



ILLINOIS STATE BAR ASSOCIATION

# AGRICULTURAL LAW

The newsletter of the Illinois State Bar Association's Section on Agricultural Law

## A bumpy road ahead for producers, buyers and sellers of Genetically Modified Organisms

By Ruth E. Robinson

Genetically modified organisms (GMOs) are at the center of numerous ongoing or recently decided lawsuits in the United States.<sup>1</sup> These cases will prove important to the grain industry because genetically modified crops, which are often made herbicide-tolerant, are increasingly common.

(See graph, below).<sup>2</sup>

modified grain, the results of these recently decided and pending suits may impact numerous industries that come into contact with GMO crops, including grain elevator operators.

### Possession and Use of Unlicensed GMOs

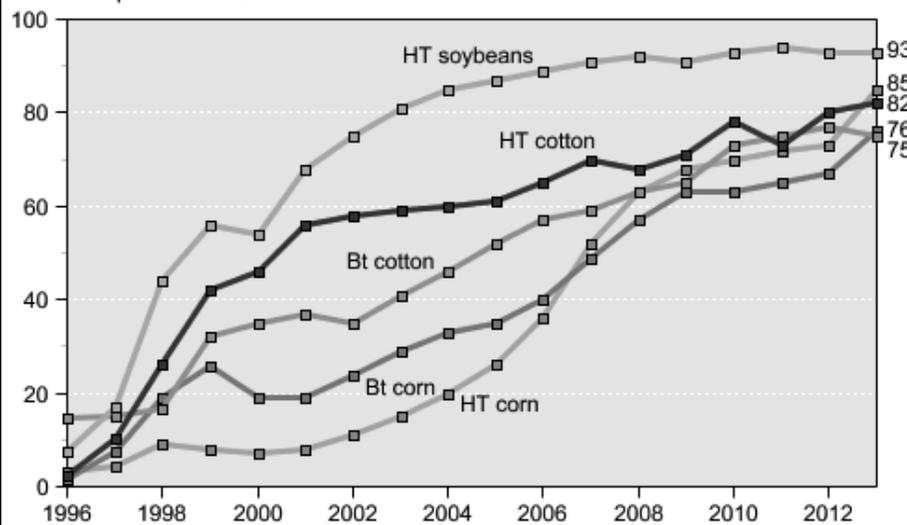
On May 13, 2013, the Supreme Court is-

seed the next year's crop.<sup>5</sup> Bowman saved seeds from a crop he planted using grain from a local elevator; however, because Bowman's seeds contained the Roundup Ready<sup>®</sup> trait,<sup>6</sup> making them herbicide-tolerant, the Supreme Court determined that Bowman infringed upon Monsanto's Roundup Ready<sup>®</sup> patent.<sup>7</sup> In its holding, the Court extended patent protection to seeds purchased from a local grain elevator, which contained Monsanto's patented Roundup Ready<sup>®</sup> trait.<sup>8</sup>

Nearly a month after the Supreme Court decided *Bowman*, the U.S. Court of Appeals for the Federal Circuit issued a decision in a case involving trace amounts—rather than a full crop—of GMO. In this decision, issued on June 10, 2013, the court upheld the dismissal of a declaratory judgment action brought by farmers and seed sellers against Monsanto.<sup>9</sup> Monsanto made a public announcement assuring that it would not sue growers, seed sellers, or other grain-handling organizations for the inadvertent use of “trace amounts” of its patented GMOs.<sup>10</sup> The court considered Monsanto's assurance an appropriate reason to dismiss the lawsuit since no danger of patent infringement existed so long as Monsanto honored its promise, which the court judicially bound Monsanto to honor.<sup>11</sup> However, the court recognized that the scope of Monsanto's promise was only limited to growers and sellers of “trace” amounts of genetically modified seed.<sup>12</sup> It remains undetermined what liability exists for possession of more than a “trace” amount of inadvertently obtained GMO. Further, it is uncertain what amount will be considered “trace”—something less than 1%?

### Adoption of genetically engineered crops in the United States, 1996-2013

Percent of planted acres



Data for each crop category include varieties with both HT and Bt (stacked) traits. Sources: USDA, Economic Research Service using data from Fernandez-Cornejo and McBride (2002) for the years 1996-99 and USDA, National Agricultural Statistics Service, June Agricultural Survey for the years 2000-13.

For example, in 1997, only 17 percent of all U.S. soybean acreage was herbicide-tolerant, as compared to 2012, where 93 percent of all U.S. soybean acreage was herbicide-tolerant.<sup>3</sup> Due to the prevalence of genetically

sued a 9-0 decision in *Bowman v. Monsanto*.<sup>4</sup> Vernon Hugh Bowman, an Indiana farmer and the Petitioner in this case, participated in “saving seed,” a process in which a farmer sets aside surplus seed from the previous year to

## International Implications of the Use and Sale of GMO

On the heels of *Bowman v. Monsanto*, on May 29, 2013, the United States Department of Agriculture (USDA) announced the unintended presence of glyphosate-resistant wheat<sup>13</sup>—a project started and abandoned by Monsanto nearly a decade ago—in Oregon.<sup>14</sup> In response to this announcement, international markets including Japan, Korea and Taiwan postponed importation of United States white wheat.<sup>15</sup> Prompted by the USDA announcement, Ernest Barnes, a Kansas farmer, filed a complaint in federal court in the United States District Court for the District of Kansas on June 3, 2013.<sup>16</sup> Barnes alleges he suffered harm as a result of the USDA's discovery of Monsanto's rogue, experimental wheat. Barnes claims he lost revenue as a result of the drop in the price of wheat and that he suffered economic loss due to the recent unavailability of suitable markets after the genetically modified wheat discovery.<sup>17</sup>

The outcome of *Barnes v. Monsanto* could have widespread implications for those dealing with grain commodities; a decline in international exportation of grain products could dramatically impact business. In *Syngenta Seeds, Inc. v. Bunge North America, Inc.*, a suit similar to *Barnes v. Monsanto* and filed in 2011, a grain elevator company refused to accept genetically modified corn containing a specific modification made by Syngenta, an agribusiness involved in the development of GMOs. The elevator company asserted

that it was too uncertain whether foreign markets would accept the GMO product.<sup>18</sup> Syngenta then filed suit against the elevator company for refusing the crop.<sup>19</sup> This case was dismissed in early 2013 for reasons unknown at this point,<sup>20</sup> but in the wake of the USDA's recent announcement, cases like *Syngenta Seeds, Inc. v. Bunge North America, Inc.* and *Barnes v. Monsanto* may become more common.

The law surrounding the possession, distribution, and refusal of GMO products remains in flux. As scientific developments and studies surrounding GMOs cause the world grain market to fluctuate, the recent decisions, pending suits, and future cases may prove significant to the agribusiness community. ■

Ruth E. Robinson is Chair of the Agribusiness Group at SmithAmundsen—[www.salawus.com](http://www.salawus.com) and Britta Sahlstrom, law clerk. Ruth E. Robinson is located in the Rockford office of SmithAmundsen and can be reached at (815) 904-8810 or e-mailed at [rrobinson@salawus.com](mailto:rrobinson@salawus.com)

1. See, e.g., *Bowman v. Monsanto Co.*, 133 S. Ct. 1761 (2013); *Organic Seed Growers & Trade Ass'n v. Monsanto Co.*, No. 2012-1298, 2013 WL 2460949 (Fed. Cir. June 10, 2013); Complaint, *Barnes v. Monsanto Co.*, No. 6:13CV01218, 2013 WL 2401640 (D. Kan. filed June 3, 2013).

2. *Recent Trends in GE Adoption*, United States Department of Agriculture: Economic Research Service, <http://www.ers.usda.gov/data-products/adoption-of-genetically-engineered-crops-in-the-us/recent-trends-in-ge-adoption.aspx> (last updated July 09, 2013).

3. *Id.*

4. *Bowman*, 133 S. Ct. 1761.

5. *Id.* at 1765.

6. The Roundup Ready® trait is a genetic modification allows a soybean plant to withstand exposure to herbicides. Fields of soybeans containing the Roundup Ready® trait can be treated with the herbicide, which kill weeds, without crop damage.

7. *Id.* at 1769.

8. *Id.*

9. *Organic Seed Growers & Trade Ass'n v. Monsanto Co.*, No. 2012-1298, 2013 WL 2460949 (Fed. Cir. June 10, 2013)

10. *Id.*

11. *Id.*

12. *Id.*

13. A type of GMO.

14. See *Statement on the Detection of Genetically Engineered Wheat in Oregon*, United States Department of Agriculture (June 14, 2013), <http://www.usda.gov/wps/portal/usda/usdahome?contentid=2013/06/0127.xml>; Updated: *Monsanto Statement on USDA GM Wheat Report*, Monsanto (May 31, 2013), <http://www.monsanto.com/newsviews/Pages/monsanto-statement-on-usda-gm-wheat.aspx>.

15. *Statement on the Detection of Genetically Engineered Wheat in Oregon*, United States Department of Agriculture (June 14, 2013), <http://www.usda.gov/wps/portal/usda/usdahome?contentid=2013/06/0127.xml>;

16. Complaint, *Barnes v. Monsanto Co.*, No. 6:13CV01218, 2013 WL 2401640 (D. Kan. filed June 3, 2013).

17. *Ernest BARNES, Plaintiff, v. MONSANTO COMPANY, Defendant*, 2013 WL 2401640 (D.Kan.)

18. Complaint, *Syngenta Seeds, Inc. v. Bunge North America, Inc.*, No: 5:11-cv-4074, 2011 WL 3659328 (N.D. Iowa filed Aug. 22, 2011).

19. *Id.*

20. Docket at 129, *Syngenta Seeds, Inc. v. Bunge North America, Inc.*, No: 5:11-cv-4074, 2011 WL 3659328 (N.D. Iowa filed Aug. 22, 2011).

THIS ARTICLE ORIGINALLY APPEARED IN  
THE ILLINOIS STATE BAR ASSOCIATION'S  
AGRICULTURAL LAW NEWSLETTER, VOL. 23 #1, JULY 2013.  
IT IS REPRINTED HERE BY, AND UNDER THE AUTHORITY OF, THE ISBA.  
UNAUTHORIZED USE OR REPRODUCTION OF THIS REPRINT OR  
THE ISBA TRADEMARK IS PROHIBITED.