Biotech Food Developers Face Potential Liability if their Product Comingles and Causes Unmodified Food Shipments to Be Rejected

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By Noel Courage

Biotechnology companies have a long road to commercialization. Investors, shareholders and company officials often have their patience tested. In the agricultural biotechnology area, there are particular regulatory concerns that make the pathway to commercialization a longer, riskier and more winding road. It has recently become clear that there are also unique liabilities that may leave innovators owing a duty of care to others in their industry based on how and when they sell genetically modified product – not just a duty of care to their own customers, but to a broad range of competitors and food producers that could be affected (even if not a *customer* of the biotechnology company).

Food distributors shipping internationally to countries where the modified foods are not approved for sale need to ensure that modified foods are not mixed with unmodified foods, or else the whole shipment could be rejected. This takes effort in some areas of trade, for example, co-mingling of product is a common practice in agriculture. In recent cases in the US and Canada, it was alleged that a multinational company, Syngenta, was negligent by selling genetically modified corn in markets where it was approved (USA, Canada), but *prior* to obtaining regulatory approval from the Chinese government to sell in China. The corn industry is interconnected enough that there was intermingling of genetically modified and unmodified corn sold in North America. Due to the unique nature of the corn industry, comingling is foreseeable and perhaps inevitable. Syngenta allegedly knew that upon commercialization, that its product would be comingled and could cause all corn to be affected in export markets. The genetically modified corn was detected by routine testing on arrival in China, and boatloads of corn shipments were rejected, resulting in lost sales, a glut in the market, and depressed prices. Syngenta was sued separately by farmers (customers and non-customers) and competitors in separate class action lawsuits in the US and Canada. Competitors also sued the company in the US. The US class action lawsuit was settled for approximately $1.5 billion. Recently, the **Ontario Court of Appeal** decided that the Canadian class action could proceed, and rejected attempts by the defendant company to have the action struck as not disclosing a reasonable cause of action[1]. The Appeal Court decided there was *no reasonable prospect* of establishing a duty of care to support a claim based on negligent misrepresentation by the defendant. However, the Appeal Court *did find that there may be a duty of care* and reasonable cause of action in regard to the claim based on alleged premature commercialization. It did not matter that this was a new claim that did not fall within a previously recognized category of claim for pure economic loss.

The potential for such a broad duty of care is an important consideration for companies undertaking development of genetically modified foods. Having a green light from regulators to sell in certain jurisdictions is not a pass to sell if a duty of care is owed to farmers, food producers and competitors, and those sales could cause damages. This should be noted not just by GMO innovators, but any companies modifying food chemically or by biotechnology, for example with coatings or chemical treatments[2]. If the Ontario Courts decide that there is liability in this type of case, it will create another obstacle and chill for commercialization of certain types of biotechnology agricultural products.

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1 *Darmar Farms Inc. v Syngenta Canada Inc.*, 2019 ONCA 789.

2 The risk of liability may also apply to any contaminated or tainted product that is marketed and gets unaffected products barred from the market, regardless of how they become contaminated or tainted. In an earlier Ontario Court of Appeal

case, Sauer v Canada (2007 ONCA 454), a claim by an Ontario farmer for negligent manufacture was allowed to proceed against a manufacturer, Ridley Inc., that allegedly sold feed to an Alberta farmer that was tainted with the microscopic particle that causes Bovine Spongiform Encephalopathy (mad cow disease). A claim based on failure to warn was struck out. Foreign borders were closed to Canadian beef after the Alberta cow was infected with BSE, causing economic losses to all exporting farmers. The Ontario farmer was found to have a reasonable cause of action even though he was not a customer of the manufacturer being sued.