

## Civil Litigation

# Bayer strategy in Roundup class actions fraught with reputational risks | Matthew Chikaonda

By **Matthew Chikaonda**



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(July 3, 2020, 3:09 PM EDT) -- On June 24, 2020, the German pharmaceutical corporation Bayer AG announced that it has agreed to a settlement package up to US\$10.9 billion, in order to settle three-quarters of the U.S. class action lawsuits against the company. The plaintiffs in these lawsuits allege that they suffered from lymphoma or other cancers as a result of exposure to glyphosate, which is the active ingredient in Roundup herbicide. Roundup was originally produced by the American agrochemical company Monsanto, which was acquired by Bayer for US\$63 billion in a merger concluded in 2018.

While several public health bodies worldwide have declared that they currently do not have evidence of carcinogenic risks associated with glyphosate, lawsuits are proceeding globally with plaintiffs claiming that their exposure to glyphosate has resulted in detrimental health consequences, particularly from non-Hodgkin's lymphoma.

In Canada, several class actions have recently been launched in which the plaintiffs allege they have suffered sickness as a result of exposure to glyphosate.

In May 2019, Merchant Law Group applied to have a Roundup lawsuit which it had filed in November 2018 on behalf of a Saskatchewan farmer certified as a class action. The claim alleges negligence and breach of warranty, stating that Bayer and Monsanto failed to warn of the health risks associated with Roundup that it was aware of, and that the companies failed to conduct adequate post-market surveillance of the product, both of which represent a failure by the defendants to meet their duty of care to the plaintiff. The defendants deny both claims. Merchant Law Group has since filed similar claims in every Canadian province.

Additionally, the law firm Diamond & Diamond filed class action claims against Bayer and Monsanto in June 2019, in courts in Ontario, Alberta and British Columbia. The claims seek damages in the amount of \$500 million on behalf of plaintiffs suffering from cancer as a result of exposure to Roundup. Diamond & Diamond alleges negligence as well as statutory breaches of consumer protection laws on the part of Monsanto, and hence by Bayer through vicarious liability. In its statement of claim the law firm accuses Monsanto of having intentionally suppressed or obfuscated scientific research showing that Roundup is a cause of cancer, with the assistance of U.K. consultancy firm Intertek, also a named defendant in the claim. Diamond & Diamond alleges that the result of the actions of Monsanto and Intertek was to mislead Health Canada's Pest Management Regulatory Agency as to the dangers posed by Roundup.

Agencies including Health Canada and the U.S. Environmental Protection Agency have deemed

glyphosate to be safe for use to the best of their available knowledge. However, the International Agency for Research on Cancer (IARC), a subordinate agency of the World Health Organization, has classified glyphosate as a probable carcinogen — both the Merchant Law Group claim and the Diamond & Diamond claim against Bayer rely heavily on the IARC findings. There is no indisputable consensus among public health agencies globally as to the possible carcinogenic risks of Roundup, and the burden of proof rests with the plaintiff to show causation linking Roundup to cancer. Bayer's litigation strategy appears to rest on the findings of Health Canada that Roundup is safe for use, as well as the lack of consensus among other public health agencies, to defend itself against claims relating to glyphosate.

However, the reputational consequences of these public trials are no doubt being seriously considered by executives at Bayer. Public confidence in chemical companies can be fragile. (Companies such as Monsanto and Dow Chemical suffered persistent reputational damage from litigation arising from the use of herbicides produced by these companies by the U.S. military during the Vietnam War, to defoliate tree canopies on a large scale. These chemicals contained the carcinogen dioxin, which caused cancers and other illnesses among thousands of U.S. service personnel as well as Vietnamese civilians.)

Whether Bayer will consider settling the Canadian lawsuits against it might significantly come down to reputational considerations. In its recent announcement that it is settling three-quarters of the U.S. class actions against it, Bayer cited factors including the reputational as well as the financial risk of ongoing multiyear litigation in explaining its reasons for settling the lawsuits against it, while not admitting any liability relating to Roundup.

The desire to protect itself from the reputational risk of multiyear litigation must be balanced against the potential moral hazard of settling claims before they are tested on their merits in court. If Bayer settles claims before they are heard before a trier-of-fact this could risk inviting other parties to initiate legal proceedings against the company in future, by shifting the risk-reward calculus that these parties make; potential litigants against Bayer will assume that the company will eventually settle rather than risk damage to its brand.

Bayer is likely considering a number of factors in deciding what strategy to adopt to defend itself against its lawsuits in Canada, including but not limited to:

- How much negative public attention to the company could potentially be generated by multiyear legal proceedings?
- How would this exposure affect Bayer from a business perspective? This includes the company's investor and stakeholder relations.
- What are the risks associated with attempting to settle the cases expeditiously?
- What is the actual likelihood of a trier-of-fact finding in favour of the plaintiffs?

Bayer has almost certainly retained lawyers with expertise in mass tort actions for advice on its litigation strategy that is specific to the Canadian legal environment, given the amount of money that is potentially at stake. There is a good chance that Bayer may seek to delay legal proceedings against it from going to trial until the results of the independent Class Science Panel — which it will convene as part of the recent settlement package announced in the U.S. — are announced. The Class Science Panel will consist of scientists agreed upon by both Bayer and the plaintiffs' lawyers, and will have the mandate to research and make a definitive determination as to whether glyphosate causes non-Hodgkin's lymphoma and at what amounts of exposure.

The findings of the panel will only be binding on future potential U.S. litigants, but they will be

highly persuasive evidence in any Canadian legal proceedings concerning glyphosate products.

*Matthew Chikaonda is a rising 3L student in the Dual Canadian/American JD program at the University of Windsor Faculty of Law and the University of Detroit Mercy School of Law.*

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