

HOUSE BILL REPORT

HB 1359

As Reported By House Committee On:
Judiciary

Title: An act relating to full disclosure of civil court proceedings relating to public hazards.

Brief Description: Requiring full disclosure of civil court proceedings relating to public hazards.

Sponsors: Representatives Appelwick, Campbell, Riley, R. Meyers, Johanson, Chappell, Ludwig, H. Myers, Kessler, Eide, Locke, Roland, Pruitt, Jacobsen, Mastin, Long, Karahalios, Jones, L. Johnson, J. Kohl, Wineberry, Basich, Dellwo and G. Cole.

Brief History:

Reported by House Committee on:
Judiciary, February 9, 1993, DP;
Passed House, March 8, 1993, 66-31.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 11 members: Representatives Appelwick, Chair; Ludwig, Vice Chair; Campbell; Chappell; Johanson; Locke; Long; Mastin; H. Myers; Riley; and Wineberry.

Minority Report: Do not pass. Signed by 4 members: Representatives Ballasiotes, Assistant Ranking Minority Member; Forner; Scott; and Tate.

Staff: Patricia Shelledy (786-7149).

Background: During civil litigation, the court has the power to issue orders preventing the dissemination of certain information either to the other party or to the public. These orders are called "protective orders." Under Washington Superior Court Civil Rule 26(c), the court for good cause may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including: "(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; . . ."

In addition to protective orders in litigation, parties may enter into settlement agreements which include an agreement by the aggrieved party not to reveal certain information about the cause of an injury to the aggrieved party.

Critics of this system argue that certain protective orders or settlements may prevent dissemination of information to the public, press, or other interested persons, about "public hazards" such as products or hazardous wastes that could pose a danger to the public or to persons who come into contact with the public hazard.

Summary of Bill: Courts may not enter an order or judgment that has the purpose or effect of concealing a public hazard.

Any agreement or contract that has the purpose or effect of concealing a public hazard is void, contrary to public policy, and unenforceable.

Definitions. "Public hazard" means an instrumentality, including but not limited to any device, instrument, procedure, product, or a condition of a device, instrument, procedure, or product that: (1) presents a real and substantial potential for repetition of the harm; or (2) involves a single incident which affected or was likely to affect many people. The term does not include acts or procedures by licensed professionals acting within the scope of their licenses.

Parties' rights. A party to an agreement or contract may bring a declaratory action to determine whether an agreement or contract conceals a public hazard and is void. In a declaratory action, a party who wants to conceal the information may bring a motion for a temporary order restraining disclosure of the information to the public or third parties pending the lawsuit's resolution. The court must examine the information and materials in camera. The court may issue a temporary order restraining a party or parties from disseminating the protected information to the public or to third parties. The temporary order will terminate upon entry of a final order or judgment or dismissal of the case.

In any final order or judgment, if the court finds that all or a portion of the information sought to be protected from disclosure is relevant to the public's knowledge or understanding of a public hazard, the court must provide for disclosure of the information. If the court finds that the information is not relevant to the public's knowledge or understanding of the public hazard, the court must order the information sealed and may include in the final order

provisions restraining the parties from disclosing the information.

Third-party rights. Any third party, including but not limited to the news media, has standing to contest an order, judgment, agreement, or contract that allegedly conceals a public hazard. The third party may challenge the motion to seal information by intervention during the court action or the third party may bring a declaratory action to determine whether the order, judgment, agreement, or contract conceals a public hazard.

The third party must establish the existence of a public hazard, that the public hazard was the subject of the order, judgment, agreement, or contract, and establish a basis for a reasonable belief by the third party that the agreement, contract, order, or judgment concealed the public hazard.

If the court finds that the third party has met those requirements, the court must require the defendant to produce the information for an in camera review by the court. The court must determine whether the information concerns a public hazard that was concealed and, if so, provide for dissemination of the information.

The court may award reasonable attorneys' fees and costs to the prevailing party in the third-party action.

Sanctions for violating disclosure orders. Any person who violates an order either publishing or sealing information is in contempt of court. The court must award attorneys' fees and costs incurred in enforcing the order plus actual damages.

Application of Consumer Protection Act. Any party who attempts to condition an agreement or contract upon another party's agreement to conceal an instrumentality that the party knows or should have known is a public hazard or who enters into an agreement that conceals an instrumentality the party knows or should have known is a public hazard will violate the Consumer Protection Act. If the party in violation is engaged in the business of insurance, the party will also be in violation of the Unfair Practices Act governing insurance companies.

Application of the Act. The act applies to all agreements, contracts, orders, and judgments entered on or after the effective date of the act.

Statute of Limitations. The statute of limitations to bring declaratory or civil actions is three years from the

execution of or entry of the agreement, contract, order, or judgment.

Fiscal Note: Not requested.

Effective Date: The bill contains an emergency clause and takes effect on July 1, 1993.

Testimony For: The public needs protection from protective orders and settlement agreements that conceal public hazards. Many plaintiffs who enter into these agreements are worn out from the emotional and financial expense of the litigation and consequently enter into agreements to suppress information about public hazards when the defendant conditions any settlement upon concealment. Judges are frequently not in a position to challenge an agreed order. Many people have been injured by products because information was concealed for years.

Testimony Against: Protective orders are a discovery tool designed to expedite litigation. This bill will interfere with expeditious resolution of cases, will foster resistance to discovery, will increase the cost of litigation, and will inhibit settlements. Additionally, the bill will suppress the flow of information among scientists and engineers designing products. Third parties will want the information for commercial purposes, not to protect the public. Judges are not in a position to determine what constitutes a public hazard and judges' judgments should not be substituted for the judgment of federal agencies that regulate and approve products. Existing discovery rules are adequate.

Witnesses: Lori Haskell, Washington State Trial Lawyers Association (pro); Hal Hodgins, Washington State Trial Lawyers Association (pro); David West, Washington Citizen Action (pro); Sonya Alexander, Association of Washington Businesses, Liability Reform Coalition (con); Nancy Bratton, Seattle Chamber of Commerce (con); William Phillips, Washington Defense Trial Lawyers (con); Cliff Webster, Pharmaceutical Manufacturers Association (con); and Cliff Finch, Association of Washington Businesses (con).