

Federal Circuit Clarifies Damages for False Marking

By Matt Walters

On December 28, 2009, the Federal Circuit decided *The Forest Group, Inc. v. Bon Tool Company* in which it clarified that the false marking statute imposes up to \$500 in damages on a *per article* basis. In so doing the Court rejected the “decision based” approach adopted by the lower court and indicated that reading the law in such a limited manner would nullify the purpose of the statute. The decision puts teeth back into a statute that many believed was quickly becoming a right without a remedy worth pursuing.

As previously discussed, false marking imposes civil liability for falsely marking unpatented products, or products not covered by a valid patent. Liability arises when a person improperly marks an unpatented article as being covered by a patent with intent to deceive the public. Anyone can sue a patentee for false marking with potential damages of up to \$500 per occurrence.

The Federal Circuit’s decision in *The Forest Group* amplifies our earlier caution that proper care should be taken when providing notice to the public through patent marking. Hasty or ill-informed decisions to improperly mark products as “patented” or “patent pending” come at a price as determined by the success of your sales, and could lead to liability of up to \$500 for *each* article sold that has been improperly marked. However, this potential liability is avoidable and reinforces the importance of working closely with your patent attorney to ensure you have properly marked your products.

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