

WOMAN CLAIMS HER PICTURE IS WORTH \$2 BILLION IN RIGHT OF PUBLICITY SUIT

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Could a promotional photograph of a restaurant scene that includes a customer with her hand partially obscuring her face be worth more than \$2 billion? That's what a lawsuit brought by the customer claims.

In an action pending in the U.S. District Court for the District of Colorado, plaintiff Leah Caldwell of Sacramento, California, who is representing herself, claims the restaurant chain Chipotle used the "iconic" image of her for advertising between 2006 and 2015. The lawsuit includes a claim for right of publicity under California's misappropriation statute, stemming from Ms. Caldwell's allegation that she is "readily identifiable and depicted in the photograph as a woman of color wearing a white, long-sleeved shirt, hair up, and large eyes looking directly at the camera." Ms. Caldwell says that she was approached by the photographer on the day of the photo shoot, which took place at a Chipotle restaurant in Denver, Colorado, in 2006, and was asked to sign a release, which she refused. According to the lawsuit, she subsequently saw the photograph displayed at various Chipotle restaurants in both California and Florida.

It used to be that right of publicity claims were the province of famous people, who would bring lawsuits when their image or likeness was used for commercial gain (i.e., for advertising or marketing purposes) without their consent. With the growth of the Internet and social media, ordinary folks have entered the right of publicity arena, using such claims when they feel their image was used commercially and without their consent. However, there are numerous exceptions and defenses to right of publicity claims, many of which depend on the context in and purpose for which an image is used. In some cases, there is a nuanced line between the unprotected use of a photo in an advertisement and the protected use of a photo in connection with editorial material.

There are a number of factors that retailers should consider when thinking about using someone's picture in promotional materials or on websites, including, for example: the purpose for which the image is being used; the degree to which the individual can be identified; and whether consent has been obtained to use the individual's photograph. Also, it is important to note that right of publicity claims are governed by state law, and each state is different. While some states have adopted

statutes governing right of publicity claims, in others such claims are determined by common law. Some jurisdictions even permit right of publicity claims on behalf of deceased people.

Independent of how Ms. Caldwell's lawsuit is resolved, it serves as a prudent reminder to retailers to account for potential right of publicity legal risks when using photographs of identifiable individuals in marketing and advertising materials.

MEET THE TEAM



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