

# News Roundup for RoundUp®

By

Monsanto's immensely popular weedkiller, RoundUp®, has not been far out the news ever since the World Health Organization's International Agency for Research on Cancer (IARC) declared in 2015 that the active ingredient in RoundUp, glyphosate, is "probably carcinogenic to humans." The IARC declaration triggered the automatic listing of glyphosate as a "known carcinogen" under California's right-to-know law, Prop 65, and precipitated an avalanche of lawsuits by private individuals alleging that they contracted non-Hodgkin lymphoma, an often fatal blood cancer, from using RoundUp. Over the past year, three of these cases came to trial in California, ending in jury verdicts awarding more than \$2.4 billion in compensatory and punitive damages. Many other cases, involving over 18,000 plaintiffs, are pending in courts around the country.

These events have potentially far-reaching ramifications. Glyphosate is by far the most widely used herbicide in the history of agriculture. Introduced in 1974, the use of glyphosate exploded in the late 1990s, as Monsanto launched a series of "RoundUp Ready®" seeds for major row crops (corn, soybeans, cotton, alfalfa, sugar beets, canola) genetically modified to tolerate glyphosate, permitting its use "over the top" of the growing crop. For example, well over 90% of all corn and soybeans grown in the U.S. over the past decade were produced using RoundUp Ready seeds – and multiple applications of RoundUp. The withdrawal or demise of RoundUp would cause seismic shifts in food and fiber production in the U.S. and globally.

In mid-2018, despite mounting lawsuits – but before any jury verdicts – Bayer AG proceeded with its acquisition of Monsanto for \$63 billion. After the first verdict was announced a few months later, Bayer's stock price dropped by 40%, and has never rebounded. Criticism over the deal from key shareholders has been fierce. Bayer is under enormous pressure to reach a global settlement, at a cost of perhaps \$10 billion or more.

Although Bayer is participating in mediation to explore settlement, it is committed to the vigorous defense of RoundUp, and its investment. Doing so may reflect several considerations. To begin with, the presiding judge in each of the three jury cases slashed the total damages awarded from over \$2.4 billion to about \$189 million – still a substantial sum. Moreover, Bayer has appealed each case and hopes ultimately to vacate the verdicts.

Second, and more important, IARC's cancer finding is at odds with the conclusions of many other scientific agencies around the world that have reviewed the extensive database on glyphosate and concluded that RoundUp is not carcinogenic. In the U.S., pesticides such as glyphosate/RoundUp are strictly regulated by the U.S. Environmental Protection Agency (EPA). After the IARC declaration, EPA conducted yet another scientific review and concluded, again, that RoundUp can be used safely and is not a carcinogen.

EPA went even further. In August 2019, EPA issued a press release and letter announcing that it will not approve glyphosate product labels bearing a cancer warning because such a warning, in EPA's view, would be false and misleading. EPA's letter – and its underlying scientific risk assessment – will no doubt play a prominent role in all pending and future glyphosate injury cases, particularly with regard to a core legal issue: whether or not plaintiffs' "failure to warn" claims are *preempted* under the federal pesticide statute, the Federal Fungicide, Insecticide and Rodenticide Act (FIFRA). This topic is discussed more fully in a companion blog.

Meanwhile, the agency in California responsible for implementing Prop 65, the Office of Environmental Health Hazard Assessment (OEHHA), wasted no time criticizing EPA's action. In a statement issued only days after EPA's press release, OEHHA defended the listing of glyphosate under Prop 65 and asserted that "[it] is disrespectful of the scientific process for US EPA to categorically dismiss any warnings based on IARC's determinations as false." In fact, however, sellers of RoundUp in California are currently not required to provide a cancer warning under Prop 65, because a federal judge last year enjoined enforcement of that requirement indefinitely, based on "the heavy weight of evidence in the record that

glyphosate is not in fact known to cause cancer.”

In short, despite the recent huge jury verdicts against RoundUp, it remains far from certain that exposure to the product in fact can cause non-Hodgkin lymphoma or any other cancer. The next RoundUp cases scheduled for trial this fall in St. Louis, MO, have been delayed until next year. It is anybody's guess how all this will ultimately play out.