

Avoiding Litigation

Many small businesses are just one lawsuit away from bankruptcy; protect yourself with the following four tips

By Kenneth D. Morris, Esq.

If you are like most business owners trying to develop your customer base, promote your business and expand services, you do not have the time or money to fend off lawsuits filed by unhappy customers or state or federal regulators. And, as such, litigation avoidance may not be top of mind. But if you're not careful, you may find yourself in the courtroom defending your processes, employees, services or products.

According to the National Federation of Independent Businesses (NFIB), the cost to defend an average lawsuit can run you \$100,000 or more. This means many small businesses are just one lawsuit away from bankruptcy. As a long-time corporate attorney and small business advisor for the green industry, I've seen first hand how time-consuming and expensive claims can be and how ill-prepared many companies are. Review the tips below to ensure you are doing everything you can to protect yourself.

1. Develop a "transparent" customer relationship.

Understanding the needs of your customer can go a long way to developing a satisfied customer. And let's face it; satisfied customers rarely sue.

The first step is to interview the customer and get to know his/her needs. This includes both the customer who pays your invoice as well as your customer's customers. For example, if you are a lawn care operator, investigate the needs of a Homeowners Association's property manager but also the needs of the homeowners themselves. Overlooking the expectations of your customer's customers can lead to problems down the road. In today's litigious society, where lawsuits have tripled in the last 30 years, this due diligence is just as important for a hundred-acre resort as it is for a single homeowner.

Next, develop a **written agreement** with the customer. The aim here is to make your relationship with the customer as transparent as possible. This agreement needn't be overly formal or written in legalese but must spell out—in clear English—what specific services will be provided, what treatments will be performed, how often, over what areas or acreage, and at what cost. You will want to make sure that the services you perform are accurately and clearly reflected in the written agreement. The customer also needs to be able easily cancel the service if he/she is not satisfied.

Maintaining transparency also means providing literature about products you are using. insecticides, herbicides, fungicides, or fertilizers to be applied. Leave behind an easy-to-locate, simple document describing the chemicals used, how they are applied, and how they interact

with the lawn or property, even if no one is at home at the time of your application. This document alerts the homeowner to the treatments but also manages their expectations.

For example, suppose your market covers one or more of the southern states where fire ants are a problem. If your customer has contacted you seeking an application to control those fire ants, it will be important to provide written communication to the customer after your treatment that describes what he or she can expect. Does the product immediately kill all fire ants or does it take several days? Are there precautions the customer should take? When will retreats be needed? If you don't take steps to communicate this information to your customer at the time of treatment you are opening yourself up to complaints, confusion or worse. In addition, always follow-up with the customer within a week to 10 days (recommended, though this may vary as per the chemical used). Follow-up ensures they received the leave behind and catches any problems before they snowball.

In general, strive for candor and fair dealing and, when discussing chemical products, always base your statements about what will be done within the four corners of a product's label. Under no circumstance should you misrepresent what the product will do or claim it will control a particular pest or disease that is not on the label. Use the same words the manufacturer uses on your customer communications. If a claim arises, you will want to have preserved the opportunity to tender that claim to the manufacturer. And you cannot do that if you misrepresent what the product will do, what services you will provide, or alter the product in any way.

2. Lean on your suppliers.

Having a good relationship with your supplier or distributor is essential, but don't forget that the manufacturer who produced the product is the real expert on its performance. Typically, the manufacturer will provide product training and has comprehensive literature describing the attributes and performance characteristics of the products. In many cases, this is the literature that can be left behind with the customer to describe the product and service performed. It not only provides credibility for you, but also promotes a better understanding of the service performed. By the same token, manufacturers will typically maintain comprehensive insurance programs—either self-insured or through a variety of carriers so you are ensured extra protection. Vendor endorsements are typically provided for distributors who resell the product in the form in which it is received. Where you can substantiate that you have purchased the product as delivered, used it for its intended purpose and followed label directions exactly, you will preserve the opportunity to tender any claim to your supplier.

3. Use your Association's resources.

Your Association can be an important part of avoiding litigation as they provide valuable resources on new products, new application techniques, and local turf problems. But be careful when speaking on certain topics with fellow members in the Association. Avoid group discussions about prices for services or the costs of the products applied. While everyone likes to gripe with fellow business owners in the same boat, be aware that both federal and state antitrust laws generally make it just as illegal to conspire with your competitors on the prices you charge for your services in the area as it is to jointly determine to boycott certain suppliers or attempt to induce a supplier to discriminate in the price of the product sold to you. The best advice to follow when you hear such talk is to immediately leave the discussion—preferably after loudly exclaiming that you cannot participate in such a discussion, spilling your coffee, or doing

something else that others will remember (and be able to testify about if they are ever deposed!). Association meetings can be spots where conspiracies are hatched (even unwittingly) and you will want to make sure you are not present at the creation. Having said that, however, it will be the Association that will be able to provide information on state or federal developments, or point you to the appropriate manufacturer's representative for more information about the product and its applications.

4. Proper internal controls and documentation is your best defense.

No matter how busy you are or how quickly you are growing, documentation on each and every transaction is your best defense. Documentation that substantiates (1) what you promised, (2) what service you actually performed, and (3) the agreement you signed with your customer will go a long way to ensure a transparent operation. Make sure that your customer records accurately define the full scope of your activity: the treatments, their frequency, the chemicals or fertilizers used, and the technicians who applied them. This also includes a customer's remarks or complaints. And, remember, what you create in writing—whether in the form of hard paper copy, or in the form of e-mails and electronic documentation—is all discoverable in the event of a claim or lawsuit.

Internal processes and controls also means documenting employee training. Your employees need to have proper training in the application of specific products and when they should be used. The law varies from state to state but as a general rule, as long as the application is overseen or performed by someone with a license, then it is lawful. Check with legal counsel for more specifics. If you are employing immigrants or other non-resident aliens, you will want to make sure they present proper documentation (a "green card" or other US Customs form (work visa, etc.)). The time spent to train employees in the application of the products and in characteristics of the various lawn diseases, weeds and documentation practices will be an important step in ensuring satisfied customers. After all, having satisfied customers is the best way to avoid claims and litigation in the first place.

About the Author

Ken Morris, Esq. is a Philadelphia-based attorney specializing in green industry issues. With more than 30 years corporate and law firm experience, he offers counsel to manufacturers and service providers dealing with litigation and regulatory matters, intellectual property issues, environmental compliance and dispute resolution, mergers, acquisitions and divestitures, and the establishment of corporate compliance policies and training programs. He is an advisor to the Philadelphia chapters of the Women's Business Development Center and the Institute for Independent Business. Previously, Morris served as corporate counsel to Bayer CropScience and its predecessor companies for 24 years. For more information, visit www.kenmorrislaw.com.

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