Can Marketing Go Too Far?

Ten rules for keeping litigation at bay.

By Lawrence Savell

NEARLY A HALF-CENTURY ago, Charles Brower, then president of the advertising powerhouse Batten, Barton, Durstine & Osborn, rather bluntly advised a national convention of sales executives, "There is no such thing as 'soft sell' and 'hard sell.' There is only 'smart sell' and 'stupid sell.'"

Brower's pointed comments highlighted the need for focused and effective marketing and to avoid counterproductive advertising. Such flawed efforts include marketing that puts the product's manufacturer at risk for a product liability lawsuit.

Marketing campaigns often include statements about a product's quality, performance or results (and their certainty), ease of use, and safety. Plaintiffs' counsel may focus on these representations and allege that the message conveyed was false or misleading, leading to injuries or other damage.

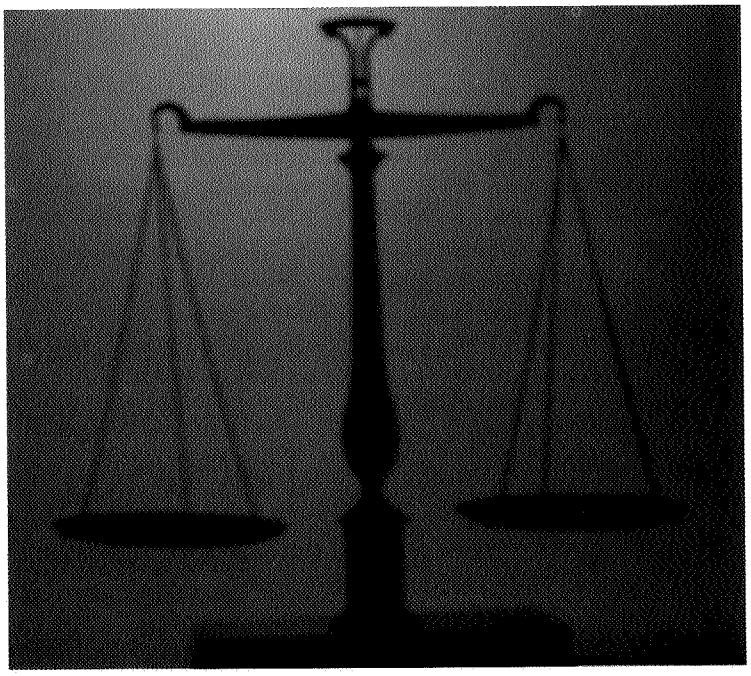
Perhaps the most frequent claim asserted here is breach of an "express warranty"—the making and breaking of a specific promise. Under the Uniform Commercial Code, which applies in nearly all states, "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."

Courts have upheld claims that statements in advertisements and other promotional efforts constituted express warranties. In a landmark case, the court ruled that a home hair permanent advertised as "gentle" that allegedly caused hair to fall out stated a claim for breach of express warranty.

Courts will examine how terms are interpreted within a particular industry. In a chocolate manufacturer's lawsuit against a supplier of whey contaminated by salmonella, the supplier's statement that the whey was "extra grade" could support a claim where the term was understood in the trade to mean it would be free of such contamination. Similarly, a statement that a certain fabric was "first quality" in accordance with industry standards was held to be an express warranty.

Depictions of goods in advertisements and promotional materials may also create express warranties. Some courts seem to believe that consumers equate pictorial representations with written instructions. In a case where 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 upheld a finding of breach of express warranty that the product could be safely used in that manner.

Perhaps the most dangerous marketing statements from a products liability defense perspective are affirmative representations of safety. The classic case illustrating this involved a golf training device, consisting of elastic fastened to a ball. Advertising materials stated the product was "completely safe" and that the ball would not hit the player; unfortunately, it did. The court affirmed judgment for the plaintiff, finding the defendant liable for, among other things, misrepresentation and breach of express warranty.



Similarly, a court reversed a prior judgment for a manufacturer that 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. In a case where the plaintiff suffered injuries from bones in canned chicken advertised as boneless, the 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."

Plaintiffs also may claim that marketing efforts constituted misrepresentations. Fraudulent misrepresentation alleges that the advertiser (1) knew the representation was false, (2) did not believe it was true, or (3) was reckless regarding whether it was true or false. Negligent misrepresentation alleges failure to use due care in crafting assertions. Statements found to be inaccurate or misleading also may constitute violations of false advertising, consumer protection, or deceptive practices laws.

Marketing statements may additionally risk undermining critical litigation defenses. For example, they may be found to have diluted or even superseded explicit warnings on labels and packaging. 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 that 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. Also, manufacturers frequently note that the plaintiff's particular use of the product was not as intended by or not reasonably foreseeable to the manufacturer, thus barring liability. However, such an argument may potentially be undercut by advertising that promotes, depicts, or encourages such particular use.

Moreover, marketing efforts may increase the likelihood that punitive damages may be imposed in a lawsuit, as a plaintiff might argue that a manufacturer's continued active promotion of a product despite knowledge of its alleged injurious side effects should be considered deliberate or "malicious."

Ten Rules for Safer Marketing

Faced with the significant risks detailed here (and the frequent reality that not all campaigns will be reviewed by counsel prior to release), marketers need to be sensitive to, and prepared to modify, potentially problematic language and illustrations. Here are 10 general rules that may help reduce the risks.

Think like a plaintiff. Examine your advertising and promotion as if you were looking for evidence to support a lawsuit. Watch out in particular for language that sets you up for an express warranty claim. Avoid anything that you would not want to see used as an exhibit against you or your client in a trial. 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. Don't use words suggesting things like "guarantee," "warranty," or "promise" (although an express warranty can be created even without such words). 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, performance, durability, compatibility, or recommended uses.

Don't promise safety. In particular, refrain from making affirmative representations of safety or the avoidance of an undesirable result. Avoid words like "safe," "unbreakable," "risk-free," "harmless," "fool-proof," "accident-proof," and anything else "-proof." If you advertise safety improvements, don't say or suggest that prior versions (or features continuing in other product lines) were or were known to be somehow "unsafe" or inferior.

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 vaguer the statement, the less use a plaintiff can make of it at trial.

Thus, the marketing statement that a manufacturer's "business is providing the right truck for your business" did not constitute an affirmation of fact or a promise sufficient to support a claim. Another truck manufacturer's statement in a sales brochure that its vehicles were "rock-solid" and that their fiberglass roofs were "strong" did not guarantee they were indestructi-

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ble. In an action involving an eye injury caused by a bungee hook, the statement, "premium quality," was found not to be a description of particular characteristics of the goods, but rather a generalized statement of salesmanship and puffery.

Clear statements of the manufacturer's opinion may be insulated against warranty liability. Under the Uniform Commercial Code, "an affirmation merely of the value of goods or a statement purporting to be the seller's opinion or commendation of the goods does not create a warranty." In a case involving children injured while riding minibikes, the plaintiff focused on the manufacturer's television commercials, which said, "You meet the nicest people on" its products, 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." Similarly, the phrase, "America's most complete line of reliable, economical gas heating appliances," was ruled to be merely the seller's opinion and "mere puffing" and not an express warranty.

Nothing should ever be said or depicted that goes beyond what the stated instructions, warnings, or precautions would allow.

Qualify language. The more tentative the language used, the less likely it will support a finding that an express warranty was made. Select less-definite words like "may," "might," or "could," and refer to results as "possible," "variable," or "estimated." A manufacturer was not liable for breach of express warranty where it stated a medication offered "virtually complete protection"; the qualified statement was found to be a hedge and not the equivalent of "complete protection." Similarly, a statement in product literature that "[i]t is estimated" that the rate of disease reported with an IUD was essentially what would have occurred without it was merely an estimate and not an express warranty.

Use comparisons instead of absolutes. 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. Thus, use "safer" or "increased safety" instead of "safe," "minimal maintenance" instead of "maintenance-free," "tamper-resistant" instead of "tamper-proof," and "reduces" instead of "prevents."

Follow industry and external rules. Don't violate any guidelines or restrictions on the content of advertising or promotion, be they governmental/regulatory or industry/company self-imposed. A plaintiff may claim that these rules created a standard of care, and your company failed to meet it.

Review all illustrations. 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 (e.g., "professional driver on closed track").

Keep instructions and warnings in mind. Verify that your language and illustrations are limited to reasonable and proper uses for which the product was designed and intended, and with any appropriate safety measures or protective devices in place. Nothing should ever be said or depicted that goes beyond what the stated instructions, warnings, or precautions would allow.

Spread the word. Make sure your entire marketing team is sensitive to these issues, and consider undertaking internal educational efforts.

Marketers are and should be allowed reasonably to promote the virtues of products, allowing consumers to be aware of and select among offerings in the marketplace. Consistent with that concept, the law has always allowed some latitude in "sales talk" about products, particularly when using general and nonspecific terms. The problem, however, is that it's not always clear what statements fall below that dividing line. Thus, it pays always to be vigilant, and to evaluate the justification for potentially troublesome language. Your efforts may help prevent claims from being brought and avoid providing ammunition to the plaintiff in the event of a lawsuit. ■

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