

# Willful Patent Infringement and Enhanced Damages After Halo

Navigating the New Standard Under 35 U.S.C. 284 Following Supreme Court Ruling

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# Willful Patent Infringement and Enhanced Damages after *Halo*

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July 19, 2016

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# Overview

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- Enhanced damages and willfulness historical background
  - Statutory history
  - Federal Circuit enhanced damages law pre-*Seagate*
  - Federal Circuit enhanced damages law post-*Seagate*
- The Supreme Court's *Halo* decision
  - Rejected two-part test
  - Changed burden of proof standard
  - Standard of appellate review
  - District court discretion implications

# Overview Continued

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- *Halo's* Implications for Litigation and Other Disputes
  - Previous litigation decisions
  - Changed strategy in litigation
  - Handling pre-litigation disputes
- Guidance

# Overview

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- Enhanced damages and willfulness historical background
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# *Enhanced Damages and Willfulness Historical Background*

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- Statutory history:
  - Patent Act of 1793
    - Trebled damages mandatory
  - Patent Act of 1836, §14, 5 Stat. 123
    - “it shall be in the power of the court to render judgment for any sum above the amount found by [the] verdict ... not exceeding three times the amount thereof, according to the circumstances of the case.”

# *Enhanced Damages and Willfulness Historical Background*

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- Statutory History - 35 U.S.C. § 284

“Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

When the damages are not found by a jury, the court shall assess them. In either event ***the court may increase the damages up to three times the amount found or assessed***. Increased damages under this paragraph shall not apply to provisional rights under section 154(d).

The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances.”

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# *Enhanced Damages and Willfulness Historical Background*

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- Past Supreme Court opinions:
  - enhanced damages warranted:
    - “where the injury is **wanton or malicious**, a jury may inflict **vindictive or exemplary damages**, not to recompense the plaintiff, but **to punish** the defendant.” *Seymour v. McCormick*, 16 How. 480, 488 (1854)
    - “where the wrong [had] been done, under **aggravated circumstances**,” *Dean v. Mason*, 20 How. 198, 203 (1858)
    - “in a case of **willful or bad-faith infringement**.” *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 508 (1964)

# Enhanced Damages and Willfulness Historical Background

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- Past Supreme Court opinions:
  - enhanced damages **not** warranted:
    - where the defendant "appeared in truth to be **ignorant** of the existence **of the patent right**, and did **not intend any infringement**," *Hogg v. Emerson*, 11 How. 587, 607 (1850)
    - where infringers were **not "wanton"** *Livingston v. Woodworth*, 15 How. 546, 560 (1854)
    - where "[t]here is **no pretence of any wanton and wilful breach**" *Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.*, 152 U. S. 200, 204 (1894).

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# *Enhanced Damages and Willfulness Historical Background*

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- *Federal Circuit Enhanced Damages Law Pre-Seagate*
  - *Underwater Devices Duty of Care Standard*
    - “Where, as here, a potential infringer has **actual notice** of another's patent rights, he has an **affirmative duty to exercise due care** to determine whether or not he is infringing. ... Such an affirmative duty includes, *inter alia*, the **duty to seek and obtain competent legal advice** from counsel *before* the initiation of any possible infringing activity.” *Underwater Devices, Inc. v. Morrison—Knudsen Co.*, 717 F.2d 1380, 1389-90 (Fed. Cir. 1983)

# *Enhanced Damages and Willfulness Historical Background*

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- *Federal Circuit Enhanced Damages Law Post-Seagate*
  - *In re Seagate*, 497 F.3d 1360 (2007) (*en banc*)
    - Revisited *Underwater Devices* because of “practical concerns stemming from our willfulness doctrine, particularly as related to the attorney-client privilege and work product doctrine.” *Id.* at 1369
    - Duty of care inconsistent with post-*Underwater Devices* Supreme Court opinions addressing “willfulness” in context of punitive damages. *Id.* at 1370

# *Enhanced Damages and Willfulness Historical Background*

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- *Federal Circuit Enhanced Damages Law Post-Seagate*
  - *In re Seagate*, 497 F.3d 1360 (2007) (*en banc*)
    - “enhanced damages requires a showing of willful infringement” *id.* at 1368
    - Clear and convincing evidence required
    - Two prong test for willful infringement
      - Objective prong
      - Subjective prong

# *Enhanced Damages and Willfulness Historical Background*

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- *Federal Circuit Enhanced Damages Law Post-Seagate*
  - *In re Seagate*, 497 F.3d 1360 (2007) (*en banc*)
    - Objective prong
      - “to establish willful infringement, a patentee must show by clear and convincing evidence that the infringer acted despite an **objectively high likelihood that its actions constituted infringement of a valid patent.**” *Id.* at 1371.
      - “The **state of mind** of the accused infringer **is not relevant** to this objective inquiry.” *Id.*

# *Enhanced Damages and Willfulness Historical Background*

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- *Federal Circuit Enhanced Damages Law Post-Seagate*
  - *In re Seagate*, 497 F.3d 1360 (2007) (*en banc*)
    - Objective prong
      - “A **substantial question about invalidity or infringement** is likely sufficient not only to **avoid** a preliminary injunction, but also a charge of **willfulness based on post-filing conduct**. *Id.* at 1374.

# *Enhanced Damages and Willfulness Historical Background*

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- *Federal Circuit Enhanced Damages Law Post-Seagate*
  - *In re Seagate*, 497 F.3d 1360 (2007) (*en banc*)
    - Subjective prong
      - “the patentee must also demonstrate that this objectively-defined risk (determined by the record developed in the infringement proceeding) was either known or so obvious that it should have been known to the accused infringer.” *Id.* at 1371
    - “We leave it to future cases to further develop the application of this standard.”

# *Enhanced Damages and Willfulness Historical Background*

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- *Federal Circuit Enhanced Damages Law Post-Seagate*
  - Further development of willful infringement standard – Who decides? Judge or jury?
    - *Bard Peripheral Vascular v. WL Gore & Assocs.*, 682 F.3d 1003, 1007-8 (Fed. Cir. 2012)
      - Objective prong is a question of law always decided by the judge
        - » Jury may decide underlying fact questions
      - Jury can decide subjective prong only if objective prong satisfied

# *Enhanced Damages and Willfulness Historical Background*

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- *Federal Circuit Enhanced Damages Law Post-Seagate*
  - Appellate review standards:
    - Objective prong subject to *de novo* review
    - Subjective prong reviewed for substantial evidence
      - *Bard Peripheral Vascular v. WL Gore & Assocs.*, 682 F.3d 1003, 1008 (Fed. Cir. 2012)
    - Whether to award enhancement – abuse of discretion
      - *Spectralytics, Inc. v. Cordis Corp.*, 649 F. 3d 1336, 1347 (Fed. Cir. 2011).

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# *The Supreme Court's Halo decision*

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- *District Court Procedural Posture*
  - *Halo* –
    - Jury found willful infringement
    - District Court found reasonable post-suit invalidity defense and no willful infringement
    - Federal Circuit affirmed
  - *Stryker*
    - Jury found willful infringement
    - District Court trebled damages
    - Federal Circuit reverses finding reasonable defenses

# *The Supreme Court's Halo decision*

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- Rejected two part test
  - Two-part *Seagate* test found inconsistent with §284:
    - “The *Seagate* test ... however, ‘is **unduly rigid**, and it impermissibly encumbers the statutory grant of discretion to district courts.’” *Halo*, slip op. at 12, quoting *Octane Fitness*, 572 U.S. at \_\_ (slip. op. at 7).

# *The Supreme Court's Halo decision*

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- Rejected two part test
  - Objective reckless prong is the “principal problem”
  - Problem aggravated by insulating infringer from enhanced damages by raising a reasonable defense at trial
    - “But culpability is generally measured against the knowledge of the actor at the time of the challenged conduct.” *Halo*, slip op. at 10

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  - **Changed burden of proof standard**
  - Standard of appellate review
  - District court discretion implications

# *The Supreme Court's Halo decision*

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- Changed burden of proof standard
  - Clear and convincing evidence standard reversed:
    - “As we explained in *Octane Fitness*, “patent-infringement litigation has always been governed by a **preponderance of the evidence** standard.” 572 U. S., at \_\_\_ (slip op., at 11). Enhanced damages are no exception.” *Halo*, slip op. at 12.

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  - **Standard of appellate review**
  - District court discretion implications

# *The Supreme Court's Halo decision*

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- Federal Circuit appellate review standard reversed:
  - Abuse of discretion adopted based on Supreme Court's 2014 *Highmark* decision. *Halo*, slip op. at 12-3.

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  - Changed burden of proof standard
  - Standard of appellate review
  - **District court discretion implications**

# Supreme Court's Halo Decision

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- District court discretion implications
  - What is the new standard?
    - “we **eschew any rigid formula** for awarding enhanced damages under §284” *Halo*, slip op. at 12.
    - “courts should continue to take into account the **particular circumstances of each case** in deciding whether to award damages, and in what amount.” *Halo*, slip op. at 11.
    - “a person is **reckless** if he acts “knowing or having reason to know of facts which would lead a reasonable man to realize” his actions are unreasonably risky.” *Halo*, slip op. at 10-11.

# Supreme Court's Halo Decision

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- District court discretion implications
  - 200 years of precedent provides guidance:
    - “Consistent with nearly two centuries of enhanced damages under patent law, however, such punishment should generally be reserved for egregious cases typified by willful misconduct.” *Halo*, slip op. at 11.
    - “Nearly two centuries of exercising discretion in awarding enhanced damages in patent cases, however, has given substance to the notion that there are limits to that discretion.” *Halo*, slip op. at 13.

# Supreme Court's Halo Decision

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- District court discretion implications
  - Enhancement appropriate:
    - “The sort of conduct warranting enhanced damages has been variously described in our cases as *willful*, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—characteristic of a pirate.” *Halo*, slip op. at 8.
    - “intentionally infringes another’s patent—with no doubts about its validity or any notion of a defense—for no purpose other than to *steal the patentee’s business*.” *Halo*, slip op. at 9.

# Supreme Court's Halo Decision

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- District court discretion implications
  - Limitations on discretion:
    - “generally be reserved for egregious cases typified by willful misconduct.” *Halo*, slip op. at 11.
    - “ Precedent “limit[s] the award of enhanced damages to egregious cases of misconduct beyond typical infringement” *Halo*, slip op. at 11.
    - Not for “garden variety cases” *Halo*, slip op. at 15.
    - a court may not “award enhanced damages simply because the evidence shows that the infringer knew about the patent *and nothing more.*” *Halo*, slip. op., Justice Breyer's concurrence at 1.

# Supreme Court's Halo Decision

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- District court discretion implications
  - *Read Corp. v. Portec, Inc.*, 970 F. 2d 816 (Fed. Cir. 1992) (considerations for enhancing damages)
    - (1) whether the infringer deliberately copied the ideas or design of another;(2) whether the infringer, when he knew of the other's patent protection, investigated the scope of the patent and formed a good-faith belief that it was invalid or that it was not infringed; (3) the infringer's behavior as a party to the litigation; (4) defendant's size and financial condition; (5) closeness of the case (6) duration of defendant's misconduct; (7) remedial action by the defendant; (8) defendant's motivation for harm; (9) whether defendant attempted to conceal its misconduct.

# *Halo's* Implications for Litigation

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- **Where Will Real World Impact Be Felt?**
  - Previous Litigation Decisions
  - Changed Strategy in Litigation
  - Handling Pre-Litigation Disputes



# *Halo's* Implications for Litigation

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# *Halo's* Implications for Litigation

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- Previous Litigation Decisions

- Previous Summary Judgments Based on *Seagate*

"[T]he court finds that Apple's obviousness defense was objectively reasonable, albeit unsuccessful. Accordingly, the court will enter judgment in Apple's favor on WARF's willful infringement claim."

*Wisconsin Alumni Research Found. v. Apple, Inc.*, 140 F. Supp. 3d 791, 792 (W.D. Wis. 2015).

- *W.L. Gore & Assocs., Inc. v. C.R. Bard, Inc.*, 11-515-LPS (D. Del.)

- What about *Alice* and other after-arising defenses?

# *Halo's* Implications for Litigation

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- Previous Litigation Decisions
  - Cases Currently on Appeal
    - Tougher standard of review, but . . .
    - More possibility of legal error

Abuse of discretion is established "by showing that the court . . . exercised its discretion based upon an error of law." *Novo Nordisk of North America, Inc. v. Genentech, Inc.*, 77 F.3d 1364, 1367 (Fed. Cir. 1996).

# *Halo's* Implications for Litigation

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- Where Will Real World Impact Be Felt?
  - Previous Litigation Decisions
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# *Halo's* Implications for Litigation

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- Changed Strategy in Litigation
  - In Which Court Will the Case Be Filed?
  - District Court Judge Will Play A Bigger Role
    - More deference on appeal
    - More say in important discovery disputes
    - More discretion to refuse enhancement



# *Halo's* Implications for Litigation

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- Changed Strategy in Litigation

*"Yet none of this is to say that enhanced damages must follow a finding of egregious misconduct. As with any exercise of discretion, courts should continue to take into account the particular circumstances of each case in deciding whether to award damages, and in what amount."*

*Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1933 (2016)  
(emphasis added)

# *Halo's* Implications for Litigation

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- Changed Strategy in Litigation
  - Discovery of Email, Instant Messages, and Wikis
    - Cost balance has changed
    - More tough privilege questions
    - More casual communications = more risk



# *Halo's* Implications for Litigation

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- Changed Strategy in Litigation
  - Shift in Pre-Trial Leverage
    - Defendants Like Summary Judgment
      - Trials are expensive
    - Summary judgment is less likely
      - Preponderance + no objective Prong
    - Worst Case Scenario Magnified by 3
      - Even if enhancement denied at the end of the day

# *Halo's* Implications for Litigation

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- Changed Strategy in Litigation
  - Can Juries Handle Egregiousness like Willfulness?

"The sort of conduct warranting enhanced damages has been variously described in our cases as **willful**, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—characteristic of a pirate."

"Consistent with nearly two centuries of enhanced damages under patent law, however, such punishment should generally be reserved for egregious cases typified by **willful misconduct**."

*Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932 (2016).

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- Changed Strategy in Litigation
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"Nearly two centuries of exercising discretion in awarding enhanced damages in patent cases, however, has given substance to the notion that there are limits to that discretion."

*Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1934 (2016).

# *Halo's* Implications for Litigation

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- Changed Strategy in Litigation
  - Can Juries Handle Egregiousness like Willfulness?

"Enhanced damages are as old as U.S. patent law. . . . In the Patent Act of 1836, however, Congress changed course and made enhanced damages discretionary."

*Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1928 (2016).

# Halo's Implications for Litigation

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- Changed Strategy in Litigation
  - Can Juries Handle Egregiousness like Willfulness?

"[T]he Patent Act of 1836 *confines the jury to the assessment of "actual damages."* The power to inflict vindictive or punitive damages is committed to the discretion and judgment of the court."

*Seymour v. McCormick*, 57 U.S. 480, 489-90 (1854) (emphasis added).

"[T]he Patent Act of 1836 *confined the jury to the assessment of actual damages*, leaving it to the discretion of the court to inflict punitive damages to the extent of trebling the verdict."

*Root v. Lake Shore & M.S. Ry. Co.*, 105 U.S. 189, 196 (1881) (emphasis added).

# *Halo's* Implications for Litigation

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- Changed Strategy in Litigation
  - Can Juries Handle Egregiousness like Willfulness?  
*Sociedad Espanola de Electromedicina y Calidad, S.A. v. Blue Ridge X-Ray Co.*, 1:10-cv-00159-MR (W.D.N.C. July 8, 2016)
    - Jury verdict found willful infringement based on *Seagate* subjective prong
    - “Thus, in *Halo*, the Supreme Court has overruled the objective prong, leaving the issue of willfulness as solely a factual issue which can readily be addressed by a jury.”
    - Entered “judgment” of willful infringement

# Halo's Implications for Litigation

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- Changed Strategy in Litigation
  - Can Juries Handle Egregiousness like Willfulness?
    - Plaintiff argues that jury should decide (*W.L. Gore & Assocs., Inc. v. C.R. Bard, Inc.*, 11-515-LPS (D. Del.))
      - “Willfulness is a classical jury question of intent” on which plaintiff has “the right of jury determination.” *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1250 (Fed. Cir. 1989)
      - *Halo* ties subjective willfulness to enhanced damages
      - *Halo* – no criticism of jury deciding willful infringement
      - 35 U.S.C. § 298 – references presenting advice of counsel to “court or jury” (but references induced infringement as well as willfulness)

# *Halo's* Implications for Litigation

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- Changed Strategy in Litigation
  - Can Juries Handle Egregiousness like Willfulness?
    - Defendant argues that jury should not decide willfulness
      - No separate claim for willful infringement
      - 35 U.S.C. § 284 reserves enhancement for the court and no jury role explicit or implicit
      - *Halo* adopted abuse of discretion standard on review which is for judicial decisions, not jury findings
      - 35 U.S. §284 “confines the jury to the assessment of ‘actual damages’” citing *Seymour v. McCormick*, 57 U.S. (16 How.) 480 (1853)

# *Halo's* Implications for Litigation

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- Changed Strategy in Litigation
  - Can Juries Handle Eggregiousness like Willfulness?
    - Advisory verdicts
    - Federal Rule of Evidence 403

# *Halo's* Implications for Litigation

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- **Where Will Real World Impact Be Felt?**
  - Previous Litigation Decisions
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  - **Handling Pre-Litigation Disputes**



# *Halo's* Implications for Litigation

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- Handling Pre-Litigation Disputes
  - To Opine or Not to Opine, That is the Question
    - Downsides
      - Cost of getting opinions for all disputes
      - Potential mismatch with trial defenses
    - Upsides
      - Might tip the balance on summary judgment
      - Limit unrelated discovery

# *Halo's* Implications for Litigation

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- Handling Pre-Litigation Disputes
  - To Opine or Not to Opine, That is the Question
    - If the jury actually is "confined to actual damages," the potential mismatch downside is reduced
    - Opinion might also help on appeal

"[T]he most culpable offenders, such as the "wanton and malicious pirate" who intentionally infringes another's patent—*with no doubts about its validity or any notion of a defense.*"

*Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932 (2016)(emphasis added).