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Changed Patent and Final Decision of the Infringement Court

Thomas Musmann (Rospatt Osten Pross) · Friday, February 1st, 2013

by Bernward Zollner

In a case called “Produktionsrückstandsentsorgung” the German Bundesgerichtshof has discussed a case in which the claim of the litigious patent had been amended and narrowed with respect to the scope of protection after the judgment of the appeal court had been handed down. The appeal court therefore, could not have discussed the amendment in the infringement judgment (in which an infringement was assumed). The appeal court had not admitted the further appeal (Revision). While the complaint against the non-admission of the further appeal was pending at the German Bundesgerichtshof the patent’s claim was amended and restricted by the German Bundespatentgericht. Although the German Bundesgerichtshof does normally not deal with factual issues in the proceeding concerning the complaint against the non-admission of the further appeal, in this particular case the attacked embodiment was indeed considered with respect to the changed patent. The Bundesgerichtshof had come to the conclusion that the amendment of the claim is not relevant with respect to the infringement and had dismissed defendant’s complaint. For this conclusion the court had relied on the undisputed factual findings of the appeal court (cf. GRUR 2010, 272).

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