

Kimberly-Clark Loses Latest Patent Spat Over Pull-Ups Diapers

By **Kevin Penton**

Law360, New York (October 1, 2015, 9:07 PM ET) -- A federal judge in Wisconsin sided with First Quality Baby Products LLC on Wednesday in the latest suit in a yearslong patent battle with Kimberly-Clark, invalidating a patent for the refastenable seams found on Kimberly-Clark's Pull-Ups training pants, determining that the concept is obvious because a patent from the 1980s anticipated it.

U.S. District Judge William C. Griesbach granted defendant First Quality's summary judgment motion that the asserted claims of Kimberly-Clark Worldwide Inc.'s U.S. Patent No. 8,747,379 are invalid because they are obvious and because the same court had previously invalidated a closely related patent held by Kimberly-Clark.

The patent at issue is a "continuation" of a "parent" patent — U.S. Patent No. 6,849,067 — that Judge Griesbach deemed invalid because of obviousness in 2012, a ruling upheld by the Federal Circuit in 2014. Applications for both patents were filed in November 1999 and they share the same drawings, specifications and inventors, according to Wednesday's order.

Judge Griesbach gave kudos to Kimberly-Clark's efforts to develop a commercially viable set of training pants that could either be pulled down by a child if relatively clean or removed via the seams by a parent if more heavily soiled, but related the obviousness determination for the '379 and '067 patents to a 1986 patent by inventor Ruby S. LaFleur that involved a Velcro-like material rather than synthetic adhesives.

"While [Kimberly-Clark's] efforts are commendable and certainly deserving of the financial rewards it has been able to recoup from its investment," Judge Griesbach wrote, "this does not change the fact that adding refastenable seams to the then-existing disposable training pants product in 1998 was an obvious change to address the problem of removing soiled training pants from a young child."

Judge Griesbach's determination arose out of a case in which Kimberly-Clark alleged that First Quality's products infringed the '379 patent. Overall, the two companies have battled over at least 11 different patents in Pennsylvania and Wisconsin federal courts since 2009.

After First Quality countered with its summary judgment filing in the instant case, Kimberly-Clark responded by arguing that because of the technical challenges involved in developing a refastenable training pant that would stay closed, it was not obvious at the time of how to develop a product that would both achieve the goal and be commercially viable, according to its brief in opposition to the summary judgment filing.

Judge Griesbach disagreed with what Kimberly-Clark needed to assert was not obvious, noting that a patent is awarded for an invention, not for the potential commercial viability of a concept.

While the invention claimed in both the '379 and '067 patents are the "refastenable sideseams" added to a disposable training pant, the idea should have been obvious to a skilled artisan because of LaFleur's Velcro concept, the judge wrote.

"Because the obviousness issue in this case is virtually the same as the obviousness issue in the last case, collateral estoppel applies," Judge Griesbach wrote.

Counsel for the plaintiffs could not be reached on Thursday for comment.

"We are pleased that the court found for First Quality on both collateral estoppel and obviousness," said Kenneth P. George, an attorney representing the defendants, in a statement.

The patent-in-suit is U.S. Patent No. 8,747,379.

Representing the plaintiffs are Daniel T. Flaherty of Godfrey & Kahn SC and Marc S. Cooperman, Matthew P. Becker, Aimee B. Kolz, Michael L. Krashin, Timothy J. Rechten and Sean J. Jungels of Banner & Witcoff Ltd.

Representing the defendants are Kenneth P. George, Ira E. Silfin, Brian A. Comack, Benjamin Charkow, Mark Berkowitz and Jessica Capasso of Amster Rothstein & Ebenstein LLP, Michael A. Brille, Amy J. Mauser, Christopher G. Renner and J. Wells Harrell of Boies Schiller & Flexner LLP and T. Wickham Schmidt of the Law Firm of Conway Olejniczak & Jerry SC.

The case is Kimberly-Clark Worldwide Inc. et al. v. First Quality Baby Products LLC et al., case number 1:14-cv-01466, in the U.S. District Court for the Eastern District of Wisconsin.

--Additional reporting by Allissa Wickham. Editing by Rebecca Flanagan.