

Food for Thought: Ninth Circuit Rejects GMO and Pesticide Bans in Three Hawaii Counties Because State and Federal Laws Preempt the Local Regulations

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Alika Atay et al v. County of Maui, et al, No. 15-16466 (9th Cir., Nov. 18, 2016)

Hawai'i Papaya Indus. Assn., et al v. County of Hawaii, No. 14-17538 (9th Circ., Nov. 18, 2016)

Syngenta Seeds, Inc., et al. v. County of Kauai, et al., No. 14-16833 (9th Cir., Nov. 18, 2016)

Robert Ito Farm, Inc., et al. v. County of Maui et al., No. 15-15246 (9th Cir., Nov. 18, 2016) The Ninth Circuit concluded that actions taken by individual counties in the State of Hawaii to regulate pesticides and biotech crops were preempted by state and federal law, in part. In four separate rulings, for separate appeals all relating to the regulations passed in Kauai County, Maui County, and Hawaii County, the appeals court held that federal and state regulatory schemes regulating harmful plants and pesticides preempted the counties from enacting their own rules. One of the rulings came in *Alika Atay, et al. v. County of Maui, et al*, 842 F.3d 688 (9th Cir. 2016). There, the court affirmed the district court's summary judgment and dismissal in two related actions relating to the Maui ordinance that banned the cultivation and testing of genetically modified crops ("GMO" or "GE"). Specifically, the Ninth Circuit held that the Maui ordinance was expressly preempted by the Plant Protection Act (PPA), 7 U.S.C. § 7756(b), to the extent it bans genetically engineered plants that the U.S. Animal and Plant Health Inspection Service (APHIS) regulates as "plant pests." The court reasoned that although the APHIS regulates plants for reasons other than the concerns that motivated the local law, such a concern was irrelevant for purposes of a finding as to express preemption. In addition, the court held that the ban was not impliedly preempted by the PPA in its application to GMO crops that APHIS deregulated, but was impliedly preempted in this application by Hawaii's "comprehensive statutory scheme" regulating potentially harmful plants. The panel's

reasoning in *Atay* carried over to the decision in *Hawaii Papaya Industry Assn., et al. v. County of Hawaii*, No. 14-17538, 2016 WL 6819700 (9th Cir. 2016), addressing Hawaii County's similar ordinance banning "open air testing of genetically engineered organisms of any kind" and "open air cultivation, propagation, development, or testing of genetically engineered crops or plants." Again, the appeals court held that the ordinance was expressly preempted because it regulates "movement in interstate commerce," was passed to "control...eradicate..., or prevent the introduction or dissemination of a ...plant pest, or noxious weed" and because "APHIS has issued regulations in order to prevent dissemination of the class of plant pests at issue, GE crops." In *Syngenta Seeds, Inc., et al. v. County of Kauai, et al.*, 842 F.3d 669 (9th Cir. 2016), the court once again referenced its reasoning in the *Atay* case. In this case, the court affirmed the district court's ruling that the Hawaii Pesticides Law impliedly preempted Kauai County's Ordinance 960's pesticide provisions. Ordinance 960 imposed pesticide notification requirements and mandated "pesticide buffer zones." The court held that Ordinance 960's pesticide provisions and the Hawaii Pesticides Law addressed the same subject matter. In addition, the court held that the state had a "comprehensive statutory scheme" regulating pesticides. Finally, the court held that the state legislature had clearly intended for the state's regulation of pesticides to be uniform and exclusive. For those three reasons, the Ninth Circuit held that Ordinance 960's pesticide provisions were impliedly preempted by Hawaii law. Finally, the court addressed another appeal related to the Maui ordinance. In *Robert Ito Farm, Inc., et al. v. County of Maui, et al.*, 842 F.3d 681 (9th Cir. 2016), the court addressed whether it is necessary to have a prospective intervenor's consent for a magistrate judge to rule on the motion to intervene. In *Robert Ito*, Moms on a Mission Hui, a citizens group, sought to intervene in a suit brought by businesses over the Maui ordinance. The parties to the case previously consented to the magistrate presiding over the case pursuant to the Federal Magistrate Act of 1979, which authorizes magistrates, when designated by the district court and with consent of the parties, to exercise jurisdiction over civil matters in district court and enter final judgment in them. However, the Second Circuit and Seventh Circuit were in conflict on the matter. The Second Circuit had held that a magistrate judge lacks jurisdiction to decide a motion to intervene without the consent of the prospective intervenor. The Ninth Circuit sided with the Seventh Circuit, holding that prospective intervenors are not parties for purposes of 28 U.S.C. § 636(c)(1) and therefore the consent of prospective intervenors is not necessary for the magistrate to exercise jurisdiction over the action if the actual parties to the suit have given consent.

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