

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB

JAN 28, 98

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Advocat Inc.

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Serial No. 74/515,132

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Lauren W. Anderson of Harwell Howard Hyne Gabbert & Manner  
for Advocat Inc.

Kevin D. Else, Trademark Examining Attorney, Law Office 103  
(Michael A. Szoke, Managing Attorney)

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Before Simms, Seeherman and Quinn, Administrative Trademark  
Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Advocat, Inc. has appealed from the Trademark Examining  
Attorney's refusal to register ADVOCAT ANCILLARY SERVICES,  
with the words "Ancillary Services" disclaimed, for the  
following services:

health care services in support of nursing homes and  
retirement center services for inpatient care,  
specifically institutional pharmaceuticals services,  
nutritional counseling, infusion and respiratory  
therapy services, rehabilitative services, psychiatric

counseling, psychological counseling, medical laboratory services.<sup>1</sup>

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark ADVOCATE HOME CARE, with the words "Home Care" disclaimed, and registered for "home and outpatient health care services",<sup>2</sup> that if used on applicant's identified services, it would be likely to cause confusion or mistake or to deceive.

Both applicant and the Examining Attorney filed briefs on the case; an oral hearing was not requested.

After considering all du Pont factors appropriate to this case, see **In re E. I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), we affirm the refusal of registration.

We turn first to a consideration of the services. Applicant argues that its services and those identified in the cited registration differ because applicant's services "are administered only to 'in-house patients of nursing homes and retirement centers'" while the registrant's mark "is used in connection with 'home and outpatient health care services.'" Brief, p. 2. As a result, applicant asserts that applicant and registrant are not head-to-head

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<sup>1</sup> Application Serial No. 74/515,132, filed April 22, 1994, based on a bona fide intention to use the mark in commerce.

<sup>2</sup> Registration No. 1,829,052, issued March 29, 1994.

competitors in the health care services market, and that their services would not normally be marketed in the same manner.

It is well-established that the services of the parties need not be similar or competitive, or even that they move in the same channels of trade, in order to support a finding of likelihood of confusion. It is sufficient that the respective services of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. See **In re International Telephone & Telegraph Corp.**, 197 USPQ 910, 911 (TTAB 1978).

Although applicant's health care services are rendered to patients within nursing homes and retirement centers, and the registrant's services are home and outpatient health care services, the same consumers may be the recipients of both parties' services. For example, a patient may, after a temporary stay in a nursing home, require home health care services when he or she is released. Or a patient who is receiving home health care services may, on occasion, need care in a nursing home. There is no question that, apart from the venue, the health care services rendered by the

parties must be deemed, at least in part, legally identical, in that many of the health care services enumerated in applicant's identification could be performed as part of home or outpatient health care.

Further, the Examining Attorney has made of record several third-party registrations which show that a single mark has been registered for inpatient and outpatient health care services. We note, in particular, registrations for, inter alia, inpatient nursing home services and providing health care services to senior citizens in their homes;<sup>3</sup> inpatient, outpatient and home health services;<sup>4</sup> health care services, namely, inpatient and outpatient hospital services, home health care services, physical medicine, rehabilitation and therapy services, and long and short term nursing home services;<sup>5</sup> and inpatient and outpatient [hospital] services, nursing home services, convalescent home services, retirement home services, and home health care services.<sup>6</sup> These registrations, while not evidence that the marks shown therein are in commercial use, do serve to suggest that the listed services are of a type which may emanate from a single source. See **In re Albert Trostel & Sons Co.**, 29 USPQ2d 1783 (TTAB 1993).

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<sup>3</sup> Registration No. 1,950,440.

<sup>4</sup> Registration No. 1,907,721.

<sup>5</sup> Registration No. 1,809,509.

<sup>6</sup> Registration No. 1,731,918.

We recognize that applicant's services are identified as health care services in support of nursing homes and retirement center services, and that applicant describes its services as being marketed to "nursing home and retirement home administrators, case managers and physicians." Nonetheless, by the very nature of its identification, applicant's health care services must be deemed to be encountered by patients. It is obvious from the identification that applicant is not providing respiratory therapy services, rehabilitative services, psychiatric counseling and the like to the nursing home administrators, case managers and physicians, but to the patients who are staying in the nursing and retirement homes. Thus, patients and their families who encounter applicant's services in a nursing home environment, and who then seek home health care, may well believe that, in view of the similarity of the marks, applicant's and registrant's health care services emanate from a single source.

Even if we were to posit that the patients to whom applicant's services are ultimately rendered would not be aware of applicant's mark, and that the mark is solely used in the marketing of the services to nursing home administrators, physicians, and the like, this would not avoid the likelihood of confusion. These same physicians might also encounter the registrant's in-home or outpatient

health care services. For example, a physician familiar with applicant's nursing home services, and who must recommend in-home care to a patient, might well assume that the services emanate from the same source. Similarly, a physician who is familiar with registrant's in-home or outpatient services, and learns that applicant's services are offered to and by a particular nursing home, may believe there is a source connection.

Applicant argues that such physicians are sophisticated purchasers, and therefore would be less likely to mistake the parties' services.<sup>7</sup> While sophisticated purchasers are likely to exercise greater care, in this case we do not think the sophistication of the medical personnel is likely to avoid confusion. It goes without saying that even sophisticated purchasers are not immune from trademark confusion. Here, the third-party registrations show that a single entity may render in-home, outpatient and nursing home services under a single mark. Thus, physicians would not think it odd for the health care services identified in applicant's application to emanate from the same source as the health care services identified in the cited registration.

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<sup>7</sup> Applicant also argues that "the services (long-term acute nursing home and retirement home care) are expensive and mandate extreme care in selection." Brief, p. 3. This statement would indicate that it is the patients themselves, and not merely

Nor are the differences in the parties' marks likely to convey to these sophisticated purchasers that the marks indicate different sources for the services. Although applicant's mark is ADVOCAT ANCILLARY SERVICES and the registered mark is ADVOCATE HOME CARE, the last two words in both marks are descriptive of the particular services, such that the marks are likely to be regarded by consumers as variants of an ADVOCATE mark in which the final words merely reflect the differences in the services. We do recognize that the dominant word in each mark differs by one letter, in that a final "E" appears in ADVOCATE in registrant's mark, and is absent in applicant's. However, this difference, as well, does not distinguish the marks. Even sophisticated purchasers are not likely to notice this difference, which does not affect the pronunciation or commercial impression of the marks, and creates only a minimal difference in appearance. While we realize that health care services are not off-the-shelf items, sophisticated purchasers, too, are subject to the fallibility of memory.

Finally, we note applicant's argument that the cited mark is weak because there are numerous third-party registrations which use the word ADVOCATE. During the course of prosecution, applicant submitted a private

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physicians and nursing home administrators, who would come in

company's search report in an attempt to make these registrations of record. The Examining Attorney advised applicant, in the following Office action, that these registrations were not properly of record, and cited a number of cases and articles on this point. Applicant did not respond to this action by making a proper submission; in its brief it has ignored the Examining Attorney's comments.

We agree with the Examining Attorney's objection, which he has reiterated in his brief, and the third-party registrations have not been considered. We would also point out, though, that these registrations do not support applicant's position that ADVOCATE is a weak mark for health care services; in fact, according to the search report, the cited mark is the only ADVOCATE mark in this field.

Decision: The refusal of registration is affirmed.

R. L. Simms

E. J. Seeherman

T. J. Quinn  
Administrative Trademark Judges  
Trademark Trial and Appeal Board

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contact with applicant's mark.