

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

WCM INDUSTRIES, INC.,

)

)

Plaintiff,

)

v.

)

No. 2:13-cv-2019-JPM-tmp

)

IPS CORPORATION,

)

)

Defendant.

)

JURY INSTRUCTIONS

TABLE OF CONTENTS

13-2019

WCM Industries, Inc. v. IPS Corporation

I.	PARTIES AND NATURE OF CASE.....	2
II.	GENERAL INSTRUCTIONS.....	4
	Corporation Not To Be Prejudiced.....	4
	Managerial Activities and Knowledge.....	5
	All Persons Equal Before the Law.....	6
	Burden of Proof and Consideration of the Evidence.....	7
	Credibility and Weighing the Evidence.....	9
	Impeachment - Inconsistent Statement or Conduct.....	12
	Direct and Circumstantial Evidence.....	13
	Evidence.....	14
	"Inferences" Defined.....	15
	Statements of Counsel.....	16
	Totality of the Evidence.....	17
	Juror Notes.....	18
	Comments by the Court.....	19
	Limited Admission of Evidence.....	20
	Opinion Testimony.....	21
	Deposition Testimony.....	22
III.	STATEMENT OF THE CASE AND STIPULATED FACTS.....	23
	Statement of the Case.....	23
	Stipulated Facts.....	25
IV.	PATENT INSTRUCTIONS.....	27
	Summary of Patent Issues.....	27
	The Patent System.....	30
	Scope of Patent Rights.....	31
	Validity of Patents Presumed.....	32
	Claims of the Patents in Suit.....	33

Independent and Dependent Claims	35
Construction of the Claims	36
Limitations of the Claims at Issue	37
“Comprising” Claims	40
Every Claim Limitation Must Be Present for Determination of Infringement	41
Patent Infringement Generally	42
Direct Infringement - Literal Infringement	44
Direct Infringement - Doctrine of Equivalents	47
Indirect Infringement	50
Inducing Infringement	51
Contributory Infringement	53
Comparison of the Competing Products	55
Answers on the Verdict Form	56
Summary of Invalidity Defense	57
Invalidity of Independent and Dependent Claims	59
Prior Art	60
Anticipation	62
Anticipation - Prior Public Use	66
Anticipation - Printed Publication	68
Anticipation - Prior Patent	70
Anticipation - Prior U.S. Application	71
Obviousness	73
Obviousness - Scope and Content of the Prior Art	75
Obviousness - Differences Between the Claimed Invention and the Prior Art	77
Obviousness - Level of Ordinary Skill in the Art	80
Obviousness - Factors Indicating Non-obviousness	82
The Prior Art Is Not Relevant to Literal Infringement	84
Answers on the Verdict Form	85
Damages for Patent Infringement	86

Compensatory Patent Damages in General	87
Reasonable Royalty	88
Reasonable Royalty (Timing)	89
What Is a Reasonable Royalty?	90
Willful Infringement	94
Willful Blindness	97
Doubts Resolved Against Infringer	98
V. VERDICT	99

JURY INSTRUCTIONS

Ladies and gentlemen of the jury, we have now come to the point in the case when it is my duty to instruct you in the law that applies to the case and you must follow the law as I state it to you.

As jurors it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence. You must not be influenced by sympathy, bias, prejudice, or passion.

You are not to single out any particular part of the instructions and ignore the rest, but you are to consider all the instructions as a whole and regard each in the light of all the others.

I. PARTIES AND NATURE OF CASE

This case involves disputes between WCM Industries, Inc. on the one hand and IPS Corporation on the other hand. The disputes relate to overflow and drain assemblies for bathtubs.

WCM is a manufacturing company that produces plumbing fixtures, valves, and fittings for use in residential and commercial buildings.

IPS is a manufacturing company that produces supplies for the plumbing, construction, and plastic fabrication industries.

The subject matter of this case involves three patents relating to inventions by Mr. William Ball, an employee of WCM, who assigned the patents to WCM. The particular products involved in this case concern overflow and drain assemblies commonly found in bathtubs. The assemblies interconnect to a waste water drain system to prevent or reduce bathtub overflow.

This lawsuit was started by WCM against IPS in January 2013, but each side is making claims against the other.

WCM contends that IPS has infringed the three patents at issue in this case.

IPS contends that it has not infringed the three patents and asserts that the patents are not valid.

Each party disputes the claims made by the other party.

II. GENERAL INSTRUCTIONS

Corporation Not To Be Prejudiced

In this case, the parties WCM and IPS are corporations. The fact that the parties are corporations must not influence you in your deliberations or in your verdict.

You may not discriminate between corporations and natural individuals. All are persons in the eyes of the law, and all are entitled to the same fair and impartial consideration and to justice by the same legal standards.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations of life. Each corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, stand equal before the law, and are to be dealt with as equals in a court of justice.

Managerial Activities and Knowledge

What AB&A, through its AB&A managers, did and/or had knowledge of prior to the asset purchase by IPS in 2010 is not evidence of anything that IPS knew or did before the 2010 asset purchase of AB&A.

You can, however, consider as evidence of IPS's knowledge after the 2010 asset purchase, the knowledge of IPS managers and AB&A managers who became managers or managerial employees of IPS after the asset purchase.

All Persons Equal Before the Law

You have heard the fact that certain witnesses live, or work in Memphis. In deciding this case, however, you should not give weight to such matters.

A party or witness's geographic ties must not affect your decision in any way. All persons stand equal before the law and must be treated as equals. Justice is not different for persons from Memphis than it is for persons from any other part of the country. You must, therefore, apply the law as I give it to you without considering a person's geographic ties.

Burden of Proof and Consideration of the Evidence

I will now instruct you with regard to where the law places the burden of making out and supporting the facts necessary to prove the legal theories in the case.

When, as in this case, a party denies the material allegations of a complaining party's claim, the law places upon the claiming party the burden of supporting and making out such claim upon every material issue in controversy by the applicable burden of proof.

For most of the factual disputes in this case, the burden of proof standard will be a preponderance of the evidence.

When a party has the burden of proving any claim or defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or defense is more probably true than not true.

When a party has the burden of proving any claim or defense by clear and convincing evidence, it means you must be persuaded by the evidence

that the claim or defense is highly probable. This is a higher standard of proof than proof by a preponderance of the evidence.

You should base your decision on all of the evidence, regardless of which party presented it.

I should also tell you that later in these instructions, I will identify some claims that must be established by a higher standard of proof, referred to as "clear and convincing" evidence. I will give you specific instructions regarding which claims must be proven by a preponderance of the evidence and which claims must be proven by clear and convincing evidence, and the clear and convincing standard will be further explained later in these instructions.

Be careful to make sure anytime you are considering a particular claim that you apply the correct burden of proof to the question you are answering.

You must consider all the evidence pertaining to every issue, regardless of who presented it.

Credibility and Weighing the Evidence

You, members of the jury, are judges of the facts concerning the controversies involved in this lawsuit. In order for you to determine what the true facts are, you are called upon to weigh the testimony of every witness who has appeared before you or whose deposition has been read to you or presented to you by video recording and to give the testimony of the witnesses the weight, faith, credit, and value to which you think it is entitled.

You should consider the manner and demeanor of each witness while on the stand. You must consider whether the witness impressed you as one who was telling the truth or one who was telling a falsehood and whether or not the witness was a frank witness. You should consider the reasonableness or unreasonableness of the testimony of the witness; the opportunity or lack of opportunity of the witness to know the facts about which he or she testified; the intelligence or lack of intelligence of the witness; the interest of the witness in the result of the lawsuit, if any; the relationship of the witness to any of the parties to the lawsuit, if any; and whether the witness testified inconsistently while on the witness stand, or if the witness said or did something or failed to say or do something at any other time that is inconsistent with what the witness said while testifying.

These are the rules that should guide you, along with your common judgment, your common experience and your common observations gained by you in your various walks in life, in weighing the testimony of the witnesses who have appeared before you in this case.

If there is a conflict in the testimony of the witnesses, it is your duty to reconcile that conflict if you can, because the law presumes that every witness has attempted to and has testified to the truth. But if there is a conflict in the testimony of the witnesses which you are not able to reconcile, in accordance with these instructions, then it is with you absolutely to determine which of the witnesses you believe have testified to the truth and which ones you believe have testified to a falsehood.

Immaterial discrepancies do not affect a witness's testimony, but material discrepancies do. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

The preponderance of the evidence in a case is not determined by the number of witnesses testifying to a particular fact or a particular set of facts. Rather, it depends on the weight, credit and value of the total evidence on either side of the issue, and of this you jurors are the exclusive judges.

If in your deliberations you come to a point where the evidence is evenly balanced and you are unable to determine which way the scales should turn on a particular issue, then the jury must find against the party upon whom the burden of proof has been cast in accordance with these instructions.

Remember, you are the sole and exclusive judges of the credibility or believability of the witnesses who will testify in this case. Ultimately, you must decide which witnesses you believe and how important you think their testimony is. You are not required to accept or reject everything a witness says. You are free to believe all, none, or part of any person's testimony.

Impeachment - Inconsistent Statement or Conduct

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something that is inconsistent with the witness's present testimony.

If you believe any witness has been impeached and thus discredited, you may give the testimony of that witness such credibility, if any, you think it deserves.

If a witness is shown knowingly to have testified falsely about any material matter, you have a right to distrust such witness's other testimony and you may reject all the testimony of that witness or give it such credibility as you may think it deserves; you may, of course, accept any part you decide is true. This is all for you, the jury, to decide.

An act or omission is "knowing," if committed voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Direct and Circumstantial Evidence

There are two kinds of evidence - direct and circumstantial. Direct evidence is testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You may consider both direct and circumstantial evidence in deciding this case. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

Evidence

You are to decide this case only from the evidence that was received, that is, evidence that was presented for your consideration during the trial. The evidence consists of:

1. The sworn testimony of the witnesses who have testified, both in person and by deposition;
2. The exhibits that were received and marked as evidence; and
3. Any facts to which the lawyers for both sides have agreed or stipulated.

"Inferences" Defined

Although you are to consider only the evidence in the case, you are not limited to the statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You may draw from the facts that you find have been proved such reasonable inferences as seem justified in light of your experience.

Inferences are deductions or conclusions that reason and common sense lead you to make from facts established by the evidence in the case.

Statements of Counsel

You must not consider as evidence any statements of counsel made during the trial. Of course, if counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you may regard that fact as being conclusively established.

As to any questions to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection, and you must assume that the answer would be of no value to you in your deliberations.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court. Such matter is to be treated as though you had never known it.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence. It may be considered only as it supplies meaning to the answer.

Totality of the Evidence

The Jury may consider all evidence admitted in the case. Testimony and documents which the Court allowed into evidence over a hearsay objection may be considered by you as evidence, on the same basis as all other evidence, for the purpose for which it was admitted. For example, matters and things which a decision maker is told may be considered for the purpose of explaining the basis upon which that person acted or made a decision. This, of course, is all for you, the Jury, to decide.

If you have taken notes, please remember that your notes are not evidence. You should keep your notes to yourself. They may only be used to help refresh your personal recollection of the evidence in this case.

If you cannot recall a particularly piece of evidence, you should not be overly influenced by the fact that someone else on the Jury appears to have a note regarding that evidence. Remember, it is your recollection and the collective recollection of all of you upon which you should rely in deciding the facts in this case.

Comments by the Court

During the course of a trial on a few occasions, I occasionally asked questions of a witness in order to bring out facts not then fully covered in the testimony. Please do not assume that I hold any opinion on the matters to which my questions may have related. Remember that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts.

On the other hand, you are required to follow the Court's instructions on the law, whether you agree with these instructions or not.

Limited Admission of Evidence

You will recall that during the course of this trial certain evidence was admitted for a limited purpose only. You must not consider such evidence for any other purpose.

For example, evidence has been admitted for the limited purpose of showing a witness's state of mind, or that the witness had notice of a particular issue. Evidence of a witness's state of mind is relevant only to show what the witness believed. Such evidence cannot be considered for the truth or accuracy of the belief. Likewise, evidence admitted only to show notice cannot be considered for the truth or accuracy of the matter it concerns.

Opinion Testimony

You have heard the testimony of opinion witnesses Clarke Nelson, James Paschal, and Peter Smith. An opinion witness is allowed to express his opinion on those matters about which he has special knowledge, training, or experience. Opinion testimony is presented to you on the theory that someone who is experienced or knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing each opinion witness's testimony, you may consider his qualifications, opinions, reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness's testimony. You may give opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept a witness's testimony merely because he is an opinion witness. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

Deposition Testimony

Certain testimony has been read into evidence from depositions or previously given testimony or has been presented by video recording. A deposition is testimony taken under oath before this trial and preserved in writing or by video recording. Previous testimony is testimony taken under oath in either the same or different proceedings. You are to consider all such testimony as if it had been given in this court.

III. STATEMENT OF THE CASE AND STIPULATED FACTS

Statement of the Case

In this lawsuit, WCM Industries, Inc. has brought claims for patent infringement against IPS Corporation. The claims in this lawsuit involve three of WCM's patents - U.S. Patent No. 8,302,220; U.S. Patent No. 8,584,272; U.S. Patent No. 8,321,970. Patents are sometimes referred to by the last three numbers, so these patents may be referred to as the '220 Patent, the '272 Patent and the '970 Patent, respectively. WCM owns the '220 Patent, the '272 Patent and the '970 Patent by assignment from the inventor, Mr. William T. Ball, an employee of WCM. IPS denies that it infringes the patents and it also has asserted claims that WCM's patents are not valid because they claim subject matter that is in the prior art or otherwise do not satisfy the requirements of 35 U.S.C. §§ 102, 103 and/or 112.

The products of IPS Corporation accused of infringement are overflow and drain assemblies for use in a bathtub. Overflow and drain assemblies are a type of plumbing fixture that allow water to flow out of a bathtub, such that water in the bathtub may exit through a drain in the bottom of the bathtub, or through an overflow in the side of the bathtub. One purpose of these overflow and drain assemblies is to

prevent or reduce a tub from overflowing and damaging the surrounding area.

Both WCM and IPS sell overflow and drain assemblies in the United States. WCM asserts that several of IPS's overflow and drain assemblies infringe upon WCM's patent rights, specifically WCM's rights in the '220 Patent, the '272 Patent and the '970 Patent. IPS denies that its products infringe the '220 Patent, the '272 Patent, and the '970 Patent and asserts that the '220 Patent, the '272 Patent, and the '970 Patent are invalid as covering subject matter in the prior art and otherwise do not satisfy the requirements of 35 U.S.C. §§ 102, 103 and/or 112.

Stipulated Facts

Before the trial of this case, the parties agreed to the truth of certain facts in this action. As a result of this agreement, the plaintiff and the defendant entered into certain stipulations in which they agreed that the stipulated facts could be taken as true without the parties presenting further proof on the matter. This procedure is often followed to save time in establishing facts which are undisputed.

Facts stipulated to by the parties in this case include the following:

1. IPS acquired the assets of AB&A in August 2010.
2. U.S. Patent Number 8,302,220 ("the '220 Patent") issued on November 6, 2012.
3. U.S. Patent Number 8,321,970 ("the '970 Patent") issued on December 4, 2012.
4. U.S. Patent Number 8,584,272 ("the '272 Patent") issued on November 19, 2013.

5. The application that issued as the '220 Patent had published by 2010.
6. IPS and WCM compete in the overflow and drain assembly market.
7. IPS and WCM compete for sales of overflow and drain assemblies.
8. IPS exports "Classic" overflow and drain assemblies to Canada from one of its two U.S.-based distribution centers.

IV. PATENT INSTRUCTIONS

Summary of Patent Issues

The United States Patent and Trademark Office has granted patents to William Ball, a WCM employee, relating to certain overflow and drain assemblies for bathtubs. WCM contends that IPS has infringed three of these patents. William Ball is the named inventor on the three patents at issue, which are identified by the Patent Office as No. 8,302,220 (which may be called the '220 Patent); No. 8,584,272 (which may be called the '272 Patent); and No. 8,321,970 (which may be called the '970 Patent). These patents may also collectively be referred to as "the Asserted Patents."

IPS contends that it does not infringe the '220 Patent, the '272 Patent and the '970 Patent. In addition, IPS contends that the '220 Patent, the '272 Patent, and the '970 Patent should not have been issued by the United States Patent Office because prior to Mr. Ball filing for his patents, the claimed invention of the Asserted Patents was described in patents and other documents demonstrating that Mr. Ball was not the first to invent the invention claimed in the Asserted Patents.

You will be asked to decide whether IPS has infringed the Asserted Patents, and whether the patents are valid. Specifically, you must decide the following:

1. Has WCM proven by a preponderance of the evidence that IPS has directly infringed one or more claims of the Asserted Patents, either literally or under the doctrine of equivalents?
2. Has WCM proven by a preponderance of the evidence that IPS has indirectly infringed one or more claims of the Asserted Patents by inducing others to infringe or contributing to the infringement by others of, one or more claims of the Asserted Patents?
3. If you find any claims of any of the Asserted Patents infringed, directly or indirectly, has WCM proven by clear and convincing evidence that the infringement was willful?
4. Has IPS proven by clear and convincing evidence that the claims of the Asserted Patents are invalid because the invention of the Asserted Patents was previously disclosed

in prior patents or printed publications, or was in use in the United States before WCM filed the Asserted Patents?

5. If you find any claims of any of the Asserted Patents infringed and if you do not find any infringed claims invalid, directly or indirectly, what amount of damages are due as a result of the infringement?

You will decide these patent issues according to the instructions that I will give you.

At the beginning of the trial, I gave you some general information about patents and the patent system and a brief overview of the patent laws relevant to this case. I will now give you more detailed instructions about the patent laws that specifically relate to this case. If you would like to review my instructions at any time during your deliberations, they will be available to you in the jury room.

Scope of Patent Rights

The patent laws provide that patent rights only confer the right to exclude others from practicing the patent holder's claimed inventions. This right to exclude others is the basic right of the patent grant.

A patent does not grant the right to make, use, or sell the patented subject matter. Indeed, the patent laws do not create any affirmative right to make, use, or sell anything.

Validity of Patents Presumed

A patent issued by the United States Patent Office is presumed valid and the named inventor is presumed to be the inventor of the claimed inventions therein. The presumption of validity can be overcome if clear and convincing evidence is presented that proves the patent is invalid.

Claims of the Patents in Suit

As I told you at the beginning of the trial, the claims of a patent are the numbered sentences at the end of the patent. The claims are "word pictures" intended to define, in words, the boundaries of the invention described and illustrated in the patent. The claims describe the invention made by the inventor and describe what the patent owner owns and what the patent owner may prevent others from doing. Claims may describe products, including products made from several components.

Only the claims of the patent can be infringed. Neither the written description, nor the drawings of a patent can be infringed. Each of the claims must be considered individually, and not all claims of a patent have to be infringed for the patent to be infringed. To prove infringement of a patent, WCM need only establish by a preponderance of the evidence that one claim of a patent is infringed.

Claims are usually divided into parts or steps, called "limitations." For example, a claim that covers the invention of a table may recite the tabletop, four legs and the glue that secures the legs to the tabletop. The tabletop, legs and glue are each a separate

limitation of the claim, and each limitation or requirement must exist in the accused product in order for there to be infringement.

Independent and Dependent Claims

Patent claims may exist in two forms, referred to as independent claims and dependent claims. An independent claim does not refer to any other claim of the patent. Thus, it is not necessary to look at any other claim to determine what an independent claim covers. Claim 12 of the '220 Patent, for example, is an independent claim.

A dependent claim refers to at least one other claim in the patent. A dependent claim includes each of the limitations of the other claim or claims to which it refers, as well as the additional limitations recited in the dependent claim itself. Therefore, to determine what a dependent claim covers, it is necessary to look at both the dependent claim and the other claim or claims to which it refers. Claim 13 of the '220 Patent, for example, is a dependent claim.

Construction of the Claims

In deciding whether or not an accused method or product infringes a patent, the first step is to understand the meaning of the words used in the patent claims.

It is my job as Judge to determine what the patent claims mean and to instruct you about that meaning. You must accept the meanings I give you and use them when you decide whether or not the patent is infringed.

At the start of the trial, I instructed you about the meaning of the words of the claims and the different types of claims that are at issue in this case. Words in a claim are generally given their ordinary and customary meaning. However, there are certain patent claim terms that I earlier determined have a specific meaning. I will instruct you now about the meaning of those claim terms.

Limitations of the Claims at Issue

You must use the definitions I provide to you in your consideration of infringement issues.

The terms "detachably engage," "detachably associated," and "detachably interconnected," as they are used in the Asserted Patents, were interpreted by this Court to mean "detachably frictionally engaged." "Detachably engage" may include a snap-fit connection so long as the snap-fit connection satisfies the other requirements of the Court's construction.

The term "lug," as it is used in the Asserted Patents, was interpreted by this Court to mean "a lug that detachably engages with the cap" consistent with the definition of the term "detachably engage." The entire circular periphery of IPS's "revised locknut" cannot be considered lugs or cap retention elements, but the jury must resolve whether any alleged high points constitute the lugs or cap retention elements recited in the claims.

The term "cap," as it is used in the Asserted Patents, was interpreted by this Court to mean "decorative cover frictionally engaged with the nut element."

The terms "nut" and "nut element," as they are used in the Asserted Patents, were both interpreted by this Court to mean "an object having at least one radially extending lug and a threaded bore to selectively engage the upper end of the overflow assembly."

The term "cap retention elements," as it is used in the Asserted Patents, was interpreted by this Court to mean "lugs on the nut element for retaining a cap" consistent with the definition of the term "lugs."

The term "waste water insert," as it is used in the Asserted Patents, was interpreted by this Court to mean "protective drain cover in selective engagement with the strainer having an opening, a flange, and a tubular wall."

The term "a wastewater drain assembly adapted for interconnection to the drain port and to the lower end portion of said overflow pipe,"

as it is used in the Asserted Patents, was interpreted by this Court to mean "an assembly capable of being connected with a drain port and a lower end portion of an overflow pipe."

"Comprising" Claims

The beginning portion, or preamble, of a claim commonly uses the word "comprising." "Comprising" means "including" or "containing." A claim that uses the word "comprising" or "comprises" is not limited to products or methods having only the elements or steps that are recited in the claim, but also covers products that include additional elements or limitations.

Let's take our example of the claim that covers a table. If the claim recites a table "comprising" a tabletop, legs, and glue, the claim will cover any table that contains these structures, even if the table also contains other structures, such as a leaf or wheels on the legs.

All of the claims of the Asserted Patents use the "comprising" language.

Every Claim Limitation Must Be Present for Determination of Infringement

You must consider each of the patent claims separately. In order to infringe a patent claim, a product or method must include every limitation of the claim. If IPS's product omits a single structure recited in a claim, then you must find that IPS has not infringed that claim. If you find that WCM has shown by a preponderance of the evidence that each limitation of the claim is present in the Accused Products, then you must find that IPS infringes that claim.

A claim limitation is literally present if it exists in the Accused Product just as it is described in the claim language, either as I have explained that language to you or, if I did not explain it, as you understand it.

Patent Infringement Generally

A patent owner has the right to stop others from using the invention covered by its patent claims during the life of the patent. If any person makes, uses, sells or offers to sell, or imports what is covered by the patent claims without the patent owner's permission, that person is said to infringe the patent. This type of infringement is called "direct infringement." In addition to enforcing a patent against a direct infringer, a patent owner also has the right to enforce the patent against those who are known as "indirect infringers."

In reaching your decision on infringement, keep in mind that only the claims of a patent can be infringed. You must compare patent claims, as I have defined them, to an Accused Product, and determine whether or not there is infringement. You must consider each claim individually and must reach your decision as to each assertion of infringement based on my instructions about the meaning and scope of the claims, the legal requirements for infringement, and the evidence presented to you by the parties.

Whether or not IPS knew that what it was doing was an infringement does not matter. A person may be found to be a direct infringer of a

patent even if he or she believes in good faith that what he or she is doing is not an infringement of any patent, and even if he or she does not even know of the patent.

Direct Infringement - Literal Infringement

There are two types of direct infringement: (1) literal infringement and (2) infringement under the doctrine of equivalents. In order to prove direct infringement by literal infringement, WCM must prove by a preponderance of the evidence, i.e., that it is more likely than not, that IPS made, used, sold, offered for sale within, or imported into the United States at least one of the Accused Products that meets all of the requirements of a claim and did so without the permission of WCM during the time the Asserted Patents were in force. You must compare the Accused Products with each and every one of the requirements of a claim to determine whether all of the requirements of that claim are met.

You must determine, separately for each asserted claim, whether or not there is infringement. There is one exception to this rule. If you find that an independent claim to which dependent claims refer is not infringed, there cannot be infringement of any dependent claim that refers directly or indirectly to that independent claim. On the other hand, if you find that an independent claim has been infringed, you must still decide, separately, whether any Accused Product meets additional requirements of any claims that depend from the independent claim, thus, whether those claims have also been infringed. A dependent claim

includes all the requirements of any of the claims to which it refers plus additional requirements of its own.

I will now discuss the claims WCM alleges are literally infringed.

First, WCM contends that IPS infringes Claims 12 and 13 of the '220 Patent by its manufacture, use, sale, offer for sale, or importation of IPS's half-kit and full-kit "Classic" overflow and drain assemblies.

Second, WCM contends that IPS infringes Claim 1 of the '970 Patent by its manufacture, use, sale, offer for sale, or importation of IPS's half-kit and full-kit "Classic" overflow and drain assemblies with IPS's "Press-in" trim kit products.

Third, WCM contends that IPS infringes Claims 11 and 12 of the '272 Patent by its manufacture, use, sale, offer for sale, or importation of IPS's half-kit and full-kit "Classic" overflow and drain assemblies.

Fourth, WCM contends that IPS infringes Claim 13 of the '272 Patent by its manufacture, use, sale, offer for sale or importation of IPS's

half-kit and full-kit "Classic" overflow and drain assemblies with IPS's "Press-in" trim kit products.

These are the products sometimes referred to as the "Accused Products" in these instructions.

It is your job to determine whether or not WCM has proven by a preponderance of the evidence that IPS has literally infringed any of these claims. If even a single limitation is missing in the Accused Products, then IPS does not literally infringe.

Direct Infringement - Doctrine of Equivalents

If you decide that any one of the products accused of infringement does not literally infringe an asserted patent claim, you must then decide whether that product infringes the asserted claim under what is called the "doctrine of equivalents."

Under the doctrine of equivalents, a product can infringe an asserted patent claim if it includes components that are identical or equivalent to the requirements of the claim. If the Accused Product lacks a component that is identical or equivalent to even one requirement of the asserted utility patent claim, the product cannot infringe the claim under the doctrine of equivalents. Thus, in making your decision under the doctrine of equivalents, you must look at each individual requirement of the asserted patent claim and decide whether the Accused Products have a component that is identical or equivalent to that individual claim requirement.

A product component is equivalent to a requirement of an asserted claim if a person of ordinary skill in the art would think that the differences between the component and the requirement were not substantial as of the time of the alleged infringement. I will instruct

you later about what factors you should consider to determine who a person of ordinary skill in the art may be in this case.

You may not find that a component in any one of the Accused Products is equivalent to an element of the patent claim if by doing so the patent claim would cover products or components that were already in the prior art. Prior art may include items that were publicly known or that have been used, or references such as publications or patents, that disclose the claimed invention or elements of the claimed invention either before the invention was made or more than one year before the filing date of the patent application. I will instruct you further about prior art later in these instructions.

You may not determine that any component of the Accused Products is equivalent to an unmet requirement of a claim if a finding of infringement under the doctrine of equivalents would effectively eliminate that requirement. Specifically, the alleged equivalent cannot eliminate or ignore an element or requirement of the claim.

IPS has argued that WCM cannot assert infringement under the doctrine of equivalents due to statements WCM made to the Patent Office

in order to get the asserted claims allowed in the first place. In order to find the Accused Products to be equivalent, you must also consider the statements WCM made to the Patent Office in order to get the '220, '970, and '272 Patents.

Indirect Infringement

As I have told you, in addition to enforcing a patent against a direct infringer, a patent owner may also enforce the patent against indirect infringers. There are two types of indirect infringement - inducing infringement and contributory infringement. The act of encouraging or inducing others to infringe a patent is called "inducing infringement." The act of contributing to the infringement of others by, for example, supplying them with components used in the patented invention is called "contributory infringement."

There can be no indirect infringement unless someone is directly infringing the patent. Thus, in order to prove that IPS is inducing another person to infringe or contributing to the infringement of another, WCM must prove by a preponderance of the evidence that the other person is directly infringing at least one claim of the patent. Proof of this direct infringement may be inferred based on circumstantial evidence.

Inducing Infringement

A person induces patent infringement if he or she purposefully causes, urges or encourages another to infringe a patent. Inducing infringement cannot occur unintentionally. This is different from direct infringement, which, as I told you, can occur unintentionally. In order to prove inducement, WCM must prove by a preponderance of the evidence that IPS knew of the patent and encouraged or instructed another person to use the Accused Products in a manner that infringes one or more claims of the Asserted Patents. WCM must also prove by a preponderance of the evidence that the other person infringed one or more claims of the Asserted Patents. Proof of this direct infringement may be based on circumstantial evidence. A person can be an inducer even if he or she thought that what he or she was encouraging or instructing the other person to do was not an infringement.

WCM asserts that IPS induced others to infringe Claims 12 and 13 of the '220 Patent, Claim 1 of the '970 Patent, and Claims 11-13 of the '272 Patent.

To show that IPS induced infringement, WCM must prove four things by a preponderance of the evidence:

1. IPS encouraged or instructed another person how to make, use, sell, or offer for sale the Accused Products in a manner that you, the jury, find infringes one or more claims of the Asserted Patents.
2. IPS knew of the Asserted Patent(s).
3. IPS knew or should have known that its encouragement or instructions would likely result in the other person doing that which you find to be an infringement of one or more claims of the Asserted Patents.
4. The other person infringed one or more claims of the Asserted Patents.

If, and only if, you find that WCM has proven by preponderance of the evidence each of these four things may you find that IPS induced patent infringement of any particular Asserted Patent.

Contributory Infringement

Contributory infringement can occur when a supplier provides a part, or a component, to another person for use in a product. In order for there to be contributory infringement, the other person who received the component must infringe one or more claims of the Asserted Patents.

The component must also have certain characteristics. First, the component must be a material part of the invention. Second, the component must be especially made or adapted for use in a manner that infringes one or more claims of the Asserted Patents, and the supplier must know that the component was especially made for that use. Third, the component must not have a substantial use that does not infringe one or more claims of the Asserted Patents. A component that has a number of non-infringing uses is often referred to as a staple or commodity article.

WCM asserts that IPS contributed to the infringement of Claims 12 and 13 of the '220 Patent, Claim 1 of the '970 Patent, and Claims 11-13 of the '272 Patent.

In order to establish that IPS has contributed to the infringement of these claims, WCM must prove five things by a preponderance of the evidence standard. These five things are:

1. IPS knew of the Asserted Patent(s).
2. The particular component of the Accused Product is a material component of the claimed invention, and IPS sold or supplied that component.
3. IPS knew that the component was especially made for use in a manner that infringes one or more of the Asserted Patent claims.
4. The component is not a staple or commodity article.
5. The particular component was actually used by the other entity in a manner that you find infringes one or more claims of the Asserted Patents.

Comparison of the Competing Products

You have heard evidence of both WCM's commercial products and IPS's accused products. In deciding the issue of infringement, however, you may not compare IPS's accused product to WCM's commercial product. Rather, you must compare IPS's accused products to the claims of the Asserted Patents when making your decision regarding infringement.

Answers on the Verdict Form

You are to consider each of the different types of infringement described in the previous instructions, including: direct, both literal and under the doctrine of equivalents; and indirect, both induced and contributory. If you find that WCM has proven by a preponderance of the evidence that IPS has infringed any claims of the Asserted Patents, you must return a verdict for WCM and answer "Yes" for the patent claims you so find are infringed in the patent infringement section of the Jury Verdict Form. If WCM has failed to prove by a preponderance of the evidence that IPS has infringed any claims of the Asserted Patents, you must return a verdict for IPS and answer "No" for the patent claims you so find are not infringed in the patent infringement section of the Jury Verdict Form.

Summary of Invalidity Defense

IPS contends that the asserted claims of the Asserted Patents are invalid. IPS must prove by clear and convincing evidence that each claim is invalid. Remember that the clear and convincing standard means you must be persuaded by the evidence that the claim or defense is highly probable. This is a higher standard of proof than proof by a preponderance of the evidence.

Claims of an issued patent may be found to be invalid. Thus, you must determine whether each of WCM claims is invalid.

IPS contends that all of the asserted patent claims are invalid for the following reasons:

1. The asserted claims were disclosed in prior patents, publications, and devices in use in the United States before WCM filed its patents.

2. The asserted claims are obvious in view of prior patents, publications, and devices in use in the United States before WCM filed its patents.

I will now instruct you in more detail why IPS alleges that the asserted claims of the '220 Patent, the '970 Patent, and the '272 Patent are invalid.

Invalidity of Independent and Dependent Claims

As I stated earlier there are two different types of asserted claims in the patent. One type of claim is called an independent claim. The other type of claim is called a dependent claim.

You must evaluate the invalidity of each asserted claim separately. Even if an independent claim is invalid, this does not mean that the dependent claims that depend from it are automatically invalid. Rather, you must consider the validity of each claim, separately. You must decide this issue of validity on a claim-by-claim basis. However, if you find that a dependent claim is invalid, then you must find that the independent claim from which it depends is also invalid. The dependent claim includes all of the elements of the independent claim from which it depends.

Prior Art

Prior art includes any of the following items that are dated prior to the patents in this case:

1. patents that issued more than one year before the filing date of the patent, or before the invention was made;
2. publications having a date more than one year before the filing date of the patent, or before the invention was made;
3. any published application for a patent filed by another in the United States before the invention was made.

In this case, IPS contends that the following items are prior art:

1. Swiss Patent CH 346187 to Gebert, which was published as early as June 15, 1960.
2. U.S. Patent No. 6,192,531 to Fritz, which was filed on December 1, 1999, and issued on February 27, 2001.

3. U.S. App. No. 09/494,265 (Pub. No. U.S. 2002/0032926) to Lewis, which was filed on Jan. 28, 2000. The corresponding provisional application No. 60/117,781 was filed on Jan. 29, 1999.
4. German Patent DE 3603877 C2 to Geberit, which issued on Jan. 16, 1997.
5. U.S. Patent No. 1,669,473 to Kelso, which issued on May 15, 1928.
6. U.S. Patent No. 5,350,266 to Espey et al., which issued on September 27, 1994.
7. U.S. Patent No. 4,890,967 to Rosenbaum, which issued on January 2, 1990.
8. U.S. Patent No. 5,692,248 to Ball, which issued on December 2, 1997.
9. U.S. Patent No. 5,745,931 to Ball, which issued on May 5, 1998.

Anticipation

A patent claim is invalid if the claimed invention is not new. For the claim to be invalid because it is not new, all of its requirements must have existed in a single device or method that predates the claimed invention, or must have been described in a single previous publication or patent that predates the claimed invention. In patent law, these previous devices, methods, publications or patents are called "prior art references." If a patent claim is not new we say it is "anticipated" by a prior art reference.

The description in the written reference does not have to be in the same words as the claim, but all of the requirements of the claim must be there, either stated or necessarily implied, so that someone of ordinary skill in the art looking at that one reference would be able to make and use the claimed invention.

To prove anticipation, IPS must prove by clear and convincing evidence that the claimed invention is not new. In this case, you must determine the date of invention or conception of the Asserted Patents. The date of invention is either when the invention was reduced to practice or when conceived, provided the inventor was diligent in

reducing the invention to practice. Diligence means working continuously, though not necessarily every day. Conception is the mental part of an inventive act, i.e., the formation in the mind of the inventor of a definite and permanent idea of the complete and operative invention as it is thereafter to be applied in practice, even if the inventor did not know at the time that the invention would work.

Conception of an invention is complete when the idea is so clearly defined in the inventor's mind that, if the idea were communicated to a person having ordinary skill in the field of the technology, he or she would be able to reduce the invention to practice without undue research or experimentation. This requirement does not mean that the inventor has to have a prototype built, or actually explained her or his invention to another person. But, there must be some evidence beyond the inventor's own testimony that confirms the date on which the inventor had the complete idea. Conception may be proven when the invention is shown in its complete form by drawings, disclosure to another person, or other forms of evidence presented at trial.

A claimed invention is "reduced to practice" when it has been constructed/used/tested sufficiently to show that it will work for its intended purpose or when the inventor files a patent application. An

invention may also be reduced to practice even if the inventor has not made or tested a prototype of the invention if it has been fully described in a filed patent application.

In this case, IPS contends that the asserted claims of the '220 Patent, the '970 Patent, and the '272 Patent are anticipated.

To anticipate a claim, each and every element in the claim must be present in a single item of prior art. You may not combine two or more items of prior art to find anticipation. In determining whether every one of the elements of the claimed invention is found in the prior publication, patent, or sale, you should take into account what a person of ordinary skill in the art would have understood from his or her review of the particular publication, patent, or sale.

In determining whether the single item of prior art anticipates a patent claim, you should take into consideration not only what is expressly disclosed in the particular item of prior art, but also what is inherently present or disclosed in that prior art or what inherently results from its practice. Prior art inherently anticipates a patent claim if the missing element or feature would be the natural result of

following what the prior art teaches to persons of ordinary skill in the art. A party claiming inherent anticipation must prove by clear and convincing evidence that the claim is inherently anticipated.

Evidence outside of the prior art reference itself may be used to show that the elements not expressly disclosed in the reference are actually present. Mere probabilities are not enough. It is not required, however, that persons of ordinary skill in the art actually recognized the inherent disclosure at the time the prior art was first known or used. Thus, the prior use of the patented invention that was unrecognized and unappreciated can still be an invalidating anticipation.

You must keep these requirements in mind and apply them to each kind of anticipation you consider in this case. There are additional requirements that apply to the particular categories of anticipation that IPS contends apply in this case. I will now instruct you about those.

Anticipation - Prior Public Use

IPS contends that Claims 12 and 13 of the '220 Patent, Claim 1 of the '970 Patent, and Claims 11-13 of the '272 Patent were anticipated because the invention defined in those claims was publicly used in the United States more than one year before WCM filed its patent applications on December 10, 2003, for the '220 Patent and September 15, 2011, for the '970 Patent. The '272 Patent has an effective filing date of September 15, 2011.

A patent claim is invalid if more than one year before the filing date of the patent an embodiment of the claimed invention was both: (1) accessible to the public or commercially exploited in the United States; and (2) ready for patenting.

An invention was in public use if the claimed invention was accessible to the public or commercially exploited. Factors relevant to the determination of whether a use was public include the nature of the activity that occurred in public; public access to the use; confidentiality obligations imposed upon observers; commercial exploitation; and the circumstances surrounding testing and experimentation. An invention is publicly used if it is used by the

inventor or by a person who is not under any limitation, restriction, or obligation of secrecy to the inventor. The absence of affirmative steps to conceal the use of the invention is evidence of a public use. However, secret use by a third party is not public, unless members of the public or employees of the third party have access to the invention.

In order to be a public use, the invention also must have been ready for patenting at the time of the alleged public use. An invention is ready for patenting either when it is reduced to practice or when the inventor has prepared drawings or other descriptions of the invention sufficient to allow a person of ordinary skill in the art to make or use the invention. The claimed invention is ready for patenting when there is reason to believe it would work for its intended purpose.

You are instructed that the invention defined by Claims 12 and 13 of the '220 Patent was invented on the date you determine to be the date of invention in your response to Verdict Form Question 14(a). The invention defined by Claim 1 of the '970 Patent was invented on the date you determine to be the date of invention in your response to Verdict Form Question 14(a). The invention defined by Claims 11-13 of the '272 Patent was invented on the date you determine to be the date of invention in your response to Verdict Form Question 14(a).

Anticipation - Printed Publication

IPS contends that Claims 12 and 13 of the '220 Patent, Claim 1 of the '970 Patent, and Claims 11-13 of the '272 Patent were anticipated because the invention defined in those claims was described in a printed publication more than one year before WCM filed its patent applications on December 10, 2003, for the '220 Patent and September 15, 2011, for the '970 Patent and the '272 Patent.

A patent claim is invalid if the invention defined by that claim was described in a printed publication before it was invented by William Ball or more than one year prior to the filing date of the patent applications.

You are instructed that the invention defined by Claims 12 and 13 of the '220 Patent was invented on the date you determine to be the date of invention in your response to Verdict Form Question 14(a). The invention defined by Claim 1 of the '970 Patent was invented on the date you determine to be the date of invention in your response to Verdict Form Question 14(a). The invention defined by Claims 11-13 of the '272 Patent was invented on the date you determine to be the date of invention in your response to Verdict Form Question 14(a).

A printed publication must have been maintained in some tangible form, such as printed pages, typewritten pages, magnetic tape, microfilm, photographs, internet publication, or photocopies, and must have been sufficiently accessible to persons interested in the subject matter of its contents. It is not necessary for the printed publication to have been available to every member of the public. An issued patent is a printed publication. A published patent application is a printed publication as of its publication date.

Anticipation - Prior Patent

IPS contends that Claims 12 and 13 of the '220 Patent, Claim 1 of the '970 Patent, and Claims 11-13 of the '272 Patent were anticipated because the invention defined in those claims was patented by third parties before it was invented by William Ball and more than one year before WCM filed its patent applications on December 10, 2003, for the '220 Patent and September 15, 2011, for the '970 and '272 Patents.

A patent claim is invalid if the invention defined by that claim was patented in the United States or a foreign country before it was invented by William Ball or more than one year before William Ball filed his United States patent application.

You are instructed that the invention defined by Claims 12 and 13 of the '220 Patent was invented on the date you determine to be the date of invention in your response to Verdict Form Question 14(a). The invention defined by Claim 1 of the '970 Patent was invented on the date you determine to be the date of invention in your response to Verdict Form Question 14(a). The invention defined by Claims 11-13 of the '272 Patent was invented on the date you determine to be the date of invention in your response to Verdict Form Question 14(a).

Anticipation - Prior U.S. Application

IPS contends that Claims 12 and 13 of the '220 Patent, Claim 1 of the '970 Patent, and Claims 11-13 of the '272 Patent were anticipated because the invention defined in that claim was described in the following United States published patent applications or patents, and because the published patent applications or patents were filed before William Ball made his invention:

1. U.S. Patent No. 6,192,531 to Fritz, which was filed on December 1, 1999, and issued on February 27, 2001.

2. U.S. App. No. 09/494,265 (Pub. No. U.S. 2002/0032926) to Lewis, which was filed on Jan. 28, 2000. The corresponding provisional application No. 60/117,781 was filed on Jan. 29, 1999.

Claims 12 and 13 of the '220 Patent, Claim 1 of the '970 Patent, and Claims 11-13 of the '272 Patent would be invalid if the invention defined by those claims was described in a United States published patent application or patent filed by another person before the invention was made by William Ball.

You are instructed that the invention defined by Claims 12 and 13 of the '220 Patent was invented on the date you determine to be the date of invention in your response to Verdict Form Question 14(a). The invention defined by Claim 1 of the '970 Patent was invented on the date you determine to be the date of invention in your response to Verdict Form Question 14(a). The invention defined by Claims 11-13 of the '272 Patent was invented on the date you determine to be the date of invention in your response to Verdict Form Question 14(a).

Not all innovations are patentable. A patent claim is invalid if the claimed invention would have been obvious to a person of ordinary skill in the field at the time of the earliest priority date. This means that even if all of the requirements of the claim cannot be found in a single prior art reference that would anticipate the claim, a person of ordinary skill in the art who knew about all this prior art would have come up with the claimed invention. Unlike anticipation, which allows consideration of only one item of prior art, obviousness may be shown by considering more than one item of prior art.

In deciding obviousness, you must avoid using hindsight; that is, you should not consider what is known today or what was learned from the teachings of the patent. You should not use the patent as a road map for selecting and combining items of prior art. You must put yourself in the place of a person of ordinary skill in the art at the time the invention was made.

The ultimate conclusion of whether a claim is obvious should be based upon your determination of several factors. The following

factors must be evaluated to determine whether IPS has established that the claimed invention(s) is obvious:

1. The scope and content of the prior art relied upon by IPS;
2. The difference or differences, if any, between each asserted claim of the '220 Patent, '272 Patent and '970 Patent that IPS contends is obvious and the prior art;
3. The level of ordinary skill in the art at the time the invention of the '220 Patent, '272 Patent and '970 Patent was made; and
4. Additional considerations, if any, that indicate that the invention was obvious or not obvious.

Each of these factors must be evaluated, although they may be analyzed in any order, and you must perform a separate analysis for each of the claims. IPS must prove obviousness by clear and convincing evidence.

I will now explain each of the four factors in more detail.

Obviousness - Scope and Content of the Prior Art

The prior art that you considered previously for anticipation purposes is also prior art for obviousness purposes. The prior art includes the following items received into evidence during the trial:

1. Swiss Patent CH 346187 to Gebert, which was published as early as June 15, 1960.
2. U.S. Patent No. 6,192,531 to Fritz, which was filed on December 1, 1999, and issued on February 27, 2001.
3. U.S. App. No. 09/494,265 (Pub. No. U.S. 2002/0032926) to Lewis, which was filed on Jan. 28, 2000. The corresponding provisional application No. 60/117,781 was filed on Jan. 29, 1999.
4. German Patent DE 3603877 C2 to Geberit, which issued on Jan. 16, 1997.
5. U.S. Patent No. 1,669,473 to Kelso, which issued on May 15, 1928.

6. U.S. Patent No. 5,350,266 to Espey et al., which issued on September 27, 1994.
7. U.S. Patent No. 4,890,967 to Rosenbaum, which issued on January 2, 1990.
8. U.S. Patent No. 5,692,248 to Ball, which issued on December 2, 1997.
9. U.S. Patent No. 5,745,931 to Ball, which issued on May 5, 1998.

You should analyze whether there are any relevant differences between the prior art and the claimed invention from the view of a person of ordinary skill in the art at the time of the invention. Your analysis must determine the impact, if any, of such differences on the obviousness or non-obviousness of the invention as a whole and not merely some portion of it.

In analyzing the relevance of the differences between the claimed invention and the prior art, you do not need to look for precise teaching in the prior art directed to the subject matter of the claimed invention. You may take into account the inferences and creative steps that a person of ordinary skill in the art would have employed in reviewing the prior art at the time of the invention.

For example, if the claimed invention combined elements known in the prior art and the combination yielded results that were predictable to a person of ordinary skill in the art at the time of the invention, then this evidence would make it more likely that the claim was obvious.

On the other hand, if the combination of known elements yielded unexpected or unpredictable results, or if the prior art teaches away from combining the known elements, then this evidence would make it more likely that the claim that successfully combined those elements was not obvious.

Importantly, a claim is not proved obvious merely by demonstrating that each of the elements was independently known in the prior art. Most, if not all, inventions rely on building blocks long since uncovered, and claimed discoveries almost of necessity will likely be combinations of what is already known.

Therefore, you should consider whether a reason existed at the time of the invention that would have prompted a person of ordinary skill in the art in the relevant field to combine the known elements in the way the claimed invention does. The reason could come from the prior art, the background knowledge of one of ordinary skill in the art, the nature of any problem or need to be addressed, market demand, or common sense. You may also consider whether the problem or need was known, the possible approaches to solving the problem or addressing the need were known and finite, and the solution was predictable through use of a known option.

If you find that a reason existed at the time of the invention to combine the elements of the prior art to arrive at the claimed invention, this evidence would make it more likely that the claimed invention was obvious. Again, you must undertake this analysis separately for each claim that IPS contends is obvious.

Obviousness - Level of Ordinary Skill in the Art

The question of invalidity of a patent claim is determined from the perspective of a person of ordinary skill in the art in the field of the asserted invention as of the filing dates of the asserted patents. The effective filing dates for the patents asserted in this case are December 10, 2003, for the '220 Patent, and September 15, 2011, for the '970 and '272 Patents.

The person of ordinary skill is presumed to know all prior art that you have determined to be reasonably relevant. The person of ordinary skill is also a person of ordinary creativity who can use common sense to solve problems.

When determining the level of ordinary skill in the art, you should consider all the evidence submitted by the parties, including evidence of:

1. The level of education and experience of persons actively working in the field at the time of the invention, including the inventor;

2. The types of problems encountered in the art at the time of the invention; and
3. The sophistication of the technology in the art at the time of the invention, including the rapidity with which innovations were made in the art at the time of the invention.

In this case, it is uncontested that a person of ordinary skill in the art has: (1) at least a Bachelor's degree in a technical field or engineering discipline with at least three years of experience in the plumbing field, or (2) at least equivalent experience (such as at least eight years of experience) in the plumbing industry.

Obviousness - Factors Indicating Non-obviousness

Before deciding the issue of obviousness, you must also consider certain factors, which, if established, may indicate that the invention would not have been obvious. No factor alone is dispositive, and you must consider the obviousness or non-obviousness of the invention as a whole.

1. Were products covered by the claim commercially successful due to the merits of the claimed invention rather than due to advertising, promotion, salesmanship, or features of the product other than those found in the claim?
2. Was there a long-felt need for a solution to the problem facing the inventors, which was satisfied by the claimed invention?
3. Did the claimed invention achieve unexpectedly superior results over the closest prior art?
4. Did others in the field, or IPS, praise the claimed invention or express surprise at the making of the claimed invention?

Answering any, or all, of these questions "yes" may suggest that the claim was not obvious.

These factors are only relevant to obviousness if there is a connection, or nexus, between them and the invention covered by the patent claims. Even if you conclude that some of the above indicators have been established, those factors should be considered along with all the other evidence in the case in determining whether IPS has proven that the claimed invention would have been obvious as of the dates you determine to be the dates of invention for the '220 Patent, the '970 Patent, and the '272 Patent in your response to Verdict Form Question 14(a).

The Prior Art Is Not Relevant to Literal Infringement

There is no "practicing the prior art" defense to literal infringement. There is no requirement that the accused device be non-obvious in light of the prior art, or otherwise be itself patentable. Literal infringement exists if each of the limitations of the asserted claim(s) read on, that is, each is found in the accused device.

Answers on the Verdict Form

You are to consider each of the different types of invalidity arguments described in the previous instructions, including anticipation, obviousness and the factors indicating non-obviousness. If you find that IPS has proven by clear and convincing evidence that an asserted claim is invalid, you must return a verdict for IPS and answer "Yes" for each patent claim you so find is invalid as anticipated or obvious in the invalidity section of the Jury Verdict Form. If IPS has failed to prove by clear and convincing evidence that an asserted claim is invalid, you must return a verdict for WCM and answer "No" for each patent claim you so find is not invalid as anticipated or obvious in the invalidity section of the Jury Verdict Form.

Damages for Patent Infringement

I have now instructed you as to the law governing WCM's claims of patent infringement and IPS's claims of patent invalidity.

If you find that IPS has infringed at least one claim of the Asserted Patents, then you must determine what damages IPS must pay to WCM for that infringement. If, on the other hand, you find that IPS has not infringed any claim of any Asserted Patent, then WCM is not entitled to any damages for patent infringement, and you should not make any findings about damages. If you find that any of the asserted claims are invalid, you should not make any findings about damages for that claim. If you find that all of the asserted claims are invalid, you should not make any finding about damages.

The fact that I am instructing you about damages does not mean that WCM is or is not entitled to recover damages. I am expressing no opinion one way or the other. These instructions are only to guide you in case you find that IPS infringed one or more claims of an Asserted Patent.

Compensatory Patent Damages in General

If you find that any claim of any of the Asserted Patents is infringed, then WCM is entitled to damages adequate to compensate for the infringement. Your damage award should put WCM in approximately the financial position it would have been in had the infringement not occurred; but in no event may the damage award be less than what a reasonable royalty would be for the use made of the invention.

In determining infringement damages, you must not consider WCM's allegations of willfulness, or take into account any evidence relating to those allegations. The consideration of willfulness, if any, is entirely separate from the question of any infringement damages that you are asked to determine. Infringement damages should not be increased because you find willfulness, nor decreased because you do not find willfulness. Nor should you include any amount in your infringement damages award for interest, attorneys' fees or other expenses. When determining damages for infringement, you must not include an additional amount for the purpose of punishing IPS or setting an example.

Reasonable Royalty

WCM is asking for damages in the amount of a reasonable royalty based on the number of infringing units. Thus, for IPS's infringing sales or activities, you should determine the amount WCM has proven to be a reasonable royalty.

Generally, a reasonable royalty is defined by the patent laws as the reasonable amount that someone wanting to use the patented invention should expect to pay to the patent owner and the owner should expect to receive. A reasonable royalty is the minimum amount of damages that a patent owner may recover.

Reasonable Royalty (Timing)

The relevant date for the hypothetical reasonable royalty negotiation is the date that the infringement began. The date you should use for the hypothetical negotiation is November 6, 2012.

What Is a Reasonable Royalty?

You are to decide what a reasonable royalty would be, based on circumstances as of the time just before IPS's manufacture, use, instruction for use, sale, or offer for sale of the patented invention became an infringement. You should assume that IPS and WCM knew at that time such things as the level of sales and profits that IPS would make using or selling the invention. You should also assume that WCM was willing to grant IPS a license to sell or use the patented invention and that IPS was willing to pay for that license.

In determining the outcome of the hypothetical negotiation, you should consider all facts known to the parties at the time infringement began. Some of the factors you may consider are:

1. Royalties received by the patent holder for licensing the patent-in-suit, proving or tending to prove an established royalty.
2. Rates the infringer paid for using other patents comparable to the patent-in-suit.

3. The nature of the license, i.e., exclusive or nonexclusive, restricted or unrestricted in terms of territory or to whom products covered by the patent claim may be sold.
4. The patent holder's policy to maintain its patent monopoly by not licensing others or by granting licenses under special conditions designed to preserve its monopoly.
5. The commercial relationship between the patent holder and infringer, such as whether they are competitors in the same territory in the same line of business.
6. The effect of selling the patented invention in promoting sales of other products of the infringer, the existing value of the patented invention to the patent holder as a generator of sales of non-patented items, and the extent of such derivative or convoyed sales.
7. The duration of the patent and the term of the license.
8. The established profitability of products covered by the patent claim, their commercial success, and their current popularity.

9. The advantages and benefits of the patented invention over older modes or devices, if any, that had been used to work on similar problems.
10. The nature of the patented invention, the character of the patent holders' products covered by it, and the benefits to those who have used the invention.
11. The extent to which the infringer has made use of the patented invention and any evidence probative of the value of that use.
12. The portion of the profit or selling price that was customary in the business or in comparable businesses allow for the use of the invention or analogous inventions.
13. The portion of the realizable profits that should be credited to the patented invention as distinguished from non-patented elements, the manufacturing process, business risks, or significant features or improvements added by the infringer.
14. The opinion and testimony of qualified experts.
15. The amount that a prudent licensor (such as the patent holder) and a prudent licensee (such as the infringer) would have

agreed upon at the time infringement began if both had been reasonably and voluntarily trying to reach an agreement.

No one factor is dispositive, and you should consider the evidence that has been presented to you in this case on each one of the factors. You may also consider any other factors which in your mind would have increased or decreased the royalty the infringer would have been willing to pay and the patent holder would have been willing to accept, acting as normally prudent business people. The final factor establishes the framework which you should use in determining a reasonable royalty, that is, the payment that would have resulted from a negotiation between the patent holder and the infringer taking place at a time when infringement began.

In view of all of the instructions I have given you on what constitutes a reasonable royalty, if you answered "Yes" to any of the patent infringement questions on the Jury Verdict Form, then indicate what you find is the reasonable royalty amount per infringing unit due to WCM in your response to Verdict Form Question No. 16(a) and the number of infringing units sold by IPS in your response to Verdict Form Question No. 16(b).

Willful Infringement

WCM also contends that IPS has willfully infringed the Asserted Patents. If you find on the basis of the evidence and the law as I have explained it, that IPS directly or indirectly infringes any claim of any of the three Asserted Patents, you must then decide whether or not IPS's infringement was willful.

When a person becomes aware that a patent may have relevance to his or her activities, that person has a duty to exercise due care and investigate whether or not his or her activities or proposed activities infringe any valid, enforceable claim of the patent. If that person did not do this and is found to have infringed the patent claims, then the infringement was willful. Willfulness must be proven by clear and convincing evidence.

The issue of willful infringement is relevant, not to your decision of whether or not there is infringement, but rather to the amount of damages to which WCM is entitled. A finding of willful infringement may, in certain circumstances, entitle the patent owner to increased damages. If you decide that IPS willfully infringed any of the Asserted

Patent claims, then it is my job to decide whether or not to award increased damages to WCM.

Although, as I explained before, WCM must prove infringement by a preponderance of the evidence standard, the burden of proving that the infringement was willful is the clear and convincing standard. To establish willful infringement as to each Asserted Patent, WCM must prove by clear and convincing evidence that IPS acted with reckless disregard of the patent it infringed.

To demonstrate such "reckless disregard," the patent holder must persuade you that the other side actually knew, or it was so obvious that the other side should have known, that its actions constituted infringement of a valid and enforceable patent.

In deciding whether IPS acted with reckless disregard for any of the Asserted Patents that you find is infringed, you should consider all of the facts surrounding the alleged infringement including, but not limited to, the following factors:

A factor that may be considered as evidence that IPS was not willful is whether it acted in a manner consistent with the standards of commerce for its industry.

A factor that may be considered as evidence that IPS was willful is whether it intentionally copied a WCM product that is covered by a patent.

If you find that WCM has proven each of the elements of willful infringement by clear and convincing evidence, then you must return a verdict for WCM in your response to Verdict Form Question No. 17.

If you find that WCM has failed to prove any element of willful infringement by clear and convincing evidence, then you must return a verdict for IPS in your response to Verdict Form Question No. 17.

Willful Blindness

Willful blindness occurs when a defendant takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts. In order to establish that IPS acted with willful blindness, WCM must prove:

1. IPS subjectively believed that there was a high probability that its actions would result in infringement of the Asserted Patents; and
2. IPS took deliberate actions to avoid learning of that infringement.

Doubts Resolved Against Infringer

Any doubts that you may have on the issue of damages due to IPS's failure to keep proper records, if there was such a failure, should be decided in favor of WCM. Any confusion or difficulties caused by IPS's records also should be held against IPS, not WCM, if you find that there was such a failure by IPS.

V. VERDICT

Finally, ladies and gentlemen, we come to the point where we will discuss the form of your verdict and the process of your deliberations. You will be taking with you to the jury room a verdict form on which to record your findings. The verdict form reads as follows:

[Read Verdict Form]

You will be selecting a presiding juror after you retire to the jury room. That person will preside over your deliberations and be your spokesperson here in court. When you have completed your deliberations, your presiding juror will fill in and sign the verdict form.

Your verdict must represent the considered judgment of each of you. In order to return a verdict, it is necessary that each of you agree to that verdict. That is, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so

without violence to individual judgments. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

We will be sending with you to the jury room all of the exhibits in the case. You may not have seen all of these previously and they will be there for your review and consideration. You may take a break before you begin deliberating but do not begin to deliberate and do not discuss the case at any time unless all of you are present together in the jury room. Some of you have taken notes. I remind you that these are for your own individual use only and are to be used by you only to refresh your recollection about the case. They are not to be shown to others or otherwise used as a basis for your discussion about the case.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the Court

Security Officer who will bring it to my attention. I will then respond as promptly as possible after conferring with counsel, either in writing or by having you returned to the courtroom so that I can address you orally. Please understand that I may only answer questions about the law and I cannot answer questions about the evidence. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.