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Litigators of the (Past) Week: A Long-Sought SCOTUS Win on Preemption in Roundup Litigation

By Ross Todd

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Our Litigators of the (Past) Week are **Paul Clement** of **Clement & Murphy**, **Lee Marshall** of **Bryan Cave Leighton Paisner** and **David Zionts** of **Covington & Burling**.

Late last month, they secured a long-sought victory for Bayer subsidiary Monsanto at the U.S. Supreme Court. In a 7-2 decision, the High Court held that state law claims that the company failed to warn consumers about the cancer risks associated with its Roundup herbicide were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, a federal law governing the product's labels. Justice Brett Kavanaugh wrote in his majority opinion that the plaintiff's state tort claim "would require Monsanto to add a cancer warning to Roundup's label even though federal law requires Monsanto to use the EPA-approved label without a cancer warning."

Courtesy photos

L-R: Paul D. Clement of Clement & Murphy, Lee Marshall of Bryan Cave Leighton Paisner and David M. Zionts of Covington & Burling.

Bayer's stock price spiked by about 20% in the hours after the ruling, the company's nullbiggest same-day gain in more than two decades.

Litigation Daily: How did you frame what was at stake here for Bayer?

Lee Marshall: The stakes were simple but significant. Bayer's ability to continue to sell glyphosate was on the table. Continued sales would not be sustainable if the company

could not rely on the EPA's determination that the product does not cause cancer and its determination that the product could not carry a warning falsely saying it did. More broadly, the stakes also included the ability of companies in regulated industries across the country to rely on the expert determinations of the agencies that regulate them or whether they could instead be subject to conflicting standards imposed by juries despite the Congressional determination that state law should not impose requirements that are in addition to or different from federal requirements.

How did you and each of your firms get involved in the Roundup litigation?

David Zionts: Covington has been involved in the Roundup litigation since shortly after Bayer acquired Monsanto and the company hired **Phyllis Jones**, **Paul Schmidt** and **Mike Imbroscio**, who had represented Bayer in a range of prior matters. A big part of our work from the start has been on the key legal issues, especially preemption, and Mike brought me on to work with Lee Marshall on developing these arguments.

Marshall: BCLP was retained shortly before the first Roundup trial to focus on issue preservation and potential appellate issues at trial. From there, we began our collaboration with Covington, who joined the team right after that initial trial. We were focused on FIFRA preemption in our first discussion together.

Paul Clement: The Clement & Murphy team was brought in after the Third Circuit victory, which created a clear circuit split (kudos to BCLP and Covington for that victory).

Who was on the team and how did you divide the work?

Marshall: The Roundup litigation includes tens of thousands of cases with dozens of cases having already been tried to date. As you might expect, the team across the virtual firm that Bayer uses is extremely large. The BCLP team includes dozens of great lawyers, but key members of the BCLP team include **Stefani Wittenauer**, **Tim Hasken**, **Alex Whitworth**, **Sam Hofmeier**, **Justin Benson** and **Randy Soriano**. Those lawyers, in particular, have done a great job and have been working with me nearly every step of the way.

Early on, we worked with Mike Imbroscio and David Zionts at Covington to build out a team to handle the legal issues across the entire virtual firm. Mike and David have been exceptional partners in all aspects of the work. The addition of Paul and his colleagues (**Matthew Rowen**, **James Xi** and **Niccolo Beltramo**), with their unparalleled expertise in the Supreme Court, brought the team to an entirely different level.

Zionts: Over the last several years, we've had a great collaborative relationship with a number of firms working on the appellate aspects of the Roundup litigation. After we successfully created the circuit split, Paul Clement and his team got involved and took the lead at the Supreme Court, and the collaboration was terrific from the start.

A number of terrific Covington associates have worked on this issue over the years.

One standout contributor who has worked on the matter for years, including during the Supreme Court stage, is **Matthew Quallen**, whose deep dive into the history and evolution of FIFRA made it directly into the Supreme Court's opinion.

The prospects of getting the Supreme Court to take this issue up looked slim after the court denied Monsanto's cert petition out of the Ninth Circuit on the federal preemption issue four years ago. With virtually all federal Roundup cases consolidated before Judge Chhabria, what did you have to do to get this issue back on the court's radar?

Zionts: Lee Marshall came up with the inspired solution. The idea was to identify one of the cases Judge Chhabria was remanding to home courts for trial and reach a high-low settlement with the plaintiff. Under that structure, Monsanto could consent to entry of judgment while reserving appellate rights on preemption; the plaintiff would receive an initial amount immediately, plus a second payment if Monsanto failed to prevail on preemption on appeal. That structure teed up the preemption question for a different Circuit on a compressed timeline, without waiting for a full trial and post-trial process.

The team identified a case being sent back to Pittsburgh, settled it and appealed. Working together, our firms honed the preemption arguments and mined the statute and its history for responses to the theories that had prevailed in the Ninth Circuit. The work and strategy paid off when the Third Circuit ruled for us—we had a circuit split, and a new path to the Supreme Court.

What were the most important decisions made long before the Supreme Court granted review that ultimately positioned Bayer to prevail?

Zionts: I'd point to two decisions that paved the way.

First, when the Supreme Court denied review of the same issue in 2022, we didn't call it quits. We were confident that we had the better of the issue on the law, and so we planned and strategized to create opportunities for more courts to hear the issue and get it right.

Second, we stepped back, took stock of the argument and really honed it into something clean and straightforward. There were so many tangents and side issues that would come up over the years of litigating this question, but we kept bringing it back to a basic strategic judgment that wound up prevailing: Congress wanted uniformity in labeling, it empowered an expert agency to make hard scientific decisions and deliver that uniformity, and it didn't want the agency's judgment being second-guessed state by state or jury by jury.

How much of your effort was devoted to explaining the practical consequences of allowing 50 different state-law warning requirements alongside a federal labeling regime?

Clement: The practical consequences were particularly important at the cert stage, but they remained an important component of our argument on the merits and at the podium. As the text of FIFRA makes clear—

the relevant provision is literally entitled uniformity—uniformity of the safety warnings on the label is critical to the regulatory regime. We had great confidence in our legal arguments, but the practical problems created by plaintiffs' contrary view reinforced what the text made clear.

Paul, at argument, the Court seemed to spend significant time testing the consequences of your position rather than the text of FIFRA alone. Did you anticipate that line of questioning during your preparation? How did you decide to address it?

Clement: The moot courts were very helpful in identifying some of the practical consequences of the competing legal positions. In particular, they helped me think about the various ways in which the EPA can address new information about a registered pesticide as part of the regulatory process. Those answers, corroborated by the Deputy Solicitor General representing the EPA, were useful in tipping the practical considerations in our favor.

You've handled numerous high-profile Supreme Court matters. What was unique about advocating a preemption argument in a case carrying such enormous real-world consequences for a single company?

Clement: Virtually every Supreme Court case is critical to the parties involved, but the stakes for the company here were truly extraordinary. In particular, success in the Supreme Court was critical to the success of the settlement class, which itself reflects enormous effort by in-house and outside counsel for Bayer. But as important as this case was for Bayer, it was equally vital for the industry and the future of innovation as our amici briefs made clear.

What part of the Court's opinion felt most consequential to you when you first read it—not just for Bayer, but for future regulated-products litigation?

Marshall: Aside from the obvious overall conclusion that warnings-based claims are preempted, the opinion's discussion of the plaintiff's "regulatory lag" argument and the discussion of information available to and considered by EPA, both before and after registration, are particularly consequential. In litigation involving regulated products, plaintiffs often attempt to diminish the role of the regulating agency and the fact of registration by portraying the defendant-manufacturer as the sole keeper of evolving information regarding its product, particularly after registration. In reality—and as the opinion acknowledges—"EPA does not sit in an information-free silo," and it "keeps abreast of new safety developments." Those observations cut across many different types of regulated-products litigation.

Was there a moment—during briefing, argument preparation, or oral argument itself—when you felt the case turn in your favor?

Zionts: Paul delivered a masterful argument. He had astute answers to all of the complex issues of statutory interpretation, but he was also able to really crystallize the case into something simple: Congress wanted

uniformity. And you could tell from some of the Justices' questions that the point was coming through: If there was no preemption here, what kind of uniformity would there really be?

What lessons can other litigators take from this case about developing a long-term strategy in bet-the-company litigation?

Marshall: Litigation this sprawling requires both short and long-term strategies, and you have to be willing to pivot when there are setbacks. That said, we believed early on that the preemption argument would be key to neutralizing this litigation threat, and we didn't stray from that strategy despite some early adverse appellate decisions. We continued to push and refine our arguments. We looked for creative ways to raise the preemption argument with different courts. And throughout it all, we worked collaboratively with each other—and with many others at many different firms—to make sure we collectively gave the client the best representation possible. We were fortunate to have a client willing and able to hang in there and see the long-term strategy result in a clear 7-2 win.

What will you remember most about this matter?

Clement: I will remember the collaboration that went into this project from identifying the right case for Supreme Court review to the briefing and oral argument preparation. Not only did all three firms work together seamlessly, but the in-house lawyers were completely vested and supportive at every turn. What a team!

Marshall: I've seen the lows and the highs of this litigation. I was in the courtroom when the first verdict was delivered and when a $2 billion verdict came back in the third trial. Those are moments you don't forget. But this client and the in-house legal team have had incredible resilience in dealing with this litigation of unprecedented scope. This is a company and people who strongly believe—quite rightly—in the safety of this product. When we got our circuit split, we called the in-house lawyer who has handled the litigation from the beginning to let her know. We reached her as she was at the airport headed out to yet another trial, and you could hear some of that pressure she was under release and you could hear the hope that we had a path forward reenter her voice. Most of all, I won't forget that phone call.

Zionts: What I will remember most is the opportunity to collaborate with an unselfish group of partners, and to engage together in creative lawyering to solve a really important issue.

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