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Product Liability

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Sellers Beware: *Cassidy v. China Vitamins, LLC*

The Illinois Supreme Court recently revisited the "Seller's exception" to strict liability product actions found in 735 ILCS 5/2-621. That section provides that a non-manufacturing defendant, such as a retailer or distributor, may be dismissed from a strict liability action if the non-manufacturer can certify the correct identity of the product's manufacturer. The statute includes several exceptions which provide that a non-manufacturer may be reinstated in the action if a manufacturer is unable to satisfy a plaintiff's judgment. Keeping a non-manufacturer in the case prevents worthless judgments and keeps the burden of a defective product on those within the stream of commerce.

Cassidy involved a products liability claim wherein a worker at a grain facility in Illinois was injured after a bulk container containing vitamins broke, causing a stacked bulk container to topple onto the worker. *Cassidy v. China Vitamins*, *LLC*, 2018 IL 122873, ¶ 5. The worker brought a strict product liability suit against China Vitamins, the seller of the vitamins. *Cassidy*, 2018 IL 122873, ¶ 5.

China Vitamins moved for dismissal from the suit in exchange for providing the name of the manufacturer of the container, Taihua Group Shanghai Taiwei Trading Company Limited (Taihua). *Id.* ¶¶ 6-8. The court granted the motion. *Id.* ¶ 8. A default judgment was entered against Taihua in an amount exceeding nine million dollars. *Id.*

For over a year however, plaintiff struggled to collect on the default judgment. *Id.* ¶ 9. Plaintiff issued a citation to discovery assets against the manufacturer that was quashed for lack of proper foreign service. Thereafter, plaintiff issued several third party citations to discover assets for the collection of default judgment. When all of those collection efforts failed, plaintiff filed a motion to reinstate the manufacturer under 735 ILCS 5/2-621(b). The record, however, did show that the manufacturer was still in operation with several subsidiaries in China and several other countries. *Cassidy*, 2018 IL 122873, ¶ 11. There was no evidence that the manufacturer was insolvent or judgment proof.

Plaintiff sought to rejoin China Vitamins to the action in order to create a source of recovery. *Id.* 9 ¶. Illinois law allows such actions under 735 ILCS 5/2-621, which provides a procedural framework for suit against manufacturers and sellers of goods in product liability actions.

The act provides first that in any product liability action against a defendant other than the manufacturer, the defendant is required to provide the identity of the manufacturer of the item at issue in the case. 735 ILCS 5/2-621(a). Once the identity has been verified, the seller is dismissed from the suit so that plaintiff may recover solely from the manufacturer. 735 ILCS 5/2-621(b).

However, the act only allows for reinstatement of the seller-defendant in one of five limited circumstances:

1. The manufacturer is protected by a statute of limitations defense;
2. The identity of the manufacturer is incorrect;
3. The manufacturer no longer exists, isn't subject to Illinois jurisdiction, or is not amenable to service of process;
4. The manufacturer is unable to satisfy any judgment as determined by the court;

5. The court determines that the manufacturer would not be able to satisfy a reasonable settlement or other agreement with the plaintiff. 735 ILCS 5/2-621(b)(1-5).

Because plaintiff was unable to collect from the manufacturer, plaintiff sought to reinstate China Vitamins under the fourth circumstance enumerated in the statute. *Cassidy*, 2018 IL 122873, ¶ 10.

State of the Law Before *Cassidy*

Prior to *Cassidy*, courts tended to take a relatively limited interpretation of what "unable to satisfy any judgment" meant. Typically, this was only allowed when the manufacturer was shown to be bankrupt or no longer in existence. The seminal case on the matter was *Chraca v. U.S. Battery Mfg. Co.*, 2014 IL App (1st) 132325. In *Chraca*, the plaintiff was unloading golf cart batteries sold by the defendant. *Chraca,* 2014 IL App (1st) 132325, ¶ 2. One of the straps on the batteries broke, causing injuries to the plaintiff's shoulder and neck. *Id.* The strap was manufactured in China. *Id.* ¶ 8. The battery distributor sought dismissal under 735 ILCS 5/2-621(a). *Chraca*, 2014 IL App 1st, 32325, ¶ 8. The court granted the motion, dismissing U.S. Battery from the action. *Id.* ¶ 11. The plaintiff subsequently sought to reinstate U.S. Battery as a defendant under 735 ILCS 5/2-621(b)(3) and (b)(4). *Chraca*, 2014 IL App (1st) 132325 ¶ 12. As evidence of the difficulty of collection, the plaintiff produced an affidavit from an attorney which stated that "there is no reasonable expectation of ever collecting a judgment against the Chinese company." *Id.*, ¶ 10.

The court refused to reinstate U.S. Battery on solvency grounds because the company must be bankrupt or nonexistent. *Id.* ¶ 24. It was insufficient for purposes of reinstatement that the plaintiff wouldn't be able to claim his judgment. It is worth noting that the suit against U.S. Battery met another exception, and was reinstated because the Chinese defendant was not amenable to service.

Cassidy and its Holding

Relying on *Chraca*, China Vitamins made a similar argument—that because the manufacturer was neither bankrupt nor nonexistent, their reinstatement under § 2-621(b)(4) was impossible under settled law. *Cassidy*, 2018 IL 122873, ¶ 15. In one case cited by the company, a manufacturer that was in bankruptcy proceedings was not bankrupt within the meaning of the statute. *Id.* ¶ 33. The plaintiff was unable to reinstate the bankrupting manufacturer until such a time as the proceedings were concluded. The Court rejected that position:

> Given the purpose underlying our strict product liability laws, it is more than reasonable to conclude that the legislature did not intend the phrase "unable to satisfy any judgment" in subsection (b)(4) to undermine an injured plaintiff's ability to obtain a full recovery by cutting off access to other viable sources unless the product's manufacturer is bankrupt or no longer in existence. Bankruptcy and business failure are conditions that are entirely outside the control of the injured plaintiff, and the policy considerations underlying this state's strict tort liability laws do not support such a cramped interpretation of the intentionally broad language in subsection (b)(4).

Id. ¶ 28.

The court ultimately held that reinstatement under section 2-621(b)(4) is not contingent on the manufacturer being bankrupt or nonexistent:

> We hold that reinstatement under section 2-621(b)(4) of a nonmanufacturer such as China Vitamins is not solely contingent on the manufacturer being bankrupt or nonexistent. If an injured strict product liability plaintiff can establish other circumstances that effectively bar recovery of the full measure of judgment damages awarded, a nonmanufacturer in the chain of distribution may be reinstated as a defendant under section 2-621(b)(4). That result harmonizes the plain language of section 2-621(b), when read in its entirety, the legislature's intent, and the public policies underlying the enactment of our strict product liability laws to create a cohesive and consistent statutory scheme.

Id. ¶ 40.

Thus, *Chraca* was overruled—rather than being required to show complete insolvency, a plaintiff in a strict liability suit must show "other circumstances that effectively bar recovery of the full measure of judgment damages awarded" to reinstate the distributor. *Id.*

In support of its holding, the court referred in large part to policy considerations. *Id.* ¶ 25-28. The court predominantly focused on loss-shifting. *Id.* While perhaps too grandiose to apply facially, the policy is relevant because it should put lower courts on notice as to what they should be considering when ruling on a product liability suit. As such, practitioners should note this probable line of analysis when litigating such issues.

In accordance with these ideas, the court remanded the decision back to the trial court to determine whether plaintiff had demonstrated that recovery was not possible. *Id.* ¶ 49.

Implications of the Change

As a preliminary matter, the court in *Cassidy* was careful to limit its holding to reinstatement actions. The newly-loosened *Cassidy* standard for insolvency of a defendant applies only when trying to reinstate a seller defendant in a products liability suit. However, practitioners of products liability law should still be aware of the change.

Cassidy will stand as a warning to sellers of consumer products: make sure your manufacturer is financially stable. Failure to work with a reputable manufacturer may result in de-facto indemnification against a seller of goods. This is especially true for large sellers who serve large groups of clients; if the manufacturer is able to avoid a judgment on the premise of insolvency (or, as was the case in *Cassidy*, to hide behind international barriers), the seller may face cataclysmic liability.

Cassidy will remind sellers and distributors of the importance of indemnification clauses when working with international manufacturers. If China Vitamins failed to require indemnity against Taihua, it made a ten million dollar mistake. Indemnification clauses serve as a strong burden-shifting device to allow liability to rest with the most culpable party—here, the manufacturer. Practitioners should strongly prefer these clauses when brokering a deal between a distributor in Illinois and an international manufacturer. In the absence of a strong and enforceable indemnity agreement, arguably, sellers and distributors have more exposure as a result of *Cassidy's* expansive interpretation of the Seller's exception.

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Finally, practitioners should advise distributors to require their manufacturers to maintain a commercial insurance policy in the United States. This will allow distributors to shift liability to the manufacturer, and subsequently, to their domestic insurance policy.

About the Authors

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