



# Inequitable Conduct Update

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## Agenda

- (Very) Brief Review of *Therasense*
- Post-*Therasense* Decisions
- Inequitable Conduct Statistics
- Liability for Plaintiffs' Attorneys

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## ***Therasense v. Becton Dickinson Co. (2011)***

- **En banc decision**
- **Intent**
  - Must prove an intent to deceive by clear and convincing evidence
    - "Single most reasonable inference"
  - Negligence insufficient
- **Materiality**
  - "But-for" Standard
  - Exception for "affirmative egregious misconduct"

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## Post-*Therasense* Decisions: Intent

- Negligence is not sufficient
- Must prove intent to deceive
  - No requirement for good faith explanation
  - Discredited explanations not enough



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## Negligence Is Not Intent

### ***Santarus, Inc. v. Par Pharm.*, 694 F.3d 1344 (Fed. Cir. 2012)**

- Failure to disclose experimental use of patented drug
- Inventor alleged ignorance of requirement to disclose
  - Allegedly believed that duty was limited to sales and public use
- District Court found that inventor's explanation "strained credibility"
- But also found that evidence not sufficient to establish clear and convincing evidence of intent.
- No inequitable conduct - affirmed.



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## Title search: Inequitable Conduct Update

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First appeared as part of the conference materials for the  
20<sup>th</sup> Annual Advanced Patent Law Institute session

"Attorney Beware! Client's Inequitable Conduct Can Lead to Attorney Liability"