No. 10-17321

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD SMITH and REBECCA KLEIN,

Plaintiffs-Appellants,

v.

FORD MOTOR CO.,

Defendant-Appellee.

On Appeal from the United States District
Court for the Northern District of California

BRIEF FOR AMICI CURIAE PUBLIC CITIZEN AND CENTER FOR AUTO SAFETY IN SUPPORT OF APPELLANTS AND SUPPORTING CERTIFICATION TO THE CALIFORNIA SUPREME COURT

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May 26, 2011

RULE 26.1 DISCLOSURE STATEMENT

Public Citizen, Inc., and the Center for Auto Safety are nonprofit corporations that have no parent corporations and that have issued no stock.

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"[U]ntil we get a ruling out of the California Supreme Court clarifying this whole matter, I don't know if we ever will, if we ever do that will be a big help. So all of us are just struggling with these cases at this point and many of the cases, as you know, are coming from the district courts. . . . [T]here's going to be some amount of disagreement along the way, I think, for quite some time."

— District Court Judge Maxine M. Chesney,
Hearing on Ford's Motion for Judgment on the Pleadings,
March 14, 2008, ER 28-29

* * *

INTRODUCTION

When deciding an issue governed by state law, a federal court must apply the law as would the state's highest court. In the mine run of cases, this task is straightforward and well within a federal court's competence. But when a case raises an unsettled and important question of state law, the federal court must attempt to predict how the state's highest court would decide the issue. In such cases, principles of federalism and comity may favor certifying the state-law question to the state's highest court. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997). Certification is particularly warranted when the absence of controlling state-law precedent has led to inconsistent decisions by federal courts, and when there are strong reasons, based on both law and policy, to doubt the accuracy of a district court's state-law prediction. This is such a case.

This case is the latest in a growing line of federal cases concerning the scope of a manufacturer's duty under California law to disclose product defects to

consumers. These cases pose the question whether California law permits a manufacturer to conceal non-safety-related product defects that generally do not appear until after a product's warranty expires. Federal courts have given sharply different answers to this unsettled question of state law.

Like the district court below, some federal courts have read one California Court of Appeal case as holding that "[a] manufacturer's duty to consumers is limited to its warranty obligations absent either an affirmative misrepresentation or a safety issue." ER 9 (citations omitted). On this view, because non-safety defects cause only economic loss, manufacturers may contractually limit their duty to disclose such defects. The federal courts that take this view have predicted that the California Supreme Court would agree because they believe the rule is consistent with that court's economic loss doctrine, which serves to mark the line "between tort recovery for physical injuries and warranty recovery for economic loss." *Seely v. White Motor Co.*, 63 Cal. 2d 9, 18 (1965).

By contrast, other federal courts have read California law differently and followed the California Supreme Court's general rule that a duty to disclose "may exist when one party to a transaction has sole knowledge or access to material facts," *Goodman v. Kennedy*, 18 Cal. 3d 335, 347 (1976), and that "materiality is generally a question of fact" to be determined under a reasonable consumer standard, *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 332-33 (2011) (citation

omitted). This approach does not treat the existence of an affirmative representation or safety defect as dispositive. In so doing, it heeds the express legislative directive that California's Consumers Legal Remedies Act (CLRA) is not waivable by contract, Cal. Civ. Code § 1751, and "shall be liberally construed and applied . . . to protect consumers against unfair and deceptive business practices." Cal. Civ. Code § 1760.

As illustrated by the increasing number of cases confronting the question, this dispute is not academic. But it should not be resolved by a federal court. Because the question here implicates the intersection of state tort, contract, and consumer protection law, and because of the sharp divide among federal courts applying California law, this Court should certify the question to the California Supreme Court to authoritatively resolve this important state-law issue.

INTEREST OF AMICI CURIAE[1]

Public Citizen is a nonprofit consumer-advocacy organization founded in 1971. On behalf of its approximately 225,000 members and supporters nationally, Public Citizen appears before Congress, administrative agencies, and courts on a wide range of issues and works for enactment and enforcement of laws protecting

[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. Both parties have consented to the filing of this amicus brief.

consumers, workers, and the general public. Public Citizen has long fought to preserve the right of consumers to seek redress in the courts and to improve the safety and quality of products including passenger vehicles and trucks.

The Center for Auto Safety is a nonprofit consumer-advocacy organization with approximately 15,000 members. Among other things, the Center works for strong federal safety standards to protect drivers and passengers. The Center was founded in 1970 to provide consumers a voice for auto safety and quality in Washington and to help "lemon" owners fight back across the country. The Center advocates for auto safety, efficiency, and quality before the Department of Transportation, Federal Trade Commission, Environmental Protection Agency, and in the courts.

Amici curiae file this brief because this case raises a recurring question of state law that implicates important policy considerations that affect consumer protections afforded by California law.

ARGUMENT

I. Because resolution of the question will determine the outcome of this appeal and there is no clear controlling precedent, the requirements for certification are met.

This case concerns the scope of a manufacturer's duty under California law to disclose product defects to consumers. As a general rule, California requires parties to a transaction to disclose all material facts of which they have exclusive

knowledge. *See Limandri v. Judkins*, 52 Cal. App. 4th 326, 337 (1997); *Bardin v. Daimlerchrysler Corp.*, 136 Cal. App. 4th 1255, 1276 (2006) ("[The CLRA] prohibit[s] concealment or suppression of material facts."). Further, "materiality is generally a question of fact" to be determined under a reasonable consumer standard. *Kwikset*, 51 Cal. 4th at 332-33. At issue here, therefore, is whether California law creates an exception to these general rules for cases predicated upon a manufacturer's failure to disclose a non-safety-related product defect that does not appear until after the warranty expires. This question meets both requirements for certification to the California Supreme Court: (1) its resolution could determine the outcome of this appeal, and (2) there is no clear controlling precedent. *See* Cal. Rule of Court 8.548(a).

First, resolution of this question will determine the outcome of this appeal. The district court granted Ford's motion for summary judgment on the CLRA, Unfair Competition Law (UCL), and fraudulent concealment claims because it found that a manufacturer has no legal duty to disclose non-safety-related product defects that will manifest themselves after the warranty period. If the court was wrong on this question, then the basis for summary judgment was wrong as well.

Ford nonetheless disputes that this question "could determine the outcome of a matter pending in the requesting court." *Id.* It argues that even if the district court were wrong that no duty to disclose could exist here, "such a holding would not

control this case because there is no evidence of [intentional] concealment." Ford's Opp. to Cert. at 14. Regardless of whether Ford's view of the evidence is correct, its argument misstates the relevant standard. In this Court, the proper inquiry is not whether a decision could determine the outcome of the *case*, but whether it could determine the outcome of the *appeal*. *See Readylink Healthcare v. Lynch*, 440 F.3d 1118, 1120 (9th Cir. 2006); *Phila. Indem. Ins. Co. v. Findley*, 395 F.3d 1046, 1049 (9th Cir. 2005). Ford does not deny that the answer to this question could determine the outcome of this appeal.

Second, the question presented for certification is not answered by clear controlling precedent in California law. Indeed, the lack of clarity on this question has vexed federal courts for several years. The confusion stems in part from the California Court of Appeal's decision in *Daugherty v. American Honda Motor Co.*, 144 Cal. App. 4th 824, 834-39 (2006). In that case, the court dismissed a complaint that alleged that Honda's failure to disclose an engine defect that appeared outside the warranty period violated the CLRA and other state laws. The court held that Honda had no duty to disclose the defect because the complaint did not allege either a safety concern or that the "public had any expectation or made any assumptions regarding the life span of the [product]," but alleged only that the manufacturer had knowledge of an "unreasonable risk" of "serious potential damages." *Id.* (citation omitted).

Federal courts have had difficulty interpreting the scope of this decision. Construed broadly, *Daugherty* stands as a major policy-based exception to California's general rule that whether a manufacturer has a duty to disclose information to consumers turns on whether the information is material, which is generally a question of fact. Construed more narrowly, *Daugherty* imposes a pleading requirement that is consistent with California's general disclosure rule and with the California Supreme Court's recognition that materiality may be decided as a matter of law if the fact misrepresented—whether affirmatively or by omission—"is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it." *In re Tobacco II Cases*, 46 Cal. 4th 298, 327 (2009) (citation omitted). On this reading of *Daugherty*, safety defects meet the pleading requirement because they are not "obviously unimportant"; whether a non-safety defect does as well depends on whether the "public had any expectation or made any assumptions regarding the life span of the [allegedly defective product]." 144 Cal. App. 4th at 829.

Not surprisingly, the confusion surrounding this issue has created "a split among [federal] courts." *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 972 (N.D. Cal. 2008), *aff'd*, 322 Fed. Appx. 489 (9th Cir. 2009). On one side are decisions, like the district court's below, holding that for a manufacturer to have a duty to disclose a product defect to consumers, the defect "must pose 'safety

concerns.'" ER 8-9 (quoting *Daugherty*, 144 Cal. App. 4th 835-38); *see Berenblat v. Apple, Inc.*, 2009 WL 2591366, at *7 (N.D. Cal. 2009); *Morgan v. Harmonix Music Sys., Inc.*, 2009 WL 2031765, at *4 (N.D. Cal. 2009); *Oestreicher*, 544 F. Supp. 2d at 969-73. These decisions read *Daugherty* to hold, as a matter of law, that when "a plaintiff's claim is predicated on a manufacturer's failure to inform its customers of a product's likelihood of failing outside the warranty period, the risk posed by such asserted defect cannot be 'merely' the cost of the product's repair." ER 8. "Such a rule," these courts find, "is consistent with the policies underlying California warranty law" and with the California Supreme Court's economic loss doctrine. *Id.* at 9.

Reading the state-court cases differently, other federal courts have held that California law does not make the existence of an affirmative misrepresentation or safety defect dispositive. *See, e.g.*, *Tietsworth v. Sears, Roebuck & Co.*, 720 F. Supp. 2d 1123 (N.D. Cal. 2010); *Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088 (N.D. Cal. 2007). These cases follow California's general rule that "a duty to disclose exists 'when the defendant had exclusive knowledge of material facts not known to the plaintiff,'" *Falk*, 496 F. Supp. 2d at 1096 (quoting *Judkins*, 52 Cal. App. 4th at 337), and that "materiality is generally a question of fact" to be decided under a reasonable consumer standard, *Kwikset*, 51 Cal. 4th at 333 (citation omitted). Under this approach, the courts recognize that it is possible that a

reasonable consumer might, depending on the circumstances, find the economic loss caused by a heightened risk of post-warranty part failure to be material to a transaction, irrespective of whether the failure also raises safety concerns. *See, e.g.*, *Tietsworth*, 720 F. Supp. 2d at 1133-38; *Falk*, 496 F. Supp. 2d at 1093-99. What matters is that the complaint alleges that the public had an expectation or made an assumption regarding the life span of the product. If the complaint does so, then the question whether the defect is material should go to the jury.

In *Tietsworth*, for example, the plaintiffs brought a class action alleging that Sears breached its duty to disclose material facts to consumers when it failed to notify them that a particular washing machine model contained an electronic defect that caused the machine to malfunction in a way that sometimes rendered it inoperable. For some plaintiffs, including Tietsworth, the defect did not become apparent until several months after the one-year product warranty had expired. For other plaintiffs, the defect appeared within the warranty period, but their machines were not fixed during that time, allegedly because of Sears' refusal to acknowledge the defect. The court in *Tietsworth* held that the plaintiffs had adequately stated a failure-to-disclose claim under the CLRA, UCL, and California common law. Because the complaint alleged that Sears knew of the defect and did not notify consumers, and also alleged that the defect was material because it affected consumers' use of the machine or required them to pay repair costs, the court held

that "the alleged defect is an omission of a fact the defendant was obliged to disclose." 720 F. Supp. 2d at 1138 (quotation omitted). Under the rule articulated by the district court in this case, however, Sears would have no duty to disclose the electronic defect. The two approaches are in direct conflict.

Similarly, in *Falk*, the district court held that the defendant automobile manufacturer had a duty to disclose a defective speedometer where the defect did not manifest itself to owners of the vehicles until after expiration of the warranty period. 496 F. Supp. 2d at 1096. The court noted several reasons why such a defect could be material to purchase of an automobile, among them the danger that the defect "would lead to traveling at unsafe speeds and moving-violation penalties." *Id.* But the court did not rest its holding on the fact that the defect raised safety concerns. Instead, it distinguished *Daugherty*, on the ground that the plaintiffs in *Falk*, unlike the plaintiffs in *Daugherty*, "allege[d] that they did, in fact, have expectations about the product in question" because they pleaded "that a reasonable consumer would expect a speedometer to last for the life of a vehicle." 496 F. Supp. 2d at 1096. Here, the plaintiffs pleaded similarly. The opinion below cannot be reconciled with the reasoning of *Falk*.

Further demonstrating the confusion on this question of California law is this case's own history. Earlier *in this very case*, the district court rejected Ford's argument that the case should be dismissed for failure to plead a safety defect

when it denied Ford's motion for judgment on the pleadings. At a hearing on the motion, the court recognized that federal courts had divided on the meaning of *Daugherty*, and commented on the difficulty of the issue and the confusion created by the lack of controlling state-court precedent: "until we get a ruling out of the California Supreme Court clarifying this whole matter . . . all of us are just struggling with these cases at this point and many of the cases, as you know, are coming from the district courts." ER 28.

Only that court can "clarify this whole matter," to use the district court's words, and end this "struggle." This Court should certify the question presented in this case to the California Supreme Court.

II. Certification is particularly warranted because the question raises important policy considerations and because there are strong reasons to doubt the district court's prediction about how the California Supreme Court would decide the question.

In addition to the lack of controlling state-court precedent and confusion among the federal district courts, certification is particularly appropriate here because this question implicates important policy judgments that are the province of the California Supreme Court. The district court in *Oestreicher*, for example, acknowledged "a split among courts," and concluded that "policy reasons militate against following *Falk*." 544 F. Supp. 2d at 972-73. Particularly when a state-law question might require the weighing of policy considerations for correct resolution, principles of federalism and comity favor giving the state court the opportunity to

answer the state-law question. Moreover, certification is warranted because there are strong reasons to doubt that the California Supreme Court would follow the district court's prediction as to how the state court would resolve the question. *See Klein v. United States*, 537 F.3d 1027, 1032 (9th Cir. 2008) (where there is "convincing evidence" that state's highest court likely would hold otherwise, certification is particularly warranted).

A. California's consumer protection statutes.

In California, "[p]rotection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority." *Vazquez v. Superior Court*, 4 Cal. 3d 800, 808 (1971). The CLRA and UCL are intended "to protect consumers against unfair and deceptive business practices." Cal Civ. Code § 1760. The CLRA was a direct response to California's "[l]ack of suitable legal means to prevent or control exploitive practices," and "represents an attempt to alleviate the effects of . . . very real social and economic problems." James S. Reed, *Legislating for the Consumer: An Insider's Analysis of the Consumers Legal Remedies Act*, 2 Pac. L.J. 1, 5, 7 (1971). To help achieve these goals, the CLRA provides that its provisions may not be waived, Cal. Civ. Code § 1751, "are not exclusive," *id.* § 1752, and "shall be liberally construed and applied," *id.* § 1760. And the UCL, for its part, "was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable 'new schemes which the

fertility of man's invention would contrive."' *Cel-Tech Comm'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 181 (1999) (quoting *Am. Philatelic Soc'y v. Claibourne*, 3 Cal. 2d 689, 698 (1935)). Through these broad and flexible statutes, the California legislature, like California courts, has been careful to ensure that California law prohibits the full range of unfair and deceptive business practices. Because requiring a safety defect as a prerequisite to bringing a failure-to-disclose claim against a manufacturer narrows considerably the scope of these statutes, the California Supreme Court should be given the opportunity to determine whether California law contains such a requirement.

B. California's general disclosure rule.

California generally requires parties to a transaction to disclose all material facts of which they have exclusive knowledge. *See Judkins*, 52 Cal. App. 4th at 337; *Khan v. Shiley Inc.*, 217 Cal. App. 3d 848, 857-58 (1990) ("[A] manufacturer of a product may be liable for fraud when it conceals material product information from potential users."). Materiality is to be judged by a reasonable-consumer standard and "is generally a question of fact." *Kwikset*, 51 Cal. 4th at 333 (citation omitted). Materiality is an issue of law suitable for resolution on summary judgment only when the misrepresentation or omission "is so obviously unimportant that the jury could not reasonably find that a reasonable man would

have been influenced by it." *Tobacco II*, 46 Cal. 4th at 327 (quoting *Engalla v. Permanente Med. Group, Inc.*, 15 Cal. 4th 951, 977 (1997)).

Under this general rule, the question here is whether the potential economic loss caused by a product defect that appears after the product's warranty period ends is *always* "so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by" its existence or nonexistence in determining whether to buy, or how much to spend on, the product. As to this question, there are compelling reasons, as a matter of both law and policy, for answering no. Cost, far from being "obviously unimportant," is a dominant consumer concern. If consumers can limit costs—say, by avoiding products that carry unacceptably high risks of significant future expenses or by negotiating to spend less on such products—it is reasonable to expect that they will do so, regardless of the existence or length of a product's warranty.

To illustrate the point, imagine a consumer in the market for a refrigerator. One model has an electronic defect that causes a significant percentage of appliances to malfunction, often just after the end of the one-year warranty period, and costs several hundred dollars to fix. Aware of such information, a reasonable consumer surely will take the defect into consideration when deciding whether to buy the model. That is, even a defect that is not noticeable until after the warranty has expired may be material to the consumer's choice. This recognition drove the

decision in *Tietsworth*, 720 F. Supp. 2d at 1133-38, where the court held that a reasonable consumer could expect, based on common sense and experience, that a washing machine will function properly a year or two after the purchase date, regardless of the length of any warranty (or that a jury might so conclude).

Here, the district court nevertheless predicted that California permits manufacturers to conceal non-safety-related defects from consumers. The accuracy of this prediction depends on whether California recognizes an exception to its general disclosure rule for cases involving product defects that appear outside of warranty and do not present safety risks. Certification will enable the California Supreme Court to determine whether California law makes that exception.

C. The district court's prediction rests on a suspect policy-based extension of California's economic loss doctrine.

The district court implicitly read *Daugherty* to create a policy-based exception to California's general rule that parties to a transaction must disclose all material facts of which they have exclusive knowledge. The court reasoned that a safety-defect requirement "is consistent with the general policy stated by the California Supreme Court that, although '[a] consumer should not be charged at the will of the manufacturer with bearing the risk of the physical injury when he buys a product on the market,' the consumer nevertheless 'can . . . be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.'" ER 9 (quoting *Seely*, 63 Cal. 2d at

18). This policy underlies what is known as the economic loss rule, or economic loss doctrine, which holds that in strict liability and negligence actions "a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone." *Seely*, 63 Cal. 2d at 18. The rule is intended to preserve the traditional distinction between contract and tort—at least when the tort alleged is not an intentional tort. As the California Supreme Court has explained, whereas contract law "govern[s] the economic relations between suppliers and consumers of goods," strict liability in tort "govern[s] the distinct problem of physical injuries." *Id.* at 15.

Importantly, although the economic loss rule applies to negligence actions, *see id.* at 18, the California Supreme Court has held that the rule does not bar fraud and intentional misrepresentation claims. *See Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 991 (2004). And although the California Supreme Court has expressly reserved the question whether the rule applies to intentional concealment claims, *id.*, other state courts of last resort have held that it does not. *See, e.g.*, *Abi-Najm v. Concord Condominium, LLC*, 699 S.E.2d 483, 490 (Va. 2010) (refusing to apply the economic loss rule to bar a fraudulent concealment action because "[t]he fraud alleged by the Purchasers was perpetrated by [the defendant] *before* a contract between the two parties came into existence, therefore it cannot logically follow that the duty [the defendant] allegedly breached was one

that finds its source in the Contracts"); *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238, 1239-40 (Fla. 1996) (holding that "[f]raudulent inducement is an independent tort in that it requires proof of facts separate and distinct from the breach of contract" and thus "is not barred by the economic loss rule"). The California Supreme Court's specific reservation of the question in *Robinson Helicopter* makes this case "particularly appropriate for certification." *Pooshs v. Phillip Morris USA, Inc.*, 561 F.3d 964, 968 (9th Cir. 2009).

In any event, the rationale for the economic loss rule has little force in actions under the CLRA and UCL, where the duty to disclose stems not from an agreement between the parties but from a statute. In such cases, the "duty not to misrepresent the quality, grade, or style of goods is a statutory duty that exists independent of the [c]ontracts entered into between the parties." *Abi-Najm*, 699 S.E.2d at 489; *accord Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So. 2d 1219, 1221 (Fla. 1999) (holding that "the economic loss rule cannot be used to eliminate a statutory cause of action"). Moreover, California's duty to disclose is part of a body of law that, unlike tort law, exists to protect consumers against economic loss.[2] In such a context, the economic loss rule—a doctrine that draws a

[2] Of course, some torts—like the tort of fraudulent concealment—also exist "to remedy purely economic losses." *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 875 (9th Cir. 2007) (citation omitted).

line "between tort recovery for physical injuries and warranty recovery for economic loss," *Seely*, 63 Cal. 2d at 18—is wholly inapplicable.

Even more fundamentally, extending the policy beneath the economic loss rule to cover consumer cases such as this one is especially inappropriate. Because consumer protection law, in contrast to tort law, does not require the existence of physical injury but rather prohibits unfair and deceptive business practices, when a consumer brings a claim under the CLRA or UCL for failure to disclose a material defect, economic loss is often the only loss *even if* that defect poses safety risks.

Instead of weighing whether a potentially misplaced rationale governs the state-law issue presented in this case, this Court should refer the policy judgment at the heart of the question presented on this appeal to the California Supreme Court as "the ultimate expositor[] of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

D. The district court's prediction is dubious for additional reasons.

Reading *Daugherty* to bar claims brought under the CLRA, UCL, and common law, the district court did not only read the case broadly—it extended *Daugherty* (which involved claims brought under the CLRA and UCL) to cover common-law fraudulent concealment claims. Again, federal courts are in disagreement as to whether *Daugherty* goes this far. *Oestreicher*, for example, acknowledges that "California [common] law has no requirement of a safety

hazard before a duty to disclose material facts about a product arises." 544 F. Supp. 2d at 970 (citing *Khan*, 217 Cal. App. 3d at 857-58).[3] This disagreement as to the applicability of *Daugherty* to common-law fraud claims further underscores the need for certification.

Moreover, the district court's conclusion that its holding "is consistent with the policies underlying California warranty law," ER 9, is questionable. "A warranty is a promise, often made by a manufacturer, to stand behind its product . . . [and pay] for any covered repairs or part replacements during the warranty period." Federal Trade Commission Consumer Alert, *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt192.shtm. A warranty thus provides a consumer with a variety of contract rights above and beyond whatever rights the consumer may already have under state and federal law. But a warranty (or the absence of a warranty) does not displace those laws—especially in the context of the CLRA, which contains a provision expressly prohibiting individuals from contracting away the protections that the statute provides them. Cal. Civ. Code § 1751 ("Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void."). A contract is not "a license

[3] Under *Oestreicher*'s reading of California law, the common law of fraud is *broader* than the CLRA or UCL. In fact, the CLRA was passed because the common law of fraud was considered inadequate to fully "prevent or control exploitative practices." *See* Reed, 2 Pac. L.J. at 5.

allowing one party to cheat or defraud the other." *Robinson Helicopter*, 34 Cal. 4th at 992 (citation omitted).

Nonetheless, the district court assumed that, so long as a consumer's safety is not threatened, the California Supreme Court would permit a manufacturer to limit by contract its obligations under the CLRA, the UCL, and state common law. The court's reasoning can be summed up as follows: (a) warranties mark the point in time when responsibility for paying product-repair costs shifts from manufacturer to consumer; (b) manufacturers know that "all parts will wear out sooner or later," often after any warranty period has expired; (c) therefore, "[a] rule that would make failure of a part actionable based on such 'knowledge' would render meaningless time/mileage limitations on warranty coverage" and should be rejected. ER 9 (quoting *Daugherty*, 144 Cal. App. 4th at 830). This reasoning is triply flawed.

First, the question here is whether California law requires a consumer to show that a product defect that manifests itself outside of warranty coverage raises safety concerns as a prerequisite to bringing a failure-to-disclose claim against the manufacturer. As discussed above, the answer to this question should depend on whether the defect is "material," and materiality, in turn, looks to whether "a reasonable man would attach importance to [the fact's] existence or nonexistence in determining his choice of action in the transaction in question." *Kwikset*, 51 Cal.

4th at 332 (citation omitted). As to this question, contract and warranty principles are beside the point: A reasonable consumer may well understand the risk-allocative function of warranties and accept their consequences. At the same time, the fact that a part that is essential to a product's use and that typically lasts the life of the product has, because of a defect, an unusually high risk of failing soon after the warranty period ends might play a role in her decision whether to buy or how much to spend on the product.

Second, as mentioned above, the district court's approach is foreclosed by the anti-waiver provision of the CLRA. *See* Cal. Civ. Code § 1751. This provision prohibits parties from contracting out of the protections afforded by the CRLA, and makes clear that while contractual rights, including warranty rights, may *add* to a consumer's rights under the CLRA, contractual rights do not extinguish a manufacturer's responsibilities under the statute.

Third, the court relied on *Daugherty*'s concern that "[a] rule that would make failure of a part actionable based on [knowledge of part failure] would render meaningless time/mileage limitations on warranty coverage." ER 9 (quoting *Daugherty*, 144 Cal. App. 4th at 830). But *Daugherty* raised this concern as a response to the argument that latent defects should be covered by express warranties; it did not mention it as a reason to require a safety defect as a prerequisite to bringing a failure-to-disclose claim. Moreover, the district court did

not explain how a rule focused on the disclosure of information is tantamount to a requirement that manufacturers provide lifetime warranties on all parts on all of their products—and it is not. Rather, although manufacturers have a duty to disclose to consumers all material information of which they are exclusively aware, they can continue to offer consumers the warranty terms of their choosing.

CONCLUSION

Because there is substantial uncertainty as to how the California Supreme Court would resolve the unsettled state-law issue presented in this appeal, and because resolution of the issue requires the weighing of complex and important policy considerations, this Court should certify the question to the California Supreme Court.

Respectfully submitted,

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May 26, 2011

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately spaced in 14 point type and contains 5,276 words, as calculated by my word-processing software (Microsoft Word).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 26, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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