



## **Pesticide newsletter**

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### **Jurisdictional news**



#### **United States: Bayer's strategy for dealing with its lawsuits**

Plagued by countless [lawsuits](#) from people with non-Hodgkin's lymphoma (NHL) attributed to its flagship product, RoundUp, and the colossal fines it suffered in the first trials, the German agrochemical company Bayer [announced](#) on July 29, 2021 that it is deploying a legal and economic defense strategy to reassure its shareholders and investors.

Bayer will stop selling its glyphosate-based herbicides (GBH) to consumers in the U.S. market from 2023. The company is careful to explain that this decision is being made only to manage litigation risk and not for safety reasons. Since the vast majority of claims in the litigation are from users in the lawn and garden market, this action largely eliminates the primary source of future claims, beyond an assumed latency period. According to research firm [AlphaValue](#), it will not be until 2037 that all consumer litigation will be resolved. More importantly, it does not affect the U.S. professional and agricultural markets, which account for the largest share of GBH sales by far, so it will have a very limited effect. But

it shows Bayer's confidence that big farmers who use GBH are too dependent on them to consider suing the company over the products.

Bayer also announced that it is making an additional \$4.5 billion [provision](#) to try to resolve potential future Roundup-related litigation. In March 2021, the company had proposed a \$2 billion settlement, which has been roundly [rejected](#) by California federal judge Vince Chhabria as failing to protect people with undiagnosed cancer and pernicious for limiting plaintiffs' ability to seek punitive damages while Bayer continues to sell Roundup. Bayer's announcement to stop selling Roundup to individuals and the doubling of provisions, on top of the approximately \$11.6 billion provision for ongoing litigation, is designed to get an agreement from the judge in case Bayer's appeal to the Supreme Court fails.

Indeed, Bayer's legal strategy relies heavily on the Supreme Court. It has decided to take the legal battle over Roundup-related cancers to the Supreme Court in order to end the litigation at the highest level. The agrochemical company filed a [petition](#) with the Supreme Court on August 16, 2021, to overturn the Federal Appeals Court's [verdict](#) upholding damages awarded to Roundup user Edwin Hardeman who claims his cancer was caused by the group's glyphosate-based weed killers. This petition was filed in the wake of the [rejection](#) by the California State Court of Appeals of Monsanto's request to cancel the \$ 87 million in damages awarded to the Pilliods couple, who believe that their regular use of the weedkiller Roundup is responsible for their NHL. The court noted Monsanto's "total disregard" for the health and safety of consumers.

The move is widely seen as Bayer's best hope for ending allegations that exposure to GBH, such as Roundup, causes non-Hodgkin's lymphoma and that the company failed to warn users of the risks. Bayer's success in the Supreme Court would end its descent to hell. The company is asking [two questions](#) to the Supreme Court: did Bayer/Monsanto have to warn of the cancer risks on its products when the warning cannot be added to a product without EPA approval and the EPA had repeatedly found that the warning was not appropriate? Did the experts called by the court have expertise consistent with the Ninth Circuit's standard for admitting expert testimony and the federal rule for admitting evidence? If the Supreme Court grants review of these issues, it will likely issue a final decision in 2022.

This petition does not stop the lawsuits from continuing. After the trials of [Dewayne Johnson](#), [Edwin Hardeman](#) and the [Pilliods](#), a fourth trial has begun in August 2021: that of Mrs. [Stephens](#), who is over 70 years old and whose trial has been expedited because of her serious health problems. This trial has been subject to numerous technical [difficulties](#) unfavorable to the plaintiff, as a result of the COVID pandemics and the subsequent decision to hold it through videoconferencing.

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