



# The Deal With Dicamba

# About the Center

---

- The National Agricultural Law Center is the nation's leading source for agricultural and food law research and information.
  - Created in 1987, the NALC is a unit of the University of Arkansas System Division of Agriculture
  - The Center also works in close partnership with the USDA Agricultural Research Service, National Agricultural Library
- We provide objective, non-partisan research and information regarding laws and regulations affecting agriculture





# The National Agricultural Law Center

The Nation's Leading Source of Agricultural and Food Law Research and Information

Check out...[The Ag & Food Law Blog](#) >



[ABOUT THE CENTER](#)

[PROFESSIONAL STAFF](#)

[CENTER NEWS](#)   [PARTNERS](#)

[RESEARCH BY TOPIC](#)

[2020 AG & ENV. LAW CLE](#)

[CENTER PUBLICATIONS](#)

[STATE COMPILATIONS](#)

[FARM BILL RESOURCES](#)

[AG LAW BIBLIOGRAPHY](#)

[AG LAW GLOSSARY](#)

[AG LAW REPORTER](#)

[GENERAL RESOURCES](#)

*Up next in our webinar series:*

## Landowner Liability: How to Protect Your Operation

Tiffany Dowell Lashmet  
*Texas A&M Agrilife Extension*

[www.nationalaglawcenter.org](http://www.nationalaglawcenter.org)



# Visit our Website

ABOUT THE CENTER

PROFESSIONAL STAFF

PARTNERS

**RESEARCH BY TOPIC**

2020 AG & ENV. LAW CLE

CENTER PUBLICATIONS

STATE COMPILATIONS

FARM BILL RESOURCES

AG LAW BIBLIOGRAPHY

AG LAW GLOSSARY

AG LAW REPORTER

GENERAL RESOURCES

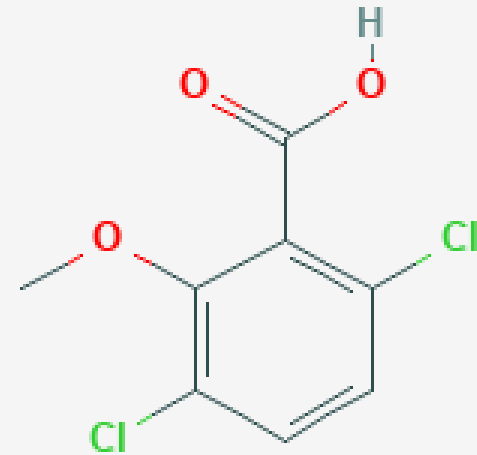
- **Administrative Law**
- **Animal Identification**
- **Aquaculture**
- **Biosecurity**
- **Business Orgs**
- **Clean Air Act**
- **Clean Water Act**
- **Commercial Trans.**
- **Conservation Programs**
- **Cooperatives**
- **Disaster Asst/Crop Ins**
- **Estate & Taxation**
- **Food Labeling**
- **International Law**
- **Labor**
- **Landowner Liability**
- **Local Food Systems**
- **Nat'l Organic Program**
- **Native American Ag**
- **Packers & Stockyards**
- **Pesticides**
- **Renewable Energy**
- **Specialty Crops**
- **Urbanization & Ag**
- **Agritourism**
- **ADR**
- **AFOs**
- **Animal Welfare**
- **Bankruptcy**
- **Biotechnology**
- **Checkoff**
- **Climate Change**
- **Commodity Programs**
- **Corp. Farming**
- **COOL**
- **Environmental Law**
- **Finance & Credit**
- **Food Safety**
- **Industrial Hemp**
- **International Trade**
- **Marketing Orders**
- **Nutrition Programs**
- **PACA**
- **Production Contracts**
- **Secured Trans.**
- **Sustainable Ag**
- **Water Law**

- Reading Rooms are one of our major online resource components
- Links are provided to major statutes, regulations, case law, Center-published research articles, and numerous other research resources



# What is Dicamba?

- A chemical herbicide designed to kill broad-leafed plants
- Used on weeds that have developed glyphosate resistance
  - Ex: *palmer amaranth* aka pigweed
- Prone to volatility – vaporizing into the air and traveling off target
- Historically applied as a preemergent in late winter and early spring to avoid volatility issues



# What's Going On?

- Monsanto & BASF developed low volatility forms of dicamba for in-crop use with dicamba-resistant seeds
- **2015:** Monsanto began to sell genetically engineered dicamba-resistant soybean and cotton seeds
  - No dicamba pesticide was approved at this time
- **2017:** EPA approved dicamba for in-crop use
- **Consequences:** Reports of dicamba-related crop damage on the rise since 2015
  - Resulted in a variety of lawsuits



# Current Dicamba Litigations

*Bader Farms v. Monsanto Co.*

*In re: Dicamba Herbicides Litigation*

*Nat'l Family Farm Coal. v. EPA*

Arkansas State Cases



# *Bader Farms*

---

- ***Bader Farms, Inc. v. Monsanto Co., No. 1:16-cv-299 (E.D. Mo. 2019)***
- First lawsuit concerning dicamba
- Bill Bader alleged dicamba damage to peach orchards beginning in the 2015 growing season
- Joined Monsanto and BASF as defendants
- First case to progress to trial stage
  - Trial began Jan. 27, 2020
  - Jury awarded Bader Farms \$15 million in actual damages on Feb. 14, 2020 and \$265 million in punitive damages on Feb. 15
  - Found in favor of plaintiff on every count





# *Bader Farms*

---

- Claims the plaintiffs argued at trial:
  - **Negligent design/failure to warn**
    - Monsanto and BASF did not exercise reasonable care in designing dicamba-based products
    - Dicamba-based products were defective and unreasonably dangerous at time of sale
    - Monsanto and BASF failed to use ordinary care by neglecting to provide an adequate warning of the danger of their dicamba-based products
  - **Civil conspiracy**
    - Monsanto and BASF agreed to engage in negligent and tortious behavior together to sell dicamba-based products
  - **Joint venture**
    - Monsanto and BASF worked together and are jointly liable for all claims



# *Bader Farms*

---

- Claims dismissed before trial:
  - **Trespass**
    - Argument: Monsanto & BASF knew or should have known dicamba-based herbicides would invade the property of others
    - Dropped: Neither company was in control of the herbicides at the time the trespass took place
  - **Aiding & Abetting**
    - A type of conspiracy
    - Argument: Monsanto & BASF each knowingly assisted the other in carrying out wrongful activity
    - Dismissed: Claim not recognized in Missouri courts



# Potential Fallout from *Bader Farms*

- Largely seen as test case indicating success/failure probability of plaintiffs in similar cases
  - Similar claims and arguments made in *In re: Dicamba*
- Success of *Bader Farms* plaintiffs could indicate success for *In re: Dicamba* plaintiffs
- Success of *Bader Farms* could encourage other farmers to initiate lawsuits
- Bayer and BASF have stated intent to appeal the verdict
  - On 3/27/2020, both companies filed post trial motions that move them closer to appeal
  - Waiting on plaintiffs to reply



# Current Dicamba Litigations

 *Bader Farms v. Monsanto Co.*

 *In re: Dicamba Herbicides Litigation*

 *Nat'l Family Farm Coal. v. EPA*

 Arkansas State Cases



# *In re: Dicamba*

- ***In re: Dicamba Herbicides Litigation, No. 1:18-md-02820 (E.D. Mo. 2019)***
- A multidistrict litigation that consolidated multiple cases from nine different states:
  - Arkansas, Illinois, Iowa, Kansas, Mississippi, Missouri, Nebraska, South Dakota, and Tennessee
  - Cases can be consolidated into an MDL when several plaintiffs file similar claims against one defendant in different jurisdictions
  - Different than class action where many plaintiffs join together to file one case
- Plaintiffs are primarily soybean farmers who did not purchase dicamba-based products, but experienced dicamba damage
- Claims come from the 2017 growing season after EPA approved dicamba pesticides for in-crop use



# *In re: Dicamba*

- Plaintiffs divided into two groups under separate complaints:
- **Crop Damage Class Action Master Complaint**
  - Filed by plaintiffs who had experienced dicamba damage but did not purchase or use dicamba-resistant seeds or dicamba herbicides
  - Brought against Monsanto and BASF
  - Alleged harm is crop damage
- **Master Antitrust Action Complaint**
  - Filed by plaintiffs who were direct purchasers of Monsanto's dicamba-resistant soybean seeds
  - Brought only against Monsanto
  - Alleged harm is monopoly of dicamba-tolerant market



# *In re: Dicamba* (Master Antitrust Action Complaint)

- Exclusively consisted of three claims under the Sherman Act:
  - (1) Monopoly
  - (2) Attempt to monopolize
  - (3) Combination, contract, or conspiracy to monopolize
- Court dismissed all claims without prejudice for lack of standing
  - To bring a claim under the Sherman Act, plaintiffs had to show they purchased seeds directly from Monsanto
  - No plaintiff named Monsanto as the seller of their seeds
- “Dismissed without prejudice” so plaintiffs could refile



# *In re: Dicamba* (Crop Damage Master Complaint)

---

- Raises many of the same claims as *Bader Farms*
- Trial scheduled to start in August, 2020
- Court opinion issued in February, 2019 indicates what claims may go to trial and which claims will not





# *In re: Dicamba* (Crop Damage Master Complaint)

---

- Claims that may go to trial:
- Violations of the Lanham Act
  - Lanham Act is the federal statute governing trademarks and unfair competition
  - Prevents manufacturers from confusing consumers about their products
  - Plaintiffs allege Monsanto misled consumers into thinking that there was no risk of dicamba drift while marketing its products



# *In re: Dicamba* (Crop Damage Master Complaint)

---

- Claims that may go to trial:
- Civil conspiracy
  - Plaintiffs allege that Monsanto and BASF worked together to carry out a scheme to unlawfully sell dicamba-based products
  - Court allowing claim to go forward, but says plaintiffs must clarify
  - Conspiracy by “concerted action” or by “aiding and abetting”
  - In *Bader Farms*, court dismissed “aiding and abetting” while jury was convinced by “concerted action”



# *In re: Dicamba* (Crop Damage Master Complaint)

---

- Claims that may go to trial:
- Failure to warn
  - Plaintiffs allege dicamba-based products do not come with adequate warning to alert consumers to risk
  - Also that Monsanto failed to warn of risks in communications other than the label
    - Ex: websites, social media, face-to-face communications, etc.
  - Court allowing claim to go forward so long as it does not exceed FIFRA
  - FIFRA preempts state law that requires labeling provisions different or in addition to those required by FIFRA



# *In re: Dicamba* (Crop Damage Master Complaint)

---

- Claims that will not go to trial
- Trespass
  - Argument: Monsanto & BASF knew or should have known dicamba-based herbicides would invade the property of others
  - Dismissed: Neither company was in control of the herbicides at the time the trespass took place
- Nuisance
  - Argument: Knew or should have known that harm from dicamba drift would prevent plaintiffs from using or enjoying their property
  - Dismissed: Neither company was in control of the herbicides when the harm occurred



# Current Dicamba Litigations

*Bader Farms v. Monsanto Co.*

*In re: Dicamba Herbicides Litigation*

✓ *Nat'l Family Farm Coal. v. EPA*

Arkansas State Cases



# *Nat'l Family Farm Coal.*

- ***Nat'l Family Farm Coal. v. U.S. Eenvtl. Prot. Agency, No. 19-70115 (9th Cir. 2019)***
- Filed in the Ninth Circuit Court of Appeals by environmental organizations
- Lawsuit alleges that EPA's 2018 re-registration of XtendiMax violated FIFRA and the ESA
- Case originally filed in 2017 making identical claims about EPA's 2016 registration of XtendiMax
  - Refiled after 2016 registration expired and XtendiMax was re-registered in 2018
- Oral argument scheduled for April 21, 2020
- Asking court to set aside XtendiMax approval



# *Nat'l Family Farm Coal. (FIFRA)*

---

- EPA violated FIFRA by re-registering XtendiMax in 2018 without:
  - Making necessary prerequisite findings
  - Meeting the requirements to register XtendiMax for conditional use
  - Supporting the 2018 registration with substantial evidence



# *Nat'l Family Farm Coal. (FIFRA)*

- FIFRA plaintiff Claim #1: **EPA re-registered XtendiMax in 2018 without making necessary prerequisite findings**
  - Rule:
    - EPA had to meet conditions it set in the 2016 registration in order to re-register XtendiMax in 2018
  - Argument:
    - 2016 registration of XtendiMax set to automatically expire in 2018 unless EPA determined that incidents of XtendiMax drift were not occurring at “unacceptable frequencies or levels”
    - Plaintiffs allege EPA did not make that finding





# *Nat'l Family Farm Coal. (FIFRA)*

- FIFRA plaintiff claim #2: **EPA re-registered XtendiMax in 2018 without meeting the requirements for conditional use registration**
  - Conditional use registration lets EPA register a new use for an already registered pesticide
  - Rule:
    - To register a pesticide for conditional use EPA must find that “(i) the applicant has submitted satisfactory data pertaining to the proposed additional use, and (ii) amending the registration in the manner proposed by the applicant would not significantly increase the risk of any unreasonable adverse effect on the environment”
  - Argument:
    - EPA failed to make either finding



# *Nat'l Family Farm Coal. (FIFRA)*

- FIFRA plaintiff claim #3: **EPA re-registered XtendiMax in 2018 without supporting the registration with substantial evidence**
  - Rule:
    - When EPA makes a change to a pesticide label, it must support the change with substantial evidence
  - Argument:
    - EPA's conclusion that the changes to the XtendiMax label would prevent drift damage was not supported by substantial evidence
    - Only one label change addressed volatility
    - Concluded that applicator error was the main cause of drift damage
    - EPA admitted that the label changes were minimal and would not completely eliminate drift damage



# *Nat'l Family Farm Coal. (ESA)*

---

- Plaintiffs allege multiple ESA violations including:
  - Applied the wrong standard to conclude that registering XtendiMax would have “no effect” on listed species
  - Applied the wrong standard when determining the effect XtendiMax would have on designated critical habitat



# *Nat'l Family Farm Coal.*

- **ESA plaintiff claim #1: Applied the wrong standard to conclude that registering XtendiMax would have “no effect” on listed species**
  - Rule:
    - ESA standard: “may effect” listed species – triggers ESA consultation, low threshold
    - FIFRA standard: “unreasonable adverse effects” – high threshold
  - Argument:
    - ESA standard should be applied specifically when considering impact on listed species



# *Nat'l Family Farm Coal.*

- **ESA plaintiff claim #2: EPA applied the wrong standard when determining the effect XtendiMax would have on designated critical habitat**
  - Rule:
    - ESA requires federal agencies to ensure that their actions will not adversely effect any designated critical habitat
  - Argument:
    - EPA wrongly restricted the area it considered to only the crop fields that were likely to be sprayed
    - EPA wrongly concluded that unless listed species occupied fields likely to be sprayed, it did not have to consult about effects on critical habitat



# Current Dicamba Litigations

*Bader Farms v. Monsanto Co.*

*In re: Dicamba Herbicides Litigation*

*Nat'l Family Farm Coal. v. EPA*

✓ Arkansas State Cases



# Arkansas State Cases

---

- Two cases filed in Arkansas state court over state rules restricting use of dicamba:
  - ***Monsanto Co. v. Arkansas State Plant Bd.*, No. 60CV-17-5964 (2019)**
  - ***McCarty v. Arkansas State Plant Bd.*, 60CV-17-6539 (2019)**
- Plaintiffs' claims:
  - Regulations passed by the Plant Board restricting the use of dicamba were unlawful
  - State law governing Plant Board appointments was unconstitutional



# Arkansas State Cases

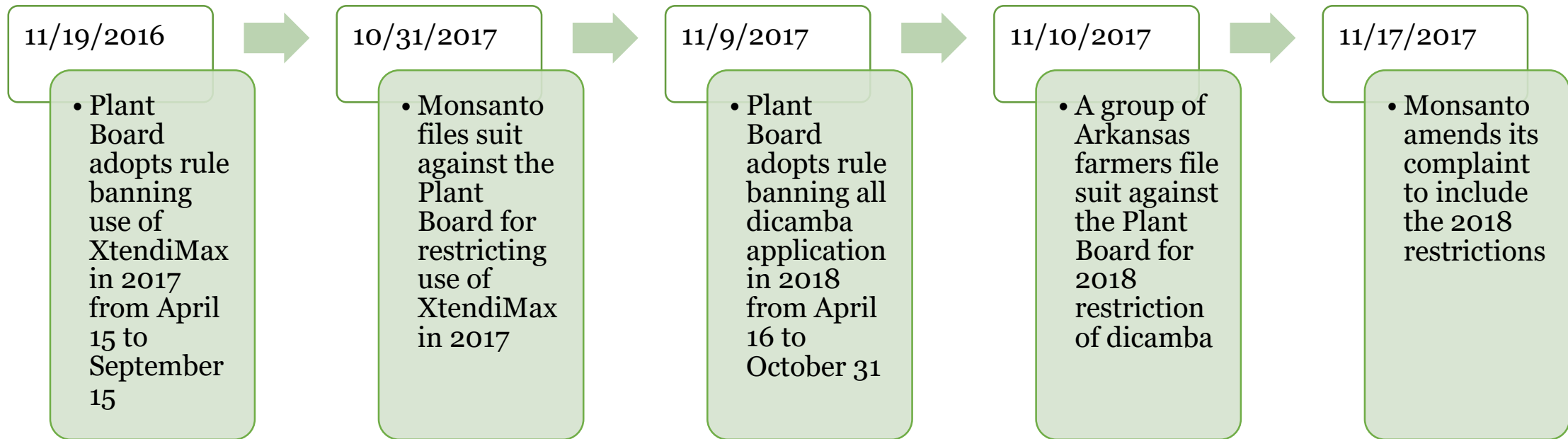
---

- Arkansas State Plant Board an agency of the Arkansas Agriculture Department and is responsible for regulating pesticides used in Arkansas
  - Before a pesticide is sold in Arkansas it must be registered by the Plant Board
- Plant Board is formed pursuant to a state law that outlines the Board's formation and its rulemaking powers
  - Plant Board has 18 members
  - Nine members are appointed by the Governor of Arkansas
  - Nine members are appointed by private interest groups, such as the Seed Dealer's Association
  - Plant Board has notice and comment rulemaking power





# Arkansas State Cases - Background



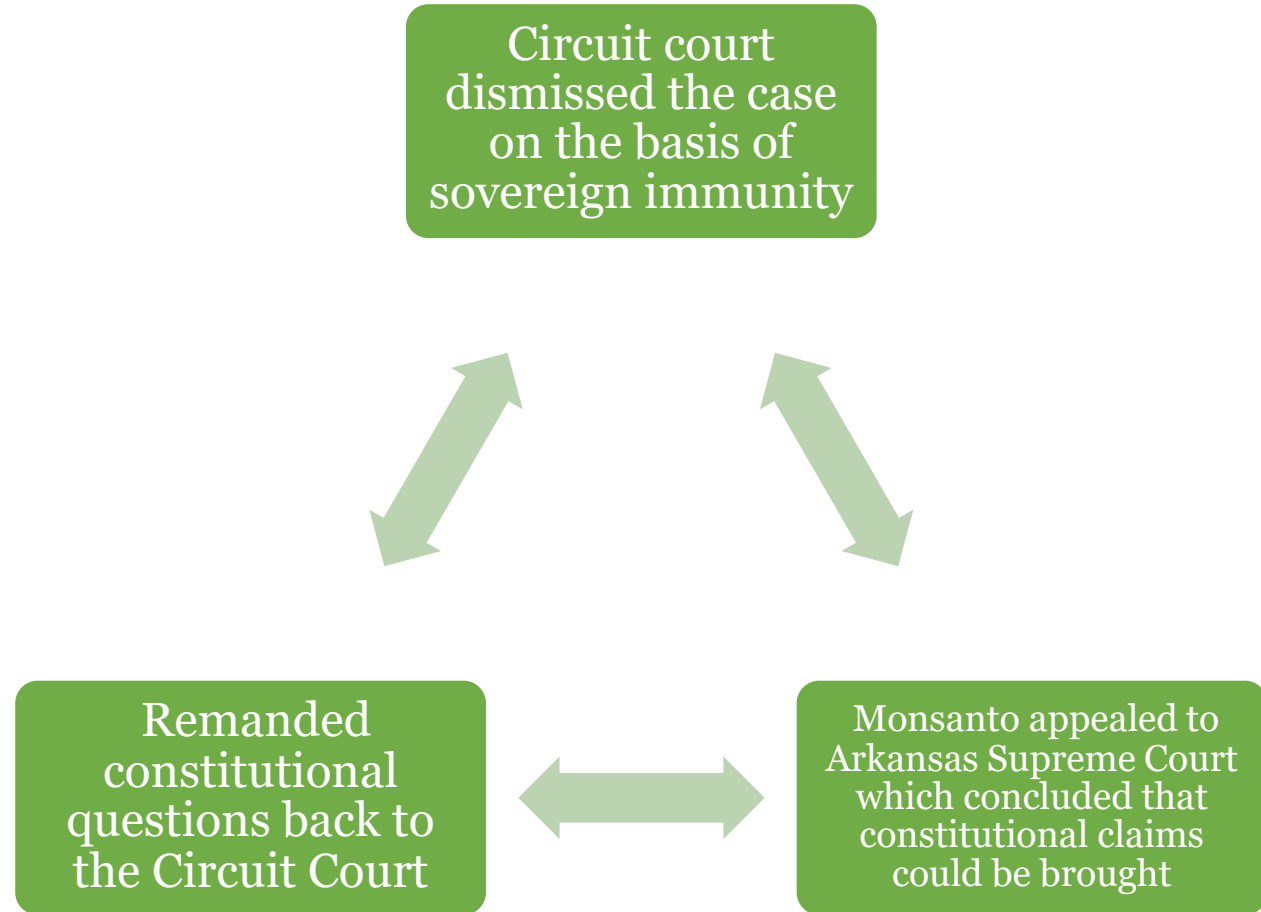
# Arkansas State Cases

---

- ***Monsanto Co. v. Arkansas State Plant Bd.***
- Plaintiff claims: 2017 and 2018 rules violated both Arkansas state law and the U.S. constitution:
  - By requiring Monsanto to comply with a requirement that it submit two years of research conducted by University of Arkansas scientists assessing the volatility of XtendiMax
  - By allowing special interest groups to appoint members to the Plant Board
- Requested relief: Vacate 2017 and 2018 rules



# Arkansas State Cases – *Monsanto Co. v. Arkansas State Plant Board*



# Arkansas State Cases

---

- ***Monsanto Co. v. Arkansas State Plant Bd.***
- Monsanto made two main claims before the Circuit Court:
  - (1) Requirement that pesticide applications must include two years of research conducted by scientists at the University of Arkansas violated the Commerce Clause
  - (2) State law allowing private interest groups to appoint Plant Board members violated the Arkansas State Constitution
- Court concluded that the Plant Board's requirement did not violate the United States Constitution, but that the state law did violate the Arkansas State constitution
- Plant Board has appealed the decision to the Arkansas Supreme Court



# Arkansas State Cases

---

- ***McCarty v. Arkansas State Plant Bd.***
- Plaintiffs had used dicamba herbicides in 2017 when only XtendiMax was subject to the April cutoff date
- Filed suit after all dicamba herbicides were subject to a cutoff date of April 16 in 2018
- Alleged that the cutoff date was invalid because the Plant Board was unconstitutionally formed



# Arkansas State Cases

---

- ***McCarty v. Arkansas State Plant Bd.***
- Like in *Monsanto Co. v. Arkansas State Plant Bd.*, the Circuit Court dismissed because of sovereign immunity
- Plaintiffs appealed to the Arkansas Supreme Court
  - Supreme Court found that plaintiffs could bring their case despite sovereign immunity
  - Dismissed the petition to vacate the 2018 rule because the rule had already expired
  - Sent constitutional issue back to Circuit Court



# Arkansas State Cases

---

- ***McCarty v. Arkansas State Plant Bd.***
- Before the Circuit Court, the plaintiffs argued that the Plant Board was unconstitutionally formed because it allowed private interest groups to appoint members
- The court issued an order concluding that the Plant Board was not unconstitutionally formed
- The plaintiffs are appealing the ruling to the Arkansas Supreme Court



# Greater Relevance of Arkansas State Cases

---

- Cases and their outcomes are specific to Arkansas, but have a larger relevance showing that:
  - Lawsuits concerning dicamba are occurring at every level
  - State restrictions on dicamba use may be challenged





# Take Aways

---

- Dicamba use is a hot button topic that is not going away
  - Will likely see more cases filed after *Bader Farms* plaintiff win
- Cases are in federal district courts, federal appellate courts, and state courts
- Plaintiffs are bringing a variety of claims in both state and federal law
- There are plaintiffs on both sides of the issue





# Additional Resources

---

- Deal With Dicamba articles:

- [Part One](#)
- [Part Two](#)
- [Part Three](#)
- [Part Four](#)
- [Part Five](#)
- [Part Six](#)
- [Part Seven](#)
- Part Eight

- Other resources:

- [\*Bader Farms\* complaint](#)
- [\*In re: Dicamba\* Master Antitrust Action complaint](#)
- [\*In re: Dicamba\* Crop Damage Master complaint](#)
- [\*Nat'l Family Farm Coal.\* complaint](#)
- [Pulaski County Circuit Court case search](#)





# Brigit Rollins

[brollins@uark.edu](mailto:brollins@uark.edu)

[www.nationalaglawcenter.org](http://www.nationalaglawcenter.org)



The National Agricultural Law Center



@nataglaw