# Press Release

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# WLF Asks High Court to Raise Bar for "Inequitable Conduct" Defense in Patent Infringement Suits

*(Regeneron Pharmaceuticals, Inc. v. Merus)*

**"By lowering the bar for those asserting an 'inequitable conduct' defense, the Federal Circuit is undermining the viability of our patent system."**
**—Richard Samp, WLF Chief Counsel**

WASHINGTON, DC—Washington Legal Foundation yesterday urged the Supreme Court to review (and ultimately overturn) an appeals court decision that substantially expands the "inequitable conduct" defense and thereby throws into question the continued viability of numerous patents. In a brief filed in *Regeneron Pharmaceuticals, Inc. v. Merus N.V.*, WLF argues that patents should be invalidated under the inequitable-conduct doctrine only when a defendant sued for infringement can demonstrate that the patentee obtained its patent by defrauding the Patent and Trademark Office (PTO). WLF argues that the doctrine is being invoked far too frequently to strike down patents for relatively trivial errors.

The plaintiff in this case sued for infringement of its patent on a genetically modified mouse used to produce medically useful antibodies. The alleged infringer raised an inequitable-conduct defense, arguing that the patentee had acted inequitably by failing to disclose to the PTO (while the patent application was pending) four documents that might have caused the PTO to conclude that the invention was not novel and thus was not patentable. The case never went to trial. Instead, the district judge: (1) held that the patentee engaged in litigation misconduct by improperly failing to turn over to the defendants in a timely manner documents that might have supported their inequitable-conduct claim; and (2) as a sanction for the trial attorneys' misconduct, simply declared that the patentee had engaged in inequitable conduct before the PTO—without conducting a trial on the issue. The result of that sanction was that the patent was invalidated.

WLF's brief argues that patents should never be invalidated on inequitable-conduct grounds in the absence of "clear and convincing" evidence that the patentee withheld documents from its patent application with "intent to deceive" the PTO. The alleged infringer presented no such evidence in this case because the trial judge used her sanctioning power as a substitute for a trial on the merits. WLF argues that the trial judge should have imposed far less drastic sanctions for trial counsel's alleged misconduct. Such misconduct cannot ever justify a sanction whose effect is the outright elimination of the patentee's valuable property rights—thereby preventing enforcement of the patent not only against the defendant but also against all other would-be infringers.

*Celebrating its 41st year, WLF is America's premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.*

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