South Carolina Law Review

Volume 22 | Issue 3 Article 8

1970

"Mail Fraud--Fraudulent Misrepresentations Must Be Distinguished From ""Puffing"" or ""Sellers Talk"" In Offenses Under 18 U.S.C. § 1341"

John C. Hayes

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Recommended Citation
John C. Hayes, Mail Fraud--Fraudulent Misrepresentations Must Be Distinguished From "Puffing" or "Sellers Talk" In Offenses Under 18 U.S.C. § 1341, 22 S. C. L. Rev. 423 (1970).

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MAIL FRAUD—FRAUDULENT MISREPRESENTATIONS MUST BE DISTINGUISHED FROM "PUFFING" OR "SELLERS TALK" IN OFFENSES UNDER 18 U.S.C. § 1341.*

I. INTRODUCTION

Perpetrating or attempting to perpetrate a fraud on the public by use of the United States mail is made a criminal offense by 18 U.S.C. § 1341.[1] The basis of this offense is "false or fraudulent pretenses, representations or promises"[2] by the defendant. The courts are in general agreement that there are at least two elements[3] to the crime of mail fraud.[4] In *Gold v. United States*,[5] the court said:

> The essential elements of an offense under the mail fraud statute are (1) a scheme conceived by appellant for the purpose of defrauding . . . by means of false

* United States v. Hannigan, 303 F. Supp. 750 (D. Conn. 1969).

1. 18 U.S.C. § 1341 (1964). This section provides:
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

2. *Id.*

3. A third element has been mentioned by the courts at least twice, United States v. Rabinowitz, 327 F.2d 62 (6th Cir. 1964); United States v. Baren, 305 F.2d 527 (2d Cir. 1962), but has not been accepted in later cases. This third element and how and why later courts distinguish it are examined later in this comment. *See* text accompanying note 47 *infra*.

4. Gold v. United States, 350 F.2d 953 (8th Cir. 1965); Beck v. United States, 305 F.2d 595 (10th Cir. 1962), *cert. denied*, 371 U.S. 890 (1962); Dranow v. United States, 307 F.2d 545 (8th Cir. 1962); Palmer v. United States, 229 F.2d 861 (10th Cir. 1955), *cert. denied*, 350 U.S. 996 (1956); Webb v. United States, 191 F.2d 512 (10th Cir. 1951).

5. 350 F.2d 953 (8th Cir. 1965).

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> pretenses, representations or promises, and (2) use of the United States mails in furtherance of that scheme.[6]

The requirement of a fraudulent scheme is the essence of mail fraud, and proof of such requires distinguishing between innocent exaggerations, which have come to be called "puffing," and actual, fraudulent misrepresentations.

In *United States v. Hannigan*,[7] the court was required to distinguish between "puffing" and actual fraudulent misrepresentations. There the defendants had made representations as to the price for which certain camera equipment sold on the open market. Such representations were found to be false, and the court upheld their convictions under section 1341.[8] The court acknowledged that "puffing" is not actionable under the statute,[9] but found that the defendants had gone beyond mere "puffing" and were guilty of fraudulent misrepresentations.

To understand the distinction which courts have made between "puffing" and actual fraudulent misrepresentations, cases arising under the statute must be examined. Such examination, accompanied by a factual study of *Hannigan*, will show how and why such differentiation has developed and some of the other problems that arise in cases under section 1341.

II. "PUFFING" V. FRAUDULENT MISREPRESENTATIONS: EVOLUTION OF THE CONCEPT

An understanding of what constitutes fraud within the purview of section 1341 is necessary since fraud arises in areas of the law other than in the criminal mail fraud area. Such understanding is also needed because of the courts' use of common law fraud by analogy in mail fraud cases.

Hannigan follows the rule, generally stated in other mail fraud cases,[10] that mail fraud is at least as broad as common

6. *Id.* at 956.
7. 303 F. Supp. 750 (D. Conn. 1969).
8. The *Hannigan* court used a subjective-objective test to determine whether or not statements of price could be considered fraudulent. Such test is examined thoroughly later in this comment. *See* text accompanying note 37 *infra*.
9. 303 F. Supp. at 753.
10. *E.g.*, United States v. Whitmore, 97 F. Supp. 733 (S.D. Cal. 1951); United States v. Buckner, 108 F.2d 921 (2d Cir. 1940), *cert. denied*, 309 U.S. 669 (1940); Foshay v. United States, 68 F.2d 205 (8th Cir. 1933), *cert. denied*, 291 U.S. 674 (1933).

law fraud.[11] In *United States v. Whitmore*,[12] which was a mail fraud case, the court said;

> In the application of these principles [of mail fraud], it may be said generally, that courts consider that whatever would be fraudulent by common law principles is a scheme to defraud under the statute.[13]

By following this line of thought, the courts are thus able to use common law fraud cases by analogy in criminal mail fraud cases.[14] This is especially convenient for a court when drawing the line between "puffing" and actual fraudulent misrepresentations since the distinction is also recognized in the common law cases.[15]

Since the scope of fraud under section 1341 "is at least as broad as common law fraud,"[16] the concept and application of what constitutes "puffing" at common law must now be examined. Legal recognition of the trader's habit of and right to add luster to his products is of long standing. In 1890 in *United States v. Staples*,[17] Judge Severens recognized this practice in his charge to the jury and at the same time enunciated clearly what then constituted "puffing." In *Staples*, the defendant had duped the public by advertising wild huckleberry bushes as cultivated "blueberry" plants. These huckleberry bushes were actually sent to purchasers, but they died shortly after planting. In charging the jury, Judge Severens said:

> Now, gentlemen, you are familiar, as the public generally are, with the fact that seedsmen and nurserymen, as well as other parties who have anything to

11. 303 F. Supp. at 754, *citing,* United States v. Whitmore, 97 F. Supp. 733 (S.D. Cal. 1951).
12. 97 F. Supp. 733 (S.D. Cal. 1951). The defendant here was convicted for fraudulently representing what must have been average, or perhaps below average, Christmas tree ornaments as, "the most sensational Christmas tree ornament package of all time" and promised "85 out-of-this-world, colorful, glittering ornaments that will make your tree the talk of the neighborhood." *Id.* at 734.
13. *Id.* at 735.
14. The converse of this seems to be true also as *McNabb v. Thomas,* 190 F.2d 608 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 859 (1951), in handling the problem presented by statements of value in advertising, relies on statements by Judge Learned Hand in *United States v. Rowe,* 56 F.2d 747 (2d Cir. 1932), *cert. denied,* 286 U.S. 554 (1932), a mail fraud case.
15. McNabb v. Thomas, 190 F.2d 608 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 859 (1951); Aron v. Mid-Continent Co., 143 Neb. 87, 8 N.W.2d 682 (1943).
16. United States v. Hannigan, 303 F. Supp. 750, 754 (D. Conn. 1969).
17. 45 F. 195 (W.D. Mich 1890).

> sell, have the habit of puffing their wares, and we are all familiar with the fact that it is a very prevalent thing in the course of business to exaggerate the merits of goods people have to sell; and within any proper reasonable bounds such a practice is not criminal. . . . A certain degree of praise and commendation of one's goods in business is allowable; but when that is carried to the extent of obtaining the public's money by means of actually fraudulent representations, then it comes under the condemnation of the law.[18]

The jury found that Staples had exceeded the bounds of "puffing" in regard to his advertisements pertaining to "blueberry" plants.

Leeway is granted to the seller in glorifying his wares even though the statute's purpose has been said to be, "[T]o protect the gullible, the ignorant and the over-credulous. . . ."[19] A salesman should not be held to insure that everything he says about his product is one hundred percent true. As section 1341 says,[20] and as later cases have pointed out,[21] there must be a scheme to defraud. Where the allegedly fraudulent statements are innocent exaggerations, no such scheme can be found. Inherent in a scheme to defraud is an intent to defraud. If the seller is merely overzealous in extolling his wares, he should not be held to criminal liability. It has been said, "The 'schemes' which have been punished have all smacked of the confidence game; of getting something for nothing."[22] While in most schemes the purchaser does receive something for his money, it is usually far from what he expected to receive based on what advertisements for the products have alleged. According to *Whitmore*:

> A purchaser is *entitled to receive what he has been led to believe he would receive.* He is defrauded if the promised expectations *do not* materialize.[23]

Thus, while a seller is not held to making statements one hundred percent true, he cannot make statements which will mis-

18. *Id.* at 198.
19. United States v. Sylvanus, 192 F.2d 96, 105 (7th Cir. 1951), *cert. denied,* 342 U.S. 943 (1952).
20. 18 U.S.C. § 1341 (1964), [based on 18 U.S.C. § 338 (1940)]. "Whoever, having devised or intending to devise any scheme or artifice to defraud . . . ."
21. United States v. Rabinowitz, 327 F.2d 62 (6th Cir. 1964); United States v. Baren, 305 F.2d 527 (2d Cir. 1962); Beck v. United States, 305 F.2d 595 (10th Cir. 1962), *cert. denied,* 371 U.S. 890 (1962); Dranow v. United States, 307 F.2d 545 (8th Cir. 1962).
22. Harrison v. United States, 200 F. 662, 666 (6th Cir. 1912).
23. 97 F. Supp. at 735.

lead the public into believing that they are buying something which they are in fact not.

There is no distinct line between "puffing" and fraudulent misrepresentations, and therein the problem lies. The problem arises both in the area of statements concerning an article's virtues and in the area of statements concerning an article's value.

III. "Puffing" v. Fraudulent Misrepresentations: Statements of a Product's Attributes

Cases dealing with whether or not certain statements made by a defendant concerning the virtues of his product constitute fraud within section 1341 have arisen numerous times. Such cases often present examples of blatant misrepresentations, while at other times they present questions of making fine distinctions as to whether or not statements are to be considered fraudulent or "puffing."

United States v. New South Farm and Home[24] and *Deaver v. United States*[25] present some of the more blatant examples of attributing virtues to one's product which they do not in fact have. *New South Farm and Home* dealt with the problem of the sale of Florida land through the mail. The printed material sent out through the mail by the defendant extolled the grandiose virtues of the land which was for sale. The land was purported to be swarming with new residents, was said to have a year-round growing season, and was portrayed as a virtual paradise. The land turned out to be somewhat less than a paradise and much of what was said in the mailed circulars was found in fact to be false. New South Farm and Home's defense was that such statements were merely "puffing." The district court agreed with this, but the United States Supreme Court found otherwise. In doing so, the Supreme Court said:

> [M]ere puffing, indeed, might not be within its [the statute's] meaning . . . that is, the mere exaggeration of the qualities which the article has; but when a proposed seller goes beyond that, assigns to the article qualities which it does not possess, does not simply magnify in opinion the advantages which it has, but invents advantages and falsely asserts their existence,

24. 241 U.S. 64 (1916).
25. 155 F.2d 740 (D.C. Cir. 1946), *cert. denied*, 329 U.S. 766 (1946).

> he transcends the limits of "puffing" and engages in false representations and pretenses.[26]

Deaver dealt with a scheme whereby the defendant offered to exchange burial plots near Washington, D. C., for securities that had greatly depreciated during the thirties. The market for these plots was held out to be exceedingly good since burial space in the area was at a minimum, various fraternal orders wished to purchase the plots, and large scale plans for redevelopment were being drawn.[27] Here, as in *New South Farm and Home*, the court found such representations to be in fact false and punishable under section 1341.

The allegedly fraudulent statements in *Harrison v. United States*[28] were of the type that present a border line question of whether such are "puffing" or not. The statements there were concerned with the ability, ease of handling, and work saving qualities of the defendant's washing machine and vacuum cleaner. The court quoted what Judge Severens had said in his charge to the jury in *Staples* concerning "puffing" and sellers' tendency toward such.[29] Harrison, however, proved to the court that most of what he had said his product could do, it could in fact do, and his conviction was reversed and remanded.

United States v. Baren[30] also presented allegedly fraudulent statements which gave the court a little more trouble than the blatant examples in *New South Farm and Home* and *Deaver*. Baren did not fare quite as well as Harrison; his conviction was upheld even though he proved that much of what he said about his product (a knitting machine) was true. In fact the Government acknowledged that the machine was effective, but based its case simply on the fact that it did not live up to its advertised standards and that purchasers had made their purchases of these knitting machines on the basis of the representations in the defendant's advertising.[31]

IV. "Puffing" v. Fraudulent Misrepresentations: Statements of a Product's Value

In *Hannigan*, the defendants contended that statements as to a product's value can never be fraudulent, but are always

26. 241 U.S. at 71.
27. 155 F.2d at 742.
28. 200 F.2d 662 (6th Cir. 1912).
29. *Id.* at 666, *quoting from* 45 F. at 198.
30. 305 F.2d 527 (2d Cir. 1962).
31. *Id.* at 529.

"puffing" since they are statements of opinion.[32] They asserted that the statement of a subjective fact, such as a product's value, is only the seller's opinion, and is to be considered "puffing", and can never be considered fraud.

Hannigan, along with others, was prosecuted for mail fraud under section 1341 and conspiracy under 18 U.S.C. § 371.[33] The scheme against which prosecution was sought dealt with the advertisement of an offer for sale of color film. The advertisements offered a package deal whereby the purchaser bought six-hundred rolls of color film at a "reduced cost" of $1.00 a roll and agreed to let the defendants process the film for the regular processing cost.[34] For doing this the purchaser was to receive free a projector which the advertisements said would sell on the open market for between $175.00 and $225.00 and a camera which would allegedly sell on the open market for $150.00. In actuality the projector and the camera were already being sold on the open market for $99.50 and approximately $50.00 respectively. Thus, the purchaser was led to believe that he was getting for free, a package deal worth between $500 and $600, when in fact it was worth approximately $280.

The defendants contended that the statements as to the value of the equipment were "puffing" and not actionable under the statute. The court said, however, that the defendants had gone beyond "mere exaggerations of value."[35] The defendants had not stated their opinion as to the worth of the equipment, but had stated an actual price for which the equipment would sell. The court suggested that, had they merely stated their opinion as to the value of the camera, a subjective fact, their defense might have been meritorious. Since they had stated an objective fact, the market price of the equipment, and since such mis-

32. 303 F. Supp. at 752. The defendants' contention follows decisions such as Byers v. Federal Land Co., 3 F.2d 9 (8th Cir. 1924) and is supported by 5 S. WILLISTON, CONTRACTS § 1493 (rev. ed. 1937) and RESTATEMENT OF CONTRACTS § 474 (1932).

33. 18 U.S.C. § 371 (1964) makes it a crime for two or more persons "[t]o conspire either to commit any offense against the United States, or to defraud the United States . . . ," and has no relevancy to the subject of "puffing."

34. While not bearing on the problem of "puffing," it is interesting to note that, when a purchase was made, the buyer received only one roll of film along with the camera equipment; the other 599 rolls were sent one roll at a time when the defendants returned a roll of developed film.

35. 303 F. Supp. at 753.

representation has been recognized as actionable fraud, such defense was not a bar to their prosecution.[36]

While defendant's contention did have some authoritative basis,[37] the cases now hold that it is not true that misrepresentations of value are never to be held actionable under section 1341.[38] In *United States v. Rowe*,[39] Judge Learned Hand, in applying the mail fraud statute, said:

> [T]he law still recognizes that in bargaining parties will puff their wares in terms which neither side means seriously . . . but it is no longer law that declarations of value can never be fraud. Values are facts as much as anything else.[40]

The court in *McNabb v. Thomas*[41] quoted the above *Rowe* statement[42] and also said:

> [A]n expression of opinion as to . . . value . . . is ordinarily held not to be actionable because it is not a statement of fact. But "In a sense any assertion is a statement of fact even though it only be an opinion."[43]

Thus it seems that, where the statement is a purely subjective evaluation by the seller of the value of the article, such statement is not actionable fraud. But, where the statements relate the value to "external objective criteria," such as market price, such statements may constitute actionable fraud.[44]

In conjunction with consideration of the "puffing" argument, the *Hannigan* court was faced with dealing with the defendant's argument that, to sustain an action under section 1341, the prosecution must prove that someone was actually defrauded.[45]

36. *Id.* The court cites as the authority for this statement, 1 F. HARPER AND F. JAMES, THE LAW OF TORTS § 7.11 at 575 (1956). This section says that a misstatement of a fixed or a previous price can be fraud and says that the courts have looked to:

> the relationship of the parties or their relative positions in regard to knowledge, experience, opportunity to investigate and the like, and have frequently held that these circumstances transformed the statement of opinion into one of fact and formed the basis of an exception to the general rule as to the non-actionability of statements of opinion.

37. *See* note 33 *supra.*
38. McNabb v. Thomas, 190 F.2d 608 (D.C. Cir. 1951); United States v. Rowe, 56 F.2d 747 (2d Cir. 1932).
39. 56 F.2d 747 (2d Cir. 1932).
40. *Id.* at 749.
41. 190 F.2d 608 (D.C. Cir. 1951).
42. *Id.* at 610 n.7.
43. *Id.* at 610, *quoting from* Taylor v. Burr Printing Co., 26 F.2d 331, 334 (2d Cir. 1928), *cert. denied*, 278 U.S. 641 (1928).
44. United States v. Hannigan, 303 F. Supp. 750, 753 (D. Conn. 1969).
45. *Id.* at 752.

This contention is based on *United States v. Baren*[46] which added this as a third element to the two elements previously mentioned in *Gold* as necessary for a section 1341 conviction. The *Baren* requirement was subsequently described in *United States v. Andreadis*[47] as a "*sui generis* exception . . . to the general rule that in prosecutions under 18 U.S.C. § 1341 the Government is not required to prove that individual purchasers were actually defrauded."[48] It seems that the *Baren* court added this third element mainly to convict the particular defendant under the statute. In that case the product (a knitting machine) could do most of what it was advertised to do, but it could not completely live up to all of its advertised standards.[49] Since the Government could present witnesses who had purchased the machines because of these advertised standards and had later found such representations to be untrue, it appears that the court threw in this element to strengthen its decision to uphold the defendant's conviction. Thus, it seems that, as a general rule, as stated in *Rowe* prior to *Baren* and subsequently in *Andreadis* and *Hannigan*, the Government need not prove nor even allege that anyone was actually defrauded.

V. Conclusion

It seems as though the scope of the mail fraud statute is being expanded by the courts in an effort to provide the "overcredulous" members of the public even greater protection than in the past. The courts are reluctant to add the element of requiring proof of persons actually defrauded and are continuing to uphold convictions on the fraudulent nature of the scheme itself. It is the attempt to defraud that is being prosecuted under section 1341 rather than actual fraud. This seems proper since the statute applies to those "having devised or intending to devise any scheme or artifice to defraud"[50] and does not specifically require proof of persons actually defrauded.

Courts are also expanding the scope of section 1341 by limiting "puffing" in various ways, mainly by the changing of the

46. 305 F.2d 527 (2d Cir. 1962).
47. 366 F.2d 423 (3d Cir. 1966), *cert. denied,* 385 U.S. 1001 (1967).
48. *Id.* at 431.
49. The statements concerned claimed, among other things, that a child could operate the machine, which in fact he could not, and stated certain average time periods in which certain things could be made, which time periods could be met only by a dexterous, experienced operator of such machines. 305 F.2d 527, 528 (2d Cir. 1962).
50. 18 U.S.C. § 1341 (1964).

oft-stated rule that statements of value are always to be considered "puffing." Courts are now applying the subjective-objective test; thus, if the statements of value are found to be objective, based on market price or other "external objective criteria," they are no longer to be considered "puffing." "Puffing" is also being limited in the sense that the courts are looking at the allegedly fraudulent statements from the point of view of what they convey to the public, not from what the seller claims to have intended to convey or what they could possibly convey. This is accomplished by looking at the relative positions of the seller and the public to determine if the intended buyers must rely on what the seller says or if they can make a judgment as to the product's purported standards by other means.[51]

The application of the statute by the courts at the present time as to "puffing" and actual actionable fraudulent representations seems to be in accord with the proper balance which the statute requires. Section 1341 must protect buyers, but should not allow prosecution merely because a few buyers are dissatisfied with a product. "Puffing" by a seller is expected by the general public, and should not, and at this time is not, actionable; however, where the seller oversteps the bounds of "puffing," undefined though the limits may be, the statements are and should be actionable under section 1341.

JOHN C. HAYES

51. McNabb v. Thomas, 190 F.2d 608, 610 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 859 (1951).