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## Lawyers Withdraw, Aiming to Revise, \$1.1 Billion Class Settlement Over Roundup

The notice of withdrawal came two days after a federal judge said he was likely to deny approval of the settlement, which Bayer reached last month to cap subsidiary Monsanto's liability over future Roundup claims.

By Amanda Bronstad | July 08, 2020



**Roundup weedkiller on shelves at Walmart in Baltimore, March 14. Photo: Diego M. Radzinski/ALM**

Two days after a federal judge said he was likely to deny approval of Bayer's \$1.1 billion class action settlement over Roundup, the lead plaintiffs attorneys withdrew their court documents in order to revise the agreement.

Plaintiffs attorney Elizabeth Cabraser filed the notice of withdrawal Wednesday. The filing comes after U.S. District Judge Vince Chhabria of the Northern District of California raised several concerns (<https://www.law.com/therecorder/2020/07/06/roundup-judge-appears-ready-to-reject-bayers-1-1-b-class->

settlement/) about the settlement, reached last month alongside a raft of other agreements, valued at up to \$10.9 billion (<https://www.law.com/2020/06/24/bayer-agrees-to-pay-up-to-10-9b-to-resolve-roundup-lawsuits/>), which resolved 75% of the 125,000 claims alleging Roundup caused non-Hodgkin lymphoma.

The class settlement, which is the only one to face scrutiny by a judge, is part of Bayer's strategy (<https://www.law.com/2020/06/30/bayers-gamble-a-1-1b-class-settlement-that-could-end-the-roundup-weed-killer-litigation/>) to cap subsidiary Monsanto's liability for future claims over Roundup, which remains on store shelves.

"We remain strongly committed to a fair and just resolution that serves the needs and interests of persons exposed to Roundup who are not otherwise included in the negotiations for the comprehensive resolution of the thousands of individual cases, in support of a settlement for all," said Cabraser, of San Francisco's Loeff Cabraser Heimann & Bernstein. Her firm represents plaintiffs in the class action along with The Dugan Law Firm in New Orleans; Audet & Partners in San Francisco; and New York University School of Law professor Samuel Issacharoff.

Bayer, in a statement, said it agreed with the decision.

"The withdrawal will enable the parties to more comprehensively address the questions recently raised by federal district court judge Vince Chhabria of the Northern District of California who presides over the federal Roundup litigation," the statement said. "Bayer remains strongly committed to a resolution that simultaneously addresses both the current litigation on reasonable terms and a viable solution to manage and resolve potential future litigation. Mass tort settlements agreements like this are complex and may require some adjustments along the way, but the company continues to believe that a settlement on appropriate terms is in the best interest of Bayer and all of its stakeholders."

The settlement resolves claims of individuals who haven't sued yet but use Roundup—some of whom have non-Hodgkin lymphoma and some who do not.

Under the deal, a science panel would give the final say on whether Roundup causes non-Hodgkin lymphoma, ending the debate in the courts, and plaintiffs, if the decision goes in their favor, could sue, but only for compensatory damages.

Unlike Bayer's other Roundup agreements, a judge must approve the class settlement under the Federal Rule 23 of Civil Procedure and the class action guidelines in the Northern District of California, where Chhabria sits in San Francisco.

Chhabria had scheduled a July 24 hearing on the settlement's preliminary approval.

Nearly a dozen firms, including Napoli Shkolnik and Baron & Budd, sought an extension to a July 13 deadline to oppose the class settlement, many of them stating that such a deal had "never before been attempted in the history of American jurisprudence" and raised "profound questions" under Rule 23, federal statutes and the U.S. Constitution. "It could have a dramatic effect not only on this litigation but on the future of mass tort litigation," they wrote.

Chhabria refused to grant the extensions but, in Monday's order, said he was "skeptical of the propriety and fairness of the proposed settlement" and was "tentatively inclined to deny the motion."

Chhabria questioned the constitutionality of having a science panel, rather than a judge or jury, decide general causation.

Brian Fitzpatrick, a professor and class action expert at Vanderbilt Law School, who had planned to oppose the deal in a filing with Roland Tellis of Baron & Budd, said the constitutional issues in Chhabria's order "really caught my eye because I teach federal courts, in addition to teaching complex litigation."

“Can administrative agencies adjudicate disputes between parties?” he said. “Because under the U.S. Constitution, Article III says the judicial power of the United States should be vested in judges with life tenure. To what extent can you peel away things and have other federal officials have judicial power?”

Chhabria also wondered whether the panel’s decision was binding, even if further scientific studies refuted its findings, and was skeptical that the notice program could reach such a “diffuse, contingent, and indeterminate” class.

Further, Chhabria, who oversaw a Roundup trial that ended in an \$80 million verdict last year, asked why a class member would want to participate in such a settlement when other Roundup users have obtained “significant compensatory and punitive damages” at trial. Bayer is appealing three Roundup verdicts totaling \$2.4 billion awarded in the past two years.

“He’s spent a lot of time thinking about general causation already. And so he has seen the plaintiffs do pretty well in court with juries,” said Fitzpatrick, of Chhabria. “And I think he’s right to ask: why would they give all that up to go to this science panel? It’s a very good question, and a very hard one to answer.”

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