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## COMPLAINTS AND CIVIL SUITS: ARE YOU PREPARED?

Foy Campbell<sup>1</sup>

### Introduction

The subject of this discussion: "Complaints and Civil Suits: Are You Prepared?", is one of increasing interest and importance to the seed industry. Not only do these problems add to the frustration of conducting business, but complaints and lawsuits can significantly add to the costs of doing business. It may be necessary for some of your most talented people to spend endless hours doing investigative work, involving costs for legal fees, Errors and Omissions insurance, and other expenditures.

No attempt is be made to catalog or document all the different types of complaints and problems in the seed industry which could lead to lawsuits. We're all familiar with various kinds of fines, violations of federal and state seed laws, suits arising from alleged violations involving interstate commerce, the Federal Seed Act, mislabeling, and numerous others. Space does not permit such a review.

### Background Information

Because most people in attendance are involved in seed production, conditioning, plant operations, etc., you are no doubt well-versed in the agronomics of solving field problems. So, rather than go into this area of discussion, I offer a few suggestions on handling the problems to better serve customers, maintain better relations, and, hopefully, avoid lawsuits.

Over 30 years ago, when I first began investigating complaints and their causes, it was unusual to hear of a lawsuit in the seed industry. When we would discuss a problem or potential suit with the lawyers, they would simply tell us that no precedents existed on that topic. However, all of that has rapidly changed. Not only are complaints on the increase, but as an industry, we are experiencing a rising number of litigations.

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It is a reasonable assumption that the professional seedsmen assembled here do take the necessary steps to insure a high quality product getting into the bag for shipment to the seed trade. So, the causes are not always related to poor quality seed.

How do we avoid lawsuits; sometimes we can't! We do all that is humanly possible before there is even a chance for a customer complaint. Of course, we should follow the very best production practices: avoid mixtures or contamination from other varieties or species; carry on a good weed control program with proper tillage; be certain that isolation distances are more than adequate to insure varietal purity; do everything to produce a superior quality product that we can market with pride and absolute confidence. We need to harvest the seed with the proper machines, properly adjusted, at the right speed to minimize harvest damage. Then, in the final conditioning step--preparing the seed for packaging and shipping to the marketplace--again being sure we have proper equipment settings, near-perfect cleaning, removing any cracked or damaged seed, etc. In other words, all the good procedures that we know should be followed.

However, a word of caution--just doing all these things correctly may still not be enough to avoid a lawsuit. Remember, you can be as innocent as a lamb and still get sued. It is important to be thoroughly prepared to successfully defend yourself, if it becomes necessary to do so.

In dealing with a complaint we should always maintain a positive attitude. As purveyors of the seed, which may or may not be the cause of the problem, we are almost automatically put into an adversary or defendant role at the very beginning. We should neither assume this role, however, nor let it affect our attitude. It should be understood that when we investigate a complaint, our motive is not to cover up or seek some excuse, not to try to avoid responsibility but instead, quite the opposite. We should be ready to assume full responsibility for the products we have sold in good faith, and with good intentions. We should go, armed with all the facts and information we can get about the situation. We should maintain an open mind, a guilt-free conscience, and a sincere desire to be of genuine service. With all the knowledge we possess, we should demonstrate our desire to sincerely seek the truth about the causes of the problem which the customer has experienced.

The farmer customer is, perhaps, not aware of the many checks and balances, inspections and tests that are run, not only by the industry itself, but also by state and federal regulatory agencies, to help insure high quality. Knowing all that has been done to see that a high quality product reaches our customers, we can confidently approach a complaint with the expectation that the cause of the problem will be found somewhere other than with the seed. However, we



should not rule out the possibility that something adverse may have happened after the seed left our control.

Do you have someone trained and experienced in your organization to deal with the problem? Or is it just whoever you can get to go look at the situation when it comes up?

A few observations to put the topic in perspective are: (1) When problems arise, in most cases it is the dealer or salesperson who first learns about it. So, in most instances, your dealer and field sales force are your first line of defense. The salesman is a most important link in conducting the initial investigation. But remember that good sales people are not always scientifically trained, nor psychologically prepared to deal with a serious problem and an irate customer. This is certainly no reflection on sales people. However, we should remember that the salesman's job, generally is filling wants and needs of the customer on a positive basis. He's experienced in selling the strong points--accentuating the positive, selling the sizzle, painting a picture of anticipation--not unlike the old time seed catalog with beautiful pictures of perfectly shaped fruits and vegetables with no sign of insect or disease damage. So, then, it may be very difficult for the salesman to deal with this problem which may end up in the courts. I've seen salesmen literally come "unglued" at the prospect of such a situation. It becomes even more difficult if an angry customer realizes that a prompt offer of pay is not going to be made for a crop he thinks he should have made.

#### Problem--Real Or Perceived

There is either a problem that is real, or certainly one that is perceived by the customer, or you would not have an unhappy situation on your hands. It should be dealt with promptly--the quicker the better. In some cases, it will help to cool the situation, just to make contact right away, letting the customer know you are concerned and want to work with him.

Now, to successfully solve this problem and avoid litigation requires knowledge, patience and perseverance, plus the ability to communicate the truth, if it can be discovered, in an acceptable manner, without argument or antagonism. That's a pretty tall order, especially if the customer is proved wrong. Is it any wonder, then, that oftentimes it appears that the best solution--certainly the easiest one--is to 'pay off' and hopefully rid yourself of this unpleasant situation.

Yet, that kind of solution is not fair to your company, nor to the seed industry, and actually does not serve the customer very well.

Chances are, you will have spent a lot of money, lost a customer, and as a result of the payment, admitted guilt. This may bring the house



down on you and your dealer from others who may fall in line and say "I knew all the time there was something wrong with that seed!"

One of my most important observations in this paper is that we should be aware that the doctrines of law, which now are being applied in agricultural suits, originated with "MANUFACTURED" or "ENGINEERED" products, rather than with products of nature or living organisms as in the past. This is one of the reasons behind the seed industry's insistence on using the term "conditioned seed" rather than "processed seed". The legal inference regarding a processed item is that it has had something done to it--it has been changed, thereby raising more legal questions. Whereas, a conditioned item has just been cleaned or put in a marketable form without any change to the item itself. It has not been altered genetically or had its bred-in ability to perform made different. It was not manufactured; yet legal actions will often use those very terms.

We are all familiar with the highly publicized recall procedures of the automobile industry. Manufactured products can be recalled, put on a rack and carefully examined. Parts can be changed, replaced or rightened. But, when seeds that are planted don't come up, or if they come up and die, or if some other malady attacks them, they cannot be recalled for such careful examination and analysis. Yet, this is the same legal doctrine often applied to the seed industry. I think we all have a responsibility to help draw these distinctions for the court's consideration. We need to become more knowledgeable and better equipped to deal effectively with complaints and the threats that often follow. Perhaps we should become less agreeable to settlements out of court as the easy or less expensive way out.

Following the unfortunate experience of the outbreak of the T-Race of Helminthosporium maydis in 1970, a new attitude emerged, leading to increased litigations against the seed industry. This may have been the real turning point. Experiences such as the southern corn leaf blight outbreak sensitized both customers and the legal profession to the possibility that more profitable solutions to agricultural problems might be found through the courts. There are several factors believed to have contributed to the increase in legal actions.

Economic conditions in recent years have threatened the stability of the agricultural community. It is a matter of record that all across the country, large numbers of farmers are insolvent. We have all heard of foreclosures in which the sale of property and equipment and everything the man owned would not pay off the indebtedness. Producers are becoming more aware of possible legal remedies as an alternative.



Although we all appreciate and respect the legal profession, it is a well-known fact that there are growing numbers of lawyers. They need to make a living, too. In the past few months, in a popular periodical, there was a feature article entitled, "American Lawyers: A Protested Profession Meets (Gasp!) Competition." This reference is certainly not intended as a criticism of the legal profession, but simply states a fact. This quote is from the article, "Much of today's trouble stems from one simple fact: There are too many lawyers chasing too few clients. The statistics are numbing. There were only 355,000 lawyers in the U.S. in 1970. There are 622,000 now, and there will be over 1 million by the middle of the next decade. The number of lawyers is growing much faster than the business available to support them. As a result, more people have found the promise of economic relief through lawyers who are willing to accept cases on a contingency basis, and who are competing for clients."

To further our exposure across the southern U.S., there are more natural hazards that affect crop production, such as high humidity and relatively mild temperatures, creating a greenhouse effect that is ideal for the development and spread of disease organisms. Also, insects can safely hibernate and multiply rapidly, while no-till farming has been on the increase.

#### Preventive Measures

It is important to remember that a complaint is usually registered before legal action is taken. This presents us with an opportunity to be of service to the customer, and to help him solve or recognize a problem that might be avoided in the future, thus contributing to his economic well-being. It can possibly help us to avoid a lawsuit and at the same time, save a valued customer. However, from the very outset you should prepare for defending your company. If all other efforts fail, you want to be prepared. This is hard and very demanding work.

You should have a fairly good understanding of state and federal seed laws and regulations. You need to have, as an absolute minimum, adequate records to comply with these laws and regulations. Good records are essential in a quality control program, and they may double in value in the case of a lawsuit.

At times I have been surprised to learn that not everyone is consistent in putting a record of the lot number on sales tickets and invoices. We should remember that knowing the lot number is the first step in tracing the history of that seed lot, and should be the first thing checked when a problem arises. The lot number is the official identification of the seed and everything that has happened to the seed is related to that particular lot number. Without this basic information as a part of your sales record, you will be in a weak



position if a problem arises. Most of us are aware that when a lawsuit comes up, everybody in sight gets sued, which means that everybody who has had anything to do with the seed along the way can become a party to the suit.

### Investigating A Complaint

At this point, we need to shift gears and stop referring to the problem as a "complaint" and think of it in terms of a "service call." In preparing for this service call, learn as much as you can about the problem before visiting the farm. Such information may come from the customer, the dealer, or some other source. Try to get the complete history of the particular lot of seed. Know as much as you can about the individual customer, his personality, temperament, etc. Does he have a history of complaining or experiencing problems, or filing lawsuits? This background information is very important in the initial stages. Whatever you do, don't arrive at the scene announcing how good the seed are, and denying everything before you've even been accused. On the other hand, don't admit fault before you've even checked into the matter.

The Service Call Report is a very basic document that should be kept as a part of your records. It is simply a form for recording all the facts we can learn about the problem. Perhaps most of you already have such a record form. If not, it would be well worth the trouble and expense of getting a lawyer to help you develop one to serve your purposes.

The following list includes a few fundamentals that I have found extremely important in making a service call:

1. Respond quickly. Don't put off calling on the customer. I am convinced that many lawsuits are caused, not by some weakness or failure of the product, but by the customer's finally feeling that legal action is the only way he can get attention.
2. Take a good camera with you--know how to use it. Good pictures can be very valuable in documenting the problem for seeking outside opinions later on if needed. Good photographs can be very helpful in case of litigation. It is remotely possible there won't be another chance to document with pictures.
3. Take something for digging. It is always a good idea to check all parts of the plants, with a look at the roots and root zone. Many times the ground is dry and hard, and this tool will help.



4. Have a good knife. Cutting into the plant stems and roots can help find the cause of trouble many times.
5. A hand lens can be helpful. Although not essential, a hand lens can improve our investigative ability by helping us see more than with the naked eye.
6. Have plastic bags with you. It is good to have several sizes of these bags, from large down to the small ones with zip-tops, for the collection of plant specimens. It is also good to take along cartons for soil samples, as well as paper bags.
7. Have bottles or jars with you. Small vials, bottles or jars can be used to collect insect specimens. If you do not have access to special type containers, small baby food jars are excellent for this purpose. A small, inexpensive tackle box makes a convenient storage and carrying case for these materials.
8. Have a good attitude--be friendly. Establish a sincere interest in the customer and his problem. Express appreciation for his business.
9. Have confidence; know your products. Know the production techniques of the crop. A good portion of the service call can be taken up with the customer's seeking advice concerning matters other than the complaint.
10. Listen and let the customer do the talking. Answer his questions with questions. Try to determine if a 'third party' should be involved to provide an expert opinion or analysis of the problem. Don't interrupt; make notes during the interview.
11. Ask questions. Listen some more, and make more notes.
12. Be prepared. Know the local conditions; know as much as you can about various problems that could possibly develop with a particular crop species. Maintain a library of reference books, experiment station and extension publications dealing with various crop production areas. By showing such information to the customer, you may bring in the help of a third party, without the intimidating effect of the third party's presence.
13. Take the dealer with you. If a dealer was involved, he will also want to establish with the customer the fact that he, too, is interested in the service aspect of the call. If you are the dealer, and don't have such a third



party to call on, then perhaps you should make the first visit alone. Depending on the nature, severity, and complexity of the problem, you might suggest that the customer invite the county agent to meet you at the farm to study the problem together. If it appears to be something out of the ordinary, you might suggest that the customer request the county agent to invite one of the state extension specialists, who will have more knowledge and experience in the field than either of you might have, to come and look at the problem.

14. Establish the fact that the customer has planted your product. We have enough to do without investigating someone else's problem. Information proving it was your seed should have been previously obtained from dealer records, samples, bags, tags, etc., all of which can be very important.
15. Be a good observer. Determine field conditions, such as soil type, drainage and topography, etc. See that a soil test is run, if it is likely to have an effect on the problem. If the problem occurred sometime ago, check the weather records to document conditions that might be crucial. Observe plants for disease, insect damage, chemical damage or poor management. (Be sure to photograph.) Observe adjacent fields and crops planted.
16. Fill out customer service call report. Ordinarily, it is advisable to fill out this report in the customer's presence. In developing such a form, provide a place for the customer to sign, after reviewing and agreeing that the facts are correctly stated. It is conceivable that presentation of such a form could agitate the customer. To overcome this you may simply explain that you are getting all the facts and details down to check over with him to be sure there are no errors and that you have everything clearly stated. If, for some remote reason, you do not fill out the form in his presence and review it with him then it should be done immediately afterwards; stating the facts and observations as accurately as you can.
17. Leave the farm and customer on a friendly note. Keep the door open. If the customer is in error, don't make an issue of it. Help the customer analyze the problems, and make suggestions on how to avoid future mistakes. If no solution has been reached, leave the customer with a definite plan of what future action you will take and be sure to FOLLOW THROUGH! Remember your objective: you are not there to win an argument but to avoid one if possible. You want to be of help and to be the customer's friend.

### Conclusion

As we try to pull all of this together, still earnestly trying to be of sincere service to the customer, we, as seedsmen, see the problem as agronomic, pathological, chemical or entomological. Yet, to a lawyer who is not familiar with these disciplines, the problem is a potential case of negligence, misrepresentation, mislabeling, failure to warn, or even legal fraud under the statutes of your state. If an acceptable answer is not found among all of these disciplines, the lines may begin to rapidly converge, and you will then have a legal problem in addition to an agronomic or pathological one.

Although legal jargon is of little value out on the turn-row, and in fact, might be harmful to the satisfactory resolution of the problem, there comes a time when all the disciplines need to be welded together to form a new discipline. At that point, we need competent legal help. At the same time, counsel needs all the professional help we can provide. It is essential in dealing successfully with legal problems in agriculture, that we select a lawyer who will work with us and listen to us, and use the facts we have helped to accumulate to carry on our defense in a highly professional manner to assure the greatest degree of success; simply put: to win the lawsuit.

In closing, with all the natural hazards that affect seed emergence, plant growth, crop production, and the difficulty in explaining these problems to those who have had little or no exposure to the causes of such problems, we can take comfort in the fact that the seed industry's lawsuits have not been more numerous. However, as more and more customers are encouraged to seek legal remedies, we, in turn, must become more knowledgeable concerning all aspects of our business, especially in the technical area of problem-solving. We must be more responsive, alert and intentional in defending ourselves.