IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM D. CONWAY,

OPINION AND ORDER

Plaintiff,

03-C-535-C

v.

RAYMOND L. LEONARD, Jr.,
MANUFACTURER'S ASSET GROUP, LLC
and RODI POWER SYSTEMS, INC.,

Defendants.

JOHN ARVOLD, KURT ARVOLD, ROD CAMREN, WILLIAM R. CLEMENS, WILLIAM J. KIPPLEY, ANTHONY B. GARDNER, PETER HARTMAN, RICHARD HEGGE, GREG HILDEN, JAMES KOCH, GALE KOCH, KEN KOPPENHAVER, DAVID KRALL, PATRICIA KRALL, MICHAEL MORAN, WILLIAM PHIPPEN, RICHARD SMITH, ARLAN SPILDE, DAN SPILDE and KENT SPILDE,

OPINION AND ORDER

Plaintiffs,

03-C-536-C

v.

RAYMOND L. LEONARD, Jr.,
MANUFACTURER'S ASSET GROUP, LLC
and RODI POWER SYSTEMS, INC.,

Defendants.

RANDY PAUL, RONALD HOLTZ and
S&S PARTNERSHIP,

Plaintiffs,

OPINION AND ORDER

03-C-539-C

v.

RAYMOND L. LEONARD, Jr.,
MANUFACTURER'S ASSET GROUP, LLC
and RODI POWER SYSTEMS, INC.,

Defendants.

In these consolidated diversity actions, plaintiffs William D. Conway, John Arvold, Kurt Arvold, Rod Camren, William B. Clemens, William J. Kippley, Anthony B. Gardner, Peter Hartman, Richard Hegge, Greg Hilden, James Koch, Gale Koch, Ken Koppenhaver, David Krall, Patricia Krall, Michael Moran, William Phippen, Richard Smith, Arlan Spilde, Dan Spilde, Kent Spilde, Randy Paul, Ronald Holtz and S&S Partnership are suing defendants Raymond L. Leonard, Jr., Manufacturer's Asset Group, LLC and RODI Power Systems, Inc. for monetary relief in connection with alleged violations of Wisconsin securities law. On October 4, 2004, at the parties' request, I issued an order cancelling the final pretrial conference and jury trial in these actions and directing the parties to submit the cases on written briefs and a stipulated set of facts. Presently before the court are plaintiffs' and defendant RODI Power Systems' cross motions for summary judgment. The facts

presented in each case are identical except for the names of the plaintiffs and the amounts of money involved; therefore, I will address the summary judgment motions in all three actions collectively.

One point requires brief discussion at the outset. According to the court's records, no lawyer has ever entered a notice of appearance on behalf of defendants Leonard and Manufacturer's Asset Group and no documents have ever been filed on their behalf. They have not joined defendant RODI Power Systems' motion for summary judgment or filed their own motion for summary judgment. Thus, no claims asserted against these defendants will be discussed or resolved in this opinion. From this point forward, the word "defendant" refers only to defendant RODI Power Systems unless otherwise specified. Although it appears that defendants Leonard and Manufacturer's Asset Group were properly served, plaintiffs never filed a motion for default against these defendants. Therefore, plaintiffs will have until January 18, 2005, to show cause why defendants Leonard and Manufacturer's Asset Group should not be dismissed from these cases for plaintiffs' failure to prosecute.

In their amended complaints, plaintiffs asserted four claims against defendants: (1) a claim that defendant sold unregistered securities to plaintiffs in violation of Wis. Stat. § 551.21; (2) a claim that defendants Leonard and Manufacturer's Asset Group offered defendant RODI Power Systems to plaintiffs without being licensed by the state of Wisconsin in violation of Wis. Stat. §§ 551.31(1) and (2); (3) a claim for fraud under Wis.

Stat. § 551.41 arising from defendant's omission of material information in connection with plaintiffs' purchase of RODI stock; and (4) a claim for fraud under Wis. Stat. § 551.41 arising from defendant's alleged failure to disclose material information to plaintiffs in connection with defendant's 2001 offer to refund plaintiffs' investments. Plaintiffs failed to present any arguments with respect to claim (4) in their briefs. "Arguments not developed in any meaningful way are waived." Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999). Thus, plaintiffs have only three live claims for resolution.

For the reasons stated below, plaintiffs are entitled to summary judgment on their claim that defendant violated Wis. Stat. § 551.31(2)(a). In brief, that provision makes it unlawful for an issuer of securities to employ an agent to represent it in Wisconsin unless the agent is licensed by the state to represent the issuer or the agent is exempt from the licensing requirement. In these cases, Leonard and Manufacturer's Asset Group acted as agents of defendant when they contacted plaintiffs in Wisconsin. It is undisputed that Leonard and Manufacturer's Asset Group were not licensed by the state to represent defendant. I conclude that Leonard and Manufacturer's Asset Group were not exempt from Wisconsin's licensing requirement because the exemption for agents who make offers or sales to accredited investors was not in effect at the time of the events in this case and does not apply retroactively. Because I conclude that defendant RODI Power Systems is liable to

plaintiffs for violating § 551.31(2)(a), plaintiffs are entitled to the consideration paid for their shares of defendant's stock as well as interest and reasonable attorney fees under Wis. Stat. § 551.59(1)(a). This is the maximum relief authorized under Wisconsin's securities law; thus, it is unnecessary to discuss the merits of plaintiffs' claims under Wis. Stat. §§ 551.21 and 551.41.

Before turning to the facts, I note that in the October 4, 2004 order, I instructed the parties to submit a stipulated set of facts and, to the extent the parties were unable to agree on certain facts, additional proposed findings of fact by October 28, 2004. Plaintiffs filed their proposed findings on November 10, almost two weeks after the October 28 deadline. I have disregarded these untimely filed proposals in their entirety. From the stipulated facts and the record, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiffs are all citizens of Wisconsin. Defendant Raymond L. Leonard, Jr., a citizen of California, is the sole member and manager of defendant Manufacturer's Asset Group, LLC, a limited liability company formed under the laws of Delaware. Defendant RODI Power Systems, Inc. is a corporation formed in 1987 under the laws of Washington and the issuer of RODI Power Systems securities.

B. The Capital Acquisition

At all times relevant to these cases, defendant RODI Power Systems developed heavy-duty diesel engines for use in trucks, boats and stationary power applications. On May 15, 2000, defendant enlisted Manufacturer's Asset Group to raise $5,000,000 through the sale of 2,500,000 shares of RODI restricted common stock at $2.00/share. The money raised was to be used to fund production of defendant's new turbo diesel engine. According to the agreement signed by representatives from the two entities, Manufacturer's Asset Group was to sell defendant's stock only to accredited investors who could document their accredited status. (The agreement required each accredited investor to complete an affidavit attesting to his net worth and his acceptance of the risk of investing in defendant.) As part of the deal, defendant agreed to accept investment money only through Manufacturer's Asset Group, provide information and subscription applications for potential investors and make company officials and facilities available to potential investors. For its part, Manufacturer's Asset Group agreed to identify, contact and conduct due diligence on potential investors, make all state blue sky filings as investors were identified, pay all advertising and promotional expenses, collect the funds raised and remit them to defendant and provide weekly status reports to defendant. For each share sold, defendant would receive $1.75 and Manufacturer's Asset Group would receive $0.25. As an added incentive, defendant agreed to award one share of its restricted common stock to Manufacturer's Asset Group for every

five shares sold. Pursuant to this agreement, Manufacturer's Asset Group had contact with some or all of the plaintiffs in these cases.

Defendant never registered its securities in Wisconsin and never told any of the plaintiffs that its stock was registered in Wisconsin. Defendant never inquired whether Manufacturer's Asset Group was a licensed agent in Wisconsin. At no time relevant to these cases was Leonard, Manufacturer's Asset Group or defendant licensed in Wisconsin as a securities agent or broker-dealer for the offer or sale of securities. Manufacturer's Asset Group never made any securities filings in Wisconsin. Defendant did not give Leonard and Manufacturer's Asset Group authority to solicit non-accredited investors and did not know whether Leonard or Manufacturer's Asset Group ever solicited non-accredited investors in Wisconsin.

C. The Private Placement Memorandum

In connection with the capital acquisition, defendant RODI Power Systems printed a "Private Placement Memorandum" for potential investors. On the first page of the memorandum, the following appeared in capital letters:

> The securities offered hereby are speculative and involve a high degree of risk and immediate substantial dilution from the offering price and should not be purchased by investors who cannot afford the loss of their entire investment. Each investor must provide documented evidence of their accreditation in order to participate in this offering.

The memorandum contained information about the company, details about the new turbo diesel engine, terms of the offering and an explanation of the risks to potential investors. Near the end of the memorandum, in a section describing the terms of the offer and the process for investing, defendant disclosed the following:

> An investment in the Shares involves substantial risks and possible loss by investors of their entire investment. The Company is offering and selling Shares in reliance on the exemptions contained in section 4(2) of the Securities Act of 1933 (the "Securities Act") and Regulation D promulgated pursuant thereto. The Company is also relying on exemptions from registration or qualification under the laws of the states in which the Shares are offered and sold. The Shares will only be offered and sold in those jurisdictions where exemptions from registration and qualification are available.
>
> Because the Shares offered hereby are not being registered or qualified under the Securities Act or any state securities laws and because no such registration or qualification is contemplated, prospective investors must be able to bear the economic risk of this investment for an indefinite period. . . .
>
> The Shares will be offered and sold solely to "accredited investors" as that term is defined in Rule 501(a) of Regulation D under the Act. The following persons are deemed to be "accredited investors":
>
>> (1) Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of purchase exceeds $1,000,000, or any entity with total assets in excess of $5,000,000; or
>>
>> (2) Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year; . . .

Packaged with the memorandum was a subscription application for investors wanting to

purchase shares. The application required the investor to certify the following:

> I have a net worth [e]xceeding $1 million and/or earned $200,000 gross income in the last twelve months and therefore qualify as an accredited investor. I further certify that I have conducted my own [d]ue diligence and am making this investment on the basis of that information alone.

D. The Direct Purchasers

Between July and September 2000, eight plaintiffs purchased stock directly from defendant's treasury at a price of $2.00 for each share. Each of these eight plaintiffs signed a statement acknowledging that he or she was an accredited investor; none of them could have received stock certificates without signing the statement. In addition, each of these eight plaintiffs received contact information for defendant's auditor and had access to defendant's Louisiana facility. The numbers of shares issued to each plaintiff were recorded in the stock transfer reports kept by defendant's stock transfer agent, U.S. Stock Transfer Corporation.

1. William Conway

In July 2000, defendant issued certificates in plaintiff William Conway's name for 25,000 shares and in September 2000, it issued him a certificate for 14,500 shares. Plaintiff alleges that he sent one payment of $101,900 for all of the shares he purchased but provides

no evidence to confirm this payment.

2. Randy Paul

Plaintiff Randy Paul wrote a check to defendant in the amount of $230,000 in June 2000. Defendant issued a certificate for 100,000 shares in his name in September 2000.

3. Ronald Holtz

Plaintiff Ronald Holtz wrote a check to defendant for $10,000 in June 2000 and was issued a certificate for 5,000 shares in September 2000.

4. Ken Koppenhaver

Plaintiff Ken Koppenhaver wrote a check to defendant for $250,000 in July 2000 and was issued a certificate for 125,000 shares of defendant's stock in September 2000.

5. William Phippen

In September 2000, defendant issued a certificate in plaintiff William Phippen's name for 2,500 shares of defendant's stock.

6. Richard Hegge

In September 2000, defendant issued a certificate in plaintiff Richard Hegge's name for 2,500 shares of defendant's stock.

7. William Clemens and William Kippley

Plaintiffs William Clemens and William Kippley wrote two checks to defendant. Plaintiff Kippley wrote a check for $25,000 to defendant on August 3, 2000. A certificate for 12,500 shares issued jointly to plaintiffs Clemens and Kippley the following month. Plaintiffs wrote a check for $75,000 to defendant in October 2000. They sent this check to a man named Jim Bradford at defendant's address in California with a letter stating that the check was not to be cashed without plaintiff Clemens's authorization.

E. The Missouri Complaint

On or about November 13, 2000, a complaint was filed with the state of Missouri regarding the sale of unregistered RODI securities by an unlicensed agent of Manufacturer's Asset Group. After learning of the complaint, Byron Spain, defendant's chairman and chief executive officer, instructed Leonard to post guidelines at Manufacturer's Asset Group for soliciting funds in accordance with the principles set out in the May 15, 2000 agreement. Spain instructed Leonard to work with Sam Guzik, corporate counsel for defendant, to

resolve the allegations in the Missouri complaint before any additional offerings were made to potential investors. On December 2, 2000, after it had received notice of the complaint but before it had responded, defendant's board of directors voted to stop distributing treasury stock. No issues of stock were authorized after December 15, 2000.

F. The Indirect Purchasers

After December 15, 2000, thirteen plaintiffs acquired stock in defendant that previously had been owned by other shareholders. These plaintiffs signed subscription applications and made payments to either Manufacturer's Asset Group or defendant. Each of these "indirect" purchasers received a letter from RODI stating the following:

> Unfortunately, your check was received after the cut-off date for the issuance of stock from the Company's treasury. We do however have shareholder stock that has been pledged for resale, which is available for issuance at the same price. On the assumption that you wish to proceed with this transaction, effective this date, your investment had been entered into our shareholder records and your stock share ownership confirmed.

The letter was the only notification that defendant gave the "indirect" purchasers that they were purchasing re-issued stock. The numbers of shares issued to these plaintiffs were recorded in the stock transfer reports kept by U.S. Stock Transfer Corporation. (Although the facts do not indicate the purchase price for these shares, the letter sent to these plaintiffs by defendant indicates that the price was the same as that paid by the direct purchasers,

$2.00 for each share; I will assume that this was the purchase price).

1. Anthony Gardner

Plaintiff Anthony Gardner made a $5,000 payment to defendant in October 2000. A certificate for 2,500 shares was issued in his name in December 2000. In addition, plaintiff Gardner made a $1,500 payment to Manufacturer's Asset Group in February 2001.

2. Greg Hilden

A certificate for 1,000 shares was issued to plaintiff Greg Hilden by defendant in December 2000. Plaintiff Hilden asserts that he made an additional payment of $10,000 on February 14, 2001, for which no certificate was issued. No written confirmation of payment is available.

3. David P. Krall

Plaintiff David P. Krall made a payment of $25,000 to defendant in October 2000. A certificate for 12,500 shares of stock in defendant was issued in plaintiff's name in December 2000.

4. Peter and Sheri Hartman

Plaintiff Peter Hartman and Sheri Hartman made a payment of $5,000 to defendant in October 2000 and received a certificate for 2,500 shares in December 2000. In addition, the Hartmans made a payment of $5,000 to Manufacturer's Asset Group in February 2001.

5. Kurt Arvold

A certificate for 5,000 shares was issued in plaintiff Kurt Arvold's name in December 2000, and a certificate for 7,500 shares was issued in plaintiff's name in February 2001.

6. Richard Smith

A certificate for 7,500 shares of defendant's stock was issued in plaintiff Richard Smith's name in December 2000.

7. Arlan Spilde

A certificate for 6,000 shares of defendant's stock was issued in plaintiff Arlan Spilde's name in December 2000.

8. Dan Spilde

A certificate for 5,000 shares of defendant's stock was issued in plaintiff Dan Spilde's name in December 2000.

9. Kent Spilde

A certificate for 4,500 shares of defendant's stock was issued in plaintiff Kent Spilde's name in December 2000.

10. S&S Partnership

A certificate for 10,000 shares of defendant's stock was issued in the name of plaintiff S&S Partnership in December 2000.

11. James and Gale Koch

Plaintiffs James and Gale Koch made a payment to defendant in the amount of $40,000 on December 5, 2000. A certificate for 10,000 shares was issued in their name on December 27, 2000.

12. William Conway

A certificate for 7,000 shares was issued to plaintiff William Conway in February 2001. As noted above, plaintiff alleges that he sent one payment of $101,900 for all of the shares he purchased, but provides no evidence to confirm this payment. Plaintiff Conway alleges that he made an additional payment of $8,900 in June 2001, but provides no evidence confirming this payment.

13. Ron Camren

Plaintiff Ron Camren made a payment of $10,000 to Manufacturer's Asset Group on or about February 6, 2001, but never received a confirmation of issuance of stock.

14. Michael Moran

Plaintiff Michael Moran asserts that he made an investment of $10,000 but provides no evidence to confirm this fact.

G. The Repurchase Offer

In early 2001, defendant determined that it had not disclosed the exact nature of Manufacturer's Asset Group's commissions on each sale of stock. Following this discovery, Byron Spain sent a letter to each of defendant's shareholders (including all of the plaintiffs in these cases) that read as follows:

> In reviewing investments made by individuals through the services of Manufacturer's Asset Group ("MAG"), it has come to my attention that you may not have received full disclosure relating to the use of funds. In the typical stock offering, the selling broker receives a percentage commission on each sale with all other expenses born by the Company and charged to General/Administrative along with all other overhead expenses that are not typically itemized. In our case, the Company did not have sufficient funds available to cover the rather substantial start-up costs associated with an offering. On May 15, 2000 RODI signed an agreement with MAG to assist in the sale of up to 2,500,000 shares at $2.00 per share. In this agreement, MAG agreed to pay all offering expenses, make all required filings and manage the selling broker/dealers leaving RODI management free to focus on executing the Business

> Plan. In return, RODI agreed to reimburse MAG for direct expenses in cash from the offering plus a stock bonus of 1 share of common stock for each 5 shares sold. Those shares could then be resold as a service fee. Those individuals who purchased MAG stock were notified in writing by RODI that they were purchasing resale stock prior to its issue. A commission of $0.25 per share was paid to the selling broker in all cases.

The letter detailed the number of shares sold by defendant and Manufacturer's Asset Group through September 2000 and disclosed $286,789 in sales commissions and $573,578 that defendant paid to Manufacturer's Asset Group in reimbursement for "direct expenses." The letter offered shareholders the choice between "an additional 25% of RODI common stock or a full refund." A form sent with the letter was to be used by the shareholders to indicate whether they wanted additional RODI stock equal to 25% of their investment or a full refund. Shareholders were to indicate their preference, sign the form and return it to RODI within two weeks. If a shareholder did not return this form within two weeks, RODI would assume the shareholder (1) accepted the use of funds as disclosed in the letter and (2) wanted additional RODI stock. All of the plaintiffs received the letter but none chose the refund option.

By e-mail dated May 5, 2001, defendant terminated its contract with Manufacturer's Asset Group and told defendant Leonard to stop all activities on defendant's behalf. In June, RODI suspended operations after losing a number of pending engine orders and failing to secure additional financing. At present, its corporate license has expired and it is inactive.

OPINION

A. Repurchase Offer

Defendant's first argument is that Wisconsin law prevents plaintiffs from bringing their claims because defendant offered to repurchase plaintiffs' shares and plaintiffs failed to accept the offer. Defendant cites Wis. Stat. § 551.59(6)(a), which states that

> No purchaser may commence an action under this section if, before suit is commenced, the purchaser has received a written offer stating the respect in which liability under this section may have arisen and fairly advising the purchaser of his or her rights; offering to repurchase the security for cash payable on delivery of the security equal to the consideration paid, together with interest at the legal rate under § 138.04 from the date of payment, less the amount of any income received thereon or, if the purchaser no longer owns the security, offering to pay the purchaser upon acceptance of the offer an amount in cash equal to the damages computed in accordance with sub (1); and stating that the offer may be accepted by the purchaser at any time within a specified period of not less than 30 days after the date or receipt thereof or such shorter period as the division may by rule prescribe; and the purchaser has failed to accept such offer in writing within the specified period.

Plaintiffs concede that defendant sent them letters in early 2001, offering to repurchase their securities but argue that the letter did not comply with all of the requirements in § 551.59(6)(a). Specifically, plaintiffs contend that the repurchase letter (1) did not contain a statement explaining the grounds for potential liability; (2) did not fairly advise each plaintiff of his or her rights; (3) did not offer to buy back plaintiffs' stock with cash plus interest; and (4) did not give plaintiffs at least 30 days to respond. Plaintiffs are correct with respect to (3) and (4): defendant's letter made no mention of a refund in the form of cash

plus interest and gave plaintiffs only two weeks to respond. Thus, defendant's repurchase offer did not comply with Wis. Stat. § 551.59. Plaintiffs' failure to respond to the offer does not bar their claims.

B. Use of Unlicensed Agents

Plaintiffs contend that defendant violated Wis. Stat. § 551.31(2)(a) by employing Leonard and Manufacturer's Asset Group to solicit investors in Wisconsin. In addition, plaintiffs contend Leonard and Manufacturer's Asset Group violated Wis. Stat. § 551.31(1) and that defendant is liable for their violations under the "control person" provision of Wisconsin's securities law, Wis. Stat. § 551.59(4).

Initially, defendant argues that plaintiffs did not allege any violations of § 551.31 by defendant in these cases. This is incorrect. In the amended complaints filed in each case, plaintiffs allege that "[t]he offer and sale of the securities to the Plaintiffs when Defendants Leonard and MAG were not properly licensed constitutes a violation *by each of the Defendants* of sec. 551.31(1) and (2), Wis. Stats . . ." (emphasis added). This language is sufficient to allege that defendant, the issuer of RODI restricted common stock, violated § 551.31(2)(a), which provides that

> It is unlawful for any broker-dealer or issuer to employ an agent to represent it in this state unless at least one of the following conditions is met:

1. The agent is licensed for that broker-dealer or issuer in this state.
2. The agent is exempted from the licensing requirement under [§ 551.31(1)].
3. The agent is not required under [§ 551.31(7)] to obtain a separate license to represent that issuer.

It is clear that defendant was the issuer of the RODI restricted common stock and that defendant signed an agreement engaging Manufacturer's Asset Group as a promoter for defendant's securities. Thus, the first question is whether Leonard and Manufacturer's Asset Group qualify as "agents" of defendant. The definition of "agent" in Wisconsin's securities law is different from the traditional conception of an agent as one who acts on behalf of a principal pursuant to a fiduciary relationship, see Restatement (Second) of Agency § 1. Wis. Stat. § 551.02(2) defines an "agent" in part as "any individual other than a broker-dealer who represents a broker-dealer or an issuer in effecting or attempting to effect transactions in securities." Defendant does not address the question whether Leonard and Manufacturer's Asset Group were its agents. It does not *deny* that Leonard and Manufacturer's Asset Group were its agents in Wisconsin. Moreover, by arguing that they were exempt from the licensing requirement, defendant appears to assume that they were its agents. Thus, I will assume that Leonard and Manufacturer's Asset Group qualify as "agents" of defendant for the purpose of § 551.31(2)(a).

It is undisputed that Leonard and Manufacturer's Asset Group were not licensed by the state of Wisconsin to act as agents on behalf of defendant at the time the offers and sales

were made to plaintiffs. Moreover, neither party argues that condition (3) in § 551.31(a)(2) applies in these cases. Thus, defendant's liability under § 551.31(a)(2) hinges on the applicability of condition (2), that is, whether Leonard and Manufacturer's Asset Group were exempt from the licensing requirement under § 551.31(1).

Section 551.31(1) lists the circumstances in which agents are exempt from the licensing requirement. The present version of the statute exempts from the licensing requirement any agent "acting exclusively as an agent representing an issuer of securities . . . who makes offers and sales of the issuer's securities in transactions that are exempt under s. 551.23(8)(g)," which deals with sales or offers to accredited investors. § 551.31(1)(d). However, this exemption did not become effective until October 2002, at least a year after the events giving rise to plaintiffs' claims. See 2001 Wis. Act. 44 § 203 (creating § 551.31(1)(d)). Defendant argues that the provision should be applied retroactively. Because this is a diversity action governed by Wisconsin law, I must look to Wisconsin law to determine when retroactive application of a statute is appropriate. L.S. Heath & Son, Inc. v. AT&T Information Systems, 9 F.3d 561, 574 (7th Cir. 1993) (looking to Illinois law to determine retroactivity of statutory amendment).

In general, Wisconsin statutes are applied prospectively. Snopek v. Lakeland Medical Center, 223 Wis. 2d 288, 293, 588 N.W.2d 19, 22 (1999). However, there are two situations in which a statute may be applied retroactively: where the language of a statute

reveals expressly or by necessary implication that the statute is to be applied retroactively or where a statute is remedial or procedural rather than substantive. State v. Haines, 2003 WI 39, ¶ 12, 261 Wis. 2d 139, 147, 661 N.W.2d 72, 75. Nothing in the text of § 551.31 indicates expressly that the accredited investor exemption applies retroactively and no court in Wisconsin has addressed § 551.31(1)(d)'s retroactivity.

Defendant argues that the necessary implication of § 551.31(1)(d) is that it has retroactive effect. Defendant's primary support for this position is that at the time plaintiffs made their investments, Wis. Stat. § 551.23(8)(g) was in effect and it exempted from state registration securities offered to accredited investors. According to defendant, by enacting § 551.31(1)(d) in 2002, the legislature was doing no more than fixing a discrepancy in the securities law that exempted securities offered to accredited investors from registration but did not exempt the offerors from the licensing requirement. In addition, defendant contends that there is no unfairness in applying § 551.31(1)(d) retroactively. First, the state legislature intended securities transactions involving accredited investors to take place outside the reach of state regulation. Second, plaintiffs did not base their decision to invest in defendant on Leonard and Manufacturer's Asset Group being subject to Wisconsin's licensing requirement. Defendant argues that it would be unfair to allow plaintiffs to recover damages solely because they discovered an inconsistency in Wisconsin's securities laws that was more likely an oversight than a deliberate exercise of legislative intent.

Defendant's case is somewhat persuasive. I conclude, however, that the language of § 551.31(1)(d) does not necessarily imply retroactive application. The relevant language of the current version reads as follows:

> 551.31. Licensing and notice filing requirements
>
> (1) Unless exempt from licensing under this subsection, it is unlawful for any person to transact business in this state as a broker-dealer unless licensed under this chapter as a broker-dealer. Unless exempt from licensing under this subsection, it is unlawful for any person to transact business in this state as an agent unless licensed under this chapter as an agent. All of the following persons are exempt from licensing under this subsection: . . .
>
> (d) An agent who is acting exclusively as an agent representing an issuer of securities and who makes offers and sales of the issuer's securities in transactions that are exempt under s. 551.23(8)(g) [the accredited investor exemption]. . .

Defendant never addresses the text of the statute; instead, it focuses on a perceived discrepancy in Wisconsin's securities laws and the rationale for exempting accredited investor transactions from reporting and licensing requirements. It ignores the state court's admonition that the question of retroactivity is answered first and foremost by examination of the statutory text. State v. Chrysler Outboard Corp., 219 Wis. 2d 130, 162-63, 580 N.W.2d 203, 216 (1998). In this case, nothing in the text of § 551.31(1)(d) implies that the licensing exemption applies to persons who acted as agents and solicited accredited investors prior to its passage. The statute exempts an agent who "is acting" and "who makes offers and sales"; it says nothing about an individual who "has acted" as an agent and "who

has made offers and sales." In other words, the text does not reveal any intent on the part of the legislature to address conduct that occurred before October 2002.

The statute at issue in Chrysler Outboard Corp. was significantly different. In that case, the Wisconsin Supreme Court held that a provision of Wisconsin's Spills Law, which became effective in May 1978, applied to hazardous substance spills caused in part by actions preceding the statute's effective date. The law required those who caused hazardous discharges to "take the actions necessary to restore the environment to the extent practicable." Id. at 141. According to the court, the legislature's use of the phrase "restore the environment to the extent practicable" was evidence of "an intent to address past conduct." Id. at 163; see also Wipperfurth v. U-Haul Co. of Western Wisconsin, 101 Wis. 2d 586, 591, 304 N.W.2d 767, 770 (1981) (holding that Wisconsin Fair Dealership Law applies retroactively). No similar intent can be gleaned from the text of § 551.31(1)(d).

Although defendant argues the remedial purpose behind § 551.31(1)(d)'s enactment, its argument falls short for several reasons. Defendant provides no evidence of the legislative intent behind § 551.31(1)(d)'s creation; its hypothesis that the provision was enacted to fix a "discrepancy" between the securities registration and licensing requirements is unsupported speculation. It is not out of the realm of possibility that a legislature could decide to regulate the seller of a product but not the product itself. Furthermore, even if defendant is correct as to § 551.31(1)(d)'s purpose, it is by no means inevitable that § 551.31(1)(d) should be

applied retroactively. Even assuming that the legislature considered it problematic or at least inconsistent that the law required agents who offered or sold securities to accredited investors but not the securities themselves to be licensed by the state, it is not obvious that the legislature's creation of an exemption for those agents was intended to absolve from liability any unlicensed agent who ever offered or sold securities to an accredited investor. Given the presumption that statutes operate prospectively, it is more likely that the legislature intended the exemption to apply solely to future offers or sales. Finally, defendant does not and cannot argue that § 551.31(1)(d) was enacted to remedy a lack of clarity in Wisconsin's securities law. The licensing obligation was clear before § 551.31(1)(d) was adopted. The fact that defendant's securities were exempt from registration did not cast any confusion on the licensing requirement. Thus, there is no reason to think that the legislature meant to absolve agents who failed to comply with their clear obligations (or the issuers who employed them) simply because it wanted to make the securities law more uniform.

Defendant's final argument is that even if § 551.31(1)(d) does not apply retroactively, defendant should not be held liable under § 551.31(2)(a) because it did not know that Leonard and Manufacturer's Asset Group were not licensed in Wisconsin. The text of § 551.31(2)(a) does not contain a knowledge requirement; it declares only that it is unlawful for an issuer of securities to employ an agent to represent it in Wisconsin unless the agent

is licensed by the state or exempt from the licensing requirement. Defendant contends that only those issuers who know that their agents are unlicensed should be held liable under this provision. No court has addressed the question whether liability under § 551.31(2)(a) requires a finding that the issuer know its agents are unlicensed, although in Garretto, M.D. v. Elite Advisory Services, Inc., 793 F. Supp. 796, 802 (N.D. Ill. 1996) the court stated that §§ 551.31(1) and (3), which contain the same "it is unlawful for" language, impose strict liability on persons who offer or sell securities as investment advisers or broker-dealers without a license. Defendant contends that this "strict" liability should not be extended to the issuers who employ unlicensed agents because the issuers are one step removed from the licensing process.

In support of its argument, defendant cites State v. Hermann, 164 Wis. 2d 269, 474 N.W.2d 906 (Ct. App. 1991) for the proposition that when a statute is silent as to the requisite mental state, courts should look to legislative intent to determine whether proof of scienter is required. In determining legislative intent, courts should consider "the statute's language, legislative history and purpose, the seriousness of the penalty and the practical requirements of law enforcement." Id. at 277, 474 N.W.2d at 909. I am not convinced that this test is appropriate in the context of a regulatory statute like § 551.31. First, I note that Hermann was not a case dealing with civil liability. It involved a statute that made it a crime to distribute controlled substances in close proximity to a school; the defendant argued that

the state had to prove he knew he was near the school when the offenses occurred. Indeed, it appears that the above-quoted test has been used exclusively in cases involving the interpretation of criminal statutes. E.g., State v. Polashek, 2002 WI 74, 253 Wis. 2d 527, 646 N.W.2d 330; State v. Stoehr, 134 Wis. 2d 396, 396 N.W.2d 177 (1986); State v. Collova, 79 Wis. 2d 473, 255 N.W.2d 581 (1977). Using the test to interpret criminal statutes makes sense in light of the rule of lenity; in order to interpret a criminal statute in favor of the accused, it might be appropriate to infer a mens rea requirement into a statute that is silent on the subject. However, the rule of lenity does not apply to statutes passed pursuant to a state's regulatory power. In Stoehr, 134 Wis. 2d at 182, 396 N.W.2d at 79, the court noted that "[w]hen the legislature's goal is to regulate, to accomplish a social good, or to obtain a high standard of care, proof of a criminal state of mind is often eliminated to achieve the desired result." I conclude that § 551.31(2)(a) means what it says: an issuer violates § 551.31(2)(a) if it employs an unlicensed agent who is not exempt from the licensing requirement. Whether the issuer knew of the agent's unlicensed status is irrelevant.

In sum, because it is undisputed that Leonard and Manufacturer's Asset Group were not licensed by the state of Wisconsin to sell defendant's securities and because defendant has not introduced evidence sufficient to rebut the presumption that § 551.31(1)(d) applies prospectively only, I conclude that defendant violated § 551.31(2)(a).

C. Liability

Wis. Stat. § 551.59 imposes civil liability on those who violate Wisconsin's securities law. In these cases, plaintiffs assert two theories of defendant's liability. First, plaintiffs contend that defendant is liable for its violation of § 551.31(2)(a) under § 551.59(1)(a), which provides in relevant part that

> Any person who offers or sells a security in violation of s. 551.21, 551.31, 551.41, or 551.55 . . . is liable to the person purchasing the security from him or her. The person purchasing the security may sue either at law or in equity to recover the consideration paid for the security, together with interest at the legal rate under s. 138.04 from the date of payment, and reasonable attorney fees, less the amount of any income received on the security, upon the tender of the security, or for damages if the person no longer owns the security. . . .

Plaintiffs' second theory is that defendant is liable for the violations of § 551.31 committed by Leonard and Manufacturer's Asset Group under § 551.59(4), which provides in relevant part that

> Every person who directly or indirectly controls a person liable under [§ 551.59(1), (2) or (3)], every partner, principal executive officer or director or such person, every person occupying a similar status or performing similar functions, every employee of such person who materially aids in the act or transactions constituting the violation, and every broker-dealer or agent who materially aids in the act or transaction constituting the violation, are also liable jointly and severally with and to the same extent as such person, unless the person liable hereunder proves that he or she did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

Because I have not found either Leonard or Manufacturer's Asset Group liable for any violation of Wisconsin's securities laws, plaintiffs' second theory of liability is unavailable.

However, defendant is liable to plaintiffs under the first theory. I have concluded that defendant violated § 551.31 because it employed unlicensed agents to represent it in Wisconsin. I conclude also that defendant "offered or sold its securities" for the purpose of § 551.59(1)(a). Defendant offered the shares sought by plaintiffs, who would not have purchased them if defendant had not made them available. That defendant used intermediaries to locate plaintiffs and collect the money is irrelevant.

Under § 551.59(1)(a), each plaintiff is entitled to recover the money paid for his shares as well as interest and reasonable attorney fees. Criticare Systems v. Sentek, Inc., 159 Wis. 2d 639, 651-52, 465 N.W.2d 216, 221 (Ct. App. 1990) (if securities violation found to exist, award of interest and attorney fees is mandatory). Unfortunately, the stipulated facts regarding the amounts paid by each plaintiff are disorganized and incomplete, making it impossible to award any monetary relief at this time. First, it is unclear which plaintiffs still own the shares of defendant's stock they claim to have purchased; this makes it impossible to determine whether plaintiffs are entitled to consideration paid or damages. Second, for roughly half of the plaintiffs, the number of shares they are listed as owning in the stock transfer reports corresponds to the amount of money they claim to have paid to defendant. However, twelve plaintiffs claim to have paid amounts of money that do not match the number of shares (at $2.00 a share) they are listed as owning. Third, the materials submitted by the parties do not contain calculations of the interest and attorney

fees to which plaintiffs are entitled. Therefore, I will give plaintiffs until January 18, 2005 to submit a detailed calculation of the monetary amounts to which they are entitled. This itemization should be organized on a plaintiff-by-plaintiff basis and should include the following information for each plaintiff: (1) the number of shares of defendant's stock purchased and the dates of purchase for those shares; (2) the consideration paid for those shares; (3) if a plaintiff no longer owns all of the shares he purchased, how many shares he sold, when they were sold and what plaintiff received for them; and (3) a calculation of the interest that has accrued from the date upon which the shares were purchased to the present or to the date on which the shares were sold. Each plaintiff must provide properly authenticated documentation of his ownership of defendant's stock and their payment of money to defendant; any plaintiff who fails to provide proper documentation will not receive an award. Any request for attorney fees must provide reasonable detail and supporting affidavits from plaintiffs' counsel regarding the work performed. Defendant will have until February 1, 2005, to file objections to the amounts sought by plaintiffs. Plaintiffs will have until February 8, 2005 to file any reply to defendant's objections.

ORDER

IT IS ORDERED that:

1. In No. 03-C-535-C, plaintiff William D. Conway's motion for summary judgment

is GRANTED and defendant RODI Power Systems Inc.'s motion for summary judgment is DENIED.

2. In No. 03-C-536-C, the motion for summary judgment filed by plaintiffs John Arvold, Kurt Arvold, Rod Camren, William R. Clemens, William J. Kippley, Anthony B. Gardner, Peter Hartman, Richard Hegge, Greg Hilden, James Koch, Gale Koch, Ken Koppenhaver, David Krall, Patricia Krall, Michael Moran, William Phippen, Richard Smith, Arlan Spilde, Dan Spilde and Kent Spilde is GRANTED and defendant RODI Power Systems Inc.'s motion for summary judgment is DENIED.

3. In No. 03-C-539-C, the motion for summary judgment filed by plaintiffs Randy Paul, Ronald Holtz and S&S Partnership is GRANTED and defendant RODI Power Systems Inc.'s motion for summary judgment is DENIED.

4. Plaintiffs in these cases have until January 18, 2005 to show cause why defendants Raymond L. Leonard, Jr. and Manufacturer's Asset Group should not be dismissed for failure to prosecute.

5. Plaintiffs have until January 18, 2005 to submit a detailed itemization of damages. Defendant will have until February 1, 2005 to file objections to the amounts sought by plaintiffs. Plaintiffs will have until February 8, 2005 to file any reply to defendant's

objections.

Entered this 5th day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge