

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION**

IN RE: SMITTY’S/CAM2 303 TRACTOR) MDL No. 2936
HYDRAULIC FLUID MARKETING,)
SALES PRACTICES, AND PRODUCTS) Master Case No. 4:20-MD-02936-SRB
LIABILITY LITIGATION)
) Related to Case No. 21-CV-00071

NATIONWIDE AGRIBUSINESS)
INSURANCE COMPANY,)
)
Plaintiff,)
v.) Case No. 21-CV-00071
)
SMITTY’S SUPPLY, INC.,) **JURY TRIAL DEMANDED**
)
Defendant.)

SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

NOW COMES Plaintiff, Nationwide Agribusiness Insurance Company, by and through its attorneys, and for its Second Amended Complaint for Declaratory Judgment against Defendant, Smitty’s Supply, Inc., states as follows:

INTRODUCTION

1. This is a declaratory judgment action brought pursuant to the Federal Declaratory Judgment Act, [28 U.S.C. §2201](#), wherein, Nationwide Agribusiness Insurance Company (“Nationwide”) seeks a determination as to what portion, if any, is it required to indemnify Smitty’s Supply, Inc. (“Smitty’s”) for the settlement in the lawsuit entitled: *Shawn Hornbeck et. al. v. Tractor Supply Company et. al.*, No. 4:18-cv-00523, filed in the U.S. District For the Western District of Missouri Western Division (“*Hornbeck Action*”).

2. An actual controversy exists wherein Smitty’s asserts Nationwide owes an obligation to fund a settlement involving claims for its sale of its tractor hydraulic fluid that failed to meet its touted specifications.

PARTIES

3. Plaintiff Nationwide is an Iowa corporation with its principal place of business in Iowa.

4. Defendant Smitty's is a Louisiana corporation, with its principal place of business in Louisiana.

JURISDICTION AND VENUE

5. A real and justiciable controversy exists between Nationwide and Smitty's concerning Nationwide's respective rights and obligations under the Nationwide Policies.

6. This Court has jurisdiction over this matter pursuant to [28 U.S.C. § 1332](#) because Plaintiff and Defendant are citizens of different states and the amount in controversy exceeds \$75,000 exclusive of interest and costs.

7. This Court has jurisdiction over Defendant in this matter as Smitty's maintains its principal place of business in the Eastern District of Louisiana, and the products at issue in the *Hornbeck* Action were manufactured in the Eastern District of Louisiana and delivered from the Eastern District of Louisiana, and the insurance policies at issue were all issued in the Eastern District of Louisiana to an insured, Smitty's, that resides in the Eastern District of Louisiana.

8. Venue is proper in this District pursuant to [28 U.S.C. § 1391\(b\)](#), in that (1) Defendant resides in the Eastern District of Louisiana, and/or (2) a substantial part of property that is the subject of the action is situated in the Eastern District of Louisiana, and/or (3) Defendant may be found in the Eastern District of Louisiana, and there is no District in which the action may otherwise be brought.

FACTUAL BACKGROUND

I. HORNBECK COMPLAINT

9. On May 25, 2018, Underlying Plaintiffs Shawn Hornbeck and Monte Burgess filed a complaint naming Smitty's and Tractor Supply Company as defendants. (See May 25, 2018 Complaint attached hereto as [Exhibit A](#)).

10. On December 28, 2019, a first amended class action complaint (“FAC”) was filed, which added Dan Chevalier and Russ Mapes as Underlying Plaintiffs and Family Center of Harrisonville, Inc. as a defendant. (*See* FAC attached hereto as [Exhibit B](#)).

11. The FAC alleged that “[f]or years, Defendants, as well as other lubricant manufacturers and sellers, have deceptively and misleadingly labeled, marketed and sold tractor hydraulic fluid as ‘303’ fluid meeting ‘303’ specifications when, in fact, the ‘303’ designation is obsolete and 303 specifications have not been available for over forty (40) years.” ([Exhibit B](#), ¶ 1).

12. The FAC alleged that “Defendants falsely and deceptively labeled, marketed and offered for sale the Super S Super Tract 303 Tractor Hydraulic Fluid (1) as meeting manufacturer specifications and being acceptable for use as hydraulic fluid, transmission fluid, and gear oil in older tractors and other equipment; (2) as a substitute for and satisfying John Deere’s JD-303 specifications; (3) as a fluid that provides extreme pressure and anti-wear protection for tractor transmission, axles and hydraulic pumps; [and] (4) as a fluid that protects against rust and corrosion.” ([Exhibit B](#), ¶ 30).

13. The FAC alleged that the defendants knew or should have known the representations regarding the 303 THF Product were false, deceptive and misleading to consumers seeking to purchase tractor hydraulic fluid. ([Exhibit B](#), ¶ 38).

14. The FAC alleged that in the summer of 2017, the Missouri Department of Agriculture (“MDA”) tested the defendants’ 303 THF Product and concluded that the Defendant’s product failed to meet any current specifications and were found to be underperforming to the point that damage was likely to result from use. ([Exhibit B](#), ¶¶ 46-48).

15. The FAC alleged that on October 12, 2017, the MDA issued a letter to Smitty’s and Tractor Supply with regard to Super S Super Trac 303 THF in which they were ordered to remove the product from sale until changes are made to correct the labeling or the product. ([Exhibit B](#), ¶¶ 52-55).

16. Through the FAC, the Underlying Plaintiffs sought to have the following Class certified:

All persons and other entities who purchased Super S Super Tract 303 Tractor Hydraulic Fluid in Missouri, at any point in time from May 25, 2013 to present, excluding any persons and/or entities who purchased for resale.

([Exhibit B](#), ¶ 79).

17. The FAC asserted the following causes of action against the defendants:
Count I – Violation of Missouri Merchandising Practices Act Violations (“MMPA”);

Count II – Breach of Express Warranty;

Count III – Breach of Implied Warranty of Merchantability;

Count IV – Fraudulent Misrepresentation;

Count V – Negligent Misrepresentation;

Count VI – Unjust Enrichment;

Count VII – Negligence;

Count VIII – Breach of Implied Warranty of Fitness for Particular Purpose.

18. The FAC alleged that the Underlying “Plaintiffs and Class Members: (a) paid a sum of money for a product that was not as represented; (b) received a lesser product than labeled, advertised and marketed; (c) were deprived of the benefit of the bargain because the 303 THF Product was different than what defendants represented; (d) were deprived of the benefit of the bargain because the 303 THF Product had less value than what was represented; (e) did not receive a product that measured up to their expectations as created by defendants; and (f) suffered damage to their equipment, including but not limited to excessive wear, leakage in the seals, exposure to spiral gear damage, improper and poor shifting, wear and damage to the wet brakes, high pump leakage, and damage from deposits, sludging and thickening.” ([Exhibit B](#), ¶ 72).

II. NATIONWIDE PRIMARY POLICIES

19. Nationwide issued a commercial general liability policy to Smitty’s, bearing policy number CPP126853A, effective April 30, 2014 to April 30, 2015, which is subject to a \$1,000,000 Each Occurrence limit, a \$2,000,000 Products/Completed Operations Aggregate, and a \$2,000,000

General Aggregate (“14-15 NW Primary Policy”). (A true and correct copy of the 14-15 NW Primary Policy with premium information redacted is attached as [Exhibit C](#)).

20. Nationwide issued a commercial general liability policy to Smitty’s, bearing policy number CPP126853A, effective April 30, 2015 to April 30, 2016, which is subject to a \$1,000,000 Each Occurrence limit, a \$2,000,000 Products/Completed Operations Aggregate, and a \$2,000,000 General Aggregate (“15-16 NW Primary Policy”). (A true and correct copy of the 15-16 NW Primary Policy with premium information redacted is attached as [Exhibit D](#)).

21. Nationwide issued a commercial general liability policy to Smitty’s, bearing policy number CPP126853A, effective April 30, 2016 to April 30, 2017, which is subject to a \$1,000,000 Each Occurrence limit, a \$2,000,000 Products/Completed Operations Aggregate, and a \$2,000,000 General Aggregate (“16-17 NW Primary Policy”). (A true and correct copy of the 16-17 NW Primary Policy with premium information redacted is attached as [Exhibit E](#)).

22. Nationwide issued a commercial general liability policy to Smitty’s, bearing policy number CPP126853A, effective April 30, 2017 to April 30, 2018, which is subject to a \$1,000,000 Each Occurrence limit, a \$2,000,000 Products/Completed Operations Aggregate, and a \$2,000,000 General Aggregate (“17-18 NW Primary Policy”). (A true and correct copy of the 17-18 NW Primary Policy with premium information redacted is attached as [Exhibit F](#)).

23. Nationwide issued a commercial general liability policy to Smitty’s, bearing policy number CPP126853A, effective April 30, 2018 to April 30, 2019, which is subject to a \$1,000,000 Each Occurrence limit, a \$2,000,000 Products/Completed Operations Aggregate, and a \$2,000,000 General Aggregate (“18-19 NW Primary Policy”). (A true and correct copy of the 18-19 NW Primary Policy with premium information redacted is attached as [Exhibit G](#)).

24. Nationwide issued a commercial general liability policy to Smitty’s, bearing policy number CPP126853A, effective April 30, 2019 to April 30, 2020, which is subject to a \$1,000,000

Each Occurrence limit, a \$2,000,000 Products/Completed Operations Aggregate, and a \$2,000,000 General Aggregate (“19-20 NW Primary Policy”). (A true and correct copy of the 19-20 NW Primary Policy with premium information redacted is attached as [Exhibit H](#)). The 14-20 NW Primary Policies are collectively referred to herein as “NW Primary Policies.”

25. Subject to all their terms, conditions, limitations, definitions, endorsements and exclusions, the NW Primary Policies provide “bodily injury” liability coverage, “property damage” liability coverage, and “personal injury” or “advertising injury” liability coverage.

26. Upon information and belief, the parties hereto do not dispute that Nationwide owes no obligation to Smitty’s under the “bodily injury” and “personal and advertising injury” coverages of the NW Primary Policies.

27. The “property damage” liability coverage of the NW Primary Policies provides, in part, as follows:

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages . . .

* * *

28. The NW Primary Policies further provide:

- b. This insurance applies to “bodily injury” and “property damage” only if:
 - (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;
 - (2) The “bodily injury” or “property damage” occurs during the policy period.
 - (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that the “bodily injury” or “property damage” had occurred, in whole or

in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or after the policy period will be deemed to have been known prior to the policy period.

- c. “Bodily injury” or “property damage” which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim, includes any continuation, change or resumption of that “bodily injury” or “property damage” after the end of the policy period.
- d. “Bodily injury” or “property damage” will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim:
 - (1) Reports all, or any part, of the “bodily injury” or “property damage” to us or any other insurer;
 - (2) Receives a written or verbal demand or claim for damages because of the “bodily injury” or “property damage”; or
 - (3) Becomes aware by any other means that “bodily injury” or “property damage” has occurred or has begun to occur.

* * *

SECTION III – LIMITS OF INSURANCE

- 1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
 - a. Insureds;
 - b. Claims made or “suits” brought; or
 - c. Persons or organizations making claims or bringing “suits”.
- 2. The General Aggregate Limit is the most we will pay for the sum of:
 - a. Medical expenses under Coverage C;
 - b. Damages under Coverage A, except damages because of “bodily injury” or “property damage” included in the “products-completed operations hazard”; and
 - c. Damages under Coverage B.
- 3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of “bodily injury” and “property damage” included in the “products-completed operations hazard”.

* * *

5. Subject to Paragraph 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
 - a. Damages under Coverage A; and
 - b. Medical expenses under Coverage C because of all “bodily injury” and “property damage” arising out of any one “occurrence”.

* * *

29. The NW Primary Policies are, in part, subject to the following definitions:

SECTION V – DEFINITIONS

8. “Impaired property” means tangible property, other than “your product” or “your work”, that cannot be used or is less useful because:
 - a. It incorporates “your product” or “your work” that is known or thought to be defective, deficient, inadequate or dangerous; or
 - b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of “your product” or “your work” or your fulfilling the terms of the contract or agreement.

9. “Insured contract” means:

* * *

- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

* * *

13. “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

* * *

16. “**Products-completed operations hazard**”:

- a. Includes all “bodily injury” and “property damage” occurring away from premises you own or rent and arising out of “your product” or “your work” except:
 - (1) Products that are still in your physical possession; or

* * *

17. “**Property damage**” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

* * *

21. “Your product”:

a. Means:

- (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (a) You;
 - (b) Others trading under your name; or
 - (c) A person or organization whose business or assets you have acquired; and
- (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
- (2) The providing of or failure to provide warnings or instructions.

- c. Does not include vending machines or other property rented to or located for the use of others but not sold.

* * *

30. The NW Primary Policies are, in part, subject to the following exclusions:

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an “insured contract”,

reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

- (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
- (b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

* * *

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any party of it.

* * *

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

* * *

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost, or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

If such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

* * *

III. NATIONWIDE UMBRELLA POLICIES

31. Nationwide issued a commercial umbrella liability policy to Smitty's, bearing policy number CU126853A, effective April 30, 2014 to April 30, 2015, which is subject to a

\$2,000,000 Each Occurrence limit, and a \$2,000,000 Aggregate (“14-15 NW Umbrella Policy”). (A true and correct copy of the 14-15 NW Umbrella Policy with premium information redacted is attached as [Exhibit I](#)).

32. Nationwide issued a commercial umbrella liability policy to Smitty’s, bearing policy number CU126853A, effective April 30, 2015 to April 30, 2016, which is subject to a \$2,000,000 Each Occurrence limit, and a \$2,000,000 Aggregate (“15-16 NW Umbrella Policy”). (A true and correct copy of the 15-16 NW Umbrella Policy with premium information redacted is attached as [Exhibit J](#)).

33. Nationwide issued a commercial umbrella liability policy to Smitty’s, bearing policy number CU126853A, effective April 30, 2016 to April 30, 2017, which is subject to a \$2,000,000 Each Occurrence limit, and a \$2,000,000 Aggregate (“16-17 NW Umbrella Policy”). (A true and correct copy of the 16-17 NW Umbrella Policy with premium information redacted is attached as [Exhibit K](#)).

34. Nationwide issued a commercial umbrella liability policy to Smitty’s, bearing policy number CU126853A, effective April 30, 2017 to April 30, 2018, which is subject to a \$2,000,000 Each Occurrence limit, and a \$2,000,000 Aggregate (“17-18 NW Umbrella Policy”). (A true and correct copy of the 17-18 NW Umbrella Policy with premium information redacted is attached as [Exhibit L](#)). The 14-18 NW Umbrella Policies are collectively referred to herein as “NW Umbrella Policies.”

35. Upon information and belief, the parties hereto do not dispute that Nationwide owes no obligation to Smitty’s under the “bodily injury” and “personal and advertising injury” coverages of the NW Umbrella Policies.

36. The “property damage” liability coverage afforded under NW Umbrella Policies provide, in part, as follows:

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

We will pay on behalf of the insured the “ultimate net loss” in excess of the “retained limit” because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking damages for such “bodily injury” or “property damage” when the “underlying insurance” does not provide coverage or the limits of “underlying insurance” have been exhausted. We will have the right to defend, or to participate in the defense of, the insured against any other “suit” seeking damages to which this insurance may apply. At our discretion, we may investigate any “occurrence” that may involve this insurance and settle any resultant claim or “suit” for which we have the duty to defend.

37. The NW Umbrella Policies further provide as follows:

* * *

- c. This insurance applies to “bodily injury” and “property damage” only if:

- (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;
- (2) The “bodily injury” or “property damage” occurs during the policy period; and
- (3) Prior to the policy period, no insured listed under Paragraph 1.a. of Section II – Who Is An Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or after the policy period will be deemed to have been known prior to the policy period.

- d. “Bodily injury” or “property damage” which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1.a. of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim, includes any continuation, change or resumption of that “bodily injury” or “property damage” after the end of the policy period.

* * *

38. By endorsement, the NW Umbrella Policies define “insured contract” as follows:

“Insured contract” means

* * *

- g.** That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization, provided the “bodily injury” or “property damage” is caused, in whole or in part, by you or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

* * *

39. The NW Umbrella Policies are subject to the following exclusions:

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an “insured contract”, provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement.
Solely for the purposes of liability assumed in an “insured contract”, reasonable attorneys’ fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of “bodily injury” or “property damage”, provided:
 - (a) Liability to such party for, or for the cost of, that party’s defense has also been assumed in the same “insured contract”; and

(b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

* * *

n. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

* * *

p. Damage To Impaired Property Or Property

Not Physically Injured "Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

q. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

IV. TENDER AND MEDIATION

40. Subject to a complete reservation of rights, Nationwide agreed to defend Smitty's in the *Hornbeck* Action.

41. On June 26, 2019, the parties participated in a mediation with respect to the *Hornbeck* Action.

42. Nationwide agreed it would not object to the insureds entering into an agreement; however, it did not concede coverage defenses and reserved all rights, including but not limited, its rights relating to funding the agreement and allocation between potentially covered and uncovered damages.

V. HORNBECK SETTLEMENT

43. On or around July 30, 2010, the Underlying Plaintiffs and Smitty's and Tractor Supply agreed to settle the *Hornbeck* Action for \$1,700,000 ("Settlement Agreement" or "*Hornbeck* Settlement"). (See Settlement Agreement attached hereto as Exhibit M).

44. The Settlement Agreement purports to resolve the following claims:

36. Release. Plaintiffs, individually, on behalf of the Members of the Settlement Class, and on behalf of Plaintiffs' respective partners, agents, representatives, heirs, executors, personal representatives, successors, and assigns (the "Releasing Parties"), hereby release and forever discharge Defendants, together with their respective past, present, and future officers, employees, agents, representatives, distributors, downstream retail customers and/or resellers, attorneys, accountants, insurers, predecessors, successors, assigns, legal representatives, parent companies, subsidiaries and affiliates from any and all claims, causes of action, suits, obligations, debts, demands, agreements, promises, liabilities, damages, losses, controversies, costs, expenses, and attorneys' fees of any nature whatsoever, that are asserted, or could have been asserted in this case, arising out of or relating to the purchase of Super Trac 303 Tractor Hydraulic Fluid in Missouri during the Class Period. As of the Effective Date, the Releasing Parties shall be deemed to have, and by operation of the Final Approval Order shall have, fully, finally and forever released, relinquished, and discharged all Released Claims against the Released Parties pursuant to the terms of this Settlement Agreement. The Parties agree that other retailers who cooperate in providing Settlement Class Member purchaser and purchase information shall be specifically named as Released Parties in the proposed Final Approval Order.

45. The Settlement Agreement defines "Settlement Class," in part, as "all persons and other entities who purchases Super Trac 303 Tractor Hydraulic Fluid in Missouri at any point in time from May 25, 2013 to present, excluding those who purchased for resale."

46. As to distribution of the \$1,700,000, Paragraph 28 of the Settlement Agreement provides, in part, as follows:

28. Class Settlement Fund. Defendants shall cause to be paid One Million Seven Hundred Thousand Dollars (\$1,700,000.00) pursuant to Section VII.B hereof to settle the Action and obtain the release set forth in Section VI hereof. That amount shall establish a settlement fund (the "Class Settlement Fund") from which shall be paid (a) claims of Settlement Class Members, (b) all settlement administration and notice costs, (c) all incentive awards to Class Representatives as Ordered by the Court, and (d) all attorneys' fees and expenses of Class Counsel as Ordered by the Court. No amount of the Class Settlement Fund shall revert to Defendants. The portion remaining in the Class Settlement Fund after payment of all settlement administration/notice costs, Class Representative incentive awards as Ordered by the Court, and Class Counsel's attorneys' fees/expenses as Ordered by the Court shall be distributed to Qualified Settlement Class Members as follows:

- a. Automatic Relief: 50% of this remaining portion of the Class Settlement Fund shall be used to provide each Qualified Settlement Class Member automatic damages calculated as a percentage of the purchase price of his/her/its Super S Super Trac 303 Tractor Hydraulic Fluid purchases during the Class Period. Each Qualified Settlement Class Member shall be paid the settlement distribution amount for each unit of Super Trac 303 purchased by the Qualified Settlement Class Member during the Class Period and not returned. This is to compensate for the property damage generally sustained. The initial settlement distribution amount for each unit of Super Trac 303 is estimated to be an amount equal to 50% of that unit's estimated average sale price during the class period: \$12 for each 5-gallon bucket purchased; \$4 for each 1-gallon jug purchased; \$6 for each 2-gallon jug purchased; and \$90 for each 55-gallon drum purchased. If the total amount of valid claims for automatic relief exceeds the amount in this fund, awards will be decreased on a pro rata basis. Any unclaimed monies after payment of Qualified Settlement Class Members' automatic relief shall go into the Repair/Parts/Specific Damage Fund described in (b), below.
- b. Repairs/Parts/Specific Damage Claim Fund Relief: 50% of this remaining portion of the Class Settlement Fund, plus any remaining monies after payment of Qualified Settlement Class Members' automatic relief as set forth in a. above, shall be used to pay claims

submitted by Qualified Settlement Class Members for the costs of any equipment repairs, parts purchases, and/or specific damage to equipment that resulted from, in whole or in part, the use of Super Trac 303 during the class period. The Repairs/Parts/Specific Damage Claims Fund is being established to reimburse Qualified Settlement Class Members for equipment repairs, parts purchases and/or specific equipment damage that resulted from, in whole or in part, the use of Super Trac 303 in said equipment during the Class Period. Such repairs, parts purchases, and/or equipment damage may relate to, without limitation, damage to seals, pumps, filters, gears, and clutch and brake systems, power take-off (PTO) systems and/or losses incurred as a result of equipment being damaged beyond reasonable repair which occurred as a result of damage and increased or excessive wear resulting from use of Super Trac 303. Such increased wear and damage may include, without limitation, scratching, corrosive wear, rippling, ridging, pitting, spalling and scoring of the gears and metal components, seal damage, spiral gear damage, metal abrasion, corrosion, surface wear, clutch wear and breakage, wet brake damage, pump failure, leakage, and damage from deposits, sludging and thickening. Claims for such repair/parts/specific damage shall require submission of the Claim Form along with receipts or other paperwork (if available) related to losses, repairs and/or parts, and with the Qualified Settlement Class Member's statement, under penalty of perjury, that said equipment repairs, parts purchases and/or specific equipment damage or losses resulted from, in whole or in part, the use of Super Trac 303 during the class period. If the total amount of said losses, repairs and/or parts purchases submitted in valid claims by Qualified Settlement Class Members exceeds the amount in this fund, plus the amount of unclaimed a. funds, awards will be decreased on a pro rata basis. If monies are remaining in this Repairs/Part/Specific Damage Fund after all valid claims are paid, those remaining funds shall be added to the automatic relief distribution and shared pro rata by all Qualified Settlement Class Members based on the same automatic relief distribution formula set forth in a. above.

- c. NOTE: Plaintiffs allege that this monetary relief is required because property damage has been suffered by each and every purchaser of the Super S Super Trac 303 THF product. That damage has occurred to the equipment in which the Super S Super Trac 303 THF was used even if the owner has not yet had to pay for repair parts or service.

47. In accordance with the terms of the Settlement Agreement, the \$1,700,000 was deposited in a Class Settlement Fund and allocated as follows:

- (1) \$100,000 for Settlement Administration and Notice Costs;
- (2) \$20,000 for Incentive Awards;
- (3) \$150,000 for Class Counsel's Expenses;
- (4) \$511,500 for Class Counsel's Attorneys' Fees;

- (5) \$128,666 under Paragraph 28(a) – Automatic Relief; and
- (6) \$789,834 under Paragraph 28(b) – Repairs/Parts/Specific Damage Claim Fund Relief.

48. Subject to a complete reservation of rights, Nationwide paid \$80,000 of the Settlement Administration and Notice Costs due under the *Hornbeck* Settlement.

49. Upon information and belief, AIG paid the remaining \$20,000 of the Settlement Administration and Notice Costs due under the *Hornbeck* Settlement.

50. Upon information and belief, Smitty’s paid the remaining \$1,600,000 due under the *Hornbeck* Settlement.

51. Upon information and belief, Smitty’s seeks reimbursement of some or all of the \$1,600,000 it paid with respect to the *Hornbeck* Settlement.

52. Upon information and belief, the \$1,700,000 Settlement Fund was paid out as follows:

\$661,500	Attorneys’ Fees and Costs
\$20,000	Plaintiff Awards
\$68,500	Administration Notice and Costs
\$950,000	Payments to Class Members

53. Upon information and belief, the \$950,000 Payments to Class Members were broken down as follows:

- \$130,082 under Paragraph 28(a) – Automatic Relief;
- \$819,918 under Paragraph 28(b) – Repairs/Parts/Specific Damage Claim Fund Relief.

COUNT I
DECLARATORY RELIEF

**Nationwide Does Not Owe Any Obligation to Indemnify
Defendant under NW Primary Policies for Any Portion of the Settlement
That Does Not Seek Damages Because of “Property Damage”**

54. Nationwide incorporates and restates the allegations of paragraph 1 through 53 above as if fully set forth herein.

55. The “property damage” liability coverage of the NW Primary Policies provides that Nationwide will pay those sums that the insured becomes legally obligated to pay as damages because of “property damage.”

56. The NW Primary Policies define “property damage” as follows:

17. “Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

57. Damages arising from reimbursement to consumers for a product that failed to meet its specifications do not qualify as “property damage”.

58. Nationwide does not owe any obligation to indemnify Smitty’s for any portion of the *Hornbeck* Settlement that does not constitute damages because of “property damage,” including but not limited to:

- a) any portions attributable to Count VI – Unjust Enrichment;
- b) the amount allocated or paid under Paragraph 28(a) – Automatic Relief;
- c) the amount allocated or paid \$20,000 allocated for payment of Incentive Awards; and
- d) any sums that do not constitute damages to third party property caused by the use of the 303 THF Product.

59. Smitty’s failed to sustain its burden of demonstrating which portions of the *Hornbeck* Settlement, if any, constitute damages because of “property damage.”

60. Accordingly, Nationwide does not owe any obligation to indemnify Smitty’s for the *Hornbeck* Settlement under the NW Primary Policies.

COUNT II
DECLARATORY RELIEF

Nationwide Does Not Owe Any Obligation to Indemnify Defendant Under the NW Primary Policies for Any Portion of the Settlement That Does Not Seek Damages Caused by an “Occurrence”

61. Nationwide incorporates and restates the allegations of paragraph 1 through 60 above as if fully set forth herein.

62. The “property damage” liability coverage of the NW Primary Policies only provide coverage for damages because of “property damage” caused by an “occurrence.”

63. The NW Primary Policies define “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

64. The alleged damages in the *Hornbeck* Action were not caused by an accident.

65. Nationwide does not owe any obligation to indemnify Smitty’s for any portion of the *Hornbeck* Settlement that does not constitute damages because of “property damage” caused by an “occurrence,” including but not limited to:

- a) any portions attributable to Count I – Violation of MMPA;
- b) any portions attributable to Count IV – Fraudulent Misrepresentation;
- c) any portions attributable to Count V – Negligent Misrepresentation;
- d) any portions attributable to Count VI – Unjust Enrichment;
- e) any damages attributable to the Defendants’ intentional conduct;
- f) the amounts allocated and/or paid for Class Counsel’s Expenses and Attorney’s Fees;
- g) the \$20,000 allocated or paid for Plaintiff awards.

66. Smitty’s failed to sustain its burden of demonstrating which portions of the *Hornbeck* Settlement, if any, constitute damages because of “property damage” caused by an “occurrence.”

67. Accordingly, Nationwide does not owe any obligation to indemnify Smitty’s for the *Hornbeck* Settlement under the NW Primary Policies.

COUNT III
DECLARATORY RELIEF

Nationwide Does Not Owe Any Obligation to Indemnify Defendant for Any Portion of the Settlement That Does Not Seek Damage Because of “Property Damage” That Occurred During the Policy Periods of the NW Primary Policies

68. Nationwide incorporates and restates the allegations of paragraph 1 through 67 above as if fully set forth herein.

69. The “property damage” liability coverage of the NW Primary Policies only provides coverage for damages because of “property damage” that occurs during the policy period of the NW Primary Policies.

70. The *Hornbeck* Settlement purports to resolve all claims that could have been asserted in the *Hornbeck* Action, arising out of or relating to the purchase of Super Trac 303 Tractor Hydraulic Fluid in Missouri at any point in time from May 25, 2013 to present, excluding those who purchased for resale.”

71. Smitty’s failed to sustain its burden of demonstrating which portions of the *Hornbeck* Settlement, if any, constitute damages because of “property damage” that occurred during the policy period of the NW Primary Policies.

72. Accordingly, Nationwide does not owe any obligation to indemnify Smitty’s for the *Hornbeck* Settlement under the NW Primary Policies.

COUNT IV
DECLARATORY RELIEF

**Alternatively, the Prior Knowledge Provisions Apply to Preclude Coverage
Under the 18-20 NW Primary Policies**

73. Nationwide incorporates and restates the allegations of paragraph 1 through 72 above as if fully set forth herein.

74. The NW Primary Policies are, in part, subject to the following provisions:

- (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no “employee” authorized by you to give or receive notice of an "occurrence" or claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or after the policy period will be deemed to have been known prior to the policy period.
- c. “Bodily injury” or “property damage” which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim,

includes any continuation, change or resumption of that “bodily injury” or “property damage” after the end of the policy period.

d. “Bodily injury” or “property damage” will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim:

- (1) Reports all, or any part, of the “bodily injury” or “property damage” to us or any other insurer;
- (2) Receives a written or verbal demand or claim for damages because of the “bodily injury” or “property damage”; or
- (3) Becomes aware by any other means that “bodily injury” or “property damage” has occurred or has begun to occur.

* * *

75. In October 2017, the MDA announced that it performed testing on the 303 THF Products, which revealed that the products were underperforming to the point damage was likely to result from use.

76. On October 12, 2017, the MDA issued a letter to Smitty’s with regard to Super S Super Trac 303 THF in which Smitty’s was ordered to remove the product from sale until changes are made to correct the labeling or the product.

77. In November 2017, the MDA issued a stop sale banning the sale of 303 THF Products in the State of Missouri.

78. Smitty’s knew of the complained of “property damage” prior to the inception of the 18-20 NW Primary Policies.

79. Accordingly, Nationwide owes no obligation to indemnify Smitty’s for the *Hornbeck* Settlement under the 18-20 NW Primary Policies.

COUNT V
DECLARATORY RELIEF

Alternatively, Nationwide Does Not Owe Any Obligation to Defendant for the Settlement Under the NW Primary Policies Based on the Doctrines of Fortuity, Loss In Progress and Known Risk

80. Nationwide incorporates and restates the allegations of paragraph 1 through 79 above as if fully set forth herein.

81. The fortuity doctrine combines the principles of known risk and “loss in progress” and holds that insurance coverage is precluded where the insured is aware of an ongoing progressive or known risk at the time the policy is purchased.

82. Smitty’s knew that the 303 Products were defective and that such would result in “property damage” to consumers prior to the inception of the Smitty’s Primary Policies.

83. In October 2017, the MDA announced that it performed testing on the 303 THF Products, which revealed that the products were underperforming to the point damage was likely to result from use.

84. On October 12, 2017, the MDA issued a letter to Smitty’s with regard to Super S Super Trac 303 THF in which Smitty’s was ordered to remove the product from sale until changes are made to correct the labeling or the product.

85. In November 2017, the MDA issued a stop sale banning the sale of 303 THF Products in the State of Missouri.

86. Smitty’s knew that the 303 THF Product was defective prior to the inception of the 18-20 NW Primary Policies.

87. Accordingly, Nationwide owes no obligation to indemnify Smitty’s for the *Hornbeck* Settlement under the NW Primary Policies.

COUNT VI
DECLARATORY RELIEF

Alternatively, The Your Product Exclusion Applies to Preclude Coverage Under NW Primary Policies for Any Portion of the Settlement Attributable to the Reimbursement of the Cost of Defendant’s Product

88. Nationwide incorporates and restates the allegations of paragraph 1 through 87 above as if fully set forth herein.

89. The NW Primary Policies are subject to an exclusion that provides, in part, as follows (“Your Product Exclusion”):

2. Exclusions

This insurance does not apply to:

* * *

k. Damage To Your Product

“Property damage” to “your product” arising out of it or any party of it.

* * *

90. The Your Product Exclusion, in part, precludes coverage for the reimbursement or replacement of the insured’s defective product.

91. In accordance with the terms of the Settlement Agreement, monies were paid of the Settlement Fund under Paragraph 28(a) – Automatic Relief of the Settlement Agreement.

92. Paragraph 28(a) – Automatic Relief provides for the reimbursement of a percentage of each Qualified Settlement Class Member’s purchase price of the Super S Super Trac 303 Tractor Hydraulic Fluid.

93. Even if the monies were paid constituted damages because of “property damage,” the Your Product Exclusion would nonetheless apply to preclude coverage for the same.

94. Nationwide has no obligation to indemnify Smitty’s under the NW Primary Policies for the monies allocated and/or paid under Paragraph 28(a) – Automatic Relief of the Settlement Agreement or any other portion of the *Hornbeck* Settlement that compensates the Underlying Plaintiffs for the reimbursement or replacement of the complained of 303 THF Product.

COUNT VII

DECLARATORY RELIEF

Alternatively, the Impaired Property Exclusion Applies to Preclude Coverage Under NW Primary Policies for Any Portion of the Settlement Attributable to the Reimbursement of the Cost of Defendant’s Product

95. Nationwide incorporates and restates the allegations of paragraph 1 through 94 above as if fully set forth herein.

96. The NW Primary Policies are subject to an exclusion that provides, in part, as follows (“Impaired Property Exclusion”):

2. Exclusions

This insurance does not apply to:

* * *

m. Damage To Impaired Property Or Property Not Physically Injured

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

* * *

97. The Impaired Property Exclusion, in part, precludes coverage for the reimbursement or replacement of the insured’s defective product.

98. In accordance with the terms of the Settlement Agreement, amounts were allocated and/or paid of the Settlement Fund under Paragraph 28(a) – Automatic Relief of the Settlement Agreement.

99. Paragraph 28(a) – Automatic Relief provides for the reimbursement of a percentage of each Qualified Settlement Class Member’s purchase price of the Super S Super Trac 303 Tractor Hydraulic Fluid.

100. Even if these amounts constituted damages because of “property damage,” the Impaired Property Exclusion would nonetheless apply to preclude coverage for the same.

101. Accordingly, Nationwide has no obligation to indemnify Smitty’s under the NW Primary Policies for the amounts allocated and/ or paid under Paragraph 28(a) – Automatic Relief

of the Settlement Agreement or any other portion of the *Hornbeck* Settlement that compensates the Underlying Plaintiffs for the reimbursement or replacement of the complained of 303 THF Product.

COUNT VIII
DECLARATORY RELIEF

Alternatively, the Product Recall Exclusion Applies to Preclude Coverage Under NW Primary Policies for Any Portion of the Settlement Attributable to the Reimbursement of the Cost of Defendant’s Product

102. Nationwide incorporates and restates the allegations of paragraph 1 through 101 above as if fully set forth herein.

103. The NW Primary Policies are subject to an exclusion that provides, in part, as follows (“Product Recall Exclusion”):

2. Exclusions

This insurance does not apply to:

* * *

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost, or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) “Your product”;
- (2) “Your work”; or
- (3) “Impaired property”;

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

* * *

104. The Product Recall Exclusion, in part, precludes coverage for the reimbursement or replacement of the insured’s defective product.

105. In accordance with the terms of the Settlement Agreement, \$128,666 of the Settlement Fund was paid under Paragraph 28(a) – Automatic Relief of the Settlement Agreement.

106. Paragraph 28(a) – Automatic Relief provides for the reimbursement of a percentage of each Qualified Settlement Class Member’s purchase price of the Super S Super Trac 303 Tractor Hydraulic Fluid.

107. Even if the \$128,666 constituted damages because of “property damage,” the Product Recall Exclusion would nonetheless apply to preclude coverage for the same.

108. Nationwide has no obligation to indemnify Smitty’s under the NW Primary Policies for the \$128,666 distributed under Paragraph 28(a) – Automatic Relief of the Settlement Agreement or any other portion of the *Hornbeck* Settlement that compensates the Underlying Plaintiffs for the reimbursement or replacement of the complained of 303 THF Product.

COUNT IX
DECLARATORY RELIEF

Alternatively, the Expected or Intended Injury Exclusion Also Applies to Preclude Coverage For Smitty’s Under the NW Primary Policies

109. Nationwide incorporates and restates the allegations of paragraph 1 through 108 above as if fully set forth herein.

110. The NW Primary Policies are subject to the following exclusion:

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.

111. Prior to inception of each NW Primary Policy, Smitty’s knew that the 303 THF Products were defective and that such would result in “property damage” to consumers.

112. Accordingly, Nationwide does not owe any obligation to indemnify Smitty's for the *Hornbeck* Settlement under the NW Primary Policies.

COUNT X
DECLARATORY RELIEF

Alternatively, the *Hornbeck* Action Only Involved a Single "Occurrence"

113. Nationwide incorporates and restates the allegations of paragraph 1 through 112 above as if fully set forth herein.

114. Even if the *Hornbeck* Settlement involves damages, because of "property damage" caused by an "occurrence," the *Hornbeck* Settlement only involves a single "occurrence" and only implicates one "occurrence" limit.

115. The NW Primary Policies define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

116. The NW Primary Policies state as follows:

SECTION III -- LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
 - a. Insureds;
 - b. Claims made or "suits" brought; or
 - c. Persons or organizations making claims or bringing "suits".
2. The General Aggregate Limit is the most we will pay for the sum of:
 - a. Medical expenses under Coverage C;
 - b. Damages under Coverage A, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and
 - c. Damages under Coverage B.
3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".

* * *

5. Subject to Paragraph 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
 - a. Damages under Coverage A; and

b. Medical expenses under Coverage C because of all “bodily injury” and “property damage” arising out of any one “occurrence”.

117. All of the complained of damage was allegedly caused by Smitty’s production of defective tractor hydraulic fluid.

118. Accordingly, the *Hornbeck* Action only involved a single “occurrence.”

COUNT XI
DECLARATORY RELIEF

The Contractual Liability Exclusion Applies to Preclude Coverage For Any Contractual Indemnity That May be Owed By Smitty’s to Tractor Supply

119. Nationwide incorporates and restates the allegations of paragraph 1 through 118 above as if fully set forth herein.

120. The NW Primary Policies are subject to the following exclusion:

b. Contractual Liability

“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an “insured contract”, provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an “insured contract”, reasonable attorneys’ fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of “bodily injury” or “property damage”, provided:

(a) Liability to such party for, or for the cost of, that party’s defense has also been assumed in the same “insured contract”; and

(b) Such attorneys’ fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

* * *

121. Assuming a valid contract exists between Smitty's and Tractor Supply, the Contractual Liability Exclusion would apply to preclude coverage for any Contractual Indemnity that Smitty's may owe to Tractor Supply under the NW Primary Policies.

COUNT XII
DECLARATORY RELIEF

The NW Umbrella Policies Are Not Implicated by the *Hornbeck* Settlement

122. Nationwide incorporates and restates the allegations of paragraphs 1 through 121 above as if fully set forth herein.

123. Coverage under the NW Umbrella Policies only applies to "ultimate net loss" in excess of the "retained limit" because of "property damage" caused by an "occurrence" during the policy period.

124. "Retained limit" is defined to include the available limits of "underlying insurance" scheduled in the Declarations.

125. The 14-18 NW Primary Policies each constitute "underlying insurance" for the NW Umbrella Policy that possesses the same policy period.

126. The limits of the 14-18 NW Primary Policies have not been exhausted, and thus, coverage under the NW Umbrella Policies is not implicated by the *Hornbeck* Settlement.

127. Nationwide does not owe any obligation to indemnify Smitty's for the *Hornbeck* Settlement under the NW Umbrella Policies.

COUNT XIII
DECLARATORY RELIEF

Alternatively, Nationwide Does Not Owe Any Obligation to Indemnify Defendant Under the NW Umbrella Policies for Any Portion of the Settlement That Does Not Seek Damages Because of "Property Damage" Caused by an "Occurrence" During Policy Period

128. Nationwide incorporates and restates the allegations of paragraph 1 through 127 above as if fully set forth herein.

129. Coverage under the NW Umbrella Policies only applies to “ultimate net loss” in excess of the “retained limit” because of “property damage” caused by an “occurrence” during the policy period.

130. The NW Umbrella Policies define “property damage” and “occurrence,” in part, as follows:

13. “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

* * *

18. “Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

* * *

131. The *Hornbeck* Settlement purports to resolve all claims that could have been asserted in the *Hornbeck* Action, arising out of or relating to the purchase of Super Trac 303 Tractor Hydraulic Fluid in Missouri at any point in time from May 25, 2013 to present, excluding those who purchased for resale.

132. Nationwide does not owe any obligation to indemnify Smitty’s for any portion of the *Hornbeck* Settlement that does not constitute damages because of “property damage,” including but not limited to:

- a) any portions attributable to Count VI-Unjust Enrichment;
- b) the amount allocated and/or paid under Paragraph 28(a) – Automatic Relief;
- c) the amount allocated and/or paid for Incentive Awards; and
- d) any sums that do not constitute damages to third party property caused by the use of the 303 THF Product.

133. Nationwide does not owe any obligation to indemnify Smitty's for any portion of the *Hornbeck* Settlement that does not constitute damages because of "property damage" caused by an "occurrence," including but not limited to:

- a) any portions attributable to Count I – Violation of MMPA;
- b) any portions attributable to Count IV – Fraudulent Misrepresentation;
- c) any portions attributable to Count V – Negligent Misrepresentation;
- d) any portions attributable to Count VI – Unjust Enrichment;
- e) any damages attributable to the Defendants' intentional conduct; and
- f) the amount allocated and/or paid for Class Counsel's Expenses and Attorney's Fees.

134. Nationwide does not owe any obligation to indemnify Smitty's for any portion of the *Hornbeck* Settlement that does not serve as compensation for damages because of "property damage" that occurred during the policy periods of the NW Umbrella Policies.

135. Smitty's failed to sustain its burden of demonstrating which portions of the *Hornbeck* Settlement, if any, constitute damages because of "property damage" caused by an "occurrence" that occurred during the policy period of the NW Umbrella Policies.

136. Accordingly, Nationwide does not owe any obligation to indemnify Smitty's for the *Hornbeck* Settlement under the NW Umbrella Policies.

COUNT XIV
DECLARATORY RELIEF

Alternatively, the Your Product, Impaired Property, and Product Recall Exclusions Apply to Preclude Coverage Under the NW Umbrella Policies for Any Portion of the Settlement Attributable to the Reimbursement of the Cost of Defendant's Product

137. Nationwide incorporates and restates the allegations of paragraph 1 through 136 above as if fully set forth herein.

138. The NW Umbrella Policies are subject to the following exclusions:

2. Exclusions

This insurance does not apply to:

* * *

n. Damage To Your Product

“Property damage” to “your product” arising out of it or any part of it.

* * *

p. Damage To Impaired Property Or Property

Not Physically Injured “Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

q. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) “Your product”;
- (2) “Your work”; or
- (3) “Impaired property”;

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

* * *

139. The Your Product, Impaired Property and Product Recall Exclusions each preclude coverage for the reimbursement or replacement of the insured’s defective product.

140. In accordance with the terms of the Settlement Agreement, \$128,666 of the Settlement Fund was paid under Paragraph 28(a) – Automatic Relief of the Settlement Agreement.

141. Paragraph 28(a) – Automatic Relief provides for the reimbursement of a percentage of each Qualified Settlement Class Member’s purchase price of the Super S Super Trac 303 Tractor Hydraulic Fluid.

142. Even if the \$128,666 paid under Paragraph 28(a) – Automatic Relief constituted damages because of “property damage,” the Your Product Exclusion would nonetheless apply to preclude coverage for the same.

143. Nationwide has no obligation to indemnify Smitty’s under the NW Umbrella Policies for the \$128,666 distributed under Paragraph 28(a) – Automatic Relief of the Settlement Agreement or any other portion of the *Hornbeck* Settlement that compensates the Underlying Plaintiffs for the reimbursement or replacement of the complained of 303 THF Product.

COUNT XV
DECLARATORY RELIEF

Alternatively, the Expected or Intended Injury Exclusion Also Applies to Preclude Coverage For Smitty’s Under the NW Umbrella Policies

144. Nationwide incorporates and restates the allegations of paragraph 1 through 143 above as if fully set forth herein.

145. The NW Umbrella Policies are subject to the following exclusion:

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.

* * *

146. Prior to inception of each NW Umbrella Policy, Smitty’s knew that the 303 THF Products were defective and that such would result in “property damage” to consumers.

147. Accordingly, Nationwide does not owe any obligation to indemnify Smitty's for the *Hornbeck* Settlement under the NW Umbrella Policies.

COUNT XVI
DECLARATORY RELIEF

The Contractual Liability Exclusion Applies to Preclude Coverage Under the NW Umbrella Policies For Any Contractual Indemnity That May be Owed By Smitty's to Tractor Supply

148. Nationwide incorporates and restates the allegations of paragraph 1 through 147 above as if fully set forth herein.

149. The NW Umbrella Policies are subject to the following exclusion:

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement.

Solely for the purposes of liability assumed in an "insured contract", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

* * *

150. Assuming a valid contract exists between Smitty's and Tractor Supply, the Contractual Liability Exclusion would apply to preclude coverage for any Contractual Indemnity that Smitty's may owe to Tractor Supply under the NW Umbrella Policies.

COUNT XVII

Alternatively, No Duty to Indemnify Defendant is Owed Under the 14-18 Umbrella Policies Based on Doctrines of Fortuity, Loss In Progress and Known Risk

151. Nationwide incorporates and restates the allegations of paragraph 1 through 150 above as if fully set forth herein.

152. The fortuity doctrine combines the principals of known risk and “loss in progress” and holds that insurance coverage is precluded where the insured is aware of an ongoing progressive or known risk at the time the policy is purchased.

153. Upon information and belief, Smitty’s knew that the 303 Products were defective and that such would result in “property damage” to consumers prior to the inception of the NW Umbrella Policies.

154. Nationwide owes no obligation to indemnify Defendant under the 14-18 NW Umbrella Policies.

WHEREFORE, Plaintiff, Nationwide Agribusiness Insurance Company, requests that this Honorable Court enter an order in its favor and against Defendant as follows:

- a. declaring that Nationwide does not owe any obligation to indemnify Smitty’s for the *Hornbeck* Settlement under the NW Primary Policies.
- b. declaring that Nationwide does not owe any obligation to indemnify Smitty’s for the *Hornbeck* Settlement under the NW Umbrella Policies.
- c. Alternatively, declaring what portions of the *Hornbeck* Settlement Nationwide is required to indemnify Smitty’s for; and
- d. Awarding Nationwide such other and further relief as this Court deems just.

JURY DEMAND

Plaintiff demands trial by jury.

NATIONWIDE AGRIBUSINESS INSURANCE COMPANY

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