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Role of Preambles in Claim Construction

Fed. Cir. Holds that Preamble of an Independent Claim is Limiting when Serving as Antecedent Basis for Limitations of Dependent Claim

- *Pacing Technologies v. Garmin*, No. 2014-1396 (Fed. Cir. February 18, 2015).

BSKB Firm Lecture
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Jason Rhodes

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Overview of Limiting Effect of Preambles in Claim Construction

MPEP 2111.02

- Determination of whether preamble limits a claim is made on case-by-case basis. *Catalina Mktg. Int'l v. Coolsavings.com, Inc.* 62 USPQ2d 1781,1785 (Fed. Cir. 2002).
- Clear reliance on preamble during prosecution to distinguish the claimed invention from prior art transforms preamble into claim limitation. *Id.* at 1785.
- Preamble language merely extolling benefits of claimed invention doesn't limit scope w/o clear reliance on benefits as patentably significant. *Id.*

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Overview of Limiting Effect of Preambles in Claim Construction

MPEP 2111.02

- Any terminology in preamble limiting structure of claimed invention must be treated as claim limitation. See e.g., *Corning Glassworks v. Sumitomo Elec. U.S.A. Inc.* 9 USPQ2d 1962,1966 (Fed. Cir. 1989).
- Preamble is limiting if it is "necessary to give live, meaning, and vitality" to the claim. *Pitney Bowes, Inc. v. Hewlett Packard Co.*, 51 USPQ (Fed. Cir. 2002).

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Overview of Limiting Effect of Preambles in Claim Construction

MPEP 2111.02.II.

- Mere statements of purpose or intended use are not limiting.
- "If a body of a claim fully and intrinsically sets forth all of the limitations of the claimed invention, and the preamble merely states, for example, the purpose or intended use of the invention, rather than any distinct definition of any of the claimed invention's limitations, then the preamble is not considered a limitation and is of no significance to claim construction" (citing to *Pitney Bowes v. HP*)

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Overview of Limiting Effect of Preambles in Claim Construction

Cited Holdings in *Pacing Tech's*

- "Preamble language that merely states the purpose or intended use of an invention is generally not treated as limiting the scope of the claim." *Bicon, Inc. v. Straumann Co.*, 441 F.3d 945 (Fed. Cir. 2006).
- "When limitations in the body of the claim rely upon and derive antecedent basis from the preamble, then the preamble may act as a necessary component of the claimed invention." *Eaton Corp. v. Rockwell Int'l Corp.*, 323 F.3d 1332 (Fed. Cir. 2003).

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Pacing Tech's v. Garmin Background

- Before CJ's Lourie, Moore & Reyna (Opinion by Moore)
- Patent infringement case involving US Patent 8,101,843 ('843 patent) owned by Pacing Tech's. and asserted against Garmin.
- '843 patent directed to methods & systems for pacing users during activities involving repeated motions (e.g., running, cycling, swimming).
- Preferred embodiment describes method of aiding user's pacing by providing user with a tempo (e.g., beat of a song or flashes of light).

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Pacing Tech's v. Garmin Background

- Garmin sells GPS fitness watches & computers to runners & bikers.
- Garmin Connect website allows users to design & transfer workouts to devices, each workout = series of intervals to which duration & target pace are assigned.
- Garmin devices can display intervals of workout, e.g., counting down time for a particular pace, while also displaying user's actual pace.
- Garmin devices **do not** play music or output a beat corresponding to desired or actual pace.

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Pacing Tech's v. Garmin Background

- Claim 25 is the only asserted indep. claim:

25. A repetitive motion pacing system for pacing a user comprising:

a web site adapted to allowing **the user** to preselect from a set of user-selectable activity types an activity they wish to perform and entering one or more target tempo or target pace values corresponding to the activity;
a data storage and **playback device**; and
a communications device adapted to transferring data related to the pre-selected activity or the target tempo or the target pace values between the web site and the data storage and **playback device**.

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Pacing Tech's v. Garmin Background

- Dependent claim 28 recites
28. The repetitive motion pacing system of claim 25, wherein **the repetitive motion pacing system** can determine a geographic location of the data storage and playback device.
- At issue: whether claimed "playback device" reads on Garmin's device.
- Dist. ct. construed "playback device" as "a device capable of playing audio, video, or a visible signal."
- Dist. ct. supplemented construction, "To be a playback device as envisioned in the patent, the device must play back the pace information."

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Pacing Tech's v. Garmin Background

- Dist. ct. also held that the preamble to claim 25 is a limitation, construing it to mean "a system for providing a sensible output for setting the pace or rate of movement to a user in performing a repetitive motion activity."
- Dist. ct. granted summary judgment to Garmin b/c while their devices repeat back or display the pace input or selections, they "do not 'play' the target tempo or pace information...as audio, video or visible signals."

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Pacing Tech's v. Garmin Background

- Parties characterize dist. ct.'s construction as implicitly requiring the devices to play the pace info as a metronomic tempo.

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Pacing Tech's v. Garmin Federal Circuit Decision

- Issue: Whether the asserted claims require the claimed devices to play back the pace information using a tempo, such as the beat of a song or flashes of light.
- Dispute turns on whether the preamble to claim 25 is limiting, as well as the construction of a "repetitive motion pacing system."

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Pacing Tech's v. Garmin Federal Circuit Decision

Holding:

- The preamble to claim 25 is limiting.
 - Limitations in the body of claims 25 & 28 rely on this preamble for antecedent basis.
- The phrase "repetitive motion pacing system for pacing a user" requires claimed system to pace user by playing back pace info using a tempo.
 - Due to disavowal or disclaimer by patentee in "Summary and Objects of the invention" that limit the claims

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Pacing Tech's v. Garmin Federal Circuit Decision

Standard of Review

- "[W]hen the district court reviews only evidence intrinsic to the patent (the patent claims and specification[]), along with the patent's prosecution history), the judge's determination will amount solely to a determination of law, and the Court of Appeals will review the construction de novo." *Teva Pharm, USA Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 841 (2015).
- Here, only evidence considered by dist. ct. in claim construction was intrinsic, thus reviewed de novo.

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Pacing Tech's v. Garmin Federal Circuit Decision

Holding that "repetitive motion pacing system" is required to play back pace info using a tempo

- Plain and ordinary meaning of phrase "repetitive motion pacing system" does not require pacing user by playing back the pace info using a tempo.
- However, "Summary and Objects of the Invention" section of '843 patent has clear and unmistakable disavowal or disclaimer.

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Pacing Tech's v. Garmin Federal Circuit Decision

Holding that "repetitive motion pacing system" is required to play back pace info using a tempo

- "Summary and Objects of the Invention" section states:
 - "[I]t is a principal object of the present invention to provide a computer-implemented, network-based system having a networked server, database, client computer and input/output device for use by individuals engaged in repetitive motion activities..."
 - Followed by 18 additional features, each feature preceded with "[i]t is an additional object of the present invention" or "[i]t is still another object of the present invention..."
 - Immediately followed by "[t]hose and other objects and features of the present invention are accomplished...by a repetitive motion pacing system that includes...a data storage and **playback device adapted to producing the sensible tempo.**"

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Pacing Tech's v. Garmin Federal Circuit Decision

Holding that "repetitive motion pacing system" is required to play back pace info using a tempo

- Characterization of feature as "an object," "another object," or even "a principal object" will not always rise to level of disclaimer.
- Here, patentee not describing yet another object of invention, but instead alerting reader that invention accomplishes all its objects and features with a repetitive motion pacing system including playback device adapted to produce sensible tempo.
- Fed. Cir. previously found disavowal or disclaimer based on clear & unmistakable statements by patentee that limit the claim, e.g., "the present invention includes..." or "the present invention is..." or "all embodiments of the present invention are..."
 - See, e.g., *Regents of Univ. of Minn. v. AGA Med. Group*, 717 F.3d 929, 936 (Fed. Cir. 2013); *Honeywell Int'l, Inc. v. ITT Indus., Inc.*, 452 F.3d 1312, 1316-19 (Fed. Cir. 2006); *SciMed Life Sys., Inc.*, 242 F.3d at 1343-44.

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Pacing Tech's v. Garmin Federal Circuit Decision

Holding that "repetitive motion pacing system" is required to play back pace info using a tempo

- Pacing argues:
 - Spec. describes an embodiment where playback device plays video landscapes to user (e.g., running on treadmill) w/ video "automatically calibrated to match the speed of the user's...pace," to simulate user running through landscape.
 - This embodiment would not be covered if claims construed to limit invention to producing a sensible tempo.

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Pacing Tech's v. Garmin Federal Circuit Decision

Holding that "repetitive motion pacing system" is required to play back pace info using a tempo

- Fed. Cir.'s response:
 - It is unclear that the embodiment would be excluded by the construction.
 - It is true that constructions excluding a preferred embodiment are disfavored.
 - However, when multiple embodiments are described, every claim doesn't need to cover every embodiment, esp. where plain language of claim limitation does not appear to cover an embodiment.
 - Plain language of claim 25 requires system to pace user.

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Pacing Tech's v. Garmin Federal Circuit Decision

Holding that preamble to claim 25 is limiting

- Citing to *Easton v. Rockwell*, pointed out that limitations in the body of claims 25 & 28 rely on this preamble for antecedent basis.
- "The user" in Claim 25:
 - 25. A repetitive motion pacing system for pacing **a user** comprising:
 - a web site adapted to allowing **the user** to preselect from a set of user-selectable activity types an activity they wish to perform and entering one or more target tempo or target pace values corresponding to the activity;
 -

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Pacing Tech's v. Garmin Federal Circuit Decision

Holding that preamble to claim 25 is limiting

- "The repetitive motion pacing system" in Claim 28:
 - 28. The repetitive motion pacing system of claim 25, wherein **the repetitive motion pacing system** can determine a geographic location of the data storage and playback device.
- Preamble terms "user" and "repetitive motion pacing system" provide antecedent basis for & are necessary to understand positive limitations in body of claims – thus preamble in claim 25 is limiting.

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Pacing Tech's v. Garmin Federal Circuit Decision

District Court's Ruling Affirmed

- No genuine dispute of material fact as to whether Garmin's devices produce a sensible tempo.
- Displaying e.g. "100 steps per minute" does not produce a sensible tempo.
- Thus, Garmin's devices are not repetitive motion pacing devices according to '843 patent.
- Dist. ct.'s granting of summary judgment affirmed.

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Pacing Tech's v. Garmin Analysis

Why was the preamble there? Was it relied upon during prosecution history?

- Unclear why it was presented.
- Claim 25 (and dependent claims) not part of claims initially examined. Newly filed after 1st Office Action. Allowed in next action.
- Reasons for allowance: the claims "are considered allowable over the prior art for the reasons set forth by Applicant in the response of 9/19/11."
 - Applicant's response did not present any argument for new claim 25. Next action was Notice of Allowance.
 - However, Applicant's arguments for other claims based on differences in regard to matching/adjusting tempo.
 - Does this meet the "clear reliance" test?

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Comparing Pacing Tech's v. Garmin with other Fed. Cir. Decisions

Eaton Corp. v. Rockwell Int'l Corp. Cited in Pacing Tech's v. Garmin
323 F.3d 1332 (Fed. Cir. 2003)

- Patent describes "vehicular transmission shift control system...for automatically shifting between a group of sequentially related forward gear ratios provided by the transmission" (abstract).
- Patentee's system allows truck to use automatic shifting in higher gears & manual shifting in lower gears.
 - "Information processing unit" effects automatic shifting according to a program.

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Comparing *Pacing Tech's v. Garmin* with other Fed. Cir. Decisions

Eaton Corp. v. Rockwell Int'l Corp.

- Patent asserted against "fully manual" transmission system – driver has complete control of which gear truck is in
 - Driver presses "shift intent" switch (initiating engine fuel controller) & then moves gear selection lever (w/o depressing clutch or gas pedal)

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Comparing *Pacing Tech's v. Garmin* with other Fed. Cir. Decisions

Eaton Corp. v. Rockwell Int'l Corp.

- Asserted claim:

14. A multiple step method for controlling an automatic mechanical vehicle driveline system having... a transmission... having a plurality of gear ratio combinations selectively engageable between a transmission input shaft... said transmission input shaft being operatively connected to said engine by means of a... **master clutch**... said automatic mechanical vehicle driveline system comprising **an information processing unit... for generating output signals whereby said driveline system is operated in accordance with [a] program, and means... effective to actuate said driveline system to effect engagement of said gear ratio combinations in response to said output signals from said processing unit... a gear ratio change** of said driveline system comprising... **disengaging a first positive clutch** and then engaging a second positive clutch, both of said positive clutches comprising **a first clutch member**...having a rotational speed dependent on the rotational speed of the vehicle engine and **a second clutch member**...having a fixed rotational speed dependent on vehicle speed; said method characterized by:

- retaining **said vehicle master clutch**...engaged during **the gear ratio shift** in said drive train;
- urging **said first and second members of said first clutch** into a disengaged condition while, in sequence, increasing the supply of fuel supplied to the vehicular engine to cause the engine to rotate at a speed sufficient to cause **said first member of said first positive clutch to drive the second member of said first positive clutch** and decreasing the supply of fuel to the engine to cause **the second member of said first positive clutch to drive the first member of the first positive clutch**.

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Comparing *Pacing Tech's v. Garmin* with other Fed. Cir. Decisions

Eaton Corp. v. Rockwell Int'l Corp.

- Defendant argued that preamble was limitation b/c many limitations in claim body find antecedent basis there.
- Thus, D argued that claim required use of "information processing unit" and "means" to effect automatic shifting.
- Patentee argued that preamble recites intended use & merely provides "reference point" for elements in claim body.
- Dist. ct. ruled that preamble wasn't a limitation & that claim language didn't require automatic shifting.
- Jury found literal infringement & D appealed.

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Comparing *Pacing Tech's v. Garmin* with other Fed. Cir. Decisions

Eaton Corp. v. Rockwell Int'l Corp.

According to Fed. Cir.:

- Preamble is a limitation.
- When limitations in claim body rely upon & derive antecedent basis from preamble, then preamble may act as necessary component of claim.
- Here, preamble structure is what permits performance of 1st step
 - w/o master clutch being selectably engageable as described in preamble, 1st step couldn't be performed.

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Comparing *Pacing Tech's v. Garmin* with other Fed. Cir. Decisions

Eaton Corp. v. Rockwell Int'l Corp.

- 1st step also performed "during the gear ratio shift," i.e. during the particular sequence defined by preamble.
- As to 2nd step, w/o benefit of preamble, the "members" of 1st clutch member could be any part of clutch
- However, b/c of preamble, we know that the step uses a member having rotational speed dependent on that of engine & another member having fixed rotational speed dependent on vehicle speed.

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Comparing *Pacing Tech's v. Garmin* with other Fed. Cir. Decisions

Eaton Corp. v. Rockwell Int'l Corp.

- Method steps require manipulation of particular structures identified & described only in preamble, during particular sequence of events defined only by preamble.
- Concludes that inventor chose to use both preamble & body of claim to define his invention.
- Reversed judgment of infringement.

However, in *Pacing Tech's v. Garmin*, the actual preamble language does not describe any structural detail regarding terms of the claim body that rely on preamble for antecedent basis.

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Comparing *Pacing Tech's v. Garmin* with other Fed. Cir. Decisions

American Medical Systems, Inc. v. Biolitec, Inc. No. 2009-1323 (Fed. Cir. 2010)

- Patent relates to technology for treating BPH, condition in which growth of prostate gland restricts passage of urine out of bladder & through urethra.
- Prior treatments applied high-intensity laser radiation to vaporize target tissue via optical fiber.
- Patent's solution is to use of high "volumetric power density" (high amt of energy delivered to given volume of tissue) to increase vaporization efficiency & minimize residual coagulation.

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Comparing *Pacing Tech's v. Garmin* with other Fed. Cir. Decisions

American Medical Systems, Inc. v. Biolitec, Inc.

- Patent describes various methods & devices for achieving high volumetric power density by manipulating variables such as wavelength, output power, beam quality, irrigant composition, & distance b/w optical fiber & tissue.
- Patent spec repeatedly uses phrase "photoselective vaporization" to describing present invention.

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Comparing *Pacing Tech's v. Garmin* with other Fed. Cir. Decisions

American Medical Systems, Inc. v. Biolitec, Inc.

- Claim:

32. A method for photoselective **vaporization of tissue**, comprising:
 delivering laser radiation to a treatment area **on the tissue**, the laser radiation having a wavelength and having irradiance in the treatment area sufficient to cause vaporization of a substantially greater volume of tissue than a volume of residual coagulated tissue caused by the laser radiation, wherein the delivered laser radiation has an average irradiance in the treatment area greater than 10 kiloWatts/cm² in a spot size of at least 0.05 mm².

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Comparing *Pacing Tech's v. Garmin* with other Fed. Cir. Decisions

American Medical Systems, Inc. v. Biolitec, Inc.

- Dist. ct. construed term "photoselective vaporization" to mean "using a wavelength that is highly absorptive in the tissue, while being absorbed only to a negligible degree by water or other irrigant."
- Relied largely on following sentence in spec:
"Photoselective vaporization of tissue, such as the prostate for treatment of BPH, **is based upon** applying a high intensity radiation to prostate tissue using a radiation that is highly absorptive in the tissue, while being absorbed only to a negligible degree by water or other irrigant during the operation, at power densities such that the majority of the vaporization of the tissue without significant residual coagulation of adjacent tissue." (col. 3, line 66 to col. 4, line 6)

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Comparing *Pacing Tech's v. Garmin* with other Fed. Cir. Decisions

American Medical Systems, Inc. v. Biolitec, Inc.

- Also relied on statements in spec criticizing prior art w/ higher wavelengths as producing "low" or "no" selective absorption of radiation by blood & tissue, & praising prior art using smaller wavelengths as "selectively absorbed by blood."
- Dist. ct. ruled that preamble of claim 32 was limiting.

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Comparing *Pacing Tech's v. Garmin* with other Fed. Cir. Decisions

American Medical Systems, Inc. v. Biolitec, Inc.

- Claim 32 among claims asserted against laser system that uses radiation wavelength of 980 nm, at which energy is absorbed to more than a negligible degree by water or other irrigant.
- Dist. ct. held that defendant's laser system didn't infringe & granted summary judgment to D.

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Comparing *Pacing Tech's v. Garmin* with other Fed. Cir. Decisions

American Medical Systems, Inc. v. Biolitec, Inc.

According to Fed. Cir. (majority):

- Preamble language does **not** constitute limitation.
- Wasn't added during prosecution to distinguish over prior art
- Doesn't provide a necessary antecedent basis for term "the tissue"
 - Preamble term "vaporization of tissue" doesn't specify particular type or location of tissue treated.

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Comparing *Pacing Tech's v. Garmin* with other Fed. Cir. Decisions

American Medical Systems, Inc. v. Biolitec, Inc.

- Descriptor "photosensitive" does not embody an essential component of the invention.
- Instead, the term "photosensitive vaporization" is simply a descriptive name for an invention whose limitations are fully set forth in the bodies of the claims.
- Bodies of asserted apparatus claims (w/ similar preamble language) describe structurally complete device, including a laser adapted to deliver "radiation at a wavelength and irradiance...sufficient to cause [tissue] vaporization."
 - Nothing in those claims suggests that term "photosensitive" further limits those wavelengths.

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Comparing *Pacing Tech's v. Garmin* with other Fed. Cir. Decisions

American Medical Systems, Inc. v. Biolitec, Inc.

- Sentence relied on by dist. ct. uses words "based upon" rather than "means" or "is."
- Undermines suggestion that "photosensitive vaporization" is used as definition or limitation of claim terms.
- It is not limited to use of wavelengths that are absorbed to substantially greater degree by tissue than by water.
- Spec describes another factor in reducing absorption by water/irrigant is reducing distance b/w optical fiber & tissue (minimizing amt of liquid laser must pass thru)

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Comparing *Pacing Tech's v. Garmin* with other Fed. Cir. Decisions

American Medical Systems, Inc. v. Biolitec, Inc.

- In patent, in sole instance in which embodiment involves "photosensitive vaporization," no preferred wavelength range is expressed.
- Spec refers to wavelengths in the 200 to 1000 nm range (including D's 890 nm wavelength) as "preferabl[e] wavelengths for use in practicing the invention."
- Dist. ct. erred by construing phrase "photosensitive vaporization" as a claim limitation, rather than merely a label.
- **Reversed & remanded.**

Aren't the facts of this case more analogous to *Pacing Tech's* than *Eaton's*?

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Comparing *Pacing Tech's v. Garmin* with other Fed. Cir. Decisions

American Medical Systems, Inc. v. Biolitec, Inc.

Dissent (by CJ Dyk):

- "Over the years our court has struggled to make sense of when a preamble should be construed as limiting."
- "As the majority itself appears to recognize, we have not succeeded in articulating a clear and simple rule."
- "It seems to me that a rule recognizing that **all preambles are limiting** would make better sense and would better serve the interests of all concerned."

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Comparing *Pacing Tech's v. Garmin* with other Fed. Cir. Decisions

American Medical Systems, Inc. v. Biolitec, Inc.

- "Principles of fairness dictate thus dictate that the patentee should be required to clearly define the claimed invention's scope."
- "By creating a uniform rule that all preambles are limiting, we would ensure that the patentee has the burden of drafting a patent that avoids confusion as to the scope of the claims."
- Also pointed out that neither Supreme Court nor Fed. Cir. sitting en banc has ever addressed the preamble limitation issue.

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Discussion

- Practice tips
 - Claim drafting – don't put too much in preamble
 - Also, as shown in *Pacing Tech's*, don't be careless with "object of the invention" statements

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Thank you.

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