

Washington University

JOURNAL OF  
LAW &  
POLICY

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Victor E. Schwartz  
Mark A. Behrens  
Kimberly D. Sandner

Reprinted from  
Washington University Journal of Law & Policy  
Volume 16, 2004  
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# Asbestos Litigation in Madison County, Illinois: The Challenge Ahead\*

Victor E. Schwartz\*\*

Mark A. Behrens\*\*\*

Kimberly D. Sandner\*\*\*\*†

The American Tort Reform Association (ATRA) has singled out Madison County, Illinois, as America's number one "judicial hellhole."<sup>1</sup> The *Chicago Tribune* has called Madison County a "jackpot jurisdiction," a "hotbed of megabuck litigation," a "local slot machine," and "the most magic of all" magic jurisdictions.<sup>2</sup> The

\* This Article complements the *Journal's* forthcoming symposium on litigation issues in Madison County, Illinois, 20 WASH. U. J.L. & POL'Y (forthcoming 2005), which will examine this popular forum from multiple perspectives.—Ed.

\*\* B.A. *summa cum laude*, Boston University, 1962; J.D. *magna cum laude*, Columbia University, 1965. Mr. Schwartz, a senior partner in the Washington, D.C. office of Shook, Hardy & Bacon L.L.P., is co-author of the most widely used torts casebook in the United States, PROSSER, WADE AND SCHWARTZ'S TORTS (10th ed. 2000). He serves as counsel to the Coalition for Litigation Justice, Inc. The Coalition was formed by insurers as a nonprofit association to address and improve the asbestos litigation environment.

\*\*\* B.A., University of Wisconsin-Madison, 1987; J.D., Vanderbilt University, 1990; Associate Articles Editor of the *Vanderbilt Law Review*. Mr. Behrens is a partner in Shook, Hardy & Bacon L.L.P.'s Washington, D.C. office. He serves as co-counsel to the Coalition for Litigation Justice, Inc.

\*\*\*\* B.A., DePaul University, 1998; J.D., University of Missouri-Columbia School of Law, 2003; Note and Comment Editor of the *Missouri Law Review*. Ms. Sandner is an associate in Shook, Hardy & Bacon L.L.P.'s Public Policy Group, based in Washington, D.C.

† The views and opinions expressed in this Article are those of the authors and do not necessarily state or reflect the views and opinions of other Shook, Hardy & Bacon L.L.P. attorneys or the firm's clients.

1. AM. TORT REFORM ASS'N, BRINGING JUSTICE TO JUDICIAL HELLHOLES (2003), <http://www.atra.org/reports/hellholes>; see generally David Baillet, *Illinois County Court a Corporate "Hellhole"*, REUTERS, Oct. 5, 2003; Brian Brueggemann, *Study: Metro-East is "Lawsuit Capital of the World"*, BELLEVILLE NEWS-DEMOCRAT, May 1, 2002; Amalia Deligiannis, *Madison County: A Corporation's Worst Nightmare*, CORP. LEGAL TIMES, Feb. 2004, at 52.

2. Greg Bums, *Lawyers Bring an International Class Action to Rural Madison County . . . Why? Because It's the Lawsuit Capital*, CHI. TRIB., Mar. 8, 2004, at 1; Christi Parsons, *Downstate County Is a "Plaintiff's Paradise"*, CHI. TRIB., June 17, 2002, at 1; Amity

*St. Louis Post-Dispatch* has said: "It's lawyer heaven."<sup>3</sup> 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."<sup>4</sup>

Retired Circuit Judge John DeLaurenti, who heard cases in Madison County for twenty-seven years until 2000, has acknowledged that there is some merit to the accusations of bias in Madison County: "When people come from hither and thither to file these cases, there's gotta be an inducement . . . They're not coming to see beautiful Madison County."<sup>5</sup> Those inducements include the county's "national reputation as a place where the scales of justice seem oddly tilted against corporations,"<sup>6</sup> and awards to plaintiffs that are "widely known [to be] generous."<sup>7</sup>

Madison County now trails only Cook County (Chicago) in the number of filed claims in Illinois that seek damages of more than

Shlaes, Commentary, *Big Judgments, Bigger Mistakes: Legal Windfalls in Madison County Demonstrate the Need to Limit Forum Shopping of Class-Action Lawsuits*, CHI. TRIB., June 29, 2004, at 15; Editorial, *The Judges of Madison County*, CHI. TRIB., Sept. 6, 2002, at 22; Editorial, *A Madison County Jackpot*, CHI. TRIB., Apr. 2, 2003, at 22.

3. Editorial, *Lawsuit Heaven*, ST. LOUIS POST-DISPATCH, Jan. 13, 2003, at B6 [hereinafter *Lawsuit Heaven*].

4. Trisha L. Howard, *Big Clash Over Class Actions: Lawyer in Big-Money Suits Is Scornful of Ex-Attorney General*, ST. LOUIS POST-DISPATCH, Apr. 15, 2004, at C1; see also Brian Brueggemann, *Forum Participants: Investigate Madison County Court System*, BELLEVILLE NEWS-DEMOCRAT, Apr. 15, 2004; Sanford J. Schmidt, *Lawyers Spar Over Asbestos Filings*, THE TELEGRAPH, Apr. 15, 2004. Judge Bell's remarks were made at an April 14, 2004 conference sponsored by the *Washington University Journal of Law & Policy* and by Washington University School of Law's Trial and Advocacy Program. The next day, a Madison County judge barred Judge Bell and his law firm from representing clients in cases in Madison County. See Paul Hampel & Trisha Howard, *Criticism of Court Leads to Ban on Atlanta Law Firm*, ST. LOUIS POST-DISPATCH, Apr. 17, 2004, at 10; "Judicial Hellhole" Deepens With Law Firm's Banishment, THE PANTAGRAPH, Apr. 27, 2004, at A8; Editorial, *The Fringes of Madison County*, WALL ST. J., May 26, 2004, at A16.

5. Martin Kasindorf, *Robin Hood Is Alive in Court, Say Those Seeking Lawsuit Limits*, USA TODAY, Mar. 8, 2004, at A1; see also *Bland v. Norfolk & Co.*, 506 N.E.2d 1291, 1297 (Ill. 1987) (describing Madison County's "burden of . . . imported litigation."); Jim Copland, *The Tort Tax*, WALL ST. J., June 11, 2003, at A16; Alan J. Ortbal, *Plaintiffs' Attorneys Flock to Madison County for Turnstile Justice*, ILL. BUS. J., July 2004, at 3.

6. Editorial, *Tilted Scales*, ST. LOUIS POST-DISPATCH, Jan. 23, 2004, at B6; see also Noam Neuser, *The Judges of Madison County*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 39.

7. Kevin McDermott, *Madison County Judges Raise Much More than Others: Political Donations Come Mainly from Lawyers*, ST. LOUIS POST-DISPATCH, Apr. 27, 2003, at C1; see also Mike Fitzgerald, *Where Money Talks*, BELLEVILLE NEWS-DEMOCRAT, Oct. 5, 2003.

\$50,000, even though Madison County is the eighth most populous county in the state.<sup>8</sup> In 2001, over 1900 such lawsuits were filed in Madison County, quadruple the number of filings in Kane, McHenry, and Winnebago Counties,<sup>9</sup> and exceeding the number of similar filings in DuPage County—which has almost four times as many residents as Madison County.<sup>10</sup>

"Mad County" is giving the entire Illinois judicial system a black eye.<sup>11</sup> Illinois now ranks forty-fourth on the U.S. Chamber of Commerce's latest survey of the legal environments in the fifty states, down from thirty-fourth place two years ago.<sup>12</sup> The state's overall poor showing is largely due to the litigation environment in Madison County.<sup>13</sup>

### I. MADISON COUNTY: A "JUDICIAL HELLHOLE"?

Why is Madison County attracting so many claims and so much attention? What makes the lawsuit industry different there compared to other jurisdictions?

We do not think the county's reputation is the fault of jurors. In many cases, jurors are simply making judgments based on the evidence they are permitted to hear and the instructions they are given. As the *St. Louis Post-Dispatch* has said: "It's a little hard to blame Madison County juries, since [cases] rarely come to trial. They're normally settled. Instead, we wonder about the judges."<sup>14</sup> Similar concerns have been raised with respect to the Madison County Circuit Court's handling of serious personal injury cases, such as asbestos-exposure suits.<sup>15</sup>

8. See ILL. STATE DATA CTR., ILL. DEP'T OF COMMERCE & CmTY. AFFAIRS, ILLINOIS CENSUS 2000 16-29 (2001).

9. See *id.*

10. See *id.*

11. Geri L. Dreiling, *Mad County*, ILL. TIMES, Mar. 25, 2004, <http://www.illinoisistimes.com/gbase/Gyrosite/Archive>.

12. Editorial, *The "Judicial Hellhole"*, CHI. TRIB., Mar. 11, 200, at 22; see also U.S. Chamber of Commerce, *U.S. Chamber Announces State Legal Fairness Rankings*, Mar. 8, 2004, <http://www.legalreformnow.com/pdfs/national%20harris%20press%20release.pdf>.

13. See Kevin McDermott, *Legal Climate in Madison County Is Called Unfair to Business*, ST. LOUIS POST-DISPATCH, Mar. 9, 2004, at B1.

14. *Lawsuit Heaven*, *supra* note 3, at B6 (referring to class actions).

15. See Trisha L. Howard, *Two Judges Discuss Justice in Madison County: Hellhole*

We understand that the judges in Madison County work hard, and we believe they mean well. They may view their role as helping to facilitate the resolution of claims on behalf of legitimately injured plaintiffs.<sup>16</sup> For example, they may believe it is appropriate to handle asbestos cases from around the United States because asbestos litigation is national in scope.<sup>17</sup> Nevertheless, it seems that the drive for efficiency is being promoted over basic fairness.<sup>18</sup> It also appears that procedures adopted by the court to manage its large docket have simply invited the filing of more claims.<sup>19</sup>

In this article, we will touch on some of the issues. We will then focus on asbestos litigation in Madison County, and suggest ways the asbestos litigation environment in the county should be improved and made fairer.

*Label Has Tainted Public View, They Say*, ST. LOUIS POST-DESPATCH, Mar. 22, 2004, at B1 (noting that ATRA's "judicial hellhole" label was not directed at criminal or family law matters).

16. See *Hefner v. Owens-Corning Fiberglas Corp.*, 659 N.E.2d 448, 454 (Ill. Ct. App. 1995).

17. See Madison County Circuit Court, Report of Proceedings, Pre-Trial Motions, vol. I(A) (Morning Session), p. 27 (May 11, 2004) ("[M]y philosophy is give an American dying of mesothelioma, or even lung cancer if they make the case, a forum.")

18. See Union Carbide Corp.'s Memorandum in Support at 3, Union Carbide Corp. v. Hon. Nicholas Byron, (Ill. May 6, 2004) (No. 03-L-1294) (quoting Tr. at 35-36 (statement of the court) ("If [expedited mesothelioma cases] are from the United States, I'm certainly not going to bar them. . . if they think they can get [justice] here faster.") (on file with the authors) [hereinafter Union Carbide Motion, May 2004]).

19. See generally Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline the Litigation Have Fueled More Claims*, 71 MISS. L.J. 531 (2001). As Professor Francis McGovern of Duke Law School has written:

Judges who move large numbers of highly elastic mass torts through their 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.

Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997).

### A. Class Actions

#### 1. Class Action Filings by the Numbers

Madison County ranks as one of the country's three most active class action jurisdictions.<sup>20</sup> The Manhattan Institute's Center for Legal Policy reported that between 1998 and 2000, more class actions were filed in Madison County than any other county in the United States except for Los Angeles County and Cook County (Chicago), Illinois, both of which have substantially larger populations than Madison County.<sup>21</sup> The Manhattan Institute has calculated that Madison County's class action filing rate, per capita, is about twenty times the national average.<sup>22</sup>

Moreover, the number of class action filings in Madison County has dramatically risen over the past few years.<sup>23</sup> The Manhattan Institute has reported that from 1998 to 1999, the number of class actions filed in Madison County jumped from two to sixteen.<sup>24</sup> By 2000, that number was up to thirty-nine. In 2001, at least fifty class actions were filed in the county.<sup>25</sup> Between 1998 and 2000, the county experienced a 3650% increase in the number of class action filings.<sup>26</sup> In 2002, seventy-seven class actions were filed in Madison

20. *The New York Times* has said that Madison County is "famously hospitable" to class actions, and that the courts there have "never met a class-action lawsuit they did not like." Adam Liptak, *Court Has Dubious Record as a Class-Action Leader*, N.Y. TIMES, Aug. 15, 2002, at 14. A commentary in the *Chicago Tribune* has noted that "Madison County judges frequently decided to hear cases that other courts have refused to hear." Amity Shlaes, *Big Judgments, Bigger Mistakes; Legal Windfalls in Madison County Demonstrate the Need to Limit Forum Shopping of Class-Action Lawsuits*, CHI. TRIB., June 29, 2004, at 15.

21. 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) [hereinafter *They're Making a Federal Case Out of It*].

22. See Noam Neusner, *The Judges of Madison County*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 39.

23. See *They're Making a Federal Case Out of It*, supra note 21.

24. *Id.* at 161.

25. *Id.*; see also JOHN H. BEISNER & JESSICA DAVIDSON MILLER, MANHATTAN INST., NO. 5, CLASS ACTION MAGNET COURTS: THE ALLURE INTENSIFIES 1 (2002), [http://www.manhattan-institute.org/cjt\\_05.pdf](http://www.manhattan-institute.org/cjt_05.pdf).

26. See *They're Making a Federal Case Out of It*, supra note 21, at 161.

County.<sup>27</sup> The number of filings rose again in 2003 to 106 class actions.<sup>28</sup>

## 2. An Open Invite to Plaintiffs

The majority of class actions filed in Madison County have, at best, a tenuous connection with that forum.<sup>29</sup> The cases are not being filed in Madison County because a significant number of the plaintiffs live there or because the defendant companies do business there.<sup>30</sup> Rather, Madison County's popularity may be attributed to the "local judiciary's propensity to approve settlement that may benefit plaintiffs' lawyers and defendants more than the plaintiffs themselves."<sup>31</sup> The *Wall Street Journal* suggests that the county's appeal may be because plaintiffs' lawyers are looking for "a courtroom where the judges will certify a class without looking too closely at the merits of the case."<sup>32</sup>

Examples of class certification abuse are not difficult to find. One instance involved a putative nationwide class action filed on behalf of potentially tens of thousands of current and former property owners who claimed that Sprint installed over 18,000 miles of fiber optic cable on or next to railroad, pipeline, energy, or other utility companies' rights-of-way which run through the landowners' property.<sup>33</sup> The plaintiffs claimed that Sprint installed the cable without seeking the landowners' permission.<sup>34</sup>

27. Deligiannis, *supra* note 1.

28. See *id.*; Brian Brueggemann, *Class-Action Lawsuits Top Old County Record*, BELLEVILLE NEWS-DEMOCRAT, Jan. 2, 2004, at 1A.

29. See Editorial, *Class-Action Paradise*, BELLEVILLE NEWS-DEMOCRAT, Apr. 1, 2002, at 4A.

30. *Id.*

31. Liptak, *supra* note 20.

32. Editorial, *Class War*, WALL ST. J., Mar. 25, 2002, at A18; see also Victor E. Schwartz & Leah Lorber, *Taking a Stand Against Lawlessness in American Courts: How Trial Court Judges and Appellate Justices Can Protect Their Courts from Becoming Judicial Hellholes*, 27 AM. J. TRIAL ADVOC. 215, 216 (2003) (stating that "Madison County, Illinois, is regarded as a judicial hellhole due in large part to the fact that class actions are certified there which would not be certified elsewhere.").

33. Isaacs v. Sprint Corp., No. 00-CV-0155-MJR, 2001 WL 775982 (S.D. Ill. Apr. 6, 2001).

34. See *id.* at \*1.

The putative class action was initiated in federal district court, which certified two subclasses consisting of current and former owners of land subject to an easement for a limited purpose obtained by a railroad through condemnation or land grant proceedings.<sup>35</sup> The court also ordered discovery to determine the manageability of a third proposed subclass involving current and former owners of land subject to an easement for a limited purpose obtained by a railroad as a result of private conveyance.<sup>36</sup>

On interlocutory appeal, the Seventh Circuit Court of Appeals reversed the district court's certification order, holding that the trial court failed to make any of the determinations that Federal Rule of Civil Procedure 23(a) makes prerequisite to certification.<sup>37</sup> In that regard, Judge Posner observed that "[t]he case involves different conveyances by and to different parties made at different times over a period of more than a century . . . in 48 different states . . . which have different laws regarding the scope of easements . . . making it unlikely that common issues predominate over individual-claim issues."<sup>38</sup> Importantly, the court went on to characterize the case as a "nightmare of a class action" and stated that class action treatment would be "decidedly inappropriate" given the numerous individual factual and legal questions at issue.<sup>39</sup> The plaintiffs then proceeded to file essentially the same class claims in the Madison County Circuit Court, which certified three subclasses under the Illinois companion to federal Rule 23.<sup>40</sup>

As the Sprint litigation illustrates, Madison County courts do not appear to seriously consider whether proposed class actions satisfy the proper requirements for class certification. Efficiency appears to be promoted over other considerations.

35. See *id.* at \*8-9.

36. See *id.* at \*9.

37. See *Isaacs v. Sprint Corp.*, 261 F.3d 679, 682 (7th Cir. 2001) (Posner, J.).

38. *Id.*

39. *Id.*

40. See *Poor v. Sprint Corp.*, No. 99-L-421 (Madison County Cir. Ct. Feb. 20, 2003); compare *Fed. R. Civ. P. 23 with 735 ILCS 5/2-801*.

### B. Welding Rods

Welding rod litigation is another area where Madison County appears unique. Welding rod lawsuits are based on the allegation that exposure to fumes containing the element manganese let off while welding may damage a part of the brain called the basal ganglia, and may cause Parkinson's disease.

On October 28, 2003, a sixty-five-year-old retired welder from Collinsville, Illinois, Larry Elam, received a million-dollar verdict in Madison County.<sup>41</sup> He claimed that fumes he inhaled from welding while he was employed in Missouri caused him to develop Parkinson's disease. According to the *Belleville News-Democrat*, the Elam verdict "was the first time a plaintiff prevailed in such a case. In seven previous trials across the country, jurors sided with the defense six times and were unable to reach a unanimous decision in [a June 2003 trial involving the Elam plaintiff]."<sup>42</sup> One must speculate as to whether the judge exercised a "gatekeeper" role in this case and kept bad science out of evidence.

### C. Medical Malpractice

Madison County has become the center of a statewide debate in Illinois "over skyrocketing medical malpractice insurance rates for doctors, and the resulting exodus of many physicians from the area."<sup>43</sup> *The Telegraph* has reported that between the beginning of 2003 and March 2004, 131 doctors left Madison and St. Clair Counties.<sup>44</sup>

41. See John Shaffery, *Welding Rod Injury and its Current Litigation: A Brief Overview*, HARRISMARTIN'S TOXIC TORT WATCH, Mar. 2004, at 6, <http://www.poolshaffery.com/welding.pdf>.

42. Brian Brueggemann, *More Research Is Needed in Welding Fumes Welders Seem Unworried About Parkinson's After Jury Awards \$1 Million to Ailing Man*, BELLEVILLE NEWS-DEMOCRAT, Nov. 2, 2003, see also Brian Brueggemann, *Ailing Plaintiff Wins \$1 Million Award From Jury*, BELLEVILLE NEWS-DEMOCRAT, Oct. 29, 2003, at 1B.

43. Kevin McDermott, *Illinois Legislators Will Aim to Contain Malpractice Rates*, ST. LOUIS POST-DISPATCH, Mar. 24, 2004.

44. Dave Whaley, *Delegation Takes Case for Malpractice Reform to Springfield*, THE TELEGRAPH, Mar. 24, 2004.

Anderson Hospital in Madison County reports that it has "lost four obstetricians, three general surgeons, two internists, two family practice doctors, one otolaryngologist, one neurosurgeon, and one anesthesiologist, all who claimed they were leaving due to the overwhelming increases in premiums they were being asked to pay."<sup>45</sup> Keith Page, Anderson's president and chief executive officer, told the *Edwardsville Intelligencer* that he expects a fifteen-percent reduction in the number of babies delivered at the hospital in 2004 compared to 2003, because "there are four fewer OB doctors and their volume cannot be absorbed by the OB doctors that remain."<sup>46</sup>

Dr. Greg Gabliani of Alton has explained: "Practicing medicine in Madison County is like walking through a bad neighborhood. . . . You're just waiting to get mugged. The costs are going out the ceiling, and we can't pass along the malpractice costs to our patients."<sup>47</sup> Doctors want to help their patients, but they fear that being named in a lawsuit could damage their practice and reputation.

### II. AN ASBESTOS "MECCA"

Former Attorney General Bell has observed that Madison County "has allowed itself to become a Mecca for asbestos lawsuits."<sup>48</sup> From 1985 through 2002, about 8,000 asbestos suits were filed in Madison County.<sup>49</sup> The "filing curve" is pointed skyward: 953 asbestos cases were filed in Madison County in 2003, up from about 884 cases in 2001, 411 in 2000, 176 in 1998, and 65 in 1996.<sup>50</sup> Between 1996 and

45. Norma Mendoza, *Anderson Feels Insurance Pinch*, EDWARDSVILLE INTELLIGENCER, Mar. 15, 2004.

46. *Id.*

47. Dave Whaley, *Doctor Exodus Threatens Hospitals*, THE TELEGRAPH, Mar. 21, 2004.

48. Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 PEPP. L. REV. 1, 7 (2004).

49. Paul Hampel & Philip Dine, *Asbestos Litigation Deal Could Force Law Offices to Find New Specialties: Bill Would Substitute Trust Fund for Lawsuits*, ST. LOUIS POST-DISPATCH, July 23, 2003, at A1.

50. Source, from Madison County clerk's office, on file with authors; see also Trisha L. Howard, *Plaintiffs' Lawyers Seek Limits on Asbestos Suits by People with Nonmalignant Illnesses: Awards in Such Cases Imperil Assets for Those Gravely Ill*, ATTORNEYS SAY, ST. LOUIS POST-DISPATCH, Dec. 11, 2001, at C4; Memorandum in Support at 2, *In re All Asbestos Litig.* Filed in Madison County (Madison County Cir. Ct. Apr. 9, 2003) (on file with authors) [hereinafter Joint Motion to Amend]; Union Carbide Corp.'s Memorandum and Explanatory Suggestions in Support, at 9, Union Carbide Corp. v. Hon. Ralph J. Mendelsohn (Ill. Apr. 10, 2003) (No. 02-L-1428) (on file with the authors) [hereinafter Union Carbide Motion, Apr.

2002, the number of asbestos filings in the county skyrocketed 1144%.<sup>51</sup> The number of asbestos cases set for trial also has jumped. In 2001, 480 cases were set for trial (forty per month).<sup>52</sup> By 2002, that number had risen to 993 cases (eighty-three per month).<sup>53</sup> The increase continued in 2003, when 1,000 asbestos cases were set for trial. As of this writing, the number is on pace to set a new record in 2004.<sup>54</sup>

For the most serious asbestos illness, mesothelioma (a type of cancer), more than 400 cases were filed in 2003.<sup>55</sup> More such cases were set for trial that year in Madison County than in New York City, which has a population many times greater than Madison County.<sup>56</sup> In a recent two-year period, one corporation had more mesothelioma claims filed against it in Madison County than in any other jurisdiction in the country.<sup>57</sup>

There are two key problems with the way asbestos cases are handled in Madison County. First, the circuit court allows plaintiffs with no relation to the county, or even the State of Illinois, to file cases in the county. Second, the court manages asbestos cases in ways that unfairly disadvantage defendants and benefit plaintiffs.

#### A. Problem One: No Logical Connection to the County

It appears that the vast majority of asbestos claimants in Madison County are non-residents that have no real nexus to the forum. For example, based on plaintiffs' complaints and answers to interrogatories, seventy-five percent of the mesothelioma claims set for trial against one defendant during two trial settings in 2003 "lacked any connection to Illinois, let alone Madison County."<sup>58</sup> We

2003].

51. See Joint Motion to Amend, *supra* note 50, at 2.

52. See Union Carbide Motion, May 2004, *supra* note 18, at 9.

53. See *id.*

54. See *id.*

55. Source, from Madison County clerk's office, on file with authors.

56. See U.S. CHAMBER OF COMMERCE & U.S. CHAMBER INST. FOR LEGAL REFORM, THE CASE OF [AGAINST] MADISON COUNTY, June 5, 2003 (on file with authors).

57. Union Carbide Motion, May 2004, *supra* note 18, at 10.

58. Union Carbide Motion, Apr. 2003, *supra* note 50, at 9.

understand that there has been at least one asbestos claim filed in Madison County by a Canadian plaintiff.<sup>59</sup>

The Madison County Circuit Court has said that it applies "kind of a loose" and "liberal" policy in allowing out-of-state asbestos claimants to remain in the county.<sup>60</sup> The circuit court routinely refuses to dismiss or transfer such cases, contrary to Illinois law. For example, the court allows claims to proceed to trial where the plaintiff and defendant are located out-of-state, the plaintiff's exposure occurred outside the state, medical treatment was provided outside the state, no witnesses live in Illinois, and no evidence relates to the state.<sup>61</sup>

In one such case in 2003, an Indiana plaintiff with mesothelioma filed a claim in Madison County against U.S. Steel for injuries he allegedly sustained as a result of asbestos exposure during his thirty-one years of employment at a U.S. Steel plant in Indiana. The plaintiff had no significant connection to Illinois, much less to Madison County.<sup>62</sup> Nevertheless, the plaintiff obtained a \$250 million verdict—believed to be one of the largest verdicts ever awarded to a single plaintiff—for injuries allegedly stemming from asbestos exposure.<sup>63</sup> The company then quickly settled the case.<sup>64</sup> Similarly, the circuit court allows cases to remain in Madison County even though they would be more appropriately heard in another Illinois county. An Illinois appellate court recently reviewed three cases centering on the issue of whether the cases were appropriately tried in Madison County. All three cases involved plaintiffs who resided outside of Madison County, were allegedly exposed to asbestos outside the county, and were treated by physicians located outside the county.<sup>65</sup> In each case the Madison County trial court denied the

59. See Union Carbide Motion, May 2004, *supra* note 18, at 3 (quoting Tr. at 36 (statement of the court, July 9, 2003) ("I don't know why they can't get [justice] faster in Canada or some other state, but it appears we have a pretty good program here.")).

60. *Id.* (quoting Tr. at 16, 22 (Apr. 28, 2004)).

61. See Union Carbide Motion, Apr. 2003, *supra* note 50, at 2-3, 7.

62. See Bell, *supra* note 48.

63. See Brian Brueggemann, *Man Awarded \$250 Million in Cancer Case*, BELLEVILLE NEWS-DEMOCRAT, Mar. 29, 2003, at 40.

64. See U.S. Steel Settles Historic \$250 Million Case for Under \$50 Million, 21 No. 5 ANDREWS TOXIC CHEM. LITIG. REP. 11 (May 1, 2003).

65. See Burns v. A.P. Green Indus., Inc., 761 N.E.2d 380 (Ill. Ct. App. 2001); Dykstra v.

defendants' forum non conveniens motions and allowed the cases to proceed. The appellate court transferred only one of the cases to a different county.<sup>66</sup>

Unfortunately, the Fifth District Appellate Court routinely affirms the Madison County judges' improper denials of forum non conveniens motions. For example, of the approximately thirty supervisory orders issued since 1993 by the Illinois Supreme Court overturning improperly denied forum non conveniens motions, twenty-six of the supervisory motions were directed towards courts in the Fifth District.<sup>67</sup>

Forum shopping abuse in Madison County has recently gained the attention of the Illinois Supreme Court. In *Dawdy v. Union Pacific Railroad Co.*, the Illinois Supreme Court reversed the Fifth District and Madison County Circuit Court's denial of a motion to transfer a personal injury action brought against a railroad stemming from a motor vehicle accident in a neighboring county.<sup>68</sup> The court held that "Madison County ha[d] little or no interest in trying the action of a nonresident whose claim arose in Macoupin County."<sup>69</sup> The court further said that given the "public interest factor of jury duty, we conclude that the residents of Madison County should not be burdened with jury duty given the fact that the action did not arise in, and has no relation to, their county."<sup>70</sup> Despite this ruling, Madison County courts persist in allowing some claims to proceed that have no logical relation to the county.

The Illinois Supreme Court has an opportunity to further police forum shopping abuse when the court decides *Gridley v. State Farm Mutual Automobile Insurance Co.*<sup>71</sup> *Gridley* is a putative nationwide class action filed in Madison County by a Louisiana resident against an automobile insurer with its corporate offices in McLean County,

A.P. Green Indus., Inc., 760 N.E.2d 1034 (Ill. Ct. App. 2001); *Hefner v. Owens-Corning Fiberglas Corp.*, 659 N.E.2d 448 (Ill. Ct. App. 1995).

66. See *Burns*, 761 N.E.2d at 383-84 (transferring the case to Shelby County).

67. See *First Nat'l Bank v. Guerne*, 764 N.E.2d 54, 60, 64-66 (Ill. 2002).

68. 797 N.E.2d 687 (Ill. 2003); see also Trisha L. Howard, *High Court Orders Case Moved From Madison County*, ST. LOUIS POST-DISPATCH, Aug. 22, 2003, at B1.

69. *First Nat'l Bank*, 764 N.E.2d at 699.

70. *Id.* at 700.

71. 767 N.E.2d 896 (Ill. Ct. App.), appeal granted, 786 N.E.2d 183 (Ill. 2002).

Illinois. The named plaintiff asserted claims of unjust enrichment and violations of the Illinois fraud and deceptive business practices law based on the defendant's alleged failure to obtain salvage titles for vehicles that had been declared total losses.<sup>72</sup>

At the trial court level, defendant filed a motion to dismiss, claiming that Louisiana was a more convenient forum because the putative class representative and only named plaintiff resided in Louisiana, and because all the evidence and witnesses with knowledge regarding the purchase of plaintiff's vehicle were located in Louisiana.<sup>73</sup> In the alternative, the defendant moved for the case to be transferred to the McLean County.<sup>74</sup> The court denied defendant's motions based on the mere assertion of class counsel that the defendant's conduct was national in scope and thus potentially involved at least some Madison County residents.<sup>75</sup> The Fifth District appellate court remanded the case with directions to for the trial court to establish a discovery schedule, apparently to allow plaintiff's counsel to try to find someone in Madison County that might be a potential class member.<sup>76</sup>

The Illinois Supreme Court is now reviewing the matter. The court should reverse the Fifth District and hold that that where a plaintiff has brought a case far from home, and there is no special connection to the forum sought, a timely motion to dismiss on forum non conveniens grounds must be granted, notwithstanding any sense that the trial court may have that the case presents a matter of "national" interest.<sup>77</sup>

72. The plaintiff claims that the defendant engaged in this practice because vehicles with clean titles could be sold for more money, thereby enhancing the profitability of defendant's claims operation. See *Gridley*, 767 N.E.2d at 899.

73. See *id.*

74. See *id.*

75. See *id.* at 903 (stating that the circuit court "was guided by assertions in the parties' arguments rather than by facts.")

76. See Kevin McDermott, *Firms Aim to Dent County's Popularity as Lawsuit Venue: High Court Considers Whether to Move Case*, ST. LOUIS POST-DISPATCH, Sept. 14, 2003, at A1.

77. See Brief of the Am. Ins. Ass'n as Amicus Curiae, at 23, *Gridley* (No. 94144).

### B. Problem Two: Unfair Case Management

The ordinary and natural approach to civil litigation is for a plaintiff to bring suit in his or her home forum. When litigants from across the country hasten to bring their cases in some distant forum like Madison County, something is afoot. One must ask, why would plaintiffs willingly give up their "home field advantage" and bring suit in an inconvenient and far away forum? Sometimes, rarely, they do it because they must. More often, plaintiffs head to particular forums because they perceive that they will receive especially favorable treatment.

This leads us to the second problem in Madison County: case management techniques that disadvantage defendants and give plaintiffs unprecedented control over a claim's resolution.

#### 1. Motions to Dismiss or for Summary Judgment Not Granted

Judges in Madison County are known for routinely refusing to grant defendants' pre-trial motions. For example, defendants' motions to dismiss are rarely, if ever, granted.<sup>78</sup> We understand that action on such motions has all but disappeared.

Moreover, Madison County judges virtually never grant summary judgment despite the plaintiff's failure to identify the manufacturer of the product that allegedly caused his or her harm.<sup>79</sup> In fact, we understand that many major defendants have never won a summary judgment motion in a Madison County asbestos case.

Under Illinois summary judgment practice, the plaintiff must come forward with competent evidence in discovery that a reasonable

78. See Joint Motion to Amend, *supra* note 50, at 8 (citing Tr. 19-20 (noting that the defendant was unaware of a single instance over the seven-year period preceding the motion in which a Madison County court granted a defendant's motion to dismiss in an asbestos case based on plaintiff's failure to allege basic facts regarding the product to which the plaintiff was allegedly exposed or the location and time of such exposure)).

79. See *id.* at 11 (indicating that a survey by the defendant of over 400 motions for summary judgment filed in Madison County asbestos cases from approximately January through June 2002 found that "[p]laintiffs did not bother filing any written responses to any of those motions, let alone responses consistent with the rules. Nevertheless, of the hundreds of motions filed, only two were granted, one of them against a *pro se* plaintiff who failed to attend the hearing.").

jury could find that plaintiff's injury was caused by defendant's product. *Thacker v. UNR Industries, Inc.*,<sup>80</sup> decided by the Illinois Supreme Court, holds that before a case may be submitted to the jury there must be sufficient evidence that the defendant's product caused the plaintiff's harm. This connection is established through "the frequency of the use of the product and the regularity or extent of the plaintiff's employment in proximity thereto."<sup>81</sup> If a plaintiff cannot pass this "frequency, regularity, and proximity" test, summary judgment should be granted.<sup>82</sup> Yet, in Madison County, even where the discovery record is devoid of such evidence, the circuit court routinely delays deciding or denies summary judgment motions upon plaintiff counsel's mere oral assertions that he or she will produce the missing evidence at trial.

It is also common for the Madison County court to refuse to hear motions for summary judgment in asbestos cases until the Friday before trial or even the morning of trial. We have heard that summary judgment may be denied based on plaintiffs' counsel's representations that the moving defendant has not completely complied with discovery, or that plaintiffs did not get a copy of the motion or hearing notice and need more time to prepare.

Few, if any, other jurisdictions in the United States so reflexively deny defendants' summary judgment motions. The problem is so widespread that most plaintiffs' attorneys reportedly do not even bother to respond to defendants' summary judgment motions in writing. The circuit court's refusal to weed out frivolous claims requires defendants that are routinely named in every claim to expend time and resources to prepare a defense against alleged injuries that may be the fault of others. The refusal to grant summary judgment motions also means that virtually every claim can proceed to trial. Thus, defendants are forced to settle virtually all claims, regardless of the merits, in order to avoid the potential of a "lightning strike" at trial.

80. 603 N.E.2d 449 (Ill. 1992).

81. *Id.* at 457 (quoting and adopting a version of the causation analysis stated in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986)).

82. *Id.* at 455.

## 2. Other Pre-Trial Issues

Defendants' requests to limit the scope of discovery to the products at issue in a certain claim also are routinely denied. The circuit court has been known to refuse to look to the specific allegations of exposure in a certain case, requiring a defendant to respond as to all of its products or all of its facilities, regardless of their connection to the case at issue.

Furthermore, defendants in asbestos cases may be given notice of upcoming trial only a short time before the trial is scheduled to begin. The routine practice in Madison County is for a defendant to show up the morning of trial and find out which cases will be going to trial that day. Multiple trials may be scheduled to begin on the same day. To further complicate matters, defendants are often forced to prepare for multiple trials involving the laws of multiple jurisdictions.

## 3. Defendants Are Further Disadvantaged at Trial

The problems do not stop with pre-trial management. When asbestos cases do make it to trial, defendants face additional hurdles. The court may not permit defendants to properly defend themselves. The defendants may be denied the opportunity to introduce evidence that a plaintiff's asbestos exposure occurred while working for a different company. Defendants also may not be permitted to show that a plaintiff was exposed to asbestos manufactured or sold by a different company. In a few instances, the court has even stopped defendants from introducing evidence that might demonstrate that the plaintiff's injury was caused by something other than asbestos.

Admittedly, not all of these problems are of Madison County's making. Defendants are disadvantaged by the rule stated by the First District (intermediate) appellate court in *Lipke v. Celotex Corp.*<sup>83</sup> The *Lipke* rule states that a party "guilty of negligence cannot avoid responsibility merely because another person is guilty of negligence contributing to the same injury."<sup>84</sup> Thus, the fact that a plaintiff was

83. 505 N.E.2d 1213 (Ill. Ct. App. 1987), appeal dismissed, 536 N.E.2d 71 (Ill. 1989).  
84. *Id.* at 1221.

exposed to a number of different asbestos products does not act to relieve a negligent defendant from liability for the injury.<sup>85</sup>

Under *Lipke*, a defendant should still be able to argue that its product was not the proximate cause of a particular aspect of the injury, even if it is unable to argue liability for the injury.<sup>86</sup> The Fifth District, however, has 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.<sup>87</sup>

## C. The Ingredients Are in Place for Enormous Settlements/Judgments

Despite Madison County's huge asbestos docket, very few cases ever make it to trial because the pre-trial and trial procedures described above give Madison County plaintiffs unwarranted settlement leverage. Of approximately 4000 asbestos cases set for trial in the county between 1996 and 2003, only four went to verdict.<sup>88</sup> Three of the four resulted in huge awards inflated by punitive damages:

- *Whittington v. A.W. Chesterton* (2003): Asbestos plaintiff awarded \$250 million, including \$200 in punitive damages. As stated, this verdict is believed to be one of the largest verdicts ever awarded to an asbestos plaintiff.<sup>89</sup>
- *Crawford v. AC & S Inc.* (2001): Asbestos plaintiff awarded \$16 million, including \$7 million in punitive damages.<sup>90</sup>

85. See *Spain v. Owens Corning Fiberglass Corp.*, 710 N.E.2d 528, 534-35 (Ill. Ct. App. 1999); *Tragarz v. Keene Corp.*, 980 F.2d 411 (7th Cir. 1992) (applying Illinois law and holding that evidence of exposure to another's product is irrelevant in evaluating if exposure to defendant's product was a substantial factor in causing the plaintiff's injury).

86. See *Leonardi v. Loyola Univ. of Chic.*, 658 N.E.2d 450 (Ill. 1995).

87. See *Kochan v. Owens-Corning Fiberglass Corp.*, 610 N.E.2d 683 (Ill. Ct. App. 1993).

88. See *Joint Motion to Amend*, supra note 50, at 3.

89. See *U.S. Steel Settles Asbestos Lawsuit*, CHI. DAILY HERALD, Apr. 1, 2003, at 1.

90. See Jennifer Kapiolani Saxton, *Belleville, Ill.-Area Jury Awards Former Forklift Operator \$16 Million*, KNIGHT-RIDDER TRIB. BUS. NEWS, Dec. 5, 2001; *Illinois Jury Awards \$16 Million to Living Meso Victim*, ANDREWS ASBESTOS LITIG. REP., Dec. 20, 2001, at 3.

- *Hutcherson v. Shell Oil Co.* (2000): Asbestos plaintiff awarded \$34.1 million, including \$25 million in punitive damages. At the time, this award was the largest asbestos verdict in Illinois history, and one of the largest asbestos verdicts in the nation.<sup>91</sup>

These verdicts stand as a bold warning to defendants: settle or face the risk of a potentially enormous verdict, perhaps in a last-minute trial on multiple claims. The impetus to settle consistently allows plaintiffs to obtain higher settlement values in Madison County than for comparable claims in other jurisdictions.<sup>92</sup> Moreover, we understand that insurers are often quick to settle up to an insured's policy limits, because they fear the possibility of a bad-faith claim based on the pro-plaintiff reputation of the Madison County Circuit Court.

It is natural, in light of these factors, that non-resident plaintiffs would try to file their claims in Madison County. But, shopping for a jurisdiction should not be akin to going on the Internet to find the best deal on eBay.

### III. INACTIVE ASBESTOS DOCKET: ONE THING THE COURT HAS DONE RIGHT

It is important when discussing a forum like Madison County to be fair and not just point out the problems that are reported to be occurring there. It is also important to recognize the court when it has done something right.

Nationally, estimates indicate that up to ninety percent of new asbestos claims are filed by plaintiffs with little or no impairment.<sup>93</sup> These filings clog the courts and threaten the ability of the truly sick

91. See Terry Hillig, *Record Verdict in Asbestos Case Pleases Man With Cancer: Madison County Jury Awards \$34.1 Million; Shell Oil Plans Appeal*, ST. LOUIS POST-DISPATCH, May 25, 2000, at C1.

92. See Union Carbide Motion, Apr. 2003, *supra* note 50.  
93. See STEPHEN CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT 20 (2002); JENNIFER BIGGS ET AL., AM. ACAD. OF ACTUARIES, OVERVIEW OF ASBESTOS ISSUES AND TRENDS 1 (2001), [http://www.actuary.org/pdf/casualty/mono\\_dec01asbestos.pdf](http://www.actuary.org/pdf/casualty/mono_dec01asbestos.pdf).

to receive adequate or timely compensation for their injuries.<sup>94</sup> As Randy Bono, a Madison County asbestos plaintiffs' attorney, has said: "Getting people who aren't sick out of the system, that's a good idea."<sup>95</sup>

In January 2004, the Madison County Circuit Court adopted an inactive docket to prioritize the treatment of asbestos cases.<sup>96</sup> Under the court's order, the claims of individuals who cannot meet certain objective medical criteria specified by the court are suspended. The statutes of limitations on their claims are tolled, permitting these claimants to sue should they develop an asbestos-related disease in the future. Claimants who demonstrate impairment can have their claims removed to the active docket and set for trial. Similar docket management plans currently exist in a number of jurisdictions, including Cook County (Chicago), Boston, Baltimore, and New York City.<sup>97</sup>

Traditionally, Madison County has not been a jurisdiction flooded with unimpaired asbestos plaintiffs, but it has happened. And while the inactive docket will not make trials fair or address forum-shopping abuse by sick claimants, the circuit court's recent order does provide hope that the court may be on the right track. Hopefully, the inactive docket is not mere "window dressing," but a signal that judges in Madison County are serious about instituting needed reform.

94. See Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Unimpaired Docket Programs*, 33 TEXAS TECH L. REV. 1 (2001); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 572 (1992).

95. Paul Hampel & Philip Dine, *Asbestos Litigation Deal Could Force Law Offices to Find New Specialties: Bill Would Substitute Trust Fund for Lawsuits*, ST. LOUIS POST-DISPATCH, July 23, 2003, at A1.

96. See Order Establishing Asbestos Deferred Registry, *In re All Asbestos Litig.* Filed in Madison County (Madison County Cir. Ct. Jan. 23, 2004).

97. See Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331 (2002); Victor E. Schwartz et al., *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Plural Registries) and Case Management Plans that Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271 (2004).

#### IV. ADDITIONAL SOLUTIONS

There are other measures that can and should be adopted to balance and improve the asbestos litigation environment in Madison County.

First, the Madison County Circuit Court should decline to hear claims from plaintiffs with little or no connection to the county. One way to curb forum-shopping would be to permit claims filed only by plaintiffs who reside in or were exposed to asbestos in Madison County. The taxpayers of Madison County should not have to pay for their courts to try the claims of non-residents. Such claimants can have their claims fairly decided at home. If the circuit court were not faced with so many non-resident cases, perhaps the court would feel less pressure to allow efficiency to trump fairness in the handling of asbestos cases.<sup>98</sup>

Second, the Madison County asbestos judges need to be fair in their decisions and administration of cases. They also need to exercise their "gatekeeper" role with respect to keeping unsound science out of the courtroom.<sup>99</sup> The Illinois appellate courts—particularly the Illinois Supreme Court—should take a more active role in reviewing trial court decisions.

Third, the circuit court should preserve assets for sick asbestos claimants by severing, deferring, or staying punitive damage claims.<sup>100</sup> As the United States Court of Appeals for the Third Circuit concluded when it approved a decision by the manager of the federal asbestos docket to sever all punitive damages claims from federal asbestos cases: "It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls . . . ."<sup>101</sup> Repeated punitive damages awards serve no

98. See Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247 (2000).

99. See David E. Bernstein, *Keeping Junk Science out of Asbestos Litigation*, 31 PEPP. L. REV. 11, 12 (2003).

100. See Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 TEX. REV. L. & POL. 137, 158 (2001); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 26 (2001).

101. *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000).

constitutionally justifiable or sound public policy goal in asbestos cases.<sup>102</sup>

Fourth, the circuit court should impose ad hoc public policy limitations on joint liability in asbestos and other appropriate cases. As Professor Richard Cupp, Jr., of Pepperdine Law School has written: "unlimited and unrestrained joint liability represents unsound public policy in the current asbestos litigation environment."<sup>103</sup>

Fifth, if the Madison County judges fail to improve the litigation environment in that forum, the Illinois Supreme Court should intervene. The Illinois Supreme Court should police forum shopping abuse as it did in *Dawdy*.<sup>104</sup> In *Gridley v. State Farm Mutual Automobile Insurance Co.*, the Illinois Supreme Court should make clear that a motion to dismiss on forum non conveniens grounds must be granted unless the claimant has a logical and direct connection to the forum.

Sixth, the Illinois Supreme Court should abolish or clarify the *Lipke* rule to address the unfair burden the rule places on defendants in the Fifth District and elsewhere to compensate plaintiffs for harms proximately caused by others.

Finally, there is a role for the Illinois legislature to play in asbestos litigation. The taint of Madison County has created a wider perception that Illinois is inhospitable to businesses. If something is not done, the actions of this small county court may affect the availability of jobs in Illinois, as well as the state's tax base. Those are matters the legislature may wish to consider.

#### V. CHALLENGES FOR THE FUTURE

The recent inactive asbestos docket order shows that Madison County judges are capable of acting to restore sound public policy to asbestos litigation. The real question, therefore, is whether the courts

102. See Walter Dellinger III & Victor Schwartz, *Asbestos Litigation Today—A Discussion of Recent Trends*, COLUMNS—ASBESTOS RAISING THE BAR IN ASBESTOS LITIG. 5 (Jan. 2002) (statement of Walter E. Dellinger III, former Solicitor General of the United States under President Clinton.).

103. Richard L. Cupp, Jr., *Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability*, 31 PEPP. L. REV. 203, 204 (2004).

104. See *Dawdy v. Union Pac. R.R.*, 797 N.E.2d 687 (Ill. 2003).

or legislature will take additional steps to fix the various problems we have outlined in this article. We hope the judges and policymakers are up to the challenge of creating a fairer civil litigation environment for all parties in the Madison County Circuit Court. Only time will tell.