

Federal Rule Of Civil Procedure 9(b) Applies To False Marking Claims Under 35 U.S.C. § 292 (Robinson, J.)

In *Brinkmeier v. BIC Corp.*, 2010 U.S. Dist. Lexis 87656 (D. Del August 25, 2010), the Court determined that a plaintiff needs to plead specific facts that show an intent to deceive on the part of the defendant when making a false patent marking claim. Plaintiff had asserted false patent marking claims against BIC for marking lighters with expired patents. In a separate action, Plaintiff also asserted false patent marking claims against Bayer Healthcare LLC for marking its Aleve® product containers with expired patents. The two cases were consolidated.

In an issue of first impression in the District of Delaware, the Court concluded that the heightened pleading standard of FRCP Rule 9(b) applied to false marking claims because 35 U.S.C. § 292 requires an intent to deceive the public. In so holding, the Court followed precedents in the Eastern District of Pennsylvania and the Northern District of California. The Court rejected contrary decisions in the Eastern District of Texas and the Middle District of Florida. On the merits, the Court concluded that plaintiff's allegations were insufficient under Rule 9(b) and dismissed Plaintiff's claims.