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BADER FARMS WINS \$265 MILLION JUDGMENT IN DICAMBA LAWSUIT AGAINST BAYER, BASF

JURY AWARDS \$15 MILLION TO BADER FARMS FOR DICAMBA DAMAGES AND \$250 MILLION IN PUNITIVE DAMAGES.

By

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A federal jury in Cape Girardeau, Missouri, has ruled in favor of Bader Farms, a Campbell, Missouri, peach farm, in its dicamba lawsuit against Bayer and BASF. The jury awarded Bader Farms \$265 million in damages.

Of that amount, \$15 million is in the form of compensatory damages for what the jury ruled was the actual amount of damage caused to the peach trees grown by Bader Farms. The \$250 million remainder was in the form of punitive damages.

[Juries typically award punitive damages when they believe a defendant's behavior is found to be especially harmful, according to the Cornell Law School Legal Information Institute.](#)

Bayer and BASF – both defendants in the lawsuit – market dicamba formulations labeled for dicamba-tolerant soybeans. Bayer markets Xtendimax with VaporGrip Technology, while BASF markets Enginia.

Bayer issued this statement following the verdict.

We are disappointed with the jury's verdict. While we have empathy for Mr. Bader, Monsanto's products were not responsible for the losses sought in this lawsuit and we look forward to appealing the decision. Despite the verdict, Bayer stands behind Xtend seed and XtendiMax herbicide products, which enjoy a 95% weed control satisfaction rate from the farmers who use them. We want our customers to know that, as this legal matter continues, we remain steadfast in our commitment

to delivering them the effective and sustainable tools they need in the field.

BASF issued this statement following the verdict.

We are surprised and disappointed with the jury's decision and we plan to appeal. Dicamba-based herbicides, like Engenia herbicide, are critically important tools for growers battling resistant weeds in their soybean and cotton fields. The evidence revealed that we formulated our dicamba product to significantly reduce off-target movement and conducted extensive testing before receiving EPA approval to market Engenia herbicide in 2017.

On-target applications of Engenia herbicide continue to produce some of the cleanest fields in recent memory. We look forward to helping growers achieve clean fields again during the 2020 growing season.

BASF will continue to provide training to applicators and emphasize the importance of following the label requirements for Engenia herbicide to achieve on-target applications. We will also continue to work with academics, NGOs, and state and federal agencies to address any concerns they may have regarding off-target movement.

How the Case Started

[*Bader Farms v. Monsanto* was the first-filed dicamba-crop damage case in the United States.](#)

Dicamba damage cited in the case was initiated when Monsanto (which Bayer bought in 2018) launched dicamba-tolerant Xtend soybeans in 2016. Traditionally, synthetic auxin herbicides like dicamba and 2,4-D are volatile and prone to off-target movement. Manufacturers of dicamba and 2,4-D labeled for use on dicamba-tolerant and 2,4-D-tolerant soybeans say these new formulations are lower in volatility than older formulations.

[However, dicamba formulations that Monsanto and BASF pegged as lower in volatility than existing dicamba formulations for the dicamba-](#)

[tolerant soybeans were not launched until 2017](#). Existing dicamba formulations in 2016 were illegal to apply.

Attorneys for Bader Farms said that BASF and Monsanto were liable for illegal dicamba applications that were applied to the Xtend soybeans.

“The law is clear that if you sell a product and if you foresee a use that is dangerous to the public, then you have an obligation to take steps and not sell it,” says Billy Randles, an attorney for Bader Farms. “They (Monsanto) clearly knew there were going to be off-label applications. They thought the benefit of selling it (Xtend soybeans) was worth the risk.”

However, peach tree damage was not caused by Xtendimax or Engenia, says Chris Hohn, an attorney who served as an outside counsel for Bayer during the trial.

“It is important to note that there was no concrete evidence presented at the trial showing anything on his (Bader’s) farm related to Monsanto’s product Xtendimax,” says Hohn. “In fact, there was no concrete evidence presented that there was any dicamba whatsoever in his peach orchard.”

The culprit instead was a fungal disease called Armillaria root rot, he says. [Armillaria root rot, which infects many deciduous and evergreen trees and shrubs, causes poor growth and eventual death of the tree, according to University of Minnesota Extension educators](#).

Hohn says Bayer had three expert witnesses in peach tree pathology who testified to this. Bayer attorneys also introduced as evidence DNA samples that tested positive for the root rot in the peach trees of Bader Farms.

Hohn adds that several hundred pounds of Bader Farms peaches in 2016 — the year in question for dicamba damage — tested negative for dicamba, according to a Food and Drug Administration test.

“There was evidence presented at trial from 2015 (before Monsanto launched its Xtend soybeans in 2016) showing that Mr. Bader had actually experienced drift from an aerial application that was a

burndown (applied preemergence to a crop) application,” says Hohn. “Testing done by the (Missouri) department of ag demonstrated it was positive for 2,4-D and dicamba among other things. So, that establishes the evidence that you can test for the presence of dicamba (in the trees). To be clear, that aerial application from 2015 was a burndown and had absolutely nothing to do with an application relating to Monsanto’s Xtend seed.

“There was also evidence presented from financial statements from Bader Farms that demonstrated that (Bader Farms) peach profits went up in the years (the farm said) it was impacted by by dicamba,” adds Hohn.

However, the jury didn’t buy it.

“I can’t speculate what was going through jurors’ minds,” says Hohn. “All that I really can say is that we presented substantial evidence and uncontroverted evidence that that dicamba wasn’t in the trees, and the true causes were causes unrelated to dicamba. It’s really hard to tell why the jury chose to disregard that evidence.”

Randles counters that the Bayer attorneys had a script they followed, such as the soil fungus defense, that the jury rejected.

“Documents showed that in this case, they counted on farmers planting (Xtend soybeans) to protect themselves from neighbors (making dicamba applications),” adds Randles. “Defensive planting was used by Monsanto as a marketing opportunity. They planned to cash in on it.

“It doesn’t matter if it is ‘old’ or ‘new’ dicamba,” he adds. “It moves off target and damages innocent folks.”

Predictable Verdict, says SOCC’s Smith

The jury’s verdict was predictable to Steve Smith, director of agriculture at Red Gold, an Orestes, Indiana, tomato processing company. He also chairs the Save Our Crops Coalition (SOCC), a group of tomato farmers and others who have been critical of the dicamba-tolerant technology.

“It’s been worse (off-target dicamba damage) than what I predicted it would be,” says Smith. “It’s just rampant up and down every county road you want to drive. Even my home lost fruit trees (from off-target dicamba).”

Smith isn’t alone in his concerns about off-target dicamba movement in dicamba-tolerant technologies. Last year’s soggy spring caused many Indiana farmers to mix or delay preemergence residual chemistry. This led to increased dependency on postemergence chemistry, including dicamba on dicamba-tolerant soybeans.

“A side effect of this were the off-target dicamba complaints,” says Bill Johnson, Purdue University Extension weed specialist. “It was flying all over the place. [So, we are making adjustments from a regulatory standpoint as well.](#)”

[In Illinois, off-target dicamba complaints set a record in 2019 at 728 – more than double the 2018 total of 330, says Jean Payne, executive director of the Illinois Fertilizer and Chemical Association.](#) In response, the Illinois Department of Agriculture has enacted a June 20 dicamba cutoff date for 2020. It also is prohibiting application of dicamba if temperatures at application exceed 85°F. or if the National Weather Service’s forecasted high temperature for the nearest available location on application day exceeds 85°F.

[Liam Condon, Bayer Crop Science CEO, countered at the February 12 media briefing that overall, off-target dicamba complaints were low in 2019.](#)

“If we look at the number of off-target inquiries that we had in 2019 per million acres planted, it’s down to about eight, which actually compared to other crop protection products, is a very, very small amount,” he says. “So, what we are hearing are anecdotal reports in specific geographies, but clearly across the overall market, (we’ve seen) massive (market) penetration and a relatively very low amount of inquiries on off-target movement.”

What’s to Come

Bayer plans to move forward with its dicamba-tolerant technology during the appeal process. The decision has no impact on the commercial availability of the dicamba-tolerant system as it now stands, says Darren Wallis, a Bayer spokesperson.

“It will be broadly available for this spring,” he says.

[At the February 12 briefing, company officials detailed Bayer’s plan to launch its XtendFlex herbicide-tolerant soybean package this spring that tolerates glyphosate, glufosinate, and dicamba formulations.](#)

Dicamba-tolerance will continue to be a strong base of Bayer’s future plans, say company officials. By 2030, Bayer aims to have a six-way soybean stack including tolerance to:

- **Glyphosate**
- **Dicamba**
- **Glufosinate**
- **An HPPD inhibitor herbicide**
- **2,4-D**
- **A PPO inhibitor herbicide**

Federal registration is up for renewal this fall for dicamba formulations in dicamba-tolerant systems. In October 2018, the Environmental Protection Agency granted a two-year approval to allow farmers and applicators to apply dicamba in dicamba-tolerant crops like soybeans in the 2019 and 2020 growing seasons.

The SOCC advocated for a preplant-only label for dicamba used in dicamba-tolerant crops in 2018. Smith says this wouldn’t have stopped all off-target issues, as trees, orchards, and vineyards are already leafed out during this late-spring time period. However, he says it would have reduced problems to a more manageable level.

The SOCC isn't alone in that assessment. [Several university weed scientists also recommended only preemergence applications in 2018.](#)

Smith says the SOCC worked well with Dow AgroSciences (now part of Corteva Agriscience) when it was developing its 2,4-D choline-based Enlist Weed Control System.

“They really reached out and wanted not just to talk, but also to figure out what they could do to make it work better,” Smith says.

That hasn't been the case with Monsanto and now Bayer, Smith says.

“The rule I have used is I can support it (the technology) if you can make an on-label application and have no risk of damage,” he says. “If you make an on-label application and still have potential for damage, that is not going to work. I am not anti-business, I am not anti-big companies. But I am anti-people doing things they know good and well they should not be doing. What it (the verdict) will do is open the floodgates for other people who have suffered (off-target dicamba) injury.”

Legal Outlook

Thirty legal cases are currently on file relating to dicamba or the Xtend system, says Hohn.

“In those 30 cases, there are 170 plaintiffs total,” he says. “This Bader Farms case related to a peach orchard, obviously, was a unique case. We don't think it has any bearing or correlation on the other cases that are pending.”

That will change, predicts Joseph Peiffer, a New Orleans-based attorney for Peiffer Wolf, which Peiffer says represents around 100 farmers in dicamba lawsuits.

“I expect there to be thousands of cases and there should be,” he says.

Peiffer says the awarding of \$250 million in punitive damages above the requested \$200 million is extremely unusual.

“I don't think anyone expected that,” he says.

A summary judgment request filed to the court by BASF and Bayer on December 31, 2019, says the test for whether punitive damages are allowed in Missouri is a strict one.

“The plaintiff must show, by clear and convincing evidence, that the defendant showed a complete indifference to or conscious disregard for the safety of others,” it states.

“I would think it (the verdict) should alert farmers who have had (off-target dicamba) crop damage that there is real justice to be had,” says Peiffer. “This is not just a bunch of lawyers saying Monsanto and BASF did something wrong. This was a jury of people from Missouri who know farmers, heard the evidence, and were clearly outraged by it.”