CONSUMER PROTECTION FOR ELDERS

California Case Brief

I. BACKGROUND FACTS

Plaintiff Michael I. (hereinafter "Michael") had attained 92 years of age and needed roof work done on his home. At this point in his life, having been a homeowner for decades, he knew he was not up to dealing directly with contractors. As a regular customer of the Seaside Home Depot store, he became familiar with their THD At-Home Services division (hereinafter THD) which promised to provide all the expertise and clout of its multi billion dollar parent organization to the management of his project.

THD's salesman came to Michael's home with sales materials and contract forms. The value proposition, a sheet with Home Depot's logo and the motto "you can do it, we can help", was as follows:

More Than Just GREAT PRODUCTS

- **Total project management from start to finish**
- **Complete insurance package to protect YOU and YOUR HOME**
  - *Interlineated by the salesman*: **100 billion HD on the job!**
- **Flexible and attractive financing options**
  - *Interlineated by the salesman*: **12 months no payments no interest (HDCC ends 07/31/06)**

Michael was most attracted to the concept of start to finish project management and to the pecuniary value of 12 months without payments or interest [hereinafter "**no/no**"]. It was a matter of utmost importance to him that the Home Depot honor these undertakings. He was also specifically familiar with the following contract provisions:

Changes and Change Orders: Home Depot, at your request, may perform additional work subject to a Change Order and additional charges payable by you to Home Depot. You may not require Home Depot to provide extra or change order work without providing written authorization prior to the commencement of any work covered by the new Change Order. Any changes to an installation, i.e. substitution of materials or an expansion of the scope of the work, will require you and Home Depot to sign a Change Order that will become a part of this Contract. Change Orders shall be clear in scope and specify any additional payment(s) and changes in completion dates However, Home Depot's failure to comply with these requirements does not preclude recovery for work performed based upon legal or equitable remedies designed to prevent unjust enrichment.

Note About Extra Work and Change Orders: Extra Work and Change Orders become part of this contract once the order is prepared in writing and signed by the parties prior to the commencement of any work covered by the new change order. The Order must describe the scope of the extra work or change, the cost to be added or subtracted from the Contract, and the effect the Change Order will have on the schedule of payments.

From the foregoing redundant, confusing, unfair, vague, deceptive and misleading language, and in the context of oral assurances made by the THD salesman, Michael reasonably understood that there would be no changes in the project without his prior written approval. He expected that in the event of extra work being required, he would have a chance to obtain competitive bids if he so desired, and of course to take his business elsewhere if defendant couldn't match a competitive bid.

With respect to the financing terms, Michael received an express promise from the salesman that the cost of any changes would be included in the 12 months no/no terms. He was led to believe the THD had the ability to deliver on this promise without the need to obtain approval from any third party, e.g. an unidentified bank.

Ultimately, Michael placed faith in Home Depot to treat him fairly, with respect, and to protect him from any transgression, interference or abuse by third parties in connection with the transaction.

II. EVENTS DURING THE PROJECT

THD hired a roofing contractor whose identity was appropriately unknown to Michael since the project was to be conducted from start to finish by THD. One of plaintiff's sons, Alex, was present in the home from time-to-time but could not always be there. Early on, however, in the first day or two while work was being performed, THD's contractor, Mel, told Alex that there would be an additional charge of $1,950 for an additional ten sheets of roof decking that had already been installed, and that Michael would have to pay him this amount at the end of the job. No invoice was provided for this extra work despite's Alex' demand, and when one was produced, there was no receipt for $920.13 of materials that was billed.

On 09/22/06, Alex reported to THD that Mel had given him a bill for $1,950 and he wanted a receipt. Alex further stated that he had been told by Mel that it took 20 hrs x $50/hr for extra work, but the crew was only there a total of 28 hours. Alex told THD he felt his dad was being ripped off and that it's theft. Alex also mentioned that his father was 92 years of age and was being taken advantage of.

When Alex told Michael of the additional charge Michael became distressed and reminded Alex that any new changes would be folded into the 12 months no/no

terms. Michael asked Alex to contact the THD Project Manager, Lance, who wasn't readily available or seen at the site, quite the opposite of the promised management from start to finish.

Alex did reach Lance who said he would see what he could do, but to expect a 20% to 30% interest rate on the additional charges. There was no follow up discussion of what Home Depot was doing to follow the procedures of the contract for implementing change orders. There was no sign that Mel was being supervised by THD or that anyone associated with THD was at all concerned with living up to the promises that the company had made. Michael did see Lance around this time on his way out the door for a doctor visit. There was a brief discussion in which Michael reasserted his rights vis-à-vis Change Orders. When Michael returned home, a proposed change order for $3,900 rather than $1,950 was left taped to his door.

Lance meanwhile was concerned exclusively with getting a Certificate of Completion signed:
(1) On 09/19/06 Lance spoke with Michael and was reminded that the homeowner wouldn't sign for completion until final inspection was approved
(2) On 09/20/06 the Inspector didn't show, so the appointment was rescheduled for Thursday. Michael had received the Certificate of Completion (COC).
(3) On 09/21/06 the Inspector did come out. Mel met with the Inspector and picked up the COC from Michael. Michael did NOT have any direct dealings with Lance in these regards, or any other dealings at all for that matter.

Michael became completely outraged by the total disregard that THD was demonstrating for him. Upon seeing the Change Order for what he considered to be 100% interest, he went directly to his local Seaside store to demand an explanation. He was only able to get the attention of a clerk who promised to forward the information to the Store Manager, and that Michael would be getting a call back. None of the pledged customer service follow up was ever provided.

Alex reached Lance by telephone and confronted him about the dramatic increase in the amount demanded for the extra work. Lance first proffered that he hadn't said 20% to 30% interest, he now claimed he had said it would be 30% to 40%. Alex pointed out that even the greater amount was considerably less than 100%. Lance fell silent, no explanation was given for the discrepant amounts.

On or about 09/21/06 Michael called Alex, who was in San Francisco, to report that Mel was standing in front of him demanding payment of the sum of $1,950. Michael reiterated that he was unwilling to pay the 100% interest amount demanded by THD. Michael asked Mel for a receipt for the materials ($920.13) and Mel replied "…that's what it costs, I'm not lying". In frustration Alex told Michael to just pay the $1,950 and he would deal with it later.

At the same time, Mel presented Michael with a THD change order, again for work alleged to have already been completed, for 15 squares of additional layer in the amount of $600. There was no signature by a THD representative submitting the change, yet somehow the additional amount was to be folded seamlessly into the 12 months no/no terms.

By now it was abundantly clear that THD had shirked its responsibilities under the contract with Michael and was using Mel as its intermediary to collect whatever signatures and monies that were required for the company to realize its profit and move on. There was no concern or respect for the customer whatsoever.

III. PRECOMPLAINT DEMANDS ON BEHALF OF PLAINTIFF

Alex prepared a letter demand to the attention of Robert Nardelli, CEO of The Home Depot, dated 12/22/06 with exhibits attached, setting forth the sum and substance of the above. The demand was for a full refund on the home repair job. Frank Blake became CEO of Home Depot shortly thereafter, and a follow up letter with the original 12/22/06 package enclosed was sent by Alex to Blake's attention on 01/12/07.

Customer service from Home Depot was sorely lacking. Sometime around January, 2007 Alex received a call from an Executive for THD wherein Alex indicated he wanted to get a response from the CEO. This did not happen.

On 03/21/07 Alex again corresponded, this time to Frank Blake, CEO with a copy to the Home Depot Board of Directors. Alex describes being ignored for the most part, and having his time wasted with calls from "impotent managers" Charlie Garrison and Kim Collier who can never be reached. Alex had also received numerous voice mails from the "original perpetrators" Lance and Mel. The demand for a full refund is reiterated, to include the $1,950 paid directly to Mel, and an additional $250 for the deductible for the fire loss.

THD and Home Depot Customer Service sought to avoid accountability by sandbagging and ignoring the complaint. However, the March letter did get a response from the Home Depot's executive offices. A telephone message was left for Alex and Alex returned the call.

There was one correspondence to Michael from Allan Deans, Regional Manager, dated April 13, 2007 offering a refund of the $1,950 Michael had paid directly to Mel. There is no mention that the head office was involved in the matter. There was no follow up on the 04/13/07 letter.

Michael hired MICHAEL WORTHINGTON as his attorney. Contact was taken with THD and Mel. Worthington was unable to elicit a response from THD. Mel claimed that the matter had been settled by refund of the $1,950 and referred claimants back to THD.

The claim was advanced to Home Depot's liability carrier Sedgwick CMS. Mr. Worthington came into contact with Carol Evans at Sedgwick who asked in a sarcastic manner whether there was a law in California allowing recovery for injuries in a contract relationship. Evans told Worthington the carrier wouldn't provide coverage and to take the matter up directly with Home Depot. She failed and refused to provide contact information for further pursuit of the claim.

IV. STATEMENT OF THE CASE

Complaint was filed in the Monterey County Superior Court by Michael against THD, Mel and Lance. Causes of action were for general negligence in hiring and performance of the work, intentional tort with respect to the failure to perform as promised, and for punitive damages.

Lance has left the employ of THD. Mel has avoided service of process even though THD was able to serve him with their cross complaint for indemnity. Mel no longer contracts with THD and had his license suspended by the California Contractor's License Board for failure to maintain workers' compensation insurance at one point in time.

Written discovery was propounded by both sides. Michael's attorney has been told by THD's attorney that he has spoken with both Lance and Mel about what happened. They claim they did nothing wrong. They contend among other things that:

- The property inspector required installation of the 10 layers of decking that was billed to Michael by Mel after the work was actually done. Michael or Alex was present at the inspection and aware of this.
- Lance told Michael and/or Alex that $3,900 was the regular Home Depot price for the extra work and the option of paying Mel $1,950 direct was offered as an alternative to save him money.

V. CONTENTIONS OF LAW

Up to this point there has been no reference to legal authority in the case by the defense. Informal discussions between the attorneys has been to the effect that, as asserted by Carol Evans at Sedgwick, this is just a contract matter and there is no claim for general or punitive damages. There is no cause of action stated for intentional tort, and no recovery in any event in the absence of actual (out of pocket) loss. There is no "elder abuse" under the California Welfare and Institutions Code, that statutory framework is for extreme cases where a defenseless elder has his/her property essentially stolen, usually by a caretaker of family member, and suffers harm by reason thereof.

Our position is that the case does have substantial merit, that plaintiff can prevail with little or no actual damage, but it may be necessary to amend the complaint.

A. Conduct That Occurs During the Performance of a Contract May be Tortious

Eads v Marks (1952) 39 C 2d 807 at 810-811 [249 P2d 257]

> "The fact that the tortious act arises during the performance of a duty created by contract does not negate the agent's liability..
> '... The same act may be both a tort and a breach of contract L. B. Laboratories, Inc. v. Mitchell, pp. 56, 62-63 [244 P.2d 385]
> Even where there is a contractual relationship between the parties, a cause of action in tort may sometimes arise out of the negligent manner in which the contractual duty is performed Green v. Hanson, 103 Cal.App. 430 **39 Cal.2d 811**; Jones v. Kelly, 208 Cal. 251 [280 P. 942]; Wetzel v. Pius, 78 Cal.App. 104 [248 P. 288].)
> A tort may grow out of or be coincident with a contract, and the existence of a contractual relationship does not immunize a tortfeasor from tort liability for his wrongful acts in breach of the contract. Jones v Kelly, supra

It is well established that defendant THD may be found liable in tort for negligent hiring and/or supervision of Mel, and that by violating its contractual obligation to follow specific steps before implementing a change order the defendant became liable under common law tort principals for all its negligent and intentional wrongful acts that grew out of the relationship.

B. Defendants' Business Practices, in Their Totality, Were Vague, Unfair and Deceptive, Thus an Action Lies for Violation of the Consumer Legal Remedies Act

The **California's Consumers Legal Remedies Act** (**CLRA)** (Cal. Civ. Code § 1750 et seq.) prohibits vagueness, unfair business practices, and deception by declaring unlawful –

> "methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer".Cal. Civ. Code § 1770

Civ Code Sec 1770 makes it an unlawful practice...

> (g) to represent that services are of a particular standard, quality or grade...if they are of another
> (i) advertising... services with intent not to sell them as advertised
> (m) making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions
> (n) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve...
> (p) Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not
> (r) Misrepresenting the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction with a consumer

Examples of vagueness, unfair or deceptive acts or practices include:

Vague and misleading language in contract regarding **Change Orders**. Internally inconsistent language making Change Orders discretionary for Home Depot if consumer makes a request, but mandatory for any extra work or substitution of materials. Also purporting to exonerate Home Depot for failing to comply, yet holding consumer liable for unjust enrichment.

Separate paragraph in contract "**A Note About Extra Work and Change Orders**" further confuses the issue by seemingly making a writing mandatory prior to commencement of any work or change, and making it mandatory to disclose any effect the Change Order will have on schedule of payments.

Promotional literature and oral and written statements by the THD salesman that the company was large and experienced in this industry, ("backed by $100 Billion Home Depot") and capable of quality, professional work in overseeing every aspect of the project.

Per the salesman terms were 12 months no/no and cost of changes were to be on the same terms. The defense argues that plaintiff's action, if any, for mishandling of the promises that were made in respect to financing is exclusively against the bank, but this misses the point. Management was able to effectuate changes in financing terms as demonstrated by action taken to change 6 months no/no to 12 months as agreed (after Alex complained), and Lance's inclusion of a second $600 Change Order in the 12 months no/no at the tail end of the transaction.

The argument (post-complaint) that the Home Depot price had to be double the amount that Mel would accept is perplexing. This is not what Lance told Alex and nothing was mentioned about this contention during the entire pre-complaint claims process.

We do not believe that this argument has any possible validity. Defendants' practice of charging its customers a higher "retail repair rate" without explanation or substantiation is a deceptive business practice which falls within the protection of the CLRA.

The standing requirement of **Civ Code Sec 1780** that a consumer who "suffers any damage" may bring suit under the CLRA does not equate with a requirement that the plaintiff suffer pecuniary loss. "Any damage" includes the infringement of any legal right defined by section 1770. [Kagan v Gibralter S&L (1984) 35 C 3rd 582; 200 CR 38]

Civ Code Sec 1780(d) provides for an award of attorney's fees in addition to court costs to the prevailing plaintiff in a claim under the CLRA.

Civil Code Sec 1752 of the CLRA provides that this Act is nonexclusive as to remedies, including common law rights. The $5,000 that may be awarded to a senior citizen is in addition to any other damage, including punitive and other relief the court may deem appropriate.

C. Plaintiff is Entitled to Remedies Afforded by General Business Regulations

> Business & Professions Code Sec 17200. As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.
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> Business & Professions Code Section 17205 provides, "Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state."

Consumer protection is one goal of the tort of unfair business competition. Any member of the public may sue on his own behalf or on behalf of the public generally. [Stoiber v Honeychuck (1980, 5th Dist) 101 CA 3d 903]

These statutes protect against the likelihood of deception to the public, not just actual harm. (Committee on Children's Television, Inc. v. General Foods Corp., supra, 35 Cal.3d at p. 211.)

The court may impose liability and civil penalties without individualized proof of reliance, deception and injury if it is convinced that such a remedy is necessary to deter an unfair practice. (Ibid.; People v. Toomey (1984) 157 Cal.App.3d 1, 16, 23 [203 Cal.Rptr. 642].)

D. Plaintiff, as an "Elder" is in a Specially Protected Class With Respect to Unfair or Deceptive Business Practices

> Welfare Code Sec15610.27. "Elder" means any person residing in this state, 65 years of age or older.
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> Civil Code 3345.
> (a) This section shall apply only in actions brought by, on behalf of, or for the benefit of senior citizens or disabled persons, as those terms are defined in subdivisions (f) and (g) of Section 1761, to redress unfair or deceptive acts or practices or unfair methods of competition.
>
> (b) Whenever a trier of fact is authorized by a statute to impose either a fine, or a civil penalty or other penalty, or any other remedy the purpose or effect of which is to punish or deter, and the amount of the fine, penalty, or other remedy is subject to the trier of fact's discretion, …

Civil Code Sec 3345 provides a separate statutory source of redress for deceptive or unfair conduct toward a senior citizen, allowing the trier of fact to award fines, civil penalties or any other remedies deemed appropriate. This would include common law general and punitive damages. We also believe that Mr. Ilich's emotional distress (accompanied by aggravation of a physical condition of sciatica) in respect to THD At Home Services' handling of this matter has in fact been quite substantial, and that the court has discretion to award general damages.

Defendants admit informally to charging a higher price, approximately twice the amount, to process a change order, as opposed to having plaintiff pay the THD contractor direct. The practice of charging a higher rate without explanation or substantiation is deceptive.

> People v. Dollar Rent-A-Car Systems, Inc. (1989) 211 Cal.App.3d 119 , 259 Cal.Rptr. 191
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> Defendants concede the agents' statements conflict with the contract language, but argue that these "sporadic statements, made by lower level employees," do not establish a business practice. The testimony of former customers, rental agents, and even the testimony of defendants' executives, demonstrate a history of false and misleading business practices and training procedures which had the actual, if not intended, effect of confusing the car rental public about the liability protection afforded by CDW and deceived customers into purchasing CDW under false pretenses.