Why Plaintiff Sues Vendor

- Venue defendant
- Destroy diversity jurisdiction
- Allege independent acts of negligence
- Manufacturer is bankrupt
- Manufacturer is foreign entity
  - Difficult to serve
  - Not subject to court’s jurisdiction
Import Statistics

- 2008 United States imported $2.1 Trillion
  - $338 Billion from China
    - 12% of United States total trade
    - 2nd leading trading partner

- 2008 United States imported $23 Billion in toys
  - 580% increase from 1998
  - 90% Chinese manufactured
Seller Liability for Product Defect

Common Law

Sellers in the chain of distribution of a product are strictly liable for defects in that product even if:
Seller Liability for Product Defect

Sellers in the chain of distribution of a product are strictly liable for defects in that product even if:

- Seller did not create the defect
- Seller had no control over the product’s manufacture or design
- Seller had no reason to believe the product was defective
- Seller, such as wholesaler, never had possession of the product
Seller Liability for Product Defect

Sellers in the chain of distribution of a product are strictly liable for defects in that product even if:

- Seller did not create the defect
- Seller did not manufacture or design the product
- Liability May Exist Under Warranty and Negligence Theories, As Well
- Seller, such as wholesaler, never had possession of the product
Theory of Seller Liability

Seller is in privity with the Plaintiff

Public Policy

An injured party should not bear the cost of his injuries simply because the product manufacturer is out of reach
Texas Statutory Indemnity

- TCPRC Chapter 82.001: Definitions
  - **Manufacturer** is a designer, formulator, constructor, rebuildor, fabricator, producer, compounder, processor, or assembler...
  - **Seller** is engaged in the business of distributing or otherwise placing in the stream of commerce a produce or any component part thereof
Liability of Non-Manufacturing Seller

- CPRC Chapter 82.003: Non-manufacturing Seller may be liable for product defect *only if*:
  - Seller caused defect
  - Seller actually knew of defect
  - Manufacturer is insolvent
  - Manufacturer is not subject to court’s jurisdiction
Manufacture’s Duty to Indemnify

- TCPRC Chapter 82.002

- “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 conduct, or other misconduct…”

- “Applies without regard to the manner in which the action is concluded.”
SSP Partners v. Gladstrong
Tex. Sup Ct., Rehearing denied Feb. 27, 2009

- SSP argued:
  - Gladstrong “producer” of lighter
  - Gladstrong “apparent manufacturer”
  - Gladstrong “deemed manufacture” under industry standards and federal law
  - Gladstrong and Chinese company “single business enterprise”
Common Law (Implied) Indemnity

- *Restatement (3rd) of Torts: Apportionment of Liability (2000):*

- The indemnity is entitled to recover the amount paid to the plaintiff, in settlement or judgment, plus reasonable legal expenses, if the indemnity was not liable except as the seller of a product supplied by the indemnitee.
SSP Partners v. Gladstrong
Tex. Sup Ct., Rehearing denied Feb. 27, 2009

- SSP argued that an importer of a defective product is at fault for facilitating entry of the product into U.S.

- "Even if we assume this is true, any such fault is not the kind of actionable wrongdoing on which common law indemnity is predicated."
Questions?

- Whose burden to show whether the manufacturer is subject to trial court’s jurisdiction?
- Does non-manufacturing seller have any common law indemnity rights against a non-manufacturing supplier?
- Suggestion: Name all suppliers as Responsible Third Parties.
Limitations of Contractual Indemnity

- Anti-Indemnity Statutes
- Language of the contract, i.e. express negligence rule
- Issues of locating the contract
- Bargaining power of small retailers
- Remote vendors with no direct dealings with the manufacturer
- Issues of enforcement, including jurisdiction
Vendors Endorsement

Intended to address the liability trail created by indemnity laws

"Who is An Insured is amended to include as additional insured any person(s) or organization(s) (referred to below as "Vendor") shown in the Schedule, but only with respect to "bodily injury" or "property damage" arising out of "your products" shown on the Schedule, which are distributed or sold in the regular course of the Vendor’s business, subject to the following additional exclusions . . . ."

ISO Form CG 20 15

Policies contain different exclusions
Coverage for Seller Negligence

Coverage For Vendor’s Negligent Sale of Product


Bodily injury “arising out” of use of the product
Coverage for Seller Negligence

No Coverage Unless Claim Arises from Product Defect


Vendor’s argument would require coverage for injuries to a customer who came to the store to buy the product and slipped on a banana peel.
Coverage for Seller Negligence

No Coverage Unless Claim Arises from Product Defect

Hartford Fire Insurance Company v. St. Paul Surplus Lines (7th Cir. 2002)

"Interpreting contracts to make economic sense..."
Other Limitations of Coverage Under Vendor’s Endorsement

Definition of “Coverage Territory”

*Ace American Insurance v. RC2, N. Dist. Of Ill. (June 2008)*

“The Occurrence must take place in the Coverage Territory”

Coverage Territory is “all the world outside the United States”
Thank You

Up Next | Texas Insurance Law Update on Recent Texas Supreme Court Decisions and Trends in Recent Developments