

Dicamba Injury: General Farm Liability Insurance Perspectives

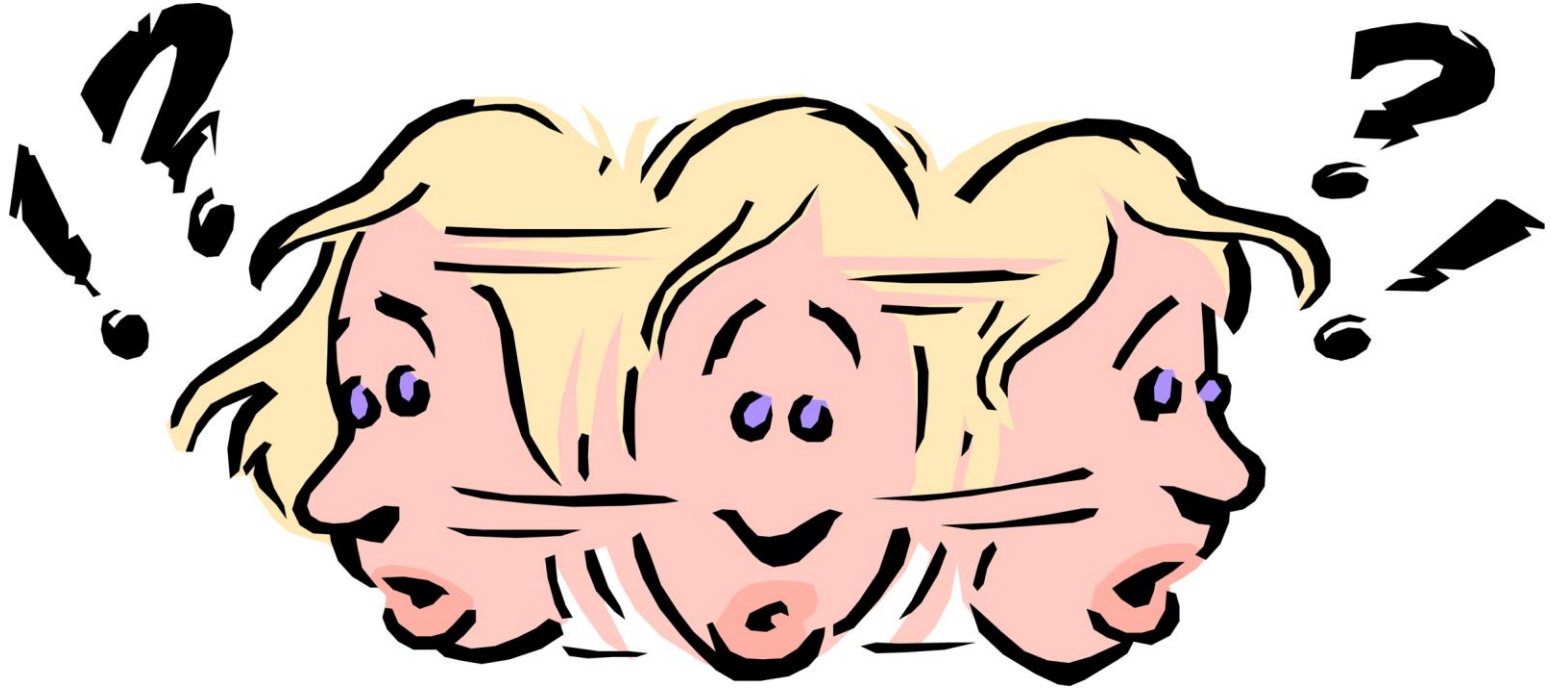
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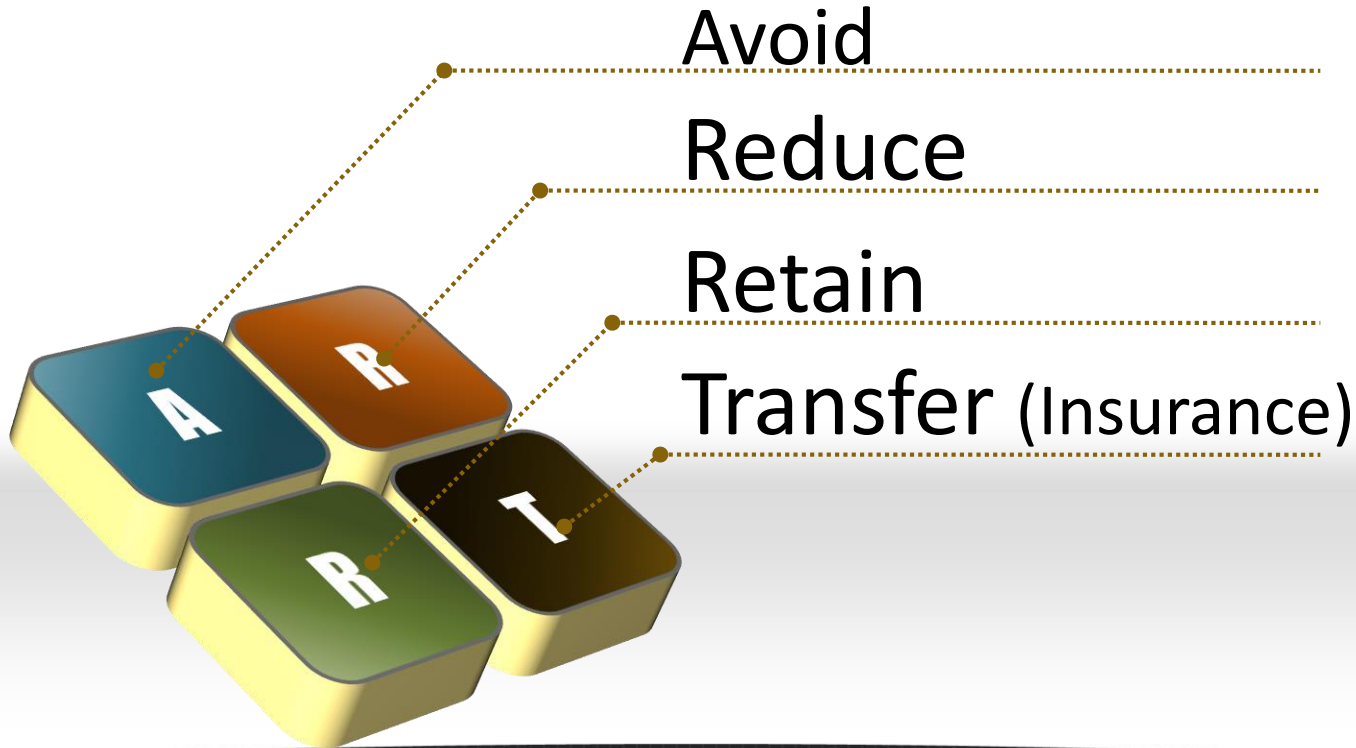


NORTH CENTRAL
EXTENSION
RISK MANAGEMENT
EDUCATION

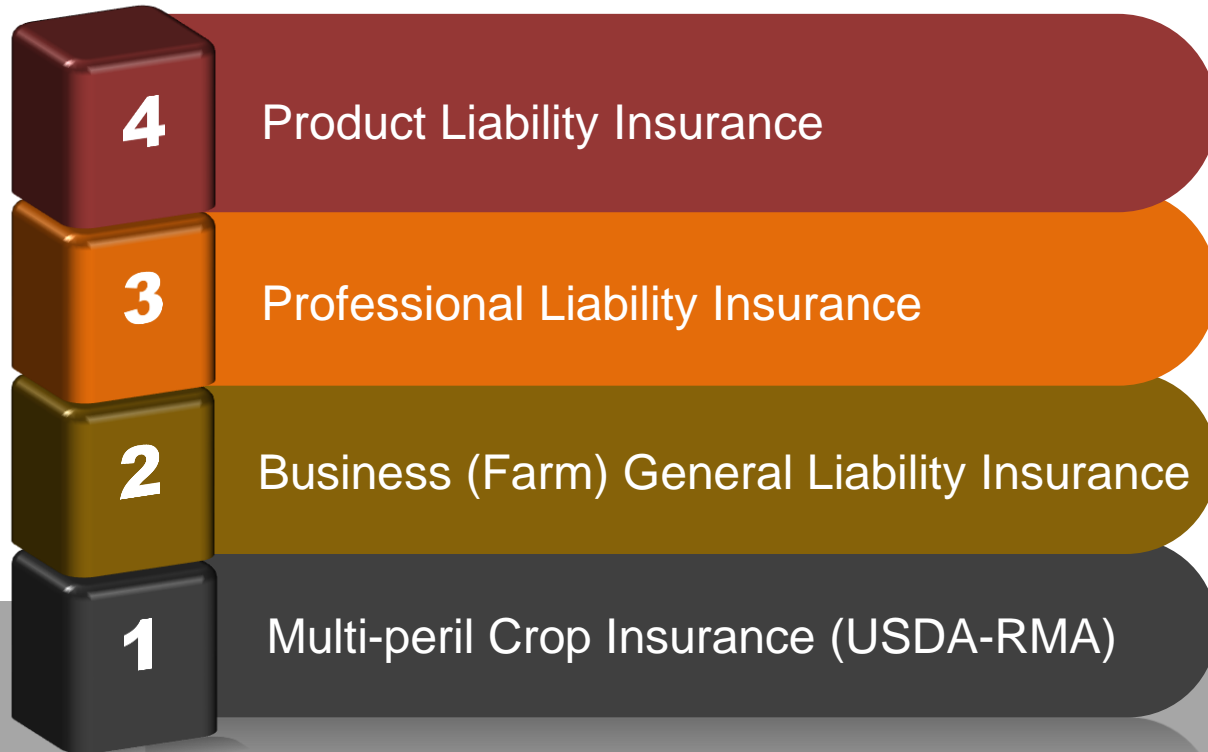
Dicamba Injury is
risk with a moving target



Risk Management Strategies



Insurances affected by 3rd party herbicide injury



Presentation Objectives

- ❖ Teach on insurance provisions when 3rd party herbicide injury occurs.
- ❖ Encourage you to review your general liability insurance policy for coverage of risks we are discussing.
- ❖ Encourage you to consider whether or not you need Professional Liability Insurance coverage.



Background: Dicamba Injury History

2016

Off-label applications

2017

Off target injuries

2018

EPA and states issue special labels for dicamba



History of Xtend crop introduction: 2015

- ❖ USDA issues determination that MON 87708 Soybean and Mon 88701 Cotton have “nonregulated status.” They can be planted.
- ❖ EPA does not finalize approval of labels for lower volatility formulations of dicamba.

ROUNDUP READY 2
X TENDTM
SOYBEANS



NOW COMMERCIALY AVAILABLE



History of Xtend crop introduction: 2016

- ❖ Spring, 2016: Xtend cotton and soybeans are planted in several mid-south states.
- ❖ Summer, 2016: Off-label application of dicamba on Xtend crops
- ❖ Summer, 2016: Extensive injury of non-target plants from off-label applications of unapproved dicamba formulations.
- ❖ Fall, 2016: EPA approves new, lower volatility formulations of Dicamba for use “over-the-top” of soybeans and cotton but not in time for the 2016 growing season.



2016: Xtend crops and insurance

- ❖ Multiple reports of off-target dicamba injury from post-emergent applications. Documented injury to row crops, trees, gardens, etc.
- ❖ RMA reiterates that 3rd party damage from pesticide drift is not a covered liability. This is NOT a new determination but a repeat of existing policy.
- ❖ The application of Dicamba over Xtend crops found to be an off-label application – not a covered loss in a general liability insurance policy



History of Xtend crop introduction: 2017

- ❖ Spring, 2017: Xtend cotton and soybeans are planted in many cotton and soybean producing states.
- ❖ Summer, 2017: Labelled application of dicamba on Xtend crops
- ❖ Summer, 2017: Extensive injury of non-target crops from approved applications of approved dicamba formulations.
- ❖ Fall, 2017:
 - EPA issues a new Restricted Use Pesticide label for approved dicamba formulations
 - Various states issue special use labels for approved dicamba formulations (<http://128.206.25.155/mocrops/dicamba/>)



2017: Xtend crops and insurance

- ❖ Expanded range of Xtend crop plantings
- ❖ Expanded range and extent of Dicamba related injury
- ❖ Multi-peril crop insurance RMA response
 - Reiteration that 3rd party damage is not a covered loss.
 - Modification of policy on APH calculations to allow exclusion of 3rd party damaged acres.
- ❖ General Liability Insurance Companies struggle with a new claim with which they have little experience or actuarial data.



History of Xtend crop introduction: 2018

- ❖ Spring, 2018: Xtend cotton and soybeans are planted in many cotton and soybean producing states.
- ❖ Summer, 2018: Labelled application of dicamba on Xtend crops
- ❖ Summer, 2018: Continued injury of non-target crops from approved applications of approved dicamba formulations.
- ❖ Fall, 2018: EPA and state responses?



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.



Liability Insurance

❖ Coverage provisions

- Some are common – e.g. personal injuries on property
- Some are elected as additional coverage – e.g. spray endorsement



Limitations on Liability Insurance

- ❖ Must communicate with insurance company when accidents occur
- ❖ Must cooperate with the insurance company to settle claims
- ❖ Specific coverage limits –
 - Some are common – e.g. personal injuries on property
 - Some are elected as additional coverage – e.g. spray endorsement
- ❖ Limited by period of time the insurance is in force
- ❖ Dollar limits on the amount paid for each occurrence
- ❖ Dollar limits on the total paid for all occurrences during a specified time period.



Insured's responsibility

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

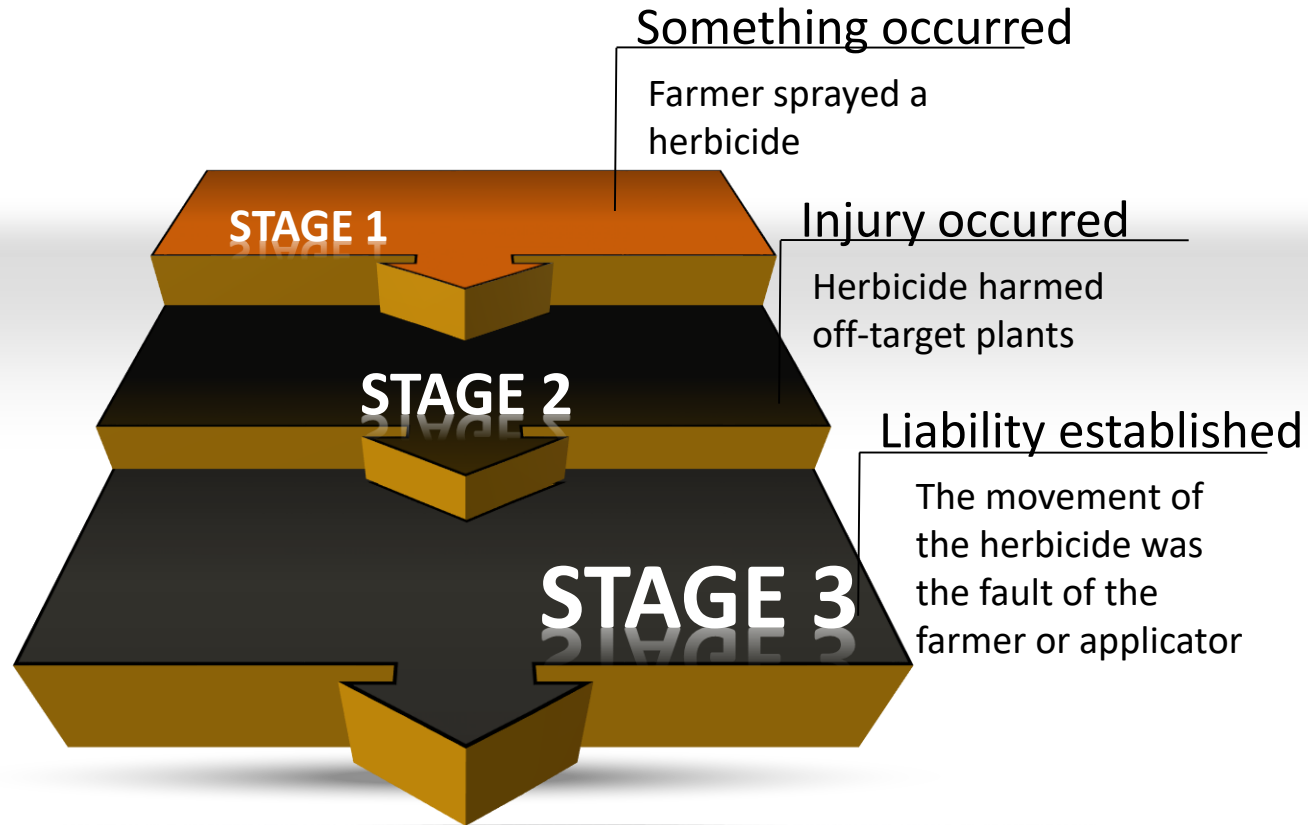


Insurance Company responsibility

- ❖ 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 3rd party damage in 2017, is it an unexpected event if Dicamba injures nearby crops?
- ❖ If the applicator followed all the special labels for Dicamba application, was there intent to injure?



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 Claims: 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 Claims: 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



Umbrella Insurance



- ❖ Provides excess coverage over primary underlying liability policies
- ❖ Provides broader coverage than primary liability policies
- ❖ Replaces coverage provided by underlying policies when they are reduced or exhausted by losses.

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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