

Internal distribution code:

- (A) [] Publication in OJ
(B) [] To Chairmen and Members
(C) [X] To Chairmen

D E C I S I O N
of 22 September 1998

Case Number: T 0404/96 - 3.2.2

Application Number: 88112069.5

Publication Number: 0301491

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Fluid barrier seal for sanitary napkin having undergarment protecting flaps

Patentee:

McNeil-PPC, Inc.

Opponent:

- (01) The Procter & Gamble Company
(02) Mölnlycke AB

Headword:

-

Relevant legal provisions:

EPC Art. 54(1)

Keyword:

"Novelty - any request - (no)"

Decisions cited:

-

Catchword:

-



Europäisches
Patentamt

European
Patent Office

Office européen
des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

Case Number: T 0404/96 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 22 September 1998

Appellant:
(Proprietor of the patent) McNeil-PPC, Inc.
Van Liew Avenue
Milltown
New Jersey 08850 (US)

Representative:
Groening, Hans Wilhelm, Dipl.-Ing.
Boehmert & Boehmert
Franz-Joseph-Strasse 38
80801 München (DE)

Respondent:
(Opponent 01) The Procter & Gamble Company
One Procter & Gamble Plaza
Cincinnati
Ohio 45202 (US)

Representative:
Boon, Graham Anthony
Elkington and Fife
Prospect House
8 Pembroke Road
Sevenoaks
Kent TN13 1XR (GB)

(Opponent 02) Mölnlycke AB
405 03 Göteborg (SE)

Representative:
Hammond, Andrew David
Göteborgs Patentbyrå AB
Sjöporten 4
417 64 Göteborg (SE)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 6 March 1996
revoking European patent No. 0 301 491 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: W. D. Weiss
Members: M. G. Noel
C. Holtz

Summary of Facts and Submissions

- I. European patent No. 0 301 491 was granted on 13 October 1993.
- II. In consequence of two oppositions filed by the respondents against the grant of the patent, the Opposition Division decided on 6 March 1996 to revoke the European patent for lack of novelty of its subject-matter with respect to a number of prior art documents.
- III. Among the numerous references cited during the opposition proceedings, the following document was discussed, although it was not considered as novelty destroying:

(2) EP-A-0 134 068.

- III. The appellant (proprietor of the patent) lodged an appeal against the first instance's decision on 6 May 1996. A statement of grounds was filed on 15 July 1996 to support novelty of claim 1 (main request) in the version as filed by letter dated 21 March 1995 on which the decision under appeal was based.

The respondents replied by letter dated 21 and 25 November 1996, respectively.

- V. Claim 1 according to the main request reads as follows:

"Sanitary napkin comprising:

- a) an absorbent element (11) having longitudinally extending sides (15) and transverse ends (13),
- b) flaps (20, 22) extending laterally from each of the longitudinal sides of the absorbent element (11) and comprising an absorbent material (30, 31);

said flaps (20, 22) being foldable onto an outer surface of a crotch portion of a user's undergarment,

characterised by

- c) body fluid sealing means (10) disposed along the entire boundary between said absorbent element (11) and said flaps (20, 22) for preventing the transmission of body fluid from said absorbent element (11) into said flaps (20, 22)."

VI. In a communication dated 6 April 1998 sent following a summons to oral proceedings, the Board informed the parties of its intention to focus the discussion on the novelty of claim 1 having regard, in particular, to the disclosure of document (2).

VII. By letter dated 21 August 1998, the appellant filed two sets of claims, one being identical to that on which the decision under appeal was based as a main request and the other being an amended set of claims as a first auxiliary request. Claim 1 of the latter differs from claim 1 according to the main request by addition of the following characterising features (identifying letters (d) to (f) having been introduced by the Board for ease of reference):

- "d) said sealing means (10) is disposed around the entire periphery of said absorbent element (11),
- e) said sealing means (10) being disposed around the entire periphery of said flaps (20, 22) thereby creating an absorbent reserve within each of said flaps (20, 22) and
- f) there being created three compartments consisting of a central absorbent compartment and two secondary flap compartments."

VIII. Oral proceedings were held on 22 September 1998.

Shortly before the end of the oral proceedings the appellant submitted a new claim 1 according to a second auxiliary request which only differs from the first auxiliary request by introducing the term "only" in feature (f), before the words "three compartments".

IX. At the oral proceedings the following arguments relevant for the reasons of the present decision were submitted;

(i) by the appellant:

- Document (2), with reference to Figures 1 and 2, disclosed a flap absorbent core 230 for absorbing body fluids that were not absorbed by, or that were expressed from the central absorbent core 216 of a sanitary napkin. In use, the napkin provided for walls formed by the flaps, having a primary function of containing body fluids therebetween. As the flaps were folded around the crotch portion of a panty along a second axis of flexibility 234 provided in the flaps as shown in Figure 7, gasket-like seals were formed between the flaps and the body of the wearer in the case of "good body contact" between the napkin and the body (cf. pages 18 and 20). Thus, without a good body contact, there was no sealing given.
- Consequently, the line of juncture 226 between the central absorbent pad and the lateral flaps was not able to prevent body fluids from passing from the central core to the flaps and, therefore, could not be regarded as sealing

means within the meaning of the patent in suit, although it was mentioned in document (2) that said line of juncture could be made by any of the techniques used to form seam 239.

- Even when considering that the first flexible axis 256 in the flaps could touch the line of juncture or coincide therewith, this would not lead to the conclusion that said line of juncture was capable of preventing the transmission of body fluids since only the second axis of flexibility was used to form a gasket-like seal.
- In the absence of any sealing means between the central core and the flaps, document (2) actually did not disclose forming three absorbent compartments, providing an absorbent reserve in each flap. Rather, due to the two lines of flexibility in the flaps, the napkin according to document (2) was divided into five compartments, as illustrated in Figure 4 and 7.
- Therefore, the subject-matter of the main claim according to either request was novel over the disclosure of document (2).

(ii) by the respondents:

- In the napkin according to document (2), the line of juncture could be formed by the same techniques as those used for making the peripheral seam, in particular by heat sealing. Therefore, this line of juncture was necessarily fluid tight.

- Hence, the transmission of body fluids from the central absorbent core into the absorbent flaps was prevented by the line of juncture in the same way and with the same efficiency as by the sealing means 10 of the napkin according to the patent in suit. This resulted in a napkin divided principally into three absorbent compartments, irrespective of the number of flexible axes provided in the flaps, since the purpose of the flexible axes was not to block the transmission of body fluids when the napkin was not in use, as illustrated in Figure 1 of document (2).

- Since none of the features recited in claim 1 according to either request was able to distinguish the invention from the disclosure of document (2), the subject-matter of these claims was not novel.

X. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of either the main request or the first auxiliary request, both filed on 21 August 1998, or the second auxiliary request, in which the word "only" is added before the words "three compartments" in claim 1 of the first auxiliary request.

The respondents requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.

2. Amendments

Claim 1 according to the main request corresponds to the version filed in the opposition proceedings with letter dated 21 March 1995. With respect to the version as granted, the amendments have not been disputed by the parties. Therefore, this claim need not be objected to.

Claim 1 according to the auxiliary requests differs from the main request by the incorporation of features ((d) and (e)) drawn up from claims 2 and 3 of the main request and by the addition of a feature (f) adequately based on the patent specification (column 3, lines 16 ff.). Therefore, on a formal aspect, the amendments are not open to objection.

3. Novelty (main request)

3.1 Document (2) is considered by the Board as the state of the art which comes closest to the invention by reason of greater structural similarities.

It discloses (cf. Figures 1 and 2) a sanitary napkin comprising a longitudinally extending central absorbent pad 212 including an absorbent core 216 and two flaps 224, 224' extending laterally from each longitudinal side of the central element. The flaps comprise an absorbent material 230 interposed between a

liquid permeable topsheet 214 and a liquid impervious backsheet 218, both sheets being common to the central absorbent element and the absorbent flaps. The lateral flaps are foldable along flexible axes onto the outer surface of the crotch portion of a user's undergarment, as shown in Figure 6.

Claim 1 in suit does not specify the manner in which the flaps are folded back around the crotch portion of the undergarment. Hence, when comparing the subject-matter of claim 1 with the disclosure of document (2), the position of the folding lines on the flap is irrelevant. According to the size and shape of the panty, in particular the width of the crotch portion, the first or the second flexible axis 256, 234 will be used, respectively, although the second axis 234 is said to be preferably used in the manner described in document (2). Besides, since the flaps are flexible essentially over their entire surface, they provide for an infinite number of axes of flexibility (cf. page 4, lines 9 to 11 and page 13, lines 18 to 25), including possibly the line of juncture 226 as a first axis of flexibility, in the case where both lines coincide (cf. pages 15, lines 8 to 14).

Since the sanitary napkin defined in claim 1 is not defined "in use", but directed to the product as such, it is sufficient to notice that the flaps described in document (2) are "foldable" onto the crotch portion of the user's undergarment, this latter element not being a part of the napkin as such. It results therefrom that features (a) and (b) forming the preamble of claim 1 in suit are known from document (2).

3.2 Moreover, document (2) states (cf. page 6, lines 14 to 19 and page 9, lines 23 to 28) that the lines of juncture 226, also called lines of demarcation, are non-linear lines along which topsheet 214, flap

absorbent core 230 and backsheet 218 are secured together by attachment means not illustrated in Figure 2. Further, (cf. page 12, lines 1 to 4 and 15 to 17), said attachment means are obtained by any of the techniques used to form the seam-239 around the entire periphery of the sanitary napkin, in particular by glueing or heat sealing, i.e. by the same techniques as those used in the patent to form the fluid sealing means 10 (cf. patent, column 5, lines 19 to 23; column 7, lines 52 to 57 and column 8, lines 24 to 35).

Therefore, although not expressly mentioned in document (2), it is implicit that said seam is fluid tight in order to confine the body fluids inside the absorbent elements of the napkin. Since the line of juncture is of the same nature as that of the peripheral seam, most of the body fluids will be prevented to pass from the central pad to the flaps, the same means necessarily producing the same technical effects.

In this respect, the appellant contended (see point IX(i) above) that the line of juncture referred to in document (2) could not be fluid tight since, according to the teaching of this document (cf. page 10, line 34 to page 11, line 2) the purpose of the flap absorbent core 230 was just to absorb the fluid in excess from the central absorbent pad, the only fluid barrier being provided by the gasket-like seal formed along the second axis of flexibility once the napkin was set in place, as shown in Figure 7 (cf. page 17, line 29 to page 18, line 13).

Contrary to the allegation of the appellant, the seal means 10 referred to in the patent in suit are not completely preventing or blocking but only reducing the transmission of body fluids into the flaps, as this was adequately specified in the application as originally

filed (cf. page 4, lines 17 to 21 and page 8, lines 8 to 13). While the corresponding paragraphs have subsequently been omitted in the patent specification, other relevant passages have remained, however, to confirm this interpretation. See in particular column 8, lines 16 to 18: "and the flaps are only used as backup compartments to absorb fluid that may escape from the primary absorbent" and column 10, lines 1 to 5: "these backup flap compartments enable the napkin to absorb fluid that have smeared to the body or occasional gushing of menstrual fluid".

It results therefrom that in both napkins to be compared the sealing means between the central pad and the absorbent flaps provide for preventing the transmission of fluid as long as the central core has not become saturated. Consequently, document (2) also discloses the characterising feature (c) of claim 1 in suit.

3.3 Since all the features recited in claim 1 according to the main request derive directly or implicitly but in any case unambiguously from the disclosure of document (2), the subject-matter of this claim is not new within the meaning of Article 54(1) EPC.

4. *Novelty (auxiliary requests)*

4.1 Claim 1 according to the first auxiliary request differs from the main request by the incorporation of features (d), (e) and (f).

After having established that the line of juncture 226 described in document (2) was of the same nature and exhibited the same properties as those of the peripheral seam 239, it becomes immediately apparent from the simple observation of Figure 1 that the whole

sealing means thus provided is disposed around the entire periphery of the central absorbent element, in accordance with feature (d) of claim 1, and that it is also disposed around the entire periphery of the flaps, thereby creating an absorbent reserve within each of said flaps, in accordance with feature (e) of claim 1. Providing an absorbent reserve in the flaps is actually one of the purposes set out in document (2) (see the sentence bridging pages 10 and 11).

Since the known napkin is made of one central absorbent compartment and two absorbent reserve compartments in the flaps, it follows necessarily that three compartments are thus created, in conformity with feature (f) of claim 1.

Consequently, the three features incorporated to claim 1 are directly derivable from the disclosure of document (2) and do not add anything new to its subject-matter. Therefore, the subject-matter of claim 1 according to the first auxiliary request is not new, either.

4.2 Claim 1 according to the second auxiliary request only differs from the first auxiliary request by addition of the word "only" before the words "three compartments" in last feature (f).

This restriction is not such as to restore novelty to claim 1 since, again, claim 1 is not defined "in use". Thus, by comparing Figure 1 of document (2) with Figure 1 of the patent, it appears immediately that both napkins are similar in shape and in composition, i.e. made of three absorbent compartments, all delimited by sealing means.

Further, even when considering Figure 7 of document (2) where the napkin is represented "in use" with a portion of the flaps folded back around the crotch portion of a user's undergarment, the second axis of flexibility 234 acts as a gasket-like seal in order to block the transmission of body fluid towards the end of the flaps. Therefore, the portion of the flap extending from said second axis to the outer edge of the flap does not serve as absorbent reserve any more and cannot be considered as a compartment in the sense defined in the patent (cf. column 3, lines 13 to 19). Thus, also in the case of Figure 7, the absorbent compartments are only three and not five, as it was submitted by the appellant.

It results therefrom that the word added to claim 1 according to the second auxiliary request does not confer any novelty to its subject-matter with respect to the disclosure of document (2).

5. Therefore, the subject-matter of claim 1 according to any request lacks novelty within the meaning of Article 54(1) EPC.

Order

For these reasons it is decided that:

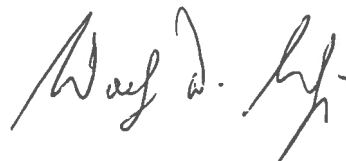
The appeal is dismissed.

The Registrar:



S. Fabiani

The Chairman:



W. D. Weiß

