

INSIGHTS

## Texas Supreme Court Narrows the Ability of General Contractors to Seek Chapter 82 Indemnity for Product Claims

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On June 17, the Texas Supreme Court further clarified the definition of the word "seller" in Chapter 82 of the Texas Civil Practice and Remedies Code (known as the Texas Products Liability Act), which was intended to provide the innocent reseller of an allegedly defective product a statutory right to indemnity from the product's manufacturer for losses arising out of a product liability action.<sup>[1]</sup> The Court specifically held that a general contractor is not "engaged in the business of" selling a product (as defined by the Act), and not entitled to indemnity, if it is only providing products that are incidental to the services it sells.<sup>[2]</sup>

### *Centerpoint Sought Indemnity from Trussway for Defective Trusses*

Centerpoint was hired as the general contractor to build the Beaumont Trace Apartments, and as part of its work, purchased trusses to be incorporated into the apartment buildings from Trussway.<sup>[3]</sup> The lawsuit arose when a worker on the project fell and was seriously injured because one of the trusses broke while he was walking across it.<sup>[4]</sup> After the worker filed suit against numerous parties, including Centerpoint and Trussway, and ultimately settled the claim, Centerpoint filed a cross-action against Trussway seeking indemnity under the Act.<sup>[5]</sup> The trial court ruled on cross-motions for summary judgment that Centerpoint was a "seller" under the Act as a matter of law, but the Beaumont Court of Appeals reversed, holding that Centerpoint did not fit the statutory definition of "seller" and could not seek indemnity.<sup>[6]</sup>

### *The Court's Previous Ruling in Fresh Coat Was Not Directly Applicable to Centerpoint*

On appeal, Centerpoint contended that the Beaumont Court of Appeals' decision conflicted with the Texas Supreme Court's decision in *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893 (Tex. 2010), where the Court held that Fresh Coat was a "seller" under the Act. Fresh Coat had entered into a contract with a homebuilder to install synthetic stucco on the exterior walls of several homes.<sup>[7]</sup> The Court relied in part on witness testimony that Fresh Coat was not only in the business of installing synthetic stucco, but was also in the business of selling synthetic stucco.<sup>[8]</sup> The Court held that the Act "anticipates that a product seller may also provide services" and that a company's installation services do not preclude it from also being a "seller."<sup>[9]</sup>

### *Would Centerpoint Be Subject to Product Liability Claims as a Defendant?*

In analyzing whether Centerpoint was a "seller" under the Act, the Court specifically examined case law from other jurisdictions and Texas authority related to whether a plaintiff could maintain a common law strict liability claim against a general contractor.<sup>[10]</sup> Specifically, if a general contractor could not be considered a seller as a defendant in a product liability lawsuit, how could it be a "seller" in relation to the Act?<sup>[11]</sup> The Court agreed with the reasoning that a company is not "engaged in the business of" selling a product if providing that product is "incidental" to selling the services.<sup>[12]</sup>

*Centerpoint's Business Was to Provide Construction Services, Not Any Particular Product*

The Court stated that Centerpoint was not a "seller" for indemnity purposes because Centerpoint was "selling construction services rather than trusses or other building materials" when it "agreed to undertake construction of the entire building and to be reimbursed for the cost of the materials (including the trusses)."<sup>[13]</sup> The Court reasoned that any sales of the trusses was incidental and held "that a general contractor who is neither a retailer nor a wholesale distributor of any particular product is not necessarily a seller of every material incorporated into its construction projects for statutory indemnity purposes."<sup>[14]</sup>

The holding in *Centerpoint* disavows the common belief in the industry, based on *Fresh Coat*, that contractors are entitled to indemnity under the Act. It instead teaches that each situation involving a general contractor must be evaluated on a case by case basis to determine if the products at issue were merely incidental to the contractor's business.

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<sup>[1]</sup> *Centerpoint Builders GP, LLC and Centerpoint Builders, Ltd. v. Trussway, Ltd.*, No. 14-0650, slip op. (Tex. June 17, 2016), available at <http://www.txcourts.gov/media/1395917/140650.pdf>.

<sup>[2]</sup> *Id.* at 13.

<sup>[3]</sup> *Id.* at 2.

<sup>[4]</sup> *Id.*

<sup>[5]</sup> *Id.*

<sup>[6]</sup> *Id.* at 3.

<sup>[7]</sup> See *Fresh Coat*, 318 S.W.3d at 895.

<sup>[8]</sup> *Id.* at 899.

<sup>[9]</sup> *Id.*

<sup>[10]</sup> *Centerpoint*, at 10-11.

<sup>[11]</sup> The Court specifically commented that "[o]ddly, by arguing that it is a seller for statutory –indemnity purposes, Centerpoint is essentially conceding that it would be a seller for purposes of a strict liability claim brought by an injured party." *Id.* at 10.

[\[12\]](#) *Id.* at 12.

[\[13\]](#) *Id.* at 13.

[\[14\]](#) *Id.*