

Don't Go Rogue in Proving Up Consumer Deception

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Consumer surveys. Love 'em or hate 'em, they are an evidentiary staple in many

Lanham Act disputes. A well designed and executed survey can bolster your case, or can act as a powerful antidote to counteract your opponent's. Survey evidence is not, legally speaking, strictly necessary. That said, courts routinely—indeed, almost reflexively—treat the absence of a survey as outcome determinative, especially in cases where a party claims an ambiguous advertisement “deceives” consumers. Sometimes litigants want to avoid the time and expense of conducting a consumer survey and instead opt to have an expert fill in that evidentiary hole with an opinion on how he or she “believes” consumers would perceive an advertisement. That is often a bitter pill. A case in point: *In re C2r Global Mfg.* issued by the United States Bankruptcy Court for the Eastern District of Wisconsin.

There, a competitor pursued a Lanham Act claim against a debtor for falsely advertising the effectiveness of its pharmaceutical drug disposal product. According to the Plaintiff, consumers were deceived by the ads in question and, as a result, purchased the debtor's product instead of Plaintiff's product. There is a well-developed playbook for proving up these types of garden variety false advertising claims. The proof often includes marketplace research gathered through a consumer survey. But here, instead of proffering survey evidence to establish how consumers perceived the debtor's “drug destroyer” ads, the Plaintiff designated an expert to provide his personal opinion on the effect the ads would have on consumers. He opined that, “because consumers read [debtor's] capacity advertisements to indicate that RX Destroyer products deactivate medication at a lower price-per-pill than the [plaintiff's] system, consumers choose to purchase [debtor's products] rather than [plaintiff's product].” The court correctly excluded this and similar opinions.

The problem with this sort of opinion testimony is at least two-fold. First, this expert attempted to opine on how consumers perceived or interpreted the ads in question. That sort of opinion is not within the province of an expert unless he or she has survey data to support it, and Plaintiff had none. Second, the expert purported to opine on how consumers would react after viewing the ad in that they would be more inclined to purchase the debtor's product than Plaintiff's. This sort of opinion is something that should be supported by gathering data from actual consumers and testing whether the ads at issue would be “material” to the consumers' purchasing decisions.

This case tells a cautionary tale about the perils of proxy evidence. If you are trying to establish how consumers perceive an advertisement or how they will react to it, counsel and their experts should resist the urge to “go it alone.” Consider designing and implementing a consumer survey to help bridge the evidentiary gap. Otherwise, going rogue when it comes to survey evidence can have costly implications.