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## Escitalopram injunctions granted in Denmark based on reversed burden of proof

Anders Valentin (Bugge Valentin) · Monday, May 3rd, 2010

During the past 9 months in Denmark, the pharmaceuticals manufacturer and patentee, H. Lundbeck A/S, has obtained two interlocutory injunctions in Denmark against wholesalers marketing generic versions of Escitalopram.

In both cases H. Lundbeck A/S argued successfully that the patent-in-suit fulfilled the conditions of the Danish Patents Act § 64a (similar to the Art 35 CPC) according to which a patentee may rely on a reversed burden of proof when the patent-in-suit is a process patent for obtaining a new product. In practice, the reversed burden of proof shall entail that the defendant shall prove that the product marketed by has not been obtained by way of the patented process.

According to the provision in the Danish Patents Act implementing the reversed burden of proof, § 64a, the alleged infringer shall not only render it probable or likely that a non-infringing method is used, but he shall in fact lift the burden of proof in full by proving that a non-infringing process has been employed.

While the application of § 64a is a straight-forward matter in cases on the merits, the issue raised in of the mentioned Escitalopram cases was whether the burden of proof, if reversed, should meet the standard of cases on the merits (i.e. proof proper) or the same standard of proof that applies to the patentee when filing an application for an interlocutory injunction i.e. rendering probable or likely.

In the first of the two cases, the enforcement court ruled that regardless of the fact that a patentee would only have to meet the standard of rendering probable or likely in the enforcement court, § 64a should be taken literally as to the burden of proof standard imposed on an alleged infringer of a process patent for a new product.

In the second case, which was decided on 15 April 2010, the enforcement court ruled, however, that the standard of proof applicable to the alleged infringer should not differ from the standard of proof applicable to the patentee – i.e. in both cases the standard of proof should be rendering probable or likely.

The latter solution seems the correct one, not least taking into account the fact that both parties should be treated equally and so whether the burden of proof is reversed shall have no bearing on which standard of proof that shall be applied, but only whether the (same standard) burden of proof shall be reversed.

These two rulings from enforcement courts are the first regarding § 64a in Denmark and there are as yet no higher instance decisions regarding this issue.

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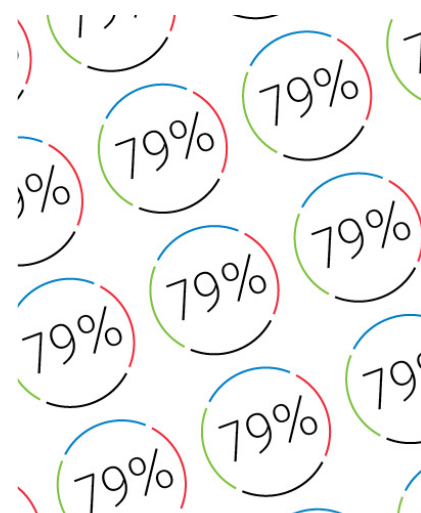
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This entry was posted on Monday, May 3rd, 2010 at 11:07 am and is filed under [Chemical Engineering](#), [Denmark](#), [Enforcement](#), [Injunction](#)

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