WASHINGTON POLICY CENTER

LEGISLATIVE MEMO

Lawmakers should help farmers by ending Washington's costly and wasteful seed-dispute arbitration mandate

By Madilynne Clark, Agriculture Policy Research Director February 2017

Key Findings

1. **Growers can sue seed manufacturers to cover damages incurred due to faulty seed. In many states, however, farmers making seed claims must first go through arbitration, mediation, or conciliation before they can seek legal action. Washington state requires the parties involved in a seed dispute to go through non-binding arbitration.**
2. **Non-binding arbitration favors large companies over smaller farmers, because they are unlikely to be familiar with the arbitration process and have less ability to afford the added expense of extended litigation.**
3. **Mandatory, non-binding arbitration was designed to decrease congestion in the courts and lowering costs for the parties involved – this has not happened.**
4. **Mandatory, non-binding arbitration delays the inevitable litigation and increases costs, because parties are required to participate in arbitration but are not required to accept the decision.**
5. **Washington state taxpayers and the parties involved in a seed dispute would be better off if allowed to choose their own legal options without mandated arbitration.**

Introduction

The quality of seed is essential to all agricultural operations; at harvest time farmers will only reap what is sown. However, if what is sown is ineffective or misrepresented, growers are left in a dire predicament.

The capital investment needed to bring a crop to harvest can easily reach thousands or millions of dollars. For example, an irrigated alfalfa field in the Columbia Basin would spend $80 per acre on seed, equivalent to 15 percent of the total cost to bring it into production.[1] When seed fails to produce, that is not the only cost a grower incurs.

Planting costs, including labor and fuel, are wasted when seed fails. For example, for that same irrigated alfalfa field, planting costs outside of seed (i.e. fuel, equipment, labor) are $18 per acre. Water, fertilizer, and crop protection products would still be applied until the seed is known to be ineffective (estimated costs are $39.80, $215.58, and $42.63 respectively), for a total of $316.01 per acre.[2] These costs still must be paid, even if a crop is not harvested.

Growers can sue seed manufacturers to cover damages incurred due to faulty seed. In many states, however, farmers making seed claims must first go through arbitration, mediation, or conciliation before they can seek legal action.[3] Washington state requires

1 "2017 Enterprise Budget for Establishing and Producing Irrigated Alfalfa in the Washington Columbia Basin," by Steve Norberg, Washington State University Extension Fact Sheet FS133E, March 2014, Washington State University Extension, at http://cru.cahe.wsu.edu/CEPublications/FS133E/FS133E.pdf.

2 Ibid.

3 "Seed Claims," Ag Seed Select, at http://www.agseedselect.com/pages/legal.

washingtonpolicy.org
(206) 937-9691

the parties involved in a seed dispute to go through *non-binding* arbitration.[4]

Non-binding arbitration is administered by the Washington State Department of Agriculture (WSDA). The arbitration process is costly and time consuming for WSDA and for the private parties involved. Taxpayers are also hurt, because arbitration administration is publicly funded.

In the current legislative session, some lawmakers have introduced House Bill 1132 in an effort to eliminate this costly and pointless process (the companion bill is Senate Bill 5075).[5] This Legislative Memo provides a summary of the bill and describes the advantages of ending mandatory non-binding arbitration for seed-related disputes in Washington state.

Background on Arbitration

Washington state seed law requires non-binding arbitration. In an effort to simplify and speed up the traditional litigation process, Washington lawmakers adopted the rule in 1990. The theory is that it provides a framework for parties to work through challenging problems, without having to go to court.[6]

In fact, the agricultural industry has written arbitration provisions into many contracts. Agribusinesses frequently include contract language requiring arbitration before legal proceedings and industry associations recommend arbitration for resolving contract disputes.[7]

Washington illustrates, however, that sometimes, mandatory non-binding arbitration does not work. When neither party is obligated to accept the decision of the non-binding arbitration process, the dispute inevitably moves to litigation, effectively eradicating any benefit of arbitration and increasing costs.

Arbitration tends to hurt smaller growers.[8] Seed companies use arbitration as a defensive technique, making it more expensive for growers to reach a settlement in court. Arbitration favors large companies because they can include the need for arbitration within contracts. Small growers are also less likely to be familiar with the rules and procedures of arbitration. [9]

Despite the supposed lower cost of arbitration, growers still must hire lawyers to represent them. State-required, non-binding arbitration makes growers incur even more legal fees than they would have if they had simply gone to court.[10]

Arbitration in other states

Thirty-seven states allow parties involved in a dispute to choose their own path towards resolution. However, 13 states have adopted non-binding arbitration provisions after seed failures, with the hopes to reduce congestion in the courts and to lower costs for the

4 "Revised Code of Washington 15.49.071 Damages – Arbitration prerequisite to legal action," effective date January 1, 1990, Washington State Legislature, at http://apps.leg.wa.gov/rcw/default.aspx?cite=15.49&full=true#15.49.071.

5 "House Bill 1132 – Concerning dispute resolution between seed buyers and dealers," sponsored by Representatives Buys and Blake, State of Washington 65th Legislature, 2017 Regular Session at http://app.leg.wa.gov/billsummary?BillNumber=1132&Year=2017.

6 "Alternative Dispute Resolution: An Overview," by National Ag Law Center, University of Arkansas Division of Agriculture Research and Extension, at http://nationalaglawcenter.org/overview/adr/.

7 "Farmer's Legal Guide to Production Contracts," by Neil Hamilton, Professor, An Agricultural Law Research Project, The National Agricultural Law Center, University of Arkansas Division of Agriculture, January 1995, at file:///C:/Users/WPC%20AG/Downloads/hamilton_productioncontracts%20(1).pdf.

8 "2015 Washington State Farmland Preservation Indicators," by Washington State Conservation Commission Office of Farmland Preservation, at http://ofp.scc.wa.gov/wp-content/uploads/2016/01/REGULATORY-BARRIERS.pdf.

9 "Farmer's Legal Guide to Production Contracts," by Neil Hamilton, Professor, An Agricultural Law Research Project, The National Agricultural Law Center, University of Arkansas Division of Agriculture, January 1995, at file:///C:/Users/WPC%20AG/Downloads/hamilton_productioncontracts%20(1).pdf.

10 Ibid.

parties.[11] Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Mississippi, Montana, South Carolina, Texas, as well as Washington, all require some form of arbitration or mediation before legal action can occur.

However, many of these 13 states face similar cost and delays due to government required arbitration and do not meet the goals of the provision. Indiana, Montana, and Texas are the only states that require mandatory arbitration which stipulate the full costs of arbitration must be covered by the involved parties. The other states use small filing fees, which range from $10 - $350, which do little to cover the cost of arbitration, including investigation.[12] Costs of arbitration, including investigation, state regulatory time, fees for the arbitration professionals, and state legal resources, can quickly reach tens of thousands of dollars. Washington would be better off by allowing parties to make their own legal choices and putting the cost on the parties involved.

Washington State's Arbitration Process

The mandatory non-binding arbitration required under Washington state seed law increases the length of the dispute, delays, but usually does not prevent, eventual judicial litigation, and increases costs to taxpayers.

Under state law a grower damaged by the failure of any seed must, "as a prerequisite to maintaining a legal action against the dealer of such seed, shall have first provided for the arbitration of the claim."[13] Damages from the failure of seed must be more than $2,000 before a claim can be filed.

The Washington State Department of Agriculture provides the forum for arbitration. The costs of investigation and administration are high, and the state mandate removes the choice to seek other arbitration resources or litigation alternatives that are more affordable and efficient.

A clause in Washington state seed law allows the parties to agree at the start of arbitration to be bound by the decision. However, the parties are not required to make this commitment and "an award rendered in such mandatory arbitration shall not be binding upon the parties and any trial on any claim so arbitrated shall be de novo."[14]

Recognizing the futility of mandatory, non-binding arbitration, a bill was introduced last year to end these provisions of the Washington state seed act. Sponsors of House Bill 2635 sought to remove the mandate, finding that, "This mandatory step towards the resolution of the dispute has not, due to the non-binding nature of the outcome, proven to be a worthwhile investment in the time or resources of the private parties or the state."[15] The bill did not pass.

House Bill 1132[16] and Senate Bill 5075[17] have been introduced during the 2017 Legislative Session. These bills remove the need for mandatory, non-binding arbitration from the parties engaged in the dispute and replace it with mediation. The bills require parties involved in the dispute to pay the cost of mediation, giving more responsibility and choice to the parties involved and relieves the

11 "Seed Claims," Ag Seed Select, at http://www.agseedselect.com/pages/legal.

12 "States' Alternative Dispute Resolution (ADR) Statutes" by Rusty Rumley, Staff Attorney, The National Agricultural Law Center, University of Arkansas, an Agricultural Law Research Project, at http://nationalaglawcenter.org/state-compilations/alternative-dispute-resolution-adr/.

13 "Revised Code of Washington 15.49.071 Damages – Arbitration prerequisite to legal action," effective date January 1, 1990, Washington State Legislature, at http://apps.leg.wa.gov/rcw/default.aspx?cite=15.49&full=true#15.49.071.

14 Ibid.

15 "House Bill 2635," by Representatives Buys, Manweller, Lytton, Rossetti, Blake, Dent, and Stanford; by request of Department of Agriculture, State of Washington 64th Legislature, 2016 Regular Session, at http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bills/House%20Bills/2635.pdf.

16 "House Bill 1132 – Concerning dispute resolution between seed buyers and dealers," sponsored by Representatives Buys and Blake, State of Washington 65th Legislature, 2017 Regular Session at http://app.leg.wa.gov/billsummary?BillNumber=1132&Year=2017.

17 "Senate Bill – 5075 – Concerning dispute resolution between seed buyers and dealers," sponsored by Senators Takko and Warnick, State of Washington 65th Legislature, 2017 Regular Session at http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Senate%20Bills/5075.pdf.

burden of non-binding arbitration for WSDA and the taxpayers.

Cost of Arbitration

In 2015, the Washington State Department of Agriculture administered an arbitration process in a seed failure case and both buyer and seller elected not to be bound by the decision. Despite the reality that the process would be pointless, state officials were required by law to force the parties to engage in a process they knew would be pointless, at a cost in excess of $30,000.

A range of investigative costs, attorney general fees, and administration costs contributed to the high tab. Not included is the work of two full-time state employees and the time taken from the voluntary arbitration panel of seed industry representatives who are not compensated. Even worse, the state Seed Program does not receive tax money directly, so the arbitration administration cost is taken from money normally used to fund lab work and field inspections.

Conclusion

Experience and commonsense show that Washington's mandatory, non-binding arbitration process for seed-related disputes is not working. The solution should be based on two principles. First, seed companies engaged in a seed dispute with farmers should have the freedom to choose the legal recourse that is best suited to their situation, weighing *their* benefits and costs. Second, Washington state should end the non-binding arbitration process, which is a symbolic process with no practical result, other than increasing costs to the parties involved and to taxpayers.

Removing the burden of state-imposed arbitration would reduce costs, achieve positive resolution of disputes more quickly, and remove a costly barrier for growers involved in these disputes.

Madilynne Clark is Washington Policy Center's Agriculture Policy Research Director.

Visit washingtonpolicy.org to learn more.