

Cleaning Up Aseptic Packaging Patent Disputes

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Addressing final decisions in two separate *inter partes* reviews, the US Court of Appeals for the Federal Circuit overturned a Patent Trial and Appeal Board (PTAB) claim construction because of collateral estoppel in one case, and in a second case upheld the PTAB claim construction and obviousness determination. *Nestle USA, Inc. v. Steuben Foods, Inc.*, Case No. 17-1193 (Fed. Cir., Mar. 13, 2018) (Hughes, J); *Steuben Foods, Inc. v. Nestle USA, Inc.*, Case No. 17-1290 (Fed. Cir., Mar. 13, 2018) (Hughes, J).

Steuben owns several patents directed to aseptic packaging of foods, which relates to putting a sterile food product into a sterile package within a sterile environment. Nestle sought *inter partes* review of Steuben's patents, and the PTAB issued final decisions finding one patent non-obvious and the second patent obvious in view of the prior art. Nestle appealed the non-obviousness decision, and Steuben appealed the obviousness finding.

In the first case (No. -1193), Nestle argued on appeal that the PTAB had erroneously construed the terms "aseptic" and "aseptically disinfecting." Pointing to a previous Federal Circuit decision involving the claim construction of "aseptic" in a related Steuben patent, Nestle argued that the same claim construction should apply here. The Federal Circuit agreed, applying the doctrine of collateral estoppel or issue preclusion. The Court noted that the prior patent used the term "aseptic" in a similar fashion and provided identical lexicography for the term in the specification. The Court also pointed out that neither party in this case identified any material differences between the patents or prosecution histories that could warrant a different claim construction. Thus, the Court found that collateral estoppel obviated the need to revisit the claim construction issue, vacated the PTAB's construction and non-obviousness finding, and remanded for further proceedings.

The second case (No. -1290) involved a patent related to a method for providing the sterile environment for aseptic packaging where the sterile environment is split into several separate zones, including at least one zone for spraying the sterilant and a second for filling the sterile package with food. The patent's claims require that the concentration of the sterilant be present in a specific ratio in the different zones, including a ratio of at least 5 to 1 in the independent claim and at least 1,000 ppm to 0.1 ppm in a dependent claim. The PTAB construed "sterilant concentration levels in the . . . zones" to mean the sterilant level measured at any point in the zone, including in residual concentration on package surfaces. Using this construction, the PTAB found the claims obvious in view of the prior art.

On appeal, Steuben challenged the PTAB's claim construction, arguing that "sterilant concentration" meant the amount of sterilant in the volume of gas within the zone. The Federal Circuit disagreed, finding that Steuben was attempting to limit the construction to a specific embodiment described in the specification. Instead, the Court affirmed the PTAB's construction, pointing to references in the specification discussing residual concentration of sterilant on lids and surfaces of the packaging. Steuben also argued that the prior art failed to disclose the specifically claimed ratios. Again, the Federal Circuit disagreed, finding that the prior art disclosed multiple zones with different sterilant concentrations, including up to 300,000 ppm of hydrogen peroxide (a sterilant) in the spraying zone. The Court found that this reference, combined with US Food and Drug Administration regulations limiting hydrogen peroxide concentrations to 0.5 ppm in the filling zone, sufficiently taught the claimed ratios, thereby affirming the PTAB's obviousness decision.

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