United States District Court,
N.D. Illinois, Eastern Division.

BAXTER INTERNATIONAL INC and Baxter Healthcare Corporation,
Plaintiffs.
v.
MCGAW, INC,
Defendant.

Feb. 12, 1996.

Conclusions of Law on Claim Construction

LINDBERG**, District Judge.**

Introduction

At this time, the court will lay out the procedure it will follow as to claim construction, and jury instructions and deliberations. The parties have submitted memoranda regarding how to implement the mandate of Markman v. Westview Instruments, 52 F.3d 967 (Fed.Cir. 1995). *Markman* clearly holds that claim construction is the province of the judge, while infringement issues are the province of the jury. Although it is true, as plaintiff points out, that the court in *Markman* states that proper claim construction can be accomplished through post-verdict motions, it also states that the trial court "should have instructed the jury as to the meaning of the claims." Markman, 52 F.3d at 981-982. The failure to do so was rendered harmless error because of the court's decisions on the post-trial motions.

It is highly doubtful that any error concerning the court's failure to properly instruct the jury would be harmless in this case. The disputed language in the claim in *Markman* involved one term; the jury's interpretation of that term was readily apparent from its holding on infringement. In contrast, as plaintiff points out, this case involves 15 claims from three patents, with each claim involving several disputed elements. The jury's interpretation of each disputed term would not be discernible from its verdict. Any attempt to correct erroneous interpretations through post-verdict motions would be futile. Also, considering the amount and complexity of the evidence, requiring the jury to interpret the claims before deciding infringement and validity issues would be much more of an imposition than the delay required to allow the court to properly construe the claims. Therefore, the court will instruct the jury on claim construction before deliberations begin.

As the parties are aware, the court will be out of session for much of the remainder of February. The court consistently reminded the parties of this fact when urging them to more closely monitor the time for the presentation of the evidence. Because of the complexity of the issues, the court is extremely reluctant to allow jury deliberations in its absence. Therefore, closing arguments and jury instructions will take place on Wednesday, March 6. To avoid any danger of the jury forgetting evidence on the issues it will decide, the court will be generous in its allowance of time for closing arguments. This will permit both parties to

thoroughly review the evidence in their cases before the jury.

The court denies all Rule 50 motions; the parties have leave to renew these motions after the jury returns a verdict. At that time, the court will also rule on issues of inequitable conduct and set dates for the submission of any post-verdict motions.

As stated above, the court has construed the patent claims at issue in this case as a matter of law. The court has ascertained the meaning of these claims, to the extent possible, from the claims themselves, the specification, and the prosecution history. At times, the court was aided by the testimony of the experts in this case as to how those skilled in the art would interpret the claims, although the court was cognizant that some of the experts may have been interpreting the claims in light of what was best for their case instead of assessing the true meaning of the claims. Furthermore, the court rejected the testimony of the inventors regarding claim construction as not helpful to the court in determining the meaning of the language they used in their patents.

Construction of the disputed claims proved somewhat difficult due to the ambiguous language and sloppy drafting of the specification and claims in the patents-in-suit. More often than not the ordinary, literal definitions of the words used, as taken from Webster's Third International Dictionary, 1986, were the court's only guidance as to the meaning of the claims.

The court's ruling on the construction of the claims is as follows:

The '234 Patent

At issue in plaintiff's '234 patent is the meaning of certain language in the first two steps of Claims 1, 2, and 3. At the outset, the court has concluded that these claims are mixed claims: the first two steps of Claims 1, 2, and 3 are method-of-manufacture steps, while the last two steps of Claims 1 and 2, and the last three steps of Claim 3 are method-of-use steps. This is readily apparent on the face of the claims, where the first two steps deal with applying respective forces to complete the manufacture of the product, while the remaining steps deal with steps taken by the clinician in the use of the product. Testimony by Vaillancourt that these are entirely method-of-use claims is not persuasive in light of the clear language of the claims, as well as the specification which shows, through the figures, the manufacturing of the injection site, including applying both axial and radial forces, respectively.

The first phrase at issue is included in all three claims of the '234 patent, in different iterations, and reads as follows:

Claim 1: "applying axially directed forces to the septum to form an outwardly, easily wipable exterior peripheral surface;"

Claim 2: "applying axially directed forces to the septum to form an outwardly curved, easily wipable exterior peripheral surface;"

Claim 3: "applying axially directed forces to the septum to form a curved, easily wipable exterior peripheral surface;"

Aided by the testimony of Sheehan, the court concludes, based upon the language of the claims themselves,

the specification, and the prosecution history, that each of these phrases has the same meaning, regardless of the discrepancies in language. Furthermore, the court concludes that the "axially directed forces" have as their sole purpose the forming of the surface of the septum. That surface is formed by these forces as outwardly curved or domed. The court also concludes that the "exterior peripheral surface" is that part of the septum not covered by the housing, and thus easily wipable because it is exposed.

Support for the court's conclusions is as follows: First, support for the court's construction that each phrase has the same meaning is found in the prosecution history of the '234 patent, and especially in plaintiff's responses to the examiner's repeated rejections of Claims 1 and 2 (Claim 3 was added later) (See pgs 77 and 90 of Exhibit 403). Plaintiff argued for the allowance of such claims as a group, with the understanding that the language in each was the same and not slightly different as the above-quoted phrases reflect (See pgs 82-84, 94-96 and 101-111 of Exhibit 403). At no time did the prosecuting attorney distinguish between the claims based upon the phrases "outwardly," "outwardly curved," or "curved." All three claims were treated throughout the prosecution as having the same meaning.

Plaintiff argued during this trial that the first step in each claim has a different meaning due to the variation in language. Vaillancourt testified as such. However, this interpretation is inconsistent with the prosecution of these claims, especially in light of three separate arguments for allowance by plaintiff's prosecuting attorney in which he treated the first step of each claim as having the same meaning.

Second, as mentioned previously, the court concludes that the sole purpose for including axially directed forces is to form the shape of the septum surface. Throughout the specifications, plaintiff explained the purpose of both radially directed forces -- to reseal -- and axially directed forces -- to form the surface. Most tellingly, in column 6, lines 41-47 of the patent, plaintiff states: "The swaged end members apply axial forces to the septum thereby creating the domed exterior peripheral surface...In contradistinction, the tapered internal surface applies radially directed forces to the septum, thereby forcing the opening into a resealed condition."

In addition, as Sheehan pointed out in his testimony, plaintiff's attorney argued throughout the prosecution that the invention was unique, and not anticipated by *Pfister* or *Wolff-Mooij,* because these patents do not teach applying axially directed forces to form an outwardly curved surface (See pgs 82-84, 94-96, and 101-111 of Exhibit 403). This is further support for the court's conclusion that the specific purpose of applying axially directed forces is to form the specified shape of the septum.

Third, there is ample support for the court's conclusion that the claims require the septum to be outwardly curved. The fact that each of the claims has a different iteration of the phrase "outwardly curved" is inapposite, and appears to be the result of sloppy drafting. On its face, Claim 1 does not make sense grammatically. "Outwardly" is an adverb which does not modify anything in this sentence. It only makes sense if you look at Claim 2, where "outwardly" is modifying "curved." Vaillancourt testified that "outwardly" in Claim 1 modified "wipable," but again this does not make sense. The court cannot conceive of a situation where a surface may be inwardly wipable. More likely, the discrepancy in the three claims is due to drafting errors rather than with the specific purpose of distinguishing the claims.

This is amply demonstrated in the prosecution history. Apparently, plaintiff's prosecuting attorney had the examiner add "outwardly" to both Claims 1 and 2 with the understanding that "curved" was still included in those claims. However, "curved" had been eliminated from the claim language by plaintiff's in-house counsel, and was only re-added to Claim 2 by a Certificate of Correction. Therefore, it was a lack of

communication that resulted in the discrepancy in language rather than an intent to vary the claims.

Even further support for this construction is found in plaintiff's attempts to distinguish the prior art from the claims in the '234 patent. Plaintiff's prosecuting attorney argued vigorously on three separate occasions that the invention was not anticipated by any prior art because the prior art "does not even arguably suggest applying axially directed forces to the septum to form an outwardly curved surface." (pg 82 of Exhibit 403). The attorney also distinguished the invention from *Pfister* by stating that *Pfister* contains "a deformable barrier means in the form of a split deformable resilient foam block, which is recessed inwardly from the open end so as to prevent accidental contact...", and thus teaches away from "an outwardly curved surface." (pg 83 of Exhibit 403). There is no doubt after reading the prosecution history that plaintiff distinguished its invention from the prior art based upon the outward curve of the septum, as well as applying axial forces to create that outward curve. Thus, each claim is read to contain the limitation "outwardly curved" despite the incomplete language actually used.

The specification also dictates this conclusion. The specification details the process of making the outwardly curved or domed surface, and explains how this surface is easily wipable. For example, column 6, lines 1 - 5 state: "The surface has been forced into a dome-like shape by annular, U-shaped, swaged end members carried by the first end. The dome-like shape of the surface can extend beyond a surface of the first end. This facilitates cleaning the surface."

Vaillancourt has testified to the contrary. In his opinion, under the claim language and specification the surface of the septum could be concave, convex, or flat. He interprets "outwardly" as the exposed section of the septum, and "curved" as merely a clarification. In his view, Claims 1 and 2 should both say "outwardly" only, with no reference to the shape of the septum. However, there is one major fallacy with this argument that demonstrates once again that "outwardly," "outwardly curved," and "curved" all have the same meaning: if outwardly means the exposed surface of the septum, then Claim 3 must describe a septum completely encased in plastic, since it does not contain the word "outwardly." Vaillancourt's reading of these three claims is nonsensical and borders on ridiculous. The court will therefore disregard it.

Similarly, one sentence in the specification states, contrary to the clear teachings of the specification as well as the prosecution history, that the septum could be flat. (Column 6, lines 48-49). This statement is not supported by the claims and is thus not persuasive that the septum could be other than outwardly curved.

Finally, as to this first step in Claims 1, 2, and 3, the support for the court's finding that the exterior peripheral surface is that portion of the septum that is exposed lies in the clear language of the claims themselves. "Exterior," in the ordinary, literal sense of the word, means external; that which is on the outside. Therefore, the exterior portion of the septum is that part which is outside the housing. In addition, exterior peripheral surface is modified, in each of the claims, by "easily wipable." A septum that is covered by a plastic housing is not wipable at all, let alone easily wipable. Only the exposed portion is easily wipable.

The second step of Claims 1, 2, and 3 of the '234 patent is also in need of interpretation by the court. Step two reads as follows in the respective claims:

Claims 1 and 2: "applying radially directed forces to the septum to reseal the slit therein;"

Claim 3: "applying sufficient radially directed forces to the septum to reseal the slit therein preventing fluid

flow therethrough;"

The court concludes that because the purpose of the radially directed forces in all three claims is to reseal, the radially directed forces must be strong enough to affect the center of the septum, thus causing the slit to reseal and not leak. Throughout the specification, plaintiff stressed the importance of having the slit reseal. For example, in column 1, lines 50 - 62, plaintiff discussed the reasons for strong resealability, including prevention of contamination and leakage. Again in column 2, lines 27 - 30, 32 - 35; column 3, lines 24 - 26; column 6, lines 19 - 26, 45 - 47; and column 8, lines 41 - 43, plaintiff discusses the use of radially directed forces to reseal.

Plaintiff in this case has presented testimony, again from Vaillancourt, that the presence of axial forces may meet the claim requirement of "radially directed forces" in that axial forces will result in radial forces that reseal. The court does not agree with such a broad interpretation of radially directed forces. As mentioned above, it is clear that axial and radial forces have distinct purposes in this patent. Nowhere in the specifications or prosecution history is it mentioned that axial forces alone can create a reaction that leads to resealing the slit. Indeed, as Sheehan pointed out, axial forces alone would urge the slit to remain open, since those forces push down on the edge of the septum to create the dome.

It is the radially directed forces -- forces emanating from the sides of the septum and directed inward toward the septum slit -- that reseal. Any radial force that comes from axially directed forces is a radially resultant force rather than a radially directed force.

The '554 Patent

At issue in plaintiff's '554 patent is the meaning of certain language in Claims 1, 3, and 5. One element of Claim 1, an apparatus claim, is "an annular shield wall extending axially beyond the distal end of said connector member..." Because Claims 3 and 5 are dependent upon Claim 1, these claims also contain the above phrase. In addition, Claim 5 includes the phrase "...annular shield wall extends axially from transverse wall." What is in need of interpretation here is the meaning of "annular shield wall."

Aided by the testimony of Vaillancourt, Browne, and Sheehan, the court concludes, based upon the language of the claims themselves, the specification, and the prosecution history, that an annular shield wall is a cylindrical hollow protective barrier which surrounds a centrally located hollow, elongated cylindrical blunt piercing member. (See column 7, lines 1-4). The claim also requires that this hollow protective barrier extend axially beyond the blunt cannula, or, in other words, be longer than the blunt cannula. The purpose of this protective barrier is to maintain the blunt piercing member in an aseptic condition by preventing touch contamination. (See column 7, lines 9-11).

The court finds its support for the above claim construction from the ordinary meaning of the words "annular," "shield," and "wall." Annular means ring-like or cylindrical; a shield is a structure, device or part that serves as a protective cover or barrier; and a wall is a partition. Inherent in the word shield is the function of the invention - to prevent touch contamination. The requirement that the shield go axially beyond the cannula also serves the function of protection. Thus, the phrase must be construed with that function in mind.

Further support for construing the phrase in light of its function is found in the '554 patent's prosecution history. Plaintiff's attorney argued, in light of an anticipation rejection, that neither *Cox* nor *Herlitze* have a

member that prevents touch contamination, nor do these patents claim as a function of their "shields" protection from touch contamination (pgs 86-87 and 97-99 of Exhibit 401). Thus, plaintiff distinguished its shield on the basis of its touch-prevention function, and that must be included as part of the definition.

Defendant urges the court to construe the phrase as requiring the shield to extend axially beyond the cannula in every radial direction, such that any cut-out or hole in the shield would not meet the limitation. The court declines to read that requirement into the phrase. What is required is that the annular shield wall prevent touch contamination. It is for the jury to decide, when determining whether defendant's device infringes, what configuration of the wall would or would not perform this function.

Claim 3 includes the word "bore," the interpretation of which is also in dispute. Claim 3 reads as follows: "A cannula as in Claim 1 in which said proximal end tube flow path is a bore and in which said distal end tube flow path is a bore having a diameter less than the diameter of said proximal end tube bore."

The court concludes that a "bore," as used in Claim 3, is a hollow tube. Neither the specifications nor the prosecution history shed light on the meaning of this term in the context of the claim, so the court relied upon the ordinary meaning of the word: an interior cylindrical opening usually running the entire or nearly the entire length of an object; the interior diameter of a tube (as of a hypodermic needle). Such a definition is consistent with that given by Sheehan, who stated that a bore is a tube, like a cannula.

Plaintiff contends that a bore, by definition, must contain an opening at the end of the tube. The court does not read that restriction into the word. The focus of the definition is on the hollowness of the tube, and not whether there is an opening or where such an opening may be located.

The '648 Patent

At issue in plaintiff's '648 patent is the meaning of particular phrases in a number of claims, including 16, 17, 18, 22, 29, 31, 36 and 37. The first phrase for the court to construe is found in Claim 16, as well as dependent Claims 17, 18 and 22, and reads as follows: "resilient sealing means, carried by said housing overlying said channel, for sealing said first end..." While it is clear that this is a means-plus-function claim, with the function being sealing said first end, an interpretation of "resilient sealing means" is required.

Aided by the testimony of Sheehan and Vaillancourt, the court has concluded, based upon the language in this claim and the specification (the prosecution history sheds no light on this issue), that the resilient sealing means is the septum under enough radial compression to reseal the slit therein. Support for this conclusion is as follows: First, a means-plus-function claim can only be interpreted in light of the function. The claim states that the function of the resilient sealing means is to reseal the first end of the housing. The specification teaches that radially directed forces acting upon the septum are what cause the slit to reseal. For example, column 2, lines 27-30 read as follows: "The sealing member is subjected to radially directed forces by a tapered interior surface of the first end of the housing. These forces tend to reseal the opening in the sealing member." (See also Column 1, lines 50-62). The septum by itself would not reseal the slit, or, therefore, seal the first end. Thus, the resilient sealing means must be the septum under radial compression.

This is further illustrated by Vaillancourt's testimony. Vaillancourt interpreted the phrase "resilient sealing means" as referring to the septum only. However, in later testimony, when discussing Claim 18 (a dependent claim of Claim 16), Vaillancourt interpreted the phrase "cylindrically shaped resilient member" as referring to a round septum. Taking both of Vaillancourt's definitions, Claim 18, which reads "An injection

site as in Claim 16 with said sealing means including a cylindrically shaped resilient member" would mean: An injection site as in Claim 16 with said septum including a round septum. Under this interpretation of the separate phrases, Claim 18 would not make sense.

However, in interpreting the resilient sealing means to mean a septum under radial compression, Claim 18 would make sense: An injection site as in Claim 16 with said septum under radial compression including a round septum."

Plaintiff uses the phrase "resilient sealing means" inconsistently throughout the '648 patent, and it is often not clear what is actually meant by "resilient sealing means." For example, Sheehan pointed to other claims in the patent, not in dispute in this litigation, which use this phrase in a similar vein to Claim 16. Claim 1 uses "resilient sealing means," and includes the language "said sealing means including a generally cylindrical sealing member positioned in said first end..." Again, interpreting the disputed phrase as comprising the septum only would render this sentence nonsensical.

On the other hand, Claim 29 uses the phrase in a way that indicates it refers to the septum by itself. Claim 29 details the position of the sealing means, stating "means for retaining said sealing means adjacent said lip including force-applying means for urging said resealable opening to a sealed condition..." If sealing means in this claim were to indicate a septum under radial resealing compression, the sentence mentioned above would be redundant, i.e., a means for retaining the septum which is under radial compression adjacent said lip including force-applying means for resealing the slit.

Therefore, the court has looked only to the specification and specific use of the phrase in Claim 16 and its dependent claims. For the reasons stated above, "resilient sealing means" in this claim is construed to mean the septum under radial resealing compression.

The next phrase in dispute in the '648 patent is also contained in Claim 16 (and thus Claims 17, 18 and 22 as dependent claims), and reads as follows: "...said retaining means including a deformation of said housing first end against said exterior peripheral surface of said sealing means, said first end deformation applying axially directed forces to said sealing means." Specifically, the parties disagree as to the meaning of "a deformation." The court concludes that "a deformation" should be construed as a structure which is the result of a change or alteration in shape.

It is undisputed that the element "deformation" is a part of a means-plus-function claim, but it is not the means and therefore does not have to be construed as one. The "retaining means" is the means in this phrase, and "a deformation" is to be included as a part of that means. Therefore, deformation is construed independently of the means-plus-function element.

However, this does not mean the court ignores the function of the deformation, which is to apply axially directed forces to said sealing means. The function sheds light on the meaning of the term, as does the specification, including the drawings.

While the specification never uses the word "deformation," it does repeatedly discuss the use of swaged end members or a retaining member to apply the axial forces. For example, column 2, lines 36-42 read: "A retaining member carried by the first end of the housing can be used to retain the sealing member within the housing. The retaining member can be generally U-shaped. Alternately, the retaining member can be formed as a coiled spring. The retaining member applies axially directed forces to the sealing member."

The specification also indicates how the retaining member becomes U-shaped or a coil spring. Column 8, lines 40-41 state: "The first end has been swaged to form an annular U-shaped retaining member," while column 9, lines 41-43 state: "The first end can be swaged so as to form an annularly shaped, spiral, spring like member." Taking these parts of the specification as a whole, it becomes apparent that what is meant by "a deformation" in Claim 16 is the result of an alteration of the shape of the first end, namely by swaging.

Further illustrative of this conclusion are the figures contained in the specification. Figures 19, 20, 21, 24 and 26 show the first end of the housing before it has been changed in shape. Figures 22, 23 and 25 show the resultant structure, or deformation. It is quite clear from these figures, taken together with the specification, that plaintiff was describing the result of a changing of the shape by swaging.

Further support for the court's conclusion can be found in the ordinary, literal meaning of the word "deformation", which is defined as the action of deforming or the state of being deformed. Thus, the definition of "deform" becomes relevant. Deform means to alter the shape of or to change the shape of a body by the action of forces. Therefore, "a deformation," as used in Claim 16, is the state after the change in shape.

Plaintiff has tried to argue that "a deformation" is broader than the court's interpretation, and that it should not take into account the process of making this structure. However, it is impossible to define this word, specifically chosen by the plaintiff in drafting the claims, without reference to its root word "deform." As Sheehan stated in his testimony, the process is inherent in the word itself. "A deformation" is simply the result of this process.

Turning to the next claims at issue, Claim 29 and Claim 31 as dependent upon 29, the court must construe the phrase "...an annular channel formed in said first end bounded in part by an annular lip." Specifically, the parties dispute the meaning of "annular channel" and "annular lip." The court concludes that "annular channel" should be construed to mean a ring-like gutter, groove or furrow which is large enough to receive displaced septum material, and "annular lip" should be construed to mean a septum-supporting ridge which also serves as one wall of the annular channel.

There is little discussion as to the meaning of these terms in the specification, and no discussion of them at all in the prosecution history. Therefore, the court must construe these phrases in light of the ordinary, literal sense of the words in light of what the specification teaches about the functions of these elements. As mentioned in the ruling on the '554 patent, "annular" means ring-like or cylindrical. Thus, both the lip and the channel in this claim must be in the shape of a ring.

A "channel" is best defined, in the context of this claim, as a gutter, groove or furrow. The gutter, groove or furrow, as the specification teaches and as Sheehan and Vaillancourt testified, exists to give displaced rubber septum a place to go. (See column 2, lines 49-53, and column 7, lines 18-21). Rubber displaces into this channel both during swaging and once the blunt cannula is inserted. Therefore, in order to be an annular channel, it must be large enough to receive the displaced rubber.

Defendant urges the court to construe the channel as being an uninterrupted groove. The court does not read such a limitation into the use of the word channel. What is necessary is that the channel be able to receive displaced rubber septum material during the processes mentioned. It is for the jury to decide whether any interruption in the channel prevents it from receiving the displaced septum, and thus rendering it outside the

definition of an "annular channel" in this claim.

The annular lip, as mentioned by Sheehan, is a fulcrum or support for the septum, to keep it from sliding into either the annular channels or the flow path. As the specification puts it, the annular lip is a "septum supporting ridge." (Column 6, lines 27-28). Besides supporting the septum, the annular lip also serves as one of the walls for the annular channel (See column 6, lines 27,-28). The width of the lip is irrelevant, as long as its width does not interfere with the two functions listed above.

The final claims in need of construction in the '648 patent are Claims 36 and 37, as dependent upon 36. Claim 36 reads as follows: "A method of making a pre-slit injection site having a housing and a septum comprising the sequential steps of : 1) forming a fluid flow path through the housing; 2) inserting the septum into an end region of the housing; 3) applying radially directed resealing forces to the septum; and 4) forming a resealable opening at least partway through the septum either during or after the preceding step." The interpretation of the first three steps is at issue here.

There is very little guidance in the prosecution history or specification as to the proper construction of these phrases, except for step three, which will be discussed below. Therefore, the court had to construe the phrases in light of their ordinary, literal meaning and the context in which they are used in this claim.

First, Claim 36 is a method-of-manufacture claim, requiring that each step be done in order, or sequentially. What is being manufactured in this claim is the injection site. The first step requires the maker to form a fluid flow path through the housing. The parties disagree as to whether this means the flow path must go through the housing piece entirely or whether the path is only the area below where the septum will be placed during the next step. The court concludes, based upon the ordinary meaning of "through," that the fluid flow path must be formed from one end of the housing to the other.

"Through" is defined as: a penetration of or passage within, along or across an object, substance, or space usually from one side or surface to the opposite one; passage from one side to another of an object. This definition indicates that plaintiff meant to convey, in step one, that the fluid flow path was to run from one end of the housing to the other.

Further support for this conclusion can be found in the sequence of steps chosen by plaintiff in drafting the patent. This path is created before the septum is placed in the housing. It would not make sense to interpret the path as ending at an element of the invention that is not yet a part of the invention. In addition, for the path to end at a certain spot along the housing, where the septum has not yet been put into place, the maker would have to erect a barrier at some point in the path. This would defeat the purpose for the invention: namely, this barrier would prevent the blunt cannula from entering the fluid flow path.

Support from the specification comes from plaintiff's repeated reference to a specific part of the housing when indicating where something is located in the housing. For example, column 2, lines 25-26, state: "The housing can also be formed with the first end including an annular channel," and column 7, lines 59-62, state: "Curved end regions of the members slidably engage the second end of the housing when the piercing member of the blunt cannula has been forced through the pre-formed opening..." A reference to which end of the housing has the fluid flow path is conspicuously absent from the first step of Claim 36. Instead, the claim states the path is formed *through* the housing.

Plaintiff points to other language in the specification, which it contends demonstrates that the flow path is

only formed underneath the septum. Specifically, plaintiff references column 6, lines 52-53, which read: "The resealable septum closes the fluid flow path." Contrary to plaintiff's contention, the court concludes that this language further supports the court's construction of the claim. Closing a path implies that it was previously open. Therefore, the flow path was open until the second step, when the maker inserts the septum and closes it off.

The second step of Claim 36 is to insert a septum into an end region of the housing. The court does not feel that this phrase needs much in the way of explanation. The maker places the septum into an end region, either the first end or the second end (if possible).

The third step, applying radially directed resealing forces to the septum, is construed in the same manner as step two of Claims 1, 2, and 3 of the '234 patent, as previously mentioned. Again, the plaintiff clearly distinguished the function of the radially directed forces and the axially directed forces in both the specification and the prosecution history. Therefore, what must be done in step three of Claim 36 is to apply forces emanating from the sides of the septum inward toward the slit, and they must be strong enough to reseal that slit. Any radial force that comes from axially directed forces is a resultant rather than directed force, and thus does not meet the requirement of step three.

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