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PUBLICATION

Disclaimers May Be Drag on Branding But Are Musts for Customers, Businesses

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Strong, effective branding is basic to differentiating businesses in this era and helping to drive consistently growing profits long-term.

But such branding can carry with it the potential for consumer misunderstanding and producer liability.

Disclaimers are intended to minimize those risks.

Blaney McMurtry's Andrea Rush has written about what businesses must watch for as they work to develop memorable brands and trademarks that will help generate lasting profits. (Click here for her article.)

The article below highlights the various roles of disclaimers in helping you preserve your brand and alerts you to what you and your advisors must think about before drafting a disclaimer.

A disclaimer can be found in almost any transaction, whether it's a consumer purchasing a good or service or one sophisticated business party buying from another. There are various risks inherent in any transaction. The disclaimer is intended to act like a warning and to set expectations between the parties as to risk and liability.

For you as supplier, the disclaimer is meant to determine which party assumes what risks, with the ultimate aim of protecting you against liability.

For you as buyer/consumer, the disclaimer is meant to help you understand what you are buying and where you stand with the other party. For instance, it is not unusual to see the following generic disclaimer:

EXCEPT AS SPECIFICALLY SET IN THIS AGREEMENT, THE PRODUCTS ARE PROVIDED AS IS WITHOUT WARRANTY OF ANY KIND. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE SELLER DISCLAIMS ALL WARRANTIES, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NONINFRINGEMENT. THE ENTIRE RISK ARISING OUT OF THE INSTALLATION OR USE OF THE PRODUCTS REMAINS WITH THE CUSTOMER.

Disclaimers also clarify the intended relationship between the parties. For instance, does the seller have a duty of care to prevent a risk of harm or injury?

With these expectations set out, a buyer/consumer can try to make an informed decision and reduce risk.

Disclaimers are not just about what you are trying to say, but also what you are trying *not* to say, about a brand. For instance, it is not unusual to see disclaimer language that outlines the actual function of a service or product and its limitations. For known and established brands, this acts as full disclosure and provides clarity, no matter how obvious the limitation maybe to a reasonable person. Take the following examples:

Blind Spot Warning is not a substitute for proper lane change procedures. The system will not prevent contact with other vehicles or accidents. It may not detect every vehicle or object around you.

Intelligent Cruise Control is not a collision avoidance system or warning device. Designed to use limited braking. Failure to apply the brakes could result in an accident.

And it is not unusual to see the following disclosure disclaimer from professional advisors:

THE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION OR BY ANY STATE SECURITIES REGULATORY AUTHORITY, NOR HAS THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION OR ANY SUCH STATE AUTHORITY, OR ANY CANADIAN PROVINCIAL SECURITIES COMMISSION OR SIMILAR REGULATORY AUTHORITY, PASSED ON THE ACCURACY OR ADEQUACY OF THIS PRESENTATION. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

This type of disclosure by sellers also suggests that they are trying to meet compliance requirements so as not to be misleading in what is being sold or advertised. It further implies that they are being diligent in meeting set industry/legal standards.

Disclaimers are intended to help brands but, on occasion, they can assume an absurd life of their own.

Take the sandwich bag that claimed “hungry people chose a hot breakfast over cold cereal 90 per cent of the time,” accompanied by the following disclaimer -- “not based on a fact.”

Or what about the pictographic instructions in the hat box that advised you to wear the hat on your head but not to sit on it or step on it?

While these credibility-damaging examples are rare, you obviously have to proceed with caution when developing a disclaimer.

Here are the principal matters that you and your advisors should be thinking about when considering disclaimers:

1. Do you need the disclaimer to begin with? Is there a regulatory requirement? Is there a particular function/feature of the product/service that needs attention? Is there a particular risk-allocation situation?

2. What should the disclaimer address? Think about the scope and breadth of what is being contemplated. Does it need to cover potentially negligent acts? Does it need to cover omissions that could result in harm?

3. Is the proposed disclaimer unconscionable or contrary to public policy?

4. How should it be presented and brought to the attention of the other party? Where should it be placed? Should it be in all capital letters? These are important questions because the supplier has an obligation to bring disclaimers to the attention of consumers.

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