

## Pfizer Can Pursue Claim For Securities MDL Coverage

By **Jeff Sistrunk**

*Law360 (July 24, 2019, 3:18 PM EDT)* -- A Delaware judge on Tuesday allowed Pfizer to press its suit to force two excess insurers to help cover its costs to defend and settle multidistrict litigation that accuses the company of misleading investors about the alleged cardiovascular risks of its pain treatments Celebrex and Bextra.

Delaware Superior Court Judge Paul R. Wallace granted Pfizer Inc.'s motion for partial summary judgment and declared that excess carriers Arch Insurance Co. and U.S. Specialty Insurance Co. cannot invoke a "specific litigation exclusion" in their policies to deny coverage for the pharmaceutical giant's costs in the case of *Morabito v. Pfizer*.

The exclusion bars coverage for any claims "arising out of, based upon or attributable to" another now-settled securities fraud class action called *Garber v. Pharmacia Corp.*, which alleged that Pharmacia and Pfizer distorted clinical study results to show that Celebrex had a better gastrointestinal safety profile than similar medications. Arch and U.S. Specialty contended that the exclusion applies because the *Morabito* and *Garber* actions contain a number of "overlapping and common allegations."

But Judge Wallace was unconvinced, finding that "while there may be some thematic similarities," the two cases are "truly, in all relevant respects, different."

"The wrongs alleged in the *Garber* and *Morabito* actions involved entirely distinct misrepresentations of very different health risks associated with Celebrex," the judge wrote. "The underlying actions are not fundamentally identical. And so, the court must find as a matter of law, that the specific litigation exclusion in the D&O policies does not excuse defendant insurers' coverage obligations."

The underlying *Morabito* action was initially filed in December 2004. The plaintiff investors claimed that Pfizer and its executives, including former CEO Henry McKinnell, knew that drug-safety studies conducted between 1998 and 2004 showed Celebrex and Bextra posed serious cardiovascular risks but hid the information from the public.

*Morabito* was later folded into an MDL, and in 2016 Pfizer agreed to pay \$486 million to settle the litigation. Over the course of 12 years, the pharmaceutical company also spent about \$82 million to defend itself and its executives in the case, according to court documents.

Court papers indicate that, at the time the *Morabito* complaint was filed, Pfizer held a \$225 million

directors and officers insurance program consisting of a primary policy issued by National Union Fire Insurance Co. of Pittsburgh and 12 layers of excess coverage issued by Arch, U.S. Specialty and a host of other carriers.

While National Union and the other excess insurers helped cover Pfizer's defense and settlement costs in the MDL, Arch and U.S. Specialty declined on multiple grounds, including the specific litigation exclusion, according to court documents. In response, Pfizer launched the current suit in Delaware Superior Court.

In Tuesday's order on the parties' cross-motions for partial summary judgment, Judge Wallace concluded that the specific litigation exclusion is inapplicable because the differences between the Morabito and Garber actions outweigh the similarities.

For one, the Morabito action was brought by Pfizer stockholders, while the Garber case was filed by stockholders of Pharmacia, which was acquired by Pfizer in 2003, the judge noted. Furthermore, Judge Wallace said, the Garber plaintiffs alleged that Pharmacia and Pfizer understated the gastrointestinal risks of Celebrex, while the Morabito plaintiffs claimed that Pfizer downplayed the drug's cardiovascular risks.

"Although both are class action lawsuits alleging securities violations, the Garber action and Morabito action do not cover the 'same subject' and the specific litigation exclusion, therefore, does not preclude coverage," the judge wrote.

An Arch spokesman declined comment on Wednesday. Counsel for Pfizer and U.S. Specialty did not immediately respond to requests for comment.

Pfizer is represented by Robin Cohen, Adam S. Ziffer and Marc Ladd of McKool Smith PC and John P. Ditomo, Kenneth J. Nachbar and Barnaby Grzaslewicz of Morris Nichols Arsht & Tunnell LLP.

The insurers are represented by Erica J. Kerstein and Marc S. Casarino of White and Williams LLP, Carmella P. Keener of Rosenthal Monhait & Goddess PA and Matthew J. Dendinger of Loss Judge & Ward LLP.

The case is Pfizer Inc. v. Arch Insurance Co. et al., case number N18C-01-310 PRW CCLD, in the Superior Court of the State of Delaware.

--Editing by Gemma Horowitz.

*Updated: This story has been updated with additional counsel information for Pfizer.*