



Cucurbit Quagmire: Calculating Damages for Crop Injury

CLE Presentation

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BACKGROUND

- 500-acre farm in South Deerfield, Massachusetts, owned and operated by two brothers.
- Farmers alleged 92 acres of cucurbits (winter and summer squash, cucumbers, pumpkins) and peppers damaged by application of rinsate containing herbicide. Claim damages in the amount of approximately \$750k.
- Counterclaim for breach of credit agreement. Total amount owed for agricultural products purchased plus interest is approximately \$200k.

LAW GOVERNING CALCULATION OF DAMAGES FOR CROP INJURY

- While some jurisdictions use a slightly different phrasing of this accepted methodology, the general calculation is the same.
- *Casey v. Nampa & Meridian Irrigation District*, 85 Idaho 299, 379 P.2d 409, 411 (1963) is the Idaho case that articulates the method of calculation:

“This court is committed to the rule that the measure of damages for injury to a growing crop is the difference between the value of the crop actually raised upon the land and the crop which would have been raised upon it under normal conditions for the year in question, less the cost of maturing, harvesting and marketing such additional portion of the crop, - the difference in value between the probable yield and the actual yield, less the probable cost of placing the additional crop in a marketable condition and marketing it.”

WHAT DOES “VALUE” MEAN?

- In other words, the law generally provides that the value of the injured portion of a crop is the difference between the crop’s projected and actual value.
- In the context of crop injury, “value” is generally interpreted to mean gross market value.
- Therefore, the “value” of the injured portion of a crop is the difference between what the probable yield would have sold for at market, and what the actual yield sold for at market.
- Idaho law contemplates a determination of projected value based on the specific growing conditions within that year, not a hypothetical “normal” year.

HOW EXPENSES/COSTS FIT INTO THE CALCULATION OF THE VALUE OF CROP INJURY

- As with civil cases generally, a party that suffers crop injury must be restored to their position before the loss.
- Damages for crop injury need not be calculated with mathematical precision. Only reasonable certainty is required.
- However, claimants are not entitled to windfall.
- A calculation of damages for crop injury based exclusively on gross market value would result in a windfall because it fails to account for what the grower would have had to spend to bring the crop to market and realize that value.

AVOIDED COSTS MUST BE DEDUCTED

- **For this reason, expenses saved / costs avoided are not recoverable and must be deducted.**
- “It would of course be erroneous for the trial court to permit the grower to recover both the expense of cultivation and the gross value of the lost crop.”
- “It would be erroneous to permit the grower to recover the expenses of cultivation prior to the injury as special damages, in addition to recovery of the difference between the value of the crop immediately before, and its value immediately after, the injury.”
- “damages based upon the value of an unmaturing crop are analogous to profits lost and are governed by the same rule precluding recovery in cases of either uncertainty or remoteness.” 20 Am. Jur. Proof of Facts 2d 115 (collecting cases)
- If this allowance were not made the grower might recover more in damages than they would have received as net profit for the sale of the crop if there had been no injury.

CONSEQUENTIAL DAMAGES

- Jurisdictions vary regarding the availability of consequential damages from crop injury. The status of the law in Idaho on this point is evolving and somewhat contradictory.
- The story begins in 1906.
- In 1906, the Idaho Supreme Court held that damages in cases involving claims of crop injury are limited to value of the crop itself. *Risse v. Collins*, 12 Idaho 689, 87 P. 1006 (1906)
- This holding would appear to restrict compensable forms of loss to exclude indirect or consequential damages.
- *Risse* has never been overruled.

CONSEQUENTIAL DAMAGES CONTINUED

- However, in 2011, Judge Winmill permitted plaintiffs claiming that the defendant caused damage to their crops to recover consequential damages for economic damages flowing from the crop damage. *Adams v. United States*, 823 F. Supp. 2d 1074, 1080 (D. Idaho 2011).
- The plaintiffs grew hay and corn not for sale, but to feed their dairy cattle. They alleged that the defendant's herbicide damaged their crops, reducing their nutritional value.
- The court rejected the defendant's motion for summary judgment, permitting the plaintiffs to seek damages for lost income from reduced milk sales, as well as losses caused by a land sale they were forced to make to cover their losses from the reduced sales.
- In so ruling, Judge Winmill predicted that the Idaho Supreme Court would no longer adhere to its holding in *Risse* limiting damages in such cases to the value of the crop itself, and would deviate from a strict “market-value-of-the-crop” measure if doing so is “necessary to make [the] plaintiff whole.”
- This determination has yet to be tested in an Idaho state appellate court, but appears generally consistent with Idaho cases post-*Risse* concerning damages to crops or to timber.

SOME SUGGESTED AREAS OF EXPLORATION DURING DISCOVERY

- Tax returns (reasonableness check on damages)
- Planting logs (stage of maturity at time of loss)
- Spray logs (adequate pest management / label violations?)
- Soil data (nutritional content / drainage)
- Tillage (drainage)
- Crop rotation (yield maximization / probable yield assessment)
- Fumigation (pest management / yield maximization / probable yield assessment)
- Seed purchases (quality and quantity)
- Yield data (historic and for the specific year at issue / for injured fields / neighboring fields / other fields with same crop varieties / entire farm)
- Harvest data (same)
- Sales data (same)
- Testing data (both pre and post event of loss)
- Loan documents (representations regarding value and what was grown)
- Site inspection as early as possible
- NOAA Data (weather and growing conditions)
- NVDI Data (Landsat Normalized Difference Vegetation Index)
- USDA yield statistics (comparator data)
- All information related to any pest management program
- All information related to fertilizer program
- All expenses including binning, labor, transport, peeling, other
- Title and/or lease documents (standing / joinder of all real parties in interest)



THE TRIAL

- How “profit” became a 4-letter word
- Experts – What worked what didn’t
- Jury Instruction for Calculating Damages for Crop Injury:

As I explained before, Plaintiff claims that Defendant caused damage to its crops. If you find that Defendant caused damage to Plaintiff’s crops, there are then four steps to calculating the amount of those damages, if any.

First, you determine what the market value of the probable yield would have been if the injury had not occurred.

Second, you determine the market value of the actual yield.

Third, you determine what expenses Plaintiff would have had to pay, but did not pay, in order to bring the crop to market if there had been no injury.

Finally, you calculate the amount of damage. To do this, you take the market value of the probable yield and subtract the market value of the actual yield. From that total, you then subtract all expenses that Plaintiff would have had to pay in order to bring the injured crop to market. The final total is Plaintiff’s damages for its injured crop.

QUESTIONS?