# Products Liability Law Daily Wrap Up, TOP STORY—CHEMICAL PRODUCTS—N.D. Cal.: No new trial in California cancer patient's Roundup® case, (Jul. 15, 2019)

Products Liability Law Daily Wrap Up

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By Georgia D. Koutouzos, J.D.

Monsanto failed to support its motions for judgment as a matter of law or a new trial based on several theories of error.

A California federal court refused to grant judgment as a matter of law favoring Monsanto Company or a new trial in the wake of a jury's $80-million verdict for a man who had been stricken with lymphoma after having used Roundup® herbicides for years. Rejecting the company's multiple bases for post-trial relief, the court reserved for another day its ruling on the amount of damages awarded (*In re Roundup Products Liability Litigation (Hardeman v. Monsanto Co.)*, July 12, 2019, Chhabria, V.).

A man developed Non-Hodgkin's Lymphoma (NHL) as the alleged result of having been exposed to Monsanto's glyphosate-containing Roundup herbicides over a period of decades. He filed suit in California federal court, asserting claims against the multinational agricultural biotechnology company for negligence and strict products liability—design defect and failure to warn, as well as breach of implied warranties.

The case ultimately was tried to a jury, which determined that the ailing man proved by a preponderance of evidence that Roundup's design was defective and that the product lacked sufficient warnings of the risk of NHL. He also proved that Monsanto had been negligent by not having used reasonable care to warn about Roundup's NHL risk and that he was entitled to punitive damages. The jury awarded him $200,967.10 for past economic loss, $3,066,667 for past non-economic loss, $2,000,000 for future economic loss, and $75,000,000 in punitive damages [see *Products Liability Law Daily's* March 28, 2019 analysis].

Monsanto filed post-trial motions for judgment as a matter of law or, alternatively, for a new trial on non-damages grounds. The company asserted 12 reasons in support of those motions, as follows: (1) there was a material difference between the quality of the causation evidence presented pretrial and at trial; (2) the ailing man's claims were preempted under U.S. Supreme Court precedent; (3) the court's jury instruction on causation erroneously referred to hepatitis C; (4) there was error in either the negligent or strict liability failure-to-warn instructions as well as in listing the amount of stipulated damages in the verdict form; (5) a new trial was warranted based on the excusal of Juror #4; (6) the court was incorrect in interpreting California law as permitting a design defect claim based on the absence of a warning; (7) the jury was presented with an inaccurate view of the scientific and regulatory landscape based on the court's "selective admission" of evidence regarding global regulatory approvals; (8) it was error to have excluded the Environmental Protection Agency's 1993 Re-registration Eligibility Determination and 2009 memorandum on Alkyl Amine Polyalkoxylate surfactants; (9) the court erred in excluding an expert's testimony regarding the ailing man's BCL6 mutation; (10) the court erred in precluding another expert from offering a general causation opinion that glyphosate does not cause NHL; (11) statements by certain experts violated Pretrial Order No. 85; and (12) it was error to have excluded evidence of Roundup's agricultural benefits.

The court addressed Monsanto's post-trial motions other than those related to damages, stating that a separate ruling relating to damages would be filed shortly.

**Causation evidence.** According to the court, there was no material difference between the quality of the causation evidence presented pretrial and at trial. If anything, the testimony of the ailing man's causation experts at trial was more reliable than their testimony during the *Daubert* hearings, because the court had barred them

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from offering certain portions of their opinions at trial that were without any scientific basis. Therefore, the ailing man presented sufficient evidence of causation.

**Preemption.** For the reasons expressed in Pretrial Order No. 101 and at the hearing on Monsanto's post-trial motions, the court found that the ailing man's claims were neither expressly nor impliedly preempted under current U.S. Supreme Court caselaw.

**Causation instruction.** The jury instruction on causation was not error, as nowhere did it refer to hepatitis C, the court advised. Contrary to Monsanto's assertion that the instruction discouraged the jury from "considering other causes or the possibility of an unknown cause," the instruction referred generically to "other factors" that might cause Non-Hodgkin's Lymphoma. Ergo, if the jury focused on hepatitis C, that was a product of the evidence presented at trial and not of the instruction, the court said. Nor did the modification shift the burden of proof to Monsanto; rather, it asked the jury to consider whether the ailing man had or had not proven that his exposure to Roundup was enough to have caused his NHL.

**Failure-to-warn instructions.** Furthermore, the court found no error in either the negligent or strict liability failure-to-warn instructions, nor was it error for the instructions to have listed the amount of stipulated damages in the verdict form.

**Excusal of juror.** Monsanto was not entitled to a new trial based on the excusal of Juror #4. For one thing, the company had waived that argument by having failed to object at trial. In any event, it was appropriate to excuse that juror after three separate jurors confirmed her statement—made after the second day of trial—that she already knew how she was going to vote and that nothing would change her mind. The court's subsequent conversation with her after her excusal effectively confirmed her conduct.

**Design defect claim.** Based on the evidence presented at trial and on closing argument by the ailing man's counsel, the jury verdict had to be understood as reflecting the theory that Roundup is defective when sold without a warning. In other words, the product's defect was the absence of a warning, which effectively caused the design defect claim to merge into the failure-to-warn claim. Consequently, the court found adequate evidence to support a finding that Roundup is "defective" within the meaning of California law when sold without a warning despite the fact that a design defect claim in the state is nearly impossible to define with any degree of precision. However, if the court was incorrect in interpreting California law as permitting a design defect claim based on the absence of a warning (and if the ailing man's only true path to victory on the design defect claim was the theory that Roundup should not have been sold for residential use at all), then judgment as a matter of law would be entered for Monsanto on the design defect claim.

**Regulatory landscape.** As for Monsanto's contention that the jury had been presented with an inaccurate view of the scientific and regulatory landscape based on the court's "selective admission" of evidence regarding global regulatory approvals, while the company was correct that the jury had not been presented with the entire regulatory landscape, the determination of what evidence to admit required a certain amount of line-drawing, the court remarked. In that regard, it would have been unfair to allow Monsanto to have expanded the scope of its case while continuing to bind the ailing man to the limits that the company had fought so hard to put in place pretrial via motions *in limine*.

**EPA documentation.** It was not error to have excluded EPA's 1993 Re-registration Eligibility Determination and 2009 memorandum on Alkyl Amine Polyalkoxylate surfactants, the court determined, adding that it was unclear how Monsanto had been prejudiced by the exclusion of those exhibits given that the company had been permitted to elicit testimony about both. There was significant extraneous information in both documents, which totaled over 350 combined pages. Although it might have been appropriate, had Monsanto asked, to admit portions of the two documents, the documents as a whole were properly excluded under Rule 403, the court held.

**Expert testimony.** The court asserted that it did not err in excluding an expert's testimony regarding the ailing man's BCL6 mutation, nor was it error to have precluded a different expert from offering a general causation opinion that glyphosate does not cause NHL. During pretrial proceedings, the court gave Monsanto

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an opportunity to express how it could be prejudiced by a rule that only the experts who offered opinions during the *Daubert* hearings on general causation may offer general causation opinions at trial. In addition, Monsanto offered no persuasive argument that it would be prejudiced, nor could it have done so in light of the many experts it had offered up during those hearings (but then declined to call at trial), the court opined. As for the company's assertion that statements by certain experts violated Pretrial Order No. 85, while some of the statements made by the experts came close to the line set by that order, Monsanto was not entitled to relief on that basis.

**Roundup's agricultural benefits.** Finally, the court concluded that it was not error to have excluded evidence of Roundup's agricultural benefits. To the extent that Monsanto suggested that such evidence helped explain why the company chose not to add a warning label to its product, it was unclear why Roundup's efficacy would impact whether consumers should be warned of a risk of developing cancer, the court said.

The case is MDL No. 2741/Case No. 16-md-02741-VC.

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