.*:

The tide has now become a tidal wave, with the recent issuance of the Fifth Circuit Court of Appeals’ en banc decision in *Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc), in which that court joined the ranks of all other federal appellate courts that have addressed this precise issue when it held that “the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act.”

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Ultimately, [the grower] and the USDA would have this court deviate from the course taken by the seven other circuits that have spoken on this issue, thus creating a conflict. We decline to do so.<sup>30</sup>

### 3. The USDA Attempts to Eliminate the PSA § 202(a) Harm-to-Competition Requirement Through GIPSA Rulemaking.

On June 22, 2010, 43 days after the Sixth Circuit’s *Terry* opinion, the Proposed GIPSA Rules were published.<sup>31</sup> The Proposed GIPSA Rules offered several new sections that materially amended or modified numerous existing definitions and provisions in the regulations implemented under the PSA.<sup>32</sup> The Proposed GIPSA Rules also offered numerous new regulations governing various facets of the livestock, swine and poultry industries.<sup>33</sup> Of particular relevance to this article were proposed rules that eliminated the requirement that a plaintiff plead and prove an anticompetitive effect and a rule governing the tournament systems used by poultry companies to calculate grower pay. The Proposed GIPSA Rules included, in

relevant part, the following:

- § 201.3(c) stating that “[a] finding that the challenged act or practice adversely affects or is likely to adversely affect competition is not necessary in all cases” under “section 202(a) and (b) of the Act.”<sup>34</sup>
- § 201.2(t) defining “competitive injury” as “when conduct distorts competition in the market channel or marketplace.”<sup>35</sup>
- § 201.2(u) defining a “likelihood of competitive injury” to include such conduct as, but not necessarily limited to, “rais[ing] rivals’ costs” and “impair[ing] a producer’s or grower’s ability to receive the reasonable expected full economic value from a transaction.”<sup>36</sup>
- § 201.210 identifying a laundry list of conduct deemed to be “unfair, unjustly discriminatory and deceptive practices or devices,” such as, but not limited to, an “unjustified material breach of a contractual duty, express or implied;” “an action or omission that a reasonable person would consider unscrupulous, deceitful or in bad faith;” retaliatory conduct; the refusal to provide statistical information or data upon request by a producer or grower; and the inclusion of such provisions as limitation of liability clauses or jury waivers in producer contracts.<sup>37</sup>
- § 201.211 establishing criteria for the USDA to consider in determining whether conduct violates § 202(b).<sup>38</sup>
- § 201.214 regulating tournament systems to require (1) “all

[poultry] growers raising the same type and kind of poultry must receive the same base pay;” (2) precluding the offering of contracts to poultry growers “containing provisions that decrease or reduce grower compensation below the base pay amount;” and (3) ranking poultry “growers in settlement groups with other growers with like house types.”<sup>39</sup>

The USDA received more than 61,000 public comments in response to the Proposed GIPSA Rules. After receiving the comments, GIPSA crafted an “Interim Rule” that would have sought to finalize only one of the Proposed GIPSA Rules—§ 201.214—but with modifications.<sup>40</sup> Although the Proposed GIPSA Rule § 201.214 required settlement groups to be comprised of growers raising poultry in “like house types,” the Interim Rule required settlement groups to consist of growers raising “the same type and kind of poultry,” and “growers with like house types based upon comparable production technology utilized.”<sup>41</sup> The Interim Rule also provided that “[p]oultry will be considered to be of the same type and kind if it is of the same breed and shares the same target weight range.”<sup>42</sup>

The controversy surrounding the Proposed GIPSA Rules is well documented in newspaper articles, trade magazines and blogs and does not require further discussion.<sup>43</sup> However, it is important to

<sup>39</sup> *Id.*

<sup>40</sup> See Tournament Systems and Compensation (“Interim Rule”) (to be codified at 9 C.F.R. pt. 201), available at [hagstromreport.com/assets/111011\\_gipsa.pdf](http://hagstromreport.com/assets/111011_gipsa.pdf).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., Troy Marshall, *The GIPSA Debate is Poised to Get Ugly*, Beef Magazine, July 9, 2010, available at <http://beefmagazine.com/cowcalfweekly/0709-the-gipsa-debate-get-ugly>; Sam Johnson, *A Rancher’s Perspective: New GIPSA Rule Could Unwind 30 Years of Success*, Beltway Beef, July 15, 2010, available at <http://www.beltwaybeef.com/2010/07/ranchers-perspective-new-gipsa-rule.html>; Lorraine Mirabella, *Poultry growers,*

<sup>34</sup> *Id.* at 35,351.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 35,351-35,352.

<sup>38</sup> *Id.* at 35,352.

<sup>30</sup> *Terry*, 604 F.3d at 277, 278.

<sup>31</sup> *Supra* note 8.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*



note Congress's reaction to the proposed rules.<sup>44</sup> Even before the Proposed GIPSA Rules were issued, the spokeswoman for Senator Saxby Chambliss (R. Ga.), who is the ranking minority member of the Senate Agriculture Committee, stated that the "rules proposal 'appears to go well beyond congressional intent under the 2008 Farm Bill . . . and contradicts established legal precedent.'<sup>45</sup> Congress eventually used its power of the purse to narrow the scope of the Proposed GIPSA Rules by prohibiting the expenditure of funds for implementing several specified sections of the Proposed GIPSA Rules.<sup>46</sup> When the Final GIPSA Rules were published on December 9, 2011, they were substantially scaled down in scope and magnitude.<sup>47</sup> For instance, the Final GIPSA Rules did not include § 201.3(c), which sought to eliminate proof of anticompetitive harm or the likelihood thereof in order to maintain a § 202 claim.<sup>48</sup> The elimination of § 201.3(c) rendered unnecessary the proposed definitions seeking to "clarify" the definitions of "competitive injury," "likelihood of competitive injury," "undue or unreasonable preference or advantage," and "unfair, unjustly discriminatory, and deceptive practices or devices."<sup>49</sup> The Final GIPSA Rules also did not include § 201.214 regulating poultry tournament

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*chicken processors at odds*, The Baltimore Sun, July 19, 2010, available at [http://articles.baltimoresun.com/2010-07-19/business/bs-bz-poultry-growers-usda-20100712\\_1\\_contract-poultry-growers-association-carole-morison-sanderson-farms](http://articles.baltimoresun.com/2010-07-19/business/bs-bz-poultry-growers-usda-20100712_1_contract-poultry-growers-association-carole-morison-sanderson-farms).

<sup>44</sup> See, e.g., H.R. Rep. No. 112-01, at 23 (noting that "the Committee believes the breadth of GIPSA's proposed rule at 75 FR 35338 unnecessarily extends beyond requirements of the 2008 Farm Bill").

<sup>45</sup> Bob Keefe, *USDA Plans New Regulations on Poultry Industry*, Atlanta J. Const., June 18, 2010, available at: <http://www.ajc.com/business/usda-plans-new-regulations-552788.html>.

<sup>46</sup> Consolidated and Further Continuing Appropriations Act of 2012 (the "Agriculture Appropriations Bill"), Pub. L. 112-55, 125 Stat. 552, § 721 (Nov. 18, 2011).

<sup>47</sup> *Supra* note 10.

<sup>48</sup> *Id.* at 76,875.

<sup>49</sup> *Id.*

systems.<sup>50</sup> The stripped-down Final GIPSA Rules became effective February 7, 2012.<sup>51</sup>

#### **4. GIPSA's New Course of Action: Attempt to Eliminate the PSA § 202(a) Harm-to-Competition Requirement Through An Agency Enforcement Action.**

On December 20, 2011, GIPSA signed its complaint alleging that Tyson Farms' grower pay settlement practices constituted unfair and deceptive conduct in violation of § 202(a) and thus led to "underpayments" in violation of § 410.

##### **a. The complaint's express and omitted allegations**

GIPSA's complaint is comprised of bare-bones allegations asserting in substance the following:

- From August 2009 through June 2010, Tyson Farms "placed flocks of birds with poultry growers that were of different breeds,"<sup>52</sup>

- The two breeds are known as "Cobb 500" and "Cobb 700" and supposedly had "different characteristics, in that Cobb 700 birds did not gain weight as rapidly as Cobb 500 birds."<sup>53</sup>

- During approximately an 11-month period from late September 2009 to early August 2010, 542 flocks of poultry were raised by 115 growers in some unidentified location. Of those flocks, nearly 31 percent of the flocks placed with the growers were Cobb 700 birds; 16 percent of the flocks were Cobb 500 birds; more than half of the flocks delivered were a mixture of both breeds; and the remaining two percent "were mixtures of Cobb 500, Cobb 700, and other poultry varieties."<sup>54</sup>

- Tyson allegedly "settled all flocks in a weekly settlement system such that flock performance for birds slaughtered were averaged and compared with the

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<sup>50</sup> *Id.* at 76,875-76,876.

<sup>51</sup> *Id.* at 76,874.

<sup>52</sup> Compl. § II, ¶ (a).

<sup>53</sup> *Id.*

<sup>54</sup> Compl. § II, ¶ (b).

performance of flocks from each grower whose birds were slaughtered that week. Superior performing flocks received a premium over the base pay for every flock that performed better than the average that week, and inferior performing flocks received a discount from the base pay for every flock that performed worse than average for the week."<sup>55</sup>

- By settling the growers raising different breeds together in the same groups, Tyson Farms allegedly "unfairly and deceptively compared growers of Cobb 700 birds to growers of Cobb 500 birds, resulting in substantial underpayments to growers whose flocks included Cobb 700 birds."<sup>56</sup>

GIPSA's complaint, however, *fails to allege that*:

- Tyson Farms' conduct caused harm to competition or a likelihood thereof;

- Tyson Farms' grower settlement practices breached the company's agreements with its poultry growers;

- Tyson Farms paid any grower less than the formula amount provided in the contract;

- Tyson Farms failed to pay its growers within the statutorily-required time frame set forth in § 410;

- any particular grower was targeted for receipt of any particular breed of poultry; or

- any grower was deceived or how they were deceived by Tyson Farms' settlement practices.

The lack of such allegations in the complaint is significant in two respects. First, the omission of allegations regarding harm to competition makes manifest that GIPSA is continuing through administrative litigation its previous unsuccessful efforts in the courts and through the regulatory process to roll back the requirement of pleading and proving harm to competition or a likelihood thereof under PSA § 202. Second, the omission of any reference to the growers' contracts

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<sup>55</sup> Compl. § II, ¶ (c).

<sup>56</sup> Compl. § II, ¶ (g).

avoids the fact that it is standard practice in the industry for poultry companies to reserve the right in the contracts to select the number, frequency, size and breed of birds delivered to poultry growers. Moreover, the payment formulas included in poultry agreements typically do not reference breed types or otherwise suggest that a grower will only be settled against other growers with like kind or quality of poultry.

#### **b. The Secretary's lack of jurisdiction to adjudicate GIPSA's § 202(a) claim against Tyson Farms**

A threshold issue raised by GIPSA's complaint against Tyson Farms is whether the Secretary has jurisdiction to adjudicate the enforcement action. According to the complaint, Tyson Farms "unfairly and deceptively compared growers of Cobb 700 birds to growers of Cobb 500 birds, resulting in substantial underpayments to growers whose flocks included Cobb 700 birds."<sup>57</sup> Based on these allegations, GIPSA is pinning its case on a violation of PSA § 202(a) in order to demonstrate an underpayment in violation of PSA § 410, which requires full payment within a specific time period.

PSA § 202 claims, however, must be brought in accordance with PSA § 209.<sup>58</sup> There, subsection (a) states that a regulated "person," such as Tyson Farms, who violates the PSA "shall be liable" to the victim "injured thereby for the full amount of damages sustained in consequence of such violation."<sup>59</sup> Subsection (b) provides that liability may be enforced through only two mechanisms: (1) "by complaint to the Secretary as provided in section 210" of the PSA; or (2) a lawsuit filed in federal court.<sup>60</sup> The first mechanism—that is, an enforcement action—is inapplicable because § 210 applies only to stockyard owners, market agencies and "dealers,"<sup>61</sup> not "live poultry dealers," such as Tyson Farms.<sup>62</sup>

<sup>57</sup> *Id.*

<sup>58</sup> 7 U.S.C. § 209.

<sup>59</sup> *Id.* at § 209(a).

<sup>60</sup> *Id.* at § 209(b).

<sup>61</sup> 7 U.S.C. § 210(a).

<sup>62</sup> A "live poultry dealer" is defined in the PSA as "any person engaged in the business of obtaining live poultry by

Similarly, PSA § 193 governing procedures before the Secretary for violations is inapplicable.<sup>63</sup> Section 193 expressly states that the Secretary may issue cease and desist orders and impose civil penalties, but only against packers and swine contractors.<sup>64</sup> Congress elected to omit live poultry dealers from § 193.

Because PSA §§ 209 and 193 do not relate to poultry companies, federal courts have consistently determined that the USDA's adjudicatory authority does not extend to allegations of unfair or deceptive practices by poultry companies. In 1995, the Eighth Circuit analyzed the statutory scheme of the PSA and concluded that the Secretary's administrative complaint procedure is "simply not available for claims against" live poultry dealers.<sup>65</sup> A decade later, the Eleventh Circuit, in *London*, determined that the USDA's interpretation of § 202(a) was not entitled to deference because the Secretary lacked adjudicatory authority over the poultry industry.<sup>66</sup> The Tenth Circuit later followed *London* and concluded similarly.<sup>67</sup>

Additionally, GIPSA has previously stated that it lacks such adjudicatory authority. In *Jackson v. Swift Eckrich, Inc.*,<sup>68</sup> a contract turkey grower alleged that the turkey company's contracting and turkey-handling practices violated PSA § 202.<sup>69</sup> The turkey company responded by arguing that the Secretary had primary jurisdiction over the PSA allegations and thus the

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purchase or under a poultry growing arrangement for the purpose of either slaughtering it or selling it for slaughter by another . . . ." 7 U.S.C. § 182(10).

<sup>63</sup> 7 U.S.C. § 193.

<sup>64</sup> 7 U.S.C. § 193(a).

<sup>65</sup> *Jackson*, 53 F.3d at 1456-57.

<sup>66</sup> *London*, 410 F.3d at 1304.

<sup>67</sup> *Been*, 495 F.3d at 1226-1227 and n. 6. The majority opinion in the Fifth Circuit's *en banc* decision in *Wheeler* also appears to agree with *London*'s and *Been*'s conclusions because Judge Reavley cited both opinions with approval in reaching the conclusion that the USDA's interpretation of §§ 202(a) and (b) was not entitled to deference. *Wheeler*, 591 F.3d at 362 & n. 32.

<sup>68</sup> 53 F.3d 1452 (8th Cir. 1995).

<sup>69</sup> *Id.* at 1454-55.

grower's case should be dismissed.<sup>70</sup> The USDA, appearing as *amicus*, argued in favor of the turkey grower's position. The Eighth Circuit's opinion states, "The United States, as *amicus*, agrees that Congress has not authorized the Secretary to conduct administrative proceedings to adjudicate allegations of unfair practices committed by poultry dealers."<sup>71</sup> Ultimately, after analyzing PSA §§ 209, 210 and 193, the *Jackson* court agreed with the grower and the USDA and concluded that the grower could pursue his § 202 claims in federal court.<sup>72</sup>

The only adjudicatory authority over live poultry dealers invested in the Secretary relates to two narrow areas: statutory trusts and prompt payment of funds to growers. The first is inapplicable; it protects poultry growers in the event of a bankruptcy.<sup>73</sup> The prompt payment provision, which regulates the time for payment of growers, is inapplicable to GIPSA's complaint based on the allegations pleaded.<sup>74</sup> GIPSA's complaint does not allege that Tyson Farms failed to pay any of the growers less than what they were entitled to under the contracts or that payment was outside the statutorily-required time frame. Instead, GIPSA avers that Tyson Farms' settlement practices are unfair and deceptive thereby violating § 202(a). It is the underlying alleged violation of § 202(a) upon which the government rests to assert "substantial underpayments to growers who raised Cobb 700 birds" under § 410.<sup>75</sup> Said another way, but-for the alleged § 202(a) violation, there would be no supposed underpayment of funds. Since GIPSA lacks authority to adjudicate an alleged PSA § 202(a) violation against a live poultry dealer, GIPSA lacks jurisdiction to adjudicate its complaint against Tyson Farms.

#### **c. The complaint's inconsistency with Congress's will expressed in PL 112-55**

Because GIPSA elected to cast its allegations in the form of an underpayment

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<sup>70</sup> *Id.* at 1455-56.

<sup>71</sup> *Id.* at 1456.

<sup>72</sup> *Id.* at 1457.

<sup>73</sup> 7 U.S.C. § 197.

<sup>74</sup> 7 U.S.C. § 228b-1(a).

<sup>75</sup> Compl. at §§ II, ¶ (g), III.

to growers based on an underlying § 202(a) violation, the § 410 claim is dependent on a successful prosecution of allegations of unfairness and deceptive conduct under § 202(a). As mentioned previously, the complaint does not allege any facts on the element of anticompetitive harm or a likelihood thereof, as uniformly required by the eight circuit courts of appeals that have ruled on the issue, including the Eighth Circuit, which would have appellate jurisdiction over an appeal from a disposition by the Secretary.<sup>76</sup>

The complaint likewise does not contain any allegations defining the relevant market, whether Tyson Farms had market power, or whether the harm or potential harm to competition outweighs any valid business justifications for Tyson Farms' business practices. These omissions are also inconsistent with legal authorities, which apply a rule of reason analysis similar to that used in the Sherman Act context in order to establish market power and determine whether challenged conduct is anticompetitive or a threat thereto.<sup>77</sup> These opinions reflect that a defendant's legitimate business reasons must also be

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<sup>76</sup> Under 7 U.S.C. § 228b-3, an appeal lies in the "court of appeals for the circuit in which" the live poultry dealer "has his principal place of business." Tyson Farms' principal place of business is Springdale, Arkansas, which falls within the Eighth Circuit's jurisdiction.

<sup>77</sup> See *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1279-1287 (11th Cir. 2005) (engaging in a rule of reason analysis concerning PSA §§ 202(a) and (e) claims); *London*, 410 F.3d at 1304-05 (affirming entry of judgment as a matter of law as to the growers' PSA § 192(a) claim because of, among other things, the absence of evidence, defining the relevant market and demonstrating the poultry company-defendant's market power); *In re Pilgrim's Pride Corp.*, 448 B.R. 896 (Bankr. N.D. Tex. 2011) (applying a rule of reason test to PSA § 202(e) claims and entering judgment in favor of poultry company based on valid business justifications); *In re Pilgrim's Pride Corp.*, No. 08-45664, 2011 Bankr. LEXIS 960 (Bankr. N.D. Tex. Mar. 24, 2011) (granting a poultry company's motion for judgment on partial findings in response to the growers' PSA § 202(a) claims based on evidence establishing that the company had valid business reasons for its conduct).

considered to determine if there has been or is a threat of harm to competition.<sup>78</sup> One unusual issue that will be litigated in the Tyson Farms proceeding is whether the Secretary may lawfully pursue relief on the grounds alleged in the Complaint in light of restrictions imposed on the Secretary by the 2012 Agriculture Appropriations Bill. As mentioned previously, Congress in Section 721 of the referenced Bill declared in pertinent part that: "None of the funds made available by this or any other Act may be used to write, prepare, or publish a final rule or an interim final rule in furtherance of, or *otherwise to implement*, proposed sections . . . 201.3(c) . . . or 201.14 of the [Proposed GIPSA Rule]."<sup>79</sup>

In the Tyson Farms proceeding, the Secretary is pursuing through administrative hearing the same interpretation of PSA § 202(a) and the same restrictions on the tournament system method of compensating chicken growers that Congress in the 2012 Agriculture Appropriations Bill prohibited the Secretary from using federal funds to pursue by rulemaking. Prohibited GIPSA Rule 201.3(c) would have eliminated competitive injury as an element of a claim under PSA § 202(a). The Secretary's Complaint in Tyson Farms, by its silence on competitive injury, seeks a ruling that competitive injury is not an element of its claim under PSA § 202(a). Prohibited GIPSA Rule 201.14 would have required live poultry dealers compensating growers on a tournament basis to provide the same base pay to "all growers raising the same type and kind of poultry" (i.e., poultry of the same breed) and would have prohibited "provisions that decrease or reduce grower compensation below the base pay amount." The Secretary's Complaint in Tyson Farms seeks a ruling that ranking birds of different breeds in the same tournament and decreasing (discounting) grower compensation for flocks that perform worse than average violates PSA § 202.

Thus, in the Tyson Farms proceeding the Secretary seeks to establish through administrative hearing -- presumably using funds appropriated by Congress -- substantially the same legal norms that the Secretary was prohibited from using federal appropriations to seek through

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<sup>78</sup> *Id.*

<sup>79</sup> Emphasis added.

rulemaking. Tyson as part of its affirmative defenses has asserted that, in prosecuting the Tyson Farms proceeding without any allegation of competitive injury or likelihood of competitive injury, the Secretary is attempting to "otherwise implement" Section 201.3(c) of the Proposed GIPSA Rule, in violation of Section 721 of the 2012 Agriculture Appropriations Bill.<sup>80</sup> Tyson similarly has asserted that the Secretary is attempting to "otherwise implement" Section 201.214, in violation of Section 721 of the 2012 Agriculture Appropriations Bill, by attempting to obtain a ruling in the Tyson Farms proceeding that settling different breeds in the same settlement groups violates Section 202(a) of the Packers and Stockyards Act.<sup>81</sup> For those reasons, Tyson contends that the Secretary's prosecution of the Tyson Farms proceeding violates Article I of the U.S. Constitution and various federal statutes.<sup>82</sup>

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<sup>80</sup> Answer of Tyson Farms, Inc. at 4-5, In re Tyson Farms, Inc., P&S Docket No. D-12-0123 (U.S. Dep't of Agriculture Jan. 27, 2012).

<sup>81</sup> Answer of Tyson Farms, Inc. at 3, In re Tyson Farms, Inc., P&S Docket No. D-12-0123 (U.S. Dep't of Agriculture Jan. 27, 2012).

<sup>82</sup> Answer of Tyson Farms, Inc. at 5, In re Tyson Farms, Inc., P&S Docket No. D-12-0123 (U.S. Dep't of Agriculture Jan. 27, 2012). Tyson claims violations of: Article I, Section 8 and Article I, Section 9, Clause 7 of the U.S. Constitution; the Purpose Statute, 31 U.S.C. § 1301(a); the Antideficiency Act, 31 U.S.C. § 1341; and parts of the Federal Administrative Procedure Act, including 5 U.S.C. § 558. *Id.* Article I, § 9, cl. 7 of the U.S. Constitution states that: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The Purpose Statute, 31 U.S.C. § 1301(a), states that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." The Antideficiency Act, 31 U.S.C. § 1341, provides that no agency, officer or employee may "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation."

## Conclusion

GIPSA's enforcement action against Tyson Farms remains pending. Since the procedures governing agency enforcement actions before the Secretary do not permit the filing of a motion to dismiss similar to a motion under Fed. R. Civ. P. 12(b)(6), it may be months before the administrative law judge assigned to the case conducts a hearing and renders a decision. Meanwhile, GIPSA's new "try" at re-crafting PSA law may result in owners and operators of companies in the protein industry being haled from the farmlands to Washington, D.C. to answer administrative complaints for PSA § 202 violations that lack the essential factual allegations of actual or likely harm to competition. Indeed on June 7, 2012, GIPSA announced that it filed another enforcement action against a poultry company based on alleged PSA §§ 202(a) and 410 violations arising from the manner in which the company paid its growers under a tournament system.<sup>83</sup> This complaint, like GIPSA's administrative complaint against Tyson Farms, fails to allege facts demonstrating an anticompetitive effect or likelihood thereof.<sup>84</sup>

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<sup>83</sup> *In re Pilgrim's Pride Corporation*, P&S Docket No. D-12-0386, available at <http://www.gipsa.usda.gov/foia/complaints/d-12-386.pdf>.

<sup>84</sup> *Id.*



## Updates:

### ***Advertising and Labeling of Foods from Genetically Modified Organisms: The Next Wave of Consumer Class Actions?***

In the Winter 2012 edition of this newsletter, we asked whether attempts to use state false advertising laws to limit the ways in which food manufacturers may describe, label, and promote products containing ingredients from Genetically Modified Organisms (GMOs) were the next wave in consumer class actions. Although less than a year has passed since posing the question, we can now answer that question with an unequivocal yes.

We discussed three cases in our prior article—*In re Wesson Oil Marketing and Sales Practices Litigation (Wesson Oil MDL)*,<sup>85</sup> *Lewis v. General Mills, Inc.*,<sup>86</sup> and *Sandys v. Naked Juice Co.*<sup>87</sup> These suits alleged that labels advertising foods—Wesson Oil, Kix Crispy Corn Puffs Cereal, and Naked Juice beverages, respectively—with the phrase “natural” were misleading and false because the foods contained ingredients from GMOs, such as GMO corn or soy. Since then, putative class action lawsuits have been brought alleging that food labels on chips,<sup>88</sup> bean dip,<sup>89</sup> and cereal<sup>90</sup> are misleading and false because those products likewise contain ingredients from GMOs, yet

advertise themselves as “natural.” Despite the increasing number of these cases, none has yet to reach the ultimate merits of the plaintiffs’ claims. Accordingly, our new question for the future is how will all of these pending cases be resolved?

Notably, one court has adjudicated the issue of whether these claims are preempted under the Nutrition Labeling and Education Act (NLEA) because the Food and Drug Administration has declined to require the labeling of foods with ingredients from GMOs. As noted in our original article, the only court to rule on this argument was the Central District of California, which held that that nothing in the NLEA or FDA regulations addressed whether companies may affirmatively label their foods as “natural” if they contain genetically modified.<sup>91</sup> While no other court has since ruled on this issue, this preemption argument was recently briefed before the Southern District of Florida in *Garcia v. Kashi Co.* on the Defendants’ motion to dismiss the complaint.<sup>92</sup> With this issue having been addressed only once by a district court so far, the Southern District of Florida’s opinion on this issue will likely be of great interest.

Additionally, the debate about the proper labeling of foods with GMO ingredients is not only taking place in the courtroom. Notably, the American Medical Association’s House of Delegates recently adopted a policy statement opposing the mandatory labeling of genetically modified foods.<sup>93</sup> California voters, however, may be poised to take the opposite approach, as in November 2012 they will vote on

Proposition 37, which “would make California the first state in the nation to require labels on genetically engineered crops or processed foods that contain genetically engineered fruits or vegetables.”<sup>94</sup> This vote, however, may turn out to be of only symbolic importance, as there is a strong argument that such a requirement would be preempted by federal law. In fact, the Central District of California held in one of the cases constituting the *Wesson Oil MDL* that the plaintiff’s claims were preempted to the extent he was requesting an order requiring the defendants to “adopt and enforce a policy that requires appropriate disclosure of GM ingredients.”<sup>95</sup> The court held this relief was preempted because “Congress and the FDA have thoroughly regulated the manner in which ingredients must be listed on packages, including specifying how oil products must be labeled.”<sup>96</sup>

This wave of consumer class actions is seeking to determine how old statutes on false and misleading advertising apply to these new and increasingly ubiquitous ingredients. It’s too soon to determine how these class actions will turn out. In the meantime, however, we can safely say that class actions alleging improper labeling of foods with GMO ingredients won’t be going away anytime soon.

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<sup>85</sup> MDL No. 2291 (C.D. Cal).

<sup>86</sup> Case No. 11-cv-09841 (C.D. Cal).

<sup>87</sup> Case No. 11-cv-08007 (C.D. Cal.). This suit was subsequently dismissed; however, several other suits involving the same claim regarding the labeling of Kix cereal are currently pending in New Jersey. See, e.g., Complaint, *Bevans v. General Mills, Inc.*, Case No. 12-cv-00249 (D.N.J. Jan. 13, 2012) (Dkt. #1).

<sup>88</sup> Consolidated Complaint, *Frito-Lay North America, Inc., “All Natural” Litigation*, Case No. 12-cv-00408 (E.D.N.Y. July 3, 2012) (Dkt. #18).

<sup>89</sup> *Id.*

<sup>90</sup> Complaint, *Garcia v. Kashi Co.*, Case No. 12-cv-21678 (S.D. Fl. May 3, 2012) (Dkt. # 1); Notice of Removal and Complaint, *Mirto v. Quaker Oats Co.*, Case No. 12-cv-06299 (C.D. Cal. July 23, 2012) (Dkt. #1).

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<sup>91</sup> See *Briseno v. Conagra Foods, Inc.*, 11-cv-05379, slip op. at 6–13 (C.D. Cal. Nov. 23, 2011) (Dkt. #54).

<sup>92</sup> Motion to Dismiss at 6–12, *Garcia v. Kashi Co.*, Case No. 12-cv-21678 (S.D. Fl. May 3, 2012) (Dkt. # 7).

<sup>93</sup> See Rosie Mestel, *GMO foods don’t need special label*, *American Medical Assn. says*, L.A. TIMES, June 21, 2012, <http://articles.latimes.com/2012/jun/21/news/la-heb-gmo-foods-medical-association-20120620>. The AMA stated that “there is no scientific justification for special labeling of bioengineered foods, as a class, and that voluntary labeling is without value unless it is accompanied by focused consumer education.” See *id.*

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<sup>94</sup> Marc Lifsher, *Food growers, beverage firms bolster effort against Prop. 37*, L.A. TIMES, Aug. 22, 2012, <http://articles.latimes.com/2012/aug/22/business/la-fi-gmo-campaign-funds-20120822>.

<sup>95</sup> *Briseno*, 11-cv-05379, slip op. at 13; see also *International Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67, 73–74 (2d Cir. 1996) (holding that requiring dairies to disclose products from cows given the hormone rBST violated the First Amendment because “rBST has no appreciable effect on the composition of milk” and that “consumer curiosity alone is not a strong enough state interest to sustain the compulsion of [this speech by companies] even an accurate.”).

<sup>96</sup> *Briseno*, 11-cv-05379, slip op. at 13.

***McHugh v. Australian Jockey Club; Abraham & Veneklasen J.V. v. American Quarter Horse Association***

Registry rules continue to breed antitrust controversy. Competition law and antitrust challenges have been mounted to breeding method rules for Thoroughbreds in Australia and American Quarter Horses (“Quarter Horses”) in the United States.

***McHugh: Natural Cover for Thoroughbreds.*** In a case with international implications, the Federal Court of Australia soon will decide whether prohibiting registered Thoroughbred breeding by artificial insemination violates Australian competition law. *McHugh v. Australian Jockey Club Ltd., et al.*, No. NSD 1187 of 2009, Federal Court of Australia, New South Wales District Registry, General Division (Aug. 20, 2012). McHugh, a Thoroughbred breeder, former chairman of the Sydney Turf Club and bookmaker sued the Australian Jockey Club, the Victoria Racing Club and the Australian Turf Club, seeking relief from Club rules that prohibit registration and racing of horses bred by artificial insemination. McHugh claims that the rules violate the Australian Competition and Consumer Act 2010 § 45(2)(b)(ii) (prohibiting contracts with the purpose or likely effect of substantially lessening competition).

McHugh seeks to prove that the breeding restrictions have substantially lessened competition by causing (1) increased cost of breeding services; (2) reduced selection and productivity of stallions; (3) reduced number, quality and genetic diversity of the Thoroughbred gene pool; (4) increased stallion injury; and (5) reduced economic efficiency.

Defendants offered evidence at trial to show that (1) McHugh’s market definition was incorrect; (2) the claims were hypothetical since there was no allegation of any attempt to register an artificially inseminated foal; (3) Thoroughbred breeding requires certain regulations intrinsic to the sport of Thoroughbred racing; and (4) if the Clubs’ breeding rules are restraints, they are reasonable. The case is fully submitted. If the Court decides the case on the merits, this will be the first judicial ruling applying competition law to the worldwide practice by Thoroughbred registries of requiring natural cover. Victory for McHugh could

stimulate cases in the United States, Great Britain and elsewhere to challenge that worldwide practice. A decision is expected soon.

***Abraham & Veneklasen J.V. Quarter Horse Cloning.*** In April 2012, Quarter Horse breeders in Texas claimed that a registry exclusion of cloned Quarter Horses violates Section 2 of the Sherman Act and the Texas Free Enterprise and Antitrust Act of 1983. *Abraham & Veneklasen Joint Venture, et al. v. American Quarter Horse Association*, Civ. No. 2-12 CV-103-J (N.D. Tex., Compl. filed April 23, 2012). Plaintiffs, who own cloned horses and the offspring of cloned horses allege that defendant American Quarter Horse Association (AQHA) monopolized and attempted to monopolize a nationwide “market for high quality registered Quarter Horses.” Plaintiffs challenge AQHA Rule 227, which makes horses produced by cloning ineligible for registration in the AQHA’s registry of Quarter Horses and excludes them from AQHA-sanctioned racing. The complaint alleges that AQHA’s enforcement of Rule 227 limits the supply and increases the price of registered Quarter Horses, harming consumers. On July 18, 2012, Judge Robinson denied defendant’s Rule 12(b)(6) motion to dismiss, which was based in part on the “doctrine of non-intervention” in the internal affairs of an association, and on *Twombly*. The parties were ordered to be ready for trial by March 25, 2013.

***Earlier Cases Have Been Inconclusive.***

***Efford: Natural Cover for Thoroughbreds.*** In *Efford v. The Jockey Club*, No. 01-02081 (Pa. Ct. Common Pleas, Civil Division) plaintiffs had registered four palomino foals with The Jockey Club as Thoroughbreds. In 2001, after learning that the foals had been produced by artificial insemination, the Jockey Club revoked their registration. The Effords sued The Jockey Club in Pennsylvania state court alleging that the revocation without a hearing violated due process and that the ban on registration of foals produced by artificial insemination violated the Sherman Act. The Jockey Club moved to dismiss the action on numerous grounds, including lack of personal jurisdiction. The court dismissed the action, and the Effords appealed. The Superior Court of Pennsylvania affirmed the trial court’s dismissal on jurisdictional grounds. *Efford v. The Jockey Club*, 796

A.2d 370 (Pa. Sup. Ct. 2002). *Effords* appears to be the only case in the United States where a plaintiff sought to challenge The Jockey Club’s ban on the registration of foals produced by artificial insemination. The case provides little guidance, however, because it was dismissed at a very early stage on jurisdictional grounds.

***Floyd: One Quarter Horse Foal per Year.*** Since 1980, the American Quarter Horse Association permitted the registration of one foal per year per breeding pair of horses, regardless of how that foal was produced. Mary W. Craig, *A Horse of a Different Color: A Study of Color Bias, Antitrust, and Restraint of Trade Violations in the Equine Industry*, 22 ST. THOMAS L. REV. 433, 449 (2010) (describing “embryo transfer rule”). In *Floyd v. Am. Quarter Horse Ass’n*, No. 87-589-C (Tex. 251st Dist. Jan. 19, 2001) (interlocutory judgment), the trial court in an interlocutory order applying Texas law concluded that the “one foal” rule was not designed to protect the reproductive health of horses, but rather was intended to limit the supply of registered Quarter Horses and was a “restraint of trade that has an adverse effect upon competition and is, therefore, anticompetitive.” The court also concluded, however, that (1) the “one foal” rule was not a *per se* violation of Texas Business and Commercial Code § 1505(a) (“Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful”) and that (2) the AQHA’s adoption of the rule did not constitute a group boycott as defined in Section 1505(c). *Id.* (“It is unlawful for any person to sell, lease, or contract . . . on the condition . . . that the purchaser or lessee shall not use or deal in the goods of a competitor or competitors of the seller or lessor, where the effect of the condition . . . may be to lessen competition substantially in any line of trade or commerce”). In 2002, AQHA settled with Floyd and agreed to allow the registration of all embryo transfer foals.

***In re Southeastern Milk Antitrust Litigation*** (E.D. Tenn., 08-MD-1000)

A long-running multi-district antitrust class action litigation involving the production and processing of milk in the Southeastern United States may finally be approaching an end after several recent developments, such as the approval of settlement agreements providing for \$145,000,000 in cash payments from certain defendants, including the milk processor Dean Foods. For more than four years, the Eastern District of Tennessee has been home to the *In re Southeastern Milk Antitrust Litigation*, which involves two separate class actions alleging an antitrust conspiracy among milk processors, dairy cooperatives, and certain executives — one class action brought on behalf of dairy farmers in the Southeast, and the other on behalf of retailers who purchased milk in the Southeast from the alleged conspiracy. The case has produced notable decisions regarding whether a court may determine if the conspiracy alleged is governed by a *per se* rule or the rule of reason as well as regarding the potential antitrust liability of corporate executives.

The dairy-farmer class action is the case involving the \$145,000,000 settlements, and trial in that case is currently scheduled for November 6, 2012 (though the trial date was continued three times in 2011 and once already in 2012). The parties named as defendants in the dairy-farmer case were Dairy Farmers of America, Inc. (“DFA”), Dairy Marketing Services, LLC, Mid-Am Capital, LLC, National Dairy Holdings, L.P., Dean Foods, Southern Marketing Agency, Inc. (“SMA”), James Baird, Gary Hanman, and Gerald Bos. In July 2011, the court largely denied the defendants’ joint motion for summary judgment. *See In re Se. Milk Antitrust Litig.*, 801 F. Supp. 2d 705, 717-21 (E.D. Tenn. 2011). The court did, however, grant the defendants’ joint motion on the issue that the “determination of the appropriate rule of law to be applied” to an antitrust claim — a *per se* rule or the rule of reason — “is a question of law” for the court. 801 F. Supp. 2d at 717-21. The court also agreed with the defendants that the alleged conspiracy and the “alleged agreements challenged by the plaintiffs are vertical in nature, not horizontal, and therefore not subject to *per se* analysis.” *Id.* Finally, the court granted the motion for summary judgment filed by DFA’s former Chief

Financial Officer Gerald Bos, finding that the dairy-farmer plaintiffs had not shown that he “actively and knowingly participated in an anticompetitive scheme by at a minimum, demonstrating that he ‘exerted his influence so as to shape corporate intentions.’” 801 F. Supp. 2d at 739.

After the July 2011 summary judgment opinion, the dairy farmer plaintiffs reached a \$140,000,000 settlement with Dean Foods, followed by a \$5,000,000 settlement with SMA and James Baird. Those settlements received final approval from the court in June 2012, and on July 11, 2012, the court issued an order granting \$48,333,333 in attorneys’ fees, and reimbursement of nearly \$7,500,000 in out-of-pocket expenses to the dairy-farmer plaintiffs’ attorneys, who began the case at Howrey LLP and are now practicing with Baker Hostetler.

The retailer class action, though consolidated with the dairy-farmer class action throughout discovery, was in February 2011 severed from the dairy-farmer case and stayed pending the resolution of a supplemental motion for summary judgment. On March 27, 2012, the district court granted summary judgment in favor of the defendants on all counts of the complaint brought by the putative class of retailer plaintiffs. *See In re Se. Milk Antitrust Litig.*, 2:08-MD-1000, 2012 WL 1032797 (E.D. Tenn. Mar. 27, 2012). The retailer case is now on appeal in the Sixth Circuit. *See Food Lion, LLC v. Dean Foods Company, et al.*, No. 12-5457 (6th Cir.).

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