



Use of the reputation of a medicinal product in the advertisement of a food supplement

Order of the Court of Appeals of Madrid of 1 October 2021

Background

In the context of a dispute between Exeltis and Italfarmaco regarding the dissemination of promotional materials by Italfarmaco of food supplement Oniria®, Exeltis requested a preliminary injunction prohibiting the dissemination of the materials and ordering their withdrawal. The Commercial Court granted the injunction and Italfarmaco appealed this decision. The decision of the Court of Appeals of Madrid which we analyse below rules on this appeal.

Anticipatory preliminary injunctions

Firstly, the Court of Appeals recalls that anticipatory preliminary injunctions, such as those requested (aimed at satisfying the claimant in advance without the need to await the final judgment), are valid and common in advertising and unfair competition litigation. Their purpose is to put an end to the actual damage that is being caused by the unfair conduct and/or to avoid the risk of aggravating the damage.

There is no *de facto* consensual situation

The Court of Appeals also points out that there is no *de facto* consensual situation (preventing the adoption of this type of preliminary injunction) whenever the parties have exchanged out-of-court correspondence prior to the request, and the party requesting the injunction has diligently combated the

advertisement conducted by the counterparty by requesting its cessation.

Use of another's reputation in advertising

Finally, when considering the likelihood of success on the merits of the case in the request for the preliminary injunction, the Court of Appeals analyses whether the conduct of Italfarmaco, which consisted in including bibliographical references to clinical studies of medicinal product Cirdadin® (marketed by Exeltis) in the advertising leaflet of the food supplement Oniria®, may constitute a case of advertising using another's reputation.

The Court of Appeals concludes that this conduct may constitute an act of use of another's reputation because, among other reasons, it aims to cause the addressees of the advertisement to associate the benefits of the medicinal product with those of the advertised food supplement (by transferring the results of the studies conducted with the medicinal product to the food supplement), thus taking advantage of the reputation of the medicinal product on the market.