

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

11924

2007 HOUSE JUDICIARY

HB 1124

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1124

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/23/07

Recorder Job Number: 1661 and 1721

Committee Clerk Signature

A. Penrose

Minutes:

Chairman DeKrey: We will open the hearing on HB 1124.

Ken Bertsch, State Seed Commissioner: (see attached testimony). Explained the bill.

Rep. Koppelman: In going over the language of the bill, I can understand why this language is sought. I'm wondering if it so delude the meaning of what certified seed is, that you fear that there might not be an advantage anymore.

Ken Bertsch: The answer from my perspective is no. Again, I refer back to my earlier comment, is what we're doing now in terms of certifying seed as to variety, varietal purity, all of the factors that are in the rules for certifying whatever type of seed there are, nothing changes with this bill. We are doing the same as we did five years ago, or will probably five years from now, except for whatever technological improvements are made during that period of time. I don't believe that is the case. Some might argue that because suddenly there may be some different language in the law that further expands the protections that we might enjoy by this, that means that suddenly seed certification is different. It will not.

Rep. Griffin: You feel that some of the language would shift the burden or liability burden more towards the producer. I saw there was one portion that refers to that.

Ken Bertsch: Probably what you are referring to is section 2 amendment, part 1 that I mentioned earlier that decouples the language regarding certified and noncertified agricultural producers from the Seed Dept. The answer to the question is no. That was simply an effort to make, the overview of the entirety of what we're trying to accomplish here is to bring clarity to the law. This was important from the AG's perspective so that there would be no misconception that under the previous language, it said certified and noncertified and the Seed Dept. would make no warranty or... In the opinion I heard, there could have been some confusion that all three parties were represented under the warranty. It is supposed to be for the Seed Dept. So the decoupling you see in parts 1 and 2 are simply to say that producers need to make their own warranty as to... and it goes on to say what those issues are, and then the Seed Dept. makes the same warranty as to the string of issues that were mostly, formerly under our disclaimer. But now is expanded to include variety. Otherwise everything else is the same.

Rep. Delmore: It seems that the liability issue that you have in here may guarantee that you won't have litigation. What are other states doing. Does MN have something that protects the seed people the way that this does.

Ken Bertsch: No, I don't think we will be immune from suit. I don't know for sure what other states have. I had heard that MN has a different disclaimer statement in their code that is more protective or stronger than ours. MN and a number of other states have seen litigation regards to certification. It's not without precedent.

Rep. Delmore: Would this address all seeds with this, or only those involved with potatoes.

Ken Bertsch: This would impact all seeds certified by the State Seed Dept. under certification programs that we operate, including potatoes and many other various products.

Rep. Klemin: In looking at the definition of certified, you first state what certified means, which means that it was randomly inspected and that's the rules of the department, we don't have the rules in front of us in terms of what it might otherwise mean, but what are you referring to specifically in this context when you talk about rule of the department.

Ken Bertsch: I actually some rules with me, in case that question came up. I can provide those to the committee. If you read chapter 74.03.02 for example you will find the rules that are involved with certification of cereals. Those are the rules that are outlined in administrative code for field inspection of those crops and for laboratory inspection of those crops. They contain issues such as field isolation standards, etc.

Rep. Klemin: Certified means more than just looking at it.

Ken Bertsch: Yes, the rules may not even be in the administrative code, they may be practices of certification agencies in terms of what actually happens in the process of a field inspection.

Rep. Klemin: You're talking about the steps you go through to determine whether the rule standards are met.

Ken Bertsch: Correct.

Rep. Onstad: On page 1, back in the definition of certified, certified means the ag seed is randomly inspected and must meet with rules of the department. Then it goes on, certification does not mean representation that the ag seed is of the variety. Please explain that.

Ken Bertsch: As I mentioned as part of my testimony at the outset, I believe that the definitions written in this way to lay the foundation for the language you see in the disclaimer further on. The point to the change in the disclaimers is to add the term variety to those areas that the department is protected against. While that might seem onerous, the problem that we've got is when we enter the field, we can provide a pretty strong guarantee (we don't

actually use the word guarantee) because we can't see every plant in that field. But when we're in a field, we can offer assurance that this variety is as stated, as was applied for because it matches the application. Beyond that, from what we've found out in a rather difficult way, is that all of a sudden if the variety is not as stated, sometimes, either by accident or beyond our control in some way, what inevitably gets planted the following year is not the correct variety. We have no control over that. It seemed important to state in black and white that this is what certification actually does. We had a post settlement meeting after this last week, in which we talked at length about what things that had to be accomplished to avoid this for the State Seed Department. One of the things that was told to me by the Solicitor General, look you guys have to clear this up. You have to tell people exactly what it is that you can and can't do and you have to make it black and white and you must do it in the rules and in the century code and in practice, which is what we have been working on for the past year. This is a culmination of that directive. The bill says what certification does and what it doesn't do, or what we can't guarantee.

Rep. Onstad: You're saying that you can't certify the seed variety.

Ken Bertsch: No, that's not what I am saying. If we certify the field, then we're also inevitably certifying that it's the variety that is claimed to be. I think the major difference here is the disclaimer language all of a sudden is changed to include the word variety; to also point out one of those areas that the Seed Department has no end control of when that seed gets planted in the ground. The other list of disclaimed issues, merchantability, fitness for a particular purpose, quantity and quality of crop produced, are all recognized by the legislature previous to this, as being those areas that the department has no control.

Chairman DeKrey: Thank you. Further testimony in support.

Dean Haas, Assistant AG: (see attached testimony).

Rep. Klemin: Section 7 repeals section 4-10-11 which is the section that provides for the inspector to furnish a certificate after inspection. Why are you repealing that.

Dean Haas: I don't have a copy of the century code in front of me. I don't remember what 4-10 will do.

Rep. Klemin: Why are you repealing that.

Dean Haas: I'm sorry about that. Mr. Bertsch indicated that he believes that the matter is now in section 4 of the bill.

Rep. Griffin: How did the plaintiff prove it was a different variety.

Ken Bertsch: The seed potatoes didn't set right, so there was some difference in the potatoes. But since there isn't a genetic test, the fact that the potatoes were certified as one strain within a variety and not caught, but if they're sold, problems can occur, such as soil and weather.

Rep. Onstad: In your testimony it says that the case settled before trial. I am assuming that there was some admission of guilt in this case.

Dean Haas: There was not an admission of responsibility, the state's usual release would indicate that there was no admission but what came about.

Rep. Onstad: So the Seed Department's now responsible, but the vendor was not.

Dean Haas: I believe there is still litigation going on up the chain of warranties. The problem in this case is that the very initial seller of the seed, which was a seller actually in MN, is bankrupt and out of business and so that next one down the chain is probably going to end up being the last recourse. The state of MN had also certified the seed in this case, in the same way as the ND Seed Department did.

Rep. Delmore: Was there liability on the part of MN, and what do other states do with other similar cases.

Dean Haas: I know that there has been litigation in other states. For example, in Idaho there was some litigation. I didn't do an exhaustive look at other states. We felt that coming here with these amendments wasn't that significant because we thought that's what the legislature already intended.

Rep. Delmore: Was there a liability issue in MN.

Dean Haas: MN was not brought into the litigation, no.

Rep. Onstad: Does the State Seed Department doing anything with this vendor in any manner, or able to recoup the costs.

Dean Haas: I know that the Seed Department has provided information to this vendor. There could be two claims by the farmers here. One against the seed farm and one against the vendor up the chain.

Rep. Onstad: So you're looking to change language so that if this case happened again, the Seed Department would not be held responsible even though they certified the seed.

Dean Haas: What we're looking at with the statute as it existed, it said that the Seed Department makes no warranty, representation of any kind, about the quantity or quality of potatoes. To us that meant that they shouldn't be looking at the state to guarantee their profit expectations.

Chairman DeKrey: Thank you. Further testimony in support.

Doug Barr, Director of Civil Litigation with the office of AG: I am here because I know a little about this issue and hopefully can present it in a very straightforward way. I am not a seed expert, I don't represent the Seed Department directly and I was not directly involved in this litigation. I was indirectly involved, as the Director of Civil Litigation, but I did not handle it as the attorney. The AG asked me why should the State Seed Department be immune if they screwed up. I said that they shouldn't. We all agree to that. That isn't what this bill does.

That's not the intent of the bill. The intent of the bill is to make clearer what is the duty of the Seed Department and to make clear to the public what they can expect, about what it means when seed is certified. After this litigation, they talked to me about the case. To me, if people misunderstand what it means when you certify, make the law and rules clearer so that no one can come back and say when you certify, we thought you were guaranteeing or promising this. It really disturbed me that someone could believe that, when as you've heard in testimony today, that there isn't any scientific way for the Seed Department to guarantee that strain is a certain strain. They can look at it, if there isn't a genetic test they can do, that's all they can do. To me, it should be clearer to the public that the Seed Department is not making those promises. All they're doing is a visual inspection and based upon that, there is no reason to disbelieve that it's not what the grower says it is, but that they are not providing 100% guarantee. So the purpose of this bill is not to immune the Seed Department if they mess up. It is to make clear what is their duty, both to them and to the public. With the new language, there shouldn't be this misunderstanding. Mr. Haas mentioned the public duty doctrine. I worked with this committee on that last session. There are arguments that that would apply to this case, but there are very strong arguments that it would not. As we work up the special relationship language together on that, there are arguments that there would be a special relationship. But even under that special relationship, one of the requirements of that is that the person recently relied on a statement from the government. Again with this language, the person cannot misunderstand what the government is promising. The AG doesn't support agencies not being responsible if they mess up; but that's not what this bill does.

Rep. Delmore: Was there never an understanding of quality when somebody bought these seeds in the past. That they were certified to be what they thought they were. I would assume

that if someone is buying seeds to plant, that there be a reasonable guarantee, not warranty, is what I'm looking at, that I'm getting what I am supposed to get.

Doug Barr: That was basically the plaintiff's argument, that because the Seed Department certified these, they must have warranted or guaranteed this. The Seed Department makes a visual inspections, etc.; but it's very clear that they cannot guarantee through any testing, through any observations, what those seeds are. They are primarily relying on the people down the chain to say that this is what it is. They can make sure all that matches; but they can't give a guarantee.

Rep. Onstad: You are saying that the Seed Department can't certify a certified field.

Doug Barr: It depends on what you mean by certified. If certified means that they are guaranteeing it is this strain, no, they can't certify the seed. They can't distinguish between one strain from another.

Rep. Onstad: So if that's the case, why wasn't that disclaimer put on the label, saying that.

Doug Barr: They had disclaimers in their books, they thought they were already covered. Because of the lawsuit it became apparent that they weren't covered.

Rep. Kretschmar: There are certain warranties on the sale of good in the UCC, are warranties in this bill more or less stringent than the UCC.

Doug Barr: I'm far from an expert on the UCC and candidly admit that. I have no information regarding what warranties the producers of these seeds sell. I'm here solely from the legal perspective of the duty and there is no warranty from the Seed Department in the sense of a UCC warranty because they aren't the sellers. They are simply saying we inspected and this is what we know.

Rep. Griffin: In section 2, it says the vendor may not disclaim their responsibility, but above that it says that the seed producers do not warrant. So if you were a certified seed producer

and then you went and had the Seed Department certified it, and then sold it, then would you be a vendor and you would be the one that is liable.

Doug Barr: As I read this and understand it, the vendor cannot disclaim responsibility for the label information.

Rep. Griffin: If there was a certification, I am assuming that would be put on the label information. I don't know what has to be put on the label, or required by law to be put on there.

Doug Barr: Mr. Bertsch would be better able to respond to what the labeling requirements are. I am not fully aware of what needs to be on the label and how that impacts the certification process.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition.

Sarah Vogel: (see attached testimony).

Rep. Klemin: The existing warranty says we're not warranting that they are of that quality, now they are adding "or of the variety". Are you saying that is a substantive change.

Sarah Vogel: Yes. That's a seed change, that's the Seed Department saying we're not in the certification business any more. That's what they are doing.

Rep. Koppelman: Let's get back to your opening statement, you referred to the legislation that was passed in 2005 with the insertion in ND law. As you know, as I think he alluded I think there might be an issue with regard to the Seed Department because the public duty doctrine has to do with the general duty that a governmental entity has for the public at large vs. a special relationship where the governmental entity has maybe made a representation or guarantee of some sort for a specific party to do a certain thing. That changes the potential liability of that public entity. I think what Mr. Barr was getting at that because the State Seed Department certifies seed, some might think that's a special relationship and they are trying to clarify, as I'm understanding what they are bringing to us, that because what they do is spotty

and random and generalized, and they sell certified seeds to lots of folks, they aren't going out and inspecting every plant in the field, etc. that it could be misunderstood to be a special relationship when it really isn't, and this language clarifies that. Do you disagree with that.

Sarah Vogel: When we are in a special relationship in the litigation, the state is now. The judge said there was a question of fact, we tried this on summary judgment, meaning no questions of fact, only questions of law. The judge said he wasn't going to dismiss that part of it, because he felt that there was a question of fact. That was the general law. We were citing to an ID case. The definition of this law, though, was never discussed.

Rep. Koppelman: I don't want to get into the details of that case. I wasn't meaning to draw you there. As a general course of things, do you think there ought to be a special relationship construed between the Seed Department and everybody that buys certified seed.

Sarah Vogel: I don't think that could occur. A customer buying something isn't going to have a one-on-one contact with the ND State Seed Department. They are going to order potatoes and they are going to come. They're not going to have that one-on-one contact. It says direct contact between the state and the injured party. An assumption by the state by its promises and actions of an affirmative duty to act and have the party who was injured. If they want to talk about having a special exemption from the special duty, that's fine. Then you could conceivably draft a bill on special duty and add that to the general state tort claims act for the State Seed Department. That's not what this bill does, though.

Rep. Onstad: A seed breeder will develop a new breed for certain characteristics. A farmer will purchase that seed knowing that he wants those same characteristics, whether it's disease free. If this was passed the way it is, who is there to really guarantee any kind of certification.

Sarah Vogel: There isn't. The irony is that the State Seed Department still wants to collect all the fees. Quite a bit of money for seed certification services. If they aren't going to certify, somebody else should do it to certify the variety.

Rep. Charging: What happens if the producer doesn't certify the seed. Then they aren't privileged the sell.

Sarah Vogel: Are you talking about from the farmer's standpoint. Yes, for example, no one can sell seed potatoes to ND unless they are certified. You can plant less than 1 acre and not use certified seed potatoes. If you plant more than 1 acre you must use certified seed. That's one of the requirements. Certification is extremely important because of variety. You rely on that information when you plant, etc. If the seeds aren't certified they could not sell them as certified. Now potato seed has to be certified.

Rep. Charging: If this definition on page 1 is put into law, that won't be specific to potatoes.

Sarah Vogel: The 4-10 references refer to potatoes, 4-09 is everything else. The very definition of variety means that it can be separated from other varieties of the same type. So when something is called a variety, it means you can tell the difference between it and other varieties. It might be difficult. It is a question of training.

Rep. Klemin: What does MN do about certifying.

Sarah Vogel: Their system is pretty much the same as ours. I think most of the states are pretty similar; 27 states have seed certification for potatoes. That's one of the things that's concerns me, unless every other state says we don't certify for variety either, then I think competitive forces are going to say, let's go buy potatoes where the State Seed Department provides the third party, independent verification of varieties, that we have historically enjoyed for the last 70-80 years.

Rep. Klemin: So other states do certify for variety.

Sarah Vogel: Yes, as has ND. One of the things in our lawsuit, I was extremely surprised about was that their first defense was, well there's no duty that was breached to you because we don't have a duty to inspect for potato variety. It certainly isn't what the inspector said they did. The inspector said they inspected for variety. The judge finally said that they do have a duty to inspect for variety. Now we come to this legislature and say take away that duty, but I think the purpose of the law is not to protect the Seed Department. It is to protect the farmers.

Chairman DeKrey: Thank you. Further testimony in opposition.

Barb Price, Dakota Resource Council: (see attached testimony).

Chairman DeKrey: Thank you. Further testimony in opposition, neutral. We will close the hearing.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1124

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 2/6/07

Recorder Job Number: 2956

Committee Clerk Signature

APenrose

Minutes:

Chairman DeKrey: We will take a look at HB 1124. What are the committee's wishes.

Rep. Kretschmar: Explained the amendments. The subcommittee consisting of myself, Rep. Klemin and Rep. Griffin went through the bill very carefully and made some changes.

Rep. Koppelman: What is the substantive affect of the amendment.

Rep. Kretschmar: It will not allow the Seed Department to be back under sovereign immunity. I asked for input from the department, but didn't receive any. I move the amendments.

Rep. Klemin: Second. We removed sovereign immunity for the state of North Dakota some time ago. This would reinstate sovereign immunity just for the Seed Department. I don't think that's reasonable.

Rep. Charging: What is the value of these certified seeds, is it defined.

Chairman DeKrey: Certified seed is what somebody is going to pay for it.

Rep. Charging: But the way the bill contradicted itself later.

Rep. Kingsbury: MN has a law that protected them. ND did not have protection, so they could sue. The seed originated in MN.

Rep. Koppelman: I'm not sure whether the bill really sought to reinstate sovereign immunity as much as did to define what certification really means. Sounds to me that the court determines what certification is.

Rep. Kretschmar: Certification is defined the bill and in the law. We did not like the new definition.

Rep. Klemin: Just to expand on that, we made the new definition of certified in section 1 the same as the existing definition of certified in section 3. Then we removed the warranty disclaimer language out of the definition, which first of all, we didn't think it was appropriate to put that language in that definition. Secondly, we felt that the scope of the disclaimer really meant that certified didn't have any meaning. Finally, by deleting section 2 and 5, we keep the existing language about the warranty in the substantive section. So there is still a warranty disclaimer section under current law.

Rep. Koppelman: Is the bill unnecessary if it is there in current law.

Rep. Griffin: It does offer a little bit of protection or extra protection under the fact that we added "at the time of inspection" because part of their concern was they can inspect it but the farmer has control over it for the rest of the time period. The State Seed Dept doesn't have control over it. The way the bill was written, it was really saying that certification really doesn't mean anything because they weren't guaranteeing anything. It might be the variety, it might not be. But then not only that, they were putting the liability on the vendors, so if the vendor could not rely on the Seed Department to certify it. As a vendor you could sell it, and someone could sue you for it not being the right variety.

Chairman DeKrey: We will take a voice vote. Motion carried.

Rep. Kretschmar: I move a Do Pass as amended.

Rep. Klemin: Second.

Chairman DeKrey: The clerk will call the vote.

10 YES 2 NO 2 ABSENT

DO PASS AS AMENDED

CARRIER: Rep. Kretschmar

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1124

Page 1, line 1, remove "4-09-20.1,"

Page 1, line 2, remove "4-10-12.1," and remove "vendor responsibility for"

Page 1, line 3, remove "data on seed labels," and remove ", and immunity from liability from contract or tort suits"

Page 1, line 4, remove "for inspection, analysis, and certifications of agricultural" and replace "crops" with "crop warranties or representations"

Page 1, line 24, after ^{before (Seed)} "department" insert "at the time of inspection" and remove "Certification does not mean or constitute any warranty"

Page 2, remove lines 1 through 4

Page 5, remove lines 9 through 30

Page 6, line 8, overstrike "and regulations", after "department" insert "at the time of inspection", and remove "Certification does not mean or"

Page 6, remove lines 9 through 12

Page 8, line 3, replace "use on seed labels or tags, or use or attach to literature," with "alter the label or certificate furnished by the inspector under subsection 4."

Page 8, remove lines 4 and 5

Page 8, line 7, remove "potato seed" and replace the underscored colon with "certified potato seed that"

Page 8, line 8, remove "a. That" and replace ", or bears false or" with an underscored period

Page 8, remove lines 9 through 31

Page 9, remove lines 1 through 4

Page 9, line 7, after "**Warranties**" insert "or representations"

Page 9, line 9, remove the overstrike over "or"

Page 9, line 10, remove "or identity of variety or selection"

Renumber accordingly

House Amendments to HB 1124 (78063.0102) - Judiciary Committee 02/01/2007

Page 1, line 1, remove "4-09-20.1,"

Page 1, line 2, remove "4-10-12.1," and remove "vendor responsibility for"

Page 1, line 3, remove "data on seed labels," and remove ", and immunity from liability from contract or tort suits"

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Renumber accordingly

Date: 2/6/07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1124

House JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as Amended

Motion Made By Rep. Kretschmar Seconded By Rep. Klemsis

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning		✓	Rep. Meyer	✓	
Rep. Charging			Rep. Onstad		
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Heller		✓			
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 10 No 2

Absent 2

Floor Assignment Rep. Kretschmar

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1124: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (10 YEAS, 2 NAYS, 2 ABSENT AND NOT VOTING). HB 1124 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "4-09-20.1,"

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2007 SENATE AGRICULTURE

HB 1124

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1124

Senate Agriculture Committee

Check here for Conference Committee

Hearing Date: March 16, 2007

Recorder Job Number: 5198

Committee Clerk Signature

ASSISTANT

Minutes:

Sen. Flakoll opened the hearing on HB 1124, a bill relating to labeling requirements and potato seed and crop warranties or representations and to inspector certificates. All members (7) were present.

Ken Bertsch, State Seed Commissioner, testified in favor of the bill. See attached testimony.

Sen. Flakoll closed the hearing.

Sen. Heckaman motioned for a do pass and was seconded by **Sen. Klein**, roll call vote 1: 7 yea, 0 nay, 0 absent. **Sen. Klein** was designated to carry the bill to the floor.

