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Civil Procedure: To prevent secrecy agreements in litigation that endanger the public

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to add Code of Civil Procedure section 188 to read as follows:

188.

(a) It is the intent of the Legislature to better protect Californians from death or substantial injury caused by any public danger to health or safety, including, but not limited to, defective products, environmental hazards, and individuals or entities that physically harm, abuse, or molest others, by creating a presumption to protect the openness of information acquired through discovery. This presumption would apply to secrecy created by settlement agreements and "confidentiality" agreements, whether or not filed with the court, and also by stipulations for protective orders that would limit the disclosure of information acquired through discovery.

(b) Notwithstanding any other provision of law, in any civil action in which the pleadings state facts setting forth and/or based upon the existence of a public danger to health or safety, evidence of or information concerning said public danger that was discovered during the course of litigation, whether or not that evidence or information was filed with the court, may not be kept secret pursuant to agreement of the parties or by court order, except as provided in this section.

(c) In any civil action as described in subdivision (b), a court shall not enter, by stipulation or otherwise, an order otherwise authorized under the Code of Civil Procedure or other law or regulation if that order: restricts the disclosure of information obtained through discovery; approves a settlement agreement that would restrict the disclosure of such information; or restricts access to court records regarding such information; unless in connection with such order the court has first made independent findings of fact that--

(i) such order would not restrict the disclosure of information that is relevant to the protection of the public health or safety; or

(ii) (A) the public interest in the disclosure of past, present, or potential health or safety danger is outweighed by a specific and substantial overriding interest in maintaining the confidentiality of the information or records in question;

(B) This specific and substantial interest supports keeping the information secret to the point at which it overrides the presumption set forth in section (a);

(C) A substantial probability exists that the specific and substantial interest will be substantially prejudiced if the information is not kept secret, such as a state-of-the-art trade secret or current proprietary customer list;

(D) The proposed secrecy is narrowly tailored to protect the secrecy only of that information for which an overriding specific and substantial interest exists;

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(E) No less restrictive means exist to achieve avoiding the substantial prejudice to the specific and substantial interest;

(F) the requested order is no broader than necessary to protect the interest asserted; and

(G) the information is kept secret only for the minimum period of time that the court deems appropriate to meet the requirements of (ii)(B) through (F) herein.

(iii) No order entered as a result of the operation of this subdivision (c), other than an order approving a settlement agreement, may continue in effect after the entry of final judgment, unless at the time of, or after, such entry the court makes a separate finding of fact that the requirements of paragraph (c) continue to be met.

(iv) The party who is the proponent for the entry of an order under this subdivision (c), as provided under this section, shall have the burden of proof in obtaining such an order.

(v) When determining whether an order would not restrict the disclosure of information that is relevant to the protection of public health or safety under subdivision (c)(1), there shall be a rebuttable presumption that protecting information relating to financial, health, personal private identification, or other similar information of an individual does not restrict the disclosure of information relevant to the protection of the public health or safety.

(d) Unless the information is protected from disclosure by court order pursuant to subdivision (c), in an action in which the pleadings state facts setting forth and/or based upon a public danger, any agreement or contract or portion of an agreement or contract that restricts a party from disclosing information relating to the public danger to health or safety is void as contrary to public policy, and may not be enforced by any court or tribunal.

(e) Nothing in this section is applicable to, or affects:

- (1) the ability of the parties to enter into a settlement agreement or stipulated agreement that requires the nondisclosure of the amount of any money paid in a settlement of a claim.
- (2) Except for the agreement itself, which is governed by subdivisions (b), (c), and (d) of this section, the confidentiality of pre-agreement communications, negotiations, or settlement discussions between mediation participants pursuant to Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code, or the confidentiality of evidence protected by Section 1153.5 or 1154 of the Evidence Code.
- (3) actions for breach of contract or any other business injury brought by a business entity against another business entity.

(f) As used in this section:

(1) "Public danger to health or safety" means an instrumentality, including, but not limited to, any device, instrument, substance, person, entity, procedure, or product, or a condition of a device, instrument, substance, person, entity, procedure, or product, that has caused and/or is likely to further cause significant or substantial bodily injury or death. "Significant or substantial bodily injury" includes significant or substantial psychological trauma resulting from any act of

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sexual molestation or abuse; or repetitive acts of abuse or neglect against a child, elder, or dependent adult.

(2) A court's "independent finding" under subdivision (b) means that the court has made an independent determination based on the review of the law as it applies to the facts and not based in whole or part on a stipulation of the parties to keep information secret, or arguments in support of such stipulation.

(3) "Overriding interest" under subparagraph (ii) of subdivision (c) may include, but is not necessarily limited to, concealing or redacting the identity of certain victims of harm, including personal information about children and the victims of abuse, and concealing certain confidential business information relating to such matters as the personal addresses of corporate officers or board members.

(g) An attorney shall not sell or offer for sale any information obtained through discovery to any member of the State Bar or to any other person in violation of the prohibitions on attorney solicitation, fee splitting, or financial arrangements among lawyers or nonlawyers included in Rules 1-320, 1-400, and 2-200 of the Rules of Professional Conduct adopted by the Supreme Court. Violation of this paragraph shall be a basis for professional discipline by the State Bar. This section does not alter or mitigate any existing rule or provision that may also be applicable to the conduct.

PROPOSERS: ten signatories as follows (listed in alphabetical order): David Bigeleisen; Margaret J. Grover; Karin Horspool; Shaun Dabby Jacobs; James P. Lamping; Ciaran O'Sullivan; Marc L. Sallus; Gerald M. Sallus; Ujvala Singh; K. Martin White

STATEMENT OF REASONS

The Sunshine in Litigation Act will save lives of hundreds, indeed thousands. It will prevent future accidents caused by car defects, tires that shred, "adverse incidents" from drugs, children maimed by unsafe toys or molested by priests or soccer coaches. And all at no cost to our government or our taxpayers.

For years, plaintiffs' lawyers and defendants and their counsel have cooperated – some might say "colluded" – to keep the facts about dangerous products, toxic conditions, molesters, and more, secret from public view. They've done this by agreeing to settlements in public litigation that keep the facts of the case secret; stipulating to protective orders too often approved with little review by busy judges; and plaintiffs returning to defendants information they learn in the "discovery" process in exchange for what amounts to hush money.

Sunshine in Litigation Acts (needed for each court jurisdiction, federal and state) will simply and effectively stop these practices by requiring that information exchanged in the discovery process may not be "secretized" when the public health and safety is endangered. It's simple: no secret settlement agreements, no stipulations for overbroad protective orders, no trading information for money premiums. And no more innocent members of the public spending years in the dark.

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In the 1970s and 1980s, the prescription drugs Zomax and Halcion, the Shiley heart valve, and the Dalkon Shield intrauterine device were all taken off the market, but not until years—and hundreds of secret settlements—had come and gone. In the 1990s, we witnessed the first cracks in the wall of silence surrounding molesting priests protected by the Catholic Church. This cone of silence is now finally exposed.

In October 2001, NHTSA determined that Firestone shredding tires had caused at least 271 fatalities, most of which involved cases settled secretly. Meanwhile, Cooper tires, just as dangerous, went undetected. One navy man, who later testified before the Senate, heard about Firestone and bought Cooper instead, then saw his entire family devastated by a Cooper tire failure.

In the late 1990s, General Motors' side-impact truck gas-tank fires resulted in GM's lawyers continually denying a defect while quietly settling exploding gas tank cases: By 1998, according to a Montana federal court, \$495 million involving over 300 plaintiffs. Since 1998? Hundreds more secret settlements, still unknown, under GM's deny-and-settle strategy. In the last few weeks since the Valukas report, the extent GM's strategy involving faulty ignitions reached epidemic proportions: 28 million cars recalled in 2014, despite internal knowledge and lawsuit settlements since 2006.

Just Sunday, July 27, 2014 the lead story in the Dallas Morning News described the extraordinary secrecy surrounding the explosion of a West, TX fertilizer plant, that killed 15 and injured scores. Given the secrecy of the litigation, it's unlikely that anyone else in danger from these explosive products will ever know.

The beat goes on – and will continue to go on, with the public in harm's way. Sunshine in Litigation is the best way to stop it – a simple matter of life and death.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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SHORT TITLE: California Sunshine in Litigation Act