

Law Groups Tell Full 11th Circ. Roundup Claims Negate EPA

By **Madeline Lyskawa**

Law360 (March 13, 2023, 5:40 PM EDT) -- Two nonprofit public interest law firms threw their support behind Monsanto Co., urging the full Eleventh Circuit to undo a panel's ruling that a Georgia doctor's claims the company failed to warn consumers that its Roundup weed killer could cause cancer were not preempted by federal regulations.

The Washington Legal Foundation and the Atlantic Legal Foundation said the full Eleventh Circuit should rule that Dr. John D. Carson's state-law failure-to-warn claims against Monsanto are expressly preempted by the Federal Insecticide, Fungicide, and Rodenticide Act because they directly conflict with the U.S. Environmental Protection Agency's federal pesticide labeling requirements and determinations, which maintain that glyphosate, the active chemical in Roundup, does not cause cancer, in an amicus brief filed Friday.

"In light of EPA's carefully considered determination prohibiting a Roundup cancer warning as unwarranted and false and misleading, Carson's attempt to equate Georgia's general duty to warn with FIFRA's general misbranding standard cannot transform his failure-to-warn claim into a state-law labeling requirement that is parallel or equivalent to, or genuinely consistent with, EPA's Roundup labeling requirements," the legal foundations said.

Carson's challenge against Monsanto made its way before the full Eleventh Circuit after a panel reversed a Georgia federal court's decision in July, ruling that FIFRA **did not preempt** Carson's claim alleging Monsanto failed to warn consumers about the health risks of Roundup, which he said led to his soft tissue cancer. In its ruling, the panel said the EPA's process for registering pesticide labels did not have the force of federal law and Carson's Georgia claims enforced FIFRA.

After being asked to reconsider its decision by Monsanto, the panel **largely reached the same conclusion** once again in October. In response, Monsanto, backed by the U.S. Chamber of Commerce and other trade groups, asked the full circuit court to rethink the panel's ruling, arguing that allowing state law to trump FIFRA would throw regulations and litigation into disarray. The full Eleventh Circuit **agreed to review the case** in December.

In Carson's latest brief, filed in mid-February, the doctor **maintained that his claims** under Georgia consumer protection laws supplement, instead of conflict, with pesticide labeling requirements under FIFRA. But the two legal foundations disagreed with Carson's assertion, calling it a "self-serving misinterpretation of the parallel requirements exception."

Instead, FIFRA's parallel requirements exception does not apply to Carson's claims because they are based on a supposed state-tort duty to provide a product-specific warning label that the EPA has repeatedly determined to be neither required nor necessary, the legal foundations said. Specifically, the EPA notified glyphosate registrants in 2019 that a cancer warning would constitute a false and misleading statement, the foundations said.

Given that Carson's state-law failure-to-warn claim "most definitely" imposes a requirement for labeling, the law foundations said allowing Carson's claims to prevail would undermine the "EPA's scientifically based determinations" regarding what warnings are or are not warranted on a particular product's labeling and lead to a "deleterious" effect by discouraging the use of "highly beneficial products such as Roundup."

"Indeed, it is difficult to imagine a more clear-cut case for FIFRA preemption of state-law failure-to-warn claims than Roundup," the legal foundations said.

Lawrence S. Ebner, executive vice president and general counsel of the Atlantic Legal Foundation, told Law360 that the legal foundation decided to throw its support behind Monsanto given its history of advocating for federal preemption of tort claims involving federally regulated products including pesticides, as well as for "sound science" in judicial and regulatory proceedings.

"In view of EPA's science-based determination that a cancer warning is unwarranted, a jury in the state tort suit should not be able to second guess that expert agency determination," Ebner said.

John M. Masslon II, senior litigation counsel of the Washington Legal Foundation, expressed similar sentiments, telling Law360 that should the full Eleventh Circuit stick by the panel's prior ruling, companies like Monsanto would be placed in the position of either being required to violate federal law or violate state law depending on whether they place the cancer warning on their product or not.

"And that's the exact point of the Supremacy Clause and of federal preemption, is to ensure that companies aren't faced with that decision of either violating federal law or violating state law," Masslon said.

Carson's suit is one of many that Monsanto is currently facing across the country. In 2020, the company agreed to pay \$11 billion to settle federal claims about the pesticide but has also won at least five trial cases in state courts, including in Oregon and Missouri. More recently, the Ninth Circuit upheld a \$25 million award against Monsanto from a bellwether trial in a sprawling Roundup multidistrict litigation in 2021. Last year the U.S. Supreme Court declined to hear Monsanto's appeal of an \$87 million verdict awarded to a couple who alleged Roundup caused their blood cancer.

Representatives for Carson and Monsanto did not immediately respond to requests for comment Monday.

The Washington Legal Foundation is represented in-house by Cory L. Andrews and John M. Masslon II.

The Atlantic Legal Foundation is represented in-house by Lawrence S. Ebner.

Carson is represented by Ashleigh R. Madison of Southeast Law LLC and David C. Frederick, Scott K. Attaway, Derek Reinbold and Rund Khayyat of Kellogg Hansen Todd Figel & Frederick PLLC.

Monsanto is represented by Joe G. Hollingsworth, Eric G. Lasker and Martin C. Calhoun of Hollingsworth LLP, David M. Zions and Michael X. Imbroscio of Covington & Burling LLP and K. Lee Marshall of Bryan Cave Leighton Paisner LLP.

The case is John Carson v. Monsanto Co., case number 21-10994, in the U.S. Court of Appeals for the Eleventh Circuit.

--Additional reporting by Peter McGuire. Editing by Jay Jackson Jr.