GMO MARKET LOSS LITIGATION: THE GOOD, THE BAD, AND THE UGLY

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I. INTRODUCTION

Mass tort and class action lawsuits contain many perils for the parties involved. In the last 20 years, farmers have been in the plaintiff's seat in mass tort and class action litigation over export market loss due to seed contamination by genetically modified ("GM") seeds.[1] An action of this type will hereinafter be referred to as "GMO Market Loss" litigation. The first successful GMO Market Loss litigation was against Bayer and its subordinates. This litigation revolved around the losses within the global long-grain rice market due to contamination caused by an unapproved GM rice seed (Case Name: In re Genetically Modified Rice, hereinafter distinguished as "Bayer Rice").[2] The second and most recent successful GMO Market Loss litigation was against Syngenta over the loss of the Chinese corn market due to contamination of a GM corn seed unapproved in China (Case Name: In re Syngenta MIR 162, hereinafter referred to as "Syngenta Corn").[3]

This pair of cases illustrate just how nuanced these mass litigations can be, and these cases shed light on an interesting trade-off of accuracy for efficiency. In light of these cases, there is not yet settled law in the area of GMO Market Loss litigation and it is not apparent how similar litigation would be resolved in the future. It is apparent, however, that parties should take care to monitor this

1. *See, e.g.*, Sample v. Monsanto Co., 283 F. Supp. 2d 1088 (E.D. Mo. 2003); *In re* Syngenta Mass Tort Actions, 272 F. Supp. 3d 1074 (S.D. Ill. 2017).

2. *See In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 393 (E.D. Mo. 2008).

3. *See In re* Syngenta AG MIR 162 Corn Litig., 131 F. Supp. 3d 1177, 1194 (D. Kan. 2015).

accuracy for efficiency trade-off in these actions such that the pendulum does not swing too far in either direction. Providing a more balanced approach will result in greater fairness in the outcomes of these litigations. Sacrificing a disproportionate amount of accuracy for minimal gains in efficiency can be mitigated in GMO Market Loss Litigation—although not completely erased—by (1) either denying class certification or adopting an issue class certification; (2) approving a settlement at a later stage in trial; and (3) adopting a more individualized approach to the way producers' claims are proven and paid from settlements.

A. Definitions: Mass Tort and Class Action

Before discussing the specifics of Bayer Rice and Syngenta Corn, it is important to understand what mass tort and class actions are. Class actions are civil claims brought in federal court, on behalf of a defined group of people whom were injured by the same event.[4] The purpose of a class action is to allow representative members of the defined group to bring an action on behalf of all class members.[5] The general rule that individuals must litigate their own claims is suspended in a class action, so long as certain requirements are met, under Federal Rule of Civil Procedure 23 ("Rule 23").[6] Congress enacted Rule 23 because a collaborative action offers several benefits, including: (1) reduced cost to individuals; (2) increased productivity in achieving results; and (3) economies of scale in discovery and court rulings on specific issues common to the entire class.[7] Thus, class actions allow a passive plaintiff to recover even though he or she is not involved in the litigation process.

A mass tort, on the other hand, is simply how it sounds: a massive group of individual plaintiffs suing in tort.[8] Usually, these individuals are represented by a handful of attorneys.[9] Therefore, a mass tort may end up with its own economies of scale. However, in order for any remedy to be realized in a mass tort, the plaintiff

4. 32B Am. Jur. 2d *Federal Courts* §§ 1443, 1445 (2021).

5. *See* 32B Am. Jur. 2d *Federal Courts* § 1443 (2021).

6. *See* FED. R. CIV. P. 23; 32B Am. Jur. 2d *Federal Courts* § 1440.

7. 32B Am. Jur. 2d *Federal Courts* § 1443 (2021).

8. *See Mass Tort and Litigation Funding*, YIELDSTREET, (Aug. 11, 2021, 8:59 PM), https://www.yieldstreet.com/resources/article/mass-tort-and-litigation-funding [https://perma.cc/SY8G-G46F].

9. *See, e.g.*, Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *11, *In re* Genetically Modified Rice Litig., No. 4:06 MD 1811 CDP, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (E.D. Mo. Sept. 4, 2012); *In re* Syngenta Mass Tort Actions, 272 F. Supp. 3d 1074, 1080 (S.D. Ill. 2017).

must hire an attorney to bring forward his or her claim.[10] This distinction is the main difference between a class action and a mass tort.[11] Mass torts do not allow a passive plaintiff to recover.[12] A class action can also be called a "mass tort class action," which is purely a group of plaintiffs suing in tort on behalf of a class of people who are not "at the table."[13]

B. Case Law Introduction

The Bayer Rice and Syngenta Corn actions provide an important framework in analyzing future GMO Market Loss litigation. Bayer and Syngenta were likely negligent in how they marketed and handled their GMO traits, and for this reason these cases spark hope of recovering losses due to such negligence. However, these cases and their verdicts do not condemn genetic modification in agriculture, nor the companies developing and using these methods. GM seeds are another advancement in plant-breeding technology, and, when used appropriately, GM seeds aid farmers in providing higher-quality food for the world.[14]

With this great technology comes great responsibility—Syngenta and Bayer did not act responsibly in a couple isolated incidents, producing devastating results for farmers. These mass tort and class action litigations can be the remedy for those harmed. However, they can quickly turn into sacrificing accuracy (in obtaining the proper and fair result) for efficiency (to quickly achieve an end result).

The Bayer Rice litigation ended in a settlement of $750 million for over 2.2 million acres, thereby throwing the door wide open to further GMO Market Loss litigation.[15] According to Bayer's financial records, the entire litigation cost Bayer a total of $1.2 billion dollars between settlements and verdicts obtained by

10. *See*, Kristine A. Tidgren, *Most Syngenta Claims Survive Motion to Dismiss…What's Next?,* IOWA STATE UNIV. (Sept. 29, 2015), https://www.calt.iastate.edu/article/most-syngenta-claims-survive-motion-dismisswhat's-next [https://perma.cc/TQW7-E64H].

11. *See Mass Tort and Litigation Funding*, *supra* note 8.

12. *See id.*

13. *See generally* 32B Am. Jur. 2d *Federal Courts* § 1445 (2021).

14. *See GMO Basics,* GMOANSWERS (Aug. 11, 2021, 10:49 PM), https://gmoanswers.com/gmo-basics?gclid=Cj0KCQiAyJOBBhDCARIsAJG2h5e17VxmrM_ALTPhrciUMGTTGWqT0303bU1J7RhT-ba_LvZM4c8YI3saAiSREALw_wcB [https://perma.cc/3UJZ-A8A6].

15. *See* Robert Patrick, *Genetic Rice Lawsuit in St. Louis Settled for $750 Million*, ST. LOUIS POST-DISPATCH (July 2, 2011), https://www.stltoday.com/news/local/metro/article_38270243-c82f-5682-ba3b-8f8e24b85a92.html [https://perma.cc/E53L-G84E].

producer and non-producer plaintiffs.[16] On the other hand, the Syngenta litigation ended in a settlement of $1.51 billion on over 86 million acres.[17] Despite the Syngenta litigation being the largest class settlement ever recorded in biotech crops, the Syngenta Court unintentionally sacrificed accuracy for efficiency, leaving farmers with inaccurate money damages and even diluted claim recovery.[18]

A comparison of these cases will pinpoint the events resulting in the vast differences between Bayer Rice and Syngenta Corn and provide guidance into the relatively uncertain future of GMO Market Loss litigation. Section II compares the facts giving rise to the litigation in Bayer Rice to those of Syngenta Corn, attempting to locate key differences in these facts affecting later court decisions. Section III identifies the differences in the actions brought in Bayer Rice and Syngenta Corn. Section IV covers each judge's analysis of whether or not a class should be certified in Bayer Rice and Syngenta Corn, which is arguably one of the most important events in mass tort actions. Section V highlights the vast differences in the results of Bayer Rice and Syngenta Corn and attempts to find reasons for said differences so attorneys and farmers can recognize and apply the lessons to future GMO Market Loss litigation.

II. THE FACTS

A. Similarities

Generally, both Bayer Rice and Syngenta Corn arose from major export market countries closing their borders to American rice and corn.[19] These markets refused to accept the American grain because of contamination by unapproved

16. William Chaney, Address at the Annual AALA Agricultural Law Education Symposium: *Genetic Editing in Agriculture—Will the Cartagena Protocol on Biosafety Restrict Access to Foreign Markets, Causing Litigation over Marker Disruption?* (Nov. 14, 2020).

17. *In re* Syngenta AG MIR 162 Corn Litig., No. 14-md-2591-JWL, 2018 WL 1726345, at *1 (D. Kan. Apr. 10, 2018); *See generally 2014 Acreage Data as of January 2015*, excel spreadsheet available under *Crop Acreage Data*, U.S. DEP'T AGRIC. (Jan. 15, 2015), https://www.fsa.usda.gov/news-room/efoia/electronic-reading-room/frequently-requested-information/crop-acreage-data/index [https://perma.cc/YH8P-2Z5B].

18. *See* Megan Galey & Thomas P. Redick, *Syngenta Grower and Grain Trader Claims,* 29 AGRIC. L. UPDATE 6, 8 (2017).

19. *See* Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *11, *In re* Genetically Modified Rice Litig., No. 4:06 MD 1811 CDP, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (E.D. Mo. Sept. 4, 2012); *In re* Syngenta AG MIR 162 Corn Litig., 131 F. Supp. 3d 1177, 1186 (D. Kan. 2015).

genetic traits found in grain supply.[20] The contamination was attributed to the developers of the GM seeds: Bayer's Liberty Link rice and Syngenta's MIR 162 corn.[21] Farmer groups and farmers alleged Bayer and Syngenta violated their duty to their customers and farmers of the alike crop—a duty to protect the groups from harm caused by premature release and contamination of GM crops.[22] Bayer conducted field trials of its Liberty Link rice varieties in rice-producing areas.[23] Somehow, the GM rice contaminated the rice supply, and USDA authorities reported the unapproved trait was found in commercially grown rice during the 2006 harvest season.[24] Similarly, Syngenta offered a side-by-side program wherein it planted its GM corn side by side with other corn seed, which led to contamination through cross-pollination.[25] When major export markets began refusing grain, national lobbyist groups began writing letters to the USDA.[26] These letters demanded that seed developers not commercialize GM traits prior to major market approval unless they assume responsibility and liability for economic losses.[27] Proposals by these lobbyist groups included requiring seed developers to implement systems designed to contain the unapproved traits from exposure to other crops in production.[28]

20. Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *11, *Genetically Modified Rice*, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (No. 4:06 MD 1811 CDP); *Syngenta AG MIR*, 131 F. Supp. 3d at 1186.

21. Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *11, *Genetically Modified Rice*, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (No. 4:06 MD 1811 CDP); *Syngenta AG MIR*, 131 F. Supp. 3d at 1186.

22. *See* Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses *11, *Genetically Modified Rice*, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (No. 4:06 MD 1811 CDP); *Syngenta AG MIR*, 131 F. Supp. 3d at 1186.

23. *See In re* Genetically Modified Rice Litig, No. 4:06 MD 1811 CDP ALL CASES, 2010 U.S. Dist. LEXIS 61846, at *134 (E.D. Mo. June 7, 2010).

24. Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *1, *Genetically Modified Rice*, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (No. 4:06 MD 1811 CDP).

25. *In re* Syngenta Mass Tort Actions, 272 F. Supp. 3d 1074, 1080 (S.D. Ill. 2017).

26. *See* Letter from N. Am. Exp. Grain Ass'n to U.S. Dep't Agric., (Mar. 4, 2014), http://naega.org/wp-content/uploads/2012/05/140304-NAEGA-Comments-on-Agricultural-Coexistence-3-4-14-Final.pdf [https://perma.cc/CCD7-VQQG].

27. *Id.*

28. *Id.*

B. Differences

Although the general harm and certain facts are similar, differences arise between Bayer Rice and Syngenta Corn in the stage of approval, the exact events rising to negligence, the size of each action, and the resulting harm to producers.

In Bayer Rice, the rice trait was not approved in any foreign market nor was it approved in the United States at the time of the USDA report mentioned previously.[29] Farmers and other non-producer plaintiffs brought claims of negligence, public and private nuisance, negligence per say, and strict liability for "ultrahazardous activities" due to the contamination of the GM rice strain developed by Bayer.[30] Farmers claimed Bayer breached its stewardship duty to producers because it did not contain the rice strain before United States and export market approval.[31]

In Syngenta Corn, the corn trait had been approved in the United States, but was not approved in major export markets, particularly China.[32] Farmers and non-producer plaintiffs brought similar claims of negligence, public and private nuisance, violations of Minnesota's consumer protection statutes, trespass to chattels, failure to warn, violations of the Federal Lanham Act, and other state-specific claims against Syngenta.[33] They claimed negligence based on Syngenta allegedly having held out their first GM trait, Viptera, as "on the verge of acceptance" in China, Syngenta's lack of monitoring stewardship programs to avoid contamination, and its omission of a warning to customers regarding what would happen if it wasn't approved by harvest.[34] Within 3 years of releasing Viptera, Syngenta released a second GMO trait, Duracade, and again performed the same potentially negligent acts in its marketing and lack of monitoring thereof.[35]

29. *In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 393 (E.D. Mo. 2008).

30. *Id.* at 394.

31. *See In re* Genetically Modified Rice Litig., 666 F. Supp. 2d 1004, 1015 (E.D. Mo. 2009).

32. *In re* Syngenta AG MIR 162 Corn Litig., 131 F. Supp. 3d 1177, 1186 (D. Kan. 2015); *see* MAX FISHER, LACK OF CHINESE APPROVAL FOR IMPORT OF U.S. AGRICULTURAL PRODUCTS CONTAINING AGRISURE VIPTERA™ MIR 162: A CASE STUDY ON ECONOMIC IMPACTS IN MARKETING YEAR 2013/14, NAT'L GRAIN & FEED ASS'N 6 (2014), http://www.ngfa.org/wp-content/uploads/Agrisure-Viptera-MIR-162-Case-Study-An-Economic-Impact-Analysis.pdf [https://perma.cc/EZ6C-X5JJ].

33. *Syngenta AG MIR*, 131 F. Supp. 3d at 1187.

34. *Id.* at 1189-91.

35. *See id.* at 1186.

In Bayer Rice, over 11,000 rice farmers, exporters, importers, mills, and dealers brought claims in state court and federal court. [36] More than 7,000 long-grain rice producers in Missouri, Arkansas, Louisiana, Mississippi, and Texas claimed to have suffered damage on over 2.2 million acres per year.[37] The plaintiffs alleged ongoing damage from 2006 to 2010, with between 2 million and 2.8 million acres of rice acreage affected and $750 million in damages solely from the loss of the export market.[38] Syngenta Corn blew Bayer Rice out of the water in the enormity of acres affected, and the aggregate claims brought were substantially greater in number (and thereby aggregate value). Rather than only the five states seen in Bayer Rice, Syngenta Corn plaintiffs from 22 states brought claims in federal court in three separate venues and more were brought in various state courts.[39] In Illinois federal court, over 3,500 claims were brought forward with an additional 200 claims brought in Illinois state courts.[40] In Minnesota federal court, over 20,000 plaintiffs in 2,375 cases brought claims against Syngenta.[41] In the Kansas federal MDL transferee court, claims were brought by 50,000 plaintiffs.[42] According to expert testimony, aggregate corn market losses ranged from $3.95 billion to $5.77 billion due to Syngenta's alleged negligence.[43] In a case study by the National Grain and Feed Association, in the 2013-2014 marketing year alone China's rejection of United States corn caused anywhere from $1 billion to $3

36. Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *11, *In re* Genetically Modified Rice Litig., No. 4:06 MD 1811 CDP, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (E.D. Mo. Sept. 4, 2012).

37. *In re* Genetically Modified Rice Litig., 835 F.3d 822, 825 (8th Cir. 2016); Patrick, *supra* note 15.

38. Patrick, *supra* note 15; NATHAN CHILDS, USDA, RICE OUTLOOK 13-23 (2013), http://www.clientadvisoryservices.com/Downloads/RCS-07-15-2013.pdf [https://perma.cc/D29R-UJ2T]; Email from Patrick Stueve, Plaintiffs' Lead Counsel on Bayer Rice MDL and Plaintiffs' Class Action Attorney in Syngenta Corn, to author (Jan. 5, 2021, 10:49 AM) (on file with author).

39. *In re* Syngenta Litig., No. 27-CV-15-3785, 2016 Minn. Dist. LEXIS 6, at *13 (Minn. Dist. Ct. Apr. 7, 2016).

40. Poletti v. Syngenta, No. 3:15-cv-01221-DRH, 2015 U.S. Dist. LEXIS 175745, at *43-44 (S.D. Ill. Dec. 30, 2015); Tweet v. Syngenta AG, No. 3:16-cv-00255-DRH, 2016 U.S. Dist. LEXIS 90145, at *4 (S.D. Ill. Jul. 12, 2016).

41. *Tweet*, 2016 U.S. Dist. LEXIS 90145, at *4; *In re* Syngenta Litig.., 2016 Minn. Dist. LEXIS 6, at *13.

42. *See* Plaintiffs' Memorandum of L. in Support of Motion for Preliminary Approval of Settlement, Provisional Certification of Settlement Class & Subclasses, Appointment of Settlement Class Couns., Subclass Couns., & Class Representatives, Approval to Disseminate the Class Notice, Appointment of the Notice Adm'r and Claims Adm'r and Special Masters, & Adoption of a Schedule for the Final Approval Process at 2, *In re* Syngenta AG MIR162 Corn Litig., No. 2:14-MD-02591-JWL-JPO (D. Kan. Mar. 12, 2018).

43. Email from Patrick Stueve to author, *supra* note 38.

billion in damages.[44] Syngenta Corn was a substantially larger case, as over 83 million acres of corn were planted and harvested for grain in the United States in 2014, which is almost 42 times the amount of acres grown in Bayer Rice.[45]

Lastly, the harm resulting from the alleged negligence was slightly different between these two cases. In Bayer Rice, there was widespread physical contamination of rice.[46] Farmers could show evidence of this contamination in two different rice varieties as well as a reduction in the market price of rice.[47] In Syngenta, it was more difficult to prove contamination in all farmers' corn production due in part to the nature of the industry and where the trait was discovered.[48] The USDA was not testing for the trait in the United States.[49] Grain merchandisers exporting to China and in China found the traits and began to reject the corn after it had been stored at local elevators, transported by train, truck, or barge to multiple grain handling or storage facilities.[50] The corn was long since contaminated and farmers could no longer identify their bushels.[51] Therefore, there was contamination, but more emphasis was placed on damages due to reduction of corn market price as there was no proof that *every* farmer bringing a claim had physical contamination.[52]

In Bayer Rice and Syngenta Corn, grain-handling facilities were included in the claims.[53] In both actions, grain-handling facilities were considered non-

44. *In re* Syngenta Mass Tort Actions, 272 F. Supp. 3d 1074, 1080 (S.D. Ill. 2017); Fisher, *supra* note 32, at 13.

45. Producer Plaintiffs' Class Action Master Complaint at 77, *In re* Syngenta AG MIR 162 Corn Litig., No. 14-md-2591-JWL-JPO (D. Kan. Mar. 13, 2015); CHILDS, *supra* note 38, at 13-23.

46. Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *11, *In re* Genetically Modified Rice Litig., No. 4:06 MD 1811 CDP, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (E.D. Mo. Sept. 4, 2012).

47. Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *11, *In re* Genetically Modified Rice Litig., No. 4:06 MD 1811 CDP, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (E.D. Mo. Sept. 4, 2012).

48. *See In re* Syngenta AG MIR 162 Corn Litig., 131 F. Supp. 3d 1177, 1194 (D. Kan. 2015).

49. *See* Fisher, *supra* note 32, at 3.

50. *See* Fisher, *supra* note 32, at 3; *Corn*, U.S. GRAINS COUNCIL (Aug. 14, 2021, 5:04 PM), https://grains.org/buying-selling/corn/ [https://perma.cc/G5FX-UZ9C].

51. *See Corn*, *supra* note 50.

52. *See Syngenta AG MIR*, 131 F. Supp. 3d at 1194.

53. Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *11, *Genetically Modified Rice*, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (No. 4:06 MD 1811 CDP); Tweet v. Syngenta AG, No. 3:16-cv-00255-DRH, 2016 U.S. Dist. LEXIS 90145 at *12 (S.D. Ill. Jul. 12, 2016).

producer plaintiffs; however, in Syngenta Corn there were some actions in which certain grain handling facilities were named as additional defendants.[54] Moreover, corn producers who purchased and grew Syngenta traits Viptera and Duracade were not named in the original class of plaintiffs due to a producer sales contract providing Syngenta with special defenses covered in Section V.[55] These farmers still pursued claims individually against Syngenta, but were not included in the original class.[56]

III. THE ACTIONS

A. Similarities in Bayer Rice and Syngenta Corn

The procedural posture was similar between Bayer Rice and Syngenta Corn. Both cases were multi-state litigations brought by plaintiffs in both federal and state courts.[57] There were fierce battles fought by plaintiffs to stay in state court, while the defendant seed developers did everything in their power to remove the actions to federal court.[58]

Bayer Rice and Syngenta Corn's federal actions were ultimately comprised into an MDL, with Bayer Rice centralized in the Eastern District of Missouri and Syngenta Corn centralized in the District of Kansas.[59] An MDL is used when there exists many civil actions involving common questions of fact pending in different districts.[60] Said actions will then be transferred to an appropriate district for coordinated or consolidated pre-trial proceedings.[61] This transfer decision is made by a judicial panel comprised of seven circuit and district judges designated by the Chief Justice of the United States, with no two judges being from the same

54. Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *11, *Genetically Modified Rice*, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (No. 4:06 MD 1811 CDP); Tweet v. Syngenta AG, No. 3:16-cv-00255-DRH, 2016 U.S. Dist. LEXIS 90145 at *12 (S.D. Ill. Jul. 12, 2016).

55. *See In re* Syngenta AG MIR 162 Corn Litig., 357 F. Supp. 3d 1094, 1108 (D. Kan. 2018).

56. Chaney, *supra* note 16.

57. *In re* Genetically Modified Rice Litig., No. 4:06 MD 1811 CDP, 2008 U.S. Dist. LEXIS 1140, at *39 (E.D. Mo. Jan. 7, 2008); *Syngenta AG MIR*, 131 F. Supp. 3d at 1186-87.

58. *See, e.g.*, Shafer v. Riceland Foods, Inc., No. 4:06 MD 1811, 4:07CV825 CDP, 2007 U.S. Dist. LEXIS 76435, at *2 (E.D. Mo. Oct. 15, 2007); *Syngenta AG MIR*, 131 F. Supp. 3d at 1186-87.

59. *In re* Genetically Modified Rice Litig., No. 1811, 2009 U.S. Dist. LEXIS 91520, at *1 (J.P.M.L. Sept. 1, 2009); *In re* Syngenta AG MIR 162 Corn Litig., 65 F. Supp. 3d 1401, 1401-02 (J.P.M.L. 2014).

60. 28 U.S.C. § 1407.

61. *Id.*

circuit.[62] An MDL is granted if the panel determines centralized proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of the actions.[63] This can be done on the panel's own initiative or by party motion.[64] This centralization is most often used for pretrial proceedings such as pleadings and discovery.[65] At some point, the proceeding will be remanded by the panel either at or before the conclusion of pretrial proceedings back to the original district where the claim was filed.[66] However, transferee judges are empowered by § 1407(b) to hold proceedings after discovery, including motions of summary judgment, class certification, and the facilitation of settlement discussions.[67] The number of claims in Bayer Rice and Syngenta Corn were in the thousands, with common questions as to development and stewardship methods, weighing in favor of an MDL approval.[68]

Notwithstanding the likely benefits of consolidated discovery efforts, a proceeding in an MDL can result in less favorable outcomes for plaintiffs because, at the very least, it means plaintiffs have lost the battle to stay in state court.[69] An MDL can inconvenience plaintiffs and their attorneys by (1) forcing them to litigate in a forum that may be some distance from their chosen forum and (2) effectively making their role a small piece of the puzzle in a very large action.[70] By proxy, the defendants reap more positive economic benefits since they would likely incur substantially more costs conducting discovery in multiple states and multiple courts against possibly hundreds of thousands of individual plaintiffs.[71] These economic benefits to defendants and negative impact to plaintiffs gives reason to oppose such transfer in actions of Syngenta Corn magnitude (22 states on behalf of hundreds of thousands of plaintiffs), in contrast to opposing transfer in a more regional action such as Bayer Rice (with a total of five neighboring

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. MELISSA J. WHITNEY, BELLWETHER TRIALS IN MDL PROCEEDINGS: A GUIDE FOR TRANSFEREE JUDGES 4-5 (2019) (citing Eldon E. Fallon et. al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2328 (2008)).

68. *See In re* Genetically Modified Rice Litig., No. 1811, 2009 U.S. Dist. LEXIS 91520, at *1 (J.P.M.L. Sept. 1, 2009); *In re* Syngenta AG MIR 162 Corn Litig., 65 F. Supp. 3d 1401, 1401-02 (J.P.M.L. 2014).

69. Danielle Oakley, Note, *Is Multidistrict Litigation a Just and Efficient Consolidation Technique? Using Diet Drug Litigation as a Model to Answer This Question*, 6 NEV. L.J. 494, 494 (2006).

70. *Id.* at 514-15.

71. *Id.*

southern states and 7,000 plaintiffs, of which 5,000 were in the federal court MDL).[72] Additionally, staying in state court may have extra economic benefits to plaintiffs in terms of future adverse rulings in the MDL court, a court that has no jurisdiction over the plaintiffs' claims brought in state court.[73]

The MDL court does have power, however, to keep the trial proceedings in the MDL court rather than remanding back to the original district courts where the claims were filed.[74] The MDL court in Bayer Rice chose to elect this right, whereas Syngenta Corn chose to remand some of the proceedings back to their original district courts: the Minnesota District and the Southern District of Illinois.[75] Within the Syngenta Corn MDL, some courts chose not to follow certain MDL rulings.[76] In *Tweet v. Syngenta AG*, the Minnesota District Court refused to adopt the Syngenta MDL Coordination Order.[77] Additionally, the court declined to follow an MDL decision which dismissed certain theories of recovery for plaintiffs based on new information unavailable at the time of the MDL decision.[78] Both of these

72. *See generally* Plaintiffs' Memorandum of L. in Support of Motion for Preliminary Approval of Settlement, Provisional Certification of Settlement Class & Subclasses, Appointment of Settlement Class Couns., Subclass Couns., & Class Representatives, Approval to Disseminate the Class Notice, Appointment of the Notice Adm'r and Claims Adm'r and Special Masters, & Adoption of a Schedule for the Final Approval Process at 3, *In re* Syngenta AG MIR162 Corn Litig., No. 2:14-MD-02591-JWL-JPO (D. Kan. Mar. 12, 2018); *In re* Genetically Modified Rice Litig., No. 4:06 MD 1811 CDP, 2010 WL 716190, at *1 (E.D. Mo. Feb. 24, 2010).

73. *See* Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *88, *In re* Genetically Modified Rice Litig., No. 4:06 MD 1811 CDP, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (E.D. Mo. Sept. 4, 2012).

74. *See* 28 U.S.C. § 1407.

75. *See In re* Genetically Modified Rice Litig., No. 4:06 MD 1811 CDP, 2010 WL 716190, at *1 (E.D. Mo. Feb. 24, 2010); Report and Recommendation of Special Master Ellen Reisman Regarding Att'ys' Feed, Expenses and Service Awards at 9-11, No. 2:14-MD-02591-JWL-JPO (D. Kan. Nov. 21, 2018).

76. *See, e.g.*, Tweet v. Syngenta AG, No. 3:16-cv-00255-DRH, 2016 U.S. Dist. LEXIS 90145 at *13 (S.D. Ill. Jul. 12, 2016).

77. *Id.* (highlighting the difference in parties, exporter parties in addition to Syngenta were defendants in their action, whereas on the MDL they were exclusively non-producer plaintiffs). The court ruled adoption of the order would conflict with plaintiff interests in the current litigation, as the defendant's attorneys in this case are a part of the plaintiffs in the MDL.

78. *See In re* Syngenta Litig., No. 27-CV-15-3785, 2016 Minn. Dist. LEXIS 6, at *59-65 (Minn. Dist. Ct. Apr. 7, 2016) (denying Syngenta's motion to dismiss on the basis of claims under Minnesota Private Attorney General statute based on a more recent ruling by the Minnesota Supreme Court evidencing no basis to dismiss motion, whereas the MDL court dismissed this action before said ruling).

instances highlight circumstances where an MDL transfer may not be an appropriate way to proceed in a nation-wide GMO Market Loss litigation (Syngenta Corn) in comparison to a more regional litigation (Bayer Rice).

B. Differences in Bayer Rice and Syngenta Corn

Apart from the MDL, there are many illuminating differences in the procedural posture of each action, including: (1) the question of class certification; (2) the treatment of Bayer Rice plaintiffs in state court versus federal court; (3) the amount of verdicts achieved before a settlement was reached; and (4) the question of punitive damages in completed trials. The effects of each of these differences provide some insight into the outcomes of future GMO Market Loss litigation.

1. Class Certification

First, the Bayer Rice MDL judge rejected class certification under Rule 23 of the Federal Rules of Civil Procedure, whereas in Syngenta Corn a nationwide Lanham Act class and various state classes were certified.[79] This is arguably the most important decision the judge can rule upon in a mass action, as it can have ominous effects impacting impending settlement, discussed in Article IV.[80]

2. Bayer Rice Verdicts (State Versus Federal)

There is a noteworthy difference in the way plaintiffs were awarded in state court versus in the MDL federal court in Bayer Rice, demonstrating how important the battle to stay out of federal court is for plaintiffs. However, state court is not always more favorable than federal court. A brief look into the details of recovery will shed light on this battle that may or may not be warranted.

Three trials in state court resulted in jury verdicts for the plaintiff, as did three of four MDL trials, with the fourth MDL bellwether trial ending in settlement for the first time in the litigation.[81] A bellwether trial is a trial held in MDLs (in other words, federal court transferees) to determine the strength of both parties' claims and defenses, with the ultimate result being efficient litigation and potential settlements on future similar claims.[82] In *Bell v. Bayer*—the first MDL bellwether

79. *See In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 397-400 (E.D. Mo. 2008); *In re* Syngenta AG MIR 162 Corn Litig., No. MDL 2591, 2016 U.S. Dist. LEXIS 132549, at *1355 (D. Kan. Sept. 26, 2016).

80. MANUAL FOR COMPLEX LITIGATION, FOURTH § 11.213 (2004).

81. *See* Mike Cherney, *Bayer Reaches 1st Settlement in Rice MDL*, LAW360, (Oct. 19, 2010), https://www.law360.com/articles/202369/bayer-reaches-1st-settlement-in-rice-mdl [https://perma.cc/26Q9-XD2N].

82. WHITNEY, *supra* note 67, at 4-5.

trial—the Bell plaintiffs received over $2 million in compensatory damages on 6,167 acres, equating to a $326 per acre damage reward to two Missouri families.[83] In the second MDL bellwether trial, *Penn v. Bayer*, the plaintiffs included one Mississippi and two Arkansas family farming operations that collectively received a damage award of $1,500,841 on 6,896 acres at $218/acre.[84] The third MDL bellwether trial was originally brought by two plaintiff operations; however, it resulted in only one verdict to a Louisiana family operation of $122/acre, which totaled $500,248 on 4,103 acres.[85] The final bellwether trial settled four days into trial for $290,000 to three farming operations, which were seeking a total of $430,000 in compensatory damages.[86] This trial was expected to last five weeks; however, the plaintiffs presumably thought 4.5 weeks of trial would cost more than the additional $140,000 or more they would likely have been awarded (award being likely—although never guaranteed—due to all three bellwether trials resulting in verdicts for plaintiffs) had there been a full trial.[87]

The average jury verdict-per-acre award in state court was 2.5 times the average per-acre award in federal court, demonstrating the reason for the intense battle for plaintiffs to stay in state court and why an MDL can be contrary to plaintiffs' interests.[88] In fact, two out of the three state court cases held in Arkansas state court returned verdicts over three times the average amount of the damage-per-acre awarded in federal court in compensatory damages alone.[89] The first Arkansas state court case, *Kyle v. Bayer*, obtained a jury verdict totaling

83. Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *31, *In re* Genetically Modified Rice Litig., No. 4:06 MD 1811 CDP, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (E.D. Mo. Sept. 4, 2012); Appellants' Brief at 79, *In re* Genetically Modified Rice Litig., 764 F.3d 864 (8th Cir. 2014) (No. 12-3958), 2013 WL 1636518.

84. Penn v. Bayer CropScience LP, No. 4:06MD1811 CDP, 2010 U.S. Dist. LEXIS 72880, at *119 (E.D. Mo. July 20, 2010); Appellants' Brief at 79, *In re* Genetically Modified Rice Litig., 764 F.3d 864 (8th Cir. 2014) (No. 12-3958), 2013 WL 1636518.

85. *See In re* Genetically Modified Rice Litig, No. 4:06 MD 1811 CDP ALL CASES, 2010 U.S. Dist. LEXIS 61846, at *117 (E.D. Mo. June 7, 2010); Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *31, *Genetically Modified Rice*, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (No. 4:06 MD 1811 CDP); Appellants' Brief at 79, *In re* Genetically Modified Rice Litig., 764 F.3d 864 (8th Cir. 2014) (No. 12-3958), 2013 WL 1636518.

86. Cherney, *supra* note 81.

87. *See generally id.*

88. *See* Appellants' Brief at 79-80, *In re* Genetically Modified Rice Litig., 764 F.3d 864 (8th Cir. 2014) (No. 12-3958), 2013 WL 1636518.

89. *See id.*

$1,032,643 on 727 acres for a staggering $733/acre damage award.[90] This case was the first to award punitive damages, alone equaling $500,000 of the total award, and upon incorporating the punitive damage award the per-acre recovery was $1,421/acre.[91] The second state court case, *Schafer v. Bayer*, followed suit, as the jury awarded $5,975,605 compensatory damages and a massive $42 million in punitive damages on 8,315 acres resulting in a $719/acre recovery and a $5,770/acre recovery including punitive damages.[92] The Arkansas Supreme Court, holding the Arkansas punitive damages cap unconstitutional, upheld the punitive damages awarded in *Schafer*.[93] The final state court case decided before the global settlement, *Sims v. Bayer*, resulted in a more conservative, yet handsome verdict of $250/acre , for a total recovery of $946,263 on 3,783 acres.[94] This final Bayer Rice court case is a good reminder that (1) two jury verdicts within the same state with similar case facts can come out vastly different and (2) a state court is not always more favorable for plaintiffs than federal court. Nevertheless, on average plaintiffs and their attorneys reaped huge benefits of remaining in state court, whether they were counting on it or not.

3. Verdicts Achieved Before Settlement

For better or worse, no one will ever know whether this federal-versus-state treatment in Bayer Rice would have rang true in Syngenta Corn, as the settlement was decided long before a state court went to verdict.[95] The Bayer Rice global settlement was achieved much later in the timeline of the litigation than the settlement in Syngenta Corn.[96] In Bayer Rice, multiple trial verdicts and one

90. *See id.* at 79; Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *35, *Genetically Modified Rice*, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (No. 4:06 MD 1811 CDP).

91. *See* Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *35, *Genetically Modified Rice*, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (No. 4:06 MD 1811 CDP); *see also* Appellants' Brief at 79, *In re* Genetically Modified Rice Litig., 764 F.3d 864 (8th Cir. 2014) (No. 12-3958), 2013 WL 1636518.

92. Bayer CropScience LP v. Schafer, 385 S.W.3d 822, 825 (Ark. 2011); Appellants' Brief at 79, *In re* Genetically Modified Rice Litig., 764 F.3d 864 (8th Cir. 2014) (No. 12-3958), 2013 WL 1636518.

93. *Bayer CropScience LP*, 385 S.W.3d at 822.

94. Appellants' Brief at 79, *In re* Genetically Modified Rice Litig., 764 F.3d 864 (8th Cir. 2014) (No. 12-3958), 2013 WL 1636518.

95. *See In re* Syngenta AG MIR 162 Litig., 357 F. Supp. 3d 1094, 1101 (D. Kan. 2018).

96. *See* Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses *41-42, *Genetically Modified Rice*, 2012

settlement collectively equating about $54 million dollars were paid to plaintiffs before Bayer decided to settle.[97] Further, there were still multiple producer and non-producer cases that remained outstanding after the global settlement, as certain plaintiffs simply decided not to join in the settlement.[98] The Bayer Rice global settlement settled rice farmers' claims in Arkansas, Texas, Missouri, Louisiana, and Mississippi, who planted long-grain rice from 2006 to 2010 with special "pots" to choose from depending on the type of their loss.[99]

Syngenta Corn, on the other hand, had only one MDL trial verdict before a settlement was reached.[100] The trial verdict on behalf of a class of 7,000 corn farmers in Kansas resulted in a verdict for plaintiffs of $217.7 million.[101] The number of grain corn acres involved in the Kansas class over a 5-year period was about 13 million acres, thus recovery was about $16.75/acre.[102] No punitive damages were awarded in the trial and the verdict was only on the plaintiffs' negligence claim.[103] There was another bellwether Minnesota federal court trial that could have gone to verdict, but ended in a mistrial due to a jury issue.[104] The plaintiff subsequently settled with Syngenta.[105] At the time of settlement, the Minnesota class trial had begun on behalf of 23,000 growers and was about to begin oral arguments.[106] It is worth noting the rather early eagerness for Syngenta

U.S. Dist. Ct. Briefs LEXIS 17321 (No. 4:06 MD 1811 CDP); *cf. Syngenta AG MIR*, 357 F. Supp. 3d at 1101.

97. *See* Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *41-42, *Genetically Modified Rice*, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (No. 4:06 MD 1811 CDP); *see also* Cherney, *supra* note 81.

98. Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *41-42, *Genetically Modified Rice*, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (No. 4:06 MD 1811 CDP).

99. Patrick, *supra* note 15.

100. *Syngenta AG MIR*, 357 F. Supp. 3d at 1101.

101. Judgment at 1, *In re* Syngenta AG MIR 162 Corn Litig., No. 14-MD-2591-JWL (D. Kan. June 23, 2017); Kristine A. Tidgren, *Jury Awards $217.7 Million to Kansas Corn Farmers in First Syngenta Trial*, IOWA STATE UNIV. (June 23, 2017), https://www.calt.iastate.edu/blogpost/jury-awards-2177-million-kansas-corn-farmers-first-syngenta-trial [https://perma.cc/89UW-UXD8].

102. Email from Patrick Stueve to author, *supra* note 38.

103. *Syngenta AG MIR*, 357 F. Supp. 3d at 1100; Judgment at 1, *In re* Syngenta AG MIR 162 Corn Litig., No. 14-MD-2591-JWL (D. Kan. June 23, 2017).

104. *Syngenta AG MIR*, 357 F. Supp. 3d at 1100.

105. *Id.*

106. *Id.* at 1100-01; Amended Class Action Complaint for Declaratory and Injunctive Relief and Damages at 3, Kellogg v. Watts Guerra, LLP, No. 2:14-md-2591-JWL-JPO (D. Kan. Nov. 13, 2018).

to settle the case, perhaps feeling pressure from three different federal MDL forums and various state forums as well as the ominous Bayer Rice precedent looming over its head.

IV. CLASS CERTIFICATION: JUDGE DISCRETION CAUSING DEVIATION

All of the factual and procedural differences—of which there were few—between Bayer Rice and Syngenta Corn impacted the rest of the litigation, ultimately resulting in vastly different outcomes. It is clear from Section III that forum selection can have an influence on the jury deciding the case, but arguably forum selection carries a more important decision in the other fact finder, the judge. The judge of an MDL carries a huge level of discretion in deciding key factors of the case long before the case reaches the jury.[107] Such factors include the two most important events in Bayer Rice and Syngenta Corn: (1) class certification approval or denial and 2) settlement approval or rejection. Class certification, which happened to be analyzed before settlement in both cases, is often a defining moment in a mass litigation.[108] It may be the death of litigation for the plaintiffs or it may create unwarranted pressure on the defendants to settle meritless claims.[109]

The presiding judge has considerable discretion in deciding whether to certify a class as long as he or she stays within the requirements of Rule 23 of the Federal Rules of Civil Procedure (Rule 23).[110] A class action may be used by defendants as a shield, as it often produces modest recovery.[111] Some defendants go as far as rushing to embrace a class certification, for many reasons including avoiding repetitive awards of punitive damages and hopes of reaching a "reasonable" settlement with plaintiff's counsel.[112] Conversely, a class action may

107. *See* MANUAL FOR COMPLEX LITIGATION, FOURTH § 11.213 (2004).

108. *See In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 400 (E.D. Mo. 2008); Plaintiffs' Memorandum of L. in Support of Motion for Preliminary Approval of Settlement, Provisional Certification of Settlement Class & Subclasses, Appointment of Settlement Class Couns., Subclass Couns., & Class Representatives, Approval to Disseminate the Class Notice, Appointment of the Notice Adm'r and Claims Adm'r and Special Masters, & Adoption of a Schedule for the Final Approval Process at 3, *In re* Syngenta AG MIR 162 Corn Litig., No. 2:14-MD-02591-JWL-JPO (D. Kan. Mar. 12, 2018).

109. *See* MANUAL FOR COMPLEX LITIGATION, FOURTH § 11.213 (2004); Castano v. Am. Tobacco Co., 84 F.3d 734, 736 (5th Cir. 1996).

110. *See generally* 32B Am. Jur. *Federal Courts* § 1445 (2021).

111. *See* John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1345-52 (1995).

112. *See id. cf. In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 400 (E.D. Mo. 2008) (noting that Bayer chose to oppose class certification in the actions against them); *In re* Syngenta AG MIR 162 Corn Litig., No. MDL 2591, 2016 U.S. Dist. LEXIS 132549, at *1356

be a huge benefit to plaintiffs in the form of economies of scale in an otherwise expensive litigation.[113] Because of these justifiable reasons to approve or reject a class certification motion, a judge must be meticulous when going through his or her analysis of Rule 23 requirements. These requirements are split into (1) prerequisites needed to proceed as a class under Rule 23(a) and (2) the type of action that is appropriate for a class action as determined under the court's discretion under Rule 23(b).[114] Both judges in Bayer Rice and Syngenta Corn went through this analysis but arrived at vastly different conclusions that came back to haunt the results of each litigation.

As previously stated, Bayer Rice was not certified as a class action.[115] The Bayer Rice MDL judge, Honorable Judge Perry, determined the prerequisites under Rule 23(a)(1) requirements of numerosity and Rule 23(a)(2) common questions of law or fact existing between class members were easily satisfied.[116] Honorable Judge Perry did not purport to resolve whether the disputed third and fourth prerequisites of typicality and adequacy of the representative parties were satisfied.[117] Rather, she denied the motion to certify as she determined it failed under the requirements set forth in Rule 23(b)(3).[118]

A. Rule 23(b)(3) by Honorable Judge Perry: Individualized Damages Predominate

Rule 23(b) must be satisfied in order to bring a class action by one of three ways provided under the Federal Rules of Civil Procedure.[119] Rule 23(b)(3) is one

(D. Kan. Sept. 26, 2016) (noting that Syngenta chose to oppose class certification in the actions against them).

113. *See* Coffee, *supra* note 111, at 1345-52; Will Kenton, *Economies of Scale*, INVESTOPEDIA (Apr. 10, 2021), https://www.investopedia.com/terms/e/economiesofscale.asp [https://perma.cc/4XN6-XC2D] (defining economies of scale as cost advantages that occur when production increases due to costs being shared/spread over a larger number of people or goods. Further explaining that, in class action litigation, the cost of litigating is shared over a large class of plaintiffs, usually taken as a percentage of the settlement fund. The cost/plaintiff of litigating is lower than it otherwise would be if each plaintiff had to bring his or her own action).

114. FED. R. CIV. P. 23.

115. *In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 400 (E.D. Mo. 2008).

116. *Id.* at 396 (noting more than 30 named plaintiffs representing more than 200 tag-along plaintiffs plus hundreds more rice producers who are all bringing claims – all arising out of the alleged mishandling of Bayer in their GM rice traits).

117. *Id.*

118. *Id.*; *see generally* FED. R. CIV. P. 23.

119. *See* FED. R. CIV. P. 23.

such requirement for a class action to be maintained.[120] Under Rule 23(b)(3), if the court finds that (1) questions of law or fact common to the class predominate individual questions and (2) proceeding as a class is superior to other ways of ruling on the issues, the class may be certified.[121] Honorable Judge Perry held that questions of fact dealing with the actual calculation of damages affected members of the purported class individually and were varied enough such that class certification was not appropriate.[122]

1. Bayer Rice: Individualized Damages Defeated Rule 23(b)(3)

The plaintiffs in Bayer Rice and Syngenta Corn alleged market damages evidenced by the Chicago Board of Trade (CBOT) price of long-grain rice and corn, respectively.[123] However, in Bayer Rice, Honorable Judge Perry looked to the actual damage calculations of growers and determined that rice growers priced their grain in a multitude of ways besides the CBOT.[124] Rice producers price their grain using delivery cash sale (CBOT price + "basis"), cooperative pool pricing, privately priced contracts between buyer and seller, basis contracts (contracts locking in the current cost of transportation for the buyer to move the grain to the next buyer, which otherwise fluctuates with supply and demand of freight), contracts based on world market price (separate price index from the CBOT), and

120. *Id*.

121. FED. R. CIV. P. 23(b)(3).

122. *In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 393 (E.D. Mo. 2008).

123. *See id.* at 394; *In re* Syngenta AG MIR 162 Corn Litig., No. MDL 2591, 2016 U.S. Dist. LEXIS 132549, at *1372 (D. Kan. Sept. 26, 2016); *CBOT*, CME GROUP (Aug. 9, 2021, 11:49 AM), https://www.cmegroup.com/company/cbot.html [https://perma.cc/6WBC-U9EZ] (explaining that the CBOT is one of the four market exchanges in CME Group, the leading marketplace for the buying and selling of financial securities, and includes the exchange of agricultural commodities in the form of contracts to buy or to sell, including both corn (at issue in Syngenta Corn) and rice (at issue in Bayer Rice). Similar to the stock market, corn and long-grain CBOT contract prices are posted in real-time during the trading hours); *see generally* Jason Fernando, *Derivative*, INVESTOPEDIA (Aug. 6, 2021), https://www.investopedia.com/terms/d/derivative.asp [https://perma.cc/8WQR-7NFX]; Nick Lioudis, *Commodities Trading: An Overview*, INVESTOPEDIA (May 24, 2021), https://www.investopedia.com/investing/commodities-trading-overview/ [https://perma.cc/G9G9-CRRD] (explaining that the CBOT contract is for a specified amount of the underlying commodity and the price is based on what the market thinks that commodity will be worth at the date the contract expires). Because the plaintiffs in both litigations alleged they received lower prices for their grain due to Syngenta and Bayer's negligence, the difference in the CBOT price before and after the alleged negligence would be the most efficient way to prove there was damage to the market in both Bayer Rice and Syngenta Corn.

124. *See In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 394, 400 (E.D. Mo. 2008).

flat-price contracts (posted by commercial buyers of rice).[125] Honorable Judge Perry concluded the calculation of actual grower damages are unique to each plaintiff based on the time, place, and manner in how each plaintiff priced and sold his or her rice and thus predominated over the common questions involved in the litigation.[126] Honorable Judge Perry went so far as to say, "[t]he very notion of a localized basis (or a fluctuating deviation from the CBOT) is itself at odds with a class wide adjudication of damages."[127] Honorable Judge Perry held that because "[a]n accurate, true assessment of any plaintiff's damages" isn't formulaic but rather a required inquiry into the circumstances of each individual sale, the claims were not appropriate for class certification.[128] Honorable Judge Perry further noted that the contamination affecting a vast number of producers is "akin to a 'mass accident' tort—the sort of case that the Advisory Notes to Rule 23 say should rarely be afforded class treatment."[129]

Using Honorable Judge Perry's analysis on Syngenta Corn's facts, it would seem likely that Honorable Judge Lungstrum would have denied class certification. However, Honorable Judge Lungstrum approved the motion for class certification, and thus must have been convinced that Honorable Judge Perry was incorrect in her analysis.[130]

2. "Independent" Pricing Systems

Honorable Judge Perry's first point in denying class certification was, "Not every plaintiff had his rice priced according to the CBOT."[131] If Honorable Judge Perry had stopped here, this would provide a strong argument for Honorable Judge Lungstrum's decision to certify the Syngenta class action. The CBOT is the most widely used pricing system for corn in the United States, with very few exceptions.[132] However, Honorable Judge Perry noted that rice is regularly sold on

125. *Id.* at 394-95; *see* CHICAGO BOARD OF TRADE, AGRICULTURE*:* UNDERSTANDING BASICS 2 (2004), https://www.gofutures.com/pdfs/Understanding-Basis.pdf [https://perma.cc/QLV4-ZA7E].

126. *In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 398 (E.D. Mo. 2008).

127. *Id.*

128. *Id.* at 399.

129. *Id.* (citations omitted).

130. *See In re* Syngenta AG MIR 162 Corn Litig., No. MDL 2591, 2016 U.S. Dist. LEXIS 132549, at *1356.

131. *In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 398 (E.D. Mo. 2008).

132. *See generally Corn Prices*, SUCCESSFULFARMING (Aug. 15, 12:14 AM), https://www.agriculture.com/markets/commodity-prices/CBOT/ZC [https://perma.cc/RL8C-773K]; *Corn*, MARKETS INSIDER (Aug. 15, 2021, 12:17 AM), https://markets.businessinsider.com/commodities/corn-price [https://perma.cc/RP6G-8PQQ].

both the World Market Price of rice, through flat price contracts to large buyers, and privately negotiated prices between parties.[133] Honorable Judge Lungstrum used this fact to differentiate Bayer Rice from the then present facts so as to certify Syngenta Corn as a class.[134]

However, prices are more connected than Honorable Judge Lungstrum and Honorable Judge Perry's analysis suggests. The commodity markets are extremely intertwined with one another, as measured by the correlation coefficient used in economic and statistical analysis.[135] Flat price contracts are based on a flat price posted by large grain dealers, which most certainly are aware of the CBOT and the World Market Price as well as their own profit margin and basis.[136] The World Market Price for rice and the CBOT rice price changes are correlated to one another, as the CBOT price is influenced by global production (supply) and

133. *In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 398 (E.D. Mo. 2008).

134. *In re* Syngenta AG MIR 162 Corn Litig., No. MDL 2591, 2016 U.S. Dist. LEXIS 132549, at *1380-81 (D. Kan. Sept. 26, 2016). It is worth noting that neither judge looked into a comparison of the trading volumes of their prospective commodity on the CBOT. On average, 350,000 contracts of corn are traded per day on the CBOT. *Corn: Futures and Options*, CME GROUP (Aug. 19, 2021), https://www.cmegroup.com/trading/agricultural/grain-and-oilseed/corn.html [https://perma.cc/4BFN-LSE2]. According to the CBOT volume monthly report, the volume of corn contracts traded throughout the month of January 2021 was 8,734,315, whereas the volume of rice contracts traded was 10,727. CME GROUP, CBOT EXCHANGE VOLUME REPORT - MONTHLY (2021), https://www.cmegroup.com/daily_bulletin/monthly_volume/Web_Volume_Report_CBOT.pdf [https://perma.cc/QTB2-948R]. These numbers point toward a finding that the CBOT is a much bigger factor in corn sales than long-grain rice sales, thus making corn pricing less individualized. This, in turn, strengthens the argument that common questions of harm predominate individual questions of damages in Syngenta Corn. Possibly, the judges did not bother comparing the two because of the nature of each market; rice is grown on significantly fewer acres than corn in the United States. In 2019, corn for grain acres harvested was estimated at 81.5 million acres and rice production (including short, medium, and long grain) was 2.54 million acres. U.S. DEP'T AGRIC., CROP PRODUCTION: 2019 SUMMARY at 3 (Jan. 2020), https://www.nass.usda.gov/Publications/Todays_Reports/reports/cropan20.pdf [https://perma.cc/DN7V-7ZAG]. The difference in CBOT volumes may just be a product of the difference in production. Thus, it is possible that Honorable Judge Lungstrum did not attempt to compare the trading volume because the argument would not have been justified in the broader picture.

135. *See* GEETESH BHARDWAJ & ADAM DUNSBY, SUMMERHAVEN INV. MGMT., LLC, OF COMMODITIES AND CORRELATIONS 5 (Jan. 2013), https://summerhavenindex.com/assets/of_commodities.pdf [https://perma.cc/25BX-8YSV].

136. *See In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 395 (E.D. Mo. 2008); *In re* Syngenta AG MIR 162 Corn Litig., No. MDL 2591, 2016 U.S. Dist. LEXIS 132549, at *1380 (D. Kan. Sept. 26, 2016).

demand for rice just like the World Market Price.[137] Further, privately negotiated prices are decided by rice farmers and potential buyers who, in turn, look to the CBOT posted price and use it as one of a multitude of factors (including possible premium/penalties and basis) to conclude their own price.[138] Thus, either Honorable Judge Perry's analysis of these "independent" pricing mechanisms was erroneous, Honorable Judge Lungstrum's differentiation from precedent was improper, or both. Honorable Judge Perry's decision that damages were an individual issue and predominated the common questions was, however, based on more than just independent pricing mechanisms.[139]

3. Factors Causing Individualized Prices

Honorable Judge Perry's analysis continued with, "[a]lthough it appears the majority of rice producers did sell rice based on the CBOT price, they did so in very different ways."[140] Honorable Judge Perry determined an individual inquiry was necessary for damages in part because the producer plaintiffs used other methods aside from cash basis selling at the current market price, such as using pools or cooperatives to sell combined grain and selling through booking contracts.[141] Farmers all over the United States use these methods to sell corn as well.[142] A booking contract is simply a contract to price a certain amount of grain in the future, same as buying a CBOT contract, except a booking contract could fix either the price on the CBOT or fix the basis.[143] Farming cooperatives—essentially groups of farmers forming a business in order to gain market power as a collective group—are widely involved in the sale of farming commodities, including corn.[144] The group of farmers pool their harvested crop, elect a board of directors who may hire employees, and collectively decide when to sell their

137. *See* CONG. RSCH. SERV., PRICE DETERMINATION IN AGRICULTURAL COMMODITY MARKETS: A PRIMER 23 (Jan. 6, 2006) https://www.everycrsreport.com/files/20060106_RL33204_79fa0fd63b92e9621e2bb9bfab44473bda614ced.pdf [https://perma.cc/QQB9-CBWE].

138. Email from Arkansas Rice Grower, to Shelby Grabanski, Drake University Law Student, (Jan. 6, 2021, 9:10 AM) (on file with author).

139. *See In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 398-99 (E.D. Mo. 2008).

140. *Id.* at 398.

141. *See id.* at 394.

142. *See, e.g.*, *Our Mission*, FARMERS CO-OP KINDE, (Aug. 15, 2021, 1:10 AM), http://www.kindecoop.com [https://perma.cc/7893-S35M].

143. *In re* Genetically Modified Rice Litig., 251 F.R.D. at 394; *see generally* Cory Mitchell, *Booking the Basis*, INVESTOPEDIA (Dec. 13, 2020), https://www.investopedia.com/terms/b/bookingthebasis.asp [https://perma.cc/8ZMT-ATJX].

144. *See generally*, *About Ag Partners Cooperative, Inc.*, AG PARTNERS (May 7, 2021, 9:52 AM), https://www.agpartnerscoop.com/about [https://perma.cc/YV4N-EZ2K].

grain.[145] The individual farmer in the cooperative receives a pro rata share of his or her crops' proceeds that were sold collectively.[146]

If Honorable Judge Perry concluded using these different ways of selling rice results in individual questions predominating common questions (and thus is not a proper case for class action under Rule 23(b)(3)), the result in Syngenta Corn would be the same, for corn farmers use these same avenues to sell their grain.[147] Honorable Judge Perry further individualized these ways of selling rice by noting, "The [rice] buyer may specify a particular quality or milling weight for the rice to be delivered, and a deviation from that quality may result in a penalty or premium."[148] Honorable Judge Perry concluded these penalties and premiums furthered the denial of class certification, as the purported class damages are even more differentiated.[149] This quality adjustment in price is also used in corn at delivery most often as a penalty (sometimes called "dockage") for too high of moisture or low test weight.[150] Using Honorable Judge Perry's analysis, this fact indicates that a class-wide damages calculation was as inappropriate in the context of corn as it was for rice. Honorable Judge Lungstrum did not discuss these penalties and premiums, nor the use of various selling mechanisms at all.[151] Again, either Honorable Judge Perry's analysis including these factors was erroneous or Honorable Judge Lungstrum's failure to consider these factors was. Thus, despite having very similar fact patterns, the two judges diverge dramatically as to their respective inquiries and holdings.

4. Basis: The Ultimate Moving Target

According to Honorable Judge Perry, "[t]he very notion of a localized basis (or a fluctuating deviation from the CBOT) is itself at odds with class-wide adjudication of damages," and thus supports the denial of class certification.[152] Basis is the cost of transportation of the grain—normally estimated by the grain

145. *See generally id.*

146. *See generally id.*

147. *See generally* U.S. DEP'T AGRIC., TOP 100 LARGEST AGRICULTURAL COOPERATIVES (Aug. 15, 2021, 1:18 AM), https://www.rd.usda.gov/files/RD_Top100AgricultureCooperatives.pdf [https://perma.cc/WZ45-QEYQ].

148. *In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 394 (E.D. Mo. 2008).

149. *See id.*at 394-395.

150. *See Test Weight in Corn*, HOEGEMEYER (May 7, 2021, 10:12 AM), https://www.therightseed.com/agronomy/test-weight-corn [https://perma.cc/J3PV-HTFN].

151. *See In re* Syngenta AG MIR 162 Corn Litig., No. MDL 2591, 2016 U.S. Dist. LEXIS 132549, at *1371-82 (D. Kan. Sept. 26, 2016).

152. *In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 398 (E.D. Mo. 2008).

buyer based on the buyer's cost to transportation—and includes the freight market, and storage and handling costs.[153] Honorable Judge Perry determined that basis is an inherently individualized factor and is used in complicated methods of pricing; therefore, class certification was not appropriate under 23(b)(3).[154] She determined that, due to a localized basis, each sale of rice would be different based on the time and location.[155] Each location incurs a different cost to transport and hold the grain, and these costs vary throughout the year depending on supply and demand of transportation vessels (i.e., trucks, train cars, and barge rates).[156] Honorable Judge Perry specifically named hedge-to-arrive and basis contracts in her analysis.[157] Hedge-to-arrive contracts lock in the underlying futures price (elevators will use the CBOT posted price)[158] and basis is to be fixed before delivery at a later time.[159] Basis contracts do the opposite; they fix the basis at the time of contracting and leave the price of the grain to be decided at the time of delivery (also based on the CBOT posted price).[160]

Basis contracts and hedge-to-arrive contracts are regularly used in pricing corn (and virtually every commodity traded on the CBOT).[161] If Honorable Judge Lungstrum had used Honorable Judge Perry's analysis here, he would have concluded that localized basis is involved in the sale of corn from producers to the grain buyers, such that an accurate damages calculation would warrant an individual inquiry into each sale.[162] Individual inquiry into each transaction leads to the conclusion that individual issues predominate over common issues, which results in denial of the motion of class certification, for the claims are inappropriate

153. *See* CHICAGO BOARD OF TRADE, *supra* note 125, at 2.

154. *In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 398-399 (E.D. Mo. 2008).

155. *Id.*

156. CHICAGO BOARD OF TRADE, *supra* note 125, at 4.

157. *In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 398 (E.D. Mo. 2008).

158. *Hedge-to-Arrive (HTA),* ADM, (May 7, 2021, 9:50 AM), https://admadvantage.com/grain-contracts/hedge-to-arrive/ [https://perma.cc/D5DX-HX26].

159. *Id.* (explaining that using this structure allows farmers to "lock in" a price according to the CBOT, while simultaneously allowing them to capture the cost of freight at the time of delivery of the grain. The farmer/seller would have hopes that the cost of transportation would decrease at the time of their delivery, which may or may not be the case).

160. CHICAGO BOARD OF TRADE, *supra* note 125, at 25 (demonstrating that this type of contract is likely to be used if a farmer thinks the CBOT price of grain will increase later on at the time of delivery. However, the current cost of transportation is favorable to farmers).

161. *See id.*; *Hedge-to-Arrive (HTA)*, *supra* note 158.

162. *See, e.g.*, *In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 398-99 (E.D. Mo. 2008).

to bring as a class action under Rule 23(b)(3).[163] This argument simply uses Honorable Judge Perry's analysis and applies the reasoning to the facts that arose in Syngenta Corn.

B. Rule 23(b)(3) by Honorable Judge Lungstrum: Not Individualized Enough

As evidenced previously, it is clear Honorable Judge Lungstrum decided not to use Honorable Judge Perry's analysis in deciding whether to certify the class action in Syngenta Corn. Instead, Honorable Judge Lungstrum decided that (1) every local price attained by every class member was based in part on the CBOT price; (2) the CBOT factor was correlated enough to the damages suffered by every plaintiff; and (3) the correlation was significant enough to hold the common claims predominated the individual harms suffered to certify Syngenta Corn as a class action.[164]

Honorable Judge Lungstrum certified a nation-wide class and eight statewide classes in Arkansas, Illinois, Iowa, Kansas, Missouri, Nebraska, Ohio, and South Dakota.[165] Honorable Judge Lungstrum relied on employees of Cargill and Archer Daniels Midland Company (ADM) (major grain buyers and exporters farmers sell their grain to), who asserted that their prices are based off of the CBOT and local prices reflect the CBOT price.[166] Honorable Judge Lungstrum recognized that the CBOT is not the only factor in deciding local prices, for employees of these companies set prices based on desired profit margins and other local factors.[167] One of these local factors is basis. This factor is always involved in the price set for contracts of grain having a CBOT contract, sometimes as the factor actually being fixed and sometimes as the variable factor to be set at the time of delivery of

163. *See, e.g.*, *id.*; FED. R. CIV. P. 23 (reemphasizing that Rule 23(b)(3) or one of its constituents must be met class action certification to be appropriate. If individual issues predominate over the common issues, the action is not appropriate for class action certification). Applying Honorable Judge Perry's analysis shows that individual issues on damages on differing pricing mechanisms predominate over common issues in the context of corn.

164. *See In re* Syngenta AG MIR 162 Corn Litig., No. MDL 2591, 2016 U.S. Dist. LEXIS 132549, at *1378-83 (D. Kan. Sept. 26, 2016).

165. *Id.* at *1402.

166. *Id.* at *1380 (noting these employees were able to establish that enough of the corn sales had a common factor—the CBOT price—which Lungstrum subsequently used to hold that pricing mechanisms were not so individualized).

167. *Id.* This factor weighs in favor of an individualized analysis into damages suffered by corn farmers, as increased variances in local prices would accurately be measured through an individual inquiry. The more individualized the damages calculation is, the more compelling it is to deny class certification under Rule 23(b)(3).

the grain.[168] Either way, the cost of transportation is different in almost every single sale of grain.[169] To get the most accurate damage calculation for the plaintiffs in GMO Market Loss litigation, there would need to be an individual inquiry into each transaction. Doing so, however, would result in increased costs, in both time and resources. Thus, the tension continues between accuracy and efficiency. Because the CBOT corn price was a factor in setting local prices, Honorable Judge Lungstrum concluded damages could be decided on a class-wide basis using CBOT price changes.[170] Honorable Judge Lungstrum held that each transaction in corn was in some way influenced by the CBOT price of corn.[171] Honorable Judge Lungstrum could have ruled that just because the CBOT price was a factor, it does not mean an actual damage calculation was common enough amongst members of the purported class, just as Honorable Judge Perry did in Bayer Rice by pointing to additional factors (i.e., localized basis and divergent ways farmers sell their grain).[172] If so, Honorable Judge Lungstrum may have concluded the other factors used in pricing corn between farmers were different enough that the individual questions of fact (accurate measurements of damages to each farmer's price received) predominated the common questions (GMO contamination causing the overall corn market price to decrease).[173] Honorable Judge Lungstrum instead rejected Honorable Judge Perry's analysis in Bayer Rice, and held the CBOT correlation was, to him, enough to weaken the argument that individual facts predominate over common questions under Rule 23(b)(3).[174]

Honorable Judge Lungstrum then pointed to Tenth Circuit precedent to hold that the presence of individualized damages (in its weakened state due to his findings above) does not predominate over class-wide impact, a case in which Honorable Judge Perry in Bayer Rice was not required to follow as precedent.[175]

168. *See* CHICAGO BOARD OF TRADE, *supra* note 125, at 2.

169. *See id.* at 4.

170. *In re* Syngenta AG MIR 162 Corn Litig., No. MDL 2591, 2016 U.S. Dist. LEXIS 132549, at *1379-80 (D. Kan. Sept. 26, 2016).

171. *Id.* at *1379-80.

172. *See In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 398-99 (E.D. Mo. 2008).

173. *See id.* As shown in the previous section, rice and corn prices are influenced by a multitude of factors that make every sale of grain to be unique to the individual. As shown throughout this section, the individual questions versus the common questions are measured on a spectrum. Honorable Judge Perry determined that the presence of all the local factors increased the predominance of individual questions of fact, which then led her to deny class certification under Rule 23(b)(3).

174. *See In re* Syngenta AG MIR 162 Corn Litig., No. MDL 2591, 2016 U.S. Dist. LEXIS 132549, at *1389 (D. Kan. Sept. 26, 2016).

175. *Id.* at *1381-82 (quoting *In re* Urethane Antitrust Litigation, 768 F.3d 1245 (10th Cir. 2014)).

However, *In re Urethane Antitrust Litigation* was an antitrust case alleging price collusion, and antitrust law permits an inference of class-wide impact from price-fixing.[176] Honorable Judge Lungstrum reasoned the presence of the CBOT and a more defined market made it more convincing to certify a class when compared to the facts in *Urethane*, which involved a more informal market, as the baseline prices of the CBOT have greater influence over the local market price for corn.[177] However, the product involved in *Urethane* had a more informal deviation from the posted price than pricing commodities, as the court noted the only price deviation was through private negotiations.[178] As evidenced by the factors involved in basis, penalties, and premiums that localize the price of commodities, the agricultural market contains frequent and unique deviations from the posted price other than private negotiations.[179] The *Urethane* precedent points to the weight given to common questions of impact versus individualized questions of damages when the individualization of damages is not a severe as the commonality in market impact.[180]

Further, *Urethane* does not explain Honorable Judge Lungstrum's failure to recognize Honorable Judge Perry's analysis that an accurate account of damages requires individual inquiry and the facts put much greater weight on the individual damages than on the common impact to the purported class.[181] The premature release and lack of stewardship oversight by Syngenta impacted each farmer uniquely and individually.[182] These harms include cleaning and decontamination costs, GMO testing costs, basis, storage costs, lost acreage, and lost income and assets.[183] These harms greatly resemble the differences in plaintiff harm in Bayer Rice, which contributed to Honorable Judge Perry's determination that individual damage inquiries predominated over the common class and thus justified denial of class certification under Rule 23(b)(3).[184] Thus, in accordance with the *Urethane* precedent, there is a weighty argument that the individual damages in Syngenta

176. *Id.* at *1382 (recognizing the Tenth Circuit noted such inference in the antitrust law. This inference is an additional "tipping of the scales" in favor of class certification in antitrust litigation).

177. *Id.* at *1381-82.

178. *See In re* Urethane Antitrust Litig., 768 F.3d 1245, 1251 (10th Cir. 2014).

179. *See In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 398 (E.D. Mo. 2008); CHICAGO BOARD OF TRADE, *supra* note 125, at 2.

180. *See Urethane*, 768 F.3d at 1251.

181. *See In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 398 (E.D. Mo. 2008); *id.*

182. J PETE LANEY, GMO LITIGATION 4-5 (2016), http://nationalaglawcenter.org/wp-content/uploads//2018/03/GMO-Litigation.pdf [https://perma.cc/WV8J-G9BQ].

183. *Id.*

184. *See In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 398 (E.D. Mo. 2008).

Corn are predominate and superior in the same way they were held to be predominate and superior in Bayer Rice.[185]

C. Reducing Rule 23(b)(3) Deviations Using Correlation Coefficient

Class certification is dependent upon the analysis of the specific MDL judge. Honorable Judge Perry in Bayer Rice decided the different ways rice was priced was individualized enough to deny certification.[186] Honorable Judge Lungstrum ruled the damages could, in the context of corn, be decided on a group-wide basis and certified the class on similar facts to those addressed by Honorable Judge Perry.[187] A solution to the imprecise and deviating analysis employed by Honorable Judge Lungstrum would be to use an economic measure called "correlation coefficient," which measures the interaction between two variables.[188] This statistical measurement would determine how each pricing avenue used by the plaintiffs is correlated to the CBOT price of the respective commodity in a GMO Market Loss litigation. The strength of the relation is a value between -1 and 1, with a value of 1 indicating there is a perfect positive correlation (as the one variable rises, the other rises by the same amount) and value of -1 indicating a perfect negative correlation (as one variable rises, the other falls in same proportion).[189]

The presiding judge would use the correlation coefficient to determine what correlation value is enough to allow class certification. This involves a determination into whether the coefficient is close enough to 1 such that the tradeoff of accuracy in damage calculations is outweighed by the cost of efficiency gained. For example, when the correlation coefficient of the CBOT corn price and the average elevator price is 0.6 or above (the actual number determined by an expert), there is enough correlation to justify the loss of accuracy inherent in class certification because it is outweighed by the efficiency gains derived from class certification.

Using a correlation coefficient would provide a fairer estimate in the trade off of accuracy for efficiency in GMO Market Loss litigation when the question of

185. LANEY, *supra* note 182, at 4-5; *Urethane*, 768 F.3d at 1251.

186. *See In re* Genetically Modified Rice Litig., 251 F.R.D. 392, 398 (E.D. Mo. 2008).

187. *In re* Syngenta AG MIR 162 Corn Litig., No. MDL 2591, 2016 U.S. Dist. LEXIS 132549, at *1381-89 (D. Kan. Sept. 26, 2016).

188. *See generally* Ivar Nilsson & Oskar Thulin, Correlations Within and Between Markets and Commodities 4-5 (2012) (B.A. thesis, University of Gothenburg), https://gupea.ub.gu.se/bitstream/2077/32986/1/gupea_2077_32986_1.pdf [https://perma.cc/W3FS-CPPQ].

189. *Id*.

class certification is presented. This proposition offers a measure to guide a judge and could have very well prevented the antithetical decisions (or could have given a more measurable explanation for the juxtaposition) of Honorable Judge Perry and Honorable Judge Lungstrum in determining class certifications in Bayer Rice and Syngenta Corn respectively. Preventing a divergence in cases involving damages in the billions of dollars—such as these GMO Market Loss litigations—is paramount. Cases involving mass tort and class actions are extremely complicated and intertwined; any way in which certain decisions can be obtained through attainable measurements rather than imprecise analyses should be diligently pursued. Using the correlation coefficient can help to reduce imprecise conclusions on the predominance question of Rule 23(b).

D. Issue Class Certification: The Middle Ground

If the correlation coefficient shows that damages are individualized and not appropriate for class certification, it does not have to end the inquiry. If only certain issues of law or fact are so common to the entire class that denial of certification would do more harm than good (sacrificing efficiency for miniscule gains in accuracy), the judge can employ the "issue class certification."[190] An issue class is a class certified for particular issues allowed under Rule 23(c)(4).[191] This would allow a judge to bifurcate the litigation into common issues and individual issues, with the common issue to be adjudicated through a class action type proceeding.[192] Thus, a judge presiding over a GMO Market Loss litigation would be able to certify the class on the issue of impact to the market and leave the individualized question of damages to be determined on an individual basis. The *Urethane* Court recommended this course of action in cases in which individualized questions would overwhelm the damages issue of class certification.[193] The most balanced approach to the class certification issue in GMO Market Loss litigation may be to (1) use the correlation coefficient to measure the connectedness of the market in determining the strength of individualized damages, and (2) use issue class certification to capture a more balanced approach of efficient litigation and accurate results.

190. *See In re* Urethane Antitrust Litig., 768 F.3d 1245, 1251 (10th Cir. 2014); Joseph A. Seiner, *The Issue Class*, 56 B.C. L. Rev. 121, 122-23 (2015).

191. FED. R. CIV. P. 23(c)(4).

192. *See Urethane*, 768 F.3d at 1251 (quoting *In re* Urethane Antitrust Litig., 237 F.R.D. 440 (D. Kan. 2006)); Seiner, *supra* note 190, at 133.

193. *See Urethane*, 768 F.3d at 1251 (quoting *In re* Urethane Antitrust Litig., 237 F.R.D. 440 (D. Kan. 2006)).

V. UNFAIRNESS RESULTING FROM TRADING ACCURATE RECOVERY FOR EFFICIENT ADJUDICATION

The moment a mass litigation becomes certified as a class action, there begins the balancing of accuracy for efficiency. Bringing a class action shifts the perspective from the individual plaintiff to the plaintiffs as a whole group.[194] As such, the class action litigation sacrifices accurate results for the individual plaintiffs in order to achieve efficient adjudication of the case and obtain a verdict or settlement. This is shown in part by the difference in the results of Bayer Rice and Syngenta Corn. Both claims were eventually resolved by settlements, but only Syngenta Corn was subject to the approval through the judge's discretion under Rule 23(e) for class actions.[195]

The settlement details and amounts per plaintiff were different between Bayer Rice and Syngenta Corn. These differences were likely influenced by more than just the variance of certain case facts covered in Sections II and III. The differences were also influenced by (1) the timing of settlement in the litigation and (2) who truly has control over approval of the settlement (the judge and party counsel or the plaintiffs). Comparing the details of the Bayer Rice and Syngenta Corn results reveals who really loses when the settlement sacrifices accuracy for efficiency in GMO Market Loss litigation.

A. Timing of Settlement

The point at which settlement arose during the litigations was vastly different in Bayer Rice and Syngenta Corn. Bayer's defense counsel battled through six adverse jury verdicts (and their appeals) before acquiescing to settle the seventh trial and later a global settlement with the remaining plaintiff producers, thereby showcasing great resistance to the entire process.[196] The turning point was the seventh trial, for this was the first time Bayer was willing to settle outside of a jury verdict and indicated a global settlement with rice producers was not far off.[197]

The Syngenta Corn settlement, on the other hand, was presented for approval after only one trial verdict was obtained in Kansas, with a Minnesota mistrial and

194. *See* Coffee, *supra* note 111, at 1346.

195. *See generally* FED. R. CIV. P. 23.

196. *See* Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *33-41, *In re* Genetically Modified Rice Litig., No. 4:06 MD 1811 CDP, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (E.D. Mo. Sept. 4, 2012).

197. Cherney, *supra* note 81.

subsequent settlement before retrial.[198] The parties had barely begun to see what may become of the Syngenta Corn litigation, whereas the Bayer Rice parties had six different cases and a settlement to review. Presumably, the Bayer Rice settlement was a more accurate estimate because the parties had these six trial verdicts upon which to base their negotiations. Syngenta Corn parties did have the benefit of the Bayer Rice precedent,[199] but every case is decided on its own merits, and as already discussed, cases with very similar facts can diverge dramatically. Settling earlier in the case was likely a strategic move by Syngenta, as they may have been feeling social pressure from their farming customers and financial pressure from litigating in three different states.[200] By settling early in the litigation, Syngenta Corn parties saved money in litigation costs and ensured a quicker payment of damages to plaintiffs (efficiency likely increased), but had less of an idea as to what the litigation was worth than Bayer Rice (accuracy likely decreased) had. The focus for the GMO Market Loss litigation comparison will be on the producer plaintiff's damage recovery, as it is the most comparable in Syngenta Corn and Bayer Rice and are most likely to be the plaintiffs in future similar litigations.

B. Settlement Details & Comparison

1. Bayer Rice Settlement Details

The ultimate settlement in Bayer Rice was termed a "global settlement," in which producers could choose whether they wanted to participate.[201] Since Bayer Rice was not certified as a class action, each producer plaintiff needed to decide whether to participate in said global settlement.[202] The settlement covered all United States long-grain rice producers who planted rice between 2006 and

198. *In re* Syngenta AG MIR 162 Corn Litig., 357 F. Supp. 3d 1094, 1100-01 (D. Kan. 2018).

199. *See In re* Syngenta AG MIR 162 Corn Litig., No. MDL 2591, 2016 U.S. Dist. LEXIS 132549, at *1380-81 (D. Kan. Sept. 26, 2016).

200. *See id;* Michael Shields, *ChemChina clinches landmark $43 billion takeover of Syngenta*, REUTERS (May 5, 2017, 12:19 AM), https://www.reuters.com/article/us-syngenta-ag-m-a-chemchina/chemchina-clinches-landmark-43-billion-takeover-of-syngenta-idUSKBN1810CU [https://perma.cc/3ZTY-4VVZ] (evidencing that, during the beginning portions of litigation, Syngenta was likely negotiating a deal to be purchased by ChemChina).

201. *See* Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *41, *In re* Genetically Modified Rice Litig., No. 4:06 MD 1811 CDP, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (E.D. Mo. Sept. 4, 2012).

202. *See id.*

2010.[203] It was a global settlement, but did not expand the definition of rice producer plaintiffs that are entitled to receive damages.[204] Because producer plaintiffs could affirmatively choose to participate, this global settlement was analogous to a private settlement among many participants. As long as farmers who planted at least 85 percent of the rice from 2006 to 2009 agreed to participate in the settlement and filed claims, Bayer was locked into the settlement amount and no amount would be reverted to Bayer.[205]

In the global settlement, there were three pots. The first pot was for market losses for rice planted during those years.[206] The payment was a per-acre payment, with the most money per acre being paid for market losses in 2006 and the least in 2010, which was consistent with the continuing market loss evidence presented in the case.[207] The second pot was $100 per acre to those who planted the two rice varieties that were most adversely affected by the contamination.[208] This second pot was in addition to the first, so a rice grower who planted contaminated varieties in 2006 and continued to grow long-grain rice into 2010 was to be paid from both pots, subject to the recovery caps.[209] The third pot was an alternative to the second pot, in which farmers can document financial damages beyond market loss and get paid.[210] This third pot required extensive documentation, was capped at $100 million, and the claim would be sent to binding arbitration if Bayer disputed it.[211] Because of the extensive documentation needed, it was recommended that farmers get help from attorneys in filing their claims.[212]

203. Patrick, *supra* note 15.

204. *See id.*

205. *Id.*

206. Lead Counsels' Memorandum in Support of Motion for Allocation and Distribution of Common Benefit Fees and Expenses at *41-42, *In re* Genetically Modified Rice Litig., No. 4:06 MD 1811 CDP, 2012 U.S. Dist. Ct. Briefs LEXIS 17321 (E.D. Mo. Sept. 4, 2012).

207. *Id.* at *40.

208. *Id.*

209. *Id.*

210. *Id.* at *40-41.

211. *Id.* at *41-42; June Grasso, *Bayer Pays $750 Million to Settle Rice Contamination Cases*, BUSINESSWIRE (July 1, 2011, 5:41 PM), https://www.businesswire.com/news/home/20110701006120/en/Bayer-Pays-750-Million-to-Settle-Rice-Contamination-Cases [https://perma.cc/PMH6-ZYPN].

212. *750 Million Settlement Reached in Bayer Contaminated Rice Lawsuits*, GRAY, RITTER & GRAHAM, P.C. (July 13, 2021, 6:14 PM), https://www.grgpc.com/750-million-settlement-reached-bayer-contaminated-rice-lawsuits/ [https://perma.cc/WW4K-R3YJ] (quoting Don Downing, lead attorney for plaintiffs in the MDL litigation).

2. Syngenta Corn Settlement Overview

The settlement in Syngenta Corn was a nation-wide class settlement. The settlement was $1.51 billion to be split among four subclasses and a portion allocated for attorney's fees.[213] Like the global settlement in Bayer Rice, no portion of the settlement money reverted to Syngenta.[214] The first subclass (Subclass 1) is any producer owning any interest in corn priced from September 15, 2013, to April 10, 2018, that did not purchase any of the Syngenta GM seeds at issue (Viptera and Duracade) during the entire period.[215] Subclass 1 was the defined class of producers that were bringing the action in the MDL action.[216]

The second subclass (Subclass 2) was any producer owning any interest in corn priced from September 15, 2013, to April 10, 2018, that at any time prior to April 10, 2010 (date of preliminary approval of the settlement), purchased Viptera or Duracade seed from Syngenta.[217] Subclass 2's recovery of damages was capped at $22.6 million and the average per-bushel payment to a producer of this subclass cannot exceed the average per-bushel payment to a producer in Subclass 1.[218] Adding Subclass 2 expanded the class of people beyond the original class certified in the class action and created some harsh recovery results.[219] The third subclass (Subclass 3) includes any grain handling facility in the United States owning any

213. Plaintiffs' Memorandum of L. in Support of Motion for Preliminary Approval of Settlement, Provisional Certification of Settlement Class & Subclasses, Appointment of Settlement Class Couns., Subclass Couns., & Class Representatives, Approval to Disseminate the Class Notice, Appointment of the Notice Adm'r and Claims Adm'r and Special Masters, & Adoption of a Schedule for the Final Approval Process at 16, *In re* Syngenta AG MIR 162 Corn Litig., No. 2:14-MD-02591-JWL-JPO (D. Kan. Mar. 12, 2018).

214. *See id.*

215. *Id.*; U.S. DIST. CT. OF KAN., CORN SEED SETTLEMENT PROGRAM: FREQUENTLY ASKED QUESTIONS 3 (December 15, 2020), https://www.cornseedsettlement.com/Docs/FAQs.pdf [https://perma.cc/NTL8-WUPT].

216. Plaintiffs' Memorandum of L. in Support of Motion for Preliminary Approval of Settlement, Provisional Certification of Settlement Class & Subclasses, Appointment of Settlement Class Couns., Subclass Couns., & Class Representatives, Approval to Disseminate the Class Notice, Appointment of the Notice Adm'r and Claims Adm'r and Special Masters, & Adoption of a Schedule for the Final Approval Process at 16, *In re* Syngenta AG MIR 162 Corn Litig., No. 2:14-MD-02591-JWL-JPO (D. Kan. Mar. 12, 2018).

217. *In re* Syngenta AG MIR 162 Corn Litig., 357 F. Supp. 3d 1094, 1101 (D. Kan. 2018); CORN SEED SETTLEMENT PROGRAM: FREQUENTLY ASKED QUESTIONS, *supra* note 215, at 3-4.

218. CORN SEED SETTLEMENT PROGRAM: FREQUENTLY ASKED QUESTIONS, *supra* note 215, at 13-14.

219. *See In re* Syngenta AG MIR 162 Corn Litig., No. MDL 2591, 2016 U.S. Dist. LEXIS 132549, at *1358 (D. Kan. Sept. 26, 2016); *Syngenta AG MIR*, 357 F. Supp. 3d at 1108.

interest in corn priced during the same period and is capped at $29.9 million.[220] The fourth subclass (Subclass 4) includes any United States ethanol production facility owning any interest in corn priced during the same period and is capped at $19.5 million.[221] In the original settlement term sheet agreed on by the parties, the individually represented plaintiffs (Illinois federal plaintiffs and all state court plaintiffs)[222] and the plaintiffs included in the class action were going to be another separate subclass, but it did not make it into the approved settlement.[223] This decreased the differentiation that would take place in the claims administration process (more efficient), but likely caused more inaccuracy among plaintiff recovery.

3. Syngenta Corn Expanded Settlement Class

The Syngenta Corn settlement expanded the amount of plaintiffs who could recover from the class action beyond what was certified under the Lanham Act class and thus created a new class, the "Settlement Class."[224] Over 600,000 entities qualified to be a part of the Settlement Class.[225] The Lanham Act claim was ruled by a summary judgment in Syngenta's favor and thus plaintiffs could not recover under their Lanham Act claims, but because this ruling is subject to appeal, the

220. CORN SEED SETTLEMENT PROGRAM: FREQUENTLY ASKED QUESTIONS, *supra* note 215, at 13.

221. Plaintiffs' Memorandum of L. in Support of Motion for Preliminary Approval of Settlement, Provisional Certification of Settlement Class & Subclasses, Appointment of Settlement Class Couns., Subclass Couns., & Class Representatives, Approval to Disseminate the Class Notice, Appointment of the Notice Adm'r and Claims Adm'r and Special Masters, & Adoption of a Schedule for the Final Approval Process at 16, *In re* Syngenta AG MIR 162 Corn Litig., No. 2:14-MD-02591-JWL-JPO (D. Kan. Mar. 12, 2018); CORN SEED SETTLEMENT PROGRAM: FREQUENTLY ASKED QUESTIONS, *supra* note 215, at 13.

222. Plaintiffs' Memorandum of L. in Support of Motion for Preliminary Approval of Settlement, Provisional Certification of Settlement Class & Subclasses, Appointment of Settlement Class Couns., Subclass Couns., & Class Representatives, Approval to Disseminate the Class Notice, Appointment of the Notice Adm'r and Claims Adm'r and Special Masters, & Adoption of a Schedule for the Final Approval Process at 11, *In re* Syngenta AG MIR 162 Corn Litig., No. 2:14-MD-02591-JWL-JPO (D. Kan. Mar. 12, 2018).

223. *See In re* Syngenta Ag Mir 162 Corn Litig., No. 14-md-2591-JWL, 2018 WL 1726345, at *6 (D. Kan. Apr. 10, 2018).

224. Memorandum and Order at 1, *In re* Syngenta AG MIR 162 Corn Litig., No. 14-md-2591-JWL (D. Kan. Dec. 7, 2018).

225. Plaintiffs' Memorandum of L. in Support of Motion for Preliminary Approval of Settlement, Provisional Certification of Settlement Class & Subclasses, Appointment of Settlement Class Couns., Subclass Couns., & Class Representatives, Approval to Disseminate the Class Notice, Appointment of the Notice Adm'r and Claims Adm'r and Special Masters, & Adoption of a Schedule for the Final Approval Process at 3, *In re* Syngenta AG MIR 162 Corn Litig., No. 2:14-MD-02591-JWL-JPO (D. Kan. Mar. 12, 2018).

court allowed this class settlement based on the nationwide Lanham Act class (and then expanded that class).[226] Using the nation-wide Lanham Act class was a more efficient way to come to a settlement agreement, but is arguably not the most accurate, for a nation-wide settlement likely divested producers from states with stronger theories of recovery (due to variances in state law) from achieving a higher recovery than producers could obtain in other states.[227] Expanding the class in a capped settlement—such as the $1.51 billion in Syngenta Rice—effectively divests producer plaintiffs who were in the original class because they had to share the settlement between a larger pool of plaintiffs.[228]

A settlement class is normally given heightened scrutiny for Rule 23 factors; however, a judge is not required to evaluate the class under heightened scrutiny when it has been previously certified.[229] Due to the vast differences in subclasses, the expanded settlement class, and the fact the Lanham Act claims failed for the plaintiffs, the settlement class could have failed the superiority and predominance requirements under a heightened scrutiny standard. Finding the settlement is fair and adequate is not enough to satisfy the requirement that the settlement is superior to other avenues of relief.[230] In this way, the previous class certification (certified for the efficient litigation benefits) had a major effect on the outcome of this litigation.[231] Defendants have historically used the tactic of a settlement class to limit their liability early in class action litigation, thereby resulting in a less favorable outcome for the plaintiffs.[232]

4. Syngenta Corn Recovery and Opt Out

Recovery for producer plaintiffs in Syngenta Corn was based on the number of acres as reported on the producer's USDA Farm Service Agency (FSA) 578 production reporting form or the USDA Risk Management Agency (RMA) production reporting form (used for crop insurance purposes) and multiplied by the average amount of bushels produced in the county where the acres were

226. *See In re* Syngenta AG MIR 162 Corn Litig., 357 F. Supp. 3d 1094, 1105 (D. Kan. 2018).

227. *See id.* at 1107.

228. *See, e.g., id.* at 1101.

229. *Id.* at 1110; *cf.* Advisory Committee Notes, FED. R. CIV. P. 23.

230. Coffee, *supra* note 111, at 1437.

231. *See* Report and Recommendation of Special Master Ellen Reisman Regarding Att'ys' Feed, Expenses and Service Awards at 6, *In re* Syngenta AG MIR 162 Corn Litig., No. 2:14-MD-02591-JWL-JPO (D. Kan. Nov. 21, 2018); *Syngenta AG MIR*, 357 F. Supp. 3d at 1110.

232. Darren M. Franklin, Note, *The Mass Tort Defendants Strike Back: Are Settlement Class Actions a Collusive Threat or Just a Phantom Menace?,* 53 STAN. L. REV. 163, 165 (2000).

grown.[233] These documents are provided to the claim administrator straight from the government agencies rather than from the plaintiffs.[234] The claim administrator then multiplies the quantity found by a weighted average for recovery, which was dependent on the year that certain acres were grown.[235] Unlike Bayer Rice, plaintiffs in Syngenta Corn were automatically a part of the settlement class unless they timely opted out of the settlement. This was even the case for plaintiffs that previously opted out of the Syngenta Corn class action to bring individual claims.[236]

C. Syngenta Corn Settlement: Rule 23(e) Analysis

The judge overseeing a class action has discretion under Rule 23(e) to inquire as to the fairness and adequacy of a settlement arising from such action.[237] In Syngenta Corn, Honorable Judge Lungstrum ruled the settlement was fair and reasonable, based in part on (1) the "substantial risk" of possible future recovery for plaintiffs; (2) the little number of objections and opt-outs (which was determined to be the corn producers vote on whether they approve of the settlement); and (3) the immediate recovery was more valuable than the possibility of a more favorable outcome later.[238]

1. Syngenta's Novel Question

Honorable Judge Lungstrum concluded Syngenta's legal duty to protect farmers was a "novel question" in Syngenta Corn because the GM trait in Bayer Rice had not been approved in the United States, and thus the ruling that Syngenta had a legal duty was subject to challenge on appeal.[239] Ultimately, this led the court to highlight the substantial risk to plaintiff's recovery without this settlement.[240] Honorable Judge Lungstrum did not take into account how premature this settlement likely was, for only one trial had gone to verdict[241] and it resulted in a very handsome award for the plaintiffs (in fact, the plaintiffs got 100 percent of

233. CORN SEED SETTLEMENT PROGRAM: FREQUENTLY ASKED QUESTIONS, *supra* note 215, at 13-14.

234. *See Syngenta AG MIR*, 357 F. Supp. 3d at 1105; CORN SEED SETTLEMENT PROGRAM: FREQUENTLY ASKED QUESTIONS, *supra* note 215, at 16.

235. CORN SEED SETTLEMENT PROGRAM: FREQUENTLY ASKED QUESTIONS, *supra* note 215, at 13-14.

236. *Id.* at 5.

237. FED. R. CIV. P. 23(e)(2).

238. *See Syngenta AG MIR*, 357 F. Supp. 3d at 1101-02.

239. *Id.*

240. *Id.* at 1102.

241. *Id.* at 1100-01.

their compensatory damages alleged).[242] This was a strategic move by Syngenta to come to the table when it did, as the Minnesota state class action trial was approaching oral argument and Honorable Judge Lungstrum had set forth the scheduling order for four more class trials to start motions as early as September 22, 2017.[243] With only one verdict, Syngenta was able to keep the upper hand in settling early before more verdicts could have been decided against them, thereby reducing the amount of risk the court highlighted.[244]

2. The Double Opt-Out

The number of plaintiff objections and opt-outs may be one measurement to use in determining the fairness and adequacy of a settlement under Rule 23(e)(2); however, it should be given proper weight. The court in Syngenta Corn likely gave it too much emphasis, considering every plaintiff who opted out of the class after it was certified had to again opt out of the settlement.[245] This "double opt-out" translates to additional and substantial time and expense for both plaintiffs and their attorneys.[246] Rule 23(e) speaks of providing a new opportunity for members to elect to be excluded from the settlement, but is silent as to those who chose to be excluded from the class action.[247] Certainly, the advisory committee's focus was the convenience of the opt-out process.[248] There is an argument that allowing previous opt-outs to choose to opt back *in* to the settlement would be a more convenient approach for those who opted out previously, though others argue many eligible class members would not take the affirmative action to opt-in.[249] The differentiating factor in Syngenta Corn is a large amount of plaintiffs previously opted-out, obviously showing an interest in litigating on their own behalf.[250] It may

242. *See generally* Tidgren, *supra* note 101.

243. *See* Kristine A. Tidgren, *Additional Syngenta Trials Have Been Scheduled in Kansas MDL*, IOWA STATE UNIV. (July 7, 2017), https://www.calt.iastate.edu/blogpost/additional-syngenta-trials-have-been-scheduled-kansas-mdl [https://perma.cc/XDN3-92PR].

244. *See* Franklin, *supra* note 232, at 165.

245. *See Syngenta AG MIR*, 357 F. Supp. 3d at 1101-03; CORN SEED SETTLEMENT PROGRAM: FREQUENTLY ASKED QUESTIONS, *supra* note 215, at 5.

246. Coffee, *supra* note 111, at 1383.

247. *See* FED. R. OF CIV. P. 23(e)(4).

248. *See* Advisory Committee Notes, FED. R. OF CIV. P. 23.

249. *See* Coffee, *supra* note 111, at 1447-48.

250. *See, e.g.,* Toups/Coffman Plaintiffs' Response in Opposition to Class Plaintiffs' Motion for Preliminary Approval of Proposed Class Settlement Agreement at 2, *In re* Syngenta AG MIR 162 Corn Litig, , No. 2:14-MD-02591-JWL-JPO (D. Kan. Mar. 26, 2018); Toups/Coffman Plaintiffs' Motion to i) Delay Consideration of the Request for Preliminary Approval of the Mediated Settlement Agreement, ii) Be Appointed to the Plaintiffs' Settlement Negotiation Committee, and iii) Compel the Production of Documents and

be fairer to plaintiffs and their attorneys to affirmatively choose to opt back in to the settlement rather than requiring a double opt-out to pursue individual claims. This opt-in process for current opted-out members would be a much stronger indication the settlement was fair and adequate—it would be an affirmative vote rather than a passive acknowledgment. However, in this contention between accuracy and efficiency, tracking who opted out and stayed out versus who opted back in would likely cost additional funds and time.

If the overwhelming goal was efficiency in the litigation—as it appears to be in class actions—the opt-back-in framework would likely not further the goal of quicker recovery. If the goal is accuracy and fairness, the opt-back-in option is more attractive. Regardless of whether the court chooses between quicker recovery or accurate recovery, if the court does not approve a class settlement opt-in procedure, the number of settlement opt-outs should be given little if any weight in determining the fairness of the settlement under Rule 23(e).

3. Plaintiff Objections to Syngenta Corn Settlement

Honorable Judge Lungstrum determined immediate recovery was more favorable and rejected objections made by various plaintiffs who argued the settlement was not fair and reasonable.[251] These objections shed light on the tradeoff of accuracy in damages for efficient class action litigation and showcased some ugly results to producer plaintiffs. Some objections have already been illuminated, including the double opt-out procedure,[252] the inclusion of individually represented plaintiffs, and the expanded "settlement class."[253] One of the objections not yet covered is the Subclass 2 recovery cap of $22.9 million.

Subclass 2 is the product of a buyer contract written up by Syngenta that was signed by every producer who grew Viptera or Duracade.[254] All buyers of Syngenta Corn had to sign a contract, which contained a prohibition against any future tort recovery from Syngenta and a one-way attorney fee provision favoring Syngenta.[255] With the additional defense of the economic loss doctrine, the court ruled the cap on recovery for these producers is fair and reasonable.[256] Though the

Information at 1, *In re* Syngenta AG MIR 162 Corn Litig., No. 2:14-MD-02591-JWL-JPO (D. Kan. Feb. 27, 2018).

251. *See In re* Syngenta AG MIR 162 Corn Litig., 357 F. Supp. 3d 1094, 1107 (D. Kan. 2018).

252. *See id.*

253. *See id.* at 1104-05.

254. *Id.* at 1107-1108.

255. *See id.*

256. *Id.*

court had a founded basis for the cap for Viptera/Duracade producers, this created grave unfairness when looking at the results. This unfairness could have been mitigated if these producers would have been able to litigate through their own trials before settlement approval.

First, no matter how many acres of Viptera and Duracade were planted by the producer, all of their acres were subject to the Subclass 2 cap for every year of the claim period.[257] The producer could not split his or her acres up to determine what amount of acres could be in Subclass 1 and what acres would be in Subclass 2.[258] The claim period was September 15, 2013, to April 10, 2018.[259] Even if a producer had 10 acres of Viptera amongst their 5,000 acres of corn planted in 2017, *every corn acre* they produced from 2013 through 2018 was put into the capped Subclass 2.[260] It did not even matter whether the producer knew they were planting Syngenta Corn; it only mattered whether they signed the buyer agreement and planted Viptera or Duracade.[261] Both of these nuances likely created a much bigger Subclass 2 than was anticipated.

Even when producers farmed with proper stewardship and waited until proper market approval to plant, their claims were limited in Subclass 2.[262] If a producer waited until Chinese approval to grow Viptera (December 2014) or

257. *Id.*

258. *Id.*

259. CORN SEED SETTLEMENT PROGRAM: FREQUENTLY ASKED QUESTIONS, *supra* note 215, at 3.

260. *Syngenta AG MIR*, 357 F. Supp. 3d at 1104.

261. *See id.* at 1108; Emily Unglesbee, *Rootworm Trait Advances*, PROGRESSIVE FARMER DTN, (July 17, 2017, 11:22 AM), https://www.dtnpf.com/agriculture/web/ag/crops/article/2017/07/17/duracade-gets-nod-china-still-awaits-2 [https://perma.cc/Q9Q6-BJ3F] (demonstrating that it may even be possible for a producer to be unaware as to whose seed they are producing. Syngenta seed, along with Monsanto and Pioneer seed, is sold through local dealers whose names may not be related to Syngenta, Monsanto, or Pioneer); *see also generally Hybrid Corn Seed*, PETERSON FARMS SEED (May 7, 2021, 10:28 AM), https://www.petersonfarmsseed.com/products/corn/ [https://perma.cc/VQM5-8HGA] (suggesting that producers may buy seed based on the performance in a local dealer's seed plot without looking at who actually produced the seed and only be aware of the particular name given to that seed by their seed dealer).

262. *See Syngenta AG MIR*, 357 F. Supp. 3d at 1108.

Duracade (July 2017),[263] they were still parties to the buyer agreement and thus put in Subclass 2.[264]

In ruling these results fair and rejecting objections by purported Subclass 2 members, Honorable Judge Lungstrum additionally reasoned, "Subclass [2] members have no successful trial result on which to rely in negotiating for a larger settlement recovery."[265] The Subclass 2 members had no trial result to rely on because of how early this settlement was negotiated and accepted—even the *original* class members had only one successful trial result.[266] Honorable Judge Lungstrum's reasoning is double-sided, and likely shows how efficiency in litigation was favored over the accuracy in claim recovery. Had there been more emphasis on accuracy (i.e., treating the Duracade and Viptera producers as individuals), these plaintiffs may have had a chance to overcome the additional contractual obstacles. The settlement decision took away any chance for a thorough challenge of the agreement for these Subclass 2 producers. In a similar future situation, providing producers an opportunity to challenge a similar grower agreement or allowing a more individualized look into claim recovery would likely mitigate this blanket assertion resulting in unfair recoveries to certain unsuspecting plaintiffs.

Many plaintiffs objected to the settlement proposal due to the inaccuracy of using county yields rather than a producer's individual yields in calculating the amount of bushels to be paid on.[267] Each producer's yields in any given county almost always vary from that of the county's average yields.[268] Honorable Judge Lungstrum approved of this method, stating, "[t]he use of the county averages greatly aids the claims process: . . . [and] makes the process far more streamlined."[269] However, the crop insurance RMA documents that can be used to find the individual plaintiff's acreage (rather than using the FSA 578 data) also

263. *Syngenta Receives Chinese Import Approval for Agrisure Viptera® Corn Trait*, SYNGENTA U.S. (Dec. 22, 2014), https://www.syngentacropprotection.com/news_releases/news.aspx?id=187482 [https://perma.cc/KBS5-JTP5]; *see also* Unglesbee, *supra* note 261.

264. *See Syngenta AG MIR*, 357 F. Supp. 3d at 1108.

265. *Id.*

266. *See id.* at 1100.

267. *Id.* at 1108.

268. *See* Gary Schnitkey et. al., *The Forgotten Variable: Yield and the Choice of Farm Program Option*, FARMDOCDAILY (Nov. 20, 2014), https://farmdocdaily.illinois.edu/2014/11/forgotten-variable-yield-and-farm-program-choice.html [https://perma.cc/U4XP-NC5R].

269. *Syngenta AG MIR*, 357 F. Supp. 3d at 1108.

holds the individual's bushels produced on the same data sheet.[270] Honorable Judge Lungstrum noted that the government agencies provided these documents at no cost.[271] To alleviate this inaccuracy, all that needed to be done was to look for the bushel amount produced, rather than the acres farmed, on the RMA forms *already collected*.[272] The claims process already accounted for producers who did not have crop insurance by allowing claimant farmers to declare their acres under penalty of perjury and could have easily had them declare their bushel production instead.[273] Allowing the payment to be based on the producer's actual yields also alleviates another problem, as the county average of corn did not differentiate between irrigated and non-irrigated acres.[274] Irrigated corn acres produce more than non-irrigated corn acres, especially in areas with variable rain during the growing season.[275] Using the county average increased the inaccuracy in damages received by the farmer in two different ways that could have been eliminated by using individual yields without much additional burden in cost or efficiency. Honorable Judge Lungstrum's conclusion that using county average yields creates efficiency that outweighs more accurate claim recovery is unconvincing. In future GMO Market Loss litigations, courts should take care to use individual producer's bushels from RMA data to create a more accurate and fair result with very little increased cost.

270. *See* U.S. DEPT. AGRIC., 2021 CROP INSURANCE HANDBOOK 656 (Nov. 2020) https://www.rma.usda.gov/-/media/RMA/Handbooks/Coverage-Plans—-18000/Crop-Insurance-Handbook—-18010/2021-18010-1-Crop-Insurance-Handbook.ashx [https://perma.cc/P4XY-VMS3].

271. *Syngenta AG MIR*, 357 F. Supp. 3d at 1105.

272. *See* U.S. Dept. Agric., *supra* note 270.

273. *Syngenta AG MIR*, 357 F. Supp. 3d at 1105.

274. *Nationwide GMO Corn Class Action Lawsuit Settled for $1.51 Billion*, FARMFUTURES (Mar. 14, 2018), https://www.farmprogress.com/corn/nationwide-gmo-corn-class-action-lawsuit-settled-151-billion [https://perma.cc/JB83-UYRU] (quoting plaintiffs' attorney David Domina, of Domina Law Group).

275. *See* USDA RISK MANAGEMENT AGENCY, RMA Actuarial Commodity Report: Corn, 2021, Revenue Protection, (State), (County), T-Yield Tab (permacc date), https://webapp.rma.usda.gov/apps/actuarialinformationbrowser2021/DisplayCrop.aspx [permacc]. RMA T-yields are based on the county average yields over a period of time. The exact bushel difference in grain corn between irrigated and non-irrigated in varies by state: 10 bushel more for irrigated grain corn in Polk County, Iowa; 15 bushel more in Clay County, South Dakota; 17 bu. more in Douglas County, Minnesota; 35 bu. in Brown County, Texas; 48 bu. Cedar County, Nebraska; 66 bu. Chase County, Kansas. The difference on a producer's farm is likely more drastic than the county averages. The lack of differentiation likely created inflated payments for non-irrigated acres and reduced recovery to irrigated corn acres. Using individual yields would be able to accurately account for this difference without additionally burdening the claims process.

VI. ATTORNEYS' FEES—ANOTHER ISSUE

Attorneys representing producers in future GMO Market Loss litigations must be aware of the Bayer Rice and Syngenta Corn precedent as it relates to attorney fee allocation. In the interest of brevity, the breakdown of attorney's fees will not be covered in detail. However, two things are certain: (1) there is overwhelming precedent for the reduction and/or modification of attorney's private contingency fee contracts,[276] and (2) due to common benefit funds and fee sharing agreements, class action attorneys will likely be favored in the allocation of attorneys' fees due to their efforts clearly benefitting the entire class of potential plaintiffs.[277] Likely lead attorneys bringing the lawsuit are doing work that can clearly be tied to benefitting the whole group of plaintiffs, which will have a greater portion of the settlement fund.[278]

276. *See* Report and Recommendation of Special Master Ellen Reisman Regarding Att'ys' Feed, Expenses and Service Awards at 46-52, *In re* Syngenta AG MIR 162 Corn Litig., No. 2:14-MD-02591-JWL-JPO (D. Kan. Nov. 21, 2018) (discussing a number of recent mass tort or class action cases providing the framework for modification of contingency fees, including *In re* NFL Players' Concussion Injury Litig., MDL No. 2323, 2018 WL 1635648, (E.D. Penn. Apr. 5, 2018); *In re* Vioxx Prod. Liab. Litig., MDL No. 1657, 760 F. Supp. 2d 640 (E.D. La. 2010); and *In re* Volkswagen "Clean Diesel" Mktg., Sales Practices & Prod. Liab. Litig., MDL No. 2672, 2017 WL 3175924 (N.D. Cal. July 21, 2017)).

277. *See id.* at 56-57, 66-88, 72-73. Special Master Reisman argued in her report and recommendation for Individually Represented Plaintiffs' Attorneys to get an amount of 10 percent from the settlement fund allocated to attorneys' fees (one third of the total $1.51 settlement) due to their efforts putting additional pressure on Syngenta during litigation, whereas the class action attorneys' recovery seemed to be a given based on her analysis in the 90 percent of attorneys' fees allocated to the common benefit fund. Reisman stated the IRPAs could recover from the common benefit fund, but the class action attorneys likely had done more hours of more impactful work, including depositions, court time, and settlement negotiations than individual attorneys due to the class actions getting tried before the settlement and certain attorney involvement.

278. *See id.* at 56-57, 66-88, 72-73; *See also In re* Genetically Modified Rice Litig., 764 F.3d 864, 872-73 (8th Cir. 2014). Although the Bayer Rice litigation was a mass tort, the common benefit fund was also created and favored the lead plaintiffs' counsel that was appointed for the multi-district litigation to recover from the allocated common benefit fund established. The court determined that the MDL lead plaintiffs' counsel's work benefitted even state court cases in their claims, even though the court also ruled the state court attorneys worked "separate and apart from the leadership group." The court ruled the state court plaintiff attorneys benefitted from the legal theories and MDL litigations but held there was no basis to say the attorneys' favorable results in state court pressured Bayer to settle with the MDL plaintiffs. Since the non-MDL lead attorneys worked separately from the MDL attorneys and did not collaborate their activities, they were not eligible to recover from the common benefit fund allocated from the global settlement. The court ultimately ruled that the common benefit fund would be allocated from all plaintiffs' claims recovered from the MDL global settlement fund even though some plaintiffs' own attorneys would not recover attorney

A lawyer looking into representing plaintiffs in GMO Market Loss litigation should proceed with caution, as the presiding judge has discretion in both the reduction of contingency fee contracts and the allocation of the common benefit fund.

VII. CONCLUSION

As presented, the results are vastly different between these two actions, without many material differences in the facts giving rise to the farmers' claims. It is clear that the presiding judge has considerable discretion in mass actions, due in part to Rule 23. This discretion is used in the trade off of accuracy for efficiency in mass actions; the judge dictates which way the pendulum will swing between more efficiency or more accuracy. It is clear GMO Market Loss litigations are no exception, as evidenced by Bayer Rice and Syngenta Corn. Being that these are the only two precedents, it will be interesting to see how this trade off unfolds as future cases are decided. One thing is clear: as an attorney or plaintiff, never count your crop before it is harvested (a rather appropriate rendition of "don't count your chickens before they hatch"). This is a theme attorney involved in or who remembered the Bayer Rice cases should have kept close to heart as they began to litigate Syngenta Corn.

Bayer Rice provided "the good" of GMO Market Loss litigation and Syngenta solidified it: farmers can get relief when GMO seed developers cause a loss of an export market in employing poor stewardship methods. This is in all actuality *very* good. Bayer Rice and Syngenta Corn illuminated "the bad" in the trade off of accuracy for efficiency in mass litigation, due to the considerable discretion the presiding judge possesses. Syngenta Corn demonstrated "the ugly" in the unfair and inaccurate results when the pendulum swings too far into efficiency. Attorneys bringing claims on behalf of producers in a GMO Market Loss situation should consider the good, the bad, and the ugly of GMO Market Loss litigation.

fees from the common benefit fund. The court also approved a fee-multiplier award for six law firms who were the leadership in the prosecution of the claims in the MDL cases.