



# Dicamba Injury: Crop, General Liability and Professional Liability Insurance Perspectives

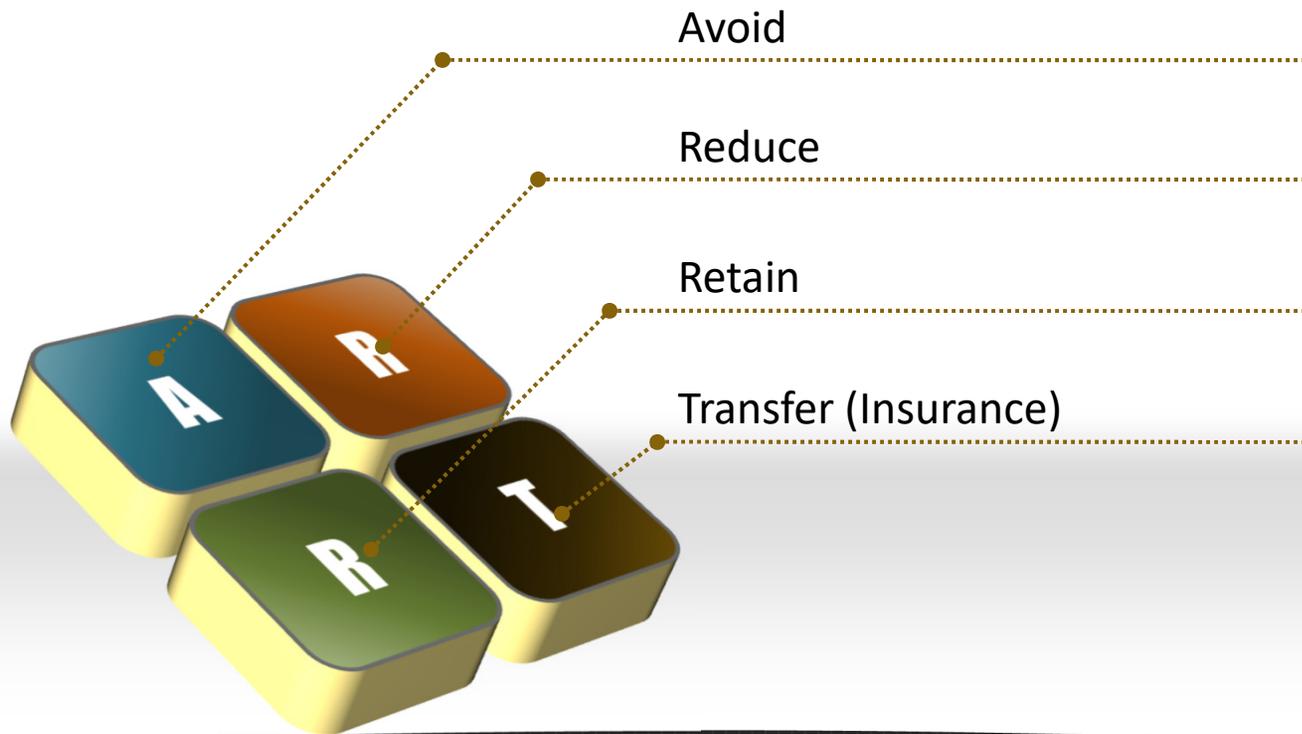
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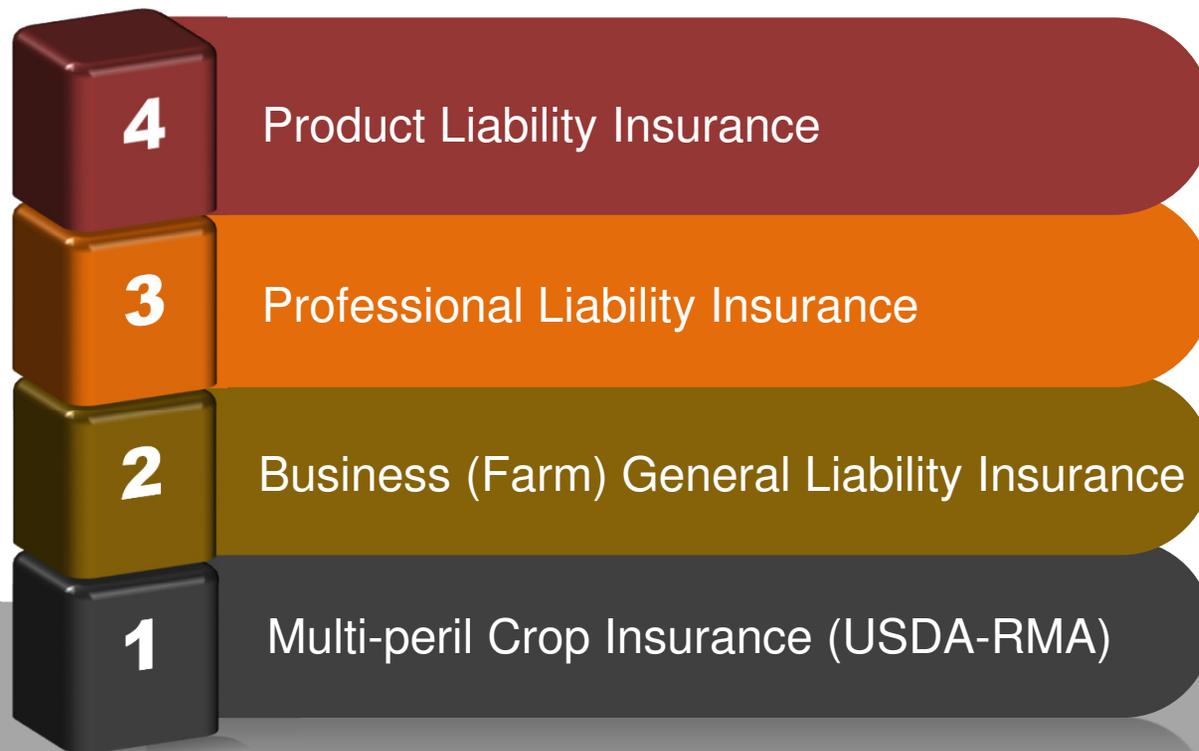


NORTH CENTRAL  
EXTENSION  
RISK MANAGEMENT  
EDUCATION

# Risk Management Strategies



# Insurances affected by 3<sup>rd</sup> party herbicide injury

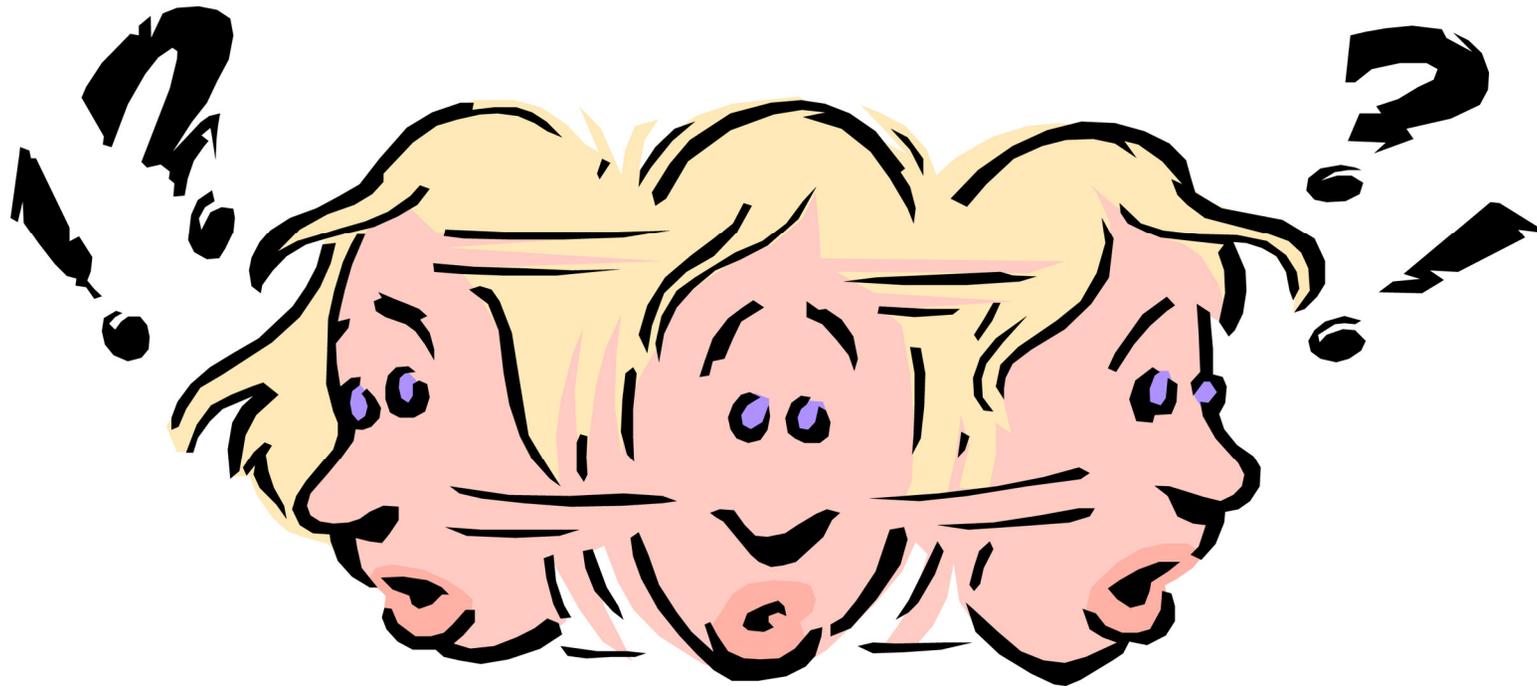
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- 1 Multi-peril Crop Insurance (USDA-RMA)
  - 2 Business (Farm) General Liability Insurance
  - 3 Professional Liability Insurance
  - 4 Product Liability Insurance

# Presentation Objectives

- ❖ Teach on insurance provisions when 3<sup>rd</sup> party herbicide injury occurs.
- ❖ Provide ideas on how to prepare for filing a liability claim due to pesticide movement.



Dicamba Injury is  
risk with a moving target



# Background: Dicamba Injury History

2016

Off-label applications

2017

Off target injuries

2018

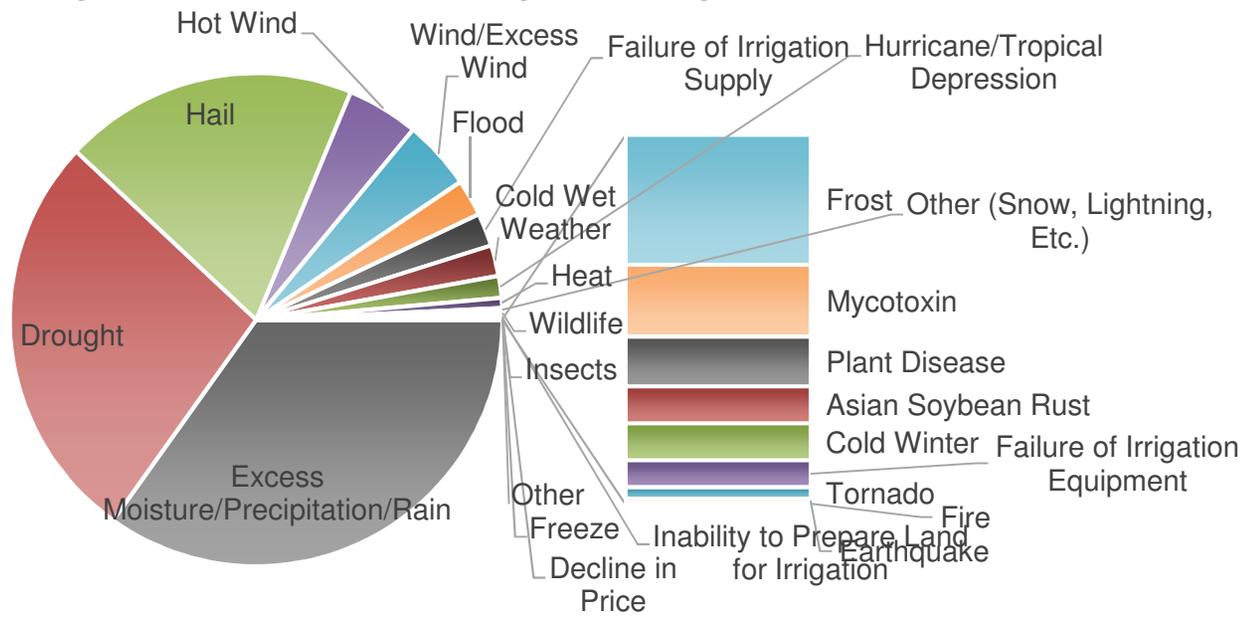
EPA and states issue new labels for dicamba



# Crop Insurance and Dicamba Injury

2017 Indemnity for Cotton and Soybean by Cause of Loss

No indemnities paid for Herbicide Injury!



Source: USDA RMA



# Multi-peril Crop Insurance Considerations in Herbicide Drift Injury

- ❖ Multi-peril crop insurance does not cover herbicide drift injury regardless of who caused the drift injury.
- ❖ The Common Crop Insurance Policy Basic Provisions state:
  - “Insurance is provided only to protect against unavoidable, naturally occurring events.”
  - “All other causes of loss, including but not limited to the following, are NOT covered: Any act by any person that affects the yield, quality or price of the insured crop (e.g., chemical drift, fire, terrorism, etc.).”



# USDA RMA Multi-peril Crop Insurance

- ❖ Third party injury from pesticide application is not a covered loss.
- ❖ Beginning with the 2017 crop year (for 2018 APH declaration),
  - Yield losses due to third parties (e.g. herbicide damage) can be excluded from APH calculations.
  - Farmer must file a notice of loss due to actions of a third party within 72 hours of noticing loss. This could be challenging.



# Whole Farm Revenue Protection

- ❖ Available in all states.
- ❖ It is designed for diverse farms that don't normally have insurance products (think fruits and vegetables) but available to all farms.
- ❖ All commodities on the farm are under one insurance policy.
- ❖ Premiums tend to be lower than other units (basic, optional and enterprise units)



# WFRP Insurable Revenue

- ❖ Includes revenue that you expect to earn, or will obtain from all commodities you produce or purchase for resale during the insurance period;
- ❖ Excludes revenue from timber and forest products and from animals for sport, show or pets.
- ❖ Lots of details to consider. See <http://www.rma.usda.gov/pubs/rme/wfrpfactsheet.pdf>
- ❖ 2018 Farm Bill instructed RMA to minimize paperwork for producers and agents.



# QUESTIONS ON HERBICIDE INJURY AND CROP INSURANCE?



"My attorney recommended posting it after the 'Dumpty' incident."

# General Farm Liability Insurance

- ❖ Covers the insured (farmer or business) when you are legally responsible for damages to others caused by your negligence.
- ❖ Insurer (insurance company) pays the liability for harm unintentionally caused to other people or property by your farming or business activities.
- ❖ Insurer defends you against lawsuits brought by a third party alleging harm within the coverage provisions of the policy.



# Insured's responsibility

- ❖ Pay the premium
- ❖ Notify the insurance company of accidents
- ❖ Cooperate with the insurance company

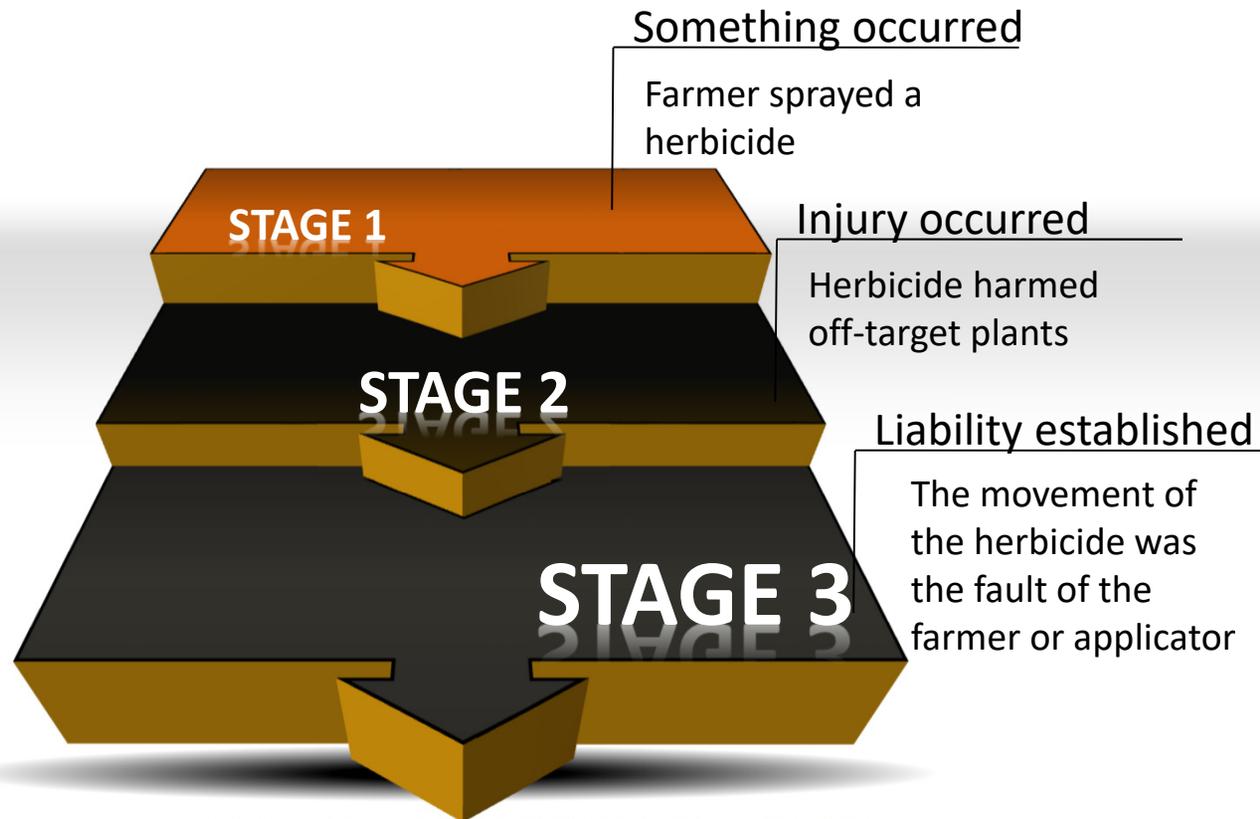


# Insurance Company responsibility

- ❖ Investigate the accident
- ❖ Defend the insured to the limit of the purchased coverage
- ❖ Pay liabilities to the limit of purchased coverage



# A Valid Insurance Claim



# Legal Doctrines in Legal Liability

## ❖ Negligence

- The insured person had a duty of care for the injured person
- The insured person breached that duty to care
- The breach of duty caused the damage
- The injured person specifies the amount of damage.

## ❖ Strict Liability

- Some activities are so dangerous that a person who participates in them is held liable for the damages caused by that activity – no matter how much care was taken to minimize hazard.



# Liability Insurance Review Items

- ❖ What is your dollar coverage?
  - Aggregate Limit specifies
    - Maximum amount of coverage for a single incident
    - Maximum amount of coverage during a term for all incidents
  - Term is typically one year
  - Are defense costs included in the limits or outside the limits?



# Liability Insurance Review Items

- ❖ What types of incidents are covered?
  - Property damage
  - Bodily injury
  - Financial Liability
  
- ❖ Each type of coverage may have specific dollar limits



# Liability Insurance Review Items

- ❖ What activities are not covered?
  - Some farming activities are excluded on a general policy
  - Endorsements are added to a general policy to cover specific activities
    - Farmer's market sales
    - Non-farm activities such as snow removal or landscaping
    - Custom farm work
    - Spraying chemicals



# Liability Insurance Review Items

- ❖ Who does your policy cover? Employees? Family members? Personal representatives?
  - How does your policy define “the insured?”
  - Covering employees may require that you mentioned you had employees on the application.



# General Liability Insurance and Pollution

- ❖ Some general liability policies have limited pollution liability. Additional coverage may need to be elected.
- ❖ Coverage is excluded for releases or emissions of “pollutants”
  - on the farm premises or
  - on another property or
  - during transportation
- ❖ “Pollutants” are defined as “... any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste”.



# General Liability Insurance: Pollution Exclusion

- ❖ In 2013, a Wisconsin Appeals Court found manure applied to fields to be a fertilizer rather than a pollutant. Neighbors adversely affected were covered by the farmers liability insurance.
- ❖ In 2013, a Wisconsin Appeals Court found that septage (septic tank contents) applied to fields as a fertilizer but adversely affecting water quality was a pollution.
- ❖ Lesson: the definition of a pollutant is not well understood or static. It may change over time or location.



# Liability Insurance Coverage Exclusions

- ❖ Illegal activity –
  - Liability incurred while committing a crime may not be covered.
- ❖ Fraud –
  - Fraud is representing yourself or product as something that it is not.
- ❖ Intentional damage –
  - if you purposefully damage someone else's property it is not covered



# General Liability Insurance: “Accidental or Unintentional”

**Accident** - an unexpected event or circumstance without deliberate intent. (National Association of Insurance Commissioners Glossary)

- ❖ Given the rate of 3<sup>rd</sup> party damage in 2017 and 2018, is it an unexpected event if Dicamba injures nearby crops?



# General Liability: Spray Endorsement

- ❖ Individual farmer buys it if they spray their own fields
- ❖ Commercial applicator buys it if they spray other farmers fields
- ❖ A farmer who “occasionally” sprays their neighbors fields should confirm that their general liability insurance covers their activity.



# Steps when complaint received

1. Determine Coverage
2. Assess Liability
3. Evaluate Damage



# Injury Claims: Determine Coverage

- ❖ The insurance company will first look at your insurance policy to make sure you are covered for the complaint that has been lodged against you.
- ❖ Void Ad Initio – material misrepresentation in application causes the loss of liability coverage for the misrepresented facts.
- ❖ Check the application you submitted when applying for liability insurance!



# Questions on General Liability Insurance Application

- ❖ Does the applicant ever hire the services of others? If yes, are certificates of insurance required of all contractors?
- ❖ Total number of employees?
- ❖ Custom farming for others for a charge?



# Injury Claims: Determine Coverage

- ❖ What conditions and coverages did you purchase?
- ❖ This is where insureds get surprised. They thought they were covered but there is an exclusion in their policy or they did not purchase an endorsement for a specific activity.
- ❖ Check your policy coverage before you need it!



# Injury Claim: Assess Liability

## ❖ Fact finding

- State investigation? Other entity investigation? Insurance company investigation.
- Establish facts such as chemicals used, instructions followed, environmental conditions, etc.

## ❖ Other insurance company that might be involved?

- If so, how do the two companies interact with each other?
- Example: farmer's liability insurance and applicator's liability insurance. Which is responsible?



# Injury Claims: Assess Liability

- ❖ Establish Liability – the burden of proof is always on the injured party filing the complaint
- ❖ General liability insurance requires a policyholder to cooperate with the insurer in defending against a claim. That farm's general liability insurer will likely prohibit admission of responsibility as a condition of coverage.



# Injury Claim: Evaluate Damage

- ❖ Insurance company sends an adjuster to document and evaluate damage.
- ❖ Damage may not be determined until later
  - Determine extent of damage at harvest time rather than at time of visible injury.
  - Determine if the difference in yield might have been due to other factors
    - Drought, poor seed emergence, pest damage, etc.
    - Does that area of the field routinely yield less than the rest of the field



# QUESTIONS ON HERBICIDE INJURY AND GENERAL LIABILITY INSURANCE?



*"Here's a dilemma. Should the disclaimer for our client's new sleeping pill read, 'May cause drowsiness' or 'May not cause drowsiness'?"*

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# Professional Liability Insurance

- ❖ Covers legal expenses when a 3<sup>rd</sup> party claims lost money because the insured's professional negligence or failure to perform a professional service.
- ❖ Synonymous with Errors and Omissions or Malpractice Insurance.
- ❖ Professional –a person who possesses specialized skills or knowledge, who offer services for a fee



# Professional Liability Insurance

- ❖ Professional applicators are held to a higher standard than the label. They are expected to use the latest science and experience to inform their actions.
- ❖ Written procedures are important. How did the sprayer interpret the label and what procedures were created as a result. This gives insight into preparation and interpretation that may justify actions.



# 2019 EPA Label for Dicamba

- ❖ Only certified applicators may apply dicamba over the top (those working under the supervision of a certified applicator may no longer make applications)
- ❖ Prohibit over-the-top application of dicamba on soybeans 45 days after planting and cotton 60 days after planting
- ❖ Applications will be allowed only from 1 hour after sunrise to 2 hours before sunset
- ❖ In counties where endangered species may exist, the downwind buffer will remain at 110 feet and there will be a new 57-foot buffer around the other sides of the field (the 110-foot downwind buffer applies to all applications, not just in counties where endangered species may exist)



# Applicator Liability

“Farmers should note that the additional restrictions and information on dicamba labels shifts more responsibility for the product onto the applicator.”

Peggy Hall,  
Asst. Professor, Agriculture and Resource Law  
Ohio State University



# Product Liability?

We are writing to advise we have completed our investigation into this loss.

We do not find any negligence on your or your representatives for this loss as label directions were followed when spraying the chemical, Engencia, and the damage to your neighbor's fields was caused by product failure versus negligence on your part.

As discussed, we will contact the claimants and explain our position on this claim.

Sincerely,

Note: the above denial copy was not from Nationwide, the company quoted to the right. This is not a single company policy.

“We have a policy to defend our insured for his negligence against a third party, but if once our investigation is done and we show he did everything correctly, then the problem lies with the product and the liability with the manufacturer,” Steve Simmons, Nationwide Associate Vice President of Risk Management

<http://agfax.com/2017/10/24/dicamba-and-liability-insurance-5-things-you-need-to-know-dtn/>



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