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Big Monsanto Loss Signals Glyphosate Litigation Headache for Policyholders, Insurers and Reinsurers

In August, Monsanto lost the first of its kind jury trial in a San Francisco, California state court proceeding when a jury awarded a retired school groundskeeper \$39,000,000 in compensatory damages and \$250,000,000 in punitive damages, as a result of Monsanto's failure to warn about the alleged risks associated with glyphosate, an herbicide. This was the first glyphosate verdict (main ingredient in popular herbicides like Monsanto's Roundup and its stronger companion product Ranger Pro). However, there is currently a pending Federal Multi-District Litigation case in California, as well as thousands of claims that have already been filed in state courts in virtually every state in the United States. Before this case went to trial, the number of other cases was below 2,500. Since the verdict was announced 2 weeks ago, that number has topped 8,000 and continues to grow.

The case against Monsanto was a products liability "failure to warn" -type case. The jury found that the Roundup was unsafe and a substantial factor in causing Plaintiff Johnson to contract non-Hodgkin's Lymphoma. The thousands of other lawsuits allege cancers, including non-Hodgkin's Lymphoma, as well as other potentially related cancers. The size of the verdict (compensatory as well as punitive) is not the only troubling aspect of this verdict. The Court found that experts for both sides in this litigation on causation were "very light on substantiated opinions", but allowed these experts to all testify, denying "Daubert" -type challenges to these experts to preclude them from testifying. The verdict in this case is legally significant because the finding allowed was that Plaintiff Johnson did not have to prove definitively that glyphosate was the active agent in the product which caused cancer, but that he only had to show that Monsanto was liable for failing to warn consumers of the risks that glyphosate could "potentially" cause harm to them.

Additionally, the California judge allowed the issue punitive damages to go to the jury, despite acknowledging that the evidence supporting a punitive damages claim was "thin".

The impact of this verdict is already spreading beyond Monsanto and other herbicide manufacturers utilizing glyphosate in their products. "Consumer advocacy groups" are releasing studies, which allege to show high levels of glyphosate in various food products, including popular children's breakfast cereals (Cheerios, Lucky Charms, Quaker Old Fashioned Oats, etc.). These same groups claim that almost 3/4 of 45 food products tested detected high levels of glyphosate. (Glyphosate was identified as a "probable carcinogen" by the World Health Organization in 2015.) As in other mass tort areas, the potential for glyphosate-based mass tort litigation to expand beyond the initial manufacturers/suppliers of the allegedly carcinogenic product to other industries (distributors, end product retailers, etc.) is not only possible, but likely, given the heightened public awareness and the successful "bell-weather" case against Monsanto.

Comment: Without a doubt, like all other mass tort litigation (asbestos, environmental, toxic tort), the issues raised by current and inevitable future glyphosate lawsuits present overwhelming exposures for policyholders, insurers and reinsurers on such key issues such as trigger of coverage, number of occurrences, allocation of loss and the insurability of punitive damages. One only has to ask regarding who is going to pay for last month's Monsanto verdict to understand the enormity of the issue. Policyholders, insurers and reinsurers will be well served to seek expert guidance on this issue.

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