

**Internal distribution code:**

- (A)  Publication in OJ  
(B)  To Chairmen and Members  
(C)  To Chairmen

**D E C I S I O N**  
**of 27 March 2001**

**Case Number:** T 0128/99 - 3.2.6

**Application Number:** 92116558.5

**Publication Number:** 0534488

**IPC:** A61F 13/15

**Language of the proceedings:** EN

**Title of invention:**

Hygienic absorbent article having compliant gaskets

**Patentee:**

MCNEIL-PPC, INC.

**Opponent:**

SCA MOLNLYCKE AB

**Headword:**

-

**Relevant legal provisions:**

EPC Art. 54, 83

**Keyword:**

"Main request - novelty (no)"

"Auxiliary request - sufficiency of disclosure (yes)"

"Auxiliary request - inventive step (yes)"

**Decisions cited:**

-

**Catchword:**

-



Case Number: T 0128/99 - 3.2.6

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.6**  
**of 27 March 2001**

**Appellant:** McNEIL-PPC, INC.  
(Proprietor of the patent) Van Liew Avenue  
Milltown  
New Jersey 08850 (US)

**Representative:** Groening, Hans Wilhelm, Dipl.-Ing.  
BOEHMERT & BOEHMERT  
Franz-Joseph-Strasse 38  
D-80801 München (DE)

**Respondent:** SCA MOLNLYCKE AB  
(Opponent) 405 03 Goteborg (SE)

**Representative:** Harrison, Michael Charles  
Albihns GmbH  
Grasserstrasse 10  
D-80339 München (DE)

**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 28 December 1998  
revoking European patent No. 0 534 488 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** P. Alting van Geusau  
**Members:** T. Kriner  
R. T. Menapace

## Summary of Facts and Submissions

I. The appellant (patent proprietor) lodged an appeal, received at the EPO on 27 January 1999, against the decision of the Opposition Division, posted on 28 December 1998, revoking the European patent No. 0 534 488. The appeal fee was paid on 29 January 1999 and the statement setting out the grounds of appeal was received at the EPO on 26 April 1999.

II. The opposition underlying the appeal had been filed against the patent as a whole and was based on Article 100(a) in conjunction with Articles 52(1), 54(1) and 56 EPC, Article 100(b) in conjunction with Article 83 EPC, and Article 100(c) in conjunction with Article 123(2) EPC.

The Opposition Division held that the grounds for opposition cited in Article 100(a) in conjunction with Article 56 EPC prejudiced the maintenance of the patent.

III. Of the documents considered by the Opposition Division, only

D1: GB-A-2 168 253

played a role during the appeal proceedings.

Additionally,

D13: WO-A-92/07536,

a document which forms part of the state of the art according to Article 54(3) EPC, was introduced into the

appeal proceedings by the appellant by letter dated 19 October 1999.

IV. Oral proceedings took place on 27 March 2001; at its end the requests were the following:

The appellant requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the main request as filed on 29 February 2000, or on the basis of the auxiliary request filed during the oral proceedings on 27 March 2001, the text and drawings according to the auxiliary request being:

**Claims:** 1 to 3

**Description:** pages 2, 3, 3a, 4, 7, 8, 9

**Figures:** 1 to 8.

The respondent (opponent) requested that the appeal be dismissed.

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

"An absorbent Article for use in the perineal area of the body to absorb fluid, comprising: a central portion (2) having (i) an absorbent core (7), (ii) a first body facing surface (8), (iii), a second surface (9) opposite of said body facing surface (8) and (iv) right and left longitudinal sides (30) and right and left longitudinally extending gasket cuffs (40,41,42,48) forming a loop which constitutes a compliant gasket (6) with circumferentially extending flange portions (18,10) of the first surface (8) and the second surface

(9), characterised in that said gasket (6) has proximal and distal ends, wherein said proximal end is located along the longitudinal sides (30) and the distal end has a smooth, curved edge surface extending outward from said central portion (2) and upward a pre-determined distance above a portion (2) and upward a pre-determined distance above a portion (16) of said first surface (8) adjacent said sides (30) and in that said gasket (6) has sufficient directional stability avoiding it being folded over said first surface (8) without providing longitudinally elastic members within the loop."

Claim 1 of the auxiliary request reads as follows:

"An absorbent Article for use in the perineal area of the body to absorb fluid, comprising: a central portion (2) having an absorbent core (7), a first body facing layer (8) a second layer (9) opposite said body facing layer (8) and right and left longitudinal sides (30) and right and left longitudinally extending gaskets (43) having proximal and distal ends, said proximal end being located along the longitudinal side (30) and the distal end having a smooth, curved edge surface extending outward from the central portion (2) and upward a pre-determined distance above a portion (16) of said first layer (8) adjacent said side (30), said gaskets (43) having sufficient directional stability avoiding it being folded over said first surface (8), characterized by right and left longitudinal extending gasket cuffs (25, 25', 25'') forming a loop which encloses circumferentially extending flange portions (18, 10) of the first layer (8) and the second layer (9) to constitute said gaskets (43), and right and left

hand wings (19), and each of said separately formed wings having a base portion (44) and a tip portion (45), wherein the base portion (44) of each wing is attached to one of said flange portions of a respective gasket, said wings are adapted to fold over the undergarment crotch (27) whereby said right and left wings (19) define right and left pockets (22) at their bases (44), adapted to retain right and left portions (28) of the undergarment crotch (27)."

VI. In support of its requests the appellant relied essentially on the following submissions:

The subject-matter of claim 1 according to the main request differed from the absorbent Articles disclosed in D1 and D13 by the feature according to which no longitudinally extending elastic members were provided within the loop forming part of the compliant gasket. With respect to D1, gasket cuffs forming a loop were only comprised in the absorbent Article shown in Figure 4. The cuffs of this embodiment did, however, contain elastic elements. The alternative folding means for the elastic means described in D1 on page 1, lines 101 to 115 were not intended for the embodiment of Figure 4, but rather for the embodiment shown in Figure 5. This was clear from the statement on page 3, lines 112 to 114, according to which instead of the elastic strips shown in Figure 4, only other elastic means could be used.

The end portions of the loops (22, 23) shown in D13 were joined by melt-glue beads (24, 25). Since the material used for melt-gluing inherently had an elastic structure, the loops according to D13 did also contain elastic members.

Hence, the subject-matter of claim 1 according to the main request was new.

Having regard to claim 1 of the auxiliary request, the most relevant state of the art was represented by D1.

The subject-matter of this claim differed from that described in this document by the provision of gaskets and wings as described in the characterising portion of claim 1. The combination of these gaskets and wings resulted in forces rotating the gaskets downwards and creating tensions in the body facing layer when the wings were folded over an undergarment crotch.

Consequently the body facing layer was thrust upwards to ensure good contact with the user's perineum, and the gaskets were pressed in sealing contact against the user's tights. Since there was no suggestion in the state of the art of the claimed combination of gaskets and wings in order to prevent leakage of fluid past an absorbent Article and to improve the sealing contact with the user's body, the subject-matter of claim 1 according to the main request was not only new, but also involved an inventive step.

Furthermore, the originally filed application disclosed the invention defined in claim 1 of the auxiliary request in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. In particular, this disclosure provided enough information to determine what was intended by sufficient directional stability of the gaskets and how to get it. The skilled person would immediately see that the criterion of sufficient stability was met, when the gaskets did not fold over the first surface when the claimed absorbent Article was used. Moreover, the

original application showed that sufficient directional stability could be provided by an appropriate selection of material for the loops (see page 11, lines 14 to 35), certain attachment methods of the loops to the gaskets (for example those of Figures 10 and 11), and by an appropriate dimensioning of the loops (see the sentence bridging pages 12 and 13).

VII. The respondent disputed the appellant's views. His arguments can be summarized as follows:

Each of the documents D1 and D13 disclosed an absorbent Article comprising all features of claim 1 according to the main request.

It was true that the loops of the absorbent Article shown in Figure 4 of D1 contained elastics. However, it was clear from page 1, lines 101 to 115 of D1 that the provision of elastics within the loops was only one possibility for forming folding means, and that the elastics could be substituted by crimping the side flaps.

In analogy, instead of the melt-glue beads shown in Figure 7 of D13, other types of adhesive could be used, or the folds could be welded together as suggested on page 12, lines 11 to 14 of D13.

Therefore, the subject-matter of claim 1 according to the main request lacked novelty.

The auxiliary request met most of the requirements of the EPC, except those of Article 83 EPC, because the feature of claim 1 according to which the gasket had sufficient directional stability to avoid it being



folded over the first surface was not disclosed in such a manner that the skilled person could determine what sufficient stability could be and how to provide it. Since the movement of the gasket was affected by many factors, such as the size and shape of the user, the construction, size and materials of the absorbent product, or the way how the absorbent Article was worn, it was impossible to determine the meaning of sufficient stability.

Furthermore, the application failed to describe any measures for providing the gaskets with a stability to prevent folding of the gasket over the first surface.

Consequently, the auxiliary request was not allowable.

### **Reasons for the Decision**

1. The appeal is admissible.
2. *Main request*
  - 2.1 Each of D1 and D13 discloses (see in particular Figure 4 of D1, Figure 7 of D13, and the corresponding descriptions)

an absorbent Article for use in the perineal area of the body to absorb fluid, comprising:

a central portion having

    - (i) an absorbent core (D1: 16; D13: 3),
    - (ii) a first body facing surface (D1: 12; D13: 1),

(iii) a second surface (D1: 14; D13: 2) opposite of said body facing surface, and

(iv) right and left longitudinal sides, and

right and left longitudinally extending gasket cuffs (D1: 27, 29; D13: 22, 23) forming a loop which constitutes a compliant gasket (D1: see page 2, lines 62 to 66; D13: see page 13, lines 11 to 16) with circumferentially extending flange portions of the first surface and the second surface (D1: portions between the seams 32 and the folds of flaps 27, 29; D13: portions between the gasket cuffs 22, 23 and the absorbent core 3),

said gasket having proximal and distal ends, wherein said proximal end is located along the longitudinal sides and the distal end has a smooth, curved edge surface (D1: 34) extending outward from said central portion and upward a pre-determined distance above a portion (central portion) and upward a pre-determined distance above a portion of said first surface (D1: 12; D13: 1) adjacent said sides, and

said gasket having sufficient directional stability to avoid it being folded over said first surface (D1: see page 1, lines 101 to 104; D13: see page 13, lines 17 to 23 in conjunction with Figures 6 and 7) without providing longitudinally elastic members within the loop (D1: see page 1, lines 107 to 115; D13: see Figure 7).

2.2 The appellant's arguments according to which the alternative folding means described in D1 were not intended for substituting the elastic means (21) shown

in Figure 4 of D1, and the loops (22, 23) shown in D13 contained elastic members in form of melt-glue beads (24, 25), cannot be accepted by the Board.

It is true that an absorbent Article having gasket cuffs forming a loop is exclusively shown in Figures 3 and 4 of D1, and that these loops include folding means formed by elastics (21). D1 does, however, not describe that the embodiment shown in Figures 3 and 4 is restricted to a combination of loop-forming gasket cuffs and folding means in the form of elastics. Consequently, the skilled person is not prevented from substituting the elastics shown in Figures 3 and 4 by other folding means as suggested on page 1, lines 101 to 115.

It is also true that the melt-glue beads (24 and 25) shown in D13 may be regarded as longitudinally extending elastic members which are arranged within the loops of the gasket cuffs (22, 23). However, the provision of melt-glue beads is only one possibility for holding the end portions of the loops together. As stated on page 12, lines 11 to 14 of the description of D13, other types of adhesive can be used for this purpose, or the folds can be welded together with the aid of heat or ultrasonic welding techniques, for instance. Consequently, the melt-glue beads (24, 25) shown in Figure 7 of D13 can be substituted by adhesives or welds which have no elastic nature. In this case, the cuffs (22, 23) are free of longitudinally elastic members.

2.3 In view of the considerations above, each of D1 and D13 comprises embodiments which disclose all features of claim 1 according to the main request.

Therefore, the subject-matter of this claim lacks novelty over the disclosure of each document.

With respect to D13 this objection does not apply for the following designated contracting states of the patent in suit: the Republic of Ireland (IE), Liechtenstein (LI), and Portugal (PT).

3. *Auxiliary request*

3.1 Disclosure of the invention

It was contended that the invention under consideration was not disclosed in such a manner that the person skilled in the art could, on the one hand, understand what was meant by "sufficient stability" of the gaskets and, on the other hand, by what measures such stability could be achieved.

3.1.1 In the given context it is immediately clear that the feature according to which the gaskets have sufficient directional stability to avoid it being folded over the first surface means that the gaskets have to be designed and arranged so that they are maintained in an upright position and do not fold over the body facing surface of the central portion when the claimed absorbent Article is worn in the intended manner.

The reason for this measure is to avoid a reduction of the effective area of the body facing surface 8 (see for example originally filed description, page 12, line 31 to page 13, line 5).

Hence, it is obvious that the criterion of sufficient directional stability is met, when folding of the

gaskets over the body facing surface of the central portion is avoided when the claimed absorbent Article is used.

- 3.1.2 It is true that the stability and the movement of the gaskets are affected by many factors. It is, however, obvious for the skilled person that those factors which depend upon the absorbent Article itself, such as its construction, size and materials, have to be selected so that the gaskets are maintained in an upright position, when the claimed absorbent Article is used in the intended way as shown in originally filed Figures 18 and 20.

Those factors which depend upon the use of the absorbent article, such as the size and the shape of the wearer, or the way how the absorbent Article is worn, would be of relevance only in case where the claimed absorbent Article is not used as shown in these Figures. This is, however, obviously not intended.

Therefore, the Board sees no reason, why the plurality of factors influencing the stability of the gaskets could prevent the skilled person from understanding the meaning of the expression "sufficient stability avoiding the gasket being folded over the first surface".

- 3.1.3 With respect to suitable measures for providing the gaskets with sufficient stability so that they are prevented from folding over the first surface when the claimed absorbent Article is worn in the intended manner, the originally filed application teaches that the directional stability of the gaskets depends amongst other things upon the position of the joint

between the gaskets and the central portion (see page 4, lines 22 to 27), the length of the gaskets (see page 5, lines 7 to 13), and the distance by which the gaskets extend above the adjacent portion of the body facing surface (see page 12, line 32 to page 13, line 5).

Furthermore, the skilled person would infer from the originally filed application that a directional stability which prevents the gaskets from being folded over the body side surface of the central portion may be obtained by

- a suitable design of the joint between the gaskets and the central portion (see page 16, lines 25 to page 17, line 10),
- the provision of elastic members (see page 17, lines 14 to 14 to 17), and
- a suitable design of the connection between the wings and the gaskets (see page 20, line 15 to 33).

3.1.4 Having regard to these indications, the respondent's contention that the application failed to describe any measures for providing the gaskets with sufficient stability to prevent them of being folded over the first surface is not supported by the facts. On the contrary, as shown above, the originally filed documents of the patent in suit suggest several possibilities of how such a stability may be achieved.

3.1.5 For these reasons, the originally filed application provides sufficient information for understanding the

meaning of sufficient directional stability and on suitable measures to achieve such a stability.

### 3.2 Amendments

The absorbent Article defined in claims 1 to 3 corresponds to those embodiments of the invention which have been disclosed in the originally filed Figures 14 to 20.

The description and the drawings have been adapted to the amended claims.

Claim 1 differs from claim 1 as granted by the additional features according to which

- the gasket cuffs enclose circumferentially extending flange portions of the first layer and the second layer to constitute the gaskets, and
- the absorbent Article comprises right and left hand wings, each of said separately formed wings having a base portion and a tip portion, wherein the base portion of each wing is attached to one of said flange portions of a respective gasket, said wings are adapted to fold over the undergarment crotch whereby said right and left wings define right and left pockets at their bases, adapted to retain right and left portions of the undergarment crotch.

Furthermore, the wording of claim 1 has been clarified.

Therefore, the auxiliary request does not contain subject-matter which extends beyond the content of the

application as filed and the claims are not amended in such a way as to extend the protection conferred.

In view of these findings, the amendments to the application do not give rise to objections under Article 123(2) and (3) EPC.

### 3.3 Novelty and inventive step

3.3.1 With respect to claim 1 of the auxiliary request and as a starting point for the assessment of inventive step for which D13 is not permissible (Article 54(3) EPC), the most relevant state of the art is represented by D1. This document discloses (see Figure 4)

an absorbent Article for use in the perineal area of the body to absorb fluid, comprising: a central portion having an absorbent core (16), a first body facing layer (12), a second layer (14) opposite said body facing layer and right and left longitudinal sides, and right and left longitudinally extending gaskets (27, 29) having proximal and distal ends, said proximal end being located along the longitudinal side and the distal end having a smooth, curved edge surface (34) extending outward from the central portion and upward a pre-determined distance above a portion of said first layer adjacent said side, said gaskets having sufficient directional stability to avoid it being folded over said first surface (see page 1, lines 101 to 115).

3.3.2 However, the absorbent Article according to D1 does not comprise any wings, and its gaskets are not formed by loop-shaped cuffs which enclose circumferentially extending flange portions of the first and second



layers.

Since at least the latter feature is also missing in D13, and since the other pre-published documents cited in the opposition proceedings are less relevant, which was not disputed, novelty of the subject-matter of claim 1 can be concluded.

3.3.3 Starting from the state of the art according to D1, the object underlying the patent in suit is to provide an absorbent Article that prevents leakage of fluid past the article, and makes good sealing contact with the user's body yet be comfortable (see column 4, lines 3 to 12 of the present description).

3.3.4 This object is achieved by the provision of right and left longitudinal extending gasket cuffs forming a loop which encloses circumferentially extending flange portions of the first layer and the second layer to constitute said gaskets, and right and left hand wings, each of said separately formed wings having a base portion and a tip portion (45), wherein the base portion of each wing is attached to one of said flange portions of a respective gasket, said wings being adapted to fold over the undergarment crotch whereby said right and left wings define right and left pockets at their bases, adapted to retain right and left portions of the undergarment crotch.

3.3.5 Since the documents cited in the opposition proceedings do not suggest a gasket formed of a cuff enclosing flange portions of two layers of an absorbent article, let alone the attachment of wings to such flange portions, the provision of the gaskets and wings as defined in the characterising portion of claim 1 in an

absorbent Article according to D1 in order to achieve the object mentioned above is not obvious.

Consequently, the subject-matter of claim 1 also involves an inventive step.

- 3.5 The above considerations lead to the conclusion that the auxiliary request meets the requirements of the EPC; as a result the patent in suit can be maintained on the basis of this request.

## **Order**

### **For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The main request is rejected.
3. The case is remitted to the first instance with the order to maintain the patent in amended form on the basis of the following documents filed during the oral proceedings on 27 March 2001:

**Claims:** 1 to 3;

**Description:** pages 2, 3, 3a, 4, 7, 8, 9;

**Drawings:** Figures 1 to 8.

The Registrar

The Chairman

M. Patin

P. Alting van Geusau