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**D E C I S I O N**  
**of 7 April 2003**

**Case Number:** T 0689/00 - 3.2.6

**Application Number:** 92115530.5

**Publication Number:** 0539703

**IPC:** A61F 13/15

**Language of the proceedings:** EN

**Title of invention:**  
Absorbent article

**Patentee:**  
KIMBERLY-CLARK WORLDWIDE, INC.

**Opponent:**  
Paul Hartmann Aktiengesellschaft

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 54(1), 111(1),(2), 123(2)

**Keyword:**  
"Admissibility of amendments - yes"  
"Novelty - yes"  
"Remittal to the first instance - yes"

**Decisions cited:**  
-

**Catchword:**  
-



Case Number: T 0689/00 - 3.2.6

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.6**  
**of 7 April 2003**

**Appellant:** KIMBERLY-CLARK WORLDWIDE, INC.  
(Proprietor of the patent) 401 North Lake Street  
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**Representative:** Dixon, Philip Matthew  
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**Respondent:** Paul Hartmann Aktiengesellschaft  
(Opponent) Paul-Hartmann-Strasse  
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**Representative:** Dreiss, Fuhlendorf, Steimle & Becker  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 28 April 2000  
revoking European patent No. 0 539 703 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** P. Alting van Geusau  
**Members:** G. C. Kadner  
M. J. Vogel

## Summary of Facts and Submissions

I. The mention of the grant of European patent No. 0 539 703 in respect of European patent application No. 92 115 530.5 filed 10 September 1992 and claiming three US-priorities from 11 September 1991 and one from 26 June 1992 was published on 5 March 1997.

II. Notice of opposition was filed on 5 December 1997 by the Respondent (Opponent), on the grounds of Article 100(a) EPC.

III. By decision of the Opposition Division announced during the oral proceedings on 13 April 2000 and posted on 28 April 2000 the European patent was revoked.

The Opposition Division was of the opinion that the subject-matter of claim 1 of the patent as granted and also in amended form according to the second to fourth auxiliary request lacked novelty when compared to the state of the art disclosed in D8: EP-A-257 280, whereas claim 1 of the first auxiliary request violated Article 123(2) EPC.

IV. On 3 July 2000 notice of appeal was lodged against this decision by the Patentee together with payment of the appeal fee. The statement of grounds of appeal was filed on 7 September 2000.

V. In a communication dated 28 January 2003 the Board pointed out that it preliminarily did not see a reason to change the Opposition Division's decision in respect of the main request and the first to third auxiliary request considered during the opposition proceedings.

However, claim 1 of the fourth auxiliary request appeared to comply with the requirement of novelty.

VI. Oral proceedings were held on 7 April 2003.

The Appellant (Patentee) requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request (claim 1), as filed during the oral proceedings,

- or of the first auxiliary request, filed with letter dated 7 March 2003,
- or on the basis of the third and fifth to ninth auxiliary request (newly numbered second to seventh) filed with the statement of the grounds of appeal.

The Respondent (Opponent) requested that the appeal be dismissed.

Claim 1 of the main request reads as follows:

"An absorbent article (10), comprising:  
a backsheet layer (3);  
a topsheet layer (28) which is disposed in facing relation with said backsheet layer (30);  
an absorbent retention portion (48) which is interposed between said backsheet layer (30) and topsheet layer (28), said retention portion (48) comprising a matrix of substantially hydrophilic fibers having a distribution of high-absorbency particle material therein, said hydrophilic fibers and high-

absorbency particles being provided in a fiber-to-particle ratio which is not more than about 70:30 and is not less than about 30:70 by weight; and

a surge management layer (46) being located adjacent at least one major, facing surface of said topsheet layer (28), the surge management layer (46) being capable of temporarily holding liquid surges and being arranged to release liquid into the high-absorbency particle containing retention portion over multiple fluid insults in use, said surge layer (46) comprising bicomponent fibers having a size of not more than about 0.33 tex (about 3 d), and said surge layer being constructed to provide for a liquid Penetration Rate index of not less than about 2.67 ml/sec, characterised in that:

said surge layer (46) consists of bicomponent fibers having a denier of not more than about 0,33 tex (about 3 d) and fibers having a size of at least about 0.33 tex (about 3 d) and has a basis weight within the range of about 24 - 68 gsm, with 0 - 75 wt% of said surge layer composed of fibers having a size of at least about 0.33 tex (about 3 d) and with 25 - 100 wt% of said surge layer composed of bicomponent fibers having a denier of not more than about 0.33 tex (about 3 d)."

VII. In support of its requests the Appellant essentially relied upon the following submissions:

Claim 1 according to the main request was composed of granted claims 1 and 2, with the introduction of a further functional feature disclosed in the patent specification (page 3, lines 46 to 55) corresponding

with the original application documents (page 6, second paragraph), and should therefore be admissible under Article 123(2) EPC.

By the amendment of claim 1 from "comprises" (line 29) to "consists of" it should be clear that no other components than bicomponent fibers having a denier of not more than about 0.33 tex (about 3 d) and other fibers having a denier of at least about 0.33 tex (about 3 d) were present in the surge management layer 46. Since this amendment was a clear restriction of the scope of protection claim 1 also complied with Article 123(3) EPC.

When compared to the disclosure of D8 the subject-matter of claim 1 was novel because both kinds of fibers had to be present in the surge layer of the patent. The other fibers of an amount of 25 % according to D8 had a denier of 1.5 whereas according to the patent in suit the 0 to 75 wt% of other fibers had a size of at least 3 denier.

VIII. As regards the new main request the Respondent no longer objected to novelty of the claimed subject-matter.

**Reasons for the Decision**

1. The appeal is admissible.
  
2. *Main request*

## 2.1 Admissibility

Claim 1 is composed of granted claims 1 and 2 the features of which correspond with those included in the original filed claims 1 and 2, with an additional restriction of the base weight of the surge layer to 24 to 68 gsm as disclosed in originally filed claim 3. The further introduced functional feature concerning the property of "the surge management layer being capable of temporarily holding liquid surges and being arranged to release liquid into the high-absorbency particle containing retention portion over multiple fluid insults in use" into the precharacterising portion is clearly derivable from the disclosure in the patent specification (page 3, lines 46 to 55) corresponding with the original application documents (page 6, second paragraph) by the skilled person.

The restriction of "comprises" to "consists of" is supported by the patent specification (page 13, lines 43 to 47) corresponding with the original application (page 40, first paragraph) where it is clearly stated that the amount of 25 to 100 wt% of bicomponent fibers corresponds with 0 to 75 wt% of non-bicomponent fibers by the term "accordingly". Further on example 1 on page 24 indicates in the same manner that the one type of bicomponent fibers is supplemented with the other type of fibers to 100 wt%. Therefore the Board considers the scope of claim 1 referring only to those embodiments of the invention which fulfil the condition that the surge layer is composed of these two fiber components. Since the amendments also clearly restrict the scope of protection, claim 1 complies with the requirements of Article 123(2) and (3) EPC.

2.2 Novelty

D8 discloses an absorbent article, comprising a backsheet layer 16, a topsheet layer 30 which is disposed in facing relation with said backsheet layer, an absorbent retention portion 12 which is interposed between the backsheet layer and topsheet layer, the retention portion 12 comprising 1.5 to 4 g of a blend of wood pulp fibers with 0.3 to 0.71 g high-absorbency particle material therein. A surge management layer 32 being located adjacent the facing surface of said topsheet layer 30 and being capable of temporarily holding liquid surges is arranged to release liquid into the high-absorbency particle containing retention portion over multiple fluid insults in use. The surge layer 32 consists of bicomponent fibers having a denier of 3 and rayon fibers having a size of 1.5 den and has a basis weight within the range of 0.8 oz/yd<sup>2</sup> (about 27 gsm) with 25 wt% of said surge layer composed of the fibers having a size of 1.5 denier and with 75 wt% of said surge layer composed of bicomponent fibers having a denier of 3 (Figure 2; page 5, lines 1 to 10).

The subject-matter of claim 1 differs from that absorbent article in that, when the surge layer comprises 75 wt% of bicomponent fibers, the 25 wt% of other fibers have at least a size of 3.0 denier and, when the surge layer consists of approximately 100 wt% of bicomponent fibers of a size of 3 denier, nearly no other fibers of a size of 1.5 denier are present in the blend.

Consequently claim 1 meets the requirement of novelty (Article 54(1) EPC).



3. *Auxiliary requests*

Since claim 1 of the main request is itself acceptable in respect of formal requirements and in respect of novelty it can form the basis for further examination.

4. *Remittal to the first instance*

Substantive examination in respect of inventive step has not yet been carried out by the Opposition Division, and therefore the case has to be remitted to the department of first instance for continuation of the opposition proceedings.

**Order**

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

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau