CLAIMS JOURNAL

View this article online: http://www.claimsjournal.com/news/national/2013/06/20/231307.htm

Liability for Marketing Communications

By Kenneth Ross | June 20, 2013

- Article
- Comments

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.

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. One case involved a design defect in computer chips in Toshiba laptops, and exceeded $2 billion, even though no one ever suffered a problem.

In product liability claims and litigation, plaintiffs can combine claims of breach of contract, breach of warranty, misrepresentation, negligence, defects in design, defects in manufacture and defects in warnings and instructions. They will use the product and any statements printed or uttered by the manufacturer to support their claims. 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 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. 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.

Product Representations

Advertising and promotional literature serves as the most significant source 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 advertisers.

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

Brochures: 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 "ensures perfect alignment of components" and "every component has positive locks" and "provides rigid support."

Drugs: 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.

Baby Oil: 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 the 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.

Vehicles: 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 one person was 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."

Terms and Puffery

Other examples from litigation include use of the terms "bulletproof," "absolutely safe," "stops assailants instantly," "tamperproof," "shatterproof," "harmless," and "indestructible."

Many problems in this area are caused by unclear, unsupported and incorrect statements caused by unclear or incorrect thinking. If there is a promise that a 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 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.

Certain language, referred to as “puffing” 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 “finest 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.

While most product liability cases are based on the traditional theories of liability – strict liability, negligence, and breach of warranty – there are many cases where some marketing theory is brought. It is easy to allege, albeit many times hard for the plaintiff to prove. Therefore, while these cases must be taken seriously – especially the so-called no-injury class actions – many of them are defensible due to a lack of causation.

About Kenneth Ross

Ross is a former partner and now Of Counsel to the Minneapolis office of Bowman and Brooke LLP, a national product liability defense firm. For over 30 years, Ross has provided legal and practical advice in the areas of regulatory compliance, product safety and liability prevention.

More from Claims Journal

Today's Insurance Headlines | Most Popular | National News