

# Dicamba Injury: General Farm Liability Insurance Perspectives

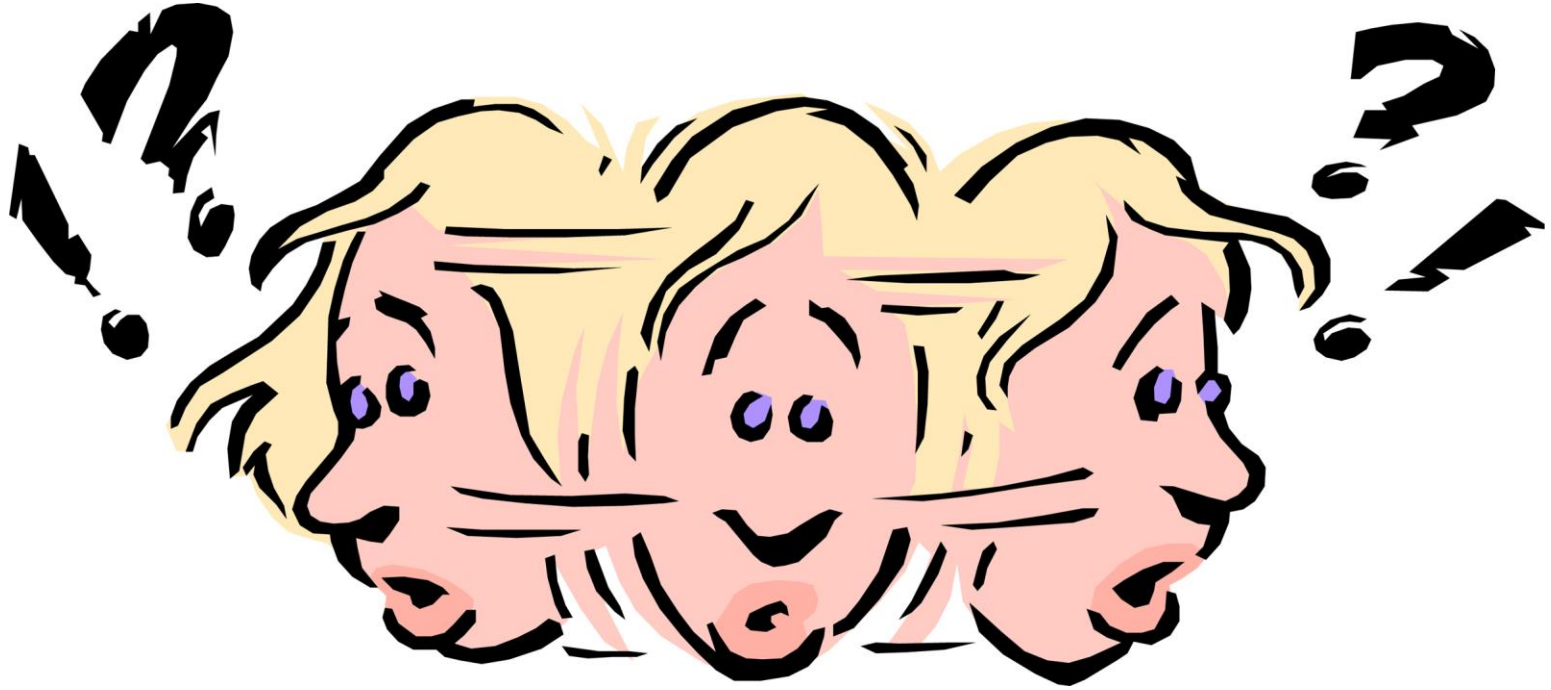
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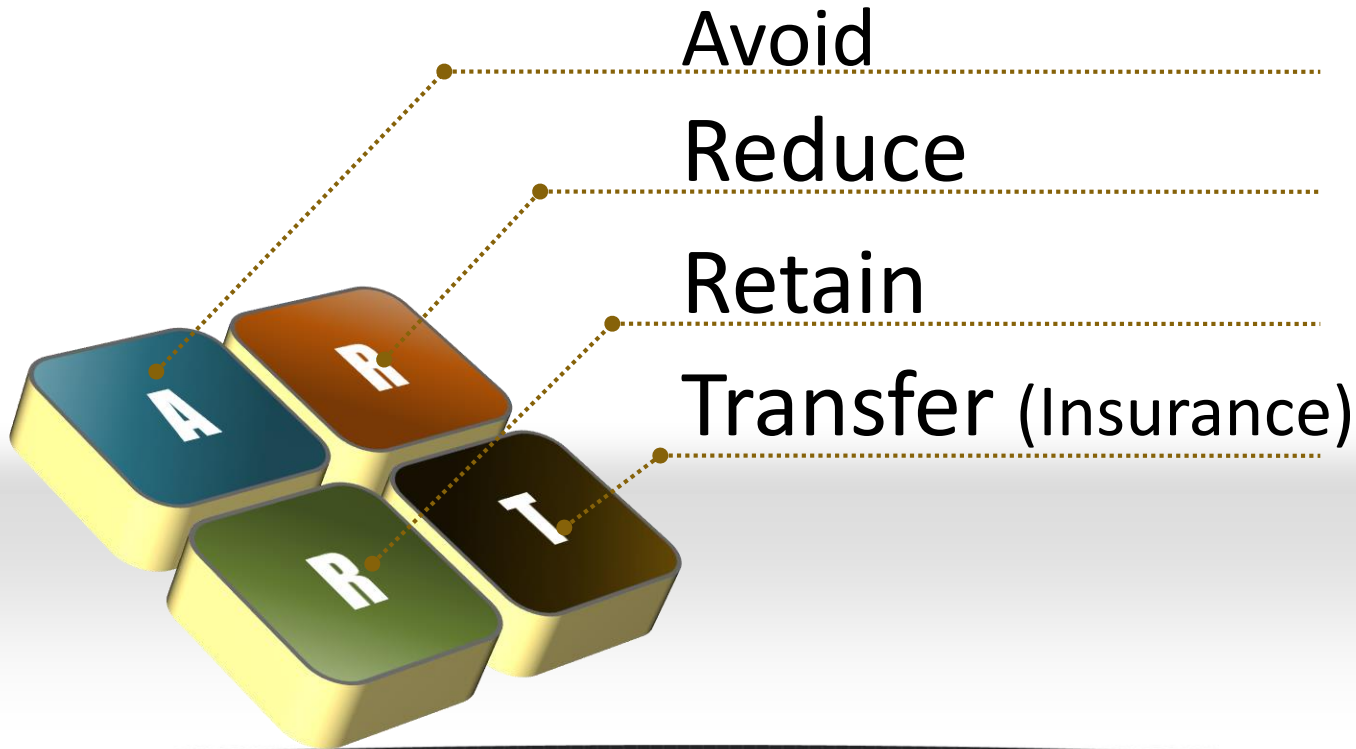


NORTH CENTRAL  
EXTENSION  
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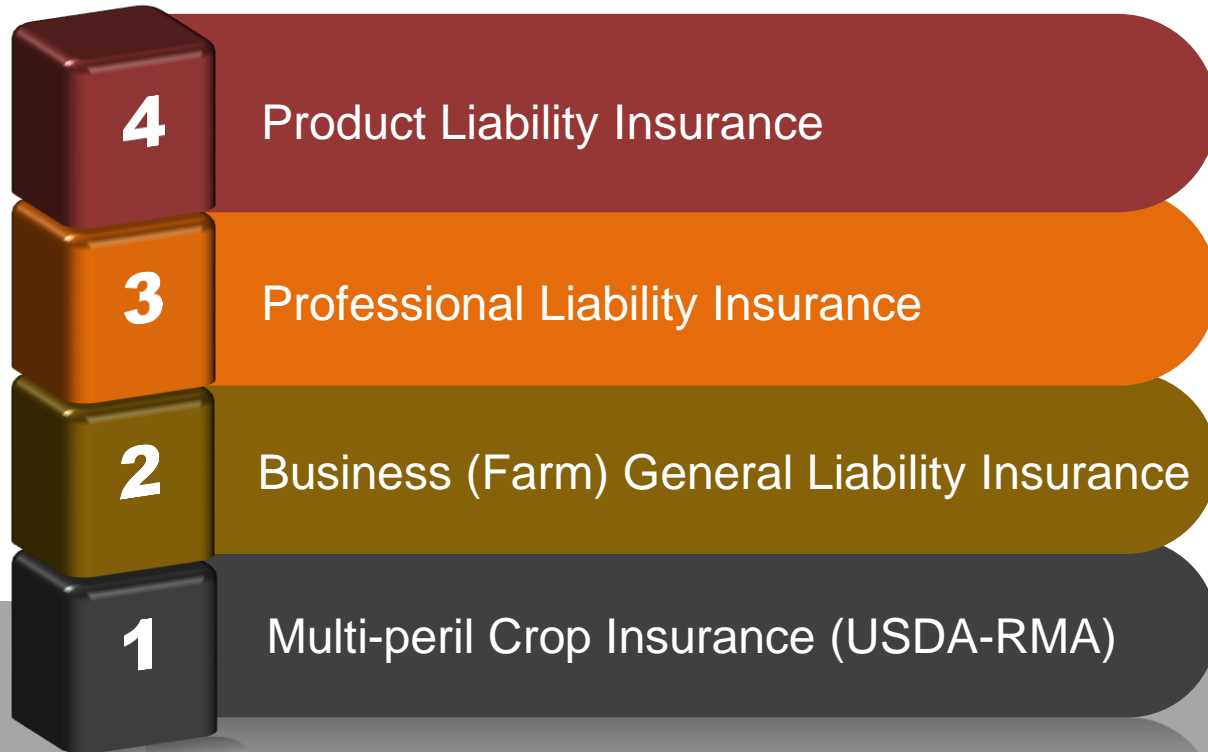
Dicamba Injury is  
risk with a moving target



# Risk Management Strategies



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



# Presentation Objectives

- ❖ Teach on insurance provisions when 3<sup>rd</sup> 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 TEND**<sup>TM</sup>  
**SOYBEANS**



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# 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 3<sup>rd</sup> 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 3<sup>rd</sup> party damage is not a covered loss.
  - Modification of policy on APH calculations to allow exclusion of 3<sup>rd</sup> party damaged acres.
- ❖ General Liability Insurance Companies struggle with a new claim with which they have little experience or actuarial data.



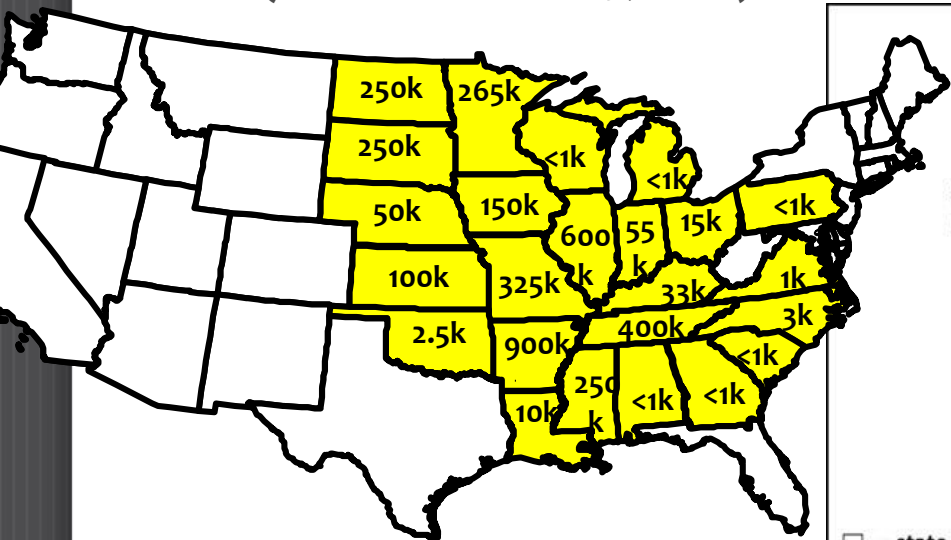
# History of Xtend crop introduction: 2018

- ❖ 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?



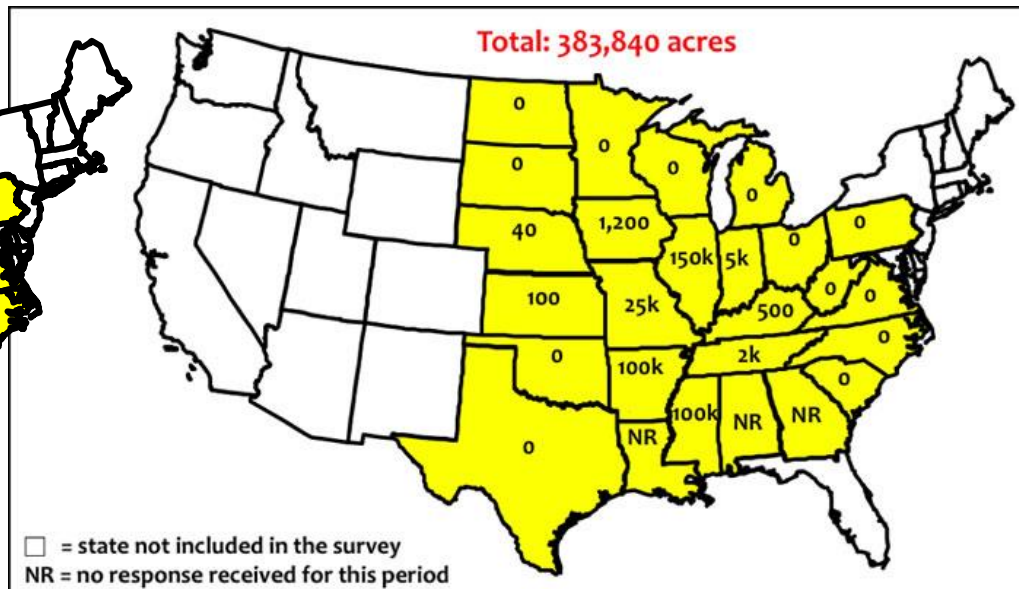
# Estimates of Dicamba-injured Soybean Acreage in the U.S. as Reported by State Extension Weed Scientists

(\*as of October 15, 2017)



\*Total: ~3.6 million

(\*as of June 15, 2018)



# 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

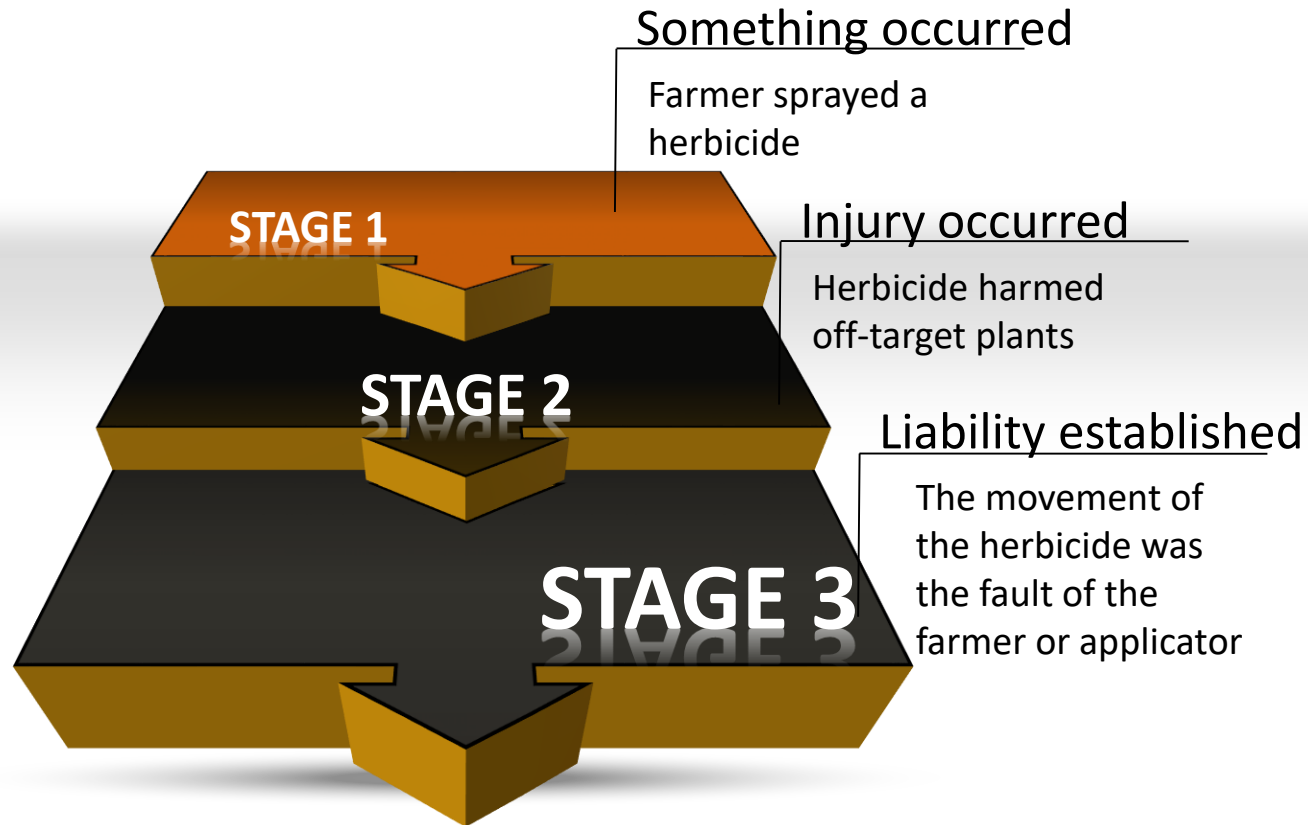


# Insurance Company responsibility

- ❖ 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 3<sup>rd</sup> 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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