

# Client Alert

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## Retail Industry on High Alert After \$289 Million Glyphosate Verdict Against Monsanto

Weeks after a federal judge called the science behind the alleged carcinogenicity of glyphosate “shaky,” a California state court jury hammered Monsanto with a \$289 million verdict, connecting a former groundskeeper’s non-Hodgkin’s lymphoma to his exposure to the Roundup® chemical. The August 10, 2018 verdict in *Johnson v. Monsanto Co.*, No. CGC16550128 (California Superior Court, County of San Francisco)—which included \$250 million in punitive damages—was the first in the nearly 8,000 Roundup-related cases currently pending against Monsanto, many of which are consolidated in multidistrict litigation in California federal court. However, adding another layer of confusion surrounding the use of glyphosate, a federal court in California recently decided that the state could not require Proposition 65 cancer warnings on products containing the chemical. The intense publicity surrounding the verdict has left retailers whose products contain ingredients that might have been treated with glyphosate wondering whether their products may be targeted next.

### Increased Scrutiny of Consumer Products After *Johnson*

Glyphosate, a weed-killing chemical commonly found in herbicides, has been used in the United States for decades. Its widespread use in commercial agriculture means that many of the raw products that eventually end up in consumer products were, at some point, likely treated with glyphosate. The resulting potential for glyphosate contamination of popular consumer products—including food, textiles and personal care products—opens the door to a nearly limitless pool of prospective plaintiffs.

Public pressure on retailers is already mounting in the wake of the *Johnson* verdict. On August 15, 2018, the consumer advocacy organization Environmental Working Group released a report contending that traces of glyphosate had been found in 43 of 45 samples of popular oat cereals, oatmeal, granola and snack bars—including products intended for children. The report, which was widely reported in the mainstream media, echoes several similar reports that have been released in recent years purporting to have detected glyphosate in a wide range of consumer products, including honey, ice cream, cookies, crackers, chips, yogurt, potatoes, eggs and even feminine care products.

Although the doses (if any) of glyphosate a consumer would receive from use or ingestion of these products would likely be negligible, companies can nevertheless expect to see an increase in personal injury lawsuits brought by consumers who claim that long-term exposure to their products caused any one of a variety of injuries that have been suggested in some literature to be linked to glyphosate.

### Focus on Labeling of Consumer Products That May Contain Trace Glyphosate

Glyphosate litigation poses other, less obvious threats to companies in the retail industry, particularly as the regulatory framework becomes increasingly complex. For example, on August 22, 2018, the Organic Consumers Association announced that it had settled a lawsuit it, along with two other consumer advocacy groups, Moms Across America and Beyond Pesticides, had brought against General Mills in 2016. *See Organic Consumers Association, et al. v. General Mills, Inc.*, No. 2016 CA 006309 B (D.C. Super. Ct. 2016). The suit claimed that the company’s “100% Natural Whole Grain Oats” label on its Nature Valley granola products was misleading to consumers because trace glyphosate was detected in the products. As part of the settlement of the suit, General Mills agreed to drop the “natural” phrase from the products’ labels.

While the FDA has not yet spoken directly on when a product may be called “natural,” suits like the General Mills Nature Valley case have been increasingly common in recent years and the momentum from the *Johnson* verdict is likely to spur additional litigation. Companies whose products bear labels with language like “natural,” “pure,” “organic” and similar terminology should be especially aware of the increased risk of litigation over potential trace glyphosate in those products.

## Uncertain Regulatory Landscape

Adding to the uncertainty about the future of glyphosate are the conflicting decisions rendered by regulatory authorities both in the United States and abroad. Since 2016, the FDA has been testing soybeans, corn, milk and eggs for glyphosate residue and recently announced that it had expanded its testing to other commodities. Although testing has been ongoing for two years, the FDA has not yet released results, leading consumer advocacy groups to accuse the FDA of hiding them from the public and demanding the release of documents related to the testing.

In July 2017, California added glyphosate to its list of Prop 65 chemicals known or suspected to cause cancer, birth defects or reproductive harm. But just five months later in December 2017, the United States Environmental Protection Agency released a draft risk assessment concluding that glyphosate is not likely to be carcinogenic to humans. Following the release of EPA’s draft risk assessment, a California federal court issued an order on February 26, 2018, temporarily enjoining California from requiring a Prop 65 warning on products that may contain glyphosate on the grounds that it violated the company’s First Amendment rights for commercial speech. That decision, which the court refused to reconsider in June 2018, means that although glyphosate nominally remains on the Prop 65 list, no warnings are required—for now.

And the glyphosate controversy has not been limited to the United States: in late 2017, the European Union narrowly voted to renew the authorization for the marketing of glyphosate in the EU for an additional five years, after a lengthy debate about the potential health hazards associated with glyphosate and particular scrutiny of the “Monsanto Papers”—internal Monsanto documents suggesting that Monsanto researchers may have “ghostwritten” favorable studies while suppressing studies they felt may have been damaging to glyphosate’s reputation.

The legal uncertainty likely will keep glyphosate in the public eye for the foreseeable future.

## Looking Forward

The potential carcinogenicity of glyphosate is hotly contested and Monsanto plans to appeal the *Johnson* verdict. What that will do to change the public perception of glyphosate is uncertain, given the widespread media coverage of the verdict. It is not likely to discourage those looking to profit from what they hope will be the next wave of mass tort litigation. That could raise trouble not only for the manufacturer, but also for retailers across a wide spectrum of industries whose products may be affected by glyphosate in some way.

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