

STATUTORY INDEMNITY FROM MANUFACTURERS IN CONSTRUCTION LITIGATION

© 2015 This paper and/or presentation provides information on general legal issues. It is not intended to provide advice on any specific legal matter or factual situation, and should not be construed as defining Cooper and Scully, P.C.'s position in a particular situation. Each case must be evaluated on its own facts. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship. Readers should not act on this information without receiving professional legal counsel.

Centerpoint v. Trussway

Centerpoint - GC

Trussway - Manufacturer

Sandidge - Framing/Installing Trusses

Maverick - Drywall/Sheetrock Contractor

Fernandez - Plaintiff/Independent Contractor working for Sandidge & Maverick

Hanging Drywall on Second Story

- Standing on trusses that had been delivered but not installed
- Plaintiff fell – paraplegic
- Suit claims defective and unreasonably dangerous product
- Both Centerpoint and Trussway settled with Plaintiff

Chapter 82 Indemnity

No indemnity at common law unless manufacturer determined to have been negligent

Chapter 82 enacted to protect innocent sellers

- Provides defense and indemnity for an allegedly defective product (based on claim not on verdict)

§82.001's Definitions

■ (2) "Products Liability Action"

- Any action against a manufacturer or seller for recovery of damages arising out of personal injury, death or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligent, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories.

§82.001's Definitions

■ (3) "Seller"

- A person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component thereof.

■ (4) "Manufacturer"

- A person who is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product or any component part thereof and who places the product or any component thereof in the stream of commerce.

§82.002: Manufacturer's Duty to Indemnify

- (a) A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.

§82.002: Manufacturer's Duty to Indemnify

- (d) For purposes of this section, a wholesale distributor or retail seller who completely or partially assembles a product in accordance with the manufacturer's instructions shall be considered a seller.
- (e) The duty to indemnify under this section:
 - (1) applies without regard to the manner in which the action is concluded; and
 - (2) is in addition to any duty to indemnify established by law, contract, or otherwise.

Claims by Centerpoint and Trussway

Centerpoint claimed it was an innocent seller entitled to indemnity from Trussway

Trussway

- Claimed Centerpoint was not a “seller”
Only sold construction services – not trusses
- Claimed a custom-built apartment complex is not a “product”
- Claimed it was entitled to indemnity from Centerpoint; can run indemnity both ways – upstream and downstream – under Ch. 82

K-2 v. Fresh Coat, Texas Supreme Court

■ PLAINTIFFS

- **Homeowners:** comprised of over 90 homeowners who had purchased homes from Life Forms, Inc. Their houses had EIFS on the exterior walls.

■ DEFENDANTS

- **Life Forms, Inc.:** homebuilder
- **Fresh Coat, Inc.:** subcontractor that installed the EIFS on the houses' exterior walls.
- **K-2, Inc.:** manufacturer of the synthetic stucco components, collectively referred to as exterior insulation and finishing system or EIFS.

CHPT. 82 ISSUES

- Is EIFS a Product?
- Is Fresh Coat a Seller?
- Does K-2 have a duty to indemnify Fresh Coat?

Is EIFS a “Product”?

- K-2: EIFS is not a product.
 - After the EIFS components were purchased by Fresh Coat, the components were not resold as products.
 - The EIFS was integrated into the house. The finished EIFS became the wall of the house, if not the house. A house is not a product.
- Fresh Coat: EIFS is a product.
 - Fresh Coat sold the EIFS components to Life Forms.

Is EIFS a "Product"?

- Chpt. 82 does not define "product."
- Texas cases have addressed other types of products/subcomponents that were incorporated into houses and found that these items were still products:
 - PVC pipe used in plumbing. *Cupples Coiled Pipe, Inc. v. Esco Supply Co.*, 591 S.W.2d 615, 616, 618 (Tex.App.—El Paso, 1979, writ ref'd n.r.e.).
 - Bricks. *Hovenden v. Tenbush*, 529 S.W.2d 302, 305-306 (Tex.App.—San Antonio, 1975, no writ).
 - Fiberboard. *Temple EastTex, Inc. v. Old Orchard Creek Partners, Ltd.*, 848 S.W.2d 724, 731-732 (Tex.App.—Dallas 1992, writ denied).
- Other Texas cases have implicitly acknowledged that EIFS is a product.

Texas Supreme Court: EFIS is a Product

- Chapter 82 defines "Seller."
- "From that definition, a product is something distributed or otherwise placed, for any commercial purpose into the stream of commerce for use or consumption."

Texas Supreme Court: EFIS is a Product

- K-2 admits that the EFIS it manufactured is a product, and that product was placed into the stream of commerce.
- Texas Supreme Court: §82.001(4) defines "manufacturer."
 - The definition refers to "any product or any component part thereof"
 - A manufacturer can be liable for a product or component parts thereof.

Texas Supreme Court: EIFS is a Product

- Even if K-2 were correct regarding the EIFS wall being the “product,” a manufacturer can still be liable for defects in components of that product.
- There is nothing in Chapter 82 excluding items that become an integral part of a home.
- The Texas Supreme Court declined to read the term “product” more narrowly than it is set forth in Chapter 82.

Is Fresh Coat a "Seller"?

- K-2: Life Forms purchased Fresh Coat's services as an applicator. Fresh Coat did not place EIFS into the stream of commerce since the EIFS was applied to the walls of new houses.
- Fresh Coat: It provided a service and was also a product seller.

Is Fresh Coat a “Seller”?

- §82.001(3) “Seller”: A person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component thereof.
- §82.002(d): For purposes of this section, a wholesale distributor or retail seller who completely or partially assembles a product in accordance with the manufacturer's instructions *shall be considered a seller*.

Is Fresh Coat a "Seller"?

- Fresh Coat is engaged in the business of selling EIFS for the use the manufacturer K-2 intended.
 - Fresh Coat contracted and charged for providing labor and the materials needed to install the EIFS.
- Applying EIFS to the houses, that Life Forms ultimately sold, is sufficient evidence of K-2's product being placed in the stream of commerce.

Fresh Coat is a Seller

- Providing installation services will not preclude a company from also being a seller.
- Chapter 82's definitions of seller under §82.001(3) and §82.002(d):
 - Do not exclude a seller that is also a service provider; and
 - Do not require that the seller only sell the product.
- Chapter 82 anticipates that a seller may also provide services.

Centerpoint's Arguments on Its Claims

Centerpoint is a "seller"

Not any different from Fresh Coat

- Purchased allegedly defective product from manufacturer
 - Trussway – and sold it downstream
- A contractor who installs a product that is a component part of a building is a "seller" under *Fresh Coat*

It never even assembled truss – it was a finished product when delivered

- Could not be a "manufacturer" subjecting it to potential indemnity to Trussway

Trussway's Arguments

Centerpoint not a "seller"

- Centerpoint a GC – only sold construction services, not trusses
- Granting GC's status as "sellers" would lead to absurd results – "transforming most premises – liability cases against general contractors into indemnity cases against material suppliers"

Custom built apartment complex is not a "product"

Centerpoint owes Trussway an offsetting indemnity duty as a manufacturer

Court Found *Fresh Coat* Distinguishable

Truss not installed pursuant to training and instructions from Trussway

Centerpoint's contract covered innumerable products and materials

- Fresh Coat was a specific product

Trusses not yet installed – Centerpoint not engaged in placing trusses “into the stream of commerce” when accident occurred

Fresh Coat did not hold that a contractor who installs a product is always a “seller”

Possible Reasons for Court's Ruling

Truss not being put to its intended use at time of accident

Taking *Fresh Coat* to a GC really is taking it too far

Cannot be an innocent seller when have not done anything with product yet – have not placed into stream of commerce

Plaintiff was not the purchaser of the product
– Ch. 82 is a products liability doctrine

Trussway's Claim for Indemnity

Trussway claimed it was an innocent seller of a component part

Court took the easy way out

- Pleadings did not assert that Centerpoint manufactured or assembled a defective product
- Only that the truss manufactured by Trussway was defective