



Podcast Transcript

AD Nauseam: Movie Pass – I Am Big. It's the Pictures that Got Small.

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Thank you for joining us for another episode of BakerHosts AD Nauseam, a podcast series focusing on new and trending advertising issues with an emphasis on the FTC and the NAD. I'm Randall Rubenking, and you're listening to BakerHosts.

We are once again joined by Amy Mudge and Daniel Kaufman, two partners from BakerHostetler's Advertising, Marketing, and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives. On today's episode of AD Nauseam, Amy and Daniel talk about the FTC's case against MoviePass and a recent HBO documentary called MoviePass, MovieCrash. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel.

Mudge: Welcome back to AD Nauseam. And we have used this phrase before, a very special AD Nauseam before, but I'm going to reserve that for when it really, truly applies and today is that day. It is a very special AD Nauseam episode. And it may have happened later in life than he had hoped, but my delightful, personable, charming co-host has finally made his cinematic debut in a recent HBO documentary called MoviePass, MovieCrash. The documentary explores the rise and the demise of MoviePass, that highly memorable service that promised consumers one movie a day at any theater for a low price of \$10 per month.

Kaufman: So, Amy, I have to say thank you, first. And close-ups on a movie screen, very scary after a certain age, but not going to oversell it. But after the documentary...

Mudge: You were gorgeous. You were the star. You carried the whole thing, Daniel. I, it was mesmerizing.

Kaufman: I could see every year of my age on that screen for about the 20, 25 seconds that I'm on it. So, let's not overstate it. And the most disappointing thing, though, apparently that was not enough to get me an IMDb credit. So, without an IMDb credit, does it really count? I ask you.

Mudge: I am going to find out who we apply, who we protest to. I'm going to work on that, Daniel. That is on my to-do list. You absolutely deserve all of your glory. I mean, the documentary wouldn't have been what it was without reference to the FTC investigation of these folks.

Kaufman: Which is more of a footnote in the documentary, but an interesting footnote. Very interesting footnote that has all sorts of implications for the work that we do.

Mudge: And of course, it relates to ROSCA and subscriptions and stuff we do talk about a lot. So, before we really get into the substance, I just got to know, how did this come to be? How did you end up, I'm going to call it starring. It is just, who is to say, you know? How did you end up starring in this documentary? Set aside your, oh, I hate my pores. What was it like seeing yourself on the big screen?

Kaufman: It is hard to talk about that without talking about my pores, but let's start from the beginning. One of the interesting things about working for the FTC is the breadth of work that they do covering all sorts of different subject areas. So, really interesting cases in all sorts of areas. And every once in a while, documentary filmmakers do get interested in some cases that the FTC has worked on, whether directly or indirectly. So, a couple of years ago I got a call from these documentary producers that were looking into MoviePass. I actually, they reached out to me because my name is on the press release at the FTC announcing it. I was the acting director.

Mudge: You were, yeah. You were acting director at the time when that, yeah.

Kaufman: Yeah. So, I talked to them, talked to the firm. I was like, this sounds like a lot of fun, love to do it. They seemed legit. Quite legit, actually. And I headed down to

New York for a couple hours of interviewing. It was kind of in the middle of COVID. So, there are COVID precautions, all that. Sat in a conference room. It was lovely. They were very nice, good to get along with. But it was just me and the film crew talking about, asking a lot of questions, and having me give answers. And then I did, I remember this very well, afterwards, I was downtown. I went to a lovely outdoor cafe in SoHo, and I got a really delicious and beautiful French omelet. I remember it very well. I don't think I've eaten French omelets very often in my life and they're just delightful and lovely. And I guess that is not really the important focus.

And then, fast forward. I hadn't read anything about the documentary for almost two years. I finally heard from them, and then I found out that they were airing it at a theater at Lincoln Center a few weeks ago. So, went there with my sister-in-law and it was really cool. The stars of the documentary were there. They talked on the stage about the history of MoviePass, what happened, and then it started airing on HBO just recently. So, from beginning to end, it was an interesting experience. Lots of fun, and it is very odd to see yourself on the screen.

Mudge: Okay. So, and now it is pretty much all downhill from here for you.

Kaufman: It is all down; my 15 seconds are over. Thank you, Andy Warhol.

Mudge: I mean, I've been in firm life my entire career and I will tell you, nobody's ever called me and invited me to be on a big screen documentary. I actually can't quite believe you were invited to a premiere at Lincoln Center and somehow chose a relative over me as your fabulous red-carpet date. But we will move on in the importance of keeping the podcast civil.

Kaufman: I had a lovely time with Carrie. But I do want to flag something interesting. When they interviewed me, being the FTC nerd that I am, I didn't just talk about the case, but I also did explain to the filmmakers why the *MoviePass* case is actually a really important case for us ad law folks. It, of course, stayed on the cutting room floor. They could care less about that. But *Movie* case is a really significant case for FTC practitioners, and it's become even shorthand that we now use *MoviePass* to describe a certain type of ROSCA case.

Mudge: Yeah, the case was certainly significant. Above and beyond anything related to subscriptions, it was a very expansive and novel interpretation of what ROSCA, or the Restore Online Shoppers' Confidence Act, was supposed to cover, which was really focused on subscriptions. And I know the case was basically called fat ROSCA. And why was that the case? No, Daniel, it was not a reference to your appearance in the movie. I digress, you looked amazing. You looked very upstanding in your suit in the conference room. But as far as the disclosures, the subscription disclosures, the signing up for the program, did you know you were going to get charged every month? The disclosures were fine. In fact, they were beautiful. They were delightful. The issue that the FTC looked at and used ROSCA to look at, were the underlying representations about the product itself that were challenged, ergo, fat ROSCA.

Kaufman: Yeah. I mean, it is interesting. When you look at ROSCA and the cases the FTC brought for years, they were just focused on were the disclosures good, did you disclose adequately the monthly information and all that. And then all of a sudden at the FTC, after *AMG*, there was a real big focus on we must closely look at every single statute we've been using and figure out, are there more clever, broad interpretations we can take of those existing statutes? But the *AMG* case had an enormous impact on the agency. You've got, for decades, you're using 13B to get money. The court says, yep, can't use 13B for that anymore. So, ROSCA, of course, was one of the statutes that was looked at closely to see, is there another way we can expand the scope of ROSCA? And not just use skinny ROSCA. But expand it to go after, not just the negative option feature aspects, but what they're saying about the product. And there is ambiguity. There is sufficient ambiguity according to the FTC, and according to me at the time, about the language in ROSCA and the ability to go after not just those disclosures about how often you pay and how much, but to the underlying representations about the product.

Mudge: Well, and why that is so important is because ROSCA has built-in penalties. You violate the statute, you can get money under ROSCA as opposed to the cut off, essentially, that *AMG* did to really focus on consumer redress. And they're big penalties, right? They're like in the \$50,000 per violation.

Kaufman: Penalties endure redress also. So, redress can be on the table as well for ROSCA cases and very often the FTC is seeking to get redress instead of penalties in ROSCA.

Mudge: Or you could theoretically get both, right?

Kaufman: You can theoretically get both.

Mudge: Depending on how fat you wanted to go in a day.

Kaufman: Exactly.

Mudge: Now, we've seen this, and I don't know, it seems like ROSCA-shaming to call it fat ROSCA. But I'm going to continue there. So, we've seen this...

Kaufman: I've got, we're going to get in trouble for this somehow, I can tell.

Mudge: We got to get right here, Daniel. But we've seen this, let's call it expansive ROSCA.

Kaufman: Okay.

Mudge: We've seen this expansive view of ROSCA pop up in a few other cases. I think that FTC case against cash advance provider, FloatMe, had a fat ROSCA count that focused on material terms about the merits that disclosures about what was happening when they advanced you the cash were not adequately disclosed. And we just, we got to be clear here, this is a huge strategic tool for the Commission. If you're focusing ROSCA not just about the requirement to disclose

key information about the negative option feature, and of course, allow an easy means of cancellation. But if you take it out of the disclosures about negative options and focus it on disclosures generally about a product that you're selling on an ongoing basis, I mean, that is using a general civil penalty statute to challenge almost any claims that are made by a product company using a subscription. So, that is a big deal.

Kaufman: Well, and it is certainly meaningful that the FTC's new proposed negative option rule doubles down and basically would require and allow this broad interpretation for all negative options, and expressly puts language in that proposed rule on that. More to be seen on where that rule goes and what happens. But of course, to be clear, no court has yet evaluated whether this expansive view of ROSCA is a valid reading of the statute. So, there is still that, I guess.

Mudge: Well, and this was one, certainly when we, now we have a full Commission again, although I do miss the earlier two republican Commissioners that would publish very colorful dissents in many of these cases. And in the *MoviePass* case, former Commissioner Noah Phillips really had issues with this. And I think he was on The Hill when ROSCA was passed, and so he was there when they made this and, in his mind, really understood what was intended by ROSCA. And it was intended to be a focus on cabining abuses in the subscription sign-up model. It was not meant to be used to go after subscription companies for anything and everything. And I think his dissent was very clear in that. Although, the other republican Commissioner at the time, Christine Wilson, she did not dissent. And she, like you said, she said, I think there is enough in ROSCA that talks about making sure there is disclosure of material information, period, that she thought gave some more leeway to read it more expansively.

Kaufman: It is interesting, Amy. This question of statutory interpretation and the general philosophy is that, if the language of the statute is clear, that is what you look at. What does the language say? And if it is ambiguous, then you can look at the intent and purpose and goal of the legislation. But according to Christine Wilson's statement, the language, when you look at the language in isolation, allowed the FTC to bring this kind of case. So, very interesting to see how courts may interpret that going forward. But, Amy, I know you, as I, have been following the FTC for quite a long period of time. Is there anything you have ever come across during your time that you think would make, actually, an interesting documentary?

Mudge: Well, that is an easy one, Daniel. That is any case in which I was involved, so perhaps somebody might call me and put me on an HBO Max documentary. Although, since typically my role is, as your role is now, is defending folks in these things, query whether we'd actually be allowed to say anything without blowing up the attorney-client privilege.

But no, I think there is a lot of good, there are cases that involve celebrities, you know, that are semi-celebrities. I think any of those would be fodder. Maybe some of the old kids advertising cases. I mean, frankly, I think a documentary about the FTC itself would be interesting. And dating back to the days when

there was very aggressive attempts to regulate kids advertisers and the FTC was called the national nanny. And really put back in its place to do what it was supposed to do. And I think we see some of that much more aggressive posture, not just in the *MoviePass* case, but more generally. So, I think looking at the history of that and seeing if maybe the FTC is repeating some of that now would be really interesting.

Kaufman: Interesting. So, from my perspective, one of the other fun cases, or interesting cases, I should say, I got to work on. One of many people that got to work on this at the FTC, Kevin Trudeau, the former, I think, self-proclaimed king of the infomercials. The FTC's brought a number of cases against him over the years. Lots of colorful history and an interesting story there to be told as well.

Mudge: And you would get invited to come back again. So alright, I'm...

Kaufman: I would hope so. But again, there are many FTC people that have worked on that case over the decades.

Mudge: You might be insufferable if you were in a second documentary. I don't, and I don't know if I can, if we can live with you then. But, ladies and gentlemen, Daniel Kaufman will be signing autographs at the ANA law conference and the NAD law conference.

Kaufman: And I do want to say, look, it is a really interesting story. I think the documentary folks put together a really interesting story about the company, its origins, what happens, how the changes happen. I thought it was a really compelling 90 minutes, I thought.

Mudge: I did too, Daniel. I saw it this weekend. I'm giving you a lot of grief about this. It was an absolutely fantastic watch. It is a crisp hour and a half, did not suffer from a lack of editing. So, look, we encourage everyone to take a look at *MoviePass*, *MovieCrash*. It is now streaming on HBO Max. In uncharacteristic form, we will not end with to-dos.

Kaufman: Except to watch the movie, gosh.

Mudge: Watch the movie. It is the single, it is a one-and-done to-do. But Daniel is happy to talk about his experiences and we, of course, are always happy to talk about ROSCA. You can catch our prior AD Nauseam episode that focuses on subscriptions. And certainly, we'll be back talking to you about that more when that FTC Negative Option Rule gets finalized because that is what, that will be a good time to take a look at this again. But, thank you so much for joining us for another issue, addition of AD Nauseam, and we will see you soon.

Rubenking Thank you, Amy and Daniel. If you have any questions for Amy or Daniel, their contact information is in the show notes. For more information on the latest developments in ad law, visit our ADventures in Law blog at www.adventures-in-law.com, and check out all AD Nauseam episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.

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