

Growing Opposition to the Bayer Monsanto Roundup Settlement

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Tens of thousands of people have sued Monsanto owner Bayer AG alleging their non-Hodgkin's lymphoma and other cancers were caused by glyphosate, the active ingredient in Monsanto's Roundup herbicide.

Three cases brought by Lee Johnson, Edwin Hardeman, and Alva and Alberta Pilliod went to trial.

And in each case, the courts found the Roundup caused the cancers, that Monsanto hid the risks, and that compensatory and punitive damages were justified.

Bayer wants to resolve the thousands of remaining cancer claims with an \$8 billion to \$9 billion compensation fund. Those cases are being negotiated by Monsanto lawyers and the lawyers representing the cancer victims.

But last year, in a surprise to the Monsanto plaintiffs lawyers, a separate settlement was put forward to handle everyone else who might bring a case against Monsanto in the future – including people who have yet to get sick or contact a lawyer.

A handful of class action lawyers, led by Elizabeth Cabraser and Sam Issacharoff, proposed a settlement that would put a four year hold on any Roundup litigation against Bayer, prohibit punitive damage claims against Bayer, and set up a secret science panel.

That proposal was rejected by a federal judge sitting in San Francisco – U.S. District Court Judge Vince Chhabria.

Now, the settlement lawyers have come back with a revised \$2 billion proposal.

A May 12 public hearing is scheduled before Judge Chhabria.

More than 300 lawyers have challenged the settlement.



One of those lawyers is Gerson Smoger (image on the right) of Dallas, Texas. ([Smoger filed a 57 page brief in opposition to the settlement](#) on March 31, 2021.)

"I'm challenging this because it's an abomination to the tort system," Smoger told Corporate Crime Reporter in an interview last week. "Monsanto continues making this material without any restrictions. Roundup will stay on the market. People's future lifetime exposure to Roundup is included in the settlement, even though they haven't been exposed yet for a product that is going to continue to go on the market."

"There is a four year stay on all litigation. And the stay is not just against people with non-Hodgkin's lymphoma. That stay includes all contract claims against Monsanto. Nothing can be brought for four years. At the end of four years, every single person in the United States who has been exposed to Roundup can never sue Monsanto for punitive damages or medical monitoring."

What does the settlement offer deliver to people who are exposed with non-Hodgkin's lymphoma?

"If you have non-Hodgkin's lymphoma during the period of the active settlement, then there are provisions for amounts of money you can apply for within a settlement grid. Theoretically you can go up to \$200,000. But I don't believe you can go above \$65,000. The best you can probably do is between \$25,000 and \$65,000 for your injury of non-Hodgkin's lymphoma, which probably costs you between \$100,000 and \$200,000 to treat, none of which you are entitled to get reimbursed for."

Compare that to the tens of millions awarded to the three cases that went to trial.

"They were each in the tens of millions or more in punitive damages. And for those people, if they were covered under this proposed settlement, they would get somewhere between \$10,000 and \$25,000."

I thought the top number was \$200,000.

"It is. But if under the proposed settlement, you go through rungs on a ladder. And if you miss any of those rungs on a ladder, you are stuck at a lower level. Three of the cases that went to trial – Hardeman and the Pilliods – would have been stuck at the second level because of how old they were. Mr. Johnson didn't have a long enough exposure to get up to the third level, so he would be stuck at the second level. The second level is between \$10,000 and \$25,000."

This wasn't the first such proposed settlement.

A previous settlement was rejected by Judge Chhabria. How is that settlement different from this?

"That settlement had a private secret science panel that would make a determination binding on the class. The panel would be put together by the proponents of the settlement and Monsanto and they had people operating in secret. And they would conclude what the literature said."

The previous settlement had the science panel. Does this settlement have it also?

"It has it well dressed. The dressing is better, the result is a little different. They have a science panel whose conclusions will be determined the same way. At the end of the day, if the science panel decides no causation, as it likely would, the juries will be told that is a stipulated fact for any opt-out. And the judge is not allowed to tell the jury that they could look elsewhere. The judge has to be silent on it. And that judge is told that an independent science panel as a stipulated fact has made a determination."

Why did the judge reject the first agreement?

"One was that the science panel took away from the province of the jury to decide. The other was the difficulty of giving notice to such a large amorphous group of exposed people, the vast majority of them being future claimants."

"I argued this issue of not binding future claimants in the Agent Orange case before the U.S. Supreme Court. You should not be able to have a large class that is not identified and take away their rights in the future when they will not have the information necessary to make an informed choice as to whether they want to be part of the settlement or not."

"And that's what this settlement does. If you don't have non-Hodgkin's lymphoma, you are not going to pay attention to this case. You are not going to think about the fact that ten years ago you spent five years working every summer with Roundup. You are going to think about it when you are diagnosed and find out that there are things you can't do, that you can't have punitive damages in your case. But you are not going to find that out when you are not injured and can't imagine that you are going to get non-Hodgkin's lymphoma."

What is the purported reason put forward by the proponents of the settlement for the four year stay on litigation?

"The best they say is that it is essential to Monsanto. They don't give a reason that it would help the class. One of the difficulties is that a number of people

who get non-Hodgkin's lymphoma during the course of the four years will die before the four years are over."

And that's because non-Hodgkin's lymphoma kills something like 20 percent in the first year?

"Exactly. Lee Johnson got a priority under California law to have his case tried faster, while he was still alive. People are going to get sick and die and not be able to get near a courtroom."

What's the purported reason for a ban on punitive damages?

"That is given up to get the settlement. They say they have sufficiently paid in compensatory damages. But compensatory damages are for compensation. They are for the injury. They are not designed for punishment in any fashion. In fact, any compensatory settlement says that they are not settling for punitive damages. But that is what they are saying - we have paid enough in compensatory damages and therefore we shouldn't be punished."

How were these lawyers chosen to do this?

"This settlement is patched on to the MDL by law firms that have no part whatsoever in the organization of this case. Did these lawyers say - there is a hole in the negotiations of this case, we'll negotiate it, we will wrap this up? Or did Monsanto come to them and say - we need somebody to wrap this up? It's rather significant that the actual lawyers that have been bringing this MDL litigation are not bringing this class action. It is not them. It is people that are well known for settling class actions."

"Elizabeth Cabraser has a great deal of experience in large scale settlements. What she does not have any experience in is Roundup or this particular litigation. She is foreign to this litigation."

Who is representing Monsanto in this case?

"Monsanto hasn't filed any papers. They have a number of law firms. But they have not filed any papers yet in support of the class."

Does there need to be some kind of settlement for people who have not yet spoken with a lawyer?

"No. There does not need to be a settlement. These injuries are substantial."

You would ban glyphosate?

"The elimination of the product is the way to go. Under our laws, it would be difficult to ban. But you would structure it out of business. Because the way our laws work, you have to phase it out. Yes, it needs to be banned."

Did the plaintiffs lawyers know that this settlement was being negotiated? Or was it a surprise?

“The first one last summer was a surprise. Clearly there was a belief that there was going to be a plan B. But the settlement negotiations have not involved the people most intimately a part of the litigation. They didn’t bring this to the table. There is that \$8 billion to \$9 billion attempt at a settlement. And then Monsanto is on this separate track with other lawyers to get this global resolution that they didn’t try to get with the people involved in the litigation.”

Why would these class action attorneys tie the hands of victims? No punitives. No lawsuits for four years. Limited amounts of recoveries even if they entered the settlement agreement?

“It’s hard for me to say. And this has occurred over the years for both Elizabeth and Sam. I believe the importance of the tort system is in vindicating individual rights. Individuals have a right to decide their own fate and bring their own lawsuits. We should always weigh in favor of individual decisions to be represented in that fashion. Elizabeth and Sam believe efficiencies of resolutions are more important than individual needs. That’s the best I can say.”

Have you spoken with any of the settlement lawyers about this case?

“The answer is no. But I know the settlement lawyers. There are others that would give less beneficent reasons as to why this settlement is taking place. But I have considered the three people who are proposing this to be friends for a very long time. And I’d rather think that we just view the world differently.”

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