

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB                      MARCH 31,99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Bankers Life and Casualty Company

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Serial No. 75/229,671

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Thomas E. Smith of Lee, Mann, Smith, McWilliams, Sweeney & Ohlson for Bankers Life and Casualty Company.

Elizabeth A. Hughitt, Trademark Examining Attorney, Law Office 101 (R. Ellsworth Williams, Managing Attorney).

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Before Cissel, Seeherman and Wendel, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Bankers Life and Casualty Company has appealed from the refusal of the Trademark Examining Attorney to register SENIOR PROTECTION PLUS, with the words "Senior Protection" disclaimed, for life insurance underwriting services.<sup>1</sup>

Registration has been refused pursuant to Section 2(d) of

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<sup>1</sup> Application Serial No. 75/229,671, filed January 22, 1997, asserting first use and first use in commerce on April 1, 1996.

the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark, when used in connection with its identified services, is likely to cause confusion with the following marks, registered by separate entities:

SENIOR PROTECTOR , with the word "Senior" disclaimed, for life insurance underwriting services<sup>2</sup>

**PROTECTPLUS**

for voluntary group term life insurance offered through employers to employees<sup>3</sup>

Both applicant and the Examining Attorney have filed briefs, and applicant has filed a reply brief.

Before turning to a consideration of the issue of likelihood of confusion, we must make some preliminary comments. During the course of examination, it appears that as a result of a conversation between the Examining Attorney and applicant's attorney, the Examining Attorney entered an amendment in which applicant, in addition to disclaiming exclusive rights to the word "Senior," disclaimed "Senior Protection." The Examining Attorney

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<sup>2</sup> Registration No. 1,814,524, issued December 28, 1993; Section 8 and 15 affidavit filed, awaiting examination.

<sup>3</sup> Registration No. 1,915,426, issued August 17, 1994.

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stated in that amendment that the Section 2(d) refusal would be withdrawn. Subsequently, apparently after review of the file by the Examining Attorney's Managing Attorney, the refusal based on likelihood of confusion with the two registered marks was reinstated.

In its main brief applicant makes the comment that the requirement to disclaim "Senior Protection" was done with the understanding that the Section 2(d) refusal would be withdrawn, and "there is a certain unfairness about requiring a disclaimer on the understanding that the Section 2(d) refusal would be withdrawn and then reneging on that offer after the disclaimer had been entered." p. 2.

Obviously, it is unfortunate that applicant was first told that the refusal would be withdrawn and then, upon further review, the refusal was reinstated. However, the mandate of the Trademark Examining Operation is to refuse registration of marks which are likely to cause confusion with registered marks, and that must take precedence over any inconvenience to applicant caused by the decision (of which applicant was notified just 20 days later) to reinstate the refusal.

With respect to applicant's comment about unfairness because it offered the additional disclaimer of

"Protection" on the assumption that the refusal would be withdrawn, we do not regard this comment as a request for the withdrawal of the disclaimer of "Protection." If applicant had wanted to withdraw the disclaimer, it should have done so by clear language, and not in its appeal brief, but rather in response to the November 25, 1997 Office action. Moreover, the arguments made by applicant in its brief with respect to the descriptive nature of the word "Protection" in its mark are contrary to any claim that a disclaimer of "Protection" is not warranted.

Turning to the issue of likelihood of confusion, we will discuss this question separately with respect to each citation. Although our opinion focuses primarily on the points argued by applicant and the Examining Attorney, our determination of likelihood of confusion is based on all appropriate du Pont factors. See **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

First we will consider whether applicant's mark SENIOR PROTECTION is likely to cause confusion with the cited registration for SENIOR PROTECTOR.

The services identified in applicant's application and the cited registration--life insurance underwriting services--are identical. Accordingly, we must presume the services to be offered through the same channels of trade

to the same class of consumers which, as applicant's specimen brochures indicate, are "mature adults."

It is a well established principle that "when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." **Century 21 Real Estate Corp. v. Century Life of America**, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Here, the marks begin with the same word, SENIOR. Although applicant points out that this word has been disclaimed in both marks because of its descriptive significance, it still forms part of each mark and cannot be ignored in determining likelihood of confusion.

The second word in each mark has the root "Protect." In the case of the cited mark, "Protect" has the suffix "or," to form the word PROTECTOR, while in applicant's mark the suffix is "ion", to form the word PROTECTION. Although these suffixes are admittedly different, there are strong visual and aural similarities between the words PROTECTOR and PROTECTION.

Thus, despite the fact that there are differences in the suffixes, and that applicant's mark has the additional third word PLUS, when the marks SENIOR PROTECTOR and SENIOR

PROTECTION PLUS are considered in their entirety, they are very similar in appearance and pronunciation.

Further, although applicant asserts that "protector" and "protection" convey different connotations, we note that "protector" is defined as "a person who protects; guardian" and one of the definitions of "protection" is "one that protects," as well as "the act of protecting" and "the condition of being protected."<sup>4</sup> "Protect" is defined as "to keep from harm, attack, or injury; to guard." Although there may be subtle differences in meaning between "Protector" and "Protection," the overall impression is similar and, when these words are viewed in the context of the respective marks, we consider the connotations to be very close. Both SENIOR PROTECTOR and SENIOR PROTECTION PLUS for life insurance underwriting services have the connotation of life insurance that protects the elderly, with the PLUS in applicant's mark indicating that the insurance provides something more than just regular life insurance.

Thus, while there are specific differences in the marks, we do not find them sufficient to distinguish the

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<sup>4</sup> The American Heritage Dictionary of the English Language, new coll. ed. ©1976. The Board may take judicial notice of dictionary definitions. **University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.**, 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

marks. The "mature adults" who are the target consumer for applicant's services may not even notice the difference between the suffixes "or" and "ion" in the context of the entire marks. This is particularly possible if the insurance service offered under one of the marks is recommended to them by word of mouth, and they then encounter the insurance offered under the other mark. Further, although they may note the word PLUS in applicant's mark, they may well view this mark as a variant of the SENIOR PROTECTOR mark, used to indicate an insurance plan that offers something more, rather than as an indication that SENIOR PROTECTION PLUS identifies services from a different source.

As has been frequently pointed out, under actual marketing conditions, consumers do not have the luxury to make side-by-side comparisons between marks, and instead they must rely on hazy past recollections. See **Dassler KG v. Roller Derby Skate Corp.**, 206 USPQ 255 (TTAB 1980).

Accordingly, we find that applicant's mark is likely to cause confusion with Registration No. 1,814,524 for SENIOR PROTECTOR.

This brings us to the question of likelihood of confusion vis-à-vis PROTECTPLUS, registered in the stylized

form shown below, for "voluntary group term life insurance offered through employers to employees."

## PROTECTPLUS

We note that applicant authorized the Examining Attorney to amend its identification of services to "life insurance underwriting services offered directly to individuals" if that would avoid the likelihood of confusion refusal. The Examining Attorney took the position that it would not, and therefore did not enter the amendment. Because of this, however, we have considered the proposed amendment in our determination of likelihood of confusion. That is, we have not treated applicant's identification as encompassing the registrant's identified group life term insurance offered through employers to employees.

While applicant's and registrant's services are not identical, we still view them as being closely related. Both are life insurance services; the only difference is that applicant's are offered to individuals and the registrant's are offered through employers to employees as part of group plans. That is, the only differences in the services are the channels of trade through which they are

offered. Despite the differences in how the insurance services are offered, they are still likely to be encountered by the same individuals. For example, a person who is offered registrant's life insurance through work may still want to obtain additional insurance on an individual basis, or that employee may encounter applicant's insurance because he or she may wish to purchase life insurance for a spouse or child.

Because of the identical nature of the services and the fact that they may be encountered by the same consumers, we find that applicant's and the registrant's services are closely related and, if they were offered under the same or confusingly similar marks, confusion is likely to result.

With respect to the marks, the words PROTECTON PLUS are very similar to the words PROTECT PLUS in the cited mark. We should point out that, while the cited mark telescopes these words together, because of the manner in which they are depicted, they would be readily recognized as PROTECT PLUS. The fact that the word PROTECTION in applicant's mark has the suffix "ion", while in the cited mark the word is PROTECT per se, is not likely to be noted or remembered by the customers of the services. Given that the registrant's services are offered through employers to

employees, and applicant's services would be offered to individuals, the services will necessarily be offered at different times and in different environments, and consumers are not likely to have an opportunity to view the marks side-by-side. In such circumstances, the slight differences between the words PROTECTION and PROTECT are not likely to be noticed.

We recognize that applicant's mark does begin with a totally different word, SENIOR, than does the cited mark. However, because of the descriptive nature of this word, consumers are likely to regard SENIOR PROTECTION PLUS as a variant of the registrant's stylized PROTECTPLUS mark, indicating a life insurance product emanating from registrant that is specially for seniors. That is, consumers are not likely to accord the word SENIOR in applicant's mark a source-identifying function, such that they will distinguish the marks based on the presence of this word.

It is well established that 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 a consideration of the marks in their

entireties. See **In re National Data Corp.**, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). For the reasons given above, in comparing the marks SENIOR PROTECTION PLUS and PROTECTPLUS (stylized), we have given less weight to the word SENIOR.

Although applicant has not alluded to this, we acknowledge that the three marks involved herein must be considered weak, with all of them being composed of highly suggestive or descriptive words. However, even highly suggestive marks are entitled to protection, and for the reasons we have discussed above, we find that applicant's mark SENIOR PROTECTION PLUS, used in connection with applicant's identified services, is likely to cause confusion with both SENIOR PROTECTOR and PROTECTIONPLUS (stylized) for the services identified in the respective registrations.

Finally, although we have no doubt about our decision, because of the reversal of position by the Examining Attorney, we think it appropriate to point out that, if there were any doubt on the issue of likelihood of confusion, it must be resolved in favor of the prior user or registrant. **In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes**, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

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Decision: The refusals of registration, based on both  
Registration Nos. 1,814,524 and 1,915,426, are affirmed.

R. F. Cissel

E. J. Seeherman

H. R. Wendel  
Administrative Trademark Judges  
Trademark Trial and Appeal Board