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CEW

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Educators Personal Insurance Center Agency, Inc.

Serial No. 76/077,425

James A. Wahl of Mackall, Crouse & Moore for Educators
Personal Insurance Center Agency, Inc.

Nicholas K. D. Altree, Trademark Examining Attorney, Law
Office 109 (Ronald R. Sussman, Managing Attorney).

Before Seeherman, Hanak and Walters, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Educators Personal Insurance Center Agency, Inc. has
filed an application to register the mark shown below on
the Principal Register for "administration of auto

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insurance, homeowners insurance and personal insurance programs for educational professionals."¹



The Trademark Examining Attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the marks, owned by the same registrant, THE EPIC LIFE INSURANCE COMPANY, previously registered for "insurance underwriting services, namely, life, disability, and health,"² and EPIC ELITE, previously registered for "underwriting and administration of health insurance services in connection with a preferred provider network,"³ that, if used on or in connection with applicant's services, it would be likely to cause confusion or mistake or to deceive.

¹ Serial No. 76/077,425, in International Class 36, filed June 22, 2000, based on use in commerce, alleging first use and use in commerce as of July 30, 1999.

² Registration No. 1,610,756, issued August 21, 1990, to Epic Life Insurance Company, in International Class 36. [Sections 8 and 15 accepted and acknowledged, respectively; renewed for a period of ten years from August 21, 2000.] The registration includes a disclaimer of LIFE INSURANCE COMPANY apart from the mark as a whole.

³ Registration No. 2,239,145, issued April 13, 1999, to Epic Life Insurance Company, in International Class 36.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register with respect to both cited registrations.

Our determination 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 likelihood of confusion issue. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

The Examining Attorney contends that both applicant's and registrant's marks contain the word EPIC; that EPIC is the dominant portion of each mark; that the specimen of record and an excerpt from applicant's Internet web site demonstrate that applicant often refers to itself as "Epic," which reinforces the contention that EPIC is the dominant portion of applicant's mark; that

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applicant's services and the services recited in each of the registrations are all highly related and, based on evidence of third-party registrations, are offered by the same entities under a single mark; and that registrant's services in Registration No. 1,610,756 are limited to a particular market or class of purchasers. In support of his position, the Examining Attorney submitted numerous third-party registrations with various insurance services all identified by a single mark. The insurance services in numerous single registrations included insurance administration, underwriting, health care, life, medical, and automobile insurance, among other insurance services. Additionally, the Examining Attorney submitted an excerpt from applicant's Internet web site that contains numerous references to applicant as "EPIC." For example, "Contact EPIC," "Why choose EPIC," "EPIC is a Wisconsin-based subsidiary of ...," and "At EPIC, we're proud of our midwestern roots."

Applicant contends that its mark is different from the registrant's marks in appearance, sound, connotation and commercial impression when the marks are considered in their entireties, noting in particular the apple design in its mark and the additional wording in the two cited marks. Applicant argues that the insurance it

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sells is different from the type of insurance identified in the two cited registrations; that registrant has been offering its insurance services for many years and has not expanded into the type of insurance offered by applicant; that the classes of purchasers are different because registrant's services identified by the mark EPIC ELITE are clearly directed to the health care industry and registrant's services identified by the mark THE EPIC LIFE INSURANCE COMPANY are directed towards group plans and employee benefits, whereas applicant's services are directed to educational professionals.

We turn, first, to consider the services involved in this case and we note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). *See also, Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be

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identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

Applicant's services as identified limit the class of purchasers of its auto, homeowners and personal insurance programs to educational professionals. Considering, first, the registration of the mark THE EPIC LIFE INSURANCE COMPANY, the identification of services is broadly worded so as to encompass all classes of purchasers, including educational professionals, in its services of underwriting life, disability and health insurance. While the specific types of insurance offered by applicant and registrant are different, the record contains numerous third-party registrations listing all, or various combinations of all, of these types of

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insurance, and both administration and underwriting services, in connection with the same marks.⁴ In view thereof, we find that the Examining Attorney has established that applicant's services and the services in Registration No.1,610,756, for THE EPIC LIFE INSURANCE COMPANY, are closely related services.

The cited registration of the mark EPIC ELITE pertains to health insurance "in connection with a preferred provider network. A reasonable interpretation of this language is that the particular type of health insurance that is underwritten and administered by registrant under the mark EPIC ELITE requires subscribers to use a preferred provider network for full reimbursement under the plan. However, the recitation does not contain limitations as to the class of purchasers of the health insurance and, thus, would encompass educational professionals. As discussed above, the third-party registrations are evidence of marks registered for health, auto, and homeowners insurance.

⁴ Although third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, such registrations nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

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Thus, we find that applicant's identified services are also closely related to the services identified in Registration No. 2,239,145, for EPIC ELITE.

We consider, next, whether applicant's mark is similar to each of the registered marks, when viewed in their entireties, in terms of appearance, sound, connotation and commercial impression. 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 their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

From applicant's specimens, we see that EPIC is an acronym for applicant (Educators Personal Insurance Center). However, the mark in the application does not include those words and EPIC is a word in its own right. Thus, we cannot presume that purchasers will be aware that it is an acronym as used by applicant. Rather, there is no evidence in the record to indicate that EPIC is other than an arbitrary term in connection with the services identified in the application and the cited registrations. In both of the cited registrations, we find that EPIC is the dominant portion of each mark. In the mark EPIC LIFE INSURANCE COMPANY, the term LIFE INSURANCE COMPANY is merely descriptive, if not generic, of the recited services, and this term is clearly subsidiary to the arbitrary term, EPIC, which also appears first in the mark. In the mark EPIC ELITE, the term ELITE is likely to be considered laudatory in connection with the identified services, referring to a higher class of services or coverage. Thus, it is likely to be perceived as one type of health insurance offered under EPIC, which, again, is the first term in the mark. The word portion of applicant's mark is identical to the dominant portions of each of the registered marks. In applicant's mark, the lines above and below the term EPIC

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merely frame the term, which emphasizes it. The apple design is visually subordinate to the word EPIC and is, in any case, suggestive of applicant's relevant purchasers, educational professionals. Thus, to the extent that the apple design is noted at all, purchasers familiar with registrant's services and marks are likely to perceive applicant's mark as identifying yet another type of insurance offered by registrant to a specific market. We conclude that the commercial impression of applicant's mark is sufficiently similar to the commercial impression of each of registrant's marks that, if used in connection with related services, confusion as to source is likely.

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's EPIC and design mark, and registrant's marks, EPIC LIFE INSURANCE COMPANY and EPIC ELITE, their contemporaneous use on the closely related services involved in this case is likely to cause confusion as to the source or sponsorship of such services.

Decision: The refusal under Section 2(d) of the Act is affirmed as to each of the cited registrations.