Indemnity in Product Liability Actions

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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:
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
Why Plaintiff Sues Vendor

- Venue defendant
- Destroy diversity jurisdiction
- Alleged independent acts of negligence
- Manufacturer is bankrupt
- Manufacturer is foreign entity
  - Difficult to serve
  - Not subject to court’s jurisdiction
Chinese Manufactured Goods

- In 2006 there were 467 recalls of Chinese products
  Twice as many as in 2001
- In 2007, 60 percent of all consumer recalls were for Chinese-made products
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

Plaintiff’s burden of proof
Manufacturer insolvent or not subject to court’s jurisdiction

• Decided without attempted joinder of manufacturer. *Dennis v. Giles, 2008 Tex App. Lexis 429*

• Designation as Responsible Third Party?
  • *Diamond H. Recognition LP v. King of Fans, 2008 U.S. Dist. Lexis 109095*
  • *Jagdeep v. Vanguard Pharmaceutical, 2010 U.S. Dist. Lexis 4025*
**Fresh Coat, Inc. v. K-2, Inc.**
Texas Supreme Court, decided August 20, 2010

- K-2 manufactured synthetic stucco (EIFS)
- Fresh Coat installed synthetic stucco
- Homebuilder contracted with Fresh Coat
- Plaintiffs sued homebuilder, Fresh Coat and K-2

Fresh Coat contractually obligated to indemnify homebuilder
Fresh Coat, Inc. v. K-2, Inc.
Texas Supreme Court, decided August 20, 2010

- K-2 argued that Fresh Coat did not place synthetic stucco into stream of commerce
- Seller is engaged in the business of distributing or otherwise placing in the stream of commerce a product or any component part thereof
- K-2 characterized Fresh Coat as a service provider
- Holding: Fresh Coat was a “Seller” and a service provider

Not Mutually Exclusive
Fresh Coat, Inc. v. K-2, Inc.
Texas Supreme Court, decided August 20, 2010

• “Product” is undefined by Chapter 82
• K-2 argued synthetic stucco wall, if not the home, was the product involved in lawsuit
• K-2 argued not “product” once incorporated into real property
• Holding: Synthetic Stucco is a product under Chapter 82
Manufacturer’s Duty to Indemnify

• **Product Liability Action** means any action allegedly caused by a defective product. Includes:
  - Strict Tort Liability
  - Strict Products Liability
  - Negligence
  - Misrepresentation
  - Breach of Express or Implied Warranty
  - Any other theory

• Indemnity obligation arises from four corner’s of complaint
  - For damages **arising out of a products liability action**
Fresh Coat, Inc. v. K-2, Inc.
Texas Supreme Court, decided August 20, 2010

Manufacturer shall indemnify seller for any loss, except loss caused by the seller’s negligence, intentional conduct, or other misconduct...for which the seller is independently liable.
Fresh Coat, Inc. v. K-2, Inc.
Texas Supreme Court, decided August 20, 2010

- Does not matter if seller independently contractually liable
- No finding whether conduct must be tortious
- Manufacturer’s burden to prove seller’s independent liability

How will settlement behavior be affected?
Manufacturer’s Duty to Indemnify

- “Applies without regard to the manner in which the action is concluded.”
- Seller’s burden to prove settlement reasonable
Finished Product Manufacturer vs. Component Part Manufacturer

Manufacturer is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler
Finished Product Manufacturer vs. Component Part Manufacturer

*FLS Miljo v. Munters, 682 F. Supp. 2d 681 (decided Jan 29, 2010)*

- All manufacturers are sellers
- Not all sellers are manufacturers
- Manufacturer’s duty to prove independent liability
- If both innocent of culpable conduct may be offsetting duty to indemnify
SSP Partners v. Gladstrong
Tex. Sup Ct., Rehearing denied Feb. 27, 2009

SSP argued:

- Gladstrong “producer” of lighter
- Gladstrong “apparent manufacturer”
- Gladstrong “deemed manufacturer” under industry standards and federal law
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.”