

## PTAB Litigation: Expert Not Needed to Fold Diaper

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In a patent case over pull-up diapers, the U.S. Patent Trial and Appeal Board ruled that expert witness testimony may not always be necessary.

An expert witness “is not a prerequisite for establishing unpatentability by a preponderance of the evidence,” the board wrote, citing prior precedent. This notion is especially true when the skill or art involved is not too complicated or complex—such as folding diapers.

The specific dispute at issue concerns the side-seam fasteners of pants-like pull-up diapers and how they should be folded when they are packaged. Constructional integrity of diapers and their side seams can be compromised if they are folded improperly when packaged.

In this case of ***First Quality Baby Products, LLC v. Kimberly-Clark Worldwide, Inc.***, petitioner First Quality argues that patent-owner Kimberly-Clark’s folding technique was “obvious to try.” After all, there are only so many ways to fold a diaper, petitioner argued.

Kimberly-Clark refuted such an assertion through its expert witness, claiming that the diapers’ “side panels can be folded or arranged in many ways, including not being folded at all, for positioning in a package.” Furthermore, the patent-owner argued that the petitioner’s claims that there are only a finite number of ways to do so is simply “a conclusory statement” that lacked expert witness testimony to support such an allegation.

The board, however, was unpersuaded by patent-owner’s claims or its expert witness’ testimony.

“Petitioner plainly relies on the limited number of configurations disclosed. . . as suitable for folding disposable underpants in a manner that avoids ‘protrusions’ which cause the package of training pants to swell,” the board wrote. “We agree with Petitioner that it would have been obvious for one of ordinary skill in the art to fold the side panels of [the] training pants over the absorbent assembly in preparation for packaging. . . in order to avoid irregular protrusions and bulges which would interfere with packaging the underpants.”

As any new mom or dad well knows, the compact and uniform manner in which diapers are packaged is by all measures incredibly precise and seemingly perfect—perhaps leaving less unused space in the box than any other packaged product on the market uses. It would not be a stretch to assume that at least some of the members of the Patent Board were individually and personally

aware of such particulars, ultimately having their home life help lead them to their decision.

“To the extent Patent Owner argues that Petitioner’s assertions in the Petition are merely ‘conclusory attorney argument without expert witness testimony as to what the teachings of the cited art would reasonably convey to one of ordinary skill in the art’ we note that ‘[t]estimony from a technical expert can be helpful to show what would have been known to a person of ordinary skill in the art and explain the significance of elements in a claim,’ but it ‘is not a prerequisite for establishing unpatentability by a preponderance of the evidence, ... This is especially true where, as here, the invention and prior art references are directed to relatively straightforward and easily understandable technology,” the board explained.

Again, there are only so many ways to fold a diaper.

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National Law Review, Volume V, Number 175

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