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**D E C I S I O N**  
**of 25 October 2001**

**Case Number:** T 0178/01 - 3.3.3

**Application Number:** 92903626.7

**Publication Number:** 0564584

**IPC:** C08J 9/12

**Language of the proceedings:** EN

**Title of invention:**

Energy absorbing, water blown, rigid polyurethane foam

**Patentee:**

BASF CORPORATION

**Opponent:**

Bayer AG

**Headword:**

Formalities officer duties/BASF

**Relevant legal provisions:**

EPC R. 9(3), 67

RPBA Art. 10

Point 6 Notice of the DG2 Vice President of the EPO concerning the entrustment to formalities officers of certain duties normally the responsibility of the Opposition Divisions of the EPO, dated 28 April 1999 (OJ EPO 1999, 506)

**Keyword:**

"Opposition procedure"  
"Admissibility of opposition"  
"Competence to decide"  
"Formalities officer"

**Decisions cited:**

T 0295/01

**Catchword:**

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Case Number: T 0178/01 - 3.3.3

**D E C I S I O N**  
**of the Technical Board of Appeal 3.3.3**  
**of 25 October 2001**

**Appellant:** BASF CORPORATION  
(Proprietor of the patent) 8 Campus Drive  
Parsippany  
New Jersey 07054 (US)

**Representative:** Meyer, Udo  
BASF Aktiengesellschaft  
Patentabteilung ZDX/H - C 6  
D-67056 Ludwigshafen (DE)

**Respondent:** Bayer AG  
(Opponent) Konzernbereich RP  
Patente und Lizenzen  
D-51368 Leverkusen (DE)

**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office dated 28 December 2000  
concerning the admissibility of the opposition  
against European patent No. 0 564 584.

**Composition of the Board:**

**Chairman:** R. Young  
**Members:** P. Kitzmantel  
J. De Preter

## **Summary of Facts and Submissions**

- I. The appeal lies from an interlocutory decision, dated 28 December 2000, of the formalities officer acting on behalf of the Opposition Division, that the opposition against European patent No. 0 564 584 was admissible and had been filed within the opposition period. The appellant (patentee) filed the appeal against this decision in good time and in proper form, together with payment of the prescribed fee.
- II. After the opponent (respondent) had been notified, in a communication issued by the formalities officer on 28 July 2000, of a loss of rights according to Rule 69(1) EPC consequent upon late payment (on 17 April 2000) of the opposition fee, this notification was withdrawn by a further communication, also issued by the formalities officer, on 20 September 2000. In the latter communication, it was (i) confirmed that the opposition fee had been paid on 14 April 2000, (ii) stated that the opposition was therefore considered to have been filed within the opposition period (Article 99(1) EPC) and (iii) indicated that a new communication of "Notice of Opposition" pursuant to Rule 57(1) EPC would issue.
- III. The appellant requested, in a letter dated 24 November 2000, a decision that the opposition be deemed not to have been filed, because the opposition fee had not been paid within the opposition period. An auxiliary request for oral proceedings was also made. This was followed by the issue of the interlocutory decision of 28 December 2000, referred to in point I., above, which was stated to be according to Rule 69(2) EPC.

VI. In a communication issued on 30 July 2001, the Rapporteur of the Board drew attention to a substantial procedural violation in the decision under appeal. On 16 August 2001 the appellant requested that the decision under appeal be set aside, that the case be referred back to the Opposition Division for decision, and that the reimbursement of the appeal fee be ordered (main request).

### **Reasons for the Decision**

1. The appeal is admissible.
2. It is true that formalities officers may be entrusted with decisions and notifications according to Rule 69(2) EPC (see point 4 of the Notice of the Vice-President Directorate-General 2 of the EPO concerning the entrustment to formalities officers of certain duties normally the responsibility of the Opposition Divisions of the EPO, dated 28 April 1999; OJ EPO 1999, 506).

The decision under appeal was, however, taken on 28 December 2000, after the original finding of a loss of rights on 28 September 2000 had already been withdrawn by the formalities officer. The decision under appeal furthermore issued after the appellant had requested, on 24 November 2000, a decision that the opposition be deemed not to have been filed. Consequently the reference to Rule 69(2) EPC in the communication of this decision to the respondent on 28 December 2000 was incorrect.

Furthermore, whilst point 6 of the above-mentioned

Notice of the Vice-President of Directorate-General 2 of the EPO also refers to "Decisions in ex-parte proceedings on the inadmissibility of the opposition... with the exception of the cases provided for in Rule 55(c) EPC", only decisions on the **in**admissibility of the opposition (see also for instance the French text: "constatant l'irrecevabilité de l'opposition") are covered, so that the decision under appeal, which found that the opposition was admissible, for this reason alone does not fall under this heading.

Finally, since none of the other points listed in the above-mentioned Notice of the Vice-President Directorate-General 2 of the EPO as being entrusted to formalities officers corresponds to the *vires* of the decision under appeal, it is evident that this decision was taken by a person not having the relevant jurisdiction.

3. This is independent of the question, dealt with in the decision T 295/01 of 7 September 2001 (to be published in OJ EPO), of the propriety of devolving such tasks in accordance with Rule 9(3) EPC.
4. Quite apart from the above, the auxiliary request of the appellant, submitted in its letter dated 24 November 2000, for the appointment of oral proceedings was not granted.
5. Thus the decision under appeal contains substantial procedural errors, which justify the remittal of the case to the Opposition Division (Article 10 RPBA) and the reimbursement of the appeal fee (Rule 67 EPC).

## Order

### **For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division for further prosecution and decision.
3. The reimbursement of the appeal fee is ordered.

The Registrar:

The Chairman:

E. Görgmaier

R. Young