

***Pequignot v. Solo Cup Co.***,  
\_\_\_ F.3d \_\_\_, 2010 WL 2346649 (Fed. Cir. 2010)

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In *Pequignot v. Solo Cup Co.*, \_\_\_ F.3d \_\_\_ 2010 WL 2346649 (Fed. Cir. 2010) (“the *Solo Cup* case”), the Federal Circuit has put the lid on false marking litigation. In 2010 alone, over 200 new false marking cases have been filed in district courts across the country, but after *Solo Cup*, the burden for plaintiffs in those cases just became much more difficult.

Although Solo Cup admitted that it had marked billions of its products with expired patent numbers, it claimed that it did not first learn of the problem until 12 year after expiration of one of its patents. After then seeking advice of counsel on the issue, Solo Cup developed a formal policy under which it would not immediately replace all mold cavities used to make its products bearing an expired patent number but would only do so when they became damaged or unusable. Thus, Solo Cup relied on its policy in asserting that it did not intend to deceive the public—a requisite false marking element.

Unable to cite any specific evidence of Solo Cup’s intent to deceive the public, plaintiff Matthew Pequignot contended that Solo Cup’s intentional marking of its products with patent numbers known by Solo Cup to be expired was sufficient to establish a presumption of an intent to deceive. However, the court rejected Pequignot’s contention and indicated that any presumption of fraudulent intent was weaker when the false markings were of patent numbers, albeit expired, that had at least at one time covered the marked products as compared to patent markings that did not even cover the marked product. In Solo Cup’s case, its products were marked with patents that previously did cover the marked products prior to their expiration.

Notably, the court also emphasized that Solo Cup’s rebuttal of any presumed intent to deceive the public only had to be by a preponderance of the evidence. Consequently, the court found that Solo Cup easily rebutted the presumption of intent to deceive and was, therefore, not in violation of § 292.

Post *Solo Cup*, false marking plaintiffs have greater challenges. As most false marking cases are based on products marked with expired patent numbers, clearly many cases were brought with the intention to simply rely on a presumption of intent inferred from a defendant’s knowledge of the false marking. Now, however, all that does is create a weak presumption that defendants may not have great difficulty in overcoming.

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