

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION**

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B. GAIL BURNS, ET AL.	*	
	*	
Plaintiffs	*	
	*	
VS.	*	NO: 4:07CV00535 SWW
	*	
UNIVERSAL CROP PROTECTION	*	
ALLIANCE, ET AL.	*	
	*	
Defendants	*	
	*	
	*	

**CASE MANAGEMENT ORDER**

Eighty-two cotton farmers bring this product liability action against five herbicide manufacturers, alleging that their 2006 cotton crops suffered damage from exposure to Defendants’ herbicides containing dichlorophenoxyacetic acid (“2,4-D”). In the complaint, Plaintiffs allege that between June 18 to July 13, 2006, in aggregate, tens of thousands of pounds of Defendants’ 2,4-D products were applied to rice crops in northeast Arkansas, west of Crowley’s Ridge. Plaintiffs allege that following the applications, a portion of Defendants’ 2,4-D products drifted east across Crowley’s Ridge and damaged their cotton crops.

Under Arkansas law, when several defendants’ products may have produced injury, a plaintiff must show that exposure to a particular defendant’s product was a substantial factor in producing the injury. *See Chavers v. General Motors Corp.*, 349 Ark. 550, 562 (2002)(citing *Jackson v. Anchor Packing Co.*, 994 F.2d 1295 (8th Cir .1993)). Arkansas law does not

recognize an aggregate or collective theory of liability that eliminates a plaintiff's burden to establish exposure to a specific product at levels known to cause the kind of harm that the plaintiff claims to have suffered. *See Wright v. Willamette Industries, Inc.*, 91 F.3d 1105, 1106 (8<sup>th</sup> Cir. 1996)(“We agree . . . that a plaintiff in a toxic tort case must prove the levels of exposure that are hazardous to human beings generally as well as the plaintiff's actual level of exposure to the defendant's toxic substance before he or she may recover.); *see also Davis v. DuPont*, 729 F. Supp. 652, 655 (E.D. Ark.1989)(“Alternative theories of liability that minimize or eliminate the need to prove causation such as market share or concert of action have not found their way into Arkansas jurisprudence.”)

Given Plaintiffs' burden, the Court finds that discovery in this case should proceed in phases, with the first phase aimed at clarifying allegations regarding the specific herbicide products and the specific herbicide applications that each Plaintiff claims caused damage to that Plaintiff's 2006 cotton crop.

In Phase I, Defendants will provide Plaintiffs with the identity of any third-party manufacturer(s) of the active ingredient in Defendants' 2, 4-D products, and Plaintiffs will conduct third-party discovery and provide Defendants information specified in this order. No other discovery shall be permitted during Phase I without leave of court.

Phase I discovery shall include the following subjects and deadlines:

1. Within 15 days from the entry of this order, Defendants shall provide Plaintiffs with the identity of any third-party manufacturer(s) of the active ingredient in Defendants' 2,4-D products.
2. Within 150 days from the entry of this order, Plaintiffs shall provide Defendants with specific allegations as to product identification and exposure issues. Included in these allegations shall be the identity of fact or expert witnesses upon whom they rely.

Affidavits need not be provided at this stage. The allegations shall include:

- a. Separately for each of the Defendants' products at issue, the date(s), location(s), and amount(s) of each product application at issue and the name of the person(s) making the application(s).
  - b. Separately for each Plaintiff, the location(s) and acreage of each cotton field Plaintiff claims was injured or damaged by one or more of Defendants' products in 2006.
  - c. Separately for each cotton field identified in paragraph (b) above, the manufacturer and brand name of each product allegedly transported to said field and the location, identified in paragraph (a) above, from which the product was allegedly transported.
3. Within 160 days from the entry of this order, the Court will schedule a status conference to set any Phase II discovery and other deadlines. Based on information obtained during Phase I discovery, Plaintiffs may elect to file a motion to amend the complaint.

IT IS SO ORDERED THIS 20<sup>TH</sup> DAY OF DECEMBER, 2007.

/s/Susan Webber Wright

UNITED STATES DISTRICT JUDGE