

THE DOW CHEMICAL CO. v. NOVA CHEMICAL CORP., Appeal No. 2014-1431 (Fed. Cir. Aug. 28, 2015). Before Prost, Dyk, and Wallach. Appealed from D. Del. (Judge Stark).

Background:

Dow filed suit against NOVA alleging infringement of two of its patents. A jury found that NOVA infringed the claims, and that the claims were not invalid. These findings were affirmed on appeal, and the district court held a subsequent trial regarding supplemental damages, which were granted. The granting of supplemental damages was appealed. While awaiting resolution of the appeal, the Supreme Court issued its decision in *Nautilus* (134 S. Ct. 3230 (2014)), holding that a patent is indefinite if its claims, read in light of the specification, and the prosecution history, fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention.

In view of *Nautilus*, NOVA argued that Dow's patents were invalid for indefiniteness, and that the award of supplemental damages should be reversed. Dow argued that the law of the case doctrine and issue preclusion prevented reexamining the issue of definiteness, and that their patents were definite.

Issues/Holdings:

Did the law of the case doctrine and issue preclusion prevent review of the supplemental damage award? No. Were Dow's patents invalid for indefiniteness? Yes. Reversed.

Discussion:

The law of the case doctrine indicates that when a court decides upon a rule of law, that decision should continue to govern the same issue in subsequent stages in the same case. Issue preclusion bars successive litigation of an issue of fact or law already litigated and resolved.

The Federal Circuit indicated three conditions must be satisfied to reopen a previous decision under the "change of law" exception to the law of the case doctrine and issue preclusion. The Federal Circuit found that all three conditions were met because (1) *Nautilus* changed the governing law, (2) the previous determination of no indefiniteness applied the old law, and (3) the change in the law compelled a different result. Therefore, the "change of law" exception applied, and the issue of indefiniteness of Dow's patents could be reexamined on the basis of the new standard.

At issue regarding the definiteness of the patents was the claimed feature of having a "slope strain hardening coefficient" in a specific range. At trial, it was determined that there were at least four different methods of calculating the claimed "slope strain hardening coefficient," and each of the four methods resulted in a different value. However, the specification and prosecution history did not provide any guidance as to which method was used. Dow's claims were thus found indefinite and invalid, and the award of supplemental damages was reversed.