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GUILT BY ASSOCIATION: YOU DIDN'T DESIGN IT, MAKE IT OR SELL IT, BUT YOU COULD BE LIABLE ANYWAY

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Guilt by Association: You Didn't Design It, Make It, or Sell It, But You Could be Liable Anyway: Strategies for Defending Civil Conspiracy Claims in Mass Tort Litigation

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One of the areas in which plaintiffs in mass tort litigation have struggled for decades is proof of injury by a particular defendant's product. The theory of market share liability, where liability is sought to be imposed *carte blanche* on an entire industry, has gotten very little traction outside the limited context of diethylstilbestrol (DES) cases. More recently, plaintiffs have attempted to utilize civil conspiracy claims to short-cut their burden of proving product identification and injury by a particular defendant's product. The typical allegation in such cases is that the defendant manufacturers supposedly conspired to conceal the hazards of a particular product through the activities of a trade association. This theme is certainly not new in mass tort litigation.

Indeed, this page of the mass torts playbook has been replayed time and again in cases involving tobacco, asbestos, vinyl chloride, welding fumes, breast implants, lead-based paint and gasoline additives. *See* Richard Ausness, *Conspiracy Theories: Is There a Place for Civil Conspiracy in Products Liability Litigation?* 74 Tenn. L. Rev. 383 (2007). Plaintiffs have also attempted to use conspiracy claims to bring in defendants who could not possibly have sold a product that the plaintiff used, but are alleged to be liable because they were part of a conspiracy to conceal information from the general public. Surprisingly, however, not many courts have directly addressed the abstract question of whether a simple allegation of conspiracy against an industry can relieve a plaintiff of pleading and proving product identification and thus the underlying elements of a claim of fraudulent concealment.

While there are some cases that seem to endorse the theoretical possibility of the imposition of liability for conspiracy to a disconnected plaintiff, the law presents some formidable obstacles that can shield a defendant from being held liable for conspiracy in the absence of a valid substantive claim. This paper presents an outline of some of the pertinent case law concerning civil conspiracy claims arising out of fraudulent concealment claims in mass tort cases, and provides strategies defense counsel can utilize in formulating a defense in such cases.

I. Conspiracy Law Basics

A. Elements

The case law is generally consistent as to the elements of a civil conspiracy claim that must be pleaded and proven: (1) an agreement to commit an unlawful or tortious act; (2) the commission of an underlying tort for the purpose of furthering the conspiracy; (3) causation; and (4) damages. *See*, Ausness, *supra*, at 391.

B. Proof of an Underlying Tort

Case law is generally uniform that a plaintiff must prove the elements of an underlying tort to establish liability against a defendant for civil conspiracy. *See In re: Orthopedic Bone Screw Products Liability Litigation,* 193 F.3d 781, 789-90 (3d Cir.1999) (observing that case law "uniformly requires that conspiracy claims be predicated upon an underlying tort that would be independently actionable against a single defendant"); *J. Kinson Cook of Georgia, Inc. v. Heerv/Mitchell,* 644 S.E.2d 440, 448 (Ga.Ct.App.2007) ("Absent the underlying tort, there can be no liability for civil conspiracy."); *Tilton v. Marshall,* 925 S.W.2d 672, 681 (Tex.1996) ("[A] defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable."). Moreover, "the great majority of jurisdictions agree that conspiracy claims cannot be founded on the tort of negligence." *Ruth v. A.O. Smith Corp*., 2005 W.L. 2978694 (N.D. Ohio. Oct. 11, 2005). *See also Firestone Steel Products Co.,* 927 S.W.2d 608, 614 (Tex.1996) ("Given the specific intent requirements, parties cannot engage in a civil conspiracy to be negligent."); *Sonnenreich v. Philip Morris, Inc.,* 929 F.Supp. 416, 419 (S.D.Fla.1996) ("[l]ogic and case law dictate that a conspiracy to commit negligence is a non-sequitur"); *Senart v. Mobay Chem. Corp.*, 597 F.Supp. 502, 505 (D.Minn.1984) ("it [is] impossible to conspire to commit negligence").

1. Fraudulent Concealment Claims

The cause of action that most commonly is alleged to support a conspiracy claim in mass tort cases is fraudulent concealment. Most often, the gist of the fraudulent concealment allegation is that the defendant should have placed a certain warning on a label or material safety data sheet for a particular product. Some courts have held that a fraudulent concealment claim arising out of allegedly defective warnings is not cognizable at all:

> [C]laims that a cigarette manufacturer has not warned of known product dangers are generally not cognizable as fraudulent concealment claims under Kansas law. Rather, they are cognizable as failure to warn claims. To hold otherwise would convert all product manufacturer's duty to warn claims into fraud claims. We do not believe Kansas courts would intend such a result.

Burton v. R.J. Reynolds Tobacco Co., 397 F.3d 906, 913 (10th Cir. 2005). Similarly, in *Ruth v. A.O. Smith Corp.*, 2005 W.L. 2978694 (N.D. Ohio. Oct. 11, 2005), the MDL judge in the welding fume litigation held that a plaintiff could not pursue a fraudulent concealment claim under Mississippi law based upon allegedly omitted statements in the defendant's product labels:

> The affirmative misrepresentations upon which a claim for fraud must be premised cannot include *only* the very warnings that support a product liability claim for failure to warn.
>
> In sum, Ruth has not identified any facts upon which a reasonable jury could conclude that the defendant product manufacturers conspired to engage in fraud, because Ruth has not identified any affirmative misrepresentations made by any alleged conspirators upon which he relied. This is not to say that Ruth cannot proceed against the defendants for their alleged silence and omissions; is it just that he must do so using a failure to warn theory, not a conspiracy or fraud theory.

Id. at *5. Likewise, in *Mann v. Lincoln Elec. Co.*, 2010 W.L. 6364148 (N.D. Ohio. Apr. 23, 2010), the same MDL judge in another welding fume case held that a plaintiff could not pursue a fraudulent concealment claim under Iowa law that was predicated on information being omitted from a warning label. The Court recognized, however, that "[a] manufacturer who knowingly includes a false affirmative statement on its product warning label certainly may be liable for fraud." *Id.* at * 7. However, the MDL Court in the welding fume litigation found that a plaintiff could pursue a cause of action for fraudulent concealment in the product liability context under California law in two situations: (1) when the defendant had exclusive knowledge of material facts not known to the plaintiff; and (2) when the defendant actively concealed a material fact from the plaintiff. *Tamraz v. Lincoln Elec. Co*., 2007 WL 3399721 (N.D.Ohio Nov.13, 2007).

In another welding fume case arising under Mississippi law, the MDL judge held that a welding fume plaintiff could pursue a claim for fraud based upon affirmative indirect misrepresentations made by the defendant to the plaintiff's employer, however, the Court held that the plaintiff would be required to make an "exacting" showing of reliance upon any such misrepresentations. *Jowers v. BOC Group, Inc*, 2009 W.L. 995613, at *8 (S.D. Miss. Apr. 14, 2009). Moreover, the Court held that such a fraud claim would "only lie against the individual defendant who made the relied-upon affirmative misrepresentation." *Id.*

Other courts have recognized the viability of a fraudulent concealment claim in the general context of a failure to warn:

> Plaintiff specifically claims that Defendants had a duty to warn of the allegedly defective and unreasonably dangerous product to Plaintiff's decedent, a foreseeable user of the product. Instead of warning of the dangers of the product, Plaintiff alleges that Defendants engaged in certain

> activity to conceal those dangers. In this case, it is the duty to warn in the context of products liability which supports the fraudulent concealment claim. Therefore, Plaintiff has alleged sufficient facts to support a claim for fraudulent concealment.

Roney v. Gencorp, 431 F. Supp. 2d 622, 637 (S.D. W. Va. 2006); *see also Nicolet v. Nutt*, 525 A.2d 146 (Del. 1987)(recognizing potential viability of fraudulent concealment claim regarding hazards of asbestos).

In many cases, the defendant is alleged to owe a duty to disclose health or safety information to the public at large as a type of "fraud-on-the-market" theory. This type of fraud-on-the-market theory seems to be contrary to the fundamental tenets of tort law which require an individualized analysis of duty and proximate cause. Indeed, the law of most jurisdictions requires some sort of confidential or fiduciary relationship between the parties before a duty to disclose information can exist. *See, e.g.*, *Homestead Group, LLC v. Bank of Tennessee*, 307 S.W.3d 746, 751 (Tenn. Ct. App. 2009)("Tennessee courts have identified three exceptions to this general rule and have held that a duty to disclose exists: where there is a previous definite fiduciary relationship between the parties; where it appears one or each of the parties to the contract expressly reposes a trust and confidence in the other; or where the contract or transaction is intrinsically fiduciary and calls for perfect good faith such as a contract of insurance which is an example of this last class."); *Livingston v. K-Mart Corp*., 32 F.Supp.2d 369, 374 (S.D.W.Va.1998) ("fraudulent concealment involves concealment of facts by one with knowledge, or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud."). For this reason, most courts have rejected the fraud on the market concept in mass torts litigation. Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts,* 62 Wash & Lee L. Rev. 873, 921 (2005)(citing *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 353 (6th Cir. 2000); *Brown v. Philip Morris, Inc.*, 223 F. Supp. 2d 506, 518 (D. N.J. 2002)). However, other courts appear to have recognized a cause of action for concealing information from the public at large. *See, e.g*., *Nicolet, Inc. v. Nutt,* 525 A.2d 146, 148 (Del.1987); *Cipollone v. Liggett Group, Inc.,* 683 F.Supp. 1487 (D.N.J.1988) (denying a motion for directed verdict on a claim that tobacco manufacturers conspired to misrepresent the safety of cigarettes, noting that manufacturers had gone so far as to create a purportedly independent research organization to promulgate false information); *City of New York v. Lead Industries Ass'n, Inc.,* 190 A.D.2d 173, 597 N.Y.S.2d 698 (N.Y.Sup.Ct.1993) (denying a motion to dismiss a claim that five manufacturers of lead-based paint conspired, through their co-defendant trade organization, to misrepresent the safety of their product and conceal their knowledge of its hazards); *Sackman v. Liggett Group, Inc.,* 965 F.Supp. 391 (E.D.N.Y.1997) (denying summary judgment on a claim that tobacco companies engaged in a conspiracy through their co-defendant trade association)

There is also a divergence of opinion as to whether a plaintiff asserting a claim for civil conspiracy to conceal information must show that a particular defendant owed a duty to disclose to that particular plaintiff.

a. Cases Suggesting that a Conspiracy Claim May be Asserted Despite the Inability of the Plaintiff to Prove the Elements of the Underlying Tort Against That Defendant.

The case most commonly relied upon by the mass torts plaintiffs' bar to assert conspiracy claims against non-selling defendants is *Nicolet v. Nutt*, 525 A.2d 146 (Del. 1987). That case was brought by workers exposed to asbestos. The Court held that the manufacturer, Nicolet, could potentially be subject to liability for conspiracy despite the fact that none of the plaintiffs could have been exposed to asbestos products manufactured by Nicolet. However, the following quote from the *Nicolet* opinion is curious:

> Nicolet argues that it had no duty to warn the customers of other asbestos manufacturers regarding the hazards of exposure to asbestos. That is a correct statement of the law, but it is irrelevant here. We distinguish between circumstances where a party fails to speak, and the allegations here, that a party *actively* suppressed and concealed material information. In the former situation, there is no duty to speak absent a fiduciary or contractual relationship. In the latter, liability attaches as a result of the *active* misconduct of intentionally suppressing material information. Should plaintiffs establish that Nicolet was a member of a conspiracy which actively suppressed and concealed material facts, with the intent to induce plaintiffs' continued exposure to asbestos, Nicolet would be jointly and severally liable with its co-conspirators for resulting damages.

Id. at 150. Accordingly, *Nicolet* is distinguishable from the law of many jurisdictions in that it recognized that a duty to disclose existed under Delaware law where there was "active" concealment of information, even in the absence of any contractual or fiduciary relationship between the parties.

Similarly, in *Lewis v. Lead Industries Assoc., Inc.*, 793 N.E.2d 869 (Ill. App. 1st Dist. 2003), the Court in a lead-based paint case held that a conspiracy claim could be maintained against a non-selling defendant:

> Counts I, II, and V of the plaintiffs' second amended complaint were properly dismissed because, by failing to identify the defendant that supplied the lead pigment used in the paint to which their children were exposed, the plaintiffs failed to plead facts in support of the causation element of the claims asserted. In count VI, however, by identifying the defendants along with Eagle-Picher as the sole producers and promoters of lead pigment used in paint and further alleging that each was a party to the conspiratorial agreement, the plaintiffs have alleged both an agreement and tortious conduct in furtherance of the agreement. For the purposes of this claim, the fact that the plaintiffs may not be able to identify which of the defendants was the active tortfeasor that supplied the lead pigment used in the paint to which their children were exposed is not fatal.

Id. at 878-79.

Likewise, in *Rogers v. R.J. Reynolds Tobacco Co.*, 761 S.W.2d 788 (Tex. App. 1988), the Court held that the plaintiffs in that case could pursue a conspiracy claim against non-selling tobacco companies:

> We agree with the Appellants that the law of civil conspiracy makes non-supplying cigarette manufacturers, subject to liability for failure to warn cigarette smokers of the dangers of cigarette smoking, including inhaling and ingesting the smoke, tars, ingredients and other materials in the smoke

Id. at 797.[1]

2. Cases Holding that a Plaintiff Must Prove the Elements of an Underlying Tort to Maintain a Conspiracy Claim

In *Chavers v. Gatke Corp.*, 107 Cal. App. 4th 606 (2003), the plaintiffs could not prove their exposure to the defendant's asbestos-containing product, but nonetheless sought to hold that defendant liable based upon the theory that the defendant conspired to suppress information about the dangers of asbestos. The Court rejected that theory and stated as follows:

> Conspiracy is not an independent tort; it cannot create a duty or abrogate an immunity. It allows tort recovery only against a party who already owes the duty and is not immune from liability based on applicable substantive tort law principles. …
>
> …[B]efore one can be held liable for civil conspiracy, he must be capable of being *individually liable for the underlying wrong as a matter of substantive tort law.* And that requirement, of course, means he must have owed a legal duty of care to the plaintiff, one that was breached to the latter's injury.

Id. at 611-12 (emphasis added). Furthermore, the Court held that a plaintiff cannot bootstrap a claim against a defendant who owed no duty to the plaintiff by asserting a conspiracy claim:

> [A] plaintiff's invocation of a conspiracy claim "allows tort recovery only against a party who *already owes the duty* and is not immune from liability based on applicable substantive tort law principles. Because a party to a contract owes no tort duty to refrain from interference with its performance, he ... cannot be bootstrapped into tort liability by the pejorative plea of conspiracy.

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[1] *Rogers* was subsequently overruled by the Texas Supreme Court as to its determination that a negligent failure to warn can support liability for civil conspiracy. *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 720 (1995).

Id. at 614.

In *Skipworth v. Lead Indus. Ass'n*, 665 A.2d 1288 (Pa. Super. Ct. 1995), *aff'd* 690 A.2d 169 (Pa. 1997), the plaintiffs brought a products liability action against lead pigment manufacturers for injuries to a child from ingesting lead-containing paint, but could not identify the manufacturer of the lead pigment which the plaintiff ingested. The Court rejected the plaintiff's claim that liability could nonetheless exist for conspiracy:

> Appellants contend that the theories of conspiracy and concert of action, which impose liability on a defendant who acts as a co-conspirator or accomplice to another wrongdoer, are applicable in this case because the pigment manufacturers ratified decisions to manufacture hazardous products and suppressed information regarding the dangers of their products. However: "[T]he law of this Commonwealth forecloses the assertion of a cause of action for concerted action where the plaintiff is unable to isolate a particular manufacturer as a causative agent of his injuries." *Burnside v. Abbott Laboratories,* 351 Pa.Super. 264, 284, 505 A.2d 973, 984 (1985). Here, Appellants are unable to identify the manufacturer of any of the lead pigment found in the paint at Skipworth's residence that was ingested by her and allegedly caused her injuries. Thus the trial court correctly determined that the theories of conspiracy and concert of action were not applicable in this case.

Id. at 1292.

Similarly, in *Flanders v. Garlock, Inc.*, 2003 W.L. 22697421 (S.D. Ga. Aug. 11, 2003), the Court refused to allow a conspiracy claim in an asbestos case to proceed against Metropolitan Life because the plaintiff could not establish that Metropolitan Life owed a duty of disclosure to the plaintiff. In doing so, the held that the *Nicolet* decision was "against the weight of authority." *Id.* at *2.

Likewise, in *Hunt v. Air Products & Chemicals*, 2006 W.L. 1229082 (Mo. Cir. Ct. Apr. 20, 2006)**,** the Court rejected a conspiracy claim by a plaintiff who was not exposed to a product manufactured by the defendant in that case because the defendant did not owe a duty to that plaintiff:

> By all means, let the manufacturers of the products that caused injury to plaintiffs be liable. By all means, let the evidence of how they engaged in, or aided and abetted, false research and propaganda be admissible as against those manufacturers on the issue of failure to warn and punitive damages. But, even assuming the truth of plaintiffs' allegations regarding false trade association research and publishing, it does not follow that any duty of care *toward plaintiffs here* must be imposed on defendants who, on the face of the petition, had nothing to do with manufacturing or marketing the products to which Leroy Hunt was exposed.

Id. at *6.

C. Proof of an Agreement

It is a rare case indeed where the plaintiff can prove liability for conspiracy as the result of an express agreement to commit tortious acts. Rather, more often that not, mass torts plaintiffs purport to rely upon circumstantial evidence. The law of most states recognizes that a conspiracy can be proven by circumstantial evidence, however, the evidence must be more than merely suggestive of a conspiracy:

> Because a conspiracy "is rarely susceptible of direct proof," the required intentional participation of a co-conspirator "can plausibly be inferred from words, actions, and interdependence of the activities and persons involved." But, "[i]n the absence of proof of an express or implied agreement between the parties, mere presence at the commission of a wrong, or failure to object to it, is not enough to charge one with responsibility for conspiring to commit the tortious act." As one court explained: "[K]nowledge alone of tortious conduct is insufficient to prove a conspiracy agreement." * * * Knowledge of the planned tort must be combined with intent to aid in its commission. * * * An entity that engages in legitimate business with a party that is acting tortiously cannot be deemed a co[-]conspirator, absent clear evidence of an agreement to join in the tortious conduct.

In re Welding Fume Products Liability Litigation, 526 F. Supp. 2d 775, 803 (N.D. Ohio 2007). Moreover, if the evidence supports equal inferences of lawful and unlawful conduct, a claim for conspiracy cannot proceed:

> "Although civil liability for conspiracy may be established by circumstantial evidence, the evidence of the agreement [between coconspirators] must be sufficient to create more than suspicion or conjecture in order to justify submission to a jury." . . . ***"[I]f circumstantial evidence supports equal inferences of lawful action and unlawful action, then the claim of conspiracy is not proven***." *Allen & O'Hara, Inc. v. Barrett Wrecking, Inc.,* 898 F.2d 512, 516 (7th Cir.1990).
>
> . . .
>
> Although a conspiracy is usually proved by circumstantial evidence, nevertheless ' "vital facts may not be proved by unreasonable inferences from other facts and circumstances" ' or ' "by piling inference upon inference." '. . . . Moreover, ' " 'mere presence at the scene ... or close association with a coconspirator will not support an inference of participation' " ' in a conspiracy.

First Bank of Childersburg v. Florey, 676 So. 2d 324, 328 (Ala. Civ. App. 1996)(emphasis added). *See also Schowengerdt v. United States*, 944 F.2d 483 (9th

Cir.1991) (allegations in a complaint which are based on inference and speculation cannot defeat a motion for summary judgment on a conspiracy claim), cert. denied 503 U.S. 951, 112 S.Ct. 1514, 117 L.Ed.2d 650 (1992).

Moreover, mere proof of parallel or identical conduct on the part of the alleged conspirators is not sufficient to prove a conspiracy:

> It is long settled in the Eleventh Circuit and in other jurisdictions that evidence of parallel conduct *alone* is insufficient to show a conspiratorial agreement.
>
> . . .
>
> Courts agree that ambiguous evidence, that is, evidence that is as consistent with conspiratorial behavior as it is with independent conduct is insufficient, as a matter of law, to show a conspiracy.
>
> . . .
>
> Thus, a plaintiff seeking to establish the existence of a conspiracy must offer evidence that tends to exclude the possibility that the conduct at issue was independent.
>
> . . .
>
> As the Eleventh Circuit clearly held in *Harcros,* where the proof for a Proposition is in "equipoise," it has not been established by a preponderance of the evidence. *Id.* at 592. Quite simply put, a "fact that can only be decided by a coin toss has not been proven by a preponderance of the evidence, and cannot be submitted to the jury."

Lynn v. Amoco Oil Co., 459 F. Supp.2d 1175 (M.D. Ala. 2006); *Banks v. Gallagher*, 686 F.Supp.2d 499, 529 (M.D. Pa. 2009)("under Pennsylvania law, parallel conduct, even consciously parallel conduct, is "not sufficient to establish either a civil conspiracy or [a] concerted action" claim.)(quoting *In re Asbestos School Litig*., 46 F.3d 1284, 1292 (3d Cir.1994)); *McClure v. Owens Corning Fiberglas Corp*., 188 Ill.2d 102, 241 Ill.Dec. 787, 720 N.E.2d 242, 259 (1999) ("[P]arallel conduct may serve as circumstantial evidence of a civil conspiracy among manufacturers of the same or similar products but is insufficient proof, by itself, of the agreement element of this tort."); *Rastelli v. Goodyear Tire & Rubber Co*., 79 N.Y.2d 289, 582 N.Y.S.2d 373, 375, 591 N.E.2d 222, 224 (1992)("Parallel activity among companies developing and marketing the same product, without more, we have held, "is insufficient to establish the agreement element necessary to maintain a concerted action claim").

In addition, in some jurisdictions, in order to prove a civil conspiracy claim, a plaintiff must prove that object of the conspiracy was to cause damage to the plaintiff**.**

> The plaintiff must allege and prove that the claimed conspirators had actual knowledge of, and the intent to bring about, the object of the claimed conspiracy.
>
> '[F]or conspiracy the test is 'what is in truth the object in the minds of the combiners when they acted as they did.' Malice in the sense of malevolence, spite or ill-will is not an essential for liability; what is required is that the combiners should have acted *in order that* (not *so that*) the plaintiff should suffer damage. If they did not act in order that the plaintiff should suffer damage they are not liable, however selfish their attitude and however inevitable the plaintiff's damage may have been.'

First Bank of Childersburg v. Florey, 676 So. 2d 324, 327 (Ala. Civ. App. 1996)(quoting *AmSouth Bank, N.A. v. Spigener,* 505 So. 2d 1030, 1040 (Ala. 1986) (quoting Jolowicz & Lewis, *Winfield on Torts,* Conspiracy 557, 559, 560 (8th ed. 1967)) (emphasis in original).

> The most important feature of a tortious conspiracy where unlawful means are not used is that the object or purpose of the combination must be to cause damage to the plaintiff.

Snyder v. Faget, 326 So. 2d 113, 119 (Ala. 1976); *see also Norwood v. Raytheon Co*., 237 F.R.D. 581, 599 (W.D.Tex.2006)("Some jurisdictions require proof of both an overt act and a specific intent to harm the plaintiff.").

D. The Alleged Conspiracy Must be the Proximate Cause of Injury to the Plaintiff.

Even if a plaintiff can plead and prove the existence of a conspiracy, courts have recognized that such a claim is not actionable unless the alleged conspiracy is the proximate cause of injury to the plaintiff:

> The substance of a conspiracy action is the damage and not the conspiracy, and the damage must appear to have been the natural and proximate result of defendants' acts.

Purcell Co., Inc. v. Spriggs Enterprises, Inc., 431 So. 2d 515, 523 (Ala. 1983). The MDL Court in the welding fume litigation rejected claims arising out of alleged misrepresentations made in trade journals where the plaintiff did not present any proof that he relied on the alleged representations:

> One type of misrepresentation Ruth identifies is historical statements made to industry participants, in trade journals, that welding is safe. But Ruth does not assert the defendants (or their alleged co-conspirators) made these affirmative statements to *him;* and he does not assert he, *himself,* ever read or heard these statements; and he does not assert he *relied* on these statements. While Ruth argues that the effect of these historical

> statements was to create a lasting false impression, causing industry participants, including his employer, to be less careful than necessary to assure his safety, this effect is too attenuated to suggest any direct reliance on an affirmative misrepresentation made by a defendant.

Ruth v. A.O. Smith Corp., 2005 W.L. 2978694, at *5 (N.D. Ohio. Oct. 11, 2005)(emphasis in original).

Similarly, in *Santiago v. Sherwin Williams Co.***,** 3 F.3d 546 (1st Cir. 1993), the plaintiff alleged that the defendants conspired to conceal the hazards of lead-containing paint. In rejecting this claim, the Third Circuit held as follows:

> In essence, plaintiff claims that, "in light of the substantial medical evidence of the unreasonable risk that [lead paint] posed to young children [,]" certain of defendants' actions as members of the LIA between 1930 and 1945 were tortious. Specifically, plaintiff points to defendants' "initiat[ion of] nationwide promotional campaigns, encourage[ment of] the use of white lead in house paint through extensive advertising, [attempts] to undermine the growing medical evidence of the danger of lead paint, and work[ ] to prevent the enactment of governmental regulations which would have restricted the use of white lead in painting buildings." ***What is utterly lacking from her presentation, however, is any evidence that these actions, during the fifteen year period she identifies, had any role in causing lead paint to be applied to the walls of her childhood home.*** Even if we assume that at least some of the lead paint consumed by plaintiff was applied to her home during the period of defendants' alleged concerted actions, there is *no* evidence that the application resulted from these actions, or that it would not have taken place in the absence of these actions.

Santiago, 3 F.3d at 552 (emphasis added). *See also*, *Taylor v. Airco, Inc.*, 503 F.Supp.2d 432, 446-47 (D. Mass. 2007) (claim that the defendants conspired to conceal the hazards of vinyl chloride was not actionable because the plaintiff was not aware of the alleged misrepresentations made as part of the conspiracy); *Bogner v. Airco, Inc.,* No. 02-1157, 2003 WL 24121083 at * 4 n. 4 (C.D.Ill. Apr.1, 2003)("[P]aragraphs 50 through 83 of Bogner's Second Amended Complaint focus on an alleged agreement to conceal the known dangers of vinyl chloride through publication of the material safety data sheet SD-56. Bogner has not (and presumably cannot) allege, however, that Mr. Bogner ever saw, heard, or read the information contained in SD-56.").

II. Strategies For Defending Conspiracy Claims.

A. Early Dispositive Motions to Address Pleading Deficiencies.

Many times defense counsel may eschew an early dispositive motion to dismiss or for more definite statement because of the assumption in many courts that specific pleading of facts in mass torts cases is not necessary or required. Indeed, in many mass tort settings, courts have actually encouraged the filing of a very general master complaint in order to initiate litigation on behalf of legions of plaintiffs. However, counsel should re-think such strategies in light of recent developments in the law concerning pleading requirements, especially in cases pending in federal court.

Since *Conley v. Gibson*, 355 U.S. 41 (1957), the pleading standard in federal court has been the liberal "notice pleading" standard. Under *Conley*, a complaint was not to be dismissed for failure to state a claim unless it appeared "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. 45-46. However, two recent United States Supreme Court decisions fundamentally altered that standard in favor of a "plausibility standard." *Ashcroft v. Iqbal,* 129 S.Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007). The standard was described in the *Iqbal* case as follows:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . .Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' . . .

129 S.Ct. at 1949. The *Iqbal* court stated that two working principles underpinned its decision: (1) the principle that a court must accept the allegations of a complaint as true did not apply to legal conclusions; and (2) only a complaint that presented a plausible claim for relief would survive a motion to dismiss.

There have been efforts in Congress to abrogate the new standard articulated by *Iqbal* and *Twombly*. Moreover, the case law applying this new standard is still being developed. However, for now, at least in cases filed in federal court, this case law provides new opportunities for defense counsel to attack the shotgun pleading complaints that often initiate mass tort actions.

B. Discovery Designed to "Smoke Out" the Basis for the Conspiracy Claim.

Direct contention interrogatories can be very useful in forcing the plaintiffs to set out the specific facts that allegedly support their conspiracy claim. In particular, this discovery should request the plaintiff to state the following: when did the conspiracy occur, who were the members of the conspiracy, when did the defendant joined the conspiracy, what was the specific agreement, what evidence shows proof of the agreement, what tortious acts were committed by which members of the conspiracy, and how the plaintiffs were injured as a result of the conspiracy. The failure of the plaintiff to provide this information can be useful in support of a motion for summary judgment. Moreover, such failure to provide details can be helpful in preparing motions *in limine*.

C. "Global" Conspiracy Allegations.

In cases where the plaintiffs are asserting claims against a non-selling defendant, the plaintiffs are generally unable to show that the defendant actually concealed information from the specific plaintiffs; rather, the plaintiffs allege that the information was suppressed from the public generally. The oft-repeated theme in these mass tort cases is that the entire world was deprived of some key piece of health or safety information because of some industry conspiracy. However, modern reality is that health and safety research is conducted and disseminated on a massive scale by a wide variety of stakeholders. Moreover, plaintiffs often try to paint legitimate scientific debate on health and safety issues in a sinister light. A discovery plan should include efforts to obtain discovery regarding the public dissemination of information and research concerning the product, chemical or process at issue. For example, some key areas of inquiry that should be pursued include the following:

- **Health and Safety Research**. Counsel should identify governmental agencies that perform research regarding the specific product, chemical, or process at issue, such as the National Institute of Environmental Health Sciences (NIEHS) and the National Institute of Occupational Safety and Health (NIOSH).[2] Many of the research grants are paid to academic institutions or private non-manufacturing research laboratories. Moreover, many foreign governmental institutions such as the European Union and the Health Safety Executive in the U.K. are very active in occupational health and safety research.

[2] A good source of information is the National Institute of Health's Research Portfolio Online Reporting Tools, which is a searchable database of NIH-funded research. The on-line historical information may be incomplete, so a Freedom of Information Act request is usually a good idea. In addition, there are NIH staff dedicated to fielding questions about FOIA requests, who can be very helpful in locating information concerning government-funded research.

- **Governmental Efforts to Disseminate Data**. Governmental agencies such as NIOSH, OSHA and MSHA publish information concerning potentially hazardous products used in workplace settings in a wide variety of formats. In addition to information provided on-line, these agencies often develop supplemental materials such as industry publications and handouts to be distributed in the workplace.

- **Information Regarding Safety Rules Governing the Workplace at Issue**. The work practices of the employer are critical and should be explored thoroughly. The Hazardous Communications Standard contains explicit requirements for the employer to train workers about known health effects and safe work practices concerning hazardous chemicals. Defense counsel should determine whether the employer is a sophisticated user, whether the employer had access to sufficient health and safety information to develop responsible rules for protecting workers and whether those rules are enforced.

- **Information Disseminated by the Plaintiff's Union**. Many of the larger unions are well-funded and have industrial hygienists or physicians either on staff or available for consultation. Moreover, unions frequently distribute health and safety information to their members through safety meetings, publications or courses.

- **Scientific Literature**. Counsel should investigate whether the particular health or safety issue in the case has been discussed in the open scientific literature. Even if the plaintiff did not have access to the literature, the fact of publication can be useful to show the implausibility that a conspiracy to conceal the information existed.

- **Scientific Forums**. There are a wide number of industrial hygiene and toxicological organizations throughout the world that hold meetings or seminars where cutting edge health and safety issues are discussed. Find out from experts in the field which organizations may have sponsored public forums where your issues may have been discussed. These meetings often include speakers and participants employed by governmental agencies and academic institutions as well as industry.

- **Toxic Substances Control Act Filings**. For the past several decades, the Toxic Substances Control Act has required manufacturers and others to submit health and safety information concerning hazardous chemicals to the E.P.A. These files are publicly available, and can be obtained through Freedom of Information Act requests.[3]

[3] In a recent toxic tort case, the plaintiffs attempted to claim that the defendants' alleged violations of TSCA were evidence of a conspiracy to conceal information from the government and the public.

A detailed showing of the wide variety of information that is available in the public domain can be useful to show the implausibility that a conspiracy existed and that it was the cause of any damage to the plaintiffs.

D. Specific Company Story.

Defense of a conspiracy claim will undoubtedly require some common defense themes that apply to all of the defendants, however, defense counsel should not neglect a company story, in addition to the general defense of the conspiracy allegations. While the company story should involve a defense of the specific warnings provided by your client, it should also involve other efforts the company has undertaken to promote worker safety as to the product or process at issue, both as to its employees and customers. This message, however, should not be a merely a feel-good story about how benevolent and wonderful the defendant is, but should be tailored to the issues of knowledge and control that are pertinent in the case. Moreover, the story should emphasize how effective product stewardship is smart business and is a critical part of the company's business strategy.

E. Motions *in Limine*

Counsel will definitely want to be prepared to file motions *in limine* as to alleged statements that occurred outside the time frame your client supposedly was a member of the conspiracy. In addition, in many of these cases, plaintiffs argue that attempts to petition the government concerning exposure limits or other safety issues are indicative of a conspiracy. In that instance, counsel should consider a motion *in limine* based upon the "*Noerr-Pennington* doctrine"[4] which prohibits claims that are premised upon a defendant's constitutionally protected efforts to petition the government. The doctrine has been used in numerous cases to prohibit common law claims that are based upon a defendant's attempts to influence governmental action. *See*, *e.g.*, *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 160 (3d Cir. 1988) ("In numerous cases, the courts have rejected claims seeking damages for injuries allegedly caused by the defendants' actions directed to influencing government action.") (collecting cases); *In re Asbestos Sch. Litig.*, 46 F.3d 1284 (3d Cir. 1994)(First Amendment precluded civil conspiracy claims based on the manufacturer's efforts as part of a trade organization to lobby Congress, the Environmental Protection Agency, and other local regulatory agencies); *Tuosto v. Philip Morris USA Inc.*, No. 05 Civ. 9384, 2007 WL 2398507, *5 (S.D.N.Y. Aug. 21, 2007) ("*Noerr-Pennington* has also been applied to bar liability in state common law tort claims, including negligence and products liability claims, for statements made in the course of petitioning the government."); *Lynn v. Amoco Oil Co.*, 459 F. Supp. 2d 1175, 1189 (M.D. Ala. 2006)("[P]laintiffs seek to show that the

[4] The name "*Noerr-Pennington"* comes from two United States Supreme Court cases recognizing that legislative lobbying efforts could not serve as the basis for federal antitrust liability. *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) and *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961).

defendants conspired together by agreeing to develop standards and petitioning state and federal government entities to adopt them. Such activity is protected by the Constitution and may not be proof of the conspiracy that the plaintiffs allege."); *Senart v. Mobay Chem. Corp.*, 597 F. Supp. 502, 505-06 (D. Minn. 1984)(rejecting conspiracy claim against defendants who expressed opposition to OSHA to more stringent standards of exposure to certain chemicals).

CONCLUSION

While conspiracy claims have been most prevalent in toxic tort or products liability litigation, there is every reason to suspect that this playbook will be used increasingly in other scenarios as well. They are attractive from the plaintiffs' perspective as they attempt to short-cut the legal requirement of proving specific causation for each individual plaintiff. However, the plaintiffs' bar has also become enamored of conspiracy allegations from a strategic perspective because they tend to put the fact-finder's focus on the conduct of the defendant, rather than the actions of the plaintiff or other parties who may well have been in a better position to prevent an injury from occurring.

Jury research has shown that issues of knowledge and control are more important in punitive damages cases than factors such as sympathy or corporate image:

> Our research shows that the most important factors in determining the likelihood of punitive damages in any case are knowledge and control. How much did the plaintiff know about and how much control did plaintiff have over the events and circumstances which produced the injury in the case?
>
> . . .
>
> Jurors compare plaintiffs and defendant's knowledge and control. When a defendant is perceived to have had more knowledge and control than the plaintiff, the plaintiff is seen as more deserving and the defendant more blameworthy.

Trial Tip: The Best Way to Assess the Risk of Punitive Damages, http://www.decisionquest.com/utility/showArticle/?objectID=497; *see also* Ross P. Laguzza, *Corporate Image is Everything ... Or Is It?* R & D Strategic Solutions, LLC (2003). While defense counsel in conspiracy cases will have to present evidence that its conduct was not tortious, this evidence needs to be put in the context of the overall picture of knowledge and control. Defense counsel's strategy should be a broad-based approach, not only focusing on your client's conduct, but showing that that the tools and information necessary to protect the plaintiff were readily available and thus could not have been concealed.

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Wynn joined the firm in 1993 and has been a partner since 2000. His practice primarily involves toxic tort cases, complex commercial cases, class actions and other mass tort litigation. He is admitted to practice in all Alabama and Mississippi state and federal courts and the Eleventh Circuit, Fifth Circuit and Sixth Circuit Courts of Appeals.

Wynn is honored that a wide variety of clients have trusted him to handle challenging cases involving a variety of industries. Wynn firmly believes that every battle is won or lost long before it is fought, and faithfully applies that philosophy to his practice to give his clients the best possible representation.

Wynn received his Bachelor of Arts degree from the University of Mississippi, where he graduated summa cum laude and was named a Harry S. Truman Scholar. While at Vanderbilt University Law School, Wynn was a John W. Wade Scholar, served as Associate Editor of the Vanderbilt Law Review and was elected to the Order of the Coif.

Wynn is a member of the Defense Research Institute and the Alabama Defense Lawyers Association, where he has served on the faculty of the Trial Academy. Away from work, Wynn enjoys spending time with his wife and two daughters. In addition, he is a member of Oak Mountain Presbyterian Church where he serves as a deacon and Chairman of the Mercy Ministry.