

[Products Liability Law Daily Wrap Up, CAUSATION—CHEMICAL PRODUCTS—E.D. Mo.: BASF must answer to claims that its 2017 dicamba herbicide damaged peach trees, \(Apr. 17, 2018\)](#)

Products Liability Law Daily Wrap Up

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By Pamela C. Maloney, J.D.

BASF Corporation, an herbicide manufacturer and seller, could be liable for damages to peach trees that occurred in 2017 when drift from the application of its dicamba herbicide on neighboring farms spread to the peach farm, a federal district court in Missouri ruled. However, because BASF did not have a dicamba herbicide approved for use until late 2016, it could not be liable for any damage caused by drift of dicamba herbicide during the 2015 and 2016 growing seasons, unless the peach grower could prove that BASF had entered into a conspiracy and that the 2015 and 2016 damages flowed naturally from intentional acts committed in furtherance of that conspiracy. Finally, BASF was not liable to the peach grower for fraudulent concealment ([Bader Farms, Inc. v. Monsanto Co.](#), April 13, 2018, Limbaugh, S).

Bader Farms, Inc., owner and operator of a massive peach growing business in southeast Missouri, had filed a lawsuit against Monsanto Company alleging that the crop seed and herbicide company was liable for damages to Brader Farms peach trees that occurred after neighboring farmers, who had planted Monsanto's dicamba-tolerant cotton and soybean seeds, illegally sprayed an old formulation of dicamba herbicide that was not approved for in-crop, over-the-top-use use, and drift from that herbicide spread to the peach trees. According to the peach grower, the farmers had used the old dicamba herbicide, which was volatile and prone to drift, because when Monsanto released its dicamba-tolerant seeds onto the market in 2015 and 2016, it did not release a corresponding dicamba herbicide. In response to Monsanto's motion to dismiss on the grounds that it was not responsible for the damage because it did not manufacturer, distribute, sell, or apply the dicamba herbicide that allegedly damaged the peach trees and because the warning labels on the seed products had warned against applying dicamba herbicide in-crop, the peach grower amended its complaint, adding BASF Corp. as a named defendant and expanding the complaint to include the following counts: (1) strict liability—design defect; (2) strict liability—failure to warn; (3) negligent design and marketing; (4) negligent failure to warn; (5) negligent training; (6) fraudulent concealment; (7) trespass; (8) civil conspiracy; and (9) punitive damages. Before the court was BASF's motion to dismiss all claims.

Product liability claims. With regard to BASF, the complaint specifically alleged that during the 2017 growing season, the farmers had sprayed the company's new dicamba herbicide as well as Monsanto's new herbicide, over the top of dicamba-tolerant crops and that the new herbicide had drifted off target and onto the peach farm, causing damage to the peach trees. The peach grower further alleged that BASF was liable for damages that occurred before the 2017 growing season even though its old herbicide formulation was not used by the farmers during the 2015 and 2016 growing seasons because Monsanto and BASF had developed the dicamba-tolerant seed and dicamba herbicide together and had conspired together to create the ecological disaster that resulted from the failure to release an effective herbicide at the same time the dicamba-tolerant seeds were released.

In reviewing the complaint, the court determined that insofar as the peach grower was seeking to recover for damages sustained during 2015 and 2016, BASF's only involvement was as part of the alleged conspiracy with Monsanto. Only BASF's old dicamba product was on the market during those years and none of the peach grower's claims were based on those products. Instead, the peach grower specifically defined dicamba-based products as Monsanto's dicamba-tolerant cotton and soybean seed, Monsanto's new dicamba herbicides, and BASF's new dicamba herbicide. Based on these allegations, BASF could not be liable for any damage to the peach trees that allegedly occurred in 2015 and 2016, unless those damages could be traced to the conspiracy

claims. Thus, the peach grower's strict liability and negligence counts seeking recovery for damages during 2015 and 2016 were dismissed.

With regard to damages sustained in 2017, BASF moved for dismissal of the complaint because the peach growers had failed to identify the individual farmers who applied BASF herbicides and which BASF-branded herbicide had harmed which fields. The peach grower also had failed to allege when the applications were made, in what amounts, and under what conditions the applications had been made. The peach grower's allegations that during the 2017 growing season, farmers near the peach grower sprayed BASF's new dicamba herbicide over the top of their dicamba-tolerant crops and that BASF's herbicide drifted onto the peach farm, causing damaging to the trees, was sufficient to plead causation and, therefore, the court refused to dismiss the peach grower's strict liability and negligence claims for damages incurred in 2017.

Civil conspiracy. In response to the peach grower's civil conspiracy claim in which it alleged that BASF and Montano had formed a partnership and a written joint licensing agreement to share technologies, had worked together to develop and test their products, had issued coordinated public statements explaining what had caused the crop damage, and had created a defective product, *i.e.*, the entire crop system, BASF again argued that it was not liable for any damages that occurred in 2015 and 2016 because it did not play any role in releasing an allegedly defective crop system in 2015 and 2016. In response, the peach grower alleged that BASF was liable for its co-conspirator's actions in furtherance of the conspiracy. Agreeing that under Missouri law, two parties could not conspire to act negligently, the court went on to hold that BASF could be liable for Monsanto's acts that caused damages in 2015 and 2016 if Monsanto intentionally committed those acts in furtherance of the conspiracy to create an ecological disaster. Thus, the court refused to dismiss the peach grower's civil conspiracy claim.

Fraudulent concealment. In support of the fraudulent concealment claim, the peach grower alleged that both companies knew of (1) the risks posed to third parties by their dicamba-based products given their volatility, off-target movement, drift potential, and potential to damage non-dicamba-tolerant crops, and (2) the certainty for use of illegal and unsafe herbicides with their seed products. The peach grower also alleged that the two companies intentionally concealed these facts from farmers, federal and state regulatory agencies, farming associations, and the peach grower, among others. However, the peach grower failed to allege that it had heard or relied on any fraudulent statement. Instead, it was the neighboring farmers who had sprayed BASF's new dicamba herbicide on their fields who would have been the "hearers" who relied on the company's statements, not the peach grower. Thus, the fraudulent concealment claim was dismissed.

The case is No. [1:16-CV-299-SNLJ](#).

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Companies: Bader Farms, Inc.; Monsanto Co.; BASF Corp.

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