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## Recent Trends in the Use of Surveys in Advertising Law Disputes; an Update on the Case Law

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RECENT TRENDS IN THE USE OF SURVEYS IN  
ADVERTISING AND CONSUMER DECEPTION DISPUTES

KENNETH A. PLEVAN\*

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## I. INTRODUCTION

Survey evidence is often used to address disputed issues of fact in intellectual property and other areas of the law.<sup>1</sup> Survey evidence has played a special role in advertising law, by helping to determine the messages received by members of the intended audience exposed to advertising.<sup>2</sup> This paper will address that role, and attempt to identify trends and offer comments and suggestions.

Although courts have typically referred to such studies as “consumer surveys,” the intended audience of an advertising message is not necessarily “consumers” as that word is normally used. The audience could be professionals, such as healthcare professionals, or non-consumer groups, such as retailers. For the purposes of this paper, a survey of an intended or target audience conducted to determine the message communicated by an advertising claim is referred to as a “communication survey.”

## II. RATIONALE FOR THE USE OF SURVEYS; OVERVIEW OF LEGAL ISSUES

### A. *Use of Surveys in Lanham Act False Advertising Disputes*

The use of survey evidence in advertising disputes is most common in lawsuits brought by a marketer challenging the advertising of a competitor under § 43(a) of the Lanham Act.<sup>3</sup>

1. See, e.g., Jacob Jacoby, 1 TRADEMARK SURVEYS, DESIGNING, IMPLEMENTING, AND EVALUATING SURVEYS § 1.20, 44–56 (A.B.A., 2013).

2. See Jacob Jacoby et al., *Survey Evidence in Deceptive Advertising Cases Under the Lanham Act: An Historical Review of Comments from the Bench*, 84 Trademark Rep. 541, 544–76 (1994) (reviewing and analyzing the use of surveys in Lanham Act litigation up to the 1990s); E. Deborah Jay, *Ten Truths of False Advertising Surveys*, 103 TRADEMARK REP. 1116, 1120–71 (2013) (cataloguing issues in the design of communication surveys).

3. See 15 U.S.C. § 1125(a) (2012); *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014) (holding there is no consumer standing under the Lanham Act).

### 1. Elements of Section 43(a) Claim

Section 43(a)(1) of the Lanham Act proscribes any “false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities . . . .”<sup>4</sup> The Supreme Court has held that “to come within the zone of interests in a suit for false advertising under § 1125(a), a plaintiff must allege an injury to a commercial interest in reputation or sales.”<sup>5</sup>

The elements of a Lanham Act 43(a)(1)(B) claim have been set forth as follows: (1) a false statement of fact by the defendant in a commercial advertisement about its own or another’s product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products.<sup>6</sup>

Court decisions often state that when an advertisement is literally false, consumer deception is presumed, and “the court may grant relief without reference to the advertisement’s [actual] impact on the buying public.”<sup>7</sup> However, where an advertisement is literally true but misleading, the advertisement “has left an impression on the listener that conflicts with reality,” and extrinsic evidence, in the form of a consumer confusion survey, is typically required.<sup>8</sup>

4. 15 U.S.C. § 1125(a) (2012).

5. *Lexmark Int’l*, 134 S. Ct. at 1390.

6. *See, e.g.*, *Logan v. Burgers Ozark Country Cured Hams, Inc.*, 263 F.3d 447, 462 (5th Cir. 2001); *Balance Dynamics Corp. v. Schmitt Indus., Inc.*, 204 F.3d 683, 689 (6th Cir. 2000); *Blue Dane Simmental Corp. v. Am. Simmental Ass’n*, 178 F.3d 1035, 1042 (8th Cir. 1999); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997); *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 964 (D.C. Cir. 1990).

7. *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 317 (2d Cir. 1982), *superseded by statute*, FED. R. CIV. P. 52(a)(6), *as recognized in Johnson & Johnson v. GAC Int’l, Inc.*, 862 F.2d 975, 979 (2d Cir. 1988); *see Osmose, Inc. v. Viance, LLC*, 612 F.3d 1298, 1319 (11th Cir. 2010); *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 311 (1st Cir. 2002); *Balance Dynamics Corp. v. Schmitt Indus.*, 204 F.3d 683, 693 (6th Cir. 2000) (explaining that while “a plaintiff need not demonstrate actual customer deception in order to obtain relief under the Lanham Act, . . . the ‘literal falsity’ rule has never permitted a plaintiff to recover marketplace damages without other proof that such damages occurred”).

8. *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 229 (2d Cir. 1999); *see PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 120 (4th Cir. 2011); *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1247 (11th Cir. 2002); *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6,

## 2. Distinguishing Between Literal and Implied Claims

In the author's view, the formulation set forth above distinguishing literally false advertising messages and misleading messages, as well as the use of the term "impact," tends to misstate the proper role of a communication survey in advertising litigation. For example, express claims such as, "XYZ automobile gets 30 miles per gallon in city driving," or "ABC medication is more effective for relief of back pain than regular strength aspirin," are clearly literal claims. In clearly literal claims, the messages are sufficiently unambiguous that no survey is necessary to assess their meaning. Whether the challenger can meet its burden of proof to show that the assertions are false will depend on product performance evidence, not survey evidence.

Now consider the phrase "impact on the buying public." Does this mean "impact" in that the advertising affected purchase decisions, and, if so, to what degree? Many consumers may choose not to believe an advertising message that is shown in court to be false, while others may accept the message as accurate but choose not to be influenced by it in their purchasing decisions. And, if the false claim is non-comparative and there are many competitors, measuring the market "impact" of the false claim will likely be difficult. Nevertheless, if an unambiguous claim is false (*i.e.* "literally false"), the Lanham Act, and state deception law, presumably provides for an injunctive remedy, assuming the other elements, including materiality, are met, because it is illogical and inequitable that a marketer should be free to disseminate a false material advertising claim, even if the "impact on the buying public" cannot be demonstrated or quantified.

An example of an ambiguous claim is provided by *United Industries Corp. v. Clorox Co.*<sup>9</sup> At issue was the claim that a product "kills roaches in 24 hours."<sup>10</sup> The court held that the claim was not literally false, because the consumer message could have been that roaches that came into contact with the advertiser's product died within twenty-four hours—an apparently true statement—or that all or most roaches in the infestation were eliminated within twenty-four hours—an apparently false statement.<sup>11</sup> A communication survey could, in that case, have determined whether the target audience received the challenged message. But, assuming that the

14 (7th Cir. 1992); *Johnson & Johnson-Merck Consumer Pharm. Co. v. SmithKline Beecham Corp.*, 960 F.2d 294, 297–98 (2d Cir. 1992).

9. *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175 (8th Cir. 1980).

10. *Id.* at 1181.

11. *Id.*

challenged message had been communicated to a not-insubstantial percentage of the target audience, the communication part of the survey would still not have measured the impact, or degree of impact, on purchase decisions. In other words, a communication survey cannot address what impact the message had.

A preferred way to describe the role of a communication survey is to avoid the tendency to refer to “literally false messages” versus “misleading messages,” but rather to distinguish between literal messages—whether true or false—compared to implied messages—whether true or false. This formulation recognizes that other evidence will determine whether the message communicated, either literally or by implication, can be shown to be false, and additional evidence will be needed to measure the impact of a false claim (literal or by implication) on purchase decisions. Evidence of impact could be survey evidence, but the survey would be measuring something in addition to message communication.

### 3. Use of Survey Evidence to Discern the Message Communicated by Advertising Claims

Under the Lanham Act, as noted, a competitor can challenge as false an advertising claim that delivers a literal message without extrinsic evidence of the consumer message.<sup>12</sup> An example would be: “You’re just not gonna get the best picture out of some fancy big screen TV without DIRECTV. It’s broadcast in 1080i.”<sup>13</sup> The Second Circuit found that that claim was “flatly untrue; the uncontroverted factual record establishes that viewers can, in fact, get the same ‘best picture’ by ordering HD programming from their cable service provider.”<sup>14</sup> Communication surveys are accordingly not relevant if the opposing party is challenging the literal or unambiguous message communicated by an advertising claim.<sup>15</sup>

A number of Lanham Act decisions have held that if an advertising claim is on its face susceptible to two or more plausible meanings, it cannot be literally false.<sup>16</sup> In that scenario, the challenger will need to show, usually

12. See, e.g., *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 154 (2d Cir. 2007).

13. *Id.*

14. *Id.*

15. See *Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 202 (3d Cir. 2014) (properly ignoring survey evidence offered by advertiser to purportedly show that claims were ambiguous, and thus not literally false, where the statements were found to be literal).

16. *DIRECTV*, 497 F.3d at 158; *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 587 (3d Cir. 2002); *Millennium Labs., Inc. v. Ameritox, Ltd.*, 924 F. Supp. 2d 594, 600 (D. Md. 2013); *In re Century 21-RE/MAX Real Estate Advert. Claims Litig.*, 882 F. Supp. 915, 923 (C.D. Cal. 1994).

with survey evidence, that the challenged plausible interpretation is being received by a not-insubstantial number of members of the target audience.<sup>17</sup>

#### 4. Claims Considered Literal by Necessary Implication

Included within the scope of literal messages are those conveyed by “necessary implication.” A message is “conveyed by necessary implication when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated.”<sup>18</sup> In such circumstance, because the meaning of the advertisement is apparent and not open to multiple interpretations, survey evidence is unnecessary to determine that the message conveyed is not the narrow, literal one.

An illustrative example is found in the DIRECTV case.<sup>19</sup> In that case, the Second Circuit affirmed the district court’s finding that an advertisement praising the “amazing picture clarity of DIRECTV HD” such that “‘settling for cable would be illogical,’ considered in light of the advertisement as a whole, unambiguously made the false claim that cable’s HD picture quality is inferior to that of DIRECTV’s,” even though the inferiority was not stated directly.<sup>20</sup> The court noted that where the “words or images, considered in context, necessarily imply a false message, the advertisement is literally false and no extrinsic evidence of consumer confusion is required.”<sup>21</sup>

#### 5. Challenging a Non-Literal Message

Lanham Act courts have, on numerous occasions, stated that while an advertising statement may be literally true, it can nevertheless be misleading in context.<sup>22</sup> Courts have indicated that a communication survey is relevant, and sometimes necessary, to challenge a non-literal advertising message.<sup>23</sup>

17. See *infra* Section (I)(A)(5) for discussion on the necessary level of confusion that must be shown by such a survey.

18. *Clorox Co. P.R. v. Procter & Gamble Commercial Co.*, 228 F.3d 24, 35 (1st Cir. 2000). Most federal circuits have recognized the necessary implication doctrine. See, e.g., *DIRECTV*, 497 F.3d at 158; *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 274 (4th Cir. 2002); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).

19. *DIRECTV*, 497 F.3d at 158.

20. *Id.*

21. *Id.*

22. See, e.g., *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 390 (8th Cir. 2004); *Hickson Corp. v. N. Crossarm Co., Inc.*, 357 F.3d 1256, 1261 (11th Cir. 2004); *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 820 (7th Cir. 1999); *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998); *BASF Corp. v. Old World Trading Co., Inc.*, 41 F.3d 1081, 1088–89 (7th Cir. 1994).

23. See *Clorox Co. P.R.*, 228 F.3d at 36; *United Indus. Corp.*, 140 F.3d at 1182–83; *Southland Sod Farms*, 108 F.3d at 1140.

For example, in *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*,<sup>24</sup> the product name “Mylanta Night Time Strength” for an antacid was at issue. The parties disagreed as to whether an advertisement for this product conveyed the literal message that the product was effective when taken before sleeping. The Third Circuit affirmed a finding by the district court that a consumer survey showing anywhere between 15% to 25% confusion among consumers was sufficient to show that the challenger would likely be able to prove that the product name implied “a false message that the product is specially formulated for nighttime relief,” or that the combination of the “name and label misled a substantial portion of consumers to believe that the product provided all-night relief.”<sup>25</sup>

#### 6. Rationale for the Use of Survey Evidence to Determine Implied Messages

Reliance on surveys to construe advertising messages dates back to at least 1976 with District Judge Morris Lasker’s frequently quoted rationale in *American Brands Inc. v. R.J. Reynolds Tobacco Co.*<sup>26</sup> In that case, the court observed that literally true statements still violate the Lanham Act if they have “a tendency to mislead, confuse or deceive.”<sup>27</sup> In such cases, although a court could interpret the advertisement, “the court’s reaction is at best not determinative and at worst irrelevant. The question in such cases is: What does the person to whom the advertisement is addressed find to be the message?”<sup>28</sup> The court held that the challenger failed to establish by a preponderance of the evidence that the competitor cigarette manufacturer’s advertisement “Now. 2mg ‘tar’ is lowest” had a tendency to mislead or deceive, due to the challenger’s failure to produce a reliable consumer survey.<sup>29</sup>

In 1978, the Second Circuit, in *American Home Products Corp. v. Johnson & Johnson*,<sup>30</sup> cited Judge Lasker’s rationale and held that it was proper for the district court to evaluate consumer response data to determine whether the challenged advertising conveyed a misleading superiority message. The challenger, the manufacturer of Tylenol, argued that its

24. 290 F.3d 578 (3d Cir. 2002).

25. *Id.* at 594–95.

26. 413 F. Supp. 1352, 1356–57 (S.D.N.Y. 1976).

27. *Id.* at 1357.

28. *Id.*

29. *Id.*

30. 577 F.2d 160, 166 (2d Cir. 1978).

competitor's advertising misleadingly conveyed that the defendant's pain-reliever, Anacin, was superior to Tylenol in reducing pain when, in actuality, the two products relieved pain to an equal extent. The Second Circuit affirmed the district court's finding that two advertisements highlighting Anacin's anti-inflammatory properties conveyed a false message of superior pain relief, even though Tylenol has no anti-inflammatory properties.<sup>31</sup>

### 7. Use of Surveys Rejected When Advertising Message Is Unambiguous

In recent years, several decisions have held that survey evidence is inadmissible where the advertising message at issue is literally true.<sup>32</sup> One rationale is that surveys may only measure the degree to which consumers misunderstood the message, rather than the degree to which they were misled.<sup>33</sup> Giving weight to surveys that measure misunderstandings of facially truthful or unambiguous messages could reduce advertising to "meaningless puffery" aimed to protect a company from unanticipated misinterpretations.<sup>34</sup> Applying that observation, the Seventh Circuit in *Mead Johnson* held that "survey research [cannot be] used to determine the meaning of words, or to set the standard to which objectively verifiable claims must be held."<sup>35</sup> In that case, Judge Easterbrook refused to consider a communication survey submitted to show that the phrase "1st Choice of Doctors" on infant formula packaging conveyed a misleading message to consumers because the message was literally true—the advertiser's product was recommended by more doctors than any competing infant formula.<sup>36</sup>

Similarly, in *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*,<sup>37</sup> the district court considered whether branding rum "Havana Club," even though the label clearly stated that it was made in Puerto Rico, was misleading on the theory that the mark implied that the rum was made in Cuba. Following a bench trial, the court rejected plaintiff's use of a survey, because "[a]n ad that is truthful on its face cannot be proven to be misleading by surveying

31. *Id.* at 170–71.

32. *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 702 F. Supp. 2d 238, 250 (D. Del. 2010), *aff'd*, 653 F.3d 241 (3d Cir. 2011); *see also* *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 886–87 (7th Cir. 2000) ("A 'misunderstood' statement is not the same as one designed to mislead."); 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:53 (4th ed. 2003).

33. *See Mead Johnson*, 201 F.3d at 886–87; *see also* Transcript of Oral Ruling at 70, AT&T Mobility v. Cellco P'ship, No. 09 Civ. 3057 (TCB) (N.D. Ga. Nov. 18, 2009).

34. *See Mead Johnson*, 201 F.3d at 886–87.

35. *Id.* at 886.

36. *Id.* at 884.

37. 702 F. Supp. 2d 238.

customers.”<sup>38</sup> On appeal, the Third Circuit affirmed, concluding that because the label, taken as a whole, was not misleading, “survey evidence has no helpful part to play on the question of what the label communicates regarding geographic origin.”<sup>39</sup>

#### 8. Possible Influence of Intent on the Relevance of a Communication Survey

A third approach was arguably taken in *Merisant Co. v. McNeil Nutritionals LLC*.<sup>40</sup> In that case, the challenged claim was Splenda’s “Made From Sugar” tagline, which a competitor argued implied that Splenda “contains” sugar or is “natural.”<sup>41</sup> There was no factual dispute that Splenda ingredients were derived from sugar, but did not actually contain any sugar. In denying summary judgment, and distinguishing *Mead Johnson*, the court held that at trial, survey evidence would be admissible because the challenged message was ambiguous on its face and, arguably, had been designed to mislead.<sup>42</sup> Thus, the court appears to have weighed intent as a relevant factor on the issue of survey admissibility.

#### 9. Trend Away from Consideration of Survey Evidence to Construe Advertising Messages

Critics have argued, based on the *Mead Johnson* line of cases, that it is incongruous for today’s federal judges in Lanham Act false advertising lawsuits to shy away from interpreting advertising communications with the same amount of confidence as Securities Act disclosures.<sup>43</sup> The continued development and use of the “necessary implication” principle arguably points in the direction of an expanded role for the courts in construing advertising claims. Moreover, in the post-*Daubert* era, a motion to exclude an opponent’s consumer survey as flawed is virtually *de rigueur* in Lanham Act lawsuits,<sup>44</sup> and therefore, both parties will typically bear considerable expense in dealing with survey evidence.

38. *Id.* at 250.

39. *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241, 250 (3d Cir. 2011).

40. 515 F. Supp. 2d 509, 525 (E.D. Pa. 2007).

41. *Id.* at 514.

42. *Id.* at 528.

43. Kenneth A. Plevan & Limor Robinson, *The ‘Havana Club’ Decision: An Opportunity to Reassess the Role of Survey Research in Lanham Act False Advertising Cases*, 80 BNA PAT. TRADEMARK & COPYRIGHT J. 398, 401 (2010).

44. See, e.g., Kenneth A. Plevan, *Daubert’s Impact on Survey Experts in Lanham Act Litigation*, 95 TRADEMARK REP. 596 (May–June, 2005); see also Michael Rappeport, *Litigation Surveys – Social*

One respected federal judge has pointed out, in a presentation to advertising lawyers,<sup>45</sup> that the use of surveys introduced in Lanham Act advertising cases takes “a very different approach from the securities law,” and that, it is one that is “infinitely more time consuming and more expensive. It’s more expensive to the parties[, and] . . . it’s time consuming for the court because virtually no survey is free of challenge . . . . So it’s a very different approach, and one that I’m not sure makes a lot of sense.”<sup>46</sup> Therefore, Judge Rakoff would give federal judges the same degree of freedom to interpret an advertising claim as they have to interpret the language in a securities disclosure document.<sup>47</sup>

While Judge Rakoff’s views seem opposite to those Judge Lasker expressed in 1976, they can be reconciled by recognizing that in 1976, false advertising litigation under the Lanham Act was in its infancy. Judge Lasker acknowledged as much when he observed that “few [Lanham Act cases] have been brought to our attention which deal with false advertising.”<sup>48</sup>

By now, there are hundreds of advertising lawsuits, and numerous reported decisions. It seems reasonable that the federal judges today have experience in dealing with such issues, and should have as much confidence today to construe advertising claims as the Federal Trade Commission, which, as discussed below, considers itself free to construe the meaning of advertising claims without the assistance of survey evidence.

For these reasons, the *Mead Johnson* and *Pernod Ricard* courts were correct in their approach—if a court finds an advertising communication, in context, to be reasonably clear and unambiguous, survey evidence should be inadmissible, foreclosing the “misleading,” or implied claim, challenge prong. However, in both *Mead Johnson* and *Pernod Ricard*, packaging communications were at issue. In the context of advertising with a greater degree of non-verbal images and communications, it will be more likely that a court will find the message to the intended audience to be ambiguous, leaving the challenger free to rely on survey evidence to show that an implied message was communicated.

*Science as Evidence*, 92 TM REPORTER 957, at 961, n.11 (July–Aug. 2002) (decrying survey experts who critique the surveys of others for litigation and invariably “talk glibly of ‘fatal flaws’”).

45. See Juan Carlos Rodriguez, *Judge Rakoff Criticizes ‘Peculiarities’ of The Lanham Act*, LAW360, Sept. 30, 2013, <http://www.law360.com/articles/476777/judge-rakoff-criticizes-peculiarities-of-the-lanham-act>.

46. *Id.*

47. Note that while this paper refers to federal judges because virtually all Lanham Act lawsuits are litigated in federal court, the Lanham Act does *not* provide for exclusive federal jurisdiction, and, accordingly, Lanham Act lawsuits could theoretically be litigated in state court as well. 15 U.S.C. § 1121 (2012); 28 U.S.C. § 1338(a) (2012).

48. *Am. Brands Inc. v. R.J. Reynolds Tobacco Co.*, 413 F. Supp. 1352, 1355 (S.D.N.Y. 1976).

## 10. Pleading Standards for Alleged False Implied Claims; Impact of *Twombly/Iqbal*

As is now widely known, the Supreme Court recently, in what is often referred to as *Twombly/Iqbal*, made a dramatic change in the Rule 8 standards for pleading.<sup>49</sup> In federal court, causes of action must be “plausible” to survive a motion to dismiss, and there is no doubt that these new pleading standards apply to Lanham Act cases.<sup>50</sup>

A recent decision in the Tenth Circuit applied the *Twombly/Iqbal* plausibility standards to affirm the dismissal of a Lanham Act complaint alleging the defendants’ advertising was misleading on the grounds that the complaint failed to cite any survey or any other evidence of consumer interpretation. In *Vincent v. Utah Plastic Surgery Society*,<sup>51</sup> several “cosmetic” surgeons filed antitrust and false advertising claims against a trade association of “plastic” surgeons, and the district court granted a motion to dismiss. On appeal, plaintiffs relied on legal principles that set forth standards for alleging and proving that a challenged literal claim was false. The appellate panel found this argument “unnecessary to address” because “Plaintiffs’ complaint does not allege Defendants’ statements are literally false, either on their face or by necessary implication.”<sup>52</sup> Turning to the alleged false implied claims, the court held that the allegations were “wholly unsupported by even a single relevant fact.”<sup>53</sup> In a footnote, the decision flatly rejected the argument that plaintiffs should be permitted “to produce consumer reaction surveys if they are necessary,” observing that plaintiffs “have not indicated that they possess any such surveys,” citing *Twombly*.<sup>54</sup>

*Utah Plastic Surgery Society* was designated non-binding precedent, and it remains to be seen if other courts applying the Lanham Act will follow the reasoning in that case. The decision points to raising the bar for lawsuits asserting that an implied-claim was misleading, as it requires the communication survey to have been completed before the lawsuit begins. While there was no allegation of literal falsity in *Utah Plastic Surgery Society*, the logic of the opinion suggests that if a plaintiff asserts both theories in a complaint, the implied-claim allegations should, in the absence

49. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

50. See, e.g., *Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1357, 1362 (Fed. Cir. 2013).

51. No. 13–4146, 2015 WL 5090868 (10th Cir. Aug. 31, 2015) (non-binding precedent).

52. *Id.* at \*3

53. *Id.*

54. *Id.* at \*3, n.7.

of survey evidence, be dismissed at the pleading stage even if the allegations based on literal claims are not dismissed. Of course, nothing in the decision necessarily suggests that if the lawsuit is not dismissed completely, the implied-claim allegations should be dismissed with prejudice. The *Vincent* decision could also have a significant impact if applied in the consumer class action context, as misleading allegations unsupported by survey evidence are common in putative consumer class action complaints.

### *B. Role of Consumer Research in State Law Consumer Deception Lawsuits*

The recent explosion of consumer deception lawsuits brought as putative class actions, filed by private plaintiffs under state consumer protection laws, has led to increased use of surveys, in order to address factors relevant to merits and class certification issues. As discussed below, these surveys often explore issues other than what the message was communicated. Moreover, it is worth noting that one Federal Appeals panel recently observed that “the considerable body of federal common law construing the [Lanham] Act is instructive in construing the state laws” proscribing false or misleading advertising.<sup>55</sup>

#### 1. Determination of Whether a Reasonable Consumer May Have Been Misled

As noted, under the Lanham Act, to challenge a non-literal message allegedly communicated typically requires survey evidence showing that the message was actually received by the intended audience. Under state consumer protection statutes, the comparable issue appears to be whether the challenged statement deceived the “reasonable consumer.” If so, not only does the plaintiff consumer have a valid claim, but the issue could also be seen as one common across the class for purposes of arguing class certification.

As discussed below, under the Lanham Act, a survey showing that 25% to 30% of consumers in a properly conducted survey received an implied (and false) message would normally be sufficient to support a finding that an advertising message was misleading. In a consumer class action, the equivalent percentage will presumably be far higher, perhaps 60% or even higher, because the class plaintiff is typically seeking class-wide damages, not merely an injunction. Moreover, for a consumer class action in federal

55. *In re GNC Corp.*, 789 F.3d 505, 514 (4th Cir. 2015).

court, a claimed consumer communication that is facially implausible may well not survive a motion to dismiss based on the *Twombly/Iqbal* requirement that allegations be plausible.<sup>56</sup>

In *Haskell v. Time, Inc.*,<sup>57</sup> the ubiquitous mailings from Publisher's Clearing House offering sweepstake opportunities for individuals who purchased magazine or book subscriptions were at issue. Noting that plaintiff primarily relied on the declarations of a few qualifying customers, the court pointed to the absence of "consumer survey evidence indicating that a significant portion of the population has been misled by defendants' bulletins."<sup>58</sup> The court concluded that "[p]laintiff has therefore failed to prove that defendants' statements [misled] the reasonable consumer."<sup>59</sup>

In *Rahman v. Mott's LLP*,<sup>60</sup> a consumer class action, plaintiff challenged the "No Sugar Added" statement on a food product label. Plaintiff argued that this statement, while literally true, had misled him into believing that the product, apple juice, "was lower in sugar and calories than comparable brands."<sup>61</sup> On defendant's motion for summary judgment, the court addressed defendant's contention that no reasonable consumer would have been misled by the "No Sugar Added" label. Given that the challenged label statement was literally true, the court held that plaintiff must introduce some additional evidence in order to raise a triable issue of fact as to whether a reasonable consumer would be misled by the labeling on Mott's 100% Apple Juice. The testimony of a single consumer in a putative class of potentially millions is not enough to meet this burden.<sup>62</sup>

With that background, the court in *Rahman* proceeded to review survey-related evidence offered by both parties. Defendant's expert conducted a survey of consumers, contending that it showed that very few cited a low level of sugar as a reason for their purchase. In response, plaintiff produced the report of a survey expert who (i) opined, without survey evidence, that

56. See, e.g., *Pelayo v. Nestle USA, Inc.*, 989 F. Supp. 2d 973 (C.D. Cal. Oct. 25, 2013)(providing several definitions for the term "All Natural" proffered by Plaintiff—including that it means not manufactured, that it is not artificial as defined by the FDA, or that none of the ingredients in a "natural" product are "synthetic" as defined by the National Organic Program—were all implausible); *Kane v. Chobani, Inc.*, No. 12-CV-02425-LHK, 2013 WL 5289253, at \*7 (N.D. Cal. Sept. 19, 2013) (rejecting as "simply not plausible" plaintiffs' allegation that the use of the phrase "evaporated cane juice" in an ingredients list communicated that the product only contained natural sugars from milk and fruit with no added sugars or syrup).

57. 965 F. Supp. 1398 (E.D. Cal. 1997).

58. *Id.* at 1407–08.

59. *Id.* at 1408.

60. No. CV 13-3482 SI, 2014 WL 5282106, at \*1 (N.D. Cal. Oct. 15, 2014).

61. *Id.* at \*6.

62. *Id.* at \*9.

consumers would likely be misled by the challenged label; (ii) criticized the methodology used in defendant's survey; and (iii) outlined an approach for future survey research.<sup>63</sup> The court concluded that plaintiff "failed to submit sufficient evidence to raise a genuine issue of fact as to whether a reasonable consumer would be deceived by the 'No Sugar Added' statement," and granted summary judgment dismissing all claims requiring plaintiff to show that reasonable consumers had been deceived.<sup>64</sup>

In *In re Conagra Foods, Inc.*,<sup>65</sup> at issue was a label claim for Wesson Oils that the products were "100% Natural." Plaintiffs, in a consumer class action, challenged the label claim as deceptive, alleging that the products contained genetically-modified organisms ("GMOs").<sup>66</sup> On plaintiffs' motion to certify various state classes of purchasers, the court reviewed survey evidence that plaintiffs relied on to show materiality,<sup>67</sup> and accepted plaintiffs' position that those surveys tended to show that consumers regarded the "100% Natural" claim as material to their purchasing decisions. Observing that the surveys did not directly address the issue of the meaning of "100% natural" to consumers, the court nevertheless concluded that "plaintiffs have made a sufficient showing for purposes of class certification that the '100% Natural' claim is material and that consumers generally understand it, *inter alia*, as a representation that Wesson Oils do not contain GMOs."<sup>68</sup>

In *Suchanek v. Strum Foods, Inc.*,<sup>69</sup> at issue were the individual coffee pods used in the popular Keurig single-serve coffeemakers. The defendants allegedly entered the market with a compatible pod but, due to patent protection, first introduced a pod containing mostly instant coffee, rather than fresh ground coffee. The packaging stated that defendants' pods contained "naturally roasted soluble and microground Arabica Coffee," but "soluble" coffee meant instant coffee, and the pods contained very little "microground" coffee.<sup>70</sup> Plaintiffs contended that consumers were deceived into believing that they were purchasing fresh ground coffee.<sup>71</sup>

In concluding that the class should have been certified, the Seventh Circuit panel in *Suchanek* reviewed "[n]umerous expert surveys in the record

63. *Id.* at \*10.

64. *Id.*

65. 90 F. Supp. 3d 919 (C.D. Cal. 2015).

66. *Id.* at 939.

67. *Id.* at 1018.

68. *Id.* at 1019.

69. 764 F.3d 750, 762 (7th Cir. 2014).

70. *Id.* at 753.

71. *Id.* at 753–54.

[which] concluded that few consumers understood the true nature of [defendants'] product.”<sup>72</sup> In a survey conducted by one of plaintiffs' experts, only 14% of participants identified defendants' product as containing instant coffee.<sup>73</sup> The defendants' survey reached a similar result.<sup>74</sup> On the issue of whether the challenged package was likely to mislead a reasonable consumer, the court concluded: “At least three independent expert surveys, all employing different methodologies, found that consumers were confused about the product. A jury should have decided the question whether the packaging was likely to mislead reasonable consumers.”<sup>75</sup>

In *Yumul v. Smart Balance, Inc.*,<sup>76</sup> the plaintiff sought to represent a class of purchasers of Smart Balance Nucoa margarine, promoted as “cholesterol free,” but allegedly contained artificial trans-fat. On defendant's motion to dismiss, the court cited and discussed several cases in which a court dismissed complaints on the basis of concluding that the challenged statements could not, as a matter of law, mislead reasonable consumers. Here, however, the court concluded that it was “appropriate to permit plaintiff to attempt to ‘demonstrate by extrinsic evidence, such as consumer survey evidence, that the challenged statements tend to mislead consumers,’” and therefore, the motion to dismiss with prejudice was denied.<sup>77</sup>

In *Gaston v. Schering-Plough Corp.*,<sup>78</sup> the plaintiff filed a consumer class action contending, *inter alia*, that a Schering product, Coppertone Sport SPF 30 Sunblock, contained false label claims that the product was a “UVA/UVB sunblock.” The plaintiff alleged that the product provided insignificant protection from the sun's harmful UVA rays. In ordering that the class be certified, the Court of Appeals panel relied on a consumer survey that showed that 77% of sunscreen users believed that the term “sunblock” meant protection from “most/all” of the sun's harmful rays, and that there was accordingly a common question among class members.<sup>79</sup>

In *McCabe v. Crawford*, the court noted that surveys, “similar to ones used in trademark cases,” were valuable in showing whether a collection letter was confusing to the unsophisticated consumer in violation of the Fair

72. *Id.* at 753.

73. *Id.*

74. *Id.*

75. *Id.* at 762.

76. 733 F. Supp. 2d 1117 (C.D. Cal. 2010).

77. *Id.* at 1129 (citation omitted).

78. No. B214935, 2011 WL 3452398 (Cal. App. 2d Dist. Aug. 9, 2011, *as modified* Aug. 25, 2011).

79. *Id.* at \*12.

Debt Collection Practices Act.<sup>80</sup> Citing Seventh Circuit precedent, the court concluded that the “overall message appears to be that on a defendant’s motion for summary judgment, if all a plaintiff has to go on is the language of the collection letter, he ultimately must lose.”<sup>81</sup>

## 2. Other Class Certification Issues

In the discussion above, the surveys were similar to Lanham Act consumer communication surveys evaluating the meaning of a challenged advertising statement. In the discussion below, the surveys address related but different issues more relevant to the issue of class certification.

In *Algarin v. Maybelline, LLC*,<sup>82</sup> the court based a number of its class certification findings on a consumer survey testing consumer satisfaction and consumer motivations and expectations in purchasing the cosmetics at issue, which were allegedly falsely advertised as lasting for a full twenty-four hours when they actually did not. Based on the survey results, the court found that the class was not sufficiently ascertainable because a number of purchasers had no expectations with regard to product duration or believed the products would last less than twenty-four hours, and therefore were uninjured.<sup>83</sup> The court further found commonality lacking due to the variety of duration expectations, as well as variances in consumer expectations, motivations, and satisfaction.<sup>84</sup>

A survey was used in *Fairbanks v. Farmers New World Life Insurance Co.*<sup>85</sup> to defeat a showing of materiality. In that case, defendants relied on a survey commissioned by plaintiff’s counsel, in which 500 policyholders were asked if they would have purchased their policies had it been disclosed that the policies were not permanent. A total of 47.4% of the respondents said they would still have purchased the policies.<sup>86</sup> Citing the survey results, the court found that the materiality issue was subject to individual proof, and affirmed the lower court’s denial of class certification.<sup>87</sup>

At issue in *Astiana v. Kashi Co.* were consumer deception claims asserted under California law challenging “Nothing Artificial” and “All Natural” statements on food products. On plaintiffs’ motion to certify a class

80. 272 F. Supp. 2d 736, 745 (N.D. Ill. 2003).

81. *Id.* at 745.

82. 300 F.R.D. 444, 453–54, 457 (S.D. Cal. 2014).

83. *Id.*

84. *Id.* at 564–66.

85. 197 Cal. App. 4th 544 (July 13, 2011, *as modified*, Aug. 1, 2011).

86. *Id.* at 555.

87. *Id.* at 565–66.

of California purchasers, defendant cited to (i) a “marketing survey” that showed that consumers equated “natural” with “organic,” and (ii) many of the ingredients challenged as not natural were accepted as “organic.”<sup>88</sup> Relying, *inter alia*, on this evidence, the court only certified classes based on ingredients that defendant conceded were not organic.<sup>89</sup> In a decision issued the same day, the same judge ruled similarly in a lawsuit in which plaintiffs sought to represent a California class of purchasers of Bear Naked food products labelled as “100% Pure and Natural” or “100% Natural,” relying in part on similar consumer research.<sup>90</sup>

In *Ackerman v. Coca Cola Co.*, plaintiffs challenged advertising for “vitaminwater” which was promoted as a “nutrient-enhanced” water beverage. In opposition to plaintiffs’ motion to certify classes of New York and California consumers, defendants offered a consumer survey, among other expert analyses, “to demonstrate that consumers have, *inter alia*, many opportunities to be exposed to information about the sugar and calorie content of vitaminwater, many different reasons for buying vitaminwater, wide variations in awareness of vitaminwater’s sugar and calorie content, and varying notions of what is ‘healthy.’”<sup>91</sup> Plaintiffs, in turn, sought exclusion of the survey with a *Daubert* challenge. The magistrate judge deferred consideration of those issues, finding that to the extent “these expert reports are relevant, it is to the question of whether a reasonable consumer would find vitaminwater’s labeling or marketing misleading or deceptive, which is a merits-based inquiry.”<sup>92</sup> To put this holding in perspective, the court had recommended certification of only injunctive, not damages, classes.<sup>93</sup>

In a lawsuit challenging as deceptive advertising of the health benefits of pomegranate juice, *In re POM Wonderful LLC Marketing & Sales Practices Litigation*, the court found that the commonality of the materiality issue was satisfied by survey evidence that showed “a significant majority of respondents, in excess of 90%, cited health reasons as a motivating factor behind their purchase of Pom juice.”<sup>94</sup> Another court noted that “survey information could substantiate Plaintiffs’ claim that there are shared legal

88. *Astiana v. Kashi Co.*, 291 F.R.D. 493, 508 (S.D. Cal. 2013).

89. *Id.* at 509.

90. *Thurston v. Bear Naked, Inc.*, No. 11-CV-2985-H BGS, 2013 WL 5664985, at \*8 (S.D. Cal. July 30, 2013).

91. *Ackerman v. Coca Cola Co.*, No. 09 CV 395 DLI RML, 2013 WL 7044866, at \*22 (E.D.N.Y. July 18, 2013).

92. *Id.* at \*23.

93. *Id.*

94. No. ML 10-02199 DDP, 2012 WL 4490860, at \*5 (C.D. Cal. Sept. 28, 2012).

issues among the class members with respect to all or some of [the products at issue].”<sup>95</sup> In another case, the survey evidence offered to show common class issues was rejected for not addressing the proper issues.<sup>96</sup>

In *Beltran v. Avon Products, Inc.*,<sup>97</sup> at issue were plaintiff’s allegations, on behalf of a putative consumer class, that Avon had misrepresented whether any of its products were tested on animals. In its opposition to plaintiff’s motion for class certification, Avon submitted a declaration from a marketing professor who, based on an analysis of Avon’s assessment of its customer base, including information from business consumer research, opined that the issues were not properly the subject of class certification.<sup>98</sup>

### 3. Possible Ethical Issue

In many of these state-law consumer deception cases, the defendant conducted a pre-certification survey among putative members of the class. While there are arguably ethical issues when opposing counsel directly communicates with putative class members without prior notice, none of the cited cases have raised any ethical issues. One published analysis contends that there should be no ethical concern.<sup>99</sup>

#### C. Surveys in Other Jurisdiction

##### 1. Surveys in Federal Trade Commission Proceedings

In 1972, the Federal Trade Commission (FTC) held in *In re Pfizer*<sup>100</sup> that an advertiser must have a “reasonable basis” for making objective claims and that an advertiser must possess substantiation, prior to running the ad, for affirmative product claims. Under these cases, if an advertisement includes an express or implied statement of support for a claim (*e.g.*, “surveys show,” “doctors recommend,” “tests prove”), the advertiser must possess the requisite support before making the claim. With regard to

95. *Vallabharapurapu v. Burger King Corp.*, 276 F.R.D. 611, 616 (N.D. Cal. 2011).

96. *In re Front Loading Washing Mach. Class Action Litig.*, No. 08-51(FSH), 2013 WL 3466821 (D.N.J. July 10, 2013) (refusing to allow survey expert to testify where questions did not elicit response indicating whether or not survey responders had the same mold and odor issues as plaintiffs).

97. 867 F. Supp. 2d 1068 (C.D. Cal. 2012).

98. *Beltran v. Avon Products, Inc.*, ECF 97-1, Redacted Declaration of Dr. Joel Steckel in Support of Defendant Avon Products, Inc.’s Opposition to Plaintiff’s Motion for Class Certification.

99. Kenneth A. Plevan & Xiyin Tang, *Consumer Research Among Class Members—Is There an Ethical Issue?*, 104 BNA ANTITRUST & TRADE REGULATION REPORT (2013).

100. 81 F.T.C. 23, 29 (1972).

consumer surveys offered for non-substantiation purposes, the FTC accepts surveys as evidence of both materiality, and for purposes of interpretation.<sup>101</sup>

With respect to implied messages, the FTC does not require extrinsic evidence in the form of a survey to determine the meaning of an advertisement, as the FTC often considers an implied claim to be reasonably clear from the face of the advertising.<sup>102</sup> The FTC has noted that this approach of evaluating an advertisement containing an implied claim by examining the face of the advertisement is “primarily useful in evaluating advertisements whose language or depictions are clear enough . . . for us to conclude with confidence after examining the interaction of all the different elements that they contain a particular implied claim.”<sup>103</sup> If the FTC is unable to determine with confidence what claims are conveyed in a challenged advertisement, it then turns to extrinsic evidence.<sup>104</sup>

However, if either party introduces extrinsic evidence, the Commission will consider that evidence when it reaches its conclusion about the meaning of the advertisement.<sup>105</sup> Thus, for example, in *In re POM Wonderful*,<sup>106</sup> the Commission considered the extrinsic evidence offered by the parties including expert testimony, a survey of consumer responses to billboard headlines, and evidence regarding the intent of Respondents to convey particular messages.

## 2. Use of Surveys in NAD Proceedings

Generally speaking, the National Advertising Division (NAD) follows FTC standards—if reliable, sound survey evidence is submitted, the NAD will consider it.<sup>107</sup> However, the NAD is free to step into the role of the consumer and independently assess the messages reasonably conveyed by

101. See, e.g., *In re Kraft, Inc.*, 114 F.T.C. 40, 87 (1989) (introducing survey to determine whether calcium in processed cheese slices was claimed to be important by consumers in their purchasing decisions); *In re ITT Cont'l Baking Co., Inc.*, 83 F.T.C. 865 (1973) (holding that “market surveys demonstrating consumer attitudes toward advertised products are relevant to questions of what representations were made about these products,” but that probative weight will depend on “the particular facts surrounding the format, methodology, and relevance of the survey questions and design”).

102. See *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 320 (7th Cir. 1992).

103. *In re Thompson Medical Company*, 104 F.T.C. 648, 788 (1984).

104. *Id.* at 788–79.

105. *In re Bristol-Myers Co.*, 102 F.T.C. 21, 319 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984).

106. 2013 WL 268926, at \*21 (F.T.C. Jan. 16, 2013), *aff'd*, 777 F. 3d 478 (D.C. Cir. 2015).

107. See, e.g., *Anheuser-Busch, Inc. (Select 55 Beer)*, NAD Case Report No. 5233, (Oct. 2010), ASCR (<http://case-report.bbb.org/>); *CSC Holdings, Inc. (Optimum High Definition Television Services)*, NAD Case Report No. 4978, (Mar. 2009), ASCR (<http://case-report.bbb.org/>).

the advertising, either because it has rejected a survey for unreliability or because no survey has been submitted.<sup>108</sup>

*D. Issue of Whether Surveys Can Be Used to Determine Whether an Advertising Claim Is Puffery*

Puffery is advertising that typically consists of vague or highly subjective representations, often about product superiority, on which no reasonable consumer would rely.<sup>109</sup> At least one court has held that communication surveys serve no purpose in deciding whether a challenged claim constitutes puffery.<sup>110</sup> The Eighth Circuit held that because puffery is not actionable, permitting communication surveys to determine whether such a claim is misleading might “blind-side[]” an advertiser and subject it to “a wholly unanticipated claim the advertisement’s plain language would not support.”<sup>111</sup> Surveys are inappropriate to establish that a claim of puffery is misleading, because the nature of puffery is vague, “and cannot be reasonably interpreted as providing a benchmark by which the veracity of the statement can be ascertained.”<sup>112</sup>

One district court, nevertheless, held that a survey might be useful to determine, as a factual matter, whether an advertisement actually constitutes puffery. In *Verizon Directories Corp. v. Yellow Book USA, Inc.*,<sup>113</sup> the court determined that this issue “cannot be resolved without surveys, expert testimony, and other evidence of what is happening in the real world,” and deferred the resolution for trial.<sup>114</sup>

*E. Use of Surveys to Substantiate Advertising Claims*

Consider a claim that states: “When doctors and pharmacists were asked which they would recommend more often, 8 out of 10 chose PEPCID

108. See *Priceline.com, Inc. (Name Your Own Price)*, NAD Case Report No. 5437, (Mar. 2012), ASCR (<http://case-report.bbb.org/>); *Your Baby Can, LLC (Your Baby Can Read Early Language Development System)*, NAD/CARU Case Report No. 5313, (Mar. 2011), ASCR (<http://case-report.bbb.org/>).

109. *United Indus. Corp. v. The Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998).

110. *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 393 (8th Cir. 2004) (holding that the phrase “America’s Favorite Pasta” cannot be transformed into a specific, measurable claim by nature of a survey).

111. *Id.* at 393–94.

112. *Id.* at 391.

113. 309 F. Supp. 2d 401 (E.D.N.Y. 2004).

114. *Id.* at 407.

AC Acid Controller over TAGAMET HB.”<sup>115</sup> This claim is an “establishment” claim because it explicitly represents that a survey shows that professionals prefer the product, and the advertiser, in turn, must have an appropriate survey to support, or substantiate, this claim.<sup>116</sup> Courts have found that when advertising “makes an ‘establishment claim’, a claim supported by a test or survey,” the advertisement “will be found to be literally false if the test or survey relied upon is unreliable or does not in fact support the claim.”<sup>117</sup> Likewise, if a claim implicitly represents that it is supported by a survey—for example, a claim that “more doctors prefer the patch that gives you the choice”—the advertiser must also possess the requisite survey support, even if no actual survey is literally cited in the advertising.<sup>118</sup>

Claim support surveys, of course, are not communication surveys; claim support surveys do not determine what messages the intended audience receives. Such surveys must nonetheless meet the standards and requisites for reliable survey research.

#### *F. Level of Communication Necessary to Show That a Message is Implied*

##### 1. In General

An issue that often arises with communication surveys is the level of communication necessary to demonstrate that an implied message is conveyed. The survey must establish that a “substantial number” of consumers took away a misleading impression from the disputed advertisement.<sup>119</sup> Surveys demonstrating a 20% communication rate or higher typically support a finding that there is an implied claim.<sup>120</sup> A few federal court decisions have indicated that 15% to 16% may also be sufficient

115. See *SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharms. Co., Inc.*, 906 F. Supp. 178, 183 (S.D.N.Y. 1995), *aff'd*, 100 F.3d 943 (2d Cir. 1996).

116. See *Castrol, Inc. v. Quaker State Corp.*, 977 F.2d 57, 63 (2d Cir. 1992) (holding that where the “defendant’s ad explicitly or implicitly represents that tests or studies prove its product superior, plaintiff satisfies its burden by showing that the tests did not establish the proposition for which they were cited”).

117. *SmithKline*, 906 F. Supp. at 182.

118. *Pharmacia Corp. v. GlaxoSmithKline Consumer Healthcare*, 292 F. Supp. 2d 594, 607 (D.N.J. 2003).

119. See *McNeilab Inc. v. Am. Home Prods. Corp.*, 675 F. Supp. 819, 825 (S.D.N.Y. Dec. 1, 1987, *as amended* Dec. 4 and 7, 1987), *aff'd*, 848 F.2d 34 (2d Cir. 1988).

120. *Procter & Gamble Co. v. Ultreo, Inc.*, 574 F. Supp. 2d 339, 345 (S.D.N.Y. Aug. 28, 2008); see also *Doctor’s Assocs., Inc. v. QIP Holder LLC*, 2010 WL 669870, at \*19 (D. Conn. Feb. 19, 2010).

in some circumstances.<sup>121</sup> The NAD is unlikely to find sufficient evidence of deception when a survey reports a rate below 20%.<sup>122</sup>

Courts have cited to decisions addressing trademark infringement surveys to support the thresholds for false advertising surveys.<sup>123</sup> Recently, however, the Supreme Court has made it clear that Section 43(a) of the Lanham Act “creates two distinct bases of liability: false association, §1125(a)(1)(A), and false advertising, §11(a)(1)(B).”<sup>124</sup> This language suggests that analogies to trademark law may be unhelpful unless justified by a relevant and persuasive analysis.

## 2. Net Communication (Levels Adjusted by a Control)

A reliable survey typically seeks to filter out survey noise, which can be created by guessing, pre-conceived views, and/or possible biases in the survey design or simply by the artifact of a survey. One approach is to recruit respondents into two groups, a test group and a control group. The percentage of consumers who reported receiving a certain message is then calculated by netting out the control group responses from the percentage of consumers in the test group who received the advertising message at issue.

For example, in *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*,<sup>125</sup> which considered, *inter alia*, whether the name of the product Mylanta Night Time Strength misled consumers into thinking the product provides all-night relief, the survey expert presented a survey where the first group was exposed to the Mylanta Night Time Strength product line as it would appear in retail stores, while the control group was exposed to a product not at issue in the litigation, Mylanta Extra Strength. In the first group, approximately 30% of the respondents expressed their belief that Mylanta Night Time Strength provided relief that lasted the whole night.<sup>126</sup> By contrast, fewer than 5% of the control respondents believed that Mylanta Extra Strength provided all-night relief.<sup>127</sup> After netting out the “noise” of the control group results, the

121. See, e.g., *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 594 (3d Cir. 2002); *In re Spirits Int'l, N.V.*, 563 F.3d 1347, 1356 n.4 (Fed. Cir. 2009).

122. See *Wal-Mart Stores v. H-E-B Grocery Co., LP*, NAD Case Report No. 5032, 10 (June 2009), ASCR (<http://case-report.bbb.org/>).

123. See, e.g., *William H. Morris Co. v. Group W, Inc.*, 66 F.3d 255, 258 (9th Cir. 1995); *CollegeSource, Inc. v. AcademyOne, Inc.*, No. 10–3542, 2011 WL 1540403, at \*7 (E.D. Pa. Apr. 22, 2011).

124. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1384 (2014).

125. 290 F.3d 578, 590–91 (3d Cir. 2002).

126. *Id.*

127. *Id.*

survey found a 25% confusion rate among respondents that had been misled into thinking Mylanta Night Time Strength provided all-night relief.<sup>128</sup>

In *McNeil-PPC, Inc. v. Pfizer Inc.*,<sup>129</sup> the product at issue, Listerine, was advertised to be as effective as floss in a series of television commercials, print ads, and hang tags. The challenger conducted consumer surveys—one showed consumers a television commercial and asked what their take-away was, and another showed consumers the Listerine bottle with the label at issue. As a control, consumers were asked their “pre-existing beliefs” regarding Listerine and floss; “the intent was to determine the number of people who did not recall seeing the commercials but who still believed that Listerine could be used instead of floss.”<sup>130</sup> After netting out the “noise” (19%), the survey experts arrived at a 26% to 31% level of communication (results in the label and commercial surveys).<sup>131</sup>

In *American Home Products Corp. v. Procter & Gamble Co.*, defendant’s survey expert administered two control surveys. In one of these control surveys, survey participants exposed to an ADVIL television commercial “indicated that they saw specific superiority claims that ADVIL lasted longer, acted faster, and was gentler to the stomach when in fact those specific claims were not advanced in the advertisement.”<sup>132</sup> In the other control survey, “consumers were asked via telephone how long various over-the-counter analgesics lasted, without the benefit of any advertising copy to review.”<sup>133</sup> The expert argued that the surveys showed that a “significant number of consumers have a general preconception as to [the] duration [of plaintiff manufacturer’s ADVIL] that is not informed or influenced by any ALEVE advertisement.”<sup>134</sup> The court approvingly cited these two control surveys to “illuminate the existence of the (unaccounted for) noise in [plaintiff ADVIL manufacturer’s] survey.”<sup>135</sup>

In *LG Electronics U.S.A., Inc. v. Whirlpool Corp.*,<sup>136</sup> the court refused to exclude a survey that used as a control a commercial of defendant Whirlpool advertising another product not at issue, rather than editing the test commercial. The court noted that although the “control commercial used different imagery, the commercial aired contemporaneously with the test

128. *Id.*

129. 351 F. Supp. 2d 226, 244 (S.D.N.Y. 2005).

130. *Id.*

131. *Id.*

132. *Am. Home Prods. Corp. v. Procter & Gamble Co.*, 871 F. Supp. 739, 750 (D.N.J. 1994).

133. *Id.* at 749.

134. *Id.*

135. *Id.* at 749.

136. 661 F. Supp. 2d 940, 955 (N.D. Ill. 2009).

commercial and otherwise covered the same Whirlpool product that the test commercial addressed.”<sup>137</sup> While the “differences between the test and the control may affect the weight that a jury attributes to the study,” such differences “are insufficient to find the [study] inadmissible.”<sup>138</sup>

In general, a survey reporting message communication in the lower range is more likely to constitute acceptable evidence of an implied message where that percentage reflects the level of communication *net* of a control level.<sup>139</sup> Similarly, where the survey has not accounted for noise, a borderline percentage is more likely to be deemed insufficient.<sup>140</sup>

### 3. Federal Cases

The lack of a bright-line test for the threshold percentage reflects that a court is not bound by a survey’s conclusions but is “obliged to judge for itself whether the evidence or record establishes that others are likely to be misled or confused.”<sup>141</sup> It is well-established that a false advertisement “must deceive a substantial portion of the relevant customers,”<sup>142</sup> and a deception rate of 20% or higher generally satisfies this standard.<sup>143</sup> In the gray area between 10 to 20%, one court determined that a claim is actionable where 15% of consumers surveyed took away a misleading message.<sup>144</sup> As this is in line with trademark cases holding “that survey evidence of 15% confusion

137. *Id.*

138. *Id.* at 956.

139. *See* Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co., 290 F.3d 578, 594 (3d Cir. 2002); *see also* Sanderson Farms, Inc. v. Tyson Foods, Inc., 547 F. Supp. 2d 491, 501 (D. Md. 2008) (finding 24% to 33% net deception); Ill. Bell Tel. Co. v. MCI Telecomm. Corp., 1996 WL 717466, at \*6, 9 (N.D. Ill. Dec. 6, 1996) (finding 23% to 24% net deception sufficient, even if the survey underestimated the noise by a few percentage points).

140. *See* Fruit of the Loom, Inc. v. Sara Lee Corp., 674 F. Supp. 1020, 1022 (S.D.N.Y. 1986, amended memorandum and order Oct. 9, 1987) (reporting 18% deception insufficient to establish that the advertisement was misleading where noise was not taken into account and survey also had questionable methodology).

141. Tyco Indus., Inc. v. Lego Sys., Inc., No. 84-3201 (GEB), 1987 WL 44363, at \*8 (D.N.J. Aug. 26, 1987), *aff’d*, 853 F.2d 921 (3d Cir. 1988).

142. *In re* Spirits Int’l, N.V., 563 F.3d 1347, 1356 (Fed. Cir. 2009).

143. *See* Procter & Gamble Co. v. Ultreo, Inc., 574 F. Supp. 2d 339, 345 (S.D.N.Y. 2008) (“Cases have held that 20% constitutes a substantial percentage of consumers.”) (citing Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer, Pharms, Inc., 19 F.3d 125, 134 n.14 (3d Cir. 1994)); *see also* Sanderson Farms, Inc., 547 F. Supp. 2d at 504 (54.9% “far exceed[s] the level of consumer survey evidence usually required by courts”); R.J. Reynolds Tobacco Co. v. Loew’s Theatres, Inc., 511 F. Supp. 867, 876 (S.D.N.Y. 1980) (holding that 25% is not insubstantial).

144. *Novartis*, 290 F.3d at 594 (holding that survey results showing 15% deception supported a likelihood of success on the merits); *see also* Schering-Plough Healthcare Prods., Inc. v. Neutrogena Corp., 702 F. Supp. 2d 266, 275 (D. Del. 2010); *Sanderson Farms*, 547 F. Supp. at 504.

is sufficient to demonstrate actual confusion,”<sup>145</sup> it may be that these opinions equated the two legal doctrines, without any discussion as to whether the two analyses should be comparable.

Courts are unlikely to find deception levels below 10% sufficient evidence of deception. The Ninth Circuit has rejected deception rates well below 10% as too small a percentage to support a finding of likely consumer deception.<sup>146</sup> Similarly, the Third Circuit has opined that a 7.5% rate did not constitute a substantial number of consumers.<sup>147</sup>

#### 4. NAD Cases

The threshold for establishing an implied claim before the NAD appears to be somewhat more clearly defined than in federal court. The NAD has generally considered a communication level at or above 20% adequate,<sup>148</sup> with survey evidence demonstrating that 29% of consumer respondents took away a message “too high to be ignored.”<sup>149</sup>

NAD appears less likely to find that an advertisement conveys a message where a survey reports a communication rate below 20% and has recognized 15% as “more the exception rather than the rule.”<sup>150</sup> For example, in *Nextel Communications, Inc. (Nextel Direct Connect/Calling Plans)*, the NAD combined its own impression that the advertisement appeared truthful with a survey reporting consumer deception of 12% to find that the advertisement was not misleading.<sup>151</sup> In another matter, NAD determined that a survey reporting deception of 13.3% and 9.4% on various claims, in addition to its own analysis of the advertisements, did not establish deception, particularly where the net deception levels were 2.9% and 1.9%

145. *Novartis*, 290 F.3d at 594; *see also* *Anheuser-Busch, Inc. v. Customer Co.*, 947 F. Supp. 422, 425 (N.D. Cal. 1996) (citing multiple cases that considered a 15% confusion rate to be evidence of likelihood of confusion).

146. *William H. Morris Co. v. Group W, Inc.*, 66 F.3d 255, 258 (9th Cir. 1995) (holding that less than 3% is not significant); *see also* *Diana Princess of Wales Mem'l Fund v. Franklin Mint Co.*, 216 F.3d 1082, 1999 WL 1278044, at \*2 (9th Cir. 1999) (unpublished table decision) (rejecting false advertising claim on the same evidence as the false advertising claim, which failed partially because 6.9% was deemed insufficient evidence of actual confusion).

147. *Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc.*, 19 F.3d 125, 135–36 (3d Cir. 1994).

148. *Wal-Mart Stores v. H-E-B Grocery Co., LP*, NAD Case Report No. 5032, 10 (June 2009), ASCR (<http://case-report.bbb.org/>) (not finding evidence of deception where net confusion rate was always below 18% and generally between 10% and 13%).

149. *Kimberly Clark Corporation (Kleenex Ultra Tissue)*, NAD Case Report No. 3207, 4 (June 1995), ASCR (<http://case-report.bbb.org/>).

150. *Wal-Mart Stores v. H-E-B Grocery Co., LP*, NAD Case Report No. 5032, 10 (June 2009), ASCR (<http://case-report.bbb.org/>).

151. *Nextel Communications, Inc. (Nextel Direct Connect/Calling Plans)*, NAD Case Report No. 3934, 13–14 (July 2002), ASCR (<http://case-report.bbb.org/>).

respectively after factoring in noise, and where the methodology and tabulation of the net results were questionable.<sup>152</sup>

### 5. Surveys Measuring False Implied Claims Communicated by a Trademark or Brand Name

A brand product name or trademark itself can communicate a false message. For example, in *Novartis Consumer Health v. Johnson & Johnson*,<sup>153</sup> the Third Circuit found that the product name “Mylanta Night Time Strength” was misleading because it implied all-night relief. In that case, the court determined that even a 15% confusion rate would be sufficient, citing a number of cases, including *Coca-Cola Co. v. Tropicana Products, Inc.*,<sup>154</sup> in the false advertising context.<sup>155</sup>

Similarly, the NAD has stated that it does not give special deference to product names, for “the mere fact that [a claim] appears on packaging as part of the product’s name does not insulate it from a review of its truth and accuracy.”<sup>156</sup> In *Church & Dwight Co., Inc.*, the NAD recommended a name change based on its own interpretation of a “4x” concentration claim, which the NAD found was likely to cause consumer confusion by conveying the unsupported message that the advertiser’s products are four times more concentrated than competing products.<sup>157</sup> However, the NAD has also stated that mere speculation by an advertiser that a product name may be misleading is not enough for the NAD to require an advertiser to change a product name—the challenger must submit extrinsic evidence in the form of a reliable, well-conducted consumer survey.<sup>158</sup>

### 6. Jury Instructions

Where a jury is evaluating an alleged implied claim, the court will likely not provide the jury in the jury instructions with a percentage threshold for finding confusion. For example, in *Fresh Del Monte Produce Inc. v. Del*

152. MillerCoors, LLC (Advertising for Miller Lite Beer), NAD Case Report No. 5129, 6 (Dec. 2009), ASCR (<http://case-report.bbb.org/>); see also Alamo Rent-A-Car (Alamo Rental Cars), NAD Case Report No. 3124, 3 (July 1994) ASCR (<http://case-report.bbb.org/>).

153. 290 F.3d 578 (3d Cir. 2002).

154. 690 F.2d 312, 317 (2d Cir. 1982), *superseded by statute*, FED. R. CIV. P. 52(a), *as recognized in* Johnson & Johnson v. GAC Int’l, Inc., 862 F.2d 975 (2d Cir. 1988).

155. Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co., 290 F.3d 578, 594 (3d Cir. 2002).

156. Church & Dwight Co., Inc. (*Arm & Hammer Liquid Laundry Detergents*) NAD Case Report No. 5658, (Dec. 2013), ASCR (<http://case-report.bbb.org/>).

157. *Id.*

158. Bausch & Lomb Inc. (ReNu with MoistureLoc), NAD Case Report No. 4385 (Aug. 2005), ASCR (<http://case-report.bbb.org/>).

*Monte Foods Co.*, a 2012 jury trial involving an alleged misleading promotion of packaged fruit, the court gave jurors the standard instruction that it was up to them to decide what, if any, weight to give to the testimony of the expert survey witnesses.<sup>159</sup> While the court presented a list of factors that the jurors could find useful to consider—including, for example, whether the survey questions asked were non-leading and whether the survey had been conducted among a representative sample of the universe of consumers—it did not provide a percentage threshold.<sup>160</sup>

### G. Foundation Evidence

In support of the admissibility of survey evidence, the proponent must lay a proper foundation, lest a court exclude the survey as not qualifying for an exception to the hearsay rule. An example of an improperly-laid foundation is found in *Ortho Pharmaceutical Corp. v. Cosprophar, Inc.*<sup>161</sup>

The dispute there centered on two competing, purported anti-wrinkle creams, one prescription and the other cosmetic. The challenger attempted to introduce three pre-litigation market research surveys that supposedly showed the vast majority of consumers were aware of Retin-A's use for the treatment of photo-aged skin.<sup>162</sup> The challenger argued that the surveys were admissible under the business records exception to the hearsay rule.<sup>163</sup> The court, however, found that the surveys lacked an adequate foundation—namely, that the sponsoring witness was a “person with knowledge” within the meaning of the rule.<sup>164</sup> The witness testified that Ortho regularly conducted market research and commissioned such research by hiring independent contractors.<sup>165</sup> The court nevertheless found that the witness did not personally commission the work, did not play any role in its preparation, did not see the original data, and lacked knowledge of the steps that the outside survey contractor took in preparing the report.<sup>166</sup> Therefore, the court excluded the surveys as hearsay.<sup>167</sup>

159. No. 1:08-cv-08718-SHS (S.D.N.Y. Oct. 14, 2008).

160. *Id.*; see also *Fresh Del Monte Produce Inc. v. Del Monte Foods Co.*, 933 F. Supp. 2d 655 (S.D.N.Y. 2013).

161. 828 F. Supp. 1114 (S.D.N.Y. 1993), *aff'd*, 32 F.3d 690 (2d Cir. 1994).

162. *Id.* at 1118.

163. *Id.*; FED. R. EVID. 803(6).

164. *Ortho Pharm. Corp.*, 828 F. Supp. at 1119.

165. *Id.*

166. *Id.*

167. *Id.* at 1121.

### H. Proving Damages with Survey Evidence

As noted, if a communication survey determines only the message received by the target audience, then presumably something more is needed to show a diversion of sales, such as damages.

Under the Lanham Act, a challenger must meet a higher standard to recover damages than to obtain an injunction, often referred to as the need to show causation.<sup>168</sup> Of course, a survey can help demonstrate causation by showing that the implied message has affected purchase decisions, but for this, the survey must go beyond measuring communication.<sup>169</sup>

It is interesting to consider that a survey showing net communication of 30%, for example, may be considered sufficient to obtain an injunction if the implied claim is shown to be false. However, in this example, arguably 70% of the members of the target audience were *not* confused, thus undercutting any damages claim.

### III. SPECIFIC ISSUES IN THE DESIGN OF COMMUNICATION SURVEYS AND INTERPRETATION OF RESULTS

No matter how well a party thinks its communications survey is designed, an expert for the opposing party will invariably opine that it is “fatally flawed.”<sup>170</sup> This section examines a number of the more frequently litigated issues relating to the design of communication surveys. Design shortcomings can affect the weight accorded to survey results,<sup>171</sup> as well as lead to the exclusion of the survey.<sup>172</sup>

168. See, e.g., *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1392 (2014) (“Even when a plaintiff cannot quantify its losses with sufficient certainty to recover damages, it may still be entitled to injunctive relief . . .”); *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 831 (9th Cir. 2011) (affirming denial of damage award where plaintiff failed to provide any proof of causation); *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 318 (1st Cir. 2002) (“In order to prove causation under § 1125(a) of the Lanham Act, the aggrieved party must demonstrate that the false advertisement actually harmed its business.”); *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 191 (2d Cir. 1980) (holding that inability to show lost sales does not bar injunctive relief, though it would bar monetary relief).

169. See *Hill’s Pet Nutrition, Inc. v. Nutro Prods., Inc.*, 258 F. Supp. 2d 1197, 1212 (D. Kan. 2003) (holding that plaintiff was unable to show that it had been injured where survey only showed consumer deception, but not how it influenced purchasing decisions or loss of sales).

170. See, e.g., *Rappeport*, *supra* note 44, at 96, n.11 (decrying survey experts who critique the surveys of others for litigation and invariably “talk glibly of ‘fatal flaws’”).

171. See, e.g., *Bruce Lee Enters., LLC v. A.V.E.L.A., Inc.*, 10 CV. 2333 (KMW), 2013 U.S. Dist. LEXIS 31155, at \*65 (S.D.N.Y. Mar. 6, 2013) (“The evidentiary value of a survey’s results rests upon the underlying objectivity of the survey itself.” (internal citations omitted)).

172. See *Water Pik, Inc. v. Med-Systems, Inc.*, No. 10-cv-01221-PAB-CBS, 2012 WL 2153162, at \*11 (D. Colo. June 13, 2012) (“It is the trial court’s responsibility to determine the probative value of a consumer survey, and it is appropriate for the trial court to accord little or no weight to a defective survey.”) (citing *Ashland Oil, Inc. v. Olymco, Inc.*, 1995 WL 499466, at \*12 (6th Cir. 1995)); *Procter &*

As a consequence of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>173</sup> and its progeny, as well as Federal Rule of Evidence 702, the district courts are authorized to act as “gatekeepers” with respect to all expert testimony. That necessarily led to the question of what the post-*Daubert* standards would be for surveys offered in Lanham Act cases. In a leading case addressing that issue, *Schering Corp. v. Pfizer, Inc.*,<sup>174</sup> the Second Circuit firmly established the majority rule that generally, most alleged defects in survey methodology go to the credibility, and not the admissibility, of a survey, and thus surveys should rarely be excluded from evidence in Lanham Act cases.

Plaintiff Schering, the manufacturer of Claritin, concerned that a competitor was misrepresenting the non-sedative properties of a competing prescription drug, commissioned a survey among physicians whom the competitor’s representatives visited.<sup>175</sup> The survey allegedly confirmed that false claims were being delivered, and Schering filed a false advertising Lanham Act lawsuit, which ended with a settlement.<sup>176</sup> Schering then conducted additional surveys to monitor compliance with the terms of the settlement, and filed a second lawsuit based on the survey results.<sup>177</sup> In the course of discovery, plaintiff found surveys commissioned by the competitor, and moved for a preliminary injunction, citing in support a total of five surveys.<sup>178</sup> The district court granted defendants’ *Daubert* motion to exclude the five surveys, and denied the preliminary injunction.<sup>179</sup>

On plaintiff’s appeal, the Second Circuit held that several of the surveys should have been considered, and remanded for reconsideration of the admissibility of the others.<sup>180</sup> To reach this result, Judge (later Justice) Sotomayor conducted an exhaustive analysis of the exceptions to the hearsay rule pursuant to which survey evidence can be admitted.<sup>181</sup> On the issue of

Gamble Pharms., Inc. v. Hoffmann-La Roche, Inc., No. 06 Civ. 0034 (PAC), 2006 WL 2588002, at \*27 (S.D.N.Y. Sept. 6, 2006) (“A survey is considered to be properly conducted if the survey was fairly and scientifically conducted by qualified experts and impartial interviewers . . . , if the questions upon which the results relied do not appear to be misleading or biased, and if the recordation of responses was handled in a completely unbiased manner.”) (quoting *Gilbert/Robinson, Inc. v. Carrie Beverage-Missouri, Inc.*, 758 F. Supp. 512, 524 (E.D. Mo. 1991)).

173. 509 U.S. 579 (1993).

174. 189 F.3d 218 (2d Cir. 1999).

175. *Id.* at 222.

176. *Id.*

177. *Id.* at 222–23.

178. *Id.* at 223.

179. *Id.* at 221.

180. *Id.*

181. *Id.* at 227–39.

surveys considered under the state-of-mind exception in Rule 803(3) of the Federal Rules of Evidence, the court held that “errors in methodology . . . properly go only to the weight of the evidence—subject, of course, to Rule 403’s more general prohibition against evidence that is less probative than prejudicial or confusing.”<sup>182</sup>

### A. Property Defined Universe

A threshold question in survey design is whether the survey’s “universe was properly defined.”<sup>183</sup> Among other concerns, this means that those taking the survey must fall within the group of the advertised product’s target customers.

#### 1. Surveying The Target Audience

The proper survey universe refers to “that segment of the population whose perceptions and state of mind are relevant to the issues in the case.”<sup>184</sup> Essentially, those taking the survey must be within the group expected to purchase the advertised product or service. This is because a respondent who is not a potential candidate to purchase the product will not likely have any interest in the product’s promotion. Therefore, the respondent will be more likely to give unthinking or flippant responses to the survey questions. Such a respondent also may not have a sufficient understanding of the product’s market context to provide meaningful or useful responses.

Courts have noted that advertising surveys polling the wrong universe have little probative value.<sup>185</sup> “[E]ven if the proper questions are asked in a proper manner, if the wrong persons are asked, the results are likely to be irrelevant.”<sup>186</sup> The universe should be defined so that survey respondents represent “the person[s] to whom the advertisement is addressed” and can answer questions such as “what does the public perceive the message to

182. *Id.* at 228.

183. *See* LG Elecs. U.S.A., Inc. v. Whirlpool Corp., 661 F. Supp. 2d 940, 952 (N.D. Ill. 2009) (listing criteria for evaluating the “trustworthiness of survey evidence”) (quoting Weight Watchers Int’l, Inc. v. Stouffer Corp., 744 F. Supp. 1259, 1272 (S.D.N.Y. 1990)).

184. PBM Prods., LLC v. Mead Johnson & Co., 639 F.3d 111, 123 (4th Cir. 2011) (citing J. THOMAS MCCARTHY, 6 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:159 (4th ed. 2003)).

185. *Id.*; Kwan Software Eng’g, Inc. v. Foray Techs., LLC, No. C 12-03762 SI, 2014 WL 572290, at \*4–5 (N.D. Cal. Feb. 11, 2014); Smith v. Wal-Mart Stores, Inc., 537 F. Supp. 2d 1302, 1328 (N.D. Ga. 2008).

186. 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:159 (4th ed. 2015).

be?”<sup>187</sup> This can be accomplished by targeting the survey toward the advertiser’s customer base.<sup>188</sup> Surveys that have left out defendants’ primary customers have an improper universe.<sup>189</sup>

## 2. Prospective Purchasers Versus Past Purchasers

There has been debate about whether a properly defined universe should be limited to prospective purchasers, or include past purchasers as well. What complicates the issue is the frequency of repurchase. To illustrate the issue, consider a consumer of a product that is typically used or consumed frequently, such as a soft drink. Regular consumers of soft drinks are likely to continue purchasing the product frequently, and therefore recent past purchasers are in the target market. By contrast, a recent purchaser of a more durable item, such as a refrigerator, will likely not be in the market for a new one for many years. Therefore, a recent purchaser of a refrigerator will not likely find advertisements for refrigerators to be of any interest.

Several courts have held that the proper universe includes both groups, particularly where past purchasers are likely to buy the product again.<sup>190</sup> Others, however, have discounted surveys that included past purchasers but left out prospective purchasers. For example, in *Merisant Co. v. McNeil Nutritionals, LLC*, the court noted that it is typical to survey prospective consumers, and held that the survey proponent did not sufficiently explain why past users were in the appropriate universe in that case.<sup>191</sup>

The survey need not match the advertising audience precisely, as the survey will be admissible if the survey respondents represented a “sufficiently close approximation of the recipient pool.”<sup>192</sup> However,

187. *Gillette Co. v. Norelco Consumer Prods. Co.*, 69 F. Supp. 2d 246, 258 (D. Mass. 1999) (quoting *Johnson & Johnson-Merck Consumer Pharms. Co. v. SmithKline Beecham Corp.*, 960 F.2d 294, 297–98 (2d Cir. 1992) (citations omitted)).

188. *KIS, S.A. v. Foto Fantasy, Inc.*, 204 F. Supp. 2d 968, 973 (N.D. Tex. 2001) (properly conforming survey participant group to demographics supplied by the defendant and to those segments of the population whom the expert saw using or showing interest in defendants’ Portrait Studio).

189. *Id.* at 972.

190. *See Millennium Importing Co. v. Sidney Frank Importing Co.*, No. 03-5141 (JRT/FLN), 2004 WL 1447915, at \*8–9 (D. Minn. June 11, 2004) (properly including past purchasers of vodka who were likely to purchase vodka again, where the universe was further limited to respondents who indicated they were likely to read one of the magazines in which the ad was printed).

191. 242 F.R.D. 315, 322 (E.D. Pa. 2007).

192. *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 123–24 (4th Cir. 2011) (lower court did not abuse its discretion in admitting the expert’s online consumer survey about infant formula where the respondents were “located by a third party” and “pre-screened to ensure that they were (1) new parents or expecting a baby in the next six months, (2) were open to considering purchasing infant formula, (3) were not participating in the Women, Infants, and Children Nutrition Program, and (4) were or would be the primary or shared decision maker in choosing infant formula brands”).

selection of survey locations should not unfairly favor one party over the other. For example, a mall survey was held to have a properly defined universe where it was conducted at a neutral location, a mall in which neither party had a presence.<sup>193</sup>

### *B. Representative Sample*

Selecting the appropriate sample of respondents is crucial to survey implementation, because the reactions of the polled sample should attempt to represent the genuine reactions of the defined universe.<sup>194</sup>

#### 1. Screening Questionnaire

The evidentiary value of a communication survey also depends on whether the survey screens users to properly define the survey's universe.<sup>195</sup> Therefore, respondents are typically screened before answering substantive communication questions in order to make sure that they qualify for the survey, and courts have found a failure to do so undercuts the legitimacy of the entire survey.<sup>196</sup> One reason for screening is to ensure that respondents do not have biases that would affect the accuracy of the survey, such as employment by the company whose product is being advertised. Respondents are also screened out if they do not fall within the proper universe of potential consumers of the advertised product.<sup>197</sup>

#### 2. Sample Size and Probability Sampling

If the sample is too small, survey results might not properly measure the meaning average consumers perceived, and courts will generally give

193. *Foto Fantasy, Inc.*, 204 F. Supp. 2d at 972.

194. *See MCCARTHY*, *supra* note 186.

195. *See, e.g., Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, 627 F. Supp. 2d 384, 447 (D.N.J. June 5, 2009) (holding that a survey was improperly conducted in part because it failed to use survey questions to screen out the correct sample population).

196. *Id.* (holding respondents were not screened to ensure they were in the correct universe was “a critical flaw in the design of the survey, which makes it significantly less useful for determining whether consumers who were making the actual purchasing decision were deceived, a critical question in this case”).

197. *See Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 591 (3d Cir. 2002).

less weight to the survey.<sup>198</sup> Between 200 and 300 participants is often considered an adequate sample size for a communication survey.<sup>199</sup>

Nonprobability sampling is common.<sup>200</sup> However, surveys that utilize probability sampling, such as telephone surveys, were traditionally preferred because probability sampling meant that each possible respondent had an equal chance of being selected.<sup>201</sup> One common, traditional way to conduct a nonprobability sampling survey is the “mall intercept” method.<sup>202</sup> In a national survey, the survey expert will typically select malls in geographically diverse areas of the country, for example four malls in each of the four census regions—Northeast, Midwest, South, and West. Mall surveys are routinely accepted for communication surveys.<sup>203</sup>

### 3. Internet Surveys

Nonprobability sampling may also be conducted through internet surveys, a method which numerous courts have now accepted for communication surveys.<sup>204</sup> Courts review internet surveys with the same emphasis on relevant questions and technical adequacy as they use when

198. See, e.g., *Kinetic Concepts, Inc. v. Bluesky Med. Corp.*, SA-03-CA-0832, 2006 WL 6505346, at \*5 (W.D. Tex. Aug. 11, 2006) (holding that a different court holding the sample size too small in a survey of 52 participants with only 27 in the test group distinguishable from a sample of 75 physicians and 60 nurses, which was “sufficiently large to provide meaningful results”).

199. David Bernstein & Bruce Keller, *THE LAW OF ADVERTISING, MARKETING AND PROMOTIONS* § 3.03 (2015) (citing *In re Northland Cranberries, Inc.*, NAD Case Report No. 3948 (Aug. 2002), ASCR (<http://case-report.bbb.org/>)).

200. MCCARTHY, *supra* note 186.

201. See *id.*

202. See, e.g., *Merisant Co. v. McNeil Nutritionals, LLC*, 242 F.R.D. 315, 325–26 (E.D. Pa. 2007) (denying motion *in limine* to exclude survey that employed the mall intercept method using 23 malls spread out across the country).

203. See *Fancaster, Inc. v. Comcast Corp.*, 832 F. Supp. 2d 380, 405 (D.N.J. 2011) (rejecting expert’s testimony that mall surveys, because they are not projectable, cannot be relied on in litigation, and stating that courts have repeatedly accepted mall surveys in litigation).

204. See, e.g., *T-Mobile US, Inc. v. AIO Wireless LLC*, 991 F. Supp. 2d 888, 907 (S.D. Tex. Feb. 3, 2014) (rejecting defendant’s argument that the online presentation of a consumer survey affected its weight); *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 124 (4th Cir. 2011) (admitting “without difficulty” an expert testimony based on an internet survey of prescreened individuals who viewed an advertisement online then dialed a toll-free number to answer questions about it); *Doctor’s Assocs. v. QIP Holder LLC*, Civil Action No. 3:06-cv-1710 (VLB), 2010 U.S. Dist. LEXIS 14687, at \*56 (D. Conn. Feb. 19, 2010) (holding that an internet survey that exposed consumers to a 30-second advertisement followed by a series of questions to assess their reactions was admissible); *R&R Partners, Inc. v. Tovar*, 447 F. Supp. 2d 1141, 1155 (D. Nev. 2006) (rejecting defendant’s argument that internet surveys are unreliable).

reviewing the adequacy of phone or in-person surveys, and admit internet surveys as evidence if these surveys satisfy those same requirements.<sup>205</sup>

However, monitoring the sample composition in Internet surveys can be difficult. Without information about the selection of the sample, courts have criticized survey evidence, whether compiled from internet surveys, as not probative.<sup>206</sup> One court criticized the universe of an AOL poll as “[p]resumably . . . comprised of people who happened to have been online while AOL released this poll, and cared enough about the issue to mouse-click on a box,” and described the sample as the “least representative imaginable.”<sup>207</sup>

### C. Fair Presentation of the Commercial Stimulus

To appropriately test the typical reaction of a consumer, the presentation of the commercial stimulus should mimic a typical viewing context.<sup>208</sup>

There has been debate about the amount of time that survey respondents should be exposed to visual stimuli, such as print advertisements or product labels. Courts have emphasized the need to realistically replicate the market.<sup>209</sup> Permitting the respondent to have access to the advertisement

205. See *1-800 Contacts, Inc. v. Lens.Com, Inc.*, 722 F.3d 1229, 1246 (10th Cir. 2013) (affirming the trial court’s exclusion of an online questionnaire, because the questions asked were ambiguous, but not because the survey was conducted online).

206. See, e.g., *In re Front Loading Washing Mach. Class Action Litig.*, Civil Action No. 08-51 (FSH), 2013 U.S. Dist. LEXIS 96070, at \*21–23 (D.N.J. July 10, 2013) (excluding expert testimony of an internet survey on reliability grounds because the survey asked only general questions and because the expert lacked information on whether the respondents received compensation, how many respondents there were, whether each response was from a unique individual or whether the respondents actually owned the product at issue); *Procter & Gamble Co. v. Ultreo, Inc.*, 574 F. Supp. 2d 339, 350 (S.D.N.Y. 2008) (“There is no indication of whether the universe from which these respondents were chosen was a properly defined universe, or whether the 3,116 respondents constituted a representative sample of that universe. Without any information as to the composition and selection methodology of the survey sample, the [survey] is simply not probative of irreparable injury.”); *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302, 1324–25, 1334–35 (N.D. Ga. 2008) (finding survey did not create a genuine issue of material fact with respect to consumer confusion where the survey targeted an overbroad universe and used a non-random sample).

207. *Merisant*, 242 F.R.D. at 328 n.11 (internal citations omitted).

208. See *POM Wonderful LLC v. Organic Juice USA, Inc.*, 769 F. Supp. 2d 188, 200 (S.D.N.Y. 2011) (finding the weight of an online survey is diminished where it fails to replicate real world conditions); *Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Management, Inc.*, 618 F.3d 1025, 1037–38 (9th Cir. 2010) (failing to replicate real world conditions, affecting the weight of the survey evidence); *Maker’s Mark Distillery, Inc. v. Diageo North America, Inc.*, 703 F. Supp. 2d 671, 693–94 (W.D. Ky. 2010) (holding survey evidence was not useful or persuasive where the survey created an environment that was dissimilar to that which a typical consumer would encounter), *aff’d*, 679 F.3d 410 (6th Cir. 2012).

209. See *Church & Dwight Co., Inc. v. S.C. Johnson & Son, Inc.*, 873 F. Supp. 893, 910 (D.N.J. 1994) (“In a Lanham Act *false advertising* case, it is crucial that the *survey* evidence presented to the trier

throughout the survey might reduce the survey's probative value, because respondents could view the stimulus for unrealistic periods of time.<sup>210</sup> However, several decisions have indicated that the stimulus should be visible to respondents for the duration of the survey.<sup>211</sup>

With respect to audio-visual stimuli such as television commercials, the generally accepted practice is to show the stimulus twice to respondents, in order to ensure the survey is conducted in a “generally objective and fair manner.”<sup>212</sup> Where a video was embedded on a webpage, the “fact that the respondents were not shown the text from the webpage may severely undercut the survey's reliability.”<sup>213</sup>

#### D. Question Design

Of considerable importance is the objectivity of the question design—a fact-specific inquiry that is subject to case-by-case analysis.<sup>214</sup> Survey questions must not be leading or suggestive, and must be designed to probe whether consumers actually take away the message being tested.<sup>215</sup>

Courts have cited open-ended questions as preferable to closed-ended or multiple choice questions,<sup>216</sup> but closed-ended or multiple choice questions have been found to be reliable when filter questions are asked,<sup>217</sup> and a “don't know” or “not sure” choice is included to help avoid guessing by survey participants.<sup>218</sup> Survey design typically provides specific

of fact most closely replicates consumers' ‘real world’ perceptions of the contested advertisement.” (emphasis added)).

210. *Am. Home Prods. Corp. v. Procter & Gamble Co.*, 871 F. Supp 739, 761 (D.N.J. 1994) (holding that the survey suffered from “improper technique” because of the “extended time the participant was permitted to study[,] . . . view[,] and review [the free-standing coupon insert] during the course of the entire survey interview, which typically lasted from 10 to 15 minutes”); see MCCARTHY, *supra* note 186 (defining a “reading test”).

211. *See, e.g., Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 129 F. Supp. 2d 351, 366 (D.N.J. 2000) (“[L]eaving the products to the respondents to examine rather than taking the products away replicates market conditions”) (citing *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 297 (2d Cir. 1999)), *aff'd*, 290 F.3d 578 (3d Cir. 2002).

212. *See, e.g., McNeil-PPC, Inc. v. Pfizer, Inc.*, 351 F. Supp. 2d 226, 244–52 (S.D.N.Y. 2005).

213. *POM Wonderful*, 769 F. Supp. 2d at 200.

214. *LG Elecs. U.S.A., Inc. v. Whirlpool Corp.*, 661 F. Supp. 2d 940, 956 (N.D. Ill. Sept. 28, 2009) (“The probative value of any given survey is a fact specific question that is uniquely contextual.”) (quoting *Johnson & Johnson-Merck Consumer Pharms. Co. v. SmithKline Beecham Corp.*, 960 F.2d 294, 300–01 (2d Cir. 1992)).

215. *See, e.g., Johnson & Johnson-Merck Consumer Pharms. Co. v. SmithKline Beecham Corp.*, 960 F.2d 294, 300 (2d Cir. 1992).

216. *See, e.g., id.*

217. *See, e.g., LG Elecs.*, 661 F. Supp. 2d at 955.

218. *See, e.g., id.* (finding the use of closed-ended questions, proper particularly when the questions included a “don't know” option); *L & F Prods. v. Procter & Gamble Co.*, 845 F. Supp. 984, 998 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 709 (2d Cir. 1995).

instructions to participants not to guess.<sup>219</sup> A survey is “not credible if it relies on leading questions which are ‘inherently suggestive and invite guessing by those who did not get any clear message at all.’”<sup>220</sup>

### 1. Open-Ended Questions

Communication surveys invariably start with open-ended questions that make broad general inquiries such as “What was the main message of the advertisement?” or “Aside from trying to get you to buy the product, what are the main ideas the commercial communicates to you?”<sup>221</sup> Responses to general, open-ended questions provide the “most persuasive evidence” of consumer confusion.<sup>222</sup>

The NAD has also expressed a preference for open-ended questions, which are “better indicators of how consumers interpret a commercial message,” because respondents’ answers are not influenced by the suggestions contained in the questions themselves.<sup>223</sup> Closed-ended questions may be used, but should be reserved for situations where it is necessary to have respondents choose between the parties’ different interpretations of an advertisement, or where an open-ended approach would not assess subtle differences in meaning that are at the heart of the dispute.<sup>224</sup>

### 2. Filter Questions

Courts are more receptive to multiple-choice questions when they are preceded by filter questions that screen out respondents who did not take away any message on a certain topic of interest.<sup>225</sup> Filter questions have been described as questions that probe whether a relevant topic was communicated to the consumer, and thus insulate from the possible suggestive nature of multiple-choice questions.<sup>226</sup>

219. See, e.g., *Cumberland Packing Corp. v. Monsanto Co.*, 32 F. Supp. 2d 561, 572 (E.D.N.Y. 1999) (“The leading nature of the questions asked and the lack of instructions against guessing flawed [the] surveys.”).

220. *Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc.*, 19 F.3d 125, 134 (3d Cir. 1994) (quoting *Am. Home Prods. Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 581 (S.D.N.Y. 1987)).

221. See, e.g., *Johnson & Johnson-Merck Consumer Pharms. Co. v. SmithKline Beecham Corp.*, 960 F.2d 294, 299 (2d Cir. 1992).

222. *Id.* at 300.

223. *Campbell Soup Co. (Campbell’s Select Harvest Soup)*, NAD Case Report No. 4981, at 21 (Mar. 2009), ASCR (<http://case-report.bbb.org/>).

224. *Id.*

225. See *Procter & Gamble Pharms., Inc. v. Hoffmann-La Roche, Inc.*, 2006 WL 2588002, at \*23 (S.D.N.Y. Sept. 6, 2006).

226. *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 591–92 (3d Cir. 2002).

Filter questions themselves should not be leading or suggestive, and the narrower follow-up questions should not be overly suggestive. For example, the follow-up questions in *Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Rhone-Poulenc Rorer*<sup>227</sup> were found to be flawed, because they were too suggestive and phrased in such a way that there was only one logical way for respondents to answer. The claim at issue was whether referring to an antacid tablet as the “strongest” implied that it provided better relief when it actually only proved to be “stronger” at neutralizing acid in a laboratory test. The follow-up question used in the survey asked respondents what “strongest” meant to them, and the court found that the only logical answer would be to elaborate on the “strongest” claim in relation to acid relief.<sup>228</sup> Otherwise, a respondent may have simply taken away from the commercial that “strongest” simply meant “strongest” at acid neutralization in a chemical sense.<sup>229</sup>

However, the follow-up questions used in another antacid case “met a proper filter question threshold and could be accorded significant weight.”<sup>230</sup> Those questions asked more generally whether the product label communicated anything about how long the product would provide relief and did not ask respondents to focus on any particular element of the product label.<sup>231</sup> Thus, the questions did not lead respondents to provide any particular answer or allow for only one logical response.

The NAD has also endorsed filter questions and “believes that a progression from open-ended to increasingly focused questioning” is a better technique for soliciting unbiased evidence as to how respondents interpret implied messages than using leading questions.<sup>232</sup> After filtering out viewers who did not receive any message relating to the claim in dispute, the interviewer can ask the remaining viewers follow-up questions to determine what message a particular aspect of an advertisement conveyed.<sup>233</sup>

### 3. Leading or Suggestive Questions

In *Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. SmithKline Beecham Corp.*,<sup>234</sup> the Second Circuit rejected survey results

227. 19 F.3d 125, 134 (3d Cir. 1994).

228. *Novartis*, 290 F.3d at 592 (interpreting *Rhone-Poulenc Rorer Pharms.*, 19 F.3d at 135).

229. *Id.*

230. *Id.* at 593.

231. *Id.*

232. *Merial Ltd. (Frontline Plus Flea & Tick Treatment)*, NAD Case Report No. 3844, (Dec. 18, 2001), ASCR (<http://case-report.bbb.org/>).

233. *Id.*

234. 960 F.2d 294 (2d Cir. 1992).

based on leading questions and upheld a district court finding that the only persuasive evidence of consumer confusion came from open-ended questions inquiring about the overall message communicated by the commercials at issue. In that case, the defendant, who manufactured the antacid medication Tums, aired commercials that showed the plaintiff's antacid, Mylanta, along with a list of its active ingredients, including aluminum and magnesium. The commercial touted Tums, which uses calcium carbonate as the active ingredient for acid neutralization, as being "[c]alcium rich [and] aluminum free."<sup>235</sup> The plaintiff claimed these commercials misled consumers to believe that the aluminum or magnesium in Mylanta was harmful.

The plaintiff conducted a survey that asked both open-ended questions and more narrowly focused questions about the commercials. Based on the results of the narrow questions, the plaintiff's expert concluded that 45% of the relevant respondents were misled.<sup>236</sup> The Second Circuit upheld the district court's rejection of the survey results, which were based on questions it considered to be leading: (i) "What, if anything, does the commercial communicate to you about the aluminum and magnesium in Maalox and Mylanta?"; (ii) "What else, if anything, does the commercial communicate to you about the aluminum and magnesium in Maalox and Mylanta?"; and (iii) "Based on the commercial you just saw, how do you feel about taking a product for heartburn that contains aluminum and magnesium?"<sup>237</sup> These questions were found to be leading, because they flagged the allegedly misleading specific message in the commercial for the attention of the survey respondent.<sup>238</sup> The court considered as persuasive evidence only the answers to the broad, open-ended questions: "Aside from trying to get you to buy the product, what are the main ideas the commercial communicates to you?" and "What other ideas does the commercial communicate to you?"<sup>239</sup> Only nine of the 300 answers to those questions mentioned aluminum or magnesium content as a potential danger, and the court found the 281 other answers, which did not mention aluminum or magnesium, to be the most persuasive evidence of the ultimate message communicated by the commercials—one that did not mislead consumers.<sup>240</sup>

235. *Id.* at 295.

236. *Id.* at 300.

237. *Id.* at 299.

238. *Id.* at 300.

239. *Id.* at 299–300.

240. *Id.* at 300.

This case offers an example of a typical strategy in disputing the results in a survey—arguing that the closed-ended questions or the follow-up questions should be discounted or ignored as leading, while pointing to the main idea/other ideas questions, showing that the challenged message was not being communicated.

#### 4. Closed-Answer Questions

Courts often give little or no weight to survey evidence based on questions that force respondents to choose an answer from a closed universe of options, especially when respondents are not given a “don’t know” or “not sure” option.<sup>241</sup> For example, the survey used by the plaintiffs in *Gillette Co. v. Norelco Consumer Products Co.*<sup>242</sup> asked respondents “Which, if any, of these wet razors looks most like the wet razor shown in the commercial you just saw?” while displaying twelve razors to the respondent. The court considered this question to be “markedly suggestive,”<sup>243</sup> even though the question allowed respondents to choose no razor. The court found that the question nonetheless led respondents to attempt to find a razor that most resembled the razor from the commercial, even when they would not have made the association without the prompt. However, the court noted that such a closed-ended question might be acceptable if it instead followed an open-ended question that filtered out respondents who did not think that the commercial’s image of a razor was similar to or evocative of an actual razor on the market.<sup>244</sup>

Closed-ended questions are not inherently leading. A well-designed closed-ended question can survive the lack of filter questions. In *LG Electronics U.S.A, Inc. v. Whirlpool Corp.*,<sup>245</sup> the court noted that “the purpose of a filter question is to reduce guessing” and rejected Whirlpool’s criticism of the lack of filter questions, finding that the survey’s use of “don’t know” in the close-ended question sufficiently mitigated this concern to allow admission of the survey.

Courts have also allowed variations on a multiple choice design to serve as evidence of the implied communication. For example, in *Sanderson*

241. See, e.g., *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 280 (4th Cir. 2002) (rejecting a survey partially because “the interviewers conducted the survey in this case in a way that effectively required the respondents to express a specific opinion, even if they did not have an opinion, by specifically *not* offering the respondents the opportunity to give ‘not sure’ as a response”) (emphasis in original).

242. 69 F. Supp. 2d 246, 259 (D. Mass. 1999).

243. *Id.*

244. *Id.* at 261–62.

245. 661 F. Supp. 2d 940, 955 (N.D. Ill. 2009).

*Farms, Inc. v. Tyson Foods, Inc.*,<sup>246</sup> respondents were read a series of statements and told that some, all, or none of the statements may have been implied by or stated in the advertisement at issue. Respondents were then told to answer: “(1) yes, the statement was implied; (2) no, the statement was not implied; (3) I don’t know whether the statement was implied; or (4) no opinion.”

### 5. Off-Target Questions

Survey questions may be improper if they do not reach an issue in the case. For example, in *Scotts Co. v. United Industries Corp.*,<sup>247</sup> survey questions that employed the same ambiguous language as the advertisement at issue were disregarded as non-persuasive.<sup>248</sup> The main issue in that case was whether the advertisement conveyed that the fertilizer being advertised would kill mature crabgrass—which was not true—or if it would merely prevent the growth of new crabgrass—which was true. The survey asked: “Based on your review of this section of the bag, should this product prevent the growth of [mature] crabgrass?”<sup>249</sup> The court found that “[t]hrough the use of the word ‘prevent,’ this question suffer[ed] from the same ambiguity” as the contested packaging itself.<sup>250</sup> Therefore, the court noted that although more than 90% of the respondents answered “yes” when asked whether the advertisement implied that Vigoro prevents the growth of crabgrass, those responses shed no light on the key question to the false advertising claims—whether the advertiser’s packaging “conveys the message that it can *kill* mature crabgrass.”<sup>251</sup>

Similarly, in *Mead Johnson & Co. v. Abbott Laboratories*,<sup>252</sup> the plaintiff conducted a survey asking respondents what they believed the phrase “1st Choice of Doctors” meant, as used to describe defendant’s baby formula in the advertisement. The Seventh Circuit found the survey unpersuasive because it asked respondents to consider “1st Choice” as representing a threshold percentage of doctor preference rather than the real meaning of “first”—number one in a series.

Surveys may also suffer from asking questions that are too narrow and fail to consider the broader, more fundamental issues in the case. For

246. 547 F. Supp. 2d 491, 501–02, 507 (D. Md. 2008) (issuing preliminary injunction).

247. 315 F.3d 264 (4th Cir. 2002).

248. *Id.* at 280.

249. *Id.* at 279.

250. *Id.*

251. *Id.* (emphasis added).

252. 201 F.3d 883, 884–85 (7th Cir. 2000).

example, the ultimate flaw that the court found with the survey used in *Gillette Co. v. Norelco Consumer Products Co.*<sup>253</sup> was that it only asked which razor the animated razor looked like and thus failed to consider what the court considered the real issue—whether the commercial was comparing the advertised product to any other product at all.

In *Design Resources, Inc. v. Leather Industries of America*,<sup>254</sup> plaintiff, an upholstering supplier, asserted false advertising claims against a trade association in response to defendant's advertisements warning that some upholstery suppliers were using leather scraps in their products. Plaintiff attempted to use a survey commissioned by one of the defendants to demonstrate that consumers understood the allegedly misleading advertising to be directed at bonded leather, which plaintiff argued was synonymous with its products at the time. However, the survey responses made no mention of plaintiff's products; no respondents gave an answer that could be interpreted as a belief that plaintiff or its products were specifically or impliedly referred to in the advertising.<sup>255</sup> Therefore, the court held that the survey failed to provide evidence of consumer confusion, and, if anything, appeared to disprove plaintiff's case.

#### *E. Interview Procedure and Validation*

The procedures employed when conducting a survey must be proper and objective. The survey expert must select competent interviewers who do not pose a risk of tainting evidence with questionable tactics. The expert must also use double-blind interviewing procedures, in which neither the interviewer nor the participant knows why the survey is being conducted, who the sponsor is, or what answers the sponsor hopes to obtain.<sup>256</sup> The anonymity of the sponsor is essential to avoid bias in the survey results.<sup>257</sup>

Improper interview procedures, particularly when combined with other surveying errors, may lead to exclusion of the survey. In *Procter & Gamble Pharmaceuticals, Inc. v. Hoffmann-LaRoche, Inc.*,<sup>258</sup> data collection flaws that rendered the survey inadmissible included: failure to collect non-

253. 69 F. Supp. 2d 246, 261 (D. Mass. 1999).

254. 789 F.3d 495, 503–04 (4th Cir. 2015).

255. *Id.*

256. See *Sanderson Farms, Inc. v. Tyson Foods, Inc.*, 547 F. Supp. 2d 491, 499 (D. Md. 2008) (accepting as reliable and persuasive a double blind survey); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 590 (3d Cir. 2002).

257. See *Castrol, Inc. v. Pennzoil Quaker State Co.*, No. Civ. A. 00-251, 2000 WL 1556019, at \*11 (D.N.J. Oct. 12, 2000).

258. No. 06 Civ. 0034 (PAC), 2006 WL 2588002, at \*24 (S.D.N.Y. Sept. 6, 2006).

response information; destruction of original interview forms; flawed interviewer and screening instructions; failure to comply with instructions provided to site supervisors; failure to address differences in handwriting, including the same handwriting under different interviewers' names and different handwriting under the same interviewer's name; and inclusion of unqualified interviewers.

A properly conducted survey must follow post-survey validation procedures to confirm the reliability of the survey process. However, the threshold for what courts consider to be acceptable validation is not exceedingly high. In post-interview validation, an independent third party contacts the identified respondents to confirm that they actually participated in the survey and provided answers.<sup>259</sup> For example, in one case, after the survey was complete, the survey expert enlisted an independent telephone interviewing service to verify the responses and to detect any fraud by the interviewers. Specifically, the interviewing service contacted respondents by phone to verify that the respondents: (1) existed, (2) met the universe requirements, and (3) recalled completing the interview.<sup>260</sup> One survey expert testified that it is customary in the industry to be able to successfully validate only 15 to 25% of responses,<sup>261</sup> and another survey expert noted that the 40% validation rate obtained in that case exceeded industry norms.<sup>262</sup>

#### F. Coding

Parties often disagree over whether certain individual responses to open-ended questions actually convey deception.<sup>263</sup> In one NAD decision,<sup>264</sup> the challenger, Schick, alleged that Gillette's advertising for the Venus Divine razor conveyed to consumers that the Venus Divine would provide post-shave moisturizing benefits to users, whereas Gillette argued that the ads only conveyed that the Venus Divine provided moisturizing during, and not after, shaving. In challenging the persuasiveness of Schick's consumer survey, Gillette argued that Schick's survey experts improperly coded all

259. See *Merisant Co. v. McNeil Nutritionals, LLC*, 242 F.R.D. 315, 324–25 (E.D. Pa. 2007) (noting that “validation is indeed important”).

260. *LG Elecs. U.S.A., Inc. v. Whirlpool Corp.*, 661 F. Supp. 2d 940, 954 (N.D. Ill. 2009).

261. *Id.*

262. *Merisant*, 242 F.R.D. at 325.

263. See, e.g., *Procter & Gamble Co. v. Ultreo, Inc.*, 574 F. Supp. 2d 339, 352 (S.D.N.Y. 2008) (finding that, in coding a survey regarding toothbrush commercials, the expert inappropriately considered responses that referred to “ultrasound” and “sonic vibrations” as perceiving that the ultrasound alone cleaned teeth).

264. *Gillette Co. v. Schick Mfg., Inc.*, NAD Case Report No. 4305 (Apr. 2005), ASCR (<http://case-report.bbb.org/>).

answers to open-ended questions that discussed moisturizing—both during and after shaving— as evidence of deception. Gillette’s experts re-coded the answers based on the verbatims provided by the Schick survey to obtain what they believed to be a more realistic figure for the number of misled or confused consumers. The experts concluded that after taking into account answers to follow-up questions in cases of ambiguity, only 17.6% of respondents were misled, a much lower percentage of respondents than the 51.6% claimed by Schick. NAD then undertook independent coding of the responses based on the verbatim responses.<sup>265</sup>

#### IV. CONCLUSION

To the extent there appears to be an emerging trend, the use of communication and other survey evidence in Lanham Act false advertising lawsuits is on the decline, whereas the opposite is occurring in state law consumer class action cases. Accordingly, the legal principles governing the use of surveys in these disputes continues to be of interest to lawyers who advise clients on truth-in-advertising issues.

265. *Id.* at 27.