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PROHIBIT DISPARAGEMENT OF FOOD PRODUCTS

House Bill 5451 with committee
amendment

Sponsor: Rep. Michelle McManus

House Bill 5808 (Substitute H-1)

Sponsor: Rep. Carl F. Gnodtke

Committee: Agriculture and Forestry

First Analysis (5-14-96)

THE APPARENT PROBLEM:

On February 26, 1989, CBS' "60 Minutes" ran a story questioning the safety of apples that had been sprayed with Alar, a chemical used to promote apple firmness and to reduce spoilage. The segment was based, in part, on a study performed by the Natural Resources Defense Council (NRDC), a public interest group, entitled "*Intolerable Risk: Pesticides in our Children's Food.*" Subsequently, a class action defamation and disparagement lawsuit (*Auvil v CBS 60 Minutes*, 800 F.Supp. 941 [E.D. Wash. 1992]) was filed by apple growers in the State of Washington against the news program. The suit was dismissed by a federal court, which ruled that in a disparagement case the plaintiff carries the initial burden of proof to show that an objectionable statement is false and made with actual malice, and that the apple growers failed to do so. Some assert that it was later determined that the disseminators of the allegations had no reliable scientific data to validate their charges, but not before the story had financially devastated apple growers in Washington, and in other states, including Michigan. The result of the ruling has prompted several states to pass legislation establishing a statutory cause of action for the disparagement of agricultural food products when the information causing damage is not based on scientific facts and data. In view of the importance of agricultural products to Michigan's economy, some feel that the state's agricultural product producers should have this protection.

THE CONTENT OF THE BILLS:

House Bill 5451 would create a new act to specify that someone who made a false or misleading statement of fact relating to the food product of another person to a "third party" (i.e., someone other than the producer,

distributor, or seller of the food product) would be liable for all damages proximately caused by the false or misleading statement of fact. Under the bill, a "false or misleading statement of fact" would mean an assertion that was not supported by scientific or other evidence.

House Bill 5808 would add a new section to the Revised Judicature Act (MCL 600.2963) to specify that someone who intentionally disparaged an agricultural product would be liable in an action for damages and other relief that a court considered appropriate. If someone was found to have disparaged an agricultural product, a court would have to award damages that were triple the actual damages suffered. Under the bill, "disparage an agricultural product" would mean to publicly disseminate information about a product in any manner that directly indicated it was not safe for human consumption, that--at the time of dissemination--the disseminator knew was inaccurate, and that was not based on reasonable and reliable scientific inquiry, facts, or data.

Any of the following could bring an action under the bill: a producer who suffered damages, an association representing producers, or the attorney general on behalf of the state or at a state department's request. The bill would establish a statute of limitations of two years after the last disparagement of a food product by the person who was liable.

If an association representing producers brought an action under the bill, it would have to notify each producer member that suffered or may have suffered compensable damages. A producer represented by an association that brought an action could appear through

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his or her own attorney or request exclusion from the action, and a court would have to exclude a producer who so requested. If an association brought an action, a judgment in that action--whether favorable or not--would have to include all of the association's producer members who received notice and did not request exclusion.

A notice would have to at least state that 1) the court would exclude an association's producer member if, by a specific date, he or she requested exclusion, 2) a producer member who did not request exclusion could appear through his or her own attorney, and 3) a judgment in the action, whether or not favorable, would include all the association's producer members who received notice and did not request exclusion. If an association recovered money damages for its producer members in an action, the court would have to order it to submit a plan for the distribution of the money damage award to the association and its producer members who were included in the judgment, and could accept or modify it.

FISCAL IMPLICATIONS:

The House Fiscal Agency estimates that the bills would have no impact on state funds. (5-9-96)

ARGUMENTS:

For:

It is too easy for an individual or an organization to make an accusation about a food product that may be based on questionable scientific evidence. Frequently, the media picks up on the accusation, and the ensuing publicity results in the product being found "guilty without a trial." The bills would alleviate this problem by creating a statutory cause of action specifically for the disparagement of food or agricultural products. A person who sold, produced, or distributed these products would be able to sue individuals or groups that spread false or misleading information about their products. If it were proven that the information were false, then the injured parties would be entitled to collect triple damages caused by the statements. The bills would therefore hold those who use food scare tactics to advance their opinions to standards similar to that for defamation of character. Without these safeguards, Michigan's crop producers are vulnerable if subjected to slander. It should also be noted that the problem does not merely affect farmers: damage to crops by any means has a ripple effect through the economy.

Against:

Consumers have a right to know if there is anything potentially dangerous in the food they eat. Similarly, farm workers have a right to know if the products they handle could affect their health. The bills, however, could have a chilling effect on the public's right to know about potential dangers, and could serve to silence any kind of inquiry or criticism about a product suspected of being harmful, especially when there are conflicting or inconclusive studies on the question. They would likely be challenged on constitutional grounds. Opponents of the bills point to the history of Cesar Chavez, who spent the last years of his life trying to inform people of the problems with the pesticides used on grapes. At first, Chavez's warnings were ignored, but eventually some of the pesticides he had named as being dangerous were banned from use.

Opponents of the legislation also maintain that the bill elevates the rights of chemicals (60,000 of which have been introduced into commerce since World War II) above those of people. It should also be noted that the bills would penalize only those who made "inaccurate" statements about an agricultural product. However, no penalties are specified for chemical companies, food producers, or others who "inaccurately" advertise that an agricultural product containing chemicals is safe to eat. Meanwhile, it grows more evident daily that society cannot afford to complacently assume that even small amounts of chemical compounds are safe. For example, low-level exposure to toxic chemicals has been linked to birth defects in children and to breast cancer.

Response:

The food growing industry is already subject to regulations designed to protect the public. Food growers are subject to production practices regulated by the United States Environmental Protection Agency (EPA) and the Michigan Department of Agriculture. These agencies use the best scientific evidence to set guidelines.

Against:

Proponents of the bills maintain that the provisions would permit farmers to sue. However, those who oppose the legislation point out that the bills would serve mainly to protect large corporate concerns rather than individual farmers, since it is unlikely that the latter could afford to mount a legal defense on their own behalf. Moreover, opponents of the legislation point out that the bills single out one industry for protection, but could result in other industries clamoring for the same defense. Should the legislature next make it difficult to complain about the price of gasoline, or pass laws to protect the automobile industry from speculation about the safety of cars?

Against:

As written, House Bill 5808 would define the "disparagement" of an agricultural product to mean disseminating information indicating that the product was unsafe for human consumption, when the accuser knew the information was inaccurate and not based on reasonable and reliable scientific inquiry, facts, or data. The term "inaccurate" is overly vague, and it could be difficult to prove that defendant knew his or her allegation was false. The bill should be amended to more narrowly define this term.

POSITIONS:

The Michigan Farm Bureau supports the bills. (5-13-96)

The Michigan Restaurant Association supports the bills. (5-13-96)

The following organizations submitted testimony to the House Agriculture and Forestry Committee in support of the bills (5-8-96):

****The Department of Agriculture**

****The Michigan Apple Shippers Association**

****Spartan Stores, Inc.**

****The Leelanau Horticultural Society**

****The Potato Growers of Michigan, Inc.**

A representative of The Michigan Association of Food Processors testified before the committee in support of the bills (5-8-96).

The Michigan Environmental Council opposes the bills. (5-13-96)

Representatives of the following testified before the committee in opposition to the bills (5-8-96):

****The Michigan Organic Food and Farm Alliance**

****The Farm and Thumb Chapter of Organic Growers of Michigan**

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.