

Third Circuit Indicates Judicial Disenchantment With Consumer Survey Evidence

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On August 4, the United States Court of Appeals for the Third Circuit rendered its unanimous decision in *Pernod Ricard USA, LLC v. Bacardi USA, Inc.*, holding that a consumer survey need not be considered when a label or other advertisement, on its face and taken as a whole, leaves no room for a reasonable consumer to be misled. The decision follows the Seventh Circuit's reasoning in *Mead Johnson*,¹ stating that "never before has survey research been used to determine the meaning of words, or to set the standard to which objectively verifiable claims must be held."² This decision may indicate growing judicial skepticism of survey evidence and lead to a decline in the use of consumer surveys in false advertising cases.

The case involves a Bacardi rum with the brand name "Havana Club" displayed prominently on the label. The entirety of the label includes the words "Havana Club brand Puerto Rican Rum." A rival multinational distillery, Pernod, sued Bacardi for false advertising under Section 43(a)(1)(B) of the Lanham Act, alleging that the use of the HAVANA CLUB brand name misleads consumers to believe the product is manufactured in Cuba. To prove false advertising under the Lanham Act, Pernod had to show, among other things, that Bacardi made a false or misleading statement about the product, and that there was actual deception or at least a tendency to deceive a substantial portion of the intended audience. As evidence of the label's tendency to deceive, Pernod submitted a consumer survey purporting to show that, after reading the label, eighteen percent of consumers believed the product was manufactured in Cuba or from Cuban ingredients as a result of the use of the words HAVANA CLUB on the label. Consumer surveys are a commonly-used means of establishing a statement's tendency to deceive.

The District Court held that the court may find, as a matter of law, that no reasonable consumer could be deceived by a statement, and that no reasonable interpretation of Bacardi's HAVANA CLUB brand rum label could lead to the conclusion that it is false or misleading. Pernod appealed solely on the basis that the District Court erred in not considering the consumer survey, and the Circuit Court affirmed the lower court decision, saying "there must be a point at which language is used plainly enough that the question ceases to be 'what does this mean' and becomes instead 'now that it is clear what this means, what is the legal consequence.'"³ Judge Jordan was careful to clarify that this decision does not mean that factually accurate, unambiguous statements can never be misleading, but that courts can make a common sense determination of whether a reasonable consumer could be misled without considering a consumer survey.

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¹ Mead Johnson & Co. v. Abbott Labs, 209 F.3d 1032 (7th Cir. 2000).

² Pernod Ricard USA, LLC v. Bacardi USA, Inc., No. 10-2354, slip op. at 20 (3rd Cir. August 4, 2011).

³ Id. at 19-20.