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A Referenced Compendium of Chemical Injury

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Plaintiff Awarded $4.2 Million Against DuPont in Toxic Carpet Suit

by Cindy Duehring

"A manufacturer cannot bury its head in the sand and later claim that it did not and could not have known of the danger which it is causing when it has the ability to make these determinations," stated the judge in a landmark $4.2 million ruling against E.I. duPont de Nemours and Company for damages caused by its "unreasonably dangerous" product, DuPont Certified Stainmaster Carpet.(1) DuPont is appealing the decision. The case was tried in the 12th Judicial District Court in Louisiana.

Plaintiff's attorney Jeffery Speer of Doucet-Speer in Lafayette, Louisiana, states, "On a personal level I was very pleased with the outcome. However, on a larger scale, I am disturbed by the fact that a product such as DuPont Stainmaster carpeting could be placed into so many American homes without any regard for its chemical contents or the effects which it may have upon consumers or their families."

Shortly after having DuPont Certified Stainmaster Carpet installed in his home in November of 1992, plaintiff Andre Caubarreaux developed sinus and respiratory problems. Before the carpet installation, Caubarreaux was in good health. Other individuals also experienced health problems after the installation, but Caubarreaux's symptoms continued to progress over time. Eventually he received a diagnosis of chronic asthma and bronchitis. On two separate occasions after the installation, Caubarreaux traveled away from his home. During those trips his condition improved, but worsened again upon returning home. His health continued to deteriorate until he suffered respiratory failure which required hospitalization. In the hospital, away from the carpet, his health improved again.(1)

Through a process of elimination, Caubarreaux's primary treating physician, ear, nose, and throat specialist Dr. Donna Breen came to the conclusion that the DuPont carpet "was more probably than not the cause of Caubarreaux's illness." Two of his other treating physicians, pulmonologist Dr. Gary Guidry and family practitioner Dr. Warren Plauche, also testified that "it was more probable than not that the plaintiff's injury was caused by the carpeting. The Court is further compelled to finding that the carpet was the cause of Caubarreaux's illness by the unrebutted testimony of Caubarreaux and his treating physicians that his condition improved following the removal of the carpeting from his home. Although Caubarreaux's condition did improve following the removal of the carpet from his home, the testimony of the treating physicians was that he would continue to suffer from asthma for life, that his life span would likely be shortened up to ten years by the exposure, and he would remain steroid dependent for life in an effort to combat the affects of his illness. The medication required to treat Caubarreaux's condition, namely steroids, would likely lead to other health problems to Caubarreaux."(1)

For many years, the carpet industry has been aware of chemical injury claims against their products. By April, 1991, the Consumer Product Safety Commission (CPSC) had received at least 500 consumer complaints according to a consumer alert "Chemicals in New Carpets Pose Potential Health Problems" issued by Attorney General Robert Abrams of the New York State Department of Law.(2) The complaints addressed a wide variety of carpets. The consumer alert warns that carpet is a complex blend of as many as 120 chemicals. Some of the hazardous chemicals that carpet may emit include pesticides (such as antimicrobials), neurotoxic solvents such as toluene and xylene, and the potent carcinogen benzene. Formaldehyde and other toxic volatile organic compounds (VOCs) are also commonly emitted from carpets.(2-6) Adverse health effects listed in the consumer alert include flu-like symptoms, rashes, worsened respiratory conditions, asthma, and multiple chemical sensitivities or "hypersensitivity to a broad range of consumer products: such hypersensitivity may persist even if the carpet is removed."(2)

In his opening statement at an October 1, 1992, Senate hearing on Anderson's carpet toxicity research and consumer complaints of carpet-related illness, Representative Bernard Sanders noted that thousands of consumers had reported such illnesses from carpet, and that even the U.S. Environmental Protection Agency (EPA) removed the problem carpet from its headquarters building "after many employees complained of experiencing carpet-related health problems."(7)

At least one out of every four new carpet samples tested by the biological health effect testing lab, Anderson Laboratories in Dedham, Massachusetts, caused severe respiratory, neuro-

logical, or neuromuscular abnormalities in mice exposed to air blown over the carpets. Some mice even died. The testing method Dr. Rosalind Anderson used was a standard method developed by Dr. Yves Alarie for the U.S. military to test for the presence of nerve gasses.(8-12)

EPA duplicated Anderson's findings in a side-by-side test conducted at Anderson Labs. The Carpet and Rug Institute (CRI) hired Alarie to investigate Anderson's work and see if he could duplicate her findings.(10,14) At a second congressional hearing on carpet toxicity held June 11, 1993, Alarie testified Anderson's protocol was sound and "her results are perfectly reproducible in my laboratory," which didn't stop the Carpet and Rug Institute (CRI) from instituting a campaign to discredit her work.(10, 14-15) An internal Monsanto memorandum obtained during discovery for another carpet case revealed behind the scenes discussions on how to "erode the credibility of the Anderson study....The key is to discredit her methodology, results and motives. We need to be careful with this tactic. It may be necessary to publicly discredit and disgrace her..."(16) In spite of the misinformation widely circulated and attested to by the carpet industry, the court allowed testimony and testing results by Anderson to be admitted as evidence in Caubarreaux's case.

A recent peer-reviewed study published by Anderson reports on the results of over 500 experiments conducted on more than a dozen samples purchased from carpet stores as well as 300 carpet samples submitted by consumers with health complaints associated with the carpets. The exposure tests were conducted along with sham exposures on other mice to serve as unexposed controls in the experiments. The objective health effects found in the exposed animals correlated with the human complaints. No one brand was implicated, instead, Anderson noted "each carpet appeared to have its own mixture of toxic effects presumably reflecting its complex mixture of toxic emissions."(17)

At the trial addressing the DuPont Certified Stainmaster Carpet, DuPont claimed the complaint of injury submitted by Caubarreaux was one of the only complaints it ever received out of thousands of sales of that particular product. However, a DuPont employee testified she had taken over 100 complaint calls at DuPont regarding the Stainmaster Carpet. In addition, the plaintiffs submitted into evidence 150 written complaints received by DuPont regarding the carpet.(1)

In spite of all this, DuPont neither tested the carpet nor placed warnings on it. The judge noted in the Reasons For Ruling dated September 19, 1996, "Despite the ability to test, DuPont has never done any testing of its carpet and has never attempted to prevent the introduction of harmful substances into its product." This lack of testing and care on the part of the manufacturer nullified DuPont's argument that if its product is unreasonably dangerous, then it should not be held liable since it "did not know and could not have known" of the carpet's "potential harmful qualities under R.S. 9:2800.59. This argument is without merit since 9:2800.59 inherently requires that a manufacturer test its product to insure that it is safe for its intended use," the judge concluded.(1)

For this lawsuit, both testing by an independent lab and testing by a DuPont scientist using the "well-known, scientifically accepted" procedures of gas chromatography and mass spectrometry found the presence of the plasticizer caprolactam, a prime candidate for causing Caubarreaux's symptoms. The plaintiff's industrial hygienist, Dr. Kenneth Reed, found the presence of a number of chemicals that are known to cause respiratory problems like those suffered by Caubarreaux. Reed took this information a step further, and performed reverse half-life calculations to determine the level of caprolactam that would have been present at the time just after the carpet installation. Using the emissions level that the DuPont scientist, Dr. Charlene Bayer, found in Caubarreaux's carpet — which was lower than the level established by Reed's testing — Reed was still able to show that the level of caprolactam emissions after installation "exceeded safe levels of emissions to both households and industrial settings."(1)

Reed's testing identified 42 other chemicals offgassing from Caubarreaux's DuPont Certified Stainmaster Carpet. A summary of the testing report states Caubarreaux's carpet "probably offgassed organics at a rate of up to 100 times or higher than what would have been expected of a 'normal' carpet. Such offgassing could be expected to produce significant exposure ef-

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fects. The effects of this exposure could be expected to include severe irritations of the upper respiratory tract, and lungs. Most all the chemicals found are irritants. Some are neurotoxic, affecting the central nervous system." The summary describes the adverse health effects associated with the most significant offgassing chemicals from the sample, including the cholinesterase nerve enzyme inhibitor tributylphosphate; a chemical associated with the destruction of red blood cells (hemolysis) and nerve damage, butoxyethanol; and a low molecular weight silicone compound, decamethylcyclopentasiloxane, a severe irritant which is also linked to cancer, lymph node disease (lymphadenopathy), and autoimmune diseases from its use in prosthetic devices.(23)

The carpet was also tested at Anderson Labs. The court gave "greatest weight" to Reed's testing and testimony, as compared to that of Anderson. Although the judge "did not place much weight" in the testing methodology used by Anderson Labs, he still found it admissible to the court and relevant to the case. A videotape of the Anderson's testing of the Caubarreaux carpet was also entered into evidence, and the effects on the mice correlated well with Reed's findings of irritant and neurotoxic chemicals. Bayer was initially listed by DuPont as their only witness for the carpet testing. However, DuPont did not call on her to testify at the trial. "It is presumed therefore that Dr. Bayer's testimony would have confirmed Dr. Reed and Dr. Anderson or would have been otherwise unfavorable to DuPont," the court stated. "Since this was the only witness for DuPont that actually tested the carpet and was not called to testify, then the presumption that the testimony would be unfavorable should apply."(1)

Because not one of DuPont's remaining witnesses could testify regarding the chemical contents of Caubarreaux's carpet or any other Stainmaster carpet, the court considered their testimony regarding the safety of the carpet mere "speculation" — except for one of DuPont's experts' admission of the "temporal relationship between the carpet and the injury." Although the independent medical examiners' (IME) testimony supported the conclusion that Caubarreaux had asthma and would require lifelong medication, they disagreed with Caubarreaux's treating physicians as to carpet being the cause of the asthma. However, because the IMEs only saw the plaintiff once, the court afforded "greater weight of evidence" to the opinions of the treating physicians.(1)

The court concluded: "Considering the testimony of the treating physicians regarding the carpet's cause of injury to the plaintiff and the unrebutted testimony of the scientists which tested the carpet and found it to be dangerous, the weight of the evidence easily preponderates to a finding that the DuPont Certified Stainmaster Carpet was unreasonably dangerous in construction and composition pursuant to R.S. 9:2800.55. Furthermore, because DuPont witnesses agreed that there were no design parameters used to insure that only safe chemicals were used in the production of the final product and that dangerous levels of chemical emissions were found present upon testing by the plaintiff then the evidence also preponderates to a finding that the carpet is unreasonably dangerous in design pursuant to R.S. 9:28800.56. The evidence at trial also confirmed that despite the presence of dangerous chemicals in its product, DuPont did not provide a warning regarding the potential harmful affects which the carpet might have on a consumer such as Caubarreaux."(1)

The need for a warning label on carpets to protect consumers has also been the subject of a fierce battle for a number of years. Twenty-six state attorneys general signed on to a petition to the CPSC to require consumer warning labels on carpet. The petition was initially filed by New York Attorney General Robert Abrams in April, 1991.(18-19) CPSC refused to even docket their petition, and then lent its name along with EPA to CRI's public relations campaign called the green tag program.(10, 18, 20) Even though it only involved testing one carpet sample from one carpet type once a year for total VOC emissions, the program gave green tag labels to carpets in the stores.(10, 18)

At the first carpet hearing, Representative Sanders called the green tag program "an advertising strategy, not a plan to protect the public health."(7) Four state attorneys general from New York, Vermont, Connecticut, and Oregon published a report warning consumers about the "misleading" nature of the program."(18) Total VOCs do not reflect biological health effects because they do not identify and quantify the individual chemical ingredients in the product. Nor do total VOCs reveal anything about possible synergistic effects whereby chemical combinations greatly enhance the toxicity of individual chemicals. CPSC's endorsement of this program flew in the face of its own report which stated that measuring total VOCs is "probably not adequate as a standard to protect health" and recommended the biological health effect testing method developed by Alarie.(3)

Because of the CPSC's failure to act, the same four attorneys general who released the consumer report entered into direct negotiations with CRI along with the Consumers Union and the Consumer Federation of America. The end result was a compromise label endorsed and recommended by CRI. Concerned that the label wasn't worded strongly enough to protect consumers and that it wouldn't be large enough or placed conspicuously enough to be noticed by consumers, the Consumers Union and the Consumer Federation of America did not officially endorse the final label.(21-22)

DuPont is a member of CRI, and DuPont's employee and product steward of the Stainmaster carpet, Alan Luedtke, assisted in the production of the warning label. The judge in the Caubarreaux case stated, "Despite the assistance of drafting a warning for CRI and the recommendation to provide the warning to consumers, DuPont did not issue a warning and therefore the preponderance of the evidence also supports the conclusion that the carpet is unreasonably dangerous due to the failure to warn under R.S. 9:2800.57."(1)

The court also found that the use of the word "certified" and the Stainmaster television advertisements showing the product being used safely by children were misleading: "Pursuant to R.S. 9:2800.58 the advertisements do lead the viewer to the conclusion that a warranty of safety exists and as such the defendant has failed to conform to the warranty and its product is unreasonably dangerous on these grounds as well."(1)

DuPont also tried to get off by claiming it wasn't really the manufacturer of DuPont Certified Stainmaster Carpet, but that it was just marketed as a DuPont product. However, a piece of Stainmaster carpet clearly labeled "DuPont" was entered into evidence and the judge noted "R.S. 9.2800.53(a) defines manufacturer as 'a person or entity who labels a product as his own or who otherwise holds himself out to be the manufacturer of the

product.' This defense is therefore without merit and the evidence clearly supports the conclusion that DuPont was the manufacturer of this carpet."(1)

Caubarreaux suffers constantly from trouble breathing and a cough, and his limited endurance was evident when he testified. Because of the limitations on Caubarreaux's health, Dr. Cornelius Gorman, the plaintiff's vocational rehabilitationist, testified that "Caubarreaux would be considered totally disabled under all Federal and State guidelines for the assessment of disability. Dr. Gorman testified that but for plaintiff's ability to work from his home as a stock broker he would be totally disabled. According to Gorman, Caubarreaux has lost the capacity to run a brokerage firm, which he was qualified to do before his injury."(1) Caubarreaux was awarded $2.25 million for general damages and $1,904,550 for total economic loss, $22,413.92 for medical expenses and $50,000 for loss of consortium for a total of $4,226,963.92.(1)

Perhaps this will help motivate industries to start paying attention to the chemicals they use in their consumer products. Even better yet, maybe they will decide that the cost and inconvenience of testing full product formulations for toxicity and biological health effects is worth it *before* an economically significant number of consumers are poisoned and injured by their products, thereby significantly adding to the cost side of their cost-benefit product analyses.

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Review Summarizes Evidence for Silicone Implant Problem

Because of the public controversy over silicone breast implants, many people do not realize that it's not just breast implants that are capable of causing silicone-induced health problems. One example is the health problems that can occur from the silicone in Norplant birth control implants. [See "Silicone and Norplant Cause Immune and Endocrine Effects" in *Medical & Legal Briefs* 2(2): 6-7 (1996).] In addition, researchers note, "Problems with silicone implants have been described with penile implants, testicular implants, joint implants, orbital implants, and breast implants. Nevertheless, the manufacturers and defense attorneys, and their team of experts, claim 'silicone is safe,' and 'there is no causation.' We have summarized the scientific evidence showing that causation exists, and review the criteria to be utilized by physicians to establish causation."

The review article succinctly summarizes the available data from the peer-reviewed literature and shows how the evidence clearly meets all the generally accepted 5-point scientific criteria