

ACI's 4th Advanced Forum on Resolving & Litigating Advertising Disputes

March 12-13, 2015

Battle of the Experts — Deploying the Proper Scientific Methodology for Supporting or Challenging Claims

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The Science of Answering Questions

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Examples of Competitive Claims Cases

- *Performance of two vacuum cleaners*



- *Dust pick-up performance of two dusters*



- *Comparisons of multiple fragrance variants of two manufacturers of malodor treatments for carpets*



- *Relative effectiveness of two cold sore treatments*



- *Comparisons of two early detection pregnancy kits*



- *Sequential monadic in-home use tests of two fabric refreshers*



- *Comparisons of two beers on color and taste*



- *Dropped call rates for two cell phone service providers*



- *Relative performance of two tooth whitening methods*



What is a Survey?

A research tool designed to measure responses to items presented to a sample of people drawn from a target population.

These items may include questions, words, phrases, candidates, issues, concepts, products, or brands.



Surveys are used to...

Measure occurrence of events and behaviors

- Recall of ad campaign exposure
- Product purchase

Study subjective experience

- Responses to products or brands
- Responses to advertising messages

Measure attitudes and beliefs

- Teenage Attitudes and Behavior Study (TABS)
- Perceived health value of nutritional supplements

Survey Research

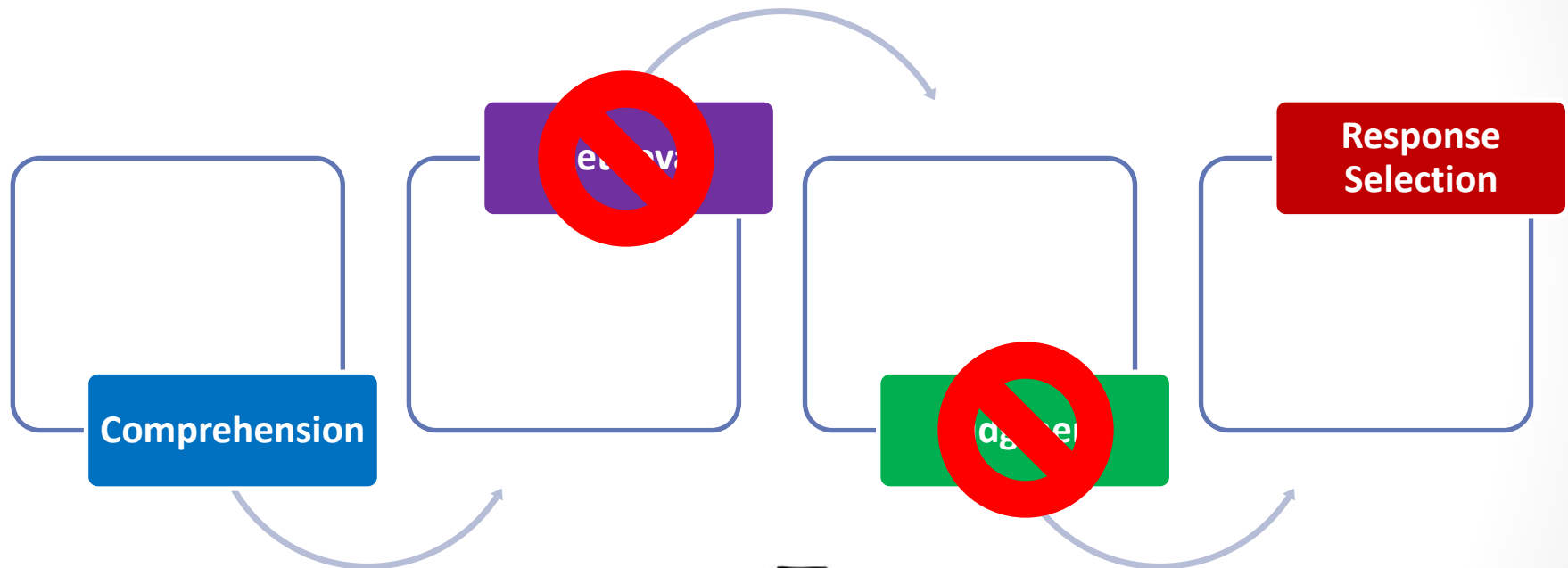


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Answering a Question

Strong satisficing occurs when respondents skip the retrieval and judgment steps altogether and select a response they believe will be reasonable to interviewer



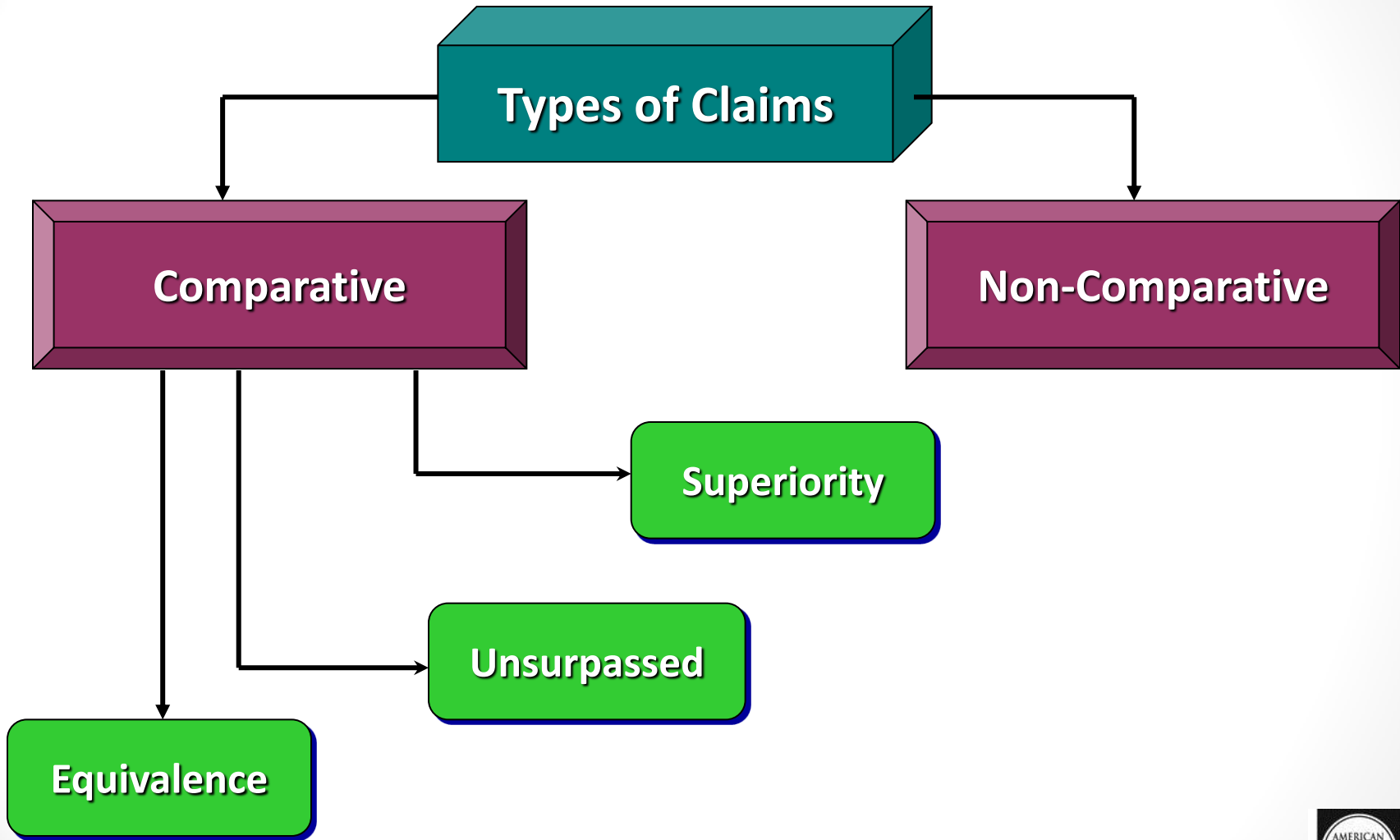
- yes
- no
- don't know



The Optimizing - Satisficing Continuum



Claims Regarding Product Efficacy



Battles Often Involve Validity and Bias

Validity: The extent to which a result corresponds accurately to the real world or what the experimenter intended to measure

Bias: A survey is biased if it does not estimate a population value accurately irrespective of sample size

Bias determines whether a **placebo** or **control product** is needed

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The Role of Surveys in the Battle of the Experts

Bruce Isaacson

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Surveys are Unique Environments With Rules That Differ From Everyday Conversation

Most People are Used to “The Cooperative Principles”

- **Quantity:** Make your contributions as informative as required, but not more informative than that.
- **Quality:** Try to make your contribution true. Do not say anything you believe is false or lacks evidence.
- **Relation:** Make your contribution relevant to the aims of the ongoing conversation.
- **Manner:** Be clear. Avoid obscurity, ambiguity, wordiness, and disorderliness in your language.

...But a Survey has Unique Rules

- Respondents cannot ask for feedback.
- Respondents must select from the response options given.
- Instructions, responses, and questions are all standardized.
- Respondents may:
 - » Try to guess the ‘right’ answers, or solve problems for the researchers.
 - » Pick up subtle cues from questions or question orders (“Demand characteristics”).

Sources: Bless, Strack, and Schwarz, “The Informative Functions of Research Procedures: Bias and the Logic of Conversation”, *European Journal of Social Psychology*, Vol. 23, 149-165, 1993; Paul Grice, *Studies in the Way of Words*, Harvard University Press, Cambridge, MA, Chapter Two, “Logic and Conversation,” 1989.



Surveys Measure Consumer Perceptions and Attitudes

Disputes about Literal or Unambiguous Statements Typically Do Not Require Surveys

- How many calories are in this candy bar?
- How many seconds for this sedan to accelerate from zero to 60?
- How much does this laptop weigh?
- Which battery lasts longest?
- Does this product reduce cold symptoms?
- Does this energy bar provide five essential nutrients?

Surveys are Required When Messages are Ambiguous or Involve Perceptions

- Does this ad communicate that this food only has 100 calories?
- Do consumers notice the disclaimer on this package?
- Are the limitations of this car's safety features clearly communicated?
- Does the package communicate how the product works?
- Which frozen entree tastes most like homemade?

Small Changes in the Phrasing of Claims Can Greatly Change the Burdens for Claim Substantiation

Claim	Type of Claim	Comparison Made	Burden for Substantiation
Our cake tastes moist and delicious.	Non-comparative	➤ None.	Easiest
No other cake mix beats ours for flavor.	Parity/unsurpassed	➤ Other brands are not better than us.	Moderate
Our cake tastes better than Duncan Hines.	Superiority	➤ We are better than Duncan Hines.	Harder
Our cake is as good as the leading brands.	Parity/equality	➤ We are equally as good as other brands.	Hardest
Our cake is better than any other pre-packaged cake you can buy.	Superlative	➤ We beat everyone.	Hardest

Where Does the Battle of the Experts Take Place?

Topic	Common or Potential Issues
Respondent Qualification	<ul style="list-style-type: none"> ➤ Do the respondents selected for the survey match the universe of relevant consumers? Were they selected in a representative manner?
Product Selection	<ul style="list-style-type: none"> ➤ Was the selection of products or services appropriate? ➤ Are these typical or representative products?
Survey Questions	<ul style="list-style-type: none"> ➤ Were survey questions non-leading, unbiased and clear, and not compound? ➤ Were “don’t know” options provided?
Research Mode	<ul style="list-style-type: none"> ➤ Did the mode of conducting the research match marketplace conditions, and clearly show the products as they would appear in the marketplace?
Survey Execution	<ul style="list-style-type: none"> ➤ Was the survey executed properly, in terms of question rotation, interviewer instructions, respondent instructions, field conditions, “double blind” research, etc.
Data and Reporting Analysis	<ul style="list-style-type: none"> ➤ Was the data analyzed and reported appropriately?

The Battle of the Experts May Also Involve Controls

- Controls separate out extraneous factors from the elements of interest in a survey. They have a variety of forms.

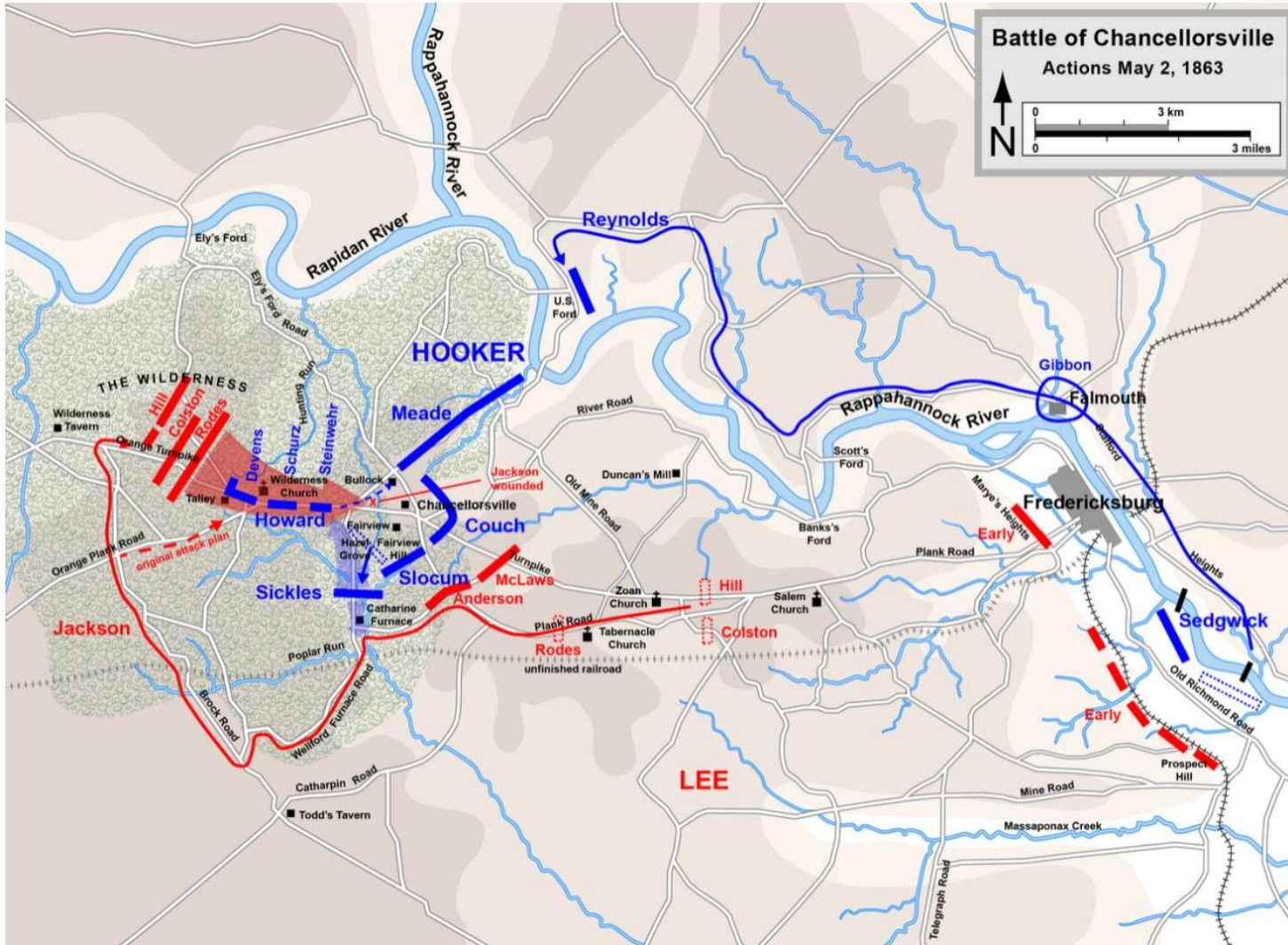
Derived Control vs. Real World Product



Internal vs. External Control

- Does or doesn't this package show, state, or imply that taking this product:
 - Reduces the risk of colds or flu?
 - Improves hearing?

The Importance of Positioning and Speed



Map from Hal Jespersen, www.cwmaps.com

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Battle of the Experts — Measuring Materiality

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Typical False Ad Surveys Include Measures of Materiality

- Population – who is claim material to?
- Open-ended questions – what is material to consumer?
- Control – does claim cause confusion or is it something else?
- Rate – are a meaningful number of consumers misled?

Why Survey Data as Evidence of Materiality?

- Need to evaluate the claim within its proper context.
- Consumers may misunderstand, but not be misled.
- The claim is part of a class action proceeding.
- There is need to quantify the economic impact or harm.

Context is Material

Native American Arts, Inc. v. Bud K Worldwide – M.D. Ga. May, 2012

“Here, the manner in which Defendant offers for sale ...encompasses all of the information provided on the website or in the catalogue. A consumer in the marketplace would not view one picture of a product and a few lines of text. ... Further, although the survey was conducted on a computer, the respondents were not allowed to interact with [the website] as they ordinarily would in the marketplace. The results of a survey that does not adequately simulate how a consumer would encounter a trademark are neither reliable nor probative.”



Misunderstood vs. Mislead

*Mead Johnson & Co. v. Abbott Lab.
(7th Cir. 2000)*



*Papa John's v. Pizza Hut
(5th Cir. 2000)*



*LG Electronics v. Whirlpool Corp.
(2010 N.D. Ill.)*



Class Actions and Materiality

Federal Rules of Civil Procedure - Rule 23:

- a) Numerosity
- b) Commonality
- c) Typicality
- d) Representatives are adequate

Astiana v. Ben & Jerry's Homemade. (2014, N.D. CA.)

More than half the respondents had **no expectation** that the ice cream contained alkalized cocoa (although both packages included "cocoa (processed with alkali)" as an ingredient; only 13% shown the "all natural" label expected that the alkali would be "natural," and of that group, only **3% said that would make them more likely to buy.**

How to Evaluate Harm?

Model Behavior With a Hypothetical Purchase

- Each respondent is given a set of choices (which vary across respondents)
- Respondents “choose” or rank the alternatives according to their preferences
- Each choice has alternatives that vary with certain attributes including price and the claimed feature

How to Evaluate Harm?



Option A



Option B



Option C

Brand	Tide	Gain	Tide
Type	Liquid	Liquid	Liquid
Strength	Super	Regular	Regular
Price	\$ 10.99	\$ 9.99	\$ 8.99

Expert Battles Over Materiality



- Meaning and weight attributed to open – ended responses
- The extent to which consumers misunderstanding would impact purchase
- The magnitude of the effect

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Battle of the Experts

Perception Studies and the NAD

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Perception Studies and the NAD

- Perception studies are usually submitted to show that consumers take away false or unsubstantiated messages from a challenged ad.
- Over the past nine years, NAD has ruled on some **86** perception studies.

Can the NAD do without them?

- When no perception study has been submitted, or when NAD rules that the study submitted is unreliable ---
- “NAD routinely steps into the shoes of the reasonable consumer and uses its expertise to discern the messages reasonably conveyed [by the ad]...”

A Previous Analysis of NAD Cases

- At a previous conference in 2011, Paul Franz of Procter & Gamble and Norman Simon of Kramer, Levin presented the results of their analysis of perception studies evaluated by NAD from 2006 through mid-2011.

NAD Evaluation: 71% Unreliable

- Franz and Simon identified 68 perception studies that were vetted in NAD decisions, and in 48 of these instances, or **71%**, NAD ruled that the studies could not be relied upon.

An Update of the Analysis

- From July 2011 until the present, I have identified 18 perception studies that were evaluated in NAD decisions.
- The proportion of these NAD found unreliable was **72%**, virtually identical with the proportion reported by Franz and Simon for the prior 4½ years.

What Reasons Are Given?

- The reasons NAD gave for rejecting the 13 perception studies in the past 3½ years were:
 - Absence of or inadequate control group 4 cases
 - Absence of filter questions 4 cases
 - Faulty coding of open-ended responses 3 cases
 - Failure to use established questioning format 3 cases
 - Poor wording of closed-ended questions 2 cases
 - Universe includes only actual users 1 case
 - Stimulus is not limited to subject at issue 1 case
- Note: Some of the studies were criticized for more than one reason.

Absence of a Filter Question

- In one case (5687) this question was appropriately criticized for not having been preceded by a filter question:
- “As you may or may not know, T-Mobile’s Jump! Program costs \$10 per month. Based on [the advertising], if you had T-Mobile’s Jump! Program and you broke the screen of your phone, would you expect to pay an additional fee to upgrade your damaged phone?”

NAD Insists on Filter Questions

- In another case (5767), NAD ruled that this question needed a filter:
- “What if anything did the commercial say, show or suggest about how Luvs diapers compare to Huggies?”
- The challenged ad expressly stated: “Luvs lock away wetness better than Huggies, even overnight.”

Conclusions

- In the past 9 years NAD has rejected 71% of perception studies submitted.
- Control groups have become a virtual necessity in perception studies.
- Filter questions are insisted upon, even in situations where many survey experts would not want to use them.

Appendix: Cases from July, 2011

- Perception studies found unreliable:
Cases 5413, 5437, 5547, 5607, 5610, 5630, 5658, 5679, 5687, 5722, 5723, 5767, 5778.
- Perception studies found reliable:
Cases 5473, 5490, 5542 (with qualification), 5628, 5686.