PRODUCT LIABILITY – INDEMNITY UNDER TEXAS LAW

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.**

The Texas Supreme Court has since held that common law indemnity can be obtained against an upstream supplier only if there is a showing that the supplier was responsible for the products defective condition. See *SSP Partners v. Gladstrong Inv. (USA)*, 275 S.W.3d 444 at 457-458 (Tex. 2009)

2. Where Supplier is the "Apparent Manufacturer"

The statutory definition of "manufacturer" in the Texas product liability statute does not include "apparent manufacturers". Therefore, the Texas Supreme Court has refused to expand the definition placed in the statute by the legislature. See *SSP Partners v. Gladstrong Inv. (USA)*, 275 S.W.3d 444 (Tex. 2009).

Note this case involved an alleged defective lighter from which a retailer was seeking indemnity against the upstream supplier whose "sister", a Chinese company, was one of the manufacturers. The Court in *SSP* also held that a seller is not entitled to indemnity from an upstream supplier other than the manufacturer either by statute or under the common law without a showing that the upstream supplier was at fault. The Court also held that corporations were not liable for each other's obligations merely because they are part of a single business enterprise.

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*. The burden of proof does not shift to the retailer/seller who is seeking indemnity (retailer is not required to prove its "innocence" or "lack of independent negligence"). In order to avoid a summary judgment in behalf of the retailer it is likely that the manufacturer must prove independent negligence or that there is a fact issue in that regard.**

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 of 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 To Indemnify Where Other Manufactured Products are Alleged to be Defective As Well

In *Owens & Minor, Inc. v. Ansell Healthcare Products, Inc.*., 251 S.W.3d 481 (Tex. 2008), it was held that a manufacturer had fulfilled its indemnity obligation when it offered to defend or indemnify the seller only for that manufacturers own products. The manufacturer was not required to offer a defense or indemnity for the products of other manufacturers which the distributor was also being sued for.

Owen's was an innocent seller of latex gloves that the Plaintiff alleged caused a systemic allergy. The suit alleged that the gloves sold by Owens, Ansell and more than 30 other manufacturers were defective. Ansell's offer of indemnity and defense pertained to its product only and not those of other manufacturers. The case was ultimately dismissed against Owens and the other manufacturers and then Owens pursued its cross-actions for indemnity against Ansell after settling with other manufacturers.

Summary judgment had been granted to Ansell by the trial court based upon Ansell fulfilling its indemnity obligation with its offer to indemnify and defend in regards to liability arising out of its product. The Texas Supreme Court answered the Fifth Circuits certified question by holding that a manufacturer fulfills its duty to indemnify when it offers to indemnify and defend an innocent seller only for claims related to the sale of products the manufacturer

released into the stream of commerce. The statute did not extend a manufacturer's obligations to claims related to other manufacturer's products.

Where there are competing duties to indemnify owed by a finished product manufacturer and a component-product manufacturer, the competing claims will fail if the evidence shows that neither party is innocent. The claims will likewise offset one another if both parties are innocent. See *Gen. Motors Corp.v Hudiburg Chevrolet, Inc.*, 199 SW3d 249 at 256-257 (Tex. 2006).

6. All Manufacturers Are Sellers But Not All Sellers Are Manufacturers

Nothing in Chap 82 prevents a person from being both a manufacturer and a seller of the same product or component. There can be situations where the component supplier can assert a claim for indemnity against the ultimate seller who incorporates the component and is the manufacturer and the seller of the final product.

An innocent seller is protected regardless of whether it is upstream or downstream of that product's manufacturer. *Hudiburg* at 256.

Likewise, the ultimate manufacturer, as a seller, can seek indemnity from the component manufacturer. In order to avoid an indemnity obligation, the "manufacturer" has to establish the sellers conduct caused the loss under Chapter 82. See *Petroleum Solutions, Inc. v. Bill Head Enterprises,* 454 SW3d 482 (Tex. 2014). Also see *Gen. Motors Corp.v Hudiburg Chevrolet, Inc.,* 199 SW3d 249 (Tex. 2006)

7. Right to Indemnity When the Party Seeking Indemnity is a Lessor

In *Meritor Automotive, Inc. v. Ruan Leasing Co.,* 44 S.W.3d 86 (Tex. 2001), Ruan was a leasing company who had leased a Freightliner truck to Plaintiff's employer. Although not addressed in the Courts opinion, it was addressed in the Court of Appeals opinion that was affirmed. See *Freightliner Corporation v. Ruan Leasing Company,* 6 S.W.3d 726 (Tex.App.-Austin, 1999 Aff'd). Footnote 2 of that opinion stated that:

"Ruan's status as 'lessor' qualifies it as a 'seller' for the purpose of section 82.001 (3) of the Texas Civil Practices & Remedies Code…….(defining 'seller as any person engaged in the business of placing the product into the stream of commerce for commercial purposes); *Rourke v Garza,* 530 S.W.2d 794, 800 Tex. 1975) (noting that a 'lessor' is one who introduces products into the channels of commerce and therefore qualifies as a 'seller' for purposes of section 82.001 (3)). Therefore we will refer to Ruan as a 'seller.'"

It is therefore clear that a commercial lessor of a product may seek statutory indemnity against the manufacturer.

8. 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.

A seller's may recover the cost of defending an unsuccessful negligence claim which is asserted independently from the product liability claim. See *Meritor at 87.*

9. In Considering Indemnity Claims Note That a Product That is Incorporated Into an Improvement to Real Property Can Remain a "Product" Under Chapter 82

See *Fresh Coat, Inc. v K-2, Inc.,* 318 SW3d 893 (Tex. 2010) and *Petroleum Solutions, Inc. v. Bill Head Enterprises,* 454 SW3d 482 (Tex. 2014). Both of these cases resulted in Chapter 82 indemnity being allowed.

10. Indemnity in Construction Cases

A sub-contractor on a construction product can seek indemnity so long as the sub-contractor also qualifies as a seller. See *Fresh Coat at 899. Fresh Coat was "in the business of providing EIFS products combined with the service of EIFS installation."*

A general contractor is not a seller in most instances. See *Centerpoint Builders GP, LLC v Trussway,* 496 SW3d 33 (Tex. 2016). "*One is not engaged in the business of selling a product if providing that product is incidental to selling services." Id at 40.*

11. 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., 199 S.W.3d 249 (Tex. 2006).

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