

CLIENT ALERT

From Roundup® to Oatmeal: The Next Trend in Glyphosate Litigation?

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Over the past year, jurors have rendered multi-million and even multi-*billion* dollar personal injury verdicts against Monsanto Company (now a Bayer AG subsidiary) showing that jurors – in California, at least – accept plaintiffs’ theory that Monsanto’s popular herbicide, Roundup®, and its active ingredient, glyphosate, cause non-Hodgkin’s Lymphoma (“NHL”), a group of blood cancers. See *Johnson v. Monsanto Co.*, No. CGC-16-550128 (Cal. Super. Ct., San Fran., Aug. 10, 2018) (\$289 M verdict); *Hardeman v. Monsanto Co.*, No. C 16-00525 VC (N.D. Cal., Mar. 29, 2019) (\$80 M verdict); *Pilliod v. Monsanto Co.*, JCCP No. 4953 (Cal. Super. Ct., Alameda, May 13, 2019)(\$2.055 B verdict).

These verdicts spotlight the risk not just from the large docket of Roundup® user plaintiffs, but also from a spinoff set of cases alleging that *food products* such as cereals contain trace amounts of glyphosate.

Despite virtually universal scientific consensus that glyphosate is not carcinogenic, the World Health Organization’s International Agency for Research on Cancer (“IARC”) decision in 2015 to classify glyphosate as “probably carcinogenic to humans” sparked a wave of tort litigation. The mainstream scientific community roundly criticized those who interpreted IARC’s conclusion as showing that glyphosate poses a real threat to human health at real-world exposure levels, because, among other things, IARC did not assess exposure or dose. Nonetheless, since that time, plaintiffs’ attorneys have been testing the outer bounds of viable glyphosate litigation.

In addition to thousands of current Roundup® claims against Monsanto over use of the herbicide product, numerous class actions against major food manufacturers and retailers allege violations of various consumer protection laws. Claims in these lawsuits largely center on allegations that companies failed to disclose that bread and grain products contained small amounts of residual glyphosate and/or that various package label statements – e.g., the product is “natural,” “wholesome,” or otherwise beneficial to one’s health – are false due to the presence of trace glyphosate concentrations. See, e.g., *Brandon v. PepsiCo, Inc.*, No. 1:18-cv-08234 (N.D. Ill., filed Dec. 14, 2018); *Doss v. General Mills, Inc.*, No. 0:18-cv-61924-RNS (S.D. Fl., filed Aug. 16, 2018); *Gibson v. The Quaker Oats Co.*, No. 1:16-cv-04853 (N.D. Ill., filed May 2, 2016).

Monsanto itself also currently faces several consumer lawsuits alleging that glyphosate harms “beneficial” bacteria present in the human gut. These suits claim that the statement on Roundup®’s label that glyphosate targets an enzyme found in plants but not “in people or pets” is false, because the enzyme is found in mammalian gut bacteria. See, e.g., *Jones v. Monsanto Co.*, No. 4:19-cv-00102-BP (W.D. Mo., filed Feb. 13, 2019); *Carias v. Monsanto Co.*, No. 2:15-cv-03677 (E.D.N.Y., filed June 24, 2015). While these cases are currently styled as consumer claims, the allegations include suggestions that glyphosate’s purported effect on “beneficial” gut bacteria could be linked to broader health consequences.

Since IARC’s 2015 report, the Monsanto Roundup® cases are the only glyphosate cases that have gone to trial. The consumer class actions against food companies have proved less successful for plaintiffs. None have yet proceeded very far and courts have dismissed several in the early stages, though similar lawsuits continue to be filed. See, e.g. *Axon v. Citrus World, Inc.*, No. 18-4163, slip op. (E.D.N.Y. Jan. 14, 2019) (finding it implausible that a reasonable consumer would be misled by defendant’s

brand name "Florida's Natural"); *In re General Mills Glyphosate Litigation*, 2017 WL 2983877, No. 16-2869 (D. Minn. July 12, 2017) (finding it implausible "that a reasonable consumer would believe that a product labeled as having one ingredient – oats – that is '100% Natural' could not contain a trace amount of glyphosate."). Likewise, "gut bacteria" consumer claims have been relatively few and slow to advance. Notably, however, several of the "gut bacteria" cases have been filed by the same plaintiff law firms leading the Roundup® litigation, including one filed just a few months ago.

Thus far, and despite this aggressive plaintiff bar strategy, the food industry has not seen lawsuits alleging personal injuries as a result of ingesting products containing residual and *de minimis* levels of glyphosate. Even so, glyphosate in food products has increasingly become a topic of public interest, with major media such as the *New York Times* reporting on the subject. The prospect of personal injury lawsuits against the food industry may at some point be attractive to the plaintiff bar given the practically limitless volume of potential claimants and defendants. Whether this comes to pass in any meaningful way remains to be seen.

There are critical distinctions between the current Roundup® claims and potential allegations against the food industry that may inhibit plaintiffs from replicating their Roundup® successes, at least in the near term. The Roundup® cases, as their name suggests, all involve plaintiffs who allege direct exposure to a multi-component, formulated herbicide, including "surfactants" that plaintiffs have focused on as potentially increasing glyphosate's purported carcinogenicity. In contrast, the food cases involve the residual active ingredient glyphosate that presumably remains in trace amounts on treated row crops like corn and wheat. In addition, all Roundup® personal injury plaintiffs alleged dermal exposure, rather than exposure by ingestion, which potentially implicates different and possibly more protective metabolic pathways for potential effects in the body. Further, users of the herbicide product can allege direct exposure to a glyphosate product, but the food litigation plaintiffs can only claim vanishingly small exposures that might notionally result from occasional ingestion of trace glyphosate in foods. Nevertheless, certain laboratories are actively soliciting individuals to send in samples of product or their own blood to test for the presence of glyphosate. Those efforts may be a precursor to recruitment of plaintiffs in food-related litigation.

Within the last year, several activist organizations have reported that their testing of common food products such as oatmeal, cereals, hummus, and corn chips revealed glyphosate, in many instances higher than the applicable regulatory tolerances. By contrast, FDA testing between 2015 and 2016 found no violative levels and Canadian Food Inspection Agency testing from the same period found only a few items above the tolerances. Further, even if plaintiffs could establish that levels in food exceeded regulatory tolerances, they would face other medical causation hurdles, notably including the facts that the potential plaintiff population is not robustly differentiated in terms of exposure (most people eat grains or other glyphosate-exposed crops), and regulatory levels are typically set at orders of magnitude below the no-observed adverse effect levels derived from sensitive experimental animal models.

The Monsanto trials to date have not really tested true low exposure/dose circumstances, though plaintiffs, based on cherry-picked epidemiology, claim that any glyphosate exposure even just a few days in duration increases cancer risk. Much as the plaintiff bar may be eager to capitalize on their recent trial success by roping the food industry into personal injury litigation, doing so would require extending their theory beyond what has proven successful to date. For the moment, at least, it seems plaintiffs' personal injury attorneys have opted to stick with their proven strategy. What will happen once the current stock of Roundup® plaintiffs has been exhausted remains to be seen.

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