Agribusiness Alert: Minnesota's Highest Court Rejects Trespass Claim for Pesticide Drift

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In another legal development on chemical drift issues, the Minnesota Supreme Court reversed a Court of Appeals decision and ruled that pesticide drift cannot qualify as a trespass. See *Johnson v. Paynesville Farmers Union Cooperative Oil Co.*, Nos. A10-1596, A10-2135 (Minn. S. Ct. August 1, 2012). **The ruling prevents a Minnesota property owner from pursuing trespass claims against spray applicators for any damage to the owner's property resulting from drift.** While an affected owner may still pursue nuisance and negligence claims for drift, eliminating trespass claims is significant because under Minnesota law trespass claims require no proof of damage.

In *Johnson*, organic farmers sued pesticide applicator Paynesville Farmers Union Cooperative Oil Company (the Cooperative) alleging that the Cooperative's pesticide spray drifted onto their adjacent, organic cropped fields and caused damage. The organic farmers asserted claims for trespass, nuisance and negligence. Allegedly, multiple drift events left residue on their crops, causing them to lose their organic certification along with the higher prices they command in the marketplace. The organic farmers also claimed that in response to the drift, the Minnesota Department of Agriculture (MDA) required the land to be removed from organic farming for three years and directed some crops to be destroyed.

At the district court level, the spray applicator moved for summary judgment on all claims, arguing as to the trespass claim, that Minnesota law precluded "trespass by particulate matter." The Stearns County District Court agreed and dismissed the case.

On appeal, the Minnesota Court of Appeals reversed the district court and held that pesticide spray could qualify as a trespass, because "particulate matter" like pesticide spray can be a physical invasion of land that interferes with owner's possession of the property. The Cooperative then appealed to the Minnesota Supreme Court.

The Minnesota Supreme Court reversed the appellate court on the trespass issue, holding that trespass claims "address tangible invasions of the right to exclusive possession of land." **A trespass claim requires a tangible or physical invasion. The organic farmers did not allege that a "tangible object" invaded their land so as to interfere with their right to possession.** Instead, they claimed the pesticide drift prevented them from "using their land as an organic farm." According to the court, this alleged interference with the organic farmers' rights of use presented a nuisance claim, since nuisance claims "address invasions of the right to use and enjoyment of land."

As for the nuisance and negligence *per se* claims, the Minnesota Supreme Court evaluated whether a violation of the current National Organic Program (NOP) regulations had occurred that could support a claim for damages under a nuisance or negligence *per se* claim. Significantly, the court determined that the NOP rules do not require an organic farmer to remove a field from production merely because pesticide residue is present as a result of drift. When an organic farmer does not "apply" the pesticide to its fields, the NOP rules do not require decertification of a crop unless residue tests detect a prohibited substance at levels greater than 5 percent of the United States Environmental Protection Agency's (EPA) tolerance level for that substance. In the absence of such residue testing, the court concluded that the certifying agent for the organic farmers had decertified the crop in error. Thus, the damage the organic farmers suffered because of the decertification was caused not by a violation of NOP rules, but by the error of the certification agent, and the Cooperative could not be held liable for damages caused by the mistake of the third party certifying agent.

However, the organic farmers also based their nuisance and negligence *per se* claims on an alleged violation of a state statute (§18B.07) governing use of pesticides and the damages caused by MDA's order to destroy a portion of their crop. In addition, they claimed other damages allegedly caused by the pesticide drift, including additional costs and measures to control weed growth, swollen throat and headaches caused by exposure to the drift, and additional record-keeping and other burdens associated with operating their farm. The Minnesota Supreme Court found support for a potential nuisance claim in these allegations, and held that since the trial court failed to address these aspects of the nuisance claim, it erred in dismissing the case.

The Minnesota Supreme Court remanded the case to the trial court. The Court found that the trial court erred in dismissing the nuisance and negligence *per se* claims to the extent they were based on grounds other than the NOP regulation and in dismissing a motion to add claims for events in 2008, to the extent those claims were not based on trespass. Finally, the Court determined since the organic growers' nuisance claim remains viable, the district court erred in dismissing their claim for permanent injunctive relief. As a result, significant claims by the organic growers' remain intact, and we can anticipate yet another chapter developing in the legal history of this case.

The Johnson case is part of a nationwide trend of increasing numbers of claims by private parties for alleged harms arising from pesticide, herbicide, and genetic pollen drift. State "right-to-farm" statutes, mostly enacted in the 1980s, have provided farmers some protection from liability for nuisance claims. Such "right-to-farm" statutes generally restrict or prohibit nuisance claims if the landowner has been operating for a certain period of time. In Minnesota, for example, such a farmer/landowner, when operating in compliance with the laws applicable to its activities, may receive protection from nuisance claims.

These agricultural drift claims also reflect the increasing movement to require complete disclosure of food origins and ingredients, and to provide private rights of action to sue for omissions in such disclosures. For example, in California, a state constitutional referendum is scheduled this fall to require labeling of genetically modified foods and to provide the right to sue food processors who fail to properly label their products.

For questions on the Johnson decision, on the rights and remedies for agricultural chemical drift, or on policies and practices to minimize exposure to drift claims, please contact Nancy Burke or Jeff Peterson.

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