

LEGAL ASPECTS OF HERBICIDE DRIFT

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Abstract: This article (1) examines how Illinois law discourages herbicide drift, and (2) illustrates how damages from suspected herbicide drift might be pursued under Illinois law. The Illinois Pesticide Act (Illinois Compiled Statutes, Chapter 415, Act 60) and principles of civil liability discourage herbicide drift. The Illinois Pesticide Act does so by making the irresponsible use of pesticides unlawful, and by assessing penalties of up to \$10,000 for violations of the Act. The Act does not, however, provide any direct means through which an injured party can collect damages. Instead, injured parties must rely on civil liability principles and the courts to seek recovery for damages caused by suspected drift. The risk of being liable for pesticide drift encourages proper use and application of pesticides, and creates an incentive to settle pesticide drift cases out-of-court. However, there is also the risk that a party will not be able to recover compensation for suspected drift damage because of insufficient evidence or the inability to reach an out-of-court settlement. An earlier version of this article was published in the Proceedings of Illinois' 2000 Specialty Crop Conference.

The Illinois Pesticide Act and Herbicide Drift

What is unlawful under the act and what penalties may be imposed for these violations? Some highlights of the Act follow.

Unlawful Acts under the Illinois Pesticide Act (Act § 14). Section 14 of the Illinois Pesticide Act lists activities that are unlawful under the Act. Several provisions are aimed directly at the irresponsible use of herbicides. Section 14 makes it unlawful to knowingly apply ineffective or improper pesticides or to apply pesticides in a faulty, careless, or negligent manner. Section 14 also requires that herbicides be used in a manner consistent with the label. Additionally, Section 14 makes it unlawful to use a restricted pesticide without the required license or certification.

Potential Penalties (Act §§ 24 & 24.1). Section 24.1 of the Pesticide Act sets forth the *administrative actions and penalties* that may be imposed for violations of the provisions of the act. These include advisory or warning letters, monetary penalties of \$500 to \$10,000, and suspension of an applicator's license. This section uses a point system to determine the amount of any monetary penalty. The system increases the monetary penalties assessed as the amount of total violation points increases. Section 24 of the Pesticide Act sets forth the *criminal penalties* that may be imposed for violations of any provisions of the act. While these criminal penalties are rarely imposed (it's easier to proceed under the provisions for administrative penalties described earlier), fines of not less than \$5,000 are authorized.

Enforcement Based on Complaints. The Illinois Pesticide Act relies on a complaint-based system of enforcement to encourage compliance with the Act. Herbicide drift complaints should be made to the Illinois Department of Agriculture's Bureau of Environmental Programs at 1-800-641-3934. These complaints must be made within 30 days of the application or 30 days

after damage first appears. The Bureau typically receives about 120 complaints per year with approximately 60% being drift-related. The percentage of complaints related to suspected drift was apparently a little higher in FY 99, making up approximately 70% of all complaints.

Illinois Pesticide Act: Additional Information. The Illinois Department of Agriculture has placed on the Internet information regarding the Illinois Pesticide Act and its complaint process. This information can be found at <<http://www.agr.state.il.us/pestuses.html>> (visited June 23, 2000). In addition, the Illinois General Assembly has placed the Illinois Compiled Statutes on the Internet. The complete text of the Illinois Pesticide Act can be found at <<http://www.legis.state.il.us/ilcs/ch415/ch415act60.htm>> (visited June 23, 2000).

Civil Liability for Herbicide Drift

By imposing civil liability in some herbicide drift cases, the legal system encourages careful application of herbicides and provides a means by which a party injured by herbicide drift may recover monetary damages. There are various legal “theories” which could support imposing civil liability for damages caused by herbicide drift.

Theories of Liability for Pesticide Drift

“Negligence” is probably the most common legal theory asserted as a basis of recovery in herbicide drift cases. Under a negligence theory, liability is imposed when there has been a failure to exercise due care under the circumstances. Examples might include failing to adhere to the instructions on the herbicide label or hiring a non-certified applicator to conduct the spraying. Sometimes an injured party may also assert a theory of “strict liability” as a basis for recovering damages. Both theories require the injured party to prove that the damage was caused by the defendant, and each theory requires the proof of other facts as well.

Seeing the Theories in Practice: Kleiss v. Cassida, 297 Ill. App.3d 165 (1998)

How courts apply the rules of civil liability to herbicide drift cases can be seen by looking at a real case. The full text of the appellate court opinion can be found on the Internet at <<http://www.state.il.us/court/appellates/1998/4970604.txt>> (visited June 23, 2000), or in a county law library. An abbreviated discussion of the case, based on the published opinion, follows. The purpose of this abbreviated discussion is not to evaluate whether the plaintiff should have been able to recover additional damages, but rather to provide a case study of one plaintiff’s efforts to recover damages for suspected herbicide drift.

Facts in the Case. A family owned a farm in Douglas County on which 185 acres of grain crops, fruits, and vegetables were raised. In 1990 the family experienced crop damage, which they attributed to a dicamba herbicide. The family believed that the damage was the result of herbicide drift from the herbicides Banvel and Marksman (both contain a dicamba growth regulator). Banvel had been sprayed by one defendant on property one mile south of the family’s farm; Marksman had been sprayed by another defendant on property one-quarter mile southeast. The family sued both custom applicators alleging negligence in the two separate applications of herbicide. The family also sued Sandoz, the exclusive producer and distributor of

Marksman and Banvel, based on a theory of strict liability. After hearing testimony, including conflicting testimony from expert witnesses, the jury awarded the family damages: a net of \$17,500 against the custom spray service which had sprayed within one-quarter mile (but no damages were awarded against the applicator who had sprayed about one mile away); the jury also awarded damages of \$17,500 against the herbicide manufacturer, Sandoz. After the trial, the judge overturned the award of damages against the manufacturer, which had been based on the strict liability theory. According to the trial judge, the jury had insufficient evidence to conclude that it was Sandoz's chemical that caused the damage. The family appealed and the appellate court affirmed the rulings of the trial judge.

A Note About Court Procedure in this case. It is generally plaintiff's responsibility to prove the "elements" of the civil case by a "preponderance of the evidence." Usually questions of fact are decided by a jury. But where a trial judge believes the jury's findings are not adequately supported by the evidence, the trial judge has the responsibility to overturn the jury's findings in the interests of justice. Such a decision by the trial judge can be appealed to a higher court. In this particular case, the rulings of the trial judge were affirmed on appeal. But separate and apart from the procedural aspects, the case highlights additional important aspects of civil liability as it relates to herbicide drift. These are described below.

Effect of Pesticide Drift Complaint and Department of Agriculture Investigation. In this case, the Illinois Department of Agriculture received a complaint, and conducted an investigation under the Illinois Pesticide Act, but was unable to determine with certainty the cause or source of the injury. If the Department had found a violation and collected an administrative penalty, that penalty would not go to the injured party but the fact that a violation had occurred might have assisted the plaintiff in carrying his burden of proof in court. If the Department of Agriculture had found a clear violation by both applicators, the civil case might have turned out differently.

Plaintiff's Burden of Proof. To collect damages, the plaintiff must initiate the lawsuit; no agency will initiate the action for the plaintiff. Additionally, the plaintiff must prove each required element of the civil action. Regardless of the legal theories of recovery used, the plaintiff must prove each element by a "preponderance of the evidence." This can be difficult in herbicide drift cases.

Difficulties in Proof. It can be very difficult to establish what particular chemical caused the damages. Even if this can be proven, it may be difficult to show that it was the defendant's spraying (as opposed to spraying by someone else, for example) that was the source of the drift. Even if causation is established, the plaintiff still must prove either that the defendant was negligent in the application (defendant may then be liable under the "negligence" theory) or that the product was unreasonably dangerous (defendant manufacturer, etc. may then be liable under a "strict liability" theory). Many of the underlying issues will call for expert testimony and the potential for conflicting expert opinions.

Weighing Conflicting Expert Testimony. One issue raised at trial was whether the herbicides could possibly drift all the way from either site of defendants' allegedly negligent sprayings (one-quarter mile away, and one mile away) to the damage site, or whether it was more likely that drift originated elsewhere. Conflicting expert testimony focused on the distances that

herbicides could possibly drift. The trial court gave little weight to the testimony of the plaintiff's expert witness, apparently because that testimony was based on nothing other than the expert's experience. In contrast, the defense's expert witness based his testimony on literature reviews, the findings of a Spray Drift Task Force, and his own research. This testimony was given much more weight than that of the plaintiff's expert. The case illustrates that experts may have differing opinions, and that the stronger the analytical basis for the expert's opinion, the more weight it likely will be given. If there is no analytical basis for the expert's opinion, it may not be very persuasive to the court.

Potentially Lengthy Judicial Processes. The alleged damage occurred in 1990, the trial occurred later, and the appellate court's decision affirming the trial court was rendered in June of 1998, eight years after the alleged harmful spraying. The judicial process can be lengthy.

Conclusion

The Illinois Pesticide Act and rules of civil liability are key tools in regulating herbicide drift. While the Illinois Pesticide Act may be effective in discouraging drift, it offers no mechanism through which one damaged by herbicide drift may recover monetary compensation directly. The rules of civil liability, including the legal theories of negligence and strict liability, do provide a court-based mechanism for recovering compensation for herbicide drift damages. But recovery through the courts can be a long and difficult process for the plaintiff, and of course, there is always the risk of non-recovery. The 1998 case illustrates many of the difficulties a plaintiff may face when attempting to recover for herbicide drift. Nevertheless, the potential for successful recovery by an injured party does exist. And this risk of being liable for pesticide drift damage serves to encourage careful pesticide application, creates an incentive to explore out-of-court settlements where drift damage appears to have occurred, and may result in the successful recovery of damages – either through an out-of-court settlement or a judgment following a civil trial.

Note: This article is not intended to represent legal advice to anyone injured by pesticide drift. If you have been injured by pesticide drift and need legal advise, you should contact an attorney.