

False Ad Suit Against Universal Is A Warning For Film Industry

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Is there a legal, cognizable claim for a consumer who was misled by a movie trailer? Perhaps. In June 2022, two plaintiffs filed a consumer protection lawsuit against Universal City Studios LLC in the U.S. District Court for the Central District of California concerning a movie they streamed titled "Yesterday" that is owned by Universal.[1]

In December, despite a host of arguments raised by Universal, the court allowed *Woulfe v. Universal* to proceed, raising the bigger question: If a cognizable, false advertising claim can exist for movie trailers, how will this affect the reasonable consumer standard?

Prior to streaming, the plaintiffs watched the movie trailer, which featured actress Ana De Armas. In the complaint, the plaintiffs alleged they were persuaded by the trailer, and de Armas' role in particular, to stream the movie. However, de Armas' character was cut entirely from the final version of "Yesterday," ironically because test audiences found her character distracting from the plot.

The plaintiffs alleged they would not have rented the movie had they known de Armas would not appear in the movie. The plaintiffs then sued Universal under a host of consumer protection violations, including violations of California's Unfair Competition Law, California's False Advertising Law and Maryland's Unfair and Deceptive Trade Practices Act.

In response, Universal moved to dismiss and filed an anti-strategic lawsuits against public participation strike motion. Universal argued that the trailer made no actionable misrepresentation as there was no express statement of de Armas' inclusion in the movie and, at best, a movie trailer provides only a vague representation of the movie.

The court disagreed, noting that advertisements can contain both express and implied claims, and those implied claims can mislead consumers. The court further articulated that while movie trailers may not provide express claims, the movie trailer may be viewed as a measurable claim implying a factual representation that actors would appear in a movie.



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Universal next argued that the plaintiffs failed to plausibly allege that a significant portion of consumers were misled by the movie trailer. The court was again unpersuaded, opining that "it is plausible that a consumer could interpret de Armas' appearance as more than de minimis."^[2]

Universal also argued that the plaintiffs suffered no damages because the price to stream "Yesterday" would have been \$3.99 regardless of de Armas' participation.

The plaintiffs countered they would not have purchased the product but for de Armas' participation, rendering the product valueless or at least less valuable than advertised.

At the pleading stage, the court held these assertions sufficient because the plaintiffs need only allege the purchase was made based on false price information.^[3]

Universal also raised a First Amendment defense, contending the movie trailer constitutes a creative, expressive work and that permitting liability under this claim interferes with editorial choice.

The plaintiffs countered that the speech is commercial because:

1. The speech is an advertisement.
2. The speech refers to a particular product.
3. The speaker is economically motivated.^[4]

The parties further argued over whether the commercial speech was inextricably intertwined with protected speech.^[5] The court held that:

Universal is correct that trailers involve some creativity and editorial discretion, but this creativity does not outweigh the commercial nature of the trailer.^[6]

Thus, the court determined that the plaintiffs sufficiently alleged that the trailer was false commercial speech, necessarily concluding that no protected speech was intertwined.^[7]

U.S. District Judge Stephen V. Wilson ultimately held the plaintiffs satisfied their burden for at least three of the claims, including the California False Advertising Law and California Unfair Competition Law claims.

The Woulfe case will now proceed to discovery, giving the plaintiffs an opportunity to certify California and Maryland classes and prove their claims that the movie studio deceived the audience by including de Armas in the "Yesterday" movie trailer.

Universal encouraged the court to consider that allowing this false advertising lawsuit to proceed would encourage a litany of lawsuits from dissatisfied viewers. The court apparently considered this position, limiting its ruling to "representations as to whether an actress or scene is in the movie, and nothing else."

Only time will tell, however, if this becomes the new trend where dissatisfied viewers are emboldened to file lawsuits against movie studios.^[8]

Indeed, commentators have already observed that allowing these types of suits to proceed beyond a motion to dismiss not only encourages further lawsuits, but will also force an increase in settlement

offers to avoid discovery costs.

The decision rings a louder warning bell across the entire consumer class landscape. Though the three laws at issue in this case provide distinct causes of action, each is grounded in the reasonable consumer standard, which takes a common sense approach regarding what an ordinary customer may reasonably expect based on the advertisement.[9]

The reasonable consumer standard often determines culpability in false advertising class action lawsuits and is heavily dependent on facts to determine reasonableness.

Although Judge Wilson found that the particular facts of the case warranted discovery, namely including an actor in the trailer not included in the final movie product, other courts have found similar claims to be untenable as a matter of law at the pleadings stage.

In 2013, a Michigan appellate court dismissed a similar complaint in *Deming v. CH Novi LLC*, where a moviegoer alleged the film preview was so inconsistent with the film they were deceived under the Michigan Consumer Protection Act.[10] But, the court in that case found that every scene displayed in the preview also appeared in the film.[11]

Will a litany of lawsuits from dissatisfied moviegoers ensue? We shall see. But, whether reasonable consumer-based claims may be dismissed prior to discovery remains a crucial issue in false advertising, and similar consumer protection claim jurisprudence.

For now, the issue remains not only case-dependent, but also court-dependent. California Attorney General Rob Bonta recently filed an amicus brief in *Souter v. Edgewell Personal Care Co.* on Jan. 30 arguing this very issue — deceptive advertising claims pose fact questions that are inappropriate for resolution at the motion to dismiss stage.[12]

However, courts may determine that the advertisement would not have misled a reasonable consumer as a matter of law, especially when the claims are based on unreasonable interpretations of the advertisement.[13]

It remains to be seen how this case will proceed, but because at least one federal court has ruled that movie studios who deceive an audience with misleading movie trailers may be sued for false advertising, movie studios and others using commercials, teasers or movie trailers conveying underlying artistic work should consider the legal implications and risk of advertisement-related products, likely to be considered commercial speech, that may also subject them to false advertising lawsuits and/or regulatory scrutiny.

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[1] *Woulfe et al v. Universal City Studios LLC et al.*, 22-cv-00459, ECF No. 83 (C.D. Cal. Dec. 20, 2022).

[2] *Id.* *13.

[3] *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1106-07 (9th Cir. 2013).

[4] *Hunt v. City of L.A.*, 638 F.3d 703, 715 (9th Cir. 2011).

[5] *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1119 (9th Cir. 2021).

[6] *Woulfe* at *29.

[7] *Id.* *28-31.

[8] *Id.* *14.

[9] *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008).

[10] *Deming v. CH Novi, L.L.C.*, 2013 WL 5629814, *1 (Mich. Ct. App. Oct. 15, 2013).

[11] *Id.*

[12] Brief for the State of California as Amicus Curiae Supporting Appellant, *Souter v. Edgewell Personal Care Company, et al.*, 22-55898 (No. 23).

[13] *Chufen Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492 (2d Cir. 2020) (finding that a court may determine as a matter of law that an allegedly deceptive advertisement would not have misled a reasonable consumer); *Bell v. Publix Super Markets, Inc.*, 982 F.3d 468, 477 (7th Cir. 2020) ("[W]here plaintiffs base deceptive advertising claims on unreasonable or fanciful interpretations of labels or other advertising, dismissal on the pleadings may well be justified.").