ROPES & GRAY

Patent Owners/Manufacturers Must Beware of False Patent Marking

When the Federal Circuit recently decided *The Forest Group, Inc. v. Bon Tool Co.*, it noted that its interpretation of Section 292 of the Patent Act will likely support a "new cottage industry" of false marking litigation by patent marking trolls. This prediction is already proving to be accurate.

In *Forest Group*, the Federal Circuit interpreted Section 292 with respect to the proper fine to be assessed where false marking is established, holding that fines must be assessed on a per article basis where a complainant meets its burden of establishing that a patentee falsely marked with an intent to deceive the public. While the Federal Circuit stated that "[i]n the case of inexpensive mass-produced articles, a court has the discretion to determine that a fraction of a penny per article is a proper penalty," Section 292 allows for fines of up to $500 per article. As any private party can bring a *qui tam* lawsuit under Section 292 against a manufacturer and keep one half of the penalty collected, the incentive for patent marking trolls to initiate false marking litigation has greatly increased.

If you have questions regarding Section 292 of the Patent Act or the *Forest Group* opinion, please contact a member of the Ropes & Gray's Intellectual Property Group or the Ropes & Gray attorney who normally advises you.