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Qui Tam, Quo Vadis?

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Yogi Berra once said "[i]f you don't know where you are going, you might wind up someplace else." For the past year, Yogi's words have aptly described *qui tam* false marking jurisprudence. Recently, however, several rulings have provided some clarity concerning two important issues:

1. the requirements for a *qui tam* plaintiff to establish standing; and
2. whether the intent to deceive element of a false marking claim is subject to Rule 9(b)'s heightened pleading standard.

In *Stauffer vs. Brooks Bros., Inc.*, Nos. 2009-1428, 2009-1430, 2009-1453, 2010 WL 3397419 (Fed. Cir. Aug. 31, 2010), the Federal Court held that "any person" really does mean "any person" when it comes to a *qui tam* plaintiff's standing to bring a false marking claim. *Id.* at *6. At issue there were bow ties purchased by the plaintiff (a patent attorney) from Brooks Brothers. The ties, marked with patent numbers which expired in 1954 and 1955, contained an "Adjustolox" mechanism manufactured by a third party. *Id.*

In December 2008, the plaintiff commenced a *qui tam* action under 35 U.S.C. § 292. On Brooks Brothers' motion, the district court dismissed the case for lack of standing, holding that Stauffer failed to sufficiently allege that the United States had suffered an injury in fact from Brooks Brothers' false marking. *Id.* at *1. The district court also found that the plaintiff's allegations of his own injury were not properly alleged, and that even if they had been, they would only support an injury to him, not to the public, and could not provide a basis for standing. *Id.* at *2.

The Federal Circuit reversed the district court's decision and held that the plaintiff's standing arose from his status as "any person" and that he did not have to allege more for jurisdictional purposes. *Id.* at *6. The Federal Circuit explained that a § 292 *qui tam* plaintiff is not required to suffer an individual injury; instead, the *qui tam* plaintiff must allege that the United States has suffered an injury that is in fact causally connected to the defendant's conduct that is likely to be redressed by the court. *Id.* at *4. The Court also noted, but declined to address, the issue of whether § 292 violated the "take care" clause of Article II, § 3, of the U.S. Constitution.

Interestingly, *Stauffer* is not just a standing case. On remand, the Federal Circuit directed the district court to specifically consider Brooks Brothers' motion to dismiss for failure to plead the intent to deceive the public "with sufficient specificity to meet the heightened pleading requirements for claims of fraud." *Id.* at *6. Thus, while *Stauffer* at first blush appears to be a plaintiff victory, it may ultimately prove more beneficial to defendants.

Although there has been a split in authority regarding Rule 9(b)'s applicability to the intent to deceive element, *Stauffer's* dicta may go a long way towards resolving that split. Two recent district court opinions are instructive. *Brinkmeier v. BIC Corp. and Brinkmeier v. Bayer Healthcare LLC,* Civ. Nos. 09-860-SLR and 10-01-SLR, 2010 WL 3360568 (D. Del. Aug. 25,

2010). In those cases, the same plaintiff alleged false marking against BIC and Bayer because they had marked certain products with expired patents. The intent to deceive allegations were based upon "information and belief" that BIC and Bayer were sophisticated companies that had many decades of experience in applying for, obtaining, and litigating patents, that they had in- house legal counsel that should have been aware of § 292's requirements, and that they had previously accused other companies of patent infringement. *Id.* at *2, *4. On BIC's and Bayer's motion, the *Brinkmeier* court dismissed the *qui tam* false marking claims after finding that the plaintiff's allegations regarding BIC's and Bayer's intent to deceive the public were conclusory. *Id.* at *9-*10.

Although *Stauffer and Brinkmeier* have provided some much-needed clarity to false marking litigation, there is still a great deal of uncertainty. For example, the dramatic increase in *qui tam* actions has concerned the legislature. Both the House and Senate have proposed amendments which would make it harder for a plaintiff to bring a *qui tam* suit and also likely would reduce the damages recoverable in those cases. Both propose amending § 292(b) as follows:

> A person who has suffered a *competitive injury* as a result of a violation of this section may file a civil action in a district court of the United States for recovery of damages adequate to compensate for the injury.

H.R. 4954, 111th Cong. (2009-2010) 2009-2010 CONG US HR 4954 (Westlaw) and S. 515, 111th Cong. (2009-2010) 2009-2010 CONG US S 515 (Westlaw) (emphasis added). Both proposed amendments call for the amendment to "apply to all cases, without exception, pending on or after the date of enactment" of the Act. Of course, there is no way of knowing whether or not the proposed reforms will take effect because, in the words of Yogi Berra, "[i]t's tough to make predictions, especially about the future."

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