Ask Your Lawyer

Larry Ebner
NPCA Legal Counsel
Answers Your Questions ...

Q: My home office was recently inspected by someone from our state pesticide agency. The inspector arrived unannounced, asked to see my business files, and even took samples of pesticides from my service vehicles. Did he have the right to do that?
A: Almost every regulatory statute gives federal or state agencies authority to conduct inspections for the purpose of monitoring compliance or investigating suspected violations. Inspectors have the right under federal and state pesticide laws to do the following: enter your business property at reasonable times with or without prior notice; inspect your files, pesticide storage areas, back lot, and service vehicles; review and copy your business records, including invoices, service agreements, pesticide purchase orders, business licenses, and employee training and certification records; interview your employees; and take samples of pesticides, soil and other substances or materials.

Q: Can the inspector observe my technicians during service calls?
A: Generally, yes. The states have primary enforcement authority for pesticide-use violations. To carry out that responsibility, state inspectors can follow technicians on their routes. A customer, however, would have to consent to an inspector entering a dwelling to observe a technician.

Q: What are *my* rights during an inspection?
A: Under most circumstances, you have the right to refuse to allow an inspector to enter your property if he does not have a valid administrative search warrant, which identifies the statutory authority he is operating under and the purpose and scope of the inspection. Further, you normally have the right to observe or accompany the inspector during the inspection (as long as you do not obstruct or interfere with the inspection), make copies of any records which he removes from your files, and obtain "split samples" of any pesticides, soil, or other substances or materials taken by the inspector.

Of course, you have the right to know who the inspector is (including name, the agency, and its address and telephone number) and why the inspector is there. If more than one inspector shows up (some states have team inspectors from different agencies), you have the right to obtain this information from each inspector.

Q: Should I exercise my right to insist on a search warrant?
A: Probably not. Although inspectors often do not have search warrants for routine inspections, they usually are easy to obtain. Your refusal to consent to a warrantless search may raise suspicion that you have something to hide, resulting in a broader or more intensive inspection. Nevertheless, you very well may want to insist on a warrant if inspectors will not identify themselves, the authority they are acting under, or the purpose or scope of the inspection, or if they want to conduct an inspection at an unreasonable time (for example, in the middle of the night, or on a holiday when your office is closed).

Q: Is there anything I should do to plan in advance for the possibility that my company will be inspected?
A: Advance planning is highly desirable. You and at least one other person from your company's management should be trained in detail by your lawyer on what to do before, during and after an inspection. One of you should be available at all times to handle an inspection when it occurs. Every employee, especially your receptionist and technicians, should be trained on how to act during an inspection. You even may want to conduct practice "inspections" once or twice a year.

Q: What should we do during an inspection?
A: Don't panic. Instruct your receptionist to contact you or your trained substitute immediately when inspectors arrive and have them wait in the reception area until you greet them. Have them sign in, and ask them to describe (preferably in writing) the purpose and scope of the inspection and the statutes under which the inspection will be conducted.

Determine whether the inspectors have an administrative search warrant. Assuming that they do not but you consent to a warrantless inspection, accompany the inspectors throughout the inspection, or at least

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stay nearby and know what they are doing. Take detailed notes.

Be courteous and cooperative, and answer questions, but do not guess if you do not know the answer. Instruct your employees to do likewise. You are under no obligation to volunteer information.

Copy any documents which an inspector wishes to remove from the office, and mark any which you believe contain confidential business information or are legally privileged. (You should consult with your lawyer about legally privileged documents as part of your advance preparation for inspections.)

If an inspector takes samples of pesticides or other materials, obtain a split sample for yourself. You also may want to videotape or photograph the sampling procedure.

Before inspectors leave, ask them for an "exit" interview to ascertain what, if anything, was found.

Above all, take copious notes of the entire inspection process.

Q: What should I do after the inspector leaves?

A: Debrief any employees who may have been interviewed out of your presence. If you have not already done so, notify your lawyer at once. If you believe that the inspector may have observed any violations, decide with your lawyer whether to approach the agency to try to resolve the issue before you are cited. Do not sign a consent order unless you have first discussed it with your lawyer.

Q: How likely is it that my company will be inspected?

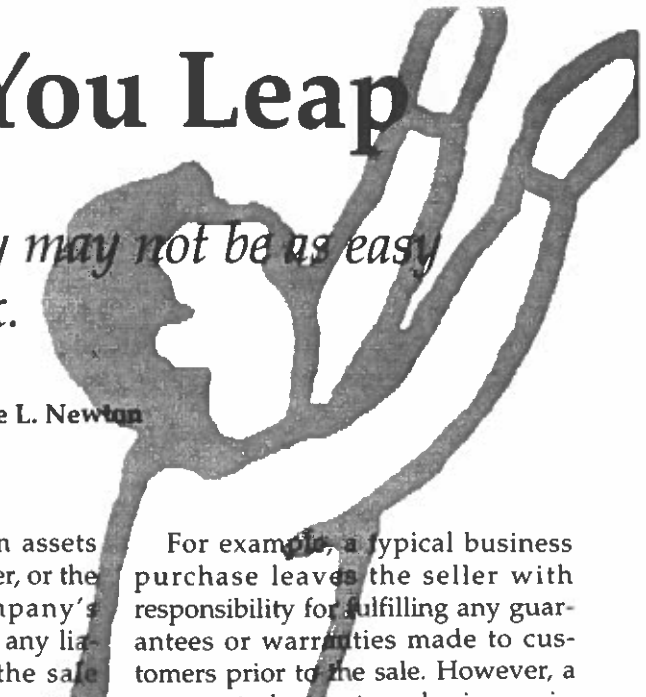
A: That's difficult to say. Pesticides are becoming more of an enforcement priority both on federal and state levels. If you have a history of violations, it is likely that you will have more frequent inspections. That is all the more reason to ensure that you are in compliance, that you prepare for inspections in advance, and that you know what to do when they occur.

Larry Ebner, a partner in the Washington, D.C., office of McKenna & Cuneo, is one of the nation's foremost authorities on pesticide legal matters.

Look Before You Leap

Buying a pest control company may not be as easy as you think.

by Lawrence S. Ebner and Kellie L. Newton



The purchase or sale of a pest control company or branch office may appear to be a simple transaction. In theory, a buyer responds to an offer by a seller or seeks out a potential business to purchase, they agree on a purchase price, a few pieces of paper are signed, and the two parties part ways. The buyer moves forward to service his or her new customers, and the seller dreams of the good life he or she will lead with the proceeds of the sale.

Unfortunately, due to the unique nature of the pest control business, the purchase or sale of a pest control company may not be so easy. Pest control operations are highly regulated by federal, state and sometimes local authorities. In addition, a generally litigious climate exists in our society today. Therefore, the purchase and sale of a pest control business often is hampered with hidden issues. As a result, both the buyer and the seller could be burdened with unanticipated costs long after the transaction has closed.

However, both the buyer and the seller can protect themselves from unexpected liability following the sale. They should thoroughly analyze and recognize exactly what they are buying or selling, take appropriate steps to identify and address future problems regarding the business, and provide for security from future loss in an enforceable legal document.

The Nature of the Deal

The purchase of a pest control business can take several forms. Generally, the transaction involves either the purchase of a company's stock, which transfers both assets and liabilities to the purchaser, or the purchase of only the company's assets, leaving (in principle) any liabilities accruing prior to the sale with the seller. The most common method of selling a pest control operation is an asset sale.

A traditional asset sale includes the following items: the purchase of customer lists and records; real estate along with leases, permits, easements and rights-of-way associated with the real estate; machinery, equipment, office supplies and furniture; inventories, including chemicals; vehicles and vehicle leases; intellectual property, including the name of the company; advertising and marketing materials; accounts receivable; judgments; permits and licenses; and cash.

Liabilities for any event or item that occurred or accrued prior to the sale — including liability for any accident, injury, property damage, tax lien, or employee benefit — are normally excluded from an asset deal.

Potential Problems

Any items that may cause future concern following a closing must be addressed prior to finalizing the purchase or sale of a pest control business. The specific problems that may arise are directly related to the nature, corporate make-up and history of the company. The common issues which may result in unexpected liability or other legal problems include the following: on-going customer obligations, supplier relationships, employee matters, litigation and claims, regulatory licenses and permits, and environmental liabilities.

For example, a typical business purchase leaves the seller with responsibility for fulfilling any guarantees or warranties made to customers prior to the sale. However, a pest control operator who is acquiring existing customers and attempting to win their confidence is likely to want to honor guarantees and warranties made by the prior owner. Failure to do so may result in the loss of former customers and perhaps invite a lawsuit to enforce the terms of the warranty, or for damages against both the prior owner and the new owner.

The buyer and seller could agree to have the buyer make good on the warranties, and for a specified period, the seller would pay a predetermined fee to the buyer for any retreats that the buyer does. Without a clear understanding of the warranties and guarantees that were made by the seller, a buyer could face major financial losses and public relations problems and may have to resort to pursuing the seller through the courts to recoup his own losses.

Similarly, while it certainly is not the buyer's responsibility to pay an invoice from a pesticide supplier ordered and used by the seller, if the buyer wants to maintain a favorable relationship with the supplier, it may be preferable to pay the supplier rather than be forced to look elsewhere for products necessary to operate the business. Failure to anticipate such expenses can burden the buyer with unexpected future losses and liabilities.

Employee benefits accruing under the former owner may have an impact on a new owner. The

responsibility for payment of employee benefits — such as accrued but unused vacation, worker's compensation, bonuses, severance and pension benefits that accrued prior to the sale — may remain the responsibility of the seller. However, employees will normally approach the buyer for payment of these items. To maintain positive employee relationships and to demonstrate that the buyer is a concerned employer, however, the buyer often is forced to accommodate the employees.

Many lawsuits brought by former or current employees against the seller may be evidence of a poorly managed business or of poor staff. While it may appear on the surface to be a sound financial business with good earning potential, the company may actually be riddled with employee and public relations problems.

An issue that may leave new owners without the ability to legally operate immediately after closing is the transferability of licenses. Each state has the authority to regulate pest control licensing. In addition to requiring non-environmental permits such as a business license, the state may have any of the following requirements: the corporation must obtain a structural pest control permit; the owner, technicians or other personnel must be certified for restricted-use pesticide applications; and each license must be properly assigned prior to the change in ownership. Many states, however, prohibit the transfer of licenses to the new owner, thereby forcing the buyer to obtain new licenses prior to closing.

Finally, unforeseen liabilities associated with pest control services or environmental contamination unique to a pest control business may leave a buyer with significant unanticipated liabilities. Buyers may assume that they are free from future obligations for liabilities of the business accruing prior to the sale, only to find later that they have been named in a suit or other legal action due to property damage or personal injury claims, illegal dumping, or environmental contamination from leaking containers or underground storage tanks. Buyers and sellers face many years of administrative hearings, lawsuits and unexpected costs if such matters are not identified prior to the sale.

Due Diligence Review

The key to avoiding monetary and legal problems is to know exactly what you are buying or selling and to clearly state those items in a purchase agreement. A buyer must also thoroughly understand how the business is operated and anticipate problems that may arise after the sale. This analysis is particularly important in the purchase or sale of a highly regulated and environmentally conspicuous pest control operation.

The best method by which to analyze the assets and nature of the business is a thorough due diligence review, sometimes called a pre-acquisition audit. Although a due diligence review benefits both the buyer and the seller, the process provides the buyer and his or her attorney with the information they need to negotiate and draft a purchase agreement. As such, the buyer usually pays the cost of the due diligence audit.

A due diligence review requires the active involvement of at least the following people: a lawyer; an environmental auditor capable of performing a "Phase I" audit of the real property; an accountant; and someone who is knowledgeable in the operations of a pest control business. Generally, this team of experts is assembled by the buyer after a non-binding letter of intent is signed between the buyer and the seller. The letter of understanding between the buyer and seller states that the pest control business will be purchased at a certain price if the due diligence review finds all aspects of the business to be in order.

The results of the review are also used by the buyer's attorney as the basis for drafting the purchase agreement. Each member of the audit team plays a specific role in the due diligence process.

The attorney reviews the real estate deeds and title insurance of owned properties to determine transferability and to identify any use restrictions. The lawyer also reviews the terms and conditions of each agreement for any leased real estate (such as home office, branch office, and warehouse), vehicles, and office equipment (such as computers and fax machines). This review includes the length of the lease, the lease payments, tax issues, and whether the agreements are transferable and, if so, under what conditions. The lawyer will also review pending or potential litigation and regulatory matters to determine whether the business is facing potential liabilities from personal injury actions or property damage claims, or is being investigated by regulatory agencies for (among other things) its environmental practices or unfair trade practices.

The lawyer also reviews the seller's insurance policies to determine whether there is adequate coverage for future liabilities, including those for which the seller may agree at closing to compensate the buyer at a later date. In addition, the lawyer reviews the licenses and permits required to operate the pest control operation and determines whether they are transferable.

Throughout the due diligence process, the lawyer becomes familiar with the business in preparation of drafting the documentation necessary to effectuate the sale. Those documents include the purchase agreement, deeds for the transfer of real property, bill of sale, and assignment documents for licenses, contracts, and leases of real property, equipment and vehicles.

The member of the due diligence team who can discover the most hidden and damaging aspects of a pest control business is the environmental auditor. The results of an environmental audit are critical to the due diligence process because of the environmental aspects associated with a pest control business, the regulations governing the operations of such a business, and the difficulty of obtaining insurance for environmental contamination.

The environmental auditor performs a Phase I audit of the real property that is proposed to be sold or transferred with the other assets of the business. A Phase I audit involves a visual inspection of the office, the facility used for storing

pesticides, and the site of underground storage tanks. Often small soil samples are taken to determine whether dumping of pesticides has taken place on the premises and to ensure that any underground storage tanks are not leaking.

The auditor, often in consultation with the lawyer, will also review publicly available records and speak with regulatory officials to uncover past and potential regulatory problems. They also become familiar with the company's operational practices by meeting with its environmental compliance officers.

If the auditor feels it is necessary, he or she may recommend a Phase II audit which further investigates the property by taking additional and more intrusive soil samples.

It is not unusual for the results of the environmental part of a due diligence audit to dramatically change the nature of the purchase and sale by reducing the sale price, building in indemnities and warranties involving the real property, or requiring the seller to clean up the contaminated areas prior to the sale.

The accountant's role is to review the company's balance sheet and financial statements. The financial statements must be audited to ensure authenticity and accuracy. They present the actual rate of return of the business, the prices actually charged to the customers, prices charged by suppliers, taxes owed to the Internal Revenue Service and other taxing bodies, judgments taken against the company, and employee benefits accrued and owed. The accountant can use this data to determine the fair market value of the business and, therefore, assist in the negotiations of the purchase price and the terms and conditions of the sale.

A person familiar with the operations of a pest control business is critical to determining whether the assets being purchased, including the customer list, are a good investment. The buyer or someone within his or her organization may be the best person to evaluate the operational aspects of the business to be purchased. Otherwise, a buyer may retain an outside consultant.

Purchase Agreement

The due diligence audit should equip the potential buyer and the buyer's attorney with a very accurate accounting of the value of the business and its existing liabilities. The audit also gives them a reasonable idea of what liabilities there might be in the future. With this information, the buyer's lawyer can draft the purchase agreement in good faith.

A purchase agreement serves several functions. It should explicitly list those assets that the buyer is purchasing (including a catch-all phrase) and disavow those assets that the buyer is not purchasing.

The agreement must specifically state who is responsible for which liabilities accruing before and after the closing. A typical scenario has the seller retaining responsibility for everything (such as employee benefits, taxes and lease payments) occurring or accruing prior to the sale, and the buyer assuming responsibility on and after the sale.

Due to the unique nature of a pest control business, however, the buyer may wish to assume some responsibilities that would otherwise be left to the seller, such as fulfilling warranties to ease the transfer of the business and maintain good customer relations. If the buyer does assume anything that would otherwise be left to the seller such as retreats, the purchase price should be adjusted downward, or a mechanism should be established for the buyer to recoup the cost of such payments.

Once it is established what assets will be transferred to the buyer and what liabilities will be retained by the seller, appropriate indemnity provisions must be drafted to protect both parties. Indemnity provisions secure compensation for a loss which is legally the responsibility of the other party.

An indemnity provision may also provide for the defense of one party by the other for an action which the purchase agreement specifically makes the responsibility of the other party. Because an indemnity is only worthwhile if the seller is financially capable of repaying any losses due, the buyer must be certain that the seller will have the financial means to fulfill any indemnity following closing.

Although a purchase agreement also includes several provisions which are beyond the scope of this article — including non-compete provisions, the use of key, non-retained personnel for transition purposes, and post-closing tax treatment of certain acquired assets — the final provision is purchase price. This provision should spell out precisely the agreed purchase price for the business and how and when it is to be paid.

If there are several unanswered questions regarding outstanding liabilities at the time of sale, or if the buyer is uncertain about the seller's ability to make good on any indemnity, a buyer and seller may agree to withhold a portion of the purchase price in escrow until some time after the closing. At that time, and according to a method specifically addressed in the purchase agreement, the buyer, seller and their representatives will reconcile what items were paid by the buyer on behalf of the seller and vice versa. The remainder of the purchase price can at that time be paid to the seller.

Look Before You Leap

Purchasing or selling a pest control business is a transaction of tremendous consequence that should only be undertaken with your eyes open and with the assistance of attorneys and other professionals. It is imperative to remember that no matter how simple the transaction may appear, and no matter how small the business might be, there may be unforeseen complications after the sale that could dramatically affect both the buyer and the seller.

Larry Ebner, a partner in McKenna & Cuneo, is NPCA's legal counsel. Kellie Newton is general counsel of McKenna & Cuneo's environmental consulting subsidiary, Technology Sciences Group. She was formerly corporate counsel for ChemLawn Services Corp., where she practiced in the area of acquisitions and dispositions of lawn care companies. Ebner can be contacted at (202) 789-7727, and Newton at (202) 828-8981.

Ask Your Lawyer

Larry Ebner
NPCA Legal Counsel
Answers Your Questions ...

Q: What kind of background check should I conduct to determine whether a prospective technician's driving record is acceptable?

A: You should conduct as thorough an investigation of the applicant's driving record as possible. A technician's ability to safely operate a motor vehicle is crucial to effective on-the-job performance. Failure to adequately investigate an applicant's driving record may increase not only the risk of employee accidents, but also the risk that your company will be liable to other drivers and pedestrians.

Your company's employment application form should ask prospective technicians if their driver's license has ever been revoked or suspended, and whether they have ever been convicted of driving under the influence of alcohol or illegal drugs. If the answer to either question is yes, the applicant should be required to state on the application the reasons for, and date of, the revocation, suspension or DUI conviction. Also, cover these questions during face-to-face interviews with applicants.

If state law permits, you also may want to contact the Department of Motor Vehicles to inquire about the applicant's driving record.

Q: Under what circumstances can I lawfully refrain from hiring a technician based on a poor driving record, especially when it reflects a history of alcohol or drug use? What about firing a technician who is cited for driving while under the influence of alcohol or drugs?

A: You are free to refuse to hire, or to terminate, a technician based on a poor driving record, assuming of course that a clean driving record is required to perform the job in question. The requirement for a clean driving record must be applied uniformly and consistently among all technicians in your company.

You also are free to refuse to hire, or to terminate, a technician who has a DUI conviction. Again, such a policy must be applied uniformly to all applicants and technicians with DUI convictions. In addition, the U.S. Department of Transportation requires employers to conduct pre-employment, random and post-accident drug-testing for employees who have commercial drivers licenses.

I also suggest that you make it clear to all technicians (and other employees) that the use of alcohol and illegal drugs in the workplace and while on work assignments is strictly prohibited. Ideally, a substance abuse policy should be placed in an employee handbook or distributed separately to employees with an acknowledgment-of-receipt form for each employee to sign.

Q: If a pest control company fails t conduct a background check on a applicant's driving record, or hire a technician with knowledge of poor driving history, what are th potential legal consequences if th technician is in an accident?

A: Under such circumstances, you company could be held liable fo negligent hiring or retention of a employee who is incompetent o unfit for the job. Liability under thi theory requires more than just th existence of an employer-employe relationship. In the case of negligen hiring, the employer must, prior t the hiring, have had reason t believe that an undue risk of harm t others would exist because of th employment.

Pest control companies shoul know that their employees' ability t safely operate a motor vehicle is nec essary to perform the job. Given thi fact, the company could be foun negligent for failing to conduct a adequate background check of th applicant's driving record, or fo hiring a technician with knowledg of a poor driving record.

Larry Ebner, a partner in the Wash ington, D.C., office of McKenna & Cuneo, is one of the nation's foremos authorities on pesticide legal matters Jonathan Rolnick, of the firm's labor an employment law department, assiste Ebner with this article.

Just Ask!
Send your questions about pest control law and regulation to NPCA Legal Counsel Larry Ebner c/o "Ask Your Lawyer," *Pest Management*, 8100 Oak St., Dunn Loring, Va. 22027.

Defending the Industry Against MCS

Due to the elusive nature of MCS, PCOs need to take special considerations into account when launching a defense.

by Lawrence S. Ebner, Esq.

Multiple chemical sensitivities (MCS) is the "designer disease" of the '90s: Its victims — with a little reinforcement from clinical ecologists — can make MCS into whatever they want it to be.

MCS proponents claim that the syndrome can have any number of environmentally induced causes, including even a fleeting exposure to properly applied pesticides. Furthermore, MCS sufferers can experience just about any type of symptom ranging from sneezing to fatigue to stomach pains, which allegedly can be triggered by any level of exposure to almost any product or substance that contains a chemical or has a scent.

Mainstream medical experts insist that MCS is not a disease or internal medical condition. Instead, they explain that MCS is a potpourri of symptoms resulting from a conditioned response or other psychogenic disorder. Most importantly, they do not believe that there is any valid scientific evidence which establishes that pesticides or other toxic substances physically or chemically cause MCS.

Because MCS is so elusive, defending a pest control company or pesticide manufacturer in a liability suit where the plaintiff complains of pesticide-induced MCS can be challenging. Although the basic legal framework is the same as in any toxic tort suit, MCS cases present the following special considerations which defendants and their lawyers should take into account.

■ **The plaintiff's symptoms probably are real even though his or her medical condition is not.** Plaintiffs undoubtedly believe that they have a medical problem caused by pesticides. Furthermore, they probably have been advised by a clinical ecologist or similar practitioner to adjust their lifestyle to avoid many everyday products and situations. This advice can range from avoiding certain consumer products such as perfume, deodorant and laundry detergent, to living in a totally enclosed, sterile environment.

Mainstream medical experts insist that MCS is not a disease or internal medical condition.

Plaintiffs or their lawyers sometimes confuse the proposed solution (avoiding chemicals) with the alleged problem (MCS). As a result, the plaintiff's MCS can be disruptive and depressing.

■ **An independent medical examination is essential, but not enough.** Most courts in personal injury or toxic tort suits will allow defendants to hire a physician of their choice to conduct an independent physical examination of the plaintiff. The exam is critical if the plaintiff has an expert witness who is prepared to testify that the MCS was caused by pesticide exposure.

The defendant's medical expert should be an internist or other medical doctor, ideally one who is experienced in diagnosing bona fide pesticide poisoning cases, and who is also familiar with MCS. The physical examination not only will assess the plaintiff's current state of health, but also will include a medical history both before and after the pesticide exposure incident that allegedly caused the MCS. A toxicological evaluation of the plaintiff also may be warranted.

But don't stop there. Because MCS is widely regarded as a mental disorder, an independent psychiatric evaluation of the plaintiff often is crucial to the defense. Evaluations not only may confirm the psychogenic nature of the plaintiffs' MCS, but also may reveal possible underlying causes that long preceded their exposure to pesticides. The court may have to be persuaded that a psychiatric exam is necessary, but the body of literature regarding the psychogenic nature of MCS should help.

■ **Time may be on your side.** MCS should not necessarily be viewed as a permanent condition. In fact, with proper behavioral therapy, an MCS

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sufferer can sometimes overcome the problem. The defense should monitor the plaintiff's condition throughout the proceedings to determine whether the condition is being treated and if it has improved. Accordingly, it is not always prudent to settle a pesticide MCS claim at its early stages.

■ **Pesticides are among the most highly regulated chemical products in use today.** Most lawyers — both on the plaintiff's side and the defendant's — know very little about how pesticides are regulated by the federal and state governments. The point is that pesticide manufacturers invest millions of dollars in state-of-the-art toxicology and other studies which the Environmental Protection Agency (and some states such as California) require to be submitted and reviewed before a product can be registered for use.

Furthermore, many older active ingredients are currently undergoing a comprehensive federal reregistration process which involves updating studies and filling any data gaps. Moreover, pesticide manufacturers are required to submit to EPA product data including any "adverse effects" information. After reviewing the data, EPA decides what product label warnings and precautions are needed for protection of applicators and the public.

Defense lawyers in MCS cases (and other types of pesticide suits) should drive these and similar points home to the jury in order to increase its "comfort level" with the pesticides involved in the case. This defense also should further distance the plaintiffs and their MCS-proponent expert witnesses from the real world of pest control, which involves thousands and thousands of beneficial applications every day without adverse effects.

In addition to serving as NPCA's Legal Counsel, Larry Ebner advises and represents companies throughout the United States on all types of pesticide-related legal matters, including toxic tort suits. He is a partner in the Washington, D.C. office of McKenna & Cuneo.

ADVERTISERS' INDEX

Ask Your Lawyer

Larry Ebner
NPCA Legal Counsel
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Q: What is the status of FIFRA preemption?
A: Congress and the courts have recognized for decades that under certain circumstances federal law preempts (i.e., supersedes and nullifies) state or local law. This federal preemption doctrine is based on the Constitution, whose Supremacy Clause (art. VI, cl. 2) declares that "the Laws of the United States... shall be the supreme Law of the Land."

In June 1991 the Supreme Court of the United States rejected industry's arguments and held in *Wisconsin Public Intervenor v. Mortier* that FIFRA, the federal pesticide statute, does *not* preempt local governments from regulating pesticide use. Environmental groups have seized upon this case as an opportunity to build grassroots support for adoption of local ordinances which second-guess, circumvent, or ignore well-balanced federal and state pesticide regulation. The Wisconsin government attorney who filed the *Mortier* case (Wisconsin's "Public Intervenor") was the recipient of this year's "exceptional public official" award from the National Coalition Against the Misuse of Pesticides (NCAMP), the notorious anti-pesticide group.

The Supreme Court's decision makes it clear that Congress can amend FIFRA to preempt local regulation, and also that state legislatures can enact laws to prohibit or restrict their own political subdivisions from regulating pesticides. NPCA and other organizations have been lobbying hard for such federal and state legislation, which is essential to the structural pest control industry's ability to protect the public and the environment.

Q: Did anything good come out of the Supreme Court's *Mortier* decision?
A: Yes. Besides uniting the pesticide community, the Supreme Court's decision acknowledged that FIFRA does preempt the states and their political subdivisions from imposing requirements for pesticide labeling which are in addition to or different from those established by EPA pursuant to FIFRA. See FIFRA § 24(b).

Q: How does FIFRA labeling preemption help our industry?
A: This preemption is the basis for a defense against state law tort claims based on allegations of inadequate labeling or failure to warn. Such claims are preempted because they represent an attempt to impose state requirements for labeling in addition to or different from EPA's requirements, and would interfere with EPA's exclusive authority to regulate labeling.

Courts are split on this FIFRA-preemption tort suit defense. To date, three federal appeals courts and one state Supreme Court have ruled in favor of tort preemption; one federal appeals court and one state Supreme Court have ruled against it.

In June 1992, the Supreme Court declined to review the issue, and instead, sent back *Papas v. Zoecon Corp.*, the leading case on FIFRA preemption of tort claims, back to federal appellate court for further consideration in light of *Cipollone v. Liggett Group, Inc.*

The widely publicized Cippollone case is quite complex. The section of the Supreme Court's decision most pertinent to FIFRA preemption held that the current version of the Federal Cigarette Labeling and Advertising Act, which contains preemption language similar to FIFRA's, preempts state law tort claims alleging that cigarette manufacturers failed to adequately warn of smoking's dangers. In my opinion, the *Cipollone* decision supports FIFRA preemption of labeling and warning claims.

Larry Ebner, a partner in the Washington, D.C. office of McKenna & Cuneo, is one of the nation's foremost authorities on pesticide legal matters.

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Q: Can I advertise that the pesticides which my company uses are "safe"?

A: I would not recommend it, even though you are convinced that the pesticides are in fact safe when used properly. Federal and state agencies have expressed concern about so-called "green advertising," which they sometimes consider to be misleading. Recent government scrutiny has included advertising relating to pest control, especially in the lawn care area. Government agencies' views on whether a pesticide is "safe" may differ from yours, especially since safety is a relative concept.

Also, you should be aware that EPA prohibits pesticide manufacturers from claiming that their products are "safe." EPA labeling regulations provide that claims as to the safety of a pesticide or its ingredients, including statements such as "safe," "nonpoisonous," "harmless," or "nontoxic in humans and pets," with or without a qualifying phrase such as "when used as directed," are false and misleading. See 40 C.F.R. § 156.10(a)(5). As a result, a pesticide whose labeling makes such claims is considered to be "misbranded" and in violation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

Your advertising would not be considered labeling under FIFRA. Nevertheless, you should consider carefully the potential consequences of making safety claims that pesticide manufacturers themselves cannot lawfully make.

While EPA itself does not customarily take enforcement action against pest control companies that it believes have engaged in making false or misleading claims, it sometimes refers complaints to the Federal Trade Commission (FTC).

Q: One of our customers claims that she became ill after we applied a particular pesticide in her home. Does the federal pesticide law require pest control companies to report such claims to EPA?

A: No. Section 6(a)(2) of FIFRA states as follows: "If at any time after the registration of a pesticide the *registrant* has additional factual information regarding unreasonable adverse effects...the *registrant* shall submit such information to the [EPA] Administrator" (emphasis added). Thus, the statutory duty to report unreasonable adverse effects information is on the registrant (i.e., manufacturer) of a pesticide, not on pesticide users.

If you feel that you have new or additional information regarding adverse effects of a pesticide which has been used in accordance with label directions, you very well may want to share the information with the pesticide's manufacturer. Be aware that doing so may trigger a FIFRA § 6(a)(2) reporting obligation on the part of the manufacturer.

Under current EPA policy, which is somewhat unclear, information received by pesticide registrants regarding incidents involving similar toxic effects to three or more persons within a ten-year period, or to three or more non-target animals (e.g., pets) within a five-year period, generally must be reported to EPA under FIFRA § 6(a)(2).

This policy is expected to be further clarified later this year when EPA proposes a regulation to implement § 6(a)(2).

Q: Can I protect my company from liability by requiring customers to sign a waiver form?

A: Generally, no. PCOs are expected to render pest control services in a professional manner, including following pesticide label directions and other requirements for application. Use of a pesticide in a manner inconsistent with its labeling may lead to civil liability for personal injury or property damage, and also federal or state enforcement proceedings. If there has been a significant label violation or other misuse, few courts would allow a pest control company to avoid or limit liability by producing a waiver form signed by a customer prior to treatment.

The same would be true in the event of a negligent termite inspection. It should be noted, however, that disclamatory language on wood destroying insect (WDI) inspection forms or service agreements normally are legally valid and can be helpful in defining the scope of services. For example, the written explanation that termite inspections are limited to readily accessible areas of the property should be useful in defending against a claim involving termite damage that could not have been discovered without breaking apart, dismantling or removing walls, ceilings, floors, and so forth.

Ask Your Lawyer

Larry Ebner
NPCA Legal Counsel

Q: One of my competitors uses the NPCA "torch" logo in its advertising, but is not a member of NPCA. What can I do?

A: Call the situation to NPCA's attention by writing a letter to Ms. Kittie Rothschild, Membership Manager, 8100 Oak Street, Dunn Loring, VA 22027. Be sure to include copies of all advertisements (Yellow Pages, newspapers, brochures, mailers, fliers, etc.) in which NPCA's logo is being used by the nonmember. If possible, you should identify on each advertisement the name and date of the publication, and the page number. If the non-member is also using the NPCA logo on other items such as company stationery, business cards, or service contracts, you should include copies of those as well.

NPCA's logo is registered under the federal trademark law. Only active, dues-paying members of NPCA are entitled to display it. Unauthorized use of the logo is a violation of federal law and can result in injunctive relief or money damages.

NPCA (either directly or through me) will contact the violator and insist that it cease and desist unauthorized use of NPCA's logo. Similar action will be taken if a nonmember company is claiming that it belongs to NPCA.

Q: Can a company continue to use the NPCA logo if its NPCA membership has been suspended for nonpayment of dues?

A: No. NPCA's Constitution states that suspended members "shall not continue to utilize the mention of NPCA affiliation... and must expeditiously remove the NPCA logo from any promotional material, advertising, brochures, stationery and so forth. The same applies, of course, to companies where NPCA membership has been terminated.

Q: My company belongs to our state pest control association, but not to NPCA. Can we use the NPCA logo or refer to affiliation with NPCA in our promotional material?

A: No. Under NPCA's Bylaws, state pest control associations which are affiliate members of NPCA may adopt seals which incorporate NPCA's torch logo and may indicate that they are affiliated with NPCA. A pest control company that is a member of such a state association, however, may not use the NPCA logo, or refer to membership in or affiliation with NPCA, unless that company is an active member of NPCA.

Q: I think that one of my competitors, which is not a member of NPCA or our state association, is using unfair advertising by implying that pest control methods used by other companies (like mine) are not "safe." What can I do about this?

A: Depending upon its wording, the advertisement may violate both federal and state laws which prohibit false or deceptive advertising. These laws are enforced by federal and state agencies. In addition, several of these laws provide for a private right of action. Relief in the form of money damages, or an injunction to prevent further dissemination of the false or deceptive advertisement is possible if such a violation is established.

Contact the Federal Trade Commission at (202) 326-2418 or your state Attorney General's office to discuss your concerns regarding your competitor's advertising. If the government takes no action, you may want to contact an attorney about a private suit.

Q: Can a manufacturer of a pest control device use its Allied Membership in NPCA to imply that NPCA endorses its product?

A: No. NPCA does not test or endorse products manufactured or sold by its Allied Members, including devices, pesticides or application equipment. You should write to NPCA to provide all the facts regarding this erroneous claim of endorsement.

Larry Ebner, a partner in the Washington, D.C., office of McKenna & Cuneo, is one of the nation's foremost authorities on pesticide legal matters.

Just Ask!
Send your questions about pest control law and regulation to NPCA Legal Counsel Larry Ebner c/o "Ask Your Lawyer," *Pest Management*, 8100 Oak St., Dunn Loring, Va. 22027.

Ask Your Lawyer

Larry Ebner
NPCA Legal Counsel
Answers Your Questions ...

Q: EPA's Regional Office has cited my company for allegedly not following label directions. I thought that only my state's pesticide agency can bring a pesticide enforcement proceeding.

A: Section 26 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) provides that a state "shall have primary enforcement responsibility for pesticide use violations" if EPA has determined that the state has adopted adequate pesticide use laws and enforcement procedures, or if EPA and the state have entered into a cooperative agreement for enforcement of pesticide use restrictions. Every state other than Nebraska currently has such FIFRA primary enforcement responsibility for pesticide use violations (i.e., authority to fine a commercial applicator for using a pesticide in a manner inconsistent with its labeling).

EPA does not have authority to initiate its own enforcement proceeding for an alleged pesticide-use violation occurring in a state that has FIFRA primary enforcement responsibility, except in very limited circumstances. These circumstances, described in FIFRA sec. 27, are when a "significant violation" has been referred by EPA to a state, and the state "has not commenced appropriate enforcement action" within thirty days, or when EPA "determines that emergency conditions exist that require immediate action on the part of [EPA] and the State authority is unwilling or unable adequately to respond to the emergency." If neither of these circumstances applies to your situation, EPA's enforcement proceeding is improper.

My experience in representing pest control companies is that some personnel in EPA's Regional Offices do not understand the limits of their pesticide enforcement authority. They sometimes confuse EPA's authority to enforce other types of FIFRA violations (e.g., distributing an unregistered pesticide) with authority to enforce pesticide-use violations. Cooperative agreements between EPA and state pesticide agencies for enforcement of FIFRA are other possible sources of confusion. Such agreements merely delegate certain FIFRA enforcement authority from EPA to the states; they do not change the limit of EPA's authority.

I suggest that you ask EPA to voluntarily withdraw its enforcement proceeding. If EPA refuses, you or your lawyer can file a motion to dismiss with the EPA Administrative Law Judge assigned to the case. There is no guarantee, however, that your state pesticide agency will not cite you for the same violation under its own laws, and perhaps even with a higher penalty than the $5,000 per violation maximum currently established by FIFRA.

Q: A well-known environmental activist who recently sued another pest control company in my town has asked my company to perform general pest control service in his home. I am concerned that he will sue us too if he *thinks* that we've done something wrong. Can we refuse this account?

A: In general, you can do business with whomever you choose. Federal, state and local laws, however, prohibit discrimination in business transactions on the basis of race, religion, and so forth. Assuming that you are not violating any discrimination laws, you can refuse the service call. It may be prudent for you to make and maintain a record of the reason why you are not providing service (i.e., your concern that this particular homeowner may file a pesticide suit). Such a record would be helpful in defending your company should a discrimination complaint be filed by the homeowner.

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Ask Your Lawyer

Larry Ebner
NPCA Legal Counsel

Q: Can my company still use chlordane that we obtained prior to 1987?

A: No. Effective April 15, 1988, EPA prohibited all sale, distribution and use of chlordane for subterranean termite control in the United States. The only exceptions are for protection of underground cables, and use of chlordane products *not* manufactured by Velsicol Chemical Corp. by *individuals* (not corporations or government agencies) on property owned and occupied by those individuals (see 52 Fed. Reg. 42,145, Nov. 3, 1987; and 53 Fed. Reg. 11,798, Apr. 8, 1988). In the fall of 1987, NPCA participated in negotiations with EPA and Velsicol to obtain the April 15, 1988 deadline for use of existing stocks in order to prevent the immediate suspension of use that environmental groups had sought (see *Pest Management*, April 1988).

Q: What should my company do with the chlordane that we still have in our warehouse?

A: According to EPA, any chlordane products (including those labeled for the "retained uses" listed under the fourth question) that were not used on or before April 15, 1988 must be disposed of in accordance with applicable federal, state and local laws (see 52 Fed. Reg. 42,147). Under the federal Resource Conservation and Recovery Act (RCRA), chlordane is on the list of commercial chemical products which are deemed to be hazardous waste when discarded (see 40 C.F.R. § 261.33).

Accordingly, your existing stocks of chlordane should be stored or discarded in compliance with all applicable federal, state or local hazardous waste laws.

Each state's hazardous waste program differs, and some states consider long-term storage of cancelled pesticide products without a permit to be a violation of their hazardous waste laws. You may want an attorney or your state pest control association to look into these state regulations for you.

Q: What is the legal status of chlordane?

A: In 1987, Velsicol agreed with EPA to voluntarily delete most post-construction uses from its chlordane subterranean termite labels. However, under the agreement with EPA, Velsicol *retained*, but voluntarily suspended distribution and sale of chlordane products for, certain pre-construction and non-pressure post-construction uses.

The FIFRA registrations for these "retained uses" will be automatically terminated on August 11, 1994 unless prior to that time Velsicol submits certain studies to EPA demonstrating that such uses do not result in indoor residues.

Q: What uses may be reinstated?

A: If Velsicol submits the required studies, and if EPA makes a favorable determination following its review of those studies, the sale and distribution of chlordane for the following uses *may* be reinstated:

1. application to the outside perimeter of any structure by trenching, or drilling through sidewalks, patios, or other unenclosed slabs, and application to the soil without pressure (e.g., flow or gravity feed);
2. applications by the excavation technique to the exterior of any structure (i.e., by removing soil next to the foundation, placing on a tarp, treating with termiticide, and placing back in trench after soil dries);
3. pre-construction low pressure (maximum 25 psi) vertical rodding of the perimeter outside any structure;
4. post-construction low-pressure (maximum 25 psi) vertical rodding outside slab and post- and pier-type structures; and pre-construction coarse spray surface treatment (maximum 50 psi) and low pressure (maximum 25 psi) vertical rodding under the slab of slab-type structures.

Of course, your state would also have to reinstate chlordane before you could use it.

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Ask Your Lawyer

Larry Ebner
NPCA Legal Counsel
Answers Your Questions ...

Q: Our company has been sued. Can we use the lawyer we want and get our liability insurer to pay her fees?
A: Maybe. Liability policies require the insurer to defend all claims within the policy's coverage, but give the insurer the right to control all aspects of the defense, including choosing defense counsel. Typically, the insurer will select a local lawyer who specializes in insurance defense work, but may not have much experience in defending pest control companies. Many states recognize, however, that if there is a conflict of interest between the insurer and the insured, the insured is entitled to an "independent counsel" paid for by the insurer.

Q: How can we tell whether the lawyer hired by our insurance company is "independent"?
A: The question of whether an attorney hired by your insurer to defend your company is independent will vary from case to case. In general, the insurer's lawyer will not be considered independent if he is in a position to control the outcome of the case in a way which would benefit the insurer on a coverage issue or otherwise relieve the insurer of the obligation to pay damages under the insurance policy. This is because you need to be able to disclose the facts of the case fully and candidly to your attorney without fear that the attorney will use those facts to deprive you of coverage.

The most common conflict of interest situation between the insurer and insured is where the insurer agrees to defend a case subject to a "complete reservation of rights." This means that the insurer reserves the right to subsequently disclaim coverage or the obligation to pay an adverse judgment rendered against the insured.

For example, if a customer sues a pest control company alleging intentional, knowing, reckless or wanton misuse of a pesticide (not merely negligent misapplication), the insurer may provide a defense subject to a reservation of rights. The reservation of rights is issued because damages based on a finding of intentional misconduct may not be covered by the insurance policy.

Under such circumstances, because it would be in the insurer's financial interest for the pest control company to have committed intentional misconduct (thereby depriving the company of insurance coverage), a lawyer hired by the insurer may not be considered sufficiently independent, especially if he or his law firm routinely receives cases from the insurer in return for a "volume discount" on legal fees.

Where there is a conflict requiring the insurer to pay for independent counsel, the insured normally has the right to select the lawyer. In some cases, however, the insurer still may be able to choose the lawyer, as long as he or she is independent.

Q: What if the attorney we want specializes in pesticide cases and her fees are substantially higher than what our insurer usually pays lawyers in our town?
A: You have the right to be defended by counsel with the expertise, experience and skills necessary under the circumstances of the case, even if her fees are higher. If her fees are reasonable in light of her professional background and reputation, the insurer should pay her normal hourly rate. In some cases, the insured will agree to pay for part of the fees in order to be defended by the lawyer of his or her choice. Legal specialists, especially if they are from out of state, often will act as co-counsel with a local attorney, also paid for by the insurer.

Q: What should I do as a practical matter?
A: Notify your insurer promptly when a claim or suit is filed. If you have a preference for a particular lawyer, tell your insurer and explain why. Should your insurer choose a different lawyer, interview him or her, and if you are dissatisfied, let your insurer know. Stand up for your rights!

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A Critique of the Supreme Court Ruling

The Court gives short shrift to industry arguments as to why local pesticide regulations obstruct Congress' objectives.

by Lawrence S. Ebner

On June 21, the U.S. Supreme Court ruled 9 to 0 that the Federal Insecticide, Fungicide, and Rodenticide Act does not preempt local governments from regulating the use of pesticides (*Wisconsin Public Intervenor v. Mortier*, 59 LW 4755, US SupCt 89-1905, 6/21/91; 15 CRR 387).

The court's opinion, written by Justice Byron White, is legalistic and mechanical — what *The New York Times* described on June 22 as "a dry review of the text and history" of FIFRA.

Justice Antonin Scalia's separate concurring opinion is a little more spirited, and even accepts industry's view of FIFRA's legislative history, but will be of interest primarily to legal scholars who question the legitimacy of using congressional committee reports to interpret federal statutes.

Neither the court's opinion nor Scalia's concurrence squarely addresses the real issue concerning local regulation: whether allowing tens of thousands of municipal and county governments to ignore or second-guess the Environmental Protection Agency's and the states' scientific and regulatory determinations will undermine the well-coordinated system of professional federal/state pesticide regulation that has evolved under FIFRA during the past 20 years.

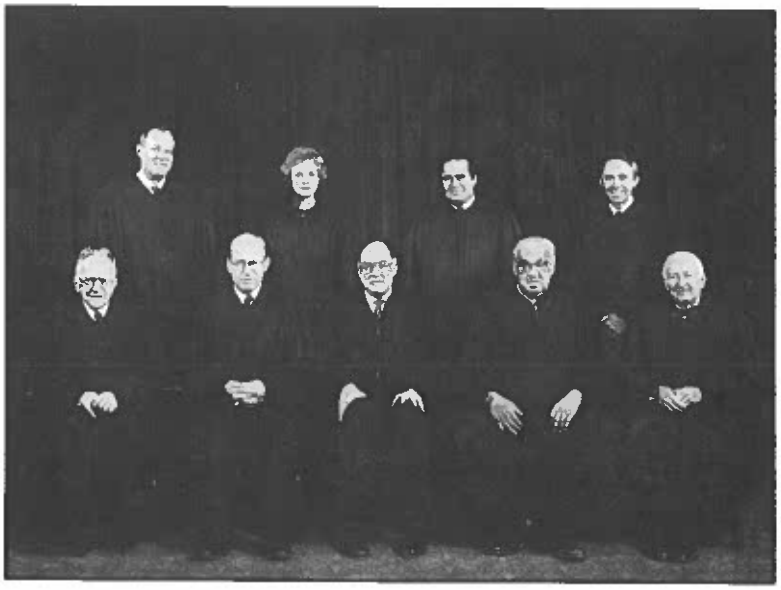
Town of Casey Ordinance

The Supreme Court made it clear at the outset of its opinion exactly where it was coming from on the issue of local regulation. The first footnote explains that the Town of Casey, Wis., which has a population of 400-500, is "large enough to enact the ordinance at issue" in the case.

The Casey ordinance requires a permit to be sought at least 60 days before applying pesticides aerially or to public-use lands. To obtain a permit the prospective pesticide applicator must submit to the Town Board extensive information, including a description of the pesticides and quantities to be used, their regulatory status and potential risks, available chemical and nonchemical alternatives, the environmental impact of the proposed pesticide application and any chemical alternatives, and the precautions that will be taken to protect the public.

The Town Board then can deny or grant the permit, or grant it with conditions. If a permit is granted, placards must be posted giving at least 24 hours' advance notice of the pesticide application.

It is impossible to read the elaborate text of the ordinance without concluding that the members of the Casey Town Board (1) have made it extremely difficult to obtain permission to use pesticides, and (2) have reserved for themselves apparently unfettered discretion to disallow or restrict the use of pesticides which both EPA and Wisconsin authorities have determined will not cause unreasonable adverse effects



NATIONAL GEOGRAPHIC SOCIETY

Justices of the Supreme Court

when applied in accordance with label precautions and directions.

The court held that "FIFRA does not preempt the town's ordinance either explicitly, implicitly, or by virtue of an actual conflict." This ruling reversed a decision of the Supreme Court of Wisconsin, and resolved the split of authority on FIFRA preemption of local regulation that had developed among several federal appellate courts and state supreme courts.

The Supreme Court case provoked numerous *amicus curiae* briefs, not only from pesticide industry associations, but also from the solicitor general, a number of states, public interest groups, and others.

The Court's Preemption Analysis

The court identified "textual inadequacies" in FIFRA, such as inconsistent usage of the term "state," and found that "the statutory language ... is wholly inadequate to convey an express preemptive intent on its own."

Based on FIFRA Section 24(a), which authorizes "states" to regulate pesticide "sale or use," the court found that "the statutory language tilts in favor of local regulation" because "political subdivisions are components of the very entity the statue empowers."

Along the same lines, the court pointed to FIFRA's statutory structure in finding that "whatever else FIFRA may supplant, it does not occupy the field of pesticide regulation in general or the area of local use permitting in particular."

The court's decision does make it clear the regulation of pesticide labeling "fall[s] within an area that FIFRA's 'program' preempts." Accordingly, even under *Wisconsin Public Intervenor*, local governments like the states are preempted from regulating pesticide labeling.

The court emphasized that "FIFRA's authorization to the states leaves the allocation of regulatory authority to the 'absolute discretion' of the states themselves, including the option of leaving local regulation of pesticides in the hands of local authorities."

Accordingly, the states remain free to enact legislation (as several have) to prohibit or otherwise restrict their political subdivisions from regulating pesticides.

Although the industry relied heavily on FIFRA's legislative history to establish congressional intent to preempt local regulation, the court found it "at best ambiguous." In this regard, the court adopted EPA's view (expressed in the solicitor general's brief) that the two key Senate committees (agriculture and commerce) with responsibility for rewriting FIFRA in 1972 "agreed to disagree" about local regulation.

Scalia pointedly took exception to the other justices' interpretation of the same legislative history. He quoted from the 1972 Senate Agriculture Committee report which explained that FIFRA Section 24 "should be understood as depriving ... political subdivisions of any and all jurisdiction and authority over pesticides."

Scalia found that "Clearer committee language 'directing' the courts how to interpret a statute of Congress could not be found, and if such a direction had any binding effect, the question of interpretation would be no question at all."

As to the supposed disagreement between the two Senate committees, Scalia cited a Commerce Committee report confirming that the Agriculture Committee report "states explicitly that local governments cannot regulate pesticides in any manner."

According to Scalia, "[t]his legislative history clearly demonstrates ... not (as the court would have it) that the two principal Senate Committees disagreed about whether [the 1972 FIFRA Amendments] preempted local regulation, but that they were in complete accord that it *did*, and in disagreement over whether it *ought* to" (emphasis in original).

Nevertheless, Scalia concurred in the court's holding because he believes that committee reports are unreliable indicators of congressional content.

Industry Arguments Given Short Shrift

Perhaps the most disappointing aspect of the court's opinion is the short shrift that it gives to industry's arguments as to why local regulation of pesticides would obstruct Congress' objectives, including protection of health and the environment. Even where there is no express preemption, federal law preempts a state or local law which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Although the court "discern[ed] no actual conflict ... between FIFRA and local regulation generally," it offered little explanation for this misperception.

Instead, the court dismissed industry's arguments as resting "on little more than snippets of legislative history and policy speculations."

The industry had argued that local governments lack the technical resources and expertise to regulate pesticides competently; that local regulation would render superfluous the comprehensive system of professional federal-state regulation established by FIFRA; and that multiple, overlapping, conflicting and onerous local ordinances would lead to regulatory chaos and prevent cost-effective pest control.

The court found that "Congress is free to find that local regulation does wreak such havoc and enact legislation with the purpose of preventing it ... [but] has not done so yet."

A New Challenge

Because the Supreme Court has ruled that FIFRA as currently written does not preempt local regulation, the focus will shift from the courts to the legislative arena, where the industry will seek amendments to FIFRA or state laws. As a practical matter, such amendments will not change the status quo, since it has been widely understood for 20 years that local governments do not have the authority independently to regulate pesticides.

The challenge is to prevent the *Wisconsin Public Intervenor* decision

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Critique of Ruling

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from turning pesticide regulation on its head. At a minimum, industry will urge local governments to exercise forbearance and give deference to EPA's and state agencies' scientific and regulatory determinations, while continuing to cooperate on pesticide enforcement.

Public interest groups inevitably — but erroneously — will contend that industry's efforts to meet the challenge of local regulation will place the public at risk by failing to take into account localized needs and conditions.

To the contrary, both EPA and state agencies have in the past — and can in the future — adopt localized restrictions on pesticide use where and when appropriate. Equally important, preempting local governments from regulating pesticides will help ensure that regulatory decisions are based on dispassionate scientific judgments, that they are well balanced and shielded from political pressures, and that cost-effective pest control will remain available for the benefit and protection of society.

Wisconsin Public Intervenor affords Congress and state legislatures a fresh opportunity to reaffirm those objectives.

Larry Ebner is a partner in the Washington, D.C., office of McKenna & Cuneo, where he specializes in pesticide legal matters. He submitted an amicus curiae *brief in* Wisconsin Public Intervenor *on behalf of the National Pest Control Association, National Agricultural Chemicals Association, Agricultural Commodity Coalition, Edison Electric Institute, and Chemical Manufacturers Association.*

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Contact Larry Ebner or BNA for references to the quotes and documents cited in the article

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ADVERTISERS' INDEX

Ask Your Lawyer

Larry Ebner
NPCA Legal Counsel
Answers Your Questions ...

Q: What was the Supreme Court's recent ruling on regulation of pesticides by local governments?

A: On June 21, 1991, the Supreme Court of the United States unanimously held in *Wisconsin Public Intervenor v. Mortier* that FIFRA, the federal pesticide law, does not "preempt" (i.e., preclude) local governments (e.g., towns, cities, counties) from regulating pesticide use within their geographic boundaries.

Q: What does the local ordinance in this case involve?

A: The ordinance, which was adopted by a rural town in Wisconsin, requires a permit for aerial application of pesticides, and for pesticide applications to public lands and private lands subject to public use. The permit application has to be submitted at least 60 days in advance and must describe the pesticides to be used, their risks, chemical and non-chemical alternatives, regulatory status, and environmental impact. If the Town Board grants a permit, placards must be posted giving at least 24 hours' advance notice of the application.

Q: What was the basis for the Court's ruling?

A: The Court found that nothing in the language of FIFRA preempts local regulation, and that congressional intent on this issue was ambiguous. In addition, the Court held that there is no conflict between local regulation and the purposes or administration of FIFRA.

Q: Does this mean that local governments can do whatever they want in the field of pesticide regulation?

A: Not exactly. The Court indicated that local governments (like states) cannot regulate pesticide labeling, since FIFRA expressly reserves that authority for EPA. Also, the Court explained that it is within the discretion of each state to determine how, if at all, to restrict its own political subdivisions from regulating pesticide use. In the absence of such state-imposed prohibitions or restrictions on local regulation, however, the Court held that local governments are free to regulate pesticides as they see fit.

Q: Does this include local requirements for pesticide storage?

A: Presumably yes, but the Court did not address that question specifically.

Q: Can FIFRA be changed?

A: Congress has the constitutional power to amend FIFRA in order to expressly preempt or otherwise restrict local pesticide regulation. Each state can take similar action, depending on its state constitution and other laws.

Q: Where does this leave local public notification requirements?

A: The local ordinance that the Supreme Court reviewed includes an advance posting requirement, yet the Court found no conflict with federal law. Also, on the basis of its decision in *Wisconsin Public Intervenor*, the Court summarily vacated and remanded a federal appellate case that had found that FIFRA preempted local lawn care posting requirements *(Village of Milford v. PLCAA)*. As a result of these rulings, it seems clear that the Supreme Court does not believe FIFRA preempts local notification regulations.

Q: What should the pest control industry do now?

A: The focus will shift from the courts to the legislative arena. NPCA and other pesticide industry associations are planning a coordinated strategy. On the local level, you should try to convince your municipal leaders that local regulation is unnecessary or that, at most, local ordinances should supplement, not supersede or contradict, federal and state regulations.

Send your questions about pest control law and regulation to NPCA Legal Counsel Larry Ebner c/o "Ask Your Lawyer," Pest Management, *8100 Oak St., Dunn Loring, Va. 22027 Fax: (703) 573-4116. Larry, a partner in the Washington, D.C., office of McKenna & Cuneo, is one of the nation's foremost authorities on pesticide legal matters.*

Ask Your Lawyer

Larry Ebner
NPCA Legal Counsel
Answers Your Questions ...

Q. What laws affect interview questions of prospective technicians?

A. There are many federal and state laws that regulate what you may ask prospective technicians. These laws include the following: Title VII of the Civil Rights Act of 1964 (prohibiting discrimination on the basis of race, color, religion, national origin, or sex); the Age Discrimination in Employment Act (prohibiting discrimination against applicants aged 40 and over); the Americans With Disabilities Act of 1990 (prohibiting discrimination on the basis of physical or mental handicap); the Immigration and Reform Control Act (prohibiting discrimination on the basis of citizenship); constitutional and common-law rights to privacy; the Employee Polygraph Protection Act; and state workers' compensation laws (prohibiting discrimination against individuals who have filed workers' compensation claims). Many states also have additional laws regulating pre-employment inquiries. Pest control operators need to become familiar with the employment laws of each state in which they operate.

Q. What is the bottom-line effect of all these laws?

A. While each of these laws covers specific issues, the bottom-line effect is that PCOs are permitted to ask technician applicants only job-related questions. Avoid questions that (1) identify a person as a member of a "protected class" covered by Equal Employment Opportunity laws; (2) result in a disproportionate screening out of members of a "protected class"; and (3) are not a valid predictor of successful job performance. For example, it would be impermissible to ask an applicant "What language do you speak in your home?" because that would tend to identify applicants whose national origin is not American.

Likewise, PCOs may not ask an applicant, "Have you ever been arrested?" because courts have found that a higher percentage of minorities are arrested than whites. So, if a PCO rejected all applicants who had ever been arrested, that would have a disproportionate impact on the employment of minorities.

In terms of predicting successful job performance, an example of an impermissible question would be "Have you ever had a drug problem?" Courts have held that an applicant's past drug problem is irrelevant to current job performance.

Q. What are some more examples of questions we shouldn't ask?

A. 1. How old are you and where were you born?
2. Have you ever filed a workers' compensation claim?
3. Have you ever had your wages garnished, or have you ever declared bankruptcy?
4. Do you have any physical or mental disabilities?
5. Have you ever filed a health and safety complaint?
6. Have you ever been a member of a union?

Q. What *can* we ask?

A. Examples of questions that courts have found to be job-related and that do not violate any law include the following:
1. Are you eighteen years old or over?
2. Are you a U.S. citizen and/or legally eligible to work in the United States?
3. Are you physically and mentally able to perform all parts of the technician position? If not, what reasonable accommodations could be made for you?
4. Have you ever been *convicted* (not arrested) of a felony? Have you ever, within the past two years, been convicted of a misdemeanor that resulted in imprisonment? (A conviction should not automatically disqualify an applicant.)
5. Has your driver's license ever been suspended or revoked?
6. Have you ever been involved in any pesticide regulatory enforcement action or any lawsuit involving pesticides?

Q. Does a PCO have liability for negligent hiring?

A. This is a bit of a "Catch-22." Even though there are many questions that may not lawfully be asked of applicants, courts sometimes hold employers liable for damages caused by an employee if the employee

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Ask Your Lawyer

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should not have been hired in the first place. In other words, if you could have determined by reasonable means (but didn't) that a technician applicant had previously been convicted of burglary, and you hire the person and he burglarizes one of your customers while on the job, the customer could sue you for the property loss. So, while you need to be aware of the laws regulating interview and employment application questions, do not let them stop you from doing a reasonable investigation into an applicant's qualifications.

Susan Grody Ruben, an attorney at McKenna & Cuneo, San Francisco, Calif., helped prepare this month's column. She works with the firm's Labor & Employment Law Department, which advises companies of all sizes on a wide range of personnel and employment issues. You can reach department staff through Larry Ebner, NPCA's Legal Counsel, who is a partner in the same firm, at (202) 789-7727.

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Ask Your Lawyer

Who Regulates Ultrasonic Devices?

Larry Ebner
NPCA Legal Counsel
Answers Your Questions ...

Q: Are electromagnetic or ultrasonic devices which claim to repel rodents or other pests subject to regulation under FIFRA?

A: Yes. FIFRA section 2(h) defines a "device" as any instrument or contrivance (other than a firearm) which is intended for trapping, destroying, repelling, or mitigating any pest or other form of plant or animal life." Unlike pesticides, devices do not have to be registered under FIFRA. (Note that some states do require registration of devices.) Devices, however, are subject to other provisions of FIFRA, especially the prohibitions against misbranding (section 2 (q)). Other FIFRA provisions applicable to devices include registration of establishments (section 7), record keeping (section 8), inspection of establishments (section 9), and imports and exports (section 17).

On November 19, 1976 EPA published in the *Federal Register* a "Consolidation and Clarification of Requirements" regarding devices (41 Fed. Reg. 51,065). EPA still considers this document to be its basic position on regulation of devices under FIFRA.

Q: What is the prohibition against misbranding?

A: FIFRA section 12(a)(1)(F) makes it unlawful for any person to distribute or sell any device which is "misbranded." FIFRA's definition of "misbranded" includes labeling which is "false or misleading" (Section (q)(1)(A)). "Labeling" is broadly defined in FIFRA section 2(p) to include "all labels and all other written, printed, or graphic matter ... accompanying the ... device at any time; or ... to which reference is made on the label or in literature accompanying the ... device."

As a result, it is a violation of FIFRA to market a device with false or misleading claims regarding its effectiveness in controlling rodents or other pests.

Q: How is this prohibition enforced?

A: FIFRA section 14(a) authorizes EPA to assess civil penalties for violations of the Act, including the misbranding provisions. This is accomplished through an administrative civil penalty proceeding initiated by one of EPA's regional offices or by EPA headquarters staff. In the case of serious "knowing" violations of the Act, criminal proceedings can be brought by the U.S. Department of Justice.

Q: What is the civil penalty for selling or distributing a device with false or misleading claims?

A: Under EPA's July 1990 FIFRA Enforcement Response Policy, the base penalty is $3,000 to $5,000 per violation, depending on the size of the business involved. The penalty is subject to upward or downward adjustments based on the gravity of the offense and certain other factors, but FIFRA limits the maximum penalty to $5,000 *per violation.*

Q: What do you mean "per violation"?

A: EPA considers each shipment of a misbranded product to be a separate violation of FIFRA. Also, a single shipment which includes different types of misbranded products would be considered multiple violations by EPA. Thus, the actual penalty which EPA seeks to assess for one or more shipments of misbranded devices can be many times $5,000.

Q: What else can EPA do regarding sale or distribution of a misbranded device?

A: EPA can issue a Stop Sale, Use or Removal Order ("SSURO") pursuant to FIFRA section 13 in order to prevent sale, distribution, and/or use of a misbranded device. Under EPA's FIFRA Enforcement Response Policy, issuance of a SSURO is mandatory if a device contains labeling that is materially misleading or fraudulent,

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Ask Your Lawyer

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and if the user follows the labeling device, is likely to cause a life-endangering health hazard. This includes labeling for devices that are ineffective for the purposes claimed. Under section 13, EPA can also file an action in federal court for seizure, condemnation and destruction of misbranded devices.

Q: What can I do, as a pest control operator, if I become aware of a "pest control" device that is being sold with false or misleading claims about its effectiveness?

A: You or your attorney can write or telephone the Office of Compliance Monitoring (202-382-3807), which is part of EPA's Office of Pesticides and Toxic Substances in Washington, D.C. Alternatively, you can contact the nearest EPA Regional Office. EPA is receptive to bona fide complaints about misbranded devices, even from pest control "competitors."

Q: What, if anything, will EPA do?

A: At a minimum, EPA should investigate your complaint. It then will be within EPA's discretion to initiate enforcement proceedings, including possibly a stop sale or use order, or seizure and condemnation. During the past 15 years, the EPA has brought and successfully prosecuted a number of administrative proceedings for sale or distribution of misbranded electromagnetic or ultrasonic pest control devices.

Send your questions about pest control law and regulation to NPCA Legal Counsel Larry Ebner c/o "Ask Your Lawyer," Pest Management, 8100 Oak St., Dunn Loring, Va. 22027. Larry, a partner in the Washington, D.C., office of McKenna & Cuneo, is one of the nation's foremost authorities on pesticide legal matters.

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ADVERTISER'S INDEX

Legal Brief

New EPA Policy On FIFRA Penalties

by Lawrence S. Ebner and Michael R. Neilson

EPA recently issued a new FIFRA Enforcement Response Policy to update its criteria for enforcement actions and to bring greater consistency to penalties for FIFRA violations. When faced with the prospect of an enforcement action brought by EPA, a PCO and his legal counsel can turn to the Enforcement Policy as a guide to how EPA personnel calculate civil penalties and what arguments can be made for penalty reductions. Although it is too early to say to what extent the Enforcement Policy will informally influence state-administered FIFRA enforcement programs, state enforcement officials are aware of the policy and may draw guidance from its principles.

The Enforcement Policy explains EPA's methods for calculating civil penalties, including penalties for use of a pesticide "in a manner inconsistent with its labeling." FIFRA penalties for pesticide misuse are substantial — as high as $5,000 *per use violation*. Although the policy considers the size of the business in determining the penalty, even small businesses may face an onerous penalty — $3,000 is the minimum for use violations. Furthermore, EPA usually treats each occasion of pesticide misuse as a separate violation.

In general, EPA's Office of Compliance Monitoring will hold you responsible for your employees' FIFRA violations. Because of substantial penalties and the need to protect against tort liability, an effective program to prevent employee misuse of pesticides has become a business necessity. A company which permits even modest misuse occurrences can face large penalties.

Under the new policy, EPA can adjust downward the base penalties assessed for a pesticide use violation. To negotiate adjustments, you should consult the Enforcement Policy and thoroughly present arguments for adjustments. To start, you should review EPA's calculation of the base penalty. If EPA has not taken into account the size of your business, you should present information to demonstrate that you qualify financially for a smaller base penalty.

In addition, the Agency will consider how the penalty will affect your ability to continue in business, and theoretically will not collect a penalty that exceeds that ability. To demonstrate inability to pay, your financial information should be carefully presented to EPA — the Agency will consider a detailed tax or financial accounting analysis, or apply a guideline of 4 percent of average gross annual income, or use an EPA-developed computer model.

Adopting the right negotiating style is important. EPA can view your "attitude" or "good faith" as downward adjustment factors in penalty negotiations.

Voluntarily disclosing FIFRA violations can result in as much as a 40 percent civil penalty reduction. To be considered voluntary, your disclosure must be made promptly (within 30 to 60 days) upon discovery of the violation, occur before the violation is discovered by EPA or state officials, and before an inspection is scheduled by EPA or the state. You must immediately take all steps to comply, including those requested by EPA to mitigate the violation.

The Enforcement Policy gives EPA the option to use a settlement with conditions (SWC) in which part of a civil penalty is devoted to a "specific environmentally beneficial activity," in addition to any environmental activities already required by law. An example of such an activity is cleaning up the area where the violation occurred. EPA seems open to creative suggestions if they provide real value to the environment. If handled with finesse, performing the SWC's requirements may effectively counteract damage to a PCO's public image.

EPA has available its own public relations response in an enforcement action. The Enforcement Policy leaves to the discretion of the EPA Regions whether to issue a press release or advisory to notify the public of a FIFRA violation. Under the policy, EPA may not use this authority as a negotiating tool in settlement discussions.

The Enforcement Policy also reemphasizes FIFRA's criminal provisions. Knowing violations of FIFRA may subject a PCO to a fine of up to $25,000, or imprisonment of up to one year, or both.

Larry Ebner is NPCA Legal Counsel and a partner in the Washington, D.C., office of McKenna & Cuneo. His associate, Michael Neilson, practices law in the area of chemical regulation.

Legal Brief

Local Regulation Controversy Heats Up

By
Lawrence S. Ebner
NPCA Legal Counsel

Recent judicial developments have raised the possibility that the United States Supreme Court will decide whether cities, towns or counties have the authority to regulate the application of pesticides within their boundaries. Under the leadership of the National Pest Control Association, the structural pest control industry has long taken the position that the Federal Insecticide Fungicide and Rodenticide Act (FIFRA) preempts any form of pesticide regulation below the state level.

The issue seemed settled in 1986 when the U.S. Supreme Court of Appeals for the Fourth Circuit affirmed in *Maryland Pest Control Association v. Montgomery County* that Congress intended to preclude all local regulation. But recently, petitions in two cases have been filed requesting the Supreme Court to consider the FIFRA preemption issue.

In the first case, *Mortier v. Town of Casey, Wisconsin* (decided March 1990), the Wisconsin Supreme Court affirmed FIFRA preemption. The petition for review, however, points to the decision earlier the same month by the Maine Supreme Judicial Court in *Central Maine Power Co. v. Town of Lebanon*, which reached the opposite conclusion.

The petition also cites the 1984 adverse ruling of the California Supreme Court in *Deukmejian v. County of Mendocino* and the October 1989 decision in *COPARR, Ltd. v. City of Boulder*, in which a Colorado federal district court held that certain pesticide ordinances were not preempted by FIFRA. The *COPARR* ruling is now being reviewed by the U.S. Court of Appeals for the Tenth Circuit, and a decision is expected at any time.

The second petition for Supreme Court review challenges the August 1990 decision of the U.S. Court of Appeals for the Sixth Circuit affirming preemption in *Professional Lawn Care Association v. Village of Milford (Michigan)*. The court of appeals reviewed FIFRA's legislative history and concluded that "when Congress rewrote the [FIFRA] statute [in 1972], it impliedly preempted the local regulation of pesticides." *Id.* at 9. "Nearly every congressional committee . . . deleted [proposed local regulation] provisions in the belief that the state and the federal governments could regulate pesticides adequately without subjecting the pesticide industry to thousands of regulatory jurisdictions." *Id.* at 5.

It should be noted that the Village of Milford tried to circumvent preemption by claiming that its requirements for posting and notification (including a chemical sensitivity registry) and for applicator regulation did not regulate pesticide "use." The court of appeals disagreed, however, because "the unambiguous language of the ordinance imposes requirements that pesticide users must fulfill, and practices they must follow, before and after applying pesticides." *Id.* at 7.

On behalf of the Village of Milford, the Public Citizen Litigation Group, a Ralph Nader-affiliated organization, filed the petition for Supreme Court review of the Sixth Circuit opinion. The petition argues that even if Congress intended FIFRA to preempt *some* local authority, it did not intend FIFRA to preempt *all* local authority over pesticides, e.g., notification requirements, which according to the petition, are outside the scope of FIFRA and at most have an "incidental effect" on federal pesticide regulation.

Other examples of local regulation which the petition argues are not preempted by FIFRA include ordinances that bar application of pesticides in schools and child care facilities when children are present; ordinances that require landlords to notify tenants before public areas are sprayed; ordinances that bar trucks from carrying open containers of pesticides on residential streets; and ordinances requiring closing of food establishments "that serve food contaminated by rat poisoning." Milford Petition at 17-18. This gives you an idea of the types of inflammatory arguments to which the pest control industry will have to respond should the Supreme Court accept review of the local regulation issue.

The National Pest Control Association opposes Supreme Court review because the congressional intent against local regulation is clear, there is no split among the federal courts of appeals on the issue, and the overall weight of judicial authority supports preemption. If the Supreme Court does

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31 to February 2. Pacific Northwest Management Conference, Executive Inn, Fife, Washington. *Contact: Jeff Weier, W.B. Sprague & Co., P.O. Box 2222, Tacoma, Wash. 98401, (206) 572-6500, or Jane Treleven, PNMC Executive Secretary, 11222 70th Ave. N.W., Gig Harbor, Wash. 98335, (206) 857-5547.*

FEBRUARY

5 to 6. University of Maryland, 12th Annual Interstate Pest Control Conference, on campus, College Park. *Contact: Nancy Breisch, Center for Adult Education, Univ. of Md., College Park, Md. 20742, (301) 405-3921.*

5 to 7. South Carolina Pest Control Assn., PCO School, Sheraton Hotel and Convention Center, Columbia. *Contact: Jack Lewis, SCPCA Secretary-Treasurer, P.O. Box 27, Rock Hill, S.C. 29731, (803) 328-6815.*

11 to 12. West Tennessee Pest Control Assn., Eighth Annual Tennessee PCO Conference, Holiday Inn Crowne Plaza Hotel, Memphis. *Contact: Bob Taylor, WTPCA c/o Taylor Termite & PC, 5813 Leisure Ln., Bartlett, Tenn. 38134, (901) 386-6980.*

MARCH

3 to 5. Ontario Ministry of the Environment and the Ontario Pest Control Assn., 12th Annual Structural Pest Control Conference, Sheraton Toronto East Hotel, Canada. *Contact: Sharon Ayer, PCO Services, Inc., 170 Robert Speck Pkwy., Mississauga, Ontario L4Z 3G1, (416) 949-8778.*

11 to 12. National Pest Control Assn., Legislative Day, Holiday Inn Capitol Hill, Washington, D.C. *Contact: Government Affairs Dept., NPCA, 8100 Oak St., Dunn Loring, Va. 22027, (800) 678-NPCA.*

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review the issue, NPCA anticipates filing an *amicus curiae* ("friend of the court") brief as it did in the Fourth, Sixth, and Tenth Circuit cases discussed above. NPCA's brief would explain the reasons for preemption, including the substantial and unwarranted burdens that local regulation would impose upon structural pest control operations, and the resulting detriment to pest control customers and the public.

Larry Ebner is a partner in the Washington, D.C., office of McKenna & Cuneo. As NPCA's legal counsel, he authored the Association's amicus curiae *briefs opposing local regulation of pesticides. He will update the information in this article at the NPCA Convention in Miami Beach during the "Legal Issues Affecting PCOs" session scheduled for 8:00 to 10:00 a.m. on Thursday, November 1, 1990.*

Advertiser's Index

Legal Brief

How To Avoid Getting Sued

By
Lawrence S. Ebner,
NPCA Legal Counsel

Litigation has become as American as apple pie. Pest control companies are especially vulnerable to this lawsuit mania because the public is more nervous than ever about pesticides. Furthermore, structural pest control is a highly regulated business. There are many federal, state and local environmental regulations which carry with them stringent administrative and judicial enforcement and penalty provisions. If your customers do not sue you, the government may.

How can pest control operators protect themselves? Is there any way to insulate your company from getting sued?

The short answer is probably no! However, there are many steps that a pest control company can take to lessen the risk of litigation. Here are a few:

• **Resolve customer complaints before they wind up in court.** This is more realistic for property damage and contract claims, but also possible for personal injury or health complaints, which usually are difficult and expensive to resolve.

Reaching a cash settlement with a customer *even when you are not at fault* can be much cheaper than having to pay a lawyer to defend your company in court. Aside from legal fees, the real costs of litigation are often hidden: lost revenues resulting from tying up your time and employees' time for court appearances, and possible adverse publicity in the local press.

In almost every case, you should try to reach a prompt settlement with your customer before a suit is filed, even if it is just a small claim (small claims frequently become large claims in court). If you do reach a settlement, be certain to obtain a written release from all claims and an agreement to keep the settlement confidential. An attorney can provide you with an appropriate form of release to use in such cases.

• **Consider alternative dispute resolution methods.** If you cannot negotiate a settlement, there are less expensive ways to resolve a dispute than going to court. For example, you and your customer could consider professional mediation or arbitration. The latter is more informal and much less time-consuming than a lawsuit. Arbitration normally involves a hearing lasting one day or less and results in a decision by a neutral arbitrator. The American Arbitration Association, which has offices in most major cities, will provide an arbitrator for a small administrative fee (arbitrators, who are often lawyers or businessmen, normally do not charge a fee for resolving a small dispute). The arbitrator's decision is usually binding, meaning that it can be enforced, but not challenged, in court.

There is one major catch: Both sides must agree to arbitrate and agree in advance to adhere to the arbitrator's decision. You should consider placing an arbitration clause in your service contracts to require binding arbitration of property damage claims up to a certain amount.

• **Hire a lawyer *before* you are sued.** Most small or medium-size businesses will not engage the services of an attorney until they find themselves in court or about to be sued. In my opinion, no pest control company can afford to be without a lawyer who can provide advice as needed on strategies for minimizing the risk of getting sued. At a minimum, an attorney should review your service contracts, including warranties and disclaimers, to determine if they adequately protect your company (if you do not use written service agreements, you probably should). Also, a legal audit of your record-keeping systems and your compliance with environmental and other government regulations can be extremely helpful and well worth the cost in the long run. When you hire an attorney, you should have a clear understanding with him or her about the scope of the services to be rendered and the legal fees to be charged (see "How to Hire and Work With a Lawyer," *Pest Management*, March 1989). An ongoing relationship with an attorney who understands the pest control business and the complex regulations which govern it may be your way of staying out of court.

Lawrence S. Ebner is a partner in the Washington D.C. office of McKenna, Conner & Cuneo, a national law firm specializing in pesticide matters. If you have any questions or comments, he can be reached at (202) 789-7727.

Legal Brief

Court Defers to EPA on Pesticide Injury Suit

By
Lawrence S. Ebner,
NPCA Legal Counsel

A federal court's recent dismissal of a personal injury suit against a lawn care company is good news for pest control operators. The case, *Ryan v. ChemLawn Services Corporation*, was decided by Judge Suzanne B. Conlon on the U.S. District Court for the Northern District of Illinois.

The plaintiff alleged that ChemLawn was liable for personal injuries suffered by her and her son as a result of their use of ChemLawn's pesticide products. According to her complaint, the active ingredients in those EPA-registered products are unsafe and have been inadequately tested by the Environmental Protection Agency. The complaint raised issues regarding whether the active and inert ingredients in the products are carcinogenic, teratogenic or fetotoxic. The plaintiff sought monetary damages as well as an injunction barring continued use of the pesticides.

In granting ChemLawn's motion to dismiss the complaint, Judge Conlon found that "[the] complaint essentially asks this court to substitute its judgment for that of the EPA and to decide whether the active and inert ingredients in [the defendant's] products are safe for commercial use." The court refused to second-guess EPA because the issues raised by the plaintiff fall within the primary jurisdiction of EPA, not the courts. The court order dismissing the suit stated as follows:

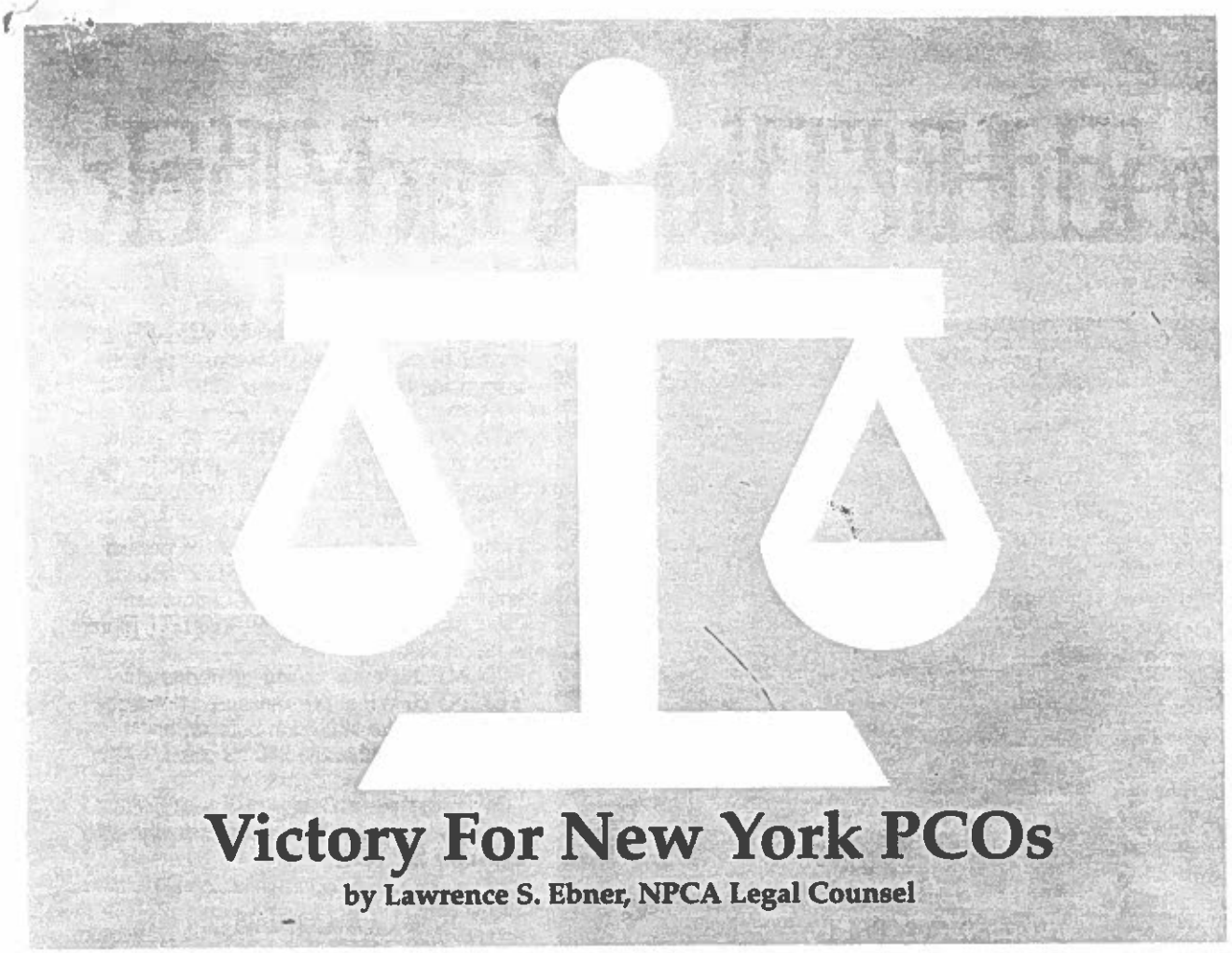
> Resolution of these issues involves a command of arcane technical data, uniquely within the EPA competence. Therefore, [plaintiff's] claims fall squarely within the EPA's primary jurisdiction.
>
> EPA regulations provide for expedited review proceedings where evidence suggests that EPA-regulated chemicals may be unsafe. [The plaintiff] cannot claim that EPA proceedings provide inadequate relief.

More specifically, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizes EPA not only to register pesticides, but also to review previously registered pesticides to determine whether they cause "unreasonable adverse effects." Amendments to FIFRA enacted by Congress in October 1988 require EPA to reassess by 1997 most of the 1,300 currently registered pesticide-active ingredients.

The U.S. Supreme Court has indicated that, under the legal doctrine of primary jurisdiction, judicial process must be suspended if a claim requires resolution of issues which, under a regulatory scheme, are within the special competence of an administrative agency. As a result, the *Ryan* case, which is currently on appeal, was dismissed without prejudice. This means that it may be possible to file a suit again *after* all FIFRA administrative reviews (and presumably, judicial review of EPA determinations) are exhausted. Similar arguments have been raised by ChemLawn in a suit pending in the federal district court in Maryland.

Recent unfounded criticisms by so-called public interest groups have greatly heightened public anxiety about pesticides and created a boon for plaintiffs' attorneys. Many PCOs already have been confronted with toxic tort suits. Virtually every PCO faces this threat. The Ryan decision is an important precedent by a federal court for judicial restraint where the safety of EPA-registered pesticides is challenged by someone who claims to be a pesticide "victim."

Lawrence S. Ebner is a partner in the Washington, D.C., office of McKenna, Conner & Cuneo, a national law firm specializing in pesticide regulation and litigation. He may be contacted at (202) 789-7727.



Victory For New York PCOs

by Lawrence S. Ebner, NPCA Legal Counsel

Court declares PCO public posting and notification regulations null and void.

The New York State Pest Control Association (NYSPCA) has won a major legal victory for pest control operators everywhere. On May 11, 1989, Justice Paul E. Cheeseman of the Supreme Court of the State of New York (county of Albany) rendered a favorable decision in a suit brought by NYSPCA challenging the broadscale pesticide public posting and notification regulations which had been adopted by the New York Department of Environmental Conservation (DEC). The court declared the regulations null and void on the ground that DEC had exceeded its authority under the New York Environmental Conservation Law by "engaging in legislation rather than regulation." (The court subsequently indicated that the ruling does not extend to lawn care notification requirements which have already been authorized by statute.) The structural pest control industry's victory was marred only by a decision one day earlier of the U.S. Court of Appeals for the Second Circuit, which rejected a different challenge to the regulations. That federal court proceeding was brought by the New York State Pesticide Coalition, a group consisting of agricultural, horticultural and other applicator associations. NPCA participated in both suits.

The State Court Proceedings

Five separate suits by various groups (including NYSPCA and the Professional Applicators of Long Island) were filed in the Supreme Court, which is the lower court in New York, challenging the DEC regulations. Although the court consolidated the suits into a single case, NYSPCA took the lead in the litigation.

The court rejected a procedural challenge to the timeliness of the regulations, but agreed with NYSPCA that the posting and notification regulations went far beyond DEC's authority under the state Environmental Conservation Law. In 1983, the New York legislature had enacted a limited notification provision as part of the Environmental Conservation Law (posting was not required). The statute was amended in 1987 to require visual posting in connection with lawn care applications only. The DEC regulations, which were scheduled to become effective January 1, 1989, would have required public posting for nearly all commercial applications.

The court found it significant

that the legislature could have required posting for all commercial applications, but chose to limit posting to lawn care. In holding that DEC had exceeded its authority under the Environmental Conservation Law, the court explained that posting is a policy which should "be set by the legislature and not by an administrative agency." The court ruled that DEC had usurped that legislative function, especially since numerous attempts to amend the Environmental Conservation Law to require broader posting had failed:

> Since the Senate and Assembly have not seen fit to amend the Environmental Conservation Law to provide for this notification and visual posting in all commercial applications, but only for commercial lawn applications, it would appear that the *Commissioner of the Department of Environmental Conservation has under color of regulatory authority, actually rewritten and extended the law.*
>
> (Emphasis added.)

In addition, the court agreed with NYSPCA (and NPCA) that the notification requirements would do nothing to enhance safe usage of pesticides:

> We are in agreement with the statutory purpose of the 1983 legislation relating to pesticides and their application which is to insure safe, reasonable pesticide usage. We find however that *the notification provisions* newly created some five years after the creation of the statute *do not, in any way provide for safe, reasonable pesticide usage.*
>
> (Emphasis added.)

The DEC is appealing Judge Cheeseman's decision to the state appellate court. NYSPCA expects implementation of the structural pest control regulations to continue to be enjoined pending the outcome of DEC's appeal.

The Federal Court Litigation

The Pesticide Coalition had filed a challenge to the DEC regulations (and to portions of the Environmental Conservation Law) in federal district court. The theory of the suit was that the posting and notification requirements are a form of pesticide labeling, which only the U.S. Environmental Protection Agency (EPA) has authority to impose under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the federal pesticide law. Because of the diverse membership of the Coalition, it had to argue that everything from written lawn care contracts to PCO placards are labeling preempted by FIFRA.

The suit was dismissed on January 19, 1989 by Neal P. McCurn, Chief Judge of the U.S. District Court for the Northern District of New York. He found that "Congress intended states to have a strong role in the regulation of pesticides." The court went on to state as follows:

> State notification requirements concerning the commercial application of pesticides which *serve merely to amplify the informational content of the FIFRA label while not diluting, distorting, or contradicting the labeling language,* are within a state's regulatory capacity. If anything, *notification requirements of this sort are a complementary adjunct to the whole purpose of FIFRA's labeling requirement.* That purpose being to prevent unreasonable injury to man and the environment.
>
> (Emphasis added.)

Following the court's ruling, the Coalition filed an expedited appeal to the U.S. Court of Appeals for the Second Circuit. On May 10, 1989—the day before Judge Cheeseman's state court ruling overturning the regulations—Judge Irving R. Kaufman of the Second Circuit issued a stinging opinion affirming the district court's dismissal of the FIFRA preemption challenge. The Court of Appeals found that the New York notification requirements are "designed to assure public awareness that poisonous chemicals are being utilized." According to the court, "the target audience of the New York notification program is those innocent members of the general public who may unwillingly happen upon an area where strong poisons are present as well as those who contract to have pesticides applied." The court indicated that FIFRA labeling is "intended to moderate the behavior of people who sell and apply pesticides," whereas the New York requirements "are designed to warn the public at large." Given sentiments like these, it is not surprising that the Court of Appeals rejected the FIFRA preemption argument. EPA's opinion that FIFRA does not preempt state posting and notification requirements bolstered the Court of Appeals decision.

Taking an accelerated appeal to such a prestigious federal court was a risk, especially in light of the then pending state court proceedings. If the state court had ruled first (which it would have, had the federal appeal not been accelerated), the federal appeal may have been mooted and Judge Kaufman's unfortunate ruling avoided.

Impact of Litigation

The state court ruling makes it clear that state *agencies* do not have the authority to encroach upon legislative prerogatives, such as setting policy on whether, where, when, or what types of pesticide posting and notification should be required. On the other hand, the state court's decision seems to clear the way for a state *legislature* (at least in New York) to enact pesticide posting and notification laws. The federal district court and appellate court rulings clearly hold that FIFRA is not a bar to such state statutory requirements. Whether other federal courts will view the preemptive effect of FIFRA differently remains to be seen.

Copies of the court decisions discussed in this article are available from Mr. Ebner, who is a partner in the Washington, D.C. office of McKenna, Conner & Cuneo, (202) 789-7727.

Legal Brief

How to Hire and Work With a Lawyer

By
Lawrence S. Ebner

You need a lawyer who is competent to handle your case or problem. The local lawyer you have used to write wills or contracts may not know much about trial work or how to handle a pesticide toxic tort suit.

Ethical rules prohibit a lawyer from accepting a case he is not competent to handle. But because most lawyers are not licensed in legal specialties, they can judge their own qualifications to handle a case. An inexperienced lawyer is allowed to learn about an area of law *after* he accepts a case, as long as that does not cause undue delay or expense to his client.

What if your insurance company hires a lawyer for you? Do not assume that he is the best qualified attorney to handle your case. A lawyer who has spent twenty years settling automobile cases probably does not know much about pest control or defending a toxic tort suit.

Even if your insurance company hires the lawyer, you are still the client and your company's reputation is at stake. Most insurance companies will let you have some say in who your lawyer should be. In many states, you have the *right* to tell your insurance company which lawyer to hire if the insurance company has agreed to pay defense costs, but has reserved the right to disclaim liability.

Ask Tough Questions. Always interview a lawyer in person before you hire him, or before your insurance company hires one on your behalf. Conduct the interview at the lawyer's office, not at your office or the insurance company. This will enable you to see firsthand what type of operation the lawyer runs.

Ask questions like these: How many lawyers are in your firm? Will you personally be handling my case from start to finish? If not, who will? May I meet the lawyer now? How long have you been practicing law? What law school did you graduate from? What types of law do you practice? How long have you been handling cases like mine? How many other cases like mine have you handled? Which companies did you represent in those cases? What was the outcome of those cases? How do you plan to defend my case? Are you available to handle my case promptly? What role do you see for me in the case? What are the chances for success in my case?

If the lawyer is unwilling to answer questions like these, be suspicious, or walk out.

Discuss Fees. Remember that lawyers are in business and that they charge for their services.

Most lawyers charge by the hour for defense work or legal advice. (Contingency fees are normally just for plaintiffs' lawyers.) Typical fees range from $75 an hour for inexperienced lawyers or some solo practitioners in small towns, to $250 an hour or more for highly experienced lawyers in major firms. In terms of expertise and experience, you generally get what you pay for. Bargaining about fees may be difficult, but it is not impossible.

Ask about billing practices. Insist on a monthly statement which describes day-by-day the services performed, the attorneys involved, and the number of hours spent. Ask about charges for photocopying, messenger services, travel expenses, word processing and paralegal time.

Ask for an estimate of the total fees for the case or matter. Remember to recognize that this is usually very difficult to predict, especially if litigation is involved.

Speak to Other Clients. You do not have to decide on the spot whether to hire the lawyer you are interviewing. Even if you do not want to shop around for legal services, you can ask the lawyer for references. Obviously, you want to know whether other clients were satisfied with the lawyer's performance. Ask about any particular problems they might have had.

Get it In Writing. Once you decide on a lawyer, ask for a written letter of engagement. The letter should describe the nature of services to be rendered, staffing of your case, hourly fees and billing practices, how the lawyer will communicate with you, and any potential conflicts of interest or limitations on the lawyer's ability to represent you.

In working with a lawyer, every case is different, but here are three basic suggestions.

Get Involved. Whether it is a lawsuit, a contract, a real estate transaction, or a will, you should know what your lawyer is doing and why. Even if you are covered by insurance, there is too much at stake for

you to remain in blissful ignorance. You need to communicate with your lawyer and stay informed. Unfortunately, client communication is alien to some lawyers, especially lawyers with large caseloads who are hired by insurance companies. They may keep in touch with the insurance company, but forget that *you* are their client.

Insist that your lawyer keep you informed. This should include periodic telephone briefings or meetings on case status and plans, receiving copies of all court papers and correspondence, and being told promptly of any settlement offers. If you have any suggestions or comments on how to handle your case, do not hesitate to give them to your lawyer.

Educate your lawyer. This is the most important thing you can do, no matter how experienced your lawyer is. There is no substitute for intimate familiarity with the facts of your case. You can increase your chances for success by making sure your lawyer knows all the facts. Your lawyer may want to visit your company and interview your technicians. Give him open access to your files and your staff.

Do not be afraid to tell secrets. You can trust your lawyer. He is ethically bound to keep your confidences and secrets. Courts recognize the attorney-client privilege. When you give information to your lawyer that you consider to be confidential, be sure to tell him so that he can protect it to the extent allowed by law. The vast majority of lawyers are ethical and highly talented. They want to help you and will, if you let them.

Larry Ebner is a partner of McKenna, Conner & Cuneo in Washington, D.C. He represents pesticide users and producers in litigation and regulatory manners. This article is based on a talk he gave at the NPCA Eastern Conference in January 1989. You can reach him at (202) 789-7727.

Legal Brief

Court Affirms FTC Action Against Pest Control Company

By
Lawrence S. Ebner
NPCA Legal Counsel

A U.S. court of appeals has ruled that a major pest control firm engaged in an unfair practice by raising the annual renewal fee for "lifetime guarantee" termite service contracts which specified what the annual renewal fee would be. The court upheld an order of the Federal Trade Commission (FTC) requiring the company to roll back all fees to the levels specified in the service contracts involved.

The contracts were written between 1966 and early 1975. They contained a one-year guarantee covering reinspection and retreatment. At the customer's option, the guarantee could be renewed "for life" by payment of the annual renewal fee specified in the contract. The contract stated that this "lifetime guarantee" would terminate, however, if the premises were structurally modified at any time after initial treatment, unless the company and the owner had entered into a prior agreement to reinspect, provide additional treatment and/or adjust the annual renewal fee. At one point in 1968, some of the company's sales materials stated that the yearly payment for continued protection "never increases."

In 1980, the company began notifying pre-1975 customers that annual renewal fees would be increased due to inflation. According to the court, many customers and state government officials complained. The company thereupon adopted an "accommodation program," by which the renewal fees for about 10% of the affected customers were rolled back. These were primarily customers who had entered service contracts in 1968, but also included disgruntled customers from other years.

Despite the accommodation program, the FTC issued an administrative complaint alleging that the increase in renewal fees was an "unfair act or practice" in violation of section 5 of the Federal Trade Commission Act. Following a summary decision by an FTC administrative law judge and affirmation by the Commission itself, the company appealed to the U.S. Court of Appeals for the Eleventh Circuit.

The company argued that the contracts were ambiguous because they did not explicitly state that the annual renewal fee could not be increased. But the court rejected this argument, noting that the lifetime renewal feature and the annual fee requirement were inextricably linked and coextensive as to their lifetime duration. In addition, the court found that the contracts contained language indicating that renewal of the guarantee (by payment of the stated fee) is to continue, so long as the covered premises are not modified. Because the contracts were terminated upon modification of the treated structure, the contract was not of "indefinite" duration, and thus, was legally enforceable by the customer.

The company also argued that a breach of a service contract is not an "unfair" practice within the meaning of the FTC Act. The court rejected this argument, agreeing with the FTC that even if the actual economic injury to individual customers is small on an annual basis, this does not mean that the harm is insubstantial. The FTC had found that the company's increases in renewal fees generated millions of dollars in additional revenues. Further, the FTC found that the increase in fees did not result in an increase in services or benefits to be provided under the contracts. Thus, the court held that the company's failure to live up to the terms of the contracts was an unfair trade practice in violation of federal law, especially since the breach of contracts was "widespread" (the FTC found that more than 200,000 contracts were involved).

Finally, the company argued that because it had relied in good faith upon advice of legal counsel when it decided to increase annual fenewal fees, there was no knowing or willful breach of the contracts. The court, however, dismissed as irrelevant the fact that the company relied on the advice of counsel. According to the court, the unfairness standard of the FTC Act focuses upon consumer injury and does not take into account the mental state of the accused company. Thus, a practice may be unfair without a showing that the offending company intended to cause consumer injury.

The message to pest control companies from this case seems clear: do not specify an annual renewal fee in your service contracts without expressly reserving the right to increase it. Also, breach of service contracts, especially if widespread, may constitute an unfair trade practice in violation of federal law. Relying on advice of legal counsel apparently is no defense.

Larry Ebner is a partner at McKenna, Conner & Cuneo in Washington, D.C. For more information, contact him at 202-789-7727.

The Role of Pesticide Enforcement in Toxic Tort Litigation

By
Lawrence S. Ebner

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Pesticide enforcement activities can have important consequences for private litigants in toxic tort suits. This is particularly true in situations involving structural pest control (e.g., control of pests such as termites, rodents and roaches) where homeowners or other members of the public may claim that they have been exposed to hazardous chemicals. An increase in government regulatory activities involving pesticides and the attendant press coverage have helped to trigger an explosion of toxic tort litigation. The plaintiffs' bar has been only too happy to accommodate heightened public anxiety.

Most toxic tort complaints employ the "kitchen sink" method of pleading. A typical pesticide misapplication case may include counts for continuing chemical trespass, infliction of emotional distress, and cancerphobia as well for more traditional causes of action such as negligence and breach of warranty. Despite the proliferation of toxic tort theories, the key issue confronting judges and juries in these cases remains the same: *Was the pesticide applied properly?* Environmental enforcement officials often play a critical role in answering this mixed question of law and fact. This article examines a few of the principles and cases that establish a correlation between pesticide enforcement or regulatory activity and potential toxic tort liability.

"The Label Is the Law"

When it comes to pesticide enforcement, the maxim is "the label is the law." A pesticide's labeling is the standard by which enforcement officials determine whether or not the pesticide has been misused or misapplied. Proof of compliance with the label is a pest control operator's best defense in an enforcement proceeding or in a toxic tort suit.

The contents of the label are prescribed by the U.S. Environmental Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)[1]. FIFRA was enacted more than forty years ago as a misbranding statute. It was comprehensively revamped in 1972 to address growing environmental and safety concerns about the widespread use of pesticides.

Under section 3(a) of FIFRA, no person in any state may sell, distribute, or receive a pesticide that is not registered with EPA[2]. A pesticide will be registered only if "it will perform its intended function without unreasonable adverse effects on the environment." FIFRA section 3(c)(5)(C). "Unreasonable adverse effects" means

"any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." FIFRA section 2(bb).

To register a pesticide, the manufacturer must submit to EPA not only extensive safety data but also a copy of the proposed labeling[3]. The labeling must comply with the requirements of the Act. FIFRA section 3(c)(5)(B). Thus, the labeling must contain application directions and procedures, safety precautions and warning statements that will ensure that the pesticide, when used in accordance with the labeling, will not cause "unreasonable adverse effects on the environment."

The heart of the pesticide enforcement program is section 12(a)(2)(G) of FIFRA, which makes it unlawful to use a pesticide "in a manner inconsistent with its labeling." *See also* FIFRA section 2 (ee)[4]. A proposed EPA regulation makes it clear that a violation of section 12(a)(2)(G) of FIFRA represents misuse of the pesticide[5].

Pursuant to section 26 of FIFRA, virtually every state exercises primary responsibility for enforcing pesticide use violations (i.e., use of a pesticide in a manner inconsistent with its labeling)[6]. Under section 27 of FIFRA, EPA retains enforcement oversight authority. Section 14 of FIFRA authorizes civil and criminal penalties for violations of the Act. States, under their primary enforcement authority, or EPA (normally through its regional offices), may initiate civil enforcement proceedings for pesticide misuse. Alternatively, a warning may be issued if the violation occurred "despite the exercise of due care or did not cause significant harm to health or the environment." FIFRA section 14(a)(4). It is well established that no private right of action exists for violations of FIFRA[7].

Every state also operates its own pesticide regulatory program, including some type of pesticide registration scheme as an adjunct to FIFRA registration. See FIFRA section 24(a)[8]. No state, however, may "impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]." FIFRA section 24(b). Thus, *only EPA* may establish requirements for the contents of a pesticide's label or labeling[9].

Misuse Determinations

The central role that the EPA-approved label plays in pesticide enforcement suggests its significance in toxic tort suits. Consider the example of a homeowner who, suspecting a termite problem, hires a licensed pest control operator to perform a termiticide treatment. The following day, the homeowner happens to read a newspaper article about the potential risks of the termiticide that was applied. Suddenly, he notices that there is still a slight chemical odor in his basement. He arranges for a state inspector to visit. The enforcement official conducts a site inspection and also reviews the detailed record of the application made by the PCO. The inspector finds no evidence that the termiticide was applied in a manner inconsistent with its labeling, *i.e.*, misused.

Should the homeowner subsequently sue the pest control operator for alleged misapplication of the termiticide, the findings of the state enforcement official may constitute crucial evidence. In all probability, the defendant would call the inspector as a witness to present his findings as set forth in his written inspection report. In addition, the records kept by the PCO will provide important evidence of the specific application made and its consistency with label requirements.

The importance of the state inspector's findings was recently underscored in a termiticide suit in South Carolina. The court ruled that a state official's testimony regarding the applicator's compliance with label procedures was sufficient for the jury to conclude that the pest control operator was not negligent. *Rabb v. Orkin Exterminating Co.*[10] The official's testimony was bolstered by the pest control operator's own testimony about his adherence to label procedures.

Negligence Per Se

Some plaintiffs' attorneys blithely assume that evidence of misuse of a pesticide is negligence *per se*. In a recent termiticide misapplication suit, however, a federal district court held that alleged flaws in an EPA-approved termiticide label (*i.e.*, alleged inadequate label warnings and directions) would not constitute negligence *per se* on the part of the manufacturer. *Dine v. Western Exterminating Co.*[11]

The *Dine* court held that the principle of negligence *per se* would apply only if FIFRA (or its District of Columbia counterpart) was intended specifically to protect homeowners or to prevent infiltration of houses by pesticides. But the court found that FIFRA and the regulations promulgated thereunder "have a far broader scope."[12] The court explained that the legislative goal of FIFRA "was to establish a broad scheme for regulating the manufacture and use of pesticides."[13] "No provision of FIFRA suggests that the class of persons to be protected is any less broad than the entire population of the United States."[14]

As a result, the court held that the plaintiffs could not invoke the principle of negligence *per se* to avoid the burden of demonstrating that a duty owed to them by the defendants had been breached. The court's rationale should apply with equal force to allegations of pesticide misuse.

Duty to Warn

A continuing controversy exists as to whether professional applicators have a duty to provide

pre-treatment warnings to homeowners or building occupants.[15] While there is no such requirement imposed by FIFRA, the law is still unsettled on whether an applicator can be held liable under state tort law for failing to provide warning statements.[16] Pesticide enforcement officials should be aware that any determinations they make regarding warnings which may or may not have been given by a PCO could have ramifications in toxic tort suits.

The cases discussing whether PCOs have a duty to warn customers, and if so, what constitutes an adequate warning, do not establish a clear or consistent pattern. A state court of appeals in Texas held that the manufacturer of a termiticide, not the professional applicator who applied the product, had the duty to provide warnings about the hazards of the chemical when used in certain situations, *Kahn v. Velsicol Chemical Corp.*[17] The manufacturer had attempted to shift liability to the PCO by invoking the "learned intermediary" doctrine, which has been used with some success by pharmaceutical manufacturers in product liability cases. The court found that most, if not all, of the expertise possessed by professional exterminators came from the manufacturers and suppliers of the chemicals through bulletins, seminars, and labeling. Thus, the manufacturer cannot escape liability for failing to place adequate warnings and instructions on the label.

This ruling is consistent with the fact that what PCOs know about the hazards of a pesticide normally is based on information provided by the manufacturer or distributor and by EPA. In *Dine v. Western Exterminating Co., supra,* however, the court held that the applicator in that case "unquestionably had a duty to warn plaintiffs" about the hazards of the termiticide being used. The manufacturer of the termiticide, which had been responsible for the content of the labeling, had acted reasonably in relying on the applicator to "convey any necessary warnings," according to the *Dine* court.[18]

Issues have arisen in toxic tort suits regarding the adequacy of FIFRA label warnings and precautionary statements. A federal district court in Michigan recently ruled that FIFRA precludes tort suits under state law alleging that the warnings on pesticide labels are inadequate. *Fitzgerald v. Mallinckrodt, Inc.*[19] The court held that "any state law tort recovery based on a failure to warn theory would abrogate Congress' intent to provide uniform regulations governing the labeling of pesticides."[20]

The plaintiff in *Fitzgerald* had been a greenskeeper on a golf course for eighteen years. His supervisor instructed him on how to mix and apply an inorganic, mercury-based fungicide. The greenskeeper wore a snowmobile suit, respirator, goggles and rubber gloves during mixing, but spilled some of the fungicide on his clothes and created a large cloud of dust. He brushed off his clothes and washed his hands and face. That night, he began to feel sick. The greenskeeper was diagnosed as suffering from mercury poisoning.

The greenskeeper admitted that he knew about, but failed to read, the pesticide label on the twenty-five pound drum from which he removed the fungicide. He sued the manufacturer alleging that if the label warnings had been different, he would not have been injured in the same manner. The federal district court dismissed the suit. The court agreed that because FIFRA section 24(b) preempts states from adopting requirements regarding pesticide labeling, state tort remedies for alleged inadequate label warnings or directions are also preempted. In reaching its decision, the *Fitzgerald* court repudiated an earlier decision by the U.S. Court of Appeals for the District of Columbia, which had reached a different conclusion in a similar case.[21] The Michigan court found that FIFRA's preemption of state pesticide labeling requirements encompasses not only statutes enacted by state legislatures, but also court-made law in individual suits. The *Fitzgerald* court agreed with dicta by the U.S. Court of Appeals for the First Circuit that FIFRA's preemption clause "expressly prohibits 'state law' not merely 'statutory law' from imposing any 'requirement or prohibition' different from the Act's warning label."[22] The Michigan court stated: "Where the federal government has preempted any state regulation, there can be no recovery in tort. Allowing recovery under state tort law where Congress has preempted state law would effectively authorize the state to do through the back door exactly what it cannot through the front. FIFRA expressly provides that no state may impose '*any* requirement for labeling or packaging *in addition to* or *different from* those required under this Act.' "[23]

Conclusion

This article highlights only a few of the principles and cases which establish a correlation between pesticide enforcement or regulatory activity and potential toxic tort liability. Federal and state pesticide officials should recognize that they are not operating in a vacuum. While they must strive to fulfill their duties in an impartial manner, their determinations may affect both the outcome of individual liability suits and the future direction of pesticide toxic tort law.

Larry Ebner is NPCA legal counsel and partner in the Washington, D.C., law firm of McKenna, Conner & Cuneo. For more information, contact him at (202) 789-7727.

References

1) U.S.C.§ 136-136y (1982 & Supp. III 1985).

2) "Pesticide" is defined as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest." FIFRA§ 2(u).

3) The "label" is the written, printed, or graphic material affixed to the pesticide container. "Labeling" encompasses the label, but also includes any other written, printed, or graphic material that accompanies the pesticide. *See* FIFRA§ 2(p). EPA has recently indicated that some parts of the termiticide labels or labeling should be considered merely advisory.

4) Section 2(ee) of FIFRA defines use of a pesticide in a manner inconsistent with its labeling as use "in a manner not permitted by the labeling." Several exceptions are provided, including applying a pesticide at a rate less than that specified on the labeling; applying a pesticide against a target pest not specified on the labeling unless prohibited by the labeling itself; and employing any method of application not prohibited by the labeling. These exceptions were added by Congress in 1978 to afford applicators more flexibility in determining the manner in which to apply their pesticides. H.R. Rep. No. 663, 95th Cong., 1st Sess. 15,20,70, *reprinted* in 1978 U.S. Code Cong. & Ad. News 1988, 1993, 2039.

5) *See* 49 Fed. Reg. 37,972 (1984) (proposed 40 C.F.R. 156.1(e)(2)).

6) State pesticide officials have their own organizations -- the American Association of Pesticide Control Officials (AAPCO) and the Association of Structural Pest Control Regulatory Officials (ASPCRO). The latter group is made up specifically of state personnel involved in structural pest control.

7) *See e.g.*, Fiedler v. Clark, 714 F.2d 79 (9th Cir. 1983) (citing In re Agent Orange Product Liability Litigation, 635 F.2d 987,991-92 n.9 (2d Cir. 1980)).

8) The legislative history of FIFRA makes it clear that towns, counties, and other political subdivisions of a state are preempted from regulating pesticides. See Maryland Pest Control Ass'n v. Montgomery County, 646 F. Supp. 109, 111, *aff'd*, 822 F.2d 55 (4th Cir. 1987) ("[T]he legislative history could not be more clear."). *But see* People *ex rel.* Deukmejian v. County of Mendocino, 36 Cal. 3d 476,683 P.2d 1150 (1984).

9) The regulatory scheme of FIFRA is discussed in detail in the *Pesticide Regulation Handbook* (Revised Edition) (Executive Enterprises Publications Co. 1987).

10) No. 6:87-0714-3 (D.S.C. Oct.30, 1987), 25 Toxics L. Rep. (BNA) 682 (Nov. 18,1987).

11) 86-1857-OG (D.D.C. Mar. 9,1988).

12) Slip. op. at 10.

13) Id at 10-11.

14) Id. at 11 (citing *In re* Agent Orange Product Liability Litigation, *supra*).

15) See Ebner, "PCOs and the Duty to Warn," *Pest Management* (March 1988); Ebner and Rahinsky, "The Duty to Warn Controversy," *Pest Management* (May 1986).

16) The following states have adopted regulations requiring professional applicators to provide customers with a copy of the EPA-approved label or other specific precautionary information: California, Connecticut, Maryland, Massachusetts, New Jersey, New York, and Texas.

17) 711 S.W.2d 310 (Tex. Civ. App. 1986, writ ref'd n.r.e.).

18) *Dine, supra*, slip op at 13, 15-16.

19) 86-2598 (E.D. Mich. Dec. 22, 1987).

20) Slip op at 8.

21) *See* Ferebee v. Chevron Chemical Co., 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1985).

22) *See* Palmer v. Liggett Group, Inc., 825 F.2d 620, 627-28 (1st Cir. 1987).

23) *Fitzgerald, supra*, slip op at 8.

Legal Brief

Three-Day "Cooling Off" Period Affects Door-to-Door Sales

By
Lawrence S. Ebner
John S. Wotowicz

Since 1974, a Federal Trade Commission (FTC) regulation has required pest control operators to provide customers with a three-day "cooling off" period following any door-to-door sale of pest control services (or products) which have a total value of $25 or more. 16 C.F.R. S 429 (1988). The "cooling off" period regulation applies whenever a PCO personally solicits a sale, lease, or rental of pest control services and when the sale is made at a place other than the PCO's place of business. The regulation is applicable even where the customer has asked or invited the PCO to come to his home to make a sales presentation. During this three-business day (Monday through Saturday) period, the customer is free to cancel any contract without a penalty or further obligation to the pest control firm.

The door-to-door sales regulation does not apply where the customer initiates the contract with the PCO *and* the pest control services are needed to meet a customer's legitimate personal emergency. In order to qualify for this exemption, the customer must give the PCO a separate, dated and signed personal statement in the customer's own handwriting describing the emergency situation and waiving the right to cancel. PCOs are also exempt from the door-to-door regulations where the entire transaction takes place by mail or telephone and where there is no other contact between the PCO and the customer.

This 1974 regulation remains virtually unchanged today and continues to impose substantial restrictions on the door-to-door sales of PCOs. The potential for severe penalties for violating this regulation makes it important for PCOs to be aware of its provisions in order to avoid the penalties and to ensure that a contract made in the customer's home is enforceable.

What Must the PCO Do To Comply?

In situations where the regulation applies, the PCO must give the customer a fully completed receipt or copy of the sale or service contract at the time of the sale. The receipt or contract must be in the same language (i.e. English, Spanish, etc.) as the oral presentation, must include the date of the transaction, must contain the pest control firm's name and address and must include a summary of the customer's right to cancel the sale within the three-day period. The summary must be in boldface type of at least 10 points and must appear either on the first page of the receipt or near the place for the customer's signature on the contract.

Along with the contract or receipt given to the customer, the PCO must include a completed duplicate "Notice of Cancellation." The notice must be attached to and easily detachable from the contract or receipt, must again be in the same language as the oral presentation, must contain the pest control firm's name and address, the date of the transaction and the date of the end of the "cooling off" period. The notice must be in 10-point, bold-face type and must use the specific words set out in the regulation.

What Is the PCO Prohibited from Doing?

In addition to providing the cancellation summary and notice of cancellation the regulation requires that the PCO refrain from certain specific conduct. In order to comply with the regulation, the PCO must, at the time of sale, orally inform the customer of his right to cancel during the three-day period and must not misrepresent the details of that right. The PCO must not include any language within the receipt or contract that acts as a waiver of the customer's cancellation rights. Furthermore, if the PCO receives a note or other evidence of indebtedness from the customer as payment for the services and the PCO intends to sell or transfer that instrument to a finance company or other third party, they must allow five days to pass after the sale before making that transfer.

When A Customer Cancels, What Must the PCO Do?

When a customer elects, within the three-day period, to cancel the contract and submits the valid cancellation notice, the PCO, within 10 days, must refund all payments made by the customer

under the contract or sale, must return any goods or property traded in by the customer, must cancel and return any negotiable instrument executed by the buyer, and must take action to terminate any security interest.

What Should PCOs Do Now?

In order to ensure that door-to-door sales are made in compliance with the "cooling off" period regulation, PCOs should check their receipt, contract, and cancellation forms to ensure that they contain the required language. Administrative procedures should be reviewed to make sure that evidences of indebtedness tendered by customers are not transferred to third parties until the required five-day period has expired. Finally, PCOs should examine their procedures for handling the receipt of customer cancellation notices so that they will not be forced to abandon delivered services because of non-compliance with the regulations.

Mr. Ebner is NPCA Legal Counsel and a partner in the Washington, D.C. law firm of McKenna, Conner & Cuneo. Mr. Wotowicz is a summer associate at the firm. For more information contact Mr. Ebner at (202) 789-7727.

Attention Women Pest Control Operators!

If you are interested in networking with other women pest control operators, join The Association of Women in the Pest Services Industry at its first official business meeting. Mark your Nashville convention calendar for 2:00 p.m., Wednesday, November 2. *For details, contact Glenda Love, Vice President, Handyman Pest Control, 3979 Covington Highway, Decatur, Ga. 30032, (404) 288-8233.*

Legal Brief

EPA and OSHA Inspections: Your Basic Rights

By
Lawrence E. Ebner
Karen E. Harrison
McKenna, Conner & Cuneo

Pest control companies often dread the prospect of an inspection by the United States Environmental Protection Agency (EPA) or the federal Occupational Safety and Health Administration (OSHA). FIFRA, the OSH Act, and other federal environmental statutes authorize warrantless inspections of commercial property. Moreover, EPA and OSHA are currently considering a joint enforcement or inspection strategy. These inspections are less oppressive when companies know their rights and handle the inspection in accordance with an established company policy.

Pest control companies have several basic rights when faced with an inspection. Most importantly, company management can refuse entry to inspectors who arrive without a warrant to conduct an administrative inspection. If the inspectors are admitted, company management retains the right to withdraw consent for a warrantless search at any point or to ensure that searches are conducted within the limits of an administrative warrant. Further, a company representative can accompany the inspectors to answer questions and to maintain a record of the inspectors' findings.

Company management must decide whether to admit inspectors for a warrantless search and if admitted, when to discontinue the warrantless search. Companies have the right to deny entry to inspectors for warrantless searches as the result of a Supreme Court case, Marshalls v. Barlow's, Inc. which held that warrantless OSHA inspections are unconstitutional. Although the court has not yet determined whether warrantless EPA inspections are unconstitutional, EPA acknowledges the right of companies to deny entry to inspectors who arrive without warrants pursuant to the Barlow's decisions. To obtain a warrant, inspectors must prove to a magistrate that the inspection is justified by specific probable cause (e.g. an employee complaint) or because the inspection comprises part of a neutral administrative inspection scheme.

Many companies believe they must consent to warrantless EPA or OSHA inspections to preserve their public image as a "good citizen." While this belief may be accurate, it is important to note that administrative warrants do not reflect a finding that the company is not in compliance with environmental laws or the OSH Act. Some companies also consent to warrantless searches because they believe that inspections will be harsher when conducted pursuant to a warrant. This latter belief appears to be unfounded. Administrative warrants restrict the scope and object of inspections and usually contain limitations on the length of the search. Further, the inspectors may not return with a warrant since both EPA and OSHA require inspectors to follow time-consuming and expensive procedures to obtain permission to seek a warrant. For example, the decision to seek a warrant for an inspection under FIFRA requires approval by the EPA Regional Counsel, the Office of Pesticides and Toxic Substances (Headquarters) and the United States Attorney's Office.

All pest control companies should develop a policy for handling EPA inspections. The policy should cover not only whether to permit a warrantless search but also how a search pursuant to a warrant or consent of the company will proceed. Company officials should assign a company representative to accompany the inspection team. The representative should be familiar with EPA's statutory authority to inspect and EPA inspection procedures. FIFRA §9 authorizes officers designated by the EPA Administrator to inspect places where pesticides are held for distribution or sale. The authority to inspect is limited to "inspecting and obtaining samples of any pesticides or devices, packaged, labeled, and released for shipment, and samples of any containers or labeling for such pesticides or devices." If the inspector takes any samples, he must give to the owner, before leaving the premises, a receipt that describes the sample. The owner may obtain a portion of the sample equivalent in volume or weight to the portion retained by

the inspector. FIFRA §8 (b) authorizes inspections and copying of records pertaining to the delivery, movement, or holding of pesticides or pesticidal devices. The company representative should ensure that the inspection team does not review financial, sales, pricing, or personnel data which are exempt from inspection under FIFRA.

Similarly, pest control companies should assign a company representative to accompany OSHA inspection teams. OSH Act §8 authorizes inspection of workplaces during reasonable times to investigate "all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials" and to question privately any such employer, owner, operator, agency or employee. The company representative should be familiar with OSHA inspection procedures found in the OSHA Field Operations Manual. An employee representative will also accompany the inspection team if the employees are represented by a union. The company representatives should take notes and photographs in the same manner as the inspection team. Further, the representative should feel free to stop the inspection for a break (e.g., to consult with an attorney) or to withdraw consent to a warrantless search. When company management and employees are prepared in advance, the inspection should proceed smoothly.

Larry Ebner is NCPA's Legal Counsel. Ebner and Karen Harrison are attorneys at McKenna, Conner & Cuneo in Washington, D.C. Please contact them if you have any questions: (202) 789-7500.

Legal Brief

Federal Court Decides Termiticide Suit

Lawrence S. Ebner
NPCA Legal Counsel

A recent termiticide "exposure" suit in Washington, D.C., has produced some interesting results. In the *Dine* case, homeowners sued both the applicator and the manufacturer of a chlordane/heptachlor product for alleged medical and emotional problems and property damage following a termite treatment just prior to their purchase of a home in 1983 (they abandoned the house two years later). The federal district court which heard the case issued a number of important rulings before the suit was settled on the second day of trial.

According to the court, the multiple legal theories asserted in the plaintiffs' complaint represented "the kitchen-sink method of pleading." While the defendants were successful in obtaining pre-trial dismissal of several plaintiffs' counts, in at least two instances the court drew a distinction between the legal obligations of the applicator and those of the manufacturer. The following are among the court's more significant holdings:

1. The applicator "unquestionably had a duty to warn" the homeowners about the "dangers" of the termiticide. The manufacturer, however, had no similar duty to warn because it "acted reasonably, as a matter of law" in relying upon the applicator "to convey any necessary warnings and take all reasonable steps to ensure that such warnings would be given." According to the court, any "failure" on the part of the applicator to fulfill his duty to warn "does not undermine the reasonableness" of the manufacturer's actions.
2. The manufacturer had no "duty to train" the applicator on proper application techniques. The court found that the plaintiffs lacked standing to assert such a claim because the manufacturer was not "in control" of the termiticide or the applicator "at the time that plaintiffs' home was treated." Citing a recent Virginia decision, the court implied that if the termiticide labeling is adequate, the manufacturer would have no reason to know if the applicator used the termiticide negligently.
3. Violation of FIFRA's "misbranding" prohibitions is not "negligence per se" because that Act is intended to protect "the entire population of the United States," not a more limited class of persons such as homeowners.
4. Sale and application of the chlordane/heptachlor termiticide was not an "ultrahazardous activity" giving rise to strict liability for damages. Instead, the plaintiffs would have had to prove that the termiticide was somehow "defective."
5. There was insufficient evidence to demonstrate that the applicator had the "requisite knowledge" of the termiticide's properties to establish any act of fraud or misrepresentation by the applicator. Also, there was insufficient evidence to show that the manufacturer was aware at the time the application was made in 1983 that the termiticide might infiltrate treated residences despite proper application techniques (subsequent knowledge which the manufacturer may have acquired was irrelevant to plaintiffs' claim of fraud).
6. EPA's approval of the termiticide label is "strong evidence" that the sale and application of the termiticide in 1983 "was not extreme or outrageous and that the label was reasonably accurate." Thus, there were insufficient grounds to support plaintiffs' claim for intentional infliction of emotional distress.

The court also made several significant pre-trial evidentiary rulings. For example, the court held that the record of the EPA suspension/cancellation hearings on the *non*-termiticide uses of chlordane in the mid-70s was not admissible as evidence. Similarly, the court held that the August 1988 settlement agreement with EPA which led to voluntary cancellation of chlordane termiticides was inadmissible as evidence of alleged risks of chlordane and heptachlor. But, the court ruled that evidence from animal studies and evidence of increased risk of cancer are admissible for certain purposes. Finally, the court reportedly directed the plaintiffs' attorney to adhere to a protective order which prohibits dissemination of confidential materials obtained from the manufacturer to members of the public (such as so-called "public interest" groups which promote suits against PCOs).

Larry Ebner is a partner in the Washington, D.C., law firm of McKenna, Conner & Cuneo. For more information contact him at (202) 789-7727.

Legal Brief

by
Lawrence S. Ebner
NPCA Legal Counsel

FIFRA Labeling Preemption Upheld

A federal district court in Michigan recently ruled that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) precludes tort suits which allege that the warnings on a pesticide's label are inadequate (*Fitzgerald v. Mallinckrodt, Inc.*). Pest control operators and pesticide manufacturers now have a helpful precedent to rely on if sued by an applicator or homeowner over the adequacy of warning statements.

The plaintiff had been a greenskeeper on a golf course for eighteen years. His supervisor instructed him on how to mix and apply an inorganic, mercury-based fungicide. The greenskeeper wore a snowmobile suit, respirator, goggles and rubber gloves during mixing, but spilled some of the fungicide on his clothes and created a large cloud of dust. He brushed off his clothes and washed his hands and face. That night, he began to feel sick. The greenskeeper was diagnosed as suffering from mercury poisoning.

The greenskeeper admitted that he knew about, but failed to read the pesticide label on the twenty-five pound drum from which he removed the fungicide. He sued the manufacturer alleging that if the label warnings had been different, he would not have been injured in the same manner. The federal district court dismissed the suit (an appeal has been filed and is pending).

The court agreed with the manufacturer that because FIFRA preempts (i.e., precludes) states from adopting laws regarding pesticide labeling, state tort remedies for alleged inadequate label warnings or directions are prohibited. (A *tort* is a negligent or other imprudent act which inflicts harm and creates monetary liability to the victim.) The court held that "Congress has expressly stated its intent to preempt any state [pesticide] labeling or packaging requirements different from or additional to those mandated by FIFRA."

In reaching its decision, the court

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(**Legal Brief**, *Continued*)

rejected an earlier decision by a federal appeals court in Washington, D.C., which had reached a different conclusion in a similar case (see "PCOs and the Duty to Warn," *Pest Management*, Page 20, March 1988). The Michigan court found that FIFRA's preemption of state pesticide labeling requirements encompasses not only statutes enacted by state legislatures, but also court-made law in individual suits. The Michigan court agreed with a ruling by a federal appeals court in Boston that FIFRA's preemption clause "expressly prohibits 'state law' not merely statutory law' from imposing any 'requirement or prohibition' different from the Act's warning label."

The court stated: "Where the federal government has preempted any state regulation, there can be no recovery in tort. Allowing recovery under state tort law where Congress has preempted state law would effectively authorize the state to do through the back door exactly what it cannot through the front. FIFRA expressly provides that no state may impose '*any* requirement for labeling or packaging *in addition to or different from* those required under this Act.' 7 U.S.C. §136v(b) (emphasis added)."

It is important for PCOs to recognize that FIFRA makes the pesticide registrant (normally the manufacturer) and the U.S. Environmental Protection Agency responsible for the label and its content. Although users of the pesticide (i.e., applicators) are not responsible for the label's content, they are prohibited from applying the pesticide "in a manner inconsistent with its labeling."

When a PCO is sued by a homeowner for alleged misapplication, he can rely on his compliance with the label as evidence of no misapplication. The Michigan court's ruling that courts cannot second-guess EPA on the adequacy of label warnings bolsters the defenses available to PCOs.

Larry Ebner is a partner in the Washington, D.C., firm of McKenna, Conner & Cuneo. For more information, contact him at (202) 789-7727.

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Legal Brief

NCAMP Suit —A Victory for PCOs

Lawrence S. Ebner
NPCA Legal Counsel

A federal judge in Washington, D.C. has upheld the National Pest Control Association's efforts to ensure that pest control operators would have a reasonable period of time to use up existing stocks of chlordane and to make the transition to alternative termiticides. *The deadline for existing stocks is April 15, 1988.*

Last August the National Coalition Against the Misuse of Pesticides (NCAMP) filed a suit in federal district court to challenge the agreement between the Environmental Protection Agency and Velsicol Chemical Corp. regarding the regulatory status of chlordane termiticides. The agreement had temporarily withdrawn chlordane from the market, but permitted continued sale by distributors and continued use of existing stocks by applicators. NCAMP sought an immediate cessation of all sales and use of existing stocks and a permanent bar against future reinstatement of chlordane usage.

NPCA filed papers to intervene in the suit in order to defend the continued use of existing stocks. Without explanation, the court turned down NPCA's request to participate. When the court suggested that it might grant NCAMP's request for immediate cessation of existing stocks, NPCA worked directly with Velsicol and EPA to develop an existing stocks provision with reasonable cut-off dates that the structural pest control industry could live with. NCAMP was invited to participate in these discussions, but after a brief appearance, walked out. As a result of NPCA's efforts, the agreement between EPA and Velsicol was supplemented to permit use of existing stocks for pre-treats and other exterior applications through April 15, 1988. (There was also a November 30, 1987 cut-off date for interior applications.) NPCA believed that the April 15 cut-off date was a lot better than the immediate cessation NCAMP was seeking.

On February 23, 1988 the court issued a Judgment and Order. While the court found that EPA had failed to make the findings required by FIFRA (the federal pesticide law) to allow continued use of existing stocks, the court did not interfere with the April 15 cut-off date. Even though NCAMP *may* have won a legal point (EPA is considering an appeal), in reality the case was a devastating defeat for NCAMP in at least two respects.

First, NCAMP did not achieve the immediate suspension of chlordane that it sought.

Second, by forcing EPA to defend the continued use of existing stocks, NCAMP defeated its own goal of obtaining findings on chlordane which could be used against PCO toxic tort liability suits. Instead, EPA made findings which may be of *help* to PCOs who have used chlordane. For example, EPA stated it has never made a final determination that the termiticide use of chlordane poses unreasonable adverse effects. While EPA had planned administrative hearings to address its concerns about the safety of chlordane, the Agency explained to the court that many scientists do not think that chlordane poses a major cancer risk to humans and that the issue of cancer potency for chlordane remains open to legitimate question.

Thanks to NCAMP, PCOs now have a favorable set of written statements from EPA regarding the safety of chlordane which can be used as part of a litigation defense, or to answer questions from the public or the press.

Larry Ebner is a partner in McKenna, Conner & Cuneo, a national law firm active in the pesticide and toxic tort areas. For more information contact Mr. Ebner at (202) 789-7727.

PCOs & the Duty to Warn

"Compliance with pesticide labeling can be the key factor in a PCO's defense against a toxic tort suit."

by Lawrence S. Ebner
NPCA Legal Counsel

This article discusses an important question confronting every pest control operator who treats homes or other structures for termites: What is your duty to warn customers about potential risks from the termiticides you apply? This is a complicated and controversial issue.

As the National Pest Control Association Legal Counsel and a specialist in pesticide law, I'd like to suggest four points for you to consider in developing your own approach to the duty-to-warn problem:

Point 1

There is no *simple* answer to the question of whether PCOs have a duty to warn, or what constitutes an adequate warning.

The duty to warn is primarily a matter of state law. As a result, the circumstances under which a court may hold a pest control company liable for failing to provide an adequate warning differ from state to state. There are common legal principles, but different courts in different states interpret and apply the same legal principles differently.

Furthermore, the outcome of each case depends on its own set of facts. A court may rule that a particular warning was required in one case, but not in another. What may be adequate warning in one case may be considered inadequate in another. It is even unclear whether compliance with state regulations which require PCOs to post notices or distribute pesticide labels provides enough of a warning to avoid liability.

Chances are you will not know whether you had a duty to provide a particular warning unless and until a court holds you liable for failing to do so and orders you to pay damages to your customer.

The duty to warn is not a new concept—for many years legal principles regarding warnings have been developed under the area of tort law known as product liability. For example, courts often rely on a well-established set of scholarly legal principles known as the Restatement of Torts. The Restatement imputes liability to manufacturers and suppliers who fail to provide adequate warning information to purchasers or users of their products. But traditional legal principles governing liability for everyday consumer products such as defective tires or toaster ovens do not necessarily apply to toxic chemicals, where the risks, if any, may not be known or well understood.

Instead, a new type of product liability law is rapidly evolving—"toxic tort" law. Toxic tort law involves liability for injuries or property damage caused by exposure to toxic chemicals or other hazardous substances.

During the past few years there has been an explosion of toxic tort suits. Some are being promoted by public interest groups, which proclaim themselves defenders of whatever *they* decide the public interest should be.

Not only are toxic tort suits being filed at an alarming rate, the courts are continually expanding the grounds for toxic tort liability. Failure to provide an adequate warning is only one of many closely related legal theories which creative plaintiffs' lawyers are using in toxic tort suits against PCOs and pesticide manufacturers. The following are some of the more popular toxic tort theories that are finding their way into American courtrooms and legal decisions.

*1. **Negligence***—You may be held liable if you fail to exercise reasonable care in protecting your customer's health or property from harmful exposure to toxic chemicals. Negligence is a very old and very common basis for recovery, but it now is being applied to the testing, use and disposal of pesticides and other toxic substances.

*2. **Strict liability***—Even if you are not negligent, you may be held liable if you use an inherently dangerous chemical or engage in an inherently dangerous activity, and harm to your customer's health or property results. Under strict liability, a court could rule that a pesticide is inherently dangerous, even when applied properly.

*3. **Nuisance***—You may be held

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liable if you perform a service which substantially interferes with your customer's enjoyment of his property or health, or public property or health. Misapplication of a pesticide could result in a legal nuisance.

*4. **Trespass***—You may be held liable if you apply a pesticide in a manner which interferes with your customer's right to possession of his home or property.

*5. **Continuing chemical trespass***—You may be held liable without regard to the statute of limitations (i.e., the cut-off date for filing a suit) if you apply a pesticide in your customer's home and leave behind "unacceptably high" residues or air levels.

*6. **Breach of warranty***—You may be held liable if you breach an expressed or implied warranty in your service contract requiring you to render pest control services in a safe and workmanlike manner.

*7. **Tort per se***—You may be held liable if you violate a federal or state regulation which is intended to protect the injured party. For example, application of a pesticide in a manner inconsistent with its labeling is a violation of FIFRA, and therefore, could be considered a tort per se.

*8. **Latent risk***—You may be held liable if your customer can prove there is a better than even chance that sometime in the future he will develop cancer or another health problem as a result of a pesticide application made by you. Some courts are awarding damages to cover the costs of lifetime medical surveillance.

*9. **Cancerphobia***—You may be held liable if you apply a pesticide in a manner which inflicts your customer with a reasonable fear of developing cancer.

Who knows what additional theories aggressive plaintiffs' lawyers will dream up in the future to win big damage awards for their clients and big contingency fees for themselves?

"For every creative plaintiff's attorney, there is an equally creative defense attorney."

Most toxic tort suits allege various combinations of legal theories, but failure to provide an adequate warning is almost always included. This leads to my major second point.

Point 2

Always comply with the FIFRA label, even though that may not be enough. You'v heard many times that the label is the law. Not only is that true, compliance with pesticide labeling can be the *key* factor in a PCO's defense against a toxic tort suit. For example, in a recent chlordane case in South Carolina, the court ruled that a state official's testimony regarding the applicator's compliance with label procedures was sufficient for the jury to conclude that the PCO was *not* negligent. However, PCOs should not necessarily assume that the warning statements or other information on a pesticide's labeling is enough for manufacturers or PCOs to avoid liability under state tort law.

In 1984 a federal appeals court in Washington, D.C. held that even if labeling is adequate for FIFRA, it may be *inadequate* for purposes of state tort law. The case involved an agricultural research worker who died of lung disease after several years of exposure to an agricultural pesticide. The label did not contain a specific warning linking the pesticide to lung disease. The manufacturer argued that because EPA had approved a label without such a warning, no such warning should be required to avoid tort liability. But the court held that a warning *beyond* what is on the EPA-approved pesticide label may be required to avoid tort liability.

In December 1987 a federal district court in Michigan repudiated the D.C. court's ruling and held that FIFRA preempts (or precludes) tort claims based on alleged inadequacy of EPA-approved pesticide labeling. In the Michigan case, a greenskeeper sued a pesticide manufacturer claiming that he was poisoned by a pesticide because the warning statements on the label were inadequate. The Michigan court dismissed the case and held that FIFRA precludes tort claims based on alleged negligent labeling because Congress intended to provide uniform regulations governing the labeling of pesticides. The court explained that FIFRA prohibits states from adopting their own labeling regulations, and that allowing recovery under state tort law for alleged inadequate labeling would "authorize the state to do through the back door what it cannot through the front."

Thus, at least two courts disagree on whether FIFRA labeling is a defense to failure-to-warn claims. In the same vein, it is unclear whether the proposed consumer advisory which EPA may require PCOs to distribute to termite customers would be adequate to avoid tort liability under state law.

You have read about the recent cigarette cases in which several courts have dismissed suits against tobacco companies and held that they are *not* required to provide warnings beyond the government-required statements on cigarette packages. These rulings may be of some help to pesticide producers and applicators.

As you know, a number of states now require PCOs to provide customers with the EPA label or other specific hazard information. The law is still unsettled on whether the existence of such state regulations precludes courts from finding that additional warnings are necessary to avoid liability under state tort law.

Point 3

Legal defenses *are* available to PCOs. For every creative plaintiff's attorney, there is an equally creative defense attorney. A number of defenses are available to PCOs who are sued by customers alleging failure to provide an adequate warning.

One type of defense against an alleged failure to warn is "foreseeability." Courts will require a plaintiff to prove that the type of injury suffered was *foreseeable* from and caused by the failure to warn or the inadequacy of the warning given. In other words, the duty to warn is limited to hazards which PCOs know about or should have known about (this sometimes is called the "state of the art" defense).

Let's say that if swallowed, "pesticide X" causes hair to turn purple, but EPA does not require pesticides to be tested to determine whether they cause hair to turn purple, and no one knows or has reason to know about this unusual property of pesticide X. Then the PCO would not be held liable for failing to provide his customer with a warning about this unforeseeable harmful effect.

Most courts recognize the foreseeability defense, but some are chipping away at it. One court held that even in the absence of scientific certainty, general knowledge about a possible link between a pesticide and a particular hazard may be enough to require a specific warning to avoid liability.

There is another type of defense, but it is a delicate subject. I'm referring to legal arguments which share or shift potential liability from the PCO to other defendants in a case. Many termiticide suits name multiple defendants, including the pesticide manufacturer and distributor as well as the pest control operator. PCOs need to recognize that the legal interests of each defendant sometimes differ.

For example, pesticide manufacturers or suppliers sometimes deny liability by alleging that the applicator failed to follow the label or was negligent. One liability-shifting theory used by manufacturers is the "learned intermediary" defense. This was first used by drug manufacturers. The drug manufacturer argues that it has no duty to warn patients about the potential dangers of a drug because there was a learned intermediary—namely, the physician who prescribed the drug and presumably provided his patient with any necessary precautionary information.

In a Georgia case, the learned intermediary defense was used successfully by a pesticide producer. The court held that as a professional applicator, the PCO should have knowledge about the hazards of the pesticides being used and that the PCO, not the pesticide producer, has the duty to warn customers. But in a recent Texas case, a termiticide manufacturer was unsuccessful in shifting liability to a PCO through this "learned intermediary" defense. The court held that the learned intermediary defense cannot be used to shift the duty to warn from the pesticide manufacturer to the PCO, because PCOs obtain a substantial part of their knowledge about a pesticide from the manufacturer through product bulletins, seminars and labeling. This is consistent with the fact that what PCOs know about the toxicity and hazards of a pesticide normally is based on information provided by the manufacturer or distributor and EPA.

I am not suggesting that PCOs run out and sue the supplier or manufacturer. However, PCOs must realize that they have their own legal interests to protect.

"When warnings are presented to customers, it is a good idea to keep a written record of the warning provided."

As another possible defense, PCOs may be able to place themselves in a more equitable position by pointing to any general warnings they may have given. This may not be enough to avoid liability for failing to provide a specific warning, but it could help limit jury awards to compensatory damages for actual harm and avoid punitive damages.

When warnings are presented to customers, it is a good idea to keep a written record of the warning provided, and have the customer sign an acknowledgement so that there is no question what warning was given, when, and to whom. That leads to the final point.

Point 4

The more specific the warning is, the better it is. There are numerous product liability cases holding that a particular warning either is or is not adequate under the particular circumstances of the case.

Most courts will analyze various factors to determine whether a warning is adequate. Here are some of the types of questions courts often ask:

Was the warning given in a manner that will catch the attention of customers?

Was the warning comprehensible?

Did the warning convey a fair indication of the nature and extent of the foreseeable dangers?

This last requirement may be the most important because courts often will consider whether the customer had enough information to make an intelligent choice on whether to proceed with the treatment.

This article is based on a talk Larry Ebner gave at NPCA's Eastern Conference in January. PCOs or their attorneys should contact him directly for more information or case citations (202-789-7727). Mr. Ebner is a partner in McKenna, Conner & Cuneo, a national law firm active in the pesticide and toxic tort areas. Karen M. Hansen of the firm assisted Mr. Ebner with the research for this talk.

Legal Brief

OSHA Hazard Communication Expanded

by Lawrence S. Ebner
NPCA Legal Counsel

On May 23, 1988, OSHA's Hazard Communication Standard (HCS) will be expanded to cover *all* employers whose employees are—or may be—exposed to "hazardous chemicals" under normal working conditions. This includes every pest control firm in the United States. Previously, only employers in the manufacturing sector were subject to the HCS (some states had their own laws covering non-manufacturing employers such as pest control companies). OSHA—the federal Occupational Safety and Health Administration—has estimated that the expanded HCS will cover 32 million workers and that first-year compliance costs will be $700 million.

HCS is a *worker* protection standard. It is separate from and in addition to federal, state, and local "community right-to-know" laws which may require PCOs to provide information to state or local agencies, customers, and the public. Under Title III of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), employers required by the HCS to maintain material safety data sheets (see below) must submit copies of them and an annual emergency and hazardous chemical inventory form to designated state emergency response commissions, local emergency planning committees, and to local fire departments (*See July Legal Brief*). A future Legal Brief will discuss in detail additional PCO requirements under SARA Title III.

OSHA expanded the HCS pursuant to a court order in a case brought by various labor organizations. Under the expanded HCS, pest control firms will be required to do the following:

1. *Obtain a Material Safety Data Sheet (MSDS) for each hazardous chemical to which PCOs may be exposed.* It is the responsibility of the chemical manufacturer—not the pest control company—to determine whether a particular pesticide is "hazardous" based on criteria established by OSHA. If a pesticide is considered "hazardous" (as many will be), the pesticide manufacturer must develop an MSDS which contains detailed information about the charcteristics and hazards of the chemical, safety precautions, first aid measures, etc. Chemical manufacturers and distributors were required to provide MSDSs to their non-manufacturing customers on or before September 23, 1987. Pest control companies must keep copies of the MSDSs on file so they are readily accessible to employees.

2. *Train PCOs regarding the hazards of the pesticide.* This is something that most pest control firms already do. The HCS states that training must be provided to all new employees whenever a new hazardous chemical is used. Training is to include methods for detecting accidental releases of the chemicals used, information regarding physical and health hazards of the chemicals, and measures employees can take to protect themselves. Clerical and office workers are not covered by this requirement.

3. *Label containers of any hazardous chemicals.* The HCS also requires that "containers" of hazardous chemicals in the workplace be labeled with information about the identity of the chemical. Labels must also provide appropriate hazard warnings. Containers include drums, bottles, storage tanks, etc. Pesticide containers, however, are exempt from this requirement insofar as they already are subject to FIFRA labeling requirements. Portable containers into which hazardous chemicals are transferred from labeled containers by an employee for immediate use, and certain hazardous consumer products, are also exempt from the labeling requirement. Pesticide tanks on PCOs' trucks probably are not subject to the labeling requirement, but further clarification from OSHA on this may be necessary.

4. *Develop a written hazard communication program.* On or before the May 23, 1988 effective date, every pest control firm must have on file a written program describing how the company is implementing the HCS and containing a list of every hazardous chemical used in the workplace. "Workplace" includes job sites as well as the company's headquarters.

Despite these requirements, the expanded HCS may be a blessing in disguise. This is because the standard expressly preempts state and local worker right-to-know laws covering chemical hazard communication. Many such state and local laws which have been adopted in the past few years are more stringent than the federal HCS. However, 24 states and territories currently operate OSHA-approved state occupational safety and health programs.* These states have until February 1988 to adopt state hazard communication programs comparable to the expanded

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These states and territories are as follows: Ala., Anz., Conn. (for state and local government employees only), Hawaii, Ind., Iowa, Ky., Md., Mich., Minn., Nev., N.M., N.Y. (for state and local government employees only), N.C., Ore., Puerto Rico, S.C., Tenn., Utah, Vt., Va., Virgin Islands, Wash., and Wyo. California is in the process of relinquishing its state plan status.

Larry Ebner is a partner at the Washington, D.C. law firm of McKenna, Conner & Cuneo. He is also Legal Counsel for NPCA. For more information, contact him at (202) 789-7727.

1987-88 NPCA Election Results

On August 31, 1987, tellers appointed by NPCA President Robert M. Russell, pursuant to Article VIII, Section 1 of the By-laws accompanied by Mr. Joe Kotwicki, principal of the certified public accounting firm of Feddeman, Lesche, and Tata, met at NCPA headquarters to receive the ballots submitted by the membership.

The ballots were taken from the post office to be counted, tallied and certified. The tellers and the firm of Feddeman, Lesche and Tate notified the NCPA Executive Vice President after certifying the results. The results of the election follow:

President
Robert W. Jenkins
ABC Pest Control
San Antonio, Texas

President-Elect
Rufus I. "Bubba" Tindol, III
Tindol Services, Inc.
Atlanta, Ga.

Secretary-Treasurer
Lawrence Musgrove
Musgrove's Pest Control
Santa Barbara, Calif.

Vice President Membership
Linden Griffin
Kalamazoo, Mich.

Vice President
Project Development Council
Phil Gregory
Gregory, The Service that Cares
Greenville, S.C.

Note: Terms of office will begin at the end of NPCA's 54th Annual Convention in Honolulu, Hawaii.

Advertiser's Index

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federal HCS. Programs in those states *can* be more stringent than the federal requirements as long as OSHA believes that they will not conflict with the federal HCS.

This is just a brief summary of the expanded HCS requirements applicable to PCOs. For more detailed information refer to the HCS itself (52 Fed. Reg. 31,852) (Aug. 25, 1987), or contact your regional OSHA or EPA office.

Legal Brief

Pesticide Labeling Developments

by
Lawrence S. Ebner
McKenna, Conner & Cuneo

The pesticide label is the U.S. Environmental Protection Agency's key regulatory tool under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Not only is the label "the law" (*Legal Brief*, Aug. 1986), it is EPA's principal method of communicating use and safety information to pesticide applicators.

FIFRA encompasses both the "label" and "labeling." The label is the written, printed, or graphic matter actually attached to the pesticide container or wrapper. Labeling is the label and all *other* written, printed, or graphic matter which accompanies the pesticide at any time. *See* FIFRA § 2(p). EPA has interpreted "labeling" to include any technical bulletin, brochure, circular, leaflet, pamphlet, insert, printed advertising or any other printed or graphic matter to which reference is made on the label, or which accompanies the pesticide at any time in distribution or sale. Advertising material not accompanying the product (for example magazine ads), is *not* considered labeling. *See* 49 Fed. Reg. 37,972 (Sept. 26, 1984).

EPA has long been concerned about the adequacy of pesticide labels, especially those on older products. A Label Improvement Program was established by EPA in 1980 as a means of modernizing and improving various categories of pesticide labels. For example, in November, 1981 EPA issued a "Label Improvement Notice" requiring modification of termiticide labels, including the addition of container disposal directions (the Agency is currently giving further consideration to the labels and labeling for subterranean termiticides).

EPA also has proposed comprehensive regulations which formalize the Agency's policies regarding the content of pesticide labels (format, signal words, child hazard warnings, storage and disposal statements, use directions and restrictions, etc.). Although published in proposed form almost 2½ years ago, the regulations (which revise the current § 162.10 label requirements) still have not been finalized. *See* 49 Fed. Reg. 37,960.

On a broader scale, EPA is assessing the effectiveness and utility of pesticide labels and labeling. This was prompted in part by an April 1986 report from the U.S. General Accounting Office which criticized the supposedly "limited and misleading information on pesticide hazards" contained on pesticide labels. The GAO report was also critical of professional applicators who allegedly "sometimes make [safety] claims that would be subject to enforcement action, if made by a pesticide distributor."

At about the same time the GAO report was issued, EPA's Office of Pesticide Programs released a lengthy "Pesticide Label Utility Project Report." This staff report examined many issues relating to the effectiveness of pesticide labels and labeling as a means of communicating use and hazard information to applicators and the general public. In addition, "alternative communicaton avenues" (such as educational and consumer awareness programs) were considered.

One idea discussed in the EPA report is to display essential use and hazard information more prominently on the label by reducing label "clutter." This would be accomplished by moving detailed use directions and other secondary information to supplemental "labeling" (i.e., a detailed technical booklet that would accompany the pesticide container). While this approach may have certain advantages, it also could greatly expand the length and complexity of the use directions and precautions applicable to PCOs by creating virtually unlimited space for whatever information EPA wants to have included.

The National Pest Control Association and other associations have played an active role in advising EPA on these and related issues. Under FIFRA, pesticide labels and labeling are the responsibility of pesticide producers, who must register their products with EPA. The Agency, however, also needs input from professional applicators, because it is they who are confronted with the practical problem of adhering to label directions, precautions and other requirements. Use of a pesticide "in a manner inconsistent with its labeling" can subject a PCO to civil and criminal penalties.

PCOs should consider one other recent labeling development. Certain products do not have traditional labels because they are not fully registered under FIFRA (e.g., pesticides subject to experimental-use permits, emergency exemptions, special local needs registrations, etc.). On July 3, 1986 EPA announced a policy that advertising a pesticide for a use which is subject to an experimental-use permit, or which otherwise is not registered with EPA, is unlawful. 51 Fed. Reg. 24,393. In addition, EPA's policy

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Meetings

JANUARY 1987

16 to 19. PROFESSIONAL PEST CONTROL ASSOCIATION OF NEW YORK CITY, Annual Convention, Fallsview Hotel, Ellenville, N.Y. *Contact: Andrew Esposito, 138 Fourth Ave., Brooklyn, N.Y. 11217, (718) 624-7600.*

18 to 21. NATIONAL PEST CONTROL ASSOCIATION, 47th Annual Eastern Conference, Sands Hotel and Casino, Atlantic City, N.J. *Contact: Meetings Department, NPCA, 8100 Oak St., Dunn Loring, Va. 22027, (703) 573-8330.*

20 to 22. NORTH CAROLINA STATE UNIVERSITY, 36th Annual Pest Control Technician's School, McKimmon Continuing Education Center, Raleigh, N.C. *Contact: Dr. Bruce Winston/Mavis Stillman, N.C. State University, P.O. Box 7401, Raleigh, N.C. 27695-7401, (919) 737-2261.*

22 SOUTH JERSEY PEST CONTROL ASSOCIATION, Annual All Day Workshop Seminar, Cherry Hill Hyatt, Cherry Hill, N.J. *Contact: Carl Cassidy, P.O. Box 380, Westville, N.J. 08093, (609) 854-5353.*

23 to 25. NATIONAL DATA SERVICE, 2nd Annual User's Meeting and Workshop, Clearwater Beach, Fla. *Contact: Ken Jones, Nicholas Data Service, 2497 East Bay Drive, Suite 210, Largo, Fla., 33541, (813) 535-4627.*

28 to 30. FLORIDA PEST CONTROL ASSOCIATION, Annual Management Workshop, Crowne Plaza Hotel, Orlando, Fla. *Contact: Toni Caithness, CAE, Florida Pest Control Association, 5104 N. Orange Blossom Trail, Orlando, Fla. 31810, (305) 293-8627.*

28 to 30. PEST CONTROL OPERATORS OF IDAHO, Convention, Twin Falls, Idaho. *Contact: Earl Jones, 20 West 200 South, Jerome, Idaho 83338, (208) 324-7531.*

28 to 31. LOUISIANA PEST CONTROL ASSOCIATION, Annual Management Conference and Trade Show, Baton Rouge Hilton, Baton Rouge, La. *Contact: Dennis Vidrine, LPCA, 2431 S. Acadian Thruway, Baton Rouge, La. 70808, (504) 928-6985.*

FEBRUARY

8 to 10. CANADIAN PEST CONTROL ASSOCIATION, Structural Pest Control Conference, Downtown Holiday Inn, Toronto, Ontario, Canada. *Contact: Ontario Pest Control Association, P.O. Box 160, Chatsworth, Ontario, Canada NOH 1GO. (800) 265-3170.*

18 to 19. DELAWARE PEST CONTROL ASSOCIATION, Short Course, Clayton Hall, University of Delaware, Newark, Del. 19711. *Contact: Dale F. Bray, Ph.D., Bray Entomology Service, 18 South Parkway, Elkton, Md. 21921. (301) 398-3784.*

18 to 21. PACIFIC NORTHWEST PEST MANAGEMENT CONFERENCE, Tacoma Sheraton Hotel. *Contact: Jane Treleven, 6707 Sunset View N.W., Gig Harbor, Wash. 98335. (206) 857-5547.*

19 NEW YORK STATE AGRICULTURAL EXPERIMENT STATION and **CORNELL UNIVERSITY,** Pest Management and Sanitation Program, Quality Inn, Jefferson Road, Rochester, N.Y. *Contact: D.L. Downing, Cornell Universtiy—NYSAES, Geneva, N.Y. 14456. (315) 787-2273.*

B&G Company, 16th Annual Pest Control Workshop:

Dallas
January 30–31
Ramada Hotel Dallas
Houston
February 6–7
Holiday Inn Greenway
San Antonio
February 13–14
Sheraton San Antonio
Oklahoma City
February 20–21
Holiday Inn N.W.

Target Specialty Products' 15th Annual Seminar and Exhibit—"Strategies For a Changing Industry":

San Jose Convention Center
February 20, 1987
Fresno Hilton
February 20
Hyatt Regency, Phoenix
February 24
Hyatt Queen Mary, Long Beach
February 27 & 28

Legal Briefs *(Continued)*

imposes certain limitations on advertising a pesticide for a use that is authorized under an emergency exemption or a special local needs registration. While these requirements apply primarily to pesticide producers, PCOs should keep EPA's advertising policy in mind when choosing or making claims about the pesticides they use.

Larry Ebner is General Counsel to NPCA. For more information contact him at 202-789-7727.

Legal Brief

OSHA Hazard Communication Expanded

by Lawrence S. Ebner
NPCA Legal Counsel

On May 23, 1988, OSHA's Hazard Communication Standard (HCS) will be expanded to cover *all* employers whose employees are—or may be—exposed to "hazardous chemicals" under normal working conditions. This includes every pest control firm in the United States. Previously, only employers in the manufacturing sector were subject to the HCS (some states had their own laws covering non-manufacturing employers such as pest control companies). OSHA—the federal Occupational Safety and Health Administration—has estimated that the expanded HCS will cover 32 million workers and that first-year compliance costs will be $700 million.

HCS is a *worker* protection standard. It is separate from and in addition to federal, state, and local "community right-to-know" laws which may require PCOs to provide information to state or local agencies, customers, and the public. Under Title III of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), employers required by the HCS to maintain material safety data sheets (see below) must submit copies of them and an annual emergency and hazardous chemical inventory form to designated state emergency response commissions, local emergency planning committees, and to local fire departments (*See July Legal Brief*). A future Legal Brief will discuss in detail additional PCO requirements under SARA Title III.

OSHA expanded the HCS pursuant to a court order in a case brought by various labor organizations. Under the expanded HCS, pest control firms will be required to do the following:

1. *Obtain a Material Safety Data Sheet (MSDS) for each hazardous chemical to which PCOs may be exposed.* It is the responsibility of the chemical manufacturer—not the pest control company—to determine whether a particular pesticide is "hazardous" based on criteria established by OSHA. If a pesticide is considered "hazardous" (as many will be), the pesticide manufacturer must develop an MSDS which contains detailed information about the charcteristics and hazards of the chemical, safety precautions, first aid measures, etc. Chemical manufacturers and distributors were required to provide MSDSs to their non-manufacturing customers on or before September 23, 1987. Pest control companies must keep copies of the MSDSs on file so they are readily accessible to employees.

2. *Train PCOs regarding the hazards of the pesticide.* This is something that most pest control firms already do. The HCS states that training must be provided to all new employees whenever a new hazardous chemical is used. Training is to include methods for detecting accidental releases of the chemicals used, information regarding physical and health hazards of the chemicals, and measures employees can take to protect themselves. Clerical and office workers are not covered by this requirement.

3. *Label containers of any hazardous chemicals.* The HCS also requires that "containers" of hazardous chemicals in the workplace be labeled with information about the identity of the chemical. Labels must also provide appropriate hazard warnings. Containers include drums, bottles, storage tanks, etc. Pesticide containers, however, are exempt from this requirement insofar as they already are subject to FIFRA labeling requirements. Portable containers into which hazardous chemicals are transferred from labeled containers by an employee for immediate use, and certain hazardous consumer products, are also exempt from the labeling requirement. Pesticide tanks on PCOs' trucks probably are not subject to the labeling requirement, but further clarification from OSHA on this may be necessary.

4. *Develop a written hazard communication program.* On or before the May 23, 1988 effective date, every pest control firm must have on file a written program describing how the company is implementing the HCS and containing a list of every hazardous chemical used in the workplace. "Workplace" includes job sites as well as the company's headquarters.

Despite these requirements, the expanded HCS may be a blessing in disguise. This is because the standard expressly preempts state and local worker right-to-know laws covering chemical hazard communication. Many such state and local laws which have been adopted in the past few years are more stringent than the federal HCS. However, 24 states and territories currently operate OSHA-approved state occupational safety and health programs.* These states have until February 1988 to adopt state hazard communication programs comparable to the expanded

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*These states and territories are as follows: Ala., Ariz., Conn. (for state and local government employees only), Hawaii, Ind., Iowa, Ky., Md., Mich., Minn., Nev., N.M., N.Y. (for state and local government employees only), N.C., Ore., Puerto Rico, S.C., Tenn., Utah, Vt., Va., Virgin Islands, Wash., and Wyo. California is in the process of relinquishing its state plan status.

Larry Ebner is a partner at the Washington, D.C. law firm of McKenna, Conner & Cuneo. He is also Legal Counsel for NPCA. For more information, contact him at (202) 789-7727.

1987-88 NPCA Election Results

On August 31, 1987, tellers appointed by NPCA President Robert M. Russell, pursuant to Article VIII, Section 1 of the By-laws accompanied by Mr. Joe Kotwicki, principal of the certified public accounting firm of Feddeman, Lesche, and Tata, met at NCPA headquarters to receive the ballots submitted by the membership.

The ballots were taken from the post office to be counted, tallied and certified. The tellers and the firm of Feddeman, Lesche and Tate notified the NCPA Executive Vice President after certifying the results. The results of the election follow:

President
Robert W. Jenkins
ABC Pest Control
San Antonio, Texas

President-Elect
Rufus I. "Bubba" Tindol, III
Tindol Services, Inc.
Atlanta, Ga.

Secretary-Treasurer
Lawrence Musgrove
Musgrove's Pest Control
Santa Barbara, Calif.

Vice President Membership
Linden Griffin
Kalamazoo, Mich.

Vice President
Project Development Council
Phil Gregory
Gregory, The Service that Cares
Greenville, S.C.

Note: Terms of office will begin at the end of NPCA's 54th Annual Convention in Honolulu, Hawaii.

Advertiser's Index

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federal HCS. Programs in those states *can* be more stringent than the federal requirements as long as OSHA believes that they will not conflict with the federal HCS.

This is just a brief summary of the expanded HCS requirements applicable to PCOs. For more detailed information refer to the HCS itself (52 Fed. Reg. 31,852) (Aug. 25, 1987), or contact your regional OSHA or EPA office.

Legal Brief

EPA Letter Helps PCOs

by Lawrence S. Ebner
McKenna, Conner & Cuneo

A recent interpretation from the director of the U.S. Environmental Protection Agency's Office of Solid Waste helps clarify a potentially troublesome development for some pest control operators and their customers. In August 1986, an official of the Arizona Department of Health Services stated in a letter to a PCO that "the EPA and Arizona consider the presence of detectable chlordane or heptachlor in any waste or soil as evidence of a hazardous waste." This position, if correct, could effectively subject a homeowner or PCO to federal and state laws regulating disposal of hazardous wastes.

To clarify the situation, George Rambo, National Pest Control Association Director of Research, Education and Technical Resources, wrote to Marcia Williams, Director of EPA's Office of Solid Waste. OSW is responsible for administering the Resource Conservation and Recovery Act (RCRA), the principal federal hazardous waste law. Dr. Rambo explained that the letter from the Arizona official apparently involved a soil sample taken from an untreated crawl space around the foundation of a structure that had been treated with chlordane in accordance with FIFRA label directions. Dr. Rambo suggested that the low amount of chlordane detected—three ppb—could have been present in the untreated area due to vapor movement, previous treatment, etc.

On behalf of NPCA, Dr. Rambo sought EPA's confirmation that this "site"—ie., an occupied house—cannot be regarded as a "hazardous waste site." He explained that a contrary interpretation could "create millions of hazardous waste sites in individual occupied homes and apartment complexes."

Ms. Williams of EPA responded to Dr. Rambo in a letter dated March 11, 1987. She stated as follows:

> As you are aware, Subtitle C of RCRA controls the management of hazardous wastes. *The soils described in your letter are not considered hazardous wastes under the Federal hazardous waste rules* since contamination which results from normal pesticide use is not covered by the hazardous waste regulations. *(emphasis added)*

Ms. Williams did point out, however, "that states may have differing regulations which may affect this interpretation. In particular, state regulation may be more stringent than the federal hazardous waste rules."

Ms. Williams' letter is helpful to PCOs because it confirms that incidental or inadvertent "contamination" of soil resulting from proper application of termiticides is not considered generation or disposal of hazardous waste under the federal RCRA. This is true even with respect to those pesticides—such as chlordane—which are regulated as hazardous waste under RCRA when "discarded" rather than used for their intended purpose. See 40 C.F.R. § 261.33. In addition, Ms. Williams indicated that her interpretation would be no different for soils which contain levels of pesticides higher than the proposed maximum concentration limit for "leaching" toxicity. In other words, as long as the residues are present as a result of proper pesticide application, the residues are not hazardous waste under federal law.

Nothing in RCRA specifically addresses the question of whether normal pesticide application can result in generation of hazardous waste. In contrast, CERCLA (the federal "Superfund" law) expressly provides that a person cannot be held liable under the act for "any response costs or damages resulting from the application of a pesticide..." CERCLA § 107(i). The subject of Superfund and PCOs was discussed in an earlier *Legal Brief* (April 1986).

Ms. Williams, the chief federal hazardous waste official, now has confirmed that proper pesticide application cannot result in generation of hazardous waste under federal law. Thanks to the efforts of NPCA, PCOs can take comfort that adherence to FIFRA label directions apparently will provide protection against federal RCRA regulation. State hazardous waste authorities should be urged to adopt the same interpretation.

Larry Ebner is a partner at the Washington D.C. law firm of McKenna, Conner & Cuneo. He is also General Counsel for the National Pest Control Association. For more information, contact him at 202-789-7727.

Legal Brief

EPA Cancellation Procedures

by
Lawrence S. Ebner
NPCA General Counsel

Newspapers, TV and radio often present imprecise—if not misleading—information about the regulatory status of pesticides. With more and more pesticides being scrutinized by the U.S. Environmental Protection Agency, pest control operators need to understand exactly what certain EPA regulatory actions mean, and perhaps more importantly, don't mean.

Cancellation

The press is apt to report that "EPA has decided to ban pesticide X." This type of statement is highly misleading to PCOs and their customers if, for example, all EPA has done is initiate statutory proceedings which may or may not eventually lead to cancellation. Legal procedures which afford pesticide users and producers the right to challenge proposed EPA cancellation actions are usually ignored by the press or only treated as an afterthought. Press releases or "fact sheets" issued by EPA or environmental groups can sometimes exacerbate the situation by erroneously implying that initiation of cancellation proceedings is the same as a final decision to cancel.

Section 6(b) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) establishes administrative procedures which EPA must follow before cancellation of a pesticide can become effective. Typically, the EPA Assistant Administrator for Pesticides issues a "notice of intent to cancel." This notice is published in the *Federal Register* and also sent to all registrants of the pesticide. The notice may *propose* either outright cancellation or various restrictions on use (such as requiring protective equipment or limiting use to certified applicators or persons under their direct supervision).

Once the notice of intent to cancel is issued, registrants and other adversely affected parties (such as pesticide users or their trade associations) have the right to request a hearing before an Administrative Law Judge to challenge the actions proposed in the notice. If such a hearing is requested within 30 days, *the cancellation or restrictions proposed in the notice do not go into effect until after the hearing is completed.* Unless EPA suspends use of the pesticide while the hearing is being held, *PCOs are permitted to continue using the pesticide even though a notice of intent to cancel has been issued.* The hearing covers risks and benefits and can take from six months to two years to complete. Even if the Administrative Law Judge decides at the end of the hearing to approve the cancellation, EPA often will allow a phase-out period of a year or longer after the final decision is rendered.

Suspension

Under § 6(c) of FIFRA, EPA can suspend the use of the pesticide if it poses an "imminent hazard" while the hearing on the notice of intent to cancel is being held. But even under those circumstances, suspension does not immediately take effect. The Assistant Administrator first must issue a "notice of intent to suspend." Registrants then have five days to request a hearing to challenge the proposed suspension. The suspension hearing (which precedes the cancellation hearing) is supposed to be "expedited," but often takes six months or longer to complete. Unless an "emergency order" is issued, *the pesticide can lawfully be used* while the suspension hearing (which addresses risks only) is being conducted. Pesticide users or their trade associations are permitted to participate in most suspension hearings.

Section 6(c)(3) of FIFRA authorizes the Administrator to issue an order unilaterally and immediately suspending use of a pesticide if he determines that an "emergency exists." This has only happened three times in the 17-year history of EPA. Use of the pesticide is prohibited while suspension and cancellation proceedings are being conducted *only* if such a rare emergency order is issued.

Special Review

In most cases, EPA will comprehensively review the risks and benefits of a pesticide before deciding whether to issue a notice of intent to cancel or suspend. This is known as "Special Review" (formerly RPAR or "Rebuttable Presumption Against Registration"). Special Review is a relatively informal process in which pesticide producers and users and other interested parties can submit written information on risks and benefits to the Office of Pesticide Pro-

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grams for consideration. The Special Review often takes two years or longer (in some instances, eight years). Dozens of pesticides have undergone or are currently in the Special Review process. *Special Review in no way represents or implies a decision to cancel or suspend a pesticide.* Applicators can continue using the pesticide while the Special Review is being conducted.

In reading this "Legal Brief," PCOs should keep in mind that state agencies also have authority to take action against pesticides. Even if use is permitted under FIFRA, states can prohibit use of a pesticide on a more accelerated basis.

The next time you read or hear about a pesticide being cancelled or suspended by EPA, check the facts before taking any action of your own.

Larry Ebner is a partner at the Washington, D.C. law firm of McKenna, Conner & Cuneo. He is also General Counsel for the National Pest Control Association. For more information, contact him at 202-789-7727.

Advertiser's Index

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Salesman Wanted

Wanted salesman, Philadelphia area, health-care commercial-industrial. Starting salary $25,000 plus commission, plus benefits, plus car. Send resume to: Universal Pest Control, P.O. Box 383, Ardmore, Pa. 19003.

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Let's talk privately about selling or buying a pest control business in Florida, Georgia or South Carolina. A+ Business Brokers in Fla., call (904) 454-3333 or 1-800-542-0515.

Help Wanted

Experienced Supervisors that want to become managers needed for growth and service oriented company. Located in Piedmont North Carolina (5 hours from coast, 2 hours from mountains). Salary plus incentive, health benefits, profit sharing retirement plan, plus car. All replies strictly confidential. Send resume to: Hugh Wilson, Wilson Pest Control Co., Inc., P.O. Box 1538, Winston-Salem, N.C., 27102.

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Experienced sales or sales manager for midwest company. Top draw, excellent commission. Sell commercial, industrial. Please send reply to *Pest Management* (S), 8100 Oak Street, Dunn Loring, Va., 22027.

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Are you people oriented? In sales or service? We are growing and need top-notch people. Send resume to Dan Everts, 451 East 38th, Indianapolis, Ind. 46205.

Products for Sale

Complete fumigation supplies, featuring exclusive "RIP STOP" tarps for structural fumigation. Michelin Canvas Products, Inc., 3386 N.W. 78 Ave., Miami, Florida 33122. Wats: 800-432-1243. Outside Florida, please call 800-327-1548.

Business Opportunity:

Florida PCOs and Salespeople specializing in bird control to facilitate quality leads for HOT FOOT, a non-toxic bird repellent with a 2 year guarantee. Mail resume to: BIRDBUSTERS of FLORIDA, 4706 West South Ave., Tampa, Fla. 33614, or call Jack Wagner (703) 821-2892.

Career Opportunity

Seeking experienced termite supervisor that is capable of hiring and training crews in tent fumigation and subterranean termite control. Must have a minimum Florida Special I.D. Card, or be a certified fumigation operator. Excellent opportunity for management and advancement with one of the largest and fastest growing companies in beautiful Naples, Fla. Contact Debbie Gogan, Truly Nolen Pest Control, 3986 Domestic, Naples, Fla. 33942, (813) 643-2555.

Practical Pest Control Professional

MS Entomology—seeks an opportunity where his experience and skills could contribute to an organization's short and long term objectives. Competent in pest control and termite procedures. Past technical director for large PCO; later owner. Winding up extensive overseas work in country-wide malaria control programs at the end of September 1987. Will consider offers from any area in the USA. Contact Robert L. Turner, Dares Salaam (ID), Washington, D.C. 20520.

Immediate Openings

Experienced pest control technicians, supervisors, managers—nationwide retailer expanding into pest control markets in six southeastern states. Minimum two years experience, some college and license preferred. Excellent growth opportunity. Send resume to *Pest Management* (IO), 8100 Oak St., Dunn Loring, Va. 22027.

Next Month:

Just ahead in the September issue of *Pest Management*, you'll find:

- **1987 Trade Show Preview**
- **Claims Management: A Small Investment With Big Returns**
- **The Increasing Need for More Urban Pest Control Research**
- **Report on Insecticide Resistance in German Cockroaches**

Legal Brief

Community Right-To-Know and PCOs

by Robert A. Matthews
McKenna, Conner & Cuneo

An analysis of the new Emergency Planning and Community Right-to-Know Act of 1986—Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA)—indicates that for pest control operators the news is almost all good. PCOs are *not* subject to the more onerous provisions of Title III, found in Subtitle B, but they must comply with the Emergency Planning and Notification provisions of Subtitle A.

Title III of SARA creates many new programs to be administered by the U.S. Environmental Protection Agency and by state and local governments, and imposes significant requirements on regulated facilities. The goal of these programs and requirements is to provide the public with information concerning hazardous chemicals used or manufactured at facilities in their communities, and to develop emergency plans to be implemented in the event of a major release of hazardous chemicals.

The heart of the Title III provisions are found in Subtitle B, Sections 311, 312 and 313. Together, these sections require the preparation and submission of what can be voluminous and detailed information concerning hazardous and toxic chemicals used, stored or released at a facility.

Fortunately for PCOs, the requirements of §§ 311, 312 and 313 are applicable only to facilities which fall within SIC codes 20 through 39. Since PCOs do not fall within these SIC Codes, they are not currently subject to these provisions. (*Note: the applicable SIC Code lists may be expanded in the future.*)

Requirements for PCOs

PCOs potentially are subject to Subtitle A, including the various reporting requirements of Sections 302, 303 and 304. To determine whether a facility is subject to Sections 302 and 303 requires a two-step analysis. First, one or more of the designated "extremely hazardous substances" must be present at the facility. EPA published a final list of over 400 designated substances in the April 22, 1987 *Federal Register* (52 Fed. Reg. 13378).

Second, the extremely hazardous substance must be present in an amount in excess of the "threshold planning quantity" (TPQ). Facilities not meeting these dual criteria are not subject to Sections 302 and 303. (*Note: both the list of extremely hazardous substances and the TPQs are subject to change by EPA. See accompanying table.*)

The first requirement for a subject facility is to notify the designated state authority. The bad news for PCOs who are learning this for the first time is that these notifications were required no later than May 17, 1987. The good news for these PCOs is that it is not too late to overcome their oversight. For whatever reasons, Congress chose not to make the initial failure to provide a timely notification under Section 302 subject to either civil or criminal penalties. Such penalties may be asssessed only after a facility has violated an order issued by EPA to comply with the notification requirement. PCOs who now realize that they are in this position should take advantage of this grace period by proceeding to prepare and submit the proper notification. See *Editor's Note* at end of article.

The next Subtitle A requirement imposed on subject facilities is found in Section 303 (d), which requires facility owners to designate a representative to work with local authorities in developing an emergency plan for use during releases of extremely hazardous substances. The facility representative must be identified by September 17, 1987, or within 30 days prior to this date if a local emergency planning committee is formally established. This requirement also enjoys the benefit of a statutory grace period, so affected PCOs should proceed to designate their facility representative.

The final and most significant requirements created by Subtitle A are the emergency notification provisions found in Section 304. Pursuant to Section 304, a release of an extremely hazardous substance which exceeds its reportable quantity (RQ) must be reported immediately to the designated state and local authorities. These new reporting requirements complement Superfund's existing release reporting requirements, including the vague but potentially significant exemptions for continuous and federally permitted releases. However, unlike Superfund, Section 304 releases need be reported *only if* the substances escape outside the plant boundaries. In addition, releases from affected facilities of Superfund substances not on the list of Section 302 substances must now be reported to state and local authorities.

The emergency release reporting requirements contain many exceptions and complications. As a result PCOs are well advised to pay closer attention to these requirements, to establish closer ties with the appropriate local authorities and to consider

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a policy of increased information sharing with these authorities and with potentially affected citizens.

Extremely Hazardous Substances

The following pesticides used by PCOs are taken from the list published in the April 22, 1987 *Federal Register*.

Chemical Name	Reportable Quantity (pounds)	Threshold Planning Quantity (pounds)
Aldrin	1	500/10,000
Aluminum Phosphide	100	500
ANTU	100	500/10,000
Bromadiolone	1	100/10,000
Chlordane	1	1,000
Dichlorvos	10	1,000
Endrin	1	500/10,000
Ethylene Oxide	1	1,000
Lindane	1	1,000/10,000
Methyl Bromide	1,000	1,000
Pentachlorophenol	10	10,000
Warfarin	100	500/10,000
Zinc Phosphide	100	500

Note: The lower of the two threshold planning quantities would normally apply to requirements of manufacturers or formulators. The higher quantities would apply to PCOs (i.e. 10,000 lbs.).

Pest control companies and pesticide distributors which store *more than* the "threshold quantity" of these pesticides must report to their governor or state emergency planning commission. At this time, you need only identify the *location* where the pesticide is present in excess of the threshold quantity, and give the name and addresss of your facility. If you need to know the phone number in your state, you can find out through the U.S. Environmental Protection Agency's hotline, (800) 535-0202.

Editor's Note: Information on Section 302 of SARA, including the table of pesticides printed here, was sent to all NPCA member companies in a "Regulatory Alert" in the May membership mailing.

For more information, call Bob Matthews or Larry Ebner at (202) 789-7500, or NPCA at (800) 782-6722.

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Let's talk privately about selling or buying a pest control business in Florida, Georgia or South Carolina. A+ Business Brokers in Fla., call (904) 454-3333 or 1-800-542-0515.

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Experienced Supervisors that want to become managers needed for growth and service oriented company. Located in Piedmont North Carolina (5 hours from coast, 2 hours from mountains). Salary plus incentive, health benefits, profit sharing retirement plan, plus car. All replies strictly confidential. Send resume to: Hugh Wilson, Wilson Pest Control Co., Inc., P.O. Box 1538, Winston-Salem, N.C., 27102.

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Experienced sales or sales manager for midwest company. Top draw, excellent commission. Sell commercial, industrial. Please send reply to P.O. Box 377, NPCA, 8100 Oak Street, Dunn Loring, Va., 22027.

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Legal Brief

State Environmental Cleanup Responsibility Acts: A Breakthrough or a Barrier?

By
Lawrence S. Ebner
Carole Stern
McKenna, Conner & Cuneo

If you are thinking about buying, selling, leasing or closing a pesticide manufacturing or wholesaling establishment in a state like New Jersey, which has an Environmental Cleanup Responsibility Act (ECRA), think again. Under ECRA, the Department of Environmental Protection, or the party purchasing or renting the business or real property, can void the transaction if the owner or operator fails to meet certain environmental cleanup requirements imposed by the Act.

While ECRA currently does not apply directly to pest control firms, its impact may be felt through higher pesticide costs brought about by compliance with the Act by manufacturers and wholesalers. The same, or even greater, effects may soon be felt by pest control operators in other states which plan to follow New Jersey's lead in requiring pre-transaction cleanups.

ECRA, which became effective on December 31, 1983, requires the owners or operators of industrial establishments with environmental contamination caused by hazardous substances or wastes to clean up their property as a precondition to closure, sale or transfer. The law only applies to owners or operators of businesses within certain standard industrial classifications, including manufacturing and wholesale operations for chemicals such as pesticides. ECRA imposes certain pre-transaction obligations on the owners or operators of these businesses if they have generated, manufactured, refined, transported, treated, stored, handled or disposed of certain hazardous substances and wastes including pesticides regulated by the state. Following an inspection and evaluation procedure undertaken by the Department of Environmental Protection prior to consummation of the transaction, the owner or operator must submit either (1) a declaration that there is no hazardous substance contamination on the site or (2) a detailed cleanup plan accompanied by financial security assuring the performance of the cleanup.

ECRA has been described as both a breakthrough in environmental regulation and a barrier to corporate and real estate transactions. ECRA's use of the "void transaction" remedy in addition to substantial penalties gives rise to its description as a radical, new approach to environmental control. Its characterization as an obstacle to conduct of commerce, on the other hand, derives from an analysis of the scope of transactions which it affects.

ECRA comes into play not only upon the final sale or shutdown of a facility, but also in a broad range of other transactions affecting property interests. Its provisions must be considered upon any conveyance of real property on which an industrial establishment is located, the sale of the assets or controlling stock of the business, the transfer or dissolution of a corporate identity, a financial reorganization, the initiation of bankruptcy proceedings, the exercise of an option to buy, or a foreclosure sale. Leasing transactions are also subject to ECRA. The pre-transaction cleanup requirements may be triggered by the closure of operations leasing a location, a landlord's sale of title to real property even though the industrial establishment is continuing to operate on the leased premises, or initiation of a new leasing arrangement. ECRA cannot be circumvented by agreement between the parties that the transferee need not conduct a cleanup.

The costs of complying with ECRA may be great, but the risks of noncompliance are greater. Both can be limited with careful planning. Landlords should draft lease terms to require tenants to comply with the Act upon closure of their operations. Sellers of the stock or assets of a business should carefully assess the costs of ECRA compliance before finalizing the terms of the transaction. They should also complete compliance with ECRA before the transfer (or negotiate an administrative consent order with the state) in order to avoid a challenge to the transaction that may be raised on ECRA grounds if the buyer ultimately determines that the transaction is no longer financially attractive. Purchasers, while not required to conduct the cleanup, should monitor sellers' compliance with ECRA so as to assure that its terms have been met and the transaction is not subject to challenge by the state. Companies entering into mergers should conduct pre-transaction planning and cleanup to avoid challenge to the transaction by the state.

Undoubtedly, these precautions will add time and expense to the completion of many business transactions. Nonetheless, until the many questions concerning the scope and effect of ECRA are resolved through litigation, chemical manufacturers

(Continued on Page 38)

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Legal Brief

(*Continued from Page 26*)

and wholesalers in states which have ECRA laws are well advised to plan for compliance, rather than risk the consequences of entering into corporate or real estate transactions which may later be undone. Further, and perhaps more importantly, the progress of similar legislation in other states should be closely monitored to ensure that ECRA-type requirements are not imposed on even broader categories of real estate and business transactions such as those affecting pest control firms or their customers directly.

For more information contact Larry Ebner, who is NPCA's General Counsel, or his associate, Carole Stern, at (202) 789-7500.

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Just ahead in the May edition of *Pest Management*, you'll find features on:

- **The Future of Pest Control**
  Pest Management *asks industry leaders what changes they forsee in pest control technology, products, and certification requirements.*
- **Insecticide Discoloration of Nylon Carpet Dyes (Part I)**
  It is important that pest control operators select, when possible, insecticide products that have the least potential for causing dye discoloration.
- **Small Engine Maintenance**
  In many cases, small engine maintenance programs fail to pay off because owners or supervisors do know enough about their equipment.
- **How To Dress for Safety**
  Clothing worn when applying pesticides, if selected carefully, can offer optimal protection and minimize the risk of pesticide poisoning.

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NPCA Argues Against Local Rules

On September 29, 1986, a federal judge in Baltimore ruled that FIFRA, the federal pesticide law, preempts local jurisdictions from regulating the sale or use of pesticides (See "Government Affairs, Page 9, November/December Pest Management.*) The defendants in the case, Prince George's and Montgomery Counties, Md., have filed an appeal with the U.S. Court of Appeals in Richmond, Va. Because of the national significance of this case, the National Pest Control Association has filed a "friend of the court" (amicus curiae) brief explaining why local regulation of pesticides is detrimental to the pest control industry and the public. The brief was written by NPCA's General Counsel, Larry Ebner, who is a partner in the Washington, D.C. law firm of McKenna, Conner & Cuneo. He was assisted by several members of NPCA's staff. The full text of the brief follows.*

Having obtained the written consent of all parties, the National Pest Control Association (NPCA) is submitting this brief as *amicus curiae*. The brief supports the position of the appellees that federal law preempts counties, cities, townships, and other political subdivisions within a state from regulating the sale and use of pesticides.

Interest and Position of the Amicus

NPCA is the national non-profit association of structural, general household, industrial, and institutional pest control companies. The Association's principal purpose is to promote safe and effective pest control through technical research, applicator training, and public education. The educational and training materials produced by NPCA are internationally acclaimed. They are widely referenced and recommended by federal and state regulatory agencies for training of commercial pest control operators (PCOs).

NPCA's 2,400 member companies have a direct interest in the outcome of this critically important case. The district court unequivocally held that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempts local regulation of pesticides. Unless the Court of Appeals affirms this ruling, the ability of PCOs to protect public health and safety will be severely impaired by a multiplicity of conflicting, unwarranted and onerous local regulations.

PCOs protect the public from pernicious infestations of termites, insects, vermin and other pests which carry dangerous disease vectors or threaten the structural integrity of private dwellings, schools, hospitals, office buildings, factories, and commercial establishments. To perform their job competently, PCOs must be able to rely upon their own training and experience and act expeditiously when confronted with a serious pest control problem. Local regulation of commercial pest control activities would make this impossible by imposing upon PCOs a maze of unnecessary, burdensome, confusing, and deleterious restrictions and requirements.

NPCA concurs with the district court's opinion that local regulation is preempted, and defers to the legal points and authorities ably presented by the appellees, the Maryland Pest Control Association and the Maryland Alliance for the Responsible Regulation of Pesticides. Rather than repeat those arguments, the purpose of this *amicus* brief is to explain to the Court the substantial adverse impact local authority to regulate pesticides would have on public health and safety and the pest control industry throughout the United States.[1]

Argument

Local regulation of pesticides would jeopardize public health and safety by interfering with essential pest control operations.

Most pest control firms are small businesses. They must operate in more than one local jurisdiction (in urban and suburban areas) or county (in rural regions) to survive. The activities of these pest control firms already are pervasively regulated by the U.S. Environmental Protection Agency (EPA) and regulatory agencies in every state pursuant to FIFRA and state pesticide laws.

There are 40,000 political subdivisions below the state level in the United States.[2] If each had the authority to adopt its own rules for pesticide use, the practical and financial burdens on pest control firms would be enormous. The tremendous cost of complying with multiple and differing local regulations would have to be passed on to pest control customers. As a result, professional pest control would become unavailable to those who can least afford to live without it. Untrained individuals would have to endanger themselves and others by attempting on their own to apply pesticides which could be harmful if used improperly.

1 NPCA wishes to call to the Court's attention that both the Association of American Pest Control Officials (AAPCO) and the National Association of State Departments of Agriculture (NASDA) have adopted resolutions strongly opposing the regulation of pesticides below the state level. These organizations are comprised of government officials who are experts in enforcement of pesticide use regulations.

2 Source: U.S. Bureau of the Census, Statistical Abstract of the United States (1986), p. 285. This figure does not include overlapping local governmental entities such as school, housing, or environmental control districts. According to the Statistical Abstract, the total number of local governments in the United States is over 80,000. A single dwelling or other building requiring pest control may be subject to several local governmental entities (e.g., an environmental control district, a municipal government, and a county government).

Even for those who still could afford professional pest control, local regulation would substantially interfere with the PCO's ability to render prompt, necessary service. Lack of availability of pest control would endanger human health, public safety, and even the food supply.

The areas where structural pest infestations are most heavily concentrated are the same as those which have the highest population densities. These in turn are the areas of the United States with the largest number of political subdivisions. As a result, the adverse impact of local regulation would be the greatest where structural pest control is needed the most.

The case at bar arose from county ordinances requiring posting of pesticide application notices. Local regulation of pesticides, however, could take numerous additional forms. Aside from the high probability that neighboring municipalities or counties would adopt inconsistent or conflicting requirements, each potential form of local regulation would pose its own special problems for PCOs and their customers. The following examples are only by way of illustration:

1. Local Bans or Restrictions on the Use of Pesticides

Most local jurisdictions lack the sophisticated scientific and technical resources and expertise needed to make informed judgments about the use or conditions for use of pesticides. Because they are ill-equipped to decide whether a use of a particular pesticide should be banned or restricted, local governments could be susceptible to political pressures or emotionalism and unjustifiably deprive their constituents of essential pest control.

In accordance with the requirements of FIFRA, all of the pesticides used by PCOs have undergone intensive scrutiny by EPA to ensure that they can be applied safely and perform their intended function without causing "unreasonable adverse effects" on man or the environment. FIFRA § 3(c) (5), 7 U.S.C. § 136a(c) (5). EPA's cadres of scientists analyze comprehensive information and data on a pesticide's toxicology, environmental effects, use patterns, etc. before the Agency permits the pesticide to be registered for use under FIFRA. The EPA-approved label or labeling which accompanies the pesticide prescribes in detail the exact methods of application and the numerous safety precautions that PCOs must follow in using or handling the pesticide. Moreover, every state has authority under FIFRA to further restrict or even ban the use of a federally registered pesticide. *See* FIFRA § 24(a), 7 U.S.C. § 136v(a). Pursuant to this authority, all states have established their own pesticide registration programs, and many have promulgated pesticide use regulations, particularly for structural termite control, which impose safety measures in addition to those mandated by EPA.

Locally enacted bans on use of federally and state registered pesticides would obstruct the delivery of professional pest control services. Like physicians who need access to a wide variety of pharmaceuticals, PCOs rely upon an array of pesticides, only one of which may be suitable to treat a specific problem. Limiting a PCO's ability to utilize the pesticide of choice would force him to use a less effective alternative (if available). This in turn could necessitate an increased number of treatments, as well as result in higher pest control costs to the customer. It also could subject the customer to prolonged pest-caused risks to health or property. Thus, damage would be more severe and the ultimate costs to the customer even higher.

Local restrictions on when or where pesticides can be applied would be detrimental also. For example, a local prohibition against applying a pesticide in office buildings during business hours would create serious problems. To comply with such a rule, a pest control firm might have to hire and train a night shift and pass the cost on to the customer. The building guard, however, may be unable or unwilling to open offices to PCOs during "off hours" as would be required. Furthermore, off-hour applications would interfere with effective pest management if the PCO could not communicate on-site and directly with office occupants. To be fully informed, the PCO must have the opportunity to ask questions about tl precise nature and location of the pe problem. This type of communicatic is even more critical in buildings wi food handling establishments, or hospitals, where disease-carryi pests must be continually controll so that health standards can be m Finally, there are many types of pe control emergencies which can ari during the day and require immec ate service (for example, attacks l rats or wasps, or flea infestations). local regulation requiring that app cations be made only at night wou make it impossible for the PCO lawfully abate such an urgent heal threat.[3]

2. Local Preapplication Notification Requirements

Many of the same probler would be caused by local regulatio requiring posting of dwellings or pu lic buildings for a specified period time (e.g., 24 hours) prior to tre ment. The PCO's hands would tied if immediate service were neede In addition, the extra trip to post t customer's residence or buildi would increase application costs a could delay service well beyond e piration of the posting period due the routing system which most pe control firms must use to opera efficiently.[4]

In an urban environment, prea plication notification requiremer imposed by local authorities could even more difficult, time-consumir and costly to implement. If a lo regulation required notification of persons residing within a specifi distance from the proposed site of a plication, notification of hundreds thousands) of persons residing in multi-family dwelling or on an ent city block could be required. Were single person to object to the app cation, it could be delayed further prohibited altogether if the regulati

3 *NPCA recognizes that exceptional circumstances occasionally warrant eliminating a certain pesticid completely or between certain hours in a partic county or municipality. The lack of local authori regulate pesticides would not prevent the state pest regulatory agency from imposing such a restrictio the request of the county or municipality as long a state's actions were consistent with the need to pr public health and safety from harmful pest infestati*

4 *The record contains testimony on these prac difficulties. See J.A. at 132-35.*

so provided. Again, the party needing prompt and effective pest control would be the victim of local regulation.

3. Local Testing and Data Requirements

Before a pesticide can be registered under FIFRA, the manufacturer must conduct and submit to EPA numerous categories of tests covering toxicology, applicator and bystander exposure, environmental fate, and many other subjects. *See* 40 C.F.R. pt. 158. Once the pesticide has been registered, EPA can and often does require submission of updated or additional data. *See* FIFRA §3(c)(2)(B), 7 U.S.C. § 136a(c)(2)(B). This information is utilized by EPA to ensure that label directions and safety precautions are current and reflect the latest pesticide application technology. Furthermore, many states require manufacturers to submit to state agencies data beyond those required by EPA. States utilize such data in connection with their own pesticide registration and enforcement programs.

In view of the foregoing, local requirements for testing of pesticides would be superfluous at best. Not only would testing be unnecessary, most local jurisdictions would be incapable of intelligently analyzing complex scientific data and assessing their significance. Those are tasks which are and should be left to EPA and state regulatory agencies.

Toxicology and other pesticide studies cost millions of dollars to conduct. Local requirements for testing would increase these costs, and pesticide suppliers would have to pass off such costs to PCOs in the form of price increases (PCOs themselves would be incapable of conducting or paying for studies on the pesticides they purchase). Because of the substantial cost and competitive value of pesticide data, EPA has elaborate procedures in place for protecting trade secret or other confidential or proprietary information. *See* FIFRA §10, 7 U.S.C. §136h. State agencies are just beginning to adopt similar controls, which are essential if chemical companies are to have sufficient incentives for engaging in financially risky and expensive pesticide research to develop safer and more effective new products. Having to submit proprietary pesticide data to tens of thousands of local jurisdictions would destroy the value of the data and remove incentives for new product innovation.

4. Local Certification and Training Requirements

Certification and training of commercial pesticide applicators already is regulated by stringent state programs coordinated with EPA in accordance with FIFRA. *See* FIFRA §§ 4 and 23, 7 U.S.C. §§ 136b and 136u. Local authority to impose additional certification or training requirements would add an unnecessary layer of multiple and conflicting burdens on PCOs. Logistical problems regarding assignment of particular PCO personnel "qualified" to handle jobs in particular local jurisdictions would assume nightmarish proportions. The substantial time PCOs would have to devote to meeting each local jurisdiction's training programs and requirements would detract from time available for pest control services. Again, the public would suffer. Furthermore, the need to comply with varying local certification and training requirements would cause smaller pest control firms to cut back on personnel and geographic areas served. That would reduce both competition and the availability of competent pest control.

5. Local Recordkeeping Requirements

Most states require commercial pest control firms to maintain extensive records of application activities. At a minimum, these records include the date and location of each application, the name of the applicator, the target pest, and the identity and concentration or amount of the pesticide used. Some states also require information on the time of day, type of equipment used, and nature or content of customer or public notice. These records must be made available to state pesticide enforcement officials in case of a complaint against the PCO. They also can be reviewed by local officials upon request.

It would be impractical for a PCO to have to generate multiple versions of records with varying categories of information depending on the locality of an application. There is no justification for local governments to impose such a paperwork burden on the pest control industry. If a local jurisdiction believes that certain additional information should be maintained by PCOs, it can request the state regulatory agency to expand its recordkeeping requirements. Then all jurisdictions within the state would have access to the same types of information.

6. Local Enforcement of Pesticide Regulations

FIFRA makes it unlawful to use a pesticide "in a manner inconsistent with its labeling." FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G). States have the primary enforcement responsibility for pesticide use violations, subject to oversight by EPA. *See* FIFRA §§ 26 and 27, 7 U.S.C. §§136w-1 and 136w-2. In addition, state agencies have the authority to enforce their own pesticide use regulations.

Empowering local officials to enforce federal pesticide use requirements would impair the entire federal-state cooperative program established by FIFRA. There would be a jumble of varying local enforcement procedures rather than a uniform, state-wide policy. PCOs could be confronted with situations in which the identical practice or procedure is considered consistent with federal requirements by one local jurisdiction and unlawful by another. This and similar problems would affect the overall quality of pesticide enforcement.[5]

Conclusion

The foregoing examples of adverse impacts illustrate why Congress deliberately preempted local jurisdictions from regulating pesticides. The district court recognized that both FIFRA and its legislative history are clear on this point. The Court of Appeals should give full force and effect to congressional intent by affirming the district court's decision.

5 *One additional cost of local regulation would be the burden on taxpayers of hiring and training local officials to enforce local requirements.*

Legal Brief

Defenses Against Continuing Trespass

By
Lawrence S. Ebner
Risa H. Rahinsky
McKenna, Conner & Cuneo

"Continuing trespass" is a wrongful interference to property rights which gives rise to a continuous injury. Because the injury continually recurs, there is no statute of limitations (i.e., time limit) within which to file suit. Cases which have found continuing trespass include a continual settling of fluorides from an aluminum production plant, and a continual emission of lead particulates and sulfoxide from a smelter. Although continuing "chemical" trespass cases involving pesticides are rare, pest control operators should be aware of the possible defenses.

First, PCOs can argue that suits alleging misapplication of pesticides should be subject to the statute of limitations for negligence (typically three years). The statute of limitations is established by the state legislature. It enables PCOs and other potential defendants to conduct their business and personal affairs without fear of unexpected liability from "ancient" activity. The policy underlying the statute of limitations would be meaningless if it could be circumvented simply by alleging that misapplication of pesticides constitutes continuing trespass.

Second, PCOs can argue that the presence of residues or air levels following a pesticide application does not represent a continuing trespass. PCOs should explain to the court that residues can occur as a result of the pesticide application process. The presence of the pesticide in the soil or on the target area will prolong efficacy and thereby make treatments cost effective. Fewer treatments mean less potential exposure for customers.

This leads to a third possible defense: consent by the homeowner to the "entry" upon his premises. Consent is an absolute defense to an allegation of trespass; if there was consent, there can be no trespass. By consenting to the applicaton of a pesticide, a customer necessarily consents to the presence ("entry upon his premises") of residues or air levels following treatment. Since there is consent to the presence of the pesticide, there can be no trespass (or continuing trespass) resulting from residues or air levels.

A fourth defense is that adherence to label directions creates a strong (if not irrebuttable) presumption of proper application. Under FIFRA, the federal pesticide law, Environmental Protection Agency-approved label directions are deemed adequate to ensure that use of the pesticide will not cause "unreasonable adverse effects" to man or the environment. Thus, PCOs can argue that the burden is on the homeowner to prove "misuse" if label directions and precautions have been followed by the PCO.

Finally, there are several public policy arguments against continuing trespass suits for alleged misapplication of pesticides. For example, because of the serious threat to human health and property posed by structural pests, there is a critical need for professional pest control. Safe, effective application of pesticides in homes and other buildings requires the services of experienced, trained professionals.

The possibility of continual potential liability due to the theory of continuing trespass would be a strong disincentive for PCOs. Firms would have to refuse high-risk jobs. Furthermore, liability insurance to meet state requirements and business needs would become too costly for many pest control firms. As a result, some firms may not be able to afford to stay in business. Moreover, the cost of available pest control services could rise dramatically because of the severe liability risks.

All of these factors could make professional pest control out of reach for many homeowners, businesses, and institutions. Consequently, untrained individuals may attempt to treat their own homes or property. This would pose health and safety risks not only to themselves, but to the public and environment as well.

NPCA recently planned to file an amicus curiae ("friend of the court") brief in a continuing trespass case in New York to raise these important industry-wide issues. The case was an appeal from a lower court's decision allowing a homeowner to pursue a continuing trespass suit for the alleged misapplication of a pesticide even though the three-year statute of limitations for negligence had expired. The defendant pest control firm and chemical supplier withdrew their appeals, however, following enactment of a New York statute reviving certain suits that were previously barred by the statute of limitations. As a result, NPCA lost the opportunity to file its brief.

There are many defenses available to PCOs confronted with continuing trespass or other "toxic tort" suits. PCOs need not feel alone. The law is on their side.

For more information contact Larry Ebner, who is NPCA's General Counsel, or his associate, Risa Rahinsky, at (202) 789-7500.

Legal Briefs

EPA's Expanded Rules For Disposal Of Pesticide Containers

by
Lawrence S. Ebner
McKenna, Conner & Cuneo

PCOs often ask about the federal regulations for disposal of empty pesticide containers. In recent months, the Environmental Protection Agency (EPA) has made compliance easier by requiring virtually all pesticide registrants to place uniform disposal instructions on their product labels, depending upon the type of container involved.

Back in 1972, Congress gave EPA authority under FIFRA, the federal pesticide law, to establish procedures and regulations for storage and disposal of pesticides and their containers [FIFRA § 19(a)]. Pursuant to that authority, EPA issued recommended procedures for disposal of various types of depleted containers. For example, EPA recommended that metal drums which had contained organic pesticides be triple-rinsed and then either: returned in good condition to the pesticide manufacturer, formulator or drum reconditioner; punctured and recycled as scrap metal; or crushed and disposed of by burial in a sanitary landfill [40 C.F.R. § 165.9(b)]. Those recommendations are still on the books, but now have been strengthened with formal label instructions, which PCOs must follow to avoid liability for using a pesticide "in a manner inconsistent with its labeling" [FIFRA § 12(a) (2) (G)].

EPA's Office of Pesticide Programs was prompted to establish a uniform set of pesticide container disposal requirements as a result of increasing agency regulatory activity under the Resource Conservation and Recovery Act (RCRA). Congress enacted RCRA in 1976 to govern disposal of solid and other hazardous wastes. EPA felt that older pesticide products included disposal statements (especially for disposal of pesticide wastes) which were inadequate or inconsistent with regulations issued under RCRA. With respect to pesticide containers, the Office of Pesticide Programs wanted to establish uniform requirements to ensure that drums and other types of containers could be reused or disposed of *without* being regulated as hazardous waste under RCRA.

Mr. Ebner is a Partner at McKenna, Conner & Cuneo. He specializes in environmental regulation and litigation.

To accomplish this goal, in March 1983 the Office of Pesticide Programs (through its Registration Division) notified all manufacturers, formulators and registrants of pesticides that the labels of their products would have to be amended to include updated storage and disposal statements. This notification ("PR Notice 83-3") was made under the FIFRA Label Improvement Program, which EPA established in 1980 as an across-the-board means of modernizing and improving various categories of pesticide labels. (In a November 1981 notice issued under the Label Improvement Program, the agency "upgraded" labels for many termiticides, including the addition of the same container disposal statements now being specified for all pesticides.)

PR Notice 83-3 describes required label language for storage and disposal of pesticides as well as disposal of containers. It became effective on December 31, 1984, except for household/domestic use products, whose labels have to be amended before December 31, 1985. In addition, virtually identical requirements for pesticide container disposal have been included in a comprehensive set of proposed revised pesticide label regulations (see proposed § 156.70). These proposed regulations were published in the *Federal Register* on September 26, 1984 (49 Fed. Reg. 37,960), and EPA hopes to issue them in final form prior to the end of 1985.

Under these requirements, all products (other than those intended exclusively for household use) must bear one of the following container disposal instructions, based on container type:

Metal containers (non-aerosol)
Triple rinse (or equivalent). Then offer for recycling or reconditioning, or puncture and dispose of in a sanitary landfill, or by other procedures approved by state and local authorities.

Plastic containers
Triple rinse (or equivalent). Then offer for recycling or reconditioning, or puncture and dispose of in a sanitary landfill, or incineration, or, if allowed by state and local authorities, by burning. If burned, stay out of smoke.

Glass containers
Triple rinse (or equivalent). Then dispose of in a sanitary landfill or by other approved state and local procedures.

Fiber drums with liners
Completely empty liner by shaking and tapping sides and bottom to loosen clinging particles. Empty residue into applica-

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Legal Briefs

tion equipment. Then dispose of liner in a sanitary landfill or by incineration if allowed by state and local authorities. If drum is contaminated and cannot be reused, dispose of in the same manner. [Manufacturer may replace this phrase with one indicating whether and how fiber drum may be reused.]

Paper and plastic bags
Completely empty bag into application equipment. Then dispose of empty bag in a sanitary landfill or by incineration, or, if allowed by state and local authorities, by burning. If burned, stay out of smoke.

Compressed gas cylinders
Return empty cylinder for reuse (or similar wording).

Despite the foregoing, alternative statements based on data, or on special packaging types or product characteristics, may appear on labeling with the approval of EPA. Thus, while it still is necessary to read the label to verify specific directions, PCOs will now have clear and generally uniform federal guidelines to follow when disposing of their empty containers. Of course, state regulations may impose additional requirements. ■

Pest Quest hidden sentence:
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Must be willing to relocate to the suburban Boston area of Massachusetts. Call collect, Mr. Aaron Fleischer, at 617-329-7000, X 305.

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Wish to purchase a small pest control company in the Philadelphia suburbs, for expansion purposes. Location and staff more important than contracts. Address all replies to: Universal-Sentinel, Inc., P.O. Box 383, Ardmore, Pa. 19003.

Service Manager
NYC Metro area. Certified, skilled in: routing, customer relations, personnel management. Benefits, company car. Send resume c/o NPCA, 8100 Oak St., Dunn Loring, Va. 22027.

Termite Control Operations Supervisor
Established north Florida company is looking for the right person to supervise and direct their termite control operations. Must have state certification, proven experience, and ability to train and supervise others. This is primarily a field position. Top pay, benefits and relocation. All replies confidential. Send resume and salary requirements to Personnel Manager, P.O. Box 13768, Tallahassee, Fla. 32317.

Next Month . . .

The June edition of *Pest Management* features:

- **Advice for the "Nincompute"**
  PCOs who know little about computers will appreciate this seven-step guide to computer literacy.
- **Guidelines for a Computer System Contract**
- **Good News for Fumigators**
  This article addresses PCO concerns regarding methyl bromide, EPA's new Label Improvement Program for fumigants, and fumigation in general.
- **What are "Biorationals"?**
  You won't find the answer in Webster's Dictionary. Pest Management *takes an in-depth look at the origin and development of biorationals.*

Plus, a special interview with the U.S. Senate and House Agriculture Committee Chairmen that deal with pesticides. Also, look for two new exciting departments—*Member Spotlight* and *Then and Now*.

MEETINGS

MAY

21 CONNECTICUT PEST CONTROL ASSOCIATION, Membership Meeting, Yale Motor Inn, Wallingford, Conn. *Contact*: Steven J. Blum, Acme Pest Control, P.O. Box 3031, New Haven, Conn. 06515, (203) 387-4321.

JULY

14 to 16. ALABAMA PEST CONTROL ASSOCIATION, Five States Convention (Tenn., La., Miss., Ark., Ala.), Gulf State Park Resort, Gulf Shores, Ala. *Contact:* Jody Thomas, P.O. Box 1109, Leeds, Ala. 35094, (205) 699-2272.

25 to 28. GEORGIA PEST CONTROL ASSOCIATION, Summer Meeting, Sheraton Savannah Inn & Country Club, Wilmington Island, Savannah, Ga. *Contact*: Glenn H. Burnett, 1273 Bernadette Lane N.E., Atlanta, Ga. 30329, (404) 634-7013.

AUGUST

1 to 4. NORTH CAROLINA—SOUTH CAROLINA JOINT ASSOCIATION, Summer Meeting, Grove Park Inn, Asheville, N.C. *Contact*: Marcy Hege, P.O. Box 36160, Raleigh, N.C. 27706, (919) 851-2901.

SEPTEMBER

17 to 19. PEST CONTROL OPERATORS OF WEST VIRGINIA, Fall Workshop, Ramada Inn, Morgantown, W. Va. *Contact*: Dexter Owsley, P.O. Box 9445, South Charleston, W. Va. 25309, (304) 768-6568.

OCTOBER

16 to 18. MISSOURI PEST CONTROL ASSOCIATION, Fall Conference, Ramada Inn, Columbia, Mo. *Contact*: Andy Mannino, Sr., 3815 Harvester Rd., St. Charles, Mo. 63301, (314) 946-7704.

Legal Brief

Company Owners & Officers: Beware!

By
Lawrence S. Ebner
Peter L. Gray
McKenna, Conner & Cuneo

Under general principles of law, an incorporated pest control firm is an independent legal "person" having an existence separate and distinct from that of its owners. As a result, company officers, directors, and employees who act within the scope of their authority normally cannot be held personally liable for negligence. Instead, litigious customers must look to the corporate entity for recovery. This principle, however, is altered by personal liability provisions found in numerous federal environmental statutes.* Owners, officers, directors, and employees of pest control firms should be aware of their potential personal liability under environmental statutes and should not assume that the incorporated status of their company will automatically protect them.

Two general types of civil liability exist under the various environmental statutes: remedial liability and civil penalty liability.

1. **Remedial liability provisions**—found in CERCLA, RCRA, CWA, and SDWA—generally enable the U.S. Environmental Protection Agency (EPA) to remedy a pollution event (past, present, or threatened). This is accomplished in one of two ways: either the corporation and/or its officials are ordered to take specific remedial action, or EPA will undertake the necessary action at its own expense and then seek reimbursement from the responsible parties.

The purpose of remedial provisions is to ensure that *someone* assumes financial responsibility for cleanup or cleanup costs. Normally, EPA will proceed against the responsible corporation because it has the "deepest pocket" and is the least controversial to reach. However, because the statutory focus is on ensuring that remedial action is taken or that payment is made, if a corporation is bankrupt, undercapitalized, a sham, or merely the "alter ego" of corporate officers and directors, the statutes provide EPA with express or implicit authority to impose liablity on corporate officers and directors, usually as "owners or operators" of a facility or site. Courts have specifically upheld EPA's imposition of liability on corporate officers and directors for cleanup or cleanup costs under CERCLA and CWA, and probably would affirm such liability under the remedial provisions of RCRA and SDWA.

Many pest control firms are small closely held companies in which the distinctions between the company, its owners, officers, directors, and employees are often blurred. Officers and directors in such firms run a higher risk of personal liability for cleanup costs than do their counterparts in bigger firms (with deeper pockets). Of course, companies can indemnify their officers and directors or take out "D&O" liability insurance. Whether such insurance covers liability under environmental statutes, however, could be a controversial issue.

2. In addition to remedial liability provisions, environmental statutes such as FIFRA invariably authorize the assessment of **civil penalties** against "persons" who violate the statute. Although "persons" are defined under most of these statutes to include both individuals and corporations, at least two courts have rejected EPA attempts to impose civil penalties on corporate officers and directors absent some clearer expression of congressional intent. Nevertheless, in many circumstances EPA probably has authority to assess civil penalties against corporate officers and directors. As a practical matter, EPA assesses civil penalties against the party with the deepest pocket. That could either be the corporation or the principals behind it.

I. Remedial Liability

CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act affords EPA sweeping authority to deal with releases or threats of releases of hazardous substances into the environment and with abandoned hazardous waste disposal sites. "Superfund" (the popular name for CERCLA) authorizes EPA to order responsible parties to clean up sites contaminated with hazardous wastes. Where the responsible parties are unavailable or unwilling to do so, EPA is authorized to clean up the environmental contamination itself, and proceed against any responsible party or parties to recoup its expenses.

CERCLA defines the class of persons who are considered "responsi-

* For example, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Superfund"), the Resource Conservation and Recovery Act (RCRA), the Federal Insecticide, Fungicide, and Rodenicide Act (FIFRA), the Clean Air Act (CAA), the Clean Water Act (CWA), and the Safe Drinking Water Act (SDWA). In addition, many state laws have similar or more stringent liability provisions.

ble parties for cleanup and remedial action" as follows:

- The owner or operator of the releasing site or vessel [owners and operators];
- Owners and operators of the site at the time hazardous substances were disposed of there [former owners and operators];
- Persons who arranged to have their waste taken to the site for treatment or disposal [generators]; and,
- Persons who have transported waste to be disposed of or treated at a site they selected [transporters].

Courts have interpreted the phrase "owner or operator" as congressional authorization to impose liability on corporate officers and directors. For example, in one case, the vice president of a corporation that transported and disposed of hazardous waste was held liable for cleanup costs. He was directly responsible for arranging the disposal and transport of hazardous waste at the site, had direct knowledge and supervision of the disposal contract, and asssisted in the selection of the hazardous waste site. The vice president argued that corporate officers normally are not held liable for acts of a corporation, and that he personally did not own or possess the hazardous waste.

The court found such arguments irrevelant to the imposition of liability. The court reasoned that the corporate officer had actual knowledge of the drums and storage, and supervised disposal of the barrels. Further, the person "arranging for the disposal" is not required to actually own or possess the hazardous waste. As a result, the officer was held liable as "owner or operator."

A second provision of CERCLA authorizes EPA to seek injunctive and other relief upon a finding that "there may be an imminent and substantial endangerment to public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." It appears that courts will uphold liability of corporate officers and directors under this "imminent hazard" provision as well as the liability provision.

From these cases, it appears that courts will hold corporate officers and directors liable as "owners or operators" under CERCLA particularly where they actively manage the corporation's hazardous waste activities.

RCRA

The Resource Conservation and Recovery Act provides "cradle to grave" management of hazardous wastes through a comprehensive regulatory scheme applicable to generators and transporters of hazardous wastes and to owners and operators of treatment, storage, and disposal facilities. RCRA primarily regulates ongoing industrial activities, whereas CERCLA usually addresses the environmental problems of abandoned and inactive hazardous waste sites.

RCRA, like CERCLA, provides EPA with authority to bring suit for injunctive relief and damages when the past or present handling of hazardous waste presents an "imminent and substantial endangerment to health or the environment."

RCRA's general definition of "persons" subject to liability, like CERCLA's, does not expressly include corporate officers and directors. Nevertheless, EPA has sued corporate officers under the RCRA "imminent hazard" provision and was upheld when challenged in court.

While there is little case law on the subject, it is likely that EPA will, if necessary, seek to impose liability on corporate officers and directors for the same reasons it would do so under CERCLA—to ensure that *someone* assumes financial responsibility.

CWA

The goal of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." One CWA program in particular authorizes EPA to clean up oil spills (or other similar spills) and recover its cleanup costs from responsible parties. The program specifically imposes limited liability for these cleanup costs upon "such owner or operator of any vessel from which oil or a hazardous substance is discharged."

Courts construing this liability section have consistently upheld EPA's imposition of liability upon corporate officers and directors.

SDWA

The purpose of the Safe Drinking Water Act is to ensure that water supply systems serving the public comply with uniform standards for the protection of public health. SDWA authorizes EPA to regulate the pollution of potable ground and surface water under an imminent hazard provision, as similarly found in CERCLA and RCRA.

There has been only modest enforcement of SDWA to date, and no case directly addresses the question of whether corporate officers and directors may be held liable for cleanup costs incurred by EPA under the SDWA "imminent hazard" provision. Such liability, however, probably could be imposed since "person" is specifically defined under SDWA to include officers, employees, and agents of any corporation, company, association, state, municipality, or federal agency. Although the imminent hazard provision does not specify against whom EPA may commence civil actions, it seems likely that a court would allow an action against corporate officers and directors given this language.

Further, several courts have listed the SDWA imminent hazard provision among other statutes as authority to impose liability upon corporate officers and directors.

II. Civil Penalty Provisions

The question of whether corporate officers and directors can be assessed civil penalties pursuant to environmental statutes is largely unsettled. As a starting point, most federal environmental statutes (such as FIFRA, CERCLA, and RCRA) impose civil penalties for statutory violations by a "person." "Person" generally is

(continued on page 38)

jointly by Harvey S. Gold, executive vice president of NPCA, Dunn Loring, Va., and Charles R. Nash, business manager for Specialty Products, ICI Americas, Wilmington, Del.

Under the new program, ICI will pay the "first $100" to each new member joining the association. This offer is limited to the first 200 members who apply.

"We are pleased to be part of this exciting new program. We think that membership in the NPCA is a stake in the future and we are happy to invest in the future of interested professionals in this industry," Nash said. "As long admirers of the NPCA, we wanted to help this organization in strengthening and upgrading the industry."

"We believe increasing membership in this Association is the prudent way to strengthen our cause and upgrade the professionals around the country," Nash added.

Adams Wins Convention Trip

Mr. and Mrs. Virgil C. Adams of Adams Exterminating, Denton,

Texas, won two roundtrip tickets to the National Pest Control Association's annual convention in Atlanta. All those who booked their air travel through Gateway South Travel, the official convention travel agency, were eligible for the drawing. The drawing was held at NPCA's headquarters, Dunn Loring, Va. Larry Pinto, R.P.E., of Pinto & Associates Inc., Vienna, Va., drew the winning name; *Pest Management* Editor Kathy Bova assisted.

Don't forget to support *Pest Management* advertisers!

Three New Executive Board Members Elected

The National Pest Control Association's 1986-87 Board of Directors elected three Members-at-Large to the 1986-87 Executive Board during its meeting at the association's

H.M. "Jim" Jamison

Harry W. Linindoll, Jr.

annual convention in Atlanta, Ga. The new Executive Board Members are: **H.M. "Jim" Jamison, Harry W. Linindoll, Jr.,** and **Herbert W. Pencille**. They join the recently elected 1986-87 Executive Board: President Robert M. Russell, President-Elect Robert Jenkins, Secretary/Treasurer Bubba Tindol, Membership Vice President Larry Musgrove and Project Development Vice President Norman Besheer.

Herbert W. Pencille

Jim Jamison, president of Jim Jamison Pest Control, Little Rock, Ark., is a past president. His current NPCA activities include serving on the Planning Council Committee, PAC leader and member of the Board of Directors.

Harry W. Linindoll, Jr. is president of Harry W. Linindoll Pest Control, Inc., Albany, N.Y. Linindoll has been a member of the National Pest Control Association for over thirty years and is currently serving on the Board of Directors.

Herbert W. Pencille, owner/manager of Hydrex Pest Control Company of East San Fernando Valley, North Hollywood, Calif., is a third generation pest control operator. Pencille is currently on the Board of Directors.

Legal Brief

(continued)

defined to include either an individual or a corporation. Principles of corporate law would suggest that these civil penalties should be imposed on the corporation, not its officers and directors. Nevertheless, EPA in several instances has attempted to impose personal liability upon corporate officers and directors. In addition, state authorities routinely fine individual pesticide applicators for violations. Pest control firms normally pay such fines for their employees, and the state maintains records of the transactions.

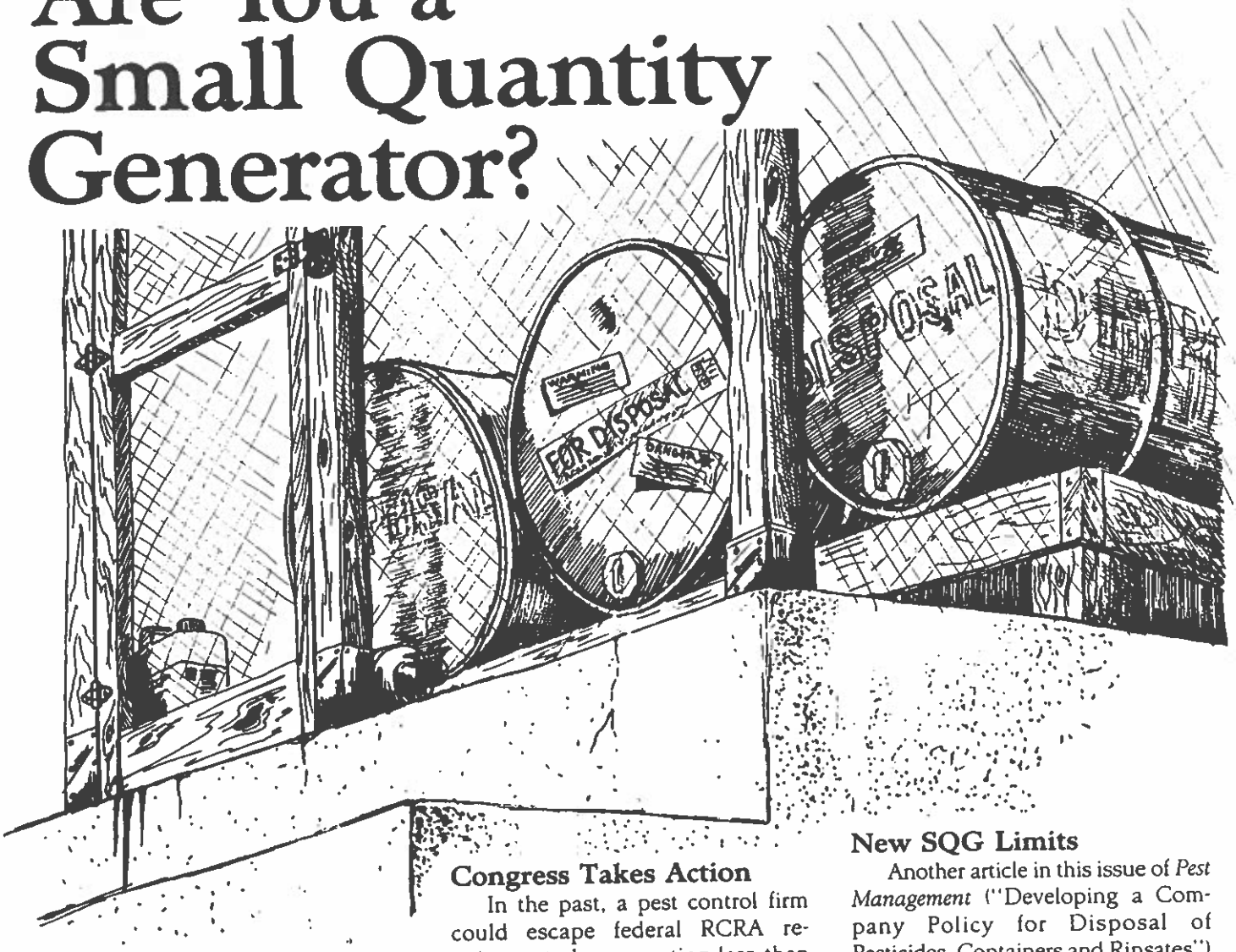
Two federal courts have rejected EPA's attempt to impose personal liability on corporate officers and directors, although one court's approach leaves open the possibility for such liability.

While recognizing that this is an unsettled issue, some general predictions can be made. Assuming that corporate officers and directors are within the class of persons potentially subject to civil penalty assessments, presumably ***some level of intent to violate the statute or prior knowledge of the violation would be required before EPA would attempt to impose a civil penalty on the corporate officer or director, rather than the corporation.*** As a general proposition and barring special circumstances (such as corporate insolvency), EPA will proceed against the party with the "deepest pocket," i.e., normally the corporation.

For further information or case citations, please contact either Larry Ebner or Peter Gray at McKenna, Conner, and Cuneo, 1575 I Street, N.W., Washington, D.C. 20005 (202) 789-7500.

from
Pest Management

Are You a Small Quantity Generator?



By
Lawrence S. Ebner
McKenna, Conner & Cuneo

Until now, most pest control firms have considered themselves exempt from federal and state hazardous waste regulations. This is because they were classified as small quantity generators under the federal Resource Conservation and Recovery Act (RCRA) or similar state programs. On September 22, 1986, however, the situation will change dramatically for many companies. That is when RCRA's new small quantity generator (SQG) rules go into effect. Under the new rules, generating as little as 100 kg/mo (220 lb) hazardous waste—or 1 kg/mo (2.20 lb) "acutely" hazardous waste—will subject a pest control firm to numerous RCRA hazardous waste generator requirements.

Congress Takes Action

In the past, a pest control firm could escape federal RCRA requirements by generating less than 1,000 kg (2,200 lb or 1 metric ton) of RCRA-regulated wastes per month. Congress became concerned, however, that too many professional pesticide applicators and other small businesses were generating hazardous waste but avoiding regulation. As a result, when Congress comprehensively overhauled RCRA in 1984, it directed the Environmental Protection Agency (EPA) to establish new requirements for SQGs who produce between 100 and 1,000 kg of hazardous waste in a calendar month.

EPA estimates that approximately 100,000 new businesses will be affected by these expanded SQG requirements. Such businesses include not only structural pest control firms, but also, for example, automobile repair shops, printers, laundries, construction companies and textile manufacturers.

New SQG Limits

Another article in this issue of *Pest Management* ("Developing a Company Policy for Disposal of Pesticides, Containers and Rinsates") describes how firms in the structural pest control industry may be able to avoid generating RCRA-regarded hazardous waste through triple rinsing of containers or other techniques. The fact remains, however, that numerous pesticides commonly used by PCOs are listed in EPA's RCRA regulations as "hazardous" ("f" list) or "acutely hazardous" ("e" list) wastes when discarded. State listings of pesticides are even more extensive than the federal RCRA lists.

Under EPA's new SQG rules (codified at 40 C.F.R. pt. 261-262), merely generating 100 kg of "f" list hazardous waste or 1 kg of "e" list acutely hazardous waste (from all sources) in a calendar month is enough to subject a pest control firm to RCRA generator requirements. That could be as little as a half-full 55-gallon drum of a discarded

pesticide or rinsate. Furthermore, if a firm is a large quantity generator of hazardous waste (i.e., if it generates more than 1,000 kg/mo), the 1 kg/mo limit for "e" list acutely hazardous waste does not apply. Instead, generating *any* quantity of acutely hazardous waste subjects the firm to the RCRA generator requirements. Only firms that generate less than 100 kg/mo of "f" list non-acutely hazardous waste and less than 1 kg/mo of "e" list acutely hazardous waste remain exempt under the federal regulations (in many states such as California, Louisiana, Minnesota and Rhode Island, such generators are *not* exempt).

Generator Requirements

Beginning September 22, 1986, SQGs in the 100 to 1,000 kg/mo category will be treated basically the same as large quantity generators. SQGs will have to do the following:

- Determine whether their wastes are hazardous (previously required).
- Obtain an EPA Identification Number by completing EPA Form 8700-12 or a similar form used by your state. The Identification Number enables EPA and state authorities to track your hazardous waste activities.
- Accumulate a maximum of 6,000 kg waste on-site for no more than 180 days (or no more than 270 days if the waste is to be shipped more than 200 miles to a disposal site), unless you undertake the costly and laborious process of obtaining a permit as a hazardous waste storage facility. A maximum of only 1 kg/mo of "e" list acutely hazardous waste can be accumulated without obtaining a storage permit. Wastes must be stored in approved containers or tanks, and marked in accordance with RCRA requirements. In addition, employees must be instructed on emergency procedures in case of an accidental spill or leak.
- Offer wastes only to hazardous waste transporters who have an EPA Identification Number. Pest control firms shipping hazardous waste off-site must comply with pre-transport requirements such as packaging, labeling, and marking before providing wastes to transporters.
- Use the full Uniform Hazardous Waste Manifest system when shipping hazardous waste off-site. This is EPA Form 8700-22 or a state-specific counterpart. The manifest system is a "round trip" system designed to ensure that hazardous waste shipped off-site reaches its intended destination. Unlike large quantity generators, however, SQGs do not have to file "exception reports" if the completed manifest is not returned within 45 days.
- Ensure that hazardous waste is managed at a hazardous waste facility which has a RCRA interim status authorization or a final permit under RCRA as a treatment, storage or disposal (TSD) facility. SQGs no longer can dispose of hazardous wastes in municipal dumps that do not have RCRA permits to receive such wastes.

SQGs do get a few breaks under the new federal rules. In most cases they temporarily can store hazardous waste on-site for 180 days (the temporary storage period for large quantity generators is only 90 days). In addition, SQGs need not file manifest exception reports or biennial reports describing their hazardous waste management activities. Nor are SQGs required to prepare a formal contingency plan or conduct formal personnel training.

Enforcement

EPA has announced that its "implementation strategy" for the new SQG rules will be to direct available funds to an educational effort rather than enforcement activities. PCOs should be aware, however, that potential civil and criminal penalties are stiff for RCRA violations. Given the complexity of federal and state requirements, pest control firms are encouraged to seek the advice of legal counsel experienced in the hazardous waste area. Information also may be obtained from EPA's RCRA "hotline" (800-424-9346) or from your state hazardous waste management agency.

For more information, call Larry Ebner at 202-789-7727. Mr. Ebner serves as legal counsel to NPCA and is an expert in pesticide regulation and environmental law.

For More Information

The Environmental Protection Agency provides free publications on the new federal regulations (effective September 22) for small quantity generators.

One is a "Q and A" leaflet: *Hazardous Waste Requirements for Small Quantity Generators of 100 to 1,000 Kg/Mo.*, with 13 frequently asked questions and direct, concise, answers.

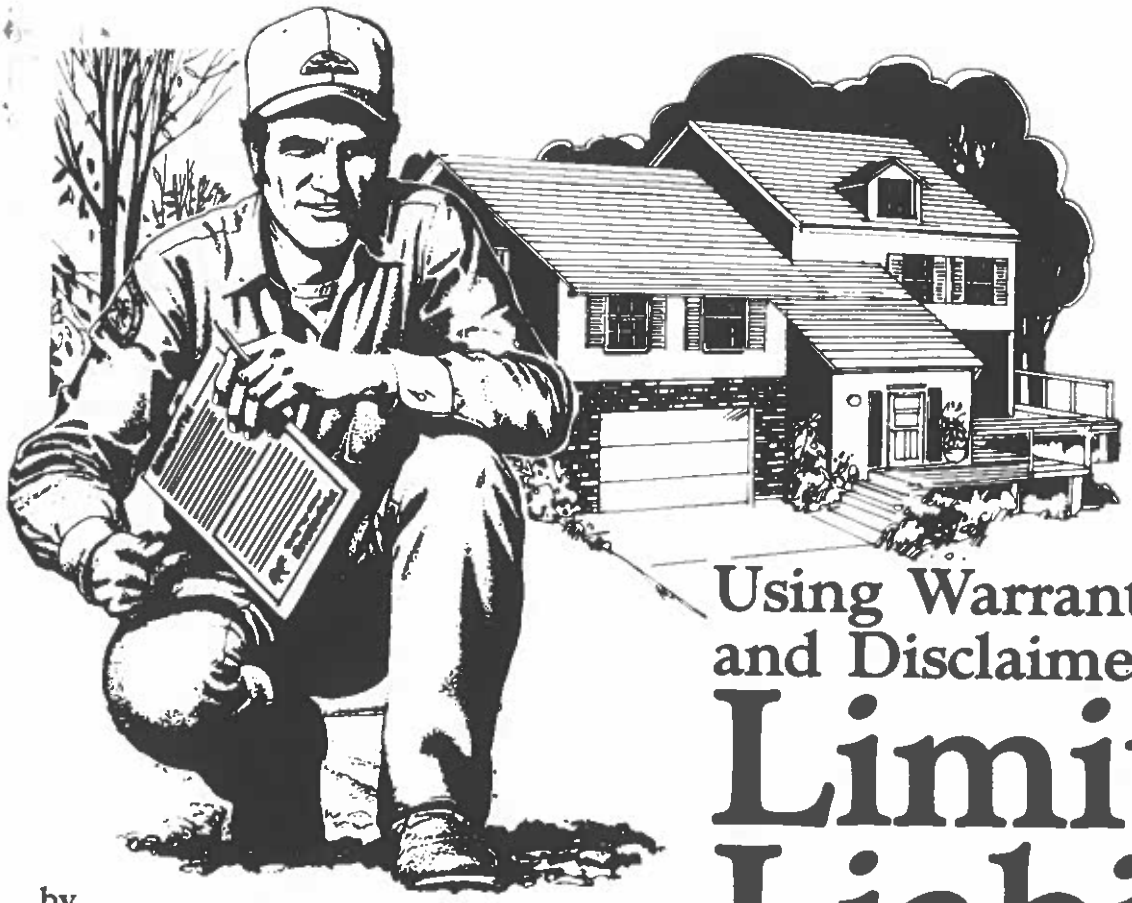
EPA provides more extensive information in its new booklet: *Understanding the Small Quantity Generator Hazardous Waste Rules: A Handbook for Small Business.* It is a 32-page, 8½-by-11-inch self-mailer. EPA advises that this handbook covers every major aspect of the regulations for 100-1,000 kg/mo generators.

For free copies of both publications call your regional EPA office or EPA's RCRA/Superfund Hotline 1-800-424-9346 (except in the District of Columbia call 382-3000). Or you may call the EPA Small Business Hotline, 1-800-368-5888. Your hazardous waste management questions may be directed to any of the three numbers.

Also as part of EPA's efforts to assist small business in understanding and complying with new hazardous waste rules, a national teleconference will be held on Wednesday, October 22 from 1 to 4 p.m. (EST)

During the teleconference, small quantity generators will have the opportunity to interact with EPA officials, state regulators and other industry experts about the new rules. Practical tips and "how to" information will be the major focus of the event.

The teleconference will be transmitted live from Washington, D.C. The National Narrowcast Service of PBS (Public Broadcasting Service) is developing the program for EPA. It will be presented locally by public television stations in approximately 100 cities across the country.



Using Warranties and Disclaimers to Limit Liability

by
Lawrence S. Ebner
William A. McCue
McKenna, Conner & Cuneo

Today's pest-control firms operate in a business environment of heightened consumer awareness and aggressive plaintiffs' lawyers. One of the best ways pest-control operators can prevent excessive claims for termite damage is through warranty and disclaimer (or "limitation of liability") clauses in their customer service contracts. Many pest-control companies, particularly national and regional ones, have used such clauses with success for years. As their experience suggests, a well-drafted warranty-disclaimer can greatly reduce a PCO's potential liability for damages resulting from alleged improper or ineffective application of termiticides.

Effect of Warranty-Disclaimers

A recent Indiana appeals court decision, *Orkin Exterminating Co. v. Walters*, 466 N.E. 2d 55 (Ind. App. 1984), illustrates the usefulness of these contractual clauses. The pest-control company first treated the Walters' house for termites in 1976. At that time, the pest-control firm offered the Walters its "Lifetime Re-Treatment Guarantee," one of the company's standard warranty-disclaimer clauses, which the Walters accepted. The contract provided that for a stated fee the PCO would guarantee additional treatments at no extra cost if termites reappeared during the guarantee period. The disclaimer aspect of the contract expressly limited the PCO's liability to the duty to re-treat. Further, by signing the contract, the customer expressly waived any recourse against the PCO for termite damage to the house or its contents following treatment. Pursuant to the Re-Treatment Guarantee, the PCO re-treated the house from 1976 through 1980, but termite damage continued. The Walters then sued the PCO, alleging damages to the house, its contents and their own peace of mind. The trial court awarded them $54,000.

The PCO appealed the trial court's decision citing the limitation of liability contained in the Lifetime Re-Treatment Guarantee. The appeals court held that the homeowner had waived any claim for damages to the house or its contents and could not avoid the limitation of liability clause. Accordingly, the appeals court reversed the trial court's award and entered judgment for the PCO.

The *Walters* case is a textbook example of the effective use of a warranty-disclaimer clause: If the homeowner had not accepted the Lifetime Re-Treatment guarantee, the PCO would not have been able to avoid liability for damage to the house or its contents. On the other hand, there are plenty of cases in which PCOs who failed to incorporate such clauses into their service contracts have been held liable for termite damage subsequent to treatment.

For example, in *Plow v. Bug Man Exterminators, Inc.*, 290 S.E.2d 787 (N.C. App. 1982), a homeowner sued a PCO for property damage resulting from a termite infestation that the PCO's inspection had failed to disclose. The PCO's contract with the homeowner apparently did not include a warranty-disclaimer clause. The court allowed the homeowner to recover from the PCO the cost of repairing the termite damage to the house and also required the PCO to pay the homeowner's attorney fees.

Similarly, in *Orkin Exterminating Co. v. Callaway*, 190 S.E.2d 827 (Ga. App. 1972), a homeowner signed a contract with the PCO providing for "lifetime control" of termites. The contract ap-

parently did not contain any disclaimers or limitation of liability clauses. Termite inspections of the house were made for two years following the initial treatment. The trial court found that after each inspection, the house was reported to be "OK" when, in fact, the premises were infested with termites. The appeals court affirmed the lower court's award for structural harm to the property based on the PCO's negligence.

In short, in the absence of effective warranty-disclaimer clauses in termite treatment contracts, PCOs run the risk of being held liable for substantial monetary claims.

Warranty-Disclaimer Provisions

What are the elements of an effective warranty-disclaimer in a termite-control contract? While the exact wording may vary from state to state or company to company, there are several types of warranty-disclaimer provisions that PCOs should consider including. PCOs should consult their attorneys in drafting these clauses.

An effective warranty-disclaimer is a double-edged sword: it warrants the results of the termite treatment, but at the same time it disclaims any liability beyond the PCO's commitment to retreat or repair. A typical provision might guarantee that the termite treatment will be effective for up to five years against subterranean termites (but perhaps not Formosan termites) and that if reinfestation should occur during the guarantee period, the company will re-treat and repair any property damage up to a stated monetary amount.

Warranty and disclaimer provisions may also state that the guarantee is only applicable to those portions of the homeowner's property which the PCO was able to inspect visually. Further, the clause may state that by signing the treatment contract the homeowner expressly waives all remedies against the PCO—including the right to sue for damages—other than the retreatment or repair remedies contained in the warranty-disclaimer. PCOs may also wish to stipulate that any repair work required must be done by contractors approved by the PCO.

An additional feature of many customer service contracts containing warranty-disclaimer clauses is that they attach and reference diagrams of the homeowner's property that show the existence of any damage at the time of the initial treatment. Such diagrams are useful in defending a claim that areas of the property were ineffectively treated when, in fact, the customer had acknowledged by signing the contract that those areas had existing termite damage prior to treatment.

Finally, warranty-disclaimer clauses may also require the homeowner to bring any claim for retreatment or repair to the PCO's attention within a limited period of time in order to be eligible for the remedy provided under the contract. In this regard it is always a good idea for the PCO to try to avoid litigation—whether there is a warranty-disclaimer in his service agreement or not—by retreating the premises or reaching a prompt and reasonable settlement directly with the customer.

Legal Issues

The principal legal issue raised by warranty-disclaimer clauses in service contracts is whether they are subject to challenge as an improper attempt to exculpate the PCO from the consequences of his own negligence. To put it another way, is a warranty-disclaimer clause an effort to evade the consequences of the breach of an implied "warranty of workmanlike performance"?

Generally speaking, the courts have responded negatively to such challenges, holding that the law does not prevent parties from removing themselves, by contract, from liability for simple negligence. Courts normally take the position that such contracts are valid unless they contain unconscionable provisions or contradict public policy in the particular jurisdiction. In the leading case of *Orkin Exterminating Co. v. Stevens*, 203 S.E.2d 587 (Ga. App. 1973), the court discussed at length a warranty-disclaimer clause containing the following key provision:

> This Guarantee is limited to retreatment only and in no way, implied or otherwise, covers damage and repairs to the structure or contents.
>
> 203 S.E.2d 587 at 590.

The court held that this provision was perfectly valid as a limitation on liability for negligent performance. The court stated:

> Absent a limiting statute or controlling public policy, parties *may contract with one another on whatever terms they wish*. . . . and the written contract defines the full extent of their rights and duties.
>
> *Id.* at 592-93 (emphasis added).

Similarly, in *Orkin Exterminating Co*

v. Clark, 253 So.2d 884 (Fla. App. 1971), a Florida appellate court examined a similar warranty-disclaimer provision in a PCO's service contract and reached the same conclusions: The homeowners could not circumvent the provision in the service contract which limited the PCO's liability to $5,000. The limitation of liability clause was deemed perfectly valid under Florida law. In *Orkin v. Walters*, 466 N.E.2d 55 (Ind. App. 1984), the court stated that parties are permitted to make such contracts as long as they are knowingly and willingly made and are free from fraud. Although the court acknowledged that exceptions exist where the parties have unequal bargaining power, the contract is unconscionable, or the transaction adversely affects the "public interest," the court could find no such factors present in the context of the homeowner's contract with the PCO.

PCOs should be aware, however, that in at least one jurisdiction, Alabama, contractual clauses exculpating persons from liability for their own negligence are considered to violate public policy and will not be enforced. *See Majors v. Kalo Labs, Inc.*, 407 F. Supp. 20 (M.D. Ala. 1975).

Limitation of liability clauses in PCO treatment contracts also raises the question whether such contracts may warrant a pesticide's effectiveness for a period of time substantially shorter than its technical effectiveness, as determined by appropriate scientific studies. The authors are unaware of any federal or state statutes which prohibit such a limitation, or any court decisions forbidding such a limitation. As is the case with respect to other limitations set forth in PCO service contracts, as long as the limitation on liability does not contradict a specific public policy and is not unconscionable, the limitation should be valid under the laws of most states.

Pest-control contracts containing warranty-disclaimer clauses also raise the question whether such clauses are covered by the Magnuson-Moss Warranty Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1982). The Magnuson-Moss Act is the federal law that governs the warranties that are provided with respect to consumer products. The requirements of the act are implemented by the Federal Trade Commission. The act's principal provision is the requirement that a seller who makes a written warranty to a consumer must fully disclose the terms of the warranty. The act specifically defines the term "service contract" to mean "services relating to the maintenance or repair of a consumer product." Because termite treatment contracts do not appear to meet that definition, the authors do not believe that PCO contracts are covered by the act. ■

Larry Ebner and Bill McCue practice environmental law at McKenna, Conner & Cuneo in Washington, D.C. (202) 789-7727. They wish to thank William F. Bartee, Jr. of the Rollins, Inc. Law Department for reviewing and contributing to this article.

Legal Briefs

Defensive Record-Keeping

by
Lawrence S. Ebner
Peter L. Gray
McKenna, Conner & Cuneo

Every time a pest-control operator enters a customer's home to perform a routine inspection and treatment, the threat of a lawsuit for property damage or personal injury looms around the corner. "Defensive" recordkeeping will greatly increase the PCO's chances for success in such a suit. Although this article deals specifically with termite work, the information is applicable to *all* pest inspections and treatments.

Invariably, the customer's case will depend on proving that the PCO failed to provide service in a "workmanlike" manner or that a PCO "misapplied" the termiticide. The best evidence a PCO can produce to counter such allegations are contemporaneously made, detailed records of the inspection and treatment. This will demonstrate that he applied the pesticide properly and that he is not responsible for damage or injury. Such business records are admissible as evidence in most courts despite their self-serving nature. Furthermore, because such records are generated at the time the inspection or treatment is performed and are made in the normal course of business, they carry considerably more weight in court than the PCO's mere recollections. Thus, each and every observation recorded in an inspection/treatment report has the potential to become critically important evidence in the PCO's defense.

Defensive recordkeeping begins with *routine* use of a standardized form to record observations made during the termite inspection and the details of any subsequent treatment. PCOs who do not currently use such a form should contact the National Pest Control Association or their local pest-control organizations for sugggestions on an appropriate recordkeeping format. Such forms vastly simplify the task of recording detailed information in an organized fashion. A typical inspection/treatment form includes subheadings such as "Building Information," "Interior," "Findings of Visual Inspection," and "Treatment" under which questions such as the following might appear:

- Was roof/attic inspected?
- Was attic insulated?
- Was evidence of subterranean termites found? Specify.
- What was the extent of infestation?
- What chemicals were applied? Where and how? At what rates?

In addition, such a form could contain a grid for mapping termite and damage locations, a section describing follow-up recommendations given to the customer, and a section for additional comments. An inspection form has been developed by the VA/FHA ("Form 2053"). A PCO could tailor (and expand) that form to suit his own needs, or could develop his own format. NPCA has issued several technical releases on this subject.

PCOs should go beyond a perfunctory completion of inspection/treatment forms. While the following is by no means a complete list of protective steps a PCO could take, it does list a few suggestions which PCOs should consider in filling out inspection/treatment reports:

(1) *Record Customer Observations and Remarks*. PCOs should pay careful attention to remarks made by customers such as:

- "You know, you're the fourth exterminator we've had here this month."
- "Every time it rains, the roof leaks and the carpet gets soaked."
- "I've been nauseous and dizzy all morning."

Each of these remarks should be recorded in the "Comments" section of the report. If such a customer makes remarks during telephone conversations prior to or after the inspection or treatment, they should be noted on a separate report or in the customer's file. Such remarks would generally be viewed by a court as "admissions" that could undermine the customer's case.

(2)*Look for Problems and List Them in the Inspection Report*. Any pre-existing conditions observed by the PCO which could cast doubt on the customer's claim of damage or injury resulting from the treatment should be noted. For example, evidence of prior infestations, treatments, or structural damage should be recorded. Even if the inspection fails to reveal a current termite infestation, any conditions conducive to infestation should be noted. Of course, if the customer were to comment that he suffers from a severe respiratory condition, or is sensitive or allergic to chemicals, that should be noted as well.

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Legal Briefs

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(3) *Alert the Customer to What He or She Can Expect.* Inform the customer about the possibility of cosmetic damage or unpleasant odors which may result from treatment. List in the inspection/treatment report each warning that was given. (This is in addition to any warnings that may be contained in written service agreements.)

(4) *Be Clear and Concise.* Write legibly when completing an inspection/treatment report. Use concise, unambiguous language. Be certain to include the date and time of inspection or treatment. Sign the report and date it. Consider providing the customer a copy of the report as a deterrent against future claims.

In summary, you can help defend yourself against unfounded claims by preparing as thorough an inspection/treatment report as possible. ■

For more information, call Larry Ebner at 202-789-7727

Legal Briefs

DOT Regulations Affect PCOs

by
Lawrence S. Ebner and Tami L. Azorsky*
McKenna, Conner & Cuneo

Pest-control operators are subject to the U.S. Department of Transportation's Hazardous Materials Regulations (49 C.F.R. pt. 172). This means that a PCO who transports more than the minimum quantity of a pesticide classified by DOT as a "hazardous material" must carry shipping papers in his truck, van or other vehicle and ensure that the tank or container holding the pesticide is properly marked. If a PCO is stopped by a state trooper or other law enforcement official and found not to be in compliance, he may be subject to civil or criminal penalties (up to $25,000 in fines or up to 5 years of imprisonment, or both). The regulation is currently being enforced on PCOs in California and New York.

The DOT requirements most directly affecting PCOs are those pertaining to shipping papers (49 C.F.R. § 172.200). The first step in determining whether you have to comply with the shipping papers requirement is to refer to column two of the Hazardous Materials Table (49 C.F.R. § 172.101) where the names of chemicals designated as hazardous materials are located. If you are transporting hazardous chemicals, the numbers in italics following the proper (generic) shipping name of the pesticide specify both in pounds and kilograms the minimum quantity of any formulation of the chemical which constitutes a reportable quantity (i.e., the quantity requiring the chemical to be listed on the shipping papers).

For example, three of the pesticides most commonly used by PCOs—chlordane, chlorpyrifos, and pyrethrins—are classified as hazardous materials in DOT's Hazardous Materials Table. Under column two of the entry for chlordane liquid, the reportable quantity (RQ) is specified as *RQ-1/0.454* (i.e., one pound or 0.454 kilograms). For chlorpyrifos the RQ is the same (one pound or 0.454 kilograms). For pyrethrins the RQ is 1,000 pounds or 454 kilograms. The RQs for some other pesticides are: aldrin—1/0.454, diazinon—1/0.454, lindane—1/0.454, DDVP (vapona)—10/4.54, chlorpyrifos—1/0.454 heptachlor—1/0.454, and pentachlorophenol—10/4.54.

If you you are carrying more than the reportable quantity for any of these pesticides, it must be identified on shipping papers by entry of an "X" before the proper shipping name in the column titled "HM." In addition, the description of the hazardous materials for each specific entry must include the hazard class and the identification number for the material as prescribed by the Hazardous Materials Table. Each entry also must specify, except for empty packaging, the total quantity (by weight, volume, or other appropriate unit) of hazardous materials.

For example, a PCO carrying a quart of Dursban 4E containing one pound of chlorpyrifos must have shipping papers reading as follows: one container, chlorpyrifos, ORM-A [Hazard Class], NA 2783 [Identification Number], one pound. Recognizing that the PCO will use some of the Dursban during the day, it would be appropriate to mark the quantity figure with an asterisk and indicate in a key at the bottom that "The actual quanitity at any time during the day could range from the amount stated to zero because the substance is in actual use."

In addition to carrying proper shipping papers, the DOT Hazardous Materials Regulations require that PCOs transport only chemicals which are properly marked and packaged (49 C.F.R. § 172.300). If the pesticide is transported in the manufacturer's original container, these regulations should not pose a problem for PCOs.

PCOs, however, generally transfer the pesticide from its original shipping container (possibly a 10- or 55-gallon drum) to a tank or secondary container for use. "Marking" of these tanks or secondary containers is required if they contain a reportable quantity of the pesticide. Markings generally must be durable, in English, and printed on or affixed to the surface of the tank or container, or on a label, tag, placard or sign. The marking must be displayed on a background of sharply contrasting color, must be unobscured by labels or attachments, and must be located at a distance from any other marking (for example, advertising) which would destroy its effectiveness (49 C.F.R. § 172.305). The marking is the certification by the PCO that the pesticide is properly described, classified, and packaged.

(Continued on page 39)

The authors gratefully acknowledge the assistance of Lawrence M. Farrell, McKenna, Connor & Cuneo, in preparing this article.

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If a PCO's tank truck is carrying Dursban TC, which contains a reportable quantity of chlorpyrifos, the truck must be marked with: "Chlorpyrifos, NA 2783" on both sides. The name of the PCO, whether he is the owner or a lessee, also must be displayed. All letters and numbers must be at least two inches in height. Moreover, the chemical inside the tank always must be the same as the chemical identified on the outside.

DOT's Hazardous Materials Regulations are complicated and pervasive. All PCOs may want to be prepared in case of enforcement in their state. ■

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Advertisers' Index

The Duty to Warn Controversy

by Lawrence S. Ebner and Risa H. Rahinsky

A pest-control operator's duty to warn his customers about potential hazards of the chemicals he is applying is a highly controversial issue. There are diverse views on whether or when a warning is necessary, and on what constitutes an adequate warning. While these are usually questions for courts to resolve on a case-by-case basis, at least one state (California) has enacted legislation requiring PCOs to provide customers with a specific notice concerning the pesticides to be used and local agencies to contact in the event of problems. This article explores various aspects of the duty-to-warn issue and provides some general legal background that should be useful to PCOs confronted with this problem.

Differing Legal Theories

Whether or not a warning is required is a mixed question of law and fact to be decided under the circumstances of each case. A court may or may not find under the facts of a particular case that a PCO had a duty to warn his customers about the potential hazards related to use of a pesticide. In general such a duty may arise under either strict liability or negligence principles of law. Although these principles primarily apply to manufacturers or sellers of products, they may be helpful in assessing the potential liability of users of hazardous products to third parties.

Under strict liability, a duty to warn arises if a product is "inherently dangerous." Regardless of the care with which such a product is manufactured, an "inherently dangerous" product always possesses some dangerous propensity. Without adequate warnings about the hazards of an inherently dangerous product, the product is considered defective and the seller is subject to strict product liability for injury that could have been prevented with a proper warning. Hence, to avoid liability, sellers of inherently dangerous products must warn consumers of the hazards associated with the product so that appropriate precautions to prevent possible injury can be taken.

The seller must warn the customer of known or reasonably foreseeable dangers associated with an inherently dangerous product. The seller is presumed to have knowledge of the product's hazardous propensities, and therefore, cannot escape liability merely because he had no actual knowledge of the potential dangers.

Under a negligence theory, liability for failing to provide a warning focuses on the defendant's conduct, rather than on the product itself. In order for a seller to be held liable in negligence for failing to warn users of the hazardous nature of a product, the seller must fail to exercise reasonable care in informing consumers or users of the known dangerous propensities of the product. Under a negligence standard the court (or jury) must decide whether the seller exercised reasonable care in providing, formulating, and updating the warning.

The practical differences between strict product liability and liability for negligently failing to warn lie not in the defendant's duty to warn, but rather in the defenses available to the seller. In a strict liability action, for example, courts generally refuse to permit sellers to escape liability by claiming that the consumer was contributorily negligent. Thus, the negligence of a plaintiff in failing to read a warning would not be an automatic bar to recovery under strict liability. Under a negligence standard, however, a plaintiff's failure to read a

Mr. Ebner and Ms. Rahinsky practice environmental law at McKenna, Conner & Cuneo. The views expressed are their own.

warning may at times absolve the seller from liability.

The case law treats a seller as an expert who must keep abreast of scientific developments concerning new links between the hazardous ingredients in his product and potential injuries. Some courts have expanded this foreseeability requirement by holding that even information regarding a *general* link between exposure to the product and the alleged injury is sufficient to create a duty to warn. One court has held that "if the injury is reasonably foreseeable. . . even if rare," the seller cannot exempt himself from liability for failing to warn. *Billiar v. Minnesota Mining & Manufacturing Co.*, 623 F.2d 240, 246 (2d Cir. 1980).

Recent court decisions have focused on whether a seller owes any duty to warn of potential dangers where the customer has actual knowledge of the product-connected hazard. This "knowledgeable user" defense can absolve sellers from liability for failing to warn if the seller can prove that the plaintiff knew that the product was potentially hazardous. Courts which recognize this defense have reasoned that because the purpose of a warning is to apprise a party of a danger of which he is not aware, no duty to warn a knowledgeable user could exist. The "knowledgeable user" defense probably has limited applicability to the PCO-homeowner relationship. Most PCO customers are not well educated on pesticides and, therefore, rely on the PCO's expertise and experience.

Effect of FIFRA

Under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Environmental Protection Agency is required to ensure that label directions and warnings are adequate to prevent "unreasonable adverse effects." The fact that a pesticide and its labeling have been approved by EPA creates a presumption that adequate warnings are contained on the pesticide label. Label warnings, however, frequently are directed to applicators, rather than third parties. Also, many PCOs are not in the habit of showing these labels to customers prior to treatment. Furthermore, compliance with FIFRA label warnings may not be a complete defense if a customer brings suit against a PCO for failing to warn about potential hazards associated with use of a pesticide.

In *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 545 (1984), for example, mere compliance with FIFRA labeling requirements did not preempt a state tort action based on the inadequacy of FIFRA label warnings. The federal court of appeals held that although EPA determined that the producer's labeling was adequate and in accordance with FIFRA, this was not a defense to a state court action in product liability. The court of appeals upheld the lower federal court's affirmance of the state court jury verdict that the label, albeit EPA-approved, was the proximate cause of the plaintiff's fatal condition because it lacked sufficient detail to warn the plaintiff of the link between lung disease and exposure to the chemical.

The court in *Ferebee* stated that the purposes of FIFRA and state tort law may be quite distinct. FIFRA ensures that a pesticide does not produce "unreasonable adverse effects on the environment," whereas state tort law is intended to fulfill a broader compensatory goal. The court concluded that FIFRA does not preclude a state from requiring a pesticide registrant to pay compensation for injuries resulting from use of the pesticide. Although this case arose in the context of a manufacturer's duty to warn, the holding underscores the possibility that product liability may be imposed generally, regardless of statutory compliance.

Similarly, in *Rumsey v. Freeway Manor Minimax*, 423 S.W.2d 387 (Tex. Civ. App. 1968), a manufacturer's compliance with FIFRA, as well as with a state statute regulating marketing and labeling requirements for insecticides, did not conclusively establish freedom from negligence. In this case, a three-year old consumed the manufacturer's roach poison, thallium, and ultimately died. The court found that the manufacturer of the poison owed a common law duty to warn of the full extent of the danger, including a warning that there exists no antidote to thallium, even where federal and state law had no such warning requirement.

Form of Warning

For some PCOs, the issue is not whether to provide a warning, but *how* to provide an adequate warning. In determining whether the form of a warning was adequate, courts consider whether the injury suffered was the type of injury specified in the warning or whether such injury was sufficiently foreseeable that it should have been included in the warning.

A written warning is generally preferable to an oral warning. Oral communications between PCOs and customers can vary, and therefore, may be insufficient standing alone to apprise customers fully of the product's potential dangers at the time of the initial selection of a pest-control method. A *written* warning provides the PCO with documentary evidence as to the exact warning given. Having the customer sign an acknowledgement that he has read the written warning precludes the customer from later denying that he received the warning, and it helps to establish that the customer—although forewarned—consented to use of the pesticide in his home.

To be effective, a written warning should be calculated to reach, directly or indirectly, those persons who may come in contact with the pesticide or treated areas. Generally, an adequate warning must be in such a form that it will catch the attention of a reasonably, prudent person (e.g., bold print). A warning should be comprehensible to the average customer and convey the nature and extent of foreseeable dangers. In addition, the warning should provide the customer with any specific instructions for safe and appropriate conduct after the PCO has applied the pesticide.

A warning may be weakened and, therefore, inadequate if it is watered down with representations of "safety." Thus, where a supplier of carbon tetrachloride placed on all four sides of a can in large letters the words "Safety-Kleen," with a warning in much smaller letters next to it, the warning was held inadequate. *See Maize v. Atlantic Refining Co.*, 352 Pa. 51, 41 A.2d 850 (1945).

PCOs may choose to attach the pesticide label to the copy of the pest-control contract provided to the customer. Additionally PCOs may want to include a written policy statement that the pesticide will be applied in accordance with the label directions. A PCO also could consider including a release from liability clause. Whether a release would limit liability for personal injuries, however, is highly debatable. ■

For more information, call Larry Ebner at (202) 789-7727.

Legal Brief

Superfund and PCOs

by
Lawrence S. Ebner
Christian Volz
Peter M. Gillon

McKenna, Conner & Cuneo

Pesticide applicators are exempt from the liability provisions of Superfund for environmental damage resulting from the application of a pesticide. This "pesticide application exemption" is limited in scope: it does not protect pest-control operators from liability for contamination caused by accidental spills, and may not protect them from liability for contamination caused by pesticide applications not in accordance with Environmental Protection Agency label directions.

In October 1984—in a well-publicized action listing six contamination wells on the island of Oahu, Hawaii as candidates for inclusion on the list of sites eligible for cleanup under Superfund—EPA announced its intent to consider ways of circumventing, or at least limiting, the pesticide application exemption. Congress also has addressed this exemption in recent proposed legislative amendments. This article describes the controversy over Superfund's pesticide application exemption and discusses possible resolutions.

The Pesticide Application Exemption

Under Superfund (the popular name for the Comprehensive Environmental Response, Compensation and Liability Act, or "CERCLA"), EPA may clean up hazardous substances released into the environment or order the parties responsible for the damage to perform the cleanup. CERCLA § 107 provides that the parties responsible for a cleanup can include, among others, both the individuals or firms that caused the spill of the hazardous substance and also the owners or operators of the site of contamination. Either EPA or a private party performing the cleanup can recover costs from any one of the responsible parties, regardless of "fault," and no matter how ancient the spill may be.

CERCLA's "pesticide application exemption" provides that a person cannot be held liable under that Act for "any response costs or damages resulting from the application of a pesticide product" registered under FIFRA. CERCLA § 107(i). Thus, if a PCO contaminates a well, sewer system or soil as the result of a termite or other treatment, the costs of cleaning up the contamination cannot be recovered from him by EPA or a private party under Superfund. (PCOs may be liable for such contamination, however, under other federal or state laws.)

CERCLA § 103, which requires persons with knowledge of "releases" of hazardous substances into the environment to report those releases at once, contains a similar exemption: the release-reporting obligation "shall not apply to the application of a pesticide product registered under [FIFRA]." (CERCLA's release-reporting implications for PCOs were the subject of a "Legal Brief" in *Pest Management*, October 1985.) EPA has interpreted this reporting exemption as limited to the "normal application of a pesticide" in a manner "generally in accordance with its [pesticide's] purpose." 50 Fed. Reg. 13,464 (1985).

EPA considered an even more restrictive interpretation of the exclusion that would have limited it to the "normal application of registered pesticides . . . in ways which are not inconsistent with the pesticides' labeling." 48 Fed. Reg. 23,558 (1983). Faced with numerous objections from the pesticide industry and user groups, however, EPA ultimately retreated from its vague and threatening references to label directions, and conceded that "strict compliance with the label directions is not a prerequisite for the exemption." 50 Fed. Reg. 13,464 (1985). Even so, EPA stressed that "the extent of compliance will be a critical factor" in determining whether the exemption applies. *Id.*

This vague but important limitation on the scope of the pesticide application exemption for spill reporting is also considered by EPA to limit the scope of the liability exemption under CERCLA § 107(i). The courts have yet to address this issue, but in our opinion, EPA's interpretation (as modified) is likely to be affirmed—at least in the case of serious violations of label restrictions. Thus, a PCO who causes contamination while "misusing" a pesticide (*e.g.*, by substantially exceeding the application rate) could be subject to liability under Superfund.

EPA's New Interpretations

In its proposal to add six nematicide-contaminated agricultural wells in Hawaii to the National Priori-

ties List of sites for EPA-conducted Superfund cleanups, EPA proposed two ways to circumvent or limit the pesticide application exemption. 49 Fed. Reg. 40,323-24 (1984).

First, EPA argues that the § 107(i) exemption is, at most, a limitation on liability—not on EPA's authority to spend Superfund money. Thus, EPA contends that it may spend Superfund money to clean up the Hawaiian sites even though it may be unable to recover the money from the responsible parties.

Second, and far more threatening to pesticide users, EPA suggests that it has the power to order pesticide applicators and farm owners to clean up the Hawaiian wells on the ground that the pesticide application exemption does not limit EPA's power under CERCLA § 106 to order private cleanups of "imminent hazards."

Prospects for Resolution

Both of EPA's theories may be addressed and resolved by Congress when it reauthorizes CERCLA. After two years of strife over the subject, the House and Senate both passed CERCLA reauthorization bills in late 1984; as of early March the two bills were in conference committee. In response to EPA's Hawaiian site listings, Rep. James Florio (D-N.J.) criticized EPA's idea of spending Superfund money where pesticide users would be exempt from Superfund liability for cleanup costs. In response, EPA proposed a Superfund amendment that would bar the use of federal Superfund monies to clean up contamination resulting from the normal application of pesticides.

As to EPA's claim that it can compel private parties to clean up contamination resulting from pesticide applications, the House (but not the Senate) CERCLA reauthorization bill would amend CERCLA § 106 to provide that EPA may *not* order private parties to conduct cleanups necessitated by the "normal application of a pesticide." Neither the House nor the Senate bill as enacted contains EPA's proposed limitation on its power to expend Superfund monies to clean up pesticide contamination. Moreover, the Senate bill contains a provision for "State Matching Grants" that would provide up to $1 million per year per state, to be expended at sites where "there is no reasonable likelihood of recovery of costs under existing authority." Pesticide application sites are not expressly mentioned, but they appear to meet the description of the sites for which this grant money would be available.

In general, this matching grants provision, and others in both bills, establish that in certain circumstances EPA and the states may spend Superfund money on cleanups even if the money is unrecoverable. Thus, these bills support EPA's contention that CERCLA's pesticide application exclusion from liability is not a limitation on EPA's power to take response action.

In short, the likely effect of the pending bills is that EPA will be able to perform cleanups of "pesticide application sites" if necessary, but will not be able to recover the funds so spent from parties responsible for the release, and will not be able to compel private parties to conduct such cleanups at their own expense. This may be a fair solution to the problem. If important drinking water wells are contaminated, they should be cleaned up for the sake of the public.

We caution that this relatively favorable outcome is not guaranteed. As of early March, Congress had not yet reauthorized CERCLA, and it is possible that the House prohibition against EPA's use of § 106 administrative orders to compel private cleanups of pesticide contamination will be rejected by the Senate conferees. PCOs should watch this issue closely—and should be aware of the importance of label compliance to preserve the benefits of Superfund's pesticide application exemption. ■

For more information, call Larry Ebner at 202-789-7727.

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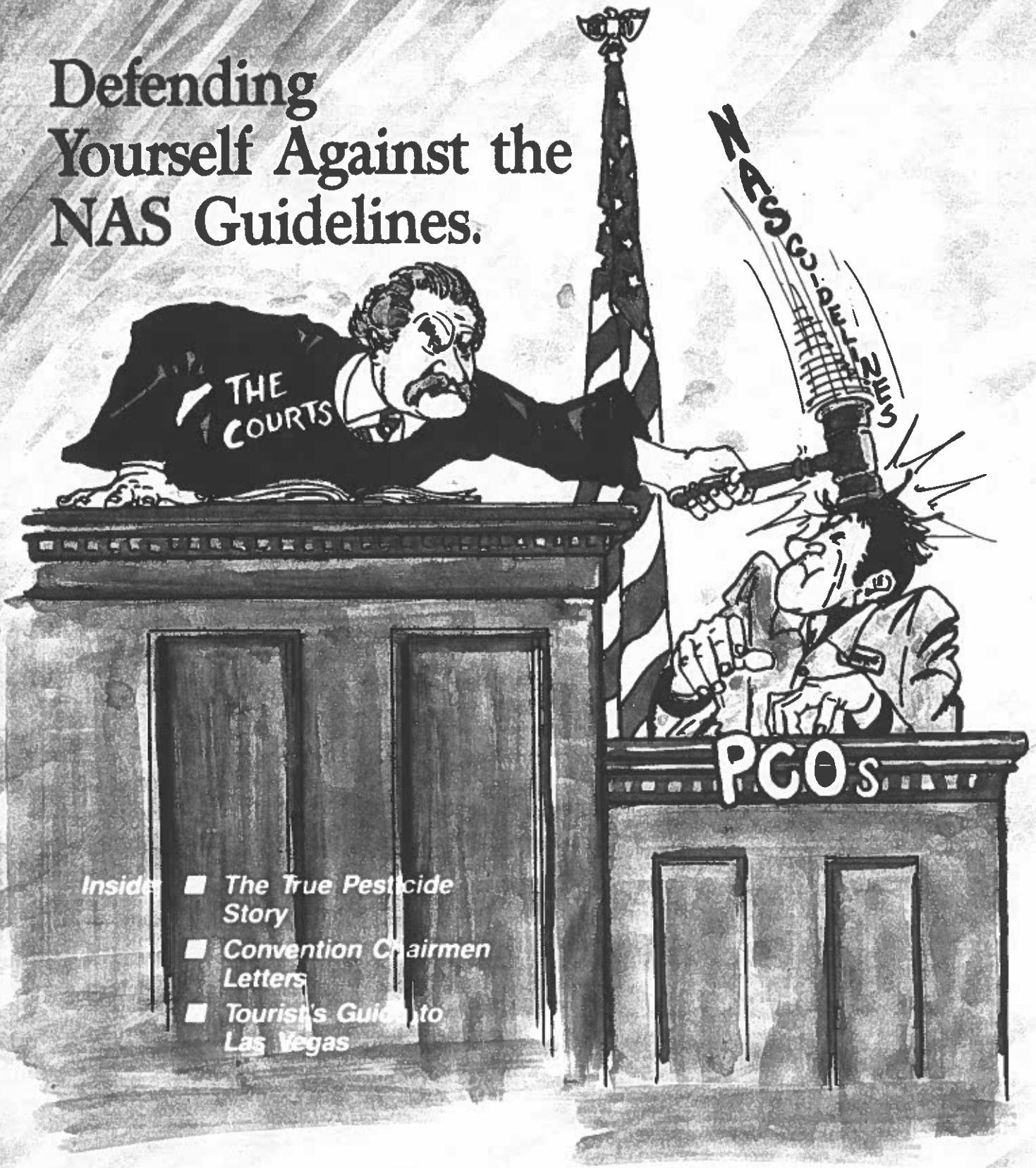
Defending Yourself Against the NAS Guidelines.



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Pest Management

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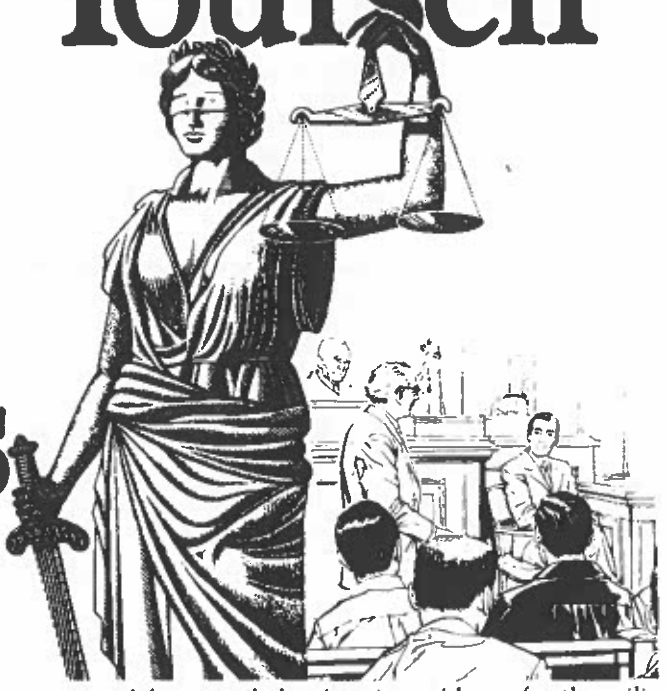
Articles

Departments

The purpose of *Pest Management* magazine is to be the voice of the industry by improving communications within the industry and with regulatory officials and to assist members—through timely topics—in the safe, efficient operation of their business with the goal to make a profit.

Defending Yourself Against the NAS Guidelines



How can a PCO fight back if he is faced with a lawsuit alleging violations of the NAS Guidelines?

by
Lawrence S. Ebner, Esq. and Alison A. Kerester, Esq.

Pest-control operators are being hit with a growing number of lawsuits alleging personal injury and property damage as a result of "excess" airborne levels of termiticides in homes following application. Many of the homeowners who bring these suits accuse PCOs of negligence because indoor levels of chlordane, heptachlor or other termiticides are higher than the levels suggested by the National Academy of Science's 1982 "guidelines."

Reports of incidents involving treatments of military and civilian housing, a national radio broadcast on chlordane "contamination" in houses treated for termites, and confusion about the NAS guidelines have sparked public fears about termiticides. This article traces the evolution of the controversy about the NAS guidelines and explains how PCOs can defend themselves when accused of violating them.

Roots of the Controversy

Damage from termites exceeds a billion dollars a year, and Americans spend an enormous amount on their continuing war against this pest. There are eight chemicals currently registered for control of subterranean termites: chlordane, heptachlor, aldrin, dieldrin, lindane, pentachlorophenol, chlorpyrifos and (most recently) permethrin. Chlordane is generally regarded as the termiticide of choice, and consequently has been the most widely used, followed by heptachlor and a chlordane-and-heptachlor mixture.

At the heart of the termiticide controversy is a 1982 NAS report ("An Assessment of the Health Risks of Seven Pesticides Used for Termite Control") recommending certain acceptable indoor air levels for chlordane and several other termiticides. NAS is a private, nonprofit scientific organization which receives 90 percent of its funding through grants from Congress and various federal agencies. Although the NAS report on termiticides was merely intended as interim guidance for the military, the report has been widely misinterpreted by over zealous personal injury lawyers and others as establishing "standards" for proper application of termiticides in private residences.

The NAS report was prepared at the request of the U.S. Air Force in response to several reports of adverse health effects involving families living in military housing which had been treated with termiticides years before. Initially, the Air Force felt that the problem was limited to the Wright-Patterson Air Force Base in Ohio, but similar complaints surfaced at other military bases around the country. Upon investigation, the Air Force discovered that the "contaminated" houses had been built on concrete slabs, without basements, and with heating and cooling ducts that were in or below the slabs. The Air Force theorized that chlordane applied around the bases of these houses had entered indoor living areas through the duct work, either through cracks in the concrete slabs or disruptions in the ducts. As a result of these findings, in 1978 the Air Force requested the NAS's National Research Council (the research arm of NAS) to review the toxicology data on chlordane and recommend an airborne concentration that could be used as a *guideline* in deciding whether *military housing* constructed on *concrete slabs* should be evacuated.

Mr. Ebner and Ms. Kerester practice environmental law at McKenna, Conner and Cuneo in Washington, D.C. *They wish to thank Phillip W. Gregory, president of Gregory The Service That Cares, Greenville, S.C., and Lt. Col. Robert W. Clegern, assistant executive director, Armed Services Pest Management Board, for their input on this article.* *Mr. Ebner will be speaking on the liability aspects of the NAS guidelines at NPCA's annual convention in Las Vegas, Nev. He is one of the panel members in the "Whose Lawyer" session on Tuesday, October 29.*

Upon completing this review in 1979, the NAS/National Research Council's Committee on Toxicology recommended in a "Chlordane in Military Housing" report to the Air Force that an airborne concentration of 5 micrograms per cubic meter (ug/m³) be used as a guideline for relocation of families living in military housing treated with chlordane. As NAS subsequently stated in its 1982 report on termiticides, this 1979 guideline was "pragmatically determined" based on the known concentrations of chlordane in military housing, a review of the health complaints of persons living in such housing, and a comparison with the "acceptable daily intake" derived from long-term animal feeding studies. The committee qualified its recommendation with the explanation that further research needed to be done. Nevertheless, in May 1980 the Department of Defense banned further application of chlordane to military buildings constructed on concrete slabs. (In June 1984 DOD revised its policy on termiticides to again permit the use of chlordane. Under this revised policy the construction of buildings on concrete slabs with duct work in or below the slabs is banned.)

In 1981, the Department of Defense initiated a general review of pesticide use on military bases and requested NAS to review the then seven registered termiticides—and the 1979 recommended guidelines for airborne concentrations of chlordane—to ascertain whether sufficient data existed to recommend indoor exposure limits.

In response to this request, in August 1982, NAS published a report entitled "An Assessment of the Health Risks of Seven Pesticides Used for Termite Control" in which the NAS/National Research Council's Committee on Toxicology concluded that there were no new data available that justified a change from its original recommended guideline of 5 ug/m³ for chlordane. The report also recommended levels for heptachlor (2 ug/m³), aldrin (1 ug/m³) and dieldrin (1 ug/m³). NAS cautioned, however, that these levels were *not intended as standards*, but as *guidelines* for military housing:

> "The airborne exposure limits suggested here are intended to provide *guidance* in estimating the health risks of the pesticides in military housing. *These are not standards* like those suggested by the Occupational Safety and Health Administration, and they do not guarantee absolute safety." (Emphasis added.)

The NAS report went on to stress that not only was the recommended level for chlordane merely intended as "guidance," but that it was intended as *interim* guidance:

> "Because of the *shortcomings of current data* and in view of the Committee's request that more definitive data be developed, the airborne concentration of 5 ug/m³ should be regarded as an *interim* guideline for exposures not exceeding 3 yr." (Emphasis in original.)

The committee also recommended that "more definitive human-health data be developed for a fuller assessment of the risks of exposure," including "long term animal inhalation studies, *airborne monitoring studies*, and epidemiological studies" (emphasis added). The NAS report was not made available for comment to the industry or the public prior to release.

NAS concluded the letter by stating again that the guidelines were "not intended as standards. They are a best estimate based on available but insufficient data."

Public Apprehension Grows

In September 1982, shortly after the NAS report was released, National Public Radio's "All Things Considered" broadcast a program entitled "Chlordane Contamination." The program implicated chlordane as the cause of serious health problems in people whose homes had been treated with the termiticide. Although the narrator conceded that there was no proof that chlordane was the cause of the health problems, he cautioned that anyone who had their home treated with chlordane was susceptible to poisoning. The broadcast equated the NAS guidelines with "standards" and asserted that chlordane levels in the homes of persons who had suffered from adverse health effects exceeded these supposed "standards." Little if any information was provided in the program on the benefits of chlordane and other pesticides in protecting the nation's homes from devastating termite damage.

In the spring of 1983 a Long Island homeowner, acting on advice of his insurance company, had his home bulldozed because of aldrin "contamination" following the application of this termiticide.

Widespread publicity surrounding this incident led to thousands of calls from worried homeowners to local health authorities and the New York Department of Environmental Conservation. As a result, several hundred homes on Long Island were monitored to determine whether indoor air levels exceeded the NAS guidelines for chlordane and other termiticides. Homeowner suits against PCOs and chemical manufacturers followed. A "60 Minutes" broadcast on chlordane in April 1983 intensified public apprehension about the use of termiticides in the home.

The net impact of the military and civilian housing incidents, the NAS report, the National Public Radio and "60 Minutes" broadcasts, and other continuing adverse publicity has been increasing public apprehension about the safety of termiticides. This in turn has led to a large number of lawsuits against PCOs and chemical manufacturers by alleged "victims" of termiticides. Most of these suits seek enormous monetary damages on the theory that a PCO has been negligent in applying a termiticide if airborne concentrations in treated houses exceed the levels identified by NAS as "safe." In filing these suits, plaintiffs' attorneys invoke the NAS guidelines as if they were government-established standards for proper use of termiticides in private homes.

NAS Tries to Clarify its Report

One such suit involved Gregory The Service That Cares, a pest-control firm in South Carolina. In October 1982, the company treated the home of Rae and Louise Litaker for termites and other pests with Gold Crest Termide, manufactured by Velsicol Chemical

(Continued)

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Corp. The Litakers later brought suit against Gregory The Service That Cares, alleging that they had suffered severe and recurring health effects as a result of the termiticide application by the pest-control firm, that they could not inhabit their house for several months following the termiticide application, and that the house had depreciated in value as a direct result of chlordane contamination. Like many other such suits, the plaintiffs in this case claimed that the air levels of chlordane and heptachlor in their house exceeded the "NAS standards." This led to another claim—that the pest-control company had "misused" the pesticide and is guilty of negligence. Specifically, the Litakers alleged that:

> "In failing to insure that the application of the chemicals was such that the primary components of said chemicals would not reach levels within the homeplace or upon personal property or food items considerably higher than ordinary and customarily *accepted national standards, specifically those standards for Heptachlor and Chlordane.*" (Emphasis added.)

Faced with an $800,000 claim for damages based in large part on the misinterpretation of the NAS guidelines as standards, the pest-control company president, Phil Gregory, organized a task force of industry and regulatory representatives. This committee met with NAS to seek clarification of the 1982 report. The company, through the committee's efforts, succeeded in obtaining a letter from NAS clarifying the intent underlying the recommended indoor air levels. The NAS letter, dated October 18, 1984, stated as follows:

"1. *Reports of the National Research Council contain advisory information only and do not represent formal standards.* Federal and state regulatory agencies may use our advice in establishing regulatory standards but will often incorporate other considerations such as technical feasibility or risk vs. benefit in applying our advice. The committee that authorized our report attempted to make this clear when it stated, '*These are not standards* like those suggested by the Occupational Safety and Health Administration.'

"2. The committee also clearly identified their suggestions as an '*interim guideline for exposure*' while awaiting the availability of additional data which might help in refining the number. It is important to recognize that the *committee found the data on chlordane to be scanty* and relied on a 1979 NRC report (Chlordane in Military Housing) as a starting point for its deliberations. The 1979 report, that had originally suggested the exposure level, had derived the number 'pragmatically'." (Emphasis added.)

NAS concluded the letter by stating again that the guidelines were "not intended as standards. They are a best estimate based on available but insufficient data." Armed with this letter, Gregory was able to successfully settle the case. Unfortunately, the type of situation faced by Gregory's company keeps repeating itself as claims for damages based on alleged violations of the NAS guidelines continue to be filed against PCOs. (*It has been reported that some state regulators are taking a new approach. Unless a case involved blatant pesticide misuse, a regulator may request that a blood sample of the occupants be obtained to determine if there is a need for further investigation, e.g., sampling the building's air level.*)

Guidelines do not carry the force and effect of law, and cannot be enforced.

Guidelines vs. Standards

Because the NAS guidelines continue to play a major role in suits brought by persons alleging harm as the result of termiticide applications, it is important for a PCO confronted with this type of suit to understand the legal distinction between guidelines and standards.

Guidelines are just that; they simply are recommendations, and as in the case of the NAS guidelines, often are based on limited information. Guidelines do not carry the force and effect of law, and cannot be enforced. They do not constitute proof of how someone should or should not act. At most, guidelines represent a consensus of opinion about what may constitute an acceptable practice in a given situation. For example, many industries issue "industry guidelines," which are voluntary recommendations reflecting a consensus view about a particular practice. The National Pest Control Association issues "Good Practice Statements" which are general recommendations for the pest-control industry. NPCA explicitly prefaces these guidelines with the warning that they are not standards. While industry guidelines can be introduced in a court of law as a factor in deciding what the appropriate standard of conduct should be under a given set of circumstances, they are not in and of themselves determinative of proper conduct.

Standards, on the other hand, are promulgated for the purpose of establishing an objective definition of what constitutes an acceptable practice. Government standards are promulgated pursuant to express statutory or regulatory authority, and once issued, have the

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force and effect of law, i.e., they carry with them a legal obligation to comply that can be enforced in a court of law. Generally, factors such as benefits and technical feasibility, in addition to comprehensive health-related data, are examined in devising standards for use of hazardous chemicals.

Standards are issued by government agencies only after notice of the standard has been proposed, the public has had an opportunity to comment on the proposed standards, and the issuing agency has taken public comments into account in deciding what the final standard should be. Thus, the Occupational Safety and Health Administration (OSHA) is authorized by statute to establish certain standards for workplace safety, such as standards to limit the amount of dust or chemicals in the air in workplace environments. Similarly, the Environmental Protection Agency issues standards under many of the statutes it administers. For example, EPA has issued worker protection standards under the Federal Insecticide, Fungicide and Rodenticide Act for farm workers who come into contact with pesticides following applications in the field (40 C.F.R. pt. 170).

Defending Yourself

The distinction between guidelines and standards is critical in determining the potential liability of a PCO accused by a homeowner of exceeding the NAS levels. Homeowners often allege that PCOs are liable for negligence because they supposedly have "misused" a termiticide. As purported proof of misuse, these plaintiffs merely assert that indoor air levels were above the NAS "standards," even if there is no evidence that the PCO failed to follow EPA label directions. Fortunately, there are a number of ways a PCO can defend himself against such abuse of the NAS guidelines:

1. *Attack the Plaintiff's Reliance on the NAS Guidelines.*

PCOs should forcefully argue, as explained above, that NAS never intended its interim recommended termiticide guidelines for military housing to serve as general "standards" for private residences. NAS stressed this fact both in its 1982 report and in its clarifying letter to Gregory The Service That Cares.

Clearly, exceeding the NAS guidelines is not proof of misuse.

PCOs also should argue that the recommended levels in the 1982 NAS report were merely a "best estimate" to be used in a limited situation, i.e., a recommendation based on limited data to be used by the military in evaluating exposure of persons in certain types of military buildings until more complete information can be obtained. In addition, NAS acknowledged in its report that the recommended levels, particularly the level for chlordane, were based on limited information which were insufficient to establish anything more than *interim* guidelines. PCOs should argue that the recommended levels described in the report may no longer be current, as evidenced by the mass of new data EPA has been receiving in response to its February 1984 "call-in" for data on termiticide air levels and residues.

2. *Establish That There Is No Proof of Product Misuse.*

No matter what the indoor air levels may be, unless the plaintiff can prove that the PCO failed to apply the termiticide in accordance with EPA-approved label directions, there is a strong presumption that the product was not misused. Clearly, exceeding the NAS guidelines is not proof of misuse.

FIFRA has established the standard for misuse of a pesticide: it is unlawful to use a registered pesticide "in a manner inconsistent with its labeling." FIFRA § 12(a)(2)(G). In approving a pesticide label, EPA is required by law to ensure that use of the pesticide in accordance with label directions will not cause "unreasonable adverse effects" on human health or the environment. Thus, the standard of care established by law for termiticide applications is compliance with the EPA-approved label directions for the product being used. There can be no product "misuse" if the PCO has complied with the pesticide label. In addition to all their other limitations, the NAS guidelines are not government standards, and do not replace or supercede the standard of care reflected by the EPA-approved application directions.

There can be no product "misuse" if the PCO has complied with the pesticide label.

Efforts to Obtain EPA Standards

An "NAS Review of Termiticide Airborne Levels" Committee was formed to address the overall problem with the NAS guidelines. Committee members are: Bob Russell, Orkin Exterminating Co., Atlanta; Phil Gregory, Gregory the Service That Cares, Greenville, S.C.; South Carolina regulators Neil Ogg, ASPCRO, and Dr. von McCaskill, AAPCO; Mark Weisburger, B.&D.A. Weisburger, White Plains, N.Y.; Tom Fortson, Terminix Services, Inc., Columbia, S.C.; and Dr. George Rambo, NPCA, Dunn Loring, Va. The committee has been meeting with EPA's Office of Pesticide Programs in an attempt to induce the Agency to promulgate legally correct and scientifically sound standards for indoor air levels of termiticides based on the data EPA has obtained from the FIFRA data call-in.

Unless and until EPA promulgates such standards, PCOs are likely to continue to be harassed by irresponsible lawsuits accusing them of negligence and product misuse based on the NAS guidelines. Providing to the court a thorough explanation of what the NAS guidelines are and are not, however, should go a long way in helping PCOs and their attorneys mount an effective defense. ■

How to Fight Back

The following are practical suggestions for defending yourself against alleged violations of the NAS guidelines:

1. Find out who—or what "public interest" organization—might have induced the homeowner to sue.

2. Gather as much information as you can about similar suits filed by the homeowner or organization.

3. Determine what termiticides the homeowners may have applied (or misapplied) himself prior to engaging your services and under what circumstances.

4. Hire an expert to evaluate the homeowner's "proof" that air levels in his house exceeded the NAS guidelines and obtain the court's permission to conduct your own monitoring.

5. Have your lawyer explain to the court why the NAS guidelines are not "standards" and why there can be no product "misuse" under FIFRA if label directions were followed.

— Larry Ebner & Alison Kerester

Legal Briefs

EPA's Expanded Rules For Disposal Of Pesticide Containers

by
Lawrence S. Ebner
McKenna, Conner & Cuneo

PCOs often ask about the federal regulations for disposal of empty pesticide containers. In recent months, the Environmental Protection Agency (EPA) has made compliance easier by requiring virtually all pesticide registrants to place uniform disposal instructions on their product labels, depending upon the type of container involved.

Back in 1972, Congress gave EPA authority under FIFRA, the federal pesticide law, to establish procedures and regulations for storage and disposal of pesticides and their containers [FIFRA § 19(a)]. Pursuant to that authority, EPA issued recommended procedures for disposal of various types of depleted containers. For example, EPA recommended that metal drums which had contained organic pesticides be triple-rinsed and then either: returned in good condition to the pesticide manufacturer, formulator or drum reconditioner; punctured and recycled as scrap metal; or crushed and disposed of by burial in a sanitary landfill [40 C.F.R. § 165.9(b)]. Those recommendations are still on the books, but now have been strengthened with formal label instructions, which PCOs must follow to avoid liability for using a pesticide "in a manner inconsistent with its labeling" [FIFRA § 12(a) (2) (G)].

EPA's Office of Pesticide Programs was prompted to establish a uniform set of pesticide container disposal requirements as a result of increasing agency regulatory activity under the Resource Conservation and Recovery Act (RCRA). Congress enacted RCRA in 1976 to govern disposal of solid and other hazardous wastes. EPA felt that older pesticide products included disposal statements (especially for disposal of pesticide wastes) which were inadequate or inconsistent with regulations issued under RCRA. With respect to pesticide containers, the Office of Pesticide Programs wanted to establish uniform requirements to ensure that drums and other types of containers could be reused or disposed of *without* being regulated as hazardous waste under RCRA.

To accomplish this goal, in March 1983 the Office of Pesticide Programs (through its Registration Division) notified all manufacturers, formulators and registrants of pesticides that the labels of their products would have to be amended to include updated storage and disposal statements. This notification ("PR Notice 83-3") was made under the FIFRA Label Improvement Program, which EPA established in 1980 as an across-the-board means of modernizing and improving various categories of pesticide labels. (In a November 1981 notice issued under the Label Improvement Program, the agency "upgraded" labels for many termiticides, including the addition of the same container disposal statements now being specified for all pesticides.)

PR Notice 83-3 describes required label language for storage and disposal of pesticides as well as disposal of containers. It became effective on December 31, 1984, except for household/domestic use products, whose labels have to be amended before December 31, 1985. In addition, virtually identical requirements for pesticide container disposal have been included in a comprehensive set of proposed revised pesticide label regulations (see proposed § 156.70). These proposed regulations were published in the *Federal Register* on September 26, 1984 (49 Fed. Reg. 37,960), and EPA hopes to issue them in final form prior to the end of 1985.

Under these requirements, all products (other than those intended exclusively for household use) must bear one of the following container disposal instructions, based on container type:

Metal containers (non-aerosol)
Triple rinse (or equivalent). Then offer for recycling or reconditioning, or puncture and dispose of in a sanitary landfill, or by other procedures approved by state and local authorities.

Plastic containers
Triple rinse (or equivalent). Then offer for recycling or reconditioning, or puncture and dispose of in a sanitary landfill, or incineration, or, if allowed by state and local authorities, by burning. If burned, stay out of smoke.

Glass containers
Triple rinse (or equivalent). Then dispose of in a sanitary landfill or by other approved state and local procedures.

Fiber drums with liners
Completely empty liner by shaking and tapping sides and bottom to loosen clinging particles. Empty residue into applica-

Continued on page 45

Mr. Ebner is a Partner at McKenna, Conner & Cuneo. He specializes in environmental regulation and litigation.

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tion equipment. Then dispose of liner in a sanitary landfill or by incineration if allowed by state and local authorities. If drum is contaminated and cannot be reused, dispose of in the same manner. [Manufacturer may replace this phrase with one indicating whether and how fiber drum may be reused.]

Paper and plastic bags
Completely empty bag into application equipment. Then dispose of empty bag in a sanitary landfill or by incineration, or, if allowed by state and local authorities, by burning. If burned, stay out of smoke.

Compressed gas cylinders
Return empty cylinder for reuse (or similar wording).

Despite the foregoing, alternative statements based on data, or on special packaging types or product characteristics, may appear on labeling with the approval of EPA. Thus, while it still is necessary to read the label to verify specific directions, PCOs will now have clear and generally uniform federal guidelines to follow when disposing of their empty containers. Of course, state regulations may impose additional requirements. ■

Pest Quest hidden sentence:
Oops! We forgot the Beatles!

Classifieds

Field Supervisor
One of the largest pest control companies in Massachusetts is looking for experienced personnel to supervise and train field technicians in all phases of pest control. College level entomology or urban pest control courses important, but not essential.

Must be willing to relocate to the suburban Boston area of Massachusetts. Call collect, Mr. Aaron Fleischer, at 617-329-7000, X 305.

Looking to Buy
Wish to purchase a small pest control company in the Philadelphia suburbs, for expansion purposes. Location and staff more important than contracts. Address all replies to: Universal-Sentinel, Inc., P.O. Box 383, Ardmore, Pa. 19003.

Service Manager
NYC Metro area. Certified, skilled in: routing, customer relations, personnel management. Benefits, company car. Send resume c/o NPCA, 8100 Oak St., Dunn Loring, Va. 22027.

Termite Control Operations Supervisor
Established north Florida company is looking for the right person to supervise and direct their termite control operations. Must have state certification, proven experience, and ability to train and supervise others. This is primarily a field position. Top pay, benefits and relocation. All replies confidential. Send resume and salary requirements to Personnel Manager, P.O. Box 13768, Tallahassee, Fla. 32317.

Next Month . . .

The June edition of *Pest Management* features:

- **Advice for the "Nincompute"**
  PCOs who know little about computers will appreciate this seven-step guide to computer literacy.
- **Guidelines for a Computer System Contract**
- **Good News for Fumigators**
  This article addresses PCO concerns regarding methyl bromide, EPA's new Label Improvement Program for fumigants, and fumigation in general.
- **What are "Biorationals"?**
  You won't find the answer in Webster's Dictionary. Pest Management ***takes an in-depth look at the origin and development of biorationals.***

Plus, a special interview with the U.S. Senate and House Agriculture Committee Chairmen that deal with pesticides. Also, look for two new exciting departments—*Member Spotlight* and *Then and Now.*

MEETINGS

MAY

21 CONNECTICUT PEST CONTROL ASSOCIATION, Membership Meeting, Yale Motor Inn, Wallingford, Conn. *Contact*: Steven J. Blum, Acme Pest Control, P.O. Box 3031, New Haven, Conn. 06515, (203) 387-4321.

JULY

14 to 16. ALABAMA PEST CONTROL ASSOCIATION, Five States Convention (Tenn., La., Miss., Ark., Ala.), Gulf State Park Resort, Gulf Shores, Ala. *Contact:* Jody Thomas, P.O. Box 1109, Leeds, Ala. 35094, (205) 699-2272.

25 to 28. GEORGIA PEST CONTROL ASSOCIATION, Summer Meeting, Sheraton Savannah Inn & Country Club, Wilmington Island, Savannah, Ga. *Contact*: Glenn H. Burnett, 1273 Bernadette Lane N.E., Atlanta, Ga. 30329, (404) 634-7013.

AUGUST

1 to 4. NORTH CAROLINA—SOUTH CAROLINA JOINT ASSOCIATION, Summer Meeting, Grove Park Inn, Asheville, N.C. *Contact*: Marcy Hege, P.O. Box 36160, Raleigh, N.C. 27706, (919) 851-2901.

SEPTEMBER

17 to 19. PEST CONTROL OPERATORS OF WEST VIRGINIA, Fall Workshop, Ramada Inn, Morgantown, W. Va. *Contact*: Dexter Owsley, P.O. Box 9445, South Charleston, W. Va. 25309, (304) 768-6568.

OCTOBER

16 to 18. MISSOURI PEST CONTROL ASSOCIATION, Fall Conference, Ramada Inn, Columbia, Mo. *Contact*: Andy Mannino, Sr., 3815 Harvester Rd., St. Charles, Mo. 63301, (314) 946-7704.

Legal Briefs

Citizen Suits Under FIFRA—A New Threat to PCOs

by
Lawrence S. Ebner
McKenna, Conner & Cuneo

As if PCO's didn't already have enough to worry about, Congress is considering a bill that would give virtually any disgruntled customer the right to haul a pest control company into federal court and attempt to collect money damages for alleged violations of FIFRA, the federal pesticide law. In addition, the bill would permit environmental groups to seek a court order closing down a PCO's operation or preventing a company from using particular pesticides. The proposed legislation is part of a FIFRA reform package (S.309) introduced late in January by Sen. William Proximre, D-Wis. (The bill also would require all applicators of restricted-use pesticides to be certified, and require commercial applicators to file with the Environmental Protection Agency (EPA) comprehensive annual records of their pest-control activities.)

The so-called "citizen-suit" proposal would cause a fundamental change in the law. At present, only EPA and state enforcement officials have the right to initiate legal proceedings to prevent pesticide applicators from violating FIFRA or for assessing civil penalties when violations occur. Under the Proxmire proposal, any aggrieved "citizen" would have the right to file a suit in federal district court alleging that a PCO has violated FIFRA. PCOs could be accused, for example, of using a pesticide "in a manner inconsistent with its labeling," of using a pesticide that has been "adulterated" or "misbranded," or of using a pesticide that has been suspended or cancelled by EPA (*See* FIFRA §12). If a plaintiff can prove his case, the citizen-suit provision would give him the right to obtain an injunction against further violations of the act, damages for past violations, and even reimbursement for attorney fees incurred in bringing the suit.

If the citizen-suit proposal is enacted, the increased potential liability exposure to PCOs would be tremendous, not to mention the cost of defending against frivolous suits. Presumably, a pest control customer alleging to have suffered injury or harm as a result of a pesticide application would not have to prove negligence or tortious conduct. Instead, he merely would have to demonstrate that the PCO in some manner violated the broad (and vague) "use" provisions of FIFRA.

An imaginative litigant could devise many types of suits under the proposed provision. For example, FIFRA makes it unlawful to use a pesticide that is "misbranded." An environmental group which opposes use of a particular termiticide or rodent bait could allege that the pesticide is "misbranded" under FIFRA because it does not perform its intended function without adversely affecting health or the environment. If a federal court agrees that the pesticide is "misbranded" for such reason, it could enjoin PCOs from violating FIFRA by using the misbranded product. The environmental group even could try to collect damages on behalf of its members for past use (or "misuse") of the pesticide.

There is no way of knowing whether such citizen suits would succeed. Numerous courts have held that under the current FIFRA, there is no "private right to sue." Because federal courts have limited jurisdiction, they can hear cases only when the plaintiff has the right to sue under some statute. The Proxmire bill or a similar amendment would be necessary to create such a right under FIFRA.

In 1972, when the modern FIFRA was enacted, Congress considered, but ultimately rejected, a citizen-suit provision. The Senate Committee on Agriculture (which oversees the federal pesticide law) felt that enforcement of FIFRA should be left up to EPA and state authorities. In an official report, the committee expressed concern that the amendment could "encourage suits by professional litigants" and "[t]he filing of baseless claims and harassing suits" (Supplemental Report on H.R. 10729, S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 39).

Congress' attitude, however, may have changed. Prompted by a coalition of environmental groups, a citizen-suit proposal and other FIFRA "reform" measures passed the House and were working their way through the Senate when Congress adjourned in 1982. The recently introduced Proxmire bill is identical to the bill that almost was enacted in 1982. While the future of the citizen suit proposal is uncertain, it certainly would be another legal headache for PCOs and their affiliates if enacted. ■

Mr. Ebner is a graduate of Dartmouth College and Harvard Law School. He is a partner in McKenna, Conner & Cuneo, a national law firm specializing in environmental law, toxic tort litigation, and pesticide regulation.

Legal Briefs

Federal Hazard Communication & PCOs

by
Lawrence S. Ebner and
William A. McCue
McKenna, Conner & Cuneo

The initial deadline for complying with the Occupational Safety and Health Administration's (OSHA) hazard communication standard—November 25, 1985—is rapidly approaching. Pest control operators (PCOs) have been asking how, if at all, the federal hazard communication standard will affect them. The concern of PCOs is certainly understandable. Hazard communication is a regulatory program of extremely broad effect. The standard's requirements include assessing the hazards of workplace chemicals, labeling chemical containers, distributing material safety data sheets, and providing training on the safe handling of hazardous chemicals in the workplace and minimizing exposure to them. (*See generally* 29 C.F.R. § 1910.1200, 1985.)

For the time being at least, PCOs can relax about federal hazard communication. Because most PCOs are not "chemical manufacturers," "importers," "distributors" or "manufacturing employers" as defined in the standard, they are not presently covered. Moreover, even if a PCO did fall into one of those categories, he would be exempt from the standard's labeling requirements because of the exemption for labeling of pesticides.

PCOs should *not* assume, however, that just because the federal standard does not presently reach them, it never will. As a result of two recent federal court decisions, the scope of the standard and its effect on state and local "right-to-know" laws are undergoing change.

One case, *New Jersey Chamber of Commerce v. Hughey,* involved a challenge to New Jersey's right-to-know law by trade association and corporate plaintiffs. They contended that the New Jersey law is preempted in its entirety by the federal hazard communication standard. The federal district court in New Jersey held that the New Jersey law is preempted only insofar as manufacturing employers are concerned since they are subject to the federal standard. The rest of the New Jersey law remains intact. Since PCOs are generally not manufacturing employers, they still would be covered by New Jersey's and other states' right-to-know laws to the extent that those laws are applicable, if the Chamber of Commerce decision is upheld.

The second case, *United Steelworkers v. Auchter*, was decided by the U.S. Court of Appeals for the Third Circuit in late May. United Steelworkers involved a challenge to hazard communication from petitioners who contended that hazard communication's limitation to the manufacturing sector is arbitrary and inconsistent with the purposes of OSHA's enabling act, the Occupational Safety & Health Act of 1970. In its decision, the Third Circuit agreed with petitioners noting that OSHA had failed to show why it was not feasible to extend the hazard communication requirement beyond the manufacturing sector of the economy. The court directed the Secretary of Labor to order that the hazard communication program be extended "to other sectors" of the economy unless "he can state reasons why such application would not be feasible."

Next, the court held that the hazard communication standard does preempt state right-to-know laws with respect to manufacturing sector employees. The ruling is highly significant because it may lead to the invalidation of all state right-to-know laws that are not approved by OSHA.

The implications of *United Steelworkers v. Auchter* for PCOs are intriguing. OSHA has now been sent back to the drawing board to consider broadening the coverage of hazard communication beyond the manufacturing sector. It is thus possible that the agency will eventually decide to include PCOs within the purview of the program. OSHA has stated that it will conduct a formal rulemaking to determine what other industries should be covered by hazard communication. It expects this process to consume one year.

If OSHA does extend the scope of hazard communication to cover PCOs, that action would apparently have the effect of releasing PCOs from their obligations pursuant to whatever state and local right-to-know laws cover them. Such a result might be greatly preferred by PCOs operating in more than one state, since it would result in considerably greater uniformity and predictability with respect to company-wide hazard communication obligations.

In sum, the scope and effect of hazard communication at the federal and state levels are not yet fully settled. PCOs are not covered by the federal standard, but may be in the future since they use "hazardous" chemicals. That could be a blessing in disguise given the proliferation of state and local right-to-know laws. ■

Messrs. Ebner and McCue specialize in environmental law at McKenna, Conner & Cuneo, Washington, D.C.

REGULATION OF PESTICIDE APPLICATORS

by Lawrence S. Ebner and Risa H. Rahinsky

"A pesticide applicator's compliance with the label creates a presumption that the pesticide has not been misused."

The primary means by which the Environmental Protection Agency regulates pesticide applicators is through pesticide labels and labeling. Under § 12 of FIFRA, the federal pesticide law, the use of a pesticide "in a manner inconsistent with its labeling" is unlawful. FIFRA § 12(a)(2)(G). As a result, EPA can regulate pesticide applicators by utilizing labeling to specify the terms and conditions of use. Furthermore, pesticides are classified either for "general use" or "restricted use." Only certified applicators or persons under their direct supervision can apply a pesticide that is labeled for "restricted use."

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Pesticide Labeling

Pesticide labeling* is EPA's principal method of communicating safety information to pesticide applicators. Labels and labeling provide detailed information regarding proper application methods, protective clothing, safety precautions, and so forth. In recognition of the importance of labeling, EPA has been conducting a comprehensive "Pesticide Label Utility Project" to determine the extent to which labels and labeling are read and followed. The goal of the study is to develop measures for increasing the effectiveness of pesticide labeling as a communications vehicle.

On September 26, 1984, EPA published proposed regulations which would describe labeling requirements in considerably more detail. These proposed regulations are expected to be finalized in 1987 or 1988.

EPA's proposed regulations define "use" as "*any activity* covered by the pesticide label, including but not limited to, application of a pesticide, mixing and loading, storage of pesticides and pesticide containers, disposal of pesticides and pesticide containers, and reentry into treated areas." 40 C.F.R. § 156.3(i)(proposed) (emphasis added). This circular definition suggests that EPA intends to utilize labeling to regulate more activities than just pesticide application *per se*.

Use Classification

FIFRA also regulates pesticide applicators according to the type of pesticide being applied. Section 3(d) of FIFRA requires that each pesticide product be classified either for "general use" or "restricted use." A general use pesticide is one which "when applied in accordance with its directions for use, warnings and cautions...will not generally cause unreasonable adverse effects on the environment." A restricted-use pesticide is one which "may generally cause, *without additional regulatory restrictions*, unreasonable adverse effects on the environment, including injury to the applicator." FIFRA § 3(d)(1)(C)(i) (emphasis added). A restricted-use pesticide may be applied only "by or under the direct supervision of a certified applicator." *Id.* Certification of applicators ensures that access to restricted-use products is limited to persons who have the knowledge, skills, and experience to use such pesticides safely. In most cases, certification is granted by state agencies.

"Some states require a certified applicator to be present during application of restricted-use pesticides."

An applicator certified pursuant to FIFRA § 4 can use or supervise the use of any pesticide that is classified for restricted use. FIFRA § 2(e) defines two categories of certified applicators: private applicators and commercial applicators. EPA regulations establish different standards for certificaton of commercial and private applicators. *Compare* 40 C.F.R. § 171.4 *with* § 171.5. In addition, the distinction between the two is relevant for purposes of imposing civil or criminal penalties for pesticide misuse.

A private applicator is a certified applicator who uses or supervises the use of restricted-use pesticides for agricultural purposes on property owned or rented by him or his employer. Thus, farmers who have fulfilled certification requirements are considered private applicators.

A commercial applicator is an applicator who uses or supervises the use of any restricted-use pesticide for any purpose or any property other than as provided in the definition of private applicator. Note that a commercial applicator need not be certified if he works under the direct supervision of a certified applicator. Commercial pest control operators fall within the FIFRA definition of commercial applicators *only* when they apply restricted-use pesticides.

Certified applicators and other persons under their direct supervision can apply restricted-use pesticides. Unless otherwise prescribed by its labeling, a restricted-use pesticide is considered to be "applied under the direct supervision of a certified applicator if it is applied by a competent person acting under the instructions and control of a certified applicator who is available if and when needed, even though such certified applicator is not physically present at the time and place the pesticide is applied." FIFRA § 2(e)(4); *see also* 40 C.F.R. § 171.2(a)(28). Moreover, certified applicators must demonstrate a practical knowledge of federal and state supervisory requirements with respect to the application of a restricted-use pesticide by uncertified applicators. While some states have the authority to adopt regulations requiring a certified applicator to be physically present, a majority of them have not. Some states, however, require a certified applicator to be present during application of restricted-use pesticides. *See* GAO Report, *supra*, at 50.

EPA regulations define "competent" as used in FIFRA § 2(e)(4) to mean "properly qualified to perform functions associated with a pesticide application, the degree of capability required being directly related to the nature of the activity and the associated responsibility." 40 C.F.R. § 171.2(a)(11). Nevertheless, interpretations of the term "competent person" vary among state regulatory agencies.

The proposed 1986 amendments to FIFRA would have required noncertified commercial pesticide applicators to be trained and registered with the lead state regulatory agency before applying *any* pesticides, restricted or not. Most pesticide user associations have taken the position that the training of service technicians is an effective way to ensure applicator competency. Maryland, for example, has enacted a law providing that commercial pesticide applicators, other than FIFRA-certified applicators, successfully complete a mandatory technician training program approved by the Maryland Depart-

(Continued on Page 24)

* The term "labeling" encompasses the term "label." FIFRA defines "label" as "the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers." FIFRA § 2(p)(1). "Labeling" is "all labels and all other written, printed, or graphic matter accompanying the pesticide at any time, or . . . to which reference is made on the label or in literature accompanying the pesticide or device." FIFRA § 2(p)(2). The pesticide applicator, therefore, must read and follow any and all labeling, not just the label.

ment of Agriculture. Pennsylvania has passed similar training requirements for technicians and applicators.

Although there are no federal controls over the competency of commercial applicators with respect to general-use pesticides, a majority of states have requirements designed to ensure that such applicators perform competently. Generally, states require that commercial applicators either demonstrate competency or work under the direct supervision of someone who has. Some states require firms which apply any pesticide for hire to obtain a business license and to have a certified applicator in their employ at all times. In several states (for example, California and Florida), the controls are more stringent, requiring *each* applicator to demonstrate competency. EPA's growing interest in regulating pesticide applicators has been influenced by the GAO Report mentioned earlier, which recommends that EPA encourage states not having general-use pesticide applicator programs to institute them.

Currently, EPA categorizes § 2(e)(3) commercial applicators who use or supervise the use of restricted-use pesticides according to the types of pest control listed at 40 C.F.R. § 171.3. These categories include, for example, "commercial" applicators involved in agricultural pest control, aquatic pest control, forest pest control, and use of pesticides on animals or seeds. EPA has proposed regulations for pesticide-use classification that broaden the scope of regulation of commercial pesticide applicators. *See* 49 Fed. Reg. 37,966 (1984).

First EPA has proposed a change in pesticide labeling language to require certified applicators who apply restricted-use pesticides to be specially trained and certified to perform the specific uses listed on the label. Thus, the EPA has proposed to modify the restricted-use statement to read: "For retail sale to and use only by a Certified Applicator *for uses authorized by his certification*, or by persons under his direct supervision." *Id.* (emphasis added). EPA thereby can limit the use of restricted-use pesticides to designated categories of certified applicators.

"EPA is required to ensure that use of the pesticide in accordance with label directions will not cause 'unreasonable adverse effects' on human health or the environment."

Second, EPA is considering expanding the categories of commercial applicators under 40 C.F.R. § 171.3 by establishing a series of highly specialized, defined user categories pursuant to its authority under § 3(d)(1)(C)(ii). That provision enables EPA to classify a pesticide for restricted use on the basis of considerations such as the need for specialized equipment and training rather than toxicity criteria. EPA intends to work with the states to develop these user categories.

Finally, EPA believes that the term "general use" is potentially misleading if a user infers from the statement that the product may be used for "general purposes" not listed on the label. Thus, EPA has proposed that only products classified for restricted use bear a statement to that effect. Products classified for general use would not be permitted to bear a classification statement. EPA believes that the labeling of only those pesticides which are restricted will effect the intent of FIFRA to distinguish between restricted-use and general-use pesticides.

Use in a Manner Inconsistent With the Labeling

Section 12(a)(2)(G) of FIFRA prohibits use of a pesticide "in a manner inconsistent with its labeling." Such unauthorized use represents "misuse."

Section 2(ee) of FIFRA establishes four exceptions to the definition of using a pesticide "in a manner inconsistent with its labeling": "(1) applying a pesticide at any dosage, concentration, or frequency less than that specified on the labeling; (2) applying a pesticide against any target pest not specified on the labeling if the application is to the crop, animal, or site specified on the labeling, unless [EPA] has required that the labeling specifically state that the pesticide may be used only for the pests specified on the [label]. . . (3) employing any method of application not prohibited by the labeling, or (4) mixing a pesticide. . . with a fertilizer, when such mixture is not prohibited by the labeling." The 1978 amendments added the foregoing exceptions to FIFRA in order to afford applicators more flexibilty in determining the manner in which to apply their pesticides.

A pesticide applicator's compliance with the label creates a presumption that the pesticide has not been misused. This is because in approving a pesticide registration, EPA is required to ensure that use of the pesticide in accordance with label directions will not cause "unreasonable adverse effects" on human health or the environment. Thus, the standard of care established by law for pesticide applicators is compliance with the EPA-approved label.

Enforcement Actions Against Pesticide Applicators

Although FIFRA vests EPA with substantial enforcement authority, allegations involving pesticide misuse are primarily the responsibility of state regulatory agencies. Pursuant to FIFRA § 26, EPA must determine that a state has adopted adequate pesticide use laws and enforcement procedures before it can acquire primary enforcement responsibility. EPA retains enforcement authority for use violations that occur within a state that has not met EPA's criteria for primary enforcement authority. With the exception of Nebraska and Wyoming, all states have full primary enforcement responsibility as of this writing. Moreover, EPA may prosecute a use violation upon the request of a state.

Investigations to determine whether pesticides are being properly used can be divided into two categories—use inspections and misuse investigations. Although EPA derives its authority to conduct such investigations from FIFRA § 12(a)(2)(G), the states

normally perform these activities pursuant to their primary enforcement authority.

Use inspections include routine investigations or planned observations. Their purpose is to develop data on the common practices of applying pesticides, to encourage the proper use of pesticides, and to determine whether pesticides are being used in accordance with their label directions.

Misuse investigations include investigations of reported complaints or incidents of pesticide misuse. These investigations are conducted to develop evidence in support of enforcement actions arising from the alleged use of a registered pesticide in a manner inconsistent with its labeling.

The appropriate level of enforcement for pesticide misuse is based on the severity of the violation. There are two types of actions—administrative and judicial. Generally, administrative actions are initiated for violations of a lesser nature or against first-time offenders. Judicial actions are reserved for use violations of an especially egregious nature that result in serious harm to human health or the environment, and for willful or repeated violations.

"Unless the plaintiff can prove that the pesticide applicator failed to apply the pesticide in accordance with EPA-approved label directions, there is a strong (if not irrebuttable) presumption that the applicator did not misuse the product."

Several different administrative enforcement remedies are authorized by FIFRA. For example, EPA or the states, under their primary enforcement authority, may issue a notice of warning pursuant to FIFRA § 9(c)(3) in response to minor offenses rather than prosecute an applicator for pesticide misuse. Under FIFRA § 14(a)(4), EPA determines whether a violation has occurred "despite the exercise of due care" by the pesticide applicator, or "did not cause significant harm to health or the environment." In such situations, EPA "may issue a warning in lieu of assessing a penalty." EPA also has authority to issue a stop use order under § 13(a) if the violation is of a serious and ongoing nature. State agencies may or may not have state statutory authority to assess civil fines.

Under the regulations relating to the certification of pesticide applicators, EPA is authorized to deny, suspend, modify, or revoke federally issued applicator certifications if the applicator violates FIFRA or its regulations. States may take the same action with respect to state FIFRA certifications. An enforcement action affecting certification status is a strong measure to be taken only when the "public health, interests or welfare warrants immediate action." 40

C.F.R. § 171.11(f)(5)(i). Therefore, EPA, as well as the states, will deny, suspend, modify, or revoke a certification only in limited circumstances.

Judicial enforcement actions may involve either civil or criminal proceedings. *See, e.g., United States v. Corbin Farm Service*, 578 F.2d 259 (9th Cir. 1978) (pesticide applicator held criminally liable for knowingly applying a pesticide in a manner contrary to the directions on the label); *George's Pest Control Service v. EPA*, 572 F.2d 204 (9th Cir. 1977) (pesticide applicator held civilly liable for failing to apply a pesticide directly into "cracks and crevices" as required by the label). Remedies in civil proceedings include fines, injunctions and seizures under FIFRA. Criminal proceedings are authorized under § 14(b) and could result in fines or even imprisonment of the pesticide applicator.

EPA seeks initiation of criminal proceedings infrequently and imposition of criminal sanctions only in the most serious instances of applicator misconduct. The nature of the violation, the history of compliance on the part of the pesticide applicator, and the seriousness of the environmental consequences generally influences EPA's decision on whether to seek criminal prosecution of a pesticide applicator.

Unlike certain environmental statutes, FIFRA does not include a provision for citizen suits to enforce the act (Congress considered adding such a provision to FIFRA in 1986). Nevertheless private individuals sometimes attempt to redress alleged pesticide misuse by filing lawsuits against pest control operators. The agricultural, aviation, and structural pest control industries have been targets of such suits. Although these types of suits are not enforcement actions *per se*, they focus on pesticide misuse and seek damages from the pesticide applicator (and sometimes, from the pesticide producer). Unless the plaintiff can prove that the pesticide applicator failed to apply the pesticide in accordance with EPA-approved label directions, there is a strong (if not irrebuttable) presumption that the applicator did not misuse the product.

State and Local Regulation of Pesticide Applicators

In addition to their primary enforcement authory under FIFRA, virtually all states regulate the use of pesticides. Most states have enacted special laws directed specifically to misuse of pesticides. California, for example, enacted a statute directed at illegal applications of pesticides on crops or commodities, or at sites not included on the pesticide's EPA labeling. The statute imposes civil and criminal penalties against applicators for illegal use in order to counter "the serious threat to the environment and public health" and "the serious market disruption because of loss of consumer confidence." By addressing problems of pesticide misuse through state legislation, the states provide an additional mechanism by which to regulate pesticide applicators.

The extent to which a state's political subdivisions (i.e., counties and municipalities) have authority to regulate pesticide applicators is considerably less certain. A federal district court in Maryland recently ruled that local governments are preempted by FIFRA from regulating the use of pesticides through posting requirements or otherwise. *Maryland Pest Control Association v. Montgomery County*, 646 F. Supp. 109 (D. Md. 1986), *appeal filed*, Nos. 86-3633, 86-3639 (4th Cir. Oct. 14, 1986), *argued*, April 7, 1987. The National Pest Control Association filed a brief as a "friend of the court" in support of the federal district court's decision.

Issues Affecting the Regulation of Pesticide Applicators

Notwithstanding the legal debate over local regulation of pesticides, EPA continues its efforts to expand regulation of pesticide applicators under FIFRA. For example, EPA is considering regulations to require public notification of certain pesticide applications. EPA may in the future require pesticide applicators to provide notification to potentially exposed individuals.

The users of wood preservatives, who treat wood commercially, recently were confronted with the issue of third-party notification. In a FIFRA § 6(b) notice of intent to cancel, EPA announced that registrants of wood preservatives (which are regulated as pesticides under FIFRA) would have to include on their product labeling the requirement that applicators (i.e., commercial wood treaters) implement a Consumer Awareness Program (CAP) involving labeling of the treated wood. A wood-preservers' trade association contended that the CAP was an unprecedented and unlawful attempt by EPA to expand the scope of its authority over applicators. The EPA administrative law judge (ALJ) who ruled on the issue agreed. He invalidated the CAP because it required labeling of pressure-treated wood, which is neither a pesticide nor a device within the meaning of FIFRA. The wood-preservative proceeding was eventually settled and a voluntary CAP implemented by the industry.

EPA also has solicited comments regarding a proposed requirement for "downstream" labeling of consumer products treated with pesticides. Downstream labeling would require treated substances or articles that have repeated or regular human contact to bear statements of the potential hazard of the product. This could include, for example, pesticide-treated fabrics, paints, mattresses, rugs, etc. EPA would impose these downstream notification requirements through pesticide labeling. Under this scheme, failure to label the consumer product to which the pesticide has been applied would be "misuse" of the pesticide. In light of the ALJ's decision in the wood-preservative proceeding, however, EPA's authority under FIFRA to require downstream labeling of consumer goods is debatable.

For more information or legal citations contact the authors, Larry Ebner (who is NCPA's General Counsel) and his associate Risa Rabinsky, at (202) 789-7500, McKenna, Conner & Cuneo, Washington, D.C.

The article is based on a chapter of the Pesticide Regulation Handbook (Revised Edition) *by McKenna, Conner & Cuneo. NPCA members can order the handbook at a discounted price of $50 (⅓ off the regular price) through the publisher, Executive Enterprises Publications Co., Inc., (212) 645-7880, Ext. 210. Remember to identify yourself as an NPCA member if you wish to receive the discount.*

Getting Your Legal Moneys' Worth

by Lawrence Ebner
Attorney, McKenna & Cuneo
Washington, D.C.

You've heard all the lawyer jokes, and maybe told a few. When legal problems arise, however, they are no laughing matter. They can cost you a lot of money, keep you awake at night, and hurt or ruin your company's reputation. That's why sooner or later, almost every pest control company needs an attorney, either to help avoid legal problems or handle them when they occur.

It's no secret that you have to pay a lot for the services of a high quality lawyer. Here are some suggestions on how to work well with your attorney to get the most for your money:

CHOOSE YOUR LAWYER CAREFULLY.

Be certain that he or she has previous experience with your type of problem. For example, a local lawyer who knows how to incorporate a business or draft an air-tight service agreement is not necessarily the best lawyer to advise you on a sticky employee issue or defend your company in court when a customer claims his property has been damaged. You should not have to pay for an attorney's on-the-job training. Before you hire a lawyer, ask questions like, "Have you ever worked with a pest control company before?," "How many other cases (or problems or projects) like mine have you handled?," "Will you personally be working on my matter, or will it be another lawyer in your firm?," "How much experience does that other lawyer have?," and "How soon can you help me?."

Even if your insurance company is responsible for hiring a lawyer to defend your company in a liability suit, you should have a say in who the lawyer will be. Unfortunately, some insurers hire attorneys more on the basis of the relatively low, bulk rates they offer to insurance companies than on their experience dealing with pest control issues. Insurance companies will select a lawyer from their "approved list" and simply notify the affected PCO, who incorrectly assumes that he must accept the insurer's choice, like it or not. In many states, if the insurer has sent you a reservation of rights letter (meaning that the insurer may or may not indemnify you in the event of an adverse judgment), you have the right to select a lawyer, even though the insurer must pick up the tab. The worst thing you can do is turn a claim or suit over to your insurance company and assume you can just forget about it. Remember — your company's reputation, and possibly your money, is at stake.

AGREE ON FEES BEFORE ANY WORK IS DONE.

Most lawyers get paid by the hour for the types of legal work that PCOs typically need (contingency fees normally are used only by attorneys representing plaintiffs in damages suits). If you are responsible for paying a lawyer's fees, you should determine his or her hourly rate in advance and obtain an estimate of the total time that he or she expects to devote to your matter. You can negotiate hourly rates. Companies of all sizes frequently request and obtain discounts from standard rates. Other types of fee arrangements (such as a fixed fee) sometimes will work. Billing details are also important, such as how much of an up-front retainer will be required, what types of additional costs you will incur (photocopying, postage, etc.), and how frequently you will be billed (monthly, quarterly, or only once). You should ask the lawyer for a written letter of engagement which describes the nature and scope of the legal work and summarizes the fee arrangement.

STAY IN TOUCH WITH YOUR LAWYER.

Some attorneys do a better job of communicating with their clients than others. If you think that yours falls into the latter category, you should let him or her know that you want to be kept apprised of all major developments and consulted at key decision points, either in person or by telephone or mail. You are entitled to have a clear understanding of exactly what your attorney is doing for you and why at all times. Never forget, or allow your lawyer to forget, that you are the client, even when your insurance company hires the lawyer for you. Most lawyers not only welcome, but actively seek, their clients' continuing input and support. You should remain involved to enable yo attorney to handle your matte efficiently and achieve a favc able outcome.

EDUCATE YOUR LAWYER ABOUT YOUR CASE.

You need to be open with you lawyer and provide him or her with all pertinent facts. This includes the opportunity for the lawyer to interview you and your employees in detail, and review any relevant files or documents. Even when the facts are bad, such as when you have reason to believe that one of your technicians may have missed signs of termite damage or misapplied a pesticide, you need to let your lawyer know. Remember that there is an attorney-client privilege which attaches to all confidential information provided by you to your lawyer. This means that it would be unethical for the lawyer to disclose such information without your prior approval.

These are just a few tips on how to have a successful, cost-effective relationship with your lawyer. As long as you are willing to assert yourself and maintain control over that relationship, there is no reason to be reluctant about seeking a lawyer's assistance.

Lawrence Ebner *is a lawyer who works closely with NPCA and individual pest control companies throughout the United States.*

Legal Brief

State Environmental Cleanup Responsibility Acts: A Breakthrough or a Barrier?

By
Lawrence S. Ebner
Carole Stern
McKenna, Conner & Cuneo

If you are thinking about buying, selling, leasing or closing a pesticide manufacturing or wholesaling establishment in a state like New Jersey, which has an Environmental Cleanup Responsibility Act (ECRA), think again. Under ECRA, the Department of Environmental Protection, or the party purchasing or renting the business or real property, can void the transaction if the owner or operator fails to meet certain environmental cleanup requirements imposed by the Act.

While ECRA currently does not apply directly to pest control firms, its impact may be felt through higher pesticide costs brought about by compliance with the Act by manufacturers and wholesalers. The same, or even greater, effects may soon be felt by pest control operators in other states which plan to follow New Jersey's lead in requiring pre-transaction cleanups.

ECRA, which became effective on December 31, 1983, requires the owners or operators of industrial establishments with environmental contamination caused by hazardous substances or wastes to clean up their property as a precondition to closure, sale or transfer. The law only applies to owners or operators of businesses within certain standard industrial classifications, including manufacturing and wholesale operations for chemicals such as pesticides. ECRA imposes certain pre-transaction obligations on the owners or operators of these businesses if they have generated, manufactured, refined, transported, treated, stored, handled or disposed of certain hazardous substances and wastes including pesticides regulated by the state. Following an inspection and evaluation procedure undertaken by the Department of Environmental Protection prior to consummation of the transaction, the owner or operator must submit either (1) a declaration that there is no hazardous substance contamination on the site or (2) a detailed cleanup plan accompanied by financial security assuring the performance of the cleanup.

ECRA has been described as both a breakthrough in environmental regulation and a barrier to corporate and real estate transactions. ECRA's use of the "void transaction" remedy in addition to substantial penalties gives rise to its description as a radical, new approach to environmental control. Its characterization as an obstacle to conduct of commerce, on the other hand, derives from an analysis of the scope of transactions which it affects.

ECRA comes into play not only upon the final sale or shutdown of a facility, but also in a broad range of other transactions affecting property interests. Its provisions must be considered upon any conveyance of real property on which an industrial establishment is located, the sale of the assets or controlling stock of the business, the transfer or dissolution of a corporate identity, a financial reorganization, the initiation of bankruptcy proceedings, the exercise of an option to buy, or a foreclosure sale. Leasing transactions are also subject to ECRA. The pre-transaction cleanup requirements may be triggered by the closure of operations leasing a location, a landlord's sale of title to real property even though the industrial establishment is continuing to operate on the leased premises, or initiation of a new leasing arrangement. ECRA cannot be circumvented by agreement between the parties that the transferee need not conduct a cleanup.

The costs of complying with ECRA may be great, but the risks of noncompliance are greater. Both can be limited with careful planning. Landlords should draft lease terms to require tenants to comply with the Act upon closure of their operations. Sellers of the stock or assets of a business should carefully assess the costs of ECRA compliance before finalizing the terms of the transaction. They should also complete compliance with ECRA before the transfer (or negotiate an administrative consent order with the state) in order to avoid a challenge to the transaction that may be raised on ECRA grounds if the buyer ultimately determines that the transaction is no longer financially attractive. Purchasers, while not required to conduct the cleanup, should monitor sellers' compliance with ECRA so as to assure that its terms have been met and the transaction is not subject to challenge by the state. Companies entering into mergers should conduct pre-transaction planning and cleanup to avoid challenge to the transaction by the state.

Undoubtedly, these precautions will add time and expense to the completion of many business transactions. Nonetheless, until the many questions concerning the scope and effect of ECRA are resolved through litigation, chemical manufacturers

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Classified Ads

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Experienced sales or sales manager for midwest company. Top draw, excellent commission. Sell commercial, industrial. Please send reply to P.O. Box 377, NPCA, 8100 Oak Street, Dunn Loring, Va., 22027.

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Legal Brief

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and wholesalers in states which have ECRA laws are well advised to plan for compliance, rather than risk the consequences of entering into corporate or real estate transactions which may later be undone. Further, and perhaps more importantly, the progress of similar legislation in other states should be closely monitored to ensure that ECRA-type requirements are not imposed on even broader categories of real estate and business transactions such as those affecting pest control firms or their customers directly.

For more information contact Larry Ebner, who is NPCA's General Counsel, or his associate, Carole Stern, at (202) 789-7500.

Another NPCA Member Service

Did you know...the National Pest Control Association retains a management consulting firm to answer member questions about pay plans, employment, benefits, discharge and other benefit services. This "no charge" service is through a retainer agreement with Seay Management Consultants, Inc., Orlando, Fla. If you're a member of NPCA, call Sandy Seay at (305) 423-7329 or write to Seay Management Consultants, Inc., P.O. Box 8216, Orlando, Fla. 32856-8216.

Next Month:

Just ahead in the May edition of *Pest Management*, you'll find features on:

- **The Future of Pest Control**
  Pest Management *asks industry leaders what changes they forsee in pest control technology, products, and certification requirements.*
- **Insecticide Discoloration of Nylon Carpet Dyes (Part I)**
  It is important that pest control operators select, when possible, insecticide products that have the least potential for causing dye discoloration.
- **Small Engine Maintenance**
  In many cases, small engine maintenance programs fail to pay off because owners or supervisors do know enough about their equipment.
- **How To Dress for Safety**
  Clothing worn when applying pesticides, if selected carefully, can offer optimal protection and minimize the risk of pesticide poisoning.

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