

# Cotton Fields to Courtrooms: Legal Issues and Spray Drift



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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

- Tips for applicators
- Tips for injured parties
- Potential administrative penalties if damage occurs
- Potential civil claims if damage occurs
- Update on Dicamba litigation



# Tips for Applicators

- Label, Label, Label!
- Carry liability insurance that includes coverage for pesticide drift damage & confirm limits.
- 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
- Determine actual damages.
- Talk with neighbors.
- Consider contacting Texas Department of Agriculture.
- Consider seeking civil monetary damages.



# Potential Administrative Penalties

- If you call TDA, be sure your ducks are in a row first.
- If TDA 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



# What TDA Does Not Do?

- Get any \$ for the injured farmer.
- Any fines collected by TDA go to state.
- If you want \$\$, you've got to handle it yourself.





# 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 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*: Aerial spray company applies malathion 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.
  - AR (2014) crop dusting is not an inherently dangerous activity.

# What about Texas?

- Galveston Ct. App (1966) has said that a party has to prove negligence.
- Amarillo Ct. App. (1973) refused to look at out of state cases considering aerial spraying “extremely dangerous.”



# Trespass

- Basically occurs when a person (or substance) enters another's land without consent.
- Case examples:
  - *Dallas Flood Control Dist. v. Fowler*: Cotton farmers sue flood control district when crops are damaged by herbicide spray. Court finds trespass.
- Potential defense: Right to Farm statute
  - Must show not operating negligently or in violation of laws.
  - Must have been in operation for at least 1 year.

# 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.
  - *Pitchfork Land & Cattle v. King*: Aerial spraying company hired by cotton farmer that used its own tools, decided when and how to spray, furnished the chemical spray, determined height plane should fly was an independent contractor.



# Your Liability for Hired Contractor (cont.)

- 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.



# What about Texas?

- Supreme Court has never addressed this question.
- Several lower level appellate courts have said at least that aerial application when drift conditions are favorable near susceptible crops is inherently dangerous.
  - Ct. App. Texarkana said yes in 1962.
  - Ct. App. Waco said potentially in 1972.
  - Ct. App. Beaumont indicates no 1974.
  - Ct. App. Eastland said yes in 1983.
- *Foust v. Walters* (San Antonio – 2000).
  - Farmer buys 2, 4D and hires company to spray milo.
  - Drifts onto neighbor's cotton field.
  - Testimony about selection process of chemical probably not helpful.
  - Jury verdict of liability for farmer affirmed.

# Real Life What Not To Do Story



# Dicamba Update - Background

- **2015**: Monsanto begins selling Xtend cotton and soybean seeds for planting in 2016 growing season.
- **November 2016**: Xtendimax approved by EPA.
- **December 2016**: Engenia approved by EPA.
- **February 2017**: FeXepan approved by EPA.
- **Summer 2017**: Numerous states take action and limit use.
- **December 2017**: EPA makes label modifications.
- **November 2018**: EPA label for Xtendimax expires.

# Dicamba Update

- Numerous class action lawsuits filed around the country.
  - Single-state and nationwide of farmers who suffered drift.
- Primary claims are:
  - Negligence (Monsanto did not act reasonably)
  - Strict liability (product design defect – cannot be safely used)
  - Strict liability (product design defect -when sold without corresponding herbicide)
  - Breach of implied warranty of merchantability
- Most of the cases consolidated in MDL in Eastern District of Missouri.
- EPA label expires in November...

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## Pipeline Easement Negotiation Checklist and Podcast

Posted on *January 10, 2018* by *tiffany.dowell*



If you've ever gotten notice that a pipeline company is planning on coming across your property and you found yourself facing the task of negotiating an easement, you know how intimidating that can be. The most important thing to keep in mind is that you, as a landowner, do have rights! You can and should take time to really negotiate with the company to ensure you are receiving adequate compensation and have included terms in the agreement to protect your property. In the last couple of months, I've...

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