

Not All Surveys Are Created Equal

Law360, New York (September 9, 2011) -- In May 2011, Sun Products Corporation, maker of Snuggle Blue Sparkle fabric softener, challenged an advertisement for Procter & Gamble's Ultra Downy April Fresh Liquid fabric softener before the National Advertising Division (NAD) of the Council of Better Business Bureaus.[1]

During the challenge, Sun Products produced a consumer perception survey in which 22 percent of respondents took away an implied message that the fresh scent from Snuggle's fabric softener lasted only one day, versus seven days for Downy. The NAD relied in part on the survey to find that P&G's implied claim was unsupported.

The case marked one of the relatively infrequent occasions on which the NAD found a consumer perception survey to be "instructive" and not "fatally flawed," although the NAD did find that "certain flaws existed in the design of the ... survey and found certain aspects of the methodology troublesome."

A bedrock principle of the NAD is that advertisers must substantiate every message that is reasonably conveyed by their advertising.[2] As a result, advertisers, or entities challenging advertising before the NAD, use consumer perception surveys to identify implied claims within the challenged ad. A well-executed survey can support a challenger's assertion that consumers perceive an advertisement in a way that cannot be substantiated by the advertiser.

Despite the potential benefits of survey evidence in an NAD proceeding, our review of NAD decisions indicates that the odds are that such evidence will have little influence on the final outcome of the dispute. Almost three-quarters of consumer perception surveys introduced in the past five-and-a-half years were set aside after the NAD found them to be unreliable. In those cases, the NAD typically reverted to its own judgment and experience to decide the matter.[3]

This article discusses the primary reasons why the NAD discounts the large majority of consumer perception surveys introduced during challenges, based on a review of NAD decisions discussing consumer perception surveys between January 2006 and June 2011. The article further describes the framework by which the NAD analyzes survey evidence, and the survey design characteristics that have the greatest influence on generating a reliable survey.

Nearly Three Out of Four Surveys Are Found Unreliable

Advertisers and challengers introduced 68 consumer perception surveys during NAD cases decided between January 2006 and June 2011.[4] The NAD held that 71 percent of the surveys (48 of the 68) were unreliable and therefore had little or no impact on the final outcome of the decision.

The NAD does not use a set formula to evaluate consumer perception evidence,[5] and may find that a survey is reliable or fatally flawed based upon the survey design, survey questions, and the significance of the results. The five most frequent reasons why the NAD set aside consumer perception survey evidence during the past five and a half years are set forth below.

Absence of an Adequate Control

Since January 2006, the survey flaws most frequently cited by the NAD involve ineffective or missing controls.[6] Controls serve several purposes in advertising consumer perception surveys.

One important type of control helps to ensure that the results of the survey are focused on the allegedly offending message within the challenged advertising by assessing the extent to which respondents attend to non-offending elements and messages present in the ad. Controls can also measure, and through analysis provide a means to correct for, responses attributable to a respondent's pre-existing beliefs or familiarity with the product,[7] guessing by the respondent, and biases unintentionally created by the survey itself.[8]

A commonly used control in advertising surveys is an advertisement that closely resembles the challenged advertising except that the allegedly offending elements of the ads are removed. One group of respondents are shown the actual challenged advertisement, while a separate group of respondents view the modified control advertisement. All respondents are then asked a series of questions to determine the perceived messages within the advertisement.

Controls may be flawed for a number of reasons. In several cases, the NAD cited differences between the challenged advertisement and the control advertisement, expressing the principle that the control should incorporate as many non-offending elements of the challenged ad as possible in order to isolate respondents' reactions to the offending elements only.

In a case involving Bayer's Advantage and K9 Advantix flea repellent, for example, Bayer's advertising included the claim "fleas don't have to bite to die." A competitor challenging the ad introduced a survey to argue that the claim conveyed the unsupported message that fleas do not bite dogs treated with the Bayer products. The NAD noted that the control advertisement used in the survey was a single-page advertisement that prominently featured a half-bone and half-hammer image, while the challenged advertisement was a multi-page ad that lacked the half-bone, half-hammer image. The NAD found the survey unreliable because the control ad shared few characteristics with the advertising at issue.[9]

The NAD has applied a similar logic in critiquing control questions, which are questions designed to elicit responses not directly of interest in the survey for purposes of assessing possible bias due to survey artifacts, guessing and "yea-saying."

When Procter & Gamble, maker of Bounty paper towels, introduced survey evidence to challenge advertising for Kimberly-Clark's Viva paper towels, the control questions dealt with a separate pre-existing consumer opinion survey about the two paper towel brands. The NAD stated that a control based on an opinion survey that was unrelated to the challenged claim was "devoid of context," and thus rendered the survey results unreliable.[10]

The NAD closely evaluates controls when analyzing survey evidence; however, the lack of a control in a survey is not a fatal flaw per se.[11] The NAD acknowledges that producing an appropriate control advertisement can be challenging, particularly with television advertising. In a challenge over claims for Bayer's Rapid Headache Relief Aspirin, the NAD found the challenger's consumer perception survey credible despite the lack of a control because the survey results were nevertheless consistent with the NAD's own analysis.[12]

Limited Probative Value

When evaluating survey evidence, the NAD considers the survey's probative value, i.e. whether the survey objective is directly relevant and appropriate for the advertising claims at issue. If, for example, a survey measures consumer perceptions about a product's ability to clean indoor surfaces, the survey results may not be appropriate to support claims about the product's indoor and outdoor cleaning efficacy.

Surveys with limited probative value, including surveys that were off-topic or too narrow in scope to support the challenged claim, were noted in several NAD cases.[13]

For example, a challenge to claims for General Mills' Yoplait Yo-Plus yogurt included a survey offered to show that Yo-Plus offered superior digestive health benefits versus a competing brand. The NAD rejected the survey after noting that the challenge concerned whether the two yogurts provided the same digestive health benefits, which was a comparative parity efficacy claim rather than a superiority claim.[14]

In a 2006 case involving the term "Pure" in Mazola Pure Cooking Spray, the challenger introduced a survey to show that consumers associate "Pure" with a single-ingredient product. The NAD found the survey results unreliable after determining that the challenger had wrongly grouped the survey responses, and only seven percent of respondents actually understood "pure" to mean "only oil." [15]

Leading or Suggestive Questions

A number of decisions discussed surveys that were rejected by the NAD due to leading or suggestive questions.[16] A question may be leading or suggestive depending upon what the question asks, words or phrases within the question, or the manner in which the questions are presented to respondents.

In cases where the NAD has found survey evidence credible, the NAD often noted that the initial questions were open-ended questions — those in which responses are not limited to pre-selected answers — which the NAD views as more reliable indicators of how consumers interpret messages communicated in advertising. The survey questions then should become increasingly focused as the survey probes for the advertisement's implied messages, using more specific open-ended questions and/or closed-ended questions.[17]

When DIRECTV asserted that its "over 130 HD channels" claim included pay-per-view channels, Comcast challenged the claim using a survey that asked respondents to decide which provider offered more HD channels. Respondents were shown channel lists for DIRECTV [List #387] and Comcast [List #429]. NAD rejected the survey after finding that the higher list number (#429) "served as a subtle, yet effective cue" that Comcast's list contained more channels.[18]

In 2008, Russian Standard Inc. relied on responses to closed-ended (or multiple choice) survey questions to show that consumers expect authentic Russian vodka to be imported from, or at least bottled in, Russia. The NAD, however, noted that responses to the survey's initial open-ended questions on the meaning of "authentic" generated few answers referring to "imported from" or "bottled in" Russia. As a result, the NAD held that the closed-ended questions were overly suggestive.[19]

The Absence of Adequate Filter Questions

Filter questions often are used in surveys to determine whether respondents recall the challenged advertising claims, and therefore should be allowed to move on to additional questions.[20] A respondent who cannot recall the challenged claim may unintentionally provide answers based on information that does not reflect his or her actual opinions of what the claim means in the context of the advertisement.[21]

In 2010, a rival paint company introduced a consumer perception survey to challenge Sherwin-Williams' claim that its paint eliminates household odors. The survey did not use filter questions prior to asking respondents questions about the "eliminates household odors" claim. The NAD held that respondents first should have been asked whether they even recalled the claim, and only participants answering in the affirmative should have been allowed to continue with the survey.[22]

Respondents Not Shown Actual Advertisement or Claim[23]

A core NAD principle is that survey respondents, if asked to give their interpretation of a claim, should view the claim as it appears in the challenged advertising.[24]

For example, a survey introduced by Conagra Foods to support claims for its Hebrew National Beef Franks showed respondents a storyboard of the advertising that contained images and voiceover text that were different from the challenged advertisements. The storyboard read "when it comes to choosing a hot dog, be more observant," even though the term "observant" was not used in the actual advertisement. The NAD found that the survey responses did not reliably correspond to the advertising claims at issue in the case.[25]

Similarly, the NAD rejected a survey that was offered to show allegedly unsubstantiated claims for Dannon's Light & Fit 0% Plus Yogurt. The survey was based on television commercials for the yogurt, while the challenged advertising was limited to claims on the yogurt container label. The NAD stated that it would "not use the results of a survey conducted on one commercial to draw conclusions about the express or implied message in [other advertising], even if the claims used are substantially similar." [26]

Additional Points to Consider Before Introducing Survey Evidence

The NAD evaluates survey evidence on a case-by-case basis, which means that a flawed survey can nevertheless influence the NAD's decision.

For example, the NAD found that, despite a flawed methodology, a survey used to challenge a "No Fee" claim for Priceline.com's travel booking service still "provided evidence that the message being conveyed by the original commercial was. . . confusing." Additionally, the NAD will give weight to surveys that, while imperfect, produce results that are consistent with the NAD's own analysis of the challenged claim.[27]

The NAD also will consider the following questions when evaluating survey evidence:

Methodology

Was the survey conducted (or independently validated) by a third party, and were participants blinded to the purpose and sponsor of the survey? How many respondents participated in the survey, and was this group geographically diverse?

Questionnaire

Are the survey questions clearly-worded? Also, if the survey uses close-ended questions, are the answer choices randomized? Did the length of the survey result in fatigue among respondents?

Results

Are the survey results statistically significant? For example, if a challenger offers a survey to show that an advertising claim is misleading, the NAD will consider the percentage of respondents who stated that they were misled by such claim.

Conclusion

The NAD's self-regulatory role within the advertising industry allows it to stand in the shoes of consumers to determine the reasonable messages conveyed by an advertisement. The NAD therefore does not require consumer perception evidence and regularly decides cases based solely on its own expert judgment.

Nevertheless, the NAD may give considerable weight to a well-executed survey when evaluating implied claims within advertising. The NAD's standards for a well-executed survey, however, are exacting and often are not met, even by experienced survey researchers guided by competent counsel.

Given the time and resources required to conduct a credible survey, parties to an NAD proceeding should carefully consider the factors that influence the NAD's analysis of survey evidence, which in turn will give their survey the greatest chance of impacting the final outcome.

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[1] See The Procter & Gamble Company, NAD Case Report No. 5332 (May 10, 2011).

[2] See The Procter & Gamble Company, NAD Case Report No. 5261 (Dec. 8, 2010).

[3] See Bayer Healthcare, NAD Case Report No. 4455 (Feb. 16, 2006). (NAD asserted its role to stand in the shoes of consumers in order to determine the reasonable messages conveyed by an ad).

[4] Research for this article focused on consumer perception surveys that were described in published NAD case reports at www.NADReview.org. Our review encompassed all case reports published from January 2006 through June 2011 that include the terms "survey," "consumer study," or "consumer perception." We identified 68 consumer perception surveys within the 218 reports that we reviewed. The remaining case reports noted the absence of "consumer perception" evidence, or included unrelated survey types such as doctor or dentist surveys (to support a "doctor/dentist recommended" claim), taste test studies, pricing surveys, or third-party surveys (e.g. Consumer Reports, J.D. Power).

[5] See Elanco Animal Health Division, NAD Case Report No. 5134 (Jan. 8, 2010).

[6] Absence of an adequate control was cited in 23.5 percent of the surveys held unreliable by the NAD.

[7] See Campbell Soup Company, NAD Case Report No. 4981 (Mar. 9, 2009).

[8] See Animal Health Division of Bayer Healthcare, LLC, NAD Case Report No. 5200 (Aug. 4, 2010).

[9] Id; see also Wal-Mart Stores, Inc., NAD Case Report No. 5032 (June 8, 2009).

[10] Kimberly-Clark Corporation, NAD Case Report No. 5269 (Dec. 30, 2010); Kimberly-Clark Corporation, NAD Case Report No. 5264 (Dec. 15, 2010).

[11] See D'Artagnan, Inc., NAD Case Report No. 4959 (Jan. 16, 2009); Seventh Generation, Inc., NAD Case Report No. 5206 (Aug. 24, 2010).

[12] Bayer Healthcare LCC, NAD Case Report No. 4455 (Feb. 16, 2006).

[13] Limited probative value was cited in 17.6 percent of the surveys held unreliable by the NAD.

[14] General Mills, Inc., NAD Case Report No. 4941 (Dec. 3, 2008).

[15] ACH Food Companies, Inc., NAD Case Report No. 4539 (Aug. 7, 2006).

[16] Leading or suggestive questions were noted in 17.6 percent of the surveys held unreliable by the NAD.

[17] See Kimberly-Clark Corp., NAD Case Report No. 5254 (Dec. 2, 2010); see also Maybelline New York, Inc., NAD Case Report No. 5241 (Nov. 10, 2010) ("NAD found that the advertiser's study was a reliable, well-controlled, perception survey. Open-ended main message questions were asked, followed by an appropriately-filtered closed-ended question.").

[18] DIRECTV, NAD Case Report No. 5208 (Aug. 25, 2010).

[19] Russian Standard Vodka, Inc., NAD Case Report No. 4591 (Jan. 24, 2008).

[20] The absence of adequate filter questions was cited in 14.7 percent of the surveys held unreliable by the NAD.

[21] The Sherwin-Williams Company, NAD Case Report No. 5148, (Mar. 8, 2010)); see also Seventh Generation, Inc., NAD Case Report No. 5206 (Aug. 24, 2010).

[22] Id.

[23] Respondents not shown the actual advertisement or claim was cited in 8.8 percent of the surveys held unreliable by the NAD.

[24] 3M Company, NAD Case Report No. 4596, (Nov. 14, 2006).

[25] Conagra Foods, Inc., NAD Case Report No. 4581 (Oct. 27, 2006).

[26] The Dannon Company, NAD Case Report No. 4953 (Jan. 2009).

[27] See Mega Brands, Inc., NAD Case Report No. 5300 (Mar. 9, 2011); Kimberly-Clark Corp., NAD Case Report No. 5254 (Dec. 2, 2010)

