

False Patent Marking: Litigation and Legislation

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Summary

A patent holder that manufactures or sells a patented product will usually mark it with the patent number or other words that provide notice to the public that the article is patented. Such marking also permits the patent holder to recover an increased amount of damages in patent infringement lawsuits. However, marking a product with an expired patent number or inapplicable patent number is a violation of the false marking statute, Section 292 of the Patent Act. Section 292 provides that anyone who *falsely* marks an *unpatented* product with either a patent number, the words "patent," "patent pending," or any other words or numbers implying that the product is protected by a current or pending patent when, in fact, it is not, *and* does so with the intent of deceiving the public, shall "be fined not more than $500 for every such offense."

Until late 2009, false marking lawsuits were relatively rare, and federal courts often assessed one $500 fine for the decision to falsely mark, without regard to the number of articles that had been mismarked by the defendant. Yet in December 2009, the U.S. Court of Appeals for the Federal Circuit issued *Forest Group, Inc. v. Bon Tool Company*, which interpreted § 292 to require a penalty of up to $500 for *every* article that is falsely marked. The Federal Circuit explained that this calculation is mandated by the plain language of the statute. Furthermore, the Federal Circuit identified policy considerations that support its interpretation of § 292, noting that false marking deters innovation and stifles competition in the marketplace because a falsely marked article may dissuade potential competitors from entering the same market.

The Patent Act's false marking provision expressly allows qui tam civil actions—any member of the public may sue a false marking offender on behalf of the federal government, in which event the fine is shared evenly between the person bringing the suit and the United States. The *Forest Group* decision helped fuel a surge of false patent marking lawsuits nationwide, filed by so-called "whistleblower" plaintiffs who targeted defendants that sold thousands of products marked with expired patent numbers, such as plastic cups, dental floss, and mouse traps. Such product manufacturers could face considerable financial liability for false patent marking.

Two decisions by the Federal Circuit in 2010 have addressed several questions that have arisen during the false patent marking litigation. *Pequignot v. Solo Cup Co.* held that a product covered with an expired patent is "unpatented" for purposes of the false marking statute. *Solo Cup* also explained that a defendant can escape liability if, despite knowing that a marking is false, it can prove that it did not consciously desire to deceive the public. *Stauffer v. Brooks Brothers, Inc.* determined that although a qui tam plaintiff in a false marking complaint may not have suffered an injury to himself, the United States has suffered an injury from the false marking violation—and because the false marking statute operates as a statutory assignment of the United States' interests, a private plaintiff (acting as the government's assignee) has standing to enforce § 292.

The 112th Congress may consider legislation similar to that introduced (but not passed) in the 111th Congress to amend the false marking statute in an effort to curb the proliferation of false patent marking suits. H.R. 4954 would have required that the person bringing a false marking suit must have suffered a competitive injury as a result of the violation, thus eliminating § 292's qui tam provision. The bipartisan manager's amendment to the Senate version of the Patent Reform Act of 2009, S. 515, contained a similar amendment to § 292. H.R. 6352, the Patent Lawsuit Reform Act of 2010, would have made the same changes to § 292 and, in addition, would have specifically limited the damages available for the false marking offense to a single fine of not more than $500.

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Introduction

Under Section 287(a) of the Patent Act, a patent holder that manufactures or sells a patented product may give notice to the public that the product is patented either by marking it with the word "patent" or the abbreviation "pat.," together with the number of the patent.[1] If the patent holder does not mark the product with such information, the patent holder cannot receive damages for any infringement that occurred before the patent holder has filed a lawsuit against an infringer; the only damages that may be recovered are for infringement occurring after the infringer has been given notice of the infringement and continued to infringe thereafter. Therefore, the Patent Act provides the patent holder with an incentive to mark its products in order to obtain a greater amount of damages in infringement actions. In addition, the public benefits from a patent holder marking its products, as marking provides "a ready means of discerning the status of intellectual property embodied in an article of manufacture or design."[2]

However, Section 292 of the Patent Act imposes civil penalties upon anyone who *falsely* marks products for the purpose of deceiving the public. The following kinds of false marking are prohibited by Section 292, including (1) unauthorized marking without the consent of the patent holder, (2) marking a product that is not covered by a patent, and (3) marking a product with the words "patent-pending" when in fact no patent application has been made.[3] The U.S. Supreme Court has recognized that federal patent policy furthers an "important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain."[4] Yet false marking "clearly injure[s]" that public interest "because the act of false marking misleads the public into believing that a patentee controls the article in question."[5] The public is thus defrauded by false marking, and the patent system is injured as well because of the erosion of the public notice function that the act of marking provides.[6]

False patent marking is subject to a fine of "not more than $500 for every such offense." To enforce the false patent marking statute, Congress permitted a qui tam[7] action: "Any person may

[1] 35 U.S.C. § 287(a).

[2] Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 162 (1989).

[3] 35 U.S.C. § 292(a) ("Whoever, without the consent of the patentee, marks upon, or affixes to, or uses in advertising in connection with anything made, used, offered for sale, or sold by such person within the United States, or imported by the person into the United States, the name or any imitation of the name of the patentee, the patent number, or the words "patent," "patentee," or the like, with the intent of counterfeiting or imitating the mark of the patentee, or of deceiving the public and inducing them to believe that the thing was made, offered for sale, sold, or imported into the United States by or with the consent of the patentee; or

Whoever marks upon, or affixes to, or uses in advertising in connection with any unpatented article, the word "patent" or any word or number importing that the same is patented, for the purpose of deceiving the public; or

Whoever marks upon, or affixes to, or uses in advertising in connection with any article, the words "patent applied for," "patent pending," or any word importing that an application for patent has been made, when no application for patent has been made, or if made, is not pending, for the purpose of deceiving the public—

Shall be fined not more than $ 500 for every such offense.")

[4] Lear, Inc. v. Adkins, 395 U.S. 653, 670 (1969).

[5] Clontech Labs., Inc. v. Invitrogen Corp., 406 F.3d 1347, 1356 (Fed. Cir. 2005).

[6] Elizabeth I. Winston, *The Flawed Nature of the False Marking Statute,* 77 TENN. L. REV. 111, 115 (Fall 2009).

[7] Qui tam is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means "who pursues this action on our Lord the King's behalf as well as his own." Qui tam is the process whereby an individual sues or prosecutes in the name of the government and shares in the proceeds of any successful litigation or (continued...)

sue for the penalty, in which event one-half shall go to the person suing and the other to the use of the United States."[8]

Until late 2009, lawsuits claiming a violation of § 292 were fairly rare,[9] and federal courts often assessed a single $500 fine for the defendant's decision to falsely mark, without regard to the number of products that had been mismarked by the defendant.[10] However, in December 2009, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") ruled that § 292 requires a fine of up to $500 *per article* that has been falsely marked by the defendant. Because the appellate court's interpretation of the false marking statute has "exponentially raised the potential recoveries in false patent marking actions," the year 2010 has seen a "meteoric rise in false patent marking suits."[11] As one observer has described, "false marking plaintiffs [are] scouring store shelves for *any* mass-manufactured product with inaccurate patent markings, with hopes for a massive payday."[12]

This report will describe and analyze the Federal Circuit's 2009 decision that requires a per-article penalty for false marking, as well as two subsequent Federal Circuit decisions in 2010 that answer several questions that have arisen during the recent false patent marking litigation. It also discusses legislation that was introduced, but not passed, in the 111th Congress that would have amended § 292 in order to retroactively end qui tam false marking suits and with the intent of reducing the number of false marking suits filed in the future. The 112th Congress may consider similar legislation.

Case Law

In order to prevail under the most commonly used prongs of the false marking statute, the plaintiff must establish by a preponderance of the evidence two elements of the false marking claim: (1) marking an unpatented article with (2) intent to deceive the public.[13] Courts have explored the contours of both of these elements, as well as the amount of the penalty imposed for the offense.

In an opinion from a century ago, *London v. Everett H. Dunbar Corp.*, the U.S. Court of Appeals for the First Circuit held that the false marking language from the Patent Act of 1870 (that

(...continued)

settlement. The qui tam plaintiff need not have been a victim of the misconduct giving rise to the litigation. The U.S. Supreme Court has recognized § 292 of the Patent Act as a qui tam statute. Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 769 n.1 (2000). For a comprehensive overview of qui tam, *see* CRS Report R40785, *Qui Tam: The False Claims Act and Related Federal Statutes*, by Charles Doyle.

[8] 35 U.S.C. § 287(b).

[9] *See* Winston, *supra* note 6, at 135 ("[I]n the one hundred sixty-seven years of existence of the false marking qui tam action, only eleven circuit court decisions have addressed the statute.").

[10] S. Christian Platt and Jeffrey D. Comeau, *The Rise of False Patent Marking Suits,* BNA PATENT, TRADEMARK & COPYRIGHT JOURNAL, April 30, 2010.

[11] *Id. See also* Sheri Qualters, *A Surge of Patent Whistleblower Suits,* NATIONAL LAW JOURNAL, April 5, 2010. For a listing of cases that allege false patent marking that have been filed since January 1, 2010, *see* http://www.grayonclaims.com/storage/False%20Marking%20Cases.pdf.

[12] Scott E. Scioli, *Patently Unproved: False Patent Marking Defendants Breathe Sigh of Relief*, Corporate Counsel, July 13, 2010, *at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202463447109 (emphasis in original).

[13] *See Clontech Labs*, 406 F.3d at 1352.

required a penalty of not less than $100 for every such offense) should be interpreted as imposing a single fine for continuous false marking of multiple articles.[14] Many district courts followed the *London* interpretation even after Congress in 1952 changed the false marking penalty from a $100 minimum fine to a $500 maximum fine.[15]

Forest Group, Inc. v. Bon Tool Company

On December 28, 2009, the Federal Circuit in *Forest Group, Inc. v. Bon Tool Company* distinguished the *London* precedent, explaining that the 1952 amendment to the false marking statute eliminated the policy considerations that had justified the *London* court's interpretation.[16] The *London* court had expressed a concern that a $100 minimum penalty applied on a per article basis would "result in the accumulation of an enormous sum of penalties, entirely out of proportion to the value of the articles."[17] However, with Congress amending the penalty in 1952 to a "not more than $500" maximum fine, district courts were given the discretion to assess a *per article* fine of any amount up to $500 for the false marking offense, the Federal Circuit asserted.[18]

The patent at issue in the *Forest Group* decision pertains to a spring-loaded parallelogram stilt commonly used in the construction industry. The patent holder, Forest Group, had sued Bon Tool for infringement of its patent; Bon Tool counterclaimed alleging false marking by Forest Group of its own stilts. However, the district court found that there was no patent infringement, and then turned to Bon Tool's counterclaims. The court held that the stilts produced by Forest Group were not covered by its own patent because they did not include a "resiliently lined yoke," as the patent claim required. However, the court found that Forest Group had knowledge that its stilts were not covered by the patent (after a district court in a related case granted summary judgment of noninfringement), yet Forest Group continued to mark its stilts with the patent number after that other case.[19] The district court in *Forest Group* fined Forest Group $500 for a single offense of false marking.

Bon Tool appealed to the Federal Circuit, arguing among other things that the district court had erred in its interpretation of the false marking statute, when it determined that the statute provided for a penalty based on each *decision* to mark rather than on a per article basis. The Federal Circuit agreed with Bon Tool:

> The plain language of the statute does not support the district court's penalty of $ 500 for a decision to mark multiple articles. Instead, the statute's plain language requires the penalty to be imposed on a per article basis. The statute prohibits false marking of "*any* unpatented *article*," and it imposes a fine for "*every* such offense." … The statute requires a fine to be imposed for every offense of marking any unpatented article. The act of false marking is the

[14] 179 F. 506 (1st Cir. 1910).

[15] *See, e.g.,* A.G. Design & Assocs., LLC v. Trainman Lantern Co., 2009 U.S. Dist. LEXIS 8320, at *9-10 (W.D. Wash. Jan. 23, 2009); Undersea Breathing Sys., Inc. v. Nitrox Techs., Inc., 985 F. Supp. 752, 782 (N.D. Ill. 1997); Sadler-Cisar, Inc. v. Commercial Sales Network, Inc., 786 F. Supp. 1287, 1296 (N.D. Ohio 1991); Joy Mfg. Co. v. CGM Valve & Gauge Co., 730 F. Supp. 1387, 1399 (S.D. Tex. 1989); Precision Dynamics Corp. v. Am. Hosp. Supply Co., 241 F. Supp. 436, 447 (S.D. Cal. 1965).

[16] 590 F.3d 1295 (Fed. Cir. 2009).

[17] *London,* 179 F. at 508.

[18] *Forest Group,* 590 F.3d at 1302.

[19] *Id.* at 1299.

> offense punished by the statute. The phrase "for the purpose of deceiving the public" creates an additional requirement of intent but does not change the relationship between the act of marking an article and the penalty. We conclude that the statute clearly requires that each article that is falsely marked with intent to deceive constitutes an offense under 35 U.S.C. § 292.[20]

In addition to relying on the literal words of the statute, the Federal Circuit cited policy considerations to support its interpretation of § 292. The appellate court explained that false marking deters innovation and stifles competition in the marketplace: potential competitors are dissuaded from entering the same market as the falsely marked product because they do not want to be sued for infringement, among other things. Others might invest unnecessarily in "designing around" the falsely marked product to avoid infringement, or they may incur costs to determine whether the patent numbers marked on the products are valid and enforceable. But a single $500 fine for each decision to falsely mark (or $500 per continuous act of marking that "could span years and countless articles") would, in the Federal Circuit's opinion, "render the statute completely ineffective" and fail to provide sufficient deterrence against false marking.[21]

Furthermore, the Federal Circuit observed that the fact that Congress provided qui tam actions to enforce the false marking statute lends further support to its "per article" penalty construction:

> Penalizing false marking on a per decision basis would not provide sufficient financial motivation for plaintiffs—who would share in the penalty—to bring suit. It seems unlikely that any qui tam plaintiffs would incur the enormous expense of patent litigation in order to split a $500 fine with the government.[22]

However, the Federal Circuit cautioned that its ruling does not mean that a district court must fine defendants $500 per article marked; rather, the $500 fine is a maximum limit:

> [T]he statute provides district courts the discretion to strike a balance between encouraging enforcement of an important public policy and imposing disproportionately large penalties for small, inexpensive items produced in large quantities. In 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.[23]

On remand from the Federal Circuit, the district court in *Forest Group* imposed a per article fine of $180 for each of the 38 stilts that had evidence of false marking (a total fine of $6,840).[24] The lower court observed that Forest Group had sold the falsely marked stilts at prices between $103 and $180; it determined that the highest point of the price range to be most appropriate in order to "deprive Forest of more than it received for the falsely-marked stilts, fulfilling the deterrent goal of § 292's fine provision."[25]

[20] *Id.* at 1301 (emphasis in original).

[21] *Id.* at 1303.

[22] *Id.* at 1304.

[23] *Id.*

[24] Forest Group, Inc. v. Bon Tool Co., 2010 U.S. Dist. LEXIS 41291 (S.D. Tex. Apr. 27, 2010), at *2.

[25] *Id.* at *6-7.

Pequignot v. Solo Cup Co.

With its June 10, 2010, decision in *Pequignot v. Solo Cup Co.,*[26] the Federal Circuit provided answers to several outstanding questions regarding false patenting marking. Solo is a company that manufactures disposable cups, bowls, plates, and utensils, and it holds patents regarding plastic drink cup lids. Solo marked its lids with the patent numbers using a stamping machine that contains "mold cavities" that produce the lids.[27] The molds can last 15 to 20 years. One of Solo's patents expired in 1988 and the other expired in 2003, yet Solo continued to mark the lids with these patent numbers after they had expired. When Solo became aware that it was marking its products with expired patent numbers, it requested the advice of outside intellectual property counsel. Based on the counsel's advice:

> Solo developed a policy under which, when mold cavities needed to be replaced due to wear or damage, the new molds would not include the expired patent marking. According to deposition testimony, Solo indicated to its attorneys that a wholesale replacement of the mold cavities would be costly and burdensome, and Solo's attorneys concluded that Solo's policy was permissible under § 292.[28]

In September 2007, a patent attorney, Pequignot, filed a qui tam action under § 292, alleging that Solo had falsely marked at least 21,757,893,672 of its products with the patent numbers for the purpose of deceiving the public, despite knowing that those patents had expired. He sought an award of $500 per article, which the Federal Circuit observed would amount to an award to the United States of approximately $ 5.4 trillion, or 42% of the country's total national debt.[29] The Federal Circuit affirmed the district court's decision to grant summary judgment to Solo Cup, finding that there was a lack of evidence that Solo Cup intended to deceive the public with its expired patent number markings.[30]

Solo Cup answered several questions concerning a false patent marking claim. The first is the meaning of the statutory term "unpatented article." Solo had argued that products that were previously protected by patents which have since expired are not "unpatented articles." The appellate court disagreed, holding that "an article covered by a now-expired patent is 'unpatented'" because it is just as much in the public domain as an article that had never been patented.[31] The Federal Circuit noted that "many of the same public policies apply to falsely marked products with inapplicable patent numbers and expired patent numbers."[32]

The second question concerned whether an expired patent marking and a defendant's knowledge of that marking provides conclusive proof of § 292's second element, the defendant's intent to deceive the public by falsely marking. The Federal Circuit first announced that "the combination of a false statement and knowledge that the statement was false creates a rebuttable presumption of intent to deceive the public, rather than irrebuttably proving such intent."[33] The appellate court,

[26] 608 F.3d 1356 (Fed. Cir. 2010).

[27] *Id.* at 1358.

[28] *Id.* at 1359.

[29] *Id.* at n.1.

[30] *Id.* at 1357.

[31] *Id.* at 1361.

[32] *Id.* at 1362.

[33] *Id.* at 1362-63.

however, opined that "the bar for proving deceptive intent here is particularly high" and held that "mere knowledge that a marking is false is insufficient to prove intent if Solo can prove that it did not consciously desire the result that the public be deceived."[34] The appellate court explained that "a purpose of deceit, rather than simply knowledge that a statement is false, is required" by § 292.[35]

The third question concerned what kind of evidence the defendant may provide to rebut the presumption of intent to deceive the public. The appellate court approved Solo's reliance in good faith on the specific advice of counsel and that it had followed that advice. The court noted that Solo had continued to falsely mark "out of a desire to reduce costs and business disruption" that would have occurred by removing the markings immediately upon the patents' expiration dates.[36] Such actions demonstrated to the appellate court's satisfaction that Solo "acted not for the purpose of deceiving the public" in falsely marking its products.[37]

Stauffer v. Brooks Brothers, Inc.

In the second significant opinion issued by the Federal Circuit in 2010 regarding the false patent marking statute, the appellate court examined questions about standing and injury in fact under a § 292 qui tam suit. *Stauffer v. Brooks Brothers, Inc.* involved a claim brought by a patent attorney, Stauffer, against the clothing company Brooks Brothers for falsely marking men's bow ties with patents that had expired over 50 years ago (Stauffer had purchased some of these falsely marked ties). The district court judge had granted Brooks Brothers' motion to dismiss the suit because he found that Stauffer lacked standing to sue because he had not suffered an injury in fact.[38]

On August 31, 2010, the Federal Circuit reversed the district court's decision on standing.[39] The appellate court observed that although a qui tam plaintiff in a false marking complaint may not have suffered an injury to himself, the United States has suffered an injury. The court remarked that "Congress has, by enacting section 292, defined an injury in fact to the United States. In other words, a violation of that statute inherently constitutes an injury to the United States."[40] Because the false marking statute operates as a statutory assignment of the United States' interests and rights, a private plaintiff (acting as the government's assignee) has standing to enforce § 292, the Federal Circuit held.[41]

However, the Federal Circuit instructed the district court on remand "to address the merits of the case, including Brooks Brothers' motion to dismiss … on the grounds that the complaint fails to state a plausible claim to relief because it fails to allege an 'intent to deceive' the public—a critical element of a section 292 claim—with sufficient specificity to meet the heightened pleading requirements for claims of fraud imposed by Rule 9(b)" of the Federal Rules of Civil

[34] *Id.* at 1363.

[35] *Id.*

[36] *Id.* at 1364.

[37] *Id.*

[38] Stauffer v. Brooks Bros., 615 F. Supp. 2d 248, 255 (S.D.N.Y. 2009).

[39] Stauffer v. Brooks Bros., 2010 U.S. App. LEXIS 18144 (Fed. Cir. 2010).

[40] *Id.* at *11.

[41] *Id.* at *11-12 (citing Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 773 (2000)).

Procedure.[42] Note that the Federal Circuit did not definitively hold that false patent marking cases must be subject to the elevated pleading standard; the appellate court only directed the district court to examine the question. If a false marking claim must meet the heightened pleading standard of fraud cases, this requirement may pose a barrier for some plaintiffs in bringing a successful false marking claim, according to some observers.[43] Several federal district courts have disagreed about whether the heightened pleading requirement of Rule 9(b) applies to false marking claims.[44]

The Federal Circuit is currently considering a petition for writ of mandamus regarding the proper pleading standard for false marking cases.[45] In an amicus curiae brief submitted to the Federal Circuit in *In re BP Lubricants USA Inc.*,[46] the U.S. Department of Justice advised the appellate court to rule that the enhanced pleading standard applies to false marking actions: "The position of the United States is that, consistent with other cases 'sounding in fraud,' False Marking cases should be subject to the pleading requirements of Rule 9(b)."[47] The Federal Circuit's decision on this mandamus petition has not been issued as of the date of this report.

Legislation in the 111th Congress

Legislation was introduced but not passed in the 111th Congress to amend § 292 of the Patent Act in an effort to curb the proliferation of false patent marking suits. Introduced by Representative Issa on March 25, 2010, H.R. 4954 would have required that the person bringing a false marking suit suffer a "competitive injury" as a result of the violation—which would eliminate § 292's qui tam provision. The new standing requirement would have applied to future false marking suits as well as retroactively, thereby barring any qui tam lawsuit that had been filed prior to the bill's enactment. The bill would have limited entitlement to bring suit to those who have suffered direct harm (no longer "any person" as the current law allows). In addition, the bill would have changed the calculation of damages, requiring a recovery "adequate to compensate for the injury."

The bipartisan manager's amendment to the Senate version of the Patent Reform Act of 2009, S. 515, released on March 4, 2010, contained a similar amendment to § 292.[48]

H.R. 6352, the Patent Lawsuit Reform Act of 2010, would have made the same changes to § 292 as H.R. 4954, but in addition, it would have specifically limited the damages available for false

[42] *Id.* at *19 (citation and internal quotations omitted). Rule 9(b) requires that a party alleging fraud "must state with particularity the circumstances constituting fraud…" FED. R. CIV. P. 9(b).

[43] Sheri Qualters, *Despite Broad Holding On Whistleblower Standing in False Marking Cases, Pleading Hurdle is High*, NATIONAL LAW JOURNAL, Sept. 1, 2010.

[44] Jim Lennon, Texas Split on Applicability of Rule 9(b) to False Marking Pleadings, Dec. 17, 2010, *at* http://falsepatentmarking.blogspot.com/2010/12/texas-split-on-applicability-of-rule-9b.html.

[45] *See* Justin E. Gray, *United States Files Amicus Curiae Brief Arguing that Rule 9(b) Should Apply in False Marking Cases*, *at* http://www.grayonclaims.com/home/2010/12/7/united-states-files-amicus-curiae-brief-arguing-that-rule-9b.html.

[46] In re: BP Lubricants USA Inc., Misc. Docket No. 2010-960 (Fed. Cir. 2010).

[47] Response of the United States as Amicus Curiae in Support of the Petitioner, at 2, *available at* http://www.grayonclaims.com/storage/BPLubricantsDOJ.pdf.

[48] Manager's Amendment to S. 515, In the Nature of a Substitute, page 16, *available at* http://www.aipla.org/Content/ContentGroups/Legislative_Action/111th_Congress1/Senate5/S515PatentReformAmendment-March-2010.pdf.

marking to a single fine of not more than "$500, in the aggregate, for all offenses in connection with" falsely marked articles.[49]

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[49] H.R. 6352, § 2(a)(1)(C).