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SALES AND ADVERTISING: KEEPING THE PROMISES WE MAKE

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I. INTRODUCTION

The philosophy of product safety and product liability prevention must be woven through the corporate fabric. Every department within a product manufacturing company must understand what can proactively be done to design, manufacture, and sell safer products and must understand the implications of failing to do so. As product manufacturers devote a renewed focus to product safety and product liability prevention and begin to examine each department of the company for proactive practices, the sales, marketing, and advertising functions cannot be overlooked. Specific steps can and should be taken to develop defensible promotional materials.

II. LEGAL THEORIES

The history of products liability has taught that the promises made during the sales and promotion process to win the sale can later be used by plaintiffs' counsel to win the lawsuit. A product manufacturer's advertising can provide the basis for claims of negligence, strict liability, breach of express and implied warranty, mis-

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representation, and false advertising. A manufacturer's advertising can be used to demonstrate that a product was intended for a particular use or to demonstrate that a particular use was foreseeable. Terms such as "warranty," "guarantee," and "promise," may serve to create express warranties outside the scope of the corporate written warranty. Inaccurately describing the product or its performance capabilities can serve as fodder for misrepresentation claims. Cases illustrative of these theories follow.

The concept that product manufacturers can be held liable for express misrepresentations made about a product's safety or quality originated with the case of Baxter v. Ford Motor Co. In Baxter, the plaintiff purchased a new Ford based on the manufacturer's sales literature which stated that all new Fords had "shatter-proof glass windshields." While the plaintiff was driving the vehicle, a rock hit the windshield and shattered the glass, causing the plaintiff to go blind in one eye. The Supreme Court of Washington initially found liability based on breach of express warranty, but on second appeal, the court relied on the theory of misrepresentation, holding that if the plaintiff relied on the misrepresentation, the fact that the manufacturer did not know that the representations were false was immaterial.

A finding of liability based on misrepresentations found in marketing literature was also reached in the case of Klages v. General Ordnance Equipment Corp. In Klages, a motel night auditor purchased a mace weapon for protection. The selection of the particular mace product was allegedly based on product literature which described the effectiveness of the mace product as follows: "Rapidly vaporizes on face of assailant effecting instantaneous incapacitation...It will instantly stop and subdue entire groups...Instantly stops assailants in their tracks...." Other marketing materials claimed that

2. 12 P.2d 409 (Wash. 1932).
3. Id. at 410.
4. Id. at 411-12.
7. Id. at 306 (emphasis added).
the mace product was "for police the first, if not the final, answer to a nationwide need—a weapon that disables as effectively as a gun and yet does no permanent injury...."\(^8\)

When intruders held the plaintiff at gunpoint, he sprayed the mace product at one of the intruders, hitting him near his nose.\(^9\) The plaintiff then ducked behind the cash register, but the assailant followed him and shot him in the head.\(^10\) The plaintiff's lawsuit against the manufacturer of the mace product followed.\(^11\) The jury found in favor of the plaintiff, and the supreme court affirmed, analyzing potential liability in light of Section 402B of the Restatement (Second) of Torts.\(^12\) Section 402B states:

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 (a) it is not made fraudulently or negligently, and (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.\(^13\)

Critical to the court's finding of liability, under section 402B, were the following factors: (1) the fact misrepresented was a "material" fact—the representation that the product would protect the purchaser from harm under dangerous circumstances; (2) plaintiff justifiably relied on the misrepresentation by purchasing a product he believed would protect him; and (3) proximate cause.\(^14\)

Although Section 402B requires justifiable reliance, the reliance on the misrepresentation need not necessarily be by the injured consumer. So long as the purchaser relied on the misrepresentation that led to the injury, albeit to another, recovery may still be available.\(^15\)

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8. *Id.* at 306.
9. *Id.* at 307.
10. *Id.*
11. *Id.*
12. *Id.* at 307-310.
13. *Restatement (Second) of Torts* § 402B.
In *Denny v. Ford Motor Co.*, the plaintiffs' vehicle allegedly rolled over when plaintiff swerved to avoid a deer. The plaintiffs sued the manufacturer, alleging claims of negligence, strict liability and breach of the implied warranty of merchantability.

Ford argued that the vehicle was designed as an off-road vehicle and was not designed to be sold as a conventional passenger automobile. This design intent, the plaintiffs claimed, ran contra to statements in the manufacturer's marketing manual claiming that the vehicle was appropriate for on-road use and "suitable for contemporary lifestyles" and to be "considered fashionable" in suburban areas. The plaintiffs also argued that the manufacturer's sales force was encouraged to promote the vehicle as "suitable for commuting and for suburban and city driving." The evidence suggested that women were targeted by the manufacturer's marketing plan, as reflected by the marketing manual which stated that the vehicle's ability to switch between two-wheel and four-wheel drive would be "particularly appealing to women who may be concerned about driving in snow and ice with their children." The plaintiffs testified that these advertised features impacted their decision to purchase the vehicle and that they had no interest in the vehicle's off-road capabilities.

The jury in the *Denny* case found the manufacturer liable under the theory of breach of implied warranty of merchantability, in part relying on the testimony of a Ford engineer who testified that he would not recommend the vehicle for use as a passenger car.

The plaintiffs in *Leichtamer v. American Motors Corp.*, also based their claims against the manufacturer on elements of a corporate advertising campaign, which advertised the product as vehicle to "...discover the rough, exciting world of mountains, forests, rugged terrain." On appeal, appellants argued that the trial court erred by admitting television commercials into evidence because there

17. *Id.* at 731.
18. *Id.* at 732.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 732-33.
25. *Id.* at 578.
was no specific representation contained in the commercials as to the quality or merit of the product in question and no evidence to suggest that the plaintiffs (who were passengers in the vehicle) used the product in reliance on such representations. The court disagreed reiterating that:

[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.

Punitive damages were also awarded and affirmed on appeal. While the court found that advertising alone did not reach the requisite level of malice to support an award of punitive damages, the advertising, in conjunction with what was found to be a lack of testing for pitch-overs for this particular vehicle, supported an award of punitive damages. The advertising used as an example to support the award of punitive damages was:

My [vehicle] is the toughest rig around: That's [vehicle] guts—Guts to take you where only the toughest dare to go: [Vehicle] guts—will take you places you have never been before: [Vehicle]—will give the young couples the ride of their lives on the dunes and gutsy ground steering: Alright, which one of you guys is going to climb that big old hill with me? I mean you guys aren't yellow, are you? Is it a steep hill? Yeah, little lady, you could say it's a steep hill. Let's try it. The King of the Hill is about to discover the new [vehicle]: That [vehicle] four-wheel drive is tough enough to go anywhere.

26. Id.
27. Id at 578.
28. Id. at 579-80.
29. Id. at 578.
III. GUNS AND TOBACCO

Most recently, the advertising of tobacco and gun manufacturers has come under fire.\(^30\) Gun manufacturers have battled against claims that their advertising specifically targets criminals.\(^31\) Recently, a major gun manufacturer, Smith & Wesson Corporation, agreed to settle with several United States Government agencies\(^32\) by making major changes in the way it manufactures and markets its products, including not making or marketing any firearm targeted at criminals.\(^33\)

Other measures the industry has agreed to take include: adding external child safety locks while shipping, making design changes that make it more difficult for children under the age of six to operate firearms, designing a second hidden serial number on handguns, selling only to authorized distributors and dealers who adhere to a strict code of conduct, and preventing release of guns to buyers until background checks have been completed.

Proposed offers to settle various state health care cases against the tobacco industry have contained provisions targeting advertising, including demands that (1) the industry alter advertising practices that target children, such as by the use of cartoon characters; (2) outdoor advertising on public transit and billboards and in arenas and stadiums be banned (3) efforts be initiated to study the effects of smoking and smoking advertising which would lead to the creation of advertising and educational campaigns to fight youth smoking and educate consumers.\(^34\)

IV. CONSUMER PRODUCTS

The Consumer Product Safety Commission ("CPSC") may also seek corrective action against a product manufacturer who com-
communicates misleading messages to consumers regarding design intent. For example, the CPSC required IRIS USA, a manufacturer of plastic storage trunks, to send notices to customers and initiate a recall after the company used labeling that depicted the trunk filled with toys and after a retailer advertised the chest as a "roomy toy chest with apple-red lid." In contrast, the label also bore language cautioning against sitting on the lid or climbing on the trunk. Further, the storage trunk manufactured by IRIS did not meet ASTM voluntary standards for toy chests. For toy chests, the standards outlined requirements for devices that prevented latching and lid support device ventilation. The CPSC concluded that the storage chest, with accompanying label, comprised a substantial product hazard under Section 15 of the Consumer Product Safety Act and worked with the company to change the labeling on the chest to clearly discourage the use of the trunk as a toy chest.

V. PHARMACEUTICALS AND MEDICAL DEVICES

The advent of direct consumer marketing within the pharmaceutical and medical device industry may heighten that industry's vulnerability to product liability advertising claims, as well as begin to erode the learned intermediary doctrine. Daily television and radio commercials extol the virtues of many drugs and devices—from those which will address allergies, high cholesterol, hair loss, weight loss, and the effects of menopause—to those that are marketed to address erectile dysfunction.

Direct to consumer advertising has proven to be very lucrative for the pharmaceutical and medical device industry. For example, by December 1998, sales of a drug to treat male impotence reached $788 million, with more than 7.5 million prescriptions written. These sales were largely attributable to print, television and radio advertising. As drug and device companies direct their advertising to the patient-consumer, arguably the physician's role as the health-care decision maker and primary source of medical in-

36. Id.
37. Id.
38. Id.
formation is eroded and the consumer-patient assumes a much more active role in deciding upon the course of medical treatment. Significantly, the actions of drug and device manufacturers have affirmatively established this direct link—and potential direct liability—to the patient, while downplaying the need for the expert intervention of the patient's physician.

By trying to influence the patient's buying decisions, drug and device manufacturers have arguably put themselves on par with all other product manufacturers who advertise their products. While still the minority position, several courts have concluded that the learned intermediary doctrine does not apply to drugs or medical devices marketed directly to consumers and that manufacturers will be held directly liability to the consumer if product advertising fails to provide adequate warnings.40

The recent trend of direct-to-consumer advertising in the pharmaceutical and medical device industries and the potential degradation of the learned intermediary doctrine must also be scrutinized in the context of the uniqueness of drugs and medical devices. Not only are these products federally (and heavily) regulated, they are accessible to a consumer only through the intervention of a physician and cannot generally be purchased directly by a consumer. The public policy debate in this theatre has only just begun.

VI. GUIDELINES

Using the clarity of hindsight provided by past litigation and collective corporate experience, a company should establish guidelines to get the most out of its advertising dollars, while avoiding the pitfalls of over-promotion, misrepresentation, and exaggeration. Here are some recommendations:

1. Establish a mandatory written policy for advertising and communications review and approval which includes (a) verification of technical accuracy, (b) substantiation of all claims, and (c) legal review which should include an analysis of any and all applicable regulations;

2. Require that all communications that go outside the company go through the formal review process (television and radio commercials, print advertising, sales and promotional brochures,
catalogs, press releases, trade show exhibits and distribution pieces, etc.);

3. Keep substantiation files for each approved advertising and promotional piece;

4. Ensure all advertising is focused on the design intent of the product and fairly and accurately depicts product capabilities and limitations; do not feature unintended, untested or unknown uses of the product;

5. Ensure that publicly made statements do not over-promote or exaggerate the capabilities of the product;

6. Make sure the proper and safe use of the product is featured and that the intended audience is featured using the product (i.e., do not depict children using a product intended only for adults);

7. Make sure all required proper safety devices and accessories are featured;

8. Review customer claims and complaints to ascertain what types of advertising claims, if any, are problematic to your customers. Then avoid future use of those statements or claims;

9. Avoid "absolute" terminology such as "warranty," "guarantee," "promise," and "safe";

10. Conduct training for the Sales, Marketing, Service, Research and Development departments so that employees within those departments understand the legal parameters for advertising and selling and the ramifications of deviating from established guidelines;

11. Make sure that re-prints of advertising are reviewed to confirm continued accuracy and to incorporate any product change information.

Consideration may also be given to creating proactive safety communication pieces, much like those created by Volvo and Andersen Corporation.

In August of 1996, Volvo, whose brand is based on safety, launched an advertising campaign to inform the public that children should not ride in the front seat of cars, especially cars equipped with passenger side air bags. The television ads aired by Volvo showed preschoolers secured in a child seat placed in a rear seat center position. The voice over for the commercial discussed the importance of proper seating for children.41

41. Volvo Initiates Advertising Campaign to Encourage Proper Seating for Kids, BNA
Andersen Corporation, too, has developed a proactive communications program called "Lookout For Kids®." The "Lookout For Kids" program, in existence since 1991, includes a written brochure which is disseminated to child caregivers nationwide to educate about how to safely interact with windows and patio doors.

Programs like those created by Volvo and Andersen Corporation afford those companies the opportunity to educate not only their consumers, but the public in general, regarding the safe use of their products.

VII. OTHER CONSIDERATIONS

The discussion above has focused on the product liability implications of improper sales and marketing tools. The product manufacturer, however, must also be cognizant of a myriad of advertising challenges that can be launched by competitors. For example, a company may challenge a competitor's advertising as false or misleading by (1) filing a lawsuit under § 43(a) of the Lanham Act or under state consumer protection laws; (2) initiating a challenge with the National Advertising Division (NAD) of the Council of Better Business Bureaus (3) initiating a challenge with the television networks or individual stations which have aired a commercial; or (4) filing a complaint with the Federal Trade Commission or with a state Attorney General. If the products a company manufactures are regulated by the federal government, all advertising generated should conform to the letter of the requirements set forth in those regulations. If a company manufactures children's products, all advertising should conform to the Self-Regulatory Guidelines for Children's Advertising. 42

VIII. CONCLUSION

Catchy product advertising is often the first opportunity to capture the attention of a prospective customer. If, however, the product fails to meet the expectations created by the advertising, at minimum, companies can expect dissatisfied customers and the loss of customer goodwill. In a worst-case scenario, a company can expect that the advertising that helped win the sale will now be

used as evidence against it in a claim or lawsuit, and may even be used to substantiate a claim for punitive damages.