UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re: BRIDGESTONE/FIRESTONE, INC., TIRES PRODUCTS LIABILITY LITIGATION	Master Case No. IP 00-9373-C-B/S MDL No. 1373 (Centralized Before Judge Sarah Evans Barker)
THIS DOCUMENT RELATES TO ALL CLASS ACTIONS	

REPLY MEMORANDUM IN SUPPORT OF BRIDGESTONE/FIRESTONE, INC.'S MOTION FOR 28 U.S.C. § 1292 CERTIFICATION

Plaintiffs and Firestone agree on the four criteria for certification under 28 U.S.C. § 1292: that there be (a) a question of law, which is (b) controlling and (c) contestable and (d) whose resolution may materially advance the litigation. Plaintiffs and Firestone also agree that this Court's July 27, 2001 decision to apply Tennessee law to all claims against Firestone and Michigan law to all claims against Ford is indeed a ruling on a question of law.

Plaintiffs argue, however, that this question is not controlling or contestable and that its resolution would not advance this litigation. All three arguments are wrong; recent Seventh Circuit authority proclaims the central and controlling nature of choice-of-law determinations in cases like these.

I. THE CHOICE-OF-LAW DETERMINATION IS "QUITE LIKELY" TO AFFECT THE COURSE OF THIS LITIGATION AND IS THEREFORE CONTROLLING

A question is "controlling" even if not automatically dispositive; thus, in applying section 1292(b), a question of law is "deemed 'controlling' if its resolution is quite 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). Plaintiffs assert that this Court's choice-of-law determination does not meet this standard and focus their arguments on

class certification issues. (Pls.' Mem. in Opp. to Mot. for 28 U.S.C. §1292 Cert. at 10.) Plaintiffs are wrong for two reasons.

First, Firestone's arguments about the choice-of-law determination are not limited to class certification. To the contrary, under what Firestone believes to be the correct choice-of-law analysis, claims of the named plaintiffs would not have survived a motion to dismiss; at the very least, the number of named plaintiffs who would be able to sustain claims under the applicable laws would be greatly reduced. (*See* Mem. in Supp. of Mot. for 28 U.S.C. § 1292 Cert. at 3; Mem. in Supp. of Defs.' Mot. to Dismiss, Br. III, *passim*.) And, of course, a dismissal of most or all of the claims would indeed profoundly affect this litigation's further course.

Second, plaintiffs are wrong in their contention that the choice-of-law determination has no appreciable impact on class certification. To prevail on their class motion, plaintiffs must establish both that common questions of law and fact predominate and that the proposed class action would be manageable. Fed. R. Civ. P. 23(b)(3). The Seventh Circuit has clearly indicated that a proposed class action including claims to be adjudicated under the laws of fifty states would likely fail the test of predominance and manageability. *See Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674 (7th Cir. 2001); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300-02 (7th Cir. 1995) (variations among state laws preclude class certification). Indeed, the weight of federal authority has recognized that nationwide product claims do not satisfy the predominance and manageability requirements of Rule 23(b)(3). (*See* Defs.' Mem. in Opp. to Pls.' Mot. for Class Cert. at 11-17, 71-72.) Firestone believes that no class should be certified here even if this Court's July 27 choice of law remains unchanged, but *Szabo* and *Rhone-Poulenc* together make plaintiffs' burden on class certification even steeper if it is decided that fifty states' laws apply. (*See* Defs.' Suppl. Mem. in Opp. to Class Cert. at 9-16.)

Reversal of the July 27 choice-of-law decision is thus "quite likely" to affect the future course of this litigation and is therefore controlling for section 1292 purposes.

II. SUBSTANTIAL DISAGREEMENT UNDERLIES THIS COURT'S CHOICE-OF-LAW DETERMINATION, WHICH IS THEREFORE CONTESTABLE

Plaintiffs argue that this Court was correct in choosing the choice-of-law principles of Indiana -- and, because the Master Complaint was filed in Indiana, Firestone agrees.

Plaintiffs do little, however, to address Firestone's discussion of those principles or the number of contacts that must be taken into account under Indiana's "significant contacts" analysis. Firestone did not "point to differing methods under which choice-of-law issues can be analyzed" (Pls.' Mem. in Opp. to Mot. for 28 U.S.C. §1292 Cert. at 11-12); rather, Firestone set forth Indiana's rules for determining the law applicable to tort and contract claims, and then identified a number of contacts that, according to those rules, should be considered in this case. (*See* Mem. in Supp. of Mot. for 28 U.S.C. § 1292 Cert. at 5-7).

Plaintiffs' argument that due process concerns are not implicated is also off the mark. They cite four cases holding that, on the facts of those cases, the laws of a single state could be applied to a nationwide class action. (*See* Pls.' Mem. in Opp. to Mot. for 28 U.S.C. §1292 Cert. at 12-13.) But in each case, the court either did, or recognized that it would need to, undertake a choice-of-law analysis to determine whether that single state's law could constitutionally be applied to each class member's claims. Whether other courts addressing other circumstances have found sufficient contacts with a single state is irrelevant; in *this* case, the analysis called for by plaintiffs' own cases shows that neither Tennessee nor Michigan has sufficient contacts with the claims of non-Tennessee and non-Michigan plaintiffs to meet the standard of fundamental fairness that due process requires.

Numerous courts have recognized that the application of choice-of-law rules can raise a contestable question appropriate for interlocutory review under section 1292(b). *See, e.g.*, *NL Indus., Inc. v. Commercial Union Ins. Co.*, 154 F.3d 155, 157 (3d Cir. 1998) (accepting for interlocutory review district court's choice-of-law determination because there was substantial "uncertainty" about how rules should apply to particular case); *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991) (accepting certification of choice-of-law issue under section 1292 to determine both whose choice-of-law rules to apply and, under those rules, whose law should apply); *Dresser Indus., Inc. v. Sandvick*, 732 F.2d 783, 784 (10th Cir. 1984) (accepting interlocutory review where district court's choice-of-law determination may render contract provision invalid). Here, the question is at least equally contestable.

III. RESOLUTION OF THE CHOICE-OF-LAW ISSUE WILL NOT UNDULY DELAY THIS LITIGATION AND MAY SUBSTANTIALLY EXPEDITE IT

A different resolution of this Court's July 27 choice of law could result in dismissal of many or all of the claims and affect class certification. Plaintiffs counter that an interlocutory appeal of the choice-of-law question would nevertheless delay, rather than expedite, the litigation. Plaintiffs are wrong.

First, plaintiffs repeatedly assert that Firestone must show that "exceptional circumstances" justify interlocutory review. (*See* Pls. Mem. in Opp'n to Mot. for 28 U.S.C. §1292 Cert. at 3.) The Seventh Circuit has held, however, that the possibility of an erroneous choice-of-law determination in a multi-million dollar class action may indeed constitute just such an exceptional circumstance. *See Szabo*, 249 F.3d at 675 (granting Rule 23(f) review of class certification decision where certifying class created "bet [the] company" litigation); *Rhone-Poulenc*, 51 F.3d at 1298-99 (granting mandamus to review class certification decision because improvidently-granted certification put defendants under undue pressure to settle). Here, this

Court's choice-of-law determination may have a significant impact on whether this case proceeds at all and, if so, whether it proceeds as a class action involving millions of class members. Interlocutory review is appropriate.

Second, plaintiffs rely heavily on *Freeman v. Kohl & Vick Machine Works, Inc.*, 673 F.2d 196 (7th Cir. 1982), a case they characterize as "on-point." (Pls.' Mem. in Opp. to Mot. for 28 USC § 1292 Cert. at 4).[1] But *Freeman* was decided under the collateral order doctrine, and "the collateral order doctrine and section 1292(b) serve different goals." *Forsyth v Kleindienst*, 599 F.2d 1203, 1208 (3d Cir. 1979). The standards are therefore different. *See id.* at 1208-09; *see also Starcher v. Correctional Med. Sys., Inc.*, 144 F.3d 418, 422 n.3 (6th Cir. 1998) (outlining different requirements for "collateral order" review and interlocutory appeals reviewable under section 1292).[2] Indeed, far from viewing *Freeman* as barring the interlocutory appeal of choices of law, the Seventh Circuit itself has certified choice-of-law issues for interlocutory appeal under section 1292(b). *See Edwardsville Nat'l Bank & Trust Co. v. Marion Labs., Inc.*, 808 F.2d 648, 650-51 (7th Cir. 1987) (accepting certification under section 1292 to determine whether district court may determine grounds for transfer and thus whose choice-of-law rules should apply).

Third, plaintiffs assert that this Court should not certify its Order for interlocutory appeal because "Firestone most assuredly will attempt another discretionary appeal under Fed.R.Civ.P. 23(f) if the Court grants class certification." (Pls.' Mem. in Opp. to Mot. for 28 U.S.C. §1292 Cert. at 6.) Plaintiffs' argument ignores the reality that the choice of law impacts their ability to

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[1] Plaintiffs characterize *Freeman* as an *en banc* decision. (Pls.' Mem. in Opp. to Mot. for 28 U.S.C. §1292 Cert. at 5). In fact, *Freeman* was a *per curium* opinion issued by a three-judge panel.

[2] *Freeman* noted in dictum that, if the appellant there had sought review under section 1292(b), the Court still would not have granted interlocutory review because the appellant -- a third-party defendant -- had not shown that he would suffer greater harm than any other litigant by delaying his appeal until after final judgment. 673 F.2d at 202 n.13. To the extent this Court believes that Firestone needs to make such a showing, *Szabo* and *Rhone-Poulenc* explain why a choice-of-law determination in litigation like this presents the sort of harm that warrants interlocutory appeal.

survive dispositive motions that could end this litigation. In addition, plaintiffs' argument necessarily assumes that this Court will certify a class and that the Seventh Circuit will grant interlocutory review under Rule 23(f), two assumptions that Firestone is unwilling to make. The proper approach to choice-of-law analysis should be decided now.

CONCLUSION

All the tests for section 1292(b) certification are satisfied. For the foregoing reasons and those set forth in Firestone's moving papers, this Court should certify the choice-of-law determination in its July 27, 2001 Order Granting In Part And Denying In Part The Motion To Dismiss The Master Complaint for interlocutory review under 28 U.S.C. § 1292(b).

Dated: August 30, 2001

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was sent via facsimile and first-class U.S. mail, postage prepaid, to each of the attorneys appearing on the Court's Panel Attorney List on this 30th day of August, 2001.

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Attorney for Defendant