

Chemical Drift & Your Potential Liability



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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

- Basic overview information
- Common chemical drift claims
- Your liability
- Steps to take if you are affected by chemical drift
- Chemical drift in the news



Basic Overview

- Can always face fines/agency actions
- Today, focused on civil cases, usually brought by a neighbor
- 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

- Basically a failure to exercise reasonable care under the circumstances
- Very fact specific
- Most common claim in drift cases
- 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.)

- TX case examples:
 - *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.
- Oklahoma has imposed this standard on aerial pesticide spraying in a case involving a cotton farmer.
- What about Texas?
 - Dallas Ct. App. said no in 1953
 - Beaumont Ct. App. said yes in 1974
 - Texas Supreme Court has not addressed



Trespass

- Basically occurs when a person (or substance) enters another's land without consent.
- Elements:
 - Person or object
 - Enters another's land
 - Without the landowner's 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
 - Statute protects agricultural operations from lawsuits from neighbors for nuisance or trespass so long as the operation has existed substantially unchanged for at least 1 year and is not violating state or federal laws.

Nuisance

- Claim that the defendant's action interfered with the plaintiff's use and enjoyment of their property
- Very common with odors, dust
- No Texas case law examples
- 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.
- 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?

We Don't Know!

- Texas Supreme Court has refused to answer this question.
- Appellate level courts seem to think it is:
 - Ct. App. Eastland said yes in 1983
 - Ct. App. Waco said potentially in 1972
 - Ct. App. Texarkana said yes in 1962



Key Advice for Farmers

- Be sure you act reasonably and use common sense.
 - Don't spray when it is windy.
 - Always follow the label on chemicals.
 - Take care when spraying near other crops.
 - Talk to your neighbor if you are going to be spraying and/or you have sensitive crops planted in the area.
- Do your homework when hiring another person as an applicator.
 - Ensure they are licensed.
 - Check with the state with complaints.
 - Discuss spraying practices, warn of neighboring crops.
- Liability Insurance
 - Some policies limit drift claims.

Steps to take if you are affected by chemical drift

- Talk to your neighbor
- Document
 - Take pictures, take samples of damaged crops, record wind speed and direction, record the temperature, record time of day, gather witness statements.
- Report to the Texas Dept. of Agriculture
 - TDA can assess fines payable to TDA not the affected landowner.
 - Make sure your own records are in good shape.
- Civil Lawsuit
 - Judgment is payable to the injured party.

Dicamba and 2,4D Drift in the News

- Flashback to 2016
- Seed that is resistant to Dicamba and 2,4D was released but the corresponding herbicides weren't approved.
- Producers used the seed and used traditional formulations of the chemicals since the new ones weren't approved which resulted in an unprecedented amount of drift complaints.
- Class Action suit filed by several states including Texas claiming that Monsanto was willful and negligent in releasing the seed without EPA approval of the corresponding herbicide.

Dicamba and 2,4D Drift in the News

- Today's Concerns
 - Chemicals have been approved, but...
 - Still a threat of drift even though drift is supposed to be reduced.
 - Varieties are not tolerant to all chemicals. One seed is tolerant to 2,4D and not dicamba and vice versa.
 - Specific tank clean out procedures required.
 - New formulations allow for applications later in the growing cycle which increases timeframe that drift can occur.
 - States have issued bans and/or restrictions:
 - Arkansas passed a ban on dicamba which includes the new formulations.
 - Missouri banned dicamba and placed restrictions on the new formulations.
 - Tennessee imposed restrictions on the use of dicamba.

For producers planting and not planting Enlist or Xtendflex seeds

- Flag the Technology Program
 - Field marking program to prevent misapplication of herbicide and notify applicators of sensitive crops nearby.
- Texas Crop Registry
 - Identifies locations of certain crops and chemical tolerance
 - Hit the Target App
- Talk to your neighbors
 - Conversations need to be initiated by not only farmers who will be planting these varieties, but also those who are not.
 - Puts everyone on notice

If you are planning on using Enlist or Xtendflex seeds

- Review the label requirements.
 - Specific buffer zones, spray nozzle sizes, wind speed levels, boom heights, etc.
- Take additional precautions above what is required.
- Follow wash out procedures to prevent damage to other crops.
- Talk to your neighbors!

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Jury Finds AQHA Clone Ban Violates Antitrust Laws

Posted on August 5, 2013 by tdowell



Last week a federal jury found that an AQHA rule prohibiting registration of cloned horses violated state and federal antitrust laws. The AQHA has announced that it will appeal this decision. The AQHA Rule REG 106.1 The AQHA is the world's largest equine breed registry and membership organization, having more than 5 million registered horses and over 280,000 members. The AQHA allows registration of quarter horses that are conceived by live cover, artificial insemination, and embryo transfer. In 2004, however, the AQHA implemented Rule 227 (the rule has since been re-numbered as Rule REG106.1),...

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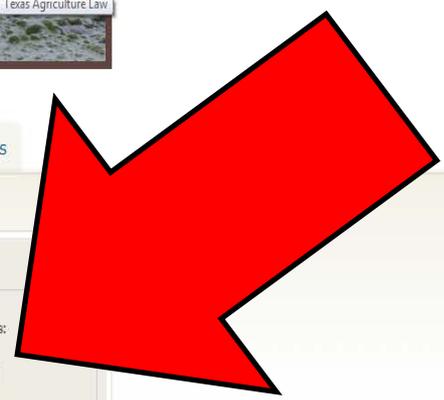
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Thank you!



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