

Specific Litigation Exclusion Does Not Bar Coverage for Securities Class Action
Mealey's Emerging Insurance Disputes
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A Delaware judge on July 23 held that wrongs asserted in two underlying securities lawsuits implicated “entirely distinct misrepresentations of very different health risks associated with Celebrex,” rejecting excess directors and officers liability insurers’ argument that the specific litigation policy exclusion excuses their duty to defend (*Pfizer Inc. v. Arch Specialty Insurance Company and U.S. Specialty Insurance Company*, N18C-01-310, Del. Super.; 2019 Del. Super. LEXIS 345).

(Memorandum opinion and order available. Document #13-190801-014Z.)

A securities class action was filed against Pfizer, several of its directors and officers and Pharmacia Corp., alleging that the defendants made misrepresentations and omissions as to the safety of cyclooxygenase-2 (COX-2) inhibitor drugs Celebrex and Bextra (*In re Pfizer Inc. Securities Litigation*, No. 04-09866 (S.D.N.Y. Mar. 27, 2012) (the Morabito action).

The two drugs at issue were developed by Pharmacia and co-marketed by Pfizer and Pharmacia.

On Jan. 26, 2018, Pfizer sued its excess insurers Arch Insurance Co. and U.S. Specialty Insurance Co. in the Delaware Superior Court for breach of contract and sought a declaration that the excess insurers have a duty to cover its underlying defense costs.

The same day, the excess insurers filed a similar lawsuit in the U.S. District Court for the Southern District of New York. On March 30, Pfizer moved to dismiss or stay the federal lawsuit. On May 21, 2018, the Southern District of New York stayed the federal lawsuit pending resolution of a lawsuit seeking the same relief that was pending in the U.S. District Court for the District of Delaware.

After the District of Delaware denied a motion to transfer venue to the Southern District of New York, the Southern District of New York granted Pfizer’s motion to dismiss. The insurers appealed to the Second Circuit U.S. Court of Appeals, which affirmed the District Court’s ruling on June 6, 2019.

‘Specific Litigation’ Exclusion

On March 30, 2018, the insurers moved to dismiss the present state court lawsuit. On Nov. 5, Pfizer moved for partial summary judgment. Judge Paul R. Wallace converted the insurers’ motion to dismiss to a cross-motion for summary judgment.

The insurers argued that the “Related Wrongful Acts” and the “Specific Litigation” policy exclusions bar coverage because Morabito shares “a common nexus any fact, circumstance, situation, event, transaction [or] cause” with Robert L. Garber v. Pharmacia Corp., et al., No. 03-1519 (AET) (D.N.J.).

Garber was a prior securities fraud class action lawsuit that was brought by shareholders of Pharmacia Corp. In the lawsuit, the shareholders alleged that they incurred financial losses resulting from false and misleading statements that were contained in a Pharmacia study concerning Celebrex's gastrointestinal health risks.

Pfizer countered that while the two underlying lawsuits involve securities claims involving the drug Celebrex, they are not related pursuant to the policies because they involve “different plaintiffs, different defendants, different alleged harms, and different alleged wrongful conduct committed by different people.”

‘Same Subject’

Judge Paul R. Wallace concluded that the two underlying lawsuits are “not fundamentally identical.”

“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. . . . In short, while there may be some thematic similarities, the Underlying Actions are truly, in all relevant respects, different.”

The judge added that the “wrongs alleged in the Garber and Morabito Actions involved entirely distinct misrepresentations of very different health risks associated with Celebrex.”

The judge granted Pfizer's motion for partial summary judgment and denied the excess insurers' cross-motion for partial summary judgment.

Counsel

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