Journal of Contemporary Health Law & Policy (1985-2015)

Volume 6 | Issue 1 Article 20

1990

# Asbestos Manufacturers: The Pathway to Punitive Damages

Marina C. Appleton

# ASBESTOS MANUFACTURERS: THE PATHWAY TO PUNITIVE DAMAGES

This is as strange a maze as e'er men trod;
And there is in this business more than nature
Was ever conduct of. Some oracle
Must rectify our knowledge.
SHAKESPEARE, *The Tempest*, Act V, Scene 1, Alfonso speaking.

## I. INTRODUCTION

Thousands of claims against asbestos manufacturers, most by insulation workers, have been filed in state and federal courts across the United States and this figure is expected to increase by several hundred new claims each month.[1] It is estimated that twenty-one million living Americans have been occupationally exposed to asbestos through 1980,[2] and additional millions have been or are being exposed to the deadly mineral in schools nationwide.[3] Medical science presently offers no cure for the damage incurred by asbestos-related diseases.[4] Thus, "the injured party's only remedy is judicial relief."[5]

1. "To date, more than 30,000 personal injury claims have been filed against asbestos manufacturers and producers. An estimated 180,000 additional claims of this type will be on court dockets by the year 2010." *In re* School Asbestos Litig., 789 F.2d 996, 1000 (3d Cir. 1986). This Note focuses on the state of Delaware, where the court stated that over 100 lawsuits based on participation in an industry-wide conspiracy to conceal and suppress information on the health hazards of asbestos were pending. Nicolet, Inc. v. Nutt, 525 A.2d 146, 147 n.2 (Del. 1987).

2. Dr. Irving J. Selikoff, who is widely acknowledged as the world's leading authority on asbestos disease "estimated that among the twenty-one million living American men and women who had been occupationally exposed to asbestos between 1940 and 1980 there would be between eight and ten thousand deaths from asbestos-related cancer each year for the next twenty years." P. BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 6 (1985) [hereinafter OUTRAGEOUS MISCONDUCT].

3. "[T]he Environmental Protection Agency has estimated that as many as 15 million students may be attending schools with asbestos-containing ceiling panels and other exposed asbestos surfaces, and that 1.2 million teachers and other school employees may also be undergoing daily exposure to the mineral." *Id.* at 123.

4. *See* Comment, *Asbestosis: Who Will Pay the Plaintiff?*, 57 TUL. L. REV. 1491 (1983). Injuries from exposure to asbestos fibers range from fatal cancer to mild impairments of lung capacity. However, three distinct diseases associated with asbestos exposure include: asbestosis, mesothelioma, and cancers (including lung, gastrointestinal and pulmonary cancer). *See* Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 579 nn.10-12 (1983) [hereinafter *Special Project*].

5. Comment, *supra* note 4, at 1491-92 (footnote omitted).

The main thrust of asbestos suits today is that asbestos manufacturers are guilty of the tort of conspiracy: the intentional misrepresentation and active concealment of the potential health hazards from exposure to asbestos or the failure to warn of the health risks involved.[6] In Delaware, conspiracy claims

6. *See* Temple v. Raymark Indus. Inc., No. 82C-JL-80, slip op. at 28 (Del. Super. Ct. Aug. 31, 1988) (1988 Del. Super. LEXIS 339) (plaintiffs can recover for conspiracy by either proving failure to warn or by proving intentional concealment, and they need only prove one by a preponderance of the evidence to recover damages). The court stated further:

> In order to establish a claim for conspiracy [in Delaware] based on intentional concealment, plaintiffs must prove the following elements by a preponderance of the evidence:
>
> (1) that [the defendant] and one or more other manufacturers of asbestos-containing products conspired to intentionally conceal or misrepresent the health hazards of asbestos;
>
> (2) that one of the members of the conspiracy sold an asbestos-containing product which was eventually used in plaintiff's place of work;
>
> (3) that at the time that product was sold by that member of the conspiracy, the member knew that asbestos containing products were dangerous to health;
>
> (4) that one of the members of the conspiracy concealed, the hazards of asbestos-containing products from publications, including medical articles, trade magazines, promotional brochures or newspaper articles;
>
> (5) that the plaintiffs did, in fact, remain ignorant of the dnagers [sic] of asbestos-containing products and as such were exposed to asbestos-containing products manufactured by at least one of the conspirators and were injured;
>
> (6) that the member of the conspiracy who engaged in the concealment referred to above intended that plaintiffs rely on the absence of information in any of such publications;
>
> (7) that the member's conduct enumerated above was intended to be in furtherance of the objectives of the conspiracy;
>
> (8) that plaintiffs justifiably relied on the absence of or inadequacy of warning of the dangers to health.

*Id.* at 28-30.

> In order to establish a claim for conspiracy based upon intentional failure to adequately warn, plaintiff must prove the following elements by a preponderance of the evidence:
>
> (1) that [the defendant] and one or more other manufacturers of asbestos-containing products conspired to intentionally conceal or misrepresent the health hazards of asbestos;
>
> (2) that one of the members of the conspiracy sold an asbestos-containing product which was subsequently used in plaintiff's place of work;
>
> (3) that at the time that product was sold by that member of the conspiracy, that member knew that asbestos-containing products were dangerous to health;
>
> (4) that a manufacturer of asbestos-containing products at the time of this sale of asbestos-containing product had a duty to inform the buyer and the users of that product of the danger of such product to health, which danger was known to that manufacturer;
>
> (5) that in connection with that sale, that member of the conspiracy did not give an adequate warning that asbestos-containing products were dangerous to health;
>
> (6) that at the time that the member of the conspiracy sold that product, that member intended not to give a warning or an adequate warning that asbestos-containing products were dangerous to health;

against former employers are barred by the workmen's compensation exclusivity provision.[7] This provision expresses the legislature's intent that all employee actions against employers for work-related injuries, including occupational diseases, are within the exclusive coverage of the workmen's compensation law and may not be maintained under the common law.[8] Seeking compensatory and punitive damages for their occupational injuries, plaintiffs have turned their attention to the manufacturers of asbestos because such actions are not barred by Delaware's workmen's compensation laws. Employees have thus used a shotgun approach in drafting their complaints, naming most national manufacturers of asbestos-containing products as defendants, and adding local suppliers and retailers of such products as long as some relationship to plaintiffs' asbestos exposure exists.[9]

This Note begins with an examination of the legislative history behind Delaware's workmen's compensation laws in barring conspiracy suits against employers. It then analyzes the recent development in Delaware

---

(7) that the member of the conspiracy who engaged in the conduct enumerated above intended that plaintiffs rely on the absence or inadequacy of warning of the danger to health;

(8) that the member's conduct enumerated above was intended to be in furtherance of the objectives of the conspiracy;

(9) that plaintiffs justifiably relied on the absence of or inadequacy of warning of the dangers to health;

(10) that plaintiff was exposed to an asbestos-containing product.

*Id.* at 30-31.

7. DEL. CODE ANN. tit. 19, § 2304 (1974). Section 2304 provides:

Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.

8. *See* Kofron v. Amoco Chems. Corp., 441 A.2d 226 (Del. 1982) (actions under workers' compensation statute held exclusive remedy and precluded intentional tort actions by asbestos workers against employers alleging fraudulent concealment of known asbestos-related dangers); Nutt v. A. C. & S., Inc., 466 A.2d 18 (Del. Super. Ct. 1983), *aff'd sub nom.*, Mergenthaler v. Asbestos Corp. of Am., 480 A.2d 647 (Del. 1984) (deceit that precedes and helps produce an injury was barred by exclusive remedy provisions because it merges into the injury for which a compensation remedy is provided); Farrall v. Armstrong Cork Co., 457 A.2d 763 (Del. Super. Ct. 1983) (A conspiracy claim against former employer was barred by workmen's compensation exclusivity principle). The *Farrall* court held that an employer, who is also a supplier of products used by employees, functioning in a dual capacity, still enjoys immunity from common law liability under the exclusivity principle and is equally immune from an attempt by a third party to require contribution by the employer. *Id.*

9. Bell v. Celotex Corp., Nos. 85C-FE-25, 85C-AP-60, slip op. at 3 (Del. Super. Ct. Jan. 19, 1988) (1988 Del. Super. LEXIS 13) ("This format has been utilized in the various cases which have generated the principles of law which are generally applied to the Delaware asbestos cases.").

law, specifically the facts and issues in *Nicolet, Inc. v. Nutt*.[10] In *Nicolet*, the court held that an asbestos manufacturer whose products did not cause the purported injury, but who allegedly conspired with other manufacturers to suppress medical evidence warning of the health dangers of asbestos inhalation, was liable for conspiracy and fraudulent concealment.[11] The Note then discusses the potential effects the ruling may have on both asbestos manufacturers and employers.

This Note also outlines a manufacturer's defense which was recently recognized by the State of Delaware, namely the "sophisticated purchaser" defense.[12] The basic thrust of the defense is that if a manufacturer, distributor, seller, or supplier provides a product to a purchaser/employer knowledgeable of the dangers therein, then there is no duty to warn either the purchaser or the purchaser's employees of that danger. The supplier thus relies on the "sophisticated purchaser" to warn and protect its own employees.[13] Where the defense is successful, the manufacturer is relieved of liability, and the employer is protected from suit by the workmen's compensation laws.

Amending Delaware's workmen's compensation law to allow the plaintiff the right to elect his remedy, i.e., to forego compensation to which he is otherwise entitled under the statute in favor of suing the employer at law for damages, can result in a more equitable and reasonable approach to ensuring that those responsible for work-related injuries share the expense proportionately.

## II. DELAWARE'S WORKMEN'S COMPENSATION LAWS

The philosophy of Delaware's workmen's compensation laws[14] is to give an injured employee, irrespective of the merits of his cause of action, a prompt and guaranteed means of receiving compensation and medical care without subjecting him to the hazards and delays of a law suit.[15] While the

10. 525 A.2d 146 (Del. 1987).

11. *Id.* at 147.

12. *See In re* Asbestos Litig. (Merganthaler), 542 A.2d 1205, 1212 (Del. Super. Ct. 1986). The Court held that:

> [W]hen a supplier provides a product it knows to be dangerous to a purchaser/employer whom the supplier knows or reasonably believes is aware of that danger, there is no duty on the part of the supplier to warn the employees of that purchaser unless the supplier knows or has reason to suspect that the requisite warning will fail to reach the employees, the users of the product.

13. *See* Temple v. Raymark Indus. Inc., No. 82C-JL-80, slip op. at 5 (Del. Super. Ct. Aug. 31, 1988) (1988 Del. Super. LEXIS 339).

14. *See* DEL. CODE ANN. tit. 19, § 2301 (1974).

15. *See* Hill v. Moskin Stores, Inc., 53 Del. 117, 124, 165 A.2d 447, 449-50 (Del. 1960) (The Delaware Workmen's Compensation Act is a compulsory Act and such Acts were passed for the benefit of employees to relieve them from the expense and hazard of lawsuits).

purposes of the workmen's compensation laws are numerous, two recurring themes emerge: workmen's compensation provides a scheme for assured compensation for work-related injuries without regard to fault and the laws relieve employers and employees of the expense and uncertainty of civil litigation.[16]

The question of whether complaints in cases involving fraud, deceit, and conspiracy by employers state viable causes of action upon which relief can be granted is one of legislative intent and turns on the construction given to the exclusivity principle and its legislative history. The exclusivity principle found in Delaware's Workmen's Compensation statute[17] refers specifically to "personal injuries" caused by accidents. Review of the legislative history of the Delaware workmen's compensation laws, however, reveals that the exclusivity principle encompasses not only injuries caused by accident, but also all compensable occupational diseases, such as asbestosis.[18]

Prior to 1937, only those injuries which resulted from accidental physical violence to the bodily structure were covered by the statute.[19] In 1937, the legislature amended the statute to include coverage for specifically listed "compensable occupational diseases . . . arising out of and in the course of the employment."[20] Asbestosis was not compensable under this statute, however, a 1949 amendment eliminated the list of compensable occupational diseases and extended coverage to "all occupational diseases arising out of

16. *See* Kofron v. Amoco Chems. Corp., 441 A.2d 226, 231 (Del. 1982).

17. *See supra* note 7.

18. *See infra* notes 20 & 21.

19. *See* 29 Del. Laws, ch. 233 (1917):

> Every employer and employee shall be conclusively presumed to have elected to be bound by the compensatory provisions of this Article and to have accepted the provisions of this Article, respectively, to pay and to accept compensation for personal injury or death by accident arising out of and in the course of the employment, regardless of the question of negligence, and to the exclusion of all other rights and remedies.

20. *See* 41 Del. Laws, ch. 241 (1937):

> [T]erms Construed: The term "injury" and "personal injury" as used in this Chapter shall be construed to mean violence to the physical structure of the body, such disease or infection as naturally results directly therefrom when reasonably treated and compensable occupational diseases, as are hereinafter defined, arising out of and in the course of the employment. . . . Compensable occupational diseases shall not include any other than those scheduled below and shall include those so scheduled only when the exposure stated in connection therewith has occurred during the employment, and the disability has commenced within five months after the termination of such exposure: Occupational Diseases include: Anthrax; Lead Poisoning; Mercury Poisoning; Arsenic Poisoning; Phosphorous Poisoning; Benzene, and its homologues, and all derivatives thereof; Wood Alcohol Poisoning; Chrome Poisoning; Caisson Disease; Mesothorium or radium poisoning; Carbon Disulphide; and Hydrogen Sulphide.

and in the course of employment . . . ."[21] The exclusivity provision did not distinguish between accidental work-related injuries and occupational diseases in awarding benefits under the statute. Therefore, the exclusivity provision was rephrased by the Supreme Court of Delaware to read: "[e]very employer and employee . . . shall be bound . . . to pay and to accept compensation for all occupational disease . . . only when the exposure . . . has occurred during the employment . . . ."[22] Further, the term "personal injury" as used in the exclusivity provision expressly includes "compensable occupational diseases."[23]

As noted previously, the Delaware workmen's compensation laws assure compensation for work-related injuries and relieve the parties from the expense of litigation.[24] In effect, the cost of industrial injuries is placed on the customers who enjoy the benefits of the industry[25] and the cost of employ-

---

21. 47 Del. Laws, ch. 270 (1949):

> [C]ompensable occupational diseases shall include all occupational diseases arising out of and in the course of employment only when the exposure stated in connection therewith has occurred during the employment and the disability has commenced within five months after the termination of such exposure.

22. *See* Alloy Surfaces Co. v. Cicamore, 221 A.2d 480, 486 (Del. Super. Ct. 1966) (on the strength of the statutory history of the compensation laws, the court has not previously distinguished between accidental work-related injuries and occupational diseases in awarding benefits under the statute).

23. *See* DEL. CODE ANN. tit. 19, § 2301(12) (1974) (" 'injury' and 'personal injury' mean violence to the physical structure of the body, such disease or infection as naturally results directly therefrom when reasonably treated and compensable occupational diseases and compensable ionizing radiation injuries arising out of and in the course of employment"); DEL. CODE ANN. tit. 19, § 2301(4) (1974) (compensable occupational diseases are defined as "all occupational diseases arising out of and in the course of employment only when the exposure stated in connection therewith has occurred during employment"); DEL. CODE ANN. tit. 19, § 2328 (1974):

> ([t]he compensation payable for death or disability total in character and permanent in quality resulting from an occupational disease shall be the same in amount and duration and shall be payable in the same manner and to the same persons as would have been entitled thereto had the death or disability been caused by an accident arising out of and in the course of the employment.).

24. *See* Hill v. Moskin Stores, Inc., 53 Del. 117, 124, 165 A.2d 447, 451 (Del. 1960) (the philosophy of the workmen's compensation law is to give an injured employee, irrespective of the merits of his cause of action, a prompt and sure means of receiving compensation and medical care without subjecting himself to the hazards and delay of a lawsuit). *See also* New Castle County v. Goodman, 461 A.2d 1012, 1014 (Del. 1983) (the Delaware Workmen's Compensation Act is construed in order "to fulfill its twin purposes of providing a scheme for assured compensation for work-related injuries without regard to fault and to relieve employers and employees of the expenses and uncertainties of civil litigation").

25. *See generally* Ianire v. Univ. of Del., 255 A.2d 687 (Del. Super. Ct. 1969), *aff'd sub nom.* Diamond State Tel. Co. v. Univ. of Del., 269 A.2d 52 (Del. 1970) (by providing for an automatic limited recovery under workmen's compensation, employers are guaranteed a certain and predictable liability for insurance purposes and employees are guaranteed a certain amount of immediate compensation).

ment injuries are shifted to the consumer as part of the cost of production.[26] These objectives have been embodied in the amendments to the Delaware workmen's compensation laws. For this reason, the legislative history of the law evinces an intent to make workmen's compensation an exclusive remedy in occupational disease cases, thereby barring common law claims against an employer.

In sum, claims by workers exposed to asbestos alleging gross negligence and intentional tort for falsely deceiving the workers as to the true facts concerning the dangers of asbestos are encompassed within the workmen's compensation laws and cannot be maintained under the common law against the employer. Consequently, employees are not suing their employers. They are instead suing the manufacturers of asbestos for compensatory and punitive damages relying on fraudulent concealment and conspiracy theories.

## III. THE DECISION IN *Nicolet, Inc. v. Nutt*

### *A. Factual Background*

The case of *Nicolet, Inc. v. Nutt*[27] arose when the Superior Court, New Castle County, denied Nicolet's motion for summary judgment on a complaint alleging that Nicolet conspired with other members of a trade association to conceal information on asbestos hazards.[28] The superior court concluded that Nicolet would be liable to plaintiffs for injuries caused by exposure to another party's asbestos if plaintiffs could show that defendants conspired to suppress information about the health hazards of asbestos.[29]

Nicolet did not dispute the fact that the plaintiffs were exposed to the asbestos of other companies who were members of the Quebec Asbestos Mining Association (QAMA) and the Asbestos Textile Institute (ATI).[30]

26. *See generally* Price v. All Am. Eng'r Co., 320 A.2d 336 (Del. 1974) (the fundamental purpose of workmen's compensation is to shift the cost of employment injuries to the consumer as part of the cost of production).

27. 525 A.2d 146 (Del. 1987).

28. *In re* Asbestos Litig., 509 A.2d 1116 (Del. Super. Ct. 1986), *aff'd*, 525 A.2d 146 (Del. 1987). The superior court denied Nicolet's motion for summary judgment on the conspiracy issue and held that material facts existed as to whether Nicolet and members of the trade association had conspired to conceal public disclosure of asbestos hazards. 509 A.2d at 1122.

29. *Id.* at 1120.

30. *Nicolet*, 525 A.2d at 148. Plaintiffs' allegations against the defendant, Nicolet Inc., are summarized as follows: "Nicolet or its wholly owned Canadian subsidiary, Nicolet Mines, Ltd., was a member of the Quebec Asbestos Mining Association ("QAMA") from 1948 until 1968 and members of the Asbestos Textile Institute ("ATI") in 1969, 1971 and 1972" and further, "[m]embers of the referenced trade associations suppressed publication as well as general dissemination of medical and scientific data concerning the health hazards associated with inhalation of asbestos fibers." *Id.*

Nicolet did, however, deny that it was a member of the QAMA and that it knowingly took part in this conspiracy.[31] The court noted that knowing participation in a conspiracy need not be by express agreement; tacit ratification is sufficient.[32] The court stated, "[l]ikewise, consciously parallel action is not sufficient to show conspiracy, but it is enough that knowing concerted action was contemplated or invited, the defendant adhered to the scheme and participated in it . . . ."[33] Further, there was some evidence that Nicolet had direct contact with members of QAMA, whose members publicly minimized the dangers of asbestos after 1968.[34] In denying summary judgment, the court held there was some evidence from which a jury could reasonably conclude the existence of the alleged conspiracy by Nicolet to suppress information regarding asbestos and its harmful effects.[35]

### *B. The Supreme Court of Delaware's Decision*

The Delaware Supreme Court affirmed the trial court's decision that a cause of action existed against Nicolet, Inc.: "if competent medical evidence as to the dangers of asbestos was intentionally misrepresented and suppressed [by Nicolet] in order to cause plaintiffs to remain ignorant thereof, coupled with proof that such suppression caused injury to the plaintiff, the alleged tort is established."[36] The court also concluded "that under the well-settled law of civil conspiracy, Nicolet may be jointly and severally liable for damages caused by the acts of co-conspirators if such acts were committed

---

31. *Id.*

32. *Id. See also In re Asbestos Litig.*, 509 A.2d at 1121 (citing De Jong Packing Co. v. United States Dep't of Agric., 618 F.2d 1329, 1334 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980); James Julian, Inc. v. Raytheon Co., 557 F. Supp. 1058, 1065 (D. Del. 1983)) ("the District Court for Delaware has stated that even membership and knowledge of the association's wrongful conduct is not, by itself, sufficient to show 'knowing participation,' but once that is coupled with a consistent later act, an inference of knowing participation is permissible."). James Julian, Inc., 557 F. Supp. at 1065 n. 18.

33. *Nicolet*, 525 A.2d at 148 (quoting *In re Asbestos Litig.*, 509 A.2d at 1121).

34. *Id.*

35. There were several items of evidence supporting the plaintiffs' claims of conspiracy and giving rise to triable issues of fact. First, the president of Nicolet, as well as other members of ATI, received a letter from the U.S. Navy asking questions with regard to asbestos, its hazards and whether adequate substitutions for asbestos existed. Second, a letter dated May 28, 1969, sent to Johns-Manville from Raybestos-Manhattan, with copies to ATI's Board of Governors, stated in part that members of the trade association should discourage a development program on substitutes for asbestos. Third, on May 26, 1969, the president of Nicolet responded to the U.S. Navy's inquiry by stating that a considerable amount of scientific research is being conducted on the biological effects of asbestos; that current research results leave substantial doubt concerning the issue of whether and to what extent asbestos is harmful to health; and if asbestos is harmful, we [Nicolet] do not know why. *In re Asbestos Litig.*, 509 A.2d at 1121-22.

36. *Nicolet*, 525 A.2d at 147.

in furtherance of the scheme."[37]

The *Nicolet* court outlined the theories upon which tort actions for conspiracy and fraudulent concealment may be based.[38] First, the court relied on *Stephenson v. Capano Development, Inc.*,[39] a case outlining the elements necessary to establish a prima facie case of intentional misrepresentation (fraudulent concealment). Briefly, these elements include: deliberate concealment by defendant of a material past or present fact; silence in the face of a duty to speak; scienter; intent to induce plaintiff's reliance on concealment; causation; and damages resulting from concealment.[40]

The *Nicolet* court examined the plaintiffs' allegations utilizing the *Stephenson* elements of fraud, and summarized their findings as follows: plaintiffs' complaint includes allegations that Nicolet possessed medical and scientific data on the hazards of asbestos; Nicolet positively and falsely asserted to plaintiffs that it was safe for them to work in close proximity to asbestos materials, thus causing the plaintiffs to remain ignorant of the dangers; Nicolet knowingly and willfully conspired with other asbestos manufacturers to withhold this information, thus Nicolet acted with scienter; and there was intent by the alleged conspirators, including Nicolet, to induce plaintiffs' reliance on false or incomplete material facts.[41] Given these allegations, the *Nicolet* court concluded the evidence was sufficient to state a tort claim based on a theory of fraudulent concealment.[42]

Having decided the fraudulent concealment issue, the court focused next on the conspiracy claim. The *Nicolet* court again relied upon case law, this time in denying Nicolet's motion for summary judgment on the conspiracy issue.[43] Delaware law imposing liability for civil conspiracy is well settled,[44]

---

37. *Id.*

38. *Id.* at 149-150.

39. 462 A.2d 1069 (Del. 1983). The court in *Nicolet* affirmed that the plaintiffs' allegations were sufficient to state a tort claim based on a theory of fraudulent concealment. *Nicolet*, 525 A.2d at 149.

40. *Stephenson*, 462 A.2d at 1074.

41. *Nicolet*, 525 A.2d at 149.

42. *Id.*

43. *Id.* at 150. Further, civil conspiracy does not exist as an independent cause of action in Delaware. It exists to implicate others and to increase the measure of damages. *See* Phoenix Canada Oil Co. v. Texaco, Inc., 560 F. Supp. 1372, 1388 n.43 (D. Del. 1983); *rev'd in part, on other grounds*, 658 F. Supp. 1061 (D. Del. 1987). In addition, while the essence of the crime of conspiracy is the agreement, the essence of a civil conspiracy is damages. In other words, absent damages, there is no cause of action for a civil conspiracy. *See* Weinberger v. UOP, Inc., 426 A.2d 1333 (Del. Ch. 1981), *rev'd on other grounds*, 457 A.2d 701 (Del. 1983). *See also* McLaughlin v. Copeland, 455 F. Supp. 749, 752 (D. Del. 1978), *aff'd without op.*, 595 F.2d 1213 (3d Cir. 1979).

44. *McLaughlin*, 455 F.Supp. at 752 (quoting Van Royen v. Lacey, 262 Md. 94, 97, 277 A.2d 13, 14 (1971)). (In Van Royen the court stated that plaintiffs must prove: "in addition to

and the court concluded that Nicolet would be subject to liability if the plaintiffs established the following:

> (1) Nicolet was a member of a conspiracy consisting of asbestos manufacturers; (2) a member of the conspiracy, acting in furtherance of the conspiracy, actively suppressed data on the harmful effects of asbestos with the intent to hide such information from plaintiffs in order to induce them to continue their exposure (i.e., committed the tort of intentional misrepresentation); and, (3) plaintiffs were injured as a result of the unlawful acts of Nicolet's co-conspirator(s).[45]

Nicolet contended that no independent tort existed to support conspiracy liability.[46] However, the court correctly concluded that the independent tort supporting the conspiracy charge is intentional misrepresentation.[47] Nicolet also argued that it had no duty to warn the customers of other asbestos manufacturers regarding the health hazards associated with asbestos.[48] The *Nicolet* court distinguished between those situations where a party fails to speak (where there is no duty to speak absent a contractual or fiduciary relationship), and those situations where a party actively suppresses and conceals material information (where liability attaches as a result of the active misconduct of intentionally suppressing material information).[49] In this case, plaintiffs alleged the latter. 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."[50]

---

a confederation of two or more persons; (1) some unlawful act done in furtherance of the conspiracy, and (2) actual legal damage resulting to the victim-plaintiff."). *Id.*

45. *Nicolet*, 525 A.2d at 150.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* Defendant, Nicolet, Inc., cited Burnette v. Nicolet, Inc., No. 84-2063, slip op. at 6 (4th Cir. July 25, 1986) arguing that a cause of action does not exist for fraudulent concealment absent a contractual or fiduciary duty. *Nicolet*, 525 A.2d at 150 n.3. The Court in *Nicolet* declined to adopt the Fourth Circuit's interpretation and limitations, and instead believed that a better and more reasoned approach is to recognize a cause of action for fraudulent concealment wherever the plaintiff can establish active, rather than passive, concealment. The *Nicolet* court followed Michigan's approach in Marshall v. Celotex Corp., 652 F. Supp. 1581 (E.D. Mich. 1987) (where the court stated that justice demands a remedy whenever manufacturers cooperate to conceal product risk, with resulting injury from that concealment). *Id.*

The Court in *Nicolet*, however, did not consider the issue of whether the plaintiffs proffered enough evidence to pursue the conspiracy claim, stating that it was beyond the scope of this appeal. *Id.* at 150 n.4. In sum, the supreme court affirmed the lower court's decision denying Nicolet's motion for summary judgment on the conspiracy issue. *Id.* at 150.

## IV. THE POSSIBLE IMPACT OF *Nicolet, Inc. v. Nutt* UPON THE ASBESTOS MANUFACTURERS AND ASBESTOS EMPLOYERS

It is likely that the decision to allow conspiracy claims against asbestos manufacturers will have a very dramatic effect upon the quantity of suits brought against such defendants before the Delaware courts. Assuming that both asbestos manufacturers and asbestos employers know of the possible health risks of asbestos, asbestos employers are relieved of the timeliness and expense of litigation because such conspiracy suits against employers are barred by Delaware's workmen's compensation laws. The following section represents a scenario that may result in current and future asbestos litigation in the Delaware courts.

### *A. Employers - Compensation: Manufacturers - Damages*

For purposes of this section, it is assumed that a plaintiff can proffer enough evidence to sustain a conspiracy and fraudulent concealment charge against his former employer, an asbestos company, and against the manufacturer who supplied the asbestos to his employer. The plaintiff, suffering from disease purportedly caused by exposure to asbestos, has basically two avenues for relief. In a suit against his employer, the plaintiff can collect workmen's compensation as provided through Delaware's workmen's compensation law.[51] The workmen's compensation law's exclusivity provision,[52] however, bars recovery against an employer under any common law theory,[53] even in cases where the employer actively concealed and suppressed information on workplace hazards.[54] Thus, the employee-plaintiff who contracts an occupational disease, such as asbestosis, may recover from the employer-defendant only those benefits provided by statute.

The plaintiff can also elect to sue the asbestos manufacturer for conspiracy to conceal information relating to the dangers of asbestos. Here, the plaintiff is entitled to collect a much larger award in the form of compensatory and

51. *See* DEL. CODE ANN. tit. 19, §§ 2301 - 2304 (1974).

52. *See* DEL. CODE ANN. tit. 19, § 2304 (1974).

53. Powell v. Interstate Vendaway, Inc., 300 A.2d 241 (Del. Super. Ct. 1972). *See also* Kofron v. Amoco Chems. Corp., 441 A.2d 226, 231 (Del. 1982) ("all employee actions against employers for work-related injuries based on any degree of negligence, from slight to gross, are within the exclusive coverage of the Workmen's Compensation Law and may not be maintained under the common law.").

54. *See generally Kofron*, 441 A.2d 226 (worker's compensation statute is exclusive remedy and precludes intentional tort actions by asbestos workers who allege fraudulent concealment of known health dangers related to asbestos.); Farrall v. Armstrong Cork Co., 457 A.2d 763, 770 (Del. Super. Ct. 1983) ("to the extent that the conspiracy charge is directed against employer-defendants, . . . it is barred by the exclusivity principle already considered.").

punitive damages.[55] Punitive damages are awarded to punish a tortfeasor for willful or reckless conduct which is particularly reprehensible.[56] Delaware has allowed punitive damage awards for almost 150 years and the court has stated that it is not in a position to reject this historical foundation in favor of the defendant's (manufacturer's) contrary policy and philosophical considerations.[57]

Thus, because of the exclusivity provision in Delaware's workmen's compensation laws, employers have escaped not only the expense and timeliness of civil litigation with respect to conspiracy charges, but also the expenses associated with awards of complete compensatory and punitive damages to the employee. No mathematical formula is needed to show that a large discrepancy exists between the statutory amount recoverable under workers' compensation and the full tort damages which may be recovered through litigation. The *Nicolet* decision, in allowing plaintiffs to sue asbestos manufacturers for conspiring to fraudulently conceal pertinent medical and scientific information, has in essence, shifted the costs of such conspiracies solely to the asbestos manufacturers. This result is inherently unfair to both asbestos manufacturers and employee-plaintiffs.

### *B. The Sophisticated Purchaser Defense*

The sophisticated purchaser defense has gained widespread popularity among manufacturers, suppliers and distributors of products as a means for escaping liability.[58] Delaware recently decided that such a defense was

55. The amount recoverable through a workmen's compensation claim is relatively small when compared to compensatory and punitive damage awards received through litigation. *See* OUTRAGEOUS MISCONDUCT, *supra* note 2, at 17, 22, & 115.

56. Riegel v. Aastad, 272 A.2d 715, 718 (Del. 1970) ("[p]unitive or exemplary damages are allowed not by way of recompense for injury, but as punishment to the tortfeasor when his wrongful acts are committed wantonly and willfully."). *See also* Malcolm v. Little, 295 A.2d 711, 714 (Del. 1972) ("[p]unitive damages should bear a relationship to the type of conduct, keeping always in mind that the compensatory damages have already made the victim 'whole'."). Since 1981, plaintiffs have been successful in asserting that manufacturers should be subject to punitive damages because these companies deliberately concealed information about the perils of asbestos. *See Special Project*, *supra* note 4, at 690-709.

57. Nutt v. GAF Corp., No. 80C-FE-8, slip op. 2-3 (Del. Super. Ct. March 16, 1987) (LEXIS, State Library, Del. file). *See also* Conway v. A.C. & S. Co., No. 82C-AP-77, (Del. Super. Ct. Aug. 13, 1987) (LEXIS, State Library, Del. file) (defendant argued that an award of punitive damages would be contrary to public policy, i.e., that punitive damages were developed originally to satisfy societal goals of deterrence and punishment, and that today, compensatory damages have increased tremendously, and criminal and regulatory statutes have assumed greater roles in deterrence and punishment).

58. *See In re* Asbestos Litig. (Merganthaler), 542 A.2d 1205, 1209-12 (Del. Super. Ct. 1986). Delaware, in deciding whether or not to adopt the sophisticated purchaser defense in this case, provides an in depth discussion of those states that have adopted the sophisticated purchaser defense in one form or another.

available:

> [W]hen a supplier provides a product it knows to be dangerous to a purchaser/employer whom the supplier knows or reasonably believes is aware of that danger, there is no duty on the part of the supplier to warn the employees of that purchaser unless the supplier knows or has reason to suspect that the requisite warning will fail to reach the employees, the users of the product.[59]

Consequently, in assessing the availability of the defense, the first question to be asked is whether a manufacturer or supplier must warn the purchaser/employer of the dangers of a product. If the employer already knows or should be aware of the dangers which the warning would cover, there would be no duty to warn on the part of the supplier.[60] The second question is whether the supplier or manufacturer knew or had reason to suspect that the requisite warnings would fail to reach the employees.[61] If the supplier or manufacturer knew or had reason to know that employees would not be adequately warned, the manufacturers/suppliers then incur a duty to reasonably warn of the dangerous use of its product.[62] Without this defense, courts may hold manufacturers liable for uses of their product that may have been unforeseeable. Moreover, lack of this defense makes it the responsibility of every primary manufacturing company, no matter how far down the chain of distribution, to ensure that the ultimate user is warned. This appears to be contrary to industrial reality since the manufacturer may never know who in fact is the ultimate user of its asbestos products.

Manufacturers who are successful in asserting such a defense escape liability from a charge of negligent failure to warn. Since the employer is protected from such a suit, the employee's only recourse is workmen's compensation. Where the sophisticated purchaser defense is successful, the costs of failure to warn thus appear to shift to the employee. The employer, in reality, has the last clear chance to warn its employees of dangers related to the product, and because of Delaware's exclusivity provision, the employer escapes such liability. If the exclusivity provision were repealed, plaintiffs would have a better chance to recover compensation for their occu-

59. *Id.* at 1212. The court also stated: "[t]he 'sophisticated purchaser' defense focuses on the issue of reasonable care that is: is it reasonable for a supplier to rely on a knowledgeable purchaser/employer to warn its employees of a known danger." *Id.* at 1209.

60. *Id.* at 1212.

61. *Id.* at 1213.

62. In considering the reasonableness of the warning, one may consider the color, size, location and prominence of the warning together with the clarity of its language. *See* Temple v. Raymark Indus., No. 82C-JL-80, slip op. at 26 (Del. Super. Ct. Aug. 31, 1988) (1988 Del. Super. LEXIS 339).

pational injuries because it would be far easier for employees to establish an employer's failure to warn.

### *C. Amendment of Delaware's Workmen's Compensation Law*

There is no reason, legal or otherwise, for giving employers an escape hatch from conspiracy claims in asbestos litigation. As the Delaware court noted, "an occupational disease [such as asbestosis] arising out of or during the course of employment is compensable under the Workmen's Compensation Law, and under that law the employer is bound to pay, and the employee is bound to accept, compensation as determined under the applicable provisions of the Law."[63]

Employers are not burdened with conspiracy suits because of the workmen's compensation law's exclusivity provision.[64] If the employee-plaintiff can proffer enough evidence for a cause of action against his employer, and prove he was in fact involved in a conspiracy to suppress pertinent medical and scientific data on the toxicity of asbestos, then the employer should be compelled to defend against this claim. Plaintiffs should be allowed to elect their remedies in situations where the facts warrant it, that is, "to forego compensation . . . under the statutes in favor of suing the employer at law for damages . . . because of what they feel to have been grossly negligent or intentionally tortious conduct on the part of the employer in causing the condition which gave rise to the occupational disease."[65] This can only be accomplished if Delaware's legislature amends the workmen's compensation law to allow a plaintiff the right to elect his remedy. If Delaware would amend their Workers' Compensation statutes to allow plaintiffs the right to elect their remedies, suits such as *Nicolet* would not be limited to the manufacturers. Moreover, employers who conspire to conceal information pertaining to asbestos disease could be held accountable for their outrageous misconduct.

---

63. Kofron v. Amoco Chems. Corp., 441 A.2d 226, 232 (Del. 1982) (Brown, J., concurring).

64. DEL. CODE ANN. tit. 19, § 2304 (1974).

65. *Kofron*, 441 A.2d at 233 (Brown, J., concurring). The *Kofron* court stated: "[w]hile legislatures in other states have specifically allowed employees to proceed with a common law cause of action based on the theory that their employers maintained a dangerous working environment with the intent to injure them . . . our Legislature [Delaware] has not done so and we [the court] decline to act in its stead." *Id.* at 231. Further, the court "believe[d] that any changes in the Delaware Workmen's Compensation Law must come from the Legislature, whence it came which, because of increasing informational input from both employer and employee lobbies, is perhaps best equipped to grapple with this issue." *Id.*

## V. CONCLUSION

In view of the legislative history of the exclusivity provision of the workmen's compensation law, both in its original and amended forms, and considering the prior case law interpreting the scope of the statute, it is apparent that an employee who has an occupational disease cannot sue his employer for the conspiracy of fraudulent concealment or failure to warn of the hazards of asbestos. Because the *Nicolet* decision allows a similar cause of action against manufacturers of asbestos, such manufacturers will be sued at an increasing rate.

If both asbestos employers and manufacturers conspire among themselves and with each other not to disclose information related to the dangers of asbestos exposure, then they are both guilty of outrageous misconduct. Manufacturers of asbestos should not be the only parties hauled into court for such gross misbehavior. A more fair and reasonable approach to this inequity is to allow plaintiffs the right to sue their employers outright for such willful and wanton conduct. This approach also allows more plaintiffs the opportunity to collect damages, since it is far easier for the employee to establish that the employer, rather than the manufacturer or supplier, is guilty of negligent failure to warn. In effect, this will justifiably spread the expense of such claims among those who caused the damage. This can only be accomplished by the legislature's repealing the exclusivity principle, or carving an exception to the rule in conspiracy cases, to allow such suits against asbestos employers. Given the inequity such a statute produces, it is well to remember a telling phrase spoken by Ulysses S. Grant, "I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution."[66]

*Marina C. Appleton*

66. Inaugural Address of Ulysses S. Grant (March 4, 1869), *reprinted in* THE INAUGURAL ADDRESS OF THE PRESIDENTS OF THE UNITED STATES 1789-1985 78-79 (1985).