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**Datasheet for the decision  
of 2 March 2023**

**Case Number:** T 2029/21 - 3.3.03

**Application Number:** 06805629.0

**Publication Number:** 1904570

**IPC:** C08L9/10, A47C29/00, B29C70/70,  
B29C70/68

**Language of the proceedings:** EN

**Title of invention:**  
LATEX BASED COMPOSITE FOAMS

**Patent Proprietor:**  
Latexco NV

**Opponent:**  
Artilat NV

**Relevant legal provisions:**  
EPC Art. 56

**Keyword:**  
Inventive step - (no)

**Decisions cited:**  
T 0939/92



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Case Number: T 2029/21 - 3.3.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.03**  
**of 2 March 2023**

**Appellant:**

(Opponent)

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**Decision under appeal:**

**Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
11 November 2021 concerning maintenance of the  
European Patent No. 1904570 in amended form.**

**Composition of the Board:**

**Chairman** D. Semino  
**Members:** O. Dury  
C. Brandt

## **Summary of Facts and Submissions**

- I. The appeal of the opponent lies from the interlocutory decision of the opposition division concerning maintenance of European patent No. 1 904 570 in amended form according to the claim of auxiliary request 13 filed with letter of 11 May 2021 and an adapted description.
- II. The following documents were, among others, cited in the decision under appeal:
- D6: US 5 701 623  
D15: US 2001/0029632
- III. In that decision, the following conclusions, which are relevant for the present case, were reached:
- Neither the main request, nor any of auxiliary requests 1A, 1B and 2 to 12 then pending was allowable;
  - Regarding inventive step of auxiliary request 13, although document D6 was a more suitable starting point than document D15, the subject-matter being claimed involved an inventive step when either D6 or D15 was taken as the closest prior art;
  - The objection pursuant to Article 123(2) EPC raised against auxiliary request 13 was rejected.

For these reasons, the patent as amended on the basis of auxiliary request 13 was held to meet the

requirements of the EPC.

IV. The opponent (appellant) lodged an appeal against that decision.

V. The **requests** of the parties are as follows:

The appellant requested in writing that the decision under appeal be set aside and that the patent be revoked.

The patent proprietor (respondent) did not file any requests during the appeal proceedings.

VI. Auxiliary request 13 dealt with in the decision under appeal comprised a single claim, which read as follows:

"Use of a single composite foam, the composite foam comprising: a top layer of latex foam and a second layer of a foam selected from polyolefin, polyurethane, polystyrene or polyester or visco-elastic latex or mixtures thereof, the top layer of latex foam having a thickness of about 0,5 to 6 cm and that the second layer having a thickness of 0,5 to 9,5 cm as a topper for use on top of an existing conventional mattress."

VII. The appellant's arguments, in so far as they are pertinent for the present decision, may be derived from the reasons for the decision below. They are essentially as follows: the subject-matter of auxiliary request 13 dealt with in the decision under appeal did not involve an inventive step when either document D6 or document D15 was taken as the closest prior art.

VIII. The respondent did not make any submissions during the appeal proceedings.

### **Reasons for the Decision**

1. Considering that the Board arrived at the conclusion that the appeal is allowable for the reasons outlined below and that there is no request on file from the respondent, the present decision can be issued in written proceedings.
2. Operative request in appeal
  - 2.1 According to the provisions of Article 12(2) RPBA 2020, in view of the primary object of the appeal proceedings to review the decision under appeal in a judicial manner, a party's appeal case shall be directed to the requests on which the decision under appeal was based. Considering that the sole appellant in the present appeal is the opponent and that the respondent has not filed any written submissions, the sole operative request for the present appeal proceedings is auxiliary request 13 which was allowed by the opposition division.
  - 2.2 In that regard, whereas it is indicated in forms 2327 and 2339 as well as in sections 12 and 14 of the decision under appeal that the decision is based on auxiliary request 13 comprising a single claim 1 filed in electronic form on 11 May 2021, it is indicated on page 18 of the reasons of that decision that auxiliary request 13 was "filed during oral proceedings", whereby "Claims 1 to 9 have been deleted" and "Claim 10 remains identical to claim 10 of the Main Request" (whereby the

main request dealt with in the decision under appeal was the patent as granted). Also, auxiliary request 13 attached to the minutes of the oral proceedings held on 30 March 2021, which was apparently filed on that day, comprises a single claim 10. Although these passages of the decision under appeal appear at first glance inconsistent, it is undisputable that during both oral proceedings that took place during the opposition proceedings (on 30 March 2021 and on 23 September 2021) the same auxiliary request 13 was filed, which comprised a single claim 10, the wording of which was identical to the one of both claim 10 as granted and claim 1 of auxiliary request 13 filed in electronic form on 11 May 2021 (see auxiliary requests attached to the minutes of the oral proceedings held on 30 March 2021 and 23 September 2021).

- 2.3 That conclusion is in line with the appellant's presentation of the case (statement of grounds of appeal: point 1.0), which was not contested by the respondent.
- 2.4 Under these circumstances, there is no doubt as to the identity of the subject-matter defined in auxiliary request 13 dealt with in the decision under appeal, namely it consists of a single claim 1 filed in electronic form on 11 May 2021, the wording of which is identical to claim 10 of the patent as granted (see section VI above).
3. In their statement of grounds of appeal, the sole objections raised by the appellant were in respect of inventive step, among others taking document D15 as the closest prior art.

4. Article 56 EPC

4.1 Closest prior art

4.1.1 The appellant agreed with the opposition division's finding that D15 was a suitable document to be taken as the closest prior art (reasons: point 30.21).

4.1.2 In that regard, it is noted that the opposition division considered that D6 was closer to the invention than D15 and carried out an analysis of inventive step starting from D15 in a short and condensed manner (see section 30.31 of the reasons). However, it is undoubtedly derivable from the decision under appeal that D15 was considered as a suitable starting point for the analysis of inventive step and that said decision was based on that objection. In addition, it is established case law that, if the skilled person has a choice of several workable routes, i.e. routes starting from different documents, which might lead to the invention, the rationale of the problem and solution approach requires that the invention be assessed relative to all these possible routes, before an inventive step can be acknowledged (Case Law of the Boards of Appeal of the EPO, 10th edition, 2022, I.D.3.1, see in particular the sixth paragraph). Therefore, the Board is satisfied that the objection of lack of inventive step starting from D15 as the document constituting the closest prior art is open to review in the present appeal proceedings (Article 12(2) RPBA 2020).

4.2 Distinguishing feature(s)

- 4.2.1 D15 is directed to a posturized bedding or seating product, comprising according to claim 1 thereof:
- a core having a first surface and an oppositely-disposed second surface;
  - an upholstered covering which covers at least one of the core first and second surfaces; and
  - a foam ply positioned between the core and the upholstered covering, the foam ply having a first section which includes latex and a second section which is free of latex, thereby providing the foam ply with different degrees of firmness.
- 4.2.2 It is derivable from the appellant's written submissions that they considered that the subject-matter of operative claim 1 only differed from the "foam ply" according to D15 - which was a topper in the sense of the patent in suit - in the thickness of the top layer and second layer defined therein (statement of grounds of appeal: section 2.2, from page 7, first paragraph to page 8, fifth paragraph).
- 4.2.3 In that regard, the appellant did not dispute the reading of claim 1 which was adopted by the opposition division, according to which the wording of operative claim 1 "single composite foam" imposed that the foams defined therein could not be releasably put on top of each other but had to be "different foams attached to each other" (reasons: point 18.2.2). Also the Board has no reason to deviate from that view.
- 4.2.4 In addition, the Board agrees with the appellant's view that the foam ply disclosed in D15 (see in particular the embodiment according to figure 3 thereof in



combination with the disclosure of paragraphs 24 to 30 of D15 - cited as the relevant part of the disclosure of D15 also in the decision under appeal, point 30.13) is encompassed by the wording of operative claim 1 defining a "composite foam comprising: a top layer of latex foam and a second layer of a foam selected from polyolefin, polyurethane, polystyrene or polyester or visco-elastic latex or mixtures thereof" for the following reasons:

a) It is clear from the disclosure of D15 as a whole (see e.g. figures 1 to 3) that the foam ply disclosed therein is a topper to be used on top of a conventional mattress as defined in operative claim 1.

b) In addition, the term "composite foam comprising ..." is not held to exclude from the scope of operative claim 1 that the top layer is present on top of the second layer in the form of discrete sections as is done in the whole disclosure of D15 (see e.g. claim 1) and in particular in figure 3 thereof. That the top layer is composed of a foamed latex while the second layer is a polyurethane foam is further disclosed in paragraph 27 (first to fifth lines) and in paragraph 30 (first to third lines) of D15.

c) In the decision under appeal, the opposition division considered that D15 could not lead in an obvious manner to the subject-matter of operative claim 1 because the teaching of D15 was that the latex (of the top layer) impregnated the polyurethane (of the second layer), which appears to mean that the opposition division considered that the wording of operative claim 1 did not encompass embodiments corresponding to a foam ply according to the teaching of D15. However, the Board concurs with the appellant

that an impregnation of the latex of the top layer into the second polyurethane layer as indeed disclosed in D15 (see in particular paragraph 29 thereof) is not excluded from the wording of operative claim 1 (statement of grounds of appeal: page 7, last two paragraphs; page 8, first four paragraphs). In particular, it is derivable from D15 that the sections of latex of the top layer disclosed therein must have a specific thickness, which is referred to as the "level of penetration of latex into the interior of the foam ply" in D15 (paragraph 29 of D15).

d) As an aside, it is noted that the above conclusion is confirmed by the disclosure of paragraph 8 of the patent in suit, in which it is indicated that a foam ply disclosed in paragraph 7 of the patent in suit, which appears to be very similar (if not identical) to the ones according to D15, is a "composite foam comprising a top layer of latex foam and a second layer of foam made of polyurethane". Also, it seems that the process used in the examples of the patent in suit (column 10, lines 12-31) is very similar, if not identical, to the one disclosed in paragraph 30 of D15 in relation to figure 3 thereof.

- 4.2.5 In view of the above, the subject-matter of operative claim 1 differs from the disclosure of D15 only in the specific thicknesses of both layers (which is not disputed by the appellant).
  
- 4.3 Problem effectively solved
  - 4.3.1 In the decision under appeal, the opposition division held that in the absence of any effect demonstrated in relation to the distinguishing features identified therein, the objective technical problem solved over D6

as the closest prior art resided in the use of an alternative single composite foam as topper (reasons: points 30.27 and 30.28).

- 4.3.2 Although the conclusion of the opposition division regarding the absence of fair comparison to the closest prior art was reached in view of D6 as the closest prior art, it is noted that their analysis - which was done considering that the single composite foam defined in operative claim 1 comprised a second layer of a polyurethane foam - is equally valid when D15 is taken as the closest prior art. Indeed, it is indicated in the decision under appeal that the conclusion was drawn because there was "no comparative example" (reasons: point 30.27), which is equally valid when D15 (instead of D6) is considered as the closest prior art.
- 4.3.3 In addition, in the absence of any additional evidence or arguments by the respondent, the Board can only agree with the appellant that no effect was shown to be achieved in respect of the specific thicknesses of the layers defined in operative claim 1 (statement of grounds of appeal: page 4, fourth paragraph to page 5, ninth paragraph).
- 4.3.4 It is further noted that according to paragraph 14 of the patent in suit, "the topper of the present invention is for use on top of an existing conventional mattress, to increase the comfort of the mattress while utilizing an existing conventional mattress". However, since that mere allegation is not backed up by any fair comparison between the subject-matter being claimed and the disclosure of D15, it cannot be retained for the formulation of the problem effectively solved over the closest prior art.

4.3.5 In view of the above, the Board is satisfied that the distinguishing features identified in section 4.2.5 above do not solve any particular technical problem, as was argued by the appellant (statement of grounds of appeal: page 8, sixth paragraph). Therefore, the problem effectively solved over D15 can only reside in the use of an alternative single composite foam as topper.

#### 4.4 Obviousness

4.4.1 The question remains to be answered if the skilled person, desiring to solve the problem identified as indicated in section 4.3.5 above, would, in view of the closest prior art, possibly in combination with other prior art documents or with common general knowledge, have modified the disclosure of the closest prior art in such a way as to arrive at the claimed subject matter. In particular, it has to be assessed if it would have been obvious to solve the problem posed by using a single composite foam comprising a top layer and a second layer having specific thicknesses as defined in operative claim 1.

4.4.2 In that regard, the established decisive principle governing the answer to the question as to what a person skilled in the art would have done depends on the result they wished to obtain (T 939/92, OJ EPO 1996, 309: point 2.5.3 of the reasons). In the present case, since the problem to be solved resides in the provision of a mere alternative, no suggestion in the prior art is needed in order to render the subject-matter claimed obvious. Rather, it is sufficient to show that said missing features constitute an arbitrary selection within a host of available alternatives.

4.4.3 The appellant put forward that the thickness of the top layer and second layer specified in operative claim 1 were usual in the art and constituted an arbitrary choice (statement of grounds of appeal: page 8, seventh to ninth paragraphs).

a) In that respect, there is neither evidence to the contrary, nor any counter-arguments on file which may justify that the Board deviates from the appellant's conclusion.

b) In addition, the dimensions of both layers defined in operative claim 1 undoubtedly encompass embodiments having a total thickness which is usual in the art for toppers to be used on conventional mattresses, which according to common general knowledge are of the order of some centimeters thick. That conclusion is in line with the disclosure of toppers known in the art and disclosed in e.g. D6 (column 2, lines 29-33 and column 4, lines 14-16: 0.25 to 4 inches, i.e. 0.6 to 10.2 cm), as put forward by the appellant (statement of grounds of appeal: section 2.4).

4.4.4 In view of the above, the distinguishing features indicated in section 4.2.5 above correspond, for the skilled person confronted with the problem of using an alternative single composite foam as topper, to purely arbitrary measures.

4.4.5 For these reasons, the subject-matter of operative claim 1 does not involve an inventive step in view of document D15 as the closest prior art.

5. While the Board considers that the use of claim 1 of auxiliary request 13 does not involve an inventive step also starting from D6 as the closest prior art, there

is no need to analyse this objection in any further detail in view of the conclusion reached on inventive step starting from D15 as the closest prior art.

6. As the sole operative request is not allowable, the decision under appeal is to be set aside and the patent is to be revoked.

## 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:



D. Hampe

D. Semino

Decision electronically authenticated