

Agribusiness Alert: Minnesota Court of Appeals Allows Trespass Claim for Pesticide Drift

August 3, 2011

Pesticide overspray drift to a neighboring property in Minnesota may now qualify as a trespass, thanks to the Minnesota Court of Appeals' recent decision in *Johnson, et al., v. Paynesville Farmers Union Cooperative Oil Co.*, No. A10-1596, A10-2135 (July 25, 2011). The ruling allows neighboring property owners to pursue trespass claims against spray applicators for any damages the neighbor believes a spray product caused.

In *Johnson*, organic farmers Oluf and Debra Johnson (the Johnsons) sued Paynesville Farmers Union Cooperative Oil Company (PFUC) alleging that PFUC's spray pesticide and herbicide applications drifted onto the Johnsons' adjacent cropped fields and caused damage. The Johnsons' claims included nuisance, negligence, and trespass. Allegedly, drift occurred on multiple occasions and caused impacted crops to lose their organic certification along with the higher prices they command in the marketplace. The Johnsons also claimed that in response to the pesticide/herbicide drift, the Minnesota Department of Agriculture required impacted land to be removed from organic farming for three years and directed some crops to be destroyed. PFUC moved for summary judgment on all claims, and as to the trespass claim, PFUC argued that Minnesota law precluded "trespass by particulate matter." The Stearns County District Court agreed and granted PFUC's motion.

The appellate court reversed the judgment on all claims, including the trespass claim, and ruled that pesticide overspray could qualify as an unlawful entry onto the plaintiffs' land. In so holding, the court distinguished *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546 (Minn. App. 2003), in which it had decided that offensive odors cannot support a claim for trespass. Specifically, the Johnson court distinguished the odors in *Wendinger* that, as "transient fumes," may interfere with the enjoyment and use of property, from the liquid pesticide drift that "descends and clings to soil or plants" and remains on the property in a manner that interferes with the Johnsons' right of possession. In differentiating odors from pesticide drift, the court of appeals clarified that, contrary to the trial court's decision, simply because an intrusive substance may consist of "particulate matter" does not prevent it from qualifying as a trespass.

Notably, the appellate court's decision in *Johnson* also addressed proof of damages relating to organic product certification under the National Organic Program (NOP) regulations (7 C.F.R. Part 205) promulgated



under the Organic Foods Production Act, 7 U.S.C. §§6501 - 6523, and adopted by reference in Minnesota law (Minn. Stat. §31.925). While a detailed discussion is beyond this article's scope, it bears mentioning that the court decided the 5 percent tolerance limit for detectable residue of prohibited substances (e.g., pesticides) established under the NOP's organic certification regulations does not provide an automatic safe harbor for organic farmers. As a result, the court allowed the Johnsons' damages claims to proceed whether or not those tolerance limits were exceeded.

Johnson reflects the nationwide trend of allowing private party claims against spray applicators for damages resulting from pesticide/herbicide drift, whether under trespass, nuisance, or negligence theories. Most jurisdictions now recognize that agricultural chemical drift provides sufficient grounds for a trespass claim, and some courts are issuing injunctions against applicators to prohibit drift. These trespass actions impose liability on the applicators without the need to prove any negligence or unlawful conduct.

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

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