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United States Court of Appeals
For The Federal Circuit

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MARINE POLYMER TECHNOLOGIES, INC.,
Plaintiff-Appellee

v.

HEMCON, INC.,
Defendant-Appellant

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United States Court of Appeals
For The Federal Circuit

Appeal from the United States District Court for the District Court of New
Hampshire in Case No. 1:06-CV-100, Judge Joseph A. DiClerico, Jr.

**RESPONSE TO PLAINTIFF-APPELLEE'S COMBINED PETITION FOR
PANEL REHEARING AND REHEARING EN BANC**

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FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

NOV 29 2011

JAN HORBALY
CLERK

CERTIFICATE OF INTEREST

Counsel for the Defendant-Appellant certifies the following

1. The full name of every party represented by us is:

HemCon, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by us is:

None

3. All parent corporations and publically held companies that own 10 percent or more of the stock of the party represented by us are:

None

4. The names of all law firms and the partners and associates that appeared for the party now represented by us in the trial court or are expected to appear in this court are:

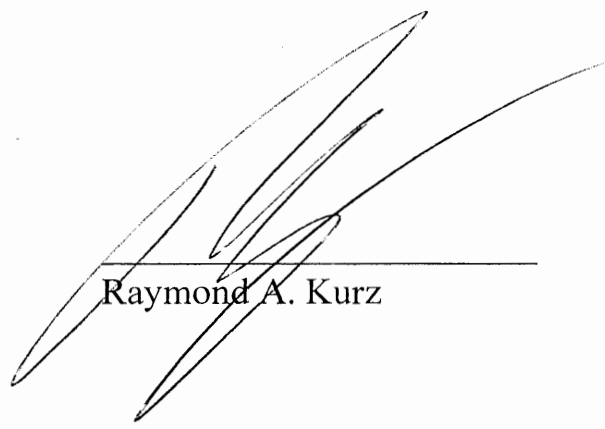
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H. R. Rep. No. 96-1307, pt 1 (1980)10

*Webster’s Third New International Dictionary of the English Language
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TABLE OF ABBREVIATIONS

'245 Patent	U.S. Patent No. 6,864,245
A _____	Page(s) from the Joint Appendix
district court	United States District Court for the District of New Hampshire, the Honorable Joseph A. DiClerico Jr. presiding.
HemCon	HemCon, Inc.
IV _____ ..	Page(s) in Brief of <i>amicus curiae</i> Intellectual Ventures Management, Inc.
Marine Polymer	Marine Polymer Technologies, Inc.
MP _____	Page(s) in Marine Polymer's Principal Brief in this Appeal
Petition	Marine Polymer's Combined Petition for Panel Rehearing and Rehearing <i>en banc</i>
Pet _____	Page(s) in Marine Polymer's Petition
pGlcNAc	Collective term for the claimed polymers
USPTO	United States Patent and Trademark Office
Voda _____	Page(s) in Brief of <i>amicus curiae</i> Jan K. Voda, M.D.

INTRODUCTION

The Majority's decision that HemCon is entitled to absolute intervening rights is entirely consistent with the relevant statutes, applicable precedent, and long-standing patent policy. Through the process of reexamination, a patent owner may obtain claims that are substantively different from the claims that were originally issued by the USPTO. The doctrine of intervening rights, however, prevents a patent owner from enforcing claims that are substantively different from the original claims during the period before the claims exited reexamination. This makes perfect sense and is outlined clearly in this Court's precedent. A patent claim should not be enforceable during a period of time when it did not exist.

The Majority's decision followed this logic and precedent exactly. Specifically, the Majority concluded that all of the original claims of the '245 patent were directed to pGlcNAc that exhibited some biological reactivity. The Majority also determined that, based on Marine Polymer's arguments during reexamination of the '245 patent (which explicitly redefined the key claim term "biocompatible"), all of the claims that exited reexamination were limited to pGlcNAc with no detectable biological reactivity. Because none of the reexamined claims were the same as the original claims, the majority held that HemCon is entitled to absolute intervening rights. Marine Polymer does not dispute the Majority's decision that all of the reexamined claims have a different

scope than the original claims. Instead, Marine Polymer argues that, because of the manner in which the claims were substantively changed during reexamination, intervening rights should not apply.

Specifically, in its Petition, Marine Polymer urges the Court to adopt a rule under which intervening rights would apply when claims are substantively changed during reexamination by altering the actual language of the claims, and would not apply when claims are substantively changed through arguments made to the USPTO. Even where, as here, there has been an expressly stated change in the definition of a key claim term during reexamination. As an example, applying Marine Polymer's proposed rule would result in the following potential outcomes:

1. If Marine Polymer changed the actual language of the original claims so that they expressly recited pGlcNAc with "no detectable biological reactivity," HemCon would be entitled to intervening rights.
2. But, if Marine Polymer accomplished the same substantive change in the claims by explicitly redefining an original claim term through argument, HemCon would not be entitled to intervening rights.

As a further example, if, during reexamination, a patentee actually changed the wording of a claim from "x" to "y," Marine Polymer would agree that intervening rights should apply; however, if a patentee instead argued during reexamination that the original word "x" actually means "y," intervening rights would not apply.

This distinction between changes to claim language and changes made through argument to the USPTO is nonsensical, is contrary to precedent and policy, and would effectively eviscerate the doctrine of intervening rights. The examples noted above demonstrate that a patent owner can accomplish the same change in claim scope by argument as it can by altering the claim language. As a result, the Majority correctly acknowledged that Marine Polymer's proposed exception to intervening rights would provide a clear path for patent owners to avoid intervening rights. This loophole would disrupt the patent system by allowing patent owners to change the scope of their claims based on arguments made during reexamination and to then enforce those reexamined claims based on allegedly infringing activities that occurred before the reexamined claims even existed.

Marine Polymer attempts to justify its self-serving exception to intervening rights by relying on an incorrect interpretation of the relevant statutes, ignoring well-established precedent, and raising unfounded policy concerns. As explained in detail below, the statutes that created intervening rights are not limited in the way that Marine Polymer suggests. Furthermore, this Court has long held that clear and unmistakable arguments made to the USPTO can have the same effect as changes to claim language, and there is no reason to stray from this precedent in the context of intervening rights. And, finally, the Majority's application of

intervening rights is in accord with Congressional intent and prevents reexamination from being used for improper purposes.

BACKGROUND

While a more detailed background is included in the parties' briefs to the panel and the Majority's decision, certain relevant facts are reviewed below.

The district court construed the claim term "biocompatible" to mean "low variability, high purity, and no detectable biological reactivity as determined by biocompatibility tests." Slip op. 4. Based upon this construction, the district court entered its final judgment finding, *inter alia*, infringement on September 22, 2010. Slip op. 6.

During pendency of the district court proceedings, HemCon requested reexamination of the '245 Patent. During that reexamination, the Examiner initially construed "biocompatible" to mean "low variability, high purity and little or no detectable reactivity." Slip op. 5. This construction was based, in part, on the existence of six dependent claims that specifically required non-zero levels of (e.g., some) reactivity. Slip op. 12. Based upon this construction, the Examiner rejected all claims over the prior art.

In response, Marine Polymer argued that the district court's "interpretation of the term 'biocompatible' should be adopted in this reexamination" and cancelled the six dependent claims that contradicted this construction. Slip op. 6; A039449.

The Examiner accepted this argument and adopted the interpretation of the claim term “biocompatible” that Marine Polymer had urged during reexamination, including the new limitation requiring no reactivity. Specifically, the Examiner states that, “with the cancellation of the claims which required that the elution test scores were 1 or 2, the Examiner now agrees with the court’s definition of the term biocompatible as derived from the specification of the Vournakis ’245 patent: “low variability, high purity and no detectable biological reactivity as determined by biocompatibility tests.” Slip op. 6; A39481.

On appeal, Marine Polymer argued that the district court’s construction of the original claim term “biocompatible” (including the no detectable biological reactivity limitation) was correct. And further, Marine Polymer argued that, because the USPTO adopted this construction, the claim scope was not changed during reexamination. MP 36. Thus, Marine Polymer admitted that the reexamined claims are limited to, *inter alia*, “no detectable biological reactivity.” MP 14, 36, 37, 10.

On the other hand, HemCon argued on appeal that the district court’s construction of the original claim term “biocompatible” was incorrect and that the claim scope of the original patent was changed during reexamination. The Majority agreed. Namely, the Majority found that “biocompatible,” as described in the specification of the ’245 patent, included polymers that showed slight or

mild reactivity. Slip op. 12. Thus, prior to reexamination, the claims “permitted p-GlcNAc that exhibited some biological reactivity.” The Majority then found that HemCon was entitled to absolute intervening rights because the scope of the claims changed during reexamination. Slip op. 15 (J. Lourie dissenting). Specifically, before reexamination, the claims allowed for slight or mild reactivity and, after reexamination, the claims were limited to no reactivity. The Majority also remanded the case to the district court for a determination of whether HemCon was entitled to equitable intervening rights. Slip op. 17.

ARGUMENT

A. The Majority Correctly Applied the Relevant Statutes and Case Law.

The Majority held that, if the original claims of a patent are substantively changed based on arguments made to the USPTO during reexamination, then the claims have been amended and intervening rights apply. Slip op. 11. This holding is correct under the statutes that created intervening rights, namely 35 U.S.C. §§ 252 and 307, and this Court’s precedent. This Court has long held that arguments made to the USPTO during prosecution can change the meaning and scope of a claim, and, as the Majority recognized, there is no reason why this precedent should not apply in the context of intervening rights. Slip op. 10-11.

Marine Polymer tries to challenge the Majority’s reasoning by arguing that the relevant statutes require a change to the actual language of the original claims

in order for intervening rights to apply. Pet. 7; *see also* IV. 3; Voda 3. Marine Polymer admits that courts “should not read into the patent laws limitations and conditions which the legislature has not expressed.” Pet. 7 (citing *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 199 (1933)). But, that is exactly what Marine Polymer is asking the Court to do here.

On its face, Section 307 refers to “any amended or new claim,” not amended or new claim language. In relevant part, Section 307(b) states that “any proposed amended or new claim determined to be patentable and incorporated into a patent following a reexamination proceeding will have the same effect as that specified in Section 252 of this title for reissued patents.” 35 U.S.C. § 307(b) (emphasis added); Slip op. 9. Statutory construction “begins . . . with ‘the assumption that the ordinary meaning of the language chosen by Congress ‘accurately expresses the legislative purpose.’” *Microsoft Corp. v. i4i Ltd. P’Ship*, 131 S. Ct. 2238, 2245 (2011) (citations omitted).

The ordinary meaning of the word “amended” refers to change generally and does not carry with it any requirement as to how a change is made. *See, e.g., Webster’s Third New International Dictionary of the English Language Unabridged*, (Philip Babcock Gove ed., 2002) at 94 (defining “amend” as “to reform, convert, or make better” or “to change or modify in any way for the better”). Thus, the phrase “any amended claim” refers to any claim that has been

changed. This is the plain and unambiguous meaning of the language that Congress used in Section 307(b). Marine Polymer acknowledges that the word “amended” means that a change is made. *See* Pet. 6 (“changes in claim language give rise to intervening rights); 10 (“Have those changes (the amended or new claims) caused a change in the scope of the claims?”). However, Marine Polymer seeks to import into Section 307(b) an additional requirement that the language of the claim must be changed. This is not present in the text of the statute. Nowhere does Section 307(b) state that the language of a claim must be changed. Therefore, this additional limitation should not be read into the statute. *Microsoft*, 131 S. Ct. at 2245; *Dubilier*, 289 U.S. at 199.

Section 252 adds that intervening rights apply “unless the [accused product] infringes a valid claim of the reissued patent which was in the original patent.” 35 U.S.C. § 252 (emphasis added); MP 35. Like Section 307(b), the text of Section 252 does not require that the language of the original claims be changed in order for intervening rights to apply. As the Majority recognized, the question of whether a valid claim “was in the original patent” depends upon whether the claims were “substantively changed” during reexamination. Slip op. 9; *Bloom Eng’g Co. v. N. Am. Mfg. Co.*, 129 F.3d 1247 (Fed. Cir. 1997). This, in turn, requires determining “whether the scope of the claims [has changed] not merely whether different words are used.” Slip op. 9; *Laitram Corp. v. NEC Corp.*, 163

F.3d 1342, 1346 (Fed. Cir. 1998) (emphasis added); *Bloom*, 129 F.3d at 1249. And, as this Court has repeatedly held, and Marine Polymer admits, claim scope may be changed by arguments made during reexamination. Slip op. 10-11 (citing *American Piledriving Equip., Inc.*, 637 F.3d 1324, 1336 (Fed. Cir. 2011) (claim scope changed during reexamination despite no amendment being made); *CIAS, Inc. v. Alliance Gaming Corp.*, 504 F.3d 1356, 1362 (Fed. Cir. 2007) (same); *Cole v. Kimberly Clark Corp.*, 102 F.3d 524, 532 (Fed. Cir. 1996); *see also Elkay Mfg. Co. v. Ebco Mfg. Co.*, 192 F.3d 973, 979 (Fed. Cir. 1999)). Thus, this Court’s interpretation of Section 252 and its long-standing precedent regarding the effect of arguments made during prosecution support the Majority’s decision.

Nonetheless, Marine Polymer asserts that Section 252 requires “actual changes in claim language,” citing a law journal article for support. Pet. 9 (citing *Federico*, 75 J. P&T Off. Soc. 161, 206-07 (1993)). While citation to a law journal article hardly supplies the kind of authority needed to undo years of this Court’s precedent, even *Federico* does not support Marine Polymer’s position. *Federico* merely restates the language of Section 252. Pet. 9 (“the statute gives a simple test for determining whether intervening rights cannot be present and this is whether claims of the original patent which are repeated in the reissue are infringed”) (emphasis added). The article does not make any distinctions between changes to the claim language and changes made by argument, and it certainly does not state

that changes to claim language are required in order for intervening rights to apply. Importantly, the test described by Federico is exactly the same test that this Court's precedent requires and the Majority applied. Namely, were the reexamined claims "in the original patent" or were the claims substantively changed? Slip op. 9-11. Therefore, contrary to Marine Polymer's assertion, Sections 307 and 252 do not require changes in claim language for intervening rights to apply.

Furthermore, in enacting Sections 252 and 307, Congress did not intend intervening rights to be limited to changes in claim language. Congress expressly indicated that its goal in passing Section 307(b) was to ensure that a party is not held liable for infringement during the period between the issuance of an invalid patent and the time when that patent is made valid by way of reexamination. H.R. Rep. No. 96-1307(I), at 7 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6460, 6467 ("Thus, a person practicing a patented invention would not be considered an infringer for the period between issuance of an invalid patent and its conversion through reexamination to a valid patent."). Marine Polymer's proposed rule, which exempts argument-based amendments from intervening rights, would significantly impede this goal. As the Majority appreciated, under Marine Polymer's interpretation, a patent owner could narrow the scope of its claims by argument to avoid the prior art, thus converting an invalid patent to a valid patent, and then still enforce that patent during the period when the claims were invalid.

Slip op. 11; *see also Univ. of Virginia Patent Found. v. General Elec. Co.* 755 F. Supp. 2d 738, 748-9 (W. D. VA 2011). This is not the result Congress intended.

B. The Majority’s Decision is Supported by Important Patent Policy.

The Majority’s holding that arguments made to the USPTO during reexamination can trigger intervening rights is supported by important policy concerns, including protecting the public from the enforcement of invalid patents. As the Majority acknowledged, Marine Polymer’s proposed exception to intervening rights would provide patentees with a clear path for avoiding intervening rights and thus allow them to assert claims that otherwise would be invalid. Slip op. 11 (exception would allow patentees to “preserve otherwise invalid claims and, at the same time, avoid creating intervening rights as to those claims”); *see also Univ. of Virginia*, 755 F. Supp. 2d at 748-9 (same). According to Marine Polymer’s proposed rule, patentees could change the scope of their claims to avoid the prior art simply by redefining terms already in the claims, and be assured that it would never trigger intervening rights. The Majority correctly chose not to allow patentees to circumvent intervening rights in this manner.

Marine Polymer argues that the Majority’s holding is “unworkable” because it requires determining whether arguments made during reexamination changed the scope of the original claims. Pet. 12; *see also Voda* 6-7. This concern is completely unfounded. The task of determining whether statements made during

prosecution changed the meaning of a claim term is already a key aspect of claim construction in nearly every patent lawsuit. *See, e.g., Phillips v. AWH Corp.*, 415 F.3d 1303, 1317 (Fed. Cir. 2005) (prosecution history may make “the claim scope narrower than it otherwise would be”). And, Marine Polymer readily admits that this analysis is perfectly workable when determining whether a defendant is infringing a patent. Pet. 13. But, for no apparent reason, Marine Polymer maintains that it is not appropriate in the context of determining whether a defendant is entitled to intervening rights.

Marine Polymer also suggests that the Majority’s holding is problematic because “one cannot know” whether there is intervening rights without first determining the scope of the original claims. Pet. 1-2, 12. What Marine Polymer fails to acknowledge, though, is that this will be true even when there is a change to the actual language of a claim during reexamination. As this Court has held, and Marine Polymer acknowledges, a change in the language of a claim does not trigger intervening rights unless it results in a change of the scope of the original claims. *Laitram*, 163 F.3d at 1346; Pet. 10. Therefore, even when there is a change in claim language, the scope of the original claims must always be determined before granting intervening rights. As such, Marine Polymer’s concerns about “workability” would apply to all of this Court’s intervening rights precedent, and not just the Majority’s holding in this case.

Marine Polymer claims that the Majority's application of this Court's precedent would create "mischief, unfairness, and abuse of the reexamination process." Pet. 13; *see also* IV 6-7. But, Marine Polymer's only suggested abuse is that more reexaminations would be filed because patentees would be bound by statements made during reexamination. Of course, as appreciated by the Majority, patentees are already bound by statements made to the USPTO during reexamination for claim construction purposes. Slip op. 10-11. Furthermore, this Court has consistently held that a statement made during prosecution will only result in the disavowal of claim scope if it is both "clear and unmistakable." *See Martek Biosciences Corp. v. Nutrinova, Inc.*, 579 F.3d 1363, 1377 (Fed. Cir. 2009). Thus, Marine Polymer's concern that "virtually every statement" made during reexamination could trigger intervening rights is misguided. Pet. 14. And, in fact, as outlined above, it is the exception Marine Polymer is advocating that would actually create mischief before the USPTO.

Marine Polymer also argues that reexaminations are "popular enough" and that they are burdensome on the USPTO. However, as shown by the passage of the America Invents Act, Congress is continuing to encourage the increased use of post grant procedures at the USPTO to challenge patent validity. *Leahy-Smith America Invents Act*, Pub. L. 112-29, 125 Stat. 284, (codified at 35 U.S.C. §§ 321-29). Indeed, the Act states that intervening rights shall apply to these new

procedures. *Id.* Creating the exception Marine Polymer is seeking would allow patentees to side step intervening rights thereby frustrating Congress's goal of addressing patent quality at the USPTO while protecting the public from enforcement of invalid patents.

C. Marine Polymer Clearly and Unmistakably Disavowed Claim Scope During Reexamination.

There is no question that the scope of the claims of the '245 Patent were changed during reexamination. The Majority construed all of the original claims to permit some biological reactivity, and Marine Polymer does not challenge that construction in its Petition. During reexamination, Marine Polymer requested that all of the claims be construed to require "no detectable biological reactivity" and then argued that the prior art did not disclose this limitation. A039448; A039449; A039465. The Examiner accepted this construction and allowed the claims on that basis. Slip op. 6; A039481. Furthermore, Marine Polymer admitted throughout the principal brief it submitted to the panel that, after reexamination, all of the claims required "no detectable biological reactivity." MP 14, 36, 37, 10. Thus, it is "clear and unmistakable" that all of the reexamined claims require "no detectable biological reactivity," whereas all of the original claims allowed for some biological reactivity. As the Majority found, this is a change of claim scope.

Regarding a panel rehearing, Marine Polymer now tries to argue that the Majority erred in granting intervening rights because, while there was a change in

claim scope, the change was not necessary to distinguish the prior art. Pet. 4-5. However, this Court's precedent clearly states that there is no such requirement in order for intervening rights to apply. When a patent owner makes substantive changes to the original claims during reexamination, it is "treated as an irrebuttable presumption that the original claims were materially flawed." Slip op. 9 (citing *Bloom*, 129 F.3d at 1249). This "irrebuttable presumption" means that Marine Polymer cannot avoid intervening rights by arguing after the fact that the original claims would have been valid over the prior art. Further, this Court has unequivocally held that whether a patent owner "had to" relinquish claim scope during prosecution in order to overcome the prior art is irrelevant in determining whether there was in fact a disavowal of claim scope. *Elkay*, 192 F.3d at 979.

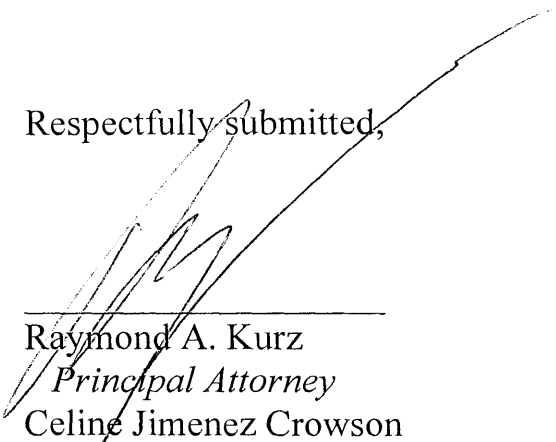
In sum, there is no dispute that Marine Polymer argued for, and the USPTO adopted, a requirement of "no detectable biological reactivity" during reexamination. Because this substantively changed the scope of the original claims, HemCon is entitled to absolute intervening rights.

CONCLUSION

Because the Majority's claim construction determination was correct, and because the Majority correctly granted intervening rights under this Court's precedent and the relevant statutes, Marine Polymer's Petition should be denied.

Dated: November 29, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2011, as indicated below, two copies of the foregoing Response to Marine Polymer's Combined Petition for a Panel Rehearing and a Rehearing *en banc* were served via overnight mail and/or electronic mail on the following counsel for Plaintiff-Appellee:

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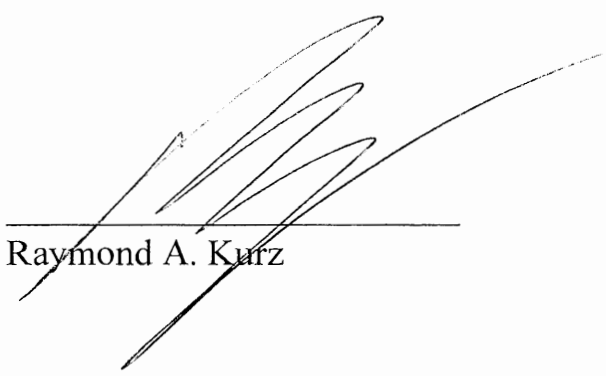
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