

## SURVEY EVIDENCE IN FALSE ADVERTISING CASES

SARAH BUTLER<sup>1</sup>

Surveys can provide evidence in a false advertising and unfair competition case that a particular claim or product packaging creates a misleading impression and that the claim or packaging has an impact on consumer purchasing decisions. While it can be particularly effective and is in many circumstances necessary, survey evidence is always challenged and there is no single manner in which a false advertising survey must be conducted. This article will briefly outline the steps for designing, conducting and presenting survey evidence in false and misleading advertising cases. The discussion will focus on what issues are likely to be raised in a *Daubert* challenge and what elements of survey evidence are likely to be compelling and persuasive to the courts and juries.

### Why Survey Evidence?

False and misleading advertising cases are typically brought under 43(a) of the Lanham Act which basically defines a false claim as that which uses any word, term, name or symbol in commerce to convey a false or misleading description of fact which is likely to cause confusion.

Generally, courts agree that the following evidence is needed to support a claim of false or misleading advertising and unfair competition. First, Plaintiffs must demonstrate that the advertising or claim at issue contains a false or misleading statement or inference about its own or a competitor's product. Second, Plaintiffs must prove that the claim at issue has actually deceived or is likely to deceive a substantial portion of the intended audience. Third, there must be evidence that the deception is material and is likely to influence purchasing decisions. Finally, Plaintiffs must show that the deception has injured or is likely to cause lost sales or loss of good will for the complainant.

While the degree of truth or falsity of a particular claim (for example, the meaning of "raised without antibiotics",<sup>2</sup> the equivalency of nutritional supplements,<sup>3</sup> or the manner in which "steam" is used to dry clothing<sup>4</sup>) may also be at issue, a key element in a false advertising claim is how the average or "reasonable" consumer views, perceives and incorporates the claim into their potential purchasing decision. In most circumstances, no data exist to demonstrate the impact of the claim on consumers and it is for this reason survey evidence becomes necessary.

Before reviewing the specific challenges in designing and submitting into evidence a survey for a false advertising claim, it is useful to restate the general principles of acceptable survey research. Survey experts generally rely on two treatises to guide their research designs, the Manual for Complex Litigation (3<sup>rd</sup> Edition) and the chapter on survey research in the Reference Guide on Scientific Evidence.<sup>5</sup> Aside from ensuring that the survey is designed and implemented by trained and qualified individuals, there are a number of additional requirements. These include:

- The definition and selection of the relevant population;

- The design of the questionnaire;
- The interviewing procedures;
- The recording and interpretation of the data.

These are broad standards and within each there is considerable scope for debate as to what the appropriate method for testing should have been and whether the scientific and legal standards have been met. Unlike consumer preference or other market research type studies which typically seek to draw on all of a consumer's experiences and thoughts, false advertising studies need to isolate the *causal* impact of a particular stimulus. Thus, while marketers may be interested in which product is preferred or which product ad is most compelling, the survey expert is primarily interested in whether a particular aspect of a claim provided a specific impression and whether that impression was material to the consumer. Therefore, for false advertising surveys, *Daubert* challenges often focus on how consumer impressions have been elicited and how the causal link between those impressions and the advertising at issue has been demonstrated.

### **The *Daubert* Challenge – the particular issues in a false ad case.**

Once commonly used survey method for false advertising cases involves recruiting current, past or potential consumers in a shopping mall.<sup>6</sup> Appropriate consumers (i.e., those that have been or are likely to be customers for the product at issue) are brought back to a viewing room and asked to look at a product or product advertising. Generally, consumers are then asked to provide their “top-of-mind” impressions of the product or advertising. A possible question format is something like, “Other than trying to sell you product X, what message or messages does this advertisement convey to you?” This question format is generally termed a “communication question”, attempting to see what messages or impressions were communicated by the advertisement or product. This initial question can be followed by additional questions about comprehension. Comprehension questions are typically more focused and ask that the consumer consider a particular phrase or aspect of the advertising or product.<sup>7</sup> In some studies, the communication question is used as a filter to identify which respondents should be asked more targeted comprehension questions. In other cases, both question formats are asked of all respondents. Depending on the evidence needed,<sup>8</sup> a materiality question is included which typically asks a respondent whether or not the advertising would have any impact on the potential purchase of the product. Once the responses are gathered, the survey expert typically does some type of coding or counting exercise to determine which answers indicate a consumer was misled.

Surveys used in false advertising cases are often challenged for the manner in which the communication, and more often, the comprehension questions have been asked. Asking consumers about the meaning of advertising and relying on participants to offer fully articulated, intelligible answers can be difficult, but survey experts need to be cautious and avoid asking questions that can be characterized as leading or as biased. A close-ended question, that is a question focusing consumers on a particular aspect of the advertising with predetermined answer selections, is often criticized. Close-ended questions are often viewed as biased or leading, by

encouraging respondents to focus attention on an aspect of the advertising that was not initially significant or meaningful or by providing response categories that suggest the “correct” answer to a respondent. Moreover, a close-ended question or questions following an open-ended question can suggest to a respondent that the answer he/she offered previously was not “sufficient” or correct and can suggest to the respondent that another answer is required.

While close-ended questions are often criticized, they are also often necessary to understand fully how a consumer interprets a particular message. Allegations of bias or leading for close-ended questions can be somewhat tempered by asking follow-up questions only of the subset of consumers who articulate a particular message in their open ended response. Also, close-ended questions can be worded neutrally and can be balanced in structure<sup>9</sup> and should offer consumers the ability to say “don’t know”.

Survey evidence on the causality in false advertising cases is also often challenged in *Daubert* proceedings. How well the survey established that the beliefs or perceptions articulated by consumers were in fact a result of the advertising materials shown is a key finding and most often subject to challenges. The issue of causality, i.e. whether the particular advertising claim can be directly linked to consumers’ beliefs, is key as consumers have many ideas about products, product categories and the benefits or advantages or particular items. One possible way to isolate causality is to ask respondents to confine their answers to the materials being shown. This is generally a weak strategy, as consumers are unlikely to be able to determine exactly where their perceptions come from and then articulate only those impressions resulting from a single, specified source. An alternative method is to ask respondents a “control question”, that is a question embedded within the questionnaire that attempts to filter out respondents who are guessing or whose answers are being affected by the survey process.<sup>10</sup> While better than attempting to have respondents self-censure their answers, a control question does little to determine the extent to which responses have been affected by pre-existing beliefs.<sup>11</sup> A more acceptable method is to include a control group in the survey design. A control group is shown advertising that does not contain the allegedly infringing claims<sup>12</sup> and asks respondents the same series of questions as are asked of the respondents viewing the materials with the infringing claim. A well designed control allows the researcher to establish the extent to which consumers believe, “X is better than Y” for example, because they have tried X before and liked it, because a friend uses X, because the consumer has general understandings about X or Y, etc. A failure to include a control or to use a proper control can render the survey results meaningless and result in exclusion.<sup>13</sup>

## **Presenting the Evidence at Trial**

While the technicalities of the survey design may be persuasive to the court, juries are less likely to be focused on issues such as leading and biased questions and the particular design of the control. As with all experts, the credibility of the survey expert will be important when presenting evidence. Credibility is established not only through a demonstration of competence and experience, but also a showing that the survey design and administration was without bias. Academic discussions of leading and bias are unlikely to have the same impact as evidence of obvious coding errors or misinterpretations of respondent answers. Quotes from actual respondents indicating that the question format or survey structure influenced their answers are far more persuasive than a critique that “standard procedures” weren’t followed.

In addition to credibility, survey evidence often benefits from the presentation of “one number and one story”. In other words, the survey evidence should be simple to understand and interpret. In a false advertising case, the survey evidence can be weakened if too many steps are taken or too much calculation is required to demonstrate that a particular percentage of respondents are misled.

Finally, it should be remembered that, perhaps unlike other evidence on the technical truth or falsity of particular claims, survey evidence can be easily related to a jury’s own experience as consumers. Even for products that the average consumer wouldn’t purchase (for example prescription products only advertised directly to physicians), juries are likely to still tie their own experience and perceptions to the advertising at issue.

A well designed survey can present effective evidence that a particular claim or product creates a misleading impression and that the claim is material in consumer purchasing decisions. Survey evidence is always challenged and there is no absolute way in which the survey must be conducted. There are general scientific principals that should be followed and practitioners seeking to use survey evidence in a false advertising claim should be particularly wary of how the questions are posed to respondents and what efforts have been made to determine the causal impact of the claim. When presenting the survey as evidence to a jury, a simple straightforward explanation that relies on actual responses is persuasive and can help a jury relate their own consumer experiences to the evidence at issue.

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<sup>1</sup> Sarah Butler, NERA Economic Consulting, 2010.

<sup>2</sup> *Sanderson Farms, Inc. v. Tyson Foods, Inc.*, 547 F.Supp.2d 491, 2008 WL 1838719, 2008-1 Trade Cases P76,159 (D.Md., April 22, 2008).

<sup>3</sup> *Rexall Sundown, Inc. v. Perrigo Co.*, 2009 WL 2891021 (E.D.N.Y., September 10, 2009).

<sup>4</sup> *LG Electronics U.S.A., Inc. v. Whirlpool Corp.*, 2009 WL 3113246 (N.D.Ill., September 28, 2009).

<sup>5</sup> *Manual for Complex Litigation Third* (1995) and Diamond, Shari, *Reference Guide on Survey Research* (2000).

<sup>6</sup> Again, it should be emphasized that all aspects of a survey design are open to criticism and the definition of the appropriate definition of the population is often at issue in these cases. The description of a typical survey here is not to represent the most common or most accepted format but simply is to serve as an example of a general framework survey experts can use. For example, some surveys are conducted using the internet and showing consumers the materials online. The appropriateness of a specific method of data collection, online, in person depends on the nature of the case.

<sup>7</sup> See Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:55 (4th ed.)

<sup>8</sup> Surveys are not always necessary to demonstrate materiality and the courts are divergent in their views on this issue. In some cases, like *JTH Tax, Inc. v. H&R Block Eastern Tax Services, Inc.*, 128 F.Supp.2d 926, 939 & n.8 (E.D. Va. 2001), the court ruled that evidence of materiality did not necessarily need to come from survey evidence.

<sup>9</sup> A balanced structure means that respondents are offered balanced alternatives and that these alternatives are randomly rotated such that half of all respondents see one alternative first and the other half sees the other alternative first. For example, a balanced structure about a comparative claim might read, “Do you think this advertisement communicates that

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...Product X is better than Product Y, Product Y is better than Product X...or do you have no opinion?"

<sup>10</sup> The impact of a survey design and the survey process more generally has on respondent answers is typically known as demand effects.

<sup>11</sup> See *Pharmacia Corporation v. GlaxoSmithKline consumer Healthcare, L.P.*, 292 F.Supp.2d 594, 604 n. 5, 605 n. 8 (D.N.J. 2003) for an example of a criticism of a control question.

<sup>12</sup> Depending on the case and product or claims at issue, the control group can be another product or existing advertisement or a manipulated or created advertisement which removes the allegedly false material.

<sup>13</sup> For recent example see, *TrafficSchool.com, Inc. v. Edriver, Inc.*, 2008 WL 4000805, 2008-2 Trade Cases P76,243 (C.D.Cal., June 4, 2008), in which Plaintiffs' survey was given little weight because no control was used (Defendants also conducted a survey found to have significant flaws). See also, *DeKoven v. Plaza Associates*, 2009 WL 901369, (N.D.Ill., March 31, 2009). In this matter, the survey was excluded largely because of an improper control.

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