

LITIGATING *in the* FIELD *of* DREAMS

Asbestos Cases in Madison County, Illinois



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Asbestos Cases in Madison County, Illinois

By James L. Stengel¹

Summary

The Madison County asbestos litigation story involves the creation of a national clearinghouse for asbestos malignancy claims by first suspending normal rules about which courts should hear these cases, and second, by adopting procedures to facilitate the “processing” of large numbers of those claims. These factors combine to facilitate the process of extracting maximum value from the defendants. The resulting economics, in turn, drive a litigation perpetual motion machine where, so long as the rules are relaxed, more and more cases will be drawn to the jurisdiction. Whether Madison County asbestos litigation will continue along its current course is an unwritten chapter; but, as it stands now, the story is a 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.

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I. The Problem: “If You Build It, They Will Come”

The story of Madison County tells of how a small, rural area in southwestern Illinois assumed a starring role in the drama of asbestos litigation. The reviews from 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 times² and has helped, despite its modest population and level of commercial activity, to diminish the state of Illinois’ ranking as a place to do business.³ How does one small county have such a disproportionate impact on national litigation? In asbestos litigation, the conscious decisions of the presiding judge, supported by influential members of the plaintiffs’ bar, created a clearinghouse. Madison County’s emergence as a “magnet” for asbestos litigation was the result of an affirmative desire to achieve that result, much like the magical baseball field from the movie “Field of Dreams” that attracted people across the country yearning to relive their childhood innocence. Unfortunately, the type of attraction in Madison County is 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 for processing 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 cases were drawn to the county. A mid-decade change in judicial personnel raised hopes that improvement might be imminent, but shortly after the court resumed what was, in many relevant respects, “business as usual.” Madison County remains a “magnet” jurisdiction with a huge and disproportionate docket of asbestos-related cancer cases. The county maintained this status quo 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. This unorthodox procedure invites litigation from firms specializing in asbestos-related litigation, even if the firms are not

² American Tort Reform Ass’n, *Judicial Hellholes 2009/2010* (2009), available at <http://www.atra.org/reports/hellholes>.

³ See, e.g., U.S. Chamber of Commerce, *Ranking the States: Lawsuit Climate 2010* (2010), available at <http://www.instituteforlegalreform.com/images/stories/documents/pdf/lawsuitclimate2010/2010LawsuitClimateReport.pdf>.

currently representing clients. At present, the county sits at a crossroads. Another change in judicial personnel has recently taken place, and the court has the ability to abandon the past, distortive approaches.

Madison County's unique approach has been most notorious in two areas: class action litigation⁴ and asbestos litigation. The former has been addressed, in part, by broader legal reform,⁵ but the latter, although it 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 prediction uncertain, seems at risk of regression. 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 here, these circumstances continue to consume local judicial resources in a manner grossly disproportionate to the interests of the citizens of Illinois and Madison County. Absent change, those conditions will continue.

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 "Field of Dreams" that very much resembles a national clearinghouse, or "magnet", for asbestos malignancy cases. But unlike the creative ideas from Hollywood filmmakers, the "Field of Dreams" in Madison County is driven by a number of actions from the court that can be summarized as follows: (i) suspending application of the governing legal standard for where cases should be litigated; (ii) denying defendants the ability to litigate these and other issues by, among other things, creating a trial docket which places tremendous pressure on defendants; and (iii) uniquely catering to mostly local plaintiffs' firms by allocating specific trial times in the near future to these firms, rather than allocating time slots to specific plaintiffs. In addition, the environment in Madison County presents further risk because of continued uncertainty surrounding the application of standards governing alternative causes of injury and increased recoveries by asbestos claimants via the asbestos bankruptcy trust system.

4 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).

5 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*, Beisner & Miller, *supra* note 4; Victor E. Schwartz, Mark A. Behrens & Kimberly D. Sandner, *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 Wash. U. J. L. & Pol'y 235, 239 (2004).

II. History: “A Stain On Our System”

Asbestos litigation has created a long-running crisis for the American litigation system.⁶ 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, transaction costs absorbed huge amounts of money and over 90 companies have been forced into bankruptcy.⁷ It is a problem of national scope, but of particular concern is how it assumed its specific form in Madison County. As commentators have noted, “[f]ormer 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.’”⁸ In Madison County, a number of factors coalesced to create the case volumes necessary for the county to become a

clearinghouse and to ensure that cases are more valuable than what they would be worth absent the special rules, practices and distortions.⁹

A. Building the “Field of Dreams”: The Consistent Refusal to Apply “Black Letter” Law Governing Venue

The Illinois provisions relating to venue are clear¹⁰ but have long been ignored in Madison County with predictable results. Venue rules specify where a case should be heard if there is jurisdiction, or the power to hear the case, in multiple courts. The procedural device available to litigants who believe that a case (or cases) is “misvenued,” or that a more appropriate venue exists elsewhere, is a motion for a dismissal on *forum non conveniens* grounds.¹¹ In the last decade, despite the vast predominance of cases with little or no contact with the forum, only

⁶ *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* 33 (1991).

⁷ Mark A. Behrens, *What's New in Asbestos Litigation*, 28 *Rev. Litig.* 501 (2009).

⁸ Schwartz et al., *supra* note 5, at 236 (citations omitted).

⁹ As will be explored in greater depth at pp. 19-20, 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 if the local court system were repaired, by virtue of the advantage of their historically high settlement averages against what the emerging bankruptcy trusts will provide.

¹⁰ 735 ILCS 5/2-101 (West 2006); *see also, Dawdy v. Union Pacific R. R. Co.*, 207 Ill.2d 167, 171 (2003); *Laverty v. CSX Transportation, Inc.*, Ill. App. LEXIS 996, at 5 (Ill. Ct. App. 2010).

¹¹ “*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.*, citing *First American Bank v. Guerine*, 198 Ill.2d 511, 515 (2002).

one or two *forum non conveniens* motions have been granted in Madison County.¹²

By the early 2000s, Madison County “ha[d] allowed itself to become a Mecca for asbestos lawsuits.”¹³ This was especially true for cases involving the disease of mesothelioma, a fatal cancer of the lung’s lining 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 should 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...¹⁴ [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...¹⁵ If [expedited mesothelioma cases] are from the United States, I’m certainly not going to bar

them.”¹⁶ As Judge Byron concluded, “My philosophy is to give an American dying of mesothelioma, or even lung cancer if they made the case, a forum.”¹⁷

The program worked, drawing 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.¹⁸ Of these, “[a]s many as 75% of them [were] filed by plaintiffs who had never before set foot in the County.”¹⁹ There was a dramatic increase in the number of cases filed in Madison County in the early 2000s. The rate of filing hit an all time high in 2003 with 953 asbestos cases filed that year.²⁰ Between 2006 and 2008 the number of asbestos claims climbed a remarkable 97 percent while the population of Madison County rose less than 1 percent over the same period.²¹

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

12 See *Palmer v. Riley Stoker Corp.*, No. 04-L-167, slip op. (Cir. Ct. Madison County, Ill., Oct. 4, 2004).

13 Griffin B. Bell, *Asbestos and The Sleeping Constitution*, 31 Pepp. L. Rev. 1, 7 (2004).

14 Madison Ct’y Circuit Court Hearing Transcript (Asbestos Litigation), dated July 9, 2003, at 36.

15 Madison Ct’y Circuit Court Hearing Transcript (Asbestos Litigation), dated December 5, 2003, at 18.

16 Madison Ct’y Circuit Court Hearing Transcript (Asbestos Litigation), dated July 8, 2003, at 35-36.

17 Madison Ct’y Circuit Court Report, Report of Proceedings, Pre-trial Motions, vol. I(A) (morning session), p. 27 (May 11, 2004), cited in Schwartz et al., *supra* note 5, at 238 n. 17.

18 Adele Nicholas, *Judicial Shakeup Signals Reform In Madison County*, Corp. Legal Times, Jan. 2005, at 50.

19 *Id.*

20 Behrens, *supra* note 7, at 541-42.

21 Population Division, 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), March 19, 2009.

should be approximately 140 mesothelioma cases each year in all of Illinois.²² As Madison County hosts 2 percent of the state’s population, there would theoretically be 2 or 3 mesothelioma cases per year in Madison County. Instead, mesothelioma filings have defied statistics:

Year	Mesothelioma Filings
2006	325
2007	455
2008	639
2009	814

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. Both of these numbers have been flat or declining.²³ Madison County’s experience with opposing trends supports the conclusion that the

flood of new asbestos filings come from plaintiffs from other states and jurisdictions.²⁴ Legal reform in other jurisdictions also drove the migration of asbestos cases into Madison County. One commentator observed:

*In 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.*²⁵

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, but, more significant was the nature of the asbestos claims that were 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. 400 of the 953 total asbestos claims filed in Madison County in 2003 were for mesothelioma.²⁶ As a point of reference, there were only 1,856 mesothelioma claims filed nationwide in 2002.²⁷

22 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.

23 See Manhattan Institute, *Trial Lawyers, Inc. Asbestos: A Report on the Asbestos Litigation Industry 2008* 1, (2008) (data from RAND). See Stephen J. Carroll, Deborah R. Hensler, Jennifer Gross, Elizabeth M. Sloss, Mattias Schonlau, Allan Abrahamse, & J. Scott Ashwood, *RAND Institute for Civil Justice, Asbestos Litigation* 71, (2005).

24 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* note 23, at 259 (asserting that Madison County has experienced an uptick in out-of-state plaintiff filings).

25 Behrens, *supra* note 7, at 556.

26 Schwartz et al., *supra* note 5, at 243.

27 Carroll et al., *supra* note 23, at 71.

This illustrates 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 other 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.²⁸ While some of these unimpaired cases found their way to Madison County, they were largely pursued in other problematic jurisdictions as discussed above. This latter category of cases has declined substantially on a national scale through legislative and judicial reforms.²⁹

Because of the seriousness of the claims and the potential for large jury awards, the process for claims involving malignant disease presents a very different set of issues. While someone’s having a disease may be undisputable, a plaintiff’s having been exposed to products or premises of a particular defendant and whether the disputed exposure was sufficient to cause 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.” In order to reach increasingly

peripheral defendants, weak (or fabricated) evidence of minimal exposures has been offered.³⁰ Malignancy trials thus require effective discovery and careful preparation and are complicated. The Madison County docket magnet practice places huge burdens on defendants who must prepare to defend hundreds of these cases each year, especially when witnesses are scattered all over the country. Plaintiffs’ firms alone know which cases they will actively try, leaving defendants’ firms guessing as to which cases to devote research.

B. The Tilted Playing Field: Denying Defendants the Ability to Litigate

The refusal to consider whether cases had any contact with Madison County or Illinois made the concentration of malignancy cases possible, but the skewed system of asbestos litigation in the county and its *in terrorem* effect on defendants reached its full power because of a number of other attributes and conditions that tilted the playing field against defendants.³¹

First, lawyers involved promoted the widely held perception that 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,

28 See Lester Brickman, *Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screening and Claimant Studies*, 29 *Cardozo L. Rev.* 513, 588 (2007).

29 See Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 *N.Y.U. Ann. Surv. 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.

30 James L. Stengel, *The Asbestos End Game*, 62 *N.Y.U. Ann. Surv. Am. L.* 223, 236-38 (2006).

31 See, generally, Hanlon & Smetak, *supra* note 29, at 552-555.

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.³² His potential influence supported this perception.

Second, a variety of local economic considerations at work encouraged a pro-litigant environment within the court. Judges in Madison County are elected, and the plaintiffs' trial bar was a reliable source of contributions for favored trial judges.³³ There was an obvious economic interest on the part of the plaintiffs' bar which would derive a substantial benefit from locating this litigation in Madison County. However, the local defense bar would also benefit substantially from locating a mass tort firm in its home jurisdiction. An established clearinghouse for asbestos claims creates work and revenue for the defense attorneys as well, creating a set of perverse incentives for some in the local defense bar. 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 have found these jurisdictions initially attractive, only later discovering that they are now in a leverage-free jurisdiction, with case values determined independently from the merits. Additionally, and on a somewhat related note, some local residents believed bringing all these

cases, and the economic activity they would generate, would be good for the local economy.³⁴

Third, the presiding asbestos judge at that time, Judge Byron, put in place a set of procedures which many perceived as precluding the defense of Madison County asbestos cases.³⁵ Extremely large numbers of complex malignancy cases were set for trial, making it difficult, if not impossible, for defendants to prepare cases, let alone have time to develop the necessary record to challenge 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 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.³⁶ 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 case litigation. As one onlooker said, "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."³⁷ Even the trial scheduling procedure itself was, by design, unfair to defendants. Each trial setting included multiple

32 *Id.*, citing Paul Hampel, *Bono's Firm Opened Floodgates to Asbestos Lawsuits Here*, St. Louis Post-Dispatch, Sept. 19, 2004, at A9.

33 *Id.*, citing Kevin McDermott, *Plaintiffs Bar Gives Top Dollar to Judges' Campaigns*, St. Louis Post-Dispatch, Sept. 21, 2004 at A1.

34 *Id.*, citing Paul Hampel, *Madison County: Where Asbestos Rules*, St. Louis Post-Dispatch, Sept. 19, 2004 at A1.

35 *See, generally*, Schwartz et al., *supra* note 5, at 248-52.

36 *Id.*

37 *Id.* at 248 (citations omitted).

plaintiffs. The plaintiffs' counsel controlled 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. Indeed, there were three headline-worthy plaintiffs' verdicts:

- **Hutcheson v. Shell Wood River Refining Co.**, No. 99-2450 (Madison County Cir. Ct., Ill., verdict May 20, 2000). Shell's defenses had been stricken as a discovery sanction, and the jury awarded \$34.1 million to a single plaintiff.³⁸
- **Crawford v. AC and S, Inc.**, No. 01-L 781 (Madison County Cir. Ct., Ill., verdict Dec 4, 2001). The jury awarded a husband and wife

\$16 million,³⁹ including \$7 million in punitive damages awarded to the husband (a forklift operator who contracted mesothelioma).⁴⁰

- **Whittington v. U. S. Steel**, No.02-4113 (Madison County Cir. Ct., Ill., verdict April 10, 2003). The jury awarded \$250 million in damages, which included \$200 million in punitive damages, to a single plaintiff⁴¹ who contracted mesothelioma from alleged exposure during his work at a mill located in Gary, Indiana.⁴²

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, discouraging defense attorneys from seeking appeals.⁴³

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.⁴⁴ In 2004, there was a change in judicial personnel.⁴⁵ Judge Daniel J. Stack replaced Judge Byron, the original architect of the "magnet jurisdiction" approach, and there was hope and expectation that

38 *Illinois Jury Awards Former Roofer \$34M, Believed To Be Largest Single Plaintiffs' Verdict*, Mealey's Litig. Rep.: Asbestos, June 2, 2000, at 3.

39 *Illinois Husband, Wife Awarded \$16 Million By Jury In Living Mesothelioma Case*, Mealey's Litig. Rep.: Asbestos, Dec. 7, 2001, at 4.

40 Schwartz et al., *supra* note 5, at 251.

41 *U.S. Steel Settles Premises Case Following \$250 Million Illinois Verdict*, Mealey's Litig. Rep.: Asbestos, Apr. 2, 2003, at 3.

42 Lozano, Mario, *U.S. Steel Settles Asbestos Related Mesothelioma Lawsuit*, LegalNewsWatch via The National Law Journal, Apr. 10, 2003.

43 Schwartz et al., *supra* note 5, at 246.

44 Mark A. Behrens and Manuel Lopez, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 Rev. Litig. 253, 264 (2005).

45 *Id.*

he would level the playing field by approaching venue in a conventional way. The early experience was promising, and in an early case, Judge Stack 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.*⁴⁶

However, 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, 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 that the court was “crowded to the point where congestion is of great concern,”⁴⁷ and another said, “This 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.”⁴⁸

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 cases being filed in other states or even other counties in Illinois, the court discovered that it could process this burgeoning docket through its magnet docket, thereby forcing settlements. But this kind of “success” in moving large numbers of

46 *Palmer v. Riley Stoker Corp.*, No. 04-L-167, slip op. at 6 (Cir. Ct. Madison County, Ill. Oct. 4, 2004).

47 *Dowdy*, 207 Ill.2d at 181-84.

48 *Bland v. Norfolk & W. Ry Co.*, 116 Ill.2d 217 (1987).

mesothelioma cases through the system tends to promote even more filings.⁴⁹ One scholar 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.*⁵⁰

C. 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. To address this problem a deferred registry order was entered first.⁵¹ 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” of malignancy cases. Second, the court adopted a Standing Order, setting special procedures to address the substantial backlog of pending malignancy cases. These measures were 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 wayward incentive to harvest cases fueled by allocating trial slots to firms rather than specific plaintiffs further exacerbated the phenomenon of Madison County “magnetism.” After a brief decline mid-decade, mesothelioma filings in Madison County began to climb again.⁵² 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.⁵³ As a result, the Madison County Circuit Court presides over litigation involving “one sixth of America’s mesothelioma deaths.”⁵⁴

Between 2005 and 2007, however, defendants obtained five defense verdicts in cases tried in

49 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 trial] 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, Mark A. Behrens & Rochelle M. Tedesco, *Addressing the Elephantine Mass of Asbestos Cases*, 31 Pepp. L. Rev. 271, 284-285 (2004).

50 Francis E. McGovern, *The Defensive Use of Federal Class Actions and Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997).

51 Behrens & Lopez, *supra* note 44, at 264.

52 *See* p. 6-7.

53 Ann Knief, *Madison County Asbestos Cases Top Last Year’s Total*, Madison/St. Clair Record, November 13, 2009.

54 Steve Koris, *Madison County: Asbestos Trial Dates to Increase in 2011*, The Madison/St. Clair Record, May 6, 2010. Of these, 90% have no connection to Southern Illinois. *Hello ‘bellhole,’* Editorial, The Madison/St. Clair Record, Nov. 21, 2009.

Madison County.⁵⁵ While this signaled an incremental change in how trials were conducted, it was not the end of Madison County as a “magnet” jurisdiction. The cases continued to pour in from across the nation and in record numbers, indicating that the procedures in place for both venue and trial settings were still providing substantial returns. As the authors noted, “Asbestos cases rarely go to trial. In Madison County they have normally settled out of court for millions of dollars.”⁵⁶

The local 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 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 have hundreds of potential trial settings available each year.

The allocation of trial slots to law 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 continues today.

The most recent extension of the Standing Order contemplates 480 trial settings for 2011. There are a limited number of “cause” settings not allocated to the chosen few plaintiffs’ firms, but, ironically, were a Madison County resident to become ill and attempt to prosecute an asbestos claim without retaining one of these firms, he or she would have no guarantee of obtaining a trial setting.

The procedural innovation adopted by the court was the allocation of trial slots to plaintiffs’ law firms rather than to plaintiffs themselves. This gives the firms control over which cases will actually be tried and also allows the favored firms to, in effect, “market” their trial settings to obtain additional cases. The 2004 Standing Order specifies that on or

55 Steve Gonzalez & Ann Knief, *Madison County Asbestos Trial Marks Fifth Defense Verdict In A Row*, *The Madison/St. Clair Record*, Dec. 18, 2007 at 1.

56 *Id.*

before March 10, plaintiff counsel should specify dates for trials in the following year and “need not specify the cases to be set.”⁵⁷

While it is generally accepted that the backlog which this special procedure was intended to remedy was cleared in 2004, the special procedures remain in place, and trial slots are still allocated to the firms rather than to cases or plaintiffs. The numbers have been increasing. The Madison County court set aside 424 trial slots for asbestos cases in 2009, 490 slots in 2010, and 520 are proposed for 2011. Once the favored firms have trial slot assignments firmly in hand they can market their ability to get a case to trial quickly nationwide. Coupled with the suspension of *forum non* rules, the clearinghouse continues to draw cases. The effectiveness of this process can be measured through a snapshot of one week’s filings in the county early this year. During the week of March 29–April 2, 2010, 17 new asbestos cases were filed, and of those, 16 appeared to have little or no connection to Illinois, let alone Madison County.⁵⁸

D. The Uncertainty Over Proving Alternative Cause

Historically, Madison County asbestos defendants have been substantively disadvantaged by the application of the *Lipke*⁵⁹ rule. *Lipke* was an Illinois doctrine which stated that a party “guilty of negligence cannot avoid responsibility merely because another person is guilty of negligence contributing to the same injury.” Given that asbestos plaintiffs typically proceed against large numbers of defendants, this rule negatively impacted the ability to defend these cases. Further, the intermediate appellate court which supervises Madison County “broadly interpreted *Lipke* to prevent defendants from introducing evidence of plaintiffs’ exposure to asbestos-containing products of non-party companies or from settled or bankrupt defendants.”⁶⁰ The *Lipke* case was recently overruled in *Nolan*,⁶¹ but to date the impact of *Nolan* has not been seen in Madison County.

57 Order Assigning 2011 Trial Dockets (April 16, 2010) at 16.

58 Kelly Holleran, *17 New Asbestos Cases Filed in Madison County*, The Madison/St. Clair Record, April 27, 2010.

59 *Lipke v. Celotex Corp.*, 505 N.E.2d 1213 (Ill. Ct. App. 1987), *appeal dismissed*, 536 N.E.2d (Ill. 1989).

60 Schwartz et al., *supra* note 5, at 251, *citing Kochan v. Owens-Corning Fiberglass*, 610 N.E.2d 683 (Ill. Ct. App. 1993).

61 *Nolan v. Weil-McLain*, 233 Ill.2d 416 (2009).

E. Increased Bankruptcy Trust Recovery

As a result of the conditions in Madison County in the 2000 to 2004 period described above, it is reasonable to assume that the case values obtained by the dominant plaintiffs' lawyers with cases in the county were among the highest in the nation. While that effect has been diminished, it is still important today. Many of the defendants most heavily impacted by the hostile environment in Madison County from 2000 to 2004 sought bankruptcy protection. Most of those companies have completed their reorganizations, and their pending and future asbestos claims will be paid by bankruptcy trusts set up for that purpose. The historically high settlement values paid by these companies to the Madison County plaintiffs' bar are significant, because these firms may now perpetuate the Madison County effect by obtaining maximal recoveries from the trusts. A common trust procedure allows those firms to do this because most trusts give claimants the option to elect "individual evaluation" in lieu of matrix or

average value. The values available under individual evaluation are putatively individually negotiated, but are heavily influenced by historical values, by firm and jurisdictions. Hence, by virtue of past excesses, the Madison County firms can collect greater amounts from the trusts.

The larger trust recoveries available to these firms drive two consequences. Taken together with the economic advantage of the trial settings assigned to the firms, the enhanced trust recoveries provide resources to "buy"⁶² mesothelioma claims to file in Madison County. Hence, the system is kept at full capacity. In addition, these substantial trust recoveries are an "inconvenient fact" in the tort system; they could be used to offset judgments or drive down defendants' settlement evaluations. For this reason, full efforts are made to resist disclosure. Defendants' efforts to obtain meaningful discovery on this issue have been impeded. Recently, certain defendants sought relief before both the trial court and via Writ of Mandamus to the Illinois Supreme Court.

⁶² "Buy", meaning to obtain from those firms which harvest mesothelioma cases via advertising through the internet or television in exchange for either a referral fee or a fee sharing agreement. The "harvesting" firms have the infrastructure in place to recruit cases nationwide while the local Madison County plaintiffs' counsel have access to guaranteed trial settings.

III. Conclusion: Avoiding “Back to the Future”

The future of asbestos litigation in Madison County is uncertain. Its historic arc demonstrates how accommodations to litigants and their counsel, first implemented with good, albeit ill-informed, intentions, can prove to have enormous and disagreeable 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 forced to litigate there. The solution to this problem is simple: apply the law as written. If venue rules are enforced, fair procedures for trial

allocation and scheduling adopted, discovery of the bankruptcy trusts provided and the *Lipke* rule regarding alternative cause implemented as mandated by the Illinois Supreme Court, the jurisdiction would return to normal and appropriate operations. There is reason to be hopeful, because judicial personnel changed this year. A new judge could assess the current state of affairs with an unjaundiced eye and restore the rule of law. There have also been recent indications that the relevant intermediate appellate court is rethinking venue.⁶³ However, if despite these promising developments, the county maintains its prior practices, history will repeat itself where a “Field of Dreams” could quickly turn into a recurring nightmare for asbestos defendants.

⁶³ *Lavery*, Ill. App. at 13-14.



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