

Products Liability Law Daily Wrap Up, DAMAGES—CHEMICAL PRODUCTS—8th Cir.: Punitive damages between co-conspirators in herbicide drift case must be assessed separately, (Jul. 11, 2022)

Products Liability Law Daily Wrap Up

[Click to open document in a browser](#)

By Robert B. Barnett Jr., J.D.

While liability was affirmed, the action was remanded for a new trial on punitive damages because no joint venture existed and culpability between the co-conspirators differed.

In a negligent design and failure-to-warn case alleging that Monsanto Company's dicamba-tolerant soybean seeds caused damage to a grower's peach orchards, the U.S. Court of Appeals for the Eighth Circuit has affirmed a \$15 million compensatory damages award against Monsanto and BASF Corporation, but it has reversed a \$60 million punitive damages award because the trial court failed to separately assess punitive damages against Monsanto and BASF. Separate assessments were necessary after the appellate court ruled that Monsanto and BASF never formed a joint venture (although they did engage in a conspiracy). Thus, the punitive damages award was vacated and remanded for a new trial only on the issue of punitive damages ([Bader Farms, Inc. v. Monsanto Co.](#), July 7, 2022, Benton, D.).

Background. Dicamba is an herbicide that, when applied to kill weeds, also harms crops. As a result, it is against the law to spray dicamba herbicides over crops during growing season.

Monsanto and BASF began developing dicamba-tolerant seeds in the early 2000s. Intellectual property suits and counter-suits resulted in a settlement agreement, which provided that Monsanto would sell the seeds and BASF would receive value share payments. Both companies also began developing lower-volatility dicamba herbicides.

In 2015, Monsanto obtained U.S. Department of Agriculture (USDA) deregulation of its dicamba-tolerant cotton seed. At this point, however, the Environmental Protection Agency (EPA) had not approved any lower-volatility dicamba herbicide. Despite warnings from all sides (including Monsanto employees) that Monsanto should not sell the seeds until a lower-volatility dicamba herbicide was approved, Monsanto began selling the cotton seed. The seeds came with a warning not to apply any dicamba herbicide to crops.

After Monsanto began selling the seed, which proved popular, farmers' off-label dicamba use exploded. "Dicamba drift" complaints proliferated. Even so, when Monsanto obtained USDA deregulation of dicamba-tolerant soybean seed, Monsanto began selling those seeds too. The EPA later that year approved Monsanto's lower-volatility dicamba herbicide. BASF's similar herbicide was approved the next year.

Bader Farms, Inc. sued Monsanto and BASF in Missouri federal court, alleging negligent design and failure to warn after its peach orchards were damaged by dicamba drift in 2015-2019. The jury awarded \$15 million in compensatory damages and \$250 million in punitive damages. The trial court later reduced the punitive damages award to \$60 million, holding Monsanto and BASF jointly and severally liable [see *Products Liability Law Daily's* December 1, 2020 [analysis](#)]. Monsanto and BASF appealed the decision to the Eighth Circuit. On appeal, they argued that (1) Bader failed to prove causation, (2) actual damages should have been measured by the value of the land rather than by lost profits, (3) Bader's lost profits estimate was speculative, and (4) the punitive damages award was unwarranted. BASF separately argued that it did not participate in a joint venture or conspiracy with Monsanto and, therefore, punitive damages should have been assessed separately.

Causation. Under Missouri law, products liability claims have been rejected when the plaintiff could not establish which of the many products that the plaintiff was exposed to actually caused the injuries (*Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 243 (Mo. banc 1984)). On that basis, Monsanto sought dismissal of the claims, arguing that Bader never proved which dicamba product ruined its peach trees. The appellate court agreed that Bader never

could identify which dicamba product was at fault, but it also noted that, under the claims made by Bader, it was the seed that caused the injuries, not the dicamba herbicide. Because Monsanto was the only producer of that seed, direct causation had been established satisfactorily at trial.

Monsanto next argued that the farmers' off-label use of the dicamba was an intervening cause that broke the chain of proximate causation between Monsanto and Bader. The Eighth Circuit agreed with the lower court, however, that injury to the peach trees was foreseeable when Monsanto sold the seed. It was objectively foreseeable that the farmers would respond to the sale of dicamba-resistant seeds by using dicamba.

Whether the use of dicamba during growing season, despite Monsanto's warnings on the label, was an intervening cause was a question for the jury, after the trial court had determined that it was not an intervening cause as a matter of law. The Eighth Circuit ruled that both decisions—the trial court's decision that it was not an intervening cause as a matter of law and the jury's decision that it was not an intervening cause—were supported by the evidence.

Furthermore, the trial court did not err when it refused to issue a jury instruction on intervening causes. Such instructions are referred to as affirmative converse instructions because intervening cause instructions are offered as the converse to a proximate cause instruction. Intervening cause can be likened to sole cause, which can produce jury confusion. Although once allowed, the Missouri Supreme Court has since said that they are in disfavor (*Hiers v. Lemley*, 834 S.W.2d 729, 735-36 (Mo. banc 1992)). The Eighth Circuit, therefore, ruled that it was not error for the lower court to refuse to issue such an instruction.

As a result, the jury's conclusion that Monsanto and BASF were liable and caused the injuries was affirmed.

Compensatory instruction. Turning to compensatory damages, Monsanto argued that loss in land value rather than lost profits should have been the proper measure. The Eighth Circuit agreed that loss in land value was normally the proper measure, but it also noted that this case fell within an exception to that general rule. Bader Farms owned the peach trees but did not own the land (Bader individually owned the land, and he was not a plaintiff). Thus, the change in value of the property was not the proper measure for Bader Farms. As a result, the lower court correctly instructed the jury to measure compensatory damages by lost profits rather than land value.

Turning to whether the estimate was too speculative, the Eighth Circuit noted that all estimates are by their nature speculative. In this case, Bader's orchard had been productive for decades, with financial statements to back up its claim for lost profits. The jury found Bader's profit projections to be reliable, and that decision was affirmed because it rested on an adequate basis for the award.

Joint venture. The appellate court agreed with BASF, however, that a joint venture did not exist between Monsanto and BASF because control was entirely in Monsanto's hands. In no way did BASF have "equal control over the direction of the enterprise." Yes, BASF entered into an alliance with Monsanto to work together, but the facts revealed that Monsanto maintained full control over the critical aspects of the project.

Two decisions were seen as critical to injuring Bader: (1) the decision to sell the dicamba-tolerant seed, and (2) the decision not to use market power to stop the farmers from using dicamba as an herbicide. BASF had no role or control in either decision. Therefore, for purposes of these claims, no joint venture existed as a matter of law.

Civil conspiracy. Having concluded that no joint venture existed, the appellate court turned to whether a civil conspiracy existed. A civil conspiracy is an agreement between two or more parties to do an unlawful act. The jury concluded that Monsanto and BASF engaged in a conspiracy, and the Eighth Circuit ruled that sufficient evidence existed to support that determination. The two parties enabled widespread off-label use of dicamba during growing season to increase sales of the soybean seeds. Both companies furthered the objective by sharing data, sharing testing results, and providing capital expenditures. As a result, BASF was jointly and severally liable for Bader's actual damages because it engaged in a civil conspiracy.

Punitive damages. Monsanto and BASF jointly argued that punitive damages were not submissible under Missouri law under these facts, because Monsanto did not sell the seeds until it received USDA approval. The Eighth Circuit, however, agreed with the district court that sufficient evidence supported an award of punitive damages for other actions that Monsanto took. For example, evidence existed that Monsanto consciously

blocked testing for volatility so as not to interfere with regulatory approval. Also, Monsanto sold the seeds knowing that farmers intended to spray dicamba off-label. At the very least, it knew of the dangers because of its experience with the dicamba-resistant cotton seeds.

The Eighth Circuit then moved to the question of whether BASF was entitled to a determination of punitive damages that was separate from Monsanto. If Monsanto and BASF had formed a joint venture, the appellate court said, a judgment holding BASF jointly and severally liable for punitive damages would have been appropriate. Because no such venture existed as a matter of law, however, BASF could not be held jointly and severally liable on that basis.

Although BASF was found to have engaged in a civil conspiracy, the existence of a conspiracy did not change the rule that punitive damages against multiple defendants must be assessed separately. The Eighth Circuit went on to note that the evidence established different “degrees of culpability,” which meant that BASF was entitled to have its punitive damages assessed separately from Monsanto.

The Eighth Circuit, therefore, vacated the punitive damages award, and it remanded the case with instructions to hold a new trial only on the issue of punitive damages. In all other respects, the judgment was affirmed.

The case is No. [20-3663](#).

Attorneys: Tracey Flexter George (Davis George Mook, LLC) and Beverly Turina Randles (Randles & Splittgerber, LLP) for Bader Farms, Inc. and Bill Bader. Shane Alan Anderson (Faegre Drinker Biddle & Reath LLP) and Troy Bozarth (HeplerBroom LLC) for Monsanto Co. and BASF Corp.

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

MainStory: TopStory DamagesNews ChemicalNews DesignManufacturingNews WarningsNews CausationNews EvidentiaryNews ArkansasNews IowaNews MinnesotaNews MissouriNews NebraskaNews NorthDakotaNews SouthDakotaNews