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Patent Law—Bringing Predictability Back With the Intracircuit Split Pronounced in Retractable Technologies, Inc. v. Becton, Dickinson & Co., 653 F.3d 1296 (2011): Claim Construction and Unpredictably Limiting the Patentee's Rights

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PATENT LAW—BRINGING PREDICTABILITY BACK WITH THE
INTRACIRCUIT SPLIT PRONOUNCED IN *RETRACTABLE TECHNOLOGIES, INC. V.
BECTON, DICKINSON & CO.*, 653 F.3D 1296 (FED. CIR. 2011): CLAIM
CONSTRUCTION AND UNPREDICTABLY LIMITING THE PATENTEE’S RIGHTS

I. INTRODUCTION

In the rapidly expanding entrepreneurial world of biotechnology, an up-and-coming medical student at UAMS has recently secured a patent on a precision laser device, which she will dedicate her life to developing, which will revolutionize how doctors treat and eliminate cancerous tumors. Inspired by the loss of a close family member to cancer, she has been developing this cancer-killing device since taking Robotics in her junior year of college. Two years after securing the patent and during the testing phase of her invention, she discovers that without her consent her former lab partner copied her design, reprinted her notes, and stole her idea. He secretly cloned and then modified the device, and now he seeks to secure a patent of his own. She knows that he is guilty of patent infringement, and she wants to protect her legal rights, including the rights to exclusively market, produce, license, and distribute the invention.

After consulting an attorney, she learns that her previous patent attorney, who compiled and secured the patent, used ambiguous language in constructing the necessary components of the patent. The new attorney tells her that when certain language of the patent is ambiguous or unclear, the court can be unpredictable in its determination of what constitutes the patentable invention and thus what infringes upon that patent. At this point, she is not sure what the court will consider to be her patented device or her legal rights because the United States Court of Appeals for the Federal Circuit (“Federal Circuit”) is not uniform in its methodology of analyzing ambiguous patent language. The unpredictability and lack of uniformity leave her with more questions than answers, and she wonders if pursuing litigation will even render her the best results.

There is no denying that patents can be very arduous and complex. Generally speaking, there are three primary parts of a patent: the specification, the drawings, and the claims.¹ The claims and specification are the two primary components relevant to this note. A patent must conclude with at least one claim, which is a single sentence description that identifies the

1 1 ROBERT A. MATTHEWS, JR., ANNOTATED PATENT DIGEST § 1:21 (2008).

invention over which the patentee wants legal rights and exclusivity.² The single sentence of a claim identifies exactly what the patentee regards as “its” own invention. The specification “includes drawings and textual descriptions of the invention” and describes the “embodiments of the invention,” which are specific blueprints to build and use the invention.³ Thus, the specifications provide a step-by-step description and illustration of what the invention looks like, how it is constructed, and how it is used. The claims are single sentences that identify exactly what the patentee seeks to establish legal rights over.⁴ When the words within the claims, the claim terms, are ambiguous, the court will analyze the varying evidence in order to determine the meaning of the claim term; this is claim construction.⁵ Simply, claim construction can be thought of as being analogous to statutory interpretation because both require interpretation of ambiguous language where reasonable minds can reach very different conclusions.

The Federal Circuit is the appellate court of focus in this note regarding matters of patent litigation on appeal. Although the Federal Circuit was created to provide predictability and uniformity, the court can be unpredictable and lack uniformity in the methodology used in claim construction, which can leave a patentee wondering exactly what rights he may have over his patent.⁶ Predictability and uniformity have been well-known goals and objectives in the creation and interpretation of law throughout history. The Federal Courts Improvement Act created the Federal Circuit with the goal of establishing uniformity in patent law interpretation, including claim construction.⁷

Despite efforts to establish uniformity in the Federal Circuit, there has been substantial uncertainty and unpredictability in claim construction within the Federal Circuit.⁸ According to a 2001 study by Judge Kimberly Moore, now a judge in the Federal Circuit, the district courts have decided at least one claim construction issue incorrectly in 33% of appealed cases, and the Federal Circuit reversed or vacated the decision in 81% of cases where the district court’s claim construction reached an incorrect conclusion.⁹ This is a huge percentage of reversed and vacated judgments handed down from a district court. Because the Federal Circuit has not established and adhered

2. Christopher A. Cotropia, *What is the “Invention”?*, 53 WM. & MARY L. REV. 1855, 1865 (2012).

3. *Id.* at 1866.

4. *Id.* at 1865.

5. *See id.* at 1865–66, 1879.

6. *See* Eifion Phillips, Comment, *Phillips v. AWH Corp.: Reemphasizing Context in Patent Claim Construction*, 31 DEL. J. CORP. L. 957, 958–59 (2006).

7. *Id.* at 958.

8. *Id.*

9. Kimberly A. Moore, *Are District Court Judges Equipped to Resolve Patent Cases?*, 15 HARV. J.L. & TECH. 1, 11–13 (2001).

to one specific methodology, patent litigants have faced extremely high reversal rates in the Federal Circuit, purportedly up to 47% in 2003–2004.¹⁰

Many argue that the particular claim construction methodology the court employs in any given case depends largely on which judges are on the panel and which ones are not, making it panel-dependent and very unpredictable.¹¹ Moreover, when claim construction is not certain or definite, even in the Federal Circuit, there is greater unpredictability and uncertainty that can dictate how a person chooses to pursue infringement litigation and the chances of success.¹² Claim construction appeals can “lead[] to frustrating and unpredictable results” for all parties involved, leaving litigants wondering exactly what rights they have over their patents and how the court will construe their patents in litigation.¹³

This note examines the claim construction methodologies of the Federal Circuit as pronounced in the intracircuit split of *Retractable Technologies, Inc. v. Becton, Dickinson & Co.*¹⁴ (“*Retractable I*”) and *Retractable Technologies, Inc. v. Becton, Dickinson & Co.*¹⁵ (“*Retractable II*”), as well as the role of the specification in claim construction. The majority in *Retractable I* appears to transgress the precedent and guidelines of claim construction as promulgated by *Phillips v. AWH Corp.*¹⁶ (“*Phillips*”).¹⁷ The dissents in *Retractable I* and *II* assert that the majority deviated from its established method of claim construction and its approach cannot be reconciled with *Phillips*.¹⁸ *Phillips* established that within the rules of claim construction, the specification should not be used to import a limitation into the claim term, but the specification should be used to interpret the meaning of a claim term.¹⁹ The dissent in *Retractable I* maintains that the majority improperly used the specification to import a limitation into the claim term,

10. *Phillips*, *supra* note 6, at 959.

11. Stephanie Ann Yonker, *Post-Phillips Claim Construction: Questions Unresolved*, 47 IDEA: INTELL. PROP. L. REV. 301, 308–09 (2007).

12. *See* Moore, *supra* note 9, at 27–28.

13. *See, e.g.*, *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1370 (Fed. Cir. 2011) (denial of rehearing en banc) (Moore, J., dissenting) (noting the frequent commentary, discussion, and analysis of the unpredictability and lack of uniformity in claim construction appeals).

14. *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 653 F.3d 1296 (Fed. Cir. 2011).

15. *Retractable Techs.*, 659 F.3d 1369 (denial of rehearing en banc).

16. 415 F.3d 1303 (Fed. Cir. 2005) (en banc) (establishing guidelines for conducting claim construction).

17. *Compare Retractable Techs.*, 653 F.3d at 1303–13, with *Phillips*, 415 F.3d at 1312–20.

18. *See Retractable Techs.*, 659 F.3d at 1370–73 (Moore, J., dissenting); *Retractable Techs.*, 653 F.3d at 1312–13 (Rader, C.J., dissenting).

19. *See Phillips*, 415 F.3d at 1323.

thereby deviating from the guidelines of *Phillips* and limiting the rights of the patentee.²⁰

This note shows that the majority in *Retractable I* erred when it deviated from the well-established guidelines of *Phillips* and improperly and unpredictably limited the rights of the patentee. The dissent in *Retractable I* and the majority in *Phillips* adhere to the correct claim construction methodology, and in order to increase predictability and uniformity, the Federal Circuit should adhere to the claim construction methodology promulgated by *Phillips* and avoid deviation from those guidelines. Compounding the problem, the Federal Circuit reviews claim construction appeals de novo as a matter of law, granting zero deference to the lower court, even when factual-based extrinsic evidence is utilized, and the lower court is better equipped to analyze large amounts of factual based evidence.²¹

As essential background information, this note first examines the purpose of a patent, the relevant components of a patent, and the establishment and role of the Federal Circuit. Next, the note discusses the claim construction process and standards of *Phillips* and the intracircuit split of *Retractable I* and *Phillips*. This note then explains the concept of extrinsic versus intrinsic evidence, as well as the Federal Circuit's de novo review of claim construction matters. In conclusion, the note analyzes the intracircuit split by comparing and contrasting methodologies, established standards, extrinsic evidence, and it concludes that the majority in *Retractable I* erred when it deviated from the standards of *Phillips* by improperly using the specification to limit the meaning of a claim term, which leads to unpredictable consequences for patent litigants.

II. BACKGROUND

This section begins by exploring the purpose of a patent, the components, and the Federal Circuit as the appellate court of focus. Next, this section explains claim construction, the standards of claim construction used by the Federal Circuit, and the intracircuit split of claim construction methodology. Finally, this section shows that the courts should use extrinsic evidence when the intrinsic evidentiary record is inconclusive to resolve a claim term ambiguity.

20. See *Retractable Techs.*, 653 F.3d at 1311–13 (Rader, C.J., dissenting).

21. See *Retractable Techs.*, 659 F.3d at 1370–73 (Moore, J., dissenting); *Retractable Techs.*, 653 F.3d at 131–13 (Rader, C.J., dissenting).

A. What a Patent Represents, the Purpose, the Components, and the Federal Circuit

In the United States, a patent confers upon the patentee certain legal rights that are established to help protect the patented invention.²² Recall previously that the specification is composed of drawings and textual descriptions that provide a blueprint on how to duplicate the invention.²³ The specification is analogous to a food recipe in a cookbook that shows step-by-step how to reproduce and use the invention. The claims of a patent are single-sentence descriptions that conclude the specification and identify the invention and exactly what the patentee is claiming to have rights over.²⁴ During patent litigation and prosecution for infringement, the court must determine the specific rights that encompass the patent in order to determine if those rights have been infringed upon.²⁵ Upon appeal from the federal district courts, the Federal Circuit is the primary appellate court and the court of focus in this note.²⁶

1. *The Purpose of a Patent*

It is important to understand the necessity and significance of a patent and its purpose because patents serve to confer on the patentee certain legal rights to exclusively develop, produce, sell, market, distribute, license, and provide an incentive to disclose “new scientific and technical developments.”²⁷ Patents also serve to encourage innovation and development by protecting the rights of the patentee from infringement by outside sources such as duplication, reproduction, or modification.²⁸ The protection of a patentee’s rights encourages innovation by protecting the fruits of the patentee’s labor from infringement and exploitation.²⁹ Patents seek to “foster and reward invention,” “promote[] disclosure of inventions,” and “assure that ideas in the public domain remain there for the free use of the public.”³⁰

Inventors, researchers, developers, investors, and academics need reassurance and confidence that their inventions and developments will be pro-

22. See generally Cotropia, *supra* note 2.

23. *Id.* at 1866.

24. *Id.* at 1865; Christian E. Mammen, *Patent Claim Construction as a Form of Legal Interpretation*, 12 J. MARSHALL REV. INTELL. PROP. L. 40, 44 (2012).

25. See generally Cotropia, *supra* note 2.

26. Mammen, *supra* note 24, at 51.

27. 1 JOHN GLADSTONE MILLS III ET AL., PATENT LAW FUNDAMENTALS § 1:2 (2d ed. 2015).

28. *Id.*

29. *Id.*

30. *Id.* (quoting *Thomas & Betts Corp. v. Panduit Corp.*, 138 F.3d 277, 284 (7th Cir. 1998)).

tected from infringement.³¹ In order to foster and encourage research, development, and innovation, the United States must have a system of laws and protections that affords these assurances.³² The purpose of United States patent law is to ensure that a person who has invested time, energy, money, and labor in developing a patentable product or process should be afforded the benefit of that invention by having the legal right to exclude others from the benefit of that invention.³³

2. *The Relevant Components of a Patent: Specification and Claims*

The two main, and most relevant, parts of a patent are the claim and the specification.³⁴ As previously discussed, a patent must end with at least one claim, which is a single sentence that identifies the invention over which the patentee wants legal rights and exclusivity.³⁵ Also, the specification “includes drawings and textual descriptions of the invention” and describes the “embodiments of the invention,” which can be used as a blueprint to build and use the invention.³⁶

The requirement of one or more claims and the specification are statutory requirements that, pursuant to established law, must be included in every patent.³⁷ Statute 35 U.S.C. § 112(a) establishes the requirement that a written specification must use “clear, concise, and exact terms” such that “any person skilled in the art to which it pertains” can make and use the same invention with the understanding of the meaning.³⁸ Section 112(b) requires the specification to conclude with one or more claims, which will identify precisely what the inventor regards as the invention.³⁹ Thus, this statute requires a specification as well as one or more claims to identify in clear and concise terms what the inventor seeks to enforce legal rights and exclusivity over, and what is regarded as the invention.⁴⁰

3. *The Role and Establishment of the Federal Circuit*

Claim language and specifications can be difficult, technical, and extremely complex to dissect and analyze.⁴¹ Because of the specialization and

31. See generally Phillips, *supra* note 6, at 957, 979.

32. See *id.* at 979.

33. MILLS ET AL., *supra* note 27, § 1:2.

34. See Cotropia, *supra* note 2, at 1865–66.

35. *Id.* at 1865.

36. *Id.* at 1866.

37. 35 U.S.C. § 112(a)–(b) (2013).

38. *Id.* § 112(a).

39. *Id.* § 112(b).

40. *Id.* § 112(a)–(b).

41. See generally Cotropia, *supra* note 2.

technical aspect of patent infringement and claim construction, not every court has jurisdiction over issues of patent law, specifically over patent infringement.⁴² Congress created the Federal Circuit, through the Federal Courts Improvement Act of 1982, in order to provide an appellate forum having exclusive jurisdiction specifically over patent law.⁴³ The Federal Circuit, therefore, serves as the exclusive appellate court for matters of patent law and patent cases when appealed from a federal district court.⁴⁴ The Federal Circuit will ultimately hear matters of patent infringement on appeal regarding patent claim construction, and is the court of focus in this note.⁴⁵

B. When the Claim Term is Ambiguous: The Standard of Claim Construction and the Intracircuit Split

A patent infringement case on appeal requires the court to analyze and interpret the claims and the specification in order to determine the patentee's precise legal rights and whether those rights have been infringed.⁴⁶ When the claim term or language is unambiguous, the court need not engage in further analysis for that particular claim.⁴⁷ However, when the claim term is ambiguous the court is required to engage in claim construction analysis in order to determine what legal rights that claim will confer upon the patentee.⁴⁸ Claim construction is the particular analysis that the court will undertake in order to interpret and define the particular meaning of claim terms and claim language.⁴⁹ *Phillips* represents the Federal Circuit's well-established guidelines of claim construction.⁵⁰

1. *Phillips v. AWH Corp. Sets the Standard for Claim Construction Methodology*

Phillips sets the standard and guidelines for claim construction analysis and provides a roadmap of how the court is to engage in claim construction in order to provide uniformity and predictability.⁵¹ In *Phillips*, the court in-

42. See Joseph R. Re, *Brief Overview of the Jurisdiction of the U.S. Court of Appeals for the Federal Circuit Under § 1295(A)(1)*, 11 FED. CIR. B.J. 651, 651–52 (2002).

43. *Id.*

44. *Id.*

45. See *id.*

46. See Edward D. Manzo, *How to Improve Patent Claim Interpretations*, 22 FED. CIR. B.J. 203, 204–13 (2012).

47. See *id.* at 203–12.

48. See *id.*

49. See Manzo, *supra* note 46, 203–212.

50. See *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc).

51. See *id.*

terpreted, established, and reiterated all of the rules and guidelines to be followed in conducting claim construction.⁵²

The claims of a patent define the invention and what the patentee has a legal right to exclude others from using.⁵³ This principle has been recognized since 1836, when Congress first required that a specification include one or more claims.⁵⁴ *Phillips* states that the words contained in a claim “are generally given their ordinary and customary meaning” when reading a patent.⁵⁵ The ordinary and customary meaning of a term in patent law is “the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention.”⁵⁶ The person of ordinary skill through whose eyes the claim is construed—persons skilled in the field of the invention—must read the claim term in the context of the whole patent, including the specification.⁵⁷ However, the meaning of the claim term under these guidelines may not be readily apparent, and the court then looks to other sources to determine the meaning of the claim term.⁵⁸ The court may look to the words of the claims themselves, claim language, or the remainder of the specification, all of which constitute intrinsic evidence.⁵⁹ When the intrinsic evidentiary record is insufficient to determine the meaning of the claim term or language, the court may then look to extrinsic evidence, including expert testimony, the dictionary meaning of terms, and prior trial court hearings and proceedings, for example.⁶⁰

The specification plays an important role, because claims do not stand alone and must be analyzed and interpreted in view of the specification in order to ascertain the whole written instrument.⁶¹ In fact, the specification is highly relevant, and when the claim term is disputed, the specification is usually dispositive in claim construction analysis, but not always.⁶²

When the specification is not dispositive but is unclear or ambiguous, the court must engage in claim construction to determine the whole meaning

52. *See id.* at 1311–24.

53. *Id.* at 1312 (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004)) (citing *Vitronics Corp. v. Conceptor, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996); *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979–81 (Fed. Cir. 1995) (en banc)).

54. *See id.*

55. *Id.* (quoting *Vitronics Corp.*, 90 F.3d at 1582) (citing *Toro Co. v. White Consol. Indus., Inc.*, 199 F.3d 1295, 1299 (Fed. Cir. 1999); *Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1249 (Fed. Cir. 1998)).

56. *Phillips*, 415 F.3d at 1313 (citations omitted).

57. *Id.* at 1313 (citations omitted).

58. *See id.* at 1314 (citations omitted).

59. *See id.* at 1313–15 (citations omitted).

60. *See id.* at 1317–19 (citations omitted).

61. *See id.* at 1315.

62. *Phillips*, 415 F.3d at 1315 (citing *Vitronics Corp. v. Conceptor, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)).

of the written instrument.⁶³ The purpose of the specification is to enable others skilled in the art to make and use the invention, that is, to essentially provide a blueprint of the invention.⁶⁴ In cases of ambiguity, case law prescribes that the court should refer to the descriptive portion of the specification to ascertain the meaning of the claim term.⁶⁵

In claim construction, the court seeks to determine the “scope of the actual invention” by analyzing the context of the patent as a whole rather than “divorcing the claim language from the specification.”⁶⁶ The court considers the specification as a guideline in construing the claim term when determining the scope of the actual invention; that is, the claim term should not be interpreted to mean something that the specification does not support.⁶⁷

However, it is essential to understand that there is an important “distinction between using the specification to interpret the meaning of a claim and importing limitations from the specification into the claim.”⁶⁸ This quoted language means that the specification should not be used to improperly limit the meaning of the claim term, but rather it should only be used for the purpose of interpreting the meaning of a claim term. For example, if a claim term in the precision laser device is written as a “laser refractor” and the specification describes a “two-piece laser refractor,” the claim term should not be limited in its interpretation to include only a “two-piece laser refractor” because that would import a limitation from the specification into the claim term. The claim term should not be limited to the exact description or embodiments of the specification.⁶⁹ The specification is not to be used as limiting language but rather as a helpful tool in construing a claim.⁷⁰ Previous case law concludes that the court must focus on understanding what a person of ordinary skill in the art would interpret the claim to mean and refrain from confining the meaning of a claim term to the specific embodiments described by the specification.⁷¹

63. *See id.* at 1315.

64. *See id.* at 1323 (citing *Spectra-Physics, Inc. v. Coherent, Inc.*, 827 F.2d 1524, 1533 (Fed. Cir. 1987)).

65. *Bates v. Coe*, 98 U.S. 31, 38 (1878).

66. *Phillips*, 415 F.3d at 1323–24.

67. *See id.* at 1320–24.

68. *Id.* at 1323 (citing *Comark Commc’ns, Inc. v. Harris Corp.*, 156 F.3d 1182, 1186–87 (Fed. Cir. 1998)).

69. *Id.* (citing *Nazomi Commc’ns, Inc. v. ARM Holdings, PLC*, 403 F.3d 1364, 1369 (Fed. Cir. 2005); *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 906–08 (Fed. Cir. 2004); *Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1327 (Fed. Cir. 2002); *SRI Int’l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1121 (Fed. Cir. 1985)).

70. *See id.*

71. *See id.* (citing *Nazomi Commc’ns, Inc.*, 403 F.3d at 1369; *Liebel-Flarsheim Co.*, 358 F.3d at 906–08; *Teleflex, Inc.*, 299 F.3d at 1327; *SRI Int’l*, 775 F.2d at 1121).

This means that the claim term should not be limited strictly to what the specification describes.⁷² Improperly importing a limitation diminishes the patentee's rights, restricts her patented invention, and increases unpredictability by creating unintended consequences. In order to avoid importing limitations from the specification into the claim, the court should adhere to the notion that the purpose of the specification is to teach a person of ordinary skill in the art how to make and use the invention, not to provide limitations upon the claim term.⁷³ This is a very important distinction and is the crux of this note's analysis. *Retractable I, II*, and *Phillips* represent an intracircuit split in which the dissents in *Retractable I* and *II* alleged that the majority improperly imported a limitation from the specification into the claim term, thereby deviating from the guidelines of *Phillips*.⁷⁴ This deviation defies the standards set forth by *Phillips*.

2. *The Intracircuit Split: Claim Construction Methodology in Retractable I and the Dissents in Retractable I and II, and Whether a Limitation was Improperly Imported—Background Case Law*

Retractable I, *Retractable II*, and *Phillips* are the primary cases at hand in examining the ambiguity in a claim term, claim construction, and the intracircuit split. In *Retractable I*, Becton, Dickinson and Company (BD), referencing patented retractable syringe needles, argued that the claim term "body" as a central housing of a syringe needle (the part of the needle that contains any liquids to be injected) should be restricted to include only one-piece bodies.⁷⁵ BD argued that the district court erred in construing the term "body" as not limited to a single-piece structure and finding that the term can include multiple-piece bodies.⁷⁶ Retractable Technologies, Inc. (RTI) countered that the ordinary meaning of "body" does not limit the term to a one-piece structure.⁷⁷ According to RTI, the use of the modifier "one-piece" in specific instances indicated that the "body" was not intended to be exclusively one-piece but could contain multiple pieces; otherwise, the modifying term "one-piece" would have been superfluous.⁷⁸ The Federal Circuit agreed

72. See *Phillips*, 415 F.3d at 1323.

73. See *id.*

74. See generally *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369 (Fed. Cir. 2011) (denial of rehearing en banc); *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 653 F.3d 1296 (Fed. Cir. 2011); *Phillips*, 415 F.3d 1303.

75. See *Retractable Techs.*, 653 F.3d at 1298–1300, 1304.

76. See *id.* at 1304.

77. *Id.*

78. See *id.*

with BD that the term “body” is limited to a one-piece structure when viewed in light of the specification.⁷⁹

The majority in *Retractable I* asserted that a court must view the claim language in light of the specification to determine the proper construction of the term.⁸⁰ The construction of the term “body” being limited to a “one-piece body is required to tether the claims to what the specifications indicate the inventor actually invented” because the specifications show the body constructed as a single structure and only disclose embodiments that are limited to a single-piece body.⁸¹ The majority limited the claim term to one piece not by construing the term itself but by viewing the term in light of the specification in order to “capture the scope of the actual invention.”⁸²

The dissent argued that the majority improperly imported a limitation from the specification into the claim term, which improperly limited the rights of the patentee, RTI.⁸³ The dissent in *Retractable I* (and *Retractable II*), recognizing *Phillips* as the standard for claim construction methodology, asserted that the claims themselves, not the specification, define the invention.⁸⁴ The dissent believed that the term “body” and the claim language were ambiguous and reiterated that the “[c]laim language is to be given its ordinary . . . meaning, as understood by a person of ordinary skill in the art.”⁸⁵ In support of the dissents, the court in *Phillips* held that the court must not improperly import a limitation from the specification into the claim but should only construe the claim in light of the specification.⁸⁶

There is clear disagreement in determining if the majority improperly imported a limitation into the claim term and whether the claim construction in this case violated the guidelines of claim construction set forth in *Phillips*.⁸⁷ This is significant because if the majority in *Retractable I* did in fact use the specification to limit the meaning of the claim, thereby violating the rules of *Phillips*, then the patentee’s legal rights were improperly limited as well. Based upon the methodology established by *Phillips*, the court should

79. *Id.* at 1305.

80. *Id.* at 1305 (citing *Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005) (en banc)).

81. *Retractable Techs.*, 653 F.3d at 1305.

82. *See id.* at 1304–05.

83. *See id.* at 1312–13 (Rader, C.J., dissenting).

84. *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1370–71 (Fed. Cir. 2011) (denial of rehearing en banc) (Moore, J., dissenting) (citing *Phillips*, 415 F.3d at 1312); *Retractable Techs.*, 653 F.3d at 1312 (Rader, C.J., dissenting) (citing *Phillips*, 415 F.3d at 1312).

85. *Retractable Techs.*, 653 F.3d at 1312 (Rader, C.J., dissenting) (citing *Phillips*, 415 F.3d at 1312–13).

86. *See Phillips*, 415 F.3d at 1323.

87. *See generally Retractable Techs.*, 659 F.3d 1369 (Moore, J., dissenting); *Retractable Techs.*, 653 F.3d 1296 (Rader, C.J., dissenting).

not use the specification to limit the meaning of a claim term, and the Federal Circuit is split in determining if *Retractable I* represents a deviation from that methodology. Deviation from precedential methodology introduces and compounds the element of unpredictability for patent litigants.

Parallel with the dissent in *Retractable I*, the dissenting opinion in *Retractable II* illustrated the intracircuit split regarding claim construction methodology and the role of the specification. The judges here explicitly acknowledged the existence of an intracircuit split in claim construction methodology and the role of the specification.⁸⁸ The dissenting judges declared that the majority decision in *Retractable I* cannot be reconciled with *Phillips* and that *Retractable I* deviated from the claim construction methodology promulgated in *Phillips*.⁸⁹

This split affirms the notion that the Federal Circuit is not uniform or predictable in its methodology of claim construction as promulgated by the guidelines of *Phillips*. This lack of uniformity and predictability can have grave consequences for both parties in a patent infringement case in determining the legal rights of each party and what constitutes the patented invention. Improperly importing a limitation into a claim term will degrade predictability and uniformity because the patented rights will be improperly limited. It is paramount that predictability and uniformity be material goals in both the creation and interpretation of law.

C. When the Intrinsic Evidentiary Record is Inconclusive, Extrinsic Evidence is Needed

In conducting claim construction analysis, the court first looks to the intrinsic evidentiary record consisting of claim language and the specification to construe the meaning of a claim term.⁹⁰ However, the intrinsic record is not always conclusive or dispositive in resolving ambiguity, and the court can look to the extrinsic evidentiary record as a tool in claim construction analysis, such as expert testimony, prior hearings, documentary evidence, etc.⁹¹ Extrinsic evidence has an inherently factual component for which the Federal Circuit's standard of appellate review is *de novo*, granting zero deference to the lower court even on matters of factual inquiry.⁹²

88. See *Retractable Techs.*, 659 F.3d at 1373 (Moore, J., dissenting).

89. See *id.* at 1371–72.

90. See *Phillips*, 415 F.3d at 1312–17.

91. See *id.* at 1317–19.

92. See *Retractable Techs.*, 659 F.3d at 1374–76 (O'Malley, J., dissenting) (reviewing extrinsic evidence is factual in nature).

It is improper to use extrinsic evidence in the claim construction analysis when the intrinsic evidence alone resolves an ambiguity.⁹³ The trial court, and the Federal Circuit, will only look to the extrinsic evidentiary record if ambiguity exists after analyzing the intrinsic record to construe a claim.⁹⁴ When the claim language is still ambiguous after analyzing the intrinsic evidentiary record, extrinsic evidence can be useful in determining the whole meaning of claim language; however, it is second to intrinsic evidence in the hierarchy.⁹⁵

Comparatively, intrinsic evidence is more reliable because it is firsthand, primary evidence written into the patent.⁹⁶ Although useful, extrinsic evidence is not part of the patent and is not created for the purpose of expounding on the patent's scope.⁹⁷ Extrinsic evidence might not be written by or directed towards a person skilled in the field of the patent and thus may not reflect the understanding of the skilled artisan.⁹⁸ Moreover, extrinsic evidence can also suffer from bias that intrinsic evidence is not subject to, because extrinsic evidence may be generated for the specific purpose of patent litigation.⁹⁹ Although it can be useful, extrinsic evidence cannot be used to change or contradict the claim language itself or the specification; it can only help in understanding the meaning of the claim terms, and when the claim is unambiguous, extrinsic evidence should be given no weight.¹⁰⁰ *Phillips* established intrinsic evidence as the most important source of evidence used in claim construction, while finding that extrinsic evidence is secondary.¹⁰¹

III. ANALYSIS

The holder and owner of a patent must know the exact legal rights he or she possesses over his or her invention when patent infringement is alleged. This is especially true in cases of patent infringement where the patentee's legal rights may determine whether or not an outside party has in-

93. *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1583 (Fed. Cir. 1996) (citing *Pall Corp. v. Micron Separations, Inc.*, 66 F.3d 1211, 1216 (Fed. Cir. 1995); *Hormone Research Found., Inc. v. Genentech, Inc.*, 904 F.2d 1558, 1562 (Fed. Cir. 1990)).

94. *See id.* at 1584.

95. *See Phillips*, 415 F.3d at 1317–19.

96. *See id.* at 1313–18.

97. *Id.* at 1318.

98. *Id.*

99. *Id.*

100. *See Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1584 (Fed. Cir. 1996) (citing *Southwall Techs., Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1578 (Fed. Cir. 1995); *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979–81 (Fed. Cir. 1995) (en banc)).

101. *See THE LITIG. COMM. OF THE INTELLECTUAL PROP. LAW ASS'N OF CHI.*, CLAIM CONSTRUCTION IN THE FEDERAL CIRCUIT § 1:8 (Edward D. Manzo ed., 2012).

fringed upon those rights. It is imperative that the patentee and the patent attorney be able to adequately predict how the court will construe the claim language and terms. Unpredictability and lack of uniformity exist when the court is split on how to properly construe a claim term, and where zero deference is given to the lower court on matters of factual inquiry involving extrinsic evidence. Claim construction utilizing extrinsic evidence is at least partly a factual inquiry, and by granting zero deference to the lower court on these factual inquiries, the Federal Circuit creates more unpredictability and a lack of uniformity. Deviating from established claim construction guidelines increases the unpredictability of patent claim construction appeals to the Federal Circuit, which is contrary to the purpose of establishing predictability in patent litigation.

A. De Novo Review Utilizing Extrinsic Evidence Compounds the Unpredictability

If claim construction utilizing extrinsic evidence consists of sufficient factual inquiry so as to make claim construction a mixed question of law and fact, the Supreme Court has indicated that deference should be given to the lower court on mixed questions of law and fact.¹⁰² Judge O'Malley, in the *Retractable II* dissent, recognized that claim construction using extrinsic evidence requires a factual inquiry and consists of an inherently factual component.¹⁰³ Because extrinsic evidence can be extensive, including prior testimony and hearings sometimes extending for several days, the trial court is better equipped to acquire and evaluate such massive amounts of evidence.¹⁰⁴ Analyzing and utilizing extensive documentary evidence sounds much more like a factual inquiry than a legal inquiry.¹⁰⁵ The court must recognize the obvious factual inquiry rather than brushing it off as a question of law and affording no deference to the lower court.¹⁰⁶ There is clearly a factual component of claim construction when using extrinsic evidence, because extrinsic evidence itself contains factual components.¹⁰⁷

By not recognizing the factual component of claim construction when using extrinsic evidence, the Federal Circuit exacerbates the problem of unpredictability by granting zero deference to the lower court, which is usu-

102. See *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1374 (Fed. Cir. 2011) (denial of rehearing en banc) (O'Malley, J., dissenting) (citing *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991)).

103. See *id.* at 1374–76.

104. See *id.*

105. See *id.* at 1375–76.

106. See *id.* at 1373–76.

107. See *id.* at 1374–76.

ally more equipped to determine questions of fact.¹⁰⁸ In *Cybor Corp. v. FAS Technologies, Inc.*,¹⁰⁹ the Federal Circuit held that claim construction is purely a matter of law and is reviewed de novo on appeal, which includes any fact-based questions or inquiries.¹¹⁰ In affirming this decision, the Federal Circuit looked to the Supreme Court decision in *Markman v. Westview Instruments, Inc.* (“*Markman II*”),¹¹¹ which held that claim construction is purely a matter of law to be decided by a judge, not a jury.¹¹² The decision in *Cybor* effectively abrogated any prior decisions or language purporting that claim construction is a mixed question of law and fact and set in stone the notion that claim construction is purely a matter of law to be reviewed on appeal de novo.¹¹³

However, there is much argument and debate surrounding the assertion that claim construction is purely a matter of law that resulted from *Cybor*, even within the Federal Circuit.¹¹⁴ Many scholars, professors, lawyers, and even Federal Circuit judges believe that claim construction contains elements of factual inquiry, especially when considering extrinsic evidence, and this postulation brings into question the issue of de novo review of factual inquiry.¹¹⁵ Patent law expert, Professor Peter S. Menell of U.C. Berkeley School of Law, argues that the Federal Circuit erroneously concluded, in *Cybor*, that claim construction matters must be reviewed de novo regardless of any factual underpinnings.¹¹⁶ Professor Menell asserts that the court misapprehended the mixed fact and law nature of claim construction as being purely a matter of law and concludes that there is a factual inquiry involved in claim construction that must be recognized.¹¹⁷ This means that the court must recognize the factual nature of claim construction when extrinsic evidence is involved.

The review and analysis of extrinsic evidence contains matters of factual inquiry because it looks beyond the patent to outside sources, which are inherently fact based.¹¹⁸ Nonetheless, even against much disagreement and dissent from the legal world, the Federal Circuit continues to review matters

108. See *Retractable Techs.*, 659 F.3d at 1374–76 (O’Malley, J., dissenting).

109. 138 F.3d 1448 (Fed. Cir. 1998) (en banc).

110. *Id.* at 1456.

111. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

112. See *id.* at 372; *Cybor Corp.*, 138 F.3d at 1451 (citing *Markman*, 517 U.S. 370).

113. See *Cybor Corp.*, 138 F.3d at 1456.

114. See *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1373–76 (Fed. Cir. 2011) (denial of rehearing en banc) (O’Malley, J., dissenting).

115. See *id.*

116. See Brief of Professor Peter S. Menell as Amicus Curiae Supporting Lighting Ballast Control LLC at 2–3, *Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp.*, 500 F. App’x 951 (Fed. Cir. 2013) (Nos. 2012–1014, 2012–1015) [hereinafter Menell].

117. See *id.* at 2–6.

118. See *Retractable Techs.*, 659 F.3d at 1374–76 (O’Malley, J., dissenting).

of claim construction de novo per *Cybor*.¹¹⁹ This means that even in matters of claim construction where extrinsic evidence is utilized to construct the claim language, the Federal Circuit reviews the matter de novo with zero deference to the lower court, and the lower court is often more capable and better equipped to analyze and review such vast amounts of factual evidence.¹²⁰ Additionally, the Supreme Court has held that courts must use a deferential standard of review when reviewing mixed questions of law and fact.¹²¹ Giving zero deference to the lower court on factual matters of claim construction fosters unpredictability and a lack of uniformity in conjunction with the intracircuit split on proper claim construction methodology.

Many in the legal community argue that claim construction is one area where the Federal Circuit has erroneously treated factual matters of claim construction as questions of law.¹²² The evaluation and review of extrinsic evidence seems to be a factual inquiry, at least in part, and not solely a question of law because much of extrinsic evidence consists of matters of fact and factual components.¹²³ Judge Mayer of the Federal Circuit asserts that claim construction is not devoid of any factual component, but rather claim construction inherently contains matters of factual inquiry.¹²⁴ Claim construction, particularly when reviewing extrinsic evidence, requires questions and inquiries of fact because of the factual nature of extrinsic evidence such as prior hearings and expert testimony.¹²⁵ Professor Peter S. Menell recognizes that extrinsic evidence is inherently factual in nature, which undermines the notion that claim construction is a pure question of law; rather there is indeed a factual component.¹²⁶

The problem lies in the fact that the Federal Circuit grants zero deference to the district court on matters of claim construction involving the analysis and interpretation of extrinsic evidence, which contains factual components.¹²⁷ Judge Moore of the Federal Circuit stated that the Federal

119. *See id.* at 1373–76.

120. *See id.*; Menell, *supra* note 116, at 2–3.

121. *Retractable Techs.*, 659 F.3d at 1374 (O'Malley, J., dissenting) (citing *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991)).

122. *See* Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791, 1831–33 (2013).

123. *See Retractable Techs.*, 659 F.3d at 1375–76 (O'Malley, J., dissenting); Gugliuzza, *supra* note 122, at 1832.

124. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1330–34 (Fed. Cir. 2005) (en banc) (Mayer, J., dissenting).

125. *See id.* at 1332.

126. *See* Peter S. Menell et al., *Patent Claim Construction: A Modern Synthesis and Structured Framework*, 25 BERKELEY TECH. L.J. 711, 726 (2010) (explaining that claim construction is not a pure question of law and when extrinsic evidence is being introduced into the analysis, the inquiry becomes a factual inquiry).

127. *See Phillips*, 415 F.3d at 1331–34 (Mayer, J., dissenting); Gugliuzza, *supra* note 122, at 1832–34.

Circuit is not well suited to review issues of factual determinations without giving deference to the lower court.¹²⁸ The court's decision in *Cybor* to regard all claim construction matters as questions of law reviewed with zero deference "was ill considered . . . and has not proven 'beneficial.'"¹²⁹ In fact, the district court is better equipped than the Federal Circuit and it has the tools to evaluate large amounts of extrinsic evidence.¹³⁰ The Federal Circuit compounds the unpredictability and lack of uniformity in appellate claim construction matters because the lower court is given zero deference on what appear to be mixed questions of law and fact.¹³¹ The dissent in *Retractable II* and many commentators recognize the mixed question of law and fact inherent in claim construction using extrinsic evidence, and by granting zero deference to the lower court, the Federal Circuit may exclude or give a disproportionate weight to the extrinsic evidence and come to a different conclusion than the district court.¹³²

The conclusions drawn by the Federal Circuit from claim construction using extrinsic evidence may be very different than the conclusions drawn by a district court. When the district court is better positioned to handle large amounts of extrinsic evidence, the Federal Circuit should give its conclusions weight and deference because that will help provide uniformity and increase the predictability of patent litigation. A scenario where the Federal Circuit reaches a completely different result and conclusion than a district court upon the review of extrinsic evidence further increases the unpredictability of claim construction.

On the other hand, Douglas Y'Barbo argues that conclusions reached from the extrinsic evidence are in fact entitled to deference by the Federal Circuit and the Federal Circuit does not review district courts' conclusions drawn from extrinsic evidence de novo.¹³³ However, this assertion directly defies *Cybor*, which stated that claim construction is a matter of law that is reviewed without deference to district court conclusions, even when extrinsic evidence is considered in the district court's conclusion.¹³⁴ *Cybor* does not carve out an exception for deference when extrinsic evidence is utilized

128. Moore, *supra* note 9, at 16.

129. *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1374 (Fed. Cir. 2011) (denial of rehearing en banc) (O'Malley, J., dissenting) (quoting *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1463 (Fed. Cir. 1998) (en banc) (Plager, J., concurring)).

130. See *Cybor Corp.*, 138 F.3d at 1477 (Rader, J., dissenting in part and concurring in part); Douglas Y'Barbo, *Is Extrinsic Evidence Ever Necessary to Decide Claim Construction Disputes? Part II*, 82 J. PAT. & TRADEMARK OFF. SOC'Y 101, 102 (2000).

131. See *Retractable Techs.*, 659 F.3d at 1373–75 (O'Malley, J., dissenting).

132. See *id.* at 1370, 1373 (Moore, J., dissenting).

133. See Y'Barbo, *supra* note 130, at 103.

134. See *Cybor Corp.*, 138 F.3d at 1455–56.

and analyzed by the district court in reaching its conclusion, which rebuts Mr. Y'Barbo's conclusion.¹³⁵

As an example, in the case of *Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve, Inc.*, the Federal Circuit reached a different conclusion than the district court based upon the extrinsic evidentiary record.¹³⁶ In essence, the Federal Circuit granted zero deference to the district court and disagreed with its interpretation of the extrinsic evidentiary record even though the lower court is better equipped to interpret extrinsic evidence.¹³⁷ The patent litigants in this case likely did not predict that the Federal Circuit would reach a completely different conclusion than the district court. The district court was likely in a better position to review and analyze the extrinsic evidentiary record in construing the claim.

The Federal Circuit could have generated a more predictable outcome by granting some deference to the lower court on factual matters that exist in claim construction with extrinsic evidence. Although the Federal Circuit would not always reach the same conclusion as the district court, the granting of some deference would decrease the extraordinarily high reversal rate for which the Federal Circuit is notorious. It stands to reason that because the district court is presented with vast amounts of extrinsic evidence intertwined with factual inquiry, the Federal Circuit should grant some deference to the lower court. This deference would increase predictability by ensuring that the Federal Circuit takes into account the district court's ability to better handle large amounts of factual evidence, and thereby decrease the high reversal rate. If the conclusions drawn by the Federal Circuit hinge on the utilization of extrinsic evidence, the Federal Circuit would pay homage to the goal of predictability by acknowledging and granting deference to the lower court.

The Federal Circuit's conclusions can be very unpredictable when the claim construction is based upon extrinsic evidence. This is precisely the lack of predictability and uniformity that is a result of reviewing all matters of claim construction as questions of law with zero deference when it appears to be a mixed question of law and fact. Patent litigants may get unpredictable results between the Federal Circuit and the district court, which increases unpredictability and lack of uniformity in patent litigation.

135. *See id.*

136. *See Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve, Inc.*, 796 F.2d 443, 450-51 (Fed. Cir. 1986).

137. *See id.*

B. *Retractable I* and *Retractable II*: Providing a More Thorough Look

Separate from the use of extrinsic evidence and de novo review, this note now discusses the issues associated with claim construction methodologies. The court's construction of a claim term will determine what constitutes the patent and patentable rights. *Retractable I* held that the claim term "body," which is the central part of a syringe that holds the liquid to be injected, should be limited to include only "one-piece bodies" because this was the only construction that comported with the specifications.¹³⁸ The court looked to the specifications and determined that because the specifications only disclosed one-piece bodies, the claim term "body" must be limited to that construction.¹³⁹ However, the dissent asserted that construing a claim term in order to comport with the court's view of the specification is erroneous and not supported by *Phillips*.¹⁴⁰ The dissent argued that under the rules of *Phillips* and the doctrine of claim differentiation, the claim term "body" should not be limited to include only one-piece bodies but should also include multiple-piece bodies.¹⁴¹ The majority's improper limitation of the claim term "body" consequently limited the rights of RTI to what the court considered to be the patented invention.¹⁴²

The relevant issue in *Retractable I* was the interpretation of the claim term "body" within a patent for a retractable syringe needle.¹⁴³ On appeal, BD asserted to the Federal Circuit that the district court erred by concluding that the term "body" should not be limited to a one-piece body but should include multiple-piece bodies.¹⁴⁴ RTI argued that even though the specification discloses a "one-piece body," the claim term should not be limited to only one-piece bodies because the claims also refer simply to "body" as well as "one-piece bodies."¹⁴⁵ The multiple usage of the term indicates that it was not intended to be limited to only one-piece bodies, otherwise the claims would only mention one-piece bodies and not include the more open, unlimited term of just "body."¹⁴⁶ If the inventor only intended the term "body" to include one-piece bodies, then the claims would only reference one-piece bodies.¹⁴⁷ The court's construction of the claim term "body" ultimately de-

138. See *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 653 F.3d 1296, 1305 (Fed. Cir. 2011).

139. See *id.*

140. See *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1371 (Fed. Cir. 2011) (denial of rehearing en banc) (Moore, J., dissenting).

141. See *Retractable Techs.*, 653 F.3d at 1312–13 (Rader, C.J., dissenting).

142. See *id.*

143. See *id.* at 1298, 1304–05 (majority opinion).

144. *Id.* at 1304.

145. See *id.*

146. See *id.* at 1312–13 (Rader, C.J., dissenting).

147. See *Retractable Techs.*, 653 F.3d at 1312–13 (Rader, C.J., dissenting).

terminated what constitutes RTI's patent, whether RTI has legal rights over multiple-piece bodies or just one-piece bodies of the syringes, and thus whether its patent was infringed upon.¹⁴⁸

I. The Retractable I Majority's Holding and Reasoning That the Claim Term Should be Limited

This section will look in detail at the majority holding in *Retractable I* and its improper limitation of a claim term, which resulted in the improper limitation of the patentee's rights. This limitation of the patentee's rights exemplifies the unpredictability in claim construction methodologies within the Federal Circuit. In *Retractable I*, the majority concluded that the specifications had to be reviewed in order to properly construe the ambiguous term "body" and held that the term was limited to a "one-piece body."¹⁴⁹ Reviewing the exact language and written descriptions, "[t]he specifications indicate that the [claim term] 'body' refers to a 'one-piece body,'" and they state that the syringe "features a one piece hollow body."¹⁵⁰ The drawings and figures presented by the specifications delineate a syringe with a one-piece body and do not depict a multiple-piece body.¹⁵¹ There is nothing in the specification language to suggest that the term "body" was intended to mean anything other than a "one-piece body."¹⁵² However, this does not mean that the specification should limit the claim term to mean only what the specification discloses because the specification should not be used to limit a claim term but only to interpret a claim term.¹⁵³ It is important to know what the specification discloses in order to understand how the majority uses it to limit the claim-term "body."

The court proclaimed to adhere to the standard rules of claim construction, as promulgated by *Phillips*, that claim construction requires more than interpreting the claim term in isolation; it must be read in view of the specification.¹⁵⁴ The court here recited the rules of *Phillips* by stating that claim construction should not improperly import a limitation from the specification into the claims.¹⁵⁵ Also, the court should try to capture the scope of the actual invention and should not strictly limit the claim to disclosed language

148. *See id.* at 1304–07 (majority opinion).

149. *See id.* at 1305.

150. *Id.*

151. *Id.*

152. *See id.*

153. *See Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1370–73 (Fed. Cir. 2011) (denial of rehearing en banc) (Moore, J., dissenting); *Retractable Techs.*, 653 F.3d at 1312–13 (Rader, C.J., dissenting).

154. *Retractable Techs.*, 653 F.3d at 1305 (citing *Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005) (en banc)).

155. *See id.* (citing *Phillips*, 415 F.3d at 1323).

or allow the claim language to become divorced from the scope of the specification.¹⁵⁶

In holding that the claim-term “body” should be limited to only one-piece structures, the majority looked to the specification and concluded that because the specification only recites or describes one-piece bodies, the claim term must therefore be limited to what the specification describes.¹⁵⁷ According to the court, the construction of “body” must be limited to a one-piece body because the scope of the specification that refers to a one-piece body limits the meaning of the term.¹⁵⁸ The court admittedly notes that although the claims themselves do leave open the possibility that “body” could mean multiple-piece bodies, the specifications direct the construction to encompass only “one-piece” bodies.¹⁵⁹ The dissent and the precedential rules of *Phillips* disagree with the majority’s conclusion that purports to limit the claim term and thereby improperly limit the patentee’s rights.¹⁶⁰

2. *The Dissent’s Reasoning in Retractable I and II and the Doctrine of Claim Differentiation*

The dissenters in *Retractable I* and *II* fundamentally disagreed with the majority regarding its construction of the claim term at issue.¹⁶¹ Using the rules established in *Phillips*, and determining “[t]he ordinary and customary meaning of ‘body,’” the *Retractable I* dissent argued that the claim term does not contain a one-piece limitation and neither the claim language nor the written description supports the notion that the inventor intended to limit

156. *See id.* (citing *Phillips*, 415 F.3d at 1323–24).

157. *See id.* (asserting that the term “body” must be limited to a one-piece body in order “to tether the claims to what the specifications indicate the inventor actually invented”). The dissent argues that this improperly limits the claim term and that the claim terms should not be “tethered” to the specifications, thereby violating the rules of *Phillips*. *See id.* at 1311–13 (Rader, C.J., dissenting).

158. *See id.* at 1305 (the specifications only refer to one-piece bodies and thus limit the meaning of the claim term).

159. *See id.* (concluding that even though the claim language leaves open the possibility of multiple-piece bodies, the specifications guide the construction of the term to include only one-piece bodies). The dissent uses the doctrine of claim differentiation to show that when the claim language has two different meanings, dependent and independent claims, the court should not import a limitation from one claim term into the adjacent claim. *See id.* at 1312 (Rader, C.J., dissenting). This condition suggests that although one claim may state “body,” and the other claim states “one-piece body,” the court may not import the one-piece limitation into the other claim.

160. *See Retractable Techs.*, 653 F.3d at 1312–13 (Rader, C.J., dissenting).

161. *See Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1370–73 (Fed. Cir. 2011) (denial of rehearing en banc) (Moore, J., dissenting); *Retractable Techs.*, 653 F.3d at 1311–13 (Rader, C.J., dissenting).

the body to a one-piece structure.¹⁶² The ordinary meaning of the term “body” is clear and commonly understood, and it is not ambiguous; therefore, the specification is not needed in order to determine the meaning.¹⁶³ The dissent claimed that it is improper to limit the term where the meaning is clear and further, that it is erroneous to import a limitation from the specification in order to tether the claim to the majority view of the scope of the intended invention.¹⁶⁴ Thus, the deviation from the rules of *Phillips* improperly limited the rights of the patentee, and such deviation fosters unpredictability, because there is no way for a patent litigant, like RTI, to know when the Federal Circuit will adhere to precedent or deviate at its whim.

The dissent argues that the majority also disregarded the doctrine of claim differentiation and the conclusion that this doctrine would have rendered.¹⁶⁵ Simply put, the doctrine of claim differentiation provides that a dependent claim with a particular limitation does not limit an independent claim.¹⁶⁶ Specifically, “the presence of a dependent claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim.”¹⁶⁷ For example, the dependent claim “square laser refractor” should not limit the independent claim “laser refractor” to only include a square-shaped laser refractor. By not limiting the independent claim “laser refractor” to any particular shape, the patentee has purposefully not limited its invention to include only square laser refractors, but rather the patentee has left open the term laser refractor to include another feasible shape other than square. This rule takes on particular importance when one party seeks to limit the patentee’s rights by importing the limitation from the dependent claim into the independent claim.¹⁶⁸ That is exactly the situation in this case, where BD sought to limit the term, and the majority does, in fact, import the limitation from the dependent claim into the independent claim.¹⁶⁹

162. See *Retractable Techs.*, 653 F.3d at 1312 (Rader, C.J., dissenting) (stating that the majority should not limit the term because the ordinary meaning of the term does not include a one-piece limitation and there is nothing to suggest that was the intent of the inventor).

163. See *id.* (stating that the majority should not have used the specification in the instant case because the meaning of the term is clear).

164. See *id.* at 1311–12 (discussing the court’s importation of limitation from the specification, whereby the majority limits the rights of the patentee and the patented invention, which accordingly can lead to unpredictable and unintended consequences for the patentee).

165. See *id.* at 1312–13.

166. See *id.* at 1312 (quoting *Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005) (en banc)).

167. *Id.* (quoting *Phillips*, 415 F.3d at 1315).

168. See *SunRace Roots Enter. Co. v. SRAM Corp.*, 336 F.3d 1298, 1303 (Fed. Cir. 2003); *Ecolab Inc. v. Paraclyse, Inc.*, 285 F.3d 1362, 1375 (Fed. Cir. 2002).

169. See *Retractable Techs.*, 653 F.3d at 1312 (Rader, C.J., dissenting).

Under the claim differentiation doctrine, the court cannot import a limitation from the dependent claim “one-piece” into the independent claims of “body.”¹⁷⁰ A court acknowledging and applying the doctrine of claim differentiation should hold that the claim term should not be limited by another claim term, but rather it should be viewed independently so as to encompass both meanings of the term.¹⁷¹ Properly applying the rules and analysis of *Phillips*, the court should conclude that the claim term is not limited by another claim term, or by the specification, and that any such limitation placed upon the patentee’s rights is improper.¹⁷² Because the Federal Circuit randomly defies the precedent of *Phillips*, patent litigants cannot predict when the court will adhere to *Phillips*, acknowledge the doctrine of claim differentiation, or unpredictably distort the rules to fit the court’s own view of what the patent should entail. This important analysis of claim differentiation gets to the heart of the dissent’s opinion, that the majority improperly imported this limitation into the term “body” and limited the rights of RTI.¹⁷³

The doctrine of claim differentiation is sufficient to establish the proper construction of the term “body” even when the court reads it in light of the specification, because the court is not to use the specification as a limiting factor but alternatively, as a useful part of the intrinsic record.¹⁷⁴ The court cannot use the specification to narrow a claim term or deviate from its plain and ordinary meaning.¹⁷⁵ The specifications do not provide a special definition to restrict the term “body,” and although the embodiments described in the specifications contain one-piece bodies, that alone is an insufficient basis for limiting the term “body” to a one-piece.¹⁷⁶ Here, the majority improperly used the specification to determine what it viewed as the scope of the actual invention and proceeded to limit the claim-term “body” as it deemed fit, while simultaneously disregarding the doctrine of claim differentiation by giving it only a passing nod.¹⁷⁷

170. *See id.*

171. *See id.*

172. *See id.* at 1311–13.

173. *See id.*

174. *See id.* at 1312–13.

175. *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1371 (Fed. Cir. 2011) (denial of rehearing en banc) (Moore, J., dissenting) (citing *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) (en banc); *Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1327 (Fed. Cir. 2002); *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002)).

176. *Retractable Techs.*, 653 F.3d at 1312–13 (Rader, C.J., dissenting) (explaining that although the specifications refer to one-piece bodies, that is not dispositive and conclusive enough to justify limiting the claim term accordingly).

177. *See Retractable Techs.*, 659 F.3d at 1371–72 (Moore, J., dissenting); *Retractable Techs.*, 653 F.3d at 1305.

The dissents assert that their analysis is analogous and parallel to the analysis in *Phillips* and makes clear that the majority opinion in *Retractable I* cannot be reconciled with *Phillips*.¹⁷⁸ The claim construction methodology and holding in *Retractable I* are in disagreement with *Phillips*, and the majority erred when it imported a limitation from the specification into the claim term. Courts and patent litigants regard *Phillips* as establishing proper claim construction methodology, and thus, they may analyze their legal strategies, chances of success, patented rights, and predicted outcomes based upon these guidelines. When the Federal Circuit deviates from this recognized methodology, lower courts and litigants cannot accurately predict the outcome because the Federal Circuit has misconstrued established precedent, or in some instances, such as claim differentiation in *Retractable I*, the Federal Circuit has blatantly ignored it. This distortion makes patent law and litigation, particularly on appeal to the Federal Circuit, very unpredictable, and it lacks the desired uniformity concerning all involved parties.¹⁷⁹ The intracircuit split in claim construction methodology introduces an element of unpredictability, which can have dire consequences for a patent litigant when the court hands down unforeseen results.¹⁸⁰ The inconsistent and unpredictable methodology employed by the Federal Circuit defies the goal of predictability and uniformity.¹⁸¹ One major goal in creating the Federal Circuit was to increase uniformity and consistency; however, the Federal Circuit arbitrarily juggling between methodologies undermines that goal.¹⁸² Adhering to one specific and established methodology with consistency would increase the predictability of patent litigation and reduce the number of reversals and appeals, while promoting settlement.¹⁸³

C. A Closer Look at *Phillips* and a Comparison With *Retractable I*

The court in *Phillips* clarified the guidelines of claim construction promulgated by past precedent, and the Federal Circuit still recognizes *Phillips* as the standard for claim construction rules.¹⁸⁴ In *Phillips*, Mr. Phillips brought suit against AWH Corp., alleging infringement of patent claims, among other claims.¹⁸⁵ Mr. Phillips invented modular, steel-shell panels that

178. See *Retractable Techs.*, 659 F.3d at 1371–72 (Moore, J., dissenting); *Retractable Techs.*, 653 F.3d at 1312–13 (Rader, C.J., dissenting).

179. See Yonker, *supra* note 11, at 308–09.

180. See *id.*

181. See *id.* at 323.

182. See *Phillips*, *supra* note 6, at 958–59.

183. See Yonker, *supra* note 11, at 323, 331.

184. See *Retractable Techs.*, 653 F.3d at 1303–05; *Phillips v. AWH Corp.*, 415 F.3d 1303, 1311–24 (Fed. Cir. 2005) (en banc).

185. *Phillips*, 415 F.3d at 1309.

were designed to be impact resistant, and one component of these panels is the “baffle,” which was the claim term at issue in *Phillips*.¹⁸⁶ Specifically, the panels are comprised of baffles that are described as “internal steel baffles extending inwardly from the steel shell walls.”¹⁸⁷ Here, it is more important to understand the proposed function of the panels and baffles, which is to be impact resistant and deflect projectiles,¹⁸⁸ than it is to understand the exact appearance or demeanor of a baffle.

Comparable to the dissent in *Retractable I*, the majority in *Phillips* looked to the doctrine of claim differentiation, which dictates that the presence of a dependent claim, adding a particular limitation, presumes that the limitation does not exist in the independent claim.¹⁸⁹ A dependent claim that limits the baffle to angles that exclusively deflect projectiles, angles not 90°, should not limit an independent claim that does not limit the baffle to a particular angle.¹⁹⁰ By specifying in one instance that the baffle should deflect projectiles does not mean that every baffle must serve that purpose and thus be constructed at that particular purpose-serving angle.¹⁹¹ Here, specific claims within the patent specify particular functions of the baffles, such as a dependent claim which states that baffles may be “oriented with the panel sections disposed at angles for *deflecting projectiles* such as bullets able to penetrate the steel plates.”¹⁹²

The underlying assumption here is that baffles at right angles (90°) do not “deflect” projectiles but rather halt motion and momentum altogether, and in order to deflect projectiles, the baffle must be at an angle other than 90°. The language of a dependent claim limitation of being constructed at angles for deflecting projectiles (angles other than 90°) indicates that the patentee did not intend that the term “baffles” inherently contained that limitation, otherwise to specify would be superfluous.¹⁹³ If the term baffles inherently contained that limitation, there would be no need to specify that

186. *See id.* at 1309–10.

187. *See id.*

188. *See id.* at 1310.

189. *See id.* at 1315 (citing *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 910 (Fed. Cir. 2004)) (stating the general rule of claim differentiation, which is cited and discussed in *Retractable I*).

190. *See id.* at 1324–27.

191. *See id.*

192. *See Phillips*, 415 F.3d at 1324 (emphasis added).

193. *See id.* (citing *Dow Chem. Co. v. United States*, 226 F.3d 1334, 1341–42 (Fed. Cir. 2000) (“concluding that an independent claim should be given broader scope than a dependent claim to avoid rendering the dependent claim redundant,” which is to say that a limitation provided by a dependent claim should not be read into an independent claim)). This is the general rule of claim differentiation, and *Phillips* states that the court has “rejected the contention that if a patent describes only a single embodiment, the claims of the patent must be construed as being limited to that embodiment.” *Id.* at 1323 (citing *Gemstar-TV Guide Int’l, Inc. v. Int’l Trade Comm’n*, 383 F.3d 1352, 1366 (Fed. Cir. 2004)).

particular limitation.¹⁹⁴ The patentee included it in order to reflect the idea that not every baffle will serve the function of deflecting projectiles, because the person of ordinary skill would not understand baffles to be limited to angles that deflect projectiles (not 90° angles).¹⁹⁵ Adhering to the doctrine of claim differentiation, the presence of the dependent claims that specify a particular function (deflecting projectiles) should not be imported or assumed to be present in the independent claim term, “baffles.”¹⁹⁶ Such a construction would improperly limit the claim term, and thus, the patentee’s rights where the patentee did not intend to limit its invention or rights.¹⁹⁷

Looking at the role of the specification, the dissent in *Phillips* cited that the specifications themselves contained no illustrations, descriptions, or disclosure of baffles at right angles (90°) and there was no reference to baffles at right angles.¹⁹⁸ The specifications unequivocally made clear that the baffles are angled (not at right angles) and only referenced angled baffles.¹⁹⁹ Compare this to *Retractable I* where the specifications disclosed only a “one-piece” body, did not disclose multiple-piece bodies, and the majority limited the claim term to what the specification disclosed.²⁰⁰ However, contradictory to the majority in *Retractable I*, the majority in *Phillips* declined to limit the claim term, “baffle,” to the disclosed specifications and instead, construed the term to its ordinary and plain meaning.²⁰¹ This is an important distinction, and a perfect illustration of how the majority in *Retractable I* deviated from the analysis of *Phillips*.

This analysis of claim differentiation in *Phillips* is analogous to the analysis of the dissents in *Retractable I* and *II*, in which both courts concluded that the limitation of a dependent claim does not import a limitation

194. See *id.* at 1325 (citing TurboCare Div. of Demag Delaval Turbomachinery Corp. v. Gen. Elec. Co., 264 F.3d 1111, 1121 (Fed. Cir. 2001)).

195. See *id.* at 1324–25. The court infers that the person of ordinary skill would not understand the term to include only deflecting baffles; therefore, the patentee included the limitation in order to make the distinction that some baffles will serve to deflect projectiles while others will not. See *id.* This is supported in the rest of the specification and claim language, where baffles are described as having functions other than deflection. See *id.*

196. See *id.* at 1324–27 (this is the general proposition and rule abiding conclusion that the majority accepts).

197. See *id.*

198. See *Phillips*, 415 F.3d at 1329 (Lourie, J., concurring in part and dissenting in part). The dissent asserts that nothing within the specifications indicates, discloses, or illustrates baffles at right angles, but instead the specifications only depict baffles at angles other than right angles. See *id.* This is synonymous with the reasoning that the majority in *Retractable I* gave for deciding to limit the term “body” to one-piece bodies, because the specifications only depict one-piece bodies. See *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 653 F.3d 1296, 1304–05 (Fed. Cir. 2011).

199. See *Phillips*, 415 F.3d at 1329 (Lourie, J., concurring in part and dissenting in part).

200. See *Retractable Techs.*, 653 F.3d at 1305.

201. See *Phillips*, 415 F.3d at 1324–27.

into the independent claim, so that the patentee's rights are not inappropriately limited.²⁰² *Phillips* stands for the notion that a claim term should not be limited by another claim term or the specification, and this argument is promulgated by the dissents in *Retractable I* and *II*.²⁰³ The patentee in *Retractable I* likely did not predict that the Federal Circuit would bypass *Phillips* and ignore the doctrine of claim differentiation en route to limiting the patentee's rights to what the court determined was the scope of the invention. This unpredictability and deviation from precedent renders litigants, like the patentee in *Retractable I*, unable to accurately surmise what rights they may possess or how the Federal Circuit will construct a claim upon appeal.

Reflecting back to the previous discussion of the majority holding and analysis in *Retractable I*, the court's conclusion and reasoning disregarded the doctrine of claim differentiation, while also importing a limitation from the specification into the claim term.²⁰⁴ It is obvious that the *Retractable I* court dismissed, or at the very least downplayed, the doctrine of claim differentiation, especially in comparison to *Phillips*.²⁰⁵

In *Retractable I*, the court acknowledged the existence of the limiting dependent claim, "one-piece body," and the independent claim, "body," but declared the implication that "body" is not limited to a one-piece body is a weak implication.²⁰⁶ This assessment minimizes and overlooks the conclusions drawn from the doctrine of claim differentiation, and *Phillips*. In contrast to *Phillips*, *Retractable I* held that even though "the claims leave open the possibility that . . . 'body' may encompass" multiple-piece bodies, thereby ignoring the doctrine of claim differentiation, and determined that the claim-term should be limited to one-piece bodies in order to "tether the claims to what the specifications indicate."²⁰⁷ By properly adhering to the analysis and guidelines established by *Phillips*, the majority in *Retractable I* should have concluded that the presence of this limiting dependent claim does not then automatically limit the independent claim, and the doctrine of

202. See *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1371–72 (Fed. Cir. 2011) (denial of rehearing en banc) (Moore, J., dissenting); *Retractable Techs.*, 653 F.3d at 1312–13 (Rader, C.J., dissenting); *Phillips*, 415 F.3d at 1324–27.

203. See *Retractable Techs.*, 659 F.3d at 1371–73 (Moore, J., dissenting); *Retractable Techs.*, 653 F.3d at 1312–13 (Rader, C.J., dissenting); *Phillips*, 415 F.3d at 1324–27.

204. See *Retractable Techs.*, 653 F.3d at 1304–05 (holding that the claim term should be limited to what the dependent claim states and importing the limitation of a "one-piece" body from the specification because the specification only depicts one-piece bodies).

205. See *id.* (glancing over the fact that a dependent claim and an independent claim exist and, therefore, the dependent claim's limitations should not be imported into the independent claim); *Phillips*, 415 F.3d at 1324–27.

206. See *Retractable Techs.*, 653 F.3d at 1305. This is in direct conflict with the doctrine of claim differentiation established in *Phillips* and cited by the dissent in *Retractable I*.

207. See *id.*

claim differentiation can only lead to the conclusion that the term “body” should not be limited to only one-piece bodies.²⁰⁸ As evidenced, the majority in *Retractable I* disregarded the analysis involving claim differentiation in reaching its conclusion, and instead, it imported a limitation from the specifications, which is in direct conflict with the well-established guidelines of *Phillips*.²⁰⁹

The majority in *Retractable I* not only declined to adhere to claim differentiation, or give it more than a passing nod; however, it also defied the rules and guidelines of *Phillips* by improperly importing a limitation from the specification into the claim-term “body.”²¹⁰ The specifications in *Phillips* are comparable to the specifications in *Retractable I* because, in both cases, the specifications only depict one type or version of the claim term in question.²¹¹ Comparing the two conclusions drawn, unlike *Phillips*, the *Retractable I* court rejected the notion that if a specification describes a single embodiment, as it does in both cases at hand, the claim-terms should not be construed as being limited to that embodiment.²¹² Rather than adhering to *Phillips* and declining to import a limitation from the specification, the court in *Retractable I* decided to limit the claim term in order to “tether the claims to what the specifications indicate[d],” and thus, limited the rights of RTI.²¹³

The dissents of *Retractable I* and *II* explained that the analysis and holding in *Retractable I* were incorrect, the specification cannot be used to narrow a claim term, and the court “cannot . . . redefine a claim term to match [its] view of the scope of the invention” based upon the specification.²¹⁴ According to the *Retractable II* dissent and its well-reasoned assessment, the majority in *Retractable I* rewrote the claim term in order to conform to the court’s belief of what the scope of the invention inhabits rather than abiding by the doctrine of claim differentiation, the proper role of specifications, and the rules set forth by *Phillips*.²¹⁵

208. See *Retractable Techs.*, 653 F.3d at 1312 (Rader, C.J., dissenting); *Phillips*, 415 F.3d at 1324–25. By adhering to the principles and analysis in *Phillips*, the court in *Retractable I* should have declared that the term body is not limited to a one-piece body based upon the doctrine of claim differentiation. *Id.*

209. See *Retractable Techs.*, 653 F.3d at 1304–05; *Phillips*, 415 F.3d at 1324–27.

210. See *Retractable Techs.*, 653 F.3d at 1305 (limiting the claim-term “body” to only one-piece bodies, because the specifications only disclose one-piece bodies).

211. See *id.* (declaring that the specifications only disclose one-piece bodies); *Phillips*, 415 F.3d at 1329–30 (Lourie, J., concurring in part and dissenting in part) (declaring that the specifications only depict angled baffles).

212. See *Retractable Techs.*, 653 F.3d at 1305; *Phillips*, 415 F.3d at 1324.

213. See *Retractable Techs.*, 653 F.3d at 1305 (basing its claim construction on language not found in the rules of *Phillips*).

214. See *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1371–72 (Fed. Cir. 2011) (denial of rehearing en banc) (Moore, J., dissenting); *Retractable Techs.*, 653 F.3d at 1311–13 (Rader, C.J., dissenting).

215. See *Retractable Techs.*, 659 F.3d at 1371–72 (Moore, J., dissenting).

This intracircuit split represents a clear disconnect and lack of uniformity in how the Federal Circuit conducts claim construction when there are both dependent and independent claims, and where the specifications only disclose one version of the claim-term.²¹⁶ The court in *Phillips* adhered to its own rules, which are well recognized and established, while the court in *Retractable I* deviated from those rules, importing a limitation from the specification into the claim-term.²¹⁷ This importation of a limitation upon the claim-term is unwarranted under *Phillips*, and moreover, is unpredictable. In order to establish more predictability and uniformity, the court must adhere to the well-reasoned, and well-established, guidelines set forth in *Phillips*.

This intracircuit split highlights the lack of uniformity in the claim construction methodology and introduces an element of risk as well as lack of predictability. The intracircuit split may have grave consequences for patent litigants because there is no uniform method of claim construction, and the parties are left in the dark as to how the court will construe particular claim-terms. Unpredictability and a lack of uniformity leave patent holders, and patent litigants, wondering exactly what rights they may or may not procure, how the court will rule in a patent infringement case, and what general aspects of the patent are protected. Uniformity in claim construction was a major goal of the Federal Courts Improvement Act,²¹⁸ and the Federal Circuit would take a step toward achieving that goal by adhering to the established claim construction methodology promulgated by *Phillips*. A singular, well-defined claim construction methodology would promote settlement, reduce litigation, and increase the predictability and uniformity of patent litigation.²¹⁹

IV. CONCLUSION

The Federal Circuit was established, in part, to bring predictability to patent litigation. However, contrary to this goal, the Federal Circuit has achieved a reputation of being notoriously unpredictable in its patent litigation, particularly claim construction disputes. There are many proposed theories explaining the causes and effects of this unpredictability. Here, the intracircuit split within the Federal Circuit, regarding claim construction methodologies, underlines and increases unpredictability and a lack of uniformity. The Federal Circuit in *Retractable I* deviated from the well-established rules of *Phillips* and unnecessarily limited the claim-term “body,” and as a consequence, the court unexpectedly limited the patentee’s

216. See *Retractable Techs.*, 653 F.3d at 1304–05; *Phillips*, 415 F.3d at 1324–27.

217. See *Retractable Techs.*, 653 F.3d at 1304–05; *Phillips*, 415 F.3d at 1312–27.

218. See *Phillips*, *supra* note 6, at 958.

219. See *Yonker*, *supra* note 11, at 323, 331.

legal rights as well. The Federal Circuit also increases unpredictability by reviewing matters of claim construction with extrinsic evidence as pure questions of law, thereby granting zero deference under de novo review, even though it is likely a mixed question of fact and law to which some deference should be granted. This apparent unpredictability and lack of uniformity can lead to unforeseen results and unclear expectations. Most importantly, it blurs the line on what the patentee regards as his or her rights over the particular patented invention. In order to help achieve the goal of bringing more predictability to patent litigation, the Federal Circuit should adhere to the claim construction guidelines established by *Phillips*.

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