

Kimberly-Clark Loses Fed. Circ. Rehearing Bid In IP Row

By **Django Gold**

Law360, New York (September 29, 2011, 3:42 PM ET) -- The Federal Circuit on Thursday denied Kimberly-Clark Worldwide Inc.'s petition for an en banc rehearing of its decision tossing a lower court's preliminary injunction against First Quality Baby Products LLC in Kimberly-Clark's patent infringement suit over diaper products.

A vote taken among 10 appeals court judges denied Kimberly-Clark's request that the court's previous ruling reversing the Wisconsin district court's injunction against First Quality be reheard by the entirety of the bench.

Seven judges voted not to reconsider the June 2011 ruling for First Quality, with Judges Pauline Newman, Kathleen M. O'Malley and Jimmie V. Reyna dissenting.

Kimberly-Clark attorney Constantine L. Trela Jr. of Sidley Austin LLP told Law360 on Thursday that his client was disappointed by the ruling and that they were considering their options.

A representative for First Quality was not immediately available for comment.

Kimberly-Clark sued First Quality in September 2009, saying in Wisconsin federal court that First Quality's diapers infringed patents held by the consumer products conglomerate.

The company subsequently filed a motion for a preliminary injunction in March 2010, arguing a likelihood of success on the merits of its infringement claims with respect to U.S. Patent Numbers 6,514,187; 6,776,316; 6,888,143; and 7,156,939.

U.S. District Judge William C. Griesbach granted the motion in May, saying that Kimberly-Clark had demonstrated that it would likely prevail if the case went to trial.

"[Kimberly-Clark] has also established that it will suffer irreparable harm if an injunction is not granted, the balance of hardships lies in its favor and the public interest will be furthered by affording meaningful protection to its patent rights," Judge Griesbach said.

First Quality then appealed the injunction order to the Federal Circuit, successfully arguing that there were questions of validity as to the '187, '143 and '193 patents.

Judge Sharon Prost, writing for the three-judge appellate panel, did however rule that the district court had not erred in granting an injunction on the '316 patent, affirming Judge Griesbach's ruling in that regard.

Following the Federal Circuit's reversal of the injunction for the three patents, Kimberly-Clark applied for a rehearing with the appellate body, asking that the matter be reconsidered before the entire body of Federal Circuit judges.

Though Kimberly-Clark's petition was denied Thursday, Judge Newman said in her dissenting opinion that an en banc rehearing of the matter was necessary to establish precedent.

"The panel's view of the law governing preliminary injunctions warrants correction, for it is in conflict with the law of the Supreme Court, in conflict with the law of all of the regional circuits and in conflict with controlling Federal Circuit precedent," Judge Newman said.

Judge Newman said that the three-judge panel's previous ruling was too hasty in granting First Quality its motion to toss the injunction.

"The panel simply rules that if an accused infringer's position does not lack substantial merit, no preliminary injunction is available," she said. "The appropriate question, however, is whether the movant is likely to prevail on the merits, not whether the accused infringer can raise a defense."

Kimberly-Clark is represented by Constantine Trela Jr. of Sidley Austin LLP and Bradley Wright, J. Pieter van Es, Matthew Becker, Aimee Kolz, Michael Krashin, Katie Becker, Christopher Roth and Marc Cooperman of Banner & Witcoff Ltd.

First Quality is represented by Kenneth George, Ira Silfin and Michael Solomita of Amster Rothstein & Ebenstein LLP.

The case is Kimberly-Clark Worldwide Inc. et al. v. First Quality Baby Products LLC et al., case number 2010-1382, in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Zach Winnick. Editing by John Quinn.

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