

From Roundup To Oatmeal: New Trends In Glyphosate Suits

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Over the past year, three juries have rendered multimillion- and even multibillion-dollar personal injury verdicts against Monsanto Co. (now a Bayer AG subsidiary), showing that jurors — in California, at least — accept the questionable scientific theory advanced by plaintiffs that Monsanto’s popular herbicide, Roundup, and its active ingredient, glyphosate, cause non-Hodgkin’s lymphoma, a group of blood cancers.[1]

These three verdicts spotlight the risk not just from the large docket of Roundup user plaintiffs, but also from a spinoff set of consumer protection cases alleging that food products such as cereals failed to disclose the presence of trace amounts of glyphosate.

Despite virtually universal scientific consensus that glyphosate is not carcinogenic, the decision by the World Health Organization’s International Agency for Research on Cancer, or IARC, in 2015 to classify glyphosate as “probably carcinogenic to humans” sparked a wave of tort litigation. Regulators around the world, other agencies within the WHO, and the mainstream scientific community have rejected IARC’s conclusion — which did not assess real-world exposure — by repeatedly concluding that glyphosate does not pose a threat to human health.

Nonetheless, since that time, plaintiffs attorneys have been searching for possible theories supporting glyphosate litigation. In addition to thousands of current Roundup personal injury claims against Monsanto over use of the herbicide product itself, 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 that various package label statements — e.g., calling products “natural,” “wholesome” or otherwise beneficial to one’s health — are false due to the presence of trace glyphosate concentrations[2].

Monsanto itself also currently faces several consumer lawsuits alleging 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[3]. These cases are styled as consumer claims, and do not allege actual personal injury.



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Since IARC's 2015 report, the Monsanto Roundup personal injury 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[4].

Just last month, a consumer class action alleging General Mills failed to disclose the presence of glyphosate in Cheerios was dismissed[5]. The plaintiff, the court noted, did not allege "that the Cheerios she herself bought actually contain[ed] any glyphosate — just that some Cheerios that have been tested do," and further, "[d]id not allege she even consumed the Cheerios she purchased." The plaintiff's allegations thus failed to show that she had suffered any negative health effects as a result of purchasing Cheerios. And allegations that "ultra-low levels of glyphosate may be harmful to human health" left unanswered questions about what level of glyphosate in food could cause harm — "[m]ere conjecture that something has the potential to be harmful is not enough."

Like the consumer actions, "gut bacteria" consumer claims have been relatively few and slow to advance. Notably, however, the same plaintiffs law firms leading the Roundup litigation are leading the charge in the gut bacteria cases, including one filed just a few months ago. Because of this activity, 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.

There are critical distinctions between the current Roundup personal injury claims and potential allegations against the food industry that will presumably inhibit plaintiffs from converting the personal injury cases into successful consumer fraud cases. The Roundup personal injury cases all involve plaintiffs such as landscapers, groundskeepers and home users, who allege direct exposure to a formulated herbicide, including a "surfactant" 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, at most, only trace amounts on treated row crops like corn and wheat. In addition, the food litigation plaintiffs would only be able to claim de minimis exposures that might notionally result from occasional ingestion of trace glyphosate in foods. Further, all Roundup personal injury plaintiffs to date have alleged dermal exposure, rather than exposure by ingestion, which potentially implicates different metabolic pathways for potential effects in the body.

Nevertheless, certain laboratories, possibly with ties to activist organizations, 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. Notably, though, none of these reported detections have exceeded the strict limits set by the U.S. Environmental Protection Agency and the U.S. Food and Drug Administration. Indeed, FDA testing between 2015 and 2016 found no levels in violation of federal standards.

Canadian Food Inspection Agency testing from the same period found only a few items above the tolerances. And the Food and Agriculture Organization of the United Nations and World Health Organization Joint Meeting on Pesticide Residues concluded, post-IARC, that glyphosate residues in food do not pose a carcinogenic risk to humans. Thus, the food advertising cases will depend, at best, on the trace presence of glyphosate below harmful levels to claim that the food packaging is somehow mislabeled.

Much as the plaintiffs bar may be eager to capitalize on their recent personal injury trial success by extending cases to advertising and consumer protection litigation against the food industry, doing so would require an entirely different set of questionable assertions about the risk of de minimis amounts of product in foods. Plaintiffs in these cases also face significant challenges arising out of the much different consumer fraud and advertising litigation world, in which no plaintiff will likely be able to claim actual physical injury.

Nevertheless, many food companies that have never heard of glyphosate will find themselves faced with trace contamination claims in the next few years — unless and until courts dismiss enough of these cases to discourage these filings.

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[1] 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., March 29, 2019) (\$80 M verdict); *Pilliod v. Monsanto Co.*, JCCP No. 4953 (Cal. Super. Ct., Alameda, May 13, 2019) (\$2.055 B verdict).

[2] 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).

[3] 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).

[4] 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").

[5] See *Doss v. General Mills Inc.*, No. 18-61924-Civ-Scola (S.D. Fl. 2019).