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## Legal Effects of the Nigerian Patent Law on Sale of Drugs and Consumer Protection in Nigeria

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However, as the task of this work demands, the concentration will be on health related inventions. That is, the legal effects of patent laws on pharmaceuticals or drugs and other edibles. The legal protection available to consumers will also be discussed in the light of the customs and practices of trade in Nigerian. This will then lead us to an examination of how the law relating to patent has been able or failed to safeguard public health care system in Nigeria. Consequently, issues regarding consumer rights and the corresponding right of the buyer for goods to be of merchantable quality especially regarding the enormity of the problem of counterfeit drugs will be discussed.

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LEGAL EFFECTS OF THE NIGERIAN PATENT LAW ON SALE OF DRUGS AND CONSUMER PROTECTION IN NIGERIA

*Strictly as per the compliance and regulations of:*



# Legal Effects of the Nigerian Patent Law on Sale of Drugs and Consumer Protection in Nigeria

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However, as the task of this work demands, the concentration will be on health related inventions. That is, the legal effects of patent laws on pharmaceuticals or drugs and other edibles. The legal protection available to consumers will also be discussed in the light of the customs and practices of trade in Nigerian. This will then lead us to an examination of how the law relating to patent has been able or failed to safeguard public health care system in Nigeria. Consequently, issues regarding consumer rights and the corresponding right of the buyer for goods to be of merchantable quality especially regarding the enormity of the problem of counterfeit drugs will be discussed. These issues are much more vital as it is increasingly becoming costly being a Nigerian<sup>1</sup>. Medical care delivery is adversely affected in Nigeria as the spate of counterfeit drugs have killed or maimed many Nigerians. In a recent report by a journalist<sup>2</sup>, the sad story of a mother whose child almost died as a result of the fake drug that was administered to the child. The mother had bought the drug from a chemist and had administered the right dose to her child. Stories such as this enumerate the gravity of the problem faced by average Nigerians who seek medical treatment.

This work will examine briefly the legal regime of patent law and consumer protection in Nigeria. In order to do this efficiently, an analysis of the relevant provisions of the Patent and Design Act,<sup>3</sup> the historical background of patents in Nigeria, the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act,<sup>4</sup> the Consumer Protection Council Act<sup>5</sup> and the Sale of Goods Act of 1873<sup>6</sup> and other regulatory Acts will be discussed. Furthermore, the role NAFDAC will also be examined whilst an attempt will be made at cross border issues of patent relating to health.

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<sup>1</sup> Okakhume, B, 'Our Pharmaceutical Products Market. The Nation Newspaper 7<sup>th</sup> August, 2011 Pg 61

<sup>2</sup> Ketefe, Kayode, 'Enforcing Consumers' Rights in Nigeria' published in the National Mirror Newspaper of August 15, 2011

<sup>3</sup> Cap P2, LFN 2004

<sup>4</sup> Cap C34 LFN 2004

<sup>5</sup> Cap C25 LFN 2004

<sup>6</sup> As applicable to Nigeria as a Statute of General Application (SOGA)

## I. HISTORICAL BACKGROUND OF PATENTS IN NIGERIA

In the 19th and early 20th centuries, patents registered in the United Kingdom were by order-in-Council made applicable in Nigeria. The colonialist's first introduced the patent system in the former colony of Lagos and southern Nigeria in 1900 by the Patents Ordinance No. 17 of 1900 and the Patents Proclamation Ordinance No. 27 of 1900 respectively. The Patents Proclamation Ordinance No. 12 of 1902 introduced similar legislation in Northern Nigeria. These instruments provided for a full fledged patent office headed by a Registrar. However, the patent administrative institution was never meant to encourage either indigenous inventive activity, local research and effective transfer of technology but it was geared towards the protection of property rights in technology relevant for the exploitation of other mineral and human resources in the colonies<sup>7</sup>.

Following the amalgamation of Southern and Northern Nigeria in 1914, the separate legislations for the different regions were repealed and substituted by the Patents Ordinance No. 30 of 1916 which was amended in 1925<sup>8</sup> to become the Registration of United Kingdom Patents Ordinance No. 6 of 1925. The new law only provided for the registration in Nigeria of patents already granted in the U.K, an anomaly that persisted even long after independence in 1960. In effect, applications were first made to the UK patent office to be granted a patent for an invention before proceeding to Nigeria to have it registered. It also meant that it was the UK law that substantially applied to patent applications and grant in Nigeria<sup>9</sup> up till 1970.

In 1970, the Patents and Design Act No. 60 was enacted repealing the Registration Right (Limitation) Act 1968 and the UK Patents Act, 1949 in so far as it was force in Nigeria. This Act is substantially still in force but it is now codified with provisions on industrial designs to become the Patents and Designs Act.

<sup>7</sup> Sikoyo, G.M et al., 'Intellectual Property Protection in Africa'. Act Press 2006 Pg. 19-20

<sup>8</sup> Ibid

<sup>9</sup> Cap P2, LFN 2004

## II. PATENTS AND DESIGNS ACT CAP P2 LFN 2004

This Act generally regulates, administers and enforces patent rights in Nigeria. Section 1 generally provides for the requirement that an invention must meet to be patentable. An invention will be patentable if it is new, results from an inventive activity and is capable of industrial application<sup>10</sup> or if it constitutes an improvement upon an already patented invention, new in its improvement. This must also satisfy the requirements of resulting from an inventive activity and industrial application. It is clear from the provision stated that novelty is a condition precedent for patentability. More so, that the Act does not or will readily not protect an invention that is not beneficial to the larger consumers. Hence, the requirement that such a patent must be capable of being used or worked in any industry including agriculture. Innovative improvements on inventions are also encouraged by the Act<sup>11</sup>. For instance, the law will readily grant the application of patent in respect of a drug manufactured by a similar process of existing patent drug that has a soporific effect if that new drug does not have this effect and still performs effectively the same function.

Unlike copyright, a patentee, like a trademark owner does not enjoy statutory rights automatically. Accordingly, he or she must file an application for it to be registered<sup>12</sup>. In *Ducros S.A v. Silas Industries and Trading Company Ltd*<sup>13</sup>, the court in deciding whether registration of a product with NAFDAC constitutes registration as envisaged in an infringement action, held that a patent that is not registered under the Patents & Design Act cannot be protected. An applicant for a patent, upon the grant of his application becomes a patentee and enjoys the following rights: to preclude others from making, importing, selling or using the product on stocking it for the purpose of sale or use. If the patent has granted in respect of a process he has the right of precluding others from applying the process or doing in respect of a product obtained directly by means of the process, any other Acts mentioned in paragraph (a)<sup>14</sup>. It needs no serious or critical thinking to conclude that counterfeiting of patented articles is an infringement of intellectual property rights of patent because if patent concerns about how things work, how they are made and what they are made of, then unauthorized making of any patented article is a violation of rights. This is most gruesome when it comes

to pharmaceuticals and food item which are very germane to the health of any nation.

Section 25 of the Act forbids these acts of infringement and goes further to state the reliefs available to a successful plaintiff in an action for infringement. This includes damages in function, accounts or any proceedings in respect of the infringement of other preparatory rights.

Like every right known to law, there are also exceptions to rights conferred on a patentee. The Act generally allows the use of patented articles for public purposes by government agency<sup>15</sup>. Drugs are among the articles that can be used by government for public interest, which includes public health.

## III. THE ROLE OF NAFDAC

Just like many other issues that are taken care by various legal and institutional frame works in Nigeria, the aspects of what goes into the mouth as food and pharmaceuticals which are integral components of health care systems worldwide are not left behind<sup>16</sup>. This further confirms the importance of intellectual property laws (particularly patents and trademarks) when properly enforced to the public health. This brings to fore the need to appraise the role of National Agency for Food and Drug Administration and Control (NAFDAC).

The threat posted to global health by counterfeit pharmaceuticals led World Health Organization Assembly Resolution in 1988 to call on countries to help in combating this menace<sup>17</sup>. Nigeria received her share of the threat in 1989 when over 150 children died as a result of Paracetamol syrup containing DIETHYLENE GLYCO. Also, in 1990, 109 children died as a result of taking Paracetamol syrup produced with toxic ethylene glycol instead of propylene glycol, a tragedy that occurred more than 50 years after its occurrence in the United States<sup>18</sup>. The problems of fake drugs<sup>19</sup> was so severe that neighboring countries like Ghana and Sierra Leone officially banned the sale of drugs, foods and beverage made in Nigeria. Such problems led to the establishment of NAFDAC. It is important, however, to import the meaning given to Fake drugs by the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act<sup>20</sup>. Fake drugs were defined as "

<sup>15</sup> Part II, FIRST Schedule, patent and design Act, Cap P2. LFN

<sup>16</sup> www.ncbi.nlm.nih.gov (accessed on: 16th August, 2011)

<sup>17</sup> See NAFDAC website @www.nafdacnigeria.org/- (Last visited on August 16, 2011)

<sup>18</sup> See World Health Organization, 'Fake Drugs: A Scourge of the System. WHO Drug Info. 1995, 9 127-129

<sup>19</sup> See S.12 The Interpretation section of the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act Cap C34 LFN 2004

<sup>20</sup> Hereinafter referred to as the CFDUPF Act

<sup>10</sup> Act S.1 generally of the Patents and Designs Act, Cap P2, LFN 2004

<sup>11</sup> *James OitomenAgboronfo V Grain Haulage and Transport Ltd* (1998) FHC, 1, 236.

<sup>12</sup> S, 2, 3, 4, 5 Loc Cit'

<sup>13</sup> FHC/L/CS/1057/2003

<sup>14</sup> S. 6 Ibid. *Pfizer Incorporation V Polyking pharmaceutical Limited and Anor.* (1998) FHCL.1

1. Any drug or drug product which is not what it purports to be
2. Any drug or drug product which is so coloured, powdered or polished that the damage is concealed or which is made to appear to be better or of greater therapeutic value than it really is, which is not labeled in the prescribed manner, one which label or container or anything accompanying the drug bears any statement, design or device which makes a false claim for the drug or which is false or misleading; or
3. Any drug or drug product, the container of which is so made, formed or filled as to be misleading;
4. Any drug or drug product, the label of which does not bear adequate directions for use and such adequate warning against use in those pathological conditions or by children, where its use may be dangerous to health or against unsafe dosage, or methods of duration of use; or
5. Any drug or drug product which is not registered by the agency in accordance with the productions of the Food, Drugs and Related Products (Registration etc.) Act.

In December 1992, NAFDAC's First governing council was formed. In January 1993, the enabling legislation was approved as DECREE NO 15 of 1993 (now currently listed as CAP N1 laws of federation on Nigeria 2004). On 1st of January 1994, NAFDAC was officially established as a parastatal under the Federal Ministry of Health replacing the Directorate of Food and Drug Administration and Control which had been deemed ineffective.

According to its enabling law, NAFDAC has the following functions: to regulate and control the importation, exportation, manufacturing, advertisement, distribution, sale and use of drugs, cosmetics, medical devices, bottled water and chemical; conduct appropriate tests and ensure compliance with standard specifications designated and approved by the council for the effective control of quality of foods, drugs, cosmetics, medical devices, bottled water, chemicals and establish a relevant quality assurance system including certification of the production sites of the regulated products; undertake inspection of imported drugs, foods, cosmetics, medical relevant quality assurance system including certification of the production sites and of the regulated product, compile standard specifications, regulations and guidelines for the production, importation, exportation, sale and distribution of foods, drugs cosmetics, medical devices, bottled water and chemical; undertake the registration of food, drugs medical devices, bottled water and chemical intended for export; establish and maintain relevant laboratories or other institutions in strategic area

of Nigeria as may be necessary for the performance of its function<sup>21</sup>.

From the statutory functions of the body highlighted above, it is crystal clear that even though the regulatory functions of NAFDAC are product based and much attention is likely to be paid to trademark issues because of product identity, the body is also better positioned to regulate, control and enforce some of the rights of a patentee enshrined in the Patents and Designs Act.

However, as at year 2000, Nigeria was still drowned in the ocean of fake pharmaceuticals which for obvious reasons is not a good report on the nation's health, The Obasanjo administration then dissolved the management of NAFDAC in August 2000. A new management team with Dr. Dora Akuyuli as the Director General was inaugurated in April, 2001. The following three new federal government policies assisted the new management as it kicked off:

- The outright ban on the importation of drugs and other regulated products through land borders
- Designation of Calabar and Apapa sea ports, Muritala Mohammed International Airport and Mallam Aminu Airports as exclusive ports of entry for the importation of drugs and pharmaceutical raw materials.
- Release of shipping and Cargo manifest by the Nigerian Ports Authority, shipping lines and airtime to NAFDAC inspectors.

The achievements of NAFDAC<sup>22</sup> over the years include the creation of 6 zonal and 36 state offices for easier accessibility which are being equipped function effectively; organization of workshop to enlighten various stakeholders such as (a) pure water producers (b) patent and proprietary Medicine Dealers Association (PPMDA) and the National Union of Road Transport Workers (NURTW), raising awareness not just in Nigeria but also in other countries like India, China, Pakistan, Indonesia and Egypt where drugs are mostly imported into Nigeria; holding meetings in concert with Chairman, House Committee on Health and other members, with ambassadors of countries identified with exporting fake drugs into Nigeria and soliciting their support to stop the trend; public destruction of 2 billion naira worth of drugs from four sources namely: repentant traders, those found in secret warehouse on tip off by the drug sellers and the public, those seized by drug sellers' internal task forces and NAFDAC's task forces; launching of anti-counterfeiting technologies by the Nigerian presidency; ensuring the formation of a wholesome drug mart as the bedrock of the sanitization exercise; making NAFDAC activities more efficient to reduce delays in, for example, registration and inspection, holding

<sup>21</sup> See NAFDAC website @[www.nafdacnigeria.org/](http://www.nafdacnigeria.org/)- (Last visited on August 16, 2011)

<sup>22</sup> See NAFDAC's website for a more detailed list of achievements

consultations with national and international stakeholders leading to various areas of assistance including in the area of staff training, equipment donations and information sharing from United States Food and Drug Agency (USFDA), environmental and occupational health science institute (ECHSI), South African Medicines and Medical Devices Regulatory Agency (SAMMDRA); sending proposals for reviewing obsolete laws to the national assembly; putting new guidelines and Standard Operating Procedures (SOP) in place for all regulatory processes. NAFDAC also supports consumer safety clubs in Nigerian high schools. This is particularly important given the socio-cultural context i.e. where teenagers often run errands for the elderly and it pays to provide them with adequate information on the hazards associated with buying counterfeit pharmaceuticals<sup>23</sup>. Between the years 2001 and 2006, counterfeit drugs in circulation as measured by NAFDAC dropped from an average of 41% to 16.7%.<sup>24</sup> Drugs not registered by NAFDAC stood at 19% in 2006 as against 68% recorded in 2001<sup>25</sup>. In collaboration with law enforcement agencies, NAFDAC performed 13,897 raids on fake drugs manufacturing locations between 2001 and 2002. One of such raids involved as many as 150 soldiers, 350 policemen and 150 NAFDAC staff<sup>26</sup>. Compared to Argentina, another country facing the challenges posed by counterfeit drugs, NAFDAC carried out within that short period over half of the raids that occurred in Argentina over 9 years.<sup>27</sup> Furthermore, in response to World Health Organization recommendation for the inspection along the entire drug supply chain manufacturing, distribution and sales, NAFDAC sent independent analysts to inspect manufacturers in China and India before drugs were licensed for import. This has led to an import ban imposed on 30 Indian and Chinese companies' failure to meet NAFDAC's standards.<sup>28</sup> More so, the producing capacities of local pharmaceutical industries have increased tremendously and 22 new drug manufacturing outfits were established between 2001 and 2006.<sup>29</sup> The confidence of investors in the

pharmaceutical industry has been reinforced evidenced by the continuous upward movement in the share prices of the pharmaceutical companies quoted in the Nigerian Stock Exchange.<sup>30</sup> Consequently, by reason of NAFDAC enforcement activities, the Nigerian Patent and Trademark Office enjoyed increased patronage.<sup>31</sup> Also, the ban on made-in-Nigeria drugs has been lifted by the other West African Countries and many multinational drug companies are coming back to Nigeria due to improved regulatory environment.<sup>32</sup>

However, with the achievements of NAFDAC so far highlighted, it is clear that much has been done, although, this is not to say all has been done. There is still much to be done by NAFDAC as it still hazardous being a sick Nigerian due to the problem of fake drugs. The question thus arises as to the level of protection that NAFDAC registration offers the average Nigerian drug or medical service consumer. Questions have arisen as to whether one important effect of registration is quality assurance or whether it guarantees the potency of the drug as one may find in some developed countries where registration and quality assurance demands that the actual content and effects are of necessity and must be inscribed on the label of the drugs produced.

#### IV. THE CHALLENGES OF NAFDAC

Some of the challenges faced by NAFDAC in the course of fulfilling its mandate include.

- *Slow Judicial Process*: It needs not to be said that the wheel of justice grinds slowly in Nigerian courts. There are instances where a case drags on for 16 years<sup>33</sup> and another for 20 years.<sup>34</sup> Despite the agency's on-field success with 121 destruction exercises in 7 years leading to counterfeit drugs and food items worth 190 million US dollars destroyed, these have been 45 convictions with about 60 cases pending in courts.<sup>35</sup>
- *Slow Upgrade of Technological Equipments*: Counterfeits have become advanced in their operations with the aid of modern sophisticated technologies with effect that even the fake drugs appear even more original than the genuine ones. It is however unfortunate that the agency lacks necessary modern equipment to carry out its duties. This is made worse by lack of re-training and update of its personnel with recent trends in counterfeiting.
- *Corruption*: Corruption is also a serious challenge to the agency. This problem is quite endemic in Nigeria and has permeated all aspects of the

<sup>23</sup> World Health Organization, Fake Drugs: A Scourge of the System WHO Drug Inf. 1995; 9: 127- 129. Found also at: ncbi. Nlm.nih.gov (Last visited on 16th August 2011)

<sup>24</sup> Transcript of the interview titled "cracking down on killer drugs: Dora Akuyuli and the Nigerian success story; American Enterprises Institute, April 14, 2008: available at www.aei.org see also www.sproxil.com/socioeconomic.phii-accesssd on 16th August 2011

<sup>25</sup> Ibid

<sup>26</sup> Ibid

<sup>27</sup> See www.Sproxil.com/socioeconomic.Phi (Last visited 16th August, 2011)

<sup>28</sup> Ibid

<sup>29</sup> Consideration of Intellectual Property Rights in Regulation and Control: Activities of NAFDAC; prepared by Professor Dora Akuyuli, Director General NAFDAC, submitted to the World Intellectual Property Organization (WIPO) Advisory Committee on Enforcement on 15th – 17th May 2006, available at www.wipo.int/l/accessed on 10th August 2011.

<sup>30</sup> Ibid

<sup>31</sup> Ibid

<sup>32</sup> Ibid

<sup>33</sup> See Ajani v. Giwa (1986) 6 SC 234

<sup>34</sup> See Ariori v. Elemo (1981) S.C 1

<sup>35</sup> See www.sproxil.com (last visited on the 16<sup>th</sup> of August, 2011)

society. Drug counterfeiters stop at nothing to enhance their illicit trade. However, in order to enhance the performance of the agency, some likely solutions are suggested

#### a) *Training of Personnel*

Constant training is essential in the war against fake drugs. Enhanced pay and continued training of personnel may help to reduce the incidence of bribery and corruption within the agency. This is more important in light of the technological trends involved in counterfeiting. This can be achieved in part by providing relevant literature fake drug, their distribution models and Standard Operating Procedures (SOP) upon apprehension to minimize legal snags. The personnel of the agency must also be informed and be knowledgeable about the nation's Good Distribution Practices (GDP), Good Pharmacy Practices (GPP), Total Quality Management (TQM), Continual Process Improvement (CPI) and Good Manufacturing Practices (GMP).<sup>36</sup>

#### b) *Monitoring*

Also, National Pharmaco-vigilance policies need to stay abreast of global trends by developing Standard Operation Procedures (SOP) for product sampling for tests of counterfeiting issuing merchandise warnings and administering product recalls.<sup>37</sup>

#### c) *Consumer Awareness*

Moreover, much still needs to be done on consumer awareness. This is by maintaining a sustained awareness programme, unraveling the inherent risks in purchasing drugs from non-reputable resources especially those that indicate "goods sold cannot be returned" as such declarations tend to violate basic consumer rights. As a matter of fact, goods sold in Nigeria are generally not returnable. Consumers must be aware that they possess certain basic rights in contract. This can only be done through sensitization of the public through a sustained e.g. media awareness program.

## V. CROSS BORDER ENFORCEMENT

Cross-national enforcement of patent especially through regulatory bodies is of vital importance given its relevance to health care of nations.<sup>38</sup> The World Health Organization has called for an increase in Inter-agency Collaborations between major enforcement agencies and regulatory bodies to tackle the problem of counterfeiting.<sup>39</sup> Examples of these are the European Union Rapid Alert System, the WHO's Rapid Alert

System, PSI Counterfeiting Incident System and the West African Drug Regulatory Authorities Network (WADRAN). However, the largest organized multinational cooperation on counterfeiting fake drugs to date was set up by the World Health Organization (WHO) in 2006: International Medical Products Anti-Counterfeit Task Force (IMPACT). It coordinates global action to protect public health. It includes all 193 WHO member states and well recognized international stakeholder. It also involves border control, prosecution, enforcement, media manufactures and product distributors and health.<sup>40</sup>

Other groups such as the International Federation of Pharmaceutical Wholesaler (IFPW), World Self Medication Industry (WSMI), International Federation of Pharmaceutical Manufactures and Association (IFPMA), European Federation of Pharmaceutical Manufactures and Associations (FPIA) can be made to co-operate by entering MOU and they would provide key feedbacks to the regulatory agencies on fake drug sources while leveling fees on members who fall below required manufacturing practice standard.

In fact, the World Trade Organization (WTO) agreement known as TRIPS (Trade Related Aspects of Intellectual Property)<sup>41</sup> to which Nigeria is a signatory sets down minimum standards for the enforcement of Intellectual property rights. Part III<sup>42</sup> of TRIP is in fact dedicated to the enforcement of rights and contains provisions on civil and administrative procedures and remedies, provisional measures, special measures on border control and criminal procedures which specify a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights.<sup>43</sup> Members are enjoined to provide fair and equitable enforcement procedures without unwarranted delays or time-limits for effective action against infringements and avoid barriers to legitimate trade.<sup>44</sup> The rights of foreign owners and associations are also recognized under the agreement.<sup>45</sup> However, certain state corporations such as the Nigerian Television Authority (NTA) may not be sued without a few weeks' notice prior to the commencement of action.<sup>46</sup> Article 50 of the TRIPS Agreement provides for Anton Pillar, inspection and seizure orders. Judicial authorities are also granted the authority to order effective measures to preserve evidence especially where delay may cause irreparable harm to the right holder or where there is a demonstrable risk of evidence

<sup>36</sup> Ibid

<sup>37</sup> Ibid

<sup>38</sup> Ghosh, S et al.: 'Intellectual Property' Thompson West, 2007

<sup>39</sup> WHO Factsheet, "Counterfeit Drugs – November 2003" found at [www.wpro.who.int/mediacentre](http://www.wpro.who.int/mediacentre)

<sup>40</sup> Summary Reports, Impact General Meeting 12-13 December, 2007

<sup>41</sup> This was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994

<sup>42</sup> S.41-61 of TRIP

<sup>43</sup> See <http://www.wto.org>

<sup>44</sup> Article 41

<sup>45</sup> Article 42

<sup>46</sup> S. 27 of the NTA Act, Cap N 2004.

being displayed. Regrettably, Anton Pillar order is yet to find a favourable place in the heart of many judges considering the fundamental issues that are raised such as the constitutionality of interfering with privacy, right of fair hearing and privilege against self-incrimination. Articles 51-60 thus include ample provisions that should prevent or even discourage infringement across territorial borders.

However, critical issues like sovereigns, trade agreements and political agenda can be delay or hinder the workability of cross- border enforcements.

## VI. IMPACT ON SALE OF GOODS AND CONSUMER PROTECTION

As stated earlier, control of drugs, sale and availability of high quality medical goods and services are major problems in Nigeria. Thus, the health and safety of many have been compromised by the ineffective control of the manufacturing segment of the drug industry and more importantly by the inadequate control of the supply chain which includes local and international (import and export) trade in drugs and medical services and equipments. Regulatory bodies such as the Pharmacy Board and the Nigerian Medical Council also hold their members to strict rules of professional ethics in the bid to control the administration medicines and the protection of human health. The Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act Cap C34 LFN 2004<sup>47</sup> affords protection across the board to include not only fake, substandard, adulterated, or expired drugs, processed food but the sale of drugs or poisons in certain premises or places. Additionally, local trade practices that violate the rights of the Consumer abound in Nigeria. An example of this is the imbalance of power between consumers and drug manufacturers / counterfeiters, the no-return/refund policy of goods purchased locally, including medicines and the loss of such rights as the breach of warranty,<sup>48</sup> and other implied conditions such as that goods should be of merchantable quality among others or as to quality and fitness.<sup>49</sup> A famous case on liability of makers of products under the Common Law is the English case of *Donoghue v. Stevenson*<sup>50</sup> which laid down the principles of manufacturer negligence stating the principles that the consumer is able to claim damages if he has suffered harm from the said product and the injury is traceable to the producer.<sup>51</sup> In *Oye Soremu v. Nigerian Bottling Co. Ltd*, the plaintiff successfully pleaded that the defendant had breached a duty of care owed to him.

However, in *Nathaniel Ebelamu v. Guinness Nigeria Ltd*,<sup>52</sup> the plaintiff lost where there was proof, even by medical evidence that the sample of the Harp Beer consumed were poisonous.<sup>53</sup>

The CFDUPF Act prescribes severe penalties for the act of selling, displaying counterfeit goods. S.1 of the CFDUPF Act however provides that, "notwithstanding anything to the contrary contained in any enactment of the law, any person who –

1. Produces, imports, manufactures, sells distributes or is in possession of; or
2. Sells or displays for the purpose of sale; or
3. Aids or abets any person to produce, import, manufacture, sell, distribute or display for the purpose of sale any counterfeit, adulterated, banned or fake, substandard or expired drug or unwholesome processed food, in any form whatsoever, commits an offence under this Act and shall, accordingly be punished as specified in this Act.

It follows therefore that the sale, hawking etc. of drugs or poisons in certain premises or places is prohibited.<sup>54</sup> The Act further prescribes penalty for offences under sections 1 and 2 of the Act. Liabilities for offences under S. 1 include a fine of N500, 000.00 or imprisonment for a term of not less than five years or more than fifteen years or to both such fine and imprisonment. For offences under S.2 (1), conviction to a fine not exceeding N500,000.00, or imprisonment for a term not less than two years or to both such fine and imprisonment. Where offences have been committed by bodies corporate,<sup>55</sup> S. 2 (2) of the Act provides that such shall be deemed to be guilty of the offence and may be proceeded against and punished accordingly. The Federal High Court shall have exclusive jurisdiction to try such cases.<sup>56</sup>

The Act further establishes a Federal Task Force<sup>57</sup> with membership including principal pharmacists, two inspecting officers, not below the rank of Principal Regulatory Officers, two officers of the Nigerian Police Force of senior rank, appointed by the Inspector General of Police charged with the responsibility for enforcing the provisions of the Act, including coordinating the activities of the Task Force, powers to take samples or specimen of any article, and opening and examining, while on the premises, any container or package, book, record, believed to contain any information relevant to the enforcement of the Act, including fake drugs or poison, adulterated, banned or

<sup>47</sup> Referred to as the CFDUPF Act

<sup>48</sup> See S. 53 of the Sale of Goods Act, 1893

<sup>49</sup> See generally the Sale of Goods Act 1893

<sup>50</sup> (1932) A.C 562

<sup>51</sup> See *Ngonadi v. Nigerian Bottling Co. Ltd*. [1985] 1 NWLR (Part 4)

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<sup>52</sup> (1980) 1 PLR 538

<sup>53</sup> See also, Ketefe, Kayode, 'Enforcing Consumer Rights in Nigeria' Can also be found in the online version of *The Mirror* August 15, 2011

<sup>54</sup> S.2 of the CFDUPF Act

<sup>55</sup> S. 4 of the CFDUPF Act

<sup>56</sup> S. 4 of the CFDUPF Act

<sup>57</sup> S.5 of the Act. The Act also provides for a State Police Task Force

fake drug or poison or unwholesome processed food.<sup>58</sup> S.7 provides for a State Task Force with special powers including the power to enter or seal-up any premises used or being used in connection with offences under the Act. S.9 further establishes a Nigeria Police Force Squad charged with the responsibility in the lawful execution of their functions under the Act. The 'ForceSquad' is however empowered to arrest, seize goods (all such goods seized shall be forfeited) and conduct lawful investigation into matters arising under the Act. Any person that obstructs the Force Squad in the performance of the lawful duty will be liable under the Act.

The Dangerous Drugs Act Cap D1 LFN 2004 is another Act that regulates the importation, manufacture, sale and use of Opium and other Dangerous Drugs. The question then is whether an importer or marketer who deliberately ships expired or counterfeit drugs into the country can be held responsible since the drugs would be extremely dangerous if used. In regard to hard drugs such as cocaine, opium, etc. to which the Dangerous Drugs Act apply, the simple act of selling or importing or trading in these will subject one to the law appropriately. The relevant point here is the use or trade in chemicals such as "Medical Opium" or morphine which are used medically. One may imagine the fluidity in the control of these very dangerous substances in Nigeria as they may be used under the guise of medical need.

Aside from these major legislations and the Common Law position as established by the case of *Donoghue v. Stevenson* which has since been judicially affirmed in Nigeria. For example, in the case of *Okwejinor<sup>59</sup> v. Gbakeji* it was established inter-alia that, the appellant was injured by the orange drink (Fanta) he drank. The duty of care was thus breached and the appellant was entitled to reparation from the second respondent. Hence, the appeal was therefore allowed. Other laws such as the Weight and Measures Act, Food & Drug Act, Hire Purchase Act, Merchandise Mark Act and the Standards Organization of Nigeria Act also apply to protect consumers in the country. All these laws were expected to offer the average consumer some protection against fraudulent and deceitful practices and offers rights such as the right to free access and informed decision and choice of goods at competitive prices, right of protection from hazardous goods or services, right to consumer education and the right to compensation in cases where misrepresentation or unsatisfactory goods have been marketed.

The Consumer Protection Council Act<sup>60</sup> provides generally for the formation of a Consumer Protection Council bestowed with functions such as providing speedy redress to consumer complaints

through negotiations, mediation and conciliation;<sup>61</sup> work to eliminate hazardous products from the market;<sup>62</sup> publish on a regular basis, list of products that are banned and by the Federal Government;<sup>63</sup> force offending companies to compensate the affected consumer; encourage trade, industry and professional associations to enforce quality standards;<sup>64</sup> ensure that consumers,<sup>65</sup> interests receive due consideration at appropriate forum and to provide redress to obnoxious practices or the unscrupulous exploitation of consumers and encourage the adoption of appropriate measures to ensure that products are safe for intended use or normal use.<sup>66</sup> In enforcing these rights, the Council has powers to apply to court where there is imminent public hazard, compel a company to certify that all safety standards have been complied with or even compel the company to give public notice of such hazard, ban sale, distribution or advertisement of products which do not comply with safety regulation or cause quality standards to be conducted on a consumer product and demand production of label showing date and place of manufacture of a commodity as well as certification of compliance.<sup>67</sup>

The CPCA seeks to afford the consumer of goods and services so much so that where the rights of a consumer has been violated, the consumer shall have a right of civil action for compensation or restitution in any court of law. This is in addition to any redress that might have been imposed by the Council.<sup>68</sup> A judicial intervention may be possible where the Attorney General of the Federation is notified by the Council<sup>69</sup> that a person has persisted in a course of conduct that is detrimental to the interests of the consumer despite the receipt of a written assurance from such a person by the Council.<sup>70</sup> The Attorney General is therefore empowered to enforce compliance with the provisions of the CPC Act.<sup>70</sup>

As mentioned earlier, the imbalance of power between the consumer and the seller of goods has grossly undermined the rights of the consumer. More importantly, the average Nigerian is grossly uninformed and is often deceived into buying low quality products that often have no return value or warranties. Sadly, most of the toys that are brought into the country have unsafe levels of lead which are dangerous to the health of children. The cost of health care is often beyond the

<sup>61</sup> S.2 (a) of the CPCA Cap C25 LFN 2004

<sup>62</sup> S.2 (b) of the CPCA Cap C25 LFN 2004

<sup>63</sup> S.2 (c) of the CPCA Cap C25 LFN 2004

<sup>64</sup> S.2 (f) of the CPCA Cap C25 LFN 2004

<sup>65</sup> S.2 (i) of the CPCA Cap C25 LFN 2004

<sup>66</sup> S.2 (j) of the CPCA Cap C25 LFN 2004

<sup>67</sup> S.5 of the CPCA Cap C25 LFN 2004

<sup>68</sup> S.8 of the CPCA Cap C25 LFN 2004

<sup>69</sup> S.10 (2) (b) of the CPCA Cap C25 LFN 2004

<sup>70</sup> S.16 of the CPCA Cap C25 LFN 2004

<sup>58</sup> S.6 of the CFDUPF Act

<sup>59</sup> [2008] 5 NWLR (Part 1079) pg. 172-226

<sup>60</sup> Hereinafter referred to as the CPCA



reach of many of the poor Nigerians who readily resort to home-made remedies when children fall sick. The number of unreported fatalities makes it more difficult for the authorities to manage emerging health crisis especially in a timely fashion.

The Nigerian Sale of Goods Act

## VII. CONCLUSION

In truth, consumer protection is still under-developed in Nigeria. This is the same with the law of patent as it is yet to get appreciable application in Nigeria. An average Nigerian knows that it is against the law to go into a bank with a gun and rob that bank. This is not with law of patent. This is however unfortunate in view of its importance. Interestingly, just like other areas of human endeavour, there are laws governing consumer protection and patents in Nigeria but its level of awareness is low. The importance of patent to health of a nation can thus not be overemphasized.

It is hereby suggested that in order not to allow these laws to remain dormant, regulatory agencies like NAFDAC, the CPC, SON, and other law enforcement agencies must rise to their calling. These bodies should be assisted with everything to boost or enhance their actions. If no other thing is considered, let the health of the nation be considered, it is wealth.