



May 31, 2022

To: The Honorable Mark Stone, Chair, Assembly Judiciary Committee
Members, Assembly Judiciary Committee

RE: **SB 1149 (Leyva), as amended May 9, 2022, OPPOSE – Public Dissemination of Confidential Information**

The Civil Justice Association of California (CJAC), and the organizations listed above, must respectfully **OPPOSE SB 1149**, which would prevent businesses from being able to protect proprietary business information, discourage settlement agreements, lead to longer and costlier lawsuits, and chill lawyers' ability to zealously represent clients.

Specifically, SB 1149 would prohibit confidential settlement agreements and protective orders in actions involving an allegation of product defect or environmental hazard and would subject attorneys engaged in these actions to professional discipline for noncompliance. California has repeatedly and rightfully rejected previous proposals to limit confidential protections fairly afforded all litigants in civil actions for the following reasons:

Infringes Upon Trade Secrets and Intellectual Property Rights

Under this bill, any information or evidence concerning the alleged product defect or environmental hazard, regardless of whether the information is relevant to the action, is presumed to be public. This policy would make any company doing business in California at risk of losing valuable proprietary information by making it available to the public and competitors without recourse.

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. Businesses have the right to maintain their investments and remain competitive in the market, which is why the confidentiality of protective orders and settlement agreements have been routinely recognized by the courts.

For example, in *Seattle Times Co. v. Rhinehart*, the United State Supreme Court noted the importance of allowing protective orders in preventing the misuse of information produced through the court's coercive powers:

Liberal pretrial discovery under the State's Rules has a significant potential for abuse. There is an opportunity for litigants to obtain - incidentally or purposefully - information that not only is irrelevant but, if publicly released, could be damaging to reputation and privacy. The prevention of such abuse is sufficient justification for the authorization of protective orders.¹

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!

Incentivizes Frivolous Demands and Extortion of Premature Settlement Agreements

SB 1149 would unwittingly create an *extortion pre-lawsuit settlement mill* that leverages premature settlements prior to a case being filed, putting businesses in the position of having to pay early settlements for false or frivolous allegations to protect their intellectual property.

We will see businesses settle frivolous claims to avoid the dissemination of proprietary information to their competitors and the public at large, encouraging more demands outside the eye of the courts where there is accountability. This policy does more to weaken the purpose of our civil justice system than it does to protect the public.

Presumes Responsibility Without Evidence

Presuming liability based only on unproven allegations run contrary to our system of justice and is not good public policy. A defective product or environmental hazard does not exist simply because a lawyer files a lawsuit claiming it does. 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. Businesses should not be put in a position of having to choose between paying out unsubstantiated claims or keeping legitimate confidential information private. Moreover, businesses could suffer huge financial losses and reputational damages for false allegations.

Discourages Reasonable Settlements and Increases Litigation and Court Costs

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. SB 1149 transforms this relationship into presuming the plaintiff has proven their case - that a defect or hazard exists - and that the business concedes the point even when that is not so.

Another issue with this bill is who can intervene on behalf of the public. Under SB 1149, even if the parties to the litigation agree to a protective order, anyone acting on behalf of the public - the media, a YouTuber, blog writer, or anyone with an axe to grind - can intervene in the litigation and demand public disclosure of the business's proprietary information. A competitor does not need to sue to get their competition's information, they can simply intervene on behalf of the public to get access to competitive trade secrets.

¹ 467 US 20 (1984) Pp. 467 U. S. p 34-36

Confidentiality promotes cooperation in discovery and the settlement of legal disputes outside of the courtroom. Without confidentiality, parties will end up back before the judge, taking up time that could be used to resolve other matters and adding to current court congestion.

If this policy were to become law, businesses operating in California would potentially see litigation costs skyrocket and consumers in turn will see a corresponding increase on the cost of goods and services. State and local governments could also lose revenue when they are defendants in cases in which they are unable to settle.

Discourages Zealous Client Representation

SB 1149 also takes the extraordinary step of subjecting attorneys to professional disciplinary action for endeavoring to provide vigorous legal counsel to their clients. This bill could potentially lead to disbarment for simply advising a client that signing an agreement shielding information is in that client's best interest, even when that advice is warranted, and even where the existing and long-standing law in California affords the client the option to do so. Making it unethical for an attorney to advise a client against releasing trade secrets for public consumption essentially puts businesses in the untenable position of paying settlements every time they get sued as the only means of protecting their hard work, ingenuity and innovation and faulting the attorney for trying to provide them other legal options. Counsel should not have to defend themselves for zealously and ethically defending their client.

Conclusion

In today's instant information world of online product reviews and social media exposés, where anyone with an Internet connection can find out anything at the touch of a smart screen, the notion that there is insufficient information available about potential product defects or hazardous environmental conditions is nonsensical. There is no compelling public policy need to widely expose proprietary business information in the large swath of litigation impacted by SB 1149. This bill will only serve to exacerbate an already unfriendly legal environment for California businesses without advancing any public health and safety interests.

For the foregoing reasons, CJAC and the aforementioned organizations respectfully **OPPOSES SB 1149**. If you have any questions, please contact Jaime Huff at jhuff@cjac.org or by phone 916-956-2905.

Sincerely,



Jaime Huff
Vice President and Counsel, Public Policy

On behalf of the below-listed organizations:

AdvaMed – Bobby Patrick
Almond Alliance – Aubrey Betterncourt
American Property Casualty Insurance Association – Denneile Ritter
Association of California Egg Farmers – Debbie Murdock
Biocom California – Fielding Greaves
Biotechnology Innovation Organization – Brian Warren
California Apartment Association – Embert Madison
California Association of Winegrape Growers – Michael Miller
California Building Industry Association – Nick Cammarota
California Business and Industrial Alliance – Tom Manzo
California Business Properties Association – Matt Hargrove
California Chamber of Commerce – Robert Moutrie
California Farm Bureau – Taylor Roschen
California Federation of Independent Businesses – Kevin Pedrotti

California Food Producers – Trudi Hughes
California Grain and Feed Association – Chris Zanobi
California Life Sciences – Sam Chung
California Manufacturers and Technology Association – Lily Movsisyan
California Pear Growers Association – Debbie Murdock
California Seed Association – Donna Boggs
Civil Justice Association of California – Jaime Huff
National Marine Manufacturers Association – David Dickerson
Official Police Garages of Los Angeles – Chris Micheli
Personal Care Products Council – Mandy Lee
PhRMA – Flo Kahn
The Household and Commercial Products – Christopher Finarelli
Western Growers Association – Mathew Allen
Western States Petroleum Association – Zachary Leary

Cc: Senator Connie Leyva
Jith Meganathan, Assembly Judiciary Chief Counsel
Daryl Thomas, Assembly Republican Consultant