

RoundUp® Redux

By

A November 2019 blog reported on fast-moving developments concerning Monsanto's popular weedkiller, RoundUp®. The most recent challenges to RoundUp® follow a 2015 declaration by the World Health Organization's International Agency for Research on Cancer (IARC) that the active ingredient in RoundUp, glyphosate, is "probably carcinogenic to humans." This triggered an avalanche of lawsuits against Monsanto seeking tens of billions of dollars in compensatory and punitive damages for injuries – specifically, non-Hodgkins lymphoma, an often fatal blood cancer – allegedly caused by exposure to the product.

In stark contrast to the IARC finding, many other regulatory authorities around the world including the U.S. Environmental Protection Agency have continued to maintain that RoundUp® when used as directed is safe and that glyphosate is not a carcinogen. Indeed, in August 2019, EPA announced that it would not approve glyphosate product labels bearing a cancer warning because such a warning would be, in EPA's view, false and misleading.

In this context, Bayer AG proceeded with its acquisition of Monsanto for \$63 billion in 2018, despite the rising tide of lawsuits. Shortly thereafter, however, Monsanto/Bayer suffered stunning losses in the first three RoundUp® cases that had proceeded through trial, with juries awarding over \$2.4 *billion* in damages. Although the judge in each case reduced the awards to a total of about \$189 million and Bayer has appealed all three cases, the future of RoundUp® litigation looked grim for the company. As reported in November 2019, Bayer felt enormous pressure from shareholders to reach a global settlement, "at a cost of perhaps \$10 billion or more."

On June 24, 2020, Bayer took a giant step forward in managing its RoundUp® litigation problem. On that day, Bayer announced that it had reached separate settlements with 25 law firms to resolve about 95,000 of a total of 125,000 pending RoundUp® cases, at a cost of as much as \$10.9 billion. To settle current litigation, Bayer has set aside \$9.6 billion, an amount that includes a cushion to cover claims not yet resolved. Individual plaintiffs will reportedly receive payments of \$5,000 to \$250,000, depending on the strength of their cases. Bayer has not admitted any wrongdoing.

The settlement process was facilitated by Washington lawyer, Kenneth R. Feinberg. Mr. Feinberg served as special master for the 9-11 Victim Compensation Fund. He also administered claims for victims of the BP Deepwater Horizon oil spill; the relief fund for a mass shooting in Aurora, Colorado; and a fund established for victims of the Boston Marathon attacks in 2013.

Bayer is taking a calculated risk that the June 2020 settlements will lead to the end of all RoundUp® litigation. Bayer still faces some 30,000 claims from plaintiffs who have not agreed to settle – including plaintiffs in the three cases that resulted in jury verdicts in their favor. Bayer is hoping that mediator Feinberg is correct in his prediction that "all those cases that have not yet been settled will quickly be resolved by settlement ... I will be surprised if there are any future trials."

In this regard, the settlements include \$1.25 billion set aside for a class action suit recently filed in California on behalf of those who have used RoundUp® but have not yet developed cancer or other health problems. Part of these funds are intended to be used to establish an independent science panel to issue findings on whether or not RoundUp® can cause non-Hodgkin's lymphoma, and if so, what level of exposure is safe. The five-member panel will be selected by mutual agreement between Bayer and the class action plaintiffs. If the two sides cannot agree, each will select two panel members, and those four will choose a fifth. If the panel concludes that glyphosate is a carcinogen, Bayer will not be allowed to argue otherwise in future cases. If the experts reach the opposite conclusion, the class action lawyers will be similarly bound.

However, this part of the deal is in serious jeopardy. The presiding judge in the class action case expressed deep skepticism as to constitutionality and lawfulness of the arrangement. Why should a future plaintiff, the judge asked, be required to waive the right to have a jury decide causation and instead accept the findings of an expert panel? In light of the judge's concerns, the parties withdrew this portion

of the settlement for further negotiations.

In any case, it is clear that the settlements do not require Bayer to add a cancer warning to its RoundUp® label. This is not surprising given EPA's August 2019 announcement that it would disallow any such warning as false and misleading. Of course, EPA could revisit that position once the five-member panel (assuming that it is established) reaches its expert determinations – which could take several years – or if additional evidence becomes available in the interim.

Notably, Bayer scored a significant court victory just days before announcing these far-reaching settlements. In 2017, and based on IARC's finding, California added glyphosate to its Prop 65 list of "known carcinogens." This triggered a requirement that sellers of glyphosate products in California provide an appropriate warning (albeit not necessarily on the product label). Bayer challenged this action and, in 2018, a federal district court judge issued a preliminary injunction against the requirement, based on "the heavy weight of evidence in the record that glyphosate is not in fact known to cause cancer." After further proceedings, on June 22, 2020, the judge issued a permanent injunction against the Prop 65 listing, concluding that the First Amendment bars California from requiring a Prop 65 warning for glyphosate products. The judge ruled that the requirement for such a warning "undermines California's interest in accurately informing its citizens of health risks."