

# AGRICULTURAL POLICY AND LAW: NEW DEVELOPMENTS/ PRESSING ISSUES

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## Executive Summary

### I. 2002 Farm Bill

- The commodity title of the Bill re-labels the income-support programs used during 1998 – 2001. Under most corn-soybean price scenarios, the 2002 Bill provides a slightly higher level of support.
- Acre/yield updating decisions should be assisted with spreadsheet tools like the one at [www.farmdoc.uiuc.edu](http://www.farmdoc.uiuc.edu).
- The new Bill allows for significant increases in conservation payments. Producers should watch for opportunities under the EQIP and CSP programs.

### II. Protecting Farmers and Lenders from Elevator Failure

- USDA issued new regulations that preempt state regulation of the buying and selling activities of federally licensed warehouses.
- The impact of this change is seen in the recent Ty-Walk elevator failure; farmers selling grain to Ty-Walk or storing grain, and lenders holding Ty-Walk warehouse receipts would all have received less protection under federal law than under the current Ill. Grain Code; farmers, in particular, would have fared substantially less favorably.
- Various policy options exist to address farmer concerns, including federal legislation that would “undue” the effect of the new regulations.
- Recommendations regarding how to fix the Illinois Grain Code have been made; the funding problem needs to be addressed since the Illinois Grain Insurance Fund has a “loan” from the State of Illinois; oversight of “farmer marketing programs” should also be considered.
- Under existing law, farmers can take protective steps in the event of elevator failure; the most important step is not to allow delay pricing contracts to extend beyond 270 days.

### III. Liability Risks in Growing Transgenic Crops

- Theoretically, growing transgenic crops can result in damages to human health, the environment, and property, and damages for patent infringement.
- Farmers can reduce their liability risk for property damage, e.g., damaging neighbor's crop through pollen drift; these steps include delivering transgenic crops to appropriate marketing points, being truthful about varieties delivered, avoiding certain contract language.
- Farmers who, without authorization, save seed from transgenic crops protected by patents (e.g., saving seed from Roundup Ready beans) are liable for up to three times the technology fees that should have been paid, plus attorney fees in some cases.

# Agricultural Policy and Law: New Developments/Pressing Issues

by Donald L. Uchtmann  
and Robert J. Hauser



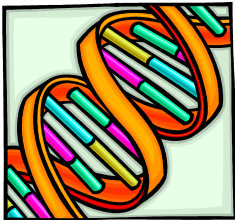
# Law and Policy Topics



2002 Farm Bill



Protecting Farmers & Lenders from  
Elevator Failure



Liability Risks in Growing Tx Crops  
(E.g., Root Worm Resistant Bt Corn)

# Topic: 2002 Farm Bill



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# 2002 Bill's Commodity Title

- Three types of payments
- 1st Type: Fixed (Direct) payment like AMTA
  - Base bushels for corn, beans, and wheat
  - 28 cents times corn base bushels
  - 44 cents times bean base bushels
  - 52 cents times wheat base bushels



## 2<sup>nd</sup> Type of Payment: Counter-Cyclical

Payment based on national average price (Counter-Cyclical Payment), institutionalizing MLA's

- Base bushels for corn, beans, and wheat
- Effective “trigger price” at national level:
  - Corn – \$2.32, Beans – \$5.36, Wheat - \$3.34
  - Higher, if based on IL prices



## 3<sup>rd</sup> Type of Payment: LDP

- Loan Deficiency Payments
  - National corn rate \$1.98
  - National bean rate \$5.00
  - National wheat rate \$2.80



# EXAMPLE OF 1/2 CORN, 1/2 BEAN ILLINOIS SIMULATION

**CORN = \$1.89**

**BEANS = \$4.60**

	2002 BILL			1996 BILL		
	ACRE	Corn	Beans	ACRE	Corn	Beans
<b>DIRECT PAYMENT</b>	<b>\$21</b>	<b>\$28</b>	<b>\$13</b>	<b>\$14</b>	<b>\$27</b>	<b>\$0</b>
<b>CC or MLA &amp; OILSEED</b>	<b>\$24</b>	<b>\$36</b>	<b>\$12</b>	<b>\$18</b>	<b>\$30</b>	<b>\$6</b>
<b>LOAN PGM</b>	<b>\$27</b>	<b>\$26</b>	<b>\$28</b>	<b>\$27</b>	<b>\$16</b>	<b>\$38</b>
<b>Program Support</b>	<b>\$72</b>	<b>\$90</b>	<b>\$53</b>	<b>\$59</b>	<b>\$73</b>	<b>\$44</b>
<b>Mkt Rev - Var Cost</b>	<b>\$99</b>	<b>\$105</b>	<b>\$93</b>	<b>\$99</b>	<b>\$105</b>	<b>\$93</b>
<b>TOTAL</b>	<b>\$171</b>	<b>\$195</b>	<b>\$146</b>	<b>\$158</b>	<b>\$178</b>	<b>\$137</b>

## EXAMPLE OF 1/2 CORN, 1/2 BEAN ILLINOIS SIMULATION

CORN = \$2.15

BEANS = \$5.86

	2002 BILL			1996 BILL (WITH MLA and oilseed)			1996 BILL (W/O MLA and oilseed)		
	ACRE	Corn	Beans	ACRE	Corn	Beans	ACRE	Corn	Beans
DIRECT PAYMENT	\$21	\$28	\$13	\$14	\$27	\$0	\$14	\$27	\$0
CC or MLA & OILSEED	\$13	\$24	\$2	\$18	\$30	\$6	\$0	\$0	\$0
LOAN PGM	\$3	\$5	\$1	\$3	\$2	\$3	\$3	\$2	\$3
Program Support	\$37	\$57	\$16	\$34	\$59	\$9	\$16	\$29	\$3
Mkt Rev - Var Cost	\$145	\$143	\$147	\$145	\$143	\$147	\$145	\$143	\$147
<b>TOTAL</b>	<b>\$182</b>	<b>\$200</b>	<b>\$163</b>	<b>\$179</b>	<b>\$202</b>	<b>\$156</b>	<b>\$161</b>	<b>\$172</b>	<b>\$150</b>

# EXAMPLE OF 1/2 CORN, 1/2 BEAN ILLINOIS SIMULATION

CORN=\$2.40

BEANS=\$6.73

	2002 BILL			1996 BILL (WITH MLA and OILSEED)			1996 BILL (WO MLA and OILSEED)		
	ACRE	Com	Beans	ACRE	Com	Beans	ACRE	Com	Beans
DIRECT PAYMENT	\$21	\$28	\$13	\$14	\$27	\$0	\$14	\$27	\$0
CC or MLA & OILSEED	\$4	\$8	\$0	\$18	\$30	\$6	\$0	\$0	\$0
LOAN PGM	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Program Support	\$25	\$36	\$13	\$32	\$57	\$6	\$14	\$27	\$0
Mkt Rev - Var Cost	\$183	\$180	\$185	\$183	\$180	\$185	\$183	\$180	\$185
<b>TOTAL</b>	<b>\$207</b>	<b>\$216</b>	<b>\$198</b>	<b>\$214</b>	<b>\$237</b>	<b>\$191</b>	<b>\$196</b>	<b>\$207</b>	<b>\$185</b>



# Updating Decisions

- Updating base acres allows you to update yields for CC payments
- But, corn acres pay better than wheat which pays better than beans for direct and (in general) for CC payments
- So, ideally, updating base also increases corn base
- But there will often be a tradeoff involving a decrease of corn base against increasing the program yields

**Estimated Direct and Counter-Cyclical Payments  
Under the 2002 Farm Bill for Different Base Acre and Yield Alternatives**

	Northern	Central	Southern
Direct and counter-cyclical with maximum counter-cyclical payments -----\$ per acre -----			
Current base acres and yields	<b>\$54.90</b>	\$48.30	\$33.34
Updated acres, current program yields	49.23	46.33	33.57
Updated acres, 70% diff.yields	53.52	51.43	38.23
Updated acres, 93.5% yields	53.20	<b>51.58</b>	<b>38.68</b>
Direct and counter-cyclical with 50 % of maximum counter-cyclical payments -----\$ per acre -----			
Current base acres and yields	<b>\$40.25</b>	\$35.64	\$24.88
Updated acres, current program yields	36.31	34.28	25.03
Updated acres, 70% diff.yields	38.45	36.83	27.37
Updated acres, 93.5% yields	38.30	<b>36.90</b>	<b>27.59</b>
Direct with no counter-cyclical payments -----\$ per acre -----			
Current base acres and yields	<b>\$25.61</b>	<b>\$22.98</b>	\$16.41
Updated acres, current program yields	23.39	22.22	<b>16.50</b>
Updated acres, 70% diff.yields	23.39	22.22	<b>16.50</b>
Updated acres, 93.5% yields	23.39	22.22	<b>16.50</b>

# Questions about Updating?

- Run your numbers with spreadsheets
  - E.g., one at [www.farmdoc.uiuc.edu](http://www.farmdoc.uiuc.edu)
  - See handout
- Where are you in the process?
- Problems/issues?

# Conservation Title



- From \$2.2 billion per year to \$3.9
- Increases in CRP and WRP acres
- Large (relative) increases in FPP and WHIP
- EQIP
  - Nearly \$1 bil per year, or about 4-5X current spending
  - 60% to livestock (large operations now eligible)
  - 40% to crops
  - \$450,000 cap

# Conservation Security Program (CSP)

- New program introduced by Harkin
- Aimed at practices on “working lands”
- Three tier program
- Maximum annual payments of \$20K, \$35K, or \$45K



# Topic: Protecting Farmers From Elevator Failure



- **Important:** Elevators can and do fail!!!
- **Timely:** In August, USDA “preempted” state regulation of federally licensed grain warehouses
- **Relevant:** Ty-Walk (Illinois’ largest elevator failure) sensitized farmers to the risk of failure

# Do Elevators Fail?

## Recent Illinois Elevator Failures

8/12/02	Ashley Elevator	~\$ 1.1 Mil.
4/04/02	Diss Grain & Trucking	~\$ 0.1 Mil.
8/23/01	Ty-Walk Liq. Sales	~\$42.0 Mil.
8/11/00	Grainary Inc.	~\$ 0.5 Mil.

*Source: Ill. Dept. of Agriculture*

# Do Elevators Fail?

## IL Elevator Failure Statistics

75 failures since IL Grain Ins. Fund established (1983)

- Average incidence: ~ 3/year
- Trends: ↓ Incidence (IL); ↑ Magnitude (Everywhere)
- Claimants: 5285 producers, holders of warehouse receipts, other grain depositors
- Total claims: ~ \$140 Mil.

24 required tapping the IL Grain Insurance Fund

- IGIF tapped \$14.1 Mil. to pay “guaranteed benefits” to producers, holders of warehouse receipts, other grain depositors

*Source: Ill. Dept. of Agriculture*

# Do Elevators Fail in Other States?

## Draws on Midwest Grain Ins. Funds

IN:	7 since 1995
<b>IA:</b>	<b>44 since 1986</b>
OH:	30 since 1983
KY:	4 since 1984
<b>IL:</b>	<b>24 since 1983</b>

*Source: Ill. Dept. of Agriculture*

*(Grain Insurance Fund Study as of 4/22/02)*

# New Rule: States can't regulate “grain dealer” activities of federally-licensed warehouses



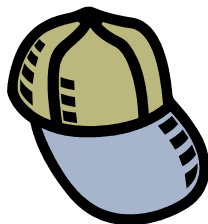
- Aug. 4 USDA “Final Rule”
  - Warehouses licensed by USDA do not need to meet state requirements regarding “grain merchandizing,” i.e., buying and selling grain
  - Federal Preemption!!!
- Understanding this new rule requires understanding a grain elevator’s two hats

# Grain Elevators Wear Two Hats



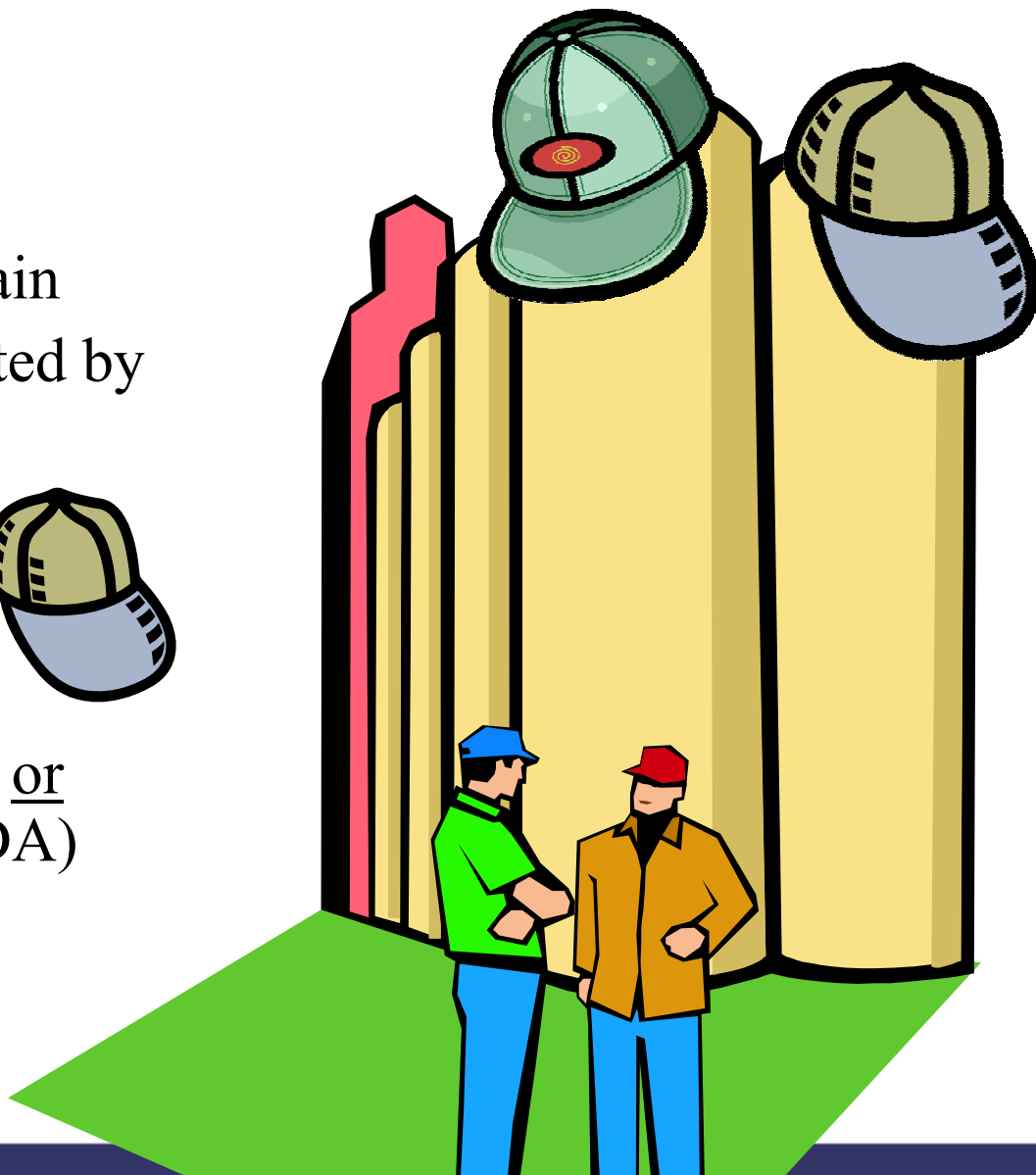
## Grain Dealer Hat:

- Buying/Selling Grain
- Historically regulated by State



## Warehouse Hat:

- Storing Grain
- Regulated by State or Federal Gov. (USDA)  
(operator's choice)



# USDA Licensed Warehouse: Regulating Each Hat Pre-Aug. 4



## **Grain Dealer Activity (buying/selling grain)**

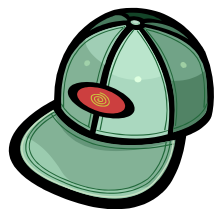
- Regulated by IL Dept. of Ag Under IL Grain Code
- Il Grain Dealer License Required

## **Warehouse Activity (storing grain)**



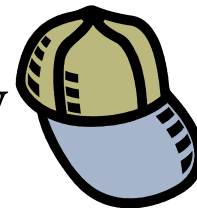
- Regulated by USDA under U.S. Warehouse Act
- Warehouse License from USDA

# USDA Licensed Warehouse: Regulating Each Hat After Aug. 4



## Grain Dealer Activity (buying/selling grain)

- *After August 4:*
  - Federal Preemption, but little/no fed. reg.
  - IL can't regulate
  - No IL Grain Dealer License Required
  - Per Aug. 4 Regs



## Warehouse Activity (storing grain)

- *After August 4:*
  - Regulated by USDA under U.S. Warehouse Act
  - Warehouse License from USDA
  - Rules for Electronic Warehouse Receipts for all commodities



# IL Elevators Affected by New Rule

28 federally-licensed warehouses

But temporarily participating in IGIF

331 state-licensed warehouses  
could “switch” to federal

But 90-day moratorium on accepting  
new license applications from  
state licensed warehouses

-Undersecretary J. B. Penn, Oct. 9, 2002

What happens January 2003?



# What if federally licensed warehouse in IL fails in future?

## **Assuming Federal Preemption Sticks:**

- Unpaid producers can't access IGIF
- Depositors of grain and Lenders with warehouse receipts can't access IGIF
  - Unless warehouse voluntarily participates

*Note: All federally licensed warehouses have opted to participate in Grain Dealer portion of IGIF for the present, so their customers are currently protected*

# Illinois Grain Insurance Fund

IGIF available to pay claims if warehouse or grain dealer fails (analogous to FDIC insurance)!!!

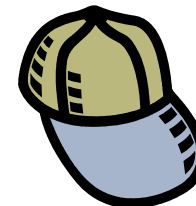
How IGIF Funded?

- IL licensed grain dealers and warehouses must pay required assessments
- Federally licensed warehouse may participate (then its grain depositors are covered)
- Assessments (if IGIF < \$3 mil):  
Complex formula, but Min = \$500, Max = \$5000 per yr

# How New Rule Affects Each Hat:



## Ty-Walk Example



1<sup>st</sup>: Identify actual payments to producers, holders of warehouse receipts, other grain depositors under Grain Dealer & Warehouse parts of IL Grain Code

Then: Compare with hypothetical payments if

- Ty-Walk were a federally-licensed warehouse not voluntarily participating in IGIF for its storage activities
- Federal preemption had prevented IL from regulating Ty-Walks Grain Dealer activity?

# What happened in Ty-Walk?

*(Source: IL Dept of Ag)*

- August 23, 2001: Ty-Walk voluntarily surrendered its Illinois Grain Dealer/Grain Warehouseman Licenses
- Pre-April, 2002:
  - >300 claims submitted
  - IL Dept of Ag reviewed claims, liquidated Ty-Walk grain and equity assets

# Ty-Walk: Source of Payments Under IL Grain Code

April 01, 2002: IL began sending checks drawn on  
the Illinois Grain Indemnity Trust Account

\$\$\$\$\$ to Claimants came from . . .

- ~ \$ 21.2 mil from liquidation of Ty-Walk Grain
- ~ \$ 1.7 mil from liquidation of Ty-Walk Equity
- ~ \$ 5.0 mil balance of GIF
- \$ 4.0 mil “loan” from State of Illinois



Ty-Walk as “Grain Dealer”--

Claims Paid under IL Grain Code

Producer “Grain Dealer” Claims:

Paid under IL Grain Code:      ~\$ 4.0 Mil.

**Ineligible under Grain Code:      ~\$ 4.0 Mil.\***

Total Grain Dealer Claims:      ~\$ 8.0 Mil.

*\* Some claims not entitled to payment; these will be described later*



# Ty-Walk as “Warehouse”--

## Claims Paid under IL Grain Code

	<u>Paid</u>	<u>Not Pd.</u>
Producer Claims (Mil.):	\$ 3.6	\$ 0.0*
Lender Claims (Mil.):	<u>\$24.1</u>	<u>\$14.0*</u>
Total WH Claims (Mil.):	\$27.7	\$14.0

*\*\$1 Mil. Limit per claimant on claims paid from IL Grain Ins. Fund*



# Summary: Ty-Walk under IL Grain Code (\$ in Millions)

## Claims covered under IL Grain Code:

- Producer Grain Dealer Claims      \$ 4.0
- Producer Warehouse Claims      \$ 3.6
- Lender Warehouse Claims      \$24.1      ~ \$32

## Claims not covered under Grain Code:

- Producer Grain Dealer Claims      \$ 4.0
- Lender warehouse claims      \$10.0      ~ \$14

Total Claims (New IL Record):      ~ \$46

# Ty-Walk: What if Federal Scheme Applied Instead of IL Grain Code?

- Resources available for payout:

Ty-Walk Grain (Mil.):            ~\$21.2

Maximum Bond (Mil.):            \$ .5

Total Resources (Mil):            ~\$21.7

- Total Producer/Lender Claims:            (~\$46.0)
- Claims not covered (Mil.):            ~\$24.3

*How divided between grain dealer and warehouse claims?*



# Ty-Walk as “Grain Dealer”-- Claims Paid under US Warehouse Act

## Producer “Grain Dealer” Claims:

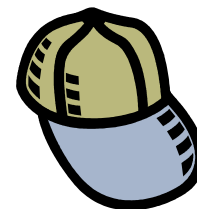
Paid under Federal Law: \$ 0.0 Mil.

**Not paid under Federal Law: \$ 8.0 Mil.\***

Total Grain Dealer Claims: \$ 8.0 Mil.

*\* No provision in federal law for paying grain dealer claims where WH claims remain unpaid*

# Ty-Walk as “Warehouse”--






## Claims Paid under US Warehouse Act




	<u>Paid</u>	<u>Not Pd.</u>
Producer Claims (Mil.):	~\$ 2.0	~\$ 1.6*
Lender Claims (Mil.):	<u>~\$19.7</u>	<u>~\$14.3*</u>
Total WH Claims (Mil.):	~\$21.7	~\$15.9

*\*The grain assets and \$500,000 bond provided enough funds to pay warehouse claims at ~58%*

# Ty-Walk Total Payout Comparison: IL and **USDA** Regulatory Schemes

	Grain Code Payout (IL)	USDA Payout
 Grain Sellers:	~\$ 4.0 Mil.	\$ 0.0 Mil.
Farmers w/ WH Rcpts: 	~\$ 3.6 Mil.	~\$ 2.0 Mil
Lenders w/ WH Rcpts: 	~\$24.1 Mil.	~\$19.7 Mil.
Total (all Claimants):	~\$31.7 Mil.	~\$21.7 Mil.

# Ty-Walk “Cents/Dollar” Payout: IL and USDA Regulatory Schemes

	Grain Code Payout (IL)	USDA Payout
 Grain Sellers (farmers):	50¢/\$	0¢/\$
Farmers w/ WH Rcpts: 	100¢/\$	58¢/\$
Lenders w/ WH Rcpts: 	71¢/\$	58¢/\$
Total (All Claimants):	69¢/\$	47¢/\$

# Policy/Strategy Options

## Re: Federal Preemption

1. Accept federal preemption?
2. Accept federal preemption, but ask USDA to expand its regulation of “grain dealers”?
3. Challenge USDA preemption in courts?
4. Seek a legislative “rollback” of federal preemption?
5. Seek a USDA “rollback” of its new rule?

*Great uncertainty! Resolution needed quickly!!!*

# Different Issue: How fix IL Grain Insurance Fund and Grain Code?

- IGIF needs to be replenished
  - New target balance?
  - Assessments on Sellers as well as warehouses & grain dealers? What about lenders?
- Increase oversight responsibility for farmer marketing programs of grain dealers?



# Grain Code Amendment: Funding/Replenishing the IGIF?

Balance triggering assessments (target balance)?

- \$3 Mil: Current Law
- \$7 Mil: Task Force Recommendation
- \$5 Mil: SB1573 (died last spring)

Replenish?

- Must pay \$4 Mil. “loan” + build target bal.

Assessment Reform?

- Current annual assessment on licensees: ~ \$800,000
- Double this? Also assess 1<sup>st</sup> sellers (e.g., @ .0005 x sales)?
- Also assess lenders using warehouse receipts as collateral?

# Grain Code Amendment: Oversight of Farmer Marketing Programs?

- Ty-Walks Farmer Marketing Program
  - A complicated “farmer marketing program”
  - Involved trades on the Chicago Board of Trade
  - Participating producers had an “account balance” in the producer’s name on Ty-Walk’s books (many disputed!)
  - These FMP Accounts Receivable totaled ~\$26 Mil.
- Should such programs be more closely regulated?  
If so, how? By whom? With what resources?

Different Issue: How can Farmers &  
Lenders reduce the adverse  
consequences of elevator failure?

What does the Ty-Walk example tell us?

# Some Grain Dealer Claims Limited to 85%

- Some grain dealer claims paid at 100%
  - E.g., where Farmers priced & delivered grain within 21 days of failure
- Some grain dealer claims paid at 85%
  - E.g., Farmers who delayed payment for grain > 21 days
  - E.g., Farmers w/ Price Later contracts
- In the case of Ty-Walk:
  - The 85% limit cost farmer-claimants > \$700,000

# “85% Payments” Also Capped at \$100,000 Per Claimant

- For grain dealer claims paid at 85% . . .
  - E.g., Farmers who delayed payment for grain > 21 days
  - E.g., Farmers w/ Price Later contracts

. . . payments from IGIF limited to \$100,000 per claimant
- In the case of Ty-Walk:
  - The \$100,000 limit cost farmer-claimants > \$500,000

# Other Grain Dealer Claims Barred: Deferred Payment Contracts >160 Days Old

- No Protection:
  - Claim barred if farmer
    - priced grain more than 160 days before the elevator failure and
    - did not receive payment
- In the case of Ty-Walk:
  - 160 day rule cost farmer-claimants >\$300,000.

# Grain Dealer Claims Barred: Price Later Contracts > 270 Days Old

- No Protection
  - Claim barred if farmer
    - sold grain under a “price later” contract and
    - contract was signed, or delivery made, more than 270 days before elevator failure
- In the case of Ty-Walk:
  - 270 day rule cost farmer-claimants > \$2.3 mil.

# \$1,000,000 Limit Per Claimant

- Payouts from IL Grain Insurance Fund are limited to \$1,000,000 per claimant
- In the case of Ty-Walk:
  - Five creditors collectively experienced uncovered losses of almost \$10 million because of the \$1,000,000 limit on IGIF payouts to any one claimant
  - But no producers were affected by this limit



# Protecting yourself from the risks of elevator failure

- What's the **most important step** farmers can take to reduce their risk if an elevator fails?
- What's the **most important step** lenders can take?

# Tabulation: Ty-Walk Claims Ineligible under IL Grain Code (October data in Millions)

Cost of 85% limit to farmer-claimants:	~\$ 0.7
Cost of \$100,000 limit to farmers:	~\$ 0.5
Cost of 160 day rule to farmers:	~\$ 0.3
Cost of 270 day rule to farmers:	~\$ 2.3
Cost of \$1 mil. limit to lenders:	<u>~\$10.0</u>
Total Claims not covered	~\$14*

*\*Federal Scheme would have ~\$24 Mil. not covered*

# Summary: Protecting Farmers From Elevator Failure



- Federal preemption of state’s traditional role of regulating grain dealer activity
  - IL regime has “defined benefit”; US regime has defined contribution (grain assets plus bond)
  - Impacts on producers/lenders using Ty-Walk example
  - Policy options:
    - Undo preemption? If so, how?
    - Enhance federal regulatory scheme? If so, how?

# Summary Continued: Protecting Farmers . . . .



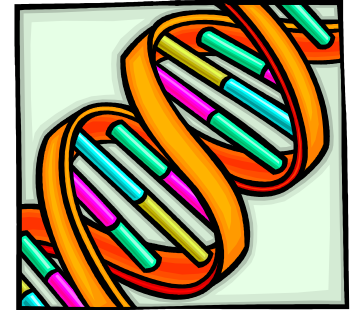
- Need to “fix” IL Grain Code
  - How fund/replenish the IL Grain Insurance Fund?
  - Increase oversight responsibility for farmer marketing programs of grain dealers?
- Protecting yourself from elevator failure
  - Most important step for farmers, in light of Ty-Walk?
  - Most important step for lenders, in light of Ty-Walk?

# Topic: Brief Update on IL Landlord's Lien



- P.A. 92-0819, effective August 21, 2002, eliminates the requirement for landlords to file a UCC1 with the IL Sec. of State
- Illinois' Statutory Landlord's Lien once again has priority, automatically, over other security interests in the crop
- See farmdoc web site for more info  
[http://www.farmdoc.uiuc.edu/legal/securingAg\\_rent\\_\\_text.html](http://www.farmdoc.uiuc.edu/legal/securingAg_rent__text.html)

# Topic: Liability Risks in Growing “Tx” Crops



- Examples of Transgenic (Tx) Crops
- Damages that could theoretically result from growing Tx Crops
- Potential grower liability for such damages
- Potential steps to manage the liability risk

# Examples of Tx Crops

- Bt Corn approved for feed/food use in US
  - Varieties approved in major export markets
  - Varieties awaiting approval overseas, e.g.,
    - Round-up Ready®™
    - Herculex I®™
    - YieldGard®™ Rootworm (U.S. approval pending)
- Roundup Ready™ Beans
- Tx Crops for pharmaceutical or industrial use (not approved for food or feed use in US)

# Growing Tx Crops: Theoretical Damages

- Damage to human health
- Damage to environment
- Damage to property
- Damage for patent infringement



# Damage to Human Health and Environment

- Tx crops undergo rigorous US regulatory review of health/environmental risks
- Tx crops approved for feed/food use are deemed to be
  - Safe for human consumption
  - Safe for environment when grown as directed

# Damage to Human Health and Environment

- Even if someone did get sick, e.g., allergic reaction, grower liability is unlikely
- Even if the environment is damaged, grower liability unlikely
  - Especially if grown as directed, e.g., refuge requirements for Bt corn are met

# Special Case: Pharmaceutical or Industrial Tx Crops

Growing pharmaceutical or industrial Tx crops creates additional liability risk

- Such Tx crops may not be approved for food/feed use (may not be safe as food/feed)
- Obvious potential liability if farmer allows such crops to be channeled into food/feed use and people or animals are injured as a result

Growing of pharma crops in future likely to be totally controlled of pharma company

# ProdiGene Example

(but problem for Company, not Farmer)

- 2001: ProdiGene used Neb. test plot to grow/test Tx corn producing pharmaceuticals
- 2002: Test plot used to grow soybeans
- October 2002: APHIS inspectors discovered volunteer Tx corn in the test plot (a violation of test plot limitations)
  - Ordered company to remove volunteer corn
  - Ordered “hold” on harvested beans from plot – beans now in local elevator containing 500,000 Bu. of soybeans
- Cost of buy and destroy 500k Bu.: ~\$2.7 Mil.
- In Iowa, a similar ProdiGene situation:
  - ProdiGene “incinerated” 115 acres of corn adjacent to test plot

# Biotechnology Industry Organization (BIO) Statement:

“Spurred by growing fear that drugs or chemicals made in gene-altered plants will taint the food supply, . . . [BIO] is adopting a broad moratorium on planting certain types of crops in major food-producing regions. The voluntary ban, . . . beyond any proposed government regulation, is designed to prevent the spread of exotic genes into field crops likely to be used for food or animal feed.

- *Washington Post*, 10/22/02, p. E01

# Real Concern: Damage to Property by Pollen Drift or Commingling of Tx Crops Fully Approved in US

- E.g., neighbor's Bt corn pollen drifts and pollinates farmer's GMO-free corn crop; farmer's crop damaged, i.e., not eligible for GMO-free "premium"
- E.g., farmer inadvertently sells Bt corn to corn processor; processor's shipment of corn gluten feed is damaged by GMO "contamination," i.e., rejected or discounted by European buyer

# “Tool Kit” of Plaintiff’s Attorney

Attorneys have various legal theories on which to base a liability suit, e.g., . . .

- Negligence, Nuisance, Trespass,
- Strict liability, Breach of Contract

Each theory has its particular “elements” that must be proven by the Plaintiff

Synthesis of these theories suggests some steps to reduce risk of farmer-liability . . .

# Property Damage: Managing the Liability Risk

- Know the varieties you are growing and which buyers will accept these varieties
- If growing Tx crop varieties with limited markets:
  - Talk to your neighbors selling to special markets so each can act reasonably to limit cross-pollination
  - Keep these varieties segregated
- Channeling Tx crops to appropriate market & use
- Be truthful when asked what varieties you are delivering for sale



# Property Damage: Managing Contract Liability

Be very cautious with contract language

E.g., don't sign contracts saying your crop . . .

- has no GMO germplasm (or no DNA of a particular type)
- is not contaminated by any pollen drift, or
- is not contaminated by mechanical handling.

Such assurances probably beyond farmer's control.

# Managing Contract Liability Continued

But contract could say (assuming it's true), e.g.,

- only the following seed varieties, as represented by the seed company, were (will be) planted [include names of seed varieties];
- buffer areas, as required by the tags on any seed varieties, were (will be) installed and handled as specified in the written requirements; and
- reasonable care was (will be) taken to avoid mechanical contamination by any seed varieties requiring special handling.

# Where Liability Is Clear: ... Patent Infringement



- Utility Patent: Utility patent provides right to exclude others from making, selling, or using within the United States the patented invention for twenty years
- Patent Infringement: Making, selling, or using the patented invention w/o permission
- Damages for Infringement:
  - Not less than a reasonable royalty for use of the technology
  - Possibly “treble damages,” where infringement willful
  - Reasonable attorney fees in some cases

# Roundup Ready™ Beans

- Monsanto's utility patents cover
  - Glyphosate-tolerant plants (Roundup Ready plants)
  - Genetically modified seeds for such plants
  - Specific modified genes
  - Method of producing Tx plants
- Using/selling Roundup Ready soybeans, seeds, or genes within territorial boundaries of US without authority from Monsanto is an infringement



# Recent Federal Cases -- Saving Roundup Ready Seeds

*Monsanto v. McFarling* (Fed. Cir. 2002) and  
*Monsanto v. Trantham* (Tenn. 2001) are recent  
federal court cases where Farmers . . .

- Saved Roundup Ready beans for planting
- Were sued by Monsanto for patent infringement or breach of contract
- Were not successful in challenging the legal barriers to saving Roundup Ready beans for seed

# Lessons from *Trantham & McFarling*

- Right to save seed from plants registered under the Plant Variety Protection Act *does not* convey to farmers the right to save seed from plants, like Roundup Ready soybeans, containing technologies patented under Patent Act
- Doctrines of patent exhaustion and first sale *do not* prevent Monsanto from enforcing its restrictive agreements and patent rights in Roundup Ready beans

# Lessons - Continued

- Monsanto's agreement with all seed dealers, that anyone buying Roundup Ready seeds must sign a technology agreement that prohibits saving seed, *is not* an unreasonable restraint of trade under the Sherman Act
- Allegations that Monsanto is guilty of monopolization in violation of Sherman Act *are not* supported by the evidence

# Final Lessons

- Monsanto is *not precluded*, because the price of Roundup Ready soybean seeds is high (especially when compared to the price charged in Argentina), from enforcing its patent rights against U.S. farmers who saved seed
- Where
  - seed dealer forged farmer's signature on technology agreement
  - this farmer saves seeds

the doctrine of unclean hands *does not* bar Monsanto from suing for patent infringement

  - but Monsanto could be barred from enforcing other terms of the technology agreement



# Saving Patented Seeds: The Bottom Line

- Many farmers dislike the legal barriers to saving Roundup Ready beans for seed
- Legal barriers (e.g., patent rights) have been upheld by federal courts when challenged by farmers caught saving beans for seed
- It's unlikely that farmers who
  - disregard the legal barriers to saving seed
  - or acquire “pirated” seeds from anothercan successfully defend such conduct in court

# The End

2002 Farm Bill



Protecting Farmers & Lenders from  
Elevator Failure



Liability Risks in Growing Tx Crops  
(E.g., Root Worm Resistant Bt Corn)



By Donald L. Uchtmann and Robert J. Hauser