

Pesticide Drift Liability

How to avoid it and how to limit it.

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- ▶ This presentation is for education purposes only as well as to give general information and a general understanding of the law, not to provide specific legal advice. This presentation does not create an attorney/client relationship and should not be used as a substitute for the advice of a licensed attorney.

As a practical matter one cannot avoid liability if the drift causes any significant loss. It goes without saying that the potential for lasting injury to agricultural workers, animal life, rural residents and aerial applicators themselves is an ever present hazard which demands the utmost care and strictest attention to proper application practices and equipment maintenance to reduce or eliminate the risk of accident. Farmers who choose to use the services of aerial applicators may well be held liable for the torts of their independent contractors under a theory of agency, and that alone is a strong argument for close oversight and supervision.

Federal Regulation- Labeling

- ▶ Federal government solely controls any rules or requirements to do with pesticide labeling/packaging.
- ▶ If a person fails to follow the pesticide label, he or she has violated FIFRA
Examples:
 - ▶ Applying to an unlabeled crop, using wrong nozzle, applying when wind speed too high/low.
- ▶ Labels will designate a product either general use or restricted use.
 - ▶ General: Anyone can buy at the store; must follow label.
 - ▶ Restricted use: Must have license to purchase; requires training; must follow label. Usually has record keeping requirements
 - ▶ States may impose stricter rules.

Potential Administrative Penalties

- ▶ If state regulator is contacted by injured party (or party reporting violations by an applicator):
 - ▶ Investigation begins
 - ▶ Report will be prepared
 - ▶ Potential for regulatory fines or withdrawal of license
- ▶ Penalties include:
 - ▶ Civil fines
 - ▶ Loss of applicator's license
 - ▶ Criminal penalties

Potential Civil Claims

- ▶ Generally, we see 4 legal claims in drift cases:
 - ▶ Negligence: Failure to act as a reasonable person would
 - ▶ Strict liability: For certain “ultra hazardous activities” liability is imposed anytime someone is injured, regardless of facts
 - ▶ Trespass: Physical invasion on the property of another
 - ▶ Nuisance: Interference with another’s use and enjoyment of his property.
- ▶ Each may differ slightly by state.
- ▶ Each requires different proof, considerations, and is subject to different defenses.

Negligence

- ▶ Most common claim in drift cases.
- ▶ Basically a failure to exercise reasonable care under the circumstances.
- ▶ Very fact specific.
- ▶ Elements:
 - ▶ Duty: Relationship between plaintiff and defendant is such that a duty to act reasonably is owed.
 - ▶ Breach of duty: The defendant breached that duty by doing something that was unreasonable under the circumstances. Failure to comply with the label prohibitions against drift is unreasonable.
 - ▶ Causation: The defendant's breach was the cause of the plaintiff's injury.
 - ▶ Damages: Plaintiff must show actual damages.
 - ▶ Fla, Ga, and Ala

Strict Liability

- ▶ There are some activities that are so dangerous, we will impose liability regardless of how careful or reasonable you acted.
- ▶ States divided on this issue. Louisiana is one of 4 states which apply strict liability for damage caused by spray drift.
 - ▶ LA (1957) first application of Strict Liability for applying 2 4 D on rice field.
- ▶ “We are unwilling to follow any rule which rejects the doctrine of absolute liability in cases of this nature and prefer to base our holding on the doctrine that negligence or fault, in those instances, is not a requisite of liability, irrespective of the fact that the activities resulting in damages are conducted with assumed responsible care and in accordance with modern and accepted methods.”
Gotreaux v Gary, 94 So.2d 293 (La. 1957)

Trespass

- ▶ Basically occurs when a person (or substance) enters another's land without consent.

Nuisance

- ▶ Claim that the defendant's action interfered with the plaintiff's use and enjoyment of their property.
- ▶ Very common with odors, dust.
- ▶ Not a common claim in pesticide situations.

Your Liability for a Hired Contractor

- ▶ General rule: You are liable for the acts of your employees in the scope of their employment, but you are not liable for the acts of an independent contractor.
- ▶ What is an independent contractor?
 - ▶ Court looks at numerous factors including whether the person has an independent business, furnishes his own tools and supplies, has the right to control the progress of the work except the final outcome, is employed for a short time or specific task.
 - ▶ Most of the time, spray companies are independent contractors
- ▶ Big Important BUT:
 - ▶ You can be liable for the acts of an independent contractor if the activity is “inherently dangerous.”
 - ▶ An “inherently dangerous” activity is one that is dangerous in its normal or non-defective state, and work that will probably result in an injury to a third party.
 - ▶ So.....is spraying chemicals on crops inherently dangerous?

At Least 11 States Say Yes.

- ▶ AL, MS, OK, NM, MO, SC, AR, MA, CA, AZ, GA.
- ▶ *Yancy v. Watkins*, 708 S.E.2d 539 (Ga. Ct. App. 2011).
- ▶ Farmers need to carefully choose independent contractor applicators.

All sprays produce some drift - but paying attention to a few simple things can help keep your spray where it belongs.

1. Apply in the right wind conditions. Do you really know the wind condition now, when you are spraying? You should.
2. Buy and learn to use a good quality handheld wind meter, and keep it with the sprayer
3. Document wind direction and speed at the beginning, middle, and end of the spray. Winds change. Proving you've stayed within label conditions is the cheapest "CYA" insurance you'll ever buy.
4. Make sure you get a good wind measurement. Walk into the field to get a read.
5. Hold the meter face height, arm's length out, and rotate slowly to the direction the wind reads strongest. Product labels often give guidance on maximum wind speed; follow it.
6. Make a written record of your readings.
7. Discuss importance of accurate records/reveals effort to comply with label requirements for use.

Tips for Grower Applicators

- ▶ Label, Label, Label! it is ABSOLUTE NECESSARY THAT PESTICIDES BE APPLIED IN COMPLIANCE WITH LABEL Requirements
- ▶ Carry liability insurance that includes coverage for pesticide drift damage. Make sure your aerial applicator has adequate coverage.
- ▶ Determine how much coverage you have for pesticide drift claims. If the policy excludes coverage for pesticide drift in excess of \$25,000 per occurrence, consider buying more. You may be able to increase coverage to \$100,000 per occurrence for approximately \$100.
- ▶ Check for sensitive crops in the area.

Tips for Injured Parties

- ▶ Document, Document, Document!
- ▶ Talk with neighbors. Did they have any spray damage to their crops or trees? When? Do they know who applied the pesticide?
- ▶ Consider contacting state agency and filing a complaint. Each State Department of Agriculture is charged with the responsibility of investigating pesticide complaints and determining if a pesticide label violation has occurred and if injury has resulted.
- ▶ La, Ga and Miss. Require reporting of drift damage within 60 days of discovery. Failure to report such damage within 60 day is an absolute bar to recovery of damage in Mississippi.
- ▶ Allow the one who caused the drift and his representatives to enter your property at reasonable times to take samples and investigate the potential damage caused by the drift. Barring the offender, his representative, or the Dept of Agri inspector from the property is an absolute bar to any damage claim.
- ▶ Consider seeking civil monetary damages. Many farm liability policies have spray drift liability coverage. Many policies limit such coverage to \$25,000.
- ▶ Photograph crop or tree damage as soon as it appears and periodically thereafter.
- ▶ Immediately contact Agricultural Extension Service and involve extension specialists to determine if any way to mitigate the damages or loss. An injured party is under a duty to mitigate his damages.