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EXHIBIT 2
DATE 3/9/05
SB
Officers: 196

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March 9, 2005

TO: House Judiciary Committee
RE: SB 196 Gus Barber Anti Secrecy Act

Since at least the mid-1970s, the disturbing practice of secrecy has taken root in courts across America. Defendants in civil litigation, as a condition to discovery or settlement, have sought to keep private the information emerging from litigation.

Secrecy in litigation takes many forms. "Protective Orders" prohibit parties who receive information in a case from distributing it to others. "Confidentiality Agreements" require that certain matters, once discussed or agreed to by the parties, remain confidential. A confidentiality agreement, for example, may prohibit disclosure of the cause of injury, the terms of settlement, or even the fact that a claim was ever filed. "Sealed Court Files" bar access to any details of a case, including the parties' names. In this instance, the court records are simply titled "Sealed v. Sealed."

Secrecy orders should not be enforced unless they meet stringent standards to protect the public interest.

You may be wondering, if secrecy orders are so bad, why don't trial lawyers just withhold their consent to them or fight them? Well, here's the problem - our allegiances have to be to our clients first and foremost, to do what is best for them individually. If a manufacturer of a defective product comes to us and says "We'll settle the case for the amount you've requested, that should take care of your client's medical and financial problems for the rest of her life, but we'll only settle if you agree to a confidentiality agreement that seals the court file and prevents you and your client from ever talking about what you've learned about our product in this case."

We are obligated to take that offer to our client and give them our opinion. We say "it's all we asked for, we may get less, or even nothing if we proceed to trial. I'd prefer that we go to trial and make this defective product and the harm it is causing and will continue to cause public, but this is a good offer and it will be another year before we even get to trial and the defendants may appeal any judgment we get, delaying the case for another year."

The client, often someone whose life has been devastated with medical problems, being out of work for years already, facing bill collectors on a daily basis, risking losing their home, thinking about how she will ever be able to pay her future medical bills decides that she has to take the offer, even with the confidentiality agreement. We can tell her about the others who will

be hurt in the future, we can tell her she'd be doing the public a service by not caving in to the settlement with strings, we can assure her we'll back her all the way - but ultimately we have to abide by the decision the client makes. They are not easy decisions - for us or for clients, but we can't fault a client who needs to do what is best for hem and their families.

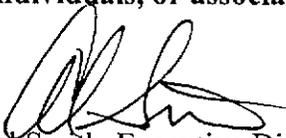
Secrecy keeps vital health and safety information from consumers. Montana consumers have a right to know whether products or services are defective or hazardous. The confidential settlements of early litigation involving the Bjork-Shiley artificial heart valves kept life-threatening defects secret even as more valves were implanted in patients. Hundreds of patients have died as a result of valve failure. In other cases, doctors have avoided disciplinary charges because court files, which would document negligent care, have been sealed. And the manufacturer of a drug that caused internal bleeding secured a secrecy order barring the injured consumer's attorney from disclosing information to any government agency. Even the FDA!

Secrecy creates more litigation. The most effective way to prevent injuries and deaths -- and resulting tort claims -- is to ensure that consumers have adequate information about the safety of products and services. A free flow of information will ensure more awareness about hazards and opportunities to avoid harm, and thus result in fewer injuries and less litigation. Secrecy orders, however, prevent consumers from making informed decisions. Secrecy permits defendants to bury "smoking guns" and limit public debate of real hazards associated with their products. In a series of suits over faulty fuel systems, General Motors obtained protective orders for internal company documents showing that financial considerations outweighed safety concerns. And a manufacturer repeatedly used secrecy to stifle attorneys from revealing dangerous seat belt hazards.

Montana courts are public institutions. Records and materials obtained during civil litigation are generally public information. The courts and what goes on within them are the province of the people. When a private dispute is taken before a city council, state regulatory body or court it is no longer purely private. Taxpayers finance public institutions and have a fundamental right to know how such matters are being resolved. Private litigants should not be allowed to determine what the public will see. Secrecy orders, however, threaten to turn courts into mere deciders of private disputes.

Montana courts operate under a presumption of openness. As public institutions, our courts function under a presumption of openness. This presumption should not be overcome except in extraordinary circumstances and for very limited purposes. Secrecy orders not only restrict the information available to consumers, but also to the media and government regulatory agencies, thereby threatening to obscure injury patterns caused by dangerous products.

SB 196 is simply about protecting Montanans from known public hazards. SB 196 is not about releasing legitimately private information about all civil litigants, nor is it about amassing some 'database' for trial lawyers. **Montana Trial Lawyers urge you to fulfill your constitutional duty under Article XIII, Section 1 and "provide protection and education for the people against harmful and unfair practices by either foreign or domestic corporations, individuals, or associations" by passing SB 196.**



Al Smith, Executive Director

The Hazards of Secrecy: Cases Where Protective Orders Or Confidential Settlements Jeopardized Public Health And Safety

Corporations sued in products liability actions very often insist that any material they turn over to injured consumers and their attorneys be kept completely confidential, even where the product is defectively designed or otherwise dangerous, and remains on the market. Often, corporations make confidentiality of information a condition for settling a case. Not only do such arrangements force every consumer injured by the same product to build their case against the corporation from scratch, they also prevent regulatory agencies, the media and the public from learning about dangerous or hazardous products. The following are examples of cases where corporations' insistence on such secrecy arrangements has endangered the public.

FORD/FIRESTONE

The horrible Ford/Firestone defect, involving scores of deaths and injuries, first came to light in litigation. Unfortunately, public revelation of the defect came nearly *ten years after* the first case was brought against Firestone. Documents that could have potentially saved over 200 lives and 700 injuries were, until October 2000, buried behind secrecy agreements and protective orders. The reason this information remained secret was that the defendants insisted on confidentiality as a condition of settlements. In October 2000, Ford and Firestone finally agreed to release numerous documents previously hidden, confirming their knowledge of defects and safety hazards relating to ATX and Wilderness tires on Ford Explorers. Information made public during the case of Trahan v. Elvin Hayes Firestone created public pressure for the recall of tens of millions of tires.

CAR SEATS

On March 12, 1989, 16 month-old Michael Wright suffered a broken neck in a car accident, causing him to be paralyzed from the waist down. Michael, who weighed 22 pounds, had been sitting in a booster-type car seat manufactured by Kolcraft Enterprises. The family sued Kolcraft, alleging the car seat should not have been advertised for use by children of Michael's weight. Other car seat manufacturers, and the National Highway Transportation Safety Administration, recommended that children under 30 pounds not use this type of car seat. The manufacturer agreed to settle the case for a sum of money that reportedly could reach eight figures, but the family and their lawyers had to sign a confidentiality agreement requiring, among other things, that the manufacturer never be named, and that any contacts by the media be immediately reported to the manufacturer's lawyers. The family's attorney, who in the past had publicly spoken out against companies' insistence on such confidentiality agreements, said, "In the end, I agreed, because my job is to secure proper care for my client. And I deemed it inappropriate for the confidentiality agreement to stand between my client and the settlement." (Dick Dahl, *Strictly Confidential*, Massachusetts Lawyers Weekly, January 11, 1993.)

ZOMAX

Zomax was an arthritis pain reliever, manufactured by McNeil Laboratories, that caused acute and sometimes fatal allergic reactions in many consumers in the early 1980s. In the numerous lawsuits filed against the manufacturer in 43 states, the company insisted on protective orders and confidential settlements, keeping information secret that could have alerted Zomax users of its dangers. By the time the FDA recalled the drug in 1985, the agency believed that Zomax was probably a factor in 14 deaths and 403 life-threatening allergic reactions. One lawyer representing several clients who settled confidentially, told *The Washington Post*, "What they are trying to do is not be accountable to the vast majority of the public for what they've done ... They paid my clients a ton of money for me to shut up." Another said, "The problem is that they have a

gun to our head..." Devra Davis, a toxicologist who nearly died from using Zomax, said she believes court secrecy impairs "free scientific inquiry and the right of the public to know specific information about drugs it consumes." (Eye to Eye with Connie Chung, CBS News, Oct. 10, 1994; Benjamin Weiser & Elsa Walsh, *Drug Firm's Strategy: Avoid Trial, Ask Secrecy*, Washington Post, Oct. 25, 1988. See also, Daniel C. Carson, *'Hired guns' aim to keep veil of secrecy on product dangers*, San Diego Union-Tribune, May 4, 1991.)

WATER SLIDES

In 1991, Bill Evans broke his neck while sliding down a back yard toy called Slip 'N Slide. He is paralyzed from the neck down, confined to a wheelchair and needs round-the-clock care. Suspecting there was something defective about this product, Evans sued Kransco, the manufacturer. Evans' lawyer discovered that there had been at least seven other broken necks involving the Slip 'N Slide. He also discovered a videotape that was sealed as part of a confidential settlement in an earlier case, which showed that the manufacturer knew exactly how adults might be severely injured using the Slip 'N Slide. Evans and Kransco reached a confidential settlement, but Evans wanted to issue a press release alerting consumers about the hazards of the Slip 'N Slide. Kransco told Evans if he did this, their deal would be off and he would have to return the settlement money. Evans sued for the right to speak out, and the company eventually backed down. The manufacturer eventually stopped manufacturing the Slip 'N Slide. (Eye to Eye with Connie Chung, CBS News, Oct. 10, 1994.)

GM FUEL TANKS

Between 1973 and 1987, GM manufactured approximately 9.6 million C/K pickup trucks equipped with unsafe, 40-gallon "side saddle" fuel tanks. According to the Center for Auto Safety, from 1973 until today, there have been at least 750 fire deaths involving GM pickup crashes. The company knew it was endangering the public by using this fuel tank design, evidenced by a 1973 memorandum, authored by GM engineer Edward Ivey, which evaluated the cost to GM of these expected "burned deaths." When victims of fuel tank crashes first sued, GM disclosed documents to them only under confidentiality agreements, and settled these cases only on the condition that plaintiffs and their lawyers agreed to keep the information secret. In one such case, GM lawyers asked a judge to punish an injured consumers' lawyer, claiming he had violated the confidentiality agreement by telling other lawyers suing GM about the existence of the Ivey memo. In 1986, the lawyer had to pay an \$8,000 fine for the breach of confidentiality for disclosing this safety information. (J. Todd Foster, *Woman Without a Face Vows to Stay in GM's Face*, The Oregonian, August 3, 1997; Ralph Nader & Wesley Smith, *No Contest: Corporate Lawyers and the Perversion of Justice in America*, p. 72-73 (1996); Elsa Walsh & Benjamin Weiser, *Court Secrecy Masks Safety Issues*, Washington Post, Oct. 23, 1988.)

BJORK-SHILEY HEART VALVES

The Bjork-Shiley heart valve, put on the market in 1980, was prone to fracture. About two-thirds of all fractures were fatal, while many others led to serious injury. The valves were finally removed from the market by the FDA in 1986. But as of January 1990, the company had reported a total of 389 fractures and 248 deaths (numbers generally agreed to be greatly understated due to the limited number of autopsies taken). Because the company insisted on confidential settlements and protective orders during early litigation, the valve's defects stayed secret and more patients were implanted with the valve. Among them was the wife of Fred Barbee, of Minong, WI who, according to the *Toxics Law Reporter*, said, "I learned that many [victims'] families had filed lawsuits against [the manufacturers and its parent company]. I also learned that documents and information obtained in those lawsuits were never made public because of agreements or court orders which kept the information secret. I learned that Shiley had settled every fracture case out

of court and in each settlement required that the victims keep the settlements confidential."(Diane Jay Weaver, *Secrets that can kill have no place in our courts*, Toxics Law Reporter, June 19, 1991; Staff Report for the Use of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, U.S. House of Representatives, *The Bjork-Shiley Heart Valve: Earn as You Learn*, Feb. 1990, p. 2, 3.)

BIC LIGHTERS

In the 1980s, Bic Corporation quietly settled a number of lawsuits stemming from its allegedly defective butane cigarette lighters that would occasionally blow up and burn to death or maim the user. In exchange for paying out millions in settlements to injured consumers, it routinely demanded that they return all company documents provided during discovery. Not until 1987, when it was eventually reported in newspapers that 10 deaths had been linked to these lighters, did Congress begin investigating. They found that Bic and other popular brand lighters were so unsafe that they sometimes failed to meet the industry's own safety standards. (Barry Meier, "Deadly Secrets System Thwarts Sharing Data on Unsafe Products," *Newsday*, April 24, 1988. See also, Daniel C. Carson, *'Hired guns' aim to keep veil of secrecy on product dangers*, San Diego Union-Tribune, May 4, 1991.)

CHRYSLER FUEL TANKS

Shirley LoPrest sued Chrysler in a Los Angeles court after her husband burned to death when his 1971 Dodge Demon was hit and burst into flames. She alleged that because of the car's fuel tank design, there was a serious risk that fire would enter the passenger compartment on impact. In 1987, in response to LoPrest's discovery requests, Chrysler obtained a protective order from the judge that limited access to the company's documents to only the parties, their attorneys, consultants and expert witnesses. As a result, Chrysler's crash test results and other company safety documents were kept secret. The case settled confidentially and the Chrysler files are still secret. (Ralph Nader & Wesley Smith, *No Contest: Corporate Lawyers and the Perversion of Justice in America*, p. 73, 1996.)

XEROX

In 1988, two families settled their case against Xerox Corporation in which they alleged that exposure to toxic chemicals released from its plant in Rochester, New York had damaged their health. According to Richard Rifkin, counsel for the Attorney General of New York, Xerox paid the families several million dollars in exchange for a promise of confidentiality. The health departments of Monroe County and the State of New York sued to open the records, believing that other families in the area could be injured by exposure to these toxic chemicals. Upon gaining access to the file, the agencies discovered that no critical scientific data were contained in them. Said Rifkin, "The time and effort involved could have been avoided if the documents had been available to the state agencies from the outset."(Amy Dockser Marcus, *Firms' Secrets Are Increasingly Bared by Courts*, *Wall Street Journal*; See also, Daniel C. Carson, *'Hired guns' aim to keep veil of secrecy on product dangers*, San Diego Union-Tribune, May 4, 1991.)

ASBESTOS

In 1933, the Johns-Manville Company settled with an attorney for 11 former Manville employees, all asbestosis victims. The attorney received \$30,000 for the victims, in exchange for a written promise that he would not "directly or indirectly participate in the bringing of new actions against the Corporation." This fact did not come to light for more than 45 years. In the meantime, the company was able successfully to avoid damage suits. Had the public known about this settlement, it is likely that the hazards of asbestos would have come to light decades earlier. (Paul Brodeur, *Outrageous Misconduct; The Asbestos Industry on Trial*, Pantheon Books,

p. 22; See also, Barry Meier, *Deadly Secrets System Thwarts Sharing Data on Unsafe Products Series*, Newsday, April 24, 1988.)

GM CORVAIR

John Petry drove his 1961 Corvair more than 100 miles a day for work. The Corvair's heating system was of a design that other manufacturers had long rejected: air used to cool the engine was diverted into the passenger compartment to provide heat. This allowed deadly carbon monoxide fumes to enter the car. As a result, Petry developed permanent brain damage. He sued GM on the grounds that the heating system was defective. GM settled, but as part of the deal required Petry to sell the company not only his entire case file, but also the car itself. It also required him to change the basis of Petry's original 1962 complaint from design defect, which could implicate all similar Corvairs, to a manufacturing defect, which could cover only Petry's car. As a result, information about the defective design of the Corvair's heating system was kept confidential for nearly a decade. (Ralph Nader & Wesley Smith, *No Contest: Corporate Lawyers and the Perversion of Justice in America*, p. 88, 1996.)

KUFM Commentary
November 7, 2000

Two weeks ago, here in Montana, a nine year old boy was killed when the hunting rifle his mother was unloading fired unexpectedly. Most of us who heard the news reports at the time were saddened to hear the reports, and it was especially so for parents confronted with the unimaginable pain of losing a child. For those of us who hunt, especially with our kids, it was a sober reminder of the inherent dangers of firearms and the need to reinforce safe gun handling practices.

One of the benefits of being a trial lawyer is that you get to help people. The down side, is that people usually only seek the assistance of a trial lawyer when they or a member of their family have been injured or killed.

I've talked before about defective products that injure and kill unsuspecting Americans, like the recent revelations about defective Firestone tires. Our lives, or those of our families or friends can be quickly and severely altered or taken away by a defective product.

Unfortunately, the tragedy of the loss of nine year old Gus Barber's life here in Montana was caused, in part, by a defective product. Gus's mother was unloading a Model 700 Remington rifle. When she released the rifle's safety, the gun fired. The gun firing was an unexpected event for Gus's mother, she didn't touch the trigger, she just released the safety. A Remington Model 700 rifle accidentally discharging, however, was not unexpected, by Remington.

It seems that over the years thousands of Remington Model 700 rifles have discharged unexpectedly, including many here in Montana. And, a lot of those accidental firings occurred when a person simply slid off the safety. Remington knew such malfunctions were occurring. Remington received complaints from gun owners, and Remington faced numerous lawsuits because people were injured or killed.

Faced with owner complaints and lawsuits, Remington, making a cost benefit analysis, chose not to recall the rifles. Remington chose instead to issue a statement to Remington rifle owners about proper gun handling. The statement did not alert Remington owners that there was a potential design problem with their rifles that required added attention to safety.

Gun experts think the trigger on Remington Model 700 rifles is unnecessarily complex, 14 parts compared to three on other popular rifles, leading to added chances of a malfunction. And, the Remington safety only prevents the trigger from working, it does not prevent the firing pin from coming in contact with the cartridge, unlike safeties on other popular rifles that put a piece of steel between the firing pin and the cartridge.

Remington knew it's Model 700 rifles had problems. They

even launched an internal program to develop a safer rifle. And they did develop a safer rifle, but chose not to market it.

How do we know all this about Remington Model 700 rifles? Because the victims of the tragedies that have resulted from Remington's design defect have come to trial lawyers for help. Trial lawyers have uncovered the internal documents showing Remington's knowledge of this problem, and of their knowledge of safer alternatives. Trial lawyers have secured judgments against Remington, to aid those harmed and to try to get Remington to accept its responsibility for its defective product.

It is deplorable when the manufacturer of a product knows that its product has a defect, especially when it has a safer alternative design for the product. It is unconscionable when a manufacturer then chooses to not tell the public of the unnecessary risk the product poses and also chooses not to change to the safer alternative.

While Gus's parents haven't decided whether to sue Remington, it is important to keep our courts open to consumers like the Barbers who have suffered a grievous injury or loss of life due to a defective product. Our civil justice system provides the means for individual consumers to influence a corporation or government agency to remove a dangerous product from the market.

Consumers with access to the courts have made our lives safer. Cribs that no longer strangle infants. Trucks that have back-up alarms. Auto fuel systems that do not explode upon impact. Farm machinery that has safety guards. Children's pajamas that no longer burst into flames. All thanks to a civil justice system that remains accessible to courageous families who decide to make a company responsible and accountable for the harm they cause.

My heart goes out to the Barbers and I thank them for stepping forward in this difficult time to tell their story. Nothing can be done for nine year old Gus Barber now. But we can do plenty to try and make sure that Gus is the last victim of Remington's design defect. You can spread the word to family and friends about the problems with the Remington Model 700 rifles. You can encourage them to take their rifles into a gun smith to have the trigger and safety mechanisms replaced with safer, more reliable designs. You can express your outrage to Remington.

Most importantly, those of us who do own and use firearms, whether for hunting or sport shooting, need to make sure that we emphasize safe gun handling practices, for ourselves and those we are shooting with. I, for one, have started making sure that my son and I fully review gun safety before and after each and every hunting trip. We have come to place too much trust in the mechanical safeties on our guns, but we know now that that trust is misplaced. We need to reinforce the safe handling of guns, remembering to treat each and every weapon as if it were loaded. Please remember Gus and be safe.

This is Al Smith for the Montana Trial Lawyers Association.