

California Bill Would Prohibit Settlement Agreements Keeping Certain Information Secret

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UPDATE: California's Senate passed the bill on May 23, 2022, and on June 14, 2022, the Assembly Judiciary Committee voted 7-1 to advance an amended version of the bill to the full Assembly. The amended bill (1) removes language allowing any person to challenge violations of the act by bringing a separate action for declaratory relief and (2) carves out actions regarding a motor vehicle brought pursuant to the Song-Beverly Consumer Warranty Act, unless the action includes a claim of physical personal injury.

The California Senate will soon consider a bill prohibiting settlement agreements that prevent disclosing information about defective products or environmental hazards.

The Public Right To Know Act of 2022, SB 1149, would impact actions involving a “defective product or environmental hazard that poses a danger to public health or safety.” The bill would, if passed, prohibit both settlement agreements that restrict the disclosure of factual information and court orders that do not allow public disclosure of the covered information.

The bill allows any person, including a news media representative, “for whom it is reasonably foreseeable that the person will be substantially affected by a” violation of the act to challenge such a provision, agreement or order by filing a motion in the action.

The act does not apply to certain categories of information: (1) medical or personal identifying information regarding an injured person; (2) the settlement amount; (3) a current customer list or trade secret if a party moves for an order of nondisclosure in good faith and demonstrates that the presumption is “clearly outweighed by a specific and substantial overriding confidentiality interest”; and (4) the citizenship or immigration status of any individual.

Under the bill, an attorney’s failure to comply could be grounds for professional discipline and a potential investigation by the State Bar of California. Violations under the act include: (1) requesting a settlement provision preventing disclosure of factual information; (2) advising a client to sign an agreement including such a provision; and (3) moving for an order of nondisclosure without good faith.

In April 2022, California’s Senate Judiciary Committee voted to advance the bill to the full Senate. If the bill passes, it could have long-lasting implications for California businesses. Proponents of the act say that secrecy in litigation — such as “overbroad protective orders that keep discovery information secret and protect incriminating documents without any basis” — can lead to public harm. The bill’s author, Sen. Connie M. Leyva, D-Chino, has said the legislation “aims to protect the public by ensuring that information about defects and hazards created by companies and individuals are not hidden behind a veil of secrecy.” The bill is sponsored by the nonprofits Consumer Reports and Public Justice, and supported by numerous consumer groups as well as by 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 that argue that such a law would disincentivize efficient settlements, even in nonmeritorious cases, and increase litigation time and costs for both plaintiffs and defendants. The Chamber posits that in cases where a defendant did not create a hazard or manufacture a defective product, the defendant will be disincentivized from settling the case “because such a settlement would be public and would create the appearance of wrongdoing, despite it being more cost efficient for both parties to settle.” And where a product or condition actually harmed the plaintiff, the Chamber notes that, rather than negotiate an early settlement that might result in an immediate correction of the defect or recall, “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.” Accordingly, according to the Chamber, “delaying such a settlement might commensurately delay corrective action by the defendant, for fear that a correction would be used against them in litigation.”