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Monsanto Gets Gift With Two-Stage Roundup Bellwether

By **Daniel Siegal**

Law360 (February 20, 2019, 6:59 PM EST) -- After being hit with a \$78 million loss in state court over claims its Roundup weedkiller causes cancer, Bayer AG's Monsanto unit could turn its luck around in the first federal bellwethers over the herbicide now that it has convinced a federal judge to split the trials in two in an unconventional way.

The bifurcation will keep the jury from hearing potentially damaging evidence alleging Monsanto tried to influence regulatory agencies until after they've decided whether the company's products cause cancer, giving Monsanto a better shot at a favorable verdict, according to product liability attorneys.

U.S. District Judge Vince Chhabria on Jan. 3 granted Monsanto's request to bifurcate three bellwether trials, including one set to begin Feb. 25 in San Francisco.

The first phase of the trial will focus only on causation — meaning the jury will be asked only to determine whether Roundup and Monsanto's other glyphosate herbicides can cause non-Hodgkin's lymphoma generally, and whether they caused plaintiff Edward Hardeman's cancer specifically. If the jury finds the answer is yes, the trial will proceed to a second phase to answer all remaining liability and damages questions.

As part of this ruling, Judge Chhabria held that the plaintiffs will be barred from introducing evidence in phase one of Monsanto's alleged attempts to influence regulatory agencies and manipulate public opinion about the safety of its product — evidence that makes up a "significant portion" of Hardeman's case, according to the judge's order. This evidence also played a large part in the first state court bellwether, also held in San Francisco, that resulted in a \$289 million verdict — later **reduced to a \$78 million judgment** — against Monsanto.

The plaintiffs have argued that keeping this evidence out will leave jurors wondering during the causation phase how glyphosate could be a carcinogen if it was largely unregulated for decades. However, Judge Chhabria said this is a "relatively minor concern" that can be addressed with jury instructions.

Judge Chhabria added that while this type of bifurcation is unusual and should be done "with caution," it is worth doing in this instance to avoid the "distraction" caused by arguments about Monsanto's influence to answer factual questions at the heart of the causation phase. The judge did note that he might scrap the split in the later trials if problems arise in the first bellwether.

Experienced product liability attorneys for both the plaintiffs and defense agree that this

type of bifurcation is rarely seen — and is likely to be a significant boon to Monsanto. It could decrease the chance of a verdict for the plaintiff or reduce the huge damages amount that any such verdict could bring.

Georgia Lucier, co-head of Hunton Andrews Kurth LLP's product liability and mass tort litigation practice group, said that, as a defense attorney, she thinks bifurcation is an excellent idea, and will give the jury the best chance to make a fair decision on the causation issue — while still showing them the rest of the evidence at the appropriate time.

"A corporate defendant's bad conduct, that really has nothing to do with causation," she said. "Corporations did things for different reasons ... Their lobbying efforts to say a product is safe is completely different from the science underlying that."

Keeping the lobbying evidence separate from the causation question helps Monsanto because jurors can have an emotional response to claims a corporation was trying to manipulate them, and that can spill over into their entire verdict, according to Lucier.

"I think jurors are human. I think if you hear about how horrible a corporation is — and I'm not saying Monsanto is horrible — but ... if there's any doubt in your mind, you're going to side with the plaintiff, and against the corporation," she said.

Eversheds Sutherland partner Matt Gatewood said the decision is a boon for Monsanto if it ends up keeping this evidence away from the jury while they decide causation.

"I think it helps the defense because it allows them to avoid the jury hearing evidence that would be introduced solely to distract them from the sole question they're answering, which is, 'Did this product cause this plaintiff's injury?'" he said.

Janine Pollack of The Seltzer Law Firm, who represents plaintiffs in product liability cases, said the split could be unfair to plaintiffs.

"To start breaking up pieces of a trial where it's really one or part of one thing, I think it really does prejudice the plaintiff," she said. "If there's elements to a claim that can and should be tried together, breaking them up like that, to me, it's not really appropriate or fair."

Pollack added that she had recently represented a plaintiff in a Florida tobacco trial that was bifurcated into a liability phase and then a punitive damages phase, a common arrangement.

In that type of bifurcation, the jury would generally hear during the first phase all evidence that goes to liability and compensatory damages, and would also be asked to decide if they think the defendant should face punitive damages. If so, additional evidence will be introduced, such as the defendant's financial information, and the parties will make additional arguments about the punitive damages, but liability is already settled.

But in the upcoming bellwether, if the jury finds that glyphosate caused Hardeman's cancer in phase one, the case will head to a second phase with liability still undecided, and the jury could yet find that Monsanto was not to blame.

Lucier of Hunton said this arrangement was definitely unusual, and has rarely been done in big multidistrict litigation like the instant case. She noted that the examples of similar bifurcations cited by Monsanto in its brief arguing for the split were single-plaintiff cases over asbestos or diet drugs.

In other major mass torts where even more conventional bifurcations have been tried midstream, they have appeared to benefit the defendant.

In one example, in the federal nuisance trials over the stench and environmental hazards inflicted on people living near hog farms, an August 2018 nonbifurcated trial, *Artis v. Murphy Brown*, resulted in a **verdict of \$473.5 million** for six plaintiffs.

Four months later, another set of hog farm neighbors headed to trial on similar claims, in *Gillis v. Murphy Brown*, but the trial was bifurcated into a first phase on liability and a second phase on damages. Although the jury still found in favor of the plaintiffs, the damages awarded in that case were drastically lower, ranging from \$100 to \$75,000.

Pollack said if a bifurcation prevents a plaintiff from showing the jury evidence that supports their allegations, it would be prejudicial, and bifurcation also drives up the cost of the litigation.

She added that Monsanto's request for the bifurcation is almost like a motion in limine, an effort to have the judge rule out evidence they view as prejudicial, and that there's no reason potentially prejudicial evidence couldn't be handled via a motion in limine before the trial begins, rather than forcing all of the evidence to fit within a two-phase structure.

"If one of the elements of the plaintiff's claim involves putting in evidence that isn't flattering to the other side ... that's part of litigation," Pollack said.

On Monday, Judge Chhabria **granted Monsanto's motion in limine** to exclude the International Agency for Research on Cancer's monograph finding glyphosate is "probably carcinogenic to humans" from the first phase trial, but noted that it could potentially be used in phase two.

For its part, Monsanto is also already trying to use Judge Chhabria's bifurcation ruling to set a new pattern for other Roundup trials.

Two weeks after the ruling, Monsanto filed a motion with a California state court judge to put in place the exact same type of bifurcation in an upcoming March trial with plaintiffs Alva and Alberta Pilliod.

Lucier, however, noted that Judge Chhabria's order said that if the bifurcation proves unmanageable, the court could revert to having one trial straight through for the following federal bellwether trials, the next of which is scheduled for May.

And should the plaintiffs lose in next week's trial, the unusual bifurcation might provide them with ammunition in the Ninth Circuit, according to Pollack.

"In the end, if it doesn't go their way, that's going to be a basis they're going to use for appeal," she said.

Gatewood of Eversheds Sutherland said that while he's sure the plaintiffs will use the bifurcation as grounds for an appeal should they lose, it's hard to say whether the appellate courts would agree.

"You're in the Ninth Circuit here and it's just not something that's extremely predictable," he said.

--Editing by Pamela Wilkinson and Kelly Duncan.

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