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FOREWORD

ALWAYS AT THE MARGIN: INEQUITABLE CONDUCT IN FLUX

THE HONORABLE RANDALL R. RADER*

The U.S. Courts of Appeals rarely issue binding precedential opinions that reiterate only solid black-letter principles of law. Instead, the regional circuits and the national Court of Appeals for the Federal Circuit typically issue precedential opinions in cases featuring facts that press at the margins of established law. These constant and recurrent “close calls” persistently press the appellate courts to expand or contract the reach of legal rules.

The dynamics of appellate review bias the common law system of appeals in favor of constant evolution and alteration of the precise bounds of the law. This phenomenon occurs for a couple of reasons. In the first place, the district courts competently apply settled principles of law. Skilled appellate lawyers quickly and convincingly advocate against futile appeals. Thus, cases relying on settled principles tend to settle before appeal. If a party insists on an appeal, those same skilled attorneys cast even a simple case in terms that press at questioned margins of the law.

For still another reason, most precedential cases involve the difficult frontiers of the law. When an appeal does invoke solely stable doctrines, appellate judges—pressed to keep pace with a heavy workload—often resolve the matter using a truncated

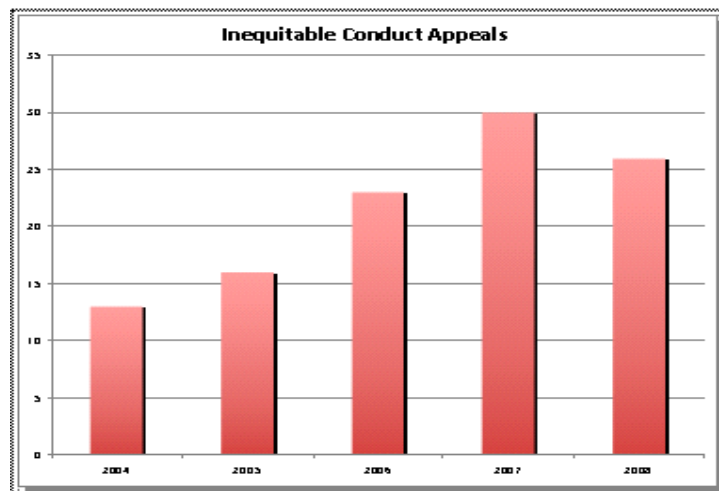
* Circuit Judge, U.S. Court of Appeals for the Federal Circuit. I would like to thank the Stanford Intellectual Property Litigation Clearinghouse for its research and analysis with respect to inequitable conduct case trends. I also thank Joss Nichols and Adam Eltoukhy for their assistance in preparing this Foreword.

non-precedential format.¹ Thus, for various reasons, the common law system, with its focus on correcting legal error and accepting the facts as found in the trial court, produces precedential opinions that press at the margins of the law. The result is that too often precedential opinions make new law rather than reaffirm the old (and note, even the term “old” seems perjorative when in fact it represents stability). With such concentration at the margins, the boundaries of the law undergo constant evolution—to use a flattering modifier—or constant destabilization—to take a more pessimistic tact.

If it were otherwise—that is, if settled issues were truly settled—one would expect to see fewer appeals relating to longstanding doctrines over time. Yet, with the outer limits of the law in constant flux—my general impression after roughly twenty years as a judge on the Federal Circuit—the number of appeals of supposed black-letter issues of patent law might generally increase over time. To test this intuition in one narrow area of law, I turned to research by the Stanford Intellectual Property Litigation Clearinghouse (IPLC). This reputable institution tallied the appeals involving inequitable conduct. From 2004 to 2007, an admittedly small sample, the number of appeals involving that issue steadily increased, even though the total number of patent appeals to the Federal Circuit remained fairly constant²:

1. The Federal Circuit also has given itself the power, under Local Rule 36, to enter a summary judgment of affirmance under certain circumstances, such as when a judgment or decision has been entered in the district court without an error of law. See FED. CIR. LOC. R. 36(e).

2. See U.S. Court of Appeals for the Federal Circuit, Filings of Patent Infringement Appeals from the U.S. District Courts, *available at* <http://www.cafc.uscourts.gov/pdf/PatentFilingsHistorical2000-2009.pdf>.



According to IPLC's research, the number of cases appealed on inequitable conduct rose from thirteen to thirty between 2004 and 2007, with a small drop in 2008 to twenty-six.³ This overall rising trend in the number of inequitable conduct cases could have many sources beyond the unsettled nature of the doctrine as the appeals press at the margins of the law. Nonetheless, it is one indicator that this doctrine requires repeated appeals and clarification after clarification at the margins.

The trilogy of U.S. Supreme Court cases that spawned the doctrine of inequitable conduct all involved clear-cut scenarios where a witness was paid to suppress or falsify information without which the applicant would not have had a chance to obtain a patent. The only

3. The IPLC reached these numbers by (1) looking for any case in PACER (a service that offers online access to U.S. district court documents) where the district court's opinion or judgment (including non-final opinions/judgments) included the words "inequitable conduct" for the inequitable conduct search and "equivalents" or "equivalency" for the doctrine of equivalents search and (2) picking out those cases where a notice of appeal or other Federal Circuit-related event occurred within thirty days after the opinion or judgment was filed. This is likely an overinclusive data set. For example, the IPLC's search would pick up an appeal if inequitable conduct was decided in the district court's final opinion even if the parties did not appeal the issue. It also might be underinclusive. For example, there might have been cases where a summary judgment ruling dismissed an inequitable conduct counterclaim in 2004, but the final judgment after trial was not rendered until 2007. If the final judgment or notice of appeal did not mention inequitable conduct, it would not be counted even if the summary judgment ruling was an issue on appeal. Finally, only the data for 2005 and later is included because before that many district court dockets were not accessible via PACER. Mark A. Lemley & J. H. Walker, *Intellectual Property Litigation Clearinghouse: Data Overview* (Stanford Pub. Law, Working Paper No. 1024032), available at <http://ssrn.com/abstract=1024032>.

question in those cases was what effect the fraudulent conduct should have on the patentee's case.

A cursory examination of the development of inequitable conduct law also lends support to the notion that this doctrine is constantly overflowing its banks. As suggested earlier, the doctrine's roots extend to Supreme Court cases where applicants "lied, cheated, and stole" to obtain a patent—hardly difficult matters to resolve. In *Keystone Driller Co. v. General Excavator Co.*,⁴ after learning about a possible prior use, the applicant paid the purported prior user to sign an affidavit that stated that the prior use was an abandoned experiment, to assign any rights he might have to the applicant, and to suppress evidence.⁵ The Court held that such conduct with respect to one patent was sufficient to infect causes of action based on related patents.⁶ The "deliberately planned and carefully executed scheme to defraud" in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*⁷ involved a patentee who paid an expert after he falsely told the defendants that he, not the patentee's attorney, wrote an article that extolled the ingenuity of the invention at issue.⁸ The Court held that the court of appeals could have set aside its earlier judgment after those facts came to light.⁹ Finally, the patentee in *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*¹⁰ was punished because it settled an interference proceeding after the opposing applicant admitted to lying. Rather than "doing all within its power to reveal and expose the fraud," however, the patentee acquired the rights to, and attempted to assert and enforce, the "perjury-tainted patents."¹¹ The Court held that the inequitable conduct "impregnated [the patentee's] entire cause of action," which included claims premised on contracts and other patents.¹² Interestingly, the Court used broad language in these cases to highlight the need for flexibility.¹³

4. 290 U.S. 240, 19 U.S.P.Q. (BNA) 228 (1933).

5. *Id.* at 243, 19 U.S.P.Q. (BNA) at 229.

6. *Id.* at 246, 19 U.S.P.Q. (BNA) at 230.

7. 322 U.S. 238, 245, 61 U.S.P.Q. (BNA) 241, 245 (1944), *overruled on other grounds by* *Standard Oil Co. v. United States*, 429 U.S. 17 (1976).

8. *Id.* at 240–42, 61 U.S.P.Q. (BNA) at 243–44.

9. *Id.* at 249–50, 61 U.S.P.Q. (BNA) at 246–47.

10. 324 U.S. 806, 65 U.S.P.Q. (BNA) 133 (1945).

11. *Id.* at 816, 65 U.S.P.Q. (BNA) at 138.

12. *Id.* at 819, 65 U.S.P.Q. (BNA) at 139–40.

13. *See id.* at 816, 65 U.S.P.Q. (BNA) at 138 ("The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope."); *Hazel-Atlas Glass Co.*, 322 U.S. at 248, 61 U.S.P.Q. (BNA) at 246 ("[T]his equitable procedure has always been characterized by flexibility which enables it to

These cases have several common characteristics. In each case, egregious fraud, perjury, and extortion infected every part of the patent acquisition and enforcement process. The perpetrator of the fraud would not have received, or been able to enforce, the patent without the egregious conduct. In other words, without the fraud, the patent right would not have been enforceable at all. And notably, the Supreme Court did not make any connection between its inequitable conduct doctrine and an incentive to disclose prior art to the patent officer during prosecution. In other words, this doctrine was not born as a universal principle to encourage a patent owner to disclose (excessive amounts of) prior art, but only as a remedy for truly abusive behavior. Indeed the United States remains the only country in the world that embraces inequitable conduct as an incentive to disclose prior art. If the United States establishes an opposition system in its patent reform efforts, much of the justification for the expanded modern inequitable conduct doctrine will disappear.

This brief forward is not the place to document the gradual expansion of this doctrine, which grew from a tiny bush on the patent landscape that inhibited gross fraud into a ubiquitous weed that infects every prosecution and litigation involving patents. That expansion took on several forms. For instance, as mentioned, the doctrine took on the purpose of eliciting prior art from a patent applicant.¹⁴

meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations.”); *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245–46, 19 U.S.P.Q. (BNA) 228, 230 (1933) (“[Courts] apply the maxim [of clean hands], not by way of punishment for extraneous transgressions, but upon considerations that make for the advancement of right and justice. They are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.”).

14. The first case to render a patent unenforceable for a mere failure to disclose prior art appears to have been *Beckman Instruments, Inc. v. Chemtronics, Inc.*, 428 F.2d 555 (5th Cir. 1970). In the related case of *In re Clark*, 522 F.2d 623, 187 U.S.P.Q. (BNA) 209 (C.C.P.A. 1975), the Court of Customs and Patent Appeals affirmed the Patent Office’s rejection of a reissue application for the patent at issue in *Beckman*. *Id.* at 628, 187 U.S.P.Q. (BNA) at 213. Although the court noted that the applicant’s failure to disclose the prior art was “not fraud,” the court nonetheless held that “an applicant or his agent cannot knowingly withhold relevant prior art from the examiner until he finds out whether such action invalidates his patent and then apply for reissue only if he loses the gamble.” *Id.*, 187 U.S.P.Q. (BNA) at 213; see *Nilssen v. Osram Sylvania, Inc.*, 504 F.3d 1223, 1235, 84 U.S.P.Q.2d (BNA) 1811, 1820 (Fed. Cir. 2007) (“Given that these material references were repeatedly before Nilssen, and his failure to offer any good faith explanation for withholding them other than mere oversight, we find an inference that Nilssen intended to deceive the PTO not unreasonable.”).

In another expansion, the doctrine grew to embrace any kind of perfidy, no matter how inconsequential to the grant of a patent. In other words, any misstatement or overstatement, even if irrelevant to the issuance or validity of a patent, became subject to this “atomic bomb” remedy against fraud. In *Nilssen v. Osram Sylvania, Inc.*,¹⁵ for example, the Federal Circuit affirmed a ruling of inequitable conduct where the patentee had made several small entity maintenance fee payments to the Patent Office after the patents in suit had issued, when in fact the patentee was not entitled to claim small entity status under the relevant regulation.¹⁶ In another example, the Federal Circuit held that inequitable conduct had occurred where an applicant falsely stated to the Patent Office, in order to expedite examination, that his search of the prior art was “careful and thorough.”¹⁷ These cases hardly involve the gross misconduct and deceit that characterized the original Supreme Court cases.

The expansion of this doctrine, characteristic of many appellate issues, evolved into a multi-part test for compliance. Thus, the evolving doctrine took on the character of a two-part test, which requires a patent challenger to show materiality and intent to deceive the Patent Office by clear and convincing evidence.¹⁸ Far from the Supreme Court’s admonitions about a flexible approach to redress genuine fraud and deceit, this test constrains a court’s flexibility and invites it to lose sight of the central principle of inequitable conduct—namely, that a court “will not extend its aid to a wrongdoer.”¹⁹

As a simple mathematical matter, as a court considers *seriatim* each element of materiality and intent “and determin[es] in what manner it has been affected by the broadening of the concept of ‘fraud’ before the Patent Office,”²⁰ the court effectively doubles the number of cases that might otherwise fall into an overall “unclean hands” test. Moreover, the test for materiality is much broader than necessary to prevent avoidance of prior art that might indeed affect the outcome of the patent prosecution. Indeed, the Patent Office has adopted

15. 504 F.3d 1223, 84 U.S.P.Q.2d (BNA) 1811 (Fed. Cir. 2007).

16. *Id.* at 1230–33, 84 U.S.P.Q.2d (BNA) at 1815–19.

17. *See* *Gen. Electro Music Corp. v. Samick Music Corp.*, 19 F.3d 1405, 1411–12, 30 U.S.P.Q.2d (BNA) 1149, 1154–55 (Fed. Cir. 1994).

18. *Larson Mfg. Co. of S.D., Inc. v. Aluminart Prods. Ltd.*, 559 F.3d 1317, 1326, 90 U.S.P.Q.2d (BNA) 1257, 1262 (Fed. Cir. 2009).

19. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 260, 61 U.S.P.Q. (BNA) 241, 251 (1976), *overruled on other grounds by* *Standard Oil Co. v. United States*, 429 U.S. 17 (1976).

20. *Norton v. Curtiss*, 433 F.2d 779, 794, 167 U.S.P.Q. (BNA) 532, 544 (C.C.P.A. 1970).

rules that limit the scope of material prior art. Yet the Federal Circuit retains a test for materiality that calls into question almost any undisclosed prior art, not just prior art of consequence to the issuance decision. As stated in *McKesson Information Solutions, Inc. v. Bridge Medical, Inc.*,²¹ “the test for materiality is whether a reasonable examiner would have considered the information important, not whether the information would conclusively decide the issue of patentability.”²² In *McKesson*, an applicant’s failure to notify the examiner of the allowance of claims in a co-pending application was material merely because those claims gave rise to a “conceivable” double patenting rejection.²³ District courts relying on *McKesson* have recognized that the “reasonable examiner” standard is less stringent than the Patent Office’s own definition of materiality and have relied on the testimony of patent examiners to evaluate materiality.²⁴ This materiality test also becomes important because some modern iterations of the doctrine often allow a high showing of materiality to “trump” a low showing of intent to deceive, and vice versa.²⁵

This gradual evolution away from the roots of the inequitable conduct doctrine inspired litigants to use inequitable conduct as a strategic part of a defense against patent infringement. An allegation of inequitable conduct opened the door to vast discovery into the circumstances of the patent prosecution, leveled an embarrassing charge of fraud as a counterweight to the presumption of patent validity, and even disqualified the prosecuting attorney (who may be a witness) from the patentee’s litigation team. With these considerations, inequitable conduct became a standard pleading practice in patent cases. The Federal Circuit, even early in its history, recognized this misuse of the fraud doctrine as a “plague.”²⁶

21. 487 F.3d 897, 82 U.S.P.Q.2d (BNA) 1865 (Fed. Cir. 2007).

22. *Id.* at 925, 82 U.S.P.Q.2d (BNA) at 1885 (citing *Li Second Family Ltd. P’ship v. Toshiba Corp.*, 231 F.3d 1373, 1380, 56 U.S.P.Q.2d (BNA) 1681, 1686 (Fed. Cir. 2000)).

23. *Id.*, 82 U.S.P.Q.2d (BNA) at 1885.

24. See *Eli Lilly & Co. v. Actavis Elizabeth LLC*, No. 07-cv-3770, 2009 WL 5159650, at *5 (D.N.J. Dec. 31, 2009) (collecting cases that allowed testimony from former patent examiners on the question of materiality); *Rentrop v. Spectranetics Corp.*, 514 F. Supp. 2d 511, 527 (S.D.N.Y. 2007), *aff’d*, 550 F.3d 1112, 89 U.S.P.Q.2d (BNA) 1417 (Fed. Cir. 2008) (“[A] reasonable examiner would . . . consider that prior art important in deciding patentability. However, the materiality of this reference is low. It is not material when measured against the more stringent standards of the USPTO’s Rule 56 . . .”). Of course, I express no view here on whether these cases were rightly decided under Federal Circuit law.

25. *E.g.*, *Halliburton Co. v. Schlumberger Tech. Corp.*, 925 F.2d 1435, 1439, 17 U.S.P.Q.2d (BNA) 1834, 1837 (Fed. Cir. 1991).

26. *Kingsdown Med. Consultants, Ltd. v. Hollister Inc.*, 863 F.2d 867, 876 n.15, 9 U.S.P.Q.2d (BNA) 1384, 1392 n.15 (Fed. Cir. 1988) (quoting *Burlington Indus.*,

At that point, the Federal Circuit intervened to attempt to cabin the doctrine and return it to its roots. The result was *Kingsdown Medical Consultants, Ltd. v. Hollister Inc.*,²⁷ where the Federal Circuit, sitting en banc, held that mistakenly including a previously rejected claim into a later application was not inequitable conduct.²⁸ As I have said before, the court in *Kingsdown* clearly conveyed that “inequitable conduct was not a remedy for every mistake, blunder, or fault in the patent procurement process.”²⁹ Yet sadly, *Kingsdown* may have retracted the margins of the doctrine only temporarily, as many of the more recent cases have shown that it did not achieve its objective.³⁰

As the margins of inequitable conduct fluctuated back and forth, the Federal Circuit has attempted again more recently to restore some certainty to the doctrine. It has reminded district courts and litigants that a finding of inequitable conduct has severe consequences.³¹ District courts appear to be taking these warnings to heart.³² And even where those reminders fail, the court has given patentees a way to short-circuit claims of inequitable conduct by requiring accused infringers to identify the specifics of the material

Inc. v. Dayco Corp., 849 F.2d 1418, 1422, 7 U.S.P.Q.2d (BNA) 1158, 1161 (Fed. Cir. 1988)).

27. 863 F.2d 867, 9 U.S.P.Q.2d (BNA) 1384 (Fed. Cir. 1988).

28. *Id.* at 873, 9 U.S.P.Q.2d (BNA) at 1389.

29. *Aventis Pharma S.A. v. Amphastar Pharms., Inc.*, 525 F.3d 1334, 1350, 87 U.S.P.Q.2d (BNA) 1110, 1123 (Fed. Cir. 2008) (Rader, J., dissenting), *cert. denied*, 129 S. Ct. 2053 (2009).

30. *Id.*, 87 U.S.P.Q.2d (BNA) at 1123; *see Ferring B.V. v. Barr Labs., Inc.*, 437 F.3d 1181, 1194, 78 U.S.P.Q.2d (BNA) 1161, 1171 (Fed. Cir. 2006); *Novo Nordisk Pharms., Inc. v. Bio-Tech. Gen. Corp.*, 424 F.3d 1347, 1362–63, 76 U.S.P.Q.2d (BNA) 1811, 1822–23 (Fed. Cir. 2005).

31. *See Larson Mfg. Co. of S.D., Inc. v. Aluminart Prods. Ltd.*, 559 F.3d 1317, 1340–41, 90 U.S.P.Q.2d (BNA) 1257, 1272–73 (Fed. Cir. 2009); *Star Scientific, Inc. v. R.J. Reynolds Tobacco Co.*, 537 F.3d 1357, 1366, 88 U.S.P.Q.2d (BNA) 1001, 1007 (Fed. Cir. 2008); *Scanner Techs. Corp. v. ICOS Vision Sys. Corp.*, 528 F.3d 1365, 1376, 87 U.S.P.Q.2d (BNA) 1225, 1233 (Fed. Cir. 2008).

32. *See Cordis Corp. v. Boston Scientific Corp.*, 641 F. Supp. 2d 353, 359 (D. Del. 2009) (“[A]lthough neither Dr. Fischell nor Mr. Rosenberg prosecuted the ‘312 application with the professional care and vigor one might expect from them, I believe it would be clear error for me to imbue their conduct with deceptive intent on this record.”); *Purdue Pharma Prods. L.P. v. Par Pharm., Inc.*, 642 F. Supp. 2d 329, 379–80 (D. Del. 2009) (“In short, Par’s proof is incriminating, but not incriminating enough.”); *Powell v. Home Depot U.S.A., No. 07-80435-CIV*, 2009 WL 3855174, at *9 (S.D. Fla. Nov. 17, 2009) (“Considering the specific facts of this case, the equity is better served by denying Defendant’s likelihood of success in inequitable conduct defense . . .”). *But see Ring Plus, Inc. v. Cingular Wireless LLC*, 637 F. Supp. 2d 423, 440 n.6 (E.D. Tex. 2009) (“At a minimum, Defendants have shown by clear and convincing evidence that the applicants made material misstatements coupled with a ‘reckless indifference to the truth’ and an ‘absence of evidence of good faith.’” (quoting *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 882 F.2d 1556, 1562, 11 U.S.P.Q.2d (BNA) 1750, 1755 (Fed. Cir. 1989))). Once again, I express no view here on whether these cases were rightly decided.

misrepresentation or omission in their pleadings and to sufficiently allege facts that would allow a court to reasonably infer knowledge and intent.³³ The last part of the Federal Circuit's current test—requiring the court to determine whether the materiality and intent to deceive, once found, amount to inequitable conduct—is very important.³⁴ Still, once a court has found both materiality and intent, it is a short, slippery step into the final ruling of unenforceability.

This brief recounting of some of the fluctuation of the inequitable conduct doctrine serves to illustrate the difficulties of an appellate process that works always at the margins of the law. Perhaps the antidote, as I have reminded my colleagues (and myself) from time to time, is to remember the founding principles of each doctrine.³⁵

In sum, the Federal Circuit has vacillated on inequitable conduct in an attempt to fashion delicate rules that waver to account for the context and posture of the particular marginal facts at issue. Rather than collapse under the pressure of particularized fact patterns by creating rules and exceptions to those rules, the Federal Circuit's inequitable conduct jurisprudence might profit from a renewed focus on propounding clear standards that can be easily applied by lower courts and the public. One way to do this would be to issue more precedential opinions in cases that are seemingly straightforward. In other words, our courts should occasionally take advantage of clear-cut cases to restate and reinforce the fundamental underpinnings of this doctrine.³⁶

To be clear, the common law appellate system draws great benefits as well from deciding cases at the margins of the law. Those cases permit the courts to brighten fuzzy lines and distinguish various aspects of a particular legal issue by embracing new thoughts, technologies, and needs. But those benefits carry the vast risk of unintended consequences. As noted, litigants continually solicit courts to rewrite or modify the law to suit their particular needs.

33. See *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1328–29, 91 U.S.P.Q.2d (BNA) 1656, 1668–69 (Fed. Cir. 2009).

34. *Larson Mfg. Co. of S.D., Inc.*, 559 F.3d at 1326, 90 U.S.P.Q.2d (BNA) at 1262.

35. *Aventis Pharma S.A. v. Amphastar Pharms., Inc.*, 525 F.3d 1334, 1350, 87 U.S.P.Q.2d (BNA) 1110, 1123 (Fed. Cir. 2008) (Rader, J., dissenting) (“In light of the rejuvenation of the inequitable conduct tactic, this court ought to revisit occasionally its *Kingsdown* opinion.”), *cert. denied*, 129 S. Ct. 2053 (2009).

36. Most such cases are now disposed of summarily or through non-precedential opinions. For the time frames September 30, 2007 to September 30, 2008 and September 30, 2008 to September 30, 2009, 66.3% and 64.9% of cases appealed to the Federal Circuit were disposed of in a non-precedential manner, respectively. See U.S. Court of Appeals for the Federal Circuit, Chart of Caseload Analysis for FY 2008–FY 2009, at 2, *available at* <http://www.ca9c.uscourts.gov/pdf/CaseloadAnalysisFY09.pdf> (last visited Mar. 24, 2010).

Courts, in turn, sometimes oblige without adequate attention to the full consequences of expanding the law's central principles and concepts. This recurring theme can lead to exception piled on exception until the law has become far less legal. With inequitable conduct as a doctrine of warning, appellate courts ought to reason from the anchoring security of common and fundamental principles. Otherwise, the law risks a battering ride on the constantly changing tides of marginal litigation.