



GMO Liability Threats for Farmers

Legal Issues Surrounding the Planting of Genetically Modified Crops

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What's in it for farmers?

A series of papers
addressing concerns
about genetically
modified crops

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Genetically Engineered
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on Genetic Engineering

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Introduction

As giant agribusiness corporations control more and more of the genetics that go into farmers' crops, the entire food supply may face yet-to-be-discovered risks. This article focuses on possible legal risks of farmers in relation to genetically modified organisms (GMOs). It is not intended, however, to be a comprehensive analysis of the multitude of legal issues farmers must take into account when making decisions related to GMOs.

The introduction of GMOs into commercial crop production alters the risks farmers must consider when making decisions about buying seed and planting and marketing their crops. These include the possible loss of export markets and other market risks, as well as potential legal liability. Legal issues raised by the production of crops containing GMOs include tort-based liability, such as those claims arising when genetic drift and crop contamination occur; contract-based liability, such as might arise under farmers' Technology Agreements with seed companies or farmers' assurances to crop purchasers; and regulatory liability, such as might arise if farmers' actions or circumstances result in violations of statutes or regulations.

The discovery by Genetically Engineered Food Alert of genetically modified StarLink corn in taco shells and other food products starting in September 2000 caused ripple effects throughout the grain handling and food industries. StarLink corn had only been approved by the U.S. Environmental Protection Agency (EPA) for animal feed or industrial uses (non-food consumption) because the corn contains a biopesticide that may cause allergic reactions in humans. For farmers who planted StarLink corn and any neighbors whose crops were contaminated, the introduction of StarLink corn into human foods has had lasting effects.

Aventis CropScience, the company that engineered StarLink corn, instituted a buy-back program intended to compensate farmers for their extra costs and lost markets resulting from the funneling of StarLink corn into the entire corn distribution chain. However, despite a buy-back agreement worked out between Aventis and 17 state Attorneys General, farmers encountered problems finding a location to deposit their StarLink or StarLink-contaminated corn, experienced delays in making debt repayments due to late buy-back payments, and face the continuing possibility of civil litigation by neighbors or grain elevators over contamination issues.

At present, at least nine class action lawsuits in six states have been filed against Aventis over the StarLink debacle. On September 17, 2001, thousands of Taco Bell restaurant franchises and other Mexican food companies sued Aventis in Arkansas state court. The lawsuit claims that the discovery of StarLink corn in Taco Bell products resulted in Taco Bell becoming the "poster child" for concerns about StarLink and other GMOs. Missouri Attorney General Jay Nixon has also sued Aventis on behalf of Missouri farmers and elevators, claiming that Aventis did not adequately teach farmers how to keep corn intended only for animal feed out of the human food supply.

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Liability Law in United States Related to GMO Crops

Tort Liability

One of farmers' primary GMO-related problems that the StarLink situation revealed is that what a farmer's neighbor plants may seriously affect the farmer's own crops. This is true because certain crops—such as corn and canola—cross-pollinate, causing genetic material to migrate beyond where the crop was planted. Until "genetic fences" are developed that stop genetic drift, or "pollution," from occurring during cross-pollination, disputes may arise between farmers who plant GMOs and their neighbors who do not. Neighbors may suffer damages, for example, by being unable to market their non-GMO crop as they wish if the non-GMO crops test positive for GMOs that came from a neighboring farmer's field. Farmers growing GMO crops should be aware that if effective barriers to genetic pollution are unavailable or these barriers fail, they might face tort liability from their neighbors and others for contaminated crops.

Aventis attempted to create a "genetic fence" for StarLink by having farmers plant a 660-foot buffer strip of non-StarLink corn around StarLink cornfields. Corn grown in the buffer strip was also only approved for animal feed or industrial purposes. The use of buffer strips was to limit cross-pollination to non-GMO corn and also create a refuge where European corn borers and other targeted pests would not as quickly develop resistance to the bio-pesticide *Bacillus thuringiensis* (Bt) found in StarLink corn. Many farmers were reportedly unaware of the buffer strip requirement, resulting in many cases of StarLink corn being planted directly adjacent to a neighbor's non-StarLink corn. This non-StarLink corn then tested positive for the StarLink insecticidal protein Cry9C.

Farmers and seed companies who are responsible for genetically contaminating neighboring fields might be liable for a neighbor's damages based on tort claims of trespass to land, nuisance, negligence, or strict liability.

The tort claim of trespass to land arises when someone intentionally enters another person's land and causes damage. This claim could arise in a GMO context if a farmer and/or seed company knew that genetic traits from a GMO crop would enter a neighbor's property and genetic drift in fact occurs, causing harm to the neighbor's crop. The farmer and/or seed company could then be liable for any resulting harms caused by the GMO crop.

A similar tort is nuisance. Nuisance occurs when someone interferes with another person's use and enjoyment of his or her property. The interference is generally an act that results in obnoxious noise, sights, or smells emanating from the defendant's property and sensed from the other person's land. The interfering act does not need to cause property damages, just affect a person's ability to use and enjoy his or her property. GMO contamination could affect what crops a neighboring farmer can grow, thereby interfering with the farmer's ability to use his or her property.

The negligence tort claim arises when a person fails to act reasonably under the circumstances and this failure causes harm to another. The elements of a negligence claim are: (1) the existence of a duty on the part of the defendant to protect plaintiff from injury; (2) failure of defendant to perform that duty; and (3) injury to the plaintiff resulting from such failure. To prove that GMO contamination was the result of negligence, a person would have to prove that a neighboring landowner had a duty to prevent GMO contamination and that there was a reasonably foreseeable

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likelihood of injury. Given the potential for certain GMO crops to contaminate neighboring fields, a court could find that farmers have a duty to prevent this injury to their neighbors. If a duty is established, neighbors would then have to show that this duty was breached by the GMO crop grower. Failure to properly select seed, adhere to specified buffer zones, or follow growing and harvesting procedures could mean a breach of that duty. If one of these failures is linked to another person's injuries, the farmer that caused the GMO contamination could be liable for negligence.

Another potential claim related to GMO contamination is strict liability. Strict liability arises when someone engages in an abnormally dangerous activity; in such cases, a person harmed by the abnormally dangerous activity can recover damages from the person who engaged in the activity, without having to prove that the person who did the activity was reckless or negligent. Courts have found abnormally dangerous activities to include housing wild animals, storing and using explosives, or spraying pesticides. Some legal scholars argue that if a farmer and/or seed company know that a GMO crop is difficult to control and that it will likely cross-pollinate with crops in adjacent fields, the farmer and/or seed company should be held strictly liable for any resulting damages.

Courts assessing genetic contamination claims based on strict liability may compare them to past pesticide drift cases. In an often-cited 1977 Washington State Supreme Court case, the court held that an aerial spray company, which allowed pesticides to drift onto an organic farm, was strictly liable for damages because the organic farm faced losing its ability to market organic crops and, due to the prevalent use of contracts by organic farms, the farmer would be unable to sell crops on the regular commercial market due to failure to enter into a contract before the growing season began. *Langan v. Valicopters*, 567 P.2d 218 (Wash. 1977). The holding in that case may be used by to argue that seed companies who develop and farmers who raise GMO crops that genetically "pollute" a crop should be strictly liable for damages to neighboring crops. Such damages could include: loss of organic certification with resulting loss of ability to meet contract obligations or market crops at higher premiums, costs related to violating identity-preserved crop contracts because the crops no longer meet the required specifications, or even litigation costs when neighboring farmers are sued by companies for "stealing" genetic intellectual property that was in actuality blown onto their fields.

Contract Liability Farmers' Liability Under GMO Seed Contracts

Biotechnology companies and seed distributors that market GMO seeds to farmers usually require that farmers sign grower or technology agreements. These agreements generally give the farmer rights to use the GMO seeds in exchange for complying with all of the company's production methods and management requirements. The contract may require the farmer to allow company representatives access to fields to inspect crops and determine if the farmer is in compliance with the contract.

The companies are generally seeking to secure a number of protections for themselves through the agreements. These agreements may include provisions designed to ensure that farmers follow specific guidelines directing where and how the GMO seed will be planted, to stop farmers from saving seed from the crop that is produced from the purchased seed, to protect the company's intellectual property rights, and to ensure that disputes arising under the contracts are resolved either through binding arbitration or in a court convenient to the company.

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In addition to altering farmers' year-to-year production practices, contract provisions that protect the companies' intellectual property rights in the GMOs and prohibit farmers from saving seed to plant in the following year may also open farmers to liability for breach of contract. Monsanto, a chemical company based in St. Louis, Missouri, has recently brought complaints against farmers for allegedly saving seed in violation of either a technology agreement or Monsanto's intellectual property rights.

Farmers' Liability Under Non-GMO Seed and Marketing Contracts

Farmers market their crops utilizing a number of different methods. One method is the use of a marketing contract where the farmer agrees to deliver a certain number of bushels on a certain date to the food processor or cooperative. If the end use of the crop is for a non-GMO product, then the farmer will be under contract to deliver a non-GMO crop. Some of these marketing contracts are for identity-preserved crops, which provide the processor with specified characteristics such as high oil content. However, farmers may be unable to fulfill their marketing contracts if their crops are contaminated by GMOs from their neighbors or through the grain handling system. Farmers may face damages for failure to deliver on the contract and may need to find replacement crops or compensate the buyer for the costs of obtaining the crop elsewhere.

Farmers' Liability Under Crop Sales Contracts

Because of the risks of genetic contamination, discussed above, and a farmer's inability to ensure that he or she receives completely GMO-free seed from a seed supplier, even farmers who did not knowingly plant GMO seed should exercise caution in the guaranties and warranties that they make to the buyer of their crops. The risk is that a farmer may market crops that he or she believes are GMO-free but that later test positive for GMO genes. The farmer who guaranteed or warranted that his or her crops were GMO-free may then have those crops rejected by the buyer, may be liable for the buyer's expenses to replace the purchased crops, and may even be held liable for any further damages incurred by the buyer if the GMO-positive crop mingles with and contaminates other crops. For example, currently the European Union will not allow the importation of certain GMO crops. If farmers attempt to market crops that do not have the necessary regulatory approvals, this could cause entire shipments to be rejected by the importing country. The grain handling industry has shown that it is not yet capable of segregating most major crops. Because of this, one farmer's mistake could cause contamination of millions of bushels. Depending upon the representations made by the farmer when selling the crop and the terms of the sales contract, the farmer could face significant liabilities if intermixing of GMO and non-GMO crops occurs.

To limit potential liability, when making sales farmers should only make representations about actions that were actually in their control. This might include the fact that the seed planted was represented by their seed company as being non-GMO seed and that care was taken to avoid contamination from GMO crops. For many farmers, taking precautions to clean equipment and bins and test their seed and crops for GMOs will result in significant costs that may not be recouped, but may lower liability exposure. Farmers should avoid promising that a crop contains all non-GMO material or promising that the crops were not genetically contaminated from a neighbor's crop or during harvest and storage.

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Regulatory Liability

The introduction of GMO crops presents potential liability for violation of statutes or regulations related to the companies' genetic intellectual property or the control of GMO crop distribution, including whether the crop has the proper regulatory approvals for various uses including human consumption. Just as Monsanto is enforcing intellectual property rights for farmers who signed technology agreements, they are also suing farmers for alleged patent infringement by improperly using Monsanto technology without signing a technology agreement and paying the technology fee. For example, Monsanto sued a Canadian farmer, Percy Schmeiser, for growing Roundup Ready canola without a technology agreement. Schmeiser, an organic farmer for over 40 years, claimed that the GMO canola drifted onto his property. In May 2001, a Canadian court ruled in favor of Monsanto and ordered Schmeiser to pay for the alleged profits he received from growing GMO canola. Schmeiser is appealing the ruling. Monsanto has recently brought similar actions in the United States against farmers throughout the nation including farmers in North Dakota, South Dakota, Indiana, and Louisiana. Whether or not the farmers violated Monsanto's intellectual property rights, they still must raise a defense in court ringing up thousands of dollars in attorneys' fees.

On October 3, 2001, the United States Supreme Court heard oral arguments in a case that may also provide biotechnology companies with greater regulatory control over farmers' use of GMO products. The case of *J.E.M. Ag Supply v. Pioneer Hi-Bred International* concerns J.E.M. Ag Supply's resale of 600 bags of Pioneer brand non-GMO corn seed. Pioneer sued J.E.M. for making an unauthorized sale and thereby infringing Pioneer's patent on the seed. Pioneer argues that the seed is covered by a "general utility patent" that prohibits any unauthorized use. In its defense, J.E.M. argues that the resold seed was protected only under the Plant Variety Protection Act of 1970 (PVPA), which specifically exempts certain uses including research and seed saving. If Pioneer wins this case, it will likely open the door for all seed companies to obtain and enforce utility patents for their GMO products. With utility patent protections in addition to PVPA certificates, companies will no longer need the "bargained-for" contract language prohibiting farmers from saving seed, because the utility patents would automatically prevent farmers from making any use of the seed that was not authorized by the company. If J.E.M. wins this case, biotechnology companies' ability to obtain utility patents on plants will be restricted and farmers will have a right to save seed, though presumably this right can still be waived by contract. Some experts speculate that if J.E.M. wins, the biotechnology companies will lobby Congress to override the Supreme Court's ruling by amending the PVPA. The Supreme Court is expected to issue its decision around spring planting time in 2002.

The Aventis Buy-Back Program

The Aventis StarLink corn buy-back program is an example of how all three types of the liabilities discussed above impact farmers. Farmers who planted StarLink corn were supposed to sign Grower Agreements dated April 2000 that required the use of a 660-foot buffer zone and informed farmers that StarLink was not approved for human consumption. Many farmers did not sign these contracts before planting StarLink, and Aventis attempted to have these farmers sign another contract in September 2000. Other farmers who did sign the contract were not aware of the marketing restrictions imposed on StarLink corn. As a result of contract misunderstandings and the regulatory restrictions on StarLink's approved uses, Aventis and perhaps StarLink corn growers face tort liability for contaminating neighboring fields and entire shipments of corn. The legal theories alleged in the various class-action lawsuits

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against Aventis include public nuisance, consumer fraud, and negligence. The fallout of this debacle may also lead to farmers suing their StarLink-growing neighbors because, despite growing non-StarLink corn, the farmers' grain bins tested positive for StarLink corn.

Aventis attempted to rectify some of the economic damages by providing growers of StarLink corn and growers of StarLink-contaminated corn a per bushel premium to make up for lost marketing opportunities. In an agreement and supplemental agreement with 17 state Attorneys General, Aventis agreed to pay a 25-cent per bushel premium above the October 2, 2000, corn price to StarLink and certain non-StarLink corn growers for corn planted with StarLink seed and in the 660 feet buffer zone area. Aventis has also agreed to reimburse some transportation and storage costs to corn growers and elevators. In the supplemental agreement between the state Attorneys General and Aventis announced on July 24, 2001, Aventis will also reimburse non-StarLink growers who either had seed contaminated with the StarLink Cry9C protein or who had their grain commingled with StarLink corn. Such growers will receive a 5-cent per bushel premium if the corn is fed on the farm (an approved use) and a 10-cent per bushel premium if the corn is marketed to a StarLink Logistics Approved Destination.

While Aventis' buy-back program allows farmers to sell or utilize their StarLink or StarLink-contaminated corn that would otherwise be rejected by major feed buyers such as Tyson, the buy-back program has encountered legal and logistical problems. Farmers have reported difficulty in obtaining timely and prompt payments for their corn. In its agreement with the state Attorneys General, Aventis assured the States that it has sufficient assets to cover any obligations and that the parties will negotiate concerning implementation details. Iowa Attorney General Tom Miller and others have exerted pressure on Aventis to speed up payments, but the agreements do not have a specific timeline. As of September 15, 2001, Attorney General Miller reported that 400 Iowa farmers had still not been compensated by Aventis.

The Aventis buy-back program does not eliminate potential contract liability for farmers. Farmers may be unable to fulfill delivery contracts for their corn because StarLink and StarLink-contaminated corn is only accepted at limited elevators or for certain uses. For example many corn farmers have delivery contracts with their member-owned ethanol cooperatives. StarLink corn is approved for industrial uses, but many ethanol plants utilize a wet mill system that produces food by-products, such as corn gluten feed, for domestic and export markets. Since StarLink corn is not approved for food consumption, these farmers would not be able to deliver their corn to their ethanol plants. Other farmers who have identity-preserved contracts for a specific type of corn may be unable to fulfill those contracts if their corn was contaminated with StarLink corn.

The Aventis buy-back program similarly does not eliminate potential tort liability for farmers. The January 22, 2001, state Attorneys General agreement disclaims any release of claims against Aventis by the states or any growers or elevators. There is no attempt in the agreement, however, to make Aventis responsible for claims brought against individual growers because of genetic drift or commingling of crops. It is likely that any lawsuit against a grower would also name Aventis as a defendant, and the farmer-defendant could argue that Aventis should be responsible for any damages awarded by a court, but there is no guarantee that this would be successful and the farmer would likely face considerable legal expenses in the meantime.

As for potential regulatory liability, given the buy-back program, it does not appear that Aventis will argue any violation of its intellectual property rights and in fact is working with farmers to eliminate "volunteer" StarLink corn. The United States is

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similarly not likely to pursue individual farmers for violating regulatory restrictions on the use of StarLink corn, but farmers should not always assume that this will be the case if future breakdowns in the grain handling system occur, especially where farmers are on notice of required regulatory controls. Under the federal regulatory system, farmers who plant Bt crops are required by EPA to set up Bt refuges to limit insects developing resistance to the Bt pesticide. Failure to plant Bt refuges could potentially result in EPA bringing enforcement actions against not only seed companies, but also individual farmers. Another example of farmers assuming responsibility for complying with the regulatory restrictions that apply to their crops is Monsanto's 2001 Technology Agreement, through which farmers growing Roundup Ready corn and canola explicitly agree to "channel grain produced to domestic use as necessary to prevent movement to markets where the grain is not yet approved for import." If a violation of this provision occurs, it is possible other entities besides Monsanto may seek damages from farmers or other responsible parties.

Conclusion

This article can only speculate about the potential liabilities farmers may face as a result of growing StarLink corn and other GMO crops. The reason for this is that courts are just beginning to address the complex legal and regulatory issues that GMO crops present. The present abundance of class action and antitrust lawsuits and the potential for individual farmers suing their neighbors and seed companies for GMO contamination problems may begin to sort out these legal issues and provide farmers a better assessment of the legal risks involved in growing GMO crops. State Attorneys General have taken the lead, seeking economic protections for farmers damaged by the StarLink corn situation, but these efforts do not fully address Aventis' implementation of the buy-back program or clarify legal liability issues.

Legislation has been introduced in Congress and state legislatures that attempts to impose legal liability on the companies that market and sell GMOs. Until legislation is enacted, however, it is premature to assume that these efforts will eliminate farmers' legal liabilities related to GMO crops. The potential for GMO products to cause damage to neighboring farmers and the entire grain handling system is evidenced not only by the StarLink example, but also in the increasing number of questions raised by GMOs including genetic drift distances, insect and weed resistance, and the inability of the current system to segregate GMO and non-GMO crops. Farmers assessing the costs and the benefits of growing GMO crops should base their decisions not only on production costs and expected yields, but also on the legal liability they may incur by planting, growing, and marketing GMO crops. For those farmers who choose not to grow GMO crops, especially organic farmers, caution still needs to be exercised in ensuring that their crops are protected from genetic contamination and that any promises made about the non-GMO crops are accurate representations of factors within the farmers' control.

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