

In the 5th District Court of Clarke County
State of Iowa

Jerry DeWayne Mercer and)	
Eddie Leon Andrews)	
)	
Vs.)	Case Number EQCV010968
)	
Terence C. Kern, an individual, and)	
Paul J. Cleary, an individual and)	
Phil Lombardi, an individual and)	
Elisabeth A. Shumaker, an individual)	

Pre-Trial Brief

Jerry DeWayne Mercer and Eddie Leon Andrews hereby submit:

NATURE AND CAUSE: Common law fraud. The elements of common law fraud in Iowa are: *See Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 400 (Iowa 2001) (listing elements necessary to establish **common-law fraud** claim: "(1) defendant made a representation to the plaintiff, (2) the representation was false, (3) the representation was material, (4) the defendant knew the representation was false, (5) the defendant intended to deceive the plaintiff, (6) the plaintiff acted in reliance on the truth of the representation and was justified in relying on the representation, (7) the representation was a proximate cause of plaintiff's damages, and (8) the amount of damages .

In light of this quote from Attorney General Tom Miller: "The Iowa Supreme Court got it right" a number of years ago when the Court said in a decision: "The protection afforded consumers by common-law remedies was generally ineffective. The burdens of a common-law action were sufficient to dissuade all but the most persistent and most seriously injured customer." " Plaintiffs respectfully request this court to

recognize the obvious default of these defendants to deny, rebut or contradict allegations and Attorney General Tom Miller's further support of the upcoming consumer rights law by stating: "This law just gives consumers an even playing field and a fighting chance," Miller said. "It's about time Iowans get the consumer rights given to everyone else in the country."

When a statute is newly enacted it may be applied prospectively only or it may be applied both prospectively and retrospectively. Legislative intent determines which of these two applications is to be given. Walker State Bank v. Chipokas, 228 N.W.2d 49, 51 (Iowa 1975); Barad v. Jefferson County, 178 N.W.2d 376, 378 (Iowa 1970); Schnebly v. St. Joseph Mercy Hospital of Dubuque, 166 N.W.2d 780, 782 (Iowa 1969). In determining such intent, "* * * [the] general rule is that [a statute] operates prospectively only unless it clearly appears the legislature intended the law to have retrospective effect. * * *." Walker, supra, at 51; City of Monticello v. Adams, 200 N.W.2d 522, 525 (Iowa 1972); Schnebly, supra, at 782. This basic rule is however not without exceptions.

Plaintiffs in this cause have a burden of proving that all defendants were associated for a common purpose, that they made a common representation which was false, that the materiality of the falsehood was an element of fraud, that the defendants knew that the representation which they were cohesively making was false, that their intention was that the plaintiffs rely on the falsehood in a manner reasonably contemplated, that the plaintiffs' ignorance of the falsity caused them to rely on the falsity, the test for determining whether a party to a transaction has a right to rely on representations of the other is not whether a reasonably prudent person would be justified in relying on such representations but rather, whether the complaining party, in view of

his own information and intelligence, had a right to rely on the representations, of the false representation to the detriment of ensuing injury proximately caused by reliance on the falsehood.

Which makes it "unlawful for any person employed by or associated with" a qualifying enterprise "to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity," including "mail fraud," 18 USC §1961(1)(B). Mail fraud, in turn, occurs whenever a person, "having devised or intending to devise any scheme or artifice to defraud," uses the mail "for the purpose of executing such scheme or artifice." 18 USC §1341. The gravamen of the offense is the scheme to defraud, and any "'mailing . . . incident to an essential part of the scheme' . . . satisfies the mailing element," Schmuck v. United States, 489 U.S. 705, 712, 109 S. Ct. 1443, 103 L. Ed. 2d 734, even if the mailing "contain[s] no false information," id., at 715, 109 S. Ct. 1443, 103 L. Ed. 2d 734. Once the relationship among these statutory provisions is understood, respondents' theory of the case is straightforward. Plaintiffs urge that this honorable court recognize the fact Plaintiffs filed actions that were timely in accordance to the two-year statute of limitations contained in the Iowa Blue Sky law, Iowa Code § 502.23 (1975), governed in this litigation. Plaintiffs also argue for the five-year statute of limitations applicable to common law fraud actions in Iowa. Iowa Code § 614.1(4) (1975). And "whenever a party must prove something, they must do so by the preponderance of the evidence." The instruction defines a preponderance of evidence as evidence "that is more convincing than opposing evidence" and states that "to prove something by the preponderance of the evidence is to prove that it is more likely true than not true."

Nor can a first-party reliance requirement be derived from 18 USC § 1964(c), which, by providing a right of action to "[a]ny person" injured by a violation of 18 USC § 1962, suggests a breadth of coverage not easily reconciled with an implicit first-party reliance requirement. Moreover, a person can be injured "by reason of" a pattern of mail fraud even if he has not relied on any misrepresentations. For example, accepting respondents' allegations as true, they were harmed by petitioners' scheme when they lost valuable Awards of money they otherwise would have been awarded.

Determination by this Court that the plaintiffs have stated with particularity that the defendants, from their respective locations and interposed into the state of Iowa via the United States Mail Service, uttered representations which were falsely made, the defendants knew the representations were falsely made and the person reasonably would do to protect his or her interests, but upon what the *complaining party* reasonably could be expected to do. Decisions from other jurisdictions in accord with this view include Winn v. McCulloch Corp., 60 Cal. App. 3d 663, 671, 131 Cal. Rptr. 597, 601 (1976) ("Negligence in reliance upon a misrepresentation is not a defense where the representation was intentionally made to induce reliance upon it."); Blynn v. Ralbag, 201 So. 2d 611, 613 (Fla. App. 1967); Bergman & Lefkowitz Insurance Agency v. Flash [**21] Cab Co., 110 Ill. App. 2d 415, 429, 249 N.E.2d 729, 736 (1969); Gonderman v. State Exchange Bank, Roann, 166 Ind. App. 181, 190, 334 N.E.2d 724, 729 (1975) ("The requirement of reasonable prudence in business transactions is not extended so as to permit an intentional fraud perpetrated upon the unwary."); Wolf v. Brungardt, 215 Kan. 272, 283, 524 P.2d 726, 735 (1974); Public Finance Corp. v. Scribner, 159 Me. 150, 152-

53, 189 A.2d 368, 369 (1963); Judson v. Peoples Bank & Trust Co., 25 N.J. 17, 27, 134 A.2d 761, 766 (1957); Crofford v. Bowden, 311 S.W.2d 954, 956 (Tex. App. 1958).

The plaintiffs relied on the representations which were later discovered to be false to the plaintiff's detriment of losing money and forfeiting property and that the defendants had notice and opportunity regarding these material averments but failed to deny in the required responsive pleading warrants judgment for and in favor of the plaintiffs. We think the general rule is that no such election and demand is necessary before filing suit. Coffin v. Younker, 196 Iowa 1021, 1026, 195 N.W. 591, 593 (1923); Wyatt v. Bailey, 1 Morris 522, 523 (Iowa 1845); 25 C.J.S. Damages § 229, at 630 (2002). Filing suit, as was done here, constitutes the demand. Coffin, 196 Iowa at 1026, 195 N.W. at 593; Wyatt, 1 Morris at 523.

Determination by Court that the plaintiffs have testified to their injuries, under oath and subject to cross-examination regarding authenticated documents, and that their testimony was neither rebutted nor impeached, warrants award of damages as this Court should find reasonable, lawful, and just according to the law to amend the social ill of mail fraud which is not denied by the defendants. Plaintiffs have proven reliance and intent, not just deception or misrepresentation. Plaintiffs have pleaded facts giving rise to a "strong inference" of scienter, (See Wyckoff v. A & J Home Benevolent Association, 254 Iowa 653, 119 N.W.2d 126 (1962)) "However, the District Court concluded that scienter is always an element of proof in a fraud case, ").

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defraud, and any "mailing . . . incident to an essential part of the scheme' . . . satisfies the mailing element," Schmuck v. United States, 489 U.S. 705, 712, 109 S. Ct. 1443, 103 L. Ed. 2d 734, even if the mailing "contain[s] no false information," id., at 715, 109 S. Ct. 1443, 103 L. Ed. 2d 734. Once the relationship among these statutory provisions is understood, respondents' theory of the case is straightforward. Petitioners nonetheless argue that because the alleged pattern of racketeering activity is predicated on mail fraud, respondents must show that they relied on petitioners' fraudulent misrepresentations, which they cannot do because the misrepresentations were made to the county. Nothing on the statute's face imposes such a requirement. Using the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud, and hence a predicate racketeering act under [***4] RICO, even if no one relied on any misrepresentation, see Neder v. United States, 527 U.S. 1, 24-25, 119 S. Ct. 1827, 144 L. Ed. 2d 35; and one can conduct the affairs of a qualifying enterprise through a pattern of such acts without anyone relying on a fraudulent misrepresentation.

Verification

I, Jerry DeWayne Mercer and Eddie Leon Andrews hereinafter "Affiants", of lawful age and competent to testify, by our signatures below, hereby verify under penalty of perjury, under the laws of the United States of America, without the "United States" [federal government], that the foregoing *Pre-Trial Brief*, is true, correct, complete, and not misleading, to the best of our current knowledge and belief, pursuant to Title 28, United States Code, Section 1746 (1), so help me Almighty God.

Signed by our hands below at Clarke County, Iowa, on this the 31st day of July, in the year of our Lord, *Yahushua Ha Massiac*, two thousand eight.

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Jerry DeWayne Mercer, affirmed Jerry DeWayne Mercer

Eddie Leon Andrews, affirmed Eddie Leon Andrews

Witness *[Signature]*

Witness *[Signature]*