

The Alarming Rise in the Use of Civil Conspiracy Theories in Mass Tort Litigation

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INTRODUCTION

Civil conspiracy historically has been one of several devices by which plaintiffs have attempted to hold a defendant liable for tortious acts committed by other parties. Civil conspiracy claims have been raised nationwide and have been used in cases related to antitrust, banking, civil rights, insurance, labor, securities, and numerous other substantive areas. Recently, civil conspiracy has become a favored weapon of plaintiffs' lawyers in mass tort product liability litigation involving asbestos, breast implants, tobacco, automotive tires and other products, as well as in toxic tort cases. In these types of cases, plaintiffs have pled civil conspiracy in an attempt to hold a manufacturer liable for tortious acts committed by other members of its industry, sometimes even the acts of its competitors. Because the civil conspiracy theory is broad enough to cover almost any area of law and almost any industry, few corporate entities are likely to be beyond its potential reach. As the number of high-profile actions successfully utilizing this theory increase, so will the numbers of plaintiffs that include civil conspiracy as an allegation in their complaints. The three most important questions facing defense counsel and defendants in these cases are (1) what has led to this recent expansion of civil conspiracy liability; (2) what can be done to stem its advance; and (3) what can be done to defend against such claims in litigation.

This article offers the views and suggestions of counsel who regularly confront civil conspiracy claims in their defense of mass tort actions. It begins with a brief overview of the theory of the history and elements of civil conspiracy. This article then discusses the reasons why plaintiffs find the claim attractive -- a point illustrated by the recent increase in the use of civil conspiracy in cases where there has been no exposure to the defendant's products or processes. Finally, the article discusses potential defense strategies and the need for more in-depth analysis of the elements of civil conspiracy.

OVERVIEW

Many civil conspiracy claims currently being brought by plaintiffs attempt to implicate a seemingly uninvolved defendant based on the theory that, as a member of a relevant industry or trade association, the defendant is responsible for the acts of others in the industry. A number of earlier theories based on the same philosophy have been proffered over time, including market-share liability

and concert of action, which both seek to hold each member of an entire industry liable for the acts of another member. Although judicial acceptance of these theories has slowly eroded in the tort context, the growing assertion of civil conspiracy causes of actions is alarming. One need only consider the \$12 million compensatory verdict and \$144 billion punitive verdict awarded by a Florida jury against the tobacco industry earlier this year to appreciate that the stakes in such cases can be extraordinarily high. To adequately respond to civil conspiracy claims, however, one must first understand the nature of the theory.

Grappling with the theory of civil conspiracy

A civil conspiracy is an agreement together with an overt act to do an unlawful act or a lawful act in an unlawful manner. Unfortunately, this seemingly straightforward definition is not always easy to apply to the facts of a specific case, and does not always untangle the misconceptions held by many practitioners and numerous courts regarding civil conspiracy. Some fifty years ago, Justice Jackson of the U.S. Supreme Court remarked, “the modern [claim] of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid.” *Krulewitch v. United States*, 336 U.S. 440, 446-47 (1949) (Jackson, J., concurring).

Although the elements of civil conspiracies are generally a product of state law, an examination of the law in each state reveals striking similarities in the language that defines civil conspiracy as a common law-based theory. The necessary elements of civil conspiracy are: (1) an agreement between two or more persons to commit an unlawful or tortious act (or a lawful act in an unlawful manner); (2) an overt tortious act committed in furtherance of the agreement; and (3) an injury caused by the unlawful or tortious act performed by one of the conspirators. *See, e.g.*, 16 Am. Jur. 2d *Conspiracy* §50 (1998).

A claim based on civil conspiracy cannot exist independent of a viable cause of action for an underlying tort. Failure to establish proof of each element of the underlying tort should doom a conspiracy claim based on that same act. If there is an affirmative defense to the tort, there can be no action for the conspiracy. The key is to focus the court’s attention to where it properly should be placed, on the underlying act, and not simply the existence of an alleged agreement.

Criminal conspiracy distinguished

In addition to understanding the legal definition of civil conspiracy, any reasoned consideration of this theory must differentiate conspiracy actions based in civil rather than criminal law. The key difference between the two is that in civil law, it is necessary for an overt act to be committed in furtherance of the conspiracy. In criminal law, no such act is required -- the mere agreement to do an unlawful act is the actionable offense. In an early pronouncement on this subject, Judge Learned Hand stated, “whatever may be the rule in criminal conspiracies, it is well settled that civil liability does

not depend upon the confederation . . . , but upon the acts committed in realization of the common purpose.” *Lewis Invisible Stitch Mach. Co. v. Columbia Blindstitch Mach. Mfg. Corp.*, 80 F.2d 862, 864 (2d Cir. 1936). This distinction is often overlooked by both attorneys and judges, yet the requirement of a tortious overt act as an essential element of civil conspiracy can make the difference between a successful motion to dismiss and an expensive, protracted legal battle.

ADVANTAGES OF CIVIL CONSPIRACY ACTIONS TO PLAINTIFFS

Although the difficulties associated with the definition and elements of a civil conspiracy claim may provide savvy plaintiffs’ counsel with certain advantages (as well as pitfalls) in advancing the cause of action, civil conspiracy is attractive to plaintiffs for a number of other reasons.

First and foremost is the attractive nature of this theory to jurors. We live in a society where “conspiracy theories” and sensationalism are constantly depicted in the popular media. Television dramas and movies such as “The Insider” and “A Civil Action” offer dramatized scenes of secret board room meetings and muffled golf course conversations wherein greedy industry giants covertly agree to file away a safety report and continue business as usual. When jurors hear similar allegations at trial, their reaction is not likely to be one of immediate skepticism. Whether the issue is asbestos, tobacco, automobile tires or the next target of mass tort plaintiffs’ lawyers, many potential jurors have heard reports of how the “industry knew for years” what it was doing and how the industry leaders covered up hazards for profit. Jurors, who in their daily lives are consumers and employees, also may be receptive to an idea that spreads liability around to all those involved in an industry. It is therefore imperative for a defendant facing a conspiracy-based action to delineate clearly for the court the elements the plaintiff must prove so that triers of fact are not permitted to rely mainly on these perceptions.

A second advantage for plaintiffs in conspiracy cases is created by the existence of trade organizations to which many manufacturers belong, industry seminars that they attend, and the growing ease at which information can be, and is, disseminated. These forums, where extensive information is exchanged among industry members, make it difficult for any manufacturer to assert ignorance of the conduct of other members of its industry. While the mere exchange of information between manufacturers alone is not enough to establish a conspiracy, it is possible that jurors might infer culpability. Moreover, the more of this type of evidence that enters the record, the greater the opportunity for plaintiff’s counsel to argue to the jury that “everyone knew what was going on.”

Third, civil conspiracy provides an evidentiary advantage based on an exception to the hearsay rule. Under Federal Rule of Evidence 803(2)(E) and its state law equivalents, the declaration or act of a co-conspirator pursuant to or in furtherance of the conspiracy is admissible in evidence against another party to the conspiracy regardless of his presence or absence at the time of the declaration or act, and regardless of whether the declaration or act was by a conspirator who has been joined as a defendant in the pending action.

This exception can be especially important in civil conspiracy cases brought against only one alleged conspirator. In these cases, the evidence offered against the defendant may include statements that would otherwise be considered hearsay (absent the alleged conspiracy) from non-parties not present at trial. Additionally, evidentiary problems can be amplified in product liability cases as some courts hold that the knowledge of one manufacturer can be a proper basis for concluding that another manufacturer should have known of a danger associated with the product. *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 461 (5th Cir. 1985). It is important to note, however, that this connection does not evidence a conspiracy and only addresses the elements of the underlying product defect tort.

Fourth, a civil conspiracy claim brings the potential to extract damages from a defendant based on activity that predates that defendant's involvement in the conspiracy, if the defendant is found to have adopted the conspiracy's purpose. In jurisdictions that rely on joint-and-several liability, this factor can prove very costly to a manufacturer who is found to have been involved in a conspiracy with members of its industry. A defendant to a civil conspiracy action could potentially be held liable for the actions of other parties (who now may be defunct or bankrupt) that were committed before the defendant corporation was even formed.

THE PROLIFERATION OF CIVIL CONSPIRACY CLAIMS IN MASS TORT LITIGATION

The convergence of the problematic and inconsistent application of the theory of civil conspiracy on the one hand, and recognition of the advantages described above on the other, has created a legal climate that is ripe for the continued proliferation of civil conspiracy claims in the tort arena. As noted in the Introduction, many industries have already faced these claims. Traditionally, however, civil conspiracy claims were brought as "accessory claims" along with direct injury claims. In these types of cases, the civil conspiracy allegations allowed the plaintiff to introduce much of the evidence relating to a punitive damages claim during the liability phase of trial.

One recent expansion of civil conspiracy claims, which can only be expected to continue in the future, is the advent of "conspiracy-only" lawsuits. In such cases, the plaintiff alleges that the actual injury was caused by exposure to another manufacturer's product or process, but that the exposure occurred because of a conspiracy among all members of the industry to conceal hazards associated with the product or substance. This new application of civil conspiracy once again seeks to impose industry-wide accountability for the acts of any individual member of the industry.

Another notable expansion of civil conspiracy is to claims in which corporate clients are alleged to have conspired with their outside law firms, lobbying groups or public relations organizations. In these types of cases, the plaintiff contends that these entities worked together to suppress or conceal damaging or dangerous information related to the products manufactured by the client, or to the posture of the client in litigation involving those products. It has generally been the law that a corporation

cannot conspire with itself. *See, e.g., Nelson Radio & Supply Co., Inc. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952). These civil conspiracy actions seek to avoid that traditional bar by arguing that the conspiracy included these other actors seeking to advance the interests of the corporate client.

Defendants and their counsel should be cognizant of these developments in the area of civil conspiracy. Ultimately, however, successfully limiting a client's exposure to these claims depends on the aggressive and creative work of defense counsel.

PRACTICAL TIPS ON THE DEFENSE OF CIVIL CONSPIRACY CLAIMS

Limiting the civil conspiracy theory through a litigator's traditional tools

From a practical standpoint, the most important aspects of the defense of civil conspiracy claims are those that occur before conspiracy allegations ever reach the jurors' ears. Some of the traditional tools of litigation -- discovery, motions for summary judgment and motions in limine -- can be invaluable in shaping the scope and nature of the conspiracy claims ultimately heard by the jury.

A monumental challenge in dealing with civil conspiracy claims is forcing the plaintiffs to move beyond rhetoric and supposition and to identify the specific acts they claim establish the existence of a conspiracy. If the allegations in the complaint fail to satisfy the specific elements of a conspiracy identified in the Overview section above, a motion to dismiss should be considered. Unlike other causes of action where the plaintiff's inability to articulate the specifics of his or her claim may be advantageous to a defendant, generalities are a defendant's enemies in a civil conspiracy action. An early motion to dismiss may force the plaintiff to plead the civil conspiracy claim with greater specificity, or result in the dismissal of the cause of action altogether.

In addition, rather than attempting to glean specifics from a plaintiff's initial allegations, defendants should utilize simple but pointed interrogatories and requests for admissions to force the plaintiff to articulate the elements of the claim. For example, asking the plaintiff to identify (1) the dates of the conspiracy; (2) all members of the conspiracy; (3) how your defendant joined the conspiracy; and (4) what underlying tortious act was allegedly committed by the conspiracy, will be invaluable later on when filing a motion for summary judgment or trying to limit the evidence the jury will hear on the conspiracy charge. Most important, defendants should seek from the plaintiff the basis for a claim that the conspiracy and underlying tort harmed the plaintiff.

Once the defense has gathered as much information as possible regarding the scope of the alleged agreement, the nature of the underlying tortious acts and the alleged causal link, defense counsel should strongly consider filing a motion for summary judgment in most cases. Doing so will offer an opportunity to both educate the judge as to the requirements of the cause of action and to argue that the plaintiff's allegations either do not satisfy the requirements for conspiracy, or they fail, as a matter of law, to meet the heightened standard of proof the plaintiff will face at trial.

If the motion for summary judgment is not successful, some attempt must be made to limit the admissibility of prejudicial evidence. Motions in limine are excellent tools in accomplishing this goal. Once again, the discovery responses obtained from the plaintiff may assist in articulating a rationale for the exclusion of some evidence. For example, if a plaintiff admits that a conspiracy existed only between the years of 1945-1965, then common sense and fairness dictate that documents related to conduct before and after those years are irrelevant to the plaintiff's conspiracy claims. Similarly, if the plaintiff alleges that companies A, B, and C were the only members of the conspiracy, then documents relating to conduct by company D should likewise be excluded at trial.

Distinguishing the defendant from "the industry"

Early articles discussing the defense of civil conspiracy claims extolled the benefits of cooperation among the defendants in defending such claims. While there certainly can be benefits in pooling resources and increasing the likelihood of consistent facts, our experience suggests that any successful defense of civil conspiracy claims in the context of mass or toxic torts requires a "company story," not an industry one. Particularly, when an industry is one that is portrayed in a less-than-flattering light by the media -- tobacco, asbestos or pharmaceutical companies, for example -- an attempted defense of the conduct of the entire industry may be fruitless. Instead, another way to break the cloud of an alleged conspiracy is to distinguish the acts of the defendant from other members of the industry.

One such example can be found in the asbestos context. In the case of *Sealover v. Carey Canada*, 793 F. Supp. 569 (M.D. Pa. 1992), as lawyers for a defendant we were able to successfully argue that the plaintiff's evidence that asbestos manufacturers had suppressed information regarding the hazards of asbestos should not be applied with the same force against every member of the industry. The *Sealover* court noted that our client had taken steps to protect its workers and had not been a primary participant in alleged industry-sponsored health studies regarding asbestos. As a result, the client "could not be tarred with the same brush" as the more notorious members of the industry.

Most companies can identify things that they did or do differently or "better" than the rest of their industry. Concern for a company's own employees, implementation of strong safety programs, and voluntary compliance with exposure or health standards more rigid than those required by law at the relevant time, for example, may suggest an approach contrary to others in the industry. Perhaps the company retained an outside expert or consultant and was simply following the recommendations of that expert in pursuing its course of conduct. Finally, emphasizing a company's limited involvement (if appropriate) in the agreement or commission of the acts alleged to be part of the conspiracy may make a quantitative difference in how the company is perceived. Attempting to defend a single defendant against a civil conspiracy claim is challenging enough without assuming unnecessarily a defense of the industry as a whole.

Moreover, in many civil conspiracy cases, a goal of plaintiffs is to connect the defendant to the decisions, acts, and omissions of all those involved in the relevant industry, both past and present. Consequently, plaintiffs will frequently attempt to present any evidence, regardless of its relevance, which links the defendant to the industry. This can be particularly damaging when individual members or specific sects of the industry appear to have neglected some duty. Fortunately, most courts have regularly handed down decisions affirming the basic elements of civil conspiracy -- an agreement and an act which cause harm to the plaintiff. Defense counsel should be cognizant of these rulings as one of the difficulties in defending civil conspiracy actions is educating the judge and jury that what may appear to be evidence of an “agreement” does not necessarily satisfy all the elements of a civil conspiracy claim.

For example, plaintiffs have attempted to hold a defendant civilly liable merely because it belonged to an association. The U.S. Supreme Court, however, has held this to be improper and has stated that civil liability may not be imposed because an individual belonged to a group unless it is first established that the group possessed unlawful goals and that the individual held a specific intent to further those tortious objectives. *National Assoc. for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982). In another example, courts have held that the mere participation in the drafting of guidelines established by a commercial association is not sufficient to evidence an agreement. *McClure v. Owens Corning Fiberglass Corp.*, 702 N.E.2d 242, 266 (Ill. 1999). This is an extremely important factor in the current wave of conspiracy cases because of the prominence of trade associations to which many manufacturers belong.

Courts have also held that “parallel conduct” alone cannot be considered itself sufficient evidence of a conspiracy. *See, e.g., Smith v. Eli Lilly & Company*, 527 N.E.2d 333, 351 (Ill. App. 1988), *modified by* 560 N.E.2d 324 (Ill. 1990). Plaintiffs may argue that similar conduct on the part of defendants to a civil conspiracy action amounts to liability. They may attempt to show that defendants, by acting in a like manner, have formed a conspiracy. Courts have held, however, that the mere exchange of information by manufacturers of similar products is a common practice in the business world and therefore evidence of such conduct alone cannot support an inference of an agreement for civil conspiracy purposes. Defendants in conspiracy actions should be aware of these facets of the law which are designed to prevent a plaintiff from sidestepping the burden of proving the existence of an underlying tort, and use them to affirmatively counter such attempts.

Civil conspiracy requires an underlying tort -- Where's the causation?

Vigorously challenging a plaintiff's ability to establish a causal link between the alleged action by the defendant and the plaintiff's injury has long been regarded as the most effective arrow in a

toxic tort defendant's quiver. There is no logical reason why a claim of civil conspiracy cannot and should not be presented to courts in the same mold. Our experience reveals, however, that the causation hurdle is often overlooked in civil conspiracy claims.

Many conspiracy claims will be susceptible to a defense that there is no proximate causation between the alleged tortious overt act and the injury alleged by the plaintiff. The plaintiff's discovery responses regarding conspiracy may again assist a defendant in highlighting any gap in the connection of the alleged conspiracy to the alleged act on one hand, and to the connection of the alleged injury on the other.

For example, if the allegations are that the defendant suppressed certain information regarding hazards related to the product or substance at issue, the defendant should investigate whether there any parallel events or acts which render the alleged suppression irrelevant for the plaintiff's claims. Was the information disclosed in some other manner? Was it not disclosed because there was a valid scientific or other reason for not doing so? Alleged suppression of information or problems years before the plaintiff's alleged exposure or involvement with the product or process may not be causally linked if the information becomes known publicly through other means in the intervening years. Civil damages are not recoverable from a conspirator unless the agreement and tortious act proximately caused injury to the plaintiff. Many courts, however, have either not been alerted to this requirement or have been reticent to address it.

Issues of proof and procedural barriers to civil conspiracy

There are several procedural aspects to a civil conspiracy claim that may assist a defendant. Civil conspiracy is an intentional tort, and thus, many jurisdictions require proof that a defendant "knowingly and voluntarily participated in a common scheme to commit an unlawful or tortious act." Many jurisdictions also enforce a "clear and convincing evidence" standard of proof on the plaintiff to establish the action because it may be subject to misuse. Another procedural bar to a civil conspiracy claim may be the statute of limitations. Generally, the statute of limitations period for a conspiracy claim is widely held to be measured by the underlying tort and begins with each commission of the tort. These procedural aspects should not be overlooked by defendants, as they may dispose of a conspiracy claim at the outset of the case.

CONCLUSION

The indiscriminate use of civil conspiracy claims against members of target industries is only likely to continue. Recent litigation involving tobacco and other products has shown many plaintiffs' lawyers that the upside of asserting such theories is nearly boundless. Further, recent case law has shown many judges and defense counsel are still coming to terms with the application of and response to this theory. Use and refinement of the above strategies may serve as a starting point for a more effective response to these claims.

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