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Milbank Wins Confirmation of Record-Setting Patent Arbitration Award for Bayer

By Jenna Greene

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Courtesy photos

Milbank partners Chris Gaspar, left, Michael Nolan, middle, and Robert Koch, right

In what Milbank, Tweed, Hadley & McCloy describes as the largest known arbitration award involving a patent dispute, partners Chris Gaspar, Michael Nolan and Robert Koch won confirmation from the U.S. Court of Federal Appeals for a \$456 million-plus payment to their client, Bayer CropScience.

The court also awarded Bayer costs.

At issue: a gene in plants that confers resistance to the herbicide Liberty, which competes with Monsanto's Roundup Ready. Farmers use the gene to modify their crops to withstand the weed-killing herbicide.

In 2012, Bayer sued Dow Agrosciences for patent infringement in U.S. District Court for the Eastern District of Virginia.

The district court stayed the action pending arbitration. In 2015, an international tribunal found that Dow breached a cross-licensing agreement with Bayer when it effectively sublicensed the gene, and that it also infringed Bayer's patents.

The district court affirmed the award. On Wednesday, so did the Federal Circuit, although it did conclude that

the tribunal incorrectly calculated post-judgment interest.

Because the panel was reviewing an arbitration award, it did not dig deeply into the merits.

"Judicial review of the arbitral award at issue here is very limited even if, as we assume for present purposes, the standards governing both international and domestic arbitration apply," wrote Judge Richard Taranto. The panel also included judges Kimberly Ann Moore and Raymond Chen.

Taranto continued, "In numerous ways, the relevant federal statutes and precedents make clear that ordinary legal or factual error is not a ground for disturbing an arbitral award like the one at issue here... It suffices to say that the tribunal's conclusion did not contravene any well-defined, established law applicable to the situation presented here."

He concluded, "Dow has not presented any persuasive argument justifying judicial reversal of the tribunal's conclusion."

Between November 2014 and August 2015, Dow also filed six requests for inter partes reexamination of Bayer's patents. To date, the office has issued final rejections in four proceedings and nonfinal rejections in the others.

"Those proceedings remain pending in the office and do not alter our resolution of this appeal," the Federal Circuit panel wrote.

Weil, Gotshal & Manges represented Dow.

Contact Jenna Greene at jgreene@alm.com. On Twitter @jgreenejenna.