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Bayer Gets Boost As It Preps For Roundup Showdown In Calif.

By **Daniel Siegal**

Law360 (February 3, 2020, 5:59 PM EST) -- As Bayer works behind the scenes to settle thousands of cases alleging its weedkiller Roundup causes cancer, a California judge's refusal to require multiplaintiff trials in the state's consolidated litigation will slow plaintiffs' path to the courtroom and make reaching a deal more appealing.

Alameda Superior Court Judge Winifred Smith, who is overseeing the 128 cases consolidated in California over Roundup, last month **rebuffed a request** from plaintiffs' attorneys to require other judges to hold trials with more than one plaintiff. While Judge Smith said her hands were tied, experts said the ruling helps Bayer both in front of a jury and at the negotiating table.

But while the ruling can make it easier for Bayer to defend plaintiffs' claims and stretches the time it takes for them to get to trial, it can also mean verdicts for plaintiffs are more likely to stand up on appeal, according to product liability attorneys.

Duane Morris LLP partner Robert Kum said that if Bayer faces off against individuals instead of groups, the defendant can more plausibly argue to a jury that a plaintiff's cancer is a "freak occurrence." That becomes more difficult when the jury sees several plaintiffs with the same disease and the same alleged exposure to the product, according to Kum.

"Jury research, mock trials, and trial attorneys and jury consultants will all tell you that the likelihood of getting a verdict, especially a large verdict, goes up significantly once you get beyond one plaintiff," he said. "When you start getting two, three, four plaintiffs, your risk starts going up exponentially."

McGuireWoods LLP partner James Neale agreed, saying jurors are more likely to take a skeptical look at the possible causes of a person's cancer when they only have one plaintiff to assess. This is a key part of a plaintiff's burden in a product liability case like the Roundup suits, in which plaintiffs have to prove that the defendant's product was a substantial cause of their injury.

"Jurors tend to take specific causation a lot more seriously if they're asked to evaluate it as to one person as to eight or 10 or 20," Neale said. "When jurors see a big gang of plaintiffs who are all alleging the same thing, they tend to assume that the causation element is true."

Neale noted that there's a reason the U.S. Supreme Court held in **Amchem Products v. Windsor** in 1997 that a class of people allegedly injured by asbestos exposures couldn't be certified.

"Every personal injury case has a causation question and every causation question is an individual question," he said.

Even individual plaintiffs have proven to be potent litigation risks, with the first Roundup trial ending with former school groundskeeper DeWayne "Lee" Johnson winning a \$289 million verdict, later **reduced to \$78 million**.

The first trial in the federal multidistrict litigation ended with an \$80 million verdict for plaintiff Ed Hardeman — since **cut to \$25 million** — and the first Roundup trial in front of Judge Smith saw

husband-and-wife plaintiffs Alva and Alberta Pilliod win a \$2.06 billion jury verdict in May 2019. The judge later **slashed that award to \$86.7 million**. Bayer has appealed all of the verdicts against it.

That's not to say multiplaintiff Roundup trials won't be heard in California. Peter Joy, a professor at Washington University School of Law in St. Louis, noted that Judge Smith in her January decision wasn't ruling out the possibility that there could be multiple-plaintiff Roundup trials at some point, but only refusing to make such trials mandatory as she farms the cases out to other county judges.

Joy said that this seemed to be Judge Smith's only option.

"Quite frankly, unless a judge is given some specific authority to be able to require other judges to act in a certain way, they don't have that authority," he said. "There's no implied authority for a presiding judge to be able to require other judges to handle cases in a specific way."

If enough similar Roundup claims get sent to the same county judge, that judge could decide in the future to consolidate them for trial, Joy said.

For now though, Joy said that holding single plaintiff trials adds even more fuel to Bayer's ongoing settlement talks, as plaintiffs face yearslong waits to get into the courtroom and Bayer likewise doesn't want the legal battle to drag on forever.

"Plaintiffs sitting where it may take two or more years to actually get to trial, there's a lot of pressure," Joy said. "When pending for a while, there are economic reasons where people would prefer settlement."

With tens of thousands of similar Roundup claims pending in the federal MDL and state courts, Bayer and plaintiffs are negotiating before mediator Ken Feinberg. The talks are far enough along that the parties chose to delay a trial that was set to start Friday in California after a St. Louis trial was put off in late January.

Neale of McGuireWoods agreed that limiting trials to one plaintiff at a time creates a situation where plaintiffs whose claims appear to be years away from getting to court have to revise the value of those claims downward.

"If they think it's going to take years and years to advance the claim, I think obviously the value goes down," Neale said. "The defendant can benefit by saying, 'Get in line and wait' ... and the defendant is usually better situated to run the marathon."

Plaintiffs side toxic tort attorney Allan Kanner of Kanner & Whiteley LLC agreed that by creating a "bottleneck" for plaintiffs and increasing the amount of time until their cases can be heard, holding only single plaintiff trials in a proceeding with hundreds of claims will increase the pressure on the plaintiffs' attorneys to reach a settlement.

However, Kanner disagreed that tackling multiple plaintiffs in one trial would impede a defendant's ability to get a fair shake.

"I don't really see the prejudice. I don't know that I've ever seen empirical data that it's prejudicial," he said.

Kanner noted that plaintiffs attorneys have to invest substantial amounts of money in expert witnesses and the work needed to prepare cases for trial, and thus want to get to court as fast as possible.

But he said there is an advantage to both sides in holding single-plaintiff trials during the initial bellwethers in a larger consolidated proceeding: With fewer moving parts, any verdict in such a trial will give the parties better information about the value of claims in the litigation.

Single plaintiff trials are also less likely to end up leading to a reversal in an appellate court, according to Kanner.

Neale agreed, noting that when multiple plaintiffs are included in one trial, a judge may have to give

the jury instructions that differ for the various plaintiffs and that can create more opportunities for reversal.

"I think those instructions are really hard for a jury to follow, and you end up with a skew that tilts one way or the other," he said.

The Judicial Council Coordinated Proceedings cases are Roundup Product Cases, case number JCCP004953, in the Superior Court of the State of California, County of Alameda.

--Additional reporting by Emily Field and Dorothy Atkins. Editing by Jill Coffey and Michael Watanabe.

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