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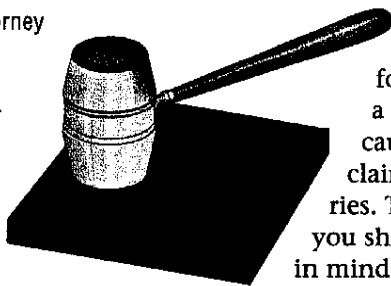
Don't Let Your Advertising Attract A Lawsuit

By Lawrence Savell, Attorney
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You and your company spend considerable time, effort, and resources on marketing and advertising your products.

But 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. Therefore, you should keep in mind some general principles and considerations to help reduce the risks.

Don't Make Promises

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.

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.

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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.

And don't limit your review to the copy. 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. If so, consider either reworking the ad or at least displaying a notice countering such an implication.

Consider A Warning

Products liability lawsuits may also include claims that a manufacturer had *aduty to warn* of risks allegedly involved in the use or consumption of a product. 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.

Think Like A Plaintiff

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, 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.—Cited in

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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