Overview: The Role of Consumer Research Evidence in Recent National Advertising Regulation

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OVERVIEW: THE ROLE OF CONSUMER RESEARCH IN RECENT NATIONAL ADVERTISING REGULATION

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In this volume of the Advertising Law Anthology, readers will find several topics in advertising law and regulation that have benefitted immeasurably from consumer research and/or have generated calls for further research from federal agencies. Issues such as the impact of food and drug advertising regulations, cross-cultural advertising law comparisons, professional services advertising, the recent Food and Drug Administration (FDA) tobacco regulations and the influence of "Old Joe the Camel," and extrinsic evidence (e.g., ad copy tests) presented before the Federal Trade Commission (FTC) and in Lanham Act cases have been the beneficiaries of considerable study. These consumer research studies have employed a variety of methods, such as survey work, ad copy tests, baseline and follow-up studies, experimentation, and reviews of recent case decisions. Other emerging advertising law topics listed in this volume (e.g., advertising in cyberspace, dietary supplement advertising, sponsorship advertising) will no doubt receive similar attention by consumer researchers in the future. Thus, the purpose of this volume overview is to highlight two areas (i.e., extrinsic evidence in ad deception cases and national advertising regulation) where consumer research has made a significant


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contribution to advertising law issues. Then, several calls for future consumer research which federal agencies have recently requested will be emphasized.

**Extrinsic Evidence in Ad Deception Cases**

In FTC ad deceptiveness cases, if the Commission’s review of evidence from the ad itself (i.e., intrinsic evidence) does not allow with confidence a clear interpretation of an implied claim, then extrinsic evidence is often given substantial weight by the Commission in determining the net impression of the ad on consumers. In the FTC Deception Policy Statement, extrinsic evidence is viewed as consisting of "expert opinion, consumer testimony... copy tests, surveys, or any other reliable evidence of consumer interpretation" (Cliffdale Associates, Inc. 1989 at 176). Preston has provided a thorough review of extrinsic evidence accepted and rejected by the Commission in the form of direct consumer research, expert testimony, and indirect evidence (e.g., prior consumer beliefs). Other authors have discussed general standards or principles for the consideration of extrinsic evidence before the Commission. As found in Stouffer

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3 See Stolle in this volume (p. 933) regarding arguments from Kraft, Inc. 114 FTC 40 (1991) relating to the FTC’s authority to rely solely on intrinsic evidence in determining ad deception.


Foods Corp. (1994), difficult methodological tradeoffs often exist in the operationalization of such general standards for ad copy tests, such as the selection of the most appropriate controls to use for the targeted ad(s) and copy test questions.

Other researchers have designed consumer studies examining the misleading representation, omission or practice; reasonable consumer; and materiality elements of the FTC's Deception Policy Statement. For example, recent research has examined how consumers may misinterpret and overgeneralize from implied claims in advertising. Other experimental research has explored the roles of product expertise and involvement associated with the reasonable consumer element in

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10 See Cliffdale Associates, Inc. 103 FTC 175-176. Also see Ford, Gary T. and Calfee, John E., Recent Developments in FTC Policy on Deception, 50 JOURNAL OF MARKETING 82 (1986).

the Deception Statement. Also, considerable discussion on the question of the materiality of the "milk equivalency" claim in Kraft, Inc. has ensued among consumer researchers. Finally, consumer researchers have provided a long history of studies and reviews of FTC information remedies, such as corrective advertising.

In Lanham Act cases, unless a claim is "false on its face," the burden of proof rests with the plaintiff in that they must demonstrate that the claim in question is false and misleading, not just that it is unsubstantiated. Examples of contributions from consumer researchers in Lanham Act advertising cases include an extensive review of comparative ad cases, a comparison of extrinsic evidence


13 Kraft, Inc. 114 FTC 40 (1991); aff'd, Kraft, Inc. v. FTC 970 F.2d 311 (7th Cir. 1992); cert. denied, 113 S. Ct. 1254 (1993).


16 Coca-Cola Company v. Tropicana Products, Inc. 690 F.2d 312, 317 (2d Cir. 1982).


requirements between FTC and Lanham Act advertising cases,¹⁹ and a case-by-case review of survey evidence and standards under the Lanham Act.²⁰

**National Advertising Regulation**

Three important national ad regulation areas receiving considerable attention from researchers recently are the FDA’s food labeling regulations in conjunction with the FTC’s food advertising policy, the FTC’s environmental marketing guides, and the FDA’s recently released tobacco rules. The first area of inquiry involves the implementation of the Nutrition Labeling and Education Act (1990) as put forth in the FDA’s food labeling regulations²¹ and the FTC’s Enforcement Policy Statement on Food Advertising.²² For example, an entire section of the recent Spring 1996 *Journal of Public Policy & Marketing* is devoted to food labeling issues such as alternative nutrition formats, consumer processing of nutrient and health claims on packages, acquisition and comprehension of nutrition information, demographic profiles and nutrition shopping preferences, and alternative reference points for the provision of daily nutrition value information.²³ Recent calls for consumer research by the FTC have included the question of

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whether consumers will generalize from nutrient content claims in advertising given the omission of an important negative nutrient. Evidence from one study shows that consumers do indeed generalize from such claims, however, this generalization is dependent on the product category, specificity of ad claims, consumer nutrition knowledge, and disclosure type employed. The study of consumer interpretations of health and dietary supplement claims in advertising would be an important extension of such research.

A second topic of interest to consumer researchers is that of environmental marketing claims. Extensive hearings were held this past December at the FTC regarding issues related to the revision of the Commission’s 1992 Environmental Marketing Guides. Consumer researchers working in this area have provided helpful evidence in the form of tracking studies on environmental claim usage across product categories and geographical areas. In fact, an entire recent issue of the Journal of Advertising is devoted to research examining environmental marketing claims. Further discussion and research continues regarding topics such as exhortations to recycle, lifecycle analyses, recyclability claims, pre- and post-consumer recycled content claims, seal systems, and ozone-related claims.

A third area of note, addressed in this volume, is the recent


regulatory initiative on children, adolescents, and tobacco proposed by the FDA. Early research on the question of whether advertising depicting the character "Old Joe the Camel" disproportionately affected children’s logo recognition rates, brand recall and preferences, and market share estimates has been conducted in the medical community and further examined and debated in the advertising research profession.

More generally, recent consumer research on adolescents has indicated that exposure to antismoking ads made salient pre-existing beliefs regarding smoking hazards and led to less favorable thoughts about smokers. Exposure to cigarette ads resulted in more favorable thoughts about smokers. Other consumer research is evolving on cigarette package labeling, antismoking ads, and interpretation of

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29 Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 FEDERAL REGISTER 44396 (1996).


numerical tar ratings. Several recent meta-analyses and market-share studies by consumer researchers have examined the overall impact of tobacco advertising. Finally, an examination of the final FDA tobacco rules reveals the application of numerous consumer, marketing, and advertising research studies in sections of the regulations (e.g., advertising; 61 FEDERAL REGISTER 44465 (1996).

Calls For Future Consumer Research on Advertising Law and Regulation Issues

The purpose of this volume overview was to share with readers some examples of contributions from consumer research in helping to better understand exactly how consumers interpret advertising in recent national advertising regulation issues, many of which appear in this volume. After all, as the FTC indicates in Thompson Medical (1984 at 789), "The extrinsic evidence we prefer to use and to which we give great weight is direct evidence of what consumers actually thought upon reading the advertisement in question."

While such consumer research is sought in ad copy test cases and in assessing the impact of national ad regulations, it is not without its difficulties. For example, while generally-accepted principles exist, researchers designing ad copy tests in deception cases often face challenging tradeoffs in the design of such a test (e.g., control ad group choices). Regarding the impact of national ad rules, the use of baseline and follow-up studies is usually recommended to fully assess the rule's impact. However, such research efforts require not only significant


planning on the part of the researcher, but sufficient resources as well. In general, consumer researchers working in the policy field also face challenges in achieving the right balance between underlying theory (addressing internal validity concerns) and public policy applications (addressing external validity concerns). In consumer research, internal validity refers to the confidence by which causal inferences can be made among variables measured in the research, whereas external validity is concerned with the generalizability of the findings to other populations, settings, and times. While strong theoretical frameworks from fields of consumer behavior, economics, and law can help with internal validity issues, specific calls for consumer research from several federal agencies have assisted researchers with external validity concerns. For example, a recent call for consumer research from the FTC has targeted such needs as research in the areas of health, safety, and leasing disclosures; internet advertising; telemarketing; "Made in the USA" claims; corrective advertising; alcohol advertising; and consumer perceptions of tar and nicotine numbers. Similarly, the FDA has called for consumer research help in the areas of patient information, food and drug labeling, and the proposed tobacco regulations. These calls have no doubt generated considerable interest among scholars in our field, and are likely to lead to further research contributions applied to national advertising law and regulation issues.


