

Chapter 8 Humor

By J. SCOTT BOVITZ

On the Dangers of Asteroids and Other Disclosure Statement Lessons

When making your New Year's resolutions for 2016, consider the following helpful hints and tips on plain speaking, disclosure statements, email disclaimers and footnotes.

Simple Language Is Usually Best

Alan E. Ramos is a bankruptcy lawyer who is best known as the writer, producer and director of multiple educational skits and videos for the annual insolvency conference of the California Bankruptcy Forum (CBF).¹ He recently reached a traditional retirement age, but instead of retiring, he moved from Northern California to Los Angeles. Now, he splits his day between lawyering and (what else?) acting. Ramos has played the parts of a happy wedding guest, a member of the board of directors, a dying grandfather and a dead body. ("All I have to do is act naturally," he quips.)

Ramos concludes that bankruptcy lawyers are uncomfortable with plain language and simple sentences. His version of the Lawyer's Holiday Greeting card reads:

Please accept without obligation, implied or implicit, my best wishes for an environmentally conscious, socially responsible, politically correct, low-stress, non-addictive, gender-neutral celebration of the winter solstice holiday, practiced within the most enjoyable traditions of the religious persuasion of your choice, or secular practices of your choice, with respect for the religious/secular persuasions and/or traditions of others, or their choice not to practice religious or secular traditions at all ... and a financially successful, personally fulfilling and medically uncomplicated recognition of the onset of the next generally accepted calendar year, but with due respect for the calendars of choice of other cultures or sects, and having regard to the race, creed, color, age, physical ability, religious faith, choice of computer platform or dietary preference of the wishee.

Do you see some of your own verbose work product in Ramos's holiday card? His subtle lesson is, of course, to use simple language.²

Bankruptcy lawyers could take a lesson from professional advertising agencies. Have you seen the late-night television advertisements for the cancer treatment drug Opdivo? Lawyers and doctors wrote up a nine-page, small font, single-spaced list of warnings about Opdivo. For example, "As with all therapeutic proteins, there is a potential for immunogenicity." This makes no sense to the average consumer — nor does the typical disclosure statement.³

The Opdivo advertising agency magically synthesized nine pages of legal disclaimers into 35 seconds of a short television commercial — with life-affirming violins and cellos! "Opdivo can cause your immune system to attack normal organs and tissues in your body ... anytime ... and may become serious and lead to death." Opdivo can also cause a "new or worsening cough, chest pain, shortness of breath, diarrhea, severe stomach pain or tenderness, severe nausea or vomiting, loss of appetite, swollen ankles, extreme fatigue, constipation, rash, or muscle or joint pain." Short, easily understood, and gross!⁴

By the way, Ramos reports that the actors in the Opdivo commercial earn a little money (residuals) every time the commercial airs. The commercial has aired at least 2,272 times — a big hit for the actors.⁵

Excessive Disclaimers Can Be Harmful to Disclosure Statement

Earthlink is not in bankruptcy, but the following text (from an Earthlink press release) sounds like it was lifted out of a traditional chapter 11 disclosure statement:

Although we believe that the expectations expressed in these forward-looking statements are reasonable, we cannot promise that our expectations will turn out to be correct. Our actual results could be materially different from and worse than our expectations.... These risks include, without limitation: (1) we may not be able to execute our strategy...; (2) we may not be able to grow



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1 All bankruptcy professionals are welcome to attend the May 2016 CBF conference in Indian Wells, Calif. (for more information, visit www.calbf.org/index.htm). Chief Judge Sheri Bluebond (U.S. Bankruptcy Court (C.D. Cal.); Los Angeles) is rumored to be updating last year's successful parody of the Bankruptcy Dating Game. I was Bachelor No. 3 on a 1978 segment of Chuck Barris's first revival of "The Dating Game," so I am able to confirm that Chief Judge Bluebond has mastered the details of this schmaltzy show. See en.wikipedia.org/wiki/The_Dating_Game (unless otherwise indicated, all links in this article were last visited on Nov. 23, 2015).

2 Ramos's goal is to make more money from appearing in commercials than from practicing bankruptcy law. This shouldn't be hard, because bankruptcy filings were down in every district in the country as of Sept. 30, 2015. See "Table F — Bankruptcy Filings (September 30, 2015)," Administrative Office of the U.S. Courts, available at www.uscourts.gov/statistics/table/f/bankruptcy-filings/2015/09/30.

3 See Highlights of Prescribing Information at p. 3, available at packageinserts.bms.com/pi/pi_opdivo.pdf.

4 For a video of the Opdivo commercial, visit www.ispot.tv/ad/AL_Z/opdivo-longer-life.

5 *Id.* (for commercial airing data).

revenues ... to offset declining revenues...; (3) our failure to achieve operating efficiencies will adversely affect our results...; (4) we may determine to undertake further restructuring plans...; (6) if we are unable to adapt to changes in technology and customer demands, we may not remain competitive...; (7) unfavorable general economic conditions could harm our business; (8) we may be unable to successfully identify, manage and assimilate future acquisitions...; (9) we face significant competition...; (10) failure to retain existing customers could adversely affect our results...; (11) decisions by legislative or regulatory authorities ... may restrict our ability to provide services and may increase ... costs...; (15) failure to obtain and maintain necessary permits and rights-of-way could interfere with our ... operations; (16) we have substantial business relationships ... and some of our customer agreements may not continue due to financial difficulty, acquisitions, non-renewal or other factors...; (17) we obtain a majority of our... equipment and software from a limited number of third-party suppliers; (18) work stoppages ... could adversely impact our ability to provision and service our customers; (19) our commercial and alliance arrangements may not be renewed or may not generate expected benefits...; (21) we face significant competition ... that could reduce our profitability...; (23) potential regulation ... could adversely affect our operations; (24) cyber-security breaches could harm our business; (25) privacy concerns relating to our business could damage our reputation...; (26) interruption or failure of our ... systems or other technologies could impair our ability to provide our services...; (28) if we, or other industry participants, are unable to successfully defend against disputes or legal actions, we could face substantial liabilities or suffer harm to our financial and operational prospects; (29) we may be accused of infringing upon the intellectual property rights of third parties, which is costly to defend and could limit our ability to use certain technologies in the future; (30) we may not be able to protect our intellectual property; (31) we may be unable to hire and retain sufficient qualified personnel...; (32) government regulations could adversely affect our business or force us to change our business practices; (33) our business may suffer if third parties are unable to provide services or terminate their relationships with us; (34) we may be required to recognize impairment charges on our goodwill and intangible assets...; (35) we may have exposure to greater than anticipated tax liabilities and we may be limited in the use of our net operating losses and certain other tax attributes in the future; (36) our indebtedness could adversely affect our financial health...; (37) we may require substantial capital to support business growth, and this capital may not be available to us on acceptable terms, or at all; (38) our debt agreements include restrictive covenants...; (39) we may reduce, or cease payment of, quarterly cash dividends; (40) our stock price may be volatile; [and] (41) provisions of our

certificate of incorporation, bylaws and other elements of our capital structure could limit our share price and delay a change of control of the company[.]... *These risks and uncertainties ... are not intended to represent a complete list of all risks and uncertainties inherent in our business...*⁶

In other words, the lawyers don't want you to rely on anything that management has already promised. The disclaimers are well written, but they kill the impact of the earlier commitments by the company.

Putting the Lessons to Use in Your Own Disclosure Statement

Using the Ramos lesson (simple language is best) and the Earthlink lesson (back away from every representation you make), here are some examples of "adequate information ... of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor" under 11 U.S.C. § 1125(a)(1). Feel free to use or adopt these sample paragraphs in your own disclosure statements.

Management: The same bums who couldn't keep the company out of chapter 11 will still be running the company after the bankruptcy case is over. You might get a little money on your unsecured claim, but don't go spending the proposed dividend until you actually have it in your hand. These guys and gals aren't really all that smart.

Administrative Fees: The lawyers in this case are super-duper. Your kid in college drives an old car worth \$1,375, and the lead lawyer from New York (who represents the creditors' committee) charges almost that much per hour. But heck, someone has to watch over the fatally overoptimistic debtor. Lawyers are going to make a lot of money on this case. But don't worry about it.

Feasibility: This company has a really good chance of becoming profitable soon, and you are going to want to be a part of that future. So we are giving you stock in the company (in exchange for your claim). Your claim is going away, but you will be thanking us soon. Mark my words. Your grandchildren will all be rich. Seriously.

Preference Claims: I'm sorry, but we are going to sue you for the dollars we paid you just before bankruptcy. You will need to hire a lawyer to defend the case. Ask us, we might know someone who can represent you. After you pay us back this money (a preference) and your attorneys' fees, we will eventually give some of the money back to you. What was that you said? Oh, you made a joke about it. Hey, we aren't Congress, we just work here.

Risks: We found out what the company was doing wrong. We fixed it, filed for chapter 11 and now everything will be just fine down the road. Well, we aren't sure about the Dodgers bullpen, but then baseball isn't our concern, is it? Oh, but there is some chance the reorganized company might tank. Interest rates could rise, the Chinese could stop buying American goods, and an asteroid might hit our plant in Houston. Did you see the pictures from comet 67P/

⁶ See "Earthlink Reports Third Quarter 2014 Results," available at www.earthlink.net/about/press/pressrelease.faces?id=1048.

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Churyumov-Gerasimenko? Scary stuff. I'm not really sure about the difference between an asteroid and a comet.⁷

Email Disclaimers

While you are at it, drop the silly disclaimer at the end of your emails. When you started practicing law, you wrote letters. Did you ever see a letter with this at the end?

P.S. This message and any attachments are confidential and intended only for use by the addressee. If you have received it by mistake, thank you for notifying us immediately by telephone or by email, for deleting and not delivering it to anyone else. We shall not be liable for the message if altered, changed or falsified. This is not tax advice, even if it is. We mean it. In addition, the author reserves the right to assert that the views attributed to him are actually those of his evil twin.⁸

⁷ For more on 67P/Churyumov-Gerasimenko (the rubber ducky-shaped comet), visit <https://en.wikipedia.org/wiki/67P/Churyumov%E2%80%93Gerasimenko>.

⁸ This email footer is an exemplar created from emails received in 2015. The author thanks Los Angeles-based attorney **Ben H. Logan** of O'Melveny & Myers LLP for the evil-twin reference.

Footnotes

Finally, drop the footnotes. No one reads them. Judges hate them.

On Nov. 16, 2015, U.S. District Judge Beth Labson Freeman received a lot of favorable press when she entered an order striking the plaintiff's opposition to a motion to dismiss the third amended complaint in *Free Range Content v. Google*. The objectionable brief violated "the Court's Standing Order [regarding] Civil Cases with respect to the use of footnotes.... The Standing Order provides that footnotes 'are to be used sparingly and citations to textual matter shall not be contained in footnotes.'"⁹

As singer Don Henley observed, "the lawyers dwell on small details." You should clean up your details.¹⁰ **abi**

⁹ The order can be found at pdfserver.amlaw.com/ca/Orderstrikingopposition.pdf. The author wonders if Judge Freeman would be amused that her opinion is cited in a footnote. Meanwhile, ABI program junkie **Ron Maroko** from the U.S. Trustee's Office in Los Angeles says that he reads all of the Chapter 8 Humor footnotes (as you should). I hide some good stuff in the footnotes.

¹⁰ Don Henley, "End of the Innocence," available at www.lyricsfreak.com/d/don+henley/the+end+of+the+innocence_20042063.html.

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