

THOUGHT LEADERSHIP

News

NORTHERN DISTRICT OF TEXAS ORDERS EXCESS CARRIER TO PAY POST-JUDGMENT INTEREST IN E-FEROL SUIT

Newsbrief

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This week, the United States District Court for the Northern District of Texas addressed an excess insurance carrier's obligation to pay post-judgment interest in *Klein et. al v. Federal Insurance Co. et. al.*, No. 7:03-CV-102-D, 2018 WL 5084888 (N.D. Tex. Oct. 18, 2018). The case centered around a coverage dispute between plaintiffs and Federal Insurance Co. in a certified class action involving the administration of the vitamin E supplement E-Ferol Aqueous Solutions.

Plaintiffs consisted of individuals who, between November 1, 1983 and April 30, 1984, were administered E-Ferol and suffered injury or death as a result. In 2003, plaintiffs initiated suit against numerous defendants including Revco D. S., Inc. and its wholly-owned subsidiary, Carter-Glogau Laboratories, Inc. a/k/a Retract Inc. alleging negligence, negligent misrepresentation and strict liability. Federal Insurance served as the excess insurance carrier for Revco. In 2009, the plaintiffs settled with various defendants including Retract and Revco, for claims relating to the manufacture and distribution of E-Ferol. The settlement was funded by the settling defendants' various excess carriers, however Federal Insurance did not participate and disputed its duty to indemnify its insureds, (Retract and Revco) pursuant to the underlying policy. Accordingly, under the settlement agreement, Revco and Retract agreed to assign to plaintiffs their right to seek indemnity from Federal Insurance based on plaintiffs' claims asserted in the Consolidated Declaratory Judgment Actions. At the same time the settlement agreements were signed, Federal Insurance executed a Non-Waiver Agreement agreeing to deposit the \$15 million policy limits of the Revco policy into an interest bearing escrow account to be distributed to either Federal Insurance or plaintiffs following final judgment on the Consolidated Declaratory Judgment Actions and exhaustion of all appeals.

Following the indemnity assignment, plaintiffs amended their complaint seeking declaratory judgment that the Revco policy covered their claims and that Federal Insurance must indemnify the plaintiffs as assignees to the full extent of the settlement agreement. Plaintiffs won summary judgment, and the court found the Revco policy provided coverage, that the settlement agreement did not release claims against Revco, and that plaintiffs were entitled to summary judgment on Federal Insurance's affirmative defenses. The Fifth Circuit Court of Appeals affirmed. The funds in the escrow account were transferred to plaintiffs, including the accrued interest, however, Federal Insurance refused to pay the post-judgment interest, asserting that it did not owe post-judgment interest as the parties contracted for a different interest rate when they agreed to deposit the funds in the escrow account.

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Accordingly, plaintiffs moved for declaration that Federal Insurance owed \$157,217.50 in post-judgment interest.

Analyzing the post-judgment interest provision of 28 U.S.C. § 1961(a) against the language of the Non-Waiver Agreement, the Court concluded that Federal Insurance still owed the statutory post-judgment interest. Specifically, the Non-Waiver Agreement provided for the contracted interest rate in the escrow account funds, but did not directly address the post-judgment interest rate, nor did it waive the plaintiff's entitlement to post-judgment interest under §1961(a). Because variation to the statutory post-judgment interest rate must be clear and unambiguous, the Court rejected Federal Insurance's position and ultimately granted Plaintiffs' motion for declaration that Federal Insurance owed the plaintiffs \$157,217.50 in post-judgment interest.