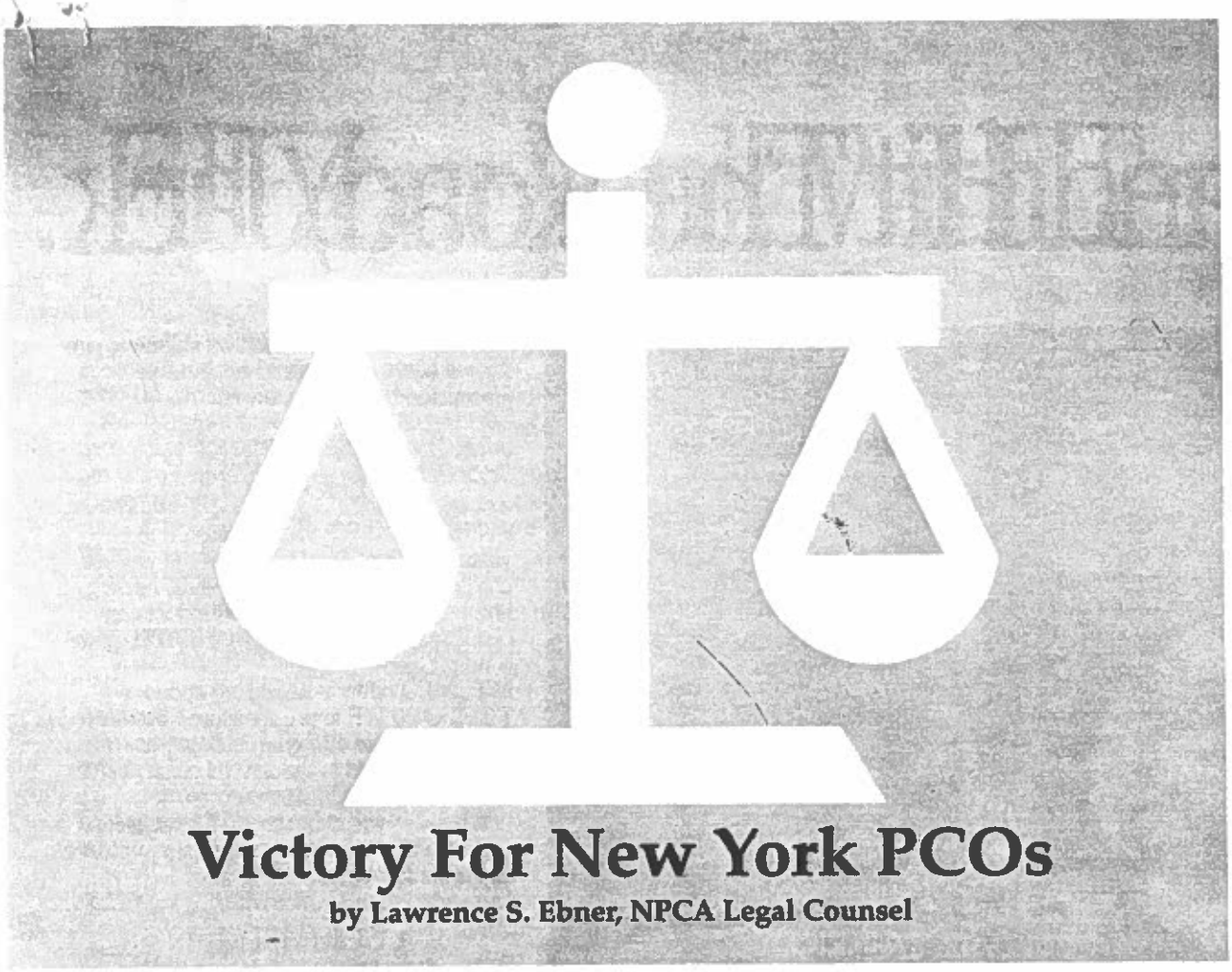

Victory For New York PCOs

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.*
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> (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.