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The Postal Fraud Statutes: Their Use and Abuse

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Food·Drug·Cosmetic Law

Journal

FREDERICK M. HART Discusses

The Postal Fraud Statutes: Their Use and Abuse

Mr. Hart Warns That Authority for Issuance of a Fraud Order
Should Be Made to Stand Rigid Tests as to Constitutionality

THE POWER TO ESTABLISH a postal system is specifically granted to Congress by the Constitution of the United States.¹ This power has been held to embrace the regulation of the entire postal system² and led, in 1872, to one of the earliest statutes aimed at fraudulent merchandising.³ In that year Congress vested in the Post Office Department the power to refuse mail service to anyone who is "conducting any . . . scheme or device for obtaining money or property of any kind through the mails by false or fraudulent pretenses, representations, or promises" and to return all mail sent such persons to the addressee "with the word 'Fraudulent' plainly written or stamped upon the outside thereof . . ."⁴ As an added sanction, the Postmaster General may also decree that money orders made out in favor of these operators be refused payment.⁵ In 1889 the fraudulent use of the mails was made a criminal offense as well.⁶

¹ United States Constitution, Art. I, Sec. 8.

² *Public Clearing House v. Coyne*, 194 U. S. 497 (1904).

³ 17 Stat. 322 (1872), as amended, 39 USC Sec. 259 (1952); 17 Stat. 323 (1872), as amended, 39 USC Sec. 732 (1952).

⁴ 17 Stat. 322 (1872), as amended, 39 USC Sec. 259 (1952).

⁵ 17 Stat. 323 (1872), as amended, 39 USC Sec. 732 (1952).

⁶ 18 USC Sec. 1341 (originally enacted on March 2, 1889, Ch. 393, Sec. 1, 25 Stat. 873).



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The history of the enforcement of these federal statutes reveals that the courts have not always been in sympathy with their censor-like provisions. Their constitutionality has been upheld, however, against attacks challenging that they (1) are an undue limitation upon freedom of speech in violation of the First Amendment;⁷ (2) contain unlawful search and seizure provisions in violation of the Fourth Amendment; (3) do not comply with the due-process clause of the Fifth Amendment; and (4) inflict unusual punishment in violation of the Eighth Amendment.⁸

Notwithstanding the courts' refusal to invalidate the statutes on constitutional grounds, they have indicated a tendency to restrict the Post Office Department's use of them to cases in which there can be little doubt of their applicability.⁹ This is unquestionably due not only to a reluctance on their part to sanction any "prior restraint" statutes, but also because of the potential power which such laws place in the hands of the Postmaster General.¹⁰ Not only is the one proceeded against barred from receiving any and all mail, but—further than that—his customers, suppliers, creditors and, in fact, all his correspondents are informed by the government that he is engaged in fraudulent activity. It should be noted here that such fraud orders apply to *all* mail sent to the cited party, whether or not it pertains to his fraudulent operations. There need be no attempt on the part of the Post Office Department to segregate personal mail from business mail or to refuse

⁷ *Public Clearing House v. Coyne*, cited at footnote 2; *Donaldson v. Read Magazine, Inc.*, 333 U. S. 178 (1948); cf. Holmes, J., dissenting in *Leach v. Carlile*, 258 U. S. 138, 140 (1922).

⁸ *Public Clearing House v. Coyne*, cited at footnote 2; *Donaldson v. Read Magazine, Inc.*, cited at footnote 7.

⁹ *Reilly v. Pinkus*, 338 U. S. 269 (1949).

¹⁰ Case cited at footnote 9. at p. 277.

delivery of only that mail connected with the fraud.¹¹ In effect this could mean that where a corporation manufactures a line of products, although only one of them is met with official objection, its entire business could be effectively squashed by such an order.

Since the remedies are dangerously powerful, their use must be restricted to those abuses which they were designed to correct. They are, by their very wording, aimed at *fraud*. They are not concerned with the manufacturer who is engaged in mere "puffing" of his product nor even with the advertiser whose claims border on the misleading. Before a fraud order can issue, there must be a finding that the accused party *intentionally* misrepresented his wares: the respondent must be *knowingly* attempting to deceive the public.¹² When the statutes are so restricted in use, the remedies are not so harsh, but are, indeed, necessary.

The statute is particularly effective in controlling the drug or device distributor who solicits mail-order purchases based upon fraudulent misrepresentations. Such a form of retailing is especially attractive, as distance from the consumer provides easy escape from the victim's available civil remedies, as well as from his extralegal recourse to local better-business bureaus and to methods devised at bringing the scorn of the community against a local unprincipled vendor. Here, however, the source of orders depends upon the delivery of mail. The charlatan or unprincipled purveyor of useless remedies is usually without benefit of any normal retail outlets, as the local pharmacy and general retail establishments will refuse to carry his products. There is no more efficient method of stopping his business than by stopping his mail.

The enforcement of this law is of special interest to the proprietary drug manufacturer. These fly-by-night vendors of nostrums are his competitors, and competitors of the worst sort if they are allowed to escape punishment for false claims. The drug distributor who can claim a cancer cure, even if only in the more sensational magazines, is dangerous not only to the consumer, but also to the legitimate drug industry which must truthfully label its products and restrict its advertising to claims based upon fact.

As competitors, they are also a source of discredit to the industry as a whole. There is nothing which serves to discredit the drug manu-

¹¹ *Public Clearing House v. Coyne*, cited at footnote 2.

¹² *Farley v. Heining*, 105 F. (2d) 79 (CCA D. C., 1939), cert. den., 308 U. S. 587 (1939).

facturers more than these pernicious peddlers of potential death, and nothing can make the public less willing to believe truthful claims of cures and relief than the exposé of the falsity of claims made by these people. To a large degree the proprietary drug industry's good will is based upon confidence in the truth of advertising claims. A breach of that confidence by one swindler weakens the good will of all.

On the other side, the drug industry must guard against overzealous public officials who would be willing to expand the use of the postal fraud statutes far beyond that intended by Congress. The legitimate drug house should have little fear from the postal authorities, as the statutes are not directed at it, but in at least one recent case there is a vivid showing of a reach for power by the agency.¹³

Largely unnoticed, there have been, during the past few years, several very significant developments in the enforcement of these statutes—developments of which the industry should be aware. There is presently a bill before Congress¹⁴ which, if passed without amendment, would vest even greater powers in the Postmaster General, powers which might well be feared not only by illicit operators, but by the legitimate drug industry and by all who are interested in procedural due process. It is the purpose of this article to explore this legislation, as well as significant recent case developments.

Post Office Administrative Procedure

Prior to 1951.—Prior to July of 1951, the issuance of a postal fraud order involved comparatively simple administrative proceedings. It was possible for the agency to obtain, quickly and effectively, a final fraud order and enforcement, since it was accomplished merely by the agency's withholding of the respondent's mail, thus providing no problems.

The procedure¹⁵ followed by the agency consisted of the issuance of a complaint by the chief of the frauds section, which was approved by the solicitor, who then set a time for hearing and served the complaint plus a notice of hearing on the respondent. The respondent then had an opportunity to answer the complaint and was afforded a formal hearing before a trial examiner who was a member of the agency. At the close of the hearing the trial examiner prepared find-

¹³ *Atlanta Corporation v. Olesen*, 124 F. Supp. 482 (DC Calif., 1954).

¹⁴ H. R. 174, 84th Cong., 1st Sess. (1955).

¹⁵ Rules of practice in postal fraud proceedings prior to July 8, 1951, are found in

39 CFR Sec. 151.1-39 (1949). These were rescinded by new regulations promulgated on July 8, 1951. In 16 *Federal Register* 6683 (1951).

ings of fact and forwarded them, together with his recommendations, to the Postmaster General for final decision. If the Postmaster General decided that an order should issue, he notified the respondent and notified the local postmaster, who immediately stopped delivery and began return of all mail addressed to the respondent marked, as directed, with the word "fraudulent." The simplicity of the hearings and the ease of enforcement added greatly to the force of the statutes.

No effort was made to comply with the provisions of the Administrative Procedure Act.¹⁶ Whether the postal department was to be governed by this act in the administration of fraud orders was first raised in *Bersoff v. Donaldson* in 1948.¹⁷ There the United States Court of Appeals for the District of Columbia held that:

. . . provisions of the Act do not apply to mail fraud orders as Section 5, 5 U. S. C. A. § 1004, thereof confines the prescribed procedure to cases of adjudication "required by statute to be determined on the record after opportunity for an agency hearing."¹⁸

The statutes¹⁹ instituting postal fraud orders do not specifically require a hearing.

Wong Yang Sung v. McGrath and Its Application to Postal Fraud Proceedings.—In 1950 the United States Supreme Court decided the case of *Wong Yang Sung v. McGrath*,²⁰ in which it was held that deportation hearings, although their authorizing statute did not specifically require a hearing, were controlled by the Administrative Procedure Act. The court stated that:

. . . the limiting words [do not] render the Administrative Procedure Act inapplicable to hearing, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity.²¹

In 1951 the question of whether the Administrative Procedure Act was made applicable to postal fraud hearings by this case was raised by the petitioner in *Cates v. Haderlein*.²² The United States Court of Appeals for the Seventh Circuit, following the *Bersoff* case,²³ held that the Administrative Procedure Act did not control. Certiorari was requested. Before the Supreme Court could act, however, the Post Office Department had promulgated new regulations which incorporated

¹⁶ 60 Stat. 237. 5 USC Sec. 1001 (1952).

¹⁷ 174 F. (2d) 494 (CA D. C., 1949).

¹⁸ *Bersoff v. Donaldson*, cited at footnote 17, at p. 495 (italics supplied by the court).

¹⁹ 17 Stat. 322 (1872), as amended, 39 USC Sec. 259 (1952); 17 Stat. 323 (1872), as amended, 39 USC Sec. 732 (1952).

²⁰ 339 U. S. 33 (1949).

²¹ At p. 50. There would seem to be little doubt but that a hearing is required to save the postal fraud order statutes from constitutional invalidity as a denial of due process guaranteed by the Fifth Amendment.

²² 189 F. (2d) 369 (CA-7), rev'd, 342 U. S. 804 (1951).

²³ Cited at footnote 17.

all the guarantees of the Administrative Procedure Act into its fraud proceedings.²⁴ When the case came before the Court, the Post Office Department took the unusual step of confessing error, and the court reversed "upon consideration of respondent's confession of error and the record."²⁵ This action of the Supreme Court was interpreted by the Court of Appeals for the District of Columbia as being *contra* to *Bersoff v. Donaldson*,²⁶ and at least one commentator concluded that the Administrative Procedure Act was now applicable to postal fraud hearings.²⁷

Present Hearing Procedure.—The regulations²⁸ which the Post Office Department enacted in order to bring its fraud order proceedings within the Administrative Procedure Act substantially lengthened the time that it takes the Postmaster General to secure such an order. Under present regulations, the hearing examiner (who now fulfills the requirements of Section 11 of the Administrative Procedure Act²⁹) must, at the close of all testimony, allow the parties to submit proposed findings and conclusions prior to preparing his initial order. Then, once he makes his findings and his initial decision, he must submit them to the parties before he presents them to the Postmaster General. The respondents must be given time to file exceptions to his initial decision, and these exceptions are presented to the Postmaster General who must dispose of them prior to issuing a final agency order.

It has also been contended by the agency that additional delays are occasioned by the deposition provisions of the new regulations.³⁰ It has been estimated by former Postmaster General Donaldson that the disposition of cases takes twice as long under the present rules as in the past. It is the position of the agency that this delay is responsible for a weakening of the fraud statutes.³¹

Interim Stop Orders.—The delay caused by adherence to the new regulations soon began to cause the Post Office Department concern as it found the effectiveness of its orders greatly diminished. To fill the breach, occurring between the time of the complaint and the final order, they appealed to Congress.³² From all their actions and from

²⁴ 39 CFR Sec. 150.400-426 (1949); now found at 39 CFR Sec. 201.1-26.

²⁵ *Cates v. Haderlein*, 342 U. S. 804 (1951).

²⁶ Cited at footnote 17.

²⁷ See Note. 94 L. Ed. 631, 652.

²⁸ 39 CFR Sec. 201.1-27.

²⁹ 60 Stat. 237 (1946), 5 USC Sec. 1011 (1952), which requires that hearing examiners be primarily controlled by the

Civil Service Commission in regard to promotions, etc.

³⁰ 39 CFR Sec. 201.19.

³¹ H. Rept. 1874, 82d Cong., 2d Sess. (1952); H. Rept. 850, 83d Cong., 1st Sess. (1953).

³² H. R. 174, 84th Cong., 1st Sess. (1955); H. Rept. 850, 83d Cong., 1st Sess. (1953); H. R. 569, 83d Cong., 1st Sess. (1953); H. Rept. 1874, 82d Cong., 2d Sess. (1952); H. R. 5850, 82d Cong., 2d Sess. (1952).

their public statements before Congress,³³ it would appear that they accepted the fact that the Administrative Procedure Act applied to fraud orders and that a formal hearing, in accordance with that act, was required before the issuance of *any type* of an order stopping mail delivery³⁴ under the law as it is presently written.

In spite of this, the Post Office Department has pursued a policy of issuing, without any type of hearing whatsoever, *interim impounding orders* which result in a refusal by the local postmaster to deliver any mail to the respondent until the outcome of the agency hearing on a final order. The mail is not returned to the sender, but is held at the local post office.

The three United States district courts which have directly ruled on whether such interim orders are valid have expressly refused to grant injunctions against their enforcement.³⁵ These courts have implied the necessary power for the issuance of such orders from the general broad duty which has been reposed in the Postmaster General—the power to regulate the mails. They have failed to mention either due process or the applicability of the Administrative Procedure Act to such orders. The only restriction which these courts have placed upon such intermediate orders is that they can remain in effect only so long as the Postmaster General expeditiously handles the hearings.³⁶

A sharp dissent from the above cases occurs in the dictum of a similar case which eventually reached the hands of Justice Douglas of the Supreme Court sitting, in chambers, as circuit justice. Procedural grounds caused him to refuse an injunction against the enforcement of just such an order in the case of *Stanard v. Olesen*.³⁷ Showing a reluctance to disturb the normal channels of appeal, he accepted a promise that the Postmaster General would soon decide upon the final order, and the argument that such decision would render the question moot—whether it be for or against the respondent. He reasoned that if the order did not issue, the mail would soon be returned, and that if the final order did issue against the respondent, it could be tested along with the interim order in one proceeding. Justice Douglas left no doubt about his belief as to how the case should be decided:

³³ Postmaster General Summerfield: H. Rept. 850, 83d Cong., 1st Sess. (1953); Former Postmaster General Donaldson: H. Rept. 1874, 82d Cong., 2d Sess. (1952).
³⁴ See Postal Decision 328 (Post Office Department).

³⁵ *Williams v. Petty*, 136 F. Supp. 283 (DC Okla., 1954); *Barel v. Fiske*, 136 F. Supp. 751 (DC N. Y., 1954); *Wallace v. Fanning*, No. 15499-T (unreported) (DC Calif.).

³⁶ *Donnell Manufacturing Company v. Wyman*, 156 F. 415 (CC E. D. Mo., 1907).

³⁷ 74 S. Ct. 768 (1954).

Under the law . . . every business . . . has the right to be let alone. The Administrative Procedure Act . . . gives some protection to that right. The power of the Post Office Department to restrain the illegal use of the mails is subject to that Act. . . .

The power to impound at the commencement of the administrative proceedings is not expressly delegated to the Post Office It has such serious possibilities of abuse (unless carefully restricted) that I am reluctant to read it into the statute. I, therefore, strongly incline to the view that the interim order . . . is invalid.³⁸

After the Post Office Department had issued a final order against the respondent, this case came before the United States Court of Appeals for the Ninth Circuit and, although the question of whether the Postmaster General has the discussed power was not squarely in issue, the court, in dictum, expressed the view that the Administrative Procedure Act applied to postal fraud proceedings.³⁹

The view of Justice Douglas seems to be by far the one more consistent with the traditional notions of fair play and statutory construction. Unless proper procedural safeguards are afforded the charged party, postal fraud statutes face grave constitutional difficulties as being violative of the due-process clause of the Fifth Amendment. Proper procedures are secured by the present administrative regulations governing the issuance of a *final* order. They must also be provided before the issuance of an interim order. Since such an order is issued *ex parte* under present policy, the only argument which the department can present in the favor of its bridging the due-process requirements is that the individual may go to a district court and seek his review in the form of an injunctive suit restraining enforcement of the order. No other opportunity is afforded whereby he might defend his rights. Even this tenuous avenue of due process (which fails to consider the possibility that the Administrative Procedure Act applies) was closed to the petitioner in the aforementioned *Stanard* case when the district court held that the petitioner's administrative remedies were not exhausted and would not be until there was an administrative decision on the *final* order.

As has been indicated, the effect of a fraud order is drastic. This is no less true of an interim order which may run for months, or even years, than it is for a final order. Because it results in such a violent taking, the authority for its issuance should be clear and that authority should be made to stand the rigid tests of constitutionality. Under

³⁸ At p. 771.

³⁹ *Olesen v. Stanard*, 227 F. (2d) 785 (CA-9, 1955).

the present law there is no clear direction to the Postmaster General which can be fairly construed to give him the power to issue interim orders in the face of the above objections. The Congress must act if he is to have such power.

Proposed Legislation.—The proposed legislation,⁴⁰ which is pending before the House of Representatives, provides that:

... upon the institution of proceedings before the Postmaster General against any person . . . for the purpose of determining whether . . . [a postal fraud order] should be issued, and when it shall appear to the Postmaster General to be reasonably necessary for the protection of the public or to be in the public interest, he may order that mail addressed to such person . . . be impounded and detained by the postmaster at the office of delivery pending final decision of the issues involved in said proceedings . . .

The legislation also specifically allows the respondent to seek an injunction against the enforcement of such an order "upon a showing that such order was issued arbitrarily, capriciously, or improvidently, and that such order is not necessary for the protection of the public. . . ."

This legislation, in its present form, would allow the Postmaster General to make an *ex parte* determination of whether such an order should issue and leave it to the affected party to bring the controversy before the courts. It would force the burden of proof on the respondent to show that the order was issued "arbitrarily, capriciously, or improvidently, and that such order is not necessary for the protection of the public." (Italics supplied.) It would seem that it is more in the traditions of our legal system and more in the interest of fair play to make the government proceed in the courts and to shoulder the burden of proof when such sanctions as these, albeit they are not technically punishments, are being imposed.⁴¹

Probably the most important objection to this legislation is that it provides no limit on the length of time which such a "temporary" order may remain in effect. This is extremely important, as the length of the hearings under the fraud statutes has been significantly extended. Indeed, in one case recently reported, the entire proceeding consumed four years and four months.⁴²

Under the presently proposed legislation, the Postmaster General could have refused delivery during this entire period by a valid interim

⁴⁰ H. R. 174. 84th Cong., 1st Sess. (1955).

⁴¹ These statutes have as their objective the prevention of injury to the public by denying the use of the mails to those engaged in fraudulent operations. They are not intended as a punishment of

wrongdoers. (*Donaldson v. Read Magazine*, cited at footnote 7; *Commissioner of Internal Revenue v. Heininger*, 44-1 USC ¶ 9109, 320 U. S. 467 (1943).)

⁴² *Atlanta Corporation v. Olesen*, cited at footnote 13.

order. Such action would undoubtedly destroy the respondent's business long before the conclusion of a final order hearing, and would make such a hearing a farce indeed.

Need for Interim Stop Orders.—That some interim sanctions are necessary would seem to be evident if the power of the Post Office fraud orders are to be retained and yet the safeguards of the Administrative Procedure Act are to be incorporated into the regulations for hearings on the final orders. Where the fraud involves the peddling of a nostrum, speed is essential to protect not only the pocketbook of the consumer, but even his health and life. A survey of the advertisements of some of the mail-order drug and device distributors shows enough promises of "cures" to startle not only the medical man, but also the casual reader. A closer investigation of these ads often leads to the conclusion that the loss of time pursuing the useless remedy could result in additional damage to the ailing victim. Although it is true that other governmental agencies have concurrent jurisdiction over false advertising,⁴³ still—as has been pointed out above—the mail fraud statutes have certain advantages when applied to the mail-order distributor. This is true only as long as quick, effective sanctions are available.

The presently proposed bill is not the answer, however. Although it amply provides the rapid administration to be desired, it fails to protect the respondent from arbitrary actions on the part of the government. What safeguards it does contain are insignificant and the legal philosophy of the bill is contrary to our established maxims of justice.

Alternate, and Better, Method of Accomplishing Same End.—Congress has adopted an alternate method to accomplish the same objective in regard to the Federal Trade Commission.⁴⁴ This agency has practically the identical problem in relation to its "cease and desist" orders where the agency proceeds against false and misleading advertising. Here, as in the Postal Department hearings, the administrative process is lengthy, and the delay can often result in a frustration of the purposes of the Commission. The procedure which Congress deemed the most advisable for filling the gap between the discovery of the wrong and the issuance of a final cease-and-desist order was in the nature of an injunction *pendente lite*. The law reads, in part:

⁴³ Namely, the Federal Trade Commission as, to some extent, the Food and Drug Administration. See discussion below, under "Concurrent Jurisdiction of

Federal Trade Commission and Food and Drug Administration."

⁴⁴ 52 Stat. 114 (1938), 15 USC Sec. 53 (1952).

Whenever the Commission has reason to believe—

(1) that any person . . . is engaged in or is about to engage in . . . any . . . violation . . . [of the act] and,

(2) that the enjoining thereof pending the issuance of a complaint by the Commission . . . and until such complaint is dismissed by the Commission or set aside by the court on review . . . would be to the interest of the public, the Commission . . . may bring suit in a district court . . . to enjoin the . . . [violation].

This would appear to be somewhat less effective than the procedure recommended under the proposed bill, but the loss of effectiveness is more than compensated for by the safeguards which this type of interim order proceeding provides. It is worthy of note, however, that this method of securing interim restriction of the respondent's mail is only workable as long as the courts refuse to go into the merits of the proposed fraud order and confine their investigations merely to a consideration of whether the Postmaster General has *reasonable grounds* to suspect that the situation requires the issuance of the order.⁴⁵

A further safeguard which should be seriously considered would be in the nature of a limitation upon the length of time such an injunction can remain in effect. It would seem desirable to limit the injunction to a period no longer than is generally required for the hearing process. If the hearings and the decision of the Postmaster General, either unavoidably or through the dilatory tactics of the respondent, require more time than is expected, an extension should be made available.

What Constitutes Fraud?

In order for a plaintiff to sustain a common law civil action based upon fraud he must prove that the defendant, knowingly and with the purpose of deceiving, made a false representation, and that he, the plaintiff, relied upon that misrepresentation and that he consequently was damaged.⁴⁶ Basically, the same type of allegations and proof must be made by the Postmaster General to support a fraud order; however, since here the government is bringing the suit, the courts have held that there need be no showing of either actual reliance or of damage.

⁴⁵ The correct view of this type of injunctive proceeding is found in *FTC v. Rhodes*, 1950-1951 CCH Trade Cases ¶ 62,894, 191 F. (2d) 744 (CA-7, 1951), wherein it is stated that the court should grant the injunction if a showing be made of "a justifiable basis for believing, derived from reasonable inquiry or other credible information, that such a state of affairs . . . existed as reasonably would

lead the Commission to believe that the defendants were engaged in . . . violation of the Act."

⁴⁶ Although the courts have consistently refused to define "fraud" on the rationale that once it is defined the schemer will devise a method of circumventing it, these are generally considered to be the essential elements (*Farrar v. Churchill*, 135 U. S. 609 (1890)).

In *Baker v. U. S.*,⁴⁷ which admittedly arose under the criminal fraud provisions⁴⁸ but which should rule in fraud order cases as well, the court said:

We do not wish to be understood as intimating that in order to constitute the offenses it must be shown that the letters . . . were of a nature calculated to be effective It is enough if, having devised a scheme to defraud, the defendant, with a view of executing it deposits in the Post Office letters, which he thinks may assist in carrying it into effect, *although in the judgment of the jury they may be absolutely ineffective therefor.* [Italics supplied.]

In another criminal action, *Deaver v. U. S.*,⁴⁹ the court held that conviction was proper, regardless of actual injury, if the scheme was designed to defraud.

The proof of *fraud in fact*, sans the above two requirements, is necessary for all stop orders. This fraud includes the common law elements of *intent and knowledge*, and intent has proved one of the principal limiting factors in any attempt that the department has made to expand the use of the statutes. Over 50 years ago, the Supreme Court dealt a severe blow to its enforcement when it decided, in the *McAnnulty* case,⁵⁰ that the Postmaster General could not conclude fraud when there was a split of medical opinion over whether the treatment advertised was efficacious. The decision would probably not have been particularly offensive except for the facts of the case, which involved a mental cure for illness. This decision has been much modified by later court rulings, but still stands as a warning that intent must be shown and that it cannot be shown unless medical and scientific testimony is practically unanimously in favor of the government's position. The Court, in its latest interpretation of this doctrine, said:

We do not understand or accept it as prescribing an inexorable rule that automatically bars reliance of the fact-finding tribunal upon informed medical judgment every time medical witnesses can be produced who blindly adhere to a curative technique thoroughly discredited by reliable scientific experiences. But we do accept the *McAnnulty* decision as a wholesome limitation upon finding of fraud under the mail statutes when the charges concern medical practices in fields where knowledge has not yet crystallized in the crucible of experience.⁵¹

The statute provides that the Postmaster General is the judge of what constitutes fraud. The limits of his discretion are narrowed by the above cases and also by the power that the courts have to review

⁴⁷ 115 F. (2d) 533 (CCA-8, 1940), cert. den., 312 U. S. 692 (1941).

⁴⁸ 18 USC Sec. 1341 (originally enacted on March 2, 1889, Ch. 393, Sec. 1, 25 Stat. 873).

⁴⁹ 155 F. (2d) 740 (CCA D. C., 1946).

⁵⁰ *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (1902).

⁵¹ *Reilly v. Pinkus*, cited at footnote 9, at p. 274.

his actions. Although he is given the power, it could hardly be suggested—even by the department itself—that he has been given *carte blanche* authority; the scope of review which the courts have in these cases greatly determines how much it is restricted.

Scope of Review

Speaking of its own powers of review, the District Court for the District of Columbia said (quoting from *Read Magazine v. Hannegan*):

The duty of administering the law devolves on (the Postmaster General). The discretion is vested in him. The determination of the fact whether a fraudulent scheme is being conducted must be made by him "upon evidence satisfactory to him." The court may not substitute its own judgment for that of the Postmaster General. Neither may it review the weight of evidence and set aside his action merely because the court might have arrived at a different result on the same evidence.⁵²

The court here recognizes that Congress has removed the weighing of evidence from its hands and that, although it is a court of first instance sitting as an equity court, it has but appellate power. Whether all district courts accept this view is questionable. Recently, the United States District Court for the Southern District of New York, in a case where it appears a *de novo* review was granted, stated:

The issue, therefore, is not whether the claims . . . may have been exaggerated or even whether they are incorrect and misleading. The issue is whether they are "fraudulent" in fact. . . . We are not to set ourselves up as censors of the advertising . . .⁵³ [Italics supplied.]

If the court here meant by *we* they themselves, then it would appear that they were of the belief that the final decision, the final weighing of the evidence, was to be done by them.

The better rule would seem to be that the district court is to act merely to determine if there is substantial evidence, in the record as a whole, to substantiate the Postmaster General's decision. This is the now-established test being applied by the courts to administrative agencies, and it would appear to be the correct test here.⁵⁴

It would also seem that the district court should not sit *de novo*, but should restrict itself to the record as prepared by the Post Office Department:

Its jurisdiction is limited to a review of the proceedings before the Postmaster General to determine whether the evidence before him sustains his order

⁵² *Pinkus v. Reilly*, 71 F. Supp. 993 (1946).

⁵³ *United States Nature Products Corporation v. Schaffer*, 125 F. Supp. 374 (DC N. Y., 1954).

⁵⁴ *Universal Camera Corporation v. NLRB*, 19 LABOR CASES ¶ 66,191, 340 U. S. 474 (1951).

It may not on an independent investigation substitute its judgment for that of the Postmaster General.⁵⁵

Concurrent Jurisdiction of Federal Trade Commission and Food and Drug Administration

Federal Trade Commission.—The postal fraud order provisions are not the sole means which Congress has taken to control fraudulent use of the mails in connection with the sale of drugs and devices. Perhaps the principal agency involved in suppressing fraudulent merchandising not only of drugs, but of all commodities, is the Federal Trade Commission. Although the scope of that agency's policing is far wider than that of either the Post Office Department or the Food and Drug Administration, there is specific reference in the act which authorizes their existence to the use of the mails for the fraudulent advertising of drugs and devices. Section 12(a) of the Federal Trade Commission Act⁵⁶ reads:

It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.⁵⁷

Section 12(b) of the act establishes that any violation of the quoted section is an unfair or deceptive act which is condemned by Section 5 of the Federal Trade Commission Act.

The burden of proof which FTC has to sustain in an action brought under Section 5 is much less than that which encumbers the Postmaster General. It must prove merely that the advertising is false, not that it is fraudulent.⁵⁸ In spite of this, the agency is often criticized for the ineffectiveness of its proceedings and its lack of expertise. From a purely legal standpoint, however, it must be noted that Congress had greatly simplified the task of proceeding against false advertising in enactment of the above provisions.

The power that the agency has to enforce its orders is not nearly so strong as that of the Post Office Department. Although it is true

⁵⁵ *Shaw v. Duncan*, 194 F. (2d) 779 (CA-10, 1952).

⁵⁶ 38 Stat. 717 (1914), as amended, 15 USC Secs. 41-51 (1952).

⁵⁷ 38 Stat. 717 (1914), as amended, 15 USC Sec. 52 (1952).

⁵⁸ Vernon, "Labyrinthine Ways: The Handling of Food, Drug, Device and Cosmetic Cases by the Federal Trade Commission Since 1938," 8 *Food Drug Cosmetic Law Journal* 367 (June, 1953).

that a cease-and-desist order of the Federal Trade Commission goes into effect immediately upon its becoming final, either by the passage of time or by the denial of an appeal,⁵⁹ the actual effect of the order must be noted. The order does not put the offending party out of business; it merely restrains him from the false advertisement of his wares. But how small a change may be made in his advertising to take him out from under the order and to require a new determination by the agency that he is again involved in false advertising?

Although the Federal Trade Commission Act, as amended by the Wheeler-Lea Amendment, is aimed at substantially the same type of wrongdoer as the post office fraud statute, there is one situation which the Post Office could condemn but which FTC could not touch. That is the case in which the offender is using the mail not to advertise, but as an aid to his scheme—perhaps by way of distributing his product on an intrastate basis. A close examination of the Federal Trade Commission Act will show that this is not covered by its provisions but such action is within the scope of the Postmaster General.

This is not the important difference between the two acts, however. The difference, it is submitted, is in the type of offender at which they are aimed. It is apparent from the quantum of proof required by each act and by their provisions for remedial action that they are directed at two different groups. The postal statutes are directed at the fraud, the swindler, the fly-by-night drug merchant who is nothing but an outright cheat. The Federal Trade Commission has as its primary obligation the policing of false—not necessarily fraudulent—advertising. Its efforts should be primarily directed at the drug or device distributor who, although his advertising contains some questionable claims or misrepresentations, still produces a good and valuable product. He should not be destroyed; he merely should be chastised.

Food and Drug Administration.—Before the passage of the Federal Food, Drug, and Cosmetic Act of 1938⁶⁰ there was a wide split between those who wanted to place all advertising control of foods, drugs and cosmetics in the Food and Drug Administration and those who wanted to place it in the Federal Trade Commission.⁶¹ Congress, wisely or not, failed to give any control of advertising to FDA.⁶² The Adminis-

⁵⁹ 38 Stat. 717 (1914), as amended, 15 USC Sec. 45 (1952).

⁶⁰ 52 Stat. 1040 (1938), as amended, 21 USC Secs. 301-392 (1952).

⁶¹ Dunn, *Wheeler-Lea Act* (1938), p. 343 80 *Congressional Record* 4429-4436 (1938).

⁶² Wheeler-Lea Trade Commission Act, 52 Stat. 111 (1938) 15 USC Secs. 52-58 (1952).

tration has found it possible to exert a limited control over advertising, nevertheless, by what has been commonly called the "squeeze play."

Here the agency takes the position that a drug is misbranded under Section 502(f) of the Act⁶³ in that it fails to contain "adequate directions for use" if, although advertised for the cure or treatment of a certain disease, there is no reference to the disease on the label. If the disease is noted on the label, and it is not in fact treated by the medication, then the drug is misbranded under Section 502(a).⁶⁴

Strong arguments can be, and have been made,⁶⁵ that it was never the intention of Congress to give such power to FDA, but the courts have upheld the agency whenever its legality has been tested.⁶⁶

The Federal Food and Drug Administration is undoubtedly the best equipped, from a scientific standpoint, for the control of false and fraudulent claims in the drug and device field. The data-gathering forces that it has at its command, in the scientific and medical fields; singles it out as the agency which should be the most effective in preparing and prosecuting these cases, yet these forces are not available for use in the control of advertising. The many other duties of the agency are paramount, and the prosecution of false advertising can only be on a highly selective basis.

Cooperation between the postal department and the Food and Drug Administration is extremely necessary and highly to be desired. By the pooling of their resources, their statutory authority and their knowledge, advances can be made which neither agency could hope to make independently.

Conclusions

Although the founders of our Nation felt that "the power of establishing postroads [and a postal system] must, in every view, be a harmless power, and may, perhaps by judicious management, become productive of great public conveniency. Nothing which tends to facilitate the intercourse between states can be deemed unworthy of the public care,"⁶⁷ their observations are not wholly true. The power

⁶³ 52 Stat. 1050 (1938), as amended, 21 USC Sec. 352(f) (1952).

⁶⁴ Nelson. "Control of Advertising by Section 502(f)(1), 7 *Food Drug Cosmetic Law Journal* 579 (September, 1952).

⁶⁵ Work cited at footnote 64, at p. 593.

⁶⁶ *Alberty Food Products Company v. U. S.*, CCH Food Drug Cosmetic Law Reports ¶ 7182, 185 F. (2d) 321 (CA-9, 1950); *Colgrove v. U. S.*, 176 F. (2d) 614 (CA-9,

1949), cert. den., 338 U. S. 911 (1950); *U. S. v. 38 Dozen Bottles of Tryptacin*, CCH Food Drug Cosmetic Law Reports ¶ 7264, 114 F. Supp. 461 (DC Minn., 1953).

⁶⁷ *The Federalist*, No. 42, at p. 278 (Modern Library Ed., 1941) (Madison). It is believed that this is the only reference to the establishment of a Post Office Department in *The Federalist*.

to control the postal department, which includes the power to exclude one from the use of the mails, has become one of the strongest of governmental weapons. As the postal system expanded and became more efficient, business practices changed; the customer who used to be around the corner or across the town moved across the country and could only be served as long as the free and unrestricted use of the mails was available. As this power has grown, consumer and merchant have found themselves allies in the search for a method of discouraging and punishing fraud through the use of the mails.

Such controls must contain adequate safeguards for the protection of industry and, at the same time, must be of sufficient strength to be effective. One of the primary sources of control has always been the post office fraud statutes, and these statutes have a place in our law today, even though Congress has enacted additional laws aimed at the same end.

From the standpoint of effectiveness of these statutes, the Administrative Procedure Act was detrimental; in respect to the necessity of providing procedural safeguards that act was both desirable and necessary. The act requires revision, however, to return it to its stature as a weapon of the government against fraud. The amendment currently being proposed is far from adequate for this purpose because it destroys the safeguards which the Administrative Procedure Act brought to the proceedings.

Even though the postal statutes are a necessary part of our protective scheme, they are of very limited applicability. They are directed at fraud, and fraud implies and connotes intentional deception of the public. If there be any attempt on the part of the Postmaster General to extend the purview of the acts to include cases other than those of genuine fraud, it is the duty of the courts to restrain such action. Ideally, though, the restraint should come from the agency itself.

[The End]

FOOD PRODUCTS—PRICE DISCRIMINATION, BROKERAGE COMMISSIONS

A seller of food products which grants a promotional allowance to one customer must offer affirmatively, or otherwise make available, such allowances to all competing customers on proportionally equal terms. (Released May 3, 1956.)

A corporation has been ordered to stop accepting brokerage compensation from food-products manufacturers on sales made to its stockholders which are wholesalers. (Released May 3, 1956.)—CCH TRADE REGULATION REPORTS ¶ 25,960; 25,959.