

# The Legal Intelligencer

## Will GMOs Be the Next Crop of Bodily Injury Claims?

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Imagine a farmer's delight at the sight of lush and weedless fields of alfalfa, soybeans and corn. That is the allure of genetically modified organisms, or GMOs, offering a cornucopia of crops engineered to be immune to the use of deadly herbicides. Anti-GMO advocates believe that GM crops have led to a liberal dosing of herbicides that harm people through air, land, water and

food itself. They believe that GMOs are more morally repugnant than other recent advances in nanotechnology, pharmacogenetics and gene therapy. Conversely, pro-GMO advocates claim there are no risks and that GMOs will miraculously eliminate world hunger. The truth is simply that the potential of GMOs to harm humans is unknown and unproven at this time, although the divide between the pro-GMO and anti-GMO advocates is growing.

Presently, the science behind whether GMOs are toxic, allergy-producing and harmful to humans is hotly debated. While there is no single identifiable instance of a GM food consumption death or illness, media sources contain daily warnings about the continued use of GM crops, along with the promoted use of herbicides. This article focuses on personal-injury litigation arising from the exposure to glyphosate, which is the active ingredient in Roundup.

Glyphosate has been used as an herbicide for over 40 years and became the most-used herbicide over the last few decades, including agricultural, commercial and residential applications. After Monsanto's patent for glyphosate-based herbicides expired in 2000, numerous other companies, including BASF, Bayer CropScience, Dow AgroSciences, DuPont and Syngenta, introduced similar products into the market. In 1985, the U.S. Environmental Protection Agency originally classified glyphosate as a "possible" human carcinogen, but a re-evaluation of a mice tumor study caused the EPA to change the classification to a noncarcinogen for humans in the early 1990s.

In March, however, the International Agency for Research on Cancer, a specialized agency of the World Health Organization, classified glyphosate as "probably carcinogenic to humans." The IARC's classification is based primarily on agricultural-related exposure studies that have been published since 2001, finding some support that glyphosate may cause non-Hodgkin lymphoma. The IARC also relied upon laboratory animal studies finding evidence of carcinogenicity. In other words, while glyphosate has been researched for nearly three decades, no definitive link between exposure and cancer has been identified. Let's take a look at some of the most recent attempts to recover for bodily injuries caused by alleged toxic exposure to glyphosate:

*Arias v. Dynacorp*, 928 F. Supp. 2d 10 (D.D.C., 2013) and 752 F.3d 1011 (D.C. Cir., 2014), is a consolidated suit involving approximately 2,000 Ecuadorians who alleged bodily harm due to the spraying of herbicides along the Colombian-Ecuadorian border to eradicate drug farms. Under a joint effort, known as "Plan Colombia," the United States and Colombia in the late 1990s began using glyphosate-based herbicides in an aerial assault against drug cartels. The plaintiffs, who live near the Ecuadorian-Colombian border, filed negligence and other tort claims seeking to

recover for acute and chronic personal injuries caused by alleged toxic exposure due to intentional and inadvertent herbicide spraying. Numerous plaintiffs alleged the following symptoms immediately after exposure: skin irritation; burning and itchiness to the skin, nose, eyes and throat; vomiting; respiratory problems; and digestive system distress. The plaintiffs also sought medical monitoring due to the significantly increased risk to develop cancer, such as non-Hodgkin lymphoma.

In February 2013, the district court held (under a *Daubert* analysis) that while the plaintiffs' medical expert was qualified to testify regarding causation, the expert's proffered testimony failed to rely upon any scientifically accepted or reliable information regarding necessary dosage and duration of exposure and was, thus, inadmissible. The court precluded the plaintiffs' expert on the basis that there existed no reliable medical evidence that glyphosate exposure could cause the acute injuries alleged. The plaintiffs' collective testimony regarding alleged exposure and the temporal onset of adverse reactions was alone insufficient to prove causation. Without expert testimony regarding causation, the court granted the defendants' summary judgment motion on the toxic-tort claims.

In May 2014, the appellate court affirmed the dismissal of numerous other plaintiffs' toxic-tort claims when they failed, after repeated requests and extensions, to provide basic evidence of their alleged exposure or injury, including a date, dosage and effect.

In *Jackson v. Syngenta Crop Protection*, No. 12-581, 2013 U.S. Dist. LEXIS 92065 (M.D. La., June 11, 2013), Roshaunda Jackson brought suit against Syngenta, Monsanto and various nondiverse defendants, including individual employees of Syngenta, claiming that her exposure to glyphosate dust in the workplace injured her unborn child. Although this opinion concerned the plaintiff's motion to remand and issues of improper joinder of nondiverse defendants, the case is illustrative of the different types of bodily injury claims that may likely arise in the GMO and herbicide context.

Jackson alleged that in 2009 she advised her employer that she was pregnant. As a result, her employer evaluated her for exposure hazards in the workplace. After her child was born with developmental and respiratory defects, she alleged that the defendants failed to warn her about potential adverse health effects due to glyphosate exposure and failed to prevent her exposure. Interestingly, in May 2011, Monsanto updated its material safety data sheet for glyphosate and disclosed that it had the potential to cause birth defects. The court held that Jackson's suit against the individual employees was improper and that these individuals could not have had

constructive or actual notice of potential adverse health effects while she was pregnant in 2009. The case proceeded in the district court against Syngenta and Monsanto until the plaintiffs dismissed it in April 2014.

In *Alcala v. Monsanto*, No. C-08-4828, 2014 U.S. Dist. LEXIS 147082 (N.D. Cal., October 15, 2014), Javier Alcala's employment involved operating a vehicle that sprayed various Roundup products manufactured by Monsanto. Alcala alleged that his exposure to glyphosate caused a variety of adverse health effects, including respiratory problems, nervous system disorders, chronic fatigue, fibromyalgia and gastritis. He eventually limited his claim solely to respiratory problems. When Alcala's treating physicians reported that his respiratory ailments were not related to herbicide exposure or, conversely, related to "chemical exposure" or "herbicide exposure," but did not identify the defendant's product specifically, the court granted Monsanto's summary judgment motion due to a lack of medical causation and dismissed the negligence and products liability claims.

While the recent glyphosate exposure toxic-tort cases failed to flourish due to the lack of medical causation, one has to question whether medical research advances will change the landscape. We anticipate that similar claims will continue to be filed and will evolve. For instance, the heavy use of glyphosate with GM crops has spawned glyphosate-resistant "super weeds." In an effort to address this problem, certain manufacturers are producing a new herbicide that combines glyphosate with 2,4-D (one of the main ingredients in Agent Orange). Significantly, on June 23, the IARC classified 2,4-D as "possibly carcinogenic to humans." How will GMOs and nature's game of one-upmanship end? Only time will divulge whether GMOs and herbicides will sprout the next crop of bodily injury claims.

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