

ANOTHER MISSED OPPORTUNITY: THE SUPREME COURT'S
FAILURE TO DEFINE NONOBVIOUSNESS OR COMBAT
HINDSIGHT BIAS IN *KSR V. TELEFLEX*

by
Gregory N. Mandel*

This Article analyzes two significant errors of omission in the Supreme Court's recent patent decision, KSR v. Teleflex. First, though KSR represents the Court's eighth decision on nonobviousness since the standard was enacted in 1952, the Court still has never defined what this core patent standard requires. The failure to instruct on the level of ingenuity necessary to satisfy nonobviousness leads to inconsistent and unpredictable non-obvious decisions. Second, despite recognizing the problem of hindsight bias in nonobviousness analysis and the importance of ameliorating this bias to achieve accurate non-obvious decisions, the Supreme Court not only failed to take the hindsight problem seriously in KSR, but actually appeared to misconstrue the problem. As a result, nonobviousness decisions will continue to be systematically biased with respect to the legal inquiry required by section 103. This is a symposium article based on a presentation given at Nonobviousness—The Shape of Things to Come, a 2007 Lewis & Clark Law School Business Law Forum.

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I. INTRODUCTION

The Supreme Court's 2007 *KSR International Co. v. Teleflex Inc.*¹ opinion represents the Court's eighth nonobviousness decision in the fifty-five years since the non-obvious requirement was statutorily enacted.

* Professor of Law, Temple University—Beasley School of Law. © 2007 Gregory N. Mandel. This Article is based on a presentation given at "Nonobviousness—The Shape of Things to Come," a 2007 Lewis & Clark Law School Business Forum.

¹ 127 S. Ct. 1727 (2007).