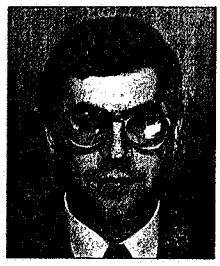
OPINION: PRODUCTS LIABILITY

Is Your Advertising Attracting a Lawsuit?



By Lawrence Savell

You and your company spend considerable time, effort and resources on marketing and advertising your products. But have you considered whether such promotional efforts may also promote the chance of your company being dragged into court by an allegedly-injured plaintiff?

In many so-called "products liability" lawsuits, plaintiffs allege that manufacturers' promotional efforts played a role in causing their claimed injuries. In an ideal world of unlimited resources and time, all advertising and marketing campaigns and copy would be reviewed by litigation counsel prior to release. Given reality, you should at least keep in mind some general principles and considerations to help reduce the risks.

Some of the most common claims brought against manufacturers allege that the company either *misrepresented* or *breached a warranty* made to the consumer regarding the qualities or performance of a product. In essence, such allegations are aimed at the very "image" of the product that marketing and advertising strives to create, and claim that the message conveyed was false or misleading. The particular representations involved typically include such attributes as the results a product will bring (and the certainty of those results), or the ease and/or safety of its use.

How can such claims be avoided? The most obvious suggestion is to avoid making specific, definite guarantees or promises. Don't use the words "guarantee," "warranty" or "promise," which a plaintiff might highlight to a jury. Qualify your language wherever possible, such as by using less-definite words like "may," "might" or "could," or by referring to results as "possible," "estimated" or "variable." Absolute statements—using words like "will," "do" or "are"—allow little room for explanation down the road. Similarly, think twice before making affirmative representations of safety or avoidance of an undesirable result. Using words like "safe," "foolproof," "risk-free" or "harmless" can come back to haunt you in the event of an injury. The manufacturer of a golf training device learned this lesson when its labeling and instruction booklet contained the unfortunately incorrect statement: "completely safe; ball will not hit player."

And don't limit your review to the copy.

The law allows manufacturers some latitude in "puffery" or "sales talk" about products by using general and nonspecific terms.

Plaintiffs have asserted and courts have ruled that an advertisement should be viewed as a whole. Thus, consider whether one could argue that representations—particularly regarding safety—were somehow implied in the depiction of the use of a product under the conditions illustrated, such as a commercial showing a car driven on a treacherous road at a rapid speed. If so, consider either reworking the ad or at least displaying a notice countering such an implication, such as "professional driver on closed track."

Products liability lawsuits may also include claims that a manufacturer had a *duty to warn* of risks allegedly involved in the use or consumption of a product. Whether a particular product should bear a warning is a complex question obviously beyond the scope of this article. However, you should recognize that placing a warning on a product or its package or advertising and promotional materials will not necessarily remove the risk of liability. First, a plaintiff may argue that the warning given was *insufficient*, either in language, placement, size, color or other attributes relating to its prominence, and particularly when compared with the way other information was presented. A plaintiff might also argue that laudatory statements made by the manufacturer elsewhere on the product or in promotional materials *undercut* or diluted the effect of the warning to a consumer.

On the other hand, a plaintiff may try to use a manufacturer's voluntary warning *affirmatively*, such as by arguing that it represents a *concession* by the manufacturer of hazards inherent in the product or its use. This might make it difficult for the manufacturer to deny the existence of such hazards at trial.

Obviously, marketers and advertisers are and should be allowed to extol the virtues of their products, allowing consumers to be aware of and select among offerings in the marketplace. The law has always allowed manufacturers some latitude in "puffery" or "sales talk" about their products by using general and nonspecific terms, such as a slogan that a company's trucks were "built tough," and opinions as opposed to "facts." Nevertheless, it pays always to be vigilant, and to evaluate the justification for potentially troublesome language. Such efforts may help your company avoid claims from being brought, and avoid providing ammunition to the plaintiff should a lawsuit be commenced. ■

Attorney Lawrence Savell specializes in products liability litigation defense and counseling with the law firm Chadbourne & Parke in New York.