

From Farm Fields to the Courthouse: Legal Issues Surrounding Pesticide Use



Tiffany Dowell Lashmet, Texas A&M Agrilife Extension
Rusty Rumley, National Ag Law Center



Disclaimers

This presentation is a basic overview of pesticide regulations and legal issues. We will not delve into the specifics of pending cases or get “into the weeds” on various issues.

This presentation is for educational 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.



Roadmap

- Regulatory system governing pesticides
- Tips for applicators
- Tips for injured parties
- Potential administrative penalties if damage occurs
- Potential civil claims if damage occurs



Pesticide Regulation Generally

- Federal and state agencies both have control.
- Some aspects solely under EPA jurisdiction (EPA), but others left to individual states (i.e. AR Plant Board).
- FIFRA enforcement delegated to the state.
- If state enforcement deemed inadequate, EPA can take control back.



Federal Regulation-Basics

- FIFRA: Federal Insecticide, Fungicide, and Rodenticide Act
 - Enacted in 1947, several amendments since that time.
- Generally, all pesticides must be registered and labeled under FIFRA to be used in the United States.
 - Chemicals and other products used to kill, repel, or control pests.
 - Would include pesticide, herbicide, rat poison.
 - Would not include fertilizer.
- FFDCA: Federal Food Drug and Cosmetic Act
 - Pesticides used in food production also regulated under FFDCA.



Federal Regulation-Registration

- Applicant must prove “will not generally cause unreasonable adverse effects on people or the environment.”
- EPA will consider the following factors in making the registration determination:
 - Carcinogenicity
 - Reproductive effects
 - Immunological effects
 - Neurological effects
 - Impacts on groundwater
 - Impact on wildlife and fish
 - Toxicity; and
 - the availability of effective alternatives.



Federal Regulation-Registration (cont.)

- Company must provide FIFRA info to EPA
 - Chemical make up
 - Environmental impacts
 - Results of scientific tests (EPA may require any combo of more than 100 different tests)
- Generally this info is available to public 30 days after registration (except trade secrets).
- Company must seek separate registration for each specific use (i.e. approval for cotton will not work for application to soybeans).
- If product will be used in food production, EPA must establish residue level (“tolerance”) under FFDCA.
 - Level at which there is a “reasonable certainty of no harm” from exposure.



Federal Regulation – Registration (cont.)

- Periodic Review:
 - Once registered, review mandated on 15 year cycle.
 - Determine whether pesticide continues to meet standard of no unreasonable adverse effects to people or environment.
- Special Review:
 - Registrants required to promptly report new evidence of adverse effects from pesticide exposure.
 - In evidence shows unreasonable risk, EPA may initiate special review.
 - EPA can require registrants to conduct new studies to fill in gaps/assist with risk assessment.
 - Can amend or cancel is not adequate



Federal Regulation- Labeling

- Federal government solely controls any rules to do with pesticide labeling/packaging.
- If a person fails to follow the pesticide label, he or she has violated FIFRA.
 - Ex: 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.



State Regulations - Allowable

- Regulate the sale/use of registered pesticides within bounds of the state
 - State could require notice be given to neighbors.
 - State could prohibit pesticide registered & labeled under FIFRA.
- Handle applicator training for certified applicators.
- Require insurance or bonds for commercial applicators.



State Regulation - Prohibitions

- State may NOT pass rules dealing with labeling/packaging.
- States generally may not approve sale/use of a pesticide that is otherwise prohibited or not approved by FIFRA.
 - Subject to Special Local Needs exception: State can approve for usage if no federally approved pesticide available & certain criteria are met. EPA has 90 days to object.
- States cannot set standards lower than what EPA set.
 - If EPA says wind speed cannot be over 15 mph at the time of application, state cannot allow application at 20 mph.



Tips for Applicators

- Label, Label, Label!
- Carry liability insurance that includes coverage for pesticide drift damage.
- Check for sensitive crops in the area.
- Talk to your applicator.
- Talk to your neighbors.
- Use common sense.



Tips for Injured Parties

- Document, Document, Document!
- Talk with neighbors.
- Consider contacting state agency.
- Consider seeking civil monetary damages.



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.
 - Causation: The defendant’s breach was the cause of the plaintiff’s injury.
 - Damages: Plaintiff must show actual damages.



Negligence (cont.)

- Example cases:
 - *Parker v. 3 Rivers*: Farmer's employee aerial sprays for boll weevils. Neighbors claim personal injuries from drift. Court finds for farmer, says that there was no evidence of unreasonable actions. Wind speed was less than 10 mph, inspected airplane before leaving the airport, had a ground observer to make monitor wind speed/direction and watch for people, pilot inspected the field first to ensure safety.
 - *Boyd v. Thompson-Hawyard*: Neighbor sues sprayer for drift after neighbor's cotton field was damaged. Court finds for the neighbor because it was a windy day, the pilot admitted he knew the pesticide could drift, knew that the label warned against using the product near cotton, and the chemical was actually smelled by witnesses on the neighbor's field after it was sprayed.



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.
 - LA (1957) first application of SL for applying 2, 4D on rice field.
 - OK (1961) imposed SL for aerial applicator on cotton field.
 - WA (1977) applied SL for aerial application of Thoidan on farm.
 - WI (1984) refused to impose SL for aerial application of Sevin on corn field.
 - NY (1994) application of pesticide not inherently dangerous.
- What will your state do?
- Does ground versus aerial application make a difference?



Trespass

- Basically occurs when a person (or substance) enters another's land without consent.
- Case examples:
 - Texas found trespass when herbicide damaged cotton crop.
 - New York held that pesticide was not a "tangible object" invading property, therefore, not trespass.
- Potential defense: Right to Farm statute



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, but some AZ cases indicate it may apply.
- Potential defense: Right to Farm statute.



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.



Thank you!



Tiffany Dowell Lashmet, Texas A&M Agrilife Extension,
tdowell@tamu.edu

Rusty Rumley, National Agricultural Law Center,
rrumley@uark.edu

