

Litigator of the Week: A Long-Sought Win on Preemption for Monsanto at the Third Circuit

By Ross Todd

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The litigation around Monsanto's blockbuster herbicide Roundup is of such a scale that its parent company Bayer AG has posted a five-point plan on its website outlining how it aims to manage the risks associated with it.

The first leg of that plan is pretty clear: "1. Seek a positive ruling from the U.S. Supreme Court."

Our Litigator of the Week, **David Zionts** of **Covington & Burling**, helped the company take a step towards that goal this past week. Zionts argued for Monsanto at the Third Circuit in a case where the court held last week that the Federal Insecticide, Fungicide, and Rodenticide Act preempted plaintiffs' failure-to-warn claims under Pennsylvania state law based on Roundup's lack of a cancer warning label. The Third Circuit's decision creates a split on the preemption issue with the Ninth and Eleventh Circuits.

Bayer's stock price jumped 11% after the decision's release.

Lit Daily: Bayer agreed to pay nearly \$11 billion to settle about 75% of the claims in the Roundup MDL four years ago. What was at stake here in this appeal?

The basic claim in these lawsuits is that the company should have warned that Roundup can cause cancer. Despite the lack of reliable science connecting Roundup to cancer, the Roundup litigation has presented an existential threat to



Courtesy photo

David M. Zionts of Covington & Burling.

the company. From the outset, the company has argued that these claims were preempted by the express terms of an applicable federal statute, given that the EPA has repeatedly and consistently found that such a cancer warning was unwarranted. The company has set aside a total of about \$16 billion to resolve this litigation, and while more than 100,000 claims have been resolved or deemed ineligible, there are still a significant number of claims remaining, and the stakes in this appeal are big for this significant number of claims.

For years, the company also has repeatedly stated its plan to seek a positive ruling from the Supreme Court on this central, cross-cutting issue to help manage the litigation toward a successful conclusion. The Third Circuit's decision directly

conflicts with the rulings of the Eleventh and Ninth Circuits, meaning that the U.S. Supreme Court will now almost certainly need to resolve this circuit split. A favorable ruling by the U.S. Supreme Court on this cross-cutting federal preemption question could largely end this litigation.

How did you and your firm get involved in this matter? How has Covington been involved in the Roundup litigation more broadly?

Paul Schmidt, Phyllis Jones and Mike Imbroscio in our mass torts group have handled a number of matters for Bayer over the years, and when Bayer acquired Monsanto, we were brought on to complement the excellent virtual firm the company already had in place. Mike has worked closely with **Lee Marshall at Bryan Cave Leighton Paisner** as co-leaders of the nationwide Roundup briefing team, and they graciously brought me on to help on the preemption appellate strategy.

Who was involved in this appellate effort and how have you divided the work?

We've had a great collaborative relationship with a number of firms working on appellate aspects of the Roundup litigation. In particular, Covington has worked closely with Lee Marshall's team at Bryan Cave, including on the *Schaffner* appeal and the preemption issue more broadly. Lee has been a great partner in this whole effort, especially in developing the overall strategy around preemption. Within Covington, I've led the appellate team, and we've been privileged to have a terrific group of associates from both the appellate and products liability groups making key contributions. Associates **Emily Vernon** and **Matthew Quallen**, among others, made important contributions to the briefing and argument prep.

U.S. District Judge Vince Chhabria, who is overseeing the Roundup MDL, sits in the Northern District of California in the Ninth Circuit. He issued the initial decision against your client on the preemption question on appeal here. How did this appeal end up before the Third Circuit?

It's just a result of how the MDL process works. The *Schaffner* case originated in the

Western District of Pennsylvania but was then transferred to the MDL for pre-trial proceedings. When the time came to remand the case back to Pennsylvania, the MDL court's pretrial decisions, including its ruling on preemption, traveled with the case back to the Western District, and so from there the appeal went to the Third Circuit.

You handled an unsuccessful appeal for Monsanto on similar preemption issues in a Roundup case in the Eleventh Circuit, a case that went en banc. How did your approach differ in this appeal in the Third Circuit?

Overall our approach was pretty consistent. We have a strong story to tell based on the text of the statute, Congress's stated objective of "Uniformity" in labeling, the regulatory framework, Supreme Court precedent and, ultimately, common sense. So it's really a matter of finding the right ways to crystallize that message and package all those points in a clear and compelling way. Of course, any time you are able to live with an issue for a while and argue it in different courts, there's opportunities to see things from a new angle and refine your approach. So we certainly were able to take what we learned in the Eleventh and apply it in the Third, but it was more about subtle refinements, not major course corrections. And while the ultimate ruling by the three-judge panel in the Eleventh circuit was disappointing, along the way we received a helpful decision from the full en banc court on one of the predicate issues in the case, which advanced the overall effort.

How did you feel about how the oral argument went before the Third Circuit? Looking back now, is there any particular exchange that stands out?

My main takeaway from oral argument was that this was a panel that had really dug into the case and was asking thoughtful, probing questions of both sides. You never know for sure after oral argument, but I was heartened by the level of engagement. Because I think when you really dig into the issues, think deeply about the full regulatory context, and probe the relevant Supreme Court precedent, our position is really

compelling. It wasn't a one-sided oral argument at all—I faced some tough questions. But I left thinking that this was a panel that was really trying to figure out the right answer, and that was encouraging.

One exchange that stands out to me involved what the statute refers to as a “miscellaneous” provision. The name sort of says it all—it isn't the focal point of the statute and doesn't on its face modify anything about how preemption works. But other courts had really fixated on that miscellaneous provision. And at one point in the argument, Judge Chung asked this really detailed question about that provision and its history. It was a humorous moment because she cited the statute with a lot of specificity and Chief Judge Chagares looked over and chuckled and admired the preparation that went into that question. But the question also got at something we'd addressed in our brief about how this provision had a particular history and didn't really have any relevance to the preemption issue. And ultimately, in the court's opinion, there was a lengthy discussion of the miscellaneous provision explaining exactly that point. Looking back, it was significant not only because of the specifics of that issue, but because it illustrated how the panel had really dug in and was asking the right questions.

Where does this leave the state of play in the remaining Roundup cases? The company has said it looks forward to presenting “its arguments, as fully embraced by the Third Circuit, to the U.S. Supreme Court.” What's the path to get there?

We expect this decision will have a major impact on the nationwide Roundup litigation, and we have already begun the process of bringing this decision to the attention of the various courts around the country overseeing Roundup cases. At the same time, we are evaluating our numerous options to present this issue to the Supreme Court. There's going to be no shortage of opportunities for these important arguments to get the hearing they deserve at the Supreme Court.

What can others take from how you and your client approached this appeal?

I think there's a lesson to be learned about really going back to first principles—the statutory text, the regulatory landscape, the seminal Supreme Court cases—and making a compelling case about why they point in your direction. We were able to call attention to the fact that Congress enacted an express “uniformity” provision and to point out the close parallels between FIFRA's preemption provision and similar provisions that have been interpreted by the Supreme Court consistent with our position. We had circuit-level authority going against us, but we were convinced that the reasoning of those cases didn't hold up. We didn't try to sugarcoat the adverse authority. We just took it on: we explained why the approach some courts were taking was faulty, why we think there's a better one, and carefully laid out all the reasons why and built an argument from the bottom up. I think there's a lesson to be learned about not being so focused on adding up cases and distinguishing others, but instead to really make an argument that goes to the heart of the matter.

What will you remember most about getting this result?

I think two things will stand out. First, it's that much more rewarding when there is appellate authority going the other way, but you can convince a court that actually the other courts have gotten it wrong and there's a different path that should be followed. Second, I'll remember the great collaboration that led to this result, both within Covington and also with the talented lawyers that Bayer has assembled in its “virtual law firm,” from people who were deeply involved at every step to others who stepped in to moot me and offered great ideas in advance of argument. Having a chance to kick around tricky issues with really smart colleagues made this a great experience along the way, in addition to contributing to the ultimate victory.