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"HAVANA CLUB" DEFENSE AGAINST SURVEYS: A NEW BATTLEGROUND IN LANHAM ACT FALSE ADVERTISING CASES

By

Randall K. Miller*

INTRODUCTION

The Third Circuit's recent decision in *Pernod Ricard USA, LLC v. Bacardi U.S.A.*[1] about "Havana Club" rum establishes a new battleground in Lanham Act cases. In *Havana Club*, the defendant successfully urged the court to disregard a survey because the advertising claim (arguably) was unambiguously truthful on its face (the "Havana Club" defense). Prior to *Havana Club*, the only case that stood for such a proposition was the Seventh Circuit's decision in *Abbott Labs. v. Mead Johnson & Co.*,[2] which was corrected, criticized as an outlier, and not followed by other courts. Now, *Havana Club* has revitalized *Mead Johnson* and given the defense greater credibility, not only in the Third Circuit, but in all Circuits. The Havana Club defense is sure to spawn new battles in future Lanham Act cases and litigants should anticipate these issues. This article reviews (1) the use of survey evidence in Lanham Act cases; (2) the *Mead Johnson* and *Havana Club* cases; and (3) the significance of *Havana Club* to litigants in future cases.

BACKGROUND: SURVEY EVIDENCE IN LANHAM ACT CASES

Competitor false advertising claims under the Lanham Act fall into two categories: literal falsity and implied falsity.[3] Many of the most prevalent and powerful advertising messages are communicated by implication. Advertising professionals are trained to construct an advertising campaign to communicate on many levels, including implicit messages. When a challenger pursues a claim of implied falsity, the challenger must prove two things: (1) the implied claim exists; and (2) the implied claim is false.[4] In step 1, a challenger must demonstrate the existence of the implied claim "by extrinsic evidence"[5]– typically in the form of a survey–showing the target audience's reaction to the advertising. Courts increasingly have relied on surveys as reliable proof of "exactly what message ordinary customers received in the ad."[6] "The success of a plaintiff's implied falsity claim

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usually turns on the persuasiveness of a consumer survey."[7] The survey allows the plaintiff to prove that the advertising statement "actually conveyed the implied message and thereby deceived a significant portion of the recipients."[8] For example, in *McNeil-PPC, Inc. v. Pfizer Inc.,*[9] the court enjoined Pfizer's advertising campaign that "Listerine's as effective as floss at fighting plaque and gingivitis."[10] Pfizer defended the claim on the basis that it had clinical data to substantiate the equivalence claim regarding "plaque and gingivitis"; however, McNeil's survey showed that 26-31 percent[11] of consumers interpreted the phrase as a broader "replacement" message (that is, one "can replace floss with Listerine" and receive all of the same benefits), which could not be substantiated.[12]

The reliability of surveys to prove the existence of an implied claim has matured over the past 10-15 years. Litigants and courts now are conversant with the commonly accepted scientific principles to ensure that surveys are reliable.[13] Litigants routinely use these principles to attack proffered survey methodology, including through cross examination and rebuttal expert testimony. Courts also are more willing and able to substantively analyze surveys, including admissibility questions through a *Daubert* process.[14]

Mead Johnson

Until *Havana Club*, Judge Easterbrook's decision *in Abbott Labs. v. Mead Johnson* stood alone as an exception to the survey rule.[15] In *Mead Johnson*, the challenger used a survey to show that consumers interpreted the advertising statement "1st Choice of Doctors" to mean that a *majority* of doctors preferred the product, which was allegedly false claim because only a *plurality* of doctors preferred the product with many not expressing a preference. Judge Easterbrook refused to even consider the survey, because he determined that the phrase "1st Choice of Doctors" was unambiguous and simply meant that more doctors preferred the advertiser's product to the competitive product. Having made this determination, Judge Easterbrook would not allow a survey to be used to offer a different meaning to the advertising statement, holding that surveys should not be "used to determine the meaning of words or to set the standard to which objectively verifiable claims must be held."[16] Judge Easterbrook's decision was grounded in First Amendment principles, and the opinion noted that a contrary ruling would have the effect of chilling commercial speech. The opinion also indicated that there must be a limit to the use of surveys. *Mead Johnson* has not been followed, and many judges and commentators that cite to *Mead* have distinguished or criticized the case.[17]

Havana Club

Havana Club[18] resurrects *Mead Johnson*. In Havana Club, Pernod Ricard alleged that Bacardi's "Havana Club" name falsely implied that the rum was

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made in Cuba. Bacardi defended on the basis that the bottle itself prominently disclosed the product as a "Puerto Rican Rum." Pernod sought to rely on a survey showing that approximately 18% of consumers who viewed the bottle believed that the rum was made in Cuba. The Third Circuit affirmed the victory for Bacardi and rejected the survey. The Third Circuit held that "there are circumstances under which the meaning of a factually accurate and facially unambiguous statement is not open to attack through a consumer survey."[19] Because "no reasonable person could be misled by the advertisement," the court could "disregard" the survey as "irrelevant" and "immaterial."[20] Perhaps recognizing the implications of its ruling, the Third Circuit cautioned that any future decision to reject a survey in favor of the court's subjective determination about an advertising claim should be "rare."[21]

SIGNIFICANCE AND ISSUES FOR FUTURE CASES

Notwithstanding the Third Circuit's attempt to limit Havana Club to the "rare" circumstance, its joining of the Seventh Circuit on this issue is significant. The Third Circuit has issued many of the leading Lanham Act false advertising cases, and it can no longer be said that the principle discussed here is limited to the Seventh Circuit. It remains to be seen what another leading circuit–the Second Circuit–will do on this issue. But it is sure to come up, and quickly. Defendants will argue that advertising statements in Lanham Act cases are so obviously truthful that even a survey showing a substantial portion of a target audience receiving an implied false message should be ignored. Plaintiffs will emphasize that the Havana Club defense is wrong as a matter of law or, alternatively, it should be extremely limited. Both arguments will include themes central to Lanham Act litigation, discussed below.

Interpretation by the judge or the "target audience." The Havana Club defense invites a court to substitute its view of implied claims for the view of the target audience. Courts have long held that that a judge's subjective view should not interfere with the determination of implied claims. 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?"[22] "It is not for the judge to determine, based solely upon his or her own intuitive reaction, whether the advertisement is deceptive"[23] Judges are also consumers and there is risk that a judge's subjective reaction could differ significantly from that of the more typical (and therefore relevant) consumer. Significantly, a Judge may not even qualify to participate in a survey–surveys ordinarily are limited to those in the target audience, of a certain demographic, who actually used or

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purchased the product recently.[24] The impressions of other consumers are "irrelevant."[25] Even the opinion of a trained and experienced market researcher is irrelevant absent a survey.[26] This concept is well established, but plaintiffs may be reluctant to offend judges by making this argument too forcefully.

Importance / over-importance of survey experts. One argument in favor of the Havana Club defense is that it diminishes the dominance of survey experts in Lanham Act cases. Survey experts arguably have become too important in these cases. The minute a party wants to discuss implied messages from advertising, it first must shell out several hundreds of thousands of dollars–or more–to pay a survey expert and to collect survey data. Once one party presents such evidence, the opponent often is advised to then develop rebuttal survey testimony that may include a counter survey. The escalation in costs can be substantial and can erect a financial obstacle to challenging an obvious implied claim. This fact distinguishes a Lanham Act court from agency and self-regulatory organizations; as one commentator notes: "the FTC, the NAD, ERSP and CARU have their own expertise and do not necessarily require survey evidence to establish implied advertising claims, whereas such proof is an essential element in Lanham Act litigation."[27] In its winning appellate brief, Bacardi argued that the amici (survey organizations) "predictably wants all of § 43(a) to devolve into a battle of handsomely paid survey experts mediated by the courts."[28] Against this backdrop, a litigant might be able to persuasively ask whether the court "really needs" these experts, and litigants can be expected to employ this theme in future cases. On the other hand, the Havana Club defense threatens to short-circuit a case by essentially barring consideration of scientific data that courts consistently have held to be admissible and reliable. One can imagine a case involving a "gold standard" survey–large, well-controlled, with a bullet-proof design showing implied falsity. Defendants who ordinarily would have to confront the survey on the merits may seek sanctuary under *Havana Club*. Under this circumstance, the court would have to balance (a) the purported clarity of the advertising claim; against (b) the "power" of the survey.

Whose implied claim? Defendants who have favored the Havana Club defense often themselves attribute their own implied claims–or at least "interpretations"–to the advertising statement. For example, Bacardi argued that "Havana Club" refers to the fact that a Cuban family created the original Havana Club recipe. The district court stated that "Havana Club has a Cuban heritage and, therefore, depicting such a heritage is not deceptive"[29] and "Bacardi should have a First Amendment right 'to accurately portray where its product was historically made–as opposed to claiming that the product is still made there.'"[30] Of course, the advertising does not say anything about

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family heritage; all of that information–allegedly suggested by the slogan "Havana Club"–was supplied by the counsel for the Defendant. Similarly, in the Splenda case,[31] McNeil offered that "made from sugar" really "means" that Splenda is made through a multi-step process that starts with sugar but then is, through a chemical process, altered, resulting in an artificial sweetener that does not contain sugar. McNeil argued (unsuccessfully) that "made from sugar" is not susceptible to proof, by a survey, that Splenda "contains" sugar, "is" sugar, or is more "natural" than competing products. The court held that it was a factual dispute, and denied summary judgment.[32] In future cases in the wake of Havana Club, defendants can be expected to argue that they are offering only reasonable interpretations of an unambiguous/truthful claim; plaintiffs will argue that the minute the court has to depart from the literal words to understand the claim, the court is in the realm of "implied" claims where surveys must be considered.

First Amendment freedoms versus protecting competitive interests. At its core, Havana Club appears to be a pro-First Amendment decision that tends to reduce a challenger's ability to bring a Lanham Act claim. The Lanham Act provides a company a private right of action to protect against competitive harm caused by a literally truthful yet "misleading" promotional statement. Havana Club raises the question of how far courts are willing to go in trimming this statutory right in favor of the constitutionally-protected marketplace of ideas.[33] This theme will be sure to be used in future litigation over the Havana Club defense.

Flip-side of Havana Club: the "necessary implication" doctrine. Havana Club arguably is the analog to the necessary implication doctrine, which holds that some implied claims are so obvious that a court can determine their existence without a survey.[34] Most courts view "necessary implication" as a subset of literal falsity even though the actionable advertising claim is implied from–and therefore different than–the express words used. The necessary implication doctrine permits a plaintiff to prove implied falsity without a survey.[35] Therein lies the similarity to Havana Club: the court is using its subjective judgment about what an advertising statement does or does not communicate without reliance on a survey. Perhaps both doctrines may be limited to extreme (or "rare") cases. For example, in *Schering Plough Healthcare Products, Inc. v. Schwarz Pharm., Inc.*,[36] Judge Posner commented that litigants should not be permitted to use necessary implication to avoid presenting evidence. Posner suggested that a claimant asserting a necessary implication claim (with the associated benefit of not needing a survey) requires a clear "lie" that is "bald-faced, egregious, undeniable, [and] over the top."[37] Perhaps the same kind of narrow

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opportunity should apply to clearly "truthful" claims at the other end of the spectrum under the Havana Club defense.

Procedural issues. The Havana Club defense could arise in a variety of procedural settings. For example, a defendant may attempt to avoid the pains and burdens of litigation altogether by raising the Havana Club defense at the threshold of a case–such as on a motion to dismiss–and suggest that no discovery should be had until the Havana Club issue is resolved. The issue also could come up as an evidentiary motion–such as a motion in limine before trial–to exclude a survey. In a bench trial setting, the Havana Club defense may not preclude the admissibility of a survey but suggest it should be entitled to no weight (Havana Club, for example, was decided after a bench trial).

CONCLUSION

As litigants prepare to apply the Havana Club defense, expect to see arguments and judicial opinions that address foundational issues in Lanham Act cases, including the proper role of the court in using its own judgment about advertising, the acceptable influence of survey experts, and the evidentiary reliability of surveys themselves. As the door opens further to judges applying their "own expertise" in these cases, litigants may find that "what's good for the goose is good for the gander": plaintiffs can be expected to use this opportunity to invite judges to find potentially actionable implied claims in advertising based on their subjective views, and without a survey.

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Footnotes

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[1] 653 F.3d 241 (3d Cir. 2011).

[2] 201 F.3d 883 (7th Cir. 2000), amended, 209 F.3d 1032 (7th Cir. 2000).

[3] *See*, *e.g.*, *LG Elecs. U.S.A., Inc. v. Whirlpool Corp.*, 661 F. Supp. 2d 940, 948 (N.D. Ill. 2009) ("Federal false advertising claims generally fall into two categories: literal falsity and implied falsity. Where a statement or claim made in advertising is literally false, 'the plaintiff need not show that the statement either actually deceived customers or was likely to do so.' Where a statement or claim is literally true or ambiguous, however, a plaintiff must prove that the statement 'implicitly convey[s] a false impression, [is] misleading in context, or likely to deceive consumers.'") (citations omitted).

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[4] *Schering Corp. v. Pfizer, Inc.*, 189 F.3d 218, 229 (2d Cir. 1999) (observing that a plaintiff pursuing an implied falsity theory must prove that the advertising statement "has left an impression on the listener that conflicts with reality" and that courts must compare "the impression, rather than the statement, with the truth.").

[5] *McNeil-PPC, Inc. v. Pfizer, Inc.*, 351 F. Supp. 2d 226, 250 (S.D.N.Y. 2005).

[6] *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 310 n.6 (1st Cir. 2002).

[7] *Johnson & Johnson * Merck Consumer Pharms. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 298 (2d Cir. 1992).

[8] *See also Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256 (11th Cir. 2004); *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 37 (1st Cir. 2000).

[9] 351 F. Supp. 2d 226 (S.D.N.Y. 2005).

[10] *Id*. at 231.

[11] 31 percent of those who saw the television commercial and 26 percent of those who viewed the shoulder label. *Id*. at 244.

[12] *Id*. at 252-53.

[13] The leading treatise recently has been updated, *see* Shari Seidman Diamond, Reference Guide on Survey Research, in Reference Manual on Scientific Evidence at 359 (Federal Judicial Center 3d ed.2011). In his forthcoming article, Gerald L. Ford analogizes the development of surveys to human growth, and he argues that surveys have passed through the infant and adolescent stages, and are now in the adult stage, with courts now understanding the scientific need for controls and other survey design features necessary for survey reliability. *See* Gerald L. Ford, "Survey Percentages In Lanham Act Matters," in *Trademark and False Advertising Surveys* (S. Diamond and J. Swann, eds.) (American Bar Association, forthcoming 2012).

[14] *See, e.g., Scotts Co. v. United Indus. Corp*., 315 F.3d 264, 278-80 (4th Cir. 2002); *see also Scott Fetzer Co. v. House of Vacuums Inc*., 381 F.3d 477 (5th Cir. 2004); *Starter Corp. v. Converse, Inc*. 170 F.3d 286, 297 (2d Cir. 1999).

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[15] 201 F.3d 883 (7th Cir. 2000), amended, 209 F.3d 1032 (7th Cir. 2000).

[16] *Id*. at 886.

[17] *See* Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law,* 159 U. PA L. REV. 1305, 1319 n.54 (2011); *see also id*. at 1349, noting the corrected opinion in *Mead*, which is sometimes overlooked and which limits the initial opinion); R.J. Leighton, *Making Puffery Determinations in Lanham Act False Advertising Case: Surveys, Dictionaries, Judicial Edicts and Materiality Tests*, 95 Trademark Rptr. 615, 626 (2005). *But see American Italian Pasta Co. v. New World Pasta Co,* 371 F.3d 387 (8th Cir. 2004), a puffery case, which commented favorably on *Mead*.

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

[19] *Id*. at 252.

[20] *Id*. at 252, 253.

[21] *Id.* at 254-55 (emphasis added). The court stated as follows:

> We hasten to add that cases like the present one should be rare, for one hopes that a case with truly plain language will seldom seem worth the time and expense of contesting in court. That this particular case, and related ones, have been litigated so intensely is due, it seems, to the unusual political baggage and branding potential involved. A word of caution is nevertheless in order, so that our holding today is not taken as license to lightly disregard survey evidence about consumer reactions to challenged advertisements. Before a defendant or a district judge decides that an advertisement could not mislead a reasonable person, serious care must be exercised to avoid the temptation of thinking, "my way of seeing this is naturally the only reasonable way." Thoughtful reflection on potential ambiguities in an advertisement, which can be revealed by surveys and will certainly be pointed out by plaintiffs, will regularly make it the wisest course to consider survey evidence.

[22] *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 156 (2d Cir. 2007).

[23] *Johnson & Johnson * Merck Consumer Pharms. Co. v. Smithkline Beecham Corp*., 960 F.2d 294, 297-98 (2d Cir. 1992); *see also Clorox Co. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 37 (1st Cir. 2000); (citation omitted); *see also Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d

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489, 497 (5th Cir. 2000) (the "plaintiff may not rely on the judge or the jury to determine, 'based solely upon his or her own intuitive reaction, whether the advertisement is deceptive' "); *Castrol Inc. v. Pennzoil Co*., 987 F.2d 939, 947 (3d Cir. 1993).

[24] *See, e.g., Georgia-Pacific Consumer Prods. LP v. Kimberly-Clark Corp*., No. 09 C 2263, 2010 WL 1334714, at *2 (N.D. Ill. Mar. 31, 2010) ("In order to qualify for participation in the study the respondent had to indicate that Northern or Quilted Northern was the brand or among the brands of toilet tissue he/she had used in the past three months.").

[25] *See, e.g.*, *Kournikova v. Gen. Media Commc'ns.*, *Inc.,* 278 F. Supp. 2d 1111, 1125 (C.D. Cal. 2003) (discarding a survey that did not sample "the appropriate target group" and noting that "[t]o be probative and meaningful . . . surveys . . . must rely upon responses by potential customers of the products in question.") (citations omitted); *Weight Watchers Int'l, Inc. v. Stouffer Corp.*, 744 F. Supp. 1259, 1272 (S.D.N.Y. 1990) ("[S]ome of the respondents may not have been in the market for diet food of any kind, and the study universe was therefore too broad.").

[26] *See, e.g., Fed. Trade Comm'n v. Wash. Data Res.*, No. 8:09-cv-2309-T-23TBM, 2011 WL 2669661, at *2 (M.D. Fla. July 7, 2011) (striking an expert's opinion in absence of a survey and stating: "Maronick's conclusion as to the perception of a 'reasonable consumer' appears purely speculative, apart from any scientific or technical knowledge or method, and unhelpful because the speculation rests entirely on Maronick's unlearned prediction of consumer reaction and consumer perception. Maronick's proposed testimony concerns a matter within the ken of the fact finder, subject to primary evidence from consumers, and to which Maronick adds not reliable expert opinion but only one person's opinion, which is no better than another person's opinion.").

[27] David H. Bernstein, False Advertising Challenges: A Review of Available Fora, Practicing Law Institute, 1041 PLI/Pat 41 (Mar. 21, 2011).

[28] Case 10-2354, Appellee Br. at 34.

[29] *Pernod Ricard*, 653 F.3d at 250.

[30] *Id*.

[31] *Merisant Co. v. McNeil Nutritionals, LLC*, 515 F. Supp. 2d 509 (E.D. Pa. 2007).

[32] *Id*. at 526-28.

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[33] As the Supreme Court noted in *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977), "commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system."

[34] *See, e.g.*, *Castrol Inc. v. Pennzoil Co*., 987 F.2d 939, 946-47 (3d Cir. 1993); *Johnson & Johnson-Merck Consumers Pharms. Co. v. Proctor & Gamble Co*., 285 F. Supp. 2d 389, 391-92 (S.D.N.Y. 2003).

[35] "[C]onsumer survey evidence is not required when the allegedly false claim is a 'necessary implication' of the explicit language in the advertisement." *SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, No. 01 Civ. 2775(DAB), 2001 WL 588846, at *8 (S.D.N.Y. Jun. 01, 2001) (citing *Gillette Co. v. Wilkinson Sword, Inc.*, No. 89 CIV. 3586 (KMW),1989 WL 82453 (S.D.N.Y. July 6,1989)).

[36] 586 F.3d 500 (7th Cir. 2009).

[37] *Id*. at 513.

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