

AMENDED IN ASSEMBLY JUNE 6, 2001  
AMENDED IN ASSEMBLY MAY 16, 2001  
AMENDED IN ASSEMBLY FEBRUARY 5, 2001

CALIFORNIA LEGISLATURE—2001–02 REGULAR SESSION

**ASSEMBLY BILL**

**No. 36**

**Introduced by Assembly Member Steinberg**

December 4, 2000

---

---

An act to add Section 188 to the Code of Civil Procedure, relating to confidentiality.

LEGISLATIVE COUNSEL'S DIGEST

AB 36, as amended, Steinberg. Confidentiality of writings.

Existing law provides for the confidentiality of trade secrets, government records, records maintained by financial and other institutions, privileged communications, and other writings.

This bill would provide that, in an action based upon *bodily injury*; *or wrongful death*; ~~or financial loss~~ allegedly caused by a defective product, ~~financial fraud~~, ~~unfair insurance claims practice~~, or environmental hazard, as defined, specified information contained in settlement agreements and confidentiality agreements not filed with the court, and specified information acquired through discovery, ~~shall be presumed to be public information~~ and may not be kept confidential pursuant to an agreement of the parties *or by court order, if that information would be beneficial in protecting the public from a defective product or environmental hazard*. The bill would permit this information to be kept confidential *for a period of time* only pursuant to a court order based upon specified findings. The bill would further

provide that, ~~unless the information is a trade secret, as defined, or otherwise privileged, in an action based upon injury, wrongful death, or financial loss allegedly caused by a defective product, financial fraud, unfair insurance claims practice, or environmental hazard~~ *except for reasonable provisions designed to protect legitimate claims of confidentiality, as specified, any ~~portion~~ provision of an agreement or contract that restricts a party from disclosing certain* ~~has the purpose or effect of concealing information to that would be useful in protecting the public from a defective product or environmental hazard from the public or a governmental agency, as specified, is void and may not be enforced, with specified exceptions. The bill would authorize a court to request~~ *require certain documents to be provided to the court in order to implement its provisions, and to redact proprietary or other material not necessary for informing the public, as specified.* This bill would provide that its provisions are not intended to affect *medical malpractice actions, or other actions except for those involving product defects or environmental hazards, or the confidentiality of communications, negotiations, or settlement discussions between participants in mediation proceedings or the confidentiality of evidence protected under specified sections of the Evidence Code. The bill would specify other exceptions from, and limitations of, these provisions.* The bill would also state legislative findings.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. The Legislature finds and declares all of the
- 2 following:
- 3 (a) ~~Secrecy~~ *Secrecy* agreements that prohibit disclosure to the public or
- 4 public safety agencies of information that is evidence of defective
- 5 ~~products, financial fraud, unfair insurance claims practices, or~~
- 6 ~~environmental hazards~~ *and that the plaintiff shows, pursuant to*
- 7 *subdivision (i) of Section 188 of the Code of Civil Procedure,*
- 8 *would be beneficial in protecting the public* are injurious to the
- 9 health, safety, and economic well-being of all Californians.
- 10 (b) ~~Secrecy~~ *Secrecy* These ~~secrecy~~ *secrecy* agreements can have tragic
- 11 consequences. They can also allow companies to shield
- 12 ~~information that shows a practice of treating consumers unfairly~~
- 13 ~~and can permit those companies to continue illegal practices~~



1 ~~without accountability, and~~ *which can* allow companies to shield  
2 life-threatening dangers and harmful practices from public view,  
3 thereby severely jeopardizing public welfare and safety.

4 (c) It is therefore against the public interest to allow *these*  
5 ~~secrecy agreements about defective products, financial fraud,~~  
6 ~~unfair insurance claims practices, or environmental hazards to~~  
7 ~~remain confidential agreements~~ except in very limited  
8 circumstances.

9 SEC. 2. Section 188 is added to the Code of Civil Procedure,  
10 to read:

11 188. (a) ~~The Legislature finds that the Judicial Council has~~  
12 ~~adopted Rule 243.1 of the California Rules of Court, which creates~~  
13 ~~a presumption against secrecy for certain documents filed with the~~  
14 ~~court. It is the intent of the Legislature to better protect~~  
15 ~~Californians from injuries, deaths, or financial loss caused by~~  
16 ~~defective products, financial fraud, unfair insurance claims~~  
17 ~~practices, or environmental hazards by also creating a presumption~~  
18 ~~against secrecy for settlement agreements and confidentiality~~  
19 ~~agreements not filed with the court and information acquired~~  
20 ~~through discovery.~~

21 (b) ~~Notwithstanding any other provision of law, in an action~~  
22 ~~based upon injury, wrongful death, or financial loss~~ *bodily injury*  
23 *or wrongful death* allegedly caused by a defective product,  
24 ~~financial fraud, unfair insurance claims practice, or environmental~~  
25 ~~hazard, information that is evidence of a defective product,~~  
26 ~~financial fraud, unfair insurance claims practice, or environmental~~  
27 ~~hazard contained in settlement agreements and confidentiality~~  
28 ~~agreements not filed with the court, and information acquired~~  
29 ~~through discovery that is evidence of a defective product,~~ ~~financial~~  
30 ~~fraud, unfair insurance claims practice, or environmental hazard,~~  
31 ~~shall be presumed to be public information and may not be kept~~  
32 ~~confidential pursuant to agreement of the parties~~ *or by order of the*  
33 *court, if the plaintiff shows pursuant to subdivision (i) that*  
34 *information would be beneficial in protecting the public from*  
35 *defective products or environmental hazards.* This information  
36 may be kept confidential for a period that the court deems  
37 appropriate only pursuant to a court order based upon a finding that  
38 either:



1 (1) The information is a trade secret, as defined in Section  
 2 3426.1 of the Civil Code, or otherwise privileged under existing  
 3 law.  
 4 (2) (A) An overriding interest exists that overcomes the right  
 5 of public access to the information-  
 6 ~~(B) The ; (B) the~~ overriding interest supports keeping the  
 7 information confidential-  
 8 ~~(C) A ; (C) a~~ substantial probability exists that the overriding  
 9 interest will be prejudiced if the information is not kept  
 10 confidential-  
 11 ~~(D) The ; (D) the~~ proposed confidentiality is narrowly tailored-  
 12 ~~(E) No ; and (E) no~~ less restrictive means exist to achieve the  
 13 overriding interest.  
 14 ~~(c) Unless the information is a trade secret, as defined in~~  
 15 ~~Section 3426.1 of the Civil Code, or otherwise privileged under~~  
 16 ~~existing law, in an action based upon injury, wrongful death, or~~  
 17 ~~financial loss allegedly caused by a defective product, financial~~  
 18 ~~fraud, unfair insurance claims practice, or environmental hazard,~~  
 19 ~~any portion of an agreement or contract that restricts a party from~~  
 20 ~~disclosing information that is evidence of a defective product,~~  
 21 ~~financial fraud, unfair insurance claims practice, or environmental~~  
 22 ~~hazard to a governmental agency with enforcement authority over~~  
 23 ~~the defective product, financial fraud, unfair insurance claims~~  
 24 ~~practice, or environmental hazard is void, contrary to public~~  
 25 ~~policy, and may not be enforced.~~  
 26 ~~(d)-~~  
 27 *The burden of proving entitlement to confidential treatment*  
 28 *under this chapter shall be on the party seeking confidentiality.*  
 29 *(b) Except for reasonable provisions designed to protect*  
 30 *legitimate claims of confidentiality under paragraph (1) or (2) of*  
 31 *subdivision (a), any provision of an agreement or contract that has*  
 32 *the purpose or effect of concealing information from the public or*  
 33 *a governmental agency with enforcement authority over a*  
 34 *defective product or environmental hazard, which information*  
 35 *would be beneficial in protecting the public is void, contrary to*  
 36 *public policy, and may not be enforced.*  
 37 *(c) In order to implement this section, the court may require the*  
 38 *requesting party to provide an identifying log or other document.*  
 39 *Whether or not the court orders that the information may be kept*  
 40 *confidential pursuant to subdivision (a), it may nevertheless redact*



1 *any proprietary or other material it finds not necessary for*  
2 *informing the public of the defective product or environmental*  
3 *hazard.*

4 ~~(e)~~

5 (d) As used in this section:

6 (1) “Defective product” means a product that may be defective  
7 because of a defect in manufacturing, or design, or a failure to  
8 adequately warn the consumer of a hazard involved in the  
9 foreseeable use of the product, where the defect may result in  
10 ~~personal~~ *bodily* injury to one or more persons.

11 ~~(2) “Financial fraud” means any fraudulent insurance practice~~  
12 ~~or any fraudulent plan or scheme to sell a publicly offered~~  
13 ~~investment product without full disclosure of the risks associated~~  
14 ~~with the purchase of the product, where the plan or scheme may~~  
15 ~~cause or has caused financial loss.~~

16 ~~(3) “Unfair insurance claims practice” means any act or~~  
17 ~~omission that would constitute a violation of subdivision (h) of~~  
18 ~~Section 790.03 of the Insurance Code.~~

19 ~~(4)~~

20 (2) “Environmental hazard” means a release ~~or threatened~~  
21 ~~release~~ of a hazardous substance that poses a threat to public health  
22 or safety involving ~~present or future~~ danger of death, bodily  
23 injury, or health disability to human beings exposed to a hazardous  
24 substance release ~~or threatened release~~.

25 ~~(f)~~

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

36 ~~(g)~~

37 (f) Nothing in this section is intended to affect the  
38 confidentiality of communications, negotiations, or settlement  
39 discussions between mediation participants pursuant to Chapter 2  
40 (commencing with Section ~~415~~ *1115*) of Division 9 of the



1 Evidence Code, or the confidentiality of evidence protected by  
2 Section 1153.5 or 1154 of the Evidence Code.

3 ~~(h)~~

4 (g) Nothing in this section shall be deemed to prohibit the entry  
5 or enforcement of that part of a confidentiality agreement,  
6 settlement agreement, or stipulated agreement between the parties  
7 which requires the nondisclosure of the amount of any money paid  
8 in a settlement of a claim.

9 (h) *Nothing in this section shall be deemed to limit or abrogate*  
10 *the attorney-client privilege, the work product doctrine, or any*  
11 *other privilege recognized under law.*

12 (i) *Nothing in this section shall be deemed to restrict the power*  
13 *of the trial court under subdivision (f) of Section 2031 to enter an*  
14 *interim protective order, whether stipulated to by the parties or not,*  
15 *that limits the dissemination of documents claimed in good faith*  
16 *to warrant confidential treatment pursuant to paragraph (1) or (2)*  
17 *of subdivision (a), if that order will expedite the production of*  
18 *documents and avoid unnecessary delays. That order shall (1)*  
19 *permit, subject to reasonable measures designed to protect*  
20 *legitimate claims of confidentiality under paragraph (1) or (2) of*  
21 *subdivision (a), the disclosure of the documents to the parties, their*  
22 *lawyers, and their experts, and to governmental agencies with*  
23 *enforcement authority over the allegedly defective product or*  
24 *environmental hazard; (2) provide that any person to whom the*  
25 *documents were properly disclosed may serve a notice identifying,*  
26 *with reasonable particularity, documents as to which*  
27 *confidentiality was improperly claimed under paragraph (1) or (2)*  
28 *of subdivision (a); and (3) further provide that, upon service of that*  
29 *notice, the party seeking confidentiality shall have the burden to*  
30 *move within 30 days for confidential treatment under paragraph*  
31 *(1) or (2) of subdivision (a) and the burden of proving entitlement*  
32 *to that relief. Failure to make that motion within 30 days shall be*  
33 *deemed a waiver of confidentiality as to those documents. After a*  
34 *party has issued notice and the party who has been issued notice*  
35 *has motioned the court pursuant to this subdivision, the party who*  
36 *issued notice shall have the burden of showing that the information*  
37 *would be beneficial in protecting the public from defective*  
38 *products or environmental hazards. The burden of proving*  
39 *entitlement to confidential treatment under this chapter shall be on*  
40 *the party seeking confidentiality.*



1 (j) *In the event that the plaintiff seeks to make a settlement or*  
 2 *confidentiality agreement involving a defective product or*  
 3 *environmental hazard public in order to protect the public under*  
 4 *the provisions of this chapter, the same notice and other procedures*  
 5 *required in subdivision (i) for making documents obtained in*  
 6 *discovery public shall apply.*

7 (k) *Except for those documents denied confidential treatment*  
 8 *pursuant to a court order issued pursuant to this section, all other*  
 9 *documents produced under the terms of a protective order shall*  
 10 *remain subject to the terms of that order, subject to further order*  
 11 *of the court. Nothing in this section shall prevent any party from*  
 12 *issuing subsequent notices pursuant to subdivision (i).*

13 (l) *Nothing in this section is intended to affect medical*  
 14 *malpractice actions or other actions except those involving*  
 15 *product defects or environmental hazards.*

16 (m) *In order to streamline the process for review under this*  
 17 *section, the court may require, pursuant to paragraph (3) of*  
 18 *subdivision (g) of Section 2031, the party who makes a motion for*  
 19 *confidential treatment under subdivision (i) to provide an*  
 20 *identifying log or other document. Nothing in this section is*  
 21 *intended to prohibit a party from requesting that a record be filed*  
 22 *under seal pursuant to Section 243.2 of the California Rules of*  
 23 *Court.*

24 \_\_\_\_\_

25 CORRECTIONS  
 26 **Text — Page 2.**

27 \_\_\_\_\_

28

