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Atay v. County of Maui

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***Atay v. County of Maui*, 842 F.3d 688 (9th Cir. 2016)**

Stephanie A. George

As genetically engineered plants become more common, questions frequently arise regarding how the plants are regulated and who can regulate them. The Ninth Circuit attempted to answer these questions through preemption doctrine. The court left the door open for states and localities to regulate genetically engineered crops that have been deregulated by the federal government. This decision will implicate the future cultivation of genetically engineered crops, and the food industry as a whole.

I. INTRODUCTION

Maui County imposed an ordinance banning the testing and cultivation of genetically engineered (“GE”) crops.¹ The state of Hawaii serves as a major site for GE plant testing and development because of its temperate climate.² Many experimental GE varieties, in addition to commercial GE varieties, are grown in the state’s fertile soil.³ Farmers growing GE crops disputed this ban, and sought to invalidate the ordinance.⁴ The district court found state and federal law preempted the ordinance.⁵ The Ninth Circuit found that federal law expressly preempted the ordinance to the extent GE crops were already regulated by the federal government, and that state law impliedly preempted the ordinance to the extent it regulated commercial GE crops not federally regulated.⁶

II. FACTUAL AND PROCEDURAL BACKGROUND

Hawaii’s tropical climate offers a year-round growing season for agricultural crops making it ideal for the farming and testing of many plants, including GE plants.⁷ As a result, it has become a “ground zero” for the development of GE crops.⁸ Plants are genetically modified to produce useful goods like biofuels, and to enhance desirable traits such as disease resistance, pest and pesticide resistance, yields, nutritional value, and shelf life.⁹ Genetic engineering has played an important role in Hawaii’s papaya industry.¹⁰ The industry was nearly obliterated by the

1. *Atay v. Cnty. Of Maui*, 842 F.3d 688, 693 (9th Cir. 2016).
2. *Id.* at 692.
3. *Id.*
4. *Id.* at 694.
5. *Id.* at 695.
6. *Id.* at 688.
7. *Id.* at 692.
8. *Id.*
9. *Id.*
10. *Id.*

ringspot virus until the GE papaya was introduced, saving the industry.¹¹ GE crops also play a large role in the global food supply, with over 90% of all corn, soybeans, and cotton grown in the United States being GE varieties.¹²

Science has not shown that GE crops pose any risks to human health, but their testing and cultivation raise concerns.¹³ For example, cross pollination of GE plants with non-GE plants can cause biological contamination, which can have severe economic and environmental impacts.¹⁴ Some markets, such as the European market, have a low tolerance for GE contamination in imported food.¹⁵ Environmental concerns include the proliferation of “superweeds” that are resistant to pesticides, the potential for increased pesticide use, and a reduction in plant biodiversity.¹⁶

Citizens of Maui County (“County”) became concerned with the risks associated with the testing and cultivation of GE crops. On November 4, 2014, County voters passed a ballot initiative enacting “A Bill Placing a Moratorium on the Cultivation of Genetically Engineered Organisms” (“Ordinance”).¹⁷ The stated purposes of the Ordinance are to “protect organic and non-GE farmers and the County’s environment from transgenic contamination and pesticides, preserve the right of Maui County residents to reject GE agriculture, and protect the County’s vulnerable ecosystems and indigenous cultural heritage.”¹⁸ The Ordinance makes it “unlawful for any person or entity to knowingly propagate, cultivate, raise, grow or test GE crops within the County.”¹⁹ Hawaii and Kauai Counties passed similar ordinances, and over 130 statutes, regulations, and ordinances governing GE crops have been passed nationwide.²⁰

On November 12, 2014, a group of proponents of the Ordinance (“SHAKA”) filed suit in Hawaii state court seeking declaratory relief to resolve the Ordinance’s legality.²¹ On November 13, 2014, opponents of the Ordinance (“GE Parties”) filed suit against the County in federal district court, seeking to invalidate the Ordinance.²² A magistrate judge enjoined the County from implementing the Ordinance until the Court determined its legality.²³ SHAKA moved to intervene, and the GE Parties removed SHAKA’s action to federal district court.²⁴ The district court

11. *Id.*
12. *Id.*
13. *Id.* at 693.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 693—694.
18. *Id.* at 694.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 695.

found that federal and state law preempted the Ordinance.²⁵ SHAKA appealed this determination.²⁶

III. ANALYSIS

Before delving into preemption analysis, the court first analyzed whether SHAKA had standing to bring the suit, and whether the GE Parties' removal of the action filed by SHAKA to federal district court was proper.²⁷ The court found that the parties making up SHAKA could individually show standing because they were Maui residents who alleged that GE testing and cultivation on Maui threatened economic harm to their organic, non-GE farms.²⁸ The court found that the GE Parties' removal of SHAKA's action to federal district court was proper because it presented questions of federal preemption "front and center," giving the federal court jurisdiction to hear the case.²⁹ The court then addressed the larger issues in the case: federal and state preemption of the Ordinance.

A. The Federal Plant Protection Act Preempted the County's Ordinance Banning Genetically Engineered Plants Regulated as Plant Pests.

The Supremacy Clause makes federal law "the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."³⁰ Federal law preempts state or local law if: (1) state or local law conflicts with federal law; (2) federal law occupies the legislative field; or (3) if the language of the federal statute expressly preempts state law.³¹

The three federal agencies that regulate GE plants are the Food and Drug Administration, the Environmental Protection Agency, and the U.S. Department of Agriculture through the Animal and Plant Health Inspection Service ("APHIS").³² The federal preemption issue in this case only concerns APHIS's regulation of GE plants under the federal Plant Protection Act ("PPA").³³

In 2000, Congress enacted the PPA to facilitate commerce of non-dangerous plants and protect agriculture, the environment, and the economy of the United States from potential harm caused by plant pests or noxious weeds.³⁴ The PPA authorizes the Secretary of Agriculture to "prohibit or restrict the movement in interstate commerce of plants and

25. *Id.*
26. *Id.*
27. *Id.* at 695—697.
28. *Id.* at 696.
29. *Id.* at 698.
30. *Id.* at 699 (citing U.S. Const., Art. VI, cl. 2.)
31. *Id.* at 699.
32. *Id.* at 700.
33. *Id.*
34. *Id.*

other products” to prevent the introduction or dissemination of plant pests or noxious weeds.³⁵ The Secretary of Agriculture delegated this authority to APHIS, which administers a rigorous permitting process for the movement of plant pests.³⁶

The PPA defines plant pests as organisms that “can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product.”³⁷ APHIS regulates GE plants under the PPA falling within this definition if they were created using an organism that is itself a plant pest, or if APHIS “has reason to believe that it is a plant pest.”³⁸ APHIS regulates these plants as plant pests until it concludes they are not a pest based on scientific evidence.³⁹ Once deemed not a plant pest, APHIS deregulates the GE plant.⁴⁰ The PPA prohibits the use of these regulated plants outside a contained structure, such as a laboratory or greenhouse, without APHIS’s permission.⁴¹ APHIS regulates and permits most all GE plants in the testing phase under the PPA because they are nearly all created using *Agrobacterium*, a listed plant pest.⁴²

The PPA contains an express preemption provision.⁴³ In order for the PPA to preempt a local law, the local law must first trigger interstate commerce by banning testing, planting, cultivation, and dissemination of GE plants regulated under the PPA.⁴⁴ The Ordinance in this case did this by banning the testing and cultivation of all GE plants in the County.⁴⁵ The Ordinance itself acknowledged that GE crops impacted foreign markets.⁴⁶ Therefore, the first prong of the federal preemption test was met.⁴⁷

Second, the local law must intend to control, eradicate, or prevent the introduction of a plant pest or noxious weed.⁴⁸ The express purpose of the Ordinance was to prevent the cultivation, testing, and spread of all GE plants on the island, including those that were regulated under the PPA.⁴⁹ Therefore, the court found that the Ordinance intended to control and eradicate GE plants regulated under the PPA.⁵⁰ The second prong of the federal preemption test was met.⁵¹

35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 700—701.
42. *Id.* at 703.
43. *Id.* at 701.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 702.
49. *Id.*
50. *Id.*
51. *Id.*

Finally, APHIS must regulate the plants regulated by the local law.⁵² As stated previously, APHIS deems nearly all GE plants in the testing phase to be plant pests because they are nearly all created using *Agrobacterium*, a listed plant pest.⁵³ Commercialized GE varieties have been deregulated by scientifically proving they are not a plant pest, but because the County was a primary GE testing and development site, many GE varieties grown there had not been deregulated.⁵⁴ Therefore, the class of plants the County sought to regulate under the Ordinance were already regulated by APHIS under the PPA.⁵⁵ Having found that the third prong of the federal preemption test was met, the court concluded the PPA expressly preempted the County's Ordinance with regard to its ban on GE plants regulated by APHIS.⁵⁶

B. The Federal Plant Protection Act Did Not Preempt the County's Ordinance Banning Genetically Engineered Plants that were Deregulated.

The court found that the County's Ordinance was preempted to the extent that it banned GE plants APHIS regulated under the PPA, but it was not preempted to the extent it banned GE plants APHIS had deregulated and therefore had no control over.⁵⁷ These included GE crops already commercialized, such as corn, soybeans, cotton, papaya, and other crops.⁵⁸ The court reached this conclusion by noting that the PPA's express preemption of regulated GE plants created a "reasonable inference that Congress did not intend to preempt state and local laws" outside the scope of the PPA, including deregulated GE plants.⁵⁹ It said that a court should not consider implied theories of preemption where an express preemption provides a reliable indication of congressional intent.⁶⁰ In a previous case, the court held that once APHIS deregulated a GE crop, it no longer had jurisdiction to continue regulating it.⁶¹

This determination could be overcome by a showing that the Ordinance's ban on deregulated GE crops conflicted with the PPA.⁶² However, the court found that the GE Parties failed to meet this high threshold and show conflict between the Ordinance's ban on deregulated GE crops and the PPA.⁶³ Nothing in the PPA suggested that Congress

52. *Id.* at 701.

53. *Id.* at 703.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 692.

59. *Id.* at 704.

60. *Id.*

61. *Id.* at 704 (citing *Ctr. For Food Safety v. Vilsack*, 718 F.3d 829, 832 (9th Cir. 2013)).

62. *Id.* at 704.

63. *Id.*

intended to prevent state and local governments from exercising authority over deregulated GE crops.⁶⁴

C. Hawaii State Law Regulating Potentially Harmful Plants Preempted the County's Ordinance.

The court found that although the PPA did not expressly preempt the Ordinance to the extent that it applied to deregulated, commercial GE plants, Hawaii state law impliedly preempted the Ordinance.⁶⁵ The court determined that Hawaii state law regulates the same subject matter the Ordinance was created to regulate, including the importation, transportation, sale, control, and eradication of potentially harmful plants.⁶⁶ The court also found that Hawaii's state statutory scheme for the regulation of harmful plants was comprehensive, and the Hawaii state legislature intended for its regulation to be exclusive.⁶⁷ Therefore, the Ordinance's ban of deregulated, Hawaii state law impliedly preempted commercial GE crops.⁶⁸

IV. CONCLUSION

This determination will have ramifications for the expanding GE industry and its growing opposition. GE crops have undeniable benefits to society, such as allowing for the continued production of papaya in the face of an obliterating virus, or allowing for the growth of crops using fewer precious resources.⁶⁹ The benefits are matched with concerns associated with GE crops, including their ability to contaminate non-GE crops destined for markets that do not tolerate GE material, and their potential to become "superweeds" that are difficult to control.⁷⁰ In response to the concerns regarding GE crops, many states and counties either have imposed regulations on GE cultivation in their localities or will do so in the future. *Atay v. County of Maui* effectively allows states or localities to regulate commercial GE crops in their area that have been deregulated by the federal government, but protects GE crops that are in testing and development stages from regulation by state or local governments. This decision will serve as a roadmap for future litigation that is sure to come regarding this highly controversial technology.

64. *Id.*

65. *Id.* at 705.

66. *Id.* at 706.

67. *Id.* at 708—709.

68. *Id.* at 710.

69. *Id.* at 692.

70. *Id.* at 693.