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

(Continued on Page 20)

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.

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

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.

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.