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Nancy C. Marcus LL.M., S.J.D.

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THE DUTY OF MANUFACTURERS TO CONSUMERS UNDER CALIFORNIA FRAUDULENT CONCEALMENT LAW

NANCY C. MARCUS, LL.M., S.J.D.*

ABSTRACT

Under California tort law, consumers injured by products whose dangers were not disclosed by manufacturers may not only bring traditional product liability claims for negligence or strict liability, but they also may have viable intentional concealment claims based on fraud. It is well-established and relatively uncontroversial that intentional concealment tort claims are generally available under California fraud law, and that the elements of such a cause of action include a duty owed by the defendant. However, a degree of confusion persists regarding the extent to which defendant manufacturers have a duty to disclose the product hazards to consumers with whom they do not have fiduciary or direct transactional relationships, or to the consumer public generally, thanks to vague language in court decisions describing the requirements for intentional concealment claims. The California Court of Appeal decision LiMandri v. Judkins lists several scenarios under which concealment may constitute actionable fraud, even absent a fiduciary relationship between plaintiff and defendant. Rather than providing clarity, however, LiMandri includes a vague requisite to establish the elements of an intentional concealment claim; that there should be "some" relationship and "some sort" of transaction between the parties for a duty to be established.

The more recent Bigler-Engler v. Breg court of appeal case, interpreting LiMandri, further compounded the ambiguity regarding

* Legal Skills Professor, California Western School of Law; J.D., Case Western Reserve University School of Law; LL.M. and S.J.D., University of Wisconsin Law School. Much appreciation to Robert Bohrer, Timothy Casey, Paul Gudel, Susan Bisom-Rapp for their support and input, and to Michael Gurien for his brilliant guidance and mentorship in my years as a toxic torts litigator.

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the requirements for establishing a manufacturer's duty to consumers. While emphasizing the need for a "transaction" to exist for a duty to be found under fraud law, Bigler-Engler failed to clarify what type of transaction or relationship satisfies that requirement. Those who portray Bigler-Engler as precluding any manufacturer duty to the public or to consumers generally in fraud cases, or to individual members of the consumer class absent any type of direct transactional relationship, are wrong for a number of reasons. Although the decision did contain language calling into question a manufacturer's duty owed to the "public at large," Bigler-Engler, which was written in narrow terms and only addressed a woefully incomplete and largely inapplicable body of legal authority presented to the court, left intact a number of precedents recognizing such a duty to consumers. Courts are particularly receptive to finding such a duty in toxic torts and other cases involving safety risks, cases involving egregious conduct by manufacturers, in cases in which manufacturers profit from consumers' use of a product, and in cases in which manufacturers intend for misrepresentations about product safety to induce end users to use their products, even absent direct transactions and communications with those consumers.

It would be contrary both to well-established California law and to public policy to allow manufacturers to evade liability for intentional acts of fraud upon consumers based on overbroad interpretations of vaguely worded case law. Consumers injured by manufacturers who, through fraudulent concealment, induced them to use their dangerous products should rest assured that, even if they are absent from direct contact with the manufacturers, fraud claims remain available to them. Correspondingly, members of the bench and bar should apply the law as it existed prior to Bigler-Engler and continues to exist in its aftermath.

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INTRODUCTION

In California, product liability claims involving dangerous products often include negligence causes of action (including negligent failure-to-warn claims)[1] and strict liability claims.[2] Following the Third Restatement of Torts, California courts have recognized product liability claims for three types of defects: (1) manufacturing defects, (2) design defects, and (3) inadequate warnings and failure to warn.[3]

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1. *See* Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549, 559 (Cal. 1991) ("Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care . . . ."); Putenson v. Clay Adams, Inc., 91 Cal. Rptr. 319, 328 (Ct. App. 1970) ("[T]he manufacturer has a duty to use reasonable care to give warning of the dangerous condition of the product or of facts which make it likely to be dangerous to those whom he should expect to use the product or be endangered by its probable use, if the manufacturer has reason to believe that they will not realize its dangerous condition.") (citations omitted).

2. *See* O'Neil v. Crane Co., 266 P.3d 987, 1005 (Cal. 2012).

3. *Anderson*, 810 P.2d at 559; Chavez v. Glock, Inc., 144 Cal. Rptr. 3d 326, 342 (Ct. App. 2012); *see also* Brady v. Calsol, Inc., 194 Cal. Rptr. 3d 243, 246 (Ct. App. 2015). Under the Restatement of Torts, Third, Products Liability, a product is defective if it has the following qualities:

> (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product; [¶] (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe; [¶] (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2 (AM. LAW INST. 1998).

In addition to failure-to-warn negligence and strict liability causes of action in product liability cases involving dangerous products, California courts also recognize intentional misrepresentation tort claims based in fraud when manufacturers fail to disclose or fraudulently conceal hazards of their products.[4] In California, fraud, deceit, omission or concealment can constitute actionable fraud.[5] Such claims include those in a manufacturer-consumer context, where the concealed facts included material information about a product's safety risks that result in an implicit misrepresentation about a product's safety that further induced consumers to purchase the product.[6]

This Article addresses the extent to which a manufacturer's duty to disclose safety risks and to refrain from intentional concealment of their products' hazards continues to extend to consumers in the general public even after *Bigler-Engler v. Breg, Inc.*[7] Manufacturers have argued that *Bigler-Engler* limits their duties under California fraud and intentional torts law.[8] Contrary to the wishes and representations of such manufacturers, the duty to refrain from fraudulent concealment of

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4. *See* LiMandri v. Judkins, 60 Cal. Rptr. 2d 539 (Ct. App. 1997).

5. *See infra* Part I, addressing, for example, CAL. CIV. CODE §§ 1572, 1709, and 1710 (West, Westlaw through Ch. 75 of 2021 Reg. Sess.); Warner Constr. Co. v. City of Los Angeles, 466 P.2d 996 (1970); *LiMandri*, 60 Cal. Rptr. 2d at 543–44; Brighton Collectibles, LLC v. Hockey, 279 Cal. Rptr. 2d 518, 543–44 (Ct. App. 2021); Tenet Healthsystem Desert, Inc. v. Blue Cross of Cal., 199 Cal. Rptr. 3d 901, 920 (Ct. App. 2016); Boschma v. Home Loan Center, Inc., 129 Cal. Rptr. 3d 874, 889–90 (Ct. App. 2011); Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC, 76 Cal. Rptr. 3d 325, 332 (Ct. App. 2008); Marketing West, Inc. v. Sanyo Fisher Corp., 7 Cal. Rptr. 2d 859, 863–64 (Ct. App. 1992).

6. *See* Gutierrez v. Carmax Auto Superstores Cal., 248 Cal. Rptr. 61, 85–88 (Ct. App. 2018) (defective headlamps in vehicles); Falk v. General Motors Corp., 496 F. Supp. 2d 1088, 1096 (N.D. Cal. 2007) (defective speedometer in vehicles); Grisham v. Philip Morris, Inc., 670 F. Supp. 2d 1014, 1044 (C.D. Cal. 2009) (potential liability where cigarette manufacturer concealed risks).

7. 213 Cal. Rptr. 3d 82 (Ct. App. 2017).

8. *See* Licon v. Carfax, Inc., Case No. C089882, 2020 WL 6054518 at *8 (Cal. App. Oct. 14, 2020); *In re* Ford Motor Co. DPS6 Powershift Transmission Products Liability Lit., No. CV1706656ABFFMX, 2019 WL 3000646 at *5 (C.D. Cal. May 22, 2019); Burch v. CertainTeed Corp., 246 Cal. Rptr. 3d 99, 106–109 (Ct. App. 2019); Bahamas Surgery Ctr., LLC v. Kimberly-Clark Corp., Case No. CV 14-8390-DMG, 2010 WL 11274489 at *6 (N.D. Cal. 2018) *vacated on other grounds*, 820 Fed. Appx. 563 (9th Cir. July 23, 2020).

a product's hazards (particularly in toxic torts cases) is alive and well even after the *Bigler-Engler* decision. Even after *Bigler-Engler*, they can continue basing their arguments on various precedents that remain good law and that affirm the viability of such claims. Such precedents continue to affirm an underlying duty of manufacturers to disclose product dangers to consumers, even absent a direct transactional relationship between the manufacturer and a particular member of the consumer class.

Part I of this Article describes the history of California's recognition of liability for fraudulent concealment claims leading up to *Bigler-Engler,* including the imposition of liability against manufacturers who fail to disclose the safety risks of their products. Part I also addresses a matter of some debate: the extent to which, under fraud law, defendant manufacturers have a duty to disclose the hazards of products to members of the consumer public with whom they do not have a fiduciary or direct transactional relationship.

Part II explains how the duty of manufacturers to disclose product dangers to members of the consumer public remains intact after the *Bigler-Engler* decision, despite some interpretations of the decision as eliminating any such duty. A more careful reading of the opinion, viewed in the context of other intentional concealment precedents, reveals that the *Bigler-Engler* decision is narrow in scope. Furthermore, the decision recognizes that other factors beyond the existence of a direct transaction or relationship must be considered in determining the extent of a manufacturer's duty to consumers. Manufacturers can still be held liable for fraudulent conduct intended to induce consumers to purchase dangerous products, particularly in toxic torts cases.

Part III sets forth several public policy reasons why *Bigler-Engler* should not be interpreted as requiring a direct transactional relationship as a prerequisite for finding a manufacturer's duty to disclose known safety hazards to consumers.

Last, this Article concludes that consumers in California should rest assured that they still have viable claims against manufacturers who intentionally and fraudulently fail to disclose known hazards of their products. Even after *Bigler-Engler*, they can continue basing their arguments on various precedents that remain good law and that affirm the viability of such claims. Such precedents continue to affirm an underlying duty of manufacturers to disclose product dangers to

consumers, even absent a direct transactional relationship between the manufacturer and a particular member of the consumer class.

I. FRAUDULENT CONCEALMENT LAW APPLICABILITY TO MANUFACTURERS LEADING UP TO *BIGLER-ENGLER*

A. General Principles and Elements of Fraudulent Concealment Claims

In addition to traditional product liability claims, California plaintiffs injured by dangerous products may bring actions based on fraud, as set forth in common law. These claims are consistent with the California Civil Code, including sections 1572,[9] 1709[10] and 1710 (3),[11] which address fraud and deceit.

An important facet of California fraud-based tort law is that an intentional tort claim based on fraud can arise out of nondisclosure or concealment., i.e., conduct that looks like a failure to warn, as opposed to an affirmative misrepresentation. As the California Supreme Court explained in *Lazar v. Superior Ct.*, "[t]he elements of fraud, which gives rise to the tort action for deceit, are (a) misrepresentation (false representation, *concealment, or nondisclosure*); (b) knowledge of

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9. California Civil Code section 1572 provides:

> Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:
>
> 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
>
> 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
>
> 3. The suppression of that which is true, by one having knowledge or belief of the fact;
>
> 4. A promise made without any intention of performing it; or,
>
> 5. Any other act fitted to deceive.

CAL. CIV. CODE § 1572 (West, Westlaw through Ch. 75 of 2021 Reg. Sess.).

10. *Id.* § 1709 ("One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.").

11. *Id.* § 1710(3) (defining "deceit" to include "[t]he suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact").

falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage."[12]

Thus, to satisfy the "misrepresentation" element of a fraud claim in California, a cause of action need not arise from an affirmative false representation or concealment. Rather, a cause of action can also arise from nondisclosure or concealment, which may closely resemble a product liability failure-to-warn claim. As California courts recognize, "no difficulty should be found in imposing liability on [a defendant] for mere nondisclosure since his conduct in the transaction amounts to a representation of the nonexistence of the facts which he has failed to disclose. His fraud is of a different type; it is 'negative' rather than 'affirmative'; but it is fraud nonetheless."[13] The California Court of Appeal similarly explained in a 1949 case, "[f]raud may be either actual or constructive. The suppression of that which is true, by one having knowledge or belief of the fact, is actual fraud,"[14] and elaborated "'[d]eceit may be negative as well as affirmative; it may consist in suppression of that which it is one's duty to declare, as well as in the declaration of that which is false.'"[15]

California courts have set forth the circumstances under which fraudulent nondisclosure or concealment causes of action may arise[16]

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12. 909 P.2d 981, 984–85 (Cal. 1996). *Accord*, Small v. Fritz Cos., Inc., 65 P.3d 1255, 1258 (Cal. 2003) (emphasis added).

13. Lingsch v. Savage, 29 Cal. Rptr. 201 (Ct. App. 1963) (italics in original) (citations omitted).

14. Barder v. McClung, 209 P.2d 808, 811 (Cal. App. 1949) (citations omitted).

15. *Id.*

16. Throughout this Article, "intentional concealment" and "fraud" or "fraudulent concealment" are referenced interchangeably, with intentional/fraudulent concealment claims being a subset of fraud claims. The terms are used interchangeably in litigation and by the courts (as are "nondisclosure" and "concealment"). As the California Court of Appeal has explained, "[t]he tort of concealment is simply another species of fraud or deceit." With the elements of fraud and deceit claims based on concealment being "the same as for intentional fraud, with the additional requirement that the plaintiff allege that the defendant concealed or suppressed a material fact in a situation in which the defendant was under a duty to disclose that material fact." Tenet Healthsystem Desert, Inc. v. Blue Cross of Cal., 199 Cal. Rptr. 3d 901, 920 (Ct. App. 2016) (citing CAL. CIV. CODE § 1710(3); Lovejoy v. AT&T Corp., 14 Cal. Rptr. 3d 117 (Ct. App. 2004); Marketing West, Inc., 7 Cal. Rptr. 2d 859, 863–64 (Ct. App. 1992); *see also* Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC, 76 Cal. Rptr. 3d 325, 332 (Ct. App. 2008) ("Concealment is a species of fraud or deceit.") (citations omitted).

in cases including the California Supreme Court case *Warner Constr. Corp. v. City of Los Angeles*,[17] decided in bank, the California Court of Appeal case *LiMandri v. Judkins*,[18] and their progeny, as follows:

> There are "four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. [Citation.]" (*Heliotis v. Schuman* (1986) 181 Cal.App.3d 646, 651, 226 Cal.Rptr. 509.)
>
> . . . As set forth in BAJI No. 12.36 (8th ed.1994), "where material facts are known to one party and not to the other, failure to disclose them is not actionable fraud unless there is *some relationship* between the parties which gives rise to a duty to disclose such known facts." (Italics added.)
>
> As a matter of common sense, such a relationship can only come into being as a result of some sort of *transaction* between the parties. (See *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294, 85 Cal.Rptr. 444, 466 P.2d 996 ["In *transactions* which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances"], italics added; *Goodman v. Kennedy* (1976) 18 Cal. 3d 335, 347, 134 Cal. Rptr. 375, 556 P.2d 737 ["duty of disclosure . . . may exist when one *party to a transaction* has sole knowledge or access to material facts and knows that such facts are not known to . . . *the other party"],* italics added.) Thus, a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement. (Civ.Code, § 1572, subd. 3.) All of these relationships are created by transactions between parties from

17. 466 P.2d, 996, 1001–02 (Cal. 1970).
18. 60 Cal. Rptr. 2d 539, 543–44 (Ct. App. 1997).

> which a duty to disclose facts material to the transaction arises under certain circumstances.[19]

Claims for intentional misrepresentation or nondisclosure grounded in fraud law—as opposed to framed as negligence or strict liability product liability claims—are recognized in other jurisdictions as well, as set forth in the Restatement (Second) of Torts. For example, section 557A of the Restatement (Second) of Torts, "Fraudulent Misrepresentations Causing Physical Harm," describes the tort of fraudulent misrepresentation as follows: "One who by a fraudulent misrepresentation or nondisclosure of a fact that it is his duty to disclose causes physical harm to the person or to the land or chattel of another who justifiably relies upon the misrepresentation, is subject to liability to the other."[20] In addition, section 310 of the Restatement (Second) of Torts, "Conscious Misrepresentation Involving Risk of Physical Harm" provides:

> An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor (a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and (b) knows (i) that the statement is false, or (ii) that he has not the knowledge which he professes.[21]

Comment b to section 310 explains that such intentional misrepresentation claims are not limited to affirmative misrepresentations regarding whether the physical condition of land, structures, or chattel is safe, but also is "equally applicable to misrepresentation of other matters upon which the safety of the person or property of another depends."[22]

Thus, California's recognition of intentional concealment or nondisclosure as a form of actionable fraudulent misrepresentation—including concealment that results in injury to third parties—is both a

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19. *Id.* (footnote omitted).
20. RESTATEMENT (SECOND) OF TORTS § 557A (AM. L. INST. 1977).
21. RESTATEMENT (SECOND) OF TORTS § 310 (AM. L. INST. 1965).
22. *Id.* at cmt. b.

well-established area of law in California and also consistent with the principles and causes of action affirmed in the Restatement (Second) of Torts.

B. Concealment Claims Where There are No Fiduciary Relationships or Direct Transactions or Communications Between Manufacturer and Consumer, or Where Intent Is To Defraud the Public

As acknowledged in subsequent concealment cases (including *LiMandri v. Judkins*),[23] the California Supreme Court in *Warner Constr. Corp. v. City of Los Angeles* established that viable claims for non-disclosure of material facts may exist even absent fiduciary or confidential relationships between plaintiff and defendant: "[i]n transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff;[24] (3) the defendant actively conceals discovery from the plaintiff."[25]

The court's use of the word "transactions" to describe scenarios in which a duty may arise absent fiduciary or confidential relationships does not establish an absolute requirement of *direct* transactions, such as sales or communications from a defendant manufacturer directly to the consumer plaintiff. Rather, a defendant manufacturer may be found liable for injuries to a consumer it did not have direct transactions or communications with if the defendant had reason to believe its

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23. *LiMandri*, 60 Cal. Rptr. 2d at 543–44.

24. In such cases, the longstanding rule is that even without a fiduciary relationship between the parties, "where one party to a transaction has sole knowledge or access to material facts and knows that such facts are not known or reasonably discoverable by the other party, then a duty to disclose exists." Shapiro v. Sutherland, 76 Cal. Rptr. 2d 101, 107 (Ct. App. 1998) (real estate case involving property defects); *see also* Goodman v. Kennedy, 556 P.2d 737 (Cal. 1976) (case involving fraud claims brought against an attorney for advice the attorney gave the client regarding purchase of stock from a third party).

25. 466 P.2d 996, 1001 (Cal. 1970).

misrepresentations to a third party will be repeated to and influence the consumer harmed by the product. This principle is recognized by California courts and reflected in sections 310 and 533 of the Restatement (Second) of Torts. Comment c to section 310 of the Restatement (Second) of Torts provides:

> Liability to third persons. A misrepresentation may be negligent not only toward a person whose conduct it is intended to influence but also toward all others whom the maker should recognize as likely to be imperiled by action taken in reliance upon his misrepresentation. Thus, as stated in § 388, one who, by actively concealing a defect, misrepresents the condition of a chattel which he furnishes to another for use is liable not only (1) to the person to whom he furnishes the chattel and who, in the belief that it is safe, is injured while using it in a way for which it appears safe, but also (2) to such others as the actor permits . . . .[26]

Comment d to section 310 further provides:

> The liability stated in this Section is not confined to those persons whose conduct the misrepresentation is intended to influence, or to harm received in the particular transaction which the misrepresentation was intended to induce. Thus a misrepresentation of the physical condition of a chattel or of land or a structure, whether by express words or concealment, may make a vendor liable not only to his vendee to whom it was addressed and who is thereby induced to purchase it, but also to any person whom the vendee invites or permits to enter or use it.[27]

In such cases, the transaction between defendant and plaintiff is less direct, being an indirect misrepresentation or concealment channeled through a third party.

Consequently, the California Court of Appeal has found liability for intentional concealments and misrepresentations to the consumer public. For example, in *Massei v. Lettunich*, the court of appeal reiterated the "well-settled" law "that 'representations made to one person with the intention that they will be repeated to another and acted upon by him and which are repeated and acted upon to his injury gives

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26. Restatement (Second) of Torts § 310 cmt. c (Am. L. Inst. 1965).

27. *Id.* at cmt. d.

the person so acting the same right to relief as if the representations had been made to him directly.'"[28] The California Court of Appeal case *Burch v. CertainTeed Corp.* illustrates that in intentional or fraudulent concealment claims, the evidence itself—not just the transaction between plaintiff and defendant—can be indirect in nature, with the court affirming the potential viability of a claim against the defendant, a manufacturer of asbestos-cement pipe, based on its nondisclosure of the hazards of asbestos that it knew about but made efforts to hide, including by omitting the word "cancer" from legally required signs.[29]

Even more pertinently, in *Whiteley v. Philip Morris, Inc.*, a case involving a fraudulent misrepresentation claim against Philip Morris, the court of appeal explained that the plaintiff in that case:

> [D]id not have to prove that she saw or heard any specific misrepresentations of fact or false promises that defendants made or that she heard them *directly* from defendants or their agents. It was sufficient that the statements were issued to the public with the intent that they reach smokers and potential smokers and that Whiteley, as a member of the intended target population, heard them. The jury was correctly instructed: "One who makes a misrepresentation or false promise or conceals a material fact is subject to liability if he or she intends that the misrepresentation or false promise or concealment of a material fact will be passed on to another person and influence such person's conduct in the transaction involved." "A person has reason to expect that misrepresentation, false promise or nondisclosure of material fact will be passed on to another person and influence that person's conduct if he or she has information that would lead a reasonable person to conclude that there is a likelihood that it will reach such person and will influence his or her conduct in the transaction involved." . . . "One who makes a misrepresentation or false promise or conceals a material fact with the intent to defraud *the public or a particular class of persons* is deemed to have intended to defraud every individual in that category who is actually misled thereby."[30]

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28. 56 Cal. Rptr. 232, 235 (Ct. App. 1967) (citations omitted).
29. 246 Cal. Rptr. 3d 99 (Ct. App. 2019).
30. 11 Cal. Rptr. 3d 807, 845 (Ct. App. 2004) (emphasis added).

The court of appeal applied the same principles in its analysis in *Varwig v. Anderson-Behel Porsche/Audi, Inc.*, in which the court ultimately denied summary judgment to an automobile dealer who was sued for fraudulent misrepresentations made to a separate auto dealer who in turn sold the car to the plaintiff consumer.[31] Rejecting the defendant's argument that it could not be held liable for an indirect representation made to the company that ultimately repeated the representation to a third party (the plaintiff) who did not have a direct transaction with the defendant, the court emphasized that "an actionable representation 'may be made *indirectly* as well as directly.'" [32] The court further explained that "[i]f a representation is made with 'intent to defraud . . . *a particular class of persons*,' the one making such a representation is deemed to have intended 'to defraud every individual in that class who is actually misled by the deceit.'"[33] The court concluded that in selling the vehicle wholesale to the second auto dealer, the original auto dealer knew and intended for the vehicle to be resold; it did not matter whether there was knowledge of who the specific end user would be, as long as it intended to defraud a particular class of person, i.e., those who might ultimately purchase the car.[34]

Finally, *Massei v. Lettunich* similarly discussed that evidence of fraudulent concealment can be indirect in nature, rejecting the defendant's argument that guilt of deceit requires contact between parties because, as the court explained, "'representations made to one person with intention that they will be repeated to another and acted upon by him and which are repeated and acted upon to his injury gives the person so acting the same right to relief as if the representations had been made to him directly.'"[35]

Consequently, and consistent with tort fraud law generally, in intentional tort claims based on fraudulent concealment of a product's hazards, an affirmative misrepresentation directly to the defendant is but one way to prove liability. Liability may also be established through

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31. 141 Cal. Rptr. 539 (Ct. App. 1977).

32. *Id.* at 540 (citing 4 Witkin, Summary of Cal. Law, Torts, § 467, p. 2729).

33. *Id.* (citing 4 Witkin, Summary of Cal. Law, Torts § 469, p. 2730, and authorities there cited).

34. *Id.* at 540–41.

35. Massei v. Lettunich, 56 Cal. Rptr. 232, 235 (Ct. App. 1967) (citations omitted).

implicit misrepresentations in the form of nondisclosure and concealment. This includes, for example, misrepresentations made through a third party or those intended to defraud the public or a class of consumers, rather than only those made directly to the injured plaintiff.

C. The Manufacturer's Duty Owed to the Consumer Public Based on Egregious Conduct or Safety Risks

Duty is an essential element of tort claims generally, and intentional or fraudulent tort claims specifically.[36] Because of this, establishing the extent of the duty to disclose is often the crux of intentional concealment cases. California courts have explained that a duty to disclose material facts may arise from the egregiousness of the defendant's actions. For example, in *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*, the California Court of Appeal explained, "[i]t goes without saying that no one can be liable in tort for causing injury to another unless he, or someone whose conduct is attributed to him, was legally obligated to act differently. Liability cannot arise from silence unless the law commands the defendant to speak."[37] The court continued, however, "[a] duty to speak may arise in four ways: it may be directly imposed by statute or other prescriptive law; it may be voluntarily assumed by contractual undertaking; it may arise as an incident of a relationship between the defendant and the plaintiff; *and it may arise as a result of other conduct by the defendant* that makes it wrongful for him to remain silent."[38] Although the court did not ultimately conclude there was a duty owed,[39] its affirmation that a duty could be found "as a result of other conduct by the defendant that makes it wrongful for him to remain silent"[40] is a significant part of the *Blickman Turkus* opinion.

Similarly, in *Tenet Healthsystem Desert, Inc. v. Blue Cross of California*, a patient who was an Anthem UM Services ("Anthem")

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36. *See* Shapiro v. Sutherland, 76 Cal. Rptr. 2d 101, 107 (Ct. App. 1998); Goodman v. Kennedy, 556 P.2d 737 (Cal. 1976).

37. 76 Cal. Rptr. 3d at 331.

38. *Id.* (emphasis added).

39. *See id.* at 335–45.

40. *Id.* at 331.

health insurance policyholder filed suit against their insurance company. The California Court of Appeal held that there was an actionable claim for fraudulent misrepresentation and suppression of facts, even absent a transaction involving fiduciary or confidential relations, even where the misleading conduct by Anthem was made to a third party, not to the patient-plaintiff.[41] More specifically, despite knowing the requested medical services would not be "covered" (i.e., paid for) by the patient's insurance policy, Anthem made misleading statements to the patient's treating hospital that certain medical services were "authorized" and additionally made requests for information to which it would not have been entitled unless the services had been covered by the policy.[42] Those misleading actions and subsequent statements, along with the defendant's exclusive knowledge about the lack of coverage, sufficiently constituted an actionable fraudulent concealment claim.[43]

The egregiousness of a defendant's conduct itself being what gives rise to a duty in an intentional concealment cause of action is consistent with other areas of law. In California, the legislature has established that "[o]ne who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."[44] Although that statutory provision is specific to the constructive trust remedy in property law, it illustrates California's general policy recognizing that fraudulent conduct itself can result in imposing responsibilities and duties.

Regarding the significance of safety concerns as a basis of the duty of manufacturers owed to consumers, federal courts interpreting California law have explained that although a manufacturer's duty to consumers is generally limited to its warranty obligations, exceptions expanding manufacturer's duties apply in cases involving affirmative misrepresentations or issues related to safety: "[a] manufacturer's duty to consumers is limited to its warranty obligations *absent* either an

41. 199 Cal. Rptr. 3d at 920.

42. *Id.*

43. *Id.*

44. CAL. CIV. CODE § 2224 (West 1987); *accord*, Birch v. Ciria, 22 Cal. Rptr. 798, 801 (Ct. App. 1962).

affirmative misrepresentation *or a safety issue*."[45] Although federal courts examining *LiMandri v. Judkins* and its progeny have explained that California courts "'have generally rejected a broad obligation to disclose,'" they have also recognized a "manufacturer's duty to consumers" based either on (1) its warranty obligations or (2) its affirmative misrepresentations *or* a (3) failure to disclose risks of products, giving rise to safety issues.[46]

Consequently, intentional concealment or nondisclosure may establish a duty to disclose a product's defects arising from safety concerns emanating from the defendant's concealment of material facts.[47] Following these cases, other courts applying California law may find that a duty to disclose a product's dangers may arise from the manufacturer's egregious conduct, including its concealment of material safety risks posed by its products.

D. The Manufacturer's Duty Under Fraud Law to Disclose Product Hazards to the Public in Toxic Torts Intentional Concealment Cases

The likelihood that California courts will find a duty to disclose and subsequent liability for intentional concealment is especially acute in toxic torts cases. Considering the particularly dangerous nature and safety risks hazardous products pose, California courts have recognized a manufacturer's duty to warn of their products' risks requires disclosing those risks to members of the public where the manufacturer alone possesses knowledge of those dangers. As the California Court of Appeal explained in *Hoffman v. 162 N. Wolfe LLC*, "[a] manufacturer's nondisclosure *to the public* of the toxic nature of its products where the toxicity is known to the manufacturer but not to others is a very different circumstance from [cases not involving toxic products, such as] a

45. Smith v. Ford Motor Co., 749 F. Supp. 2d 980, 987 (N.D. Cal. 2010) (emphasis added); *accord,* Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1141 (9th Cir. 2012); Mui Ho v. Toyota Motor Corp., 931 F. Supp. 2d 987, 996 (N.D. Cal. 2013); Oestreicher v. Alienware Corp., 322 Fed. Appx. 489, 493 (9th Cir. 2009).

46. *See Mui Ho*, 931 F. Supp. 2d at 996–99 (quoting *Wilson*, 668 F.3d at 1142, and citing *Smith*, 749 F. Supp. 2d at 987–88) (internal citation omitted); LiMandri v. Judkins, 60 Cal. Rptr. 2d 539, 543–44 (Ct. App. 1997); Falk v. General Motors Corp., 496 F. Supp. 2d 1088 (N.D. Cal. 2007).

47. *See Mui Ho*, 996–97.

landowner's knowledge that it possesses prescriptive easement rights."[48]

In accordance with those principles, in *Jones v. ConocoPhillips Co*. (discussed in more detail in Part II, *infra*), the California Court of Appeal found sufficient facts supporting a claim for fraudulent concealment against chemical manufacturers where the manufacturer alone, not the decedent, knew of the toxic nature of the chemical to which the worker was exposed, and the manufacturer actively concealed those material facts.[49] The *Jones* court concluded that because the manufacturer alone possessed that knowledge, it had a duty to disclose the toxic properties of its products to its products' end users.[50]

Consequently, in fraud-based intentional concealment claims in toxic torts cases such as *Jones*, the determinative factor is the manufacturer's failure to disclose known dangers, rather than the existence of any direct relationship between the manufacturer and consumer of the products or an affirmative misrepresentation.

Most notably, in 1942, the California Supreme Court case *Wennerholm v. Stanford University School of Medicine* recognized that parties may prove fraudulent misrepresentation claims through indirect evidence of intent to deceive, including intent to deceive the public.[51] In *Wennerholm*, the plaintiff appealed from judgment in favor of defendants, among whom were manufacturers of a drug the plaintiff alleged caused her eyesight loss after the defendant manufacturers indicated that the drug was harmless.[52] In a passage of pertinent importance to the extent of manufacturers' duty to the public to disclose product dangers under fraudulent concealment law, the court indicated that liability may lie when the defendant's misrepresentations target the public or a class of persons.[53] Through this language, the court signaled that manufacturers owe a corresponding duty to the public (or class of

48. Hoffman v. 162 N. Wolfe LLC, 175 Cal. Rptr. 3d 820, 832 (Ct. App. 2014) (emphasis added).

49. 130 Cal. Rptr. 3d 571, 573–81.

50. *Id.*

51. *See* Wennerholm v. Stanford School of Medicine, 128 P.2d 522 (Cal. 1942).

52. *Id.* at 523–24.

53. *See id.*

persons) to disclose when the misrepresentations target the them.[54] Specifically, the supreme court explained:

> Although somewhat inartistically framed, the fifth amended complaint states a cause of action for fraud. Defendants contend it lacks an essential element of a cause of action because it does not specifically allege that the false representations were made with an intent to deceive plaintiff, citing *Harding v. Robinson,* 175 Cal. 534 [166 Pac. 808]; *Vandervort v. Farmers etc. Nat. Bank,* 7 Cal. (2d) 28 [59 P. (2d) 1028]. The intent to deceive sufficiently appears, however, by the facts alleged, from which it may be inferred that the alleged false statements were made with the intention of inducing *the public* to purchase the drug. One who intends to defraud the public, *or a particular class of persons*, is deemed to have intended to defraud every individual in the class who is actually misled. (Civ. Code, § 1711; *Gill v. Johnson,* 125 Cal. App. 296 [13 P. (2d) 857, 14 P. (2d) 1017].)[55]

Consequently, California courts have long recognized that manufacturers with knowledge of the toxicity of their products have a duty to disclose those hazards to the public, or at the very least, to consumer class members of the public whom the manufacturers intend to use their products.

II. THE CONTINUED DUTIES MANUFACTURERS OWE TO CONSUMERS AFTER *BIGLER-ENGLER*

A. The Claims and Ruling in the Bigler-Engler Decision

In 2017, the California Supreme Court decided *Bigler-Engler*, a case that has since been cited by manufacturer-defendants seeking to avoid liability for intentional concealment claims.[56] In *Bigler-Engler*, the plaintiff-decedent Whitney Engler was a medical patient whose estate brought an action against various defendants, including her physician and Breg, Inc., the manufacturer of the Polar Care 500

54. *Id.*
55. *Id.* (emphasis added).
56. *See* cases cited infra note 69.

medical device.[57] The device, available through prescription only, was a delivery system for cold therapy akin to using an ice pack, intended to assist in the healing process, but which, when used continuously, could be dangerous.[58] Ms. Engler had rented, rather than purchased, the product and, pursuant to her physician's instructions, used the device continuously, to the degree that it caused injuries to her.[59] The plaintiff's claims included claims for design defect, failure to warn, breach of fiduciary duty, intentional misrepresentation, and intentional concealment.[60]

The defendants in the case appealed after a jury verdict in favor of Bigler-Engler (the substituted plaintiff).[61] The defendants argued, among other things, that, as to the intentional concealment claim, the evidence did not support the jury's verdict against Breg.[62] In support, the defendants contended that Breg did not owe a duty to disclose the dangers of its products in the absence of a transactional relationship between the defendant and Ms. Engler or her parents.[63]

On review, California's Fifth District Court of Appeal concluded that the *LiMandri* opinion's description of three circumstances in which nondisclosure or concealment may constitute fraud absent a fiduciary or confidential relationship, "'presupposed the existence of *some other* relationship between the plaintiff and defendant in which a duty to disclose can arise.'"[64] The court then described the prerequisite as a relationship that "must necessarily arise from direct dealings between the plaintiff and the defendant; it cannot arise between the defendant and the public at large."[65]

The *Bigler-Engler* court then criticized the plaintiff's attempt to support its argument that the manufacturer owed a duty absent a transactional relationship solely through reference to *strict liability*

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57. Bigler-Engler v. Breg, Inc., 213 Cal. Rptr. 3d 82, 90–91 (Ct. App. 2017).
58. *Id.* at 92–96.
59. *Id.*
60. *Id.* at 96–97.
61. *Id.* at 91, 112–16.
62. *Id.*
63. Bigler-Engler v. Breg, Inc., 213 Cal. Rptr. 3d 91, 112–16 (Ct. App. 2017).
64. *Id.* at 112–16 (quoting LiMandri v. Judkins, 60 Cal. Rptr. 2d 539, 543-44 (Ct. App. 1997)) (emphasis added).
65. *Id.*

cases, rather than fraudulent concealment cases identifying the duty requirements under *fraud* law (intentional tort).[66] The *Bigler-Engler* court explained that it would not issue a finding of duty in a fraud case based on strict liability duty standards, which are distinct from the determination of duty under fraudulent concealment law.[67] After chastising the plaintiff for citing only strict products liability cases, the court rejected the argument that Breg owed a duty to Ms. Engler because the plaintiff failed to cite any supporting fraudulent concealment precedent.[68]

B. Bigler-Engler Does Not Preclude a Duty Under Fraud Law to Disclose Product Hazards to Consumers, Even Absent Direct Transactions Between Manufacturers and Consumers

Manufacturer defendants have cited *Bigler-Engler*, at times with success, to argue that they do not owe a duty to the "public at large," consumers at large, or the end users of a product with whom the manufacturer does not have a direct transactional relationship.[69] However, such arguments are flawed for several reasons.

1. Bigler-Engler Does Not Require Evidence of a Direct Transactional Relationship to Establish a Manufacturer's Duty to Consumers in All Cases

First, to the extent such arguments against manufacturers' duties to consumers emphasize the need for a direct fiduciary or transactional relationship, such relationships are not always required for a duty to disclose. As *Bigler-Engler* acknowledged, there are three other circumstances in which nondisclosure or concealment may constitute

66. *Id.* at 113–16.

67. *Id.*

68. *Id.*

69. *See* Bahamas Surgery Center, LLC v. Kimberly-Clark Corp., No. CV 14-8390-DMG, 2010 WL 11274489 at *6 (N.D. Cal. 2018), *vacated on other grounds*, 820 Fed. Appx. 563 (9th Cir. July 23, 2020); *In re* Ford Motor Co. DPS6 Powershift Transmission Products Liability Lit., No. CV1706656ABFFMX, 2019 WL 3000646 at *5 (C.D. Cal. May 22, 2019); Burch v. CertainTeed Corp., 246 Cal. Rptr. 3d 99, 106–109 (Ct. App. 2019); Licon v. Carfax, Inc., No. C089882, 2020 WL 6054518 at *8 (Cal. Ct. App. Oct. 14, 2020).

actionable fraud even absent a fiduciary or confidential relationship, including "[1] when the defendant had exclusive knowledge of material facts not known to the plaintiff; [2] when the defendant actively conceals a material fact from the plaintiff; and [3] when the defendant makes partial representations but also suppresses some material facts."[70]

On the one hand, the *Bigler-Engler* court emphasized "[a] duty to disclose facts arises only when the parties are in a relationship that gives rise to the duty, *such as* 'seller and buyer,' employer and prospective employee, doctor and patient, or parties entering into any kind of contractual arrangement.'"[71] Furthermore, the court indicated that absent a fiduciary relationship, there must nonetheless be some kind of "transaction," or "direct dealings" between the defendant and the plaintiff, as opposed to "between the defendant and the public at large," giving rise to the duty.[72]

On the other hand, as much as some manufacturers may emphasize the *Bigler-Engler* language as eschewing a duty to the "public at large" and requiring some type of "transaction" as a prerequisite for finding a duty, there is nothing in *Bigler-Engler* that precludes a duty to disclose arising from a relationship or transaction through a third party. In other words, the *Bigler-Engler* court's broad, undefined reference to "direct dealings" as indicia of duty-triggering relationships leaves open the possibility that a duty could be established through the relationship between manufacturer and consumer, even when the consumer was not the direct *purchaser* of a product. In the *Shin v. Kong* language cited and followed by the *Bigler-Engler* court, the listing of "'seller and buyer,' employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement" was not an exhaustive list, as indicated by the "such as" language that the court used to preface that list of examples.[73]

Furthermore, although the *Bigler-Engler* court considered whether the decedent, Ms. Engler, directly purchased the product, the court did

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70. Bigler-Engler v. Breg, Inc., 213 Cal. Rptr. 3d 82, 112–113 (Ct. App. 2017) (quoting Limandri v. Judkins, 60 Cal. Rptr. 2d 539, 543–44 (Ct. App. 1997).

71. *Id.* (quoting Shin v. Kona, 95 Cal. Rptr. 304, 313 (Ct. App. 2000)) (emphasis added).

72. *Id.*

73. *Id.*

not establish a sweeping bright-line rule that only those who purchase a product directly can claim a duty owed to them by the manufacturer.[74] If a direct transaction alone had been determinative in the court's decision, the court would not have considered other factors beyond whether there was a direct sales transaction between Breg and Ms. Engler. Instead, *Bigler-Engler* explicitly left open the finding of a duty to disclose where there is either a direct transaction *or* "sufficient relationship" between the parties.[75] Specifically, the court noted that the duty to disclose arises when there is either a transaction *or a "sufficient relationship"* between the parties, and "[w]here, as here, a sufficient relationship *or* transaction does not exist, no duty to disclose arises even when the defendant speaks."[76]

Consequently, the *Bigler-Engler* court applied the "sufficient relationship" standard to the facts of the case. The court noted that Ms. Engler rented the Polar Care product from a third party without Engler's knowledge that she was a potential user or that she had been prescribed or used the device. The court then emphasized, "[t]he evidence does not show that Breg directly advertised its products to consumers such as Engler or that it derived any monetary benefit directly from Engler's individual rental of the Polar Care device."[77] Only after weighing *all* of those facts did the *Bigler-Engler* court conclude that "[u]nder these circumstances, there was no relationship between Breg and Engler (or her parents) sufficient to give rise to a duty to disclose."[78]

In so framing its analysis and conclusion, the *Bigler-Engler* court explicitly recognized that a duty to disclose can arise from either a direct transaction or another type of sufficient relationship, which does not–on its face or otherwise–preclude finding a duty based in part on the relationship between manufacturers and consumers more generally,

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74. *Id.* at 115.

75. *Id.* at 114.

76. Bigler-Engler v. Breg, Inc., 213 Cal. Rptr. 3d 82, 113–114 (Ct. App. 2017) (emphasis added) (citing Pavicich v. Santucci, 102 Cal. Rptr. 2d 125 (Ct. App. 2000); Warner Constr. Corp. v. City of Los Angeles, 466 P.2d 996 (Cal. 1970); LiMandri v. Judkins, 60 Cal. Rptr. 2d 539, 543–44 (Ct. App. 1997); Hoffman v. 162 North Wolfe LLC, 175 Cal. Rptr 3d. 820, 831 (Ct. App. 2014); Platt Electrical Supply, Inc. v. EOFF Electrical, Inc., 522 F.3d 1049, 1059, n.3 (9th Cir. 2008).

77. *Bigler-Engler*, 213 Cal. Rptr. 3d at 115.

78. *Id.*

including in cases involving a third-party intermediary. Reading the court's conclusion in its full context, that such a sufficient relationship may be found where there is evidence that a manufacturer advertised its products to those in the plaintiff's consumer class, or that it derived a monetary benefit from the consumer's use of the product.

It is also of critical significance that the *Bigler-Engler* decision did *not* explicitly address whether the relationship between manufacturers and consumers who rely on a failure to disclose product dangers, through labeling, advertising, or otherwise, to the detriment of the consumers and benefit of the manufacturers, could result in fraudulent concealment liability, under *LiMandri*, when other *LiMandri* factors are present. Consequently, *Bigler-Engler* does not preclude the possibility that relationships between manufacturers and consumers could be sufficient to give rise to fraudulent or intentional concealment claims.

2. Bigler-Engler was Narrow in Scope

Second, the dicta passage calling into question a duty to the "public at large," upon which manufacturer defendants have pounced with celebratory vigor,[79] must be read in its fuller context: that of the court's explanation that the plaintiff, in that case, had failed to establish a duty under tort fraud law, because it had only cited strict liability product liability cases, not fraud cases, in support of its duty argument for a fraud claim.[80] The *Bigler-Engler* court was unwilling to base a finding of duty on such an unsupported argument by the plaintiff.[81] On that point, it is helpful to parse out the exact language used by the *Bigler-Engler* court immediately following its statement that a transaction giving rise to a duty to disclose in fraudulent concealment cases "cannot arise between the defendant and the public at large":

> By contrast, as Bigler-Engler points out, *other doctrines* impose liability even without evidence of a transaction between the plaintiff and the defendant. Bigler-Engler relies on the general principle that a manufacturer has a duty to warn consumers of a product's hazards and faults. (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64, 74 Cal.Rptr.3d 108, 179 P.3d 905; *Pannu v. Land Rover*

79. *Id.* at 113; *see also supra* note 70.
80. *Id.*
81. *Id.*

> *North America, Inc.* (2011) 191 Cal.App.4th 1298, 1316, 120 Cal.Rptr.3d 605.) Bigler-Engler argues that this duty applies here as well and the violation of that duty gives rise to a cause of action for fraud under a theory of concealment. *The authorities Bigler-Engler cites, however, involve strict products liability, not fraud. Bigler-Engler has not provided any reason to apply this duty to the fraud cause of action here, and we are aware of none*. Products liability law involves a set of circumstances, elements, and doctrines that are independent from, and not directly applicable to, fraud. The duties underlying each cannot simply be applied to the other. (Cf. *Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 108, 85 Cal.Rptr.3d 299 ["[W]e do not agree that a suit based on a theory of negligent or intentional misrepresentation is governed by rules developed under the distinct doctrine of strict products liability law."].)[82]

Johnson v. American Standard, Inc. and *Pannu v. Land Rover North America Inc*., i.e., the two *strict liability* authorities that the court criticized the plaintiff in *Bigler-Engler* for using as the sole basis for its *fraud* arguments, rather than citing fraudulent concealment case, are, in turn, cases that discussed the duty to warn consumers about product hazards in the context of strict liability, not fraud, law.[83] The courts in those cases emphasized that the purpose of product liability law's duty-to-warn requirements is "to inform consumers about a product's hazards or faults of which they are unaware, so that they can refrain from using the product altogether or evade the danger by careful use," and explained that, therefore, "[t]ypically, under California law, we hold manufacturers strictly liable for injuries caused by their failure to warn of dangers that were known to the scientific community at the time they manufactured and distributed their product."[84]

It is important to read the court's *Bigler-Engler* analysis in its entirety to understand its context and accord fair weight to what the court was and was not saying. In *Bigler-Engler*, the court emphasized that "Bigler-Engler argues that this duty applies here as well and the violation of that duty gives rise to a cause of action for fraud under a theory of concealment. The authorities Bigler-Engler cites, however,

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82. *Id.* (emphasis added).

83. Johnson v. American Standard, Inc., 179 P.3d 905, 910 (Cal. 2008); Pannu v. Land Rover N. Am., Inc., 120 Cal. Rptr. 3d 605, 620 (Ct. App. 2011).

84. *Id.*

involve strict products liability, not fraud. Bigler-Engler has not provided any reason to apply this duty to the fraud cause of action here . . . ."[85]

Thus, the opinion does *not* set forth a sweeping new bright-line rule that manufacturers never have a duty to warn consumers of a product's hazards for purposes *under fraud law*, i.e., in the context of an intentional concealment claim. The court did not preclude the possibility that in a different fraud case in which a duty was asserted, it might recognize a duty on manufacturers to warn a class of consumers. Rather, in concluding that it would not apply that "this duty" asserted by Bigler-Engler "here," the court specifically referenced the duty owed to the public to warn of a product's hazards and faults as specifically set forth in strict liability cases cited by the plaintiffs, as opposed to in fraud cases.

As such, *Bigler-Engler* does not preclude the finding of a duty owed to consumers in future fraudulent concealment cases, but instead concluded only that the plaintiff in that case did not cite fraud cases establishing such a duty, and that the court was consequently unaware of one from the plaintiff's argument. By highlighting that deficiency in the plaintiff's argument and concluding only that it was declining to apply a duty to warn consumers of product hazards and faults "here," the court left open the continued availability of fraudulent concealment precedents that affirm such a duty. Thus, in the *Bigler-Engler* passage rejecting the applicability of a product liability-based "duty to the public at large" in fraud cases, the court was merely declining to inject into fraud law the general principle of *product liability* law setting forth a manufacturer's duty "duty to the public generally and to each member thereof who will become a purchaser or a user of the article . . . *to exercise ordinary care* with reference to" the use of inherently dangerous products.[86]

In the end, it was not unreasonable for the *Bigler-Engler* court to chastise the plaintiff in that case for making an argument grounded in product liability law, i.e., citing the wrong cases and doctrine, in support of its intentional tort fraud-based claim. However, for the court to

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85. *Bigler-Engler*, 213 Cal. Rptr. 3d at 113 (emphasis added).

86. *See* Phillips v. Ogle Aluminum Furniture, 235 P.2d 857, 859 (Cal. Dist. Ct. App. 1951) (emphasis added); *see also* Larramendy v. Myres, 272 P.2d 824, 826–27 (Cal. Dist. Ct. App. 1954).

render the duty of care owed to the public at large *under product liability law* inapplicable in a fraudulent concealment context, distinguishing product liability duties from fraud duties, does not amount to the court declaring that manufacturers owe *no* duty to consumers whom they fraudulently induced to use their products.

Tellingly, the *Bigler-Engler* court proceeded to frame its fraudulent concealment discussion in terms that both narrowly confined its finding to the facts of that case and acknowledged that in other cases, a relationship between manufacturer and consumer *could* create a duty, along with other *LiMandri* factors:

> An essential element underlying Engler's claim for intentional concealment, a duty to disclose, is absent *here* because there was no evidence of a relationship between Engler (or her parents) and Breg sufficient to give rise to a duty to disclose. Breg did not transact with Engler or her parents in any way. Engler obtained her Polar Care device from Oasis, based on a prescription written by Chao, all without Breg's involvement. The evidence does not show Breg knew—prior to this lawsuit—that Engler was a potential user of the Polar Care device, that she was prescribed the Polar Care device, or that she used the Polar Care device. The evidence also does not show that Breg directly advertised its products to consumers such as Engler or that it derived any monetary benefit directly from Engler's individual rental of the Polar Care device. Indeed, Oasis appears to have obtained the Polar Care device Engler used from Breg several years before Engler's surgery and maintained the device itself for rental to its patients. *Under these circumstances*, there was no relationship between Breg and Engler (or her parents) sufficient to give rise to a duty to disclose.[87]

This passage indicates that the *Bigler-Engler* court's decision was confined to the particular circumstances of that case, in which the manufacturer was not involved "in any way" with the plaintiff-patient injured by the medical device, and in which there was no evidence that the manufacturer "directly advertised its products to consumers" or profited from the plaintiff's use of the product.[88]

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87. *Bigler-Engler*, 213 Cal. Rptr. at 115 (emphasis added).
88. *Id.*

Similarly, because the court's analysis was confined to those cases that were explicitly addressed in *Bigler-Engler*, it did not abrogate other California cases, including those that affirm the existence of broad duties absent direct financial transactions or communications between the parties. These cases were not addressed in *Bigler-Engler* likely because the plaintiffs had failed to bring those cases to the court's attention. Specifically, cases mentioned previously in this Article were not addressed by the court in *Bigler-Engler*, including *Wennerholm v. Stanford Univ. Sch. of Medicine, Whiteley v. Phillip Morris*, *Varwig v. Anderson-Behel Porsche/Audi, Inc.*, *Massei v. Lettunich*, *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC, Tenet Healthsystem Desert, Inc. v. Blue Cross of California*, and *Jones v. ConocoPhillips Co.*. However, the precedential value of those cases remains in force.

Bigler-Engler left in place the longstanding, well-established law in California that under fraudulent concealment law—absent fiduciary relationships—a duty may be found in cases involving a relationship between a consumer of a product and the product's manufacturer's indirect interactions with the consumer. For example, a duty arises even if a manufacturer's only communications to the consumer are through a third party or by indirect communications through advertising, packaging, or brochures describing the product that injured the plaintiff who used it.

Relatedly, the *Bigler-Engler* court cited the California Supreme Court, *Warner Const. Corp. v. City of Los Angeles*,[89] in which the passage cited does not require a specific *direct* relationship or transaction. It states:

> In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable

89. *Id.* at 113 (citing Warner Constr. Corp. v. L.A., 466 P.2d 996, 1001 (Cal. 1970)).

> by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff.[90]

As a court of appeal opinion, *Bigler-Engler* lacks the precedential weight to impose a requirement not set forth in the California Supreme Court precedent. Consequently, even if a new direct relationship requirement was established in *Bigler-Engler*, its contradiction to the Supreme Court precedent would invalidate it. Thus, *Warner Const. Corp.*'s ruling regarding indirect links between the manufacturer and the end-user is well-established among the California Court of Appeal and remains good law.[91]

Similarly, while *Bigler-Engler* cited *Hoffman v. 162 N. Wolfe, LLC* in its discussion of the need for a "sufficient relationship" to establish a duty, *Hoffman* actually underscores certain fraud cases may require a broader duty to the public.[92] Specifically, in fraud cases involving toxic products, there may be a broader duty to the public to disclose the products' toxicity than the duty owed in other cases, such as contract cases. For example, *Hoffman* states: "[A] manufacturer's nondisclosure *to the public* of the toxic nature of its products where the toxicity is known to the manufacturer but not to others is a very different circumstance from [cases not involving toxic products, such as] a landowner's knowledge that it possesses prescriptive easement rights."[93]

As such, *Bigler-Engler* and the cases it cites permits the possibility of a duty to disclose being founded upon "some other relationship,"[94] i.e., that between a manufacturer who knows of the hazards of its product and an end-user consumer who may lack comparable knowledge and a direct transactions with the manufacturer.

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90. Warner Constr. Corp. v. City of Los Angeles, 466 P.2d 996, 1001 (Cal. 1970); *accord*, LiMandri v. Judkins, 60 Cal. Rptr. 2d 539, 543–44 (Ct. App. 1997).

91. *See* Tenet Healthsystem Desert, Inc. v. Blue Cross of California, 199 Cal. Rptr. 3d 901, 920 (Ct. App. 2016); Marketing West, Inc. v. Sanyo Fisher Corp., 7 Cal. Rptr. 2d 859, 863–64 (Ct. App. 1992).

92. 175 Cal. Rptr. 3d 820, 832 (Ct. App. 2014).

93. *Id.* (emphasis added).

94. *See Warner Constr. Corp.*, 466 P.2d at 1001.

3. Standard Jury Instructions and California Cases Continue to Support Concealment Claims Absent a Direct Transactional Relationship

Third, Judicial Council of California Civil ("CACI") Jury Instructions and courts continue to recognize concealment claims based on a manufacturer's duty to warn consumers of hazards known only to the manufacturers. This shows that such claims remain viable even after *Bigler-Engler*. For example, the CACI instructions on concealment continue to allow various alternative methods of establishing a duty in a concealment claim, and the existence of a special relationship is not required for every concealment claim. CACI Number 1901 ("Concealment"), which was not revised following *Bigler-Engler*, explicitly specifies that a plaintiff can prove a concealment claim either through evidence:

> [1. (a) That [name of defendant] and [name of plaintiff] were insert type of fiduciary relationship, e.g., "business partners"]; and
>
> (b) That [name of defendant] intentionally failed to disclose certain facts to [name of plaintiff];]
>
> [***or***]
>
> [1. That [name of defendant] disclosed some facts to [name of plaintiff] but intentionally failed to disclose [other/another] fact[s], making the disclosure deceptive;]
>
> [***or***]
>
> [1. That [name of defendant] intentionally failed to disclose certain facts that were known only to [him/her/nonbinary pronoun/it] and that [name of plaintiff] could not have discovered;]
>
> [***or***]
>
> [1. That [name of defendant] prevented [name of plaintiff] from discovering certain facts;]
>
> 2. That [name of plaintiff] did not know of the concealed fact[s];
>
> 3. That [name of defendant] intended to deceive [name of plaintiff] by concealing the fact[s];
>
> 4. That had the omitted information been disclosed, [name of plaintiff] reasonably would have behaved differently;

> 5. That [name of plaintiff] was harmed; and
> 6. That [name of defendant]'s concealment was a substantial factor in causing [name of plaintiff]'s harm.[95]

In other words, California's standard jury instructions reflect that, under California law, proof of a special type of relationship is only required for the first type of concealment claim, but not required when a claim is based, for example, on allegations that the defendant "intentionally failed to disclose certain facts that were known only to [him/her/nonbinary pronoun/it] and that [name of plaintiff] could not have discovered."[96]

Consistent with CACI jury instructions, in decisions subsequent to *Bigler-Engler*, various courts in California have continued to recognize a manufacturer's duty to not conceal product hazards from consumers, even in the context of intentional torts where the relationship between the manufacturer and consumer plaintiff is more attenuated. Other California precedents indicating that the requirements for a fraudulent or intentional concealment claim can be met when fraudulent concealments mislead a class of persons such as consumers remains good law after *Bigler-Engler*. For example, *Whiteley v. Phillip Morris Inc.*, a case not addressed by *Bigler-Engler*, continues to affirm in California, "'[o]ne who makes a misrepresentation or false promise or conceals a material fact with the intent to defraud the public or a particular class of persons is deemed to have intended to defraud every individual in that category who is actually misled thereby."[97]

Further, *Bigler-Engler* did not address or detract from the precedent of the California Court of Appeals *Varwig v. Anderson-Behel Porsche/Audi, Inc.* decision, in which the court explained that "an actionable representation 'may be made *indirectly* as well as directly'"[98] and that "[i]f a representation is made with intent to defraud . . . *a particular class of persons*," the one making such a representation

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95. Judicial Council of California Civil Jury Instructions (2020 edition).

96. *Id.*

97. 11 Cal. Rptr. 3d 807, 845 (Ct. App. 2004) (emphasis added).

98. Varwig v. Anderson-Behel Porsche/Audi, Inc., 141 Cal. Rptr. 539, 540 (Ct. App. 1977) (citing 4 Witkin, Summary of Cal. Law, Torts, § 467, p. 2729) (emphasis added).

is deemed to have intended "to defraud every individual in that class who is actually misled by the deceit."[99]

Additionally, *Bigler-Engler* did not address the California Court of Appeals decision in *Massei v. Lettunich*. It remains good law in California that, as the court there concluded, in a misrepresentation or nondisclosure claim, a defendant's contention "that he had no contact with appellants and that therefore it was impossible for him to be guilty of deceit toward them is without merit," because of "well settled" law "that representations made to one person with intention that they will be repeated to another and acted upon by him and which are repeated and acted upon to his injury gives the person so acting the same right to relief as if the representations had been made to him directly."[100]

Furthermore, after *Bigler-Engler*, long-standing California Supreme Court decisions continue to affirm general duties to the public in the context of fraudulent misrepresentation cases. For example, the 1942 California Supreme Court case *Wennerholm v. Stanford Univ. Sch. of Medicine* remains good law, a case in which the Supreme Court explained that fraudulent misrepresentation claims may be established through indirect evidence of intent to deceive, including intent to deceive *the public*.[101] In *Wennerholm*, the California Supreme Court indicated that a duty to disclose, and liability for breaching that duty, may be found when the manufacturer makes misrepresentations to the *public*, or a *class of persons*.[102] Specifically, the Supreme Court explained that an intent to deceive, as required for a fraudulent concealment case, may be sufficiently established through evidence "from which it may be inferred that the alleged false statements were made with the intention of inducing *the public* to purchase the drug. One who intends to defraud the *public*, *or a particular class of persons*, is deemed to have intended to defraud every individual in the class who is actually misled."[103]

Following *Wennderholm*, *Warner Const. Corp.* (cited affirmatively by *Bigler-Engler*) specified the three conditions under which a duty to

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99. *Id.* (emphasis in original).

100. Massei v. Lettunich, 56 Cal. Rptr. 232, 235 (Ct. App. 1967) (citations omitted).

101. 128 P.2d 522 (Cal. 1942).

102. *See id.*

103. *Id.* (emphasis added) (citations omitted).

disclose may exist even absent a fiduciary or confidential relationship between plaintiff and defendant. While vaguely referencing the word "transaction" in passing, it did not explicitly require a *direct* financial transaction between plaintiff and defendant.[104] There is nothing in the *Warner Const. Corp.* passage cited by *Bigler-Engler* that further requires any other types of specific direct relationship in those instances.[105]

As a court of appeal opinion, *Bigler-Engler* lacks the precedential weight to impose a requirement not otherwise outlined in California Supreme Court cases. Conversely, decisions incorporating *Warner Construction Corporation*'s requirements for finding a duty in non-disclosure cases *without* imposing a direct financial transaction requirement, therefore, remain good law.[106] Similar cases continuing to retain their precedential force include *Tenet Healthsystem Desert, Inc. v. Blue Cross of California*,[107] *Marketing West, Inc. v. Sanyo Fisher Corp.*,[108] *Whiteley v. Philip Morris,*[109] *Varwig v. Anderson-Behel Porsche/Audi, Inc.,* [110] and *Massei v. Lettunich*.[111] All of which plaintiffs may cite to argue that even absent direct transactions, a duty to disclose may exist. This is particularly true when a manufacturer makes either explicit or implicit representations to a third party.

Notably, this argument can be made in numerous types of cases. For example, in cases in which a consumer plaintiff's employer was the one who purchased the product from a manufacturer, who in turn intended that its own misrepresentations of product safety would be conveyed to the employer's workers, i.e., the end-user consumers, who in turn then relied on misrepresentations about the product safety in

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104. Warner Constr. Corp. v. City of Los Angeles, 466 P.2d 996, 1001 (Cal. 1970).

105. *Id.*

106. *See* Tenet Healthsystem Desert, Inc. v. Blue Cross of California, 199 Cal. Rptr. 3d 901, 920 (Ct. App. 2016); Marketing West, Inc. v. Sanyo Fisher Corp., 7 Cal. Rptr. 2d 859, 863–64 (Ct. App. 1992).

107. 199 Cal. Rptr. 3d 901 (Ct. App. 2016).

108. 7 Cal. Rptr. 2d 859 (Ct. App. 1992).

109. 11 Cal. Rptr. 3d 807 (Ct. App. 2004).

110. 141 Cal. Rptr. 539 (Ct. App. 1977).

111. 56 Cal. Rptr. 232 (Ct. App. 1967).

deciding to use those products.[112] In such cases, the manufacturers owe a duty and are thus potentially liable to, every individual in the public or in the particular class of persons who is actually misled thereby.[113]

Additionally, California Court of Appeal decisions establish that a manufacturer's duty to disclose materials facts to consumers may arise from the egregiousness of their actions. This includes circumstances in which the defendant manufacturer's nondisclosure of a product's hazards results in safety concerns. Following *Bigler-Engler*, these appellate decisions still retain their precedential force. For example, the precedent laid out in *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*, was left untouched. There, the court of appeal explained:

> A duty to speak may arise in four ways: it may be directly imposed by statute or other prescriptive law; it may be voluntarily assumed by contractual undertaking; it may arise as an incident of a relationship between the defendant and the plaintiff; and it may arise as a result of other conduct by the defendant that makes it wrongful for him to remain silent.[114]

Tenet Healthsystem Desert, Inc. v. Blue Cross of California, another case not discussed in *Bigler-Engler*, even though it remains good law and influential in this area, involved an actionable claim for fraudulent misrepresentation even absent a transaction involving fiduciary or confidential relations and where the misleading conduct was instead made to a third party.[115] The court concluded that misleading statements and actions made by an insurance company to a hospital, a third party, taken along with the company's failure and exclusive knowledge regarding lack of coverage which it failed to disclose, was sufficient to constitute grounds for actionable non-disclosure, or fraudulent concealment.[116]

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112. *See Whiteley*, 11 Cal. Rptr. 3d at 845.

113. *See Massei*, 56 Cal. Rptr. at 235.

114. Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC, 76 Cal. Rptr. 3d 325, 331 (Ct. App. 2008).

115. Tenet Healthsystem Desert, Inc. v. Blue Cross of Cal., 199 Cal. Rptr. 3d 901, 905–10, 920–21 (Ct. App. 2016).

116. *Id.*

Federal courts interpreting California law have come to similar conclusions. In *Bahamas Surgery Center, LLC v. Kimberly-Clark Corporation,* the United States District Court for the Central District of California, rejected the defendant's assertion that it had no duty to disclose absent a transactional relationship between plaintiff and defendant.[117] The court explained that sufficient evidence existed for the jury to find that the defendant *did* in fact owe a duty to disclose its product's failure to satisfy safety standards to end users.[118] The court noted that this duty existed even where there was no fiduciary relationship between the manufacturer and the end users.[119] Explaining that while the defendant had waived the issue, it nonetheless finds "that the lack of a direct transactional relationship between Defendants and Bahamas is not fatal to Bahamas' concealment claim."[120] Clarifying that whereas in *Bigler-Engler*, where there was not a sufficient direct relationship to establish a duty to disclose, that duty may nonetheless still exist in particular cases.[121] Specifically, in cases where (1) a device was purchased through a third-party intermediary, and (2) the relationship between the manufacturer and plaintiff is more attenuated, where (3) the manufacturer obtained some kind of profit from the sale.[122] Concluding that "because Bahamas and class members purchased the MicroCool Gowns largely through authorized third-party intermediaries, which resulted in a direct financial benefit to Defendants," the defendants could not evade liability for lack of a direct relationship.[123]

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117. Bah. Surgery Ctr., LLC v. Kimberly-Clark Corp., No. CV 14-8390-DMG (PLAx), slip op. at *2–3 (C.D. Cal. Apr. 11, 2018) *vacated on other grounds sub nom*, Hrayr v. Kimberly-Clark Corp., No. CV 14-08390 DMG (SHx), (C.D. Cal. Dec. 29, 2014).

118. *Id.*

119. *Id.*

120. *Id.* at *7.

121. *Id.*

122. *Id.*

123. Bah. Surgery Ctr., LLC v. Kimberly-Clark Corp., No. CV 14-8390-DMG (PLAx), slip op. at *2–3 (C.D. Cal. Apr. 11, 2018) *vacated on other grounds sub nom*, Hrayr v. Kimberly-Clark Corp., No. CV 14-08390 DMG (SHx), (C.D.Cal. Dec. 29, 2014).

The United States District Court for the Southern District of California, interpreting California law in *In re Ford Motor Co. DPS6 Powershift Transmission Products Litigation*, rejected Ford's argument that under *Bigler-Engler*, it had no duty to disclose absent a transactional relationship.[124] Specifically, Ford argued that the only relationships the plaintiffs had were with the dealerships where the Ford vehicles were purchased, not with Ford itself.[125] Instead, the court found that the plaintiffs had sufficiently alleged a "threshold relationship from which a duty can arise" based on the fact that Ford had marketed its vehicles to consumers, communicating with them through the Ford dealerships from whom plaintiffs purchased their vehicles.[126] The court concluded that the complaints in that case sufficiently pled a duty to disclose, even without a direct relationship between Ford and the consumers beyond that attenuated transaction. Rather, the duty arose from Ford's allegedly exclusive knowledge of facts regarding vehicle defects not known to the consumer plaintiffs.[127]

With this extensive background in mind, *Bigler-Engler* should not be construed as reversing decades of precedent of California courts. Rather, these cases should make clear that *Bigler-Engler*'s discussion of direct transactional relationships is indeed no more than a discussion. Instead, this extensive case history makes clear that manufacturers owe duties of disclosure to consumers in various contexts. Simply put, such cases remain good law even after the *Bigler-Engler* decision.

4. California Continues to Recognize a Duty to the Public and Members of Consumer Classes in Toxic Torts Cases

Ultimately, the *Bigler-Engler* decision does not preclude the finding of a duty placed on manufacturers to warn consumers about the safety risks and dangers of their products in toxic torts. This applies particularly to fraudulent or intentional concealment cases. Primarily because *Bigler-Engler* did not diminish the precedential force of California cases, therefore indicating that such a duty continues to exist in California for toxic tort cases. As the California Court of Appeal

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124. *In re* Ford Motor Co. DPS6 Powershift Transmission Prod. Litig., No. ML 18-02814 AB (FFMx), 2019 WL 3000646, at *5–6 (C.D. Cal. May 22, 2019).

125. *Id.*

126. *Id.* at *6.

127. *Id.*

explained in *Hoffman*, "a manufacturer's nondisclosure to the public of the toxic nature of its products where the toxicity is known to the manufacturer but not to others is a very different circumstance from [cases not involving toxic products, such as] a landowner's knowledge that it possesses prescriptive easement rights."[128] Hence, even if *Bigler-Engler* were read as rejecting a duty to the public in similar cases, it was not one involving toxic products. As such, following this analysis, intentional concealment claims remain viable in toxic torts cases, especially where a duty to disclose hazards of products to the consumer public exists. It is based in part on the unequal access to knowledge about the product hazards in the manufacturer-consumer relationship.

On this point, *Jones v. ConocoPhillips Co*,[129] provides pertinent precedent. In that case, the California Court of Appeal explained that although in a typical case, "a duty to disclose arises when a defendant owes a fiduciary duty" or confidential relationship, absent such a relationship, "a duty to disclose may also arise when a defendant possesses or exerts control over material facts not readily available to the plaintiff."[130]

As previously described, in *Jones*, the court of appeal found there were sufficient facts supporting a claim against chemical manufacturers for fraudulent concealment by a worker who was exposed to toxic chemicals against chemical manufacturers, where the manufacturer alone, not the decedent, knew of the toxicity of the chemicals and concealed those material facts. [131]

Of utmost pertinence, in *Jones*, there was no allegation of a fiduciary relationship between the decedent and defendants, or indeed *any* type of direct relationship or transaction between them, other than the decedent's use of or exposure to their products in the course of his work.[132] Rather than requiring evidence of a fiduciary or direct

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128. Hoffman v. 162 N. Wolfe LLC, 175 Cal. Rptr. 3d 820, 832 (Ct. App. 2014).

129. Jones v. ConocoPhillips Co., 130 Cal. Rptr. 3d 571 (Ct. App. 2011).

130. *Id.* at 580 (quoting Magpali v. Farmers Group, Inc., 55 Cal. Rptr. 2d 225, 231 (Ct. App. 1996) ("[T]he duty to disclose may arise without any confidential relationship where the defendant alone has knowledge of material facts which are not accessible to the plaintiff.")) (citations omitted).

131. *Id.* at 571.

132. *Id.*

relationship between the decedent and the defendant manufacturer beyond the decedent's use of the defendant's toxic product in his work, the court found sufficient evidence establishing a duty to disclose and supporting the fraudulent concealment claim based on the manufacturer's active concealment of the toxic properties of the product from consumers.[133]

In its analysis, the *Jones* court described the *LiMandri* factors for establishing a fraudulent concealment claim in the following terms:

> In *LiMandri* . . . each of the circumstances cited by the court in which a duty to disclose may exist *absent* the presence of a fiduciary relationship concerns the defendant's exertion of control over material facts that were not disclosed to the plaintiff, that is, 'when the defendant ha[s] exclusive knowledge of material facts not known to the plaintiff [or] actively conceals a material fact [or] makes partial representations but also suppresses some material facts.'[134]

This description of *LiMandri* is striking not only in its comparative (compared to *Bigler-Engler*) lack of emphasis on the importance of certain relationships, but even more so in that the *Jones* court did the opposite. The *Jones* court *emphasized* the fact that the predominant factor in determining a duty to disclose may be the control over and concealment of knowledge regarding material facts rather than the presence of a particular type of relationship.

Jones was not even addressed by *Bigler-Engler*, perhaps because of the plaintiff's failure in *Bigler-Engler* to bring the relevance of that case to the court's attention. As discussed, under *Jones*, the relationship between a manufacturer and consumer, particularly of a toxic product, may be sufficient to establish a duty to disclose where there is also evidence of concealment or knowledge of dangers exclusive to the manufacturer.[135] Its interpretation of *LiMandri* as not requiring a special fiduciary or confidential relationship where the other three *LiMandri* factors are present must still be accorded precedential weight, particularly in toxic torts cases, where *Jones* has more pertinence than *Bigler-Engler*.

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133. *Id.*

134. *Id.* (citing LiMandri v. Judkins, 60 Cal. Rptr. 2d 539, 543–44 (Ct. App. 1997)).

135. *See* Jones v. ConocoPhillips Co., 130 Cal. Rptr. 3d 571 (Ct. App. 2011).

Thus, the fact that *Bigler-Engler* may have distinguished the duty of care owed to the public at large in strict liability product liability cases from the duty owed in fraudulent concealment cases does not mean that manufacturers do not owe a duty to consumers to refrain from concealing the hazards and dangers of their products, particularly in toxic torts cases. Past California decisions recognizing a broad duty of manufacturers to not conceal, and to disclose to consumers the toxic hazards of their products, remain good law. *Bigler-Engler*, being a somewhat narrow opinion, does not conflict with or undermine the authority of toxic torts precedents such as *Jones v. ConocoPhillips.* Consequently, California courts should continue to affirm a broad duty of manufacturers to disclose toxic hazards to users of their products and actionable intentional torts claims where that duty is not adhered to.

III. AS A MATTER OF PUBLIC POLICY, CALIFORNIA PROTECTS AND SHOULD CONTINUE TO PROTECT CONSUMERS FROM MANUFACTURERS WHO ENGAGE IN FRAUDULENT CONCEALMENT

Finally, as a matter of public policy, *Bigler-Engler* should not be interpreted as requiring a direct transactional relationship between defendant manufacturers and plaintiff members of a consumer class of the public as a prerequisite for recognizing that manufacturers owe a duty to disclose safety hazards, particularly of toxic tort products, and particularly where they have engaged in egregious behavior in covering up the dangers of their products.

The public policy considerations pertinent to the determination of a legal duty have been described as follows by California courts:

> [T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care

> with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.[136]

Moreover, there are well-established public policies in California of preventing fraud,[137] and of protecting consumers from injuries caused by dangerous or defective products.[138] California courts have also explained that it is against public policy to allow a party with superior bargaining power to harm large numbers of consumers through fraudulent conduct or willful injury.[139]

The California Supreme Court has also declared that "California public policy favors the effective vindication of consumer protections."[140] In product liability cases addressing the duty of manufacturers to warn consumers about hazards inherent in their products, California courts have emphasized that "[t]he requirement's purpose is to inform consumers about a product's hazards or faults of which they are unaware, so that they can refrain from using the product altogether or evade the danger by careful use," therefore, "[t]ypically, under California law, we hold manufacturers strictly liable for injuries caused by their failure to warn of dangers that were known to the scientific community at the time they manufactured and distributed their product."[141]

Although that public policy has generally been articulated in the context of strict liability product liability cases, it would be anathema to conclude that California's interest in protecting consumers from

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136. Hale v. George A. Hormel & Co., 121 Cal. Rptr. 144, 152–53 (Ct. App. 1975) (citing Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968); Biakanja v. Irving, 320 P.2d 16, 18 (Cal. 1958); Hanberry v. Hearst Corp., 81 Cal. Rptr. 519, 523 (Ct. App. 1969)).

137. *See* Klussman v. Cross Country Bank, 36 Cal. Rptr. 3d 728, 741 (Ct. App. 2005); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Koebke v. Bernardo Heights Country Club, 115 P.3d 1212, 1222 (Cal. 2005).

138. *See* Daly v. General Motors Corp., 575 P.2d 1162 (Cal. 1978); Price v. Shell Oil Co., 466 P.2d 722 (Cal. 1970).

139. *See* Gavin W. v. YMCA, 131 Cal. Rptr. 2d 168, 176 (Ct. App. 2003); Firchow v. Citibank, N.A., No. B187081, 2007 WL 64763 at *10 n.8 (Cal. Ct. App. Jan. 10, 2007).

140. Williams v. Superior Ct., 22 Cal. Rptr. 3d 472, 485 (Ct. App. 2017) (citing Pioneer Electronics (USA), Inc. v. Superior Ct., 150 P.3d 198 (Cal. 2007)).

141. Johnson v. American Standard, Inc., 179 P.3d 905, 910 (Cal. 2008); Pannu v. Land Rover N. Am., Inc., 120 Cal. Rptr. 3d 605, 620 (Ct. App. 2011).

product dangers somehow ceases to exist when the manufacturer's conduct that results in harm to consumers is more intentional and egregious, as it is in fraudulent concealment cases.

Indeed, California courts have similarly recognized that the public policy interest in protecting California consumers extends to the need to protect them from intentional egregious conduct as well. As a unanimous California Supreme Court explained in *Vasquez v. Superior Court*, "Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society."[142]

It is also the public policy of the State of California "to protect the health, safety and welfare of the public."[143] Indeed, the very concept of *public* policy assumes that the state has an interest in protecting members of the *public*. At the very least, public policy should include preventing egregious intentional harms against classes of people who might be susceptible to hazards imposed on them by others. Such is the case with consumers who are dependent on manufacturers to provide accurate information about the dangers of their products, if not to guarantee the safety of those products.

Particularly when failure to disclose the hazards of toxic products can be the subject of both product liability (strict liability) claims and fraudulent concealment (intentional tort) claims, it would be unconscionable to allow a claim to proceed against a defendant for comparatively less intentional, egregious conduct, but not where the claim is grounded in facts demonstrating intentional fraud committed by a manufacturer. Although the duties for each claim may be framed differently, to conclude that manufacturers have no duty at all to the consumer public to refrain from egregious conduct in the form of intentional or fraudulent concealments of their products' hazards would defy both common sense and well-established public policy.

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142. Vasquez v. Superior Ct., 484 P.2d 964, 968 (Cal. 1971).

143. Parada v. City of Colton, 29 Cal. Rptr. 2d 309, 310 (Ct. App. 1994); *see also* Westlye v. Look Sports, Inc., 22 Cal. Rptr. 2d 781, 799 (Ct. App. 1993) (affirming the "policy of the law in promoting human safety") (citing Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960); Prosser, *Strict Liability to the Consumer in California* (1966) 18 HASTINGS L. J. 9, 46–48 (fns. omitted)).

CONCLUSION

Bigler-Engler notwithstanding, fraud law in California continues to recognize a duty of manufacturers to not conceal material facts about the toxic or dangerous nature of their products from consumers. Longstanding precedent in California continues to support findings in intentional concealment cases that the egregiousness of a manufacturer's fraud, and safety issues related to hazardous products, among other factors, may result in finding that a manufacturer has breached a duty to not conceal from the public or fail to disclose the presence of toxic risks in the products it sells. In toxic torts cases especially, consumers may continue to invoke California statutes and case law and to apply standard jury instructions, recognizing the potential viability of claims against manufacturers for intentional concealment of their products' dangers from the members of the consumer public. To deny such recourse based on an overly broad interpretation of a narrow court of appeals decision would be contrary to public policy in California, including strong public policy favoring the protection of health, safety, and welfare of the public generally, and more specifically, of consumers.