SENATE THIRD READING
SB 1149 (Leyva)
As Amended August 4, 2022
Majority vote

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.

Major Provisions

1) 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.

2) 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.

3) 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.

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

5) Prohibits, based on the presumption in 4), above, 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.

6) Notwithstanding 3) and 5), above, 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 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.

7) Provides that a court or arbitral tribunal may enter an order of nondisclosure of specified information under 6) d), above, 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.

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.

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 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.

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 include the following.

1) *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/.)

2) *Essure*, a non-surgical form of birth control, was implanted in hundreds of thousands of women once it was approved by the United States Food and Drug Administration (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.)

3) *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.)

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 takes 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 good faith motion for an appropriately-tailored nondisclosure order covering proprietary customer lists or trade secrets.

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.

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.

According to the Author
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.

Arguments in Support
Consumer Reports 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.

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!

FISCAL COMMENTS

None

VOTES

SENATE FLOOR: 26-10-4
YES: Allen, Atkins, Becker, Bradford, Cortese, Dodd, Durazo, Eggman, Glazer, Gonzalez, Hueso, Kamlager, Laird, Leyva, Limón, McGuire, Newman, Pan, Portantino, Roth, Rubio, Skinner, Stern, Umberg, Wieckowski, Wiener
NO: Bates, Borgeas, Dahle, Grove, Jones, Melendez, Min, Nielsen, Ochoa Bogh, Wilk
ABS, ABST OR NV: Archuleta, Caballero, Hertzberg, Hurtado

ASM JUDICIARY: 7-1-3
YES: Stone, Bloom, Haney, Kalra, Reyes, Robert Rivas, Wilson
NO: Davies
ABS, ABST OR NV: Cunningham, Kiley, Maienschein

UPDATED

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CONSULTANT: Jith Meganathan / JUD. / (916) 319-2334 FN: 0003185