SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 1149 (Leyva)
Version: February 16, 2022
Hearing Date: April 5, 2022
Fiscal: No
Urgency: No
CK

SUBJECT

Civil actions: agreements settling actions involving public health or safety

DIGEST

This bill prohibits provisions in settlement agreements that restrict disclosure of information related to actions involving defective products or dangerous environmental conditions, as specified, with certain exceptions.

EXECUTIVE SUMMARY

Settlements of civil actions can generally include provisions that restrict disclosure of certain underlying information upon agreement of the parties. While settlement is generally encouraged for the sake of judicial efficiency and in the interests of the parties, existing law prohibits such "secret settlements" in connection with certain actions, including sexual assault and harassment claims.

Concerns have arisen that nondisclosure provisions in certain settlement agreements can ultimately lead to greater societal harms where information that could prevent future injuries is kept from public view. This bill targets such settlements and related court orders in cases involving defective products or environmental conditions that pose a danger to public health or safety. It prohibits provisions that aim to keep secret factual information connected to such covered civil actions. There are exceptions, including for trade secrets and certain medical or other personally identifiable information.

The bill is sponsored by Consumer Reports and Public Justice. It is supported by numerous consumer groups, including the California Public Interest Research Group and the Consumer Attorneys of California, as well as the California Employment Lawyers Association and the California Labor Federation. The bill is opposed by a coalition of groups led by the California Chamber of Commerce, including business and agricultural associations.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Provides that a provision within a settlement agreement that prevents the disclosure of factual information related to the action is prohibited in any civil action the factual foundation for which establishes a cause of action for civil damages for any of the following:
    a) an act that may be prosecuted as a felony sex offense;
    b) an act of childhood sexual assault, as defined in Section 340.1;
    c) an act of sexual exploitation of a minor or other conduct prohibited with respect to a minor, as defined in the Penal Code; or
    d) an act of sexual assault against an elder or dependent adult, as defined in the Welfare and Institutions Code. (Code Civ. Proc. § 1002(a).)

2) Provides that the law does not preclude an agreement preventing the disclosure of any medical information or personal identifying information regarding the victim of the offense or of any information revealing the nature of the relationship between the victim and the defendant. (Code Civ. Proc. § 1002.)

3) Provides that an attorney's failure to comply with the requirements of this section by demanding that a provision be included in a settlement agreement that prevents the disclosure of factual information related to the action that is not otherwise authorized as a condition of settlement, or advising a client to sign an agreement that includes such a provision, may be grounds for professional discipline and the State Bar of California shall investigate and take appropriate action in any such case brought to its attention. (Code Civ. Proc. § 1002(e).)

4) Provides that a provision within a settlement agreement that prevents or restricts the disclosure of factual information related to a claim filed in a civil action or a complaint filed in an administrative action, regarding any of the following, is prohibited:
    a) an act of sexual assault that is not governed by subdivision (a) of Section 1002;
    b) an act of sexual harassment, as defined in Section 51.9 of the Civil Code;
    c) an act of workplace harassment or discrimination, failure to prevent an act of workplace harassment or discrimination, or an act of retaliation against a person for reporting or opposing harassment or discrimination, as described in subdivisions (a), (h), (i), (j), and (k) of Section 12940 of the Government Code; or
    d) an act of harassment or discrimination, or an act of retaliation against a person for reporting harassment or discrimination by the owner of a housing accommodation, as described in Section 12955 of the Government Code. (Code Civ. Proc. § 1001(a).)

5) Permits a provision in the above cases that shields the identity of the claimant and all facts that could lead to the discovery of the claimant's identity, including pleadings filed in court, to be included within a settlement agreement at the request of the claimant. This exception does not apply if a government agency or public official is a party to the settlement agreement. A provision that precludes the disclosure of the amount paid in settlement of a claim is not prohibited. (Code Civ. Proc. § 1001(c), (e).)

6) Prohibits a court from entering an order, in all actions described above, that restricts the disclosure of information in a manner that conflicts with the above provisions. A provision within a settlement agreement that prevents the disclosure of factual information related to such actions or claims is void as a matter of law and against public policy. (Code Civ. Proc. §§ 1001, 1002.)

7) Declares it is the policy of the State of California that confidential settlement agreements are disfavored in any civil action the factual foundation for which establishes a cause of action for a violation of the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 9 of the Welfare and Institutions Code). It further provides that provisions of such an agreement, except those requiring nondisclosure of the amount paid, may not be recognized or enforced by the court absent a showing of any of the following:
    a) the information is privileged under existing law;
    b) the information is not evidence of abuse of an elder or dependent adult, as specified; or
    c) the party seeking to uphold the confidentiality of the information has demonstrated that there is a substantial probability that prejudice will result from the disclosure and that the party's interest in the information cannot be adequately protected through redaction. (Code Civ. Proc. § 2017.310.)

This bill:

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

2) Prohibits a provision within, or agreed to in connection with, a settlement agreement that purports to restrict the disclosure of factual information related to a civil action the factual foundation for which establishes a cause of action for civil damages regarding a defective product or environmental condition that poses a danger to public health or safety ("a covered civil action").

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

4) Establishes a presumption that the disclosure of information relating to a covered civil action shall not be restricted, and a court or arbitral tribunal shall not enter, by stipulation or otherwise, any order that restricts the disclosure of such information, except as provided.

5) Provides that it does not preclude a provision or order that restricts the disclosure of any of the following information relating to a covered civil action:
    a) medical information or personal identifying information, as defined in subdivision (b) of Section 530.55 of the Penal Code, regarding a person injured by a defective product or environmental condition;
    b) the amount of a settlement;
    c) the citizenship or immigration status of any individual or group of individuals, including the existence of any request, hearing, or determination made pursuant to Section 351.2 of the Evidence Code; or
    d) information relating to a current proprietary customer list or a trade secret, if the party moves the court or arbitral tribunal in good faith for an order of nondisclosure restricting the disclosure of specified information and the order is granted. A court or arbitral tribunal may enter such an order of nondisclosure 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 order shall 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.

6) Provides that a provision that purports to restrict the disclosure of factual information related to the action is void as a matter of law and as against public policy and shall not be enforced, except as provided.

7) Provides standing to any 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 in violation of the above provisions, to 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.

8) Provides that an attorney's failure to comply with these requirements are 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:
    a) requests that a provision be included in a settlement agreement that prevents the disclosure of factual information related to the action, and that is not otherwise authorized;
    b) advises a client to sign an agreement that includes such a provision; or

c) moves for an order of nondisclosure that does not meet the good faith requirements above.

9) Makes a series of findings and declarations.

COMMENTS

1. State law favoring disclosure in certain contexts

Existing law disfavors the secret settlement of certain civil actions in which the public has a strong interest. AB 2875 (Pavley, Ch. 151, Stats. 2006) prohibited the confidential settlement of a civil action the factual basis for which is a cause of action for "an act that may be prosecuted as a felony sex offense." (Code Civ. Proc. § 1002.) The author and proponents asserted that allowing such confidentiality clauses "deprive the public of critical information that can protect future victims."[1]

It has also become the policy of the State of California that confidential settlement agreements are disfavored in any civil action based on a violation of the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA). (Code Civ. Proc. § 2017.310.) The enacting legislation, AB 634 (Steinberg, Ch. 242, Stats. 2003), established a test for the court to determine whether good cause exists to enforce a confidential settlement agreement or a stipulated protective order that hides information that is evidence of abuse of an elder or dependent adult in violation of the EADACPA. AB 634 limited the enforcement of a confidential settlement agreement or stipulated protective order if that confidentiality will hide specified information from public disclosure. Proponents of the bill argued against secrecy agreements "because people have the right to know both the facts that led to a settlement in these cases, and the name of the involved institution so they can make a fully informed decision when choosing a nursing facility for their loved ones."[2] The bill sought to ensure "the public gets crucial information" about these violations. AB 634 only applied to EADACPA cases.

Seeking to ensure that the perpetrators of other sexual crimes are made known to the public, AB 1682 (Stone, Ch. 876, Stats. 2016) prohibited a confidentiality or secrecy provision in a settlement agreement in a civil action for an act of childhood sexual abuse or an act of sexual assault against an elder or dependent adult and made a confidential settlement agreement void as a matter of law and against public policy. It also subjected an attorney that fails to comply with those requirements to discipline by the State Bar of California. The author stated the case for the bill: "Strong public policy arguments can be made that secret settlements are inappropriate in some cases, specifically matters of

[1] Senate Judiciary Committee, *AB 2875 Analysis*, June 6, 2006.
[2] Senate Judiciary Committee, *AB 634 Analysis*, July 8, 2003.

concern to the public because they involve particularly vulnerable victims, highly dangerous behavior, or especially egregious conduct."[3]

SB 820 (Leyva, Ch. 953, Stats. 2018) further expanded the universe of information for which so-called "secret settlements" are restricted. Enacted in the wake of a flood of sexual harassment and assault allegations against serial offenders, the bill prohibited a provision within a settlement agreement that prevents the disclosure of factual information related to a claim in any civil action or a complaint in an administrative action, regarding specified acts, including various forms of sexual harassment or discrimination and any claims for sexual assault not already covered. The prohibition came as it was publicly revealed that many of these offenders had settled previous cases against them and demanded non-disclosure provisions that kept their misconduct hidden. SB 820 reserved the ability to shield the identity of the claimant in the terms of a settlement agreement at their request so long as a government agency or public official is not a party to the agreement.

2. Extending these "sunshine" laws to litigation involving defective products and dangerous environmental conditions

This bill extends these sunshine laws to "covered civil actions," those where the factual foundation establishes a cause of action for civil damages regarding a defective product or environmental condition that poses a danger to public health or safety. "Defective product or environmental condition that poses a danger to public health or safety" is further defined to mean "a product or condition that has caused, or is likely to cause, significant or substantial bodily injury or illness, or death." Provisions within, or agreed to in connection with, settlement agreements in these actions that seek to restrict disclosure of relevant information are prohibited. The bill further establishes a presumption that the disclosure of information relating to these actions is not restricted, and prohibits courts and arbitral tribunals from entering, by stipulation or otherwise, any order that restricts the disclosure of such information, except as provided.

The bill bolsters these provisions by granting standing to affected persons, including media representatives, to challenge any provision, agreement, or order in violation of the law in the covered civil action, or in a separate action for declaratory relief in the superior court.

The bill allows for limited exceptions in connection with medical or other personally identifying information regarding the injured plaintiff, including their immigration or citizenship status, and the amount of the settlement. Given concerns about the potential release of a defendant's trade secrets, the bill authorizes a party to move the court for an order of nondisclosure of current proprietary customer lists or trade secrets, as defined. The party seeking nondisclosure must demonstrate to the court that the presumption in

[3] Senate Judiciary Committee, *AB 1682 Analysis*, June 28, 2016.

favor of disclosure is clearly outweighed by a specific and substantial overriding confidentiality interest. If it grants such a motion, the court is required to narrowly tailor the order to restrict the disclosure of no more information, and for no longer a period of time, than is necessary to protect the interest.

Some concerns have been raised about whether third parties would be eligible to avail themselves of these exceptions. For instance, if a business not a party to the lawsuit has documents subpoenaed that include trade secrets, the business should similarly be able to protect their interests. While this is the intent of the bill, the author has agreed to amend the bill to clarify that such parties are to be provided notice and an opportunity to move for such an order.

Just as with similar laws, attorneys attempting to violate or circumvent the law are subject to professional discipline and other action taken by the State Bar.

3. Policy arguments in favor of disclosure

According to the author:

> Court records, discovery and information in a case that could protect the public from a defective product or environmental hazard should be open to public inspection. However, this is not the case under current law. Even in a dispute between private parties, a court's resolution of that dispute is a matter of public interest. This is especially imperative when a case involves a public danger, such as a defective product or environmental hazard.
>
> Nevertheless, examples abound of courts issuing overbroad protective orders that keep discovery information secret and protect incriminating documents without any basis—and lawyers mutually agreeing to settlements and stipulated orders that prohibit disclosing the very facts that prompted the case. 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.

Proponents of the bill present a multitude of examples where non-disclosure provisions in settlement agreements and protective orders have kept hidden information that prevented greater public awareness of grave risks.

One example involves the now infamous OxyContin danger. An early case involved a suit brought by the State of West Virginia against OxyContin's maker, Purdue Pharma LP in 2001. West Virginia accused Purdue of "duping doctors into widely prescribing the drug by minimizing its risks" and "convincing them it was less addictive than other opioids." During the discovery process, Purdue turned over thousands of pages of internal memos, notes from sales calls, marketing plans, and other records. The court rejected an early motion to dismiss and "sided with the state's assertion that the material could convince a jury that Purdue's sales pitch was full of dangerous lies."

However, relevant here, the court sealed the evidence despite the clear public dangers that continue to exist:

> [W]hen Purdue and the state reached a settlement that year, before the case went to trial, the evidence remained hidden, out of sight to regulators, doctors and patients. Over the next few years, as OxyContin sales and opioid-related deaths climbed, more than a dozen other judges overseeing similar lawsuits against Purdue took the same tack, keeping the company's records secret.
>
> It would be 12 years – and 245,000 overdose deaths – before evidence [the original court] and other judges kept hidden was made public, and then only after it was leaked to a newspaper. What it showed was revelatory: OxyContin, the first billion-dollar-a-year narcotic, was not the reliable 12-hour painkiller Purdue long claimed it was. Its effects often wore off much sooner, exposing patients to a relapse of pain, withdrawal, or both – suffering relieved only by the next pill. When doctors raised concerns, the documents showed, Purdue sales reps counseled them to put patients on bigger, more dangerous doses.
>
> The eventual release of the evidence reinforced the widely held view that OxyContin was a catalyst for the epidemic, which by then had expanded beyond prescription opioids to include illicit drugs such as heroin. The material also informed hundreds of new lawsuits seeking to force accountability on the entire opioid industry for its role in the addiction crisis.
>
> But for untold numbers of opioid users who had overdosed, it was too late. "Heartbreaking and sickening" is how Congresswoman Katherine Clark, a Massachusetts Democrat who has been involved in investigating the causes of the opioid epidemic, described the early decisions to seal the

> Purdue evidence. In an interview, Clark said she believes that had the secrets come out earlier, doctors would have written fewer OxyContin prescriptions and fewer insurers would have covered the drug. "We don't know how many lives we could have saved," she said.[4]

This bill prohibits such secrecy provisions from being included in settlements or court orders to avoid such preventable outcomes. It furthers the same public policy that has motivated the series of bills discussed above that were championed by this Legislature.

It should be noted that the use of these non-disclosure provisions in settlements have some benefits. The parties may not wish to go through the burden and stress of litigation and seek a quicker resolution. For the injured plaintiffs in these cases, settlements with confidentiality clauses often result in larger sums to the injured party, where the defendant desires the matter be put behind them and do not want any further reputational damage to come of it. In theory at least, the victim would be agreeing to this voluntarily, although there may be an imbalance in the negotiating process for victims in practice. In addition, the settling of a civil case is not necessarily an indication of guilt and a defendant may simply be settling based on a risk assessment with confidentiality as a factor. However, ultimately, the balance is between the possible benefit for parties in individual cases weighed against the clear benefit to the wider community. This bill prevents use of these provisions only where that benefit to society is arguably at its peak, where the information relates to dangerous products and conditions that have caused or are likely to cause "significant or substantial bodily injury or illness, or death."

4. Stakeholder positions

Consumer Reports, a co-sponsor, writes in support:

> As an essential part of proving their case, a person who has been injured, or the family of a person who has been killed, as the result of a defective product or toxic environmental condition must collect evidence. When the victim collects sufficient evidence to prove the case, the defendant often offers to settle it – but insists, as a pre-condition for settling, 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. This deprives the public of their right to know of the dangers involved, thereby unjustly exposing others to the same danger.

[4] Benjamin Lesser, et al., *How judges added to the grim toll of opioids* (June 25, 2019) Reuters, https://www.reuters.com/investigates/special-report/usa-courts-secrecy-judges/.

> The Public Right to Know Act of 2022 would put an end to this unjust and dangerous practice, by explicitly prohibiting it as part of any settlement, and creating a strong presumption against any restriction on disclosure of information related to a case involving such a product or condition. Personal information and a business's trade secrets could be appropriately kept confidential.

Writing in support, the Consumer Attorneys of California argue:

> For decades, settlement agreements between the parties in litigation and, more recently, stipulations for court orders and standing protective orders have sealed information that the public has a right to know. This information relates not to legitimate trade secrets, but to dangers, defects, and hazards that not only deserve no protection, but deserve disclosure in order to protect the public health and welfare. . . .
>
> SB 1149 will fix this situation and put plainly, save lives. It will replace the protective order regime with a presumption of disclosure and openness. True trade secrets will still be protected by applying for an order of nondisclosure. But no longer will secrecy rule the day.

Public Justice, also a co-sponsor, make the case for this movement toward disclosure:

> A corporation's interest in keeping public hazards secret cannot outweigh the public interest in health and safety. Yet examples abound of overbroad protective orders and sealing orders that kept incriminating discovery and court records secret, and settlement agreements that prohibit the parties from disclosing what they have learned, so that other people are not victimized.
>
> Court secrecy is a matter of life and death. In 2016, Public Justice obtained a court order unsealing thousands of previously sealed documents showing that Remington knew for decades that its rifles were defective and could discharge without anyone pulling the trigger. No court should ever agree to keep information like this secret. In 2005, Montana passed the "Gus Barber Anti-Secrecy Act," named for the nine-year-old boy killed by a defective Remington rifle. Gus's father worked tirelessly for the legislation after he discovered that Remington had previously settled suits with secrecy provisions. The cases in which the public learned the truth years too late to prevent needless suffering and death are too many to list here, but include Firestone tires, Zyprexa, Essure, Zomax, Cooper tires, and the Berkeley balcony disaster.

A coalition of groups, including the Official Police Garages of Los Angeles and the Almond Alliance of California, argue that "this legislation will disincentivize efficient settlement of cases – regardless of their merits – and thereby increase litigation time and cost for both plaintiffs and defendants." They assert:

> [I]in a case where a defendant's product or condition did cause harm to the plaintiff, the defendant might desire to negotiate an early settlement and properly pay the plaintiff's costs. In such a scenario, one term of negotiation might very well be a correction of the defect going forward, and a recall of such products. However, in the event such a settlement is going to be made public, then the defendant is incentivized to litigate the case to trial even if their chance of success is slim.

The opposition coalition also argues that the bill will upend the longstanding norm of producing documents under a protective order by creating a presumption against such orders. The Chamber of Commerce's coalition also takes issue with the attorney discipline provision. It argues that "any attorney who even mistakenly requests such a settlement term (for example, by sending over an old form settlement agreement on January 5th of 2023) would be subject to professional discipline from the State Bar of California." The provision does provide that the State Bar may investigate and take "appropriate action." Certainly this provision should not work to subject attorneys to discipline in such "foot foul" cases, but additional clarity may be warranted.

SUPPORT

Consumer Reports (co-sponsor)
Public Justice (co-sponsor)
Alliance for Justice
California Employment Lawyers Association
California Labor Federation
California Public Interest Research Group
Consumer Attorneys of California
Consumer Federation of California
Consumer Protection Policy Center
Consumers for Auto Reliability and Safety
David Campos
Law Project for Psychiatric Rights
National Consumers League

OPPOSITION

AdvaMed
Almond Alliance of California
American Property Casualty Insurance Association

Association of California Egg Farmers
Biocom California
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 Grain and Feed Association
California League of Food Producers
California Life Sciences
California Manufacturers & Technology Association
California Pear Growers Association
California Seed Association
Civil Justice Association of California
National Federation of Independent Business
National Marine Manufacturers Association
Official Police Garages of Los Angeles
PhRMA
Western Growers Association

RELATED LEGISLATION

Prior Legislation:

AB 603 (McCarty, 2021) would have required law enforcement agencies, including the California Highway Patrol, to annually post information about money spent on the agency such as settlements, judgements and other information on their websites. This bill was vetoed by Governor Newsom, who wrote in his veto message that it was unnecessary and costly.

SB 820 (Leyva, Ch. 953, Stats. 2018) *See* Comment 1.

SB 1300 (Jackson, Ch. 955, Stats. 2018) prohibits requiring an employee to sign a release of a claim or right under the Fair Employment and Housing Act (FEHA) in exchange for a raise or bonus, or as a condition of employment or continued employment, unless the release is a voluntarily negotiated settlement agreement filed by an employee in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process. It also prohibits requiring an employee to sign a nondisparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment and declares any such agreement contrary to public policy and unenforceable.

AB 889 (Stone, 2017) would have limited the ability of litigants to enter into settlement agreements or obtain protective orders that keep secret evidence of a danger to public health and safety, except as specified. This bill died on the Assembly Floor.

AB 1682 (Stone, Ch. 876, Stats. 2016) *See* Comment 1.

AB 1628 (Beall, 2012) would have, among other provisions, prohibited the confidential settlement of a civil action the factual basis for which is a cause of action for an act of childhood sexual abuse. This bill was held on Suspense in the Assembly Appropriations Committee.

AB 2875 (Pavley, Ch. 151, Stats. 2006) *See* Comment 1.

AB 634 (Steinberg, Ch. 242, Stats. 2003) *See* Comment 1.

****