

SENATE BILL REPORT

ESB 5886

As Passed Senate, March 11, 2009

Title: An act relating to legal proceedings involving public hazards.

Brief Description: Regulating legal proceedings involving public hazards.

Sponsors: Senator Kline.

Brief History:

Committee Activity: Judiciary: 2/17/09, 2/24/09 [DP].

Passed Senate: 3/11/09, 40-8.

SENATE COMMITTEE ON JUDICIARY

Majority Report: Do pass.

Signed by Senators Kline, Chair; Regala, Vice Chair; McCaslin, Ranking Minority Member; Hargrove, Kohl-Welles and Tom.

Staff: Lidia Mori (786-7755)

Background: In 1994 the Washington Legislature repealed the statute governing hazards to the public and adopted a statute that provides more precise definitions of the type of damage claims covered, and specific criteria for courts to use in entering or enforcing confidentiality provisions. As a matter of public policy, the public has a right to information necessary to protect members of the public from harm caused by alleged hazards to the public. The importance of protection of trade secrets, other confidential research, development, or commercial information in order to promote business activity and prevent unfair competition is also emphasized.

A "product liability/hazardous substance claim" is defined in RCW 4.24.611 as a claim for damages for personal injury, wrongful death, or property damage caused by a product or hazardous or toxic substances that are an alleged hazard to the public. A provision in a court order or agreement settling, concluding, or terminating a product liability/hazardous substance claim that limits the possession or disclosure of information about an alleged hazard to the public is considered a confidentiality provision. Confidentiality provisions in settlement contracts or court orders are valid and enforceable only if the court finds the provision is in the public's interest. The court must balance the right of the public to information regarding the alleged risk against the right of the public to protect the

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confidentiality of trade secrets, confidential research, or commercial information. Protective or discovery orders may be issued during the course of litigation pursuant to court rules.

Summary of Engrossed Bill: It is the Legislature's intention that there be a presumption in Washington State against the sealing of court documents relative to public hazards. "Public hazard" is defined as a condition of a product that has caused, or can be reasonably expected to cause, death or serious bodily harm, or other serious harm to a person unaware of the condition.

At the conclusion of litigation, the court must review any protective or discovery orders issued during the course of litigation to determine whether they are in compliance with the statutory provisions governing a public hazard. Confidentiality provisions may be entered into, ordered, or enforced by a court only if the court finds that the provision does not conceal the existence of a public hazard. The court must balance the right of the public to information regarding the alleged risk to the public from the product or substance against the right of the public to protect confidentiality of information. A confidentiality provision is voidable if it requires a party to agree to withhold or remain silent on information regarding a public hazard as a condition of reaching a settlement of litigation. Causes of action that exist on or after July 1, 2009, must comply with the provisions governing legal proceedings involving a public hazard, except for monetary damage claims reduced to final judgment by a superior court.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This bill creates a presumption in the interest of public safety. In 1994 Washington gutted what was good law and created a balancing test, but in the practical reality of today's courts, that balancing test is not going to happen. The *Seattle Times* turned up a number of cases that were sealed and, when opened, they revealed cases about sexual predators. This bill doesn't address all of those types of cases. Nothing in this bill creates new liability. The government has no business hiding things from the public. The definitions should be broader to include toxic emissions. The trade secret laws and propriety laws are broad enough as it is to protect such things.

CON: Governor Lowry convened a group headed by Fred Tausend and the law that was passed as a result of this group is the current law. It has served the citizens of this state very well. With this bill there is danger that trade secrets or proprietary information could be disclosed. Current law allows courts to determine when it's in the public interest to allow such protective orders. If parties couldn't use these orders, there might be a tendency to litigate more.

OTHER: The cities don't use protective orders in settlement agreements so this legislation isn't problematic for us. But the broad definition of public hazard in this bill is, of concern,

that the federal law requires that we collect certain road condition information and not disclose it so we would be in violation of that law. Our concern is limited to the definition.

Persons Testifying: PRO: Larry Shannon, Washington State Association for Justice; Arthur West, citizen.

CON: Cliff Webster, Washington Liability Reform Coalition.

OTHER: Tammy Fellin, Association of Washington Cities.