KAYE SCHOLER

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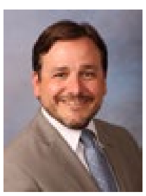
Starbucks Loses Another Round in the Long-Running Dilution Battle Against the Maker of "Charbucks" Coffee



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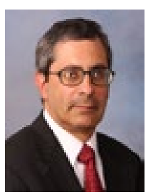

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Starbucks has waged a twelve-year legal battle to prevent Black Bear Micro Roastery from selling a coffee blend under the marks "Mister Charbucks," "Mr. Charbucks" and "Charbucks Blend." Black Bear won a significant victory against Starbucks this month when the Second Circuit affirmed the trial court's holding that the Charbucks marks are not likely to dilute the famous Starbucks mark. The decision could have important implications for owners of famous trademarks asserting dilution claims.

The dispute between Starbucks and Black Bear is nearly as old as the federal dilution statute itself. In 1997—one year after the passage of the Federal Trademark Dilution Act—Starbucks first objected to Black Bear's use of "Mister Charbucks," "Mr. Charbucks" and "Charbucks

Blend," terms that Black Bear admitted it chose with Starbucks in mind. Starbucks sued to enjoin use of the terms, bringing claims for both trademark infringement and dilution.

Starbucks conducted a telephone survey in which consumers were asked what came to mind when they heard the term "Charbucks," to which 30.5 percent responded "Starbucks" and nine percent responded "coffee." But when asked to name any company or store that might sell a "Charbucks" product, only 3.1 percent of respondents identified Starbucks.

After a 2005 bench trial, the district court ruled in Black Bear's favor on both infringement and dilution. While Starbucks' initial appeal was pending, Congress passed the Trademark Dilution Revision Act of 2006 (TDRA), which changed the standard for dilution from requiring a showing of *actual* dilution—as the Supreme Court held in *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003)—to requiring only a showing of *likelihood* of dilution. The Second Circuit sent the case back to the district court for additional proceedings in light of the change in the law.

After the first remand, the district court found that, even under the new TDRA standard, there was no likelihood of dilution. Starbucks again appealed. In 2009, the Second Circuit affirmed the district court's finding of no infringement, but held that the district court did not properly apply the new TDRA dilution standard. *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 105–10 (2d Cir. 2009). In particular, the court of appeals held, the district court improperly conflated the lack of confusion with a lack of association. The case was again remanded to the district court.

After the second remand, the district court once again found that there was no likelihood of dilution, and Starbucks once again appealed. On November 15, 2013 the Second Circuit issued its third decision in the case, this time affirming the district court's dilution ruling.

The Second Circuit reaffirmed its earlier holding that the district court did not clearly err in finding that there was "minimal similarity" between the Charbucks mark and the Starbucks mark in light of the differences in how the marks actually are presented to consumers. The Second Circuit also declined to disturb the district court's finding that Starbucks had presented only "weak" evidence of actual association, noting that Starbucks' survey (i) failed to present the marks in their full marketplace context (noting that there was no evidence of the extent to which consumers encountered the marks aurally rather than on packaging) and (ii) showed only "minimal actual confusion," far below the 70 to 90 percent association rates shown in other cases.

Balancing these two important factors (actual association and similarity of the marks), both of which favored Black Bear, against other factors that favored Starbucks (including Black Bear's admitted intent to create an association), the Second Circuit held that the district court had not clearly erred in finding that Starbucks failed to carry its burden of showing a likelihood of dilution.

For companies enforcing famous trademarks, the *Starbucks* case provides some important lessons. First, it serves as a reminder to litigants regarding the need to carefully design consumer surveys in trademark cases to reflect marketplace conditions and to present other evidence justifying the particular survey stimuli that are used. Second, *Starbucks* signals that owners of famous trademarks may face a tougher time prevailing on a trademark dilution claim in the Second Circuit than elsewhere. In particular, the Circuit's analysis of Starbucks' survey results suggests that it may require a higher percentage threshold of association than other circuits have accepted. The court of appeals' demand for high association levels in the survey can be viewed in light of the court's other problems with the survey and in light of the district court's finding of low similarity between the marks. At the same time, requiring association levels of 70 percent or more seems to disregard the fundamental principle that dilution involves the "slow whittling away" of a famous mark's distinctiveness, as well as Congress' view, enacted in the TDRA, that a famous mark owner should be able to stop potential dilution before any significant actual dilution takes place.

The case is *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, No. 12-364, 2013 WL 6037227, 2013 U.S. App. LEXIS 23114 (2d Cir. Nov. 15, 2013).

Judge Rules That Google Books Project Is Fair Use

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Since 2004, Google has scanned tens of millions of books—many of which are protected by US copyright law—to create a text-searchable electronic database. After Google scans the books, sometimes without the permission of the copyright holder, it makes "snippets" of the text (but not the entire book) available in search results. In *Authors Guild, Inc. v. Google Inc.*, a putative class of copyright holders sued Google for copyright infringement in connection with the Google Books project.

...[I]n its overall assessment, the court found that the Google Books project "expands access to books" and is an "essential" and "invaluable research tool."

In our Summer 2013 NEWSLETTER, we reported on the Second Circuit's decision from earlier this year, which reversed an order granting class certification. The Second Circuit held that Google's fair use defense should be resolved before the issue of class certification was addressed. Earlier this month, following remand, Judge Chin (who was the original district court judge and, after being elevated to the Second Circuit, continued to preside over the case by designation) granted Google's motion for summary judgment. Applying the four-factor test of the copyright fair use statute (17 U.S.C. § 107), the court held that the conduct alleged in connection with the Google Books project was protected fair use.

Addressing the first fair use factor—"the purpose and character of the use"— the court found that Google's use of the copyrighted material was "highly transformative" because it "digitizes books and transforms expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books" and it "open[s] up new fields of research," "including data mining and text mining." In addition, "Google Books helps to preserve books and give them new life" because many of the books are "out-of-print books that are falling apart buried in library stacks." The court compared Google's practice of making only snippets of the books available to other cases in which the use of "thumbnail" images of copyrighted photographs was found to be fair use. While Google's use of the works was commercial—a factor that generally weighs against a finding of fair use—the court did not find that fact to be dispositive, particularly because any commercial aspect of Google's conduct was indirect (it does not sell digital copies of the books, nor does it place ads on the pages with the snippets of copyrighted text).

The court further found that the second fair use factor—"the nature of the copyrighted work"—favored fair use because the scanned books are published works and the vast majority are non-fiction. The third factor—"the amount and substantiality of the portion used"—"weighs slightly against a finding of fair use" because, although Google scans the full text of each book, it limits the amount of text it displays in response to a search.

With respect to the fourth factor—"the effect of the use upon the potential market for or value of the copyrighted work"—Judge Chin rejected the plaintiffs' arguments that Google Books would negatively impact the market for the copied books, holding that "a reasonable fact-finder could only find that Google Books *enhances* the sales of books to the benefit of copyright holders" by enabling librarians and others to identify books that, through links to Amazon and other online sellers, they subsequently can purchase. (Emphasis added).

Finally, in its overall assessment, the court found that the Google Books project "expands access to books" and is an "essential" and "invaluable research tool." The court also found that the project "provides significant public benefits" that enhance the progress of the arts and sciences—which is the very purpose of copyright law.

Plaintiffs have indicated that they will appeal, providing the Second Circuit, which has a history of issuing significant fair use decisions, an opportunity to do so again.

The case is *Authors Guild, Inc. v. Google Inc.*, No. 05-Civ-8136 (DC), 2013 WL 6017130, 2013 U.S. Dist. LEXIS 162198 (S.D.N.Y. Nov. 14, 2013), *on remand from* 721 F.3d 132 (2d Cir. 2013).

Seventh Circuit Affirms Certification of Washing Machine Purchaser Class Action Despite Lack of Uniform Injury

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Taking a narrow reading of the Supreme Court's recent decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the Seventh Circuit reaffirmed an earlier decision allowing a group of washing machine purchasers to proceed as a Rule 23(b)(3) class action in their breach of warranty claims against Sears.

Asserting claims under state warranty laws, the plaintiffs alleged that certain models of front-loading washing machines sold by Sears are defectively designed, causing mold to grow in the machines, which, in turn, causes offensive odors. But, according to Sears, "most" class members—including several of the named plaintiffs—never experienced mold issues. Sears argued that the lack of uniformity as to injury and damages meant that individual issues, not common ones, would predominate. Nevertheless, the district court granted plaintiffs' motion for class certification.

Last year, the Seventh Circuit affirmed the class certification order. The Supreme Court granted Sears' petition for a writ of *certiorari* and issued a summary order vacating the Seventh Circuit's judgment and remanding the case for further proceedings in light of the Court's March 27, 2013 decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). In *Comcast*, a class of subscribers brought an antitrust suit against a cable television provider for alleged anti-competitive activity. The Court reversed the order granting class certification on the ground that the plaintiffs' damages model was inconsistent with their theory of liability. The Court held that because the model did not measure only those damages attributable to plaintiffs' theory of injury, it "cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)": "Without presenting another methodology, [plaintiffs] cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class."

On remand in the *Sears* case, the Seventh Circuit adopted a narrow reading of the Supreme Court's decision in *Comcast* and reaffirmed its earlier decision permitting class certification. Judge Posner, once again writing for the three-judge panel, wrote that "[u]nlike the situation in *Comcast*, there is no possibility in this case that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis; all members of the mold class attribute their damages to mold[.]" The court found that if liability was established, then individual class members' damages could be determined through separate hearings. The court did not attempt to reconcile this statement with its earlier recognition that Sears "argued that most members of the plaintiff class had not experienced any mold problem"—i.e., that *most* class members had *not* suffered any injury. Rather, the court stated that this fact "was an argument not for refusing to certify the class but for certifying it and then entering a judgment that would largely exonerate Sears."

The Seventh Circuit's decision is consistent with a recent decision by the Sixth Circuit involving a nearly identical class action against Whirlpool brought by a class of purchasers of front-loading washing machines. As in *Sears*, the plaintiffs allege that Whirlpool's defective design caused moldy odors. The case against Whirlpool followed the same procedural path: the Sixth Circuit upheld class certification; the Supreme Court vacated and remanded for further proceedings in light of *Comcast*; and the Sixth Circuit reaffirmed its earlier decision. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013), *petition for cert. filed*, 2013 WL 5532730 (U.S. Oct. 7, 2013) (No. 13-431).

Both decisions are at odds with the recent decision of the DC Circuit in *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013). There, a group of shippers brought antitrust claims against a group of railroad companies, alleging that the railroads conspired to fix fuel surcharge prices. Some members of the class, however, were unaffected by the surcharges because they had "legacy contracts" setting different surcharge formulae. As a result, the plaintiffs' damages model—which did not take these differences into account—yielded "false positives" with respect to these class members. The DC Circuit vacated the class certification order and remanded for further proceedings to determine whether the plaintiffs' proposed damages model satisfied *Comcast*. The court stated that while the plaintiff need not show on a class certification motion "the precise amount of damages incurred by each class member, . . . we do expect the common evidence to show *all* class members suffered *some* injury." (First emphasis added). The court further explained that, absent an adequate damages model, the case could not proceed as a class action: "Common questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact. When a case turns on individualized proof of injury, separate trials are in order." "It is now indisputably the role of the district court to scrutinize the evidence before granting certification, even when doing so 'requires inquiry into the merits of the claim.' . . . If the damages model cannot withstand this scrutiny then that is not just a merits issue. . . . No damages model, no predominance, no class certification." (Quoting *Comcast*).

Whether a class may be certified where each class member was not injured as a result of the defendant's allegedly wrongful conduct is an issue central to class certification. Sears and Whirlpool each filed (on the same day) petitions for *certiorari* with the Supreme Court to review the Seventh and Sixth Circuit's most recent rulings, highlighting their inconsistency with the DC Circuit's decision. Stay tuned.

The case is *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), *petition for cert. filed*, 2013 WL 5519505 (U.S. Oct. 7, 2013) (No. 13-430).

Third Circuit Denies Class Certification on Ascertainability Grounds Where Membership in the Putative Class Would Turn on Class Member Affidavits Regarding Purchases

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Alleging that Bayer had deceptively promoted its One-A-Day WeightSmart vitamins, the plaintiff sought to represent a class of all Florida purchasers in a suit under the Florida consumer fraud statute. As part of his burden at the class certification stage, the plaintiff was required to show that the membership of the class would be "ascertainable"; i.e., that membership in the class be readily ascertainable based on objective criteria and not require individualized fact-finding or mini-trials. But Bayer does not sell directly to consumers and does not have records that would identify end purchasers. Conceding that consumers would be unlikely to have retained receipts or packaging, plaintiff suggested that the class members could be identified either (1) using records of online sales and store loyalty cards or (2) by affidavits of class members. Plaintiff submitted the declaration of a class action settlement consultant, who opined that class member affidavits could be "screened" using various techniques to weed out inaccurate claims. The district court accepted the plaintiff's argument and certified a class of all Florida purchasers.

The Third Circuit reversed. Calling class ascertainability an "essential prerequisite of a class action," the court emphasized that the requirement protects several constituencies: (i) potential class members, by allowing them to "identify themselves for purposes of opting out of a class"; (ii) defendants, by protecting their "due process right" to "raise individual challenges and defenses to claims," including "class membership"; and (iii) the courts, by ensuring that class litigation is administratively feasible.

The decision suggests that courts, at least within the Third Circuit, will take a harder look at the class certification stage ... particularly in consumer fraud cases involving low-value or consumable products for which purchasers are unlikely to have kept sales records.

The court rejected the plaintiff's proposal to rely on online sales records or retail loyalty card records to establish class membership, noting that there was "no evidence that retailers even have [such] records[.]" The court also rejected the plaintiff's argument that class member affidavits could be used to determine class membership. Noting that the plaintiff himself was confused at his deposition regarding the identity of the product he had purchased, the court found that the plaintiff had failed to meet his burden of showing that class member affidavits could be reliably screened to prevent inaccurate claims. It was not enough for plaintiff to present a screening model and provide "assurances that it will be effective"—the plaintiff must actually "prove how the model will be reliable" and how it would be consistent with the defendant's due process right to challenge the affidavits. The declaration of the plaintiff's class settlement consultant was not enough, as he merely opined in the abstract without presenting an actual model tailored to the circumstances of the case. Although the court "doubt[ed]" whether such a model, if presented, "could satisfy the ascertainability requirement," it allowed the plaintiff, on remand, one more opportunity to do so.

The decision suggests that courts, at least within the Third Circuit, will take a harder look at the class certification stage as to whether class membership can be determined through a fair and efficient method, particularly in consumer fraud cases involving low-value or consumable products for which purchasers are unlikely to have kept sales records.

The case is *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013). The plaintiff has filed a motion for rehearing before the panel or rehearing *en banc*. The court has asked Bayer for a response, which is due December 30.

Trademark Owner Asks Supreme Court to Weigh In on Whether the TTAB's Determination of Likelihood of Confusion Is Binding in Subsequent Infringement Litigation in Federal Court

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In our Summer 2013 NEWSLETTER, we discussed a recent Eighth Circuit case that held that the determination of the Trademark Trial and Appeal Board (TTAB) regarding likelihood of confusion does not have any preclusive effect in a subsequent trademark infringement action in federal court. *See B&B Hardware, Inc. v. Hargis Indus., Inc.*, 716 F.3d 1020 (8th Cir. 2013).

Unless and until the Supreme Court clarifies the law in this area, litigants should be cognizant of this issue and plan their litigation strategy accordingly.

On September 18, the plaintiff, B&B Hardware, Inc., filed a petition for a writ of certiorari with the US Supreme Court. *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 2013 U.S. S. Ct. Briefs LEXIS 3888 (Sept. 18, 2013) (No. 13-352).

B&B asks the Supreme Court to determine two issues: (1) whether issue preclusion prevents defendant from seeking to relitigate the TTAB's finding of likelihood of confusion; and (2) if not, whether the district court should have given deference to the TTAB's finding "absent strong evidence to rebut it." B&B argues that the TTAB has long been willing to give preclusive effect to likelihood-of-confusion findings made by district courts, an approach endorsed by the Federal Circuit. In its petition, B&B contends that the Eighth Circuit's approach varies from approaches taken by other circuits: (i) the Third and Seventh Circuits have applied preclusion in similar circumstances; (ii) the Second Circuit will apply preclusion if the TTAB considered the marks in their marketplace context; and (iii) the Fifth and Eleventh Circuits decline to apply issue preclusion but nonetheless give deference to the TTAB's finding.

The deference given to a TTAB likelihood-of-confusion finding may significantly impact a party's litigation strategy, particularly when deciding whether to initiate a parallel proceeding in federal court, and the B&B *certiorari* petition highlights the variations in Circuit law on this issue. Unless and until the Supreme Court clarifies the law in this area, litigants should be cognizant of this issue and plan their litigation strategy accordingly.

"Dope" Indemnity Claim for Copyright Infringement? Think Again!

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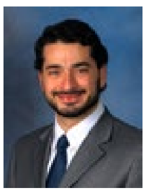

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The informal world of hip-hop DJs cannot remix the time-tested standards for contract formation and fraud, as Monster Energy Company recently learned while defending itself against a copyright infringement lawsuit brought by the Beastie Boys. The venerable hip-hop group sued the energy drink manufacturer in the Southern District of New York in August 2012, bringing copyright infringement, Lanham Act and New York Civil Rights Law claims arising out of Monster's allegedly unauthorized publication of a promotional video that used as its soundtrack a remix of several of the Beastie Boys' greatest hits.

After it was sued by the Beastie Boys, Monster filed a third-party complaint against Zach Sciacca, a/k/a "Z-Trip," the DJ who, with the Beastie Boys' permission, originally made the remix Monster used in its video. In its complaint, Monster asserted breach of contract and fraud causes of action, and alleged that Z-Trip was responsible for the Beastie Boys' damages because he fraudulently led Monster to believe that he had the authority to grant Monster an unrestricted license to use the remix, and did, in fact, contract with Monster to grant them a license to use the remix in the video. Monster's claims were based on fleeting interactions between Z-Trip and Nelson Phillips—Monster Canada's director of marketing—during a Monster-sponsored snowboarding festival held in the spring of 2012.

After a period of discovery, Z-Trip filed a motion for summary judgment on both of Monster's causes of action. According to the motion and opposition papers, in early 2012, Monster booked Z-Trip to perform at Monster's annual "Ruckus in the Rockies." Monster videotaped the event, including one of the DJ's performances. Before Z-Trip took the stage for an after-party gig, Phillips talked to him very briefly about possible future collaborations. Phillips also asked the DJ if he had any music that Monster could use for a video of the event that Monster was going to post on its website. Z-Trip told Phillips that he did have music that Monster could use for their video, and that his Beastie Boys remix was available on his website for free.

A day or two after Z-Trip performed, Phillips had breakfast with him and again discussed the video. He told Z-Trip that he would send him the video for approval, and that he would not publish it until the DJ was satisfied. After the breakfast, Phillips downloaded the remix from Z-Trip's website. Based on Z-Trip's prior statements and the fact that the remix was available for free download, Phillips believed that he could use it for any purpose. So, Phillips went about setting Monster's "Ruckus in the Rockies" video to Z-Trip's Beastie Boys remix.

When Phillips' first cut of the video was complete, he sent Z-Trip a link to the video, asking him to "have a look at the video" and "let [him] know if [he] approve[d]." Z-Trip responded: "Dope! Maybe at the end when you put up the info about my Beasties mix, you could post [a link to my website below it]." Phillips believed that Z-Trip's response—"Dope!"—indicated the DJ's approval of the entire video and all of its elements. Phillips further believed that, through Z-Trip's email, Monster had been granted a license to use the remix in exchange for adding to the video a link to Z-Trip's website.

The court first considered Monster's breach of contract claim. According to Monster, the conversations and emails between Phillips and Z-Trip formed a contract, the terms of which were that Monster could use the remix for free in exchange for placement of the link. Monster further argued that, because its use of the remix implicated the Beastie Boys' copyrights, Z-Trip necessarily represented to Monster that he had the authority to grant a license to use the original recordings that were contained in the remix. According to Monster, Z-Trip breached this agreement because he could not, in fact, convey a valid license.

The court would have none of Monster's argument. Instead of entertaining Monster's strained interpretation of Phillips' and Z-Trip's interactions, it subjected Monster's claim to a traditional contracts analysis, requiring "an offer, acceptance, consideration, mutual assent and intent to be bound." Not one of the pair's interactions contained an offer, and Z-Trip's "Dope!" was too ambiguous to constitute acceptance. In addition, the sparse communications between the two could not be read to imply a binding promise by Monster in exchange for Z-Trip's approval of its proposed use of the remix. Finally, the court found that no reasonable person could have understood Z-Trip's and Phillips's exchanges as setting forth a license on behalf of the Beastie Boys to use the copyrighted material underlying the remix in the video; nor did Monster or Phillips have any credible basis to believe that Z-Trip was in a position to grant such a license. Accordingly, the court dismissed Monster's third-party claim for breach of contract.

Monster's remaining claim against Z-Trip was based on the DJ's alleged failure to disclose that Z-Trip did not have permission to license his remix because it contains Beastie Boys music. Monster asserted that Z-Trip committed fraud when, after Phillips asked him "if he had any music that Monster could use as the soundtrack [to the video]," Z-Trip "told Phillips that Monster could use his [remix]."

The court found Monster's entire fraud claim "risible." It found that no reasonable fact-finder could infer fraudulent intent on Z-Trip's part, and that no reasonable juror could find that Monster reasonably relied on Z-Trip's allegedly fraudulent statements. Monster had "no business entrusting such matters to Phillips," who "completed one semester of college and worked in the forestry and ski industries before joining [the company]." Z-Trip's and Phillips's interactions, when viewed as a whole, did not supply a reasonable basis on which a major corporation could conclude that it had obtained the necessary license to make use for its own purposes of a third party's original recordings. Thus, the court dismissed Monster's fraud claim, and held that if Monster is eventually held liable to the Beastie Boys, it may not shift that responsibility to Z-Trip.

The case is *Beastie Boys v. Monster Energy Co.*, No. 12-Civ-6065, 2013 WL 5902970, 2013 U.S. Dist. LEXIS 157780 (S.D.N.Y. Nov. 4, 2013).

Trademark, Copyright & False Advertising

Kaye Scholer's Trademark, Copyright & False Advertising Practice is unique in that we have both highly experienced IP trial counselors and trial attorneys. This experience is key to developing a strategy at the early stages that will protect your interests if the matter ends up in litigation. We develop a winning strategy from the outset of a dispute, focusing our efforts on preparing for the turning point of the case, avoiding costly side skirmishes along the way, and bringing maximum pressure at the key moment—whether it is in expert discovery, a motion for summary judgment or even a trial.

Our experience allows us to effectively handle disputes on an expedited basis through TROs and preliminary injunction proceedings, efficiently manage targeted discovery, and often set the stage for early disposition of disputes by summary judgment or settlement.

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