

# Illinois Distributor's Statute: Navigating the Litigation "Off Ramp" for Non-Manufacturer Defendants After *Cassidy v. China Vitamins LLC*

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## INTRODUCTION

In *Cassidy v. China Vitamins LLC*, 2017 IL App (1st) 160933 ("China Vitamins"), the First District Appellate Court made it lot harder for non-manufacturers to free themselves from litigation through the Illinois Distributor's statute (sometimes referred to as the "innocent seller's statute" or "seller's exception"). Under *China Vitamins'* new interpretation of the statute, a trial court now has discretion to reinstate a case against a non-manufacturer when a foreign manufacturer is able to pay, but chooses not to pay a judgment.

## WHAT IS THE "DISTRIBUTOR'S STATUTE"?

Strict product liability law generally imposes the same liability on everybody in the distribution chain. When our firm represents distributors, retailers, importers, brand licensors, and others who did not design, manufacture, or test the product (i.e., "non-manufacturers"), the non-manufacturers typically want to get themselves out of the case early. The strategy often includes the Illinois Distributor's Statute, 735 ILCS 5/2-621.<sup>1</sup>

The purpose of the Distributor's Statute is to allow non-manufacturer defendants, whose sole basis of liability is their role as a member of the distributive chain, to defer liability upstream to the ultimate alleged wrongdoer, the manufacturer. *Kellerman v. Crowe*, 119 Ill. 2d 111, 113 (1987); *Murphy v. Mancari's Chrysler Plymouth, Inc.*, 381 Ill. App. 3d 768, 775 (2008). It is meant to be a litigation "off ramp" for non-manufacturers.

## WHAT IS THE PROCEDURE FOR INVOKING THE DISTRIBUTOR'S STATUTE?

The Distributor's Statute only permits dismissal of a strict products liability action against a non-manufacturing defendant after the manufacturer has been identified and sued. 735 ILCS 5/2-621. In a product liability action based in part of strict product liability, The Distributor's Statute requires that a non-manufacturing defendant file an affidavit certifying the identity of the manufacturer. § 2-621(a).

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<sup>1</sup> The Distributor's Statute was amended by the Tort Reform Act, Public Act 89-7. However, in 1997, the Illinois Supreme Court in *Best v. Taylor* held the Tort Reform Act unconstitutional and void in its entirety. *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997). Accordingly, all references to the Distributor's Statute herein are to the version immediately pre-dating the Tort Reform Act, which is currently in effect.

Once the manufacturer is certified, the plaintiff is required to diligently sue the manufacturer and, once the manufacturer is sued, the court is required to dismiss any strict product liability claim against the non-manufacturer. § 2-621(b). Such dismissal must be granted unless plaintiff shows defendant: (1) exercised some significant control over the design and manufacture of the product or instructed or warned the manufacturer relative to the alleged defect in the product; (2) had actual knowledge of the defect in the product; or (3) created the defect. 735 ILCS 5/2-621(b), (c); *See also South Side Trust & Savings Bank of Peoria v. Mitsubishi Heavy Industries, Ltd.*, 401 Ill. App. 3d 424, 431 (2010). Consistent with these exceptions, the Distributor's Statute does not permit dismissal of negligence claims against a non-manufacturer. *See e.g., Link v. Venture Stores, Inc.*, 286 Ill. App. 3d 977 (1997).

## UNDER WHAT CONDITIONS CAN THE PLAINTIFF REINSTATE THE NON-MANUFACTURER AFTER DISMISSAL?

Unfortunately, the “off ramp” is not necessarily final for the non-manufacturer. A plaintiff can reinstate the non-manufacturer if, after dismissal, the manufacturer cannot be held accountable by the Court either because: (1) the applicable period of the statute of limitations or statute of repose bars the assertion of a strict liability in tort cause of action against the manufacturer; (2) the identity of the manufacturer given to the plaintiff by the certifying defendant was incorrect; (3) the manufacturer no longer exists, cannot be subject to the jurisdiction of the Illinois courts, or, despite due diligence, is not amenable to service of process; (4) “the manufacturer is unable to satisfy any judgment as determined by the court;” or (5) “the court determines that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with the plaintiff.” 735 ILCS 5/2-621(b)(1) to (b)(5). The purpose of this reinstatement mechanism is to ensure “that the burden of loss due to a defective or dangerous product remains on those who placed the product in the stream of commerce.” *Thomas v. Unique Food Equipment, Inc.*, 182 Ill. App. 3d 278, 282 (1989).

## THE CHINA VITAMINS INTERPRETATION -- A COURT CAN NOW DECLARE THAT A MANUFACTURER WHO REFUSES TO PAY A JUDGMENT IS “UNABLE TO PAY” UNDER §621(b)4

The plain language of the Illinois Distributor's statute allows reinstatement when a manufacturer “is unable to pay”, but does not appear to allow reinstatement of a non-manufacturer defendant who simply chooses not to pay and avoids collection. This is exactly how cases prior to *China Vitamins* interpreted Illinois law.

In *Chraca v. U.S. Battery Manufacturing Co.*, 2014 IL App (1st) 132325 (“Chraca”), the plaintiff was injured when a flexible black strap that he was using while unpacking a shipment of golf cart batteries gave way, wrenching his shoulders and neck. *Id.* ¶12. The plaintiff filed a strict-liability action against his employer. *Id.* ¶¶12–3. After certifying a Chinese company as the manufacturer, the employer moved for dismissal from the suit. Although the plaintiff objected, arguing that plaintiff would ultimately be unable to collect on the default judgment from the Chinese company, the trial court dismissed the employer. *Id.* ¶¶10-11. The Plaintiff served and obtained a default judgment against the manufacturer. When the Plaintiff had difficulty collecting, however, the Plaintiff filed a motion to reinstate, which the trial court denied. On appeal, the First District Illinois Appellate Court held that difficulty in enforcing or collecting a judgment is not enough to satisfy the requirements for reinstatement; rather, the manufacturer must be “unable to satisfy any judgment” by virtue of insolvency or bankruptcy. *Id.* ¶ 24. Since no evidence was presented as to Chinese manufacturer's financial viability and the business appeared operational, there was nothing to indicate that reinstatement of the employer was appropriate under 735 ILCS 5/2-621(b)(4). *Id.* ¶26.<sup>2</sup>

<sup>2</sup> The *Chraca* court permitted reinstatement under a different section of the Distributor's Statute based upon independent grounds, failure of personal jurisdiction.

The *China Vitamins* case upended *Chraca*. There, the plaintiff filed a product liability action alleging that a ripped flexible bulk container caused another stacked container to fall on him. *China Vitamins*, 2017 IL App (1st) 160933, ¶ 6. China Vitamins identified two Chinese companies as the manufacturers of the vitamins and the container, respectively, and was granted dismissal under the Illinois Distributor Statute. *Id.* ¶12. Based upon *Chraca*, the trial court denied reinstatement. The Appellate Court reversed, finding *Chraca's* narrow reading of the Distributor's Statute to be "flawed." *Id.* ¶¶29-30. The Appellate Court then reinterpreted "unable to satisfy a judgment" as synonymous with either "judgment-proof" or "execution proof." *Id.* ¶133. Under this expanded interpretation, the Court held that a foreign company with "insufficient assets within the court's jurisdiction to satisfy the judgment" will be deemed to be "unable to satisfy" that judgment. *Id.* ¶ 60.

The court tried to limit the effect of its ruling, stating that reinstatement is not available "when a plaintiff merely has trouble collecting a judgment." ¶134. However, when trouble collecting arises from overseas enforcement, the *China Vitamins* ruling appears to make reinstatement possible.

## CONCLUSIONS

The Illinois Distributor Statute affords an important avenue for non-manufacturer defendants to escape involvement in strict product liability cases. By expanding the reinstatement rights under the Distributor's Statute, *China Vitamins* increased the risk to non-manufacturers. This risk should be carefully considered by non-manufacturers and their product liability insurers.

Lawrence Kamin's Litigation attorneys routinely counsel manufacturers and product chain clients in commercial disputes and products liability cases. They are happy to discuss whether the Illinois Distributor Statute or other potential strategies could assist in efficient disposition of claims asserted against you.

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