

## Excess Insurer Owes Pfizer Coverage For Securities MDL

By Jeff Sistrunk

*Law360 (August 31, 2020, 4:42 PM EDT)* -- A Delaware judge on Friday ruled that excess insurer U.S. Specialty Insurance Co. must help cover Pfizer Inc.'s costs to defend and settle multidistrict litigation that accused the company of misleading investors about the alleged cardiovascular risks of its pain treatments Celebrex and Bextra.

Delaware Superior Court Judge Paul R. Wallace held that Pfizer is entitled to coverage under a \$15 million excess directors and officers policy with U.S. Specialty for its costs in the underlying case of *Morabito v. Pfizer*, even though the pharmaceutical giant previously settled with one of its lower-level excess insurance companies for less than the limit of that insurer's policy.

U.S. Specialty's policy provided the eighth layer of excess coverage in Pfizer's 13-layer, \$225 million insurance "tower" for a period spanning April 2004 to April 2005. The insurance carrier argued that its layer was not triggered because the lower-level excess insurer, which was not identified in the judge's order, had not paid out its full policy limit.

But Judge Wallace rejected that contention. He noted that Delaware courts have long applied the so-called Stargatt rule, which provides that, if a policyholder agrees to settle with an excess insurer for less than the policy limit, that agreement exhausts the policy for legal purposes.

Judge Wallace said U.S. Specialty could have worked around this rule by specifying that its coverage layer would be triggered only if the lower-level excess insurers paid out their full policy limits to Pfizer, but did not do so. Instead, the U.S. Specialty policy only requires that the lower-level policies be "exhausted by actual payment of claims."

"A settlement in which an insurer makes a payment and the insured agrees that the payment fully satisfies the policy accomplishes just such an exhaustion through actual payment," Judge Wallace wrote.

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.

At the time the Morabito action 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, Pa. and 12 layers of excess coverage issued by U.S. Specialty, Arch Insurance Co. 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, according to court documents.

In response, Pfizer launched the current suit in Delaware Superior Court.

In a **prior decision** issued in July 2019, Judge Wallace found that a "specific litigation exclusion" in U.S. Specialty's and Arch's policies did not bar Pfizer's insurance claim.

The exclusion forecloses 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 applied because the Morabito and Garber actions contain a number of "overlapping and common allegations."

But Judge Wallace was unconvinced, finding in the July 2019 opinion that "while there may be some thematic similarities," the two cases are "truly, in all relevant respects, different."

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. Judge Wallace also said the Garber plaintiffs had alleged that Pharmacia and Pfizer understated the gastrointestinal risks of Celebrex, while the Morabito plaintiffs claimed that Pfizer downplayed the drug's cardiovascular risks.

Following that ruling, Arch settled with Pfizer on undisclosed terms, but U.S. Specialty continued to contest its coverage obligations.

In addition to asserting that Pfizer's lower-level excess policies were not properly exhausted, U.S. Specialty invoked two "prior notice" exclusions in its policy. Those exclusions bar coverage for any claims "arising out of" or "based upon" identical or related "wrongful acts" as any claims that Pfizer had previously reported under policies predating those in its 2004-2005 insurance tower.

U.S. Specialty argued that the exclusions apply because Pfizer in April 2003 notified its prior insurers of the Garber action and a proposed class action that was later consolidated with Garber. Judge Wallace, however, said U.S. Specialty's attempt to invoke the exclusions must fail based on his previous ruling that the Garber and Morabito cases are materially different.

"Whether the Morabito action was 'resulting from, or in any matter relating' to the Garber action is in all respects the same inquiry as 'arising out of' or 'based upon' and still requires a showing that the actions are 'fundamentally identical,'" Judge Wallace wrote. "The distinction the court identified in the previous round of cross-motions between concealment of cardiovascular health risks and concealment of gastrointestinal health risks dooms U.S. Specialty's current effort to avoid coverage."

An attorney for Pfizer declined to comment Monday, while counsel for U.S. Specialty did not immediately respond to a request 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.

U.S. Specialty is represented by Carmella P. Keener of Cooch & Taylor PA and Jeffrey J. Ward of Dkykema Gossett PLLC.

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

--Editing by Jack Karp.