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## WEEKLY

## Bayer CropScience opens door to mediation

*Loses third straight modified rice lawsuit in St. Louis*



Don Downing

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Six months, three trials, \$4 million. Those were the numbers likely ringing in plaintiffs' attorney Don Downing's ears last week after a third federal court win in St. Louis against bioscience giant Bayer CropScience that netted a \$500,000 verdict.

Add to that \$49 million from two Arkansas cases that also accused Bayer of contaminating the U.S. rice supply in 2006 with a genetically modified strain of rice, an event that dried up the European export market and sent rice prices plummeting.

Bayer faces claims from 6,600 plaintiffs in federal and state courts. It hasn't won any rice trials so far.

In the face of mounting damages, Bayer says its attorneys will still sit down for upcoming settlement talks in St. Louis.

"Bayer CropScience looks forward to working with those parties who approach discussions of economic loss with an appropriate frame of reference," said Bruce Mackintosh, general counsel for Bayer CropScience, in a statement.

The most recent verdict, handed down

July 14 to a Louisiana rice farmer, is the smallest amount awarded over the series of "test trials" in St. Louis. In closing arguments, Downing had asked the jury for \$1.5 million in damages. He couldn't seek punitive damages, he said, because Louisiana law doesn't allow it.

"We don't know exactly what they cut and why," Downing said of the \$500,000 verdict. "We did not have a chance to talk to jurors about their rationale for that. From our perspective, it's just another jury verdict in favor of the rice farmers."

The amount each farmer lost in rice sales varies case to case, Downing said. In this case, Louisiana farmer Danny Deshotels was able to sell his rice in the months after the August 2006 contamination, but at a lower price than usual. He also had to let some fields lie fallow and in others, plant alternative crops such as soybeans.

Downing and Bayer's defense attorney, Mark Ferguson, of Bartlit Beck Herman Palenchar & Scott in Chicago, faced off for the third time in closing arguments.

Downing said at this point, both attorneys have a pretty good idea of what the other side will present and argue, with some surprises cropping up.

For example, in the trial last week, Ferguson brought out a large magnetic whiteboard. He used it to separate out a number of colorful phrases in e-mails that Bayer's employees traded about impending problems with its modified rice strain, LibertyLink.

Ferguson picked up phrases written on magnets — "crisis plan," "I'm less than convinced we have our act together" — and placed them under the heading of another variety of rice, not the varieties that leaked out.

Ferguson told the jury the visual aid would help them "put things in the right box."

But Downing used snippets from the

same e-mails to argue the opposite point. The executives were talking about the rice strain that contaminated the U.S. rice supply, he said.

Excerpts from the e-mails included several references to "another Taco Bell disaster," a nod to a 2000 discovery of a potentially harmful genetically modified corn variety in Taco Bell taco shells.

"Those e-mails tell a story of culpability," Downing said, and the jury got to read each one.

Downing also attacked Bayer for testing its genetically modified rice variety, LibertyLink, at Louisiana State University, home to a major breeding program of non-genetically modified rice. Steve Linscomb, a rice breeding specialist, headed the program.

"Steve Linscomb's name was like a Good Housekeeping seal of approval," Downing told the jury. "That's a great brand name to have."

By testing its modified rice in close proximity to other rice crops, Bayer ran the risk of contaminating the rice seed supply for thousands of farmers, he said.

Ferguson, the Chicago defense attorney for Bayer, said in closing arguments that a number of other modified rice developers, including Monsanto, conducted test trials at LSU.

"It was reasonable to go to LSU," Ferguson said, noting that Bayer had to give notice to the U.S. Department of Agriculture that it would be testing a modified rice variety at the university.

"[The government] could have said, 'Stop,'" he said to the jury. "They didn't."

The next trial in the series of test cases in St. Louis will begin Oct. 12, although another Arkansas trial starts today.

The St. Louis cases are *In Re Genetically Modified Rice Litigation*, 4:06MD1811, U.S. District Court, Eastern District of Missouri. **MC**