

**Unfair Competition Defense Podcast**  
**Greenberg Traurig, LLP**  
**Episode 14**

Speaker 1 ([00:00](#)):

This podcast episode reflects the opinions of the hosts and guests and not of Greenberg-Traurig LLP. This episode is presented for informational purposes only, and it is not intended to be construed or used as general legal advice nor a solicitation of any type.

Greg Nysten ([00:17](#)):

Hello everyone, this is Greg Nysten. Welcome to this episode of the Unfair Competition Defense Podcast. I'm here with my co-host, Adil Khan, and today I'd like to introduce GT Los Angeles shareholder, Michael McCarthy. His practice focuses on complex litigation and consumer class actions. He has extensive experience with mass arbitrations, products liability, false advertising, financial institutions, and construction matters. He's here to talk to us about the compelled speech doctrine and its role in product defect cases. Welcome Michael.

Mike McCarthy ([00:54](#)):

Hi, guys. Thanks for having me on today. Happy to be here.

Adil Khan ([00:57](#)):

Thanks for being here, Mike. So before we get into the details, could you just give us and our listeners an overview of the compelled speech doctrine?

Mike McCarthy ([01:07](#)):

Sure. What I'm here to talk about today is really an intersection of two areas of law, which on the one hand, the First Amendment and the compelled speech doctrine's application to commercial speech and how that intersects with product defect omission claims, or in other words, claims that a manufacturer or seller should have disclosed an alleged product defect. And how those two concepts fit together, and an area where we see the potential for defendants to be making constitutional arguments that we don't often see made today, but there is a growing body of support for them in recent case law, at least in the Ninth Circuit.

Greg Nysten ([01:59](#)):

So Michael, where did this concept of a duty to disclose come from?

Mike McCarthy ([02:02](#)):

So if I can maybe just even back up for a second. Many of the consumer fraud or consumer statutory protection claims today, they follow a common allegation. And that allegation goes that the consumers allege that they were deceived because they bought a product with an undisclosed defect. And from the manufacturer's perspective, no product is perfect or lasts forever. You can have problems that result from misuse or overuse. Companies often provide a manufacturer's warranty that covers materials and workmanship defects, and companies also remain responsible for defects that cause physical injury and strict liabilities. This whole concept of, well now do we really have some duty to disclose a potential defect in a subset of products? Do we really have to criticize our own products when we're selling them? And surprisingly, some courts have said in certain situations, the answer is yes. That's what we're talking about here when we're talking about a duty to disclose in this particular context of consumer fraud claims is do companies actually have to disclose that their products have a limitation or a potential to fail on the product packaging in the advertising?

[\(03:28\)](#):

Do the companies actually have to criticize their own products? So in terms of where this duty to disclose came from, and your question, Greg, and today we're going to be focusing a little bit on California and Ninth Circuit law, which is where a lot of jurisdictions have modeled their consumer fraud laws after. In California, this duty to disclose can be traced back about 50 years to a very well-known decision called *Outboard Marine*, and then a decision about 20 years later known as *LiMandri v. Judkins*. But in the *Outboard Marine* decision, that was a partial representation case where the manufacturer had made a number of representations about how the product operated. And according to the plaintiff, the defendant knew, but did not disclose that the off-road vehicles would not operate within those criteria. And the court, analyzing the California Consumer's Legal Remedies Act or CLRA found that when you represent that goods are a particular standard, that part and parcel of that is a prohibition on failing to disclose characteristics that may be contrary to those represented.

[\(04:45\)](#):

So not what we would call a pure omissions case, but the idea of a partial representation theory, if you're going to disclose A, but B relates to A and B is a limitation of A, then you have to disclose B when you make statement A. And really many of the consumer fraud and consumer omission claims that are alleged today, very frequently, almost every day, a new case being filed in the Ninth Circuit or around the country trace back to this similar partial representation theory, which was articulated in the *Outboard Marine* case. And about 20 years after that case, in a seminal case, *LiMandri*, or you often hear what's called the *LiMandri* factors, a California state court held that there are four circumstances in which non-disclosure may constitute actionable fraud or consumer fraud in later cases. And those four circumstances are when the defendant is in a fiduciary relationship with the plaintiff. When the defendant had exclusive knowledge of material facts not known to the plaintiff. When the defendant actively conceals a material fact from the plaintiff. And when the defendant makes partial representations but also suppresses some material facts.

[\(06:07\)](#):

And in some of what we're about to talk about, we'll talk about how these case holdings have evolved over time or been molded over time in the product defect context because *LiMandri* was not a product defect case. But when talking about the four *LiMandri* factors, the two that generally are invoked by plaintiffs asserting CLRA or UCL claims are the, are factor two or factor four. You often don't have fiduciary relationships between consumers and manufacturers, but where you often see is allegations that the manufacturer had exclusive knowledge of the alleged defect before the plaintiff bought the product and didn't disclose it, or that the defendant, what's factor four, that the manufacturer or the seller made some type of marketing representations about the product but did not also disclose the alleged product limitation or defect that the plaintiff wants to claim was related to those marketing representations. The second and fourth *LiMandri* factors are really where we're seeing the bulk of consumer fraud claims tracing back to this duty to disclose in California.

Adil Khan ([07:11](#)):

Thanks, Mike. That's really helpful context. So if we skip forward to the legal landscape today, how do the courts think about this duty to disclose and what its scope would be and what's required of these businesses?

Mike McCarthy ([07:25](#)):

Since *LiMandri* and *Outboard Marine*, courts in the Ninth Circuit have continued to, and California, have continued to refine and articulate and provide different tests for when a duty to disclose may arise. Sometimes those tests have focused on what are the reasonable expectations of the consumer. Sometimes, over time, the test has evolved to focus on whether there was, what's known as a, quote, unreasonable safety hazard. And then after the safety hazard context for products where maybe there isn't a safety hazard, courts have looked at what they call the central functionality of the product. Going back to the beginning and talking a little bit more about how this evolution has occurred and the contours of it, plaintiffs alleging consumer fraud in certain products, there may be a theory that the manufacturer had a duty to disclose that the materials could fail over time. You've seen cases where the plaintiff has alleged, well, for example, in my car or my boat or my electronic product, the manufacturer used this quality of steel or this quality of plastic or this electronic component, but they should have used this other component, and that violated my reasonable expectations.

[\(08:52\)](#):

And a theory like that is frequently rejected by courts unless there has actually been some disclosure to the contrary, or really some well-established basis that the product should have used the alleged component that was missing. In other words, courts have generally rejected the claim that, well, you needed to disclose that you did not use the utmost high-performing quality materials in my product such that you deceived me by using some potentially lesser-grade products. That general theory of my reasonable expectation should be that you would always use the material that's going to last. The longest courts have generally rejected that concept. And once courts started rejecting that concept, plaintiffs pivoted and they tried to say, okay, well I'm focusing on claims where a defect had an alleged safety hazard. And that's often where we still see the bulk of claims today in the consumer fraud space is alleging that the product could fail in a way that constitutes an unreasonable safety hazard to the plaintiff.

(10:06):

And courts have articulated different grounds about when a product really rises to that level of having an unreasonable safety hazard. Oftentimes what you see is courts assessing whether a product rises to the level of an unreasonable safety hazard. We'll often look at the severity and likelihood of that hazard arising. Some courts have said that an unreasonable safety hazard needs to be something like a high-speed vehicle failure or a fire or a serious risk of injury that is almost certain to manifest in the product.

(11:13):

But on the other hand, where the plaintiff's allegations have focused more on a speculative hazard that could arise, but they cannot point to that hazard arising in their own products or in any large scope of the products that are on the market or where the allegation relates to an alleged premature failure that may occur over a long period of time, but that period of time is not really inconsistent with premature use or failure in a product, generally, those types of allegations have failed. With unreasonable safety hazard duty to disclose claims, the key factors are often the severity of the safety hazard and the certainty that it will arise. And whether a court will find a duty to disclose based on an unreasonable safety hazard usually hinges on a function of those two factors.

(12:07):

Over time, where plaintiffs were unable to allege an unreasonable safety hazard, but that the product failed to function, courts have started to develop a third concept which relates to what is called the central functionality of the product. So in other words, let's say you buy a product and the product malfunctions, but that malfunction has nothing to do with safety and poses no safety risk, in California, in the Ninth Circuit, the duty to disclose doctrine has evolved to where there can still be a duty to disclose if the alleged omission was material to the purchase transaction, if the alleged product defect is central to the product's function, or in other words the product is not usable as a result of that alleged defect. And third, if the plaintiff alleges one of the four LiMandri factors, which we talked about earlier.

(13:05):

So in cases where there is no unreasonable safety hazard, creating a duty to disclose, the plaintiff instead would need to show a defect affecting central functionality materiality, and one of those four LiMandri factors. Most typically that the manufacturer or seller had exclusive knowledge or that the alleged defect is inconsistent with a partial representation. Those are unreasonable safety hazard defects and alleged central functionality defects plus one of those LiMandri factors are almost the most common, if not virtually all of the types of California UCL, CLRA product defect omission claims that are being filed today.

Greg Nylan (13:49):

Michael, that's really helpful and really interesting. Some of what you're describing sounds like it could raise First Amendment issues. Can you tell us about the concept of compelled commercial speech?

Mike McCarthy (13:58):

We have not seen the First Amendment and the compelled commercial speech doctrine applied to product defect omission cases very frequently. But over the last couple of years, we have seen it applied in the California Proposition 65 context. And as we'll talk about a little bit, there's little reason why the concept in the argument doesn't also apply to an omission claim in the product defect context. And we think that the defendants and manufacturers should be considering whether the argument is applicable. But just to go back to your question, Greg, and what is compelled

speech? What are we even talking about? The First Amendment, it affords protection to both commercial and non-commercial speech. But the protection of commercial speech is less than the protection of non-commercial speech. The government has a greater interest in regulating commercial speech. And because of that subsidiary status, commercial speech may be regulated in manners where there is a suppression of commercial messages that don't accurately inform the public about lawful activities.

[\(15:09\)](#):

And there are really two E tests that apply to regulation of commercial speech. One is known as the Central Hudson test, which coming from the Supreme Court case, central Hudson Gas, and under the Central Hudson Test, the government may restrict commercial speech that is neither misleading nor connected to unlawful activity as long as the governmental interest in that regulation is substantial. And Central Hudson is what is called an intermediate level of scrutiny, where the regulation at issue must directly advance the governmental interest asserted and not be more extensive than necessary to serve that interest. Now, a related test is known as the Zauderer Test, Z-A-U-D-E-R-E-R, coming from another Supreme Court case. Zauderer v. Office of Disciplinary Counsel. And under the Zauderer test, the government may regulate commercial speech, where the government regulation seeks purely factual and uncontroversial information.

[\(16:14\)](#):

In other words, the government under the Zauderer Test can require speakers to disclose purely factual and uncontroversial information about consumer products as long as those disclosures are reasonably related to a substantial government interest and are neither unjustified nor unduly burdensome. And the interplay of these tests is important, Zauderer is sometimes considered a narrow exception to Central Hudson, but it's really not an exception. It's just another way to meet the Central Hudson intermediate scrutiny test where several of the Central Hudson elements have already been established. Both tests are really focused and met where the government is commanding surely factual and non-controversial disclosures to prevent deceptive advertising.

Adil Khan ([17:06](#)):

So Mike, can you explain to us, we're here in California and the three of us, we practice a lot in the Ninth Circuit. How have these two, kind of, overlapping and interrelated tests been applied in the Ninth Circuit?

Mike McCarthy ([17:17](#)):

Most recently, over the last few years, these tests have been applied to where in the preliminary injunction context where there has been a claim that some type of manufacturer or producer or seller had to disclose the risk of cancer or reproductive harm under Proposition 65, and the manufacturer or the seller has sought an injunction against being compelled to make that disclosure. And usually the argument that goes, the disclosure that you are trying to force me to make, the criticism of my own product that you're trying to force me to make against my willingness to make it is not truly factual, it's not uncontroversial, and it is unjustified and unduly burdensome. For example, food products. If there's a certain food product where the plaintiff has alleged that this food product causes cancer over-consuming it, but there's robust disagreement among the scientific sources about whether the food product does in fact cause cancer, that is a typical example where we've seen the First Amendment and compelled speech doctrine applied.

[\(18:37\)](#):

Another similar scenario would be for chemicals that are used in food manufacturing, but we've typically seen, or cosmetics, there have been recent cosmetics cases, but usually these arguments have arisen with some type of product that is consumed by people or used on the body and is alleged to cause cancer or reproductive harm under Prop 65. And the issue becomes is this non-controversial? Is this factual? And how burdensome would it be to make these disclosures? And we've seen manufacturers have success seeking injunctions of duty to disclose claims, compelled speech claims where the science behind the claim is disputed or where there are not enough accepted scientific sources to support the plaintiff's claim of physical harm.

Greg Nylén ([19:31](#)):

Michael, how does this compelled speech apply to omission cases?

Mike McCarthy ([19:34](#)):

Well, we think it fits squarely. The evolving standards about a duty to disclose a product defect and whether that is consistent with a compelled speech restriction, they logically tied together tightly. And one reaction might be, well, misleading advertising may be prohibited entirely under the First Amendment. So it isn't that, really, the end of the story that if you're making an alleged false advertisement or misleading marketing that there's no First Amendment protection at all. That assumes the truth of the conclusion. And courts have not, in the Prop 65 context, have not agreed with that type of conclusory or circular thinking. So in the product defect case or an undisclosed product defect case, the consumer is alleging that they were misled because of an omission. That there should have been a statement on the product packaging or in the advertising that said, warning, harm, warning, defect, and that they would not have bought the product or they would've paid less for it had there been that disclosure.

[\(20:38\)](#):

But what they're essentially asking for is a compelled speech. They're asking for the manufacturer or seller to be forced to place a message on their product that they fundamentally disagree with. And it's a neat tie to the First Amendment where it should be the plainest burden to show that what they're also, this disclosure they're demanding is purely factual and non-controversial and not unduly burdensome. And in cases where the alleged defect rarely manifests or only manifests in a small subset of products or the science behind the alleged defect or the alleged harm is disputed, and there are competing scientific sources going both ways, it could provide, the First Amendment and the compelled speech doctrine could provide a ripe defense for defendants defending product omission claims in the consumer fraud context.

Adil Khan ([21:37](#)):

Mike, thanks for that explanation. This was really informative for me. I know I learned a lot. If our listeners want to learn more, I know you've recently published an article on this and they should be able to easily find that on your firm bio at GTLaw.com.

Mike McCarthy ([21:52](#)):

Thanks guys. Thank you for having me on. I appreciate the chance to talk with you.

Greg Nysten ([21:55](#)):

Yes, thank you, Michael. All right. I want to continue also quickly our tradition of a film review. This one is unusual because it's not the sort of art house or quirky fair that I've covered in the past, but it was something I discovered on an airplane trip for work by accident, and that was a prequel to, A Quiet Place. This is called, A Quiet Place: Day One. The original film, some reviewers have described as a near perfect film. It's not normally my type of genre, but it was very entertaining about these aliens that are already here and will show up and kill you if you make any sort of noise. But what was interesting about the prequel, which is how they got here in the first place, was the humanity of it, the human story, because the protagonist in the story is dying of cancer before these aliens show up.

[\(22:39\)](#):

And when they do, she has to confront her own mortality. And without giving away the plot, the things that she's willing to do for others in the film is really moving. I found myself surprisingly engrossed by it, and it also has a very heroic kitty, and I will, as a cat lover, and dog lover, but I love them both. I'll tell you, you don't have to worry about the cat. I'm going to give that away, but it's got a great cat in it. So I highly recommend it, especially if you're on Delta and you want to watch something that's pretty much entertaining, it's got more depth than you'd expect.

Adil Khan ([23:08](#)):

Thanks for sharing that, Greg. So thanks again to our guest, Michael McCarthy. Greg, thank you for your time here. And thanks to our listeners and keep an eye out for our next episode, which we hope to publish in the next few weeks.