

Key Takeaways From Roundup Verdicts So Far

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On May 13, a California jury returned a \$2 billion verdict against Monsanto. The case marks the third bellwether trial in the Roundup products liability litigation, in which more than 13,000 plaintiffs have filed suit against Monsanto on the grounds that glyphosate, the active ingredient in Monsanto's popular weedkiller, causes cancer.

Juries in all three cases have found for the plaintiffs and awarded staggering punitive damages. In August 2018, a San Francisco jury awarded plaintiff Dewayne "Lee" Johnson \$39.25 million in compensatory damages and \$250 million in punitive damages. The court later reduced the punitive damages award to \$39.25 million, the same amount awarded in compensatory damages. In March 2019, a second San Francisco jury awarded plaintiff Ed Hardeman about \$200,000 in economic damages, \$5 million in noneconomic damages and \$75 million in punitive damages. Monsanto has again challenged the punitive damages award as unconstitutionally high.

In this most recent iteration of the Roundup litigation, counsel for plaintiffs Alva and Alberta Pilliod asked the jury to award \$55 million in cumulative compensatory damages and \$1 billion in punitive damages. In closing argument, the plaintiffs' counsel explained that although \$892 million represented one year of profits, a \$1 billion award would more effectively send a message to Monsanto. The jury doubled the plaintiffs' ask, awarding \$1 billion in punitive damages to each plaintiff.

With only three cases decided in effectively the same jurisdiction, a meaningful postmortem is premature. (The next bellwether trial will take place in Missouri, where Monsanto's former headquarters are located). But any corporation facing mass tort litigation would be well advised to consider lessons from Roundup's outcomes to date. When

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strong science, favorable pretrial rulings and adequate legal representation are not enough, what additional considerations can tip the scales?

Punitive Damages

Legal authorities reviewing the Roundup trials have uniformly concluded that each of the punitive damages awards would be vulnerable on appeal. As San Francisco County Superior Court Judge Suzanne Bolanos observed before slashing the Johnson award by 85%, even under circumstances in which plaintiffs have demonstrated that defendants acted maliciously, the Fourteenth Amendment imposes constitutional limitations on punitive damages.

In general, punitive damages cannot exceed a 10:1 ratio as against compensatory damages, and that ratio tends to narrow further where compensatory damages are noneconomic. That maxim begs the question: Should plaintiffs lawyers be permitted to suggest punitive damage awards that they know are unconstitutionally high?

The Pilliod award was not arbitrary. The plaintiffs' counsel, in closing, asked the jury to award the specific amounts of \$55 million in compensatory damages and \$1 billion in punitive damages – nearly twice the presumptive constitutional limit. By basing their punitive damages calculation on one year's worth of Roundup profits, the plaintiffs' ask poses another dilemma: With more than 13,000 cases pending, can two plaintiffs claim what could easily amount to marketwide punitives?

In light of the Roundup verdicts, and similar outcomes in other contemporary multidistrict litigation, defendants facing punitive damages at trial might consider a pretrial motion to preclude plaintiffs counsel from making improper closing arguments that seek unconstitutional relief. Faced with certain post-trial litigation over the propriety of these awards, trial courts may be receptive to tamping down constitutional issues at the outset. After all, juries are still free to award what they see fit. And plaintiffs counsel cannot in good faith propose a figure they know to be excessive.

Celebritizing Litigation

Another topic ripe for motion in limine treatment is the increasingly common endorsement of litigation by high-profile celebrities. The plaintiffs' counsel in the Pilliod case were seen outside the courtroom taking photographs with Neil Young and Daryl Hannah – both vocal Monsanto critics. Defense counsel reported to the court that one juror had even gone so far as to ask about the option of taking a photograph with them. While observing trial proceedings, Hannah generated more than 20 critical tweets.

Undoubtedly, celebrities are free to support, oppose and comment on chosen causes, and the public has the right to learn about them. But there are ethical restraints on lawyers' ability to cultivate media attention to support their case. Rule 3.6 of the ABA's Model Code of Judicial Conduct, for example, prohibits lawyers from making extrajudicial statements that they know or reasonably should know will be disseminated publicly and will have a substantial likelihood of materially prejudicing an adjudicative proceeding. In a formal ethics opinion issued last year, the American Bar Association made clear that the prohibition extends to social

media and other online commentary.

Consistent with those standards, although we have no specific reason to believe the Pilliod lawyers did so, counsel should not be permitted to invite celebrities to attend and comment on trial proceedings in the hopes of influencing jurors' opinions.

Jury Exercises

Finally, no client facing trial – but particularly those facing trial in unfriendly jurisdictions – should underestimate the importance of jury exercises. MDLs, by definition, call for the coordinated litigation of a core set of facts. Often, bellwethers involve overlapping experts, company documents and theories of causation. But given the drastically different jury pools across jurisdictions, counsel must resist the urge to build a single, unified theory of the case.

Successful litigation requires specific insights into the relevant jury pool and the ability to apply those insights flexibly. To that end, little compares with conducting a jury exercise in the jurisdiction set for trial. Jury exercises allow counsel to test legal theories, determine what documents resonate with jurors (both positively and negatively), identify red flags for the jury selection process and take risks without consequence. They are a crucial part of crafting and honing a case-by-case approach.

Having weathered three trials in northern California, Monsanto is undoubtedly preparing for a new set of circumstances in Missouri. Altering the course of the Roundup MDL will depend on its ability to read the new jurisdiction and to pivot accordingly.