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Application of the Clean Hands Doctrine in Damage Actions

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The Application of the Clean Hands Doctrine in Damage Actions

The clean hands doctrine allows courts to refuse relief to any plaintiff who has acted inequitably.[1] Judicial integrity, justice, and the public interest form the basis for the doctrine.[2] The doctrine is a valid defense to an action for equitable relief, but the majority of courts refuse to apply it where the plaintiff seeks damages.[3] These courts reason that the doctrine developed in the equity courts and therefore applies only to equitable actions.[4] In a few recent cases, however, courts have applied the doctrine in actions for damages.[5]

This note examines the clean hands doctrine and urges its use in damage actions. Part I discusses the doctrine's meaning and rationale, and its present use where equitable relief is sought; Part II analyzes the reasons for extending the doctrine to damage actions; Part III determines whether the doctrine is needed; and Part IV discusses practical concerns for judges and practitioners.

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1 *See* 2 J. POMEROY, EQUITY JURISPRUDENCE §§ 397, 399 (5th ed. S. Symons ed. 1941) [hereinafter cited as J. POMEROY]. *See also* H. MCCLINTOCK, EQUITY § 26 (2d ed. 1948) [hereinafter cited as H. MCCLINTOCK]. *See* notes 6-10 and accompanying text *infra*.

2 *See* notes 15-27 and accompanying text *infra*.

3 *See, e.g.*, Truitt v. Miller, 407 A.2d 1073 (D.C. App. 1979); American Nat'l Bank & Trust v. Levy, 83 Ill. App. 3d 933, 404 N.E.2d 946 (1980); Cusumano v. City of Detroit, 30 Mich. App. 603, 186 N.W.2d 740 (1971). *See also* Fadely, *The Clean Hands Doctrine in Oregon*, 37 OR. L. REV. 160 (1958).

4 Evans v. Mason, 82 Ariz. 40, 308 P.2d 245 (1957); Rodriguez v. Dicoa Corp., 318 So. 2d 442 (Fla. App. 1975); Caudill v. Little, 293 S.W.2d 881 (Ky. 1956); Cusumano v. City of Detroit, 30 Mich. App. 603, 186 N.W.2d 740 (1971); Kesinger v. Burtrum, 295 S.W.2d 605 (Mo. App. 1956). *See* Garvey, *Some Aspects of the Merger of Law and Equity*, 10 CATH. U. L. REV. 59 (1961) [hereinafter cited as Garvey].

5 Tempo Music, Inc. v. Myers, 407 F.2d 503 (4th Cir. 1969); Kuehnert v. Texstar Corp. 412 F.2d 700 (5th Cir. 1969); F.E.L. Publications v. Catholic Bishop of Chicago, 506 F. Supp. 1127 (N.D. Ill. 1981), *rev'd on other grounds*, No. 81-1333 (7th Cir. Mar. 25, 1982); Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co., No. 79-175-9 (D.S.C. July 7, 1981) (order granting dismissal); Urecal Corp. v. Master, 413 F. Supp. 873 (N.D. Ill. 1976); Union Pacific R.R. v. Chicago & Northwestern Railway, 226 F. Supp. 400 (N.D. Ill. 1964); Goldstein v. Lees, 46 Cal. App. 3d 614, 120 Cal. Rptr. 253 (1975); Fibreboard Paper Prods. Corp. v. East Bay Union of Mach., 227 Cal. App. 2d 675, 39 Cal. Rptr. 64 (1964).

I. The Use of the Clean Hands Doctrine Where Equitable Remedies are Sought

A. *The Clean Hands Doctrine: Definition and Rationale*

The clean hands doctrine demands that a plaintiff seeking equitable relief come into court having acted equitably in that matter for which he seeks remedy.[6] Inequitable conduct alone does not prevent a plaintiff's recovery, but generally[7] only conduct related to the plaintiff's claim.[8] The inequitable conduct which causes the doctrine to be invoked must be wilful,[9] and usually involves fraud, illegality, unfairness, or bad faith.[10]

The clean hands doctrine, however, is not "a license to destroy the rights of persons whose conduct is unethical,"[11] nor is it a "judicial straightjacket."[12] The doctrine is a matter of sound discretion for the court, and should never prevent a court "from doing justice."[13] Thus, if allowing an "unclean" plaintiff to recover serves one of the fundamental rationales of the doctrine, that plaintiff should recover.[14]

The three fundamental rationales that form the basis for the clean hands doctrine are judicial integrity, justice, and the public

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6 *See* note 1 *supra*.

7 Some courts allow an exception to the requirement that the plaintiff's inequitable conduct be related to the matter he sues upon, where the plaintiff's action is condemned by statute or is against public policy, and the right sought to be vindicated is inimical to the public welfare. The defense is available even if no relation exists between the plaintiff's act and the relief sought. Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 492-93 (1942). This exception developed in patent infringement cases where plaintiffs used their patents to restrict competition. *Id.* Subsequent decisions cast doubt on the viability of this exception even in the patent area. *See, e.g.*, McCullough Tool Co. v. Well Surveys, Inc., 395 F.2d 230, 238 (10th Cir. 1968). *But see* Skil Corp. v. Lucerne Prods., Inc., 489 F. Supp. 1129, 1162 (N.D. Ohio 1980). If the exception is allowed, courts have made it clear that the patent holder must use his patent to subvert the policy of the patent law itself. *See, e.g.*, Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 864 n.25 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

8 Loughran v. Loughran, 292 U.S. 216, 229-30 (1934); W. DEFUNIAK, MODERN EQUITY 40 (2d ed. 1956) [hereinafter cited as W. DEFUNIAK]; 2 J. POMEROY, *supra* note 1, § 397.

9 New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471, 474 (5th Cir. 1961); Eresch v. Braecklein, 133 F.2d 12, 14 (10th Cir. 1943); H. MCCLINTOCK, *supra* note 1, at § 26.

10 Johnson v. Yellow Cab Co., 321 U.S. 383, 387 (1944); Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245 (1933); 2 J. POMEROY, *supra* note 1, § 290.

11 D. DOBBS, REMEDIES § 2.4 (1974) [hereinafter cited as D. DOBBS].

12 Smith v. Marzolf, 81 Ill. App. 3d 59, 66, 400 N.E.2d 949, 954 (1980).

13 *Id.*

14 Kuehnert v. Texstar Corp., 412 F.2d 700, 704 (5th Cir. 1969). *See* text accompanying notes 122-29 *infra*.

interest. First, the doctrine protects judicial integrity.[15] Allowing an unclean plaintiff to recover would not only abet him in his inequitable conduct,[16] but would also raise doubts as to the justice provided by the judicial system. Thus, the court must close its door to the unclean plaintiff and "refuse to interfere on his behalf,"[17] allowing the court to remain above inequity.

Second, the clean hands doctrine promotes justice.[18] Courts use the doctrine to ensure a fair result.[19] Where the plaintiff's conduct is such that it would be unjust to allow him a remedy, courts can use the doctrine as a bar to remedy.[20] Therefore, withholding assistance from the unclean plaintiff allows courts to prevent "a wrongdoer from enjoying the fruits of his transgression."[21]

Third, the clean hands doctrine promotes the public interest.[22] Courts can use the doctrine where a suit involves a public right or issue.[23] The Supreme Court of the United States has stated that, in cases involving the public interest, the "doctrine assumes wider and more significant proportions."[24] Thus, in suits involving the public interest, a court may not only prevent a wrongdoer from benefitting from his transgressions, but avoid injury to the public.

Morton Salt Co. v. G. S. Suppiger[25] illustrates this concern for the public interest. In *Morton Salt*, the Supreme Court denied a patentee equitable relief because the patentee had used his patent to unnecessarily restrict competition.[26] The plaintiff not only came into court with unclean hands, but he infringed upon the public interest by re-

15 Fibreboard Paper Prods. Corp. v. East Bay Union of Mach., 227 Cal. App. 2d 675, 727, 39 Cal. Rptr. 64, 96 (1964). *See* H. MCCLINTOCK, *supra* note 1, § 26.

16 Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 814 (1945).

17 Keystone Driller Co. v. General Execavator Co., 290 U.S. 240, 245 (1933). *See* 2 J. POMEROY, *supra* note 1, § 398.

18 Keystone Driller Co. v. General Excavator Co., 290 U.S. at 245; Mas v. Coca Cola Co., 163 F.2d 505, 509 (4th Cir. 1947); Dunscombe v. Amfot Oil Co., 201 Ky. 290, 292, 256 S.W. 427, 428 (1923).

19 Keystone Driller Co. v. General Excavator Co., 290 U.S. at 245.

20 *See* notes 111-21 and accompanying text *infra*.

21 Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. at 815.

22 Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. at 815; Republic Molding Corp. v. B.W. Photo Util., 319 F.2d 347, 349-50 (9th Cir. 1963); Baue v. Embalmers Federal Labor Union, 376 S.W.2d 230, 236 (Mo. 1964).

23 Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. at 815.

24 *Id.*

25 314 U.S. 488 (1942).

26 *Id.* at 491.

stricting competition.[27]

Finally, the clean hands doctrine must be distinguished from the doctrines of *in pari delicto*, and "he who seeks equity must do equity." Often, the clean hands doctrine has been misunderstood and confused with these two doctrines.[28]

In pari delicto, potier est conditio defendentis means that where the acts of the plaintiff and the defendant are equally inequitable, the plaintiff will not be allowed to recover.[29] This doctrine is closely related to the clean hands doctrine,[30] but is narrower in application. *In pari delicto* usually applies only where the parties have entered into a fraudulent, illegal, or inequitable transaction.[31] In its most conventional form, *in pari delicto* condemns a party if "by participating in the illegal [or fraudulent] transaction he is guilty of moral turpitude."[32] Thus, while *in pari delicto* focuses on the transaction and its possible illegality or fraudulence, the clean hands doctrine looks at the plaintiff's inequity and its connection with the matter at issue.[33] It is entirely possible for a party to have unclean hands in a transaction that is lawful and not violative of public policy.[34]

The second major difference between the clean hands doctrine and *in pari delicto* is that *in pari delicto* requires the plaintiff to have been "in equal fault"[35] with the defendant, while clean hands is not as concerned with the parties' relative fault. Thus, while courts considering the clean hands doctrine may weigh the parties' relative fault, courts may properly refuse the plaintiff relief on a clean hands theory even if the plaintiff's wrongdoing is not as serious as the defendant's.[36]

The clean hands doctrine must also be distinguished from the maxim that "he who seeks equity must do equity" (seek-do). While

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27 *Id.* at 492.

28 *See* Stockton v. Ortiz, 47 Cal. App. 3d 183, 200, 120 Cal. Rptr. 456, 466 (1975); D. DOBBS, *supra* note 11, § 2.4.

29 *See* Truitt v. Miller, 407 A.2d 1073, 1079 (D.C. App. 1979).

30 Tarasi v. Pittsburgh Nat'l Bank, 555 F.2d 1152, 1156-57 n.9 (3d Cir. 1977); Truitt v. Miller, 407 A.2d 1073, 1079-80 (D.C. App. 1979).

31 Truitt v. Miller, 407 A.2d at 1079.

32 *Id.*

33 *See* note 8 and accompanying text *supra*.

34 For example, in Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co., No. 79-175-9 (D.S.C. July 7, 1981) (order granting dismissal), the "transaction" was a legitimate reimbursement plan and the plaintiff's unclean hands resulted from his misuse of the plan. *See* notes 111-21 and accompanying text *infra*.

35 Tarasi v. Pittsburgh Nat'l. Bank, 555 F.2d at 1157. *See* 10 LOY L. A. L. REV. 709, 713 (1977).

36 *See* text accompanying note 117 *infra*. *See generally* 2 J. POMEROY, *supra* note 1, § 398.

the clean hands doctrine denies the plaintiff relief if his conduct has been inequitable, the "seek-do" maxim denies him relief unless he makes an affirmative effort to aid the defendant.[37] The "seek-do" maxim is best exemplified in a case where the defendant builds a house on the plaintiff's land, honestly claiming title.[38] There, the court may expect the plaintiff to "do equity" by paying for the house before equity will quiet title in his name.[39]

B. *Current Use of the Clean Hands Doctrine Where Equitable Remedies are Sought*

By the twentieth century, the clean hands doctrine was well established as an important equitable principle.[40] In addition to extensive scholarly treatment,[41] an "astonishing number" of decisions turned on the doctrine.[42] Courts apparently found the doctrine's broad scope an attractive feature.[43]

Today, the clean hands doctrine may arise in any suit where the plaintiff seeks an equitable remedy, such as specific performance, rather than a legal remedy, usually damages. The defendant normally raises the doctrine as a defense,[44] and in some jurisdictions the court may raise it *sua sponte*.[45] Ordinarily, it may not be raised on

37 D. DOBBS, *supra* note 11, § 2.4.

38 *Id.*

39 *Id.*

40 Z. CHAFEE, SOME PROBLEMS OF EQUITY 8-9 (1950) [hereinafter cited as Z. CHAFEE]. The clean hands doctrine embodies a relatively modern but well established equitable principle. Richard Francis, an English barrister, seems to have created the doctrine in 1728 by deriving it from nine cases where an inequitable plaintiff had been denied relief. *Id.* at 5-12. Since the purpose of equity courts was to produce fair results, 2 J. POMEROY, *supra* note 1, § 398, the doctrine naturally developed there. The first case to use the clean hands doctrine, phrased as it is today, as a rule of decision was Cadman v. Horner 18 Ves.10 (1810), cited in Z. CHAFEE, *supra* at 9. That court held that a fiduciary's misrepresentation "disqualifies him from coming for the aid of a court of equity, where he must come, as it is said, with clean hands." *Id.*

41 Two leading scholars devoted a significant amount of space to clean hands in their treatises on equity. H. MCCLINTOCK, *supra* note 1, § 26; 2 J. POMEROY, *supra* note 1, §§ 397-404. The Pomeroy text referred to the doctrine as "a universal rule guiding and regulating the action of equity courts in the interposition on behalf of suitors for any and every purpose, and in their administration of any and every species of relief." 2 J. POMEROY, *supra* note 1, § 397.

42 Z. CHAFEE, *supra* note 40, at 12. *See* cases cited in H. MCCLINTOCK, *supra* note 1, § 26 and in 2 J. POMEROY, *supra* note 1, §§ 397-404.

43 2 POMEROY, *supra* note 1, § 399.

44 Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 243; Kuehnert v. Texstar Corp., 412 F.2d 700, 704 (1969); Fibreboard Paper Prods. Corp. v. East Bay Union of Mach., 227 Cal. App. 2d 675, 728, 39 Cal. Rptr. 64, 97 (1964).

45 Bishop v. Bishop, 257 F.2d 495, 500 (3d. Cir. 1958), *cert denied*, 359 U.S. 914 (1959);

appeal for the first time, unless a party shows very strong grounds for doing so.[46]

The clean hands doctrine commonly arises in eighteen different types of actions.[47] The categories include actions for specific performance of a contract,[48] tort actions by persons charged with a crime[49] and actions to protect copyrights,[50] patents,[51] and trademarks.[52] Note that in all of these categories the plaintiff could sue for equitable relief or damages. However, only if the plaintiff seeks one of the remedies developed in the equity courts[53] will he generally be subject to a clean hands defense.[54]

II. Reasons for Extending the Use of Clean Hands to Damage Actions

A few courts, however, have applied clean hands to damage actions.[55] Three arguments support these decisions: (1) the merger of

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Frank Adam Elec. Co. v. Westinghouse Elec. & Mfg. Co., 146 F.2d 165, 167-68 (8th Cir. 1945); Bell & Howell Co. v. Bliss, 262 F. 131, 135 (7th Cir. 1919).

46 Mosely v. Magnolia Petroleum Co., 45 N.M. 240, 257, 114 P.2d 740, 757 (1941).

47 The eighteen categories are: (1) suits to enforce illegal or immoral trusts; (2) suits to undo deeds and other executed transactions for such reasons as fraud and mistake, where the plaintiff himself is a wrongdoer; (3) suits to undo completed transactions in fraud of creditors or for evading taxes; (4) suits to undo an executory transaction growing out of wrongful conduct in which both parties have shared; (5) suits to remove cloud on title; (6) suits for specific performance of contracts where the plaintiff has engaged in fraud, sharp practice or other unethical conduct; (7) suits to enforce illegal contracts; (8) miscellaneous tort suits by a person charged with a crime; (9) suits to protect copyrights and literary property; (10) patent suits; (11) suits to protect trade-marks or trade names; (12) labor litigation; (13) suits to enjoin torts of various kinds, where the plaintiff has committed similar torts against the defendant or otherwise wronged him; (14) matrimonial litigation; (15) suits to enforce building restrictions and other equitable servitudes; (16) suits concerning corporate and stock transactions; (17) suits for contribution, subrogation, and other remedies of a surety; (18) miscellaneous proceedings in equity. Z. CHAFEE, *supra* note 40, at 12-94.

48 *Id.* at 23.

49 *Id.* at 40.

50 *Id.* at 46.

51 *Id.* at 54.

52 *Id.* at 63.

53 *See, e.g.,* D. DOBBS, *supra* note 11, § 12.2.

54 *See* note 3 and accompanying text *supra*.

55 *See* note 5 and accompanying text *supra*. The doctrine is correctly not allowed in antitrust actions because of the public interest to be served by initation of antitrust suits. *See* Perma Mufflers v. International Parts Corp., 392 U.S. 134, 138-39 (1968); Simpson v. Union Oil Co., 377 U.S. 13, 16-17 (1964); Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 214 (1951); Pearl Brewing Co. v. Jos. Schlitz Brewing Co., 415 F. Supp. 1122, 1126 (S.D. Tex. 1976); Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780, 796 (S.D. Tex. 1971). *But see* Bernstein v. Universal Pictures, Inc., 517 F.2d 976, 981-82 (2d Cir. 1975). The public interest in maintaining a competitive market is the reason for the antitrust laws and this supervenes the interest involved in clean hands. The threat of suit is needed to deter

law and equity; (2) equitable and legal remedies are many times equally harsh; and (3) conduct not warranting an equitable remedy does not warrant a legal remedy either.

A. *Merger of Law and Equity*

Separate equity courts were the Anglo-American solution to the inflexibility of the common law courts.[56] Common law courts had little concern for abstract right and much concern for technical rules. Therefore, a separate system was necessary where litigants could seek justice when the technical rules produced inequitable results.[57]

As the equity courts developed, two things occurred which helped to establish a two-court system. First, the equity courts developed rules and principles entirely separate from those of the law courts.[58] Second, antagonism developed between the common law courts and the equity courts.[59] This antagonism was natural, because the equity courts attempted to correct "the judgments and judge-made law" of the common law courts.[60] Because of this antagonism, the rules and principles of each system were not freely adopted by the other.[61]

This antagonism between the two systems no longer exists, because law and equity have merged. Many states enacted codes of procedure in the latter half of the nineteenth century purporting to abolish the formal distinctions between law and equity,[62] and now nearly all the states have followed suit.[63] The federal system has also been merged since 1938, when the Supreme Court enacted the Federal Rules of Civil Procedure.[64] Despite this merger, many of the differences in substantive rules persist.

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antitrust activity. Thus, plaintiffs are given every opportunity to bring suit. If the plaintiff has violated antitrust laws this may be remedied in subsequent actions against him.

56 Stevens, *A Plea for the Extension of Equitable Principles and Remedies*, 41 CORNELL L. REV. 351 (1956) [hereinafter cited as Stevens].

57 1 J. POMEROY, *supra* note 1, § 15.

58 Stevens, *supra* note 56, at 351.

59 *Id.*

60 *Id.*

61 *Id.* Some principles were, however, interchanged. *See* note 71 and accompanying text *infra*.

62 H. MCCLINTOCK, *supra* note 1, § 6, at 13 n.46.

63 D. DOBBS, *supra* note 11, § 2.6.

64 The original rules were enacted pursuant to 28 U.S.C. § 2072 (1976) by order of the Court. 308 U.S. 645 (1937). They were transmitted to the Congress by the Attorney General on January 3, 1938 and became effective on September 16, 1938. Exec. Commun. 905, to 75th Cong., 3rd Sess., 83 Cong. Rec. 13 (1938). The applicable rule in this case is FED. R. CIV. P. 2.

There are two reasons for the continued separation of the substantive rules. First, courts still seem to consider themselves an equity court when they hear an equitable claim, and a law court when they hear a legal claim.[65] Second, many courts consider the merger procedural only.[66]

Continued separation of substantive rules results partly from the courts perceiving their role differently depending on the claim before them. The primary reason behind courts making this distinction is of constitutional significance. Trial in equity courts was always by a judge, while at law the Constitution guaranteed litigants the right to a jury trial.[67] The Supreme Court has perpetuated this difference through holdings that essentially say that a person has a jury trial right only for a legal claim.[68] Therefore, courts must determine whether a party is advocating a legal or an equitable claim, so they will know whether the party has a jury trial right. This initial determination in every civil trial reinforces the separate court notion in judges' minds.

Differences also survive because many courts refuse to acknowledge that the merger was more than procedural. These courts argue that the substantive differences survive.[69] This argument, however, fails because many substantive rules of equity have been assimilated into the unified court systems,[70] and the substantive law of equity had a significant effect on common law jurisprudence even before merger.[71] Because some equitable principles have been accepted in legal actions, it seems reasonable that courts should also accept other useful equitable principles. Yet, despite its inadequacy, the argument that the merger was only procedural remains a leading reason for refusal to apply the clean hands doctrine to damage actions.[72]

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65 Stevens, *supra* note 56, at 352.

66 *See* note 4 and accompanying text *supra*.

67 W. DEFUNIAK, *supra* note 8, at 8.

68 Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). *See* Note, *The Right to Trial by Jury in Complex Litigation*, 20 WM. & MARY L. REV. 329, 329-40 (1978); Note, *Unfit for Jury Determination: Complex Civil Litigation and the Seventh Amendment Right of Trial by Jury*, 20 B.C.L. REV. 511, 512-17 (1979).

69 *See* note 4 *supra*.

70 Garvey, *supra* note 4, at 66. Examples of well established equitable defenses are fraud, duress, and illegality.

71 *See* Stevens, *supra* note 56, at 352; D. DOBBS, *supra* note 11, § 2.6.

72 *See* note 4 and accompanying text *supra*.

B. *Equally Harsh Remedies Require Equal Treatment*

Equitable remedies are also commonly thought to affect the defendant more harshly than legal remedies.[73] Where this is true it would make sense to allow damages but require more of the plaintiff to obtain specific performance.[74] In many cases, though, damages are as severe as any equitable remedy.[75] In these cases, courts should apply the clean hands doctrine whenever the facts require it, whether the plaintiff seeks legal or equitable relief.

For example, in contract breaches where damages are compensatory, a defendant might prefer to perform his obligation rather than pay damages.[76] In such a case, if the plaintiff sought specific performance, courts would allow the defendant to raise the clean hands defense.[77] But, if the plaintiff sought damages, the majority of courts would not allow a clean hands defense.[78] Where legal and equitable remedies have the same effect on the defendant,[79] it does not make sense to require more of the plaintiff to receive one remedy than the other. It is illogical for "the same judges to be very moral in a specific performance suit and brutally mathematical in a damage suit."[80] Thus, if a court is going to require clean hands, it should apply the requirement when the facts of the case demand it, regardless of the remedy sought.

C. *Conduct not Warranting an Equitable Remedy Does Not Warrant a Legal Remedy*

Distinguishing cases by the remedy sought is unprincipled and unjust. Conduct not warranting an equitable remedy does not war-

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73 Garvey, *supra* note 4, at 67. This may be because some equitable remedies are coercive in that the defendant may be ordered to perform an act which he has decided not to perform such as his end of a bargain. Specific performance and injunction are examples of coercive equitable remedies. D. DOBBS, *supra* note 11, § 2.1.

74 This assumes that it is reasonable to hold plaintiffs to higher levels of conduct for harsher remedies.

75 Z. CHAFEE, *supra* note 40, at 29; Garvey *supra* note 4, at 67-68.

76 Garvey, *supra* note 4, at 67-68.

77 Z. CHAFEE, *supra* note 40, at 25-26.

78 *See* note 3 and accompanying text *supra*.

79 This determination would have to be made on an ad hoc basis by the court upon examining the facts of the case. Wherever it appears that the equitable remedy and legal remedy would weigh equally upon the defendant, clean hands should logically bar either both remedies or neither.

80 Z. CHAFEE, *supra* note 40, at 28. This statement must be qualified because the law will not allow *any* plaintiff to recover damages. *In pari delicto*, fraud, and equitable estoppel are three defenses which to some extent require the plaintiff to have clean hands. *See* notes 88-90 and accompanying text *infra*.

rant a legal remedy. Under the merged court system, it is illogical that a right protected at law might not warrant equitable protection,[81] especially where the legal and equitable remedies affect the defendant equally.[82] In short, courts should not require better behavior of the plaintiff simply because he seeks an equitable remedy rather than a legal remedy.

Further, the courts should prevent those who have acted unjustly from benefitting from their conduct, whether they seek an equitable or a legal remedy. Allowing unclean plaintiffs to gain where they have acted unfairly, because they seek legal and not equitable relief, is inconsistent, unjust, and reflects poorly on the judicial process.[83] Courts should be concerned with judicial integrity, justice, and the public interest regardless of whether the plaintiff seeks damages or equitable relief.[84] The clean hands doctrine, when properly applied,[85] ensures that justice is done between the litigants and society.[86] Because most courts will not apply the doctrine in damage actions, courts can sometimes reach unjust results by allowing the unclean plaintiff to recover.[87] Clean hands should be extended to damage actions to avoid such unjust results.

III. Need for Applying the Clean Hands Doctrine in Damage Actions

Whatever the reasons for applying the clean hands doctrine in damage actions, the argument can be made that courts need not ex-

81 Buchanan Home & Auto Supply v. Firestone Tire & Rubber Co., No 79-175-9 (D.S.C. July 7, 1981) (order granting dismissal).

82 There may be situations where unfairness could reasonably prevent equitable relief without preventing damages. *See* notes 73-74 and accompanying text *supra*. But the distinction is not reasonable if it is based on the equity-law separation. Such a distinction is no longer valid. *See* notes 69-72 and accompanying text *supra*. If a distinction is to be made, it ought to be based on the "difference in the actual nature of the two remedies which the single court has at its disposal." Z. CHAFEE, *supra* note 40, at 29.

83 These problems are precisely what the clean hands doctrine seeks to avoid. *See* notes 15-27 and accompanying text *supra*.

84 Several courts have agreed that the principles embodied in the clean hands doctrine apply equally to damage actions. *See* note 5 *supra*.

85 *See* notes 6-27 and accompanying text *supra*. *See also* text accompanying notes 109-29 *infra*.

86 *See* notes 18-27 and accompanying text *supra*.

87 *See* Truitt v. Miller, 407 A.2d 1073 (D.C. App. 1979); American Nat'l. Bank & Trust v. Levy, 83 Ill. App. 3d 933, 404 N.E.2d 946 (1980). A classic example of such an unjust result occurred in Carmen v. Fox Film Corp., 269 F. 928 (2d. Cir. 1920), where the plaintiff sued in federal court for equitable relief, was denied on appeal because of unclean hands, then sued in a New York state court for damages on the same facts—and won. 204 A.D. 776, 198 N.Y.S. 766 (1923).

tend the doctrine to damage actions because the defenses accepted at law adequately cover the area. These other defenses do not, however, cover the area. Even if they did, the clean hands doctrine's breadth and underlying values require its acceptance.

The strongest argument against applying the clean hands doctrine in damage actions is that the other defenses already permitted, such as *in pari delicto*,[88] fraud,[89] and equitable estoppel,[90] encompass every possibility the doctrine covers in equity.[91] As a practical matter, these narrower defenses do not cover every possibility.[92] Some courts have refused to apply the doctrine in damage actions, and have thus allowed unclean plaintiffs to recover because the defendant could find no accepted legal defense that worked.[93] Many situations

88 *See* notes 29-36 and accompanying text *supra*.

89 In most jurisdictions, both fraud in the inducement and fraud in factum in a transaction or contract can be used as a defense to the claim brought by the person guilty of fraud. *See, e.g.*, American Life Ins. Co. v. Stewart, 300 U.S. 203, 212 (1937); Bowmer v. Louis (H.C.), Inc., 243 Cal. App. 2d 501, 503, 52 Cal. Rptr. 436, 437 (1966); Darling v. Rose, 301 So. 2d 19, 20 (Fla. Dist. Ct. App. 1974); Smith v. Werkheiser, 152 Mich. 177, 179-80, 115 N.W. 964, 965-66 (1908); Henry v. McConnell 400 S.W.2d 344, 346 (Tex. Civ. App. 1966). Generally, the same elements necessary for damage actions must be established for the defense. Wilson v. Byrd, 79 Ariz. 302, 288 P.2d 1079, 1081 (1955); Latta v. Robinson Erection Co., 363 Mo. 47, 59, 248 S.W.2d 569, 576 (1952). The elements for establishing fraud are: (1) a representation made as a statement of fact; (2) which representation was untrue and known to be untrue by the party making it, or else recklessly made; (3) made with the intent to deceive and for the purpose of inducing the other party to act upon it; (4) the other party did rely in fact; (5) and the other party suffered injury or damage. Farrar v. Churchill, 135 U.S. 609, 615-16 (1890).

90 Equitable estoppel denies a party the right to plead and prove an otherwise important fact because of what he has done or not done. James Talcott, Inc. v. Associates Discount Corp., 302 F.2d 443, 446 (8th Cir. 1962). *See also In re* Jackson's Estate, 112 Cal. App. 2d 16, 245 P.2d 684 (1952); *In re* Veltri's Estate, 202 Misc. 401, 113 N.Y.S.2d 146 (1952). Its purpose is to prevent a party from speaking in court against his prior act, representation, or commitments if to do so would injure the party to whom they were directed and that party reasonably relied on them. Wright v. Farmers' Nat. Grain Corp., 74 F.2d 425, 428 (7th Cir. 1935). Four elements are essential to establishing the defense: (1) party to be estopped must be appraised of the true facts; (2) party must intend that his conduct be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting the estoppel must have been ignorant of the true state of facts; (4) the party asserting the estoppel must rely upon the conduct to his injury. *See, e.g.*, Santoro v. Carbone, 22 Cal. App. 3d 721, 99 Cal. Rptr. 488 (1972).

91 *See generally* Z. CHAFEE, *supra* note 40, at 94.

92 Each of these defenses requires certain elements that the clean hands doctrine does not require. They cover specific kinds of inequitable conduct, whereas the clean hands doctrine applies to inequity in general. Such inequitable conduct may not always be successfully categorized as the type of conduct covered by one of the narrow defenses. *See* note 98 and accompanying text *infra*.

93 *See, e.g.*, Truitt v. Miller, 407 A.2d 1073 (D.C. App. 1979); American Nat'l. Bank & Trust v. Levy, 83 Ill. App. 3d 933, 404 N.E.2d 946 (1980). No one knows how many times

exist in which the clean hands doctrine may be the only defense.[94]

For example, in *Truitt v. Miller*,[95] the District of Columbia Court of Appeals rigidly refused to allow a clean hands defense to bar relief to a homeowner seeking rescission of a repair contract.[96] The court reasoned that although rescission is an equitable remedy, the plaintiff had originally sought damages and was therefore precluded from invoking the doctrine.[97] The defendant asserted *in pari delicto*, but could not meet the required elements of that defense.[98] Also, in *American National Bank & Trust v. Levy*,[99] the Appellate Court of Illinois allowed a broker, who had breached his fiduciary duty, to recover his commission.[100] Despite some highly questionable actions by the broker, the court refused to consider the doctrine as a defense, saying it "does not affect legal rights."[101]

Even if the various accepted legal defenses together thoroughly covered those situations that clean hands covers in equity, the breadth of the doctrine combined with the fundamental values it represents still compel its acceptance. There are no "comparable broad-based grounds for dismissing legal actions for damages."[102] The clean hands doctrine offers judges a proven rationale for refusing a plaintiff relief where principles of fairness indicate that the plaintiff should not receive relief. At the very least, courts should not disregard the doctrine merely because it developed in equity courts. The clean hands doctrine represents values that should be of the utmost concern to our courts, whether they hear a claim for equitable or legal relief.

IV. Practical Concerns for the Judge and Practitioner

The clean hands doctrine's fate in damage actions will be determined by how much practitioners advocate its use and how well

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clean hands might have worked but was simply not pleaded because of unawareness or realization that the court would not consider it in a damage action.

94 Clean hands may be the defendant's only hope when the plaintiff's conduct is simply inequitable and does not meet the requirements of any of the narrower defenses. *See, e.g.*, notes 95-101 and accompanying text *infra*.

95 407 A.2d 1073 (D.C. App. 1979).

96 *Id.* at 1079-80.

97 *Id.* at 1080.

98 *Id.*

99 83 Ill. App. 3d 933, 404 N.E.2d 946 (1980).

100 *Id.*

101 *Id.* at 936, 404 N.E.2d at 948.

102 Buchanan Home & Auto Supply v. Firestone Tire & Rubber Co., No. 79-175-9 (D.S.C. July 7, 1981) (order granting dismissal).

judges receive it. The clean hands doctrine should be an attractive doctrine to judges because it allows them to interject some fundamental values into their decisionmaking process.[103] The values at stake are the courts' integrity, justice, and the public interest.[104] By using the doctrine, a court can focus these fundamental values on the case at bar.[105]

The doctrine undoubtedly gives judges more discretion. While an appealing aspect of the doctrine, it potentially subjects judges to criticism for misuse. Moreover, not only will abuse of the doctrine leave judges vulnerable to reversal,[106] but it will invite criticism of the doctrine since it allows judges to interject their personal biases and morals into a decision. If courts clearly define the doctrine and keep its underlying values in mind, however, the doctrine's misuse should be minimal.

Some people will also criticize the doctrine simply because it is a discretionary defense and the law will lose some of its certainty. As one commentator responded, however, are "we really so interested in assuring certainty to those who walk upon the fringe of the legal rules"[107] that we cannot permit the assimilation of a proven doctrine used only to assist the court in reaching a just result?[108]

Buchanan Home & Auto v. Firestone Tire & Rubber[109] and *Fibreboard Paper Products Corp. v. East Bay Union of Machinists*[110] are two cases in which courts considered the clean hands doctrine a legitimate defense to a damage action. These cases illustrate how two judges used the doctrine to achieve just results.

In *Firestone*, a retail dealer sued Firestone on various theories connected with marketing the defective 500 steel-belted radial tire. The dealer sought damages for loss of good will and "other undue expenses in connection with handling unsatisfactory Firestone 500

103 The defense would be available for jury trials. Fibreboard Paper Prods. Corp. v. East Bay Union of Mach., 337 Cal. App. 2d 675, 726, 39 Cal. Rptr. 64, 96 (1964). The judge would have to explain the doctrine to the jury in his instructions and the jury would decide whether the defense applied. Presumably, the judge would have some control over the jury's decision by the way he explained and interpreted the doctrine for the jury.

104 *See* notes 15-27 and accompanying text *supra*.

105 For example, in a case where a plaintiff's patent rights have been violated, clean hands offers a principled means for denying that plaintiff recovery if he has used the patent to violate the antitrust laws by restricting competition. *See* notes 25-27 and accompanying text *supra*.

106 Reversal would presumably be for abuse of discretion.

107 Garvey, *supra* note 4, at 74.

108 *Id.*

109 No. 79-175-9 (D.S.C. July 7, 1981) (order granting dismissal).

110 227 Cal. App. 2d 675, 39 Cal. Rptr. 64 (1964).

radials,"[111] including inadequate reimbursement.[112] Firestone had an agreement with its dealers to "reimburse them for the cost of time spent replacing and adjusting unserviceable Firestone tires."[113] The plaintiff, however, had abused the reimbursement procedure. The plaintiff admitted falsifying roughly 600 reimbursement forms over a three-year period.[114]

The South Carolina District Court dismissed the case on a clean hands theory, saying it "would be grossly inequitable to allow plaintiff to recover.[115] The court recognized its "fundamental authority to protect its own integrity and the integrity of the judicial process"[116] by refusing to hear the case. For the same reasons, the court refused to balance the respective misconduct of the parties.[117] The court stated that the plaintiff's very "presence in the courtroom in this action suggests danger to the administration of justice."[118]

In *Firestone*, the plaintiff's wrongdoing was directly related to the matter asserted.[119] The plaintiff tried to use falsified documents as part of its evidence. The plaintiff's wrongdoing justified the court's use of the "broad-based"[120] doctrine to bar recovery and thus protect its integrity and advance justice.[121]

In *Fibreboard*,[122] the firm's management sued in tort for damages, alleging that the machinists' union's violent interference with the company's employees caused a loss of business and profits, and other "continuing expenses."[123] There, the union had protested the firing of fifty maintenance men by picketing Fibreboard's plant. While picketing, union members inflicted "bodily harm" on Fibreboard employees and damaged Fibreboard property. The union alleged that Fibreboard had breached a collective bargaining agreement with the union by firing the maintenace workers. The union thus claimed that Fibreboard had come into court with unclean hands

111 Buchanan Home & Auto Supply v. Firestone Tire & Rubber, No. 79-175-9, at 1 (D.S.C. July 7, 1981) (order granting dismissal).
112 *Id.* at 3.
113 *Id.* at 2-3.
114 *Id.* at 3.
115 *Id.* at 6.
116 *Id.* at 10.
117 *Id.* at 9-10.
118 *Id.* at 10.
119 *See* note 8 and accompanying text *supra*.
120 Buchanan Home & Supply v. Firestone Tire & Rubber, No. 79-175-9, at 5 (D.S.C. July 7, 1981) (order granting dismissal).
121 *See* notes 15-21 and accompanying text *supra*.
122 227 Cal. App. 2d 675, 39 Cal. Rptr. 64 (1964).
123 *Id.* at 686-87, 39 Cal. Rptr. at 71.

and did not deserve compensation.[124]

The California Appellate Court recognized the clean hands doctrine's applicability to damage actions,[125] but refused to apply it in this case. The court stated that the defense did not apply, because use of the doctrine "would be to sanction an assault upon a person who has perpetrated a fraud upon or breached a contract with the assaulter."[126] The court reasoned that the breached contract and the violent interferences with the employees were separate "transactions"[127] and that the requirement that the plaintiff's unclean act pertain to the transaction sued upon was therefore not met.[128]

The *Fibreboard* court's reasoning slightly strained the clean hands doctrine. The events involved seem closely connected enough to be considered one transaction. Whatever the rationale, the court recognized the doctrine's availability in damage actions and correctly refused to apply it to reach an unjust result.[129]

The clean hands doctrine also provides practitioners with a means of avoiding an unjust result for their clients. Defense counsel should raise and argue the doctrine whenever the plaintiff has acted unfairly toward the defendant in the matter the plaintiff sues upon.[130] The doctrine supplies a principled rationale for obtaining dismissal of a case in which the plaintiff has acted inequitably. The defendant's attorney will have to convince the court that one of the three values underlying the doctrine—judicial integrity, justice, or the public interest[131]—compels the court to apply the doctrine.

V. Conclusion

The clean hands doctrine should be available to prevent a litigant who has acted unfairly from receiving *any type* of relief for a wrong done to him in the matter in which he has acted unfairly. The majority of courts, however, apply the doctrine to equitable actions only. Strong arguments exist for extendng the doctrine to damage actions. First, law and equity courts have merged and the law has assimilated other equitable principles. Thus, a proven doctrine such as clean hands should be considered. Second, damages can be as

124 *Id.*
125 *Id.* at 728, 39 Cal. Rptr. at 97.
126 *Id.* at 729, 39 Cal. Rptr. at 98.
127 *Id.* at 729, 39 Cal. Rptr. at 97.
128 *Id. See* note 8 and accompanying text *supra*.
129 *See* note 13 and accompanying text *supra*.
130 *See* notes 6-10 and accompanying text *supra*.
131 *See* notes 15-27 and accompanying text *supra*.

harsh as any equitable remedy. Therefore, in those cases where damages and equitable remedies are equally harsh, plaintiffs should have to meet the same requirements to recover damages as they must meet to receive equitable relief. Third, conduct that does not merit equitable relief does not merit damages either. The values behind clean hands—judicial integrity, justice, and the public interest—also apply to damage actions.

Judges and practitioners need the clean hands doctrine in damage actions because, without the doctrine, conduct which would prevent equitable relief might not prevent damages, and because there is no comparable broad-based defense to damage actions. Because of the values the doctrine promotes, judges and practitioners alike should begin to advocate its use in damage actions.

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