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Supreme Court to Mull Extent of Patent Protection for Monsanto Branded Seed.

By Jan Wolfe - February 15, 2013

On Tuesday the U.S. Supreme Court will hear arguments in a patent fight between Vernon Bowman, a 75-year old grain farmer from Indiana, and Monsanto Co., the global agribusiness giant. Experts say the court's ruling could have major implications not just for Monsanto's branded line of genetically modified soybeans, but for other "self-replicating" technologies like stem cells and vaccines. Bowman's lawyer has never argued at the Supreme Court before, while Monsanto's counsel is a former U.S. solicitor general.

The case turns on the question of how long Monsanto can claim patent protection for its "Roundup Ready" brand of soybean seed, which is genetically engineered be resistant to the company's Roundup herbicide. Bowman argues that Monsanto can only derive patent licensing fees from first-generation seed. The company, which sued Bowman for patent infringement, counters that it can claim rights for subsequent-generation seed, since it invented the technology at issue in the first place.

The case is being closely watched by biotech companies that market self-replicating products like crops, vaccines, and DNA constructs. They argue that if the court adopts Bowman's view of "patent exhaustion," they won't be able to derive fair revenue from their products, which can be very expensive to develop.

Monsanto licenses the Roundup Ready soybean seed to farmers, who must agree to buy new seed each season. The farmers must also agree not to sell the soybeans that they grow from the seed to other farmers, although they are allowed to sell the soybeans to local grain elevators as a commodity, which in turn sell them as livestock feed.

Bowman has conceded that in order to avoid paying fees to Monsanto, he bought commodity seed from a grain elevator and used it for planting. The seed wasn't as reliable as first-generation seed from Monsanto, but Bowman found that most of it exhibited Roundup Ready's herbicide-resistant trait.

After investigating Bowman's practices, Monsanto sued him for patent infringement in U.S. district court in Indianapolis in 2007. According to its website, Monsanto has sued 145 farmers for infringement since 1997, most of whom were accused of saving Roundup Ready seed from season to season.

Bowman first represented himself pro se but now has pro bono counsel from Frommer Lawrence & Haug, a Seattle-based IP boutique. He has tried to dismiss Monsanto's case against him on the grounds that it can't claim rights for seed he developed from commodity grain, because that grain was owned by the grain elevator companies and not Monsanto. His argument is based on the doctrine of patent exhaustion, which holds that the right to control or prohibit the use of an invention is terminated after an authorized sale.

After losing on summary judgment, Bowman appealed to the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit affirmed Monsanto's victory in 2011. Crucially, the appeals court sidestepped the question of when Monsanto's patent rights are exhausted and focused on what Bowman created. "Even if Monsanto's patent rights in the commodity seeds are exhausted, such a conclusion would be of no consequence because once a grower, like Bowman, plants the commodity seeds containing Monsanto's Roundup Ready technology, the grower has created a newly infringing article," the court ruled.

The Supreme granted cert in October, and asked the parties for briefing on whether the Federal Circuit erred by essentially "creating an exception to patent exhaustion for self-replicating technology." In his Supreme Court debut, Mark Walters of Frommer Lawrence will argue for Bowman. He'll face off against former U.S. Solicitor General Seth Waxman of Wilmer Cutler Pickering Hale & Dorr.

A Supreme Court ruling adopting Bowman's view of self-replicating technology could have "dire consequences" for biotech companies, said Michael Kahn of Ropes & Gray, who has written about the case. He notes that many crucially important technologies, like vaccines and renewable fuels, have self-replicating components. "If companies lose the right to protect replicates of self-replicating technologies, they will not be able to recoup extensive research and development investments," Kahn said. "I can't see how the Supreme Court could side with Bowman, while still maintaining the incentive to innovate."

The National Corn Growers Association and the National Association of Wheat Growers have jointly filed an amicus brief siding with Monsanto. They say that Roundup Ready seed improves efficiency and profits, and their members they are willing to pay for it. "They're telling Bowman, 'Don't mess things up for the rest of us,'" said Michael Belliveau a patent prosecutor at Clark & Elbing who has been following the case closely.

Bowman isn't without his supporters, however. Groups that oppose genetically engineered food, like Ecology International and the Center for Food Safety, say that giving broad patent protection to self-replicating technologies will allow Monsanto to bolster its already dominant place in the agriculture industry—a dominance that they say Monsanto has not used to improve the world. "The current intellectual property environment of transgenic crops has spurred the privatization and concentration of the world's seed supply," the Center for Food Safety wrote in its amicus brief. "With concentration has come increasing market power, and seed prices have risen substantially."