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# Laws Governing Use and Impact of Agricultural Chemicals: Common Law Standards of Conduct and Theories of Liability<sup>1</sup>

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The common law of torts imposes society-wide standards of behavior designed to deter wrongful, negligent, or unreasonably dangerous conduct and compensate victims of such conduct. A tort is an act or omission that is blameworthy because the act or omission is either careless, shortsighted, unreasonably dangerous, or against a law or a public policy.<sup>1</sup> A tort is considered a private or civil wrong or injury. Unlike statutes and regulations, which often provide specific, technical guidelines on how agricultural chemicals should be used, the common law is much broader, addressing the reasonableness of all aspects of the use of agricultural chemicals. This section is designed to familiarize the reader with the basics of common law liability for misuse of agricultural chemicals.

## THE LEGAL PROCESS

A person injured by acts or omissions of another must file a lawsuit in order to be awarded compensation by a court. The person filing such a lawsuit is called the plaintiff. A plaintiff must do

several things before a court will consider his/her lawsuit. First, s/he must allege that the person being sued, the defendant, harmed him/her in some manner. The lawsuit must also state a principle of law and allege that the defendant violated that principle. The principle may be one or more of the common law theories of liability that will be discussed in greater depth below, or may be a statute which states that the defendant's conduct was unlawful.<sup>2</sup> Additionally, the lawsuit must allege facts, which if proven, would demonstrate that the defendant acted wrongful or unlawfully, and that the plaintiff suffered harm as a result. The plaintiff will win if s/he can convince the judge or the jury of the truth of these essential facts. In civil cases the standard of proof is whether the facts necessary to support a recovery are proven by a preponderance of the evidence presented in court.

Following are the common law theories of liability most relevant to users of agricultural chemicals. The statements below are generalizations about the law, and the reader should understand that the law may differ from state to state. Any questions about the

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law and any doubts about how the law affects the reader's operation should be addressed to an attorney.

## NEGLIGENCE

Negligence is the theory most widely used to impose liability for unintentional acts. Any unintentional act or omission that creates an unreasonable risk of harm to another constitutes negligence. If a negligent act results in harm to another, a court will award damages to the injured party.

### Elements of the Claim

The plaintiff must prove four elements to prevail in a negligence lawsuit: duty, breach, causation, and damages.

#### Duty

First, the plaintiff must show the defendant owes a duty of care toward the plaintiff. A duty of care exists whenever the defendant ought to foresee that there is a risk of harm to another person or to property. For example, if a reasonable person could foresee that the use of an agricultural chemical could result in damage to a neighbor's crops, then the user has a duty to avoid the risk by taking all reasonable precautions.

#### Breach

When a duty of care exists, the defendant must act reasonably in light of the foreseeable risk. If the defendant does not act reasonably, the duty of care is breached. The test to determine whether the defendant's actions were a breach of an existing duty is to ask what a reasonable, prudent person would have done under like circumstances. This determination is made by a jury, or if the case is tried without a jury, by the judge. For example, a defendant applied an herbicide under windy conditions. The resultant drift has caused damage to the neighbor's crops. If a reasonable person under similar conditions would not have applied the herbicide, then the defendant has breached his/her duty of care by using the chemical.

The reasonable person standard becomes more strict if the defendant has special expertise. The duty of care increases with the level of expertise. For example, a plant pathologist recommending a

pesticide might be held to the standard of care of a reasonably prudent plant pathologist of similar training and in a similar locality. The determination of how a similar expert might act under the circumstances is still made by the jury or the judge; however, in this instance, the jury is aided by expert testimony from others in the field.

#### Cause

To recover damages from the defendant in a negligence action, the plaintiff must have suffered some actual injury to person or property that was caused by the defendant's breach of the duty to exercise reasonable care. Often causation is a simple determination; for example, when an aerial applicator is observed treating the wrong field. The more remote the harm from the negligent act, the more difficult it is to prove causation. Cases that involve tracing chemical pollutants to their source often present highly technical causation problems.

Another causation issue arises when there is more than one contributing cause to an injury. The key to whether liability will be imposed in these circumstances is foreseeability. If harm is readily foreseeable from the defendant's act, but other intervening acts contribute to the injury, the defendant is still liable if the intervening acts are foreseeable. However, the original act must still directly contribute to the injury. For example, if a farmer knows or reasonably should be expected to know that a certain chemical is unreasonably dangerous to neighboring crops and is likely to drift if applied by air, the farmer will probably not be relieved of liability if a contractor negligently applied the pesticide, compounding the damage. The damage was foreseeable to the farmer. In this situation, the plaintiff could sue both the farmer and the contractor for their respective responsibility for the damage, or the plaintiff could sue either one individually for the entire amount.<sup>3</sup>

#### Damages

Finally, the plaintiff must prove that actual damages occurred as a result of the defendant's acts or omissions. In other words, if someone's admittedly negligent behavior harms no one, then there is no claim for negligence. These concepts of duty of care, breach of duty, causation, and damages are developed further in the publications *Agricultural Chemical Use and Liability for Water Pollution* and

*Liability for Damage Caused by Agricultural Chemical Drift.***Case Example**

In Gonzalez v. Virginia-Carolina Chemical Company, 239 F.Supp. 567 (D. S.C. 1965), a pilot was injured in an airplane crash while applying a chemical dust-defoliant. The plaintiff was a pre-medical student who had two years of application experience. He followed all the recommended procedures by the company. On his third trip, he was overcome by the odor of the defoliant and its toxic ingredients. Before he could return to the airport, he lost control of the plane and hit a wire causing the plane to slow down, stall, and dive nose first into the ground. Upon impact, the plane flipped and threw the pesticide compound onto the plaintiff. There was nothing on the label of the defoliant that said it was poisonous. The doctor at the hospital could not find the product listed on any record of poisons, but he found the ingredients poisonous.

In this case, the court found that the manufacturer owed a **duty** to the plaintiff to make proper tests, give adequate warning, and, in general, protect the public from potential dangers arising out of the manufacture, sale, and use of the pesticide. The **breach** occurred when the manufacturer failed to do all the above. A reasonable manufacturer would have done so. The manufacturer's breach was the proximate **cause** of the plaintiff's injuries. The toxicity of the chemical caused the plaintiff to lose control of the plane and consequently crash. The plaintiff suffered actual damages as a result of the defendant's negligence, and was awarded \$40,000 in damages.

This case law example also involved other issues of negligence such as negligence per se and strict liability which is discussed in the following sections. This case is an example of how a defendant can be held liable on different legal theories. It is important to note that unless there is a federal or state statute that explicitly prohibits common law actions, an individual can sue under common law negligence.

**NEGLIGENCE PER SE**

In a case where an action that results in a lawsuit also violates a statute, the court will usually regard the violation alone as evidence of negligence. This doctrine is known as negligence per se or statutory negligence because the action is a violation of the

statute. Negligence per se is applied, however, only if the damage complained of in the lawsuit is of the type intended to be prevented by the statute, and the plaintiff is a member of the class of persons intended to be protected.

The usual rationale for applying the doctrine of negligence per se is that courts will view the statute as setting a standard of conduct for those affected, and deviation from the standard is viewed as a negligent act. Thus, the doctrine of negligence per se relieves the plaintiff of having to offer specific evidence of negligence if a violation of the statute can be shown. *For example*, a statute makes it unlawful to dispose of pesticide containers without triple rinsing them first. It does not matter if the individual charged with violating the statute can demonstrate that thousands of others have disposed of chemicals without triple rinsing. If a defendant has violated the statute, then s/he is negligent per se.

The converse, however, is not true. Evidence of compliance with a statute or evidence that no laws were broken is not proof that the defendant was not negligent, unless the statute so provides. Thus, if a person violates a statute, the person will be deemed negligent per se, whereas if a person follows a statute, the person may still be deemed negligent under common law. In the heavily regulated field of agricultural chemical use, farmers and applicators seeking to avoid liability must be certain that no statutes are being violated. Further, they must not believe that compliance with regulations relieves them from taking additional precautionary steps when warranted by the circumstances.

There are limitations on negligence per se. One such limitation is whether the party asserting negligence per se is a member of a class that is meant to be protected. *For example*, Congress enacted the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) with the intention of protecting the public as a whole. Thus an individual could not bring a lawsuit under FIFRA and under the theory of negligence per se because FIFRA does not create a private cause of action.

**Defenses**

Several defenses are available to a defendant in a negligence suit. In most cases, if the defendant can establish that the plaintiff was also negligent and that the plaintiff's own negligence contributed to the plaintiff's harm, then the plaintiff's award will be

reduced according to the degree of the plaintiff's negligence. This doctrine is known as comparative negligence.

Similarly, if the defendant can show that a third person's negligence contributed to the plaintiff's injury, the defendant should seek to join the third person in the lawsuit. In most cases, the original defendant's liability will be reduced by the percentage by which the third person's negligence contributed to the plaintiff's harm.

The defense of assumption of the risk is also available in some states. This doctrine permits the defendant to show that the plaintiff knew of the risks and voluntarily went ahead with the act. An example might be where a seller of a pesticide application device can establish that the plaintiff knew and understood the risks inherent in the device, yet used that device causing injury to the plaintiff or others.

### Damages

Those injured by negligent acts are entitled to recover not only actual damages (the cost of the harm actually suffered) but also damages for lost wages, pain and suffering, the loss of the companionship of a spouse, etc. Punitive damages, or damages designed to punish, are also available if the defendant acted willfully or in reckless disregard of the plaintiff's interests.

### NEGLIGENCE AS AN ELEMENT OF OTHER CAUSES OF ACTION

Negligence is also an element in other types of lawsuits. For example, court will often say that the plaintiff must prove negligence in a unintentional trespass action. This type of negligence is discussed below.

### Respondeat Superior

The doctrine of respondeat superior holds an employer liable for the torts (civil wrongs) of employees conducted within the scope of employment.<sup>4</sup> Generally, an employee's activities are within the scope of employment if the actions are of the type which the employee was hired to perform, occur when and where the employee was supposed to be working, and the purpose of which was to benefit the employer.<sup>5</sup> An important exception to this doctrine is that as a general rule, the employer is not responsible for the torts of an independent contractor.

However, an exception to the exception is that the person who hires an independent contractor to perform an inherently dangerous activity may still be liable. Numerous courts have held that aerial application of pesticides is an "inherently dangerous" activity.<sup>6</sup>

### Strict Liability

Strict liability imposes the highest standard of care, holding persons liable for damages resulting from their actions without proof of fault. Unlike negligence, in a strict liability suit, courts will not consider whether the defendant acted reasonably. They will only consider whether the activity caused the harm complained of. The basis of strict liability is a policy decision by the courts or by the legislature that the person conducting the dangerous activity should be responsible for harm caused to innocent persons by that activity, regardless of fault.

Courts of most states will apply strict liability if the activity being conducted by the defendant is "abnormally dangerous" or "ultra hazardous." The most widely accepted definition of an "abnormally dangerous" activity is that of the American Law Institute's Restatement (Second) of Torts. The Restatement sets forth a multi-factor test for courts to apply:

- (a) existence of a high degree of risk of some harm to the person, land, or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.<sup>7</sup>

The common law of the various states differs with respect to which activities are considered abnormally dangerous and subject to strict liability. For the most part, generators, storers, and transporters of hazardous wastes are strictly liable for injury resulting from handling the waste. In Oklahoma, Washington, and Oregon, aerial application of pesticides and herbicides is subject to strict liability. In Louisiana,

courts will apply strict liability to both aerial and ground application.

An important limitation on the doctrine of strict liability is that the defendant is liable only for injury caused by those aspects of the activity that are abnormally dangerous. Therefore, a person engaged in an abnormally dangerous activity will not be strictly liable for any and all harm resulting from the operation, but only those injuries caused by the danger inherent in the activity. *For example*, a transporter of hazardous waste would not be held strictly liable for striking a pedestrian, but might be held strictly liable for damage caused by the spill.

Strict liability may be imposed in other ways. The legislature, in regulating activity, may decide that strict liability is warranted in its enforcement. For example, some state ground water pollution regulations provide that a polluter is subject to penalties whether or not the polluter was at fault in any way. In a lawsuit for damages arising from the same incident, the court may look at the violation of the regulation as negligence per se, and in effect hold the polluter strictly liable.<sup>8</sup> Strict liability can also be imposed in nuisance and trespass cases, as discussed below.

## **TRESPASS**

Trespass has traditionally been the most widely used theory for recovery for damage to property. Trespass is an unauthorized entry onto the property of another by any physical, tangible agency. Agency can include fine particulate matter, liquid droplets, and even gases. The courts have divided trespass into two categories, intentional and unintentional.

### **Intentional Trespass**

If the authorized entry is intentional, the defendant is liable regardless of whether the trespass actually caused any harm and almost regardless of the defendant's reason or justification for the entry. The plaintiff is entitled to at least nominal monetary damages for intentional trespass and may obtain an injunction against any threatened or continuing trespass.

Agricultural chemical use could result in liability for trespass if the chemicals, their residues, or containers become deposited on another's land through dumping, drift, runoff, incineration, or other

means. To constitute intentional trespass, it is not necessary for the defendant to intend that the chemical enter onto the plaintiff's land, only that the actions that result in the trespass are intentional. For example, intentional disposal of chemicals or their containers in a manner that eventually results in trespass constitutes intentional trespass.

### **Unintentional Trespass**

If the trespass is unintentional, the defendant is liable only for harm caused by negligent or reckless acts, or in some cases by abnormally dangerous activities. If the defendant is involved in an abnormally dangerous activity, the courts of many states will apply strict liability and the plaintiff will not be required to prove negligence in order to recover.<sup>9</sup>

Examples of unintentional trespass involving agricultural chemicals would be when theft, vandalism, or a natural disaster cause chemicals to become deposited on another's land. In these cases, the defendant will be liable only if he failed to take reasonable precautions to guard against such an occurrence. However, if the courts of the state have characterized pesticide handling as an abnormally dangerous activity, or a state or federal statute has created strict liability, the defendant would be liable for the trespass regardless of whether the defendant was at fault in any way.

## **NUISANCE**

While trespass involves violation of another's property rights, nuisance consists of use of one's own property in a manner that causes injury to others. Nuisance has traditionally been the most widely used theory in environmental pollution actions. Nuisances are categorized as either public or private, depending on whether the nuisance affects the rights of the public or the rights of an individual exclusively. The practical difference between public and private nuisances is that public nuisance actions can be brought by a public official on behalf of the public at large, and that certain defenses, such as delay on the part of the plaintiff in bringing the action, are not available to the defendant.<sup>10</sup> In many states, certain types of public nuisances are considered criminal acts.

An example of a public nuisance involving agricultural chemicals would be where storage, use, or disposal has a significant effect upon the water quality of a public water source, thereby interfering with the

public right to safe drinking water. A public official or individuals joined in a class action would be able to obtain an injunction against the activity creating the nuisance. An adjacent landowner may recover damages from the defendant if, in addition to the interference with the landowner's right to safe drinking water, the landowner suffered the loss of livestock from the defendant's actions.

### **Elements of a Nuisance Action**

A private nuisance is a substantial interference with another's use and enjoyment of land. No physical invasion is required as in trespass. All that is required in nuisance is a substantial interference with the possessor's enjoyment of land, such as exposing the landowner to undue noise, unpleasant odors, or an unsightly appearance. To constitute private nuisance, the invasion must be wrongful. An invasion may be wrongful in two ways. First, it may be intentional and unreasonable. The unreasonable element, absent in the trespass action, allows the courts to balance the social value of the offending activity against injury to the plaintiff. Second, the invasion may be wrongful because it results from negligence, recklessness, or abnormally dangerous activities. However, in many states the requirement that the nuisance must be wrongful is not strictly followed. Many courts will find a nuisance from the mere fact that damage occurred.

A possessor of land who has suffered a substantial interference with his use and enjoyment may seek to obtain both monetary damages and an injunction against the defendant. In determining a remedy, the court may consider both the value of the offending activity to society and the gravity of the interest that have been invaded. Because this balancing test allows a court to consider the worth of the defendant's activity, a plaintiff will normally prefer to bring a trespass action. Nuisance actions are usually brought in cases where a plaintiff cannot establish a physical trespass.

*For example*, if improper pesticide use resulted in potentially dangerous or offensive odors being carried onto adjacent property, the possessor could sue in trespass charging that the odors, which consist of molecules of the odor-producing substance, constitute a physical entry. If there is any doubt as to whether the court will consider the odor a physical entry, then the plaintiff will also sue for a private nuisance, charging that the odors constitute an invasion of the plaintiff's right to use and enjoyment of the land. In

a nuisance case, the court will also weigh the reasonableness of the defendant's spraying. However, this rule will differ if the court determines the defendant is engaged in an abnormally dangerous activity or that the condition causing the nuisance is abnormally dangerous.<sup>11</sup>

### **RIGHT-TO-FARM LAWS**

In almost all states,<sup>12</sup> limited protection from nuisance actions is given to farmers by state "right-to-farm" statutes. The effect of most of these statutes is to allow farmers to assert as a defense to a nuisance action the fact that the farm was in operation and the conditions complained of were in existence prior to the plaintiff's coming to the area. This defense, however, is limited. Most right-to-farm statutes have no effect on the enforceability of federal or state anti-pollution laws, or are conditional on compliance with those laws. In states where the defense is conditional on compliance with anti-pollution laws, the existence of a law forbidding air or water pollution will render the defense inapplicable in cases where the nuisance consists of air or water pollution. Further, the defense is limited to nuisance actions and has no effect on other causes of action such as trespass or negligence. It is important to recognize that the statutes are directed primarily as a defense to complaints about odor, noise, and other common annoyances resulting from the conduct of agricultural activities and have little or no application in cases where actual harm or pollution is caused by agricultural chemicals. The reason for this is that water and chemical pollution present the possibility of broad public endangerment.

### **INJUNCTIONS AND OTHER FORMS OF EQUITABLE RELIEF**

Equitable relief means a remedy imposed by a court to compensate a plaintiff when money damages are inappropriate or insufficient. Usually equitable relief will consist of an order to the defendant to stop an activity, an injunction, although it may also consist of an order to undertake an activity to correct or compensate for a previous harm. Equitable relief is most common in nuisance and trespass actions. Before a court will grant equitable relief, it must determine that money damages are inadequate or unavailable to compensate the plaintiff for the type of harm suffered. Situations where money damages may be inadequate include when the nuisance will cause irreparable harm if continued, or if there is cause to believe that the harm will continue or reoccur after

the award of money damages, resulting in future lawsuits.

In order for a court to grant injunctive relief, the plaintiff must show that the defendant's activity is unreasonable at the time and place that the injunction is sought. In making this determination, a court will consider the hardship that granting an injunction would have on the defendant, along with broader societal issues, such as the value of the activity to the community or the harm posed by the activity to the community.<sup>13</sup> For example, an ongoing agricultural operation that pollutes ground water might be shut down by a court if it finds that the harm that is caused outweighs the potential hardships on the defendant.

Factors that could be considered in weighing the hardships on the defendant include whether the land has value for other uses and the extent of the defendant's investment. However, a court will not balance the hardships if it determines that the defendant's actions were willful or against an assertion of right by the plaintiff. An example of an action against an assertion of right would be where the plaintiff advises the defendant that the defendant's activities must not trespass on the plaintiff's property, yet the trespass nevertheless occurs.

### **STRICT PRODUCTS LIABILITY**

Other causes of action exist to enable a person harmed by an agricultural chemical to recover from the manufacturer, distributor, or seller of the product. Although a manufacturer can always be sued for negligent acts, American courts, in order to protect consumers, have adopted other theories allowing recovery for defective or ineffective products without the need to demonstrate a specific negligent act. The doctrine of strict products liability is the most widely used.

The courts of most states have adopted the rule of strict product liability set forth by the American Law Institute's Restatement (Second) of Torts.<sup>14</sup> Under the Restatement, if a product is "defective" and "unreasonably dangerous," a party injured by the product can recover without showing proof of negligence. In actions for damages where a farm chemical has caused physical harm, the case often turns on the meaning of the terms "defective" and "unreasonably dangerous." The comments to the Restatement state that a product is defective if it is

one that is "unreasonably dangerous" to the consumer at the time it leaves the seller's hands.<sup>15</sup> The comments also say that in order to prevent the product from being unreasonably dangerous, "the seller may be required to give directions or a warning on the container as to its use."<sup>16</sup> Furthermore, the comments state that manufacturers, distributors, or sellers have a duty to warn of dangerous ingredients whose danger is not generally known if they know or reasonably should know of its presence in the product and of its dangerous characteristics.<sup>17</sup>

The theory of strict products liability is similar to the theory of negligence in that there is a duty to warn against foreseeable dangers and the injured party has the burden of proving that the seller was, in effect, negligent in failing to warn. The practical difference is that the defense that the user of an agricultural chemical was also negligent is not available to the defendant. The theory of strict products liability has often been used in cases where agricultural chemicals damage crops or are ineffective, causing the crops to be lost or reduced.

### **BREACH OF WARRANTY**

An alternative to strict products liability in cases where agricultural chemicals are harmful to crops or ineffective is an action for breach of warranty. An action for breach of warranty is based on the failure of a product to perform as promised. As such, it is an action for breach of contract, rather than an action based on a civil wrong or "tort," although a wrongful act may be involved. Recovery is limited to damage to the product itself, lost profit, and consequential economic losses arising from the failure of the product to perform. Further, every person in the marketing chain, from the manufacturer to the ultimate seller, is liable, whether or not negligence is proven against them.

### **DEFINITIONS, ABBREVIATIONS AND ACRONYMS**

#### **Citation Definitions**

Et seq.: and the following

Id.: the same; used to indicate a reference previously made.

Infra: within; used to indicate a reference made in a later part of the paper.

Supra: above; used to indicate a reference made in a previous part of the paper.

## Definitions

**Actual Damages** -- The amount awarded to a plaintiff in compensation of the plaintiff's actual and real loss or injury.

**Common Law** -- It is a body of law that develops and derives through judicial decisions, as distinguished from legislative enactments.

**Enjoin** -- To require a person, by writ of injunction, to perform, or to abstain or desist from, some act.

**Injunctions** -- A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury.

**Inherently dangerous** -- Danger inhering in an instrumentality or condition itself at all times, so as to require special precautions to prevent injury; not danger arising from mere casual or collateral negligence of others with respect to under particular circumstances.

**Nominal Damages** -- The trifling sum awarded to a plaintiff in an action, where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his rights or a breach of the defendant's duty.

**Punitive Damages** -- Damages that are above and beyond that which would compensate the plaintiff for his loss. They are based on the public policy of punishing a defendant who acted willfully, maliciously, or fraudulently.

**Statutory Law** -- The body of law created by acts of the legislature in contrast to constitutional and common law.

Definitions are taken from *Black's Law Dictionary* 1990 edition.

## Abbreviations

C.F.R.: Code of Federal Regulations

U.S.C.: United States Code

1. The general discussion of the law of torts that follows can be found in greater detail in Prosser and Keeton, *Torts*, 5th ed. (1984). Because most of the propositions of law contained in this section are so generally accepted, authority will not be cited unless necessary.

2. See *infra* text this document.

## Acronym List

BMP - Best Management Practices  
 CERCLA - Comprehensive Environmental Response, Compensation, and Liability Act  
 CZMA - Coastal Zone Management Act  
 DOT - Department of Transportation  
 EPA - Environmental Protection Agency  
 ESA - Endangered Species Act  
 FAA - Federal Aviation Administration  
 FACT - Food, Agriculture, Conservation, and Trade Act  
 FDA - Food and Drug Administration  
 FFDCA - Federal Food, Drug, and Cosmetic Act  
 FIFRA - Federal Insecticide, Fungicide, and Rodenticide Act  
 IPM - Integrated Pest Management  
 MCL - Maximum Contaminant Level  
 MCLG - Maximum Contaminant Level Goals  
 NPDES - National Pollution Discharge Elimination System  
 OSHA - Occupational Safety and Health Act  
 PPE - Personal Protective Equipment  
 RCRA - Resource Conservation and Recovery Act  
 RCWP - Rural Clean Water Program  
 REI - Restricted-Entry Interval  
 SARA - Superfund Amendments and Reauthorization Act  
 TPQ - Threshold Planning Quantity  
 USDA - United States Department of Agriculture  
 WPS - Worker Protection Standard

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3. See Michael T. Olexa, Agricultural Chemical Use and Liability for Water Pollution, notes 13-16 and accompanying text.
4. See Prosser and Keeton, supra note 1, at 502.
5. Id.
6. Id. at 512-15. See also Michael T. Olexa, Liability for Damage Caused by Agricultural Chemical Drift, notes 11-29 and accompanying text.
7. American Law Institute, Restatement (Second) of Torts §520.
8. See Prosser and Keeton, supra note 1, at 227.
9. See Loe v. Lenhardt, 362 P.2d 312, 316 (Or. 1961).
10. 1 William H. Rogers, Jr., Environmental Law: Air and Water 34 (1986).
11. Restatement (Second) of Torts, supra note 7, §822, which is followed in many jurisdictions, states that: "One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either:
  - (a) intentional and unreasonable, or
  - (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.
12. The only state that does not have a right-to-farm statute is South Dakota.
13. See Prosser and Keeton, supra note 1, at 631-32.
14. Restatement (Second) of Torts, supra note 7, §402A. See also American Law Institute, Restatement (Third) of Torts: Products Liability, Tentative Draft No. 1 (April 12, 1994).
15. Id. at Comment g.
16. Id. at Comment j.
17. Id.