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Causes of Action under California Law Related to Lead Abatement

RESEARCH SUMMARY

I. Introduction

Client contracted with a vendor who specializes in lead abatement work in the construction industry. Vendor failed to perform any lead abatement activities for client.

II. Cause of Action

Listed below are possible causes of action the client can claim. Except for those causes of action listed below all other cause of actions require a showing of damages, which the client in the present case cannot prove. Outlined are the elements of various causes of action for reference.

A. Contract

1) Unjust Enrichment

In order to prevail on an unjust enrichment claim, a plaintiff must satisfy the five elements: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and the impoverishment, (4) the absence of justification and (5) the absence of a remedy provided by law. *McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.*, 339 F.3d 1087 (9th Cir. Cal. 2003); *Lectrodryer v. Seoulbank*, 77 Cal. App. 4th 723, 725 (Cal. App. 2d Dist. 2000).

The elements of an unjust enrichment claim are the receipt of a benefit and the unjust retention of the benefit at the expense of another. *Peterson v. Cellco Partnership*, 164 Cal. App. 4th 1583, 1593 (Cal. App. 4th Dist. 2008). The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefore. *Id.* There is no

equitable reason for invoking restitution when the plaintiff gets the exchange that he or she expected. *Id.*

Here, the client can sue for the value of the services it performed on an unjust enrichment theory.

2) Good faith & Fair Dealing

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 683 (Cal. 1988). Because the covenant is a contract term, however, compensation for its breach has almost always been limited to contract rather than tort remedies. *Id.* See also, *Yee v. Hughes Aircraft Co.*, 1996 U.S. App. LEXIS 18540 (9th Cir. Cal. 1996).

B. Tort

3) Intentional Infliction of Emotional Distress

The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965 (Cal. 1993) (affirming an award of punitive damages and the award of damages for plaintiffs' fear of cancer due to exposure to toxic waste; it must be established that the plaintiff's fear of cancer is reasonable, that is, that the fear is based upon medically or scientifically corroborated knowledge that the defendant's conduct has significantly increased the plaintiff's risk of cancer and that the plaintiff's actual risk of the threatened cancer is significant).

4) Fraud

The elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce

reliance; (4) justifiable reliance; and (5) resulting damage. *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 990 (Cal. 2004); *Hunter v. Up-Right, Inc.*, 6 Cal. 4th 1174, 1184 (Cal. 1993).

II. Applicability of California Business & Professions Code

Section 17200 defines unfair competition as "any unlawful, unfair or fraudulent business act or practice" *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838 (Cal. App. 2d. Dist. 1994). The "unlawful" practices prohibited by section 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. *Id.* at 839. It is not necessary that the predicate law provide for private civil enforcement because section 17200 "borrows" violations of other laws and treats them as unlawful practices independently actionable under sections 17200 et seq. *Id.* "Unfair" simply means any practice whose harm to the victim outweighs its benefits. *Id.* "Fraudulent" as used in the statute, does not refer to the common law tort of fraud but only requires a showing that members of the public are likely to be deceived. *Id.* A plaintiff suing under section 17200 does not have to prove he or she was directly harmed by the defendant's business practices. *Id.* An action may be brought by any "person, corporation or association or by any person acting for the interests of itself, its members or the general public." *Id.* There is nothing in the word "practice" that necessarily limits section 17200 cases to those actions involving multiple victims. See *Allied Grape Growers v. Bronco Wine Co.*, 203 Cal. App. 3d 432 (Cal. App. 5th Dist. 1988) (rejecting argument that because plaintiff was a single entity operating under a single contract with defendant, it was impossible as a matter of law for plaintiff to show that defendant's fraudulent actions constituted a "business practice" as required by section 17200).

III. Applicability of California Health and Safety Code

California's Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65), H & S C § 25249.6 states in relevant part: “[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10.”

Proposition 65 adopts a dual-pronged approach based on protection and information. *As You Sow v. Conbraco Industries*, 135 Cal. App. 4th 431, 437 (Cal. App. 1st Dist. 2005). The Act accomplishes these twin objectives by prohibiting any person in the course of doing business from knowingly discharging or releasing a listed toxic chemical into a source of drinking water (discharge provision) or from knowingly and intentionally exposing any individual to such chemicals without first providing a warning (warning requirement). (Health & Saf. Code, §§ 25249.5, 25249.6.) *Id.* Section 25249.8 requires the state to publish and update annually a list of known cancer-causing chemicals (carcinogens) and reproductive toxins (teratogens). *Id.* Lead and lead compounds are listed carcinogens and teratogens. (Regs., § 12000, subds. (b), (c)). *Id.*

However, private actions are permitted under Proposition 65 if two requirements are met: (1) the private action was commenced 60 days after the individual had given notice of an alleged violation to the governmental agency in whose jurisdiction the violation was said to have occurred, accompanied by a certificate of merit; and (2) there was no pending public action. *In re Vaccine Cases*, 134 Cal. App. 4th 438 (Cal. App. Dist. 2005).