

Internal distribution code:

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

**Datasheet for the decision
of 9 April 2019**

Case Number: T 1180/15 - 3.2.06

Application Number: 09774279.5

Publication Number: 2328532

IPC: A61F13/15

Language of the proceedings: EN

Title of invention:

DISPOSABLE ABSORBENT ARTICLE WITH VARIED DISTRIBUTION OF
ABSORBENT PARTICULATE POLYMER MATERIAL

Patent Proprietor:

The Procter & Gamble Company

Opponent:

Braun-Dullaëus Pannen

Headword:

Relevant legal provisions:

EPC Art. 54(1), 54(3), 101(3)(b)
RPBA Art. 13(1)

Keyword:

Novelty - main request (no)

Late-filed auxiliary requests - requests clearly allowable (no)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 1180/15 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 9 April 2019

Appellant: Braun-Dullaeus Pannen
(Opponent) Patent- und Rechtsanwälte
Platz der Ideen 2
40476 Düsseldorf (DE)

Representative: Braun-Dullaeus Pannen Emmerling
Patent- und Rechtsanwaltspartnerschaft mbB
Platz der Ideen 2
40476 Düsseldorf (DE)

Respondent: The Procter & Gamble Company
(Patent Proprietor) One Procter & Gamble Plaza
Cincinnati, OH 45202 (US)

Representative: Heide, Ute
Procter & Gamble Service GmbH
IP Department
Sulzbacher Straße 40-50
65824 Schwalbach am Taunus (DE)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
24 March 2015 concerning maintenance of the
European Patent No. 2328532 in amended form.**

Composition of the Board:

Chairman M. Harrison
Members: P. Cipriano
W. Ungler

Summary of Facts and Submissions

- I. In its interlocutory decision dated 10 March 2015 the opposition division found that European patent No. 2 328 532 in an amended form met the requirements of the EPC.
- II. An appeal against this decision was filed by the appellant (opponent) requesting that the decision be set aside and the patent be revoked.
- III. In its letter of response, the respondent (patent proprietor) requested that the appeal be dismissed or, in the alternative, that the patent be maintained according to the first, second or third auxiliary request.
- IV. The following documents, referred to by the appellant in its grounds of appeal, are relevant to the present decision:

D8 WO 2009/134626 A1
- V. With letter of 30 August 2018 the appellant stated that it would not attend any oral proceedings.
- VI. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that novelty and clarity might need to be discussed and that D8 seemed to render the subject-matter of claim 1 of the main request not novel.
- VII. With letter of 4 April 2019 the respondent filed amended first, second, third and fourth auxiliary

requests to replace the previous auxiliary requests on file.

VIII. Oral proceedings were held before the Board on 9 April 2019, in the course of which the respondent replaced all its auxiliary requests of 4 April 2019 by amended first to fourth auxiliary requests.

As announced, the appellant did not attend the oral proceedings.

The appellant requested (in writing) that the decision under appeal be set aside and the patent be revoked (see II. above)

The respondent requested that the appeal be dismissed (main request), or that the patent be maintained in amended form on the basis of one of the first to fourth auxiliary requests filed during the oral proceedings of 9 April 2019.

IX. Claim 1 of the main request (i.e. the amended form found allowable by the opposition division) reads as follows:

"A disposable absorbent article (10) comprising: a chassis (12) including a topsheet (18) and a backsheet (20); and an absorbent core (14) located between the topsheet (18) and the backsheet (20) and comprising absorbent particulate polymer material (66), the disposable absorbent article (10) having a longitudinal axis (36) extending from a first end to a second end and the absorbent particulate polymer material (66) present in the absorbent core (14) has a basis weight that varies across the absorbent core (14) in a direction perpendicular to the longitudinal axis (36),

wherein the absorbent core (14) is substantially cellulose free;
the absorbent core (14) comprises first and second side absorbent zones (120 and 122) spaced from one another and extending substantially parallel to the longitudinal axis (36) and a central absorbent zone (121) extending along the longitudinal axis (36) and between the first and second side absorbent zones (120 and 122), the absorbent particulate polymer material in the first and second side absorbent zones (120 and 122) of the absorbent core (14) has a basis weight, the absorbent particulate polymer material in the central absorbent zone (121) of the absorbent core (14) has a basis weight, and the basis weight of the absorbent particulate polymer material in the first and second side absorbent zones (120 and 122) is greater than the basis weight of the absorbent particulate polymer material in the central absorbent zone (121), wherein the areas of greater absorbent particulate polymer material basis weight have curved shapes."

The wording of claim 1 of the first to fourth auxiliary requests is annexed at the end of this decision.

- X. The arguments of the appellant can be summarised as follows:

Main request - novelty

The subject-matter of claim 1 lacked novelty over D8.

D8 disclosed all the features of claim 1, in particular the feature "the areas of greater absorbent particulate polymer material basis weight have curved shapes" (hereinafter also referred to as "feature m").

The areas 120 and 122 as disclosed in Figure 8 of D8 were curved, since the mating clusters 91 were of round shape, the resulting areas 120 and 122 necessarily had a curved shape, which the patent did not specify in any way which provided a difference.

XI. The arguments of the respondent can be summarised as follows:

Main request - novelty

D8 disclosed all the features of claim 1 with the exception of the feature "the areas of greater absorbent particulate polymer material basis weight have curved shapes".

The claimed zones and areas represented the same feature. They were represented in the description by the same reference numeral and thus it was clear for the skilled person, when taking into consideration the whole content of the patent, that the zones and the areas referred to the same regions delimited by particulate basis weight.

There was no direct and unambiguous disclosure in D8 of an area of greater absorbent particulate polymer material basis weight having a curved shape.

The surface of the roll 144 disclosed a single core layer 60 and thus its outline did not correspond to the outline of the whole core after the mating of core layers 60 and 62. When mating the first and second absorbent core layers, each one produced by a printing roll 144 as seen in Figure 18, the resulting areas of greater absorbent particulate polymer material basis weight would not necessarily have a curved shape.

A skilled person would consider the peripheral limit to be a straight line. A resulting core, such as the one in Figure 8 of D8 and which corresponds to the one in Figure 8A in the contested patent, was disclosed in paragraph [0081] of the patent as being straight, parallel and continuous. By analogy, the skilled person would not consider the areas of greater absorbent particulate polymer material basis weight in Figure 8 of D8 as having a curved shape.

Admittance of the auxiliary requests

The first to fourth auxiliary requests should be admitted. The amendments made to claim 1 of the auxiliary requests overcame the inconsistency problem between the zones and the areas defined in each of the claims of the previous auxiliary requests, and made clear that there was a single kind of area, which corresponded to a zone.

Reasons for the Decision

1. Main request - novelty

1.1 The respondent argued that D8 does not disclose the feature

"the areas of greater absorbent particulate polymer material basis weight have curved shapes" (feature m)).

It is undisputed between the parties that all the other features of claim 1 are disclosed in D8. The Board also sees no reason to find otherwise.

1.2 Even though it was argued by the respondent that the claimed "areas" and "zones" are the same feature, the wording of claim 1 is however broad enough for the skilled person reading the claim to interpret that the areas and the zones are certainly not necessarily the same.

The wording of claim 1 does not link the terms "zone" and "area" in any way. In fact rather the opposite is true since the claim defines first and second side absorbent "zones" spaced from one another and extending substantially parallel to the longitudinal axis, and a greater absorbent particulate polymer material basis weight than a central absorbent "zone", whereas the claim defines "areas" of greater absorbent particulate polymer material basis weight having curved shapes. Although both the side areas and the zones seem to have an absorbent particulate polymer material basis weight which is greater than that in the central absorbent zone, this is not enough to establish that they are the same feature, since, for example there may be several regions of the core which have differing amounts of absorbent particulate polymer material basis weight which are higher than that in the central zone.

A direct equivalence between the zones and areas also cannot be established, even when considering the description. Although in the embodiment of Figures 1-8a (see paragraphs [0077] to [0081]) the side absorbent zones and the areas of greater absorbent particulate polymer material basis weight are referred to with the same reference signs 120a and 122a (as argued by the respondent, noting that 120a and 120b are not in fact shown in the Figures), this is anyway only a disclosure for this specific embodiment and does not imply that the claimed areas and zones necessarily must coincide

nor that they refer to the same feature, i.e. that the zones are the same as the areas is just one of the possibilities encompassed by the claim. For example, in the embodiments of Figures 8B, 8C and 8D belonging to the invention, the areas are "curved" inwardly or outwardly (see also paragraph [0081]) whereas the zones are defined in the claim as "extending substantially parallel to the longitudinal axis".

- 1.3 Assuming that each side area is defined by the region of the core comprising the clusters 91 with greater absorbent basis weight, the embodiment of Figure 8 in D8 discloses feature m. From the construction process described and seen schematically in Figure 16 of D8, the periphery of the areas will not be straight lines and are also shown as curved shapes (see the surface of roll 144 in Figure 18, for example). Even after passing through the nip 162, the substrates 64 and 72 of the first and second absorbent layers 60 and 62, respectively, would not lose their circular cluster shape, since they have been sprayed with thermoplastic material when passing through the thermoplastic material applicators 146 and 158 respectively.

Whilst it is true, as the respondent argued, that surface of the roll 144 discloses a single core layer 60 and thus its outline does not correspond to the outline of the whole core after both core layers 60 and 62 have been mated, the lateral limits of the side areas of the whole resulting core also have an irregular curved shape. As seen in Figure 8 of D8 for example, the mating of corresponding large clusters 91 between the first and second core layers results in an area shape that does not correspond to the shape seen in the roll of Figure 18 (as indeed argued by the respondent) but is nevertheless a combination of the

circumferences of the mating outer clusters 91, i.e. a combination of curved shapes.

The argument of the respondent that a skilled person would consider the peripheral limit to be a straight line, is not accepted by the Board. As can be seen from the relation between the size of the core and the clusters in Figure 8, the clusters do not have such a small diameter that the skilled person would not be able to recognize the arcs (i.e. curved shapes) on the area periphery - see also page 19, 3rd paragraph, disclosing the size of land areas from about 8 mm to 12 mm.

The respondent argued further that Figure 8 of D1 and Figure 8a of the patent were identical and since paragraph [0081] of the patent implied that the areas of Figure 8A were continuous and straight by referring to embodiments which were "other shapes such as curved or intermittent", the skilled person would analogously interpret the areas of Figure 8 of D1 as continuous and straight. The Board is, however, not convinced by this argument. Paragraph [0081] discloses directly and unambiguously that in Figure 8A the core is rectangular and the areas 120a and 122a substantially parallel and continuous. This does not exclude that the areas have curved shapes, since curved shapes may also be parallel and continuous (e.g. two parallel sinusoids) Also, a statement in the patent about one of its own embodiments cannot be used to limit how prior art is understood by a skilled person.

- 1.4 It thus follows that all features of claim 1 are known from D8 such that its subject-matter lacks novelty (Article 54(1) and (3) EPC). The main request is thus not allowable.

2. Admittance of the auxiliary requests

2.1 During the oral proceedings before the Board, the Chairman indicated the Board's provisional opinion concerning the first to fourth auxiliary requests filed on 4 April 2019, this being that the Board provisionally saw *inter alia* a lack of clarity (Article 84 EPC) in claim 1 of all requests. The added features such as "continuous areas curved inwardly" seemed to define a further type of area that bore no relationship to the zones defined in the claim(s), at least no clearly recognisable relationship.

2.2 The respondent subsequently filed amended first to fourth auxiliary requests during the oral proceedings.

Claim 1 of the first to fourth auxiliary request has been amended such that it now comprises *inter alia* the following features:

- wherein the amount of absorbent particulate polymer material per unit area of the absorbent core varies from zone to zone,
- wherein the areas of greater absorbent particulate polymer material basis weight have curved shapes,
- the absorbent core comprises continuous areas of greater absorbent particulate polymer material basis weight which are, dependent on the request, curved either inwardly or outwardly, so as to form a predetermined pattern.

2.3 According to Article 13(1) of the Rules of Procedure of the Boards of Appeal (RPBA), it lies within the discretion of the Board to admit any amendment to a party's case after it has filed its grounds of appeal or reply. In order to be admitted, any such request

should be clearly allowable at least in the sense that it overcomes the objections raised and does not give rise to new objections, in order that economy of procedure is respected. However, this is not met for claim 1 of any of these requests.

- 2.4 The Board finds that the amendments to claim 1 in all the requests do not overcome the previously discussed objection of lack of clarity and moreover that a new lack of clarity objection arises.

The claims now define that the amount of absorbent particulate polymer material basis weight per unit area of the absorbent core varies from zone to zone. Contrary to the argument of the respondent, the amount of absorbent material per unit area of the absorbent core is simply a definition for the basis weight. The "area" referred to in "unit area" however does not relate to the specific areas defined in the claim and thus it does not establish any link between the zones and the areas defined in the claim. Instead, the amendment simply defines that the basis weight varies from zone to zone. The lack of clarity objection to the previous auxiliary requests is thus not overcome.

Further, the wording and structure of claim 1 now defines not only zones and continuous areas of greater basis weight of absorbent particulate polymer curved, dependent on the request, inwardly or outwardly but, in addition, potentially further areas having curved shapes. Without a specific link, such as a definite article or an adjective giving some reference to an antecedent, it is not clear whether the continuous areas are the areas having curved shapes already defined previously in the claim or further ones. A new lack of clarity objection thus arises.

2.5 The Board therefore exercised its discretion according to Article 13(1) RPBA not to admit the first to fourth auxiliary requests into the proceedings.

In the absence of any request which meets the requirements of the EPC, the patent has to be revoked (Article 101(3)b) EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



A. Pinna

M. Harrison

Decision electronically authenticated

Claim 1 of the first auxiliary request filed during oral proceedings

1. A disposable absorbent article (10) comprising: a chassis (12) including a topsheet (18) and a backsheet (20); and an absorbent core (14) located between the topsheet (18) and the backsheet (20) and comprising absorbent particulate polymer material (66), the disposable absorbent article (10) having a longitudinal axis (36) extending from a first end to a second end and the absorbent particulate polymer material (66) present in the absorbent core (14) has a basis weight that varies across the absorbent core (14) ~~in~~ in a direction perpendicular to the longitudinal axis (36),

wherein the absorbent core (14) is substantially cellulose free;

the absorbent core (14) comprises first and second side absorbent zones (120 and 122) spaced from one another and extending substantially parallel to the longitudinal axis (36) and a central absorbent zone (121) extending along the longitudinal axis (36) and between the first and second side absorbent zones (120 and 122), **wherein the amount of absorbent particulate polymer material per unit area of the absorbent core varies from zone to zone,** the absorbent particulate polymer material in the first and second side absorbent zones (120 and 122) of the absorbent core (14) has a basis weight, the absorbent particulate polymer material in the central absorbent zone (121) of the absorbent core (14) has a basis weight, and the basis weight of the absorbent particulate polymer material in the first and second side absorbent zones (120 and 122) is greater than the basis weight of the absorbent particulate polymer material in the central absorbent zone (121);

wherein the areas of greater absorbent particulate polymer material basis weight have curved shapes;

wherein the absorbent core comprises:

(a) continuous areas of greater absorbent particulate polymer material basis weight (120b) and (122b) curved inwardly so as to form a concave pattern and adjacent areas of lower absorbent particulate polymer material basis weight (121b); or

(b) continuous areas of greater absorbent particulate polymer material basis weight (120c) and (122c) curved inwardly so as to form an hourglass pattern and a central area of lower absorbent particulate polymer material basis weight (121c); or

(c) continuous areas of greater absorbent particulate polymer material basis weight (120d) and (122d) curved outwardly so as to form a convex pattern and adjacent areas of lower absorbent particulate polymer material basis weight (121d); or

- (d) substantially straight parallel areas of greater absorbent particulate polymer material basis weight (120e) and (122e) and adjacent areas of lower absorbent particulate polymer material basis weight (121e), wherein the parallel areas of greater absorbent particulate polymer material basis weight (120e) and (122e) have a length shorter than that of the adjacent areas of lower absorbent particulate polymer material basis weight (121e); or
- (e) substantially straight parallel intermittent areas of greater absorbent particulate polymer material basis weight (120f) and (122f) and adjacent areas of lower absorbent particulate polymer material basis weight (121f).

Claim 1 of the second auxiliary request filed during oral proceedings

1. A disposable absorbent article (10) comprising: a chassis (12) including a topsheet (18) and a backsheet (20); and an absorbent core (14) located between the topsheet (18) and the backsheet (20) and comprising absorbent particulate polymer material (66), the disposable absorbent article (10) having a longitudinal axis (36) extending from a first end to a second end and the absorbent particulate polymer material (66) present in the absorbent core (14) has a basis weight that varies across the absorbent core (14) ~~in~~ in a direction perpendicular to the longitudinal axis (36),

wherein the absorbent core (14) is substantially cellulose free;

the absorbent core (14) comprises first and second side absorbent zones (120 and 122) spaced from one another and extending substantially parallel to the longitudinal axis (36) and a central absorbent zone (121) extending along the longitudinal axis (36) and between the first and second side absorbent zones (120 and 122), **wherein the amount of absorbent particulate polymer material per unit area of the absorbent core varies from zone to zone,** the absorbent particulate polymer material in the first and second side absorbent zones (120 and 122) of the absorbent core (14) has a basis weight, the absorbent particulate polymer material in the central absorbent zone (121) of the absorbent core (14) has a basis weight, and the basis weight of the absorbent particulate polymer material in the first and second side absorbent zones (120 and 122) is greater than the basis weight of the absorbent particulate polymer material in the central absorbent zone (121),

wherein the areas of greater absorbent particulate polymer material basis weight have curved shapes;

wherein the absorbent core comprises:

(a) continuous areas of greater absorbent particulate polymer material basis weight (120b) and (122b) curved inwardly so as to form a concave pattern and adjacent areas of lower absorbent particulate polymer material basis weight (121b); or

(b) continuous areas of greater absorbent particulate polymer material basis weight (120c) and (122c) curved inwardly so as to form an hourglass pattern and a central area of lower absorbent particulate polymer material basis weight (121c); or

(c) continuous areas of greater absorbent particulate polymer material basis weight (120d) and (122d) curved outwardly so as to form a convex pattern and adjacent areas of lower absorbent particulate polymer material basis weight (121d).

Claim 1 of the third auxiliary request filed during oral proceedings

1. A disposable absorbent article (10) comprising: a chassis (12) including a topsheet (18) and a backsheet (20); and an absorbent core (14) located between the topsheet (18) and the backsheet (20) and comprising absorbent particulate polymer material (66), the disposable absorbent article (10) having a longitudinal axis (36) extending from a first end to a second end and the absorbent particulate polymer material (66) present in the absorbent core (14) has a basis weight that varies across the absorbent core (14) ~~in~~ in a direction perpendicular to the longitudinal axis (36),

wherein the absorbent core (14) is substantially cellulose free;

the absorbent core (14) comprises first and second side absorbent zones (120 and 122) spaced from one another and extending substantially parallel to the longitudinal axis (36) and a central absorbent zone (121) extending along the longitudinal axis (36) and between the first and second side absorbent zones (120 and 122), **wherein the amount of absorbent particulate polymer material per unit area of the absorbent core varies from zone to zone,** the absorbent particulate polymer material in the first and second side absorbent zones (120 and 122) of the absorbent core (14) has a basis weight, the absorbent particulate polymer material in the central absorbent zone (121) of the absorbent core (14) has a basis weight, and the basis weight of the absorbent particulate polymer material in the first and second side absorbent zones (120 and 122) is greater than the basis weight of the absorbent particulate polymer material in the central absorbent zone (121);

wherein the areas of greater absorbent particulate polymer material basis weight have curved shapes;

wherein the absorbent core comprises:

- (a) continuous areas of greater absorbent particulate polymer material basis weight (120b) and (122b) curved inwardly so as to form a concave pattern and adjacent areas of lower absorbent particulate polymer material basis weight (121b); or
- (b) continuous areas of greater absorbent particulate polymer material basis weight (120c) and (122c) curved inwardly so as to form an hourglass pattern and a central area of lower absorbent particulate polymer material basis weight (121c).

Claim 1 of the fourth auxiliary request filed during oral proceedings

1. A disposable absorbent article (10) comprising: a chassis (12) including a topsheet (18) and a backsheet (20); and an absorbent core (14) located between the topsheet (18) and the backsheet (20) and comprising absorbent particulate polymer material (66), the disposable absorbent article (10) having a longitudinal axis (36) extending from a first end to a second end and the absorbent particulate polymer material (66) present in the absorbent core (14) has a basis weight that varies across the absorbent core (14) ~~in~~ in a direction perpendicular to the longitudinal axis (36),

wherein the absorbent core (14) is substantially cellulose free;

the absorbent core (14) comprises first and second side absorbent zones (120 and 122) spaced from one another and extending substantially parallel to the longitudinal axis (36) and a central absorbent zone (121) extending along the longitudinal axis (36) and between the first and second side absorbent zones (120 and 122), **wherein the amount of absorbent particulate polymer material per unit area of the absorbent core varies from zone to zone,** the absorbent particulate polymer material in the first and second side absorbent zones (120 and 122) of the absorbent core (14) has a basis weight, the absorbent particulate polymer material in the central absorbent zone (121) of the absorbent core (14) has a basis weight, and the basis weight of the absorbent particulate polymer material in the first and second side absorbent zones (120 and 122) is greater than the basis weight of the absorbent particulate polymer material in the central absorbent zone (121);

wherein the areas of greater absorbent particulate polymer material basis weight have curved shapes;

wherein the absorbent core comprises:

(a) continuous areas of greater absorbent particulate polymer material basis weight (120b) and (122b) curved inwardly so as to form a concave pattern and adjacent areas of lower absorbent particulate polymer material basis weight (121b).