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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Humana Inc.
v.
Aetna Inc.

Opposition No. 91192704

Jeffrey S. Standley of Standley Law Group LLP for Humana Inc.

Roberta Jacobs-Meadway of Eckert Seamans Cherin & Mellott, LLC for Aetna Inc.

Before Hairston, Cataldo and Ritchie, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Applications have been filed by Aetna Inc. (applicant) to register the marks AETNA ONE (in standard character form) and AETNA ONE and design shown below,

Aetna ne

both for "managed health care services, namely, health and wellness counseling; medical, behavioral health, and disability care management services; disease care management services; providing health care information in the field of

health and wellness, behavioral health, disability, management, and disease management" in International Class 44.¹

Registration has been opposed by Humana Inc. (opposer). Opposer alleges that applicant's marks, when applied to applicant's services so resemble opposer's previously used and registered marks HUMANAONE (in standard character form)² and HUMANAONE and design³ shown below,



for "underwriting insurance for pre-paid health care; insurance underwriting in the field of health administration of pre-paid health care plans; organizing pre-paid health care," as to be likely to cause confusion, under Section 2(d) of the Trademark Act.

Opposer also alleges that its HUMANAONE and HUMANAONE and design marks are famous "through the extensive length of

¹ Serial Nos. 77677706 and 77677709, respectively. Both applications were filed February 25, 2009, based on use in commerce, alleging first use and first use in commerce as of February 12, 2009. In Serial No. 77677709 the mark is described as follows: "The mark consists of the words 'Aetna One' in block letters with a stylized letter 'O' in the word 'One' that is composed of two arrows forming a circle.

² Registration No. 2771449, issued October 7, 2003; Section 8 affidavit accepted, Section 15 affidavit acknowledged.

³ Registration No. 3050248, issued January 24, 2006.

use and the amount of sales revenue achieved." (Notice of Opposition ¶23)

Applicant, in its answer, denied the salient allegations of the notice of opposition.

Accelerated Case Resolution (ACR)

In a January 20, 2010 telephone conference with the Board interlocutory attorney responsible for this case, counsel for both parties agreed to resolve the instant proceeding by way of Accelerated Case Resolution (ACR).

On January 21, 2010 the Board issued an interlocutory order granting the parties' request to resolve this case via ACR. Pursuant thereto, the parties agreed to forego trial and proceed directly to briefing of the case on the merits, and rely upon evidence submitted with their briefs on the case. The parties further stipulated to, inter alia, the following:

Opposer has priority of use for purposes of its claim under Section 2(d) of the Trademark Act; and

Upon conclusion of the parties' briefing of the case, the Board will render a final decision on the merits in accordance with the evidentiary burden at trial, that is, by preponderance of the evidence.

The Record

By operation of Trademark Rule 2.122, 37 C.F.R. §2.122, the record in this case consists of the pleadings and the files of the involved applications. In addition, pursuant to the parties' ACR stipulation, opposer relies upon a

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notice of reliance on certified copies of its pleaded registrations; a notice of reliance on third-party registrations for marks that cover both managed health care services and health insurance underwriting services; the discovery deposition of Ryan Staniak, opposer's marketing manager; the discovery deposition of Deidre King, applicant's marketing manager; and a declaration of Mr. Staniak. Applicant relies upon a notice of reliance on opposer's responses to applicant's discovery requests; the discovery depositions of Mr. Staniak and Ms. King; the discovery deposition of Jill Adams, a member of the marketing firm Adams & Knight; a declaration of Ms. King; and the declarations of Shirley R. Smith, senior vice president of Coventry Health Care, Inc.; Christopher R. Campbell, applicant's chief financial officer; Michael L. Corne, vice president of Golden Rule Health Insurance Company; Peter Brodnitz, applicant's Head of Advertising and Brand; John Dube, applicant's public affairs manager; Amy Zinsser, applicant's Head of Market and Customer Insights; and John F. Metzger, a legal assistant with applicant's counsel.

Opposer and applicant filed main trial briefs, and opposer filed a reply brief.

Standing and Priority

The parties have stipulated that opposer has priority, and opposer has pleaded and made of record status and title copies of its registrations for the marks HUMANAONE and HUMANAONE and design. Thus, we find that opposer also has established its standing to oppose registration of applicant's marks. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

Likelihood of Confusion

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors set forth in *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In each case, we need consider and weigh only those factors as to which there is pertinent evidence of record. See *In re Majestic Distilling Co.*, 315 F.3d at 1315, 65 USPQ2d at 1204 ("Not all of the *DuPont* factors may be

relevant or of equal weight in a given case, and 'any one of the factors may control a particular case,'" quoting *In re Dixie Restaurants, Inc.*, 105 F.3d at 1406-07, 41 USPQ2d at 1533; *In re National Novice Hockey League, Inc.*, 222 USPQ 638 (TTAB 1984).

The Services

We begin with the second *du Pont* factor, which requires us to determine the similarity or dissimilarity of the services as identified in applicant's applications and in opposer's relied-upon registrations. We note that applicant has failed to offer any response in its brief to opposer's contention that the respective services are related.

It is settled that it is not necessary that the respective services be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the services are related in some manner, or that the circumstances surrounding their marketing are such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective services. *In re Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

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Opposer's services, as identified in opposer's registrations, are "underwriting insurance for pre-paid health care; insurance underwriting in the field of health administration of pre-paid health care plans; organizing pre-paid health care." Applicant's services, as identified in applicant's applications, are "managed health care services, namely, health and wellness counseling; medical, behavioral health, and disability care management services; disease care management services; providing health care information in the field of health and wellness, behavioral health, disability, management, and disease management." Obviously, both parties' services involve the provision of health care. Furthermore, opposer has submitted twelve use-based third-party registrations for marks that cover health insurance underwriting and/or administration services, on the one hand, and managed health care services, on the other hand. Although such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have probative value to the extent that they serve to suggest that the services listed therein are of a kind which could be marketed by a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988).

In view of the foregoing, we find that applicant's services as identified in its applications are related to the services identified in opposer's registrations. Accordingly, this *du Pont* factor weighs in favor of a finding of likelihood of confusion.

Trade channels and purchasers

Under the third *du Pont* factor, we determine the similarity or dissimilarity of the trade channels in which and the purchasers to whom applicant's services and opposer's services, as identified in the applications and registrations respectively, are marketed. Here, because there are no limitations or restrictions as to trade channels or classes of purchasers in the respective identifications of services, we presume that the services are marketed in all normal trade channels and to all normal classes of purchasers for such services. *In re Elbaum*, 211 USPQ 639 (TTAB 1981). As such, opposer's services are presumed to travel in all the normal channels of trade for health insurance underwriting services. Thus, opposer's services could be directed to or at least be encountered by individuals or companies who are purchasers or users of applicant's managed health care services. The respective services must therefore be treated as traveling in the same channels of trade to the same classes of purchasers.

Accordingly, this *du Pont* factor weighs in favor of a finding a likelihood of confusion.

Conditions of Purchase

The next *du Pont* factor we consider is the sophistication of purchasers and the level of care taken in making the purchasing decision. In this case, the purchasers include individuals and companies. Because the decision to purchase healthcare insurance and related services involves both the quality of the services and a significant financial commitment, purchasers are likely to exercise greater care and know with whom they are dealing. Indeed, the Board has noted that “[i]t is common knowledge that even ordinary consumers tend to exercise some sophistication when it comes to decisions relating to healthcare and healthcare insurance services.” *Carefirst of Maryland, Inc. v. FirstHealth of the Carolinas, Inc.*, 77 USPQ2d 1492, 1503 (TTAB 2005). We find that this *du Pont* factor weighs against a finding of likelihood of confusion.

Fame

We next take up the fifth *du Pont* factor of fame, because fame of the prior mark plays a dominant role in likelihood of confusion cases featuring a famous mark. *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000); and *Kenner Parker*

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Toys, Inc. v. Rose Art Industries, Inc., 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992). Fame may be measured indirectly by the volume of sales and advertising expenditures of the goods and services identified by the marks at issue, "by the length of time those indicia of commercial awareness have been evident," widespread critical assessments through notice by independent sources of the products or services identified by the mark, as well as the general reputation of the products and services. *Bose Corp. v. QSC Audio Products Inc.*, 63 USPQ2d at 1305-1306 and 1309.

Opposer's evidence on fame includes sales revenue and marketing expenditures for the years 2002-2009.⁴ The HUMANAONE marks have been in use for eight years, and opposer has promoted the marks and the services offered there under in a variety of media, including in printed publications, on television, radio and the Internet, and by way of direct mail. Opposer also has used the marks on several collateral products.

Insofar as opposer's sales and marketing figures are concerned, while they are indeed substantial, opposer has

⁴ The breakdown of figures by specific years during this time period has been deemed confidential.

failed to put the numbers in any context, such as evidence of opposer's market share for the services. As the Federal Circuit has stated, "[r]aw numbers of product sales and advertising expenses may have sufficed in the past to prove fame of a mark, but raw numbers alone in today's world may be misleading ... Consequently, some context in which to place raw statistics is reasonable." *Bose Corp. v. QSC Audio Products, Inc.*, 63 USPQ2d at 1309. In this case, opposer has failed to put the numbers in context in terms of where its HUMANAONE services rank among health insurance underwriters. Thus, opposer's evidence falls far short of establishing that its HUMANAONE and HUMANAONE and design marks are truly famous. *See Blue Man Productions, Inc. v. Erich Tarmann*, 75 USPQ2d 1811, 1819 (TTAB 2005) ["In view of the extreme deference that is accorded to a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, we think that it is the duty of a plaintiff asserting that its mark is famous to clearly prove it."].

Thus, we find that the *du Pont* factor of fame is neutral. Even if fame had been shown, the factor of fame is not sufficient to establish likelihood of confusion in the present proceeding. As stated in past cases, if that were the case, ownership of a famous mark would entitle the owner

to a right in gross, and that runs counter to trademark laws. See *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 703 F.2d 1372, 217 USPQ 505, 507 (Fed. Cir. 1983) ["The fame of the [plaintiff's] name is insufficient in itself to establish likelihood of confusion under § 2(d)."]. See also *Recot Inc. v. M.C. Becton, supra* at 1898 ["fame alone cannot overwhelm the other duPont factors as a matter of law"].

In this case, the differences between the marks (see *infra*), would be sufficient to overcome any showing of fame. See *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459 (Fed. Cir. 1998); and *Kellogg Co. v. Pack-Em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991).

Third-party use and registrations

The next *du Pont* factor to consider is the number and nature of similar marks in use on similar services. Applicant maintains that there is significant third-party use of the word "One" in the health insurance field and, therefore, the word is weak. In support of its position, applicant submitted: (1) the declaration of Shirley R. Smith, vice-president of Coventry Health Care, Inc. ("Coventry"). Ms. Smith stated, inter alia, that Coventry has used the federally-registered mark COVENTRYONE for providing managed health care services and underwriting and

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administration of prepaid health insurance benefit plans since at least as early as August 1, 2006; that Coventry renders such services in twenty-two states throughout the United States; that the COVENTRYONE mark is advertised and promoted through a variety of direct marketing activities, through insurance brokers, and at Coventry's website; and (2) the declaration of Michael I. Corne, vice-president of Golden Rule Health Insurance Company ("Golden Rule"). Mr. Corne stated, inter alia, that Golden Rule began use of the mark "UnitedHealth One" at least as early as September 4, 2008 in connection with the sale of health insurance products; that the mark is used in connection with organizing, administering and underwriting insurance plans and programs in the fields of health, dental and life insurance; organization and administration of prepaid health care plans and prepaid dental plans; organization and administration of health care benefit plans dental care plans; and insurance underwriting in the fields of health, dental and life insurance; and that the "UnitedHealth One" mark is promoted through television advertisements, direct mail, internet advertisements and advertisements sent to independent insurance brokers.

In addition, with the declaration of John Metzger, applicant introduced evidence of over thirty third-party

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registrations for marks that include the word "One."

Examples of these registrations include the following:

CAPITAL ONE for, inter alia, "insurance services ... in the field of health"; CLEAR ONE for, inter alia, "insurance services, namely, underwriting, issuing and administration of individual and group health insurance plans ..."; COVENTRYONE for "underwriting and administration of prepaid health insurance benefit plans"; EAGLE ONE for "managing medical cost and healthcare; namely, managing cost of health care benefit plans for Worker's compensation injuries for insurance companies and self-insured employers"; FOUNDATION ONE SECURITY for "organizing health insurance programs and health benefit programs for others"; HEALTHAMERICAONE for, inter alia, "underwriting and administration of prepaid health insurance benefit plans"; INSURE ONE (INSURE disclaimed) for, inter alia, "insurance brokerage services in the fields of ... health insurance"; MEDONE CHOICE for "insurance services, namely, design, and administration of health care insurance plans for others"; ONENET PPO (PPO disclaimed) for, "managed health care services"; PREFERREDONE for "administration of preferred provider programs in the field of health care"; \$AVER ONE for "health insurance underwriting, brokerage and administration"; VITAL ONE for "insurance agency and brokerage in the field of health and life insurance plans"; AFFORDABLEONE for

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"insurance services, namely, design and administration of health care insurance plans for others"; ONE2ONEHEALTH for "providing information and consultation services in the healthcare insurance and benefit plans of others industry, namely, managed healthcare services, healthcare utilization and review services, featuring health coaching and administrative advocacy services that assist others in understanding medical condition(s) and health benefits, rendered to employees who provide health insurance and benefits to their employees."

Applicant also introduced, via the Metzger declaration, reprints of numerous web pages that feature various marks that include the word "One." Many of these web pages appear to be websites posted by the owners of certain registrations referenced above, e.g., CLEAR ONE, COVENTRYONE, EAGLE ONE, FOUNDATION ONE SECURITY, HEALTHAMERICAONE, INSURE ONE, MEDONE, ONENET PPO, PREFERRED ONE, and \$AVER ONE.

The above evidence leads us to conclude that the word "One" is relatively diluted as used in the health insurance field, and that marks using the word "One" often co-exist and are distinguished because of other terms used in conjunction with "One." This *du Pont* factor, therefore, weighs against a finding of likelihood of confusion.

The marks

We turn finally to the first *du Pont* factor, which requires us to determine the similarity or dissimilarity of applicant's marks and opposer's marks when viewed in their entirety in terms of appearance, sound, connotation and commercial impression. The test for confusing similarity 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 impression that confusion as to the source of the 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 specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975) The marks at issue may not be dissected but rather must be considered in their entirety. However, 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).

In this case, the initial elements in the marks, AETNA and HUMANA differ significantly. Cf. *Presto Products, Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988)

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["... [it is] a matter of some importance since it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered."].

Furthermore, and more importantly, we find that AETNA, applicant's house mark, is the dominant portion of applicant's marks, and HUMANA, opposer's house mark, is the dominant portion of opposer's marks. Opposer argues that "the addition of the parties' house mark in front of "ONE" does not serve to obviate any likelihood of confusion. The Board has frequently held that a mere addition of a house mark to a registered mark will not avoid confusion."

(Opposer's brief, p. 19). However, this is not a case where applicant has merely added its house mark to opposer's registered mark. In other words, applicant has not added AETNA to HUMANAONE to form the mark AETNA HUMANAONE. In short, opposer's reliance on decisions which have held that the addition of housemark to a registered mark may not be sufficient to avoid a likelihood of confusion is misplaced.

The sole similarity between the parties' respective marks is the presence of the word ONE. Opposer contends that the word ONE, "when used in connection with health care related services, is arbitrary as it has no particular meaning with respect to those services and is thus inherently strong." (Brief, p. 18). However, as discussed above, ONE is weak in the health insurance field and

purchasers are able to distinguish among various ONE marks by looking at other elements of the marks.

We find that when applicant's and opposer's marks are considered in their entirety, giving appropriate weight to the dominant portions thereof, namely, AETNA and HUMANA, the marks differ in appearance, sound, connotation and commercial impression. In addition, applicant's mark,

The logo for Aetna One features the word "Aetna" in a clean, sans-serif font, followed by a circular icon containing a stylized "O" with a curved arrow, and the word "one" in a bold, lowercase sans-serif font.

and opposer's mark,

The logo for Humana One features the word "Humana" in a light, serif font above a black circle. Inside the circle, the word "one" is written in a white, lowercase, cursive-style font.

are further distinguished by their respective stylization and design elements. The *du Pont* factor of the similarity of the marks weighs against a finding of likelihood of confusion.

Conclusion

Having considered the evidence of record as it pertains to the relevant *du Pont* factors, we find that confusion is unlikely to result from the contemporaneous use of opposer's marks HUMANAONE and HUMANAONE and design and applicant's marks AETNA ONE and AETNA ONE and design, even when the

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marks are used on similar services marketed in the same trade channels to the same purchasers. We find that the dissimilarity of the marks, under the first *du Pont* factor, simply outweighs the evidence as to the other factors which favor opposer's case. See e.g., *Kellogg Co. v Pack-Em Enterprises, Inc.*, 21 USPQ2d at 1145.

Decision: The opposition is dismissed.