Recommending Health Benefits Of Products and Services

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What do you tell a customer who asks if a particular filter will make him feel better, if a particular product will make the air "healthier," or if a particular design will improve occupants' health? How you approach these inquiries determines your risk of legal liability. This column addresses legal issues to consider when providing "health" information and gives practical advice on how to respond to questions on health benefits.

An HVAC company that improperly advertises the "health benefits" of its products or services may be liable to purchasers who relied on its advice. A trap for the unwary is that even *proper* advertising can result in a lawsuit brought by a customer who did not fully understand the information. Each individual hears and interprets a message in his or her own way. Later, when the customer recalls "the facts," they may only vaguely resemble reality. Without planning and execution, a lawsuit brought by a customer who unreasonably interprets factually accurate information can be difficult to defend. The dispute quickly can become a "he said, she said" battle of personalities. Protect yourself by developing a practice that outlines your script in advance and later will be your "Exhibit A" in court.

To develop a practice that fits your needs, be aware of the following current legal standards.

Potential Legal Liability

Three major benchmarks trigger liability for incorrect advice about health benefits. First, federal and state unfair trade practices statutes specifically protect consumers and business people in the conduct of trade. Second, other statutes, such as product liability laws may apply. Third, the common law, based on judicial rulings, has established liability based on negligence which, in the context of recommending health benefits, means negligent misrepresentation.

Unfair Trade Practice Statutes

Unfair trade practice statutes are designed to prevent consumer deception. The federal government and all 50 states have enacted unfair trade practice statutes, which impose criminal and civil liability for "deceptive and unfair trade practices." Although the definition of this term varies from one jurisdiction to another, its foundation is to prevent consumer deception, including wrongful advertising.

The 1966 Revision of the *Uniform Deceptive Trade Practices Act* states that a person commits a deceptive trade practice when he "represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have."

The governmental agencies responsible for enforcing these statutes have broad discretion. Therefore, it is important that your legal counsel be well-versed with the current body of this law. The Federal Trade Commission (FTC), which enforces the federal statute, issued a "Policy Statement Regarding Advertising Substantiation." This policy requires advertising to "represent explicitly or by implication that the advertiser has a reasonable basis supporting [the] claims," and that "failure to possess and rely upon a reasonable basis for objective claims constitutes an unfair and deceptive act or practice in violation of the Federal Trade Commission Act."

The specific statements that sellers can make about health benefits are defined by the FTC. The FTC requires that advertising be based on "competent and reliable scientific evidence," which it defines as follows:

> *Tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.*[1]

Public Rights of Action. The FTC has been diligent in pursuing companies that do not have support for the claims they make. It has issued many complaints against manufacturers and distributors for making unsubstantiated claims about the health-related benefits of their products. Since the mid-1990s, the FTC has taken action with respect to sellers of air filtration

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and ozone generating devices. Complaints have been filed against Alpine Industries,[2] AAF-McQuay, Inc.,[3] TechnoBrands[4] and Ford Motor Co.[5]

The *Alpine* case exemplifies the FTC's position and power. Alpine advertised that "when used as directed, the Living Air Model XL 15 [an ozone generator] prevents and provides relief from colds, flu, allergies, asthma, sinus headaches, and ear, eye, nose and throat infections." In 1995, the FTC ordered Alpine to "cease and desist" from advertising that its product "prevent[ed] or provide[d] relief from any medical or health related condition" in the absence of "competent and reliable scientific evidence that substantiate[d] the representation."

Following this ruling, Alpine entered into a consent decree. Later, when Alpine failed to comply with the consent decree, the FTC brought a lawsuit in federal court to enforce the agreement. After a lengthy trial, a jury determined that, with the exception of Alpine's supporting data concerning its product's ability to remove smoke, all of Alpine's claims regarding its product's ability to remove other contaminants and any resulting health benefits were not properly substantiated. In September of 2003, a Federal Court of Appeals upheld a $1.5 million civil penalty against Alpine.[6]

In addition to granting enforcement powers to governmental agencies, "unfair trade practice statutes" also provide consumers with a private right of action. Such statutes allow customers to recover damages against sellers more easily than if the customers were to rely on traditional negligence law. For example, some states do not require the plaintiff to prove that the defendant intended to deceive, or that the plaintiff relied on the false statement. In addition to making it easier to prove a claim for recovery of monetary damages, many unfair trade practice statutes provide for a much greater monetary award, including double or triple damages and attorneys' fees (in addition to the actual damage suffered) to successful plaintiffs.

Product Liability/Breach of Implied Warranty

Even in the absence of any representation of special qualities or health benefits, HVAC professionals may be liable for a customer's disappointment, under a theory of implied warranty of fitness for a particular purpose, "if they knew or should have known that a customer was buying a product for its particular health benefits." Often these statutes, similar to the "unfair trade practices" statutes, make establishing liability easier. This is not the typical basis for suits based on misrepresentation.

Negligent Misrepresentation. In addition to responsibilities based upon statutes, HVAC professionals who provide improper or unsubstantiated advice about the health benefits of products can be liable under the traditional legal theory of negligent misrepresentation. To recover for negligent misrepresentation, the person bringing the lawsuit must prove that the seller after failing to exercise reasonable care in obtaining or communicating the information, supplied false information resulting in monetary loss to others who justifiably relied upon the information.

If successful in proving negligent misrepresentation, the customer is entitled to be placed (by compensation) in the same position that he or she was in prior to the negligent statement. Typically, the customer is entitled to recover all out-of-pocket expenses, including the cost of the HVAC product or service.

If a seller consciously intended to deceive the buyer, he or she may be liable for *fraudulent* misrepresentation. To recover for fraudulent misrepresentation the plaintiff must prove that the seller knew that the matter was not as he represented it to be, did not have confidence in the accuracy of his representation or knew that he did not have the basis for the representation. In addition, a representation is fraudulent if it states the truth, but the person making the representation knew or believed it to be materially misleading because of his failure to state additional or qualifying information.

If the customer succeeds in proving fraudulent misrepresentation, the customer is entitled to "benefit-of-the-bargain" damages, which can be even greater. For example, damages could consist of furnishing a more expensive HVAC system that would deliver the results originally promised. It is also possible that punitive damages may be awarded in some jurisdictions.

Advising Customers About Product Health Benefits

It is incumbent upon those who design or sell HVAC equipment to have a clear understanding of the equipment's capability and health benefits. Anticipate health-related questions and have a planned response. Recognize that misunderstanding is common and consider preparing written material with graphics. Written documentation serves as excellent evidence of the information conveyed.

The best way to avoid liability is three-fold: 1) develop legally supportable data to back up the health claims made regarding products and services; 2) train personnel on policies and procedures for responding to these questions; and 3) document the communication. HVAC equipment manufacturers should consider each of these goals prior to releasing advertising materials.

If a customer asks a question that is not covered by the sales person's documentation, refer the question to the appropriate expert. Avoid letting a sale today turn into a lawsuit tomorrow.

Notes

1. See In re: AAF-McQuay, Inc., 123 F.T.C. (January 6, 1997) When the FTC issued its "Guides for the Use of Environmental Marketing Claims," it included this definition in its standard. See 16 C.F.R. § 260.5. See also, "1983 FTC Policy Statement Regarding Advertising Substantiation."
2. In re: Alpine Industries, Inc. et al., 120 F.T.C. 649 (Sept. 22, 1995).
3. In re: AAF-McQuay, Inc., 123 F.T.C. 40 (January 6, 1997).
4. In re: Techobrands, Inc., 2002 F.T.C. 18 (April 15, 2002).
5. In re: Ford Motor Co., 122 F.T.C. 69 (August 22, 1996).
6. United States v. Alpine Industries, Inc., Docket No. 01-5759 (9th Cir. September 26, 2003).

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