ANALYSIS AND PERSPECTIVE

'CONDE v. VELSICOL CHEMICAL CORP.'— LESSONS FOR THE DEFENSE OF TOXIC TORT CASES

By Joe G. Hollingsworth and Bruce J. Berger *

On May 16, 1994, the United States Court of Appeals for the Sixth Circuit issued a decisive opinion in *Conde v. Velsicol Chemical Corp.*, 24 F.3d 809, 9 TXLR 6 (6th Cir. 1994) (Martin, J.), affirming the grant of summary judgment in a toxic exposure case. *See Conde v. Velsicol Chemical Corp.*, 804 F.Supp. 972 (S.D. Ohio 1992); *Conde v. Velsicol Chemical Corp.*, 816 F.Supp. 453 (S.D. Ohio 1992).

The opinions of the appellate and district courts provide substantial support for defense positions in all manner of toxic tort cases and confirm the value of particular defense strategies.

The purpose of this article is to outline the holdings and discuss the ramifications of *Conde*.

The underlying claims in *Conde* stemmed from the misapplication of Gold Crest C-100, a chlordane-containing termiticide, at plaintiffs' house in 1983 by a professional pest control operator ("Swat").

Plaintiffs were a family of five: Dr. James Conde (an osteopathic physician), his wife Rhonda (office manager of Dr. Conde's practice), and their three children, Ryan, Autumn, and Kimberly, 14, 12, and 9, respectively, at the time of the district court decisions.

The Condes contended that their physical and mental health was adversely affected in a number of ways as a result of exposure stemming from this misapplication. They abandoned their house in 1985 when they had been told by Robert K. Simon, Ph.D., that traces of transnonachlor, a chlordane metabolite, had been found in their blood.

Testing of the house itself by Dr. Simon and others found minute amounts of chlordane and heptachlor, a related chemical. In their 1987 law suit against Swat and Velsicol, plaintiffs sought recovery for alleged bodily injury, emotional distress, property damage, and punitive damages.

At first blush, the case presented unique problems. Unlike many chronic exposure cases in which plaintiffs contend that they were sick for a long time before ever presenting themselves for medical attention, the entire Conde family was observed on a daily basis by Dr. Conde himself.

Evidence At Trial

Dr. Conde presented evidence that his family had been in good health prior to the application of Gold Crest C-100, but had suffered from serious health problems immediately thereafter.

He was able to produce extensive documentary evidence of those problems. He also testified that he had performed differential diagnoses as to each health complaint and could find no explanations other than pesticide exposure. In support of his positions, he cited a variety of regulatory papers, case reports, animal toxicology, and other items.

Additionally, plaintiffs proffered the testimony of Arthur Zahalsky, Ph.D. and Peter McConnachie, Ph.D., purported experts in immunology. Dr. McConnachie had performed "immune system panels" on the blood of the Conde family in 1986 and again in 1991. These "immune system panels" reported, among other things, various cell markers on lymphocytes and functional tests conducted *in vitro* (in test tubes).

Dr. Zahalsky, who interpreted these tests, testified that they were generally accepted in the medical profession and that they showed that the Condes had significant immune system irregularities. He deemed most of the results "abnormal."

As noted, Dr. Simon provided testimony about the presence of chlordane components in the Conde house and in plaintiffs' blood. He also offered extensive toxicologic testimony, citing literally thousands of pages of studies and other documents supporting plaintiffs' medical causation claims. In addition, he offered testimony that chlordane-containing products were defective in that they would have entered the living areas of treated houses even in the event that the houses were treated properly, in accordance with the EPA-accepted label.

Velsicol's Strategy

From the beginning of the litigation, Velsicol's strategy was to set up the case appropriately for summary

* Joe G. Hollingsworth and Bruce J. Berger are partners at Spriggs & Hollingsworth, Washington, D.C.

0887-7394/95/$0+$1.00

judgment. This required a multi-front attack against each expert witness offered by plaintiffs. Elements of the defense plan included the following:

- Demonstrating that Dr. Conde was biased and could not serve as an expert witness;
- Undermining the scientific and medical basis for the immune system testing and opinions offered by Drs. McConnachie and Zahalsky;
- Undermining the basis for Dr. Simon's testimony that trace levels of transnonachlor were found in the Condes' blood; and,
- Demonstrating to the court the extreme importance of epidemiology in the field of medical causation and the burden on plaintiffs to prove their case through such epidemiology in order to get to a jury.

District Court Rulings

In two lengthy opinions issued in late 1992, prior to the Supreme Court's seminal ruling on the admissibility of scientific evidence, the district court first granted summary judgment for Velsicol.

In its first opinion, on issues of medical causation, the court held that plaintiffs' proffered expert testimony was inadmissible and, even if admissible, inadequate to allow a jury to find that chlordane caused the Condes' health problems.

As shown below, the district court anticipated the seminal Supreme Court decision of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), regarding the admissibility of purportedly scientific evidence and the responsibility of a district court to exercise a "gatekeeping function" with respect to such testimony.

In its second opinion, the district court dismissed the remaining claims for property damage, psychological injury, and punitive damages. Additionally, the district court rendered an opinion that plaintiffs could not have gotten to a jury on the question of product defect under a "risk benefit" analysis, *i.e.*, that as a matter of law plaintiffs had failed to prove that the purported risks of Gold Crest C-100 outweighed its benefits.

Review of the District Court Opinion

The district court held that it was "uncontroverted that the collective view of medical doctors, toxicologists, and immunologists is that there is no proven causal relation between exposure to chlordane at the levels experienced by [plaintiffs] and the symptoms and diseases suffered by them." 804 F.Supp. at 1022.

This conclusion was premised on plaintiffs' experts' inability to show through human epidemiologic evidence any connection between exposures at the measured levels and the alleged health complaints. *Id.* at 1024. Rather, the court found that "[t]he human epidemiologic studies show no correlation between long-term worker exposure to chlordane and the symptoms and diseases suffered by plaintiffs." *Id.* at 1025 n. 54.

Second, the opinion recognized the toxicologic doctrine of "dose/response" and required that evidence used to support toxic tort claims be closely focused into the scientific literature, if any, relating to doses comparable to those alleged in the particular case. Thus, in explaining why it rejected the testimony of plaintiffs' medical causation experts, the court observed:

> The toxicity of a substance is dose specific. It is not a medical or scientific methodology to lump together without explanation ... acute exposure case studies, worker exposure studies, animal studies, excerpts from standard medical references, and regulatory agency pamphlets, and then to assert without further analysis that these studies and other information about the toxicity of chlordane [show that chlordane] 'caused' [plaintiffs'] symptoms and diseases. ... [W]hen an expert expresses an opinion which is not generally accepted within the medical and scientific communities, he has an obligation to provide a reasoned explanation of why his methodology and opinions differ from those representing the collective view of the relevant medical or scientific disciplines.

Id. at 1023-24.

Third, the court set forth standards for what plaintiffs' medical causation experts must do *at a minimum* in order for a toxic tort case to get to a jury. A medical causation expert must be able to:

- "[C]onnect the symptoms and the literature related to those particular symptoms"; and,
- Present a "connected, systematic analysis of symptoms, findings on clinical examination, relevant medical knowledge from the literature, and resulting diagnosis." *Id.* at 1022-23. The court held that plaintiffs' experts had failed to conduct the required type of analysis.

Fourth, the court held that the mere temporal association between exposure and symptoms is not enough to create a genuine issue of fact. In this case, the court accepted for purposes of Velsicol's dispositive motions that a temporal connection existed, *i.e.*, that symptoms began immediately after application of Velsicol's product and subsided three and one-half years later when plaintiffs moved from their house. Nonetheless, such evidence "standing alone is not sufficient to go to the jury." *Id.* at 1023.

Fifth, the court determined that "immune system panels [prepared and analyzed by plaintiffs' experts Zahalsky and McConnachie] are experimental and not generally accepted by the medical or scientific communities as a methodology for making a determination of medical causation." *Id.* at 1024.

"The technique is not presently considered sufficiently reliable by the medical and scientific communities to permit reliance on it in this case. Moreover, even if the court were to assume injury to the [plaintiffs'] immune systems, the immune system panels themselves are not capable of identifying the *cause* of that damage." *Id.*

Sixth, the court concluded that plaintiffs could not present a genuine issue of material fact concerning whether the risks of chlordane as a termiticide outweighed the benefits of its use as of 1983. It determined that plaintiffs' experts "have no knowledge of alternative technologies available during or prior to the spring of 1983, no knowledge of how termiticides are manufactured, and the like." *Id.* at 982. Plaintiffs' "fail[ure] to offer admissible evidence regarding the mechanical and economic feasibility of an alternative

0887-7394/95/$0+$1.00

design, the relative costs of producing, distributing, and selling an alternative design, and the new or additional harms that may result from an alternative design," *id.*, precluded plaintiffs from getting to a jury on a risk-benefit theory.

The Oct. 13, 1992, opinion and order did not resolve other claims. Thus, the court found—for the time, at least—that there was a genuine issue of fact concerning whether plaintiffs' house had been damaged by exposure to chlordane, particularly in light of its reassessment by local authorities—at plaintiffs' insistence—at a zero value. The court invited further submissions, however, based on its ruling.

District Court's Second Ruling

After the court issued the Oct. 13 opinion and order, Velsicol accepted the court's invitation and filed another summary judgment motion, asserting in part that Swat's misapplication was the sole cause of any alleged damages.

In its second ruling, the court granted this motion. It determined that even if plaintiffs' home had been damaged, "plaintiffs are unable to recover from Velsicol because they cannot show that Gold Crest C-100 is a defective product." 816 F. Supp. at 456. The basis for this conclusion lay in the court's recognition—based on its Oct. 13 ruling on medical causation—that "Gold Crest C-100, even if it permeates a treated residence . . . has not been shown to pose a threat to the health of the residents." *Id.*

Moreover, the court held that even if Gold Crest C-100 *were* defective, it is not "the cause in fact of any property damage [plaintiffs] suffered." *Id.* Rather, the cause in fact was deemed to be Swat's misapplication. "Swat not only used Gold Crest C-100 in a manner contrary to the EPA-accepted label but also in violation of federal criminal law." *Id.* The court found significant that "plaintiffs have offered no evidence suggesting that homes treated against termites in accordance with the instructions on Velsicol's labels with a chlordane-based termiticide suffer compensable property damage," *i.e.*, that no evidence "that a properly treated home suffers a diminution [in value]." *Id.*

As of the first summary judgment order, the court had not ruled on Velsicol's motions on emotional distress and punitive damages claims.

The second order granted these motions. First, the court concluded that plaintiffs had not adduced evidence that their alleged fears and emotional distress were "severe and debilitating," a standard they were required to meet in light of their failure to prove that chlordane had caused physical harm. *Id.* at 457. Second, the court held that punitive damages were inappropriate because, given their failure to adduce evidence "even that chlordane is capable of causing injuries of the type plaintiffs allegedly sustained," plaintiffs had not shown that Velsicol's conduct had a "great probability of causing substantial harm." *Id.*

The Sixth Circuit's Opinion

For purposes of the appeal, the Sixth Circuit accepted as true—as did the district court—plaintiffs' testimony that they became sick immediately after the application of Gold Crest C-100 in 1983 and that their symptoms alleviated as soon as they vacated the house in 1985.

Notwithstanding that assumption, the Court of Appeals affirmed the district court's ruling that, even if admissible, the evidence was insufficient to create a genuine issue of material fact on medical causation.

In reaching this conclusion, the Court of Appeals noted and gave substantial weight to each of the following:

- That the average concentration of chlordane in plaintiffs' house was less than one microgram per cubic (ug/m3)) meter, compared to the OSHA Permissible Exposure Level of 500 ug/m3;
- That "[n]ineteen epidemiological studies have shown no apparent ill effects in human beings exposed to this latter level of chlordane" [*i.e.*, 500 ug/m3];
- That "[n]o studies of long-term exposure to very low levels of chlordane have been conducted;"
- That no chlordane or related compounds could be found in plaintiffs' blood or tissue samples;
- That plaintiffs' experts on the immune system, Drs. McConnachie and Zahalsky, were unable to provide cogent explanations of their theories and were unable to explain substantial changes in plaintiffs' "immune panel" results from 1987 to 1991;
- That Dr. Simon, who opined that Ryan Conde's liver abnormalities were "consistent with" chlordane toxicity, was nonetheless unable to rule out myriad other causes for increased liver enzymes; and
- That Dr. Conde's opinions concerning medical causation were not supported by the scientific literature he cited, nor could Dr. Conde explain his opinions in light of the 19 negative epidemiologic studies. 24 F.3d at 810-11, 813-14.

The Sixth Circuit's holding in this regard is summarized in the following passage from its opinion:

> After analyzing the testimony and documentary evidence, we believe that the present case is indistinguishable from *Turpin*.[1] The Condes' non-medical experts can only state, as did the experts in *Turpin* with respect to Bendectin and birth defects, that chlordane exposure 'is consistent with' the Condes' observed symptoms. *Turpin*, 959 F.2d at 1360. Drs. McConnachie, Zahalsky, and Simon are unable to exclude other potential causes for these symptoms, and their theories are inconsistent with the negative chlordane test results on the Condes' tissue and the vast majority of the relevant, peer-reviewed scientific literature. Dr. Conde, the only medical doctor to testify,

[1] In *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349 (6th Cir.), *cert. denied*, ____U.S.____, 113 S. Ct. 84, 121, L. Ed. 2d 47 (1992), the Sixth Circuit affirmed the grant of summary judgment on medical causation in a Bendectin case. Among other things, the court articulated that medical causation questions in such toxic tort cases should be given a "hard look" before being sent to the jury.

0887-7394/95/$0+$1.00

> 'does not testify on the basis of the collective view of his scientific discipline, nor does he take issue with his peers and explain the grounds for his differences.' *Id.* The 1987 draft Technical Support Document, which relies on animal studies, is also not probative of medical causation by its own terms. In sum, the 'analytical gap between the evidence presented and the inferences to be drawn on the ultimate issue . . . is too wide.' *Id.* Accordingly, the Condes' expert testimony is insufficient to permit a jury to conclude, by a preponderance of the evidence, that chlordane exposure caused the Condes' health problems.

24 F.3d at 814. Based on that ruling and for the reasons given by the district court, the Sixth Circuit then affirmed dismissal of plaintiffs' product defect, property damage, emotional distress, and punitive damage claims.

Implications Of Decision

The Sixth Circuit opinion in *Conde* presents a significant application of the premise, articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), that a district court must dispose of a toxic tort case on summary judgment, not only when plaintiffs' expert testimony is inadmissible under Federal Rules of Evidence 702 and 703, but also when a reasonable jury could not find that plaintiffs had carried their burden of establishing medical causation even if the expert testimony were admitted. *See Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349 (6th Cir.), *cert. denied*, ——U.S.——, 113 S. Ct. 84, 121, L. Ed. 2d 47 (1992). The opinion in *Conde* is particularly important for the defense of toxic tort cases generally for at least the following reasons:

- It reinforces the propriety, indeed the necessity, for trial courts to take a "hard look," *Turpin*, 959 F.2d at 1352, at proffered scientific evidence in cases alleging low level, chronic chemical exposures to ensure that the expert opinions are both admissible and adequate to allow a jury to find a more-probable-than-not causal relationship between exposure and claimed injuries;
- It emphasizes the superiority of human epidemiological evidence over animal studies, anecdotal reports, and the like in resolving issues of medical causation;
- It makes clear that the mere assertion that expert opinions are based on the scientific literature does not suffice; each step of the methodologic route from scientific principles to expert opinions must be articulated and well-founded;
- It holds that the mere presence of measurable levels of a chemical does not give rise to a claim for property damage if the levels at issue are not high enough to pose a risk of harm to the property's occupants; and
- It affirms the district court's ruling that, under a "risk benefit" analysis, plaintiffs cannot get to a jury unless they proffer admissible evidence, not only about risks of the product at issue, but about alternatives available at the time of marketing, and the costs, practical difficulties, and risks of such alternatives.

In addition, the opinion is of particular value to defense of product liability and toxic tort cases because for many additional reasons, including that:

- It stresses the relevance of the OSHA PEL to defect claims involving measured exposure levels orders of magnitude lower;
- It finds that theories of "immune system dysregulation" are "inconsistent with . . . the vast majority of the relevant, peer-reviewed literature," 24 F.3d at 814;
- It holds that immune system findings are inadequate to support a plaintiffs' verdict when the proponent of such findings is "unable to explain the mechanistic association between certain cell 'markers' or activation molecules, which were the subjects of these tests, and his autoimmunity theory of immune system dysregulation," *id.* at 813; and
- It impugns the significance of regulatory documents "based primarily on animal studies" and EPA's determinations that particular compounds are "probable human carcinogens" based on such studies, *id.* at 814.

Lessons For Defending Toxic Tort Cases

As noted above, *Conde* provides a wealth of holdings and language that can support a variety of defense motions in toxic tort cases. *Conde* is also instructive with regard to defense strategy and tactics. In this section we discuss some of the lessons that can be learned from this case.

First, defendants should aggressively attack the foundation of evidence purporting to show trace levels of foreign chemicals in plaintiffs' bodies. Velsicol's plan in this regard worked perfectly.

By deposing the laboratory that had analyzed plaintiffs' blood samples, Velsicol discovered that the analyst had written a report saying that transnonachlor could *not* be found in the samples. The report was rewritten and distorted by the analytical chemist to whom the Condes had sent their blood. This not only undercut plaintiffs' claims that the blood samples showed a high level exposure to chlordane, but also helped to demonstrate to the court that plaintiffs' own expert witnesses had misled them. When they received a report about transnonachlor in their blood, the Condes became even more agitated about their supposed health situation. However, the distress they may have felt was laid directly at the door of their own expert witness's deception.

Second, defendants should aggressively attack the foundation of so-called immune system panels. In this case, depositions over a four-day period of plaintiffs' experts in immunology established, among other things, that the most serious representations in their 1986 report to the Condes—about the lack of "natural killer" function that might lead to a higher risk of cancer—were based on comparing the Condes' test results to faulty norms. The tests had just been instituted and the immunologists did not really know what "normal" and "abnormal" values were. When they found out that they had been using incorrect norms, however, they did not go back and inform the Condes that their pronouncements about the risk of cancer were based on a mistake. Instead, they allowed the Condes to continue to believe that the 1986 test results showed an increased risk of cancer. Again, any distress plaintiffs may have felt as a

result of this faulty advice was laid directly at the door their own expert witnesses.

Third, defendants should aggressively depose treating physicians. This is counter-intuitive to many defense attorneys, who believe they will only elicit information helpful to plaintiffs. However, Velsicol was able to show that not a single one of plaintiffs' treating physicians agreed with Dr. Conde's theories about the cause of his family's problems. Furthermore, Velsicol was able to show that none of these physicians had ever been contacted by or put in touch with the so-called expert witnesses upon whom the Condes were relying for a case. Thus, the immunologists who supposedly found that the Condes' immune systems were dysregulated were never asked to provide suggestions to any of the treaters or inform them about what risks to look out for. These failures thus made it appear that plaintiffs themselves did not truly believe the opinions of their own experts.

None of these points shows exactly why Velsicol prevailed on summary judgment in this complex case. They do not go directly to the important substantive issues such as the meaning of "scientific knowledge" as outlined in *Daubert*. However, we believe they did have an effect on the trial court's thinking about the case.

Conclusion

The defense of toxic tort cases goes beyond developing and presenting medical science to a court or jury. It encompasses the art of persuasion, *i.e.*, making the court or the jury *want* to reach the "right" result.

The task of reviewing reams of affidavits and supporting documents must have been daunting at first to the district court in *Conde*. Indeed, the court castigated the parties for having filed too much paper. Nonetheless, the court undertook to review the paper with alacrity and performed it with skill and insight.

We believe that at least part of the explanation for this was Velsicol's ability to show the court through its various motions what really happened: the deceit of plaintiffs' experts and the illogic of plaintiffs' use of their own treating physicians.

Every case is different. The exact litigation opportunities that arose in *Conde* will never precisely arise in another case.

However, in very important ways, virtually every toxic tort case is the same. Such cases have to be defended aggressively and without fear. Each plaintiffs' case has its weak points, its weaker points, and its weakest points. Risks must be taken in order to find and exploit these weak points.

JOURNAL

May 15-16 – "Environmental Site Assessments: A ulti-phase Approach to Real Estate Transactions," (Environmental and Occupational Health Sciences Institute—Centers for Education and Training, 45 Knightsbridge Road, Brookwood II, Piscataway NJ 08854-3923; (908) 235-5062).

May 16 – "Environmental Insurance Coverage: Lead, Electromagnetic Fields and Other Emerging Issues," House of the Association, New York, N.Y. (The Association of the Bar of the City of New York, Communications Office, 42 West 44th Street, New York NY 10036-6690; (212) 382-6695).

May 18-19 – "Preparing the Medical Devices Case: What You Need to Know About Pedicle Screws, Norplant and Jaw Implants," The Wigwam Resort, Phoenix, Ariz. (Andrews Continuing Education Institute, P.O. Box 1000, Westtown PA 19395; (800) 345-1101; FAX (610) 399-6610).

May 19-20 – "Environmental and Toxic Torts: Current Controversies and Trial Strategies," Mark Hopkins Inter-Continental Hotel, San Francisco, Calif. (ATLA Education Fund, PO Box 3717, Washington DC 20007; (202) 965-3500 ext. 612; FAX (202) 625-7084).

June 2 – "Trial Techniques for Serious Injury Cases," Hotel Inter-Continental, New York City, N.Y. (National Practice Institute, 701 Fourth Avenue South, Suite 800, Minneapolis MN 55415-1634; (800) 328-4444; FAX (612) 349-6561).

June 2-3 – "Failure to Diagnose Disease," Back Bay ilton, Boston, Mass. (ATLA National College of Advocacy, 1050 31st St., N.W., Washington DC 20007; (202) 965-3500 ext. 612; FAX (202) 625-7084).

June 8-9 – "Hot Topics for Corporate Counsel," The Doubletree Hotel at Los Angeles Airport, Los Angeles, Calif. (American Bar Association, Financial Services, Dept NI 799/800, PO Box 109078, Chicago IL 60610-9078; (800) 964-4253; FAX (312) 988-5850).

June 9 – "Key Environmental Issues in U.S. EPA Region VII," Westin Crown Center, Kansas City, Mo. (American Bar Association, Section of Natural Resources, Energy, and Environmental Law, 750 N. Lake Shore Drive, Chicago IL 60611; (312) 988-5724).

June 12-13 – "Environmental Due Diligence," Hotel del Coronado, Coronado, Calif. (Environmental Compliance Course, Federal Publications Inc., 1120 20th St. NW, Washington DC 20036; (800) 922-4330; FAX (202) 775-9304).

June 12-13 – "Environmental Insurance Claims & Litigation," Latham Hotel, Washington, D.C. (Environmental Compliance Course, Federal Publications Inc., 1120 20th St. NW, Washington DC 20036; (800) 922-4330; FAX (202) 775-9304).

June 14 – "Key Environmental Issues in U.S. EPA Region V," Fairmont Hotel Chicago, Chicago, Ill. (American Bar Association, Section of Natural Resources, Energy, and Environmental Law, 750 N. Lake Shore Drive, Chicago IL 60611; (312) 988-5724).

June 15-16 – "Compliance with New European Union; Product Regulations-Obtaining that CE Mark," The Wisconsin Center, Madison, Wis. (University of Wisconsin-Madison, Department of Engineering Professional Development, 432 N. Lake St., Madison WI; (800) 462-0876; FAX (800) 442-4214).

0887-7394/95/$0+$1.00