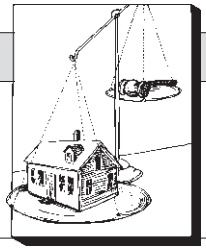
When a Pitch Becomes a Promise



by Bill Kacerovskis

"Leave modesty at the doorstep" is a basic rule of selling. The idea is that the confident, if not the outright boastful, will get the sale in a competitive situation. "Top-quality," "fine craftsmanship," or even "plumb, strum, straight, and true" (as one Texas framer calls his work) are all stock phrases in the sales lingo of builders and remodelers. Words sell, and the marketing-savvy contractor knows how to put a verbal shine on his work.

However, sales talk can get you into trouble if you promise too much. The more specific the sales pitch regarding the quality of your work, the more likely a court will see it as a contractual obligation. Offer your work as "high-quality" or "first-rate," and you'll probably be okay. Promise "the most energy-efficient home in the county," though, and you've made a commitment a court may make you keep.

Ground Rules

The general rules applied by the courts on this subject are easy to state but hard to apply. In general, consumer law provides the following guidelines regarding oral and written representations of quality of work:

- Enforceable contractual promises or warranties are created by any statement or affirmation of fact, but not by mere opinions or general statements recommending the goods or services
- General statements regarding the value of goods or services are not enforceable
- An enforceable contractual promise or warranty can be created without the use of words such as "guarantee" or "warranty"
- It does not matter whether a salesperson or the author of a written advertisement intended to create an enforceable contractual promise or warranty

These rules apply regardless of whether the statement in question is made orally, in writing, in person, on the phone, in promotional literature, or in any type of advertisement (including radio or television advertising). Too specific a statement in any of these situations may be taken as a contractual promise.

It's important to note that one of the main distinguishing characteristics here is whether something is stated as a fact (regardless of whether it's actually true) or as an opinion. Almost anything you represent as fact, rather than as opinion, has a strong potential to be considered a promise. There's a large difference, for instance, between saying, "You are not going to be bothered by squeaky floors" and, "These floors are glued and nailed; I'd be surprised if they squeaked."

Case Studies

Disputes over whether sales pitches are binding are often decided on rather fine points. The cases below recount a number of scenarios.

A black-and-white case. This fairly clear-cut case was heard in 1972 by a Texas Appellate Court. A commercial greenhouse owner purchased PVC panels for his greenhouse. Approximately two years after the panels were installed, they turned black and had to be replaced. The sales brochure for the panels said that the paneling would not turn black or discolor even after years of exposure. The brochure also said the panels would not burn, rot, rust, or mildew, and that tests showed that there was no deterioration of the panels after five years of normal use.

Not surprisingly, the court found that these were assertions of fact, not mere opinions or statements of value, and thus constituted enforceable contractual promises or warranties. The jury held the seller of the panels liable for the damage to the greenhouse owner's business.

Just my opinion. In 1976, the North Carolina Supreme Court heard a case that hinged on more ambiguous language. The case was brought by the owners of a new home that had moisture problems in the crawlspace. They argued, and the real estate salesperson who had sold them the home agreed, that before the sale the salesperson had stated that the water was "probably" left from construction and that it "should" dry up. The salesperson also said that the contractor who had built the home was a "good contractor and he built good homes and that they were substantial." The owners argued that these statements amounted to a warranty and a promise that the moisture would dry up.

The court, however, decided that the salesperson's statements were not statements of fact, but mere opinions, and thus no enforceable contractual promise or warranty was created.

Crucial in this case was that the speaker was a salesperson, not the builder, and that the salesperson used language that suggested it wasn't certain that the water would dry up, only that it "probably" would. Had it been the builder instead of the salesperson, the case might have gone the other way. Had the salesperson or builder said that the water "would" dry, the homeowner would have surely won the case.

Flexible language. Another case, similar at first glance, drew an even more complex decision from a Missouri jury. A building maintenance product catalog offering a floor resurfacing product called Sylox claimed that the product was meant "to patch or resurface old wood floors for hand-trucking or foot traffic." The catalog also stated that,

> Sylox is a hard yet malleable material which bonds firm to wood floors for smooth and easy hand-trucking. Sylox will absorb considerable flex without cracking and is not softened by spillage of oil, grease, or solvents.

The buyer, a large corporation, purchased and applied some Sylox without consulting with the manufacturer. Shortly after it was applied, the material deteriorated and became completely unserviceable. The buyer sued, arguing that the product was used as intended, and that it did not absorb flex in the way advertised.

The court bought half of the argument. It agreed that the statement, "Sylox will absorb considerable flex," being a statement of purported fact, constituted an enforceable contractual promise or warranty. But the jury found in favor of the manufacturer anyway, apparently finding that the warranty had not been breached because the cracking had been caused by the floor having too much give, and that the product was being asked to do something it wasn't designed to do. In other words, the jury found that the floor had more than "considerable" flex, and let the manufacturer off the hook. While this case ended happily for the manufacturer, it illustrates the risks of using language even so fuzzy as "considerable" to describe something that can in theory be quantified.

Keep This In Mind

To avoid making promises you can't afford to keep, keep the following principles in mind.

- Statements made orally, in advertisements, or in promotional literature will probably be considered to be enforceable contractual promises or warranties unless they are vague and nonspecific statements of personal opinion, general value, or recommendation
- Statements that a product or service is "good," "high-quality," "first-rate," or the like are generally not seen as enforceable promises or warranties, unless the statements are made at a time when the seller knows of a problem with the product, services, or work
- When preparing promotional literature and advertisements, remember that the words you use can be used against you in court, and neither the judge nor the jury is likely to take your side — particularly if the statements are false or deceptive
- The more specific a statement, the greater the risk it will be found to be a promise or warranty
- A statement is more likely to be held to be enforceable if it misrepresents the facts
- A statement is more likely to be held to be enforceable if it is made to people who are ignorant of the subject matter

Finally, you should always remember that most states automatically impose an implied warranty of good workmanship on all work, regardless of whether you agree to give such a warranty. This is generally stated as an implied warranty that the work will be performed in a workmanlike manner and suited for the purpose for which it was made.

Be Specific at Your Peril

Using vague and nonspecific language such as "valuable," "better than others," "fine," or "good quality" will probably keep you out of most legal problems. Statements more specific than that — particularly anything sounding like a statement of fact about something that can be quantified — run the risk of being seen as contractual promises. A statement such as "we build energy-efficient homes," for instance, will probably put you on the borderline of what can get you into legal trouble — particularly if your homes are in fact less energy efficient than those of most other builders in your area. Before making such statements, be dead certain that you can back them up. ■

Bill Kacerovskis is an attorney with Brown and James, P.C., a legal firm in St. Louis, Mo., which handles a large number of construction cases.