

\$110M E-Ferol Settlement Gets Final Approval

By Melissa Lipman

Law360, New York (April 12, 2010) -- A federal judge has given final approval for O'Neal Inc., Retrac Inc. and several of their insurers to pay up to \$110 million to settle a class action over E-Ferol, a toxic vitamin solution that allegedly caused liver and kidney failure in premature infants in the mid-1980s.

Chief Judge Sidney A. Fitzwater of the U.S. District Court for the Northern District of Texas on Friday gave final approval to the deal, which calls for the plaintiffs' attorneys to receive 30 percent of the settlement fund as fees.

Under the terms of the deal, plaintiffs' counsel will also be reimbursed for expenses and \$300,000 will be withheld from the fund to cover the cost of administration and distribution. The two class representatives will receive an additional \$75,000 each for their efforts.

All but 10 of the 369 class members have responded in favor of the deal, according to the opinion. Only three actively opposed the settlement, and just one still objected to it at the time of the February fairness hearing.

The lone objector sought permission to opt out in order to pursue an independent suit against the defendants and the health care providers that treated his deceased infant daughter. The objector maintained that he could recover about \$6 million — three times as much as he would receive under the settlement — if he pursued his claim on his own.

But in a 108-page opinion, Judge Fitzwater ruled that the court needs to determine only that the settlement represents a reasonable recovery for the class as a whole.

The judge found that the "uncontroverted evidence" shows that the estimated settlement payments for the class members fall within the range of what they could reasonably expect to recover for these types of claims.

Plaintiffs' attorney Dwain Dent said he was "very impressed with the detail" in the judge's opinion and added that he expected the settlement would be upheld if appealed.

An attorney for the defendants could not immediately be reached for comment Monday.

Under the terms of the deal, \$90 million will be paid immediately into escrow by the defendants' liability insurers that have agreed to the settlement.

The insurers participating in the settlement are First State Insurance Co., Twin City Fire Insurance Co., Hartford Accident & Indemnity Co., Sentry Insurance Mutual Co., Continental Insurance Co., Everest Reinsurance Co., Landmark Insurance Co., New England Reinsurance Corp. and Travelers Casualty & Surety Co.

The remaining \$20 million is still subject to a dispute between the plaintiffs and Retrac on the one hand and Westchester Fire Insurance Co. and Federal Insurance Co. on the other, pending in the same court. The insurers claim they are not liable for claims against Retrac.

The settlement class includes more than 300 people who either were administered E-Ferol as infants between November 1983 and April 1984 or are surviving family members of infants who died from the drug. The class is further divided into six subclasses, depending on how large a role E-Ferol played in infant deaths or how severely the class members who received E-Ferol themselves were injured.

Plaintiffs launched the suit in 2003, claiming that E-Ferol had killed or permanently injured their children. The drug was produced by Revco subsidiary Carter-Glogau Laboratories Inc., now called Retrac, and distributed by O'Neal.

In 1984, Carter-Glogau issued an emergency recall of the drug after it was found to cause liver and kidney failure in infants, which often proved deadly. A criminal investigation following the recall concluded that Carter-Glogau and O'Neal had illegally marketed the drug without any clinical tests and fraudulently represented it as "FDA-approved."

Some of the plaintiffs alleged wrongful death, while others alleged that E-Ferol had caused brain damage or other health problems in their children. The court certified a class of plaintiffs in May 2004.

Revco merged with CVS Corp., now CVS Caremark Corp., in 1997.

The plaintiffs are represented by the Law Office of Art Brender and the Dent Law Firm.

Retrac and O'Neal are represented by Akin Gump Strauss Hauer & Feld LLP.

Federal Insurance is represented by Seeley Savidge Ebert & Gourash Co. LPA and Schell Cooley LLP. Westchester Fire is represented by Cozen O'Connor.

The case is Klein et al. v. O'Neal Inc. et al., case number 7:03-cv-00102, in the U.S. District Court for the Northern District of Texas.

--Additional reporting by Brendan Pierson