Manufacturers' Center for Legal Action

MCLA Constitutional Law Series

THE FIRST AMENDMENT AND MANDATORY COMMERCIAL DISCLOSURES

This white paper explores the First Amendment implications of mandatory product disclosures and transparency initiatives, when such disclosures compel manufacturers to disparage their own products, or to in-effect take sides in controversial public policy debates they might otherwise avoid. Such mandates raise important free speech concerns under the First Amendment, and as a result courts should apply strict scrutiny when reviewing them.

Mandatory commercial disclosures—for example, requiring a manufacturer to include a known product hazard on their product label—can be an effective and generally low-burden alternative to top-down "command and control" regulation in many settings. At the same time, there is little doubt that such disclosures are compelled private speech and requirements such as these have become increasingly common in recent years at the federal, state, and local level.[1] Manufacturers are concerned that policymakers increasingly leverage such requirements to force manufacturers to speak on controversial issues and even to make broader policy statements with which they disagree.

There are many reasons for the increased interest in mandatory commercial disclosures. Some regulators are interested in altering market behavior and consumer attitudes.[2] Others feel increasingly resource constrained, and mandatory labeling may provide a low-cost way to advance a regulatory goal.[3] In some cases, mere disclosure of factual information may act to correct a market failure or information asymmetry in a way that improves public health and welfare. Whatever the aim, however, there are significant downside risks associated with mandatory commercial disclosures.

Many of the practical risks of mandatory disclosures are well documented. One example is the danger of over warning. Members of the public may become sufficiently desensitized to warnings that they "are less likely to pay attention to any one particular warning."[4] Detailing too many risks may cause consumers to discount *all* risks or to become so habituated to repeated warnings that they stop paying attention.[5] Such impacts undermine the very rationale for requiring disclosures in the first instance. A warning that does not lead to beneficial public outcomes is wasted ink at-best.

At-worst, compelled disclosures present a more fundamental attack on private speech protected under the First Amendment. Drawing a manufacturer into a debate that they would otherwise avoid or requiring them to label a product in order to make it less appealing versus safer has far-reaching consequences. This white paper identifies practical and legal problems with mandated

commercial speech and makes the case that subjecting such requirements to strict scrutiny is a vital and rational check on improper government behavior.

The Nature of Mandatory Disclosures has Changed

In addition to traditional dangers such as overwarning and consumer confusion, recent disclosure requirements have begun to force companies to speak in ways that lead the public to believe that they are expressing views on controversial topics or taking positions in divisive and unsettled debates over public health and social science. Such requirements raise concerns that policymakers are using disclosure mandates to "burden the speech of others in order to tilt public debate in a preferred direction."[6]

Examples of troublesome mandates are common. Vermont required food and dairy manufacturers to "warn" consumers about their methods for producing milk,[7] processed foods,[8] and raw agricultural commodities[9] in a way that implied that such foods were unsafe—even though the federal government and several reputable public health organizations had determined that the methods and ingredients in question pose no health risks. New York City required chain restaurants to display sodium warnings for certain items on their menu boards despite unclear and at-times contradictory science on the health impacts of sodium consumption.[10] Local governments in California forced cell phone retailers to advise the public that using cell phones is dangerous, despite a total lack of evidence suggesting why such a claim should be made.[11]

These new mandates contrast sharply with long-standing and familiar requirements designed to promote standardization or cure deception in the marketplace through enforcement of neutral and objective measures like "honest weights."[12] Disclosure of such information is not inflammatory, political, or viewpoint-based. Not surprisingly, courts saw few First Amendment challenges to these largely unobjectionable requirements.

The National Association of Manufacturers ("NAM") has been at the forefront of work to curb some of the most aggressive government encroachments on the First Amendment rights of manufactures. For example, the NAM challenged a U.S. Securities & Exchange Commission requirement that manufacturers disclose the origin of certain minerals in their supply chains. Under the so-called "conflict minerals" rule, exchange-listed companies were required to certify whether minerals in their products were or were not "conflict-free," referring to armed conflict in the Democratic Republic of Congo.[13] The NAM argued that private parties should not be forced to disparage their own products or business operations, and the D.C. Circuit agreed, holding that the required disclosures interfered with the exercise of the freedom of speech under the First Amendment by "requir[ing] an issuer to tell consumers that its products are ethically tainted."[14] Further, the court agreed with NAM's arguments that "[r]equiring a company to publicly condemn itself is undoubtedly a more 'effective' way for the government to stigmatize and shape behavior than for the government to have to convey its views itself, but that makes the requirement more constitutionally offensive, not less so."[15]

What Legal Regime Applies to Required Disclosures?

Courts today tend to apply a confusing range of scrutiny to regulatory measures that involve mandatory commercial speech. The seminal case on disclosure regimes, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), involved allegations that an Ohio lawyer was misleading the public by advertising that new clients would not have to pay legal fees if their suit was unsuccessful without mentioning that clients would still pay costs. Ohio required the attorney to disclose this fact in his advertisements. The Supreme Court held that this disclosure requirement did not violate the attorney's First Amendment rights because the requirement was "purely factual," "uncontroversial," not "unduly burdensome" or "unjustified," and it was "reasonably related to" the Government's interest in preventing deception.[16]

In the decades following *Zauderer*, the Supreme Court repeatedly affirmed and clarified that government-mandated disclosure requirements must address harms that are "potentially real not purely hypothetical,"[17] and must extend "no broader than reasonably necessary."[18] "Otherwise, they risk 'chilling' protected speech."[19] In addition, the Court has continued to expand First Amendment protections for all kinds of commercial speech, subjecting an increasing number of regulations to heightened judicial scrutiny.[20]

The Court intended *Zauderer* to act as a limit on governmental attempts to compel speech, but the "purely factual" and "uncontroversial" standard has proven too broad and ambiguous to effectively constrain modern disclosure requirements that in-effect force manufacturers to disparage their own products or speak on issues they would otherwise avoid. Lower courts, the first bulwark against governmental attempts to force, control, or chill speech, are sorely in need of updated guidance from the Supreme Court.[21]

Mandatory Disclosures Should be Subjected to Strict Scrutiny

The First Amendment issues associated with mandatory commercial disclosures have been percolating in the lower courts for some time following the *Zauderer* decision.[22] The Supreme Court may soon address this issue.[23] If it does, the Court should look to bedrock principles of First Amendment jurisprudence and make clear that private commercial speech is protected to the same extent as speech of other kinds. It is only appropriate that federal courts subject compelled speech mandates to a strict scrutiny analysis.

The Court recognized long ago that even free speech rights have limits, but it subjects such limits to a stringent standard of review, generally holding that they must be narrowly tailored to further a compelling governmental interest.[24] The Court has long viewed content- or viewpoint-based regulations to be particularly corrosive to fundamental rights, because targeting speech based on its message may reflect government hostility toward that message or toward the speakers who carry the message. Courts regularly subject egregious examples of compelled speech that suggest a viewpoint bias to a strict scrutiny analysis. Recent cases have gone further, however, applying a strict analysis to regulatory requirements that may appear more garden-variety, suggesting that the Court is uncomfortable with content and viewpoint-based regulations regardless of context.[25]

Subjecting compelled speech requirements of all kinds to a strict scrutiny analysis places the burden of justifying such an imposition on private rights where it belongs: with the government. Some familiar disclosure requirements would certainly be struck down, but courts will only invalidate disclosure requirements if they are unjustified.[26] Many commercial regulations, including disclosure or product labeling requirements, pose no particular problem and would not risk invalidation. Health and safety warnings that serve compelling interests and are appropriately tailored to serve those interests will remain intact and useful. Where a governmental actor intends to take sides in a policy debate but cannot meet strict scrutiny, they will simply be forced to speak directly using their own resources and will be limited only to the extent that legislatures place restrictions on the public dissemination of information.[27]

In the modern era, manufacturers are routinely engaged in activities that are both highly regulated and tremendously important. Governments play an important role in striking a balance between effectively regulating risks and addressing market failures, and they should certainly be encouraged to explore light-touch regulatory approaches that involve a minimal amount of command-and-control intervention in markets such as targeted and factual disclosure requirements. Forcing manufacturers to speak and disparage their services and products, or to take sides in controversial public policy debates, should only ever be done as a last resort subject to the strictest possible standard of judicial review.

The right to free speech is among the most important of those protected under the bill of rights—enjoying pride of place before all other critically important rights. That protection can be no less important based merely on the source of the speech at issue. Extending uniform protections through a strict scrutiny analysis will provide a predictable and fair roadmap for all actors, whether private or governmental, and will result in a robust and appropriate exchange of ideas in the marketplace to the benefit of all citizens.

NOTES

[1] *See, e.g.*, Timothy J. Straub, *Fair Warning?: The First Amendment, Compelled Commercial Disclosures, and Cigarette Warning Labels*, 40 Fordham Urb. L.J. 1201, 1224 (2013).

[2] *See generally*, Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2009).

[3] *See* Brian E. Roe et al., *The Economics of Voluntary Versus Mandatory Labels*, 6 Ann. Rev. Resource Econ. 407, 408–09 (2014).

[4] Experimental Study of Risk Information Amount and Location in Direct-to-Consumer Print Ads, 82 Fed. Reg. 27842, 27844 (June 19, 2017).

[5] *Id.*

[6] *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578–79 (2011).

[7] *See Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996).

[8] *See Grocery Mfrs. Ass'n v. Sorrell*, 102 F. Supp. 3d 583 (D. Vt. 2015), *appeal dismissed*, Order, No. 15-1504 (Aug. 5, 2016).

[9] *Id.*

[10] *See Nat'l Rest. Ass'n. v N.Y.C. Dep't of Health & Mental Hygiene*, 148 A.D.3d 169, 172 (N.Y. App. Div. 2017).

[11] *See CTIA–The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105 (9th Cir. 2017), *cert. granted, judgment vacated and remanded*, 138 S. Ct. 2708 (2018); *CTIA–The Wireless Ass'n v. City & Cty. of S.F.*, 494 F. App'x 752, 753 (9th Cir. 2012).

[12] *See Armour & Co. v. North Dakota*, 240 U.S. 510, 516 (1916).

[13] *See Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015).

[14] *Id.* at 530.

[15] *Id.*

[16] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, at 650–53 (1985).

[17] *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377 (2018) (quoting *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146 (1994)).

[18] *Becerra*, 138 S. Ct. at 2377 (collecting cases).

[19] *Id.* (quoting *Zauderer*, 471 U.S. at 651).

[20] *See, e.g.*, *Matal v. Tam*, 137 S. Ct. 1744, 1763–65 (2017); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571–79 (2011).

[21] This perception is widespread, with both Justice Clarence Thomas and Justice Ruth Bader Ginsburg stating that it is time for the Court to step in and clarify the law in this area. *See Borgner v. Fla. Bd. Of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari). They are not the first justices to indicate skepticism that the *Zauderer* standard is sufficient to curtail First Amendment harms. *See Zauderer*, 471 U.S. at 659 (Brennan, J., joined by Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[22] *See Nat'l Ass'n of Mfrs.*, 800 F.3d at 524 (noting "the conflict in the circuits regarding the reach of *Zauderer*") (footnotes omitted); Note, *Repackaging Zauderer*, 130 Harv. L. Rev. 972, 979 (2017) ("*Zauderer*'s treatment in various circuits most closely resembles a fractured, frequently contradictory mosaic.").

[23] *See, e.g.*, *CTIA–The Wireless Ass'n v. City of Berkeley*, 138 S. Ct. 2708 (2018) (per curiam) (granting, vacating, and remanding for reconsideration in light of *Becerra*).

[24] *See, e.g.*, *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010).

[25] *Becerra*, 138 S. Ct. at 2374–75; *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227–31 (2015); *Sorrell*, 564 U.S. at 561–70.

[26] *See Sorrell*, 564 U.S. at 579 ("[C]ontent-based restrictions on protected expression are sometimes permissible[.]").

[27] *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245–46 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.").