

# Lawyer Insights

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## Expert Analysis: Retailers At Risk From New Glyphosate Liability Theories

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Glyphosate, the world's most widely used herbicide, dominated headlines in 2018, as Monsanto battled thousands of lawsuits brought by consumers claiming that the chemical causes cancer. Now, other companies in the retail supply chain are beginning to feel pressure, as consumer groups and plaintiffs lawyers turn their attention to other, less obvious targets following early success against Monsanto in both state and federal courts.

But as the potential pool of defendants has expanded, so too has the disconnect between the plaintiffs' success in court and the scientific and regulatory landscape, suggesting that reliance on science will do little to mitigate the risk and cost of glyphosate litigation for companies in the retail industry.

### **Monsanto Facing Historic Verdicts and Lawsuits Despite Strong Scientific and Regulatory Evidence**

Although the scientific and regulatory communities have disagreed about the alleged carcinogenicity of glyphosate for years, the debate drew little attention from the general public until August 2018. Then, a California state jury slammed Monsanto with a \$289 million verdict for a groundskeeper who claimed that his exposure to Roundup weed-killer caused his non-Hodgkin's lymphoma, in *Johnson v. Monsanto*.<sup>1</sup>

While the Johnson court later slashed the punitive damages award by \$211 million on due process grounds, it ultimately left the jury's causation findings intact. And the reduction in damages has done little to quell the media attention on glyphosate.

With the Johnson verdict still fresh in the public's mind, Monsanto now faces the first bellwether trials in the Roundup multidistrict litigation in the United States District Court for the Northern District of California, where nearly 900 cases are currently pending. With the causation phase of the first bellwether trial beginning this month, the scientific and regulatory disagreement regarding the alleged carcinogenicity of glyphosate will come into sharper focus both in court and in the public arena, and add further fuel to the media frenzy surrounding the chemical and products that may contain it.

The International Agency for Research on Cancer, or IARC — a subdivision of the World Health Organization — first classified glyphosate as "probably carcinogenic to humans" in 2015. Two years later,

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in December 2017, the United States Environmental Protection Agency released a risk assessment classifying glyphosate as “not likely to be carcinogenic to humans.” A majority of regulators around the world have since sided with the EPA, including multiple European agencies, and agencies in Australia and New Zealand.

California initially placed glyphosate on its Prop 65 list of chemicals “known to the state to cause cancer” in July 2017 — just before the EPA released its risk assessment. But in February 2018, a federal court temporarily enjoined the state from requiring companies to place Prop 65 warning labels on foods that may contain traces of glyphosate, finding that requiring labels would violate the First Amendment because, aside from IARC, “almost all other regulators have concluded that there is insufficient evidence that glyphosate causes cancer.”<sup>2</sup>

Judge Vince Chhabria, the federal judge presiding over the Roundup multidistrict litigation, weighed in on the controversy in July 2018, calling the bulk of the plaintiffs’ scientific expert testimony “shaky,” but ultimately admissible under the Daubert standard.<sup>3</sup>

## **What Could the Roundup Federal Bellwether Trials Mean for Glyphosate Litigation?**

Although Judge Chhabria’s decision to admit the plaintiffs’ scientific evidence was certainly a setback for Monsanto, he recently granted Monsanto’s request to “reverse-bifurcate” the upcoming bellwether trials. Unlike the Johnson trial, the federal bellwether trials will be separated into two phases: an initial causation phase, and then (if necessary) a second phase to determine liability and damages.<sup>4</sup> This trial structure will provide Monsanto with an opportunity to defend the safety of glyphosate without the added distraction of the plaintiffs’ lawyers offering “evidence” that may divert jurors’ attention away from the core scientific causation issues in the case.

Perhaps most importantly, while the plaintiff’s lawyers in the Johnson trial were permitted to freely introduce and reference what have become known as the “Monsanto Papers” — internal Monsanto documents that initially became public during discovery proceedings in the federal MDL — most of those documents will not be admissible unless and until the jury decides that glyphosate can indeed cause cancer. Plaintiffs lawyers and consumer groups have used the Monsanto papers in the past to paint a damning picture of Monsanto, attacking the company for engaging in what they have characterized as “ghostwriting” of favorable scientific studies, colluding with federal officials to improperly influence agency reviews of glyphosate and employing third parties to post positive comments online defending Monsanto and its chemicals.

Those documents undoubtedly played a major role in the Johnson jury’s verdict and punitive damages award. Their near-exclusion from the first phase of the federal trials is an important victory for Monsanto.

How Monsanto fares in the causation phase of the first bellwether trial will unquestionably set the tone for glyphosate litigation in 2019. If Monsanto prevails, it could drive down — at least temporarily — the plaintiffs bar’s interest in bringing new personal injury suits, especially against downstream retailers whose products may contain only trace levels of glyphosate.

But that does not mean that plaintiffs will stop filing glyphosate suits. Instead, plaintiffs lawyers will likely continue to capitalize on the growing public interest in the glyphosate controversy by simply shifting

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tactics and filing costly class actions against defendants on non-personal-injury theories, like false advertising.

Any success for Monsanto in federal court will likely also mean increased glyphosate filings in state courts, particularly those known as plaintiff-friendly “judicial hellholes,” where procedural safeguards are weak, causation standards are lower and expert testimony is liberally admitted. And, of course, if Monsanto loses, potential plaintiffs will be armed with a favorable finding of causation from a federal court — meaning that the floodgates opened after the Johnson verdict will only widen.

## **Regulators Around the World Face Increased Scrutiny on Glyphosate**

While Monsanto and other companies facing the threat of glyphosate lawsuits may believe that they have science on their side, the Johnson verdict and federal MDL Daubert decision make clear that that argument may not be enough to win in court or in the public eye.

Since the Johnson verdict, plaintiffs and consumer groups have continued to grab headlines by calling glyphosate carcinogenic, increasing pressure on companies to respond to consumer inquiries and defend the safety of their products. Likewise, decisions as to the carcinogenicity of glyphosate made by regulatory agencies around the world have come under fire as Monsanto’s legal battles continue to make front-page headlines.

In September 2018, the Environmental Working Group, or EWG, teamed up with eight major food companies to petition the EPA to reduce the current glyphosate tolerance level in oat-based products from 30 ppm to 0.1 ppm, the original level set by the EPA in 1993.<sup>5</sup> The petition criticizes the EPA’s stance on glyphosate, and cites the IARC classification in support of its claims that glyphosate causes cancer.

The petition also touts EWG’s own self-commissioned “study,” which reportedly found that the majority of the food samples tested by EWG contained glyphosate levels higher than what it considers to be safe — although none of the products exceeded current legal limits. EWG followed up with a second round of tests on oat-based cereals and breakfast products in October 2018, claiming that it detected traces of glyphosate in all 28 samples tested.

EWG also attacked the U.S. Food and Drug Administration after the agency released a report in October 2018 concluding that over 99 percent of United States-sourced foods it tested in 2016 complied with federal glyphosate tolerance levels. The FDA also found that over 90 percent of imported foods complied with federal glyphosate tolerance levels, and it found that 52.9 percent of domestic foods and 50.7 percent of imported foods contained no pesticide residue at all.

While glyphosate residue was found in 173 of the corn samples and 178 of the soybean samples tested by the FDA, none of the samples contained glyphosate residue in excess of the federal glyphosate tolerance levels. EWG struck back quickly, seeking to change the narrative by criticizing the FDA’s testing methods, and pointing out that the FDA did not test oat- or wheat-based products — products that EWG claims are the two major crops on which glyphosate is used as a drying agent, and which EWG had tested for its self-published report.<sup>6</sup>

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Agencies in the United States are not alone in facing criticism for their decisions on glyphosate. In August 2018, a federal judge in Brazil ruled that new products containing glyphosate would not be permitted, and existing product registrations would be suspended until the Brazilian government re-examined its toxicological basis for permitting the chemical, though that ruling was overturned the next month just as Brazil's soybean planting season was set to begin.<sup>7</sup>

More recently, in January 2019, a French court banned sales of a Roundup product nationwide after deciding the French Agency for Food, Environmental, and Occupational Health and Safety did not adequately account for the alleged health risks of glyphosate when it approved Roundup Pro 360 in 2017. Also in January, the German Federal Institute for Risk Assessment faced a backlash from members of the European Parliament with the release of a report claiming the agency plagiarized several portions of its glyphosate evaluation from a renewal application submitted by several pesticide companies including Monsanto.<sup>8</sup>

## What's Next?

Regardless of whether Monsanto prevails in the causation phase of the first bellwether trials in the federal MDL, the continued debate in the regulatory and scientific communities means that glyphosate-related lawsuits are here to stay. Plaintiffs attorneys have already expanded their targets beyond Monsanto and traditional personal injury lawsuits, after receiving additional fuel from consumer groups like EWG, who are working to keep glyphosate in the public eye by criticizing prominent companies for alleged glyphosate residue in their products.

At least three different food companies have been hit with putative class action suits based, at least in part, on the results of self-commissioned studies published by consumer groups. In July 2018, a putative class action suit was filed in a New York federal court against Florida's Natural Growers Inc. and Citrus World Inc. — the companies behind Florida's Natural orange juice — after a 2017 report from consumer group Moms Across America claimed to have identified glyphosate residue in the product.<sup>9</sup> That case was swiftly dismissed after the court found in December 2018 that no reasonable consumer would understand the label "Florida's Natural" to mean that the product was free from any traces of glyphosate.<sup>10</sup>

But plaintiffs lawyers have not been discouraged. Six days after the Johnson verdict, General Mills was hit with a putative class action suit in Florida, relying on EWG's report in alleging that General Mills deceived consumers by failing to disclose that Cheerios products contain traces of glyphosate.<sup>11</sup> The new claims against General Mills came just as the company agreed to remove the phrase "natural" from its granola products to settle a two-year-old lawsuit alleging that the "100% Natural Whole Grain Oats" label misled consumers because the products contained traces of glyphosate.<sup>12</sup>

A third putative class, also citing EWG's report, recently sued Kellogg Co. in California federal court for failing to disclose traces of glyphosate allegedly contained in two of its popular food products.<sup>13</sup>

Other consumer product companies will likely be pulled into the glyphosate litigation as plaintiff's attorneys test the waters with new theories of liability following the early success against Monsanto. Reports that glyphosate has been detected in diapers,<sup>14</sup> women's feminine hygiene products,<sup>15</sup> vaccines,<sup>16</sup> cotton clothing products<sup>17</sup> and pet foods<sup>18</sup> are already making the news, and should put all retail companies on notice of the risk that their products may be thrust into the spotlight following independent testing they may not even know about.

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As companies await the outcome of the causation phase of the bellwether trials in the Roundup MDL — which will inform plaintiffs lawyers' strategy going forward — they should take stock of the growing threat of glyphosate litigation, and evaluate their products to assess their relative risk. The Johnson verdict is cause for concern for any company whose products may contain glyphosate, even in trace amounts, given the Johnson jury's punitive damage award and the substantial (and costly) risk of proliferating litigation after early success.

Companies that advertise their products as “natural” or “organic” or tout their products' health benefits should be particularly aware of the threat of glyphosate litigation, especially because plaintiffs lawyers tend to bring false labeling and deceptive trade practices claims as nationwide class actions. Those types of claims are unlikely to disappear from plaintiffs lawyers' playbooks any time soon, even if Monsanto wins the causation issue in federal court.

In fact, they may even multiply if Monsanto wins and personal injury claims become more difficult to prove. And all companies should take the opportunity now — before being hit with litigation — to review their product lines and supply and distribution agreements to evaluate and negotiate risk-shifting and indemnification provisions associated with products that may be the subject of glyphosate litigation.

## Notes

<sup>1</sup> *Johnson v. Monsanto Co.*, No. CGC16550128 (Cal. Super. Ct., County of San Francisco Aug. 10, 2018).

<sup>2</sup> See *Nat'l Assoc. of Wheat Growers v. Zeise*, 309 F.Supp.3d 842 (E.D. Cal. 2018).

<sup>3</sup> See Pretrial Order No. 45: Summary Judgment and Daubert Motions, In Re Roundup Products Liability Litigation, No. 16-md-02741-VC (N.D. Cal. July 10, 2018).

<sup>4</sup> See Pretrial Order No. 61 Re: Bifurcation, In Re Roundup Products Liability Litigation, No. 16-md-02741-VC (N.D. Cal. Jan. 3, 2019).

<sup>5</sup> Petition to Modify the Tolerance of Glyphosate in Oats to 0.1ppm and Require Glyphosate-Containing Product Labels to Explicitly Prohibit the Use of Glyphosate as a Preharvest Desiccant (proposed Sept. 27, 2018), <https://cdn3.ewg.org/sites/default/files/Glyphosate%20Petition%20Final%20.pdf>.

<sup>6</sup> See Roundup for Breakfast, Part 2, *supra* note 6.

<sup>7</sup> See Brazil Court Overturns Ban on Weed-killer Glyphosate, Reuters (Sept. 3, 2018), <https://www.reuters.com/article/us-brazil-agriculture/brazil-court-overturns-ban-on-weed-killer-glyphosate-idUSKCN1LJ1D7>.

<sup>8</sup> Steven Weber and Helmut Burtscher-Schaden, Detailed Expert Report on Plagiarism and Superordinated Copy Paste in the Renewal Assessment Report (RAR) on Glyphosate (Jan. 2019), <https://www.greens-efa.eu/files/doc/docs/298ff6ed5d6a686ec799e641082cdb63.pdf>.

<sup>9</sup> *Axon v. Citrus World Inc. and Florida's Nat. Growers Inc.*, No. 1:18-cv-04162-ARR-RML (E.D.N.Y. July 20, 2018).

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<sup>10</sup> See Op. & Order No. 20, *Axon v. Citrus World Inc. and Florida's Nat. Growers Inc.*, No. 1:18-cv-04162-ARR-RML (E.D.N.Y. Dec. 10, 2018).

<sup>11</sup> See *Doss v. General Mills Inc.*, No. 0:18-cv-61924 (S.D. Fla. Aug. 16, 2018).

<sup>12</sup> See *Organic Consumers Association et al. v. General Mills Inc.*, No. 2016 CA 006309 B (D.C. Super. Ct. Sept. 21, 2018).

<sup>13</sup> *Kien v. Kellogg Co.*, No. 3:18-cv-02759-AJB-MSB (S.D. Cal. Dec. 7, 2018).

<sup>14</sup> See Toxic Substances Found in Diapers in France: Government Agency, *Reuters* (Jan. 23, 2019), <https://www.reuters.com/article/us-france-health/toxic-substances-found-in-diapers-in-france-government-agency-idUSKCN1PH0I1>; 'Toxic Substances' Found in Most Nappies in France, *The Local* (Jan. 24, 2017), <https://www.thelocal.fr/20170124/weedkiller-found-in-nappies-in-france>.

<sup>15</sup> Monsanto's Chemicals Make Their Way Into 85% of Personal Hygiene Products, *Waking Times* (Jan. 12, 2016), <https://www.wakingtimes.com/2016/01/12/monsantos-chemicals-makes-their-way-into-85-of-personal-hygiene-cotton-products/>.

<sup>16</sup> FDA Hides Information on Glyphosate in Vaccines, *Moms Across America* (Sept. 12, 2017), [https://www.momsacrossamerica.com/fda\\_hides\\_information\\_on\\_glyphosate\\_in\\_vaccines](https://www.momsacrossamerica.com/fda_hides_information_on_glyphosate_in_vaccines).

<sup>17</sup> Why Opting for Organic Cotton Matters, *Mercola* (Apr. 4, 2017), <https://articles.mercola.com/sites/articles/archive/2017/04/04/non-organic-cotton-clothing.aspx>.

<sup>18</sup> Zhao et al., *Detection of Glyphosate Residues in Companion Animal Feeds*, 243 Part B *Envtl. Pollution* (Dec. 2018), <https://www.sciencedirect.com/science/article/pii/S0269749118319067>.

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