

Compelled Disclosures in Commercial Speech



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Compelled Disclosure Requirements

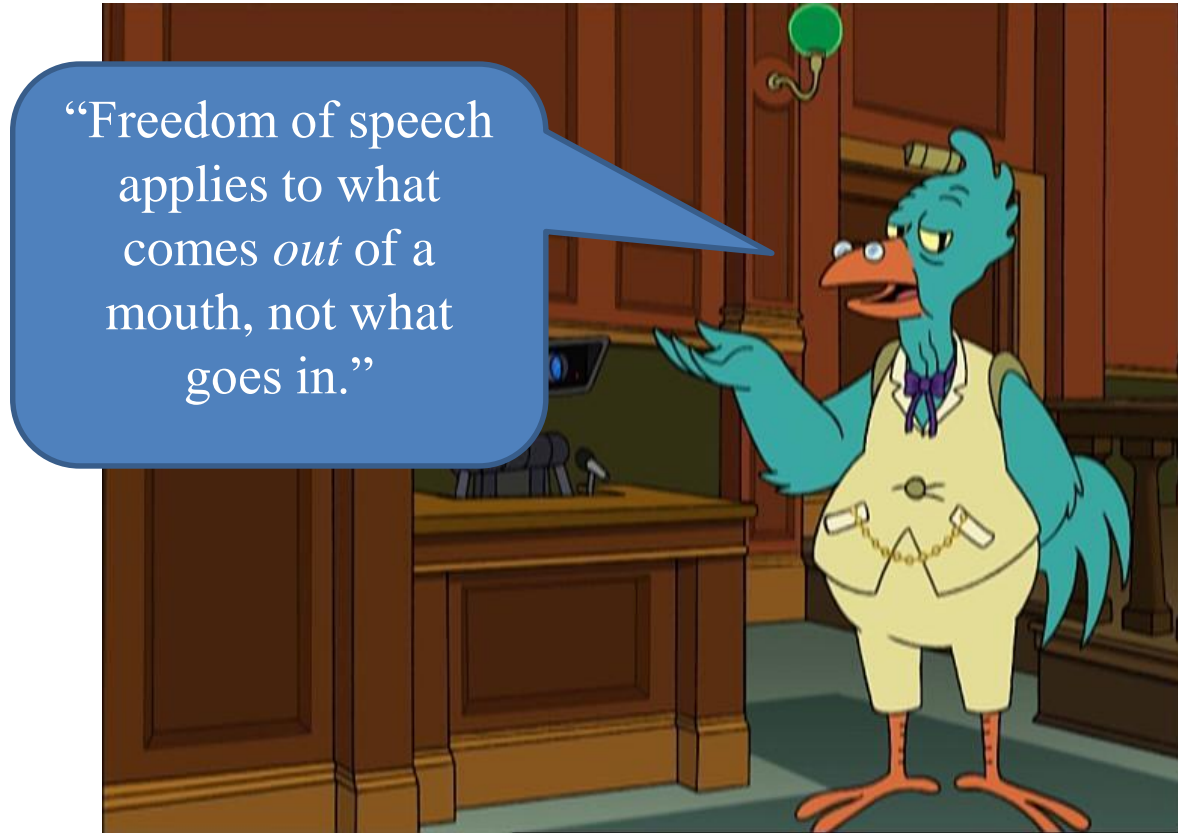
National Rest. Assn. v N.Y. City, 148 A.D.3d 169 (N.Y. App. 2017)



Am. Bev. Assn. v San Francisco, 871 F. 3d 884 (9th Cir. 2017)



Compelled Speech



State of Alabama v. Giant Space Iguana, 27³ U.S. Ω (2976)
(Chewing corners off Constitution deemed non-protected speech).

DID YOU USE THIS IUD?

ATTENTION

If you or a friend have been seriously injured by this IUD, do not assume it is too late to take legal action against the manufacturer. Our law firm is presently representing women on such cases.



The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

Free Case Review 1-888-995-6117

Zaudurer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)

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Clients are responsible for costs even if claims are unsuccessful. Contingency percentages computed after deduction of court costs and expenses.

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Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)

- Affirmative limit on commercial speech
 - *Central Hudson*
 - Substantial government interest
 - Means directly advance that interest

But advertisers interest in *not* providing information minimal

- Compelled commercial disclosure (Zauderer)
 - Purely factual and uncontroversial
 - Not unduly burdensome
 - Reasonable relation to interest of avoiding deception
 - Possibility of deception that is more than speculative
 - No survey or hard data required

Zauderer Factors (1985-2014)

- Is deception required?
 - Government interest may be broader than consumer deception
 - *N.Y. State Rest. Ass'n. v. N.Y. City*, 556 F.3d 114 (2d Cir. 2009)
 - Government must show ‘self-evident’ or ‘potentially real’ danger of consumer deception.
 - *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012)



Zauderer Factors (1985-2014)

- Is the required disclosure controversial?

- NO: Calorie counts
- *Zauderer* applies
 - *N.Y. State Rest. Ass'n. v. N.Y. City*, 556 F.3d 114 (2d Cir. 2009)



- YES: Graphic cigarette warning images
 - “A different animal”
 - Intended to elicit emotional response
 - *Central Hudson* applies
 - *R.J. Reynolds v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012)



Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014)



- *Zauderer* applies to uncontroversial disclosures related to governmental interests other than preventing deception
 - Overruled *R.J. Reynolds v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012)
- Does interest have to be substantial?
 - “Adequate;” more than “idle curiosity” of consumer.
- Is “slaughter” controversial?
 - Regulation allows “harvested” instead.

National Rest. Assn. v N.Y. City, 148 A.D.3d 169 (N.Y. App. 2017)



- Factual or controversial?
 - “The weight of the scientific evidence in the record shows that it is factual, accurate and uncontroversial.”
- Adequate government interest?
 - Improving consumer information about potential health risks sufficient; deception not required
 - Applicability to chain restaurants only is reasonable – easier to comply and administer



Am. Bev. Assn. v San Francisco, 871 F. 3d 884 (9th Cir. 2017)



Coca-Cola

#openhappiness

**happiness.
coca-cola.**

WARNING

Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.

© 2017 Coca-Cola Bottling Co. of San Francisco. All rights reserved. #openhappiness

Am. Bev. Assn. v San Francisco, 871 F. 3d 884 (9th Cir. 2017)

- Applicable beyond prevention of deception
 - *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014)
- Controversy regarding factual accuracy?
 - Ignores quantity consumed; other lifestyle choices
 - Contrary to FDA statements
 - Applicability to beverages only misleading; implies other sugary foods are ok
- Unduly Burdensome
 - Box overwhelms other visual elements
 - Forcing a speaker to deliver one-sided message is an undue burden



Judicial and Administrative Orders



**Likely sourced
from suppliers
using child and/or
forced labor**

McCoy v. Nestle United States, Inc., 173 F. Supp. 3d 954 (N.D. Cal. 2016)

Judicial and Administrative Orders

ECM Biofilms, Inc. v. FTC, 851 F.3d 599 (6th Cir. 2017) (required disclosure in administrative order)



Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc., 2017 U.S. App. LEXIS 15966 (4th Cir. 2017) (court-mandated corrective email)



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Compelled Advertising Expenses

Government Speech Doctrine



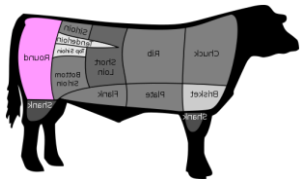
Glickman v. Wileman Bros. & Elliott, 521 U.S. 457 (1997)

United States v. United Foods, 533 U.S. 405 (2001)



Constitutional law classes will doubtless enjoy the superficially droll question, 'why does the Constitution prohibit the government from compelling mushroom growers, but allow government to compel nectarine, peach and plum growers, to pay for generic advertising?'

- Delano Farms Co. v. California Grape Comm., 318 F. 3d 895 (9th Cir. 2003)



Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005)

