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## Judge Dismisses Monsanto Suit Seeking to Block Listing of Glyphosate

OEHHA

By ROGER PEARSON, February 10, 2017

A Fresno County Superior Court judge has issued a tentative decision dismissing a lawsuit filed by Monsanto Corporation seeking to block the listing of glyphosate as a Proposition 65 carcinogen. Assuming Judge Kristi Kapetan finalizes her ruling and it survives any appeal, Monsanto may be required to slap a Prop. 65 warning on its popular Roundup pesticide, which contains glyphosate as its active ingredient.

In September 2015 the Office of Environmental Health Hazard Assessment (OEHHA) announced its notice of intent (NOI) to list four organophosphate pesticides as carcinogens pursuant to the Prop. 65 Labor Code listing mechanism. The four pesticides included tetrachlorvinphos, parathion, malathion, and glyphosate. OEHHA finalized the listing of the first three of these pesticides effective May 20, 2016 [see **OEHHA Proposes to List Four IARC Pesticides Using Labor Code Mechanism**<sup>1)</sup>, September 15, 2015].

However, Monsanto decided not to wait until glyphosate is actually listed to challenge that potential listing. The company took the unusual action of filing a lawsuit, **Monsanto v. OEHHA**<sup>2)</sup> last January seeking an injunction blocking the listing before it occurs. The lawsuit was filed in Fresno County Superior Court [see **Monsanto Launches Preemptive Strike Against Glyphosate Listing**<sup>3)</sup>, January 30, 2016]. OEHHA has for now held off on the listing of glyphosate pending the outcome of this suit.

The basis cited by OEHHA for the listing of all four pesticides, including glyphosate, is the Prop. 65 Labor Code listing mechanism. That mechanism, according to OEHHA, requires it to list any substance found by the International Agency for Research on Cancer (IARC) to be a "probable" (Group 2A) or "possible" (Group 2B) human carcinogen based on sufficient evidence of carcinogenicity in animals. IARC identified glyphosate as a Group 2A probable human carcinogen based on sufficient animal evidence.

In seeking to block the listing Monsanto cited a number of somewhat arcane constitutional and other theories. In her tentative decision Kapetan rejects each of these theories. Ruling on a demurrer filed by OEHHA, Kapetan concludes that Monsanto's suit fails to demonstrate that it can prevail on any of its arguments on their face:

- **Unconstitutional Delegation Of Authority.** Monsanto argued that Prop. 65 in creating the Labor Code listing mechanism illegally delegated the authority to determine what is a carcinogen to

IARC without establishing any standard for that determination. In rejecting this argument Judge Kapetan determined that the Proposition itself establishes the listing standard and that IARC simply makes the factual determination of what constitutes a carcinogen under that standard. This delegation allowing a third party to do the technical work to determine what meets a standard has been determined to be constitutional by the California Supreme Court.

- **Due Process.** Monsanto argued that its property interest in its Roundup trademark, its business goodwill, and its reputation will be damaged if glyphosate is listed and that there are no procedural safeguards in place to protect against an arbitrary determination by IARC. In response, Judge Kapetan noted that this is a procedural due process argument and procedural due process is not applicable to a quasi-legislative action.
- **Article II, Section 12.** This section of the California Constitution provides that no action by the Legislature or the voters can identify any private corporation required to perform any function or to have any power or duty. Monsanto argued that this provision was breached by naming IARC in the Proposition 65 statute establishing the Labor Code listing mechanism. The problem with this argument, says Judge Kapetan, is that IARC is not a “private corporation.”
- **Guarantee Clause.** Article IV, Section 4 of the U.S. Constitution guarantees every state in the Union a Republican form of government and Monsanto argued that the Labor Code mechanism violates this principle. Judge Kapetan points out in response that challenges under this Guarantee Clause have been consistently rejected as political questions that are not justiciable.
- **Unlawful Amendment of the California Constitution.** Monsanto argued that the Labor Code listing mechanism violates Article 4, Section 1 of the California Constitution, which states that the legislative power of the state lies with the state Senate and Assembly, by empowering IARC to make law. This argument, says Judge Kapetan, is similar to the first argument over illegal delegation and fails for the same reason; i.e., that IARC is simply establishing the facts necessary to carry out an existing legislatively-established standard.
- **Free Speech.** Finally, Monsanto argued that the listing of glyphosate would violate its First Amendment free speech right by forcing it to label its Roundup product as containing a carcinogen without advancing any valid state interest. Judge Kapetan agreed with OEHHA’s claim that this argument is premature, because listing of glyphosate would not necessarily require a warning if Monsanto can demonstrate that Roundup does not pose a significant risk to exposed individuals.

Monsanto has indicated that it will try to persuade Judge Kapetan to alter her decision prior to making the tentative decision final. If it cannot then the company has the option of appealing the decision.

## **Resources for this article**

**1. OEHHA Proposes to List Four IARC Pesticides Using Labor Code Mechanism**  
[/articles/2971](#)

**2. Monsanto v. OEHHA**  
[/cases/3097](#)

**3. Monsanto Launches Preemptive Strike Against Glyphosate Listing**  
[/articles/12372](#)