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INDEMNITY AND CONTRIBUTION IN THE LITIGATION OF AERIAL APPLICATION CLAIMS: LOOKING FOR A DEEPER POCKET

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BACKGROUND

AIRCRAFT HAVE been used in agriculture since shortly after World War I.¹ The use of aircraft for aerial applications of pesticides did not become popular, however, until after World

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¹ McGreen, *Legal Implications of Agricultural Aviation*, 18 *J. AIR L. & COM.* 399 (1951).

War II. By 1975, there were approximately 3,500 applicators in the United States employing 4,700 professional pilots. Those applicators flew 2 million hours and treated more than 200 million acres at a cost of 375 million dollars to farmers.³ The increase in the use of aircraft in agriculture resulted primarily from the increased number of trained pilots and the availability of surplus aircraft following World War II, coupled with the development of modern, more effective pesticides.³

Boom times in the aerial application and pesticide industry have created the mixed blessing of governmental regulation. The industry has become the subject of comprehensive regulatory schemes on both the state and federal levels. The complexity of the schemes is illustrated by the cost of compliance. One expert has estimated that manufacturers can expect to spend ten to fifteen million dollars and from five to ten years in development and testing costs just to register a product for marketing.⁴ Once on the market, a pesticide is always subject to "recall," a reality illustrated by the Environmental Protection Agency's recent decision to suspend the use of 2, 4, 5-T and Silvex.⁵ The aerial applicators themselves have also been subject to increasing regulation in recent years. In addition to satisfying numerous licensing requirements, applicators have found it necessary to comply with comprehensive reporting and record keeping regulations. Prohibitions on the use of certain pesticides have necessarily hurt the industry. In a few instances, local governmental bodies literally have put some applicators out of business. Voters in Mendocino County, California recently voted for a ban on aerial applications of phenoxy herbicides.⁶ In nearby Trinidad County, California, the Board of Supervisors has just enacted two bans: one on the use of herbicides containing dioxin and one on aerial applications.⁷

² BUS. WEEK, Mar. 15, 1976, at 58.

³ Annot., 37 A.L.R.3d 833, 837 (1971).

⁴ Warren, *Controlling Drift in Herbicides*, WORLD OF AGRICULTURAL AV., March, 1976, at 30.

⁵ EPA Emergency Suspension Order, Feb. 28, 1979, 44 Fed. Reg. 15,874 (1979).

⁶ WORLD OF AGRICULTURAL AV., August, 1979, at 30.

⁷ *Id.*

CLAIMS AGAINST AERIAL APPLICATORS: THEORIES OF LIABILITY

A. *Common Law*

The most serious risk inherent in aerial applications is the movement of pesticides from target areas to non-target areas. This is commonly called "drift." Drift is a function of various factors: (1) the chemical nature of the pesticide; (2) the method of application; (3) wind direction; (4) stability of the air; (5) temperature and humidity; and (6) the carrier. Certain chemicals create more of a drift hazard than others. The techniques employed by the applicator are critical when the chemicals involved are phenoxy herbicides and dusts.⁸

A common phenoxy herbicide, 2, 4-D, can be used to illustrate the hazards of drift. Used to control broadleaf weeds in crops such as wheat, barley, and rice, the chemical is deadly to crops such as cotton and tomatoes. Aerial applications of 2, 4-D products are common in the Western States and areas of the South. When applied in liquid form, the drift hazard of 2, 4-D is twofold: spray droplets may be blown from the target field to non-target areas immediately after application ("spray drift"). The product may also volatilize, during application or days after application, and be blown in a vapor form to non-target areas ("vapor drift"). A spray droplet five microns in diameter released at an altitude of ten feet in a three mile-per-hour wind will travel three miles before touching ground.⁹ The danger of drift is not necessarily eliminated by restricting applications to calm days. When the air is still, a "lapse" or an "inversion" may occur, causing spray particles or vapors to remain suspended above target areas. The slightest air movement will move the pesticide off target. In one study on the effects of stable air on aerial applications, herbicide symptoms were noted fifty miles from the point of application.¹⁰

As suggested above, control of pesticide "drift" is extremely difficult. In fact, many commentators have suggested that precise control in application is impossible. It would be fair to say that

⁸ Dusts are used very little in herbicide applications because of the problem of confining dust to target areas. Warren, *supra* note 4, at 32.

⁹ *Id.* at 37.

¹⁰ *Id.* at 27.

aerial application is an imperfect art at best and that the risk of inadvertent drift is one that cannot be eliminated with the technology currently available.¹¹

A majority of the states nationwide have held that the liability of an aerial application must be based on a finding of negligence. Unfortunately, it is not at all clear what must be proved in order to show such negligence.¹² Examples of specific negligent acts cited by various courts include applications in "high winds" conditions,¹³ failing to notify plaintiff of the applications,¹⁴ making applications when defendant knew or should have known that the wind would carry the pesticide over and upon plaintiff's crops,¹⁵ and failing to shut off sprayers while flying over plaintiff's land.¹⁶ In other cases, the courts appear willing to make a finding of negligence on little more than evidence of damage. Thus, in *Schultz v. Harless*,¹⁷ the court held the defendant liable because he knew or should have known that his application of 2, 4-D might cause damage. Similarly, in *Kennedy v. Clayton*,¹⁸ the court found the defendant negligent for failing to investigate the possibility that the 2, 4-D pesticide applied might drift.

If the various courts seem unable to agree on a "standard of care" for the aerial applicator, their shortcomings can perhaps be explained by the risk-benefit analysis which lies at the heart of

¹¹ Comment, *Crop Dusting, Two Theories of Liability?*, 19 HASTINGS L.J. 476, 478 (1968). See also *WORLD OF AGRICULTURAL AV.*, September, 1979, at 23, in which it was reported that:

[T]he National Pesticide Use Observation Program, a program of the Environmental Protection Agency, concluded after extensive tests that complete drift control cannot be achieved with any device, additive, or system commercially available. Even under ideal weather and application conditions it was found that an estimated 10 percent to 35 percent of the chemical applied drifted beyond the target site.

¹² In *Loe v. Lenhardt*, 227 Or. 242, 362 P.2d 312 (1961), the court noted, after reviewing the decisions on aerial applicator liability, that it was sometimes difficult to detect what theories the courts were following in imposing liability. 362 P.2d at 314.

¹³ *Gragg v. Allen*, 481 S.W.2d 452 (Tex. Civ. App.—Waco 1972, writ dismissed w.o.j.).

¹⁴ *Brown v. Sioux City*, 242 Iowa 1196, 49 N.W.2d 853 (1953).

¹⁵ *Parks v. Atwood Crop Dusters*, 118 Cal. App. 2d 368, 257 P.2d 653 (1953).

¹⁶ *Hammond Ranch Corp. v. Dodson*, 199 Ark. 846, 136 S.W.2d 484 (1940).

¹⁷ 271 S.W.2d 696 (Tex. Civ. App.—El Paso 1954, no writ).

¹⁸ 216 Ark. 851, 227 S.W.2d 934 (1950).

our tort system. Negligence has been defined as conduct which involves an unreasonably great risk of causing damage.¹⁹ Since all human activity carries some possibility of harm to others, the "reasonableness" of one's conduct is determined "by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued."²⁰ For this reason, argues Prosser, it is seldom possible to reduce negligence to any definite rules. Negligence is relative to the need and the occasion.²¹

Decisions such as *Schultz v. Harless* strongly suggest that certain courts are merely paying lip service to the negligence doctrine while in fact shifting the risk of loss to the applicator and imposing a rule of strict liability. Indeed, under the standards of care imposed by some courts, it is difficult to conceive of any aerial applicator escaping liability for damage resulting from his applications.

Only four states in the United States have expressly adopted the doctrine of strict liability in connection with aerial application losses. The first to do so was Louisiana. In the case of *Gotreaux v. Gary*,²² the court allowed judgment for the plaintiff where plaintiff established that his crop was destroyed by a 2, 4-D herbicide applied by defendant on a rice field 3-1/4 miles south of plaintiff's fields. Although the court recognized that rice was one of Louisiana's most important crops and that its proper cultivation necessitated the use of herbicides, it held that plaintiff could not be deprived of the privilege of raising his crops because of defendant's spraying operations. Said the court:

We are unwilling to follow any rule which rejects the doctrine of absolute liability in cases of this nature and prefer to base our holding on the doctrine that negligence or fault, in these instances, is not a requisite to liability, irrespective of the fact that the activities resulting in damages are conducted with assumed reasonable care and in accordance with modern and accepted methods.²³

Four years after the *Gotreaux* decision, the Supreme Court of

¹⁹ W. PROSSER, HANDBOOK OF THE LAW OF TORTS 145 (4th ed. 1971).

²⁰ *Id.* at 149.

²¹ *Id.*

²² 232 La. 373, 94 So. 2d 293 (1957).

²³ 94 So. 2d at 295.

Oklahoma rendered its opinion in *Young v. Darter*.²⁴ In that case, plaintiff sought recovery for damage to cotton allegedly caused by the drift of a 2, 4-D herbicide applied by defendant to a nearby pasture. In affirming a judgment for plaintiff, the court said:

When one, in an operation lawful and proper in itself, but cognizant of existing conditions and with knowledge that injury may result to another, does an act with the result flowing therefrom that damage is done to the other as the direct and proximate consequence of the act, the one who does the act and causes the injury should be required to compensate the other for the damage done.²⁵

The facts of the case, reasoned the court, brought it within the rule of *Rylands v. Fletcher*.²⁶ Defendant's use of 2, 4-D was at his own peril. He was responsible for its drifting and thereby trespassing on plaintiff's land where it damaged plaintiff's cotton. Any precautions defendant may have taken to prevent the injuries to plaintiff's cotton could not serve to extinguish his liability. "The question," said the court, "is not whether defendant acted with due care and caution, but whether his acts occasioned the damage."²⁷

The third state to adopt a strict liability approach to aerial application losses was Oregon. In the case of *Loe v. Lenhardt*,²⁸ the court ruled that the use of pesticides was an "ultrahazardous activity" which warranted the application of the trespass principles set forth in section 165 of the Restatement of Torts:²⁹ "The element of fault, if it can be called that, lies in the deliberate choice

²⁴ 363 P.2d 829 (Okla. 1961).

²⁵ *Id.* at 832.

²⁶ If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been and whatever precautions he may have taken to prevent the damage.

3 H.L. Cas. 330, 334 (1868) (concurring opinion).

²⁷ 363 P.2d at 834.

²⁸ 227 Or. 242, 362 P.2d 312 (1961).

²⁹ RESTATEMENT (SECOND) OF TORTS § 165 (1965) provides as follows:

One who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or to a thing or third person in whose security the possessor has a legally protected interest.

by the defendant to inflict a high degree of risk upon his neighbor even though utmost care is observed in so doing."³⁰ Under this theory, liability is imposed upon the applicator by virtue of his voluntary taking of the risk of damage to his neighbor's crops.

The most recent state to impose strict liability on an aerial applicator is Washington. In *Langan v. Valicopters*,³¹ the court relied upon sections 519 and 520 of the Restatement (Second) of Torts in finding the defendant applicator strictly liable for damage resulting from the applicator's operations.³² Imposition of strict liability was justified, the court reasoned, because the aerial application of pesticides is an "abnormally dangerous activity."³³ Although the court recognized that the control of insects, weeds, and other pests was socially valuable, it pointed out that the high degree of risk inherent in aerial applications could not be eliminated by the exercise of reasonable care. Under such circumstances, said the court, the losses caused by pesticides should be borne by the applicator.³⁴

B. State and Federal Legislation

The Federal Environmental Pesticide Control Act of 1972 establishes a federal regulatory scheme for the manufacture and

³⁰ 362 P.2d at 317.

³¹ 88 Wash. 2d 855, 567 P.2d 218 (1977).

³² RESTATEMENT (SECOND) OF TORTS § 519 (1977) provides as follows:

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the persons, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent such harm; (2) such strict liability is limited to the kind of harm, the risk of which makes the activity abnormally dangerous.

RESTATEMENT (SECOND) OF TORTS § 520 (1977) provides as follows:

In determining whether an activity is abnormally dangerous, the following factors are to be considered: (a) whether the activity involves a high degree of risk of some harm to the person, land or chattels of others; (b) whether the gravity of the harm which may result from it is likely to be great; (c) whether the risk cannot be eliminated by the exercise of reasonable care; (d) whether the activity is not a matter of common usage; (e) whether the activity is inappropriate to the place where it is carried on; and (f) the value of the activity to the community.

³³ 567 P.2d at 222-23.

³⁴ *Id.*

use of pesticides. The federal statute covers everything from production to application.³⁵

Under 7 U.S.C. § 136a, all pesticides must be registered with the Administrator of the Environmental Protection Agency before they may be sold or distributed. Registration requires submission to the Environmental Protection Agency of a statement of all claims made for the pesticide, as well as a complete copy of the product's label and a description of the product's use. An applicant may also be required to submit a full description of all tests made on the product and the results thereof. The Administrator is authorized to register a pesticide only upon his determination that the pesticide is properly labeled and that it will not cause unreasonable adverse effects on the environment. Use of an unregistered pesticide is prohibited.

Seven U.S.C. § 136b(a)(1) is of special significance to the aerial applicator. It empowers the Administrator to prescribe standards for the certification of applicators of pesticides. The impact of this section is modified, however, by a provision which permits a state to establish certification procedures, subject to the approval of the Administrator. Most of the major agricultural states have chosen this option. At the same time, most of the states choosing this option have patterned their certification procedures on the federal model. Typically, the state regulatory schemes require applicators to undergo a training program followed by a written proficiency examination. Many of the state programs also require pesticide dealers to participate in certification programs. Both the state and federal regulatory schemes are designed to insure that applicators demonstrate a knowledge of labeling, safety factors, environmental impacts, pesticides, equipment to be used, application techniques, and state and federal laws and regulations.

Aerial applicators must also comply with the requirements of Part 137 of the Federal Aviation Regulations.³⁶ Under these regulations, no person may conduct agricultural aircraft operations without an aircraft operator's certificate. An applicant for a Commercial Agricultural Aircraft Operator's Certificate must have available the services of at least one person who holds a current

³⁵ Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 793 (codified at 7 U.S.C. §§ 135-136y (1976)).

³⁶ 14 C.F.R. § 137 (1979).

Commercial or Airline Transport Pilot Certificate. The applicant must also have at least one certified and airworthy aircraft, equipped for agricultural operation. Finally, the applicant must show that he has satisfactory knowledge and skill regarding agricultural aircraft operations. Part 137.19 requires a test of knowledge of pesticides and a flight test on agricultural operations maneuvers. Once certificated, the agricultural operator must follow precise operating rules and satisfy numerous record keeping requirements.

As might be expected, the various federal and state statutes and regulations have had an impact on the aerial applicators' civil liability. Although proof of compliance with government regulations will not necessarily relieve the applicator of liability for damage caused by pesticide applications,³⁷ the provisions of the state and federal pesticide acts have been held to establish minimum standards of care.³⁸ Compliance with the legislative standard may be *prima facie* evidence of due care.³⁹ In Arkansas, a violation of the state pesticide act is, by statute, *prima facie* evidence of negligence on the part of the applicator.⁴⁰ In Mississippi, the pesticide act limits plaintiff's recovery for certain pesticide damage to a single theory—negligence.⁴¹ In Virginia, violation of the state pesticide act constitutes negligence as a matter of law, precluding the need for establishing the common law elements of negligence.⁴²

INDEMNITY AND CONTRIBUTION:

SHIFTING THE BURDEN OF LOSS TO THE MANUFACTURER

When sued for losses sustained to non-target crops, the aerial

³⁷ See *Muncey v. Magnolia Chem. Co.*, 437 S.W.2d 15 (Tex. 1968).

³⁸ *Muncey v. Magnolia Chem. Co.*, 437 S.W.2d 15 (Tex. 1968) (violation of the federal act is negligence *per se*); *McClanahan v. California Spray-Chem. Corp.*, 75 S.E.2d 712 (Va. 1953) (violation of state and federal statutes is negligence as a matter of law); *Gonzalez v. Virginia-Carolina Chem. Co.*, 239 F. Supp. 567 (E.D.S.C. 1965) (violation of federal labeling provisions is negligence *per se*).

³⁹ *Jones v. Hittle Serv., Inc.*, 219 Kan. 627, 549 P.2d 1383 (1976).

⁴⁰ ARK. STAT. ANN. § 77-258(e)(4) (Supp. 1979).

⁴¹ MISS. CODE ANN. § 69-21-15 (1972) provides that "in all actions for damages to crops caused by application of hormone-type herbicides by aircraft . . . the Plaintiff shall allege and prove that the damage complained of is the result of negligence. . . ."

⁴² *McClanahan v. California Spray-Chem. Corp.*, 75 S.E.2d 712 (Va. 1953).

applicator is frequently limited to a single defense: due care under the circumstances. It is suggested by the authors that opportunities abound for obtaining contribution or even full indemnity from pesticide manufacturers. In this section, the basic rules of contribution and indemnity shall be examined, and the application of this rule to litigation involving aerial applicators will be discussed.

A. *General Rules of Indemnity and Contribution*

Indemnity is the right of a party held liable to another to shift the entire liability to a third party. The concept is designed to relieve the "morally innocent" tortfeasor from the burden of a loss and to impose the burden instead on the party whose wrongful conduct actually caused the loss. As Prosser has pointed out, it is extremely difficult to formulate a general rule as to when indemnity will be allowed and when it will not:

It has been said that it is permitted only where the indemnitor has a duty of his own to the indemnitee; that it is based on a great difference in gravity of the fault of the tortfeasors; or that it rests upon a disproportion or difference in character of the duties owed by the two to the injured plaintiff. Probably none of these is a complete answer and, as is so often the case in the law of torts, no one explanation can be found which will cover all of the cases. Indemnity is a shifting of responsibility from the shoulders of one person to another, and the duty to indemnify will be recognized in cases where community opinion would consider that, in justice, the responsibility should rest upon one rather than the other.⁴³

It is generally agreed that the right to indemnity exists in favor of one who is liable by imputation of law because of his special relationship with the actual wrongdoer, as where an employer is held vicariously liable for the acts of his employee. Indemnity is not strictly limited, however, to those who are free from fault. Thus, the courts have recognized that a right of indemnity exists against a manufacturer in favor of the retailer of a product lacking an adequate warning where the retailer was held liable for his negligence in failing to provide an adequate warning.⁴⁴ Such

⁴³ W. PROSSER, *supra* note 19, at 281.

⁴⁴ *Jacobs v. Technical Chem. Co.*, 472 S.W.2d 191 (Tex. Civ. App.—Houston [14th Dist.] 1971), *rev'd on other grounds*, 480 S.W.2d 602 (Tex. 1972).

a result is justified on the grounds that the retailer's liability stems from his "passive" or "secondary" role as a distributor of a defective product furnished by the "active" or "primary" wrongdoer, the manufacturer.

Contribution is a right, developed in equity, which permits a tortfeasor who pays more than his fair share of a judgment to recover from fellow tortfeasors their pro rata share of the judgment. Common liability is the essence of contribution. If the party from whom contribution is sought is not liable to the person harmed, there is no basis for contribution.⁴⁵

A majority of states now permits contribution among joint tortfeasors, and generally, this right is governed by statute.⁴⁶ Although there are variations among the statutes, they are similar in several important respects. Most provide that there is no contribution in favor of persons who commit willful or intentional torts.⁴⁷ Most also provide that the contribution defendant must be a tortfeasor, and originally liable to the plaintiff.⁴⁸ Finally, most of the contribution statutes provide that each tortfeasor is required ultimately to pay his pro rata share of the damages.⁴⁹ In a few jurisdictions, the distribution of the liability is in proportion to each tortfeasor's comparative fault.⁵⁰ Generally, however, the pro rata share is determined by dividing the plaintiff's damages by the number of tortfeasors responsible for the loss.⁵¹

B. *Indemnity Under the Uniform Commercial Code*

Pesticides are "goods" within the meaning of the Uniform Commercial Code (UCC) and subject to the provisions of Article Two (Sales). The Code defines a "buyer" as "a person who buys or contracts to buy goods."⁵² A "seller" is defined as a "person who

⁴⁵ W. PROSSER, *supra* note 19, at 305-10.

⁴⁶ 1 J. DOOLEY, *MODERN TORT LAW* 566-67. Twenty states permit contribution by statute. Ten of these states have adopted variations of the Uniform Contribution Among Joint Tortfeasors Act. Six states have allowed contribution by judicial decision. *Id.*

⁴⁷ W. PROSSER, *supra* note 19, at 305-10.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*; see also *Burk Motors, Inc. v. International Harvester Co.*, 466 S.W.2d 907, *reh. denied*, 466 S.W.2d 943 (Ark. 1971).

⁵¹ W. PROSSER, *supra* note 19, at 305-10.

⁵² U.C.C. § 2-103(a).

sells or contracts to sell goods."⁵³ An aerial applicator who buys and applies pesticides is at times a buyer and at times a seller within the meaning of the UCC. In his dealings with the aerial applicator, the chemical manufacturer will generally be a seller.

When a sale of goods takes place, the UCC provides that the seller impliedly warrants that his goods are of "merchantable" quality.⁵⁴ If the seller knows the particular purpose for which the goods sold are to be used, the seller also impliedly warrants that his goods are "fit" for the buyer's "particular purpose."⁵⁵ The implied warranties which arise under the UCC are in addition to express warranties made by the seller.⁵⁶ When a seller breaches any of his warranties, the buyer may avail himself of the remedies delineated in the Code, which include incidental and consequential damages.⁵⁷

The rights of the pesticide applicator under the UCC were spelled out with exceptional clarity in an opinion rendered by the United States District Court of Missouri. The case of *Chemco Industrial Applicators Co. v. E.I. DuPont de Nemours & Co.*⁵⁸ involved an applicator who contracted with the Grady-Gould Water Shed Improvement District (District) to eradicate vegetation along thirty-five miles of drainage ditches owned by the District. To fulfill its obligations under said contract, the applicator, Chemco, used approximately twelve thousand pounds of Hyvar-x, a product manufactured by DuPont. DuPont had, through its sales agent, represented that Hyvar-x would effect a ninety to one-hundred percent kill on willow and brush in drainage ditches. Based upon this representation, Chemco had guaranteed the District an eighty-five percent kill. Subsequent to the applications, the District discovered that the actual kill was from twenty to seventy-five percent. The District brought suit against Chemco and its surety in state court and obtained judgment in the amount of \$31,000. Chemco and its surety then sued DuPont for indemnity. In its answer to Chemco's complaint, DuPont

⁵³ U.C.C. § 2-103(d).

⁵⁴ U.C.C. § 2-314.

⁵⁵ U.C.C. § 2-315.

⁵⁶ U.C.C. § 2-313.

⁵⁷ U.C.C. § 2-711, § 2-715.

⁵⁸ 366 F. Supp. 278 (E.D. Mo. 1973).

alleged that Chemco had improperly applied the product.⁵⁹

Sitting without a jury, the court held that the representations made by DuPont's sales representative that Hyvar-x would effect a ninety to one-hundred percent kill were express warranties under section 2-313 of the Uniform Commercial Code.⁶⁰ The court also held that DuPont had impliedly warranted, under sections 2-314 and 2-315, that Hyvar-x was "merchantable" and "reasonably fit for the purpose" of eradicating brush from the drainage ditches. According to the court, all of these warranties were breached and Chemco was thus entitled to consequential damages under section 2-715 of the UCC. By way of relief, the court ruled that DuPont was liable for the \$31,000 judgment recovered in state court by the District and discharged by Chemco's surety. The court further ordered DuPont to pay for the attorney's fees incurred by Chemco in defending the District's suit. The court found no evidence to support DuPont's argument that the applications had not been made in accordance with DuPont's labeled instructions.⁶¹

In opinions rendered prior and subsequent to the *Chemco* decision, numerous other courts have recognized the indemnity rights of buyers under the UCC. In *Burr v. Sherwin Williams Co.*,⁶² the court recognized that the presence of a 2, 4-D compound in a DDT spray would amount to a breach of the implied warranty of merchantability. In *Jones v. Hittle Service, Inc.*,⁶³ the court held that a manufacturer's failure to warn users of the dangerous nature of its product would make the product defective and that any subsequent sale of that product would constitute a breach of the implied warranty of merchantability and/or fitness.

Of particular importance to the aerial applicator faced with claims is the rule generally accepted by the courts that the promotional literature distributed by manufacturers and the oral representations made by their sales agents may constitute express warranties within the meaning of section 2-313 of the Uniform Commercial Code.⁶⁴ The UCC states that an express warranty

⁵⁹ *Id.* at 281.

⁶⁰ *Id.* at 283.

⁶¹ *Id.* at 285.

⁶² 42 Cal. 2d 682, 268 P.2d 1041, 1048 (1954).

⁶³ 549 P.2d 1383 (Kan. 1976).

⁶⁴ *Chemco Indus. Applicators Co. v. E.I. DuPont de Nemours & Co.*, 366 F. Supp. 278 (E.D. Mo. 1973).

may be an affirmation of fact, a promise, a description of goods or a sample, if the parties agreed that the goods shall conform thereto.⁶⁵ Oftentimes, manufacturers promote products, especially herbicides, by providing locally prominent applicators with free samples or by enlisting such applicators in test programs. When an applicator purchases and uses large quantities of herbicide, based on the test samples provided by the manufacturer, and is subsequently the subject of a lawsuit for damages caused by the product, the applicator should have a viable action against the manufacturer for breach of express warranty upon proof that the product sold was not the same as the product tested.

C. Indemnity and Contribution Under Strict Liability and Negligence Theories

An aerial applicator faced with claims arising out of the use of a pesticide which does not perform as expected may claim indemnity or contribution from the pesticide manufacturer on either a negligence or strict liability theory. Special attention should be given to the possibility that the pesticide label contains inadequate warnings or is otherwise deficient. Under the Federal Environmental Pesticide Control Act, a pesticide is "misbranded" if it does not contain certain warnings or cautionary statements adequate to protect health and the environment.⁶⁶ A product is obviously misbranded if it contains impurities,⁶⁷ and the manufacturer may be held liable for damages resulting therefrom. Likewise, a manufacturer who markets a product with dangerous propensities has a duty to adequately warn the user of the dangers.⁶⁸ Failure to provide proper warnings on pesticide labels has, on at least one occasion, been held to be negligence as a matter of law.⁶⁹ Several courts have held that misbranded products are defective under the doctrine of strict liability.⁷⁰ In any event, it would appear that if an applicator can show that plaintiff's damages were

⁶⁵ U.C.C. § 2-313.

⁶⁶ Pub. L. No. 92-516, 86 Stat. 973 (codified at 7 U.S.C. § 136(q) (1976)).

⁶⁷ *Rose v. Buffalo Air Serv.*, 104 N.W.2d 431 (Neb. 1960).

⁶⁸ *McClanahan v. California Spray-Chem. Co.*, 75 S.E.2d 712 (Va. 1953).

⁶⁹ *Id.*

⁷⁰ *Jones v. Hittle Serv., Inc.*, 549 P.2d 1383 (Kan. 1976); *Brooks v. Dietz*, 545 P.2d 1104 (Kan. 1976).

caused by inadequate warnings or misleading labeling, the applicator is entitled to indemnity from the manufacturer.⁷¹

At least one reported decision suggests that a manufacturer can be held strictly liable in tort for its failure to adequately test a product before placing it on the market. In *Chapman Chemical Co. v. Taylor*,⁷² plaintiff filed suit against an aerial applicator for damages sustained by plaintiff when 2, 4-D dust applied by the applicator drifted onto plaintiff's cotton. The applicator, in turn, filed a third-party complaint against the manufacturer of the dust. At trial, both the applicator and the manufacturer testified that they were unaware of the drift potential of 2, 4-D powder. On the basis of this testimony, the appellate court sustained a not guilty verdict for the applicator. The court refused, however, to reverse a finding of liability against the manufacturer. The court's decision was based on testimony that the manufacturer had made no tests to determine the floating quality of the dust and that it was this characteristic which made the product extra hazardous. The court reasoned that the manufacturer was strictly liable for its failure to test the product.⁷³

It should be remembered that the theories which will support an action for indemnity or contribution may overlap. For example, an "unmerchantable" product may also be "defective." Thus, the facts necessary to prove an action for indemnity under a warranty will probably also support a claim for indemnity under a strict liability theory.

Tortfeasors may be entitled to contribution from one another even though their tortious acts were committed at different times and in different places, as long as their conduct combined to cause the plaintiff's injury. Thus, in *Yanick v. Pennsylvania Railroad*,⁷⁴ a case in which plaintiff was injured when a train plowed through a bumping block on entering the station, the court held

⁷¹ See *Jacobs v. Technical Chem. Co.*, 472 S.W.2d 191 (Tex. Civ. App.—Houston [14th Dist.] 1971), *rev'd on other grounds*, 480 S.W.2d 602 (Tex. 1972), a failure to warn action by the buyer of a can of freon against the packager and seller for injuries he sustained when the can exploded. The Texas Court of Civil Appeals held that the dealer was entitled to indemnity from the packager because the dealer carefully stored the product and its character was not changed while in the dealer's possession. 472 S.W.2d at 200.

⁷² 222 S.W.2d 820 (Ark. 1949).

⁷³ *Id.* at 827.

⁷⁴ 192 F. Supp. 368 (E.D.N.Y. 1961).

that the railroad, which was negligent in the operation of the train, could maintain a cross-claim in contribution against the manufacturer of a coach equipped with defective brakes. Similarly, in *Delta Engineering Corp. v. Scott*,⁷⁵ a negligent crane operator was said to have a right of contribution against the manufacturer of a defective rope in connection with injuries sustained by plaintiff when a rigging made from the rope failed.

Contribution is, of course, a two-edged sword. The manufacturer of a defective product can maintain an action in contribution against a user whose negligence is a concurrent, proximate cause of another's loss. A case in point is *Bristol-Myers Co. v. Gonzales*,⁷⁶ in which a drug manufacturer was found liable to a patient in strict liability for failure to provide adequate information on the use of its medicine. The evidence also showed that the physician who administered the drug in question used amounts well over the recommended dosage and that he further employed other, improper, medical procedures. In approving an award in contribution in favor of the manufacturer and against the physician, the court noted that the law already gave negligent manufacturers contribution rights against other negligent third parties. The court saw no reason to deprive the manufacturer of its contribution rights simply because the judgment against the manufacturer was based on a strict liability theory.⁷⁷

CONCLUSION

An aerial applicator faced with claims resulting from use of a misbranded or otherwise defective product has a sound basis in law for recovering against the manufacturer of that product in either indemnity or contribution. If the applicator's "fault" is imputed by law, he has an excellent chance to obtain full indemnity from the manufacturer. If the applicator has been "actively" negligent, as where his actual carelessness results in damage to non-target vegetation or livestock, his action against the manufacturer will be limited to one for contribution. In either situa-

⁷⁴ 322 F.2d 11 (5th Cir. 1963).

⁷⁶ 548 S.W.2d 416 (Tex. Civ. App.—Corpus Christi 1976), *rev'd on other grounds*, 561 S.W.2d 801 (Tex. 1978).

⁷⁷ 548 S.W.2d at 428.

tion, since claims in aerial application mishaps can easily run into hundreds of thousands of dollars, the attorney defending an applicator against such claims must thoroughly investigate his indemnity and contribution possibilities.

