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THE FEDERAL CIRCUIT IS AN INEFFICIENT MONOPOLY: A REPLY TO LEE AND LEMLEY[†]

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William Lee and Mark Lemley's article entitled *The Broken Balance: How "Built-In Apportionment" and the Failure to Apply Daubert Have Distorted Patent Infringement Damages* ably describes how certain flawed methods employed by the Federal Circuit in calculating patent damages lead to inflated awards in infringement cases.[1] This reply to that article describes how such methods can arise because the Federal Circuit is structured as an inefficient monopoly.

Of course, courts themselves are not subject to the antitrust laws,[2] but when certain courts are largely protected from competition in the development of the law, the result is inefficient law.

As Lee and Lemley describe, patent damages get inflated when the Federal Circuit allows "expert" witnesses to speculate to the jury about patent damages without any expressed justification based on sound methodology,[3] even though the Supreme Court long ago rejected conjecture by expert witnesses in patent damages evaluations. In *Rude v. Wescott*, the Court held, "Actual damages must be calculated, not imagined, and an arithmetical calculation cannot be made without certain *data* on which to make it."[4]

Today, as Lee and Lemley recount, the Federal Circuit has been particularly lax in applying the latest standards for expert evidence handed down by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[5] Rule 702 of the Federal Rules of Evidence

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[†] Response to: William F. Lee & Mark A. Lemley, *The Broken Balance: How "Built-In Apportionment" and the Failure to Apply* Daubert *Have Distorted Patent Infringement Damages*, 37 HARV. J.L. & TECH. 255 (2024).

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1. William F. Lee & Mark A. Lemley, *The Broken Balance: How "Built-In Apportionment" and the Failure of Daubert Have Distorted Patent Infringement Damages*, 37 HARV. J.L. & TECH. 255 (2024).

2. *See* Hoover v. Ronwin, 466 U.S. 558, 574 (1984) (finding conduct at issue was that of the Arizona Supreme Court, which is exempt from Sherman Act liability under the state-action doctrine).

3. *See* Lee & Lemley, *supra* note 1, at 325.

4. Rude v. Wescott, 130 U.S. 152, 167 (1889) (emphasis in original).

5. 509 U.S. 579 (1993); Lee & Lemley, *supra* note 1, at 308.

relates to "Testimony by Expert Witnesses."[6] In *Daubert*, the Supreme Court held that the rule's reference to scientific "knowledge" established reliability as a prerequisite for the admissibility of expert scientific testimony,[7] and that trial court judges must adopt "a gatekeeping role" to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[8] The Court emphasized that Rule 702 "requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility,"[9] and that a trial judge "exercises more control over experts than over lay witnesses."[10] The Court also held that, before an expert analysis can be presented to the jury, the court must assess "whether the reasoning or methodology underlying the testimony is scientifically valid" and "properly can be applied to the facts in issue."[11]

But as Lee and Lemley write, the Federal Circuit, in its June 2024 decision in *EcoFactor, Inc. v. Google LLC*,[12] allowed a jury to use previous licensing agreements to gauge infringement damages based on the cursory statements of an expert witness who, "despite being shielded from the licensees' confidential sales numbers," believed "based on his understanding of the market, that the lump sums reasonably reflected the licensees' sales."[13] This was not uniformly adopted by the court, as Judge Prost wrote in dissent that the expert witness's beliefs were "directly refuted" by the fact two of the three licenses expressly disavowed that they reflected or constituted a royalty, and lacked other support in the form of sales data, records, or other testimony.[14] As Judge Prost pointed out, "the majority opinion here at best muddles our precedent and at worst contradicts it," because the patentee's expert "did not ask the necessary question under our law — what effect the *specific* non-asserted patents in [the patentee's patent] portfolio would have on the hypothetical negotiation."[15] The

6. Fed. R. Evid. 702.
7. 509 U.S. at 580.
8. *Id.* at 589, 597.
9. *Id.* at 592.
10. *Id.* at 595.
11. *Id.* at 592–93.
12. 104 F.4th 243 (Fed. Cir. 2024), *rev'd en banc*, 137 F.4th 1333 (Fed. Cir. 2025).
13. *Id.* at 252–53.
14. *Id.* at 257–59 (Prost, J., dissenting).
15. *Id.* at 257, 260 (emphasis in original). Judge Prost further explained in dissent that the expert witness relied on EcoFactor's technical expert "who compared the asserted patents in each license to the '327 patent and concluded that the asserted patents and the '327 patent were technologically comparable. But EcoFactor's technical expert didn't discuss the remaining patents in each license — the non-asserted patents in EcoFactor's portfolio." *Id.* at 260 (internal citations omitted). Of course, when a prior licensing agreement includes consideration of additional patents not at issue in a subsequent case, and such prior licensing agreement is used in the subsequent case as evidence of an appropriate royalty rate, such rate can only be inflated since the subsequent case involved only a smaller subset of the patents at issue in the prior case.

Federal Circuit has since reviewed the case en banc and reversed course, remanding the case for a new trial and holding that "[t]he evidence relied upon by [the expert witness] does not provide a sufficient basis for his testimony that the lump-sum settlement licenses were based on a royalty rate of $X per unit."[16] But because the expert's opinion in *EcoFactor* was so untethered to reality,[17] it is unclear what larger lesson the en banc decision holds.[18] This is especially true given the court did not address the issue of apportionment — which, as Lee and Lemley point out — the court had been failing to carefully apply for some time.[19] Additionally, the decision was foreshadowed by several unrelated prior decisions in which the Federal Circuit also performed no gatekeeping function as required by *Daubert*, but instead simply accepted that certain other "magic words" uttered by expert witnesses were enough to bless previous licensing agreements as accurately reflective of the value of a patent at issue in a case, even though the previous licensing agreements were consummated in significantly different factual circumstances.[20] As Lee and Lemley have

16. EcoFactor, Inc. v. Google, LLC, 137 F.4th 1333, 1346 (Fed. Cir. 2025) (en banc).

17. To illustrate, the court found that the expert witness "put forth his own opinion" that the licenses reflected a certain rate, "asserting the proposition with the imprimatur of his expertise"; that the license "directly contradict[ed] any claim that the lump sum is based on any particular royalty rate or . . . based upon sales volume"; and that, despite the comparable licenses including EcoFactor's entire patent portfolio, "[the expert witness] opined that the value of the settlement license is almost entirely attributable to the asserted patents." *Id.* at 1340–42, 1343 n.9.

18. To be sure, the Federal Circuit's stating that the lack of a basis for anything in the expert's testimony goes to its admissibility, not its weight, is a significant improvement on prior precedent. *See id.* at 1339. However, broader lessons cannot be gleaned from *EcoFactor* just yet without seeing how the Federal Circuit applies that proposition to future facts less egregious than those presented in *EcoFactor*. The court also did not address the issue of apportionment. *See id.* at 1334–38 n.7. And as Lee and Lemley point out:

> Courts have long allowed the use of prior license agreements to show damages if the agreements are … comparable to a hypothetical license to the patents-in-suit . . . Nevertheless, starting around 2014, courts began to permit plaintiffs to use purportedly comparable licenses to prove damages . . . without the careful apportionment required by Supreme Court precedent.

Lee & Lemley, *supra* note 1, at 262–63 (also stating "For example, even for agreements covering hundreds of patents, different products, or rights beyond patent rights, patentees asserting just a small subset of the licensed patents have been allowed to use the entirety of the royalty payments in those agreements as a basis for damages, without any apportionment whatsoever.") (footnotes omitted).

19. Lee & Lemley, *supra* note 1, at 291–94 (discussing cases in which the Federal Circuit allowed patentees' experts to "end run any real apportionment analysis" by assuming apportionment was "built-in" to prior licenses); *see also, e.g.*, Elbit Sys. Land & C4I Ltd. v. Hughes Network Sys., LLC, 927 F.3d 1292, 1299–1301 (Fed. Cir. 2019) (affirming verdict based upon an allegedly comparable settlement agreement, where the patentee's expert assumed apportionment was implicit in the prior agreement).

20. Lee & Lemley, *supra* note 1, at 291, 294 (internal quotations omitted) (describing how the Federal Circuit has permitted "built-in" apportionment even where prior licenses "involved different parties, different patents, and different products," as long as the expert "claims the prior agreement to be comparable" and "purports to assess any differences").

written, "[p]atentees' experts have asserted that apportionment is deemed to be 'built in' to historical licenses — even where the licenses involved different parties, different patents, and/or different products — and courts have permitted damages awards to be based on the prior royalty terms without any modification despite those differences."[21]

So whereas *Daubert* is supposed to be applied by the Federal Circuit as part of its duty to cut away layers of claimed damages that have nothing to do with any reasonable evaluation of the value added by an allegedly infringing component, *Daubert* has instead been largely ignored by the Federal Circuit.[22] And it will continue to be ignored in the area of apportionment insofar as the Federal Circuit continues to leave that subject unaddressed.[23] Having an expert spout inflated damages figures unchecked by any *Daubert* gatekeeping by the district court also allows patent trolls to set an unfairly inflated outer bound to the jury's damages assessment, which has been shown to significantly, and unfairly, taint jury deliberations by creating an "anchoring effect," whereby a jury is influenced to award higher damages simply because the plaintiff's attorney presents the jury with higher damages amounts for their consideration.[24]

These dynamics result in large costs to innovation, just as inefficient illegal monopolies suppress innovation. As Lee and Lemley write:

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21. Lee & Lemley, *supra* note 1, at 296.

22. Indeed, one of the leading legal commentators on the ramifications of the Supreme Court's decision in *Daubert* has written that "[p]erhaps the worst example of a federal appellate court ignoring the language of amended Rule 702 arose in . . . Liquid Dynamics Corp. v. Vaughan Co. In this case, the court never referenced the text of Rule 702 . . . To justify its ruling, the court cited a 1986 Eighth Circuit opinion for the proposition that inadequacies in expert testimony are a matter of weight, not admissibility." David E. Bernstein & Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57 Wm. & Mary L. Rev. 1, 23–24 (2016) (citing Liquid Dynamics Corp. v. Vaughan Co., 449 F.3d. 1209 (Fed. Cir. 2006) and Wilmongton v. J.I. Case Co., 793 F.2d 909, 920 (8th Cir. 1986)) (footnotes omitted).

23. While the Federal Circuit cited its en banc *EcoFactor* decision in a subsequent case, see Jiaxing Super Lighting Electric Appliance Co. v. CH Lighting Tech. Co., 146 F.4th 1098 (Fed. Cir. 2025), it did so only in stating that "[o]n remand the district court should consider the reliability of [the expert witness's] testimony in light of EcoFactor," without itself further assessing the reliability of such expert witness's testimony. *Id.* at 1112.

24. *See* John Campbell, Bernard Chao, Christopher Robertson & David V. Yokum, *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments*, 101 IOWA L. REV. 543, 545, 547 (2016) (noting studies establishing that "the jury's damages decision is strongly affected by the number suggested by the plaintiff's attorney, independent of the strength of the actual evidence (a psychological effect known as 'anchoring'). . . . the effect appears so powerful that some researchers advise that 'the more you ask for, the more you get' . . .") (footnotes omitted); *see also* David A. Wenner, *Anchoring: A Trial Lawyer's Tool*, ANNUAL AAJ-PAPERS 2013, at 20 (stating jurors who are bombarded with information during a trial suffer from "cognitive overload" and "unconsciously welcome the presence of an anchor that will reduce the cognitive effort needed").

> [E]xcessive patent damages present an additional risk because they impose ongoing costs on innovative activity. They do so directly by making innovative companies pay too much in patent litigation, but also indirectly by creating damages benchmarks that increase the costs paid by other users in the future . . . This can result in costs being passed on to the consumer in the form of higher prices, diminished funds, and reduced incentives for investment in research and development.[25]

Invalid patents are a form of unjust monopoly. As I have argued elsewhere, failing to promptly reverse invalid patents, enforcing unreasonably broad patents, or granting inflated damages for patent infringement all amount to unfairly rewarding those whose innovations do not warrant benefits under the patent laws and to perpetuating just the sort of unjust monopolies that appalled the Framers of the original patent system.[26] Yet, the Federal Circuit's precedents often do just that. Why?

The Federal Circuit has become a sort of inefficient judicial monopoly in itself, largely impervious to any competition in legal reasoning. As James Bressen and Michael J. Meurer argue, "patent law misses the benefits of the intercircuit competition that exists in most other areas of federal law":[27]

> In other areas of law, where there are multiple appellate courts, different courts adopt different policy innovations and there is some degree of competition between them. Each gains experience with different doctrines, allowing the Supreme Court (or the appellate courts themselves) to select the best approach based on this experience.[28]

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25. Lee & Lemley, *supra* note 1, at 258, 270 (footnotes omitted).

26. *See* Paul Taylor, *Anti-Monopoly & Pro-Commerce: The Original Frontier Spirit of Patent Law and Its Implications for Today*, 74 SYRACUSE L. REV. 59, 95–100 (2024).

27. JAMES BRESSEN & MICHAEL J. MEURER, PATENT FAILURE 25 (2008).

28. *Id.* at 229–30. Bressen and Meurer quote Federal Circuit Judge Mayer, joined by Judge Newman, in dissent in *Phillips v. AWH*, to reiterate this point. Judge Mayer and Judge Newman describe how, instead of "bringing consistency to the patent field," as the Federal Circuit was created to do, the court has continued to "focus inappropriate power in [itself]" and "seriously undermined the legitimacy of . . . the institution." Phillips v. AWH Corp., 415 F.3d 1303, 1330 (Fed. Cir. 2005) (Mayer and Newman, JJ., dissenting) (citations and footnotes omitted).

As retired Federal Circuit Judge Paul Michel writes, the Federal Circuit has failed in significant ways to fulfill its original purpose to provide predictability:

> Congress created the [Federal Circuit] . . . to provide predictability, stability, and clarity for the U.S. patent laws and system. Without these attributes, the patent system suffers — who, after all, wants to invest in patents where the governing rules are unclear or unpredictable? . . . [D]espite the predominant role that claim construction plays in determining patent rights and cases, the Federal Circuit's claim-construction precedents have proven wholly inconsistent — and its constructions unpredictable . . . [O]ver the course of some three decades, the Federal Circuit has developed two fundamentally divergent sets of claim-construction principles . . . [C]ontrary to Congress's 1982 intent, the Federal Circuit has not provided clarity and predictability as to claim construction.[29]

F.M. Scherer has discussed the interesting history of prominent opposition to the creation of a specialized Federal Circuit in the form it exists in now, referencing the Commission on Revision of the Federal Court Appellate System, which Congress created in 1972, writing that:

> Appellate court reform questions were addressed repeatedly by diverse study groups. One of the most thorough was the so-called Hruska Commission, chaired by Senator Roman Hruska, which delivered its conclusions in 1975. It favored creation of a new nationwide appellate court to which matters that posed important precedential questions (including patent cases) would be transferred at the behest of the normal appellate courts, which would retain jurisdiction over most patent appeals from federal district courts. Or alternatively, cases could be referred to the court by the Supreme Court when the high court was reluctant to hear an appeal itself. However, the proposal to create a separate court hearing all appeals on patents or other specialized subject matter was soundly rejected (a point largely

29. Paul Michel & John Battaglia, *On Claim Construction, Predictability, and Patent Law Consistency: The Federal Circuit Needs to Vote En Banc*, IP WATCHDOG (Feb. 3, 2020, at 16:15 ET), https://ipwatchdog.com/2020/02/03/claim-construction-predictability-patent-law-consistency-federal-circuit-needs-vote-en-banc/ [https://perma.cc/7H2E-J2U4].

> neglected in subsequent Congressional reports and debate).[30]

As a general matter, competition exposes each participating court to each other's arguments and to criticism by the legal community and the larger public. The competing courts' exposure to such criticism incentivizes each of them to craft better arguments in the future. But without such competition, that incentive largely disappears, and remains only insofar as the Supreme Court may occasionally step in to correct a court's errors.

Interestingly, the Hruska Commission warned that, if the Federal Circuit were to have jurisdiction over all patent issues, as it has today, patent law would be worse off:

> [T]he quality of decision-making would suffer as the specialized judges become subject to "tunnel vision," seeing the cases in a narrow perspective without the insights stemming from broad exposure to legal problems in a variety of fields . . . Judges of a specialized court, given their exposure to and greater expertise in a single field of law, might impose their own views on policy."[31]

Indeed, the Supreme Court, in *eBay, Inc. v. MercExchange, L.L.C.*,[32] admonished the Federal Circuit for creating special rules in patent cases, stating, "We hold only that the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent

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30. F.M. Scherer, *The Political Economy of Patent Policy Reform in the United States*, 7 J. ON TELECOMMS. & HIGH TECH. L. 167, 187 (2009) (footnotes omitted).

31. The Hruska Report is reproduced as Commission on Revision of the Federal Court Appellate System Structure and Internal Procedures: Recommendations for Change, 67 F.R.D. 195, 234–35 (1975). Even further back, a 1919 Report of the Patent Committee of the National Research Council, which had been charged by the Patent Commissioner with making recommendation for the improvement of the patent system, recommended the formation of a specialized patent court, but one that consisted solely of generalist judges. As L.H. Baekeland, the Chairman of the Commission, wrote, to avoid charges of "special interests" or the perception the judges were chosen to "promote special views" of patent law, the judges "would take up the work of the [court] with a breadth coming from the performance of the general duties of Judges in their own circuits or districts," thereby "escap[ing] the narrowing which so often comes from continuous work in a specialized field." Reprint And Circular Series of the National Research Council 3–4, https://babel.hathitrust.org/cgi/pt?id=uc2.ark:/13960/t7tm73f5h&seq=5&q1=special [https://perma.cc/5T9K-N2AK].

32. 547 U.S. 388 (2006).

with traditional principles of equity, in patent disputes no less than in other cases governed by such standards."[33]

The isolated nature of the Federal Circuit also leads to fewer opportunities for review by the Supreme Court. As Bressen and Meurer write:

> Moreover, lacking distinct, well-developed doctrines evolved by competing courts, the Supreme Court cannot easily intervene [in cases decided by the Federal Circuit] . . . Some readers might be troubled that multiple appellate courts would create different versions of patent law in different circuits and thereby create harmful uncertainty. It is certainly true that appeals courts had different interpretations of patent law before the Federal Circuit was created, but that uncertainty must be weighed against the benefit of better-quality patent law that would likely result from intercircuit competition.[34]

And as Ryan Vacca points out, the Federal Circuit has increasingly denied itself the benefits of en banc review by the full complement of its own judges, further insulating its decisions from wider review, when en banc review "produces a more thorough consideration of the issue under the theory that 'more heads are better than one.'"[35]

Law and economics scholars William Landes and Richard Posner have also described their related concerns with the Federal Circuit, describing how a specialized court may produce poor quality decision-making as a result of increased lobbying by special interests:

> A specialized and even semispecialized court would be more inclined than a court of generalists to take sides on the fundamental question whether to favor or disfavor patents, especially since interest groups would be bound to play a larger role in the appointment of the judges of such court than they would in the case of the generalist federal courts. It would be difficult to get the patent bar excited about the appointment of an appellate judge who might hear only two or three patent appeals a year, but if a judge was going to be a member of the court that heard *all*

33. *Id.* at 394 (2006) (emphasis added). Chief Justice Roberts began his concurring opinion, joined by Justice Ginsburg, by emphasizing the same statement. *See id.* at 394–95.

34. BRESSEN & MEURER, *supra* note 27, at 230–31.

35. Ryan Vacca, *Revisiting the Federal Circuit En Banc*, 37 HARV. J.L. & TECH. 501, 501, 547 (2024) (footnotes omitted).

> patent appeals, the patent bar and its clients would exert themselves to influence the selection. The side of the fundamental controversy that the patent court would be likelier to take would be the pro-patent side, simply because a court that is focused, like an administrative agency (invariably specialized), on a particular government program is more likely than a generalist court to identify with the statutory scheme that it is charged with administering. This, by the way, has been the bent of the Patent and Trademark Office (PTO) itself . . . The Federal Circuit has indeed turned out to be a pro-patent court in comparison to the average of the regional courts that it displaced in the patent domain.[36]

And as F. M. Scherer points out, the Federal Circuit has

> rendered decisions greatly strengthening the presumption of patent validity and broad scope in contested cases and increased to occasional billion-dollar thresholds the amount of damages awarded when infringement is proved. These changes bolster incentives for innovators in one respect. But they also make innovation more dangerous — indeed, much like walking through a mine field — in technologies with complex and overlapping patents of uncertain scope. The net effect on incentives is neither obvious nor known.[37]

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36. WILLIAM S. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 335 (2003) (emphasis in original). Although the Federal Circuit has since cut back somewhat on patent eligibility standards, they've done so in ways that continue to cause confusion. *See* 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50, 50 (Jan. 7, 2019) (noting the "legal uncertainty" surrounding Supreme Court decisions regarding patent eligibility exceptions "poses unique challenges" for the agency). Still, it has remained "pro-patent" on many other issues. *See* Paul R. Gugliuzza & Mark A. Lemley, *Myths and Reality of Patent Law at the Supreme Court*, 104 B.U. L. REV. 891, 931 (2024) (noting "it seems fair to say that the Supreme Court has tried to rein in the pro-patent, rule-formalist proclivities of the Federal Circuit, at least in the cases involving core patent law doctrines of validity, infringement, claim construction, and remedies."). And more recently, regarding the kinds of Federal Circuit opinions that tend to be relied on by federal district court, researchers have found that "the Federal Circuit's precedent tends to be relied on more in pro-patent opinions than in anti-patent opinions." David Pekarek-Krohn & Emerson H. Tiller, *Federal Circuit Precedent: An Empirical Study of Institutional Authority and IP Ideology* 3 (NW. U. Sch. L. Fac. Working Paper No. 42, 2010).

37. F.M. Scherer, New Perspectives on Economic Growth and Technological Innovation 87 (1999).

Landes and Posner summarize their own empirical study on the matter, in which they found the Federal Circuit exhibited a pro-patent bias, but also failed to stem the tide of patent litigation, as follows:

> [T]he creation of the Federal Circuit appears to have had a positive and significant impact on the number of patent applications, the number of patents issued, the success rate of patent applications [and] the amount of patent litigation . . . These built-in tendencies to bias are exacerbated by the Federal Circuit's own bias in favor of upholding the validity of patents . . . One might at least have thought that the centralization of patent appeals would, after an initial transition period, reduce the rate of growth in the number of patent lawsuits by making case outcomes more predictable. However, the opposite appears to be true.[38]

Judicial immunity — the doctrine under which judges themselves are protected from suit for the harmful consequences of their own decisions[39] — may be necessary for the preservation of judicial independence. But when judges of a particular court come to be independent of the competition for better legal reasoning engaged in by other courts, that immunity can turn into monopoly, with all a monopoly's attendant disadvantages. In the case of the Federal Circuit, those disadvantages include lax applications of *Daubert*, and its continued failure to address the unfairly inflated damages awards caused by its own apportionment precedents.

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38. Landes & Posner, *supra* note 30, at 352.

39. *See, e.g.*, Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1871) (holding that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly."). The Supreme Court defined the scope of judicial immunity even more broadly. *See* Stump v. Sparkman, 435 U.S. 349, 356 (1978) (holding that "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority.").