Podcast Transcript

Survey Says: The Consumer Perception Study Pt. 1

Date: April 17, 2025

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Run Time: 24:20

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Rubenking: Thank you for joining us for another episode of BakerHosts AD Nauseam, a podcast series focusing on new and trending advertising issues with an emphasis on the FTC and the NAD. I'm Randal Rubenking, and you're listening to BakerHosts.

We are once again joined by Amy Mudge and Daniel Kaufman, two partners from BakerHostetler's Advertising, Marketing and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives. On today's episode of AD Nauseam, Amy and Daniel are back to discuss consumer perception surveys, a tool that businesses use to gauge how consumers view and interpret advertisements, in part 1 of their new series, Survey Says: The Consumer Perception Study. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel.

Mudge: Welcome and thank you for joining us once again for AD Nauseam. Today, Daniel and I are going to begin what will be a multi-part series. We have not decided how many parts, but it will have several parts on consumer perception surveys. Today, we're going to talk about why one might want to do such a survey. And, of course, when you have to do such a survey. And we might start riffing on some of our classic favorite surveys.

But when I hear survey, I can't help but think of Family Feud. Now, I'm talking the original Family Feud with Richard Dawson, where he would ask each family for an answer before pointing to the board and saying, survey says, before revealing an answer. So, got me thinking, Daniel, you know I got to ask, what are your favorite game shows?

Kaufman: This is an awesome question that brings me just more joy than it should. Like look, childhood memories of being home, allegedly sick, watching the Price Is Right with Bob Barker. Like that is key to me. And actually, my TikTok feed right now has been showing me old clips from the Price Is Right with like cars costing like $6,000 or $7,000. It was the best. I adored Let's Make A Deal. I always wondered, why do these people have like a hardboiled egg in their bag? Just all of this stuff. But finally, like I got to add, just Prompt 2. It was only on for a couple of years, but the $1.98 beauty show from the late 70s that I enjoyed a lot.

Mudge: Okay, I don't know that one. But you had me at Rip Taylor. And Price Is Right, yeah, I get, I have, when I would stay home feeling sick from school, I just couldn't wait to get all of the soap operas. Every single one. I had no idea what was happening on the ones at noon. But, you know, it, they were easy to catch up on. But when I'd visit my grandparents, yeah, the Price Is Right. But I have to say, like the Drew Carey one is pretty good. In general, I'm not a fan of the updated host. I like those originals. And I think Drew Carey is killing it. I will say, jury is still out on whether Ryan Seacrest can pick up on Wheel of Fortune. But I did like, I like the sort of scandalous, like the naughty 70s game shows like the Newlywed Game. That was always just a little bit edgy. The dating game, I think those were where I'd go. But I do, my mom, every night she watches Wheel of Fortune. She watches Jeopardy! She never misses a night. So, I have to say when she, when we're with her, we are still glued to the TV. Now, I think it is from 7:00 to 8:00. But we're always there.

Kaufman: You know, I got to say Amy, I would say a big no to Ryan Seacrest on Wheel of Fortune. I just don't approve. But I actually think Steve Harvey is great on Family Feud, actually really do enjoy what he is doing there.

Mudge: I don't actually think I've ever seen him. I think I've only seen the SNL knockoff skits of him. So I'm not really sure if I know how he does it or not. But alright, survey says let's get back to it.

Kaufman: Yes. And today, hopefully we're going to have all the answers about when, about why an advertiser might want to conduct a consumer perception study. And you know, we're not talking about the kind of focus groups here or research done routinely for marketing purposes. We are talking the litigation quality survey that are used to copy test and ad or a product label in order to understand if consumers understand the intended and supported message of an ad or if we've got a meaningful number of consumers taking away some sort of false or misleading message.

Mudge: Indeed. And you know, look, well, a few quick basics. You know, an ad obviously can have express claims or what the literal words promise. But also those pesky implied claims or what an ad can reasonably be understood to promise. So, for example, this is a, you know, a classic one, you will lose five pounds a week, is an express promise. Showing a testimonial where a user talks about his experience and says, I lost 10 pounds a week, to imply or promise that others will have a similar experience and will also lose 10 pounds a week.

And one of the things that is vexing to advertisers is an ad can have multiple reasonable messages. And an advertiser is responsible for substantiating all of them, even the ones that they didn't intend. So, what messages consumers actually do take away from ads is really important, at the outset, to nail down. This is an issue in an FTC investigation, in an NAD case, in a Lanham Act case, or in a class action, looking at whether advertising is deceptive or misleading. And all of these various form, they're different burdens of proof depending on where you are. But in all of these types of cases, sometimes parties assert how consumers will understand their ads. But other times, you pull in the big guns and you do a consumer perception survey, showing consumers your ad or your label and asking them questions about what they understand is being promised.

We'll talk soon, in a future episode, about some of the dos and don'ts with survey design and survey analysis. But yeah, today we're going to walk through, walking when you might do a survey. And Daniel, the FTC is viewed as a specialized agency that can look at ads and discern likely consumer confusion based on their experience. But the FTC itself will sometimes conduct its own surveys. Can you talk to us about when the FTC might undertake such work?

Kaufman: The short answer is not as often as people might think. I mean, these surveys, of course, are significant resources. They're not cheap, and they're not cheap for the FTC either. So, the big picture answer is not that often. However, it is important to keep in mind, in enforcement cases, the FTC does not need to rely on surveys to show how consumers understand an ad. And we've got a case from the 1990s involving Kraft Singles in the 7th Circuit. The court confirmed that quote, the Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement. So the FTC will rely on extrinsic evidence, but this may come in the form of experts. It may come from an advertiser's internal documents, including consumer complaints. So the FTC isn't required to submit consumer perception studies in litigated cases, but they will on occasion if the claims are more subtle.

Also, less well-remembered from the Kraft decision was the 7th Circuit admonition that the use of surveys should be the rule and not the exception, and that the Commission should adopt a consistent position on survey methodology to help avoid disputes over survey reliability. I haven't really seen the FTC do that. But look, outside the context of litigated cases, the FTC did a survey in a series of cases involving savings claims if you replaced your windows. Like save up to 20% on your heating bills. And the FTC did a survey purporting to show that consumers did not understand this as promising a maximum benefit or a best case scenario, but that, instead, they viewed this as the savings they could expect. And to be clear, this caused some furor in the industry, and the FTC actually then made its survey work public. Though I do think it is worth noting a recent statement, a couple of months ago, from Chair Ferguson. He raised his own concerns about the survey.

Mudge: Oh, with the Up Two case, right? Where he said, come on Up Two is Up Two. I love that. I love a chair saying, ah, forget about the study. But there were, you know, it, there were a lot of criticisms levied at that study. And again, we'll talk about some of the ways you do critique a study in a future episode. I'm actually, Daniel, the FTC has experts on staff. It has a whole Bureau of Economics full of, well, economists. Is it, it is, has the FTC ever had survey experts on staff? Or that is something that they always will third party out, so they've got to have the resources to do it.

Kaufman: So, there have been marketing experts that have sort of formal affiliations and agreements with the agencies sort of on a part-time basis. But certainly, they've never had like a full-time, that I'm aware of, a full-time sort of survey person. But they definitely have marketing people they work closely with on these things.

Mudge: And you know, where I think you see the FTC doing surveys with some frequency is in connection with drafting or updating business guidance. And so, for example, moving ahead 20-odd years to the 90s, yes, the FTC was looking at made in the USA. And it decided to survey consumers to see if they understood that a made in USA claim referred to manufacturing processes. Or whether consumers took away a broader message that manufacturing and ingredients or components were of domestic origins. And the results were of a pretty mixed bag. But the FTC went with its all or virtually all of the cost of the product should be attributable to U.S. sources standard anyway.

Now, when it updated its green guides in 2012 gave a little bit more credence to some of the survey work it did. It did a survey of how consumers understand, at the time, sustainability claims. Alright? And at that time, sustainability claims weren't as ubiquitous as they are today. And the FTC wanted to understand, did people take away a green message from such claims? If so, what message? But what they heard in this study is a number of consumers saying they thought when they heard sustainability that meant durability. Alright? And that didn't, you know, connect at all to a green promise. And so, based on this, the FTC actually decided not to give specific guidance on how to use such claims in the green guides context. Probably will change with the update we're expecting any day now.

Kaufman: Any day now, absolutely. Yeah, no. Sometimes you sort of see the results and you just sort of scratch your head and you're like, well, what were they thinking?

But also, look, in 2009, when the FTC updated, in connection with the updates to the testimonial and endorsement guides, the FTC surveyed the use of results not typical disclaimers in advertising. Which, of course, we saw for decades. That survey showed consumers did not understand that when an ad had a testimonial that claimed, weight loss of 20 pounds, that this might not be something that was readily attainable. And based on this, the FTC said a results not typical disclaimer should not be used. And instead, if a testimonial showed an atypical result, the advertiser would need to disclose what results are actually typical. Quite a big deal. But Amy, in a Lanham Act context, surveys are often required, right?

Mudge: And so, if a company is bringing an action alleging that a competitor's advertising is literally false, then you don't need a survey. But in the more typical case where the, an allegation is based on an implied claim, yes. Typically, the plaintiff or challenger will have the burden of establishing that consumers are taking away a false message. There is a little nuance. Unless the claim is so obvious that it would be implied, and that is something called false by necessary implication, that is a whole other podcast episode, but generally, if in a Lanham Act context, if there is an implied claimant issue, a survey is needed off the bat to support the complaint, and a typical request for a TRO or preliminary injunction.

Kaufman: Yeah. It is funny, Amy, you just remind me what, I remember a case I was litigating many years ago when I was at the agency. I kept on referring to the claim we were challenging as virtually express. It was so close to express that it was virtually express. But the words we were sort of alleging as a claim were just a little bit different. And we got away with it.

Mudge: Daniel, you are, okay, all right, that is marketing copy at its finest. I have to say, virtually express is so much better than false by necessary implication. They, somebody, that should have been picked up. I got to say.

Kaufman: Yeah. So, okay, let's turn to NAD. So challengers will often ask the NAD to review certain claims, both express and implied, in a competitor's ads. So, challengers sometimes submit surveys but don't have to. NAD will, of course, use its expertise and step into the shoes of the consumer and decide what claims can be reasonably implied from an ad. So, Amy, if neither party in an NAD case needs a survey, when and why would a party decide to go to the expense to do one?

Mudge: Well, sometimes when what an ad implies is pretty facially clear, and the challenge will be comfortable that NAD will agree that that implied claim is being made, they won't go to the time or trouble. Now, other times, you know, sometimes challengers stretch. And an advertiser, well, sometimes the challenger might, you know, feel it wants a survey really to back it up. But if a challenger is asserting something that the advertiser feels is kind of out there, but is a little bit worried what happens when NAD will step into those shoes? You know, the advertiser might feel that it really needs evidence to back up that an implied message a challenger says is there is really not a message that is being taken away. So, you know, again, this ads can have more than one message.

And they definitely can and do say different things to different consumers. In a survey, typically you need to show evidence that approximately 20% of consumers took away a false implied message. Now, in some litigated contexts, and at the FTC, sometimes a lower number's been found to be sufficient. But certainly, if 20% of respondents take away a message that cannot be supported, an ad will often be found to be misleading.

Kaufman: Yeah. And I always think 20% is a pretty low number. And we know there is just a lot of folks simply confused a lot of the time. So, it is always felt like a very low bar to me. But you know, of course, advertisers are not going to be responsible for pre-existing beliefs and there are going to be efforts made to set aside those people who are just not paying attention. This is often done by using a control.

Mudge: And one of our future episodes, we'll talk lots about controls because that really is the art and the science in the surveys. But look, you ask consumers in a survey what they understand to be the main message from an ad. And then you ask increasingly targeted questions designed to ferret out if they find a misleading message that you believe is there. But you also do typically need to create a control or a version of the ad with that part of the ad that you believe is causing the deception and remove it. Alright? So and then you ask the same questions using this cleaned up version of the ad. And if any consumers are still confused by the new and improved ad, you subtract that level of confusion to get what is called net deception.

Kaufman: And maybe an example would be helpful here. So let's go back to the results, not typical example. There is a weight loss testimonial ad where a person says they lost 50 pounds drinking Fat Away shakes, because the names are always really subtle, and there was a really small results not typical disclaimer. So, a survey of those who had or would likely in the near future purchase weight loss products would be shown that ad and asked what the main message was. And then they might be asked if they thought the ad promised weight loss, and if so, what is the amount. So let's say 30% of the people said they thought the ad promised they could lose 50 pounds using Fat Away. And then a control ad would be created, the same ad, but that said in the headline that most people lose 10 pounds, or 1 to 2 pounds a week using Fat Away and the same questions would be asked. So let's say 10% of people said they thought this ad promised they would lose 50 pounds. You would subtract the control results from the test ad results for a net confusion of 20%, which is likely still enough to show the original ad implied a misleading or unsupported message.

Mudge: Now we're not going to get into the fine details today, but let's talk a little bit about the mechanics here and what you said in the beginning, how those surveys differ from marketing surveys. And one thing is who conducts them. You know, typically in an academic or at least someone with a marketing degree and background in surveying, consumers will be hired to draft a litigation quality survey and analyze the results. And typically they will work with the third party who is set up with the consumer panel to actually field the survey. This is not something that can be done quickly in house, you know, in the old days, often those surveys happened in one of Daniel and my favorite places in a mall. Now with rare exception those surveys are conducted online.

Kaufman: And in marketing surveys, even if perception questions are asked, often the main thing being looked at is purchase intent. Will the ads motivate a consumer to buy the product? And there will often be background information provided about the product. In a consumer perception survey that could be said to bias the results if you tell participants upfront what you're selling and its attributes.

Mudge: Yeah, there are lots of ways the survey can be critiqued for introducing bias, including how the questions are worded. And the design of a survey to limit the critique of bias is really key, and it is another area where survey design is really art and science. Now, Daniel, I want to go back to asking about the utility of surveys in an FTC investigation. Is it common for companies under investigation for false advertising to submit surveys? And are they persuasive for staff?

Kaufman: I mean, I would say Amy they're somewhere between uncommon and common. You know, you see them once in a while, but you don't see them routinely. And it really depends upon the nature of what the FTC is investigating. Very often, they really are looking at express claims and you're very unlikely to come forward with the study that says obviously the express claims don't say what they say. So, but when you have the FTC looking at sort of more subtle issues potentially implied claims, you know, I would say it is not uncommon for company to come back preliminary information or preliminary data showing that there are, you know some copy test results that are bringing questions about the FTC's interpretations. So I do think it is a really important tool to think about based upon the nature of the FTC's investigation.

Mudge: And in Lanham Act cases when they're litigated, it is often both sides have a survey and the court needs to dig in and decide which survey is more reliable. I'm hard pressed to think of well, there's so few FTC litigated cases in courts or administratively, but I'm hard pressed to think of one where the FTC had its own survey they submitted and the party and the target had its survey submitted. But yeah, when the cases are private, those are more and more common. And sometimes we have that at NAD too. Sometimes there is no surveys, sometimes one side will submit a survey and the other side will, typically in that case, at least hire a survey expert to critique the survey. But sometimes there are dueling surveys and that is hard to do within the time constraint of an NAD action. But, you know, another factor that I think at the NAD that parties them all about is if you submit a survey that is going to add time to the decision because not only does the NAD have to decide how a case should be decided, they also have to go through the survey and decide, is the survey reliable? Is the survey not reliable? Why or why not? And if not, you know, then they have to go through that stepping in the shoes of the reasonable consumer exercise. So, I think it is funny, I spoke at the last NAD conference and we all on evidence including survey evidence, and we did a poll of staff to say, hey, do you like it when surveys are submitted because that takes some pressure off of you, right, to decide what claims are implied? The FTC staff actually said no, it is just it is a lot more work when we have to go through surveys and we kind of know it when we see it ourselves. But it is my sense that when there are surveys at NAD, it is not uncommon for NAD to find fault with the surveys, so not to credit them as reliable. We'll talk about it next time, but there is a lot of ways to pick at surveys. But that said, it is my sense that even if NAD finds fault with the survey, that NAD can also be kind of swayed by them, at least it sticks in the back of the mind. So, if a case or particularly part of a case really matters, we typically at NAD do encourage a party to spend the extra resources and do a survey.

Kaufman: Yeah, Amy, I can remember, like an FTC case where the FTC submitted survey data, but the survey just didn't quite make the point that the FTC wanted to, and the survey instead showed that the claim could have been made more clearly. But that, of course, is not the standard. So really interesting. So do companies often do surveys proactively?

Mudge: Well, as you pointed out, they do a lot of focus group surveys, right, and what is going to motivate you to purchase. And marketers survey consumers all the time, but litigation-quality surveys up front, typically not. It is a really, really big investment, and they take some time, and there is often just not a lot of time to do one. And NAD cases are fast, you need to respond to a complaint in a few weeks. So, having a relationship through your advertising counsel, with a quality survey expert if you need to get the job quickly if you are in an NAD or Lanham Act context, is really going to be important.

Kaufman: Yeah. Well, Amy, I think we have set the table on surveys and hopefully gotten our listeners in the mood for more because next time we tackle surveys, we're going to welcome back the very popular Randy Shaheen.

Mudge: Professor Shaheen.

Kaufman: Yes, indeed, and we will explore some of the detail of survey design and analysis. And survey says, that is a wrap on another edition of AD Nauseam. Thanks for joining us.

Rubenking: Thank you, Amy and Daniel. If you have any questions for Amy or Daniel, their contact information is in the show notes. For more information on the latest developments in ad law, visit our ADventures in Law Blog at www.adventures-in-law.com and check out all AD Nauseam episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.