



U.S. CHAMBER
Institute for Legal Reform



Litigating in the Field of Dreams

Asbestos Cases in Madison County

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DECEMBER 2013 UPDATE



U.S. CHAMBER
Institute for Legal Reform

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Prepared for the U.S. Chamber Institute for Legal Reform by

James L. Stengel

Partner, Orrick, Herrington & Sutcliffe, LLP

Please note, the views expressed here are those of the author and not those of any firm, client or related entity.

Summary

When we last examined Madison County in late 2010, we observed that the Madison County asbestos litigation story is one involving the creation of a national clearinghouse for asbestos malignancy claims by first suspending normal rules about which court should hear these cases, and second, by adopting procedures to facilitate the “processing” of large numbers of those claims. These factors combined to facilitate the process of extracting maximum value from the defendants. The resulting economics, in turn, drove a kind of litigation perpetual motion machine where, so long as the rules are relaxed, more and more cases were drawn to the jurisdiction.

While there have been changes in the procedure approved and employed in the county to assign cases for trial—the court abandoned the highly controversial assignment of trial settings to law firms as opposed to actual plaintiffs—Madison County continues to demonstrate a hard fact of asbestos litigation: the more things change, the more they stay the same. Whether Madison County asbestos litigation will continue along its current course is an, as of yet, unwritten chapter; but as it stands now, the story is a useful cautionary tale about the power of procedural “innovations,” the ability of a judge or judges in one location to impact

the entire national system of litigation, the extreme mobility of asbestos claims, and the tyranny of economic incentives. Although it is in its early days in terms of the abandonment of the trial assignment scheme, Madison County seems poised to play a substantial and continuing role as a “clearinghouse” jurisdiction in the next chapter of the unfolding drama that is asbestos litigation: lung cancers.

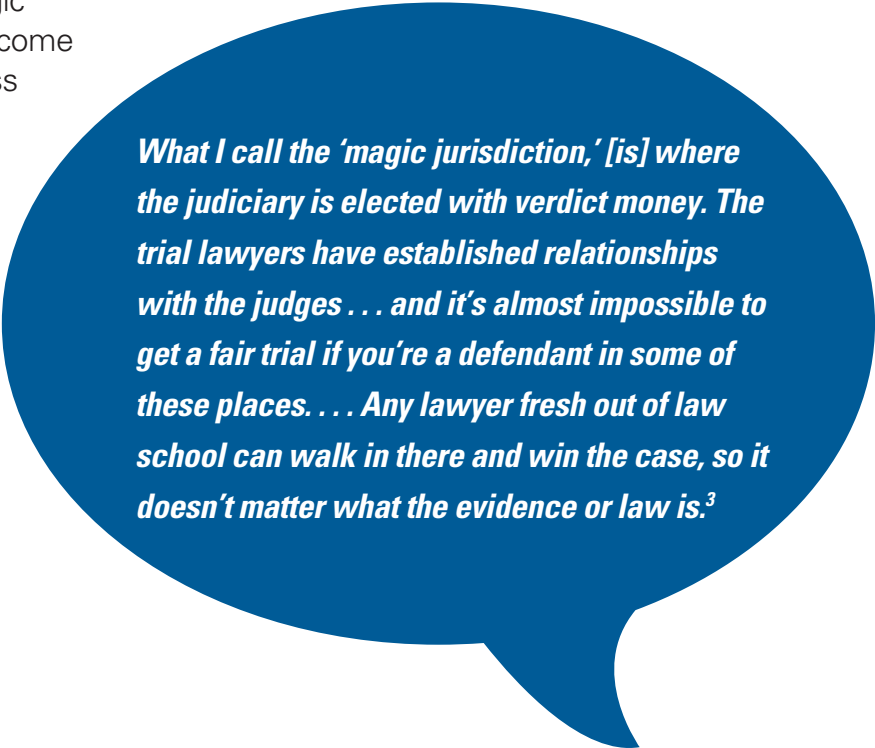
This paper is, in part, an update of ILR’s 2010 publication, but with new information and analysis to bring it current to today’s issues and challenges.

The Problem: “If You Built it, They Will Keep Coming.”

Asbestos litigation is America’s longest-running and largest mass tort.¹ Its size and complexity creates significant distortions in the current litigation system—distortions that operate to the detriment of defendants—raising substantial concerns about the system’s ability to deliver fairness and due process while substantially and negatively impacting the American economy.²

Lax rules together with economic incentives have had a substantial detrimental impact on asbestos litigation. One of the most critical is the development of so-called “magic” jurisdictions. These jurisdictions become magnets or clearinghouses for mass asbestos litigation.

As one once prominent plaintiffs’ lawyer defined it:



What I call the ‘magic jurisdiction,’ [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges . . . and it’s almost impossible to get a fair trial if you’re a defendant in some of these places. . . . Any lawyer fresh out of law school can walk in there and win the case, so it doesn’t matter what the evidence or law is.³



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Madison County, Illinois has been among the most notorious magnet jurisdictions for asbestos cases for more than a decade. It has continued to play that role despite a torrent of critical attention, changes in judicial personnel, alterations in substantive law, and amendments to asbestos-specific procedural rules. The persistence of the county’s immense gravitational pull is the subject of this update.

The story of Madison County is the tale of how a small, rural area in the southwestern tip of Illinois assumed a starring role in the drama of asbestos litigation. The reviews of the defendants sued in these cases, however, have largely been thumbs-down, and for well over a decade, the unique approach of the courts of Madison County, Illinois to the conduct of litigation has earned substantial criticism. The county has been designated a “judicial hellhole” numerous times⁴ and has helped, despite its modest population and level of commercial activity, to diminish the entire state of Illinois’ ranking as a place to do business.⁵ How does one small county come to have such a disproportionate impact on national litigation? How has it retained that position in the face of substantial change?

It came about initially in asbestos litigation because of the conscious decisions of the judge presiding over this litigation, supported by influential members of the plaintiffs’ bar, to create a clearinghouse for asbestos litigation. Madison County’s emergence as a magnet for asbestos litigation was the result of an affirmative desire to achieve that result, much like the fantasy baseball venue in “Field of Dreams” that attracted scores of people throughout the country yearning to relive their childhood innocence. Unfortunately, the type of attraction in Madison County was driven by far different motives.

Affirmative steps were taken to throw open the doors of the county to asbestos cases and to develop procedures which would not only facilitate processing of large numbers of asbestos cases, but also provide clear economic incentives for the plaintiffs' bar to recruit cases nationwide in order to process them in Madison County. In addition, the drama has been an astounding box-office draw for plaintiffs and their lawyers: the perception that the Madison County Judiciary was hostile to defendants, coupled with a series of large and highly publicized plaintiffs' verdicts meant that more and more cases would be drawn to the county. A mid-decade change in judicial personnel raised hopes that improvement might be imminent, but in short order the court resumed what was, in many relevant respects, "business as usual."

Subsequent changes have in each case raised similar hopes and in one instance, actual change, but none of these developments have diminished Madison County's position as the nation's asbestos case clearinghouse. Madison County remains a magnet jurisdiction with a huge and disproportionate docket of asbestos-related cancer cases. This maintenance of the status quo was achieved by keeping the doors open to non-local cases and through a unique and pernicious procedure assigning trial slots, a year or more in advance, to law firms rather than plaintiffs. At present, the county sits at a crossroads. Another change in judicial personnel has recently taken place, and the court has within its power the ability to abandon the past, distortive approaches.

Madison County's unique approach has been most notorious in two areas: class action litigation⁶ and asbestos litigation. The

former has been addressed, in part, by broader legal reform,⁷ but the latter, although it has evolved substantially over the last ten years, has proven to be a hardy perennial. The handling of asbestos litigation reached a true nadir in the early 2000s, appeared to have improved somewhat through the middle of the decade, and now, although changes in judicial personnel and some limited signs of hope in the appellate sphere make this harder to predict with certainty, seems at some substantial risk to regress. Under any circumstances, there are certain ingrained, long-standing elements of the court's handling of asbestos cases that have historically tilted this "field of dreams" against defendants, and, in some cases, disfavored local plaintiffs, and consumed local judicial resources in a fashion grossly disproportionate to the interests of the citizens of the State of Illinois and Madison County in this litigation.

Magnet or clearinghouse jurisdictions like Madison County develop a sort of jurisdictional momentum towards business as usual. Change, even substantial change, will not necessarily end practices engrained by habit and market forces. This has been amply demonstrated by recent history in Madison County. The pernicious practice of assigning trial slots to favored local law firms ended in early 2012 (albeit only as to 2013 trial settings), but the county continues to attract disproportionate numbers of asbestos cases. The reasons are that an infrastructure of case referral and filings has come into being that has not been disturbed by the change. Further, until there is consistent application of favorable *forum non conveniens* law in the county to limit the cases litigated in Madison County

to those with some legitimate connection to the county, old practices will persist. Finally, much of the current spike of filings has been driven by a nationwide phenomenon of huge numbers of lung cancer cases.

Each element of the Madison County approach to asbestos litigation will be addressed in greater detail below, but the broad contours of the problem may be

described as follows: the Madison County courts have created a national clearinghouse or magnet for asbestos malignancy cases, by suspending application of the governing legal standard for where cases should properly be litigated; by denying defendants the ability to litigate these and other issues; and by creating a trial docket which places tremendous pressure on defendants.

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History: “A Stain on our System”

Asbestos litigation has created a long-running crisis for the American litigation system.⁸ The litigation has progressed from claims by the truly sick against the truly responsible, to claims by the non-sick against almost everyone, to claims by the truly sick against virtually any peripheral defendants with a pulse—the so-called “search for the solvent bystander.”

Given this history, special rules have been created, magnet jurisdictions have come and gone, huge amounts of money have been absorbed by transactions costs, and over 100 companies have been forced into bankruptcy.⁹ It is a problem of national scope, but the particular concern is how it assumed its specific form in Madison County. As commentators have noted, “former U.S. Attorney General Griffin Bell has said that jurisdictions that have a

reputation for treating civil defendants unfairly, such as Madison County, bring a ‘stain on our system.’”¹⁰ In the specific case of Madison County, a number of factors coalesce to create the case volumes necessary for the county to become a clearinghouse and to ensure that cases there have a potential value which far exceeds what they would be worth absent the special rules, practices, and distortions.¹¹



The Consistent Refusal to Apply “Black Letter” Law Regarding Venue—Building the Field of Dreams

The Illinois provisions relating to venue, both inter- and intra-state are clear,¹² but have long been ignored in Madison County with predictable results. Venue rules specify where a case should be heard assuming there is jurisdiction in multiple courts. The procedural device available to litigants who believe that a case (or cases) is “misvenued,” that is pending in the wrong court, is a motion for a dismissal on *forum non conveniens* grounds.¹³ In the last decade, despite the vast predominance of cases with little or no contact with the forum, only a limited number of *forum non conveniens* motions have been granted in Madison County.¹⁴

By the early 2000s, Madison County “ha[d] allowed itself to become a Mecca for asbestos lawsuits.”¹⁵ This was especially true for cases involving the disease of mesothelioma, a fatal cancer of the lung’s lining that is associated with asbestos exposure. The decision to jettison venue rules in asbestos cases was a component of a conscious strategy. In 2003, then Chief Judge Nicholas Byron explained on a

number of occasions that he fully intended to accept cases without regard to where they would properly be venued and to then move those cases through the system quite rapidly. As he announced in court:

“I’m certainly not going to bar [out of state cases] and [I’m going to] provide for justice if they think that they can get it faster. . . .¹⁶ [N]ow that is speed. You can’t tell me that Cook or any other county in the State of Illinois or even United States would compare with that . . .¹⁷ If [expedited mesothelioma cases] are from the United States, I’m certainly not going to bar them, and [I’m going to] provide for justice if they think they can get it here faster.”¹⁸

As Judge Byron concluded, “[m]y philosophy is to give an American dying of mesothelioma, or even lung cancer if they made the case, a forum.”¹⁹

The program worked, drawing on escalating numbers of asbestos cases generally, and mesothelioma cases specifically, to Madison County. Between 1994 and 2004, 5,000 asbestos cases of all kinds were filed in Madison County.²⁰ Of these, “[a]s many as 75% of them [were] filed by plaintiffs who had never before set foot in the county.”²¹ There was a dramatic increase in the number of cases filed in Madison County in the early 2000s, which continued to climb

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through the early part of the decade.²² Between 2006 and 2008 the number of asbestos claims climbed a remarkable 97% while the population of Madison County rose less than 1% over the same period.²³

The results, measured specifically in terms of numbers of mesothelioma cases filed in Madison County, speak for themselves. Projections of mesothelioma disease incidence suggest that there should be in the neighborhood of 140 meso cases each year in the entire State of Illinois.²⁴ As Madison County is home to 2% of the State’s population, it would be reasonable to expect there to be 2 or 3 meso cases a year in Madison County.

Instead, mesothelioma filings have defied statistics:

Year	Asbestos ²⁵ Filings
2006	325
2007	455
2008	639
2009	814
2010	752
2011	953
2012	1,563
2013 ²⁶	793

This continued growth in malignancy claims implies there has been either an increase in the incidence of disease or an increase in the number of claims asserted nationally. Yet neither is true: in both cases, these numbers have been flat or declining.²⁷ That Madison County is experiencing trends which move in the opposite direction supports the conclusion that this flood of new asbestos filings is coming from plaintiffs who are otherwise strangers to the jurisdiction.²⁸ Another driver for the migration of asbestos cases into Madison County was law reform in other jurisdictions.

As one commentator observed: “[i]n addition, a migration of claims is occurring. Plaintiffs’ lawyers are actively seeking out new jurisdictions in which to file their claims, largely driven by the desire to avoid reforms adopted in states that were once favored jurisdictions, such as Texas.”²⁹

After a slight pause in 2010, asbestos filings in Madison County have continued to climb. To place this in context, “Madison County comprises .0008 percent of the nation’s population [but it] handles more than 25 percent of the nation’s asbestos cases.”³⁰ As has historically been the case, the recent waves of asbestos filings have no connection with Madison County or, for that matter, Illinois.³¹ These filings do

reflect broader trends in asbestos filings nationally, but are dramatically concentrated in Madison County. The claims are being “harvested” and asserted in selected jurisdictions via a highly developed solicitation process. “Collection” or “feeder” law firms use heavy internet and television advertising to encourage claims to be filed. This process has expanded dramatically as a result of the relatively certain funding available in the trusts for these claims.³² The more than 50 asbestos compensation trusts formed in the bankruptcies of former asbestos defendant companies pay claims, including those for lung cancer, pursuant to published standards and scheduled values. As a result, plaintiffs’ counsel knows, to a fair degree of certainty, what money will be available for a particular claim from the collective trusts.³³ The trust funding covers the cost of harvesting, making the assertion of tort system claims relatively riskless; hence the continuing flow of cases to “friendly” jurisdictions.

This process has had another effect. Claims for mesothelioma used to dominate the Madison County docket. However, mesothelioma continues to be a rare disease with the national incidence being no more than 2,000 to 3,000 cases annually. The solicitation machine required more “raw material” which has arrived in Madison County in the form of lung cancer cases. There is upwards of 200,000 lung cancer cases diagnosed in the United

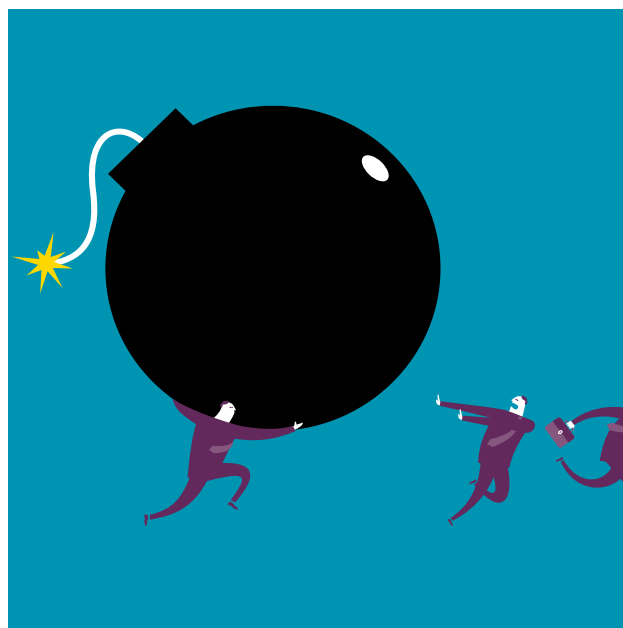
States every year, most of which are caused by smoking. The minimal standards of the trusts and some tort jurisdictions mean that these lung cancers have potential value as asbestos claims. Not surprisingly, there has been an explosion of lung cancer filings in Madison County.³⁴

The problems with Madison County’s asbestos docket go back at least as far as 2000. As noted, asbestos filings took off in Madison County starting that year. Even more significant was the nature of the asbestos claims that were being filed there. Unlike other jurisdictions that attracted huge numbers of unimpaired, non-malignancy case (e.g., Mississippi or West Virginia), Madison County attracted large numbers of purportedly asbestos-related malignancy cases, particularly those involving mesothelioma. Of the 953 total asbestos claims filed in Madison County in 2003, 400 were for mesothelioma.³⁵ As a point of reference, there were 1,856 mesothelioma claims filed nationwide in 2002.³⁶

This is illustrative of another unique aspect of Madison County: its long-standing focus on cases involving allegations of asbestos-related cancers. These cases, involving primarily lung cancer and mesothelioma, should be distinguished from those cases, typically referred to as “unimpaired,” that involve allegations of radiographic evidence of exposure rather than current injury or impairment. “Unimpaired” claims were initially generated in substantial numbers by

lawyer-sponsored screening programs, often fraught with fraud and abuse.³⁷ This latter category of cases has declined substantially in numbers because of legislative and judicial reforms.³⁸

Because of their seriousness and jury award potential, claims involving malignant disease processes present a very different set of issues. While the fact of disease may be undisputed, the evidence of exposure to the products or premises of a particular defendant and whether these disputed exposures were sufficient to be a cause of the disease will be hotly contested. As the primarily responsible defendants disappeared into bankruptcy, the litigation of these cases in Madison County and elsewhere became “the search for the solvent bystander.” As part of that process, in order to reach increasingly peripheral defendants, weak (or fabricated) evidence of minimal exposures has been offered.³⁹ Malignancy trials thus require effective discovery and careful preparation and involve complicated trials. The Madison County docket magnet practice places huge burdens on defendants who must prepare to defend hundreds of these cases each year, with witnesses scattered all over the country. Yet the plaintiffs’ firms alone know which cases they will actively try.



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The Tilted Playing Field

This concentration of malignancy cases in Madison County was made possible by the refusal to consider whether these cases had any contact with the county or even the State of Illinois, but the skewed “system” of asbestos litigation in the county and its *in terrorem* effect on defendants reached its full flower because of a number of other attributes and conditions that tilted the playing field against defendants.⁴⁰

First, there was a widely held perception, promoted by the lawyers involved, that the leaders of the local asbestos trial bar had disproportionate influence over how these cases would be conducted. Randall Bono, the lead plaintiffs’ asbestos attorney in Madison County, had served as a judge on the Madison County Circuit Court for a number of years and, as a result, was well known to the local bench.⁴¹

Second, there were a variety of economic considerations at work. The courts in Madison County are elected, and the plaintiffs’ trial bar was a reliable source of contributions for favored trial judges.⁴² There was an obvious economic interest on the part of the plaintiffs’ bar who would derive a substantial benefit from locating this litigation in Madison County. Less obviously, the local defense bar would benefit substantially from locating a mass tort firmly in their home jurisdiction. This may create a set of perverse incentives for some in the local defense bar. A clearinghouse creates work and revenue for them as well. Even defense counsel giving due consideration to client interests may see a benefit to concentrating their clients’ cases in a single jurisdiction. Thus, short-sighted defense counsel may find these

jurisdictions initially attractive, but will eventually discover that they are now in a leverage-free jurisdiction, with case values escalating for reasons having nothing to do with the merits of the cases. Additionally, and on a somewhat related note, some local residents had a sense that bringing all these cases and the economic activity they would generate would be good for the local economy.⁴³

Third, the presiding asbestos judge at that time, Judge Nicolas Byron, put in place a set of procedures which were broadly perceived as precluding the defense of Madison County asbestos cases.⁴⁴ Extremely large numbers of complex malignancy cases were set for trial, making it difficult, if not impossible, for defendants to prepare cases for trial, let alone time to develop the necessary record to support a *forum non conveniens* challenge to venue in the county. An asymmetrical approach to discovery was imposed where plaintiffs were rarely, if ever, held to the legally required discovery, but where, in contrast, defendants often found themselves sanctioned, including the imposition of so-called “death penalty” sanctions striking all defenses or precluding presentation of a defense case, for trivial discovery failures.⁴⁵ Defendants’ dispositive motions were routinely denied, typically without a response from plaintiffs. Madison County was historically indifferent to the legal issues which are central to cancer litigation. One commentator noted that “. . . Madison County judges virtually never grant summary judgment despite the plaintiff’s failure to identify the manufacturer of the product that allegedly causes his or her harm.”⁴⁶ The trial scheduling procedure itself was, by design, unfair to defendants. Each trial setting included multiple

plaintiffs. The plaintiffs' counsel controlled, of course, which of the multiple cases set for trial on the same day would actually be tried. Devoid of this knowledge, defendants would be forced to prepare all the cases set for trial, an unsupportable burden, particularly as it was repeated for each of the many hundreds of cases set for trial in a given year.

These procedural innovations had the intended and expected result. Defendants found it difficult to impossible to defend these cases and were forced either to pay exorbitant settlement demands or face the prospect of disastrous trial outcomes.

If a defendant decided to take a case to trial in the early 2000s, the Madison County verdicts were largely disastrous for the defendant involved. There were three headline-worthy plaintiffs' verdicts:

- In *Hutcheson v. Shell Wood River Refining Co.*, a case where Shell's defenses had been stricken as a discovery sanction, the jury awarded \$34.1 million to a single plaintiff.⁴⁷
- In *Crawford v. A C and S, Inc.*, the jury awarded a husband and wife \$16 million.⁴⁸
- In *Whittington v. U.S. Steel*, the jury awarded \$250 million including \$200 million in punitive damages to a single plaintiff.⁴⁹

In addition, there was a firmly held belief that the relevant intermediate appellate court, the Fifth Circuit Court of Appeals, was as plaintiff-friendly as the Madison County trial court, so there was no viable appellate escape path either.⁵⁰

At this point in time, the asbestos cases being filed included both seriously ill malignancy cases as well as unimpaired claims. On a positive note, the court

created a deferred docket, which took non-malignancy cases largely out of the trial docket.⁵¹ In 2004 there was a change in judicial personnel.⁵² Judge Daniel J. Stack replaced Judge Byron, the original architect of the magnet jurisdiction approach, and there was a hope and expectation that he would reverse course and approach venue in a conventional way. The early experience was promising. In an early case, he offered the following assessment:

As much as this judge, or any judge with any compassion whatsoever, would like to do anything to assist such a litigant, which expedited schedules and to accommodate him in any way possible, such accommodation must be reasonable in following the law. The court must consider, not only how many jury trials actually occur out of this docket; but, also what would happen if every case or even a similar percentage of these cases to all other types of civil jury lawsuits were to go to trial.

If large numbers of these cases did actually go to trial, then this docket would no longer be the "cash cow." Such circumstances would place an astronomical burden upon the citizens of Madison County and others whose cases bear some connection or reason to be here.

But when, as in the case being considered, there is no connection with the county or with this state, the trial judge would probably be required to apply [foreign] law (another factor not only of difficulty to the trial judge but a consideration of local problems being decided locally); the treating physicians are all from [out of state]; there is a similar asbestos docket with expedited

trial settings for persons similarly situated to the plaintiff herein; the distance from the home forum and the area of exposure is in excess of 700 miles and this county has such an immense docket; the case should be transferred.⁵³

The early promise was short-lived, and the court returned to its established pattern of rejecting any and all *forum non conveniens* challenges in asbestos litigation. These challenges were rejected despite the fact that a critical factor in the analysis, crowding in the Madison County courts, was well recognized in litigation arising outside of asbestos. One court observed: “crowded to the point where congestion is of great concern.”⁵⁴ Another stated: “[t]his is an injustice to the taxpayers, jurors, judges and other court personnel of Madison County and to the Madison County litigants who must await trial of their cases while non-Madison County litigation displaces their own in the case-clogged Madison County Circuit Court.”⁵⁵

For this to happen, the courts must resolutely refuse to apply well established and unambiguous rules of venue. Instead of applying the law which should result, almost without exception, in the cases being filed in other states or even other

counties in the State of Illinois, the court discovered that it could “successfully” process this burgeoning docket through its magnet docket, thereby forcing settlements. But this kind of “success,” in moving large numbers of mesothelioma cases through the system tends to promote even more filings.⁵⁶ As has been noted:

Judges who move large numbers of highly elastic mass torts through the litigation process at low transaction costs create the opportunity for new filings. They increase the demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.⁵⁷

Ironically, Madison County has continued to host large numbers of “foreign” asbestos claims improperly venued in the county despite continuing improvement in the general application of the law of *forum non conveniens* in the State of Illinois. In 2012, the Illinois Supreme Court made clear that *forum non conveniens* is a viable doctrine in the state.⁵⁸ What remains to be seen is whether defendants will be given an opportunity to enforce these rules, whether they will take advantage of that opportunity, and whether the Madison County court will apply the law.

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Allocation of “Trial Slots” and the National Harvest

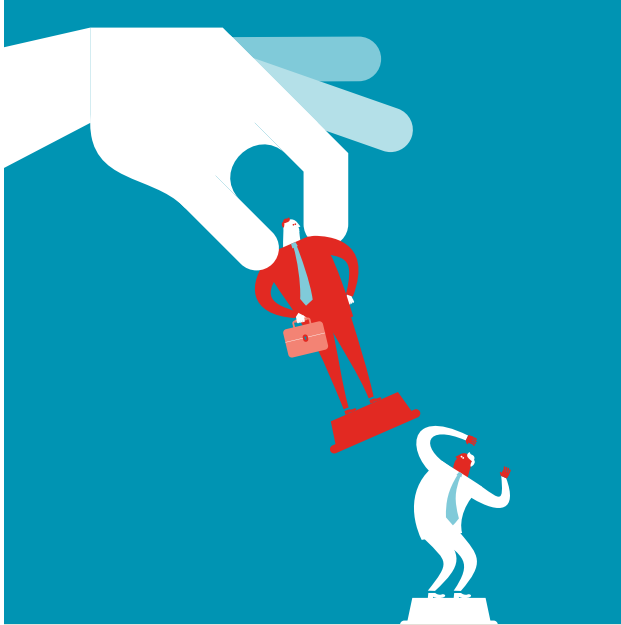
The program initiated by Judge Byron worked, if anything, too well. By 2004, a substantial backlog of cases had collected in Madison County. Two actions were taken to address this problem. First, a deferred registry order was entered.⁵⁹ This is typically a positive and appropriate step, but given other elements of asbestos litigation in Madison County, it had the perverse effect of “clearing the decks” for malignancy cases. Second, a set of special procedures were adopted to address the substantial backlog of pending malignancy cases. These measures were, fairly viewed, inconsistent with Illinois procedural rules and unfair to defendants even on a temporary basis. They have become permanent, however, and serve no function other than to maintain the case volumes necessitated by Madison County’s successful program of remaining a magnet jurisdiction for asbestos cancer cases. This procedural innovation also serves to confer a substantial economic benefit on favored trial lawyers while simultaneously increasing plaintiffs’ leverage over defendants in these cases.

The phenomenon of Madison County “magnetism” will be further exacerbated by the perverse economic incentive to harvest cases provided by the allocation of trial slots. After a brief decline at mid-decade, mesothelioma filings in Madison County began to climb again.⁶⁰ In a newspaper interview a local defense attorney said that the county’s asbestos court had “turned into a processing center,” and cited the 2004 Standing Order as a reason.⁶¹ As a result, the Madison County Circuit Court presides

over litigation involving “one sixth of America’s mesothelioma deaths.”⁶²

Between 2005 and 2007, however, defendants obtained five defense verdicts in cases tried in Madison County.⁶³ While this signaled an incremental change in how trials were conducted, it did not evidence an end of Madison County as a magnet jurisdiction. The cases continued to pour in from across the nation and in record numbers. The plaintiffs’ bar is anything but economically irrational. The procedures in place in Madison County both as to venue and trial settings were still presumably providing substantial returns. As the authors noted, “[a]sbestos cases rarely go to trial. In Madison County they have normally settled out of court for millions of dollars.”⁶⁴

The judiciary’s desire to bring asbestos cases to Madison County begged the question of how these cases would be processed once they were filed. This led to a unique procedural innovation as to trial scheduling. Although entered originally in 2004 as a means to clear a then substantial backlog of cases, the Standing Order regarding trial scheduling, and more critically, trial assignments, has become an integral component of the Madison County machinery. The order contemplated that trial schedules for the coming years would be established 18 to 24 months in advance of trial, and that the calendar would be filled with scheduled cases in trial groups. Since the disposition time for a mesothelioma case is typically very short, six to twelve months from filing, the practice arose of assigning trial slots, in large numbers, to a limited number of local firms which dominated the Madison County asbestos plaintiffs’ bar. As a result, those firms would



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have hundreds of potential trial settings available each year.

Economic incentives being what they are, the allocation of trial slots to those firms both conferred something of tangible value on those firms—a guaranteed trial setting which would allow them to invest in cases to fill these slots—and provided a strong incentive to “harvest” cases from outside the county. These trial settings simply could not be filled by locally-arising cases. In addition, the Standing Order maintained the practice of scheduling multiple plaintiffs’ trial settings (all controlled by the same plaintiffs’ counsel) on the same day so as to continue the practice of “trial preparation roulette” for defendants and maintain the pressure to settle along with the increased settlement values driven by that pressure. As a result, the system has continued through the present.

The procedural innovation adopted by the court was the allocation of trial slots to plaintiffs’ law firms rather than to plaintiffs themselves. This gave the firms control over which cases will actually be tried and also allowed the favored firms to, in effect, “market” their trial settings to obtain additional cases. The 2004 Standing Order specifies that on or before March 10, plaintiff counsel should specify dates for trials in the following year and “need not specify the cases to be set.”⁶⁵

Be Careful What You Ask For...

After years of debate, the propriety of the process of pre-assignment of trial slots came to a head, when in November of 2011, a subset of defendants asserted challenges to that process. The motion was not supported by all defendants—some were concerned that the unknown could, in fact, be worse than current practices.

The motion focused on several aspects of “asbestos practice” in Madison County including (1) the pre-assignment of trial slots or settings; (2) the failure to enforce accepted *forum non conveniens* rules which required some contact with the forum; and (3) the unfairness visited on defendants by the need to prepare for potential multiple simultaneous trial settings in a single docket under extremely tight time constraints. The memorandum, filed on behalf of certain defendants, provided:

The practice of reserving trial dates more than one year in advance for potential cases transforms the right to a timely resolution of an asbestos claim into a valuable and highly sought commodity. . . .

The argument that allowing the reservation of trial dates results in a system that makes Madison County an ‘open jurisdiction’ for out-of-state cases is hardly academic. A glimpse at Madison County asbestos cases shows that the vast majority of cases filed have little or no connection to the State of

Illinois, let alone Madison County. (5)

While the motion was pending, a controversy erupted involving the judge overseeing the Madison County asbestos litigation. Circuit Judge Barbara Crowder replaced Judge Daniel Stack in 2010. In late 2011, it was disclosed that shortly after allocating 2013 trial sites to a number of local law firms, Judge Crowder accepted \$30,000 in campaign contributions from the top three local firms. Judge Crowder was removed from the asbestos docket, although she maintained that she had done nothing wrong and eventually returned the contributions.⁶⁶ Judge Crowder’s replacement, Clarence Harrison, ruled on the defendant’s motion in March 2012. The court’s “Revised Setting Order” provided:

The Court finds no continuing need for pre-assignment of trial settings. Therefore, the Preliminary Order Assigning Trial Weeks for 2013 is hereby terminated. The standard jury trial week calendar will be used hereafter. Cases will be set by motion on a case-by-case basis. The Court may

group cases for efficiency. All parties are counseled to have adequate staff available.⁶⁷

Whatever the expectation, the change to the trial setting procedure did not reduce the number of asbestos filings in Madison County. A record number of cases—1,573—were filed in 2012, and it appears that a comparable or even greater number of cases are being filed in 2013.⁶⁸ Local commentators speculated that the elimination of the trial slot pre-assignment system might have had the perverse effect of opening up the dockets for more lawyers, allowing new entrants to file cases in the county. While that hypothesis is plausible, it appears much more likely that what is occurring is driven by firms which were already in Madison County participating in an

emerging and troubling phenomenon—mass lung cancer filings. Those cases reflect “an emerging trend of an increase in the number of lung cancer-related asbestos suits as opposed to traditional mesothelioma claims.”⁶⁹

In the end, what might have appeared to be progress in Madison County in terms of abandoning a procedurally offensive process for assigning trial settings, not to actual plaintiffs, but to specified plaintiffs’ law firms, was illusory. Because the Madison County asbestos docket has continued to comprise cases with no contact with the jurisdiction, it was a logical location for the next act in the asbestos litigation drama—the mass emergence of lung cancer claims.

Conclusion: Avoiding “Back to the Future”

Does the appellate courts’ renewed adherence in proper venue in Madison County,⁷⁰ the Illinois Supreme Court’s reversal of *Lipke*⁷¹ in *Nolan*,⁷² and other changes in judicial personnel⁷³ mean that the problem of Madison County asbestos litigation is solved? These changes are promising, perhaps, but without assurance of a complete solution.

First, and most obviously, the continued pace of filings suggests that, at least as far as the plaintiffs’ bar is concerned, nothing material has changed. Second, the abandonment of the process of assigning trials slots is recent. Its longer term effects remain to be seen. Third, and most critically, there has been, as of now, no attempt to apply *forum non conveniens* rules on a consistent and universal basis to asbestos cases in Madison County. Unless and until that happens, there is no reason to expect the flow of cases into the jurisdiction to abate.

Thus, asbestos litigation in Madison County, once again, stands at a crossroads. Its historic arc demonstrates how accommodation to litigants and their counsel, implemented in the first instance with what may have been ill-informed good intentions, can prove to have enormous and perverse effects. After a “false dawn” in the mid-2000s, the county has continued along

the path of a magnet or clearinghouse jurisdiction, adopting and maintaining procedural, and in some cases substantive, rules which attract large numbers of cases to the jurisdiction to the benefit of select local plaintiffs’ counsel and to the detriment of fairness and the due process right of defendants. The relatively recent abandonment of the process of assigning trial settings to local firms is promising but not a comprehensive solution. The real solution to this problem is simple: apply the law as written. If venue rules are enforced and fair procedures for trial scheduling adopted, the jurisdiction would return to normal and appropriate operations. There is reason to be hopeful. If, as has happened before, despite these promising developments, the county maintains its prior practices of finding ways to accommodate large numbers of asbestos cases from all over the United States, history will, in fact, repeat itself.

Endnotes

- 1 Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation* 37 SW U. L. REV. 511, 511 (2008).
- 2 Victor E. Schwartz, *A Letter to the Nation's Trial Judges* 36 AM. J. TRIAL ADVOC. 1 (2012).
- 3 *Medical Monitoring and Asbestos Litigation: a Conversation with Richard Scruggs and Victor Schwartz*, 17 NO. 3 MEALEY'S LITIG. REP.: ASBESTOS 5 (2002) (quoting Mr. Scruggs), in Victor Schwartz et al., *Addressing the Elephantine Mass of Asbestos Cases*, 31 PEPPERDINE L. REV. 271, n. 21 (2004).
- 4 *Judicial Hellholes* 2012/13, AM. TORT REFORM FOUND., at 12-3, 2012, http://www.judicialhellholes.org/wp-content/uploads/2012/12/ATRA_JH12_04.pdf (chronologizing Madison County's brief departure from the "hellholes" list followed by its, perhaps inevitable, return); "# 3 Madison County, Illinois, is known as the nation's asbestos court and this year is on track to beat its old record for new law suit filings. The county finally decided to abandon its unique and controversial system of assigning asbestos trial dates to favored local law firms after it was revealed that the judge who oversaw the asbestos docket received tens of thousands of dollars in campaign contributions from lawyers in those same firms. The money has since been returned and the asbestos docket is under new management. But the election of a former head of the Illinois plaintiffs' bar to the appellate bench overseeing its courts provides new reason for concern." *Bringing Justice to Judicial Hellholes* 3, AM. TORT REFORM ASS'N, 2003.
- 5 See, e.g., Press Release, U.S. Chamber of Commerce, U. S. Chamber Announces State Legal Fairness Rankings (Mar. 8, 2004) available at <http://www.uschamber.com/press/releases/2004/march/us-chamber-announces-state-legal-fairness-rankings>.
- 6 For an early assessment of the class action "problem" in Madison County, see John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 HARV. J. L. & PUB. POL'Y 143 (2001).
- 7 Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.), see also, John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 HARV. J. L. & PUB. POL'Y 143 (2001); Victor E. Schwartz et al., *Asbestos Litigation in Madison County: The Challenge Ahead*, 16 WASH. U. J. L. & POL'Y 235, 239 (2004).
- 8 Rep. of the Judicial Conf. Ad Hoc Com. on Asbestos Litigation 2 (Mar. 1991), reprinted in MEALEY'S LITIG. REP.: ASBESTOS Sec. A (1991).
- 9 LLOYD DIXON, et al., ASBESTOS BANKRUPTCY TRUSTS 25 (Rand Corporation 2010); see also, Mark A. Behrens, *What's New in Asbestos Litigation*, 28 REV. LITIG. 501 (2008).
- 10 Schwartz, Behrens & Sandner, *Asbestos Litigation In Madison County: The Challenge Ahead*, 16 WASH. U. J. L. & POL'Y 235, 236 (2004) (citations omitted).
- 11 There is a logical, albeit at this point unproven, hypothesis, that the dominant Madison County plaintiffs' firms will continue to harvest large numbers of claims even were the local court system repaired, by virtue of the advantage of their historically high settlement averages against the emerging bankruptcy trusts will provide.
- 12 Fennell v. Ill. Cent. R.R. Co., 2012 IL 113812 (2012); 735 ILCS 5/2-101 West 2006; see also, Dawdy v. Union Pacific R. R. Co., 207 111.2d 167 (2003); Laverty v. CSX Transportation, Inc., 2010 111. App. LEXIS 996 (111. App. 5th Cir. 2010).

- 13 “*Forum non conveniens* is an equitable doctrine ‘founded in considerations of fundamental fairness and sensible and effective judicial administration’ [citation] [and] allows a [circuit] court to decline jurisdiction in the exceptional case where trial in another forum with proper jurisdiction and venue would better serve the ends of justice.’” *Laverty, id.* at 5., *citing* *First American Bank v. Guérine*, 198 Ill.2d 511, 515 (2002).
- 14 *Palmer v. Riley Stoker Corp.*, No. 04-L-167, slip op. (Cir. Ct. Madison County, Ill., Oct. 4, 2004).
- 15 Griffin B. Bell, *Asbestos and The Sleeping Constitution*, 31 PEPP. L. REV. 1, 7 (2004).
- 16 Transcript of Hearing at 36 (2003), *cited with approval in* *Schwartz, Behrens & Sandner, Asbestos Litigation In Madison County*, 16 WASH. U. J. L. & POL’Y 235, 238 n. 17 (2004).
- 17 Transcript of Hearing at 18 (2003), *cited with approval in* *Schwartz, Behrens & Sandner, Asbestos Litigation In Madison County*, 16 WASH. U. J. L. & POL’Y 235, 238 n. 17 (2004).
- 18 Transcript of Hearing at 35-6 (2003), *cited with approval in* *Schwartz, Behrens & Sandner, Asbestos Litigation In Madison County*, 16 WASH. U. J. L. & POL’Y 235, 238 n. 17 (2004).
- 19 Pre-trial Motions at 27 (2004) (vol. I(A) (morning session)), *cited with approval in* *Schwartz, Behrens & Sandner, Asbestos Litigation In Madison County*, 16 WASH. U. J. L. & POL’Y 235, 238 n. 17 (2004).
- 20 A. Nicholas, *Judicial Shakeup Signals Reform In Madison County*, CORP. LEGAL TIMES, Jan. 2005, at 50.
- 21 *Id.*
- 22 Mark A. Behrens, *What’s New In Asbestos Litigation?*, 28 REV. LITIG. 501, 541-42 (2009).
- 23 U.S. Census Bureau. *U. S. Census, Table 1: Annual Estimates of the Resident Population for Counties of Illinois: April 1, 2000 to July 1, 2008 (CO-EST 2008-10-17)*, Issued March 2009. (Population Division).
- 24 In 2005, for example, there were 140 mesothelioma diagnoses in Illinois. *See Table 7-4, Malignant Mesothelioma: Number of Deaths by State, U. S. Residents age 15 and over, 1999-2005*, WORK-RELATED LUNG DISEASE (WORLD) SURVEILLANCE SYSTEM, <http://www2a.cdc.gov/drds/WorldReportData/pdf/2005T07-04.pdf>.
- 25 Bethany Krajelis, *2013 Asbestos Filings On Pace With Last Year At 793 Year To Date*, MADISON-ST. CLAIR REC., Oct. 31, 2013. Asbestos filings for 2010 and later are not segregated by disease. The cases continue to be almost exclusively malignancy cases, but recent years have seen a burgeoning lung cancer population.
- 26 Through June 2013.
- 27 *See Trial Lawyers, Inc. Asbestos: A Report on the Asbestos Litigation Industry 2008*, MANHATTAN INSTITUTE, May 7, 2008, <http://www.triallawyersinc.com/asbestos/asb01.html>.
- 28 *See* N. J. C. Pistor, *Area Courts Bear Watching as Potential Judicial ‘Hellholes,’ Report States*, ST. LOUIS POST-DISPATCH, Dec. 16, 2008, at D2; Manhattan Institute, *supra*, at 23 n. 259 (asserting Madison County has experienced an uptick in out-of-state plaintiff filings).
- 29 Mark A. Behrens, *What’s New In Asbestos Litigation?* 28 Rev. Litig. 501, 556 (2009).
- 30 Travis Akin, *New Chief Judge Can Help Madison County Shed Its ‘Judicial Hellhole’ Reputation*, MADISON-ST. CLAIR REC., May 8, 2013.
- 31 *See* N. J. C. Pistor, *Judge Ends Controversial Trial ‘Reservations,’* ST. LOUIS POST-DISPATCH, Mar. 29, 2012; *Judicial Hellholes 2012/13*, AMERICAN TORT REFORM FOUNDATION, at 13, 2012, http://www.judicialhellholes.org/wp-content/uploads/2012/12/ATRA_JH12_04.pdf.
- 32 *See*, M. BEHRENS AND J. STENGEL, “ASBESTOS LITIGATION” IN THE NEW LAWSUIT ECOSYSTEM, 31-8 (ILR 2013).
- 33 *Id.*
- 34 Bethany Krajelis, *Lung Cancer Suits Are New Trend in Asbestos Litigation*, MADISON-ST. CLAIR REC., Mar. 28, 2013.
- 35 Victor Schwartz, et al., *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 WASH. U. J. L. & POL’Y 235, 243 (2004).

- 36 STEPHEN J. CARROLL ET AL., *ASBESTOS LITIGATION*, 71 (RAND 2005).
- 37 See Lester Brickman, *Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screening and Claimant Studies*, 29 CARDOZO L. REV. 512, 588 (2007).
- 38 See Hanlon & Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SUR. OF AM. L. 525, 564-569 (2007). Indeed the Madison County Court adopted a deferred docket to address these cases and remove them from the trial queue in 2004. *Id.* at 565, n. 155.
- 39 J. L. Stengel, *The Asbestos End Game*, 62 N.Y.U. ANN. SUR. OF AM. L. 223, 236-38 (2006)
- 40 See generally Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SUR. OF AM. L. 525, 552-555 (2007).
- 41 *Id.*, citing Paul Hampel, *Bono's Firm Opened Floodgates to Asbestos Lawsuits Here*, ST. LOUIS POST-DISPATCH, Sept. 19, 2004, at A9.
- 42 *Id.*, citing Kevin McDermott, *Plaintiffs Bar Gives Top Dollar to Judges' Campaigns*, ST. LOUIS POST-DISPATCH, Sept. 21, 2004, at A1.
- 43 *Id.*, citing Paul Hampel, *MADISON COUNTY, WHERE ASBESTOS RULES*, ST. LOUIS POST-DISPATCH, Sept. 19, 2004, at A1.
- 44 See generally Schwartz, *supra* note 10, at 248-52.
- 45 *Id.*
- 46 Schwartz, Behrens & Sandner, *supra* note 10, at 248 (citations omitted).
- 47 Illinois *Jury Awards Former Roofer \$34 m, Believed To Be Largest Single Plaintiffs' Verdict*, MEALEY'S LITIG. REP.: ASBESTOS, June 2, 2000, at 3.
- 48 Illinois *Husband, Wife Awarded \$16 Million By Jury In Mesothelioma Case*, MEALEY'S LITIG. REP.: ASBESTOS, Dec. 7, 2001, at 4.
- 49 *U. S. Steel Settles Premises Case Following \$250 Million Illinois Verdict*, MEALEY'S LITIG. REP.: ASBESTOS, Apr. 2, 2003, at 3.
- 50 Victor Schwartz, et al., *Asbestos Litigation In Madison County*, 16 WASH. U. J. L. & POL'Y 235, 246 (2004).
- 51 Mark A. Behrens & Manuel Lopez, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 Rev. Litig. 253, 264 (2005).
- 52 *Id.*
- 53 Palmer v. Riley Stoker Corp., No. 04-L-167, slip op. at 6 (Cir. Ct. Madison County, Ill. Oct. 4, 2004).
- 54 Dowdy v. Union Pac. R. R. Co., 207 Ill. 2d 167, 181-84 (2003).
- 55 Bland v. Norfolk & W. Ry Co., 116 Ill.2d 217 (1987).
- 56 The West Virginia experience is illustrative. Handling mass numbers of asbestos cases results in more cases being filed, as Judge Andrew McQueen, the judge presiding over the West Virginia consolidations opined: "I will admit that we thought that [a mass tort] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases." Victor E. Schwartz et al., *Addressing the Elephantine Mass of Asbestos Cases*, 31 PEPP. L. REV. 271, 284-285 (2004).
- 57 Francis E. McGovern, *The Defensive Use of Federal Class Actions and Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997).
- 58 Fennell v. Ill. Cent. R.R. Co., 2012 IL 113812 (2012).
- 59 Mark A. Behrens & Manuel Lopez, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 REV. LITIG. 253, 264.
- 60 Bethany Krajelis, *2013 Asbestos Filings On Pace With Last Year At 793 Year To Date*, MADISON-ST. CLAIR REC., Oct. 31, 2013; see also Bethany Krajelis, *Lung Cancer Suits Are New Trend in Asbestos Litigation*, MADISON-ST. CLAIR REC., Mar. 28, 2013.
- 61 Ann Knef, *Madison County Asbestos Cases Top Last Year's Total*, MADISON/ST. CLAIR REC., Nov. 13, 2009.
- 62 *Madison County: Asbestos Trial Dates to Increase in 2011*, MADISON/ST. CLAIR REC., May 6, 2010. Of these, 90% have no connection to

- Southern Illinois. *Hello 'hellhole*, MADISON/ST. CLAIR REC., Nov. 21, 2009.
- 63 Steve Gonzalez & Ann Knief, *Madison County Asbestos Trial Marks Fifth Defense Verdict In A Row*, MADISON/ST. CLAIR REC., Dec. 18, 2007, at 1.
- 64 Gonzalez, *supra* note 64.
- 65 Order Assigning 2011 Trial Dockets at 16 (Apr. 16, 2010).
- 66 Bethany Krajelis, *2013 Asbestos Filings on Par With Last Year at 793 to Date*, MADISON COUNTY RECORD, June 27, 2013; *see also* Bethany Krajelis, *Lung Cancer Suits Are New Trend in Asbestos Litigation*, MADISON COUNTY RECORD, Mar. 28, 2013.
- 67 Revise Setting Order, *In re: All Asbestos Litigation* (95 ASA LLL IT), (Mar. 29, 2012).
- 68 Krajelis, *supra* note 67.
- 69 *Id.* (“When it comes to new trends in asbestos litigation, the increasing number of lung cancer suits would probably top the list”).
- 70 Fennell v. Ill. Cent. R.R. Co., 2010 Ill. App. LEXIS 996 (2010).
- 71 Lipke v. Celotex Corp., 153 Ill. App. 3d 498 (1987). (*Lipke* announced a rule, unique to Illinois which effectively precluded asbestos defendants from offering proof of alternative asbestos exposures as a cause of a plaintiff’s asbestos disease and thus a defense to liability. As a result, it deprived defendants in asbestos cases where plaintiffs have typically been exposed to asbestos from a large number of sources of a key defensive strategy. Despite substantial criticism and repeated appellate attacks, the *Lipke* rule survived and was applied in Illinois asbestos cases for almost twenty years until overruled in *Nolan*.)
- 72 Nolan v. Weil-McLain, 233 Ill. 416 (2009).
- 73 Amelia Flood, *Stack and Crowder Begin Asbestos Docket Transition*, MADISON/ST. CLAIR REC., May 15, 2010.



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Institute for Legal Reform

202.463.5724 main
202.463.5302 fax

1615 H Street, NW
Washington, DC 20062

instituteforlegalreform.com