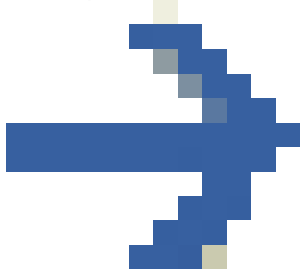


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June 21, 2013

How to Dodge a Declaratory Judgment Suit – by Website Disclaimer?

Fresh off its **Supreme Court win last month**, Monsanto has notched another appellate victory in a case relating to its patents on “Roundup Ready” genetically modified seeds. This most recent case involved an attempt by a group of organic farmers to challenge Monsanto’s patents in a declaratory judgment action, alleging that they feared being sued by Monsanto in the event that their crops are inadvertently contaminated by Roundup Ready seed. Given Monsanto’s repeated representations that it had no intention of suing the farmers for any such inadvertent use of the seed, a lower court dismissed the lawsuit last year.

On June 10, the Federal Circuit affirmed the lower court ruling, finding that the farmers could not establish a substantial risk that Monsanto would sue and, hence, did not have standing. *See Organic Seed Growers et al. v. Monsanto Co.*, Appeal No. 2012-1298 (Fed. Cir. June 10, 2013). Pointing to a statement on Monsanto’s website and several representations by Monsanto’s counsel both before and during the litigation that Monsanto would not sue the plaintiffs, the court held that the plaintiffs could not establish a justiciable case or controversy.

The court found no actual controversy despite assuming that windblown seeds would contaminate the organic farmers’ fields, and that “using or selling windblown seeds would infringe any patents covering those seeds....” According to the court, “[d]espite this possibility of infringement, the question is whether Monsanto is correct that its representations moot any potential controversy.” The court found that, “[t]aken together, Monsanto’s representations unequivocally disclaim any intent to sue appellant growers, seed sellers, or organizations for inadvertently using or selling ‘trace amounts’ of genetically modified seeds.”

The court went on to explain that, while Monsanto’s representations did not amount to a covenant not to sue, “they have a similar effect.... [a]s those representations are binding as a matter of judicial estoppel.” As a result, because “[t]he appellants have alleged no concrete plans or activities to use or sell greater than trace amounts of modified seed,” they accordingly failed “to show any risk of suit on that basis.”

Perhaps most interesting about the decision is the court’s repeated references to the statement on Monsanto’s website that: “[i]t has never been, nor will it be Monsanto’s policy to exercise its patent rights where trace amounts of our patented seeds or traits are present in farmer’s fields as a result of inadvertent means.” While the court did not decide whether this statement alone would have been sufficient to avoid the farmers’ declaratory judgment action, companies seeking to dodge such suits may be wise to consider a carefully crafted website disclaimer to assist in that effort.