The Need for Rational Boundaries in Civil Conspiracy Claims

MARK A. BEHRENS*
CHRISTOPHER E. APPEL **†

---

* Mark A. Behrens is a partner in the Public Policy Group of Shook, Hardy & Bacon L.L.P. in Washington, D.C. and a Distinguished Visiting Practitioner in Residence at Pepperdine University School of Law (Fall 2010). He received his B.A. from the University of Wisconsin-Madison and his J.D. from Vanderbilt University Law School, where he was a member of the *Vanderbilt Law Review*.

** Christopher E. Appel is an attorney in the Public Policy Group of Shook, Hardy & Bacon L.L.P. in the Washington, D.C. He received his B.S. from the University of Virginia's McIntire School of Commerce and his J.D. from Wake Forest University School of Law.

† Research support for this article was provided by the American Tort Reform Foundation. The views discussed herein are those of the authors.

I. INTRODUCTION

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

"Recently, civil conspiracy has become a favored weapon of plaintiffs' lawyers in mass tort product liability litigation involving asbestos, breast implants, tobacco, automotive tires and other products, as well as in toxic tort cases."[3] Civil conspiracy claims are often asserted by plaintiffs to allege the liability of peripheral defendants based on their associations with the party primarily responsible for the allegedly injurious product—the manufacturer—such as through membership in a relevant industry or trade association.[4]

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

---

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

II. THE ROLE OF DUTY IN CIVIL CONSPIRACY

A. TORT LAW PRINCIPLES OF DUTY

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

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

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

---

12. *See* KEETON ET AL., *supra* note 10, § 53, at 356-58.
13. *See* DAN B. DOBBS, THE LAW OF TORTS § 277, at 577-78 (2000).
14. *See* Pulka v. Edelman, 358 N.E.2d 1019, 1022 (N.Y. 1976).
15. Courts often analyze (1) the foreseeability of harm to the injured party; (2) the degree of certainty he or she suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant and the consequences to the community of imposing a duty of care with resulting liability for breach; and (7) the availability, cost, and prevalence of insurance for the risk involved. *See, e.g.*, Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968). Foreseeability of harm, alone, is not enough. As the California Supreme Court explained in *Thing v. La Chusa*, 771 P.2d 814, 830 (Cal. 1989), "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury."
16. *See* DOBBS, *supra* note 13, § 227, at 579.
17. Southland Corp. v. Griffith, 633 A.2d 84, 90 (Md. 1993).
18. *See* RESTATEMENT (SECOND) TORTS § 314A (1965).
19. *See* RESTATEMENT (SECOND) TORTS § 314B (1965).

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

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

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

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

---

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

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

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

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

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

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

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

B. THE LANDSCAPE OF DUTY IN CIVIL CONSPIRACY

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

---

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

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

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

1. *States Adopting an Independent Duty Rule*

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

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

---

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

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

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

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

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

32. *Id.* at 459.

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

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

35. *See id.* at 199.

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

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

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

---

36. *See id.*
37. *See id.* at 199-201.
38. *Id.*at 200-202.
39. *Chavers,* 132 Cal. Rptr. 2d at 203 (emphasis added).
40. *See id.*
41. 927 S.W.2d 608, 612 (Tex. 1996).
42. *See id.* at 615.
43. *Id.* at 617. *See also* Block v. Wyeth, Inc., No. 3:02-CV-1077-N, 2003 WL 203067 (N.D. Tex. Jan. 23, 2003) (holding that plaintiff claiming injury from a generic drug could not recover in a civil conspiracy action against the brand name manufacturer because the brand name manufacturer owed no duty to the plaintiff); Staples v. Merck & Co., 270 F. Supp. 2d 833 (N.D. Tex. 2003) (holding that consumers could not maintain civil conspiracy claim against clinical researcher).
44. 174 F. Supp. 2d 400 (D. Md. 2001).

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

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

2. *States Rejecting an Independent Duty Rule*

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

---

45. *See id.* at 409.
46. *Id.* (emphasis added).
47. *Id.* (quoting *Applied Equip. Corp.*, 869 P.2d at 458).
48. *See* Mosley v. Garlock, Inc., No. 2002CV59552, 2003 WL 22331284, at *1 (Ga. Super. Ct. June 25, 2003) ("A cause of action for civil conspiracy does not arise against a defendant who is not bound by the duty violated by the alleged wrongdoing."); Hunt v. Air Prods. & Chems., No. 052-9419, 2006 WL 1229082, at *3 (Mo. Cir. Ct. Apr. 20, 2006) ("Here, plaintiffs allege many actions by defendants to conceal or misrepresent the hazards of welding fumes. There are no allegations, however, that these actions independently caused any harm to the plaintiffs."); *see also* 15A C.J.S. *Conspiracy* § 8 (2010): ("[Civil conspiracy] allows tort recovery only against a party who already owes a duty and is not immune from liability based on applicable substantive tort law . . . ."); 16 AM. JUR. 2D *Conspiracy* § 55 (2010) ("Tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing a tort in that he or she owes a duty recognized by law to the plaintiff and is potentially subject to liability for breach of that duty.").
49. 525 A.2d 146 (Del. 1987).
50. *Id.* at 147.
51. *Id.*

the hazards of asbestos exposure.[52] The court distinguished between the situation where a party fails to speak, which the court said is not actionable absent a fiduciary or contractual relationship, and the "*active* misconduct of intentionally suppressing information."[53] The court concluded: "Should plaintiffs establish that Nicolet was a member of a conspiracy which actively suppressed and concealed material facts, with the intent to induce plaintiffs' continued exposure to asbestos, Nicolet would be jointly and severally liable with its co-conspirators for resulting damages."[54]

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

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

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

---

52. *Id.* at 150.
53. *Id.*.
54. *Nicolet, Inc.*, 525 A.2d at 150. *See also* Farmer v. City of Newport, 748 S.W.2d 162 (Ky. Ct. App. 1988) (allowing men who lost their families in an apartment building fire to bring a concert of action claim against approximately one hundred mattress manufacturers alleging that defendants withheld information about the flammable nature of mattresses from the public).
55. 84 P.3d 1056 (N.M. Ct. App. 2003).
56. *Id.* at 1058.
57. *Id.*
58. *See id.* at 1064-65.
59. *Id.* at 1064.

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

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

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

---

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

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

62. *Id.* at 1012.

63. *Id.* at 1114-15.

64. *See id.* at 1022.

65. *Id.*

66. *See id.* at 1022.

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

68. *Id.* at 1113.

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

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

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

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

---

70. *See id.*
71. *Id.* at 1117.
72. 645 N.E.2d 888 (Ill. 1994).
73. *See id.* at 895.
74. *See McClure*, 698 N.E.2d at 1118.
75. *Id.*
76. *Id.*
77. *See id.* at 1120.
78. *See* McClure v. Owens Corning Fiberglas Corp., 720 N.E.2d 242, 268 (Ill. 1999).
79. 712 N.E.2d 939 (Ill. App. Ct. 1999), *vacated*, 722 N.E.2d 193 (Ill. 1999), *on remand*, 725 N.E.2d 792 (Ill. App. Ct. 2000).
80. *Id.* at 941.

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

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

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

---

81. *Id.*
82. *Id.*
83. *Id.* at 944 (emphasis added).
84. *Id.* (emphasis added).
85. *Burgess*, 722 N.E.2d at 193.
86. 725 N.E.2d 792 (Ill. App. Ct. 2000).
87. *Id.* at 795.
88. *See id.* at 797.
89. *Id.* at 796.
90. *See id.* at 797.
91. *See* BEP, Inc. v. Atkinson, 174 F. Supp. 2d 400 (D. Md. 2001).
92. *See* Multiut Corp. v. Draiman, 834 N.E.2d 43, 51-52 (Ill. App. Ct. 2005). The Illinois decision is distinguishable from the Maryland case based on the covenant not to compete agreement, the wife's prior relationship with her husband's employer, and the wife's participation in forming the competing companies and serving as CEO.