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The Need for Rational Boundaries in Civil Conspiracy Claims

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I. INTRODUCTION

“The actuality or imminent probability of bankruptcy has increasingly come to dominate most mass tort, or at least mega-mass tort, litigation.”¹ As a result, plaintiffs’ attorneys seeking to find substitute or supplemental “deep pockets” for their clients have focused their creative energies on pursuing secondary or peripheral sources of recovery in many mass tort cases.² Civil conspiracy claims are an example.

“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.”³ Civil conspiracy claims are often asserted by plaintiffs to allege the liability of peripheral defendants based on their associations with the party primarily responsible for the allegedly injurious product—the manufacturer—such as through membership in a relevant industry or trade association.⁴

“The major significance of a conspiracy [claim] lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity.”⁵ Thus, a co-conspirator defendant may be held jointly liable for the actions of insolvent coconspirators. Other reasons that plaintiffs’ attorneys appear to find civil conspiracy claims attractive include (1) the impact on jurors (alleging a conspiracy sounds ominous and charges of a corporate cover-up may draw

1. Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 290 (1991).

2. See ‘*Medical Monitoring and Asbestos Litigation*’—A Discussion with Richard Scruggs and Victor Schwartz, MEALEY’S LITIG. REP.: ASBESTOS, Mar. 1, 2002, at 33, 37 (quoting well-known former plaintiffs’ attorney Richard Scruggs as describing asbestos litigation as an “endless search for a solvent bystander”).

3. James D. Pagliaro et al., *The Alarming Rise in the Use of Civil Conspiracy Theories in Mass Tort Litigation*, METRO. CORP. COUNS., Dec. 2000, at 15, available at http://www.morganlewis.com/pubs/1DED9855-948A-4588-AF302E8F3DF7AD98_Publication.pdf.

4. See Richard Ausness, *Conspiracy Theories: Is There a Place for Civil Conspiracy in Products Liability Litigation?*, 74 TENN. L. REV. 383, 383 (2007) (discussing the emergence of civil conspiracy claims in product liability litigation); see also Eric Watt Wiechmann & Patrick J. Day, *Guilt by Association: Trade Associations, Liability, and Protections*, THE BRIEF, Winter 2001, at 35, 39 (“[M]anufacturer may be liable for the acts of a trade association, or an association member, even where the target has not been directly involved in the underlying conduct.”).

5. Howard v. Superior Court, 2 Cal. Rptr. 2d 575, 576 (Cal. Ct. App. 1992) (quoting Mox Inc. v. Woods, 262 P. 302, 303 (Cal. 1927)).

upon similar sensationalism in the popular media and provoke outrage);⁶ (2) evidentiary advantages based on an exemption from the hearsay rule;⁷ and (3) the opportunity to capitalize on the widespread membership by corporate defendants in trade associations and the information-sharing function of these groups to argue that a defendant was knowledgeable about the activities of other members of its industry.⁸ Some of the attractiveness to plaintiffs' counsel also may stem from the murkiness of the doctrine, which is discussed below and in more depth later in this article. In short, where the law is unclear or permissive, it can be exploited.

Civil conspiracy claims also fit into a broader pattern of plaintiffs' counsel seeking to extend concepts of vicarious liability, even to implicate entire industries. Examples of theories that have been raised based on the same type of philosophy include market share, enterprise, concert of action, aiding and abetting, and recent attempts to convert what are ostensibly mass product liability claims into industry-wide public nuisance claims. By and large, these efforts at collective liability have failed outside of a few limited situations. Courts have been reluctant to impose liability on one entity or individual for the acts of another because of concerns about potential limitless liability.

Civil conspiracy claims were intended to address situations involving (1) an agreement between two or more persons to commit an unlawful or tortious act (or a lawful act by unlawful means); (2) an act committed in furtherance of the agreement; (3) an injury caused by one of the conspirators; and (4) special damages (i.e. quantifiable monetary losses such as lost wages, medical expenses, or property damage).⁹ In practice, however, courts have struggled with the application of this seemingly straightforward doctrine and the law remains unclear and unsettled.¹⁰ A few courts have

6. See Richard C. Ausness, *Product Liability's Parallel Universe: Fault-Based Liability Theories and Modern Products Liability Law*, 74 BROOK. L. REV. 635, 642 (2009) (stating that some juries have imposed large punitive damage awards against defendants alleged to have withheld information from consumers about the health risks associated with their products).

7. See FED. R. EVID. 801(d)(2)(E) ("A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."). States generally follow the same approach.

8. See *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 461 (5th Cir. 1985) (stating that under *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), "the knowledge of one manufacturer can be a proper basis for concluding that another manufacturer should have warned of a specific danger.").

9. See 16 AM. JUR. 2D *Conspiracy* §§ 50-53 (2009). "While the essence of the crime of conspiracy is the agreement, the essence of civil conspiracy is damages." *Id.* § 50, at 280 (footnotes omitted).

10. Some fifty years ago, United States Supreme Court Justice Jackson remarked that the claim of civil conspiracy was "so vague that it almost defies definition." *Krulewitch v. United States*, 336 U.S. 440, 446-47 (1949) (Jackson, J., concurring) (footnote omitted).

subjected attenuated defendants to liability by glossing over one of the most basic elements of tort law—the existence of a duty of care—creating the potential for a super-tort.

This article examines the public policy implications of expanding the reach of civil conspiracy law. Part I analyzes the traditional role duty plays in tort law and how the principle applies in civil conspiracy claims. The article explains that, despite centuries of common law development,¹¹ fundamental questions regarding the scope and circumstances in which liability may attach for civil conspiracy either remain unanswered in many states or are marked by stark differences across jurisdictions. Part II places the law of civil conspiracy in the broader context of other efforts to impose liability on increasingly remote classes of defendants. Part III analyzes the need for more exacting standards in civil conspiracy actions as a matter of sound public policy and adherence to the traditional tort law duty requirement.

The article concludes that requiring a defendant to have an independent duty to the plaintiff—based on the existence of a relationship between the plaintiff and defendant—provides a necessary, rational boundary to otherwise amorphous civil conspiracy claims. Unless courts require this core element, civil conspiracy law is prone to abuse. Currently, courts are narrowly divided as to whether an independent duty is required in civil conspiracy claims, although a bare majority of courts that have addressed the issue recognize this safeguard. As additional courts consider such claims, the article recommends that they follow this sound path. The article also suggests that courts clarify other key elements of civil conspiracy claims to promote predictability and litigation fairness.

Justice Jackson's description is still accurate today. *See, e.g.,* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 46 at 322 (5th ed. 1984) (footnote omitted) (stating that torts such as civil conspiracy “have been surrounded by no little uncertainty and confusion” and “have meant very different things to different courts”); David Waksman, *Causation Concerns in Civil Conspiracy to Violate Rule 10b-5*, 66 N.Y.U. L. REV. 1505, 1512 (1991) (describing civil conspiracy as “a murky doctrine”); Jerry Whitson, Note, *Civil Conspiracy: A Substantive Tort?*, 59 B.U. L. REV. 921, 949 (1979) (footnote omitted) (“In the past, courts have hidden behind empty phrases rather than analyze the elements necessary to a successful tort action for civil conspiracy,” but such ambiguity “leaves future courts free to discard the empty phrases and fashion the contours of the tort with greater regard to contemporary societal mores”); *see also* P. Benjamin Cox, *Combination to Achieve an Immoral Purpose: The Oppressively Vague Tort of Civil Conspiracy in Arkansas*, 62 ARK. L. REV. 57, 57-58 (2009).

11. *See* PERCY HENRY WINFIELD, THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE (1921); Kristopher S. Kaufman, *The Liability Reform Act Subsequent to Field v. Boyer Co.: Sounding the Death Knell of Civil Conspiracy in Utah?*, 2003 UTAH L. REV. 1077, 1079-84 (2003) (describing the early English and American development of civil conspiracy).

II. THE ROLE OF DUTY IN CIVIL CONSPIRACY

A. TORT LAW PRINCIPLES OF DUTY

A foundational principle of tort law is that liability requires a breach of a duty of care.¹² At the most generalized level, it can be said that everyone owes another a reasonable duty of care to avoid physical harm to others.¹³ This is a legal duty separate from any moral duty to avoid harm.¹⁴ The existence and scope of a duty of care, if any, is a question of law to be determined by a court. Duty questions involve policy-laden judgments in which a line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit.¹⁵

As a starting point, courts examine the relationship of the parties. Generally, individuals do not need “to act affirmatively for the benefit of others in the absence of some special relationship.”¹⁶ Such “special relationships” are “narrowly drawn.”¹⁷ Common examples include the relationship between an individual and a common carrier, innkeeper, land possessor who opens its property to the public, and one who voluntarily takes custody of an individual in certain circumstances.¹⁸ Similarly, the employer-employee relationship generally places a duty of care on the employer to take affirmative steps to protect employees from harm.¹⁹

Only in narrow and exceptional circumstances does the law impute vicarious liability on an actor who did not breach his or her independent duty of care, such as on an employer for the negligent acts of an employee. Even in such instances, there is an underlying relationship in which one party has

12. See KEETON ET AL., *supra* note 10, § 53, at 356-58.

13. See DAN B. DOBBS, *THE LAW OF TORTS* § 277, at 577-78 (2000).

14. See *Pulka v. Edelman*, 358 N.E.2d 1019, 1022 (N.Y. 1976).

15. Courts often analyze (1) the foreseeability of harm to the injured party; (2) the degree of certainty he or she suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant and the consequences to the community of imposing a duty of care with resulting liability for breach; and (7) the availability, cost, and prevalence of insurance for the risk involved. See, e.g., *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968). Foreseeability of harm, alone, is not enough. As the California Supreme Court explained in *Thing v. La Chusa*, 771 P.2d 814, 830 (Cal. 1989), “there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury.”

16. See DOBBS, *supra* note 13, § 227, at 579.

17. *Southland Corp. v. Griffith*, 633 A.2d 84, 90 (Md. 1993).

18. See RESTATEMENT (SECOND) TORTS § 314A (1965).

19. See RESTATEMENT (SECOND) TORTS § 314B (1965).

knowingly assumed liability exposure for the tortious conduct of others.²⁰ Moreover, it is the guiding principle of the tort system and black letter law that a party is not liable where no breach of a duty has occurred.

Against this tort law backdrop, civil conspiracy is unique in that it is grounded in the notion that a combination of two or more persons in an action poses a greater risk of harm than does an individual in the same action.²¹ For that reason, the role and importance of an independent duty of care may appear to some courts more ambiguous and less fundamental than in actions premised upon a single tortfeasor.

Courts and legal scholars have historically struggled to find common ground in delineating a civil conspiracy claim. For instance, some courts view civil conspiracy as a derivative action that requires an underlying tort to maintain a claim, while other courts recognize it as a separate and independent tort.²² This distinction provides important insight with regard to the role of duty in civil conspiracy.²³ If civil conspiracy is a derivative tort action, then it follows that civil conspiracy requires an independent duty of care because the underlying tort action would require breach of a duty. On the other hand, if civil conspiracy is a stand-alone tort, it could, at least theoretically, not require an independent duty, although this would make it an aberration in tort law.

In addition to uncertainty over the precise fit of civil conspiracy within tort law, there are considerable differences among states as to the basic elements of a claim. Most courts agree that civil conspiracy requires (1) an agreement with two or more persons to commit an unlawful or tortious act or to commit a lawful act by unlawful means, (2) the commission of an overt act for the purpose of furthering the conspiracy, (3) an injury caused by the unlawful or tortious act committed by one of the conspirators, and

20. See DOBBS, *supra* note 13, § 333, at 905-06.

21. See *Recent Case Notes*, 29 YALE L.J. 795, 809-10 (1920) (“[T]he only difference between the civil ‘liability’ for acts done in pursuance of a conspiracy and for acts of the same character done by a single person is in the greater probability that such acts where [sic] done by many in combination will cause injury.”).

22. Compare Michael Finch, *Governmental Conspiracies to Violate Civil Rights: A Theory Reconsidered*, 57 MONT. L. REV. 1, 8 (1996) (“Conspiracy liability is totally derivative of the underlying cause of action in tort.”), with Scott S. Addison, *Civil Conspiracy in the Employment At-Will Context: Where Does South Carolina Stand After Angus v. Burroughs & Chaplin Co.?*, 56 S.C. L. REV. 803, 804-05 (2005) (footnote omitted) (“Although civil conspiracy may stand on its own, a plaintiff may not collect damages for both civil conspiracy and a separate tort . . .”). See also KEETON ET AL., *supra* note 10, § 46, at 324 (footnote omitted) (“There has been a good deal of discussion as to whether conspiracy is to be regarded as a separate tort in itself.”).

23. See KEETON ET AL., *supra* note 10, § 46, at 324.

(4) special damages.²⁴ Variations in these factors, however, have led to inconsistent application of civil conspiracy claims.

It is becoming increasingly typical to find civil conspiracy claims in the context of product liability. For example, if a group of manufacturers illicitly agreed to hide the risks of their products, and this action, in fact, caused greater harm to consumers than if each manufacturer on its own had hidden the same risks, it would likely present a classic example of a civil conspiracy. But what if these manufacturers hired a consulting firm or an advertising agency to promote their products with knowledge of the risks? Would those companies be jointly liable for harms caused by the manufacturers' defective products? What if the manufacturers financed private research and then collectively chose not to release unfavorable results? Would the research institute and its scientists, working on a private contract, face liability for injuries stemming from the product if they did not release their findings to the public? And what if the research firm had signed a non-disclosure agreement or was otherwise bound to confidentiality? Finally, what if private companies, insurers, or the government contributed to fund the research? Is each entity liable for the harms related to products it did not make, market, or profit from?

These are issues courts must address in defining the scope of civil conspiracy. As the next section discusses, courts have struggled in drawing a clear line.

B. THE LANDSCAPE OF DUTY IN CIVIL CONSPIRACY

The role of duty in civil conspiracy claims is at a crossroads. Relatively few courts have squarely addressed this critical issue. On one end of the spectrum, a developing line of case law in several jurisdictions imposes an independent duty requirement to restrain the spread of civil conspiracy liability to peripheral defendants. The leading case is from the California Supreme Court, which has held that liability for civil conspiracy is limited to those defendants that owed an independent duty to the specific plaintiff.²⁵ On the other end is Delaware, which does not require an independent duty.²⁶ Finally, some states, such as Illinois, inconsistently apply an independent duty rule.

24. See, e.g., *Jay Edwards, Inc. v. Baker*, 534 A.2d 706, 709 (N.H. 1987); *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983); *Sonnenreich v. Philip Morris, Inc.*, 929 F. Supp. 416, 419 (S.D. Fla. 1996); *Vaught v. Waites*, 387 S.E.2d 91, 95 (S.C. Ct. App. 1989).

25. See *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454 (Cal. 1994); see also *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608 (Tex. 1996).

26. See *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 147 (Del. 1987); see also *Valles v. Silverman*, 84 P.3d 1056, 1058 (N.M. Ct. App. 2003).

1. States Adopting an Independent Duty Rule

The California Supreme Court in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*²⁷ was one of the first courts of last resort to carefully consider the independent duty requirement in civil conspiracy cases. In *Applied Equipment*, the court reversed a \$2.5 million verdict for conspiracy in which a subcontractor who was hired to procure spare electronic parts for a general contractor sued the general contractor and an equipment supplier claiming that the two had entered into a conspiracy to contract directly with each other and interfere with the subcontractor's contractual relationships.²⁸ The court explained, "By its nature, tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she *owes a duty to plaintiff* recognized by law and is potentially subject to liability for breach of that duty."²⁹ The court added, "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."³⁰ Thus, in California, a cause of action for conspiracy does not arise if the alleged conspirator, "though a participant in the agreement underlying the injury, was not *personally bound* by the duty violated by the wrongdoing."³¹ Because the general contractor was a party to the underlying contract, the court reasoned that it owed no duty to refrain from interference with the performance of its own contract.³² The court limited the extent to which peripheral defendants can "be bootstrapped into tort liability by the pejorative plea of conspiracy."³³

More recently, in *Chavers v. Gatke Corp.*, a California appellate court considered a civil conspiracy claim in the context of products liability.³⁴ In *Chavers*, an automobile and truck mechanic who worked around asbestos-containing friction brake products and contracted mesothelioma (an asbestos-related cancer) sued scores of manufacturers, suppliers, and distributors for failure to warn—including defendant Gatke, a dissolved, bankrupt company that previously made automotive brakes and clutches.³⁵ Plaintiff pos-

27. 869 P.2d 454 (Cal. 1994).

28. *See id.* at 455-56. The plaintiff was also awarded contract damages totaling \$112,531.25 (\$81,250 plus prejudgment interest) and \$12.5 million in punitive damages. *See id.* at 456.

29. *Id.* at 457 (emphasis added).

30. *Id.* at 459 (emphasis added).

31. *Id.* at 458 (emphasis omitted in part) (quoting *Doctors' Co. v. Superior Court*, 775 P.2d 508, 511 (Cal. 1989)).

32. *Id.* at 459.

33. *Applied Equip. Corp.*, 869 P.2d at 459.

34. 132 Cal. Rptr. 2d 198, 199-200 (Cal. Ct. App. 2003).

35. *See id.* at 199.

sessed no evidence that he had used or worked around brake shoes manufactured by Gatke.³⁶ Instead, he and his wife claimed that many decades ago Gatke and other asbestos-product manufacturers conspired to suppress the release of health effects research they funded, therefore, each funder was liable for a tortious failure to warn potential asbestos-product users of the hazards of exposure.³⁷ The appellate court found that resolution of plaintiffs' claims was "straightforward," because a defendant cannot be held liable for civil conspiracy in California unless it is "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."³⁸ The court added that "the source of substantive liability [for civil conspiracy] arises out of a preexisting legal duty and its breach; liability *cannot* arise out of participation in the conspiracy alone."³⁹ Since the plaintiffs could not show exposure to any of Gatke's products, Gatke did not owe them a duty of care.⁴⁰

The Texas Supreme Court has also embraced the independent duty requirement in civil conspiracy cases. In *Firestone Steel Products Co. v. Barajas*, the family of a mechanic who was killed when a tire exploded sued Firestone, claiming that Firestone had "engaged in a civil conspiracy to conceal and obscure the hidden dangers of trying to mount mismatched tires and wheels."⁴¹ Firestone had not manufactured, distributed, or sold the product that caused plaintiff's injury.⁴² In rejecting the civil conspiracy claim, the Texas Supreme Court held that "Firestone proved it had no duty to the Barajas. Accordingly, Firestone negated the Barajas' civil conspiracy claim as a matter of law."⁴³

In addition, a Maryland federal court has adopted the California Supreme Court's holding in *Applied Equipment*. In *BEP, Inc. v. Atkinson*,⁴⁴ a warehouse operator sued a former managerial employee and his wife, a part-time employee, for conspiring to begin a rival company and encourag-

36. *See id.*

37. *See id.* at 199-201.

38. *Id.* at 200-202.

39. *Chavers*, 132 Cal. Rptr. 2d at 203 (emphasis added).

40. *See id.*

41. 927 S.W.2d 608, 612 (Tex. 1996).

42. *See id.* at 615.

43. *Id.* at 617. *See also* Block v. Wyeth, Inc., No. 3:02-CV-1077-N, 2003 WL 203067 (N.D. Tex. Jan. 23, 2003) (holding that plaintiff claiming injury from a generic drug could not recover in a civil conspiracy action against the brand name manufacturer because the brand name manufacturer owed no duty to the plaintiff); Staples v. Merck & Co., 270 F. Supp. 2d 833 (N.D. Tex. 2003) (holding that consumers could not maintain civil conspiracy claim against clinical researcher).

44. 174 F. Supp. 2d 400 (D. Md. 2001).

ing customers to switch their business. The court held that the managerial employee could be liable for breach of fiduciary duty, but the manager's wife owed no fiduciary duty to the plaintiff given her employment position. Consequently, she could not be held liable under a conspiracy theory.⁴⁵ In reaching its decision, the court explained, "Tort liability arising from a conspiracy presupposes that the coconspirator is legally capable of committing the tort, that is, *that she owes a duty to the plaintiff* recognized by law and is potentially subject to liability for breach of that duty."⁴⁶ Quoting *Applied Equipment*, the court said, "A cause of action for civil conspiracy may therefore not arise if the alleged conspirator, though allegedly a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing."⁴⁷

These decisions recognizing an independent duty rule are joined by similar rulings in Georgia and Missouri.⁴⁸

2. States Rejecting an Independent Duty Rule

The Delaware Supreme Court took a different path in *Nicolet, Inc. v. Nutt*,⁴⁹ a 1987 case, which predates *Applied Equipment* by several years. In *Nutt*, former plant workers exposed to asbestos alleged that various former asbestos manufacturers that were members of two trade associations conspired to intentionally misrepresent and suppress information about the hazards of asbestos exposure.⁵⁰ The workers did not claim exposure to any products made by the defendant, Nicolet, Inc.⁵¹ On interlocutory appeal following a denial of summary judgment, Nicolet argued unsuccessfully that it had no duty to warn the customers of other asbestos manufacturers of

45. See *id.* at 409.

46. *Id.* (emphasis added).

47. *Id.* (quoting *Applied Equip. Corp.*, 869 P.2d at 458).

48. See *Mosley v. Garlock, Inc.*, No. 2002CV59552, 2003 WL 22331284, at *1 (Ga. Super. Ct. June 25, 2003) ("A cause of action for civil conspiracy does not arise against a defendant who is not bound by the duty violated by the alleged wrongdoing."); *Hunt v. Air Prods. & Chems.*, No. 052-9419, 2006 WL 1229082, at *3 (Mo. Cir. Ct. Apr. 20, 2006) ("Here, plaintiffs allege many actions by defendants to conceal or misrepresent the hazards of welding fumes. There are no allegations, however, that these actions independently caused any harm to the plaintiffs."); see also 15A C.J.S. *Conspiracy* § 8 (2010): "[Civil conspiracy] allows tort recovery only against a party who already owes a duty and is not immune from liability based on applicable substantive tort law"; 16 AM. JUR. 2D *Conspiracy* § 55 (2010) ("Tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing a tort in that he or she owes a duty recognized by law to the plaintiff and is potentially subject to liability for breach of that duty.")

49. 525 A.2d 146 (Del. 1987).

50. *Id.* at 147.

51. *Id.*

the hazards of asbestos exposure.⁵² The court distinguished between the situation where a party fails to speak, which the court said is not actionable absent a fiduciary or contractual relationship, and the “active misconduct of intentionally suppressing information.”⁵³ The court concluded: “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.”⁵⁴

A New Mexico appellate court reached a similar result, albeit in a less direct way. In *Valles v. Silverman*,⁵⁵ neighbors who opposed the development of a shopping center were sued by the developer and several individual property owners based on a litany of statutory violations and tort law claims. The neighbors countersued claiming that the underlying lawsuit was a Strategic Litigation Against Public Participation (SLAPP) suit intended to discourage their opposition to the development.⁵⁶ The countersuit alleged claims of malicious abuse of process and civil conspiracy claims against the developer and property owners in the underlying action and also joined Wal-Mart, one of the shopping center’s planned tenants.⁵⁷ Wal-Mart asserted it could not be liable for malicious abuse of process because it was not a party in the allegedly abusive lawsuit, and thus plaintiffs’ derivative civil conspiracy claim must fail.⁵⁸ The court, however, disagreed with “Wal-Mart[’s] suggest[ion] . . . that Plaintiffs must be able to recover on the underlying tort against every coconspirator before that coconspirator can be liable for its part in the conspiracy.”⁵⁹

3. *Illinois: Inconsistent Application of the Independent Duty Rule*

Recently, the civil conspiracy law in Illinois has come under considerable scrutiny because the law has not been applied consistently and because critics believe that the highly permissible application of the law by some courts “makes it easy for plaintiffs to simply lob complaints against busi-

52. *Id.* at 150.

53. *Id.*

54. *Nicolet, Inc.*, 525 A.2d at 150. *See also* Farmer v. City of Newport, 748 S.W.2d 162 (Ky. Ct. App. 1988) (allowing men who lost their families in an apartment building fire to bring a concert of action claim against approximately one hundred mattress manufacturers alleging that defendants withheld information about the flammable nature of mattresses from the public).

55. 84 P.3d 1056 (N.M. Ct. App. 2003).

56. *Id.* at 1058.

57. *Id.*

58. *See id.* at 1064-65.

59. *Id.* at 1064.

nesses—not just the alleged wrongdoer, but deep-pocketed third-parties that have no relationship or responsibility to the plaintiff.”⁶⁰

At least one Illinois appellate court has reached the same conclusion as the California and Texas Supreme Courts holding that there can be no civil conspiracy liability absent an independent duty owed by the defendant to the plaintiff.⁶¹ In *Doe v. Noe*,⁶² the First District, Sixth Division, considered a civil conspiracy claim brought by a hospital patient against persons associated with her treating physician.⁶³ After the patient contracted the HIV virus during surgeries performed by her doctor, she claimed that the doctor’s partner and employer conspired not to reveal the surgeon’s HIV status “so as to gain consent to care and treatment that the plaintiff would otherwise decline.”⁶⁴ The court rejected this piling on of defendants, explaining that “[t]he duty to disclose risks to a patient . . . rests exclusively with the doctor in a physician-patient relationship. No independent duty is imposed upon others.”⁶⁵ Accordingly, no conspiracy could be stated and the court affirmed dismissal of the plaintiff’s conspiracy claim.⁶⁶

Less than a year later, however, another Illinois appellate court (the Fourth District) called this clear and concise statement of Illinois law into doubt in *McClure v. Owens Corning Fiberglas Corp.*⁶⁷ The plaintiffs in *McClure* alleged that former manufacturers of asbestos products had engaged in a conspiracy to subvert information regarding the health risks of asbestos.⁶⁸ Owens Corning Fiberglas Corp., a former manufacturer of asbestos products and later the owner of the plant where the plaintiffs or their spouses had worked, and Owens-Illinois, another former asbestos product manufacturer, were named as defendants.⁶⁹ The plaintiffs, however, did not

60. Gerald Roper, Editorial, *Illinois Civil Conspiracy Law Hurts Businesses*, CHI. SUN-TIMES, Oct. 17, 2009, available at <http://www.suntimes.com/news/otherviews/1831032,illinois-civil-business-101709.article> (view of President and CEO of the Chicagoland Chamber of Commerce). See also Steve Bartlett, Editorial, *Illinois Law Makes Lending Money Harder*, CHI. TRIB., Oct. 1, 2009, available at <http://www.chicagotribune.com/news/opinion/chi-oped0929lendingoct01,0,7736937.story> (view of the President and CEO of The Financial Services Roundtable).

61. See, *Doe v. Noe*, 690 N.E.2d 1012, 1022 (Ill. App. Ct. 1997), *vacated on other grounds*, 707 N.E.2d 588 (Ill. App. Ct. 1999).

62. *Id.* at 1012.

63. *Id.* at 1114-15.

64. See *id.* at 1022.

65. *Id.*

66. See *id.* at 1022.

67. 698 N.E.2d 1111 (Ill. App. Ct. 1998), *rev'd on other grounds*, 720 N.E.2d 242 (Ill. 1999).

68. *Id.* at 1113.

69. See *id.* at 1113-14.

specifically claim that they were exposed to the defendants' products and their work ended before Owens Corning purchased the plant.⁷⁰

Without addressing the merits of *Doe*, the *McClure* court distinguished the doctor-patient relationship at issue in *Noe* from the employer-employee relationship, finding that “[n]o case has stated that the duty to disclose risks to asbestos workers rests exclusively with those workers’ employees.”⁷¹ The court also noted that the Illinois Supreme Court in *Adcock v. Brakegate, Ltd.*⁷² held that a civil conspiracy action could be stated against a successor employer in the absence of a direct causal connection between that defendant and the injured party.⁷³ The court in *McClure*, while expressing concern that a defendant shown to have joined the conspiracy might be “liable to every plaintiff anywhere in the world who has contracted” an asbestos-related disease,⁷⁴ then effectively side-stepped the independent duty issue. The court concluded that “direct connections between these plaintiffs and these defendants [existed],” because Owens Corning “purchased the plant where these plaintiffs worked” and Owens-Illinois “had ties to” Owens Corning.⁷⁵ The court further explained, “This is not a case where the only connection between defendants and plaintiffs is that plaintiffs contracted asbestosis and defendants were a remote part of a conspiracy to conceal the dangers of asbestos.”⁷⁶ The appellate court affirmed the trial court’s entry of judgment for the plaintiffs on the civil conspiracy claim.⁷⁷ The Illinois Supreme Court subsequently reversed the appellate court, holding that the evidence against Owens Corning and Owens-Illinois was insufficient to establish that they participated in an asbestos conspiracy and ordered judgment be entered in their favor.⁷⁸

A related set of opinions from the Fourth District Appellate Court further highlights the need for greater clarity in Illinois law. In *Burgess v. Abex Corp.*,⁷⁹ (“*Burgess I*”), decided before the Illinois Supreme Court’s ruling in *McClure*, the appellate court again took up claims of civil conspiracy in the asbestos context.⁸⁰ The defendants this time were Abex Corp. (“Abex”) and

70. *See id.*

71. *Id.* at 1117.

72. 645 N.E.2d 888 (Ill. 1994).

73. *See id.* at 895.

74. *See McClure*, 698 N.E.2d at 1118.

75. *Id.*

76. *Id.*

77. *See id.* at 1120.

78. *See McClure v. Owens Corning Fiberglas Corp.*, 720 N.E.2d 242, 268 (Ill. 1999).

79. 712 N.E.2d 939 (Ill. App. Ct. 1999), *vacated*, 722 N.E.2d 193 (Ill. 1999), *on remand*, 725 N.E.2d 792 (Ill. App. Ct. 2000).

80. *Id.* at 941.

Pittsburgh Corning Corp. (PCC).⁸¹ “Neither Abex nor PCC ever employed [the plaintiff], and no evidence shows that [either company’s] product was ever used in the Unarco plant where [plaintiff] worked.”⁸² “As in *McClure*,” the court remained “*uncertain where the line should be drawn*, if at all,” to prevent unfair and limitless liability.⁸³ The court then explained that it did not need to decide the issue because “*we do see direct connections between these plaintiffs and these defendants*. Abex and PCC were not remote parts of this conspiracy.”⁸⁴ *Burgess I* was vacated after the Illinois Supreme Court decided *McClure*.⁸⁵ On remand, in *Burgess II*,⁸⁶ the court flipped, describing Abex as having “no direct connections with the plaintiff here.”⁸⁷ Without directly addressing the independent duty rule, the court reversed the trial court’s entry of judgment in favor of Burgess and remanded the case for a new trial as to the Burgess family’s claims regarding Abex’s participation in a conspiracy.⁸⁸ In contrast, the court found PCC’s situation “very similar to that of Owens Corning, for which the supreme court entered judgment in *McClure*.”⁸⁹ Accordingly, the court reversed the judgment against PCC and “order[ed] that judgment be entered in PCC’s favor.”⁹⁰

In another conspiracy case, and in contrast to the Maryland federal court case described earlier,⁹¹ an Illinois appellate court (First District, Fifth Division) found that the wife of an energy consulting company employee who assisted her husband with the establishment of competing businesses was liable on a conspiracy claim.⁹²

The tension between these cases and *Noe* leaves considerable uncertainty regarding how the duty requirement applies in Illinois civil conspiracy cases. It appears that Illinois courts have abandoned the independent duty requirement, but the law is not a model of clarity and at least one appellate court has twice expressed its concern that an unbounded claim could result in limitless and open-ended liability against remote defendants.

81. *Id.*

82. *Id.*

83. *Id.* at 944 (emphasis added).

84. *Id.* (emphasis added).

85. *Burgess*, 722 N.E.2d at 193.

86. 725 N.E.2d 792 (Ill. App. Ct. 2000).

87. *Id.* at 795.

88. *See id.* at 797.

89. *Id.* at 796.

90. *See id.* at 797.

91. *See* BEP, Inc. v. Atkinson, 174 F. Supp. 2d 400 (D. Md. 2001).

92. *See* Multiut Corp. v. Draiman, 834 N.E.2d 43, 51-52 (Ill. App. Ct. 2005). The Illinois decision is distinguishable from the Maryland case based on the covenant not to compete agreement, the wife’s prior relationship with her husband’s employer, and the wife’s participation in forming the competing companies and serving as CEO.

III. THE NEED FOR AN INDEPENDENT DUTY RULE IN CONSPIRACY CLAIMS

A. AN INDEPENDENT DUTY RULE FURTHERS BASIC TORT LAW PRINCIPLES

Given the divided authority on the need for an independent duty in civil conspiracy claims, which approach should courts adopt? The current split of opinion favors application of an independent duty rule, but might the nature of civil conspiracy justify an exception to traditional tort law standards?

To answer this question, it may prove helpful to build off of one California court's characterization of the independent duty requirement in civil conspiracy as a rule of "experience."⁹³ A claim for civil conspiracy, after all, is not the first occasion in which the role of a duty of care or concepts of vicarious liability have been questioned and debated in tort law. A brief review of similar situations not only reveals hard-learned lessons of some courts as to the consequences of altering a basic restraint on civil liability, but also suggests that conspiracy claims are not unique, nor are the circumstances especially compelling to warrant a departure from firmly-established principles.

1. *Efforts by Plaintiffs to Expand Traditional Notions of Duty*

Consider, for example, how courts have treated other attempts to erode traditional duty rules and subject defendants to liability for harms to the general public or other large classes of remote plaintiffs.

In *Meyers v. Donnatucci*,⁹⁴ a New Jersey court refused to impose liability on a swimming pool trade association that engaged in research and publication activities, including the promulgation of suggested minimum safety standards for residential swimming pools. Plaintiff alleged that the trade association had a duty to use reasonable care in the development, accrual, and dissemination of swimming pool information. He admitted that he had no special relationship with the trade association; instead, he asserted that it was foreseeable that he would be injured if the trade association failed to use reasonable care in its operations.⁹⁵ The court rejected the argument, holding that a trade association "owes no duty to the general

93. *Chavers*, 132 Cal. Rptr. at 203 (citing OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881) (stating that the "life of the law has not been logic: it has been experience.")).

94. 531 A.2d 398 (N.J. Super. Ct. Law Div. 1987); *see also* *Howard v. Poseidon Pools, Inc.*, 522 N.Y.S.2d 388 (N.Y. App. Div. 1987) (affirming grant of summary judgment to swimming pool trade association because the association owed no duty to prevent harm to members of the general public), *aff'd on other grounds*, 530 N.E.2d 1280 (N.Y. 1988).

95. *See Meyers*, 531 A.2d at 402.

public who may use products manufactured and/or installed by its members.”⁹⁶ This conclusion is largely shared by other courts.⁹⁷

In similar cases, courts have rejected attempts to hold insurers liable for failing to disclose health hazards to expansive groups of plaintiffs as a result of inspection activities.⁹⁸ For example, the Alabama Supreme Court in *Barnes v. Liberty Mutual Insurance Co.*⁹⁹ held that “[t]he mere fact that [the defendant insurer] may have had some knowledge of the potential health hazards associated with cotton dust exposure does not, without more, impose a legal duty upon it as the insurance carrier to disclose such knowledge to its insured’s employees.”¹⁰⁰ Plaintiffs had alleged that over a period of several years the insurer actively suppressed data and information concerning the health risks of textile work, interfered with independent scientific investigations of those risks, and conspired with others to conceal the dangers of cotton dust exposure.

Courts also have steadfastly rejected efforts to hold publishers liable to the general public for “negligent publication” of information that causes harm to a reader,¹⁰¹ except in very narrow instances in which the publica-

96. *Id.*

97. *See, e.g.,* *Collins v. Am. Optometric Ass’n*, 693 F.2d 636 (7th Cir. 1982); *Swartzbauer v. Lead Indus. Ass’n*, 794 F. Supp. 142 (E.D. Pa. 1992); *Evenson v. Osmose Wood Preserving, Inc.*, 760 F. Supp. 1345 (S.D. Ind. 1990); *Harmon v. Nat’l Auto. Parts Ass’n*, 720 F. Supp. 79 (N.D. Miss. 1989); *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149 (E.D. Pa. 1987); *Klein v. Council of Chem. Ass’ns*, 587 F. Supp. 213 (E.D. Pa. 1984); *Bailey v. Edward Hines Lumber Co.*, 719 N.E.2d 178 (Ill. App. 1999); *Beasock v. Dioguardi Enters., Inc.*, 494 N.Y.S.2d 974 (N.Y. Sup. Ct. 1985).

98. *See, e.g.,* *Daraio v. Carey Can., Inc.*, 309 F. Supp. 2d 706 (E.D. Pa. 2004) (finding an insurer that conducted dust studies at asbestos plant did not assume a duty to provide a safe work environment for its insured’s employees or to warn them of the dangers of asbestos); *Swift v. Am. Mut. Ins. Co. of Boston*, 504 N.E.2d 621 (Mass. 1987) (accident prevention programs by workers’ compensation insurers do not give rise to third party liability); *Kent v. Jomac Prods., Inc.*, 542 So. 2d 99 (La. Ct. App. 1989) (insurer owed no duty to warn employees of insured of any defective conditions it might have discovered during inspection of insured’s workplace); *Bugg v. Am. Standard, Inc.*, No. 84829, 2005 WL 1245043 (Ohio Ct. App. May 26, 2005) (rejecting duty on insurers to disclose to the general public what they purportedly knew about the dangers of asbestos).

99. 468 So. 2d 124 (Ala. 1985).

100. *Id.* at 126. *See also* *Ulwelling v. Crown Coach Corp.*, 23 Cal. Rptr. 631, 655 (Cal. Ct. App. 1962) (finding that a truck insurer’s inspection program primarily for underwriting purposes and suggestion to replace certain tires on truck later involved in accident did not establish a duty owed to plaintiffs by truck owner’s insurer).

101. *See* *Winter v. G.P. Putnam’s Sons.*, 938 F.2d 1033 (9th Cir. 1991) (holding a mushroom enthusiast could not recover against book publisher after getting sick from picking and eating wild mushrooms based on erroneous information); *Watters v. TSR, Inc.*, 904 F.2d 378 (6th Cir. 1990) (manufacturer of the game “Dungeons & Dragons” was not liable for publishing and distributing game materials to mentally fragile person who committed suicide); *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990 (E.D.N.Y. 1977) (finding an author of an “index” to drugs owed no duty to medical appliance supplier for incorrect in-

tion was intended to be used as a “product” and strict liability was applied.¹⁰² In addition, courts have found that corporations conducting product safety research for a subsidiary owe no duty to any potential ultimate users of the product because the liability “would be indeterminate and infinite.”¹⁰³

In the asbestos context, a similar emerging liability theory being pursued by plaintiffs’ counsel to reach peripheral defendants is that premises owners should be held liable for harms to the family members of workers as a result of off-site exposure to asbestos, typically through contact with a directly exposed worker or that worker’s soiled work clothes.¹⁰⁴ These “take home” exposure claims seek to impose a duty of care in the absence of a relationship between the plaintiff and defendant; they are based on the alleged “foreseeability” of the harm. Most courts, however, have rejected take-home exposure claims after considering the lack of a relationship between the parties and public policy concerns.¹⁰⁵

formation about drug used in appliance); *Birmingham v. Fodor’s Travel Publ’ns, Inc.*, 833 P.2d 70 (Haw. 1992) (finding that a publisher of travel guide had no duty to warn swimmer of dangerous condition at beach it described); *Jaillet v. Cashman*, 139 N.E. 714 (N.Y. 1923) (finding that Dow Jones & Co. was not liable to subscriber for misinformation as to stock sent out over its ticker); *Bailey v. Huggins Diagnostic & Rehab. Ctr., Inc.*, 952 P.2d 768 (Colo. App. 1997) (finding that a dentist did not owe a duty of care regarding statements made on television program and in book which would support a negligent misrepresentation claim); *Way v. Boy Scouts of Am.*, 856 S.W.2d 230 (Tex. App.-Dallas 1993) (finding that a publisher had no duty to publish a supplement or to add warnings about danger of firearms or ammunition); *Walters v. Seventeen Mag.*, 241 Cal. Rptr. 101, 102-03 (Cal. Ct. App. 1987) (rejecting claim against publisher for printed advertisement and stating “we are loathe to create a new tort of negligently failing to investigate the safety of an advertised product”); *Roman v. N.Y.C.*, 442 N.Y.S.2d 945 (N.Y. Sup. Ct. 1981) (finding that a publisher of pamphlet owed a reader no duty and rejecting the alleged claim of negligent misrepresentation in the booklet); *Yuhas v. Mudge*, 322 A.2d 824 (N.J. Super. Ct. App. Div. 1974) (finding that a publisher was not liable for injuries by fireworks advertised in magazine).

102. See *Brocklesby v. United States*, 767 F.2d 1288 (9th Cir. 1985) (finding that an inaccurate aircraft instrument approach chart was a defective product subject to strict liability law); see, e.g., *Saloomey v. Jeppesen & Co.*, 707 F.2d 671 (2d Cir. 1983); *Fluor Corp. v. Jeppesen & Co.*, 216 Cal. Rptr. 68 (Cal. Ct. App. 1985).

103. *Matter of New York State Silicone Breast Implant Litig.*, 632 N.Y.S.2d 953, 957 (N.Y. Sup. Ct. 1995), *aff’d*, 642 N.Y.S.2d 681 (N.Y. App. Div.), *appeal dismissed*, 676 N.E.2d 493 (N.Y. 1996). See also *Artiglio v. Corning Inc.*, 957 P.2d 1313 (Cal. 1998) (finding that a corporation owed no duty to implant recipients by virtue of silicone toxicology research for subsidiary).

104. See Mark A. Behrens & Frank Cruz-Alvarez, *A Potential New Frontier in Asbestos Litigation: Premises Owner Liability for “Take Home” Exposure Claims*, MEALEY’S LITIG. REP.: ASBESTOS, July 5, 2006, at 32.

105. The highest courts of Georgia, New York, Michigan, Delaware, Iowa, and Ohio have rejected take-home exposure claims, see *Riedel v. ICI Ams. Inc.*, 968 A.2d 17 (Del. 2009); *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005); *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009); *Miller v. Ford Motor Co. (In re Certified Question from the Fourteenth Dist. Ct. App.)*, 740 N.W.2d 206, 216 (Mich. 2007); *Holdampf v. A.C. & S., Inc. (In re N.Y. City Asbestos Litig.)*, 840 N.E.2d 115, 116 (N.Y.

Another attempt to modify traditional duty rules for the purpose of expanding the scope of litigation, also in context of asbestos litigation, is occurring in litigation involving makers of component parts. Some plaintiffs' counsel are promoting the theory that makers of nondefective component parts, such as pumps or valves, should be held liable for harms allegedly caused by asbestos-containing replacement parts manufactured or sold by third parties (i.e., replacement internal gaskets or packing or replacement external flange gaskets) or asbestos-containing external thermal insulation manufactured and sold by third parties and attached post-sale, such as by the U.S. Navy.¹⁰⁶ The presumptive reason this theory is being pushed is that most major manufacturers of asbestos-containing products have filed for bankruptcy and the Navy enjoys sovereign immunity; component part suppliers would provide a fresh batch of solvent defendants.¹⁰⁷

The driving force behind the theory, two appellate decisions from Washington State, is now gone—overwhelmingly rejected by an *en banc* panel of the Washington Supreme Court in two companion cases, *Simonetta v. Viad Corp.*¹⁰⁸ and *Braaten v. Saberhagen Holdings*.¹⁰⁹ In *Simonetta*, the court held that an evaporator manufacturer was not liable in negligence or strict liability actions for failure to warn of the dangers of asbestos exposure resulting from another manufacturer's insulation applied to its products

2005); *Boley v. Goodyear Tire & Rubber Co.*, 929 N.E.2d 448 (Ohio 2010); *see also* *Rindfleisch v. Alliedsignal, Inc.* (*In re* Eighth Judicial Dist. Asbestos Litig.), 815 N.Y.S.2d 815, 820-21 (N.Y. Sup. Ct. 2006); along with state appellate courts in Texas and Maryland, *see* *ALCOA, Inc. v. Behringer*, 235 S.W.3d 456, 462 (Tex. App. 2007); *Adams v. Owens-Illinois, Inc.*, 705 A.2d 58, 66 (Md. Ct. Spec. App. 1998); a federal appellate court applying Kentucky law, *see* *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 441 (6th Cir. 2009); and a federal district court applying Pennsylvania law, *see* *Jesensky v. A-Best Prods. Co.*, No. CIV A 96-680, 2003 WL 25518083 (W.D. Pa. Dec. 16, 2003) (issuing a magistrate opinion recommending grant of summary judgment to Duquesne Light Co.), *adopted by*, No. Civ.A. 96-680, 2004 WL 5267498 (W.D. Pa. Feb. 17, 2004), *aff'd on other grounds*, 287 Fed. Appx. 968 (3d Cir. 2008). Kansas and Ohio have statutorily barred claims against premises owners for off-site asbestos exposures. *See* KAN. STAT. ANN. § 60-4905(a) (2009); OHIO REV. CODE ANN. § 2307.941(a)(1) (LexisNexis 2010). The New Jersey and Tennessee Supreme Courts have applied a different duty analysis to reach the opposite result. *See* *Olivo v. Owens-Ill., Inc.*, 895 A.2d 1143 (N.J. 2006); *Satterfield v. Breeding Insulation, Inc.*, 266 S.W.3d 347 (Tenn. 2008). In these cases, and nearly every other instance where courts have recognized a duty of care in a take-home exposure case, the foreseeability of risk was the primary, if not only, consideration in the courts' duty analyses. *See* *Chaisson v. Avondale Indus., Inc.*, 947 So. 2d 171, 183-84 (La. Ct. App. 2006); *Zimko v. Am. Cyanamid*, 905 So. 2d 465, 483 (La. Ct. App. 2005).

106. *See* Paul J. Riehle et al., *Product Liability for Third Party Replacement or Connected Parts: Changing Tides From the West*, 44 U.S.F. L. REV. 33 (2009).

107. *See* *Behrens & Cruz-Alvarez*, *supra* note 105, at 542-45.

108. 197 P.3d 127 (Wash. 2008).

109. 198 P.3d 493 (Wash. 2008).

after sale of the products to the Navy.¹¹⁰ In *Braaten*, the court rejected failure to warn claims against pump and valve manufacturers relating to replacement packing and replacement gaskets made by others.¹¹¹ Plaintiffs' lawyers then tried to export the third-party duty to warn theory to California, where it has been soundly rejected by almost all California appellate courts—and is being reviewed by the California Supreme Court at the time of this writing.¹¹² The *Simonetta/Braaten/Taylor* approach is in accord with the majority rule nationwide.¹¹³

2. *Efforts by Plaintiffs to Expand Vicarious Liability in General*

In addition to seeking novel theories to expand traditional notions of duty, plaintiffs' counsel have sought ways to hold defendants vicariously liable for harms caused by others. Since these theories are based on the same general philosophy as civil conspiracy, it is helpful to see what the experience has been regarding their reception in the courts.

One such theory, market-share liability, was developed by the California Supreme Court in *Sindell v. Abbott Laboratories, Inc.*¹¹⁴ The plaintiff in *Sindell* was a young woman who developed cancer as a result of her mother's use of the widely manufactured prescription drug diethylstilbestrol (DES) during pregnancy. Since the drug was a fungible product and its harmful effects arose years after plaintiff's mother ingested the drug, it was impossible for the plaintiff to identify the specific manufacturer(s) of the DES her mother took. The court chose to shift the burden to each defendant to prove that it did not manufacture the drug that caused the plaintiff's

110. See *Simonetta*, 197 P.3d at 138.

111. See *Braaten*, 198 P.3d at 504.

112. See *Hall v. Warren Pumps, LLC*, No. B208275, 2010 WL 528489 (Cal. Ct. App. Feb. 16, 2010); *Walton v. William Powell Co.*, 108 Cal. Rptr. 3d 412 (Cal. Ct. App. 2010), review granted and opinion superseded, 232 P.3d 1201 (Cal. 2010); *Taylor v. Elliott Turbomachinery Co.*, 90 Cal. Rptr. 3d 414 (Cal. Ct. App. 2009); *Merrill v. Leslie Controls, Inc.*, 101 Cal. Rptr. 3d 614 (Cal. Ct. App. 2009), review granted and opinion superseded, 224 P.3d 919 (Cal. 2010); see also *Petros v. 3M Co.*, No. R609429427, 2009 WL 6390885 (Cal. Super. Ct. Sept. 30, 2009). But see *O'Neil v. Crane Co.*, 99 Cal. Rptr. 3d 533 (Cal. Ct. App. 2009), review granted and opinion superseded, 223 P.3d 1 (Cal. 2009).

113. See James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 Sw. U. L. REV. 595, 602-03 (2008); see also *Lindstrom v. A-C Prods. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005); *Niemann v. McDonnell Douglas Corp.*, 721 F. Supp. 1019 (S.D. Ill. 1989); *Schaffner v. Aesys Tech., LLC*, Nos. 1901 EDA 2008, 1902 EDA 2008, 2010 WL 605275 (Pa. Super. Ct. Jan. 21, 2010); *Ford Motor Co. v. Wood*, 703 A.2d 1315 (Md. Ct. Spec. App. 1998), abrogated on other grounds; *John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002); *Rumery v. Garlock Sealing Tech., Inc.*, No. 05-CV-599, 2009 WL 1747857 (Me. Super. Ct. Apr. 24, 2009) (trial order).

114. 607 P.2d 924 (Cal. 1980).

harm. Otherwise, each defendant would be liable for a share of the plaintiff's injury equal to its share of the market for the product.

The theory was adopted by several courts in DES cases,¹¹⁵ but its acceptance in DES cases has not been universal.¹¹⁶ For example, the Illinois Supreme Court in *Smith v. Eli Lilly & Co.*¹¹⁷ rejected market-share liability in a DES action as unsound and as too great of a deviation from traditional tort principles.¹¹⁸ The court said, "Each manufacturer owes a duty to plaintiffs who will use its drug or be injured by it. However, the duty is not so broad as to extend to anyone who uses the type of drug manufactured by a defendant."¹¹⁹ Furthermore, courts in other contexts have overwhelmingly rejected imposition of market-share liability.¹²⁰ They have done so in a variety of contexts, including cases involving asbestos, handguns, vaccines, breast implants, blood products, and lead paint.¹²¹

115. See, e.g., *Conley v. Boyle Drug Co.*, 570 So. 2d 275 (Fla. 1990); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989); *Martin v. Abbott Labs.*, 689 P.2d 368 (Wash. 1984); *Collins v. Eli Lilly & Co.*, 342 N.W.2d 37 (Wis. 1984); see also *Morris v. Parke, Davis & Co.*, 667 F. Supp. 1332 (C.D. Cal. 1987) (DPT vaccine); *Smith v. Cutter Biological, Inc.*, 823 P.2d 717 (Haw. 1991) (blood products).

116. See *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986) (rejecting market-share theory as social engineering more appropriately left to the legislative branch); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984) (holding that DES plaintiffs could not maintain a cause of action absent proof establishing a causal relationship between defendants and injury-producing agents).

117. 560 N.E.2d 324 (Ill. 1990).

118. See *id.* at 337.

119. *Id.* at 343.

120. See Donald G. Gifford & Paolo Pasicolan, *Market Share Liability Beyond DES Cases: The Solution to the Causation Dilemma in Lead Paint Litigation?*, 58 S.C. L. REV. 115, 118 (2006) (noting that most attempts to impose market-share liability have failed).

121. See *Chapman v. Am. Cyanamid Co.*, 861 F.2d 1515 (11th Cir. 1988) (DPT vaccine); *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581 (5th Cir. 1983) (asbestos); *210 E. 86th St. Corp. v. Combustion Eng'g, Inc.*, 821 F. Supp. 125 (S.D.N.Y. 1993) (asbestos); *Poole v. Alpha Therapeutic Corp.*, 696 F. Supp. 351 (N.D. Ill. 1988) (blood products); *Dawson v. Bristol Labs.*, 658 F. Supp. 1036 (W.D. Ky. 1987) (tetracycline); *Marshall v. Celotex Corp.*, 651 F. Supp. 389 (E.D. Mich. 1987) (asbestos); *Griffin v. Tenneco Resins, Inc.*, 648 F. Supp. 964 (W.D.N.C. 1986) (benzidine congener dyes); *In re Related Asbestos Cases*, 543 F. Supp. 1152 (N.D. Cal. 1982) (asbestos); *Starling v. Seaboard Coast Line R.R. Co.*, 533 F. Supp. 183 (S.D. Ga. 1982) (asbestos); *Sheffield v. Eli Lilly & Co.*, 192 Cal. Rptr. 870 (Cal. Ct. App. 1983) (Salk polio vaccine); *Shackil v. Lederle Labs.*, 561 A.2d 511 (N.J. 1989) (DPT vaccine); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001) (handguns); *Brenner v. Am. Cyanamid Co.*, 699 N.Y.S.2d 848 (N.Y. App. Div. 1999) (lead pigment and paint litigation); *Matter of New York State Silicone Breast Implant Litig.*, 631 N.Y.S.2d 491 (N.Y. App. Div. 1995) (breast implants); *Goldman v. Johns-Manville Sales Corp.*, 514 N.E.2d 691 (Ohio 1987) (asbestos); *Case v. Fibreboard Corp.*, 743 P.2d 1062 (Okla. 1987) (asbestos); *Senn v. Merrell-Dow Pharm., Inc.*, 751 P.2d 215 (Or. 1988) (DPT vaccine); *Skipworth v. Lead Indus. Ass'n*, 690 A.2d 169 (Pa. 1997) (lead pigment and paint litigation); *Spring Branch Indep. Sch. Dist. v. NL Indus., Inc.*, No. 01-02-01006-CV, 2004 WL 1404036 (Tex. App. June 24, 2004) (lead pigment and paint litigation).

Enterprise liability is another burden-shifting theory with some similarities to market-share theory. Enterprise liability stems from a New York federal court case, *Hall ex rel. Hall v. E.I. du Pont de Nemours & Co., Inc.*¹²² where a group of children playing with blasting caps were injured when the blasting caps detonated. The explosions destroyed the blasting caps, making it impossible to identify the manufacturer. Because there was a strong likelihood that the blasting caps were produced by one of six major manufacturers, the court declined to dismiss the complaints and indicated that it might be appropriate to shift the burden of causation to the defendants. The court found:

If plaintiffs can establish by a preponderance of the evidence that the injury-causing caps were the product of some unknown one of the named defendants, that each named defendant breached a duty of care owed to plaintiffs and that these breaches were substantially concurrent in time and of a similar nature, they will be entitled to a shift of the burden of proof on the issue of causation.¹²³

Thus, although the court shifted the burden of proof to each defendant to show its product did not cause the plaintiff's injury, the court maintained the plaintiff's obligation to initially show that each and every named defendant breached a duty of care owed to the plaintiffs. Courts almost universally have rejected the theory or found it inapplicable under the facts of a particular case.¹²⁴ For example, in *Ryan v. Eli Lilly & Co.*,¹²⁵ a South Carolina federal court refused to apply enterprise liability, describing it as "repugnant to the most basic tenets of tort law."¹²⁶

122. 345 F. Supp. 353, 378 (E.D.N.Y. 1972).

123. *Id.* at 380.

124. See *City of Phila. v. Lead Indus. Ass'n*, 994 F.2d 112, 129 (3d Cir. 1993) ("[E]nterprise liability has been rejected by virtually every jurisdiction."); see also *Kurcz v. Eli Lilly & Co.*, 113 F.3d 1426 (6th Cir. 1997); *In re Consol. Fen-Phen Cases*, No. 03CV3081, 2003 WL 22682440 (E.D.N.Y. Nov. 12, 2003); *In re MTBE Prods. Liab. Litig.*, 175 F. Supp. 2d 593 (S.D.N.Y. 2001); *Hamilton v. Accu-tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996); *Swartzbauer v. Lead Indus. Ass'n*, 794 F. Supp. 142 (E.D. Pa. 1992); *Univ. Sys. of N.H. v. U.S. Gypsum Co.*, 756 F. Supp. 640 (D.N.H. 1991); *Lewis v. Lead Indus. Ass'n*, 793 N.E.2d 869 (Ill. App. Ct. 2003); *Catherwood v. Am. Sterilizer Co.*, 532 N.Y.S.2d 216 (N.Y. App. Div. 1988), *aff'd*, 540 N.Y.S.2d 218 (N.Y. App. Div. 1989); *Jackson v. Glidden Co.*, 647 N.E.2d 879 (Ohio Ct. App. 1995); *Gaulding v. Celotex Corp.*, 772 S.W.2d 66 (Tex. 1989); *Lillge v. Johns-Manville Corp.*, 602 F. Supp. 855 (E.D. Wis. 1985); *Martin v. Abbott Labs.*, 689 P.2d 368 (Wash. 1984); *Thomas ex rel. Gramling v. Mallett*, 701 N.W.2d 523 (Wis. 2005).

125. 514 F. Supp. 1004 (D.S.C. 1981).

126. *Id.* at 1017.

Civil aiding and abetting is another type of vicarious liability that plaintiffs have attempted to apply in mass tort cases.¹²⁷ As set forth in the Restatement (Second) of Torts § 876(b): “For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself”¹²⁸ This theory, like the others discussed, has only been recognized in very limited contexts.¹²⁹

“Public tort” public nuisance cases provide yet another example of attempts to expand tort law principles to produce vicarious liability.¹³⁰ Traditionally, public nuisance has been applied to remedy harms to public rights.¹³¹ Recently, however, attempts have been made to radically alter this tort to create industry-wide liability for alleged product-related harms.¹³²

For example, in *Rhode Island v. Lead Industries Association*,¹³³ Rhode Island’s Attorney General and retained contingency fee counsel sued former producers of lead pigments and paint alleging that the defendants contributed to a public nuisance of lead paint in private dwellings across the State. The State introduced evidence at trial of each defendant’s association

127. Kevin C. Mayer et al., *Mass Tort Cases: Debunking the Expansion of Defendants Theory*, DRI FOR THE DEF., Oct. 2005, at 10.

128. Restatement (Second) of Torts § 876(b) (1979).

129. Mayer, *supra* note 128, at 31. Recently, the United States Supreme Court in *Stoneridge Inv. Partners v. Scientific-Atlanta*, 552 U.S. 148 (2008), considered and rejected a new attempt at a form of “scheme liability” in the context of federal securities litigation. For more than a decade plaintiffs’ attorneys have tried to sue secondary actors for aiding and abetting primary violators of the federal securities laws. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), however, the Court made a significant distinction between primary and secondary liability, holding that private litigants may bring actions against primary actors, but not aiding and abetting claims under the Securities Exchange Act. Congress affirmed this policy in the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, which directed prosecution of aiders and abettors by the Securities and Exchange Commission. 15 U.S.C. § 78t(e) (2010). In *Stoneridge*, the Court reaffirmed that there is no implied private right of action against aiders and abettors under the Securities Exchange Act. 552 U.S. at 162. The Court observed that if it allowed such an implied cause of action, a new class of defendants would be subject to extensive discovery and potential uncertainty, which could “allow plaintiffs with weak claims to extort settlements from innocent companies.” *Id.* at 163.

130. See Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMP. L. REV. 825 (2004).

131. See Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 561-70 (2006) (discussing the traditional elements of a public nuisance action).

132. See Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941; Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Product Torts*, 62 WASH. & LEE L. REV. 873 (2005).

133. 951 A.2d 428 (R.I. 2008).

with a trade organization and promotional activities to show that each producer contributed to the alleged public nuisance by fostering a market for lead pigments.¹³⁴ The trial court also instructed the jury to consider whether the “cumulative presence of lead pigment” constituted a public nuisance.¹³⁵ On appeal, a unanimous Rhode Island Supreme Court held that the trial judge erred in denying defendants’ motion to dismiss. The court explained that “however grave the problem of lead poisoning is in Rhode Island, public nuisance law simply does not provide a remedy for this harm. The state has not and cannot allege facts that would fall within the parameters of what would constitute public nuisance under Rhode Island law.”¹³⁶

Similar public nuisance lawsuits have been brought against firearm manufacturers for harms caused by gun violence, and automobile and gasoline manufacturers for costs associated with smog or global warming.¹³⁷ In each line of cases, plaintiffs’ attorneys have sought unsuccessfully to use public nuisance theory as a lever for industry-wide liability. Like the Rhode Island Supreme Court, courts cognizant of the adverse public policy consequences of the liability-extending theory have soundly rejected imposition of liability in these types of situations.¹³⁸

Finally, similarities exist between civil conspiracy and concert of action. “The concert of action theory posits that when a group of actors agree, whether explicitly or tacitly, to proceed in risk-creating behavior, each of the actors will be jointly and severally liable if that behavior results in injury to another.”¹³⁹ The “cases in which the concert of action theory of liability has been applied ‘involve conduct by a small number of individuals

134. See Charles H. Moellenberg, Jr. & Leon F. DeJulius, Jr., *Second Class Speakers: A Proposal to Free Protected Corporate Speech from Tort Liability*, 70 U. PITT. L. REV. 555, 579 (2009).

135. *Lead Indus., Ass’n*, 951 A.2d at 442. See also Fredrick C. Schaefer & Christine Nykiel, *Lead Paint: Mass Tort Litigation and Public Nuisance Trends in America*, 74 DEF. COUNS. J. 153, 165 (2007). The trial court’s instruction conflicted with the Rhode Island Supreme Court’s previous rejection of market-share liability in a DES case. See *Gorman v. Abbott Labs.*, 599 A.2d 1364 (R.I. 1991).

136. *Lead Indus., Ass’n*, 951 A.2d at 435.

137. See Victor E. Schwartz et al., *Can Governments Impose a New Tort Duty to Prevent External Risks? The “No-Fault” Theories Behind Today’s High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923, 925 (2009).

138. See, e.g., *Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639 (Cal. Ct. App. 1971); *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007).

139. M. Stuart Madden & Jamie Holian, *Defendant Indeterminacy: New Wine Into Old Skins*, 67 LA. L. REV. 785, 792 (2007). See also Restatement (Second) of Torts § 876(a) (1979) (“For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him . . .”).

whose actions resulted in a tort against a single plaintiff, usually over a short span of time”¹⁴⁰ “Most jurisdictions that have considered this theory have rejected its application to latent disease product liability cases, which involve numerous manufacturers.”¹⁴¹ As the California Supreme Court explained in *Sindell*, a pharmaceutical product liability action,

Application of the concept of concert of action to this situation would expand the doctrine far beyond its intended scope and would render virtually any manufacturer liable for the defective products of an entire industry, even if it could be demonstrated that the product which caused the injury was not made by the defendant.¹⁴²

B. OTHER FACTORS AFFECTING DUTY IN CIVIL CONSPIRACY

As courts assess the need for an independent duty requirement in civil conspiracy, they also might consider other potential constraints on the scope of the action. Separate from the independent duty issue is the type of conduct and level of culpability that may trigger liability. For instance, if civil conspiracy claims required a showing that a defendant acted with malice and orchestrated the underlying act to cause direct physical harm to a plaintiff, it might suggest a less critical need for reaffirming an independent duty requirement. The law of civil conspiracy, however, does not appear to have fully or consistently answered basic questions of conduct, and instead of providing a meaningful guidepost, the lack of clarity and consistency operate to heighten avenues for abusive and expansive litigation.

1. *Negligence as the Underlying Conduct for Conspiracy*

Courts have reached conflicting decisions as to whether negligent or otherwise unintentional conduct can serve as the basis for a civil conspiracy claim. In other words, can one “conspire” to be negligent?

140. *Chavers v. Gatke Corp.*, 132 Cal. Rptr. 2d 198, 204 (Cal. Ct. App. 2003) (quoting *Sindell v. Abbott Labs*, 607 P.2d 924 (Cal. 1980)). See also *Ryan v. Eli Lilly Co.*, 514 F. Supp. 1004, 1015 (D.S.C. 1981) (noting that concert of action theory cases have involved “an extremely narrow fact pattern,” including “group assault and battery, illegal highway racing, conversion and trespass by related corporations, and the fraudulent utterance of false bills of lading by a railroad and a consignor”).

141. *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 69 (Tex. 1989). See also Kathy J. Owen & C. Vernon Hartline, Jr., *Industry-wide Liability: Protecting Plaintiffs and Defendants*, 44 BAYLOR L. REV. 45, 53 (1992) (“Though a few jurisdictions have adopted the concert of action theory, it has been rejected for the most part.”).

142. *Sindell*, 607 P.2d at 933.

The Colorado Supreme Court considered this issue in the context of an alleged conspiracy among officers and the director of a savings and loan association to adopt “inadequate policies and procedures for underwriting the loans and in otherwise failing to exercise adequate oversight”¹⁴³ The plaintiffs did not allege that the defendants intentionally damaged the business, but rather that they performed inadequately and in breach of their fiduciary duties.¹⁴⁴ In finding that such conduct could support a civil conspiracy claim, the court reframed the issue, stating that “[t]he proper question is not whether one can conspire to be negligent, but whether when two or more persons consciously conspire and deliberately pursue a common plan or design, the execution of such common plan or design results in wrongful conduct causing injury or damages.”¹⁴⁵ The court, therefore, focused on the existence of an injury or damages as the primary basis for sustaining a civil conspiracy action, effectively reducing the significance of how that injury occurred.

The Illinois Supreme Court has similarly held that “any tortious act committed in furtherance of the conspiracy, whether such tortious act is intentional or negligent in nature,” can provide the basis for a civil conspiracy claim.¹⁴⁶ The court reached this determination in a civil conspiracy action arising out of an alleged agreement to suppress information regarding the health effects of asbestos.¹⁴⁷ Once a party satisfied the agreement element of the conspiracy, the court found that whether the conspirators acted intentionally to further the alleged objectives of the conspiracy was immaterial.¹⁴⁸

This reasoning is problematic. It ignores the legal doctrine that recognizes that a party may exit a conspiracy before the agreed-upon acts in furtherance of the conspiracy are accomplished, and preclude joint liability.¹⁴⁹ A formulation allowing unintentional acts to underlie the civil conspiracy claim means that a defendant essentially becomes liable at the moment of

143. *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049, 1053 (Colo. 1995). The Colorado Supreme Court has interpreted its civil conspiracy law, which is codified, as including “any conduct other than breach of contract that constitutes a civil wrong and causes injury or damages.” *Id.* at 1055. This includes intentional torts, negligence, gross negligence, negligence per se, breach of fiduciary duty of care, or breach of fiduciary duty of loyalty.

144. *See id.* at 1053.

145. *Id.* at 1055.

146. *Adcock v. Brakegate, Ltd.*, 645 N.E.2d 888, 895 (Ill. 1994). *See also Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 173 (Iowa 2002) (“We disagree with those courts that conclude an agreement to be negligent is a non sequitur.”).

147. *Adcock*, 645 N.E.2d at 891-92.

148. *See id.* at 894 (“While a civil conspiracy is based upon intentional activity, the element of intent is satisfied when a defendant knowingly and voluntarily participates in a common scheme to commit an unlawful act or a lawful act in an unlawful manner.”).

149. *See KEETON ET AL.*, *supra* note 10, at 323-24.

agreement, rather than at the completion of the unlawful act. A party may, therefore, be held liable regardless of whether the action is attempted as planned or the outcome occurs as a result of mere happenstance. Put simply, the intentional tort action of civil conspiracy can devolve into a claim that no longer requires specific intent.¹⁵⁰

Further, when viewed in combination with rejection or inconsistent treatment of a duty requirement in civil conspiracy, it would appear that plaintiffs could maintain an action for civil conspiracy based upon unintentional conduct against those with no relationship to the plaintiff. Such a result would seem to permit a civil conspiracy action without clear limits.

In stark contrast, most courts that have addressed the type of conduct that can give rise to a civil conspiracy action have concluded that unintentional conduct is insufficient to support a claim.¹⁵¹ These courts recognize that a conspiracy must involve engaging or, at least, attempting the specific acts agreed upon to further the objectives of the conspiracy. This clear limit on the scope of civil conspiracy recognizes its root as an intentional tort. By definition, specific intent cannot be established through negligence alone.¹⁵²

The disagreement among courts with regard to this basic conduct issue creates substantial ambiguity in the law and opens avenues for potential abuse and manipulation. In particular, the state of the law in Illinois shows how courts can, in a series of decisions, gradually chip away or call into question fundamental standards and inadvertently construct a potentially boundless cause of action. Thus, courts that have yet to define the level of conduct necessary to support a claim would be wise to follow the majority rule.

2. *Evidentiary Line-Drawing*

Another emerging, yet largely unaddressed, issue in civil conspiracy is what evidence a plaintiff must present to maintain a claim. Similar to an intentional conduct standard, an evidentiary threshold could function as a basic restraint on the scope of civil conspiracy, yet courts have not uniformly drawn a line. The danger of a low-level evidentiary burden, operating in

150. See *Bankers Commercial Life Ins. Co. v. Scott*, 631 S.W.2d 228, 231 (Tex. App. 1982) (“The very essence of a conspiracy is secret intent of the co-conspirators.”).

151. See, e.g., *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 175 F. Supp. 2d 593, 633 (S.D.N.Y. 2001); *Sackman v. Liggett Group, Inc.*, 965 F. Supp. 391, 395 (E.D.N.Y. 1997); *Sonnenreich v. Philip Morris Inc.*, 929 F. Supp. 416, 419-20 (S.D. Fla. 1996); *Campbell v. A.H. Robins Co.*, 615 F. Supp. 496, 500 (W.D. Wis. 1985); *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996); *Triplex Commc’ns, Inc. v. Riley*, 900 S.W.2d 716, 720 n.2 (Tex. 1995); see also RESTATEMENT (SECOND) OF TORTS § 876 (1979) (requiring assistance or encouragement in order to incur liability for knowledge of another’s tortious conduct).

152. See *Triplex Commc’ns, Inc.*, 900 S.W.2d at 719.

tandem with either a “no independent duty” requirement or an unintentional conduct standard, is that the combination could permit civil conspiracy claims against those with an attenuated connection to the litigation where there is no direct evidence of wrongdoing.

Because the existence of a conspiracy is often guarded and “rarely susceptible of direct proof,”¹⁵³ claimants have sought to prove conspiracy “through circumstantial evidence and inferences drawn from evidence, coupled with commonsense knowledge of the behavior of persons in similar circumstances.”¹⁵⁴ Plaintiffs have claimed that the mere fact that those named in a lawsuit have acted in the same or similar manner can demonstrate they were associated in a conspiracy. This “parallel conduct,” however, may commonly and innocently occur in the absence of a conspiracy, particularly when the companies are competitors the same line of business and “encountering the same business problems, the same consumer demands, and the same competitive pressures.”¹⁵⁵ Without something to directly implicate the conspirators, circumstantial evidence may be misleading and prejudicial.

Most courts agree that civil conspiracy claims require “parallel conduct plus,” with the “plus” indicating some form of direct evidence,¹⁵⁶ but courts diverge on what level of direct evidence will suffice.¹⁵⁷ For instance, the Illinois Supreme Court in *McClure* noted:

Some federal courts have held that “substantial additional evidence” is required. Other courts have required only additional evidence that reasonably tends to exclude the possibility that the defendants were acting independently. Such additional evidence includes evidence of “(1) actions con-

153. *Majewski v. Gallina*, 160 N.E.2d 783, 788 (Ill. 1959).

154. *McClure v. Owens Corning Fiberglas Corp.*, 720 N.E.2d 242, 269 (Ill. 1999) (Harrison, J., dissenting).

155. *Id.* at 262.

156. *See Wilk v. Am. Med. Ass’n*, 671 F. Supp. 1465, 1492 (N.D. Ill. 1987) (“More recent cases have tended to require a greater showing to establish proof of conspiracy.”), *aff’d*, 895 F.2d 352 (7th Cir. 1990).

157. *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1294 (3d Cir. 1994) (“[W]e do not see how a rational jury could find the existence of a civil conspiracy . . . based solely on the alleged fact that Pfizer and the other defendants consciously engaged in parallel conduct”); *McClure*, 720 N.E.2d at 259 (noting that “overwhelming weight of authority has refused to accept mere parallel action as proof of conspiracy” and that jurisdictions take varying approaches on the level of direct evidence); *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 473 (Pa. 1979) (“The mere fact that two or more persons, each with the right to do a thing, happen to do that thing at the same time is not by itself an actionable conspiracy.” (quoting *Fife v. Great Atl. & Pac. Tea Co.*, 52 A.2d 24, 39 (Pa. 1947))).

trary to the defendants' economic interests, and (2) a motivation to enter into such an agreement."¹⁵⁸

The court found that the plaintiffs had not presented any direct evidence of an agreement between former asbestos manufacturers to suppress information regarding the health effects of asbestos exposure, and therefore the court did not need to decide the level of direct evidence required when granting judgment notwithstanding the verdict.¹⁵⁹

More recently, the United States Supreme Court, in two key decisions, *Bell Atlantic Corp. v. Twombly*¹⁶⁰ and *Ashcroft v. Iqbal*,¹⁶¹ took issue with the type of low-level evidentiary pleadings introduced in cases such as civil conspiracy, and held that it justified adoption of a more exacting pleading standard in all federal cases.¹⁶² The *Twombly* Court, addressing an alleged conspiracy among a variety of telephone carriers in violation of antitrust law, explained that while parallel anti-competitive conduct may be "consistent with conspiracy," plaintiffs must ultimately prove that the carriers actually agreed not to compete, and this proof "requires more than labels and conclusions"¹⁶³ Rather, under the Court's interpretation of federal pleading rules, a claimant must provide direct evidence and "enough fact to raise a reasonable expectation that discovery will reveal evidence" of the wrongful conduct alleged.¹⁶⁴

Courts considering evidence offered in civil conspiracy cases would benefit from more exacting evidentiary standards and more careful judicial review of pleadings. As the *Twombly* Court explained, such review is vital in protecting against purely speculative claims, which often "push cost-conscious defendants to settle even anemic cases" and unjustly burden them with "sprawling, costly, and hugely time-consuming" discovery.¹⁶⁵ Permitting a plaintiff to maintain a conspiracy claim against a defendant that does not owe him or her a duty magnifies the potential for abuse. As the next section discusses, such basic standards represent sound public policy.

158. *McClure*, 720 N.E.2d at 259 (citations omitted).

159. *Id.* at 267-68.

160. 550 U.S. 544 (2007).

161. 129 S. Ct. 1937 (2009).

162. See Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL'Y 1107 (2010).

163. *Twombly*, 550 U.S. at 554-55.

164. *Id.* at 556.

165. *Id.* at 559, 560 n.6.

IV. PUBLIC POLICY FAVORS RATIONAL BOUNDARIES IN CIVIL CONSPIRACY ACTIONS

As expressed throughout this article, the principal justification supporting recognition of an independent duty rule in civil conspiracy, and other more exacting standards on the level and type of conduct permitting a claim, is that without such boundaries these actions can result in potentially open-ended and limitless liability against highly remote defendants.¹⁶⁶ Furthermore, “the requirement is defensible on the ground that it prevents plaintiffs from circumventing the policies of other torts.”¹⁶⁷

Consider, for example, the Delaware case, discussed earlier, in which a business was joined in the lawsuit solely on the basis of its former membership in two trade associations.¹⁶⁸ The court expressly rejected an independent duty requirement to allow the claim to proceed against a company that did not make, sell, or distribute the products that allegedly caused the plaintiff’s injury.¹⁶⁹ Thus, rather than seeking to hold the manufacturer responsible under product liability law, the lawsuit used civil conspiracy as a surrogate to recover against a third party. The manufacturer that breached its duty of care and directly caused the injury is removed from the liability equation altogether.

In terms of public policy effects, this formulation of civil conspiracy can infringe on the lawful activities of many individuals, businesses, and associations. Merely entering a trade group, conducting or funding research or could mean exposure to significant liability.¹⁷⁰ The law would provide a disincentive for discovering potentially damaging information because, after the fact, that information could provide the basis for a civil conspiracy claim if the information was not promptly disclosed. The availability of civil conspiracy in the absence of an independent duty requirement would, therefore, have the effect of *creating* a duty of care among parties agreeing not to reveal certain information to the rest of the world.

In addition, the overbroad application of civil conspiracy claims ignores the practical difficulty of how an attenuated party, for instance an individual, would go about disseminating information regarding the harms

166. See *United States v. Kaiser*, 179 F. Supp. 545, 550 (S.D. Ill. 1960) (“It may be said that conspiracy is a nebulous offense but even nebulae must admit of some limitations.”).

167. Martin H. Pritikin, *Toward Coherence in Civil Conspiracy Law: A Proposal to Abolish the Agent’s Immunity Rule*, 84 NEB. L. REV. 1, 16 (2005).

168. *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 147-48 (Del. 1987).

169. *Id.* at 150.

170. See *Ausness*, *supra* note 4, at 411 (stating that “courts’ hostile attitudes to civil conspiracy claims” may partly stem from the belief that “liability concerns cause manufacturers to invest excessive resources in accident cost avoidance measures or to withdraw useful products”).

of another's product, particularly if he or she has no direct affiliation with or connection to the source of the information or to the end user of the product. While it might sound absurd, legal issues would develop in civil conspiracy actions over whether an individual took reasonable efforts to disclose disparaging information he or she previously agreed not to reveal, and was under no duty to reveal, in order to preclude joint liability. Further, if such disparaging information were disclosed to a newspaper or some other media channel, it would seemingly follow that the newspaper or other media outlet would be compelled to publish that information or risk complicity in the conspiracy, regardless of whether it felt that the information was newsworthy.

Courts that allow civil conspiracy claims against remote defendants also overlook the practical consideration of whether disclosure would make a difference for causation purposes.¹⁷¹ For instance, in the context of some of the alleged asbestos conspiracies to suppress information, common sense suggests that it is a somewhat far-fetched proposition that a worker decades ago would have immediately stopped working with asbestos if a report linking asbestos to cancer had not been suppressed and was, instead, published among numerous other reports at the time reaching different conclusions.¹⁷²

Furthermore, overbroad liability based on relationships in associations may chill the exercise of fundamental constitutional rights, namely, freedom of expression and association.¹⁷³ Courts "have frequently expressed concern that civil conspiracy liability interferes with defendants' ability to exercise their First Amendment rights"¹⁷⁴

A Missouri circuit court addressed such wide-ranging adverse public policy implications when determining whether an independent duty rule provided the appropriate standard in civil conspiracy. In *Hunt v. Air Products & Chemicals*,¹⁷⁵ the court considered whether companies in a trade

171. *See id.* ("[C]ourts appear to dislike collective liability theories because they are inconsistent with the requirement of a causal relationship between a wrongdoer and the injured party.")

172. *See In re Fifth Judicial Dist. Asbestos Litig.*, 784 N.Y.S.2d 829, 833 (N.Y. Sup. Ct. 2004) (concluding in an asbestos exposure case that plaintiffs failed to offer any evidence "establishing either the awareness of the plaintiffs of the alleged misrepresentation and non-disclosure, or even if such awareness was to have been established, that such reliance would have been justified" where plaintiffs sued an insurer for allegedly conspiring to suppress information regarding the health effects of asbestos).

173. *Chavers v. Gatke Corp.*, 132 Cal. Rptr. 2d 198, 207 (Cal. Ct. App. 2003).

174. *Ausness*, *supra* note 4, at 414. *See also In re Orthopedic Bone Screw Prods. Liab. Litig.*, 193 F.3d 781, 792 (3d Cir. 1999) (freedom of speech); *In re Asbestos Sch. Litig.*, 46 F.3d at 1286, 1288 (3d Cir. 1994) (freedom of speech and association); *Chavers*, 132 Cal. Rptr. 2d at 207 (freedom of association); *cf. Senart v. Mobay Chem. Corp.*, 597 F. Supp. 502 (D. Minn. 1984) (civil conspiracy claim was not stated where defendants' concerted action sought only constitutionally protected petitioning activity).

175. No. 052-9419, 2006 WL 1229082 (Mo. Cir. Ct. Apr. 20, 2006).

association having no connection with the manufacture or sale of welding products allegedly causing the plaintiff's injury could be held liable. The court eschewed what it described as "ingenious attempts to ensnare in the net of tort liability . . . the entire welding product industry" and "to turn membership in the National Electrical Manufacturers Association (NEMA) and the American Welding Society (AWS) into membership in a conspiracy to kill and maim."¹⁷⁶ Specifically, the court rejected plaintiffs' "guilt by association" theory as exceeding the boundaries of a duty of care.¹⁷⁷ The court also identified the "burdening of fundamental rights of [free] speech and association," and the punitive and chilling affect allowing liability would have on industrial research and development in areas of product safety.¹⁷⁸ At the same time, the court was not insensitive to protecting plaintiffs and holding responsible parties accountable. As the court explained,

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 products¹⁷⁹

The court concluded that it could "perceive absolutely no reason (other than the naked desire to have deep-pocketed defendants available to pay judgments, or, even better, quick settlements) to cast the net of liability even wider than it is already cast by established tort principles."¹⁸⁰

V. CONCLUSION

The law of civil conspiracy is at a crucial point in its development and interpretation by courts. The role of the concept of a duty of care is at the center of what is likely to be an active and hotly contested debate. Courts deciding this issue should look to the approach of the supreme courts of California and Texas, which have required that a defendant must indepen-

176. *Id.* at *2.

177. *Id.* at *4.

178. *Id.* at *5.

179. *Id.* at *6.

180. *Hunt*, 2006 WL 1229082, at *6.

dently owe a duty of care to the plaintiff before liability can be imposed under a civil conspiracy theory. This approach most closely follows traditional tort law principles and reflects the historic resistance of courts to various theories of vicarious liability. It also reflects sound public policy. Without an independent duty of care owed to a plaintiff, civil conspiracy liability can be boundless and open-ended. Rational limits are needed in civil conspiracy claims, and courts should adopt them.