

Buyers Beware: But Don't Blame the Bad Guy if You Don't Use Your Head

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Most of us know that people manipulate us to sell stuff. Lawyers categorize this manipulation as either “puffery,” which is legal, or “misrepresentation,” which is not. And, even in instances of illegal misrepresentation, the law does not help people who don't use common sense to see through a pitch. You might call this the, “it's not the liar's fault that the guy is stupid” defense.

Believe it or not, the law also allows claims against a stupid liar. [Maybe there is a “stupid” theme here.] Most of us think of misrepresentation as purposeful. The bad guy lies, by making a known false statement or hiding the truth to convince us to do something. However, the law also recognizes negligent misrepresentation, which you might call “stupid lying.” In an example of negligent misrepresentation, the bad guy might tell their target that the concrete he is selling will hold its form for a hundred years, but does not know one way or the other and doesn't check.

A few examples may amuse and help you better understand both misrepresentation and stupidity:

In 2014, the [Michael Kors](#) company was sued. The plaintiff alleged Michael Kors engaged in a fraudulent business practice by making a false statement on its outlet store clothing price tags. The tag showed both the manufacturer's suggested retail price, “MSRP,” and a lower “Our Price,” implying a “mark-down” savings. The lawsuit alleged that Michael Kors manufactured the clothing solely for sale in its outlet stores and never intended to sell it retail. The “MSRP” price was a fiction and the “Our Price” was the retail price. There was no “mark-down” savings. There also was no trial. Michael Kors [settled](#), paying \$4.88 million in damages. Michael Kors also replaced the “MSRP” statement on its tags with the word “value.” Don't ask what “value” means . . .

In 2016 [Starbucks](#) was sued in two courts for fraudulent misrepresentation related to the amount of ice in its iced drinks. True. In each lawsuit, the plaintiff claimed Starbucks committed fraud by putting too much ice in its drinks, reducing the amount of actual beverage in the xyz ounce cup. Both courts [dismissed](#) the cases. We believe each followed the “don't cry to us if you don't use common sense rule.” In essence the court rulings relied upon the common sense understanding that an iced drink requires ice, which must reduce the amount of beverage in the cup. The Plaintiff in the California case has appealed the dismissal to the 9th Circuit Federal Court of Appeals. To quote Pepper Brooks in *Dodgeball*, “it's a bold strategy Cotton, let's see if it plays out for them.”

The “don't cry to us if you don't use common sense” doctrine allows for puffery - defined as an exaggeration so obvious that no reasonable person would rely upon it. Puffery is a commonly used defense to false advertising claims. The defense can be summarized as something like this: Yes, we made the claim to manipulate you, but we never expected that you would believe us.

One case presents a pretty funny example of the relationship between puffery and the common sense defense.

In 2013, a plaintiff sued [Red Bull](#) claiming that its marketing slogan was untrue. The slogan was, as most of you know, “it gives you wings.” The plaintiff did not demand wings. In fact, at least one [Red Bull commercial](#) made before the 2013 lawsuit actually told consumers that it would not give you wings. This was an argument about metaphor in advertising. The suit contended that this was a misrepresentation of increased consumer performance, concentration, and reaction speed, when in fact the energy drink had no more caffeine than a cheaper cup of coffee.

Red Bull [settled](#) and agreed to pay \$13M to its consumers, though maintaining its marketing and labeling were truthful and accurate. Today, Red Bull continues to proclaim that “[it gives you wiiings.](#)” Wings or no wings, we still drink the stuff.

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