

BEFORE THE NORTH CAROLINA STRUCTURAL PEST CONTROL COMMITTEE

*In re: Aptive Environmental, LLC's  
Petition for Declaratory Ruling*

**DECLARATORY RULING**

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On March 29, 2023, Aptive Environmental, LLC (Petitioner) served the North Carolina Structural Pest Control Committee (the Committee) with a Petition for Declaratory Ruling (the Petition). On April 25, 2023, the Committee granted the Petition in accordance with North Carolina General Statute § 150B-4(a1)(1). Pursuant to North Carolina General Statute § 150B-4(a1)(3), the Committee hereby issues the following written ruling on the merits of the Petition:

In enacting the Structural Pest Control Act of North Carolina of 1955 (the Act), the General Assembly stated “[i]t is declared to be the policy of this State that the regulation of persons, corporations and firms engaged in the business of structural pest control in this State . . . is in the public interest in order to ensure a high quality of workmanship and in order to prevent deception, fraud and unfair trade practices in the conduct of said business.” N.C.G.S. § 106-65.22. Therefore, the Committee considers these consumer protection goals as paramount in its interpretation and enforcement of the applicable statutes and rules.

**ISSUE I: Whether the Structural Pest Control Act of North Carolina of 1955 (Chapter 106, Article 4C of the North Carolina General Statutes) and its associated rules (Title 02, Chapter 34 of the North Carolina Administrative Code) requires Aptive Environmental, LLC, as a structural pest control licensee, to have its sales representatives be employed as “employees” if they are selling or soliciting structural pest control services.**

The Petition and discussion before the Committee centered on in-person/door-to-door sales. Therefore, the Committee’s declaratory ruling is limited to answering whether those selling or soliciting structural pest control through in-person/door-to-door sales must be an “employee.” This ruling is further limited to whether the person must be an “employee” in the context of, and as defined by, the Act and its associated rules and does not address other aspects of the employment relationship. Additionally, Furthermore, the Committee’s declaratory ruling is with regards to situations in which the sales person completes a transaction with the customer by entering into a contract for the performance of a structural pest control service.

**ANSWER I: Yes, if an individual is acting as an estimator, salesman, serviceman, or solicitor for structural pest control, the individual must either hold a structural pest control license or be an employee of a company that has engaged the services of a licensee as a full-time regular employee, such that the individual selling or soliciting is subject to the direction, control, and oversight of the license holder.**

The Act defines an “employee” as “any person employed by a licensee with the exceptions of clerical, janitorial, or office maintenance employees, or those employees performing work completely disassociated with the control of insect pests, rodents or the control of wood-destroying organisms.” N.C.G.S. § 106-65.24(9).

The entire purpose of the type of sale/solicitation at issue is to enter into a contract for the performance of structural pest control, meaning providing services for the control of insect pests, rodents and/or wood-destroying organisms. Additionally, the sale and solicitation of structural pest control, directly to a customer while at the property where the services will be performed, inherently requires the sales person to identify infestations or infections and inspect the property. To find otherwise would contemplate a situation in which a sales person is simply selling the customer structural pest control with no regard for whether the services contracted for were necessary or appropriate under the circumstances. Such a practice would be directly contrary to the public interest and result in unsuspecting customers being deceived into paying for unnecessary or inappropriate structural pest control services. Therefore, estimators, salespersons, and solicitors are performing “structural pest control” and are not exempt from the statutory definition of an “employee.”

The word “independent contractor” does not appear in the Act. However, 02 NCAC 34 .0331(a) states that “[p]ersons engaged in ancillary activities in association with control of household pests or wood-destroying organisms as indicated in Paragraph (c) of this Rule may be an employee, independent contractor, or otherwise, for one or more structural pest control licensees and are exempt from structural pest control license requirements.” The exempt ancillary activities are specifically limited to those duties listed in 02 NCAC 34 .0331(c), which notably does not list acting as a sales person, solicitor, or estimator. The Committee finds this omission as evidence of an intent to keep those individuals engaged in the sale and solicitation of structural pest control subject to the Act’s licensing requirements.

N.C.G.S. § 106-65.31(b1) states in relevant part:

Within 75 days after the hiring of an **employee** who is either an estimator, salesman, serviceman, or solicitor, the licensee shall apply to the Division for the issuance of an identification card for such **employee**. . . . The card shall be issued in the name of the **employee** and shall bear the name of the **employing** licensee, the **employer's** license number and phases, the name and address of the **employer's** business, and such other information as the Committee may specify. The identification card shall be carried by the **employee** on his person at all times while performing any phase of structural pest control work.

...

When a license is reissued, the licensee shall be responsible for registering and securing identification cards for all existing **employees** who engage in structural pest control within 10 days of the reissuance of the license.

(emphasis added).

N.C.G.S. § 106-65.31(b1) speaks exclusively in terms of an “employer” and an “employee.” Consistent with this language, 02 NCAC 34 .0313(b), which sets forth some of the identification card’s contents and requirements, is phrased in terms of “the license of the **employer** of the card holder” (emphasis added). Similarly, 02 NCAC 34 .0904(d) state “No licensee shall advertise, in any way or manner, as a contractor for structural pest control services, in any phase of work for which he or she does not hold a valid license as provided for under G.S. 106-65.25(a), unless said licensee shall hold a valid certified applicator’s identification card or registered technician’s identification card, as provided for under G.S. 106-65.31, **as an employee** of a person who does hold a valid state license covering phases of structural pest control work advertised” (emphasis added). The Committee likewise finds the use of the word “employee” in these provisions as evidence of an intent to have these sales persons operating as employees of a responsible structural pest control license holder (or a company that has engaged the services of a license holder as a full-time employee).

Therefore, in light of these definitions and regulatory framework, the Committee finds that the Act and its associated rules requires that those selling structural pest control services must be an employee of the individual or business that holds the structural pest control license for whom they will be selling, such that the responsible license holder can control and direct the manner in which they conduct their sales activity. Allowing a person that is not an employee of a license holder (or a company that has a license holder as a full-time employee) to sell structural pest control violates and undermines numerous legal requirements aimed at protecting the public.

First, if the sales person is not operating subject to the supervision, direction, and control of the structural pest control license holder, then the license holder is violating their duty to control the structural pest control and structural pest control activities conducted under their license

One of the main ways the consumer protection goals of the Act are achieved is by requiring businesses engaged in structural pest control to have a structural pest control license holder that is responsible for the activities conducted under their license. See N.C.G.S. § 106-65.25(c)(2) (“[i]t shall be unlawful for any licensee to . . . [f]ail to supervise the structural pest control performed out of the licensee’s home office or any branch office under the licensee’s management”). “It shall be a violation of the rules of the Committee for any license holder to fail to adequately control, direct, and supervise the structural pest control activities of his/her office or **employees**.” 02 NCAC 34 .0325(e) (emphasis added). “Supervision” requires “oversight by the licensee of the structural pest control activities performed under that license.” 02 NCAC .0102(51). Therefore, Act and the Committee’s rules show a requirement and an intent to have a responsible structural

pest control license holder who controls and answers for the activities performed under their license.

As previously discussed, sales and solicitation are not listed as one of the “ancillary activities” that are specifically authorized to be performed by independent contractors and are exempt from the structural pest control license requirements. See 02 NCAC 34 .0331. While “independent contractor” is not defined, North Carolina’s Court of Appeals has stated “An independent contractor, as distinguished from an employee, is ‘one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work.’” Yelverton v. Lamm, 94 N.C. App. 536, 538, 380 S.E.2d 621, 623 (1989) (internal citation omitted). “The test in determining a worker’s status is whether the employer has the right to control the worker with respect to the manner or methods of doing the work or the agents to be employed in it, or has the right merely to require certain results according to the parties’ contract.” Id. It is impossible for a sales person to be operating under the license holder’s supervision when they are an independent contractor who by definition operates independent of the license holder’s control and direction. Therefore, the Committee finds it impossible for a license holder to fulfill their mandatory supervision requirements if they do not have the authority to direct and control the activities of the individual selling and contracting for structural pest control on the licensee’s behalf.

Second, if these estimators, sales persons, or solicitors are allowed to operate as non-employees, it would mean these individuals are never required to obtain identification cards pursuant to N.C.G.S. § 106-65.31(b1) because they are not “employees.” The requirement in N.C.G.S. § 106-65.31(b1), that employees selling structural pest control obtain an identification card that is directly tied to the license of their employer, is a consumer protection mechanism to ensure that individuals selling/contracting for structural pest control are doing so under the supervision of a properly licensed individual responsible for their actions.

It would be contrary to the statutory language of N.C.G.S. § 106-65.31(b1) and the Act’s stated purpose to allow a license holder/company to completely bypass the identification card requirements by simply titling the individual as something other than an “employee.” To find that a company can completely avoid this obligation by making their sales persons something other than an “employee” would make the identification card requirement, and the consumer protection benefits it brings, entirely optional. This would unfairly allow individuals engaged in identical structural pest control activities to operate under a vastly different set of rules.

Additionally, allowing sales persons to bypass the identification card requirements would allow individuals to sell structural pest control without completing any of the training required by 02 NCAC 34 .0313(c) – (f). This training is necessary to help sales representatives understand the unique structural pest control services that they are selling and what services may be appropriate for a given customer.

Furthermore, not requiring sales persons and solicitors to obtain identification cards leads to a lack of transparency and documentation as to who these individuals actually are and who is responsible for their conduct. This creates confusion and an inability of the Committee, and private citizens, to locate and hold responsible individuals that commit violations of the law while selling structural

pest control. Furthermore, a sales representative attempting to solicit sales while wearing the uniform of a company where they are not employed is deceptive and creates consumer confusion.

In addition to identifying and locating the responsible individual, allowing sales persons to be independent contractors could result in a license holder claiming that they have no responsibility for any violations of the Act or its associated rules committed by the non-employee sales person. In discussing the liability of an employer for actions committed by employees and independent contractors, the North Carolina Court of Appeals has stated “[i]f the requisite right to control is found to exist, then an employer is held liable, albeit vicariously, for the negligent acts of its agents, servants, or employees which cause injuries to third persons; but an employer is not liable to third parties for the negligence of an independent contractor.” *Id.* Allowing a license holder/company to bypass their responsibility for its sales persons by calling them something other than an “employee” was not contemplated by the language of N.C.G.S. § 106-65.31(b1) or the Committee’s rules. See e.g., 02 NCAC 34 .0313 (setting requirements for identification cards in terms of “employer” and “employee”); .0325 (setting duties to control activities of “employees”); .0902(a) (setting financial responsibility requiring an insurance policy for “employees that work for the licensee”); .0904 (setting prohibited acts for “employees”); and .1001(a) (setting time to commence a disciplinary action against an “employee of a licensee”).

Such a practice fails to protect the public from the type of deception, fraud and unfair trade practices the Act seeks to prohibit and would be detrimental to the Committee’s ability to take enforcement actions against the license holder for violations committed by the non-employee sales person. Therefore, the Committee finds that allowing for such non-employee sales persons is contrary to the plain language of N.C.G.S. § 106-65.31(b1) and would create an illogical result.

Finally, if these non-employee estimators, sales persons, or solicitors offer to engage in structural pest control, it would constitute a violation of N.C.G.S. § 106-65.25(b)(1), which states that “it unlawful for any person to “[a]dvertise as, offer to engage in, or engage in or supervise work as a manager, owner, or owner-operator in any phase of structural pest control or otherwise act in the capacity of a structural pest control licensee unless the person is licensed pursuant to this Article or has engaged the services of a licensee as a full-time regular employee who is responsible for the structural pest control performed by the company.” N.C.G.S. § 106-65.25(b)(1). Therefore, for a company to lawfully offer to engage in structural pest control, they must have a full-time regular employee that holds a valid structural pest control license. If the sales person is an employee of a separate company that has not engaged the services of a licensee as a full-time regular employee, then a violation has occurred. Additionally, if the license holder is allowing the non-employee sales person or another company to sell under their structural pest control license, it would constitute a violation of N.C.G.S. § 106-65.25(c)(3), which states that it is “unlawful for any licensee to . . . [a]llow his or her license to be used by any person or company for which he or she is not a full-time regular employee actively and personally engaged in the supervision of the structural pest control performed under the license.”

For all of the reasons stated above, in the best interests of the public, and consistent with the stated intent and plain statutory language of the Act, the Committee finds that if an individual is acting as an estimator, salesman, serviceman, or solicitor for structural pest control, the individual must either hold a structural pest control license or be an employee of a company that has engaged the

services of a licensee as a full-time regular employee, such that the individual selling or soliciting is subject to the direction, control, and oversight of the license holder.

**ISSUE II: Whether the Structural Pest Control Act of North Carolina of 1955 (Chapter 106, Article 4C of the North Carolina General Statutes) and its associated rules (Title 02, Chapter 34 of the North Carolina Administrative Code) requires Aptive Environmental, LLC, as a structural pest control licensee, to include the notice-of-cancellation set forth in North Carolina General Statute § 14-401.13 when applicable in its consumer contracts for structural pest control.**

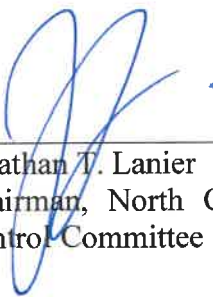
The Committee's declaratory ruling on this issue is strictly limited to interpretation of the Structural Pest Control Act of North Carolina) (the Act) and its associated rules as these are the extent of the Committee's jurisdiction. The Committee makes no finding or determination as to the general applicability of N.C.G.S. § 14-401.13 with regards to contracts that involve structural pest control. Nothing in this declaratory ruling shall prohibit or require the prosecution of an individual entering into a consumer contract for structural pest control in violation N.C.G.S. § 14-401.13 and the Committee strongly encourages all those engaged in structural pest control to comply with this statute and all other applicable state, federal, and local laws, rules, and regulations.

**ANSWER II: Neither the Structural Pest Control Act of North Carolina of 1955 (Chapter 106, Article 4C of the North Carolina General Statutes) nor its associated rules (Title 02, Chapter 34 of the North Carolina Administrative Code) includes or incorporates N.C.G.S. § 14-401.13 and enforcement of this statute is beyond the jurisdiction of the North Carolina Structural Pest Control Committee.**

N.C.G.S. § 14-401.13 makes it a Class 3 misdemeanor for any seller engaged in off-premises sales to fail to provide the buyer with certain language informing the buyer of their right to cancel the transaction. N.C.G.S. § 14-401.13 is not codified within the Act setting out the Committee's authority/jurisdiction and has not been incorporated into the Committee's rules by reference. Therefore, the Committee finds it does not currently have the authority to take regulatory action for violations of N.C.G.S. § 14-401.13.

However, the Committee notes that while it does not have currently the authority to enforce N.C.G.S. § 14-401.13 directly, violations of this provision in the language used in contracts for structural pest control may otherwise result in a disciplinary enforcement action by the Committee. Untrue or misleading contract language that violates N.C.G.S. § 14-401.13 may also rise to the level of a "[m]isrepresentation for the purpose of defrauding; deceit or fraud; the making of a false statement with knowledge of its falsity for the purpose of inducing others to act thereon to their damage; or the use of methods or materials which are not reasonably suitable for the purpose contracted" in violation of N.C.G.S. § 106-65.28(a)(1). Additionally, 02 NCAC 34 .0101(a)(1) requires that "[a]ll licensed structural pest control operators shall faithfully and honestly carry out the provisions and terms of all contracts into which they enter for the control of structural pests."

This the 9th day of June, 2023.



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Jonathan T. Lanier  
Chairman, North Carolina Structural Pest  
Control Committee

### CERTIFICATE OF SERVICE


The undersigned certifies that, on the date shown below, the foregoing Decision was served on the individuals listed below by placing a copy of the same, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

Andrew H. Erteschick  
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And by electronic mail as follows:

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This the 9th day of June, 2023.

  
Christopher R. McLennan  
Special Deputy Attorney General