

# Defensive

*moves*

## The PCO's

## Guide To

## Avoiding

## Lawsuits



**N**obody wants to get slapped with a lawsuit, and yet, it happens every day. Thankfully, the majority of potentially litigious situations that crop up in the pest control industry get settled or resolved long before they reach the lawsuit stage. But, says at least one industry legal expert, the number of lawsuits against PCOs is increasing.

By

Lisa Josof

Larry Ebner is a lawyer with 25 years' experience who defends pest control companies throughout the United States and also serves as legal counsel for the National Pest Control Association. He believes PCOs "should do everything they can to avoid getting sued."

According to Ebner, the most common type of litigation against PCOs concerns claims of structural damages caused by alleged negligent inspections for wood destroying insects. The next most common types, he finds, are lawsuits filed by customers claiming injury or sickness due to chemical exposure; and lawsuits claiming contamination of customers' homes and/or property.

Furthermore, Ebner says, there are five things PCOs must do to avoid getting sued. These measures should be followed by all PCOs,

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and will not only serve to protect them, but also to help stop the trend of litigation against PCOs. In addition, several industry insurance experts have provided practical comments on specific areas of technician training, documentation, and communications, which will go a long way toward guarding PCOs in the event of a claim situation or customer dispute.

**Resolve complaints early.** The first thing PCOs need to do to avoid getting sued, says Ebner, is to resolve customer complaints early, before they become lawsuits. And while this sounds simple enough to do, in reality it often isn't.

"Very often the customer isn't satisfied with just one callback," Ebner points out, "and the PCO needs to continue working at resolving the customer's complaints." If the customer's problem isn't resolved, the customer may grow impatient and decide to take legal action.

"Once the dispute gets into the hands of an aggressive plaintiff's lawyer, the PCO's being right won't carry the day," says Ebner. Therefore, he adds, it's often a lot cheaper to give the customer what they want while the complaint is still fresh than to have to go through litigation later.

Michael Weisburger of B&DA Weisburger Insurance points out that resolving a claim quickly can involve several people.

"There's the reaction time on the part of the technician, the reaction time on the part of the owner of the company, the reaction time of the insurance broker, and of the insurance company, insurance adjusters and attorneys," Weisburger said. "If there's a perception that it's taking too long for a plaintiff to have their problem corrected, emotionally and in reality, cases heat up and cost a lot more money."

**Use alternative dispute resolution techniques.** The next rule of thumb for PCOs to follow in avoiding lawsuits is to use what lawyers refer to as "alternative dispute resolution" when trying to resolve customer complaints and disputes. There are two basic types of "ADR," says Ebner: mediation and arbitration.

Mediation occurs when an impartial third party meets with each side in the dispute and tries to work out a negotiated settlement. Arbitration, on the other hand, is somewhat like a "mini-trial," and is often conducted through the local office of the American Arbitration Association.

Local associations such as the Better Business Bureau also offer mediation and arbitration services.

Arbitration has the advantages of being quicker, cheaper and more informal than a trial in a court of law, and furthermore, it normally is legally binding. Considering the advantages arbitration has over legal actions in a court of law, Ebner is amazed that more pest control companies' written service agreements don't contain arbitration clauses dictating that any disputes should be resolved through arbitration.

"I strongly recommend that every pest control company not only have a written service agreement," said Ebner, "but that they also have a broad arbitration clause in the agreement, so that no matter what type of dispute they may have with a customer, it can be arbitrated."



Michael Weisburger



Larry Ebner

agreement from the customer. The nondisclosure agreement assures the PCO that whatever settlement was made, it

cannot be discussed or made public. Both of these documents should be secured as part of the settlement, whether or not a lawsuit has been filed, Ebner says.

"If you don't get the release, the customer could turn around and try to sue you two months later," Ebner explained. "Or they can go talk to the local newspapers or the broadcast media, or their lawyers can talk to other potential claimants about the settlement to try to drum up more lawsuits."

**Two precautionary measures.** The last two steps to "avoiding lawsuits" are actually two measures that will help PCOs

## When To Draw The Line On ANSWERING QUESTIONS

**F**red Whitford, the coordinator of pesticide programs at Purdue University, has some advice for pest control technicians: don't talk about what you don't know.

Whitford is a regular speaker at technician training programs all over the country. His advice concerns the random occasions that technicians are stopped by regulatory officials and asked questions about their work. Sometimes, Whitford says, these questions have to do with facts technicians may not know about, or may be beyond the scope of what they are expected to know. In such situations, technicians should be wary of trying to answer questions to which they do not know the answers, Whitford says.

"Why would a technician guess at an answer a regulatory person asked them?" Whitford says. "They've been taught to always talk to regulatory people and answer questions," Whitford notes, "and in that scenario, if you don't know what the answers are, why would you guess at an answer which they are writing down as if they're facts?"

It's important not to guess at answers, Whitford explains, because any information collected by regulators, whether bogus or not, typically ends up as part of the record. And should the need arise, that record is often used as evidence in a court of law.

Making the problem worse, says Whitford, is that many times technicians can feel threatened or intimidated, or may even be bullied by regulatory officials to respond with at least some answer, even if they have to guess. Therefore, he advised, technicians should be instructed that when they feel uncomfortable with a questioning situation, they should stop and call their supervisor, who should be present to support them. After all, Whitford points out, it may be the job of the regulatory people to ask questions, but technicians have the right to answer questions on their own terms and to have the appropriate support people present.

### Get a release and secrecy agreement.

A third prevention recommendation, says Ebner, applies when a PCO has settled either a dispute or a lawsuit. In this situation, when a settlement is agreed upon, the PCO should insist the customer provide a written document stating that he or she releases the PCO from all further liability regarding the matter. Along with that release, the PCO should also obtain a secrecy or nondisclosure

win, should they ever find themselves in a lawsuit situation. They are ways, Ebner says, for PCOs to avoid "sabotaging their own defense."

"These are ways to make sure you are in the best possible position to win," says Ebner. "Winning is a deterrent against future lawsuits by others."

The first thing PCOs must do, he says, is to comply with all applicable government regulations as part of normal opera-



Fred Whitford

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that there was no negligence in the inspection, and that the inspector did a good job."

Such documentation, which often consists of maps and graphs, can protect PCOs because it shows exactly which areas have been inspected and limits inspections to just those treated areas.

Furthermore, PCOs not only have to make the records, Ebner says, but they have to keep them. Many states, for example, require that records be kept for anywhere from three to five years. But Ebner recommends keeping them far longer than that.

"As far as I'm concerned, you should keep them forever, because if you ever get sued by a customer or the state, you'll have proof that your actions were proper and reasonable."

This added security is necessary, Ebner says, because in some personal injury cases, the courts and litigators have been finding ways to extend the statute of limitations, meaning those records might

be of critical importance, even years after the typical two- or three-year window for filing suit has passed. Again, Ebner notes, keeping records is one way PCOs can put themselves in a better position to win, should they become involved in a lawsuit.

**Stop the trend.** According to Ebner, the number of lawsuits filed against PCOs appears to be growing, and he says this trend needs to be reversed, especially by getting more cases thrown out of court

jury and property damage cases that will discourage other cases from being filed, Ebner says.

There are ways PCOs can protect themselves from lawsuits. These involve handling customer complaints promptly, using alternative methods of dispute resolution, and obtaining releases and nondisclosure agreements. PCOs can also prepare for lawsuits by adhering to regulations and by having handy all the facts and figures that document their work.

## Keeping thorough records is one way that pest control operators can put themselves in a better position to win, should they become involved in a lawsuit.

before they ever go to trial. And while settling cases may be appropriate in some situations, he adds, it may not be the answer in every situation.

"If you settle every time, it's just going to invite more lawsuits," said Ebner, "so sometimes you've got to take a stand."

Fighting and winning some cases sets helpful legal precedents in personal in-

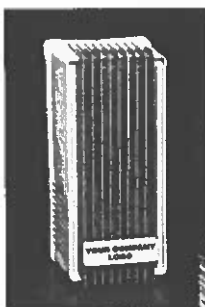
Of course, it's impossible for pest control operators to protect themselves from every unfortunate circumstance which comes their way. But by following these guidelines, PCOs will be at a far greater advantage when defending themselves in a court of law.

PCT

Lisa Josof is associate editor of PCT.

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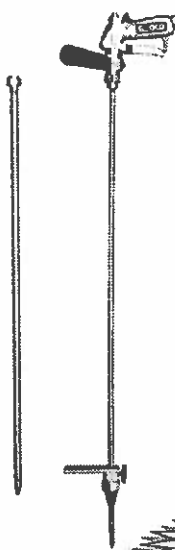
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tions. This encompasses everything from training and certification regulations for technicians to having an up-to-date business license and complying with OSHA, DOT, and FIFRA regulations.

As with resolving customer complaints quickly, strictly following policies is an area that gets much lip service, but when it comes down to the details, there are sticking points. As Fred Whitford, coordinator of pesticide programs at Purdue University, can attest, there may well be a problem with 'going by the book' at some firms.

"When I go out and do training for companies and I ask the employees how well they follow company policy, the answer, unfortunately, is they don't do a good job following policy, or they don't have any policies, or the policies are set up to cover some requirements by a law," said Whitford.

He explained that many times company policies are on paper but have never been implemented by the firm. Therefore, PCOs must do a better job to convey to technicians what potential problems exist for companies, and how employees' decisions and actions can affect the life of the business and the livelihoods of everyone employed there.

The next step in strengthening your

defense, Ebner says, is making and keeping self-serving records. He recommends that PCOs make records about each application, and that those records should exceed state requirements. This means including as many details as possible about what precautions may have been given to the customer, what the customer said in response, if the customer had any questions, concerns or complaints, and what the technician or manager said in re-

sponse. The records, which should be typed or computerized, should also include what advice the company gave to the customer and who gave the advice. If a recheck of the account was made, all findings and any actions taken should also be noted.

**Arbitration has the advantages of being quicker, cheaper, and more informal than a trial in a court of law, and furthermore, it normally is legally binding.**

tion involves more than you might think. "Most companies do not take the step of making sure the service contract they use has been approved by their attorney," Judy said. "You also need to make sure the forms and contracts you use conform with what your insurance company wants to see, and that it doesn't create a coverage conflict with your insurance policy."

Another problem PCOs run into, Judy says, concern reinspections. While most

"The thing that puts you in the barrel more often than not is poor documentation," said Richard Judy, loss control supervisor at S.E.C.U.R.E. Insurance. And, Judy points out, thorough documenta-

PCOs document original inspections for wood destroying insects, Judy said, many of them do not document anything on a reinspection if there is no activity. But PCOs still need to document reinspections, even when no activity is found, Judy emphasizes.

"If a problem does show up some years after the initial treatment," said Judy, "a well-documented set of renewal inspection information helps us clarify

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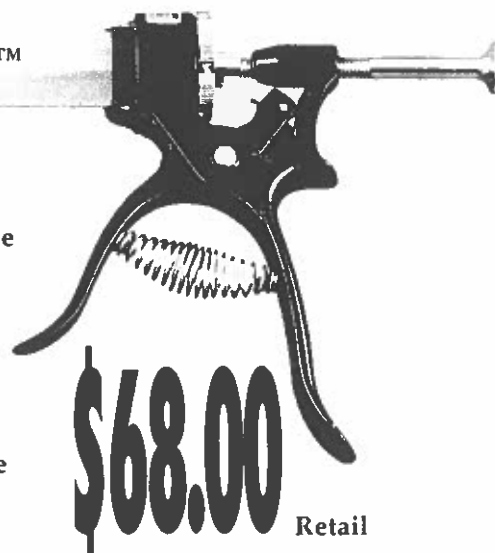
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