

GM In the Dock

US courts step in where safety regulators fail

Briefing III in a series: Bayer brought to book for contaminating rice

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Since GM crops were introduced regulators have been accused, including by the USDA Inspector General, of failing to protect people, the environment and the economy from the dangers of the technology.ⁱ

The public is routinely assured that GM food and crops are “substantially equivalent” to their conventionally bred counterparts and that biotech companies and products have been thoroughly examined for rigour and safety during authorisations.

Along side these assurances runs an argument that the EU’s reluctance to embrace the technology is both missing out on its benefits and holding back developing countries in acquiring the technology.

Recent developments in the US courts highlight the flaws in all of these arguments. Judges are taking regulators to task for not doing their job.ⁱⁱ Juries are ordering biotech companies to pay millions in compensation and punitive damages to farmers in the first of thousands of pending cases over just one contamination incident. The US Department of Justice has opened an anti-trust investigation of, among other things, Monsanto’s practices.ⁱⁱⁱ

This briefing highlights the details of the legal cases brought by farmers against Bayer for the 2006 contamination of US rice supplies that affected exports for years afterwards. It demonstrates both how far the industry will go to protect itself against the public interest and why the EU is prudent in declining to trust the GM industry about the safety of its products before strict, enforceable liability measures are in place to hold them to account for any damage they cause.

US rice contaminated by Bayer’s experimental GM LL601

Between 1998 and 2001 Aventis (acquired by Bayer CropScience in 2002) grew experimental GM herbicide resistant rice variety LL601 on test sites in the US. Development was halted after those trials.^{iv}

However, in July 2006 Bayer notified USDA and FDA that they had detected contamination of commercial rice supplies^v as early as January that year, but EU authorities were not informed of the problem until August 2006.

In November 2006, at the request of Bayer, the USDA deregulated LL601, giving it regulatory approval in an attempt to calm fears by concluding that the rice was “as safe as its traditionally bred counterparts”.^{vi}

However, LL601 was not approved for commercial cultivation or import anywhere in the world. The contamination announcements triggered emergency measures in Japan, the Philippines and South Korea introducing strict testing requirements (resulting in rejection of US rice imports), while others like Russian and Bulgaria banned US rice outright.^{vii} In the EU the Commission issued emergency measures on 23 August 2006^{viii}, although UK authorities dragged their feet implementing emergency testing requirements leading to legal action (see box).

Efforts to find and isolate rice stocks contaminated with LL601 were hampered by delays in developing the reference materials necessary for analysis to identify its presence and Bayer’s refusal to then send reference material to more than a handful of labs. By then the rice had spread to 24 countries^{ix}, making it clear that US rice supplies had suffered years of undetected contamination by an experimental GMO without any commercial approval. The US rice industry estimated some 41% of their market was affected and proposed measures to try to rid US rice supplies of the GM trait.^x EU restrictions on US rice imports were not lifted until April 2010.^{xi}

To make matters worse, in March 2007 a second experimental Bayer GM rice (LL62) was found in US plantings of Clearfield estimated to date back to 2004. Testing labs also found a third unidentified LL GM contamination that must have come from one of Bayer’s other experimental lines abandoned at least a decade earlier.

UK authorities drag their feet

The Food Standards Agency (FSA) were very slow in carrying out tests on US rice imports and in protecting consumers from a product which did not have a full safety assessment or approval to import and was therefore illegal. This was in part due to delays in obtaining the necessary reference materials for analysis from Bayer. In early September 2006 GM Freeze wrote to the FSA to challenge their reliance on a test for the illegal GM rice that only had a limit of detection of 2% (meaning illegally contaminated rice could be undetected by the blunt test) and questioning its testing protocols and other measures to protect consumers. At that point no cargoes of US rice had been refused entry to the UK.

The FSA advised “on the basis of current evidence the presence of low levels of this GM material in the food supply is not a safety concern”.¹ EFSA also “consider[ed] that the consumption of imported long grain rice containing trace levels of LLRICE601 is not likely to pose an imminent safety concern to humans or animals,” yet at the same time admitted, “The available data are not sufficient to allow the safety of LLRICE601 to be assessed in accordance with the EFSA guidance for risk assessment.”²

The EFSA admission forced the FSA to alter its advice, but minutes of private meetings between the food industry and FSA showed they FSA were advising companies they did not “expect contaminated products already in the food supply chain to be removed from sale” and did not “expect companies to trace products and remove them from sale” even though at a time it was still illegal to sell such products.³

Eventually the FSA’s handling of the LL601 case was subject to a Judicial Review, launched in January 2007, during which FSA officials promised the judge an internal review of the incident. The February 2007 finding of the High Court was that the FSA made mistakes in their handling of the incident including that the food safety watchdog should have:

- issued Food Alerts to local authorities advising them of the problem and what to do about it.
- notified the public of which batches of rice were contaminated.
- provided legal guidance to local authorities at the start of the incident.

The FSA’s review was finally held in November 2007, to which GM Freeze submitted a detailed critique of the agency’s approach and called for a House of Commons Select Community to oversee their performance.

The review seems to have had little impact on FSA policy or practice, as the same mistakes found in the Judicial Review were repeated during the global contamination of Canadian flax supplies discovered in 2009.

Box notes:

1. Letter from the FSA’s Clair Baynton to stakeholders 13 September 2006 and www.food.gov.uk/news/newsarchive/2006/sep/gmricetest.
2. See www.efsa.europa.eu/en/science/gmo/statements0/efsa_statement_gmo_LLrice601.html%2001.html
3. See Food and Drink Federation minutes of a meeting with the FSA.

The USDA investigation into the source of the contamination drew a blank in October 2007, despite 8,500 hours of staff time, visits to 11 states and Puerto Rico and analysis of some 396 samples. A lack of long-term records was blamed and a host of regulatory failures recorded.^{xii}

The US authorities decided not to prosecute Bayer.

Serious Consequences for US Rice Growers

Throughout the LL601 contamination incident US rice farmers received little support from the US regulators or Bayer, and many faced extreme hardship and mounting debt as a result of their inability to sell their crops.

In October 2008 Bayer successfully stopped a bid by US rice farmers from Missouri, Arkansas, Louisiana, Mississippi and Texas to launch class action suits (one per state) when the judge ruled there were too many variations in circumstances to treat the farmers in groups. It was suggested that this might increase pressure

on Bayer to settle out of court with the 1,200 farmers claiming compensation at that time, as early losses could be used to inform later cases. At this time damages were estimated at US\$1 billion (about 16% of Bayer's 2007 net income), but Bayer's lawyer said, "It's our view most of these plaintiffs didn't suffer market losses in selling their rice."^{xiii}

The farmers regrouped, and in August 2009 a complaint was filed on behalf of over 2,000 Arkansas rice farmers in the US District Court detailing seven counts against Bayer including negligence, fraudulent concealment, ultra hazardous activity, absolute or strict liability, punitive damages, statutory negligence and breach of contract. The complaint said that within four days of the 2006 announcement declines in rice futures had cost US growers about US\$150 million.^{xiv}

Bayer ordered to compensate contaminated farmers

In December 2009 Bayer was ordered by the Federal jury to pay just over US\$2 million compensation to Missouri farmers Kenneth Bell and Johnny Hunter in the first "bellweather" case.^{xv}

Mr Hunter said, "This is a huge victory, not only for Kenny and me, but for every farmer in America who was harmed by Bayer's LibertyLink rice contamination," adding the verdict gave the company "the wake-up call they deserved" for contamination more than 30% of US rice lands.

The company denied their program had been negligently managed, and the jury declined to order punitive damages. One juror said they had been instructed that to award punitive damages the case must prove both that Bayer knew what would happen if the GM rice escaped and that they had done so intentionally, saying, "Sure, Bayer knew what would happen, but it wasn't proven to us that they did this on purpose. Both points weren't proven."^{xvi}

In February 2010, a second case in Federal court also resulted in Bayer being ordered to pay US\$1.5 million compensation to three Arkansas farmers, Joe and Jim Penn and Jerry Catt. The jury also awarded nearly US\$1 million compensation to Black Dog Planting (a lawn and grounds maintenance company). Punitive damages were again declined, and Bayer maintained they "acted responsibly and appropriately at all times in the handling of its biotech rice".^{xvii}

Jury finds Bayer negligent and order punitive damages

In March 2010 the Woodruff County State Court jury awarded Lenny Joe Kyle US\$1.3 million. There were two significant differences in this finding: that Bayer intentionally contaminated US rice supplies and that punitive damages were awarded for loss of future earnings.

Kyle's complaint alleged Bayer:

- Was "negligent or careless" with following USDA testing guidelines, and once the rice was contaminated, did not act appropriately.
- Did not use tarpaulins or safe zones to prevent contamination.
- Did not take precautions with equipment.
- Allowed GM rice to "commingle" with non-GM rice in drying facilities.
- Was aware, or should have been aware, of the contamination before they reported it to the US government in July 2006, saying, "Bayer simply sat back, did nothing, and hoped the [GM] contamination would not surface."^{xviii}

The jury agreed. The Judge's instructions to the jury said: "It was the duty of Bayer, before and at the time of the occurrence, to use ordinary care (the care a reasonably careful person would use) toward Lenny Joe Kyle."

In order to be able to award punitive damages, the jury had to believe "clear and convincing evidence":

"That Bayer knew or ought to have known, in the light of the surrounding circumstances, that Bayer's conduct would naturally and probably result in damage and that Bayer continued such conduct with malice or in reckless disregard of the consequences from which malice may be inferred. Or, second, that Bayer intentionally pursued a course of conduct for the purpose of causing damage. Or both."^{xix}

The finding means the jury did not believe Bayer was "reasonably careful", and that this led directly to the damage done. This is a significant failing for a company developing and testing material that clearly had huge potential to affect thousands of other businesses for years to come.

Bayer said that it “disagrees” with the decision to award punitive damages.

Mr Kyle said, “It’s a lot to do with the way the big companies act. They think the farmer is just going to tuck his tail and take it, but we’re not to going to anymore.”

Further cases are pending during which juries will be able to consider the finding of intention, raising the pressure on Bayer considerably.^{xx}

Further cases show Bayer’s negligence

In April 2010, a jury in Lonoke, Arkansas took less than two hours to decide to award twelve Arkansas farmers US\$48 million over the contamination of their farms, of which US\$42 million was punitive damages against Bayer.^{xxi}

The company said it would “vigorously” appeal directly to the Arkansas Supreme Court. Bruce Mackintosh, General Counsel for Bayer CropScience, said “I’m hopeful our willingness to talk settlement – and, in fact, settle claims at reasonable levels – is being considered among plaintiffs’ lawyers.” He went on:

“We really regret this has come between Bayer and farmers, who are the purpose of all our work and investment. When I see farmers and hear them speak, I can tell they were scared to death and it hit them hard. We’re very sorry it happened...I think the actual economic consequences – except when described by their lawyers – weren’t so devastating. The market was really good to these guys promptly after that.”

He continued, “Bayer is now, and has been for decades, an investor and innovator in support of agricultural solutions. We’re not giving up on that. We continue to do that in many crops in all corners of the world.”^{xxii}

The lawyers representing the plaintiffs in the case, Scott Powell and Jerry Kelly, took a different view. They said after the verdict there was a meeting with Bayer about possible settlements, but “it didn’t get very far”. They said it had taken years to get to trial because Bayer employed delaying tactics, taking three separate “detours to the federal court”, which sent the case back to Lonoke County each time.

Kelly said the economic damage had been extensive, saying testimony from Producer’s Rice Mill CEO Keith Glover “was some of the most powerful I’ve heard in a court of law.”

“One of Bayer’s main arguments was that damages were negligible. The fact of the matter is we lost the EU market...Glover laid it out, perfectly clear, why that is absolutely inaccurate. The loss of the EU market devastated the rice market and US rice farmer.”

Powell said the jury’s verdict “isn’t surprising” because of the “accumulation of so much evidence”. He said their case included evidence that Bayer lost GM seed samples, had missing seed samples, as well as evidence “where people would say there were obvious foul-ups in the lab. There was mishandling of material.”

Powell said after the verdict most of the plaintiffs “got on their tractors and hit the fields...very satisfied in the sense that they stood up to this big conglomerate. They were wronged and wanted to right the wrong. They’re very grateful to the jury for vindicating them and agreeing that Bayer’s conduct was egregious.”

He added, “We’re looking forward to continuing on. We represent a lot of farmers in Arkansas and we want them to get their day in court. We anticipate and are hopeful for similar results.”^{xxiii}

Settling up

In June Bayer agreed to pay US\$5.8 million to leading US rice company Riviana Foods Inc and its affiliates in order to settle claims in a multidistrict litigate before a Missouri Federal court. The settlement is only one part of the claims Riviana makes against Bayer, others hinge on the pending outcomes in cases brought by European customers.^{xxiv}

Losing Streak

In losing their fifth straight case in July, Bayer was ordered by a St Louis jury to pay another US\$500,248 to a rice farming family who lost over US\$1.5 million due to contamination. Lawyer Don Downing said after the trial:

“Five different juries under the laws of four different states in both federal and state courts now have unanimously found that Bayer was negligent and liable to rice farmers for damages...Not a single

juror in any of the five trials found for Bayer.^{xxv}

There are still thousands of rice farmers from Missouri, Arkansas, Louisiana, Mississippi and Texas waiting for their day in court with Bayer.

Notes

- ⁱ "However, the EFSA GMO panel has failed to conduct a rigorous assessment of the data provided by companies and, in most cases, has even ignored some of the EU legal requirements on risk evaluation of GMOs." www.greenpeace.org/raw/content/eu-unit/press-centre/policy-papers-briefings/EFSA-RA.pdf
- and US Department of Agriculture Office of Inspector General, *Audit Report: Animal and Plant Health Inspection Service Controls Over Issuance of Genetically Engineered Organism Release Permits*, (Dec. 2005), available at www.usda.gov/oig/webdocs/50601-08-TE.pdf and Rebecca Bratspies, *Some Thoughts On the American Approach to Regulating Genetically Modified Organisms*, 16 Kan.J.Law & Public Policy 393, 415-18 (2007)
- and <http://gmo-journal.com/index.php/2010/01/28/internal-report-finds-usdas-failure-to-effectively-regulate-gmos/>
- and www.non-gmoreport.com/articles/feb10/usda_gm_alfalfa_threatens_organic_industry.php.
- ⁱⁱ See GM Freeze briefing *GM In the Dock: US courts step in where safety regulators fail, Briefing I in a series: Courts check spread of GM alfalfa and beet*.
- ⁱⁱⁱ See GM Freeze briefing *GM In the Dock: US courts step in where safety regulators fail, Briefing II in a series: Monsanto and the monopoly investigators*
- ^{iv} See www.coextra.eu/news/news752.html.
- ^v See www.aphis.usda.gov/newsroom/content/2006/11/rice_deregulate.shtml.
- ^{vi} See http://deltafarmpress.com/maq/farming_aphis_deregulates_II/ and www.coextra.eu/news/news752.html
- and www.aphis.usda.gov/newsroom/content/2006/11/rice_deregulate.shtml
- ^{vii} See www.gmcontaminationregister.org/index.php?content=nw_detail2.
- ^{viii} Commission Decision (2006/578/EC) on emergency measures regarding the non-authorized genetically modified organism LL RICE 601 in rice products (notified under document number C(2006) 3863).
- ^{ix} See www.saveourseeds.org/en/dossiers/rice-ll601.html.
- ^x See www.saveourseeds.org/fileadmin/files/SOS/Dossiers/Gt73/LLRiceFactSheet.pdf.
- ^{xi} See www.reuters.com/article/idUSLDE6311ZM20100419?type=marketsNews.
- ^{xii} See USDA APHIS, *Report of LibertyLink Rice Incidents*, October 2007. Available at www.aphis.usda.gov/newsroom/content/2007/10/content/printable/RiceReport10-2007.pdf.
- ^{xiii} See www.bloomberg.com/apps/news?pid=20601087&sid=auu3BOBRYwaE&refer=home.
- ^{xiv} See www.ricelitigation.com/component/content/article/1-arkansas-rice-farmers-file-complaint-against-bayer-cropscience.
- ^{xv} See www.dallasfortworthinjurylawyer.com/2009/12/bayer_must_pay_farmers_for_con.html and <http://arkansasnews.com/2009/12/04/missouri-farmers-awarded-2-million-in-tainted-rice-case/>
- ^{xvi} See www.bloomberg.com/apps/news?pid=20601127&sid=adGubJZ21Uzo.
- ^{xvii} See www.bizjournals.com/stlouis/stories/2010/02/08/daily11.html.
- ^{xviii} See www.allbusiness.com/legal/torts-damages/14079681-1.html.
- ^{ix} From Judge's Final Charge to the jury.
- ^{xx} Personal communications with Mr Kyle's lawyer.
- ^{xxi} Personal communication with the US lawyers in the case.
- ^{xxii} See <http://deltafarmpress.com/rice/gm-rice-litigation-defense-0504/>.
- ^{xxiii} See <http://deltafarmpress.com/rice/gm-rice-litigation-plaintiffs-0504/index.html?imw=Y>.
- ^{xxiv} See <http://www.lexology.com/library/detail.aspx?q=f41f2a34-0e20-4989-add6-1256c0270211>
- ^{xxv} See <http://www.businessweek.com/news/2010-07-14/bayer-loses-fifth-straight-trial-over-u-s-rice-crops.html> and http://www.sttoday.com/business/article_24421a30-e14c-5a52-be40-d7ac7370e589.html