

Forum

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Bill Misses Mark, Gives Plaintiffs Too Much Ammo

By Michael A.S. Newman

The 19th century military theorist Karl von Clausewitz famously commented that war "is merely the continuation of politics by other means." Ironically, it appears now that politics is often the continuation of war (or, our civil equivalent of war, litigation) by other means.

Governments have, time out of mind, used war to change the political landscape. But in our modern age, lobbyists use the legislative process to change the rules of litigation to their advantage. And here we can draw a quote from Clausewitz's contemporary, Napoleon, who defined opposing armies as "two bodies which meet and try to frighten each other."

Much of litigation is the art of frightening the other side into settlement. AB1700 illustrates this principle.

On Feb. 22, 2005, Assemblywoman Fran Pavley introduced AB1700, a law that purports to nullify confidential settlements and protective orders where, in a subsequent litigation regarding "public danger," the protected information is deemed to be "evidence of or information concerning a public danger." As AB1700 provides, "in an action based upon the existence of a public danger, evidence of or information concerning a public danger that was disclosed during the course of litigation, whether or not that evidence or information was filed with the court, shall be presumed to be public information and may not be kept secret pursuant to agreement of the parties or by court order."

Under AB1700, such information "may" be kept secret "for a period that the court deems appropriate only pursuant to court order based upon the court's independent finding that either of the following exist: ... The information is a trade secret or otherwise privileged under existing law"; or there is a substantial probability of the existence of "overriding interest" that overcomes the right of public access to the information, where disclosure would be prejudicial to such overriding interest, and where no less restrictive means exist for achieving that interest.

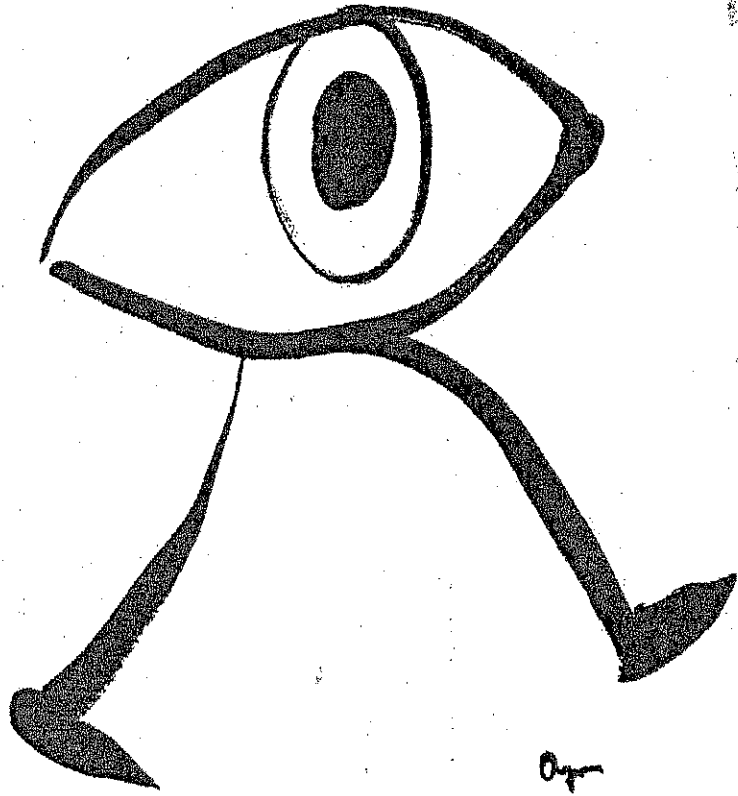
The supporters of AB1700 argue that such a measure is necessary because, as the legislative findings of the statute announce, "[s]ecrecy agreements can allow companies to shield information from public view and can permit these companies to continue illegal practices without accountability." The legislative findings discuss the example of Firestone tires: "For many years, Bridgestone/Firestone Inc. knew about ... dangerous defects, but kept the information out of the public eye by secretly settling many lawsuits brought as a result of crashes related to defective tires. ... In the absence of ... secrecy agreement[s], information about this dangerous product could have been disclosed publicly, which could have saved lives and avoided injuries."

All of this sounds very compelling and reasonable, but a closer look at AB1700 provokes the following simple question: Will AB1700 in fact do anything to remedy the problem of businesses shielding information regarding dangerous products from public scrutiny?

The clear answer is no.

If AB1700 is passed into law, businesses that have something illicit to hide (for example, information regarding potentially dangerous products) will be more likely to settle before discovery puts such information into the hands of their opponents — and, presumably, the public. Those who have something to hide will continue to hide the information, regardless of AB1700.

In addition, AB1700 will have a host of undesirable consequences. While the bill purportedly targets businesses that endanger the public, its effect will be much more widespread and perverse. Many businesses with nothing illicit to hide possess information that they reasonably wish keep out of the public realm. Trade secrets are an example of such information. Although the bill gives the court discretion to respect the confidentiality agreement or prior court orders relating to trade secrets, the statute merely provides that the court "may" allow the information to be kept secret; arguably, the court "may" also disregard the confidential nature of the infor-



mation even if it is otherwise privileged. The court also has discretion to keep the information secret for a period of time the "court deems appropriate."

From the point of view of businesses that live or die by their trade secrets, it may not be worth the risk. For such businesses, an adverse party's request for discovery regarding trade secrets will present a grave threat that has nothing to do with the merits of the present action. For companies that manufacture food, drugs, hardware, appliances, automobiles or medical supplies (just to name a few), all product information could conceivably become relevant to a case arising from "public danger."

If, by any stretch of the imagination, such information could be deemed relevant to "public danger," then the business will have to worry about protecting such information from AB1700 exposure in future actions.

To understand how such a danger may manifest itself, consider the following example: Acme Cola Co. is sued by a disgruntled ex-employee for age discrimination. Acme alleges it fired its ex-employee for cause, not because of his age. The plaintiff alleges he was not fired for cause and that he was, in fact, an outstanding worker; indeed, he claims to be the inventor of Acme's secret recipe for its cola.

In discovery requests, the plaintiff seeks a disclosure of Acme's secret recipe. Acme considers such recipe to be a trade secret, and it reasonably fears that public disclosure will allow competitors to duplicate its product.

Under AB1700, Acme faces a threat far greater than liability in the present lawsuit. If it agrees to disclose such information under a confidentiality agreement, or if it is forced to produce such documents subject to a protective order, it will thereafter have to worry about such documents being deemed relevant in some later lawsuit involving an alleged public danger and disclosed to the public. Under such circumstances, Acme will have a strong incentive to settle the matter before it

is compelled to produce such documents — even if the ex-employee's case has no merit. The possibility that some later court will order Acme's trade secret subject to disclosure under AB1700 may be deemed too great a risk.

Thus, AB1700 will be a powerful weapon in the hands of plaintiffs attorneys, particularly against defendants for whom confidential and trade secret information is an important element of business. Such defendants will feel the pressure to settle early not because of a fear that their unsafe practices will be exposed to the public, but because of a fear that their perfectly legitimate trade secrets will be exposed on a pretext of public safety. A well-drafted set of document requests may lead to capitulation and settlement, even if the underlying case has no merit. The mere risk of later disclosure may be deemed too grave to allow the case to continue.

In short, AB1700 will not achieve its purported aim, but instead will provide a very powerful weapon for plaintiffs attorneys to hound defendants into early settlement, regardless of the merits of the case.

All this is not to say that businesses should necessarily be allowed to avoid disclosure of dangers to the public. Society, after all, has an interest in securing public safety by allowing the public to know when a product presents a danger. It may be that the non-disclosure of business information regarding public dangers is a problem lawmakers should seek to remedy.

It may also be that businesses that hide the dangers of their products will ultimately suffer in a free market, as consumers conclude that such businesses cannot be trusted. But whether the proper solution is through free market or through legislation, one thing is clear: AB1700 is not the answer.

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