

Organic Seed Growers and Trade Association's suit against Monsanto, 2012 and 2013

In March 2011 the Organic Seed Growers and Trade Association and around sixty agricultural organizations (OSGATA et al.) filed a suit against Monsanto Company and Monsanto Technology L.L.C., collectively called Monsanto. The hearings for Organic Seed Growers and Trade Association (OSGATA) et al. v. Monsanto (2012) took place at the United States District Court for the Southern District of New York in Manhattan, New York. The district court's Judge Naomi Reice Buchwald dismissed OSGATA's suit. A year later, OSGATA appealed to the United States Court of Appeals for the Federal Circuit in Washington, D.C., and the court agreed with the District Court's 2013 decision. OSGATA appealed to the US Supreme Court in late 2013, and the Supreme Court refused to hear the case in 2014. In the OSGATA et al. v. Monsanto case, OSGATA claimed that genetically modified seeds are a threat to both human health and conventional and organic farming. OSGATA petitioned that because of this threat, twenty-three of Monsanto's patents on genetic modification processes and technologies were invalid.

Monsanto manufactures, licenses, and sells agricultural seed varieties that are genetically modified, also called transgenic seeds. To produce genetically modified crop varieties, scientists alter the variety's genetic material (DNA) by incorporating into the organisms of that variety genes and regulatory sequences that those organisms don't normally have. This process is called genetic engineering or agricultural biotechnology. Scientists modified several different crop varieties to express traits in crops such as herbicide tolerance and pest resistance. These crop varieties became commercially successful because the engineered traits protect crops yields under adverse circumstances. Some of Monsanto's most popular genetically modified varieties are called Roundup Ready. Those varieties tolerate exposure to the herbicide glyphosate, commonly called Roundup, which enables farmers to control weeds without damaging their crops.

In the early decades of the twenty-first century, Monsanto was the world's largest seed producer and controlled about 85 percent to 90 percent of the seed market for soybeans, corn, cotton, sugar beets, and canola grown in the US. Monsanto relied on patents to protect its investments in seeds, traits, and production biotechnologies, and Monsanto licensed its patents to other seed companies. Monsanto permitted farmers to use its patented seeds under a limited-use license, which allowed farmers to plant, harvest, and consume or sell patented crops in a single growing season. A limited-use license did not allow farmers to save any of the harvested crops for replanting or to supply to other farmers.

OSGATA is a coalition of farmers, seed growers' associations, seed distributors, agricultural organizations, and public advocacy groups headquartered in Washington, Maine. According to OSGATA, they represented about 300,000 individuals and 4,500 farms or growers who had no interest in genetically modified seeds and do not use or wish to possess or sell any genetically modified seeds, including those covered by Monsanto's patents. OSGATA said that even though they did not use Monsanto's seeds, their crops could become contaminated by genetically modified varieties. Inadvertent contamination may occur through seed drift or scatter, crosspollination, and during harvest or postharvest activities such as transportation, and storage. As a result, Monsanto could sue for patent infringement should Monsanto's genetically modified seeds contaminate OSGATA members' farms. OSGATA was also concerned that transgenic contamination would cause farmers to lose their organic certification from the US Department of Agriculture, located in Washington, D.C.

OSGATA preemptively sued Monsanto based on these issues. On 29 March 2011, OSGATA filed a complaint against Monsanto at the Southern District Court of New York. They sought a declaratory

judgment that twenty-three of Monsanto patents were invalid, unenforceable, and not infringed under the Patent Act. OSGATA argued that Monsanto's genetically modified seeds were not safe for societal use, and were invalid under the Patent Act, which says that only technology with beneficial societal use may be patented. OSGATA argued that Monsanto's genetically modified seeds worsen people's health.

In their argument, OSGATA asserted that genetically modified crops are indistinguishable to the human eye from conventional varieties. OSGATA claimed that genetic testing, the only proactive way to detect genetically modified contamination, is expensive, and that contaminated crops must be completely destroyed. Further, OSGATA claimed that the constant threat of genetically modified seed contamination could destroy their market. In addition, they said that they had the right to do their businesses without taking expensive precautions that lessen their risk of contamination.

In April 2011, after filing the original complaint, OSGATA requested in a letter that Monsanto sign a written waiver that protected OSGATA from claims of patent infringement. Monsanto denied that request and responded that it was not their policy to exercise patent rights against farmers whose fields inadvertently contained trace amounts of patented seeds or traits. According to Monsanto, a written promise not to sue OSGATA was unnecessary because the company had no incentive to sue OSGATA. In July 2011, Monsanto filed a motion to dismiss the case for lack of subject matter jurisdiction, arguing that OSGATA had failed to allege an actual case or controversy. Subject-matter jurisdiction is the authority of a US court to hear cases of a particular type or cases relating to a specific subject matter or controversy initiated in its court.

The United States District Court for the Southern District of New York called an oral hearing in January 2012 to hear both parties' cases. Then in February 2012 judge Buchwald dismissed OSGATA's petition against Monsanto. The district court judge compared OSGATA v. Monsanto's case to *MedImmune, Inc. v. Genentech, Inc.*, a US Supreme Court case from 2007. Buchwald considered whether, under *MedImmune, Inc. v. Genentech, Inc. (2007)*, there was a substantial controversy between the two parties to warrant a declaratory judgment. Because Monsanto had never demanded royalty payments from OSGATA or identified any OSGATA conduct as potentially infringing on patents, the judge ruled that there was no substantial controversy. OSGATA based their argument on three types of alleged actions by Monsanto, none of which the judge considered to be a substantial controversy. First, Monsanto's alleged pattern of litigating against non-OSGATA farmers over patent rights. Second, an implicit threat in Monsanto's statement to not enforce their patent rights against farmers whose crops inadvertently acquired trace amounts of patented seeds or traits. Third, Monsanto's refusal of OSGATA's request to provide a written promise not to sue them.

The district court ruled that OSGATA did not establish a substantial controversy or case. Buchwald ruled that if Monsanto did present OSGATA with a lawsuit, OSGATA could establish a case or controversy. The judge found that OSGATA overstated their allegations about Monsanto's patent enforcement and previous lawsuits, and that the number of lawsuits Monsanto had filed represented only a small portion of farms in the US. The court also ruled that OSGATA's attempt to demand from Monsanto a written promise not to sue was an attempt to create a controversy.

In March 2012, OSGATA filed an appeal with the United States Court of Appeals for the Federal Circuit in Washington, D.C., to reverse the lower court's decision. In June 2013 Judge William Curtis Bryson, Judge Timothy Belcher Dyk, and Judge Kimberly Ann Moore presided over the hearing with Attorney Daniel Ravicher and Attorney Seth Waxman representing OSGATA and Monsanto, respectively. The three judges affirmed the lower district court's dismissal. They concluded that there was no case or controversy because Monsanto had made binding assurances that it would not take legal action against farmers whose crops might inadvertently contain traces of genetically modified traits, which the court defined as less than one percent. Monsanto had agreed "not to take legal action against growers whose crops might inadvertently contain traces of Monsanto biotech genes (because, for example, some transgenic seed or pollen blew onto the grower's land)."

The judges asserted that Monsanto was legally bound by its commitment to not sue OSGATA for patent infringement through inadvertent contamination of Monsanto's seeds or traits, and that the commitment would be upheld if Monsanto changed its position. The court noted that if OSGATA or

other farmers behaved outside of the limits inadvertent contamination, Monsanto's promise could not be upheld. Because OSGATA said that they would not intentionally use Monsanto's seeds, the judges ruled that OSGATA presented insufficient controversy that merited no declaratory judgment. Finally, the judges found that OSGATA's concerns about the environmental and health effects of genetically modified seeds were outside the scope of this case, which focused on patent rights.

OSGATA's final appeal against Monsanto occurred at the level of the US Supreme Court. In September 2013 OSGATA petitioned the US Supreme Court, located in Washington D.C., to hear its case against Monsanto. In January 2014 the Supreme Court did not select OSGATA's case for review.

Sources

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