

New York Law Journal

Del. Court Orders Insurers to Provide Coverage in \$486M Settlement of Pfizer NY Shareholder Dispute

Tom McParland

July 26, 2019

A Delaware judge has ruled that two of Pfizer Inc.'s insurers must cover the costs associated with a \$486 million settlement in a New York shareholder suit that accused the pharmaceutical giant of misleading investors about the health risks associated with two anti-inflammatory drugs.

The ruling said Pfizer's excess insurers, Arch Insurance Co. and U.S. Specialty Insurance Co., could not rely on a "special litigation exclusion" in their director and officer policies to deny coverage based on another securities class action they claimed was identical to the case in Manhattan federal court.

In a 27-page ruling, Delaware Superior Court Judge Paul R. Wallace sided with Pfizer in finding that though aspects of the cases overlapped, there were still distinct differences between the two, which prevented the insurers from avoiding their coverage obligations.

"In short, while there may be some thematic similarities, the underlying actions are truly, in all relevant respects, different," Wallace wrote in the decision dated Tuesday.

The dispute stemmed from long-running litigation in the Southern District of New York, which accused Pfizer and its then-chairman and CEO, Henry A. McKinnell, of hiding cardiovascular risks associated with Celebrex and Bextra. The case, referred to in Wallace's opinion as the "Morabito action," settled in 2016, with Pfizer agreeing to pay \$486 million, on top of the \$82 million it had incurred in defense costs over the 12-year life of the lawsuit.

According to court documents, Pfizer annually purchased insurance to cover third-party claims for wrongful conduct against its directors and officers, and had 13 layers of insurance providing \$225 million in coverage in excess of a \$10 million self-insured retention.

In the wake of the Morabito action, however, Arch and U.S. Specialty refused coverage, saying the case was "unquestionably related" to another securities class action in which investors in Pharmacia Corp. sued over false and misleading representations in a study Pharmacia had commissioned regarding Celebrex's gastrointestinal health risks. Pharmacia, a Swedish pharmaceutical and biotechnological firm, was later acquired by Pfizer in 2003.

The insurers argued that the language of the policies precluded coverage, so long as the two cases "share any commonality."

But Wallace called that reading “strained and uncharacteristically broad,” in light of previous Delaware rulings that found coverage to be precluded only when the two underlying claims were “fundamentally identical” and involved the same subject.

The “Garber case,” as it is called in the decision, was brought by Pharmacia stockholders over misstatements regarding Celebrex’s gastrointestinal risks, whereas the Morabito action focused on cardiovascular concerns surrounding Celebrex and another drug, Bextra, Wallace said.

“Although both are class action lawsuits alleging securities violations, the Garber action and Morabito action do not cover the ‘same subject’ and the special litigation exclusion, therefore, does not preclude coverage,” Wallace said.

Attorneys for Pfizer declined to comment, and an attorney for the insurers did not return a call Friday seeking comment on the ruling.

Pfizer was represented by Robin Cohen, Adam Ziffer and Marc Ladd of McKool Smith in New York and John P. Ditomo, Kenneth J. Nachbar and Barnaby Grzaslewicz of Morris Nichols Arshat & Tunnell in Wilmington, Delaware.

Arch and U.S. Specialty were represented by Erica J. Kerstein of White & Williams in New York, Marc S. Casarino from the firm’s Wilmington office, Carmella P. Keener of Rosenthal, Monhait and Goddess in Wilmington and Matthew J. Dendinger of Loss, Judge & Ward in Washington, D.C.

The case was captioned Pfizer v. Arch Insurance.