

SCOTUS Opts Not To Remand Case Raising Preclusion Question Answered in B&B Hardware

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On April 27, 2015 the Supreme Court surprisingly denied certiorari in *Escamilla v. M2 Tech., Inc.*, U.S., No. 14-1012 rather than remanding the case for further consideration in light of the High Court's recent decision in *B&B Hardware, Inc. v. Hargis Industries, Inc. et al.*, No. 13-352, 575 U.S. ____ (2015).

The petitioner in *Escamilla* owns the "M2" trademark and sought to enjoin the respondents from continuing to use the mark "M2 Technology" on the grounds that such use was likely to cause confusion with the petitioner's mark. The district court denied the petitioner's claim for injunctive relief finding, among other things, no likelihood of confusion between the marks. On appeal, the petitioner made a number of arguments, including that the Trademark Trial and Appeal Board (TTAB) found (in an adversarial proceeding) that there was a likelihood of confusion between the marks and that the district court erred in failing to give this determination preclusive effect. Although the Fifth Circuit affirmed the district court's finding of no likelihood of confusion without ever opining on the preclusion issue, it had to have rejected the petitioner's preclusion argument in light of the TTAB's prior confusion determination. Such a rejection would have been fully in accord with circuit precedent holding that TTAB decisions never have preclusive effect. See *Am. Heritage Life Ins. Co. v. Heritage Life Ins. Co.*, 494 F.2d 3, 9-10 (5th Cir. 1974).

However, such a rejection appears to be at odds with the Supreme Court's recent decision in *B&B Hardware*, wherein the Court held that TTAB likelihood of confusion determinations can have preclusive effect so long as (i) the other ordinary elements of issue preclusion are met; and (ii) the usages adjudicated by the TTAB are "materially" the same as those litigated in the infringement action. It is therefore surprising that the Court chose to deny certiorari rather than remand the case to the Fifth Circuit for further consideration in light of *B&B Hardware*.

See the Supreme Court's decision in *B&B Hardware* [here](#).

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