



A Comparison of Two Versions of Senate Bill 18

The Vermont House of Representatives and Senate will be taking up Senate Bill 18 when the 2006 legislative session begins. The bill concerns liability for harm caused to farmers. Senate Bill 18 passed the Senate in April 2005.¹ As the 2005 session ended, the House Judiciary committee approved a “strike-all amendment” version of the bill.² The legal analysis below reviews similarities and differences between the two versions of Senate Bill 18. For convenience, the bills are referred to as the “Senate bill” and the “House Judiciary amendment.”

Injury Addressed

The **Senate bill** addresses two types of harm. The first type of harm is the transfer of liability for dispersion of genetically engineered seeds or plant parts from the manufacturer of the seeds and plant parts to the farmer who uses the seeds or plant parts. The bill begins from the position that a farmer who plants genetically engineered seeds and plant parts—who does not own the technology, but merely has a license to use it for one growing season—should not be liable for injuries caused by the dispersion of genetically engineered crops. The bill places strict liability for release of a genetically engineered crop with the manufacturer.

The second type of harm addressed is the economic injury suffered by contaminated farmers. The bill provides a cause of action against the manufacturer, rather than another farmer, and defines this type of injury as including:

- 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;
- Reasonable additional costs incurred by the farmer that would not have been incurred in the absence of crop contamination; and
- 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.

The **House Judiciary amendment** primarily addresses “economic losses” suffered by farmers as a result of the purchase and use of defective agricultural goods. The bill does not define “economic losses.” The type of harm addressed is most similar to common law causes of action for breach of warranty in contract law and products liability in tort law. The bill is not limited in application to release of genetically engineered crops, but applies broadly to economic losses arising after purchase of goods for agricultural use. The bill does not eliminate the potential of farmer versus farmer lawsuits arising out of release of genetically engineered crops.

What Farmers Must Show in Order to Receive Protection

In order to receive protection under the **Senate bill**, a farmer must show (1) that a genetically engineered crop was released into Vermont, (2) that the manufacturer produced and commercialized the genetically engineered seed or plant part that was released and (3) that the release caused injury to the farmer. The bill does not define “release of a genetically engineered crop.” Based upon the everyday meaning of “release,” the bill would attach liability for all discharges of genetically engineered crops, without an inquiry into whether the release was intentional.

Affirmative Defense: If a contaminated farmer were to file suit for damages against a manufacturer, the manufacturer could avoid liability by establishing an affirmative defense. The affirmative defense has four parts, all of which must be shown by the manufacturer: (1) the release of the genetically engineered crop that resulted in injury to the contaminated farmer was caused by gross negligence on the part of a farmer who used the genetically engineered seeds or plant parts; (2) the farmer who used the genetically engineered seeds or plant parts had received and signed a contract with the manufacturer; (3) the farmer who used the genetically engineered seeds or plant parts had received a training manual from the manufacturer; and (4) if the farmer who used the genetically engineered seeds or plant parts had followed the manufacturer’s contract and training manual, the farmer would not have caused injury through the use of the genetically engineered crop.

In order to receive protection under the **House Judiciary amendment**, a farmer must show (1) that he or she is a consumer with respect to a particular agricultural product, (2) that the agricultural product was defective, and (3) that the farmer suffered “economic losses” as a result of the fact that the product was defective.

Consumer: The bill provides that farmers are consumers for purposes of products liability. The bill further provides that goods purchased by farmers for agricultural use are consumer goods. It is unclear whether a farmer who is not a purchaser or intentional user of the genetically engineered seeds or genetically engineered plant parts would be able to receive protection under this amendment, because a contaminated farmer would not be the consumer with respect to the genetically engineered seeds or plant parts.

Economic Losses: A contaminated farmer would have to show that the genetically engineered seed or plant part was a defective product in order to establish a products liability claim and recover for “economic losses.” The bill does not define “economic losses.” In general, “economic losses” is a term used in the context of claims for products liability. As used in the case *Mainline Tractor and Equipment Co. v. Nutrite Corp.*³, “economic losses” are damages sought when a defective product does not work as intended, which results in a loss of profits. “Economic losses” cases are distinguished from “property damage” cases, in which the defective product damages other property. The economic loss theory is not applicable in the context of genetically engineered seeds, which may perform as promised for the farmer who plants them, insofar as the desired characteristic—such as herbicide resistance—is concerned, and where the damage is in fact to crops planted by another party.

Gathering the necessary evidence to show that the genetically engineered seeds or plant parts were defective and caused economic losses, and then presenting the evidence in court, would almost certainly be costly and time-consuming. In the end, a farmer who was unable to prove that the genetically engineered seeds or plant parts were defective would not be able to recover any damages.

Damages Available

Under the **Senate bill**, a farmer who prevails in a lawsuit by proving that a genetically engineered crop was released in Vermont and the release resulted in economic injury (as defined above) to the farmer may recover compensable damages, reasonable attorney's fees and other litigation expenses from the manufacturer. The bill does not provide for punitive damages.

Under the **House Judiciary amendment**, a farmer who prevails in a lawsuit by proving that defective goods for agricultural use sold by the manufacturer caused economic losses to the farmer could presumably recover compensatory damages, as in any other products liability action. However, the farmer would not be entitled to attorney's fees, other litigation expenses, or punitive damages. As mentioned above, "economic losses" would be among the compensatory damages that farmers could recover.

Choice of Law

The **Senate bill** provides that Vermont law will govern in the event of disputes arising out of contracts for the purchase of seeds or plant parts in Vermont.

Under the **House Judiciary amendment**, disputes involving contracts for agricultural goods which are used in Vermont shall be decided using the law of Vermont. It is unclear from the current text whether this provision is aimed solely at sales of agricultural goods, or whether lease agreements and other use agreements would also be subject to this provision.

Venue

The **Senate bill** provides that the venue for an action shall be in the county in which the injury is alleged to have occurred. The provision does not address where venue lies if a farmer alleges the injury took place in more than one county.

The **House Judiciary amendment** states that the venue for an action shall be the Vermont county in which one of the parties resides. If neither party resides in the state, the venue may be any county in Vermont.

Waivers Ineffective

Under the **Senate bill**, a contract between a manufacturer and a farmer who purchases or uses genetically engineered seed or genetically engineered plant parts may not waive or avoid liability for release of a genetically engineered crop by any means other than insurance.

The **House Judiciary amendment** similarly prohibits the parties from waiving or changing their rights under the bill through agreement of the parties.

Severability

The **Senate bill** provides that if any part of the Act, or specific application of the Act, is found to be in violation of the U.S. Constitution or federal law, the remaining parts of the Act shall remain in full force and effect, to the extent that they can be given effect without the invalid provision.

The **House Judiciary amendment** similarly provides that if any part of the Act, or specific application of the Act, is found to be in violation of the U.S. Constitution or federal law (and adds the Vermont Constitution or state law), the remaining parts of the Act shall remain in full force and effect, to the extent that they can be given effect without the invalid provision.

Statute of Limitations

The **Senate bill** sets forth a statute of limitations, stating that an action brought under its provisions must be brought within three years after the cause of action accrues and not after. Sometimes it is difficult to determine when a cause of action “accrues.” It seems clear that there is no cause of action under the bill until an injury is suffered.

The **House Judiciary bill** does not contain a statute of limitations. It seems likely that a claim under this bill would be part of a products liability suit, and be subject to the statute of limitations for product liability in Vermont.

This analysis was prepared by Farmers’ Legal Action Group, Inc.
on behalf of the Farmer to Farmer Campaign on Genetic Engineering.
For more information contact Bill Wenzel. Phone: 877-968-3276, Email: Bwenzel2@aol.com.

¹ The text of the bill as passed in the Senate is available at <http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2006/bills/senate/S-018.HTM>. The “Farmer Protection Act” would add a new subchapter 3, entitled, “Liability Resulting from the Use of Genetically Engineered Seeds and Plant Parts” to Chapter 35, concerning seeds, of the Agriculture title of the Vermont Statutes Annotated.

² The text of the bill as passed by the House Judiciary committee is available at <http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2006/calendar/hc060103.htm>. The “Act Relating to Farmers And Agricultural Goods Liability Actions” would add a new Chapter 210 to Title 7 of the Vermont Statutes Annotated, “Farmers and Agricultural Goods: Liability Actions.”

³ 937 F. Supp. 1095 (D. Vt. 1996).