

Legal Analysis & Regulations

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LAR-467e

September 21, 2005

Sunlight Can Be the Best Disinfectant: *Avery v. State Farm* and the Growing Consensus on Tort Reform

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Sunlight Can Be the Best Disinfectant: *Avery v. State Farm* and the Growing Consensus on Tort Reform¹

Although statistics show that the number of tort cases resolved by trial in U.S. district courts has been steadily declining, falling a total of 79 percent since their peak in 1985,² much of that decline has been attributed to the increase in state courts handling civil actions. This shift to the states, along with general concerns about the handling of tort cases in particular jurisdictions, has prompted numerous calls for tort reform. Illinois, a microcosm for the tort reform debate nationwide, is a case in point. Long criticized for being a “plaintiff paradise,”³ Illinois and its infamous Madison County are showing signs of reform. The election of a pro-business Illinois Supreme Court justice in November, defense verdicts in Madison County in June, and a scathing reversal of a \$1 billion plaintiff’s award in August all demonstrate that tort reform is gaining momentum.

The Illinois Supreme Court Election

In 2004, Illinois Supreme Court Justice Philip Rarick declined to run for a full term on the court. This decision unleashed the most expensive and most hotly contested judicial election in U.S. history. Two candidates, Republican Lloyd Karmeier and Democrat Gordon Maag, quickly emerged and

raised over \$9 million in contributions—an amount greater than contributions raised in 18 of the nation’s 34 U.S. Senate races in 2004.⁴

Why all the interest in a Fifth Judicial District race for an Illinois state supreme court justice, especially a race which regardless of outcome would not shift the political majority of the court? In large part it is because the race sat squarely in the shadow of an intense national debate on tort reform. The Fifth Judicial District of Illinois consists primarily of the Metro East St. Louis region and Madison County. Madison County has become the poster child for tort reform and most recently received nationwide attention in January 2005 when President Bush made his first public policy speech of the year on tort reform in Collinsville, Illinois.

The American Tort Reform Association (ATRA) consistently ranks Madison County as its number one “judicial hellhole”⁵ because leniently applied rules of venue combined with sympathetic judges and juries have enticed increasing numbers of plaintiffs to file suits in Madison County. Indeed, in its *Judicial Hellholes 2004* report, ATRA ranked St. Clair County, Illinois, which is contiguous to Madison County and includes the Metro East St. Louis region, as the second worst litigation “hell-hole” in the United States.

Despite a largely rural environment with a relatively small population (259,000), Madison County consistently hosts more than its fair share of cases. In 2003, nearly one-third of all the asbestos-related mesothelioma cases filed nationally were filed in Madison County (457 of 1,500 cases). More of those cases were filed there than in any other single jurisdiction, including Chicago and New York, cities with substantially larger populations.⁶ The Manhattan Institute and a Belleville, Illinois,

¹ In 2003, the Manufacturers Alliance/MAPI published a book entitled *I Pay, You Pay, We All Pay—How the Growing Tort Crisis Undermines the U.S. Economy and the American System of Justice*, which highlighted the need for meaningful civil justice/tort reform in the United States. This report represents a continuation of the Alliance’s effort to call attention to these critical national issues.

² Thomas H. Cohen, “Federal Tort Trials and Verdicts 2002-03,” *Bureau of Justice Statistics Bulletin*, U.S. Department of Justice, p. 1 (August 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ftv03.pdf> (reporting on trends in Federal tort trials and finding that “[f]rom 1985 to 2003 the number of tort trials terminated in U.S. district courts declined 79%”).

³ Paul Hampel, “Jurors Battle Image of Plaintiff Paradise,” *St. Louis Post-Dispatch* (June 26, 2005) (suggesting a growing cynicism among potential jurors in Madison County, citing a case that was declared a mistrial because potential jurors questioned why the plaintiff, who lived in Missouri but had worked in Madison County, brought the case in Madison County).

⁴ Deborah Goldberg *et al.*, *The New Politics of Judicial Elections 2004*, Justice at Stake Campaign, p. 18 (2005), available at <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf>.

⁵ American Tort Reform Foundation, *Judicial Hellholes 2004*, p. 14 (2004) [hereinafter *Judicial Hellholes*].

⁶ Rob Jordan, “What is at stake in the 2004 Illinois 5th District Supreme Court race? The Illinois Legal System,” FreedomWorks.org (October 22, 2004).

newspaper have reported that class action lawsuits filed in Madison County skyrocketed from 2 in 1998 to 106 in 2003.⁷ Judges have historically allowed claims to proceed there when other jurisdictions have refused, even when there is virtually no plaintiff or defendant connection to Madison County, the alleged injury occurred out of state, no witnesses live in the state, and no evidence relates to the state. Cracker Barrel alone has been sued 19 times in recent years in Madison County. In just one week, between November 15 and 19, 2004, the following companies were defending lawsuits there: American Standard, Champion International, Firestone, Ford, General Dynamics, General Motors, Georgia-Pacific, Honeywell, Ingersoll-Rand, Kimberly-Clark, K-Mart, Mead Corporation, MetLife, Pfizer, Roto-Rooter, Scott Paper, Sears Roebuck & Co., Union Carbide, Union Pacific, Uniroyal, and Viacom.⁸ This part of Illinois is viewed as pro-class action and anti-business, and the Illinois Supreme Court election consequently became the line in the sand for the debate on tort reform.

Given the turmoil and strong feelings about the need for reform of the judicial system in Madison County and the surrounding Fifth Judicial District in Illinois, the opportunity to elect a new state supreme court justice to represent this area became critical to both sides of the issue. Justice Rarick's departure created the first southern Illinois Supreme Court race in 12 years.⁹ Once elected, the justice would likely review many controversial tort cases, including an appeal of a \$10 billion verdict against tobacco giant Philip Morris. Moreover, the prevailing candidate would have the authority to recommend judges to fill vacancies within the Fifth District's courts, thereby greatly influencing the direction of the courts for years to come.¹⁰

Special interest groups on both sides of the debate used the election as a referendum on tort reform and descended on Illinois with over 7,500 television ads and millions of dollars in contributions to stir emotions. One ad warned that "predatory trial lawyers" are driving away jobs and doctors, and "sharks in fancy suits are getting rich at our expense."¹¹ The Illinois State Chamber of Commerce paid for that ad, making an unprecedented endorsement of a state judicial candidate, Karmeier. The U.S. Chamber of Commerce also publicly vowed "to spend tens of millions of dollars on state court races in Illinois and other key states with an eye toward making the courts more business friendly."¹²

The two candidates were viewed as disagreeing fundamentally on the need for tort reform. Fifth District Appellate Court Justice Gordon Maag, the Democrat, was widely supported by trial lawyers and portrayed as the candidate least likely to embrace tort reform. The Republican, 20th Circuit Judge Lloyd Karmeier, received large donations from the business sector and campaigned on a pro-business platform. At the time of the election, Democrats held a 5-2 majority on the court—a court which in 1997 declared a law to restrict personal injury damages "unconstitutional."¹³ The election also occurred just months after an Illinois judge ordered Philip Morris to pay \$10.1 billion in damages for misleading smokers.

When the dust finally settled, Lloyd Karmeier won with 55 percent of the vote and with him tort reformists declared victory. In less than a year on the bench, the Illinois Supreme Court has overturned a \$1 billion verdict against State Farm Auto Insurance and will hear Philip Morris' appeal later this year. Moreover, Justice Karmeier has already

⁷ John H. Beisner and Jessica Davidson Miller, The Center for Legal Policy at the Manhattan Institute, *Class Action Magnet Courts: The Allure Intensifies*, p. 1 (July 2002); Brian Brueggemann, "Class-Action Lawsuits Top Old County Record," *Belleville News-Democrat*, January 2, 2004, at 1A.

⁸ *The Madison County Record* (Madison County, Ill.) (providing a list of companies in court between November 15 and 19, 2004) quoted in *Judicial Hellholes*, p. 14 (2004).

⁹ Kevin McDermott, "All eyes on the Fifth," *Illinois Issues Online* (September 2004) available at <http://illinoisissues.uis.edu/features/2004sept/fifth.html>.

¹⁰ Under Illinois Supreme Court Rules, supreme court justices make recommendations to fill vacancies of state appellate court judges within their respective judicial districts. Historically, these recommendations are from the justice's political party and are almost always accepted.

¹¹ "Supreme Court Race in Illinois Gets Nasty," Associated Press (July 14, 2004) available at <http://www.newsmax.com/archives/articles/2004/7/14/154529.shtml>.

¹² McDermott, *op. cit.*, note 9. The U.S. Chamber of Commerce has not released official information regarding the amount it contributed to the Karmeier campaign. However, two campaign watchdog groups, Public Citizen and the Illinois Campaign for Legal Reform, reported that according to the State Board of Elections, between September 26 and November 2, 2004, the U.S. Chamber of Commerce contributed \$2,050,000 to the Illinois Republican Party, which in turn contributed \$1,922,294 to the "Citizens for Karmeier" political action committee. See, e.g., Illinois Campaign for Legal Reform website at <http://www.ilcampaign.org/issues/judicial/karmeierchart.html>.

¹³ "Supreme Court Race in Illinois Gets Nasty," *op. cit.*, note 11.

recommended at least one judge who has been appointed to serve on the appellate court.¹⁴

The Defense Rests . . . and Wins!

Defense verdicts in Madison County in June further encouraged tort reformists.¹⁵ After an eight-day trial, it took a jury less than an hour to rule in favor of defendant General Electric (GE) and reject the plaintiff's claim that asbestos from GE killed her husband. In *Gudmundson v. General Electric*,¹⁶ Mrs. Gudmundson alleged that GE's steam turbines on her husband's Navy ship required asbestos insulation and that asbestos dust caused his mesothelioma. During the Korean war, Mr. Gudmundson worked as a laundryman aboard the U.S.S. Bausell. His wife alleged that the asbestos from the ship's turbines contaminated the seamen's clothes and that her husband's repeated and consistent exposure to these clothes exposed him to the asbestos. GE countered that it did not produce or use the asbestos; rather, it merely constructed and turned the bare-metal turbines over to the Navy. Another now-defunct company made the asbestos insulation that the Navy purchased and applied to the turbines. Given the tenuous connection between GE and the asbestos, and between the alleged asbestos exposure on the clothing and the husband's mesothelioma diagnosis 50 years later, the jury required only 20 minutes to deliberate and find for the defense.

Gudmundson was an unusual victory for the defense. Asbestos lawsuits flourish in Madison County and are usually settled out of court for \$2-\$3 million.¹⁷ Three other asbestos cases tried between 2000 and 2003 resulted in plaintiff awards

of \$16 million, \$34.1 million, and \$250 million, respectively, although the last one was later settled for an undisclosed amount.

For supporters of tort reform, recent defense verdicts such as in *Gudmundson* give cause for hope in Madison County. Many reform advocates suggest that the change is a result of juries being more informed and taking notice of the negative national attention their county has received for its plaintiff verdicts. The hopes of tort reformers were further buoyed by another development in Illinois, the state supreme court's much acclaimed acerbic opinion in *Avery v. State Farm Auto Insurance*.¹⁸

A Reversal of Fortune: *Avery v. State Farm*

Perhaps the strongest indication that tort reform is afoot in Illinois is the state supreme court's resounding reversal of a \$1 billion verdict against State Farm Auto Insurance. In *Avery v. State Farm*, the court held that the plaintiffs were incorrectly certified as a class and that State Farm neither breached its contracts, nor committed fraud by specifying the use of non-original equipment manufacturer ("non-OEM") auto parts in repairing policyholders' vehicles. This case is noteworthy in several respects. First, it reverses a \$1 billion class action verdict against a major insurance company. Second, the vehemence with which the court pronounced its opinion demonstrates a growing hostility for dubious class action suits. Third, many view the opinion as an insight to a new direction for tort reform in Illinois. Fourth, since the verdict is a striking departure from a long history of class action suits in Illinois, many view this verdict as a harbinger of tort reform nationwide.

The facts and history of the *Avery* decision are considerable. Michael Avery and four other named plaintiffs brought a class action alleging breach of contract and statutory consumer fraud against State Farm Auto Insurance. Basically, Avery claimed that non-OEM auto parts are inferior to OEM parts and that State Farm's use of these inferior non-OEM parts breached its contracts. Further, plaintiffs argued, State Farm committed fraud by not disclosing its use of these "categorically inferior" parts during the claims process. A jury, a judge, and an appellate court all agreed with Avery before the Illinois Supreme Court (including newly elected

¹⁴ On June 8, 2005, the Supreme Court announced that Justice Karmeier had recommended the appointment of Stephen P. McGlynn to the Appellate Court for the Fifth Judicial District. See Press Release, Illinois Supreme Court (June 8, 2005), available at <http://www.state.il.us/court/PressRel/2005/060805.pdf>.

¹⁵ According to the National Law Journal, two defense verdicts in Madison County in June 2005 came as pleasant surprises to tort reformers. This article addresses *Gudmundson v. General Electric*, No. 03-L-538 (Madison Cty. Cir. Ct. June 2005). Few details are available for a subsequent medical malpractice lawsuit, *Wolfe v. Southwestern Illinois Health FAC, Inc.*, No. 03-L-2022 (Madison Cty. Cir. Ct. June 2005), also won by the defense.

¹⁶ *Gudmundson v. General Electric*, *op. cit.*, note 15.

¹⁷ Brian Brueggeman, "Jury rules GE not liable in asbestos trial," *Belleville News-Democrat* (June 4, 2005), available at <http://www.belleville.com/mld/belleville/news/local/11814114.htm>.

¹⁸ *Avery v. State Farm Mutual Automobile Insurance Co.*, No. 91494, 2005 Ill. LEXIS 959 (Ill. August 18, 2005), also available at <http://www.state.il.us/court/Opinions/SupremeCourt/2005/August/Opinions/Html/91494.htm>.

Justice Karmeier) released a blistering reversal in favor of State Farm.

Case History

Avery *et al.* initially filed the case in July 1997. There were over two years of pretrial motions before attorneys made opening statements to the jury on August 16, 1999. The trial itself lasted seven weeks, with 81 witnesses, over 200 exhibits, and a record of over 30,000 pages in filings. The Illinois Supreme Court issued its final decision on August 18, 2005. Overall, the case consumed many personal and public resources including a plethora of attorneys, 12 jurors, several circuit court judges, an appellate court, and the Illinois Supreme Court to reach a conclusion.

Only one of the named plaintiffs resided in Illinois; however, the circuit court of Williamson County certified the class of plaintiffs to include “all persons in the U.S., except those residing in Arkansas and Tennessee, who, between July 28, 1997 and February 24, 1998” had a vehicle insured by State Farm, made a claim for vehicle repairs, and had non-OEM parts installed.¹⁹ A jury decided the breach of contract claim in favor of Avery. In a simultaneous bench trial, the circuit court ruled in favor of Avery on the consumer fraud claim. Damages awarded to plaintiffs totaled nearly \$1.2 billion. The appellate court affirmed the judgments, but reversed part of the damages by lowering the total award to near \$1.06 billion. The Illinois Supreme Court reversed the appellate court’s decision in a blistering opinion.

Facts, Claims and Counter Arguments

Five named plaintiffs filed the lawsuit and testified at trial: Michael Avery of Louisiana, Mark Covington of Mississippi, Sam DeFrank of Illinois, Carly Vickers of Pennsylvania, and Todd Shadle of Massachusetts. The plaintiffs all owned vehicles insured by State Farm Auto Insurance and experienced accidents with these vehicles requiring repairs covered by their State Farm policies. Three of the named plaintiffs—Covington, DeFrank, and Vickers—had non-OEM parts installed on their vehicles. All three expressed dissatisfaction with the parts; however, Vickers subsequently received book value for her car from State Farm after a second more serious accident totaled her car, and DeFrank sold his repaired truck to his brother-in-

law for fair market value. Two plaintiffs specifically requested OEM parts and paid the difference in cost from the State Farm authorized non-OEM parts (Shadle \$45, Avery \$155). When taking their vehicles in for repair, all named plaintiffs were told and/or given paperwork explaining that State Farm would use non-OEM parts.

The plaintiffs argued that State Farm breached its contract by requiring the use of non-OEM auto parts in the repair of policyholders’ vehicles. Plaintiffs argued that under the contract, State Farm promised “to restore plaintiffs’ vehicles to their pre-loss condition using parts of like kind and quality.”²⁰ The plaintiffs argued that non-OEM parts are not “of like kind and quality,” but are inferior parts. In order to certify their claim as a class action, plaintiffs further alleged that despite different language in multiple policy forms, State Farm essentially had a single contract policy. Regarding the consumer fraud claim, plaintiffs contended that during the claims process State Farm failed to disclose the categorical inferiority of non-OEM parts.

State Farm countered that non-OEM parts are “of like kind and quality.” Further, State Farm did not have a single, uniform contract; rather, there were multiple policies with varying terms. Thus, each contract and claim needed to be reviewed individually, not as a class. Moreover, because of the varying contracts around the country, there were substantive conflicts of law making it improper to apply Illinois consumer law nationwide.

During trial, several State Farm Auto Insurance policy forms were presented and discussed. There were “like kind and quality” policies that promised “to repair or replace the property or part with like kind and quality” but “[i]f the repair or replacement results in better than like kind and quality, you must pay for the amount of the betterment.”²¹ There also were “You agree” policies stating “[State Farm] will include in the estimate parts sufficient to restore the vehicle to its pre-loss condition. You agree with us that such parts may include either parts furnished by the vehicle’s manufacturer or parts from other sources including non-original equipment manufacturers.”²² Finally, a Massachusetts policy promised to pay “the actual cash value” of “parts at the time of collision” and an “Assigned Risk” policy promised to pay an “[a]mount necessary to repair or replace the

¹⁹ Avery, 2005 Ill. LEXIS 959, p. *63.

²⁰ *Ibid.*, p. *6-7.

²¹ *Ibid.*, p. *35.

²² *Ibid.*, p. *36.

property,” but neither included language imposing any standard of part quality.²³

To be certified as a class action, plaintiffs argued that despite the different language on different forms, State Farm practiced one “uniform policy” with “the same or common general terms.”²⁴ The evidence for this ironically relied on testimony from defendant’s witness, Don Porter, a State Farm property consultant with over 20 years of experience at State Farm. He testified that State Farm had “always had a commitment to restoring the vehicle to its pre-loss condition.”²⁵ He repeated this statement no less than 26 times. While both the circuit and appellate courts relied on his expertise and testimony to find that State Farm had a uniform nationwide policy, the Illinois Supreme Court did not and found that his testimony referred only to a philosophy.

The Opinion of the Court

Chief Justice McMorro delivered the opinion of the court. First, the court denied the certification of the class, concluding that the differing language in State Farm’s contracts could not be given uniform interpretation so that the class could be certified. The court found that Porter’s testimony about State Farm’s “commitment to restoring the vehicle to its pre-loss condition” referred to a “basic philosophy” goal, not a contractual obligation.²⁶

Despite denying certification of the class as a whole, the court continued its analysis, assuming for the sake of argument that the breach of contract claim could move forward for a potential subclass of State Farm policyholders. First, the court found there was no single contract; there were multiple policy forms with differing language. Neither the Massachusetts policy nor the “Assigned Risk” policy included language imposing any standard of part quality, thus, no breach of contract. The “You agree” policies failed on two counts: (1) no breach because policyholders expressly agreed to the use of non-OEM parts; and (2) no class action because in order to establish the “pre-loss condition” one would have to examine each car separately. Finally, the “like kind and quality” policies failed for lack of proof because at no point did any of the named plaintiffs produce policy papers with this language. However, even if there were plaintiffs

with this policy form, there is still no breach because: (1) if the promise “to repair or replace the property or part with like kind and quality” were to require only OEM parts, then there is no reason to use the phrase “like kind and quality”; and (2) State Farm cannot be referring only to OEM parts because the policy itself indicates there is a standard of quality which is *better* than “like kind and quality” because the policy states “If the repair or replacement results in better than like kind and quality, you must pay for the amount of the betterment.”²⁷ Thus, the court found that the breach of contract claim could not be affirmed for any subclass of policyholders under any of the relevant policy forms. Moreover, the breach of contract verdict could not be upheld because plaintiffs failed to establish damages.

With regard to the Consumer Fraud Act, plaintiffs claimed that the non-OEM parts were “categorically inferior” to OEM parts, and, therefore, could never be “of like kind and quality.” The court reasoned, however, that not all consumer goods are of equal quality, therefore it is not fraudulent to specify a non-OEM part simply because there may be “better” parts available. Thus the only thing that could make the use of non-OEM parts fraudulent is if State Farm omitted or misrepresented the use of non-OEM parts. Plaintiffs did not allege or prove this.

The court also held that it would be improper to apply the Consumer Fraud Act to out-of-state claims. The only named plaintiff with a potential claim was Sam DeFrank, who resides in Illinois. To succeed in a private cause of action in a Consumer Fraud Act case, a plaintiff must prove by a preponderance of the evidence “(1) a deceptive act or practice by the defendant, (2) the defendant’s intent that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade or commerce, and (4) actual damage to the plaintiff (5) proximately caused by the deception.”²⁸ DeFrank’s claim, however, failed on two counts. First, he suffered no actual damage, as required under the Act, because ultimately he sold his repaired truck for fair market value. Second, he failed to establish proximate causation because he testified at trial that he requested replacement parts made by General Motors (the original manufacturer) before ever receiving the State Farm brochure that allegedly deceived him about the use of non-OEM parts.

²³ *Ibid.*, p. *38.

²⁴ *Ibid.*, p. *7.

²⁵ *Ibid.*, p. *19.

²⁶ *Ibid.*, p. *40.

²⁷ *Ibid.*, p. *54.

²⁸ *Ibid.*, p. *118-119.

The Court's Tone and Entry Into the National Tort Reform Debate

Interestingly, both sides of the tort reform debate agree that the supreme court intended its opinion in *Avery* to set a new tone for tort reform and class actions in Illinois. The court strongly chided the plaintiffs for “deliberately avoid[ing] any theory relating to defective parts at trial because such a theory would have significantly increased their burden of proof.”²⁹ The court also suggests that the appellate court intentionally rephrased DeFrank’s damages to avoid “temporal problems.”³⁰

Justice Freeman expressed deep concern about the tone of the opinion, filing a separate opinion joined by Justice Kilbride, concurring in part and dissenting in part. Freeman specifically stated that he “takes issue with the tenor of the court’s analysis of the consumer fraud claim . . . [because] the court indulges in sarcasm, chiding and innuendo in furtherance of needless and intemperate attacks on the plaintiffs bar and our own appellate court.”³¹ Further, he states his belief, and that of many

others, that “today’s opinion appears to be my colleagues’ point of entry into the ongoing national debate concerning class action litigation.”³²

Conclusion

While the number of tort cases in federal courts has steadily declined, state and local courts are seeing increasing numbers. The rays of tort reform sunshine, however, are beginning to glow even in jurisdictions with controversial histories such as Illinois, and in particular, Madison County. The election of a pro-business Illinois Supreme Court Justice, business defendants winning recent cases in Madison County, and the strongly worded reversal of the verdict against State Farm all indicate times and tendencies are changing with regard to tort reform. As the spotlight continues to shine on Illinois and Madison County, other jurisdictions may begin to experience reform as well. Businesses and tort reform proponents may soon have reason to cheer nationwide.

²⁹ *Ibid.*, p. *103.

³⁰ *Ibid.*, p. *149.

³¹ *Ibid.*, p. *211 (Justice Freeman concurring in part, dissenting in part).

³² *Ibid.*, p. *212.