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Greek court applies doctrine of equivalents in numerical range

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 PATRINOU & KILIMIRIS
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Constantinos Kilimiris December 09 2022



Constantinos Kilimiris of Patrinos & Kilimiris explains why a ruling by the Athens First Instance Single Member Court is an important addition to the body of case law on the doctrine of equivalents

While the doctrine of equivalents is well established as a legal theory in Greece, the number of decisions applying this is still not very large. In view of the above, any new decision is a welcome addition to building the respective Greek case law and clarifying the criteria applicable.

In this context the Athens First Instance Single Member Court was recently called to decide on a preliminary injunction (PI) application by an originator pharmaceutical company holding a patent protecting a pharmaceutical formulation, which was claimed on the basis of its excipients and its load of active pharmaceutical ingredients (API) presented in a numerical range. The claim expressly excluded two excipients.

The generic product at issue differed in that its API load slightly exceeded that of the patent claim and contained, in its coating, one of the excipients excluded in the claim.

While there was no issue of literal infringement, the court was asked to decide whether the above differences in the generic product were sufficient to avoid infringement under the doctrine of equivalents.

The court's decision

The court ruled that the generic products at issue perform the same function, are directed to the same patients, and have the same therapeutic effect as the patented products.

Furthermore, it was held that the fact that the generic products' API were outside the claimed range was an insubstantial differentiation since they were still well within the tolerance generally accepted by the regulatory authorities and substantially achieved the same therapeutic effect.

Finally, as regards the different excipient in the generic formulation, the court held that this was also an insubstantial differentiation since it was contained in the coating of the tablet, which, according to the decision, is a non-functional element that did not affect the release of the API, the therapeutic effect, or the overall function of the invention.

In summary the court found that the differentiating features were obvious and equivalent variants of the claimed features that did not place the generic product at issue outside the scope of the claims.

Apart from being another decision applying the doctrine of equivalents in Greece, this decision is also important because the court held that even numerical ranges in patent claims should not be determined by their strict verbal sense but, like any other claimed feature, can be interpreted taking into account the perception of the person skilled in the art considering the patent description as well as the regulatory bodies' practice.

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Constantinos Kilimiris

PARTNER Patrinos & Kilimiris
