



June 22, 2012

## Federal Circuit Refines Willful Patent Infringement Standard

## Intellectual Property Client Alert

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For the first time, the Federal Circuit set standards on the objective-risk portion of a willful patent infringement analysis, holding that such analysis is a question of law to be resolved by a judge, subject to full review on appeal. In *Bard Peripheral Vascular, Inc. v. W.L. Gore & Associates, Inc.*, the Court granted Gore's petition for rehearing *en banc* to reconsider the issue of willfulness and the standard of review applicable to it.

In 2007, the Court in *In re Seagate Technology, LLC* ([here](#)) established a two-prong test for proving willful infringement, a finding of which allows an award of enhanced damages under [35 U.S.C. § 284](#). The *Seagate* test requires a patentee to show (1) "that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent", and (2) that this "objectively-defined risk . . . was either known or so obvious that it should have been known to the accused infringer." In *Bard*, the Court noted that while *Seagate* established that an objective standard of recklessness applied to the willfulness determination, the application of this standard was left to future cases to develop.

In the underlying case, a jury found that Gore willfully infringed Bard's blood vessel graft patent, awarding Bard \$185 million. The judge then found that Bard was entitled to enhanced damages based on the jury's willfulness determination, increasing the award to \$371 million. The Federal Circuit affirmed in February, but then granted an *en banc* rehearing to revise its holding on willfulness. The Court found that "[t]he ultimate legal question of whether a reasonable person would have considered there to be a high likelihood of infringement of a valid patent should always be decided as a matter of law by the judge."

Going forward, the question of whether there was an objective risk of willful infringement will be determined by a judge, not a jury, with the judge's finding subject to no deference on appeal.

The *Bard* opinion may be found [here](#).

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