UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

In re BRIDGESTONE/FIRESTONE, INC. ATX, ATX II, AND WILDERNESS TIRES PRODUCTS LIABILITY LITIGATION	Master File No. IP 00-9373-C-B/S MDL No. 1373 (Centralized before Hon. Sarah Evans Barker, Judge)
THIS DOCUMENT RELATES TO THE MASTER COMPLAINT	

PLAINTIFFS MEMORANDUM IN OPPOSITION TO DEFENDANT BRIDGESTONE/FIRESTONE S MOTION FOR 28 U.S.C. § 1292 CERTIFICATION

On July 27, 2001, this Court resolved the choice of law issues in this litigation and ruled that Tennessee law applies to claims against Bridgestone/Firestone, Inc. (Firestone) and Michigan law applies to claims against Ford Motor Company (Ford). Firestone has now moved the Court to certify the choice of law decision for appeal under 28 U.S.C. § 1292(b). Firestone s request, however, does not satisfy the requirements under section 1292(b) for an interlocutory appeal. An interlocutory appeal in this instance is wasteful of judicial resources and is contrary to the policy underlying section 1292(b) appeals. Plaintiffs therefore respectfully request that this Court deny Firestone s motion.

ARGUMENT

A district court may certify a decision for interlocutory review under 28 U.S.C. § 1292(b) only if the court is of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation[.] 28 U.S.C. § 1292(b). This Court s July 27 Order (the Order) does not meet any of section 1292(b) s requirements.

The Seventh Circuit recently set forth the standards for a district court to consider in whether to certify an issue for section 1292(b) treatment: There are four statutory criteria for the grant of a section 1292(b) petition to guide the district court: there must be a question of law, it must be controlling, it must be contestable, and its resolution must promise to speed up the litigation. Ahrenholz v. Bd. of Trustees of Univ. of Ill., 219 F.3d 674, 675 (7th Cir. 2000)(emphasis in original).

I. An Interlocutory Appeal In this Case is Contrary to the Policy Behind Section 1292(b) and Will Delay, Not Speed Up, the Litigation.

The decision whether to allow an immediate interlocutory appeal of a non-final order under section 1292(b) is with the discretion of the district court. Kirkland & Ellis v. CMI

Corp., 1996 WL 674072, * 2 (N.D. Ill.), citing Swint v. Chambers County Com n 514 U.S. 35 (1995). Certification of an interlocutory appeal should be granted sparingly and with discrimination. Smith v. Ford Motor Co., 908 F. Supp. 590, 600 (N.D. Ind. 1995)(citations omitted). Federal courts should certify orders for interlocutory appeal under section 1292(b) only when exceptional cases or circumstances justify departing from the normal course of taking an appeal after entry of final judgment. Id. (citations omitted).

The district court must consider whether certification would only prolong the life of the litigation at all the parties expense. Kirkland & Ellis, 1996 WL 670472, * 2. The moving party must demonstrate that exceptional circumstances justify a departure from the basic policy of postponing review until after the entry of a final judgment. Fisons Limited v. United States, 458 F.2d 1241, 1248 (7th Cir. 1972).

The purpose of providing interlocutory appeals under section 1292, is to expedite litigation and preserve judicial resources. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 474-475 & n. 25 (1978). Interlocutory review is not intended as a vehicle to provide early review of difficult rulings in hard cases. See Giguere v. Vulcan Materials Co., 1988 WL 119064, at *1 (N.D. Ill.) Furthermore, interlocutory appeals are disfavored as they

represent piecemeal litigation. Kirkland & Ellis, 1996 WL 674072, *1; see also In Re Burlington Northern, Inc., 1983 WL 529, * 2 (N.D. Ill.)(Certification is not to be used to create piecemeal litigation. . . .);In re Folding Carton Antitrust Litig. 75 F.R.D. 727, 738 (N.D. Ill. 1977) (permission to take an interlocutory appeal should be granted sparingly and with discrimination). A choice of law determination is subject to effective review after final judgment . . . Gramercy Mills, Inc. v. Wolens, 63 F.3d 569, 571 (7th Cir. 1995).

Choice of law decisions by the district court are not subject to interlocutory appeal under the collateral order doctrine. Freeman v. Kohl & Vick Machine Works, Inc., 673 F.2d 196 (7th Cir. 1982). The policy reasons for precluding interlocutory appeals of choice of law issues under the collateral order doctrine apply with equal force to requests for permission to appeal under section 1292(b).

Indeed, in Freeman, an on-point case not cited by Firestone, the Seventh Circuit stated the criteria it would consider in whether to grant a 1292(b) appeal regarding a choice of law decision. In Freeman, a products liability suit involving a Georgia resident, an Illinois corporation and another party whose principal place of business was in Illinois, the district court held Georgia law applied. One of the defendants took an

interlocutory appeal. The circuit court, en banc, held that the choice of law determination was not subject to interlocutory appeal under the collateral order doctrine or under section 1292(b).

The Freeman court noted that [p]ermitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in the judicial system. 673 F.2d 196, 198, n. 4,quoting Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981). The court further noted that although the appellant had not sought a section 1292(b) certification, it would have been to no avail because the court would have refused to exercise [its] discretion to permit the appeal. . . . The court held that the appellant could not demonstrate that any harm caused it by waiting for final judgment before appealing is any greater than the harm suffered by any litigant forced to wait until termination of the trial before challenging interlocutory orders it considers erroneous. 673 F.2d 196, 202, n. 13.

The same is true in this case. Firestone makes no claim that it will suffer any injury, let alone greater injury than that suffered by Plaintiffs as a result of the delay. An appeal in this instance will not expedite this litigation. Rather, an appeal will delay this Court s decision on class certification.

According to the most recent statistics available, the median time from filing notice of appeal to disposition is 11.5 months in the Seventh Circuit. Seventh Circuit 2000 Annual Report, available at www.ca7.uscourts.gov.

Co-Defendant Ford apparently agrees that the section 1292(b) requirements are not met in this case. Despite jointly filing the motion to dismiss, the two Defendants have parted company on the choice of law issue. Ford did not join in Firestone s section 1292(b) motion and instead requested reconsideration by the district court or certification to the Indiana Supreme Court. See Ford s Motion for Reconsideration of the Court s Order Granting in Part and Denying in Part of the Motion to Dismiss the Master Complaint.

Firestone s section 1292(b) motion is, in addition, an effort to have two interlocutory appeals, for Firestone most assuredly will attempt another discretionary appeal under Fed.R.Civ.P. 23(f) if the Court grants class certification. This is exactly the type of piecemeal litigation frowned upon by the Seventh Circuit. Freeman, 673 F.2d 196 at 200 (It is clear that federal law expresses strong policy against piecemeal appeal.)

By granting Firestone s request, Firestone will be given two bites at the same apple: interlocutory review at this stage and a potential Rule 23(f) appeal in the event of class certification.

One interlocutory appeal is rare enough, but two are virtually unheard of. See Gary v. Sheahan, 188 F.3d 891, 892 (7th Cir. 1999) (Interlocutory appeals are rare, because they may disrupt progress of the case); McMunn v. Hertz Equipment Rental Corp., 791 F.2d 88, 90 (7th Cir. 1986) (the main reason for forbidding interlocutory appeals is to prevent the same case from generating more than one appeal.)

Rule 23(f) already contemplates discretionary, interlocutory appeals of class certification decisions. Firestone seeks a 1292(b) appeal because it contends it is relevant to the class certification determination. Firestone s Br. at p. 8. However, Rule 23(f) procedures provide the appropriate avenue to seek appellate review. In fact, Firestone s discussion ofSzabo v. Bridgeport Machines, Inc., 249 F.3d 672 (7th Cir. 2001) (petition for certiorari filed August 1, 2001), illustrates this point. Szabo was not a section 1292 appeal; it was an appeal under Rule 23(f).

Firestone seem to believe that if it upsets the Court s choice of law determination, they will (a) win on class certification, or (b) defeat Plaintiffs claims. Neither premise is correct. If the circuit court reversed the choice of law determination, Plaintiffs merely would face the challenge of organizing the law and the class in such a way as to classify the

common legal questions. There is no doubt, however, that challenge can be met. There is also no doubt that it has been done successfully, as the class certification decisions in In re School Asbestos Litigation, 789 F.2d 996 (3d Cir. 1986) and In re Telectronics Pacing Systems Prods. Liab. Litig., 172 F.R.D. 271 (S.D. Ohio 1997), among others, demonstrate.

In addition, were the Court to follow an an all-state laws approach, Defendants would still face Plaintiffs causes of action. A different outcome on the motion to dismiss would not materialize. Amendment of the complaint might be appropriate, but Plaintiffs will still have stated the elements of claims that the Court sustained, whether they are sustained under one state s law or all states laws. Indeed, the Master Complaint was drafted with such a result in mind -- it was designed to function regardless of the outcome of the Court s choice of law decision.

Firestone is asking the Court to certify the Order for interlocutory review of a choice of law analysis even though a reversal of that Order will not change the fact that Plaintiffs stated viable claims. Indeed, the Court s substantive ruling on the motion to dismiss will stand regardless of the Seventh Circuit s review of the choice of law decision (assuming the Seventh Circuit would accept Firestone s petition for appeal). And, while reversal of the Order may change the nature of the

class certification process, reversal will not change the fact that Plaintiffs class certification motion and claims will still be pending against Firestone and Ford.

A reversal of the Order will not materially advance the termination of the case. Denying certification now will preserve judicial resources because the issues that are the subject of attempted interlocutory appeal [will] still [be] present on appeal after the case is tried[.] Giguere 1988 WL 119064, at *2. Thus, the circuit court, if it determines to allow Rule 23(f) review, will have the opportunity to decide the issues based on a full record embellished by the proceedings below. Id. In this case, the choice of law issue will remain once the Court makes a final determination.

II. The Court s Choice of Law Determination Does Not Involve A Controlling Question of Law.

A controlling question of law is a threshold issue which seriously affects the way that the court conducts the litigation (e.g., impacting whether or not the plaintiff has a cause of action under a particular statute). Stout v. Illinois Farmers Insurance Co. 882 F. Supp. 776, 777 (S.D. Ind. 1994).

That a reversal of the Order may influence this litigation s manageability does not satisfy section 1292(b) s controlling-question-of-law requirement. A question is controlling when it

isquite likely to affect the further course of the litigation, even if not certain to do so. Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc., 86 F.3d 656, 659 (7th Cir. 1996)(emphasis added). Firestone has not shown that a reversal of the Order is quite likely to affect this litigation merely by claiming that this litigation s manageability will be influenced or that a reversal may make class certification insurmountable.

III. The Court s Choice of Law Determination is Not Contestable.

A question of law is contestable when there is conflicting authority on the issue[.] In Re Lloyd s American Trust Fund Litig., 1997 WL 458739, at *5 (S.D.N.Y.)(citations omitted).

Since Indiana is the forum for this litigation, Indiana s choice-of-law analysis applies in this case. Accordingly, this Court properly applied Indiana s choice-of-law analysis, as prescribed by Hubbard Mfg. Co., Inc. v. Greeson, 515 N.E.2d 1071, 1073-74 (Ind. 1987). See July 27 Order at 3-6. The choice-of-law analysis prescribed by Greeson is the Indiana standard. See Jean v. Dugan, 20 F.3d 255, 261 (7th Cir. 1994). Under Greeson s most significant contacts analysis, the Indiana Supreme Court considered factors relevant to a choice-of-law resolution, which include the place where the conduct causing the injury occurred;

the residence or place of business of the parties; and the place where the relationship is centered. Greeson, 515 N.E.2d at 1073-74. Furthermore, Greeson requires that the court consider these factors according to their relative importance to the particular issues before the court. Id. at 1074. This is exactly what the Court did. See July 27 Order at 3-6.

The Court need not consider how other jurisdictions resolve choice-of-law issues. The Order focused solely on Indiana choice-of-law principles because Indiana is the forum court. As stated in the Order, the parties agreed that this Court should be treated as the forum court because Plaintiffs filed their Master Complaint in this Court. Id. at 2. Indiana is thus the only jurisdiction whose choice-of-law principles apply. That other jurisdictions apply different choice-of-law analyses is irrelevant.

The Court properly considered the factors necessary to resolve the choice-of-law issues. Indiana s choice-of-law analysis necessitates that the court exercise its discretion in determining the relevant factors prescribed by Indiana s choice-of-law rules. See Greeson, 515 N.E.2d at 1073. (A court should be allowed to evaluate other factors when the place of the tort is an insignificant factor.) Merely because Firestone can point to differing methods under which choice-of-law issues can be

analyzed is not an adequate basis for review under § 1292(b). The standard under § 1292(b) is clear: there must exist a substantial ground for difference of opinion regarding the question of law at issue. In this case, there is not.

Nor are due process considerations are satisfied by the Court s Order. Courts have applied a single state s laws to a nationwide class action. In Avery v. State Farm, 746 N.E.2d 1242 (Ill.App. 5 Dist. 2001), holders of automobile insurance policies brought a nationwide class action under Illinois law for breach of contract and consumer fraud. The appeals court found that Illinois had "significant contacts to the claims asserted by each class member." Id. at 1254 (citing Phillips Petroleum v. Shutts, 472 U.S. 797 (1985)).

Like this Court, the Avery court considered the plaintiffs claims, the location of the defendant s business and the defendant s conduct as it related to the plaintiffs claims.Id. 1254-55. The Avery court determined that substantial evidence existed that the defendant s conduct, as it related to the plaintiffs claims, emanated from the defendant s headquarters, Illinois. Id. at 1255. In the court's view, Illinois had sufficient contacts so that the application of Illinois law to all class claimants was neither unfair nor a violation of due process. Id.

In addition to this state court decision, several federal court decisions have held the application of the law of a single jurisdiction constitutional. See, e.g., Gruber v. Price Waterhouse, 117 F.R.D. 75, 82 (E.D. Pa. 1987)(finding selection of forum law constitutional where defendant maintained its principal place of business in the forum and auditing and financial statement preparation occurred there); In re ORFA Sec. Litig., 654 F. Supp. 1449, 1455 (D.N.J. 1987)(applying New Jersey law to the class where defendant s principal place of business was New Jersey and alleged misrepresentations originated there); In re LILCO Sec. Litig., 111 F.R.D. 670 (E.D.N.Y. 1986)("Without doubt, Shutts does not require us to apply the law of each state in which the plaintiffs reside nor does it prohibit the application of one state's law to all plaintiffs, regardless of residence").

Finally, assuming arguendo, that the choice of law ruling is contestable, section 1292(b) s requirements are conjunctive. Ahrenholz, 219 F.3d at 676 (Unlessall these criteria are satisfied, the district court may not and should not certify its order to us for an immediate appeal under section 1292(b)).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Firestone s motion for section 1292(b) certification.

Dated: August 22, 2001

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
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INDIANAPOLIS DIVISION

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	)	Master File No. IP 00-9373-C-B/S
This Document Relates to All Cases	)	

CERTIFICATE OF SERVICE

The undersigned Plaintiffs Liaison Counsel certifies that a copy of the foregoing document was served via hand delivery or facsimile upon the following local counsel for the Defendants and Intervenors in this MDL Proceeding, this ____ day of August, 2001:

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