Senate Judiciary Committee Approves "Sunshine" Bill That Clouds Up Settlements

May 24, 2011 by Sean Wajert

Here at *MassTortDefense* we know that while not the "sexy" part of litigation, the nuts and bolts of settlement agreements are crucial to clients. That is why it caught our eye that the U.S. Senate Judiciary Committee last week approved a bill that would require courts to consider so-called public health and safety concerns before approving the sealing of certain legal agreements and settlements in product liability suits.

The committee voted 12-6 to pass S. 623, the so-called Sunshine in Litigation Act. The bill would prohibit a federal court, in any civil action in which the pleadings state facts relevant to the "protection of public health or safety," from entering an order restricting the disclosure of information obtained through discovery, or from approving a settlement agreement that would restrict such disclosure, or restricting access to court records, unless in connection with that order the court has first made certain findings of fact. Specifically, the bill requires the court to find that: (1) the order would not restrict the disclosure of information relevant to the protection of public health or safety; or (2) the public interest in the disclosure of past, present, or potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information, and the requested protective order is no broader than necessary to protect the confidentiality interest asserted.

The bill similarly would prohibit the court from enforcing any provision of a settlement agreement that prohibits a party from disclosing that a settlement was reached or the terms of the settlement, other than the amount paid, or from discussing the civil action, or evidence produced in it, that involves matters relevant to the protection of public health or safety -- unless, again, the court finds that the public interest in the disclosure of past, present, or potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question, and the requested order is no broader than necessary to protect the confidentiality interest asserted.

Surprisingly Republican Senators. Orrin Hatch, R-Utah, and Chuck Grassley, R.-Iowa, joined all 10 Democrat committee members in support. But the bill seems ill-conceived and even unnecessary. As pointed out by the American College of Trial Lawyers' Federal Rules of Civil Procedure Committee, the bill would establish an undesirable precedent by circumventing the procedure set out in the Rules Enabling Act that Congress established for amending the Federal Rules of Civil Procedure. These kind of ad hoc legislative initiatives that address specific parts of the Federal Rules contradict the careful, open, deliberative, rigorous ways that the rules have been amended from time to time.

Moreover, the bill would would unduly restrict the discretion of trial judges to regulate civil litigation and would impose substantial new fact-finding burdens on the courts, without a demonstrated need for those changes. There is no compelling evidence that protective orders governing discovery or confidentiality provisions in settlement agreements are frequently

abused. Nor is there evidence that federal courts do not currently have the power to regulate those agreements.

Moreover, as written, the bill would lead to more confusion, not less, regarding what information has to be released, and when. As pointed out by Steve Zack, President of the ABA, the language is is vague and indefinite, threatening to sweep up many cases having little to do with true public health or safety. And it certainly would require the parties and courts to spend extensive time and resources litigating whether and how the statute applies. The politicians seem to forget that protective orders are critical to both plaintiffs and defendants, including by helping to safeguard against dissemination of highly personal sensitive information or trade secrets.

Perhaps Congress should spend less time on restricting judicial discretion and more on seeing that federal judges are paid a market-competitive wage. A district court judge on the bench since 1993 failed to receive a total of $283,100 in statutorily authorized but then-denied pay. Appellate court judges have lost even more.