

The Truth Hurts: Two Circuits Now Recognize That Consumer Surveys Cannot Be Used to Dispute Unambiguous Advertising Claims

Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc., No. 10-2354 (3d Cir. Aug. 4, 2011)

The Third Circuit has joined the Seventh Circuit in holding that a false advertising plaintiff cannot rely upon a consumer survey to alter the clear meaning of words in an ad.

The plaintiff in *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.* sought to use a consumer survey to show that the label of Bacardi's "Havana Club" rum was misleading under the Lanham Act. But on August 4, 2011, the Third Circuit held that the trial court was not required to consider the plaintiff's survey evidence because no reasonable consumer could be misled by the "accurate" and "unambiguous" statements on the label.

In reaching its determination, the Third Circuit relied heavily upon the Seventh Circuit's landmark opinion in *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 886 (7th Cir. 2000), a case successfully handled by our firm (Steven Zalesin argued the *Mead* appeal). At issue in *Mead* was the claim on defendant's label that its infant formula was the "1st Choice of Doctors." Though this statement was literally truthful – more doctors recommended the product than any other – a survey purported to show that some consumers interpreted the claim to mean that the defendant's product was preferred by a *majority* of physicians. The Seventh Circuit rejected this approach, holding that survey evidence cannot be used to "determine the meaning of words, or set the standard to which objectively verifiable claims must be held."

The Third Circuit became the first federal appellate court to endorse this decade-old ruling with its recent decision in *Pernod Ricard*, in which the plaintiff challenged the label on Bacardi's "Havana Club" rum, shown below.



The label displayed "Havana Club" in large stylized letters, followed by the word "BRAND" in smaller type. The phrase "PUERTO RICAN RUM" appeared prominently, albeit in letters smaller than the brand name. Text on the back of the bottle also stated that the rum is distilled in Puerto Rico.

Pernod Ricard asserted that the label misled consumers to believe that the rum is produced in Cuba. To support this argument, the plaintiff presented survey evidence that approximately 18% of consumers who viewed the bottle believed that the rum was made in Cuba or from Cuban ingredients. The district court refused to consider the survey, finding that no reasonable consumer could be misled by the label. Pernod Ricard appealed.

The Third Circuit affirmed the district court's ruling that the label, taken as a whole, could not mislead any reasonable consumer. "[A]ny thought a consumer might have that the words 'Havana Club' indicate the geographic origin of the rum must certainly be dispelled by the plain and explicit statements of geographic origin on the label," the court held. Since no reasonable consumer could be misled, the court concluded, survey evidence "has no helpful part to play" in determining what the label communicates. The Third

Circuit agreed with the *Mead* court that there are circumstances when "the meaning of a factually accurate and facially unambiguous statement is not open to attack through a consumer survey."

The *Pernod Ricard* decision should give some comfort to advertisers, as it insulates facially accurate and unambiguous advertising statements from attack on the basis of consumer survey evidence. Even under the *Pernod Ricard* decision, however, courts can still find a literally truthful advertisement to be misleading under the Lanham Act if the words or images used in the ad are ambiguous. In such circumstances, courts will continue to look to consumer surveys to determine whether an advertisement misleads a substantial segment of its intended audience. ♦

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