CRAFTING ADVERTISING AND PROMOTIONAL LANGUAGE TO MINIMIZE THE RISK OF PRODUCTS LIABILITY CLAIMS

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I. Introduction

Advertising continues to play an increasingly prominent role in products liability litigation.[1] The desires of manufacturers to increase sales and to avoid litigation may come into conflict in the context of advertising and promotion. This is because advertising and promotional efforts often include representations regarding a product's quality, performance or results (and the certainty of them), ease of use, and/or safety. The allegations in many products liability lawsuits are aimed at the very "image" of the product that marketing and advertising efforts strive to create, and claim that the message conveyed was false or misleading.[2]

The challenge facing defense practitioners is clear: How can you help your client attract customers without attracting a lawsuit? How can you keep a plaintiff from using your client's own advertising/promotional words and images against it—as an actual predicate for liability, as dramatic and often visual evidence of your client's alleged failure to live up to representations made, as a tactical evidentiary weapon to turn the jury's sympathies against your client, and/or as a way to rebut or minimize your client's defenses?

This article will: (1) briefly review the primary causes of action typically raised in products liability lawsuits involving advertising and promotion (including a discussion of the availability of some traditional defenses); then (2) set forth general guidelines on crafting promotional language and visuals to reduce the risk of claims or adverse judgments.

II. Causes of Action Related to Advertising/ Promotion

Products liability lawsuits regarding advertising or promotion may involve a variety of causes of action. There may be significant overlap between theories; several may be raised in the same case, with differing results.

A. Warranty

An *express warranty* is the making of a specific representation.[3] Express warranties go beyond any warranties implied by the law, and can give rise to consumer expectations possibly greater than those normally associated with a particular product. They may, in effect, impose a quasi-strict liability, since it typically does not matter whether the manufacturer knew or should have known that the warranty made was inaccurate.

The landmark case of Rogers v. Toni Home Permanent Co.[4] was an action against the manufacturer of a hair-waving product for injuries allegedly resulting from its use. The court ruled that a complaint alleging that a treatment advertised as "gentle" caused hair to fall out stated a cause of action for breach of express warranty. The court provided a lengthy discussion of how advertisers in general describe the "worth, quality and benefits" of products "in glowing terms and in considerable detail."[5]

In Stephens v. G.D. Searle & Co.,[6] a consumer allegedly suffered a stroke after taking oral contraceptives. The court denied the defendant manufacturer's motion for summary judgment on issues of warranty, ruling that the question whether statements made in advertising and promotional literature that the drug was safe and fit for use constituted requisite affirmations of fact was for the jury.

Express warranties can also be created through pictorial product representations—depictions of goods in advertisements and promotional materials. As one commentator observed, "pictorial representations may constitute an express warranty under Section 2-313 of the Uniform Commercial Code."[7] In Tirino v. Kenner Products Co.,[8] a child allegedly suffered an allergic reaction to glow-in-the-dark costume makeup applied near his eyes as shown in a box illustration. The court ruled that the evidence supported a jury finding of breach of express warranty that the product could be safely used in this manner.

Some courts have ruled that an illustration does not have to mirror exactly the use by plaintiff to support liability. In Sylvestri v. Warner & Swasey Co.,[9] involving an injury allegedly resulting from the use of a backhoe depicted in an advertising brochure, the court upheld a jury finding of breach of express warranty despite variation from the depicted use.[10] Such rulings highlight the need for manufacturers to carefully examine their illustrations of their products' use.[11]

Note also that, where express warranties are concerned, little proof of reliance may be required. According to comments to the U.C.C., "In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement."[12] As one commentator observed, "It is risky for advertisers to believe they can convey a forthright message about the virtues of their products and, later, tell disappointed customers they ought not to have believed it."[13]

Implied warranties arise by operation of law. They include the implied warranties of merchantability under U.C.C. § 2-314[14] and fitness for a particular purpose under U.C.C. § 2-315. An example of the latter is West v. Alberto Culver Co.,[15] where the manufacturer and seller of a hair conditioner were found liable for breach of the implied warranty of fitness for a particular purpose when

the contaminated product allegedly could not be removed from and damaged the buyer's hair.

B. Misrepresentation

Misrepresentation claims can take several forms. Allegations of *fraudulent* misrepresentation require proof of "scienter" regarding the representation—i.e., that the manufacturer either (1) knew it 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 appear in the form of allegations that the manufacturer failed to warn of risks.

Perhaps of greatest concern are claims brought under the *Restatement (Second) of Torts* § 402B for misrepresentation without fault—strict liability for misleading advertising that causes physical harm to the consumer.[16] According to some authorities, in such cases "state-of-the-art" may not be a defense.[17] In Crocker v. Winthrop Laboratories,[18] the court held a drug company liable regardless of "the state of medical knowledge" after finding that the manufacturer positively and specifically represented its product to be free and safe from all dangers of addiction, the treating physician relied upon that representation, the representation proved false, and the patient died.[19]

In cases of advertising misrepresentation, the plaintiff may only have to prove the falsity of the statement, and not that the product had a specific "defect."[20] This may also be true in cases of breach of express warranty.[21]

Moreover, evidence of advertising misrepresentation may support other claims and theories.[22] For example, such evidence may make it more likely for a court to find a "defect." In McCormack v. Hankscraft Co.,[23] a child was burned when she accidentally tripped over a vaporizer near her bed, overturning it. The manufacturer's advertising represented that the product was "tip-proof." The court found that the plaintiff stated a claim for a defectively designed vaporizer and entered judgment for the plaintiff.

C. Violation of Statutes

Additional claims may be premised on alleged violations of false advertising or consumer protection/deceptive practices legislation.

D. Punitive Damages

Another concern is that the imposition of punitive damages may be more likely in clear cases of misrepresentation or breach of express warranty. As one commentator observed, "There are growing indications that advertising and other forms of marketing behavior are increasingly being considered as influential factors in imposing punitive damage liability."[24] A plaintiff might argue that a manufacturer's continued active promotion of the sale of a product despite knowledge of its injurious side effects should be considered "malicious" and thereby support an award of punitive damages.[25] As another writer warned, "inflated promises or exaggerated product claims can severely heighten the risk of punitive damages."[26]

III. Effect on Availability of Defenses

In addition to potentially providing the basis for products liability claims, advertising and promotional efforts may also serve to undermine critical defenses traditionally available to manufacturers.

A. Foreseeability of Use

Manufacturers frequently point out that the use of the product by the plaintiff was not as intended or not reasonably foreseeable. However, such an argument may potentially be undercut by advertising that promotes, depicts, or encourages such use. In addition, in jurisdictions where the "consumer expectation" standard applies,[27] advertising and marketing statements and portrayals of the product may serve to influence those consumer expectations. In Leichtamer v. American Motors Corp.,[28] a vehicular pitchover case, the court affirmed a verdict for the plaintiffs, ruling that advertising evidence had been properly admitted to establish consumer expectations about the product's safety.[29]

In some situations, courts have ruled that admissibility on the issue of foreseeable use may not require that the injured party saw the advertisement involved. In King v. Kayak Manufacturing Corp.,[30] a man who dove into a shallow pool struck his head rendering him a quadriplegic. The court ruled that print ads and a promotional film showing people diving into similar pools made by the manufacturer were properly admitted although the plaintiff testified he had not seen or relied on such materials. The court stated: "In a product liability case, the manufacturer's advertising or promotional material concerning the uses of the product are a part of reasonable use of the product and may be admitted into evidence even though the user is not aware of the material."[31]

B. Foreseeability of Dangers of Use/Harm

Manufacturers may also point out that the dangers of the use of the product or the harm suffered by the plaintiff was not reasonably foreseeable. Such an argument may potentially be undercut, however, by 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. Such statements may unintentionally set up an argument that the original product did not have state-of-the-art safety features.

C. "Learned Intermediary" Doctrine

In the prescription drug context, one of the principal arguments available to manufacturers is the "learned intermediary" doctrine. This provides that the duty to warn runs from the manufacturer to the physician who prescribes the drug; thus a warning given to the physician should be sufficient.[32] Unfortunately, advertising and promotional efforts may to varying degrees in some cases undermine this valuable defense.

1. Overpromotion

Plaintiffs have argued that excessive promotion and other laudatory statements made regarding prescription drugs by a manufacturer *undercut* or *diluted* the effect of an otherwise adequate warning to a physician or consumer.[33] In Salmon v. Parke, Davis & Co.,[34] the court ruled that evidence that the manufacturer overpromoted a drug, diluting the warning to physicians, precluded summary judgment for the manufacturer. The court observed that "overpromotion of the drug may erode the effectiveness of otherwise adequate warnings."[35] Similarly, in Stevens v. Parke, Davis & Co.,[36] a drug wrongful death case, the court affirmed a judgment for the plaintiff, noting that "an adequate warning to the profession may be eroded or even nullified by overpromotion of the drug through a vigorous sales program which may have the effect of persuading the prescribing doctor to disregard the warnings given."[37] The court found that to have been the case, where "advertisements placed by [the manufacturer] in magazines constantly reminded physicians of the alleged effectiveness of the drug without mentioning its dangers."[38]

2. Direct-to-Consumer Advertising

The increasing frequency of direct-to-consumer advertising of prescription drugs may also carry with it the risk of carving out another exception to the learned intermediary doctrine. There has been some talk of a developing "advertising exception" to the doctrine, as the Food and Drug Administration (FDA) expands the ability of pharmaceutical companies to conduct direct-to-consumer advertising.[39]

In Garside v. Osco Drug, Inc.,[40] involving a child who allegedly contracted toxic epidermal necrolysis after being treated with amoxicillin and phenobarbital, the court, in *dictum*, said: "In an appropriate case, the advertising of a prescription drug to the consuming public may constitute a[n] . . . exception to the learned intermediary rule. By advertising directly to the consuming public, the manufacturer bypasses the traditional patient-physician relationship, thus lessening the role of the 'learned intermediary.' "[41]

Overall, however, liability for direct advertising by prescription drug makers to consumers "remains rather theoretical."[42]

3. Physician as "Consumer"

A third possible undermining of the doctrine may occur where the physician stands as the "consumer," and brings an action against the drug or medical device manufacturer for the physician's claimed economic and emotional injuries allegedly suffered as a result of the harm caused to his or her patient by the manufacturer's product.

In Oksenholt v. Lederle Laboratories,[43] a patient who became blind after taking a prescribed drug had sued the manufacturer and the doctor (and had settled with the latter). The physician then sued the manufacturer. The court ruled that the doctor's complaint stated causes of action for negligence, fraudulent misrepresentation, and recovery of punitive damages against the manufacturer. It further ruled that recovery at trial could include payment for injury to the doctor's professional reputation, as measured by impairment of his earning capacity and lost income, and punitive damages if warranted by the evidence.

IV. Strategies to Reduce Risks

So what can you do (and how can you advise your client) to avoid the products liability risks of advertising and promotional efforts? Here are some general guidelines.

A. Review Promotional Language

1. Think Like a Plaintiff's Lawyer

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.[44]

2. Avoid Making Guarantees or Promises

Don't use words—such as "guarantee," "warranty," or "promise"—that may make a commitment that is not intended. Bear in mind, however, that an express warranty can be created even without using such words.[45]

Avoid absolute statements that allow little room for explanation down the road, such as "will," "do," or "are." Don't overstate your product's capabilities (have your technical people advise you on what they are). Caution is necessary when referring to your product's durability, performance, compatibility, or recommended uses.

3. Qualify Language Whenever Possible

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

4. Use Nonspecific Terms Where Appropriate

General positive statements about a product are more likely to be considered nonactionable "puffing" than specific representations about its quality or results. The vaguer the statement, the less use a plaintiff can make of it at trial. This approach proved successful in Florence v. Clinique Laboratories, Inc.,[46] involving a woman whose skin broke out during her use of certain cosmetics. The court characterized the general statements made by the manufacturer as a traditional and nonactionable "sales pitch."[47]

In addition, statements clearly of the manufacturer's opinion may be insulated against warranty liability.[48] In Baughn v. Honda Motor Co.,[49] children were injured while allegedly riding minibikes made by Honda. The

manufacturer's television commercials 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 summary judgment for the defendant (no design or manufacturing defects were found, and the warnings provided were found to be adequate). On the plaintiff's misrepresentation claims, the court found that the television commercials cited by the plaintiff fit the description in comment g to *Restatement (Second) of Torts* § 402B of "loose general praise of goods sold known as sales talk or puffing" to which "the rule does not apply."[50] It also ruled that the trial court did not err in dismissing the express warranty claims, noting, "Such statements do not rise to the level of express representations for which recovery under the UCC is allowed. Rather, they appear to be Honda's opinion or commendation regarding minibikes rather than affirmations of fact about the goods."[51]

Note, however, that the "puffing" defense may be narrowly viewed by some courts in drug and medical device cases when unqualified language is used. In Kociemba v. G.D. Searle & Co.,[52] an intentional misrepresentation action claiming resulting infertility against an IUD manufacturer, the court ruled that a statement by a company representative to physicians that the product was "excellent for use" with nulliparous women (those who had never borne a child) could be found to be a "statement of fact" rather than an opinion.[53] It concluded that the statement's specificity undermined the argument that it was mere opinion; it was "not simply a general commendation of [the] product," but advised the doctor "that he could use the product with a specific subgroup of patients; i.e. women who had never borne children."[54] 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."

5. Don't Promise Safety

Manufacturers should refrain from making affirmative representations of safety or the avoidance of an undesirable result. The classic case illustrating this principle is Hauter v. Zogarts.[55] The defendant manufactured 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 trial court's 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."[56] The court noted a judicial narrowing of the scope of the "puffing" defense,[57] designed, at least in part, to counter reliance on the "opinion" defense.[58]

Thus, it is prudent to avoid words like "safe." In Spiegel v. Saks 34th Street,[59] 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. The court ruled, "Clearly, the affirmation in the advertisement, on the carton, and on the jar itself that the product was 'safe' constituted an express warranty."[60] Similarly, in Wright v. Carter Products, Inc.,[61] the court reversed and remanded 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.

Other terms to avoid include "nonbreakable," "risk-free," "harmless," "foolproof," "accident-proof," and anything else "-proof."[62]

In addition, statements in advertising claiming that a product is free from elements that might cause injury to the user may in some cases justify the imposition of liability on the manufacturer. In Bryer v. Rath Packing Co.,[63] the court reversed and remanded a judgment for the manufacturer of canned chicken where the plaintiff suffered injuries from the presence of bones in a product advertised as "Ready to Serve Boned Chicken" with "No bones." The court reasoned that "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."[64] Similarly, in Lane v. C.A. Swanson & Sons,[65] the court ruled that advertisements for and labels on a canned product describing it as "boned chicken" with "no bones" constituted an express warranty which was breached when the plaintiff found and was injured by a chicken bone packed in a can.

Even advertising statements that refer to the "convenience" with which a product can be used may be a concern. In Markovich v. McKesson and Robbins, Inc.,[66] an action 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 products of its competitors.[67]

6. Other Suggestions

In the prescription drug context, if direct-to-consumer advertising is undertaken, advise consumers to ask or consult with their physicians about the merits of particular products. Advise consumers to "See your doctor," and "Let him or her decide what is best for you" or "Let him or her decide if this medication is appropriate for you."

When advertising safety improvements, don't say or suggest that conditions prior to the introduction of such improvements (or continued in some product lines) were and/or were known to be somehow "unsafe" or inferior.

Don't run afoul of any guidelines or restrictions on the content of advertising or promotion, be they governmental or regulatory, industry self-imposed, or company self-imposed. A plaintiff may attempt to use these rules to create an alleged standard of care, and then allege that your company failed to meet it.

B. Review Graphics/Visuals

1. Don't Limit Your Review to the Copy

Keep in mind that 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 adding a notice countering or disclaiming such an implication (such as "professional driver on closed track").

2. Follow Warnings/Instructions

Verify that 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. Be wary if the depicted use goes beyond what the stated warnings or precautions would allow.

Note that pictorial representations may in some cases be viewed as superseding label warnings. In Drayton v. Jiffee Chemical Corp.,[68] involving a child who sustained chemical burns when a bottle of liquid drain cleaner accidentally spilled, the court affirmed a finding of breach of express warranty. The court ruled that evidence, including that the mother had seen the product advertised on television with claims that it was "safe" and depicting a human hand swirling water in a sink which presumably contained the product, gave rise to an express warranty regarding the safety of the product for human contact—despite explicit warnings on the label.[69]

Make sure what your advertising promotes is the reasonable and proper use of your product. Limit descriptions and depictions to uses for which the product was designed and intended, and with any appropriate safety measures or protective devices in place. Beware of explicit or implicit suggestions of overconsumption of food or drugs, or of consumption in inappropriate or dangerous situations or conditions (e.g., just before driving or swimming).

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.[70]

C. Set Up a Review Process

Ideally, you should require both in-house and outside advertising and public relations personnel to submit all materials they prepare on your company's behalf for legal review before dissemination. If that is not feasible, consider undertaking educational efforts to sensitize them to products liability concerns so they can (1) modify problematic images or copy on their own, and (2) forward for your 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,[71] responses to consumer inquiries (whether in a letter or by telephone), and statements to governmental or regulatory agencies.

V. Conclusion

Obviously, manufacturers are and should be allowed reasonably to 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.

The problem, however, is that it is not always clear what statements fall below that dividing line. Courts are demonstrating an increasing willingness to let claims regarding advertising and promotional statements to go to the jury, particularly in situations where the defendant manufacturer holds itself out as an expert, or where the plaintiff consumer lacks knowledge or skill regarding the product. Thus, 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.

It also pays, however, to keep in mind practical business realities. The advice presented in this article is from a legal, products liability defense viewpoint. By contrast, your company's sales and marketing personnel may feel that making certain advertising or promotional claims, despite their litigation risks, may be critical to its continued success (if not survival) in the marketplace. If faced with the need for advertising and promotion to say *something* on such matters, one middle ground may be to limit such language to *comparative* statements rather than absolute statements or superlatives. Thus, words like "safer" or "increased safety" would be preferable to "safe," "minimal maintenance" preferable to "maintenance-free," "tamper-resistant" preferable to "tamper-proof," and "reduces" preferable to "prevents."

Nevertheless, it remains your responsibility as lawyers also to emphasize that a company besieged by claims and drained by legal fees and adverse judgments cannot effectively compete. Hopefully, the business decision that is ultimately made will take your expressions of concern carefully into account.

Endnotes

1. "The classic cases of products liability law that propelled the law toward tort and away from contract—*Henningsen v. Bloomfield Motors, Inc., Greenman v. Yuba Power Products, Inc.*, and Justice Traynor's famous concurrence in *Escola v. Coca Cola Bottling Co.*—were grounded, in part, on the courts' keen awareness of advertising's growing power over consumer decision making." Note, *Harnessing Madison Avenue: Advertising and Products Liability Theory*, 107 HARV. L. REV. 895, 895 (1994) (footnotes omitted).
2. Peter Perlman, in his article entitled, *Product Promotion: Using Manufacturers' Words Against Them*, 29 TRIAL 36 (Association of Trial Lawyers of America November 1993), claimed that, "In their zeal to maximize sales, manufacturers often fail to warn about their products' dangerous propensities. In addition, companies often over-promote and exaggerate their products' expected performance." *Id.* at 36. He went on to suggest focusing on "how the

manufacturers' advertising messages differed from the positions the companies took at trial." He also cautioned that "Lawyers must be diligent in representing victims of dangerous products. All available sources of information should be used in this effort. What better source can there be than the words of the manufacturer? Often, promotional materials will be the key to a successful result." *Id.* at 41.

3. Uniform Commercial Code § 2-313(1)(a) states: "Any 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." Subsections (b) and (c) do the same with regard to descriptions and samples or models.
4. 167 Ohio St. 244, 147 N.E.2d 612 (Ohio 1958).
5. 147 N.E.2d at 615. The court went on to say: "The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. What sensible or sound reason then exists as to 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. In our minds no good or valid reason exists for denying him that right. Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious." *Id.* at 615-616.
6. 602 F. Supp. 379 (E.D. Mich. 1985).
7. Susan E. Grady, *Inadvertent Creation of Express Warranties: Caveats for Pictorial Product Representations*, 15 U.C.C.L.J. 268, 268 (1983). The writer observed, "Recent court cases are beginning to show a trend toward holding manufacturers liable for pictorial representations. That is, no defense may be presented which denies what the pictures say." Moreover, "courts seem to have acquiesced to the belief that consumers assume pictorial representations are comparable with written instructions." *Id.* at 271-272.
8. 72 Misc. 2d 1094, 341 N.Y.S.2d 61 (Civil Ct., Queens Co. 1973).
9. 398 F.2d 598 (2d Cir. 1968).
10. "While Sylvestri apparently did not attach the rock to the backhoe in exactly the same manner that the pipe was attached in the brochure picture, and while lifting rock may in some way be different from lifting pipe, we conclude that the jury was properly left to determine under the applicable New York law whether the brochure picture and statements as a whole represented an affirmation of fact or promise that the machine could be used as Sylvestri used it. It is the 'essential idea' conveyed by the advertising representations which is relevant." *Id.* at 602 (footnote omitted).
11. "[R]ealistic pictorial portrayals can and are being interpreted strictly by the courts unless the pictorial representation is a blatant flight of fancy. The consumer is entitled to what the picture portrays. From the consumer's point of view, these pictorial representations, unless disclaimed, are powerful evidence if problems arise." Grady, *supra*, at 272.
12. U.C.C. § 2-313, comment 3.
13. Marshall S. Shapo, *Advertising and the Liability of Product Sellers (Part I)*, PRODUCT SAFETY & LIABILITY REPORTER 510, 513 (May 7, 1993).
14. Note that this warranty may also constitute a form of quasi-strict liability, as proof of its breach may not require proof of the seller's knowledge of the product's deficiency.
15. 486 F.2d 459 (10th Cir. 1973).
16. The section ("Misrepresentation by Seller of Chattels to Consumer") provides:

> One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though
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> (a) it is not made fraudulently or negligently, and
>
> (b) the consumer has not bought the chattel from or entered into any contractual relationship with the seller.

17. "When advertising misrepresentation is involved, . . .a true strict liability action can be maintained, with state-of-the-art being no defense. . . . By making the representation, the manufacturer in effect guarantees his product." Jerry J. Phillips, *Advertisements Clearly Are Basis for Lawsuits*, 9 PRODUCT LIABILITY LAW AND STRATEGY 1, 4 (March 1991).
18. 514 S.W.2d 429 (Tex. 1974).
19. "Whatever the danger and state of medical knowledge, and however rare the susceptibility of the user, when the drug company positively and specifically represents its product to be free and safe from all dangers of addiction, and when the treating physician relies upon that representation, the drug company is liable when the representation proves to be false and harm results." *Id.* at 433.
20. "Another significant advantage of an action based on advertising misrepresentation is that the only 'defect' the plaintiff need prove is that the representation was false, causing the plaintiff's injury. . . . This aspect of the remedy sidesteps the difficult problems often present in product liability cases of identifying and proving the alleged defect." Phillips, *supra* note 17 at 4.
21. *See* Huebert v. Federal Pacific Electric Co., 208 Kan. 720, 494 P.2d 1210, 1215 (1972) (claim for breach of express warranty regarding electrical switch) ("A manufacturer may by express warranty assume responsibility in connection with its products which extends beyond liability for defects. . . . [D]efects in the product may be immaterial if the manufacturer warrants that a product will perform in a certain manner and the product fails to perform in that manner.").
22. "Even when advertising misrepresentation is not the sole basis of recovery, it may provide an important support for recovery under other theories." Phillips, *supra* note 17, at 4.
23. 278 Minn. 322, 154 N.W.2d 488 (1967).
24. Michael Hoenig, *The Influence of Advertising in Products Liability Litigation*, 5 JOURNAL OF PRODUCTS LIABILITY 321, 336 (1982).
25. *Id.* at 336 n. 54.
26. Jeffrey N. Gibbs, *Medical Device Promotional Activities and Private Litigation*, 47 FOOD AND DRUG L.J. 295, 306 (1992). That commentator explained: "A company that has undermined its warnings, made unsubstantiated claims, or otherwise exceeded the boundaries of reasonable promotion can be more vulnerable to a punitive damages award. The greater the unkept promises made by the company, the greater the likelihood that a jury will return a punitive damages award. An unsubstantiated or misleading advertisement will allow the plaintiff's attorney to make a powerful jury argument, such as the company 'willfully disregarded the safety of patients in pursuit of a bigger profit.'"
27. See *Restatement (Second) of Torts* § 402A, comment i (1966) (for a manufacturer to be liable in tort because of an allegedly defective product, "[t]he article must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.").
28. 67 Ohio St. 2d 456, 424 N.E.2d 568 (Ohio 1981).
29. "[A] product is unreasonably dangerous if it is dangerous to an extent beyond the expectations of an ordinary consumer when used in an intended or reasonably foreseeable manner. The commercial advertising of a product will be the guiding force upon the expectations of consumers with regard to the safety of a product, and is highly relevant to a formulation of what those expectations might be. The particular manner in which a product is advertised as being used is also relevant to a determination of the intended and reasonably foreseeable uses of the product. Therefore, it was not error to admit the commercial advertising in evidence to

establish consumer expectation of safety and intended use." 424 N.E.2d at 578.

30. 387 S.E.2d 511 (W. Va. 1989).
31. *Id.* at 522.
32. The doctrine is based on the recognition that the physician is the principal actor in the designation of a prescription drug or medical device for a particular patient. The use of the product is thus a result of the exercise of the doctor's professional judgment. The target of an advertisement, therefore, is the physician, not the consumer. Note, however, that not all jurisdictions bar suits under such circumstances by ultimate consumers. Exceptions to the rule have been made in cases involving oral contraceptives and some mass-administered vaccines.
33. See Phillips, *supra* note 17, at 4 ("Deceptive or misleading advertising . . . or the over-promotion of a product . . . may nullify what might otherwise be an adequate warning of danger by the manufacturer.").
34. 520 F.2d 1359 (4th Cir. 1975).
35. *Id.* at 1362.
36. 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973).
37. 507 P.2d at 661.
38. *Id.* at 662.
39. See, e.g., Craig A. Marvinney, *How Courts Interpret a Manufacturer's Communications to Consumers: The Learned Intermediary Doctrine*, 47 FOOD AND DRUG L.J. 69, 72-73 (1992).
40. 764 F. Supp. 208 (D. Mass. 1991), *rev'd on other grounds*, 976 F.2d 77 (1st Cir. 1992).
41. 764 F. Supp. at 211 n.4 (concluding that such an exception did not apply in that case).
42. Shapo, *supra* note 13, at 511.
43. 294 Or. 213, 656 P.2d 293 (1982).
44. Products liability defense practitioners are familiar with the phenomenon that many of the same people who habitually ignore printed advertisements and zap television commercials, when they become jurors, often suddenly and unquestioningly accept the premise that all advertising (1) is carefully studied and ingested by consumers, and (2) thereafter automatically and completely dictates and controls their behavior.
45. *See* U.C.C. § 2313(2) ("It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty").
46. 347 So. 2d 1232 (La. Ct. App. 1st Cir. 1977).
47. "[A]ny statements made by the salespersons or by the Clinique literature to the effect that the Clinique products were 'the future of beauty' or that they were 'just the products for you [plaintiff]' do not constitute material declarations giving rise to actionable warranties. . . . These statements are merely in the nature of a sales pitch arising in the ordinary course of merchandising, the purpose and effect of which a reasonable person should be knowledgeable." *Id.* at 1236.
48. U.C.C. § 2-313(2) provides that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."
49. 107 Wash. 2d 127, 727 P.2d 655 (1986).
50. 727 P.2d at 668.
51. *Id.* at 669 (footnote omitted). Similarly, in Schmaltz v. Nissen, 431 N.W.2d 657, 661 (S.D. 1988), the court ruled that the words "good seed" did not create an express warranty. It reasoned that "[g]eneral statements to the effect that goods are 'the best' or are 'of good quality,' or will 'last a lifetime' and be 'in perfect condition,' are generally regarded as expressions of the seller's opinion or 'the puffing of his wares' and do not create an express warranty." However, the court did caution that "words of this type may create express warranties when given in response to specific questions or when given in the context of a specific averment of fact." Another case finding that an attention-getting statement of opinion did not create an express warranty was Dent v. Ford Motor Co., 83 Ohio App. 283, 614 N.E.2d 1074 (Lorain Co. 1992), *motion overruled*, 66 Ohio St. 3d 1924, 607 N.E.2d 846 (1993). The court ruled a truck manufacturer could not be held liable for injuries sustained by a motorist under fraud and breach of express warranty theories based on an advertising slogan that its vehicles were "Built Fun Tough."
52. 707 F. Supp. 1517 (D. Minn. 1989).
53. *Id.* at 1525. The court ruled that the award of $7 million in that case was not excessive.
54. *Id.*
55. 14 Cal. 3d 104, 120 Cal. Rptr. 681, 534 P.2d 377 (1975).
56. "The assertion that the Gizmo is completely safe, that the ball will not hit the player, does not indicate the seller's subjective opinion about the merits of his product but rather factually describes an important characteristic of the product. Courts have consistently held similar promises of safety to be representations of fact." 534 P.2d at 381.
57. *Id.* (citing "the trend toward narrowing the scope of 'puffing' and expanding the liability that flows from broad statements of manufacturers as to the quality of their products" and observing that "[c]ourts have come to construe unqualified statements such as the instant one liberally in favor of injured consumers").
58. *Id.* at 381 n.7 ("This expansion of sellers' liability has been necessary to counteract the shrewd technique of those sellers who, instead of making broad factual assertions about their products, seek to couch their representations in opinion form.").
59. 43 Misc. 2d 1065, 252 N.Y.S.2d 852 (Sup. Ct. 1964), *aff'd*, 26 A.D.2d 660, 272 N.Y.S.2d 972 (2d Dep't 1966).
60. 252 N.Y.S.2d at 856.
61. 244 F.2d 53 (2d Cir. 1957).
62. In the *McCormack* case discussed, *supra* text at note 23, the manufacturer represented in various media that vaporizer was "safe," "practically foolproof," and "tip-proof."
63. 221 Md. 105, 156 A.2d 442 (1959).
64. 156 A.2d at 446.
65. 130 Cal. App. 2d 210, 278 P.2d 723 (2d Dist. 1955).
66. 106 Ohio App. 265, 149 N.E.2d 181 (Cuyahoga Co. 1958).
67. "The plaintiff was induced to purchase 'Prom Home Permanent' by defendant's radio broadcast, urging its use with the statement that a neutralizer other than water was unnecessary, making the application or use of its product much more convenient than those of other manufacturers. The product was purchased because of the warranties published by the defendant. The defendant induced the sale and is liable if the product thus bought does not comply with the representations made and the health of the user is endangered when the product is used as directed by the manufacturer." 149 N.E.2d at 186.
68. 395 F. Supp. 1081 (N.D. Ohio 1975), *modified and aff'd*, 591 F.2d 352 (6th Cir. 1978).
69. See Grady, *supra* note 7, at 272 ("as the cases have demonstrated, if there is a contradiction between the written and the visual, the visual overrides. It is no longer safe to show one thing in pictures and another on instructions or labeling.").
70. While the subject of what constitutes an adequate warning is obviously beyond the scope of this article, it pays to keep in mind that warnings can be a two-edged sword. 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.
71. In the *McCormack* case discussed, *supra* text at note 23, involving a child burned when she accidentally tripped over a vaporizer near her bed, the jury found that language and pictures in an instruction booklet enclosed in the vaporizer box constituted an express warranty that letting the vaporizer run unattended all night in the child's room was safe.

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