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Glyphosate: a new toxic tort time-bomb?

Clyde & Co LLP

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The global spotlight on glyphosate continues following a third successive US court case finding that the world's most popular pesticide is carcinogenic. Despite unresolved uncertainties in the scientific evidence, the case resulted in the highest damages award to date, highlighting the burgeoning risk in this developing litigation. Indeed, this may be the beginning of a new toxic tort that has the potential to prompt a raft of claims globally and should be watched closely by insurers and risk managers alike.

A California jury recently found that glyphosate (branded as 'Roundup') was the likely cause of two married plaintiffs' lymphoma and awarded the couple USD 55 million in damages and a staggering USD 1 billion each in punitive damages. Bayer (who purchased the Monsanto and the Roundup brand last year) was found to have failed to adequately warn consumers of the risks associated with its product and to have suppressed scientific evidence of the cancer link.

As with the previous two cases, Bayer has stated it intends to appeal the decision, which will allow key aspects of legal rulings to be reviewed. Whilst this appeal may not reverse the finding of fault, it seems likely the punitive damages award will be reduced as rulings by the US Supreme Court limits the ratio of punitive to compensatory damages to 9:1.

However, the company faces similar US lawsuits from more than 13,400 plaintiffs, with a federal 'bellwether' trial of 900 consolidated cases is expected take place shortly to help determine likely damages entitlement and settlement options for the cohort of claims. Shareholder actions are also becoming increasingly likely after the recent verdicts wiped 40% from Bayer's market value. The agrochemical giant's present predicament highlights the dangers of hidden legacy risks in M&A and insurance business transfers, emphasising the need for robust due diligence to be undertaken as part of the transaction.

The case underlines the apparent disconnect between scientific understanding and the law. Lawsuits are largely based on a 2015 World Health Organization's International Agency for Research on Cancer finding which classified glyphosate as "probably carcinogenic to humans". However, a subsequent Reuters investigation found

the WHO had removed “non-carcinogenic” findings that were inconsistent with its final conclusion. Indeed, the US Environmental Protection Agency, the European Chemicals Agency and other international regulators, including Canada and Australia, all found that glyphosate is not likely to be carcinogenic to humans. Research around this compound is also becoming increasingly politicised, with focus shifting to the resultant reduction in crop yields and impact on international trade if a ban is implemented.

Bayer’s defence was that Roundup is safe when used as directed, citing a recent EPA study and 40 years of scientific data noting rates of lymphoma remain consistent despite an increase in glyphosate use. It accused the plaintiffs’ lawyers of selecting evidence, particularly the WHO assessment, which it alleged conflicted with scientific consensus. The case was unique in its structure, with limitations placed on the evidence the plaintiffs could present in the first trial phase. Bayer no doubt intended this would focus jurors on the scientific evidence showing the safety of Roundup, rather than on particular company actions. However, allegations of Monsanto’s foul play seem to have trumped the cogency of scientific evidence and the interplay with legal causation tests.

As in this case, allegations of failing to adequately warn of the risks are likely to be central to plaintiffs’ future claims. Similar allegations were made in the ‘big tobacco’ litigation and most recently against Johnson & Johnson in the ongoing asbestos talc litigation, which has resulted in a spate of high profile cases in which significant punitive damages were awarded by juries despite uncertainties in the scientific evidence.

What is unique about the recent glyphosate litigation when compared with asbestos is that the risks are not yet universally accepted and still largely open for debate. Indeed Roundup still remains on sale internationally utilising the same packaging and advertising. Currently the US litigation has focused on product liability claims against a sole defendant, Bayer, which is unlikely given its size to succumb to litigation burnout that resulted in the bankruptcy of smaller companies in the asbestos context. However, this is only likely to be start of litigation internationally, which can be expected to extend to the occupational disease context, with claims made under general and employee liability policies.

Glyphosate typifies the problems associated with research and regulation of pesticides, particularly in relation to the significant split opinion between regulators, manufacturers and scientists on glyphosate’s health effects. What is perhaps clear from this conflicting position is that further research is needed to properly understand the risks of glyphosate use. In the meantime, corporates and their insurers must be mindful of this developing risk and take appropriate action to prevent any unwanted side effects.

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