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Opinion: Farmers and all aggies need to focus more attention on judicial advocacy

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This summer, the Supreme Court held 7-2 in *Monsanto v. Durnell* that the Federal Insecticide, Fungicide, and Rodenticide Act bars failure-to-warn suits premised on the absence of a pesticide label warning that the U.S. Environmental Protection Agency does not require.

As we'll explain, this is a VERY BIG DEAL. More importantly, this landmark decision is a reminder that agriculture should apply the same level of professional attention, resources and advocacy to the judicial branch of government as with the legislative and executive branches.

Durnell was one of more than 100,000 suits involving Roundup, the nation's most widely used agricultural herbicide. EPA — the agency that Congress has vested with responsibility for regulating pesticides and their labeling under FIFRA — repeatedly has determined, consistent with the overwhelming scientific evidence, that a cancer warning on Roundup labels is not scientifically warranted. The Court's opinion, authored by Justice Brett Kavanaugh, holds that FIFRA's "Uniformity" provision expressly preempts states from using their tort law systems to second-guess EPA's determinations on what health and safety warnings should or should not be provided on a pesticide label.

Until Durnell, plaintiffs' personal-injury contingency-fee bar cashed in by engaging in a decades-long — but FIFRA-preempted — Roundup litigation frenzy. Through extensive TV and other advertising about Roundup's supposed cancer risk, these trial lawyers not only trolled for Roundup "victims," but also attempted to bias the juror pool, throughout the nation.

They argued in court, with considerable success, that Roundup's manufacturer, Monsanto (now part of Bayer), should be held liable for billions of dollars on the theory that the product's EPA-approved labels failed to provide the same cancer warning that EPA has determined not only is scientifically unwarranted, also would be false and misleading, and a violation of federal law.

The Durnell decision is a USA victory for sound science. It effectively terminates the Roundup failure-to-warn litigation but also bars personal injury suits involving any FIFRA-registered pesticide where the plaintiff alleges the product's label should have provided a health or safety warning that EPA did not require for that product. Depriving personal-injury trial lawyers of their ability to sue pesticide manufacturers for failure to warn is also a victory for agriculture.

ENGOS are disappointed by Durnell and are seeking other ways to attack glyphosate (Roundup) and FIFRA preemption. But the "cloud" that was cast over this important weed control technology has largely been lifted — and the billions of dollars a year of farm productivity that has been preserved are very real.

The two of us along with countless colleagues and allies have been associated with this and many other "pesticide preemption" cases in recent decades — some successful and some less so. It is rare when this sort of policy-clarifying case makes it to the Supreme Court. Sometimes the work we've pursued on pesticide policy litigation has not always gone to plan, but the pesticide industry has been persistent and organized along with key allies, and every case can be key to refining the issues strategy and building momentum.

Not all ag industry segments enjoy the policy assets that exist for pesticides — well-developed science for government licensing of products used by farmers, preemption provisions in our FIFRA law, and many decades of case law to rely upon. Some other sectors have these assets — and even where all those assets are not in place, there is still a valid reason to be more proactive on including a judicial component for overall public policy strategy.

While the costs of stepping up in the court system — and the process and timing aspects of litigation can seem mind-bending — we argue that more of ag could benefit from a comprehensive, three-branch approach to issue management. We encourage you to consider adding a judicial component to your issue approach. Remember: the courts are a venue for both protective defense and effective offense.

What is a cost-effective approach? Filing friend-of-the-court briefs in carefully selected cases. Known as “amicus briefs,” they can provide courts with ag’s broad perspective on the real-world impacts of issues such as juries that were shot down by Durnell. Numerous amicus briefs were filed in *Monsanto Co. v. Durnell*, and they contributed to this blockbuster victory.

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