

IS LITIGATION THE ANSWER?

by
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Every year in the Columbia Basin there are a number of lawsuits filed. My experience from having been involved in a number of them over the past several years would say that many of them should never have gone to the courts.

Most of the suits have involved seed, faulty application of fertilizers or pesticides or in some cases failure of a pesticide to perform. The most common thing in seed cases are ring rot or black leg. In the case of ring rot most of the complaints are legitimate. Because of very characteristic plant symptoms, tuber symptoms and the characteristics of the bacterium, the disease is relatively easy to identify and the amount of damage can be ascertained. If you suspect that you have ring rot get a county agent or some other qualified person to identify the disease. Then notify your seed source after making sure that you can prove that it is his lot of seed. This allows him the opportunity to be sure that it is ring rot and that it was his lot of seed. At this time arrangements can usually be worked out on a method of settlement. If the seed producer doesn't acknowledge responsibility or agree on a method of settlement, then you should get an attorney and start gathering evidence to support your claim.

In the case of black leg this is usually a different ball game. There are many different conditions that can cause plant symptoms that may resemble black leg. Also, there is a difference of opinions of several potato pathologists as to whether there are two types of black leg, one seed borne and the other soil borne. In most of the cases that I have seen where there is a substantial loss of yield, I would have said that it was not the black leg that is usually associated with the seed borne type as I know it.

Dr. Mary Powellson, plant pathologist from Oregon State University, feels that we are definitely experiencing a form of black leg that is caused by Erwinia Caratovora, the soft rot organism that is found in most all soils. I, for one, agree with her as I have seen potato fields develop symptoms somewhat like the true black leg long after black leg usually appears. The other thing that I often see is a field that has been allowed to get dry for a day during a period of high temperatures. The result is that the stems get scalded right above the soil line or wherever the vines lie across the hills. I have seen two excellent examples of this in the past two years and both growers were hollering black leg. In all my years of experience, I have rarely seen a Russet field where the amount of seed borne black leg has been much over 10 to 12%. With Norgolds in the early years I have seen as much as 45% black leg. However, in later years this has not been the case.

The other seed problem that may end up in a court room is poor emergence. This can be caused by many things and in my opinion most often is caused by something the grower did. Some of the things that may happen is to allow the cut seed to dehydrate, plant the seed too deep. Plowing under a green manure crop or heavy crop refuse will often attract the seed corn maggot. This year I saw three fields that were pretty badly riddled by seed corn maggot and all three growers at first felt that they had a bad lot of seed. Planting seed in dry soil is an excellent way to cause seed piece decay. Another thing that often causes poor or uneven emergence is planting in cold soils. If the soil temperature is below 45° emergence is very slow and this allows Rhizoctonia and other soil fungi the chance to invade the tissue. So my advice on poor emergence is to make sure why the seed emerged poorly before calling your attorney.

Occasionally I have seen poor or slow emergence due to the placement of fertilizer too close to the seed piece. This is especially true with nitrogen. In most cases the worst of the damage is the burning off of the sprout which delays emergence about a week. In some cases,

however, the fertilizer may destroy the eye and this results in a poor stand. If the fertilizer was applied commercially there may be cause for a settlement. Careful examination of the seed pieces and sprouts will determine if this indeed was the cause of the problem. If the fertilizer was applied commercially, whose recommendation was it that it be placed where it was. If it was your recommendation then forget it as this was your responsibility. If it was the fertilizer companies, then this is a different ball game. But remember it is your word against theirs if it goes to court.

One other cause of poor emergence is soft rot caused by the bacterium Erwinia Caratovora. The soft rot organism is probably on all seed and in almost all soils. Potatoes that are left tarped for 24 hours or longer in the spring may generate moisture and enough heat to get the bacteria started. Then any cut or bruise that may occur from there on may be a site for infection. Most seed potatoes are treated with Captan, which is a fungicide and does very little to protect against bacteria, except to dry the cut surface. Seed planted late in the spring may also be subject to soft rot from the soil. With soft rot the seed piece will usually break down before the sprout emerges. Too often growers think that this is black leg and sue a supplier of the seed or a seed producer or both.

The next category of suits come from pesticides, usually they are suits involving lack of performance. In many cases there was a lack of performance and in most of these cases it was not due to the material not performing but due to variables or conditions that were not met when the material was applied. This may be lack of moisture or too much moisture, not enough organic matter in the soil, clods, trash or improper tillage, application or incorporation. It is rare that anyone of us like to admit that we made a mistake and that someone else or something failed to perform. I am not saying that there aren't failures of materials because companies have humans working for them also, and they too make mistakes.

Before accusing a material for failure make sure that it was lack of performance due to the material and not due to something that you or a hired man did or didn't do. One case that I remember was a man who told his hired man to fertilize his lawn with urea. About a week later his lawn died. When the smoke cleared it was discovered that the hired man had used urea-bor instead of urea. I recall another case that went to court because a farmer had accused a chemical company of renting him a sprayer that hadn't been properly cleaned out. The farmer used the sprayer for spraying weeds in wheat. About a week later the wheat turned white and died. Later it was learned that the farmer had a spare 5 gallon can of weed killer which he added to the 2,4-D. It just so happened that the weed killer was aminole-triazole. Apparently the farmer never read the label, he only saw the words "weed killer" on the can. This caused the company's insurance company quite a few thousand dollars to defend their client, and as a result his insurance rates went up. Who pays for these higher insurance premiums? You do, because you know that any increase in cost of business is passed on to the consumer.

Another thing that can happen and may happen in the case of chemicals and that could be what happened to Kern County, California. Many of the major chemical companies, due to the large number of suits occurring in Kern County, have labeled out the use of their chemicals in Kern County. This could almost be disastrous if such a thing happened here.

There is one more area that I know where problems occur and which has been the basis of lawsuits and that is potato seed. I have covered the problems associated with seed. So what I am now saying is that some seed growers are becoming reluctant to sell seed in the state of Washington. In most cases they are the better growers who do not have a problem of disposing of their seed. In most cases it would be a loss to lose their source of seed.

What can be done and what should be done is not a simple answer. Some of the things that I feel should be done are as follows. First of all when you first notice a problem, don't jump to conclusions. Try to make an assessment of what is wrong and what caused the problem. This is probably best done by asking several people of whom you have confidence to

look at the problem. In many cases you may come up with several different explanations. Here is where you come in. You can ask each person that voices an opinion, the basis for his answer. Often common sense will allow you to discard some of the reasons. This may narrow your choice down to two or three, then look to see if there is an interrelationship of the possible causes. If so, you may be able to pinpoint the cause. After making a decision as to the cause of the problem, then give the party that you feel caused the injury a chance to look at it and defend their position. I remember looking at one field this year that had a chemical burn from an application of an insecticide. I was called out as well as the party who caused the injury. My own diagnosis of the problem was that the injury was cosmetic and that the field would grow out of it with no injury. However, I also discussed means of determining injury if the injured party wished to pursue the situation. Well, in two weeks, you couldn't see the injury and the field turned out to be one of the growers better fields.

Also while talking to the party suspected of causing the injury, this is a good time to set up a method of determining the extent of the damage. If you do this and eventually go to court this gives you a good basis on which to base your claim and especially if he has agreed to it. Preferably write up the procedure, making two copies and both parties signing it. He may refuse to sign but at least you have a written procedure and this will help in case of litigation.

There is a new idea that is being proposed to help settle differences without going to court. It is called "binding arbitration". Binding arbitration can be used to solve agricultural disagreements when individual discussions break down or cease.

I feel the most important consideration is that the problem is confined - kept low key - away from news media, courts, etc. In the long run, binding arbitration could maintain insurance rates and insurability. Certainly high risk and exposure affects each insurer and their rates.

Therefore, a major problem may occur when insurance exposure occurs and one cannot over emphasize the fact that binding arbitration must be carefully explained to an insurance carrier when they have exposure. I believe in most cases insurance will benefit when binding arbitration is engaged as compared to going through the entire court system.

The rules are rather simple as follows and could be changed somewhat depending upon the case. All parties must know the rules and agree to abide by the final decision.

1. Each party involved selects a person who understands their situation to represent them. In the most simple case two parties - two people plus an unbiased third person agreed upon by the two original people selected as someone who can understand all sides of the issue.
2. The parties must agree that they will abide by the decision of the three people selected. In a larger case, possibly five people may be selected. At this point the rule must be decided whether a unanimous decision or majority decision must be reached. Certainly as far as one participating in this type of action a majority decision is the most reasonable.
3. Decide whether those selected will be paid or serve on a voluntary basis.
4. Each participant has the private opportunity to completely present their position, answer questions, and be called back for further clarification if the need arises.
5. After all have presented their case and all questions answered, the selected persons ~~deliberate the case, make a decision, and appoint a spokesman to explain the decision.~~

6. Call back all parties involved and have spokesman explain the groups findings, rationale and decision.
7. Since parties have agreed to abide by the decision and remain friends, they should accept the decision of the people they have selected to represent them.

So in summary I am not trying to say don't sue. I am trying to say don't sue unless all other avenues have been closed.

1. Be sure of your facts.
2. Talk things over with the other party, usually things can be worked out.
3. Think about binding arbitration if you can't come to an agreement with the other party.
4. If this fails consider what your damages are, what it will cost to go to court and where you will be if you win or lose.
5. Get more than one opinion on the problem before jumping to conclusions.
6. If all things fail, then sue.