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H.733

Introduced by Representatives French of Shrewsbury, Burke of Brattleboro,
Clarkson of Woodstock, Davis of Washington, Edwards of
Brattleboro, Marek of Newfane, McCullough of Williston,
Stevens of Waterbury, Waite-Simpson of Essex, Wizowaty of
Burlington and Yantachka of Charlotte

Referred to Committee on

Date:

Subject: Agriculture; trespass; contracts; genetically engineered seed

Statement of purpose: This bill proposes to establish a cause of action in
trespass against the manufacturer of a genetically engineered seed or
genetically engineered plant part when such seed or plant part enters the
property of a person engaged in an agricultural activity and causes damages.

The bill would also provide that indemnification clauses in seed contracts are
against public policy and are void and unenforceable. The bill also provides
that seed contracts shall not include venue clauses that provide that a dispute
under a seed contract shall be governed by the laws of a state other than
Vermont. The bill also provides requirements and procedures for obtaining
crop samples under a seed contract. In addition, the bill would require a refuge
area for a corn crop using genetically engineered seed to be at least 20 percent
of the acres planted in corn.

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

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

3 Sec. 1. FINDINGS

4 The general assembly finds and declares that:

5 (1) A manufacturer of genetically engineered seeds or genetically
6 engineered plant parts own the seeds or plant parts that it sells to farmers in the
7 state, as evidenced by the following:

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

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

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

1 (i) the manufacturer retains ownership of the patented
2 technologies in the seed or plant part, including the genes and gene
3 technologies in the seed or plant part;

4 (ii) the manufacturer is licensing the use of the patented
5 technology to the person purchasing the genetically engineered seed or
6 genetically engineered plant part;

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

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

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

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

1 (vii) the person purchasing the right to use a genetically
2 engineered seed or genetically engineered plant part shall not transfer any seed
3 that the person has produced through the use or hybridization of the genetically
4 engineered seed or genetically engineered plant part;

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

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

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

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

1 (i) Seed saving is a traditional method used by Vermont farmers in
2 which seed from a crop is used in planting a crop in a subsequent year;

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

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

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

16 (i) Under the federal Organic Food Production Act and its rules,
17 for a product to be sold as organic, the product must be produced and handled
18 without the use of excluded methods;

19 (ii) An excluded method under the Organic Food Production Act
20 and its rules includes the use of genetically engineered seed, specifically
21 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;

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 seed-
2 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" shall mean a person engaged in an agricultural activity, as
19 that 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) of this title.

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 enters the property of the farmer and
21 causes damages.

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

2 (1) Loss of any price premium that would have accrued to a farmer by
3 contract or other marketing arrangement or that would have been otherwise
4 reasonably available to the farmer through ordinary commercial channels;

5 (2) Costs incurred by a farmer to determine if seed has been
6 contaminated by an excluded method;

7 (3) Costs incurred by a farmer to replace a seed or a crop contaminated
8 by an excluded method, including any costs incurred by the farmer due to the
9 inability to save seed or incurred in the transportation, storage, or handling of
10 contaminated seed, a contaminated crop, or seed purchased to replace
11 contaminated seed or a contaminated crop;

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

17 (5) Any compensable damage incurred by a farmer that would not have
18 been incurred in the absence of crop contamination;

19 (c) Liability under this section may not be waived or otherwise avoided by
20 contract or other means. As of the effective date of this chapter, a contract
21 clause or provision that purports to require one party to the contract to

1 indemnify, hold harmless, insure, or defend the other party to the contract for
2 liability under this section shall be in violation of the requirements of 6 V.S.A.
3 § 650, and such clause or provision shall be void and unenforceable.

4 (d) The court shall award costs, including reasonable attorney's fees, to a
5 farmer who prevails in an action under this section.

6 Sec. 3. 6 V.S.A. § 641 is amended to read:

7 § 641. DEFINITIONS

8 As used in this chapter:

9 (1) "Agricultural seed" includes grass, forage, cereal, oil, fiber, and
10 other kinds of crop seeds commonly recognized as agricultural seeds, lawn
11 seeds, and combinations of such seeds, and may include noxious weed seeds
12 used as agricultural seed.

13 * * *

14 (9) "Genetically engineered (GE) seed" means seed produced using a
15 variety of methods, as identified by the National Organic Program of the U.S.
16 Department of Agriculture, used to modify genetically organisms or influence
17 their growth and development by means that are not possible under natural
18 conditions or processes. Such methods include cell fusion, microencapsulation
19 and macroencapsulation, and recombinant DNA technology (including gene
20 deletion, gene doubling, introducing a foreign gene, and changing the positions
21 of genes when achieved by recombinant DNA technology). Such methods do

1 not include the use of traditional breeding, conjugation, fermentation,
2 hybridization, in vitro fertilization, or tissue culture.

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

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

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

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

11 (B) Licenses the sale or use of genetically engineered seeds or
12 genetically engineered plant parts.

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

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

16 § 649. SEED CONTRACTS GOVERNED BY VERMONT LAW

17 (a) On or after the effective date of this section, a seed contract for the
18 purchase of seeds or plant parts in Vermont shall be governed by the laws of
19 Vermont. If a seed contract entered into after the effective date of this section
20 purports to choose the laws of a jurisdiction other than Vermont to govern the
21 contract, such provisions of the contract are void and unenforceable.

1 (b) On or after the effective date of this section, a provision of a seed
2 contract to purchase seed or plant parts that purports to waive the provisions of
3 this section, to choose the laws of a jurisdiction other than Vermont, or to
4 choose a forum that would not otherwise have jurisdiction over the purchaser
5 is void.

6 (c) The proper venue for an action under a seed contract entered into after
7 the effective date of this section is in the civil division of the superior court for
8 the county in which the injury is alleged to have occurred.

9 § 650. ANTI-INDEMNIFICATION CLAUSE; CONFLICTING

10 CONTRACTUAL CLAUSE

11 (a) On or after the effective date of this section, a clause or provision
12 within a seed contract that includes a covenant, a promise, an agreement, or an
13 understanding regarding the use of seed or plant parts and that purports to
14 require one party to the contract to indemnify, hold harmless, insure, or defend
15 the other party to the contract or other named indemnitee against liability or
16 claims for damages, losses, or expenses, including attorney's fees, is against
17 public policy, and such a clause or provision is void and unenforceable.

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

1 § 651. MANDATORY REFUGE AREA

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

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

6 § 652. SEVERABILITY

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

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

13 Subchapter 3. Crop Sampling

14 § 656. PROCEDURES TO GAIN ACCESS TO A LANDOWNER'S
15 PROPERTY

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

19 (1) Notify the landowner whose property it intends to enter of:

20 (A) an allegation warranting an inspection;

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

3 (C) the requirements and rights afforded the landowner under this
4 chapter;

5 (2) Provide a copy of the notification to the secretary; and

6 (3) Request permission to enter the landowner's property and obtain the
7 written permission of the landowner.

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

12 (c) If a landowner to whom notice is provided under subsection (a) of this
13 section withholds permission, the manufacturer may petition the civil division
14 of the superior court in the county in which the alleged action occurred for an
15 order granting permission to enter the landowner's property.

16 (d) A manufacturer may obtain from the civil division of the superior court
17 in the county in which the alleged action warranting inspection occurred a
18 protective order prohibiting the intentional destruction or damage to a crop if
19 the manufacturer can demonstrate that the crop is at risk of intentional
20 destruction or damage. If the civil division issues a protective order under this
21 subsection, the civil division shall draft the protective order to minimize

1 interruption or interference with normal farming practices, including harvest
2 and tillage.

3 § 657. CROP SAMPLING PROCEDURES

4 (a) A manufacturer that receives written permission to enter a landowner's
5 property under section 656 of this title shall notify the landowner at least
6 24 hours in advance of the time and location of the sample taking.

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

11 (c) If requested by either party, the secretary or his or her designee shall be
12 present for the sample taking. The secretary may impose a fee for providing
13 this service. The manufacturer shall pay the fee charged by the secretary.

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

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

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

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

8 § 658. UNLAWFUL ENTRY UPON PROPERTY

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

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

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

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

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

- 1 Sec. 6. EFFECTIVE DATE
- 2 This act shall take effect on passage.