

# CROP LOSS: WHO'S TO BLAME?

By Charles M. Greene

One of the few events a farmer can predict with certainty is that sooner or later a crop will be lost. Often, there are no reasonable measures that could have been taken to prevent the loss and no one to blame when it happens. An unexpected freeze, prolonged rain, drought, sudden white fly infestation and other symptoms of Mother Nature's abrupt mood changes can leave a farmer with little chance of profit on the season's crop and a hard row to hoe in preparing for the next one.

Other times, a farmer has only himself (or the hired help) to blame when a crop is lost. The failure to recognize insects that could have been controlled, poor varietal selection, misuse of pesticides or the failure to modify fertilization practices to account for changing nutritional needs are common management problems that have caused many a farmer a poor year in the market.

Every now and then, however, the weather is right and management practices are good, but the crop is nonetheless lost. On those occasions, it may be reasonable to investigate whether an agricultural product used by the farmer played a role in the crop's failure. Steps should be taken to identify the cause of crop loss and prepare a claim when someone other than Mother Nature or the grower was responsible for the lost crop.

Identifying the cause of a crop's failure requires the analysis and elimination of many variables. Varietal selection, planting times and procedures, weather conditions during the life of the crop, fertilization practices, pesticide applications and other facets of management are potential factors that should be closely reviewed to search for the cause of the problem. Through the process of eliminating possible alternative causes, the field of likely culprits will be narrowed until one cause or combination of causes becomes more likely than the others.

## Identify the symptom

Identifying the type of symptom a crop manifests when a problem arises is a preliminary step to identifying the cause of the problem. A plant that appears to decay may be infected by a pathogen. A plant that appears scorched may be symptomatic of a fertilizer that was over-applied or released too soon. If a plant exhibits signs of phytotoxicity, the problem may be attributable to a misused or misbranded pesticide. While visual analysis of a plant's symptoms is rarely enough to diagnose the cause, identifying the type of symptom may narrow the search that must be made to determine the cause by pointing to a particular practice or product.

## Review application records

Pesticide application records should be scrutinized when evaluating the possible causes of crop loss. It is important to verify that pesticides were used at label rates and according to other conditions imposed by the label. It is also helpful to consult with those actually involved in pesticide applications to ensure the applicators used the proper equipment (e.g. a fungicide sprayer dedicated to fungicide use) and monitored weather conditions to account for possibilities such as herbicide drift. If records pertaining to fertilization practices were maintained (as they should be), those records should also be reviewed.

In addition to reviewing application records relating to crop loss, it is helpful to review historical records for recent preceding years. Were fertilization or pesticide practices modified? Did the grower stop using a particular product and/or start using another? If so, there may be a connection between the use or non-use of those products and the current problem.

It is important to pinpoint the date the problematic symptoms first appeared. In this regard, it may be important to consult with applicators or

other persons present in the field on a regular basis. A link in time between the use of a particular product and the manifestation of a problem is significant.

## Contact your extension agent

Extension agents for the University of Florida's Institute of Food and Agricultural Sciences are assigned to each county in Florida and are available to provide advice and assistance to growers confronting problems. Extension agents are valuable resources for evaluating the causes of crop loss for several reasons.

First, many extension agents have engaged in comprehensive agricultural-related studies and are experts in diagnosing problems in various crops. Most extension agents also have years of experience growing and evaluating problems in crops that are grown in the geographic area where they are assigned. The combination of their educational background and hands-on experience qualifies IFAS extension agents to handle problems commonly confronted in the geographic area they represent.

Second, since the extension agent is assigned to a particular geographic area, he should know whether others in the area have experienced similar problems. In some cases, the extension agent may have previously gotten to the root of a problem and determined its cause. If not, farmers experiencing the same problem can coordinate their efforts to identify its cause and avoid the costs and time that would be involved if their efforts were duplicated.

An extension agent can also collect plant and soil samples for laboratory analysis. Most nutritional and pathogen testing can be conducted in the IFAS laboratories at a relatively reasonable rate. Testing by the IFAS laboratories is advisable because personnel there will be familiar with problems experi-

*(Continued on page 39)*

(continued from page 30)

enced by other growers across the state. As a result, IFAS laboratory scientists may be able to identify a commonality between particular problems that could lead to a diagnosis of their cause.

### Contact the manufacturer

If investigation into the cause of crop loss points to a particular product, the product supplier and/or manufacturer should be contacted for assistance. Most companies are anxious to resolve legitimate complaints as soon as practical. If the product representative concludes the problem was caused by the suspected product, the grower may receive reasonable compensation for his loss relatively early in the claims process.

If the product representative concludes the problem is not attributable to the suspected product, he may nonetheless be able to provide valuable assistance. Many product representatives have years of experience evaluating disorders in crops that are grown using the products they sell. Ac-

cordingly, they may provide helpful insight into the cause of the problems experienced by growers. The product representative may also arrange for laboratory analyses of samples collected from the affected crop at no cost to the grower.

The supplier or manufacturer of a suspected product should always be contacted and offered the opportunity to observe the affected crop. Such an invitation should be extended early, not after the season is over and the crop is gone. A product representative would probably view with skepticism any claim made after the evidence had disappeared. Moreover, suppliers who were invited to observe an affected crop could not later complain they were denied that opportunity. This may be important if a product complaint is ultimately resolved in a courtroom.

### Don't wait

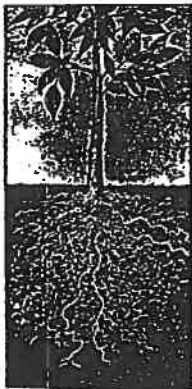
The failure to recognize a problem and take timely corrective measures is a common cause of crop failure. Once a crop problem is observed, immediate efforts to determine its cause should be

undertaken. The ability to identify a problem and find a solution decreases as time passes because symptoms can dramatically intensify in a short period of time. A plant weakened by a particular ailment also becomes more susceptible to other disorders. If timely diagnostic efforts are not made, it will be difficult or impossible to determine the original cause of the plant's illness.

An extension agent, product representative or other qualified third party should be contacted no later than 48 hours after a problem is first observed. This is important not only to identify and try to correct the problem, but also to preserve evidence that might otherwise rot away or be plowed under.

### Collect samples for laboratory analysis

For almost every symptom a plant manifests, there are a myriad of possible causes. Chlorosis of plant tissue, for example, can be caused by too much water, not enough water, too



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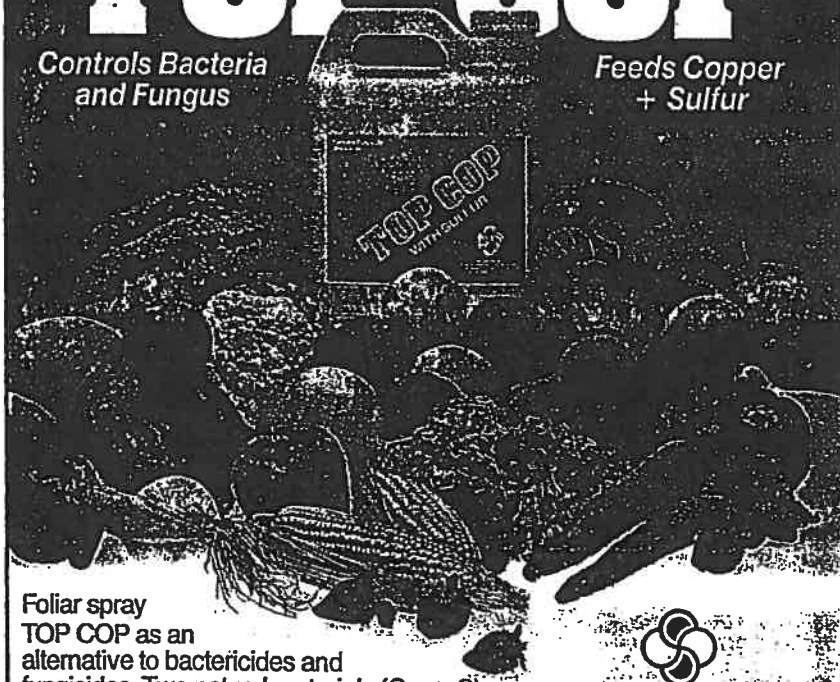
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much sun, not enough light, too much fertilizer, not enough fertilizer, disease, herbicide misuse and many other factors. It is therefore crucial that appropriate laboratory analyses be made of the affected crops and soil where they were located. Such testing is necessary both to ensure that all efforts to identify the cause of the problem have been taken and to rule out

possible alternative causes. Ruling out alternative causes may be an important factor in convincing a manufacturer that its product was responsible for the loss.

There are appropriate scientific methods that must be followed when collecting samples for laboratory analyses. If the grower has the skill to collect the samples himself, then the sampling process should be documented. If the grower does not have such skill, and tests of samples collected by an

extension agent or a manufacturer's representatives are believed insufficient, then independent testing laboratories have consultants who will collect samples in exchange for a fee.

### Testing for pesticide residues

If a reasonable investigation into the cause of crop loss points to a particular pesticide, then testing of the suspected pesticide for contaminants (or the affected crops for pesticide residues) should be considered. IFAS has limited facilities for conducting analyses involving chemical compounds. In the event pesticide testing is determined appropriate, sending samples to a qualified independent agricultural-testing laboratory should be considered.

A laboratory will only conduct the analysis requested. Where possible, it is best to be selective because testing can be expensive. If a particular pesticide is suspected of causing damage, the laboratory should be advised to look for that pesticide. If, on the other hand, contamination of a pesticide by an unknown chemical is suspected, testing for a broad range of chemicals can be conducted. In the case of suspected pesticide contamination, it may be helpful to obtain the services of a scientist qualified in diagnosing chemical phytotoxicity to help narrow the range of pesticides that could be responsible for the crop damage observed.

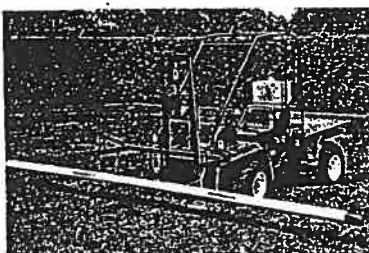
### Retaining an agricultural expert

The assistance of an agricultural expert with specific expertise is sometimes required to diagnose perplexing problems. There are some who profess to have expertise in a variety of fields. With respect to those experts, the old adage "he knows a lot about everything, but very little about anything" is often applicable, and they can be cross-examined along those lines. "Jack-of-all-trade" experts should be avoided. Any expert relied upon should specialize in the particular crop and/or the particular product involved.

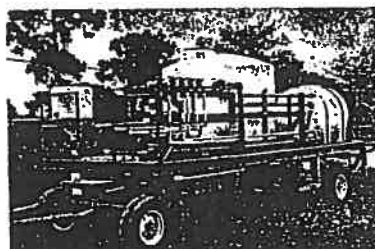
The university system provides an ample supply of experts. Universities in Florida have many qualified scientists in a broad range of agricultural fields. If it appears that the matter may result



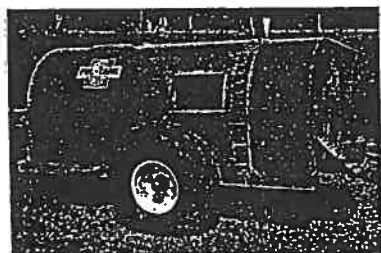
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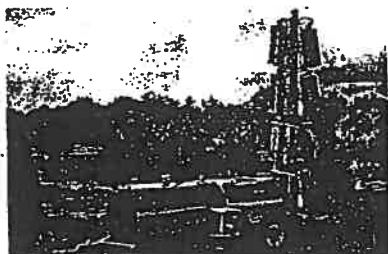
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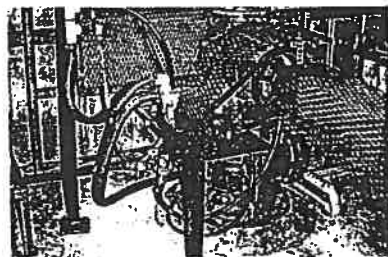
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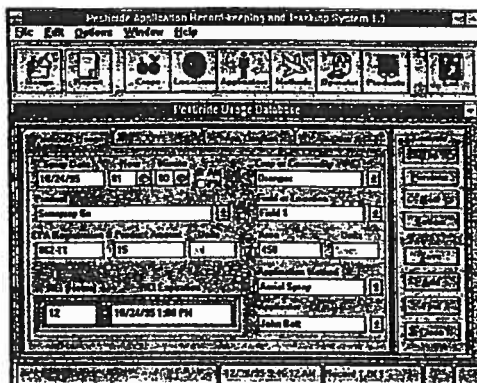
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in litigation, scientists affiliated with universities may be hesitant to become involved in cases within their own

state. In that event, university personnel can recommend other scientists who are qualified to provide the assistance needed.

Caveat: One should be selective in searching for an agricultural expert. There are experts who make their living providing consulting services to farmers. While many are honest and reputable scientists, others are "hired guns" who will tell their client what they think he wants to hear instead of searching for an honest answer. The opinion of a scientist whose conclusions are not supported by valid scientific proof may receive little weight from either a manufacturer or a jury reviewing a claim.

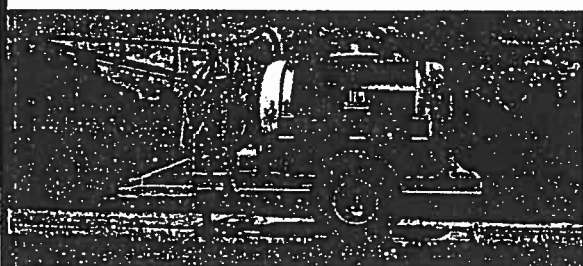
Under Florida law, the manufacturer of an agricultural product can be held liable for damages arising from a lost crop if a product sold by the manufacturer was (1) defective and (2) that defect caused the farmer to lose his crop. If investigation leads to the conclusion that a defective agricultural product was the cause of a lost crop, then a claim for fair compensation may be made to the manufacturer and/or supplier of that product.

If a product representative is involved in the process of trying to identify the problem, then the claim may be nothing more than a formality. In cases where it seems clear the manufacturer will deny liability, a claim should nonetheless be made prior to resorting to litigation in order to afford the manufacturer a formal opportunity to respond. Such an opportunity may eventually become relevant to a claim for attorney's fees or some other issue in litigation. Moreover, a well-documented claim may receive the attention of upper management, which could reverse any decision to deny the claim that was made at a lower management level.

Unless the case is unusual or complex, there may be no need to retain an attorney for assistance in the initial stages of the claims process. In fact, an attorney hoping to obtain a per-



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centage of any recovery can raise the stakes and make a settlement more difficult.

Nonetheless, before signing a release or some other document which restricts the right to relief, it might be wise to retain an attorney to review the document.

Moreover, there are legal defenses to certain claims. Before incurring large expenses pursuing a claim, one may be well-advised to consult an attorney with experience in handling crop loss cases.

### Content of the claim

A claim presented to a manufacturer or supplier should describe the evidence upon which it is based and include supporting documentation. The amount of changes sought to be recovered should also be described and supported by proof. The well-documented claim will be more carefully evaluated than the claim lacking evidentiary support.

The evidentiary support necessary for a crop loss claim will probably be gathered during the process of identifying the cause of the loss. Scientific evidence is most reliable. A laboratory analysis that demonstrates a fertilizer was improperly manufactured or that reveals the presence of a harmful foreign product in a pesticide, for example, would be invaluable. A qualified expert's opinion

that a particular product is defective may also support a claim.

A product defect can also be proven through the testimony of other growers who used the same product under the same conditions and had the same problem. Conversations with extension agents and others in the farming community may help identify such growers. The fact that other growers who used the same product had the same problem is significant and should be noted in the claim. On the other hand, if others used the same product and had no problem, then it might be wise to re-evaluate whether a valid basis for pursuing a claim exists.

Damages are calculated by determining the volume of crop that would have been produced had the suspected product not been used, multiplied by the market value that would have been received at the time of the expected harvest, minus the production costs that would have incurred in growing the crop and getting it to market.

Production records from the preceding two or three years, as well as records from the crop loss year, should be submitted to support the damages sought.

There are occasions when errors in the design or manufacturing of products can render them defective. If the use of a defective product leads to crop loss, then there may be a legal basis to seek recovery for

the losses incurred. Before pursuing a claim against a third party for a lost crop, reasonable thorough efforts should be made to rule out other possible causes for the loss. By conducting a thorough investigation into the cause of a crop failure, evidence necessary to support any future claim will be gathered. After submitting a claim to a company or testifying before a jury regarding that claim, one can then be confident that his position is justified.

Beware of those who recommend that the exorbitant costs of litigation be used as an economic bludgeon to coerce a settlement from a company even where none is deserved. This is a tactic that has lost its potency as companies have been educated to its use. Moreover, undeserved settlements of crop loss claims only lead to increased prices in products and ultimately hurt everyone whose livelihood is derived from agricultural pursuits. In the final analysis, our system of justice and all of us who abide by it suffer each time an unwarranted claim succeeds. Before pursuing a claim, it is best to be certain it has merit. ○

*Charles M. Greene is a products liability lawyer who specializes in crop loss cases. Greene will be a speaker at the annual Florida Seed Association meeting, Feb 21-22. He is with the Orlando office of Holtzman, Krinzman, Equels and Furia.*

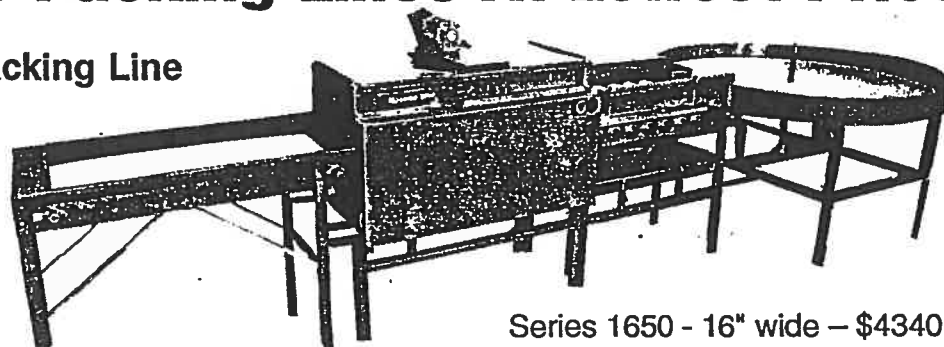
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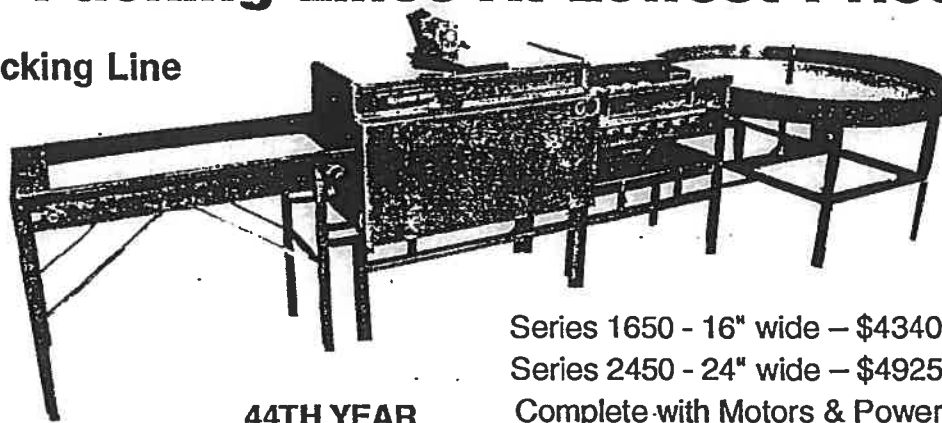
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