

**RUSSELL KEIMER, Plaintiff and Appellant, v. BUENA VISTA BOOKS, INC., et al., Defendants Respondents.**

**No. A084888.**

**COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT,  
DIVISION THREE**

*75 Cal. App. 4th 1220; 89 Cal. Rptr. 2d 781; 1999 Cal. App. LEXIS 947; 28 Media L. Rep. 1050; 99 Cal. Daily Op. Service 8672; 99 Daily Journal DAR 11015*

**October 27, 1999, Decided**

**SUBSEQUENT HISTORY:**

[\*\*\*1]

Review Denied March 1, 2000, Reported at: *2000 Cal. LEXIS 1740*.

**PRIOR HISTORY:**

Superior Court of the City and County of San Francisco. San Francisco County Super. Ct. No. 994076. David A. Garcia, Trial Judge.

**DISPOSITION:**

Our Supreme Court has recently reaffirmed the viability and strength of the Unfair Trade Practices Act, and has noted that each time the Legislature has amended the Act, "... it has done so only to *expand* its scope, never to narrow it." (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal. 4th 553, 570 [71 Cal. Rptr. 2d 731, 950 P.2d 1086], italics in original.) Given California's legitimate and broad interest in protecting its populace from the dissemination of false or misleading advertising, we hold that appellant should be permitted to proceed with his action seeking remedies under the Unfair Trade Practices Act for respondents' allegedly false advertising statements. The entry of judgment is reversed and the matter is remanded for further proceedings. Appellant shall recover his costs on appeal.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Appeal by plaintiff of judgment of the San Francisco County Superior Court (California) in suit contending defendant publishers' advertisements on book and videotape covers violated

California's false advertising and unfair business practices laws.

**OVERVIEW:** Plaintiff alleged that defendants' advertisements on book and magazine covers, trumpeting falsely inflated investment returns by investment club, violated state's false advertising and unfair business practice laws. Defendants demurred, claiming that plaintiff could not state a cause of action because statements to which he objected were noncommercial speech protected by U.S. Const. amend. I and state's constitutional free speech provisions. Trial court sustained demurrers without leave to amend. The court reversed, holding that the complaint stated causes of action for false advertising and unfair business practice and that the advertising, alleged to be false, was commercial speech which was not, in the context presented, protected by U.S. Const. amend. I. The court reiterated state's legitimate right to protect the public by regulating dissemination of false or misleading advertising.

**OUTCOME:** Judgment reversed and remanded; complaint stated causes of action for false advertising and unfair business practice, and defendants' advertising, which was alleged to be false, was commercial speech and was not constitutionally protected.

**CORE TERMS:** commercial speech, advertising, videotape, First Amendment, demurrer, misleading, advertisement, false advertising, Unfair Trade Practices Act, noncommercial speech, commercial transaction, judicially noticed, free speech, club, deceptive, misleading advertising, investment return, pamphlets, mailing, unfair business practice, cause of action,

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untrue, constitutional protection, regulation, sustaining, newsletter, consumer, prong, exercise of reasonable care, causes of action

#### LexisNexis(TM) HEADNOTES - Core Concepts

##### *Civil Procedure > Appeals > Standards of Review > De Novo Review*

[HN1] The reviewing court reviews de novo the trial court's entry of judgment from a demurrer sustained without leave to amend. In so doing, the reviewing court assumes the truth of all properly pleaded facts, and examines them to determine whether they state a cause of action on any available legal theory. If the reviewing court determines that a cause of action has been stated, the reviewing court must find that the trial court abused its discretion in sustaining the demurrer without leave to amend.

##### *Torts > Business & Employment Torts > Unfair Business Practices*

[HN2] See *Cal. Bus. & Prof. Code* § 17200.

##### *Torts > Business & Employment Torts > Unfair Business Practices*

[HN3] See *Cal. Bus. & Prof. Code* § 17500.

##### *Constitutional Law > Fundamental Freedoms > Freedom of Speech > Commercial Speech*

[HN4] Commercial speech, characterized as speech that does no more than propose a commercial transaction, is entitled to a degree of U.S. Const. amend. I protection, but the protection is limited; commercial speech can be regulated and restricted in a manner that can be justified by legitimate state interests.

##### *Constitutional Law > Fundamental Freedoms > Freedom of Speech > Commercial Speech*

[HN5] Provably false commercial speech is entitled to no U.S. Const. amend. I protection at all.

##### *Constitutional Law > Fundamental Freedoms > Freedom of Speech > Commercial Speech*

[HN6] Some speech cannot be characterized as core commercial speech, because it serves some purpose beyond the pure proposition of a commercial transaction.

##### *Constitutional Law > Fundamental Freedoms > Freedom of Speech > Commercial Speech*

[HN7] By holding that certain statements constitute commercial speech, the court does not strip them of all free speech protections. The court does, however, limit those protections by allowing rational and carefully crafted restrictions.

##### *Constitutional Law > Fundamental Freedoms > Freedom of Speech > Commercial Speech*

[HN8] Clearly, the State of California has a fervent interest in protecting the public from advertising which is deceptive or is likely to deceive and in insuring that the stream of commercial information flows cleanly as well as freely. This being the case, the court determines whether a regulation directly advances the government's interest and whether it is reasonably tailored to serve that interest. Obviously, legislation designed specifically to protect consumers from deceptive or misleading advertising directly advances the state's interest in preventing such abuses.

##### *Torts > Business & Employment Torts > Unfair Business Practices*

[HN9] The Unfair Trade Practices Act imposes liability upon an advertiser for untrue or misleading statements which the advertiser, in the exercise of reasonable care, should have known were false. *Cal. Bus. & Prof. Code* § 17500.

#### COUNSEL:

Bayer, August & Belote, Andrew A. August, Timothy [\*\*\*2] M. Flaherty; Lerman & Lerman and Jeffrey H. Lerman for Plaintiff and Appellant.

Carr, Mussman & Harvey, Timothy E. Carr and Ian K. Boyd for Defendants and Respondents Buena Vista Books, Inc., and Buena Vista Publishing Group, Inc.

Keesal, Young & Logan, Philip A. McLeod, Devin A. Donohue; Seidler & McErlean and William M. McErlean for Defendant and Respondent Central Picture Entertainment, Inc.

Weil, Gotshal & Manages and Jared Bobrow for the Association of American Publishers, Inc., as Amicus Curiae on behalf of Defendants and Respondents.

#### JUDGES:

Opinion by Walker, J., with McGuinness, P. J., and Parrilli, J., concurring.

#### OPINIONBY:

WALKER

#### OPINION:

[\*1223] [\*\*782]

WALKER, J.

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In this appeal we decide a narrow question: Does the First Amendment protect advertising statements made on book and videotape covers which reiterate verifiably false factual statements contained in the books and videotape themselves? Appellant Russell Keimer sued on behalf of the general public, contending that publishers' advertisements on those covers, trumpeting falsely inflated investment returns by the now infamous Beardstown Ladies Investment Club, violated California's false advertising [\*\*\*3] and unfair business practice laws. n1 The publishers/producers of the books and videotape, respondents on appeal, n2 demurred to Keimer's complaint, [\*\*783] claiming that he could not state a cause of action because the statements to which he objected were noncommercial speech protected by the First Amendment of the United States Constitution and California's constitutional free speech provisions. The trial court sustained the demurrers without leave to amend; Keimer appeals.

n1 *Business and Professions Code sections 17200 et seq. and 17500 et seq.* Unless otherwise specified, all statutory references will be to this code.

n2 In his complaint, Keimer sued Hyperion Press, Ltd., The Disney Publishing Group, Inc., Seth Godin Productions, Inc., and Central Picture Entertainment, Inc. He later learned that Hyperion Press was doing business as Buena Vista Books, Inc., and that The Disney Publishing Group had changed its name to Buena Vista Publishing Group, Inc. Because the Buena Vista entities are subsidiaries or affiliates of The Walt Disney Company, and Buena Vista has taken the lead in pleading in the trial court and here, both sides often refer to all respondents collectively as Disney, we shall do likewise.

[\*\*4]

We hold that the complaint stated causes of action for false advertising and unfair business practice and that the advertising, alleged in the complaint to be false, was commercial speech which was not, in the context presented, protected by the First Amendment. In so holding we reiterate California's legitimate right to protect the public by regulating the dissemination of false or misleading advertising, and again recognize the broad sweep of the false advertising and unfair business practice provisions of the Business and Professions Code. We reverse.

#### I. FACTS n3

n3 The facts are gleaned from the allegations of the complaint, which we accept as true for purposes of reviewing the trial court's ruling on demurrer (*Day v. AT & T Corp.* (1998) 63 Cal. App. 4th 325, 335 [74 Cal. Rptr. 2d 55]) and from those matters properly judicially noticed and conceded by both sides.

In 1983 a group of retired women from Beardstown, Illinois, formed a financial investment club which came to national [\*\*\*5] attention in 1991 because [\*1224] of its claimed 10-year-average annual investment return of 23.4 percent, a return higher than the Standard and Poors Index, and 3 times higher than that obtained by mutual funds and professional money managers during the same period. News of the women who became known as "The Beardstown Ladies" and their financial investment savvy spread to television, then to a videotape produced by respondent Central Picture Entertainment, Inc., entitled *Cookin' Up Profits on Wall Street--A Guide to Common Sense Investing*. Eventually respondent Seth Godin Productions acquired the rights to The Beardstown Ladies' story and developed a ghost-written book for them, which it sold to Hyperion Press, the Disney-owned publisher. Disney titled the book, *The Beardstown Ladies' Common-Sense Investment Guide --How We Beat the Stock Market--and How You Can, Too* which was first published in hardcover, and later in paperback. Four other books, entitled *The Beardstown Ladies' Stitch-in-Time Guide to Growing Your Nest Egg*; *The Beardstown Ladies' Guide to Smart Spending for Big Savings*; *The Beardstown Ladies' Little Book of Investment Wisdom*; *The Beardstown Ladies' Pocketbook [\*\*\*6] Guide to Picking Stocks*; and a video entitled *The Beardstown Ladies--Cookin' Up Profits on Wall Street--A Guide to Common Sense Investing* followed. Displayed prominently on the front and back covers and the packaging of these materials there often appeared statements such as "23.4 Annual Return"; "59.5 returns in 1991"; "find [the Beardstown Ladies'] secret recipe for success"; and "learn how to outperform mutual funds and professional money managers 3 to 1."

Keimer's complaint alleged that these statements, extolling The Beardstown Ladies' annual rate of return and investment success record as compared with investment industry professionals, were used by respondents as the primary basis for advertising and marketing the books and videotape to the general public. The complaint further alleged that these statements were false and misleading, because the verifiable fact was that the investment club's actual average rate of return from 1984 to 1994 was 9.1 percent as opposed to the advertised 23.4 percent, and did not outperform mutual funds and investment professionals by a ratio of three to

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one. As such, Keimer claimed that Disney had engaged in false advertising and unfair business [\*\*\*7] [\*\*784] practices because it knew or should have known that the advertising claims were false, misleading and/or likely to deceive the public.

The complaint's allegations were supplemented by the books and videotape themselves, of which Disney asked the trial court to take judicial notice, a request which received no opposition from Keimer. n4 The judicially noticed materials substantiated the complaint's allegations regarding the text of [\*1225] statements made on the covers of the books and videotape. They also supported Disney's claim on demurrer that the advertising statements made on those covers were contained in the text of the books themselves. Finally, they bolstered Keimer's allegation that Disney "knew, or by the exercise of reasonable care should have known, that the advertisements were untrue or misleading," because the Library of Congress page of the first best seller's paperback reprint n5 contained the following disclaimer: "NOTE: Investment clubs commonly compute their annual 'return' by calculating the increase in their total club balance over a period of time. Since this increase includes the dues that the members pay regularly, this 'return' may be [\*\*\*8] different from the return that might be calculated for a mutual fund or a bank. Since the regular contributions are an important part of the club philosophy, the Ladies' returns described in this book are based on this common calculation." The parties agree that this disclaimer was an admission that the trumpeted rates of return had not been calculated in the manner customary to banks and mutual funds. And, as was subsequently revealed, the investment club's rates of return were far below the 23.4 percent proclaimed in the advertisement. The judicially noticed materials also reveal that this disclaimer was not repeated in any of the subsequent publications, and that the inflated investment return claims continued to be used to advertise the club's books. For these alleged wrongs, the complaint sought an injunction barring Disney from continuing to use the false statements in advertising and requiring it to publish retractions or corrections in future publications. The complaint also sought disgorgement of Disney's profits from the sale of the books and videotape.

n4 Although the record does not indicate the trial court's ruling on the judicial notice request, it appears clear that it did take notice of the books and videotapes. Had it not, it could not have adequately evaluated Disney's ground for demurrer, which it sustained. To the extent that the request for judicial notice asked the trial court to consider the books for the existence of certain statements made in their pages, and not for

determining whether those statements were true or false, judicial notice was appropriate. (*Evid. Code*, § 452, subd. (h).) [\*\*\*9]

n5 The Beardstown Ladies' Common-Sense Investment Guide--How We Beat the Stock Market--and How You Can, Too.

Respondents demurred to the complaint on the ground that it failed to state a cause of action. They maintained that the allegedly false advertising statements on the book and videotape covers were taken directly from information contained in the materials themselves. As such, they contended that the statements were absolutely protected by the First Amendment and California's constitutional right to freedom of speech. The trial court sustained the demurrers without leave to amend and entered judgment for respondents. This appeal followed.

## II. STANDARD OF REVIEW

[HN1] We review de novo the trial court's entry of judgment from a demurrer sustained without leave to amend. In so doing, we assume the truth [\*1226] of all properly pleaded facts, and examine them to determine whether they state a cause of action on any available legal theory. If we determine that a cause of action has been [\*\*\*10] stated, we must find that the trial court abused its discretion in sustaining the demurrer without leave to amend. (*Day v. [\*\*785] AT & T Corp.*, *supra*, 63 Cal. App. 4th at p. 335.)

## III. DISCUSSION

We first consider California's Unfair Trade Practices Act n6 and determine that appellant's complaint stated viable causes of action for unfair business practice under section 17200 et seq. and false advertising under section 17500 et seq. We next consider the nature of the statements alleged in the complaint to be false and hold that they are commercial speech. Because the state has a legitimate interest in regulating false commercial speech, we conclude that the statements, as alleged, are not entitled to First Amendment protection. Finally, we briefly address Disney's proposed analytical approach, which we reject.

n6 See footnote 1, *ante*.

### A. The Unfair Trade Practices Act

Keimer's complaint alleged that Disney violated the Unfair Trade Practices Act by disseminating [\*\*\*11] advertisements for The Beardstown Ladies' books and videotape which it knew were false and misleading, and

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which it should have known in the exercise of reasonable care were false and misleading. As such, it was alleged that Disney had violated section 17500's false advertising law, and section 17200's unfair business practice provisions. n7 Disney does not contend that the complaint's allegations fail to state prima facie causes of action under these provisions. Rather, it maintains that free speech protections shield the statements from California's regulatory [\*1227] powers. As implicitly conceded by Disney, the complaint does contain facts sufficient to state causes of action under the Unfair Trade Practices Act.

n7 [HN2] Section 17200 provides as follows: "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

[HN3] Section 17500 states in relevant part that: "It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading ...."

[\*\*\*12]

#### B. *The Constitutional Right to Freedom of Speech*

In sustaining Disney's demurrer on the ground that the complaint failed to state a cause of action, the trial court accepted Disney's argument that the advertising statements were entitled to First Amendment protection because they repeated statements made in the books and

videotape themselves. In making this claim, Disney characterized the statements in question as noncommercial speech, entitled to full free speech protection. Appellant maintains that the advertising statements made on the book jackets must be viewed as commercial speech which, when false or misleading, is entitled to no First Amendment protection at all and may be entirely prohibited.

#### C. *The Commercial Speech Doctrine*

The commercial speech doctrine was first enunciated by the United States Supreme Court in *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748 [96 S. Ct. 1817, 48 L. Ed. 2d 346] (*Virginia State*). There, the court acknowledged that [HN4] commercial speech, characterized as [\*\*786] "speech that does 'no more than propose [\*\*\*13] a commercial transaction'" was entitled to a degree of First Amendment protection, but that the protection was limited: commercial speech could be regulated and restricted in a manner that could be justified by legitimate state interests. (425 U.S. at pp. 770-772, & fn. 24 [96 S. Ct. at pp. 1829-1831].) In explaining the rationale for the limitation, the court pointed out some "commonsense differences" between commercial speech and other varieties, which justified a different degree of protection: "The truth of commercial speech, for example, may be more easily verifiable by its disseminator ... in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else," and because advertising is indispensable in the commercial world it may be more durable than other types of speech, as "there is little likelihood of its being chilled by proper regulation and foregone entirely." (*Id.* at pp. 271-272, fn. 24 [96 S. Ct. at p. 1830].) These differences, the court reasoned, justified less tolerance for inaccurate statements. They also rendered appropriate those [\*\*\*14] restrictions designed to prevent commercial speech from being deceptive, such as by requiring the message to include any necessary warnings and disclaimers. (*Ibid.*)

Since deciding *Virginia State*, the United States Supreme Court has articulated an additional reason for permitting appropriate governmental regulation of commercial speech: "To require a parity of constitutional protection [\*1228] for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech." (*Ohralik v. Ohio State Bar Assn.* (1978) 436 U.S. 447, 456 [98 S. Ct. 1912, 1918, 56 L. Ed. 2d 444].) Finally, the Supreme Court in *Virginia State* stated, in no uncertain terms, that [HN5] provably false commercial speech was entitled to *no First Amendment protection at*

