

## Fed. Circ. Buries Kimberly-Clark's Diaper Patent Row

By **Allissa Wickham**

*Law360, New York (October 10, 2014, 8:51 PM ET)* -- The Federal Circuit on Friday upheld a lower court's findings that claims in two of Kimberly-Clark Worldwide Inc.'s training pant patents were either obvious or anticipated, and that First Quality Baby Products LLC's manufacturing process did not infringe a third patent's claims.

In a per curiam decision reading simply "affirmed," a three-judge panel of the Federal Circuit upheld a Wisconsin federal court's ruling that three claims in Kimberly-Clark's patent for "absorbent articles with refastenable side seams," listed as U.S. Patent No. 6,849,067, were invalid as obvious.

The court also held that claims in Kimberly-Clark's patent for training pants that include "wetness indicating graphics," listed as U.S. Patent No. 6,307,119, were anticipated by prior art.

And finally, the Federal Circuit panel affirmed the lower court's finding that First Quality's process for making disposable training pants doesn't infringe several claims in Kimberly-Clark's patent for a "garment side panel conveyor system and method," U.S. Patent No. 6,513,221.

The order is the latest salvo in the patent battle between Kimberly-Clark and First Quality. In the present case, Kimberly-Clark sued First Quality in Wisconsin federal court in 2009, eventually alleging infringement of seven patents.

Kimberly-Clark filed a motion for a preliminary injunction that same day, arguing a likelihood of success on the merits with respect to infringement claims in four of the patents, and U.S. District Judge William C. Griesbach granted the motion. However, the Federal Circuit reversed the injunction on three of four patents in 2011, and the U.S. Supreme Court later refused to take up the case.

At issue in the current Federal Circuit appeal were three orders handed down by Judge Griesbach in fall 2012. Two of the rulings found the '067 patent obvious in light of a "disposable training panty" patent from 1986, and the '119 patent anticipated by a 1985 patent disclosing a graphic of Mickey Mouse who served as a "wetness indicator" because his arm and facial expression changed when wet, according to the order.

Kimberly-Clark also challenged Judge Griesbach's finding that First Quality's manufacturing process for its rival training pant product doesn't infringe the '221 patent. The company filed its notice of appeal in June 2013, after Judge Griesbach issued his final judgment.

On appeal, Kimberly-Clark argued that the district court mistakenly relied on the printed-matter doctrine in finding the '119 patent was anticipated, and said that the obviousness analysis for the '067 patent was "fundamentally flawed." As for the '221 noninfringement judgment, Kimberly-Clark contended the lower court misconstrued its claims.

First Quality, on the other hand, argued the summary judgment rulings should be affirmed. On Friday, Kenneth P. George of Amster Rothstein & Ebenstein LLP, who argued for First Quality during oral arguments Monday, said the company was happy with the ruling.

"First Quality is pleased that the Federal Circuit affirmed, per curiam, all three of the summary judgment rulings on appeal," George told Law360 in an email.

An attorney for Kimberly-Clark did not immediately respond to requests for comment Friday evening.

The Federal Circuit's order comes just a few months after Kimberly-Clark and First Quality opted to settle a separate patent suit in Pennsylvania federal court on June 5.

The patents-in-suit in the appeal are U.S. Patent Numbers 6,849,067; 6,307,119; and 6,513,221.

Kimberly-Clark is represented by Constantine L. Trela Jr., Ryan C. Morris and Jeremy M. Bylund of Sidley Austin LLP; Marc S. Cooperman, J. Peiter van Es and Matthew P. Becker of Banner & Witcoff Ltd.; and Anthony S. Baish of Godfrey & Kahn SC.

First Quality is represented by Kenneth P. George, Brian A. Comack and Mark Berkowitz of Amster Rothstein & Ebenstein LLP; and D. Michael Underhill, Michael A. Brille and Richard S. Meyer of Boies Schiller & Flexner LLP.

The case is Kimberly-Clark Worldwide Inc. et al. v. First Quality Baby Products et al., case number 13-1493, in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Zach Winnick. Editing by Edrienne Su.