

FALL 2016 NEWSLETTER

PRODUCTS LIABILITY UPDATE

By Rocky Little

1. *Centerpoint Builders GP, LLC v. Trussway, Ltd.*, No. 14-0650 (Supreme Court of Texas) June 17, 2016.

The underlying lawsuit for personal injury (paraplegia) arose from a fall during construction of an apartment complex. Merced Fernandez, an Independent Contractor, while carrying sheetrock and walking across uninstalled trusses on the second floor, stepped on a truss that broke resulting in the fall. The Independent Contractor (Fernandez) filed suit against the General Contractor (Centerpoint Builders) of the apartment construction project as well as the manufacturer of the trusses (Trussway) pursuant to the Texas Products Liability Act. Texas Civil Practice & Remedies Code Section 82.002. The General Contractor purchased the trusses directly from Trussway, the manufacturer.

The Texas Products Liability Act gives the innocent seller of an allegedly defective product a statutory right to indemnity from the product's manufacturer. More specifically, the Act states: 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 misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable. The purpose of section 82.002 is to protect innocent sellers by assigning responsibility for the burden of product-liability litigation to product manufacturers. While the scope of a manufacturer's duty to indemnify is broad, that duty is owed only to sellers of the manufacturer's product, and being a seller is a necessary prerequisite to maintaining a claim. The Act defines "seller" 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. In this case, the General Contractor (Centerpoint) contended that it is a "seller" of Trussway's trusses, and therefore entitled to indemnity. The sole issue before the Texas Supreme Court was whether the General Contractor of the apartment complex qualified as a truss seller under Chapter 82 of the Texas Civil Practice & Remedies Code.

In evaluating the General Contractor's seller status, the Texas Supreme Court examined whether Centerpoint was "engaged in the business of" selling trusses. The court held that one is not "engaged in the business of" selling a product if providing that product is incidental to selling services. Consequently, the court determined that Centerpoint's "sale" of trusses was incidental to its contract to provide the services necessary to construct the apartment building. The court noted that this conclusion is consistent with the way the trusses were priced in the contract. The General Contractor did not set prices on the trusses to achieve a gain or profit; it was effectively reimbursed for the cost of materials that were necessary to complete construction. Although the quantity of different materials used in the construction is not dispositive, the fact that Centerpoint used innumerable building materials supports the conclusion that any single material was incidental to its provision of construction services.

In sum, the court held that a general contractor who is neither a retailer nor wholesaler of any particular product is not necessarily a “seller” of every material incorporated into the construction project for statutory-indemnity purposes. Whether a person or entity is “engaged in the business of” selling a service, selling a product, or selling both depends on the specific facts at issue, regardless of the person’s classification as a general contractor or subcontractor. In this case, evidence that the general contractor agreed to construct the entire building and to be reimbursed for the cost of the materials, including trusses, indicates that Centerpoint was selling construction services rather than trusses or any other building materials. While it is possible for a contractor to sell both products and services, in this case, any sale of trusses by Centerpoint was incidental to its contract to provide services to construct a building. Consequently, because Centerpoint was “engaged in the business of” providing a service, and its provision of trusses was incidental to that service, Centerpoint is not a “seller” under the Products Liability Act, and does not have a statutory right to indemnity.