

When Allegations Ignore Reality

By Stephen J. Finley, Jr.

Injecting claims related to intent and motive, such as conspiracy or concert of action, conflicts with this traditional product liability framework.

Defending Conspiracy Claims in Product Liability Actions

The crux of a product liability case is the plaintiff's allegation that a particular product of a specific manufacturer caused the alleged injury. Failing to plead and to prove this basic element will generally doom a plaintiff's product

liability claim, often before it even reaches a jury. Against this backdrop is the reality that many entities along the chain of distribution are involved in a common effort to design, build, advertise, sell and deliver a finished product to the consumer. This "common effort" may invite the assertion of a claim for civil conspiracy in what should be a run-of-the-mill product liability case. When plaintiffs assert civil conspiracy claims, manufacturers, distributors and others find themselves facing allegations that they not only played a role in bringing a defective product to market, but they did so as part of an illicit agreement with others.

A civil conspiracy allegation in a product liability lawsuit upsets basic principles of product liability law by shifting the focus away from the product toward a consideration of conduct and intent. Claims alleging product defect or negligence on the part of a manufacturer or a distributor are product-focused. Conspiracy claims

are, by definition, centered on the intent of the co-conspirators. A product liability claim should not—and, as this article will explore, generally does not—lend itself to a concurrent allegation of conspiracy.

Conspiracy Defined

At its most basic definition, a civil conspiracy is an agreement by two or more persons to do something illegal or to do something legal in an illegal manner or by illegal means. It is an intentional tort. A conspiracy count is generally not a stand-alone cause of action and cannot be maintained without a valid underlying claim. *See, e.g., Spain v. Brown & Williamson Tobacco Corp.*, 872 So. 2d 101, 123 (Ala. 2003) ("[C]onspiracy itself furnishes no cause of action. The gist of the action is not the conspiracy but the underlying wrong that was allegedly committed. If the underlying cause of action is not viable, the conspiracy claim must also fail.")



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A concert of action claim, which is similar to a conspiracy claim, involves two or more persons committing a tort while acting in concert with one another or by common design. See Restatement (Second) Torts §876 (Persons Acting in Concert). Similar to a conspiracy claim, a concert of action claim is an intentional tort that requires an underlying cause of action. While some states will allow a plaintiff to maintain claims for conspiracy and concert of action simultaneously, others will dismiss the concert of action claim as duplicating the conspiracy count.

A conspiracy claim requires an allegation and proof of an intent to harm a plaintiff. Unlike product liability claims, which are typically centered on the attributes of a product, a conspiracy claim is conduct focused. Accordingly, a plaintiff must initially allege, and eventually prove, that a manufacturer entered into an agreement with the intent to harm the plaintiff. A product liability complaint that fails to plead that the manufacturer set out to harm a product user “on purpose” has not alleged a conspiracy.

Pleading Conspiracy in a Product Liability Case After *Twombly*

Defendants faced with a civil conspiracy claim should immediately review the Supreme Court decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which involved consideration of the plaintiffs’ conspiracy allegations. *Twombly* is a defendant’s primary and best tool to attack the sufficiency of a complaint. Its application is especially appropriate when contesting the adequacy of a plaintiff’s pleading of a conspiracy count. Pleading a conspiracy claim is no small task. “It generally takes fewer factual allegations to state a claim for simple battery than to state a claim for... conspiracy.” *W. Penn Allegheny Health Systems v. UPMC*, 627 F.3d 85, 98 (3rd Cir. 2010). While reviewing courts may have previously given plaintiffs the benefit of the doubt and leniently drawn inferences to permit a conspiracy claim to survive a motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6), *Twombly* requires an end to such a practice.

Courts applying *Twombly* in the product liability realm have found claims against alleged co-conspirators insufficiently

pleaded when the plaintiff alleged only that multiple defendants failed to warn of the harmful propensities of their products. In *Smith v. Univar USA, Inc.*, 2013 U.S. Dist. Lexis 36843 (E.D. Ky. Mar. 18, 2013), the plaintiffs alleged that a group of manufacturers sold chemicals to their employer without adequately warning the employer of the health risks of those chemicals. The plaintiffs’ complaint included allegations that these manufacturers “agreed with each other to conceal the adverse health effects [of their products].” *Id.* at * 13. Citing *Twombly*, the court rejected this allegation as a generic pleading “without specifics as to the role each [defendant] played in the alleged conspiracy.” *Id.* at * 14. While the court denied the defendants’ motion to dismiss the product liability theories, it found the conspiracy allegations inadequate and dismissed them.

In *Acosta Orellana v. CropLife Int’l*, 711 F. Supp. 2d 81 (D. D.C. 2010), which involved allegations of injuries stemming from fungicide exposure, the plaintiffs asserted a civil conspiracy count that the court found insufficient under *Twombly*. The complaint alleged nothing more than a common effort to distribute the allegedly defective product. Specifically, it alleged that the defendant “acted in concert to promote heavy usage of [the fungicide],” provided false and misleading information regarding the dangers of its use and worked to ensure a market for the product. *Id.* at 91–92. The plaintiffs had not alleged a conspiracy, only that the chemical agent was defective and was accompanied by insufficient warnings. In other words, the plaintiffs attempted to convert a traditional product liability claim into a conspiracy. The court rejected this effort, finding that the allegations lacked “factual support that even tend[ed] to support the existence of an agreement.” *Id.* at 92.

Product liability practitioners should look to decisions applying *Twombly* in areas of law other than product liability for guidance in challenging conspiracy allegations. For example, courts have applied *Twombly* in antitrust cases and commercial disputes to require a plaintiff allege the specific activities attributed to each member of an alleged conspiracy. See, e.g., *In re Elevator Antitrust Litigation*, 502 F.3d 47, 50 (2d Cir. 2007) (holding that a complaint list-

ing “in entirely general terms without any specification of any particular activities by any particular defendant” is “nothing more than a list of theoretical possibilities, which one could postulate without knowing any facts whatsoever.”) *Twombly* and interpreting case law provide defense attorneys with effective tools to challenge non-specific allegations lumping manufacturers and

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distributors together in a conspiracy claim without parsing out which activity is attributed to which party.

Challenging the Underlying Cause of Action

In *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534 (Pa. Super. Ct. 2003), the Pennsylvania Superior Court was faced with determining whether a civil conspiracy count could survive after the plaintiff’s product liability claim was dismissed. The court affirmed the lower court’s award of summary judgment to the defendant on the plaintiff’s failure to warn claim. Without an underlying product liability claim, the conspiracy claim had to be dismissed as a matter of law.

The *Viguers* decision invites consideration of a threshold question: can a product liability claim, whether based in strict liability, negligence or breach of warranty, ever serve as the underlying tort to support a conspiracy claim? Many jurisdictions have answered this question “no”. See, e.g., *Gonzalez v. Am. Home Prods. Corp.*, 223 F. Supp. 2d 803, 805 (S.D. Tex. 2002) States that adopt this view do so because proving a conspiracy claim requires a plaintiff to establish a deliberate and intentional agreement by the conspirators. In a product liability case, typically that means the manufacturer and the distributor. How-

ever, many courts find that it is illogical and inconsistent with the principles underlying product liability law to permit a plaintiff to allege that those in the chain of distribution either conspired to commit a negligent act or deliberately agreed to injure a plaintiff under a strict liability theory. See, e.g., *Sonnenreich v. Philip Morris Inc.*, 929 F. Supp. 416, 419 (S.D. Fla.

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1996) (“Logic and case law dictate that a conspiracy to commit negligence is a non sequitur.”). Some decisions have expanded this holding to all product liability claims, regardless of the theory asserted. See, e.g., *Campbell v. A.H. Robins Co.*, 615 F. Supp. 496, 500 (W.D. Wis. 1985) (explaining that it is “incomprehensible” to hold that the defendants conspired to cause “negligent harm” or “damages under a strict liability theory” or a warranty claim.)

In many, if not most, of the states that have codified their product liability law in a product liability act, the courts have interpreted that statute as prohibiting a product liability plaintiff from maintaining a conspiracy claim. In *Brown v. Philip Morris, Inc.*, 228 F. Supp. 2d 506 (D.N.J. 2002), the United States District Court for the District of New Jersey was faced with determining whether the New Jersey Product Liability Act subsumed the plaintiff’s civil conspiracy count. The court evaluated the scope of the statute, its text and its purpose and found that the act was intended to encompass all claims involving “harm caused by a product.” *Id.* at 517. The court found that “any doubt” about the answer to this question was removed

when the plaintiff classified her claim as “based on the assertion that the decedent contracted fatal cancer from smoking cigarettes.” *Id.* Since the New Jersey Product Liability Act was intended to provide the sole vehicle for plaintiffs to assert all claims involving harm caused by a product, except for breach of express warranty, the plaintiff’s conspiracy and fraud claims were subsumed by the act. Courts have interpreted several other states’ product liability acts, including the Connecticut Product Liability Act, the Louisiana Products Liability Act and the Tennessee Products Liability Act, as barring a product liability plaintiff from maintaining civil conspiracy claims.

The Parallel Conduct Defense

What a plaintiff calls a conspiracy may actually amount to nothing more than allegations of so-called “parallel conduct.” In other words, two or more entities may undertake to do the same thing at the same time for entirely legal reasons and using completely legitimate means. In the product liability sphere, these parallel activities may involve testing, research, marketing or other activities that are part and parcel of bringing a product to market.

In *Burnside v. Abbot Laboratories*, 505 A.2d 973, 980 (Pa. Super. Ct. 1985), the plaintiffs alleged a common scheme to injure. The court disagreed: “The mere fact that two or more persons, each with the right to do a thing, happen to do that thing at the same time is not by itself an actionable conspiracy.” *Id.* at 980. What the plaintiffs alleged was a conspiracy was, in the court’s view, only parallel conduct: “Plaintiffs have not alleged either a tacit understanding or common design to market a defective product or that appellees rendered substantial assistance in causing injury to the plaintiffs. They have charged the defendants merely with parallel and imitative conduct.” *Id.* at 984.

The parallel conduct defense to a conspiracy claim is critical when conspiracy allegations are lodged in a product liability complaint. Product manufacturers face competitive pressure to bring new products to the market and to compete effectively on cost and quality. So when one member of an industry launches a new product or explores an innovative design

change, customers can expect that other members of the industry will soon look to protect their share of the market by offering new design features or developing new marketing campaigns. This “parallel conduct” may also be used by a plaintiff to concoct a civil conspiracy claim. Courts evaluating conspiracy claims, however, are often able to distinguish between the rare instance of two or more product manufacturers conspiring to do harm and members of an industry working to bring innovative products to the market. For example, when members of an industry rely upon a competitor’s research, the inference to draw is not that those companies have entered into an illegal agreement but that they have reacted similarly to the same information.

That was precisely what the Florida Court of Appeals held in *Conley v. Boyle Drug Co.*, 477 So. 2d 600 (Fl. Dist. Ct. App. 1985), *reversed on other grounds*. In *Conley*, a DES case, the plaintiff pursued a concert of action claim citing evidence of “conscious parallel activity by the drug companies in seeking FDA approval for DES... evidence from which may be inferred a tacit understanding.” *Id.* at 603. The complaint alleged that members of the industry relied upon each other’s testing and marketing methods. Calling this practice “common” in the industry, the court reasoned that

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

Id.

Contesting Product Identification to Defeat a Conspiracy Claim

The Florida Appeals Court expressed a valid concern in its *Conley* decision: broad use of conspiracy or concert of action claims in product liability cases risks imposing liability upon a defendant that a plaintiff has not alleged, or proved, caused the plaintiff any harm. Plaintiffs’ attorneys have employed civil conspiracy claims in product liability lawsuits in an effort to circumvent the critical threshold requirement that

a plaintiff establish that it was the product of a particular defendant that caused the alleged harm. A conspiracy claim, however, should not excuse a plaintiff from pleading and proving product identification.

When a plaintiff cannot establish that a particular manufacturer's product caused an alleged injury, generally the manufacturer does not owe a duty to the plaintiff on a product liability theory. Where there is no duty owed to a plaintiff, a plaintiff cannot sustain a conspiracy claim. In *Chavers v. Gatke Corp.*, 132 Cal. Rptr. 2d 198 (Cal. Ct. App.), *modified* (2003), the plaintiff asserted a conspiracy claim and product liability causes of action based on allegations that Gatke was part of an industry-wide effort to suppress information concerning the hazards of asbestos. However, the plaintiff was unable to prove that a product that Gatke manufactured caused the injury. The court explained that "[a] duty, however, independent of the conspiracy itself, must exist in order for substantive liability to attach." *Id.* at 202. Without sufficient product identification evidence, no duty was owed to the plaintiff and without that, no basis to find the manufacturer liable for conspiracy.

In *Doe v. Baxter Healthcare Corp.*, 380 F.3d 399 (8th Cir. 2004), the plaintiffs alleged that the negligence of a group of medical device manufacturers caused their son, a hemophiliac, to become infected with HIV. The plaintiffs argued that by allowing a product that the defendants knew carried a risk of infection to remain on the market they breached the duty of care owed to patients. As to their conspiracy count, the plaintiffs alleged that the defendants conspired to keep a product that "they knew to be contaminated with HIV on the shelves after they had decided to change their production method to eliminate the risk of infection." *Id.* at 404. The district court granted summary judgment in favor of the defendants. The Eighth Circuit affirmed and held that the plaintiffs' claims could not survive a summary judgment motion because the plaintiffs could not show that any one particular defendant's product caused the alleged injury. Without evidence identifying the offending product, no viable cause of action existed and the conspiracy claim could not stand alone. The court reasoned that "[g]iven our

conclusion that the Does did not present enough evidence that any single defendant caused Doe Jr.'s injury, it follows that the district court properly dismissed the civil conspiracy claim as well." *Id.* at 410.

Where a conspiracy claim is asserted in a product liability case, actively contesting product identification is especially critical because a plaintiff must have a viable underlying cause of action to sustain that cause of action. That means identifying the manufacturer or distributor of the offending product, as most jurisdictions adhere to the principle that when a plaintiff cannot identify the particular product that caused the alleged injury, the plaintiff does not have a viable product liability claim. *See, e.g., Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 328 (Ill. 1990); *Fields v. Wyeth, Inc.*, 613 F. Supp. 2d 1056 (W.D. Ark. 2009).

Even when a plaintiff may plead his or her way around the product identification requirement, a conspiracy claim will not stand when the alleged co-conspirator was not a participant in the marketplace when the alleged conspiratorial acts took place. In *Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (Wis. 1984), the Wisconsin Supreme Court rejected a conspiracy claim against a manufacturer that had not entered the marketplace—the DES market—by the time of the alleged conspiratorial conduct. The alleged parallel behavior took place in 1941 and 1947. In the court's view, no evidence proved that the defendant either "explicitly or tacitly collaborated to gain FDA approval," which was the basis for the plaintiff's conspiracy claim. Lack of evidence, however, was not the court's only basis for dismissal. The Wisconsin Supreme Court ruled that the plaintiff's theory was "unworkable" considering "that many drug companies entered the DES market well after FDA approval." *Id.* at 47. These late entrants into the market could not be charged with participating in or having knowledge of the alleged conspiracies that took place in the 1940s before their entry into the market. A conspiracy defendant should, therefore, compare the timeframe of the allegedly conspiratorial acts with an offending product's history. If the product was not on the market when a plaintiff alleges that conspiratorial acts took place, or if it did not incorporate the purported design defect at that time,

the disconnect in the chronology should bar a conspiracy claim under cases such as *Collins*.

Inconsistent Allegations and Contradictory Proof

In some circumstances, courts have found inconsistencies in the pleadings or in the factual record permit dismissing conspir-

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acy claims against product liability defendants. For example, in *In re MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d 348 (S.D. N.Y. 2005), the court rejected the plaintiff's allegations against "downstream handlers" of MTBE. The court found the allegations to be "inherently contradictory" and explained that these downstream handlers were alleged to be "both the perpetrators and victims of the same tortious conduct." *Id.* at 398.

The *In re MTBE* decision is an important precedent for product manufacturers and distributors characterized as alleged co-conspirators. Complaints in complex product liability cases, such as multidistrict litigation (MDL) or mass torts, often include allegations that a manufacturer or another entity up the chain of distribution failed to conduct sufficient product testing, withheld critical safety information or took other actions that resulted in a downstream distributor or purchaser receiving purportedly inadequate or incorrect information. A plaintiff who alleges that those in the chain of distribution "conspired" to withhold safety information or to perform inadequate testing, while simultaneously alleging that a downstream entity "knew or should have known" of the risks associated with the product likely runs afoul of the *In re MTBE* court's holding. This is a basis for a motion to dismiss because the contra-

ditory allegations rebut the inference of a conspiratorial intent.

In another MDL decision, *In re Welding Fume Prods. Liab. Litig.*, 526 F. Supp. 2d 775, 803 (N.D. Ohio 2007), the court rejected a conspiracy claim against a manufacturer that was found to have worked at “cross-purposes” with the alleged conspiracy. In *In re Welding Fume*, the plaintiffs

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alleged, among other things, that the defendants took steps to prevent neurological studies on welders. The court determined that it was only because of the suggestion of an alleged “co-conspirator” that a proposal for an epidemiological study included a neurological assessment. Such conduct, in the court’s view, hardly indicated an agreement to do something unlawful. The benevolent “co-conspirator” was awarded summary judgment.

The *In re Welding Fume* decision demonstrates that “good company” evidence can be critical in defending against a conspiracy claim. In a product liability case, that evidence may consist of studies and testing performed as part of initial product development, design changes, ongoing review of product design, updated product warnings in response to incident reports, participation in regulatory or industry organizations that advance product safety or any evidence dispelling the allegation that a defendant acted intentionally to harm the plaintiff. Under *In re Welding Fume*, a defendant that can effectively present a “good company defense” likely provides a com-

PELLING argument for dismissal of a conspiracy claim.

As a footnote to this last point about participation in trade associations, while product liability plaintiffs may cite membership in a trade or industry group as evidence of a conspiracy, “mere membership” in a trade association is generally insufficient to plead a conspiracy. See, e.g., *Thomas v. Mallett*, 701 N.W.2d 523 (Wis. 2005). In *Payton v. Abbot Labs.*, 512 F. Supp. 1031 (D. Mass. 1981), the court recognized the value of participating in trade associations and suggested that membership is normal conduct, not sign of a broad conspiratorial plan. The court explained that “[t]here is nothing inherently wrong with membership in an industry-wide trade association... these practices are probably common to most industries.” *Id.* at 1038.

The holding in cases such as *In re Welding Fume* and *In re MTBE* should also be used during the motion to dismiss stage when a plaintiff alleges that members of a conspiracy were negligent and also acted intentionally to further the alleged conspiracy. Courts view concurrent claims of conspiracy and negligence with skepticism. When a court is willing to compare the various allegations in a complaint for consistency, a defendant should highlight the simultaneous assertion of negligence allegations and conspiracy claims to point out the inconsistencies in a plaintiff’s allegations and invoke the rule against “negligent conspiracies.”

Conspiracy and Preemption of Product Liability Claims

Plaintiffs seeking to circumvent preemption jurisprudence have attempted to do so by relying on civil conspiracy claims. This was the case in *Strayhorn v. Wyeth Pharmaceuticals*, 887 F. Supp. 2d 799, 820 (W.D. Tenn. 2012), in which the plaintiff tried to circumvent preemption under the decision in *Pliva, Inc. v. Mensing*. 131 S. Ct. 2567 (U.S. 2011). In *Mensing*, and more recently in *Mutual Pharmaceuticals Co. v. Bartlett*, the United States Supreme Court found that a theory of implied preemption preempts failure-to-warn claims against generic drug makers. In *Strayhorn*, the Court rejected the plaintiff’s attempt to survive preemption and found that the civil conspiracy allegations all related to the

adequacy of the warnings, and were preempted under federal law.

A Conspiracy Does Not Create a Statutory Cause of Action

A product liability plaintiff asserting a conspiracy claim will not acquire a private right of action under a statute that does not provide one. The United States Court of Appeals for the Third Circuit addressed this very point in *In re Bone Screw Prods. Liab. Litig.*:

Because plaintiffs here could not sue an individual defendant for an alleged violation of the [Food Drug and Cosmetic Act], it follows that they cannot invoke the mantle of conspiracy to pursue the same cause of action against a group of defendants. A claim of civil conspiracy cannot rest solely upon the violation of a federal state for which there is no corresponding private right of action. 193 F.3d 781, 789–90 (3rd Cir. 1999).

This would seem to be the final word on the issue, but plaintiffs persist in attempting to transform conspiracy claims into a private cause of action under the Food Drug and Cosmetic Act. More recently in *Placencia v. I-Flow Corp.*, 2011 U.S. Dist. Lexis 39273 (Dist. Ariz. Apr. 11, 2011), the plaintiff alleged that the defendants promoted the allegedly defective pain pump for orthopedic use “despite knowing that the FDA had not approved the pumps for orthopedic use.” *Id.* at *7. However, because the Food Drug and Cosmetic Act does not provide a private cause of action, violating the act is not an “underlying tort” that will support a conspiracy claim. *Id.* at *11. Without a valid underlying tort, the plaintiff’s conspiracy claim could not survive alone.

Fraudulent Joinder of a Co-conspirator

In a potential case of fraudulent joinder, a diverse defendant should scrutinize a conspiracy claim in a complaint when it appears that the claim solely aims to keep a nondiverse party in the case. For example, courts have found fraudulent joinder and denied remand when a plaintiff included a conspiracy count against a nondiverse defendant in the chain of distribution. In *Hagen v. U-Haul Co.*, 613 F. Supp. 2d 986, 997 (W.D. Ky. 2009), the

plaintiffs alleged that a moving truck that they rented exposed them to high levels of noxious fumes. Among the defendants was the operator of the U-Haul facility where they returned the truck. The plaintiffs alleged that the operator of the U-Haul facility conspired “to promote the dangerous [truck].” *Id.* at 997. The defense contended that the non-diverse defendants did not owe a duty to the plaintiffs because the in-state parties “merely accepted return of the truck after the primary injury-causing event had occurred.” *Id.* at 992. The defendants also argued that the conspiracy claims were insufficiently pleaded in that the plaintiffs did not identify the “unlawful purpose” or “unlawful means” that the defendants allegedly undertook. *Id.* at 997. The court agreed, finding that the plaintiffs had pleaded insufficient facts to impose a duty upon the in-state defendants and had not offered any facts upon which to plead a conspiracy between the diverse and non-diverse defendants. *See also Askew v. DC Med., LLC*, 2011 U.S. Dist. Lexis 50817, at *21 (N.D. Ga. May 12, 2011) (finding nondiverse distributor fraudulently joined where “[p]laintiff’s claim for fraud and suppression must fail because... plaintiff has not presented evidence to support her allegation that DC Medical had knowledge of a defect prior to distributing the ASR device implanted into plaintiff” and civil conspiracy cause of action cannot stand on its own.)

Conclusion

Including civil conspiracy claims in product liability actions ignores several fundamental tenets of product liability law. Product liability claims should be about a product—its design, manufacture and the warnings that accompany it. This makes the inquiry in a product liability claim necessarily product focused. Injecting claims related to intent and motive, such as conspiracy or concert of action, conflicts with this traditional product liability framework.

Courts should refuse to permit a product liability plaintiff to pursue an allegation of civil conspiracy when the gist of the claim is that an allegedly defective product is claimed to have harmed the plaintiff. The fact that several states with codified product liability statutes exclude conspiracy claims

from the permissible causes of action that a plaintiff can maintain strongly supports limiting a plaintiff seeking to recover for injuries or damages caused by an allegedly defective product to asserting traditional product liability theories.

Assertion of civil conspiracy claims in product liability lawsuits ignores the reality that manufacturers know that in order to maintain market share they must take precautions to keep their customers safe, not work with others to intentionally harm those customers. Concluding or inferring that a defective product reached a customer because of a conspiracy or because those in the chain of distribution agreed to harm the customer is entirely inconsistent with the way products are brought to market.

The defense of a conspiracy claim in a product liability case requires a two-pronged attack centered on defeating both the conspiracy allegation and the underlying tort claims. Not only must an attorney pursue traditional product liability defenses, such as inadequate product identification, but the attorney must also vigorously challenge the legal and the factual basis for the conspiracy itself. The allegations lodged and the facts discovered will often show that the purported conspirators did nothing more than design and distribute an allegedly defective product. Moreover, defense attorneys should be skeptical when a conspiracy claim is included in a product liability complaint. Such a claim may reflect an ulterior “intent” on the part of the plaintiff to forum shop or an attempt to pursue an otherwise barred claim. The cases and concepts discussed in the preceding pages show that a product liability defendant can defeat a conspiracy claim by defending the product and attacking what are often insufficient legal and factual bases to sustain such a claim. 