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50-State Survey: Landowner Liability for Pesticide Drift

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Landowners who apply or contract for the application of pesticide may have concern over their potential liability should pesticide drift occur and cause damage to neighboring crops. Generally, lawsuits related to drift sound in negligence. However, there are two additional potential claims that may arise in these cases of which landowners should be aware. Specifically, the first issue relates to whether the application of pesticides is considered inherently dangerous. This is a critical question because under tort law in most states, a landowner is not liable for the acts of his or her independent contractor. One exception to that general rule provides that landowners may be held liable for actions of an independent contractor if the action being taken by the contractor is considered to be inherently dangerous. The second issue relates to a claim of strict liability against persons who apply pesticide. Unlike the more common negligence theory, strict liability does not consider the reasonableness of the defendant's action. Instead, this legal theory imposes almost automatic liability if certain actions are taken.

This paper sets forth the results of a 50-state survey looking at each of these issues across the United States. Generally, among the states that have addressed these issues, the survey found as follows:

(1) ***Inherently Dangerous?*** Approximately 20 jurisdictions have directly addressed this question in some manner. Of these 20, 16 have determined that the aerial application of pesticides is an inherently dangerous activity, and a landowner should generally be held co-liable with his independent contractor for damages resulting therefrom. The remaining 4 jurisdictions that have addressed this issue directly have held that the aerial application of pesticides is not an inherently dangerous activity, so a landowner should generally escape

co-liability with his independent contractor. Interestingly, several jurisdictions seem to be trending toward finding that aerial application of pesticides is no longer inherently dangerous; states like Arkansas and California have adopted this view in recent cases. Also interesting is that certain states like Washington distinguish between aerial and ground application of pesticides, with the former being inherently dangerous and the latter maybe not.

(2) ***Strict Liability?*** Approximately 27 jurisdictions have directly addressed the issue of strict liability for pesticide drift in some manner. Of these 27, 8 have agreed that the aerial application of pesticides is an ultrahazardous activity for which its applicator should be held strictly liable. The remaining 19 jurisdictions have held that the aerial application of pesticides is not an ultrahazardous activity for which its applicator should be held strictly liable. Interestingly, Oregon is among the states to distinguish between aerial and ground application of pesticides, finding that the former is an ultrahazardous activity deserving of strict liability while the latter is not.

Below, this paper will provide an overview of the cases addressing these issues in each of the 50 states.

Alabama:

(1) **Inherently dangerous activity? Yes.** Boroughs v Joiner, 337 So.2d 340 (Ala. 1976) ("We hold that aerial application of insecticides and pesticides falls into the intrinsically or inherently dangerous category and, therefore, the landowner cannot insulate himself from liability simply because he has caused the application of the product to be made on his land by an independent contractor.").

(2) **Strict liability? No.** Boroughs v. Joiner, 337 So. 2d 340 (Ala. 1976) ("[W]do not adopt the view, as some courts have done, that such activity [crop dusting] is ultrahazardous thereby rendering one strictly liable, notwithstanding his exercise of the utmost care.").

Alaska:

(1) **Inherently dangerous activity? Unclear because no cases directly on point.**

(2) **Strict liability? Unclear because no cases directly on point.**

Arizona:

(1) **Inherently dangerous activity? Yes.** S. *A. Gerrard Co. v. Fricker,* 42 Ariz. 503, 506-07, 27 P.2d 678, 680 (1933) (holding lettuce grower liable for independent contractor's negligent ***aerial*** application of Dutox insecticide that drifted onto and damaged the neighboring plaintiff's apiary: "We conclude that the facts bring the case within the named exception, and that, because of the dangerous character of the agency employed, the work was not delegable."); *Lundberg v. Bolon*, 67 Ariz. 259, 194 P.2d 454 (1948) (holding liable a cotton

farmer and the aerial insecticide applicator he hired for the negligent ***aerial*** application and drift of insecticide to neighbor's bees); *Sanders v. Beckwith*, 79 Ariz. 67, 283 P.2d 235 (1955) (affirming cotton farmer's liability for independent contractor's negligent ***aerial*** insecticide that poisoned neighbor's dairy herd); *Pride of San Juan, Inc. v. Pratt*, 221 Ariz. 337, 212 P.3d 29 (Ct. App. 2009) (holding broccoli farmer liable for independent contractor's negligent ***aerial*** pesticide application, which contaminated neighboring farmer's vegetables, because "the facts of this case reflect crop dusting remains an inherently dangerous activity").

(2) **Strict liability? Probably no.** *Lundberg v. Bolon*, 67 Ariz. 259 P.2d 454 (1948) (analyzing the judgment for evidence supporting negligence, not strict liability); *Sanders v. Beckwith*, 79 Ariz. 67, 283 P.2d 235 (1955) (same); *Pride of San Juan, Inc. v. Pratt*, 221 Ariz. 337, 212 P.3d 29 (Ct. App. 2009) (same).

Arkansas:

(1) **Inherently dangerous activity? Recent decisions generally say no.** *Little v. McGraw*, 250 Ark. 766, 467 S.W.2d 163 (1971) (rejecting farmer's liability for hiring ***aerial*** crop duster who negligently struck and killed farm employee with airplane's landing gear because "[a]viation is now so commonplace that it cannot be considered to be either inherently dangerous or ultrahazardous"); *Wilson v. Greg Williams Farm, Inc.*, 2014 Ark. App. 334, 436 S.W.3d 485 (2014) (affirming denial of landowner liability for independent contractor's negligent ***aerial*** application of herbicide because "our supreme court has held that crop dusting is no longer an inherently dangerous activity, [citing *Little v. McGraw*, *supra*]"); *but see Hammond Ranch Corp. v. Dodson*, 199 Ark. 846, 136 S.W.2d 484 (1940) (affirming cotton farmer's liability for independent contractor's negligent ***aerial*** application of arsenic poisoning, which killed plaintiff's livestock, and "because of the very great likelihood of the poisonous dust or spray spreading to adjoining or nearby premises and damaging or destroying valuable property thereon, it could not delegate this work to an independent contractor and thus avoid liability"); *Burns v. Vaughn*, 216 Ark. 128, 224 S.W.2d 365 (1949) (affirming landowner's liability for independent contractor's negligent ***aerial*** application of chemical dust, which caused damage to neighbor's cotton crop); *Walton v. Sherwin-Williams Co.*, 191 F.2d 277 (8th Cir. 1951) (applying Arkansas state law) (affirming rice farmer's liability for independent contractor's negligent ***aerial*** application of weed killer because "[u]nder Arkansas law it has been held specifically that in cases where an airplane pilot in applying sprays does so negligently, his negligence is that of the farmer employing him, and the theory of an independent contractor relationship does not apply); *McKennon v. Jones*, 219 Ark. 671, 244 S.W.2d 138 (1951) (affirming cotton farmer's liability for independent contractor's negligent ***aerial*** application of pesticide, which caused neighbor's honey bees to suffer damage, because "where to the work to be performed is inherently dangerous, as here, the employer will not be permitted to escape liability for negligent injury to the property of another"); *Heeb v. Prysock*, 219 Ark. 899, 245 S.W.2d 577 (1952) (affirming liability of rice farmer for independent contractor's negligent ***aerial*** application of liquid 2,4-D on plaintiff's rice crops); *McCorkle Farms, Inc. v. Thompson*, 79 Ark. App. 150, 84 S.W.3d 884 (2002) (reversing jury verdict because jury was not instructed that "the spreading of 2,4-D by ***air*** is unduly hazardous to nearby crops [and] a person making use of such

substances cannot escape liability for such injury or damage by employing an independent contractor to make the actual application").

(2) **Strict liability? No.** *Burns v. Vaughn*, 216 Ark. 128, 224 S.W.2d 365 (1949) (affirming jury's finding of landowner liability based on finding that independent contractor acted negligently but denying strict liability because "one who uses a dust of this kind is not liable to his neighbors in every case; negligence must be shown"); *Kennedy v. Clayton*, 216 Ark. 851, 227 S.W.2d 934 (1950) (finding the trial court did not err in failing to give instructions that aerial crop dusting was an ultrahazardous activity for which the defendants could be held strictly liable); *Mangrum v. Pigue*, 359 Ark. 373, 198 S.W.3d 496 (2004) (affirming denial of liability for landowner and independent contractor who aerially applied Roundup Ultra that affected neighbor's corn crop because plaintiff failed to show negligent application and the "spraying of the widely used herbicide, Roundup Ultra, was not an ultrahazardous activity"); *but see Chapman Chem. Co. v. Taylor, for Use & Benefit of Wilson*, 215 Ark. 630, 222 S.W.2d 820 (1949) (finding strict liability should apply in an action by farmer against corporation which sold 2,4-D chemical dust for use of spraying rice crops from airplanes, because the corporation knew that such chemical dust was inherently dangerous to broad leaved plants); *Walton v. Sherwin-Williams Co.*, 191 F.2d 277 (8th Cir. 1951) (applying Arkansas Law) (affirming the trial court's finding that although 2,4-D in dust form "is so inherently dangerous when sprayed from an airplane as to impose 'strict liability' on the manufacturer, it does not follow that 2,4-D in liquid form is such an inherently dangerous product"); *see also Hammond Ranch Corp. v. Dodson*, 199 Ark. 846, 136 S.W.2d 484 (1940) (analyzing the judgment for evidence supporting negligence, not strict liability); *McKennon v. Jones*, 219 Ark. 671, 244 S.W.2d 138 (1951) (same); W.B. Bynum Cooperage Co. v. Coulter, 219 Ark. 818, 244 S.W.2d 955 (1952) (same); *J. L. Wilson Farms, Inc. v. Wallace*, 267 Ark. 643, 590 S.W.2d 42 (Ct. App. 1979) (same).

California:

(1) **Inherently dangerous activity? The most recent case says no.** *See Boyd v. White*, 128 Cal.App.2d 641, 276 P.2d 92 (1954) (finding that flying an *airplane* is not inherently dangerous: "It is true that the law formerly looked upon aviation as an ultra-hazardous activity [but] this view has come to be modified and now it is considered that properly handled by a competent pilot an airplane is not an inherently dangerous instrument."); *but see Miles v. A. Arena & Co.*, 23 Cal.App.2d 680, 73 P.2d 1260 (1937) (upholding a honeydew farmer's liability for the damage caused to his neighbor's bee hives by his independent contractor's *aerial* crop dusting); *Parks v. Atwood Crop Dusters, Inc.*, 118 Cal. App. 2d 368, 257 P.2d 653 (1953) (affirming a cotton farmer's liability for the damage caused to his neighbor's cotton fields when an independent contractor negligently applied *aerial* pesticide).

(2) **Strict liability? Historically no, but maybe trending toward yes.** *See Andreen v. Escondido Citrus Union*, 93 Cal. App. 182, 269 P. 556 (Cal. Ct. App. 1928) (analyzing liability for crop dusting in terms of negligence, not strict liability); *Kolberg v. Sherwin-Williams Co.*, 93 Cal. App. 609, 269 P. 975 (Cal. Ct. App. 1928) (same); *Miles v. A. Arena & Co.*, 23 Cal.App.2d 680,

73 P.2d 1260 (1937) (same); *Lenk v. Spezia*, 95 Cal. App. 2d 296, 213 P.2d 47 (1949) (same); *Adams v. Henning*, 117 Cal. App. 2d 376, 255 P.2d 456 (1953) (same); *Parks v. Atwood Crop Dusters, Inc.*, 118 Cal.App.2d 368, 257 P.2d 653 (1953) (same); *Yasukochi, Inc. v. McKibbin*, 152 Cal. App. 2d 108, 312 P.2d 770 (1957) (same); *SKF Farms v. Superior Court*, 153 Cal. App. 3d 902, 200 Cal. Rptr. 497 (Ct. App. 1984) (reversing the trial court's finding that, as "a matter which is in common usage" in California's agriculture, crop dusting is not an ultrahazardous activity but declining to affirmatively state on demurrer whether crop dusting is subject to strict liability); *Neil Bassetti Farms v. Tierra AG Spraying, Inc.*, No. F040302, 2003 WL 22079510 (Cal. Ct. App. Sept. 9, 2003) (noting jurisdictions "are in conflict over whether the ground application of pesticides is an ultrahazardous or abnormally dangerous activity warranting the imposition of strict liability" but declining to decide the issue because the parties did not directly raise it).

Colorado:

(1) **Inherently dangerous activity? Nothing directly on point, but probably no.** *Cf. Huddleston by Huddleston v. Union Elec. Ass'n*, 841 P.2d 282 (Colo. 1992) (reversing and remanding a jury finding of liability for a utility company that had hired a single-engine plane to *fly* decedent children: "[W]hen the inherently dangerous activity exception is applicable, 'the law invokes the theory of *respondeat superior*, imposing the master-servant relationship upon the parties engaged in the activity.'… [but w]e are satisfied that contracting with a charter airplane service to fly passengers in the wintertime is not *per se* an inherently dangerous activity.").
(2) **Strict liability? Unclear because no cases directly on point**.

Connecticut:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**
(2) **Strict liability? Unclear because no cases directly on point**.

Delaware:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**
(2) **Strict liability? Unclear because no cases directly on point**.

District of Columbia:

(1) **Inherently dangerous activity? Unclear because no cases directly on point.**
(2) **Strict liability? Unclear because no cases directly on point**.

Florida:

(1) **Inherently dangerous activity? Probably yes.** *See Emelwon, Inc. v. United States*, 391 F.2d 9 (5th Cir. 1968) (applying Florida state law) (holding that the United Sates could be held

liable for damage resulting from negligent spraying even if such spraying was performed by an independent contractor, if the jury found the activity contracted for was inherently dangerous).

(2) **Strict liability? Probably no.** *See Emelwon, Inc. v. United States*, 391 F.2d 9 (5th Cir. 1968) (applying Florida state law) (analyzing defendant's liability for crop spraying in terms of negligence, not strict liability).

Georgia:

(1) **Inherently dangerous activity? Yes.** *Yancey v. Watkins*, 308 Ga. App. 695, 708 S.E.2d 539 (2011) (holding lettuce farmer was liable for independent contractor's negligent ***aerial*** application of pesticide, which caused damage to neighbors' crops: "[B]ecause of the very great likelihood of the poisonous dust or spray spreading to adjoining or nearby premises and damaging or destroying valuable property thereon, it could not delegate this work to an independent contractor, and thus avoid liability.").

(2) **Strict liability? Probably no**. *See Chancey v. Peachtree Pest Control Co.*, 288 Ga. App. 767, 655 S.E.2d 228 (2007) (analyzing liability for crop dusting in terms of negligence, not strict liability); *Yancey v. Watkins*, 308 Ga. App. 695, 708 S.E.2d 539 (2011) (same).

Hawaii:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.

(2) **Strict liability? Unclear because no cases directly on point**.

Idaho:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.

(2) **Strict liability? Unclear because no cases directly on point**.

Illinois:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.

(2) **Strict liability? Unclear because no cases directly on point**.

Indiana:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.

(2) **Strict liability? Unclear because no cases directly on point**. *Cf. Dow Chem. Co. v. Ebling*, 723 N.E.2d 881 (Ind. Ct. App.) (analyzing pest control company's liability for damage allegedly caused to neighbors in terms of negligence, not strict liability), *transfer granted, opinion vacated on other grounds*, 741 N.E.2d 1249 (Ind. 2000), *and aff'd in part, vacated in part sub nom. Dow Chem. Co. v. Ebling ex rel. Ebling*, 753 N.E.2d 633 (Ind. 2001); *Hannan v. Pest Control Servs., Inc.*, 734 N.E.2d 674 (Ind. Ct. App. 2000) (same).

Iowa:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.
(2) **Strict liability? Probably no**. *Nizzi v. Laverty Sprayers, Inc.*, 259 Iowa 112, 143 N.W.2d 312 (1966) (analyzing farmer's negligent spraying of plaintiff's farmland in terms of negligence, not strict liability); *Martin v. Jaekel*, 188 N.W.2d 331 (Iowa 1971) (same).

Kansas:

(1) **Inherently dangerous activity? Historically yes, but the most recent case says no.** *See Desaire v. Solomon Valley Co-op, Inc.*, No. 94-1271-JTM, 1996 WL 148561 (D. Kan. Mar. 21, 1996) (applying Kansas state law) (holding "that the *ground*-based application of a herbicide in a rural and agricultural environment was not the sort of inherently dangerous activity contemplated by the Restatement or under Kansas law") (quoting *Desaire v. Solomon Valley Co-op, Inc.*, No. 94-1271-PFK, 1995 WL 580064, at *5 (D. Kan. Sept. 14, 1995)); *but see Underhill v. Motes*, 158 Kan. 173, 146 P.2d 374 (1944) (holding a farmer liable for his son's negligent *ground* application of grasshopper poison, which caused the neighbor's cattle to become sick and die).
(2) **Strict liability? No**. *Underhill v. Motes*, 158 Kan. 173, 146 P.2d 374 (1944) (analyzing the farmer's liability in terms of negligence, not strict liability); *Binder v. Perkins*, 213 Kan. 365, 516 P.2d 1012 (1973) (finding an *aerial* crop duster negligent for causing damage to his neighbor's crops, but refusing to apply strict liability because "[w]e should not apply a rule of strict liability without fault since the legislature has endorsed a policy of requiring liability based upon negligence… [i.e.,] a duty to prevent [the chemical's] escape. This is the outline of a high degree of care, not liability without fault."); *Ernest v. Faler*, 237 Kan. 125, 697 P.2d 870 (1985) (affirming the rule in *Binder v. Perkins* that "an aerial sprayer of crops is liable for negligence," not strict liability).

Kentucky:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.
(2) **Strict liability? No**. *Kentucky Aerospray, Inc. v. Mays*, 251 S.W.2d 460, 462 (Ky. 1952) (finding the evidence adequately supported a finding of negligence in the defendant's application of herbicide, which settled in plaintiff's pond killing his fish).

Louisiana:

(1) **Inherently dangerous activity? Yes.** *Gotreaux v. Gary*, 232 La. 373, 94 So.2d 293 (1957) (affirming liability of tenant rice farmer for hiring independent contractor who negligently applied 2, 4-D aerially, causing the destruction of his neighbor's cotton crop); *Jones v. Morgan*, 96 So.2d 109 (La. Ct. App. 1957) (affirming co-liability of rice farmers for hiring independent contractor who negligently *aerially* applied 2, 4-D that destroyed neighbor's cotton crops); *Romero v. Chris Crusta Flying Serv., Inc.*, 140 So. 2d 734 (La. Ct. App. 1962)

(affirming co-liability of rice farmer for his hiring of an independent contractor flying service, which negligently applied herbicide that damaged plaintiff's cotton crops); *Himel v. Am. Emp. Ins. Co.*, 354 So. 2d 606 (La. Ct. App. 1977) (affirming liability of insured farmer for crop damage incurred by his independent contractor's negligent crop dusting); *Augustine v. Dickenson*, 406 So. 2d 306 (La. Ct. App. 1981) (affirming liability of insured landowner for damage to his neighbors' vetegable gardens and fruit trees as a result of his independent contractor's negligent application of herbicides).

(2) **Strict liability? Yes.** *Gotreaux v. Gary*, 232 La. 373, 94 So.2d 293 (1957) (finding that strict liability applies to the aerial application of dangerous substances like 2, 4-D: "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"); *Jones v. Morgan*, 96 So.2d 109, 113 (La. Ct. App. 1957) (affirming "the doctrine of strict liability," as enunciated in *Gotreaux v. Gary*); *Trahan v. Bearb*, 138 So.2d 420 (La. App. 1962) (citing *Gotreaux v. Gary* and holding a chemical sprayer and farmer strictly liable for damages caused by the farmer's spray that drifted from his rice fields onto the neighbor's plants); *Romero v. Chris Crusta Flying Serv., Inc.*, 140 So.2d 734 (1962) (citing *Gotreaux v. Gary* and *Trahan v. Bearb* and upholding liability against a landowner and the dusting company on a finding that the preponderance of the evidence proved that plaintiff's pepper and cotton crops were damaged by defendants' spraying operations); *Russell v. Windsor Properties, Inc.*, 366 So.2d 219 (La. Ct. App. 1978) (finding "defendants are strictly liable for all damages occasioned to plaintiffs' 1974 cotton crop which are shown to have been proximately caused by defendants' spraying operations"); *but see Dupre v. Roane Flying Serv., Inc.*, 196 So. 2d 835 (La. Ct. App. 1967) (analyzing landowner's liability for spraying herbicide that damaged plaintiff's clover-seed crop in terms of negligence, not strict liability); *Mayeux v. Cane-Air, Inc.*, 426 So. 2d 305 (La. Ct. App.), *writ denied*, 429 So. 2d 159 (La. 1983) (same); *Petitto v. McMichael*, 588 So.2d 1144 (1991) (same).

Maine:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.
(2) **Strict liability? Unclear because no cases directly on point**.

Maryland:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.
(2) **Strict liability? Unclear because no cases directly on point**.

Massachusetts:

(1) **Inherently dangerous activity? Yes.** *Pannella v. Reilly*, 304 Mass. 172, 23 N.E.2d 87 (1939) (holding tree farmer liable for actions of independent contractor who sprayed arsenate of lead compound on ground, causing damage to neighbor's lettuce crop).
(2) **Strict liability? Probably no**. *See Pannella v. Reilly*, 304 Mass. 172, 23 N.E.2d 87 (1939) (briefly analyzing landowner's liability for damage to neighbor's crop of lettuce in terms of negligence, not strict liability).

Michigan:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.
(2) **Strict liability? Probably no**. *Motors Ins. Corp. v. Aviation Specialties, Inc.*, 304 F. Supp. 973 (W.D. Mich. 1969) (analyzing a spray company's liability to the plaintiff, an automobile dealer, in terms of negligence, not strict liability).

Minnesota:

(1) Inherently dangerous activity? Probably yes. *Kellen v. Mathias*, 519 N.W.2d 218 (Minn. Ct. App. 1994) (holding soybean farmer liable for independent contractor's negligent spraying that damaged neighbor's sugar beet crop because "if aerial spraying is an 'ultra-hazardous' activity, it follows that one who employs another to engage in an ultrahazardous activity is vicariously liable for any loss"); *Anderson v. State Dep't of Natural Resources*, 674 N.W.2d 748 (Minn. App. 2004) ("Although the record supports appellants' claim that [aerially applied] Sevin is toxic to bees, none of the parties briefed or addressed at oral argument the specific question of whether spraying pesticides is an ultrahazardous activity. Accordingly, on the record before us, we are not prepared to find that the spraying of pesticides is an ultrahazardous activity [for purposes of determining whether the defendant can be liable for the actions of his independent contractor]."), *rev'd on other grounds by* 693 N.W.2d 181 (Minn. 2005).
(2) **Strict liability? Probably no**. *See Anderson v. State, Dep't of Nat. Res.*, 674 N.W.2d 748, 759 (Minn. Ct. App. 2004) (choosing not to decide "that the spraying of pesticides is an ultrahazardous activity," albeit with regard to a different topic), *aff'd in part, rev'd in part*, 693 N.W.2d 181 (Minn. 2005).

Mississippi:

(1) **Inherently dangerous activity? Yes.** *Lawler v. Skelton*, 241 Miss. 274, 130 So. 2d 565 (1961) (finding liable a cotton farmer for his independent contractor's negligent *aerial* application of insecticides that damaged neighbor's cotton gin: "Farmers and all horticulturalists have the right to use the many beneficial new dusts and sprays to protect their growing crops from insects and diseases, but such preventative measures cannot be used with absolute impunity. Due care must be exercised in the operation, and an owner or lessee of land may be liable in damages for spreading poisonous dusts and sprays negligently."); *Council v. Duprel*, 250 Miss. 269, 165 So. 2d 134 (1964) (denying liability for want of evidence but

finding Duprel, a rice farmer, could be co-liable for any damage from the negligent herbicide application by Marquis, his independent contractor); *see also Evans v. Boyle Flying Serv., Inc.*, 680 So.2d 821 (Miss. 1996) (finding a crop duster not liable for drift of his aerially applied pesticide because the defendant failed to comply with the notice of claim limitation period prescribed by statute).

(2) **Strict liability? No.** *Council v. Duprel*, 250 Miss. 269, 165 So. 2d 134 (1964) (finding rice farmer not liable for damage caused to neighboring cotton and bean farmers by independent contractor who *aerially* applied 2-4-5-T because jury found lack of evidence to support theory of negligence); *see also Aerial Agr. Serv. of Mont. v. Richard*, 264 F.2d 341 (5th Cir. 1959) (applying Mississippi law) (analyzing seed spreader's conduct under negligence, not strict liability, theory).

Missouri:

(1) **Inherently dangerous activity? Probably yes.** *Laseter v. Griffin*, 968 S.W.2d 774, 775 (Mo. Ct. App. 1998) (denying a motion to dismiss by a defendant-landowner whose independent contractor negligently applied aerial pesticide that damaged a plaintiff-neighbor's crop and, in *dicta*, implying that the trial court should find the defendant liable for his independent contractor's negligence because other cases have found aerial pesticide application an inherently dangerous activity); *see also McLain v. Johnson*, 885 S.W.2d 345 (Mo. Ct. App. 1994) (discussing the inherently-dangerous-activities exception to the rule of independent-contractor nonliability but finding it did not apply in a suit directly against the pesticide applicator).

(2) **Strict liability? No.** *Faire v. Burke*, 363 Mo. 562, 252 S.W.2d 289 (1952) ("[A]n owner of premises may be liable to damages for spreading poisonous dusts and sprays negligently."); *Treon v. Hayes*, 721 S.W.2d 789 (Mo. Ct. App. 1986) (sorting through the evidence of negligence before concluding the defendant, a watermelon farmer, was liable for negligently applying 2, 4-D that harmed his neighbor's watermelon crop).

Montana:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.

(2) **Strict liability? Unclear because no cases directly on point**.

Nebraska:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.

(2) **Strict liability? Yes**. *Rose v. Buffalo Air Serv.*, 170 Neb. 806, 104 N.W.2d 431 (1960) ("All persons who deal with deadly poisons or noxious and dangerous substances are held to strict accountability, and the highest degree of care must be used to prevent injury from their use."); *Mustion v. Ealy*, 201 Neb. 139, 266 N.W.2d 730 (1978) (affirming an airplane crop-spraying service's liability for negligent spraying of poisonous chemical on plaintiff's farm land because "[a] person who negligently sprays a liquid or powder containing a

dangerous proportion of poison in such a manner as to endanger the animals of another person in the immediate vicinity may be held liable for damage resulting therefrom.") (citing *Rose v. Buffalo Air Serv.*, 170 Neb. 806, 104 N.W.2d 431 (1960)).

Nevada:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.
(2) **Strict liability? Unclear because no cases directly on point**.

New Hampshire:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.
(2) **Strict liability? Unclear because no cases directly on point**.

New Jersey:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.
(2) **Strict liability? No**. *Smith v. Okerson*, 8 N.J. Super. 560, 73 A.2d 857 (Ch. Div. 1950) (denying a farmer's liability to his neighbor for damaging the neighbor's cattle feed despite careful, non-negligent use of an arsenic sprayer: "The [English] rule was laid down… that one who brings upon his own land anything which would be harmful to his neighbors if it escaped, liable for the consequences in the event of escape, even though no negligence be proven. But our own courts declined to accept that doctrine.").

New Mexico:

(1) **Inherently dangerous activity? Yes.** *Pendergrass v. Lovelace*, 1953-NMSC-097, 57 N.M. 661, 262 P.2d 231 (holding a landowner for the damage caused when his independent contractor negligently sprayed aerial 2,4-D, which damaged the defendant-neighbor's cotton crop: "The proper test, it has been said [in 57 C.J.S., Master and Servant, § 590(b) and § 591(a)], is whether danger inheres in the performance in the work… Work held inherently dangerous, within the [inherently dangerous activities] exception, includes: Building of a brick wall abutting on a highway; depositing an insecticide, consisting of a poisonous dust or spray, on a field.").
(2) **Strict liability? No.** *Ligocky v. Wilcox*, 1980-NMCA-159, 95 N.M. 275, 620 P.2d 1300 (holding an aerial applicator of 2, 4-D not strictly liable for damage because the trial court did not find that he knew or reasonably should have known that the pesticide "was abnormally dangerous or unreasonably dangerous"); *but see id.* at ¶¶ 17-30, 95 N.M. at 277-79, 620 P.2d at 1302-04 (Sutin, J., concurring in part and dissenting in part) (arguing that New Mexico should adopt the rule of strict liability so that "negligence of a field sprayer is irrelevant, and contributory negligence of an employer is not a defense" because such would properly "shift[] the burden to the field sprayer to prove non-liability.").

New York:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.
(2) **Strict liability? Potentially yes, but only for abnormally dangerous chemicals.** *See June v. Laris*, 205 A.D.2d 166, 618 N.Y.S.2d 138 (1994) (denying plaintiff's claim for strict liability against the applicator of the pesticide, MU-17, because "MU-17 has been Federally approved since 1966 and, although posing certain risks if improperly applied, its application on [the defendant's] farm cannot be considered an abnormally dangerous activity requiring the imposition of strict liability").

North Carolina:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**. *Cf. Bivins v. S. Ry. Co.*, 247 N.C. 711, 714, 102 S.E.2d 128, 131 (1958) (finding that men who caused damage to adjacent land were acting without the knowledge of their employer, so the doctrine of respondeat superior did not apply).
(2) **Strict liability? Unclear because no cases directly on point**.

North Dakota:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.
(2) **Strict liability? Probably no**. *See Christensen v. Midstate Aerial Applicators Corp.*, 166 N.W.2d 386 (N.D. 1969) (discussing liability for damage caused by pesticide drift of crop duster in terms of negligence, not strict liability).

Ohio:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.
(2) **Strict liability? Unclear because no cases directly on point**.

Oklahoma:

(1) **Inherently dangerous activity? Yes**. *Burke v. Thomas*, 1957 OK 154, 313 P.2d 1082 (affirming a jury instruction that classified a landowner as liable for the action of his independent contractor in aerially applying pesticide because it "was such an operation that from its very nature injurious consequences could be expected to result unless means were adopted to avoid those consequences").
(2) **Strict liability? Probably yes**. *Young v. Darter*, 1961 OK 142, 363 P.2d 829 (holding ground spraying of 2,4-D herbicide was ultrahazardous activity deserving of strict liability because "[t]he use, by the defendant, of a poison on his land, which, if it escaped, would cause damage to plaintiff, was done at defendant's peril. He is responsible for its drifting and thereby trespassing on plaintiff's land where it damaged the cotton."); *but see Hiller v. Rist*,

1961 OK 137, 362 P.2d 678 (analyzing aerial crop duster's liability to farmer for pesticide drift in terms of negligence, not strict liability).

Oregon:

(1) **Inherently dangerous activity? Yes**. *See Loe v. Lenhardt*, 227 Or. 242, 362 P.2d 312 (1961) (holding landowner liability for the actions of his crop duster, an independent contractor who caused damage to plaintiff's crops); *Bella v. Aurora Air, Inc.*, 279 Or. 13, 566 P.2d 489 (1977) (same).

(2) **Strict liability? Yes for aerial application, unclear for ground application**. *Compare Loe v. Lenhardt*, 227 Or. 242 , 362 P.2d 312 (1961) (applying strict liability against an aerial crop duster and farmer who aerially applied pesticide that caused damage to a neighbor's crops: "where a farmer hired a contractor to spray chemicals from an airplane, the activity was one capable of inflicting damage upon neighboring crops notwithstanding the exercise of the utmost care by the applicator"); *Chase v. Henderson*, 265 Or. 431, 509 P.2d 1188 (1973) (applying strict liability against defendant for aerial application of a chemical spray from a helicopter that resulted in harm to plaintiff's annual pole bean crop because "the spraying of chemicals was an ultrahazardous activity and the sprayer was liable if the chemicals went on another's land and caused danage regardless of the absence of intention or negligence"); *Bella v. Aurora Air, Inc.*, 279 Or. 13, 566 P.2d 489 (1977) (applying strict liability against an aerial crop duster for application of 2,4-D that resulted in harm to adjoining farmer "in light of this legislation" indicating the harmfulness of the chemical; "whether an activity is 'ultrahazardous' or to use the later term, 'abnormally dangerous,' so as to impose liability without negligence, is to be determined not in the abstract but in the locality and circumstances where it is done, and it is to be determined by the court"); *cf. Speer & Sons Nursery, Inc. v. Duyck*, 92 Or. App. 674, 759 P.2d 1133 (1988) (denying a motion for summary judgment in a claim for damages resulting from ground application of pesticide because the complaint on its face could "not provide a [sufficient] basis for deciding the issue" of whether the application was ultrahazardous);

Pennsylvania:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.

(2) **Strict liability? Unclear because no cases directly on point**. *See also Villari v. Terminix Int'l, Inc.*, 663 F. Supp. 727 (E.D. Pa. 1987) (applying Pennsylvania state law) (applying strict products liability against pest control business for contaminating plaintiff's home with hazardous insecticide).

Puerto Rico:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.

(2) **Strict liability? Unclear because no cases directly on point**.

Rhode Island:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.
(2) **Strict liability? Unclear because no cases directly on point**.

South Carolina:

(1) **Inherently dangerous activity? Yes.** *See Alexander v. Seaboard Air Line R. Co.*, 221 S.C. 477, 71 S.E.2d 299 (1952) (finding defendant railroad company liable for the action of its independent contractor in applying 2,4-D by *ground*, which caused damage to plaintiff's crop; defendant "was aware of the probable damages that would result to growing cotton if this chemical floated over on same, and that the spraying tanks of his corporation should not be operated if the wind was blowing and might carry it to fields of cotton").
(2) **Strict liability? No**. *See Alexander v. Seaboard Air Line R. Co.*, 221 S.C. 477, 71 S.E.2d 299 (1952) (analyzing liability of applicator and landowner in terms of negligence, not strict liability).

South Dakota:

(1) **Inherently dangerous activity? Probably yes**. *See Lindblom v. Sun Aviation, Inc.*, 2015 S.D. 20, 862 N.W.2d 549 (analyzing liability of landowner for independent contractor's negligence without specifically holding that herbicide application was an inherently dangerous activity).
(2) **Strict liability? No**. *See Wieting v. Ball Air Spray, Inc.*, 84 S.D. 493, 173 N.W.2d 272 (1969) (analyzing crop-spraying company's liability to adjacent landowner in terms of negligence, not strict liability; "use [of herbicides] cannot be made with absolute impunity and due care must be exercised in seeing that weather conditions are right and that the poisonous spray or dust is not negligently spread"); *Lindblom v. Sun Aviation, Inc.*, 2015 S.D. 20, 862 N.W.2d 549 (holding plaintiff farmers failed to establish that defendants committed negligence in aerially applying herbicide upon neighboring field).

Tennessee:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.
(2) **Strict liability? Unclear because no cases directly on point**.

Texas:

(1) **Inherently dangerous activity? Probably yes, although the Texas Supreme Court has not yet ruled directly on the issue**. *See Gragg v. Allen*, 481 S.W.2d 452 (Tex. Civ. App. 1972) (finding "that the use of aerial application of poisonous herbicides as 2,4-D, and 2,4,5-T are extremely dangerous, especially when conducted around or near broad-leaf plants as cotton… [a]nd an employer is liable for injuries caused by the failure of an independent

contractor to exercise due care to the performance of work which is inherently or intrinsically dangerous… the aerial spraying of chemical defoliants and herbicides are activities having such potential for injury as to be classed as inherently dangerous"); *Sun Pipe Line Co. v. Kirkpatrick*, 514 S.W.2d 789 (Tex. Civ. App. 1974) (acknowledging that "the employer of an independent contractor may not escape liability for the acts of the contractor which are 'intrinsically dangerous'" but declining to determine whether aerial application of pesticides is intrinsically dangerous), *writ refused NRE* (Apr. 30, 1975); *Frazier v. Moeller*, 665 S.W.2d 155 (Tex. App. 1983) (considering without deciding whether aerial application of pesticides is inherently dangerous), *dismissed on other grounds* (May 2, 1984); *but see Leonard v. Abbott*, 366 S.W.2d 925 (Tex. 1963) ("We do not pass on [whether] the use and application of such herbicides to be inherently dangerous. We reserve this question until it is controlling in a case before us."); *see also Pitchfork Land & Cattle Co. v. King*, 162 Tex. 331, 346 S.W.2d 598 (1961) (finding that the company was not liable for its independent contractor's negligence when it was solely the pilot who decided when to begin crop spraying operations, when to stop and how high he should fly, how the chemical should be sprayed, and which furnished all necessary tools, supplies and materials, and who was paid by the acre); *Foust v. Estate of Walters ex rel. Walters*, 21 S.W.3d 495 (Tex. App. 2000) (finding landowner liable for actions of independent contractor when landowner was ultimately responsible for decision to apply less safe herbicide when conditions favored drift but noting that "[t]he supreme court has yet to determine whether crop dusting is inherently dangerous").

(2) **Strict liability? No**. *See Schultz v. Harless*, 271 S.W.2d 696 (Tex. Civ. App. 1954) (analyzing liability of crop dusters to adjoining landowners in terms of negligence, not strict liability); Miller v. Maples, 278 S.W.2d 385 (Tex. Civ. App. 1954) (same); *Vrazel v. Bieri*, 294 S.W.2d 148 (Tex. Civ. App. 1956) (same), *writ refused NRE*; *Aerial Sprayers, Inc. v. Yerger, Hill & Son*, 306 S.W.2d 433 (Tex. Civ. App. 1957) (same); *Pitchfork Land & Cattle Co. v. King*, 162 Tex. 331, 346 S.W.2d 598 (1961) (same); *Bruenger v. Burkett*, 364 S.W.2d 453 (Tex. Civ. App. 1963) (same); *Kesler v. Merritt*, 368 S.W.2d 17 (Tex. Civ. App. 1963) (same), *writ refused NRE* (July 31, 1963); *Gamblin v. Ingram*, 378 S.W.2d 941 (Tex. Civ. App. 1964) (same); *McPherson v. Billington*, 399 S.W.2d 186 (Tex. Civ. App. 1965) (same), *writ refused NRE* (Apr. 20, 1966); *Boyd v. Thompson-Hayward Chem. Co.*, 450 S.W.2d 937 (Tex. Civ. App. 1970), *writ dismissed* (June 17, 1970); *Farm Servs., Inc. v. Gonzales*, 756 S.W.2d 747 (Tex. App. 1988), *writ denied* (Nov. 30, 1988) (same); *Parker v. Three Rivers Flying Serv., Inc.*, 220 S.W.3d 160 (Tex. App. 2007) (same).

Utah:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.
(2) **Strict liability? Unclear because no cases directly on point**.

Vermont:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.
(2) **Strict liability? Unclear because no cases directly on point**.

Virginia:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.
(2) **Strict liability? Unclear because no cases directly on point**. *See also Kaltman v. All Am. Pest Control, Inc.*, 281 Va. 483, 706 S.E.2d 864 (2011) (finding that in applying pesticides to a residential property, the pest control company owes a duty to exercise the skill and diligence of a reasonably prudent person).

Washington:

(1) **Inherently dangerous activity? Yes**. *See Langan v. Valicopters, Inc.*, 88 Wash. 2d 855, 567 P.2d 218 (1977) (upholding a jury verdict against crop dusters operating as independent contractors, as well their employers).
(2) **Strict liability? Yes**. *See Langan v. Valicopters, Inc.*, 88 Wash. 2d 855, 567 P.2d 218 (1977) (holding crop duster and landowner strictly liable for crop damage caused to organic farmers: "Whether strict liability or negligence principles should be applied amounts to a balancing of conflicting social interest the risk of harm versus the utility of the activity. In balancing these interests, we must ask who should bear the loss caused by the pesticides…. Under these circumstances, there can be an equitable balancing of social interests only if appellants are made to pay for the consequences of their acts."); *Hue v. Farmboy Spray Co.*, 127 Wash. 2d 67, 896 P.2d 682 (1995) (declining to reverse *Langan v. Valicopter*'s rule of strict liability for pesticide drift); *Mendoza v. State, Dep't of Agr.*, 135 Wash. App. 1026 (2006) (affirming *Langan v. Valicopters* finding that "pesticide application is an abnormally dangerous activity"); *see also Crosby v. Cox Aircraft Co. of Washington*, 109 Wash. 2d 581, 746 P.2d 1198 (1987) (holding strict liability did not apply against airplane pilot who crashed into and damaging plaintiff's land).

West Virginia:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**. *Cf. Kell v. Appalachian Power Co.*, 170 W. Va. 14, 289 S.E.2d 450 (1982) (observing approvingly that "[t]he Fifth Circuit has called the aerial broadcast spraying of herbicides inherently dangerous… The aerial broadcast spraying of toxic herbicides was found to be an extra hazardous activity… One court characterized 2,4-D as 'a dangerous instrumentality' and the handling of it 'a hazardous activity.'").
(2) **Strict liability? Unclear because no cases directly on point**. *Cf. Kell v. Appalachian Power Co.*, 170 W. Va. 14, 289 S.E.2d 450 (1982) (observing approvingly that "[t]he Fifth Circuit has called the aerial broadcast spraying of herbicides inherently dangerous… The aerial

broadcast spraying of toxic herbicides was found to be an extra hazardous activity… One court characterized 2,4-D as 'a dangerous instrumentality' and the handling of it 'a hazardous activity.'").

Wisconsin:

(1) **Inherently dangerous activity? Yes.** *Brandenburg v. Briarwood Forestry Servs., LLC*, 2014 WI 37, 354 Wis. 2d 413, 847 N.W.2d 395 (finding landowner co-liable for hiring independent contractor, who aerially applied herbicide on his property but caused damage to 79 trees on adjoining property, because "under our precedent, the activity is inherently dangerous, because the activity poses a naturally expected risk of harm, and taking certain precautions could reduce the risk to a reasonable level").

(2) **Strict liability? No.** *Bennett v. Larsen Co.*, 118 Wis. 2d 681, 348 N.W.2d 540 (1984) (concluding that "the application of pesticides is a necessary and beneficial activity to ensure the production of adequate and healthy food and that its value to the people of this state outweighs the potential for harm. Accordingly, we hold that pesticide application is not an ultrahazardous activity warranting the application of strict liability for resulting harm.").

Wyoming:

(1) **Inherently dangerous activity? Unclear because no cases directly on point**.

(2) **Strict liability? Unclear because no cases directly on point**.