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Supreme Court of Texas.
Owens and Minor, Inc. and Owens and Minor Medical, Inc., Appellants,
v.
Ansell Healthcare Products, Inc. and Becton, Dickinson and Company, Appellees.
No. 06-0322.

March 28, 2008.

Appearances:
Robert F. Redmond, Jr., Richmond, VA, for appellant.
Mike A. Hatchell, Locke Liddell & Sapp LLP, Austin, Texas, for appellees.
Barry M. Epstein, Sills, Cummis, Epstein, & Gross, Dallas, TX, for appellees.

Before:

Scott A. Brister, Phil Johnson, Dale Wainwright, Nathan L. Hecht, Paul W. Green, David M. Medina, Harriet O'Neill, Don R. Willett, Wallace B. Jefferson, Supreme Court Justices.

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JUDGE: The Court is ready to hear argument in 06-0322. Owens & Minor, Inc., Owens & Minor Medical, Inc. versus Ansell Healthcare Products and Becton, Dickinson.
COURT MARSHALL: May it please the Court. Mr. Redmond will presents the argument from the appellant, Ansell Healthcare Products.

ORAL ARGUMENT OF ROBERT F. REDMOND ON BEHALF OF THE PETITIONER

MR. REDMOND: May it please the Court. My name is Bob Redmond. I'm honored to represent Owens & Minor in this matter. We respect from the request of this Court respond to the Fifth Circuit as follows. He asked that the Court state that the manufacturer of the allegedly defective product was an independent duty to defend, indemnify and hold harmless and innocent seller of the allegedly defective product. And that the manufacturers can receive contribution with the other statutory manufacturers. I think that this case addresses three important things which I like to cover this morning.
JUDGE: Have you seen the Ceiling medical case that -
MR. REDMOND: We have, your Honor.
JUDGE: - that was put up here this morning?

MR. REDMOND: We have, your Honor. And actually Ceiling, we think ties into one of the points I'd like to make. And that is that the duty to indemnify was triggered by the injured claimant pleading and the scope of that duty is set by the injured claimants pleading. And I'd like to get to that in just a moment but the other two points I'd like to cover on; number one, the most important point is that the purpose of Section 82.002 is to protect innocent sellers in the products liability actions by signing all cause of that part liability litigation to the manufacturers, the next stated by this Court are these three similar cases. There's also stated in the plain language of the, of the statute it'self [inaudible] District; the second point, is that the statutory duty under Section 82.002, is the duty of-- by the manufacturers to the seller and not to the product.

That's the analytical point that we think the Federal District Court missed when it incorporate this case; and the last point which I've already discussed is that the timing and scope of the indemnity allegation is set and triggered by the injured claimant's plead. Just in the first point as to the purpose, this Court has stated the legislative purpose of 82.002, at three separate times. First in meritorious, this Court stated that the legislative purpose was to asked the cause of product litigation from the innocent seller to the product manufacturers. Two years later -

JUDGE: But what, what -

MR. REDMOND: - this case stated ...

JUDGE: - what we did have in mind in this situation for the circuit would certified question.

MR. REDMOND: That's correct, your Honor. But I think that principle is what's important. And that's why I believe that the Court and this circuit certified this question. To carry through the principle from a situation as Fitzgerald where is-- where the manufacturer sought a duty to indemnify it's seller who did not distribute the product.

JUDGE: But it's not quite another things that say a manufacturers should indemnify the seller for all the other things.

MR. REDMOND: Well, your Honor, I think, that really goes to the third point which is that, you have to look to the petition. The injured claimant's plea. And in this case, the injured claimants pleading broadly alleged product liability claim against Owens & Minor for distributing latex gloves and broadly alleged industry wide out nations against the manufacturers of those gloves. So that the issue then is when does a duty trigger. The principle that the duty triggers on the injured claimants pleading is a principle that is appropriate and then applies in this case and ...

JUDGE: In deed that they alleged 13 manufacturers were liable. Right?

MR. REDMOND: Your Honor, they ...

JUDGE Then you'd picked up a few of those who suit for indemnity.

MR. REDMOND: That's not quite correct, your Honor. And, and the reason is this; first of that the, quote, 13 manufacturers is 13 sellers of gloves. They included imports like Micro Plus. They included reassemblers or packagers like Med line. They included certain companies for Owens & Minor did not have a historical relationship and in the Fitzgerald dissent and one of the courses of the dissent was that the distributor could, could sue a product-- a manufacture whose product, they never sold. So we interpreted that as a limitation of the right to sue certain manufacturers, in fact ...

JUDGE: Counsel, but you also think you could have sue anyone of

them and collect against anyone of them.

MR. REDMOND: We, your Honor, we believe that we can sue any manufacturer for who we had in relationship before the lawsuit and could collect because of duty is trigger on the injured claimant's plea. We believe that that is, in fact, the case because the reason that it so is because the language used by the legislature when it work to statute shall indemnifying all harmless puts the burden on the manufacturers to assume all cost, that's the phrase whole promise -

JUDGE: So ...

MR. REDMOND: - according to-- I'm sorry, go ahead.

JUDGE: So manufacturer has to assume all risk on a product that is could be-- for example, this is a tissue paper. People may know that is clean actually if you manufactured tissue paper and somehow it's defective and maybe have some Asbestos fiber in it. Every manufacturer over that has to respond to that request for indemnification when the plaintiff's pleading's aren't clear as to which manufacturers product may have cause that injury?

MR. REDMOND: Well, your Honor, I believe, that, that is correct. If, if the plaintiff's pleading's alleged broad industry wide allegations that are just seller of that product it Owens & Minor sold cleanex, for example. And so the-- and other brand, it could, it could go and ask indemnification and nothing have to ask under the, under the statute a duty to indemnify has triggered by the plaintiff's pleading and the joiner of seller as a defendant. And, and this case, we had Beckon Dickinson and Ansell were already name defendants include, so they had statutory notice. And when Owens & Minors was served with that petition, that do the trigger. We technically, didn't have to asked but that's, that curious trigger at that point and as independent duty as to each manufacturer.

JUDGE: Are their products exactly the same or ...

MR. REDMOND: In the way the differences. The way the petition was alleged is that, that latex gloves are defective. The petition that mis-burden file in this case did not segregate any manufacturer's product from any other manufacturers product.

JUDGE: But in fact, are they?

MR. REDMOND: They are-- it, it-- the plaintiff's did not alleged. The plaintiffs alleged that the, that the causative agent was latex proteins. Now, some of the manufacturers in, in various cases in-- or in discovering argued that their gloves had few related [inaudible] and others. But all latex gloves, all natural of the latex gloves have proteins and the plaintiff's allegations were that these proteins are what cause this type one systemic allergy. So to, to that extent, it is an analogous to Asbestos and frankly that the-- with the plaintiff's prosecuted this plaintiff's was very similar to Asbestos claims. Understood why an allegations against distributors, importers, all sellers and manufacturers. Without segregating any particular brand now, based on work places exposure very similar to Asbestos litigation as, as has been prosecuted in Texas and throughout the country. These are, are broad based industry wide claims, Owens & Minor is an innocent seller that's undisputed fact on this case, Owens & Minor.

First of, when it, when it did what it's job was to do simply moving seal packages from a warehouse to a hospital, typically in sealed palace, so we really had no action whatsoever on the product it'self. But in this case, it was in more of an innocent seller because Owens & Minor did not distribute any gloves to any of the plaintiff's Burden work sales. That's in contrast for example, to Ansell, were Ms. Burden specifically cited Ansell gloves as gloves that she used and

that's in the record at 839, 840 and 844. But Owens & Minor of innocent seller under this Court's jurisprudence, an innocent seller is entitled to reimbursement of all costs. That's in the Meritory case, all cost means everything, I mean, that means if the duties is trigger at the time of the petition the duty cannot be segregated, parcel about that provided the duty is held from the first day Owens & Minor was serve with that complaint or the petition until the Owens & Minor is dismissed by the plaintiff of all liability. Even then, Owens & Minor, because it did not continue it's defense from the manufacturers, Owens & Minor had to put-- seek out the manufacturers and obtain indemnification. And in, in fact, did make settlements with the three manufacturers. The remaining two here Ansell and BD, did not so.

JUDGE: The only exception to this blanket indemnity is lost caused by the sellers [inaudible] -

MR. REDMOND: That -

JUDGE: - and that's it.

MR. REDMOND: - that is correct your Honor. And, and that, that stated by this Court both in Meritor and recently in Genamers Corporation versus Hodiberg Chevrolet case. The court stated that the only way the manufacturer can escape the duty to indemnify which is to prove that the innocent seller is independently negligent. That's the one-- a escape so to speak. Although, the court didn't make an important distinction in Hooderveg and that is that allegations that are not fairly raised in the plaintiff's petition are not covered by the duty to defend. And if, if, if there is specific allegation that is not raised, then the manufacturer doesn't have that duty. That goes back to the third point, that is that the metes inbounds of the duty to defend are set by the plaintiff's petition.

JUDGE: Have you address this-- the Ceiling case here. I didn't ear response.

MR. REDMOND: I, I, I'd like to addressed that right now your Honor, ' cause it's, it's, I think, it ties in well their point. In the Ceiling case, Ceiling was a seller of a medical device. That device was a combination of a walker and the platform. A person or plaintiff Bysa sue Ceiling, the Walker Manufacturer indicator in the Platform Manufacturer grandfield. At, at trial, at the fourth trial and that no evidence summary judgment motion, a Walker Manufacturer sought summary judgment with no evidence motion against the plaintiff to show that the walker was not defective. At that time, Ceiling the distributor brought up 82.02 claim against the Walker Manufacturer. The Walker Manufacturer prevailed on this notice on summary judgment motion were throughout the claim against the Walker Manufacturer.

Bysa then amended his petition, we move all allegations whatsoever, against the Walker Manufacturer and continued forward only unexplained against the Platform Manufacturer and the sellers, Ceiling. What significant about the Ceiling case is that, that Eastern Court of Appeal said, "That the duty to indemnify that distributor was triggered on plaintiff Byza's petition. So the duty triggered as soon as Ceiling assert with that petition that alleged the Walker has defective." The duty continued even after the Court enter summary judgment in favor of the Walker Manufacturer and only terminated when the petition was amended. So Ceiling is a perfect example of why the plaintiff's petition established that the scope of the duty to defend. In other words, access the boundary to the duty to defend.

JUDGE: Okay. What is the-- what the duty to defend be different is that what this case is seems, seems on point but it also my reading involved with-- could be a component part or could be a sub-product

ancillary to the main product that was distributed. Does this rule of indemnification applied to a manufacture of a, of any product that also contains components or manufactured by another company?

MR. REDMOND: Well, I, I think that's correct, your Honor. And that, that really ties into the general Motor's Corporation case. If the plaintiff's petition fairly raises an allegation against the component product whether by name or by description then that is covered by the duty to defend. And the duty to defend would applied both to the, to the finished product manufactured and to the component manufactured.

In this case, and the Ceiling case as, as I read the, the case, it sounded as if the plaintiff brought the claim against the combination product. Two separate products, the Walker and the Platform and then when he amended his petition you can leave that all references whatsoever to the Walker and only proceed and forward in the Platform. So again, it ties in to the fact that plaintiff's petition establishes the boundaries of the duty to defend. And in this case, the plaintiff's petition makes broad based industry wide allegations against the sellers and manufacturers, whole sellers and importers of latex gloves.

Therefore, under-- in the-- this Court's jurisprudence, the duty to defend was triggered on Owens & Minor was served with [inaudible] burdens petition. That duty continued on until Owens & Minor was dismissed from that case. Ansell would be the-- had the duty to defend that was triggered as soon as Owens & Minor served and that duty continued throughout. They did not assume that duty and as a result, the second part of the statute continued to play and that is they have to, have to reimburse Owens & Minor for it's reasonable defense facts. As this Court probably aware these facts were all played out and before trial in the-- in another case called the Decomocated perkily has been decided at Sixth Court of Appeals in some petition for review in this case. And in that case the, the petition was basically have provided copy and soon they do embarrassing the defense.

In that case, the trial court at Texarkana had a bench trial in determine the reasonableness and necessity between this and awarded Owens & Minor of judgment the $351,000. And the reason, the reason that they-- this two district cases are important is because it, it, it sets the issues squarely before this Court of whether in a, whether the plaintiff's petition is what sets the scope of the duty to defend or whether the, the duty to defend can be divided up, parts of that of being addressed as, as the federal district court in this case felt that the duty could be address simply by the manufacturer defending it'self. But the federal district court held in this case is that a manufacturers du-- defends of it's own product implicitly defends the distributor.

And unfortunately, what that does is simply removes the statute from the, from, from the, the law all together. At common law all the manufacturers duty was, was to defend it's own product. That's what the federal district court held in this case. Were as this Court has stated expressly several times. When in [inaudible] that 82.002 is a new and distinct statutory duty, that is in addition to and on top of the common law. And in fact, that's clear right from the language of the statute, the common-- and this Court have said, "The common law shots a little like on the duties under 82.002." And the Dallas Court of Appeals said it perhaps, more colloquy it said that 82.002 turns the common law on it'self. I see my time's up, I-- on behalf of-- if there's any questions, please?

JUDGE: Any further questions? Thank you, Counsel. The Court is

ready to hear argument from the appellee.

COURT MARSHALL: May it please the Court. Mr. Hatchell and Mr. Epstein will represent the argument for the appellees. Mr. Hatchell will open the first attendance.

ORAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF THE RESPONDENT

MR. HATCHELL: May it please the Court. I represent Ansell Healthcare Products for an appellee Mr. Epstein, Ansell and Becton, Dickinson. If Mrs. Burden or any point brought up your action against 10 manufacturers, 10 different counties in Texas or this 10 separate lawsuit's-- you know, in the same Court. We would be here today contending that Ansell and Becton, Dickinson had the obligation to intervene in those actions and offer a defense to manufacture of the products that they didn't make. And Owens & Minor does not address how the interpretation and application of 82.002. So radically changes to make us liable not only or defending claims against products we make but defending claims against product may bother manufactures. And we must submit that there is no difference and there should not be any difference. The problem comes from, I think, Owens & Minor failure to understand about 82.002 is all about.

Owens & Minor would tell you that it's an indemnity statute and then at the end of the road, I guess, it ends. But what statute really is, is a defend or indemnify statute. The primary goal, if you look at 82.003 in conjunction with 82.002, is to get the innocent, truly innocent seller out of the mixed as soon as possible. And the way that is going is by giving manufacturers notice of the sue or they require of it. They come in, they defend their product and they get a summary judgment in favor of, of the distributor and perhaps, they settle and their out of the case. Well, the primary object is not the-- then the penalty is in-- is indemnity, if you don't do that then you're obligated to indemnify.

Well, the purpose of the act is just around us under in this case because we can do everything the statute wants us to do. We could come in, we can alter to defend our product. We can get a summary judgment on behalf of Owens & Minor. We can even settle our portion of the action and you would think we would able to go home Scott free. But under Owens & Minor's interpretation, we are stuck there for the rest of the litigation for however many years it takes in reliable for all the defense cause were active against or against 10 manufacturer or about 10 manufacturers or we have to come in and actually offer to take over the defensive products that are competing with us for whose preperotarian information we cannot get, so that's number one.

JUDGE: Under, under Fitzgerald, you agree that even though Ms. Burden didn't used perhaps your products-- affected products, you still have to defend Owens against her charges then -

MR. HATCHELL: No, no question –

JUDGE: - these are all defective.

MR. HATCHELL: - no question if that's the case and from a policy stand point, I can accept that. I, I was Counsel in the, the Heritage case which was partially overruled in that case but I think, from policy stand point occurred is outside of the range. So number one, I say, the purpose of the act is run to [inaudible]. Number two, I say, the structure of the act supports our position and it's contrary to

Owens & Minor's position. Then in the structure created that events, there must be under the definition of manufacturer. A released of a product into the stream of commerce had do not owe indemnity. Even if I'm the defendant in the case, if I would not released the product into the stream of commerce. And the second thing is that, the indemnity must inhere in a product liability action. So there must be an allegation according to the specific terms of 82.002, that my product is defective and I released it into the stream of commerce.

When you read those two together as-- unless that Justice Medina, I think, this even Court did do and, and did do very brilliantly, I think. That limit's the indemnity obligation to one claim against one manufacturer that the a late-- release of one product. Well, what is Owens & Minor said? That we're, we-- we're obligated to do in this case. They say that we are obligated to defend claims against products that we did not release into the, into the chain of commerce-- into the stream of commerce. And I think it that used [inaudible] sculpture of, of the act at your record. And the third thing that we say is that Owens & Minor's position in this case leads to very absurd results.

I think that this Court has come to the lift of the cut on at least two occasion in saying that the situation that we had here today is an observed result that we cannot attribute to be, to be the intent of the legislature. The first occurred in the Fitzgerald case, which was a factual decision and just as Owen's dissent in that case throughout the logic that our interpretation of 82.002 requires manufacturers to defend all of them back to it. I mean, what would say that the seller could, could claim indemnity from all manufacturers. And in rebutting that Justice Gonzales says, "our construction, I said, our construction of the plain language of Section 82.002 must avoid absurd results, if the language will allow." Only manufacturers of a product alleged by a plaintiff to it been defective or subject to a claim of indemnity. There is no allegation in this case that we have to add into the stream of commerce. Any glove manufactured by any others, other than our own.

So I think it what Justice Gonzales is doing in Fitzgerald was essentially anticipating the case that you have today in saying, "That's an absurd result." they didn't sue multiple manufacturers in that case, so we don't reached the issue but it really absurd to make the contention. And then, I think, Mr. Justice Hecht comes extremely close to our situation again and Hodiberg speaking for this Court. When he says very simply, "The claimant's pleadings must fairly alleged and defect in the component it'self, not merely a defect in the sellers product of which the component is apart."

Now, we're not dealing with components in this case, but in my judgment substantively, there is no difference. We have not been alleged to have released a defective product by Becton, Dickinson or any other manufacturer into the stream of commerce. Submit and I sub-- I-- that the Court again, in Hodiberg which, I think, and they lay almost on top of this case was clearly speak into this situation and putting orders and offenses around the indemnity obligation in the way that I have said.

Let me give you-- I know that my good friend and colleague, Mr. Epstein is going to talked to me about the consequences because he lives this on the daily basis. But consider two very drastic consequences from Owens & Minor position in this case.

The first, is join and severability under their interpretation again, I could come in, I could defend my product, I could then acclaims against my product. I can get my distributors out of the case

but what happens if I do that in the litigation goes on for 10 more years as the famous toxic glove case and it's [inaudible] did. I had to stand in the wings and wait my turn to pay all the defense cause, rocked up against every other manufacturer and if they had, had for hundreds of millions of dollars have injunct the ancillary liable for that and yet I have done everything the statute request me to do, absurd result, number one. Absurd result number two is forcing, again, remember that this is a statute that wants me to come in and defend. It forces me to come in and say, "Becton, Dickinson have taken-over the defense of your gloves and give me all your preacular information." That in my judgment is a business disaster that the legislature simply do not to understood.

JUDGE: Does a decision in this case decide the case who have reasonable?

MR. HATCHELL: Yes, in my judgment, it does. There are more facts because the way the cases were done. This is a bear, they're bound to summary judgment but by the way does bring it one of your questions, your Honor? It was or not identical. And in fact, the difference is do play out and Mr. Epstein is a little more familiar with that, but, but the differences are very, very important and they are primary reasons who have some distributive [inaudible] and distributive similars and not others because powders in amateur levels. And I think is not-- my time is expired. I don't know with [inaudible] my co-counsel.

JUDGE: Thank you, Counsel. We'll hear from Mr. Epstein.

MR. EPSTEIN: May it please the Court. As Mr. Hatchell said, I've been in this cases for about nine years, so even the practical consequences of what Owens & Minor's, Owens & Minor has ask for a strike in the very close to the heart.

JUDGE: Well, how, how are this gloves different and how do you handle this type of claims over the last nine years?

MR. EPSTEIN: And actually were the latex gloves became an essential health product because of the blood-born-- born diseases that it prevents. AIDS would have you. It protect both the physician and the patient because these things run both ways. Many, many manufacturers got into the business producing this gloves and they differ all-over the place. They differ in the manufacturing techniques. They differ on how they washed on, how they prepare them, it differ in the thickness, it differ in the tensile strength that is how's it good feel. For example, if you have a gloves that you using for the phoenix surgery has to be thick because you dealing with bones, if you using it for microsurgery you have to have very thin -

JUDGE: So how's it -

MR. EPSTEIN: - stencils and ...

JUDGE: - how does the consumer are able to detect-- determine that?

MR. EPSTEIN: The consumer doesn't determined that, the-- what, what each manufacturer puts a different glove into the stream of commerce and ...

JUDGE: Does each one have latex protein, that was the basis of the plaintiff suit?

MR. EIPSTEIN: Each one has latex protein but not all of them have enough latex protein that they're allergenic.

JUDGE: Which is the same in sort of argument this compared those to the Asbestos case. That's why it's difficult to tell exposure levels to which products and that therefore, these over [inaudible] 202 scheme next particular sense in that situation.

MR. EPSTEIN: Well, it actually has nothing to do frankly with the

allergenic level of the, of the various gloves because each-- in the complaint in the petition, is alleged that they were that ways to reduce the allergenic level, that some manufacturers did and some manufacturers did not. There are much-- they are differences is not-- all the Asbestos is not the same as all alle-- all protein. The protein can be reduce so that is not allergenic and not harmful. They're really are no comparison than Asbestos cases with, with all due respect, your Honor, I really should not be an analogize to this. What really is strick ...

JUDGE: But-- well, I guess you don't realize that until you get much beyond the pleadings and much further down the road.

MR. EPSTEIN: Well, I, I understand that but on the other hand, the pleadings themselves recognize differences. The pleadings, for example, took in, this is in the complaint, in paragraph 53 about safe rule alternative designs existed which reduce or eliminated the, the ultimate uses exposure to harmful ingredients. So it, it implicate and it talks about each manufacturers throughout here. So it implicates the differences and these are the defenses and their much different from manufacture to manufacturer based upon the petition it'self. So the petition doesn't go and say, "Does a uniform industry problem much, much to the contract," it says, the opposite. The basic premise of our argument on 82.02 is that as written, you Honors. It can be apply very easily to multiple manufacturers it has been. What happens under 82.02, if the innocent seller comes to you or if your name on the petition, you go to that seller and say, "We will defend and indemnify you pursuant to our obligation on the 82.02".

And this cases, every manufacturer especially in the situation we'll have been dealing with all of this all them for a long time and dealt with them on a commercial basis. Went to on it and said, "We will defend and indemnify you." As a matter of fact in, in most cases that I'm aware of, certainly, BD's and Ansell's case, we cover them under our own insurance policy under a vendors endorsement. That vendors endorsement which was after all over the country, not only in Texas where we have the statute, provided that almost like the statute that the vendors endorsement covered on all an [inaudible] for any product-- any liability they might have with the exception of their own negligence, pretty much like 82.02.

So that the-- in this commercial setting, they simply was no need. It was not necessary for Owen to pick or select two manufacturers at the whole bunch and say, "You're responsible for our entire defense for stranger manufacturers products all we have absolutely in the whole ability to defend stranger manufacturers products." So this is the, the issue that is faced in an issue that is, it is, I think, really unnecessary for this Court to have, to have dealt with if only that just follow the procedures set forth by the law. In Fitzgerald ...

JUDGE: Oh if you had insurance policy that cover them -

MR. EPSTEIN: Right.

JUDGE: - for products liability claims alleging that one of your products was defective, would that policy not defend them as long as you were in the lawsuit?

MR. EPSTEIN: Sure. It defends that it. And we otherwise, had ...

JUDGE: So what's the difference between that policy in what the statute says?

MR. EPSTEIN: I don't know any difference, I mean they're, they're-- they duplicated each other in a sense, Owen has it's own insurance. -

JUDGE: So -

MR. EPSTEIN: - The fact, the fact ...

JUDGE: - but what I'm saying is if, if the policy would cover them regardless of the number of co-defendant, manufacturers, why does the statute not be the same?

MR. EPSTEIN: Well, it covers them only for a [inaudible].

JUDGE: Only -

MR. EPSTEIN: It doesn't ...

JUDGE: - oh, only for your policy ...

MR. EPSTEIN: Yes. We have a policy that ...

JUDGE: But the insurance -

MR. EPSTEIN: Right, defendant's ...

JUDGE: - which he says, only for your problem -

MR. EPSTEIN: Oh, sure.

JUDGE: - the statute doesn't say that, doesn't it?

MR. EPSTEIN: Well, the statute of Court-- I, I believe the statute says it very firmly and I think with Gerland says, because the statutes says as Mr. Hatchell's point it out. "The only products that we are responsible to indemnify for, a products that we put in the stream of commerce".

JUDGE: Does your insurance policy specifically say that it covers them only for allegations related to your product?

MR. EPSTEIN: Yes, yes, yes, your Honor. As a matter of fact, just imagine if in a situation like this which is uncontrolled we try to buy insurance on a commercial basis to ensure for any product they might sell that happened to be sue on any given case you could not get such insurance that they could never figure out of what kind of premium to charge and you've-- it's just not available on the market so, so this has, has a very practical application.

In Fritzgerald, this Court said, '7FOn it's phase, the statute requires a manufacturer allegedly produced the defective product to identify certain sellers for reasonable products liability litigation course except for those due for the sellers own fault.'7D So it was the manufacturer allegedly produced the defective product, they complied out of the statute because the statute defines a manufacturer as well he produced the product. In fact, there is, is no-- Becton, Dickinson is not a manufacturer or statutory 82.002 manufacturer vis-a-vis and sells product. We do not qualifying this statute and the, and the requirement to indemnify never arises because we did not put theirs product on the stream of commerce.

And then move to your question also, your Honor, in, in Fitzgerald, this Court said, "Viewed in context 82.002 is part of a scheme to protect manufacturers as well as sellers." First, no one assure that the relatively small seller did not fair litigation involving problems then it not really it's control. Second, it established uniform rules of liability so that manufacturers could make informed business decisions and plaintiffs could understand their rights. One of those important business decision is getting insurance for the seller that sells your product. That what's the vendors endorsement does, they common place and that's what we have. As a matter of fact, in the record, I think, in the, in the McCabe case which has been cited too. The request came but we, we, we call your attention on our briefed and request came to us under the vendors endorsement, the request for covergen and the -

JUDGE: What's and would like to the vendors endorsement didn't kick-in otherwise, we probably wouldn't be here. What, what happens in the situation and I think, I ask this on the other side with the distributor products it's very generic, I don't know if this latex gloves -

MR. EPSTEIN: Right.

JUDGE: - are generic or not, I don't know the chemical make up. But you say they're different. The consumer doesn't know they're different and, and distributed to A, distri-- distributes products for every manufacturer of this glove in the entire world. And plaintiff doesn't know which product cause their illness and either does the distributor. Are the, are the manufacturers of the product on the hook to the entire case are-- is reserve?

MR. EPSTEIN: Well, you, you can't-- First, I'd like to answer the first comment. When you said, "The vendors endorsement do not kick-in otherwise, we wouldn't be here." That isn't exactly what happened. What happened is Owens did not let the vendors endorsement kick-in because rather than go with the vendors endorsement or with our agreements, the defendant under 82.002 or, or similar rules, they said, '7FDefend us not only for your own product, defend us for everybody's product even stranger products.'7D Products that are not covered under the vendors endorsement or under 82.002. In effect, they prevented our exercise of our desire to defend and indemnify them. One, what was repeated over and over again by Ansell, by ourselves but all of the manufacturers. This is not-- this was not something that came to us out of the blue that we did not understand. This is sophisticated companies doing business with the very sophisticated companies. This is a ...

JUDGE: Counsel your, your time has expired. You might want to -

MR. EPSTEIN: Oh, excuse me, I was answering the question [inaudible].

JUDGE: - you might want to answer this, this second question, second question about the vendor of-- for the world.

MR. EIPSTEIN: I, I frankly kicking my arms at around that question. I think we, we cannot, with all due respect, your Honor, understand how to defend anybody else except to ourselves. And so it, it is not a possibility under, under the, under the circumstances available to us, to go out and defend anybody but our own fight with it's own documents, it's own in-house witnesses, it's own a manufacturing techniques and everything else and understand that case. We just cannot unjustice defend them on, on any rational basis.

JUDGE: It does. Any further questions? Thank you Counsel.

MR. EPSTEIN: Thank you. Thank you for allowing me to -

REBUTTAL ARGUMENT OF ROBERT F. REDMOND ON BEHALF OF PETITIONER

MR. REDMOND: May it please the Court. If I may addressed first, Mr. Hatchell's hypothetical. He initially raised hypothetical 10 different lawsuit with 10 different manufacturers in this Becton, Dickinson and Ansell have to intervene in each one and of course, the answer is '7Fno,' 7D because the duty to indemnify has set by the plaintiff's petition. So in it-- in the lawsuit Owens & Minor and Johnson & Johnson are sue, Owens & Minor was entitled to indemnification from Johnson & Johnson. And that there be, of course, no reason protecting Becton, Dickinson and Ansell.

JUDGE: Do you think the duties to defend and the duties to indemnify are identical?

MR. REDMOND: Yes.

JUDGE: Well, and how do you address the concerned that you can end up with one manufacturer defending another manufacturers product?

MR. REDMOND: That first of, that is what we would have to do if they don't defend us. That's what we, as a distributor, have to do, if they do as they did in this case and not defend us. We have to-- because we distribute products by the many manufacturers. We have to defend that product through by curious liability and that is exactly why that 82.002 makes sense.

JUDGE: You've got a relationship with both of those. They don't-- these are competitors, they don't have relationship upon [inaudible] -

MR. REDMOND: Well ...

JUDGE: - or they better or not under the end at [inaudible].

MR. REDMOND: Well, yes and no, your Honor. The fact of the matter is that Becton Dickinson, Ansell were in the join manufacture group, we we're showing experts discovery as you can see from the Court conceived from all the letters that went back and forth, we were specifically told to wait.

JUDGE: Which they asked you to do too. They ask you, I mean, if you got 10 manufacturers and AZZ will represents you, so you've only got two left. Then what you need to do is not defend the whole case but let them do most of the case and just if they start pointing the finger at the two guys that are left then you have an attorney there to speak-up who say, "No," but you'd-- otherwise you end up just duplicating the stuff and unless everybody agrees on your terms you get a free lawyer and whoever you picked on has to pay it. Don't they?

MR. REDMOND: Well, not necessarily, it, it-- first, on the facts in this case in all the latex cases. Nobody ever stepped in and enter the appearance for Owens & Minor and to use, Justice Medina term, "The vendors endorsement never kicked-in," they, they did not enter an appearance for us, they did not answer the petition for us, they did not answer discoveries.

JUDGE: But he says that's because you all said, "Not just us for every-- but for everybody."

MR. REDMOND: Not necessarily your Honor, if, if, if the Court looks at to the letters that they wrote and one of the free conditions was that we would have to send them documentation that we distributed gloves to plaintiff's were it cites at the time he or she claimed to be expose. That's in point three of the letter at head, I think, record say 88. In any event, in the Burden case, we couldn't meet that condition because we didn't distribute any gloves for any manufacturer. We were in exactly the same position as Fitzgerald in the Fitzgerald case. We didn't distribute any gloves to the work sites, so how can we give Becton, Dickinson it's mandatory documentation that we distributed gloves to the plaintiff's work sites. That is why that, that's ...

JUDGE: So you would have dropped your agreement. You would have dropped your demand that they defend all of the, everything all the products.

MR. REDMOND: Well, in, in Texas, we think that they do all that. That's the duty ...

JUDGE: So you would not have dropped it?

MR. REDMOND: We would not in Texas. That's correct, your Honor, that the letter that Mr. Hatchell refers to didn't even address Texas.

JUDGE: So, so the effect, I mean, just to make, make it clear, let say as a whole, you as a whole to and prevails a motion for summary adjustment and it's completely out of the lawsuit and, and for good reason because they probably didn't have nothing to do with any injuries that were claim. They continue to have to pay defense cost and indemnify you throughout the litigation.

MR. REDMOND: That's correct and if ...

JUDGE: And is the-- aside from the term to the statute, where is the-- even if we look at that, what-- where's the [inaudible] from that?

MR. REDMOND: Well, two, two points, your Honor. First, first is what I considered with the much broader point and that is, that Owens and Minor is an innocent seller because all of those which distributes sealed products from the Becton, Dickinson truck to a hospital and it wait's on a warehouse for a couple of weeks one of the hospital decide to try to use it.

JUDGE: Okay.

MR. REDMOND: So the question is how fair is that, that Owens and Minor assumed in products liability litigation, that goes back to 1967 when in a McCasen-- Mukasey case where this Court determined that the distributors or by-carries liable can be sued in price liability litigation. So really that's the over arching issue of fairness, a legislature corrected that fundamental unfairness that a company like Owens & Minor is did nothing more than to keep a pallet of gloves in it's warehouse for three weeks can be sued in the Burden case and 20 other cases in Texas that correction is in 82.002, because it, it reverses the fields so to speak. It puts the duty on a manufacturer to come back and defend the distributor except in those instances where that, that seller committed independent motives, that is significant that the duty has to be trigger at the outset as this Court has held.

JUDGE: Is there anyway for a manufacturer defend it'self through insurance or other than defend the problem?

MR. REDMOND: Your Honor, that is never happened from this case such an Owens & Minor knows but not in a years from now and no manufacturers has ever [inaudible] of vendors endorsement. But Owens & Minors they, they simply addre-- raises same objections that they raised with respect to the statute. And that is the other manufacturers who, who will not defend, there is in terms of insurance there certainly is-- has to be some lay for the fact should be develop, that's, that's an area that I'm not completely familiar with but my understanding insurance is that you can arrange a policy however, you'd like.

And in this case, what we really talking about practically is one manufacturer stepping in and providing the defense or better yet, as Becton, Dickinson did in a hypodermic needle litigation, they got together with, with all the other manufacturers and appointed separate counsel for all the distributors. The manufacturers in hypodermic needle litigation, which by the way was pending in Texas at the same time as this litigation got together and decided to appoint one one set of lawyers for all the distributors.

JUDGE: I ask the other side, do you agree that this, this case decides for [inaudible]?

MR. REDMOND: Everything except the attorney's fees. Correct, your Honor. That, that is correct.

JUDGE: Any further questions? Thank you, Mr. Redmond. That includes the argument and all address this morning and the Court-- and Marshall will now adjourn.

COURT ATTENDANT: All rise. Oyez, oyez, oyez, the Honorable of the Supreme Court [inaudible].

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