Joseph Scott Miller, Reasonably Certain Notice

In the Nautilus case, the Supreme Court held "that a patent is invalid for indefiniteness if its claims … fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention." 134 S. Ct. 2120, 2124. We do not require perfect clarity because, as the Festo case highlighted, patentees can't achieve it. We do not accept post hoc judicial salvage operations because, as the 1930s and 1940s functional-claiming cases highlighted, others can't adequately plan around it. Reasonably certain notice, then, is just right: § 112 "require[s] that a patent's claims, viewed in light of the specification and prosecution history, inform those skilled in the art about the scope of the invention with reasonable certainty." Id. at 2129. How then, should the Patent Office and the courts determine whether claim language provides reasonably clear notice, for the protection of patentee and public alike? Reasonableness, a concept that pervades law, looks for the fit between means and ends and depends on the particular circumstances. This paper explores the contours of reasonably certain notice, using insights gleaned from other legal domains requiring reasonable notice, including matters as diverse as Due Process cases, class action practice under Rule 23, and qualified immunity in civil rights cases. All indicate that, to fairly judge the reasonableness of the notice that claim language provides, we must contextualize the claim language with far more robust data about typical language usage in a given art at a given time than we currently consider. Happily, linguistics tools are readily available for analyzing usage in a large text corpora, and indefiniteness challenges are bound to call them into use.