



DECEPTIVE CONSUMER GOODS ADVERTISING IN NIGERIA: A CASE FOR PRO BONO AMMUNITION VIZ-A-VIZ COMPETITION LAW

Arthur Oforbuike Ezema & Ken Oraegbunam*

Abstract

False misrepresentation is a phenomenon prominent in the law of contract but it is also a problem in the world of product marketing and advertising. While in contract law parties can bring an action for damages or redress, in advertising the consumer is left porous and without remedy. The objective of this paper is to consider the issue of deceptive advertising and the possibility of pro bono services to be offered by lawyers. The adopted modus operandi is what is popularly described as doctrinal research and it is exactly the method the researcher adopted for this research. As a desk-based activity, primary and secondary materials will also be sourced online, using legal databases to search for academic papers, legislation, and case law, all of which would aide in properly addressing the research questions raised.¹The finding is that National Agency for Food, Drug, Administration and Control (NAFDAC) and Standard Organization of Nigeria (SON) are making an effort but there needs to emerge an extra layer of protection for the consumer.

Keywords: Advertising, Competition law, Consumer Protection, Deceptive Advertisement.

1.0 Introduction

The focus is on advertising of consumer goods particularly deceptive advertising that sways the consumer rather puffery making promises beyond what the product can really deliver in real time. However, a bit of a background is important to shape the conversation from top down and showing the nexus between trade liberalisation and advertising. The turn of the 20th century witnessed rapid industrialisation and technological advancement at such an exponential rate that there became a need for increased cross border trade and an ultimate expansion of international markets for domestic products. This phenomenon meant increased international economic interaction between the nations of the world; thus the allied powers and other States began to make deliberate moves to guarantee trade liberalisation and eliminate restraint to cross border trade. The efforts at trade liberalisation came to a fruitful crescendo with the institution of the General Agreement on Tariffs and Trade (GATT) 1947². General Agreement on Tariffs and Trade (GATT), was intended to boost economic recovery after World War II through reconstructing and liberalising global trade. Trade liberalisation creates a scene where anyone is allowed access into the marketplace and in order to attract patronage, advertising becomes a great investment to present the product to the market. There is perfectly no issue with being creative in advertising, but the problem is where there is more promise than the product can deliver.

This work x-rays the issues of deceptive advertising of consumer goods, competition law, and the need to deliberately fight against fomenters of deceptive advertising. The Nigerian commercial market is humongous and even foreign businesses know this as a matter of fact. Nigeria is a giant geographically, demographically and economically, these features make Nigerian consumers ready victims of deceptive advertising even though she has an obligation to spearhead the trade liberalisation mantra across sub-Saharan Africa and Africa as a whole. The overdependence on Oil

*Arthur Oforbuike Ezema, LL.B, LL.M, BL, ACI Arb (UK), PhD Student in Faculty of Law, Nnamdi Azikiwe University, Awka. Email: oforbuikeezema2@gmail.com, Tel: 07035804499

*Rev.Fr. Prof Ken Oraegbunam, Department of International Law and Jurisprudence, Faculty of Law, Nnamdi Azikewe University, Awka,, ik.oraegbunam@unizik.edu.ng.

¹M. McConville and W. Hong Chui, *Research Method for Law* (2nd edn, Edinburgh University Press, 2017) 49

² Christina Majaski, 'General Agreement on Tariffs and Trade'

<https://www.investopedia.com/terms/g/gatt.asp> > accessed 11 November 2024



exports has led to the suffering of other sectors and a heavy reliance on imports from other nations to supplement the lack of qualitative home-grown products. A total of \$411.32 billion worth of goods were imported into the Country, between 2010 and 2017.³ The sum spent on imports increases as the years go by because the local industries are finding it hard to level up competitively with external producers. In 2017 alone, Nigeria imports \$32.67 billion worth of goods from around the globe, down by 7.29% from the total amount of good imported in the previous year-2016.⁴ The story is not different today. The objective of every modern business organisation is to maximize as much profit as possible within its defined target market meeting customers' needs while also occupying strategically advantageous position in the market place. However, in this era of high-level digitalization and technological advancement, the marketing plan and strategy must ideally capture novelties and possibly perceive future changes and prepare for those changes. Rapid changes in market competitive forces in any industry means an organisation's marketing planning ought now to be dynamic open to evolving.⁵ According to Berkowitz⁶ a marketing plan is a legibly written document or declaration which clearly defines the market being targeted, marketing objectives, proposed grouping earnings, profit forecasted, and scheduling/budgeting components all synergizing to create a marketing programme. Within the marketing plan is the advertising strategy and this is the crux of the matter. The focus of this paper is on the advertising aspect of the marketing plan which is where the deception actually takes place.

2.0 Deceptive Advertising; Import and Purport in Nigeria?

Advertising is the action word that describes drawing the public's attention to something to promote its sale.⁷ According to the Dictionary of Economics, advertising is the business of announcing that something is for sale or trying to persuade customers to buy a product or service.⁸ The popular perception is that heavy advertising will concomitantly stimulate sales or customer patronage; however the cost of said advertising at the end becomes borne by the consumer.⁹ Advertisement therefore means any word, letter, model, sign, placard, notice, board, device or representation, whether lighted or not illuminated, employed wholly or partially for the purpose of announcement¹⁰ of a product and directing consumers on how to get that product.

Deceptive here as a useful omnibus label to describe all the situations where the buyer has legitimate grounds to complain about the goods. In some of the situations, the goods will not be defective in a lay sense. So, if a seller contracts to sell a red car and delivers a blue car, the buyer may be entitled to reject it.¹¹ Deceptive advertising or false advertising refers to the phenomenon or better put the tortuous act of distributing an advertisement that is untrue, deceptive or misleading intended to simply mislead the consumers about the true characteristics, quality, durability, geographic origin or role of one's goods¹² or the goods of another. In deceptive advertising it is not only goods that can be falsely represented, even services too can be falsely represented. The bulk of businesses established are set up to ensure maximum returns especially for shareholders and investors with stakes in the business. Deceptive marketing is false or misleading sales activities and information aimed at luring, coercing, seducing, persuading, or enticing both potential and existing

³ D Adesanoye, 'How Importation is Killing Nigeria's Economy'

<<https://nairametrics.com/2018/10/03/nigeria-imports-411-32b-goods-in-8-yrs/>> accessed 12 June 2024

⁴ Ibid, 1

⁵ MR ,Czinkota, et al *Marketing Management* (Springer Publishing, 2021) 45

⁶ KR Berkowitz,, *Marketing* (IRWIN Publishing, 1989) 46

⁷ Bryan A. Garner (ed.), *Black's Law Dictionary* (8th edn, PDF version, West Publishing Co Ltd, 2004) 168

⁸ PH Collins, *Dictionary of Economics* (A & C Black Publishers Ltd, 2003) 5

⁹ Ibid, 5

¹⁰ Control of Advertisement (Federal Highways) Act 2004, s. 1 (5)

¹¹ Michael Furmston, *Principles of Commercial Law* (Cavendish Publishing Limited, 2001) 77

¹² Bryan A. Garner (ed.), *Black's Law Dictionary* (8th edn, PDF version, West Publishing Co Ltd, 2004) 1769



consumers of a product to patronise the business by purchasing the product. It is an act of selling the concept as the sole aim is geared towards the immediate conversion of goods to cash, not minding the aftermath effect it may have on the buyer or consumer as well as the organisation's sales, sustenance, and growth potentials.¹³ Put differently, the object of deceptive advertisers seems to be making money only without looking at far reaching consequences.

Marketing plays a salient role in ensuring that the brand outpaces every other competitor, achieves the objects for which the business was formed, and satisfying the customer, client or end users. At the centre of this herculean task for corporations or firms lays the marketing strategy and advertising plan. The advertising must deliver on the promises made in the advertising campaign whether by billboard, television marketing, and radio commercial or stickers. Curiously a company like Coca-cola has been successful at floating theirs well-coordinated adverts and in so doing have secured repeat customers patronage for over a century. It is important to pay attention to this global brand. Having existed for over 135 years and counting, the Coca Cola Company has found a way to be very successful at marketing and sustaining the enthusiasm of her consumers across over 200 countries in the world. The open secret to Coca cola's massive international success seems to be her excellent marketing strategy and her ability to adapt to changes and still offer quality products to the consumer. There are many unique fundamentals to Coca cola's marketing strategy such as the practice of a policy known as the Global School Beverage Policy honouring the rights of parents to choose or make fair choices for their offspring, and this is the corner stone of the company's responsible marketing practices. This is just one of those marketing plays that keep Coca Cola ahead of competitors. Evidently from the reputation of coca-cola, it seems easy to calculate as precisely as possible the impact of marketing strategy on organisational performance both internally and externally using Coca cola as a prime example. It can then be said that coca-cola advertising is not deceptive if it attracts repeat consumer patronage without complain.

A personal experience may proof useful. 'Mr A buys an air freshener from a marketer who stands at the market road to advertise how powerfully scented the air freshener is only to use it at home and find out that it does not live up to the promise. What happens to Mr A when next he walks past market road and sees the same marketer advertising the same product of air freshener? Would he be excited or will he feel cheated and want his money back?' The argument following is for a deliberate system to dissuade advertisers from deceptive advertising through a series of pro bono court action.

3.0 A Case for Pro Bono Litigation Against Deceptive Advertisers

In a free-market economy or generally in a capitalistic economy, it is expected that promotion of goods in a manner as to look better than the competition, in fact out doing competitors is applauded even being commonplace. A reasonable level of competition is allowed in a free market economy. Competition is simply the struggle for commercial advantage¹⁴ and fair, open, equitable, and just; competition is good for the economy with the end user or consumers benefiting the most. Fair competition discourages industrial espionage, unethical behaviour and corrupt practices.¹⁵ Unfair competition law have developed over the years to prohibit acts that confuse and deceive consumers, create a level playing field, remove things like passing off. Unfair competition law reinforces pro-competitive goal and at the same time enables the courts of law to compensate for the liability of legislators to rapidly keep pace with technological advancement in an industrialized economy.¹⁶

¹³ RC Ukaegbu, 'Deceptive Advertising and Consumer Reaction: A Study of Delta Soap Advertisement' *Open Access Library Journal* (2020) 7 < <https://doi.org/10.4236/oalib.1105865> > accessed 25 February 2025

¹⁴ Bryan A. Garner (ed.), *Black's Law Dictionary* (8th edn, PDF version, West Publishing Co Ltd, 2004) 856

¹⁵ JH Reichman, 'Beyond the Historical Lines of Demarcation Competition Law, Intellectual Property Rights, and International Trade After the GATT's Uruguay Round' *Brooklyn Journal of International Law* [1993] 20 (1) (4) 77

¹⁶ Ibid 77



The case of *Carlil v Carbolic Snowball*¹⁷ is famous for other principles but it is relevant to emphasise the point of deceptive advertising being an age-old phenomenon. In the *locus classicus* of *Carlil v Carbolic Snowball*¹⁸ a medical firm advertised that its new wonder drug, the smokeball, would cure people's flu, and if it did not, buyers would get £100. Lots of people sued for their £100 when it did not work. Fearing bankruptcy, Carbolic argued the advert was not to be taken as a serious, legally binding offer.¹⁹ In this case, the plaintiff, Mrs Carlill, bought a smokeball manufactured by the defendant from a retail chemist, relying on elaborate advertising by the defendant in which it offered to pay £100 to anyone who used the smokeball according to the directions and then caught flu. It was held that the Smokeball Company was bound to Mrs Carlill. Typically, modern manufacturers' advertising tends to be couched in much less contractual language. The technical problem with giving contractual force to the manufacturer's guarantee is that, often, customers will not know of the guarantee until after they have bought the goods and further they will often not have done anything in exchange for the guarantee.²⁰ In the 21st century, mere puffs and outright fraudulent advertising seem to be higher than ever before due to the expansion of competition and aggressive marketing that takes place today. The element of social media also adds a different condiment to the controversy by making manufacturers and sellers boast and brag of things their products cannot do just to sway more customers to purchase their goods.

In Nigeria, the advertising industry is undergoing significant reforms by way of new regulation and policies aimed at optimizing local capacity, increasing revenue, and ultimately maximizing the post-Covid reality, which to an extent, has accelerated the adoption of the digital economy.²¹ Deceptive advertisement is one of the conventional approaches that unethical business organisations seek to increase their product demand. Deceptive advertisement through the media has been on the rise, which is detrimental to both the companies and the consumers.²² The prevalence of misleading advertising in Nigeria underscores the need for robust regulatory measures to ensure fair competition and protect consumers from deceptive marketing tactics. Misleading advertisements can encompass a wide range of deceptive practices, including false claims, exaggerated statements, and omission of material information. Such practices not only undermine consumer trust but also pose potential health, safety, and financial risks.²³ Liability for defective goods may be contractual, tortious or criminal.²⁴ Misrepresentation in law is a big deal and deceptive goods advertisement is rooted in fraudulent misrepresentation. A misrepresentation is a statement of a fact made by one party to the contract to the other party before the contract is made which induces that other party to enter into the contract but is not characterised as being a term of the contract.²⁵ Deceptive goods advertising misrepresents the true nature and capabilities of the product fundamentally and this is a problem. The challenge now is that the advertisement cannot be considered an offer that needs acceptance but simply as an invitation to treat that needs to then be acted on by the consumer who makes an offer by approaching the manufacturer or seller to purchase the advertised product. The dilemma then is how to ensure that advertisers who indulge in deceptive advertisement of consumer goods are prohibited from continuing to deceive and swindle the consumers from buying goods they only regret buying because of this misrepresentation. The study is significant for a plethora of reasons. First, the manufacturer owes the consumer the whole truth in advertising, the goods must fit the description

¹⁷ [1892] 2 QB 484

¹⁸ [1891–94] All ER Rep 127; (1892) 8 TLR 680

¹⁹ Ehsan, Zarrokh, *Practical concepts in Contract Law* (Munich Personal RePEc Archive, 2008) 2

²⁰ Michael Furmston, *Principles of Commercial Law* (Cavendish Publishing Limited, 2001) 95

²¹ MS Afolayan and O Awwal-Bolanta, 'Regulation of Misleading Advertisement and the Effect of Disclaimer of Truth in Advertisement' *Journal of Humanities and Social Policy* {2024} 10 (5) 39

²² RC Ukaegbu, (n.14)

²³ Michael Sunday Afolayan and Olaide Awwal-Bolanta (n.22)

²⁴ Michael Furmston, *Principles of Commercial Law* (Cavendish Publishing Limited, 2001) 77

²⁵ *Ibid*, 78



and fit the purpose intended as anything short is fraudulent. Unfortunately, even though the Sales of Goods laws affirm this position in excluding misrepresentation, manufacturers and sellers still indulge in fraudulent deceptive advertisement to the detriment of the consumer. Secondly, it appears the advertising regulators in Nigeria are either overwhelmed or simply lack-lustre in pursuing this worrisome issue. Thirdly, while a manufacturer or seller sets out to sway more consumers to purchase his product by deceptive advertising, preliminary findings show that the reverse is the case.

The logical conclusion is, if deceptive advertising amounts to misrepresentation, unfair competition and fraudulent deception, then these are actionable torts, but who will bell the cat? The easiest suggestion would be for the Nigerian Bar Association (NBA) to set up a sub-committee within the human rights committee of the NBA to specifically deal with deceptive advertising within the Nigerian market place. Fortunately, the National Agency for Food and Drug Administration and Control (NAFDAC) was established by the National Agency for Food and Drug Administration and Control (NAFDAC) Act ²⁶to regulate and control the manufacture, importation, exportation, advertisement, distribution, sale and use of food, drugs, cosmetics, medical devises, bottled water, detergent and chemicals (referred to as regulated products).²⁷ The NBA can and should collaborate with NAFDAC to make this a feasible reality. It is easy also to co-opt lawyers in this space with some small incentives to commence that action against defaulting manufacturers, marketers, or advertisers.

4.0 Conclusion and Recommendations

In practice, deceptive advertising is subtle, maleficent and sometimes not easily noticed by the average consumer. Falsity or confusion can be either in the advertisement's literal or implied meanings. Whether the advertisement has caused any harm or injury to consumers is not necessary. Misleading Advertising includes exaggerating and overstating, expressing unrealistic attributes of the product, use of professional concepts for more effect, fake licenses, false warranties, use of cinematic tricks and misleading images, discounts, and gifts. Misleading advertisements cause viewers to misunderstand or make incorrect decisions.²⁸ False advertisements are those that are inconsistent with facts and objectionable advertisement shows unsafe or dangerous acts and obscene visuals. Advertisements of products banned from advertising e.g. alcohol, and cigarettes also fall under this category.²⁹ The war against defective consumer goods was successfully waged by the late Dora Akunyili led NAFDAC and subsequently the mark of the Standard Organization of Nigeria (SON) was established for quality assurance and quality compliance. Unfortunately, while the focus has been on the product being of standard quality little or no attention has been paid to the possible solution for deceptive advertising within the current regulatory framework for regulation of consumer goods within the shores of Nigeria. A lacuna was therefore created which pro bono legal action can readily fill and that has been the position canvassed herein.

²⁶ Cap N1 Laws of the Federation of Nigeria (LFN) 2004

²⁷ OO Ogadinma , 'Legal Regulation For Innovation: A Review Of NAFDAC Ban On Importation, Manufacture, Distribution And Use Of Alcoholic Beverages In Containers Of 200ml And Below' *Nnamdi Azikiwe University Journal of Private and Property Law* (2024) 1 (1) 30, 33

²⁸ Michael Sunday Afolayan and Olaide Awwal-Bolanta , (n.22)

²⁹ N Modi and P Ramarao, 'Misleading Advertisements' *International Journal of Research and Analytical Reviews*, (2019) 6 (1) 569-576