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There's a fine line between ads and product liability

BY MIKE GOUDREAU

Attorneys who oversee their clients' advertising walk a fine line between helping them remain competitive and avoiding product liability. Experts in the consumer products field discussed these two often-competing interests at a program sponsored by the Food, Drug & Cosmetic Law Section.

"In simple terms," said Barry J. Cutler of Washington, D.C., former director of the Federal Trade Commission Bureau of Consumer Protection, "advertising lawyers are the offense and product liability lawyers are the defense."

Advertising spurs competition

Cutler concentrated on the strong connection between advertising and fair competition, citing examples such as the frozen entree industry, which has had a running battle over sodium in its products. Sodium levels have steadily decreased over the years, as companies attempted to outdo each other. Years ago, the common amount was 1400 mg per serving, but Healthy Choice made the first real stride toward reducing sodium when it came out with 900 mg dinners several years ago.

"Do you think frozen dinners would be down around 500 or 600 mg if there were no advertising?" Cutler asked.

Cutler also spoke about how government regulation affects competition. He pointed out that banning cigarette advertising on TV actually helped the major tobacco companies because it drove the smaller producers out of business.

More information should be available

The former FTC bureau chief made a case that government regulations should encourage advertisers to make claims that consumers need to know about, such as those involving safety. In the past, he said, companies did much less safety advertising. FTC officials were of two minds as to the reasons why; some thought it was because companies were afraid of liability, others thought that advertisers avoided simply because they believed consumers didn't want to be reminded of safety issues surrounding certain products. More recently, Cutler has noticed an increase in safety-based advertising, a trend he termed "terrific."

Discussing other current trends in product advertising, Cutler noted an ongoing case involving the Coors beer company, which is fighting to lift the federal ban on alcohol content listings on labels. Cutler said that if Coors loses, it will be an "uphill fight" for food manufacturers to challenge federal labeling guidelines, and if the company wins, it will spark a number of challenges to the Food & Drug Administration.

Another issue the FDA is now dealing with centers on prescription drugs.

According to Cutler, the federal government is not all that anxious to allow conversion of prescription drugs to over-the-counter, since it doesn't regulate the advertising of the latter. And for lawyers representing drug companies, the change can mean a much more complicated job.

From prescription to over-the-counter

"What do you do with a product," Cutler said, "that used to be a prescription drug and that previously had a page and a half of disclaimers, and now you're advertising it in a 30-second spot?"

The Washington attorney also noted an important precedent set recently that said a scientific consensus is not necessary to make a claim, only "reliable evidence" that the claim is accurate.

"I think that is an excellent place for advertising to be," Cutler said.

How to avoid litigation

Lawrence E. Savell of Manhattan, followed Cutler with a presentation on advertising language that invites litigation and how companies can minimize liability.

Savell outlined some common liability pitfalls, such as not subjecting pictures and other representations on packaging to the same scrutiny as the language itself. Looking at common liability defenses, Savell advised that the product manufacturer can still be found liable even if the "state-of-the-art" medical or scientific knowledge didn't indicate a product could pose the danger in question. Savell also said companies must be careful in advertising an improved product not to indicate that the previous version was dangerous. Lastly, he addressed the so-called "learned intermediary" argument, which holds that instructions such as "see your doctor" on packaging transfer responsibility to the physician. Savell warned that the intermediary can be circumvented by excessive advertising.

The attorney offered a long list of observations and guidelines to help the product liability lawyer, including the following:

Look at ads from another perspective

✓ Look at every piece of advertising as a plaintiff's lawyer would.

✓ Keep in mind that people and courts perceive advertising to be more powerful than it is.

✓ Avoid absolute terms such as "guarantee" and "promise." Instead of saying "will," "do" or "are," use words such as "may," "could," "possible" and "variable."

✓ Courts have been fairly flexible about allowing "loose general praise" or puffing in advertising, but they are less lenient in cases of drugs and medical devices.

✓ Avoid words such as "safe," "non-breakable," "foolproof" and "accident-proof," any claim that product is free of

elements that can cause injury. Even "convenience" can be a problem. Speak in comparative terms—i.e. "tamper resistant" instead of "tamper proof."

✓ Never say or depict anything that contradicts your product warnings.

✓ Make sure warnings aren't lost in the shuffle of the advertising copy.

While product liability attorneys would want to address all of these issues, Savell said that in reality they are forced to make

compromises with their clients. Savell advised lawyers to set up a legal review procedure for each product, but if that can't be done, to initiate a liability education program for the company's sales department. A major point to make in dealing with stubborn clients, he said, is that the cost of defending a liability claim can cripple a company just as much as losing ground in the market.

"The bottom line," he said, "is you may have to strike a middle ground."