

Exhibit No. 5
Date 1-24-05
Bill No. SB 196

Senate Judiciary Committee

Re: SB 196

Anti-Secrecy Legislation in California

Information from the Homepage
of the Consumer Attorneys of California

Provided at: <http://caoc.com/antisecretleg.htm>

AB 36 & SB 11
Questions & Answers

Q. Do secrecy agreements harm California consumers?

A. Yes. Secrecy agreements can and do prevent consumers from being able to protect themselves and their families when vital health and safety information is withheld.

For example, Bridgestone/Firestone/Ford knew about the deadly defects in the Ford Explorer and its tires for years, but kept the information out of the public eye by secretly settling lawsuits brought against them. Because companies typically demand that victims and their families keep their injuries and other important safety information secret as a condition to settling legal claims, this information was not revealed. This crucial product defect information was never exposed and consumers unknowingly continued to put their lives and their families' lives in jeopardy.

Q. Don't the courts already prohibit secret settlements?

A. No. The new Judicial Council rules apply to cases that go to trial and result in verdicts and to documents actually filed with the court. Except for class actions or cases that actually go to trial and result in verdicts, the courts generally neither inquire into nor monitor the terms of the settlement. The case is simply dismissed with prejudice by the plaintiff. In a typical case, the injured party seeks documents and information from the defendant through the "discovery process." Defendants, routinely require the consumer party to agree to a protective order which requires that the consumer party keep the information secret from anyone, including the public, and to agree to return all information to the defendant upon the case's completion. This agreement is between the parties and is not monitored by the court. Unless the case is tried (and only 2% of California cases are), none of the information produced in discovery is "filed" with the court, and therefore, is not available for disclosure to the public under the Judicial Council rules. Any information filed prior to trial which is subject to the protective order is generally regarded to be filed "under seal." In the 98% of settled cases, the parties sign a private settlement agreement which is never submitted to the court. The parties simply file a motion to dismiss the case. Therefore, there is no disclosure of information about the dangerous product(s) or hazard(s).

Q. Does the evidence prove that keeping information from the public, through the use of secrecy agreements, results in preventable injuries?

A. Yes. Companies calculate what it calls a cost-benefit-ratio. If it believes it will be less expensive to settle a claim against them rather than recall a product or clean-up a hazardous area it decides to settle. The company then has the injured party or parties sign secrecy agreements prohibiting disclosure of information which may be essential to public safety.

Q. Why are corporations getting away with this? Why aren't severe punishments imposed against them?

A. In order for the public or appropriate regulatory agency to take action, they have to know about the danger in the first place--and right now secret settlements are preventing that! These bills will allow the public and agencies to obtain the vital information they need to help prevent future deaths, injuries and illegal insurance practices.

Q. Will these bills require companies to reveal trade secrets?

A. No. Section (b) (1) of the bills specifically allows the court to keep confidential "trade secrets or otherwise privileged [information] under existing law." Again, these bills are carefully crafted to apply only to information concerning a defective product, financial fraud, unfair insurance claims practice or environmental hazard that is the subject of litigation. If a court finds that the information is a trade secret or otherwise privileged under existing law, the information will be kept secret.

Q. When will secrecy settlements be allowed?

A. Under the bills, documents may be kept secret only if a court finds the following:

either information is protected under trade secret law or otherwise privileged under law, or (1) an overriding interest exists that overcomes the right of public access to the record; (2) the overriding interest supports sealing the record; (3) a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) the proposed sealing is narrowly tailored; and (5) no less restrictive means exist to achieve the overriding interest.

Q. Won't these bills allow private information, like people's names and settlement amounts, to become public?

A. No, this bill allows private information and settlement amounts to be kept confidential. Only the hazardous information itself must become public. Remember the objective of this legislation is to protect consumers from secrecy agreements that if kept secret will more than likely, harm, injure or possibly kill people. This is not a privacy' issue.

Q. Isn't this just another way for the trial lawyers to generate additional lawsuits?

A. No. In fact, the public awareness created by AB 36 and SB 11 will result in fewer injuries and fewer lawsuits. For example, the first case brought against the manufacturer of the diet drug Fen/Phen was secretly settled and thousands of people, unaware of the cardiac danger, continued taking the drug. It was not until months later that the FDA and the public became aware of the problems. Under AB 36 and SB 11, the information on the dangers of Fen/Phen would have been public much earlier, resulting in the prevention of thousands of injuries and corresponding legal action.

Further, there is empirical data which disproves the opponents' claims. Raw data from Florida, which has a preeminent anti-secrecy statute that went into effect on July 1, 1990, indicates that case filings actually went down in proportion to the state's population.

Q. Who supports these bills?

A. Attorney General Bill Lockyer is sponsoring AB 36 and SB 11. The bills are also supported Consumers Union, the Foundation for Taxpayer and Consumer Rights and the Consumer Attorneys of California, to name a few. All these groups have a track record of working to protect California consumers.

Consumer Attorneys Of California
Fact Sheet

ISSUE BRIEF - SECRECY IN THE COURTS

Subject:

SB 11 (Escutia)

AB 36 (Steinberg)

Position:

CO-SPONSOR

Status:

Both bills have passed their house of origin and will be heard before the Judiciary Committees.

Summary:

These bills prohibit the use of court secret settlements and agreements. AB 36 covers cases involving product liability or environmental hazards; SB 11 also covers unfair insurance practices and energy rate manipulation.

Support:

Co-Sponsor Attorney General Bill Lockyer

Consumers Union

California Newspaper Publishers Association

Center for Public Interest Law

Congress of California Seniors

Consumer Federation of California

Consumers for Auto Reliability and Safety

Foundation for Taxpayer and Consumer Rights

Sierra Club

United Policyholders

Cal. District Attorney's Association

Comments:

As the recent Firestone/Bridgestone deaths demonstrate, information about public hazards is being kept secret from the public through the use of secrecy agreements in the courts. The courts should not be used to hide information from the public.

Trade secrets are specifically protected under AB 36 and SB 11. Contrary to opponents' claims, information can be kept confidential if "(1) The information is a trade secret or otherwise privileged

under existing law," or "(2) An overriding interest exists that overcomes the right of public access to the information."

Settlements are not stifled under these bills. Other states, including Florida and Texas have anti-secrecy provisions covering discovery and the only result has been better public protection.

In 2000, the California Judicial Council adopted a rule establishing a presumption of openness for all documents formally filed with the courts. Unfortunately, almost all settlement agreements and discovery materials are never filed with the courts. These bills fill this gap for areas where the public is most at risk for repeated harm: product defects, environmental hazards, unfair insurance practices after a mass disaster and energy rate manipulation.

CALIFORNIANS HAVE A RIGHT TO KNOW ABOUT DANGERS TO THEIR FAMILIES.

AB 36 & SB 11 Myths & Facts

Myth: Opponents of this legislation state there is no evidence that the current practice creates any significant problems in concealing information about dangerous products or conditions.

Fact: The opponents' claim is unbelievable give the recent Bridgestone/Firestone/Ford deaths. Most recently, defective tires have reportedly been linked to 148 deaths in the U.S. Consumers supporting this legislation feel strongly that keeping information which resulted in 148 preventable deaths is not acceptable nor should be tolerated.

In case after case the public has been harmed when companies were able to keep information about known health risks or consumer fraud cases out of public view. A few examples include:

The Bridgestone/Firestone/Ford Tires,

Goodyear Tires,

Northridge earthquake cases, and

Chromium 6 in water supplies.

Myth: AB 36 and SB 11 are a threat to high tech firms.

Fact: AB 36 and SB 11 are designed to restrict secret settlements, not to divulge trade secrets. Further, the

legislation only applies to limited categories and does not extend to most high tech litigation.

Myth: Secrecy agreements do not harm California's consumers; this is just another pretext for trial lawyers to litigate.

Fact: In many cases, particularly actions alleging injury caused by defective products, fraud, unfair insurance practices or environmental hazards, companies demand that victims and their families keep their injuries and other important safety information secret as a demand for settling valid legal claims.

Shrouded in secrecy these companies are able to keep critical information out of view, while it determines the cost-benefit-ratio settling claims rather than recalling a product or correcting an environmental hazard or changing an illegal insurance practice.

Myth: Opponents of this new legislation speculate it will foster more litigation.

Fact: No. In fact, the public awareness created by AB 36 and SB 11 will result in fewer injuries and fewer lawsuits. Further, there is empirical data which disproves the opponents' claims. Raw data from Florida, which has a preeminent anti-secrecy statute that went into effect on July 1, 1990, indicates that case filings actually went down in proportion to the state's population. This is not speculation, these are facts.

Myth: Legislation was introduced, and failed, last year regarding this same issue; the proponents refuse to leave this issue alone.

Fact: These bills are narrower in scope than the previous bill. For example, opponents' complaints of last year's legislation were concerns over provisions which allowed interested third parties to challenge protective orders and another which provided for a detailed process notifying the Attorney General. These provisions are not included in AB36/SB 11. The language in the new legislation also allows for tracking of the Rules of Court regarding sealed

records procedures, which were recently approved by the Judicial Council. Both these bills adopt the Judicial Council standards and simply apply them to those documents not filed with the Court.

Myth: Companies will no longer be able to protect trade secrets.

Fact: Section (b) (1) of the bills specifically allows the court to keep confidential "trade secrets or otherwise privileged [information] under existing law." Again, these bills are carefully crafted to apply only to information concerning a defective product, financial fraud, unfair insurance claims practice or environmental hazard that is the subject of litigation. If a court finds that the information is a trade secret or otherwise privileged under existing law, the information will be kept secret.