

No. 11-796

Supreme Court, U.S.
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In The
Supreme Court of the United States

—◆—
VERNON H. BOWMAN,

Petitioner,

v.

MONSANTO COMPANY, ET AL.,

Respondents.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Federal Circuit**

—◆—
**BRIEF OF AMICUS CURIAE PIONEER HI-BRED
INTERNATIONAL, INC. IN SUPPORT OF
RESPONDENTS MONSANTO COMPANY, ET AL.**

—◆—
ADAM K. MORTARA,
Counsel of Record
J. SCOTT MCBRIDE
NEVIN M. GEWERTZ
BARTLIT BECK HERMAN
PALENCHAR & SCOTT LLP
54 West Hubbard Street, Suite 300
Chicago, IL 60654
Phone: (312) 494-4400
Fax: (312) 494-4440
adam.mortara@bartlit-beck.com
scott.mcbride@bartlit-beck.com
nevin.gewertz@bartlit-beck.com

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INTEREST OF THE AMICUS CURIAE

Pioneer Hi-Bred International, Inc. (“Pioneer”) is the world’s leading producer of soybean seeds, and its seeds are at issue in this litigation. Pioneer’s Plant Variety Protection Act rights were violated in transactions giving rise to this litigation, and this Court’s consideration of the issues Pioneer raises here may illuminate the intersection between the law of plant variety protection and utility patents.¹ Pioneer further has an interest in the protection of the rights of holders of valid utility patents in this technology area.²

SUMMARY OF ARGUMENT

In 1999, Vernon Bowman purchased soybeans from Huey Soil Services (the “Elevator”) for planting

¹ Amicus notified the parties of the intention to file this brief ten days prior to the brief’s due date. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to this brief’s preparation or submission.

² In other litigation, Pioneer contests the validity and enforceability of the RE247 patent at issue in this case. Consistent with Pioneer’s view that the RE247 patent is invalid and unenforceable, Pioneer’s amicus brief argues only the specific issues raised herein related to patent exhaustion on the facts before the Court.

as a second crop. Contrary to Bowman's assertion that farmers rely on commodity grain as a source of seed for planting even in the absence of utility patent rights (*see, e.g.*, Pet. Br. at 6), federal law prohibits commodity grain from being used in this way. Transactions like these violate the Plant Variety Protection Act ("PVPA"), 7 U.S.C. §§ 2321 *et seq.*, and federal and state labeling laws. Therefore patent exhaustion is not a defense available to Bowman.

The PVPA protects soybean varieties in the commodity stream of commerce, including Roundup Ready® seeds Pioneer sold to farmers. Given the significant market presence of Pioneer in the soybean market and the fact that the Elevator sells commodity soybeans in a disaggregated fashion, it is a certainty that commodity soybeans the Elevator sells to farmers contain PVPA protected Roundup Ready® seeds. Pioneer provided notice to Bowman that its seeds were PVPA protected by affixing a label that stated "Unauthorized Propagation Prohibited" on each bag of Pioneer Roundup Ready® seeds. Bowman agrees there was no deficiency in the labeling of the seeds he purchased as a first crop.

Patent exhaustion is an equitable-type defense. As a result, Bowman's invocation of the patent exhaustion defense is subject to equitable considerations, such as whether Bowman has clean hands. Bowman's arguments misconstrue the "authorized sale" requirement of the patent exhaustion defense to focus exclusively on authorization under patent and contract law, ignoring the fact that sales of the type

at issue in this case violated state and federal law, including the PVPA.

Here, Bowman's patent exhaustion is not a viable defense for two reasons. First, diversion of seed from the commodity channels for reproductive purposes is illegal. Consequently, the patent exhaustion doctrine is not applicable in this case because there was no "authorized sale." Second, because Bowman violated the PVPA, he has unclean hands. To the extent that patent exhaustion is equitable, principles of equity do not favor permitting farmers in Bowman's position to interpose a patent exhaustion defense. Doing so would allow farmers to vitiate PVPA protections by laundering seeds through a grain elevator intermediary and afford a lawbreaker the same relief as a bona fide purchaser.

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ARGUMENT

I. Diversion Of Protected Varieties From The Commodity Channel To Reproductive Purposes Is Unlawful And Therefore Cannot Be An "Authorized Sale"

A. The PVPA Provides Patent-Like Protection To Seeds Registered By A PVPA Certificate Holder

In 1970, Congress enacted the Plant Variety Protection Act ("PVPA"). *See* 7 U.S.C. § 2321 *et seq.* The PVPA "provide[s] developers of novel plant varieties with 'adequate encouragement for research, and

for marketing when appropriate, to yield for the public the benefits of new varieties.” *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 181 (1995) (quoting 7 U.S.C. § 2581). “The PVPA extends patent-like protection to novel varieties of sexually reproduced plants (that is, plants grown from seed) which parallels the protection afforded asexually reproduced plant varieties (that is, varieties reproduced by propagation or grafting) under Chapter 15 of the Patent Act.” *Id.* “The developer of a novel variety obtains PVPA coverage by acquiring a certificate of protection from the Plant Variety Protection Office.” *Id.* (citing 7 U.S.C. §§ 2421, 2422, 2481-2483). Here, there is no question that the Pioneer seed at issue containing Monsanto’s Roundup Ready® trait is PVPA protected.

The PVPA provides patent-like protection for sexually reproduced novel plant varieties, defining as infringement a number of discrete acts. *See* 7 U.S.C. § 2541(a)(1)-(10). For example, it is an act of infringement to “sell or market the protected variety, or offer it or expose it for sale, deliver it, ship it, consign it, exchange it, or solicit an offer to buy it, or any other transfer of title or possession of it.” 7 U.S.C. § 2541(a)(1). It is an act of infringement to “use seed which had been marked ‘Unauthorized Propagation Prohibited’ or ‘Unauthorized Seed Multiplication Prohibited’ or progeny thereof to propagate the variety,” 7 U.S.C. § 2541(a)(5), or to “dispense the variety to another, in a form which can be propagated, without notice as to being a protected variety under which

it was received.” 7 U.S.C. § 2541(a)(6). And it is also an act of infringement to “instigate or actively induce performance of any” of the number of discrete acts of infringement identified in the statute. 7 U.S.C. § 2541(a)(10).

A PVPA certificate holder cannot recover for an act of infringement if “the variety is distributed by authorization of the owner and is received by the infringer without” a label containing the words “Unauthorized Propagation Prohibited” or “Unauthorized Seed Multiplication Limited,” unless an infringer has “actual notice or knowledge that propagation is prohibited or that the variety is a protected variety.” 7 U.S.C. § 2567. The inquiry into whether or not an accused infringer has actual notice or knowledge requires a determination of whether the purchase of a PVPA protected plant variety was a “bona fide sale for other than reproductive purposes” or not. 7 U.S.C. § 2543. In pertinent part, the statute states:

A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. *A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 2567 of this title that the actions of the purchaser constitute an infringement.*

Id. (emphasis added). Thus, a purchaser of commodity seeds infringes PVPA rights where they exist when he “diverts” for “seeding purposes.”

B. Farmers In Bowman’s Position Have Notice That The PVPA Protected The Roundup Ready® Soybeans He Purchased From The Elevator

Monsanto markets Roundup Ready® seeds under its own brand. Monsanto also licenses the Roundup Ready® technology to other seed companies, such as Pioneer. Pioneer then markets Roundup Ready® seed under its own brand, which farmers subsequently purchase. *See Monsanto Co. v. Scruggs*, 342 F. Supp. 2d 584, 588 (N.D. Miss. 2004) (describing the history of Roundup Ready® soybeans).

Pioneer marks all seed bags containing Roundup Ready® seed. The label Pioneer affixes to each seed bag contains language indicating PVPA protection. *See Scruggs*, 342 F. Supp. 2d at 588 fn. 3 (describing Monsanto’s use of a PVPA seed bag label to protect Monsanto’s Asgrow variety soybeans) (“This Asgrow variety is protected by the Plant Variety Protection Act (7 United States Code §§ 2321 *et seq.*) and/or the Patent Act (35 United States Code §§ 1 *et seq.*). The purchaser is authorized by Asgrow to plant this variety and use the resulting crop for food or sell the crop as grain. Asgrow does not authorize the use or sale of the crop as seed. UNAUTHORIZED PROPAGATION PROHIBITED.”). Pioneer has over 30% of

the national soybean market,³ and in commodity purchases like those at issue here Pioneer seed is assuredly present.

Farmers in Bowman's circumstances have the required statutory notice that the commodity soybeans they purchase are protected varieties. First and foremost, purchase of soybeans containing the patented trait from an elevator for replanting is not "a bona fide sale for other than reproductive purposes." 7 U.S.C. § 2543. Indeed, Bowman's purchase of Roundup Ready® soybeans from the Elevator was for seeding purposes – the very action that provides notice as a matter of law that "the actions of the purchaser constitute an infringement." *Id.*

Second, Pioneer's customers have constructive notice that the seeds purchased from the commodity channel are PVPA protected. For example, Bowman admits he purchased Pioneer Roundup Ready® soybeans for his first crop. *See* Dckt. 73, First Affidavit of Vernon Hugh Bowman, at ¶ 20 ("In recent years, the seed has been purchased from a Pioneer dealer.");⁴ *see also* Pet. Br. at 7 ("Beginning in 1999 on fields where Bowman did not plant double-crop

³ See http://www.seedtoday.com/info/ST_articles.html?ID=101521 (last visited January 21, 2013).

⁴ Citations to "A" refer to the Joint Appendix before the Federal Circuit; "Dckt." to the district court record in case 2:07-cv-283-RLY-WGH; "PA" to the Petition Appendix; "JA" to the Joint Appendix before this Court; and "SA" to the Supplemental Joint Appendix before this Court.

soybeans, he planted first-generation, first-crop Roundup Ready® soybeans purchased from Pioneer Hi-Bred International, Inc.”). And Bowman also admits the bags of Pioneer Roundup Ready® soybeans he purchased as a first crop were properly marked. *See* A0248, A0631, A0663. Because Bowman planted Pioneer Roundup Ready® seeds as a first crop, he knew that the only soybeans resistant to glyphosate-based herbicides were Roundup Ready® seeds. As a result, Bowman became aware that the “commodity soybeans” he purchased from the Elevator were Roundup Ready® seeds (and in some proportion assuredly Pioneer protected varieties) when he sprayed Roundup® on the fields he planted and the soybeans did not die.

C. Purchase From The Commodity Channel And Planting Of Pioneer’s Roundup Ready® Seeds Violates The PVPA In A Number Of Different Ways

Bowman argues that he “used his purchased [commodity soybeans] in a natural and foreseeable way – he planted them,” (Pet. Br. at 50) and that a finding of exhaustion would “destroy a bona fide purchaser’s reasonable and expected property interest.” *Id.* at 50-51. He also claims that he purchased “seed” in an authorized sale from the Elevator. Those assertions are fundamentally unsound because Bowman’s concept of “authorization” focuses exclusively on patent and contract law, ignoring the unauthorized nature of purchases like these. As stated

above, those farmers purchasing from the commodity channel for reproductive purposes have statutory notice and violate the PVPA. 7 U.S.C. § 2543. As an example here, the very acts in which Bowman admits he engaged constitute infringement under 7 U.S.C. § 2541(a), and therefore are prohibited by the PVPA.

First, Bowman admits to using the commodity soybeans he purchased for seeding purposes. Bowman therefore “use[d] seed which had been marked . . . to propagate the variety” in violation of 7 U.S.C. § 2541(a)(5). Second, Bowman conditioned the Roundup Ready® soybeans he purchased for the purpose of propagation in violation of 7 U.S.C. § 2541(a)(7). Thus, Bowman’s initial purchase of Roundup Ready® soybeans from the Elevator was not an authorized sale because it was for purposes that violate the PVPA. 7 U.S.C. § 2541(a)(10) (infringement to “instigate or actively induce performance of any of the foregoing acts.”).

D. Commodity Sale Of Pioneer’s Roundup Ready® Seeds Violates Additional Provisions Of State And Federal Law And Therefore Could Not Be Authorized

Elevators also infringe the PVPA by selling to farmers PVPA protected Roundup Ready® soybeans for reproductive purposes (as opposed to a bona fide purpose to feed animals, for example). As an initial matter, an elevator is liable as a “diverter” under 7 U.S.C. § 2543 and has the requisite statutory

notice. An elevator may also violate several provisions of Section 2541. First, it may sell or market the PVPA protected Roundup Ready® soybeans in violation of 7 U.S.C. § 2541(a)(1). Second, elevators would be stocking protected varieties for the purpose of selling or marketing the soybeans in violation of 7 U.S.C. § 2541(a)(8). Third, elevators may dispense Roundup Ready® soybeans as commodity beans, without providing notice as to their being a PVPA protected variety in violation of 7 U.S.C. § 2541(a)(6). And finally, an elevator may instigate a farmer like Bowman's own acts of infringement in violation of 7 U.S.C. § 2541(a)(10). Each of these infringements may have occurred in this very case.

Bowman's arguments suggest the transaction between the Elevator and Bowman is proper because the Elevator sold the Roundup Ready® soybeans as part of an undifferentiated mixture of seeds. But this is of no moment. To the extent the Elevator sold the seeds as a mixture, federal and Indiana labeling laws required the Elevator to specify the variety of seed contained in the mixture. Section 15-15-1-40 of the Indiana Code, for example, states that "[a] person may not distribute agricultural or vegetable seed within Indiana . . . [i]f the seed is not labeled in accordance with this chapter." The referenced chapter requires:

A container of agricultural seed of any size . . . distributed in Indiana for sowing and seeding purposes must contain or have attached in a conspicuous place on the outside

of the container a plainly written or printed tag or label in English giving . . . the commonly accepted name of each kind and variety of each agricultural seed component that exceeds five percent (5%) of the whole. . . .

Indiana Code § 15-15-1-32(a)-(b)(1). The Federal Seed Act, 7 U.S.C. §§ 1571 *et seq.*, has a similar provision. *See* 7 U.S.C. § 1571(a)(1) (requiring varietal labeling of seed mixtures). That statute “makes it unlawful for any person to transport or to deliver for transportation in interstate commerce agricultural seeds with untruthful labels.” *E.K. Hardison Seed Co. v. Jones*, 149 F.2d 252, 256 (6th Cir. 1945). And as part of the federal labeling requirement, when a single seller like Pioneer uses a variety name to label seeds, such as Roundup Ready® soybeans, *all* downstream sellers must use the same variety name. *See Doebler’s Pa. Hybrids, Inc. v. Doebler*, 442 F.3d 812, 830 (3d Cir. 2006). Thus, if the Elevator did not properly label the seeds it sold Bowman, the Elevator violated both federal and state laws, and therefore could not have made an authorized sale.

II. Patent Exhaustion Is Not Available For Unauthorized Sales

If patent exhaustion is an equitable defense it is subject to equitable retorts. Here, Bowman has unclean hands. His diversion and possession of marked commodity seed from the Elevator violated the PVPA. The Elevator dispensed a protected variety of seed with notice and also potentially violated

federal and state labeling laws. Consequently, the patent exhaustion defense cannot excuse Bowman's purchase and possession of the Pioneer Roundup Ready® seed he planted as a second crop. Doing so would treat lawbreakers the same as bona fide purchasers.

A. Patent Exhaustion Is An Equitable Defense Subject To Equitable Considerations

This Court has not explicitly stated that the patent exhaustion defense is an equitable defense. The defense is not found in the U.S. Constitution, or any patent law promulgated thereunder. Instead, the defense is a construct created and first applied by the Court in the 19th century. *See Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617, 625 (2008) (describing the history of the patent exhaustion doctrine). The first case in which the Court applied the patent exhaustion doctrine was an appeal from a court of equity. *See Bloomer v. McQuewan*, 55 U.S. 539 (1852). The same is true for the second. *See Bloomer v. Millinger*, 68 U.S. 340 (1863); *see also Birsell v. Shaliol*, 112 U.S. 485, 487 (1884).

Patent exhaustion shares a common origin with the patent misuse defense, the equitable roots of which this Court, courts of appeals, and district courts explicitly recognize. *See Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 492-94 (1942) ("It is a principle of general application that courts, and

especially courts of equity, may appropriately withhold their aid where the plaintiff is using the [patent monopoly] contrary to the public interest.”); *C.R. Bard, Inc. v. M3 Systems, Inc.*, 157 F.3d 1340, 1372 (Fed. Cir. 1998) (“The defense of patent misuse arises from the equitable doctrine of unclean hands.”); *Monsanto Co. v. Swann*, 308 F. Supp. 2d 937, 942 (E.D. Mo. 2003) (“Patent misuse is an equitable defense to an infringement claim. . .”). Both patent misuse and patent exhaustion cases originally addressed the factual scenario in which a patent holder tries to expand his patent monopoly through post-sale restrictions and tying, using an infringement suit as an enforcement mechanism. For example, in *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 518 (1917), the Court rejected a patent infringement action under the patent exhaustion doctrine when a patent holder attempted to limit purchasers’ use of film projectors to show only film made under a different patent held by the same company. And in *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 493-94 (1942), the Court dismissed a patent infringement action under the patent misuse doctrine when the patent holder of a machine for depositing salt tablets attempted to restrict purchasers’ use of the patented machine to salt tablets manufactured by the patent holder’s subsidiary. See also *Dawson Chem. Co. v. Rohm and Haas Co.*, 448 U.S. 176, 193 (1980) (describing *Morton Salt* as linking “the doctrine of patent misuse to the ‘unclean hands’ doctrine traditionally applied by courts of equity.”) The equitable underpinnings of both *Universal Film*

Mfg. Co. and *Morton Salt* are clear. In each, the patent holder is not using the right asserted by a patent monopoly toward the public interest of promoting “the Progress of Science and useful Arts.” U.S. Const., Art. I, § 8, cl. 8.

The common origins between patent exhaustion and patent misuse explain litigants’ frequent inclusion of patent exhaustion among the equitable defenses they plead. *See, e.g., Barnes & Noble, Inc. v. LSI Corp.*, 849 F. Supp. 2d 925, 928 (N.D. Cal. 2012) (“Unenforceability due to standards-setting misconduct (on the grounds of estoppel, fraud, laches, waiver, implied waiver, unclean hands, patent exhaustion, implied license, and/or other equitable doctrines.)”); *Apple Inc. v. Samsung Electronics Co., Ltd.*, No. 11-CV-01846-LHK, 2011 WL 4948567, at *10 (N.D. Cal. Oct. 18, 2011) (“Finally, Apple’s Thirty-Second Counterclaim is also duplicative of its Affirmative Defense and does not appear to offer any additional relief. The Thirty-Second Counterclaim requests a declaration that Samsung’s asserted patents are unenforceable ‘by virtue of estoppel, laches, waiver, unclean hands, patent exhaustion, implied license, and/or other equitable doctrines applicable to such misconduct.’”) (internal citations omitted).

To the extent that patent exhaustion is an equitable defense, other principles of equity should inform its application.

B. Equitable Considerations Favor Monsanto Because Bowman Has Unclean Hands

The guiding principle at play in this case is the maxim: “he who comes into equity must come with clean hands.” “[W]hile equity does not demand that its suitors shall have led blameless lives, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue.” *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 815-16 (1945) (internal quotations and citations omitted).

Farmers who divert commodity seed to reproductive purposes in violation of the PVPA do not have clean hands. Nor do they act “fairly and without fraud or deceit as to the controversy in issue.” *Id.* Bowman himself violated the PVPA by purchasing Roundup Ready® seeds from the Elevator for reproductive purposes; and the Elevator may have violated state and federal law as well. As a result, the doctrine of unclean hands precludes application of the patent exhaustion defense in this case. Had Bowman obeyed the law he never could have committed the acts Monsanto accuses of infringing its utility patent. This Court should not permit Bowman to profit from an equitable defense that he obtained only by infringement of Pioneer’s rights.



CONCLUSION

For the foregoing reasons, Pioneer urges the Court to affirm the decision of the U.S. Court of Appeals for the Federal Circuit or alternatively to dismiss the writ as improvidently granted.

Respectfully submitted,

ADAM K. MORTARA,

Counsel of Record

J. SCOTT MCBRIDE

NEVIN M. GEWERTZ

BARTLIT BECK HERMAN

PALENCHAR & SCOTT LLP

54 West Hubbard Street, Suite 300

Chicago, IL 60654

Phone: (312) 494-4400

Fax: (312) 494-4440

adam.mortara@bartlit-beck.com

scott.mcbride@bartlit-beck.com

nevin.gewertz@bartlit-beck.com
