PRODUCT LIABILITY – INDEMNITY

1. Claim for Indemnity by a Seller Against an Upstream Supplier

One Court has held that there is no claim for common law indemnity by an innocent retailer from an upstream supplier who was not the manufacturer of the product. *See Federal Petroleum Co. v. Gas Equipment Co.*, 105 S.W.3d 281 (Tex. App.—Corpus Christi 2003). **Note that the innocent retailer abandoned its claim for indemnity under the statute § 82.002, apparently realizing that the statute allowed indemnity only against a manufacturer.**

2. Where Supplier is the "Apparent Manufacturer"

SSP Partners v. Gladstrong Investments, Tex. App. 2005 (LWC-2489) (Tex. App.—Corpus Christi 2005), stated that there must be a connection between the supplier and the final manufactured product, citing other cases for authority. The Court did hold that there was enough evidence to keep Gladstrong in the case because there was evidence that it was closely involved in the importation, marketing and distribution of a lighter and that it participated significantly in issues related to a recall and subsequent redesign of the product. **Note this case involved an alleged defective lighter from which a retailer was seeking indemnity against the manufacturer.**

The Court also cited to the *Federal* case which it had earlier decided. It was noted that "there was no suggestion that the upstream supplier was the 'apparent manufacturer' and, therefore, a 'producer' of the product". "There was no suggestion that the supplier had been 'held out' to be the manufacture in order to entice additional purchases."

Therefore, the Court in *Gladstrong* held that although Gladstrong was not the manufacture as defined under the statute, it was so closely allied with the manufacturer as to be virtually indistinguishable from it and that the company had been deliberately held out as the manufacturer in order to entice additional consumer sales.

3. Obligation to Indemnify a Seller When Unsuccessful Negligence Allegations Which Allege Independent Liability are Brought

See Meritor Automotive, Inc. v. Ruan Leasing Co., 44 S.W.3d 86 (Tex. 2001). **The manufacturer has the burden of proof to avoid the duty to indemnify an innocent seller.**

The traditional notion of causation is not an element of the seller's statutory claim for indemnity. The claimant or innocent retailer needs only to prove that it is a statutory seller that suffered a qualifying loss in a product liability action as defined by statute and that the defendant qualifies as a statutory manufacturer. *See Oasis Oil Corp. v. Koch Refining Co., LP*, 60 S.W.3d 248 (Tex. App.—Corpus Christi 2001). **Note that the statutory scheme relieves the seller of obtaining a defect finding by authorizing indemnification regardless of the manner in which the action is concluded, citing with approval *Meritor*.**

4. Limitations on the Manufacturer's Right to Bring a No-Evidence Summary Judgment

An alleged manufacturer can only bring a no-evidence motion for summary judgment on a claim or defense on which the seller would have had the burden proof at trial. Since under the *Meritor* decision, the manufacturer bears the burden of proof to avoid indemnifying the seller, a no-evidence motion could not be appropriately granted on that ground.

5. Duty of a Manufacturer Where Other Manufactured Products are Alleged to be Defective As Well

In *Ansell Healthcare Products, Inc. v. Owens & Minor, Inc.*, Tex. App. 2006 (LWC-2679) (Tex. App.—Texarkana 2006), it was held that where suit was brought against a seller and it was alleged that several different manufacturers' products were defective, the seller was entitled to indemnity from the manufacturer of a product it was alleged to have sold even though the seller had distributed products of other manufacturers. **Note this case is on appeal before the Texas Supreme Court.**

6. Right to Indemnity Where Seller was Sued but then Dismissed

The seller had allegedly sold the defective product but it was later determined that the seller did not sell the ones that purportedly injured the plaintiff. In an action seeking indemnity for defense costs, it was held that the manufacturer still had to indemnify the innocent retailer who had not sold the particular product claimed to have harmed the underlying plaintiff. *See Fitzgerald v. Advanced Spine Fixations Systems, Inc.*, 966 S.W.2d 864 (Tex. 1999 – based upon certified question from 5th Cir.). **Note that case also stated that anyone who was 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 part thereof qualifies as a seller.** Referencing § 82.001(3) of the Texas Civil Practices and Remedies Code.

7. Differences of Burden of Proof Between Common Law Indemnity and Chapter 82 Indemnity

A. A product manufacturer's statutory duty to indemnify a seller does not depend on proof of a product defect.

B. A product manufacturer only has a statutory duty to indemnify its seller where the pleadings allege the product is defective. The allegation of a defective finished product will include a component only if the allegation in the pleadings can fairly be read as being directed to the component as well. A manufacturer of a component product that is not defective, who is innocent of any independent culpability but who owes a duty to indemnify under § 82, can also be a seller of the component who may be owed a duty by the assembler of the finished product and, therefore, those duties may offset one another.

C. When common law indemnity is sought, the indemnitor must be liable or potentially liable and his liability must be adjudicated or admitted. There is no right of common law indemnity against a defendant who is not liable.

D. A manufacturer must prove the indemnitee has independent culpability in order to avoid the Chapter 82 statutory indemnity obligation. The indemnitor's (manufacturer) liability does not need to be adjudicated.

E. Statutory indemnity is triggered by the injured claimant's pleadings.

See General Motors Corp. v. Hudiburg Chevrolet, Inc., 119 S.W.3d 249, 49 Tex. Sup. Ct. J. 464, Tex., March 24, 2006).