

CLM

SEPTEMBER 2018

THE BLAME GAME:
PRODUCT LIABILITY EDITION

A CANNABIS CONUNDRUM
IN THE COURTS

ETHICS AND THE
UNREPRESENTED CLAIMANT

FURTHERING THE HIGHEST STANDARDS OF CLAIMS AND LITIGATION MANAGEMENT



A NEW ERA IN TOXIC TORTS?

While It Might Not Be the "Next Asbestos"
the \$289 Million Roundup Verdict Will
Have Widespread Impacts

Roundup
FOR LAWNS,³

**KILLS WEEDS
NOT THE LAWN**

KILLS CRABGRASS · DANDELION · CLOVER · YELLOW NUTSEDGE*

Keep Out Of Reach Of Children **Mantener Fuera Del Alcance De Los Niños**
CAUTION Read the entire label first. Observe all precautions and follow directions carefully. See back panel booklet for additional precautionary statements and first aid. **PRECAUCION** Antes de usar, lea todo el etiquetado. Observe todas las precauciones y siga las instrucciones cuidadosamente. Consulte el panel posterior de la etiqueta para obtener información adicional sobre precauciones y primeros auxilios.

ACTIVE INGREDIENTS: **THIS PRODUCT CONTAINS:**

MCPA, dimethylamine salt	3.85%	0.04 to 2-methyl-4-chlorophenoxyacetic acid equivalent per gallon or 3.14%
Quinclorac	1.80%	0.152 to 3,1-dichloro-5-quincloracetic acid per gallon or 1.90%
Dicamba, dimethylamine salt	0.45%	0.020 to 3,6-dichloro-o-anisic acid equivalent per gallon or 0.26%
Sulfentrazone	0.22%	0.019 to N-(2,4-dichloro-5-(4-(difluoromethyl)-5-dihydro-5-methyl-6-oxo-1H-2,4-diazepin-1-yl)phenyl)methanesulfonamide per gallon or 0.22%
INERT INGREDIENTS:	92.70%	
Total	100.00%	

NET CONTENTS / CONTENIDO NETO: 32 fl oz (1 qt) / 946mL *See inside booklet for weed list. LB8524



A NEW ERA IN TOXIC TORTS?

While It Might Not Be the “Next Asbestos,”
the \$289 Million Roundup Verdict Will
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BY PATRICK S. SCHOENBURG

For the last two decades, toxic tort litigation has involved slowly diminishing battles in the last great war (asbestos). New skirmishes have included silica, benzene, and welding rod fume exposure claims, but none of them have ever matched asbestos in size or importance.

Now, with the recent \$289 million verdict against Monsanto from a San Francisco County Superior Court jury, there is an increased focus on toxic torts. Many will analyze the reasons behind this extraordinary result in which the plaintiff alleged that he developed non-Hodgkin lymphoma as a result of exposure to the glyphosate-based herbicide Roundup—and the defendant’s prospects on appeal. Our goal here, however, is not a post mortem of the trial or a forecast of the final result. Instead, we look for answers to a larger question: What impact does this verdict have on the field of toxic torts?

GLYPHOSATE LITIGATION’S IMPACT

Asbestos litigation was so wide-ranging because asbestos was used for decades in countless industrial and construction applications as well as in numerous consumer goods. Products from gaskets to building insulation to brake pads were manufactured with asbestos. The initial targets of asbestos litigation were manufacturers of asbestos-containing products, such as Owens Corning and W.R. Grace. But, relying on the doctrine of strict product liability, every actor in the chain of distribution for asbestos-containing products was eventually brought into these lawsuits. The owners of premises where exposures occurred were also sued based on negligence and failure-to-warn theories.

Glyphosate-based herbicides were introduced by Monsanto in 1974. After relevant patents expired in 2000, other manufacturers introduced glyphosate-based herbicides. A 2016 study estimated that, since its introduction 44 years ago, more than 1.6 billion kilograms of glyphosate

have been used in the United States. Glyphosate-based herbicides are widely used in commercial agriculture. Roundup and other name brand weed killers are available for sale to consumers at home improvement and hardware stores. These products are also used by landscapers and gardeners outside commercial and residential structures throughout the country.

It is estimated that there are approximately 4,000 pending lawsuits alleging injury due to glyphosate exposure. That number is sure to increase, and, when that occurs, we expect that distributors and retailers of glyphosate-containing herbicides, agricultural users, premises owners, and gardening and building maintenance companies may all become defendants.

THE ROLE OF GOVERNMENT REGULATION

One defense argument in glyphosate-related litigation is that the herbicide has not been banned by the government and is approved for numerous uses. When California attempted to require that glyphosates be labeled as a carcinogen, a federal judge issued an injunction preventing the state from taking that action until the matter was fully litigated. But in the recent San Francisco trial and eight-figure verdict, the jury pushed aside such arguments and instead relied on evidence—including the March 2015 finding by the World Health Organization’s International Agency for Research on Cancer—that classified glyphosate as “probably carcinogenic in humans,” based on epidemiological, animal, and in vitro studies.

There are numerous other studies finding that glyphosates do not pose a health risk. In some instances, that evidence may prove persuasive. On the other hand, the importance of government regulatory decisions may be declining. In an era of environmental deregulation—in which government decisions may appear to be politically influenced—will government’s approval



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of a product (or failure to ban it) have a decreased impact on jury decisions?

NOT SO INERT

Some toxic torts have focused on raw materials such as asbestos or silica, regardless of the other ingredients in the finished products in which they may be contained. This also is true with respect to more highly processed chemicals, such as benzene. Asbestos, silica, and benzene claims generally focus solely on the effects of exposure to these specific substances.

This is not true with glyphosates. Surfactants, solvents, and preservatives are inert ingredients commonly added to glyphosate-based herbicide formulations. For example, polyethoxylated tallow amine (POEA) is a surfactant added to Roundup and other herbicides that allows glyphosate to penetrate the surface of a plant. Most health studies have focused

on the active ingredient glyphosate, but, in 2009, Scientific American reported that the inert ingredients in Monsanto’s Roundup “amplified the toxic effect on human cells—even at concentrations much more diluted than those used on farms and lawns.”

In November 2015, the European Food Safety Authority concluded that “the substance is unlikely to be genotoxic (i.e. damaging to DNA) or to pose a carcinogenic threat to humans,” but later clarified that, while carcinogenic glyphosate-containing formulations may exist, studies “that look solely at the active substance glyphosate do not show this effect.”

With this background, glyphosate litigation will focus on product formulations, not solely on glyphosates. Because of the large number of additional ingredients found in various

glyphosate-based herbicides, studying every possible combination for synergistic effects may be impossible. This will make glyphosate litigation more complex because, in the absence of studies regarding a specific formulation, experts will have to review large amounts of research and evidence in an attempt to best explain and predict how different ingredients react with glyphosates.

The complexity introduced by inert ingredients also helps ensure that more cases will be contested and sent to juries. Even those authorities that generally state that glyphosates by themselves are not harmful cannot rule out the health risks that may exist when glyphosates are combined with surfactants, solvents, and preservatives. This ambiguity and complexity limits the opportunities for defendants to prevail on summary judgment. The result? More litigation and more decisions by the trier of fact.

BIG VERDICTS AND THE “NEXT ASBESTOS”

Asbestos litigation became an industry—entire law firms and consultancies were built on it, and trust funds were established to try and resolve it. From the perspective of the plaintiffs’ bar, the only problem was that there has never been another set of claims that were as numerous, successful, and lucrative. Silica, sulfurous off-gassing from Chinese drywall, and even more suspect exposure claims such as mold have been touted as the “next asbestos,” but none have stuck.

But the search continues. An almost \$300-million verdict will inspire not just new claims involving all types of glyphosate-containing products, but also the search for new targets. There is already a new wave of toxic tort cases, with numerous lawsuits pending, based upon exposure to polychlorinated biphenyls (PCBs) and Bisphenol A (BPA). These substances share certain characteristics with glyphosates, including widespread usage in industry and consumer goods and the potential to target defendants with deep



pockets. The Roundup verdict provides momentum to the search, and we expect the number and types of toxic tort cases filed to expand in the near term.

...BUT GLYPHOSATE IS NOT THE NEXT ASBESTOS

With that said, despite the size of the Roundup verdict and the potential for numerous new glyphosate cases to be filed, this is not the next asbestos. That litigation is singular because mesothelioma, a deadly cancer of the lining of the lungs, has only one recognized cause: exposure to asbestos. That fact is the hallmark of asbestos litigation and results in a de facto flipping of the burden of proof. Defendants that manufactured, sold, distributed, or utilized asbestos-containing products are forced to disprove that a given plaintiff diagnosed with mesothelioma was exposed to their products to avoid liability. Given that mesothelioma is incurable, damages are always high. The negative publicity surrounding asbestos ensures an advantage for plaintiffs even in non-mesothelioma asbestos exposure cases.

But there is no disease caused solely by glyphosates. The vast majority of the millions of people who have used this product have not developed a serious disease. Even if glyphosates (and associated inert ingredients) have negative health effects, litigation is more likely to track with benzene than asbestos. Exposure to benzene is known to cause certain types of leukemia, but the vast majority of leukemia patients have not been exposed to benzene. Few

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in the large population of individuals who have been exposed to benzene develop a blood cancer. The lack of the one-to-one causation found between asbestos and mesothelioma has allowed defendants to prevail on causation defenses in benzene litigation. Along with the cost to prosecute, the result has been no overwhelming wave of benzene cases. Eventually, the same factors are likely to slow the filing of glyphosate claims as well.

The Roundup verdict is significant. It may foster a new era in toxic torts as the plaintiffs’ bar looks for new targets. The complexity of the issues involved with glyphosate-based herbicide exposures likely means that these cases will not be easy to resolve. Glyphosate litigation and the impact of this verdict are likely to last for years. ■

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