

Proposed Liability for Transgenic Crops  
Drew L. Kershen\*

During the legislative sessions that began in January 2005, the legislatures of several states ( e.g. California, Hawaii, Montana, North Dakota, and Vermont) dealt with bills that imposed liability for transgenic crops upon the manufacturer of the transgenic crop. While each of these bills had wording unique to the individual states, the pattern, key definitions, and the substantive provisions of the bills were very similar overall and, quite often, contained identical specific language. Each of these bills emerged from the Center for Food Safety (CFS) founded by Andrew Kimbrell, a long-time opponent of agricultural biotechnology who previously worked with Jeremy Rifkin at the Foundation for Economic Trends. Joseph Mendelson, legal director at CFS, was the lead drafter of the “model” bill. The Center for Food Safety then sought sponsors to introduce the bill into the legislatures of the several states.

For purposes of this article, the author focuses on California Assembly Bill (A.B.) 984 (introduced by Member Laird, using the April 25, 2005 version) and Vermont (Senate Bill) S. 18 (introduced by Senator Campbell, using the version referred to the Senate Committee on Agriculture in February 2005) to discuss their provisions and their impact upon agriculture.

Section 2 of both A.B. 984 and S. 18 set forth the legislative findings that support the adoption of the proposed bills. Without repeating the precise findings in Section 2, the legislatures declare that

- transgenic crops disperse widely through pollen flow, seed commingling, and inadvertent transfers caused by humans, animals, and weather;
- as a consequence of wide-spread dispersal of transgenic crops, farmers and

---

\* Earl Sneed Centennial Professor of Law, University of Oklahoma, College of Law

others in the agricultural marketing chain cannot avoid adventitious presence of transgenic material in their organic and conventional crops;

- the adventitious presence of transgenic material in organic and conventional crops creates economic costs for organic and conventional farmers; and
- the manufacturers of transgenic crops should be liable for these economic costs.

Adventitious presence of unwanted material in agricultural products is neither new nor unique to transgenic agriculture. Pollen flow occurs between all sexually-compatible crops; commingling occurs in farm equipment, transport, and storage; volunteer plants from one year to the next are common in fields and along roadsides. For example, the seed industry has dealt with issues of adventitious presence for decades through tolerance levels, agronomic practices, and identity preservation. Indeed, studies of the EU, Spain, UK, and U.S. by PG Economics, Ltd. of Dorchester, UK have shown that coexistence between transgenic, organic, and conventional agriculture can be easily achieved by adopting standards that utilize the same basic practices as the seed industry. *E.g.*, Brookes & Barfoot, Co-existence in North American agriculture: can GM crops be grown with conventional and organic crops? (PG Economics, Ltd, Dorchester, UK, 7 June 2004).

Even though adventitious presence is wide-spread, it is not at all clear that adventitious presence creates significant economic costs (depending on the definition of economic costs to be discussed later). For example, ninety-two percent of organic farmers surveyed in 2002-2003 reported that they had incurred no direct costs related to transgenic agriculture. (For the questions described in this article, the survey had 938 respondents.) Four percent of organic farmers indicated direct costs related to testing seed, inputs, or organic farm products for the presence of transgenic material. ORGANIC FARMING RESEARCH FOUNDATION (OFRF), 4<sup>th</sup>

National Organic Farmers' Survey: Sustaining Organic Farms in a Changing Organic Marketplace (May 16, 2003).

With respect to seeds and inputs (e.g. feed for animals), organic farmers have the obligation under the USDA National Organic Program (USDA-NOP) to insure that their seeds and inputs meet organic standards which means that costs for testing seeds and inputs may not be additional costs beyond those ordinarily incurred. National Organic Program (NOP), 7 C.F.R. Part 205 (§§ 205.1 through 205.690). As for testing, the OFRF made the following comment in its highlights of the survey:

“It would be interesting to break this [organic certifiers requesting testing] down because it is not surprising that seed or inputs would have to be tested by the organic seed or input seller. If the certifying agent requires organic crops to be tested without reason to believe GMO material is present, however, the organic certifier is requiring a higher standard than does the NOP.”

Moreover, it is important to remember that the adventitious presence of approved transgenic crops presents no issues of product/crop safety, food safety, or environmental harm because approved transgenic crops have met the regulatory requirements of the USDA, EPA, and the FDA. By contrast, if the transgenic crop were unapproved, as was the case in StarLink® corn, lack of approval can result in recall of products as adulterated. Farmers and others suffering damages from recall of adulterated products have recognized claims for legal damages. *E.g.*, *In re StarLink Corn Products Liability Litigation*, 211 F. Supp. 1060 (N.D. Ill. 2002).

In the same survey of organic farmers referenced in the preceding paragraph, one percent stated that they had lost organic certification for products due to the presence of transgenic

material. However, these farmers assuredly confused loss of an organic contract premium as equivalent to loss of organic certification. Under USDA-NOP standards, the adventitious presence of transgenic materials does not affect organic certification for the farm or the farm products. NOP Final Rules 2000 at pp. 33-35 (clarification of comments about genetic drift), <http://www.ams.usda.gov/nop/NOP/standards/FullText.pdf>. Moreover, the USDA-NOP has confirmed that no organic farmer has lost organic certification as a result of adventitious presence of transgenic material. USDA letter to National Association of State Departments of Agriculture (Dec. 21, 2004). Organic farmers lose their organic certification only if they intentional use transgenic crops or material or fail to take reasonable measures to avoid the use of transgenic crops or materials in their seeds or inputs.

Referring once again to the survey of organic farmers, four percent of respondents (including the one percent who assuredly confused loss of an organic contract premium with loss of organic certification) reported loss of sales due to the perceived or actual risk, or actual presence of transgenic material. Loss of sales, either through contract rejection or market access rejection, is almost always classified as pure economic loss under the common law of the United States. For a discussion of pure economic loss in the context of transgenic crops, Drew L. Kershen, *Legal Liability Issues in Agricultural Biotechnology* 17-22, National Agricultural Law Center Research Article (Nov. 2002), <http://www.nationalaglawcenter.org>.

As pure economic loss, the person experiencing the loss almost always bears the loss without legal redress against others. In a decision recently rendered by the Saskatchewan Court of Queen's Bench in a class action lawsuit against manufacturers of transgenic crops, the court ruled:

“It is my conclusion that the case before me does not present a

situation in which the courts would extend the categories for recovery of pure economic loss, for all the policy reasons traditionally cited in support of the exclusion of this recovery are in play in this case.” Hoffman v. Monsanto Canada, Inc., [2005] S.J. No. 304, 2005 SKQB 225 at ¶ 80. (The Saskatchewan court’s discussion of pure economic loss is found at ¶¶ 72-80.)

It is pure economic loss that is at the heart of the proposed bills for imposing liability upon the manufacturers of transgenic crops.

Reading the definition of injury in the proposed bills makes the pure economic loss issue crystal clear. In Vermont S. 18, the definition of “injury” reads:

“Injury” includes:

- (A) loss of any price premium that would have accrued to a farmer by contract or other marketing arrangement or that would have been otherwise reasonably available to the farmer through ordinary commercial channels;
- (B) any additional transportation, storage, handling, or related charges or costs incurred by the farmer that would not have been incurred in the absence of crop contamination;
- (C) any judgment, charge, or penalty for which the farmer of nongenetically engineered products is liable because of breach of contract, including loss of organic certification for failure to deliver a crop or shipment free of genetically engineered material or for delivering a crop or shipment exceeding any contractually agreed tolerances for the presence of genetically engineered material;
- (D) market price reductions incurred by farmers resulting from loss of crop exports, including foreign and domestic markets; and
- (E) a farmer’s loss of livelihood or reputation caused by genetically engineered

crops. VT S. 18, § 3 in added section 650(2) Definitions.

CA A.B. 984 contains a definition of “injury” that is substantially the Vermont definition. CA A.B. 984, § 3 in added section 1714.43(a)(6).

In the next added section of the Vermont bill, the language reads: “The manufacturer of a

genetically engineered seed or plant part is liable to any person injured by the release into Vermont of a genetically engineered crop ...” VT S. 18, § 3 in added section 651(a) Liability for Damages Resulting from Genetically Engineered Crops. CA A.B. 984, § 3 in added section 1714.43(b)(1) adopts the same liability as the Vermont bill.

Without doubt the language of these two proposed bills creates legal causes of actions against manufacturers of transgenic crops for the recovery of pure economic loss. Any person damaged through loss of contract premiums, loss of contract opportunities, breach of contract specifications (including zero tolerance specifications), or loss of market access for perceived or actual risk or actual presence of transgenic material can impose those losses upon the manufacturer. Farmer can also recover for loss in reputation because Vermont may no longer be perceived, using language from the proposed legislative findings, as a “pure and preserved natural environment” if approved transgenic crops grow in its soil.

VT S. 18, § 3, in added section 651(d), sets forth an affirmative defense to liability. CA A.B. 984, § 3, in added section 1714.43(c), has the same affirmative defense but in language stated with greater clarity. The California language of the affirmative defense reads as follows:

“A manufacturer shall have a defense to liability under this section if the court finds any of the following:

(1) That all of the following conditions are met:

- (A) The producer or his or her agent acted in gross negligence.
- (B) The producer received or signed a contract with the manufacturer.
- (C) The producer received a training manual from the manufacturer.
- (D) The court finds that the injury would not have occurred had the producer or his or her agent followed the terms of the manufacturer’s contract and training manual.

(2) Any person not included under paragraph (1) acted in a grossly negligent manner that caused injury from the use of a genetically engineered plant manufactured by the manufacturer.”

It is debatable whether the affirmative defense provides much practical protection from liability for the manufacturer.

When read in full, these proposed liability bills purposefully allow the transfer of economic losses:

- voluntarily created through contractual standards and obligations from the parties who negotiate and agree to them to the manufacturers of transgenic crops;
- arising from market preferences from those seeking to engage in specialty markets to the manufacturers of transgenic crops;
- arising from aesthetic preferences about rural Vermont or rural California to the manufacturers of transgenic crops;
- arising from testing and other agronomic practices exceeding the NOP standards from the organic farmer to the manufacturers of transgenic crops.

To use the language of the Saskatchewan court, in explaining why pure economic loss is ordinarily not recognized as legally compensable and why the Saskatchewan court also rejected liability for pure economic loss, these proposed liability bills “expose defendants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.” *Hoffman v. Monsanto Canada, Inc.*, *supra* at ¶ 77.

The proposed liability bills also have an implied legal consequence. These proposed bills lack reciprocity for adventitious presence. The proposed bills impose liability for adventitious presence of approved crops only upon transgenic crops. No reciprocal liability exists for the adventitious presence of approved crops from organic or conventional agriculture. For organic and conventional agriculture, these proposed bills leave the presently existing legal liability rules in place that rarely compensates for pure economic loss. By so doing, these bills purposefully

privilege organic, particularly organic, and conventional agriculture to the detriment of transgenic agriculture.

These proposed bills have another liability provision related to patent infringement. As stated in the Vermont bill,

“A farmer who is not in breach of contract for the purchase or use of genetically engineered seed or plant parts and unknowingly comes into possession or uses such seeds or plant parts as a result of natural reproduction, cross-pollination, or other contamination shall not be liable under this subchapter for any injuries, claims, losses, and expenses, including attorney’s fees, caused by the use of genetically engineered seed or plant part, including damages for patent infringement.” VT S. 18, § 3, in added section 651©). *See also*, CA. A.B. 984, in added section 1714.43(b)(3).

This provision addresses the “the innocent infringer” issue in patent law. Two commentators have explored this issue extensively and determined that the innocent infringer is not liable for patent infringement under the patent laws. Consequently, this provision of the proposed bills has only symbolic, rhetorical meaning as contrasted with a practical impact of changing legal liability. Drew Kershen, *Of Straying Crops and Patent Rights*, 43 WASHBURN L. J. 575 (2004); Norman Siebrasse, *A Remedial Benefit-Based Approach to the Innocent User Problem in the Patenting of Higher Lifer Forms*, 20 CANADIAN INTEL. PROP. REV. 79-134 (2003); Norman Siebrasse, *The Innocent Bystander Problem in the Patenting of Higher Life Forms*, 49 MCGILL L. J. 349-392 (2004).

If these proposed bills were enacted, the impact upon transgenic agriculture would be



great because it is not clear that manufacturers would be willing to bear the legal liability risks that these bills impose. Upon careful reading of these bills, it becomes clear that the Center for Food Safety sees these bills not necessarily as a mechanism for obtaining legal redress for pure economic loss. Rather, the Center for Food Safety sees these bills as having the potential of driving transgenic agriculture completely from the agricultural sector. The real issues of these bills is not about liability. The real issue of these bills is about the future of agricultural biotechnology and, more broadly, the future of technological innovation for our society.