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LIES, DAMN LIES, AND MISLEADING ADVERTISING: THE ROLE OF CONSUMER SURVEYS IN THE WAKE OF *MEAD JOHNSON v. ABBOTT LABS*

"There are three kinds of lies: lies, damn lies, and statistics."¹ Just as Benjamin Disraeli noted, statistics yield results that one can skew in a variety of ways. If Disraeli was around to observe American society in the second half of the twentieth century, he might have included another category in his list of lies: advertising. Advertising, like statistics, is recognized commonly as a medium where facts can be interpreted, twisted, and emphasized according to the advertiser's needs. When business judgment and professional ethics fail to enforce reasonable standards, the courts may have to decide if advertisers have twisted the facts too far. This Note examines how courts determine what constitutes misleading advertising and applauds the shift toward a more consistent judicial doctrine signaled by the Court of Appeals for the Seventh Circuit in *Mead Johnson & Co. v. Abbott Laboratories*.²

Advertising plays a significant role in today's economy and its presence in both print and electronic formats is likely to continue.³ Buoyed by a strong market in 1999, advertisers increased their media expenditures by 10.3 percent over 1998 spending levels up to \$87.5 billion from \$79.3 billion.⁴ With that kind of money in question, advertisers understandably want to get the highest possible return from their investment.

1. THE OXFORD DICTIONARY OF QUOTATIONS 249 (Angela Partington ed., 4th rev. ed. 1996) (citing 1 MARK TWAIN, AUTOBIOGRAPHY 246 (1924) and attributing the quote to Benjamin Disraeli).

2. 201 F.3d 883 (7th Cir. 2000), *opinion amended on denial of reh'g*, 209 F.3d 1032 (7th Cir. 2000).

3. See, e.g., Television Bureau of Advertising, Inc., *Trends in Advertising: Estimated Annual U.S. Advertising Expenditures 1998-1999*, at http://www.tvb.org/tvfacts/trends/advolume/1998_1999.html (last visited Oct. 3, 2001) (showing total advertising expenditures for all media increasing 7.5% in 1998 and 6.8 percent in 1999).

4. Competitive Media Reporting, *1999 Ad Spending: GM, Cable Networks and the Internet are the Winners* (March 29, 2000), at www.cmr.com/news/032900_2.html.

Advertisers want to make their products look as good as possible to as many consumers as possible. In today's market, they frequently attempt the task not just by saying "our product is good," but by saying "our product is better than the other guys"—which is the basic concept behind comparative advertising.⁵ The effectiveness of comparative advertising is shown not only by consumer studies, but by its continuing use by advertisers. Approximately one-third of all advertising in the United States is comparative.⁶ A 1994 study of 5000 commercials by Research Systems Corporation (RSC) found that twenty-one percent of comparative ads had "superior" persuasion scores whereas only eighteen percent of the commercials that did not compare the competition received superior scores.⁷ Comparative advertisements also lead to greater consumer attention and message recall than noncomparative advertisements.⁸

American consumers typically can recognize when advertisers make thinly veiled attempts to create an artificial advantage.⁹ In these instances, exaggerated advertising or boasting upon which no reasonable consumer would rely is not grounds for legal action.¹⁰ The term for this type of representation and manipulation of advertising statistics is "puffing."¹¹ The advertiser's object in puffing is simple: given a choice of data, pick those that make you look best; if there is no good choice, change the criteria to make the data support your product.¹² One of the more intriguing examples

5. See, e.g., 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:59 (4th ed. 2001) (discussing the tendency of advertisers to claim superior quality of their own product relative to the product of their competitors).

6. Jenna D. Beller, Comment, *The Law of Comparative Advertising in the United States and Around the World: A Practical Guide for U.S. Lawyers and Their Clients*, 29 INT'L LAW. 917, 920 (1995).

7. *Do TV Commercials Which Attack the Competition Pay Off? New Research Systems Corp. Study of 5,000 Commercials Says Comparative Ads Have a Slightly Better Chance of Achieving Success*, PR NEWswire, Jan. 20, 1994, available at LEXIS, News Group File.

8. Beller, *supra* note 6, at 920.

9. For example, in 2000, Breyer's Ice Cream packaged new novelty flavors in slightly less than the typical half-gallon volume and promoted the change as a "new convenient size."

10. 4 MCCARTHY, *supra* note 5, § 27:38.

11. *Id.*

12. See, e.g., David Pogue, *Lies, Damn Lies, and Statistics: You Can Find Numbers that Say Anything—Especially if You Make 'Em Up*, MACWORLD, Jun. 1999, at 180 (citing estimates of Internet use as 38, 53 and 73 million by various research firms), available at <http://www.macworld.com/1999/06/opinion/desktopcritic.html>; Allan Lee, *Broadcasting: "Lies, Damn Lies and Statistics"*, (July 18, 2000), at <http://www.suite101.com/article.cfm/>

of puffing occurred in the computer industry's market-share calculations. The research firm PC Data tallied each color of Apple's popular iMac computer as a different model, thus ensuring that only the competing Windows/Intel models attained best-seller status.¹³

The effectiveness of an advertisement claiming that a given product is better than its competitors increases when the ad cites a scientific study or test to "establish" the claim.¹⁴ The modern consumer often grants a position of "mystic infallibility" to information labeled as "scientifically proven."¹⁵ Given the effectiveness of claims with scientific support, advertisers will, perhaps understandably, tout the smallest nuances of established superiority to gain a perceived competitive advantage.

When advertisers' claims cross the line from puffing to actual falsity, enforcement of the laws of unfair competition is available to injured parties.¹⁶ There are a variety of legal options,¹⁷ but the predominant legislation for addressing charges of false advertising—and the legal focus of this Note—is Section 43(a) of the Lanham Act.¹⁸

broadcasting/43906 ("Whoever it was coined the phrase about lies and statistics must have been thinking about broadcast ratings. Radio and TV shows live or die at the hand of the ratingsS.").

13. Wes George, *Divide & Conquer: April Numbers Read Awry*, THE MAC OBSERVER, May 24, 1999, at <http://www.macobserver.com/columns/appletrader/99/may/990524.html>.

14. See, e.g., Jerry B. Gotlieb & Dan Sarel, *Comparative Advertising Effectiveness: The Role of Involvement and Source Credibility*, 20 J. OF ADVER. 38, 44 (1991) (stating that the effectiveness of comparative advertising increases when "a source of higher credibility [e.g., science] is included in the advertisement").

15. *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974); Charles J. Walsh & Marc S. Klein, *From Dog Food to Prescription Drug Advertising: Litigating False Scientific Establishment Claims under the Lanham Act*, 22 SETON HALL L. REV. 389, 392 (1992).

16. 4 MCCARTHY, *supra* note 5, § 27:38.

17. Other options for false advertising litigation include federally prosecuted actions under Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45, 52 (1994), and private actions under state unfair competition laws.

18. Lanham Act § 43(a)(1), 15 U.S.C. § 1125(a)(1) (1994). The range of actionable misrepresentations under the Lanham Act include product labels, direct-mail solicitations, infomercials, and on-line advertising. For a list of representative cases, see Bruce P. Keller, *It Keeps Going and Going and Going: The Expansion of False Advertising Litigation Under the Lanham Act*, 59 LAW & CONTEMP. PROBS. 131, 146 (1996).

Determining what constitutes a falsity has proven to be no easy task for the courts.¹⁹ The consumer survey has emerged in recent years as the most important tool for resolving that question.²⁰ In the view of most courts, the advertiser's targeted audience should determine which advertising claims are misleading.²¹ A competitor wanting to contest the misleading nature of an advertising claim rounds up a statistically random sample of "average" Americans and asks them how they interpret the claim in question.²² If enough consumers cannot properly interpret the claim, it may be deemed misleading.²³ In the last half of the twentieth century the use of consumer survey evidence in false-advertising litigation grew from a suspect element in the larger body of plaintiff's evidence to a required—and in some cases singular—tool.²⁴ Surveys now provide the evidentiary key to the court's determination of whether an advertising claim that is technically true is cast under the same legal status as a literally false claim.

The Seventh Circuit's ruling in *Mead Johnson & Co. v. Abbott Laboratories*²⁵ takes a step back from the prevailing judicial affection for consumer survey evidence. By enforcing a limit on when consumer survey evidence is admissible, the Seventh Circuit took a judicial position that returns some common sense to misleading advertising enforcement under Section 43(a) of the Lanham Act.

This Note analyzes how the role of consumer surveys developed and what *Mead Johnson* may change. Following this introduction, section two reviews the case law development leading to modern support for the use of consumer surveys in misleading advertising claims. The next section presents some of the ongoing problems with the use of consumer surveys in false-advertising litigation. Section four reviews the facts and holding of *Mead Johnson*.

19. See *infra* notes 71-74, 127-36 and accompanying text.

20. See *infra* notes 75-91 and accompanying text.

21. 4 MCCARTHY, *supra* note 5, § 32:180.

22. *Id.* § 32:158.

23. *Id.* § 27:55.

24. *Id.*

25. 201 F.3d 883 (7th Cir. 2000), *opinion amended on denial of reh'g*, 209 F.3d 1032 (7th Cir. 2000), *cert. denied*, 531 U.S. 917 (2000).

Finally, section five assesses the potential impact of *Mead Johnson* on the future use of consumer surveys.

PURPOSE AND ENFORCEMENT OF THE LANHAM ACT

Pre-1946 Unfair Competition

Under the common law, injured competitors found virtually no relief for false advertising.²⁶ The earliest attempts to legislate against false advertising provided a very limited cause of action against competitors' unfair tactics.²⁷ The 1920 Trade-Mark Act²⁸ covered only advertising messages that were promoted with the intent to deceive, and only those doing business in the locality of the advertising were entitled to bring suit.²⁹ With the focus on the advertiser's intent, consumer survey evidence played virtually no role in early false-advertising litigation.

False Advertising Under the 1946 Lanham Act

In response to the need for a new federal remedy for a variety of unfair competition problems, Congress passed Section 43(a) of the Lanham Trademark Act.³⁰ The Lanham Act is presently the predominant federal law for false advertising in the United States.³¹ Under the Act, only those who can show a competitive injury³²—thus specifically excluding misled consumers—can directly sue the offending advertiser without going through a government entity to do so for them.³³

26. For a concise review of false advertising actions under the common law, see Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 18-22 (1992).

27. Trade-Mark Act of Mar. 19, 1920, ch. 104, § 3, 41 Stat. 533 (repealed 1946).

28. *Id.*

29. *Id.*; see also Keller, *supra* note 18, at 131-32.

30. Paul E. Pompeo, Note, *To Tell the Truth: Comparative Advertising and Lanham Act Section 43(a)*, 36 CATH. U. L. REV. 565, 568-69 (1987); Beller, *supra* note 6, at 923.

31. See, e.g., Ross D. Petty, *The Evolution of Comparative Advertising Law: Has the Lanham Act Gone Too Far?*, 1991 J. PUB. POL'Y & MKTG. 161, 161.

32. Keller, *supra* note 18, at 137.

33. Beller, *supra* note 6, at 923.

The drafters of Lanham Act Section 43(a), considered it to be a minor section partially codifying the common law, that also eased the restrictive evidentiary requirements of common law false-advertising cases.³⁴ At common law, claimants had to prove either "palming off"—attempting to make customers believe that one's own product was actually that of a competitor—or disparagement—a false accusation leveled for the purpose of injuring a competitor's business.³⁵ The Lanham Act eased the plaintiff's burden for proving palming-off and eliminated the intent requirement.³⁶ Judicial interpretations of the Act eventually expanded the range of allowable claims, but it took a number of years—even into the 1980s in some jurisdictions—for the courts to broaden the scope of the statute beyond the pre-1946 statutory limits.³⁷

The groundwork for the expanding scope was laid in 1954 when the Third Circuit first extended the Lanham Act's unfair competition provision to false advertising. In *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*,³⁸ the plaintiff had advertised a dress in a national advertising campaign. The defendant offered an inferior dress at less than half the price, using a picture of the plaintiff's dress in its advertising.³⁹ The plaintiff accused the defendant of misleading consumers by implying that they could obtain a dress of similar quality to the plaintiff's for less money.⁴⁰ The Third Circuit held that the Lanham Act provided the plaintiff a cause of action for unfair competition through false advertising.⁴¹ The court found that Congress, in adopting Section 43(a), created a federal statutory tort similar to the common law tort of unfair competition.⁴²

Use of Section 43(a) exploded during the 1970s and 1980s as plaintiffs' attorneys began pushing the courts to apply it to more and different types of false advertising and trademark infringement

34. Gary S. Marx, *Section 43(a) of the Lanham Act: A Statutory Cause of Action for False Advertising*, 40 WASH. & LEE L. REV. 383, 386-87 (1983).

35. See *id.* at 386-87 n.9.

36. *Id.*

37. Keller, *supra* note 18, at 131-32.

38. 214 F.2d 649 (3d Cir. 1954).

39. *Id.* at 650.

40. *Id.*

41. *Id.* at 651-52.

42. *Id.* at 651; see also Walsh & Klein, *supra* note 15, at 409-10.

disputes.⁴³ Through judicial construction, Section 43(a) gradually developed into the predominant means for asserting unfair competition through false advertising.⁴⁴

The use of, and corresponding judicial reaction to, consumer survey evidence grew with Lanham Act false advertising litigation. The courts' initial reaction to the concept of consumer survey evidence was less than enthusiastic. The Fourth Circuit's opinion in *Bristol-Myers Co. v. Federal Trade Commission*⁴⁵ is representative of the cautious approach to survey evidence during the early years of Lanham Act Section 43(a) litigation:

It may well be that an accurate estimate of public opinion or practice can be obtained by a sampling process or survey, but the record is devoid of information on this subject and in the absence of the proof of the scientific principles, if any, which underlie the practice, we must rely upon the impression which the advertisements would be likely to make upon the mind of a man of ordinary intelligence.⁴⁶

False Advertising After the Trademark Law Revision Act of 1988

Prior to 1988, Section 43(a) did not contain express language about false advertising. Because of this distinction, some courts were reluctant to apply this Section beyond the traditional misuse of trademark claims.⁴⁷ In other jurisdictions, Section 43(a) was deemed only applicable to false claims targeting an "inherent quality or characteristic" of a product.⁴⁸

With the 1988 revision of Section 43(a), Congress sought to clarify some of the restrictive interpretations the statute had

43. 4 MCCARTHY, *supra* note 5, § 27-28.

44. See generally J. Thomas McCarthy, *Lanham Act § 43(a): The Sleeping Giant is Now Wide Awake*, 59 LAW & CONTEMP. PROBS. 45 (1996) ("Today section 43(a) is the preeminent federal law for asserting claims in private litigation against ... fake advertising and product disparagement.") (citation omitted).

45. 185 F.2d 58 (4th Cir. 1950).

46. *Id.* at 60-61; see also *Quaker Oats Co. v. General Mills, Inc.*, 134 F.2d 429, 433 (7th Cir. 1943) ("In the view we take of this record, all of the plaintiff's evidence obtained by the surveys could be disregarded, and the court would still be correct in the conclusion it reached.").

47. See Keller, *supra* note 18, at 133.

48. See *infra* notes 51-53 and accompanying text.

developed in the courts.⁴⁹ The Section now expressly applies to all false claims about goods and services. Section 43(a)(2) prohibits 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."⁵⁰ By holding defendants liable for misrepresentations concerning another person's products or services, Congress eliminated prior judicial interpretations, such as the "inherent characteristic" requirement of *Fur Information & Fashion Council, Inc. v. E. F. Timme & Son, Inc.*⁵¹ and *Bernard Food Industries, Inc. v. Dietene Co.*,⁵² drawing a distinction between advertising claims about the advertiser's own products and those of its competitors.⁵³

Most false comparative advertising cases are now based on Section 43(a)⁵⁴ because, with the exception of Federal Trade Commission (FTC) intervention or industry self-regulation, such actions are the only effective remedy against false comparative advertising.⁵⁵

THE GROWING USE AND LEGAL SIGNIFICANCE OF CONSUMER SURVEYS

Traditionally, plaintiffs in Section 43(a) suits sought simple injunctive relief,⁵⁶ but the tide began to turn in 1986 when the

49. See Keller, *supra* note 18, at 133-36.

50. 15 U.S.C. § 1125(a)(1)(B) (1994).

51. 501 F.2d 1048 (2d Cir. 1974).

52. 415 F.2d 1279 (7th Cir. 1969).

53. In *E.F. Timme*, 501 F.2d 1048, the court held that Section 43(a) applied only to misrepresentations relating to the inherent qualities of a defendant's own goods; thus false innuendos about a competitor's products were not actionable. "[I]t seems quite obvious that its purpose was to prevent false descriptions of the goods being offered. ... Congress could hardly have intended to flood the federal courts with claims that an advertiser had misrepresented the social desirability of its products or disparaged the ecological sensitivity of its competitors." *Id.* at 1051-52. Similarly, in *Bernard Food*, the court stated that the Lanham Act "does not embrace misrepresentations about a competitor's product but only false or deceitful representations which the manufacturer or merchant makes about his own goods or services." *Bernard Food*, 415 F.2d at 1284.

54. Keller, *supra* note 18, at 135.

55. Walsh & Klein, *supra* note 15, at 408.

56. See, e.g., *Chevron Chem. Co. v. Voluntary Purchasing Groups, Inc.*, 659 F.2d 695, 706 (5th Cir. 1981) (limiting appellant's relief under state law to the same level of injunctive

Court of Appeals for the Ninth Circuit affirmed a \$40 million damage award in U-Haul's Section 43(a)(1)(B) suit against a little-known competitor, Jartran.⁵⁷ The ability to use Section 43(a)(1)(B) claims as a commercial weapon against competitors' advertising claims has furthered the explosion of cases brought under the Lanham Act.⁵⁸ What had originally appeared to be a minor section in a federal trademark statute quickly became a powerful legal force for advertisers to wield against their competitors.⁵⁹

The Key Element: False Representation

In interpreting the Lanham Act, the courts have devised five basic elements that underlie a successful false advertising claim under Section 43(a)(1)(B), which may be summarized as follows:

- (1) the advertiser made a false representation of fact about its own or a competitor's product,
- (2) the representations actually deceived a substantial portion of the target audience,
- (3) the deception is material (i.e., likely to influence consumer purchasing),
- (4) the advertising caused the representation to enter interstate commerce, and
- (5) the plaintiff has been or is likely to be injured by the false representation.⁶⁰

relief provided under federal law); *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 646 F.2d 800, 810 (2d Cir. 1980) (granting an injunction and recall of infringing mattress pads); *Leon Finkler, Inc. v. Schlusser*, 204 U.S.P.Q. (BNA) 433, 434 (2d Cir. 1979) (granting a permanent injunction against a diamond dealer who claimed a competitor's diamonds as his own).

57. *U-Haul Int'l v. Jartran, Inc.*, 793 F.2d 1034, 1044 (9th Cir. 1986), *aff'g in part and rev'g in part* 601 F. Supp. 1140 (D. Ariz. 1984); *BeVier, supra* note 26, at 1; *see also* *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 720 F. Supp. 194, 216-17 (D.D.C. 1989) (awarding ALPO \$10.4 million in damages for Ralston Purina's advertising campaign falsely claiming Ralston Puppy Chow could lessen the severity of canine hip dysplasia), *rev'd on other grounds*, 913 F.2d 958 (D.C. Cir. 1990).

58. Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. REV. 807, 809-10 (1999).

59. *Id.* at 808.

60. *BellSouth Adver. & Publ'g Corp. v. Lambert Publ'g*, 45 F. Supp. 2d 1316, 1320 (S.D. Ala. 1999); *accord* *Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharm., Inc.*, 19 F.3d 125, 129 (3d Cir. 1994); *Telxon Corp. v. Symbol Techs., Inc.*, 961 F. Supp. 1113, 1123 (N.D. Ohio 1996). Despite the 1988 legislative changes to Section 43(a), the

Disputes over advertising claims often come down to one dispositive issue: false representation.⁶¹ The other four elements of a given claim are frequently uncontested⁶² because once the courts are convinced that an advertiser has made or implied a false statement of fact, they tend to treat the other four requirements as mere formalities.⁶³ For this reason, and for the purposes of this Note and its focus on survey use in determining misleading advertising, only the two-pronged issue of false representation is under consideration.

Two types of false representation provide a cause of action under the Lanham Act: advertising that contains literally false claims and advertising that, although literally true on its face, is perceived by a portion of the targeted market as making an implicit claim that can be proven false.⁶⁴ In other words, beyond restricting outright falsity, judicial doctrine under the Lanham Act prohibits advertisers from misleading consumers with half-truths. (For clarity of discussion, the former will be referred to as a "false claim" and the latter as a "misleading claim.") The distinction between the

five elements of the cause of action have not changed significantly in over 25 years. *E.g.*, *Skil Corp. v. Rockwell Int'l Corp.*, 375 F. Supp. 777, 783-84 (N.D. Ill. 1974).

61. *See, e.g.*, *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 276-79 (2d Cir. 1981) (holding that proof of diverted sales is not required to warrant an injunction when the depictions of consumer test results are significantly misleading); *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 720 F. Supp. 194, 214 (D.D.C. 1989), *rev'd on other grounds*, 913 F.2d 958 (D.C. Cir. 1990) (holding that once an advertising claim is found to be materially false, the materiality element may be presumed).

62. *Walsh & Klein, supra* note 15, at 415.

63. *See, e.g.*, *Warner-Lambert Co. v. Breathasure, Inc.*, 204 F.3d 87, 92-93, 97 (3d Cir. 2000) (holding that likelihood of harm to plaintiff was established without evidence of actual loss, since scientific evidence showed defendant's claims of effectiveness were false); *Cottrell, Ltd. v. Biotrol Int'l, Inc.*, 191 F.3d 1248, 1256 (10th Cir. 1999) (reversing the district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) on grounds that plaintiff could "by consumer surveys or other means [show] that [defendant's] advertising is likely to confuse or actually confuses consumers," which would make the plaintiff's claim "as damaging for Lanham Act purposes as an express false claim of EPA approval"); *BeVier, supra* note 26, at 27-29 ("Once they are convinced that defendant has made (or implied) a false statement of fact, courts tend to give but pro forma attention to whether the other requirements of the [] test have been met."); *cf. American Council of Certified Podiatric Physicians and Surgeons v. American Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 618 (6th Cir. 1999) (stating that there was no showing of the lower court's abuse of discretion because the appellee failed to present any consumer survey evidence).

64. 2 JEROME GILSON & ANNE GILSON LALONDE, *TRADEMARK PROTECTION AND PRACTICE* 7-36 to 7-42 (2000).

two types of claims generally determines whether consumer survey evidence will play a role in the litigation.

A false representation analysis requires two distinct inquiries. First, what is the advertiser's message? Second, is that message false or misleading?⁶⁵ Courts frequently turn to survey data to determine whether a particular advertisement has a tendency to mislead.⁶⁶ As a result, an advertisement that is literally true may still violate Section 43(a) if the plaintiff can show that consumers received a false impression about a competitor's product.⁶⁷

Section 43(a) covers "'innuendo, indirect intimations, and ambiguous suggestions' evidenced by the consuming public's misapprehension of the hard facts underlying the advertisement."⁶⁸ Simply put, the Act "encompasses more than literal falsehoods."⁶⁹ As the Court of Appeals for the Second Circuit has noted, the scope of the Lanham Act extends beyond literal falsehoods so as to not "shield the advertisement from scrutiny precisely when protection against such sophisticated deception is most needed."⁷⁰

Determining the distinction between a literally false claim and a true but misleading claim is not an easy matter.⁷¹ The current judicial construction requires a court to determine either: (1) what is the advertisement's actual meaning, or (2) whether a reasonable person would think that a factual statement had been made.⁷² The courts thus are forced to identify one single meaning of an

65. Walsh & Klein, *supra* note 15, at 413.

66. *Id.* at 414.

67. See, e.g., *Energy Four, Inc. v. Dornier Med. Sys., Inc.*, 765 F. Supp. 724, 729-30 (N.D. Ga. 1991) (holding that consumers received a false impression when a claim that was based on the dictionary definition of "catastrophic failure" was not the commonly understood meaning for the targeted audience); see also DORIS E. LONG, UNFAIR COMPETITION AND THE LANHAM ACT 199-201 (1993).

68. *Vidal Sassoon Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 277 (2d Cir. 1981) (quoting *American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978)).

69. *R.J. Reynolds Tobacco Co. v. Loew's Theaters, Inc.*, 511 F. Supp. 867, 874 (S.D.N.Y. 1980); see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 2 cmt. d. (1995); Keller, *supra* note 18, at 141 ("Section 43(a) also prohibits claims that, even if not literally false, still have a tendency to deceive or mislead.")

70. *American Home Prods. Corp.*, 577 F.2d. at 165.

71. See, e.g., *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1091 (7th Cir. 1994) (discussing the Lanham Act plaintiff's burden for proving literal falsity and that the proof sufficient to meet the burden will vary depending upon the words of the challenged advertisement).

72. BeVier, *supra* note 26, at 37.

advertising claim—a claim that may be intentionally ambiguous⁷³—and then determine if this meaning is consonant with reality.⁷⁴

When an advertisement is not deemed literally false, the plaintiff must support its claim with evidence indicating that the public will be or has been deceived.⁷⁵ It is here that survey evidence comes into play.⁷⁶ There may be few instances of consumer complaints about a particular advertisement that would serve as evidence in court, but survey evidence is a ready substitute for actual instances of consumer deception.⁷⁷ In federal courts, at least, proof of consumer deception almost always comes in the form of consumer surveys.⁷⁸

73. See, e.g., *Mead Johnson & Co. v. Abbott Labs.*, 41 F. Supp. 2d 879, 882 (S.D. Ind. 1999), *rev'd*, 201 F.3d 883 (7th Cir. 2000) (describing the defendant's advertising claim "1st Choice of Doctors" as "ingeniously ambiguous").

74. As one commentator stated:

[C]ourts seem to conceptualize this interpretive task as involving a dichotomous choice—an ad means *either* this *or* that—and an essentially factual determination that can be resolved by resorting to dictionary definitions (when the claim is "explicit") or to consumer surveys (when it is "implied"). They have not, in other words, recognized that the interpretive choice is not merely between this or that meaning, but is between this meaning or a number of other possible meanings, *all* of which are plausibly conveyed by a single ad, and each of which is different from but not necessarily inconsistent with the others.

BeVier, *supra* note 26, at 37 (citation omitted).

75. *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544, 1549 (2d Cir. 1991); Keller, *supra* note 18, at 141.

76. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 2 cmt. d. (1995).

77. See, e.g., *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1146 (9th Cir. 1997) (holding that consumer survey evidence was adequate evidence for a jury to conclude that plaintiffs suffered actual damage); *PPX Enters., Inc. v. Audiofidelity Enters., Inc.*, 818 F.2d 266, 271 (2d Cir. 1987) ("Actual consumer confusion often is demonstrated through ... circumstantial evidence, e.g. consumer surveys or consumer reaction tests."); Keller, *supra* note 18, at 145 (stating that consumer survey evidence "is viewed most properly, however, as a surrogate for unsolicited examples of actual confusion").

78. *American Home Prods. Corp. v. Johnson & Johnson Corp.*, 577 F.2d 160, 165 (2d Cir. 1978) (requiring survey evidence if an advertisement is not false on its face); *Tyco Indus. v. Lego Sys.*, 5 U.S.P.Q.2d (BNA) 1023, 1030 (D.N.J. 1987) (indicating that where the issue is whether "true statements are misleading or deceptive despite their truthfulness, it is not enough to place statements alone before the Court. The plaintiff must adduce evidence (usually in the form of market research or consumer surveys) showing how the statements are perceived by those who are exposed to them.") (quoting *McNeilab, Inc. v. Am. Home Prods. Corp.*, 501 F. Supp. 517, 527 (S.D.N.Y. 1980)); *Stiffel Co. v. Westwood Lighting Group*, 658 F. Supp. 1103, 1112 (D.N.J. 1987) (noting that survey evidence is critical because, if an advertisement is not false on its face, whether it is misleading "must be resolved by reference to representative reactions of the trade and consuming public"); see also *Avis Rent a Car Sys., Inc. v. Hertz Corp.*, 782 F.2d 381, 386 (2d Cir. 1986) ("[W]hen the claim is that a literally true statement has a tendency to mislead, confuse or deceive, evidence must be

Consumer surveys thus are applicable only to implicitly deceptive advertising—when the advertising claim in question is literally true but there is a legitimate dispute about its ultimate meaning.⁷⁹

Consumer Surveys in Practice

Assuming a case clears the court's initial hurdle by avoiding a "false-on-its-face" finding, the opposing parties enter the enigmatic realm of consumer survey evidence, referred to by the skeptical as "lies, damn lies, and statistics."⁸⁰

The Evidentiary Weight of Consumer Surveys

In some courts it does not matter whether the trier of fact perceives an advertisement as false or misleading; evidence of consumer reaction is the important element.⁸¹ Other courts place less emphasis on surveys but still require that the parties at least consider obtaining consumer samples.⁸²

Judges and juries have placed increasing reliance on the results of consumer surveys as the "science" of consumer research has advanced.⁸³ As a result, in the past decade, "surveys offered as evidence in deceptive advertising matters appear almost never to

introduced to show what the person to whom the advertisement was addressed found to be the message.").

Judicial statements, such as the following, can raise the question of whether the courts have begun to lose perspective on the intended purpose of consumer surveys: "[I]t would not be appropriate for this court to rely upon such ambiguous concepts as 'common sense' or its own intuitive notions of how an advertising statement should have been interpreted The relevant barometer is the opinion of the consumer, not that of the court." 2 GILSON & LALONDE, *supra* note 64, at 7-37 n.71.1 (quoting *Federal Express Corp. v. United States Postal Serv.*, 40 F. Supp. 2d 943, 955 (W.D. Tenn. 1999)).

79. *S.C. Johnson & Son, Inc. v. Carter-Wallace, Inc.*, 614 F. Supp. 1278, 1319 (S.D.N.Y. 1985), *aff'd in part and vacated in part*, 781 F.2d 198 (Fed. Cir. 1986); 2 GILSON & LALONDE, *supra* note 64, at 7-39; 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, 549 (1994).

80. See *supra* notes 1, 12-13.

81. *E.g.*, *S.C. Johnson & Son*, 614 F. Supp. at 1319 (requiring production of "specific scientific survey evidence of consumer reaction"); 5 MCCARTHY, *supra* note 5, § 32:158 (discussing the need to evaluate "the subjective mental associations and reactions of prospective purchasers").

82. 5 MCCARTHY, *supra* note 5, § 32:158.

83. Jacoby et al., *supra* note 79, at 550.

be rejected,⁸⁴ although courts vary in the weight they give surveys. Jacoby et al. conducted an interesting analysis of the credence levels accorded to survey evidence in federal deceptive advertising cases between 1953 and 1993.⁸⁵ In seventy-seven percent of the cases where consumer survey evidence was allowed, the court gave it at least moderate, if not considerable, weight.⁸⁶

In the Second Circuit, the court has held survey evidence is not explicitly required to prove consumer deception.⁸⁷ Even in that jurisdiction, however, failure to use survey evidence in litigation can be fatal to a party's case.⁸⁸ In some cases, courts routinely accept survey evidence and then critique the survey itself.⁸⁹ Other courts first will examine the survey defects and then decide whether the survey is admissible evidence.⁹⁰ The overwhelming trend has been to favor admission of survey evidence and then consider how purported defects in the survey should impact the weight of its evidence on the overall analysis.⁹¹

The Standard: What Constitutes Misled Consumers?

The federal circuits have no single standard for determining whether a given survey proves the existence of consumer confusion.⁹² At what point does "deception" become actionable? When does a survey prove deception? What percentage of consumers must be confused in order for there to be a violation of

84. *Id.* at 549.

85. *Id.* at 544.

86. *Id.* at 550.

87. See *LeSportsac, Inc. v. K-Mart Corp.*, 754 F.2d 71, 78 (2d Cir. 1985) (affirming a preliminary injunction for a trade dress infringement claim).

88. See *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 697 (2d Cir. 1994) (refusing to accept an "advertising linkage" argument in place of survey evidence); Beth Vanstrom, Note, *Ortho Pharmaceutical Corp. v. Cosprophar, Inc.: The Role Of Consumer Surveys in the Pursuit of Truthful Advertising*, 6 J. PHARMACY & L. 155, 162-63 (1997) ("The significance of the Second Circuit's decision in *Ortho Pharmaceutical Corp. v. Cosprophar, Inc.* was in the importance placed on consumer surveys. The court emphasized the use of consumer surveys and market studies to supply the causative link between the advertising and the plaintiffs potential lost sales.") (citation omitted).

89. See Ira J. Levy, *False Advertising Surveys: Recent Seventh Circuit Ruling Challenges When They May Be Needed*, N.Y.L.J., Apr. 24, 2000, at S6.

90. *Id.*

91. *Id. But cf. Schering Corp. v. Pfizer, Inc.*, 189 F.3d 218, 238 (2d Cir. 1999) (opening the door for excluding a survey if it does not meet the requisite trustworthiness standard).

92. See Keller, *supra* note 18, at 141-42.

Section 43(a) of the Lanham Act? While there are no specific answers to these questions, there is general agreement that a competent survey showing that the number of deceived consumers is "not insignificant" will be sufficient proof of confusion.⁹³ But the "not insignificant" standard leaves courts plenty of room for continued variation. In the Southern District of New York, for example, there is no need for a majority of consumers to have been deceived,⁹⁴ and the percentage of deceived consumers could be as low as fifteen percent.⁹⁵

The variance in courts' use of survey evidence leaves them open to continued skepticism. Professor McCarthy has suggested that the credence a judge places in a given survey is more a factor of the judge's predetermined notions than of a survey's statistical accuracy.⁹⁶ Furthermore, without a clear standard, defendants are left at the mercy of the judge. Judge Haight's assessment of the state of the law is telling: "The ads are misleading because a district judge has said that they are. If an appeal had been taken and the circuit judges—or two of them, for that matter—had disagreed, then the ads would have instantly shed their misleading character and become pure as the driven snow."⁹⁷

Survey Use Gets Out of Hand

Frequent reliance on two opinions in the Southern District of New York—*American Brands, Inc. v. R. J. Reynolds Tobacco Co.*⁹⁸

93. *U-Haul Int'l, Inc. v. Jartran, Inc.*, 601 F. Supp. 1140, 1149 (D. Ariz. 1984), *aff'd in part and rev'd in part*, 793 F.2d 1034 (9th Cir. 1986); *see also* *G. Heileman Brewing Co. v. Anheuser-Busch, Inc.*, 873 F.2d 985, 999-1000 (7th Cir. 1989) (requiring a significant likelihood of confusion to prevail on plaintiff's unfair competition claim); *IDV North Am., Inc. v. S & M Brands, Inc.*, 26 F. Supp. 2d 815, 829 (E.D. Va. 1998) (holding evidence of a significant percentage of confused survey participants is proof tending to show a likelihood of confusion).

94. *Eastern Air Lines, Inc. v. New York Air Lines, Inc.*, 559 F. Supp. 1270, 1280 (S.D.N.Y. 1983).

95. *Johnson & Johnson v. Carter-Wallace, Inc.*, 487 F. Supp. 740, 744 (S.D.N.Y. 1979).

96. *See* 4 MCCARTHY, *supra* note 5, § 32:196 (discussing two categories of survey cases: "[A] survey is accepted and relied upon when the judge already has his or her mind made up in favor of the survey results; and a survey is rejected and torn apart when the judge subjectively disagrees with the survey results.") (citation omitted).

97. *Cuisinarts, Inc. v. Robot-Coupe Int'l*, 580 F. Supp. 634, 637 (S.D.N.Y. 1984).

98. 413 F. Supp. 1352 (S.D.N.Y. 1976).

and *McNeilab, Inc. v. American Home Products Corp.*,⁹⁹—led to an overemphasis of survey evidence in false advertising claims.¹⁰⁰ In *American Brands*, Judge Lasker wrote, “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?”¹⁰¹ The Lasker-drafted *McNeilab* opinion in 1980 gave an even stronger reason to believe surveys were essential in showing consumer confusion:

[W]here ... the issue is whether true statements are misleading or deceptive despite their truthfulness, it is not enough to place the statements alone before the court. The plaintiff must adduce evidence (usually in the form of market research or consumer surveys) showing how the statements are perceived by those who are exposed to them.¹⁰²

Judge Lasker and others also recognized that market surveys are not the best means to identify whether consumers are misled.¹⁰³ Survey evidence is only a substitute for unsolicited examples of actual confusion.¹⁰⁴ Otherwise a court’s reliance on consumer survey evidence requires plaintiffs to satisfy a higher burden of production in Section 43(a) false advertising cases than in other unfair competition challenges.¹⁰⁵

In recent years, however, the evaluation of consumer confusion has focused almost solely on the results of surveys.¹⁰⁶ The absence

99. 501 F. Supp. 517 (S.D.N.Y. 1980).

100. See *Keller*, *supra* note 18, at 142-43.

101. *American Brands*, 413 F. Supp. at 1357.

102. *McNeilab*, 501 F. Supp. at 525.

103. *Id.* (recognizing that the court must also rely on its own understanding of human nature and that survey evidence is not binding on the court). See *Keller*, *supra* note 18, at 143.

104. See *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1146 (9th Cir. 1997) (stating that consumer surveys may be a demonstration of actual consumer confusion); *PPX Enters., Inc. v. Audiofidelity Enters., Inc.*, 818 F.2d 266, 271 (2d Cir. 1987) (noting that actual consumer confusion is frequently demonstrated through the use of direct evidence, or through circumstantial evidence, such as consumer surveys or consumer reaction tests); *Keller*, *supra* note 18, at 145.

105. *Keller*, *supra* note 18, at 145.

106. See, e.g., *Herbko Int'l, Inc., v. Gemmy Indus. Corp.*, 916 F. Supp. 322, 331 (S.D.N.Y. 1996) (requiring that a plaintiff must ordinarily present a consumer survey to prove confusion and deception); *Compaq Computer Corp. v. Procom Tech., Inc.*, 908 F. Supp. 1409,

of survey evidence in a false advertising case can now be considered a material factor in itself.¹⁰⁷ The court in *Avis Rent a Car Systems, Inc. v. Hertz Corp.*¹⁰⁸ said, "when the claim is that a literally true statement has a tendency to mislead, confuse or deceive, evidence must be introduced to show what the person to whom the advertisement was addressed found to be the message."¹⁰⁹ The reasoning is circular. Consumer survey evidence is required for true statements that have a tendency to mislead, but that tendency cannot be determined without a consumer survey.

A DIFFERENT PERSPECTIVE: MEAD JOHNSON

The Seventh Circuit took a step away from the current judicial reasoning in deciding *Mead Johnson & Co. v. Abbott Laboratories*.¹¹⁰ *Mead Johnson* involved an advertising dispute between the two heavyweights of the infant formula industry: Abbott Labs's Similac brand and Mead Johnson's Enfamil brand. At issue was the advertising flag "1st Choice of Doctors"¹¹¹ included on the label of each package of Similac baby formula. The Similac advertising claim was based on results from a national survey of pediatricians that showed more doctors recommend Similac than any other baby formula. Enfamil conducted similar surveys in an unsuccessful attempt to discredit the Similac claim, followed by additional consumer surveys to show that the Similac claim deceived consumers. The nuances of the survey statistics formed the basis of the dispute and the basis for the district court's opinion.¹¹²

1427-28 (S.D. Tex. 1995) (holding that the misleading nature of a challenged advertising claim was not established without evidence of how the relevant market perceived the claim).

107. See *Sandoz Pharm. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 228-29 (3d Cir. 1990); *BellSouth Adver. & Publ'g Corp. v. Lambert Publ'g*, 45 F. Supp. 2d 1316, 1321 (S.D. Ala. 1999); *Warren Corp. v. Goldwert Textile Sales, Inc.*, 581 F. Supp. 897, 902 (S.D.N.Y. 1984); see also *Jacoby et al., supra* note 79, at 550 (noting that courts tend to give weight not according to the interpretation of survey results, but rather according to the validity of using survey results).

108. 782 F.2d 381 (2d Cir. 1986).

109. *Id.* at 386.

110. 201 F.3d 883 (7th Cir. 2000), *opinion amended on denial of reh'g*, 209 F.3d 1032 (7th Cir. 2000), *cert. denied*, 531 U.S. 917 (2000).

111. *Id.* at 1034.

112. See *Mead Johnson & Co. v. Abbott Labs.*, 41 F. Supp. 2d 879 (S.D. Ind. 1999), *rev'd*, 201 F.3d 883 (7th Cir. 2000), *opinion amended on denial of reh'g*, 209 F.3d 1032 (7th Cir.

In accordance with prior case law for misleading but not literally false claims,¹¹³ the district court required Mead Johnson to prove what messages consumers actually received from the "1st Choice of Doctors" claim.¹¹⁴ All the studies provided by both Mead Johnson and Abbott showed a clear doctor preference for Similac over Enfamil.¹¹⁵ Mead Johnson, however, argued that the "1st Choice of Doctors" claim is misleading because consumers inferred two false messages. First, most consumers believed the claim indicated that a substantial majority of doctors prefer Similac to other brands.¹¹⁶ In fact, however, most studies indicated Similac maintained a plurality of doctors' registered preference.¹¹⁷ Second, the "1st Choice of Doctors" claim implied to consumers that doctors prefer Similac to other brands because of its medical superiority for infants.¹¹⁸ In fact, there may be a variety of reasons for doctors to recommend Similac over other brands, including cost, availability, and name recognition.¹¹⁹

The court reviewed numerous studies assessing the percentage of doctors who *really* preferred Similac (and why they did). There was evidence from only one survey—sponsored by Mead Johnson—to assess the actual consumer perception of the advertising claim.¹²⁰ After a review of numerous critiques of the various studies, the district court found Mead Johnson's argument convincing. Thus, the court granted a preliminary injunction against the use of Abbott's claim.

The Seventh Circuit, in an opinion by Judge Easterbrook, reversed, commenting that "[w]hen the absolute level of preference for the leading product is high, and the difference in support from the medical profession substantial, it is all but impossible to call the

2000), *cert. denied*, 531 U.S. 917 (2000).

113. *See id.* at 882 (citing case law from the Second, Third and Seventh Circuits); *see also supra* notes 81-97 and accompanying text.

114. *Mead Johnson*, 41 F. Supp. 2d at 882.

115. *See id.* at 894-903 (discussing the various surveys of doctors, in which every survey showed there was a greater number of doctors preferring Similac than preferring any other brand).

116. *Id.* at 889 (showing 84% of consumers interpreted the claim in this way).

117. *Id.*

118. *Id.* at 882.

119. *Id.*

120. *Id.* at 887.

claim of 'first choice' misleading.¹²¹ The court rejected the survey Mead Johnson had submitted to prove confusion and ruled that there was no need for consumer evidence at all.¹²²

The Court of Appeals was specifically concerned about the ability of competitors to structure a consumer survey in a manner that inherently would lead to a majority of consumers registering confusion.¹²³ The court found that the district court erred in relying on the Mead Johnson-sponsored survey results because "the survey was bound to produce a misleading if not meaningless answer."¹²⁴ Whereas surveys are an acceptable way to probe for consumer confusion, "never before has survey research been used to determine the meaning of words."¹²⁵ The court urged that linguistic interpretations be left to those professionally employed in the art of evaluating the meaning of words, not to "the first impressions of people on the street."¹²⁶

Despite the Court of Appeals' claim that survey research should not be used to determine the meaning of words, other courts outside the Seventh Circuit have done just that. For example, in *Energy Four, Inc. v. Dornier Medical Systems, Inc.*,¹²⁷ the defendant's comparative advertisement claimed that the competitor's product was subject to "catastrophic failure."¹²⁸ The plaintiff produced evidence that the relevant medical community generally understood catastrophic failure to mean "a failure resulting in serious equipment damage or patient injury."¹²⁹ The defendant contested by using the definition of catastrophic failure found in an engineering dictionary: a sudden failure not associated with typical wear.¹³⁰ The court ruled the advertisement was literally false, rejecting the

121. *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 884 (7th Cir. 2000), *opinion amended on denial of reh'g*, 209 F.3d 1032 (7th Cir. 2000), *cert. denied*, 531 U.S. 917 (2000).

122. *Id.* at 885-86 ("[C]onsumers' sketchy understanding of science means that survey results are apt to present firms with unrealistic demands for verification.").

123. *Id.* at 887.

124. *Id.* at 885.

125. *Id.* at 886. *But see* *Energy Four, Inc. v. Dornier Med. Sys., Inc.*, 765 F. Supp. 724, 729-30 (N.D. Ga. 1991) (using survey research to reject an engineering dictionary's meaning of the words "catastrophic failure"); *see also* *infra* notes 134-43 and accompanying text.

126. *Mead Johnson*, 201 F.3d at 886.

127. 765 F. Supp. 724 (N.D. Ga. 1991).

128. *Id.* at 729.

129. *Id.*

130. *Id.*

dictionary definition because there was "no evidence that the dictionary definition reflected a common understanding among targeted consumers."¹³¹ In other words, the court selected one of two plausible meanings for the ad and then based their finding of literal falsity on that selection.

The Seventh Circuit's revised opinion in *Mead Johnson*¹³² refused to follow a similar line of reasoning, concluding that an advertising claim that is factually supported cannot be misleading, even if not understood by a majority of consumers.¹³³ The revised Seventh Circuit opinion draws a distinction between a "misleading" claim and a claim that is "misunderstood."¹³⁴ Only the former provides a legal cause of action under Section 43(a) of the Lanham Act.¹³⁵ Noting that the Mead Johnson survey had a tendency to mislead, the court concluded it was indeterminate whether the source of the consumer confusion was the "1st Choice of Doctors" claim or the survey itself.¹³⁶

Following the *Mead Johnson* holding eliminates the use of consumer surveys in cases when there is no evidence of consumer confusion except in a competitor's survey. The Seventh Circuit emphasized that their holding did not seek to alter the currently accepted judicial notion that there is a distinction between false and misleading claims.¹³⁷ Instead, they attempted to set limits on plaintiffs' ability to show evidence of consumer confusion as support for their accusation that a competitor's advertisement was misleading.¹³⁸ The decision essentially added a previously unwritten restraint to misleading advertising litigation. After *Mead Johnson*, lower courts in the Seventh Circuit should no longer need to weigh

131. *Id.* at 729-30.

132. *Mead Johnson & Co. v. Abbott Labs., Inc.*, 209 F.3d 1032 (7th Cir. 2000), *cert. denied*, 531 U.S. 917 (2000), *amending* 201 F.3d 883 (7th Cir. 2000).

133. *Id.* at 1034 ("[I]nterpreting 'misleading' to include factual propositions that are susceptible to misunderstanding would make consumers as a whole worse off by suppressing truthful statements that will help many of them find superior products.").

134. *Id.* at 1034 ("'Misleading' is not a synonym for 'misunderstood,' and this record does not support a conclusion that Abbott's statements implied falsehoods about Similac.").

135. *See id.*

136. *Mead Johnson*, 201 F.3d at 885.

137. *Mead Johnson*, 209 F.3d at 1034 ("None of this calls into question the understanding, expressed by many decisions, that whether a claim is either 'false' or 'misleading' is an issue of fact rather than law.").

138. *Mead Johnson*, 201 F.3d at 886.

consumer survey evidence where the text of a claim is literally true and "objectively verifiable."¹³⁹

IMPACT AND PROJECTIONS IN THE WAKE OF *MEAD JOHNSON*

The Seventh Circuit's distinction between "misleading" and "misunderstood" claims entails a fundamental shift in how false advertising cases should be tried.¹⁴⁰ The distinction between the two concepts is an apparently minor linguistic nuance that could have a significant impact on litigation.

The ruling by the Seventh Circuit establishes a much-needed limit in judicial doctrine on the role of consumer survey evidence in Section 43(a) false advertising litigation. With Lanham Act suits increasingly being used as a commercial weapon,¹⁴¹ *Mead Johnson* takes a small but important step in defining to what extent a company can challenge a competitor's advertising claims.

Prior to *Mead Johnson*, even truthful advertising claims could be challenged if a competitor could sponsor a survey showing consumer confusion.¹⁴² In the Seventh Circuit, another restraint now exists: common sense. The court held that "our fundamental conclusion is that a producer cannot make a factual issue just by conducting surveys."¹⁴³

The Seventh Circuit's ruling, if followed, can make a significant impact on the judicial landscape. Evaluating the *Mead Johnson* holding in light of four factors—judicial consistency, consumer protection, clarity for advertisers, and congressional intent—reveals some of the reasons the Seventh Circuit's position is an improvement over the dominant judicial construction for misleading advertising cases.

139. *Id.*

140. See Brief for Petitioner at 10, *Mead Johnson & Co. v. Abbott Labs.*, 531 U.S. 917 (2000) (No. 00-0071); Levy, *supra* note 89, at S6.

141. See *supra* notes 56-59 and accompanying text.

142. See *supra* notes 80-91 and accompanying text.

143. *Mead Johnson & Co. v. Abbott Labs.*, 209 F.3d 1032, 1034 (7th Cir. 2000), *cert. denied*, 531 U.S. 917 (2000), *amending* 201 F.3d 883 (7th Cir. 2000).

Judicial Consistency

Reliance on consumer surveys has lead to inconsistent results in court, as will be shown by consideration of representative cases from the Second and Eighth Circuits. A brief review of these cases and an analysis of the same facts under the standard of *Mead Johnson* will demonstrate the advantage of the Seventh Circuit's decision.

First, consider the Second Circuit case *Avis Rent a Car Systems, Inc. v. Hertz Corp.*,¹⁴⁴ which addressed a controversy over the claim "Hertz has more new cars than Avis has cars."¹⁴⁵ Part of Avis' Section 43(a) challenge to the Hertz claim was that, contrary to the advertisement's plain meaning, Avis did own more total cars than Hertz had new cars.¹⁴⁶ As was the case in *Mead Johnson*, each word of the Hertz claim had an objectively verifiable definition. In reversing the lower court, however, the Second Circuit held that the objective meaning of the claim was not as important as the survey that showed consumers assumed Hertz's claim applied only to Avis cars *available for rent*.¹⁴⁷ Over six-thousand cars that Avis owned but were unavailable for rent were discounted from the comparison; Hertz's claim was thus held not to be misleading.

A second representative case, *United Industries Corp. v. Clorox Co.*,¹⁴⁸ analyzed a similarly objectively verifiable claim that defendant's product Maxattrax "Kills Roaches in 24 Hours."¹⁴⁹ As in the *Hertz* case, the appellate court—this time the Eighth Circuit—looked beyond the literal meaning of the claim. Although true that roaches that came in contact with the product died within twenty-four hours, Clorox contended that consumers would believe the product would "completely control an infestation by killing all of the roaches in one's home within 24 hours, while its competitors will fail to do the same."¹⁵⁰ Clorox's argument was rejected because it was not supported by consumer survey evidence and, therefore,

144. 782 F.2d 381 (2d Cir. 1986).

145. *Id.* at 382.

146. *Id.*

147. *Id.* at 384-85.

148. 140 F.3d 1175 (8th Cir. 1998).

149. *Id.* at 1178.

150. *Id.* at 1183.

did not show a likelihood of success on the merits.¹⁵¹ In other words, even though the claim was objectively true, the Court was willing to let consumer reaction evidence decide whether an injunction was to be enforced.

The Second and Eighth Circuit opinions support the prevailing judicial notion that literally true claims—regardless of objective verifiability—can be shown to be misleading by consumer survey evidence. The focus of the judicial inquiry is not the challenged advertisement, but rather the sufficiency of survey evidence. Under a *Mead Johnson* analysis, the claim by Hertz would be examined only for objective content, because the ad was not literally true, and the outcome of the case would be the opposite. In *United Industries*, the court was willing to apply similar reasoning as in the *Hertz* case. Despite the objectively verifiable claim, the court was willing to declare the ad likely to be misleading if Clorox could have shown a significant percentage of consumers believed Clorox's proffered interpretation.

As the Seventh Circuit suggested in *Mead Johnson*, survey results are a malleable standard.¹⁵² Despite the increasingly accepted scientific methodology of survey research,¹⁵³ the results of surveys are still subject to influential nuances of the survey sponsor. The various survey results used to argue the validity of Abbott Labs' "1st Choice of Doctors" claim is just one present example.¹⁵⁴ Under the prevailing approaches, courts are tied to interpreting the validity of proffered survey evidence rather than the validity of the advertising claims at issue. Use of the *Mead Johnson* analysis prevents such distractions.

The Seventh Circuit's analysis for misleading advertising is at odds with the other circuit courts. When literally true claims are at issue, defending advertisers will pursue the *Mead Johnson* "objectively verifiable" standard, while competitor-plaintiffs will

151. *Id.*

152. *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 885 (7th Cir. 2000) ("Respondents in survey research are suggestible"), *opinion amended on denial of reh'g*, 201 F.3d 1032 (7th Cir. 2000), *cert. denied*, 531 U.S. 917 (2000).

153. See *supra* notes 83-86 and accompanying text.

154. See generally *Mead Johnson & Co. v. Abbott Labs.*, 41 F. Supp. 2d 879 (S.D. Ind. 1999) (discussing various percentages of surveyed doctors that expressed a preference for Similac or Enfamil), *rev'd*, 201 F.3d 883 (7th Cir. 2000), *opinion amended on denial of reh'g*, 201 F.3d 1032 (7th Cir. 2000), *cert. denied*, 531 U.S. 917 (2000).

seek the more common blanket acceptance of consumer survey use. Forum shopping is a predictable result.¹⁵⁵ Although clarification by the Supreme Court would resolve the split, the Court declined to review *Mead Johnson's* appeal.¹⁵⁶ So for the present, the *Mead Johnson* standard becomes just another interesting landmark in the inconsistent judicial landscape. If applied in all jurisdictions, however, the case provides hope for a workable, consistent standard.

Consumers' Need for Protection

In reviewing the place of the consumer in misleading advertising claims, there are at least two factors, often ignored by the courts, that limit the need for the prevalent survey-based judicial construction of Section 43(a): the consumer's ability to protect herself—either by initial disbelief or by not making a repeat purchase—and the advertiser's parallel incentive not to try to deceive her.¹⁵⁷ In this age of excessive advertising, where businesses, politicians, and lobbyists are all trying to get the most out of every truthful advantage they can muster, advertising "spin" and consumer skepticism climb accordingly.¹⁵⁸

The fact that consumers may not understand the correct implications of an advertising claim does not necessarily injure either the consumer or the competitor. Few consumers in today's society are totally without skepticism toward advertising assertions.¹⁵⁹ It is not unreasonable to expect them to generally discount advertisers' claims.¹⁶⁰ Further, advertising claims will

155. See Brief for Petitioner at 10, *Mead Johnson & Co. v. Abbott Labs.*, 531 U.S. 917 (2000) (No. 00-0071) (claiming that the Seventh Circuit's decision in *Mead Johnson* renders evidence of consumer confusion "legally irrelevant").

156. *Mead Johnson & Co. v. Abbott Labs.*, 531 U.S. 917 (2000).

157. See, e.g., BeVier, *supra* note 26, at 33-34 (discussing the market-driven incentive of "self-interested repeat players" to avoid deceptive advertising because consumers can retaliate by not making further purchases).

158. See, e.g., *Let's Work Together*, FOOD ENG'G INT'L, Sep. 1, 2000, at 9, available at 2000 WL 21427875 ("Consumer skepticism is a difficult nut to crack, and those who are developing new products ... will have to be careful how they formulate their products, and what claims they make for them.").

159. BeVier, *supra* note 26, at 8.

160. Whereas consumer reaction surveys typically focus on how consumers would interpret a given claim, the issue of whether the consumer actually believes that claim is

always be subject to misinterpretation,¹⁶¹ and the only way to entirely avoid misleading advertising is to ban advertising completely.¹⁶²

Skepticism provides a self-regulating element to the advertising market by encouraging advertisers not to waste resources on implausible claims.¹⁶³ Because the market contains inherent deterrents to false advertising, the consumer benefit in allowing rivals to have a private remedy against their competitors is negligible.¹⁶⁴ "Not only do [courts] appear to believe that purging the marketplace of false inferences is costless, but they lack faith in the discernment and intelligence of consumers."¹⁶⁵

The holding in *Mead Johnson* inherently reduces the role of the judiciary in protecting consumers from misleading advertising and so makes the market's inherent consumer-protection measures more important. In terms of judicial economy this is a practical step: courts need not step in where the market provides its own remedy.

Neither the legislative purpose of the Lanham Act¹⁶⁶ nor constitutional issues concerning free speech in commercial advertising¹⁶⁷

seldom investigated. Jacoby et al., *supra* note 79, at 546 (suggesting that surveys that seek to measure whether or how much consumers are deceived should focus on what the consumer believes the advertisement says about a product, not what the consumer believes about the product itself); BeVier, *supra* note 26, at 32-33 n.99 (discussing that when an impliedly false claim is both self-interested and unverifiable it falls into a category unlikely to be completely believed or relied upon by consumers).

161. At least some courts believe that advertising does not have to inevitably result in some consumer misunderstanding. "[T]he very purpose of [Section 43(a)] is to avoid ... ambiguity." *McNeilab, Inc. v. American Home Prods. Corp.*, 501 F. Supp. 517, 543 (S.D.N.Y. 1980). Because some claims, such as the one in *Mead Johnson*, involve "credence" qualities that the typical consumer cannot verify, consumers' interests could be served by allowing competitors to police the advertising landscape through Section 43(a) claims. Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 69 (1973) (discussing the concept of "credence" qualities that consumers cannot cost-effectively discover either by prepurchase inspection or by postpurchase experience).

162. Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U.L. REV. 658, 696 (1985).

163. BeVier, *supra* note 26, at 13 ("The rational advertisers' reaction to consumer skepticism ... will be not to waste resources making direct, inherently unbelievable quality claims at all—either true or false.").

164. *See id.* at 8.

165. *Id.* at 47.

166. *See infra* notes 172-77 and accompanying text.

167. Constitutional issues concerning free speech in commercial advertising are beyond the scope of this Note. *See* Keller, *supra* note 18, at 149-57, for a concise discussion of the

are furthered by the courts' continued use of surveys to determine if consumers are misled by objectively verifiable claims. If a court's thorough analysis determines that a challenged advertising statement is literally true and objectively verifiable, then the market will provide adequate consumer protection.

Clarity for Advertisers

The uncertainty of what standards the courts apply in Section 43(a) cases deters the production of truthful advertising.¹⁶⁸ Practically, an advertiser will be reluctant to push the full boundaries of legitimate advertising if it faces the likelihood of substantial litigation costs. Besides creating artificial limits on commercial speech, potential Section 43(a) actions serve as a disincentive that limits the amount of true information available to the consumer.¹⁶⁹ Only a clear judicial standard can both eliminate the artificial restraints on commercial speech and maximize the flow of truthful advertising to the consumer. That clarity cannot be achieved so long as the legal standard for truthful advertisements is based on the fluctuating standard of consumer opinions.

With the ruling in *Mead Johnson*, advertisers in the Seventh Circuit may now have a better idea of the legal limits: objectively supported truthful statements.¹⁷⁰ The *Mead Johnson* standard allows advertisers to more confidently assert their claims without the fear that competitors can create a factual dispute by sponsoring a consumer survey. Alternatively, competitors can more accurately assess their chances of successful legal action. Rather than funding costly consumer surveys and litigation, factually based competitor's claims will be challenged in the advertising marketplace. It is true that competitors will lose the benefit of the restrictions on

issue.

168. Jeffrey P. Singdahlsen, Note, *The Risk of Chill: A Cost of the Standards Governing the Regulation of False Advertising under Section 43(a) of the Lanham Act*, 77 VA. L. REV. 339, 365-66 (1991) (discussing how advertising regulation and the accessibility of the court system to false advertising claimants "chill (over-deter) the production of truthful advertising").

169. *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 886 (2000) (discussing how removal of potentially misunderstood but truthful advertising language deprives knowledgeable buyers of useful information). See generally Singdahlsen, *supra* note 168.

170. See *supra* notes 137-39 and accompanying text.

advertisers' truthful claims when the consuming public was unable to interpret a proper meaning. The competitor, however, can still address concerns of consumer confusion through its own advertising campaign or through joint participation in private regulatory groups.

Although the *Mead Johnson* standard provides the potential for greater clarity, the holding will be shaped by subsequent case law. The precise distinction between a "misleading" claim and a "misunderstood" claim will have to be defined by future courts.¹⁷¹ The need to more adequately distinguish these concepts tempers the accomplishment of the Seventh Circuit. The potential for a workable standard is greater with the *Mead Johnson* objectively verifiable standard, however, than prior courts have shown in interpreting the 1988 Lanham Act revisions.

171. In the few months since it was decided, only three opinions have referred to *Mead Johnson* with respect to the use of consumer surveys. In *First Health Group Corp. v. United Payors & United Providers, Inc.*, 95 F. Supp. 2d 845 (N.D. Ill. 2000), the court showed a reluctance to view the Seventh Circuit holding as providing a significant change. In *First Health Group*, the plaintiff charged that the defendant falsely represented itself as a PPO when, in fact, the defendant's operating procedures did not strictly comply with the common definition of a PPO. The court determined there was no literal falsity in the advertisement and turned to the issue of whether the claim was misleading. *Id.* at 847. Although quoting language from the *Mead Johnson* opinion, the court adhered to the traditional language of earlier precedent cases: "Survey evidence is the customary way of proving significant actual deception, although consumer data, market research or evidence of diverted sales ... may sometimes be sufficient. Common sense and personal experience alone are not enough." *Id.* at 848. The court granted the defendant's motion for summary judgment on the grounds that there was no survey conducted and the other proffered evidence was insufficient to support a misleading advertising claim. *Id.* at 851. The district court did not refer to *Mead Johnson*'s "objectively verifiable" standard for whether a survey would be needed.

The court in *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24 (1st Cir. 2000), declined to extend the *Mead Johnson* holding from printed labels to television commercials. The court recognized "a fundamental difference between a slogan on a can label that communicates its meaning to consumers solely through the printed text, and a tag line shown on the screen at the end of a television commercial that communicates ... through a combination of audio-visual and textual media." *Id.* at 38. The distinction is appropriate, and serves to show the narrowness of the *Mead Johnson* holding. The meaning of an objective claim can be influenced by images, tone, or backgrounds that appear along with the television advertisement. Television claims would therefore not be considered "objectively verifiable" under the *Mead Johnson* standard. *See id.* at 37-38.

The court in *Haymond v. Lundy*, No. Civ. A. 99-5048, 2001 WL 15956 (E.D. Pa. Jan. 5, 2001), followed the Seventh Circuit's distinction between a misunderstood and a misleading statement in holding an attorney's claims that he supervised a broad range of cases were not actionable under the Lanham Act. *Id.* at *4.

Consistency with Congressional Intent

Congress adopted the Lanham Act in general, and Section 43(a) in particular, to protect both competitors and consumers.¹⁷² Compared with the typical consumers, the greater financial interest of competing advertisers—not to mention the greater financial resources—make competitors the likely plaintiffs in Lanham Act litigation. Whereas competitor suits have been a mainstay in Lanham Act litigation, the 1988 revisions to the Act were drafted with consumer protection also in the forefront of the discussion: "The purpose of the Trademark Law Revision Act of 1988 is to ... improve the law's protection of the public from counterfeiting, confusion, and deception."¹⁷³ Debate continues, however, on whether enforcement of the Act can simultaneously and effectively protect both competitors and consumers.¹⁷⁴ If that balance cannot be achieved, it is not clear whether the drafters' intent was to prefer the rights of one group over the other.¹⁷⁵

From a cursory view, the *Mead Johnson* standard sacrifices a previously existing level of consumer protection by disallowing evidence of actual consumer confusion in cases where the disputed claim can be objectively verified. Even though consumers in the post-*Mead Johnson* era may be subject to more detailed or more shaded advertising claims, the advertiser already has an economic

172. S. REP. NO. 100-515 (1988), reprinted in 1988 U.S.C.C.A.N. 5577.

173. S. REP. NO. 100-515, at 1.

174. See, e.g., Walsh & Klein, *supra* note 15, at 412 ("A competitor's interest in fair competition and the public's interest in truthful advertising are coterminous. Under section 43(a), therefore, a plaintiff-competitor, while vindicating its own interests, simultaneously serves as the 'vicarious avenger of the defendant's customers.'") (citation omitted) (quoting *Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F.2d 603 (2d Cir. 1925) (Learned Hand, J.), *rev'd on other grounds*, 273 U.S. 132 (1927)).

Although Judge Hand's opinion is still revered by many today, a number of scholars disagree. "[T]he proper perspective from which to view the rules in section 43(a) cases is that of the potentially deceived consumer rather than that of the possibly injured competitor." BeVier, *supra* note 26, at 3; see also Craswell, *supra* note 162, at 684-88.

175. See, e.g., Burns, *supra* note 58. Jean Burns notes that:

Topping off the confusion is the unanswered fundamental question: what is the ultimate goal of section 43(a)(1)(B) as currently drafted? Is its primary purpose competitor protection? Consumer protection? Both? ... As a result of Congress's lack of clarity, the courts remain without guidance on the central issue in any statutory construction: the purpose behind section 43(a).

Id. at 833-34.

incentive to avoid consumer confusion.¹⁷⁶ Thus, the reduction in consumer protection under the *Mead Johnson* standard is insignificant. At the same time, *Mead Johnson* gives advertisers the benefit of a more predictable legal standard and greater freedom to make factually supported claims.

It appears, therefore, that the *Mead Johnson* holding swings the Section 43(a) protection emphasis in favor of advertisers. Fortunately, false advertising protection is not a zero-sum game. Increasing protection available to competitors, without reducing the consumers protection in any meaningful way, is a commendable result that fully meets the intent of the Lanham Act to benefit both consumers and competitors. Furthermore, there is no indication that Congress ever intended the Lanham Act to become a commercial weapon for advertisers.¹⁷⁷ Use of the *Mead Johnson* standard will require plaintiffs to more carefully consider when to challenge competitors' advertising claims. Thus, the decision reigns in a judicial interpretation that has grown beyond the scope of the legislative purpose.

CONCLUSION

The holding in *Mead Johnson* opens the door for courts to reduce the number of instances where consumer surveys will be required in misleading advertising cases. The Seventh Circuit's holding breaks from the more popular judicial construction that allows consumer surveys as evidence of confusion in misleading advertising cases regardless of the objective truth of the advertised claim. The other circuits should follow *Mead Johnson*'s lead. The legality of objectively verifiable truthful advertising claims should no longer be subjected to consumers' subjective interpretations through the use of survey evidence.

Weighing the factors of judicial consistency, consumer protection, clarity for advertisers, and congressional intent, the Seventh Circuit's standard limiting when consumer surveys will be admitted as evidence for misleading advertising litigation is an improvement over other courts' unchallenged acceptance of survey evidence. By

176. See *supra* notes 157-65 and accompanying text.

177. See *supra* notes 56-59 and accompanying text.

allowing advertisers to use all literally true, objectively verifiable claims—regardless of survey results indicating consumer confusion—the Seventh Circuit's holding provides advertisers greater freedom and legal predictability without sacrificing any meaningful consumer protection. Because the *Mead Johnson* standard improves competitor protection without sacrificing consumer protection, the Seventh Circuit's holding fully carries out the stated purpose of Section 43(a) of the Lanham Act—protecting both the consumer and competing advertisers. The new standard will also require a change in plaintiffs' litigation strategy of challenging factually based advertising claims, limiting the availability of Lanham Act suits as a commercial weapon.

In sorting through the lies, damn lies, and misleading advertising, the Seventh Circuit has led the way for a more simple, consistent, and fair means for courts to decide false advertising litigation—outlining a new standard other circuits should follow.

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