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## BUGS AS A NICHE

Suits against pest controllers spread.

By David Hechler

STAFF REPORTER

IN THE BEGINNING, they invaded his dreams.

"I would wake up in the middle of the night, worrying about termites devouring my house," said Pete Cardillo, a Florida lawyer who began suing pest-control companies eight years ago.

He got over it.

Now Cardillo's whole practice is devoted to this niche. It's all termites all the time. He may be the first lawyer in the country to establish this specialty.

If he's right about its potential, he won't be the last. In fact, his new dream about termites is to open additional offices in the "termite belt" that spans much of the South.

But that would be getting ahead of himself. The 46-year-old lawyer went solo several months ago, and sitting in his new Tampa, Fla., office, surrounded by dozens of file boxes, he doesn't look like a man who needs more work.

Others who litigate in this area aren't sure if he's prescient or nuts.

"Probably a little of both," laughed Dan Clark of Tampa's Clark, Charlton & Martino. The pest-control industry is lucrative and "rife with fraud," he said. But he can't see himself specializing in termites—or anything. "Me, personally, I enjoy doing a variety of cases."

When Cardillo was asked if he ever thought he'd be a bug lawyer, white teeth flashed through his gray goatee.

"That's one of the great things about being a lawyer," he shot back. "You take it where it goes."

Clearly, a number of lawyers are riding the same train. Though few of these cases go to trial (none of Cardillo's has reached a verdict), many have settled in Florida and Alabama, the two states where pest-control giant Orkin Inc. says it has the most customers with the most termite activity—and the most litigation. Orkin has also been Cardillo's most frequent target.

The biggest battles are over arbitration clauses—Orkin and its competitors routinely include them now in their contracts—and plaintiffs' efforts to certify class actions.

A class action in Alabama is scheduled for trial on June 28. *Cutler v. Orkin*, No. 96-184 (Houston Co., Ala., Cir. Ct.). A Florida class

action was certified against Orkin, which is based in Atlanta, but was set aside on appeal. The trial court had not included findings of fact in its opinion; the appeal will be considered after this defect is addressed. *Butland v. Orkin*, No. 99-2173-f (Hillsborough Co., Fla., Cir. Ct.).

In another case, an appeals court reversed a trial court's rejection of Orkin's mandatory arbitration agreement. *Petsch v. Orkin*, No. 2D02-5494 (Hillsborough Co., Fla., Cir. Ct.). The court sent the case down, where an arbitrator will decide whether to permit class arbitration.

In yet another, a class certification hearing is expected in Georgia. *Warren v. Orkin*, No. 01-1-8395-35 (Cobb Co., Ga., Super. Ct.). Florida's Clark, who represents plaintiffs in *Butland* and *Petsch*, said he anticipates additional class actions in Arkansas, Texas, North Carolina and South Carolina.

### Orkin not alone

Orkin isn't the only company that's been hit with lawsuits. Its even larger competitor, Terminix International Co. of Memphis, Tenn., has had its share (including one filed recently by Cardillo). It, too, may soon face a class action. In 2002, an Alabama state trial court ordered a class arbitration to settle clients' disputes with Terminix, but on appeal the Alabama Supreme Court reversed and remanded, ruling that the arbitration clause in its termite contracts was "unconscionable and unenforceable." *Leonard v. Terminix*, 854 So. 2d 529 (2002).

Eight more class actions have been certified (and in some cases litigated) against smaller companies in Alabama, according to Tom Campbell of Birmingham, Ala.'s, Campbell & Baker, who has long been active in this field.

But Orkin seems to have attracted the most litigation, and it was also the loser in the biggest cases publicized. In 2000, an Alabama jury awarded the estate of a woman whose home was destroyed by termites more than \$80 million. A company memorandum introduced at trial revealed that Orkin employees intentionally



GNAWED: Attorney Pete Cardillo with evidence of termite damage.

concealed the damage from the owner, an elderly widow. Before she died, Orkin actually propped up the structure with car jacks to prevent it from collapsing, said one of her lawyers, Andrew Hollis of Birmingham's, Hollis & Wright.

Though later reduced by the trial judge and the state Supreme Court to \$2.3 million, the large punitive award signaled that the jury and judges were receptive and angry.

"I have served on this Court for more than 16 years," wrote Alabama Supreme Court Justice Gorman Houston in a concurring opinion. "The reprehensibility of the defendants' conduct was great—as great as any I remember." *Jeter v. Orkin*,

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832 So. 2d 25 (2001).

The other big one was the \$3 million (plus \$900,000 in attorney fees) awarded to homeowners by an arbitration panel in Jacksonville, Fla. *Black v. Orkin*, No. 33-199-00147-01.

Orkin spokeswoman Martha Craft declined to comment on the *Jeter* or *Black* cases. Addressing the litigation in general, she said: "It is important to realize that less than 1% of Orkin's [1.6 million] customers file termite claims each year. More than 98% are resolved without litigation. Publicity about a handful of unhappy customers simply ignores the quiet satisfaction of millions of others."

Steve Good, Terminix's vice president for marketing, declined to comment on pending litigation, but said: "Terminix has guarantees in place to ensure that we deliver quality services, and we provide protection for our customers in the isolated instances where services or science fails us."

### Fraud claims are key

What excited lawyers' interest in this industry, and justified punitive damages, were fraud allegations. Cardillo first uncovered evidence, he said, when investigating his second case, in 1997. He was litigating real estate and construction suits at the time and one of his clients, a large developer, discovered termite infestations in its apartment complexes.

Cardillo had settled his first case without having to file a suit. For the second, he took depositions, among them one from a former Orkin sales inspector named Jack Cox.

In Cox's first deposition and several subsequent ones, he detailed what he called common practices during his 20 years with the company. He and his colleagues frequently failed to reinspect property as required by clients' contracts, he said. Sometimes they performed what they called "windshield" or "drive-by" inspections. Other times they filled out reinspection forms and simply forged the owners' signatures, Cox said.

"[D]uring my career we were told different ways to do it," he testified in 1999. "[S]ign their name, put our initials, sign our name, put our number, sign the customer's name."

Cardillo asked what information they entered on the form. "If the ticket said 'has reinfestation' you put 'no' because you didn't know if it had one. You weren't there, so you put 'no.'" Asked two years later how often he filled out those forms without inspecting, Cox

said: "I would probably say over half." A moment later, he added: "It could be a lot higher."

There were two reasons, Cox explained. He made money from commissions on contract sales, not from reinspections. These could be time-consuming and he was reimbursed only \$3 for each. Also, managers frequently dumped stacks of reinspection forms on his desk and demanded that he complete them immediately. This typically occurred near the ends of quarters, when managers received bonuses based, in part, on their offices' productivity.

"We always were told by the branch managers if we didn't get these things done, they wouldn't get their bonuses," Cox testified.

"Requiring customers' signatures on reinspection forms is an Orkin policy—not a state law—even in Florida, where the allegations originated," Orkin's Craft responded. "We do take our internal policies seriously, and those rogue employees who were found to have broken corporate

policies in this regard were terminated upon confirmation of the allegations."

Of the sales inspectors, she added: "It's true that they get better incentives for sales, but they are still required to do the inspections." Cox was, in fact, fired in 1998. The reason, he testified, was not that he forged signatures; it was that sometimes he worked for competitors.

### Racketeering part of the mix

Cardillo's pursuit of these cases expanded in 1999, after he was hired by Pittsburgh's Buchanan Ingersoll to manage the litigation department in its Tampa office.

While he was responsible for overseeing all litigation, he took a special interest in the termite cases. Eventually, four lawyers and three paralegals did little else.

His approach positioned the firm to maximize recovery. His focus has always been apartment complexes and condominium associations. And from the first, he alleged unfair and deceptive trade practices and violations of state racketeering laws, he said. He also brings separate claims against property insurers, meaning he can sue twice. Last month, he settled a case with Allstate, and he has a pending case against Orkin based on the same damages.

The racketeering claims require proof of a predicate crime, and he often cites forgery and false advertising, he said. The claim also permits trebled damages.

"It's not just applicable to loan sharks

in Rhode Island."

Daniel Gerber of Orlando, Fla.-based Rumberger, Kirk & Caldwell has been defending Orkin and other pest-control companies since 1992. Most of his cases settle, he said, and "the vast majority of settlements occur before litigation commences."

Racketeering claims are riskier for plaintiffs, Gerber asserted. They're difficult to prove, and proving criminal conduct against "reputable service providers" is more difficult still. Since most of these statutes include cost-shifting provisions, "it's our view that the greater risk is to the plaintiff paying attorneys' fees."

In Gerber's firm, seven lawyers focus largely on pest-control litigation. At Montgomery, Ala.'s, Slaten & O'Connor, Cliff Slaten and a partner spend all their time defending these cases. Slaten estimated he's handled 300, though less than 50 went to trial and only six yielded verdicts. The largest, he added, was \$71,000, though an out-of-state case resulted in a \$50,000 verdict that was doubled by law. Still, *Jeter* (he was not involved) has affected the climate, he said.

"I would say anytime you've got negative publicity about an industry, even if it isn't justified, it makes it tough. It's like negative ads in a political campaign."

But there's been a reduction of lawsuits in the last year, he said, and he doesn't think he'll be doing them full-time for longer than three more years.

Nor does Gerber believe that Cardillo, whose cases he has defended, will thrive in a practice so limited in scope. Too much in the field is changing, he said.

"Products have changed, application methods have changed, regulations have changed and control of termites has changed to the point that long-term specialty, except for

the solo practitioner, is not broad enough to sustain a practice."

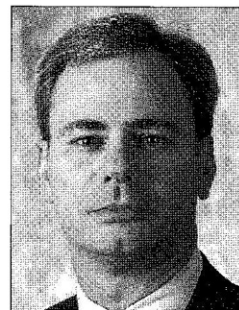
Cardillo, who is still settling into his new identity, seems unfazed. Friends have introduced him as a bug lawyer, which isn't entirely correct, he noted.

"Termite lawyer is more accurate," he said, breaking into laughter. He paused. "Although carpenter ants can cause quite a bit of damage. I see carpenter ants in my future," he deadpanned. Asked if he was serious, he said that he wasn't. Then he pulled the hair on his chin and reconsidered.

"Well, maybe in the future. I wouldn't discount it." **NLJ**



ANDREW HOLLIS:  
His client won \$80 million from Orkin after a trial in 2000 in Alabama.



DANIEL GERBER:  
In his firm, seven lawyers focus largely on pest-control litigation.



TOM CAMPBELL:  
Eight class actions have been certified against smaller Alabama firms.

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