

State and Federal Pesticide Law and Liability for Misuse of Pesticides

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Joint Agricultural Law/Economics Research Report

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Highlights

Use of pesticides in agriculture continues to expand. As a result, the risk of serious harm to humans and the environment remains even though pesticides and their application are increasingly sophisticated.

This publication deals with agricultural pesticides, including insecticides, herbicides, and fungicides, but not chemical fertilizers. It explains federal and state pesticide laws and the liability for misuse of these chemicals. Federal law requires that a pesticide be registered with the Environmental Protection Agency before it may be marketed. Pesticides classified as "restricted use" (because they may cause unreasonably adverse environmental harm or injury to the applicator) can only be acquired and used by certified applicators.

North Dakota has, as permitted by federal law, assumed responsibility for regulating pesticides used within the state. These regulations require pesticide dealers to be licensed and applicators to be certified. Certification is granted only after the person has demonstrated a practical knowledge of pesticides by successfully completing an examination administered by the county extension agent.

Pesticide application that results in damage to neighboring property is usually the legal responsibility of the applicator. Consequently, an applicator may be required to compensate a neighbor for damages resulting from a pesticide's use. Liability is based on several legal theories including negligence, strict liability, trespass, and nuisance. North Dakota also requires that a report of loss be filed with the Commission of Agriculture before damages will be awarded.

This report cannot substitute for competent professional advice. Anyone with a legal problem or a question related to the use of pesticides should contact an attorney.

STATE AND FEDERAL PESTICIDE LAW
AND
LIABILITY FOR MISUSE OF PESTICIDES

Jeff Rotering, David M. Saxowsky, and Owen L. Anderson*

The word "pollution" brings to mind visions of industry spewing forth liquid, solid, and gaseous waste materials. Agriculture, however, is also a major source of pollution. Improper use, handling, and disposal of fertilizers, animal waste, and pesticides are recognized as contributing substantially to the decline in the environment.¹ Congress and state legislatures as well as the courts have attempted to control the environmental harms without eliminating the beneficial use of chemicals and other pollutants. This report addresses legal issues pertaining to use of pesticides and possible criminal and civil liability of North Dakota farmer operators. The first section provides a general overview of applicable federal legislation. North Dakota's pesticide regulatory scheme is explained in the second part, and potential civil liability of farmers who use pesticides is discussed in the final section.

Federal Insecticide, Fungicide, and Rodenticide Act

The federal government has regulated pesticides since enactment of the Insecticide Act of 1910.² This act and other early pesticide laws were primarily concerned with protecting farmers from fraudulently labeled or manufactured chemicals.

The 1910 act was replaced by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in 1947.³ This later act required that a pesticide be registered before it could be sold in interstate commerce. Extensive amendments adopted in 1972 impose additional requirements of testing and classification before a pesticide may be marketed.⁴ The 1972 amendments also established guidelines for certification of pesticide applicators. These laws not only emphasize protecting farmers but also preserving the environment from harms caused by pesticide misuse.

Pesticide Registration

A pesticide is any substance which is used to control or eliminate weeds, insects, rodents, or other plant or animal pests.⁵ This includes insecticides, herbicides, nematocides, and fungicides. Chemical fertilizers are not considered a pesticide and therefore are outside this regulatory scheme.

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A pesticide needs to be registered with the Environmental Protection Agency (EPA) before it may be marketed.⁶ Application for registration involves the chemical manufacturer's submission of the proposed label (including directions for use), claims made about the performance of the product, description and results of tests conducted on the pesticide, and the pesticide's chemical formulation.⁷ The proposed label must list the active ingredients; first aid treatment for accidental swallowing or other contact with the pesticide; use, storage, and disposal instructions; a statement about re-entry into an area after pesticide application; the classification if it is a restricted-use pesticide; and other precautionary information. Classification of pesticides is explained in the next section.

A registration statement has to be published in the Federal Register if a pesticide contains any new active ingredient or involves a changed pattern of use.⁸ Government agencies and the public have 30 days after publication to comment on the proposed registration, and therefore, a chance to react to the proposed use or new ingredient.

Information on a new pesticide is analyzed by the EPA according to the anticipated risks and benefits. A pesticide will be approved for registration if

1. the pesticide's claims of effectiveness are justified;
2. the pesticide's label and other submitted material comply with the legal requirements;
3. the pesticide will perform its intended function without unreasonable adverse effects on the environment; and
4. the pesticide will not cause unreasonable adverse effects on the environment when used in accordance with widespread and commonly recognized practice.⁹

A tolerance level needs to be established before EPA will approve a pesticide.¹⁰ Tolerance is the amount of pesticide residue that can safely remain on a marketed crop after the pesticide has been applied in the proper manner. Agricultural commodities containing pesticide residues greater than the established tolerance level are considered unsafe and may not be sold in interstate commerce.

The registrant has a duty to inform the EPA of any adverse effects to the environment that are discovered after the pesticide has been registered.¹¹ The EPA may cancel or suspend a pesticide's registration for noncompliance with FIFRA or if any requirement for initial registration is not met.¹²

Pesticide Classification

The EPA classifies pesticides for general use, restricted use, or both.¹³ A general use pesticide will not cause unreasonable adverse effects on the environment when used as directed or in accordance with commonly

recognized practices.¹⁴ A pesticide is classified for restricted use, however, if application of the pesticide may cause unreasonably adverse environmental effects or injury to the applicator.¹⁵ In addition, restricted-use pesticides may be applied only by or under the direct supervision of a certified applicator.¹⁶ Tordon (used on leafy spurge and some other broadleaf weeds), Avadex (primarily used for wild oats), Hoelon (used for postemergence control of grassy weeds), and Paraquat (used for weed burn-down before crop emergence) are a few of the restricted-use pesticides.¹⁷

Certification of Applicators

FIFRA requires that anyone who applies a restricted-use pesticide must be certified.¹⁸ Certified applicators are either private or commercial applicators. A private applicator is any person who uses or supervises the use of restricted pesticides on his or her own property, the property of an employer, or on the property of others without compensation.¹⁹ A commercial applicator, usually a custom applicator, is an applicator who does not fit the definition of a private applicator.²⁰

Applicators are certified either by states which have an EPA approved certification plan or by the EPA. A state certification plan needs to be at least as strict as the federal requirements for the program to be approved by the EPA.²¹ North Dakota's approved certification program is explained in a subsequent section.

Protection of Workers

The EPA has established standards for protection of farm workers who perform hand labor operations in fields after pesticide application.²² The regulations require that unprotected persons may not re-enter a treated field until sprays have dried, dust has settled, or for a longer specified re-entry time in the case of certain pesticides. Workers are prohibited from entering the field (even if the specified re-entry time for a particular pesticide has expired) if a reasonable person would conclude that entry into the area continues to be unsafe. Similarly, the pesticide label or state regulation must be complied with if either establishes a re-entry time more restrictive than the EPA rule.

EPA regulations require that field workers receive written or oral warnings from pesticide applicators of hazards involved with pesticide application and appropriate re-entry times.²³ Warnings must clearly inform workers of the location and duration of the danger and should include the practical treatment and re-entry information specified on the pesticide label. Written warnings are to be posted at entrances to treated fields or on bulletin boards that are usually seen by workers. Warnings also need to be provided in a foreign language if workers are unlikely to understand English. Likewise, an oral warning is required if there is any reason to believe that a written warning will not be understood by workers.

A typical re-entry warning sign, as recommended on a pesticide label, reads as follows:

CAUTION! Area treated with Atrazine herbicide on (date). Do not enter without appropriate protective clothing until sprays have dried. This herbicide causes eye and skin irritation. Do not get in eyes, on skin, or on clothing. In case of contact with eyes, immediately flush eyes with plenty of water for at least 15 minutes. Call a physician. Harmful if swallowed. Wash thoroughly with soap and water after handling and before eating or smoking. Avoid inhalation of dust or contamination of food and feed. For 24-hour emergency medical assistance, call (713) 473-9461.²⁴

Penalties for Violations

General requirements of FIFRA can be summarized as follows: (1) a pesticide may not be sold unless it is registered; (2) the applicator must be certified; and (3) warnings must be provided after pesticide application. The penalty for violating a FIFRA provision depends on the individual's status.²⁵ Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any FIFRA provision may be assessed a maximum civil penalty of \$5,000 for each offense. However, a private applicator or other individual who violates a provision of FIFRA, after being warned by the EPA, may be assessed a civil penalty of not more than \$1,000 for each offense. An applicator who only applies pesticides, without delivering the unapplied pesticide to customers, may be assessed a maximum civil penalty of \$500 for the first violation and \$1,000 for each additional offense.

The EPA may issue a warning instead of assessing a penalty if the violation occurred even though due care was exercised or if the violation did not cause significant harm to human health or the environment.²⁶

A registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who knowingly violates FIFRA may be convicted of a misdemeanor. The maximum penalty is a fine of \$25,000 and imprisonment for one year. A private applicator who knowingly violates any FIFRA provision may be convicted of a misdemeanor, but the maximum penalty would be \$1,000 and 30 days in jail.²⁷

Enforcement of FIFRA

Primary responsibility for enforcement of FIFRA has been delegated to the states. However, a state may regulate the use and sale of pesticides only if its laws and regulations are at least as strict as those of the EPA. States which fail to adequately enforce pesticide regulations will be relieved of these enforcement responsibilities.²⁸ North Dakota is among the states currently enforcing its own pesticide regulations.

North Dakota Law

The Pesticide Act of 1975 was enacted by the North Dakota Legislative Assembly in response to the 1972 FIFRA amendments. The legislature recognized the high value of pesticides but decided that the regulation of pesticides was necessary for maintenance of public health and the environment in North Dakota.²⁹ The legislature created the Pesticide Control Board and delegated to it the responsibility for issuing pesticide regulations and enforcing pesticide laws in North Dakota. This board has established regulations relating to the sale, distribution, and use of pesticides in North Dakota that are at least as restrictive as the federal regulations.³⁰ These regulations address specific needs of the state, taking into consideration the crops grown and climatic conditions encountered in North Dakota.

Any pesticide sold for use within North Dakota must be registered with the State Food Commissioner and Chemist, in addition to meeting the federal registration requirements presented above.³¹ State registration certificates need to be renewed annually at a cost of \$25 per product. Application for state registration requires the pesticide manufacturer or distributor to submit much of the same information used in the federal registration process. A pesticide for which an application conforms to the law will be approved and the pesticide may be sold.

North Dakota's licensing and certification requirements apply only to persons using or distributing restricted-use pesticides. Competent persons applying restricted-use pesticides under the direct supervision of a certified applicator need not be certified or licensed unless a pesticide label requires that a certified applicator personally apply that pesticide.³²

Licensing of Dealers³³

Any person selling restricted-use pesticides is required to be licensed as a dealer. Furthermore, a dealer's license is required for each location or outlet from which restricted-use pesticides are distributed. Such licenses may be acquired at the Office of the County Treasurer upon payment of a \$10 fee and presentation of proof of certification.

A dealer will be certified after successfully completing the certification examination administered by the county extension agent. Persons who fail the examination may retake it, but no sooner than three days later. The North Dakota Pesticide Act requires that the examination tests a dealer's knowledge of pesticide laws, regulations, and hazards, as well as the safe distribution, disposal, use, and application of pesticides.

A licensed pesticide dealer is responsible for the actions of noncertified employees, including the solicitation and sale of restricted-use pesticides as well as claims or recommendations for their use. Violation of the law by a licensed dealer or an employee may result in suspension or revocation of the license and certification, in addition to civil and criminal penalties.

Dealer licenses expire each December 31 and are renewed annually. Dealers must recertify every three years by passing an examination or attending an approved seminar.

Commercial Applicators' Licenses³⁴

Purchase, use, or supervision of the application of restricted-use pesticides by a commercial applicator is illegal unless a commercial applicator's license is obtained first. This license may be purchased from a county treasurer upon payment of a \$20 fee and presentation of proof of certification. Certification requires successful completion of an examination administered by a county extension agent. This examination is identical to the dealer licensing exam.

A commercial applicator's license expires each December 31, and is renewed annually. The applicator also must recertify every three years by passing an examination or attending an approved seminar.

Private Applicator Certification³⁵

A private applicator is one who uses or supervises use of any restricted-use pesticide in the production of an agricultural commodity on property owned or rented by him or his employer. A private applicator may apply restricted-use pesticides on another person's property if the applicator receives no compensation other than the trading of agricultural services. Private applicators are required to be certified but need not be licensed like a commercial applicator. Nearly all farmers fit within this category and consequently are required to be certified before acquiring and using restricted-use pesticides.

North Dakota law requires the Pesticide Control Board to establish standards for private applicator certification based on standards set forth by the EPA. In order to be certified, an applicant must have a practical knowledge of³⁶

1. the pest problems and control practices associated with agricultural operations;
2. the proper handling, use, storage, and disposal of pesticides and containers; and
3. related legal responsibility.

The EPA defines practical knowledge to include the ability to³⁷

1. recognize common pests and the damage they cause;
2. read and understand labels;
3. apply the pesticides in accordance with label instructions and warnings;

4. recognize local environmental situations that must be considered during the application of the pesticide in order to avoid contamination (this may include, among other things, sensitive plants and animals or a lake or stream); and
5. recognize poisoning symptoms and know the procedures to follow in case of a pesticide accident.*

The pesticide board requires applicants for private applicator certification to be at least 18 years of age and demonstrate their competence in applying pesticides. This competence can be demonstrated by (1) attending an approved educational seminar, signing a certificate of attendance, and successfully completing an exam; (2) completing a self-instruction course and successfully completing the exam; or (3) successfully completing the dealer or commercial applicator licensing exam.

Any applicant who satisfies the requirements of the pesticide board will be issued, free of charge, a certificate by the county agent in the county of residence. Private applicators must recertify every five years using the same process as used for initial certification.

A person who is unable to read may be certified for a single restricted-use pesticide by completing an orally instructed course and successful completion of an oral exam. Such certification for a single restricted-use pesticide is valid for only two years.

Emergency certification for a single restricted-use pesticide may be issued by a county agent on completion of an orally instructed course and successful completion of an oral exam. Such emergency certification is limited to 60 days and may be issued to a person only once.

Application, Storage, Transportation, and Disposal³⁸

Pesticide Control Board regulations generally require that equipment used in applying a chemical be operationally sound and properly calibrated to prevent unreasonable adverse effects on the environment. In addition, the applicator and any person assisting in the application must follow the pesticide label as to permitted uses and recommended rates. These persons also are required to exercise the safety precautions specified on the label.

Pesticides, except bulk pesticides (defined later), must be stored in their original container with their labels clearly visible. Generally, pesticides are to be stored in dry, well-ventilated spaces in a manner which will not endanger humans, animals, the environment, food, or feed. Any additional storage requirement specified on the pesticide label (such as proper storage temperature) also must be complied with.

*Pesticide labels include basic information for treatment in case of contact with or ingestion of the pesticide. Likewise, applicators should immediately contact the nearest poison control center or hospital.

Pesticides are to be transported in their original containers and in a manner which prevents contamination from container breakage or spills. They may not be transported with food, feed, or any product that could result in a hazard to humans, animals, or the environment. Equipment contaminated during transportation of pesticides is required to be cleaned and decontaminated before being used for any other purpose.

Empty pesticide containers are to be stored and disposed of in a manner that will not pose a danger to life or the environment. Empty nonreturnable pesticide containers should be rinsed (most labels recommend triple rinsing) with the rinse water added to the pesticide mixture in the sprayer tank. The empty container should be tightly closed after rinsing. Reuse of pesticide containers is prohibited if it would endanger persons, animals, or the environment.

Most labels recommend that an empty container be punctured and disposed of in a sanitary landfill or incinerator. Some pesticides, however, form deadly gases when heated. Therefore, the North Dakota Health Department prohibits the open burning of empty pesticide containers; empty containers may be burned only in an incinerator designed for that purpose. Likewise, empty containers should not be welded or cut with a torch.

Bulk Pesticides³⁹

The term "bulk pesticide" refers to more than 55 gallons of a pesticide which is stored or transported in containers having a capacity of at least 110 gallons or 200 pounds net dry weight.

Any dealer who repackages bulk pesticides or prepares custom mixes in any quantity to be applied by another person is required to have an EPA producer establishment number. This number may be obtained by applying to the Region 8 office of EPA in Denver, Colorado. The EPA producer establishment number and the pesticide label must be attached to bulk pesticide storage tanks and accompany or be attached to mobile bulk pesticide containers. Bulk pesticides are to be stored and transported in accordance with pesticide manufacturers' label requirements, standards established by the United States Department of Transportation and state regulations.

Nonmobile bulk storage containers are required to be above ground and on a site which includes a containment structure having a capacity equal to 110 percent of the single largest storage container. Bulk containers and permanent loading areas also have to be situated in a manner which will prevent contamination of streams and water supplies. Bulk storage tanks are to be locked except when bulk pesticide is being transferred. Transfer of bulk pesticides must be under the control of a repackager holding a valid EPA producer establishment number.

Recordkeeping by Dealers⁴⁰

Every pesticide dealer is required to maintain an accurate and complete record of all purchases and sales of restricted-use pesticides. These

purchase records must include

1. dealer's name and address;
2. pesticide name;
3. volume of pesticide;
4. date pesticide was shipped or received; and
5. person or distributor from whom the pesticide was received

Sales records must specify

1. dealer's name and address and name of the individual making the sale;
2. name, address, license number, and signature of the private or commercial applicator;
3. date of sale;
4. trade name or common name and quantity of pesticide; and
5. intended use by purchaser.

Purchase and sale records are to be kept for three years from date of transaction and, upon request, must be submitted to the Commissioner of Agriculture. The Pesticide Control Board has prepared a form for use by dealers in maintaining the required dealer records.

Recordkeeping by Commercial Applicators⁴¹

A record of all applications of pesticides must be maintained by commercial applicators. These records are required to include

1. name and address of the person for whom the pesticide was applied;
2. location of the land on which the pesticide was applied;
3. pest or pests controlled;
4. time of application, including month, day, year, hour of the day;
5. supplier of the pesticide;
6. trade or common name of the pesticide;

7. direction and estimated velocity of the wind and the estimated outdoor temperature at the time of application (this information is not needed if a bait is used to attract pests or if the pesticide is applied indoors);
8. amount of pesticide used, including
 - (a) pounds or gallons per acre,
 - (b) percentage or pounds of active ingredient,
 - (c) pounds or gallons of tank mix applied per acre;
9. the specific crops and total acreage to which the pesticide was applied;
10. a description of equipment used in application; and
11. the license number of applicator.

This document is to be signed by the applicator.

Records must be completed and available for inspection on the day of pesticide application. These records are to be retained for three years from the date of pesticide application and available to the North Dakota Commissioner of Agriculture upon request.

Unlawful Acts⁴²

The North Dakota legislature and Pesticide Board have compiled a list of acts which violate state law. These include

1. misrepresenting the effects, uses or classification of pesticides;
2. recommending or applying a pesticide inconsistent with the pesticide label or other restrictions prescribed by the Pesticide Board;
3. using faulty or improperly operated equipment to apply pesticides;
4. failing to establish and accurately maintain records required by state law or to report as required;
5. failing to comply with certification or licensing regulations;
6. making false statements about pests found on land during or after an inspection;
7. impersonating a federal, state, county, or city inspector or official;

8. failing to comply with pesticide rules and regulations or any order of the North Dakota Commissioner of Agriculture; and
9. selling or transporting pesticides which (a) fail to comply with state pesticide registration requirements; (b) are improperly packaged, repackaged, or labeled; and (c) are adulterated or misbranded.

There have been few convictions for violating pesticide laws in this state; however, applicators of pesticides in other states have been convicted for violations of laws similar to North Dakota's. For example, a commercial applicator in Wisconsin was convicted and fined for improperly storing empty pesticide containers. The jury in that case decided that a pile of empty, uncovered pesticide containers created a hazard to persons or property, including fish or wildlife, in violation of Wisconsin law. The applicable pesticide law in Wisconsin is nearly identical to the law in North Dakota. Similarly, a commercial applicator in California was fined \$1,000 after he applied pesticides in a manner inconsistent with label instructions.

Accident Reports⁴³

Any person who causes a pesticide accident that results in damage to humans, animals, or the environment is to report the incident to the Commissioner of Agriculture within 24 hours by letter or telephone (701/224-2232). This report will need to indicate

1. name of pesticide;
2. amount of pesticide, tank mix, or both;
3. location of pesticide accident;
4. time of accident, including month, day, year, hour of the day;
5. direction and estimated velocity of wind and estimated temperature at the time of accident, if outdoors; and
6. actions taken to remedy the adverse effects of the accident.

Enforcement⁴⁴

The North Dakota Commissioner of Agriculture is charged with enforcement of pesticide rules and regulations. To accomplish this job, the Commissioner of Agriculture or agent is authorized to enter private property to inspect pesticide equipment, land exposed to pesticides, storage and disposal areas, pesticides, and tank mixes. Use and application of pesticides may be observed, and complaints of injury to humans or land will be investigated. The Commissioner may secure a search warrant if access to land or pesticide records is denied.

The EPA has the power to assume the enforcement of pesticide laws in North Dakota if the Commissioner fails to adequately prosecute violators.⁴⁵ A pesticide applicator, therefore, could be prosecuted separately under both state and federal law for the same wrongful activity.⁴⁶

Penalties for Violations⁴⁷

A dealer or commercial applicator who violates North Dakota pesticide law is guilty of a class A misdemeanor, which is punishable with a fine of up to \$1,000, one year in prison, or both. Violation of state pesticide law by anyone else, including a private applicator is a class B misdemeanor. Conviction of a class B misdemeanor is punishable with a fine of up to \$500, 30 days in prison, or both.

A person found guilty of violating North Dakota pesticide law is subject to a civil penalty in addition to criminal penalties. This penalty (a fine of up to \$5,000 for each violation) may be imposed by a court or the Commissioner of Agriculture.

Liability for Misuse of Pesticides

The likelihood of pesticide damage increases as North Dakota agriculture diversifies and chemicals become more exotic. A farmer or rancher can be held liable for damages resulting from the improper use of pesticides, and several theories for establishing liability have been used successfully in the past. These include negligence, strict liability, trespass, and nuisance. In addition, North Dakota law requires that a report of damages be filed with the Commissioner of Agriculture as a prerequisite to bringing a legal action for pesticide damages. These topics are discussed in the next section.

Reports of Pesticide Accidents or Loss⁴⁸

North Dakota law specifies that any person claiming pesticide damages to property (including growing crops) outside the target area of application must file a loss report with the Commissioner of Agriculture. The loss also needs to be reported to the allegedly responsible applicator and the person who hired the applicator, if that is someone other than the person claiming to have been damaged. These reports are required within 60 days of the occurrence of the loss or within 60 days of the date the claimant knew the loss occurred. The report also is to be filed before 50 percent of the crop is harvested if the alleged damage is to growing crops. The claimant shall allow the damaged property to be inspected by the pesticide applicator, the Commissioner of Agriculture, or their representatives after filing the report. Failure to allow inspection will prevent the person whose property was damaged from being paid for the loss.

Commercial applicators are required to inform their employers (farmers who hire them) of these statutory reporting requirements. An employer has one year (rather than 60 days) from the date of the incident to file the loss report if not informed by the applicator of the reporting requirements.

A loss report filed by a person claiming pesticide damages has to state

1. name and address of claimant;
2. type, kind, and location of property allegedly damaged;
3. date the alleged damage occurred;
4. name of the allegedly responsible applicator; and
5. name of the landowner or occupant who hired the applicator.

The constitutionality of these statutory preconditions to a pesticide damage suit has been upheld by the North Dakota Supreme Court;⁴⁹ that is, a person whose crop is damaged will not be allowed to seek payment for the loss if the required report is not filed with the Commissioner of Agriculture. In a subsequent case, however, a farmer's claim for damages was allowed even though the farmer had plowed under a pesticide-damaged corn crop before filing the report.⁵⁰ The court stated that since the responsible pesticide applicator did inspect the field before the crop was destroyed, the applicator suffered no prejudice or injustice, and the claim should not be dismissed.

Negligence

Negligence is the failure to exercise the degree of care that a reasonable person would exercise under the same circumstances. Most suits for pesticide damages are based on negligence.

Farmers have the right to use the many beneficial dusts and sprays available to protect their growing crops from pests, but they will be liable for damages caused by negligent application.⁵¹ For example, a landowner in Iowa was found liable for damages to a tenant beekeeper after spraying for grasshoppers in an area near the beekeeper's hives.⁵² The court stated that when the landowner applied chlordane to land adjoining the beekeeper's plot, damages were foreseeable, and the landowner should have warned the beekeeper. Conversely, a beekeeper could be contributorily negligent if he had been warned of the danger but made no effort to move or otherwise protect the bees.⁵³ A person who is contributorily negligent (the beekeeper, in this example) will not be entitled to payment for losses even though the loss is due to another person's negligent act.

A Kansas farmer who scattered poison in his alfalfa fields to prevent an infestation of grasshoppers was found to be negligent after his neighbor's cows became ill.⁵⁴ The cows had reached over the pasture fence and consumed some of the applied insecticide. The applicator's failure to follow label instructions and his failure to warn the owner of the cattle in the neighboring pasture led to the finding of negligence.

A Rhode Island farmer sprayed a pesticide on his trees but failed to warn his dairy farmer neighbor of the potential danger to the cows in the adjoining pasture.⁵⁵ The applicator's failure to warn and his application of

pesticides on a windy day were sufficient to find the applicator liable for negligence damages.

Most negligence cases involve the aerial application of pesticides. In South Dakota, 2-4D was aeriaily applied to a grain field while there was a "stiff breeze."⁵⁶ The applicator was found to be negligent and therefore liable for damages to a garden and an established shelter belt.

An aerial applicator in Iowa was found to be negligent when traces of pesticide were found in a stock pond near a corn field that had been sprayed.⁵⁷ The negligent applicator was liable for loss of the use of the pond and pasture for part of the grazing season.

The likelihood of liability for negligent pesticide application may be reduced if the following safeguards are followed:⁵⁸

1. The pesticide applicator should read and understand all label directions and precautions.
2. The output of the application equipment should be checked frequently to prevent excessive application.
3. The pesticide applicator should wear or be furnished with protective clothing and equipment prescribed by the label.
4. Pesticides should be applied at times or intervals specified on the label. Especially important are the specified intervals between the treatment of crops and harvesting, and between the last treatment of animals and slaughter.
5. No more than the recommended amount of pesticide should be applied.
6. Pesticides should be applied so that they will not drift onto or otherwise contaminate nearby crops, pastures, prairies, livestock, streams, ponds, or other sources of water.
7. Insecticides should not be applied when honey bees are working in the crops being treated.
8. Advance notice of the hazard should be given whenever application of pesticides may potentially harm a nearby landowner, tenant, or beekeeper.

Liability for Acts of Independent Contractors

An employer generally is not liable for damages arising from negligent acts of an independent contractor, such as a commercial pesticide applicator. However, if an activity, such as the aerial application of pesticides, is considered to be inherently dangerous, the employer will be liable for damages caused by a negligent independent contractor. Numerous state courts have

accepted the view that aerial pesticide application is inherently dangerous and that the duty of care is nondelegable.⁵⁹ Thus, a landowner cannot insulate himself from liability by hiring a custom applicator. For example, the Oregon Supreme Court stated that the aerial application of pesticides is an activity capable of inflicting harm upon neighboring crops in spite of the utmost care of the applicator. Since such damage is foreseeable, a landowner who hires an independent contractor is liable for any resulting harm.⁶⁰

The Wisconsin Supreme Court has decided that aerial pesticide application is not an inherently dangerous activity.⁶¹ The court stated that the value of pesticides to the people of Wisconsin outweighs the potential for harm.

The North Dakota Supreme Court has never stated that pesticide application is an inherently dangerous activity. In one case, however, the court did mention that a claim for damages caused by the negligent application of pesticides could be brought against the applicator, the landowner, or both.⁶² This suggests that a landowner in North Dakota could be liable for damages resulting from the negligent acts of a commercial pesticide applicator.

A farmer should employ only licensed applicators in order to decrease the risk of liability for the negligent acts of a custom applicator. Farmers also need to be aware of the coverage provided by their liability insurance policy. The risk of liability may be further reduced by entering into an indemnification agreement with the custom applicator in which the applicator agrees to indemnify the farmer if he (the farmer) is determined to be liable for damages caused by custom applied pesticides.

Strict Liability

The theory of strict liability provides that a person who performs an "abnormally dangerous" activity will be held liable for harm to another even if extreme care is used to prevent the harm.

Several factors are considered when determining whether an activity is abnormally dangerous.⁶³ An activity is not considered abnormally dangerous if it is a common occurrence in a community or its benefits to the community outweigh the potential for harm. Consequently, applicators of pesticides in North Dakota may never be subject to the strict liability rule because the benefit agricultural chemicals provide the state's economy outweighs the potential harm.

Trespass

The theory of trespass has been used to recover damages caused by the application of pesticides in some cases where negligence could not be proven. Trespass is an invasion of one's exclusive possession of land. The plaintiff/landowner need not show that the applicator was negligent in a trespass action. Instead, the plaintiff must establish that particles sprayed

by the applicator entered the plaintiff's land. The trespasser will be liable for resulting harm once trespass is proven. A farmer who hires a commercial applicator will not be liable for the trespass of the applicator, however.⁶⁴

Under the modern view of trespass, there will be liability for unintentional trespass only when it involves negligence or an inherently dangerous activity.⁶⁵ The specific issue of liability due to trespass by pesticide applicators has not been addressed in North Dakota.

Nuisance

Nuisance is anything which interferes with the use and enjoyment of one's property or which makes the ordinary use or occupation of the property uncomfortable. It extends to everything that endangers life or health, offends the senses, or violates the laws of decency. Nuisance usually involves continuous or repeated acts.

The application of nuisance liability to agricultural operations is severely limited by North Dakota law.⁶⁶ The statute provides that an agricultural operation in existence for a year or more, which was not a nuisance when it began, cannot later be considered a nuisance unless negligence is involved. This statute does not, however, apply to damages which may have been caused by the pollution of a body of water by pesticides.

Nuisance has seldom been used in cases involving agricultural pesticides. However, the California Supreme Court applied nuisance theory in a decision involving the death of bees killed by pesticide drift.⁶⁷ The insecticide drifted from the field to the hives, one-half mile away. The pesticide applicator and the farmer who hired him were found liable for damages in the death of 56 hives of bees.

Nuisance theory also involves comparing the harms to the benefits of the questioned activity. In an agricultural state, such as North Dakota, the economic benefits to the public from the use of pesticides are great. Pesticide drift might be found to be a reasonable and acceptable consequence and therefore not considered a nuisance.⁶⁸

Insurance

Most general farm liability policies cover damage resulting from ground application of pesticides by the insured farmer.⁶⁹ Likewise, special policies generally are available to custom applicators to protect against loss caused by ground application of pesticides. These policies, however, often provide limited or no coverage for damage caused by aerial application of pesticides by the farmer or custom applicator.⁷⁰ Alternatively, insurance policies covering aerial pesticide application are relatively expensive. Some custom applicators have decided to pay the costs of damage claims rather than the insurance premiums.

If an uninsured custom applicator is found to be negligent but is unable to pay the amount of damages assessed, the contracting farmer may be required to pay as explained in a previous section.

Conclusion

The federal and state governments have recognized both the importance of pesticides to agricultural production and the hazards of pesticides to humans and the environment. Serious problems with the law and neighbors can be avoided by following these basic rules when working with pesticides:

1. Be properly certified.
2. Read, understand, and follow label instructions.
3. Carefully consider your health, the health of others, and the environment when working with pesticides.

Persons sustaining pesticide damage or injury must comply with the reporting requirements that are prerequisite to a suit for pesticide damages. An attorney should be consulted so that proper procedures are followed and legal rights are protected.

End Notes

1. 2 Grad, Treatise on Environmental Law, section 7.02[2][b].
2. Insecticide Act of April 26, 1910, 36 Stat. 331.
3. PL 86-139, Ch. 125, 61 Stat. 163 (1947), codified as 7 USC section et. seq.
4. PL 92-516, 86 Stat. 975 (1972), codified as 7 USC section 136 et. seq.
5. 7 USC section 136(u).
6. 7 USC section 136a(a).
7. 7 USC section 136a(c)(1) et. seq.
8. 7 USC section 136a(c)(4).
9. 7 USC section 136a(c)(5)(A) et. seq.
10. 21 USC section 301 et. seq.
11. 7 USC section 136d(a)(2).
12. 7 USC section 136d(b)(1).
13. 7 USC section 136a(d)(1)(A).
14. 7 USC section 136a(d)(1)(B).
15. 7 USC section 136a(d)(1)(C).
16. 7 USC section 136a(d)(1)(C)(i) et. seq.
17. North Dakota Pesticide Certification Manual, Cooperative Extension Service, NDSU, Fargo, ND; EB-43 (October 1985).
18. 7 USC section 136a(d)(1)(C).
19. 7 USC section 136(e)(2).
20. 7 USC section 136(e)(3).
21. 7 USC section 136b(a)(2).
22. 40 CFR section 170.1 et. seq.
23. 40 CFR section 170.5(a).
24. Atrazine 80W label.

25. 7 USC section 1361(a)(1) et. seq.
26. 7 USC section 1361(a)(4).
27. 7 USC section 1361(b)(1) et. seq.
28. 7 USC section 136w-1 et. seq.
29. NDCC section 4-35-04 (1975).
30. See Article 60-03, NDAC.
31. NDCC section 19-18-04 (1985 Supp.).
32. NDCC section 4-35-19 (1975).
33. NDAC section 60-03-01-05(1).
34. NDAC section 60-03-02-05(2).
35. NDAC section 60-03-01-05(3).
36. 40 CFR sections 171.3 to 171.6.
37. 40 CFR section 171.5.
38. NDAC section 60-03-01-06.
39. NDAC section 60-03-01-10.
40. NDAC section 60-03-01-07(1).
41. NDAC section 60-03-01-07(2).
42. NDAC section 60-03-01-08, NDCC section 4-35-15(1975) and NDCC section 19-18-03 (1985 Supp.).
43. NDAC section 60-03-01-09.
44. NDCC section 4-35-24 (1985 Supp.).
45. 7 USC section 136w-2.
46. Rinaldi v. U.S., 434 U.S. 22, 98 S.Ct. 81 (1977).
47. NDCC section 4-35-23 (1985 Supp.).
48. NDCC sections 4-35-21, 4-35-21.1, and 4-35-25.2 (1985 Supp.).
49. Schroeder Aviation, Inc. v. DeFehr, 283 N.W.2d 147 (ND 1979).
50. Wills v. Schroeder Aviation, Inc., 390 N.W.2d 544 (ND 1986).

51. Lawler v. Skelton, 130 So. 2d 505, 569 (Miss. 1961). See, also, NDCC section 63-01.1-01 (1985) (Farmers and ranchers in North Dakota not only have a right but they also have a duty to use pesticides. The duty to control the spread of noxious weeds is imposed on every landowner and tenant by North Dakota law.).
52. Brown v. Sioux City, 49 N.W.2d 853, 856 (Iowa 1951).
53. Link v. Spezia, 213 P.2d 47, 53 (Calif. 1949).
54. Underhill v. Motes, 158 Kan. 173, 146 P.2d 374 (1944).
55. Cole v. New England Tree Expert Co., 163 A. 742 (RI 1933).
56. Weiting v. Ball Air Spray, Inc., 173 N.W.2d 272 (SD 1969).
57. Nizzi v. Laverty Sprayers, Inc., 143 N.W.2d 312 (Iowa 1966).
58. Harl, Agricultural Law Treatise, section 15.01[3][a], note 47.
59. Loe v. Lenhardt, 362 P.2d 312, 315 (Oreg. 1961).
60. Id. at 318.
61. Bennett v. Larsen Co., 48 N.W.2d 540, 553 (Wisc. 1984).
62. Christensen v. Midstate Aerial Applicators Corp., 166 N.W.2d 386, 387 (ND 1969).
63. Restatement, Second, Torts section 520.
64. Loe v. Lenhardt, 362 P.2d 312, 315 (Ureg. 1962).
65. Restatement, Second, Torts sections 158 and 165.
66. NDCC Article 42-04 (1983).
67. Miles v. Arena & Co., 7 P.2d 1260 (Calif. 1937).
68. Chiarella, Pesticide Spraying: Theories for Private Recovery, 26 New Hampshire Bar Journal 25, 28 (1984).
69. Telephone conversation with Tod Mittelsteadt, Farmers Union Insurance Agent, Grand Forks, January 26, 1987.
70. The North Dakota Supreme Court has decided in one case that a comprehensive farm liability policy provided liability coverage for damage caused by the insured farmer's aerial application of pesticides. The court stated that the farmer had reasonably expected the insurance to cover liability arising out of his normal farming operations, including aerial pesticide application, unless exclusions were called to his attention. The language which excluded aerial pesticide application

from coverage was ambiguous and confusing. Farmers should not depend on this court decision for coverage by their own liability policies under the doctrine of reasonable expectations because every fact situation is different and the wording of policy exclusions varies. Mills v. Agrichemical Aviation Inc., 250 N.W.2d 663 (ND 1977).