

# Liability for What You Say and What You Don't Say

For decades, I have reviewed marketing literature and advertising for product liability and warranty issues and given seminars to in-house and outside marketing communications and advertising personnel on the issues manufacturers face. However, I have never written, until now, an article describing the theories of liability and some of my thoughts on how to minimize liability.

Manufacturers of products and providers of services can be held liable for injury, damage or economic loss suffered by a customer and third party based on all aspects of its products and services. This includes the product or service itself, all written materials that accompany the product, and all oral and written statements made before and after sale. As a result, manufacturers and service providers must provide a reasonably safe product, competent services, and written and oral statements that do not diminish the quality or safety of the product or service or confuse the customer into doing something that results in injury, damage, or loss.

There are many legal theories on which a purchaser or third party can sue a manufacturer or provider of services for damages caused by things they have said or not said. These include breach of warranty, breach of contract, fraud, fraudulent concealment, misrepresentation, negligence, and strict liability.

These types of lawsuits have become

more common as products have become safer and fewer accidents occur, and plaintiffs' lawyers have looked for other claims surrounding the sale of a product. These claims can even, in some cases, be brought by the entire class of people who purchased the product. The so-called "no-injury class action" is usually based on some representation by the manufacturer before sale and the dashed expectations of customers as to things such as performance, safety, quality, or durability. Even without provable damage, settlements have exceeded hundreds of millions of dollars with at least one involving a design defect in computer chips in Toshiba laptops exceeding \$2 billion. This article will provide examples of product liability cases that alleged these theories and then will discuss the theories and ways to minimize the risk in this area.

## Examples

Describing some examples of past litigation will be helpful in illustrating how expansive the theories can be and how easy it is, in some situations, to bring such a suit.

- The seminal case in product liability involved marketing brochures. The case of *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1962), dealt with a Shopsmith power tool. While the California Supreme Court mainly used this case to, for the first time, adopt the theory of strict liability, it also discussed marketing issues. It said that the jury could have reasonably concluded that statements in the manufacturer's brochure were untrue, that these statements constituted express warranties, and that plaintiff's injuries were caused by their

breach. The marketing literature used phrases such as "insures perfect alignment of components" and "every component has positive locks" and "provides rigid support."

- For many years, there has been litigation over the alleged deceptive marketing of "light cigarettes." The theory is that the tobacco companies engaged in false advertising and other deceptive practices by misrepresenting light cigarettes as safer than regular cigarettes. The cases are being filed as class actions under state unfair business practice laws. Recently, a court, in multidistrict litigation, ruled that plaintiffs can go forward with their claims for unjust enrichment and other relief.
- One of the original drug product liability cases (*Toole v. Richardson-Merrell*, 1967) resulted in liability because the drug was advertised as "virtually non-toxic," "safe," and free of "significant side effects." In addition, the marketing of prescription drugs directly to consumers, which is a fairly recent phenomenon, has been the subject of a great deal of litigation. The typical allegation is the failure to adequately warn the user while the defense is the "learned intermediary doctrine," which is under attack because of this direct marketing. The way in which the product is advertised and marketed and the disclaimers and safety precautions that are provided to consumers is the basis of these cases.
- A case from 1990 involved Johnson & Johnson baby oil. The injury occurred when a baby swallowed the baby oil and it got into his lungs. The mother was not alarmed because she knew that baby oil was safe. Unfortunately, it was not safe in lungs and a severe injury resulted. The plaintiff's human factors expert said that the product label, which used the term "pure and gentle," perpetuated a belief that the product was very safe and benign in all foreseeable situations.



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- A case from 1991 involved the Jeep CJ-7, which was advertised driving up Pikes Peak at a high rate of speed around tight turns on the mountain. These turns were called “J turns” because the marks in the mountain road looked like a “J.” The plaintiffs saw the ads and thought the roll bar would protect them if the vehicle turned over. It didn’t and they were severely injured. The case proceeded on the theory of misrepresentation using the Jeep ads as evidence that such driving was foreseeable and intended. This despite the fact that the plaintiffs drove the Jeep off the top of a road flying almost 50 feet through the air and landing upside down. The court called the advertising an example of “intentional incitement of unlawful conduct.”
- A manufacturer of recreational products was held liable because its promotional video showed users without safety equipment, which the warnings and instructions required be used. Even though the plaintiff did not see the video, the jury believed that the manufacturer was sending a mixed message about following the safety precautions it provided with the product.
- Other examples from litigation include use of the terms “bulletproof,” “absolutely safe,” “stops assailants instantly,” “tamperproof,” “shatterproof,” “harmless,” and “indestructible.” These terms used in advertising or on product packaging were presumably relied on by the user to their detriment and resulted in liability for the manufacturer.

There are many more examples I have personally been involved with in defending litigation or counseling on advertising and safety communications. Allegations of marketing defects, while not usually the primary focus of most product liability cases, have been used by plaintiffs when necessary. Even if not specifically alleged, marketing statements have been an integral part of many claims, especially those involving failure to warn or instruct. And with the advent of the Internet and extensive websites set up by manufacturers and product sellers, there are many more opportunities for a manufacturer to slip up and say or show something that will create a problem in the event of an incident.

## Theories of Liability

Unlike a typical product liability case, there are many more theories that can be alleged. I want to quickly describe the full range of possible theories.

### Strict Liability and Negligence

Many of these marketing cases are brought

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primarily under the theories of strict liability or negligence. The allegations are that the product is defective in its design or warnings and instructions and, in addition, that the product did not meet the consumer’s expectations as to safety, quality, or durability. The marketing literature might be a piece of evidence that, for example, shows the product being used inconsistently with the way it is described in the instructions and the user relies on the picture and is injured. Or, there is nothing wrong with the marketing literature and there is just some inadequacy in the warnings or instructions, either in something they said or didn’t say. Or, the advertising refers to the product as “rugged” and “solid” and that forms a basis for expectations about how strong it is and what type of misuse it can withstand. In this situation, the marketing defect claims would be part of a typical defect claim and the plaintiff would rely on strict liability or negligence and not try to use breach of warranty, fraud or misrepresentation, all which can be harder theories to prove.

Manufacturers are required to provide adequate warnings and instructions to the purchaser to allow them to use the product safely and correctly. Injury, damage, or loss resulting from inadequate or incorrect information can be the basis for a product

liability lawsuit against the manufacturer. Warnings and instructions usually accompany the product and possibly are included in some of the literature that the manufacturer uses to sell the product. Under these theories, any oral or written statements made by anyone in the supply chain can also be used to argue that the warnings and instructions were inadequate, confusing, or inconsistent, or that the marketing literature undermined the severity of the warnings provided with the product.

### Breach of Contract

If there is privity of contract or the plaintiff is a third-party beneficiary of a contract, an injured party can sue for breach of contract and base the claim on oral or written statements made during the sales process or the warranties in the contractual documents. The damages could be based on injury or damage, but usually would include a claim of economic loss. The contractual terms and conditions should govern the potential liability and recoverable damages except for implied warranties that have not been disclaimed.

### Express Warranty

In both contracts and marketing/sales, warranties can be created by operation of law under the Uniform Commercial Code (UCC). Express warranties are created by the following:

- Any affirmation of fact or promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain.
- Any description of the goods that is made part of the basis of the bargain.
- Any sample or model that is made part of the basis of the bargain.

The above create an express warranty that the goods shall conform to the fact or promise, description or sample or model. It is not necessary that the seller use formal words such as “warranty” or “guarantee” or that he or she have a specific intention to make a warranty. However, it is necessary that these involve “the benefit of the bargain,” which means that they occur at the time of or before the purchase is consummated. In other words, the purchaser will say that they relied on these statements, samples or models to purchase the product and to use it.

An express warranty can be created by any written or oral statement or even by the appearance of the product. These statements are included in the sales and marketing literature, catalogs, website, and all statements by sales people.

While terms and conditions usually attempt to limit any express warranty to “defects in workmanship and material” or only warrant that the product “conforms to the specifications in the catalog,” the purchaser will seize on any inconsistent or expansive language to argue that additional express warranties were provided and that he or she relied on them to buy and use the product. If express warranties are deemed to have been created, this could be a problem as courts have said that a seller can’t generally disclaim them.

So sellers need to be aware of everything that is expressly said about the product: marketing and sales literature by the manufacturer and everyone else in the supply chain and every oral statement by anyone that ultimately gets to the purchaser either before sale or even after sale as long as they occurred before the accident or product problem.

Even advertising issued after an accident can adversely impact your defense. The problem arises if your defense is that the plaintiff was using the product unsafely. That is hard to argue if your advertising shows a user using the product in the same way.

### Implied Warranty

The UCC also creates an implied warranty of merchantability and fitness for a particular purpose. These warranties are implied in every sale of a product that is subject to the UCC unless they have been disclaimed. Most terms and conditions disclaim these warranties, however it is possible that the terms and conditions may not govern the sale and these warranties will not be disclaimed.

Since these are implied warranties, the scope of their applicability is governed by the UCC. The definition of “fitness for a particular purpose” has some relevance. This UCC section says:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are

required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is ...an implied warranty that the goods shall be fit for such purpose.

Many written statements assist the purchaser in determining the type of product to buy. Therefore, even if this implied war-

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ranty is disclaimed, it is possible that there will be an express warranty that the goods are fit for the purpose expressed in a company’s written material. And, in many situations, this implied warranty will not have been effectively disclaimed. In addition, if the purchaser expressly tells the sales personnel what the product will be used for and confirms with these personnel that the product to be purchased is the correct one to buy, a warranty could arise, be it express or implied.

### Misrepresentation and Fraud (Common Law and Statutory)

Theories alleging liability for injury, damage, or loss caused by intentional or negligent misrepresentation have also been used. Intentional misrepresentation involves statements that are intended to induce action by another, such as to use a product in a certain way. These statements are alleged to create an unreasonable risk of injury in that they are false or the person making them does not have the knowledge he or she claims to have.

Negligent misrepresentation involves giving false information to another that

causes injury or damage from actions taken by another person in reliance on that information. The negligence can occur by the person failing to exercise reasonable care in determining the accuracy of the information or by failing to exercise reasonable care in the way in which the information is communicated.

Misrepresentation and fraud cases carry a heavy burden of proof and that is probably why most plaintiffs, in a typical product liability injury case, most likely rely more on strict liability, negligence, and breach of warranty than on misrepresentation or fraud.

However, there is another avenue that has been utilized by plaintiffs for decades. Every state has some form of consumer fraud statute that can be separately used to allege fraud and deceptive trade practices. These laws are based on the Uniform Deceptive Trade Practices Act or Uniform Consumer Sales Practices Act. The elements necessary to prove are much less than common law fraud and a successful plaintiff is usually also entitled to treble damages and attorney’s fees. In general, the uniform law provides:

The act, use, or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice.

Many of the state statutes don’t require actual injury or damage in order to recover. And some courts have allowed a nationwide class action to proceed based on an alleged violation of these state statutes.

### Interaction of These Theories

In product liability claims and litigation, plaintiffs can allege claims of breach of contract, breach of warranty, misrepresentation/fraud, negligence, and strict liability (defects in design, manufacture, and warnings and instructions). They will use the product and any statements printed

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or uttered by the manufacturer to support their claims. And, they can allege all of these theories at the beginning of the case, try to discover a basis to support each of these claims during the discovery process, and then, at the end of the case, drop the theories that are not supported. Since they may not know what theories are viable, they may try to attack everything the manufacturer and retailer said and did.

A major element of proof for many of these theories is that the purchaser or injured party relied on the statement, misstatement, or lack of a statement. Despite that requirement, even if the plaintiff didn't rely on the statement, statements can be put into evidence for other purposes to support another claim, or to portray the manufacturer as careless or incompetent. In addition, some statements make it more difficult for the manufacturer to defend itself, such as when the injured party did something unsafe that seemed to be authorized by the manufacturer or at least not prohibited.

### Preventive Techniques

Advertising and promotional literature and videos serve as the most significant conduit of product representations. It has been said that much of product liability reflects the inability of American engineering to match the claims made for products by its marketing professionals.

Given the wide range of products that companies manufacture and services they provide, it is difficult to articulate clear guidelines on what to say and not to say when advertising and selling products. However, let me try to provide some of my thoughts based on 30 years of experience.

The first rule is the old saw, "say what you mean" and "mean what you say." Many problems in this area are caused by unclear, unsupported and incorrect statements caused by unclear or incorrect thinking. If you want to promise that the product will perform in a certain way, then be sure it can do it. There really is no defense if a product is used as you advertised and it doesn't work the way it should work. This may result in a disgruntled purchaser and no claim. But it could just as easily result in a warranty claim, a personal injury case, or a class action based on some misrepresentation.

Therefore, the first rule is that if you clearly say or promise something that is material to either the purchaser's decision to buy the product or helps with the safe use of the product, it better be clear and correct. Lawyers who review these representations might have a difficult time commenting on these factual assertions in your

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advertising and marketing unless they are very knowledgeable about the product and your company. Despite that, while lawyers should not make you justify each and every fact, they can point out statements that seem too good to be true or suggest where you should have documented substantiation for the claim.

An example is use of the phrase "maintenance free." While I will discuss puffing below, this is a clear statement with no limitations and can be a problem if not true. It isn't qualified by "almost" or "virtually" or "in most situations." So, if someone buys the product and this turns out to be false, they could claim that they didn't get the product they thought they were getting. And if the claim is based on a state's consumer protection laws, they don't even need to prove damages. In addition, if the user does not perform maintenance and the product fails, injuring a user, the manufacturer might have a problem defending the case. However, this shouldn't be a big risk as appropriate maintenance procedures, if any are necessary, should be discussed in the instructions.

Puffing is different and is legally acceptable. Puffing is not viewed as an expression of a fact but instead as an opinion about a product's performance or attributes. As a result, "puffery" does not constitute an express warranty. So phrases like "never lets you down" or "strong" or "fin-

est product of its kind available today" or "premium quality" have all been deemed acceptable puffing or opinion and not a factual assertion that can be the subject of a lawsuit. This, of course, does not mean that a customer may not sue over some puffing that resulted in injury or damage.

Courts have identified different factors to consider when distinguishing puffing from facts. They are buyer sophistication, trade usage, whether the goods are prototype, the presence of hedging, and the level of specificity, with specificity being the most important. See Clark and Smith, *Law of Product Warranties*, §4.10.

Of course, it is up to the judge or jury as to whether they believe it is fact or opinion. And a purchaser who believes the puffery and suffers a problem might sue you. So, you should try to anticipate how customers will react to everything you say, be it fact or opinion, and determine if they will use the product in an unsafe or incorrect way or think it is stronger or lasts longer than it does or buy it for an inappropriate use. If they will rely on puffing or facts and it could result in injury, damage, or loss, think how you will defend the statement and if in doubt, soften or limit the language.

In your literature and advertising, statements that should always raise a question are absolutes or clear statistical statements that can be challenged even if they are not facts. Puffery may allow you to claim that your product has the best quality, but saying it is the "strongest" or "safest" on the market can be objectively tested and challenged by a customer or a competitor. Or a user could think the product can be subjected to forces that ultimately result in product failure and injury. In addition, while using terms like "virtually" and "almost" are very good at indicating that the product is something other than the absolute best of whatever you are selling, use them sparingly as they can unnecessarily detract from the message and make it unclear.

For example, if you say your product will last for 10 years under normal use, this may constitute an express warranty no matter what your contract says. And, if it fails before 10 years, you can defend by arguing that it did not experience "normal use." But, unless you defined abnormal use, it may be difficult to defend.



Let's consider some statements that have appeared in marketing or technical literature with comments about whether or not they may be problematic.

- "Safe"—this is acceptable because it is not an absolute. It would be hard to challenge. Despite that, some lawyers will not let their clients use "safe" in connection with a product. My counterargument is that since we are required to sell a "reasonably safe" product, why can't we say that it is "safe?" I wouldn't say "completely safe" or "absolutely safe." On the other hand, one problem with saying "safe" is that it might imply that your other products aren't safe.
- "Helps bring safety to the next level" or "safer"—this is acceptable as it doesn't guarantee absolute safety. However, you should be careful when saying that some of your products are safer than your remaining products. While the law allows manufacturers to sell products with different levels of safety, an issue can arise if the plaintiff argues that the less safe product you sell is not safe enough. The fact that you sell a safer product can constitute the "reasonable alternative design" that plaintiffs are required to prove in many jurisdictions.
- "State of the art design"—this means that the design is as good as the best design on the market. This is more easily challenged but still acceptable as long as you have a basis for making the statement. "Optimized design" is vaguer and is also acceptable.
- "Unmatched capacity and service life"—also acceptable if there is a basis for it. Ask your client whether anyone has checked the capacity and service life of competitor's products? If not, while this is puffery and acceptable, it might be challenged by a competitor.
- "Our product meets all possible demands"—unclear as to what "possible demands" might entail. So, this statement can be a problem if the product does not withstand some reasonably foreseeable demand or use. Similar phrases are "suit any need" or "fill any requirement."
- "Lasts up to three times longer"—may be a problem since it is specific and can be challenged if not true. However, it is

unclear if the reader cannot determine what product it is being compared to. If it is a competitor's product, you should demand substantiation as a competitor might challenge it if untrue or unsupported. If it is your client's product, then it should be clear which product they are talking about. Either way, using a prod-

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uct after its useful safe life could result in injury so if a product's life is being mentioned, the consumer should generally be told how long the product can be used.

- "Ensures," "assures," and "insures"—most lawyers believe that these words constitute an express warranty. But it depends on what phrase it is connected to. If the remainder of the phrase is somewhat general, then I don't mind use of these words. For example, if you say that the product's design "ensures that the product will last longer than other similar products," that should be acceptable unless it never lasts longer. And, if it doesn't, then that is a problem whether or not you use the word "ensure." One way to soften it is to say something like "helps to ensure."

Of course, in most situations, the plaintiffs have to prove some injury or damage based on these statements. If they don't buy the product, I can't think of any claim they can make. And if they buy the product, most courts have been tough on plaintiffs by requiring them to prove some damage or loss. Many of the "no injury class actions" have been dismissed because the alleged damage or loss has been illusory or more in the mind of the customer.

Another area of importance for product literature is the potential for inconsistencies between safety and operational information in the marketing literature and in

the instructions and warnings. While it is not necessary to place all of the safety information in the marketing and advertising literature, there should not be confusing and misleading information that some customer may rely on in place of the product's actual warnings and instructions.

In addition, inconsistencies between representations in the marketing literature and in the field by sales people can also create problems. Sales people can create express warranties or can inappropriately alter the well thought out advice in carefully crafted instructions with simple statements made during the sales process. Customers have very good memories when it comes to what the sales person thinks is "puffing" and the customer believes is a "promise of performance." I have helped several clients recall products that were intentionally sold for uses that turned out to be inappropriate and unsafe.

With advertising, below are some rules I have used in counseling manufacturers and product sellers:

- Unsafe practices or conditions should not be shown unless it is clearly noted that they are intended for demonstration purposes only. For example, removing guards or shields from equipment for illustration.
- Bystanders should be shown in a safe location or at a safe distance from the product.
- Show the product with all safety equipment, including labels and guards.
- All ads should accurately represent the product. Performance claims should be reasonable and in accordance with design specifications.
- When illustrated, the product should always be shown in an appropriate and safe use. That's why driving a car or other vehicle in a potentially unsafe manner in an ad should be done very carefully. I understand that it is difficult to advertise certain products without showing them being used aggressively. Marketing motorcycles, automobiles, and boats would be pretty boring if the above rules were followed. Most manufacturers, when they feel compelled to cross the line or get close to the line on safe use, put a disclaimer under the ad [What You Say and Don't Say](#) > page 52

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*What You Say and Don't Say* ◀ page 38  
that reads something like “Professional driver on closed course. Do not attempt.”

With the Jeep CJ-7 case in mind, I've always wondered whether these would be deemed adequate. My main concern is that the phrase is in small print and flashes so quickly on the screen that it is hard to see or process the information. Despite that, I suspect that no one is suing for such advertising as most of these product demonstrations could be considered obvious hazards where no warning is needed.

- Personnel using the product should be wearing appropriate personal protective equipment. This can be a problem even if the injured party did not see the ad and rely on it when using the product. It is hard to argue that they were using

the product unsafely when it is shown being used that way in the company's advertising.

I think counseling lawyers should consider all of the representations that will be made about the product and set up a corporate policy to be used by in-house and outside personnel when developing such statements. This will help avoid such problems before they get to the lawyer for review. In addition, doing seminars to such personnel to explain why certain statements can be problems can be very helpful in heading them off.

### **Conclusion**

The marketing and advertising personnel need to talk to the sales force and to the engineers so that the story, as told by all of them, is accurate and appropriate. Law-

yers should educate their clients about how to decide what to write and how to write and what and when to send to the lawyers for their review. As has been my experience, lawyers are many times contacted just before some deadline and given a very short time to review advertising literature. This is very difficult and forces the lawyer to approve almost anything despite their misgivings.

Analyzing a company's potential risk in this area is useful in establishing appropriate procedures for creating and reviewing written literature and for creating guidelines on how a product is to be sold. Doing this will help satisfy customers whose products work as promised and help customers use the product safely and correctly. This will all result in lower risk to the manufacturer and product seller. 