

Novartis Dodges Fraud Claims In Farmers' Pesticide Suit

By **Gavin Broady**

Law360, New York (August 28, 2012, 1:48 PM ET) -- A federal judge on Monday stripped fraud claims from a long-running suit in which a group of New Jersey blueberry farmers have accused Novartis Crop Protection Inc. of manufacturing a pesticide that damaged their crops, saying such fraud claims are subsumed by New Jersey product liability law.

U.S. District Judge Noel L. Hillman agreed with Novartis' contention that state and federal interpretation of the New Jersey Products Liability Act has consistently found that when the core issue in a suit is harm caused by a defendant's products, fraud-based claims are subsumed by the PLA, which was created to provide a unified method of recovery in such suits.

"Under New Jersey law, the PLA governs any product liability action," Judge Hillman said. "Because the PLA is paramount, and its broad scope encompasses virtually all possible causes of action for harm caused by a product, irrespective of the theory underlying the claim, plaintiffs' fraud-based claims in this case are subsumed by the PLA and must be dismissed."

The PLA, according to Judge Hillman, was introduced by the New Jersey legislature in 1987 in an attempt — as clarified by the New Jersey Supreme Court — to limit the liability of manufacturers and "balance the interest of the public and the individual with a view toward economic reality" by providing a unified theory of recovery for harm caused by a product.

The long-running suit — which was filed in 1999 and has traveled up to the Third Circuit on appeal twice — concerns Novartis's introduction of the pesticide Diazinon AG600 in 1997 and the alleged damage it subsequently caused to blueberry crops on which it was used.

In order to prevent damage to blueberry plants, farmers commonly engage in a practice known as tank-mixing, in which insecticide are mixed with the fungicides Captan or Captec and applied to crops, according to the ruling.

AG600, however, contained a new ingredient known as a surfactant that was not disclosed to its field personnel or included in advertising and marketing materials and, when combined with the fungicides, allegedly caused systemic injury to the plaintiffs' blueberry plants, including blotches, depressions, spots on the plants and even plant death, according to the ruling.

After over a decade of litigation, the farmers' claims at this stage have been winnowed to include strict liability under the PLA for design defect and a failure to warn of the harm AG600 might cause, negligent misrepresentation and fraud based on misleading marketing material, breach of the New Jersey Consumer Fraud Act, and two claims of fraud in inducement and breach of good faith related to six plaintiffs who previously settled with Novartis.

Judge Hillman found unconvincing the plaintiffs' argument that there was substantial distinction between the negligent misrepresentation claims asserted under the consumer fraud statutes — based on the allegedly misleading AG600 promotional materials — and the failure to warn allegations under the PLA, calling it “a distinction without a difference.”

“Plaintiffs' fraud-based claims essentially allege that Novartis was aware of the dangers and potential for harm associated with the use of AG600 and failed to truthfully disclose that information,” Judge Hillman said. “This is a clear articulation of the classic tort law duty to warn of or make safe, and thus plaintiffs' fraud-based claims are merely a recasting of their PLA claims in this particular case.”

Representatives for the parties were not immediately available for comment Tuesday.

The plaintiffs are represented by Kathleen F. Beers, Thomas J. Vesper and Rudolph C. Westmoreland of Westmoreland Vesper & Quattrone PA.

Novartis is represented by John P. Mandler and Kristen R. Eads of Faegre Baker Daniels LLP and Robert J. Machi of Morgan Melhuish Abrutyn.

The case is Indian Brand Farms et al. v. Novartis Crop Protection Inc., case number 1:99-cv-02118, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Abigail Rubenstein. Editing by Lindsay Naylor.

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