HOW LITIGATION CAN RESULT FROM THE MARKETING OF PRODUCTS

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ABSTRACT
Businesses that manufacture and sell goods may be tempted to put a lot of emphasis on marketing to try to rapidly expand their revenue stream. However, Article 2 of the Uniform Commercial Code provides that express warranties can be created by the seller by any affirmation of fact or promise, description, sample or model which relates to the good and becomes part of the basis of the bargain. In addition, the law of torts, or civil wrongs, provides causes of action for misrepresentations of material facts that are reasonably relied upon by buyers. The law of torts also provides causes of action for strict product liability where a product leaves the seller's hands in an unreasonably dangerous condition not contemplated by the ultimate consumer. Advertisements have been a factor in determining the reasonable expectations of consumers as well as in determining whether the damage or injury was caused by the product. Consequently, it is possible that legal pitfalls in the form of increased legal expenses or damage judgments may await if the advertisements are considered to be warranties, misrepresentations or show that the seller was aware that the product might be used in a way that could cause injury. This paper reviews case law to ascertain what effect marketing and advertising can have upon the legal liability of sellers of goods in order to provide business managers with some guidance in this area. In particular, the paper addresses whether sellers need to ensure that assertions depicted in their advertisements are accurate even to the extent of verifying the accuracy by test results.

INTRODUCTION

Article 2 of the Uniform Commercial Code concerns the sale of goods (U.C.C. § 2 (2004)). It includes rules that define what constitutes express and implied warranties that, if breached by a seller, can lead to liability to the buyer. U.C.C. § 2-313 provides that express warranties can be created by the seller by any affirmation of fact or promise, description, sample or model which relates to the good and becomes part of the basis of the bargain. The Code also provides that an implied warranty that the good is fit for its ordinary purpose can exist when the good is sold by a merchant.

In their treatise on the Uniform Commercial Code, Professors White and Summers note that a statement in an advertisement is more likely to pass as a "puff" or sales talk than is a written statement in the contract of the parties (White & Summers, 1988, p.395). They further state that for an ad to constitute an Article 2 express warranty, the ad "must at least have been read" in order to be part of the basis of the bargain (White & Summers, 1988, p. 401). These comments thus imply that an advertisement is not as likely to create warranty liability as is a statement in a contract.

In addition to warranty liability issues under the Uniform Commercial Code, there can be issues as to whether advertisements increase the potential for liability under tort law. In his hornbook on torts, Professor Dobbs states that "the product was defective if, considering its reasonably foreseeable use, it left the seller's hands in an unreasonably dangerous condition 'not contemplated by the ultimate consumer'" (Dobbs, 2000, p. 981). He then notes that the application by courts of the consumer expectations test in determining product liability "may also reflect the fact that manufacturers make a good many representations about their products, sometimes directly and sometimes by. . . soothing words designed to inspire confidence." (Dobbs, 2000, p. 982). Also, courts have addressed the issue of whether an advertisement can result in liability for the tort of misrepresentation.

ADVERTISEMENTS ASSERTED TO BE WARRANTIES

In a case that tragically demonstrated the effect advertising can have on Article 2 warranty liability, a father obtained a bottle of "liquid-plumr" from his landlady to clear a clogged drain (Drayton v. Jiffee Chem. Corp. 1978). He poured half a bottle into the drain and put the uncapped bottle on the back of the sink. When his daughter who had been on the floor screamed, he saw that she had been doused with the drain cleaner.

He immediately took the child downstairs to where the mother and the landlady were. From reading the bottle label on the way upstairs, he recalled "something about burns" and "something about water." He wet his handkerchief and dabbed at her face. They then drove to the hospital for treatment. As a result of the burns, the daughter was hospitalized eight times and had had eleven surgeries by the age of seven. The scar tissue caused her eyelids to be so taut that she had to sleep with her eyes open. The chemical company that made the drain cleaner was sued for negligence, breach of express warranty and strict liability. The trial court awarded over $1,600,000 in damages. The appellate court affirmed liability upon the basis of breach of express warranty.

The court noted the testimony of the landlady that she bought the product after having seen it advertised on television as "safe". The father testified that he also had seen television and newspaper ads that it was "safe".

The company admitted that until 1967 it had advertised the product as "safe" in newspaper and television ads. It also acknowledged that the television commercials had even shown a human hand swishing water around in a sink as evidence that the product was safe. These ads had been stopped after the National Association of Broadcasters intervened and questioned this line of advertising. The company's expert conceded that the product was not safe.

The appellate court stated that the representation was reasonably construed by the trial judge as the finder of fact to pertain to the safety of the product. Since the caustic properties of the product would not be commonly apparent to the user (who thought it to be safe), the court agreed that a breach of express warranty was actionable.

Another express warranty case involved an ad in "Arabian Horse World", a directory for the selling of the Arabian breed of horses (Appleby v. Hendrix 1984). Mr. Appleby placed an ad offering stallions for purchase and stating "Our operation is small, and these horses need a home where their excellent bloodlines in the business are represented . . . This is a real opportunity for those of you who wish to acquire top bloodlines for sensible prices."

Mrs. Hendrix bought one of the listed stallions for $20,000 to breed her eight mares. She sued the seller when the stallion was found to be infertile.

The appellate court affirmed the holding that the advertisement was an express warranty. The court took the ad's wording to be a representation that the bloodlines were to be continued and that new colts were to be bred such that the stallion was expressly represented as being a fertile stud.

Another Texas case involved the murder of Karen Sawyers by her estranged boyfriend, Joseph Whitlow, Jr. (Kirby v. B.I. Inc. 2003). Whitlow was placed in an ankle bracelet electronic monitoring program on his April 1, 1997 release from jail where he had been held since February for the aggravated robbery of Ginny Benjamin. B.I. Inc. manufactured and leased the monitoring system.

Because she was afraid of Whitlow, Sawyers had a home based unit installed in her home on April 8. Several days later, Sawyers read on the website of B.I. several representations to the effect that the system would detect and automatically report any tampering with the bracelet and also that the bracelet would signal if the bracelet were removed. After reading these statements, Sawyers told a friend that she would be safe because Whitlow was not allowed to "mess with" his transmitter. However, in reality tampering would be detected only if the bracelet was removed within the range of a transmitter, a fact which was not stated on the website.

On June 21, Whitlow was on an "open schedule" which allowed him to leave his home without anyone other than the central monitoring station being informed he had left. He left his house that night, drove to within 400 feet of Sawyers' house, and cut the ankle bracelet off leaving the transmitter in his truck. He then killed Sawyers and commited suicide.

The federal trial court referred to the Uniform Commercial Code definition that an express warranty is "an affirmation of fact . . . that relates to the good and becomes part of the basis of the bargain." The court held that B.I. did not make an express warranty that became a basis of the bargain because Sawyers had the home unit installed several days before she saw the representations of material fact on the website.

The plaintiffs also asserted that B.I. breached the implied warranty of merchantability. The court noted that the plaintiff must prove that the goods were unfit for the ordinary purposes for which they were used and that the ordinary purpose here was to monitor the offender and alert victims of the offender's approach. Without explanation, the court then stated that the system was fit for its ordinary purpose such that there was no breach. Apparently this holding was based on the fact that until Sawyers was murdered by Whitlow, the only "victim" to be alerted of Whitlow's approach was Benjamin, the alleged aggravated robbery victim.

ADVERTISEMENTS ASSERTED TO CONSTITUTE FRAUDULENT MISREPRESENTATIONS UNDER TORT LAW

The Kirby family was more successful with their tort claim that B.I. was liable on the basis of misrepresentations on the website. Similar to the Uniform Commercial Code requirement that the ad must be a basis of the bargain, Section 525 of the Restatement (Second) of Torts requires that there be justifiable reliance by the plaintiff for a fraudulent misrepresentation claim (Dobbs, 2000, p.1345). The court held that there was no justifiable reliance by Sawyers when she decided to have the home based monitoring unit placed in her home since she did not see the website misrepresentations until later. However, the court found that Sawyers did justifiably rely on the misrepresentation by her continued use of the product. Since this reliance gave her a false sense of security, the website misrepresentations were held to be material and a "producing cause" of her death such that B.I. was liable under tort law.

In contrast, other cases have held that ads did not constitute actionable misrepresentations. These holdings were because either the ads were just sales talk or the ads were inadmissible into evidence.

Cloyd Berkebile was killed in the crash of a helicopter manufactured by Brantley Helicopter Corporation (Berkebile v. Brantley Helicopter Corp. 1975). Brantley's advertising described the helicopter in question as "safe, dependable", not "tricky to operate" and one that "beginners and professional pilots alike agree . . . is easy to fly." Since Berkebile was killed when a seven-foot section of one of the three main rotor blades separated, the plaintiffs claimed that Brantley was liable because it misrepresented the safety of the helicopter.

At issue was the trial court's refusal to charge the jury on misrepresentation separately from the issue of warning. The plaintiff's contention was that the ads misrepresented the character of quality of the helicopter. The appellate court noted that misrepresentation must be distinguished from mere "puffing" and affirmed the trial court's finding that the ads did not constitute misrepresentations of material fact.

Another case focused on statements on the packaging of the product (Hittle v. Scripto-Tokai Corp. 2001). The Hittle family bought two butane utility lighters, the packaging of which contained two statements. First, there was a warning to "KEEP AND STORE AWAY FROM CHILDREN" and second, there was a reference to an "on/off" switch which could be seen through the packaging. The packaging also depicted the lighting of birthday candles, a fireplace log, and charcoal.

That evening, the minor son brought both a lighter and a candle to the parents and asked if they could light the candle. His dad took the lighter away from him, put the switch in the "off" position, and tested the lighter by squeezing the trigger. When no flame came out, he put the lighter on a shelf behind the kitchen sink. The next day, while his mother was in the shower, the son started a fire with the lighter that killed his sister and seriously injured his mother.

The Hittles contended that the advertising and packaging misrepresented that the lighter was safe. The trial court took note of the decision in the helicopter case. It stated that if Brantley Helicopter Corp. was found to have engaged in "puffing", then certainly that to the extent there was a representation at all in the lighter's packaging, it was not such as to result in liability. The court granted the defendant summary judgment on the misrepresentation claim.

Another misrepresentation case concerned advertisements which were held to be inadmissible. The case resulted from the overturn of a 1973 Jeep CJ-5 bought in 1977 and driven by the wife, leaving her a paraplegic (Haynes v. American Motors Corp. 1982). The husband testified that he had seen television commercials demonstrating the Jeep as a good all-around vehicle, especially on back roads. However, the overturn in question occurred while the Jeep was being driven on an asphalt highway.

The plaintiffs appealed the trial court's refusal to admit the television ads into evidence. However, the appellate court first noted that a number of the ads showed a Jeep Cherokee rather than a CJ-5. Further, those commercials that showed a CJ-5 depicted it in off-road settings such as climbing steep hills and going over rough ground. The court stated that nothing in those ads implied that a CJ-5 would not roll over under the kind of conditions in which the accident happened. Consequently, it was proper for the trial court to exclude the commercials because they would have served merely to confuse the issues before the jury.

EFFECT OF ADVERTISEMENT AS TO FORESEEABLE USE OF PRODUCT

Under Section 402A of the Restatement (Second) of Torts, there can be seller liability if the product leaves the seller's hands in an unreasonably dangerous condition not contemplated by the ultimate consumer (Dobbs, 2000, p. 981). Advertisements have been a factor here in determining the consumer's reasonable expectations.

In 1976, Paul and Cynthia Vance invited Carl and Jeanne Leichtamer to go for a ride at the Hall of Fame Four-Wheel Club in the Jeep CJ-7 owned by the Vances (Leichtamer v. American Motors Corp. 1981). The Club had an off-road recreation facility in an abandoned strip mine. As Vance drove down a 30-degree slope, the rear of the Jeep raised up and passed through the air in about a 180-degree arc and landed upside down with its front pointing back up the hill.

This pitch-over resulted in the deaths of the Vances, while Carl Leichtamer suffered a depressed skull fracture. Carl's sister, Jeanne, was left a paraplegic as a result of being trapped in the Jeep. The Leichtamers sued under strict product liability alleging the Jeep's roll bar was defective since it moved forward and downward upon impact.

American Motors appealed the trial court's ruling that admitted into evidence television commercials. It also challenged the award of punitive damages. The commercials advertised the CJ-7, among other things, as a vehicle to "discover the rough, exciting world of mountains, forests, rugged terrain." The appellate court upheld the admission of the commercials and the award of punitive damages.

The court stated that the commercial advertising of a product "will be the guiding force upon the expectation of consumers with regard to the safety of a product, and is highly relevant to a formulation as to what those expectations might be." The court also noted that the 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.

As to the punitive damages, the court took notice of not only the television commercials, but also of the fact that the sales guide to the CJ-7 described the roll bar in these terms: "Surround yourself and your passengers with the strength of a rugged, reinforced steel roll bar for added protection. A very practical item, and a must if you run competition with a 4WD club." The court stated that the failure of American Motors to ever do any testing on the CJ-7 roll bar combined with its television commercials encouraging off-road use was a sufficient basis on which to award punitive damages.

Another off-road case involved an Isuzu Trooper II (Livingston v. Isuzu Motors, Ltd. 1995). Elizabeth Livingston accidentally drove the Trooper off of a paved road and when she tried to drive it back onto the roadway, it rolled and she ended up a paraplegic. The jury awarded compensatory damages of 2.1 million dollars.

Isuzu appealed in part claiming the admission into evidence of Isuzu's advertising was error because the plaintiff did not testify that she relied upon or even saw the ads. Isuzu contended that the ads were thus irrelevant.

The court was not persuaded by that argument. The court held that the ads were probative of Isuzu's ability to foresee uses of the vehicle and properly admitted regardless of whether the plaintiff had relied upon them.

Similarly, the Alaska Supreme Court held it was error not to admit into evidence a Kawasaki snowmobile ad showing a person riding the machine in the air while jumping an embankment (Hiller v. Kawasaki Motors Corp. 1983). The plaintiff had suffered a spinal injury when the snowmobile seat detached during a jump. The court stated that the ad was relevant because it indicated a use of the snowmobile that Kawasaki was able to foresee, regardless of it having been aired after the plaintiff's accident. However, the error was held to be harmless because Kawasaki admitted at trial that it had televised ads showing the machines being jumped.

A West Virginia case involved an injury when the plaintiff dived into an above-ground pool manufactured by the defendant (King v. Kayak Mfg. Corp. 1989). One of the grounds for the seller's appeal was the introduction into evidence of advertising and promotional materials that showed persons diving into pools manufactured by the defendant. The court affirmed this citing with approval the snowmobile case and noting the material was admissible since it showed a foreseeable use of the product regardless of whether the plaintiff had ever seen the material.

EFFECT OF ADVERTISEMENT ON CAUSATION

In a motorcycle case, a nine year old boy was injured when he drove his Honda from a farm side road into the path of a pickup truck being driven on a highway (Morales v. American Honda Motor Co. 1998). The driver of the truck allegedly did not see the boy in part because of hay bales lining the farm road.

The boy's mother sued Honda alleging strict product liability and negligence because the small size of the motorcycle coupled with the lack of a safety flag resulted in low visibility of the motorcycle. Honda appealed the 2.5 million dollar judgment.

One of the grounds in Honda's appeal was that the trial court improperly admitted a Honda "WindWhip" ad into evidence. The ad referred to the WindWhip as a "safety flag for everyone" and that "besides being crazy and fun, the WindWhip made younger riders easier to spot." The trial court admitted the ad as evidence of the availability of wind flags and Honda's use of them on similar models.

The circuit court held that there was no abuse of discretion by the trial court because the ad aided in establishing causation, knowledge, feasibility and industry standards all of which were relevant to the negligence and strict liability claims. The court stated that it did not matter that the plaintiffs failed to prove that they had relied on the ad because they did not seek the admission of the evidence to prove a claim of misrepresentation or the establishment of an express warranty.

CONCLUSION

To the undoubted chagrin of sellers of goods, these cases clearly demonstrate that advertising can have the unexpected and unintended consequences of resulting in increased legal defense expenses and/or increased liability. If the ad was seen or read (such that it became a part of the basis of the bargain), it can cause there to be liability for breach of warranty under the Uniform Commercial Code. If the buyer justifiably relied upon an ad that was not just "puffing" and was injured using the good in a manner similar to that depicted in the ad, the ad can result in liability for fraudulent misrepresentation in tort law. Even if the advertising was not relied upon or even seen by the buyer or plaintiff, it can increase the probability of strict product liability in tort being imposed by helping to establish that the product was defective by being sold in an unreasonably dangerous condition not contemplated by the ultimate consumer. This is because ads not only can help to formulate consumer expectations of confidence or safety in a product that turns out to be dangerously defective but also can establish that the uses of the product which caused injury were reasonably foreseeable to the seller. Further, as the Jeep roll bar case shows, the liability

can be compounded if the claims were unsupported by product testing. Finally, an ad depicting optional safety equipment can help establish negligence by the seller who failed to include it as standard equipment. Consequently, sellers should be aware that assertions depicted in their advertisements not only need to be accurate and not exaggerated but also preferably should have been verified by test results establishing that the use of the product as depicted in the ad would not result in damage to a buyer or user.

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