

Actionable Mismarking Can Occur Where Conditional Marking Language Is Used If At Least One Claim Of Each Marked Patent Does Not Cover The Marked Product.

In *Brinkmeier v. Graco Children's Prods., Inc.* 684 F. Supp. 2d 548 (D. Del. Feb. 16, 2010), Judge Farnan addressed a motion to dismiss alleging that the plaintiff failed to sufficiently plead that the products are unpatented and failed to sufficiently plead intent to deceive.

The plaintiff pled that Graco marked certain products with expired patents or patents not covering the products. Graco argued that no actionable mismarking can occur when conditional marking language is used and at least one claim of at least one of the patents covers the product at issue. In addition, Graco contended that no actionable mismarking can occur when the product was marked with an expired patent. The court rejected these arguments and held that at least one claim from *each* patent must cover the marked product even when conditional marking language is used. Further, the court found that a product marked with expired patents would be an unpatented article for a false marking action.