

1 S.289

2 Introduced by Senator French

3 Referred to Committee on

4 Date:

5 Subject: Agriculture; trespass; contracts; genetically engineered seed

6 Statement of purpose of bill as introduced: This bill proposes to establish a  
7 cause of action in trespass against the manufacturer of a genetically engineered  
8 seed or genetically engineered plant part when such seed or plant part enters  
9 the property of a person engaged in an agricultural activity and causes  
10 damages. The bill would also provide that indemnification clauses in seed  
11 contracts are against public policy and are void and unenforceable. The bill  
12 also provides that seed contracts shall not include venue clauses that provide  
13 that a dispute under a seed contract shall be governed by the laws of a state  
14 other than Vermont. The bill also provides requirements and procedures for  
15 obtaining crop samples under a seed contract. In addition, the bill would  
16 require a refuge area for a corn crop using genetically engineered seed to be at  
17 least 20 percent of the acres planted in corn.

18 An act relating to the liability of owners of genetically engineered seed

19 It is hereby enacted by the General Assembly of the State of Vermont:

1       Sec. 1. FINDINGS

2           The General Assembly finds and declares that:

3           (1) A manufacturer of genetically engineered seeds or genetically  
4           engineered plant parts owns the seeds or plant parts that it sells to farmers in  
5           the State, as evidenced by the following:

6           (A) A manufacturer of genetically engineered seed has patented the  
7           genetically engineered plants, plant parts, and seeds, and such patents extend to  
8           and limit the manufacture, use, sale, and offer for sale of a patented genetically  
9           engineered seed or genetically engineered plants;

10          (B) Under the federal plant variety protection act (PVPA), 7 U.S.C.  
11          § 2541, and the U.S. Supreme Court decision in *J.E.M. AG Supply, Inc. v.*  
12          *Pioneer Hi-Bred International Inc.*, 534 U.S. 124, 140 (2001), a patent for a  
13          genetically engineered seed or genetically engineered plant parts also extends  
14          to and protects the manufacture, use, sale, and offer for sale of hybrids created  
15          from a patent-protected seed or plant part;

16          (C) A person purchasing the right to use a genetically engineered  
17          seed or genetically engineered plant from the manufacturer is subject to an  
18          agreement with the manufacturer that provides that:

19                (i) the manufacturer retains ownership of the patented  
20                technologies in the seed or plant part, including the genes and gene  
21                technologies in the seed or plant part;

1                   (ii) the manufacturer is licensing the use of the patented  
2 technology to the person purchasing the genetically engineered seed or  
3 genetically engineered plant part;

4                   (iii) the right to use genetically engineered seeds or a genetically  
5 engineered plant part shall be acquired only from the manufacturer or a person  
6 licensed by the manufacturer;

7                   (iv) the person purchasing the right to use a genetically engineered  
8 seed or genetically engineered plant part shall use the genetically engineered  
9 seed or genetically engineered plant part solely for planting a single  
10 commercial crop;

11                   (v) the person purchasing the right to use a genetically engineered  
12 seed or genetically engineered plant part shall not save or clean any crop  
13 produced from the genetically engineered seed or genetically engineered plant  
14 part unless authorized by the manufacturer;

15                   (vi) the person purchasing the right to use a genetically engineered  
16 seed or genetically engineered plant part shall not transfer any genetically  
17 engineered seed or genetically engineered plant part to any other person or  
18 entity for planting;

19                   (vii) the person purchasing the right to use a genetically  
20 engineered seed or genetically engineered plant part shall not transfer any seed

1 that the person has produced through the use or hybridization of the genetically  
2 engineered seed or genetically engineered plant part;

3 (viii) the person purchasing the right to use a genetically  
4 engineered seed or genetically engineered plant part must agree to report to the  
5 manufacturer regarding the use of the seed or plant part, including submission  
6 of records, receipts, or other documents relevant to the use of the seed or  
7 plant part;

8 (ix) the person purchasing the right to use a genetically engineered  
9 seed or genetically engineered plant part must agree to allow the manufacturer  
10 or its representatives to access the farm or land on which the seed or plant part  
11 is used or stored.

12 (2) A manufacturer's genetically engineered seed or genetically  
13 engineered plant part limits traditional farming practices in Vermont and  
14 subjects Vermont farmers to liability actions, damages to crops, and monetary  
15 damages, as evidenced by the following:

16 (A) The use of genetically engineered seeds or genetically engineered  
17 plant part limits the use of and subjects Vermont farmers to liability for  
18 traditional and historic agriculture practices:

19 (i) Seed saving is a traditional method used by Vermont farmers in  
20 which seed from a crop is used in planting a crop in a subsequent year.

1           (ii) The transfer of genetic material from one plant to another  
2 through sexual interaction of plants—known as genetic drift—or other means  
3 could cause a genetically engineered plant to crossbreed with a nongenetically  
4 engineered plant.

5           (iii) Under federal patent law, court precedent, and the license  
6 agreements required by the manufacturers of genetically engineered seeds or  
7 genetically engineered plants, a Vermont farmer who did not plant and did not  
8 want to plant a genetically engineered seed or genetically engineered plant  
9 parts could be subject to patent infringement liability if the farmer saved seed  
10 or subsequently planted seed that crossbred with a genetically engineered  
11 plant.

12           (B) The transfer of genetic material from genetically engineered  
13 plants jeopardizes the certification and sale of organic crops:

14           (i) Under the federal Organic Foods Production Act, Pub. L.  
15 No. 101-624 (1990), as codified in 7 U.S.C. ch. 94, and its rules, for a product  
16 to be sold as organic, the product must be produced and handled without the  
17 use of excluded methods.

18           (ii) An excluded method under the Organic Food Production Act  
19 and its rules includes the use of genetically engineered seed, specifically  
20 including a variety of methods used to genetically modify organisms or

1 influence their growth by means that are not possible under natural conditions  
2 or processes and that are not considered compatible with organic production.

3 (iii) Genetic drift from a genetically engineered plant to a  
4 nongenetically engineered plant does not automatically threaten the  
5 certification of an organic farmer under the federal rules for the National  
6 Organic Program (NOP); however, according to the preamble to the NOP  
7 rules, the detection of an excluded method in an organic product would trigger  
8 an investigation by the certifying agent to determine if a violation has  
9 occurred.

10 (iv) Organic seed contaminated by an excluded method cannot be  
11 saved or reused as organic seed.

12 (v) The U.S. Supreme Court recognized in *Monsanto Co. v.*  
13 *Geertson Seed Farms*, 130 S.Ct. 2743 (2010), that genetic contamination or  
14 risk of genetic contamination poses the potential of significant costs and  
15 liabilities for organic farmers, including:

16 (I) the cost of testing seed to ensure it is not contaminated by  
17 an excluded method and, therefore, can be marketed or used as organic;

18 (II) increased administrative costs in certifying a supply of  
19 organic seeds or plants; and

20 (III) the inability to market a seed, plant, or crop as organic due  
21 to the presence of an excluded method.

1           (3) For Vermont farmers to continue the traditional practice of  
2           seed-saving and for Vermont's organic farmers to have a course of redress for  
3           damages, the manufacturers that own genetically engineered seeds or  
4           genetically engineered plant parts should be:

5                   (A) subject to liability for damages caused by contamination of crops  
6                   from the trespass of genetically engineered seed or genetically engineered  
7                   plant parts; and

8                   (B) prohibited from transferring liability to a licensee who contracts  
9                   to use a genetically engineered seed or genetically engineered plant.

10          Sec. 2. 12 V.S.A. chapter 194A is added to read:

11                   CHAPTER 194A. LIABILITY RESULTING FROM THE USE OF  
12                   GENETICALLY ENGINEERED SEEDS AND GENETICALLY  
13                   ENGINEERED PLANT PARTS

14          § 5741. DEFINITIONS

15           As used in this chapter:

16                   (1) "Excluded method" shall have the same meaning as defined in  
17                   7 C.F.R. § 205.2.

18                   (2) "Farmer" means a person engaged in an agricultural activity, as that  
19                   term is defined in section 5752 of this title.

20                   (3) "Genetic drift" means the transfer of genetic material from one plant  
21                   to another through sexual interaction of plants.

1           (4) “Genetically engineered crop” means a crop grown from a  
2           genetically engineered seed or genetically engineered plant part.

3           (5) “Genetically engineered plant part” shall have the same meaning as  
4           defined in 6 V.S.A. § 641(10).

5           (6) “Genetically engineered seed” shall have the same meaning as  
6           defined in 6 V.S.A. § 641(9).

7           (7) “Manufacturer” means a person who:

8                   (A) owns or retains ownership of the genes and gene technologies of  
9                   a genetically engineered seed or genetically engineered plant part; and

10                   (B) licenses the sale or use of genetically engineered seeds or  
11                   genetically engineered plant parts.

12           (8) “Organic” shall have the same meaning as defined in 7 C.F.R.  
13           § 205.2.

14           § 5742. LIABILITY OF MANUFACTURER FOR TRESPASS OF  
15           GENETICALLY ENGINEERED SEED OR GENETICALLY  
16           ENGINEERED PLANT PARTS

17           (a) A manufacturer shall be liable in a cause of action for trespass to a  
18           farmer if, without the consent or authority of the farmer, a genetically  
19           engineered seed, genetically engineered plant part, or the genes or gene  
20           technologies in such a seed or plant part that the manufacturer licensed for use:

1           (1) enters the property of a farmer that did not license the genetically  
2 engineered seed or genetically engineered plant part; and

3           (2) causes damages to the farmer that did not license the genetically  
4 engineered seed or genetically engineered plant part.

5           (b) In a cause of action under this section, damages may include:

6           (1) loss of any price premium that would have accrued to a farmer by  
7 contract or other marketing arrangement or that would have been otherwise  
8 reasonably available to the farmer through ordinary commercial channels;

9           (2) costs incurred by a farmer to determine if seed has been  
10 contaminated by an excluded method;

11           (3) costs incurred by a farmer to replace a seed or a crop contaminated  
12 by an excluded method, including any costs incurred by the farmer due to the  
13 inability to save seed or incurred in the transportation, storage, or handling of  
14 contaminated seed, a contaminated crop, or seed purchased to replace  
15 contaminated seed or a contaminated crop;

16           (4) any judgment, charge, or penalty for which the farmer of a crop that  
17 is not a genetically engineered crop is liable because of breach of contract,  
18 including loss of organic certification for failure to deliver a crop or shipment  
19 free of an excluded method or for delivering a crop or shipment exceeding any  
20 contractually agreed tolerances for the presence of an excluded method; and



1 their growth and development by means that are not possible under natural  
2 conditions or processes. Such methods include cell fusion, microencapsulation  
3 and macroencapsulation, and recombinant DNA technology (including gene  
4 deletion, gene doubling, introducing a foreign gene, and changing the positions  
5 of genes when achieved by recombinant DNA technology). Such methods do  
6 not include the use of traditional breeding, conjugation, fermentation,  
7 hybridization, in vitro fertilization, or tissue culture.

8 (10) “Genetically engineered plant part” means a whole plant or plant  
9 part, including scions intended for planting, which contains material derived  
10 from a GE seed or is itself produced using the methods described in  
11 subdivision (9) of this section.

12 (11) “Landowner” means a person who owns or controls real property.

13 (12) “Manufacturer” means a person who:

14 (A) owns or retains ownership of the genes and gene technologies of  
15 a genetically engineered seed or genetically engineered plant part; and

16 (B) licenses the sale or use of genetically engineered seeds or  
17 genetically engineered plant parts.

18 (13) “Refuge area” means a percentage of acreage of a crop that does  
19 not contain genetically engineered seed or genetically engineered plant parts.

1       Sec. 4. 6 V.S.A. §§ 649–652 are added to read:

2       § 649. SEED CONTRACTS GOVERNED BY VERMONT LAW

3           (a) Seed contracts entered into on or after July 1, 2014, for the purchase of  
4       seeds or plant parts in Vermont shall be governed by the laws of Vermont. If a  
5       seed contract entered into on or after July 1, 2014 purports to choose the laws  
6       of a jurisdiction other than Vermont to govern the contract, such provisions of  
7       the contract are void and unenforceable.

8           (b) In a seed contract entered into on or after July 1, 2014 to purchase seed  
9       or plant parts, a provision that purports to waive the provisions of this section,  
10       to choose the laws of a jurisdiction other than Vermont, or to choose a forum  
11       that would not otherwise have jurisdiction over the purchaser is void.

12           (c) The proper venue for an action under a seed contract entered on or after  
13       July 1, 2014 is the Civil Division of the Superior Court for the county of  
14       Vermont in which the injury is alleged to have occurred.

15       § 650. ANTI-INDEMNIFICATION CLAUSE; CONFLICTING

16           CONTRACTUAL CLAUSE

17           (a) In a seed contract entered on or after July 1, 2014, a clause or provision  
18       within the seed contract that includes a covenant, a promise, an agreement, or  
19       an understanding regarding the use of seed or plant parts and that purports to  
20       require one party to the contract to indemnify, hold harmless, insure, or defend  
21       the other party to the contract or other named indemnitee against liability or

1 claims for damages, losses, or expenses, including attorney's fees, is against  
2 public policy, and such a clause or provision is void and unenforceable.

3 (b) A clause or provision of a seed contract in conflict with this chapter or a  
4 requirement under this chapter shall be void.

5 § 651. MANDATORY REFUGE AREA

6 (a) A refuge area for a corn crop using genetically engineered seed shall be  
7 at least 20 percent of the acres planted in corn.

8 (b) A violation of this section shall be enforced under chapter 1 of this title,  
9 and any administrative penalty shall be assessed under section 15 of this title.

10 § 652. SEVERABILITY

11 If any provision of this chapter or its application to any person or  
12 circumstance is held invalid or in violation of the Constitution or laws of the  
13 United States, the invalidity or the violation shall not affect other provisions of  
14 this chapter which can be given effect without the invalid provision or  
15 application, and to this end, the provisions of this chapter are severable.

1 Sec. 5. 6 V.S.A. chapter 35, subchapter 3 is added to read:

2 Subchapter 3. Crop Sampling

3 § 656. PROCEDURES TO GAIN ACCESS TO A LANDOWNER'S

4 PROPERTY

5 (a) If a seed contract allows a manufacturer or its agent to enter a  
6 landowner's property, the manufacturer or its agent shall, before entering the  
7 land:

8 (1) notify the landowner whose property it intends to enter of:

9 (A) an allegation warranting an inspection;

10 (B) the nature of that allegation, whether breach of contract, patent  
11 infringement, or any other claim; and

12 (C) the requirements and rights afforded the landowner under this  
13 chapter;

14 (2) provide a copy of the notification to the Secretary of Agriculture,  
15 Food and Markets; and

16 (3) request permission to enter the landowner's property and obtain the  
17 written permission of the landowner.

18 (b) A landowner to whom notice is provided under subsection (a) of this  
19 section shall grant or deny access in writing within 10 days of receipt of a  
20 request that complies with the requirements of subdivisions (a)(1)–(3) of this  
21 section.

1       (c) If a landowner to whom notice is provided under subsection (a) of this  
2       section withholds permission, the manufacturer may petition the Civil Division  
3       of the Superior Court in the county in which the alleged action occurred for an  
4       order granting permission to enter the landowner's property.

5       (d) A manufacturer may obtain from the Civil Division of the Superior  
6       Court in the county in which the alleged action warranting inspection occurred  
7       a protective order prohibiting the intentional destruction or damage to a crop if  
8       the manufacturer can demonstrate that the crop is at risk of intentional  
9       destruction or damage. If the Civil Division of the Superior Court issues a  
10       protective order under this subsection, the Civil Division of the Superior Court  
11       shall draft the protective order to minimize interruption or interference with  
12       normal farming practices, including harvest and tillage.

13       § 657. CROP SAMPLING PROCEDURES

14       (a) A manufacturer that receives written permission to enter a landowner's  
15       property under section 656 of this title shall notify the landowner at least  
16       24 hours in advance of the time and location of the sample taking.

17       (b) The landowner or his or her agent may be present at any collection of  
18       samples and may take duplicate seed samples for future comparison and  
19       verification purposes. The landowner shall bear the cost for obtaining  
20       duplicate seed samples.

1       (c) If requested by either party, the Secretary of Agriculture, Food and  
2       Markets or his or her designee shall be present for the sample taking. The  
3       Secretary of Agriculture, Food and Markets may impose a fee for providing  
4       this service. The manufacturer shall pay the fee charged by the Secretary of  
5       Agriculture, Food and Markets.

6       (d) Samples may be taken from a standing crop, from representative  
7       standing plants in the field, from crops that have been stored, or from crop  
8       residue remaining in the field after harvest.

9       (e) The manufacturer may obtain no more samples than those reasonably  
10       necessary to make a determination regarding the allegation of which the  
11       landowner received notice under section 656 of this title.

12       (f) The manufacturer shall submit seeds collected under this section to an  
13       independent testing laboratory for sampling within 60 days from the date the  
14       samples are taken.

15       (g) The results of any testing conducted pursuant to this subchapter shall be  
16       sent by registered mail by the party requesting the testing to all parties  
17       involved in the investigation within 30 days after the results are reported from  
18       the testing laboratory.

19       § 658. UNLAWFUL ENTRY UPON PROPERTY

20       (a) A landowner has a right of action for trespass against a manufacturer if:

1           (1) the manufacturer or its agent enters the property under an asserted  
2 right afforded by a seed contract, but the manufacturer or agent fails to comply  
3 with the requirements of sections 656 and 657 of this title;

4           (2) the manufacturer or its agent enters property for which it has no right  
5 to enter under a seed contract and, in so doing, causes damage.

6           (b) If a landowner prevails in an action filed under this section, the  
7 landowner is entitled to recover from the manufacturer any actual damages  
8 incurred by the landowner resulting from the manufacturer's violation of this  
9 subchapter.

10          (c) The court shall award costs, including reasonable attorney's fees, to a  
11 farmer who prevails in an action under this subchapter.

12          Sec. 6. EFFECTIVE DATE

13          This act shall take effect on passage.