EFiled: Jan 27 2021 02:06PM EST
Filing ID 66288227
Case Number 352,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

U.S. SPECIALTY INSURANCE COMPANY, *Defendant Appellant*, v. PFIZER INC., *Plaintiff-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.)

APPELLEE PFIZER INC.'S CORRECTED ANSWERING BRIEF

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
Kenneth J. Nachbar (#2067)
John P. DiTomo (#4850)
Sabrina M. Hendershot (#6286)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347

Attorneys for Plaintiff Pfizer Inc.

OF COUNSEL:

Robin L. Cohen
Adam S. Ziffer
Marc T. Ladd
COHEN ZIFFER FRENCHMAN & MCKENNA LLP
1350 Avenue of the Americas
New York, NY 10019
(212) 584-1890

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NATURE OF THE PROCEEDINGS

Every carrier underlying the 2004-2005 D&O policy sold by U.S. Specialty Insurance Company ("U.S. Specialty") has either paid its full limits or settled with Pfizer for losses incurred in connection with the *Morabito* Action.[1] In its last effort to avoid coverage, U.S. Specialty insists that coverage for *Morabito* is barred because it "relates back" to *Garber*[2] even though U.S. Specialty's claims handler admitted at the time *Morabito* was filed that it did not arise out of or relate to the *Garber* complaints. U.S. Specialty's mischaracterization of the Wrongful Acts alleged in *Garber* as the same as those alleged in *Morabito* (while ignoring the *hundreds* of different allegations in those cases) does not alter its claims handler's conclusion which is the only one supported by the allegations of the two actions.

Garber was filed in April 2003 against Pharmacia by owners of Pharmacia stock. They alleged that Pharmacia and its executives misrepresented the gastrointestinal ("GI") side effects of the drug Celebrex as part of a clinical study in 2000 (the "CLASS Study"), and that when the truth about these GI side effects was revealed, Pharmacia's stock lost millions in value. Because Pfizer was a "co-marketer" of Celebrex and was acquiring Pharmacia that month, Pfizer notified its

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1 *In re Pfizer Inc. Secs. Litig.*, No. 1:04-cv-9866 (S.D.N.Y.).

2 *Alaska Electrical Pension Fund, et al. v. Pharmacia Corp., et al.*, No. 03-cv-1519 (D.N.J.).

(Continued . . .)

2002-2003 D&O insurers of the circumstances alleged in *Garber*, in case a "similar action" was filed against Pfizer. That "similar action" did not "bec[o]me a reality in 2004"[3] when *Morabito* was filed; rather, it became a reality over a year earlier in October 2003 when Pfizer was named a defendant *in Garber*, as successor to Pharmacia's liability. Throughout the next decade, Pharmacia's 2002-2003 D&O insurers covered *Garber*, and *Garber*'s scope (misrepresentations by Pharmacia regarding the GI safety of Celebrex) never changed.

Morabito was filed in late 2004 against Pfizer by owners of Pfizer stock. They alleged that Pfizer and its executives had represented that Bextra and Celebrex were free of any cardiovascular risk, while in possession of over a dozen studies showing that the drugs in fact increased the risk of heart attack or stroke. *Morabito* alleged that the revelation about the cardiovascular risks in a series of disclosures beginning in October 2004 caused Bextra's removal from the market, a dramatic decline in sales for Celebrex, and a loss of market capitalization for Pfizer stock of some $68 billion.

Garber and *Morabito* are separate lawsuits with different plaintiffs and defendants, concerning myriad different facts, claims, time periods, harm, and, most significantly, different alleged Wrongful Acts. U.S. Specialty ignores all of this and

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[3] Opening Brief of U.S. Specialty, dated December 23, 2020 ("OB"), at 1.

instead clings to the few mentions of cardiovascular issues in the original *Garber* and *Jewell* complaints, and to *Morabito's* tacked-on mentions of Celebrex's GI issues, to argue that these non-substantive "common fact[s]" (OB at 24), fit *Morabito* within the Exclusions. To support that conclusion, U.S. Specialty insists that the Specific Litigation and Prior Notice Exclusions apply if there is "any" common fact arising between the claims. This reading finds no support under Delaware or New York (or any state's) law, as it would render coverage illusory.

The Superior Court rejected this "strained" reading of the Exclusions. OB Ex. C at 23. Following Delaware law, the court held that the claims must be "fundamentally identical"—*i.e.*, differences aside, at their core, do the two claims concern the "same subject" or Wrongful Acts. *Id*. at 22. This comports with well-established Delaware law that policy exclusions must be read reasonably in scope and in line with their intended purpose. It also explains why Pfizer's "other insurers on the [2004-2005] coverage tower," including the primary insurer whose Exclusions U.S. Specialty relies upon, "paid the[ir] full limits [or] . . . settle[d] with Pfizer regarding coverage for the *Morabito* Action." *Id.* at 23 n.81. And, U.S. Specialty's demand that this Court follow New York law does not change the result. The New York courts U.S. Specialty cites have required that there be a "logically" or "casually connected" factual nexus for claims to be related, but *Morabito* and *Garber* "are truly, in all relevant respects, different." *Id.* at 27.

No choice-of-law analysis is necessary because both New York and Delaware standards achieve the same result. However, if an analysis were appropriate, Delaware law would apply. The Superior Court properly held that where directors' and officers' liability is at issue, the insured's state of incorporation is the most significant contact for choice of law, and that application of Delaware law to U.S. Specialty's policy was consistent with the parties' expectations. And while U.S. Specialty contends that this holding is contrary to this Court's ruling in *Chemtura*,[4] the opposite is true. *Chemtura*'s primary mandate is that insurance policies should be interpreted under a consistent state's law regardless of forum. Because the parties selected Delaware for arbitration or mediation, the application of Delaware law in this litigation is the only result that does not run afoul of *Chemtura*.

[4] *Certain Underwriters at Lloyds, London v. Chemtura Corp*., 160 A.3d 457 (Del. 2017).

SUMMARY OF ARGUMENTS

1. Denied. The Superior Court correctly held that the Wrongful Acts of Pfizer and its executives as alleged in *Morabito* did not arise out of, and were not related to, the Wrongful Acts of Pharmacia and its executives as alleged in *Garber*, and therefore the Specific Litigation and Prior Notice Exclusions do not apply.

a. Any reasonable reading of the Exclusions confirms that they were not intended to preclude coverage for *Morabito* merely because it shared a few superficial commonalities with the allegations in *Garber* (or *Jewell*), none of which formed the basis of the Wrongful Acts alleged in those lawsuits. The Superior Court correctly found that Delaware law requires that the claims or Wrongful Acts be "fundamentally identical" to be considered the same Claim for the purposes of the Exclusions.

b. Even if the Court were to reject the "fundamentally identical" standard, U.S. Specialty's request that the Exclusions apply where there is "any" fact, even "in part," in common goes too far. Even U.S. Specialty's New York cases require a "sufficient factual nexus" for relatedness-based exclusions to apply. Here, *Morabito* and *Garber* involved different parties, alleged wrongful conduct, and alleged harm to different company stock caused by different revelations to the market at different times

concerning different health risks of Celebrex and Bextra. The Exclusions are not triggered under any state's law.

2. Denied. The Superior Court correctly held that the U.S. Specialty policy is governed by Delaware law. Delaware courts apply the law of the state anticipated to be the principal location of the insured risk, and have "consistent[ly]" held that, "[w]hen the insured risk is the directors' and officers' 'honesty and fidelity' to the corporation . . . the state of incorporation has the most significant relationship"[5] Additionally, this Court's decision in *Chemtura* also held that one state's law should be applied consistently regardless of forum—and here, because the parties selected Delaware law for arbitration or mediation, it must apply to this litigation as well. Finally, *Chemtura* and *CNH*'s[6] identification of the insured's headquarters as the most significant contact is inapplicable, as those decisions involved comprehensive general liability ("CGL") policies covering thousands of claims scattered throughout multiple states. U.S. Specialty's policy, however, insures Pfizer's Delaware directors and officers acting in that capacity. And, the parties' express choice of Delaware law for arbitration or mediation trumps

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5 *Mills Ltd. P'ship v. Liberty v. Mut. Ins. Co.*, 2010 WL 8250837, at *4-6 (Del. Super. Nov. 5, 2010) (internal citation omitted).

6 *Travelers Indem. Co. v. CNH Indus. Am., LLC,* 191 A.3d 288, 2018 WL 3434562 (Del. 2018) (TABLE).

any implicit preference for New York law that U.S. Specialty attempts to glean from the "New York" endorsements to the policy.

STATEMENT OF FACTS

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

Pfizer is a pharmaceutical company with its principal offices in New York, and has been incorporated and organized under the laws of Delaware since 1942. A34. For the policy period of April 16, 2004 to April 16, 2005, Pfizer purchased $225 million in D&O coverage in thirteen layers. A36. National Union Fire Insurance Company of Pittsburgh, Pa. is the primary insurer (the "National Union Policy"). *Id*. The lone carrier left in this action, U.S. Specialty, sold to Pfizer an eighth-layer excess policy, with limits of $15 million, as part of a $25 million layer attaching excess of $130 million (the "U.S. Specialty Policy"). OB Ex. C at 4 n.17. The 2004-2005 D&O Policies "follow form" to, and thus (unless stated otherwise) incorporate the terms of the National Union Policy. A36. U.S. Specialty follows form to the Twin City Fire Insurance Company ("Twin City") policy, which, in turn, follows form to the National Union Policy. *See id.*; A172.

U.S. Specialty's Policy also "follows form" to an alternative dispute resolution provision (the "ADR Provision"). A44, 70-71; OB Ex. C at 4. The ADR Provision states that for all disputes, the parties must submit to binding arbitration or mediation and instructs that the law of Delaware, as Pfizer's state of incorporation, must be given due consideration in interpreting the Policy's terms. *Id.*

To deny coverage, U.S. Specialty first relies on the National Union Policy's Specific Litigation Exclusion for *Garber*:

> [T]he **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; (hereinafter "**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, 450-51.

U.S. Specialty previously contended that both National Union's and Twin City's Prior Notice Exclusion applied in its own Policy. A688-94. On appeal, U.S. Specialty focuses its argument on Twin City's Exclusion:

> 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.

B. *Garber v. Pharmacia*

On April 7, 2003, Pharmacia shareholder Robert L. Garber brought his original complaint on behalf of Pharmacia shareholders against Pharmacia and its executives, alleging they made misleading statements regarding the GI side effects of the drug Celebrex in connection with the Celecoxib Long-Term Arthritis Safety Study (the "CLASS Study"). A706. Pfizer was identified as a "co-market[er]" of Celebrex, but was not named as a defendant. A708. A week later on April 14, Pharmacia shareholder George Jewell filed suit making the same allegations. A752-784. These complaints existed for six months. *See* A475.

On October 27, 2003, after the individual *Garber*-related lawsuits (including *Jewell*) were consolidated, the plaintiffs filed a consolidated complaint captioned *Alaska Electrical Pension Fund v. Pharmacia Corp*, and named Pfizer as

a defendant, but solely as "successor in interest to Pharmacia's liability."[7] A484. The consolidated October 2003 complaint contained the operative allegations for *Garber* for the next decade until the case was settled. *See* A475-A521.

The *Garber* complaint was brought on behalf "of all those who purchased Pharmacia publicly traded securities" during a period ending on May 31, 2002. A476. The plaintiffs alleged that Pharmacia and its executives Fred Hassan, G. Steven Geis, and Carrie Cox, made false and misleading statements regarding the GI side effects of the drug Celebrex. A476-77, 484-86. The plaintiffs alleged that the defendants promoted Celebrex as the equivalent of ibuprofen but "without GI side effects." A477. In order to remove its GI warning label, "Pharmacia commissioned and funded" the CLASS Study, "a clinical study to compare the GI problems of patients who used Celebrex to those of patients who used other NSAIDs." A478. The results were announced in the Journal of the American Medical Association ("JAMA") on September 13, 2000, which "reported that patients who took Celebrex had fewer upper-GI toxic effects than those who took other traditional NSAIDs." *Id.* However, the *Garber* plaintiffs alleged that Pharmacia had excluded some of the study's data, and that "the CLASS study as originally designed did not demonstrate a superior GI safety profile." *Id.*

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[7] Pfizer merged with Pharmacia effective April 16, 2003. *See* OB Ex. C at 8.

Plaintiffs alleged that Pharmacia stock remained elevated based on defendants' insistence that "Celebrex had been proven to cause fewer GI side effects" (A479), until the truth came to light on June 1, 2002, when the British Medical Journal published an article stating that "based on the [excluded] CLASS study data," Celebrex provided no GI advantage. A481. According to plaintiffs, following this revelation, "Pharmacia's stock dropped from $40.596 to $36.563 in a few trading days." *Id*. The *Garber* plaintiffs asserted that the defendants were liable for this stock drop because they knew, or should have known, "that Celebrex did not result in a lower incidence of GI problems than comparable drugs, as [they publicly] claimed." A508-09. The complaint brought claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. A481, 508-11.

C. *Morabito v. Pfizer*

On December 17, 2004, during Pfizer's 2004-2005 D&O policy period, Pfizer shareholder Philip Morabito filed a class action against Pfizer and its executives. A40. The lawsuit was then consolidated in early 2005 with several similar actions as *In re Pfizer Inc. Securities Litigation*. A32, 40, 211. The *Morabito* Action named as defendants Pfizer and five Pfizer executives. A218. The plaintiffs alleged that the "joint sales of Celebrex and Bextra constituted between 6% and 11% of Pfizer's total sales from 2002 to 2004" because defendants represented:

> Celebrex and Bextra as completely free of any cardiovascular risk. They repeatedly touted internal safety data which they claimed demonstrated cardiovascular safety and . . . touted the drugs' allegedly superior cardiovascular safety profile as compared to its primary COX-2 competitor, Merck Inc.'s Vioxx.

A218-19. But, "in stark contrast to their cardiovascular safety statements," the *Morabito* plaintiffs alleged that the Pfizer defendants were in possession of over a dozen "completed drug safety studies and other data and information which documented the serious cardiovascular risks of Celebrex and/or Bextra," including:

- a study on the effects of Celebrex on the progression of Alzheimer's disease ("Alzheimer's 001 Study") that signaled cardiovascular risks;
- a January 2003 meta-analysis of Celebrex arthritis studies and subsequent meta-analysis showing increased risk for heart attacks in Celebrex users;
- clinical studies relating to Bextra ("047 Study" and "060 and 061 Studies") discussing cardiovascular and cardio-renal study results as "Vioxx-like";
- a study ("Study 016") on Bextra versus traditional arthritis medicine that revealed a six to zero difference in heart attacks; and
- an unpublished study in patients with chronic cancer pain ("040 Cancer Pain Study') that revealed risks of Bextra.

A219-21.

Despite these studies, Pfizer and its executives allegedly "made materially false and misleading statements and omitted to state material facts regarding the cardiovascular dangers that Celebrex and Bextra posed" (A397),

causing Pfizer's "common stock to be artificially inflated" (A425) until the truth about these cardiovascular risks "materialized in a series of events and disclosures" in October 2004. A219. The *Morabito* plaintiffs traced Pfizer's initial stock price decline to an editorial addressing these cardiovascular risks published in the New England Journal of Medicine on October 6, 2004. A309. Then, "[o]n October 15, 2004, Pfizer finally revealed the cardiovascular safety results in the CABG-2 Study to health care professionals." A223. The New York Times then followed that Pfizer warned that Bextra "increased the risks of heart attack and stroke in patients undergoing coronary-bypass surgery." A310-11 (emphasis omitted).

Plaintiffs alleged that these public revelations regarding the cardiovascular risk of Celebrex and Bextra caused "revenues for the first nine months of 2005 [to fall] by over $2 billion." A226. By the fall of 2005, Bextra had been "removed from the market," sales of Celebrex had fallen "dramatically" (A219), and Pfizer's website was required to state that Celebrex "may increase the chance of a heart attack or stroke that can lead to death." A221 (emphasis omitted). As "a result," plaintiffs alleged, "Pfizer's stock price declined precipitously." A219. That is, "from the close of trading on October 6, 2004, through and including October 19, 2005 . . . Pfizer's stock fell from $31.18 per share to $21.90, . . . representing a loss in market capitalization of $68.39 billio[n.]" A226.

For the Court's convenience, a comparison of the key features of *Garber* and *Morabito* is attached as Exhibit 1 hereto.

D. *Pharmacia's* 2002-2003 D&O Insurers Cover *Garber*; *Pfizer's* 2004-2005 D&O Insurers Cover *Morabito*

1. Pharmacia And Pfizer Notify Their 2002-2003 D&O Insurers Of The *Garber* Action

At the time *Garber* was filed against Pharmacia in April 2003, Pfizer's primary D&O insurance policy sold by Continental Casualty Company ("CNA") permitted Pfizer to give notice of a "Wrongful Act which forms the basis of [a] potential claim." B0809. Then, "any Claim otherwise covered under this Policy subsequently made arising out of such Wrongful Act shall be deemed to have been made at the time such written notice was given." *Id*.

As it had not been named as a defendant in *Garber* (and therefore could not give notice of a "Claim"), on April 15, 2003—the day before its 2003-2004 D&O coverage took effect—Pfizer utilized the above provision, sending the Notice of Circumstances for *Garber* under its 2002-2003 D&O tower. B0859-60. The Notice attached a copy of the *Garber* and *Jewell* complaints, stating:

> . . . Pharmacia shareholders have filed securities fraud class actions against Pharmacia Corporation and certain of its officers and directors alleging, among other things, violations of the Securities Exchange Act of 1934 as a result of alleged statements, representations and omissions relating to the prescription drug Celebrex. (A copy of the complaints in those actions, *Garber v. Pharmacia Corporation, et al.* and *Jewell v. Pharmacia, et al.*, are

> attached and are incorporated herein by reference.) Although Pfizer has not been named a defendant in those actions, the complaints refer to Pfizer as co-marketer of Celebrex. Thus, 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. In addition, it is possible that shareholders may attempt to seek other remedies against Pfizer and/or its officers and directors in connection with decisions to proceed with the merger between Pfizer and Pharmacia in light [of] such circumstances.
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> * * * * *
>
> Please provide Pfizer's insurers with this notice and accompanying documentation as soon as possible.

Id. Given that Pfizer was acquiring Pharmacia, Pfizer sent the Notice in case Pfizer also was named as a defendant. *See id.* Six months later plaintiffs filed the consolidated complaint naming Pfizer, as successor in liability for Pharmacia's wrongful acts alleged therein. A484. Thus, while *Garber* triggered Pfizer's 2002-2003 D&O tower based on the Notice, Pfizer's D&O carriers never paid for *Garber* (as it was Pharmacia's liability). *See* Complaint filed in *Pharmacia Corp. v. Arch Specialty Insurance Co.*, No. 2:18-cv-00510-ES-MAH (D.N.J. Jan. 12, 2018). Instead, almost every carrier[8] on *Pharmacia's* 2002-2003 D&O tower—a tower that

[8] Twin City, the only carrier disputing the coverage owed to Pharmacia for *Garber* in the New Jersey litigation, is represented in that action by the same counsel as U.S. Specialty here.

included primary carrier National Union, and CNA as an excess carrier—paid the defense costs and settlement for *Garber*. *See id.*

2. Pfizer's 2004-2005 D&O Insurers Cover The *Morabito* Action

Pfizer's broker, Marsh USA Inc. ("Marsh"), noticed the *Morabito*-related lawsuits to Pfizer's 2004-2005 D&O tower, including U.S. Specialty. *See* A42; B0916. Out of an abundance of caution, Marsh instructed the insurers that, if they did not accept coverage of *Morabito* under their 2004-2005 D&O policies where it belonged, Marsh would then attempt to pursue coverage based on the Notice of Circumstances. B0916-17. However, Marsh made clear that "Pfizer believe[d] that [*Morabito* and its tag along actions] relate[d] to the 2004-2005 coverage program." B0917. Pfizer's 2004-2005 D&O insurers agreed.

Primary carrier National Union—who was paying defense costs for *Garber* under the 2002-2003 policy it sold to Pharmacia—accepted *Morabito* as a claim made under Pfizer's 2004-2005 Policy. B0920, 925-26. When *Morabito* came in, U.S. Specialty's own claims handler admitted that the Notice of Circumstances for *Garber* did not include *Morabito* (B0947):

> the Pharmacia [*Garber*] litigation never concerned the cardiovascular risks posed by Celebrex. It focused solely on the gastrointestinal side effects. In addition, the plaintiffs in the Pharmacia litigation are Pharmacia shareholders. This new litigation [*Morabito*] is brought by Pfizer shareholders.

U.S. Specialty's claims handler recognized that the *Garber* Notice of Circumstances would not encompass *Morabito* unless the *Garber* plaintiffs "expand[ed] their case to encompass these new [*Morabito*] circumstances." *Id*. That never happened, and other of Pfizer's D&O carriers recognized that *Garber* did not include the allegations at issue in *Morabito*. For example, CNA told Marsh that *Morabito* triggered its 2004-2005 *excess* policy, not its 2002-2003 primary policy, because the Notice was for *Garber*, unrelated to *Morabito*. B0952-54; *see also* B0920 (National Union stating that "the applicable policy period for [*Morabito*] is 2004-2005"); B0958 (Zurich stating that "the [*Morabito*-related] Lawsuits do not appear to arise out of the Specific Wrongful Acts in the *Garber* and *Jewell* complaints identified in your April 15, 2003 notice of circumstances").

Morabito proceeded for over a decade, and Pfizer incurred $82.6 million in defense before settling in 2016 for $486 million. A42; OB Ex. C at 7; B0976, 1058-68. Every insurer in Pfizer's 2004-2005 D&O tower underlying the U.S. Specialty Policy, including National Union and CNA, has paid its full policy limits or settled with Pfizer regarding coverage for *Morabito*. OB Ex. C at 4, 23 n.81; B0680.

E. The Procedural History Of This Action

1. The Superior Court's July 23, 2019 Decision

Pursuant to the ADR Provision, the parties unsuccessfully engaged in a mediation in 2017, and filed suit thereafter. *See* A659-60. Following the dismissal of their competing New York action,[9] U.S. Specialty and then-co-defendant Arch Insurance Company ("Arch") moved to dismiss this case, arguing that the National Union and Arch Policies' Specific Litigation Exclusions for *Garber* barred coverage for *Morabito*. A435-69. U.S. Specialty focused solely on the allegations from the operative, consolidated complaints for *Garber* (filed October 2003) and *Morabito* (filed March 2012). *See* A439 n.1. Pfizer cross-moved, arguing that the Exclusions did not apply because *Garber* and *Morabito* involved different plaintiffs, different defendants, different alleged harms to different stock at different time periods, and were based on different alleged Wrongful Acts. B0007-08.

The Superior Court agreed with Pfizer. Initially, the Superior Court held Delaware law applied, following the "consistent" line of Delaware cases holding that "[w]here D&O coverage is at issue 'and the choice is of law is between the headquarters or the state of incorporation, the state of incorporation has the most significant relationship." OB Ex. C at 20-21 (quoting *Arch Ins. Co. v. Murdock*,

[9] *Arch Ins. Co. v. Pfizer, Inc.*, 771 F. App'x 49 (2d Cir. 2019).

2018 WL 1129110, at *9 (Del. Super. Mar. 1, 2018)). The Superior Court also held that "application of Delaware law [wa]s most consistent with the parties' reasonable expectations at the time of contracting" because, *inter alia*, the ADR Provision's application of "Delaware law [wa]s the sole law expressly contemplated in any of the D&O Policies[.]" OB Ex. C at 19.

Then, the Superior Court held that neither Specific Litigation Exclusion excluded coverage for *Morabito*, rejecting U.S. Specialty's "strained and uncharacteristically broad" reading of the Exclusions to apply if there is any commonality between the lawsuits. *Id.* at 23. The Superior Court reasonably interpreted the Exclusions "according . . . their 'ordinary and usual meaning,'" and followed Delaware law in holding that two lawsuits must be "fundamentally identical," *i.e.*, involve the "same subject," for the Exclusions to apply. *Id.* at 22-24. The Superior Court acknowledged the "thematic similarities" between the lawsuits, but held that because they involved different parties, claims, and Wrongful Acts, *Morabito* was "truly, in all relevant respects, different" from *Garber*. *Id.* at 27.

2. <u>The Superior Court's August 28, 2020 Decision</u>

The July 23 Decision effectively resolved the case. When Pfizer approached U.S. Specialty and Arch about final judgment, both initially refused, seeking to play out their remaining defenses that (1) their excess policies did not attach based on lack of underlying policy limits' exhaustion and (2) *Morabito*

belonged in Pfizer's 2002-2003 D&O tower based on the text of the Notice of Circumstances for *Garber* and *Jewell*, arguing that *Morabito* "arose out" of them based on those complaints' few references to "cardiovascular" issues with Celebrex. *See* A666-69. Arch then settled (B0680-83) but U.S. Specialty pressed forward.

On August 28, 2020, the Superior Court again ruled for Pfizer, holding first that neither the plain language of U.S. Specialty's Policy nor Delaware law required that every underlying carrier pay its full policy limit before U.S. Specialty's coverage attached for *Morabito*.[10] OB Ex. B. The Superior Court also rejected the Prior Notice Exclusions, finding that U.S. Specialty's "minor departure" of now relying on the pre-consolidated *Garber* and *Jewell* complaints did not change its previous holding: both complaints "identified the same actionable misrepresentation and concealment—manipulating the CLASS study to create the illusion of reduced gastrointestinal risks by only looking at the first six months of data—as the [consolidated] *Garber* Action to support same claim that 'Celebrex was safer for the stomach and digestive tract than conventional drugs.'" OB Ex. B at 12-13.

[10] U.S. Specialty does not challenge this ruling on appeal.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT THE WRONGFUL ACTS ALLEGED IN *MORABITO* WERE NOT RELATED TO THOSE ALLEGED IN *GARBER* AND NO EXCLUSION BARRED COVERAGE FOR *MORABITO*

A. Question Presented.

Did the Superior Court correctly hold that the Wrongful Acts as alleged in the *Garber* and *Morabito* Actions were not "related" and did not trigger application of the Specific Litigation and Prior Notice Exclusions? *See* OB Ex. C at 22-27, B0032-38.

B. Scope Of Review And Legal Standards.

The meaning and application of insurance policy language is a question of law, reviewed *de novo*. *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 72 (Del. 2011). Following cross-motions for summary judgment, the Court reviews the record and draws its own factual conclusions only "if the findings below are clearly wrong and if justice requires." *Fiduciary Tr. Co. of N.Y. v. Fiduciary Tr. Co. of N.Y.*, 445 A.2d 927, 930 (Del. 1982).

An insurance contract must be read as a whole, and policy language must be evaluated as it would be viewed by an average reasonable insured, consistent with an insured's reasonable expectation of coverage. *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006); *Med. Depot, Inc. v. RSUI Indem. Co.*, 2016 WL 5539879, at *7, *11 (Del. Super. Sept. 29, 2016).

The burden "falls on the insurer to prove the elements of a policy exclusion." *E.I. DuPont de Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 53 (Del. Super. 1995). "An exclusion clause in an insurance contract is construed strictly to give the interpretation most beneficial to the insured." *Sun-Times Media Grp., Inc. v. Royal & Sunalliance Ins. Co. of Can.*, 2007 WL 1811265, at *11 (Del. Super. June 20, 2007).

C. Merits Of The Argument.

1. The Superior Court Correctly Held Under Delaware Law That Whether Actions Are Sufficiently Related To Implicate The Exclusions Depends On Whether The Actions Are Fundamentally Identical

U.S. Specialty argues that the Superior Court erred by requiring that *Morabito* be "fundamentally identical" to *Garber* in order to trigger the Specific Litigation and Prior Notice Exclusions. OB at 2. However, the Superior Court gave full effect to both Delaware law and the Exclusions' language and purpose, and properly rejected U.S. Specialty's attempt to unreasonably expand the Exclusions' application well beyond their intended scope.

U.S. Specialty's supposed "plain reading" approach would parse out of context every word or phrase—"in part," "any," "in any way," "arising out of," "relating," "or," etc.—so that, by the end, there is no subsequent suit against Pfizer that would *not* fall within the scope of the Exclusions. OB at 20, 22-26. According to U.S. Specialty, *Morabito* is excluded merely because both it and *Garber* involved

Pfizer; or because both concerned Celebrex or "COX-2 inhibitors." *Id*. That is not what the Exclusions require.

Under Delaware law, "insurance contracts . . . must be interpreted in a common sense manner, giving effect to all provisions so that a reasonable policyholder can understand the scope and limitation of coverage." *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1149 (Del. 1997); *see Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 388 (D. Del. 2002) (holding that the court is guided by "a reasonable reading of the plain language of the polic[ies]") (internal quotation omitted). This reasonable reading of the plain language requires a different lens where the provision excludes coverage. Exclusionary clauses are "accorded a strict and narrow construction," and given effect only when the exclusion is "specific," "clear," "plain," and "conspicuous." *Med. Depot*, 2016 WL 5539879, at *7 (internal quotations omitted). The reasonable, plain-language reading of an exclusionary clause must reasonably "fulfill an insured's expectations" for coverage. *See id.*

In accordance with these principles, Delaware courts have stated that exclusions that speak to "related" or "interrelated" wrongful acts or claims turn on whether the claims or acts are "fundamentally identical." *See, e.g.*, *Med. Depot*, 2016 WL 5539879, at *14; *RSUI Indem. Co. v. Sempris, LLC*, 2014 WL 4407717, at *7 (Del. Super. Sept. 3, 2014); *cf. United Westlabs, Inc. v. Greenwich Ins. Co.*, 2011 WL 2623932, at *11 (Del. Super. June 13, 2011) (finding relatedness where

"[t]he acts are the same"). Delaware courts have rejected U.S. Specialty's "uncharacteristically broad" interpretation (OB Ex. C at 23), because "merely sharing common facts and events does not necessarily mean that actions are 'related' for purposes of allowing or denying coverage." *Providence Serv. Corp. v. Ill. Union Ins. Co.*, 2019 WL 3854261, at *3 (Del. Super. July 9, 2019).[11]

In *Providence*, the insurer sought a broad application of a similarly-worded prior notice exclusion, claiming two lawsuits against the insured filed years apart were "related" based on general overlapping facts, such as both involving the insured's "assessment of unauthorized fees accompanied by threats," while ignoring the different claims, plaintiffs, time periods and Wrongful Acts. *Id.* at *3. The court rejected this reading, in favor of a fundamentally identical standard (*Id.* at *4):

> As a general matter, any challenges to the provision of probationary services can be "related," but the analysis cannot stop there. To accept Defendant's broad definition of "related" would render all claims involving PCC professional services "related." Coverage would be illusory. It would be difficult, if not impossible, to find unrelated incidents in the context of providing probationary services.

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[11] U.S. Specialty states that *AT&T Corp. v. Clarendon Am. Ins. Co.*, 2006 WL 1382268 (Del. Super. Apr. 25, 2006), *rev'd on other grounds*, 918 A.2d 1104 (Del. 2007), "faithfully applied [the Exclusions] according to their plain, broad language" under Delaware law. OB at 26. The *AT&T* court made no choice of law decision between Delaware, New York, New Jersey and California law, and it did not endorse U.S. Specialty's "strained" interpretation here.

Any claim against Pfizer that triggers its D&O coverage will have some portion of facts in common, whether they involve the same drug, executive or securities violations. Having "'any' common fact" (OB at 24) cannot be the test for "related" claims or it would render Pfizer's D&O coverage illusory.

U.S. Specialty's specific attacks of the Superior Court's application of the "fundamentally identical" standard do not support its unreasonable reading of the Exclusions.[12] First, U.S. Specialty asserts that the "fundamentally identical" standard is improper because those words "do not appear ***anywhere*** in the exclusions." OB at 27. However, U.S. Specialty advocates for New York courts' "factual nexus" test (OB at 22, 22-26; *infra* at 29-32) even though the words "factual nexus" also do not appear in the Exclusions.

Second, U.S. Specialty claims the Superior Court's test improperly narrows the Exclusions to only "apply to . . . claims that are virtually identical." OB at 23. But U.S. Specialty ignores the Superior Court's use of the word "*fundamental*" to modify "identical." Fundamental does not mean "completely" or "virtually." "Fundamental" means "serving as a basis supporting existence or

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[12] U.S. Specialty previously argued that Delaware law required that suits have a "logical or causal relationship" and or allege "a single course of conduct that serves as the basis for the various causes of action" to determine relatedness, but does not make this argument on appeal. A455-57.

(Continued . . .)

determining essential structure or function;"[13] it means basic or "core."[14] In other words, *at their core*, do the lawsuits' "essential structure" allege the same Wrongful Acts such that they should be considered a single Claim. Delaware courts recognize that a reasonable reading of these provisions entails looking beyond superficial facts; the proper inquiry concerns whether the alleged, actionable wrongful acts are the same. *RSUI*, 2014 WL 4407717, at *5-6 (distinguishing *Westlabs* where claims were related, despite their differences, because "the *wrongful acts* giving rise to the 2007 and 2009 Counterclaims" were the same) (emphasis added).

Third, the "fundamentally identical" standard comports with the purpose of the Exclusions. *Playtex FP, Inc. v. Columbia Cas. Co.*, 622 A.2d 1074, 1076 (Del. Super. 1992) (to interpret a contractual provision, the court considers "the overall purpose of the contract[] and of the specific provision at issue."). Pfizer agrees with U.S. Specialty that policies exclude "related" claims so that an insurer who priced and sold a "claims-made" policy can limit its exposure to claims that were made during *that* policy period, and not pay twice for what is essentially a continuation of the same claim, although made in a subsequent policy period. *See*

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13 *See* https://www.merriam-webster.com/dictionary/fundamental (last visited Jan. 22, 2021)

14 *See* https://www.merriam-webster.com/thesaurus/fundamental (last visited Jan. 22, 2021).

OB at 30. And, for policyholders, these provisions allow a later claim to "relate back to the policy period in which the related claims were first made and to be eligible for coverage thereunder." *Id.*

But when *Morabito* was filed, Pfizer's 2004-2005 D&O tower was not being asked to "pay *Garber* again" because Pfizer's 2002-2003 D&O tower did not pay for *Garber*. Rather, *Garber* was paid by *Pharmacia's* 2002-2003 D&O tower because it concerned solely allegations of Wrongful Acts by Pharmacia and *its* executives harming Pharmacia shareholders. U.S. Specialty's reading of the Exclusions would deny Pfizer coverage for *Morabito* because it "relates back" to coverage for *Garber*, even though *Garber* never triggered Pfizer's coverage in the first place, contrary to the Exclusions' intent.

These Exclusions were never intended to collapse *Morabito*—a separate claim filed almost two years later—into *Garber*. Rather, the intent was to collapse a claim like *Jewell* into *Garber* if *Jewell* had been filed only two days later (and thus, during the 2003-2004 policy period) because *Jewell, at its core*, alleged the same Wrongful Acts as *Garber*. The "fundamentally identical" test effectuates the purpose of these Exclusions, and the Superior Court's ruling should be affirmed.

2. New York Courts Have Not Applied Exclusions For Related Claims Where There Is "Any" Fact, "Even In Part" In Common "In Any Way" Between Claims

U.S. Specialty argues this Court to interpret the Specific Litigation and Prior Notice Exclusions as it contends a New York court would, as precluding coverage for a claim so long as "any" fact "in any way" "directly or indirectly" is in common with or arises from, "even in part," another claim. OB at 22-27. However, New York courts do not apply "relatedness" exclusions in the unreasonable manner U.S. Specialty seeks.

While both Delaware and New York "use a plain reading approach" to examine provisions for related claims,[15] the New York cases cited by U.S. Specialty have stated that "[t]o establish that a prior Claim is interrelated with a subsequent Claim, the Claims must share a 'sufficient factual nexus.'" *Quanta Lines Ins. Co. v. Inv'rs Cap. Corp.*, 2009 WL 4884096, at *14 (S.D.N.Y. Dec. 17, 2009) (internal quotation omitted). "A sufficient factual nexus exists where the Claims 'are neither factually nor legally distinct, but instead arise from common facts' and where the 'logically connected facts and circumstances demonstrate a factual nexus' among the Claims." *Id.* (internal quotation omitted); *Weaver v. Axis Surplus Lines Ins. Co.*,

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15 *See TIAA-CREF Individual & Institutional Servs., LLC v. Ill. Nat'l Ins. Co.*, 2016 WL 6534271, at *13 (Del. Super. Oct. 20, 2016).

2014 WL 5500667, at *12 (E.D.N.Y. Oct. 30, 2014), *aff'd*, 639 F. App'x 764 (2d Cir. 2016).

U.S. Specialty relies on the *Weaver* trial court's reference to "'any' common fact" (OB at 24) to justify expanding the scope of the Exclusions, but that is not what the *Weaver* court did. Rather, the court explained that claims "need not involve *precisely* the same parties, legal theories, [and] Wrongful Acts," and that the exclusion could still apply even where "one claim may involve additional facts or allegations." 2014 WL 5500667, at *12 (emphasis added); *see also Zunenshine v. Exec. Risk Indem. Inc.*, 1998 WL 483475, at *5 (S.D.N.Y. Aug. 17, 1998) (same).[16] That general position is unremarkable and often stated by courts, and *Weaver* still held that "related" claims could not be "factually nor legally distinct" but needed to be "logically connected," which the claims before it were—they involved identical injuries to identical parties from identical conduct. 2014 WL 5500667, at *13.[17]

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[16] *See also 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) (shared facts "*in any way*" from past litigation meant only that it was "not necessary for [insurer] to demonstrate a complete overlap between the claims and the alleged facts in order to preclude coverage.") (underline added).

[17] Similarly, the Illinois court in *RSUI Indemnity Co. v. Worldwide Wagering, Inc.*, 2017 WL 3023748, at *3, *7 (N.D. Ill. July 17, 2017) that purported to apply Delaware law held that "each allegation and each fact" need not arise from the prior litigation; it was enough that "[a]ll the claims" and "essential

(Continued . . .)

U.S. Specialty's other New York decisions similarly involved a "complete overlap" of allegations or had "virtually identical" facts, claims and wrongful acts. *See, e.g.*, *Pereira*, 525 F. Supp. 2d at 380 ("the Court finds [a]… virtually complete overlap between the facts underlying the 'Dividends' claim in Trace and the facts alleged in *Barbuto*"); *Zahler v. Twin City Fire Ins. Co.*, 2006 WL 846352, at *6 (S.D.N.Y. Mar. 31, 2009) ("[a] side-by-side review of the [two] Complaint[s] reveals that the facts alleged in the two actions are in many cases identical"); *Zunenshine*, 1998 WL 483475, at *5 (both lawsuits alleged "four of the same six plaintiffs made virtually identical false statements in reports, press releases, and other public statements" during the same time period).[18] *Cf. Glascoff v. OneBeacon Midwest Ins. Co.*, 2014 WL 1876984, at *6 (S.D.N.Y. May 8, 2014) (refusing a "broad strokes" reading of an interrelated claims provision where the general "common facts" were unrelated to the purposes of the lawsuits).

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allegations" of the insured's fraudulent transfer of assets in the current litigation were "a direct effort to avoid paying the judgment in the [prior litigation]" that was the subject of the exclusion.

[18] *See also Nomura Holding Am., Inc. v. Fed. Ins. Co.*, 45 F. Supp. 3d 354, 370-71 (S.D.N.Y. 2014) ("[T]he relevant complaints contain overlapping (and frequently identical) factual allegations, arising from strikingly similar circumstances, alleging similar claims for relief").

(Continued . . .)

No matter how it is articulated, the analysis is a fact-intensive inquiry where "[t]he greater the similarities and relatedness between cases, the more likely subsequent claims are to relate back to an initial claim." *TIAA-CREF*, 2016 WL 6534271, at *13 (finding that "all of the Underlying Actions ar[ose] out of the same conduct"—TIAA–CREF's business practice of failing to pay its customers their gains—and were related under Delaware or New York law). Under any test, the Specific Litigation and Prior Notice Exclusions do not apply to *Morabito*.[19]

3. The Wrongful Acts Alleged In *Morabito* Did Not Arise Out Of, And Were Never Related To, The Wrongful Acts Alleged In *Garber* Under Any Test—They Were, "In All Relevant Respects, Different"

a. The *Garber* Specific Litigation Exclusion Does Not Preclude Coverage For *Morabito*

"When determining whether actions are 'related,' courts compare the allegations in the complaints to determine their similarities and differences." *Providence*, 2019 WL 3854261, at *3. The Superior Court did so and correctly found that the Wrongful Acts in *Garber* and *Morabito* were "entirely distinct misrepresentations" and the Actions were, "in all relevant respects, different." OB

[19] The Superior Court did not "acknowledge[]" that New York law follows U.S. Specialty's interpretation (OB at 3); rather, it conducted a choice-of-law analysis because Delaware and New York have formulated differently-worded tests for "related" claims.

Ex. C at 27. U.S. Specialty's efforts to turn *Garber* into *Morabito* (and vice versa) fail at every turn.

U.S. Specialty first claims that *Morabito* and *Garber* "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." OB at 33. They did not. *Garber*, at its core, involved Pharmacia's misrepresentation in JAMA that Celebrex was safer for GI than NSAIDs based on the CLASS Study. *Morabito*, at its core, concerned over a dozen of additional studies never mentioned in *Garber*, and allegations that Pfizer made scores of misrepresentations and omissions regarding the heart attack and stroke risk of Celebrex and Bextra.

U.S. Specialty then exaggerates the *Morabito* complaint's handful of mentions of the CLASS Study's GI results to prop up that *Morabito* "arose out of" "in part" *Garber*. OB at 31-33; A279-282. But, these were not the operative facts which formed the basis of the Wrongful Acts alleged in *Morabito*, *i.e.*, securities violations based on misrepresentations about the cardiovascular risks of Celebrex and Bextra that resulted in a significant drop in Pfizer stock when those risks were

exposed between October 2004 and late 2005.[20] These few mentions of GI issues in *Morabito* do not change the fundamental nature of that Action. Indeed, the *Morabito* Complaint introduction section mentions the "cardiovascular" or "heart attack" risks of Celebrex and Bextra more than sixty times; their GI performance is not mentioned once. And the opposite is true for *Garber*. A476-82. (*Garber* introduction references GI risks over twenty times; cardiovascular risk is not mentioned).

U.S. Specialty argues that it is irrelevant that *Morabito* contains "additional facts" because the Exclusions only require that *Morabito* "in part" arise out of or "in any way" relate to "'any' facts" of *Garber*. OB at 34. However, the "additional facts in *Morabito*" that are not in *Garber*—over 580 paragraphs describing all the studies and countless, specific alleged misrepresentations by Pfizer's executives about the cardiovascular effects of Celebrex and Bextra that ultimately caused Pfizer stock value to drop in 2004 and 2005—form the core of *Morabito* and form no part of the Wrongful Acts in *Garber*.

The *Garber* Specific Litigation Exclusion is not a "COX-2 Inhibitor," or a "Misrepresentation of Drugs' Safety and Efficacy" Exclusion. It is specific to

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[20] *See, e.g.*, *Emmis Commc'ns Corp. v. Ill. Nat'l Ins. Co.*, 323 F. Supp. 3d 1012 1027 (S.D. Ind. 2018), *aff'd* 937 F.3d 836 (7th Cir. 2019) ("The question is whether the allegations that the COF Suit shares with the Shareholder Suits and the Alden Action were operative facts in the COF Suit or merely window dressing included . . . for some purpose other than supporting the legal claims made therein. The Court finds that they were the latter.").

Garber, precluding coverage for Wrongful Acts as alleged in *Garber*, *i.e.*, stock harm arising out of Pharmacia's alleged misrepresentations of the GI effects associated with Celebrex revealed in 2002. That is not *Morabito*. The Superior Court compared the complaints and "pointed out a myriad of differences between the *Morabito* and *Garber* Actions[,]": "*[d]ifferent* plaintiffs [who] brought *separate* actions against *different* defendants regarding *different* misrepresentations about *different* products and associated health risks." *Ferrellgas Partners L.P. v. Zurich Am. Ins. Co.*, 2020 WL 363677, at *8 (Del. Super. Jan. 21, 2020). The Exclusion does not apply, and the Superior Court's holding should be affirmed.

b. The Prior Notice Exclusions Do Not Bar Coverage For *Morabito*

Regarding its Prior Notice defense, U.S. Specialty focuses exclusively on the obsolete complaints filed by Mr. Garber and Mr. Jewell that were the subject of the Notice of Circumstances, even claiming that the consolidated *Garber* complaint is "irrelevant." OB at 32. U.S. Specialty provides no support that long-outdated complaints are the relevant pleading, but that is immaterial; neither the original *Garber* nor *Jewell* complaints' Wrongful Acts are related to *Morabito* to implicate the Prior Notice Exclusion.

First, the Twin City Prior Notice Exclusion only applies where "notice of claim or occurrence . . . has been given" under a prior policy. *Supra* at 9-10. The

Notice of Circumstances was not notice of a claim (Pfizer had not been sued) nor notice of an "occurrence"—which is a term of art in insurance parlance for "occurrence"-based insurance policies. Rather, it was a notice of "circumstances" that could give rise to a claim. Thus, the predicate of the Twin City Prior Notice Exclusion is not even satisfied.

Second, a cursory review of the original *Garber* and *Jewell* complaints undermines U.S. Specialty's argument that the relevant allegations included Pfizer's "failures to disclose cardiovascular risks posed by Celebrex." OB at 32. Mr. Garber's original complaint's few mentions of "cardiovascular" issues derive almost entirely from a single *Wall Street Journal* article. *See, e.g.*, A711, 719-21. While that August 2001 article referenced purported cardiovascular issues, it was included in the complaint because it was critical of Celebrex's GI issues. *See* OB at 33; A713-14, 738-39. Consistent therewith, the original *Garber* complaint contains over *fifty* references to Pharmacia's alleged wrongful acts concerning statements of Celebrex's GI issues related to the CLASS Study, which was and then remained the fundamental alleged Wrongful Act by Pharmacia. *See* A706-750.

The Wrongful Acts and causes of action alleged in Mr. Jewell's lawsuit (which also cited the same *Wall Street Journal* article (*see* OB at 12)), also concerned Pharmacia's supposed misrepresentations concerning the CLASS Study's results for Celebrex's GI side effects, and the resulting inflated stock price. A754, 759-73 ("the

Company continued to hype Celebrex's anti-gastro capabilities, thereby artificially inflating Pharmacia's stock during the Class Period"), and A763 ("The statements contained in [the preceding paragraphs] were materially false and misleading because they failed to disclose that the results of the [CLASS Study] were flawed because [Pharmacia] manipulated the results in such a way to show that Celebrex was safer for the stomach and digestive tract than conventional drugs" which "caused the Company's stock to trade at artificially inflated prices during the Class Period[.]"), A765-67, 769 (same).

While the original *Garber* and *Jewell* complaints were replaced six months after they were filed, the operative *Garber* complaint was not "narrowed to focus on gastrointestinal risks." OB at 32-33. The *Garber* plaintiffs' operative facts always concerned Pharmacia's misstatements about the CLASS Study's data regarding the GI side effects of Celebrex. That is why U.S. Specialty's own employee contemporaneously acknowledged that *Morabito* did not relate back to *Garber* and *Jewell*. B0946-47. The only difference was the consolidated *Garber* complaint no longer referenced the above-mentioned *Wall Street Journal* article referencing "cardiovascular" issues—because it was irrelevant to alleged Wrongful Acts. A476-82, 486-88.

U.S. Specialty's reliance on these short-lived complaints was born out of necessity to get around the preclusive effect of the Superior Court's Decision on

the *Garber* Specific Litigation Exclusion. These complaints' brief mention of "recent news of possible cardiovascular risks" as a "speculative danger researchers discovered" (OB Ex. B at 13) did not change the core Wrongful Acts alleged in *Garber*. The Notice of Circumstances was notice of *Garber*, not *Morabito* filed almost two years later. The Prior Notice Exclusions simply do not apply.

II. THE SUPERIOR COURT CORRECTLY HELD THAT PFIZER'S D&O POLICIES ARE GOVERNED BY DELAWARE LAW

A. Question Presented.

Did the Superior Court correctly hold that Delaware law applies to the U.S. Specialty Policy? *See* OB Ex. C at 14-21; B0503-679; B0695-702, 705-07.

B. Scope Of Review.

The Superior Court's decision on summary judgment regarding choice of law is a legal question that is reviewed *de novo*. *Chemtura*, 160 A.3d 457, 464.

C. Merits Of The Argument.

Pfizer agrees that a choice-of-law determination is unnecessary (*see* OB at 36); while Delaware and New York have articulated their tests for "relatedness" differently, no state law has read the Exclusions to apply as U.S. Specialty contends, and the Exclusions would not apply under either state's articulation. But, if the Court finds there is a conflict, Delaware law applies.

1. Delaware Is The Principal Location Of The Insured Risk And Has The Most Significant Interest In Applying Its Law To The U.S. Specialty Policy Which Covers A Delaware Corporation's Directors And Officers

When there is a conflict of laws, Delaware applies the "most significant relationship test" under Restatement (Second) Conflict of Laws, which consists of "three layers of guidance" under Sections 193, 6 and 188. OB Ex. C at 17-18. Section 193, which applies to "casualty" insurance like D&O insurance, provides the presumption that the law applicable to an insurance policy is:

> determined by 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[.]

Delaware courts consistently hold that, "[w]hen the insured risk is the directors' and officers' 'honesty and fidelity' to the corporation . . . the state of incorporation has the most significant relationship." *Mills*, 2010 WL 8250837, at *6.

Delaware law also applies to the U.S. Specialty Policy under a traditional choice-of-law analysis under § 6. The Policy's choice of Delaware law for ADR shows that, under § 6(2)(d), the parties would justifiably expect Delaware law to apply in litigation.[21] Moreover, applying Delaware law in ADR only to then apply a different state law in litigation would be "the precise kind of uncertainty and inconsistency" that § 6(2)(f) seeks to avoid.[22] OB Ex. C at 20. Lastly, § 6(2)(b), the "relevant policies of the forum" prong, also supports the application of Delaware law: "[b]ecause Delaware law governs the scope and entitlement to indemnification and advancement [of directors and officers under 8 *Del. C.* § 145], applying Delaware law to the D&O policies that actually cover those costs advances the

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[21] *Mills*, 2010 WL 8250837, at *4 (by choosing Delaware law to apply in ADR, the "parties probably expected Delaware law to apply" in litigation).

[22] U.S. Specialty downplays the "Primary Policy's defunct ADR Provision" (OB at 43), by arguing that it "would have" required Delaware law only in ADR (*id.* at 3). However, the ADR Provision is incorporated into the U.S. Specialty Policy, and it *did* require Delaware law when the parties mediated *Morabito*. A44, 70-71; OB Ex. C at 20-21.

relevant policies of the forum." *Calamos Asset Mgmt., Inc. v. Travelers Cas. & Sur. Co.*, 2020 WL 3470473, *3 (D. Del. June 25, 2020).

U.S. Specialty's contention that § 188 factors "uniformly point to New York" (OB at 43) ignores that § 188 factors are only taken into account in applying § 6, and must be "evaluated according to their relative importance with respect to the particular issue." *Id.* While Pfizer's headquarters is located in New York, § 188(e) also considers the insured's state of incorporation, which is far more "importan[t] . . . to the particular issue" here—D&O coverage. And, U.S. Specialty does not address why Marsh's location in New York is any more relevant under § 188 than U.S. Specialty's headquarters in Texas, such that New York law should apply. Finally, the Policy does not have endorsements and stamps that "refer[] to New York law" *substantively* (OB at 36); these boilerplate endorsements and stamps refer to the minimum New York *insurance regulation* requirements that admitted carriers must comply with for their policies delivered in New York.[23]

U.S. Specialty's attempt to devalue Delaware's connections to the Policy because *Morabito* was for violation of "***federal*** securities laws" and "did not implicate any Delaware-specific duties" (OB at 43) (emphasis in original) also

[23] U.S. Specialty points, for the first time, to the Declaration Page reference to a "New York Form," but does not explain its significance; it may merely reflect the Policy's delivery in New York.

misses the mark. The Superior Court (citing *CNH*) correctly held that a choice-of-law analysis turns on the contract and the insured risk—not the underlying claims. OB Ex. C at 18-19. In any event, while the final *Morabito* complaint contained only federal securities claims, five Pfizer directors were defendants in *Morabito*, and their alleged misconduct against the shareholders appears throughout the complaint.[24]

Unlike New York, which "has, at best, an indirect interest in whether Delaware corporations insure[] their directors and officers" (*Mills*, 2010 WL 8250837, at *6), Delaware is the location of the insured risk, and has the most significant relationship to U.S. Specialty's D&O Policy covering claims addressed to the obligations of Pfizer's corporate directors and officers.

2. U.S. Specialty Runs Afoul Of *Chemtura* By Insisting That, Although Delaware Law Would Apply In An Arbitration Or Mediation, New York Law Should Apply To This Litigation

U.S. Specialty argues that the Superior Court failed to adhere to this Court's decision in *Chemtura* by not applying the law of the insured's principal place of business as purportedly having the most significant relationship to the contract. OB at 37-39. In fact, it is U.S. Specialty that is failing to adhere to *Chemtura*.

In *Chemtura*, the insured sought coverage for environmental claims in different states under its CGL policies issued from the 1950s to 1986 as part of a

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[24] Several related lawsuits consolidated as part of *Morabito* asserted breaches of fiduciary duty and other corporate governance claims. *See, e.g.*, B0580.

"nationwide insurance program." 160 A.3d at 459-60. The "fundamental question" posed by this Court in *Chemtura* was whether to have the applicable law vary based on the location of each underlying claim, or to have a consistent law to apply to the contract, wherever applied. *Id.* at 459. In answering "no," the Court stated that "insurance contracts. . . [should not have] meaning that varies substantially based on where each claim happens to arise." *Id.*

That answer applies equally to U.S. Specialty's argument that the meaning of its Policy should be construed under New York law if interpreted by a court, but under Delaware law if interpreted by a mediator or arbitrator. That result is also illogical—as the Superior Court recognized. OB Ex. C at 20-21. How could a mediator effectively consider Delaware law in arguing that parties should compromise if one of the parties insists Delaware law would not apply when they go to court? Applying Delaware law to both this litigation and the mediation which preceded it "vindicate[s] the justified expectations of the parties to the contract and avoids a result that none would have anticipated." *Chemtura*, 160 A.3d at 460.

After rejecting the argument that the applicable state law should depend on the location of the underlying claim, the Court in *Chemtura* framed its secondary inquiry as follows: "to make a reasoned determination of what state has the most significant interest in applying its law to the interpretation of the insurance scheme and its terms as a whole in a consistent and durable manner that the parties can rely

on." *Id.* Recognizing that "the facts of a particular case might lead to a different outcome," this Court held that the parties' contacts with New York, in particular as the "headquarters of the insured at the outset of the insurance program," justified the application of New York law. *Id.*

Chemtura does not hold that the policyholder's headquarters dictates the governing law, especially in different circumstances—such as where the location of the insured risk is not nationwide.[25] Here, Delaware, Pfizer's state of incorporation which provides the substantive law concerning the duties of its directors and officers, and which legally authorized this insurance (8 *Del. C.* § 145), "has the most significant interest in applying its law to the interpretation of th[is Directors and Officers] insurance scheme." *Chemtura*, 160 A.3d at 460.

The U.S. Specialty Policy does not cover risks for operations, facilities or products that are "scattered throughout two or more states" (OB at 38 (quoting § 193, cmt. (b))) like in *Chemtura*. While Pfizer executives could be located in different states and be subject to a "wide variety of claims" (OB at 36), their insured risk will always be for allegations of "Wrongful Acts" relating solely to their capacities as Delaware directors and officers. That is how the Superior Court

[25] *See CNH*, 2018 WL 3434562, at *1 (seeking coverage under program "covering operations across multiple jurisdictions" for nationwide claims caused by asbestos manufacturing facilities located across multiple states).

considered the insured risk here—D&O liability—and "followed a long line of cases holding that," as between the insured's headquarters or state of incorporation, "the state of incorporation has the most significant relationship'" for choice of law. *Calamos*, 2020 WL 3470473, *5.

This holding was consistent with numerous Delaware courts—even after *Chemtura*—that "have consistently held that Delaware law should be applied to resolve disputes over insurance coverage of directors' and officers' liability." *IDT Corp. v. U.S. Specialty Ins. Co*., 2019 WL 413692, at *6 (Del. Super. Jan. 31, 2019); *Arch*, 2018 WL 1129110 at *11; *Calamos*, 2020 WL 3470473 at *3-5; *Ferrellgas*, 2020 WL 363677, at *4. These decisions have not mistakenly relied on "dicta" from *Mills* to ignore *Chemtura* in finding the insured's state of incorporation is more significant to D&O coverage. OB at 42. Rather, as *Mills* stated, these courts recognized the fundamental difference between D&O insurance and other types of insurance for determining the applicable law to the policy:

> Again, this is not a products liability, consumer fraud, or embezzlement situation. When the conduct of a corporation's directors and officers is centrally implicated, the place of incorporation is important. . . . Those directors and officers caused a Delaware corporation to defraud its investors, which made the corporation liable and triggered the corporation's D&O policy. In a case like this, what difference does headquarters' location make to the company or the people involved?

2010 WL 8250837, at *6. The same is true here. The only way to ensure that one single state's law applies to Pfizer's D&O insurance policies, and to ensure that the applicable law is that of the state with the most significant interest in the contract and the one reasonably expected by the parties, is to apply Delaware law.

CONCLUSION

Pfizer respectfully requests that the Judgment of the Superior Court awarding Pfizer full coverage for *Morabito*, plus interest, be affirmed.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ John P. DiTomo
Kenneth J. Nachbar (#2067)
John P. DiTomo (#4850)
Sabrina M. Hendershot (#6286)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347
(302) 658-9200
Attorneys for Plaintiff Pfizer Inc

OF COUNSEL:

Robin L. Cohen
Adam S. Ziffer
Marc T. Ladd
COHEN ZIFFER FRENCHMAN & MCKENNA LLP
1350 Avenue of the Americas
New York, NY 10019
(212) 584-1890

January 27, 2021

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2021, a copy of the foregoing document was served upon the following counsel of record via File & Serve*Xpress*.

Carmella P. Keener, Esq.
COOCH AND TAYLOR, P.A.
1007 N. Orange Street, Suite 1120
Wilmington, DE 19801

/s/ Sabrina M. Hendershot
Sabrina M. Hendershot (#6286)