

CLIENT ALERT

Changes To Product, Coupled With Opinions of Counsel, Compel Reconsideration of Willfulness Finding

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Slight changes to original product, coupled with opinions of counsel on possible infringement, compel reconsideration of a jury determination of willful infringement under the Federal Circuit's recently adopted "objective recklessness" standard, a Federal Circuit panel concludes in *Jan K. Voda, M.D. v. Cordis Corporation* (No. 2007-1297, -1343; August 18, 2008).

Voda sued Cordis, alleging infringement of certain claims of three separate patents relating to cardiac guide catheters. Following instructions to the jury that "when a person becomes aware that a patent may have relevance to his or her activities, that person has a duty to exercise due care and to investigate whether or not his activities or proposed activities infringe any valid, enforceable claim of the patent," and a verdict of willful infringement, the district court granted Voda's motion for enhanced damages and attorney's fees. On appeal to the Federal Circuit, Cordis argued, *inter alia*, that the finding of willfulness should be vacated on the ground that the jury instruction on willfulness was erroneous under the subsequent Federal Circuit *Seagate* decision, which overruled the prior standard of willfulness imposing an affirmative duty of care on potential infringers having notice of another party's patent rights.

Noting that challenges to jury instructions are reviewed under the "plain error" standard of the regional circuit, the Federal Circuit panel vacates the judgment with respect to willfulness and remands for reconsideration. Cordis redesigned its catheters before issuance of the Voda patents, making slight changes to original copies of the Voda catheters, and had obtained several opinions of counsel regarding whether its redesigned catheters infringed Voda's patents. Given this record, a jury instruction in accord with the *Seagate* "objective recklessness" standard may have changed the result of the jury verdict on willfulness.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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