Could Your Advertising Attract A Lawsuit?

by Lawrence Savell

You and your company put a great deal of time, effort, and money into advertising and marketing your products and/or services. But did you consider that such promotional measures could actually hurt your business? Well, you should. Advertising and promotional efforts typically include representations about a product or service's quality, performance or results (and their certainty), and/or safety. Many products liability lawsuits take aim at the very "image" such efforts strive to create, and claim that the message conveyed was false or misleading, leading to physical injuries or other damages.

So how can you attract customers without attracting a lawsuit? How can you keep a plaintiff from using your advertising and promotional words and images against you? One way to reduce the risks is to follow (to the extent feasible) some general guidelines.

Ten Steps To "Safer" Advertising

1. **Think Like a Plaintiff**
2. **Don't Make Guarantees or Promises**
3. **Qualify Your Language**
4. **Don't Be Specific**
5. **Don't Promise Safety**
6. **Follow Governmental and Industry Guidelines**
7. **Review Graphics and Visuals**
8. **Don't Contradict Warnings/Instructions**
9. **Set Up A Review Process**
10. **Balance Legal and Business Concerns**

1. Think Like a Plaintiff

Before you put out any advertising or other statements, take a close look at them as if you were someone looking for evidence to support a lawsuit. Avoid anything that you would not want to see used as an exhibit against you. Bear in mind that juries (and, sometimes, courts) may believe that advertising is far more powerful and persuasive than it really is.

2. Don't Make Guarantees or Promises

Avoid using words suggesting such things, including "guarantee," "warranty," or "promise" which a court or jury might conclude created a binding obligation.

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

3. Qualify Your Language

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

4. Don't Be Specific

General positive statements about a product or service are more likely to be considered nonactionable "sales talk" or "puffing" than specific representations about its quality or results. The vaguer the

statement, the less use a plaintiff can make of it at trial. For example, in a case involving a woman whose skin broke out during her use of certain cosmetics, the court characterized the manufacturer's vague statements that the products were "the future of beauty" or "just the products for you" as a traditional and nonactionable "sales pitch."

In addition, statements clearly of the manufacturer's opinion may be insulated against such liability.

Note, however, that some courts have demonstrated an increasing inclination toward narrowing the scope of the "puffing" defense and expanding liability for broad statements by manufacturers and providers as to the quality of their products and services. In addition, there have been recent legislative efforts to narrow the availability of that defense, particularly where unqualified language is used.

5. Don't Promise Safety

Refrain from making affirmative representations of safety or the avoidance of an undesirable result. In a classic case, the manufacturer of a golf training device who stated in advertising that the product was "COMPLETELY SAFE [—] BALL WILL NOT HIT PLAYER" was held responsible when the ball hit the plaintiff in the head.

Thus, it is prudent to avoid words like "safe." Other terms to avoid include "nonbreakable," "risk-free," "harmless," "foolproof," "accident-proof," and anything else "-proof."

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.

If you advertise 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.

6. Follow Governmental/Industry Guidelines

Don't violate 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 claim that these rules create a minimum level or standard of care, and that your company failed to meet it.

7. Review Graphics and Visuals

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 or delivery of a service 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").

8. Don't Contradict Warnings/Instructions

Verify that your language and 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. For example, one court ruled a drain cleaner manufacturer could be found liable based on the depiction of the product's use in a television commercial — despite explicit warnings to the contrary on the label.

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 allegedly somehow "lost" due to language or images in the advertisement countering the warning, or to physical factors such as size, color, placement, and prominence.

9. Set Up a Review Process

Consider requiring in-house and outside advertising and public relations personnel to submit materials

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they prepare for possible legal review before dissemination. If that is not feasible, consider undertaking educational efforts to sensitize them to potential products liability concerns so they can: (1) modify problematic images or copy on their own; and (2) forward for specific legal 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.

10. Balance Legal and Business Concerns

Obviously, companies are and should be allowed reasonably to extol the virtues of their products and services, allowing consumers to be aware of and select among offerings in the marketplace. Unfortunately, courts are becoming increasingly reluctant to dismiss claims regarding advertising and promotional statements, particularly where the defendant manufacturer or provider holds itself out as an expert, or where the plaintiff consumer lacks knowledge or skill regarding the product or service.

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."

It pays always 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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