



**PREVENTING AND MANAGING
POTENTIAL LIABILITY FROM
THE ACTIONS OF SALES REPRESENTATIVES**

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Agenda

- Framing the Issue
- Risk Creation
 - General Risks
 - Industry-specific Risks
- Managing Risk
- Conclusion

Importance of an Effective Sales Force

- Key to success for many companies, irrespective of industry
- Sales generate revenue, revenue = growth
- Sales personnel as the “face of the company”
- Effective sales force can forge new relationships, create new opportunities, and pay huge dividends

Risk Creation

- “Scope of employment” actions create liability
- Lack of significant corporate supervision
- Direct, unsupervised contact with customers



General Risks

- High-pressure, abusive, or fraudulent tactics
- Misstatements or misrepresentations—innocent or not
- Use of technology and the “distracted driver” problem

Industry-specific Risks

Medical Device and Pharmaceutical Manufacturers

- Over-promotion—overstating benefits, understating risks
- “Off-label” use
- Sales reps in the operating room—negligence, invasion of privacy, infliction of emotion distress



Managing Risk

- Top priority for any management team, irrespective industry
- Requires ongoing attention/consideration
- Risks can be mitigated, not eliminated
- Key: Communication, Training, Supervision, Alignment

Managing Risk—Strategies

- **Communication**
 - Develop and disseminate a comprehensive set of company guidelines
 - Outline expectations for all employees
 - Customer contact and communications
 - Technology use and “distracted driving”
 - Require acknowledgement/adherence to policies

Managing Risk—Strategies

- **Training**
 - Initial Training for New Sales Personnel
 - Develop thorough/well-documented program
 - Company expectations and policies (customer interaction, technology use)
 - Ongoing Training for All Sales Personnel
 - Periodic programs for continuing education
 - Document completed training sessions for all employees

Managing Risk—Strategies

- Alignment
 - Transparent compensation system, appropriate incentives
 - Avoid unrealistic goals that create “dog eat dog” atmosphere
 - Allow sales personnel to participate in goal setting process
 - Focus should be reasonable/attainable while staying within company’s sales guidelines
 - Develop and disseminate “core values”
 - “Values-based” system based on alignment with company values
 - Elicit feedback to determine employee alignment

Managing Risk—Strategies

- Supervision
 - Periodic supervision for all sales personnel
 - Manager or peer supervision and review of client interaction
 - Partner junior and senior personnel initially



Conclusion

- Managing risk is an ongoing endeavor
- Must be constantly considered and monitored
- Communication, training, supervision, and alignment are key

In nearly every industry, the strength of a company's sales force can define its success. The reason is simple: sales generate revenue and revenue generates growth. No matter how innovative a company's product, how efficient its manufacturing process, or how strong its management team, without an effective sales operation in place, the company's product may never reach its intended customer. And to the customer, an organization's sales force is often its only direct interaction with the company. Thus, a professional and competent sales force that is able to both build lasting relationships with its company's existing customer base and forge new relationships with potential customers can pay huge dividends.

However, as with any other employee, a sales person acting within the scope of his or her employment can create liability for the employer company. This risk can be exacerbated by the fact that—in many industries—sales personnel work remotely, often without any significant corporate supervision. Even when a company does not employ the “feet on the ground” approach, a sales person's direct contact with existing or potential customers can create considerable liability.

This article will briefly explore some of the ways in which a company's sales force can expose it to liability and will provide tips for mitigating the potential legal risks.

General Risks

Nearly everyone has had the unpleasant experience of dealing with an overzealous or even pushy salesperson. Unfortunately, in the wake of the recent economic crisis, the use of high-pressure, abusive, and even fraudulent sales tactics was exposed at several companies operating in the financial services, insurance, and real estate industries. This created liability for companies that were found to either promote the use of such tactics or those who failed to adequately supervise their sales force.

Recently, for example, several lawsuits filed against a major financial services institution allege that employees routinely opened new accounts in customers' names without having the authority to do so. The alleged impetus for this effort stemmed from the unrealistic goals set by the bank's senior management on its sales force. The lawsuits allege that, among other things, the bank's lofty goals for new accounts drove its sales force to omit or even forge customers' signatures, adding financial products without asking when customers opened accounts. This resulted in customers paying monthly service fees on accounts they never authorized. Further, the lawsuits allege that many customers were forced to buy identity-theft protection services in order to prevent future fraud.

Another example: In 1997, Prudential Insurance Company paid nearly \$3 billion to settle a class action lawsuit brought

by customers who allegedly had been misled.¹ The suit, which affected 10.7 million insurance policies sold over a thirteen year period, followed from a federal investigation into deceptive practices among Prudential's sales force. Under the scheme, Prudential's insurance agents collected hefty sales commissions on insurance policies that turned out to be far more expensive than the agents had led customers to believe. In the end, the investigation concluded that Prudential had, at a minimum, been negligent in supervising its sales force.

Actions by a sales representative that are far more innocuous than those discussed above can also create liability for a company. For example, an innocent misstatement or misrepresentation by a sales representative can lead to significant contractual damages for the employer company. In a recent case, a widower filed suit against his insurance provider after misstatements made by the insurance company's sales representative led to a denial of coverage for his ailing wife.² The sales representative had incorrectly told the plaintiff that his insurance coverage would remain unchanged after switching to a lower premium plan. The plaintiff's wife was later diagnosed with liver cancer and needed a liver transplant. Insurance coverage was denied, and the plaintiff's wife subsequently died without the transplant resulting in a significant settlement.

Technology, and the ever present use of cell phones, is another area that has created potential liability for companies. Concerned with what has been described as a distracted driving epidemic, a majority of states have implemented laws that restrict the use of cell phones, and other wireless communication devices while driving. An accident caused by a distracted employee may create liability for the employer company under a number of legal theories. An employer may be vicariously liable if its employee was acting within the scope of his or her employment (e.g., making a sales call or texting a customer).³ An employer could also be liable under theories of negligent hiring, supervision, or entrustment if the employer failed to properly train or supervise the employee, or failed to perform adequate research during the hiring process.

A 2015 report issued by the National Safety Council details several more examples of employer liability for the distracted driving accidents of its employees.⁴ The report urges employers to implement policies barring the use

of all handheld and hands-free devices while driving. A comprehensive distracted driving policy alone, however, will not provide a company complete legal protection. The policy must be clearly communicated and consistently enforced, and employees must be adequately trained and reprimanded when violations occur.

Industry-specific Risks

Liability created by a company's sales force is also often seen in the medical device and pharmaceutical industries. There are many reasons for this, including, the highly-regulated nature of these industries and the fact that sales representatives in both often have direct contact with the medical practitioners who are their principal customers.

For example, over-promotion of a medical device or pharmaceutical product, which is especially prevalent in the pharmaceutical drug context, may include a sales representative overstating a product's benefits or understating its risks. Such conduct can result in a claim that the manufacturer, through its sales person's actions, failed to adequately warn physicians of a product's dangers. In some instances, this can negate what might otherwise be adequate written warnings or representations.⁵

Another example: Recently, Purdue Pharma reached a settlement with the attorney general of New York regarding the alleged over-promotion of its popular drug OxyContin.⁶ The settlement ended a nearly two-year long investigation that determined, among other things, that Purdue and its sales representatives had failed to adequately warn prescribing physicians of the risk of addiction associated with the popular pain reliever. The New York settlement followed more than \$600 million in fines levied against the company and its executives regarding the over-promotion of OxyContin.⁷ A lucrative bonus system that encouraged sales representatives to dramatically increase sales of OxyContin in certain markets has been cited as one of the many causes for the alleged over-promotion.⁸

In another case of over-promotion, a woman was prescribed medication for migraines, which ultimately caused her to suffer cardiac arrest.⁹ Her pharmacist, who happened to be her

5 See, e.g., *Boehm v. Eli Lilly & Co.*, 747 F.3d 501, 508 (8th Cir. 2014) (discussing the over-promotion exception to the learned intermediary doctrine, which can "negate an otherwise adequate warning of the risk[s]" associated with a drug); *Stevens v. Parke, Davis & Co.*, 507 P.2d 653, 661 (1973) ("[A]n adequate warning to the [medical] profession may be eroded or even nullified by overpromotion of the drug through a vigorous sales program which may have the effect of persuading the prescribing doctor to disregard the warnings given.").

6 <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlement-purdue-pharma-ensures-responsible-and-transparent>.

7 http://www.nytimes.com/2007/05/10/business/11drug-web.html?_r=0.

8 Art Van Dee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 Am. J. Public Health 221 (2009).

9 *Brown v. Glaxo, Inc.*, 790 So. 2d 35 (La. Ct. App. 2000).

1 In re Prudential Ins. Co. Am. Sales Practice Litig., 962 F. Supp. 450 (D.N.J. 1997).

2 *Romo v. Amedex Ins. Co.*, 930 So. 2d 643 (Fla. Dist. Ct. App. 2006).

3 In one recent example, Coca-Cola was found liable and ordered to pay \$21.5 million in damages after an employee caused a serious car accident while on a business call. See *Chatman-Wilson v. Cabral*, No. 10-61510-2 (Tex. Nueces Cnty. Ct. May 4, 2012).

4 National Safety Conference, *Employer Liability and the Case for Comprehensive Cell Phone Policies* (2015), available at <http://www.nsc.org/DistractedDrivingDocuments/CPK/Corporate-Liability-White-Paper.pdf>.

husband, had personally interacted with the pharmaceutical sales representative. When asked about side effects of the drug in question, the sales representative told customers that “although the pains could sometimes be ‘alarming,’ they were, for the most part, not cardiac in origin.”¹⁰ Following his wife’s death, the husband sued the sales representative and his employer. The court determined that despite warnings about rare cardiac arrests on the drug’s label, the company had to “take responsibility for any confusion over the cause of the chest pains caused by the [sales representative’s] verbal representation.”¹¹

Closely-related to over-promotion is the promotion by sales representatives of drugs for “off-label uses.” While a physician is allowed to prescribe drugs for off-label uses, pharmaceutical and medical device companies—and their sales representatives—typically cannot market them for unapproved uses.¹² Recently, a pharmaceutical company paid \$894 million to settle lawsuits stemming from its promotion of two drugs.¹³ The lawsuits alleged that the company—through its sales representatives—had promoted two painkiller drugs for uses they were not approved for.¹⁴ Further, it was determined that sales representatives had understated the safety of the drugs to physicians.

Finally, in the medical device industry, sales representatives often accompany surgeons into the operating room for the purpose of providing guidance on the proper uses and techniques for implanting a particular device. The practice has predictably exposed medical device manufacturers to potential liability and litigation over the past twenty years based on many different legal theories including negligence, negligent preparation, negligent misrepresentation, invasion of privacy, and infliction of emotional distress.¹⁵

¹⁰ Id. at 40.

¹¹ Id. at 41.

¹² “Off-label” promotion has long been prohibited by the FDA. Two recent federal decisions, however, have challenged this long-standing prohibition. See *U.S. v. Caronia*, 703 F.3d 149 (2d Cir. 2012); *Amarin Pharma, Inc. v. FDA*, No. 15-cv-3588, 2015 WL 4720039 (S.D.N.Y. Aug. 7, 2015). In both cases, the court held that a pharmaceutical company has a First Amendment right to engage in off-label promotion that is “truthful” and “non-misleading.” In *Amarin*, the court, following *Caronia*, determined that “truthful” and “non-misleading” speech “may not serve as the basis for a[n] [off-label promotion] action.” *Amarin*, 2015 WL 4720039, at *27. While *Amarin* and *Caronia*, appear to prohibit the FDA from prosecuting a pharmaceutical manufacturer for truthful and non-misleading off-label promotion, it is important to note that this precedent has only been established in the Second Circuit to date and there is considerable uncertainty as to how other Circuits would rule if faced with the same set of facts.

¹³ <http://www.nytimes.com/2008/10/23/business/23pfizer.html>.

¹⁴ See, e.g., *In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation*, 2012 WL 3154957 (N.D. Cal. Aug. 2, 2012).

¹⁵ See, e.g., *Zappala v. Leibinger*, No. 86038, 2006 WL 1174448 (Ohio Ct. App. May 4, 2006); *Sanchez-Scott v. Alza Pharm.*, 103 Cal. Rptr. 2d 410 (Cal Ct. App. 2001), as modified (Jan. 29, 2001). Often, plaintiffs hoping to avoid federal multidistrict litigation attempt to join sales representatives as defendants in order to defeat diversity. E.g., *In re Rezulin Products Liab. Litig.*, 133 F. Supp. 2d 272 (S.D. N.Y. 2001). Absent some colorable claim for negligence on the sales representative’s part, this has been an ineffective strategy. See, e.g., id. at 280–88 (citing *McCurtis v. Dolgencorp, Inc.*, 968 F. Supp. 1158, 1160 (S.D. Miss. 1997)) (dismissing cause against sales representative because sales representatives are not subject to “strict liability [as] the employees of businesses which sell products to consumers”).

Managing Risk

While lawsuits against sales representatives cannot always be prevented, companies should take great care to insure their sales force is adequately trained, supervised and appropriately incentivized in an effort to avoid potential liability. Fully managing the potential risks to any individual company should be considered both a top priority and an ongoing endeavor for any management team. Below are several general strategies that all companies, irrespective of the industry in which they operate, should consider.

- **Develop and Disseminate Guidelines.** Develop uniform guidelines and policies (through an employee handbook or manual) that detail expectations for all employees, including sales personnel. This should include policies that address contact and communications with customers, and a comprehensive policy regarding the use of cell phones and other devices while driving. Require all new and existing employees to sign a form demonstrating they have received, reviewed, understand, and—most importantly—commit to adhere to the guidelines and policies.
- **Compensation.** Create a transparent compensation system that appropriately incentivizes the sales force and aligns with company objectives and expectations. One example: Develop and disseminate company “core values” and create a “values-based” compensation system where sales representatives are evaluated on their alignment with the company’s core values. Use surveys to elicit feedback from customers regarding their interaction with individual sales representatives and to determine employee alignment.¹⁶
- **Develop Realistic Goals.** Create goals for your sales force that are reasonable and attainable while staying within the company’s sales guidelines.
- **Initial Training.** Consistent with bullet point 1, above, develop a thorough and well-documented training program for new sales personnel that fully addresses company expectations and details its policies for customer interaction.
- **Ongoing Training.** Require sales personnel to complete an ongoing training program. Maintain records documenting that employees have completed certain training sessions and carefully monitor when employees are due for refreshers.
- **Periodic Supervision.** Create a system that requires all sales personnel to periodically be supervised by a manager or peer during a client interaction. This should include a requirement that new and/or junior sales personnel initially partner with a senior salesperson.

¹⁶ For further discussion of a “values-based” compensation structure, see Navigant Consulting, Inc., *Sales Force Compensation Compliance: Back to the Future—A Response to Recent Corporate Integrity Agreement Settlements* (2012), available at http://www.navigant.com/~media/WWW/Site/Insights/Life%20Sciences/LifeSci_Article2_SalesForceComp.ashx.

Conclusion

A successful sales force is an integral part of nearly every company, regardless of the industry in which it

operates. Proper training and supervision, together with an appropriately aligned compensation structure, can help mitigate the substantial liability risks described above.

FACULTY BIOGRAPHY



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Nicole Narotzky is a partner in the firm's Litigation Group. She specializes in product liability litigation and has successfully defended major medical device and pharmaceutical manufacturers in federal and state courts throughout the country. Nicole has significant experience with the issues of federal preemption and regulatory control over claims involving FDA-approved medical devices. She also has extensive experience representing clients in a variety of commercial disputes, including construction law and intellectual property disputes.

Areas of Practice

- Litigation
- Appeals
- Business Litigation
- Construction & Real Estate Litigation
- Intellectual Property Litigation
- Tort & Product Liability

Selected Experience

- Duggan v. Medtronic, Inc., No. 09-CV-12046-PBS, 2012 WL 45503 (D. Mass. Jan. 10, 2012).
- Walker v. Medtronic, Inc., No. 2:07-00317, 2010 WL 4822135 (S.D. W. Va. Nov. 24, 2010).
- Clark v. Medtronic, Inc., 572 F. Supp. 2d 1090 (D. Minn. 2008).
- Smith v. Gorback, et al., Cause No. 2005-58539 (Harris County, Tex. 2007).

Recognition

- Recognized on Minnesota Rising Stars list as part of the Super Lawyers® selection process, 2014-2015 (Minnesota Rising Stars is a designation given to only 2.5 percent of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
- Top Women Attorneys in Minnesota® list, 2015 (The annual edition of the Top Women Attorneys in Minnesota list features attorneys who received the highest point totals in the previous year's Minnesota Super Lawyers® and Rising Stars balloting, research, and blue ribbon review process.)

Publications

- "A brush with danger: the growing product liability risk imposed by Chinese imports," co-author, ON Litigation, Vol. 1, Spring 2009
- "Is There a Perfect Notice Letter?" The IPC Browser 8-10 (Vol. 4, No. 2, Spring 2004)

Presentations

- "After the Fall: The Legacy of the I-35W Bridge Collapse Litigation and What It Means to the Design & Construction Industry in Minnesota," Maslon Speaker Series, July 25, 2013
- "Exploring Device Manufacturers' Duty to Train Physicians on the Effective Use of a Particular Device," 17th Annual Drug and Medical Device Litigation Conference, December 5, 2012

Education

- University of Minnesota Law School - J.D., magna cum laude, 2003; Honors: Order of the Coif
- Brown University - B.A., with honors, 1999; Major: Political Science