

Seagate Plus One

How the District Courts are Implementing Seagate

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Problems With Law on Willful Infringement of Patents

- 1) discouraged research
- 2) did not function as a deterrent of culpable conduct
- 3) interfered with lawyer-client relationships
- 4) spawned inefficiencies in patent litigation

Proposed Reforms

1. FTC “*To Promote Innovation: The Proper Balance of Competition and Patent Law*”:
Require written notice of infringement, or deliberate copying.
2. The National Academies report “*A Patent System for the 21st Century*,”
Abolish affirmative duty of due care;
Bifurcate willfulness

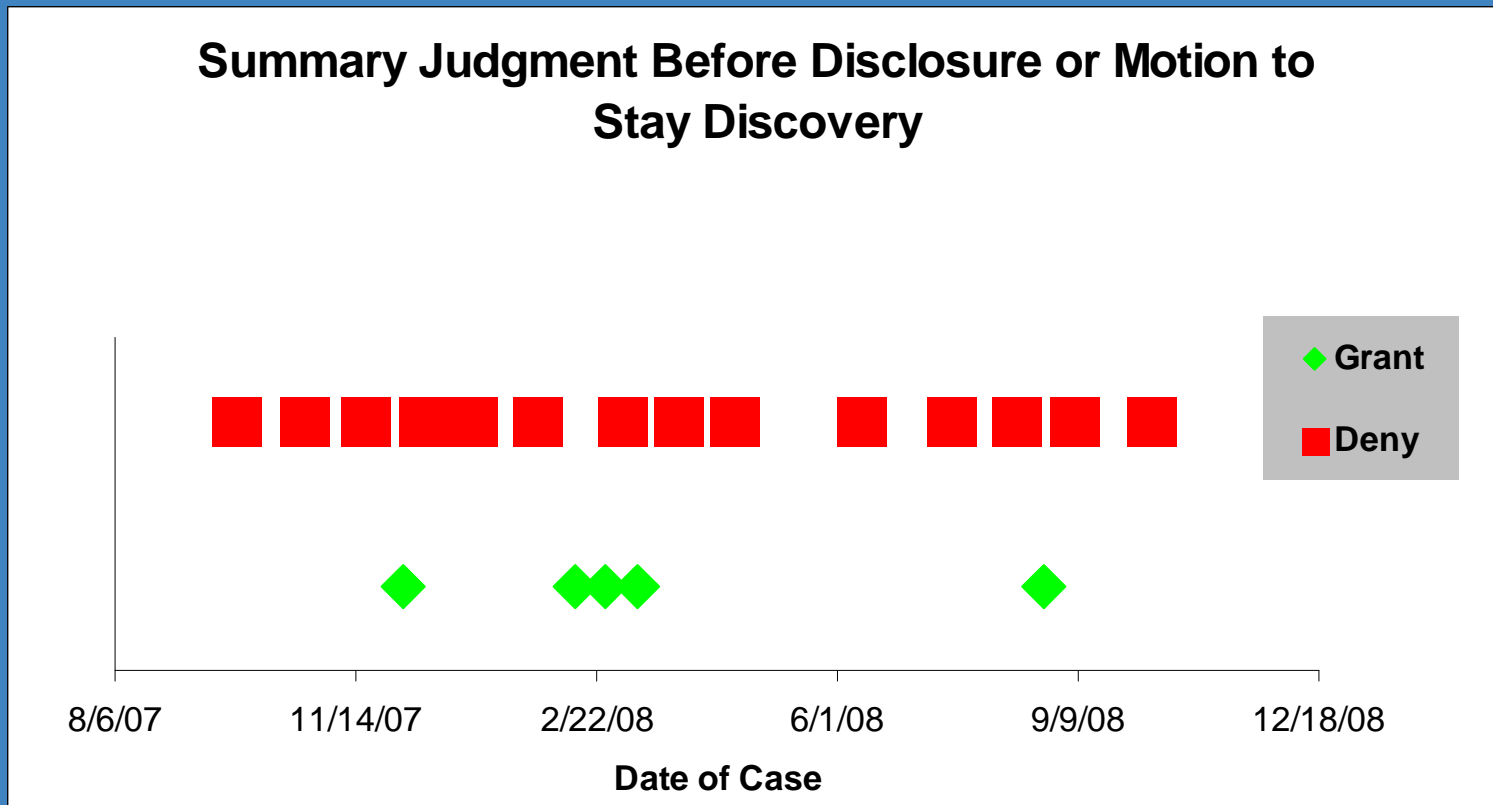
In re Seagate Tech., 497 F.3d 1360
(Fed. Cir. 2007)

Abandoned Underwater Devices, Inc. v.
Morrison-Knudson Co. Inc., 717 F. 2d 1380
(Fed. Cir. 1983) and its affirmative duty of
due care,

Adopted recklessness as a standard of care for
determining liability for willful infringement of
a patent.

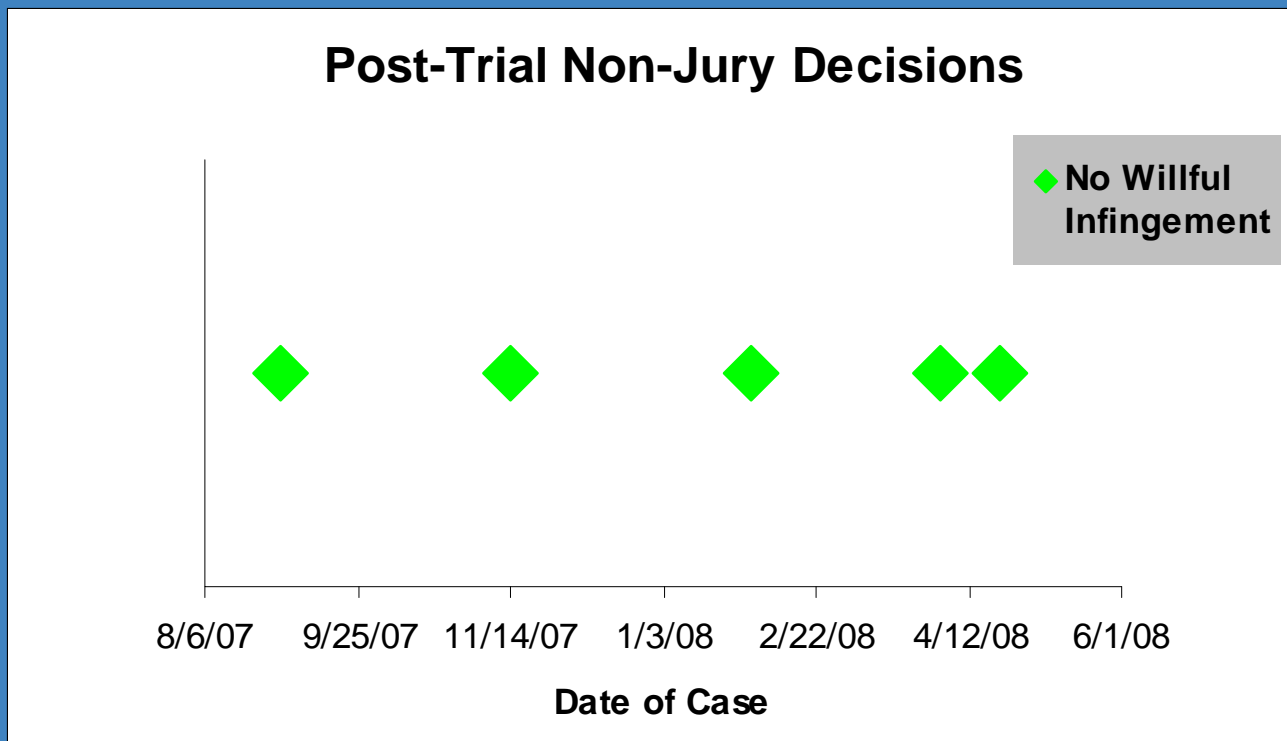
District Court Decisions Since Seagate

- In 15 of 20 decisions the trial judge denied the defendant's pretrial motion for a summary judgment of no willful infringement or to stay discovery on willful infringement.



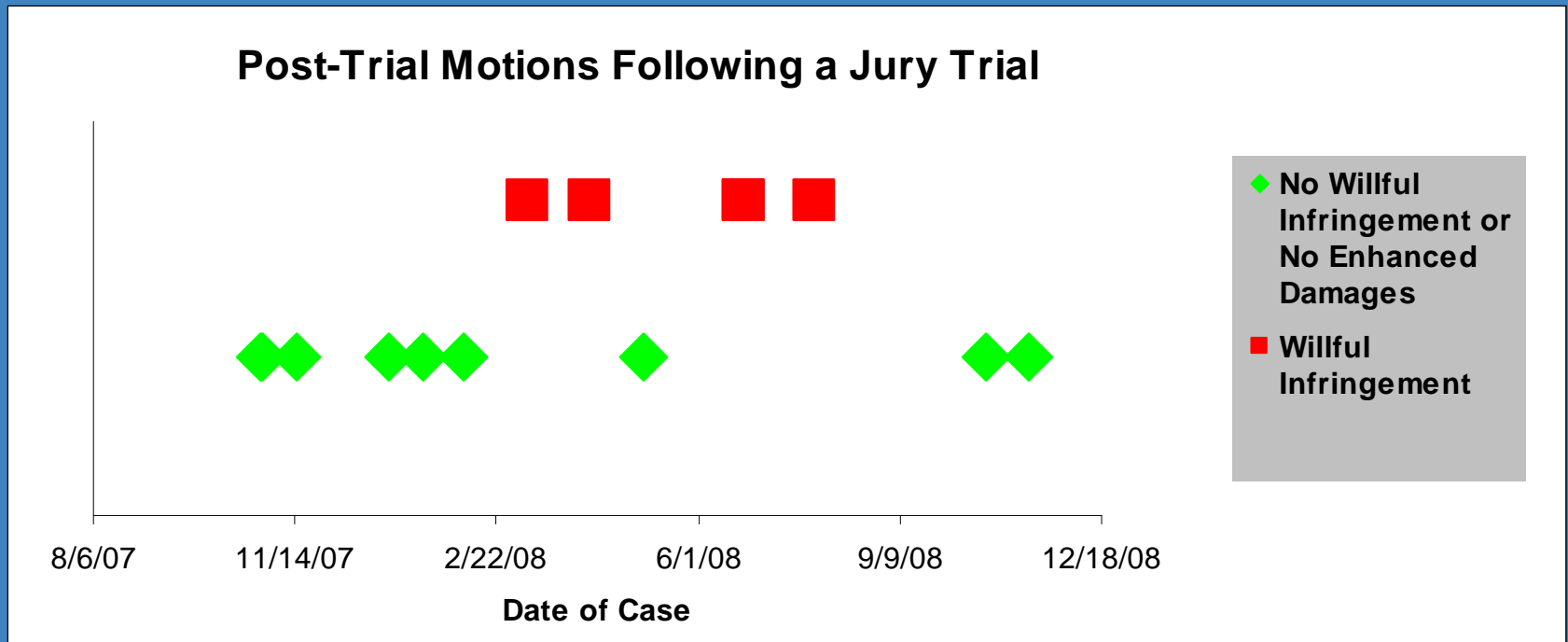
District Court Decisions Since Seagate

- In five of five post-trial decisions following a non-jury trial, the judge found no willful infringement.



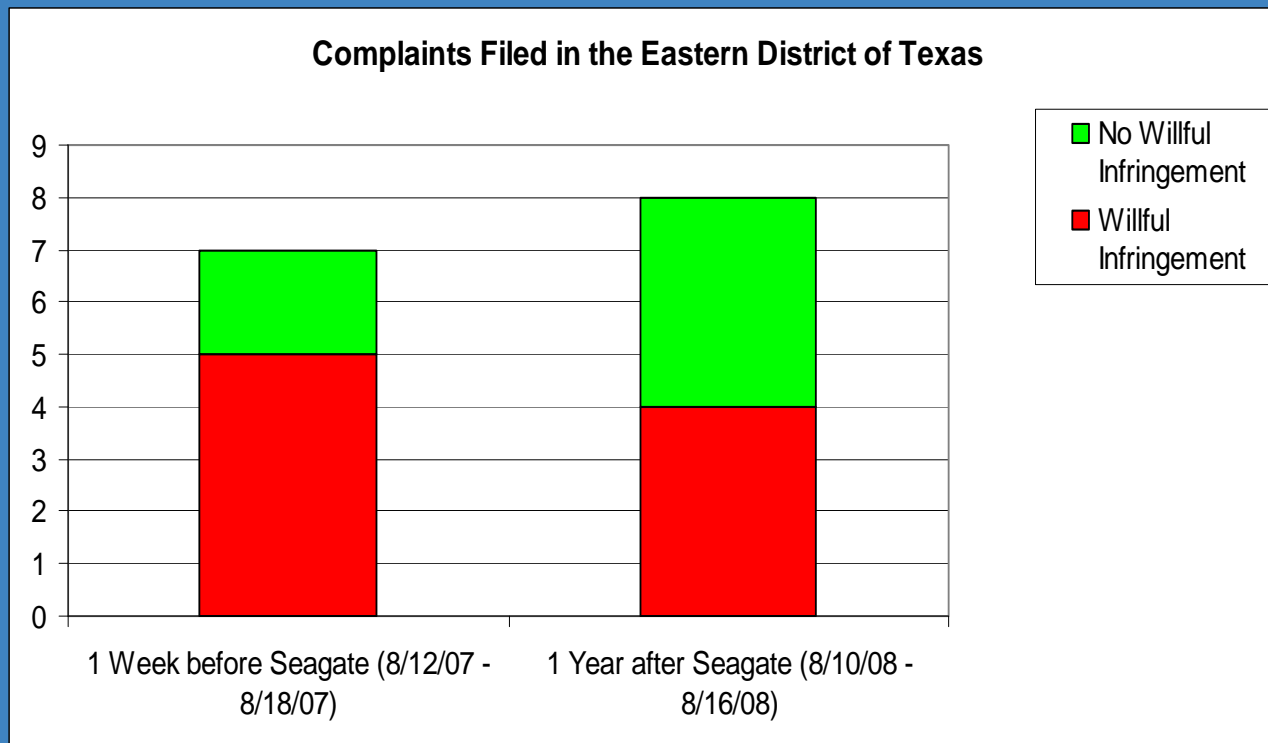
District Court Decisions Since Seagate

- In nine of fifteen decisions on post trial motions following a jury trial, the judges granted motions to either set aside a finding of willful infringement or reported that the judge would not enhance the damages.



Snapshot of a Week's Complaints Filed in the Eastern District of Texas

- In the week prior to the Seagate decision, 5 out of 7 patent complaints asserted willful infringement.
- One year later, 4 out of 8 patent complaints asserted willful infringement.



What do these decisions tell us?

- 1) Do changes in the law of willful infringement based on the Seagate decision eliminate the concerns of some firms that lead them to avoid reading competitors' patents?

Probably not

What do these decisions tell us?

- 2) Has Seagate eliminated the need that companies previously felt to obtain exculpatory legal opinions to defend against potential charges of willful infringement?

Probably not

What do these decisions tell us?

- 3) Did Seagate eliminate the need for previously introduced legislation that would require as a predicate to willful infringement written notice of infringement from the patentee or deliberate copying by the infringer?

Probably not

Solutions?

1. Federal Circuit decisions that impose predictability by confirming that willfulness claims should be tested by an early summary judgment motion.
2. Change in the law to provide willfulness can not be plead until after the defendant's liability has been established.
3. Make willfulness as an issue for the judge rather than the jury.