

Allergan Can Sue Pfizer To Recoup Opioid Litigation Costs

By **Mike Curley**

Law360 (November 5, 2020, 3:53 PM EST) -- A New York appeals court has greenlighted Allergan Finance LLC's suit for defense and indemnification from Pfizer Inc. in nationwide opioid litigation, finding it has adequately pled the suits against it trigger an agreement between the companies.

The panel affirmed an April decision by the New York County Supreme Court denying Pfizer's motion to dismiss the case, in which Allergan alleged it failed to pay past and ongoing defense costs in the litigation, including multidistrict litigation in Ohio.

According to Thursday's opinion, Allergan has adequately alleged that the underlying suits involve conduct from when Pfizer and its predecessor were responsible for the marketing and sale of the opioid drug Kadian, before it was acquired by Allergan, as required by an indemnification contract between the companies, and Pfizer hasn't shown any evidence to undermine that allegation.

The panel further found that the contract covers ongoing defense costs, rather than just final judgments and settlements, pointing to a payment schedule in the agreement as proof.

The contract contemplates ongoing quarterly payment of costs before a final decision is determined, the panel wrote, saying if they'd intended to make indemnification depend on a final determination of liability, there'd be no need for the payment mechanism or quarterly payments, and the opportunity for Pfizer to assume Allergan's defense "would make no sense."

The appeals court did, however, dismiss Allergan's claim for contribution from Pfizer for costs relating to future adverse judgments or settlements, finding that those claims are premature, and making that determination in advance is "impractical."

According to the opinion, while the right to indemnification is governed by New York law as selected by the contract, the right to contribution is governed by choice of law rules in the state in which contribution is sought.

Because it's unclear where potential future judgments or settlements might take place, and may in fact take place in multiple jurisdictions, it's impossible to say what the choice of law for those potential outcomes is at this stage.

"The court has narrowed the claims in this case which relate to a product that we never manufactured, marketed, or sold," a spokesperson for Pfizer told Law360 on Thursday. "Pfizer will continue to defend itself vigorously against the plaintiff's claims."

Attorneys for Allergan declined to comment.

Allergan is represented by Jamie L. Wine, Kevin McDonough and Michael Bern of Latham & Watkins LLP.

Pfizer is represented by Lynn K. Neuner and George Wang of Simpson Thacher & Bartlett LLP.

The case is Allergan Finance LLC v. Pfizer Inc. et al., case number 2020-02383, in the Supreme Court of the State of New York, Appellate Division, First Judicial District.

--Additional reporting by Kevin Stawicki. Editing by Alyssa Miller.

Update: This story has been updated with additional counsel information for Pfizer.