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Mailed:  
September 26, 2002  
Paper No. 21  
DEB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

The Guardian Life Insurance Company of America

v.

David P. England

Opposition No. 91/118,054  
filed on March 21, 2000  
to application Serial No. 75/621,728  
filed on January 19, 1999

Virginia R. Richard and Lana C. Fleishman of Winston & Strawn  
for The Guardian Life Insurance Company of America.

David P. England, *pro se*.

Before Simms, Cissel and Bucher, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Dr. David P. England applied to register the mark  
POCKETGUARDIAN on the Principal Register for goods  
ultimately identified as "medical identification cards held  
in a vinyl holder providing emergency and non-emergency  
telephone numbers, health and medical information, and  
treatment authorization." Applicant claimed a *bona fide*  
intention to use the mark in commerce, and this application  
continues as an intent-to-use application.

On March 21, 2000, a timely notice of opposition was filed by The Guardian Life Insurance Company of America. As grounds for opposition, opposer asserted: that it was founded in 1860 and is now one of the largest mutual insurance companies in the United States; that it has used a variety of GUARDIAN trade names and service marks continuously since 1918 in connection with insurance underwriting and related financial services; that opposer owns nearly forty federal service mark registrations for marks including the word GUARDIAN for insurance and financial services; that its marks are well-known given the long period of time they have been used, the tens of millions of dollars spent on advertising and the billions of dollars in annual revenue currently being produced by opposer's insurance business; that in conjunction with its health, vision, disability, dental and laboratory fees insurance, opposer distributes a variety of identification and information cards; that for many years prior to applicant's filing an application to register his POCKETGUARDIAN mark, opposer has used and promoted its GUARDIAN trade names and marks; and that applicant's POCKETGUARDIAN mark, as applied to the goods set forth in the application, so resembles opposer's GUARDIAN name and marks that confusion is likely.

Applicant's answer essentially denies these allegations.

Evidence at Trial

A trial was conducted in accordance with the Trademark Rules of Practice. Applicant filed two separate notices of reliance on a variety of materials. Both were the subject of opposer's motions to strike specific portions thereof.<sup>1</sup>

Opposer filed four notices of reliance with respect to excerpts from printed publications, federal trademark registrations, and the like. These included certified copies of opposer's pleaded registrations, summarized as follows:

**THE GUARDIAN** *Reg. No. 1,807,930*<sup>2</sup>  
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for: insurance underwriting in the field of group health insurance

**GUARDIAN** *Reg. No. 1,853,811*<sup>3</sup>  
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for: insurance underwriting services in the field of disability insurance

**THE GUARDIAN** *Reg. No. 1,857,906*<sup>4</sup>  
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for: insurance underwriting services in the field of disability insurance

**GUARDIAN INSURANCE AND ANNUITY  
COMPANY** *Reg. No. 1,902,991*<sup>5</sup>  
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for: insurance underwriting services in the field of life, health, disability and  
dental insurance and annuities

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<sup>1</sup> All of these objections were correctly decided in the Board's earlier ruling herein (issued on July 25, 2002), except for the substantive question of whether to admit applicant's informal survey, which we have decided *infra*.

<sup>2</sup> Reg. No. 1,807,930 issued on November 30, 1993; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

<sup>3</sup> Reg. No. 1,853,811 issued on September 13, 1994; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

<sup>4</sup> Reg. No. 1,857,906 issued on October 11, 1994; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

<sup>5</sup> Reg. No. 1,902,991 issued on July 4, 1995; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

*Reg. No. 2,132,121<sup>6</sup>*

**GUARDIAN GROUP**

for: insurance underwriting services, namely, disability insurance

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**The Guardian**

*Reg. No. 1,436,668<sup>7</sup>*

for: underwriting group and individual life and health insurance; brokerage services for mutual funds, annuities, and pension plans

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**GUARDIAN**

*Reg. No. 1,637,818<sup>8</sup>*

for: insurance services, namely group health insurance underwriting services

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**GUARDIAN**

*Reg. No. 1,641,534<sup>9</sup>*

for: insurance services, namely individual life insurance underwriting services

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**GUARDIAN**

*Reg. No. 1,641,537<sup>10</sup>*

for: insurance services, namely group dental insurance underwriting services

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**THE GUARDIAN RESOURCE LIFE**

*Reg. No. 2,181,282<sup>11</sup>*

for: insurance underwriting services, namely, life insurance

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**THE GUARDIAN FLEXPLAN**

*Reg. No. 2,199,336<sup>12</sup>*

for: administration of employee benefits, namely, administration of cafeteria plans as described in section 125 of the Internal Revenue Code

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<sup>6</sup> Reg. No. 2,132,121 issued on January 27, 1998.

<sup>7</sup> Reg. No. 1,436,668 issued on April 14, 1987; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

<sup>8</sup> Reg. No. 1,637,818 issued on March 12, 1991; Section 8 affidavit accepted and Section 15 affidavit acknowledged; renewed.

<sup>9</sup> Reg. No. 1,641,534 issued on April 16, 1991; Section 8 affidavit accepted and Section 15 affidavit acknowledged; renewed.

<sup>10</sup> Reg. No. 1,641,537 issued on April 16, 1991; Section 8 affidavit accepted and Section 15 affidavit acknowledged; renewed.

<sup>11</sup> Reg. No. 2,181,282 issued on August 11, 1998.

<sup>12</sup> Reg. No. 2,199,336 issued on October 27, 1998.

**THE GUARDIAN LIFE INSURANCE  
COMPANY OF AMERICA**

*Reg. No. 2,268,145<sup>13</sup>*

for: group and individual life, disability, accident, health and dental insurance underwriting services; pension planning services; pension and pension fund management; annuity and annuity administration services; financial services, namely, management of money market funds, trust funds, United States government trust funds and stock funds; providing information to others in the field of insurance; managing funds, stocks and bonds and other investments for institutions and the general public; administration of cafeteria plans as described in section 125 of the Internal Revenue Code; real estate services, namely, real estate development, real estate management, real estate investment and commercial and residential mortgage lending services; reinsurance underwriting services; joint venture investment services in managed care organizations

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Briefs were filed by both parties,<sup>14</sup> but neither party requested an oral hearing before the Board.

Opposer's motion to strike applicant's survey

As a preliminary matter, we turn to opposer's outstanding motion to strike from applicant's first notice of reliance excerpts from an "informal survey" (Exhibit 6) allegedly conducted by applicant during April 2001. Applicant volunteered that he got the idea for conducting such a survey from opposer's earlier request for the production of any surveys that applicant may have conducted.

The exhibit at issue contained photocopies of four completed surveys, although as noted by opposer, two of these

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<sup>13</sup> Reg. No. 2,268,145 issued on August 10, 1999.

<sup>14</sup> Actually, three months after opposer filed its first motion to strike applicant's first notice of reliance, applicant filed something entitled "Brief in Support of Applicant's Notice of Reliance." However, given its specific timing and overall content, we have chosen to treat this as applicant's brief on the case.

four came from the same individual. A blank form showing the contents of this crude instrument follows:

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Dear customer,

Thank you for your confidence in purchasing the 'PocketGuardian' for your health and safety needs. I hope it has allowed you to organize your medical information and pertinent phone numbers in a convenient and easily accessible way.

If you would take just two minutes to answer the survey and return immediately in the enclosed self-addressed stamped envelope it would be most appreciated.

1. How did you hear of the 'PocketGuardian '? Internet\_\_\_Flyer\_\_\_Newspaper\_\_\_  
Friend\_\_\_Other\_\_\_,explain\_\_\_\_\_
2. Prior to purchasing the 'PocketGuardian' were you in any way confused or mistaken that it was related to, a subsidiary of or a division of "The Guardian Life Insurance Company of America"? Yes\_\_\_No\_\_\_Other\_\_\_,explain\_\_\_\_\_
3. Did you purchase the 'PocketGuardian ' because you thought it was from "The Guardian Life Insurance Company of America"? Yes\_\_\_No\_\_\_Other\_\_\_explain\_\_\_\_\_
4. Have you ever heard of "The Guardian Life Insurance Company of America"?  
Yes\_\_\_No\_\_\_Other\_\_\_explain\_\_\_\_\_
5. Did the 'PocketGuardian' cause you any question or confusion with the prescription drug program, health insurance programs, health care services or health and medical information services offered by "The Guardian Life Insurance Company of America"?  
Yes\_\_\_No\_\_\_Other\_\_\_explain\_\_\_\_\_

Comments\_\_\_\_\_

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Thank you for your time answering these questions. We really appreciate your honesty and hope the 'PocketGuardian' is fulfilling your safety needs and concerns.

Sincerely,

Customer Relations Department  
Jamken, Inc. Home of the 'PocketGuardian'

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In explaining the relevance of his survey results, applicant concludes as follows:

... Survey(s) returned indicate no confusion between the PocketGuardian and Opposer. Some, in fact, had never even heard of Opposer. Applicant's Exhibit No. 6 establishes the fact that there are consumers who are not likely to be GUARDIAN policy holders. In addition, given the recent results of the 2000 United States census showing a population of 281 million and Opposer's "less than 4 million" policy holders there is less than a 1.5% chance anyone in the United States is a policy holder of Opposer.

Based on common sense alone, one should be reluctant to base any conclusions on a total of three responses to any survey, to say nothing of the many defects obvious from the face of this particular instrument. Moreover, as opposer points out, there is not sufficient information about the overall methodology or execution to even begin to apply the criteria for judging surveys set out in the Manual for Complex Litigation. Accordingly, we find that this exhibit is entitled to absolutely no probative value in reaching our decision herein.

Opposer's standing and priority

We note at the outset that the undisputed evidence of record establishes that opposer has used trade names and service marks, such as GUARDIAN, THE GUARDIAN (and other variations including the word GUARDIAN) continuously since

1918 in connection with insurance and related financial services, a date well prior to the earliest date upon which applicant can rely, i.e., his January 19, 1999 application filing date. In view thereof, we find that opposer has established its standing to bring this opposition proceeding, as well as its priority.

Likelihood of Confusion

We turn then to the substantive issue before us, namely the question of likelihood of confusion. Opposer contends that its marks are strong and well-known marks entitled to a broad scope of protection; that applicant's mark appropriates opposer's primary mark, GUARDIAN, in its entirety; and that GUARDIAN is the dominant portion of applicant's mark. By contrast, applicant contends that opposer's GUARDIAN marks are weak; that his goods, as identified, are in no way related to opposer's insurance business; and that the parties' marks are significantly different when compared in their entireties.

After careful consideration of the facts before us and the relevant law on the issue of likelihood of confusion, we hold that applicant is not entitled to the registration he seeks.

In the course of determining the question of likelihood of confusion herein, we have followed the guidance of In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973). The du Pont case sets forth each factor that should be considered, if relevant information is of record, in determining likelihood of confusion. We begin by looking at a most critical du Pont factor, namely, the renown of opposer's prior trade names and service marks based upon evidence of revenues, advertising, length of use, etc., as well as the number and nature of similar marks in use on similar services.

▪ Likelihood of Confusion: Renown of Opposer's marks

Based upon overwhelming evidence made of record by opposer, we cannot agree with applicant that opposer's GUARDIAN marks, other composite marks containing the word GUARDIAN, including THE GUARDIAN marks, are all weak. There is no credible evidence of third-party use or registration of similar service marks and there is no evidence that GUARDIAN is even minimally suggestive in connection with the services identified in opposer's registrations. Rather, the evidence establishes that opposer's GUARDIAN marks have been in use for eighty-four years; that significant sums of money have been spent over the years on advertising; that opposer's

annual revenues generated by insurance policies marketed and sold under its GUARDIAN marks are substantial; and that the marks enjoy considerable renown in connection with opposer's insurance services. Hence, we find that whether one focuses on GUARDIAN as opposer's house mark or looks at its family of GUARDIAN insurance services and product marks, opposer has created substantial recognition for the GUARDIAN designation. As opposer has argued, fame of the prior mark plays a dominant role in cases featuring a strong mark of great renown. Kenner Parker Toys, Inc. v. Rose Art Industries, Inc., 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992); and Recot, Inc. v. M.C. Becton, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000). Thus, opposer's GUARDIAN trade name and service marks, other GUARDIAN composite marks and THE GUARDIAN name and marks are entitled to a very broad scope of protection in the field of insurance. As a result, applicant had a heightened duty to avoid using a confusingly similar mark when adopting a mark for his product.

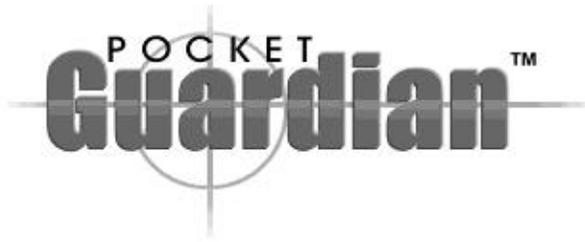
▪ Likelihood of Confusion: Similarity of marks

We turn then to the du Pont factor dealing with the similarity or dissimilarity of the marks in their entirety as to appearance, sound and meaning. While opposer contends that applicant has obviously adopted a confusingly similar

mark, applicant just as vehemently argues that its POCKETGUARDIAN mark is not at all similar to opposer's marks, pointing out repeatedly that his mark is a typed drawing depicting POCKETGUARDIAN as "intricately inseparable words" (applicant's brief, unnumbered page 13), not POCKET GUARDIAN (two words) as used by opposer throughout its brief.

However, by presenting his mark in a typed form, applicant is not limited to any special depiction and thus has implicitly asserted rights in POCKETGUARDIAN regardless of type styles, proportions or other possible variations. Hence, this is an alleged difference that cannot legally be asserted by applicant. See Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983); and Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1847-48 (Fed. Cir. 2000).

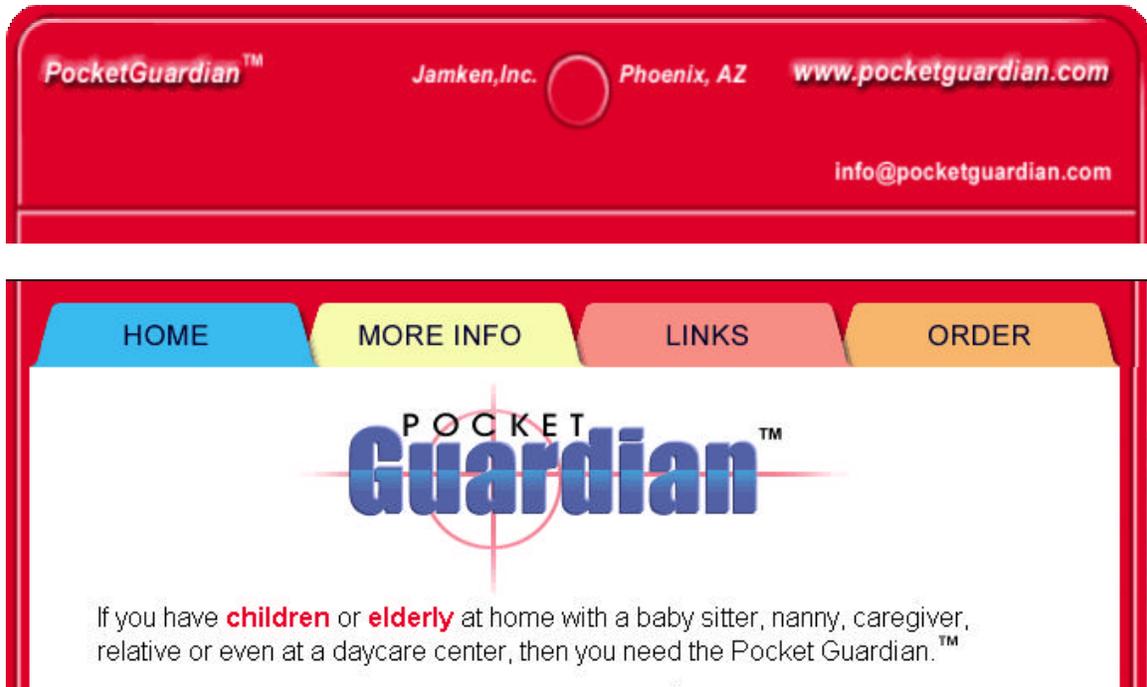
Furthermore, despite his protests to the contrary, it is clear from materials placed in evidence by applicant and by opposer that consumers will see the words POCKET and GUARDIAN as two separable elements. The mark as used on the goods and on applicant's Internet homepage is shown as follows:



As to appearance, the prominence of the word GUARDIAN as presented within applicant's logo certainly exacerbates the likelihood of confusion with opposer's GUARDIAN marks.

Moreover, throughout this record, whenever applicant is presenting his mark visually to potential consumers using a typed font (as opposed to the above design logo), he employs upper case for the letter "G" (viz. applicant's survey instrument, *supra*, where the mark is repeatedly shown as 'PocketGuardian'). Accordingly, consumers will immediately perceive the derivation of his mark from these two words even if there is no space between the two words.

It is also revealing that except on his trademark application drawing page, in his Internet URL (which does not recognize upper and lower case letters) and in his motions and other papers filed in this legal proceeding, his mark is never presented as a unitary whole. In fact, in applicant's submission of January 30, 2001, which contains a screen shot of his Web page, his mark is indeed presented as two separate words (viz., "... then you need the Pocket Guardian.™"):



(balance of Web page is not reproduced herein)

Accordingly, one need not resort to opposer's brief (wherein applicant claims opposer has "continuously and maliciously" separated these words) in order to find POCKET GUARDIAN presented as two words.

Apart from these alleged differences in appearance, in his attempts to draw a sharp contrast between the meaning of his mark and the meaning of the trade names and service marks of opposer, applicant focuses at length on the connotation of his mark in the context of his goods.

As to the derivation of the word "pocket," applicant argues that the initial portion of his mark was selected with the dictionary definition of "tiny or miniature" in mind.

Elsewhere, applicant refers to his product generically as a "portable protective holder" (First Notice of Reliance, Exhibit 4) and argues that his four, color-coded, heavy paper card inserts "fit into the Latex-free holder or POCKET ..." (capitalization in applicant's brief, unnumbered page 5), suggesting the dictionary definition applicant has listed as "receptacle or cavity." However, whether the adjectival origins of this word are "miniature," "receptacle," or even a third meaning offered by applicant, namely, "capable of being carried in a pocket,"<sup>15</sup> we agree with opposer that POCKET appears to be descriptive as to each of these meanings, and hence should not be seen as an arbitrary designation, or as the dominant portion of applicant's mark.

Unlike the word "Pocket," the word "Guardian," as used in applicant's mark, does not immediately convey as much information about the nature of the product. However, in order to understand better applicant's arguments, it is necessary to consider more closely the nature of his medical identification cards and latex (or vinyl) holder.

The first of his four included cards - having a blue colored tab - contains spaces designed for recording the

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<sup>15</sup> Applicant's first notice of reliance, Exhibit 9, describes this product as follows: "Easily fits into purse or glove box for trips."

telephone numbers of the insured, hospitals, doctors, drug stores, poison control center, etc. The next two medical identification cards have space for information for "up to six family members." (Applicant's first notice of reliance, Exhibit 4). According to applicant's promotional materials: "If ambulance workers arrive[,] would they quickly know medications taken, medical history, drug allergies, blood type, past surgeries, etc... of every household member?" *Id.* This information will be recorded by the user on the second, or yellow-colored tab ("MEDICATIONS") and on the third, or red-colored tab ("EMERGENCY INFORMATION"). Information recorded on these cards constitutes the major purpose applicant touts for consumers to use its medical identification cards.

Nonetheless, applicant contends that the word "Guardian" within its mark is derived from the written authorization for emergency care and/or medical treatment granted to named caregivers from the parent or "Legal Guardian" (viz. on the fourth, orange-colored tab entitled "EMERGENCY TAKE TO HOSPITAL").<sup>16</sup> Applicant argues, in short, that his product amounts to a 'legal guardian in miniature.' Apparently

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<sup>16</sup> In any case, as noted *infra*, opposer observes that what immediately follows the "Treatment Authorization" portion of this card is all the critical information on the family unit's health insurance carrier.

believing that mere descriptiveness is desirable in a mark, applicant continues this line of argumentation by saying that "the [mark] POCKETGUARDIAN fulfills exactly the dictionary definitions or meanings of each descriptive term ..." (underlining in applicant's brief, unnumbered page 12).

We acknowledge that this final tab contains space for a medical authorization signed by a child's parent or legal guardian. On the other hand, nowhere in the literature is this connection with the GUARDIAN portion of the trademark emphasized. In fact, based on this entire record, we find it just as likely that the prospective purchasers will take from the trademark the general connotation of a holder ("POCKET") that guards or protects ("GUARDIAN") one's critical medical information.

Turning to consider opposer's marks, the word GUARDIAN must be seen on this record as being distinctive for these services. After eighty-four years of continuous use, with the renown opposer has shown for this term within its several different composite marks, there is no question but that GUARDIAN is the dominant portion of opposer's marks. As discussed at length above, GUARDIAN is also the dominant portion of applicant's mark. Accordingly, we find that applicant's mark and opposer's marks both convey similar overall commercial impressions.

▪ Likelihood of Confusion: Relatedness of goods/services

We turn next to a consideration of the similarity or dissimilarity and nature of the goods as identified in the subject application and the services as recited in the registrations opposer has made of record. Clearly, opposer is involved in underwriting and issuing a full line of insurance policies. Of special relevance to the instant case are the service marks used in conjunction with insurance policies for medical/accident and health coverage, dental, vision, mental health and/or disability policies, programs for employee groups providing for prepaid laboratory expenses, and the like.

Opposer has submitted for the record a wide variety of its blank medical information forms. When these forms are completed by the prospective insureds, they contain extensive medical histories and treatment information, and are most critical to opposer's underwriting functions. By contrast, it is clear that applicant is not involved in underwriting or marketing insurance policies. Medical identification cards are his product. Although the space provided in applicant's designated blocks for medical information would permit only the briefest snapshot of one's medical treatments and history, in comparing the information requested on opposer's forms and the information suggested for applicant's cards, it

is clear that substantially all of the personal and medical information contained within applicant's PocketGuardian cards would be necessary in completing opposer's application forms.

Opposer's promotional materials for each of its lines of insurance products also refer to opposer's use and distribution of membership identification cards as an essential part of its insurance services. Opposer has included in the record dozens of examples of its medical identification cards for each of these types of medical insurance. Nowhere does applicant controvert the conclusion that the use and distribution of identification cards and treatment authorization cards is a standard and universally known aspect of the insurance industry. One representative example includes its outpatient laboratory program, where the membership and authorization cards are depicted as follows:



Applicant argues at length about the difference in the size, generic description and purposes for the parties' respective cards. It is clear that applicant's cards are several times larger in overall size than are opposer's wallet-sized cards. It is also true that opposer issues

these cards only to people who opposer insures, while applicant's products are marketed irrespective of the provider of one's medical insurance. However, the relative size of these respective cards is a totally irrelevant factor in making a likelihood of confusion determination herein, and it is clear that the consumer having applicant's cards and cardholder who is also insured with opposer would possess both cards. According to applicant's own brief, the "Treatment Authorization" portion of the PocketGuardian is where the consumer having one of opposer's GUARDIAN policies would record relevant information about that very medical coverage.

Applicant fails to appreciate that the test for likelihood of confusion under the Lanham Act is not whether applicant's goods will be confused with opposer's services, but rather, whether ordinary members of the public will be confused by the marks used by the parties about their respective sources. See Safety-Kleen Corp. v. Dresser Indus., Inc., 518 F.2d 1399, 1404, 186 USPQ 476, 480 (CCPA 1975). It is sufficient that the goods or services of the applicant and the registrant are so related that the circumstances surrounding their marketing are such that they are likely to be encountered by the same persons under circumstances that would give rise to the mistaken belief

that they originate from the same source. See On-line Careline Inc. v. America Online Inc., 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000) (ON-LINE TODAY for Internet connection services held likely to be confused with ONLINE TODAY for Internet content).

A general knowledge on the part of consumers as to established marketing practices is likely to give rise to the mistaken belief of an association between these parties. Consumers are likely to assume that opposer has licensed applicant's use, or that applicant has at the very least gotten opposer's approval or sponsorship. Hence, in some instances, the use of similar marks on seemingly unrelated goods and services could result in a likelihood of confusion. See In re Phillips-Van Heusen Corporation, 228 USPQ 949, 951 (TTAB 1986) ["The licensing of commercial trademarks for use on 'collateral' products (such as clothing, glassware, linens, etc.), that are unrelated in nature to those goods or services on which the marks are normally used, has become a common practice in recent years."].

In fact, helping to make opposer's case on this point, applicant issued a joint marketing proposal wherein opposer could use applicant's PocketGuardian product "[a]s a give-

away item to a client who purchased a Guardian product..."<sup>17</sup> In the context of our current likelihood of confusion determination, it is immaterial that applicant has also urged merchants in non-insurance industries (e.g., local automobile dealerships) to use his product as a "give-away" item to their prospective customers. What is significant herein is that applicant has made a convincing case for how a medical insurer like opposer could use his "PocketGuardian" emergency medical product as a promotional item for prospective customers of opposer's GUARDIAN medical insurance policies.<sup>18</sup>

▪ Likelihood of Confusion: trade channels

This leads us to an examination of the similarity or dissimilarity of established, likely-to-continue channels of

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<sup>17</sup> This quotation is drawn from the body of a letter dated March 9, 2001, having a subject line entitled "potential marketing tool." The letter is addressed to opposer's President and CEO. Applicant's First Notice of Reliance, Exhibit 15.

<sup>18</sup> Applicant is a Doctor of Osteopathy who has over the years received health insurance reimbursements from opposer for professional services rendered. We presume from such past associations that applicant was aware of GUARDIAN as a *persona* within the health insurance industry. However, while his misguided attempt during litigation to set up a joint marketing program with opposer, his occasional inappropriate usage of the formal registration symbol(®), and the fact that applicant's "trial brief is virtually incomprehensible" (opposer's characterization on page 3 of its memorandum of November 11, 2001) all support a conclusion that applicant is not well versed in the nuances of trademark law, we cannot agree with opposer that this record demonstrates bad faith on the part of applicant. Accordingly, while we find a substantial showing of likelihood of confusion herein, we also find that opposer has not established that applicant's adoption of his mark was knowingly done with the intention of trading on the goodwill of opposer's trade name and service marks.

trade. The record shows that applicant relies upon, *inter alia*, the Internet, printed promotional flyers (directed to individual consumers to purchase for their own use, for individuals to purchase as gifts for friends, or to business owners to provide as "give-aways" for their own customers), free publicity in the newspaper, and point of sale promotions in local retail establishments. Opposer uses, *inter alia*, the Internet, printed brochures, free and paid publicity in newspapers, etc. This analysis leads us to conclude that while the parties' respective marketing channels are not identical, they certainly have significant areas of overlap.

▪ Likelihood of Confusion: ordinary consumers

A closely related du Pont factor has to do with the conditions under which and buyers to whom sales are made. It is also clear from the record in this case, as discussed above, that applicant's product and opposer's services will be directed to the same type of ordinary consumers.

According to the record, applicant markets his goods as impulse items in his local drugstore, for example. We note that these goods are relatively inexpensive -- ranging in price from free (to a consumer where a merchant has chosen to use it as a promotional "give-away") up to five dollars apiece. Given this fact, we must presume that applicant's

goods may be purchased without a great deal of care in the purchasing decision, and this is yet another du Pont factor in opposer's favor.

In conclusion, we find that opposer's GUARDIAN marks enjoy considerable renown in the field of health insurance; that applicant's mark is confusingly similar in overall commercial impression to opposer's marks; and, that given the way in which applicant's goods are related to opposer's services, ordinary consumers will mistakenly believe, upon seeing applicant's mark on his goods, that there is an association with opposer.

Decision: The opposition is sustained and registration to applicant is refused.