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D E C I S I O N
of 15 May 1997

Case Number: T 0480/94 - 3.2.2

Application Number: 87108613.8

Publication Number: 0249924

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Sanitary napkin with panty gathering flaps

Patentee:

MCNEIL-PPC, INC.

Opponents:

1. VP- SCHICKEDANZ AG
2. The Procter & Gamble Company

Headword:

-

Relevant legal provisions:

EPC Art. 54, 56, 84 and 123

Keyword:

"Novelty - (yes, after amendment)"

"Inventive step - (no)"

Decisions cited:

T 0167/84

Catchword:

-



Case Number: T 0480/94 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 15 May 1997

Appellant:
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office dated 3 May 1994 and
posted 4 May 1994 revoking European patent
No. 0 249 924 pursuant to Article 102(1) EPC.

Composition of the Board:

Chairman: H. J. Seidenschwarz
Members: M. G. Noël
J. C. M. De Preter

Summary of Facts and Submissions

I. By decision of 3 May 1994 the Opposition Division revoked European patent No. 0 249 924 on the ground that the subject-matter of claim 1 lacked novelty vis-à-vis the state of the art represented by either one of documents:

(3): EP-A-0 127 103, or

(2): DE-A-3 326 026.

II. The appellant (proprietor of the patent) lodged an appeal against the first instance's decision on 1 June 1994 and paid the appeal fee in due time. A statement of grounds was filed on 14 September 1994 along with a new claim 1.

III. Amended claim 1 at issue reads as follows:

"A sanitary napkin (10) for placement on and protection of an undergarment (24), the sanitary napkin (10) comprising a central absorbent element (12) and having generally longitudinally extending edges (14), a body facing side and a garment facing side;

the napkin (10) provided with two flaps (26), each affixed at one end (28) thereof to the garment facing side of the napkin (10) with the other end (30) extending freely from and unattached to the napkin (10),

the flaps (26) being provided with means (29) for keeping the flaps (26) in the encircling position;

characterized in that the freely extending end (30) of each flap (26) extends from the garment facing side of the napkin (10) at a point which is inward from the

respective longitudinal edge (14) of the napkin (10) such that the flaps (26) are adapted to encircle and gather the crotch portion (22) of the undergarment (24) toward the longitudinal centerline (32) of the napkin (10) and enable the garment facing side of the napkin (10) to shield the undergarment (24) from body fluids."

IV. In a communication dated 3 March 1997 following a summons to oral proceedings, the parties were informed that according to the Board's provisional opinion, claim 1 in suit did not appear to be objectionable as regards the formal issues and that the discussion would turn essentially on the inventive step of the claimed subject-matter with respect to the disclosure of the above cited prior art documents.

V. Oral proceedings were held on 15 May 1997, in the course of which the appellant and the respondent 2 (opponent 02) argued as follows:

(i) As to the appellant:

- The main feature of the invention is to provide a napkin with two flaps each affixed to the garment facing side of the napkin at an affixation point which is **inward** from the longitudinal edge of the napkin in order to improve the protection offered by the napkin, such that when the lateral flaps are folded back around the crotch portion of the undergarment, the edges of the undergarment are protected from body fluids, irrespective of the width of the crotch portion, and undesirable flow of body fluids on the thighs of the wearer is prevented.

- Claim 1 is clear in itself and, in any case, its subject-matter must be interpreted in the light of the description and drawings. Although the features added at the end of claim 1 are functional in type, the aim of which is to define more clearly the object of the invention and they are fairly supported by the description. The feature related to the undergarment need not be detailed more closely since the sanitary napkin according to the invention is precisely designed to fit undergarments having crotch portions of various shapes and sizes.

- The precharacterizing portion of claim 1 is based on features known from document (3). According to this document, an additional, continuous garment protecting material is applied by adhesive onto the full surface of the garment facing side of the napkin. An affixation point positioned inwardly from the longitudinal edge of the napkin is, therefore, excluded. Moreover, the protecting material projects laterally far beyond the edges of the napkin, as shown on Figure 5, so as to simply encircle the crotch portion of the undergarment, without gathering. As a result, the garment facing side of the napkin is not designed to shield the undergarment from body fluids, in the sense of the present invention.

- In document (2), double-faced adhesive strips are attached in their middle area to the garment facing side of the napkin and project transversely beyond the width of the napkin so as to provide enlargement of the attachment surface in that area of the garment which cannot be reached by the napkin otherwise. Since the napkin is not shown in

use, ie without making reference to any undergarment, the last features of claim 1 in suit are not disclosed. Consequently the subject-matter of claim 1 is novel with respect to the disclosure of either document (2) or (3).

- The subject-matter of claim 1 is also inventive as none of the cited documents suggests the above mentioned main feature with the view to achieving the advantageous effects as claimed. Since the embodiments disclosed in documents (2) or (3) address problems which are different from that set in the present patent (in document (3) nothing but protection of the wearer's undergarment is sought; in document (2) improvement of adhesion to the garment is sought, without increasing the overall size of the napkin, while not in use), the improbable combination of these documents was made by the first instance with the benefit of hindsight. In any case, both documents teach away from the present invention as they do not disclose any gathering of the edges of the undergarment toward the longitudinal center-line of the napkin.

(ii) As to the respondent (opponent 2):

- The amendments made to claim 1 render its subject-matter unclear and result in a broadening of the protection, contrary to Article 123(3) EPC.
- The subject-matter of claim 1 lacks novelty with respect to the respective disclosures of documents (3) or (2) correctly interpreted in the light of their descriptions. In particular, document (3) provides the possibility of not adhering the additional protective layer onto the whole surface of the garment facing side of the napkin, ie at a distance from the longitudinal

edge thereof. Moreover, since the width of the crotch portion of the undergarment may be greater than that of the napkin, gathering of the undergarment edges within the encircling portion as well as a shielding effect by the napkin are necessarily obtained. As to document (2), while it does not show the napkin in position in the crotch portion of an undergarment, the laterally extending adhesive strips have all the features related to the flaps, recited in claim 1, in particular they are also "adapted" to achieve the same gathering and shielding effects when the napkin is used.

- In any case, the subject-matter of claim 1 is obvious having regard to the teaching of the prior art documents. The skilled person aware of the embodiment disclosed in document (3), who was only looking for a more protective sanitary napkin according to the general problem set in the patent in suit, could readily arrive at the subject-matter of claim 1 on the basis of its common general knowledge, given the triviality of the solution. Otherwise, document (2) still clearly suggests to attach the laterally extending flaps to the garment facing side of the napkin, at a position which is inward from the respective longitudinal edges of the napkin. The remaining features of claim 1 are of functional nature and derive necessarily from this measure.

VI. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of claim 1 filed with letter of 14 September 1994, claims 2 to 7 as granted, the description as granted with the modifications submitted by letter of 14 September 1994, and the Figures 1 to 9 as granted.

The respondent 2 requested that the appeal be dismissed.

- VII. The respondent 1 (opponent 01) did not file any written observations on the appeal, and although duly summoned did not appear at the oral proceedings.

Reasons for the Decision

1. The appeal is admissible.
2. Amendments

The amendments made to claim 1 are essentially in the form of features drawn up from the description or transferred from the preamble to the characterising portion of the claim.

Despite wording modifications, the Board is satisfied that the subject-matter of claim 1 as a whole remains clear, in conformity with Article 84 EPC. In particular, it appears clearly that the invention results, as before, from the combination of the following features:

- the napkin is provided with two flaps
- each flap is affixed at one end to the garment facing side of the napkin at a point which is inward from the respective longitudinal edge of the napkin
- the other end of each flap extending freely from this point.

These features are supported by the patent specification (cf. in particular column 6, lines 6 to 13). The functional features added at the end of the claim ("such that the flaps...from body fluids") introduce a limitation of the scope and are supported as well by the patent specification (cf. column 6, lines 51 to 58 and column 7, lines 6 to 11) as by the corresponding text of the application as filed. Therefore, the amendments are not open to objection under Article 123(2) EPC.

With respect to the version as granted, two words of particular importance have been omitted in the version under consideration: "laterally" after "extend" and "affixation" before "point" (cf. patent specification, column 6, lines 40 and 55). However, it results from the content of claim 1 as a whole that each flap can only extend "laterally" from a point which is inward from and, hence, parallel to the longitudinal edge of the napkin, as shown in Figure 1. Since, moreover, said flaps are affixed to the napkin, the "point" at issue can only be understood as a point of affixation. Therefore, the amendments made to claim 1 are not such as to extend the protection conferred, in accordance with Article 123(3) EPC.

3. *Novelty*

3.1 Document (3) represents the closest prior art and describes all the features forming the precharacterising portion of claim 1. As shown in Figure 5 of this document, a sanitary napkin comprises a longitudinally extending central absorbent element 14 and two laterally extending flaps 6 affixed at one end to the garment facing side of the napkin, the other end

extending freely from and unattached to the napkin. The flaps are provided with adhesive means 11, 12 for keeping the flaps in an undergarment encircling position.

The two flaps are formed integrally with an additional fluid impermeable garment protection material 10 adhesively applied, eg by glueing, onto the whole garment facing surface of the napkin, (cf. page 2, second and third paragraphs) so that the freely extending end of each flap extends from the respective longitudinal edge of the napkin at a point which is, therefore, not inward from said longitudinal edge. As shown in Figure 5, the flaps project laterally beyond both the napkin and the crotch portion 13 of the undergarment, the width of which is greater than the width of the napkin, and are then folded over so as to encircle the crotch portion without gathering the edges of the undergarment. Also the description of document (3) is silent about attaining a gathering effect on the undergarment or a shielding effect by the napkin.

Therefore, the subject-matter of claim 1 in suit is distinguished from the disclosure of document (3) by all the features contained in its characterising portion. Consequently, the subject-matter of claim 1 must be regarded as novel within the meaning of Article 54(1) EPC, since the assessment of novelty requires a strict approach (T 167/84, OJ EPO 1987, 369, point 6).

- 3.2 Also document (2) describes a sanitary napkin having all the features recited in the precharacterizing portion of claim 1 and, moreover, laterally extending flaps (adhesive strips 6) attached to the garment facing side of the napkin 1, so that the freely extending end 9 of each flap extends from the napkin at

a point which is inward from the respective longitudinal edge of the napkin. As a matter of fact, the middle area 8 of each adhesive strip is adhered on part of the garment facing side of the napkin, the width of which is greater than the width of the middle area (cf. page 7, second paragraph and Figure 1).

However, document (2) does not describe the napkin in use, ie it is not defined with reference to the undergarment to be protected and in which it is to be placed. For this reason, document (2) is considered by the Board as prior art farther from the present patent than document (3). With respect to document (2) the subject-matter of claim 1 in suit is still distinguished, *stricto sensu*, by the last features relating to the gathering effect on the crotch portion of the garment and to the shielding effect of the napkin, both not mentioned *expressis verbis* in document (2). Therefore, following the same strict approach as before, the subject-matter of claim 1 is also novel vis-à-vis the disclosure of document (2).

4. *Inventive step*

4.1 The napkin described in document (3) suffers from the drawback that, while protecting to some extent the wearer's undergarment, it does not completely protect the wearer, in the sense that since the laterally extending flaps project outwardly from the edge of the napkin, as shown on Figure 5, large amounts of body fluids striking the center of the absorbent pad of the napkin may reach the lateral flaps and, therefrom, continue to flow out onto the thighs of the wearer, causing embarrassment and possibly staining the wearer's outer garment.

Therefore, the problem underlying the present patent was to provide a more protective sanitary napkin, that is to provide better protection for the garment and for its wearer (cf. patent specification, column 2, lines 33 to 45).

4.2 The solution according to the first characterising feature of claim 1, is achieved by providing the affixation point of the flaps **inward** from the respective longitudinal edges of the napkin. The remaining features incorporated in claim 1 during the appeal proceedings ("such that the flaps are adapted to encircle and gather the crotch portion of the undergarment toward the longitudinal centerline of the napkin to shield the undergarment from body fluids") are consequential and are the effects obtained by the previous main feature ("inward") when the napkin is set in place and attached to the undergarment in the way claimed. It is self-evident that the undergarment, the crotch portion of which is essentially variable in width according to the wearer's waist, is not part of the sanitary napkin. But it is referred to in the claim so as to assist in defining more clearly the napkin in use, ie by making reference to the undergarment in which it is to be placed and affixed.

As a consequence, in the Board's judgement, the features added to claim 1 relating to both the gathering and the shielding effects on the undergarment, are regarded as being of minor importance as compared with the main feature and result necessarily from the correct use of the napkin.

4.3 In document (3), Figure 5 (cf point 3.1 above) shows the sanitary napkin positioned in the inner crotch portion of the undergarment and affixed to the outer face of the crotch portion by means of pressure-sensitive adhesive elements provided on the laterally extending flaps.

In fact, since the flaps are designed to fit any undergarment (cf. page 5, lines 1 to 5), ie to encircle a crotch portion of any size, in particular a crotch portion having a width which is greater than the width of the napkin as shown on Figure 5, it is obvious that when the flaps are entirely folded back around the crotch portion, from their affixation points along the longitudinal edges of the napkin, the crotch portion will be confined in a narrower space formed by the encircling flaps, thus causing the edges of the crotch portion to gather, in consequence of being drawn toward the longitudinal centerline of the napkin. In the Board's view, the teaching of document (3) is not restricted to the schematic embodiment illustrated on Figure 5. Simultaneously, the garment facing side of the napkin will act as a shield for the undergarment, since it is sufficient that the crotch portion of the undergarment be drawn beneath the absorbent pad to insure complete protection by the napkin of both the garment and the wearer, as stated in the description of the patent in suit (cf. column 7, lines 6 to 11).

Therefore, in the Board's view, the effects recited in the last features of claim 1 are at least suggested, if not obtained, by the teaching of document (3), irrespective of the position of the affixation points of the lateral flaps with respect to the edges of the napkin. Positioning the affixation points further inward from the edges of the napkin only results in enhancing the above-mentioned effects.

4.4 Starting from the embodiment disclosed in document (3) which provides for protection of the wearer's undergarment (cf. background part of the patent specification column 2, lines 33 to 34), the person skilled in the art looking for better protection of the wearer will automatically think of drawing the affixation point of the flaps towards the centerline of the napkin, in an expectation of increasing the shielding effect thereof.

A direct suggestion to do so is to be found in document (2) which shows unambiguously laterally extending adhesive strips affixed beneath the napkin and inward from the longitudinal edges of the same. The simple observation of Figure 1 in document (2) is sufficient to prompt the skilled person to make use of the measure which was missing in the embodiment of document (3), the same measure necessarily producing the same effects when applied in the same way. Whether or not document (2) differs from the patent embodiment in other respects is irrelevant for the assessment of the inventive step of the solution since the sole determinative feature for arriving at the subject-matter of claim 1 relates to the inward position of the affixation point.

4.5 As rightly submitted by the appellant, the main object of the sanitary napkin disclosed in document (2) is to extend the adhesive strips beyond the longitudinal edges of the napkin surface so as to enlarge the attachment surface in that area of the garment which cannot be reached by the napkin otherwise and, therefore, to increase the efficiency of affixation of the napkin to the garment (cf. page 5).

Document (2) does not specify, however, which side of the undergarment the free ends of the adhesive strips are to engage. The laterally extending strips can be applied in the extended position which is shown on Figure 1, on the inner, body facing side of the undergarment, in the manner as demonstrated by the model produced by the appellant during oral proceedings. But the projecting ends of the adhesive strips can also be bent over the crotch portion so as to encircle the crotch portion for attachment to the outer, lower side of the undergarment in the same way as in the patent in suit. Both possibilities of using the napkin can be equally contemplated, as was also rightly acknowledged by the appellant in its reply of 15 April 1997 (cf. points 24 and 27), the more since the napkin is described in document (2) as such, i.e. before use, without reference to the undergarment in which it is positioned. Using the second possibility, the configuration obtained will be identical in all respects to that shown on Figure 5 of the patent in suit so that, again, the same means will produce the same protective effects on the garment and the wearer.

- 4.6 For the foregoing reasons, the Board is satisfied that the subject-matter of claim 1 can be derived in an evident manner from the teaching of document (3), having regard to the minor modification suggested by document (2). As a consequence, the provisions of Article 56 EPC are not fulfilled.

Order

For these reasons it is decided that:

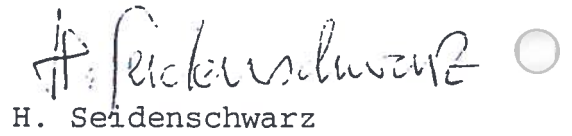
The appeal is dismissed.

The Registrar:

A handwritten signature in black ink, appearing to be 'N. Maslin', with a long horizontal stroke extending to the right.

N. Maslin

The Chairman:

A handwritten signature in black ink, appearing to be 'H. Seidenschwarz', with a circular mark to the right of the signature.

H. Seidenschwarz