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**Datasheet for the decision
of 27 February 2025**

Case Number: T 1332/23 - 3.3.09

Application Number: 16844337.2

Publication Number: 3348491

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B32B27/32, B65D65/40,
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B65D1/26

Language of the proceedings: EN

Title of invention:
MULTILAYER FILM FOR DEEP DRAWING AND METHOD FOR PRODUCING SAME

Patent Proprietor:
Kureha Corporation

Opponent:
Isarpatent - Patent- und Rechtsanwälte Barth
Charles Hassa Peckmann und Partner mbB

Headword:
Multilayer film/KUREHA

Relevant legal provisions:
EPC Art. 52(1), 54, 100(a)

Keyword:

Novelty - (no)

Decisions cited:

T 0032/17, T 0179/03



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

Case Number: T 1332/23 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 27 February 2025

Appellant: Isarpatent - Patent- und Rechtsanwälte Barth
(Opponent) Charles Hassa Peckmann und Partner mbB
Friedrichstrasse 31
80801 München (DE)

Representative: Isarpatent - Patent- und Rechtsanwälte Barth
Charles Hassa Peckmann & Partner mbB
Friedrichstrasse 31
80801 München (DE)

Respondent: Kureha Corporation
(Patent Proprietor) 3-3-2, Nihonbashi-Hamacho
Chuo-ku
Tokyo 103-8552 (JP)

Representative: Hoefler & Partner Patentanwälte mbB
Pilgersheimer Straße 20
81543 München (DE)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 8 May 2023
rejecting the opposition filed against European
patent No. 3348491 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman A. Haderlein
Members: C. Meiners
N. Obrovski

Summary of Facts and Submissions

- I. The present decision concerns the appeal filed by the opponent (appellant) against the opposition division's decision to reject the opposition filed against the patent.
- II. In its notice of opposition, the opponent had requested revocation of the patent on the basis of, *inter alia*, Article 100(a) EPC for lack of novelty.
- III. In its decision, the opposition division decided, *inter alia*, that the ground for opposition under Article 100(a) in conjunction with Article 54 EPC did not prejudice the maintenance of the patent.
- IV. The following documents are relevant to the present decision:
D1 WO 87/ 07880 A1
D4 US 4,797,235
- V. Claim 1 as granted reads:
"A multilayer film for a deep draw forming, the multilayer film comprising
a vinylidene chloride copolymer resin layer as a middle layer;
a crosslinked olefin resin layer as a first surface layer; and
an ethylene/vinyl acetate copolymer resin layer as a second surface layer; an ethylene/vinyl acetate copolymer resin layer being further provided at least either between the vinylidene chloride copolymer resin layer as the middle layer and crosslinked olefin resin layer as the first surface layer, or between the

vinylidene chloride copolymer resin layer as the middle layer and ethylene/vinyl acetate copolymer resin layer as the second surface layer;

wherein the multilayer film is obtained by performing a 10 to 40% relaxation treatment in a longitudinal direction and lateral direction

- (i) on a multilayer biaxially stretched film prepared by irradiating an energy beam from the olefin resin layer side onto a multilayer unstretched film including a vinylidene chloride copolymer resin layer as a middle layer, a olefin resin layer as a first surface layer, and an ethylene/vinyl acetate copolymer resin layer as a second surface layer, an ethylene/vinyl acetate copolymer resin layer being further provided at least either between the vinylidene chloride copolymer resin layer as the middle layer and olefin resin layer as the first surface layer, or between the vinylidene chloride copolymer resin layer as the middle layer and ethylene/vinyl acetate copolymer resin layer as the second surface layer, so as to crosslink the olefin resin, and then biaxially stretching 2.5 to 4 times in the longitudinal direction and lateral direction; or
- (ii) on a multilayer biaxially stretched film prepared by biaxially stretching 2.5 to 4 times in the longitudinal direction and lateral direction the multilayer unstretched film,

including a vinylidene chloride copolymer resin layer as a middle layer, a olefin resin layer as a first surface layer, and an ethylene/vinyl acetate copolymer resin layer as a second surface layer, an ethylene/vinyl acetate

copolymer resin layer being further provided at least either between the vinylidene chloride copolymer resin layer as the middle layer and olefin resin layer as the first surface layer, or between the vinylidene chloride copolymer resin layer as the middle layer and ethylene/vinyl acetate copolymer resin layer as the second surface layer,
and then irradiating an energy beam from the olefin resin layer side to crosslink the olefin resin."

- VI. The appellant's arguments relevant to the present decision can be summarised as follows:
- In the decision under appeal, the step of performing a 10 to 40% relaxation treatment in the longitudinal direction and lateral direction had been identified as a distinguishing technical feature over both documents D1 and D4.
 - However, the meaning of this feature was unclear. Thus, this feature could not serve as a distinguishing feature and establish novelty over the prior art.
 - Further, the burden of proof to demonstrate that the aforementioned process feature - as the only feature allegedly conferring novelty - results in a distinct and identifiable characteristic of the product was on the proprietor.
 - Consequently, the ground for opposition under Article 100(a) EPC in conjunction with Articles 52(1) and 54 EPC prejudiced the maintenance of the patent.
- VII. The proprietor (respondent) did not file a reply to the appeal and has not made any submissions in the appeal proceedings.

VIII. *Final requests*

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

Reasons for the Decision

1. *Novelty - claim 1 as granted*

1.1 In the decision under appeal, it was held in point 3 of the reasons for the decision that neither D1 nor D4 disclosed a step of performing a 10 to 40% relaxation treatment in the longitudinal direction and lateral direction. Although this feature was a process feature, the resulting film differed at a molecular level from a corresponding film not having undergone such a relaxation treatment as required in claim 1. This structural difference had been made credible by the proprietor. The burden of proof was on the opponent.

1.2 The board infers from the decision under appeal that no further potential distinguishing technical features were acknowledged by the opposition division, and the board does not see any either. *Inter alia*, the suitability of the films for deep-draw forming is, in the view of the board, given. Documents D1 and D4 describe the preparation of biaxially stretched and heat-shrinkable films having, with regard to the nature of the polymers used, a layer sequence as required in claim 1 as granted.

1.3 As to the sole feature that the opposition division considered to be distinguishing, claim 1 does not specify how the film relaxation of 10 to 40% is to be

accomplished exactly and how the resulting relaxation is to be measured/determined. The feature is thus ambiguous as regards its exact meaning. Likewise, the board concurs with the appellant that the definition of the film claimed by the process feature "wherein the film is obtained by performing a 10 to 40% relaxation treatment in longitudinal direction and lateral direction" results in the claimed subject-matter being defined, among other things, by a parameter that defines, *per se*, a process step.

1.4 The board agrees with the appellant that the burden of proof to show that a process feature results in a distinct and identifiable characteristic of the product and confers novelty generally lies with a patent proprietor or applicant (see, for instance, T 32/17, Reasons 15; T 179/03, Reasons 3.9 and 3.14; both decisions cited in Case Law of the Boards of Appeal, 10th edition, 2022, I.C.5.2.7).

1.5 In this regard, the board observes that the respondent has not adduced any evidence corroborating its view that this process feature/parameter results in a film which is structurally different from the biaxially stretched films as disclosed in the examples of documents D1 and D4 and which thus establishes novelty over those films. Contrary to what was held in the decision under appeal, the opponent does not have the burden of proof to demonstrate that the process feature does not establish novelty vis-à-vis the prior art. The board also disagrees with the opposition division's reasoning in point 3 of the reasons for the decision of the decision under appeal, according to which the resultant film must differ structurally from a film that has not undergone a relaxation treatment as claimed. In particular, the product is not

characterised in structural terms by a certain deformation ("has been stretched to a lower extent") but is directed to the film as such. It has not been substantiated that the process features "biaxially stretching" and "wherein the film is obtained by performing a 10 to 40% relaxation treatment in longitudinal direction and lateral direction" (this feature being, moreover, ambiguous) result in a structural difference having regard to the films of D1 and D4. It is thus impossible to establish whether a given film of given dimensions and molecular structure has "been stretched to a lower extent" due to the aforementioned process features, as set out in the reasoning in point 3 of the decision under appeal, compared with an otherwise identical film that has only been biaxially stretched.

The board concludes that the contentious feature does not distinguish the subject-matter of claim 1 from those embodiments of D1 and D4 which were invoked by the appellant in support of its allegation of lack of novelty.

- 1.6 Consequently, the subject-matter of claim 1 lacks novelty vis-à-vis both documents D1 and D4. Thus, the ground for opposition under Article 100(a) EPC in conjunction with Articles 52(1) and 54(1) EPC prejudices the maintenance of the patent.

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:



L. Stridde

A. Haderlein

Decision electronically authenticated