IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

VICTORIA KLEIN and ASHLEY SWADLEY, Plaintiffs, VS. FEDERAL INSURANCE CO., a/k/a CHUBB GROUP OF INSURANCE COMPANIES; INTERNATIONAL INSURANCE CO., a/k/a WESTCHESTER FIRE INSURANCE CO., n/k/a ACE USA, Ltd.; MISSION INSURANCE CO.; and MISSION INSURANCE CO. TRUST Defendants.	§ § § § § § § § § § § § § § § § §	CA 7-03-CV-102-D

PLAINTIFFS' THIRD AMENDED ORIGINAL COMPLAINT - CLASS ACTION

TO THE HONORABLE SIDNEY A. FITZWATER,
CHIEF JUDGE, UNITED STATES DISTRICT COURT,
FOR THE NORTHERN DISTRICT OF TEXAS:

COME NOW, VICTORIA KLEIN and ASHLEY SWADLEY, plaintiffs, individually and as the class representatives of the E-Ferol class action, certified by this court on May 11, 2004, and as the assignees of CVS Revco D.S., Inc. (formerly, Revco D.S., Inc.) and Retrac, Inc. (formerly, Carter-Glogau Laboratories, Inc.), third-party beneficiaries of the Revco excess liability insurance policy, and as judgment creditors of the judgment entered by this court in this cause on June 18, 2010, and file this their Third Amended Complaint against defendants, FEDERAL INSURANCE CO., a/k/a CHUBB GROUP OF INSURANCE COMPANIES; INTERNATIONAL INSURANCE CO., a/k/a WESTCHESTER FIRE INSURANCE CO., n/k/a

ACE USA, INC.; MISSION INSURANCE CO.; and MISSION INSURANCE CO. TRUST, and for cause of action, would respectfully show the Court as follows:

I.

JURISDICTION

1. Jurisdiction is conferred on this court by 42 U.S.C. §§ 1332 (diversity) since the amount in controversy exceeds $75,000.00 and since there is a complete diversity of citizenship between the plaintiffs and all defendants. This court has jurisdiction of the request for declaratory relief, pursuant to Rule 57, Fed. R. Civ. P., and 28 U.S.C. §§ 2201 and 2202, and for relief, pursuant to the Fifth and Fourteenth Amendments to the U.S. Constitution, pursuant to 42 U.S.C. §§ 1983 and 1988.

2. Plaintiff, Victoria Klein, is a resident and citizen of the State of Texas.

3. Plaintiff, Ashley Swadley, is a resident and citizen of the State of Texas.

4. Defendant, FEDERAL INSURANCE CO., a/k/a CHUBB GROUP OF INSURANCE COMPANIES (hereinafter referred to as "Federal"), is an Indiana corporation, with its principal place of business at 15 Mountain View Rd., Warren, New Jersey 07051, and doing business at all relevant times in the State of Texas.

5. Defendant, INTERNATIONAL INSURANCE CO., a/k/a WESTCHESTER FIRE INSURANCE CO., n/k/a ACE USA, Inc. (hereinafter referred to as "International"), is a New York corporation with its principal place of business in Philadelphia, Pennsylvania, and doing business at all relevant times in the State of Texas. International Insurance Co. is a wholly owned subsidiary of ACE USA, Inc.

6. Defendant, MISSION INSURANCE CO., is a California corporation, currently in liquidation under the conservatorship of the Insurance Commissioner of the State of California

("Commissioner") and whose assets are believed to be held by defendant MISSION INSURANCE CO. TRUST under the direction and control of the Commissioner. The current Insurance Commissioner of the State of California, Dave Jones, may be served with citation at the Office of the Insurance Commissioner, 300 South Spring Street, South Tower, Los Angeles, California 90013.

7. Defendant, MISSION INSURANCE CO. TRUST ("MICT"), is a California corporation, under the direction and control of the Commissioner, currently holding the assets of MISSION INSURANCE CO., in liquidation under the conservatorship of the Insurance Commissioner of the State of California. The current Insurance Commissioner of the State of California, Dave Jones, may be served with citation at the Office of the Insurance Commissioner, 300 South Spring Street, South Tower, Los Angeles, California 90013.

8. Plaintiffs, Victoria Klein and Ashley Swadley, each allege an amount in controversy in excess of $75,000.00 exclusive of any interest and costs, as do each member of the E-Ferol class.

9. Plaintiff, Victoria Klein, is a resident of the City of Wichita Falls, Texas, in the Northern District of Texas. Plaintiff was born on March 17, 1984, in Wichita Falls, Texas, and because of her premature condition, transferred to Cook Children's Medical Center in Fort Worth, Texas. The events which give rise to this cause of action occurred when a pharmaceutical product, E-Ferol, was intravenously administered to plaintiff, Victoria Klein, at Cook Children's Medical Center, formerly known as Fort Worth Children's Hospital, in Fort Worth, Texas.

10. Plaintiff Ashley Swadley is a resident of Seven Points, Texas. Plaintiff Swadley was born on February 18, 1984, at Baylor University Medical Center, Dallas, Texas. Plaintiff was administered E-Ferol intravenously at Baylor University Medical Center, in Dallas, Texas.

11. While all of the defendants are foreign corporations, each did business in the State of Texas, thus, each is subject to personal jurisdiction in the State of Texas and in the Northern District of Texas.

12. Plaintiffs would show that, at all relevant times, each of the corporate entities named herein, were acting by and through their agents and/or employees who, at all relevant times, were acting within the course and scope of their agency or employment.

13. Plaintiffs would show that, at all relevant times, Carter-Glogau Laboratories, Inc., was a division and/or wholly-owned subsidiary of Revco D.S., Inc. (hereinafter Carter-Glogau and Revco D.S. Inc. are referred to as "the Revco defendants"). Carter manufactured and developed the formula used in E-Ferol, which was then distributed and marketed by O'Neal, Jones & Feldman, Inc., a/k/a O'Neal, Inc. In December, 1986, all of the assets of Carter were sold, including the use of the name "Carter-Glogau Laboratories" with the liabilities remaining in the corporate entity that was then renamed "Retrac, Inc." In 1989, Revco filed for bankruptcy, which culminated in the reorganization of the company that was final on June 6, 1991 and modified on February 14, 1992. In 1997, Revco merged with CVS Corporation and the new corporation was named "CVS Revco D.S., Inc." Subsequent mergers, after this case was filed, have changed the name to CVS Caremark Corp. CVS Revco D.S., Inc. and CVS Caremark Corp. were included in this action as successor corporations, but were not involved in any matter pertaining to the manufacturing and distribution of E-Ferol, which had been concluded before the merger.

II.

FACTUAL ALLEGATIONS

14. Overview of E-Ferol Syndrome

In late 1983, Defendant Retrac, Inc., then operating under the name of Carter-Glogau Laboratories, manufactured, and O'Neal, Inc., marketed and distributed, a drug called "E-Ferol" as a high potency vitamin E supplement suitable for intravenous infusion in premature infants. At the time, vitamin E was believed to be beneficial in preventing blindness due to retrolental fibroplasia (RLF) in premature infants at risk for these complications due to their need for supplemental oxygen. Vitamin E had heretofore only been administered to premature infants in an intramuscular and/or oral form. The intramuscular form was difficult to administer to low birthweight infants and the oral form upset the digestive system of premature infants and hence, pharmaceutical companies were searching for an intravenous method of delivering vitamin E. The pharmaceutical product, E-Ferol, was marketed to be administered intravenously, an entirely new method of delivery that had not previously been available. O'Neal attempted to enter this lucrative market ahead of other, more established drug companies, and thus, marketed E-Ferol as a vitamin, claiming that they would not need the approval of the Food and Drug Administration ("FDA"). E-Ferol was distributed throughout the country beginning in late 1983. Neither Retrac nor O'Neal ever sought FDA approval through a new drug application for distribution of E-Ferol. Soon after E-Ferol was distributed, it became widely used in neonatal units throughout the country. These hospitals began to experience high infant mortality and morbidity rates, sufficient to draw the attention of the Center for Disease Control (CDC) and the FDA. By April 12, 1984, after being on the market for approximately four (4) months, the FDA mandated an urgent Class I Recall of E-Ferol due to the unusually high infant mortality and morbidity occurring in premature infants who had been administered E-Ferol.

15. E-Ferol was an altered form of vitamin E delivered intravenously (IV) and claimed to be a "safe intravenous form of vitamin E" for use in preventing retrolental fibroplasia. Now known

as the retinopathy of prematurity, this condition causes visual impairment and blindness in premature children. E-Ferol was administered almost exclusively to premature children to prevent visual impairment resulting from oxygen therapy needed by pre-term neonates. E-Ferol was dose-specific and, if given in a sufficient quantity relative to infant weight, caused clinical deterioration in premature infants, including unexplained thrombocytopenia, hepatic and/or renal failure, hepatolmegaly, splenomegaly, cholestic jaundice, azotemia, respiratory distress, cardiopulmonary deterioration, ascites, and distinct findings on autopsy of progressive veno-occlusive hepatic disease. Because the receipt of E-Ferol was an unique experience in pharmaceutical history, the long-term effects, if any, of the receipt of E-Ferol, whether an infant experienced some or no symptoms prior to his or her release from the hospital, are unknown.

16. Plaintiff Victoria Klein, born at Wichita Falls General Hospital, Wichita Falls, Texas, was initially administered E-Ferol intravenously at Cook Children's Medical Center, formerly known as Fort Worth Children's Hospital, in Fort Worth, Texas, on March 23, 1984, her sixth day of life. Plaintiff was administered sixteen (16) doses from March 23, 1984 through April 9, 1984. Plaintiff Klein received over 500 units of E-Ferol during the above period.

17. At all times herein, Plaintiff Victoria Klein, utilized E-Ferol as her source of vitamin E prescribed by her physician. As a result, E-Ferol was the cause of plaintiff's symptoms acutely experienced at the time of administration and throughout her hospitalization at Fort Worth Children's Hospital and thereafter.

18. Plaintiff Ashley Swadley was initially administered E-Ferol intravenously at Baylor University Medical Center, Dallas, Texas, on February 18, 1984, the first day of her life. Plaintiff Swadley was administered four (4) intravenous doses of E-Ferol, on February 18, 1984,

through February 28, 1984, all together, receiving intravenously thirty (30) units of E-Ferol during that period.

19. At all times herein, plaintiff Ashley Swadley utilized E-Ferol as her source of vitamin E prescribed by her physician. As a result, E-Ferol was the cause of plaintiff's symptoms, acutely experienced at the time of administration and throughout her hospitalization at Baylor University Medical Center, Dallas, Texas, and thereafter.

20. On October 7, 2009, the plaintiff class, O'Neal, and Revco, entered into a Settlement Agreement and Release (doc. no. 306-2), resolving the claims between the parties over the manufacture and distribution of E-Ferol. The settlement was funded by liability insurance from the defendants' excess coverage insurance carriers. Defendants, Federal Insurance Co., a/k/a Chubb Group of Insurance Companies ("Federal"), International Insurance Co., a/k/a Westchester Fire Insurance Co., n/k/a ACE USA, Inc. (hereinafter "International"), and Mission Insurance Co. (hereinafter "Mission"), having been placed in receivership as Mission Insurance Co. Trust (hereinafter "MICT"), are all insurers of Retrac, Inc. and Revco D.S., Inc. for injuries caused by E-Ferol. All three refused to participate in the settlement in any form and refused to indemnify the Revco defendants for the amounts for which they are liable in the above referenced Settlement Agreement and Release (doc. no. 306-2).

21. On February 16 and 17, 2010, following notice to class members, the court conducted a fairness hearing to determine whether the proposed Settlement Agreement and Release was fair, reasonable and adequate, pursuant to Rule 23(e), Fed. R. Civ. P.

22. On April 9, 2010, the district court issued a Memorandum Opinion and Order approving the Settlement Agreement and Release in its entirety (doc. no. 426). The district court entered Judgment on June 18, 2010 (doc. no. 453).

23. Following the resolution of an appeal taken by one class member, the district court authorized distribution of settlement proceeds by Order, dated June 21, 2011 (doc. no. 523)

24. Pursuant to the Settlement Agreement and Release (doc. no. 306-2), defendants, CVS Revco D.S., Inc., as the successors to Revco D.S., Inc., and Retrac, Inc., executed an Assignment to the plaintiff class of their right, title and interest in any and all claims, choses in action, causes of action, suits, sums of money or demands that Revco and Retrac have against Federal, International, and Mission. A copy of the Assignment is attached hereto as Exhibit 1, to this amended complaint and incorporated by reference. The E-Ferol class representatives bring this action in their capacity as assignees of these defendants, third-party beneficiaries of the excess liability insurance policy at issue, and in their capacity as judgment creditors of the judgment approving the settlement.

III.

Causes of Action Against Federal Insurance Co.

25. Pursuant to the Settlement Agreement and Release (doc. no. 306-2), class representatives entered into a Non-Waiver Agreement (doc. no. 313-2), whereby class representatives, on behalf of the E-Ferol class, would proceed to litigate coverage issues with Federal in their capacity as the assignees of Revco and Retrac. A copy of the Non-Waiver Agreement is attached to this complaint as Exhibit 2 and incorporated by reference herein.

26. Revco D.S., Inc. was issued Federal Insurance Co. policy no. (84)7935-60-01, which covered Revco as the named insured, together with "all subsidiary, affiliated, associated or allied companies, corporations, partnerships, joint ventures, organizations, associations, or firms as now or may hereafter be constituted or acquired for which the named insured has responsibility for placing insurance and for which similar insurance is not otherwise more specifically

provided." A copy of the Federal Insurance Co. policy is attached hereto as Exhibit 3 and incorporated by reference (hereinafter "Federal insurance policy" or "Federal policy"). The Federal policy was an excess liability insurance policy with an aggregate total coverage of $15 million. In insurance parlance, the Federal policy "followed form" of the underlying liability coverage supplied by Transit Casualty Co. policy no. 950-235, meaning that the Federal excess liability policy adopted as its own the terms, conditions, definitions, exclusions and coverage language of the Transit policy except as noted in its own policy. Pursuant to the Non-Waiver Agreement, Federal has placed the sum of $15 million into an escrow account, which is subject to distribution under the terms and conditions of the Non-Waiver Agreement following the conclusion of this litigation.

27. Plaintiffs' liability claims in the underlying litigation against the Revco defendants (Revco D.S., Inc. and Retrac, Inc.) are summarized as follows:

a. Retrac was negligent in that it failed to use ordinary care in the manufacture, design, processing, testing, and inspection of E-Ferol;
b. Retrac was negligent in failing to warn the hospitals, pharmacists, and physicians who used E-Ferol of their failure to test the product and submit it for FDA approval;
c. Retrac negligently misrepresented E-Ferol as being safe and effective for the treatment of retrolental fibroplasia (RLF);
d. E-Ferol, which was allowed to be placed in commerce by Retrac, Inc., was an unreasonably dangerous product such that it was dangerous to an extent beyond that which would be contemplated by the ordinary user of the product with ordinary knowledge common to the community as to the product's characteristics;
e. E-Ferol, which was manufactured and allowed to be placed in commerce by Retrac, Inc., was defectively designed and marketed and the defendants failed to give adequate warning of the product's toxic effects and lack of proper testing;
f. Revco D.S., Inc. was negligent in failing to adequately monitor and supervise the development, manufacture, and distribution of pharmaceutical products, including E-Ferol, by Retrac; and
g. These acts were the proximate cause of injury and death of class members who received E-Ferol.

28. Plaintiffs sought damages in the underlying cause for the injuries proximately and/or producingly caused by E-Ferol, as well as for medical monitoring for surviving E-Ferol recipients who are not presently experiencing symptoms of E-Ferol toxicity.

29. Pursuant to the Non-Waiver Agreement (doc. no. 313-2) (Exhibit 2), and upon agreement of the parties and the district court, this action was consolidated with *Federal Insurance Co. v. CVS Revco D.S., Inc.*, CA7-09-cv-094-D, originally filed in the U.S. District Court for the Eastern District of Ohio, and subsequently transferred to the Northern District of Texas.

30. Pursuant to the Non-Waiver Agreement, following the conclusion of the underlying cause of action by final judgment and after all appeals are exhausted, the escrow agent is to distribute the $15 million currently being held in escrow as follows:

a) In the event the U.S. District Court for the Northern District of Texas finds no coverage for the E-Ferol claims under the Federal Policy, and that finding is upheld on appeal, if any appeal is taken, then all funds on deposit in the escrow account shall be disbursed to Federal, plus all interest accrued thereon.

b) In the event the U.S. District Court for the Northern District of Texas finds coverage for all the E-Ferol claims under the Federal Policy, and that finding is upheld on appeal, if any appeal is taken, then all funds on deposit in the escrow account shall be disbursed to the E-Ferol Class, plus all interest accrued thereon.

c) Should the U.S. District Court for the Northern District of Texas find coverage under the Federal Policy for some E-Ferol class members, but coverage is barred as to other E-Ferol Class Members after a particular date within the Federal Policy, then the U.S. District Court for the Northern District of Texas shall determine, based upon applicable law: i) the portion of the Escrow Payment to be disbursed to the E-Ferol Class; and ii) the allocation from that amount to each E-Ferol Class member for whom coverage is found. After exhaustion of all appeals from these findings, if any are taken, the escrow agent shall disburse to the E-Ferol Class the amount finally determined to be paid for the E-Ferol Class members for whom coverage is found under the Federal Policy. All remaining funds on deposit in the escrow account shall be disbursed to Federal, plus all interest accrued thereon.

d) In the event a dispute arises concerning the interpretation of any judgment entered by the U.S. District Court for the Northern District of Texas, regarding how disbursements from the escrow account are to be made by the escrow agent,

> then such dispute shall be submitted to the U.S. District Court for the Northern District of Texas, Wichita Falls Division, for resolution, subject to all rights of appeal.
>
> e) This Agreement shall serve as the escrow instructions to be provided to the escrow agent governing disbursements from the escrow account.
>
> f) The term "coverage" or "coverage issues" means the issues raised at any time by the parties in the Ohio Declaratory Judgment Action, the Second Amended Original Complaint, or any subsequent pleading or pre-trial order filed in the E-Ferol Class Action concerning the Federal Policy and the Transit Policy as described above, but does not require the E-Ferol Class, in order to obtain the funds held in escrow pursuant to this paragraph, to establish liability or damages in an adversarial trial or to obtain a judgment or for the Defendants to pay a judgment as a condition of proving "coverage" or prevailing on "coverage" issues in order to obtain the funds held in escrow pursuant to the terms of this Agreement.

31. The plaintiffs would show that Revco D.S., Inc., is a separate insured under the Federal policy from its wholly-owned subsidiary, Carter-Glogau Laboratories, Inc., now known as Retrac, Inc. As a separate corporate entity, the knowledge and intent of Carter-Glogau Laboratories, Inc. is not therefore imputed to Revco D.S. Inc.

32. Plaintiffs would further show that, in connection with the manufacture and marketing of E-Ferol, the acts and omissions of both Revco D.S., Inc. and Carter-Glogau Laboratories, Inc. were occurrences as that term is defined in the Transit Casualty Co. policy no. UMB950304 (hereinafter "Transit insurance policy" or "Transit policy"), whose terms were adopted by defendant Federal as part of the Federal policy at issue. Occurrence, with respect to coverage for personal injury, is defined, in the Transit Policy, as follows:

> "Occurrence" shall mean an accident or event, including continuous, repeated exposure to conditions which results during the policy period in Personal Injury or Property Damage, neither expected nor intended from the standpoint of the Insured.

33. The plaintiff class would show the court that the allegations and evidence clearly show that injury and death to infants resulting from the administration of E-Ferol was neither expected

nor intended by Revco D.S., Inc. nor by Carter-Glogau Laboratories, Inc. The Supreme Courts of both Texas and Ohio, clearly require that for an insurer to avoid liability by claiming that an act was expected or intended by its insured, the carrier must show that the insured expected or intended the *injury* which forms the basis of the liability. Despite their negligence, neither Revco D.S., Inc. nor Retrac, Inc. (Carter-Glogau Laboratories, Inc.) intended to cause injury or death to the very infants they were attempting to serve with what was intended to be a prophylactic administration of vitamin E so as to prevent blindness and visual imparity.

34. Pursuant to the Non-Waiver Agreement, and the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, class plaintiffs, on behalf of the E-Ferol class, move the court to declare that the Federal policy at issue provides liability insurance coverage for the acts and/or omissions alleged by the plaintiffs in the underlying action against the Revco defendants, both collectively and/or separately, pursuant to the separation of insured's clause applicable to said policy.

35. The plaintiff class seeks the award of the monies, together with interest, being held in escrow, pursuant to the Non-Waiver Agreement, and reasonable attorneys' fees and costs for the expenses of this litigation from defendant Federal.

IV.

Causes of Action Against International Insurance Co., a/k/a Westchester Fire Insurance Co., n/k/a ACE USA, Inc.

36. Class representatives would show the court that Revco was insured by several layers of excess liability insurance coverage applicable to the liability claims due to the administration of E-Ferol. The last level of such coverage totaled $50 million and included two insurance carriers; (1) International, which issued policy no. 522028385-1 (hereinafter "International policy" or "International insurance policy"), a copy of which is attached as Exhibit 4 and incorporated by

reference; and (2) Mission Insurance Co., which issued policy no. M888555 (hereinafter "Mission policy" or "Mission insurance policy"), a copy of which is attached hereto as Exhibit 5 and incorporated by reference herein. The Mission and International policies, like the Federal policy, "followed form" and adopted the terms, conditions, definitions, exclusions, and coverage language of the Transit policy (policy no. UMB950304), except as otherwise indicated in the individual policies. The International and Mission policies formed the last layers of excess coverage for the Revco defendants, with each company insuring $10 million of the $50 million final excess layer of liability insurance.

37. Under the Settlement Agreement and Release (doc. no. 306-2), both International and Mission were each responsible for that last layer of coverage which was proportionally shared with six carriers that provided $50 million of excess coverage at that final level. Thus, if the Settlement Agreement and Release had been fully funded, both International and Mission would have owed $2.5 million each, as their portion of the settlement. Both International and Mission, however, refused to indemnify Revco D.S., Inc. and Retrac, Inc. for their respective portions of the settlement. Thus, Revco and Retrac have assigned their right of indemnity to the plaintiff class. Both International and Mission are liable to the extent of their $10 million coverage for the remaining unpaid portion of the settlement, less the $15 million credit to Federal.

38. The plaintiff class would show the court that the International policy "followed form" of the Transit policy, which contained the same definition of "occurrence" as set out in paragraph 32 above. While International participated in the mediation and hearings leading up to the finalization of the Settlement Agreement and Release, International refused to pay its portion of the indemnity. International agreed to sign the "additional agreement" as set out in the Settlement Agreement and Release prior to the agreement being filed with the court on October

7, 2009, but without objection before, after, or during the two-day fairness hearing, International reneged on its agreement and refused to sign the additional agreements following a hearing before the district court on November 19, 2010.

39. The plaintiff class, in its capacity as the assignees of the Revco D.S., Inc. and Retrac, Inc., collectively and separately, and as judgment creditors, moves the court pursuant to the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, to declare that the International excess liability insurance policy referenced herein provides insurance coverage for all allegations and injuries alleged by the plaintiffs against the Revco defendants in the underlying action. Based on the law, pleadings and evidence, the plaintiff class, as assignees, third-party beneficiaries, and judgment creditor, is entitled to a declaration that the International policy at issue provides full and complete liability coverage of the acts and omissions alleged by the plaintiff class against the Revco defendants.

40. The plaintiff class would show that upon entry of a declaratory judgment declaring that the International policy covers the acts or omissions alleged against the Revco defendants, collectively and/or separately, the plaintiff class is entitled to judgment against International for the balance of the $110 million settlement agreed to by the parties, as set out in the Settlement Agreement and Release (doc. no. 306-2), less a credit for the coverage provided by Federal policy. The plaintiff class would show that on January 19, 2011, the participating insurers funded the class settlement in the sum of $88,603,419.89. Allowing Federal's credit, leaves International and Mission, joint and severally, liable for completely funding of the $110 million settlement.

41. The plaintiff class would show the court that International wrongfully denied coverage of the claims asserted by the plaintiffs against its insured, the Revco defendants, collectively and/or

separately, and thus, are bound by the agreed judgment entered into by the parties and approved by the court following a fairness hearing, and are barred from challenging the reasonableness of the total amount of the settlement or the amount now remaining to be paid.

42. The plaintiff class would show the court that International has a duty to act in good faith in the handling and payment of claims of its insured. International breached that duty and acted without reasonable justification in denying indemnity to the Revco defendants. Thus, the plaintiff class is entitled to damages, reasonable attorney's fees and costs, pursuant to the insurance contract for the violations of the duty of good faith and fair dealing and the unfair claims settlement and adjusting practices pursuant to the common law and to statutes regulating insurance, in the States of Texas and Ohio. The plaintiff class pleads for an award of damages, costs and reasonable attorneys' fees for these violations.

43. The plaintiff class would show that International breached its fiduciary duty to Revco for which it is liable for damages and forfeiture of its policy limit to the plaintiff class as assignees, costs, and reasonable attorneys' fees.

V.

Causes of Action Against Mission

44. The plaintiff class would show the court that Mission Insurance Company, a California corporation, was a subsidiary of Mission Insurance Group, Inc. and insured the Revco defendants in the final layers of excess liability insurance. Mission Insurance Co. and other subsidiaries were placed in receivership by the Commissioner of Insurance of the State of California (hereinafter "Commissioner") in 1985. Due to the size of the Mission Insurance Group, its corporate structure and the intricate and complex reinsurance agreements with many foreign reinsurers, the receivership turned out to be one of the most, if not the most, complex and long-

standing insurance company insolvency proceeding undertaken in the United States. The receivership continues to this date as the Commissioner continues the effort to collect assets and pay creditors. The plaintiff class, as assignees of the Revco defendants, collectively and separately, would show the court that upon information and belief, Revco D.S. Inc. timely prepared and filed proofs of loss with Mission prior to the insolvency proceedings and afterwards as required by the receivership proceedings, although E-Ferol class members in category nos. 1, 2, 3, and 4 were not identified by Revco and were not known until identified as part of this class action. The insolvency proceedings in California resulted in the formation of various trusts, one being the Mission Insurance Co. Trust (hereinafter "MICT"), which commenced liquidation proceedings in 1987 and holds the assets collected from Mission Insurance Co. Upon information and belief, various deadlines were set by the Commissioner and/or his designee for the submission of proofs of claim, beginning in 1987 and continuing through December 31, 2003. During this time, Mission Insurance Co., as well as the receivers and trustees entrusted with its liquidation, were made aware of E-Ferol claims against Revco and that these claims pertained to infants born during the period from November 1983 through April 12, 1984. The Commissioner and/or his designees were aware of the criminal proceedings involving E-Ferol, which took place in the U.S. District Court for the Eastern District of Missouri and in the Eighth Circuit Court of Appeals, as well as the claims made in the Revco bankruptcy proceeding.

45. Upon information and belief, plaintiff class would show that E-Ferol claims were presented to various state guaranty funds, due to the bankruptcies of various Revco insurance carriers, since Revco and the state guaranty funds were responsible for paying claims that should have been covered by Revco's insurance carriers. These state guaranty funds sought recovery

from the Commissioner for E-Ferol claims, further proof that the Commissioner was aware that the claims of E-Ferol recipients were claims for minors.

46. Despite being placed on notice that E-Ferol claims were for minors and that E-Ferol was administered to newborn infants, the Commissioner and/or the designee(s) of the commissioner, set various cut-off dates for proof of claims in 1987 and 1995, with the last of such deadline set for December 31, 2003. At that point, the E-Ferol class had not been certified nor had class members been discovered and identified. On January 24, 2006, the Superior Court of the State of California, for the County of Los Angeles, in Cause No. C572724, styled *Poizner, Insurance Commissioner of the State of California v. Mission Insurance Co.*, entered an order which permanently enjoined "all creditors, policyholders, equity holders, officers, directors, and other persons or entities of any type or nature from bringing, asserting, maintaining, or pursuing any claim, suit, demand, offset, proceeding, arbitration, administrative proceeding or other legal process of any kind or nature . . ." against Mission Insurance Co. or Mission Insurance Co. Trust. Despite this order, the Commissioner continued to pursue and collect assets of Mission and distribute those assets to various creditors, a process which, upon information and belief, continues to this day.

47. Upon entry of judgment in the underlying action, class representatives requested reopening of these deadlines for E-Ferol class members, so that class members could present claims on the remaining funds collected by MICT in the Mission receivership. This request was rejected despite the fact that considerable assets are still being held in trust by the Commissioner as of the date of the filing of this amended complaint and despite knowing that E-Ferol recipients were minors, and, in some instance, incompetent and that class members or their heirs were unaware that they had received E-Ferol when these deadlines were established.

48. The plaintiff class would show the court that Mission Insurance Co. was timely placed on notice of E-Ferol claims in general and that the California Commissioner of Insurance was also aware of the fact that these claims were made for newborn infants who received this drug during a period from November 1983 through April 12, 1984. The Mission insolvency proceeding, which began in 1985 and has continued for the past twenty-six years, has made numerous accommodations and on at least three different occasions to creditors and had reset deadlines for filing a proof of loss, with the last such deadline being on December 31, 2003, after this cause was filed and at a time when E-Ferol class members had not yet been identified. E-Ferol class members were unaware of the fact they received E-Ferol as has been repeatedly shown throughout this litigation.

49. The decision to deny the claims of E-Ferol recipients by refusing to indemnify Revco, pursuant to the Settlement Agreement and Release (doc. no. 306-2), made on October 15, 2010, by the California Commissioner of Insurance, violates the basic right of due process of law and equal protection guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution to each E-Ferol class member. Class representatives, in their capacity as assignees of the Revco defendants, both collectively and separately, and as judgment creditors of the judgment entered by this court on June 18, 2010, move the court, pursuant to the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, to declare that the prohibition against making a claim by the E-Ferol class, violates the basic right to due process of law and equal protection of the law guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution to E-Ferol class members, and move the court to so find and order that the California Commissioner of Insurance reopen the deadline for filing E-Ferol class claims, and permit the E-Ferol class to submit their

claims for review and adjudication by the appropriate administrative process in the California receivership.

50. The plaintiff class would show the court that Mission Insurance Co. issued policy no. M888555 (hereinafter "Mission policy") to Revco D.S., Inc., including its subsidiaries, and allied companies and corporations, which covered losses occasioned by E-Ferol from June 1, 1983 until June 1, 1984. The Mission policy covers the last layer of Revco excess coverage, with a limit of $10 million out of the final $50 million of excess liability coverage. The Mission policy "follows form" of the Transit policy previously referenced with the same terms, conditions, definitions, exclusions and coverages as previously described for the Federal and International policies.

51. The plaintiff class would show the court that in their capacity as assignees of the Revco defendants, as third-party beneficiaries of the Revco excess liability insurance policy, and as judgment creditors of the judgment entered in this cause on June 18, 2010, they are entitled to declaratory relief, pursuant to the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, such that the court should enter judgment declaring that the Mission policy provides liability insurance coverage for the allegations of liability and damages alleged by the plaintiff class against the Revco defendants and, as such, the plaintiff class is entitled to judgment as a matter of law that the Mission policy provides liability insurance coverage to the claims of damages made by the E-Ferol class against the Revco defendants. Defendant Mission having been advised of the right to enter an appearance and having failed to do so, has wrongfully denied coverage of this claim, and thus, its insured, Revco, has entered into an agreed judgment with the plaintiff class. Mission is barred from challenging the reasonableness of the settlement reached with the Revco defendants.

52. The plaintiff class would show the court that they are entitled to declaratory judgment as a matter of law, finding that the Mission policy at issue provided liability insurance coverage for the causes of action pled by the plaintiffs against the Revco defendants. The class plaintiffs are therefore entitled to the similar insurance proceeds as those described for International in paragraph 40 above.

53. The plaintiff class would show the court that they are entitled to reasonable attorney's fees and costs from Mission and/or MICT for the cost of pursuing this action.

VI.

OTHER

54. The plaintiff class would show the court that they proceed in the following capacities in this action: as the assignees of the Revco defendants; as the third-party beneficiaries of the indemnity insurance contract issued to the Revco defendants; and as judgment creditors of the judgment entered by this court in this cause on June 18, 2010 (doc. no. 453).

55. The plaintiff class would show the court that in interpreting the definition of "occurrence" or "intentional acts" exclusions in the insurance policies at issue, that the court must adopt any reasonable explanation that favors coverage, even if a more reasonable explanation is also available. The plaintiff class would further show the court that an exclusion in insurance policy, if ambiguous, is construed against the insurance carrier and in favor of coverage.

56. The plaintiff class would show the court that the term "intentionally" or the term "expected or intended from the standpoint of the insured," as used in the liability insurance policies at issue, refers to the resulting damage or injury, not to the actions that led to the injury,

that is, the language is effect-focused and not cause-focused, and coverage is only voided when the resulting *injury* is intentional, not when the insured's *conduct* was intentional.

57. The plaintiff class would further show the court that each of the policies at issue has a "separation of insured" clause which requires that insurance coverage be considered as if separate policies were issued to each insured, such that acts or the intention to commit an act or cause injury are separate as to each of the entities and the intent of one is not imputed to the other. In short, the Revco defendants intended to manufacture and place E-Ferol into the stream of commerce, but despite their negligence in the manufacture, testing, and oversight, did not intend to cause death or injury to premature children, for whose benefit they had developed and marketed the drug.

WHEREFORE, PREMISES CONSIDERED, the plaintiff class prays for judgment against defendants Federal, International, Mission and Mission Insurance Co. Trust, as follows:

(1) That the court declare the excess liability insurance policies issued by Federal, International and Mission, which "follow form" of the liability insurance policy issued by Transit cover the liability and damages allegation by the E-Ferol class in the underlying litigation and thus, said entities are to indemnify the class plaintiffs as assignees of the Revco defendants to the full extent of the $110 million settlement as set out in the Settlement Agreement and Release (doc. no. 306-2) between the Revco defendants and the plaintiff class;

(2) That the plaintiff class is entitled to reasonable and necessary attorneys' fees and costs for the vindication of their rights under the insurance contracts at issue;

(3) That the plaintiff class be entitled to recover damages for breach of good faith and fair dealing in the common law and statutory causes of action against International;

(4) That the court award any and all relief to which the plaintiff class may be entitled either at law or in equity; and

(5) The plaintiffs demand a trial by jury for all appropriate issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October, 2011, I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means and pursuant to the Federal Rules of Civil Procedure:

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I hereby certify that on the 4th day of October, 2011, the foregoing document was served on the following attorneys, together with the Notice and Waiver of Summons, pursuant to the Fed. R. Civ. P.:

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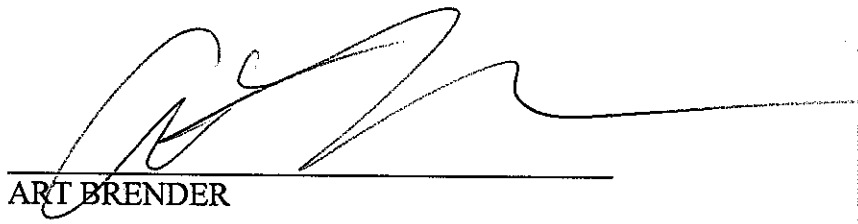

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