

## Federal Circuit Patent Bulletin: *Frans Nooren Afdichtingsystemen B.V. v. Stopaq Amcorr Inc.*

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February 24, 2014

*"It is the usual (though not invariable) rule that, in patent claims as elsewhere, the construction of a clause as a whole requires construction of the parts, with meaning to be given to each part so as to avoid rendering any part superfluous."*

On February 21, 2014, in *Frans Nooren Afdichtingsystemen B.V. v. Stopaq Amcorr Inc.*, the U.S. Court of Appeals for the Federal Circuit (Rader, Taranto,\* Chen) vacated and remanded the district court's summary judgment that Amcorr did not infringe U.S. Patent No. 5,898,044, which related to a composition used for insulating and protecting substrates, such as manhole covers, underground tanks, pipes, and cable sleeves, from corrosion, water ingress, and mechanical stresses. The Federal Circuit stated:

The district court's principal ground for holding that polypropylene in the accused products cannot help to meet the limitation at issue is a claim construction—that "a filler" in the '044 patent can contain only "one material." Because there is no contention that polypropylene itself contains more than one "fraction," as the filler/fractions limitation requires, the district court's construction means that polypropylene can play no role in meeting the limitation—which, instead, must be met solely by either the aluminum trihydrate or the calcium carbonate. We disagree with the district court's construction.

We see no basis in the language or specification for limiting "a filler" to "one material." We have been pointed to nothing about a customary usage of the term itself, and nothing in the specification's use of it, that excludes from being "a filler" a mixture of two different "materials" (whether that word means a mixture of different molecules or something else). The district court did not rely on the claim term or the specification to draw its conclusion. Instead, the court based its one-material construction entirely on its conclusion [regarding the prosecution history]. But we think that the prosecution history does not support the court's adoption of its otherwise-unwarranted narrowing of the term's meaning. . . .

The district court's second ground for holding that polypropylene in the accused products plays no role in meeting the filler/fractions limitation is the conclusion that "[t]he polypropylene in Amcorr's products is not a filler" at all. [W]e are not prepared to affirm the district court's conclusion that, as a matter of law, the polypropylene in the accused products is not serving as a filler. [I]t remains an open question whether polypropylene can be a filler, and thus maybe considered as part of any analysis of whether the accused products meet the filler/fractions claim limitation. . . . It is true that we would have the "authority" to consider the (implicit) denial of Nooren's motion for summary judgment of infringement, i.e., to decide if, as a matter of law, either the aluminum trihydrate or the calcium carbonate itself has at least two fractions with the required properties. But we are not required to do so, and here we exercise our discretion not to proceed to the question of infringement as a matter of law. There has been insufficient exploration in the record, both here and in the district court, of too many questions of apparent relevance to identifying a proper construction of the limitation, which requires, among other things, that the construction itself supply "a meaningfully precise claim scope." . . .

The claim limitation at issue requires a filler that includes "a plurality of fractions each comprising different size particles, and wherein said different fractions have different particle size distributions." It is the usual (though not invariable) rule that, in patent claims as elsewhere, the construction of a clause as a whole requires construction of the parts, with meaning to be given to each part so as to avoid rendering any part superfluous. Terms generally carry their ordinary and customary meaning in the relevant field at the relevant time, as shown by reliable sources such as dictionaries, but they always must be understood in the context of the whole document—in particular, the specification (along with the prosecution history, if pertinent).

[T]he specification, in contrast to the claim's requirement that an individual fraction have "different particle sizes" (a plural phrase), speaks of "each fraction having a different particle size" (a singular phrase) "and a different particle size distribution." . . . A proper claim-construction analysis would have to consider whether this disparity affects the proper construction, which depends on, among other things, the clarity of the claim language and whether a specification statement rises to the level of redefinition or disclaimer.

[S]uch terms can raise an indefiniteness problem. In enumerating problems relevant to arriving at a proper construction, we do not mean to be exhaustive or to suggest the absence of solutions. Nor do we address the consequences for infringement or invalidity, including what questions have to be answered (given the potential availability of polypropylene as part of a filler) in order to arrive at a final judgment. Rather, we are identifying at least some of the problems that require attention in a more focused and systematic claim-construction analysis than the parties and the record currently supply.

