

Surveys and Certification in Consumer-Finance Class Action: Supporting, Attacking Predominance and Superiority

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INTELLIGENCE THAT WORKS

Survey Evidence in Consumer Litigation

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What is a Survey?

- A survey is an investigation about the characteristics of a given population by means of collecting data from that population with the goal to provide information about the relevant population
- A survey conducted on the entire population is called a census (e.g., each employee in a company is surveyed)
- A census-based survey is typically time and cost prohibitive and cannot yield answers in a timely manner
- Sample based surveys are a time and cost-efficient alternative to census-based surveys
 - › Sample based surveys can be carried out using probability or nonprobability sampling techniques
 - › Probability sampling-based techniques offer important advantages but are often difficult to implement and can be time consuming
 - › Non-probability sampling-based surveys are frequently used and can yield reliable results if designed and implemented properly
- The remainder of this presentation will focus on sample-based surveys

The Use of Surveys in Litigation

- Federal and state courts have accepted survey-based evidence on a variety of issues including but not limited to:
 - › Surveys of consumers in consumer finance litigation
 - › Surveys of consumers in false, misleading, and deceptive advertisement class action cases
 - › Survey of consumers in consumer protection class action cases
 - › Surveys of consumers in product defect class action cases
 - › Surveys of consumers in intellectual property cases
 - › Surveys in Lanham Act cases
 - › Surveys of employees and/or employers in discrimination and wage and hour class action cases

Steps in Proper Survey Design

- Step 1: Define target population, purpose, and goal
- Step 2: Design survey instrument
- Step 3: Implement and conduct survey
- Step 4: Data preparation and coding
- Step 5: Statistical analysis of survey responses
- Step 6: Report results

Step 1: Define target population, purpose, and goal

- Identification of the proper target population or universe is recognized uniformly as one of the key elements in the development of a survey
- The target population consists of all elements (i.e., individuals or other units) whose characteristics or perceptions the survey is intended to represent
- While the target population consists of all the individuals or units that are relevant to the litigation, the sampling frame is the source (or sources) from which the sample is actually selected
- The purpose and goal of the survey have to be clearly defined at the outset of the survey process
 - › Many surveys are designed to find out about attitudes or beliefs or reported behaviors, others to determine the source of those attitudes or beliefs or behaviors, or to test a causal proposition

Step 1: Define target population, purpose, and goal

- Imprecise definition of the underlying target population will yield irrelevant information and can lead to bias due to coverage error:
 - › Over-inclusion: Nonmembers of the relevant target population erroneously included in the survey may have systematic differences than the members, and thus lead to bias in the conclusions from the survey
 - ***The inclusion of consumers who are not in the market to buy a certain product into a consumer preference survey about that product will bias the results when the goal of the survey is to assess how buyers of the product value certain attributes of the product***
 - › Under-inclusion: Members of the relevant target population erroneously excluded in the survey will lead to non-representative survey results that cannot be extrapolated to the entire target population
 - ***There are about 14 million households in rural areas in the US that do not have internet access; using an internet panel of US households to answer questions pertaining to low-income and low education households will yield unreliable results***

Step 1: Define target population, purpose, and goal

- The failure to clearly state the purpose and goal of the survey leads to the problem that it cannot be tested if the characteristics the survey is designed to describe are present to the same degree, and are distributed in the same way, in the sample as in the target population as a whole.
 - › ***The 2016 election polls seeing a large lead for Hilary Clinton are a great example for this issue: the results were not wrong, but they did not measure the question of interest which was who the next president would be - rather, they were designed to measure the outcome of the popular vote but not the electoral college outcome.***

Step 2: Design Survey Instrument – Avoid Guessing

- Steps to avoid guessing if survey respondents don't have an opinion or don't recall
- Guessing answers in a survey is a non-desirable effect that will create non-sampling bias which invalidates survey results: Therefore,
 - › The survey should include questions regarding the understanding of certain issues or
 - › The survey should include definitions of key terminology and facts
 - › The survey should make use of a quasi-filter question to reduce guessing by providing “don't know” or “no opinion” options as part of the question

Step 2: Design Survey Instrument – Open- and Closed Ended Questions

- › Open-ended questions require the respondents to formulate and express an answer in their own words:
 1. ***Please, indicate the attributes that are important to you when buying this product.***
 2. ***Which information of the packaging did you rely on when buying the product?***
- › Closed-ended questions provide the respondent with an explicit set of responses from which to choose
 1. ***From the following list, choose the attributes that are important when you are buying this product (List of specific attributes follows; if that list does not include “none”, “others”, or “Don’t Know” then the question is leading)***
 2. ***Did you see the statement “The product is organic” on the product packaging?***

Step 2: Design Survey Instrument – Open Ended Questions

- › Open-ended questions require the respondents to formulate and express an answer in their own words
 - Most responses are less likely to be volunteered by respondents who are asked an open-ended question than they are to be chosen by respondents who are presented with a closed-ended question
 - Open-ended questions give the respondent fewer hints about expected or preferred answers
 - Open ended questions do not lend themselves to many statistical analyses

Step 2: Design Survey Instrument – Closed-Ended Questions

- › Closed-ended questions provide the respondent with an explicit set of responses from which to choose
 - The response alternatives in a closed-ended question may remind respondents of options that they would not otherwise consider, or which simply do not come to mind as easily
 - They may direct the respondent away from or toward a particular response
 - The response chosen will be meaningful only if the list of choices is exhaustive
 - If the list of possible choices is incomplete, a respondent may be forced to choose one that does not express his or her opinion.

Step 2: Design Survey Instrument – Pretest and Pilot Test Procedures

- The survey research literature recommends pretests as a way to increase the likelihood that questions are clear and unambiguous
- In a pretest or pilot test, the proposed survey is administered to a small sample of the same type of respondents who are part of the target population and who would be eligible to participate in the full-scale study
- The results from a pretest may lead to changes in the ultimate survey instrument if there were issues of understanding and confusion
- Therefore, pretest procedures are a standard tool that is a valuable way to improve the quality of a survey by increasing clarity and correcting misunderstandings
- The use of pretests is now viewed as a necessary pre-requisite of proper survey construction

Step 2: Design Survey Instrument – Types of Bias and How to Avoid Them

- The most reliable survey selection process is based on statistically randomized methods which is often difficult and time consuming to implement
- Two main types of bias can arise when the design is not based on statistical randomization:
 - › **Selection bias** arises from the fact that the survey respondents do not properly represent the population which leads to skewed and unreliable results
 - sampling bias, non-response bias, and survivorship bias.
 - › **Response bias** arises from poorly designed questionnaires which encourages the respondents to give particular answers which leads to measurement error
 - Response bias” is not simply the opposite of “non-response bias.”
 - While non-response bias focuses on what happens when those who receive the survey choose not to respond, response bias is caused by defects in the survey design that can impact the actual quality of the survey answers.
 - Question order bias, answer choice bias, answer choice order bias, conformity bias, acquiescence bias

Step 2: Design Survey Instrument – Types of Bias and How to Avoid Them

- › **Response bias** arises from poorly designed questionnaires which encourage the respondents to give particular answers which leads to measurement error
 - Response bias is a general term that refers to conditions or factors that take place during the process of responding to surveys, affecting the way responses are provided.
 - Such circumstances lead to a nonrandom deviation of the answers from their true value.
 - Because this deviation takes on average the same direction among respondents, it creates a systematic error of the measure, or bias.
 - The effect is analogous to that of collecting height data with a ruler that consistently adds (or subtracts) an inch to the observed units. The final outcome is an overestimation (or underestimation) of the true population parameter.

Step 2: Design Survey Instrument – Types of Bias and How to Avoid Them

– Examples:

- › ***Selection bias: Without further design work and adjustments, internet-based surveys have the problem that specific groups in the populations are under-represented because they have less access to Internet. Furthermore, recruitment of respondents is often based on self-selection. Both under-coverage and self-selection may lead to biased estimates***
- › ***Response Bias: Questions which require recalling memories and then quantifying those memories easily lead to biases results: “How many hours of overtime did you work on average on a weekly basis?” or “Did your employer give you two paid rest breaks every day?”***

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Step 2: Design Survey Instrument – Types of Bias and How to Avoid Them

– How to Avoid Selection Bias

- › Avoid sampling bias: Ensure proper representation of all segments in the target population in the sample; ensure that the sampling frame does not have issues of over-inclusion and under-inclusion
- › Avoid non-response bias: Adjust survey timing and utilize different survey distribution channels
- › Avoid “survivorship” bias: Differentiate between current and former customers/employees

Step 2: Design Survey Instrument – Types of Bias and How to Avoid Them

– How to avoid response bias

- › Avoid acquiescence bias: Vary questions and answers, and use multiple choice questions in addition to scale question; don't use leading questions
- › Avoid order bias: If questions do not have a logical order randomize the order; the same applies to the choice of answers and the order in which they are presented – randomize order
- › Avoid conformity bias: Use neutral questions and randomly choose possible questions from a repository of questions

Step 2: Design Survey Instrument – Control Groups

- Control groups are an essential feature of proper survey design for the following reasons:
 - › Adjust for pre-existing beliefs and impressions
 - › Test hypotheses that involve causal relationships
 - › The focus on the responses in a control group design is not on the absolute response level, but on the difference between the response level of the experimental group and that of the control group, thus allowing statistical tests to assess if significant differences exist
 - › In some instances, more than one control group may be necessary to assess precisely what is causing the response to the experimental stimulus

Step 2: Design Survey Instrument – Control Groups

Example of non-exposure control group:

- *In a typical trademark case about a single mark, symbol, or phrase on a product label, one group of respondents is exposed to the contested label while the respondents in the control group are not exposed to the stimuli, or they will be exposed to a version that does not contain the alleged confusing label but is otherwise identical.*
- *Random assignment into the two groups will ensure that “pre-existing beliefs” will balance out between the two groups and will not cause bias.*

Step 3: Implement and Conduct Survey

- Mode of data collection used in survey
 - › In-person interview (often mall-intercept or scheduled interview) – interviewer needs be trained to avoid interviewer bias
 - › Telephone interview - not possible when respondents need to be shown visual materials
 - › Mail based surveys – typically have the lowest response rates out of the modes of collection of survey-based data
 - › Internet panel-based surveys – today there is an industry of panel recruiting and panel management vendors out there that can yield access to large consumer panels that are balanced with census data to ensure that the sample drawn from those panels are representative

Step 4: Data Preparation and Coding

- › Analyzing the results of a survey requires that the data obtained on each sampled element be recorded, edited, and often coded before the results can be tabulated
- › Procedures for data entry should include checks for completeness, checks for reliability and accuracy, and rules for resolving inconsistencies
- › Accurate data entry is maximized when responses are verified by duplicate entry and comparison, and when data-entry personnel are unaware of the purposes of the survey
- › Answers to open-ended questions should be recorded and coding of answers to those questions for purposes of statistical analysis must be clear
- › Check for consistency of answers and straight lining of answers

Step 5: Statistical Analysis of Survey Responses

- › Statistical analysis of survey data is important because it enables the researcher to draw conclusions from the sample to the underlying target population
- › Descriptive statistics
 - Cross-tabulations
 - Median, average, proportions
 - Time-trend charts
 - Histograms
 - Data visualization methods

Step 5: Statistical Analysis of Survey Responses

- › Inferential statistics
 - Point estimates of statistical measures (mean, proportion)
 - Variation of the data (variance and standard deviation)
 - Extrapolation to target population
 - Calculation of confidence intervals
 - Precision and margin of error
 - Statistical hypothesis testing
 - Statistical significance

Step 6: Report Results

–The completeness of the survey report is one indicator of the trustworthiness of the survey and the professionalism of the expert who is presenting the results of the survey. A survey report generally should provide in detail:

1. The purpose of the survey;
2. A definition of the target population and a description of the sampling frame;
3. A description of the sample design, including the method of selecting respondents, the method of interview, the number of callbacks, respondent eligibility or screening criteria and method, and other pertinent information;
4. A description of the results of sample implementation, including the number of
 - a. potential respondents contacted,
 - b. potential respondents not reached,
 - c. noneligibles,
 - d. refusals,
 - e. incomplete interviews or terminations, and
 - f. completed interviews;

Step 6: Report Results

5. A description of any weighting or estimating procedures used;
6. The exact wording of the questions used, including a copy of each version of the actual questionnaire, interviewer instructions, and visual exhibits;
7. A description of any special scoring (e.g., grouping of verbatim responses into broader categories);
8. Estimates of the sampling error, where appropriate (i.e., in probability samples);
9. Statistical tables clearly labeled and identified regarding the source of the data, including the number of raw cases forming the base for each table, row, or column; and
10. Copies of interviewer instructions, validation results, and code books

Choice Based Conjoint Studies - Overview

- Conjoint analysis is widely used in market research and is discussed in depth in market research literature
- Conjoint analysis has been applied to answer a diverse range of questions including but not limited to:
 - the interaction of product attributes,
 - product pricing, new product development,
 - strategic market planning, choice of complex medical treatments,
 - pricing of product bundles, and
 - how changes in attributes affect prices
- Over the last 10 years it has found its way into consumer class action cases as a methodology to assess the loss of value to consumers due to alleged false and misleading advertising or undisclosed defects;
 - it has been applied and accepted by courts in the class certification, liability, and damages phases in consumer class actions.

Choice Based Conjoint Studies – Conceptual Idea

- The general idea behind conjoint analysis is that consumers' preferences for a particular product are driven by attributes, features or descriptions/advertisements of attributes/features embodied in that product.
- Using survey data, conjoint analysis is a set of econometric and statistical techniques that have been developed to study consumers' decision-making processes, determining trade-offs between products, features, and price, as well as quantifying consumers' gains and/or losses of utility when choosing between different alternatives.
- By simulating real world and/or hypothetical choices between product features and prices under different levels of information, conjoint analysis is used to model the impact of different choice scenarios on a consumer's utility function
- ***A strong point of criticism is the fact the purchase situation is unrealistic or doesn't replicate the situation that a consumer would face in the actual world.***

Choice Based Conjoint Studies – Implementation

- The data required for a conjoint analysis is collected through a survey where survey participants are shown several product profiles with different levels of each attribute.
 - An attribute is a characteristic or a feature of a product while the levels indicate the values of the attributes (e.g., “ingredients” is an attribute of a juice product while “whole fruits” and “concentrate” are levels of this attribute; note that price is an attribute that must be part of each conjoint study)
- The survey participants are consumers who currently are, or recently have been, in the market for the product of interest.
- After reviewing a set of choice menus of product attributes and their levels, survey participants are then asked to indicate their preferences for those profiles.
- The product profiles include choice options for different price points for each set of features on the choice menu.
- ***The design of the menus that show the product profiles can be misleading (incorrect information about the product), suffer from focalism bias (drawing the attention to a particular attribute), and lead to straight-lining (the respondent always picks the same answer)***

Choice Based Conjoint Studies – Use to assess the change in value of a product when attributes change

- After the completion of the survey, conjoint analysis uses the survey data on the attribute levels of the product profiles shown and the resulting preferences or choices of respondents to decompose the respondents' preferences for the product into the attribute levels (“part-worths”) partial contribution to the overall utility using appropriate statistical methods.
- Complex statistical estimation techniques quantify the part-worths for attribute levels such that the resulting estimated part-worths best predict respondents' preferences or choices for the product attributes in the survey
- ***The choice of attributes and their respective levels are crucial in the evaluation of the reliability of each conjoint studies and are most frequently the major point of criticism of a conjoint study***

Choice Based Conjoint Studies – Internet Panel Surveys

- Conjoint studies make use of internet surveys across large consumer panels.
- Internet surveys also allow for broad geographic reach to areas where surveying via mall intercept or other face-to-face methods are not be feasible.
- Well-executed internet survey research has been regularly accepted by courts.
- There is an industry of vendors that specialize in recruiting households for consumer panels and then maintaining the quality of the panel.
- ***The strongest point of criticism in this area incorporates the failure to ensure that the chosen methodology yields a representative sample of the target population***