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MISSOURI LAWYERS WEEKLY

# Attorney Assists farmers in herbicide 'drift' case

*Plaintiffs claimed chemical damaged 41,000 acres of cotton*

Don M. Downing

By Anne C. Vitale

When a group of cotton farmers in the Missouri bootheel saw a year's worth of sweat and toil destroyed after their crops were contaminated by drifting chemicals, they turned to St. Louis attorney Don M. Downing to bail them out.

Downing, who grew up on a cotton farm in Kennett, Mo., said he immediately identified with the farmers' plight. His father, Victor, owned and managed farmland and a cotton gin. He recalled many an early morning and late evening chopping and picking cotton at his father's side.

"Having grown up in this environment, I have a good understanding of the life and hard work of the cotton farmer, and how one disastrous event or circumstance — a hailstorm, a flood, defective seed, or a herbicide drift, to mention a few — can render worthless months of dawn-to-dusk work," Downing said.

He is acutely aware of how circumstances are beyond a farmer's control. "The price at which they can sell their commodities, government farm programs cut, unpredictable weather, rising prices of seed, fertilizer, herbicides and farm machinery are just a few of the unknowns that effect farmers," he said.

The American farmer is the most productive in the world, he bragged, but often not aware of the law when it comes to protecting or asserting their rights.

"Whenever it appears to me that farmers have been victimized — whether by seed companies, seed manufacturers, herbicide manufacturers, chemical companies, or the government — my heart goes out to them," he said.

So when a group of some 70 farmers from southeastern Missouri and northeastern Arkansas approached him with their case, he knew he had to accept and represent them as lead counsel against a chemical manufacturing company.

The farmers recently settled their federal product liability case against a chemical supplier and herbicide manufacturer. They sought compensation for damage to over 41,000 acres of cotton crops due to the off-target drift of a herbicide that had been aerially applied to neighboring rice fields.

Although the settlement amount is confidential, Downing said they alleged damages in excess of $5 million.

After deciding not to pursue the case as a class action, Downing suggested a bifurcated approach to discovery — focusing on liability and general causation in the first phase and saving the plaintiffs' depositions for phase two.

"I proposed this approach based on my belief that the case likely would settle after defendants had the opportunity to investigate the case and see reports and hear testimony from respected experts that the herbicide could and did actually drift over a16-mile long, six-mile wide swath of cotton," he said, noting that the case did in fact settle shortly after plaintiffs' experts were deposed. "This approach was unusual, but one which clearly made practical sense in a case with 74 individual plaintiffs."

## Herbicide drift

Charles Parker, who is in his late 50s, farms about 3,000 acres of cotton crops on the Parker & Jones Farms in Senith, Mo. He typically farms from dawn until sundown, five or six days per week, from mid-March through mid-November — a routine he has adhered to his entire life on the family farm.

Parker's lifestyle is representative of all 74 plaintiffs who operate cotton farms primarily in southeastern Missouri, along with some whose farmland stretches into northeastern Arkansas. The area is a vast cotton-growing region.

But the region also hosts an ample supply of rice farmers — which creates "constant tension," Downing says. That tension is increasingly becoming associated with litigation — often centering on the responsibilities of landowners and farmers.

Downing said the defendants in farming lawsuits typically include the landowner and the operator of the aerial applicator — which sprays herbicides and pesticides from crop dusters. In this case, however, the landowners were not defendants — for reasons he could not disclose — and the plaintiffs reached a separate settlement with the aerial applicator.

But the plaintiff-farmers still had a case against other parties they claimed had a share of the responsibility for their crop damage. They asserted claims of strict liability, negligence, nuisance and failure to warn against Nufarm, Inc. — the supplier of the active ingredient in the herbicide, and United Agri Products — the manufacturer and seller of the herbicide.

The product — known as "Savage" — is a cheap and effective herbicide that is preferred by rice farmers because it kills weeds in rice crops. But it contains the chemical "2, 4-D," which Downing called "the most toxic chemical to cotton on earth."

In June and July 2001, he said Savage was aerially applied in two major applications to over 4,400 acres of rice. In the largest application, the herbicide was applied to rice fields that are separated from cotton fields by only a quarter-mile wide series of drainage ditches. Some rice fields that received the herbicide directly abut cotton fields, Downing said.

Following the two major herbicide applications, the plaintiffs claimed there was a significant drift of Savage onto 41,700 acres of their cotton crops, causing extensive damage. The degree of damage varied, he said, depending on the environmental conditions and where the drift fell on the crops. In total, the plaintiffs asserted that the herbicide drift damaged crops covering a 16-mile long and six-mile wide swath of cotton.

## No class action

The 74 farmer-plaintiffs alleged that the Savage herbicide is unreasonably dangerous to cotton crops, that Nufarm and UAP knew the product was unreasonably dangerous, that the defendants were negligent in their design, manufacture and selling of the product, and that the two companies failed to provide adequate warnings of the product's harmful effects, Downing said. However, he did not pursue the case as a class action — despite giving this approach "much consideration" as a "viable" alternative.

"Defendants undoubtedly would have argued that individual issues pertaining to each farmer's operations would have predominated, and therefore that class certification would have been inappropriate," he said. "Plaintiffs would have argued that issues pertaining to the 2,4-D drift were common issues that predominate over individual issues. A primary reason the case was not brought as a class action was to avoid this battle and the entire class certification phase of the case, which likely would have delayed ultimate resolution of the case by nine months to a year."

Bringing the case as a class action "also raised the prospect that defendants would face testimony at trial from 74 individual farmers — all reinforcing each others' testimony regarding the 2,4-D damage to their cotton," he said. Although this may have been an effective strategy for the plaintiffs, practicality and efficiency ultimately prevailed.

## Bifurcated discovery

The parties agreed to bifurcate discovery and focus on liability and general causation issues in Phase One, and save the 74 plaintiff depositions for Phase Two, Downing said.

"The primary benefit of this approach was to permit each side to evaluate the strengths and weaknesses of their case before incurring the time and expense of 74 individual plaintiffs' depositions," he said. "Those depositions primarily would have addressed damage issues, not issues of liability and general causation.

On the issue of causation, Downing presented five expert witnesses. Each of the experts provided reports and deposition testimony detailing the scientific basis for — and the practical movement and effect of — the drift.

Dr. Kassim Al-Khatib, whom Downing described as "the world's foremost expert on the effects of 2,4-D on cotton," testified that "Savage is defective and unreasonably dangerous because it is extraordinarily harmful to non-target plants such as cotton and because it is impossible to prevent Savage from drifting to nearby fields when it is used as reasonably anticipated," Downing said, adding that he also testified that the warnings on the Savage label are "inadequate." He said Khatib further testified that "minute and invisible amounts of 2,4-D can cause substantial damage to cotton," and that the evidence in this case "clearly showed that the Savage applied on the rice fields drifted onto plaintiffs' cotton and caused damage."

A micrometeorologist and environmental physicist, Dr. Jay M. Ham, further bolstered the plaintiffs' causation theory. Based on environmental conditions that existed on June 18, 2001, and other evidence presented to him, he testified that "it was more likely than not that a portion of the Savage applied to the rice fields was transported onto plaintiffs' cotton," Downing said.

Two experts with combined experience of over 45 years investigating crop loss claims, Lee Frazier and Dr. Rick Yager, "spent many weeks walking through the plaintiffs' cotton fields in the summer of 2001, mapping 2,4-D damage in each field, tracing the damage to the rice fields that were the source of the drift, and examining nearby undamaged fields to identify the 'drift plume,'" Downing said. They each testified that the source of damage to plaintiffs' cotton was the 2,4-D applied to the rice fields.

Finally, an agricultural economist, Dr. William E. Hardy, assisted the plaintiffs in calculating their damages. He did not provide any testimony prior to the settlement, Downing said, but he would have testified at trial if the parties did not settle the case.

Shortly after the plaintiffs' experts were deposed, the parties met with former Missouri Supreme Court Judge John Holstein, who served as mediator. Following a full-day mediation, the parties reached the confidential settlement.

Holstein's skillful mediation style evoked high praise from Downing. "He did an excellent job assisting the parties to settle the case," he said. "His former position as a Missouri Supreme Court judge, his intellect, his low-key demeanor and his willingness to reveal to each side his frank evaluation of the case all were important factors. He had great credibility with the lawyers and the clients."

## Establishing causation

"This was a case that was heavily dependent on expert testimony to confirm something that was not intuitively obvious — that a 2,4-D product could drift over a 16-mile long, six-mile wide swath of cotton and cause significant yield loss," Downing said. "The work that Frazier and Yager did to map and photograph plaintiffs' fields while the cotton crops were still growing was crucial to establishing causation. It also was very important to spend the time necessary to find academic experts who were intimately familiar with 2,4-D, its propensity to drift off-target and its extraordinary toxicity to cotton."

He said the case also required him to become educated on this complex subject matter. "As plaintiffs' counsel, it was very important for me to actually learn at least the fundamental scientific principles that explain how the drift occurred.

"We combined experts who had conducted many academic studies in the involved fields with those who had a wealth of practice experience and expertise in identifying 2,4-D symptoms, mapping the damage plume, and identifying the source of damage," he added. "If we had not been able to nail down these issues of causation, the case likely would not have settled and we would have had difficulty convincing a jury that the Savage applications on the rice fields caused the damage to such a vast expanse of cotton acreage."

For those who may represent clients in future "drift" litigation, Downing shared a helpful nugget of information. "When we filed our case, we recognized that our 'failure to warn' claim might be subject to dismissal on federal preemption grounds," he said. "As the case progressed, additional cases were decided which reinforced that possibility.

"We recognized, however, that the U.S. Supreme Court had granted certiorari in Bates v. Dow Agrosciences, LLC, and that the Supreme Court in that case was likely to restrict substantially any preemption defense defendants might assert," he advised. "In accordance with our anticipation, the Supreme Court in Bates later substantially restricted the availability of a federal preemption defense in these types of cases. Thus, counsel bringing these cases in the future should assert all viable claims under state law."

Gary W. Callahan of Fort Collins, Colo., attorney for the chemical supplier, said, "all parties are satisfied that the settlement was entered into in good faith and was reasonable." Mark Carpenter of Minneapolis, Minn., attorney for the herbicide manufacturer, declined to comment on the confidential settlement.

### Facts of the case

**Type of Action:** Product liability

**Type of Injuries:** Damage to 41,700 acres of cotton crops

**Court/Case Number/Date:** U.S. District Court, E.D.Mo./1:04-CV–00093/July 26, 2005

**Caption:** Abmeyer, et al. v. Nufarm, Inc., et al.

**Judge, Jury or ADR:** Mediation

**Name of Judge:** Richard E. Webber

**Name of Mediator:** John Holstein

**Verdict or Settlement:** Confidential settlement

**Special Damages:** N/A

**Allocation of Fault:** Cofidential

**Last Offer:** N/A

**Last Demand:** N/A

**Attorneys for Plaintiffs:** Don M. Downing, Gray Ritter & Graham PC, St. Louis; Lynn W. Jinks III, Jinks Daniel Crow & Seaborn LLC, Union Springs, Ala.; Floyd R. Gilliland Jr., Nix Holtsford Gilliland Higgins & Hitson PC, Montgomery, Ala.

**Insurance Carrier:** N/A

**Plaintiffs' Experts:** Kassim Al-Khatib, Manhattan, Kan. (effects of 2,4-D on cotton, defendants' negligence, unreasonably dangerous nature of the product, causation, inadequacy of label warnings, damages); A. Lee Frazier, Leland, Miss. (causation and damages); Jay M. Ham, Manhattan, Kan. (micrometeorological analysis of method of causation); William Hardy, Auburn, Ala. (damages); John R. Yager, Minden, La. (causation and damages)

**Defendants' Experts:** None