EFiled: Dec 23 2020 11:41AM EST
Filing ID 66200606
Case Number 352,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

U.S. SPECIALTY INSURANCE COMPANY, *Defendant Below, Appellant,* v. PFIZER INC., *Plaintiff Below, Appellee.*	No. 352, 2020 On Appeal from the Superior Court of the State of Delaware, C.A. No. N18C-01-310 PRW (CCLD) (Wallace, J.)

OPENING BRIEF OF APPELLANT U.S. SPECIALTY INSURANCE COMPANY

Of Counsel:

Douglas M. Mangel
Joseph A. Bailey III
Gabriela Richeimer
CLYDE & CO US LLP
1775 Pennsylvania Avenue NW
Suite 400
Washington, DC 20006
(202) 747-5100

Carmella P. Keener (#2810)
COOCH AND TAYLOR, P.A.
1007 N. Orange Street, Suite 1120
P.O. Box 1680
Wilmington, DE 19899-1680
ckeener@coochtaylor.com
(302) 984-3816

Attorneys for Defendant-Appellant U.S. Specialty Insurance Company

Dated: December 23, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Treatises

NATURE OF PROCEEDINGS

This insurance coverage dispute arises out of a series of securities class actions alleging that Appellee Pfizer Inc. ("Pfizer") and Pharmacia Corp. ("Pharmacia"), which later merged into Pfizer, misrepresented the safety of the blockbuster COX-2 inhibitor drug they were co-marketing, Celebrex. In April 2003, the first two of those actions ("*Garber*" and "*Jewell*") were filed against Pharmacia, alleging that Pfizer and Pharmacia failed to disclose the gastrointestinal and cardiovascular risks posed by Celebrex. In the same month, Pfizer provided notice to the insurers on its then-current 2002-2003 directors and officers ("D&O") liability insurance program, advising them that a similar action might be brought against Pfizer and its directors and officers and preserving coverage under that insurance program for any such future action.

This possibility became a reality in 2004, when another securities class action ("*Morabito*") was filed against Pfizer and its officers for their alleged role in concealing the health risks associated with Celebrex and another COX-2 inhibitor drug co-marketed with Pharmacia. *Morabito*, *Garber* and *Jewell* all alleged the same scheme by Pfizer and Pharmacia to reap billions in increased sales fueled by their alleged misrepresentations regarding the superior safety profile of their COX-2 inhibitors as compared to less expensive alternative drugs. The plaintiffs in *Morabito*, *Garber* and *Jewell* all relied on some of the same undisclosed risks,

press releases and studies to support their claims. The initial *Garber* and *Jewell* complaints were but the tip of a much larger iceberg of which *Morabito* was a part.

Pfizer's 2004-2005 D&O insurers, including Appellant U.S. Specialty Insurance Company ("U.S. Specialty"), bargained for and received broad and overlapping protections against the risk of claims in any way related to the facts and circumstances that gave rise to *Garber* and *Jewell*. These protections included broad "prior notice" and "specific litigation" exclusions that respectively bar coverage for claims "where all ***or part*** of such claim is, directly or indirectly, based on, attributable to, ***arising out of***, resulting from, ***or in any matter relating to*** wrongful acts or ***any*** facts, circumstances, or situations" noticed under a prior policy, and claims "alleging, arising out of, … ***or in any way related*** directly or indirectly, ***in whole or in part***, to a … related Wrongful Act alleged in [*Garber*]." Relying on these negotiated protections, U.S. Specialty denied coverage for *Morabito*.

In two separate rulings on cross-summary judgment motions, the Superior Court refused to apply these exclusions according to their plain, broad language, and instead limited their applicability to claims that are "fundamentally identical" to *Garber* and *Jewell*. In doing so, the Superior Court looked past the exclusions' actual language and instead concluded that prior Superior Court decisions required the application of a "fundamentally identical" standard to all similar exclusions

under Delaware law, irrespective of their actual language. The Superior Court acknowledged that New York law would have applied the exclusions as written, but held that New York law did not apply to the policies—which were issued in New York, with New York endorsements, to an insured based in New York, through a New York broker—because Pfizer is a Delaware corporation and the policies would have required consideration of Delaware law in any ADR proceeding.

The Superior Court erred. Black letter law in both Delaware and New York requires that the exclusions be applied according to their plain, broad language. When that rule of policy interpretation is followed, the exclusions bar coverage for *Morabito*. The "fundamentally identical" test contravenes basic rules of policy interpretation in Delaware and cannot be allowed to stand. Alternatively, New York law should apply and would cause the exclusions to bar coverage for *Morabito*. This Court should accordingly reverse and enter judgment for U.S. Specialty.

SUMMARY OF ARGUMENT

1. The Superior Court erred in holding that a conflict exists between Delaware and New York law on whether the prior notice and specific litigation exclusions should be applied according to their plain language to bar coverage for *Morabito*. Both states' laws require that plain policy language be applied as written. The prior notice and specific litigation exclusions plainly and broadly apply to any claims that arise out of or in any way relate, even in part, to any wrongful acts, facts, or circumstances of which notice has been provided to any prior insurer, or to related wrongful acts with those alleged in *Garber*. This language cannot reasonably be construed to limit the exclusions to claims that are "fundamentally identical" with prior noticed matters or *Garber*. In holding otherwise, the Superior Court erred.

When the exclusions are applied as written, as required by both Delaware and New York law, they unambiguously bar coverage. *Morabito, Garber* and *Jewell* arose from or relate at least in part to the same or related misrepresentations regarding the safety of Pfizer's COX-2 inhibitors, including regarding the cardiovascular safety of Celebrex, some of the same or related studies and press releases, and the same alleged efforts to spur increased sales of these drugs by representing they were not subject to the same health risks as less costly alternatives.

2. If a choice of law analysis is required, the Superior Court erred by applying Delaware law instead of New York law. New York has the most significant relationship with this case because the policies were negotiated and issued in New York with New York amendatory endorsements, New York law is referenced on every page of the policies, and New York was Pfizer's principal place of business. In applying Delaware law instead, the Superior Court followed recent Superior Court decisions concluding that the state of incorporation trumps all other choice of law factors in D&O insurance coverage disputes because D&O policies apply to breach of fiduciary duty actions governed by the laws of the state of incorporation. That overly simplistic view of D&O insurance ignores that such policies provide broad coverage for myriad claims governed by federal law or the laws of the state in which the conduct occurs—which more often points to a company's principal place of business than its state of incorporation. D&O insurance thus is more closely akin to the comprehensive insurance policies this Court analyzed in *Certain Underwriters at Lloyds, London v. Chemtura Corp.*, 160 A.3d 457 (Del. 2017) and *Travelers Indemnity Co. v. CNH Industrial America, LLC*, 191 A.3d 288 (Del. 2018). The Superior Court should have followed the analysis in these decisions and applied New York law because New York has the most significant relationship with this dispute.

STATEMENT OF FACTS

A. Pfizer's New York-Based 2004-2005 D&O Insurance Program

U.S. Specialty issued its excess policy to Pfizer with a $15 million limit of liability in excess of $130 million in underlying insurance (the "U.S. Specialty Policy"), as part of a tower of "claims made" D&O insurance for an April 16, 2004 to April 16, 2005 policy period (the "2004-2005 Program"). A157-171. The U.S. Specialty Policy provides coverage "in conformance with the terms, conditions, limitations and endorsements of the policy immediately underlying this Policy," A169 §I, *i.e.* with the terms of an excess policy issued by Twin City Fire Insurance Company (the "Twin City Policy"). A36 ¶15. The Twin City Policy in turn "follows form" to the terms, conditions, definitions, exclusions and endorsements contained in the primary policy issued by National Union Fire Insurance Company of Pittsburgh, Pa. (the "Primary Policy"), and also incorporates any exclusions in the other underlying insurance policies identified in Endorsement No. 1. *Id*.; A173-189 (Twin City Policy); A51-155 (Primary Policy).

All of these policies were issued to a New York-based insured (Pfizer) at a New York address, and were procured through Pfizer's New York insurance broker, Marsh. A34 ¶6; A51-53; A157; A173. Virtually every page of the policies bears a physical stamp stating that the policy forms and rates "must meet the minimum standards of the New York insurance law and regulations." A51-189.

All of the policies include New York endorsements ensuring conformance with New York law. A74-75, 91-101, 160-165, 174, 184-185. The U.S. Specialty Policy includes five such endorsements, A160-165, and was issued on a "NEW YORK FORM." A157.

Because the U.S. Specialty Policy follows form to the terms of the Twin City Policy, which in turn follows form to the underlying insurance policies, A36 ¶15, the U.S. Specialty Policy incorporates the broad prior notice exclusion in the Twin City Policy and the broad specific litigation exclusion in the Primary Policy. The Twin City "Excess Absolute Prior Notice Exclusion" provides:

> Underwriters shall not be liable to make any payment for loss in connection with any claim made against the Insured(s):
>
> where all ***or part*** of such claim is, ***directly or indirectly***, based on, attributable to, ***arising out of***, resulting from, ***or in any matter relating to*** wrongful acts or ***any*** facts, circumstances or situations of which notice of claim or occurrence which could give rise to a claim has been given prior to the effective date of this policy under any other policy or policies.

A179 (the "Prior Notice Exclusion") (emphasis added). The "Specific Litigation Exclusion" in the Primary Policy similarly provides:

> the Insurer shall not be liable for any Loss in connection with: (i) any Claim(s), notices, events, investigations or actions referred to in any of items (1) through (--) below; (hereafter "Events"); (ii) the prosecution, adjudication, settlement, disposition, resolution or defense of: (a) any Event(s); or (b) any Claim(s) arising from any Event(s); or (iii) any Breach of Fiduciary Duty, Wrongful Act, underlying facts, circumstances, acts or omissions in any way related, directly or indirectly, to any Event(s):

(1) Robert L. Garber v. Pharmacia (hereinafter the "Events")

> It is further understood and agreed that the Insurer shall not be liable for any Loss in connection with any Claim(s) ***alleging, arising out of***, based upon, attributable to ***or in any way related directly or indirectly, in part or in whole***, to a related Breach of Fiduciary Duty ***or related Wrongful Act*** alleged in any of the items (1) – (__) above, regardless of whether or not such Claim involved the same or different Insureds, the same or different legal causes of action, or the same or different claimants, or is brought in the same or different venue, or resolved in the same or different forum.

A144 (emphasis added).[1]

B. The *Garber* and *Jewell* Actions Allege That Pfizer and Pharmacia Failed To Disclose That Their Co-Marketed Drug, Celebrex, Led To Increased Gastrointestinal and Cardiovascular Risks

The *Garber* action referenced in the Specific Litigation Exclusion was a securities class action filed on April 7, 2003. A706-A748. The original complaint (the "*Garber* Complaint") sought relief on behalf of purchasers of Pharmacia stock between April 17, 2000 to August 21, 2001, for alleged misrepresentations regarding the gastrointestinal and cardiovascular safety of Celebrex. *Id*.

Specifically, the *Garber* Complaint alleged that "Pharmacia, ***with the aid of its partner Pfizer***, began co-marketing Celebrex" in 1999 as an alternative to other

---

[1] The Twin City Policy also incorporates a prior notice exclusion in the Primary Policy and a specific litigation exclusion in the underlying excess policy issued by Arch Insurance Company ("Arch"). A63 §4(d); A203. Because those exclusions apply for the same reasons that the above exclusions apply, *see* Argument § I, *infra*, U.S. Specialty has elected to focus its appeal on the exclusions quoted above.

Nonsteroidal Anti-inflammatory Drugs ("NSAIDs"), such as ibuprofen, that are "associated with a multitude of gastrointestinal problems, from upset stomach to life-threatening bleeding ulcers and ***heart problems***." A708 ¶2 (emphasis added). Pharmacia and Pfizer participated in a revenue sharing deal for Celebrex, *id.*, and allegedly "marketed Celebrex by focusing on its purported reduction in adverse gastrointestinal ***and cardiac events***, which factors provided Pharmacia with an enormous market advantage over competitors." A709 ¶5 (emphasis added). Celebrex consequently "became a huge success" because doctors and patients were willing to accept Celebrex's high cost "to limit their risk of adverse gastrointestinal ***or cardiac*** events." *Id.* ¶4 (emphasis added).

The putative class period alleged in the *Garber* Complaint began and ended with disclosures relating at least in part to cardiovascular risks. On April 17, 2000, Pharmacia and Pfizer allegedly issued a joint press release announcing the results of a "landmark" study of potential gastrointestinal complications associated with Celebrex, which also heralded the supposed lack of cardiovascular risks: "Importantly, ***Celebrex showed no increase in thromboembolic or other cardiovascular-related events, even among non-aspirin users***." A720 ¶38 (emphasis in original). This study, known as the Celecoxib Long-term Arthritis Safety Study ("CLASS"), was also the subject of a September 13, 2000 article in the Journal of the American Medical Association ("JAMA"). A711 ¶¶9-10; A727

¶48. The JAMA article and press releases and reports regarding the same commented on Celebrex's gastrointestinal safety profile (*id*.) and further claimed that Celebrex did not lead to an increase in cardiovascular events. A727 ¶48.

The *Garber* Complaint further alleged that in May 2001, Pharmacia and Pfizer issued another joint press release that again hailed the alleged "efficacy and safety of Celebrex," including as compared to Vioxx, again claiming that all studies to date, including CLASS, have shown "no increased risk for heart attack and stroke" for Celebrex as compared to other NSAIDs. A733 ¶58. The joint press release also quoted a scientist who claimed that those studies "substantially add to our understanding of differences between the overall ***cardiovascular safety profile*** of COX-2 specific inhibitors." *Id.* (emphasis added).

Pharmacia and Pfizer's joint marketing of Celebrex's purported safety advantages over alternative NSAIDs allegedly enabled Celebrex to become the most profitable drug launch in pharmaceutical history. A709 ¶4. Analysts noted that "Celebrex sales, along with valdecoxib [Bextra] (the next oral form) and parecoxib (an injectable) [were] projected to reach $6.7 billion by 2004." A710 ¶8.[2]

[2] The generic name of Celebrex is celecoxib. "Valdecoxib" is the generic name of Pfizer's other Cox-2 inhibitor drug, Bextra. A218 ¶1.

According to the *Garber* Complaint, however, Pfizer and Pharmacia's joint marketing of Celebrex's purported safety benefits was false. On August 22, 2001, the last day of the putative class period, *The Wall Street Journal* reported that "Celebrex causes higher incidence of cardiovascular problems." A713-714 ¶16; A738-739 ¶66. The article referred to a Cleveland Clinic study concluding that "***'[c]urrent data would suggest that use of these so-called "Cox-2 inhibitors" might lead to increased cardiovascular events.'***" *Id.* (emphasis in original). The *Garber* Complaint further notes that the Cleveland Clinic doctors also concluded that "***Celebrex was associated with a relatively high rate of heart attacks***." *Id.* (emphasis in original).

The *Garber* Complaint alleges that the disclosures regarding the gastrointestinal and cardiovascular risks posed by the drugs impaired the market prospects for the drugs and caused Pharmacia's stock to drop. A716 ¶23; A739 ¶67. Relying on these allegations, the *Garber* Complaint alleges causes of action for violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 Act (the "1934 Act") and Rule 10b-5 promulgated thereunder. A745-747 ¶¶80-89.

On April 14, 2003, a week after *Garber* was filed, another securities class action, *Jewell*, was filed on behalf of purchasers of Pharmacia shares during the same putative class period of April 17, 2000 to August 22, 2001. A752-784. Like the *Garber* Complaint, the *Jewell* Complaint alleges that Pharmacia and Pfizer

aggressively co-marketed Celebrex by misrepresenting its gastrointestinal and cardiovascular safety. A753-773 ¶¶3-5, 25-26, 44, 48-49. For example, the *Jewell* Complaint quotes extensively from an April 2000 Pharmacia/Pfizer joint press release touting the "cardiovascular safety profile of Celebrex" observed during the CLASS study. A760-763 ¶26. The companies hailed this purported finding as "important" because "about 40 percent of patients in each arm of the [CLASS] study had a history of cardiovascular disease." A762 ¶26. The *Jewell* Complaint also refers to the same May 2011 joint press release referenced in *Garber*, which boasted in part of the cardiovascular safety of COX-2 inhibitors. A768-769 ¶44.

The *Jewell* Complaint also features the same August 22, 2001 *Wall Street Journal* article that ended the *Garber* Complaint's putative class period, highlighting the cardiovascular safety warnings from the Cleveland Clinic doctors, who presciently urged: "'[W]e believe it is mandatory to conduct a trial specifically assessing cardiovascular risk and benefit of these agents.'" A771-772 ¶48. Pharmacia and Pfizer allegedly shot back at the *Journal* article, claiming in a third-quarter 2001 jointly issued press release that "properly conducted, well-controlled clinical trials have consistently shown that Celebrex poses no increased risk for heart attack compared to the traditional NSAIDs studied." A772-773 ¶49.

Like the *Garber* Complaint, the *Jewell* Complaint alleges that when the truth was revealed regarding the safety of Celebrex, Pharmacia's stock dropped,

harming the class and supporting their claims for relief under Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 thereunder. A771-773 ¶¶48-50; A777-783 ¶¶ 59-77.

C. Pfizer's Notice Of Circumstances That May Give Rise To A Claim Under Its 2002-2003 D&O Insurance Program

On April 15, 2003, within days of the filing of the *Garber* and *Jewell* Complaints, Pfizer, through its New York broker Marsh, notified its then-current D&O insurers (the "2002-2003 Program") of *Garber* and *Jewell* even though Pfizer itself had not been named as a party thereto. A786-789. Marsh's letter provided "notice of facts and circumstances that may subsequently give rise to a claim," thereby locking in coverage under the 2002-2003 Program for any such future claim. *Id*. To the same end, Marsh's letter attached correspondence from Pfizer. *Id*.

The Pfizer letter states that it "constitutes notice … of a circumstance or 'wrongful act'" under the 2002-2003 Program, and that "Pfizer has recently become aware of the following alleged or potential 'wrongful acts' … and therefore, is providing this notice to preserve all of its rights under those policies." A788. Under the heading "Celebrex-Related Litigation," Pfizer's letter states that "Pharmacia shareholders have filed securities fraud class actions against [Pharmacia] and certain of its officers and directors alleging, among other things, violations of the [1934 Act] as a result of alleged statements, representations and

omissions relating to the prescription drug Celebrex." *Id.* The Pfizer letter then refers to the *Garber* and *Jewell* Complaints, which the letter notes "refer to Pfizer as a co-marketer of Celebrex," such that "a likelihood exists that a similar action or actions against Pfizer may ensue on behalf of Pfizer and/or Pharmacia shareholders alleging similar wrongful acts or circumstances and similar types of claims and damages." *Id.* The primary insurer in the 2002-2003 Program accepted this notice "as [a] notice of facts and circumstances" that could cause a later-filed claim arising from those circumstances to be deemed a claim first made under the 2002-2003 Program. A791-797.

After Pfizer provided this notice, *Garber* and *Jewell* were consolidated with similar actions under the caption *Alaska Electrical Pension Fund, et al. v. Pharmacia Corp., et al.*, 03-cv-01519 (D.N.J.), and a consolidated complaint was filed (the "*Garber* Consolidated Complaint"). A475-513. The *Garber* Consolidated Complaint added Pfizer as a defendant as successor in interest to Pharmacia, following Pfizer's acquisition of Pharmacia. A484 ¶26. The *Garber* Consolidated Complaint continues to allege a scheme to boost sales of Celebrex by concealing its known health risks, and relies heavily on the CLASS study, the September 2000 JAMA article regarding the same, and subsequent statements regarding CLASS and/or the JAMA article. A478-503 ¶¶4, 11, 36, 45, 48, 65, 67, 69. However, the *Garber* Consolidated Complaint refocuses the allegations on

Celebrex's alleged gastrointestinal risks, A476-503, leaving the cardiovascular hazards to another day and another set of securities class action plaintiffs.

D. The *Morabito* Action Alleges That Pfizer and Pharmacia Failed To Disclose That Their Co-Marketed COX-2 Inhibitors, Celebrex and Bextra, Led To Increased Cardiovascular Risks

That day arrived in December 2004, when the *Morabito* action was filed against Pfizer and certain of its directors and officers. A33 ¶2. The operative complaint (the "*Morabito* Complaint") sought relief on behalf of purchasers of Pfizer stock between October 31, 2000 and October 19, 2005, for alleged misrepresentations regarding the safety and efficacy of Celebrex and Bextra over traditional NSAIDs. A212-433.

Specifically, like the *Garber* and *Jewell* Complaints, the *Morabito* Complaint alleges that beginning as early as 1999, Pfizer and its co-promoter Pharmacia misrepresented that Celebrex and Bextra were free from cardiovascular risk and concealed evidence from internal studies showing that the opposite was true. A219-304 ¶¶3-4, 11, 71, 100, 123, 148-49, 151, 163, 226, 228, 252, 261-62. Like *Garber* and *Jewell*, *Morabito* alleged that Pfizer was financially dependent on Celebrex and Bextra's success, A249-250 ¶¶95-97, and that Celebrex was "the most successful product launch in the history of the pharmaceutical industry." A250-251 ¶98. *Morabito* alleges that Celebrex revenues hit $1.4 billion in 1999, $2.6 billion in 2000, $3.1 billion in 2001, $3.1 billion in 2002, $2.5 billion in 2003,

and $3.3 billion in 2004, and that Bextra revenues climbed from $470 million in 2002 to $1.2 billion in 2004. *Id*.

To ensure that the drugs would increase Pfizer's revenue and stock price, Pfizer allegedly touted their safety through various press releases, including as compared to Vioxx, despite knowing that its own studies showed that Celebrex and Bextra presented significant cardiovascular risks. A251-326 ¶¶100-335. Importantly, according to the *Morabito* Complaint, Pfizer relied on the same CLASS study and September 2000 JAMA article at issue in *Garber* and *Jewell* to laud the supposed cardiovascular safety profile of Celebrex. A278-282 ¶¶180-191. The *Morabito* Complaint also refers to Pfizer and Pharmacia's August 2001 representations regarding the cardiovascular safety of Celebrex, made in response to the Cleveland Clinic study and *Wall Street Journal* article from that month. A274-275 ¶¶169-171; A340 ¶¶371-372.

Ultimately, *Morabito* alleged, just like *Garber* and *Jewell*, that the truth regarding the health risks of Pfizer's COX-2 inhibitors was revealed, causing Pfizer's stock to drop. A219 ¶4; A226 ¶17; A282 ¶191. Like *Garber* and *Jewell*, the *Morabito* Complaint seeks relief under Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder. A424-431 ¶¶560-85.

On January 3, 2005, Pfizer notified its 2002-2003 Program of the *Morabito* action, and provided notice two days later under the 2004-2005 Program. A799-

805. Pfizer advised the insurers in both programs that "Pfizer believes that these complaints relate to the 2004-2005 coverage program," but also stated: "[i]n the event that these claims are not accepted for coverage under the 2004-2005 program, Pfizer intends to pursue coverage under the notice of circumstances letter" sent to the 2002-2003 Program. *Id.* Ultimately, Pfizer settled *Morabito* for $486 million after incurring more than $82 million in defense expenses. A33 ¶3; A42 ¶31. Arch and U.S. Specialty denied coverage, and this coverage litigation ensued. A33 ¶4.

E. Procedural History

Two rulings made by the Superior Court are at issue on this appeal.

The first ruling disposed of cross-motions for summary judgment on the Specific Litigation Exclusion. Ex. C.[3] The Superior Court first concluded that a conflict of law existed, because New York law applies similar exclusions when a "sufficient factual nexus" exists between the actions, whereas Delaware law purportedly requires that the actions be "fundamentally identical." *Id*. at 16-17.

The Superior Court next completed a choice of law analysis, acknowledging Delaware's use of the Second Restatement's "most significant relationship" test.

[3] Specifically, Arch and U.S. Specialty moved to dismiss, Pfizer moved for partial summary judgment, and the Superior Court converted Defendants' motion to a cross-motion for summary judgment. Ex. C at 1 n.3. The motions addressed the Specific Litigation Exclusion and the comparable exclusion in the Arch Policy.

The Superior Court concluded that even though some factors "tip in favor of New York"—including the fact that New York is Pfizer's principal place of business, where the policies were issued, and the location of Pfizer's insurance broker—Delaware law nevertheless applied for two reasons. *Id*. at 17-21. First, the Superior Court reasoned that applying Delaware law "is most consistent with … this Court's accepted choice-of-law analysis for [D&O] insurance policies," because Pfizer is a Delaware corporation. *Id*. at 19, 21. Second, the Superior Court relied on an ADR clause in the Primary Policy that requires "consideration" of Delaware law in any ADR proceeding. *Id*. at 19-20.

Based on this analysis and its conclusion that Delaware law prevents specific litigation exclusions from applying unless the actions are "fundamentally identical," the Superior Court concluded that the Specific Litigation Exclusion did not apply because *Morabito* is not "fundamentally identical" to *Garber*. *Id*. at 20-27. In so ruling, the Superior Court concluded that *Garber* pertained to misrepresentations regarding the gastrointestinal safety of Celebrex, whereas *Morabito* pertained to misrepresentations regarding the cardiovascular safety of Celebrex and Bextra. *Id*. at 25-27.

In the second ruling at issue on this appeal, the Superior Court resolved cross-motions for summary judgment on (among other issues) the Prior Notice Exclusion. The Superior Court held that this exclusion was subject to the same

"fundamentally identical" standard that the Superior Court had applied to the Specific Litigation Exclusion, and on that basis did not apply for the same reasons that the Specific Litigation Exclusion did not apply. Ex. B at 10-13. The Superior Court acknowledged that the *Garber* and *Jewell* Complaints referenced cardiovascular risks, but dismissed those alleged risks "as a speculative danger researchers discovered two years after the drugs came on the market" and incorrectly concluded that those Complaints made no allegations regarding fraudulent misrepresentations regarding those risks. *Id*. at 13. The Superior Court thus denied U.S. Specialty's motion for summary judgment, granted Pfizer's cross motion, and certified a final judgment (Ex. A) from which U.S. Specialty has taken this appeal.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT FAILED TO APPLY THE PRIOR NOTICE AND SPECIFIC LITIGATION EXCLUSIONS AS WRITTEN TO BAR COVERAGE FOR THE *MORABITO* ACTION.

A. Question Presented

Whether the Prior Notice and/or Specific Litigation Exclusions bar coverage for the *Morabito* action pursuant to their plain, broad language, which extends to claims that even in part arise out of or in any way relate to any wrongful acts, facts, or circumstances of which notice has been provided to any prior insurer or to related wrongful acts with those alleged in *Garber*. (Preserved at A688, A550, A449.)

B. Scope of Review and Legal Standard

The interpretation of insurance contracts involves legal questions and thus the standard of review is *de novo*. *Lank v. Moyed,* 909 A.2d 106, 108 (Del. 2006). "This Court reviews *de novo* the Superior Court's grant or denial of summary judgment." *Pavik v. George & Lynch, Inc.*, 183 A.3d 1258, 1265 (Del. 2018) (quotation marks omitted).

The rules for construing insurance policies are well-settled in Delaware and New York alike. Insurers have the burden to prove that any exclusion applies. *Nat'l Grange Mut. Ins. Co. v. Elegant Slumming, Inc.*, 59 A.3d 928, 932 n.18 (Del. 2013); *Platek v. Town of Hamburg*, 26 N.E.3d 1167, 1171 (N.Y. 2015). Like any

other contract, "the terms of an insurance contract are to be read as a whole and given their plain and ordinary meaning." *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 291 (Del. 2001); *accord ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 69 (Del. 2011); *accord Chen v. Ins. Co. of the State of Pa.*, -- N.E.3d. --, 2020 WL 6875983, at *2 (N.Y. Nov. 24, 2020). A policy "is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *In re Solera Ins. Coverage Appeals*, -- A.3d --, 2020 WL 6280593, at *8 (Del. Oct. 23, 2020) (citations omitted); *accord Universal Am. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 37 N.E.3d 78, 80 (N.Y. 2015). A policy "is not ambiguous merely because the parties do not agree on its construction." *In re Solera*, 2020 WL 6280593, at *8; *accord Universal Am. Corp.*, 37 N.E.3d at 80.

"Delaware courts will not 'destroy or twist' the words of a clear and unambiguous insurance contract." *In re Solera*, 2020 WL 6280593, at *8 (*quoting Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982)). The same rule applies under New York law. *Maurice Goldman & Sons, Inc. v. Hanover Ins. Co.*, 607 N.E.2d 792, 793 (N.Y. 1992) ("Where the provisions of an insurance contract are clear and unambiguous, the courts should not strain to superimpose an unnatural or unreasonable construction.").

C. Merits of Argument

1. The Prior Notice and Specific Litigation Exclusions Broadly And Unambiguously Apply To Claims Sharing A Common Factual Nexus With Prior Noticed Circumstances or *Garber*.

Irrespective of whether Delaware or New York law is applied, the result should be the same. The Prior Notice and Specific Litigation Exclusions are broadly worded to insulate U.S. Specialty from any claim that even in part has a factual connection with the acts and circumstances noticed under the 2002-2003 Program or with any wrongful acts related to the wrongful acts alleged in *Garber*. *Morabito* falls squarely within the exclusions' plain scope.

The Prior Notice Exclusion applies to any claim "***where all or part of such claim is, directly or indirectly***, based on, attributable to, ***arising out of, resulting from, or in any matter relating to*** wrongful acts ***or any facts, circumstances or situations of which notice of*** claim or occurrence which could give rise to a claim has been given [under any prior policies]." A179 (emphasis added). The Specific Litigation Exclusion is similarly broad, applying to Loss in connection with "***any*** Breach of Fiduciary Duty, Wrongful Act, underlying facts, circumstances, acts or omissions ***in any way related, directly or indirectly, to*** [*Garber*]" or "any Claim alleging, ***arising out of***, based upon, attributable to or ***in any way related directly or indirectly, in part or in whole,*** to a … ***related Wrongful Act*** alleged in [*Garber*], regardless of whether or not such Claim involved the same or different

Insureds, … legal causes of action, … claimants, … venue, or … forum." A144 (emphasis added).

By their plain terms, the exclusions thus do not apply merely to claims that are virtually identical to prior-noticed matters or *Garber*. The exclusions instead use some of the same broad words or phrases that courts in Delaware and New York alike have construed to expand the preclusive reach of similar exclusions, as follows.

First, the Prior Notice and Specific Litigation Exclusions both apply to claims that even "in part" fall within their scope. Where an exclusion includes "in part" language, "each allegation and each fact need not arise from or connect directly to the [subject of the exclusion]. Instead, the claims in the Underlying Litigation only need to arise out of the [subject of the exclusion] ***in part***." *RSUI Indem. Co. v. WorldWide Wagering, Inc.*, 2017 WL 3023748, at *7 (N.D. Ill. Jul. 17, 2017) (applying Delaware law) (emphasis in original), *reh'g denied*, 2017 WL 4512922 (N.D. Ill. Oct. 10, 2017); *see also Ferrellgas Partners L.P. v. Zurich Am. Ins. Co.*, 2020 WL 363677, at *10 (Del. Super. Ct. Jan. 21, 2020) (applying exclusion for acts occurring "in whole or in part" after a certain date to bar coverage for an action that in part alleged acts occurring after that date).

Second and relatedly, both exclusions use the words "any" or "in any way" to describe what kind of a commonality or relationship is required for the

exclusions to apply. Where a policy provision refers to "'***any***' fact, circumstance, situation, [etc.], it is 'immaterial' that one claim may involve additional facts or allegations because ***all that is required is 'any' common fact,*** circumstance, situation, [etc.]." *Weaver v. Axis Surplus Ins. Co.*, 2014 WL 5500667, at *12 (E.D.N.Y. Oct. 30, 2014) (second emphasis added), *aff'd*, 639 F. App'x 764 (2d Cir. 2016); *accord Brecek & Young Advisors, Inc. v. Lloyd's of London Syndicate 2003*, 715 F.3d 1231, 1239 (10th Cir. 2013) (applying New York law). Similarly, where similar exclusions are modified by the phrase "in any way," it is "not necessary for [the insurer] to demonstrate a complete overlap between the claims and the alleged facts in order to preclude coverage." *Pereira v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 525 F. Supp. 2d 370, 378 n.16 (S.D.N.Y. 2007), *aff'd sub nom. Pereira v. Gulf Ins. Co.*, 330 F. App'x 5 (2d Cir. 2009); *accord RSUI Indem. Co. v. Sempris, LLC*, 2014 WL 4407717, at *6 (Del. Super. Ct. Sept. 3, 2014) ("in any way involving" is a "mop-up clause intended to exclude anything not already excluded by the other clauses").

Third, both exclusions also use the phrase "arising out of." Under Delaware and New York law alike, this phrase as used in exclusions "is broader than 'caused by,' and is understood to mean 'originating from,' 'having its origins in,' 'growing out of,' or 'flowing from[,' or] 'incident to, or having connection with.'" *Goggin v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2018 WL 6266195, at *4 (Del.

Super. Ct. Nov. 30, 2018) (quoting *Pac. Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1256 n.42 (Del. 2008)); *accord Country-Wide Ins. Co. v. Excelsior Ins. Co.*, 46 N.Y.S.3d 96, 98 (App. Div. 2017). Under Delaware law, this phrase "is broadly construed to require some meaningful linkage," *Pac Ins. Co.*, 956 A.2d at 1257, and New York similarly requires "some causal relationship between the injury and the risk for which coverage is provided." *Arch Specialty Ins. Co. v. Farm Family Cas. Ins. Co.*, 238 F. Supp. 3d 604, 612 (S.D.N.Y. 2017). Consequently, the exclusions do not apply merely to claims "for" wrongful acts, facts, or circumstances noticed under prior policies or related to the wrongful acts alleged in *Garber*, but more broadly to claims that originate from or have a connection with such wrongful acts, facts, or circumstances. *Health Corp. v. Clarendon Nat'l Ins. Co.*, 2009 WL 2215126, at *17 & n.62 (Del. Super. Ct. Jul. 15, 2009) (observing that exclusions using "arising out of" are broader than exclusions that merely use "for").

Fourth, both exclusions also use the words "related" or "relating," which further confirm that the exclusions apply where a "logical or causal connection" exists. *Fed. Ins. Co. v. DBSI, Inc. (In re DBSI, Inc.)*, 2011 WL 3022177, at *4 (Bankr. D. Del. Jul. 22, 2011); *see also Northrop Grumman Corp. v. Axis Reinsurance Co.*, 809 F. App'x 80, 88 (3d Cir. 2020) (reasoning that because policy language must be applied according to its plain meaning, the word "related"

must be applied according to its "unambiguously broad" scope, which includes both logical and causal connections, as multiple other federal circuit courts have held).

Finally, the exclusions' use of "or" to identify multiple relationships that may trigger the exclusions unambiguously means that if any one of those relationships exists, the exclusion applies. *See Nomura Holding Am., Inc. v. Fed. Ins. Co.*, 45 F. Supp. 3d 354, 363-64 (S.D.N.Y. 2014), *aff'd*, 629 F. App'x 38 (2d Cir. 2015).

Courts construing similarly broad exclusions under Delaware and New York law have held that those exclusions are unambiguous, and have faithfully applied them according to their plain, broad language. *See AT&T Corp. v. Clarendon Am. Ins. Co.*, 2006 WL 1382268, at *15, *18-19 (Del. Super. Ct. Apr. 13, 2006), *rev'd in part sub nom. AT & T Corp. v. Faraday Capital Ltd.*, 918 A.2d 1104 (Del. 2007); *WorldWide Wagering*, 2017 WL 3023748, at *7; *Darwin Nat'l Assur. Co. v. Westport Ins. Corp.*, 2015 WL 1475887, at *12-14 (E.D.N.Y. Mar. 31, 2015); *Quanta Lines Ins. Co. v. Investors Capital Corp.*, 2009 WL 4884096, at *13-15 (S.D.N.Y. Dec. 17, 2009), *aff'd sub nom. Quanta Specialty Lines Ins. Co. v. Investors Capital Corp.*, 403 F. App'x 530 (2d Cir. 2010).

Because both Delaware and New York law requires that the plain, broad language in the exclusions be applied as written, *see* Argument § I.B, *supra*, there

is "no justification" for reading the exclusions "narrowly at the expense of [their] plain language," *Brecek*, 715 F.3d at 1239, or for applying a one-size-fits-all approach from cases construing other policies' provisions in lieu of applying the actual language of the exclusions at issue. *Nomura*, 629 F. App'x at 39-40 (disapproving trial court's use of a "factual nexus" test instead of applying the plain language of the provision at issue).

2. The "Fundamentally Identical" Standard Applied By The Superior Court Contravenes Basic, Controlling Rules Of Contract Interpretation.

The Superior Court unreasonably narrowed the exclusions in derogation of their plain language and imposed a "one size fits all" standard that prior appellate courts have rejected when applying similar exclusions. Instead of applying the exclusions according to their plain language—which the Superior Court acknowledged would have been required under New York law—the Superior Court held that Delaware law limits both exclusions to claims that are "fundamentally identical" with *Garber* or *Jewell*. Ex. C at 23-25; Ex. B at 10-12. The words "fundamentally" and "identical" do not appear ***anywhere*** in the exclusions. A179; A144. Indeed, the Superior Court did not derive the "fundamentally identical" test from the exclusions' plain, broad language, and instead relied on two prior Superior Court decisions. Ex. C at 24, n.82 (citing *United Westlabs, Inc. v. Greenwich Ins. Co.*, 2011 WL 2623932 (Del. Super. Ct.

Jun. 13, 2011) and *Med. Depot, Inc. v. RSUI Indem. Co.*, 2016 WL 5539879 (Del. Super. Ct. Sept. 29, 2016)). Neither decision justifies a "fundamentally identical" standard.

In fact, the court in *United Westlabs* did not even apply such a standard. The court instead held that the "fundamentally identical" nature of the acts at issue in that case was ***sufficient*** to satisfy interrelated wrongful acts provisions. 2001 WL 2623932, at *10-11. It did not hold that such a relationship was ***necessary*** and the policy language in that case contained no such requirement. *Id*. In relying on *United Westlabs*, the Superior Court mistook sufficiency with necessity.

The other decision on which the Superior Court relied, *Medical Depot*, applied a "fundamentally identical" standard to a broad "related claims" provision for claims "in any way involving the same or related facts," without explaining its basis for doing so. 2016 WL 5539879, at *13-14. The *Medical Depot* court appears to have borrowed the phrase "fundamentally identical" out of context from *RSUI Indemnity Co. v. Sempris, LLC*, 2014 WL 4407717 (Del. Super. Ct. Sept. 3, 2014) (cited at *Med. Depot*, 2016 WL 5539879, at *13). However, *Sempris* simply concluded that the claims before it, unlike the "fundamentally identical" claims in *United Westlabs*, were not sufficiently related. 2014 WL 4407717, at *6-7.

Like a game of telephone, "fundamentally identical" has grown from a descriptive phrase in *United Westlabs* to a prescriptive phrase overriding plain

policy language in *Medical Depot* and the Superior Court's decisions below. Delaware law, like New York law, requires that plain, broad language in provisions like the Prior Notice and Specific Litigation Exclusions be applied as written. *In re Solera*, 2020 WL 6280593, at *9; *ConAgra*, 21 A.3d at 69; *O'Brien*, 785 A.2d at 291. The plain, broad language of the exclusions is irreconcilable with a "fundamentally identical" standard. Other than *Medical Depot* and the Superior Court's rulings below, ***every*** court that has considered whether claims need be identical or "fundamentally identical" for similar provisions to apply has held that they need not be, including under Delaware law.[4] This Court should reject the "fundamentally identical" test as being fundamentally incompatible with Delaware rules of policy interpretation, hold that both Delaware and New York law require

[4] *See, e.g.*, *AT&T Corp.*, 2006 WL 1382268, at *15 ("[n]othing in the policy requires that a claim involve precisely the same parties, legal theories, 'Wrongful Act[s],' or requests for relief"); *WorldWide Wagering*, 2017 WL 3023748, at *7 (citation omitted) (under Delaware law, concluding that "[t]he exclusion … did not require that litigation be identical to the Riverboat Matter to be excluded from coverage, litigation merely had to arise from or be based in part on the Riverboat Matter."), *reh'g denied*, 2017 WL 4512922 (N.D. Ill. Oct. 10, 2017); *Zunenshine v. Exec. Risk Indem., Inc.*, 1998 WL 483475, at *5 (S.D.N.Y. Aug. 17, 1998) ("Nothing in the Policy requires that a claim involve precisely the same parties, legal theories, 'Wrongful Act[s],' or requests for relief for the 'pending lawsuit' or 'prior notice' exclusions to apply"), *aff'd*, 182 F.3d 902 (2d Cir. 1999); *HR Acquisition I Corp. v. Twin City Fire Ins. Co.*, 547 F.3d 1309, 1316 (11th Cir. 2008) ("The 'prior litigation' exclusion does not require that the parties, claims, or theories of recovery in each suit be identical—only that the suits be 'in any way related to' each other."); *The One James Plaza Condo. Ass'n, Inc. v. RSUI Grp., Inc.*, 2015 WL 7760179, at *6 (D.N.J. Dec. 2, 2015) ("[t]he pleadings in both underlying actions need not have been identical to preclude coverage").

that the plain, broad language of the exclusions be enforced as written, and decide this appeal in the absence of any conflict under Delaware law, as the law of the forum. Alternatively, to the extent this Court holds that the "fundamentally identical" test is binding in Delaware and overrides contrary policy language, then a conflict of law would exist with New York law, which the Court should apply in deciding this appeal for the reasons discussed in Argument Section II below.

Applying these exclusions according to their plain language is required by applicable rules of construction and also allows insureds and insurers alike to realize the benefits of these provisions. For insurers, the maxim "where there's smoke, there's fire" creates a conundrum when deciding whether and under what terms and pricing to issue a "claims made" policy to a policyholder against whom claims have been made. Provisions like the Prior Notice and Specific Litigation Exclusions allow insurers to protect themselves against the risk that existing claims may only be the tip of the iceberg. These protections enable insurers to issue renewal policies to policyholders against whom claims have been made for a lower premium. *See DBSI, Inc.*, 2011 WL 3022177, at *3. For policyholders, the broad construction of related claim provisions permits claims made after a policy has expired to "relate back" to the policy period in which related claims were first made and to be eligible for coverage thereunder. *See, e.g., Zahler v. Twin City*

Fire Ins. Co., 2006 WL 846352 (S.D.N.Y. Mar. 31, 2006) (applying interrelated claims provisions in claims made policies).

3. *Morabito* Has Multiple Factual Connections With Circumstances Noticed To Prior Insurers And With *Garber* More Generally, And Thus Falls Within The Exclusions.

When the Prior Notice and Specific Litigation Exclusions are applied according to their plain language, they unambiguously bar coverage for *Morabito*.

In multiple respects, *Morabito* in whole or at least in part "arises out of" or "in any ma[nn]er" relates to wrongful acts, facts and circumstances referenced in Pfizer's notice under the 2002-2003 Program, causing the Prior Notice Exclusion to apply. The *Garber* and *Jewell* Complaints referenced in that notice were the tip of the iceberg, pursuing securities fraud claims for failures to disclose the gastrointestinal ***and*** cardiovascular risks from Pfizer and Pharmacia's co-marketed COX-2 inhibitor, Celebrex. A706-748; A752-784. *Morabito* similarly pursued securities fraud claims for the same alleged scheme to conceal the cardiovascular risks from Celebrex and its next oral form, Bextra, beginning around the same time period. A212-433.

Moreover, both the *Garber* and *Jewell* Complaints and *Morabito* alleged that Pfizer and Pharmacia purposefully misrepresented the safety of their COX-2 inhibitor drugs in order to induce their purchase over cheaper NSAID alternatives, fueling billions in sales and inflating their stock price. A708-717 ¶¶2-5, 8-10, 17-

23; A753-773 ¶¶3-5, 25-26, 44, 48-50; A218-226 ¶¶1-17. In this additional respect, *Morabito* "arises out of" wrongful acts, facts and circumstances referenced in Pfizer's notice to the 2002-2003 insurers. *Morabito* also arises out of or in any manner relates to additional facts alleged in *Garber* and *Jewell*, including the CLASS study and Pfizer and Pharmacia's subsequent public statements defending or building upon their alleged misrepresentations regarding the same. A278-282 ¶¶180-191; A274-275 ¶¶169-171; A340 ¶¶371-372; A710-A716 ¶¶6-22; A720-742 ¶¶38-74; A760-763 ¶26; A768-773 ¶¶44, 48-49.

The factual overlap between *Morabito*, *Garber*, and *Jewell*—from the specific failures to disclose the cardiovascular risks posed by Celebrex and the misrepresentation of CLASS results, to the more general allegations of the scheme to defraud the public about the safety of Celebrex—unambiguously triggers the plain language of the Prior Notice Exclusion. The fact that *Garber* was later narrowed to focus on gastrointestinal risks is irrelevant to the Prior Notice Exclusion, because that took place ***after*** Pfizer provided notice under the 2002-2003 Program. A786-789; A475-A513. It does not retroactively circumscribe the contents of that notice, which is why Pfizer later submitted *Morabito* to its 2002-2003 insurers for coverage. A799-801.

For many of the same reasons that the Prior Notice Exclusion applies, the Specific Litigation Exclusion also bars coverage. Even after *Garber* was narrowed

to focus on gastrointestinal risks, it continued to allege, like *Morabito*, that Pfizer and Pharmacia purposefully misrepresented the safety of their expensive COX-2 inhibitor drugs in order to induce their purchase over cheaper NSAIDs. A478-482 ¶¶2-4, 7-14. *Morabito* thus arose out of or at minimum "related directly or indirectly, in part or in whole" to the same or related Wrongful Acts alleged in *Garber*.

Morabito and *Garber* also continued to rely in part on the same alleged representations regarding the safety of these drugs, when Pfizer allegedly knew from some of the same studies that those representations were false. Most notably, *Morabito* and *Garber* alleged that Pfizer knew of the health risks associated with Celebrex from sources including the CLASS study, the results of which Pfizer misrepresented to the public. A220 ¶5(e); A478-479 ¶¶4-7. *Morabito* and *Garber* also both alleged that even though the CLASS Study was designed to compare the incidence of clinically significant gastrointestinal events between Celebrex and other NSAIDs, Pfizer and Pharmacia's joint press releases in April and May 2000 and a subsequent JAMA article in September 2000 falsely hyped ***both*** the superior gastrointestinal and cardiovascular health benefits of Celebrex. A279-281 ¶¶183-87; A331-333 ¶¶354, 356; A488-491 ¶¶36, 41, 45. Ultimately, both *Morabito* and *Garber* allege that JAMA and the British Medical Journal later "criticized Pfizer for its deceitful conduct" and demanded that the full CLASS results be

published—but, "[t]hey never were." A282 ¶191; A481-480 ¶¶11, 15; A501-505 ¶¶69, 75.

Moreover, the presence of additional facts in *Morabito*, including additional concealed studies and later alleged misrepresentations, does not change the analysis because the plain language of both exclusions is satisfied where the claims "in part" arise out of or "in any way" relate to "any" facts alleged in the prior notice or the *Garber* action. *See, e.g.*, *Pereira*, 525 F. Supp. 2d at 378 n.16 (relying on "in any way" language in a similar exclusion, concluding that the exclusion did not require "a complete overlap between the claims"); *Weaver*, 2014 WL 5500667, at *12 (because a policy provision referred to "'any' fact, circumstance, [or] situation…, it is 'immaterial' that one claim may involve additional facts or allegations"); *Northrop Grumman*, 809 F. App'x at 92 (sixteen month gap between class periods did not prevent two class actions from being interrelated, because they were part of a single course of related conduct); *Highwoods Props. v. Exec. Risk Indem. Inc.*, 407 F.3d 917, 925 (8th Cir. 2005) (later-filed lawsuit was a "related claim" with a prior lawsuit even though it alleged multiple later-occurring facts); *Fed. Ins. Co. v. Raytheon*, 426 F.3d 491, 499 (1st Cir. 2005) (holding that an even narrower exclusion for claims arising from "substantially similar facts" as prior litigation applied to a later action that alleged multiple events that occurred after the first action). Indeed, but for Pfizer's alleged

success in keeping the truth regarding the cardiovascular risks from becoming better known earlier, those risks easily could have remained a part of the *Garber* litigation, of which they originally were a part.

Because both Delaware and New York law require that one or more of the Prior Notice and Specific Litigation Exclusions be applied according to their plain meaning to bar coverage for *Morabito*, this Court should reverse.

II. THE TRIAL COURT'S CHOICE OF LAW ANALYSIS WAS ERRONEOUS BECAUSE NEW YORK HAS THE MOST SIGNIFICANT RELATIONSHIP WITH THIS DISPUTE.

A. Question Presented

To the extent a conflict of law exists, whether Delaware law applies merely because the U.S. Specialty Policy is a D&O insurance policy, Pfizer is a Delaware corporation, and consideration of Delaware law would have been necessary in an ADR proceeding, or whether New York law instead applies because D&O policies cover a wide variety of claims that are not subject to the laws of the place of incorporation, and the U.S. Specialty Policy was issued in New York, to an insured with its principal place of business in New York, through a New York broker, with multiple endorsements and stamps referring to New York law. (Preserved at A453; A631).

B. Scope of Review

The granting or denial of summary judgment, and the interpretation of an insurance contract, are both reviewed *de novo*. *ConAgra Foods, Inc. v. Lexington Ins. Co.,* 21 A.3d 62, 68 (Del. 2011).

C. Merits of Argument

This Court need not address choice of law unless it finds an actual conflict between Delaware and New York law, and it should not for the reasons discussed in Argument § I above. *See Deuley v. DynCorp Int'l, Inc*., 8 A.3d 1156, 1161

(Del. 2010) (forum state law applies in the absence of a conflict). Nonetheless, even if this Court were to find a conflict, then New York law must control because of the quality and quantity of New York contacts and this Court's controlling law.

1. Under This Court's Precedents, New York Law Must Apply Because Pfizer's D&O Policies Provide Coverage For Nationwide Risks, And New York Has The Strongest Connection With This Dispute.

Delaware follows the Restatement (Second) of Conflict of Laws' "most significant relationship" analysis when making choice of law determinations in contract disputes. *Certain Underwriters at Lloyd's, London v. Chemtura Corp.*, 160 A.3d 457, 464 (Del. 2017); *Travelers Indem. Co. v. CNH Indus. Am., LLC*, 191 A.3d 288, ¶14 (Del. 2018). When a conflict of law exists and there is no agreement on choice of law, this Court has held that Delaware courts must analyze which state has the most significant relationship to the dispute, analyzing specific presumptions set forth in the Restatement and additional factors based on "their relative importance in the particular case and in light of the Second Restatement's general considerations found in § 6." *Chemtura*, 160 A.3d at 465.[5]

[5] The general considerations under Section 6 are: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied." *Chemtura*, 160 A.3d at 465 n.52.

Specifically, Section 193 of the Second Restatement, entitled "Contracts of Fire, Surety or Casualty Insurance," creates a presumption of applying the "local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy." Restatement (Second) of Conflict of Laws § 193. However, comment (b) to Section 193 recognizes that this presumption is of "'less significance' when 'the policy covers a group of risks that are scattered throughout two or more states.'" *Chemtura*, 160 A.3d at 466 (*quoting* Restatement (Second) of Conflict of Laws § 193). Accordingly, this Court has held that the Section 193 presumption is not conclusive for policies that "provide broad-based coverage across many jurisdictions for a company's enterprise-wide risks." *Id*. at 465. In such cases, the following Section 188 factors must be considered as "the most appropriate way to determine the appropriate law" (*id.* at 467):

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicil[e], residence, nationality, place of incorporation and place of business of the parties.

Id. These factors are assessed at contract formation. *Id.* at 468.

In *Chemtura*, because the policies applied to nationwide risks and the Section 193 presumption thus was inapplicable, this Court applied the Section 188 factors and held that New York had the most significant relationship to the dispute because—as here—New York was the place of contracting, place of negotiation, place of performance and the insured's principal place of business. *Chemtura,* 160 A.3d at 470; *accord CNH*, 191 A.3d 288, ¶¶4, 17 (applying Texas law to coverage dispute involving "corporate-wide insurance program covering operations across multiple jurisdictions" where insured "negotiated and secured insurance coverage, and managed its insurance program, out of its Texas offices"); *cf. Homeland Ins. Co. of N.Y. v. CorVel Corp.*, 197 A.3d 1042, 1046 n.13 (Del. 2018) (noting "centrality of California" as the insured's principal place of business to "nationwide insurance relationship"); *Liggett v. Affiliated FM Ins. Co.*, 788 A.2d 134, 138 (Del. Super. Ct. 2001) ("[T]he most significant factor for conflict of laws analysis in a complex insurance case with multiple insurers and multiple risks ***is the principal place of business of the insured because it is 'the situs which link[s] all the parties together***'") (emphasis added; quotation omitted).

This Court's reasoning in *Chemtura* and *CNH* applies equally to D&O insurance policies including the U.S. Specialty Policy. The Section 193 presumption applicable to "Contracts of Fire, Surety or Casualty Insurance" should not apply to D&O policies, because they, like the policies at issue in *Chemtura*,

"provide broad-based coverage across many jurisdictions for a company's enterprise-wide risks." *Chemtura*, 160 A.3d at 465. In addition to applying to breach of fiduciary duty claims governed by the place of incorporation, D&O policies provide coverage for many other claims that are not governed by the laws of the place of incorporation, including securities class actions, a variety of administrative and regulatory proceedings, criminal proceedings, tort claims (including for misrepresentations to investors, lenders, counterparties, etc., tortious interference with contract, etc.), unfair competition, and even antitrust. *See*, *e.g.*, Ralph A. Guirgis, et al., *Directors & Officers Liab. Ins. Deskbook*, chs. 2-3 (4th ed. 2016). These claims are typically governed by federal law or the law of the state in which the conduct occurred—which more often than not is the principal place of business, and not the state in which the insured is incorporated. The Section 193 presumption thus should have no application to D&O policies, and the Section 188 factors must apply.

Under those factors, New York has the most significant relationship with this case because: (1) Pfizer's principal place of business is in New York, A34 ¶6; (2) the U.S. Specialty Policy was issued on a "New York Form," A157; (3) the U.S. Specialty Policy and the underlying 2004-2005 D&O policies were issued to Pfizer in New York through Pfizer's New York-based broker, A34 ¶6, A51-53, A157, A173; and (4) the policies include numerous New York amendatory

endorsements and stamps invoking New York insurance laws and regulations, without a single Delaware-specific endorsement. A51-189 (with New York endorsements at A74-75, 91-101, 160-165, 174, 184-185); *see, e.g.*, *AT&T Wireless Servs., Inc. v. Fed. Ins. Co.*, 2007 WL 1849056, *5-6 (Del. Super. Ct. June 25, 2007) (concluding that Virginia had the most significant relationship with a D&O policy issued to a Delaware insured headquartered in Virginia).

Accordingly, as in *Chemtura*, applying New York law to Pfizer's comprehensive D&O insurance program would promote "the protection of justified expectations" and "certainty, predictability and uniformity of result." *Chemtura*, 160 A.3d 470 & n.82; *accord CNH*, 191 A.3d 288, ¶24 (acknowledging that the "facts demonstrate that the place of contracting is Texas, which was 'the last act that would have brought together the whole agreement'" and that the "place of the negotiation of the contract, again, would be Texas") (quotation omitted).

2. The Superior Court Departed From This Court's Precedents

The Superior Court's decision to apply Delaware law to this insurance dispute misconstrued the "most significant relationship" analysis in *Chemtura* and *CNH* and erroneously concluded that D&O policies are subject to a special rule exalting the insured's state of incorporation over all other factors. In doing so, the Superior Court relied heavily on *Mills Limited Partnership v. Liberty Mutual*

Insurance Co., 2010 WL 8250837 (Del. Super. Ct. Nov. 5, 2010), and subsequent decisions following *Mills*. Ex. C at 19-21.

According to *Mills*, when the risk insured "is the directors' and officers' 'honesty and fidelity' to the corporation, and the choice of law is between the headquarters or the state of incorporation, the state of incorporation has the most significant relationship." *Id.* at *6. In recent years, several courts have turned this dicta in *Mills* into a blanket rule for D&O insurance coverage disputes, elevating the place of incorporation over the state where the corporation actually conducts operations and where the policies were negotiated. *See, e.g., Ferrellgas Partners L.P. v. Zurich Am. Ins. Co.*, 2020 WL 363677, at *4; *IDT Corp. v. U.S. Specialty Ins. Co*., 2019 WL 413692, at *6 (Del. Super. Ct. Feb. 15, 2019); *Arch Ins. Co. v. Murdock*, 2018 WL 1129110, at *11 (Del. Super. Ct. Mar. 1, 2018).[6]

U.S. Specialty is not disputing that an insured's state of incorporation is ***one*** of multiple relevant factors under the Second Restatement and may assume increased significance when the underlying action involved the directors' and officers' fidelity to the corporation. However, under the Second Restatement and this Court's jurisprudence, the place of incorporation should not be an exclusive or overriding factor for resolving choice of law disputes concerning all D&O policies

[6] U.S. Specialty acknowledges that the *Murdock* case is pending before this Court and was argued on December 16, 2020.

for all Delaware corporations—particularly where, as here, the Section 188 factors uniformly point to New York and the underlying lawsuit and settlement was for violation of ***federal*** securities laws and, as such, did not implicate any Delaware-specific duties on the part of Pfizer or its directors and officers.

The other factor upon which the Superior Court relied in applying Delaware law was the ADR clause in the Primary Policy, Ex. C at 19-20, which provides that in any mediation or arbitration conducted in satisfaction of the ADR clause, "[t]he mediator or arbitrators shall also give due consideration to the general principles of the law of the state where the Named Entity is incorporated in the construction or interpretation of the provisions of this policy." A70-71 §17. However, this is not a choice of law provision, as multiple courts have confirmed. *See, e.g.*, *Fed. Ins. Co. v. SafeNet, Inc.*, 817 F. Supp. 2d 290, 302 (S.D.N.Y. 2011); *Commerce & Indus. Ins. Co. v. U.S. Bank Nat'l Ass'n*, 2008 WL 4178474, at *5 (S.D.N.Y. Sept. 3, 2008).

By operation of the ADR clause's plain language, once the parties' pre-suit mediation ended, so too did any "due consideration" owed to Delaware law. And when this coverage dispute landed in court, the choice of law rules of the forum jurisdiction governed, not the Primary Policy's defunct ADR provision, and required application of New York law in the presence of any conflict of law.

Accordingly, to the extent Delaware and New York law differ on whether the Prior Notice and Specific Litigation Exclusions must be applied according to their plain language to bar coverage for *Morabito*, the Superior Court should have applied New York law and entered judgment for U.S. Specialty. *See* Argument § I, *supra*.

CONCLUSION

For the reasons stated above, U.S. Specialty respectfully requests that this Court reverse the trial court's judgment in its entirety and direct that judgment be entered for U.S. Specialty dismissing all of Pfizer's claims with prejudice.

OF COUNSEL:

CLYDE & CO US LLP
Douglas M. Mangel
Joseph A. Bailey III
Gabriela Richeimer
1775 Pennsylvania Avenue NW
Suite 400
Washington, DC 20006
(202) 747-5100

COOCH AND TAYLOR, P.A.

/s/ Carmella P. Keener
Carmella P. Keener (#2810)
1007 N. Orange Street, Suite 1120
P.O. Box 1680
Wilmington, DE 19899-1680
ckeener@coochtaylor.com
(302) 984-3816

Attorneys for Defendant-Appellant U.S. Specialty Insurance Company