

THIS DISPOSITION IS NOT CITABLE AS
PRECEDENT OF THE TTAB

JUNE 30, 1997

Hearing:
June 26, 1996

Paper No. 23
RLS/AKP

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Home Care Holdings, Inc.
v.
Care Enterprises, Inc.

Opposition No. 85,876
to application Serial No. 74/73/760,377
filed on October 28, 1988

Joel E. Bair of Varnum, Riddering, Schmidt & Howlett for
Home Care Holdings, Inc.

Darrell L. Olson of Knobbe, Martens, Olson & Bear for Care
Enterprises, Inc.

Before Simms, Quinn and Walters, Administrative Trademark
Judges.

Opinion by Simms, Administrative Trademark Judge:

Home Care Holdings, Inc. (opposer), a Michigan
corporation, has opposed the application of Care
Enterprises, Inc. (applicant), to register the mark CARE
HOME HEALTH (HOME HEALTH disclaimed), for providing health

care services in the home.¹ In the second amended opposition opposer alleges that applicant's mark so resembles opposer's previously used and registered mark CARE HEALTH SERVICES for providing health care services in the home that confusion is likely.² Opposer has also asserted as a ground for opposition that applicant has not rendered services under the mark in commerce. In this regard, opposer pleads that applicant has used its mark solely in the state of California in connection with services provided solely from California locations to customers in their homes and that applicant has not rendered services under the mark in states other than California.

In its amended answer, applicant has denied the essential allegations of the notice of opposition but has asserted that, contrary to the dates of use claimed in its application, applicant has used its mark since at least as early as February 1983. While applicant has admitted that the descriptions of services in its application and opposer's pleaded registration are identical, applicant has denied that the parties' actual services are identical.

The record of this case consists of testimony (and exhibits) taken by both parties, applicant's notice of

¹Application Serial No. 73/760,377, filed October 28, 1988, claiming use since December 24, 1983. The application has been filed pursuant to the provisions of Section 2(f) of the Act, 15 U.S.C. 1052(f).

²Registration No. 1,343,485, issued June 18, 1985, Sections 8 and 15 affidavit filed. The words HEALTH SERVICES have been disclaimed in the registration.

Opposition No. 85,876

reliance and a stipulation concerning one of applicant's exhibits (exhibit 152). By rule, the record also consists of applicant's application file. The parties have filed briefs on the case and an oral hearing has been held.

Opposer's Record

Opposer, whose main offices are in Palm Beach, Florida, owns and operates home health care agencies and provides services in the states of Michigan, Massachusetts, Connecticut, Maryland, Virginia, Florida and California, as well as the District of Columbia. Opposer has approximately 1,800 employees of which 1,600 provide patient care.

According to opposer's testimony, 40 to 45 percent of opposer's home health care business comes from referrals from physicians (cardiologists, oncologists and orthopedic surgeons) while 30 to 35 percent comes from direct patient inquiries. Opposer advertises by way of print media and direct mail.

Opposer's mark CARE HEALTH SERVICES for its home health care services has been used continuously since 1983. As noted above, opposer obtained a federal registration of this mark in 1985. Opposer has known about applicant and applicant's mark since 1983 or 1984.

With respect to the issue of likelihood of confusion in this case, opposer's chairman, president and chief executive officer, Mr. William Mara, testified, at 30-32:

Q. What leads you to believe that there would be such a high likelihood of confusion?

A. Number one, the marks are essentially identical. Number two, we provide the same services, and we market to exactly the same referral sources. Number three, our patients are elderly. Many of them are--virtually all of them have health problems to varying degrees. Many of them are alone, don't have people or advisors who can assist them in differentiating between a variety of providers.

Q. Well, let's stop right there. You told us that some of these, or a good percentage of these, come about by referrals by doctors.

A. Uh-huh.

Q. Orthopedic surgeons, cardiologists and oncologists.

A. Uh-huh.

Q. Those individuals, it would seem to me, are familiar with health care providers in the industry.

A. Not necessarily. Physicians have varying degrees of awareness about home care providers, unless they've had direct experience, either favorable or unfavorable. It's estimated -- the industry estimates that less than 25 percent of physicians, nationally, are fully -- fully cognizant and utilizers of home health care services. This is a young industry. And physicians awareness is a key and crucial issue. Another problem is the problem of differentiation for many physicians who are aware of home health care services, and take a look in the marketplace that might have dozens of providers, and they have great difficulty differentiating -- if they haven't had personal experience,

they have great difficulty in differentiating between providers. Obviously, for a group of physicians who, you know, don't have personal experience, direct personal experience with providers, you take a look in the Yellow Pages, and there are 50 providers in the marketplace. How can you differentiate between those providers, particularly if there's a great deal of confusion about who they are, because of similarities in names or whatnot.

Later, Mr. Mara testified, at 100:

Q. Would the doctor be more likely to distinguish or differentiate between health care services provided by Care Health Services as opposed to Care Home Health; do you think?

A. I -- I think it's a very real possibility that a physician could get confused between the two?

Q. And why do you say that?

A. Because of the similarity of their names. Even in our own proceedings today, you have been tripped up on the name, you have been tripped up on the name, I believe. I think I'm probably the only person who doesn't get tripped up on the name.

According to opposer's testimony, in 1985 or 1986, opposer purchased La Jolla Nurses Registry, a home health care provider, in the San Diego area. Operating under the name La Jolla Nurses Home Care, this company is now a subsidiary of Care Health Services, Inc. Ms. Brittnei Salerno, the administrator of La Jolla, testified that she is knowledgeable of applicant's operation in San Diego.

With respect to an instance of actual confusion, she testified, at 21, as follows:

A. In fact, I just heard it again very recently. I was interviewing for a staffing coordinator position in our office. We had put an ad in the paper for it. And the respondents, one of the interviewees that came in, as soon as she sat down, that's what she wanted to know; if we were the same company because she had worked for Care Home Health prior.

Ms. Salerno went on to indicate that the service mark CARE HEALTH SERVICES has been minimized in the San Diego area because of the confusion with applicant's mark CARE HOME HEALTH. Instead, opposer's subsidiary in the San Diego area has used the name "La Jolla Nurses" or "La Jolla Nurses Home Care." Salerno, dep., 22.

Opposer, through its officers, is aware of third-party home health care providers operating under such names and marks as RES-CARE, ALL CARES and SPECIAL CARE.

Applicant's Record

According to applicant's testimony, applicant has developed a large chain of skilled nursing facilities, a pharmaceutical operation in California (operating under the name Health Care Network) and offers skilled nursing home health care services under the mark CARE HOME HEALTH. Applicant also provides custodial care services under the mark Care-at-Home. Applicant's CARE HOME HEALTH services

are provided within the state of California, and applicant provides those services in the state of Ohio under the mark Americare Home Care but also uses the mark CARE HOME HEALTH in the manner more fully explained below.

Applicant first used its mark CARE HOME HEALTH in February 1983 in connection with skilled home health care services. As of 1992, applicant's revenues from its CARE HOME HEALTH services exceeded \$14 million. According to the record, most of applicant's clients are geriatric patients covered under the Medicare program. Applicant's witnesses are aware of no instances of actual confusion involving the respective marks of the parties.

Applicant called several witnesses in an attempt to demonstrate the common use of the term "CARE" with respect to home health care services. For example, a former employee, Ms. Sandra Joy Myers, testified to her awareness of the use of the mark PERSONAL CARE HEALTH SERVICES, both within and outside of the state of California, in connection with home health care services. Ms. Myers also testified to her awareness of third-party use of the mark OMNI + CARE in connection with health care services.

An advertising brochure (exhibit 153) was made of record during applicant's testimony period. It is noted that on the front of this brochure applicant is identified as "Care Home Health Services, Inc." below which are identified, in smaller print, applicant's operations Care

Home Health and Care-at-Home. On the back of that brochure is printed "Rely on Care Home Health Services ..."

Finally, Ms. Paula Herr, corporate vice president of Care Home Health, testified with respect to applicant's subsidiary and the use of the mark CARE HOME HEALTH in Ohio. Among other things, Ms. Herr testified that this mark along with the mark AMERICARE appear on signs and awnings of that subsidiary's health care facilities in Ohio. Also, patient forms bearing the designation CARE HOME HEALTH are also used by applicant's subsidiary and have been used since 1986. Herr dep., 33. Further, at trade shows, applicant promotes the services of its Ohio subsidiary under both marks AMERICARE and CARE HOME HEALTH. These trade shows have occurred in the states of Tennessee and Florida.³

Arguments of the Parties

Opposer argues that most of the so-called du Pont (In re E.I. du Pont de Nemours & Co., 177 USPQ 563 (CCPA 1973)) factors favor opposer. Opposer argues that the marks are similar, each being dominated by the term "CARE" with the remaining parts of the respective marks being descriptive and disclaimed. Opposer points out that both marks contain the word "HEALTH" and argues that the marks are very similar in sound and appearance as well as being virtually identical

³It is noted that Ms. Herr testified that applicant, Care Enterprises, Inc., is now by merger and change of name Regency Health Services, Inc. Should applicant ultimately prevail in this proceeding, applicant should ensure that appropriate documents evidencing this merger and change of name are recorded in this Office with respect to this application.

Opposition No. 85,876

in connotation and overall commercial impression, with any differences insufficient to distinguish the marks. Further, opposer points out that the respective services are identical and that, in fact, both parties belong to the same trade associations and are listed in some of the same provider directories. With respect to the sophistication of the purchasers, it is the opposer's position that, when choosing home care, patients or their family members are "often acting under a certain degree of emotional stress as well as the physical debilitations caused by advanced age and disease." Opposer's brief, 10. With respect to physicians, who might be considered more sophisticated with respect to the health care field than the ordinary consumer, opposer argues that they, too, have trouble distinguishing between various home health care providers. Opposer also maintains that its mark is a strong one entitled to a broad scope of protection within its field and that third-party marks for which there is some evidence of use convey different commercial impressions (FULL CARE HEALTH SERVICES and PERSONAL CARE HEALTH SERVICES). With respect to the limited evidence of actual confusion, opposer argues that the geographic overlap of the respective marks has been limited and that opposer's efforts in the San Diego area to minimize the use of the mark CARE HEALTH SERVICES and to emphasize the mark La Jolla Nurses Home Care has reduced the level of confusion that would have otherwise existed.

Opposition No. 85,876

With respect to the secondary issue in this case--that applicant has not used its mark in commerce--opposer maintains that applicant's mark CARE HOME HEALTH is used as a service mark only in connection with services rendered within the state of California and, outside of California, at most, as a trade name to identify the California company that renders services in Ohio under the mark AMERICARE. This use, according to opposer, is not use sufficient for purposes of federal registration.

Applicant, on the other hand, argues that confusion is unlikely. Applicant maintains that opposer's mark CARE HEALTH SERVICES is "extremely weak" and should be afforded a very narrow scope of protection. In this regard, applicant points to the 217 federal registrations for third-party marks incorporating the words "CARE" or both the words "CARE" and "HEALTH." According to applicant, these highly suggestive words are commonly used in trademarks or service marks in the health care industry. Applicant argues that the marks are sufficiently dissimilar in overall appearance to avoid likelihood of confusion. With respect to the services, applicant argues that these are relatively expensive services which are not purchased on impulse. For these services, there is a referring physician in all cases, even where an inquiry comes from a patient. Applicant maintains that physicians and health care institutions are highly sophisticated in their knowledge of these services and are, therefore, unlikely to be confused. With respect

Opposition No. 85,876

to the alleged instance of actual confusion noted above, applicant contends that an inquiry from a job applicant concerning opposer's affiliation does not constitute consumer confusion. Finally, applicant argues that the parties have coexisted for twelve years with no confusion by physicians, referring institutions or potential clients, and that opposer's inaction in protesting applicant's use for seven years after learning of applicant's mark "is highly probative of no likelihood of confusion." Applicant's brief, 25.

Concerning the issue of use in commerce, applicant maintains that, aside from its use of the mark in more than one state, a service mark may be federally registered even if an applicant has only a business establishment in a single state. Applicant argues that its health care services rendered in the state of California are federally regulated under the Medicare program, that applicant recruits employees for its services on a nationwide basis, that its services are listed in a nationally distributed directory of home nursing services, and that applicant's payment sources are located throughout the United States. Moreover, applicant points to its use of the mark CARE HOME HEALTH on building signs and patient forms in the state of Ohio (as well as in the state of California).

Opinion

Opposition No. 85,876

Disposing first of the secondary issue of use in commerce, we agree with applicant that this record is sufficient to demonstrate that applicant has satisfied the use in commerce requirements of the Lanham Act. Aside from applicant's use of this mark in more than one state, this record fully supports registration based upon applicant's activities solely within the state of California. Under Section 45 of the Act, 15 USC § 1127, "use in commerce" is the bona fide use of the mark in the ordinary course of trade. This definitional section also indicates that a mark is deemed to be in use in commerce on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce. "Commerce" is defined as "all commerce which may lawfully be regulated by Congress." In this regard, it is not necessary that such services be rendered in more than one state to satisfy the use in commerce requirement. *Larry Harmon Pictures Corporation vs. The Williams Restaurant Corporation*, 18 USPQ2d 1292, 1295 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 823 (1991)). As applicant has noted, its services are certified by the federal Medicare program and governed by federal regulations. Applicant's payment sources include insurance companies located in many states. Applicant's revenue from services rendered under its mark exceeded \$15 million in 1992, and applicant has advertised or otherwise promoted or listed its services beyond the state of California. Finally, even if this use were considered

insufficient use in commerce to satisfy the requirements for registration (and we do not believe it is), applicant's mark, as noted above, has also appeared prominently on forms as well as marketing brochures distributed in Ohio. There is no question but that applicant's services have had an effect on commerce which may be regulated by Congress.

Turning to the central issue of likelihood of confusion, we note that priority is not an issue. *Hewlett-Packard Company v. Human Performance Measurement, Inc.*, 23 USPQ2d 1390, 1394 (TTAB 1992).

After careful consideration of this record and the arguments of the parties, we agree with opposer that these marks, applied to essentially identical services, are so similar that confusion is likely. Comparing the marks in their entireties, they differ only in their descriptive components. We agree with opposer that, as used, the marks CARE HEALTH SERVICES and CARE HOME HEALTH have very similar overall commercial impressions. The fact that both marks begin with the word "CARE" and contain the common word "HEALTH" is significant. Although the purchase of home health 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 CARE HEALTH SERVICES and CARE HOME HEALTH.

While we have based our decision on the issue of likelihood of confusion by comparing the registered mark and

applicant's applied-for mark, we note that in some of applicant's promotional literature it uses the name or mark "Care Home Health Services." This use tends to make it more similar to opposer's registered mark CARE HEALTH SERVICES.

While we have considered the evidence of third-party use of allegedly similar marks as well as the numerous third-party registrations of record, we are persuaded by this record that persons familiar with opposer's CARE HEALTH SERVICES home care services who then encounter applicant's CARE HOME HEALTH home care services are likely to believe, even if they notice the minor differences in the marks, that these services emanate from or are otherwise sponsored or rendered by the same entity.

Decision: The opposition is sustained on the ground of likelihood of confusion; the opposition is dismissed with respect to the issue of use in commerce; registration to applicant is refused.

R. L. Simms

Opposition No. 85,876

T. J. Quinn

C. L. Walters
Administrative Trademark
Judges, Trademark Trial
and Appeal Board