

IN THE
Supreme Court of the United States

RETRACTABLE TECHNOLOGIES, INC., *et al.*,

Petitioners,

v.

BECTON, DICKINSON AND COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

**BRIEF *AMICUS CURIAE* OF THE INDIANA
UNIVERSITY MAURER SCHOOL OF LAW CENTER
FOR INTELLECTUAL PROPERTY RESEARCH IN
SUPPORT OF PETITIONERS**

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STATEMENT OF INTEREST OF *AMICUS CURIAE**

Amicus curiae is the Center for Intellectual Property Research of the Indiana University Maurer School of Law (the “Center”). Neither the Center nor Indiana University has any interest in the outcome of this matter. However, the Center, as a part of its missions, does have a strong interest in seeing the patent law develop in a consistent and positive way.

SUMMARY OF ARGUMENT

Competing and inconsistent claim construction rulings have arisen at the Federal Circuit Court of Appeals over the extent to which a patent specification can alter the scope of claim terms having ordinary meanings. Despite the Federal Circuit’s *en banc* decision in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005), which attempted to establish clear claim construction guidelines, subsequent Federal Circuit decisions have resulted in two dramatically different approaches to claim construction. One approach holds that the plain and ordinary meaning of claim language governs the construction unless the written description or prosecution history contains another express definition or a disclaimer of ordinary meaning.

*No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have been given at least ten days notice of *amicus*’ intention to file this brief and both have consented. Such consents are being submitted herewith.

E.g., Thorner v. Sony Computer Ent. Am. LLC, 669 F.3d 1362 (Fed. Cir. 2012). The other approach, however, holds that the ordinary meaning of claim language is narrowed, even in the absence of an express definition or a disclaimer, if the written description does not include examples of the broader meaning or does not otherwise show that the patentee actually invented the subject matter covered by the broader definition.

The conflict between the two approaches is extremely important and should be resolved. Claim construction arises in nearly every patent litigation, and the question of the extent to which a patent specification alters the scope of clear claim terms arises in nearly every patent litigation. Moreover, the reasoning used by the Federal Circuit to restrict otherwise ordinary meanings of claim terms to only that disclosed in the written description is based upon a perceived need to limit claim scope in order to preserve the claim's validity. This rationale, however, seems to contradict this Court's decision in *McCarty v. Lehigh Valley R. Co.*, 160 U.S. 110, 116 (1895) and other Federal Circuit decisions that, consistent with *McCarty*, refuse to rewrite claims to preserve validity. *E.g., Rhine v. Casio, Inc.*, 183 F.3d 1342, 1345 (Fed. Cir. 1999). The result of the Federal Circuit's competing and inconsistent lines of cases on the important claim construction question is confusion and unpredictability in the district courts and uncertainty among litigants.

In addition, the Federal Circuit invariably applies a *de novo* review of a district court's claim constructions, no matter the questions of fact or credibility the lower court may have resolved. The issue concerning the proper

standard of review of a district court's claim construction ruling also is extremely important, since patent litigation judgments are frequently appealed and claim construction is almost always part of that appeal. Even though other issues in patent litigation are reviewed in light of some level of deference to the decision of the district court or the verdict of the jury, claim construction is determined *de novo* on appeal, with no deference to the district court's ruling. This Court's decision in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996) established that claim construction is a question for the district court to decide, not the jury. But that decision did not hold, or even suggest, that the district court's claim construction ruling is freely reviewable regardless of its dependence on resolution of factual issues. However, nor did *Markman* hold that simply because claim construction can implicate factual issues, every claim construction decision is always entitled to deference. In other words, there is no basis for the Federal Circuit to have adopted a singular *de novo* review that must be applied to all district court claim construction rulings.

The Court should grant the petition for a writ of certiorari to resolve the issue of whether the ordinary meaning of claims should be narrowed to what is disclosed in the specification and to consider the level of appellate deference that should be given to a district court's claim construction.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE PERSISTENT DISAGREEMENT IN THE FEDERAL CIRCUIT OVER THE EXTENT TO WHICH A PATENT SPECIFICATION CAN ALTER THE SCOPE OF CLEAR TERMS IN PATENT CLAIMS.

In *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), this Court held that the construction of patent claim language is for the court and not the jury, but this Court did not specify the methodology that courts should use when sorting through the abundance of claim construction evidence to arrive at a proper construction. The Center agrees with the Petitioner that the time is right to consider that question. The Petitioner correctly points out that the claim construction law of the Federal Circuit remains in fundamental conflict even after the decision in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc) and that this conflict makes it impossible for litigants and patent practitioners confidently to predict how claim construction would be addressed by a district court or what line of Federal Circuit cases a particular district court might follow.

Under one line of cases, the plain and ordinary meaning of claim language governs the construction unless the written description expressly provides another meaning or unless the patentee has disclaimed the ordinary meaning, often during prosecution. *See, e.g., Thorner v. Sony Computer Ent. Am. LLC*, 669 F.3d 1362 (Fed. Cir. 2012). Under the other line of cases, the ordinary meaning of claim language is narrowed, even in the absence of an

express definition or a disclaimer, if the court concludes that the written description does not include examples of the broader meaning or does not otherwise show that the patentee actually invented the subject matter covered by the broader definition. *See, e.g., Honeywell Int'l v. ITT Indus., Inc.*, 452 F.3d 1312, 1317-19 (Fed. Cir. 2006); *Nystrom v. Trex Co., Inc.* 424 F.3d 1136 (Fed. Cir. 2005), *cert. denied*, 547 U.S. 1055 (2006). The sharp division within the Federal Circuit is both pronounced and current. *See, e.g., Marine Polymer v. Hemcon*, 672 F.3d 1350, 1370 (Fed. Cir. 2012) (Dyk, J., dissenting) (“Judge Lourie’s new approach to claim construction would enable patentees to eliminate questions of validity by narrowing claims in accordance with a preferred embodiment or single example, while also allowing alleged infringers to narrow claims beyond their valid scope to avoid infringement. That approach cannot be correct.”).

In addition to this conflict internal to claim construction, the Federal Circuit’s claim construction methodology creates an “undeniable conflict of monumental proportions” with the “written description” doctrine. *Ariad Pharm., Inc. v. Eli Lilly and Co.*, 598 F.3d 1336, 1364 (Fed. Cir. 2010) (en banc) (Rader, J., dissenting). This doctrine invalidates a claim where the specification does not objectively demonstrate that the applicant actually invented the claimed subject matter. *Id.* at 1340, 1349. *Accord, e.g., LizardTech, Inc. v. Earth Res. Mapping, Inc.*, 424 F.3d 1336, 1345 (Fed. Cir. 2005) (claim is invalid unless the specification demonstrates “that the patentee invented what is claimed.”).

As Judge Rader pointed out, in dissenting from the *en banc* decision in *Ariad*, if the line of cases limiting

claim language to what is disclosed in the specification was always followed, the written description doctrine would be irrelevant because properly construed claims “would never have a scope that exceeds the disclosure in the rest of the specification.” *Ariad*, 598 F.3d at 1365 (Rader, J., dissenting). In other words, the entire written description doctrine is predicated on the possibility of claim constructions that are broader than what is disclosed in the specification. The line of Federal Circuit decisions that seeks to avoid that very possibility by limiting the claim language to what the specification shows is the patentee’s invention renders the written description doctrine irrelevant in those cases. On the other hand, the written description doctrine is not irrelevant in those cases in which the court refuses to limit the claim language to that which is disclosed, instead holding the claims construed in accordance with their ordinary meaning to be invalid because not supported by the disclosure in the specification. *E.g.*, *Univ. of Rochester v. G.D. Searle & Co., Inc.* 358 F.3d 916 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1015 (2004).

Professor Janis, now Director of the Center, noted over a decade ago that claim construction and the written description requirement were beginning to conflict and cause improper importation of claim limitations from the specification:

Some cases indicate the Federal Circuit is willing to rely upon probable non-compliance with the written description requirement as a justification for rejecting one claim construction in favor of another in an infringement context. In form, this argument is easily supportable

under the maxim that claims be construed so as to preserve their validity. This argument also rests on the entirely non-controversial proposition that claims be construed in view of the written description portion of the specification. The problem is that the line between construing the claim “in view of” the specification and improperly importing limitations from the specification into the claim is already a fine one.

Mark D. Janis, *On Courts Herding Cats: Contending with the “Written Description” Requirement (and Other Unruly Patent Disclosure Doctrines)*, 2 Wash. U. J.L. & Pol’y 55, 86-87 (2000).

The line of Federal Circuit cases that limit the otherwise broad ordinary meaning of claim language provides an alternative to the written description doctrine to make sure that a patent claim does not cover what the inventor did not invent. But those alternative means to the same end have far different procedural implications. Under existing law, application of the written description doctrine is a question of fact, with a patent claim invalid only if the accused infringer can meet its burden by clear and convincing evidence. *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 323 F.3d 956, 962 (Fed. Cir. 2002); *see Ariad*, 598 F.3d at 1351. As a question of fact, determinations of compliance with the written description requirement are reviewed under the “clearly erroneous” standard, *Eiselstein v. Frank*, 52 F.3d 1035, 1038 (Fed. Cir. 1995), or under the “substantial evidence” standard if made by a jury. *Bard Peripheral Vascular, Inc. v. W.L. Gore & Associates, Inc.*, 670 F.3d 1171, 1188 (Fed. Cir. 2012). On the other

hand, as this case itself demonstrates, the process of narrowing otherwise broad claim language to encompass only that which is supported by the specification is seen as a question of law, reviewable *de novo* by the Federal Circuit. At least one commentator has recognized the drastically different burdens of proof and standards of review on appeal implicated by a court's unpredictable choice of which avenue to use to ensure that the patentee actually invented what is claimed:

The fundamental problem with utilization of a narrow written description to narrow otherwise broad claim language is the risk that a substantive validity defense, on which the accused infringer bears the burden of proof by clear and convincing evidence, and which the Federal Circuit has said is a question of fact and not a question of law, will be resolved as a question of law, with no burden of proof, by the judge, and without a trial.

Charles E. Lipsey, *Litigation of the Written Description* (June 22-25, 2005), available at <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=0e125471-4771-44a6-9d4f-9db77b82540a>.

So, depending of which of these two doctrines is used to limit a claim to what is disclosed by the specification, the decision can either (1) be made by the Court, with neither side having a burden of proof and (under current law) freely reviewable by the Federal Circuit, or (2) be made by the finder of fact, with the alleged infringer having the burden of proving invalidity by clear and convincing evidence and appellate review being limited to reversal only for clear error or lack of substantial evidence.

These different paths can lead to very different results. Suppose, for example, that a district court concludes, following one line of Federal Circuit decisions, that the ordinary meaning of the claim cannot be limited even though it is not supported by the specification. Under this broad meaning, the accused device may infringe and the jury may find the patent not invalid because the accused infringer did not meet its "clear and convincing" burden of proof under the written description doctrine, leading to a victory for the patent owner. However, if the district court, given the same facts, applies the line of Federal Circuit decisions that restricts the meaning of claim language to what is disclosed, the Court may find the claim not infringed by the accused device and the accused infringer will win. Because the scope of the claim has been limited to the disclosure, there will be no written description issue. On the same facts, the two doctrines, both intended to ensure that a patentee's claims are not broader than its invention, can lead to far different results.

Under a different set of facts, where broad claim language is not supported by the specification, courts that do not limit the ordinary meaning of a claim may find the claim invalid under the written description doctrine. On the other hand, courts that limit claim construction to what is disclosed, rather than reaching a finding of invalidity under the written description doctrine, would simply be more likely to find the relatively narrowly-construed claim not infringed by the accused device. Professor Holbrook recently noted the fundamental difference between these outcomes:

When there is a judgment only of noninfringement, the consequences are between only the patentee and that particular infringer; the patent is

still valid, enforceable against other potential infringers, and available to license. With an invalidity determination, however, the patent is invalid as to the rest of the world, even those not involved in the litigation.

Timothy R. Holbrook, *Patents, Presumptions, and Public Notice*, 86 Ind. L.J. 779, 802-03 (2011).

The line of Federal Circuit decisions that uses the lack of disclosure in the specification to limit the ordinary meaning of claim language seems to be predicated on the notion that the court is entitled to limit otherwise broad claim language to sustain the claim's validity. *E.g.*, *Wang Labs., Inc. v. America Online, Inc.*, 197 F.3d 1377, 1383 (Fed. Cir. 1999) (“[T]he claims are not properly construed to have a meaning or scope that would lead to their invalidity for failure to satisfy the requirements of patentability.”). However, that approach seems to be precluded by this Court’s decision in *McCarty v. Lehigh Valley R. Co.*, 160 U.S. 110, 116 (1895) (“[W]e know of no principle of law which would authorize us to read into a claim an element which is not present, for the purpose of making out a case of novelty or infringement.”). Consistent with the *McCarty* decision, the Federal Circuit has expressly “admonished against judicial rewriting of claims to preserve validity.” *Rhine v. Casio, Inc.*, 183 F.3d 1342, 1345 (Fed. Cir. 1999). It has rejected a “district court’s misguided theory that it should or could rewrite the claims” to preserve their validity. *Becton Dickinson and Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 799 n.6 (Fed. Cir. 1990).

The only time courts are to consider validity issues in determining the meaning of claim language is when

“the court concludes, after applying all the available tools of claim construction, that the claim is still ambiguous.” *Phillips*, 415 F.3d at 1327 (quoting *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 911 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 925 (2004)); *Athletic Alternatives, Inc. v. Prince Manufacturing, Inc.*, 73 F.3d 1573, 1581 (Fed. Cir. 1996). Otherwise, courts are to ignore validity considerations in their claim constructions, leaving for another day, a different burden of proof and potentially a different finder of fact to decide if the claim is valid in light of its ordinary meaning. *Rhine*, 183 F.3d at 1346 (limitations cannot be read into claim to preserve their validity because defendant “cannot avoid a full-blown validity analysis by raising the specter of invalidity during the claim construction phase.”).

It is possible to reconcile the written description doctrine with claim construction principles, but not in the way those claim construction principles are being applied in the line of cases from the Federal Circuit that add limitations from the specification to the ordinary meaning of claim language. If the principle of using the specification to construe claim language were limited to those situations in which the ordinary meaning of claim language is ambiguous or when there is more than one ordinary meaning, there would be no conflict. In accord with existing practice for determining ordinary meaning, during the claim construction process the applicable ordinary meaning could be selected that would preserve the validity of the claim. Once so construed, the claim would, by definition, not exceed the disclosure of the specification and would not be invalid under the written description doctrine. In all other cases, unless the patentee had expressly defined a claim term to have a meaning other than its ordinary meaning or had disclaimed the

ordinary meaning, the term would be given its ordinary meaning. If the accused infringer can establish that the ordinary meaning is not supported by the specification, the claim would be invalid under the written description doctrine. Such a procedure retains the written description doctrine, while still allowing the specification to be used to determine claim meaning in particular cases as necessary.

II. THE COURT SHOULD GRANT THE PETITION FOR CERTIORARI TO CONSIDER THE FEDERAL CIRCUIT'S REFUSAL TO DEFER TO DISTRICT COURTS ON ISSUES OF CLAIM CONSTRUCTION.

In deciding whether judge or jury should perform claim construction, this Court decided that claim construction decisions are not among those that “must fall to the jury in order to preserve the substance of the common-law right [to trial by jury] as it existed in 1791.” *Markman*, 517 U.S. at 376 (1996). Under the *Markman* decision, there is no doubt that claim construction decisions are not to be made by juries. But it simply does not follow that claim construction decisions are therefore freely reviewable *de novo* in all respects by the Federal Circuit, regardless of their resolution of disputed issues of fact, as determined in *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448 (Fed. Cir. 1998) (en banc). *Cybor* inappropriately read *Markman* to control the relationship between the district court and the appellate court rather than as a simple decision of who construes claims at the district court.

For example, decisions to grant permanent injunctions are, of course, not made by the jury, but those decisions are reviewed only for an abuse of discretion. *eBay Inc.*

v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). Similarly, decisions to find a patent unenforceable for inequitable conduct are not made by the jury, but are also reviewed only for an abuse of discretion. *Scanner Techs. v. Icos Vision Sys.*, 528 F.3d 1365, 1374 (Fed. Cir. 2008). In determining whether there has been an abuse of discretion, findings of fact are accepted unless they are clearly erroneous. *Id.* See also *Nilssen v. Osram Sylvania, Inc.*, 504 F.3d 1223, 1229 (Fed. Cir. 2007), *cert. denied*, 554 U.S. 903 (2008).

Consequently, there is no reason to conclude that simply because the court and not a jury determines claim construction, the court's decision is freely reviewable regardless of its dependence on resolution of factual issues. Conversely, there is no reason to conclude that simply because claim construction can implicate factual issues, every claim construction decision is always entitled to deference.

For example, it is possible in some circumstances to determine the meaning of claim language simply by referring to the four corners of the patent document. In such situations, it may be that the decision is freely reviewable as a “question of law” as are contract interpretations relying only on the contract itself. See 11 S. Williston, *Contracts* (4th Ed. 1999) § 30:6 (“the interpretation and construction of a written contract present only questions of law, within the province of the court ... so long as the contract is unambiguous and the intent of the parties can be determined from the agreement's face.”).

On the other hand, if the determination of the “ordinary meaning” of a specialized technical term

depends on resolving the credibility of opposing experts, it may be that the decision is a factual determination that can be reversed only if the determination is clearly erroneous. And, when questions of fact and questions of interpreting the patent document itself are involved, the proper standard may well be the traditional standard for reviewing mixed questions of fact and law: "We exercise plenary review of the district court's legal conclusions. We defer to the factual findings supporting that conclusion, unless they are clearly erroneous." *E.g., United States v. Voigt*, 89 F.3d 1050, 1064 (3d Cir. 1996), *cert. denied*, 519 U.S. 1047 (1996) (citations omitted). But whatever standard should be applied in any particular circumstance, there is no precedent for the Federal Circuit's decision to apply the same standard of review in all circumstances, notwithstanding the extent to which the decision implicates disputed issues of fact and even determinations of credibility. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-76 (1985) (addressing reasons for appellate deference to trial court findings of fact, particularly credibility determinations).

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari to resolve the issue of whether the ordinary meaning of claims should be narrowed to what is disclosed in the specification and to consider the level of appellate deference that should be given to a district court's claim construction.

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