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San Francisco Chronicle

SAN FRANCISCO
AND THE BAY AREA

EDITORIAL
OPINION

TUESDAY, AUGUST 21, 2001

OPEN FORUM

Time to end the secrecy

By Richard Zitrin

ON JUNE 7, the California Assembly narrowly passed a bill vital to the interests of all Californians. AB36 prevents anyone from secretly settling litigation and keeping the public in the dark about matters affecting the public health and safety.

Under this legislation, no longer would Firestone/Bridgestone be able to settle shredding tires cases and keep the truth from the public.

But the fate of the legislation remains uncertain. Even in the watered-down forms that passed the Assembly, AB36, and the Senate, SB11, the bills survived by the narrowest of margins.

Secret deals work like this: If a plaintiff's lawyer succeeds in getting hard evidence about, say, a defective product through the "discovery" process – the legal system's way of both sides trading information – the defendant often offers a quick and generous settlement to that single plaintiff in exchange for keeping secret all the information the plaintiff has learned.

The Firestone cases, which by most estimates represent the deaths of more than 100 innocent victims, brought the secrecy issue to the front pages. But we're not just talking about Firestone.

General Motors kept secret a list of 240 side-mounted gas tank fire cases until it was discovered by the Center for Auto Safety. Over the years, secrecy kept prescription drugs such as Zomax and Halcion; the Bjork-Shiley heart valve, and the devastatingly damaging Dalkon Shield on the market – long after their dangers were known privately to litigants and their lawyers.

And it's the lawyers – those on both sides – who allow themselves to participate in such a dangerous subterfuge? Not merely sitting silently on the sidelines, many lawyers create these secrecy agreements, actively participating in the coverup of information, which, if known, might save lives.

These coverups are wrong.

But, knowing their effect, lawyers justify the secrecy in the name of "zealous advocacy" – the traditional view that their obligations begin and end with their client.

In today's world, that view is not only outmoded, it's archaic.

Still, a change is going to come.

In California, it has taken eight years, since then-Sen. Bill Lockyer shepherded similar legislation through the Legislature – before then-Gov. Pete Wilson vetoed it.

The current legislation is much better constructed than Lockyer's bill. But last-minute pressures, especially from high-tech businesses, have watered down both Senate and Assembly versions.

Most significantly, provisions were removed that prevent secrecy in the event of clear-cut financial fraud.

TIM BRINTON/ *Special to The Chronicle*

The days of secret settlements are numbered.

This makes no sense. True, lives are at stake when it comes to dangerous products and toxic hazards. But what is the justification for exempting companies that pay off a single victim of financial fraud while concealing the truth from everyone else?

The state Legislature is not alone in working for "sunshine in litigation." Appellate judges around the country are considering strong court rules requiring openness, such as the Texas rule drafted by Rep. Lloyd Doggett, D-Texas.

Thirty-five ethics professors have joined me in supporting a change to the ethics rules of the American Bar Association that would prevent lawyers from participating in the worst abuses.

Openness seems an obvious choice.

Yet the Legislature faces persistent special-interest opposition. And inertia means it's always easier to do nothing. But after years of examining these secrecy deals, I still can't figure out a single objective reason to oppose such clearly beneficial legislation.

The days of secret settlements are numbered. The fight for sunshine – to turn on the light of the law, to paraphrase Congressman Doggett – will be won.

One only hopes it's accomplished before the next Firestone or Lincoln Savings scandal comes along to spur those in power to finally do the right thing.

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