

**THIS OPINION IS NOT A
PRECEDENT OF THE T.T.A.B.**

Hearing:
December 11, 2007

Mailed:
March 14, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re K&B Underwriters, LLC

Serial No. 78528124

Michael C. Whitticar of Dunlap Grubb & Weaver, P.C. for K&B Underwriters, LLC.

James A. Rauen, Trademark Examining Attorney, Law Office 109 (Dan Vavonese, Managing Attorney).

Before Rogers, Zervas and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

K&B Underwriters, LLC filed a use based application on the Principal Register for the mark K&B UNDERWRITERS, in standard character format, for use in connection with services ultimately identified as "insurance brokerage services, namely providing business-to-business insurance brokerage services," in Class 36 (Serial No. 78528124).

The Examining Attorney refused registration under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with business-to-business insurance brokerage services, is

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likely to cause confusion among consumers because of the following previously registered marks owned by KB Home Corporation which are very similar to applicant's mark:

1. KB HOME, in typed drawing format, for "mortgage lending and escrow services in connection with the construction and brokerage of single family and multiple family dwelling units," in Class 36;¹ and,
2. KB HOME MORTGAGE, in typed drawing format, for "mortgage lending services in connection with the construction of, and to assist in the purchase of, single family and multiple family dwellings," in Class 36.²

Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion

¹ Registration No. 2825554, issued March 23, 2004. Registrant disclaimed the exclusive right to use the word "home."

² Registration No. 2774497, issued October 21, 2003. Registrant disclaimed the exclusive right to use the words "home mortgage."

analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks").

A. The similarity or dissimilarity and nature of the services, and classes of consumers.

In an *ex parte* appeal, likelihood of confusion is determined on the basis of the services as they are identified in the application and the cited registrations. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976). *See also Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed").

In this case, the cited registrations are for the registrant's "mortgage lending and escrow services in connection with the construction and brokerage of single family and multiple family dwelling units,"³ on the one hand, and applicant's "business-to-business insurance brokerage services," on the other. Because applicant did not define, explain, or submit any evidence clarifying the meaning of "business-to-business insurance brokerage services," nor did the Examining Attorney seek any clarification, we construe the description of services to be insurance brokerage services between businesses, as opposed to between a business and an individual. In other words, applicant's services may be considered insurance brokerage services in connection with insuring businesses.

To prove that the services at issue are related, the Examining Attorney submitted copies of 20 of 123 third-party registrations that include both "insurance brokerage"

³ Registration No. 2825554 for the mark KB HOME. Although the descriptions of services in registrant's two registrations are somewhat different, we consider them to be the same for our purposes. For example, Registration No. 2774497 for the mark KB HOME MORTGAGE does not include "escrow" services. However, escrow services are generally associated with mortgage services because property owners with mortgages frequently pay money for insurance and taxes on their properties into an escrow account each month. The holder of the mortgage then pays the insurance and tax bills out of the escrow account when the bills are due.

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and "mortgage lending" in the description of services.⁴ Third-party registrations based on use in commerce that individually cover the activities identified in both the applicant's description of services and the registrant's descriptions of services suggest that the listed services are a type that may emanate from a single source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

In addition, the Examining Attorney submitted excerpts from 10 websites whose owners provide insurance services and mortgage lending services.⁵ The excerpts were from the following companies: Nationwide Mutual Insurance Company,

⁴ In Registration No. 2763779, one of the 20 registrations submitted by the Examining Attorney, the registrant deleted "insurance brokerage in the field of real estate titles."

⁵ Applicant objected to the websites submitted by the Examining Attorney on the ground that the Examining Attorney introduced them into evidence in his denials of applicant's two requests for reconsideration, and therefore introduced them after applicant filed the appeal. Trademark Rule 2.142(d), 37 CFR §2.142(d) (the record should be complete prior to appeal). However, when the applicant requested reconsideration, it opened the door for the Examining Attorney to submit additional evidence. "Regardless of whether an applicant submits new evidence with a request for reconsideration, the examining attorney may introduce additional evidence directed to the issue(s) for which reconsideration is sought. TBMP §1207.04. See *In re Giger*, 78 USPQ2d 1405 (TTAB 2006)." TMEP §715.03 (5th ed. 2007). Because applicant sought reconsideration after the final refusal by the Examining Attorney, the Examining Attorney was entitled to introduce additional evidence in denying the requests for reconsideration, and applicant's objection to such evidence is overruled.

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American International Group, Inc. (AIG), State Farm Mutual Automobile Company, Allstate Insurance Company, Metropolitan Life Insurance Company (MetLife), Countrywide Home Loans, Inc. (Countrywide Financial), Southwest Business Corporation (SWBC), Bank of the West, The Adirondack Trust Company, and Sovereign Bank.

Based on the third-party registrations and the excerpts from the websites showing that the same companies render mortgage lending services and insurance brokerage services, the Examining Attorney concluded that those services were related.

On the other hand, applicant argued that its services and the registrant's mortgage and escrow services are not competitive.⁶ "This is evident from the fact that a company offering [business-to-business] insurance services and a company offering new home mortgage services do not compete for the same purchasers. A reasonable purchaser seeking [business-to-business] insurance services would not encounter KB Home providing new home mortgage lending services."⁷ To support its argument, applicant submitted,

⁶ Applicant's Brief, p. 14.

⁷ Applicant's Brief, p. 14; Applicant's August 7, 2006 Second Request for Reconsideration, p. 4. We note that the services of the applicant and the registrant do not have to be competitive to support a finding that there is a likelihood of confusion. It is sufficient if the respective services are related in some manner and/or that the conditions surrounding their marketing are such

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inter alia, the insurance and mortgage entries from the 2003-2004 *Yellow Book USA, Inc.* (Northern Virginia) and a GOOGLE search hit list featuring the first 50 entries for the search term "insurance" and the first 40 entries for the search term "mortgage." Applicant asserted that this evidence shows "that no company advertises or offers [business-to-business] insurance services with new home mortgage services."⁸

Two of the insurance companies in the insurance section of the *Yellow Books USA, Inc.* were offering financial services. The following advertisements appeared in the insurance section of the directory:

Nationwide[®] Insurance & Financial Services
Auto · Home · Financial Products · Business ·
Life

CHEVY CHASE BANK
Full Service Bank

that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used in connection therewith, give rise to the mistaken belief that they emanate from or are associated with a single source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d at 1785; *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

⁸ Applicant's Brief, p. 15.

In addition, many of the trade names include the word "Financial." Representative examples of such names include the following:

Segal Financial Services Inc.

Raymond James Financial Services

Sahouri Insurance & Financial Services LLC

While the nature of the "financial services" in the trade names is not defined, financial services could include mortgage lending services. Thus, the use of "financial services" in advertising and trade names leaves open the possibility that business consumers will encounter insurance brokerage services with all types of financial services, including mortgage lending services.

Applicant further contends that the evidence of record is not probative of any alleged relationship between the services at issue because the Examining Attorney artificially broadened the registrations to encompass mortgage lending services *per se*, instead of mortgage lending services in connection with single family and multiple family dwellings. "Without this artificial broadening, **none** of these third party registrations shows the combination of the Appellant's services and the new home residential mortgage lending services of the

[registrant] in a single third party registration.”⁹ We are not persuaded by this argument because the applicant is drawing too fine a distinction between mortgage lending services *per se* and mortgage lending services in connection with single and multiple family dwellings. First, mortgage lending services *per se* encompass mortgage lending services in connection with single and multiple family dwellings. Second, applicant has not introduced any evidence to support its contention that consumers draw a distinction, if any, among the different types of mortgage lending services and their respective sources. Finally, the Examining Attorney correctly contends that because “the appropriate inquiry is into the goods and services that are *similar or related* to those of the parties,” the determination of whether the services of the parties are related is not necessarily limited to the precise language in the description of services. In other words, while the services at issue may be subject to limitations or restrictions as to the channels of trade and classes of consumers, such limitations or restrictions may, or may not, having a bearing on whether specific services are related. That finding of fact will depend upon the facts in the case.

⁹ Applicant’s Brief, p. 11.

Applicant also contends that the inference to be drawn from the third-party registrations is rebutted by the fact that "only a tiny fraction of all registrations that contain the services of either 'insurance brokerage' or 'mortgage lending' actually contain **both** services."¹⁰ Applicant submitted results from a Trademark Office database search demonstrating the following relationship between "mortgage lending" and "insurance brokerage" services:

Number of Registrations	Services
2764	Insurance brokerage services
2063	Mortgage lending services
130 ¹¹	Insurance brokerage and mortgage lending services
4697	Insurance brokerage services or mortgage lending services, but not both

Moreover, applicant points out that because a single entity may own more than one registration, there are actually only 75 different entities that own registrations for both insurance brokerage services and mortgage lending services. Accordingly, applicant concludes that "[b]ased on

¹⁰ Applicant's Brief, p. 12.

¹¹ The difference between the search results of the Examining Attorney and applicant is a function of the fact that the searches were conducted at different times. For purposes of our analysis, we will consider the results to be essentially the same.

the evidence provided by the Examiner, it is clear that the third party registrations fail to support the proposition '[i]t is quite commonplace for a single company to offer a wide range of financial services, including both insurance brokerage and mortgages.' To the contrary, the third-party evidence indicates that it is exceedingly rare that a single company uses a mark on both insurance brokerage services and mortgage lending services."¹²

While applicant is correct that there are many more registrations for either mortgage lending services or insurance brokerage services than for both services, there may be separate registrations for each service by the same individual registrants. Also, the Examining Attorney's conclusion that mortgage lending services and insurance services may emanate from a single source is based on excerpts from third-party websites, as well as third-party registrations. In fact, some of the websites are from very large, well-known companies such as Allstate, State Farm, MetLife, Nationwide and AIG. Thus, even assuming the correctness of applicant's premise (*i.e.*, that only a small number of entities offering mortgage or insurance services offer both), the fact that large, well-known companies render both insurance services and mortgage lending

¹² Applicant's May 5, 2006 Request for Reconsideration, p. 13.

services will color consumer perception despite their small number. Finally, we agree with the Examining Attorney that while the existence of third-party registrations for different goods and/or services serves to suggest that those goods and/or service may emanate from a single source, the lack of third-party registrations for the different goods and/or services does not serve to suggest that they are unrelated. As indicated *supra*, registrants may have separate registrations for different goods and services. Moreover, registration is not the *sine qua non* of whether goods and services are related.

Applicant contends that the differences between its insurance services and the registrant's mortgage services is emphasized by the fact that the insurance industry and mortgage lending are regulated by different state agencies.

Thus, the fact that nearly all states have two different agencies regulating the two different industries reflects the differences in the marketplace and product lines between insurance and mortgage lending. [Internal citation omitted]. This evidence shows insurance brokerage and mortgage lending are sufficiently different since the services are regulated differently in the marketplace. Therefore, a reasonable consumer would not be likely to confuse the services of insurance and mortgage lending, and is not likely to be confused into

believing that such services originate from a single source.¹³

However, there is no evidence that consumers are aware that the mortgage and insurance industries are regulated by different state agencies. To the extent that consumers may be aware that the industries are regulated by different state agencies, there is no evidence that consumers care about this fact or that it has any bearing on their purchasing decisions. Finally, in today's society, it is common knowledge that individuals, as well as businesses, are subject to the rules and regulations of many different local, state and federal agencies (e.g., restaurants are subject to local zoning requirements, health department standards, and liquor law regulations).

Applicant concludes that reasonable consumers will not confuse applicant's marks and services with the registrant's marks and services.¹⁴ However, the issue is not whether consumers will confuse the marks and services; the issue is whether consumers will be confused as to the source or sponsorship of the services. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). Based on this

¹³ Applicant's Brief, p. 16.

¹⁴ Applicant's Brief, p. 13. Applicant also characterized one of the issues to be decided as "[w]hether a reasonable consumer would confuse the services of Appellant's mark with the services of the '554 and '497 Registrations." (Applicant's Brief, p. 4).

record, we find sufficient evidence to conclude that purchasers of business insurance would be exposed to entities rendering both business insurance services and mortgage lending services, including mortgages for single and multiple dwelling units. In other words, applicant's services and the registrant's services would be rendered to the same consumers.

Applicant's services are business-to-business insurance brokerage services. On the other hand, the registrant's services are mortgage lending services in connection with the construction of single and multiple family dwelling units. Presumably, mortgages for single family dwelling units are written primarily for individual consumers, however, there is nothing prohibiting an individual or a small business from borrowing money from registrant to build a single family dwelling for investment purposes, and therefore businesses could engage registrant for its mortgage lending and escrow services. In this regard, we note that there is no restriction in the registrant's descriptions of services excluding businesses from engaging registrant's mortgage lending and escrow services.¹⁵

¹⁵ In its Brief, applicant incorrectly restricts registrant's trade channels to "purchasers of a mortgage from a builder of dwelling units." (Applicant's Brief, p. 21). Applicant is basing this argument on extrinsic evidence it obtained regarding registrant's business. However, there is no such restriction in

Likewise, with respect to registrant's mortgage lending and escrow services in connection with multiple family dwelling units, there is no restriction preventing registrant from writing mortgages to businesses wishing to build such units. Indeed, individuals, including individuals acting in a business capacity (e.g., a sole proprietorship) and other small businesses that acquire single and multiple family dwelling units as rental units for a real estate business will need insurance. In fact, they may require some sort of business insurance.

Even individuals who may have used registrant's services only their capacity as individuals, may be employed in business positions that would prompt them to consider purchasing insurance from applicant. Such individuals may assume that there is a relationship between the different KB and K&B services.

In view of the foregoing, we find that the services of the parties are related and that the classes of consumers for applicant's and registrant's services overlap.

registrant's description of services. As indicated in the discussion in Section A *supra*, our analysis is based on the description of services in the registration at issue regardless of what the record may reveal as to the particular nature of registrant's services.

B. The similarity or dissimilarity of established, likely-to-continue trade channels.

Applicant contends that the channels of trade are different because applicant sells its services "directly to businesses with insurance needs" while registrant's services are "limited to mortgages sold in connection with the construction of single family and multifamily residential dwellings."¹⁶ Applicant stated that it renders its services to businesses seeking to minimize risk and that registrant is a homebuilder who provides mortgages and escrow services in connection with its construction services. However, as discussed in the preceding section, the problem with applicant's argument is that it does not take into account that there are no restrictions in the registrant's description of services. Therefore, we may presume that registrant's mortgage lending and escrow services may be sold to businesses who also require business insurance, through all normal channels of trade for marketing services to businesses. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002).

¹⁶ Applicant's Brief, p. 21.

- C. The conditions under which and buyers to whom sales are made (i.e., impulse vs. careful sophisticated purchasing).

Applicant contends that the purchasers of the services of both parties are sophisticated arguing, in essence, that because the services involve finances, they are purchased only after careful planning and deliberation.¹⁷ We agree that consumers are likely to exercise a high degree of care in selecting vendors for financial services. However, this factor does not carry as much weight as it might have because applicant did not provide any evidence regarding the decision-making process used by these purportedly careful and sophisticated purchasers when selecting insurance providers or mortgage lenders, the role trademarks play in their decision making process, or how observant and discriminating consumers are in practice. The problem with applicant's "degree of consumer care" argument is that there is no corroborating evidence. Nevertheless, because the services involve financial services, we find that this likelihood of confusion factor weighs slightly in favor finding that there is no likelihood of confusion.

¹⁷ Applicant's Brief, p. 21.

D. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co., supra.* In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). Also, we are mindful that the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of overall commercial impression so that confusion as to the source of the services offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). In this case, the proper focus is on the recollection of the average business customer, who retains a general rather than specific impression of the marks. *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1957 (TTAB 2006)

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(applicant's products are computer hardware, namely, communications servers and the registrant's products are computers and computer peripherals); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975) (opposer's products are sold to industrial, retail or commercial, and military users and applicant's products are sold to industrial and institutional consumers such as manufacturing plants, transportation companies, office buildings, utilities, restaurants, hospitals, and nursing homes).

At the outset of our analysis of the marks, we note that there is no evidence of record regarding whether the letters "K&B" or "KB" have any significance in applicant's business-to-business insurance brokerage services or registrant's mortgage lending and escrow services. In other words, the letters "K&B" and "KB" do not connote anything about the services at issue. Accordingly, the letters "K&B" and "KB" are fanciful or arbitrary when used in connection with applicant's business-to-business insurance brokerage services or registrant's mortgage lending and escrow services.

The letters "K&B" in applicant's mark and the letters "KB" in registrant's marks are the dominant portions of their respective marks. The term "Underwriters" in

applicant's mark K&B UNDERWRITERS is descriptive of insurance brokerage services. Applicant disclaimed the exclusive right to use the word "Underwriters" in response to the Examining Attorney's requirement to do so because that word is descriptive of insurance brokerage services.¹⁸ Also, we take judicial notice that the term "Underwriter" is defined as "one that underwrites a policy of insurance: an individual or company that insures: insurer."¹⁹

Likewise, the word "Home" in applicant's mark KB HOME and the term "Home Mortgage" in applicant's mark KB HOME MORTGAGE are descriptive when used in connection mortgage lending services for single and multiple dwelling units (*i.e.*, homes). A descriptive feature of a mark is entitled less weight than inherently distinctive elements when weighing the similarity of marks. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("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 that the ultimate conclusion rests on consideration of the marks in their

¹⁸ July 19, 2005 Office Action.

¹⁹ Webster's Third New International Dictionary of the English Language Unabridged, p. 2491 (1993). The Board may take judicial notice of dictionary evidence. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

entireties"). Accordingly, the letters "K&B" and "KB" are entitled to more weight in the comparison of the marks than the descriptive words "Underwriters," "Home," and "Home Mortgage."

The significance of the letters "K&B" in applicant's mark and the letters "KB" in registrant's marks are highlighted by their location at the beginning of the marks. As such, they are the first features consumers will see when encountering the marks. Thus, they are likely to have a greater impact on purchasers and be remembered by them. *Presto Products Inc. v. Nice-Pak Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed on the mind of a purchaser and remembered). See also *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) ("Veuve" is the most prominent part of the mark VEUVE CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word).

In view of the preceding framework for analyzing marks, we find that consumers will look to the letters

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"K&B" and "KB" as source indicators and the terms "Underwriters," "Home," and "Home Mortgage" as describing the services. Under these circumstances, the marks are similar in appearance because the registered marks both include the letters "KB," in the same order, and applicant's mark feature the letters "K&B." The ampersand between the letters "K" and "B" in applicant's mark is not a sufficient visual distinction between the marks. See *Goodyear Tire & Rubber Co. v. Dayco Corp.*, 201 USPQ 485, 488 n.1 (TTAB 19878) (FAST-FINDER with a hyphen is substantially identical to FASTFINDER without a hyphen). Cf. *In re Seaman & Associates Inc.*, 1 USPQ2d 1657 (TTAB 1986) (use of ampersand did not render descriptive terms distinctive).

The marks are aurally similar and have a similar connotation to the extent that the dominant portions of each mark share the letters "K" and "B" in that order.

Because the letters "K&B" and "KB" are arbitrary or fanciful when used in connection with services at issue, the marks engender similar, if not identical, commercial impressions. We are cognizant that we must consider the marks in their entireties. However, in view of the fact that the marks are used in connection with related financial services and the similarity of the letters "K&B"

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or "KB" in the marks, consumers encountering applicant's mark and who are familiar with the registered marks are likely to believe that applicant's business-to-business insurance brokerage services are somehow associated or affiliated with registrant's mortgage lending and escrow services with which they are familiar.

E. Balancing the factors.

Considering all of the relevant *du Pont* factors, and the reasons we have discussed, we conclude that there is a likelihood of confusion between applicant's mark K&B UNDERWRITERS and registrant's marks KB HOME and KB HOME MORTGAGE. Any doubt as to whether there may be a likelihood of confusion is resolved against applicant. *In re Shell Oil Co.*, 16 USPQ2d at 1691.

Decision: The refusal to register is affirmed.