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Drew Kershen

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PANEL REMARKS ON LIABILITY

LIABILITY FOR REFUSING TO USE AGRICULTURAL BIOTECHNOLOGY

Remarks By: Drew Kershen*

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{1} Good afternoon. I'm very pleased to be here. I appreciate the offer and the invitation from the *Richmond Journal of Law & Technology* to speak at this conference. This final panel is really about liability issues related to genetically modified foods or transgenic crops. Now I just want to quickly introduce these three people, and I'm going to start on my far side with Rachel Lattimore. Rachel Lattimore is a lawyer with the firm of Arent Fox in Washington D.C., and she is going to focus her talk – and we've sort of agreed among ourselves so we don't step on each other's toes – she's going to focus her talk really in one sense on corn and the issues about the coexistence between transgenic crops and organic crops. Don Uchtmann, who is next to me, is a professor in the College of Agriculture at the University of Illinois, and he has done a lot of work in the area of StarLink. He is really going to talk about the impact of StarLink and the legal liability that has arisen out of StarLink. I'm Drew Kershen from the University of Oklahoma College of Law, and I'm going to talk about the liability for not using genetically modified organisms.

{2} Okay, let me get to the risk of growing non-GMO and just talk about that. I'm only going to talk about three risks in about the next ten to twelve minutes. The risk of product liability for foods, the risk of environmental compliance relating to pesticides, and the risk I call "broader social risk" or the risk of scientific ignorance which relates to future developments.

{3} Let me talk about the risk of product liability. There have been a number of companies that have responded to activist campaigns by announcing that they were not going to use transgenic crops for ingredients in their foods. There have been a number of prominent names among food companies that readily come to mind. I would just say that they're taking tremendous risk by doing this – tremendous risk of legal liability – by making this decision. Not just in a societal sense, about which I will also talk, but take immediate risk right now. The food companies are acting as if they are unaware that the Restatement of Torts for Products Liability, that specifically for the first time in the Restatement of Torts, makes it clear that food is now subject, fully and completely, to product liability.

{4} Food is now like any other product and subject to products liability. That means it's subject to a manufacturing defect. Manufacturing defect would be such things as if you had glass in a Coca Cola, or if you had a toxic poison in baby food, or whatever it is. By the way, that's not an unusual tort. It's a tort that has been around for a long time. It's a tort that has existed for a long time, and that's really not unusual because, obviously, your food is not meant to have that kind of manufacturing defect in it.

{5} Having a genetically modified organism as an ingredient is not at risk of being a manufacturing defect, as long as it has passed the regulatory provisions. It's not going to be a manufacturing defect. What is really a risk, and this is what is now made clear in the Restatement, is that food companies



had this manufacturing design before, but now with food being fully and completely accountable to the products liability there are two other kinds of products liability: design liability and also inadequate warning or instructions liability. I'm going to focus on the design liability.

{6} Design liability means that companies now have an obligation to use a design for their product which, if there is a reasonable alternative design that lessens the risk of something, then they have the obligation to use that reasonable alternative design. And this section also makes it explicitly clear that consumer expectations about the product is not a defense against design liability. That is, consumer expectations or consumer demands or consumer fears that might have been generated by activist groups are not a defense. You are required, under products liability, to use reasonable alternative designs. And if you say, "But I want to appeal to product niches or to specific consumer demands," then the answer becomes, "Well, you can do that if you want to if you think you still have an alternative which is still a reasonable alternative. But if it's not the best alternative, then you can still do it, as long as you put on adequate warnings and instructions on the label." If food companies do not add adequate warnings, they are then subjected to this third product liability – that is, the inadequate warning and instruction.

{7} Now let me just tell you how this is going to work out and begin to play out with respect to agricultural biotechnology. Let me just talk about peanuts. Peanuts are a significant risk to a number of people and a significant percent of the population. I don't mean large numbers, I just mean it's a significant allergy. And those risks are significant. That is, a peanut allergy, for example, can, in fact, kill you. Not all allergies will kill you, but peanuts very definitely can. There are a number of companies that have well into development now – past the laboratory stage and well into the research test phases – the development of hypoallergenic peanuts, which have been developed with a method using agricultural biotechnology. There are various methods, and I don't need to go into the methods to do that, but there are various methods by which this can be done. And so there will be, very shortly, companies applying for permission to commercialize – and by this I mean in the next two to three years, or maybe four – to commercialize peanuts that no longer contain the allergen.

{8} Now, again, biotechnology is not the only technique or technology that could maybe create hypoallergenic peanuts. In fact, you may have been reading in the papers these last few days about a company – I believe it's out of New Orleans but it's irrelevant – that has a vaccine that they're talking about. And that vaccine will protect you from the allergies of peanuts. So biotechnology is not the only way, and that point is going to come back in a few minutes. But what I was going to ask you is once these are commercialized, once peanut farmers could grow hypoallergenic peanuts, what would be the defense for a food company for not using that reasonable alternative? What would be the defense?

{9} "My regret is that your child only had one life to give for a natural peanut?" It's not going to float. And it's not a defense in consumer expectations. Now a few are going to say, "Oh, wait a second. If you have a reasonable alternative, you can then give label warnings." Well, yes, you can give label warnings. You could say "I am using peanuts that still contain the allergy and I'm doing this." And you better put adequate warnings, and I don't know what they would all be, but you better be careful about that.

{10} But remember, a lot of the times that you see young children come into contact with peanuts it isn't through labeling because first of all young children often don't have the ability to read. They haven't gone to school yet. They were over at a neighbor's. That's what happened to a child in Oklahoma just about two months ago. The child was at a neighbor's. And the neighbor child said, "Let's have a cookie." That sounded like a good idea. It is a good idea. Except the cookie, of course, because the child doesn't know, is a peanut cookie. And then you've got trouble. Any company that

would use that kind of peanut is at great risk of being held in products liability for design defect, when there is a reasonable alternative that's been completely approved by the FDA, completely approved by the USDA, and completely approved by the EPA. Any company that doesn't do that is at risk. I don't want a single child to die, but I will tell you, if one does, I want the case, because I'm going to own the food company. I'm going to hold them liable. Because there is no excuse. None. It's not going to be an excuse, and the food company will have to face the risk of product liability for refusing to deal with reasonable alternatives.


{11} Peanuts are the farthest along, but shellfish, shrimp and prawns have significant allergies, too. A researcher at Tulane and several others are well along in the laboratory research of removing these allergens. And the research is just beginning with respect to soybeans and wheat. What I'm saying to you is that food companies that let activists scare them into stopping and announcing that they won't use agriculture biotechnology have already turned into a dead end. A dead end that's going to be very costly in terms of products liability.

{12} What about environmental risk? EPA is presently reevaluating lots of pesticides, such as organophosphates, which I'll just use as one example. Organophosphates have been approved. They are very effective, but they do have some real risk to them about which we have evidence, such as environmental harms. They're also toxic instantly in terms of exposure to workers and so you have workers who at times get sick from the use of organophosphates. And so you have both environmental harms and worker harm. There's a real possibility that there will be registration revocation of some of these organophosphates. But even if there isn't revocation, the EPA has the authority to begin to put conditions on the use of pesticides, such as best management practices for what you can do, or best management practices for how you can farm in light of environmental harms or worker safety, though some of that may lap over into OSHA.

{13} Moreover, the EPA has authority for what's called technology-forcing standards. Now, I don't mean that EPA is going to force a particular technology. I'm just saying that EPA has the authority to nudge you – and sometimes more than nudge you – and push towards standards that force the adoption of different technologies.

{14} How does this relate to agricultural biotechnology? I'm going to use potato farming as an example. Monsanto and several other companies created a whole set of transgenic potatoes that were basically immunized from a variety of potato diseases, such as the Colorado beetle, such as viruses and blights. Farmers grew these transgenic potato varieties. Farmers began to use them like mad in the Pacific Northwest – your Idaho potato people and Washington. What the farmers liked most of all was they had reduced all these pesticides. As a practical matter, organophosphate usage was reduced significantly. That protected the family of the farmers. It protected the workers. And it also protected the environment from fish kills and runoffs that occurred. It was a technology that had all sorts of advantages to it, until food companies responded to activists' food scares and began to announce the companies would not use French fries that had transgenic ingredients. Food chains like McDonald's, Wendy's, McCain's in Canada, began to say they wouldn't use transgenic potatoes. And when the companies began to say they wouldn't use transgenic potatoes, processors stopped buying transgenic potatoes. And in response to the kinds of things that other panelists earlier talked about, when the food processors then sent those messages back, the message got included in contract clauses prohibiting the use of agricultural biotechnology. And when you put those clauses in prohibiting agricultural biotechnology, it meant that the technology basically disappeared. It's still out there, it's still patented, but it has disappeared. With all these advantages, it has disappeared.





{15} What's the impact of that on Prince Edward Island, which is a major Canadian province growing potatoes for french fries. It means last summer they had six major fish kills. They have a huge debate going on about that. And, one of the leaders of the potato industry in the discussions said recently, "Well, you know what? We really have a way of solving all of this if you just let us use biotechnology." And then he said, the fear that activist groups have generated has prevented PEI potato farmers from using agricultural biotechnology and has blocked us from using the best technology. What I'm saying to you is, if food companies pushed contract clauses in their agreements with farmers which prohibit them from using a better technology, the food companies have caused the injuries, and they may be liable for the injuries. In my opinion, that requires some expansion of liability for food companies but I'm willing to argue and I'm willing to bet that I would have a good chance of winning. Right now we are killing fish and harming workers for no good reason other than fearmongering. Fearmongering – putting people in fear of agricultural biotechnology. That liability theory, it would be my hope someday, would go back to include the activist organizations for creating this. I'm working on these theories in my mind. Liability theories should be for those who caused the harms. Those who have no respect for other peoples' lives and who claim to be protecting the environment and then let fish die when there is no good reason.

{16} What's the risk for scientific developments? Agricultural biotechnology, as I've just said, is having problems because of what I consider to be fearmongering. There are several things about the risk of scientific ignorance taking hold on our society. One is product development as a general name. This isn't just about market share. It is true that companies will certainly try to use technologies to develop market share. But it's about blocking the development of nutritional products. It's about blocking the development of biotechnology products in pharmaceuticals or industrials because we will have these debates and fearmongering about food. And so it's not about market share. It's about product development. It's about product development in a broader sense about products that I think we need to have.

{17} But it's interesting to me that the science is not going to stop. The science is going to go on. And plaintiffs' lawyers, when these harms occur, are not going to say, "Oh, we're going to ignore this science on the theory of, well, we didn't let the products develop." No, plaintiffs' lawyers are going to come back the same way they have in all the other things about whether you could put covers over drive chains or whether you could put roll bars on tractors. They're going to say there was a technology available, and be willing to argue to the jury, "The company had an alternative and therefore the company caused these harms." In other words, the loss of product development isn't just a loss of these new products. It's putting the companies back at risk again of facing plaintiffs' attorneys saying that companies not only stopped product development but, because of marketing concerns, caused personal injuries and environmental harms. Plaintiffs' attorneys will point to the science. And I'm enough of a Plaintiffs' attorney again to know that Plaintiffs' attorneys don't give a hoot which side the science turns out to be on, as long as it's the winning side for plaintiffs. So plaintiffs' lawyers will use the science tomorrow to win a good verdict.

{18} But I want to talk about a broader policy, and that's about poverty alleviation. The impact of these debates has really been significantly harmful in terms of poverty alleviation around the world, in terms of impact on developing nations. Developing nations have been put in fear of using these products. They've been put in fear of eating the food from these products as we've seen in the Zambian situation and the famine in Zambia. But the impact on these developing nations has been really a detrimental impact in terms of their ability to really begin to be nations that are hoping to escape their poverty. And I just want to give two quick examples.

{19} The transgenic potato. I have already talked about transgenic potato varieties in America. But in the next slide that I'll just show in a minute, there's a researcher at the University of Leeds in the U.K., who has developed transgenic potatoes specifically with a poverty focus for Bolivia, because in Bolivia potato is the major food. Most of the farms are very small. The entire farm is used for growing potatoes. Potatoes are a wonderful food in terms of starch. They're not very good for all the other things that give you health, called micronutrients. And what he says is that he thinks he can increase production by 50 or 60 percent with a transgenic potato resistant to diseases. That means Bolivian farmers could reduce their land use for the production of potatoes by half and feed their family with potatoes. What could the Bolivian farmers do with the land no longer devoted to producing potatoes? Maybe to grow other kinds of foods like beans, or squash, or other things that give you the kind of health that would be good.

{20} Now, what's the other example and then I'll just end? The transgenic protato. I read today on the plane about a product out of an Indian Institute of Science. And the Institute had a product called protato. The protato is a potato with all the starch and all the energy that comes from the starch of potatoes. Indian agricultural scientists have transferred a gene into it so it picks up all the protein-rich elements of the amaranth and particularly some essential amino acids that are required for good health. And here's what the Indian scientist said at the end of the article. He said, "I only hope that activists do not demonize my protato the same way they demonized golden rice." Golden rice is rice fortified with vitamin A by using agricultural biotechnology. Thank you very much.

* Drew Kershen is the Earl Sneed Centennial Professor of Law at the University of Oklahoma School of Law where he teaches courses on agricultural law, legal history, professional responsibility, and water rights. Mr. Kershen has published over thirty law review articles throughout his career, and he is coauthor of *Farm Products Financing and Filing Service*, written in 1990 with J. Thomas Hardin. He is a past member of the Board of Directors and past president of the American Agricultural Law Association, and he served as a trustee to the Rocky Mountain Mineral Law Foundation from 1991-1995. He currently serves as a Co-Reporter for the UCC Article 7 Revision Committee. Mr. Kershen received his B.A. from Notre Dame in 1966, his J.D. from the University of Texas in 1968, and his LL.M. from Harvard University in 1975.

