Cir.1991) (allegations in a complaint which are based on inference and speculation cannot defeat a motion for summary judgment on a conspiracy claim), cert. denied 503 U.S. 951, 112 S.Ct. 1514, 117 L.Ed.2d 650 (1992).

Moreover, mere proof of parallel or identical conduct on the part of the alleged conspirators is not sufficient to prove a conspiracy:

> It is long settled in the Eleventh Circuit and in other jurisdictions that evidence of parallel conduct *alone* is insufficient to show a conspiratorial agreement.
>
> . . .
>
> Courts agree that ambiguous evidence, that is, evidence that is as consistent with conspiratorial behavior as it is with independent conduct is insufficient, as a matter of law, to show a conspiracy.
>
> . . .
>
> Thus, a plaintiff seeking to establish the existence of a conspiracy must offer evidence that tends to exclude the possibility that the conduct at issue was independent.
>
> . . .
>
> As the Eleventh Circuit clearly held in *Harcros,* where the proof for a Proposition is in "equipoise," it has not been established by a preponderance of the evidence. *Id.* at 592. Quite simply put, a "fact that can only be decided by a coin toss has not been proven by a preponderance of the evidence, and cannot be submitted to the jury."

Lynn v. Amoco Oil Co., 459 F. Supp.2d 1175 (M.D. Ala. 2006); *Banks v. Gallagher*, 686 F.Supp.2d 499, 529 (M.D. Pa. 2009)("under Pennsylvania law, parallel conduct, even consciously parallel conduct, is "not sufficient to establish either a civil conspiracy or [a] concerted action" claim.)(quoting *In re Asbestos School Litig*., 46 F.3d 1284, 1292 (3d Cir.1994)); *McClure v. Owens Corning Fiberglas Corp*., 188 Ill.2d 102, 241 Ill.Dec. 787, 720 N.E.2d 242, 259 (1999) ("[P]arallel conduct may serve as circumstantial evidence of a civil conspiracy among manufacturers of the same or similar products but is insufficient proof, by itself, of the agreement element of this tort."); *Rastelli v. Goodyear Tire & Rubber Co*., 79 N.Y.2d 289, 582 N.Y.S.2d 373, 375, 591 N.E.2d 222, 224 (1992)("Parallel activity among companies developing and marketing the same product, without more, we have held, "is insufficient to establish the agreement element necessary to maintain a concerted action claim").

In addition, in some jurisdictions, in order to prove a civil conspiracy claim, a plaintiff must prove that object of the conspiracy was to cause damage to the plaintiff**.**

> The plaintiff must allege and prove that the claimed conspirators had actual knowledge of, and the intent to bring about, the object of the claimed conspiracy.
>
> '[F]or conspiracy the test is 'what is in truth the object in the minds of the combiners when they acted as they did.' Malice in the sense of malevolence, spite or ill-will is not an essential for liability; what is required is that the combiners should have acted *in order that* (not *so that*) the plaintiff should suffer damage. If they did not act in order that the plaintiff should suffer damage they are not liable, however selfish their attitude and however inevitable the plaintiff's damage may have been.'

First Bank of Childersburg v. Florey, 676 So. 2d 324, 327 (Ala. Civ. App. 1996)(quoting *AmSouth Bank, N.A. v. Spigener,* 505 So. 2d 1030, 1040 (Ala. 1986) (quoting Jolowicz & Lewis, *Winfield on Torts,* Conspiracy 557, 559, 560 (8th ed. 1967)) (emphasis in original).

> The most important feature of a tortious conspiracy where unlawful means are not used is that the object or purpose of the combination must be to cause damage to the plaintiff.

Snyder v. Faget, 326 So. 2d 113, 119 (Ala. 1976); *see also Norwood v. Raytheon Co*., 237 F.R.D. 581, 599 (W.D.Tex.2006)("Some jurisdictions require proof of both an overt act and a specific intent to harm the plaintiff.").

D. The Alleged Conspiracy Must be the Proximate Cause of Injury to the Plaintiff.

Even if a plaintiff can plead and prove the existence of a conspiracy, courts have recognized that such a claim is not actionable unless the alleged conspiracy is the proximate cause of injury to the plaintiff:

> The substance of a conspiracy action is the damage and not the conspiracy, and the damage must appear to have been the natural and proximate result of defendants' acts.

Purcell Co., Inc. v. Spriggs Enterprises, Inc., 431 So. 2d 515, 523 (Ala. 1983). The MDL Court in the welding fume litigation rejected claims arising out of alleged misrepresentations made in trade journals where the plaintiff did not present any proof that he relied on the alleged representations:

> One type of misrepresentation Ruth identifies is historical statements made to industry participants, in trade journals, that welding is safe. But Ruth does not assert the defendants (or their alleged co-conspirators) made these affirmative statements to *him;* and he does not assert he, *himself,* ever read or heard these statements; and he does not assert he *relied* on these statements. While Ruth argues that the effect of these historical

> statements was to create a lasting false impression, causing industry participants, including his employer, to be less careful than necessary to assure his safety, this effect is too attenuated to suggest any direct reliance on an affirmative misrepresentation made by a defendant.

Ruth v. A.O. Smith Corp., 2005 W.L. 2978694, at *5 (N.D. Ohio. Oct. 11, 2005)(emphasis in original).

Similarly, in *Santiago v. Sherwin Williams Co.***,** 3 F.3d 546 (1st Cir. 1993), the plaintiff alleged that the defendants conspired to conceal the hazards of lead-containing paint. In rejecting this claim, the Third Circuit held as follows:

> In essence, plaintiff claims that, "in light of the substantial medical evidence of the unreasonable risk that [lead paint] posed to young children [,]" certain of defendants' actions as members of the LIA between 1930 and 1945 were tortious. Specifically, plaintiff points to defendants' "initiat[ion of] nationwide promotional campaigns, encourage[ment of] the use of white lead in house paint through extensive advertising, [attempts] to undermine the growing medical evidence of the danger of lead paint, and work[ ] to prevent the enactment of governmental regulations which would have restricted the use of white lead in painting buildings." ***What is utterly lacking from her presentation, however, is any evidence that these actions, during the fifteen year period she identifies, had any role in causing lead paint to be applied to the walls of her childhood home.*** Even if we assume that at least some of the lead paint consumed by plaintiff was applied to her home during the period of defendants' alleged concerted actions, there is *no* evidence that the application resulted from these actions, or that it would not have taken place in the absence of these actions.

Santiago, 3 F.3d at 552 (emphasis added). *See also*, *Taylor v. Airco, Inc.*, 503 F.Supp.2d 432, 446-47 (D. Mass. 2007) (claim that the defendants conspired to conceal the hazards of vinyl chloride was not actionable because the plaintiff was not aware of the alleged misrepresentations made as part of the conspiracy); *Bogner v. Airco, Inc.,* No. 02-1157, 2003 WL 24121083 at * 4 n. 4 (C.D.Ill. Apr.1, 2003)("[P]aragraphs 50 through 83 of Bogner's Second Amended Complaint focus on an alleged agreement to conceal the known dangers of vinyl chloride through publication of the material safety data sheet SD-56. Bogner has not (and presumably cannot) allege, however, that Mr. Bogner ever saw, heard, or read the information contained in SD-56.").

II. Strategies For Defending Conspiracy Claims.

A. Early Dispositive Motions to Address Pleading Deficiencies.

Many times defense counsel may eschew an early dispositive motion to dismiss or for more definite statement because of the assumption in many courts that specific pleading of facts in mass torts cases is not necessary or required. Indeed, in many mass tort settings, courts have actually encouraged the filing of a very general master complaint in order to initiate litigation on behalf of legions of plaintiffs. However, counsel should re-think such strategies in light of recent developments in the law concerning pleading requirements, especially in cases pending in federal court.

Since *Conley v. Gibson*, 355 U.S. 41 (1957), the pleading standard in federal court has been the liberal "notice pleading" standard. Under *Conley*, a complaint was not to be dismissed for failure to state a claim unless it appeared "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. 45-46. However, two recent United States Supreme Court decisions fundamentally altered that standard in favor of a "plausibility standard." *Ashcroft v. Iqbal,* 129 S.Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007). The standard was described in the *Iqbal* case as follows:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . .Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' . . .

129 S.Ct. at 1949. The *Iqbal* court stated that two working principles underpinned its decision: (1) the principle that a court must accept the allegations of a complaint as true did not apply to legal conclusions; and (2) only a complaint that presented a plausible claim for relief would survive a motion to dismiss.

There have been efforts in Congress to abrogate the new standard articulated by *Iqbal* and *Twombly*. Moreover, the case law applying this new standard is still being developed. However, for now, at least in cases filed in federal court, this case law provides new opportunities for defense counsel to attack the shotgun pleading complaints that often initiate mass tort actions.

B. Discovery Designed to "Smoke Out" the Basis for the Conspiracy Claim.

Direct contention interrogatories can be very useful in forcing the plaintiffs to set out the specific facts that allegedly support their conspiracy claim. In particular, this discovery should request the plaintiff to state the following: when did the conspiracy occur, who were the members of the conspiracy, when did the defendant joined the conspiracy, what was the specific agreement, what evidence shows proof of the agreement, what tortious acts were committed by which members of the conspiracy, and how the plaintiffs were injured as a result of the conspiracy. The failure of the plaintiff to provide this information can be useful in support of a motion for summary judgment. Moreover, such failure to provide details can be helpful in preparing motions *in limine*.

C. "Global" Conspiracy Allegations.

In cases where the plaintiffs are asserting claims against a non-selling defendant, the plaintiffs are generally unable to show that the defendant actually concealed information from the specific plaintiffs; rather, the plaintiffs allege that the information was suppressed from the public generally. The oft-repeated theme in these mass tort cases is that the entire world was deprived of some key piece of health or safety information because of some industry conspiracy. However, modern reality is that health and safety research is conducted and disseminated on a massive scale by a wide variety of stakeholders. Moreover, plaintiffs often try to paint legitimate scientific debate on health and safety issues in a sinister light. A discovery plan should include efforts to obtain discovery regarding the public dissemination of information and research concerning the product, chemical or process at issue. For example, some key areas of inquiry that should be pursued include the following:

- **Health and Safety Research**. Counsel should identify governmental agencies that perform research regarding the specific product, chemical, or process at issue, such as the National Institute of Environmental Health Sciences (NIEHS) and the National Institute of Occupational Safety and Health (NIOSH).[2] Many of the research grants are paid to academic institutions or private non-manufacturing research laboratories. Moreover, many foreign governmental institutions such as the European Union and the Health Safety Executive in the U.K. are very active in occupational health and safety research.

[2] A good source of information is the National Institute of Health's Research Portfolio Online Reporting Tools, which is a searchable database of NIH-funded research. The on-line historical information may be incomplete, so a Freedom of Information Act request is usually a good idea. In addition, there are NIH staff dedicated to fielding questions about FOIA requests, who can be very helpful in locating information concerning government-funded research.

- **Governmental Efforts to Disseminate Data**. Governmental agencies such as NIOSH, OSHA and MSHA publish information concerning potentially hazardous products used in workplace settings in a wide variety of formats. In addition to information provided on-line, these agencies often develop supplemental materials such as industry publications and handouts to be distributed in the workplace.

- **Information Regarding Safety Rules Governing the Workplace at Issue**. The work practices of the employer are critical and should be explored thoroughly. The Hazardous Communications Standard contains explicit requirements for the employer to train workers about known health effects and safe work practices concerning hazardous chemicals. Defense counsel should determine whether the employer is a sophisticated user, whether the employer had access to sufficient health and safety information to develop responsible rules for protecting workers and whether those rules are enforced.

- **Information Disseminated by the Plaintiff's Union**. Many of the larger unions are well-funded and have industrial hygienists or physicians either on staff or available for consultation. Moreover, unions frequently distribute health and safety information to their members through safety meetings, publications or courses.

- **Scientific Literature**. Counsel should investigate whether the particular health or safety issue in the case has been discussed in the open scientific literature. Even if the plaintiff did not have access to the literature, the fact of publication can be useful to show the implausibility that a conspiracy to conceal the information existed.

- **Scientific Forums**. There are a wide number of industrial hygiene and toxicological organizations throughout the world that hold meetings or seminars where cutting edge health and safety issues are discussed. Find out from experts in the field which organizations may have sponsored public forums where your issues may have been discussed. These meetings often include speakers and participants employed by governmental agencies and academic institutions as well as industry.

- **Toxic Substances Control Act Filings**. For the past several decades, the Toxic Substances Control Act has required manufacturers and others to submit health and safety information concerning hazardous chemicals to the E.P.A. These files are publicly available, and can be obtained through Freedom of Information Act requests.[3]

[3] In a recent toxic tort case, the plaintiffs attempted to claim that the defendants' alleged violations of TSCA were evidence of a conspiracy to conceal information from the government and the public.

A detailed showing of the wide variety of information that is available in the public domain can be useful to show the implausibility that a conspiracy existed and that it was the cause of any damage to the plaintiffs.

D. Specific Company Story.

Defense of a conspiracy claim will undoubtedly require some common defense themes that apply to all of the defendants, however, defense counsel should not neglect a company story, in addition to the general defense of the conspiracy allegations. While the company story should involve a defense of the specific warnings provided by your client, it should also involve other efforts the company has undertaken to promote worker safety as to the product or process at issue, both as to its employees and customers. This message, however, should not be a merely a feel-good story about how benevolent and wonderful the defendant is, but should be tailored to the issues of knowledge and control that are pertinent in the case. Moreover, the story should emphasize how effective product stewardship is smart business and is a critical part of the company's business strategy.

E. Motions *in Limine*

Counsel will definitely want to be prepared to file motions *in limine* as to alleged statements that occurred outside the time frame your client supposedly was a member of the conspiracy. In addition, in many of these cases, plaintiffs argue that attempts to petition the government concerning exposure limits or other safety issues are indicative of a conspiracy. In that instance, counsel should consider a motion *in limine* based upon the "*Noerr-Pennington* doctrine"[4] which prohibits claims that are premised upon a defendant's constitutionally protected efforts to petition the government. The doctrine has been used in numerous cases to prohibit common law claims that are based upon a defendant's attempts to influence governmental action. *See*, *e.g.*, *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 160 (3d Cir. 1988) ("In numerous cases, the courts have rejected claims seeking damages for injuries allegedly caused by the defendants' actions directed to influencing government action.") (collecting cases); *In re Asbestos Sch. Litig.*, 46 F.3d 1284 (3d Cir. 1994)(First Amendment precluded civil conspiracy claims based on the manufacturer's efforts as part of a trade organization to lobby Congress, the Environmental Protection Agency, and other local regulatory agencies); *Tuosto v. Philip Morris USA Inc.*, No. 05 Civ. 9384, 2007 WL 2398507, *5 (S.D.N.Y. Aug. 21, 2007) ("*Noerr-Pennington* has also been applied to bar liability in state common law tort claims, including negligence and products liability claims, for statements made in the course of petitioning the government."); *Lynn v. Amoco Oil Co.*, 459 F. Supp. 2d 1175, 1189 (M.D. Ala. 2006)("[P]laintiffs seek to show that the

[4] The name "*Noerr-Pennington"* comes from two United States Supreme Court cases recognizing that legislative lobbying efforts could not serve as the basis for federal antitrust liability. *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) and *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961).

defendants conspired together by agreeing to develop standards and petitioning state and federal government entities to adopt them. Such activity is protected by the Constitution and may not be proof of the conspiracy that the plaintiffs allege."); *Senart v. Mobay Chem. Corp.*, 597 F. Supp. 502, 505-06 (D. Minn. 1984)(rejecting conspiracy claim against defendants who expressed opposition to OSHA to more stringent standards of exposure to certain chemicals).

CONCLUSION

While conspiracy claims have been most prevalent in toxic tort or products liability litigation, there is every reason to suspect that this playbook will be used increasingly in other scenarios as well. They are attractive from the plaintiffs' perspective as they attempt to short-cut the legal requirement of proving specific causation for each individual plaintiff. However, the plaintiffs' bar has also become enamored of conspiracy allegations from a strategic perspective because they tend to put the fact-finder's focus on the conduct of the defendant, rather than the actions of the plaintiff or other parties who may well have been in a better position to prevent an injury from occurring.

Jury research has shown that issues of knowledge and control are more important in punitive damages cases than factors such as sympathy or corporate image:

> Our research shows that the most important factors in determining the likelihood of punitive damages in any case are knowledge and control. How much did the plaintiff know about and how much control did plaintiff have over the events and circumstances which produced the injury in the case?
>
> . . .
>
> Jurors compare plaintiffs and defendant's knowledge and control. When a defendant is perceived to have had more knowledge and control than the plaintiff, the plaintiff is seen as more deserving and the defendant more blameworthy.

Trial Tip: The Best Way to Assess the Risk of Punitive Damages, http://www.decisionquest.com/utility/showArticle/?objectID=497; *see also* Ross P. Laguzza, *Corporate Image is Everything ... Or Is It?* R & D Strategic Solutions, LLC (2003). While defense counsel in conspiracy cases will have to present evidence that its conduct was not tortious, this evidence needs to be put in the context of the overall picture of knowledge and control. Defense counsel's strategy should be a broad-based approach, not only focusing on your client's conduct, but showing that that the tools and information necessary to protect the plaintiff were readily available and thus could not have been concealed.

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Wynn joined the firm in 1993 and has been a partner since 2000. His practice primarily involves toxic tort cases, complex commercial cases, class actions and other mass tort litigation. He is admitted to practice in all Alabama and Mississippi state and federal courts and the Eleventh Circuit, Fifth Circuit and Sixth Circuit Courts of Appeals.

Wynn is honored that a wide variety of clients have trusted him to handle challenging cases involving a variety of industries. Wynn firmly believes that every battle is won or lost long before it is fought, and faithfully applies that philosophy to his practice to give his clients the best possible representation.

Wynn received his Bachelor of Arts degree from the University of Mississippi, where he graduated summa cum laude and was named a Harry S. Truman Scholar. While at Vanderbilt University Law School, Wynn was a John W. Wade Scholar, served as Associate Editor of the Vanderbilt Law Review and was elected to the Order of the Coif.

Wynn is a member of the Defense Research Institute and the Alabama Defense Lawyers Association, where he has served on the faculty of the Trial Academy. Away from work, Wynn enjoys spending time with his wife and two daughters. In addition, he is a member of Oak Mountain Presbyterian Church where he serves as a deacon and Chairman of the Mercy Ministry.