Reforming Inequitable Conduct

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Few commentators have anything nice to say about the defense of “inequitable conduct,” which renders unenforceable a patent that has been procured by fraud on the patent office. According to the standard narrative, the availability of an inequitable conduct defense encourages scandalous accusations of fraud to be levied against patent lawyers, wrongfully punishes patentees, and the defense—rather than the underlying occurrences of patentee fraud—constitutes a “plague” on the patent system. Suggested reforms invariable make the defense more difficult to establish, and weaken the remedy when the defense has been established.

This Article takes a different perspective. Contrary to the conventional wisdom, the inequitable conduct defense is likely too weak, not too strong. This is because of remedy fails to punish a patentee who has intentionally withheld damaging information, in that the patentee has not been placed in a worse position than if he had complied with the disclosure obligation initially. A fraudulently obtained patent that might later be rendered unenforceable is better than never having a patent at all.

Instead of making the inequitable conduct defense more difficult to establish and the remedy weaker; this Article argues that the defense should be made easier to establish, and the remedy more flexibly tailored to compel mandated disclosure.

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