



## Robert W. Wood

THE TAX LAWYER

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### **\$80M Roundup Verdict Is Only \$2.5M After Taxes, New IRS Math**

Another Roundup verdict is in. This time, jurors found that Monsanto failed to warn users its product was dangerous and awarded Edwin Hardeman \$200,000 for economic losses, \$5 million for past and future pain and suffering, and \$75 million in punitive damages. Last year, [jurors gave \\$289 million to a man they say got cancer from Monsanto's Roundup](#). That verdict was later reduced, and is on appeal. But the latest case is federal, and suggests that others could be headed for big numbers. The jury had already concluded that the weedkiller was a [substantial factor](#) in causing Mr. Hardeman's non-Hodgkins lymphoma. Monsanto faces over 10,000 claims, and can be expected to continue fighting hard. But even if Monsanto pays up, new tax rules could swallow up many of the verdicts plaintiffs might be hoping to collect. Wait until you see the new tax math.

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 [can no longer be deducted](#). That means many plaintiffs must pay taxes even on monies their attorneys collect. Of course, the attorneys must *also* pay tax on the *same* money. Here's the new math. Hardeman was awarded a bit over \$5 million in compensatory damages, and \$75M in punitive damages. The combined contingent fees and costs Mr. Hardeman pays his attorneys might total as much as 50%. If so, the plaintiff would get to keep half, or \$2.5 million of the \$5 million compensatory award. Since it is for his claimed non-Hodgkin's lymphoma, that part for physical injuries should not be taxed. Then, of the \$75 million punitive award, \$37.5 million goes to legal fees and costs, and \$37.5 million to Hardeman. So *before* taxes, the plaintiff's take home is \$40 million.

What about *after* taxes? The \$75 million in punitive damages are fully taxable, with *no deduction* for the fees to his lawyer. Between federal taxes of 37% and California taxes of up to 13.3%, Hardeman could lose about 50% to the IRS and California Franchise Tax Board. That makes his after-tax (and after legal fee) haul from an \$80 million verdict only \$2.5 million. Does that seem fair? \$2.5 million isn't pocket change, but it is still a shocking result. Besides, being taxed on money you do not receive seems downright un-American. The shocking result comes from the [Trump tax law](#), which kills off tax deductions for many legal fees. Notably, compensatory damages for physical injuries or physical sickness are still tax-free.

However, exactly what injuries are “physical” can sometimes seem like a [chicken or egg](#) issue. And when punitive damages or interest enter the picture, many plaintiffs simply cannot deduct the related legal fees, so are taxed on their gross, even if the lawyer is paid first. According to the Supreme Court, if you are the plaintiff with a contingent fee lawyer, the IRS treats you as receiving 100% of the settlement or judgement, 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 after, there is *no* deduction for these legal fees. At least 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 still deductible. But in 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. Plaintiffs may have to be creative to try to get around these rules, so tax lawyers are busy. So are lawyers in both sides of the Roundup cases.

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