

STATUTORY INDEMNITY  
FROM MANUFACTURERS IN  
CONSTRUCTION LITIGATION

***K-2, INC. v. FRESH COAT, INC.***

# Cases

- *K-2, Inc. v. Fresh Coat, Inc., 2010 Tex. LEXIS 610 (Tex. Aug. 20, 2010)*
- *K-2, Inc. v. Fresh Coat, Inc., 253 S.W.3d 386 (Tex.App.—Beaumont 2008), aff'd in part and rev'd in part by Fresh Coat, Inc. v. K-2, Inc., 2010 Tex. LEXIS 610 (Tex., Aug. 20, 2010)*

# Parties in *K-2 v. Fresh Coat*

## ■ 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.

# FACTS

- Life Forms hired Fresh Coat to install EIFS
- Fresh Coat purchased and installed EIFS
  - Per K-2's instructions and training

# CLAIMS

- Plaintiff's Allegations:
  - The EIFS allowed water penetration that caused structural damage, termite problems and mold.
  - The EIFS was defectively designed, manufactured and marketed.
- Defendants' Cross-Claims
  - Life Forms: brought claims against Fresh Coat and K-2 seeking indemnity.
  - Fresh Coat: brought claims against K-2 seeking indemnity.

# Settlement

- Defendants settled with Plaintiffs.
- Fresh Coat paid over \$1 million to Plaintiffs and \$1.2 million to Life Forms to cover part of Life Forms' payment to the homeowners.
  - Fresh Coat indemnified Life Forms due to a contractual indemnity obligation.
    - K-2 was not a party to the contract between Fresh Coat and Life Forms – standard subcontract.

# Trial on Defendants' Cross-Claims

- Jury Verdict for Fresh Coat against K-2
  - \$1,036,686.23 for Fresh Coat's settlement payment to Plaintiffs.
  - \$1,203,995.50 for Fresh Coat's settlement with Life Forms.
  - \$726,642.23 for attorney fees.
- Basis of Jury Award: Tex. Civ. Prac. & Rem. Code §82.002(a).
- (Life Forms also received a jury verdict against K-2, but these parties later settled.)

# CHPT. 82 ISSUES

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



# §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.

# 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.”
- Other Texas Cases have implicitly acknowledged that EIFS is a product:
  - *Pugh v. Gen. Terrazzo Supplies, Inc.*, 243 S.W.3d 84, 93-95 (Tex.App.—Houston [1st Dist.] 2007, no pet.)
  - *R.H. Tamlyn & Sons, L.P. v. Scholl Forest Indus, Inc.*, 208 S.W.3d 85 (Tex.App.—Houston [14th Dist.] 2005, no pet.)
  - *Hixon v. Tyco Int’l Ltd.*, 2006 Tex. App. LEXIS 9494, at \*12 (Tex.App.—Houston [1st Dist.] Oct. 31, 2006, no pet.)

# Is EIFS a “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).

# Texas Supreme Court: EFIS is a Product

- Chapter 82 defines "Seller."
- The Texas Court of Appeals and Texas Supreme Court examined Chapter 82's definition of "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." *K-2, Inc.*, 2010 Tex. LEXIS 610, \*6.
- Texas Court of Appeals and Texas Supreme Court: EIFS is a product that was *placed into the stream of commerce* and *used* in the construction of the houses.



# Texas Supreme Court: EFIS is a Product

- K-2 admits that the EIFS 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”?

- Texas Court of Appeals: Fresh Coat is 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.

# Is Fresh Coat a “Seller”?

- Texas Supreme Court: agrees with the Court of Appeals.
  - Fresh Coat provided the EIFS product and the service of EIFS installation.
  - Fresh Coat is a product seller under Chapter 82.

# Fresh Coat is a Seller

- Texas Supreme Court: 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.

# BASIS FOR LIABILITY

- Whether §82.002(a)'s exception includes independent liability under contract?
  - Texas Court of Appeals: Yes



## §82.002(a): Manufacturer's Duty to Indemnify

- 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.*** (emphasis added)

# WHAT IS INDEPENDENT LIABILITY?

- Is contractual liability – indemnity obligation – enough?

# Fresh Coat only had an indemnity obligation.

- K-2 is not arguing that §82.002(a)'s exception applies because Fresh Coat improperly installed the EFIS.
- The jury was instructed to exclude from its calculation of Fresh Coat's loss any amount caused by Fresh Coat's "own negligence, intentional misconduct, or any other act or omission. . . ."
- The jury found that the exception did not apply.<sup>27</sup>

# K-2's Argument

- Fresh Coat's payment to Life Forms did not satisfy the requirements of Chapter 82:
  - Life Forms did not make a claim for personal injury, death, or property damage.
  - The payment was made pursuant to the terms of the indemnity clause in their contract.
  - The payment was made regardless of whether Life Forms caused the loss.
  - Attorney's testimony.

# Texas Court of Appeals

- The settlement payment was based solely on Fresh Coat's *independent liability* under its contract with Life Forms.
  - §82.002(a)'s exception applied as it excludes independent liability.
  - Requiring that K-2 indemnify Fresh Coat would stretch Chapter 82 to include agreements to which a manufacturer is not a party.
- Chapter 82 does not provide a seller with a right of indemnity against a product manufacturer for that seller's independent liability under contract.

# Texas Supreme Court

- §82.002(a): A **manufacturer** shall indemnify and hold harmless a **seller** against loss arising out of a **products liability action**. . . .
- Fresh Coat is a seller, and K-2 is a manufacturer.
- Did the loss arise out of a products liability action?

# Texas Supreme Court

- §82.001(3) “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.

# Texas Supreme Court

- Fresh Coat's settlement with Life Forms arose out of a "products liability action."
  - The homeowners' claims and Life Form's indemnity cross-claim were brought in a "products liability action."
  - The definition includes actions based on damage caused by a defective product whether the action is based on negligence or any other theory or combination of theories.



# Texas Supreme Court

- K-2 owes Fresh Coat indemnity unless §82.002(a)'s exception applies.
- §82.002(a)'s exception: 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.

# Texas Supreme Court

- The jury did not find the exception applicable.
- The exception does not exclude the situation where the seller is contractually liable to another.
- The Court of Appeals focused on the language at the end of the exception “for which the seller is independently liable” and excluded the preceding language in the statute.

# Texas Supreme Court

- For the exception to apply, “the indemnitor must prove the indemnitee’s independent culpability.” *Gen. Motors Corp. v. Hudiburg Chevrolet, Inc.*, 1999 S.W.3d 249, 255 (Tex. 2006).
  - Focus is on whether a seller is independently liable and why.
- K-2 has not proven that Fresh Coat caused the loss via the manner contemplated in the exception – i.e. by its own conduct.

# Texas Supreme Court

- K-2 argued that it should not be liable for contractual obligations when it was not a party to the contract, namely Fresh Coat's indemnity obligations to Life Forms.
- §82.002(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.

# TEXAS SUPREME COURT

- “In addition to any duty to indemnify established by law, contract or otherwise”
  - “suggests not affected by mere creation of other contracts or obligations to indemnify.”
- “[W]hat is important is not merely whether a seller is independently liable, but why.”

# Texas Supreme Court

- K-2 did not establish a loss for which it is exempt from indemnity.
- What the Court did not address: whether a loss needs to be tortious to fit within §82.002(a).
- Just said seller needs to be culpable.

# IMPLICATIONS

- More potential parties to construction defect cases
- Possible defense for “innocent” contractors
  - Chapter 82.003
- Different standards of proof in products liability cases – producing cause

**THE END**