

By Ms. Jacques, a petition (accompanied by bill, Senate, No. 748) of Cheryl A. Jacques for legislation to limit the use of secrecy agreements in certain legal actions. The Judiciary.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Ninety-Four.

AN ACT TO LIMIT THE USE OF SECRECY AGREEMENTS IN CERTAIN LEGAL ACTIONS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 The General Laws are hereby amended by inserting after
2 chapter 231B the following chapter:

Chapter 231C

Concealment of Public Hazards

5 Section 1. Matters of interest to the public health, safety and
6 welfare are often the subject of private litigation in which repre-
7 sentatives of the general public do not participate, and which fre-
8 quently are settled or resolved under circumstances in which dis-
9 closure of those matters of greatest concern to the public interest
10 are kept confidential from disclosure to the representatives of the
11 public by agreement of the private litigants. The General Court of
12 the Commonwealth, in recognition of the respective rights of pri-
13 vate litigants and of the general public, adopts this Act to regulate
14 the circumstances under which matters of public interest in private
15 litigation shall be kept confidential.

16 Section 2. Definitions.

17 As used in this chapter:

18 "Document" shall include all materials produced, generated or
19 obtained in the course of litigation in any court, including settle-
20 ment documents, releases and other documents terminating the lit-
21 igation, and any and all materials produced, generated or obtained

22 in discovery whether contained in files in the courthouses of this
23 Commonwealth or contained in the files of counsel for the liti-
24 gants.

25 “Environmental hazard” means a release or threatened release
26 of any substance which poses a threat to public health or safety by
27 presenting a present or future danger of death, bodily injury, or
28 physical or emotional disability to persons exposed to any such
29 substance. Such substances may include any and all substances
30 listed in any federal or state list of hazardous substances produced
31 in accordance with federal or state statutes or regulations.

32 “Final protective order” means an order of any court of compe-
33 tent jurisdiction entered pursuant to this Chapter determining that
34 a particular document or documents shall be protected from public
35 disclosure.

36 “Financial fraud” means any plan or scheme to sell an invest-
37 ment product to the general public without full disclosure of the
38 risks associated with the purchase of the product, where the plan
39 or scheme would cause or has caused financial loss to one or more
40 persons in one or more transactions.

41 “Public health or safety” shall include the health or safety of
42 any one or more members of the public.

43 Section 3. Concealment of Certain Public Hazards Prohibited.

44 Notwithstanding any other provision of law, in actions alleging
45 personal injury or wrongful death or monetary or property dam-
46 ages caused by a defective product or an environmental hazard or
47 a financial fraud, no confidentiality agreement, settlement agree-
48 ment, stipulated agreement, or protective order to keep from pub-
49 lic disclosure information that provides evidence of financial
50 fraud, a defective product, or an environmental hazard shall be
51 entered or enforceable upon the settlement or conclusion of any
52 litigation or dispute, unless a final protective order regarding that
53 information is entered by the court in accordance with section
54 four. Any agreements made by private litigants to conceal docu-
55 ments, which agreements are not contained within and sanctioned
56 by a final protective order, shall be void and unenforceable as
57 against public policy.

58 Section 4. Procedure For Obtaining A Final Protective Order.

59 (a) Any litigant in an action may seek a final protective order
60 from the court in which the action is pending upon the conclusion
61 of the litigation by settlement.

62 (b) A final protective order shall be sought by written motion of
63 one or more parties. The motion shall identify the documents as to
64 which a final protective order is sought, and shall contain a
65 request for a hearing. Documents shall be identified in a manner
66 sufficient to alert the court to their potential significance to the
67 public and to the litigants but need not contain such detailed iden-
68 tification as to disclose the contents of the documents.

69 The party or parties seeking the final protective order shall
70 identify for the court's review documents which allege evidence
71 of financial fraud, a defective product, or an environmental haz-
72 ard. Documents which do not evidence financial fraud, a defective
73 product, or an environmental hazard need not be identified for
74 review by the court. Any party opposing such motion or contest-
75 ing the character of the documents identified by the moving party
76 may file an opposition to the motion alerting the court to the
77 opponent's position on the significance of the documents to the
78 interests of the public and the litigants.

79 (c) Notice of a motion for a final protective order shall be post-
80 ed in a public place in the courthouse in which the action is pend-
81 ing upon the filing of the motion. Such notice shall contain the
82 caption of the case and the date scheduled for any hearing upon
83 the motion. Such notice shall remain posted until the court has
84 acted upon the motion.

85 (d) The clerk of the court in which the motion for a final pro-
86 tective order is pending shall provide written notice of the filing
87 of such motion to the attorney general of the commonwealth. Such
88 notice shall contain the caption of the case and the date scheduled
89 for any hearing upon the motion. Upon receipt of such notice, the
90 attorney general shall notify any and all federal, state or local reg-
91 ulatory agencies and governmental bodies with an interest in the
92 subject matter of the litigation of the filing of such motion and of
93 the date scheduled for any hearing on the motion.

94 (e) The court shall conduct a hearing upon a motion for a final
95 protective order. Such hearing shall be conducted no sooner than
96 twenty-one days after the filing of a motion for a final protective
97 order, in order to afford due notice of the hearing date to public
98 representatives. The court may permit representatives of the pub-
99 lic interest, including the attorney general, representatives of fed-
100 eral, state or local regulatory or governmental bodies, representa-
101 tives of the media, and other persons, in addition to the parties to

102 the litigation, to address the court on the issuance and scope of the
103 proposed final protective order. The court shall retain the authori-
104 ty and discretion to conduct said hearing in the manner most con-
105 ductive to just resolution of the issues, and may review documents
106 in camera.

107 (f) The court shall independently examine the basis and scope
108 of the proposed final protective order and shall make written find-
109 ing pursuant to this section for each documents proposed for
110 nondisclosure under the final protective order.

111 (g) A final protective order shall be entered only for good cause
112 shown in order to encourage the broadest availability of informa-
113 tion that provides evidence of financial fraud, a defective product,
114 or an environmental hazard, to the public. The burden of proving
115 that a final protective order should issue rests upon the party seek-
116 ing the order, and that party must satisfy the court by a fair pre-
117 ponderance of the evidence that a final protective order should
118 issue.

119 (h) In exercising its discretion to grant a final protective order,
120 a court may consider the following factors in addition to others:

121 (1) Whether the document as to which a final protective order
122 is sought would have been excluded from introduction into evi-
123 dence at trial because of any privilege, exclusionary rule, or testi-
124 monial disqualification, in accordance with the rules of evidence.

125 (2) Whether disclosure of the document would violate any
126 interest or right protected or guaranteed by the constitution or
127 laws of the United States or of the commonwealth.

128 (3) Whether disclosure of the document would reveal trade
129 secrets or confidential personal or business information which is
130 not a trade secret and that information does not provide evidence
131 of a financial fraud, a defective product or an environmental
132 hazard.

133 (i) If the court finds that a party is seeking issuance of a final
134 protective order to prevent disclosure of trade secrets which pro-
135 vide evidence of financial fraud, a defective product, or an envi-
136 ronmental hazard, the court may issue the final protective order if
137 the court makes written findings which determine that there has
138 been a particularized showing made of all of the following by the
139 moving party:

140 (1) Nondisclosure will not conceal information which may
141 enable members of the public to protect themselves from financial
142 fraud, a defective product, or an environmental hazard.

143 (2) The party seeking the final protective order has a cogniz-
144 able interest in the material, in that the material contains trade
145 secrets as defined by the general laws.

146 (3) Public disclosure would cause serious harm to the party
147 requesting confidentiality. In making a finding under this para-
148 graph, the court shall consider whether disclosure of the trade
149 secret information that provides evidence of financial fraud, a
150 defective product, or an environmental hazard, would benefit any
151 competitor of the party requesting confidentiality.

152 (j) If the court in the exercise of its discretion grants a final
153 protective order but finds that there exists information in the doc-
154 uments protected which provides evidence of financial fraud, a
155 defective product or an environmental hazard, the court shall noti-
156 fy all interested federal, state and local regulatory agencies and
157 governmental bodies, including the attorney general of the com-
158 monwealth. The recipient agency shall comply with the order to
159 maintain confidentiality unless disclosure is required in its judg-
160 ment to protect the health and safety of the public, in which case
161 the agency may move for reconsideration of the order of the court
162 or may appeal the final protective order.

163 (k) Any interested party, including parties to the litigation, the
164 attorney general, representatives of federal, state or local regulato-
165 ry agencies or governmental bodies, or representatives of the
166 media or other interested person, may appeal the grant or denial of
167 a final protective order to the appeals court or to the supreme judi-
168 cial court, in accordance with the Massachusetts Rules of
169 Appellate Procedure. For purposes of the appeal, the grant or
170 denial of a final protective order shall be considered a final judg-
171 ment. The appellate court shall conduct a de novo review of the
172 motion and documents as to which a final protective order has
173 been sought.

174 (1) (1) Any person, other than a party to a contract or other
175 agreement subject to this section, may contest any order, judge-
176 ment, agreement, or contract that violates this section by motion
177 in the court that entered the order or judgement, or by commenc-
178 ing an action for declaratory judgment. The motion or action shall
179 be filed within three years of the date on which the contract or
180 other agreement subject to this section is executed or within three
181 years of the date of issuance of the judgment or order challenged,
182 and shall specify the basis upon which the violation is alleged.

183 (2) Upon the filing of such motion or action, the court shall
184 conduct a hearing and review of the challenged materials in accor-
185 dance with paragraphs (b) through (k) of this section, and shall
186 also consider whether the original concealment of the documents
187 by the parties to the litigation was willful or was the result of
188 excusable failure to comply with the procedures set forth above. If
189 the court finds that the original concealment was in willful viola-
190 tion of this chapter, the court may award such sanctions as it
191 deems appropriate. Any person injured by such willful violation
192 of this chapter shall have a cause of action for damages against
193 any persons found to have willfully violated this chapter, includ-
194 ing litigants and their counsel.

195 (3) Any person bringing an action under this subdivision who
196 prevails in any part of his or her motion or action, shall be entitled
197 to costs and reasonable attorney's fees from the party seeking pro-
198 tection of the documents.

199 (4) If the court finds that the motion or action contesting the
200 order, judgment, agreement, or contract is wholly insubstantial,
201 frivolous or not advanced in good faith, as defined in sections 6E
202 through 6G of chapter 231, the court may award costs and reason-
203 able attorney's fees to the party seeking protection.

204 (5) If more than one person files a motion or action pursuant to
205 this subdivision, the court may consolidate the proceedings. If
206 more than one motion or petition raises the same issue, the court
207 shall consolidate the proceedings.

208 (6) A motion or petition based on issues or facts asserted and
209 decided in a prior motion or petition shall be dismissed unless the
210 new motion or petition establishes to the satisfaction of the court
211 newly discovered facts or circumstances supporting the new
212 motion or petition.

213 (m) Nothing in this section shall be deemed to compel the dis-
214 closure of any document or material protected by the constitution
215 or laws of the United States or of the commonwealth.

216 (n) Nothing in this section shall be deemed to limit a court's
217 authority or discretion to prohibit the enforcement of a part or all
218 of any confidentiality agreement, settlement agreement, stipulated
219 agreement, or protective order in any other cases.

220 (o) Nothing in this section shall be deemed to prohibit the entry
221 or enforcement of that part of a confidentiality agreement, settle-
222 ment agreement, or stipulated agreement between the parties

223 which requires the nondisclosure of the amount of any money
224 paid in settlement of a claim.

225 (p) In any action subject to this section in which the defendant
226 prevails on the merits in a trial on the matter, this section shall not
227 apply to limit a court's discretion to issue a final protective order.

228 (q) Except for the fact of the settlement itself, and except for
229 evidence of financial fraud, a defective product, or an environ-
230 mental hazard, nothing in this section shall be construed to limit a
231 court's discretion to issue a final protective order for the nondis-
232 closure of the terms and conditions of a confidentiality agreement,
233 settlement agreement, or stipulated agreement.

234 Section 5. Interim Protective Orders.

235 Section three of this chapter does not affect the issuance of any
236 interim protective order or any discovery order protecting the con-
237 fidentiality or nondisclosure of documents and materials during
238 the course of the litigation. However, any interim protective or
239 discovery order which pertains to evidence of financial fraud, a
240 defective product, or any environmental hazard shall expire auto-
241 matically thirty days after entry of final judgment. Any documents
242 which provides evidence of financial fraud, a defective product, or
243 an environmental hazard that was protected from disclosure by the
244 terms of any discovery order or interim protective order shall not
245 be sealed or subject to further confidentiality pursuant to any
246 agreement or interim protective order unless the court issues a
247 final protective order pursuant to the provisions of section three of
248 this chapter.

249 Section 6. Trade Secrets.

250 Except as set forth in section three of this chapter, a court shall
251 preserve the secrecy of a trade secret by reasonable means, which
252 may include granting protective orders in connection with discov-
253 ery proceedings, holding in-camera hearings, and ordering any
254 person involved in the litigation not to disclose an alleged trade
255 secret without prior court approval.

256 Section 7. Trafficking in Confidential Information Prohibited.

257 (a) No attorney shall sell or offer for sale any information
258 obtained through discovery to any member of the bar or to any
259 other person in violation of the prohibitions on attorney solici-
260 tation, fee splitting, or financial arrangements among lawyers or
261 nonlawyers included in rules promulgated by the supreme judicial

262 court. Violation of this paragraph may be a basis for professional
263 discipline by the supreme judicial court in accordance with its
264 rules.

265 (b) Any attorney representing a party to an action described in
266 this section who enters into a confidentiality or settlement agree-
267 ment to keep from public disclosure information that is evidence
268 of financial fraud, a defective product, or an environmental haz-
269 ard, without obtaining a final protective order in accordance with
270 this section upon conclusion of that action, may be subject to pro-
271 fessional discipline.

272 Section 8. Mediation.

273 (a) Subject to the conditions and exceptions provided in this
274 section, when persons agree to conduct and participate in a media-
275 tion for the purpose of compromising, settling, or resolving a dis-
276 pute, in whole or in part:

277 (1) Evidence of anything said or of any admission made in the
278 course of mediation is not admissible in evidence or subject to
279 discovery, and disclosure of any such evidence shall not be com-
280 pelled, in any civil action or proceeding in which, pursuant to law,
281 testimony can be compelled to be given.

282 (2) Unless the document otherwise provides, no document pre-
283 pared for the purpose of, or in the course of, or pursuant to, the
284 mediation, or copy thereof, is admissible in evidence or subject to
285 discovery, and disclosure of any such document shall not be com-
286 pelled, in any civil action or proceeding in which, pursuant to law,
287 testimony can be compelled to be given.

288 (3) All or part of a communication or document which may be
289 otherwise privileged or confidential may be disclosed if all parties
290 who conduct or otherwise participate in the mediation so consent.

291 (4) The limitations on continuing confidentiality under this
292 chapter do not limit and are without prejudice to the confidentiali-
293 ty of communications or negotiations made by participants and
294 mediators during the course of mediation negotiations and settle-
295 ment discussions.

296 (5) Evidence otherwise admissible or subject to discovery out-
297 side of the mediation process may not be made inadmissible or not
298 subject to disclosure pursuant to this section solely by reason of
299 its introduction or use in the mediation process.

300 (6) When persons agree to conduct and participate in mediation
301 processes for the purpose of compromise, settling, or resolving a
302 dispute, in whole or in part, all communications and negotiations
303 which are part of the settlement discussions between and among
304 participants in the alternative dispute resolution process shall
305 remain confidential.

306 (b) Subparagraph (2) of paragraph (a) does not limit the effect
307 of an agreement not to take a default in a pending civil action.

308 (c) If the testimony of a mediator is sought to be compelled in
309 any action or proceeding as to anything said or any admission
310 made in the course of the mediation that is inadmissible or not
311 subject to disclosure under this section, and such application is
312 denied in its entirety, the court shall award reasonable attorney's
313 fees and costs to the mediator against the person seeking such tes-
314 timony.

315 (d) This section does not apply where the admissibility of the
316 evidence is governed by other specific provision of the General
317 Laws.

