FEDERAL CIRCUIT PATENT LAW CASE UPDATE

Biagro W. Sales, Inc. et al. v. Grow More, Inc., 04-1414 (Fed. Cir. Sept. 13, 2005) (Plager, J.)

The court affirmed the district court's construction of the term "wherein said phosphorous-containing acid or salt thereof is present in an amount of about 30 to about 40 weight percent" in a patent exclusively licensed by Biagro relating to phosphorus fertilizer. The claim term applied to the final fertilizer, not to the buffering compound. Moreover, if multiple salts are present, they are to be aggregated. This led the court to affirm the summary judgment of no literal infringement because the Grow More final product contained no phosphorus acid, and it contained two phosphorus acid salts aggregating to about sixty percent. The claim term at issue was added by amendment, leading to prosecution history estoppel for the DOE.

Biagro is the exclusive licensee of U.S. Pat. No. 5,830,255, owned by the University of California, covering phosphorus fertilizer.

During reexamination, the patentee amended claim 1 by adding a limitation that the phosphorous-containing acid or salt be within the range of 30 to 40 "weight percent." The claim was not clear whether the limitation applied to the initial buffer composition, or the final fertilizer product after dilution with water according to the specifications in the claim. The district court chose the latter interpretation.

The accused Grow More product used a phosphorus acid at the beginning of its processing, but its final product contains no phosphorus acid. On the other hand, the Grow More product contains about 60% of phosphorus acid salt(s) in the final product, arising from two salts, one at about 20% and the other at about 40%.

> The trial court concluded further that, with regard to the content of acid salts in the fertilizer, a fertilizer containing two or more phosphorous-containing salts comes within the literal scope of the claim only if the aggregate amount of such salts is between about 30 and about 40 weight percent.

This led to a summary judgment of noninfringement, both as to literal infringement and under the DOE where the district court applied prosecution history estoppel.

The court rejected Biagro's "chemical equivalent" argument that as long as an accused product contained component chemicals capable of assembly into the phosphorus acid or salt, then the claim language was met.

> However, even if we agree that the labeling convention and guidelines demonstrate that those skilled in the art are familiar with the use of 'chemical equivalents,' the problem is that Biagro cannot tie its extrinsic evidence to the patent or the claim language. Nothing in the patent or prosecution history indicates that labeling standards are relevant to the claimed fertilizer, and nothing in Biagro's extrinsic evidence suggests that a person skilled in the art of fertilizer formulation would necessarily use a chemical equivalent to express the amount of phosphorous acid in a fertilizer that does not actually contain phosphorous acid.

The court also affirmed that acids and salts should be aggregated, in part due to the claim language referring to "at least one" such phosphorus acid or salt.

Under this claim construction, there was no literal infringement. In addition, Biagro could not rebut the Festo presumption of claim scope surrender arising from the amendment.

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