



Looming Texas Supreme Court Decision Could Impact Contractor Liability in Construction Cases

In November 2015, the Texas Supreme Court heard oral arguments to determine if a general contractor was a “seller” under Chapter 82 of the Civil Practice and Remedies Code and entitled to indemnification from the manufacturer of an allegedly defective roof truss. See *Centerpoint Builders GP v. Trussway, Ltd.*, 2015 LEXIS 799 (Tex. Sept. 4, 2015) (granting petition for review). If the Court agrees with the general contractor, then the decision would likely increase the risk of liability for both general contractors and manufacturers of products installed by general contractors.

Chapter 82

Chapter 82 provides a means for an “innocent” seller to seek indemnification from the manufacturer of an allegedly defective product. See Tex. Civ. Prac. & Rem. Code § 82.002. The statute requires a manufacturer to indemnify and hold harmless a seller against loss arising out of a product liability action, except for any loss caused by the seller’s negligence, intentional misconduct, or other act or omission for which the seller is independently liable. *Id.* at § 82.002(a). “Seller” is broadly defined in the statute as “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 part thereof.” *Id.* at § 82.001(3).

Notably, the Texas Supreme Court in *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893 (Tex. 2010) held that a contractor hired to apply synthetic stucco components to homes according to the manufacturer’s instructions and training is a “seller” of the synthetic stucco components. The Court in *Fresh Coat* held that Chapter 82’s definition of “seller” does not exclude a seller who is also a service provider, and Chapter 82 does not require the seller to sell only the product at issue. *Id.* at 899.

Case Background and the Beaumont Court of Appeals’ Decision

Centerpoint began as a personal injury action filed by Merced Fernandez against Centerpoint Builders GP, LLC (“Centerpoint”) and Trussway Ltd. (“Trussway”) for injuries sustained while installing drywall at an apartment complex construction project. Centerpoint was the general contractor and Fernandez was an independent contractor. At the time of the accident, Fernandez was standing on a roof truss that had not yet been installed. The truss broke and Fernandez was severely

injured from his fall. Fernandez filed suit, asserting that the truss, which was manufactured by Trussway and purchased by Centerpoint, was defective and unreasonably dangerous.

Centerpoint filed a claim against Trussway seeking statutory indemnification under Chapter 82. Trussway filed a cross-action against Centerpoint, denying that Centerpoint was a seller under Chapter 82 and contending that it was actually an innocent seller that was entitled to indemnification from Centerpoint. The trial court granted Centerpoint's motion for summary judgment and held that Centerpoint was a "seller" under Chapter 82, but denied Centerpoint's motion for partial summary judgment regarding its entitlement to indemnity. The trial court also held that Trussway was not entitled to indemnity from Centerpoint. The parties then filed a joint notice of agreed interlocutory appeal.

On appeal, the Beaumont Court of Appeals reversed the trial court's order and held that Centerpoint does not fit the statutory definition of a seller. *Centerpoint Builders GP, LLC v. Trussway, Ltd.*, 436 S.W.3d 882 (Tex. App.—Beaumont, pet. granted). The court examined *Fresh Coat*, but held that the case was distinguishable for several reasons:

- (i) Unlike in *Fresh Coat*, Fernandez's accident occurred before the trusses were installed and there was no indication Centerpoint or its subcontractors installed the truss pursuant to training or instructions from Trussway. *Id.* at 888,
- (ii) Centerpoint's contract with the apartment owner covered numerous products and materials as opposed to the contract in *Fresh Coat*, in which the contract covered only the specific product at issue. *Id.*,
- (iii) Centerpoint was not engaged in placing the trusses into the stream of commerce when Fernandez's accident occurred, and
- (iv) *Fresh Coat* merely stands for the proposition that a contractor that provides services is not precluded from being a "seller" under Chapter 82. *Id.* The court in *Fresh Coat* did not, however, hold that a contractor who installs a product is always a "seller."

For these reasons, the Beaumont Court of Appeals held that Centerpoint was not a "seller" under Chapter 82 and thus not entitled to seek indemnity from Trussway. *Id.* at 888-89. The court noted that this conclusion was consistent with the common law definition of "seller." *Id.* at 888. The court also held that Centerpoint was not a manufacturer of the truss and was not obligated to indemnify Trussway. *Id.* at 889.

Arguments Before the Texas Supreme Court

On September 4, 2015, the Texas Supreme Court granted Centerpoint's Petition for Review. *Centerpoint Builders GP v. Trussway, Ltd.*, 2015 Tex. LEXIS 799 (Tex. Sept. 4, 2015).

Centerpoint's primary argument before the Texas Supreme Court was that the Beaumont Court of Appeals' decision conflicts with *Fresh Coat*. Centerpoint asserted that the Court of Appeals improperly relied on § 82.002(d) (which states that 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") in its attempt to distinguish *Fresh Coat* because Centerpoint did not assemble the truss. Centerpoint also argued that the Court of Appeals added requirements to Chapter 82, "such as requiring the 'seller' to sell only one product as opposed to 'innumerable' products" and adding an improper "temporal requirement" that the seller be engaged in placing the product into the stream of commerce *at the time of the accident*. Petitioners' Brief on the Merits at p. 7. Finally, Centerpoint argued that the Court of Appeals erred in concluding that a determination that Centerpoint was a "seller" would improperly expand the common-law definition of "seller."

Trussway, conversely, argued that Centerpoint is a construction company engaged in the business of building apartment complexes, not selling products. Further, by purchasing the roof trusses, according to Trussway, Centerpoint was the user or consumer; it did not place them into the stream of commerce. Next, Trussway argued that the Court should consider the fact that a builder is not a seller under the common law. Centerpoint also emphasized that Chapter 82 does not transform a builder into a seller of every building material used on a project. Trussway argued that applying Chapter 82 would "lead to absurd results by transforming most negligence

or premises-liability cases against general contractors into products liability indemnity cases against material suppliers.” Respondent’s Brief on the Merits at p. 12. Finally, Trussway argued that Centerpoint could not possibly be a “seller” of a “product” because “if Centerpoint sold anything (other than its construction services), it sold a large, completed, custom-built, 166-unit apartment complex, which is not a product.” *Id.*

Practical Implications

Texas courts have struggled with establishing the parameters of Chapter 82’s definition of “seller.” The Texas Supreme Court in *Fresh Coat* tackled one such application of the term in the construction context, and *Centerpoint* represents an opportunity for the Court to either curtail Chapter 82’s applicability to construction cases or dramatically expand it.

Of particular note in *Centerpoint* is that the injury prompting the demand for indemnification under Chapter 82—i.e., a subcontractor injured on a job site in connection with building materials—is a relatively common occurrence. Accordingly, if the Court holds that Centerpoint is a “seller” under Chapter 82, there could be a substantial increase in Chapter 82 indemnification actions. In addition to the increased risk of liability for manufacturers of building materials, there could also be implications for general contractors, who might see an increase in the number of product liability suits due to their new status as “sellers” under Chapter 82. In short, this may be an important decision for the construction industry, including what claims can be made and by whom.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com/contactus/.

Andrew D. Ness

Washington
+1.202.879.7675
adness@jonesday.com

William R. Taylor

Houston
+1.832.239.3860
wrtaylor@jonesday.com

J. Laurens Wilkes

Houston
+1.832.239.3796
jlwilkes@jonesday.com