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HEARING: August 8, 2000

Paper No. 11
DEB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Grane Healthcare Co.

Serial No. 75/407,280

Raymond J. Harmuth of Deopken Keevican & Weiss, P.C. for Grane Healthcare Co.

Angela Bishop Wilson, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney).

Before Hairston, Wendel and Bucher, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

An application has been filed by Grane Healthcare Co. to register the mark "AMBER WOODS" for use in connection with "assisted living care centers" in International Class 42.¹

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to the identified services, so resembles the mark "AMBERCARE" which is registered for "home health care services," also in International Class 42,² as to be likely to cause confusion, to cause mistake or to deceive.

¹ Ser. No. 75/407,280, filed on December 12, 1997, which alleges dates of first use of July 1, 1997.

² Registration No. 2,034,357, issued January 28, 1997.

Applicant has appealed. Briefs have been filed, and at applicant's request, an oral hearing was held on August 8, 2000.

We affirm the refusal to register.

We turn first to a consideration of the services herein. Applicant asserts that assisted living centers are markedly different from home health care services. In urging reversal of the refusal to register, applicant maintains that the Trademark Examining Attorney's submission of third-party registrations allegedly demonstrating that entities provide both services is irrelevant because these registrations do not show that the services are marketed together. Moreover, applicant argues that the Trademark Examining Attorney has misinterpreted evidence from the Internet by giving too broad a definition to "assisted living" by including "home health care" therein.

It is well settled that services need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. Instead, it is sufficient that the services are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances that would give rise, because of the marks used in connection therewith, to the mistaken belief that they

originate from or are in some way associated with the same producer or provider. See Monsanto Co. v Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978); and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

The Trademark Examining Attorney argues as follows:

The applicant provides assisted living care centers. The registrant provides home health care services. These services are often marketed to the same class of purchasers, namely, elderly persons or disabled persons. Residents of assisted living care facilities are helped with daily living tasks and provided medical care. Similarly, persons who require home health care services are assisted with daily tasks and provided health care. The distinction between the two services is that in one instance the consumer is residing at home, and in the other instance the consumer is living in a facility ... (brief, pp. 3-4).

Accordingly, even if we were to accept the applicant's position that "assisted living care centers" is not broad enough to include "home health care services," that is not the end of the inquiry. The proper question is whether these two types of services are "related in some manner" such that consumers would mistakenly believe that they are in some way associated with the same provider? These services are generally offered to aged, ill or injured persons who have gotten to the place that they need assistance with living. Applicant and registrant, in their respective promotional fliers both emphasize a caring approach, compassion and

understanding, maximizing the client's independence, and the availability of professionals 24-hours a day, etc. Both strive to provide personalized supportive services and health care designed to meet the needs of those who need help with activities of daily living. The primary difference: only one provides housing.

The Trademark Examining Attorney also makes the argument that applicant's assisted living services may well be seen as being within registrant's natural zone of expansion:

It is not uncommon for persons [who] initially utilize home health care services to later move to an assisted living care center. For a person [who values her] independence, assisted living care centers are an attractive alternative to a long care center, when home health care is no longer an option due to a change in circumstances ... (Trademark Examining Attorney's appeal brief, p. 5).

A senior citizen having the provision of home health care through an independent living residence or in her own home, for example, may be compelled by health problems to move to an assisted living center or even seek nursing home care. Each represents a distinct link along a continuum of long-term care options. In fact, the third-party registrations made part of this record demonstrate that some entities do indeed apply the same service mark to several points along this continuum.

Applicant argues that registrant's home health care services are marketed to physicians while its services are

promoted directly to potential consumers and their family members. We note, however, that the literature of both parties focuses on the important role of family caregivers, and we have to assume that a significant portion of registrant's business also comes from direct patient inquiries as well as the queries of the family members of such patients. Certainly, as the Trademark Examining Attorney points out, neither recital herein has any limitations on the respective parties' channels of trade.

Furthermore, physicians are inevitably a critical part of the care-giving team for any senior citizen or injured individual. Hence, it stands to reason that a portion of registrant's home health care business and applicant's assisted living center business would result from physician referrals. Finally, there is nothing in the record to suggest that physicians without direct experience with home health care providers or assisted living centers have the expertise readily to differentiate among similarly-named, long-term care providers. Accordingly, although the purchase of these long-term care services is not normally an impulsive decision, we believe that even relatively sophisticated professionals and referring institutions are likely to be confused because of the similarities of the marks.

While we agree with applicant that "... the costs associated with assisted living care centers and home health care services are relatively [high]..." and hence prospective purchasers would be more discerning than is the case with a routine transaction, by the same token we are not convinced that most consumers seeking out long-term care could necessarily be deemed "sophisticated."

Applicant points out that the Pittsburgh/Allegheny County classified directory uses separate headings for "assisted living and elder care centers" and for "home health care services." As noted above, we acknowledge they are not identical inasmuch as one category offers a residential component while the other does not. However, to the extent that we deem these to be alternative approaches to long-term care, how they are handled in the world of classified directories is irrelevant to our likelihood of confusion analysis.

With respect to the marks, it is well settled that marks must be compared in their entireties. Nevertheless, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their

entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, "that a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark. ..." 224 USPQ at 751.

Here, the dominant element of registrant's AMBERCARE mark is the arbitrary term AMBER inasmuch as the word CARE is highly descriptive of health care services. The word AMBER is also the dominant element of applicant's mark, AMBER WOODS. Again, AMBER appears to be totally arbitrary, while the word WOODS is at least suggestive - "Amber Woods sits on 13 wooded acres in northern Allegheny County..." (from applicant's brochure, emphasis supplied).

In view thereof, while differences admittedly exist between the marks when viewed on the basis of a side-by-side comparison,³ when considered in their entireties, applicant's AMBER WOODS mark is substantially similar to registrant's

³ Such a comparison, however, is not the proper test to be used in determining the issue of likelihood of confusion inasmuch as it is not the ordinary way that customers will be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks that must determine, due to fallibility of memory, whether confusion as to source or sponsorship is likely. The proper emphasis is on the average purchaser who normally retains a general rather than a specific impression of marks. See, e.g., Envirotech Corp. v. Solaron Corp., 211 USPQ 724, 733 (TTAB 1981).

AMBERCARE mark. The first two syllables of these three syllable marks look and sound the same. Moreover, even if consumers were to notice the differences in the second word (or third syllable) in each of the respective marks, they may well believe that due to the shared term AMBER, the residential care offered by applicant under its AMBER WOODS mark represents an expanded service from the same source as the company which offers home health care under the AMBERCARE mark.

Decision: The refusal to register is affirmed.