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GUIDELINES TO KEEP ADVERTISERS OUT OF COURT

by

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For many companies, the goals of increasing sales and avoiding litigation may conflict where advertising and promotion are concerned. This is because advertising and promotional efforts often include representations about a product's quality, performance or results (and their certainty), ease of use, and/or safety. Many product liability lawsuits take aim at the very "image" of the product that such efforts strive to create, and allege that the message conveyed was false or misleading.

This LEGAL BACKGROUNDER will examine these pitfalls and provide suggestions for reducing the risk of such legal claims.

Claims Regarding Advertising/Promotion

Breach of Warranty. Perhaps the most frequent claim is for breach of an *express warranty* (*i.e.*, a specific promise). Under the Uniform Commercial Code, which applies in nearly all states, "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." UNIFORM COMMERCIAL CODE § 2-313(1)(a).

Courts have upheld claims that advertisements and other promotional efforts have contained express warranties. One court asked, "why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss." *Rogers v. Toni Home Permanent Co.*, 147 N.E.2d 612, 615-16 (Ohio 1958).

Pictorial product representations — depictions of goods in advertisements and promotional materials — may also create express warranties. Some courts seem to believe that consumers assume pictorial representations are virtually the same as written instructions. In one case, a child allegedly suffered an allergic reaction to glow-in-the-dark costume makeup applied near his eyes as shown in a box illustration. *Tirino v. Kenner Products Co.*, 341 N.Y.S.2d 61 (Civil Ct., Queens Co. 1973). The court upheld a finding of breach of express warranty that the product could be safely used in this

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manner. Some courts have ruled that an illustration does not have to mirror exactly the use by plaintiff to support liability. For example, one court upheld a plaintiff's verdict despite variation from the use depicted in an advertising brochure. *Sylvestri v. Warner & Swasey*, 398 F.2d 598, 602 (2d Cir. 1968).

The law also imposes some *implied warranties* relating to a product's "merchantability" and "fitness for a particular purpose." The manufacturer and seller of a hair conditioner were found liable for a breach of the latter when the contaminated product allegedly could not be removed from and damaged the buyer's hair. *West v. Alberto Culver Co.*, 486 F.2d 459 (10th Cir. 1973).

Misrepresentation. Misrepresentation claims can take several forms. Allegations of **fraudulent misrepresentation** require proof that the manufacturer either: (1) knew the representation was false; (2) did not believe it was true; or, (3) was reckless or careless regarding whether it was true or false. **Negligent misrepresentation** claims may allege that the manufacturer failed to warn of risks.

Perhaps of greatest concern are claims for misrepresentation "without fault" — "strict liability" for misleading advertising that causes physical harm to the consumer. In such cases, no proof of negligence or fraud is required. *See, e.g., Crocker v. Winthrop Laboratories*, 514 S.W.2d 429, 433 (Tex. 1974) (finding drug company liable for specific false representation that was relied upon by physician and which allegedly caused patient's death).

Effect on Defenses. In addition to potentially providing the basis for product liability claims, advertising and promotional efforts also risk undermining critical defenses. For example, manufacturers frequently point out that plaintiff's *use* of the product was *not as intended* or *not reasonably foreseeable*. Advertising that promotes, depicts, or encourages such use, however, may potentially undercut such an argument. Manufacturers may also point out that the *dangers* of the use of the product or the *harm* plaintiff suffered was *not reasonably foreseeable*. Advertisements for safety improvements that say or suggest that conditions prior to that introduction (or continued in some other product lines) were known to be somehow "unsafe" or inferior may potentially undercut that argument. Such statements may unintentionally set up an argument that the original product did not have safety features that were available at the time.

Suggestions to Reduce Product Liability Risks

1. Review Your Promotional Language

Think Like a Plaintiff. Take a close look at your advertising through the eyes of someone looking for evidence to support a lawsuit. Watch out in particular for advertising copy that sets you up for an express warranty claim. Avoid anything that you would not want to see used as an exhibit against you. Bear in mind that juries (and, sometimes, courts) may perceive advertising to be far more powerful and persuasive than it really is.

Don't Make Guarantees or Promises. Do not use words such as "guarantee," "warranty," or "promise." Remember, however, that an express warranty may be created even without such words. Avoid absolute statements that allow little room for explanation down the road, such as "will," "do," or "are." Learn the limitations of your product's capabilities and do not overstate them. Be careful when referring to your product's durability, performance, compatibility, or recommended uses.

Qualify Language. The more tentative the language used, the less likely it will support a finding that an express warranty was made. Thus, select less-definite words such as "may," "might," or "could." Refer to results as "possible," "variable," or "estimated."

Don't Be Specific. General positive statements about a product are more likely to be considered nonactionable "puffing" than specific representations about its quality or results. The more vague the statement, the less use a plaintiff can make of it at trial. This approach proved successful in a case involving a woman whose skin broke out during her use of certain cosmetics. The court

ISSN 1056 3059

characterized the manufacturer's general statements that the products were "the future of beauty" or "just the products for you" as a traditional and nonactionable "sales pitch." *Florence v. Clinique Laboratories, Inc.*, 347 So.2d 1232, 1236 (La. Ct. App. 1st Cir. 1977).

In addition, statements clearly of the manufacturer's opinion may be insulated against warranty liability. In a case involving children injured while riding mini-bikes, the plaintiff focused on the manufacturer's television commercials, which said: "You meet the nicest people on a Honda," described the bike as a good one for children, and showed children riding them. The court affirmed judgment for the defendant, finding that the statements were "loose general praise of goods sold known as sales talk or puffing" and the manufacturer's "opinion or commendation regarding minibikes rather than affirmations of fact about the goods." *Baughn v. Honda Motor Co.*, 727 P.2d 655, 668-669 (1986).

Note, however, that the "puffing" defense may be narrowly viewed by some courts in medical product cases when unqualified language is used. In an IUD case, the court advised that "there are strong policy reasons against broadly applying the 'puffing' and 'dealer's talk' line of reasoning to a pharmaceutical product to be inserted into the human body. Pharmaceutical salesmen should not have as much leeway in 'puffing' their wares as would a used car salesman." *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517, 1525 (D. Minn. 1989).

Don't Promise Safety. Refrain from making affirmative representations of safety or the avoidance of an undesirable result. The classic case illustrating this principle involved a "Golfing Gizmo" golf training device, consisting of elastic and string fastened to a ball. Advertising materials stated the product was "COMPLETELY SAFE [-] BALL WILL NOT HIT PLAYER." In use, the ball hit the plaintiff in the head. The court affirmed the judgment for the plaintiff, finding the defendant liable for misrepresentation, breach of express and implied warranties, and strict liability in tort for design defect. It ruled that the statement at issue was not mere "puffing," but factually described an important characteristic of the product. The court noted a judicial trend toward narrowing the scope of "puffing" and expanding liability for broad statements by manufacturers as to the quality of their products. *Hauter v. Zogarts*, 534 P.2d 377, 381 (Cal. 1975). In addition, there have been recent concerted efforts by some law "reformers" to narrow the "puffing" defense generally, regardless of the context.

Thus, it is prudent to **avoid** words like "safe." In one case, express warranty liability was found in a case where skin cream advertised as "safe" and free from skin irritation allegedly caused injury, blistering, and inflammation. *Spiegel v. Saks 34th Street*, 252 N.Y.S.2d 852 (Sup. Ct. 1964), *affd.*, 272 N.Y.S.2d 972 (2d Dept. 1966). Similarly, another court reversed a judgment for a manufacturer who had advertised its deodorant as "safe" and "harmless," and said it "would not irritate the skin," where the product allegedly caused severe contact dermatitis in the plaintiff. *Wright v. Carter Products, Inc.*, 244 F.2d 53 (2d Cir. 1957). Other "safety"-type terms to avoid include "nonbreakable," "risk-free," "harmless," "foolproof," "accident-proof," and any other "danger"-proof statements.

Statements claiming that a product is **free from elements that might cause injury** to the user may in some cases be used to justify the imposition of liability on the manufacturer. For example, in a series of cases involving canned chicken where the plaintiffs suffered injuries from the presence of bones in products advertised as boneless, courts ruled in favor of plaintiffs. One court reasoned, "the packer of the chicken set its own standard of care and increased the necessary amount of care by expressly representing on the cans sold that the product was ready to serve and boned." *Bryer v. Rath Packing Co.*, 156 A.2d 442, 446 (Md. 1959).

Even advertising statements that refer to the "**convenience**" with which a product can be used may be a concern. In a case against the manufacturer of a hair-waving preparation for injuries sustained by a user, the court reversed a judgment for the manufacturer that had advertised the home permanent as less inconvenient to use than competing products. *Markovich v. McKesson and Robbins, Inc.*, 106 Ohio App. 265 (Cuyahoga Co. 1958).

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If you feel that competitive business realities require you to make certain advertising or promotional claims despite their litigation risks, at least limit such language to **comparative statements** rather than absolute statements or superlatives — "safer" or "increased safety" instead of "safe," "minimal maintenance" instead of "maintenance-free," "tamper-resistant" instead of "tamper-proof," and "reduces" instead of "prevents."

2. Review Graphics & Visuals

Keep in mind that courts have ruled that an advertisement should be viewed as a whole. Thus, consider whether a potential plaintiff could argue that representations — particularly regarding safety — were implied in the depiction of the product's use under the conditions illustrated. If so, consider either reworking the ad or at least adding a notice countering or disclaiming such an implication (such as "professional driver on closed track"). Verify that your illustrations suggest a standard of use compatible with and comparable to your product's warnings and instructions. Nothing should ever be said or depicted to contradict or dilute in any way what is said in the instructions or warnings.

Note that pictorial representations may in some cases be viewed as **superseding** label warnings. In one case, a child sustained chemical burns when a bottle of liquid drain cleaner accidentally spilled. The court ruled that a television commercial, claiming that the product was "safe" and depicting a human hand swirling water in a sink which presumably contained it, created an express warranty regarding the safety of the product for human contact — despite explicit warnings to the contrary on the label. *Drayton v. Jiffee Chemical Corp.*, 395 F. Supp. 1081 (N.D. Ohio 1975), *modified and aff'd*, 591 F.2d 352 (6th Cir. 1978).

Finally, if your advertising or promotion contains a warning, evaluate whether that warning is somehow "lost" due to language or images in the advertisement countering the warning, or to physical factors such as size, color, placement, and prominence.

3. Set Up a Review Process

Consider requiring in-house and outside advertising and public relations personnel to submit materials they prepare for possible liability review before dissemination. If that is not feasible, consider undertaking educational efforts to sensitize them to potential product liability concerns so they can: (1) modify problematic images or copy on their own; and (2) forward for review those matters of particular concern which they want to run as is.

Consider what else a plaintiff might claim constitutes your "advertising" or "promotional" materials. These could potentially include "advertorials" in newspapers and magazines, press releases and "bulletins," and promotional articles in trade publications. Also, consider applying these recommendations in other contexts, such as labels or other packaging statements or depictions, instructional or informational inserts, responses to consumer inquiries (letter or telephone), and statements to governmental or regulatory agencies.

Conclusion

Companies should be permitted to reasonably extol the virtues of their products, allowing consumers to be aware of and select among offerings in the marketplace. Consistent with that concept, the law has always allowed manufacturers some latitude in "sales talk" about their products, particularly when using general and nonspecific terms. A problem arises, however, when it is not clear which statements fall below that dividing line. Courts are increasingly reluctant to dismiss claims regarding advertising and promotional statements, particularly where the defendant manufacturer holds itself out as an expert, or where the plaintiff consumer lacks knowledge or skill regarding the product. Thus, it always pays to be vigilant, and to evaluate the justification for potentially troublesome language. Your efforts may help your company avoid claims from being brought, and avoid providing ammunition to the plaintiff should a lawsuit be commenced.

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