

**Internal distribution code:**

- (A)  Publication in OJ  
(B)  To Chairmen and Members  
(C)  To Chairmen  
(D)  No distribution

**Datasheet for the decision  
of 9 April 2008**

**Case Number:** T 0615/06 - 3.2.02

**Application Number:** 95925338.6

**Publication Number:** 0954244

**IPC:** A61B 17/20

**Language of the proceedings:** EN

**Title of invention:**

Intravascular device utilizing fluid to extract occlusive material

**Applicant:**

Boston Scientific Scimed, Inc.

**Headword:**

-

**Relevant legal provisions:**

EPC Art. 111

**Keyword:**

"Remittal to the first instance"

**Decisions cited:**

-

**Catchword:**

-



Case Number: T 0615/06 - 3.2.02

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.02  
of 9 April 2008

**Appellant:** Boston Scientific Scimed, Inc.  
One Scimed Place  
Maple Grove, MN 55311 (US)

**Representative:** Schwan, Gerhard  
Schwan Schwan Schorer  
Patentanwälte  
Bauerstrasse 22  
D-80796 München (DE)

**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 20 October 2005  
refusing European application No. 95925338.6  
pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** T. Kriner  
**Members:** D. Valle  
M. J. Vogel

## Summary of Facts and Submissions

- I. The appellant lodged an appeal on 6 December 2005 against the decision of the examining division posted on 20 October 2005 refusing the European patent application 95925338.6. The fee for the appeal was paid simultaneously and the statement setting out the grounds for appeal was received on 23 February 2006.
- II. The examining division held that the application did not meet the requirements of Article 56 EPC.
- III. The appellant requested that the decision under appeal be set aside and a patent be granted on the basis of a main or of two auxiliary requests all filed on 23 February 2006. He requested also oral proceedings if the main requested should not be considered to be allowable.

In the telephonic conversation of 18 January 2008 the board communicated that it intended to examine only the compliance with Article 123 (2) EPC of the new submissions and that it held it appropriate in case of compliance with Article 123 (2) EPC to remit the case to the first instance for further prosecution since feature (h) of claim 1 of the main request did not appear to be searched. The board also communicated that claims 2 to 5 of the main request did not appear to adhere strictly to the content of the original disclosure and that therefore they did not appear to comply with Article 123 (2) EPC.

With the letter of 20 March 2008 the appellant expressed the readiness to leave it to the judgement of

the board whether or not to remit the case to the first instance for further prosecution and filed amended claims 2 to 5 of the main request.

IV. Claim 1 of the main request reads as follows:

"A fluid system (10) for the extraction of vascular occluding material, comprising:

- a. a catheter system (11) including an elongate catheter shaft having a proximal end and a distal end, the elongate shaft including a fluid input tube (12) and a fluid extraction tube (13), the fluid input tube being longitudinally movable relative to the fluid extraction tube;
- b. a fluid input lumen (34) extending through the shaft;
- c. an extraction lumen (29) extending through the shaft;
- d. a pressurized fluid source (15) connected to the proximal end of the shaft and in fluid communication with the fluid input lumen (34);
- e. a pressurized fluid collector (17) connected to the proximal end of the shaft and in fluid communication with the extraction lumen (29);
- f. a nozzle (32) attached to the distal end of the shaft and in fluid communication with the fluid input lumen (34);
- g. a control system (16) operatively connected to the pressurized fluid source (15) and the pressurized fluid collector (17), the control system controlling the pressurized fluid source and the pressurized fluid collector as a function of fluid dynamic parameters of the fluid input lumen (34) and the fluid extraction lumen (29), the control system being configured to keep

the volumetric fluid input rate of the fluid input lumen (34) equal to the volumetric fluid output rate of the fluid extraction lumen (29); and

h. means for detection of cavitation in the fluid extraction lumen (29), said cavitation detection means comprising a pressure sensor (20) from which the control system (16) receives input and which monitors the pressure ( $P_0$ ) at the proximal end of the fluid extraction lumen (29), a diverter valve (21) operatively connected to the control system (16) being provided for diverting pressurized fluid from the pressurized fluid source (15) as a function of the input provided to the control system (16) by the pressure sensor (20)."

## **Reasons for the Decision**

1. The appeal is admissible.
2. *Amendments*

Claim 1 of the main request is based on the original claims 1, 5, 7 and on the description, page 18, lines 10 to 20; page 19, lines 3 to 8; page 20, lines 14 to 19, and page 24, lines 1 to 4.

Claim 2 is based on page 17, lines 2 to 9; claim 3 on page 17, lines 1 to 3 and 22 to 28; claim 4 on page 16, lines 21 to 24, page 19, lines 9 to 13 and 19 to 22; claim 5 on page 16, lines 25 to 28, page 19, line 25 to page 20, line 4, and page 20, lines 6 to 13.

Claims 7 to 15, 16 and 17 are based on the originally filed claims 8 to 16, claims 17 and 18, and claim 19, respectively.

Accordingly, the main request complies with Article 123 (2) EPC.

3. *Further consideration*

Since the new feature (h) of claim 1 of the main request has not yet been searched, the board sees it as appropriate to remit the case to the first instance for further prosecution.

**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 on the basis of:

Claims: 1, 6 to 17 filed with letter of 23 February 2006 as main request;

2 to 5 filed with letter of 20 March 2008;

Description: Pages 1 to 26 as published in WO-A-96/01079;

Drawings: Sheets 1/6 to 6/6 as published in WO-A-96/01079.

The Registrar:

The Chairman:

V. Commare

T. Kriner