

A SPECIAL REPORT

TOP VERDICTS OF THE YEAR

In No. 3 verdict, Monsanto scores over seed patent

Jury found that DuPont violated license agreement in case exemplifying big-money value of agricultural IP.

BY AMANDA BRONSTAD

After three weeks of trial in a closely watched patent case involving genetically modified soybeans, a federal jury in St. Louis, Mo., took one hour to return a \$1 billion verdict against E.I. du Pont de Nemours and Co.

The August 1 verdict ranked No. 3 on *The National Law Journal* affiliate VerdictSearch's Top 100 Verdicts of 2012. George Lombardi, who represented Monsanto Co., the plaintiff in the case, said he had an easy story to tell.

"There was a clear story here that the jury could follow about what DuPont had done in this case, about the importance of the Monsanto invention and the harm that was done through the infringement," said Lombardi, chairman of the intellectual property practice at Winston & Strawn in Chicago. "I believe the jury was able to follow it, and that some of the testimony got repetitious

after a while and they had been there long enough to make up their mind."

In 2002, Monsanto granted DuPont and its subsidiary, Pioneer Hi-Bred International Inc., a license to use its technology that allowed farmers to use a pesticide on weeds without killing their own crops. Monsanto's patent involved a special gene trait in a soybean seed that made the crop resistant to its own pesticide, called Roundup Ready. In the infringement case, filed in 2009, Monsanto alleged that DuPont, having been unable to replicate the technology, stacked a gene with both its own trait and Monsanto's—something that was clearly not within its license agreement.

"When you put two or more traits into one seed, that's called stacking, and that is what the Monsanto license agreement specifically prohibited," Lombardi said. "You could not stack. DuPont could use our trait. They've had our trait for a long time, and there was no problem with



GEORGE LOMBARDI: "There was a clear story here that the jury could follow about what DuPont had done in this case, about the importance of the Monsanto invention and the harm that was done."

them using our trait. What was wrong was doing the stacking."

The case exemplified how technological breakthroughs in the agricultural sector have become big business and, with the right facts, can drive home substantial verdict awards.

"Given the importance of genetic engineering to food crops that are widely grown, there's certainly no reason to think that major litigation won't continue," said Warren Woessner, founding shareholder of Schwegman, Lundberg & Woessner, a patent-prosecution firm in Minneapolis. "You'll find other traits these companies can litigate about—not just resistance to one herbicide."

The two companies were dueling in court at about the same time they had teamed up to defeat a high-profile ballot measure in California that would have required food companies to indicate in packaging labels the presence of all genetically modified organisms. Both companies poured millions of dollars into defeating the initiative, which failed on November 6 by a vote of 51.4 percent to 48.6 percent.

Back in St. Louis, DuPont's attorneys attempted to argue at trial that Monsanto's patent was invalid.

But the jury ruled that Monsanto's patent was valid, and that DuPont had infringed that patent. The verdict was based on the reasonable royalties that Monsanto allegedly should have received from DuPont under the license agreement. Further, the jury found that DuPont had willfully infringed, which permits U.S. District Judge Richard Webber to potentially triple damages.

'ELABORATE SCHEMES'

"The materials uncovered from DuPont files during this case highlight that DuPont's senior leaders were actively working to hide the fact their...technology had failed and were using elaborate schemes to cover that up with the unlicensed use of our technology," said David Snively, Monsanto's general counsel, at the time of the verdict.

DuPont's lead attorney, Leora Ben-Ami, a partner in Kirkland & Ellis' New York office, did not return a call for comment.

In a statement, DuPont said there were "fundamental errors" in the case and plans to appeal the verdict.

DuPont ran into trouble long before the trial. On December 21, 2011, Webber sanctioned DuPont for "vexatious conduct" in insisting throughout discovery that its officials believed stacking the gene was permissible under its license agreement. Internal emails among DuPont executives clearly showed that wasn't the case, Webber found.

\$1B

It took a federal jury in St. Louis only an hour to return a verdict of an even billion to Monsanto, finding that DuPont violated its license agreement with Monsanto by stacking a seed with both Monsanto's trait and one of its own.

The judge, emphasizing that DuPont had made a "mockery of this proceeding," struck several of its defenses.

"They have intentionally made statements to the Court that are directly contradicted by facts," Webber wrote. "In doing so, Defendants have perpetrated a fraud against the Court. These misrepresentations to the Court have prolonged these already-protracted proceedings and caused unnecessary expense to Monsanto and needless effort by the Court."

On November 16, Webber unsealed his sanctions order; DuPont, which has vowed to appeal the decision, has moved to make public certain materials related to the order that "reflect its position on the allegations," according to court documents.

In an emailed statement, DuPont general counsel Thomas Sager said: "DuPont told the truth and did not mislead the Court. The sanctions ruling is dead wrong. DuPont asked the Court to unseal the briefs and exhibits on the sanctions order because those documents prove we told the truth."

Both companies are going to trial on October 15 on separate claims by DuPont alleging that Monsanto has monopolized the soybean business with its patents and license agreements.

Meanwhile, DuPont has filed numerous motions seeking a new trial or judgment as a matter of law.

"DuPont believes that the evidence presented during the trial demonstrated clearly that Monsanto's Roundup Ready soybean patent is invalid and unenforceable and that Monsanto intentionally deceived the U.S. Patent and Trademark Office on several occasions as it sought patent protection," Sager said at the time of the verdict. He added that the \$1 billion in damages was "unjustified," especially since DuPont had never sold its seed containing the allegedly stacked genes.

Woessner, who has represented Monsanto in patents not related to the DuPont case, agreed that the verdict was "unusually large," given that there were no sales at issue in the case.

"It shows that juries are willing to award very large verdicts even in cases in which the defendant has not commercialized the product," he said. "In other words, this jury was convinced that DuPont would have paid a very large license fee to Monsanto, or should have paid a very large license fee to Monsanto, to conduct experimentation that could lead to a product of potentially great commercial value: soybeans that were resistant to Roundup."

Amanda Bronstad can be contacted at abronstad@alm.com.