FALSE OR MISLEADING MAIL MATTER

(Part II)

HEARING

BEFORE THE

S MITTEE ON POSTAL OPERATIONS

OF THE

COMMITTEE ON

OFFICE AND CIVIL SERVICE

SE OF REPRESENTATIVES

EIGHTY-NINTH CONGRESS

SECOND SESSION

ON

H.R. 6102

A BILL TO AMEND SECTION 4005 OF TITLE 39, UNITED STATES CODE, RELATING TO FRAUDULENT, FALSE, OR MISLEADING AND LOTTERY MAIL MATTER, AND FOR OTHER PURPOSES

JULY 26, 1966

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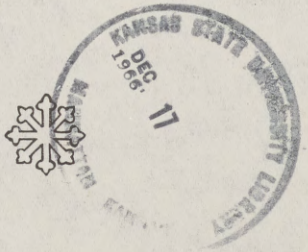

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FALSE OR MISLEADING MAIL MATTER

TUESDAY, JULY 26, 1966

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON POSTAL OPERATIONS OF THE
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:13 a.m., in room 346 Cannon House Office Building, Hon. Thaddeus J. Dulski (chairman of the subcommittee) presiding.

Mr. DULSKI. The committee will come to order.

This hearing is being held today to receive further testimony in regard to H.R. 6102, which is intended to strengthen postal laws for the protection of the public against schemes to obtain money or property through the mail by false promises or representation. At the first executive meeting of the subcommittee on this proposal, questions were raised as to the actual meaning of the word "misleading," which this bill proposes to substitute for the word "fraudulent" in section 4005 of title 39, United States Code.

Questions were also raised as to whether the Department of Justice would have any difficulties under the amended language should they be required to defend the U.S. Government in a court of law as a result of actions under section 4005, as proposed to be amended by H.R. 6102.

Accordingly, at the direction of the subcommittee, I have invited representatives of the Department of Justice to appear at this hearing for a discussion of these points and any other matters the witnesses may care to present.

Our witness today is Mr. Wozencraft, Assistant Attorney General, Office of Legal Counsel. We are very happy to have you with us.

STATEMENT OF FRANK M. WOZENCRAFT, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. WOZENCRAFT. Thank you, sir.

Mr. Chairman and members of the committee, I appreciate the opportunity to appear here this morning to discuss the position of the Department of Justice with respect to H.R. 6102, which is set forth in Deputy Attorney General Clark's letter to the committee chairman, dated July 15, 1966. As his letter indicates, the Department does not oppose enactment of this bill. It does, however, feel that the bill raises constitutional questions which should be considered by the subcommittee.

The present 39 U.S.C. 4005 is a fraud statute. It authorizes the Postmaster General to withhold mail delivery to any person engaged

in conducting a scheme for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises. An intrinsic element of fraud has traditionally been an intent to deceive and, before issuing an order withholding mail delivery, the Postmaster General must find proof of such intent. *Reilly* v. *Pinkus*, 338 U.S. 269, decided in 1949. H.R. 6102 would expressly eliminate this requirement and change "fraudulent" to "misleading." It would permit the Post Office Department to cut off mail delivery even to one who has unintentionally advertised his product in a manner which the Department considers misleading. What has always been called a mail fraud order would no longer require proof of fraud.

Depriving a citizen of the use of the mails in a business venture is stiff medicine. The Supreme Court has treated it accordingly. In *Reilly* v. *Pinkus*, *supra*, the Court considered the Government's contention that, under the present "false or fraudulent" test, the respondent was barred from using the mails, " 'regardless of the question of good faith, even if the respondent believed in all of his representations * * * if they were false as a matter of fact.' " Distinguishing mail fraud orders from FTC cease and desist orders, the Court disposed of that contention as follows:

> It is not amiss to point out that the Federal Trade Commission does have authority to issue cease-and-desist orders in cases like this without findings of fraud. * * * But that remedy does not approach the severity of a mail fraud order. * * * Unlike the Postmaster General, the Federal Trade Commission cannot bar an offender from using the mails, an order which could wholly destroy a business. See Brandeis, J., dissenting in *Milwaukee Pub. Co.* v. *Burleson*, 255 U.S. 407, 417 *et seq.* The strikingly different consequences of the orders issued by the two agencies on the basis of analogous misrepresentations emphasize the importance of limiting Post Office Department orders to instances where actual fraud is clearly proved. (338 U.S. 277.)

The importance which the Supreme Court attaches to a citizen's right to use the mails is emphasized again in the Court's recent decision in *Lamont* v. *Postmaster General*, 381 U.S. 301, decided in 1965. There the Supreme Court struck down as unconstitutional a statute which inhibited the delivery of Communist propaganda (39 U.S.C. 4008(a)), holding that an addressee could not be deprived of the right to receive such mail—or even be required to fill out a form requesting delivery in order to receive such mail.

Obviously this decision dealt with first amendment rights, and did not reach the case of preventing a citizen from purchasing by mail a product which the Post Office Department has found misleadingly advertised. In the case of communication by mail, however, it is always difficult to define the scope which the courts will give to the first amendment.

There is one more possible constitutional aspect which we feel the subcommittee should consider—that of substantive due process. It is true that section 4005 prescribes a civil rather than a criminal sanction. As I have indicated, however, a fine and a criminal prosecution may be much less onerous than being driven out of business because mail is returned to one's customers marked "fraudulent" or "unlawful." In *Reilly* v. *Pinkus* the Supreme Court required a greater showing to stop mail delivery than to support an FTC cease and desist order. It is possible that on a constitutional basis the Court could require almost as great a showing as for criminal sanctions. In criminal statutes the courts have read the requirement of intent into statutes to preserve their constitutionality. *Cf. Moris-*

sette v. *United States*, 342 U.S. 246 (1952). H.R. 6102 would preclude this possibility. It would not, however, preclude the possibility of a holding that section 4005 as amended by this bill denies substantive due process in violation of the fifth amendment where a person has not intentionally engaged in wrongful conduct and where no standards are prescribed as to what the Post Office Department will regard as misleading. Nor does H.R. 6102 preclude the possibility of a holding that under some circumstances one subjected to a mail fraud order might be deprived of his property without due process of law.

Having invited the committee's attention to these possible problems, let me quickly add that they are simply possibilities and not certainties. A mail fraud order is obviously less severe than a jail sentence. Moreover, it serves one function which criminal penalties do not: it can protect prospective purchasers by stopping violations dead in their tracks. And where the Congress has sought to protect the public from clearly harmful consequences, the courts in a few instances have upheld even criminal penalties without proof of intent, as in the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301 *et seq.* The Supreme Court has explained the justification for such laws in these terms:

"Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *United States* v. *Dotterweich*, 320 U.S. 277, 280–281, decided in 1943.

Moreover, in *S.E.C.* v. *Capital Gains Bureau*, 375 U.S. 180, decided in 1963, the Supreme Court held that an injunction against fraud could be granted under the Investment Advisers Act of 1940 even where no intent is established, on the theory that, in equity, fraud has a broader meaning than in law, especially where a fiduciary relationship is present. The same general theory might be used to support a statute based on a determination of Congress that false and misleading mail schemes are such a threat to the public that mail fraud orders can be justified without proof of intent. The case would be more analogous, of course, if the statutory remedy were an injunction rather than an administrative order.

This concludes my prepared testimony. As you can see, it is a situation where the Department of Justice, as I stated earlier, rather than opposing the bill, simply feels that it should call these matters and possible problems to the attention of the committee. And, in this connection, I want to make one point which my friend, Mr. Lawrence, has been chiding me about since yesterday when we started chatting. I was a law clerk for Justice Black when the Supreme Court decided the case of *Reilly* v. *Pinkus*. So, I did have one occasion back in 1949 to get familiar with this problem. I must admit that I haven't looked at it since, until I reached the Department of Justice and became Assistant Attorney General about 3 months ago. So I am getting newly acquainted with these problems.

Mr. DULSKI. Thank you very much.

You have given me a lead to my first question. What bearing does the case of *Reilly* v. *Pinkus* have on this bill?

Mr. WOZENCRAFT. Mr. Chairman, I think it establishes that the Court regards the mail fraud order as something so severe that it read into the existing statute the requirement of intent, differentiating

it from the FTC cease and desist order, where basically the same circumstances are involved. The severity of the sanction is such that the Court regards this as more than simply an order to stop doing something, such as a cease and desist order, but rather, a really severe sanction.

You will note that the word "severe" does arise in the opinion. Given this judicial view and given the fact that a mail fraud order or any order stopping the use of the mails, absolutely stops those things from going through the mails, we get into this prior-restraint kind of concept that gave the Court so much concern in the *Lamont* case, even though, admittedly, the first amendment area involved in the *Lamont* case would rarely be involved in a mail fraud order situation.

Mr. DULSKI. Mr. Gross?

Mr. GROSS. I was a little bit surprised that you didn't come forth at the close of your presentation with a statement as to your position on this bill. After all, I assume that you in the Justice Department will be involved if we pass a bill of this kind. Are you opposed to it or are you not opposed to it?

I am not a lawyer, understand, but I think you should state a firm position on this bill to the committee.

Mr. WOZENCRAFT. The matter of forecasting constitutionality—and that is what we are dealing with here, not simply matters of policy—is always one, of course, of deciding what nine men in black robes, after hearing many arguments and considering the matter thoroughly for many months, will decide, often by 5-to-4 vote. We are not saying that this would be unconstitutional; we are saying that it raises constitutional problems. Now, insofar as——

Mr. GROSS. The whole weight of your statement—unless I am mistaken—is that you feel that such a law, if enacted in the form presented to this committee, would be unconstitutional.

Mr. WOZENCRAFT. We think that there is a danger that this might be the holding of the Court. We would not presume to predict that this would be the holding of the Court. And, in that connection, let me point out that the constitutionality of any statute is determined by the Court in the fact context of a particular case and on the record of the entire legislative history. And, if this committee and this Congress reached the conclusion that this is really the only way that this kind of abuse of the public can be stopped, I am confident that the courts would give that great weight. And I think how they would decide might very well depend on the particular factual context of the case that arises—in other words, the statute as applied in actual practice.

Mr. GROSS. Well, what is the opinion of the Justice Department as to the proposition that this is the only way that this sort of thing can be stopped?

Mr. WOZENCRAFT. Without having nearly the knowledge that the Post Office Department has on this subject, we would doubt that it is the only way, frankly.

It would seem to us that there are other possibilities. One method, for instance, would be to authorize the statutory injunction, where, as in the case of the *S.E.C.* v. *Capital Gains Bureau* that I quoted, the Post Office Department could go into the courts and ask for judicial stopping of the distribution of this particular mail. That can be

done quite promptly. I think it would take no more time than the present administrative hearings.

Another possibility would be to take care of the finding of intent under the present law, by notifying the person in advance and being sure that he has a chance to change his position and then going to the hearing examiner with the proposition that, having known of that, and having violated it after that, he then has made a willful violation, which would at least strengthen the Government's case considerably on this point.

A third possibility would be to take care of the intent aspect by, for instance, saying that the proof that something is misleading would be a prima facie case but that the defendant could have a good defense by showing that he did not have any intent to deceive. Now, this shifts the burden; it would be rather unusual in this kind of proceeding, but it would be another possibility.

The thing that worries us is that when you strike out the requirement of intent, when you strike out the word "fraud" and all reference to "fraud," you have really changed the nature of this animal, which has always been called a mail fraud order. And now we are saying that it is not a mail fraud order, it is a "mail stop order" against mail which is either false or misleading, whether or not it is fraudulent. And that concerns us.

And, I think that it would give us problems in the courts. Whether we could successfully overcome those problems would depend a great deal, I believe, on the record made in the legislative history in this committee, on the regulations which the Post Office Department would issue to give people some advance notice of what they would regard as misleading, what kind of standards they would require. Right now there would be nothing in the act to guide the Post Office Department except its own conscience. Let me quickly add that I think this conscience will always provide a very sturdy barrier against any sort of oppression or misuse of this great power. But the power, itself, is one which obviously the Supreme Court has viewed with concern, and it concerns the Justice Department that there are so few mileposts to point directions in applying these standards.

Mr. GROSS. I agree with the latter part of your statement.

Mr. Chairman, in deference to the gentlemen on the other side of the aisle who are schooled in the law, I am going to yield the floor, with the hope, perhaps, I may have the opportunity to ask a few more questions later. I should like to hear them develop this further. There are two lawyers present here—or three.

Mr. DULSKI. Three.

Mr. GROSS. Three, yes.

Mr. DULSKI. Mr. Daniels.

Mr. DANIELS. Mr. Wozencraft, you pointed out in your statement and in your oral testimony that in the case of *Reilly* v. *Pinkus* the Court definitely declared that an intent to deceive would have to be proved by the prosecution.

Mr. WOZENCRAFT. Yes.

Mr. DANIELS. And that the Court there dealt with the severity of the penalty and thought that, without proving an intent to deceive or actual fraud, that was going too far, that a man could be put out of business; is that correct?

Mr. WOZENCRAFT. Yes, sir.

Mr. DANIELS. Now, you indicated that instead of adopting the amendment that is proposed under this bill, that, perhaps, it would be better to apply for injunctive relief and you cited the case of *S.E.C.* v. *Capital Gains Bureau.* Would you recommend that procedure instead of the amendment proposed by this bill?

Mr. WOZENCRAFT. There are so many factors involved in that kind of a decision that I would certainly wish to defer to the Post Office Department on many aspects of whether they feel this would solve their problem. I do believe that in order to authorize this kind of injunction, it would be desirable to provide for the injunction in the statute and not simply rely on equity proceedings, because provision in a statute for an injunction would get rid of two requirements which otherwise would need to be proved: irreparable injury and lack of adequate remedy at law. It would also forestall an ancient equity argument that one should not enjoin what could be a crime. And there are, of course, criminal fraud statutes on the books here.

It would seem to me that this statutory kind of injunction proceeding has proven pretty practical for some agencies who need to stop things quickly. Of course, there are also cases of administrative proceedings such as cease and desist orders in the FTC's case. I think the problem that makes this mail fraud area so difficult is that this particular penalty can be, in some circumstances, so severe. The injunctive relief avoids some of that severity. You don't get the mail just being shipped back to somebody with a stamp "Unlawful" on it and you don't arrange for the mails to be impounded. Of course, there is an impounding provision presently in the statute which can be obtained in a court, while proceedings are in progress.

Mr. DANIELS. Well, I join with my colleague, Mr. Gross, in asking you: What recommendation does the Department make? Do you approve or disapprove of this legislation?

Mr. WOZENCRAFT. We feel that this legislation will cause problems. We certainly, therefore, cannot approve it. If this committee and the Post Office Department tell us that this is the only way, or the best way, that they feel that these problems can be handled, then, we are going to do our best to support that law. But we could not approve it in this form, frankly.

Mr. DANIELS. I don't think the Post Office Department will take that position, because I read in the paper, only yesterday, that there was a mail-order conviction obtained recently. So, if convictions can be obtained, I doubt very much if the Department is going to say that "we must have this legislation because it is the only legislation that will help us."

Mr. WOZENCRAFT. Well, as I acknowledged earlier, I think there is an area for some injunctive relief, stopping the violations in addition to just criminal penalties. The question is not whether some such provision is desirable, but what kind of provision it should be. We would suggest, first, that there are ways of handling this intent, the difficulty of the proof of intent, without wiping it out. For instance, the Post Office Department could be given subpena power which it now complains that it does not have. This injunctive relief possibility is one that I have not discussed with the Post Office Department. Our invitation to discuss this with the committee came very recently and we have been addressing ourselves to this particular provision. I have not had an opportunity to get with Mr. May, the General Counsel of the Post Office Department, until late yesterday afternoon.

I would hope that some consideration could be given to these possibilities.

Mr. DANIELS. What do you think of this procedure—along an administrative level—that the Post Office Department notify the alleged offender of his actions and that he appear before the Bureau, perhaps before a review board or a reviewer, and explain what his answer is to the alleged violation? And then if a satisfactory reply is not received, the Post Office Department issue an order to desist from such practices. Do you think that would be providing the necessary legal relief?

Mr. WOZENCRAFT. In terms of legality, I think that would be an improvement, sir.

Mr. DANIELS. In other words, when I say necessary legal relief, would that be providing the alleged offender with due process?

Mr. WOZENCRAFT. Well, assuming that the hearings are in accordance with the Administrative Procedure Act, as I am sure they are now and would be there, the only real problem that would then arise—you are talking now about a cease and desist order and not a mail stop order?

Mr. DANIELS. That is right.

Mr. WOZENCRAFT. I think that that would provide him with the same kind of protection that he receives in the Federal Trade Commission kind of cases, and therefore would be adequate protection. Now, in the Federal Trade Commission kind of cases, also, there are provisions made for judicial enforcement or appeal from the cease and desist orders which could also be provided.

One of the difficulties with the mail fraud order is that it is very difficult to get into court on it. If you go ahead and make the change that the Department wants, then the case becomes moot, and the only way you can get it tested is to persevere and insist on leaving your materials the same. If you think you are correct and want to test it out, test out that assumption, it is very difficult for you to do. It is a very cumbersome kind of animal, in other words.

Mr. DANIELS. No further questions.

Mr. DULSKI. Mr. Johnson.

Mr. JOHNSON. I regret, sir, that I was not here to hear your testimony. What I am going to ask you may be repetitive.

Under present law, as you stated in your statement, in order to issue a cease and desist order or invoke criminal penalties you must make out a case of fraud and show an intention to defraud, and prove it?

Mr. WOZENCRAFT. That would not apply to cease and desist orders, but it would to the mail fraud order which we are discussing here, which is a little different from the cease and desist order. The cease and desist order orders the man not to violate; the mail fraud order summarily stops him from receiving mail.

Mr. JOHNSON. I see. From even receiving mail?

Mr. WOZENCRAFT. From receiving mail from people who want to send in an order for one of those things that he is selling. They just can't do that by mail. The mail gets stopped and sent back to them, under the present bill, stamped "Fraudulent"; under the proposed bill, stamped "Unlawful."

Mr. JOHNSON. Now, if this bill were to pass, then, rather than have a hearing and being required to prove intent, all you would have to do, in sort of an ex parte manner, in your own opinion decide that this

mail is misleading, and you could issue a similar order, and the man would not be able to receive his mail; is that correct?

Mr. WOZENCRAFT. Yes, sir. Now, this is the position of this bill. I gather you know, sir, I am not with the Post Office Department, I am with the Justice Department. So, I am approaching this from the standpoint of legality and the constitutional problems.

Mr. JOHNSON. Yes.

Mr. WOZENCRAFT. Although, I hope I notice the practicalities, too.

Mr. JOHNSON. In other words, the Post Office Department, to repeat, would have to just make a finding, within themselves, that it was misleading, and then they could proceed and invoke the same drastic penalty that they presently can do if they issue a mail fraud order, if this bill passes?

Mr. WOZENCRAFT. Yes, sir.

Now, of course, "within themselves" would mean by the processes provided under their regulations, which provide for hearing examiners and appeal to a judicial officer within the Department, but it is still within themselves in that it is a departmental decision.

Mr. JOHNSON. Yes. And it is your contention, apparently, that even while they must show an intention to defraud under present law, if this bill passes they would not have to show an intention to mislead?

Mr. WOZENCRAFT. That is right. And that is where our concern comes.

Mr. JOHNSON. Had you thought of this: Supposing that this bill were, say, watered up a little, wherein the Department could issue a mail fraud order by themselves finding that, in their opinion, on its face, per se, it was a fraudulent advertisement, and could go ahead and issue a mail fraud order? How would that facilitate the Post Office Department in stopping fraudulent mail?

Mr. WOZENCRAFT. Well, I believe that that would be something that they could handle under the present statute, Congressman, without any amendment. When they conclude that something is fraudulent, per se, I think, in a sense, fraudulent includes intent to deceive. So, they are finding that, on its face, there is intent to deceive, perhaps.

Now, it might be of some help to them to have it spelled out in the statute that there is some concept of fraudulent, per se. It is awfully tough, though, to call something fraudulent without getting into the facts and evaluating the whole situation. The thing that might be fraudulent in one context might not be in another context. So, I am concerned, frankly, about the possibility or desirability of getting "per se" language on something like "fraud."

Mr. JOHNSON. Of course, I know that in law, practically any phase of law, either criminal or civil, you just can't say "and so-and-so fraudulently did this or that"; you can allege that word and say he did it "fraudulently." That is to say, he did the following, and the facts that you allege must make out a case of fraud.

Mr. WOZENCRAFT. Yes.

Mr. JOHNSON. That goes all through our system of jurisprudence.

Mr. WOZENCRAFT. Yes, sir.

Mr. JOHNSON. Now, if this passes, I am thinking of, say, a Member of Congress' newsletter. We are bound to be partisan, let's say, on the Republican side where a newsletter goes out and we accuse the President of something which, in our opinion, partywise, we think is a pretty unconscionable thing, but to the other side, the Democratic side, they might say, "Well, that statement in that newsletter is

misleading." And all of a sudden one of we Members of Congress may find that our newsletter is stopped and we are stopped from receiving any more mail. Would that be possible under this "misleading" statute?

Mr. WOZENCRAFT. I think any interpretation of that nature of it would be held unconstitutional by the Supreme Court, clearly, under its decision in the *Lamont* case which I referred to in my testimony; *Lamont* v. *Postmaster General.*

Also, I hope that the Congress would never be accused of actually obtaining money through the mails by means of false or misleading pretenses. I guess campaign contributions might represent money being mailed to a Congressman, but it is a good deal different from what this is intended to cover.

Mr. JOHNSON. This statute is primarily aimed at obtaining money through the mails by false pretenses.

Mr. WOZENCRAFT. Yes, sir. Of course, part of our concern here is the absence of guidelines and what is false and misleading — false or misleading. It is not even "and misleading." It is "or misleading." This means a decision within the Department that an advertisement, a brochure, anything like that, is misleading. We might just have a seller's puff involved. I am sure that the Post Office Department would not intend to apply the statute in that kind of a case but there is nothing that says it couldn't in the statute itself, under this amendment.

Mr. GROSS. Is it your opinion, sir, that there would have to be money or property involved?

Mr. WOZENCRAFT. I think someone has to be conducting a scheme to obtain money before this gets involved under this particular section. There are other sections. There is one on mailing obscene matter. There is another that was declared unconstitutional in the *Lamont* case against mailing Communist propaganda to a man unless he actually sent in a card that he wanted to receive it, in which case he could.

Mr. GROSS. Then we come down to a definition of property. We understand, I think, what money is supposed to be. Then we come down to a definition of property—what constitutes property. I suppose there is a definition for it. Would property involve a seat in Congress? In other words, the estoppage of campaign material going out which the Postmaster General or his lieutenants in the Post Office Department determined to be misleading. Would this be an involvement of a property right?

Mr. WOZENCRAFT. I really believe that in the political area there is no cause for concern under the holding in the *Lamont* case. I think any effort to apply any statute to restrict distribution through the mails of political materials of any character would be held unconstitutional. So I do not believe that should really be a topic of concern.

Mr. JOHNSON. If this bill passes, nothing would stop the Postmaster General from stopping political mail that he determines misleading and it would put the candidate to go to court to assert his rights and the campaign would be over by that time.

Mr. WOZENCRAFT. I suppose, really, under the present statute, that could happen if the Postmaster General found the mail was fraudulent and you were really trying to mislead the voters. The removal of the phrase "intent" would not make much difference in that.

Mr. JOHNSON. He would have to show intent.

Mr. WOZENCRAFT. Yes, sir.

Again let me say I really feel that the fact or the idea of obtaining money is an integral aspect of section 4005. It has been aimed traditionally at commercial type schemes, not at political schemes, where other elements such as political come in. The only instance of the latter that I know of was in the Communist case where there was a specific provision enacted by the Congress.

Mr. JOHNSON. Can you conceive of a statute, a compromise here, where the statute, instead of using the word "misleading" would use the word "fraudulent," where the Postmaster General could proceed as he would under this misleading situation, without a finding of intent to defraud?

Mr. WOZENCRAFT. It is very hard for me to see what kind of language you could have that would use the word "fraudulent" and still omit this element. It is possible, as I mentioned in the *S.E.C.* case earlier, *S.E.C.* v. *Capital Gains Bureau*, in the opinion of the Court, Justice Goldberg goes to considerable length to point out that fraud is a developing concept. In a situation where an investment adviser was misleading his customers by failing—what he was doing if I remember the facts correctly, and I may not—he was giving them information on stocks that were going up, but he might have just bought some of those stocks. Then when all the people came in and bought them it might go up for them, too, but it had gone up even more for him.

The Court held that this was a breach of fiduciary duty and also held that it was equitable fraud. It drew a line between equitable fraud and legal fraud. It is possible that some language might be fashioned that would indicate that where the language was misleading it was presumed to be fraudulent, if the Post Office Department found that it actually had defrauded people, unless proof of absence of intent is introduced by the defendant. There are a lot of possibilities like that, but equally possible, I believe, would be either a utilization of the present remedy with perhaps this kind of advance notice before one starts the proceedings. I do not know exactly what the Post Office does in this regard. It seems to me if the Post Office Department tells a man that what he is sending out is misleading, and he continues to do it anyway, certainly that is willful.

The only problem then would be, and the Post Office Department points to these cases, there are some where the man honestly believes that what he is doing is not misleading and is absolutely true and correct. The question then is whether the determination in that kind of circumstance is one the Post Office should make in the mail fraud order.

Mr. JOHNSON. I yield back my time.

Mr. DULSKI. Mr. Nix.

Mr. NIX. Mr. Wozencraft, I have been sitting here for about 30 minutes trying to figure out whether or not it is not true that there is no need for H.R. 6102.

Mr. WOZENCRAFT. This is something which I and the Justice Department would be very presumptuous to announce a decision on. I would hope, as I mentioned, that within the present framework, perhaps more effective results could be achieved with some devices of the kind I have been talking about. Prior notice and publishing regulations within the Department that whenever a notice is dis-

regarded that it will be deemed to be a willful violation from that point on. This is a very marshy area.

Mr. NIX. Suppose that we were able to convince you that by giving us your opinion, by answering the question I put to you, that you would in no way offend anyone, would you then say that in your opinion this thing is not needed at all.

Mr. WOZENCRAFT. Seriously, it is not my fear of offending anyone. It is my feeling that I am not sufficiently familiar with the facts or situation on which the proposed amendment is based.

Mr. NIX. I mean this, Mr. Wozencraft. You are thoroughly familiar with the existing law covering this issue or this type of situation. Calling upon your knowledge of the existing law, I now ask you whether or not you think there is any need for H.R. 6102.

Mr. WOZENCRAFT. I would hope that there is not because I would hope that by perhaps amending regulations within the Department, and changing somewhat the method of handling these things, the legitimate aims of the Post Office Department could be achieved without amendment. As I say, however, I am speaking as an individual when I say this. As an individual I have a certain predilection toward the statutory injunction as a method of enforcement. But this is not something that the Department of Justice has taken any position on. This is just something I have seen work in various kinds of cases. It is very different from the mail fraud order. There is just no doubt about that.

Mr. NIX. Even if the change from fraudulent to misleading had not been incorporated in H.R. 6102, it still would have been objectionable, would it not?

Mr. WOZENCRAFT. I feel that the present statute is limited to situations where there is fraud rather than where there is something that is misleading.

It presents a vastly stronger case for administrative action, a vastly stronger need to protect the public, than something that may be regarded by somebody as simply selling fluff, and by somebody else as misleading. Fraud is fraud, and that is worse.

Mr. NIX. The last thing I suggest to you is that, whatever we do with H.R. 6102, it certainly would remain objectionable. So we are left to the device of either discarding it or drawing up something altogether different.

Would you say that?

Mr. WOZENCRAFT. I feel, as I have just said, that the situation where there is actual fraud to me is quite different from the situation where there is simply some misleading aspects to some advertising materials. So I do not regard the present statute as objectionable when used in that way. I think *Reilly* v. *Pinkus* makes it very clear that there are only limited kinds of situations in which the statute can properly be used. I also feel that there may be other ways of improving on this without jettisoning the entire mail fraud order structure. On the other hand, there is something to be said for shifting the approach either with a cease and desist order or to a statutory injunction. These involve so many practical aspects on which I would really welcome the thoughts of the Post Office Department and of this subcommittee that again I can only speak as an individual on these matters.

Mr. NIX. It would seem to me that, in view of the fact that in your private opinion you do not feel it is necessary to have this thing,

because present law is adequate to accomplish the objectives of this, then I do not see any need to try to reform it or to make it acceptable.

Mr. WOZENCRAFT. Again I do not feel I am in a position to say that the law is not necessary or that it is not objectionable.

Mr. NIX. May I say this to you? Having said that the objective sought by H.R. 6102 can be accomplished by present law, then it seems to me it follows that there is no need to enact additional legislation.

Mr. WOZENCRAFT. Sir, the question of need is something I feel it would be a little presumptuous of the Department of Justice to speak on. What we speak on is the kind of constitutional and legal problems which are encountered when it is changed in this way. It is to this bill that we have addressed our attention. It is on this bill that we have been invited to comment and on which we have commented.

Mr. NIX. I have no further questions.

Mr. DULSKI. Mr. Gross.

Mr. GROSS. No, thank you, Mr. Chairman.

Mr. DULSKI. Mr. Johnson, our staff director, has some questions.

Staff Director JOHNSON. Thank you, Mr. Chairman.

Mr. Chairman, these questions are ones in the interest of Mr. Udall, the author of the bill, who cannot be present. First, is it not true, Mr. Wozencraft, that a defendant or respondent to a mail fraud order who is dissatisfied with the outcome of the administrative proceedings always has recourse to the courts for relief?

Mr. WOZENCRAFT. Mr. Johnson, it is particularly awkward to get judicial review in the situation of a mail fraud order in comparison to a situation where there is statutory provision for appeal. There is no such provision in the mail fraud statutes. The only recourse that a man has is by way of an injunction against the Post Office Department which is moot unless he has continued his violation and the order continues in effect. This makes it very difficult to get judicial review of his contention that the statements are not fraudulent or misleading without subjecting himself first to the mail fraud order from which there is no direct appeal.

Staff Director JOHNSON. In your opinion, would it correct deficiencies in H.R. 6102 if provisions were written into section 4005 granting specific statutory right to judicial review similar to those that are written into the statutes with respect to obscenity?

Mr. WOZENCRAFT. It would be most helpful. I would still be a little concerned of the test of just plain misleading with no further criteria. But it would certainly be most helpful.

Staff Director JOHNSON. Another question, Mr. Wozencraft, with respect to the word "misleading." It is true, is it not, that the word "misleading" is used in the Food and Drug Act and perhaps several other statutes where administrative sanctions are applied by cease and desist orders or something of the kind?

Mr. WOZENCROFT. Yes, sir; that is correct.

Staff Director JOHNSON. So it has been interpreted.

Mr. WOZENCRAFT. It has been interpreted, yes. Of course, in each context, in each statute it often has a different interpretation, because the context of the statute can often give fabric to the meaning of the term. I think that our concern with the word "misleading" is not the word itself. It is really a perfectly nice word. It has a little

different consequence in a situation where you have a cease and desist order on the one hand, and where everybody trying to send you mail gets it back stamped "Unlawful" on the other.

Staff Director JOHNSON. I have two more, Mr. Chairman, if I may. Is there any essential difference, Mr. Wozencraft, in the proof that is required in proving criminal fraud and in proving civil fraud?

Mr. WOZENCRAFT. Obviously in a criminal situation the burden of proof is on the state to prove something beyond reasonable doubt. In a civil case a preponderance of the evidence will carry the day. So there is that rather substantial difference. Usually fraud is fraud, whether it is in a civil statute or a criminal statute. I did mention earlier a developing doctrine of equitable fraud that the Supreme Court referred to in the case of *S.E.C.* v. *Capital Gains Bureau.* It might be that this would work over into that kind of context, but it is not presently in that kind of distinction.

Staff Director JOHNSON. Could you express an opinion on this? In view of the *Reilly* v. *Pinkus* decision, and several other cases which were cited by our Chief Postal Inspector in his testimony, wouldn't it appear to be possible or even probable that section 4005 of the Postal Code might as well be written out of the law and have the Post Office Department proceed under title XVIII, Criminal Fraud, in all of these cases?

Mr. WOZENCRAFT. Mr. Johnson, I feel, as I said a little earlier, that there is room for some kind of civil relief as well as criminal prosecution, something that will make the man stop sending out these misleading things or these fraudulent things.

Staff Director JOHNSON. A cease and desist order.

Mr. WOZENCRAFT. A cease and desist order or an injunction or something like that. I think if you relegate the Post Office Department to simply criminal action it can take an awful long time to finish a criminal action and a lot of damage can be done in the meantime.

I think that some interim remedy that can stop what can be a real abuse, a real fraudulent situation, should be possible.

Staff Director JOHNSON. The final question, Mr. Chairman: Would the views of the Department of Justice be modified or changed if H.R. 6102 were amended so as to merely strike out the two words "or fraudulent" from the present section 4005? Then in effect it would apply to persons engaged in conducting a scheme or device for obtaining money or property through the mails by means of false pretenses, representations or promises.

Mr. WOZENCRAFT. While I cannot speak for the Department without checking with the Department, it would seem to me that certainly that would be considerably less troublesome than the present wording of H.R. 6102. You still have *Reilly* v. *Pinkus* which read "false or fraudulent as still requiring intent." When you cut out "or fraudulent," query whether you remove the intent requirement of *Reilly* v. *Pinkus*. I would be inclined to think that perhaps you would. It would seem to me that a plain false statement is a false statement. There is no particular room for intent to come in there as there is in the word "fraudulent." However, the courts might still require some showing of intent.

Staff Director JOHNSON. Thank you very much, Mr. Wozencraft and Mr. Chairman.

Mr. DULSKI. Are there any further questions?

Mr. JOHNSON. I have no more questions. I want to compliment the witness on the depth of his knowledge on this and his frankness with the committee. I think he did an excellent job this morning.

Mr. WOZENCRAFT. Thank you.

Mr. GROSS. I want to join in that statement.

Mr. WOZENCRAFT. Thank you. It has been a pleasure to discuss the matter with you and appear before you.

Mr. DULSKI. The hearings will now be adjourned.

(Whereupon, at 11:05 a.m., the hearing was adjourned.)

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