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CONSERVATION AND NATURAL RESOURCES Plant Disease, Pest Control, and Pesticides: Limit Liability of Farmers

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CONSERVATION AND NATURAL RESOURCES

Plant Disease, Pest Control, and Pesticides: Limit Liability of Farmers

CODE SECTION:	O.C.G.A. § 2-7-170 (new)
BILL NUMBER:	HB 1518
ACT NUMBER:	1355
SUMMARY:	The Act establishes a negligence standard for farmers who pollute the land, waters, air, or other resources of the state through application or use of fertilizers, plant growth regulators, or pesticides.
EFFECTIVE DATE:	July 1, 1988

History

The Georgia Legislature enacted the Pesticide Control Act of 1976[1] for the purpose of regulating the "labeling, distribution, storage, transportation, use, and disposal of pesticides."[2] The Act made the following policy statement regarding the use of pesticides:

> The General Assembly finds that pesticides are valuable to this state's agricultural production and to the protection of man and the environment from insects, rodents, weeds, and other forms of life which may be pests but that it is essential to the public health and welfare that they be regulated to prevent adverse effects on human life and on the environment.[3]

The 1976 Act made it unlawful for any person to distribute a pesticide that was not properly registered with the Commissioner of Agriculture, and it prohibited certain other actions regarding the use, distribution, handling, and storage of pesticides.[4] This Act seems to establish a negligence standard[5] but it opens the door to strict liability by stating that it

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1. O.C.G.A. §§ 2-7-50 to -73 (1982).
2. O.C.G.A. § 2-7-51 (1982). The Act was passed in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended by the Federal Environmental Pesticide Control Act of 1972. *Compare, e.g.*, O.C.G.A. § 2-7-53 (1982) *with* Federal Environmental Pesticide Control Act, 7 U.S.C. § 136 (1982).
3. O.C.G.A. § 2-7-51 (1982).
4. O.C.G.A. § 2-7-62 (1982) (making it unlawful to distribute unregistered pesticides, to distribute pesticides labeled for restricted use to any person not having a permit, to deface a pesticide label, to use any pesticide inconsistent with its labeling, and other such prohibitions).
5. *See, e.g.*, O.C.G.A. § 2-7-62(b)(3) (1982). This section provides that it is unlawful

does not authorize any person to violate any law or regulation whose enforcement is assigned to the Department of Natural Resources.[6] Violation of the Act is punishable as a misdemeanor.[7] However, the Act provides immunity from liability for certain activities by specified persons.[8]

That same year, the Georgia Legislature also enacted the Pesticide Use and Application Act of 1976.[9] This Act recognized that pesticides may cause potential adverse effects on persons, animals, crops, and the environment if not properly applied.[10] The Pesticide Use and Application Act focused on the licensing of pesticide contractors,[11] on inspecting premises involved with the application or storage of pesticides,[12] and on reporting of pesticide accidents and damage claims.[13] The Act provided civil and criminal penalties for violations.[14] While establishing a negligence standard for persons using and applying pesticides,[15] the Act also seems to leave the door open for strict liability by stating that the Act does not relieve any person from liability for any damage to the lands of another caused by the use of pesticides, even though such use conforms to the rules and regulations of the Commissioner of Agriculture.[16] Finally, the law applied to state and local governments as well as private parties,[17] but under certain conditions farmers, veterinarians, experimental research personnel, and persons subject to the Structural Pest Control Act were exempted from its licensing requirements.[18]

"[f]or any person to use or cause to be used any pesticide in a manner inconsistent with its labeling or the regulations of the Commissioner, if those regulations further restrict the uses provided on the labeling." This language suggests that following the instructions on the label would be the exercise of due care which would avoid liability.

6. O.C.G.A. § 2-7-72 (1982).

7. O.C.G.A. § 2-7-73 (1982).

8. O.C.G.A. § 2-7-62(c)(1)—(4) (1982). Transporters of pesticides, public officials administering pesticide laws, persons conducting authorized research and experiments with pesticides, and shippers who test pesticides are all immune from liability under O.C.G.A. § 2-7-62(a)(1)—(5) (1982) when specific conditions are met.

9. O.C.G.A. §§ 2-7-90 to -114 (1982). This Act is also consistent with FIFRA. *Compare, e.g.*, O.C.G.A. § 2-7-102 *with* FIFRA, *supra* note 2.

10. O.C.G.A. § 2-7-91 (1982).

11. O.C.G.A. § 2-7-99 (1982).

12. O.C.G.A. § 2-7-107 (1982).

13. O.C.G.A. § 2-7-110 (1982).

14. O.C.G.A. §§ 2-7-102, -114 (1982).

15. *See, e.g.*, O.C.G.A. § 2-7-102(a)(5) (Supp. 1988) (making it unlawful for a licensed pesticide contractor to operate in a "faulty, careless, or negligent manner").

16. O.C.G.A. § 2-7-103(c) (1982).

17. O.C.G.A. § 2-7-111 (1982).

18. O.C.G.A. § 2-7-112 (1982). Section (a), pertaining to farmers, states:

> Code Section 2-7-99, relating to licenses and requirements for their issuance, shall not apply to any farmer applying pesticides classified for general use for himself or for his farmer neighbors, provided that:
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> (1) He operates farm property and operates and maintains pesticide application equipment primarily for his own use;
>
> (2) He is not regularly engaged in the business of applying pesticides for

HB 1518

The purpose of HB 1518 is to exempt farmers from the strict liability possibly imposed by both the Pesticide Control Act and the Pesticide Use and Application Act when they apply chemicals to crops according to government-approved instructions and that application results in contamination of a public water supply.[19] Instead of a strict liability standard, the Act provides a negligence standard.[20]

HB 1518, as introduced, addressed the liability of any "person, firm, or corporation engaged in an agricultural, farming, horticultural, or similar operation, place, establishment, or facility, or any of its appurtenances, who has applied or used or arranged for the application or use of any fertilizer, plant growth regulator, or pesticide."[21] The Senate Committee

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hire, amounting to a principal or regular occupation, and he does not publicly hold himself out as a pesticide contractor; and

(3) He operates his pesticide application equipment only in the vicinity of his own property and for the accommodation of his neighbors.

19. Telephone interview with Allen Lacey, Legislative Specialist, Georgia Farm Bureau Federation (Apr. 20, 1988) [hereinafter Lacey Interview]. According to Mr. Lacey, the Farm Bureau was responsible for the introduction of this bill; it was sponsored by Representative Denmark Groover, House District No. 99. The bill was modeled after legislation which was introduced in New Jersey but never passed. Although, according to Mr. Lacey, no Georgia farmers have been held strictly liable for pesticide contamination, there reportedly have been a number of cases in New Jersey, Pennsylvania, and New York in which the Environmental Protection Agency has successfully traced pesticide contamination in public drinking water to particular farmers, even years after use of the particular pesticide in question was discontinued. Defendants in those cases were found strictly liable, notwithstanding their defense of due care in following the printed instructions on the label of the chemical. According to Mr. Lacey, Georgia will be the only state to have this type of legislation. The Farm Bureau sees this legislation as largely a preventive measure to protect farmers from liability because improved scientific techniques have lowered the detection limits for identifying specific chemicals in water.

See also GEORGIA FARM BUREAU FEDERATION, LEGISLATIVE ACTION BULLETIN (Feb. 1, 1988); GEORGIA FARM BUREAU FEDERATION, LEGISLATIVE REPORT No. 9 (Mar. 17, 1988). The Georgia Farm Bureau Federation claims that lawsuits involving a strict liability standard for the use of pesticides have cost farmers around the country hundreds of thousands of dollars and have contributed to some of the increases in liability insurance coverage for farm owners.

20. Lacey Interview, *supra* note 19. The Georgia Court of Appeals has held that because there is no common law cause of action in Georgia for strict liability, a party seeking recovery under that theory must proceed under a statute granting such a right. Stiltjes v. Ridco Exterminating Co., 178 Ga. App. 438, 343 S.E.2d 715, *aff'd*, 256 Ga. 255, 347 S.E.2d 568 (1986). O.C.G.A. § 12-5-51(b) (1982), for example, establishes a strict liability standard when any person "causes or permits any toxic, corrosive, acidic, caustic, or bacterial substance or substances to be spilled, discharged, or deposited in the waters of the state." Such cause of action is limited to a civil action instituted by the state or local government. Thus, HB 1518 would seemingly preclude actions brought under this Code section also.

21. HB 1518, as introduced, 1988 Ga. Gen. Assem.

on Agriculture offered a substitute adding "silviculture"[22] to the activities covered by the Act.[23] That substitute was incorporated into the final version of the Act.[24]

The original bill also provided that the specified parties would not be liable[25] "to any state or municipality" if no proof of "negligence or lack of due care" existed.[26] The Senate committee substitute deleted the phrase "to the state or any municipality."[27] This deletion appears to make the negligence standard apply to causes of action brought by private parties, in addition to those brought by the state or a municipality. However, another provision of the Act states that it does not affect any private right of action against these parties.[28] Therefore, it appears that the phrase "to the state or any municipality" was simply deleted as being redundant, and that the negligence standard only applies to environmental contamination of state "land, waters, air, or other resources."[29]

The Act defines the due care standard for the application of pesticides.[30] In this context, due care means that (1) the party must have made the application in a manner consistent with the labeling of the product and in accordance with acceptable agricultural[31] management practices and applicable laws and regulations; (2) the state or federal government must have approved, recommended, or permitted the application and there is no finding that any conditions of such approval, recommendation, or permit were violated or that warnings or limitations regarding the application were ignored; and (3) the product applied was licensed by

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22. "Silviculture," also referred to as forestry, is the art of cultivating a forest. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1691 (unabridged 2d ed. 1983).

23. HB 1518 (SCS), 1988 Ga. Gen. Assem.

24. O.C.G.A. § 2-7-170 (1988).

25. The bill specifically applies to Title 2 or Title 12. Title 12 codifies laws pertaining to conservation and natural resources. *See, e.g.*, O.C.G.A. § 12-5-51 (1982) (civil liability for pollution of waters of the state).

26. HB 1518, as introduced, 1988 Ga. Gen. Assem.

27. HB 1518 (SCS), 1988 Ga. Gen. Assem.

28. O.C.G.A. § 2-7-170(b) (1988).

29. *Id. See infra* notes 31—32 and accompanying text. Mr. Lacey indicated that the original language of the bill tracked the language of a proposed New Jersey statute that never passed. The language originally deleted from the Georgia statute was removed for the purpose of making the bill apply to private parties, as well as to the state. After further reflection, however, the Farm Bureau concluded that the primary purpose of the bill was to prevent suits that would be filed by a state or local government for pollution of a public drinking supply. As a matter of strategy, the Farm Bureau also indicated that a bill which deprived private citizens of an existing legal remedy might be less likely to receive a favorable vote by legislators. The failure to reinsert the deleted language was either an oversight or the drafters' indication that it was not really necessary because the later section expressly states that the bill does not affect a private cause of action. Lacey Interview, *supra* note 19.

30. O.C.G.A. § 2-7-170(a)(1)—(3) (Supp. 1988).

31. Though the bill did not mention silviculture and horticulture in this section, this absence was probably an oversight when the bill was amended.

or registered with the state or federal government at the time of its application and the user knew of no special geological, hydrological, or soil condition which rendered such application likely to cause pollution.[32]

The Act does not limit an individual's right of action for personal injury or damage to property resulting from the application or use of chemicals by a person or entity engaged in agricultural or farming operations.[33] Thus, under certain conditions, the pesticide applicators may be strictly liable for damages to private property or persons.[34]

The Act similarly does not prohibit strict products liability for any manufacturer of such fertilizer, plant growth regulator, or pesticide.[35] Finally, the Act is not to be applied retroactively to any orders issued by the Department of Agriculture or the Department of Natural Resources prior to July 1, 1988, the Act's effective date.[36]

Although there are no reported cases in Georgia which apply strict liability for pesticide contamination to a farmer who followed the instructions on the label of the container, courts in other states have held farmers strictly liable.[37] HB 1518 is a preventive measure; it provides protection from liability when the plaintiff is the state or a local government and the defendant has exercised due care, as defined in the Act.[38]

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32. O.C.G.A. § 2-7-170(a)(1)—(3) (Supp. 1988).

33. O.C.G.A. § 2-7-170(b) (Supp. 1988).

34. *See, e.g.*, Brooks v. Ready Mix Concrete Co., 94 Ga. App. 791, 96 S.E.2d 213 (1956). Liability for a trespass caused by blasting operations is a direct trespass upon realty; liability is absolute and does not have to be grounded in negligence. *Id.* The *Brooks* court, in reaching its decision, construed the predecessor of O.C.G.A. § 51-9-1 (1982).

See also Brand v. Montega Corp., 233 Ga. 32, 209 S.E.2d 581 (1974) (citing the RESTATEMENT (SECOND) OF TORTS § 166 (1965) in a discussion of the strict liability of an "abnormally dangerous activity"); C. W. Matthews Contracting Co. v. Wells, 147 Ga. App. 457, 249 S.E.2d 281 (1978) (citing *Brand* on the issues of abnormally dangerous activities); O.C.G.A. § 51-9-7 (1982) (providing that pollution of a stream on one's own property that flows through another's property and lessens the value of the neighboring property is a trespass).

35. O.C.G.A. § 2-7-170(d) (Supp. 1988). *See* Stiltjes v. Ridco Exterminating Co., 256 Ga. 255, 347 S.E.2d 568 (1986).

36. O.C.G.A. § 2-7-170(c) (Supp. 1988).

37. *See* Lacey Interview, *supra* note 19 (discussion of strict liability in other states).

38. *Id.*