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LIKE MIGRATORY BIRDS: LATIN AMERICAN CLAIMANTS IN U.S. COURTS AND THE FORD-FIRESTONE ROLLOVER LITIGATION

Manuel A. Gómez[*]

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I. INTRODUCTION

Among the many things for which the American legal system has become distinctive, worth mention is the handling of collective litigation. The different devices adopted in the United States ("U.S.") to process large scale litigation and complex cases certainly have no equal in other countries.[1] A variety of mechanisms like class action, multi-district litigation, formal consolidation, informal aggregation and bankruptcy[2] have permitted American courts to respond to the emergence of cases involving large-scale accidents and disasters, financial fraud, product liability[3] and other litigation involving hundreds – or even thousands – of claimants, several defendants, and very complicated issues.

In a time when numerous American corporations manufacture, market and distribute their products, offer their services, and engage in diverse business practices throughout the world, they have also become a target of many lawsuits arising from the injuries, damages and economic losses caused by their products, and U.S. courts have become the likely forum to process these suits.[4] The cases that capture the most attention are those

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1. *See* Symposium, *Implied "Consent" to Personal Jurisdiction in Transnational Class Litigation*, 2004 MICH. ST. L. REV. 619, 625 ("In particular, the class action device is unique; most foreign nations do not have a similar procedure."); Antonio Gidi, *Class Actions in Brazil – A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 313 (2003) ("So far however, Quebec and Brazil are the only civil law systems that have developed a sophisticated system of class action suits."); Thomas D. Rowe, Jr., *Debates Over Group Litigation in Comparative Perspective: What Can We Learn From Each Other?*, 11 DUKE J. COMP. & INT. L. 157, 159 (2001) ("Some forms of class actions have been adopted in a few Canadian provinces, in Australia, and in Brazil.").

2. Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. Comp. & Int. L. 179, 182 (2001) [hereinafter *Revisiting the Monster*].

3. *Id.* at 183 (Even though "mass torts arose in the United States in an era when class certification generally was not deemed appropriate for such litigation.").

4. WARREN FREEDMAN, PRODUCT LIABILITY ACTIONS BY FOREIGN PLAINTIFFS IN THE UNITED STATES 1 (Kluwer Law & Tax'n 1988) ("The United States is indeed the mecca or El Dorado for injured plaintiffs because the American tort system is geared to full recognition of the rights of consumers. The rule of liability is liberal; there is procedural ease in serving defendants,

related to accidents and others related to personal injury and property damage.[5]

One of the advantages of the American legal system is that it offers a means of collectively prosecuting cases – through class action and other aggregation – that are not feasible to be tried on an individual basis.[6] Most Latin American countries, aside from Brazil,[7] do not have a system in place to deal with collective actions. As a result, some Latin American claimants try to find ways of bringing their cases to American courts. Even though there is no data available to show how many foreign claimants have been involved in collective litigation in U.S. courts in the last decade, the presence of foreign citizens as parties in complex cases is becoming more common, but interestingly enough, not much attention has been given to them.[8]

This article represents an effort to understand some aspects surrounding the involvement of foreign claimants in collective litigation in the U.S. through the study of the Ford-Firestone rollover litigation. This case exhibits features that today are common to most product liability claims: a product designed or fabricated in the U.S. by an American corporation was marketed overseas, accidents occurred in other countries (as well as in the U.S.), and foreign victims chose to bring their claims to American courts instead of processing them in the jurisdictions where the accidents took place. Conversely, the defendant corporations have put all their efforts in having the cases dismissed in the U.S. and sent back to be tried in their countries of origin.

Of particular interest are the strategic reasons why Latin American disputants decided to file their claims in the U.S. instead of their countries of origin – where the accidents occurred – and the obstacles that they faced as well as the possible incentives of the American defendant corporations to prefer litigating in other fora. Interviews with several leading plaintiff and

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in obtaining pre-trial discovery, and in promoting the jury system to answer questions of fact, *inter alia*, all of which characteristics appeal to plaintiffs everywhere.").

5. Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 833, 833 (2001) ("For example, massive lawsuits against manufacturers of asbestos, dietary supplements, medical devices, pharmaceutical products, and tobacco are front-page news.").

6. However, the public image of class litigation tends to be negative. *Revisiting the Monster*, *supra* note 2, at 180. ("Some believe that American courts are overrun with class litigation – a phenomenon that is about to inundate the courts of other countries as well. Many ordinary Americans seem to think that class actions are a new-fangled litigation device invented by greedy plaintiff attorneys.")

7. *See* sources cited *supra* note 1 and accompanying text.

8. Symposium, *supra* note 1, at 619 ("Surprisingly little attention has been paid to the special problem of non-U.S. class members' participation in U.S.-situated class litigation.").

defense attorneys provided some of the most valuable sources of information about some critical aspects of the case and about the strategic reasons taken into account by Venezuelan claimants who bring their claims in the U.S..[9]

This article concludes that litigants, like migratory birds, travel north or south in search of an advantageous venue. Part II offers an overview of the origins and development of the Ford-Firestone rollover litigation, from the initial involvement of governmental agencies in the U.S. as well as in Venezuela, to the filing of claims in American courts and the collection under the Multi-District Litigation scheme. Part III describes the circumstances surrounding foreign claimants, from the initial filing of their lawsuits to the reasons why they chose to litigate in the U.S., the obstacles they faced, and conversely, the incentives for the defendant companies to litigate in Latin America. Part IV concludes that as has business itself, forum shopping, or seeking the most advantageous venue in which to try a case, has gone global.

II. THE FORD-FIRESTONE ROLLOVER LITIGATION: ORIGINS AND DEVELOPMENT

Ford Motor Corporation and Firestone, Inc.[10] had been doing business together in the automotive industry for nearly a century.[11] Over the years, Ford Motors sold many of its models with Firestone tires as part of its original equipment ("OE").[12] In 1990 Ford began to produce its Explorer

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9. All the interviews were done under the promise of confidentiality, so the names of the interviewees are omitted. Instead, the interviewees are identified with numbers, *e.g.*, Plaintiff Attorney #1, Plaintiff Attorney #2, and so forth.

10. Firestone, Inc. (originally, the Firestone Tire and Rubber Company) was founded in 1900 by Harvey Firestone in Akron, Ohio. The company was bought in 1988 by the Japanese tire maker Bridgestone Corporation, becoming as a result the world's largest tire and rubber company. Bridgestone Americas Holding, Inc., *A Brief History of Bridgestone Americas*, *at*: http://www.bridgestone-firestone.com/ about/index_history.asp?id=bfhistory (last visited Feb. 22, 2005).

11. Harvey Firestone and Henry Ford, two famous industrial titans of the early automotive industry, began their business partnership in 1906 when Ford partnered with Firestone to make tires for his cars. From that date on, Firestone would become Ford's main provider of tires. For a comprehensive history of the early years of the business relationship between Ford and Firestone, *see* BRINKLEY DOUGLAS, WHEELS FOR THE WORLD: HENRY FORD, HIS COMPANY, AND A CENTURY OF PROGRESS 738-739 (Penguin Books 2003); ALFRED LIEF, THE FIRESTONE STORY: A HISTORY OF THE FIRESTONE TIRE & RUBBER COMPANY 30-31 (McGraw-Hill 1951).

12. The original equipment market (OEM) is one of the two markets served by the tire industry. The other is the replacement market (RM). The OEM is a low-profit, but very important, market "because it provides large orders (and hence the scale) as well as the prospect for future replacement sales (car owners typically replace tires with the same original equipment

sport utility vehicle ("SUV") and equipped it with the Firestone fifteen-inch ATX tires.[13] The Explorer would become the most popular Ford SUV, selling more than three million units worldwide during the following ten years.[14] Approximately 60 million Firestone ATX, ATX II, and Wilderness Tires were sold worldwide.[15] But in the late 1990s the success story of the Ford/Firestone alliance was about to end as a result of the enormous crisis that resulted from hundreds of lawsuits brought all over the U.S. against both companies after the occurrence of rollover accidents involving Ford Explorers and allegedly faulty Firestone tires.

A. *The Origins of the Case*

One of the first steps toward the formation of a multimillion dollar case against Ford and Firestone was the 1998 report prepared by U.S.-based State Farm Insurance,[16] noting that Ford Explorer vehicles equipped with Firestone/Bridgestone's ATX, ATX II, and Wilderness AT tires had an unusual propensity to roll over and the tire belts to separate.[17] At that time, State Farm requested the intervention of the National Highway Transportation Safety Administration ("NHTSA"), but this agency did not become involved until 2000, when an investigation was launched after the filing of many claims by consumers.[18]

During the hearings held before the House Commerce Committee in September 2000, State Farm representatives expressed that their company's

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brand)." *See* Raghuram Rajan et al., *The Eclipse of the U.S. Tire Industry*, *in* NBER CONF. REPORT MERGERS AND PRODUCTIVITY 51-86 (Steven N. Kaplan, ed. 2000).

13. Kevin M. McDonald, *Don't TREAD on Me: Faster Than a Tire Blowout, Congress Passes Wide-Sweeping Legislation That Treads on the Thirty-Five Year Old Motor Vehicle Safety Act*, 49 BUFF. L. REV. 1163, 1171 (2001) [hereinafter *Don't Tread on Me*]. Even though ATX tires were the most common model, other tires such as the ATX II (introduced in 1995), and the Wilderness AT (introduced in 1996) were also part of the Explorer OE. *Id.*

14. *Id.* The Explorer would also become Ford's most profitable model, each sale representing $10,000 in gross profit and $4,000 in operating profit to the company. *Id.* at 1171 n. 31.

15. *Tire Recalls*, CBSNEWS.COM , *at* http://www.cbsnews.com/htdocs/tires/timeline.html (last visited Feb. 22, 2005).

16. *Bridgestone/Firestone Inc. Tire Recall: Hearing Before the Subcomm. on Com. Oversight & Investigations*, 106th Cong. (2000) (prepared statement of Samuel K. Boyden, Associate Research Administrator, State Farm Ins. Co.), *available at* http://www.statefarm.com/media/release/tires.htm#testimony [hereinafter *State Farm Testimony*].

17. Belt edge separation and belt-leaving-belt separation. This normally occurs "when the tread and one steel belt separate from the other steel belt." *See Don't Tread on Me*, *supra* note 13, at 1172.

18. Standards Enforcement and Defect Investigation; Defect and Noncompliance Reports; Record Retention, 66 Fed. Reg. 14 at 6533 (Jan. 22, 2001) (to be codified at 49 C.F.R. pts. 554, 573, and 576) [hereinafter *The NHTSA Report*].

main interest in promoting this investigation was the concern about safety issues, and described the many public policy initiatives of the company in this regard during the last forty years.[19] They also indicated that while State Farm is not a safety regulator, one of the top priorities of the company "is to promote improved vehicle and highway safety."[20]

However, in the Congressional hearing's transcripts, another possible interest, perhaps equally legitimate, but no doubt less altruistic, was revealed: State Farm has been, for many years, the nation's leading vehicle insurer "with 37 million policies and one out of every five cars insured."[21] As mentioned during the hearings, from 1991 to 1998, State Farm got an unusually large number of claims from accidents involving Ford SUV rollovers, which obviously represented an important financial burden for the company.[22] As a result, State Farm had a primary business interest in this issue, because if defects in the manufacturing of vehicles and tires were discovered, State Farm could seek compensation from Ford and Firestone, and perhaps lead policyholders to do the same instead of targeting insurance companies with their claims.

State Farm needed the help of regulatory agencies like the NHTSA to investigate the possible defects of vehicles and tires, so that if defects were found, State Farm could hold Ford and Firestone liable. Insurers are an interesting group who might have a stake in this litigation, since the occurrence of rollovers made them disburse significant amounts of money as a result of insurance policies' coverage.[23]

Accidents involving Ford Explorers equipped with Firestone tires were reported in the Middle East (Saudi Arabia) and South America (Colombia, Venezuela, Panama, and Ecuador).[24] In Venezuela, the Consumer Protection Agency ("INDECU") initiated an inquiry concerning 104 individual claims filed by the victims of accidents involving Ford Explorers

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19. Congressional hearings involved two State Farm employees, the Associate General Counsel, and the Associate Research Administrator. Both gave testimony before the House Commerce Committee Subcommittee on Telecommunications, Trade, and Consumer Protection and Subcommittee on Oversight and Investigations on September 6, 2000. *See State Farm Testimony, supra* note 16.

20. *Id.*

21. *Id.*

22. *Id.*

23. One of our interviewees mentioned that during 2002, some insurance companies tried to line up with plaintiffs, and worked to organize a class, but it did not seem to work. Apparently, no insurance company has filed a lawsuit so far, at least, at the federal level. Telephone interview with Plaintiff Attorney #1 (Mar. 25, 2003).

24. *NHTSA Investigating Failure Of Firestone Brand Tires, at* http://archives.cnn.com/2000/US/08/03/tire.investigation/ (August 3, 2000).

equipped with ATX and Wilderness Firestone tires.[25]

On August 31, 2000, as a result of an extensive research, INDECU concluded that Ford and Firestone withheld critical information to Venezuelan consumers about certain defects in Ford Explorers as well as in Firestone ATX and Wilderness tires.[26] The report suggested such defects to be the cause of the accidents.[27] Consequently, INDECU ordered Ford to recall Explorer vehicles and replace their suspension systems as well as the Firestone tires that were installed in them.[28] Firestone was ordered to recall the models of tires involved the accidents.[29] As for those who had already suffered harm or had lost their lives in accidents involving Ford Explorers and Firestone tires, INDECU recommended the filing of legal actions in courts.[30]

The case started to get public attention,[31] prompting the Venezuelan Congress to appoint a Commission to investigate Ford and Firestone.[32] Through these actions, the Venezuelan government threatened to impose administrative sanctions against Ford and Firestone.[33] The most severe proposed sanction consisted of banning the sale of Ford vehicles in Venezuela, which would also have direct effects on Ford's South American

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25. Instituto para la Defensa y Educación del Consumidor y del Usuario (INDECU), *Informe del INDECU entregado a la Fiscalía General de la República* [Report submitted to the General Attorney's Office], at 1(2000) [hereinafter *The Indecu Report*].

26. *Id.* at 2.

27. *Id.* at 5.

28. The prior year, Ford had voluntarily replaced the tires of 6,768 Explorer SUV sold in Saudi Arabia. In February 2000, Ford did the same in Malaysia and Taiwan, but Firestone denied any defect in its tires. Association of Trial Lawyers of America, *Firestone/Ford Fiasco Timeline & Internal Decisions, at* http://www.atla.org/homepage/firereca.pdf (last visited Feb. 15 2005).

29. At about that same time, Firestone started to recall ATX tires in the U.S. but the company insisted that it was part of a customer's satisfaction program, and not as a result of any defect in the tires. *See Zeroing In On The Explorer*, CBSNEWS.COM *at* http://www.cbsnews.com/stories/2000/08/02/national/main221110.shtml (Aug. 2, 2000).

30. The Indecu was enjoined from imposing on Ford and Firestone other sanctions than fines for violating consumer rights. According to the Venezuelan Consumer Protection Act, any action seeking compensation of damages has to be pursued through courts. *See* LEY DE PROTECCION AL CONSUMIDOR Y AL USUARIO [LPCU] [*Consumer and User Protection Act*] art. 142, 152 (Venez.).

31. *See Ford y Firestone en el Banquillo* [Ford and Firestone on the accused's bench], PRODUCTO ON LINE, *at* http://www.producto.com.ve/204/notas/ford.html (last visited Feb. 15, 2005); *Informe Ford-Firestone quedó para Septiembre* [report Ford-Firestone left for September], NOTITARDE.COM, *at* http://historico.notitarde.com/2002/08/09/economia/economia3.html (Aug. 9, 2002).

32. Comision Permanente de Administracion y Servicios Publicos de la Asamblea Nacional, *Informe sobre el caso Ford-Firestone* [Report on the Ford-Firestone case] at 2 (2002) [hereinafter *The National Assembly's Report*].

33. *Id.*

market.[34] After intense negotiations, Ford and Firestone reached a settlement with the regulatory agencies avoiding the sanctions.[35] Even though oriented to protect the public interest,[36] none of these governmental actions was intended to compensate those who had already suffered physical harm or the relatives of those who were killed in accidents involving Ford Explorers and Firestone ATX and Wilderness tires.[37] Victims sought an economic compensation, and even though the steps taken by governmental agencies helped their case, and perhaps created pressure on Ford and Firestone, it did not fulfill their expectations.

About the same time, the U.S. House Commerce Committee[38] initiated an extensive inquiry, which "determined that NHTSA could have detected the problems with the tires sooner if it had obtained reports about the tires' problems in a timelier manner."[39] A direct result of this investigation was the drafting and implementation of The Transportation Recall Enhancement, Accountability, and Documentation ("TREAD") Act.[40] The TREAD Act, established a series of provisions requiring vehicles and parts manufacturers: (i) to report periodically to the NHTSA information about potential safety recalls,[41] (ii) to devise a plan "that prevents replaced tires from being resold for use on motor vehicles,"[42] (iii) to "advise NHTSA of foreign safety recalls and other safety campaigns."[43] It also increased civil penalties for violations of the vehicle safety law and established "criminal penalties for misleading the Secretary [of Transportation] about safety

34. The imposition of such a sanction would be particularly damaging to Ford Motor Company, due to its important share in the South American automotive market (69.7% of the total volume of vehicles). *Ford y Firestone en el Banquillo*, *supra* note 31.

35. Interview with Defense Attorney #2 in Caracas, Venez. (Feb. 13, 2003).

36. LEY DE PROTECCION AL CONSUMIDOR Y AL USUARIO [LPCU] [*Consumer and User Protection Act*] art. 1 (Venez.).

37. In fact, pursuant to the LPCU, the Indecu can only impose administrative sanctions against those who breach any of its provisions. Any claims seeking compensation for injuries or damages, need to be filed separately in court. *See id.*

38. *Ford Motor Company's Recall of Certain Firestone Tires: Hearing Before the Subcomm. on Com., Trade, & Consumer Protection & Oversight & Investigations of the Committee on Energy & Com. House of Representatives*, 107th Cong. 107-45 (2001) [hereinafter *2001 Congressional Hearing*].

39. *Id.*

40. Transportation Recall Enhancement, Accountability, and Document ("TREAD") Act, Pub. L: 106-414, 114 Stat. 1800 (2000) (codified in 49 U.S.C.). For a comprehensive analysis of the TREAD Act *see* McDonald, *supra* note 14; *see also* Kevin M. McDonald, *Separations, Blow-Outs, and Fallout: A Treadise on the Regulatory Aftermath of the Ford-Firestone Tire Recall*, 37 J. MARSHALL L. REV. 1073 (2004).

41. *See* 49 U.S.C. § 30166 (2000).

42. *See* 49 U.S.C. § 30120(d) (2000).

43. *See* 49 U.S.C. § 30166.

defects that have caused death or injury."[44] Finally, it gave extensive powers to the Secretary of Transportation to conduct rulemaking actions in order to improve safety standards for vehicles and tires.[45]

B. *The Litigation Starts*

Soon after the first reports suggesting possible defects in Ford SUVs equipped with Firestone tires, plaintiffs started filing lawsuits in different state and federal courts throughout the U.S..[46] The majority were personal injury claims from victims or their relatives, but others were only related to the apparent economic loss that Ford SUV owners had suffered because of an alleged decrease in the value of their vehicles.[47]

One of the most interesting aspects is that many of the lawsuits involved foreign claimants – the majority from Venezuela[48] – who brought legal actions to U.S. courts instead of filing them in the countries where the accidents or losses occurred.[49]

Almost immediately after the INDECU issued its report on August 31, 2000 concluding that Ford and Firestone had intentionally conspired against consumers[50] and urging owners of Ford vehicles and Firestone tires to file lawsuits against both companies,[51] Venezuelan claimants began initiating legal proceedings.[52] The occurrence of numerous accidents in other countries helped the U.S. plaintiffs' bar build its case based on the idea that Ford and Firestone conspired to conceal the dangers of their products, therefore causing an enormous harm to consumers.[53] Instead of filing

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44. *See* TREAD Act § 5(b).

45. *See* TREAD Act § 15.

46. U.S. courts started issuing protective orders as a result of accidents involving Ford Explorer SUVs as early as 1995, but the bulk of the litigation occurred in 2000. *See Firestone/Ford Fiasco Timeline & Internal Decisions*, *supra* note 28.

47. Plaintiff's Second Amended Class Action Complaint at 3, Benford v. Bridgestone Corporation and Ford Motor Company (N.D. Ill. 2000) (No. 00 C 5406) [hereinafter Benford class action].

48. Forty-six deadly accidents were reported in Venezuela, making it the country with the highest number of fatalities outside the U.S. where one hundred and one people had lost their lives in accidents involving Ford Explorers with Firestone Tires. *See Firestone, Ford threatened with Venezuelan legal actions*, CNN.COM, *at* http://cgi.cnn.com/2000/WORLD/americas/09/30/venezuela.tire.deaths/ (March 27, 2000).

49. Based on both a comprehensive review of Venezuelan court filing reports and interviews with the several attorneys from both sides, the author verified that aside from the claims filed with the Consumer Protection Agency, no legal actions were initiated in Venezuelan courts.

50. *The Indecu Report*, *supra* note 25, at 9.

51. *Id.*

52. Telephone interview with Plaintiff Attorney #3 (Mar. 15, 2003).

53. *Id.*

lawsuits in their own country, Venezualan victims and their families contacted U.S. law firms through their local counsel, and individual actions were brought on their behalf.[54] During this period, for example, at least ten lawsuits were filed in the Southern District of Florida.[55]

In other cases, Venezuelan counsel devised sophisticated methods of organizing groups of victims, by screening the cases, gathering and organizing potential evidence, and then classifying the victims according to the seriousness of the harm or loss, the amount of the claim and other criteria.[56] These "packages" of cases were then referred to a U.S. plaintiff firm in be filed and tried in federal courts. This method was used to prepare the first class action involving foreign claimants, filed at the District Court for the Northern District of Illinois and then transferred to a Multidistrict Litigation ("MDL") judge.[57] Class actions and individual lawsuits involving only U.S. citizens were also filed in both federal and state courts. In total, approximately two hundred foreign cases were filed in federal courts and became part of the MDL docket.[58]

During this first stage Ford and Firestone made efforts to keep court cases at a very low profile and the media coverage at a minimum. The two companies began to settle most of the domestic cases but were reluctant to do so with the ones involving foreign claimants,[59] on the apparent grounds that settling these actions could be interpreted as an admission of guilt and used against Ford and Firestone in pending criminal investigations involving their executives in Venezuela.[60]

C. *The Transfer of Cases by the Panel of Multidistrict Litigation*

By October 2000, there were at least sixty-three actions initiated in thirty different federal courts,[61] all related to alleged defects in Ford

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54. *Id.*

55. Interview with Plaintiff Attorney #4 in Caracas, Venez. (Jan. 22, 2003).

56. A common way of organizing plaintiffs consisted in forming groups of consumers under the veil of civil associations (*asociaciones civiles*), which, under Venezuelan law [C.C. art. 19], may initiate legal actions on behalf of its members. The most common group formed was the *Asociacion de Propietarios de Ford Explorer* [Association of Ford Explorer owners]. Interview with Plaintiff Attorney #2 in Miami, Fla. (April 2, 2003).

57. Interview with Plaintiff Attorney #4 in Caracas, Venez. (Jan. 28, 2003).

58. Telephone Interview with Plaintiff Attorney #1 (Jan. 10, 2003).

59. *See supra* note 49.

60. Interview with Defense Attorney #1 in Caracas, Venez. (Jan. 25, 2003).

61. *In re* Bridgestone/Firestone, Inc., ATX, ATX II, and Wilderness Tires Prods. Liab. Litig., No. 1373, 2000 U.S. Dist. LEXIS 15926, at *1 (J.P.M.L. Oct. 24, 2000) (transfer order) [hereinafter *MDL transfer order*] (The Southern District of Florida had ten cases and the Middle District of Tennessee had six cases. The Northern District of Illinois and the Southern District of

vehicles equipped with Firestone tires. At least three of them were filed as class actions,[62] but only the Benford class action involved foreign claimants.[63] The Judicial Panel on Multidistrict Litigation ("MDL Panel") received petitions to transfer these actions to one Court for consolidated pretrial proceedings pursuant to 28 U.S.C. §1407.[64]

Even though both parties generally favored the transfer and collection of cases by the MDL Panel, defendant Ford Motor Company played the most active role in consolidating the litigation into one federal court by requesting the centralization of most of the actions in the Central District of Illinois.[65] In addition to supporting the transfer of cases by the MDL Panel, the defendants tried to move actions pending in state courts to federal courts, but that tactic was not successful.[66] When screening the cases to be transferred, the MDL panel remanded four of the class actions to state courts[67] on the grounds that no federal question was involved in any of them.[68]

Objections against the MDL came from some plaintiffs who contended either "that actions removed by Firestone or Ford from state to federal court should be excluded from transfer because there [was] no federal jurisdiction,"[69] or "that actions brought on behalf of persons injured or killed in accidents related to the defective tires should not be centralized or

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Texas both had five cases. The Middle District of Florida, the Southern District of Illinois and the Eastern District of Louisiana each had three cases. The following districts had one case each: the Central District of Illinois, the District of Maryland, the District of Massachusetts, the District of New Mexico and the Southern District of Ohio all had two cases within their jurisdictions. The Western District of Arkansas, the Southern District of California, the Middle District of California, the Northern District of California, the District of Columbia, the Western District of Louisiana, the Middle District of Louisiana, the Eastern District of Michigan, the Southern District of Mississippi, the Western District of Missouri, the District of New Jersey, the Eastern District of Oklahoma, the Western District of Oklahoma, the District of Rhode Island, the Eastern District of Texas, the Western District of Texas, the Northern District of Texas and the Southern District of West Virginia).

62. *Id.* at 2 (In the Middle District of Tennessee, the Louridas class action involved only U.S. citizens. In the Northern District of Illinois, the Benford class action involved both U.S. and foreign citizens. In the Southern District of Texas, the Stallone class action, involving only U.S. citizens, was originally filed in state court, but was later moved to federal court).

63. Benford class action, *supra* note 47, at 1.

64. *MDL transfer order*, *supra* note 61, at 2.

65. Forty-seven cases were consolidated. *Id.*

66. Telephone interview with Defense Attorney #1 (Feb. 12, 2003).

67. *MDL transfer order, supra* note 61, at 3.

68. In spite of the defendants' insistence in trying to move actions from state to federal courts, the MDL judge continuously rejected such petitions or remanded to state courts those cases that could not get into the MDL. Plaintiff Attorney #4, *supra* note 57.

69. *MDL transfer order*, *supra* note 61, at 2.

should be centralized separately from the other MDL-1373 actions."[70]

Those plaintiffs who supported the transfer request suggested different jurisdictions for the collection of cases: the Southern District of Illinois (six actions) and the Middle District of Tennessee (four actions).[71] Evidently, no strategy was followed by the plaintiffs' bar in regards to the transfer for MDL proceedings.

On October 24, 2000, the MDL Panel ordered the transfer of all federal court cases to a jurisdiction that no party had requested, the Southern District of Indiana, and appointed Judge Barker as the transferee judge to conduct pretrial proceedings.[72] The decision to select the District Court of the Southern District of Indiana as the MDL court was made by the judicial panel after considering "the range of locations of parties and witnesses in this docket and the geographic dispersal of constituent actions."[73]

In the decision to transfer the actions, the panel acknowledged "the pendency of more than 90 additional, potentially related actions pending in federal district courts,"[74] and anticipated its treatment as tag-along actions. By the end of 2003, approximately nine hundred federal cases were either transferred or filed directly in the MDL court, seven hundred involving domestic plaintiffs, two hundred foreign claimants,[75] and fifty class actions involving both types of claimants.[76]

D. *Class Certification*

Soon after the case consolidation, and as an effort "to prevent retransfer to the originating districts for decision on the merits,"[77] a group of U.S. plaintiffs filed a consolidated suit before the MDL judge and filed a motion requesting certification of a nationwide "hybrid" class pursuant to Federal

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70. *Id.*

71. *Id.*

72. *Id.* at 5.

73. *Id.* at 8.

74. *Id.* at 3.

75. The lead counsel for plaintiffs estimated foreign claims of $750 million in damages against Ford and Firestone. *See* Matthew Haggman, *Broward Jury Finds Against Bridgestone*, DAILY BUS. REV., Feb. 11, 1003, at A8. None of the informants could give a monetary estimate of domestic claims.

76. The MDL court did not classify the cases as domestic and foreign, but instead as subject or not subject to *forum non conveniens*' motions. Most foreign claims were filed as individual cases, and to the best of knowledge, the Benford class action is the one involving foreign plaintiffs. *MDL transfer order*, *supra* note 61, at 4.

77. *In re* Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig., 288 F.3d 1012, 1015 (7th Cir. 2002).

Rules of Civil Procedure 23(b)(2) and 23(b)(3).[78] This move represented an interesting shift in strategies, since the majority of the plaintiff bar was opposed to centralizing the federal cases.

The certification request was based on breach of warranty and unjust enrichment claims,[79] thus excluding personal injury and wrongful death claims. After partially granting plaintiffs' requests,[80] the district court certified the following two nationwide classes and sub-class, involving only domestic plaintiffs:[81]

1) Explorer Class: Current residents of the U.S. who owned or leased Ford Explorer SUV from 1991 to 2001;

Explorer Sub-class: Current residents of the U.S. who purchased, owned, or leased Ford Explorer SUVs that are or were equipped with Tires (as defined in the Tire Class) from 1991 to 2001;

2) Tire Class: Those who owned or leased vehicles equipped with any of six different types of Firestone Tires from 1991 to 2001.

The district court also decided, under Indiana choice-of-law rules, that Michigan law would apply to the class plaintiffs' claims against Firestone, while Tennessee law would apply to the cases against Ford, because these jurisdictions are the locations of defendants' corporate headquarters.[82]

Foreign claimants did not join the class certification efforts, since they considered it more convenient to litigate these cases on an individual basis.[83] However, some Venezuelan plaintiffs did file their claims as part of the Benford class action originally presented before the Circuit Court of the Northern District of Illinois, which entailed breach of warranty and financial loss claims instead of personal injury or wrongful death claims.[84]

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78. FED. R. CIV. P. 23(b)(2) & 23(b)(3).

79. Plaintiffs contended that defendants breached express and implied warranties because of failure to repair or replace defective products, and that selling defective Explorers and tires for the price of non-defective Explorers and tires unjustly enriched defendants. *In re* Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig., 205 F.R.D. 503 (S.D. Ind. 2001) (order granting motion for class certification and ruling on related matters).

80. *Id.* at 534.

81. *Id.* at 508.

82. *In re* Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig., 155 F. Supp. 2d. 1069, 1077 (S.D. Ind. 2001).

83. Plaintiff Attorney #1, *supra* note 58. However, more than half of the foreign cases were handled by two law firms and were originally filed in the same court of the Southern District of Florida, which for practical matters functions as if the cases were collected. Attorneys from the two firms that represent almost 140 victims serve as lead counsel for the plaintiffs. *Id.*

84. This case only involved financial claims. The plaintiffs argued that the propensity of the their respective SUVs to roll over, aside from posing a safety risk, diminished the market value of their SUVs, which translated to a financial loss. With respect to the Firestone/Bridgestone tires, plaintiffs argued that the defected tires made the tires obsolete, thus entitling plaintiffs the right to

III. FOREIGN CLAIMANTS IN U.S. COURTS: THE REASONS FOR THEIR CHOICE OF FORUM AND THE OBSTACLES THEY FACED

Even though foreign claimants did not represent the majority of plaintiffs in the Ford/Firestone rollovers litigation,[85] their presence played an important role in shaping the case. The occurrence of foreign accidents, and the way in which Ford and Firestone handled consumer complaints, reinforced plaintiffs' argument that defendants engaged in a conspiracy. The scandal resulting from the accidents in Venezuela also helped secure media attention[86] and was a key element during the Congressional investigation in the U.S.[87] In addition, the presence of foreign claimants affected the ways in which other plaintiffs and defendants devised their strategies for the case.

As previously noted, South American victims did not file lawsuits in their respective countries where the accidents occurred, but instead brought their suits directly in U.S. courts. However, when analyzing the adequacy of Colombia as an alternative forum, the MDL judge made reference to some verbal proceedings brought before Colombian civil circuit judges against Ford Motors de Venezuela, S.A.[88]

A. *Forum Non Conveniens Motion and its Outcome*

In December 2000, soon after the MDL docket collected a significant number of foreign cases, defendants sought dismissal on the basis of *forum non conveniens*, arguing that these lawsuits had to be tried in Venezuela and Colombia because the courts of those countries were adequate alternative fora.[89]

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recover the money invested in the original tire purchases. *See* Plaintiff's Second Amended Class Action Compl. at 3, Benford et. al. v. Bridgestone Corp. and Ford Motor Co., No. 00 C 5406 (N.D. Ill. 2000).

85. As mentioned previously, until mid-2001 the MDL court had approximately nine hundred cases in its docket, of which only two hundred involved foreign claimants. *Tire Recalls*, *supra* note 15. Only a handful of these foreign cases involving Mexican victims were tried in Texas and Tennessee's state courts. Plaintiff Attorney #1, *supra* note 58.

86. *Tire Recalls*, *supra* note 15; *see also* Plaintiff's Second Amended Class Action Compl. at 3, *Benford et. al.* (No. 00 C 5406).

87. *2001 Congressional Hearing*, *supra* note 38, at 5.

88. *In re* Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig., 190 F.Supp. 2d. 1125 (S.D. Ind. 2001). Verbal proceedings are indeed of judicial nature. Article 427 of the Columbian Code of Civil Procedure includes consumer protection actions for those that can be resolved through a summary oral trial. CÓD. PROC. CIV. art 427 (Col. 1993). The outcome of these proceedings is unknown; however, from their mention in the MDL opinion, it seems they may have been dismissed without resolution.

89. *In re Bridgestone/Firestone, Inc.*, 190 F.Supp. 2d at 1128-30.

The plaintiffs countered that, on the basis of certain treaty obligations, the Colombian[90] and Venezuelan citizens[91] were entitled to a presumption of convenience equal to that of resident or citizen plaintiffs. According to these treaties, the courts of both countries shall be open and free to the other's citizens "on the same terms which are usual and customary with the natives or citizens of the country in which they may be."[92]

After extensive discovery, on March 25, 2002 the MDL judge issued an order denying the motions to dismiss.[93] In her ruling, Judge Barker made clear that even though her order only referred to 121 Colombian and Venezuelan cases, "the parties should take its implications into account when determining their strategies in the remaining cases."[94]

In deciding the motion, the judge was guided by a two-step analysis: (a) to determine if Venezuela and Colombia were adequate alternative fora to hear the cases, and (b) to balance the various public and private interest factors to establish if their weight favored dismissal. Even though most of the arguments presented were common to Venezuela and Colombia, some differences were discussed. In any case, the outcome was the same for both: U.S. courts retained jurisdiction over the cases.[95]

B. *Strategy Behind Foreign Plaintiffs' Decision to Litigate in the U.S.*

In addition to the legal arguments already described, interviews with foreign plaintiffs attorneys revealed the strategy behind choosing to sue Ford and Firestone in the U.S. rather than Colombia or Venezuela.

1. Potential for Bigger Awards in the U.S.

The factor that seemed to have the most weight in deciding to bring a lawsuit to the U.S. was the potential to obtain a larger award. The general perception of the interviewees was that U.S. courts are more generous in awarding damages than their Venezuelan and Colombian counterparts.[96]

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90. Convention of Peace, Amity, Navigation, and Commerce, May 31, 1825, U.S.-Colum., 8 Stat. 306.

91. Treaty of Peace, Friendship, Navigation, and Commerce, June 20, 1836, U.S.-Venez., 8 Stat. 466.

92. *Id.* at 472.

93. *In re Bridgestone/Firestone, Inc.*, 190 F.Supp. 2d at 1126, 1156.

94. *Id.* at 1128.

95. *Id.* at 1156. An interesting analysis of the possible outcome of the forum non conveniens motions in this case was the focus of an article by Douglas A. Praw. Douglas A. Praw, *Venezuela v. Ford Motor Company: The Trend of Dismissing Mass Tort Cases on Grounds of Forum Non Conveniens*, 8 S.W. J. L. & TRADE AM. 373 (2001-02).

96. Some interviewees based this assertion merely on anecdotal evidence. Only favorable

But, even if awards were comparable, plaintiff attorneys still prefer to be compensated in U.S. dollars than in local currency, which is vulnerable to devaluation on a constant basis, most dramatically in Venezuela.[97] Litigating in the U.S. is a way to protect foreign plaintiffs against devaluation and maintain the current value of awards.[98] Conversely, this factor affects defendants negatively.

2. Possibility of Retaining U.S. Counsel on a Contingency Fee Basis

Another factor mentioned as an incentive to file lawsuits in U.S. courts was the possibility of retaining attorneys on a contingency fee basis,[99] which is generally prohibited in Latin America. According to one interviewee, virtually no victim has the substantial amount of money that is needed to prepare one of these cases.[100] Therefore, the only way to proceed is to agree on a contingency fee basis, and have the attorney cover all the expenses related to the trial. Under Venezuelan law, any agreement by which the attorney acquires a personal interest in the outcome of the case, including paying litigation expenses and calculating his or her fee as a percentage of the award, is illegal (*pacto de cuota litis*).[101] Attorneys fees in Venezuela are still considered as *honoraria*.[102] Some trial attorneys and clients frequently violate these rules and sign confidential agreements with their clients stipulating that the fees will be based on contingency. But this poses an enormous risk to the lawyer, because aside from jeopardizing his or her license to practice law, if a conflict regarding fees arises between the client and the lawyer, a court will deem the agreement invalid.[103] Such

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examples of generous awards obtained in the U.S. were mentioned to illustrate the advantage of this forum over those of Venezuela and Columbia. Plaintiff Attorney #3. *supra* note 50; Plaintiff Attorney #4, *supra* note 55. Additionally, none of the interviewees knew of any awards obtained from South American courts in personal injury cases that could be cited in comparison. Therefore, it is impossible to know whether the perception that U.S. courts are more generous than Venezuelan or Columbian counterparts reflects reality. However, for plaintiffs the advantages of litigating in the U.S. seems to be an uncontested truth.

97. "[T]he Venezuelan currency ('Bolivar' or 'Bs.') has devalued significantly during the last decade." Horacio E. Guiterrez-Machado, *The Personal Property Secured Financing System of Venezuela: A Comparative Study and the Case for Harmonization*, 30 U. MIAMI INTER-AM. L. REV. 343, 355 (1998).

98. Interview with Plaintiff Attorney #2 in Miami, Fla. (Feb. 5, 2003).

99. "The contingency fee is one of the defining characteristics of civil litigation in the United States." Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 267 (1998).

100. Plaintiff Attorney #1, *supra* note 58.

101. CÓD. CIV. art 1482 (Venez. 1982).

102. CÓD. ETICA DEL ABOGADO VENEZOLANO art. 39 (Venez. 1985).

103. Id., *supra* note 101.

limitation makes it difficult for clients to find lawyers willing to undertake their cases on a contingency basis in Venezuela.

3. No British Rule Regarding Award of Fees in the U.S.

Another incentive relates to the award of attorneys' fees. In contrast to what occurs in the U.S., where pursuant to 17 U.S.C. § 505, courts have the discretion of awarding the fees to the prevailing party, in Venezuela and Colombia – as in most civil law countries – attorneys' fees are awarded automatically to whoever prevails (in accordance with the so-called English, or loser-pays, rule).[104] Some interviewees think that the U.S. system relieves pressure on plaintiffs, therefore making plaintiffs' suits more attractive in the U.S.[105]

C. *Obstacles that Foreign Plaintiffs Face in the U.S.*

Interviewees in this litigation were also asked to discuss the possible obstacles posed against Venezuelan and Colombian parties by litigating in the U.S. Interestingly, the American attorneys interviewed felt the foreign plaintiffs had faced no serious obstacles, aside from the defendants' motion to dismiss on *forum non conveniens* grounds.[106] On the other hand, the Venezuelan attorneys involved in the case identified at least three practical obstacles, discussed below.

1. Little or No Involvement of the Client in Critical Decisions and No Direct Communication between the Client and U.S. Counsel

As earlier explained, in most foreign cases U.S. counsel were retained by the Venezuelan attorneys, and not directly by the clients. One of the interviewees acknowledged not having met in person most of his Venezuelan clients.[107] All communications are channeled trough the Venezuelan counsel, and important decisions are made using this system.[108] Managing cases in such a way requires a high level of transparency and coordination between the client and the attorneys. No conflicts have arisen so far in relation to this, but there is a constant concern when clients do not

104. CÓD. PROC. CIV. art. 274 (Venez. 1986); CÓD. PROC. CIV. art. 389 (Col. 1970).

105. For an interesting analysis regarding fee shifting in class actions, *see generally* Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 DUKE J. COMP.& INT'L L. 125 (2003).

106. Plaintiff Attorney #1, *supra* note 58; Plaintiff Attorney #3, *supra* note 52.

107. Plaintiff Attorney #4, *supra* note 55.

108. *Id.*

have a direct communication with the acting attorney.[109]

2. Foreign Cases are Screened More Heavily than Domestic Cases

One of our interviewees indicated foreign plaintiffs are screened more heavily than domestic plaintiffs because any lawyer who is willing to undertake a foreign case has to take into consideration the elevated costs of gathering and bringing evidence to the U.S. For example, some vehicles and tires had to be shipped from Venezuela in order to be available as evidence for the trial, and witnesses needed to be flown in.[110] In addition, because U.S. attorneys took these cases on a contingency fee basis, the screening process was very important. Plaintiff attorneys scrutinize these cases, and as a result "many of them have been rejected because the evidence was deemed weak, or the potential award to get for them [was not] worth the effort and the cost."[111]

3. U.S. Courts May Be Stricter in Analyzing the Facts

As indicated when describing the arguments presented by defendants to support their *forum non conveniens* motions, one of the factors that the court weighed as favoring dismissal was the appropriate exam of the "driving conditions to which the vehicles and tires were subjected."[112] In this respect the court acknowledged that local judges could assess these issues more accurately than a U.S. judge, even more if it involved allegations of tires and vehicles being improperly serviced, as well as negligent or reckless driving as causes for the rollovers.[113]

In their joint reply to the plaintiffs' response, Ford and Firestone expressed concern about the importance of viewing the accident scene for some cases.[114] They also stated that "it would be difficult for an American to imagine" conditions like "high speed driving over road conditions with steep shoulders with sharp drop-offs."[115] The MDL judge said that U.S. courts could instead employ videotapes, or aerial photographs to determine the real conditions of the roads and circumstances in which the accidents

109. *Id.*

110. Plaintiff Attorney #2, *supra* note 56.

111. *Id.*

112. *In Re* Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig., 190 F.Supp. 2d 1125, 1141 (S.D. Ind. 2002).

113. *Id.*

114. *Id.*

115. *Id.* at 1144.

occurred.[116]

As the cases will be litigated in the U.S., the trial courts will have to evaluate defendants' arguments about the victims' shared fault in their accidents, and most likely, will use different standards than Venezuelan or Colombian judges would. As the enforcement of traffic regulations in the U.S. arguably is stricter than in Venezuela or Colombia, the judge may be more severe than his or her Venezuelan or Colombian counterpart when analyzing the negligence of plaintiffs and their contribution to the accidents.

4. Potential Incentives for Defendants if Cases Were Tried in South America: The Two Faces of Judicial Inefficiency

One cannot conclude without commenting on the possible strategic advantages that Ford and Firestone would have if the cases were tried in Venezuela. As earlier mentioned, defendants dedicated important efforts toward the dismissal of cases by U.S. courts, under the argument that Venezuela and Colombia were the adequate fora to try those cases. Defendants argued that "these cases should be tried in the countries in which the accidents occurred, where the victims live, and where the witnesses and the investigative authorities are located."[117]

But are these the only reasons? One could assume that some of the obstacles that Venezuelan and Colombian victims face in their countries represent advantages to Ford and Firestone. If Venezuelan courts tend to give smaller awards than their U.S. counterparts, it clearly benefits the defendants because they can expect to pay less. If Venezuelan and Colombian attorneys cannot be retained on a contingency basis it may also benefit the defendants since only those victims who are able to cover trial expenses will sue. By the same token, the existence of the "British rule" system in regards to award of fees may deter risk-averse plaintiffs from filing actions in Venezuela and Colombia. In addition, there are other obstacles mentioned by plaintiffs (i.e. overall inefficiency of Venezuelan courts), which one would assume are negative for any disputant, but may turn out to be advantageous to some. Among the arguments presented to persuade the MDL court to retain jurisdiction over foreign cases, plaintiffs highlighted "the long delays plaguing the Venezuelan judicial system."[118]

Plaintiffs attorneys explained that according to the World Bank,

116. *Id.* at 1144-5.

117. *See generally In Re* Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig., 190 F. Supp. 2d 1125 (2002).

118. *Id.* at 1153.

Venezuelan courts had an estimated backlog of two to three million cases[119] and suggested that trying these lawsuits in Venezuela would be difficult, lengthy, and costly.[120] While the objective of plaintiffs is to obtain an "easy, expeditious, and inexpensive" resolution of their cases, defendants might want the opposite.[121]

Congested and slow courts may deter victims from filing their claims in Venezuela and force those who have already sued to settle their cases quickly in order to avoid costly trials. It is true that if a trial takes long, defendants will have to face that cost too, but that might not hurt their pocketbooks as much as it would the plaintiffs'.

IV. CONCLUSION

In sum, the reasons why litigants decide to use a particular forum depends heavily on important strategic considerations that go beyond the legal arguments presented in the courts. Disputants, as migratory birds, fly north or south in search of a place that offers the best shelter for them. It seems that Latin American plaintiffs have found it by flying north to the United States – whereas, not surprisingly, the American defendant corporations prefer to fly south to Latin America.

119. *Id.*

120. *Id.* at 1152.

121. *Id.*; Gulf Oil Co. v. Gilbert, 330 U.S. 501, 508 (1947) (among the important private interests to be considered in forum non conveniens analysis are "practical problems that make trial of a case easy, expeditious and inexpensive").