# Fraud for Lawyers and/or Fools

**By Melissa Huelsman**

Most of us learn about fraud as one of the basics of torts in law school, and I'm sure most professors properly advise their students of its importance in the law. Certainly I remember going over each and every one of the elements and how a fraud happens, and how it has to be proved. And once we pass the torts exam, and complete contracts, with all of its talk about offer, acceptance and consideration, and it appears that most of us delete that bit of information about fraud from our memories.

I have discussions most every day with opposing counsel, usually business and commercial litigation attorneys, who are generally puzzled by how I could plead a fraud allegation when there is a writing that has been signed by my client. The defense is essentially this--"Your client signed the document so there cannot be a fraud." Am I the only one who sees the inherent flaw in such an assertion?

For purposes of a disclaimer, I acknowledge that I am primarily a plaintiff's lawyer whose practice regularly involves pleading allegations of fraud on behalf of my consumer clients. But I also worked for many years investigating and litigating fraud cases on behalf of businesses, banks and creditors. I've been working on fraud cases in its many and varied forms for years, and I'm sure I haven't even cracked the surface of the myriad of schemes that have been developed and perpetrated since man first became civilized, because that's about the time that the first fraud was probably dreamed up.

Black's Law Dic-tionary defines fraud as "intentional injury resulting in injury to another." It says that the elements of fraud are: "a false and material misrepresentation made by one who either knows its falsity or is ignorant of its truth; the maker's intent that the misrepresentation be relied on by the person and in a manner reasonably contemplated; the person's ignorance of the falsity of the representation; the person's rightful or justified reliance; and proximate injury to the person."

Black's Law goes on to state that it "embraces all the multifarious means which human ingenuity can devise to get an advantage over another. It includes all surprise, trick, cunning, dissembling and unfair ways by which another is cheated." There are probably thousands of variations of this definition contained in an unknown number of federal and state cases across this country, and they all are essentially the same, and as lawyers, we can spend our careers debating whether or not the facts of a particular case meet these defined elements. But I particularly like the second part of Black's definition--that it embraces "all the multifarious means which human ingenuity can devise." This is the part of the definition that always seems to be ignored.

Let's go through the elements using a "classic" fraud scenario: the "fraudster" calls a victim to talk to her about a new "investment" opportunity that will allow her to purchase some ancient Roman coins at a discounted price. The fraudster knows that he does not have any ancient Roman coins to sell, but tells her that she can purchase 20 of these coins for the low, low price of $2,000.00. (A misrepresentation made by one who knows the falsity of the statement.)

The fraudster then tells the victim just how fabulous the coins are and that they are really worth $5,000.00. He also tells her that she may only buy them at the fabulously low price for today only and asks for her credit card number to make the purchase. (The fraudster intends the victim to rely upon his numerous misrepresentations to be persuaded to provide him with the credit card number--misrepresentation relied upon in a manner reasonably contemplated).

The victim is an elderly woman who knows nothing about ancient Roman coins but she believes the things the nice young man is telling her on the phone because she is lonely and he reminds her of her grandson who doesn't visit or call much. (Victim has no knowledge of the falsity of the statements.)

The fraudster goes on to tell victim about the fact that his company is registered with the federal government to sell the coins, is approved by the Better Business Bureau and is only offering this deal to her because they received information about her from her bank. He provides with the name of a bogus

government agency and the BBB Branch and contact information, but tells her that she must make the purchase now or lose the opportunity.

Victim asks if she can have the benefit of buying the coins at the special price. (Victim's justified reliance on the statements.) Once the victim provides her credit card information, she is not only charged $2,000.00 for the purchase of coins that she will never receive, but the fraudster uses her credit card until it has reached its limit to make numerous other purchases, leaving the victim in financial ruin. (Victim's proximate injury).

I will assume that we can all agree that this is a fraud. Now, would it have been a fraud if the victim had not provided her credit card and made the purchase? The clear answer is "no." Two crucial elements of fraud would not be satisfied. No reliance upon the statements and no proximate injury.

Certainly the fraudster made false statements that he knew to be false and made them with the intention of causing the victim to act affirmatively in the manner he contemplated, i.e., providing credit card, because he believed that she would not know that the statements were false. But if the victim smelled a rat and knew better than to give out credit card information on the phone, the fraud remains incomplete and the fraudster goes back to his dialing for dollars.

So, the moral of the story is that a fraud cannot be completed unless and until a victim acts affirmatively in the manner contemplated by the fraudster and is damaged by undertaking the act.

The problem for attorneys today seems to be their notion that if a document was signed in connection with the alleged fraud, the laws of contract apply and fraud is irrelevant, but there could be nothing farther from the truth. In fact, I would surmise that most white collar crimes involve writings and documents that are either actual contracts or could be construed as contracts. (I couldn't find statistics to back this up but by its very nature white collar crime usually involves paperwork.) And certainly there is nothing in the laws of contracts or tort that say if there is a writing, there can be no fraud.

Going back to Black's clarification of the definition of fraud, it "embraces all the multifarious means which human ingenuity can devise to get an advantage over another." It does not say that any nefarious activity that involves a document or contract is not a fraud.

In short, our job as attorneys is to argue about what the law is, and whether the facts fit the law. What I would hope more attorneys could do is acknowledge first that fraud exists and is defined, and that an affirmative act by the alleged victim is necessary for a fraud to be complete. This means that the signing of a document alone does not disprove fraud.

From this common acknowledgement of the existence of the tort, opposing counsel can then argue about whether the facts of a particular case meet all of the elements of fraud. Maybe then plaintiff's attorneys and prosecutors alike can stop screaming at the walls after hearing yet another argument that a signature means dismissal.

Groucho Marx once said, "The key to life is honesty and fair dealing. If you can fake that, you've got it made." Fraudsters might consider T-shirts and coffee mugs. n

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