GRG | GRAY RITTER GRAHAM

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FARM LITIGATION REPORT

Introducing GRG's Farm Litigation Report

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This is the first edition of the Farm Litigation Report, a free periodic newsletter to farmers we have had the honor to represent. The newsletter will focus on litigation affecting farmers. We hope you find these articles informative. *

I have had the honor and pleasure of representing farmers in litigation for the last 25 years. My decision to spend much of my career representing farmers stems from my childhood in the Missouri bootheel. My father owned a cotton gin and farmland which his brothers farmed. I remember farming the old-fashioned way – chopping and picking cotton by hand. My relatives still farm land I now own. But, instead of joining them on the farm, I went off to law school and became a trial lawyer (which obviously showed a lack of judgment!).

The types of litigation we plan to cover in this newsletter are illustrated by cases we have handled in the past. Many of you may remember some or all of these cases. My first case representing farmers was back in the late 1990's. It was against Monsanto and Delta & Pine. They sold genetically modified cotton seed varieties that suffered from a malady known as bronze wilt. Many farmers (including my relatives) who purchased these varieties lost up to half of their normal yield, if not more. We filed a lawsuit in Dunklin County, Missouri, and ultimately recovered close to all of the farmers' losses.

Our next big triumph for farmers came in a federal court case in Cape Girardeau, Missouri. We represented Dunklin County cotton farmers who received inaccurate information from the FSA. Farmers were told to sign one form when they should have been told to sign another. As a result, the farmers received only a fraction of the benefits to which they were entitled. After years of hotly contested litigation, the FSA finally agreed to a settlement through which Dunklin County cotton farmers recovered the full amounts they would have received had they signed the correct form.

In the last 15 years, we have been blessed to win three nationally significant cases for farmers. In the first case, I was appointed by a federal judge in St. Louis as one of two lawyers to lead litigation on behalf of rice farmers and others who were harmed when Bayer contaminated the US rice supply with unapproved genetically modified rice. As a result, the European Union stopped taking US long grain rice, and the price farmers received plummeted. After years of hard-fought litigation, we tried three cases to juries and won each case. Each trial lasted 3 to 4 weeks. Bayer thereafter agreed to a $750 million settlement for rice farmers and ultimately paid over $1 billion to settle all claims.

As the rice litigation was winding down, I was appointed by a federal judge in Kansas as one of four lawyers to lead litigation on behalf of corn farmers and others who were harmed when Syngenta decided to commercialize a new genetically modified corn variety that had not been approved in China, one of our major export markets. Syngenta was warned by Cargill and other grain companies that doing so risked loss of the important Chinese market, but Syngenta chose to do it anyway. Sure enough, when China detected the new variety in shipments, it stopped taking US corn, causing the price farmers received to fall. We tried one case to a jury for three weeks and obtained a verdict of $217.7 million for Kansas corn farmers. Syngenta later agreed to a $1.51 billion settlement.

Most recently, I was appointed by a federal judge in Cape Girardeau to lead litigation on behalf of soybean farmers and others who had been harmed by off-target movement of dicamba. The defendants are Monsanto and BASF. They developed the dicamba crop system, which allows dicamba to be sprayed over-the-top of genetically engineered, dicamba-tolerant soybeans and cotton. The problem is that dicamba is inherently volatile. Under common environmental conditions, it can and does move off-target and damage neighboring crops, trees and other plants. Many thousands of soybean acres, as well as fruits, vegetables and other crops, suffered damage. I represented farmers in herbicide drift cases earlier, but none of those cases involved the magnitude of harm caused by dicamba. After one trial which resulted in a large verdict for a Missouri peach farmer, the defendants agreed to a $400 million settlement. The claims process for that settlement is underway now.

Of course, these past results afford no guarantee of future results. Every case is different and must be judged on its own merits.

These successes have not been mine alone. Far from it. The team we have at Gray Ritter Graham is extraordinary and dedicated to serving farmers. That team includes our legal mastermind, Gretchen Garrison, as well as Kaitlin Bridges, Cort VanOstran and my son Jack Downing, who is working with me on these newsletters. We also have had the privilege of working with many good lawyers around the country.

Other members of our firm, including Maurice Graham, Steve Woodley, Pat Hagerty, Joan Lockwood, Morry Cole, Graham Dobbs and Tom Neill, have represented farmers and others in personal injury litigation. (including automobile and trucking accident cases) and medical malpractice litigation. These lawyers are among the most respected lawyers in the state of Missouri. We plan to include articles about those types of cases as well.

Given our experience representing farmers in litigation, we thought a periodic newsletter advising you about litigation affecting farmers might be interesting and helpful to you. We hope you enjoy this newsletter.

Best wishes for a great harvest!

Don

Photo By: Federico Respini on Unsplash

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GUEST COLUMN

The Weeds Are Talking But Nobody Is Listening

Dr. Ford Baldwin, Weed Scientist

I began my career as a weed scientist upon entry to graduate school in 1969. After completing a Ph.D. in 1974, I spent 28 years as an Extension Weed Scientist at the University of Arkansas. Since retiring in 2002, I have remained actively engaged as a weed scientist in the private sector. Because of my contributions in the field of weed science, I have been blessed to have received many awards and was honored to be inducted into the Arkansas Agriculture Hall of Fame.

During the 50-plus years I have been a weed scientist, there has been a lot of change, both in the development of weed control technology and the implementation of that technology at the grower level. While herbicide development began earlier, the herbicide era really took off in the 1960's as I began my career. As a result, I have been involved in some capacity with every herbicide technology developed. In the 1970's and 1980's, there were a lot of companies developing new herbicides, and university weed scientists were very involved in the process. It was difficult to keep up with all of the new herbicides and write timely recommendations for our farmers. The pipeline was full, and we assumed it always would be. I was taught by well-meaning professors that weeds would not develop herbicide resistance because they did not reproduce as quickly as diseases and insects did. Well, they were wrong, and we began to see herbicide resistance first appear in the 1980's. At the time, it was no big deal as we had that pipeline full of new herbicides. Thus, resistance issues were easily managed. It was fun being a weed scientist in those days.

I received the first Roundup Ready seed for my research program in 1994 and being a weed scientist suddenly became even more fun. Conducting the Roundup Ready research and writing the weed control recommendations for this technology in Arkansas was one of my career highlights. Suddenly weed control for every farmer was very easy and effective. Not having the ability to compete with Roundup Ready, smaller companies stopped screening for new herbicides and began merging with one another. In addition, the big money in weed control was subtly shifting from the herbicide to the seed. Because Roundup Ready was so effective in its first 10 years, I switched my research program to rice, as the need waned for soybean, cotton and corn weed scientists. We again assumed it would always be that way. Then around 2005 the Roundup Ready technology began to fail due to resistance, and by 2010 it was no longer our foundational herbicide technology.

The demise of the Roundup Ready system has brought about major changes in agriculture. The last new herbicide mode of action was developed in the 1980's and there is little new chemistry in the pipeline. The only short-term solution has been the development of more herbicide-tolerant crop technologies to utilize older herbicides. Having herbicide selectivity tied directly to the seed has upsides but it also has downsides. The choice of the seed technology dictates the herbicide choices available for the crop. Since the weed control dollars have shifted to the seed, there has been tremendous competition between companies in the seed market and herbicide market along with it. Two of the new herbicide technologies use the auxin herbicides dicamba and 2,4-D. Both are very powerful herbicides on broadleaf plants. That makes them very effective on weeds like Palmer amaranth and

common waterhemp which became the driver weeds when Roundup Ready failed. On the other hand, a lot of other broadleaf plants, including non-tolerant cotton and soybeans, can be highly susceptible to damage from off-target movement of these herbicides. The dicamba-tolerant technology in soybeans and cotton has been by far the most controversial technology in my career. Dicamba is very effective on the driver weeds in these two crops. Thus, it has been very popular with many farmers. But, with the increased use of dicamba, there has been a record number of damage complaints in many states over the past five years. While some farmers love it, others have been hurt by it or have been forced to plant the technology defensively. This has caused a tremendous division among neighboring farmers and others in the industry. Because of this, the issue has become highly political, and politicians make poor weed scientists. All of this is new to this weed scientist who loves new technology but also believes a herbicide should do its job without adversely affecting others or the environment. Times are understandably stressful and tough, but there just seems to be an increasing attitude of "I have to get my weeds sprayed regardless of the effect on my neighbors." In addition, with multiple herbicide-tolerant technologies in all of our major crops, it makes it much more difficult to get anything sprayed timely. It also has increased the chances for mix ups and honest mistakes in the field.

Another change is we are running out of weed control technology. Resistance to glufosinate, dicamba and 2,4-D has already developed in Palmer amaranth and waterhemp. These herbicides are the backbone of the new trait technologies. There are few new potential herbicides or traits in the pipeline. If we allow the resistance trend to continue, the herbicide era is over. I never dreamed I would see politics replace science in the decision-making process. I never dreamed we would run out of chemistry or I would see farmers and advisors believe herbicide resistance would not happen to them. The sky isn't falling, and we will adapt, but weed control is more challenging now than ever. When we cannot control the weeds, the wheels come off of agricultural production in our country. This cannot be allowed to happen.

The future of weed control in the major crops is uncertain. In my opinion, the future will be something other than replacing a failed herbicide with another herbicide. For the weed control future to be bright, the concept of integrated weed management must be fostered throughout agriculture. It involves a wide array of concepts including crop diversity, herbicide diversity, tillage diversity, cover crops, and non-herbicide concepts – and hopefully some that haven't been thought of yet. The good news is the new generation of weed scientists is much smarter than us old heads. That is good as I believe the next big breakthroughs will be "outside the box" of traditional herbicide development. In the meantime, farmers and others in the industry must become more adaptable and open to new agricultural practices. If we make the changes necessary, I have full confidence that the future will be very bright for farmers.

Palmer Amaranth in a Soybean Field:
Photo By United Soybean Board CC BY 2.0

Paraquat Litigation Update

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For many farmers, burndown is synonymous with the chemical known as Gramoxone (or its generic name, paraquat). But science indicates that use of Gramoxone can lead to Parkinson's disease. Many farmers suffering from Parkinson's disease around the country have filed lawsuits seeking to hold Gramoxone's manufacturers (including the Chinese-owned company Syngenta) accountable for this devastating disease.

Paraquat is a herbicide applied in a wide variety of circumstances, but it is frequently used after harvest. Given the extent of its use, it carries a high risk of exposure through ingestion or inhalation.

Paraquat goes through a cycle in plant and animal cells which brings about chemical reactions. These reactions include interference with essential functions of plants and animals by damaging proteins and DNA. This process can go on indefinitely.

In humans, these chemical reactions interfere with and damage the neurons controlling motor function. Parkinson's disease is a result of such neurons degenerating. Parkinson's is also progressive, meaning that its effects on motor skills worsen over time. It can be a devastating diagnosis for those who receive it and for their loved ones.

Since Parkinson's disease mainly affects motor function, symptoms include muscles shaking even when they are relaxed (known as a "resting tremor") and slowness in movement and reflexes. Parkinson's disease is serious, uncurable, and a real threat facing anyone in the agricultural industry who has been using Gramoxone or other paraquat products since 1964. Additionally, Parkinson's disease may not develop until long after exposure to paraquat.

Right now, there is Multi-District Litigation (often referred to as an "MDL") to provide compensation to those farmers diagnosed with Parkinson's disease resulting from paraquat exposure. There are presently over 1,500 cases in the MDL. The MDL is pending in the United States Court for the Southern District of Illinois in East St. Louis – right across the river from Gray Ritter Graham. Our offices are in downtown St. Louis.

Gray, Ritter Graham has extensive experience representing farmers – both large and small – against large corporations. We encourage you or anyone you know who has repetitively used or been exposed to paraquat and is now suffering from diagnosed Parkinson's disease to reach out to our experienced attorneys for assistance. Any questions you may have can be directed to Cort VanOstran or Tom Neill (tneill@grgpc.com).

Right-to-Repair: Lawmakers, Regulators and Litigators Taking a Stand

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Do you truly own something if your right to make repairs to it is limited? Regulators and lawmakers have been grappling with this question of late.

In today's world of rapidly expanding technology, many pieces of machinery – including John Deere tractors – require extensive knowledge and expertise to repair. Over the years, original manufacturers have sought to maintain control over the repair process for their equipment by embedding proprietary intellectual property within the repair diagnostic tools, making it difficult (if not impossible) for outside parties to conduct repairs.

State and federal elected officials have made a bipartisan push to eliminate these barriers to repair – noting that the practice does not benefit consumers and is the product of corporate greed. In March of this year, a group of U.S. senators introduced the Fair Repair Act which would require original manufacturers to provide the necessary information to allow outside parties to perform repairs to their products. Additionally, more than half of the states have introduced right-to-repair legislation in recent years. Lawmakers have contended that requiring that repairs be made in-house allows a manufacturer to hold its repair prices artificially high. They have also asserted that depriving individuals of the ability to freely repair their equipment is an encroachment on their ownership rights of the property.

On the regulatory front, the Federal Trade Commission ("FTC") has recently adopted a policy statement supporting the right to repair among consumers. This is a step in the right direction, but enforcement of this policy will be difficult given its overlap in scope with areas governed by other regulatory agencies. Not only does the FTC face pushback from other agencies, it must also deal with the manufacturers. Many companies opposing the policy claim that it would allow third parties an improper "look under the hood." Regulators have disagreed – determining that manufacturers can provide enough information for third parties to conduct necessary repairs without divulging trade secrets or proprietary information regarding the equipment.

Numerous lawsuits have been filed against John Deere for designing its agricultural equipment in a way that requires all repairs to be made in-house. Several of these lawsuits have recently been consolidated for pre-trial purposes in the United States District Court for the Northern District of Illinois. The lawsuits allege that John Deere has monopolized the market for repair services on its agricultural equipment with onboard central computers which limit repairs to parties with intrinsic knowledge of the operating system. Plaintiffs in these lawsuits are seeking monetary damages for the improperly high prices they allegedly have been charged for their repairs.

If you feel these right-to-repair issues have affected your farming operation, we encourage you to stay up to date with the consolidated action in Illinois and explore legal options if necessary.

John Deere Tractor in Field: Photo by Werktuigendagen: Flickr: DSC_0642

Tractor Hydraulic Fluid Litigation

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Our firm has recently been asked to assist lead counsel representing farmers in Multi-District Litigation in federal court in Kansas City, Missouri. The case involves tractor hydraulic fluid (THF), a multifunctional lubricant designed to act as a hydraulic fluid, transmission fluid and gear oil. The litigation alleges that manufacturers of certain THF products misled farmers as to the suitability of their THF products for use in tractors. Plaintiffs are primarily farmers who have purchased these products. Plaintiffs are seeking return of the amounts they paid and compensation for damage to their tractors, among other things. The lawsuit's primary allegations are contained in the paragraphs below.

In the 1960s and early 1970s, John Deere (Deere) manufactured a widely used THF called JD-303 or simply "303." The term "303" became synonymous with this high-quality THF product. Sperm whale oil was an essential ingredient in Deere's 303 THF. In the mid-1970s, the passage of laws protecting endangered species outlawed the use of sperm whale oil. Deere's "303" formula could no longer be manufactured. Deere was forced to manufacture new tractor hydraulic fluids with different additives. Those included J20A, J20B, J20C and J20D (low viscosity.)

Deere used a licensing program called Quatrol to police the quality of THF products in the marketplace. To ensure the products met the specifications, the Quatrol program required blenders and sellers of competing THF products to submit test data to Deere prior to the use of the J20A or B specification on their product labels.

Deere later abandoned the J20A and B specifications and discontinued the Quatrol program, which resulted in a "free-for-all" in the market and the opportunity for unscrupulous manufacturers and sellers to falsely use the Deere specifications (and other manufacturers' specifications) on the labels of the THF products they sell.

The lawsuit alleges that Defendant THF manufacturers deceptively and illegally traded on the obsolete and non-existent "303" designation and other obsolete specifications. This was deceptive, as there is no known "303" specification, and there is no way for manufacturers, sellers, or anyone else to truthfully claim the products meets such specification or any other specifications Defendants advertised on the label.

Defendants nonetheless manufactured and sold their Super S Super Trac 303 Tractor Hydraulic Fluid, Super S 303 Tractor Hydraulic Fluid, Cam2 Promax 303 Tractor Hydraulic Oil, and Cam2 303 Tractor Hydraulic Oil as THF products that purportedly met or had an equivalency to many (or in some cases all) manufacturers' specifications, had effective lubricant and anti-wear additives and properties, and were safe for use in purchasers' equipment. Defendants sold their 303 THF Products with eye-catching photos of modern tractors and industrial equipment and in bright, yellow 5-gallon buckets. The lawsuit alleges that by name dropping a list of equipment manufacturers, Defendants sought to create an impression of quality and take advantage of consumers' lack of understanding of the multitude of complex manufacturer specifications that were being ignored.

The litigation also alleges that Defendants used poor quality base oils, waste oil, line flush, and used oils and diluted additive packages, if any, in their 303 THF Products in order to keep production costs down and increase profits. As a result of the inferior ingredients and this "down-treating" of any additive packages, the lawsuit alleges that Defendants' 303 THF Products not only lacked the required lubricant and protective benefits offered to purchasers, the fluids actually exposed each purchaser's equipment to increased wear and risk of damage to the spiral gear, excessive wear in the planetaries, improper and poor shifting, seal leakage, and improper operation of the wet brakes.

In October 2017, the State of Missouri's Department of Agriculture, Division of Weights and Measures, stated publicly that its testing revealed that the products did not meet any manufacturers' current tractor hydraulic fluid specifications and were underperforming to the point damage was likely to result from use. In November 2017, Missouri banned Defendants and all other manufacturers and sellers from offering these types of "303" tractor hydraulic fluid products for sale in Missouri. The states of Georgia and North Carolina followed suit.

Despite these findings and bans, Defendants continued to sell their 303 THF Products in all states where they had not been banned. The litigation alleges that Defendants' conduct harmed purchasers. Instead of receiving a product that was an acceptable THF that met or had an equivalency to manufacturers' specifications, each plaintiff received 303 THF Products that exposed equipment to harm, increased wear and damage, and caused each Plaintiff, Class Member, and purchaser to buy a product that was worthless.

If you feel your tractors have been damaged by these THF Products, you are encouraged to seek legal counsel.

Soybeans showing the cupped leaves which are a symptom of dicamba injury.
Photo By: University of Arkansas System Division of Agriculture CC BY-NC 2.0

Dicamba Claims Update

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After negotiating a $400 million nationwide dicamba settlement, our firm has spent many months processing dicamba claims. The settlement provides compensation to farmers for soybean injury due to off-target movement of dicamba from 2015 to 2020. The process remains ongoing but ultimately is expected to result in compensation to over a thousand soybean growers nationwide.

Non-soybean crop growers also were injured by off-target movement of dicamba from 2015 to 2020. Dozens of those growers have settled their claims and received compensation.

Dicamba injury in years following 2020 is not included in the settlement. We are working with growers who suffered dicamba injury due to off-target movement of dicamba in 2021 and plan to do so for those growers who suffer dicamba injury in 2022. We do not yet know whether those cases can be settled or will have to be fully litigated.

To the extent you believe you had dicamba injury to your soybeans or other crops in 2021 or have crops exhibiting dicamba symptomology in 2022, it is important to maintain any and all records showing evidence of your injury, including photographs, crop scout reports, notes of observations of any third parties or experts that saw your damaged fields, all records showing your historical yields in the affected fields, and any other documents you believe would be useful. Monsanto also has requested that it be afforded an opportunity to observe the damage while it exists in the field. We urge you to notify us immediately when you observe dicamba damage so that we can notify Monsanto promptly.

If you or anyone you know has suffered dicamba injury in recent years, please feel free to reach out to our firm for assistance. Any questions you may have can be directed to Jack Downing.

Cattle Farmer Success Story

Patrick Hagerty phagerty@grgpc.com

GRG represented a young man who would go on to become a successful cattle farmer, though after a harrowing experience that almost took his life.

"B.K.," the GRG client, was born with hydrocephalus, a condition in which cerebrospinal fluid builds up to potentially dangerous levels in the brain. To treat this, doctors installed a "shunt" that was designed to alleviate pressure when buildup occurred.

When the young man came down with back pain many years after the shunt was placed, one of his doctors chose to do a myelogram, which provides doctors a picture of the spinal structures but also alters the delicate cerebrospinal fluid balance in the body. As a result of the procedure, B.K. suffered a serious brain injury and endured a months-long coma. Extensive rehabilitation was necessary, even to do the most basic things.

GRG maintained on B.K.'s behalf that the doctor who ordered the myelogram was negligent for not doing a diagnostic procedure with less risk to a patient with a shunt. A jury in Springfield, Missouri agreed, awarding nearly $1 million in damages. GRG attorney Pat Hagerty represented B.K.

The good news is that, despite his devastating injuries, the client went on to build up a family cattle business that remains in operation today. He still keeps in touch with Pat and GRG, which is one of the great rewards we enjoy as lawyers.

For decades, GRG has represented individuals who have been the victims of medical negligence. If we can help you or a loved, we would be happy to do so.

GRG Represents Rancher Against Coop For Botched Storage of Sensitive Genetic Material

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Chris Jones is an expert cattle rancher with a major operation in mid-Missouri. For many years, he relied on Genex Cooperative to service the liquid nitrogen tanks storing the valuable genetic material Chris uses for cattle breeding. Imagine Chris's surprise when one day, he found the tanks dry as a bone – and his genetic material ruined.

Chris called Gray Ritter Graham, and now has a lawsuit pending against Genex alleging breach of contract (among other counts). Chris alleges that after a decade-long relationship, Genex ended his service without effective notice or justification, causing Chris major economic injury. GRG attorney Cort VanOstran is handling the case.

GRG represents individual clients facing economic loss from contractual disputes like Chris's on a regular basis and has been able to secure just compensation for losses through zealous representation. We are highly experienced and equipped to handle a variety of matters involving injuries you or your loved ones may have suffered due to faulty products or illegal practices by large companies.

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