

# 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, and securities. 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.

### 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

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awarded by a Florida jury against the tobacco industry earlier this year to appreciate that the stakes in such cases can be extraordinarily high.

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.” *Krulewich v. United States*, 336 U.S. 440, 44647 (1949) (Jackson, J., concurring). 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. 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.

### **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 depicted in the media. When jurors hear similar allegations at trial, their reaction is not likely to be one of immediate skepticism. Another advantage for plaintiffs 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 disseminated. These forums make it difficult for a manufacturer to assert ignorance of the conduct of other members of its industry. Third, civil conspiracy provides an evidentiary advantage based on an exception to the hearsay rule which permits the use of a declaration or act of a co-conspirator as evidence against another party to the conspiracy. 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.

### **Practical Tips On The Defense Of Civil Conspiracy Claims**

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 dictates 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.

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, 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. 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.

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. 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.

### **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.