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A LESSON IN AVOIDING LIABILITY ON THE INTERNET

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As CEO of a thriving manufacturing business, you are not accustomed to receiving letters from others demanding money for damages allegedly caused by your business. You might think such letters would be even more scarce now that you are conducting business over the Internet. But imagine one such letter from a customer arriving today.

"We suffered $50,000 in damages," begins the letter, "because your website misrepresented the capabilities of your Precision XL adapter. We ordered 1000 adapters through your online purchase order program for delivery in two weeks for a critical retrofit of our plant. The adapters arrived three weeks late. They did not work and we returned them. Our plant sat idle for five days until we found a replacement from your competitor. Instead of paying you, we paid your competitor but had to pay $20,000 extra on a rush order. We also lost $30,000 in profits. When we complained to your sales manager, he responded with an e-mail that defamed our business. We expect payment of $50,000 in 10 days, or else we will sue your company."

You place the letter down. You had heard from your CFO that you might be getting such a demand soon. This customer has a bad reputation in the industry. You pick up the telephone and call your lawyer. You explain the situation. The conversation goes something like this.

Website Information. "Was your website information accurate?" asks the attorney. "Let me explain," you start. "Last year our business plan called for an upgrade of the Precision XL adapter, but we had troubles making the transition. In anticipation of working out the kinks, we told our marketing department to promote the new product anyway. But for awhile the website material did not match up with the product we were selling. We also delayed in our deliveries. Are we liable for what is on our website?"

Your lawyer answers. "Your website can be like any other sales material. This customer is probably thinking either misrepresentation or breach of contract. Intentional misrepresentation - fraud - is tough to prove because it requires proof of an intent to deceive. So plaintiffs focus more on negligent misrepresentation, a false statement you negligently make to someone and then that person reasonably acts upon the statement but consequently suffers a loss. Or the statement might be viewed as a warranty or promise. When you do not live up to the promise, you breach the contract. Did your website make a definite statement about the virtues of Precision XL and a two-week delivery schedule?" You read out loud the statement on the website. "It says, 'After months of product testing, our new Precision XL adapter is ready for business. You can expect delivery within two weeks." Your lawyer says, "That could be a problem."

Online Purchase Order Program. Eagerly you interrupt. "We recently entered the age of e-commerce with our online purchase order program. When this customer placed the order over the Internet, the customer clicked 'I accept' to the terms of the sale contract. Does that help us?"

Your lawyer expresses optimism. "Yes. If your online ordering system is like most others, your customer agreed to the contract term that you will not be liable for consequential damages, which would include the $30,000 in your customer's alleged lost profits." The attorney adds, "However, the customer may have a claim for the extra $20,000 it had to pay for the replacement adapters. Also, the contractual disclaimer of consequential damages may not apply to the misrepresentation claim because misrepresentation is a tort claim, not a contract claim. Still, lost profits are tough to prove, particularly for a business known for its inefficiency, and disgruntled customers typically exaggerate the extra cost incurred to find a replacement."

Electronic Mail Policy. "Tell me about this customer's defamation," asks the lawyer, adding, "I would have thought your sales manager knew about your company's e-mail policy." You remark, "What e-mail policy?"

In response, the attorney says, "Companies your size should have a written electronic mail policy, for internal and external e-mails. That way, your sales manager would have known that inappropriate use of e-mail could be cause for immediate disciplinary action, and such a policy might have discouraged any disparaging remarks to this customer. What did your sales manager write in the e-mail anyway?"

You respond, "His e-mail says: 'I am not paying for the downtime of your incompetent assembly line. Your company is a bunch of thieves anyway.' He copied our local distributer on the e-mail." Your lawyer comments, "Truth might be a defense for the incompetence remark but the thievery comment probably crossed over the line."

Conclusion. "So what do I do?" you ask. Your lawyer responds, "You have two choices. The business solution - work out a deal, such as favorable terms on the customer's next big purchase order, if you want to maintain the relationship. Or the litigation solution - wait for the lawsuit and then defend yourself vigorously. You choose."

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