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Legal Aspects of Using Pesticides

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Pesticides have contributed greatly to increased agricultural productivity. But some problems have come along, too. Users of agricultural chemicals face many technical and legal questions.

Technical information is readily available from agricultural specialists and is not discussed here. This guide gives general insight into some of the legal issues involved when pesticides are applied to the land. It will not, however, serve to solve specific legal problems. These should be handled by an attorney.

Liability for Damages from Pesticide Use.

Legal disputes often arise when someone suffers damages because of someone else spraying pesticide. Thus, the question arises, "When might you be liable?"

Ordinary Negligence. Liability is usually governed by broad common-law principles. The most common theory of liability is ordinary negligence. Well established law says that a landowner must use land in a reasonable manner. If a landowner permits a dangerous substance to pass onto another's property, he or she may be found to be negligent. If so, the injured party is awarded compensation.

Negligence in the use of pesticides might be found in a number of ways: if you spray on a windy day; if the pilot doesn't prevent the chemical from discharging over adjoining property; if you do not adjust sprayer heads properly; if you do not notify adjoining landowners of your intent to spray; if you improperly select, mix, or apply chemicals; etc.

Strict Liability. Some states have completely dispensed with the negligence requirement and apply a doctrine of strict liability for crop spraying. This means that when you make use of an unusually dangerous substance, you do so at your own risk and you assume the responsibility of any damage resulting from the use. Missouri courts have not yet used this doctrine and probably will require evidence of negligence on the part of the landowner or the custom applicator.

Can Liability be Shifted? Custom applicators or independent contractors ordinarily assume any liability arising out of their activities. As a general rule, a person who hires an independent contractor will not be liable for damages caused by the contractor's negligence. However, there are exceptions, and one of these is when the work is inherently dangerous. Courts generally will consider pesticide application an inherently dangerous activity.

Courts recognize that farmers are within their legal rights in applying pesticides. They can do the work themselves or contract to have it done. But because pesticides are highly likely to spread to adjoining or nearby premises and to damage or destroy valuable property, a farmer can't delegate this work to an independent contractor and avoid liability.

To reduce the risk of liability for damages caused by an independent contractor, hire competent custom applicators and include a written clause in the contract providing for compensation to the landowner for any damages the landowner must pay as a result of the custom applicator's negligence. This clause is known as an indemnification agreement.

Another possible means of protection is liability insurance. However, some policies exempt coverage for damages arising from use of certain pesticides and especially aerial applications. Read policies carefully for exclusions.

Pesticides and Nuisance Law. In addition to possible liability for damages, the pesticide user may face a nuisance suit if the pesticide usage unreasonably interferes with other people's use or enjoyment of their property. This might occur, for example, if the pesticide polluted a stream to the extent that the stream:

- (1) could not be used to water livestock or
- (2) created undesirable living conditions or a hazard to human health, perhaps due to the killing of fish.

A person causing pollution may be sued for (1) an injunction, (2) damages, or (3) both an injunction and damages. If an injunction is granted, the operation causing pollution may be closed down. In determining whether to grant an injunction, the court weighs the interests of both parties and determines who has the greater interest. For example, the plaintiff's interest in living free from undesirable conditions and a possible health hazard might be weighed against the defendant's interest in the large capital investment required for farming.

Since the interest of the public often outweighs the interest of an individual, the classification of the nuisance as public or private may be important when an injunction is requested. If the pollution interferes with the use and enjoyment of several people's property, a public nuisance may exist. If it interferes with the rights of only a few citizens, then the nuisance may be classified as private. An injunction will more likely be granted if a public nuisance is found.

Actual and Punitive Damages. A suit for damages may request that the person causing pollution pay the plaintiff both *actual* and *punitive* damages. *Actual damages* means just

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that. The plaintiff asks to be reimbursed for property losses, out of pocket expenses, and depreciation in property values caused by the pollution.

Punitive damages refer to those granted for the defendant's intentional or malicious conduct. Legal malice or malicious conduct may be present when a wrongful act is done intentionally without just cause or excuse. For example, if you know you could economically change some management practices and thus, decrease or eliminate the pollution and undesirable living conditions caused for nearby residents, you might be held liable for punitive damages.

The above briefly describes the approaches used by civil courts to settle disagreements over pollution problems. You will need an attorney if you're a party to a lawsuit.

Fish Kill. Because of the possibility that water pollution may result from pesticide use, pesticide users should know about state and federal laws relating to water pollution control.

For example, the Missouri Conservation Commission may bring a misdemeanor charge against anyone who causes any injurious substance to be placed, run, or drained into any Missouri waters in large enough amounts to injure, stupefy, or kill fish that inhabit the waters at or below the point where any substance was thrown, run, or drained into the waters. Anyone convicted of the misdemeanor charge can be punished by imprisonment in the county jail for up to three months or by a fine up to \$500, or by both. For more information, contact your local conservation agent.

Pesticides and the Missouri Clean Water Commission.

Regulations of the Missouri Clean Water Commission might also apply if water becomes polluted from pesticides. Under the *Missouri Clean Water Law*, polluting water or placing, causing, or permitting *water contaminants* in a location where they are reasonably certain to cause pollution is illegal.

A water contaminant is broadly defined and might include pesticides, which could cause pollution "by runoff or seepage into waters of the state if they create a nuisance or render the waters harmful, detrimental, or injurious to public health, safety, or welfare; or to domestic, industrial, agricultural, recreational, or other legitimate beneficial uses; or to wild animals, birds, fish, or other aquatic life."

The Missouri Clean Water Commission may request either the attorney general or the prosecuting attorney to bring a court action to prevent violation of the Clean Water Law or regulations of the commission. This is a civil action in which a court may grant an injunction or a fine up to \$10,000 per day, or both.

For more information on the state's role in regulating water quality, contact:

Missouri Department of Natural Resources
Water Quality Program
Box 1368
Jefferson City, MO 65101

Residues in the Soil. Another possible source of legal action against a landowner or tenant may arise when herbicides leave residues in the soil. Since the residues may rule out planting susceptible crops following the use of such chemicals, the tenant or landowner should inform a succeeding landowner or tenant of the use of the herbicide. If he fails to do so and injury results to the new tenant's or landowner's crops, then legal action may possibly be brought against the preceding landowner or tenant.

Other Legal Concepts. Environmental groups have raised other legal concepts involving pesticide use. For example, the application of existing law can compensate a person for damage to property, but what about the damage to the environment itself, which belongs to no one in particular but everyone in general? Court actions based on the right of all people to a pure environment, even when unsuccessful, tend to focus public attention on pesticides and to spread information about pesticides. Some lawsuits have been brought for this purpose.

EPA and Missouri Pesticide Controls.

The Federal Environmental Pesticide Control Act of 1972 amended the Federal Insecticide, Fungicide and Rodenticide Act. Following are some of the added responsibilities of the Environmental Protection Agency (EPA):

- Classification of all pesticides into either (1) General use or (2) Restricted use;
- Required certification of everyone using restricted use category pesticides;
- Establishment of federal penalties for both civil and criminal violations of this act.

General-Use Pesticides. General-use pesticides include those of low toxicity to mammals and those that present low or no hazard to the environment, wildlife, or water quality. General-use pesticides can be manufactured, sold, and used for their labeled purposes without certification.

Restricted-Use Pesticides. Restricted-use pesticides include those of higher toxicity to mammals and those that present some additional hazard to the environment, wildlife, or water quality. A certified or non-certified person may purchase restricted-use pesticides; however, restricted-use pesticides must be applied by a certified applicator or under the direct supervision of a certified applicator.

On February 9, 1978, the EPA classified all or some uses of 23 pesticides as restricted. Included in this restricted classification are five fumigants, three herbicides, ten insecticides, and five rodenticides. Since classification is a continuing program, other pesticides may become restricted at any time.

Certification of Applicators. The 1972 amendment requires applicators, either private or commercial, to be certified before use of a restricted-use pesticide. Under this provision, states must provide for certification and licensing of private and commercial applicators. Most states quickly adopted a model State Pesticide Use Act which met the federal requirements.

The Missouri Pesticide Use Act requires all commercial applicators (defined as those who apply pesticides for hire) to be certified and licensed whether they use general- or restricted-use pesticides. Private applicators (producers of an agricultural commodity) also have to be certified to purchase and apply restricted-use pesticides. Also, pesticide dealers must be certified and licensed to sell restricted-use pesticides.

To become certified, a commercial applicator or a retail pesticide dealer must either attend a training session or purchase and study a training manual before taking an examination. Passing the examination constitutes certification, which then must be followed by application for license. Private applicators must merely complete a training session, with no accompanying examination, to become certified.

Violations and Penalties. Using any pesticide in any manner inconsistent with its labeling violates federal and state laws. The EPA gives the states primary responsibility for enforcing federal law relating to pesticide use violations—if the state has an approved plan for certifying pesticide applicators and if state pesticide laws aren't more stringent than federal laws. However, if the state is unwilling or unable to respond to a pesticide violation emergency, the EPA has the authority to enforce the federal laws.

As with most federal or state laws, penalties were established for violations. These are generally *civil* and *criminal* penalties. Since Missouri will likely assume responsibility for enforcement of violations, the Missouri penalties are given first:

A violation of the Missouri Pesticide Use Act is a misdemeanor. A violator, if convicted, may be punished as follows:

- A violator may be fined up to \$500.
- Anyone who *knowingly* violates this law may be fined up to \$5,000 and may be imprisoned for up to one year.
- Anyone who misuses any pesticide or falsifies any record required by the law may be fined up to \$100.
- Any person who *knowingly* misuses any pesticide or

knowingly falsifies any record required by the law may be fined no less than \$500 or up to \$5,000 and may be imprisoned for up to a year.

Federal penalties include the following:

Civil Penalties. Anyone who violates any provisions of the amended Federal Insecticide, Fungicide, and Rodenticide Act may be assessed a civil penalty of up to \$5,000 for each offense, if convicted. If the violation is by a commercial applicator applying a general-use pesticide or a dilution of a general-use pesticide, a civil penalty of up to \$500 may be assessed for the first offense and up to \$1,000 for each following offense.

Criminal Penalties. Anyone who knowingly violates any provision of the federal act may be charged with a misdemeanor and, if convicted, may be fined up to \$25,000 or imprisoned for up to one year, or both.

In addition to the above penalties, any commercial or private pesticide applicator or pesticide dealer may have their certification or license denied, suspended, revoked, or modified for any violation of the Missouri Pesticide Use Act.

Examples

A lettuce farmer hired a crop dusting company to make an aerial application of an insecticide to kill lettuce worms. Some of the dust drifted onto the property of a neighbor who raised bees. The insecticide killed most of the bees. The neighbor wanted to be paid for the loss and, thus, sued the lettuce farmer. The lettuce farmer had to pay for the losses.

The court ruled that, although a landowner is not normally legally responsible for damage caused by an independent contractor's negligence, in cases such as this where the activity is inherently dangerous, the landowner cannot delegate the work to a custom applicator and thus avoid liability.

A rancher hired a custom applicator to make aerial application of herbicides 2,4-D and 2,4,5-T. The herbicide drifted or was carried by wind currents onto the cotton crops of 30 neighboring landowners. All 30 neighboring farmers sued the rancher for their losses and recovered. Again, the basis of the decision is that a landowner is responsible for injuries to third persons caused by work done by an independent contractor where the contract requires the performance of inherently dangerous work.

A landowner mixed several gallons of a herbicide and applied it liberally to fence rows and ditch banks on his farm. He had several gallons extra which he dumped in one of the ditches. The herbicide subsequently drained into a nearby creek and the Missouri Conservation Commission brought a legal action against the farmer, which could have resulted in a fine or imprisonment.

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