

## TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

JANUARY 2024

### IN THIS ISSUE

*This Newsletter addresses the recent recognition in France of a causal link between the prenatal exposure to glyphosate and the congenital deformity suffered by a teenager, in a context where the European Union has just decided to renew the authorization of glyphosate, while case law is getting increasingly pro-victim when it comes to linking deceases to pesticides. These issues will keep on getting the headlines in the coming years in Europe, especially given that NGOs are now highlighting the presence of PFAs in pesticides used in Europe.*

## What is the Role of Science in Determining a Causal Link? The Example of Pesticides in French Litigation

### ABOUT THE AUTHORS



**Sylvie Gallage-Alwis** is one of the founding partners of the Paris office of the EU dispute resolution-focused firm Signature Litigation, also established in London & Gibraltar. Sylvie is specialized in French and EU Product Liability and Toxic Tort, representing manufacturers in civil, criminal, administrative, class actions, and mass tort litigation. She is both registered before the Paris Bar (and can try cases in all Courts in France, whether lower level or appellate courts) and as a Solicitor in England & Wales. Sylvie is Chair of the Toxic and Hazardous Substances Litigation Committee and Vice Chair of International for the Product Liability Committee. She can be reached at [sylvie.gallage-alwis@signaturelitigation.com](mailto:sylvie.gallage-alwis@signaturelitigation.com).



**Elias Boukachabine** is a member of both the Paris Bar and California Bar. He is an associate of the Paris office of Signature Litigation specialized in Product Liability, Toxic Tort, and mass litigation/class action. He is involved in the first mass civil claim filed against a US manufacturer on the ground of the presence of alleged hazardous substances in the manufacturing process. He can be reached at [elias.boukachabine@signaturelitigation.com](mailto:elias.boukachabine@signaturelitigation.com).

### ABOUT THE COMMITTEE

Member participation is the focus and objective of the Toxic and Hazardous Substances Litigation Committee, whether through a monthly newsletter, committee Community page, e-mail inquiries and contacts regarding tactics, experts and the business of the committee, semi-annual committee meetings to discuss issues and business, Journal articles and other scholarship, our outreach program to welcome new members and members waiting to get involved, or networking and CLE presentations significant to the experienced trial lawyer defending toxic tort and related cases. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



**Paul V. Majkowski**  
Vice Chair of Newsletters  
Rivkin Radler LLP  
[paul.majkowski@rivkin.com](mailto:paul.majkowski@rivkin.com)

*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

Whereas the European Commission has renewed the authorization of glyphosate for a further 10 years starting from December 15, 2023, the Compensation Funds for the Victims of Pesticides (FIVP) has recently recognized the existence of a potential link between prenatal exposure to glyphosate and the illness of a teenager.

### **The FIVP's Decision is Favorable to the Victims of an Exposure to Pesticides**

Pursuant to an unprecedented decision dated 10 March 2022, which was made public on October 9, 2023, the FIVP – *ad hoc* institution created in 2020 and composed of researchers, university professors and specialists of pesticide issues – has recognized a possible causal link between the prenatal exposure to glyphosate and the congenital deformity suffered by a teenager since birth, pursuant to a favorable opinion of the Commission for the compensation of child victims of a prenatal exposure to pesticides (CIEVEP).

In 2017, the family of a teenager suffering from oesophageal atresia summoned Novajardin, owner of the Glyper brand, and Bayer-Monsanto, supplier of the active substance, Glyphosate, to have them sentenced on the ground of their liability in the development of the young man's illness. The goal of his family was to obtain the recognition that the deformity suffered by the teenager, which led to more than 50 surgeries since his birth, would have been caused by the use by his mother of the

Glyper herbicide, a generic product of Roundup containing glyphosate while she was 1-month pregnant but did not know that she was.

Even though the case is still pending before the Vienne Civil Court (Isère department), the FIVP issued a decision recognising the harmful effects of glyphosate and awarding compensation of 36,000 Euros to the teenager, meant to be paid by MSA (Mutualité sociale Agricole), the social security for farmers.

### **Near Presumption of a Causal Link between an Exposure to Glyphosate and the Victim's Illness**

As clearly reminded in the CIEVEP's opinion, the purpose was to rule on "*the possibility of a causal link between the child's symptoms and the exposure to pesticides during the prenatal period due to the mother's professional activity*".

Yet, the CIEVEP indicates in its opinion that it "*takes into account the determination of the illness*" by explaining that "[i]n light of the mother's occupation, the Commission considers that the occupational exposure to pesticides, even though it is limited, is plausible and takes into account the possibility of a causal link between the child's illness and the exposure to pesticides during the prenatal period".

To issue this decision confirming the causal link between the exposure to glyphosate and

the illness developed by the teenager, the CIEVEP indicates having taken into account all the medico-administrative elements, the available scientific data and the occupational exposure of the child's mother to glyphosate.

Obviously, the CIEVEP decided to be on the side of the potential victims of the exposure to pesticides given that, on the one hand, a purely "plausible" causal link is alleged, and, on the other hand, a significant amount of damages is awarded on the basis of the possible existence of this causal link.

The CIEVEP's decision is hence favorable to the victims as it creates a near presumption of a causal link between an illness and the exposure to glyphosate even though it recognizes that the exposure was "limited." The absence of certainty does not prevent the award of damages to potential claimants, which is similar to reversing the burden of proof.

**Renewal of the Authorization of Glyphosate by the European Commission in Spite of the Opportunistic Mediation of the FIVP's Decision**

Even though the FIVP's decision was issued on March 10, 2022, it was made public only on October 9, 2023 in the specific context of European discussions relating to the renewal of the authorisation of glyphosate by the European Commission.

Indeed, the teenager's mother indicated that her goal was to warn the European institutions at the time of the discussions on

a new authorization of glyphosate within Member States for the next ten years. Furthermore, the teenager himself called out to President Macron via social networks asking him to object to such an approval.

One can only note that the family's initiative, and that of the many associations throughout Europe, failed given that in the scope of two successive votes on October 13, 2023 and November 16, 2023 of the Permanent Committee for plants, animals, foodstuff and feed (SCoPAFF), the Member States did not obtain the required qualified majority to renew or dismiss the approval of glyphosate.

Consequently, the European Commission decided to renew the approval of glyphosate for a period of 10 years by notably relying on the assessment of the European Food Safety Authority (EFSA) on the impact of glyphosate on human health, animals and the environment, which did not demonstrate the existence of major concerns preventing the renewal of the approval of this product.

Contrary to WHO, which has been classifying glyphosate as a probable carcinogenic since 2015, European health agencies like EFSA and the European Chemicals Agency (ECHA) do not recognize this alleged harmfulness for human health, justifying the renewal of the approval of this product.

**The FIVP's Decision and the Renewal of the Authorization of Glyphosate Announces the Appearance of this Type of Litigation**

The FIVP's decision is in line with a legal and legislative trend that is increasingly favorable to the recognition and coverage of illnesses and deformities suffered by individuals and workers exposed to pesticides, in particular glyphosate.

In France, it clearly appears from Decree 2012-665 of May 4, 2012 that Parkinson's disease can be recognized as an occupational illness in farmers exposed for a long period to pesticides.

More recently, pursuant to Judgment no. 16/00439 of November 7, 2022, the Lyon Civil Court definitively sentenced Monsanto to compensate a French farmer for the intoxication and sequelae resulting from the inhalation of the fumes of a herbicide sold by this company and withdrawn from the French market, due to its carcinogenic effects.

The increasing legalization of these cases related to the progress made in scientific research on the question of the impact of pesticides on health suggests a multiplication of this type of litigation in the future, even though the opinions of the different scientific agencies and authorities on the dangerousness of pesticides differ.

In 2022, the association *Phyto-Victimes* – association helping professionals who are victims of pesticides, indicates having received more than 600 requests for

compensation, which shows the very high potential of litigation related to the exposure to pesticides.

Furthermore, it ought to be reminded that Monsanto was already significantly sentenced by the US courts in *re Delaware Johnson v. Monsanto Co* in 2018. The US agrochemical giant was sentenced in the scope of the first instance proceedings to pay nearly 290 million Dollars as punitive and compensatory damages to a gardener due to a cancer of the lymph system developed after using Roundup.

In light, on the one hand, of the opinion of FIVP and part of the scientific community on the causal link between the exposure to pesticides and different illnesses, and, on the other hand, the renewal of the authorization of glyphosate for a period of 10 years, litigation relating to the exposure to pesticides has a bright future ahead. All the more so given that some pesticides would contain PFAS, the global prohibition of which is currently being discussed at European level.

**PFAS, Future Source of Litigation Related to Pesticides**

In a report published in November 2023, the French association *Génération Futures* warns about the significant presence of Per- and polyfluoroalkyl substances, otherwise called PFAS, which are a broad family of more than 4000 chemical compounds with different properties used in many industrial sectors and everyday products, which are currently subject to a global prohibition

project to be submitted to Member States by the European Commission by 2025.

According to *Générations Futures*, 12% of all synthetic substances authorised at EU level to be used in pesticides would contain PFAS. *Générations Futures* even explains that the sales of the 30 pesticides containing PFAS authorized in France would have more than tripled between 2008 and 2021 in France, going from 701 tons per year in 2008 to more than 2,300 tons per year in 2021.

In light of the desired global prohibition of all PFAS by the European Commission due to their dangerousness for people, animals and nature, and in light of the massive use of PFAS in the pesticides authorized in France and in Europe, there is no doubt that many individual and collective actions should arise in the coming months and years.

In France, litigation relating to PFAS has already started and should continue to grow. Indeed, in September 2023, around thirty mayors in an area located south of Lyon – the so-called Chemical Valley – decided to file a collective complaint due to the abnormally high level of PFAS identified in some cities of the region.

As early as May 25, 2023, locals and associations from the Chemical Valley initiated criminal environmental summary proceedings – aiming at obtaining the rapid end of damage to the environment – against Arkema France, French chemical group accused of using and releasing PFAS.

If the Freedom and Detention Judge of the Lyon Civil Court, referred the case by the Lyon Public Prosecutor in October 2023, eventually dismissed the criminal environmental summary proceedings in a decision dated November 16, 2023, an appeal would already be planned by the associations, trade unions and individual victims.

The purpose of the mayors, associations, trade unions, and individual victims is to ask the French courts to sentence the private parties responsible for the pollution and their exposure to PFAS to compensate them for all the collective and individual losses sustained.

**Conclusion:** if the decision of the FIVP relating to glyphosate, like the global prohibition of PFAS desired by the European Commission illustrate awareness by the legislative and judicial authorities regarding pesticides and other chemical substances that are potentially harmful, one can only note that this awareness is weakened by the absence of any scientific consensus.

Yet, in spite of the absence of scientific consensus on the potential dangers of glyphosate and other pesticides containing PFAS, it is likely that the French courts hearing compensatory claims related to the exposure to these legal and authorized substances will nevertheless transfer responsibility to the companies and their private actors.

Like asbestos at the time, it appears that the current scientific evolutions relating to the



past use of authorized products will transfer collective liability to the private users of these legal substances rather than to the competent authorities that authorized them.

## Past Committee Newsletters

Visit the Committee's newsletter archive online at [www.iadclaw.org](http://www.iadclaw.org) to read other articles published by the Committee. Prior articles include:

OCTOBER 2023

[Holding the Gate Against Talc Plaintiffs' Experts: New Jersey Appellate Court Reverses Multi-Hundred-Million Dollar Verdict](#)

Paul V. Majkowski and Lauren E. Russo

SEPTEMBER 2023

[California Supreme Court Finds Employers Have No Liability for Take-Home Exposure to COVID](#)

Michael L. Fox and Anshul Agrawal

MAY 2023

[The PFAS-Concern is Reaching the EU](#)

Sylvie Gallage-Alwis and Elias Boukachabine

FEBRUARY 2023

[Air Pollution in Europe: France, Condemned to be Sentenced?](#)

Sylvie Gallage-Alwis and Jordan Leblanc

SEPTEMBER 2022

[California Appellate Court Permits Defense Expert Testimony Regarding Causation to Meet Lower Standard When Offered to Challenge Plaintiff's Causation Evidence](#)

Michael L. Fox and Audrey M. Adams

APRIL 2022

[New Jersey Bankruptcy Court Rules that Johnson & Johnson's Texas Two-Step was not a Bad Faith Filing](#)

Stephanie A. Fox and Timothy Coughlan

JANUARY 2022

[France and the UK – Asbestos is Again at the Heart of Many Litigation](#)

Sylvie Gallage-Alwis and Lorène Massé

DECEMBER 2021

[PFAS: 2022 Trending Towards a Major Turning Point in Regulation and Litigation](#)

Stephanie A. Fox, Samuel D. Habeeb, and Robert W. Petti

OCTOBER 2021

[Talc-Asbestos Claims Against Johnson & Johnson May Proceed for Now; Status of J&J Subsidiary Created to Hold Liabilities Being Weighed](#)

Stephanie A. Fox and Donald R. Kinsley

SEPTEMBER 2021

[State of Play of Pending Climate Litigation at European Level](#)

Sylvie Gallage-Alwis, Stephanie Eaton, and Inès Zaoui

MAY 2021

[Talc Verdict Overturned as Appellate Court Finds Experts' Opinions Lacking](#)

Alyson Walker Lotman and Michael L. Fox