

## Top Ag Law and Tax Developments of 2022 – Numbers 8 and 7

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### Overview

Today I continue the journey through what I believe to be the Top 10 developments in agricultural law and agricultural taxation of 2022. Today, I look at developments number eight and seven.

### No. 8 – Dicamba Drift Damage Litigation

***Hahn v. Monsanto Corp., 39 F.4th 954 (8th Cir. 2022), reh'g. den., 2022 U.S. App. LEXIS 25662 (8th Cir. Sept. 2, 2022)***

Damage from the drift of Dicamba has been an issue in certain parts of the country for the past two years. Over that time, I have written on the technical aspects of Dicamba and the underlying problems associated with Dicamba application. In 2022, the Dicamba saga continued with litigation involving Missouri's largest peach farm.

In *Bader Farms, Inc. v. Monsanto Co., et al., No. MDL No. 1:18md2820-SNLJ, 2019 U.S. Dist. LEXIS 114302 (E.D. Mo. July 10, 2019)*, the plaintiff is Missouri's largest peach farming operation and is located in the southeast part of the state. The plaintiff claimed that his peach orchard was destroyed after the defendants (Monsanto and BASF) allegedly conspired to develop and market Dicamba-tolerant seeds and Dicamba-based herbicides. The suit alleged that the two companies collaborated on Xtend (herbicide resistant cotton seed) that was intended for use with a less volatile form of Dicamba with less drift potential. But, as of 2015 neither Monsanto nor BASF had produced the new, less volatile, form of Dicamba. That fact led the plaintiff to claim that the defendants released the Dicamba-tolerant seed with no corresponding Dicamba herbicide that could be safely applied. As a result, the plaintiff claimed, farmers illegally sprayed an old formulation of Dicamba that was unapproved for in-crop, over-the-top, use and was highly volatile and prone to drift. The plaintiff claimed its annual peach crop revenue exceeded \$2 million before the drift damage, and an expert at trial asserted that the drift caused the plaintiff to lose over \$20 million in profits. While many cases had previously been filed on the dicamba drift issue, the plaintiff did not join the other litigation because it focused on damages to soybean crops. The plaintiff's suit also involved claims for failure to warn; negligent training; violation of the Missouri Crop Protection Act (MCPA); civil conspiracy; and joint liability for punitive damages.

Monsanto moved to dismiss the claims for failure to warn; negligent training; violation of the MCPA; civil conspiracy; and joint liability for punitive damages. BASF moved to dismiss those same counts except the claims for failure to warn. The trial court granted the motion to dismiss in part. Monsanto argued that the failure to warn claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), but the plaintiff claimed that no warning would have prevented the damage to



the peaches. The trial court determined that the plaintiff had adequately plead the claim and denied the motion to dismiss this claim. Both Monsanto and BASF moved to dismiss the negligent training claim, but the trial court refused to do so. However, the trial court did dismiss the MCPA claims. The trial court noted that civil actions under the MCPA are limited to “field crops” which did not include peaches. The trial court, however, did not dismiss the civil conspiracy claim based on concerted action by agreement, but did dismiss the aiding and abetting portion of the claim because that cause of action is not recognized under Missouri tort law. The parties agreed to a separate jury determination of punitive damages for each defendant.

**Note:** The case went to trial in early 2020 and was one of more than 100 similar Dicamba lawsuits. Bayer, which acquired Monsanto in 2018 for \$63 billion, announced in June of 2020 that it would settle dicamba lawsuits for up to \$400 million.

At trial, the jury found that Monsanto had negligently designed or failed to warn for 2015 and 2016 and that both defendants had done so for 2017 to the time of trial. The jury awarded the plaintiff \$15 million in compensatory damages and \$250 million in punitive damages against Monsanto for 2015 and 2016. The jury also found that the defendants were acting in a joint venture and in a conspiracy. The plaintiff submitted a proposed judgment that both defendants were responsible for the \$250 million punitive damages award. BASF objected, but the trial court found the defendants jointly liable for the full verdict considering the jury’s finding that the defendants were in a joint venture. *Bader Farms, Inc. v. Monsanto Co., et al., MDL No. 1:18-md-02820-SNJL, 2020 U.S. Dist. LEXIS 34340 (E.D. Mo. Feb. 28, 2020).*

BASF then moved for a judgment as a matter of law on punitive damages or motion for a new trial or remittitur (e.g., asking the court to reduce the damage award), and Monsanto moved for a judgment as a matter of law or a new trial. The trial court, however, found both defendants jointly liable, although the court lowered the punitive damages to \$60 million (from \$250 million) after determining a lack of actual malice. The trial court did uphold the \$15 million compensatory damage award upon finding that the correct standard under Missouri law was applied to the farm’s damages. *Bader Farms, Inc. v. Monsanto Co, et al., MDL No. 1:18md2820-SNLJ, 2020 U.S. Dist. LEXIS 221420 (E.D. Mo. Nov. 25, 2020).* The defendants filed a notice of appeal on December 22, 2020.

In *Hahn v. Monsanto Corp., 39 F.4th 954 (8th Cir. 2022), reh’g. den., 2022 U.S. App. LEXIS 25662 (8th Cir. Sept. 2, 2022)*, the appellate court partially affirmed the trial court, partially reversed, and remanded the case. The appellate court determined that the trial court incorrectly instructed the jury to assess punitive damages for Bayer (i.e., Monsanto) and BASF together, rather than separately, and that a new trial was needed to determine punitive damages for each company. Indeed, the appellate court vacated the punitive damages award and remanded the case to the trial court with instructions to hold a new trial only on the issue of punitive damages.

However, the appellate court did not disturb the trial court’s jury verdict of \$15 million in compensatory damages. On the compensatory damages issue, the appellate court held that the trial court properly refused to find intervening cause as a matter of law for the damage to the plaintiff’s peaches. On that point, the appellate court determined that the spraying of Dicamba on a nearby farm

did not interrupt the chain of events which meant that the question of proximate cause of the damage was proper for the jury to determine. The appellate court also held that there was an adequate basis for the plaintiff's lost profits because the award was not based on speculation. The appellate court noted that the peach orchard had been productive for decades, and financial statements along with expert witness testimony calculated approximately \$20.9 million in actual damages. The appellate court also determined that the facts supported the jury's determination that the defendants engaged in a conspiracy via unlawful means – knowingly enabling the widespread use of Dicamba during growing season to increase seed sales.

### **No. 7 – The Misnamed “Inflation Reduction Act”**

If ever there has been a deceptively misnamed piece of legislation, this is it. An Act with \$750 billion of newly minted money will not reduce inflation. Words have no meaning. I suppose that we are supposed to believe that the following provisions of the bill will reduce inflation:

- \$3 billion for the U.S. Postal Service to buy new electric mail trucks;
- \$3 billion for the EPA to oversee block grants for “environmental justice;”
- \$40 billion total to the EPA which includes \$30 billion for “disadvantaged communities” (keep in mind that the total annual budget of the EPA is about \$10 billion);
- \$750 million to the Interior Department for new hires;
- \$10 million to the USDA to be spent on “equity commissions” to “combat” racism;
- \$25 million to the Government Accountability Office to determine, “whether the economic, social and environmental impacts of the funds described in this paragraph are equitable;”
- Via a budget gimmick to keep the amount outside of the Act's price tag are amounts to the Energy Department for existing “green” energy loan programs and a new energy loan-guarantee program.

### **Ag Program Spending**

The Act contains a great deal of spending on ag conservation-related programs. Here are the primary provisions:

- EQIP - \$8.45 billion additional funding over Fiscal Years 2023-2026. Prioritizes funding for reduction of methane emissions from cattle (e.g., cattle passing gas) and nutrient management activities (e.g., diets to reduce bloating in cows).
- CSP - \$3.25 billion additional funding over same time frame.
- Ag Conservation Easement Program (ACEP) - \$1.4 billion over same time frame for easements or interests in land that will reduce, capture, avoid or sequester carbon dioxide, or methane oxide emissions with land eligible for the program. ACEP incorporates the Wetlands Reserve Program, the Grasslands Reserve Program and the Farm and Ranch Lands Protection Program.
- Regional Conservation Partnership Program - \$4.95 billion over same timeframe for cover cropping, nutrient management, and watershed improvement.
- \$4 billion for drought relief that prioritizes the CO basin.



- The U.S. Forest Service gets \$1.8 billion for hazardous fuels reduction projects on USFS land.
- \$14 billion for rural development and lending projects.
- \$3.1 billion to USDA to provide payments to distressed borrowers.
- \$2.2 billion to USDA for farmers, ranchers and forest landowners that have been discriminated against in USDA lending programs (i.e., reparations).
- \$5 billion to USDA for National Forest System to fund forest reforestation and wildfire prevention.

The IRS gets approximately \$80 billion in IRS funding (over next 10 years) to hire 87,000 agents. The IRS currently has 78,000 agents, but 50,000 are set to retire in the next few years. \$46 billion is to be dedicated to enforcement and is anticipated to increase the number of audits by \$1.2 million annually. \$25 billion is earmarked for IRS operations, \$5 billion for business systems modernization. IRS taxpayer services, which many tax practitioners would say as the most in need of funding, gets the short end of the stick with \$4 billion.

### **Conclusion**

I will continue looking at the biggest developments of 2022 in ag law and tax in the next post.

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