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SLAMMING THE LEGAL GUILLOTINE ON DECEPTIVE ADVERTISING: THE SITUS OF LIABILITY

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ABSTRACT: *This article examines the legal consequences of deceptive advertising with particular attention on who should bear the liability of such deceptive advertising. The primary objective of the study is to show that both the manufacturer who procures an advertising agent and the procured agent will be liable under the Nigerian law. The consumer is mostly motivated to go for a particular product by the persuasive force of an advertisement. Where the advertisement becomes awry, the issue of liability becomes germane. The article demonstrated clearly why the manufacturer and the advertising agent procured for the purpose of disseminating the deceptive advertisement are liable.*

KEYWORDS: Deceptive Advertising, Liability, Legal Consequences, Market, Trade.

INTRODUCTION

A market is any one of a variety of different systems, institutions and infrastructures, social relations and infrastructures where persons trade and goods and service are exchanged, forming part of the economy. It is an arrangement that allows buyers and sellers to exchange goods/things. A market consists of all the potential customers sharing particular needs and wants who might be willing to engage in exchange to satisfy their needs or wants. Once the potential customer needs and wants are backed by their purchasing power, an actual market is formed.[1]

Competition is essential in markets and separates market from trade. Two persons may trade, but it takes at least three persons to have a market so that there is competition on at least one of its two sides. Markets vary in size, range, geographical scale, location, types and variety of human communities, as well as the types of goods and services traded. Segmentation, on the other hand, is essentially the identification of subsets of buyers within a market who share similar needs. Market segmentation is the act of identifying and profiling distinct groups of buyers who might require separate products and for marketing mixes. It is the process of splitting customers into different groups or segments within which customers with similar characteristics have similar needs. Market segmentation can be powerful concept even in the non-profit sector, although it tends to be a device for focusing resources rather than dealing with competition. For example, there may be a number of segments within the ranks of the unemployed. Each of these segments has different opportunities for government action.

Advertising brings goods and services to the appropriate segment of the society. It presents the goods in the most attractive manner for the consumers to place demands for the goods or services. Marketers have found that the only way to advertise and sell their products is to

[1] M. R. Ezinkota, R. M. Kotabe and D. Mercer, *Marketing Management*, (Massachusetts: Blaukwell Publishers, 1997), p. 201.

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meet genuine needs and wants rather than try invent needs to go with otherwise useless products.[2] However, advertising affects the nature of the consumer's buying habits, behaviours, general motivation, culture, language, norms and value system.[3] Unfortunately, there are circumstances in which such advertisement may indeed mislead the buyer. Where this happens, what is the liability for such deceptive advertising? This is the poser for this study.

What is Deceptive Advertising?

The definition of deceptive advertising offered by the Federal Trade Commission, (FTC) the main government regulatory agency for advertising in the United States is considered comprehensive and will be adopted in this work. The Federal Trade Commission (FTC) officially defines deceptive advertising as a representation, omission or practice that is likely to mislead the consumer and practices that have been found misleading or deceptive in specific cases include false oral or written representations, misleading price claims, sales of hazardous or systematically defective products or services without adequate disclosures, failure to disclose information regarding pyramid sales, use of bait and switch techniques, failure to perform promised services, and failure to meet warranty obligations.[4] Consequently, an advertisement does not have to be untrue to be deceptive. What counts is the overall impression created by the advertisement and not the technical truthfulness of the individual parts.[5]

Three elements must be examined for an advertisement to be adjudged deceptive according to FTC namely:

(1) There must be "a representation, omission or practice that will likely mislead the consumer", such as misleading price, claims, or oral or written misrepresentation of a product or service.

(2) The misrepresentation is examined from the view of a "reasonable" consumer or particular target group, such as the elderly; a reasonable member of the groups perceptive. A company is not liable from every consumer's point of view.

(3) The representation, omission, or practice must be a "material one". This means that, if the misrepresentation is likely to affect the consumer's decision whether or not to use or purchase a certain product or service, this is considered material since the consumer may have decided differently if not for the deceptive advertising.[6]

Deceptive advertising is therefore a representation, omission, or practice that is likely to mislead the consumer. The advertisement does not necessarily have to cause actual deception, but the act need only to be likely to mislead the consumer. Liability for

[2] I. M. Chukwu, "Advertising Practice and Consumer Protection", *Consumer Journal*, vol. 1, No. 1, 2005, pp. 137 – 152 at 142.
[3] *Ibid.*, p. 138.
[4] A. Duncan, "Deceptive Advertising", available at http://advertising.about.com/od/advertisingglossaryd/g/deceptiveads.htm (last accessed 11 September 2015).
[5] T. Ma, "Deceptive Advertising", available at https://books.google.com.ng/books?id.htm (last accessed 11 September 2015).
[6] *Ibid.*

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misrepresentation in law is dependent on the nature of misrepresentation. Illustratively, a victim of fraudulent misrepresentation[7] is entitled to damages at common law in addition to the right to rescind any contract entered into as a result of the misrepresentation, a victim of innocent misrepresentation[8] has no remedy whatsoever at common law. In equity he is entitled to rescission only but not damages.[9]

In *Carbolic Smoke Ball Co. v. Carlill*[10] the defendant contended that no contract could arise from their advertisement because you cannot make a contract with the whole world. Rejecting this argument the court stated that:

> It was said that the contract is made with the whole world – that is, with everybody; and that you cannot contract with everybody. It is not a contract made with all the world. That is the fallacy of the argument. It is not a contract made with all the world; and why should not an offer be made to all the world which is ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to anyone, who before it is retracted, performs the condition, and although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement.

There are three types of deceptive advertising: Fraudulent advertising which is an outright lie; false advertising which involves a claim-fact discrepancy. In other words; the claim being made by the advertisement is different from the fact on ground vis-à-vis the goods or services being advertised; such as not disclosing all the conditions to receive a certain promotion or price; and misleading advertising which involves a "claim-belief interaction".[11]

Misrepresentation in Contract

Parties are bound by the contract they voluntarily entered into and cannot act outside the terms and conditions contained in the said contract. Neither parties to a contract can alter nor read into a written contract a term which is not embodied in it.[12] In *Dangote General Textiles Products Ltd. & Ors. v. Hascon Associates (Nig.) Ltd. & Anor*.[13] the Supreme Court held that the law relating to contractual obligation is only binding when there are offer, acceptance as well as consideration without which no valid contract can exist.[14] Most contracts are initiated by an offer and acceptance. This is where representation comes in. Misrepresentation is a representation that is untrue; a statement or conduct which conveys a false or wrong

[7] This is the type of misrepresentation that is known to be false or is made recklessly without knowing or caring whether it is true or false and it is intended to induce a party to detrimentally rely on it.
[8] Innocent Misrepresentation is a false statement that the speaker or writer does not know is false. Succinctly, this is a misrepresentation that, though false, was not made fraudulently.
[9] I. E. Sagay, *Nigerian Law of Contract*, (Ibadan: Spectrum Law Series, 2000), p. 296.
[10] [1893] 1 QB 256.
[11] An example of claim belief deception is the *Warner-Lambert case* the label on the Listerine mouthwash bottle stated "kills Germs by millions on contract" immediately followed by "for General oral Hygiene, Bad Breath, cold, and Resultant sore throats" This misled consumers to believe that by using Listerine, it could prevent the common cold and sore throat whereas it does not. Listerine was ordered to redo its advertising and delete colds and resultant sore throats" which it cannot prevent. Deceptive advertising may be in form of misrepresentation in contract or Deceit in tort.
[12] Per Ariwoola JSC in *African International Bank Ltd. v. Intergrated Dimension System Ltd. & Ors.* [2015] 12 WRN 1 at 50 lines 5 – 10.
[13] [2015] 17 WRN 1.
[14] *Ibid.*, p. 33 line 25.

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impression.[15] According to Amao:[16] "A mere representation is a statement of fact made by one party to the other during negotiation leading to a contract, which was intended to operate and did operate as an inducement to enter into a contract, but which was not intended to be binding contractual term. If such a statement turns out to be false, there is misrepresentation".[17] Simply put, a misrepresentation is a false statement of fact made by one party to another, which whilst not being a term of the contract induces the other party to enter the contact.[10]

Sagay gives an in-depth definition of misrepresentation when he writes that "A misrepresentation is an untrue statement made by one party to the other before or at the time of contracting with regard to some existing fact or to some past event which is one of the causes that induced the contract".[18] In *Museprime Properties v. Adhill Properties*[19] the judge was of the view that any misrepresentation which induces a person to enter into a contract should be a ground for rescission of that contract. If the misrepresentation would have induced a reasonable person to enter into the contract, then the court will presume that the represented was so induced, and the onus will be on the representor to show that the representee did not rely on the misrepresentation either wholly or in part. If, however, the misrepresentation induced him to act as he did. In many business transactions which go on daily in many parts of the world, it is usual for the seller, while trying to sell his goods, to appraise his articles in order to induce the customer to purchase them. A statement of fact which one party makes in the course of the negotiations with a view to inducing the other to enter into the contract and to conclude it is known as a representation.[20] Thus, in *Carlill v. Smoke Ball Co.*[21] the defendant company advertised in newspapers to the effect that it would pay 100 pounds to any person who contracted influenza after using its carbolic smoke ball three times for two weeks. They added that they had deposited one thousand pounds at the Alliance Bank, Regent Street, "to show our sincerity in the matter". So when the plaintiff after using the smoke ball still contracted influenza. The company was held liable to the plaintiff irrespective of their argument that the advertisement contained an offer to the whole world, which is not binding.

On the other hand, in *Smith v. Chadwick*[22] the prospectus of a company contained a false statement to the effect that an important person was on the board of directors of the company. The plaintiff in action for misrepresentation admitted under cross-examination that the false statement had in no way influenced him. It was held that in the absence of inducement, he could not succeed in action for misrepresentation. Therefore, once it is shown that an advertisement induced a consumer to buy goods, which later turned out to be defective, it is not a defence for the producer to argue that the principle of *caveat emptor* applies. *Caveat emptor*[23] is a common law principle which preaches that when a buyer of goods had required no warranty he took the risk of quality upon himself, and had no remedy if he had chosen to

[15] S. Bone, *Osborn's Concise Law Dictionary,* (9th edn.,London: Sweet & Maxwell, 2001), p. 253.
[16] T. Amao, *Nigeria Law of Contract in a Nutshell*, (London: Sweet & Maxwell, 1987).
[17] *Ibid.*, p. 43.
[18] Sagay, *op. cit.*, p. 295.
[19] [1990] 36 EG 114.
[20] M. C. Okany, *Nigerian Commercial Law*, (Onitsha: Africana-FEP Publishers Ltd., 2001), p. 154.
[21] *Op. cit.*
[22] [1884] 9 AC 187.
[23] Put literally is "Let the buyer beware".

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rely on the representations of the vendor, unless he could show that representation to have been fraudulent.[24]

In *Sule v. Aromire*[25] the defendant advertised certain premises known as No. 19 cemetery Road, Ebute Metta, Lagos, containing a piece of land and a house for sale. In the advertisement, reference was made to a lawsuit, No 160/47, in which the title to the premises was allegedly declared to be in the defendant. The suit was in respect of an adjoining property, No. 21 Cemetery Street, and not in respect of No. 19. In other to further convince the purchaser of the property, the defendant gave him a copy of the judgment in the case. After buying and paying for the property the purchaser now discovered that it was lawfully in the possession of third parties, and that the defendant had no title to it at all. The purchaser brought an action for the invalid conveyance to be set-aside on the ground of fraudulent misrepresentation and for a refund of the purchaser price. The defendant resisted the claim on the ground that he had hidden nothing and that the maxim *caveat emptor* applied. If the purchaser had thoroughly examined the exhibits in the said suit 160/417 he could have discovered that No 19 Cemetery Road was not the subject matter of the case. The court held that provided the purchaser acted on good faith of the false representation of the defendant, it was no defence that the purchaser would have discovered the fraud, if he had been more diligent.

On how to prove fraudulent misrepresentation it was held in *ET & EC* (*Nig.) Ltd. v. Nevico Ltd.*[26] that for the purpose of establishing fraudulent misrepresentation, the onus is on the person alleging, unless the same is already expressly or impliedly admitted at or before the trial, to prove the following.

(a) That the alleged representation consists of something said, written or done which in law amounts to representation;

(b) That the defendant is the representor;

(c) That the plaintiff is the representee;

(d) The inducement and its materiality in the circumstances;

(e) Falsity of representation;

(f) Alteration of his position as a result of the representation; and

(g) Fraud (that is the falsity or fraudulent nature of the representation).

Tort of Deceit

The tort of deceit is concerned with loss suffered as a result of reliance upon a misstatement.[27] In *Haedley Byrne Co. v. Heller & Partner Ltd.*[28] the rule is that a person who makes a careless misstatement to another may be liable to that other in negligence for loss suffered as a result of reliance upon the misstatement. The tort of deceit first mentioned in

[24] Bone, *op. cit.*, p. 24.
[25] [1951] 20 NLR 20.
[26] [2004] 3 NWLR (Pt. 860) 327.
[27] I. P. Enemo, *The Law of Tort*, (Enugu: Chenglo Ltd., 2007), p. 374.
[28] (1964) AC 465.

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the case of *Pasley v. Freeman*[29] where the defendant falsely misrepresented to the plaintiff that certain man X was a person to whom the plaintiff might safely sell goods on credit. The plaintiff relied on this misrepresentation and suffered loss. He was held to have an action on the case for deceit.

Viscount Maugham in *Bardford Third Equitable Benefit Building Society v. Boarders*[30][21] explained that common law action of deceit, requires four things to be established. First, there must be a representation of fact made by words, or it may be by conduct. The phrase will include a case where the defendant has manifestly approved and adopted a representation made by some third party. On the other hand, silence however morally wrong will not support an action of deceit.

Secondly, the representation must be made with knowledge that it is false. It must be willfully false, or at least made in the absence of any genuine belief that it is true. Thirdly, it must be made with the intention that it should be acted upon by the plaintiff, or by a class of person which will include the plaintiff, or by a class of persons which will include the plaintiff, in the manner which resulted in damage to him. However, if fraud is established, it is immaterial that there was no intention to whom the false statement was made.

Finally, it must be proved that the plaintiff has acted upon the false statement and has sustained damaged by so doing. However, it must be pointed out that tort of deceit overlaps with misrepresentation but the tort does not require that the defendant and the claimant be in a contractual relationship.

Who is Liable for Deceptive Advertisement?

It is intended at this juncture to identify the person on whom the liability for deceptive advertising lies. Section 11 of the Consumer Protection Council Act[31] provides that: "Any person who issues or aids in issuing any wrong advertisement about a consumer item, is guilty of an offence and liable on conviction to a fine N50, 000 or to imprisonment for five years or to both such fine and imprisonment". Any person who, in contravention of any enactment whatsoever for the protection of the consumer: provides any services or proffers any information or advertisement thereby causing injury or loss to a consumer is guilty of an offence under this Act and liable on conviction to N50,000 fine or five years imprisonment or to both such fine and imprisonment.[32]

It will be easy to point at the company whose product is being advertised in cases of deceptive advertising. However, the agency whose function is to prepare the advertisement for the company can also be held liable. No wonder, Ozoh writes that: "Agencies create and produce for their clients the advertisement which appear in the media. This is absolutely basic, almost a universal function".[33] Therefore, it is the duty of these advertising agencies to substantiate the claims that a company makes and not rely on the advertiser's word. So where the Agency fails to substantiate the company's claim and the consumer relying on their

[29] [1789] 3 TR 51.
[30] [1941]2 All ER 2004 at 211.
[31] Cap. C25, *Laws of the Federation* 2004.
[32] *Ibid.*, s. 12(b).
[33] H. C. Ozoh, *Principles and Practice of Advertising*, (Lagos: APCON, 1998), p. 33.

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advertisement sustains injury, the advertising agency will be held liable. Lord Denning in *ESSO Petroleum Co. Ltd. v. Mardon*[34] said that:

> If a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another…..with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable.

The advertising agencies are expected to strictly comply with the above rule as expounded by Lord Denning. After all the court has held in *Hedley Byrne v. Heller & Partner Ltd.*[35] that a statement made negligently that was relied upon can be actionable in tort. Advertising agency which uses only actions or words or both of them in their advertisements can as well be held liable for any deceptive fact contained in their advertisement. In *Gordon v. Selico*[36] it was stated that it is possible to make a misrepresentation either by words or by conducts. In *Bisset v. Wilkinson & Ors.*[37] it was noted that statements of opinion or intention are not statements of fact upon which an action on misrepresentation can be grounded.

Thus, it is the duty of the advertising agencies to prove that the advertisement was either not one of fact but opinion in order to escape culpability. However, Bergerson[38] insisted that advertisers and their agents are jointly liable for deceptive advertising. In America, the Federal Trade Commission used Colegate Palmolive and its advertising agency for a Rapid shove Television Spot. A "Mock-up" was used to show that the shaving cream was so moist; it could be used to share sandpaper. Due to production limitations, the agency used clear Plexiglas sprinkled with sand instead-but did not disclose the substitution.

The agency argued that it should not be liable because it was only acting as Colegate's agent. But because the agency had originated the sandpaper test idea and produced the advertisement, the Federal Trade Commission adopted a new principle for agency liability, if the advertising agency has sufficient involvement so as to make it an "accomplice" or joint tort reason under criminal and tort law, it would be accountable.

This should also apply in Nigeria. Unfortunately, there is lackadaisical attitude on the part of the consumers in bringing an action against deceptive advertising in Nigeria.

Media

The media made the dissemination of the advertising message to the target audience possible. The media are thus the vital link between the advertiser and the prospective customers for the advertised goods, services or ideas.[39] In Nigeria, the most extensively used media are the print and electronic media. With regards to liability, the media will not be liable unless the media participated in the deception to an extent sufficient to reasonably justify holding it accountable. For example where the media can claim to be the originator of the advertisement, in such circumstances, the media will be liable.

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[34] (1976) QB 108.
[35] *Op. cit.*
[36] [1986] 18 HLR 219.
[37] (1927) AC 177.
[38] S. R. Bergerson, "Who Foots the Bill (and/or Get the Boot) When an Ad. Goes Bad?", available at http://www.fredlaw.com/articles/marketing/mark-0505-9.6.html (last accessed 22 September 2015).
[39] *Ibid.*

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In addition, section 20 Consumer Protection Council Act provides that a publisher or any advertiser shall not be liable under this section by reason of the dissemination by him of any false advertisement, unless he refuses at the request of the Council to furnish the Council with the name and address at the request of the manufacturer, packer, distributor, seller, or advertising agency requiring him to disseminate or cause such advertisement to be made.

There it is safe to hold the person who funded the dissemination of the deceptive advertisement and or the advertising agent. This is justified on the ground that when an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it:

a. Every person who actually does the act or makes the omission which constitutes the offence;

b. Every person who does or omit to do any act for the purpose of enabling or aiding another person to commit the offence;

c. Every person who aids another person committing the offence;

d. Any person who counsels or procures any other person to commit the offence.

In the case of a person who counsels or procures any other person to commit the offence, he may be charged either with himself committing the offence or with counselling or procuring its commission. A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence. Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, that act or omission would have constituted an offence on his part, is culpable in the same proportion as the actual offender.[40] The manufacturer who procures the services of an advertising agency to articulate and disseminate deceptive advertisement is jointly liable with the advertising agency.

CONCLUSION

Deceptive advertising truly exists in Nigeria without any serious efforts on the part of consumers to bring the culprits to book due to ignorance or fear of the cost of litigation. This aspect of consumer protection seems to be relegated to the background by government, consumer protection agencies and consumer protection bodies. Advertising regulatory bodies do not seem to be making serious efforts at curbing such advertising practice in view of the level of deceptive advertising prevalent in Nigeria and the existence of quacks in the industry. Also, a comprehensive legislation on advertising practice is non-existent in Nigeria. What exists is legislation on advertising in different areas. Advertising practice in Nigeria is still largely guided by ethical regulations which are not enforceable.

The significance of advertisement has led to the establishment of agencies specializing in advertising alone. Such agencies are solely concerned with the business of planning, creation and execution of advertising for companies who contract them to advertise their goods.[2]

[40] Generally relevant to this is the Criminal Code Act, Cap. C38, *Laws of the Federation of Nigeria* 2004, s. 7.

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Thus, the responsibility for settling the bill of broadcasting or printing of advertisements is on the advertising agencies. It is incontrovertible that consumers, most of the times are influenced by advertisement in choosing what they will purchase, or even the type of services or ideas they will subscribe to. This is why it became necessary to ensure that advertisement contain true facts. Where they do not contain true facts, it may be misrepresentation or deceit. So where a consumer is misled by the falsehood contained in an advertisement there is the need that such a consumer should be granted adequate redress. Hence, the equitable maxim *ubi jus ubi remedium.*[41] The conclusion drawn from this study is that the advertising company, the advertising agency and in extreme cases the media are to be held jointly liable for any deceptive advertisement.

It is therefore recommended that a government agency such as the Federal Trade Commission should be established in Nigeria to ensure that the consumers are protected against deceptive advertising. The Consumer Protection Council can be empowered to do this. The Law Reforms Commission should consider a comprehensive advertising law instead of the scattered legislations on advertising. Advertising Practitioners Council of Nigeria (APCON) should through its various committees rise up strongly against the challenge posed by deceptive advertising. The sanction system should be strengthened through the activities of the Advertising Standards Panel (ASP) and Advertising Practitioners Investigating Panel to promote responsible advertising practice. Non-governmental Organizations should extend their consumer protection campaign to deceptive or false advertising. They can embark on studies to find out the impression made on the consumers by some advertisement and make appropriate recommendations. Once there is an advertisement about goods or services, which turns out to be deceptive, the consumer should be deemed to have relied on the advertisement. The essence of putting up an advertisement is for the consumer to rely on it while making their choice or outlining their list of preferences. The advertising agency should not hesitate to structure their advertisement in line with substantiated facts. Objective test should also be applied in determining deceptive advertising. There is need for further enlightenment on the part of consumers with respect to their right to sue for redress in deceptive advertising. “Consumer Parliament” should design programmes aim at addressing issues bordering on advertising. It is hoped that the laws and monitoring agencies should improve considerably in order to protect the consumer from the punches of deceptive advertising.

[41] Meaning where there is right there is a remedy.

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