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Multistate Litigation
January 6, 2002

A Model Multistate: Ford, Firestone and the State Attorneys General

I. Introduction

With the Attorney General innovation of multistate litigation has come a wave of disapproval of the building trend. Critics label the cooperation between the states in large-scale litigation as prime examples of the abuses of power and violations of federalism that the architects of this country so feared. While this heightened rhetoric may justify calling multistate litigation the "greatest threat to the rule of law today," an empirical look at the phenomenon demonstrates the legitimacy and efficacy of multistate litigation as the new tool of the Attorneys General. This paper examines the linked multistate cases investigating Firestone/Bridgestone tires and Ford SUV's as examples of the benefits that multistate litigation promises to deliver without the drawbacks feared by its critics.

II. The Threat of Multistate Litigation

The most prominent criticism of multistate litigation is its failure to respect the division of state and federal power inherent in federalism. Defenders of federalism see multistate litigation as an impermissible encroachment "upon the sphere of federal sovereignty" by the states that violates various federal protections built in to the Constitution. The essential basis of this argument is that states are stepping on federal toes by taking concerted action to rectify interstate problems.

While there are several theoretical defenses to this attack, the Firestone and Ford cases demonstrate that the reality of a multistate investigation does not pose such threats. As in most multistate litigation, the Working Group based its investigation on violations of state law, which fall squarely within the powers of the state Attorneys General. Furthermore, the states did not stand alone in their pursuit of Firestone and Ford violations. Through the National Highway Traffic Safety Administration ("NHTSA") and congressional hearings, the federal government was able to flex its own investigatory muscles unhindered by any action of the Attorneys General. The fact that the Multistate Working Group proved to be more effective than the federal government in preventing further

violations by asserting its own power does not indicate that the states have usurped any federal power.

Opponents of multistate litigation also point to the power of the Attorneys General to fashion broad and innovative settlements as a violation of the separation of power doctrine. Essentially, multistate litigation often allows the Attorneys General to accomplish legislation through litigation. However, the Attorneys General are doing no more than asserting their powers of *parens patriae*, conferred upon them by their own legislatures, and which can be revoked by these very same legislatures should they truly feel threatened. Therefore, multistate litigation proves to be no more than a valid exercise of power given to the Attorneys General through a process defined by the states' own separation of power. Furthermore, as the Firestone and Ford cases illustrate, the nature of this delegated power allows multistate litigation to fill gaps in the power of both the private bar and state legislatures.

III. The Bridgestone-Firestone Case

a. The Story Non-Disclosure: 1975-2000

For the last 28 years, Firestone/Bridgestone, Inc. has been embroiled in a highly publicized and costly controversy about the safety of their tires. Faced with repeated allegations that tread separation on various models have caused injury and death, Firestone continually and repeatedly denied any liability in face of federal governmental regulation, Congressional hearings and private law suits. In 1975, the National Highway Traffic Safety Administration ("NHTSA") ordered a recall of 400,000 tires. In 1976, Congress conducted hearings resulting in a second recall of 11.5 million tires mandated by the NHTSA.

By the time Japanese owned Bridgestone bought Firestone in 1988 and formed Bridgestone/Firestone Inc., hereinafter "Firestone" in 1990, tread separation on Firestone tires still remained uncured, prompting complaints of Firestone's failure to disclose such dangers in 1990.

By 1992, complaints of tread separation had mounted and Firestone undertook a formal investigation, although it remained silent to the public, even as reports mounted of the dangers of Firestone/Bridgestone tires in warmer climates abroad such as the Middle East and Southeast Asia as the heat exacerbated the tire defect. The incidence of tread separation on Ford SUV's prompted Ford to remove Firestone tires from its vehicles in these areas

over the protest of Firestone. By 1997, Firestone had released customer notification actions warning of tread separation in these countries, but "made no disclosure of either the defects or the overseas notification program to consumers in the United States."

By 1998, United States insurance companies began reporting the high numbers of highway deaths associated with Firestone tires to the NHTSA. In February 2000, the numbers of complaints soared after a Houston TV station reports the problem to the public. In April 2000, two months later, Firestone announced that it had completed a five-month study of its tires on Ford Explorers, which found produced no evidence of defects. Nonetheless, the NHTSA opened preliminary investigations into Firestone's tread separation problem in May based on 90 complaints.

On August 7, 2000, the NHTSA concludes that at least 46 deaths are the possible result of tread separation on Firestone tires, prompting national retailers to begin suspending sales of the defective tires. Finally, on August 9, 2000, following this announcement, Firestone announced a Voluntary Safety Tire Recall Reimbursement Program for three models manufactured at the Illinois plant - Firestone's first public disclosure that there was any possible problem with any of its tires since it first learned of the tread separation problem in 1975.

Recalls and Reimbursement: August 2000-November 2001

Firestone initiated the first recall of 6.5 million of its tires on August 9. This announcement and that of a congressional investigation sparked 1,400 complaints to the NHTSA followed by warnings that an additional 1.4 million tires could be defective. Firestone "balked" at the possibility of expanding its recall to include these tires. Nonetheless, Firestone announced a Customer Satisfaction Program on September 12, under which it agreed to replace this new class of defective tires or reimburse consumers up to \$140.00 per tire for new tires if the consumer so requested.

The following year, the NHTSA concluded that additional models of Firestone tires, the Wilderness AT tire in size P235/75 R15 and P235/70 R16 manufactured before 1998, were defective as well. Thus, Firestone announced a second voluntary recall of 3.5 million more tires on the same date - the first time that it disclosed to the public the dangers of the Wilderness AT tires to the public. Following this second recall, the federal government officially closed its investigation into Firestone tires.

b. The AG's

Sparked by the Firestone's initial recall in August 2000, the Attorneys General Multi-state Working Group began molding an investigation, settling on Tennessee as the lead office for the investigation. Like many multistate litigations, the states coordinated resources and worked by conference and committee. By the end of August, the Working Group had issued the first round of Civil Investigative Demands and began contacting the NHTSA and private bar to propose cooperation in the investigation. However, the Group met with limited cooperation, as the NHTSA was unwilling to share information and the private bar was unenthusiastic about doing so. Proceeding alone did not hinder the attorneys general, as they catalogued an armory of Firestone violations to give them the leverage for a generous settlement.

The Verified Complaint filed in Tennessee along with the Settlement on November 7, 2001 relied on the provisions of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §47-18-101, et. seq., and charged Firestone with thirty-two violations of law stemming from various misrepresentations it had made to consumers in the sale and distributions of its tires. These charges matched the legal violations with the numerous specific misrepresentations that Firestone had made to its consumers including misrepresentations related to the suitability for intended use, durability, and mode of failure of the tires as well as mileage warranties of the tires.

The Complaint also addressed Firestone's mishandling of its recall and reimbursement programs, highlighting Firestone's practice of giving "consumers incorrect, confusing or misleading information regarding the availability of program tires and the costs associated with obtaining such tires." Specifically, Firestone charged some customers for installation of the tires or "road hazard warranties," told other customers that replacement tires were unavailable and that they would have to upgrade to a more expensive tire, and replaced the tires of some customers with tires that were not "equivalent" to the recalled tires. Firestone also violated consumer protection laws in engaging in a "silent warranty" practice whereby it instructed consumers to bring in their vehicles for non-tire related purposes with the intention of inspecting the tires to determine whether to replace them. Finally, Firestone failed to pay the promised restitution to many consumers and failed to notify consumers regarding their right to receive restitution in many cases.

For each of the thirty-two violations, the Attorneys General requested a fine of not more than one thousand dollars. Additionally, exercising its power of *parens patriae*, the Group requested that the court permanently enjoin the "deceptive and unfair practices" that Firestone had been engaging in.

c. The Settlement

Firestone's violations of Tennessee law were clear and easily shown. Moreover, the egregious nature of the violations promised to make additional punitive damages attractive to any judge or jury. However, given the innumerable instances of each violation over the decade or more that Firestone had failed to disclose possible defects, the potential liability that Firestone faced would easily push the company out of business costing the states valuable jobs and competition in the tire market. Based on these concerns, the Working Group prioritized compensation over punishment. This decision reflects the particular power of the attorneys general to incorporate and balance all relevant concerns when formulating requested relief, as opposed to the power and motivation of the plaintiff's bar, which is primarily to maximize the monetary value of judgments and settlements.

The Group's goal of compensation put a critical focus on the financial health of the company; a settlement would be useless to consumers if it forced Firestone into bankruptcy. Furthermore, as stated above, driving Firestone into bankruptcy would have repercussions beyond corporate stockholders and investors: jobs would be lost, and a valuable product and market position would be forfeited. With this in mind, the Working Group held "hearings" to determine the critical numbers that Firestone could bear, assessing Firestone's financial abilities from two days of presentations verified by the Group's own accountants. Based on this assessment, the Attorneys General and Firestone negotiated a settlement that balanced the goals of the Working Group and the financial health of the company.

The Agreed Final Judgment, settled on November 7, 2001 and released the following day awarded the moderate amount of 41.5 million dollars to the fifty states. In addition to distributing \$500,000 of the settlement to each of the states, Washington DC, Puerto Rico and the Virgin Islands, 5 million dollars would go to the Working Group for a publicity campaign on tire safety and 10 million dollars would compensate the Group's attorneys' fees.

In addition to monetary compensation, the settlement permanently enjoins Firestone from offering any tire for sale that is known to be unsafe or make any false claims relating to the safety of its tires. Firestone is also prohibited from making any misrepresentations relating to the recall process, Customer Satisfaction or Enhancement Programs, guarantees and warranties. The settlement also required Consumer Education Programs to be provided by Firestone, put monitoring bodies in place through a Chief Compliance Officer within Firestone Inc., whom the Attorneys General will have full access to and designed penalties for any failure to comply with the Judgment.

While the Judgment seemed to represent the best possible outcome for the both parties in terms of compensation and prohibiting further violations, the Working Group had secured another benefit in its agreement: access to Firestone's knowledge of the Ford's involvement in the tread separation damages. Paragraph nine of the Agreed Final Judgment, entitled, "Full Cooperation in any Related Investigations or Lawsuits" gave the Attorneys General the golden hook to an even bigger catch. Under this provision, all agents of Firestone were required to cooperate in its investigation of "unfair and deceptive practices allegedly committed by other individuals and/or business entities relating to rollover incidents involving sport utility vehicles equipped with Defendant's Tires." With this weapon, the Attorneys General, focused their investigation on the deeper pockets of Ford.

IV. The Ford Case

a. The Story The Battle with Firestone: 1989-2000

Ford's own battle with tread separation began nearly almost fifteen years after Firestone's when a research lab hired by Ford reported the problem on Ford vehicles with Firestone tires, prompting Ford to begin an investigation in 1992. By 1997/98, complaints of tread separation on Ford Explorers throughout the Middle East had pushed Ford to direct Firestone to develop nylon caps to protect tires in hot climates, put into the market in early 1999. By August 1999, Ford, recognizing the incurable dangers of tread separation removed all Firestone tires from its vehicles in the Middle East over protest from Firestone. Six months later, Ford replaced its Firestone tires in Malaysia, and three months after that, in May 2000, replaced tires in Venezuela, despite Firestone's continuing complaints.

Ford's American market became jeopardized on May 10, 2000, when the

NHTSA requests information from Ford about the use of Firestone tires on its vehicles. Studies performed by the NHTSA had revealed that of the 6012 total reported incidents of defective Firestone tires, 3217 had occurred on Ford vehicles, over 50%. Furthermore, Ford vehicles were involved in 471 of the 628 crashes resulting from tread separation, 92 of which resulted in fatalities of the total 114 fatal crashes, nearly nine times as much as any competing vehicle that utilized Firestone tires. Finally, of the 346 rollovers associated with Firestone tires, 306, roughly 89%, were on Ford SUV's. On August 1, citizens consumer groups appealed to Ford to recall the SUV's that have been responsible for these dire statistics.

Rollovers and Recalls: August 2000-May 2001

Following the NHTSA announcement and initial recall of Firestone tires on August 9, 2000, Ford launched a further investigation based on the high incidence of tread separation on Ford SUV's. In swelling media attack that followed both companies, Ford suspended production of its SUV's that carry Firestone tires at three plants on August 21 to replace 70,000 tires. The very same day, Ford began releasing television ads to reassure customers of the safety of its vehicles.

Throughout the fall, as both the House and the Senate criticized Ford for its non-disclosure, Ford began an investigation into the replacement of every Firestone tire on its vehicles. At the conclusion of its investigation and following numerous congressional hearings, Ford announced a recall of thousands of its sport utility vehicles on May 22, 2001 to replace nearly 13 million Firestone tires. That day Firestone ceased selling tires to Ford, ending the 95-year business relationship between the two companies. In the following months, Firestone made four separate appeals to the NHTSA to open a safety defect investigation into Ford Explorers. While the NHTSA did investigate some of the replacement tires utilized by Ford after the May recall, on February 12, 2002 it released its final statement on the matter, declining to open such an investigation and thus closing the federal inquiry into Ford SUV's. Thus, as with Firestone, the NHTSA had failed to command any real change in Ford's practices.

b. The Private Bar Pounces

The NHTSA was not the only agent monitoring Ford's role in the Firestone debacle. The private bar, keeping a keen eye on Ford's deeper pockets filed a rash of lawsuits against both Ford and

Firestone, attempting to cash in on the possible link between the companies in this "conspiracy." On January 9, 2001, both Ford and Firestone settled with a Texas family for between \$25 and 35 million, one of the largest settlements in the automobile industry. In July 2001, Ford settled another case for \$22 million in California and on August 25, Firestone settled a key lawsuit with a family in Texas for \$7.5 million. Ford had settled with that plaintiff for \$6 million earlier in litigation. Throughout the summer and fall of 2001, Firestone and Ford had encountered hundreds of lawsuits, nearly all of which had been settled out of court.

Although private attorneys had made clear gains in individual cases, no success could guarantee that either company would not repeat its behavior in the future. Nor could the scattered successes guarantee that all consumers harmed by either company be compensated in any meaningful way, and certainly not in any efficient way. Recognizing this flaw, attorneys from twenty-seven states had filed a Master Complaint for a class action lawsuit against both companies on January 2, 2001 attempting to certify two nationwide classes for consolidated litigation. However, after nearly a year, the Seventh Circuit ruled that this attempt violated basic principles of choice of law, reversing the district court's opinion and denying class certification on May 2, 2002. Although the plaintiffs has requested certification by the Supreme Court, as of now, a private nationwide case remains unlikely.

c. The AG's

The Attorneys General, utilizing their spoils in the Firestone settlement opened their own inquiry into Ford's culpability, commencing an investigation in early 2001 concurrent with the Firestone investigation. In their usual fashion, the Attorneys General ensured that the multistate investigation of Ford was swift and subtle. The states alleged that Ford failed to warn consumers of the dangers of the Firestone tires that came standard with Ford SUV's and that Ford continued to use the dangerous tires after it had knowledge of the defects. With little publicity, the Multistate Working Group was able to negotiate a settlement with Ford that filled the gaps left by the NHTSA and hundreds of plaintiff's lawyers around the country. Furthermore, the Working Groups was able to achieve this without the expensive procedural hurdles involved in traditional litigation, filing its Complaints and Verified Judgments on the very same day.

d. The Settlement

The Attorneys General announced the Ford settlement on December 20, 2002, revealing that Ford would be paying \$51.5 million to the fifty states. The states will use \$30 million to launch an extensive public education campaign, \$5.6 million to pay the investigation fees of the Working Group and will divide the remaining \$15.9 million among the fifty states, Washington, DC, Puerto Rico and the Virgin Islands, with each state receiving \$300,000.

While the monetary success of the Working Group is commendable, as in the Firestone settlement, the real strength is in the conditions that the Group was able to attach to the settlement. The settlement includes a number of provisions to improve consumer safety that focus on Ford's representations to the public. Ford is now prohibited from misrepresenting the "cargo capacity, safety and handling characteristics of its SUV's." This ban refers specifically to Ford's use of the term "car-like" to describe its SUV's. Furthermore, Ford must provide the truth about any recall or inspection that it recommends. The settlement also required that Ford have "reliable scientific evidence to substantiate any representations about vehicle safety, performance or durability." In addition to regulating Ford's statements to the general public, the settlement also mandated that Ford provide additional safety information about cargo capacity and handling to customers who purchase its SUV's, information available in Spanish as well if there has been any advertising in Spanish. Finally, the settlement required that Ford comply with all state and federal regulations addressing SUV safety.

V. Conclusion

The Firestone and Ford settlements obtained by the Attorneys General represent the potential benefits of multistate litigation. Although the exact numbers of tire-related deaths are difficult to uncover, the decline in prominence of the fatal accidents indicates the decline in frequency. Unhindered by a "client" seeking exclusively monetary compensation, the Attorneys General were able to incorporate the policy aspect of their role and design settlements to maximize the benefit to the public in meaningful ways. The Multistate Working Groups could balance the value of keeping significant American suppliers and employers in business against the needs of the consumer population. The settlements were able to deter future violations of state law in a way that private bar could not and that proved more binding than simple litigation.

The settlements are, in effect, litigation with guaranteed enforcement.

While this statement may raise the hairs of many federalists and opponents of multistate litigation, in crafting these settlements, the Attorneys General, as stated above, have done nothing more than exercise their own delegated powers. Yes, they have chosen to exercise it in a creative and innovative way, but even the staunchest of federalists must recognize that the very goal of the constitutional structure was to provide flexibility and adaptability. In orchestrating a swift, efficient and effective settlement that cut across two industries concurrently, the Attorneys General have proven to be perhaps the most adaptable arm of the government to date. This is behavior that should be encouraged, not squashed.