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## How IRS Taxes Kill Plaintiff's \$289M Monsanto Weedkiller Verdict

The news that [jurors gave \\$289 million to a man they say got cancer from Monsanto's Roundup weedkiller](#) might make you think the plaintiff will get rich. Dewayne Johnson can't count on the money, as Monsanto says it will appeal. Monsanto faces hundreds of other claims, and may fight hard. But even if Monsanto forks over the money, new tax rules will be as effective as Roundup in swallowing up most of Mr. Johnson's big verdict. Under President Trump's tax bill passed in late 2017, there is a [new tax on litigation settlements: no deduction for legal fees](#). Amazingly, many legal fees simply [can't be deducted](#). That means Mr. Johnson must pay tax even on monies his attorney collects. That is so even though the attorney must also pay tax on the same money. Here's the bizarre new math.

Johnson was awarded \$39 million in compensatory damages, and \$250 million in punitive damages. The combined contingent fees and costs Mr. Johnson pays might total 50%. If so, he gets to keep half, or \$19.5 million of the compensatory award. Since it is for his claimed non-Hodgkin's lymphoma, that part should not be taxed. Of the \$250 million punitive award, \$125 million goes to legal fees and costs, and \$125 million to Johnson. So *before* taxes, his take home is \$144.5 million. What about *after* taxes? The \$250 million in punitive damages are fully taxable, with *no deduction* for the fees to his lawyer. At 37%, Johnson would lose \$92.5 million to the IRS. That makes his after-tax haul from a \$289 million verdict only \$52 million.



Dewayne Johnson (C) hugs one of his attorneys, next to lawyer and member of his legal team Robert F Kennedy Jr (R), after the verdict was read in the case against Monsanto at the Superior Court Of California in San Francisco, California on August 10, 2018. (Photo credit: JOSH EDELSON/AFP/Getty Images)

Plus, state taxes could take more. California could take over \$30 million of what's left, leaving him with less than \$20 million. Remember, the cap on state tax deductions is now \$10,000. Sure, take home pay of \$18 million is nothing to sneeze at, but it's a far cry from what most people assume. The shocking result comes from the [Trump tax law](#), which kills off tax deductions for many legal fees. Compensatory damages for physical injuries or physical **sickness are still OK. But exactly what injuries are “physical” can** sometimes seem like a [chicken or egg](#) issue.

If you are the plaintiff with a contingent fee lawyer, the IRS treats you as receiving 100% of the money, even if the defendant pays your lawyer directly. If your case is fully nontaxable, that causes no tax problems. But if your recovery is taxable, all *or in part*, you could be taxed on more money that you actually collect. Up until the end of 2017, you could claim a tax deduction for your legal fees. In 2018 and thereafter, there is *no* deduction for these legal **fees. Not all lawyers' fees face this terrible tax treatment. If the lawsuit concerns the plaintiffs' trade or business, the legal fees are a business expense.** If your case involves claims against your employer, or certain whistleblower claims, those legal fees are also OK.

But for other cases, you are out of luck unless you are awfully creative. There **are sometimes ways to circumvent these tax rules, but you'll need** sophisticated tax help, and nothing is foolproof. Settlements require advice on the [taxation of damage awards](#), preferably before the case settles. Sometimes, you can justify an allocation of legal fees that is not strictly *pro rata*, but you need to document it, and the IRS may not agree.

Awards of pre- or post-judgment interest can produce the same tax problems as punitive damages, with no deduction for legal fees. Meanwhile, defendants like Monsanto can deduct the whole \$289 million on their taxes. With a potential net take home of less than \$20 million for the plaintiff, that's a surprising result. One could understand if Mr. Johnson and his lawyers try to devise some kind of creative workaround. After all, a number of states (including California) are being inventive to get around the new \$10,000 deduction cap on state taxes. Plaintiffs may have to be equally creative.

*This is not legal advice. For tax alerts or tax advice, email me at [Wood@WoodLLP.com](mailto:Wood@WoodLLP.com).*