

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

In re: BRIDGESTONE/FIRESTONE, INC.,) Master File No. IP 00-9373-C-B/S
TIRES PRODUCTS LIABILITY LITIGATION) MDL NO. 1373
_____)
THIS DOCUMENT RELATES TO ALL)
ACTIONS)

**FIRST ENTRY REGARDING PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF
DOCUMENTS BY FORD MOTOR COMPANY ON GROUND OF WAIVER**

On February 12, 2002, the plaintiffs filed their Motion to Compel Production of Documents by Ford Motor Company on Ground of Waiver. An expedited briefing schedule was established for the motion, and pursuant to the magistrate judge's Entry for February 5, 2002, Ford produced the documents that are the subject of the motion to the magistrate judge for an in camera review. In the motion, the plaintiffs address three categories of documents, arguing that Ford has waived any privilege that may have been applicable to the documents in each category because of certain deficiencies in its privilege log entries for those documents. The magistrate judge has conducted an in camera review of one of the three categories addressed by the plaintiffs—those documents for which no author or recipient is identified as an attorney, and yet the attorney client (and/or the work product) privilege is claimed (“the Exhibit 3 documents”).¹ The focus of the magistrate judge's review of these documents was two-

¹The magistrate judge has not yet conducted an in camera review of the documents listed in Exhibits 1 and 2 to the instant motion. The issue in those two categories is whether has Ford waived any privilege as to those documents because it failed to identify by name all of the authors and/or recipients of the documents. The magistrate judge intends to examine each of the documents listed in those exhibits and rule on the plaintiffs' waiver issue; however, in light of the sheer number of documents involved, that is a very time consuming process. Accordingly, in the interest of reaching a final resolution of the privilege log issues as expeditiously as possible—and in allowing the plaintiffs to obtain any documents to which they are entitled as soon as possible—the magistrate judge has decided to issue her rulings on a rolling basis, as she completes her in camera review of each category.

fold: first, whether the information provided by Ford on its privilege log was reasonably complete and appropriate given the document in question; and second, whether the document was, in fact, privileged.

With regard to the first issue, Ford's obligations regarding the preparation and submission of a privilege log were clear:

A party who invokes any privilege also must, within five (5) days of the date the documents were due to have been produced, unless otherwise negotiated by the parties, provide to the opposing party a privilege log containing the following information for each document not disclosed:

- (1) the name and job title or capacity of the author(s)/originator(s);
- (2) the names of all person(s) who received the document or a copy of it and their affiliation (if any) with the producing party;
- (3) a general description of the document by type (e.g., letter, memorandum, report);
- (4) the date of the document; and
- (5) a general description of the subject matter of the document.

CMO Section X. As to the Exhibit 3 documents, while Ford's privilege log entries certainly are not in perfect compliance with the CMO, they are generally adequate and do convey both sufficient and accurate information regarding each document. Accordingly, as to the Exhibit 3 documents, the magistrate judge does not find any wholesale waiver of privilege by Ford.

Waiver issues aside, the Exhibit 3 documents were prime candidates for an in camera review, inasmuch as the plaintiffs are understandably skeptical regarding whether such a large number of documents which do not involve an identified attorney author or recipient are actually privileged, and yet it can be difficult, if not impossible, to convey all of the necessary information to support the privilege within the confines of a privilege log.

As an initial matter, there are three categories of documents which the magistrate judge was not

able to review. First, the following documents are completely or partially illegible: 7258, 7466, 8158, 8256. Ford shall provide legible copies of each of these documents to the magistrate judge **within two**

business days of the date of this Entry. Second, the following documents are completely or partially in Spanish:

7588	8128-29	8398	8480	8734	8864
7643	8134-35	8415	8502	8751	8866-67
7695	8147	8424	8524	8757-59	8891
7872	8193	8440-43	8567	8771	8892
7922	8220	8454	8658	8774	
7934	8277	8455	8674	8778	
8027	8343-44	8476-77	8710	8779	
8065	8352-53	8479	8718-19	8790	

Ford shall provide the magistrate judge with an English translation of each of these documents **within four business days of the date of this Entry** so that they can be reviewed. Third, it is not clear from the privilege log to what extent, if any, the following documents were produced to the plaintiffs in redacted form: 7046-7050, 7286, 7553, 7554, 7570, 7577, 7594, 7601, 7620, 7702, 7824, 8209, and 7826. **Within three business days of the date of this Entry**, Ford shall provide the magistrate judge with copies of these documents which clearly indicate what, if anything, was redacted from each document. Further, to the extent that any of these documents were withheld from the plaintiffs in their entirety, Ford shall consider whether it is possible to make appropriate redactions and produce them in redacted form.

Next, Ford has withdrawn its claim of privilege as to the following documents:

7107	7545	7698-7700	7873	8157
7108	7584	7722-24	7981	8210
7472-73	7636	7739	8059	8231
7485	7690	7744	8062	8274-75
7543	7694	7817	8063	8308

8380	8473	8791-92
8382	8474	8824
8399	8490	8859
8439	8494	8868
8462	8520	8897
	8635	8899
	8667	
	8672-73	
	8700	
	8760	

The magistrate judge assumes that Ford already has produced these documents to the plaintiffs; if it has not, it shall do so immediately.

As for the remaining Exhibit 3 documents, the magistrate judge's review has revealed three distinct categories. First, Ford has culled from the Exhibit 3 documents a group of documents that it believes are not relevant to this litigation.² As to the following documents, the magistrate judge agrees:

7072	7462	7533
7131	7464	7539
7133	7474	7571
7134	7493	7606
7141	7506-7507	7610
7143	7520	7622
7165		7659
7279		7758
7390		7853
7420		7877
7442		7884-86

²It is curious, to say the least, why these and other documents that appear to have no relationship to the facts relevant to these cases were placed on Ford's privilege log in the first place. Certainly both the magistrate judge's in camera review, and more importantly the plaintiffs' ability to make use of the documents produced by Ford, were complicated by the inclusion of so many irrelevant documents in Ford's production and on its privilege log.

7888-91	8078
7893-94	8093
7901	8097
7994	8123
8000	8160-63
8009	8165
	8232
	8237
	8243
	8246
	8291-93
	8307
	8486
	8566
	9017

These documents clearly and unequivocally are not relevant to any issue in this litigation, and therefore are not discoverable. In addition, the redacted portions of documents 7155 and 7157 are irrelevant. Finally, document 7488 is not discoverable at this time; however, its relevance may need to be revisited after the resolution of the open issue of whether and to what extent the plaintiffs are entitled to conduct discovery regarding Ford's profits. As for the remaining documents which Ford has designated as irrelevant, the magistrate judge is not convinced that they are irrelevant; therefore, each is listed under another of the categories discussed in this Entry.

The next category consists of documents, or redacted portions thereof, that clearly are privileged on their face.³ The documents in this category are:

³An example of a document in this category is one in which confidential legal advice is reported by one Ford employee to other Ford employees; i.e., Employee A e-mails Employee B and says "I met with our attorney today and he instructed us to do X, Y, and Z, so you do X and I'll do Y and I'll ask Employee C to do Z."

7102-04	7444	7892	8280	8521-23
7158	7445	7909	8284	8525-26
7159	7457	7935	8285	8533-34
7160	7461	7946	8287	8581
7183	7468	7948	8288	8583
7305	7480	8040-42	8300-02	8596
7355	7510	8069-70	8304-06	8597-98
7374	7531	8089	8341	8697
7377	7546	8112	8342	8711
7387	7569	8124	8345-48	8739
7393	7578	8136-37	8351	8743
7394	7710	8148	8390	8747
7410	7795-97	8159	8393	8765
7412	7801	8178	8394	8776
7416	7825	8194	8435	8809-10
7417	7827-28	8227	8482	8855
7425	7834	8247	8487	8941
7437	7857	8278	8496	9006

In addition, the first page of document 7398 is clearly privileged. Finally, it appears that document 7830 is virtually identical in content to document 7826, and therefore should be produced in redacted form like 7826, rather than withheld in its entirety.

Plaintiffs should rest assured that each of the documents in this category is clearly privileged; any document as to which reasonable minds could differ was placed into the final category, which consists of documents that are not clearly privileged on their face but may in fact be privileged depending upon the circumstances of their creation and use. The documents in this final category run the gamut from almost certainly privileged to almost certainly not privileged, as well as from highly relevant to almost certainly irrelevant. Ford is urged to consider carefully whether it should withdraw its claim of privilege as to any of these documents. To the extent that it cannot, it shall, **within 5 business**

days of the date of this Entry,⁴ produce the appropriate affidavit(s) for each document setting forth the facts necessary to establish that the document is in fact privileged. The type and extent of information that the affidavits should contain will vary for each document, but in general the magistrate judge needs to know the name of the attorney involved and the specific issue (or litigation) about which the attorney was giving advice or being consulted. Indeed, some of the documents consist solely of data; it could very well be that the data in any given document was generated by a Ford employee at the request of an attorney in anticipation of litigation, but on its face the document is meaningless to the magistrate judge, and a thorough explanation of what it is and why it was created will be necessary. In addition, to the extent that Ford has asserted that any of these documents are not relevant to this litigation, it should further explain that position in its affidavit. Finally, Ford should not consider this the first round of affidavits, or their first chance to demonstrate the privileged nature of these documents; rather, it is likely that a finding of no privilege, or a waiver of privilege, will be made if the affidavits submitted by Ford are insufficient to support its claim of privilege.

The documents for which affidavits are required are listed below. Documents followed by a + symbol are partially illegible; a fully legible copy shall be provided along with the necessary affidavit. Documents followed by a # symbol either appear to be amenable to redaction or have been redacted in a way that is not entirely clear to the magistrate judge; this issue should be addressed in the affidavits in

⁴The magistrate judge is aware that this is a short time frame; however, Ford has been aware that such affidavits would eventually be necessary for many of the documents on its privilege log at least since the February 5, 2002, conference at which the issue was discussed, and the magistrate judge urged Ford during that conference to begin the process of procuring the necessary affidavits at that time.

addition to the factual basis supporting the privilege claim.

7045	7252-53	7383	7745	8205	8631
7051-53	7257	7398 (p.2)	7788	8230-31 [#]	8659-60
7139	7260 ⁺	7428	7810	8238-39	8668-69
7142	7266	7440-41	7849	8248	8689
7149	7274-76 ⁺	7470	7944-45	8249-51 [#]	8704-05
7170-71	7282	7475	7971-72	8255	8764
7186	7294 ⁺	7478 [#]	7978-79	8265-66	8780
7189	7295-96	7481	7988	8271-73	8785
7190-91	7298-99	7492	8006-08	8294 [#]	8793
7194-97	7300	7495	8010-11	8297	8795-8802
7200	7302-04	7607	8016	8309-11	8807
7204-08	7308-11 ⁺	7608	8043	8317	8861
7211	7312-13	7613	8072-73	8332	8887
7215	7315-19	7615	8096	8387	8895-96
7217-18	7324	7654	8106	8457	9016
7222	7326	7657	8109	8562	9130
7227-29	7327 ⁺ -32	7660	8113 [#]	8584	9193
7231-36	7334	7664-65	8130-31	8586-90	9197
7238-42	7342-49	7673	8132-33	8612	
7244-45	7367	7682	8151-53	8615	
7247-49	7369-70	7720 ⁺	8168	8623	

The magistrate judge believes that this Entry addresses each document listed in Exhibit 3 to the instant motion. If a document has been omitted, it was inadvertent, and the plaintiffs should notify the magistrate judge of the omission so that it can be addressed promptly.

ENTERED this _____

day of March 2002.

V. Sue Shields
United States Magistrate Judge
Southern District of Indiana

Copies to:

Irwin B Levin
Cohen & Malad
136 North Delaware Street

P O Box 627
Indianapolis, IN 46204

William E Winingham
Wilson Kehoe & Winingham
2859 North Meridian Street
P.O. Box 1317
Indianapolis, IN 46206-1317

Randall Riggs
Locke Reynolds LLP
201 N. Illinois St., Suite 1000
P.O. Box 44961
Indianapolis, IN 46244-0961