Date of Hearing: June 14, 2022

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
SB 1149 (Leyva) – As Amended June 2, 2022

As Proposed to be Amended

SENATE VOTE: 26-10

SUBJECT: CIVIL ACTIONS: AGREEMENTS SETTLING ACTIONS INVOLVING PUBLIC HEALTH OR SAFETY

KEY ISSUE: SHOULD CALIFORNIA LAW ENSURE THAT INFORMATION REGARDING DEFECTIVE PRODUCTS AND ENVIRONMENTAL HAZARDS, WHICH, IF PUBLIC, COULD SAVE MANY LIVES AND PREVENT COUNTLESS INJURIES, IS NOT KEPT CONFIDENTIAL, WHILE SIMULTANEOUSLY ENSURING THAT BUSINESSES HAVE A MEANS TO KEEP VALUABLE PROPIETARY INFORMATION, SUCH AS TRADE SECRETS AND CUSTOMER LISTS, CONFIDENTIAL?

SYNOPSIS

This bill, sponsored by Public Justice and Consumers Union, seeks to change litigation practices in "covered civil actions": those in which there is a factual foundation for claims that a defective product or environmental hazard has caused, or is likely to cause, significant or substantial bodily injury or illness or death. The specific problem to be solved is the use of protective orders in discovery, and confidentiality provisions in settlement agreements, to hide the facts establishing these harms. Because the pertinent facts are kept secret, individuals, policymakers, and regulators are unable to respond to information that they never learn about. Ultimately, preventable harms are not prevented and may persist for years, leading to avoidable injuries and deaths.

Examples of cases that might fall under this bill's ambit are those involving prescription opioids that were far more dangerous than doctors were told, such as Oxycontin; defective medical devices, such as Essure birth control implants; and dangerous automobiles, such as Chevy Cobalts. With each of these products, and many more like them, the information necessary to inform the public of the attendant dangers was available in early litigation, but was kept sealed for years through agreement of the parties and the courts. As a result, thousands of consumers fell victim to these products who might otherwise have been warned and therefore been able to avoid the hazards.

The three most important provisions of this bill accomplish the following:

1. *Establish a presumption that courts should not restrict disclosure of discoverable factual information, including not entering protective orders based on the parties' stipulation.*

2. *Prohibit agreements, such as settlement agreements, between the parties restricting disclosure of factual information.*

3. *Permit parties to bring good faith motions for appropriately tailored nondisclosure orders covering proprietary customer lists or trade secrets—so long as, in each instance, the presumption in favor of disclosure is outweighed by a specific and substantial confidentiality interest.*

Taken together, this bill's provisions are intended to change the behavior of all of those involved in covered civil actions—the parties, their attorneys, the court, and witnesses—so that the resolution of a private dispute can actually facilitate prevention of public harm, while still protecting from disclosure information that ought to remain confidential. If enacted, California would join several other states that have enacted anti-secrecy laws targeted at public hazards, including Arkansas, Florida, Louisiana, Montana, South Carolina, and Washington.

The bill is supported by a number of nonprofit organizations focused on consumer and environmental protection, trade associations representing plaintiffs' attorneys, and the California Labor Federation. It is opposed by a coalition of more than two dozen business trade associations, led by the Civil Justice Association of California.

SUMMARY: Limits the ability of litigants to enter into agreements or obtain court orders restricting the disclosure of factual information in civil cases involving a defective product or environmental hazard that has caused, or is likely to cause, significant or substantial bodily injury or illness or death. Specifically, **this bill**:

1) Enacts the Public Right to Know Act of 2022.

2) Declares the intent of the Legislature to better protect all Californians, including its workers, from significant or substantial danger to public health or safety posed by a defective product or environmental hazard, by creating a presumption against secrecy in civil litigation in cases involving a defective product or environmental hazard where public health and safety are at particular risk, while at the same time reasonably protecting the privacy of civil awards and trade secrets.

3) Defines "defective product or environmental hazard that poses a danger to public health or safety" as a defective product or environmental hazard that has caused, or is likely to cause, significant or substantial bodily injury or illness or death.

4) Defines "covered civil action" as a civil action, the factual foundation for which states a cause of action for civil damages regarding a defective product or environmental hazard that poses a danger to public health or safety.

5) Excludes from the definition of "covered civil action" a civil action regarding a motor vehicle that is brought pursuant to the Song-Beverly Consumer Warranty Act, unless the action also includes a claim of physical personal injury.

6) Defines "trade secret" as having the same meaning the term does under the Uniform Trade Secrets Act in the Civil Code.

7) Prohibits, notwithstanding any other law, any provision within an agreement between the parties in a covered civil action that purports to restrict the disclosure of factual information related to the action.

8) Enacts a presumption, notwithstanding any other law, that disclosure of discoverable factual information relating to a covered civil action shall not be restricted.

9) Prohibits, based on the presumption in 8), a court or arbitral tribunal from entering, by stipulation or otherwise, any order that restricts the public disclosure of discoverable factual information, except in the form of an order of nondisclosure as provided for under this bill.

10) Notwithstanding 7) and 9), permits a provision or order that restricts the disclosure of any of the following information in a covered civil action:

    a) Medical information or personal identifying information, as the latter term is defined under the Penal Code, regarding a person injured by a defective product or environmental hazard.

    b) The amount of a settlement.

    c) The citizenship or immigration status of any person or group of persons.

    d) Information relating to a current proprietary customer list or a trade secret, if the party seeking to restrict disclosure moves the court or arbitral tribunal in good faith for, and obtains, an order of nondisclosure regarding the disclosure of specified information.

11) Provides that a court or arbitral tribunal may enter an order of nondisclosure of specified information under 10) d) if the party requesting the order demonstrates that the presumption in favor of disclosure is clearly outweighed by a specific and substantial overriding confidentiality interest. The resulting order must be narrowly tailored to restrict the disclosure of no more information, and for no longer a period of time, than necessary to protect the confidentiality interest.

12) Declares any provision within an agreement between the parties in a covered civil action that purports to restrict the disclosure of factual information related to the action—except as authorized under 11)—to be void as a matter of law and as against public policy and not to be enforced.

13) Grants standing to bring a motion for nondisclosure pursuant to this bill to any party (including an intervenor) and to any non-party whose presence in the action, or production of documents or other tangible things, is required by subpoena, subpoena duces tecum, or other means.

14) Requires that a subpoena, subpoena duces tecum, or other means requiring attendance in action or production of documents or other tangible things of a person who is not a party to the action be accompanied by a notice of the availability of a motion under 13).

15) Grants standing to any person, including a representative of the news media acting on behalf of the public, for whom it is reasonably foreseeable that they will be substantially affected by a provision, agreement, or order that violates 7) or 9) to challenge the provision, agreement, or order, by motion in the covered civil action.

16) Declares an attorney's failure to comply with the requirements of this bill to be grounds for professional discipline.

17) Authorizes the State Bar of California to investigate and take appropriate action in any case brought to its attention in which an attorney does any of the following:

    a) Requests that a provision be included in an agreement between the parties that prevents the disclosure of factual information related to the action, and that is not otherwise authorized by this bill to be included within, or in connection with, such an agreement.

    b) Advises a client to sign or otherwise enter into an agreement that includes such a provision.

    c) Moves for an order of disclosure that does not meet the good faith requirement under 10) d).

EXISTING LAW:

1) Provides the public with a long-standing right to inspect and review court records "where there is no contrary statute or countervailing public policy." (*Craemer v. Superior Court* (1968) 265 Cal. App. 2d 216.) "Since court records are public records, the burden rests on the party seeking to deny public access to those records to establish compelling reasons why and to what extent these records should be made private." (*Estate of Hearst* (1977) 67 Cal. App. 3d 777.)

2) Provides that court records are presumed to be open unless confidentiality is required by law. Provides that a court may order a record sealed only if it expressly finds that: (a) there exists an overriding interest that overcomes the right of public access to the record; (b) the overriding public interest supports sealing the record; (c) a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (d) the proposed sealing is narrowly tailored; and (e) no less restrictive means exist to achieve the overriding interest. (California Rules of Court, Rule 2.550 (d); *see also NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal. 4th 1178.)

3) Establishes that, unless otherwise limited by court order, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of an action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. (Code of Civil Procedure Section 2017.010.)

4) Defines "trade secret" under the Uniform Trade Secrets Act as information, including a formula, pattern, compilation, program, device, method, technique, or process, that both:

    a) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

    b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. (Civil Code Section 3426.1 (d).)

5) Provides for the confidentiality of trade secrets in an action under the Uniform Trade Secrets Act, by authorizing the court to issue a protective order in discovery which prohibits the disclosure of a trade secret or limits its disclosure without prior court approval. (Civil Code Section 3426.5.)

6) Defines "personal identifying information" as including a variety of items of information about a person, including the person's name, address, social security number, bank account information, biometric information, and so forth. (Penal Code Section 530.55 (b).)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: Left unchecked, defective products and environmental hazards can kill, maim, or injure hundreds or thousands of victims. When such a danger becomes known, public policy ought to work towards protecting those who could be avoidably injured or killed by such products and hazards in the future. Unfortunately, entrenched litigation practices subject pertinent information in such cases to overly broad confidentiality agreements. As a result, individuals, policymakers, and regulators are unable to respond to information that they never learn about. Ultimately, preventable harms are not prevented and may persist for years, leading to avoidable injuries and deaths.

This bill is designed to change these litigation practices, so that information regarding defective products and environmental hazards can become publicly known. At the same time, the bill provides a means for certain information to be maintained as confidential if it legitimately ought to remain so, including valuable business information such as trade secrets and customer lists.

If enacted, California would join several other states that have enacted anti-secrecy laws targeted at such hazards, including Arkansas, Florida, Louisiana, Montana, South Carolina, and Washington. According to the author:

> [E]xamples abound of courts issuing overbroad protective orders that keep court records and discovery information secret and protect incriminating documents without any reasonable basis—and lawyers mutually agreeing to settlements and stipulated orders that prohibit disclosing the very facts that prompted the case even when the hazard continues.
>
> Secrecy is sometimes necessary to protect personal information or legitimate trade secrets, but it is not appropriate when it keeps information about ongoing dangers from the public. SB 1149 will protect Californians and potentially save lives by ensuring that factual information about dangerous public hazards does not remain shielded behind overbroad and unnecessary secrecy and concealment. Lawyers and the courts will no longer be able to keep vital information from reaching the public when disclosing it can prevent countless injuries and death.

The provisions of this bill are modeled on earlier legislation prohibiting orders and agreements preventing the disclosure of factual information in civil actions alleging childhood sexual abuse and similar wrongs. (*See* Code of Civil Procedure Sections 1001, 1002.) The Senate Judiciary Committee analysis of this bill thoroughly summarizes the history of legislation in this area. The similarities to situations in which prominent institutions, such as the Catholic Church and the Boy Scouts of America, used confidential settlements to shield perpetrators of sexual abuse from public view, thereby allowing them to perpetrate further abuse, ought to be obvious.

Background re: the presumption of openness and the availability of confidentiality in California court proceedings. Court records are presumptively open to public inspection. California courts have consistently affirmed this presumption of openness by requiring the party that seeks to deny access to show "compelling reasons why and to what extent [court] records should be made private." (*Estate of Hearst* (1977) 67 Cal. App. 3d 777.)

Notwithstanding the presumption of open access, existing law provides civil litigants with several methods to prevent designated documents and information from becoming public. Two methods are particularly relevant to this bill. First, by motion of one party, or by stipulation of all of the parties to an action, a court may issue a protective order to prevent the sharing or disclosure of documents or other information obtained during discovery. (*See, e.g.,* Code of Civil Procedure Section 2017.020 ["The court shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence"].) In the absence of a protective order, litigants are presumed to have a First Amendment right to disclose documents and information obtained in discovery, or to use it in subsequent litigation. (*See Seattle Times Co. v. Rhinehart* (1984) 467 U.S. 20 [holding that a party does not have a First Amendment right to disseminate information obtained during discovery covered by a protective order, meaning there is a right to disseminate such information when it is not covered by a protective order].)

Second, the parties can enter into an agreement—typically, though not always, as part of a settlement agreement resolving the case—prohibiting the sharing or disclosure of documents and information therein, including the facts underlying the complaint. This agreement may take the form of a private contract between the parties, if it is entered into before a case is filed. It may also take the form a settlement agreement that is the basis for a motion or stipulation for the court to dismiss an active case. (Note that, in some instances, a settlement agreement may require court approval.)

Litigants may also use these methods in combination to obtain greater confidentiality: a settlement agreement may be conditioned on parties obtaining either a protective order to keep discovery materials secret, or a sealing order that shields documents filed with the court.

Core premise: confidentiality agreements in covered civil actions often facilitate repeated, avoidable public harms. This bill does not apply to all court cases (a term, throughout this analysis, which should be taken to include arbitrations). Rather, it would apply only to a "covered civil action," as defined: a court case where a cause of action for civil damages is based upon a defective product or environmental hazard that poses a danger to public health or safety.

The premise underlying this bill is that, in covered civil actions, parties agree to, and courts approve, overly broad protective orders and settlement agreements. As a result, information that members of the public ought to know about defective products and environmental hazards, and which they might use to protect themselves and others, is instead hidden from public view. People therefore continue to fall victim to these products and hazards. Worse, if these later victims seek redress through litigation, that subsequent litigation inevitably gives rise to further confidentiality orders and agreements, prolonging the cycle. While this secrecy may benefit the parties to the individual case—the plaintiff gets the information it wants or needs to obtain a favorable settlement; the defendant is able to avoid disclosing information that it wishes to hide—these private benefits come at the cost of further, avoidable, ongoing public harms.

Examples of cases that might fall under this bill's purview include the following.

- **OxyContin** was marketed to physicians as being less addictive than other opioids. The ensuing harms led West Virginia to sue the manufacturer in 2001. In discovery, attorneys for the state received internal memoranda, notes from sales calls to doctors, and marketing plans, all of which was subject to a protective order. In 2004, the judge relied on this evidence in allowing the case to proceed, but kept the evidence sealed when the

case settled. At least a dozen other courts followed suit, until 2016, when the information was leaked to the Los Angeles Times. Estimates are that perhaps 250,000 deaths from overdoses ensued in the intervening 12 years. (Lesser, et al., *How judges added to the grim toll of opioids,* Reuters (Jun. 25, 2019), *available at* https://www.reuters.com/investigates/special-report/usa-courts-secrecy-judges/.)

- **Essure**, a non-surgical form of birth control, was implanted in hundreds of thousands of women once it was approved by the FDA in 2002. Unfortunately, Essure used metal coils that dislodged or broke, leaving shards within women's reproductive systems. More than 27,000 plaintiffs eventually filed cases in California Superior Court based on their ensuing injuries. Per bill sponsor Public Justice, "In these proceedings, Bayer turned over millions of pages in discovery, but designated over 99% of them confidential." (Glaberson, "Hundreds of Previosly-Hidden Documents Now Available About Harmful Permanent Birth Control Device Essure," Public Justice (Jul. 9, 2020), *available at* https://www.publicjustice.net/hundreds-of-previously-hidden-documents-now-available-about-harmful-permanent-birth-control-device-essure/.) Some of these documents were unsealed in 2020; they showed complaints to the manufacturer from as far back as 2006 which were not reported to the FDA. (Feeley and Pettersson, *Bayer Warned of Essure Complaint Rise Long Before Sales Halt*, Bloomberg (Aug. 19, 2020), *available at* https://www.bloomberg.com/news/articles/2020-08-19/bayer-warned-of-essure-complaint-surge-years-before-sales-halted.)

- **Chevrolet Cobalts** were equipped with defective ignition switches that sometimes prevented air bags from firing. Parents of a survivor sued General Motors. "The matter was settled with confidentiality in 2005—nine years before GM admitted the problem and recalled 750,000 cars." (Editorial Board, *Sealed settlements could kill: Our view*, USA Today (Mar. 10, 2014), *available at* https://www.usatoday.com/story/opinion/2014/03/10/sealed-settlements-general-motors-priests-bridgestone-firestone-editorials-debates/6270853/.) At least 12 other people were killed by these switches prior to the recall. (*Ibid.*) By the end of 2014, "[t]he death toll from faulty ignition switches in small cars made by General Motors ha[d] reached 109." (*Death Toll From Faulty Ignition Switches in General Motors Cars Hits 109*, Associated Press (Jun. 1, 2015), *available at* https://www.nbcnews.com/news/us-news/death-toll-faulty-ignition-switches-general-motors-cars-hits-109-n367731.)

The bill's sponsors have provided Committee staff with several other examples of protective orders and confidential settlements that kept evidence of harm from public view for years. There may be many other such examples of which we are unaware because of protective orders and confidential settlements reached by the parties in those cases.

The premise of this bill is that having information become public in cases such as these would help inform the public, regulators, and policy makers about these dangers and help limit further injury. To that end, this bill seeks to change the behavior of the parties and the courts in covered civil actions by taking the following six steps:

1. Establishing a presumption that courts should not restrict disclosure of discoverable factual information, including no longer entering protective orders based on the parties' stipulation.

2. Prohibiting agreements, such as settlement agreements, between the parties restricting disclosure of factual information.

3. Nevertheless permitting agreements and orders that restrict disclosure of an injured party's medical information, personal identifying information, and the amount of any settlement obtained, as well as information regarding anyone's immigration status.

4. Permitting a party, or a witness who is subject to a subpoena for production of documents, to make a good faith motion for an appropriately-tailored nondisclosure order covering proprietary customer lists or trade secrets—so long as the presumption in favor of disclosure is outweighed by a specific and substantial confidentiality interest.

5. Granting standing to members of the public, including the media, to challenge agreements and orders restricting disclosure of factual information.

6. Establishing that it is a basis for professional discipline by the State Bar of California for an attorney to undermine the foregoing, e.g., by advising a client to enter into an agreement that violates #2.

Collectively, these measures are intended to change the behavior of all of those involved in covered civil actions—the parties, their attorneys, the court, and any witnesses—so that the resolution of a private dispute can actually facilitate prevention of public harm, while still protecting from disclosure information that ought to remain confidential.

Fundamental issue: does the fear of potential disclosure of businesses' trade secrets outweigh the harm of nondisclosure of dangers of public harms? The most disputed aspect of this bill is its elimination of protective orders in covered civil cases. As detailed above, the present system of granting protective orders is overinclusive: business defendants are incentivized to place significant amounts of discoverable information under proposed protective orders; injured plaintiffs are incentivized to stipulate to these orders so that they can more quickly obtain information in discovery; and judges are incentivized to sign the parties' proposed orders with little scrutiny in order to save time, and to avoid having to guess at the appropriate standard for whether the information in question truly merits protection. (*See Pansy v. Borough of Stroudsburg* (3d Cir. 1994) 23 F.3d 772, 785 ["[S]ome courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders."].)

This bill would replace that system, though only in covered civil actions, and in its place, would establish a system based on the presumption that the "disclosure of discoverable factual information…relating to a covered civil action shall not be restricted." (Proposed Code of Civil Procedure Section 1002.9 (c).) Parties seeking to protect proprietary customer lists or trade secrets from disclosure could move the court for a nondisclosure order covering the information in question. In order to obtain this order, they would have to demonstrate that "a specific and substantial…confidentiality interest" in this information clearly outweighs the statutory presumption favoring disclosure. (Proposed Code of Civil Procedure Section 1002.9 (d)(3)(B).)

This approach has the following advantages. First, it removes the incentive for injured plaintiffs to stipulate to overly broad protective orders. *This does not mean, however, that plaintiffs will automatically obtain the discovery they are seeking*. Defendants will still be able to oppose discovery requests, on grounds such as overbreadth or lack of relevance, just as they can today.

Second, this bill's approach requires business defendants to specifically identify the actual trade secrets they wish to keep confidential and to justify their assertions of confidentiality. This process is meant to ensure that businesses carefully identify which information actually merits confidential treatment, rather than simply trying to cover virtually all of the information they will produce in discovery. Third, courts are given a clear statutory standard for evaluating whether to grant an order of nondisclosure: whether the defendant has demonstrated "a specific and substantial overriding confidentiality interest" that "clearly outweigh[s]" the "presumption in favor of disclosure." If this demonstration is made, the bill requires the court's resulting order to "be narrowly tailored to restrict the disclosure of no more information, and for no longer a period of time, than is necessary to protect the interest." (Proposed Code of Civil Procedure Section 1002.9 (d)(3)(B).) The overinclusiveness of the present system—and its attendant dangers of public harm—are meant to be replaced by precisely-targeted orders keeping confidential what ought to be kept confidential, while allowing the public to learn information that ought to be public.

Opponents of this bill raise the following counterarguments in their opposition letter:

- "SB 1149 creates a scenario where businesses seeking to gain access to valuable competitive intelligence need only sue their competitor and ask them to produce the documents and information on which their business was built."

This argument, which could be concerning at initial review, appears to lack merit upon scrutiny. Any complaint initiating a civil action in California must meet applicable Code pleading standards. These standards include adequate pleading of the ultimate facts supporting the claim (rather than the simplified notice pleading provided for in federal court). The pleading must be sufficient to survive a demurrer. Spurious lawsuits are weeded out through this process, through the efforts of both defendants and the courts. If a complaint survives demurrer, under this bill, the court would then have to deem the action a "covered civil action" before its provisions would begin to apply. And, as noted above, nothing in this bill changes other safeguards in the Civil Discovery Act, such as the requirement that discovery requests not be overly broad, unduly burdensome, or reasonably calculated to lead to the discovery of admissible evidence. In short, contrary to the opponents' warning, a plaintiff cannot simply make an unsubstantiated claim that a defective product or environmental hazard has caused, or is likely to cause, significant or substantial bodily injury or illness or death and thereby gain access to a business's trade secrets.

- "The functional impact of this bill will be to penalize a business by subjecting them to information sharing prior to evidence ever being presented or substantiated in court."

This argument appears to lack a basis in California law. The entire purpose of civil discovery is to ensure that the parties share information and evaluate the merits of the case before they proceed to summary judgment or trial.

- "Businesses should not be put in a position of having to choose between paying out unsubstantiated claims or keeping legitimate confidential information private."

This sentiment is indisputable but also appears to be unduly alarmist. First, it rests on the premise that courts cannot be trusted to determine when confidentiality is merited and when it is not. To accept this argument is to accept that judges are incapable of discriminating between legitimate and illegitimate trade secrecy claims. Second, it ignores the fact that along with protecting legitimate confidential information, the current system also allows defendants to keep private

evidence of the harms that they have caused, so that they are able to limit their prospective liability while continuing to cause avoidable injury. Such secrecy is not a legitimate function of California's court system.

If the opponents of this bill fear that its provisions will lead to unwarranted disclosure of trade secrets, it seems that, rather than reject this bill outright, they ought to work with the author and sponsors to devise a mutually acceptable system to permit information regarding public hazards to come to light, while still maintaining the confidentiality of trade secrets.

Author's amendment—removing lemon law cases with no allegation of personal physical injury from the bill's ambit. The author proposes to amend Section 1002.9 (a)(1) in the bill to provide as follows:

> **1002.9.** (a) (1) "Covered civil action" means a civil action the factual foundation for which ~~establishes~~ **states** a cause of action for civil damages regarding a defective product or environmental hazard that poses a danger to public health or safety. **"Covered civil action" shall not include a civil action regarding a motor vehicle that is brought pursuant to the Song-Beverly Consumer Warranty Act, Title 1.7 of Part 4 of the Civil Code, unless the action also includes a claim of physical personal injury.**

The first amendment, replacing the verb "establishes" with "states," is clarificatory. The second amendment removes any doubt that motor vehicle lemon law claims—uncoupled from any claim that the alleged motor vehicle defect caused physical injury—are not within the purview of this bill. Ordinary confidentiality procedures can continue to be observed in such cases.

Author's amendment—removing option for unrelated action challenging confidentiality. The author proposes to amend Section 1002.9 (f) in the bill to provide as follows:

> **1002.9** (f) A person, including a representative of news media acting on behalf of the public, for whom it is reasonably foreseeable that the person will be substantially affected by a provision, agreement, or order that violates subdivision (b) or (c), may challenge the provision, agreement, or order by motion in the covered civil action~~, or by bringing a separate action for declaratory relief in the superior court~~.

This amendment removes the option for a person to bring an unrelated action for declaratory relief to challenge the propriety of an order or agreement granting confidentiality in a prior case. This is a prudent change, particularly given the absence of a statute of limitations on bringing the separate action. This amendment also enhances the chances that the judge who grants a motion for nondisclosure or approves a confidentiality provision is able to rule on a motion challenging the order; that judge is in the best position to understand, explain, or modify the reasoning that went into the challenged order.

Author's amendment—granting the State Bar additional discretion regarding attorney discipline. The author proposes to amend Section 1002.9 (h) in the bill to provide as follows:

> **1002.9.** (h) An attorney's failure to comply with the requirements of this section ~~shall~~ **may** be grounds for professional discipline, and the State Bar of California may investigate and take appropriate action in any such case brought to its attention, when the attorney does any of the following:

(1) Requests that a provision be included in an agreement between the parties that prevents the disclosure of factual information related to the action, as described in subdivision (b), and that is not otherwise authorized by this section be included within such an agreement.

(2) Advises a client to sign or otherwise enter into an agreement that includes such a provision.

(3) Moves for an order of nondisclosure that does not meet the good faith requirement of paragraph (3) of subdivision (d).

The goal of this subdivision is to force attorneys to be circumspect in seeking confidentiality. Nevertheless, as originally worded, this subdivision was arguably unclear as to whether attorney discipline would be mandatory ("*shall* be cause for professional discipline") or discretionary ("the State Bar of California *may* investigate and take appropriate action"). This amendment makes clear that the State Bar would continue to have discretion, as it does under existing law, to investigate the specific circumstances when attorney misconduct is reported, and to take disciplinary action if it is deemed warranted.

Is the existing system for ensuring litigation confidentiality actually less efficient than the system this bill would put in place? Another opposition argument against this bill is that it would impair settlement. The opposition coalition writes: "SB 1149 will discourage reasonable, timely settlements since confidentiality is a key consideration and motivation for their use. Most settlement agreements reflect a compromise, where the plaintiff concedes they may not be able to prove their case and the defendant does not admit but concedes there may be business reasons to resolve the matter and avoid a trial."

It is true that, absent this bill, in the initial covered civil action alleging that a product is defective, the defendant might resist discovery with much more vigor than it currently would; further, the defendant might be willing to prolong litigation that it previously would have settled. However, if information then becomes public that establishes the defendant's liability, it is much likelier that subsequent claims made by other injured parties will be settled rather than litigated. After all, why would a defendant take on the expense of defending against a lawsuit if evidence of its liability is already public and in plaintiffs' hands? Conversely, under the present system, if information establishing the defendant's liability remains hidden due to a confidential settlement, it is more likely that further litigation will ensue, as each claimant will have to bring a case and once again employ discovery to uncover the facts establishing the defendant's liability. The net result—serial cases, each involving re-discovery of the same facts—would be far less efficient for plaintiffs and for the court system as a whole than one case followed by a series of settlements. Finally, it could be argued that this bill would incentivize manufacturers to correct design defects and manufacturing flaws in their dangerous products, rather than continuing to litigate, pay out settlements, and secure confidentiality agreements. Doing so would save significant resources now spent on litigation and, most importantly, protect the public from future harm.

ARGUMENTS IN SUPPORT: Consumer Reports cogently summarizes how this bill would change plaintiffs' incentives:

Collecting evidence is an essential part of proving any case, including where a person has been injured or killed as the result of a defective product or environmental hazard. When victims or their families collect sufficient evidence to prove a case, the defendant often offers

> to settle it – but insists, as a condition, that all records of the danger be sealed. Too often, the victim is in no position to resist and is essentially coerced into agreeing in order to recover the compensation they are due. Victims should never be placed in this position where they must make a terrible choice: enter into a "secret settlement" that brings them closure, yet keeps a danger hidden from the public; or, alternatively, fight in court – often against a large, deep-pocketed corporation that can drag out proceedings for years – in the hope that a final judgment will make them whole and prevent others from suffering as they have.

Stanford Law School Center on the Legal Profession applauds the beneficial effects this measure would have on legal ethics:

> Current rules, norms and practices put lawyers in a bind—between serving the narrow interests of clients and the broader interests of society. Indeed, currently, lawyers can feel compelled to favor secret settlements—even when they may be morally opposed to doing so—because California Rule of Professional Conduct 1.2(a) mandates: "A lawyer shall abide by a client's decision whether to settle a matter." […] Proposed section 1002.9(g) changes that calculus, and frees lawyers from that untenable position, by helping to underscore and make concrete lawyers' obligations to the public, not just their individual clients.

ARGUMENTS IN OPPOSITION: The opposition coalition warns that trade secrecy, once breached, cannot be reestablished:

> The effect of publicly releasing proprietary information would have disproportionate impacts on industries that rely on research and development as cornerstones to their market share. It is self-evident that if trade secrets are not protected in one case, they won't receive protection in any case since the secrets will no longer be secret. The injustice of this policy is that sensitive business information is released even if the jury ultimately finds there is no defect or hazardous condition!

REGISTERED SUPPORT / OPPOSITION:

Support

Consumer Reports (co-sponsor)
Public Justice (co-sponsor)
Alliance for Justice
California Employment Lawyers Association
California Environmental Voters
California Labor Federation
California Public Interest Research Group
Center for Auto Safety
Consumer Attorneys of California
Consumer Federation of California
Consumer Protection Policy Center
Consumers for Auto Reliability and Safety
Courage California
Kids in Danger
Law Project for Psychiatric Rights
National Association of Consumer Advocates

Public Health Advocates
Stanford Law School Center on the Legal Profession
The Utility Reform Network

Opposition

Advanced Medical Technology Association
Almond Alliance of California
American Property Casualty Insurance Association
Association of California Egg Farmers
Biocom California
Biotechnology Innovation Organization
California Apartment Association
California Association of Winegrape Growers
California Building Industry Association
California Business and Industrial Alliance
California Business Properties Association
California Chamber of Commerce
California Farm Bureau
California Federation of Independent Businesses
California Food Producers
California Grain and Feed Association
California Life Sciences
California Manufacturers and Technology Association
California Pear Growers Association
California Seed Association
Civil Justice Association of California
Household and Commercial Products Association
National Marine Manufacturers Association
Official Police Garages of Los Angeles
Personal Care Products Council
PhRMA
Western Growers Association
Western States Petroleum Association

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