Sellers Beware

A Court Decision Increases the Reinstatement Odds

By Joseph D. D. Sweeny

Under Illinois law, all entities in the chain of distribution for an allegedly defective product are subject to strict liability in tort. However, Illinois—similar to 26 other states—has long recognized a "seller's exception" to strict-liability product liability actions. This exception, found at 735 Ill. Comp. Stat. Ann. 5/2-621, provides that a nonmanufacturing defendant, such as a retailer or distributor, whose sole basis of liability is its role as a member of the distributive chain of an allegedly defective product, may be dismissed from the litigation if it can certify the correct identity of the product's manufacturer. The statute also contains a key exception to this general rule: subsequent to a nonmanufacturer defendant's dismissal from a case, a plaintiff may move to reinstate it if the manufacturer is unable to satisfy any plaintiff's judgment. This prevents the seller's exception from producing worthless judgments and keeps the burden of loss due to a product found to be defective on those who placed the product in the stream of commerce.

The September 2017 decision *Cassidy v. China Vitamins*, LLC, 2017 IL App (1st) 160933, 89 N.E.3d 944, clarified and expanded the grounds on which a plaintiff can reinstate a nonmanufacturing defendant. In *Cassidy*, the plaintiff filed a product liability action related to an allegedly defective, flexible bulk container. The trial court dismissed the strict *and* negligent product liability counts against the nonmanufacturer under Section 2-621, after the defendant identified a codefendant as the product manufacturer. After the nonmanufacturer's dismissal, the plaintiff was unable to enforce its default judgment against the manufacturer, so he moved to reinstate the nonmanufacturer. The trial court denied the plaintiff's motion, holding that the plaintiff had failed to meet the conditions for reinstatement under Section 2-621(b). On appeal, the Illinois Appellate Court, First District, reversed the trial court's denial of the plaintiff's reinstatement motion. In doing so, the *Cassidy* court rejected the then-standing analysis of Section 2-621 in *Chraca v. U.S. Battery Manufacturing Co.,* 2014 IL App (1st) 132325, ¶ 22, 388 Ill. Dec. 275, 24 N.E.3d 183.

In *Chraca*, the Illinois Appellate Court, First District, held that a manufacturer is deemed "unable to satisfy any judgment" under Section 2-621 only if the manufacturer is (1) bankrupt or (2) nonexistent. Because the plaintiff in *Chraca* failed to present evidence of the financial viability of the manufacturer, the court in that case found that the plaintiff had not met his burden under Section 2-621's reinstatement mechanism. The *Cassidy* court disagreed with that criteria and held that *Chraca's* definition of "unable to satisfy any judgment" was too narrow, leaving the plaintiff unable to reinstate a nonmanufacturing defendant in too few situations. In taking on its own analysis of the "unable to satisfy any judgment" standard, the *Cassidy* court read nothing in Section 2-621 that limited its application to *only* bankrupt or nonexistent manufacturers. Rather, the court held that a plaintiff could also effect reinstatement of a nonmanufacturer by showing that the manufacturer has no property, or does not own enough property, within the court's jurisdiction to satisfy the judgment.

While *Cassidy* did not hold that a previously dismissed nonmanufacturer would be reinstated anytime that a plaintiff merely has trouble collecting a judgment, *Cassidy* remains a plaintiff-friendly decision, providing additional grounds for nonmanufacturer reinstatement by expanding the definition of what constitutes "judgment proof." (The court acknowledged that there can be a significant difference between difficulty collecting a judgment and a defendant being judgment proof.)

Further, the *Cassidy* court made clear that Section 2-621 permits a nonmanufacturer's dismissal only for a claim of *strict* product liability. *Negligent* product liability claims are not subject to dismissal under Section 2-621.

Thus, nonmanufacturers, especially those that distribute products manufactured by foreign entities, now have a greater chance of being reinstated into litigation even in circumstances in which a product manufacturer is an existing, profitable entity if a plaintiff can show that the manufacturer meets *Cassidy*'s broadened definition of "judgment proof." In litigation involving international product manufacturers that might disregard judgments

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rendered in American state courts, the chance of a nonmanufacturer defendant's facing potential liability increases, despite the defendant not exercising control over the subject product.

Further, *Cassidy*'s emphasis on the wide discretion of state circuit courts to determine whether a manufacturer is "unable to satisfy any judgment" may lead to a pro-plaintiff leniency when there is trouble collecting a judgment from a manufacturer. Additionally, in light of *Cassidy's* confirmation that Section 2-621's seller exception does not apply to *negligent* product liability claims, plaintiffs are incentivized to plead negligence claims against nonmanufacturers, despite the true essence of these counts being *strict* product liability, to prevent the early exit of nonmanufacturing defendants, even when a manufacturer meets *Cassidy*'s definition of "judgment proof." FD