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# AGRICULTURAL LAW

The newsletter of the ISBA's Section on Agricultural Law

## Risk management strategies for identity preserved grain exports

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Emerging foreign regulations for imported grain ultimately may result in trace-back liability to U.S. farmers for the commingling of even minuscule amounts of genetically engineered DNA. As of April 2004, all imports to the European Union (including bulk grain shipments) that contain more than 0.9 percent genetically modified organisms (GMOs) must be labeled as containing or consisting of GMOs.<sup>1</sup> Moreover, the European Union has imposed a zero tolerance for the existence of biotech products that are either unapproved or pending approval, such as StarLink™ corn.<sup>2</sup> Japan imposes similar purity and labeling requirements.

Importing governments historically have tested some bulk grain shipments for the unauthorized presence of genetically engineered grain. For example, in December 2002, the Japanese government seized a shipment of corn from the United States because it contained an unapproved genetic engineering event. Total liability for the commingled shipment exceeded \$1 million—paid by the farmer-cooperative responsible for the shipment. More recently, European Union and Japanese authori-

ties have detected trace amounts of unapproved B.t.10 corn. The European Union first detected this discrepancy in a shipment of corn gluten feed to Ireland in May 2005. Since that initial discovery, Japan has detected 10 shipments containing B.t.10. As a general rule, all grain in the ship's hold containing the unapproved transgenic event is subject to destruction or return to the United States at the shipper's election.

Recent ratification of the Cartagena Protocol on Biosafety, a subsidiary of the UN Convention on Biological Diversity, may provide nations seeking to maintain zero tolerances for biotech crops further legal justification for their strict testing regimes. Consumer and interest group pressure may also fortify these jurisdictions' resolve to maintain a zero tolerance policy. For example, in January 2005, protestors halted a ship bound for France and demanded inspection of the cargo for traces of genetically modified organisms. This action followed a previous interruption of a shipment bound for Italy in May 2004.

Increased inspections, coupled with strict enforcement of seed and grain marketing contracts, may expose individual U.S. farmers to liability claims for the adventitious presence (commingling) of GM grain. As an initial step, attorneys representing farmers should educate their clients of the potential pitfalls of guaranteeing via contract that their grain is non-GMO or "GM-Free." Although elevators generally test incoming shipments for genetic purity

tolerances before accepting the grain, elevators may retain samples of each farmer's grain delivery for more detailed testing at a later date if problems arise further along the distribution chain. Assurances made by the farmer at the point of sale may expose the farmer to warranty claims for the lost premium of an entire elevator or even an overseas grain shipment if the grain is later determined to be outside allowable tolerances for the adventitious presence of GMOs. Two recent articles in the *Journal of Food Law & Policy* (Spring 2005) provide a more detailed legal analysis of this potentially serious problem. See Thomas P. Redick & Michael J. Adrian, "Do European Non-Tariff Barriers Create Economic Nuisances in the US?," 1 J. Food L. & Pol'y 87-130; and A. Bryan Endres, "Revising Seed Purity Laws to Account for the Adventitious Presence of Genetically Modified Varieties: A First Step Toward Coexistence," 1 J. Food L. & Pol'y 131-164.

Farmers also must recognize risks and exercise diligence when purchasing seed. Seed dealers draft most purchase agreements to disavow all responsibility for seed impurities beyond the replacement cost of the seed.<sup>3</sup> For example, if the originally purchased seed, marketed to the farmer as "conventional" or "non-GMO," actually contained 2 percent GM seed, the farmer's harvested crop probably would exceed the 0.9 percent GMO threshold required for export to the European Union. The farmer would have no contract remedy

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against the seed seller for any losses.<sup>4</sup>

The extent of genetic impurity in the domestic seed supply is unknown, but at least one pilot study found low levels of GMOs in corn, soybean and canola seed marketed as conventional or "non-GM."<sup>5</sup> Unfortunately, state and federal seed laws generally do not address the issue of genetically modified seed unless the impurity exceeds 5 percent, a far cry from the 0.9 percent required for importation to the European Union. Moreover, growers also should keep in mind that seed labels indicating 98.00 percent pure soybean seed or 99.5 percent pure corn seed refer to varietal, not genetic purity and, therefore, could contain significant amounts of genetically modified seed.

In light of this uncertainty in the seed market and potential downstream liability, attorneys should advise their clients of strategies to at least mitigate the risk of liability for the adventitious presence of genetically modified DNA in grain shipments. Farmers should review their current insurance policies. At least one major agricultural insurance company has dropped standard coverage for damages resulting from biotech commingling and is demanding a specific GMO endorsement. Growers considering entering into non-GM contracts or other identity preserved growing arrangements should verify and, if necessary, secure insurance coverage to mitigate this risk. In addition, farmers should retain seed receipts for at least five years to confirm what seeds they planted and sold. The European Union's traceability regulation mandates retention of these records and local elevators that export grain to the European market may start requiring copies for their own traceability auditing. Finally, some commentators recommend independent testing of seed for GM content prior to planting. Although probably not a practicable approach for all farmers, this step may identify potential problems at an earlier date and further mitigate the risk of farmer liability for commingled biotech grain shipments.

1. See Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, 2003 O.J. (L268) 1, at Art. 12 & 24 (establishing procedures for the approval and labeling of genetically modified food and feed); Regulation (EC) No 1830/2003 of the European Parliament

and of the Council of 22 September 2003 concerning the traceability and labeling of genetically modified organisms and the traceability of feed and feed products produced from genetically modified organisms amending Directive 2001/18/EC 2003 O.J. (L268) 24, at Art. 4(c) & 5 (establishing procedures for the traceability and labeling of genetically modified food and feed).

2. Regulation (EC) No 1829/2003, at Art. 47(1).

3. For example, the International Seed Federation, in response to the problems of adventitious presence of genetically modified DNA in seed supplies, drafted for its members a "Model Conditions of Sale Disclaimer." The disclaimer is available at <[http://www.worldseed.org/Position\\_papers/cond\\_sale.htm](http://www.worldseed.org/Position_papers/cond_sale.htm)> and provides as follows:

Seeds supplied to you are from a variety bred from parent components that have not been genetically modified. The methods used in the development and maintenance of that variety are aimed at avoiding the presence of off-types, including genetically modified material, as defined by the applicable laws or regulations.

Seed production has been carried out in accordance with production rules including stipulated isolation distances. However, in open fields there is free circulation of pollen. . . . [I]t is not possible to totally prevent the adventitious presence of GM material and to guarantee that the seed lots comprising this delivery are free from any traces derived from GM plants.

(Company name) had undertaken due diligence to avoid adventitious presence of GM material in this seed lot. However, (company name) gives no guarantee that the seed is GM free and can accept no liability arising from the adventitious presence of GM material.

4. See, e.g., *Day v. Tri-State Delta Chemicals, Inc.*, 165 F. Supp. 2d 830 (E.D. Ark. 2001); *Jones v. Asgrow Seed Co.*, 749 F. Supp. 836 (N.D. Ohio 1990).

5. Margaret Mellon & Jane Rissler, "Gone to Seed: Transgenic Contaminants in the Traditional Seed Supply" 1 (2004) available at <[http://www.ucusa.org/food\\_and\\_environment/genetic\\_engineering/gone-to-seed.html](http://www.ucusa.org/food_and_environment/genetic_engineering/gone-to-seed.html)>. The Mellon & Rissler pilot study tested six varieties of corn, soybean and canola at two independent laboratories. One laboratory found genetically modified DNA in 50 percent of the corn and soybean samples and 100 percent of the canola samples. The other laboratory identified genetically modified DNA in 83 percent of the corn, soybean and canola samples. *Id.* at 26-27.

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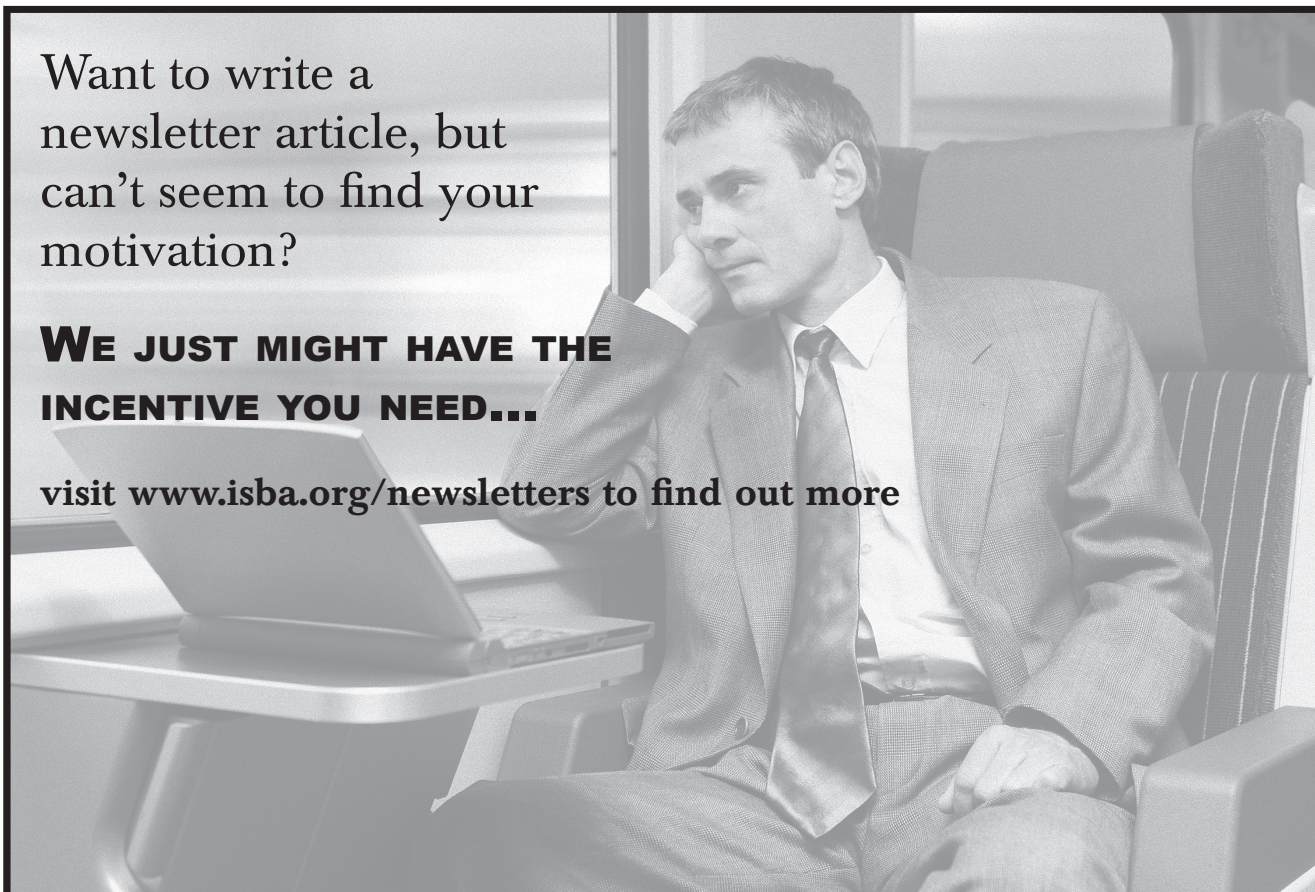
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