

INEOS USA LLC v. BERRY PLASTICS CORPORATION, Appeal No. 2014-1540 (Fed. Cir. April 16, 2015). Before Dyk, Moore, and O'Malley. Appealed from S.D. Tex. (Judge Costa).

Background:

Ineos sued Berry Plastics for infringing its patent directed to polyethylene-based compositions that can be used to form shaped products, such as screw caps for bottles. Berry Plastics moved for summary judgment on the grounds that the asserted claims were anticipated independently by various prior art references, including U.S. Patent No. 5,948,846. Claim 1 of the Ineos patent, the only independent claim, essentially requires a composition comprising at least (1) 94.5% by weight of a polyethylene, (2) 0.05 to 0.5% by weight of at least one saturated fatty acid amide, (3) 0 to 0.15% by weight of a subsidiary lubricant, and (4) 0 to 5% by weight of one or more additives.

The District Court determined that the '846 patent's disclosure of an optional subsidiary lubricant and an optional additive satisfied limitations (3) and (4) because the recitation of ranges beginning with 0% in limitations (3) and (4) renders the claimed subsidiary lubricant and additive in those limitations optional. There was no dispute that the '846 patent discloses limitation (1) or a saturated fatty acid amide, as recited in limitation (2). Further, the District Court found that the '846 patent disclosed points within the range of the saturated fatty acid amide of limitation (2). The District Court, therefore, found the Ineos patent anticipated and granted Berry Plastics' motion for Summary Judgment. Ineos appealed.

Issue/Holding:

Did the District Court err in granting summary judgment? No, affirmed.

Discussion:

Ineos asserted that although the '846 patent discloses a saturated fatty acid amide, it does not disclose the claimed range of 0.05 to 0.5% by weight. The '846 patent discloses the fatty acid in a total quantity of at least 0.1 part by weight per 100 parts by weight and not to exceed 5 parts by weight. While the Federal Circuit disagreed with the District Court that the endpoints disclosed in the '846 patent constituted anticipatory embodiments within the claimed range, the Federal Circuit still found the range anticipated in the absence of any convincing evidence of criticality of the claimed range, citing its decisions in *Atofina* and *ClearValue*.

The Federal Circuit further found that Ineos failed to raise a genuine question of fact about whether the claimed range is critical to the operability of the invention. Ineos argued that because the '846 patent discloses a range that only overlaps with the range recited in limitation (2), and because it presented un rebutted evidence that the range recited in limitation (2) is critical, the District Court should not have found claim 1 anticipated. Citing *OSRAM*, Ineos argued that the District Court at least should not have granted summary judgment in view of the evidence it presented. The Federal Circuit disagreed.

Distinguishing over *OSRAM*, the Federal Circuit held that Ineos did not raise a genuine question of fact regarding the criticality of the claimed range. The Federal Circuit found that Ineos had not established that any of the beneficial properties disclosed in its specification would differ if the range from the '846 patent was substituted for the range of limitation (2). Thus, the Federal Circuit affirmed the District Court's grant of summary judgment.