

United States District Court,  
N.D. Ohio, Western Division.

**BANYAN LICENSING, L.C,**  
Plaintiff.

v.

**ALLIED FOAM & PACKING, et al,**  
Defendants.

**Aug. 30, 2000.**

## **ORDER**

CARR.

This is a federal question case in which plaintiff, Banyan Licensing, L.C. (Banyan), the holder of a patent for a leg support pillow, seeks to enforce its patent against rival pillow manufacturers and their distributors. Pending is defendant OrthoSupport's motion for summary judgment. (Doc. 40). For the following reasons, OrthoSupport's motion is denied.

## **BACKGROUND**

Banyan licenses a leg pillow that has been patented by the United States Patent and Trade Office (PTO), and has been assigned United States Patent No. 5, 216, 771 ('771). The hourglass shaped pillow, marketed under the name CONTOUR LEG PILLOW,(R) is for placing between a person's legs along the upper thigh just above the knees. When the user is lying on his side, the pillow aligns the spine, hips and knees, relieving pressure on the muscles, joints and nerves so that one can rest more comfortably:

OrthoSupport markets two rival pillows in the United States and Canada: SLEEP BUDDY(TM) and SLEEP BUDDY PLUS.(TM) In January 2000, Banyan sued OrthoSupport for infringing patent '771, unfair competition, and various violations of the Lanham Act, alleging that OrthoSupport's products copy CONTOUR LEG PILLOW's(R) patented design. (Doc. 1).

OrthoSupport moves for partial summary judgment as to the infringement claims. (Doc. 40). According to OrthoSupport, patent '771 should be invalidated because it provides indefinite information regarding the pillow's dimensions, particularly its longitudinal axis.

## **STANDARD OF REVIEW**

"A patent shall be presumed valid," and the "burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting the invalidity." 35 U.S.C. s. 282. This burden is a heavy one. The party moving for invalidity must prove by "clear and convincing evidence" that a patent "was stillborn or had birth defects, or it is no longer viable as an enforceable right." Roper Corp. v. Litton Sys., Inc., 757 F.2d

1266, 1270 (Fed.Cir.1985). *See also* Ethicon, Inc. v. Quigg, 849 F.2d 1422, 1427 (Fed.Cir.1988) ("Before the courts, a patent is presumed valid and the party asserting invalidity must prove facts to establish invalidity ... by clear and convincing evidence.").

If a claim is fairly susceptible to two or more constructions, the construction adopted "should ... secure to the patentee his actual invention." *Smith v. Snow*, 294 U.S. 1, 14 (1935). *See also* Whitaker Corp. v. UNR Indus., Inc., 911 F.2d 709, 712 (Fed.Cir.1990) ("[C]laims are generally construed so as to maintain their validity, if possible."). Thus, it is not fatal to a patent that certain of its claims plausibly may be given multiple constructions. Rather, the touchstone of invalidity is that the only claim construction consistent with the patent's claim language and written description renders it invalid. *Rhine v. Casio, Inc.*, 183 F.3d 1342, 1345 (Fed.Cir.1999).

Further, there is a presumption that the claims of a patent are unambiguous, and, therefore, comport with the requirements of 35 U.S.C. s. 112, et seq. Patent applications, unlike contracts, are reviewed by patent examiners, quasi-judicial officials trained in the law and presumed to have some expertise in issuing valid patents. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 986 (Fed.Cir.1995) (citing *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1359 (Fed.Cir.1984)). "If the patent's claims are sufficiently unambiguous for the PTO, there should exist no factual ambiguity when those same claims are later construed by a court of law in an infringement action." *Id.*

## DISCUSSION

OrthoSupport points out that the pillow patented by Banyan has a longitudinal axis "no less [in length] than that of a human thigh," as written in the patent's claim section, which OrthoSupport interprets to mean the length of a person's femur, the bone in the upper leg spanning the distance from one's hip joint to one's knee joint. But in actuality, Banyan's pillow has a longitudinal axis the width of a thigh rather than the length of a femur. Accordingly, OrthoSupport contends that Banyan's patent should be invalidated because its description of the pillow's dimensions-by reference to thigh length-is vague, ambiguous, and subject to multiple interpretations.

OrthoSupport further argues that 98 percent of adults have femurs ranging in length from 11 to 20 inches. Banyan's patent, however, specifies that the longitudinal axis of the pillow should be 10 inches to accommodate most users. This is nonsensical, in OrthoSupport's view, because the pillow as designed (i.e., for people with 10 inch long femurs) would be useful to less than 1 percent of the adult population. Thus, OrthoSupport asserts that Banyan's patent does not meet 35 U.S.C. s. 112's requirement that patent claims be "full, clear and exact," nor does it enable a person ordinarily skilled in the field of the invention to make and use the pillow as claimed.

For these reasons, OrthoSupport seeks the invalidity of patent '771.

A patent applicant must specify "one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." 35 U.S.C. s. 112. Patent claims serve two functions. First, they establish that the invention at issue can be patented. *See* 3 Donald S. Chisum, *Chisum On Patents* s. 8.01 (2000). Second, they define the invention and therefore put the public on notice of what, precisely, cannot be made or sold without the patent owner's permission. *Id.* *See also* *Markman*, 52 F.3d at 978 ("[I]t is only fair (and statutorily required) that competitors be able to ascertain to a reasonable degree the scope of the patentee's right to exclude.").

Courts must ascertain, as a matter of law, what the words in the claim mean—a process known as claim construction. *See* *Markman*, 52 F.3d at 977-79 ("[T]he Supreme Court has repeatedly held that the construction of a patent claim is a matter of law exclusively for the court."); *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 796 (Fed.Cir.1990) ("[C]laim interpretation may be resolved as an issue of law by the court on summary judgment ...") (quoting *Johnston v. IVAC Corp.*, 885 F.2d 1574, 1580 (Fed Cir.1989)). Once this has been done, the trier of fact must evaluate whether the claim, as constructed, covers the alleged infringer's product. *Minnesota Mining & Mfg. Co. v. Johnson & Johnson Orthopaedics*, 976 F.2d 1559, 1570 (Fed.Cir.1992).

Three sources are to be considered in claim construction: 1) the claims themselves, 2) the specification, and 3) the patent's prosecution history. *Markman*, 52 F.3d at 979. Disputed terms in claim language should be given the ordinary meaning one skilled in the art would have understood them at the time of the invention. *Id.* at 986. In some cases, expert testimony may be necessary to aid the court. *Fornar Corp. v. Johnson & Johnson*, 821 F.2d 627, 631 (Fed.Cir.1987). Further, extrinsic evidence—such as inventor testimony, dictionaries, and learned treatises—may be received by the court in its discretion, but that evidence cannot be interpreted to contradict the express terms of the claim. *Markman*, 52 F.3d at 980-81.

Here, the claim in dispute is relatively straightforward: patent '771 defines the longitudinal axis of Banyan's pillow to be "a length of no less than that of a human thigh." Does this mean the length of a femur or the cross-sectional thickness of a thigh? Because femurs are considerably longer, on average, than thighs are thick, this question is determinative of the dimensions of the pillow.

On review of patent '771, I hold that the claimed length of the longitudinal axis, when put into context with all the other claims and specifications of the patent, must mean the cross-sectional thickness of a thigh. OrthoSupport has not carried its burden of proving otherwise by clear and convincing evidence, and its summary judgment motion, therefore, shall be denied.

First, the pillow's shape and its placement between the legs when a user is lying down leave little doubt that the longitudinal axis traces the cross-section of one's thigh. The patent describes an hourglass shape which, longitudinally, lies along the thigh's posterior/anterior axis, keeping the legs separated and therefore aligning the spine during sleep:

Pillow has a major longitudinal axis extending through the medial section and the end sections that define a length no less than a typical human thigh in the preferred embodiment. Pillow is sandwiched between the legs of a person in a supine position so that pillow remains between the legs as the person turns from side to side. Opposed portions of the user's ... legs engage pillow and are maintained evenly spaced apart. Proper ventilation between the legs, as well as proper support and alignment of the spine, hips and knees are obtained so as to relieve pain and pressure on muscles, joints and nerves enabling the body to relax and rest comfortably.

That the longitudinal axis corresponds to the thickness of the thigh is further confirmed by numerous diagrams included with the patent. Figure 1 shows that the longitudinal axis of the pillow is oriented along the posterior/anterior axis of the body. *See* Figure 1, *supra*. Similarly, Figures 5 and 6 depict an hourglass shaped pillow designed to cradle the thighs so that the pillow's longitudinal axis is aligned with the thigh's diameter, not the length of the femur:

Second, the patent indicates that a longitudinal axis 10 inches long would be a "proper fit for most individuals." Only if the longitudinal axis refers to the thickness of an average human thigh does this specification make sense. As OrthoSupport's own expert opines, the vast majority of adults-98 percent-have femurs longer than 10 inches. Thus, to read, as I must, the patent in a way that eliminates contradictions between the specifications and the claims, Markman, 52 F.3d at 979, the longitudinal axis cannot possibly correlate to femur length. Rather, as the patent diagrams make unambiguously clear, the longitudinal axis spans the cross-section of the thigh.

It is true, as OrthoSupport counters, that to describe the pillow's longitudinal dimension by reference to thigh length leaves the door open to multiple, potentially inconsistent claim constructions. But this is not enough to render patent '771 invalid. OrthoSupport must show, by clear and convincing evidence, that it is impossible to discern which of those multiple interpretations best fits with the rest of the patent's claims, impeding a person skilled in the art of invention from comprehending, precisely, what has been patented.

OrthoSupport has failed in this burden. When viewed in light of all of the claims, specifications, and diagrams, the correct claim construction is that the pillow's longitudinal axis should be approximately 10 inches long, the length of the cross-section of an average human thigh. No other construction is as reasonable. Thus, patent '771 provides a sufficiently clear explication under 35 U.S .C. s. 112, et seq.

### **CONCLUSION**

It is, therefore,

ORDERED THAT defendant OrthoSupport's motion for summary judgment shall be denied.

So ordered.

N.D.Ohio,2000.

Banyan Licensing, L.C. v. Allied Foam & Packing

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