News Release

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COURT URGED TO UPHOLD PATENT RIGHTS FOR GENETICALLY MODIFIED SEEDS

(*Bowman v. Monsanto Co.*)

The Washington Legal Foundation (WLF) yesterday urged the U.S. Supreme Court to uphold the right of patent holders to require farmers to pay royalties for use of genetically modified seeds. Some growers are insisting that patent holders are entitled to collect a royalty on the first generation of seeds only, and that thereafter growers are entitled to royalty-free use of seeds produced by those first-generation plants.

In a brief filed in *Bowman v. Monsanto Co.*, WLF argued that the doctrine of "patent exhaustion" does not limit the right of seed producers to prevent multi-generational use of their patented seeds. WLF asserted that patent law grants purchasers of a patented item a virtually unlimited right to "use" the item, but that it does not give them the right to construct a new article on the template of the original.

"The extremely broad interpretation of the patent exhaustion doctrine being espoused by the petitioner in this case would, if accepted by the Court, throw into question the Nation's ability to sustain its tremendous advances in seed technology," said WLF Chief Counsel Richard Samp after filing WLF's brief. "Companies have spent many millions of dollars developing genetically engineered seeds that are resistant to weed-killing herbicides and that increase yields. No one will be willing to continue those huge research and development outlays if their patent rights cannot extend beyond one generation of plants," Samp said.

The case involves soybean seeds developed by Monsanto. They have been genetically engineered to tolerate Roundup, a widely used agricultural herbicide. Seeds that can tolerate Roundup (referred to as "Roundup Ready" seeds) are highly prized by farmers because they enable farmers to control all of their weed problems through use of a single herbicide. Monsanto charges a premium for its patented, Roundup Ready soybean seeds; farmers who buy the seeds must agree not to use the seeds for more than a single generation (*i.e.*, they are not permitted to use the seeds produced by the soybeans they grow from the Roundup Ready seeds). If they were permitted to do so, they would not need to buy any more seeds from Monsanto because all such second-generation seeds carry the same Roundup-tolerant genetic trait.

An Indiana farmer, Vernon Bowman, sought to avoid paying a premium price by purchasing "commodity" soybeans grown by other farmers. Correctly suspecting that those commodity soybeans were "Roundup Ready," he planted the seeds he obtained

from those commodity soybeans and then applied Roundup to the growing plants. He then repeated the process for nearly a decade, replanting the seeds from each generation of soybeans that he grew.

When Monsanto discovered what Bowman was doing, it sued him for patent infringement. The U.S. Court of Appeals for the Federal Circuit rejected Bowman's argument that the patent exhaustion doctrine barred the lawsuit, and it entered judgment in favor of Monsanto. The U.S. Supreme Court later agreed to review the appeals court's decision.

The patent exhaustion doctrine provides that the initial authorized sale of a patented item terminates all patent rights to that item. A patent holder may use *contract* law to limit the buyer's use of the purchased item; but contract law is of little value to a patent holder if the buyer later resells the item, because such remote purchasers are not bound by the terms of the initial sales contract if they did not sign it. Thus, the applicability of the patent exhaustion doctrine is crucial to the outcome of this case, because seed producers have nowhere to turn other than to patent law if they are to limit the activities of those, such as Bowman, who did not obtain their Roundup Ready seeds directly from Monsanto or one of its licensees.

In its brief filed yesterday, WLF urged the Court to uphold the Federal Circuit's decision. WLF did not contest Bowman's contention that, as a result of the patent exhaustion doctrine, he obtained his "commodity" soybean seeds free and clear of Monsanto's patent rights. Thus, WLF stated, Bowman was free to "use" the commodity seeds any way he wanted to; for example, he could use them as animal feed. But, WLF argued, patent law has never permitted purchasers of patented items to construct a brand new patented item from the template of the original item. If Bowman wanted to grow patented Roundup Ready soybeans from his commodity seeds, he was required to obtain permission from Monsanto to do so, WLF argued. WLF noted that federal law grants patent holders the right not only to limit unauthorized "using" of patented items but also to limit unauthorized "making."

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a significant portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government. WLF regularly appears in federal courts in cases raising important issues regarding the scope and enforceability of patents.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.