Conspiracy Theories: Is There a Place for Civil Conspiracy in Products Liability Litigation?

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CONSPIRACY THEORIES: IS THERE A PLACE FOR CIVIL CONSPIRACY IN PRODUCTS LIABILITY LITIGATION?

RICHARD AUSNESS*

I. INTRODUCTION

A civil conspiracy is a group of two or more persons acting together to achieve an unlawful objective or to achieve a lawful objective by unlawful or criminal means. During the past two decades, plaintiffs have brought numerous civil conspiracy claims against product manufacturers. The defendants in these cases have included manufacturers or producers of tobacco products, asbestos, pharmaceuticals, lead-based paint, multi-rim truck wheels, and gasoline additives. Surprisingly, less than half of the civil conspiracy claims have made it to trial. This unimpressive success rate suggests that courts are not very receptive to civil conspiracy claims even when there is strong evidence of wrongdoing by product manufacturers. This article will summarize the state of the law in this area and suggest some possible reasons for this lukewarm judicial response to conspiracy arguments.

Part II describes some of the alleged industry-wide agreements that have generated civil conspiracy claims in the past. These include agreements among tobacco companies to mislead the public about the health risks of smoking, suppression of information by asbestos insulation manufacturers about the dangers of asbestos exposure, and the sharing of clinical data among producers of diethylstilbestrol (DES) and their joint decision to market the drug as a generic product. Alleged conspiracies also have included attempts by the lead-based paint industry to suppress information about the health risks of lead-based paint, the campaign by multi-rim truck wheel manufacturers to shift the

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4. See infra Part IV.E.
duty to warn about safety risks to employers, and the effort by the manufacturers of the gasoline additive methyl tertiary butyl ether (MTBE) to mislead the Environmental Protection Agency (EPA) about the dangers of ground water contamination with this product.

Part III examines the elements of civil conspiracy, including the agreement requirement and the overt act or independent tort requirement. It also identifies some other collective liability theories, such as "true conspiracy," concert of action, aiding and abetting, alternative liability, enterprise liability, and market share liability.

Part IV discusses some of the issues that have arisen in products liability litigation. This section examines issues associated with the agreement requirement, including unlawful purpose, parallel conduct, and membership in a trade association. The independent tort requirement is covered along with the various torts that have been proposed to support a civil conspiracy claim. Part IV also looks at the effect of civil conspiracy on statutes of limitation and repose and considers the right to the freedoms of expression and association as possible defenses to civil conspiracy claims.

Part V discusses some civil conspiracy concerns and suggests that they may explain why many courts have not been receptive to conspiracy theories. One explanation is that courts might generally disapprove of collective liability because it undermines the principle that there must be a causal relationship between a wrongdoer and the injured party. Another possible explanation is that courts fear massive tort liability will cause manufacturers to overinvest in accident cost avoidance or to withdraw useful products from the market. Courts have also been reluctant to intrude upon defendants' First Amendment rights of free expression and association. Finally, courts might dislike civil conspiracy claims because they often involve issues that other branches of government traditionally address.

II. ALLEGED CONSPIRACIES

Over the years, many litigants have alleged the existence of conspiracies by manufacturers to bolster their damages claims against them. The defendants in these cases have included manufacturers of tobacco products, asbestos, DES, lead-based paint, multi-rim truck wheels, and gasoline additives.

A. Tobacco Products

According to the Department of Justice's complaint in United States v. Philip Morris, Inc., corporate officials from American Tobacco, Brown & Williamson, Lorillard, Philip Morris, and R.J. Reynolds met in 1953 to develop a plan for protecting the market for cigarettes. In pursuit of this scheme, tobacco companies allegedly issued misleading press releases, disseminated

false information in articles, destroyed or hid damaging evidence of the health effects of smoking, and targeted their advertising and promotional efforts at underage consumers.\(^6\)

In addition, the tobacco companies set up a Council for Tobacco Research (CTR).\(^7\) While posing as an objective research organization, the CTR actually devoted most of its efforts to helping tobacco companies defend lawsuits and oppose tobacco regulation.\(^8\) For example, in January 1954, the CTR published a full-page statement entitled “A Frank Statement to Cigarette Smokers,” which assured the public that “‘distinguished authorities’” had confirmed that “‘there is no proof that cigarette smoking is one of the causes’ of lung cancer.”\(^9\) Spokesmen for the tobacco industry also maintained that “the products we make are not injurious to health,” notwithstanding the fact that its own research had found many of “the carcinogenic substances in tobacco smoke.”\(^10\)

The government also alleged that the tobacco industry “created . . . the Tobacco Institute (TI) [to mislead] the public, the medical establishment, the media, and the government” about “the ‘connection between smoking and disease.’”\(^11\) In addition, tobacco companies agreed not to conduct in-house research on the health effects of smoking and not to devote any resources to developing “safe” cigarettes.\(^12\) Furthermore, tobacco companies steadfastly denied that nicotine was addictive and “attacked” the Surgeon General’s findings on nicotine addiction as “an unproven attempt to find some way to differentiate smoking from other behaviors.”\(^13\)

The government’s complaint also asserted that tobacco companies selectively bred tobacco plants to raise the concentration of nicotine in their cigarettes but repeatedly denied that they did so.\(^14\) Tobacco companies also falsely assured smokers that “light” or “low tar/low nicotine” cigarettes were less dangerous, even though these products did not significantly lower the health risks of smoking.\(^15\)

Finally, the government claimed that tobacco companies targeted young people by advertising in stores near high schools, promoting their products heavily during school vacation, giving away free samples at places where young people got together, paying to place their products in movies with young audiences, advertising their products in youth-oriented magazines, and sponsoring events primarily of interest to teenagers.\(^16\)

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6. Id.
7. Id.
8. Id. at 137.
9. Id. at 136 (quoting Compl. ¶ 37).
10. Id.
11. Id. (quoting Compl. at ¶ 42).
12. Id.
13. Id.
14. Id.
15. Id. at 137-38.
16. Id. at 138; see also Frank J. Vandall, *Reallocating the Costs of Smoking: The*
B. Asbestos

Critics of the asbestos industry have accused it of conspiring for more than forty years to conceal the dangers of asbestos from the public.\textsuperscript{17} They allege that corporate officials attended a secret meeting in 1936 and agreed to finance experiments at the Trudeau Foundation's Saranac Laboratory at Saranac Lake, New York.\textsuperscript{18} The purpose of this research was not to study the health risks of asbestos, but rather to accumulate data to help defend against potential lawsuits.\textsuperscript{19} In addition, evidence later came to light that Sumner Simpson, an executive at Raymark, intervened on several occasions to prevent articles about the occupational health risks of asbestos exposure from being published in \textit{Asbestos} Magazine.\textsuperscript{20} Furthermore, the Asbestos Textile Institute (ATI) suppressed a study of textile factories by the Industrial Hygiene Foundation, which had found evidence of asbestosis among workers.\textsuperscript{21} ATI refused to fund any further studies because “such an investigation would stir up a hornet’s nest and put the whole industry under suspicion.”\textsuperscript{22}

C. Diethylstilbestrol

Stilbestrol, or synthetic estrogen, was developed in England in 1937.\textsuperscript{23} In 1940, when a number of American pharmaceutical companies sought approval to produce and sell stilbestrol for treatment of menopausal symptoms, the Food and Drug Administration (FDA) requested that they consolidate their individual clinical studies into a single “Master File.”\textsuperscript{24} A working committee of drug companies assembled the Master File and submitted it to the FDA.\textsuperscript{25} After the FDA accepted the clinical data, the working committee was disbanded and never met again.\textsuperscript{26}

Other researchers subsequently discovered that estrogen treatment could correct hormonal deficiencies that might cause miscarriages in pregnant


19. Id.


22. Id.


24. Id.

25. Id.

26. Id. at 1010.
Based on this research, several drug manufacturers sought permission from the FDA in 1947 to market stilbestrol for treatment of miscarriages and other pregnancy-related problems. Each company selected the clinical data that it wished to submit to the FDA in support of its application. In 1952, the FDA allowed any company to market stilbestrol for any previously approved use without filing a separate application.

Eventually, hundreds of companies produced and sold DES. Because the drug companies marketed chemically identical DES, pharmacists treated DES as a generic product and filled prescriptions with whatever DES they had in stock. In 1971, a study first linked the daughters of women who ingested DES during pregnancy with the development of clear cell adenocarcinoma, a form of cancer. Shortly thereafter, the FDA directed DES manufacturers to warn that “DES [was] contraindicated for use in the prevention of miscarriages.”

Injured plaintiffs alleged that drug companies conspired to procure FDA approval for the sale of DES in 1941 and then conspired again in 1947 to secure the FDA’s permission to market DES as an anti-miscarriage drug. They also claimed that the drug companies conspired to misrepresent the safety and efficacy of DES to physicians and their patients. As proof of this conspiracy, the plaintiffs pointed to the 1941 agreement under which the drug companies pooled their research data and submitted the Master File to the FDA.

D. Lead-Based Paint

Lead paint and pigment companies, as well as their trade associations, have faced accusations of conspiring to suppress information about the health risks associated with their products. Executives from the lead industry met in New York City in 1928 to establish a trade association known as the Lead Industries Association (LIA) and agreed that they would adopt a common strategy with respect to lead-based paints.

27. Id.
28. Id.
29. Id. at 1010-11.
30. Id. at 1011.
31. Id.
33. Id.
34. Id.
36. Smith, 527 N.E.2d at 352.
37. Id.
39. Motley & Kearse, supra note 18, at 47.
Manufacturers allegedly knew of the health risks of lead-based paint but continued to sell such products. For example, between 1930 and 1945, the lead paint industry encouraged the use of white lead in house paint even though they were aware of lead paint's health risks. Additionally, during the 1930s, at least one company suggested that lead-based paint was safe for children by distributing coloring books to children which featured the "little Dutch boy." Injured plaintiffs also accused the industry of intimidating researchers and blocking them from documenting the dangers of lead-based paint. In addition, the industry undermined the efforts of public interest organizations and government agencies to investigate the health risks of lead paint and to inform the public about these risks. According to some critics, "the lead-based paint industry 'cultivated a simulacrum of concerned, responsible 'objectivity,'" taking control of the information the public received by funding its own research programs, and forcing its presence into the "'regulatory . . . process.'"

Furthermore, after scientific studies confirmed the health risks of lead paint, the industry changed tactics and argued that the costs of removing paint from residential buildings was not cost-effective.

E. Multi-Rim Truck Wheels

According to the plaintiff in Cousineau v. Ford Motor Co., manufacturers of multi-rim truck wheels learned as early as the 1970s of the dangers of using truck wheel rim parts that were manufactured by different companies. While some of these rim components could be safely interchanged, in other cases using mixed rims was highly dangerous. The plaintiff alleged that wheel-rim manufacturers shared information about wheel rim interchangeability to provide charts for mechanics but otherwise sought to shift the burden entirely to those who changed truck tires. Specifically, the wheel rim manufacturers urged the Occupational Safety and Health Administration (OSHA) to promulgate standards that would "remove all of the burden from the Wheel and

43. Id.
45. Perillo, supra note 42, at 1071 (quoting id. at 1683-84 (quoting Paul Mushak, The Landmark Needleman Study of Childhood Lead Poisoning: Scientific and Social Aftermath, 2 PSR Q. 165, 169 (1992)).
46. Id. at 1071-72.
48. Id.
49. Id.
Rim manufacturers” and instead require employers to protect their mechanics against this risk. OSHA eventually responded by directing employers to post information about mounting multi-rim truck wheels and requiring them to provide better training for mechanics who changed truck tires with multi-rim wheels.

F. Gasoline Additives

The plaintiffs in In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation brought a class action against MTBE manufacturers, claiming that they conspired to deceive the EPA to persuade the agency to permit gasoline refiners to put greater amounts of MTBE in their gasoline. In 1990, a federal statute created the Reformulated Gasoline Program (RFG Program), which required gasoline suppliers to use reformulated gasoline in metropolitan areas with high ozone levels. The higher oxygen levels in reformulated gasoline caused it to burn more cleanly, thereby producing fewer volatile organic compound (VOC) emissions. Refiners often added MTBE to increase their gasoline’s oxygen content. According to the plaintiffs, however, MTBE was highly soluble in water, making it a threat to water wells and reservoirs if it seeped into underground aquifers. In addition, the plaintiffs charged that MTBE was an animal carcinogen and was also thought to cause health problems in humans. The plaintiffs’ complaint stated that by 1980 MTBE producers knew MTBE was contaminating groundwater supplies in some areas. In addition, they learned of MTBE’s health risks in 1986 when a study known as the Garrett Report identified the threat of MTBE contamination and concluded that MTBE should not be used as a gasoline additive.

Although MTBE producers knew about the dangers linked to MTBE, the plaintiffs claimed that they allegedly conspired to deceive the EPA to convince the agency to authorize raising the amount of MTBE permitted in gasoline. According to the plaintiffs, gasoline additive producers “formed the MTBE Committee for the purpose of addressing environmental, health, safety, legislative and regulatory issues concerning MTBE.” On February 27, 1987,

50. Id.
51. Id.
55. MTBE, 175 F. Supp. 2d at 600.
56. Id. at 599.
57. Id.
58. Id. at 600-601.
59. Id. at 601.
60. Id. at 601-02.
61. Id. at 602.
The MTBE Committee falsely assured the EPA "that MTBE was only slightly soluble in water, [that the risk of] exposure to MTBE was low, and that MTBE [was] biodegradable." In addition, the plaintiffs asserted that the MTBE Committee assured the EPA that MTBE did not threaten public health or the environment. The plaintiffs further alleged that a member of the MTBE Committee stated that MTBE gasoline spills were no longer a concern to the environment and that in 1994, the American Petroleum Institute, another industry trade association, affirmed that there was no reason to be concerned about the continued use of MTBE. Finally, the plaintiffs asserted that the Oxygenated Fuels Association (OFA), another industry trade group, falsely stated that federal regulations and industry practices had almost completely eliminated MTBE contamination.

III. OVERVIEW OF CIVIL CONSPIRACY LAW

Most courts agree that civil conspiracy involves: (1) an agreement to commit an unlawful 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) causation, and (4) damage to another resulting from the conspiracy. Problems with pleading and proving the elements of civil conspiracy make alternative theories of liability somewhat more attractive.

A. The Agreement Requirement

First, there must be some sort of agreement between the defendant and at least one other party to commit a wrongful act. Thus, one who is accidentally, inadvertently, or negligently involved in an illegal scheme will not be held liable for civil conspiracy. "Nor is mere knowledge that others are committing..."
fraudulent or illegal actions enough to make one part of a conspiracy. At the same time, one who understands the general goals of an illegal scheme and agrees to further them will be treated as a conspirator, even if that person does not agree to the details of the scheme or know the identity of all the conspirators.

B. The Overt Act or Independent Tort Requirement

A mere agreement will not amount to a civil conspiracy, there must also be some illegal or tortious act committed by at least one of the parties to carry out the objectives of the agreement. One important issue is whether the act must amount to an intentional tort or whether negligence or strict liability will suffice. Most courts have held that the parties must commit an intentional tort and that, therefore, negligence will not satisfy the independent tort requirement. When the plaintiff tries to base a civil conspiracy on negligence, a number of courts have responded that one cannot conspire to commit negligence. A few courts, however, have allowed civil conspiracy claims based on negligence or even strict liability.

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69. See RESTATEMENT (SECOND) OF TORTS § 876 (requiring assistance or encouragement in order to incur liability for knowledge of another’s tortious conduct); see also Jones, 856 F.2d at 992 (requiring voluntary participation in the conduct).


72. Estate of White, 109 F. Supp. 2d at 428; N.D. Asbestos Litig., 737 F. Supp. at 1095; Belkow, 722 F. Supp. at 1550; Rogers, 761 S.W.2d at 796.


74. Ryan, 514 F. Supp. at 1012; Goldstein, 854 A.2d at 590.


76. Adcock v. Brakegate, Ltd., 645 N.E.2d 888, 894-95 (Ill. 1994); Wright, 652 N.W.2d at 174.

77. MTBE, 175 F. Supp. 2d at 634.
C. Pleading and Proof

In the federal courts, Rule of Civil Procedure 8(a) merely requires "a short and plain statement" of the grounds for the claim. Nevertheless, when the underlying tort is fraudulent misrepresentation or fraudulent concealment, the plaintiff must also comply with the requirement of Rule 9(b) that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." This latter requirement may impose a serious burden on the plaintiff in a civil conspiracy case. For example, in Belkow v. Celotex Corp., a federal district court dismissed the plaintiff's conspiracy claim because his complaint failed to provide explicit details about the "time, place and alleged effect of the conspiracy." Another federal district court reached a similar conclusion in Carlson v. Armstrong World Industries, Inc. The plaintiff in Carlson alleged that the defendant asbestos companies conspired to fraudulently conceal information about the health risks of exposure to asbestos products. The court observed that Rule 9(b) required the plaintiff to state his claim for fraud with particularity. In this case, however, the court found that the conspiracy claims were "vague, general, and conclusory" and, therefore, were not specific enough to satisfy the requirements of Rule 9(b).

D. Civil Conspiracy and Other Liability Theories

Other theories besides civil conspiracy are available to impose joint and several liability on a group of wrongdoers. These include: (1) "true conspiracy," (2) concert of action, (3) aiding and abetting, (4) enterprise liability, (5) alternative liability, and (6) market share liability.

1. "True Conspiracy"

A true conspiracy exists when the defendants, "acting in unison, exercise a 'peculiar power of coercion' over the plaintiff that they would not have had if

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78. FED. R. CIV. P. 8(a).
79. FED. R. CIV. P. 9(b); see also Town of Hooksett Sch. Dist. v. W.R. Grace & Co., 617 F. Supp. 126, 135 (D.N.H. 1984) (requiring a claim alleging fraud or conspiracy to meet the requirement of Rule 9(b)).
83. Id. at 1078.
84. Id.
85. Id. But see Adcock v. Brakegate, Ltd., 645 N.E.2d 888, 895 (Ill., 1994) (observing that "conspiracies are often purposefully shrouded in mystery...[and] by their very nature do not permit the plaintiff to allege, with complete particularity, all of the details of the conspiracy or the exact role of the defendants in the conspiracy").
they acted alone."

In contrast to civil conspiracy, a true conspiracy is itself an independent tort; therefore, the plaintiff does not have to prove the existence of an underlying tort. True conspiracy is quite narrow in its focus and is largely confined to economic boycotts and illegal interferences with business relationships. Consequently, this tort has little application to personal injury claims in product liability actions.

2. Concert of Action

Concert of action is a theory that subjects defendants to joint and several liability when they act together to commit tortious conduct. Furthermore, one who negligently or intentionally commits a tort may be held jointly and severally liable even though his or her conduct is not the direct cause of the plaintiff's injury. Concert of action requires: (1) "an understanding, express or tacit, to participate in a common plan to commit a tortious act," (2) that each party act tortiously, and (3) that one of the parties commits a tortious act to carry out the agreement. Concert of action cases typically involve only one plaintiff, a few defendants, and a short time between the commission of the tort and the discovery of that tort. Unlike some liability theories such as alternative liability, a plaintiff can rely upon concert of action when the identity of the person who caused the injury is known.


88. Aetna, 43 F.3d at 1563; Liappas v. Augoustis, 47 So. 2d 582, 583 (Fla. 1950).

89. Leonard A. Washofsky, Note, Offenses and Quasi-Offenses—Conspiracy—Civil Action for "True Conspiracy," 33 Tul. L. Rev. 410, 413 (1959); see also Liappas, 47 So. 2d at 583 (finding conspiracy "in the combined action of groups of employers or employees... and related or similar fields"); Fleming v. Dane, 22 N.E.2d 609, 611 (Mass. 1939) (declaring that "[t]he most common illustration of such a 'conspiracy' is to be found in the combined actions of groups of employers or employees, where through the power of combination pressure is created and results brought about different in kind from anything that could have been accomplished by separate individuals").


3. Aiding and Abetting

To establish a claim for aiding and abetting, the plaintiff must show that: (1) the principal or active defendant committed a tortious or illegal act, (2) the defendant was aware of the violation, and (3) the defendant gave "substantial assistance or encouragement" to the active defendant to commit the act. In determining whether the substantial assistance requirement is met, "the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind are all considered." Unlike civil conspiracy, in an aiding and abetting case, the plaintiff does not have to prove that an agreement exists between the parties.

4. Alternative Liability

Alternative liability requires: (1) that all defendants be joined in the lawsuit and (2) that the defendants either have more knowledge than the plaintiff about the identity of the person who caused the plaintiff's injury or are responsible for the plaintiff's inability to identify that person. This rule assumes that where each of the defendants breached a duty to the plaintiff and it is sufficiently likely that any one of them was the culprit, it is fair to force each of them to exonerate himself or be held liable for the plaintiff's injury. Some courts have applied alternative liability in products liability cases, while other courts have refused to do so.
5. Enterprise Liability

The theory of enterprise liability subjects each member of an industry to joint and several liability when:

1) the injury-causing product was manufactured by one of a small number of defendants in an industry; 
2) the defendants had joint knowledge of the risks inherent in the product and possessed a joint capacity to reduce those risks; 
and 3) each of them failed to take steps to reduce the risk but, rather, delegated this responsibility to a trade association.1

Courts have specifically rejected enterprise liability when a large number of manufacturers belong to the industry and the plaintiff has not joined most of its members in the lawsuit. 103 This makes it difficult for plaintiffs to rely on the enterprise liability theory as an alternative to civil conspiracy in the types of large class actions discussed in this Article.

6. Market Share Liability

The theory of market share liability provides that one who is injured by a generic or fungible product may recover damages from each producer based on its share of the total market for the product. 104 For market share liability to apply, the plaintiff must be unable to identify the manufacturer whose product caused the harm and the plaintiff must join a sufficient number of defendants in the action to constitute a substantial share of the product’s market. 105 The California Supreme Court first introduced market share liability in Sindell v. Abbott Laboratories. 106 The plaintiffs in Sindell developed cancer as a result of their mothers’ use of DES. 107 They brought suit against eleven named and 100


105. Id. at 1626, 1635.

106. 607 P.2d 924 (Cal. 1980).

107. Id. at 925.
unnamed DES manufacturers but were unable to identify the manufacturers who actually caused their injuries. Nevertheless, the California court held that the plaintiffs could recover a pro rata amount of their damages from each DES manufacturer based on its market share during the time the plaintiffs were exposed to the drug. Although a number of courts have applied some form of market share liability in DES cases, some others have declined to do so, and it is rarely used in cases that did not involve DES.

III. CIVIL CONSPIRACY AND PRODUCTS LIABILITY

Injured plaintiffs have invoked civil conspiracy against a variety of product manufacturers, including producers of cigarettes, asbestos, pharmaceuticals, lead-based paint, multi-rim truck wheels, and gasoline additives. A number of issues of proof and jurisdiction have arisen in these cases.

108. Id. at 925-26.
109. Fischer, supra note 98, at 1635-36 (citing id. at 937).
111. Smith v. Eli Lilly & Co., 560 N.E.2d 324, 344-45 (Ill. 1990) (rejecting the appellate court’s adoption of modified market share liability as a “flawed concept” that “is too great a deviation from” established principles of tort law); accord Tidier v. Eli Lilly & Co., 851 F.2d 418, 424 (D.C. Cir. 1988); Morton v. Abbott Labs., 538 F. Supp. 593, 599-600 (M.D. Fla. 1982); Mizell v. Eli Lilly & Co., 526 F. Supp. 589, 596 (D.S.C. 1981); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1018 (D.S.C. 1981). In each of these cases except Smith, a federal judge was bound by established state tort law or was unwilling to adopt a novel liability theory without clear evidence that the state courts would have done the same. Tidier, 851 F.2d at 424; Morton, 538 F. Supp. at 599-600; Mizell, 526 F. Supp. at 596; Ryan, 514 F. Supp. at 1018.
A. The Agreement Requirement

1. Unlawful Purpose

The agreement requirement caused serious problems for the plaintiff in Cousineau v. Ford Motor Co. The plaintiff's son had been killed when the wheel he was repairing "explosively disengaged." The plaintiff sued the wheel manufacturers who had supplied the employer's truck wheel stock and the manufacturers of the trucks owned by the employer. When the plaintiff was unable to identify the manufacturer whose product caused the injury, she tried to add a concert of action count to her complaint to overcome this problem. On appeal, the court found that the plaintiff's claim was essentially that the defendants conspired to make product identification difficult. As the court observed, the plaintiff failed to show why such an agreement was unlawful. Because there was no agreement to act unlawfully, there was no legal basis for the plaintiff's concert of action claim.

The defendants in the MTBE case also argued that there could be no civil conspiracy because there was no evidence of an unlawful agreement. In that case, however, the "plaintiffs allege[d] that the defendants formed joint task forces and committees such as the MTBE Committee . . . for the express purpose of suppressing or minimizing information regarding MTBE hazards." In addition, the plaintiffs accused the defendants of plotting to deceive the government and the public about these dangers. These allegations were sufficient to support a claim of an unlawful agreement.

2. Parallel Conduct

Because conspiracy is sometimes difficult to prove directly, courts often allow plaintiffs to introduce circumstantial evidence. "[P]arallel conduct may serve as circumstantial evidence of a civil conspiracy," but a great many

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114. Id. at 725.
115. Id.
116. Id. The plaintiff also attempted to add an alternative liability claim, which failed because in theory she could have discovered the identity of the specific wheel and truck manufacturers involved in her son's death. Id. at 727-28.
117. Id. at 731.
118. Id.
119. Id.
121. Id.
122. Id.
123. Id. at 635.
courts refuse to allow a plaintiff to prove the existence of a conspiracy by
evidence of parallel conduct alone.\textsuperscript{126} At least one court held that evidence of
parallel conduct among asbestos manufacturers is not sufficient to satisfy the
agreement requirement in a civil conspiracy action.\textsuperscript{127} In McClure v. Owens
Corning Fiberglas Corp.,\textsuperscript{128} the plaintiffs sued a number of asbestos
manufacturers for conspiring to suppress information about the harmful effects
of asbestos exposure.\textsuperscript{129} The plaintiffs could not offer any direct evidence that
the asbestos companies agreed to conceal information about the health risks of
asbestos but offered evidence of parallel conduct by these companies as proof
of such an agreement.\textsuperscript{130} The Illinois Supreme Court held that parallel conduct
constitutes circumstantial evidence of a conspiracy between manufacturers of
the same product but does not, without more, prove that there actually was such
a conspiracy.\textsuperscript{131}

Several DES cases have also held that parallel conduct is not sufficient to
satisfy the agreement requirement. For example, the plaintiff in Collins v. Eli
Lilly Co.\textsuperscript{132} brought suit against various manufacturers of DES for injuries
caused by her mother's ingestion of the drug during pregnancy.\textsuperscript{133} Because the
plaintiff could not identify the DES manufacturer that caused her injuries,\textsuperscript{134} she included allegations that the defendants had "conspired to misrepresent that

\begin{footnotes}
\footnotenumbers
\footnotetext{126.  Id. (declaring that "[o]ur review of the case law from other jurisdictions convinces us
that the overwhelming weight of authority has refused to accept mere parallel action as proof of
conspiracy"); see also In re Asbestos School Litig., 46 F.3d 1284, 1294 (3d Cir. 1994)
(concluding that "we do not see how a rational jury could find the existence of a civil conspiracy
\ldots based solely on the alleged fact that Pfizer and other defendants consciously engaged in
parallel conduct"); Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 472 (Pa. 1979) (stating
that "[t]he 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"); Collins v. Eli Lilly Co., 342
N.W.2d 37, 47-48 (Wis. 1984) (observing that "the drug companies apparently engaged in
parallel behavior in both 1941 and 1947, but parallel behavior alone cannot prove agreement").

court affirmed the dismissal of a civil conspiracy claim based on a parallel absence of conduct.
That court found that the plaintiffs had failed to describe how the manufacturers carried out the
conspiratorial scheme and had "alleged no[thing] more than a contemporaneous and negligent
failure" to test the drug or warn about its potential dangers. \textit{Id.} According to the court, "[t]his
was insufficient to state either a conspiratorial agreement or the requisite intent to cause injury.
"

\textit{Id.}

\footnotetext{127.  McClure, 720 N.E.2d at 259.}
\footnotetext{128. 720 N.E.2d 242.}
\footnotetext{129.  \textit{Id.} at 245-46.}
\footnotetext{130. \textit{Id.} at 247. The plaintiffs also presented evidence of several contacts among the
defendants, but the court found these contacts insufficient to support an inference of an
agreement. \textit{Id.} at 264.}
\footnotetext{131. \textit{Id.} at 259.}
\footnotetext{132. 342 N.W.2d 37 (Wis. 1984).}
\footnotetext{133. \textit{Id.} at 41-42.}
\footnotetext{134. \textit{Id.} at 43.}
DES was safe and efficacious for use by pregnant women” and that they acted together to manufacture and market the drug.\(^{135}\) As evidence of this conspiracy, the plaintiff claimed that the drug companies had pooled their clinical data and filed a joint New Drug Application (NDA) with the FDA in 1941 to produce and market DES.\(^{136}\) Later, in 1947 and 1948, several drug companies filed supplemental NDAs with the FDA to market DES for prevention of miscarriages.\(^{137}\)

The Wisconsin Supreme Court acknowledged that the drug companies engaged in parallel actions in 1941 and 1947 but declared that this conduct alone could not prove that there was an underlying agreement to commit an unlawful act.\(^{138}\) The plaintiff presented no evidence that the defendants cooperated with each other to misrepresent the “safety and efficacy” of DES to obtain FDA approval of the drug.\(^{139}\) Furthermore, even if the cooperative efforts of 1941 constituted an agreement, there was no basis for concluding that the agreement covered the NDA filings in 1947 and 1948.\(^{140}\) Consequently, the court affirmed the lower court’s summary judgment dismissing the plaintiff’s civil conspiracy claim.\(^{141}\)

3. Membership in a Trade Association

A trade organization can be held liable under civil conspiracy even though it does not manufacture or supply defective products to consumers.\(^{142}\) Thus, in Rogers v. R.J. Reynolds Tobacco Co.,\(^{143}\) a Texas court found a viable claim the plaintiff’s civil conspiracy case against a tobacco industry trade association and an industry-sponsored research and public relations organization.\(^{144}\) In another case, Jefferson v. Lead Industries Ass’n,\(^{145}\) the trade association of the lead-based paint industry escaped a similar fate only because the plaintiff was unable to prove all of the elements of the underlying tort, namely fraudulent misrepresentation.\(^{146}\)

On the other hand, at least one court has declared that mere membership in a trade association will not cause innocent members to be held liable for civil
In *Wright v. Brooke Group Ltd.*, an amicus brief filed on behalf of defendant tobacco companies expressed a concern that "[e]very company that belongs to a trade association, industry group, or product advisory group would face conspiracy charges predicated on nothing more than the fact that it manufactured a product that had characteristics of those within that industry." The Iowa Supreme Court responded that only members of the association who knowingly participated in a conspiracy would be held liable. In other words, an agreement to commit an unlawful act was still necessary to be held liable for civil conspiracy and "mere membership" in a trade association did not amount to such an agreement.

**B. The Overt Act or Independent Tort Requirement**

1. Fraudulent Misrepresentation

Many civil conspiracy cases against tobacco companies have centered on the overt act or underlying tort requirement. In most instances, the overt act or underlying tort complained of was fraudulent misrepresentation or fraudulent concealment. Where the claim was fraudulent misrepresentation, the case has often turned on whether all of the underlying tort's elements were properly pleaded. A fraudulent misrepresentation claim requires proof of six elements by clear and convincing evidence:

1) a representation; 2) which is material to the transaction at hand; 3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; 4) with the intent of misleading another into relying on it; 5) justifiable reliance on the misrepresentation; and 6) the resulting injury was proximately caused by the reliance.

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148. 652 N.W.2d 159.
149. *Id.* at 173 (alteration in original) (quoting an amicus brief filed in the case).
150. *Id.* at 174.
151. *Id.*
154. See *infra* Part IV.B.2.
156. *Goldstein*, 854 A.2d at 590-91 (citing Debbs v. Chrysler Corp., 810 A.2d 137, 155
Even when the claim has been properly alleged, plaintiffs often have trouble satisfying the burden of proof for the reliance requirement of fraudulent misrepresentation.\textsuperscript{157}

\textit{Johnson v. Brown & Williamson Tobacco Corp.} is illustrative of this problem. In \textit{Johnson}, the widow of a deceased smoker brought suit against Brown & Williamson, alleging fraudulent misrepresentation and civil conspiracy.\textsuperscript{159} In her fraudulent misrepresentation claim, the plaintiff maintained that her husband had "relied upon the manufacturer's superior knowledge regarding tobacco products and was impliedly or expressly instructed in their use by the advertising, marketing and other efforts of the defendant..."\textsuperscript{160} The court, however, concluded that the plaintiff needed to identify more specifically the time, place, and content of the defendant’s false statements or deceptions upon which the decedent smoker had relied.\textsuperscript{161} Without this, the plaintiff would not have met the pleading requirements of Rule 9(b)\textsuperscript{162} or the reliance element of fraudulent misrepresentation, so the civil conspiracy claim would fail.\textsuperscript{163}

Likewise, in \textit{Estate of White v. R.J. Reynolds Tobacco Co.},\textsuperscript{164} the plaintiffs claimed that the decedent’s long-time smoking habit indicated that he had relied upon the defendant’s advertising and promotion activities.\textsuperscript{165} The court determined that "there [was] no evidence that [the decedent] ever saw or heard anything that B & W or RJR said" and concluded that the plaintiffs failed to prove that the decedent relied on any of the defendants’ statements or advertising.\textsuperscript{166} The plaintiffs also asked the court to presume that the decedent would have seen or heard the defendants’ misrepresentations—and relied on them—"because [he] read the newspaper and magazines, watched television, and listened to the radio where these misrepresentations were made."\textsuperscript{167} The court, however, concluded that such a presumption would be nothing more than pure speculation and, therefore, dismissed the plaintiffs’ civil conspiracy claim.\textsuperscript{168}

\textit{(Pa. Super. Ct. 2002)).}

\textsuperscript{157} E.g., Tuttle v. Lorillard Tobacco Co., 377 F.3d 917, 926 (8th Cir. 2004); \textit{Estate of White}, 109 F. Supp. 2d at 429-30; see, e.g., \textit{Ryan}, 514 F. Supp. at 1013.

\textsuperscript{158} 122 F. Supp. 2d 194.

\textsuperscript{159} \textit{Id.} at 198.

\textsuperscript{160} \textit{Id.} at 207 (quoting Compl. ¶ 21).

\textsuperscript{161} \textit{Id.} at 208.

\textsuperscript{162} \textit{Fed. R. Civ. P.} 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

\textsuperscript{163} \textit{Id.} at 207-08.


\textsuperscript{165} \textit{Id.} at 429.

\textsuperscript{166} \textit{Id}.

\textsuperscript{167} \textit{Id.} at 430.

\textsuperscript{168} \textit{Id}.
In *Ryan v. Eli Lilly & Co.*,169 the plaintiff alleged that the defendants engaged in a collective promotional and marketing scheme to fraudulently misrepresent stilbestrol’s benefits.170 Unfortunately for the plaintiff, her physician testified that he completely disregarded the promotional and marketing campaigns of any defendant regarding stilbestrol and relied only on reports and studies in the medical literature by independent doctors and scientists.171 Thus, even if the defendants had fraudulently misrepresented DES’s benefits, the plaintiff’s fraud claim failed because she was unable to show that either she or her physician had relied upon these fraudulent representations.172

Finally, in *Brenner v. American Cyanamid Co.*,173 a civil conspiracy action against lead-based paint manufacturers was dismissed because the plaintiffs could not establish the existence of fraud as an independent tort.174 The plaintiff accused the defendants of fraud for “promoting the use of lead pigments in their paint without proper tests or warnings . . . ”175 The court, however, concluded that the plaintiffs had “failed to raise a triable issue of fact concerning the reliance element” and dismissed their fraud and conspiracy claims.176

2. Fraudulent Concealment

Some plaintiffs have identified fraudulent concealment as the underlying tort in civil conspiracy actions. Fraudulent concealment requires proof of: (1) deliberate hiding by the defendant of a material fact, or silence when there is a duty to speak, (2) “that the defendant acted with scienter,” (3) intent to cause the plaintiff to rely upon the concealment, (4) causation, and (5) “damages resulting from the concealment.”177

The duty requirement has been especially troublesome for plaintiffs basing their civil conspiracy claim on fraudulent concealment.178 For example, in *Viguers v. Philip Morris USA, Inc.*,179 a Pennsylvania appellate court upheld the dismissal of a civil conspiracy claim.180 The court acknowledged that

170. *Id.* at 1012-13.
171. *Id.* at 1013.
172. *Id.*
174. *Id.* at 800.
175. *Id.* at 801.
176. *Id.*
179. 837 A.2d 534.
180. *Id.* at 540.
concealment would constitute "actionable fraud if the seller intentionally concealed a material fact to deceive the purchaser . . .". The court also observed that silence alone would not amount to fraud unless the defendant had a duty to speak. The court implied that a duty to speak did not exist and found that there was no evidence that the defendant's silence about the dangers of smoking actually caused the decedent to continue smoking.

In Chavers v. Gatke Corp., the plaintiff stated that manufacturers of friction brake products conspired to conceal a study showing that exposure to products containing asbestos could be harmful. The court considered the civil conspiracy claim on the basis of concealment and found for the defendant. On appeal, a California appellate court declared that a conspiracy could "only be formed by parties who are already under a duty to the plaintiff, the breach of which will support a cause of action against them—individually and not as conspirators—in tort." In this case, the court found that the defendant did not owe a duty to the plaintiff because he was not exposed to the defendant's products.

The plaintiffs were more successful in Nicolet, Inc. v. Nutt. In that case, asbestos workers claimed that the defendant participated in a conspiracy to conceal information about the health risks of asbestos. The court distinguished between deliberate concealment of material facts and "silence in the face of a duty to speak." According to the court, a defendant would not be liable for fraudulent concealment for merely failing to disclose a material fact unless he had a duty to speak; nevertheless, a defendant who "actively conceal[ed] a material fact" would be liable regardless of whether there was a duty to speak. The court concluded that fraudulent concealment would support a civil conspiracy claim if the defendant participated in a conspiracy that actively concealed information about the health risks of asbestos exposure.

Finally, in the Fifth Judicial District Asbestos Litigation, workers who were exposed to asbestos sued Metropolitan Life Insurance Company for failing to disclose information about the dangers of asbestos which the

181. Id.
182. Id.
183. Id.
184. 132 Cal. Rptr. 2d 198 (Ct. App. 2003).
185. Id. at 200.
186. Id. The jury also found there was no conspiracy to make intentional misrepresentations. Id.
187. Id. at 203.
188. Id.
189. 525 A.2d 146 (Del. 1987).
190. Id. at 147.
191. Id. at 149.
192. Id.
193. Id. at 150.
company had obtained in the 1930s from medical examinations of asbestos workers.\textsuperscript{195} Although the study allegedly showed "that a high percentage of these workers] suffered from asbestosis," the defendant declined to publish any such findings in a medical journal.\textsuperscript{196} When Metropolitan did publish another study, the asbestos industry persuaded it to misrepresent the seriousness of asbestos-related diseases.\textsuperscript{197} Despite strong evidence of a conspiracy among asbestos manufacturers, the court granted the defendant's motion for summary judgment,\textsuperscript{198} concluding that the 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."\textsuperscript{199}

3. The "Intentional Tort" Requirement

The majority of courts have held that the tort underlying a civil conspiracy claim must be intentional.\textsuperscript{200} For example, a federal district court in \textit{Sonnenreich v. Philip Morris Inc.}\textsuperscript{201} dismissed a civil conspiracy claim because it was largely based on negligence.\textsuperscript{202} The court reasoned that the claim must fail because it was impossible to conspire to be negligent.\textsuperscript{203} The court did, however, allow the plaintiff to amend her complaint to allege that the defendants engaged in fraudulent conduct by suppressing information about the health risks of smoking.\textsuperscript{204}

In contrast, some courts have concluded that negligence, or even strict liability, can satisfy the underlying tort requirement for a civil conspiracy claim.\textsuperscript{205} The Iowa Supreme Court in \textit{Wright v. Brooke Group Ltd.}\textsuperscript{206} declared that an intentional tort was not necessary to support a civil conspiracy claim as long as the underlying acts were independently actionable.\textsuperscript{207}

\begin{itemize}
  \item 195. Id. at 831.
  \item 196. Id.
  \item 197. Id.
  \item 198. Id. at 834.
  \item 199. Id. at 833.
  \item 201. Id. at 419-20.
  \item 202. Id. at 419.
  \item 203. Id. at 420.
  \item 204. Id. at 420.
  \item 206. 652 N.W.2d 159.
  \item 207. Id. at 174.
\end{itemize}
federal court in *Sackman v. Liggett Group, Inc.*, 208 after declaring that a claim of civil conspiracy requires a showing of intentional conduct, 209 dismissed the plaintiffs’ negligence-based claim but surprisingly refused to dismiss a claim based on conspiracy to market a defective product. 210 After discussing cases on both sides of the issue, the court concluded that new law regarding civil conspiracy and products liability was developing so rapidly that it was premature to dismiss a claim based on strict products liability. 211

In the *MTBE* case, the defendants also argued that the plaintiffs’ civil conspiracy claim must fail because they had not alleged an underlying intentional tort. 212 The court acknowledged that in order to incur liability the defendants must have agreed to commit an intentional act; therefore, negligent failure to warn could not serve as the underlying tort in the civil conspiracy claim. 213 The plaintiffs, though, had alleged that the defendants had intentionally misrepresented and suppressed information about MTBE. 214 The court concluded that the defendants’ alleged failure to warn was intentional, not negligent, and the claim could go forward. 215 The court also declared that because the defendants intentionally marketed a product that they knew was unreasonably dangerous, the plaintiffs’ strict liability design defect claim might also qualify as an underlying tort for civil conspiracy. 216

4. Statutory Claims

*Jefferson v. Lead Industries Ass’n* 217 represents an interesting twist on the underlying tort requirement. The plaintiff in *Jefferson* brought a class action against various lead-based paint pigment manufacturers and their trade association, seeking recovery under the Louisiana Products Liability Act (LPLA) 218 for victims of lead poisoning. 219 The district court had dismissed the plaintiff’s complaint pursuant to Federal Rule 12(b)(6) 220 because she could not identify the manufacturers who made the product that caused the harm and

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209. *Id.* at 395.
210. *Id.* at 396.
213. *Id.*
214. *Id.* at 633-34.
215. *Id.* at 634-35.
216. *Id.* at 634.
217. 106 F.3d 1245 (5th Cir. 1997) (per curiam).
220. FED. R. CIV. P. 12(b)(6).
because she failed to state a cause of action based upon civil conspiracy. In response, the plaintiff asked the Court of Appeals for the Fifth Circuit to certify certain questions to the Louisiana Supreme Court, including whether defendants could be held jointly liable under the civil conspiracy provisions of the Louisiana Civil Code based on their alleged violation of the LPLA and other torts. The Fifth Circuit, however, refused to certify the plaintiff's questions and instead incorporated the trial court's analysis by reference into its own opinion.

The trial court observed that the LPLA provides the only available theories of manufacturer liability for injuries caused by their products. The statute identified a number of liability theories, such as defective design and failure to warn, but required that the plaintiff identify the defective product's manufacturer. The plaintiff in Jefferson tried to avoid this hurdle by charging the defendants with civil conspiracy. However, the court concluded that civil conspiracy was not a permissible theory of liability under the LPLA.

On the other hand, the court acknowledged that the Act did not apply to non-manufacturers, such as the defendant trade association, so the plaintiff could maintain an action for civil conspiracy against the trade association if she could establish the existence of an underlying tort. In this case, the plaintiff pleaded fraudulent misrepresentation but was unable to demonstrate reliance on the trade association's alleged misrepresentations. In fact, the representations were made many years before the plaintiff was born. By the time the plaintiff's injury occurred, the dangers of lead pigment were well known and lead-based paint had been legally banned for residential use for more than twenty years. Because the plaintiff was unable to make out a prima facie case of fraudulent misrepresentation, the court dismissed her civil conspiracy claim against the Lead Industries Association.

221. Jefferson, 106 F.3d at 1246.
222. Id. at 1246-47.
223. Id. at 1248.
224. Id. at 1250.
225. Id. at 1251.
226. Id.
227. Id. at 1251-52.
228. Id. at 1253.
229. See id. at 1253-54.
230. Id. at 1254.
231. Id.
232. Id.
233. Id.
In at least one instance, plaintiffs relied on a civil conspiracy claim to assert jurisdiction over a non-resident defendant.\textsuperscript{234} In the \emph{North Dakota Asbestos Litigation},\textsuperscript{235} residents of North Dakota brought suit against Cassiar, a Canadian company that mined raw asbestos and sold it in Canada to American manufacturers of asbestos products.\textsuperscript{236} Cassiar challenged the North Dakota federal district court's jurisdiction on the basis that it had not sold products or conducted any other business in North Dakota.\textsuperscript{237} In response, the plaintiffs alleged that Cassiar participated in a conspiracy with American asbestos manufacturers and the Asbestos Textile Institute (A.T.I.), an industry trade association of which Cassiar was a member, to deceive the public about the health risks of asbestos.\textsuperscript{238} The court agreed that the plaintiffs had presented sufficient evidence that the defendant had participated in a conspiracy.\textsuperscript{239}

The court declared that it could assert personal jurisdiction over Cassiar under "[t]he theory of conspirator jurisdiction" if the plaintiff presented prima facie evidence of the conspiracy and any of the co-conspirators had "sufficient minimum contacts" in North Dakota to be subject to personal jurisdiction.\textsuperscript{240} Personal jurisdiction can be asserted over an out-of-state corporation without minimum contacts when another person or entity with minimum contacts in the forum state acted as its alter ego.\textsuperscript{241} This required the court to consider: (1) "the nature and quality of" the alleged conspirators' contacts with North Dakota, (2) "the quantity of these contacts," (3) the relationship between the contacts and the plaintiff's lawsuit, (4) North Dakota's interest, and (5) the parties' convenience.\textsuperscript{242} With this in mind, the court considered whether the A.T.I. or any of its members with minimum contacts in the state acted as Cassiar's alter ego.\textsuperscript{243} It concluded that the other A.T.I. members satisfied the five criteria for minimum contacts\textsuperscript{244} and that the plaintiff had made out a prima facie case of civil conspiracy.\textsuperscript{245} Therefore, the court refused to dismiss the plaintiffs' claim against Cassiar for lack of jurisdiction.\textsuperscript{246}
The effect of civil conspiracy on a statute of limitations is nicely illustrated by *Grisham v. Philip Morris U.S.A.* The *Grisham* case involved certified questions from the Court of Appeals for the Ninth Circuit to the California Supreme Court. The plaintiffs claimed that they would not have begun to smoke if they had known about the health hazards, nicotine's addictive properties, the purposeful adjustment of nicotine levels, and the targeting of underage consumers by tobacco companies. Responding to the defendant's assertion that their claims were barred by the statute of limitations, the plaintiffs argued that the statute should be tolled if the defendant tobacco companies were engaged in an ongoing conspiracy to defraud them and other smokers.

The lower court acknowledged that under California law the statute of limitations would not begin to run until the conspiracy's "last overt act" was completed. It concluded, however, that the plaintiffs' civil conspiracy claim failed, so the statute of limitations had not been tolled and the plaintiffs' claims were time barred. The underlying torts that supported the plaintiffs' civil conspiracy claim were fraudulent misrepresentation and concealment, of which justifiable reliance was an essential aspect. Although the plaintiffs alleged that they were not aware of the risks of smoking until after they were addicted, the lower court found that under California law the plaintiffs were presumed to have constructive knowledge of addiction and the health risks of smoking and, therefore, could not have relied on the defendants' false statements. On appeal, the plaintiffs argued that the presumption of awareness about addiction and the health risks of smoking was rebuttable, not conclusive. Rather than deciding this issue itself, however, the Ninth Circuit certified the matter to the California Supreme Court for resolution.

The supreme court determined that the "discovery rule" is "[a]n important exception to the general rule of accrual" of a cause of action. The statute of limitations on a claim does not begin to run until the plaintiff has reason to suspect that the claim exists; this generally requires suspicion of one element of

247. 403 F.3d 631 (9th Cir. 2005) (per curiam).
248. *Id.* at 632.
249. *Id.* at 635.
250. *See id.*
251. *See id.* (citing Wyatt v. Union Mortgage Co., 598 P.2d 45, 53 (Cal. 1979)).
252. *Id.* at 635 & n.6.
253. *See id.* at 635-36.
254. *Id.* at 635-36 (relying on Soliman v. Philip Morris, Inc., 311 F.3d 966, 973-76 (9th Cir. 2002)).
255. *See id.* at 636.
256. *Id.* at 632.
the claim along with knowledge of at least one other element. The court then rejected the special presumption upon which the district court had relied but went on to acknowledge that "California law recognizes a general, rebuttable presumption, that plaintiffs have 'knowledge of the wrongful cause of an injury.'" Therefore, in order to overcome this presumption and take advantage of the discovery rule, the plaintiffs in Grisham were required to plead facts "such as reasonable reliance on tobacco company misrepresentations" that caused them to be unable to discover their addiction and health problems.

The court found that one plaintiff discovered her addiction—and therefore her economic injury—outside the period of the statute of limitations, but that her physical injuries were sufficiently distinct from the addiction to support a separate cause of action. Because her health problems could not reasonably have been discovered until some time later, her causes of action based on them were not barred by the statute of limitations. The other plaintiff, on the other hand, did not allege that she discovered her injuries during the statute of limitations period. For this reason, she could only proceed with her claim if she alleged that she relied on the defendants' misrepresentations when she began smoking and that the ongoing civil conspiracy caused her justifiable reliance to continue into the statute of limitations period. Because she did not adequately plead this point, the trial court would have to determine whether to permit her to amend her complaint.

Greene v. Brown & Williamson Tobacco Corp. involved a statute of repose. In Greene, the widow of a smoker sued a number of cigarette manufacturers, alleging negligence, strict liability, and civil conspiracy. The defendants moved to dismiss, contending that Tennessee's statute of repose barred the plaintiff's claims. The statute declared that "[a]ny action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought . . . within

258. Id. (citing Fox, 110 P.3d at 920).
259. Id. at 1159 (citing Fox, 110 P.3d at 920).
260. Id.
261. Id. at 1159-60.
262. Id. at 1163.
263. Id. at 1164-65.
264. Id. at 1165.
265. Id.
268. Id. at 885.
269. Id.
ten (10) years from the date on which the product was first purchased . . . ." 270

Having determined that the statute barred the plaintiff’s negligence and strict liability claims, the court considered whether it also barred the civil conspiracy claim. 271

The court acknowledged that the civil conspiracy claim would fail if the underlying tort was not actionable. 272 The court also found that the underlying torts—misrepresentation, concealment, and nondisclosure—were specifically identified as “product liability actions” by the Tennessee code. 273 In light of the broad definition of “product liability action” in the statute and the close interrelationship between the plaintiff’s civil conspiracy claim and its underlying fraud allegation, the court concluded that the statute of repose must also bar the civil conspiracy claim. 274 Consequently, the court dismissed the negligence, strict liability, and civil conspiracy claims insofar as these claims were based on cigarette sales made more than ten years prior to the filing of the plaintiff’s lawsuit. 275

E. A Final Assessment

Over the years, plaintiffs have relied on civil conspiracy claims to extend liability to additional manufacturers or trade associations when the actual wrongdoer cannot be identified. 276 Plaintiffs have also invoked civil conspiracy to assert personal jurisdiction over out-of-state defendants 277 and to avoid the effects of statutes of limitation or repose. 278 Interestingly, the majority of these civil conspiracy claims have not been well received.

Civil conspiracy claims have been most successful in litigation against tobacco companies. Plaintiffs in those cases prevailed against motions to dismiss and motions for summary judgment in slightly less than half of the reported cases surveyed by this author. 279 A respectable number of civil

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270. Id. at 886 n.4 (quoting TENN. CODE ANN. § 29-28-103 (Supp. 1998)).
271. Id. at 887.
272. Id.
273. Id. (quoting TENN. CODE ANN. § 29-28-102(6) (Supp. 1998)).
274. Id. The plaintiff argued unsuccessfully that barring a suit for fraudulent concealment was against Tennessee public policy. Id. at 887-88. Neither the plaintiff nor the court seems to have addressed the fact that the relevant statute refers only to “negligent or innocent” behavior. § 29-28-102(6).
275. Id. at 888.
conspiracy claims have also survived pretrial motions by defendants in asbestos cases. On the other hand, plaintiffs have had only modest success with civil conspiracy claims in lead paint cases and conspiracy claims have been largely rejected in most other cases. This suggests that many courts are suspicious of civil conspiracy claims in products liability cases and, therefore, insist that all of the traditional requirements for products liability torts be strictly met.

V. CONCERNS ABOUT CIVIL CONSPIRACY CLAIMS

There are a number of possible explanations for the courts' hostile attitudes to civil conspiracy claims. First, courts appear to dislike collective liability theories because they are inconsistent with the requirement of a causal relationship between a wrongdoer and the injured party. Another explanation is that courts believe that liability concerns cause manufacturers to invest excessive resources in accident cost avoidance measures or to withdraw useful products from the market. Courts have also been reluctant to intrude on defendants' First Amendment freedoms of expression and association. Finally, courts may be unwilling to encourage civil conspiracy claims because they often involve issues that are better addressed by other branches of government.


282. No civil conspiracy claim seems to have been allowed against DES manufacturers or the manufacturers of any other pharmaceutical product. So far, courts have also rejected civil conspiracy claims against the manufacturers of wheel rims. The only other group of manufacturers against whom plaintiffs have been successful are the makers of MTBE. See In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 175 F. Supp. 2d 593, 635 (S.D.N.Y. 2001).
In a civil case, the plaintiff ordinarily must prove each element of the case, including causation, by a preponderance of the evidence. This requirement often makes it difficult for plaintiffs to recover for injuries that have been caused by common products such as cigarettes, asbestos, or lead-based paint. Parties injured by such products often use civil conspiracy and other forms of collective liability to try to overcome causation-related proof problems.

One might expect courts to embrace collective liability theories to bypass oppressive causation requirements, but, in fact, they often seem reluctant to allow civil conspiracy claims to go to trial. One possible explanation for this judicial reluctance involves the concept of corrective justice. Corrective justice requires that one who is unjustly enriched at the expense of another is morally obligated to restore the victim to his former position. Moreover, it may also serve as a rationale for tort doctrines in which the defendant has not directly profited from personal injuries that nevertheless require compensation. The case for collective liability, however, is problematic when the defendant does not breach a particularized duty owed to the plaintiff. In other words, the wrongful act “and the transfer of resources that undoes it” constitute “a single nexus of activity and passivity where actor and victim are defined in relation to each other.”

Courts that adhere to this view of corrective justice may resist collective liability theories because they blur the requirement of a duty-based relationship between the wrongdoer and the victim.

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285. Gifford, supra note 279, at 875-76.
286. Id. at 876.
287. See generally id. at 881-90.
289. See Calnan, supra note 283, at 602-04.
290. See id. at 603-04.
291. See Gifford, supra note 279, at 885 (citing ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 125, 142-44 (1995)).
292. Id. at 885 (quoting WEINRIB, supra note 286, at 56).
293. See id. at 881-83.
B. Deterrence and Overdeterrence

The deterrence rationale for strict products liability is based on the notion that product manufacturers who engage in risky production or marketing practices should internalize the costs of product-based injuries that would otherwise fall on society.\(^{294}\) When a manufacturer is not held responsible for product-related injuries, it will not take those injuries into account when deciding how much money to allocate to product safety.\(^{295}\) A manufacturer who is required to compensate consumers for their injuries will have an incentive to reduce its liability exposure by reducing the occurrence of those injuries.\(^{296}\) In other words, a manufacturer who is held liable for product-related injuries will spend money on product safety when the marginal cost of accident reduction is less than the marginal reduction of potential liability.\(^{297}\)

On the other hand, the deterrent effect of tort liability may be lessened when injured parties fail to sue, when they recover nothing at trial, or when they accept a minimal settlement to avoid the emotional or financial costs of litigation.\(^{298}\) If this is true, then civil conspiracy and other forms of collective liability may offset the effects of underdeterrence by enabling injured consumers to avoid product identification and other causation problems that otherwise prevent them from recovering against manufacturers of defective products.

Collective liability may also lead to overdeterrence when the liability assessed against a manufacturer exceeds the damage actually suffered by accident victims. To illustrate, if a product’s total accident costs equal $100 million, the manufacturer should spend no more than that amount on product safety. If, however, expected tort recoveries exceed actual accident costs by $50 million, the manufacturer will spend up to $150 million to avoid tort liability. Spending $150 million to prevent $100 million in accident costs is an inefficient allocation of resources.

Overdeterrence not only causes excessive spending on accident cost avoidance, it may also induce manufacturers to take useful products off the market because of concerns about potential tort liability.\(^{299}\) The experience of the pharmaceutical industry suggests that this form of overdeterrence is a


\(^{295}\) See Raymond E. Gangarosa et al., Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol, 22 FORDHAM URB. L.J. 81, 81-82 (1994).

\(^{296}\) See Craig Brown, Deterrence and Accident Compensation Schemes, 17 U.W. ONTARIO L. REV. 111, 128 (1979); Priest, supra note 289, at 520.


serious problem. For example, in response to tort claims against vaccine manufacturers, a number of manufacturers have left the business since 1968. This litigation also led to an extraordinary rise in vaccine prices. Fear of massive tort liability caused the manufacturer of Bendectin, an anti-nausea drug, to withdraw it from the market. Therefore, courts that are concerned about the effects of overdeterrence are likely to view civil conspiracy claims with a jaundiced eye.

C. First Amendment Issues

Courts also have frequently expressed concern that civil conspiracy liability interferes with defendants' ability to exercise their First Amendment rights of free expression and association.

1. Freedom of Expression

The First Amendment declares that “Congress shall make no law . . . abridging the freedom of speech . . .” Courts have interpreted this language to mean that the government cannot regulate speech based on subject matter or viewpoint and any such regulation must be necessary to support a compelling governmental interest. This First Amendment protection is not limited to political or artistic expression but also extends to commercial speech to a lesser

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300. See, e.g., id. at 84-85 (describing how liability concerns caused Dow Corning, DuPont, and other biomaterials providers to stop producing these materials in the 1990s).
302. Id. at 1471-72.
303. Id. at 1473-74.
305. U.S. CONST. amend. I.
These First Amendment restrictions apply to common law tort doctrines as well as to statutes and administrative regulations.\footnote{307} Defendants raised freedom of speech issues in the Orthopedic Bone Screw Products Liability Litigation,\footnote{309} which involved civil conspiracy claims by thousands of plaintiffs against the manufacturers and distributors of orthopedic bone screw devices and their trade associations.\footnote{310} The plaintiffs maintained that the manufacturers of bone screw devices gave royalties and stock options to surgeons and other health care professionals in exchange for speaking at "seminars" which purported to show other doctors how to use these devices.\footnote{311} According to the plaintiffs, these were "purely commercial" seminars "conducted in the guise of educati[on]."\footnote{312} The physicians who spoke at them failed to discuss that the FDA had not approved these devices for pedicle fixation surgery and they failed to inform their audiences that clinical trials had revealed potentially serious safety problems with these devices.\footnote{313} The plaintiffs also alleged that the defendants paid various trade associations to hold seminars advocating the use of bone screw devices and concealing critical information about the safety of bone screw devices.\footnote{314} Later, the defendants allegedly created an industry trade association to conduct a study of pedicle screw fixation which, according to the plaintiffs, "was an intentional fraud, relying on selective data and ignoring unfavorable results."\footnote{315}

The defendants moved to dismiss all of the claims that were based on the speech at the seminars.\footnote{316} The district court refused, finding that the plaintiffs had "allege[d] false and misleading commercial speech, which does not qualify


\footnote{308}{See Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (holding that the First Amendment restricts a public figure’s ability to recover for intentional infliction of emotional distress); Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (finding that the First Amendment “require[s] that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved”); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (concluding that the First Amendment “prohibits a public official from recovering damages for a defamatory falsehood” absent a showing of “actual malice”).}

\footnote{309}{193 F.3d 781 (3d Cir. 1999).}
\footnote{310}{Id. at 784-85.}
\footnote{311}{Id. at 786.}
\footnote{312}{Id.}
\footnote{313}{Id. at 786-87.}
\footnote{314}{Id. at 787.}
\footnote{315}{Id.}
\footnote{316}{Id. at 788.
for First Amendment protection."\textsuperscript{317} The appeals court acknowledged that the First Amendment provides less protection to commercial speech than to other forms of expression, particularly where it was false or misleading.\textsuperscript{318} The court also declared that "[w]here the commercial and noncommercial elements of speech are 'inextricably intertwined,' the court must apply the 'test for fully protected expression.'"\textsuperscript{319} In this case, the court found that it was too early in the lawsuit to decide exactly what parts of the seminars, if any, constituted sales promotions and what parts were educational in nature.\textsuperscript{320} Accordingly, the court concluded that the factual dispute about the character of the seminars was sufficient to preclude the defendants' motion.\textsuperscript{321}

2. Freedom of Association

Freedom of association is also protected by the First Amendment.\textsuperscript{322} As the Supreme Court observed, "[e]ffective advocacy . . . is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."\textsuperscript{323} In \textit{NAACP v. Claiborne Hardware Co.},\textsuperscript{324} the Court extended this constitutional protection to a conspiracy-based tort, concluding that membership in the NAACP was protected conduct and its innocent members could not be held liable for the tortious acts of other members.\textsuperscript{325} Liability for illegal acts that occurred as part of an NAACP-organized boycott was unconstitutional unless "the group itself possessed unlawful goals and . . . the [defendant] held a specific intent to further those illegal aims."\textsuperscript{326}

Freedom of association may also be implicated when plaintiffs seek to hold individual members of a trade association liable for a conspiracy involving the trade association. Of course, the trade association itself can be held liable for its participation in a conspiracy.\textsuperscript{327} Mere membership in a trade association, though, will not cause innocent members to be held liable for a conspiracy

\begin{itemize}
  \item\textsuperscript{317} Id.
  \item\textsuperscript{318} Id. at 792.
  \item\textsuperscript{319} Id. at 793 (quoting Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988)).
  \item\textsuperscript{320} Id.
  \item\textsuperscript{321} Id.
  \item\textsuperscript{323} NAACP v. Alabama \textit{ex rel.} Patterson, 357 U.S. 449, 460 (1958).
  \item\textsuperscript{324} 458 U.S. 886 (1982).
  \item\textsuperscript{325} James M. Beck, \textit{Constitutional Protection of Scientific and Educational Activities from Tort Liability: The First Amendment as a Defense to Personal Injury Litigation}, 37 \textit{TORT & INS. L. J.} 981, 984 (2002).
  \item\textsuperscript{326} Id. (quoting \textit{Claiborne Hardware}, 458 U.S. at 920).
  \item\textsuperscript{327} See \textit{infra} Part IV.A.3.
\end{itemize}
carried out by other members. In the Asbestos School Litigation, asbestos manufacturer Pfizer sought to vacate a lower court’s denial of its partial summary judgment motion on the plaintiffs’ civil conspiracy and concert of action claims, contending that the imposition of tort liability would interfere with the exercise of its First Amendment rights. The plaintiff school districts claimed that the defendant and other manufacturers had sold asbestos-containing building products (ACBPs), which they knew were dangerous, without warning about the health risks of asbestos. They also alleged that the manufacturers had been acting as part of a civil conspiracy. As evidence of Pfizer’s participation in the conspiracy, the plaintiffs alleged that Pfizer had marketed an ACBP known as Kilnoise from 1964 until 1972 and that it joined a trade organization, Safe Buildings Alliance (SBA), in 1984. The manufacturers described the SBA as a “lobbying and public education organization” that represented the asbestos product manufacturers before state and federal legislators, the EPA and other agencies, and the public. The defendant argued that “‘[s]haring and discussing information which is a matter of public record and debate in a voluntary association such as the SBA is neither a conspiracy nor a concert of action that was in any way illegal.’”

The lower court had refused to dismiss the civil conspiracy and concert of action claims, finding that “‘there [was] evidence by which a jury could reasonably find that Pfizer later joined an ongoing conspiracy/concert of action by its involvement with, and financial support for ... [the SBA].’” Specifically, the district court stated that the plaintiffs had provided evidence that the SBA’s actions were not just educational but “were also aimed in part at convincing the public that SBA members had no prior knowledge of the dangers of asbestos” when they marketed asbestos products. In the court’s view, “[these] actions ‘could reasonably be interpreted by a jury as contributing to an ongoing conspiracy to conceal the asbestos industry’s alleged knowledge of the dangers of asbestos.’”

Relying on the Supreme Court’s reasoning in Claiborne Hardware, the Third Circuit held that the plaintiffs’ civil conspiracy and concert of action claims were trumped by Pfizer’s First Amendment rights. The court declared

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328. See infra Part IV.A.3.
329. 46 F.3d 1284 (3d Cir. 1994).
330. Id. at 1286.
331. Id.
332. Id.
333. Id. at 1287.
334. Id.
335. Id.
336. Id. (quoting the district court opinion) (alteration in original).
337. Id. at 1288 (quoting the district court opinion).
338. Id. (quoting the district court opinion).
340. In re Asbestos Sch. Litig., 46 F.3d at 1286.
that "[j]oining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection." Rejected the plaintiffs' "ongoing conspiracy" theory, the court ruled that the defendant could not be held liable for the tortious acts of other asbestos manufacturers simply because it had a "limited and (as far as the record reflects) innocent association with the SBA." This sort of vicarious liability, in the court's view, would make legitimate educational and lobbying activities "unjustifiably risky and would undoubtedly have an unwarranted inhibiting effect upon them." Freedom of association was also involved in Chavers v. Gatke Corp. In Chavers, a former automobile mechanic sued various manufacturers of asbestos-containing friction brake products, alleging that exposure to these products caused his cancer. The plaintiff conceded that he had no evidence that he was ever exposed to asbestos products manufactured by defendant Gatke Corporation but sought to hold it liable on theories of civil conspiracy and concert of action. The plaintiff's conspiracy claim was based on the defendant's involvement with Saranac Laboratory, a private research facility. According to the plaintiff's expert witness, beginning in 1936 a number of asbestos manufacturers, including the defendant, provided research funds to Saranac Laboratory to investigate the health effects of asbestos products. Saranac's researchers found that exposure to asbestos products posed serious health risks, including cancer, but at the insistence of some of the companies that financed its research, Saranac deleted all references to cancer in its published report. According to the plaintiff, the suppression of this information by those funding the research was "a tortious failure to warn potential users" of the health risks of asbestos exposure.

The state appellate court upheld the trial court's decision not to instruct the jury on the civil conspiracy claim since the plaintiff had not pled an underlying tort. The court also held that a concert of action instruction would have been inappropriate, in part because such claims cannot be based solely on membership in trade associations or research consortiums. A review of the record convinced the court that there was no evidence to support the claim that Gatke, which had contributed only $250 a year to Saranac Laboratory,

341. Id. at 1294.
342. Id.
343. Id.
344. 132 Cal. Rptr. 2d 198 (Ct. App. 2003).
345. Id. at 199.
346. Id.
347. Id. at 200.
348. Id.
349. Id.
350. Id.
351. See id. at 201-03.
352. See id. at 206-07.
“possessed the specific intent to promote the sale of asbestos products” on an industry-wide basis; rather, it seemed to have sought access to Saranac’s research primarily to assist in defending against workers’ compensation claims.\textsuperscript{353} Quoting from \textit{In re Asbestos School Litigation},\textsuperscript{354} the court declared that requiring a manufacturer “to stand trial for civil conspiracy and concert of action predicated solely on its exercise of its First Amendment freedoms could generally chill the exercise of the freedom of association by those who wish to contribute to . . . and otherwise associate with trade groups and other organizations that engage in public advocacy and debate.”\textsuperscript{355}

\textit{D. Institutional Competence}

As Professor Donald Gifford has pointed out, courts may also be reluctant to embrace collective liability theories, such as civil conspiracy, because they believe that legislative and administrative bodies, rather than the judiciary, should determine economic and regulatory policy.\textsuperscript{356} In the 1980s and 1990s, the issue of institutional competence arose in connection with product category liability.\textsuperscript{357} Under the theory of product category liability, courts could hold manufacturers strictly liable for injuries caused by inherently dangerous products because the accident costs they generate outweigh the benefits to public consumers.\textsuperscript{358} Plaintiffs’ attorneys have invoked this liability theory, usually without much success, against the manufacturers of such inherently dangerous products as asbestos, cigarettes, firearms, and alcoholic beverages.\textsuperscript{359}

Commentators, however, have condemned product category liability for two reasons. First, the adversarial nature of litigation and the courts’ limited access to information make them ill-suited to make generic determinations of risk and utility.\textsuperscript{360} Second, product category liability gives courts the power to

\textsuperscript{353} Id.

\textsuperscript{354} 46 F.3d 1284, 1295-96 (3d Cir. 1994).

\textsuperscript{355} Chavers, 132 Cal. Rptr. 2d at 207.

\textsuperscript{356} Gifford, supra note 279, at 934.


\textsuperscript{360} Harvey M. Grossman, \textit{Categorical Liability: Why the Gates Should Be Kept Closed},
impose massive liability upon manufacturers and, therefore, potentially to
decide whether entire classes of products, such as firearms or cigarettes, will
continue to be produced and consumed. Opponents of product category
liability argued that "legislative" decisions with this much power to shape
public policy should be left to the political process rather than being made by
the courts.

The first of these "institutional competence" critiques is probably not
applicable to civil conspiracy and other collective liability theories. While it
might be difficult for courts to weigh risks and benefits in a product category
case, it is not particularly difficult for them to ascertain whether or not the
defendants have engaged in a conspiracy. Furthermore, the underlying tort in a
civil conspiracy case is usually fraud—a concept with which courts are familiar.

The second critique, though, applies as clearly to civil conspiracy as it does
to product category liability. Because civil conspiracy in products liability
cases usually involves an entire industry and because such cases often involve
class actions and punitive damages, it is quite possible that a plaintiff's
judgment will economically cripple or even bankrupt an entire industry.
Recognizing that their institutional role is not to decide the fate of an industry,
courts unsurprisingly view civil conspiracy claims with some degree of
skepticism.

VI. CONCLUSION

Civil conspiracy claims provide plaintiffs with a potentially very useful
theory in product liability cases. Because each member of a conspiracy is held
jointly and severally liable, a plaintiff does not carry the burden of proving
which defendant caused the injury. A successful civil conspiracy claim may
also extend the statute of limitations and enable a plaintiff to obtain personal
jurisdiction over nonresident parties. Unfortunately for plaintiffs, courts have
not been very receptive to civil conspiracy claims and have required plaintiffs
to prove each element of their claim with highly credible evidence.

In general, this is a good policy. Courts should treat civil conspiracy claims
with caution because those claims weaken the requirement that there be a
causal relationship between a wrongdoer and the injured party. In addition,
they create the risk of massive industry-wide liability, perhaps inducing
manufacturers to overinvest in accident cost avoidance measures or to withdraw
useful products from the market. Finally, civil conspiracy claims can threaten
First Amendment freedoms and often involve policy issues that would be better
resolved by other branches of government.

36 S. TEX. L. REV. 385, 407 (1995); Kim D. Larsen, Note, Strict Products Liability and the
Risk-Utility Test for Design Defect: An Economic Analysis, 84 COLUM. L. REV. 2045, 2059-61

361. See Grossman, supra note 355, at 405-06.

362. See id.

363. Gifford, supra note 279, at 934.