Docket No. 122873

IN THE ILLINOIS SUPREME COURT

MARTIN CASSIDY, Plaintiff-Appellee, v. CHINA VITAMINS, LLC, Defendant-Appellant, and TAIHUA GROUP SHANGHAI TAIWEI TRADING COMPANY LIMITED and ZHEJIANG NHU COMPANY, LTD., Defendants.	On Appeal From The Illinois Appellate Court, First Judicial District Docket No. 1-16-0933 There Heard On Appeal From The Circuit Court of Cook County, Illinois County Department, Law Division No. 07-L-13276 The Honorable Kathy M. Flanagan, Judge Presiding

ADDITIONAL BRIEF AND APPENDIX OF DEFENDANT-APPELLANT CHINA VITAMINS, LLC

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NATURE OF THE CASE

The plaintiff, Martin Cassidy, brought this negligence and product liability action seeking damages for injuries he sustained at work when a flexible bulk container containing vitamins ruptured and one of the stacked containers fell on him. The trial court dismissed one of the defendants, China Vitamins, LLC ("China Vitamins"), pursuant to section 2-621 of the Illinois Code of Civil Procedure (735 ILCS 5/2-621 (West 1994)), after it identified

Taihua Group Shanghai Taiwei Trading Company Limited ("Taihua Group"),[1] as the manufacturer of the flexible bulk container. More than three years later, after the entry of a default judgment against Taihua Group for $9,111,322.47 and collection efforts in Illinois were unsuccessful, the plaintiff filed a motion to reinstate China Vitamins, pursuant to section 2-621(b) of the Code of Civil Procedure. 735 ILCS 5/2-621(b) (West 1994). The trial court granted the plaintiff's motion to reinstate China Vitamins over its objections, but later granted its motion to reconsider and denied the plaintiff's motion to reinstate. The trial court then denied the plaintiff's motion to reconsider the denial of his motion to reinstate and made the required written findings that its order was final and appealable pursuant to Illinois Supreme Court Rule 304(a). The appellate court reversed and remanded, holding that the plaintiff met the "unable to satisfy any judgment" language in section 2-621(b)(4) by showing his unsuccessful efforts to collect the judgment as opposed to the manufacturer's inability to satisfy the judgment.

No questions are raised on the pleadings.

ISSUE PRESENTED FOR REVIEW

Whether the appellate court properly construed section 2-621(b)(4) in reinstating the product liability claim against China Vitamins as a defendant when (1) China Vitamins identified Taihua Group as the manufacturer of the flexible bulk container; (2) Taihua Group thereafter appeared and answered the first amended complaint without challenging

[1] The parties have referred to this defendant by a variety of names—Shanghai Taiwei Trading Co., Ltd., Shanghai Taiwei, Taihua Group Shanghai Taiwei Trading Co., Ltd., Taihua Group Shanghai, and Taihua Group (R.C3325). To avoid confusion, this defendant will be referred to as Taihua Group as that is the name that the appellate court used in its opinion and the trial court used in its memorandum opinion and order that is the subject of this appeal (R.C3325).

personal jurisdiction; and (3) after the dismissal of China Vitamins, the plaintiff did not show that Taihua Group was either bankrupt or no longer operating and therefore "unable to satisfy the judgment" entered against it at any time.

STATEMENT OF JURISDICTION

The plaintiff appealed, pursuant to Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. March 8, 2016)), from the order of the trial court denying his motion to reinstate China Vitamins as a defendant on March 14, 2016 (R.C3334). The plaintiff filed a notice of appeal within thirty days on March 31, 2016 (R.C3336-40). China Vitamins timely filed its Rule 315 petition for leave to appeal on November 2, 2017, within 35 days of the appellate opinion and judgment filed on September 29, 2017.

STATUTE INVOLVED

§ 2-621. Product liability actions.

> (a) In any product liability action based in whole or in part on the doctrine of strict liability in tort commenced or maintained against a defendant or defendants other than the manufacturer, that party shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage. The commencement of a product liability action based in whole or in part on the doctrine of strict liability in tort against such defendant or defendants shall toll the applicable statute of limitation and statute of repose relative to the defendant or defendants for purposes of asserting a strict liability in tort cause of action.
>
> (b) Once the plaintiff has filed a complaint against the manufacturer or manufacturers, and the manufacturer or manufacturers have or are required to have answered or otherwise pleaded, the court shall order the dismissal of a strict liability in tort claim against the certifying defendant or defendants, provided the certifying defendant or defendants are not within the categories set forth in subsection (c) of this Section. Due diligence shall be exercised by the certifying defendant or defendants in providing the plaintiff with the correct identity of the manufacturer or manufacturers, and due diligence shall be exercised by the plaintiff in filing an action and obtaining jurisdiction over the manufacturer or

manufacturers.

The plaintiff may at any time subsequent to the dismissal move to vacate the order of dismissal and reinstate the certifying defendant or defendants, provided plaintiff can show one or more of the following:

(1) That the applicable period of statute of limitation or statute of repose bars the assertion of a strict liability cause of action against the manufacturer or manufacturers of the product allegedly causing the injury, death or damage; or

(2) That the identity of the manufacturer given to the plaintiff by the certifying defendant or defendants was incorrect. Once the correct identity of the manufacturer has been given by the certifying defendant or defendants the court shall again dismiss the certifying defendant or defendants; or

(3) That the manufacturer no longer exists, cannot be subject to the jurisdiction of the courts of this State, or, despite due diligence, the manufacturer is not amenable to service of process; or

(4) That the manufacturer is unable to satisfy any judgment as determined by the court; or

(5) That the court determines that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with plaintiff.

(c) A court shall not enter a dismissal order relative to any certifying defendant or defendants other than the manufacturer even though full compliance with subsection (a) of this Section has been made where the plaintiff can show one or more of the following:

(1) That the defendant has exercised some significant control over the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury, death or damage; or

(2) That the defendant had actual knowledge of the defect in the product which caused the injury, death or damage; or

(3) That the defendant created the defect in the product which caused the injury, death or damage.

(d) Nothing contained in this Section shall be construed to grant a cause of action in strict liability in tort or any other legal theory, or to affect the right of any person to seek and obtain indemnity or contribution.

(e) This Section applies to all causes of action accruing on or after

September 24, 1979.

P.A. 82-280, § 2-621, added by P.A. 83-350, § 1, eff. Sept. 14, 1983. Amended by P.A. 84-1043, § 1, eff. Nov. 26, 1985.

STATEMENT OF FACTS

Pleadings And Discovery

The plaintiff alleged that he was working at a Ridley Feed Ingredients ("Ridley") facility located in the Mendota, Illinois, on October 26, 2006, when a flexible bulk container containing vitamins ruptured and one of the stacked containers fell and injured him (R.C4). Thereafter, on November 27, 2007, he filed a three-count complaint against China Vitamins, alleging that it was liable under theories of strict product liability, negligence product liability, and *res ipsa loquitur* (R.C3-13).

China Vitamins filed an answer to counts I and II of the complaint, admitting that it distributed and sold a certain product stored inside a flexible bulk container but denied that it manufactured either the product or the container (R.C134-45). The trial court dismissed the *res ipsa* count for failure to state a cause of action on April 22, 2008 (R.C171).

On May 12, 2008, China Vitamins identified Taihua Group as the manufacturer of the flexible bulk container (R.C183) in its answers to the plaintiff's interrogatories (R.C177-86).

On October 1, 2008, less than two years after the incident, the plaintiff filed a nine-count amended complaint naming as defendants Taihua Group Shanghai Taiwei Trading Company Limited ("Taihua Group") and Zhejiang Nhu Company, Ltd. ("Zhejiang Nhu") (R.C806-37).

On August 24, 2009, Shanghai Taiwei Trading Company, Ltd., incorrectly sued as

Taihua Group Shanghai Taiwei Trading Company, Ltd. (R.C1963-70), filed its answer and admitted that it designed, manufactured, distributed, supplied and/or sold a certain product commonly known as a flexible bulk container (R.C1963-64, R.C1965, R.C1967).

China Vitamins Is Dismissed Pursuant To The Distributor Statute

On August 29, 2011, China Vitamins filed a motion for summary judgment and requested dismissal of counts I and IV of the first amended complaint, respectively, for strict product liability and negligence product liability, on grounds that it was only a distributor of bulk vitamins and that it did not design or manufacture the flexible bulk container (R.C2258-2323).

The proofs showed that China Vitamins, a distributor of vitamin products, was established in 1998 and is headquartered in Bedminster, New Jersey (R.C2305-06, R.C2317). China Vitamins bought vitamins manufactured by Zhejiang Nhu and imported them for sale to its customers for use in animal feed, human dietary supplements and food supplements (R.C2306, R.C2317). The plaintiff's employer, Ridley, was one of its customers and purchased bulk vitamins from China Vitamins starting in 2000 (R.C2307).

After China Vitamins placed an order in China, a container load, usually consisting of totes each weighing1000 kilos or approximately a metric ton, would be loaded into a container in China, shipped by ocean to the west coast of the United States, travel by rail to the Chicago area, and delivered to the Mendota location where Ridley would unload it (R.C2318).

China Vitamins did not construct, design or manufacture the flexible bulk container, which was manufactured by Taihua Group (R.C2314). China Vitamins was not involved in the construction, design or manufacture of the flexible bulk container and it never had

control or possession of the bulk container (R.C2315).

The plaintiff filed an opposing response to the motion (R.C2360-63) and China Vitamins filed a supporting reply (R.C2324-56).

On January 9, 2012, the trial court granted the motion and dismissed China Vitamins pursuant to section 2-621 in a memorandum opinion and order (R.C2400-03). The trial court concluded that China Vitamins had met the requirements of section 2-621(b) (R.C2402). Although China Vitamins had requested summary judgment, the trial court treated the motion as a dismissal without prejudice pursuant to section 2-621 (R.C2402-03).

A Default Judgment Is Entered Against Taihua Group

Also on January 9, 2012, the trial court entered a default against Taihua Group (R.C2404). The default was pursuant to the plaintiff's motion after the trial court gave defense counsel for Taihua Group leave to withdraw as counsel on January 6, 2010 and Taihua Group failed to retain counsel to file a supplemental appearance as ordered on or before March 3, 2010 (R.C2049). When the trial court entered the default, it transferred the case for prove up (R.C2399). Thereafter, a default judgment was entered against Taihua Group for $9,111,322.47 on June 14, 2012 (R.C2411-13).

The Plaintiff's Efforts To Collect The Judgment

On March 27, 2013, the plaintiff issued a citation to discover assets against Taihua Group (R.C2414-20), which the trial court quashed on May 23, 2013 for lack of proper service on a foreign resident and foreign business entity (R.C2468). Between March 27, 2013 and October 16, 2013, the plaintiff also issued third-party citations to discover assets in pursuit of collection of the judgment in Illinois (R.C2421-27; R.C2428-34; R.C2469-79R.C2480-91; R.C2496-2508; R.C2648-49; R.C2654-55), without success (R.C2640;

R.C2665; R.C2912).

The Plaintiff Seeks To Reinstate The Action Against China Vitamins

On July 24, 2015, the plaintiff filed a motion to reinstate China Vitamins pursuant to section 2-621(b) of the Code of Civil Procedure (R.C2915-27). On August 11, 2015, China Vitamins filed an opposing response to the motion to reinstate and asserted that the motion did not address the criteria for reinstatement under section 2-621(b) (R.C2929-3019). On September 21, 2015, the trial court granted the plaintiff's motion to reinstate without addressing the requirements of section 2-621(b) (R.C3022).

On October 14, 2015, China Vitamins filed a motion to reconsider on grounds that the plaintiff had not met the reinstatement requirements of section 2-621(b) (R.C3031-36). On December 14, 2015, the trial court agreed and granted the motion to reconsider and vacated its previous order of reinstatement (R.C3190). The trial court specifically found that the plaintiff failed to meet the conditions for reinstatement under section 2-621(b) and made the order final and appealable pursuant to Illinois Supreme Court Rule 304(a) (R.C3190).

Within thirty days, the plaintiff filed a motion to reconsider on December 31, 2015 (R.C3253-60). China Vitamins filed an opposing response on February 1, 2016 (R.C3192-3240). The trial court denied the plaintiff's motion to reconsider on March 14, 2016 and again made the required Supreme Court Rule 304(a) findings (R.C3324-34).

The Appellate Court Decision

The Illinois Appellate Court, First Judicial District, Fifth Division, reversed and remanded for further proceedings in an opinion filed on September 29, 2017 (A1-A28),

First, the appellate court unanimously held that the trial court had erred in dismissing the negligence product liability claim in favor of China Vitamins. ¶¶ 20-21. Prior to 1995,

section 2-621 applied only to strict product liability. *Id.* Although the General Assembly had amended section 2-621 to apply to negligence product liability in 1995 as part of the so-called Tort Reform Act, the Act had been held to be void in its entirety in 1997. *Id.* Accordingly, the pre-1995 version of section 2-621 applied and China Vitamins was not entitled to dismissal of the negligence product liability claim. *Id.*[2]

Next, the majority rejected *Chraca v. U.S. Battery Mfg. Co.*, 2014 IL App (1st) 132325, 24 N.E.3d 183, which had interpreted the "unable to satisfy any judgment" language in section 2-621(b)(4) as requiring a plaintiff to show that the manufacturer was bankrupt, and which held instead that the plaintiff need only show that the manufacturer was "judgment-proof" or "execution-proof" in order to reinstate the seller or distributor. ¶¶ 29-35. After noting the plaintiff's efforts to enforce the default judgment, the majority remanded the case for further proceedings to determine whether the manufacturer was unable to satisfy the judgment in accordance with its interpretation of section 2-621(b)(4). ¶¶ 38, 41.

Concurring in part and dissenting in part, the dissenting justice agreed with the majority that the negligence product liability claim should be reinstated, but disagreed with the majority on remanding the case for further proceedings on the strict product liability claim. ¶ 44. The dissenting justice believed that, in view of the plain language of section 2-621(b)(4), the focus should be on the manufacturer's inability to satisfy the judgment rather than the plaintiff's inability to enforce a judgment (¶ 49), and agreed with *Chraca*. ¶¶ 51-53. The dissenting justice further noted that the General Assembly

[2] As acknowledged in its petition for leave to appeal, China Vitamins does not appeal the reinstatement of the negligence product liability claim under the pre-1995 version of section 2-621.

had elected not to include an "unable to enforce" provision in section 2-621, unlike some other jurisdictions which had enacted legislation with an "unable to enforce" provision loosely patterned after the Model Uniform Product Liability Act (Model Act). ¶¶ 58-59. Next, the dissenting justice noted that Illinois, like many other states, had enacted laws recognizing and enforcing foreign judgments, and for that reason, a defendant is not "judgment-proof" merely because assets are located outside the jurisdiction of the court. ¶ 60. Finally, the dissenting justice pointed out that the record showed that the manufacturer was an ongoing concern operating through various subsidiaries in China and many other countries (¶ 61), and that the plaintiff himself acknowledged on appeal that the manufacturer "could voluntarily pay the damages assessed against it." ¶ 62.

China Vitamins Petitions For Leave To Appeal

China Vitamins elected not to file a petition for rehearing but timely filed a petition for leave to appeal within 35 days of the appellate court's opinion and judgment. This court granted the petition on January 18, 2018, and this appeal now follows.

ARGUMENT

A DIVIDED APPELLATE COURT MISINTERPRETED SECTION 2-621(b)(4) OF THE CODE OF CIVIL PROCEDURE TO PERMIT REINSTATEMENT OF A STRICT PRODUCT LIABILITY CLAIM AGAINST A NON-MANUFACTURER BASED ON THE PLAINTIFF'S INABILITY TO ENFORCE THE JUDGMENT AGAINST THE MANUFACTURER IN ILLINOIS

A. Standard of Review: *De Novo*

The issue presented on appeal is one of statutory interpretation. That issue is whether the "unable to satisfy any judgment" language in section 2-621(b)(4) (735 ILCS 5/2-621(b)(4) (West 1994)) requires a plaintiff to show that the judgment against the product manufacturer cannot be satisfied by assets found in the jurisdiction of the court—

as the majority held in this case—rather than by the plaintiff showing that the product manufacturer is bankrupt or no longer operating as the appellate court held in *Chraca*, 2014 IL App (1st) 132325. This court reviews an issue of statutory interpretation *de novo*. *JP Morgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 461, 939 N.E.2d 487 (2010).

B. The Appellate Court Wrongly Equated "Unable To Satisfy Any Judgment" With A Judgment Creditor's Inability To Enforce The Judgment In Illinois

Pursuant to section 2–621, also known as the "seller's exception," a non-manufacturer defendant sued for strict product liability may be dismissed from the action if it certifies the correct identity of the manufacturer of the product which allegedly caused the injury. 735 ILCS 5/2–621 (West 1994); *Murphy v. Mancari's Chrysler Plymouth, Inc.*, 381 Ill. App. 3d 768, 770, 887 N.E2d 569 (1st Dist. 2008). Once the plaintiff has sued the product manufacturer and the manufacturer has answered or otherwise pleaded, the court must dismiss the strict liability claim against the certifying defendant(s). 735 ILCS 5/2–621(b) (West 1994); *Kellerman v. Crowe,* 119 Ill. 2d 111, 113-14, 518 N.E.2d 116 (1987). When a defendant complies with the requirements of section 2–621, its dismissal from a strict liability action is mandatory. *Lamkin v. Towner,* 138 Ill. 2d 510, 532, 563 N.E.2d 449 (1990).

Thereafter, a plaintiff can vacate the order and reinstate the certifying seller or distributor—in this case, China Vitamins—only if the plaintiff can show one or more of the following:

> (1) That the applicable period of statute of limitation or statute of repose bars the assertion of a strict liability in tort cause of action against the manufacturer…; or

(2) That the identity of the manufacturer given to the plaintiff by the certifying defendant…was incorrect.; or

(3) That the manufacturer no longer exists, cannot be subject to the jurisdiction of the courts of this State, or, despite due diligence, the manufacturer is not amenable to service of process; or

(4) That the manufacturer is unable to satisfy any judgment as determined by the court; or

(5) That the court determines that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with plaintiff.

735 ILCS 5/2-621(b)(1)-(5) (West 1994). The plaintiff bears the burden of establishing that he is entitled to vacate the dismissal and reinstate the nonmanufacturing defendant. *Chraca*, 2014 IL App (1st) 132325, ¶ 22; *Cherry v. Siemans Medical Systems, Inc.*, 206 Ill. App. 3d 1055, 1064, 565 N.E.2d 215 (1st Dist. 1990) ("The onus is on the plaintiff to make this showing [for reinstatement], which presumably may be rebutted by the certifying defendant").

The purpose of section 2–621 is to allow a defendant whose sole liability results from its role as a member in the chain of distribution of an allegedly defective product, which has not been shown to have created or contributed to the alleged defect or had knowledge of the defect, to obtain dismissal of a product liability action at an early stage in order to avoid expensive litigation and to defer liability upstream to the manufacturer, the ultimate wrongdoer. *Kellerman,* 119 Ill. 2d at 113; *Cherry*, 206 Ill. App. 3d at 1060-61. The General Assembly did not intend that non-manufacturing defendants be reinstated when the plaintiff does not satisfy the criteria for reinstatement of a strict liability in tort claim. In this case, the plaintiff did not meet his burden of showing that the manufacturer was "unable to satisfy any judgment" under section 2-621(b)(4) when

the plaintiff's own proofs showed that the manufacturer was a going concern and the plaintiff admitted as much below. [3]

1. Other Courts In Illinois And Outside Illinois Have Required A Plaintiff To Present Proof That The Product Manufacturer Was Bankrupt Or That It Was Not A Going Concern In Order To Reinstate The Seller Or Distributor

Here, in addressing the "unable to satisfy any judgment" language of section 2-621(b)(4) above, the appellate court was not writing on a clean slate. In *Chraca*, 2014 IL App (1st) 132325, a panel addressed the identical issue of what a plaintiff must prove to reinstate a strict product liability action as to a seller or distributor under section 2-621(b)(4) after the plaintiff obtained a default judgment against a Chinese manufacturer.

There, the plaintiff wrenched and injured his shoulder when a strap that he was using to carry a golf cart battery gave way. *Id.* at ¶ 2. The plaintiff filed a product liability action against the domestic battery company, which identified a Chinese entity as the manufacturer of the carrying strap. *Id.* at ¶ 8. The Chinese manufacturer was thereafter named in a first amended complaint and a default judgment was entered against it after it was served in accordance with the Hague Convention. *Id.* at ¶ 9. The plaintiff then opposed the dismissal of the distributor on grounds that he would be unable to collect on the default judgment. *Id.* at ¶ 10. After the trial court granted the distributor's section 2-621 motion to dismiss, the plaintiff filed a motion to reinstate two weeks later. *Id.* at ¶ 11.

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[3] The plaintiff argued in his opening appellate brief, *inter alia*, that "[w]hile it may be true that Shanghai Taiwei could voluntarily pay the damages against it, there is no realistic expectation of it ever doing so." (Br., at 18). China Vitamins has filed a certified copy of the brief pursuant to Supreme Court Rule 318(c). Ill. S. Ct. R.318(c) (eff. Feb. 1, 1994).

The trial court denied this motion and a motion to reconsider, and the plaintiff appealed. *Id.* at ¶¶ 15-19

The appellate court held that the plaintiff failed to show that the Chinese entity was "unable to satisfy any judgment" within the meaning of section 2-621(b)(4). The court cited with approval prior decisions holding that in a section 2-621 proceeding, a company is deemed "unable to satisfy any judgment" when it is bankrupt or nonexistent. *Id.* at ¶ 24 (citing *Harleysville Lake States Ins. Co. v. Hilton Trading Corp.,* No. 12 C 8135, 2013 WL 3864244, at *3 (N.D. Ill. July 23, 2013) (under Illinois statute, where retailer identified manufacturer of counterfeit bill detector that had started an office fire, and the manufacturer was not shown to be "insolvent or otherwise judgment-proof," the retailer was entitled to be dismissed); *Finke v. Hunter's View, Ltd.,* 596 F.Supp.2d 1254, 1271 (D. Minn. 2009) (under Minnesota's version of the statute at issue, where the product manufacturer had declared chapter 7 bankruptcy and thus was unreachable, the retailer was not entitled to be dismissed); *Malone v. Schapun, Inc.,* 965 S.W.2d 177, 182 (Mo. Ct. App. 1998) (indicating that under Missouri's version of the statute at issue, a non-manufacturer should not be dismissed unless the manufacturer "is insolvent")). The *Chraca* court noted that the plaintiff presented no information about the Chinese manufacturer's financial viability and that the record suggested that it was an ongoing business. *Id.* at ¶ 25. As further relevant to this case, the plaintiff's reliance on an affidavit of the two Chinese attorneys about their local courts' unwillingness to "recognize or enforce a judgment obtained in an American state court" did not indicate that the Chinese manufacturer was declared bankrupt or no longer operating and thus "unable to satisfy any judgment" as that phrase is used in the statute. *Id.*

Similarly, in this case, the plaintiff presented no evidence that the product manufacturer's operations were not ongoing between 2013-2015. Indeed, the plaintiff's own proofs showed that in 2015 the Taihua Group had a working website and LinkedIn page; that a sales office was located in Georgia (identified as Taihua USA Inc.); that Taihua Europa GmbH had a sales office located in Munich, Germany; and that a sales office and a central warehouse were located in Lille, France and Cologne, Germany, respectively (R.C3013-19). A visit to the Taihua Group's website and LinkedIn page in 2018 shows that it continues to be a global business.[4]

As the dissenting justice pointed out, the record shows beyond dispute that the manufacturer is an ongoing business operating through various subsidiaries with sales offices and production facilities in China and many other countries (¶ 61), and the plaintiff himself acknowledged in the appellate court that the manufacturer "could voluntarily pay the damages assessed against it." ¶ 62. The manufacturer's unwillingness to pay the judgment is not the same as a financial inability to satisfy the judgment. On this record, the plaintiff did not meet his burden of showing that the manufacturer was bankrupt or no longer operating and therefore unable to satisfy the judgment.

2. The Appellate Court Erred In Rejecting The Interpretation Of Section 2-621(b)(4) Adopted Previously In *Chraca*

The majority rejected the *Chraca* court's interpretation of section 2-621(b)(4) as "flawed" (¶ 21), and believed that the *Chraca* court "misconstrued the import of the holdings" in *Harleysville*, *Finke* and *Malone* which the *Chraca* court had cited. ¶¶ 29-30. Instead, the majority treated the phrase "unable to satisfy any judgment" as a term of art

[4] The website can be found at www.taihuagroup.com (accessed February 21, 2018).

and relied only on a patchwork of dictionary definitions to conclude that the requirement for reinstatement of the seller or distributor can be met under section 2-612(b)(4) where the product manufacturer is "judgment-proof" and "execution-proof" (citing Black's Law Dictionary, at 849 (7th ed. 1999)). But, as the dissenting justice pointed out, the same dictionary definitions of the words contained in the phrase "the manufacturer is unable to satisfy the judgment" indicate that the plain meaning of the phrase is that the manufacturer is incapable of completely discharging its financial obligations under the judgment. ¶ 49. To combine and extrapolate from dictionary definitions, as the majority did, does not support its conclusion that the phrase is a "terms of art" or its interpretation which wrongly turns on the plaintiff's inability to collect the judgment within a specific jurisdiction rather than on the manufacturer's inability to pay the judgment regardless of where its assets are located.

The appellate court also reasoned that to adopt the *Chraca* court's interpretation would render superfluous some of the language of section 621(b)(3) regarding a manufacturer which "no longer exists." ¶ 30. However, the majority failed to consider that section 2-621(b)(3) groups the manufacturer which "no longer exists" with a manufacturer which is not subject to jurisdiction or which is not amenable to service of process—situations that arise only at the time that the action is brought against the manufacturer. The doctrine of *noscitur a sociis* provides that the meaning of words may be ascertained by reference to the words associated with them. *Warren v. LeMay*, 144 Ill. App. 3d 107, 113, 494 N.E.2d 206 (5th Dist. 1986). The doctrine applies here as the words grouped in section 2-621(b)(3) refer to situations—lack of jurisdiction or failure to obtain service—that arise at the commencement of the action. By comparison, subsection

(b)(4) applies to a manufacturer which becomes insolvent or which ceases to exist at the time of judgment. The *Chraca* court was addressing the later time period when it interpreted the "unable to satisfy any judgment" language as referring to the manufacturer's inability to satisfy the judgment due to bankruptcy or nonexistence.

The majority concluded that even if the "unable to satisfy any judgment" language of section 2-621(b)(4) were ambiguous, the result was more consistent with the statute by not having injured consumers absorb the costs of having "to chase after foreign manufacturers" which do not have sufficient assets within the court's jurisdiction. ¶ 35. However, even the majority recognized that "{c]ivil judgments are not self-executing, and tort claimants often must undertake postjudgment litigation to collect their judgments." ¶ 38. The majority simply ignored the dissenting justice's observation that states and foreign countries have enacted laws patterned after the Uniform Enforcement of Foreign Judgments Act and the Uniform Foreign-Country Money Judgments Recognition Act, so that the process of enforcing judgments in other jurisdictions is not outside the norm, as the dissenting justice noted (¶¶ 60-61), and a judgment-debtor is not "judgment-proof" or "execution-proof" merely because its assets happen to be located outside a particular court's jurisdiction.

3. Section 2-621(b)(4) Does Not Contain Language Found In Similar Statutes In Other Jurisdictions Allowing For Reinstatement Of The Distributor When It Is "Highly Probable That A Claimant Would Be Unable To Enforce A Judgment"

Finally, the appellate court failed to consider that statutes in other jurisdictions have provisions, loosely patterned after section 105(C) of the Model Act (44 Fed. Reg. 62714, at 62726 (1979)), that allow for reinstatement of the product seller or distributor

when the court determines that it is "highly probable that a claimant would be unable to enforce a judgment," but, notably, section 2-621(b)(4) has no such "highly probable" language. *Cf.* WASH. REV. CODE ANN. § 7.72.040(2)(b) (incorporating Model Act's "highly probable" language); IDAHO CODE § 6-1407 (same). The General Assembly's election not to include a similar "unable to enforce" provision in section 2-621(b)(4) has manifested its intent that an inability to enforce a judgment is not a consideration under section 2-621(b)(4).

The goal of statutory interpretation is to ascertain and give effect to the legislature's intent (*Maksym v. Board of Election Commissioners*, 242 Ill. 2d 303, 318, 950 N.E.2d 1051 (2011)), and the simplest and surest means of effectuating this goal is to read the statutory language itself and give the words their plain and ordinary meaning. *MD Electrical Contractors, Inc. v. Abrams*, 228 Ill. 2d 281, 287, 888 N.E.2d 54 (2008). In construing section 2-621(b)(4), the court's job is not to supply omissions, remedy defects or annex new provisions. *Seaman v. Thompson Electronics Co.*, 325 Ill. App. 3d 560, 564, 758 N.E.2d 454 (3d Dist. 2001). Rather, the court's job is to construe the statute as it stands and not add to its provisions under the guise of construction. *Toys "R" Us, Inc. v. Adelman*, 215 Ill. App. 3d 562, 568, 574 N.E.2d 1328 (3d Dist. 1991). To accept the appellate court's interpretation in this case would rewrite section 2-621(b)(4) to include "unable to enforce" language under the guise of statutory construction and would be tantamount to legislation by litigation. This court should respectfully reject the appellate court's interpretation and enforce section 2-621(b)(4) as written.

CONCLUSION

For all of the foregoing reasons, the defendant-appellant, China Vitamins, LLC, respectfully requests that this court reverse in part the opinion and judgment of the Illinois Appellate Court, First Judicial District, and affirm in part the memorandum opinion and order of the trial court denying the motion of the plaintiff-appellee, Martin Cassidy, to reinstate against the defendant-appellant, China Vitamins, LLC, on March 14, 2016.

Respectfully submitted,

/s/ Michael Resis

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b) of the Supreme Court Rules. The length of this brief, excluding the pages containing the Rule 341(d) cover, the matters required to be appended to this petition pursuant to Rule 315(c)(6) of the Supreme Court Rules, and the Rule 341(c) certificate of compliance, is 19 pages.

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APPENDIX

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2017 IL App (1st) 160933
No. 1-16-0933
Opinion filed September 29, 2017

Fifth Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

MARTIN CASSIDY, Plaintiff-Appellant, v. CHINA VITAMINS, LLC, TAIHUA GROUP SHANGHAI TAIWEI TRADING COMPANY LIMITED, and ZHEIJIANG NHU COMPANY LTD., Defendants (China Vitamins, LLC, Defendant-Appellee).	)	Appeal from the Circuit Court of Cook County. No. 07 L 13276 Honorable Kathy M. Flanagan, Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court, with opinion.
Justice Hall concurred in the judgment and opinion.
Justice Rochford specially concurred in part and dissented in part, with opinion.

OPINION

¶ 1 Plaintiff Martin Cassidy filed this product liability action seeking damages for injuries he sustained when a flexible bulk container ripped and caused a stacked container to fall on him. The trial court dismissed the product liability action against defendant China Vitamins, LLC

(China Vitamins), pursuant to the statutory provision that allows a nonmanufacturing defendant that identifies the product manufacturer to be dismissed from a strict liability in tort claim.

¶ 2 Eventually, the trial court entered a default judgment against defendant Taihua Group Shanghai Taiwei Trading Company Limited (Taihua Group), the manufacturer of the bulk container. In 2015, plaintiff moved the trial court to reinstate China Vitamins as a defendant, and the trial court ultimately denied that motion. The trial court also found there was no just reason to delay enforcement or appeal of that ruling.

¶ 3 On appeal, plaintiff contends that the law allows reinstatement of a nonmanufacturer defendant when an action against the manufacturer appears to be unavailing or fruitless. Plaintiff argues this exception applies in the instant case because the default judgment is not enforceable in the People's Republic of China (PRC), which will not recognize judgments entered in American state courts, and Chinese law does not follow Illinois damages law with respect to the elements of damages.

¶ 4 For the reasons that follow, we reverse the judgment of the trial court, which denied plaintiff's motion to reinstate defendant China Vitamins and improperly dismissed plaintiff's negligent product liability claim against China Vitamins. We remand this cause for further proceedings.

¶ 5 I. BACKGROUND

¶ 6 In 2007, plaintiff filed a three count complaint against China Vitamins, alleging it was liable under theories of strict product liability, negligent product liability, and *res ipsa loquitur*. Plaintiff alleged he sustained injuries at work on October 26, 2006, when a flexible bulk

container ripped and leaked its contents, thereby becoming unstable among the other stacked containers and causing one of the stacked containers to fall on him and injure him.

¶ 7 In its April 2008 answer to the product liability counts, China Vitamins admitted that it distributed and sold a certain product stored inside the flexible bulk container but denied that it manufactured either the product or the container. China Vitamins also moved to dismiss the *res ipsa loquitur* count of the complaint for failure to state a cause of action because plaintiff did not allege that China Vitamins had exclusive control over the instrumentality that allegedly caused his injuries. Furthermore, China Vitamins filed a third-party negligence complaint against plaintiff's employer, seeking contribution as an alleged joint tortfeasor. The trial court granted China Vitamins' motion to dismiss and struck the *res ipsa loquitur* count of the complaint without prejudice pursuant to section 2-615(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2-615(a) (West 2006)) and granted China Vitamins leave to file its third-party complaint. During discovery, China Vitamins identified Taihua Group as the manufacturer of the flexible bulk container.

¶ 8 Plaintiff was granted leave to file his October 2008 nine-count first amended complaint against defendants China Vitamins, Taihua Group, and Zheijiang Nhu Company Ltd. (Nhu) (the alleged manufacturer of the vitamins), alleging they were liable under theories of strict product liability, negligent product liability, and *res ipsa loquitur*. Plaintiff alleged that the bulk container was in an unreasonably dangerous condition when it left defendants' control; defendants' duty to exercise reasonable care for plaintiff's safety included a duty to exercise reasonable care in the design, manufacture, distribution, or sale of the bulk container; and the subject incident would

not have occurred if defendants had used reasonable and proper care while the bulk container was under their control.

¶ 9 Defendant Nhu initially filed in August 2009 a special and limited appearance and motion challenging the court's personal jurisdiction. However, Nhu withdrew that motion in May 2010 and submitted to the jurisdiction of the court. In July 2010, the trial court entered an order of default against Nhu for failure to comply with orders regarding representation. The court struck Nhu's answer and deemed the allegations of the complaint admitted.

¶ 10 Meanwhile, defendant Taihua Group filed a general appearance in July 2009 and answer in August 2009, thereby waiving the service of process requirement and submitting itself to the court's jurisdiction. In its answer, Taihua Group admitted that it designed, manufactured, distributed, supplied and/or sold the flexible bulk container but denied any liability. On January 6, 2010, the trial court granted counsel for Taihua Group leave to withdraw as counsel and ordered Taihua Group to file a supplemental appearance by March 3, 2010. However, no supplemental appearance was filed.

¶ 11 Meanwhile, defendant China Vitamins' October 2008 answer denied any liability concerning the strict product liability and negligent product liability counts. China Vitamins moved the court to dismiss the *res ipsa loquitur* count pursuant to sections 2-615(a) and 2-619(a)(9) of the Code (735 ILCS 5/2-615(a), 2-619(a)(9) (West 2006)), arguing that plaintiff failed to state a cause of action and China Vitamins did not have exclusive control over the instrumentality that allegedly caused the injury. On November 20, 2008, the trial court granted the motion and dismissed and struck only the *res ipsa loquitur* count against China Vitamins.

¶ 12 In 2011, China Vitamins moved for summary judgment and requested dismissal of the strict product liability and negligent product liability counts, on grounds that it was only a distributor of bulk vitamins manufactured by Nhu; was not involved in the construction, design, or manufacture of the flexible bulk container at issue; never had possession or control of the flexible bulk container; had no actual knowledge of the defect; and did not create the defect. China Vitamins, which is headquartered in Bedminster, New Jersey, imported the vitamins into the United States for sale to customers. When an order for vitamins was placed, the vitamins were loaded into containers in China, shipped to the west coast of the United States, and then sent by rail direct to the customer. A container load usually consisted of "totes," which each weighed 1000 kilos or approximately one metric ton. China Vitamins argued it was entitled to dismissal of both the strict and negligent product liability counts pursuant to section 2-621 of the Code (735 ILCS 5/2-621 (West Supp. 1995), amended by Pub. Act 89-7 (eff. Mar. 9, 1995)), as a nonmanufacturer defendant sued in a "product liability action based on any theory or doctrine."[1]

¶ 13 On January 9, 2012, the trial court denied China Vitamins' motion for summary judgment and instead dismissed both the strict and negligent product liability counts against

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[1]However, the "any theory or doctrine" language cited by China Vitamins was added to section 2-621 in 1995 by Public Act 89-7, which was held unconstitutional in its entirety and not severable by our supreme court in *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997). Accordingly, the version of section 2-621 that was in effect prior to the 1995 amendment is applicable to this case. *South Side Trust & Savings Bank of Peoria v. Mitsubishi Heavy Industries, Ltd.*, 401 Ill. App. 3d 424, 427 n.2 (2010). This issue is discussed *infra* ¶¶ 20-22.

China Vitamins without prejudice pursuant to section 2-621(b) of the Code. Also on January 9, 2012, the trial court granted plaintiff's motion for a default against Taihua Group based on its failure to retain counsel to file a supplemental appearance. After a prove-up hearing, the trial court entered on June 14, 2012, a default judgment against Taihua Group for $9,111,322.47. There was no adjudication of any cause of action against defendant Nhu.

¶ 14 Plaintiff issued citations to discover assets against Taihua Group but those citations were quashed on May 23, 2013 for lack of proper service against a foreign resident and foreign business entity. Between August 2013 and May 2015, plaintiff issued third-party citations to discover assets in pursuit of collection of the default judgment in Illinois, but those citations were dismissed because the third-parties were not holding assets that belonged to or were due and owing to Taihua Group.

¶ 15 On July 24, 2015, plaintiff moved to reinstate China Vitamins pursuant to section 2-621(b)(3) and (4) of the Code, arguing that Taihua Group was outside the personal jurisdiction of Illinois courts and not subject to or obligated to respond in a state court action under international law. The trial court initially granted the motion to reinstate China Vitamins but thereafter vacated that order when it granted China Vitamins' motion to reconsider. The trial court found that plaintiff failed to meet the conditions for reinstatement under section 2-621(b) of the Code and ruled that the order was final and appealable pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). Thereafter, the trial court denied plaintiff's motion to reconsider and again made Rule 304(a) findings.

¶ 16 II. ANALYSIS

¶ 17 On appeal, plaintiff argues China Vitamins should be reinstated as a defendant based on section 2-621(b)(4) of the Code because Taihua Group, the manufacturer defendant, "is unable to satisfy any judgment as determined by the court." 735 ILCS 5/2-621(b)(4) (West 1994). Plaintiff asserts that Taihua Group has not paid the default judgment entered against it, an Illinois state court judgment is not enforceable in the PRC, and Taihua Group, which submitted to the jurisdiction of the Illinois state court, refuses to respond to this action, thus limiting plaintiff's ability to recover. Plaintiff asserts that he has met the legal requirements to establish that "it appears" an action against Taihua Group is "unavailable" or will be "fruitless" because sufficient evidence showed that the PRC does not recognize judgments entered in American state courts and Chinese law does not follow Illinois damages law with respect to the elements of damages. Plaintiff argues that the provision allowing a nonmanufacturing defendant to be reinstated pursuant to section 2-621(b)(4) should include foreign manufacturers beyond the reach of Illinois courts.

¶ 18 Because a dismissal of a defendant under section 2-621 contemplates the possibility of further action, the dismissal does not dispose of the rights of the parties and thus is not final or appealable until the trial court rules on the plaintiff's motion to vacate the dismissal of his claims against the previously dismissed defendant and to reinstate those claims. *Kellerman v. Crowe*, 119 Ill. 2d 111, 115-16 (1987); *South Side Trust & Savings Bank of Peoria*, 401 Ill. App. 3d at 431. Here, the trial court denied plaintiff's motion to vacate the dismissal of his claims against China Vitamins and to reinstate those claims. The trial court also found that there was no just reason for delaying either enforcement or appeal of this judgment. Accordingly, this court has

jurisdiction to review the trial court's January 2012 order, dismissing plaintiff's strict and negligent product liability claims against China Vitamins, and the 2015 orders denying plaintiff's motion to reinstate China Vitamins and motion for reconsideration.

¶ 19 The elements of a strict liability claim based on a product defect are (1) a condition of the product as a result of manufacturing or design, (2) that made the product unreasonably dangerous, (3) that existed at the time the product left the defendant's control, and (4) an injury to the plaintiff, (5) that was proximately caused by the condition. *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 543 (2008). Under Illinois law, all entities in the chain of distribution for an allegedly defective product are subject to strict liability in tort, and the imposition of liability on them is justified based on their position in the marketing process, which enables them to exert pressure on the manufacturer to enhance the safety of the product. *Hammond v. North American Asbestos Corp.*, 97 Ill. 2d 195, 206 (1983). However, Illinois law recognizes a "seller's exception" to product liability actions that are based on strict liability. This exception in section 2-621(b) of the Code provides that nonmanufacturer defendants may be dismissed from a strict product liability action under certain circumstances. 735 ILCS 5/2-621(b) (West 1994). The purpose of this exception is to allow defendants, whose sole basis of liability is their role as a member of the distributive chain of an allegedly defective product, to extract themselves from a strict product liability action at an early stage, before they incur the expense of fully litigating the dispute, and to defer liability upstream to the ultimate wrongdoer, the manufacturer. *Kellerman*, 119 Ill. 2d at 113; *Murphy v. Mancari's Chrysler Plymouth, Inc.*, 381 Ill. App. 3d 768, 775 (2008). The seller's exception, however, is subject to section 2-621(b)'s reinstatement mechanism, whereby a plaintiff may be allowed to reinstate a previously dismissed

nonmanufacturer defendant if the plaintiff's action cannot reach the manufacturer or the manufacturer would not be able to satisfy a judgment or settlement. 735 ILCS 5/2-621(b) (West 1994); *Kellerman*, 119 Ill. 2d at 114. "Section 2-621 thus ensures 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).

¶ 20 Prior to 1995, this exception applied only to actions in strict product liability; if a plaintiff proceeded against a nonmanufacturer defendant under a negligence theory, that defendant was not entitled to dismissal under section 2-621. See *Link v. Venture Stores, Inc.*, 286 Ill. App. 3d 977, 978 (1997) (plaintiff had a vested right in her negligence cause of action against the defendant store for selling an alleged defectively designed car seat where the cause of action accrued and was filed before the statute was amended to provide for the dismissal of such nonmanufacturer defendants). Specifically, the pre-1995 version of section 2-621 provided for dismissal of claims against nonmanufacturing defendants in "any product liability action based in whole or in part on the doctrine of strict liability in tort." 735 ILCS 5/2-621(a) (West 1994).

¶ 21 In 1995, the legislature enacted Public Act 89-7, the so-called Tort Reform Act, which, *inter alia*, amended section 2-621 to provide that nonmanufacturer defendants in product liability actions who were sued under "any theory or doctrine" could be dismissed if they fulfilled certain requisite criteria. 735 ILCS 5/2-621 (West Supp. 1995) (amended by Pub. Act 89-7 (eff. March 9, 1995)). However, in 1997, our supreme court in *Best*, 179 Ill. 2d at 467, held that Public Act 89-7 was void in its entirety because certain core provisions of the act were contrary to the Illinois constitution and were not severable from the remaining provisions of the act. If an act is unconstitutional in its entirety, the state of the law is as if the act had never been enacted, and the

law in force is the law as it was before the adoption of the unconstitutional amendment. *In re G.O.*, 191 Ill. 2d 37, 43 (2000); *People v. Gersch*, 135 Ill. 2d 384, 390 (1990). Our legislature has not reenacted the amendment to section 2-621 in the two decades since *Best* was decided. Accordingly, the pre-1995 version of section 2-621 is applicable to this case. *South Side Trust & Savings Bank of Peoria*, 401 Ill. App. 3d at 427 n.2.

¶ 22 The pre-1995 version of section 2-621 provides that a nonmanufacturer defendant, usually a distributor or retailer, in a strict product liability action may be dismissed from the action if it certifies the correct identity of the manufacturer of the product that allegedly caused the injury. 735 ILCS 5/2-621 (West 1994). As soon as the plaintiff has filed against the product manufacturer and the manufacturer has answered or otherwise pleaded, the court must dismiss the strict liability claim against the certifying defendant, unless the plaintiff shows the 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) (West 1994); *South Side Trust & Savings Bank of Peoria*, 401 Ill. App. 3d at 431.

¶ 23 At any time subsequent to the dismissal, the plaintiff may move to vacate the order of dismissal and reinstate the certifying defendant, provided the plaintiff can show one or more of the following: (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) (West 1994).

¶ 24 On appeal, plaintiff argues that China Vitamins should be reinstated pursuant to section 2-621(b)(4) because he has sufficiently shown that the manufacturer Taihua Group "is unable to satisfy any judgment as determined by the court." 735 ILCS 5/2-621(b)(4) (West 1994). According to plaintiff, our supreme court in *Kellerman* adopted for section 2-621(b)(4) an "appears unavailing or fruitless standard" to assess whether the manufacturer is unable to satisfy any judgment. Plaintiff contends he has met this standard because his documented unsuccessful efforts to enforce his over $9 million default judgment against Taihua Group establishes that he has no reasonable expectation that Taihua Group will ever remit the ordered damages and Taihua Group is insulated from his collection efforts because the Chinese government is unwilling to recognize or enforce American state court judgments against Chinese entities.

¶ 25 Plaintiff raises an issue of statutory interpretation, which this court reviews *de novo*. *JP Morgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 461 (2010). We disagree with plaintiff's assertion that *Kellerman*, 119 Ill. 2d at 116-17, construed section 2-621(b)(4) to require a plaintiff to show that it "appears" an action against the manufacturer would be "unavailing," "unavailable," or "fruitless." The *Kellerman* court did not construe the language of section 2-621. Rather, *Kellerman* addressed only whether a section 2-621 dismissal was a final and appealable order. The language in *Kellerman* quoted by plaintiff here was merely part of the *Kellerman* court's passing reference to, and summary of, all of the five subsections of section 2-621(b). See *Chraca v. U.S. Battery Manufacturing Co.*, 2014 IL App (1st) 132325, ¶ 22.

¶ 26 Our primary objective in construing a statute is to ascertain and give effect to the intent of the legislature. *MidAmerica Bank, FSB v. Charter One Bank, FSB*, 232 Ill. 2d 560, 565 (2009). The plain language of a statute is the most reliable indication of legislative intent. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). "[W]hen the language of the statute is clear, it must be applied as written without resort to aids or tools of interpretation." *Id.* The statute should be read as a whole and construed "so that no term is rendered superfluous or meaningless." *In re Marriage of Kates*, 198 Ill. 2d 156, 163 (2001). "Words and phrases should not be viewed in isolation but should be considered in light of other relevant provisions of the statute." *Bettis v. Marsaglia*, 2014 IL 117050, ¶ 13. We do not depart from the plain language of a statute by reading into it exceptions, limitations, or conditions that conflict with the legislative intent. *Harrisonville Telephone Co. v. Illinois Commerce Comm'n*, 212 Ill. 2d 237, 251 (2004). When the meaning of an "enactment is unclear from the statutory language itself, the court may look beyond the language employed and consider the purpose behind the law and the evils the law was designed to remedy." *Bettis*, 2014 IL 117050, ¶ 13.

¶ 27 This court previously addressed the meaning of section 2-621(b)(4) in *Chraca*, 2014 IL App (1st) 132325, where the consumer plaintiff, who had obtained a default judgment against a manufacturer-defendant located in China, moved to reinstate his product liability claim against the previously dismissed distributor defendant after the plaintiff was unable to collect on the default judgment. Specifically, the plaintiff argued that the Chinese manufacturer was "thumbing its nose at this Illinois court" by "ignoring this action." (Internal quotation marks omitted.) *Id.* ¶ 10. Plaintiff's counsel had engaged in collection proceedings and submitted affidavits averring that there was no reasonable expectation of ever collecting the default judgment against the

Chinese manufacturer because, even though the manufacturer had been served in accordance with The Hague Convention, it was not possible to register a United States judgment in China, since there was no arrangement for the reciprocal enforcement of judgments between the United States and China. *Id.* Also, counsel averred that the plaintiff would have to start a new tort action in China and any amount of damages that might be awarded would be significantly less than that in the United States. *Id.*

¶ 28 This court in *Chraca* concluded that the plaintiff had not met his burden under section 2-621(b)(4) to show that the manufacturer defendant was unable to satisfy any judgment because "[a]uthority indicates that in a section 2-621 proceeding, a company is deemed 'unable to satisfy any judgment' when it is bankrupt or nonexistent." *Id.* ¶ 24. Specifically, *Chraca* found that the plaintiff failed to present any information about the financial viability of the manufacturer, which seemed to be an ongoing business because the plaintiff's Chinese translator purported to have reached the manufacturer's owner on a mobile telephone. *Id.* ¶ 25.

¶ 29 We find that the *Chraca* court's analysis was flawed and its conclusion is not persuasive. The three cases *Chraca* cited to support its conclusion were not limited to the issue of a manufacturer's bankruptcy or nonexistence. Rather, the rationale of the cited cases focused on whether the manufacturer was judgment-proof and ensuring that the plaintiff's total recovery would not be prejudiced by the dismissal of a nonmanufacturer defendant. See *Harleysville Lake States Insurance Co. v. Hilton Trading Corp.*, No. 12 C 8135, 2013 WL 3864244, at *3 (N.D. Ill. July 23, 2013) (because there was no suggestion that the manufacturer was either insolvent under section 2-621(b)(3) or otherwise judgment-proof under section 2-621(b)(4), the retailer was entitled to be dismissed under the seller's exception); *Finke v. Hunter's View, Ltd.*, 596 F. Supp.

2d 1254, 1271 (D. Minn. 2009) (the retailer of the defective product was not entitled to dismissal under the seller's exception statute because the manufacturer had filed for Chapter 7 bankruptcy and the retailer failed to support its claim that the manufacturer's liability insurance policy would satisfy a judgment against the manufacturer); *Malone v. Schapun, Inc.*, 965 S.W.2d 177, 182 (Mo. Ct. App. 1997) (after the plaintiffs had settled with the manufacturer and distributor for a *partial* payment of the plaintiffs' claims, the mere seller was not entitled to dismissal because the statute required that there had to be another defendant properly before the court from whom *total* recovery may be had).

¶ 30 *Chraca* misconstrued the import of the holdings of *Harleysville*, *Finke*, and *Malone* to support *Chraca*'s finding that "unable to satisfy any judgment" must mean bankrupt or nonexistent. To the contrary, *Harleysville*, *Finke*, and *Malone* actually considered the effect a manufacturer's judgment-proof status would have on the plaintiff's total recovery. Nothing in section 2-621(b)(4) limits its application to only bankrupt or nonexistent manufacturers. Moreover, assigning *Chraca*'s narrow meaning of bankrupt and nonexistent to section 2-621(b)(4) renders some of the language of section 2-621(b)(3), *i.e.*, "no longer exists," superfluous.735 ILCS 5/2-621(b)(3) (West 1994). Accordingly, we do not follow *Chraca*'s analysis or holding concerning section 2-621(b)(4).

¶ 31 When determining the plain and ordinary meaning of words, a court may look to the dictionary if, as here, a word or phrase is undefined in the statute. *Murphy*, 381 Ill. App. 3d at 774. The adjective "able" is defined as "having sufficient power, skill, or resources to accomplish an object," and "susceptible to action or treatment." Merriam-Webster's Collegiate Dictionary 3 (10th ed. 1998). "Unable" is defined as "not able," "incapable," such as (a)

"unqualified, incompetent"; (b) "impotent, helpless." https://www.merriam-webster.com. (last visited Aug. 17, 2017).

¶ 32 "Satisfy" is defined as "1 a : to carry out the terms of (as a contract) : DISCHARGE b : to meet a financial obligation to 2 : to make reparation to (an injured party) : INDEMNIFY 3 a : to make happy : PLEASE b : to gratify to the full : APPEASE." Merriam-Webster's Collegiate Dictionary 1038 (10th ed. 1998). The noun "satisfaction" is defined as the "fulfillment of an obligation; esp., the payment in full of a debt." Black's Law Dictionary 1343 (7th ed. 1999). The phrase "satisfaction of judgment" means "1. The complete discharge of obligations under a judgment. 2. The document filed and entered on the record indicating that a judgment has been paid." *Id.*

¶ 33 Also, we note that the phrase "unable to satisfy a judgment" is synonymous with the terms "judgment-proof" and "execution-proof." See *id.* at 849 (defining "judgment-proof" as "unable to satisfy a judgment for money damages because the person has no property, does not own enough property within the court's jurisdiction to satisfy the judgment, or claims the benefit of statutorily exempt property. — Also termed *execution-proof*."). Terms of art abound in the law, and the entire phrase "unable to satisfy any judgment" is a term of art that means judgment-proof, execution-proof. Rather than construing that entire phrase, it seems that *Chraca*'s analysis focused on the word "unable." Similarly, here, the trial court and defendant China Vitamins focused on the word "unable" to conclude that reinstatement of China Vitamins was not warranted because Taihua Group seemed unwilling rather than unable to pay the judgment.

¶ 34 Nothing in section 2-621(b)(4) suggests that we should not give the phrase "unable to satisfy any judgment" its ordinary meaning of judgment-proof. See also, *Ungaro v. Rosalco,*

Inc., 948 F. Supp. 783, 785 (N.D. Ill. 1996) (refusing to apply the section 2-621(b)(4) or (5) "exception pertaining to judgment-proof manufacturers" because the plaintiff failed to show that the manufacturer "is unable to satisfy any judgment imposed by this court").[2] Thus, in order to reinstate a previously dismissed nonmanufacturer defendant, the plaintiff, in addition to showing that the manufacturer is insolvent or bankrupt, may also show that the manufacturer has no property or does not own enough property within the court's jurisdiction to satisfy the judgment. We do not hold that section 2-621(b)(4) applies when a plaintiff merely has trouble collecting a judgment; there can be a significant difference between situations involving a plaintiff experiencing some difficulty in collecting a judgment and a defendant being judgment-proof. The court's focus is not on plaintiff's mere inability to collect or enforce the judgment but, rather, whether plaintiff, based on the plain language of the statute, has met his burden to show that Taihua Group is judgment-proof.

¶ 35 Even if section 2-621(b)(4) was deemed ambiguous, our construction of the statute is consistent with its purpose to ensure that the burden of loss due to defective or dangerous products is not borne by the consumer but instead remains on the manufacturer, distributor and retail defendants who placed the product in the stream of commerce. See *Hammond*, 97 Ill. 2d at 206; *Thomas*, 182 Ill. App. 3d at 282. We find no support in the Illinois common law or statutes concerning strict product liability for the notion that the legislature intended for injured consumers to bear unreasonable costs to chase after foreign manufacturers who do not own

[2] *Ungaro* was issued one year before *Best*, 179 Ill. 2d 367, and thus *Ungaro*'s holding that the seller's exception of section 2-621 applies to negligence product liability claims has been superseded. See *supra* ¶ 12n.1, ¶¶ 20-22.

sufficient property within the court's jurisdiction to satisfy a judgment while reachable downstream liability distributor defendants, who profited from the sale of the defective product, could have contracted with the manufacturer for insurance coverage, and could seek indemnification from the manufacturer, simply sit and watch from the sidelines.

¶ 36 According to the plainly-worded statute, plaintiff has the burden to show that Taihua Group is unable to satisfy the over $9 million default judgment because Taihua Group either lacks the power, skill, or resources to do so; has no property; or does not own enough property within the court's jurisdiction to satisfy the judgment. A plaintiff must put on competent evidence to show under section 2-621 that the previously dismissed nonmanufacturer defendant should be reinstated in the case. See *Logan v. West Coast Cycle Supply Co.*, 197 Ill. App. 3d 185, 191 (1990). Where, as here, a trial court rules on the plaintiff's motion to reinstate the nonmanufacturer defendant without hearing any testimony and based solely on documentary evidence, a *de novo* standard of review is appropriate. *Rosenthal-Collins Group, L.P. v. Reiff*, 321 Ill. App. 3d 683, 687 (2001).

¶ 37 Because section 2-621(b)(4) includes judgment-proof manufacturers, the issues about whether Taihua Group is a viable enterprise in China and that country's alleged policy to disregard judgments rendered in American state courts are not dispositive of the issue of China Vitamin's reinstatement. According to the record, Taihua Group submitted to the jurisdiction of the trial court but then dropped out of the proceedings and has not paid the judgment rendered against it. The record also contains evidence of plaintiff's efforts to discover assets to satisfy any portion of the default judgment against Taihua Group. Specifically, the record before the trial court documented plaintiff's retention of Querrey & Harrow, Ltd. after the entry of the default

judgment to identify assets to collect the default judgment against Taihua Group, the entry of citations to discover assets against Taihua Group and multiple third parties, the various motions to quash presented by the third parties, and a conditional judgment entered against a third party that was subsequently vacated by the trial court. See *May Department Stores Co. v. Teamsters Union Local No. 743*, 64 Ill. 2d 153, 159 (1976) (a court may take judicial notice of court filings and other matters of public record when the accuracy of those documents reasonably cannot be questioned). Furthermore, plaintiff summarized in his motion to reinstate China Vitamins the history of his unsuccessful attempts to collect the default judgment.

¶ 38 Nothing in the plain language of section 2-621(b)(4) requires a plaintiff to exhaust all possible means of collection of a judgment before a previously dismissed nonmanufacturer defendant may be reinstated. Rather, the plain language of the statute provides for reinstatement if "the manufacturer is unable to satisfy any judgment *as determined by the court*." (Emphasis added.) 735 ILCS 5/2-621(b)(4) (West 1994). Civil judgments are not self-executing, and tort claimants often must undertake postjudgment litigation to collect their judgments. We believe the determination of whether a plaintiff has expended sufficient effort to show that a manufacturer is judgment-proof may be best addressed first by the circuit court, which often will have direct knowledge of the plaintiff's efforts. Here, the parties and the trial court analyzed the section 2-621(b)(4) reinstatement issue within the confines of *Chraca*'s holding that a plaintiff must show that the manufacturer defendant was either bankrupt or nonexistent. Because we reject that holding by *Chraca*, and because the trial court denied plaintiff's motion to reinstate China Vitamins based on the lack of any evidence that Taihua Group was bankrupt or no longer

existed, we reverse the trial court's denial of plaintiff's motion and remand the cause to the trial court for further proceedings consistent with this opinion.

¶ 39 Finally, we also reverse the trial court's order that dismissed plaintiff's negligent product liability claim against China Vitamins. As discussed above, the version of section 2-621 that is presently in *effect permits a seller's* exception dismissal only for a claim of strict product liability. Negligent product liability claims are not strict liability claims and therefore are not subject to dismissal under section 2-621. *Link*, 286 Ill. App. 3d at 978.

¶ 40 III. CONCLUSION

¶ 41 For the foregoing reasons, we conclude that the trial court erroneously denied plaintiff's motion to reinstate the action against China Vitamins based on the lack of any evidence showing that Taihua Group was bankrupt or no longer existed. We remand this cause to the trial court for further proceedings to determine whether Taihua Group is unable to satisfy any judgment within the meaning of section 2-621(b)(4). Also, we conclude that the trial court erroneously dismissed plaintiff's negligent product liability claim against China Vitamins under a void version of the statute. Accordingly, we reverse the judgment of the trial court and remand this cause for further proceedings.

¶ 42 Reversed and remanded.

¶ 43 JUSTICE ROCHFORD, concurring in part and dissenting in part.

¶ 44 I concur in the majority's decision to vacate the dismissal of plaintiff's negligence-based product liability claim against China Vitamins, for the reasons discussed *supra* ¶ 21-39. I also concur with the majority's conclusion that the decision in *Kellerman v. Crowe*, 119 Ill. 2d 111, 115-16 (1987), does not provide the relevant standard applicable to this matter, for the reasons

discussed *supra* ¶¶ 24-25. However, for the reasons that follow, I respectfully dissent from the majority's decision to remand this matter for further proceedings on plaintiff's motion to reinstate China Vitamins as a defendant with respect to plaintiff's strict product liability claim.

¶ 45 On appeal, plaintiff argues that his strict product liability action against China Vitamins should be reinstated pursuant to section 2-621(b)(4) of the Code of Civil Procedure, which allows for such reinstatement where "the manufacturer is unable to satisfy any judgment as determined by the court." 735 ILCS 5/2-621(b)(4) (West 2014). A plaintiff bears the burden of establishing that a statutory basis exists for the reinstatement of a dismissed defendant. *Cherry v. Siemans Medical Systems, Inc.*, 206 Ill. App. 3d 1055, 1064 (1990).

¶ 46 In seeking reinstatement under section 2-621(b)(4), plaintiff specifically argued that he "made exhaustive attempts to collect the [default] judgment [against Taihua Group]," that he has been unable to do so, and that such efforts "will continue to be unavailing." Thus, plaintiff sought reinstatement under this section primarily on the basis of his difficulty in enforcing the judgment.

¶ 47 In finding that this matter should be remanded to allow plaintiff to satisfy his burden of establishing that a statutory basis exists for the reinstatement of China Vitamins, the majority first interprets section 2-621(b)(4) to allow for reinstatement where a manufacturer is "judgment-proof." *Supra* ¶ 34. However, the majority provides three different, partially overlapping definitions of what that means. See *supra* ¶ 33 (noting that judgment-proof is defined as "unable to satisfy a judgment for money damages because the person has no property, does not own enough property within the court's jurisdiction to satisfy the judgment, or claims the benefit of statutorily exempt property."); *supra* ¶ 34 (to establish that a manufacturer is judgment-proof,

"the plaintiff, in addition to showing that the manufacturer is insolvent or bankrupt, may also show that the manufacturer has no property or does not own enough property within the court's jurisdiction to satisfy the judgment."); *supra* ¶ 36 (finding that a plaintiff has the burden to show that manufacturer "lacks the power, skill, or resources to [satisfy a judgment against it], has no property; or does not own enough property within the court's jurisdiction to satisfy the judgment."). Then, stating that its "focus is not on plaintiff's mere inability to collect or enforce the judgment," the majority nevertheless suggests that—on remand—plaintiff may establish that Taihua Group was "judgment-proof" by presenting competent evidence concerning his unsuccessful efforts to collect any portion of the default judgment against Taihua Group. *Supra* ¶¶ 34-37.

¶ 48 However, in light of the plain statutory language, it is my belief that it is improper to focus on *plaintiff's inability to enforce* the default judgment rather than *Taihua Group's inability to satisfy* that judgment.

¶ 49 As the majority correctly notes, plaintiff's arguments require this court to interpret the language of section 2-614(b)(4) *de novo*, to give effect to the legislative intent evidenced by the plain language of that section and, in doing so, not depart from the plain language by reading into it exceptions, limitations, or conditions that conflict with the clearly expressed legislative intent. *Supra* ¶¶ 25-26. The plain language of section 2-621(b)(4) provides that the dismissal of a nonmanufacturing defendant may be vacated, and the strict liability action against it reinstated only where the court determines "the manufacturer is unable to satisfy the judgment." 735 ILCS 5/2-621(b)(4) (West 2014). "When a court is called upon to determine whether a statutory term has a plain and ordinary meaning, it is appropriate to consult a dictionary." *Board of Education*

of Springfield School District No. 186 v. Attorney General of Illinois, 2017 IL 120343, ¶ 41. As the definitions provided by the majority itself indicate (supra ¶¶ 31-32), dictionary definitions of the words contained in the phrase "the manufacturer is unable to satisfy the judgment" indicate that it has the following plain and ordinary meaning: the manufacturer is not able or is incapable of completely discharging its financial obligations under the judgment.

¶ 50 What is also evident from that plain language is that the proper focus should be on the manufacturer's *inability* to *satisfy* a judgment. There is no language in section 2-621(b)(4) stating that a dismissal may be vacated where the court determines a plaintiff cannot *enforce* a judgment, and no language that reinstatement may occur merely when the court determines that the manufacturer has insufficient or no assets within the court's specific jurisdiction—while possessing assets elsewhere. As such, there is nothing in the plain language of the statute to support the contention that plaintiff's difficulties in *enforcing* the default judgment in China or elsewhere rendered Taihua Group *unable to satisfy* that judgment. And, without reading conditions into the statutory text, there is no language indicating that section 2-621(b)(4) is concerned with manufacturers that are "judgment-proof," as defined in three separate ways by the majority.

¶ 51 This court's decision in *Chraca v. U.S. Battery Manufacturing Co.*, 2014 IL App (1st) 132325, supports this reading of section 2-621(b)(4).

¶ 52 In *Chraca*, the plaintiff was injured while unpacking a shipment of golf cart batteries sent by the defendant U.S. Battery Manufacturing Company (U.S. Battery) to the plaintiff's employer. *Id.* ¶ 2. The plaintiff suffered injuries as he was carrying individual batteries with a strap that broke. *Id.* The plaintiff brought a strict liability action against the manufacturer of the

strap and U.S. Battery. *Id.* U.S. Battery was dismissed as a defendant under section 2-621(b) after showing it did not participate in the manufacture and design of the strap and had no knowledge of, nor responsibility for, any defect in the strap. *Id.* ¶ 8. U.S. Battery identified the manufacturer, Yuhuan County Litian Metal Products Co. Ltd., an entity located in China. *Id.* The plaintiff filed an amended complaint which added the manufacturer as a defendant and served the manufacturer pursuant to the Hague Convention. *Id.* ¶ 9. The plaintiff obtained a default judgment against the manufacturer-defendant. *Id.* ¶ 1. Subsequently, the plaintiff moved to reinstate his product liability claim against U.S. Battery arguing that it was unable to collect the default judgment. *Id.* ¶ 12. In support of the motion, the plaintiff submitted affidavits from lawyers in China averring that there was no reasonable expectation of ever collecting the default judgment in that a United States judgment could not be registered and the plaintiff would have to bring a new tort action in China where the potential award of damages would be significantly less than that in the United States. *Id.* ¶ 13.

¶ 53 In construing section 2-621(b)(4) in *Chraca*, this court noted that "[a]uthority indicates that in a section 2–621 proceeding, a company is deemed 'unable to satisfy any judgment' when it is bankrupt or nonexistent." *Id.* ¶24 (collecting cases). We then concluded that plaintiff's inability to enforce a judgment was not a basis for reinstatement, stating:

> "Chraca's attorney misconstrued the statutory language when he asked [another attorney] how Chraca could demonstrate to the Illinois trial court that there is 'no reasonable expectation of ever collecting a judgment against the Chinese [manufacturing] company.' [The] response and the joint affidavit of the two Chinese attorneys about their local court's unwillingness to 'recognize or enforce a judgment obtained in an American state

court' do not indicate that Yuhuan was declared bankrupt or is no longer operating and thus is 'unable to satisfy any judgment' as that phrase is used in the statute at issue." *Id.* ¶ 25 (citing 735 ILCS 5/2-621(b)(4) (West 2010)).

¶ 54 Thus, in interpreting the phrase "unable to satisfy any judgment," the *Chraca* court properly distinguished between a defendant manufacturer's inability to satisfy a judgment and a plaintiff's inability to enforce a judgement. I see no reason to depart from the *Chraca* court's interpretation, as it reflects the plain language of the statute.

¶ 55 Nevertheless, both plaintiff and the majority take issue with *Chraca's* limitation of the application of section 2-621(b)(4) to only those situations where a manufacturing defendant is bankrupt or nonexistent, in part because the authority cited by the *Chraca* court did not focus simply on insolvency or nonexistence, but rather on the fact that defendant manufacturers were "judgment-proof." *Supra* ¶¶ 29-30. While those two situations may not represent the only circumstances where a manufacturer is unable to satisfy a judgment, I find that—at the very least—our prior decision correctly interpreted the plain statutory language to focus on the defendant's inability to satisfy a judgment rather than a plaintiff's inability to enforce a judgement.

¶ 56 Moreover, while the majority contends that the phrase "unable to satisfy any judgment" contained in section 2-621(b)(4) represents a legal "term of art" meaning "judgment-proof," I note that our supreme court has only recognized that "if a term has a settled legal meaning, the courts will normally infer that the legislature intended to incorporate the established meaning." *People v. Smith*, 236 Ill. 2d 162, 167 (2010). However, the majority cannot say the terms of that statute have the settled legal meaning of "judgment-proof" after it both rejects the interpretation

of section 2-621(b)(4) previously offered by the *Chraca* court and after its own analysis provides three separate definitions of the language of the statute, which the majority arrived at by combining and extrapolating from several dictionary definitions.

¶ 57 That said, there may be valid policy reasons for allowing the reinstatement of a dismissed defendant in the chain of distribution when a plaintiff has failed to overcome significant burdens in the collection of a judgment. However, this court is not free to read exceptions, limitations, or conditions into a statute, even for laudable reasons. *Bettis v. Marsaglia*, 2014 IL 117050, ¶ 13. Indeed, this court has previously declined to place glosses upon or provide exceptions to the plain language of section 2-621(b). See *Logan v. West Coast Cycle Supply Co.*, 197 Ill. App. 3d 185, 193 (1990); *Cherry*, 206 Ill. App. 3d at 1064. In contrast, here the majority improperly grafts its own definition of "judgement-proof" onto the plain language of section 2-621(b)(4).

¶ 58 Moreover, if the legislature had in fact desired to include a plaintiff's inability to enforce a judgment as a statutory basis for reinstatement, it could easily have done so. The provisions of section 2-621 are one example of legislation enacted in many states "that, to some extent, immunizes nonmanufacturing sellers or distributors from strict liability." Restatement (Third) of Torts: Products Liability § 1 cmt. e (1998). These statutes "are loosely patterned after the Model Uniform Product Liability Act" (Model Act). *Malone v. Schapun, Inc.*, 965 S.W.2d 177, 181 (Mo. Ct. App. 1997) (citing Frank J. Cavico, Jr., *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products*, 12 Nova. L. Rev. 213, 240-41 (1987)).

¶ 59 Notably, the Model Act includes provisions that a product seller will be held liable to the same extent as a manufacturer in a strict product liability action *both* where: (1) the manufacturer is insolvent such that it is "unable to pay its debts, and (2) "[t]he court determines that it is highly

probable that a claimant would be unable to enforce a judgment." 44 Fed. Reg. 62714, at 62726 (1979). Our legislature chose not to include an "unable to enforce" provision in section 2-621(b)(4), thus exhibiting an intent that the inability to enforce a judgment was not a consideration in the mechanisms of section 2-621(b)(4). Legislatures in other states have similarly expressed their legislative intent, electing to provide a "seller's exception" under different circumstances than those included in the Model Act. See Wash. Rev. Code Ann. § 7.72.040(2)(b) (incorporating the Model Act's "highly probable" language); Minn. Stat. Ann. § 544.41 (2)(4) (utilizing language identical to section 2-621(b)(4)).[3]

¶ 60 Further, and contrary to the majority's interpretation, section 2-621(b)(4) does not specifically include language providing for reinstatement where a manufacturer has either no assets or insufficient assets within the court's jurisdiction to satisfy a judgment. Perhaps this is because Illinois is one of many states that recognize foreign judgments and provide a mechanism for enforcement of such foreign judgments. See 735 ILCS 5/12-650 *et seq.* (West 2014) (Uniform Enforcement of Foreign Judgments Act); 735 ILCS 5/12-661 *et seq.* (West 2014) (Uniform Foreign-Country Money Judgments Recognition Act). As such, a defendant is generally not considered judgment-proof simply because assets are located outside the jurisdiction of the court. I therefore have concerns about making an overbroad generalization that

[3] Notably, the Minnesota language—identical to our own—appears to have only been applied where the manufacturer is insolvent. See *Tabish v. Target Corp.*, Civ. No. 07-2303 RHK/JSM, 2007 WL 1862095, at *2 (D. Minn. June 26, 2007); *Marcon v. Kmart Corp.*, 573 N.W.2d 728, 731 (Minn. Ct. App. 1998).

a defendant is unable to satisfy a judgment simply because it has either no assets or insufficient assets within the court's specific jurisdiction.

¶ 61 Furthermore, I note that in response to the plaintiff's effort to reinstate, China Vitamins provided evidence that Taihua Group was an ongoing commercial concern operating thorough various subsidiaries in China and many other countries. This included sales and warehouse facilities in Germany. Of note, and despite any difficulties plaintiff may have collecting its judgment in China, German law contains specific provisions for the enforcement of foreign judgments. See Zivilprozessordnung (ZPO) (German Code of Civil Procedure) §§ 328, 722, 723. While the majority contends that plaintiff should not be forced to "chase after foreign manufacturers" before reinstating a nonmanufacturer defendant (*supra* ¶ 35), the process of enforcing judgments in other jurisdictions is not outside the norm. Rather, as the above discussed mechanisms reflect, it is a normal part the litigation process. Indeed, even the majority itself recognizes: "Civil judgments are not self-executing, and tort claimants often must undertake postjudgment litigation to collect their judgments." *Supra* ¶ 38.

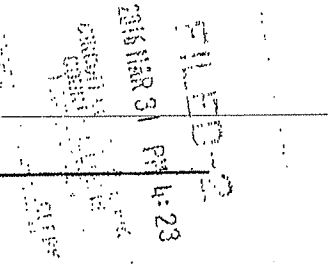
¶ 62 Finally, I note that even if the statutory definition and policy considerations proffered by the majority are to be accepted, it would not necessarily follow that the dismissal of plaintiff's strict product liability claim against China Vitamins should be vacated. To the extent that we look to Taihua Group's power, skill and resources to pay the default judgement, I note that plaintiff himself acknowledges on appeal that Taihua Group "could voluntarily pay the damages assessed against it." And, to the extent that the majority seeks to ensure that section 2-621 succeeds in its objective to place the burden of loss on those who placed the product in the stream of commerce (*supra* ¶ 19), plaintiff has taken no efforts to finalize the default entered

against defendant Nhu, another defendant involved in the supply chain at issue here, or to attempt to collect damages from that remaining defendant.

¶ 63 For all the above the reasons, I respectfully dissent from the majority's decision to remand for further proceedings on plaintiff's motion to reinstate China Vitamins as a defendant with respect to the strict product liability claim. Plaintiff's motion failed to demonstrate that Taihua Group was unable to satisfy the judgment against it, when that phrase is given its plain and ordinary meaning. That said, nothing in the statute would prevent plaintiff from bringing another, similar motion below should it have additional, relevant evidence regarding Taihua Group's inability to satisfy the judgment. See 735 ILCS 5/2-621(b) (West 2014) ("The plaintiff may *at any time* subsequent to the dismissal move to vacate the order of dismissal and reinstate the certifying defendant or defendants." (Emphasis added.)).

APPEAL TO THE ILLINOIS APPELLATE COURT
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Martin Cassidy, Plaintiff-Appellant, v., China Vitamins, LLC, Defendant-Appellee,	Appeal from Circuit Court of Cook County, Illinois, Law Division Honorable Kathy M. Flanagan, Case no. 07 L 013276



NOTICE OF APPEAL

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NOW COMES the Plaintiff-Appellant, Martin Cassidy, by and through his attorneys, HORWITZ, HORWITZ & ASSOCIATES, LTD., and pursuant to Illinois Supreme Court Rule 304(a), appeals to the Appellate Court of Illinois, First District, from the Order entered by the Honorable Kathy M. Flanagan of the Circuit Court of Cook County on March 14, 2016, denying the Plaintiff-Appellee Martin Cassidy's Motion to Reinstate Defendant China Vitamins, LLC.

The Plaintiff-Appellant, Martin Cassidy, seeks an order from the Appellate Court including, without limitation, reversing and vacating the Circuit Court's March 14, 2016 Order denying the Plaintiff-Appellee Martin Cassidy's Motion To Reinstate Defendant, China Vitamins, LLC, pursuant to 735 ILCS 5/2-621(b)(3) and (b)(4). Specifically, Plaintiff-Appellant will ask the Appellate Court to reinstate Defendant-Appellee China Vitamins, LLC because the defendant manufacturer cannot be subject to the jurisdiction of the courts of this State as provided by subsection (b)(3), or, in the alternative, the defendant manufacturer is unable to satisfy any judgment as determined by the court, provided by subsection (b)(4), and granting such other relief which the Appellate Court deems equitable and just.

Respectfully submitted,

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One of Plaintiff-Appellant's
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

MARTIN CASSIDY,	)	
	)	
Plaintiff	)	
	)	
-v-	)	
	)	NO: 07-L-13276
CHINA VITAMINS, LLC,	)	
TAIHUA GROUP SHANGHAI TAIWEI	)	
TRADING COMPANY LIMITED, and	)	
ZHEJIANG NHU COMPANY, LTD.,	)	
	)	
Defendants	)	

MEMORANDUM OPINION AND ORDER ON PLAINTIFF'S MOTION TO RECONSIDER THE ORDER OF DECEMBER 14, 2015

I. Factual Background

On November 27, 2007, the Plaintiff filed a multi count lawsuit against the Defendant, China Vitamins, LLC, requesting damages for injuries sustained to the Plaintiff on October 23, 2006. It was specifically alleged that the Defendant engaged in the business of designing, preparing, manufacturing, advertising, distributing, supplying and/or selling a certain product and its appurtenances, commonly known a flexible bulk container. It was further alleged that on the date and time in question, the Plaintiff was employed at a company known as Ridley Feed Ingredients and was injured when this product, which was stacked for storage, ripped and leaked its contents, causing instability in the product which then collapsed and fell upon the Plaintiff.

Subsequent thereto, China Vitamins identified the Defendant, Shanghai Taiwei

Trading Company Limited, sued as Taihua Group Shanghai Taiwei Trading Company, Ltd. ("Shanghai") [1] as the manufacturer of the flexible bulk container. China Vitamins subsequently moved for dismissal pursuant to the distributor statute, 735 ILCS 5/2-621(b). Defendant Taihua Group filed its appearance and answer, although its attorney subsequently withdrew. This Defendant was the subject of an order of default on January 9, 2012, for failure to file any supplemental appearance by and through an attorney. Subsequent thereto, the Plaintiff conducted a prove up, pursuant to which a judgment against Taihua Group was entered on June 14, 2012, in the amount of $9,111,322.47. Thereafter, the case was transferred to the Law Division, Tax and Miscellaneous Section, for post-judgment collections.

On July 24, 2015, the Plaintiff filed a motion to reinstate the case against the Defendant, China Vitamins, pursuant to the applicable provisions of the Illinois Distributor's Statute, 735 ILCS 5/2-621.

The motion alleged that from August 8, 2013 through May 2015, the Plaintiff pursued all available collection efforts in an attempt to satisfy the judgment. This conduct included, but was not limited to, citations to discover assets against who allegedly may have been in possession of assets of the Defendant Taihua Group. These efforts also included performing

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[1] The parties throughout their briefs have referred to this Defendant by a number of different names: "Shanghai Taiwei Trading Co., Ltd.," "Shanghai Taiwei," "Taihua Group Shanghai Taiwei Trading Co., Ltd," "Taihua Group Shanghai," and "Taihua." In Plaintiff's pleadings, the Defendant was referred to as "Taihua Group," and that is the name which will be used throughout this opinion.

asset searches and investigation of two possible instances of assets being maintained in the United States, both ostensibly without success.

The Plaintiff alleged in the motion that the known potential methods of collecting a judgment had been engaged in, against a Chinese entity which no longer did business or held assets in the United States, and because of this, the Plaintiff requested the reinstatement of the Defendant China Vitamin, because the manufacturer could not be subject to the courts of this state, and therefore was unable to satisfy any judgment.

This motion was scheduled for initial presentation on August 4, 2015, at which point the Court entered a briefing schedule and continued the case for status and presentation of courtesy copies. The ruling date was set for September 21, 2015 and on that date, pursuant to an oral ruling by this Court, the Plaintiff's motion to reinstate China Vitamins was granted.

Thereafter, the Defendant, China Vitamins filed a motion to vacate and/or reconsider this Court's order of September 21, 2015. In that motion, the Defendant correctly pointed out to this Court that in the oral ruling of September 21, 2015, the Court erroneously focused on whether the Court had subject matter jurisdiction to even entertain the reinstatement issue. This analysis arose out of an examination of the order of June 14, 2012 when the aforementioned prove-up was held and the judgment was entered against Taihua Group. This order was erroneously coded by the court clerk as having been a final judgment which disposed of the entire case as of that date. Because of this indication in the docket, the Court considered this order a final order, which would have divested this Court of subject matter

jurisdiction to hear anything.

However, an examination of the order specifically revealed that the judgment was only against one Defendant, Taihua Group. China Vitamins had been dismissed pursuant to the distributor statute, and these was no adjudication of any cause of action against the third named Defendant, Zhejiang Nhu, Company, Limited. Unfortunately, the order of June 14, 2012 did not contain a finding pursuant to Supreme Court Rule 304(a) and did not provide that the case continued against the remaining Defendant, ZHEJIANG. Once this Court realized that the order of June 14, 2012 was not a final order, the Court then informed the parties that it did still have subject matter jurisdiction over the remaining Defendant as well as still retaining jurisdiction to reinstate China Vitamins. However, this was not an issue that either side had raised in the briefs concerning Plaintiff's motion. This was a matter of the Court examining whether it had subject matter jurisdiction to hear Plaintiff's motion at all.

On its motion to reconsider, China Vitamins argued that the Plaintiff could only reinstate China Vitamins by meeting the criteria provided for in the distributor statute, and the Plaintiff failed to do so. China Vitamins indicated that a plaintiff may move at any time subsequent to the original dismissal, may reinstate the certifying defendant provided the Plaintiff can show one or more of the following:

1. That the applicable period of statute of limitations or statute of repose barred the assertion of a cause of action against the manufacturer, or

2. That the identity of the manufacturer given to a plaintiff by a certifying defendant

was incorrect, or

3. That the manufacturer no longer exists, cannot be subject to the jurisdiction of the courts of this state, or despite due diligence, the manufacturer is not amenable to service of process, or

4. The manufacturer is unable to satisfy any judgment as determined by the court, or

5. That the court determines that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with the plaintiff.

China Vitamins argued that by reinstating it as per the court order of September 21, 2015, the Court was ignoring the plain language of the statute, because Plaintiff had not established *any* of the criteria set forth for reinstatement, and that the matter of whether or not there was a final order was irrelevant. This motion was set for its initial hearing on October 26, 2015, when this Court was absent. The motion was then continued on the Court's own motion to October 30, 2015 and set for ruling on November 16, 2015.

On November 16, 2015, the Court was absent, and the matter was continued to December 7, 2015. On that date, because the Plaintiff was not present in court, the Court ordered the case to be continued to December 14, 2015 for ruling on the motion for reconsideration of Defendant, China Vitamins.

On December 14, 2015, this Court granted China Vitamins motion to vacate and/or reconsider the September 21, 2015 order, and then denied Plaintiff's motion to reinstate

China Vitamins under 2-621, with the specific finding that Plaintiff failed to meet any of the conditions for reinstatement under 735 ILCS 5/2-621(b), and also provided that the order of December 14, 2015 was final and appealable pursuant to Supreme Court Rule 304(a). This finding was entered because there is still a remaining named Defendant, ZHEJIANG Nhu Company, Ltd.

Then, on December 31, 2015, Plaintiff filed a motion for reconsideration of this Court's December 14, 2015 order, and the Court allowed briefing on it, requiring China Vitamins to file its response by February 1, 2016 and setting the matter for status and presentation of courtesy copies for the same date.

Shortly thereafter, on January 29, 2016, Plaintiff's counsel faxed to defense counsel Plaintiff's "amended" motion for reconsideration of the December 14, 2015 court order, which consisted of two paragraphs, stating that "Defendant China Vitamins cannot be subject to the jurisdiction of the courts of this state," and that "Defendant China Vitamins is unable to satisfy any judgment in this matter" and requesting an evidentiary hearing. It is interesting to note that this amended petition was never actually filed with the Clerk of the Circuit Court, it was not imaged, and clearly contained a typographical error in both of those paragraphs, because it refers to Defendant "China Vitamins" rather that the Defendant against whom the Plaintiff obtained the judgment, "Taihua Group."

On February 1, 2016, the Defendant China Vitamins filed a motion to strike the Plaintiff's amended motion for reconsideration, setting forth the procedural posture of this

case, and arguing that the Plaintiff lacked standing to file his amended motion because such motion was not filed within thirty days of the December 14, 2015 order. Defendant argues that the original motion for reconsideration was filed within the deadline, but in order to properly file an "amended" motion, thereafter, the Plaintiff needed leave of court pursuant to Supreme Court Rule 183 and no such leave was ever obtained. Additionally, Defendant argues that the amended motion does not cite to any legal authority and misstates the record in this case. Specifically, the Defendant argues that the Plaintiff is requesting an evidentiary hearing, and presumably possesses some new evidentiary basis for why the dismissal of China Vitamins on December 14, 2015 was improper. However, any such evidence is not identified.

Having considered all the arguments contained in these various motions, responses, replies, and considering the orders entered by this Court, on September 21, 2015 and on December 14, 2015, the Court finds that in order to make a completely clear record for purposes of a possible appeal, it is in the best interests of the entire case to vacate the court order of December 14, 2015, which leaves the parties in the position of having this Court rule *de novo* on the Plaintiff's Motion To Reinstate Distributor China Vitamins, filed on July 24, 2015, and on China Vitamin's Response, filed on August 11, 2015. The Court considers all the relevant material contained in the various briefs filed by the parties as supplemental argumentation proffered by both sides. The Court will not consider the so-called "Amended Motion For Reconsideration," since it was never filed with the Clerk of the Circuit Court.

Further, the request for an evidentiary hearing is not supported in any event, since there is no showing what evidence, if any, would be or could be presented which would have any effect on the issues regarding satisfaction of the criteria for reinstatement of China Vitamins.

With regard to the Plaintiff's Motion to Reinstate China Vitamins, the Plaintiff contends that because the manufacturer cannot be subject to the courts of this State and the judgment cannot be satisfied. Thus, the Plaintiff suggests that under section 2-621(b)(3) and (4), he is entitled to reinstate the previously dismissed distributer. On January 9, 2012, this Court dismissed China Vitamins pursuant to 2-621, as the evidence showed that the defective containers were manufactured by the Taihua Group and Taihua was made a Defendant and *appeared and answered, admitting that it designed and manufactured the subject product.* Further, there was also no evidence that China Vitamins exercised significant control over the design or manufacture of the product, provided warnings or instructions, had actual knowledge of the defect or created the defect.

The Plaintiff correctly notes that the dismissal pursuant to 2-621 is not a final disposition and a non-manufacturing defendant can be reinstated at any time. However, a plaintiff can vacate the dismissal and reinstate a certifying defendant *only* if he can show one of the following under 2-621(b): (1) That the applicable period of statute of limitation or statute of repose bars the assertion of a cause of action against the manufacturer; (2) That the identity of the manufacturer given to the plaintiff by the certifying defendant was incorrect; (3) That the manufacturer no longer exists, cannot be subject to the jurisdiction of the courts

of the State, or despite due diligence, the manufacturer is not amenable to service of process; (4) That the manufacturer is unable to satisfy any judgment as determined by the court; or (5) That 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).

Here, the Plaintiff argues that Illinois courts have no personal jurisdiction over the Taihua Group (2-621[b][3]) and that the judgment cannot be satisfied (2-621[b][4]). However, the Taihua Group *waived any objection to personal jurisdiction or service of process when it filed a general appearance and answered the complaint in 2009*. Further, as noted by China Vitamins, the Taihua Group was amenable to service of process, was served, received notice of the action, participated in the litigation, and was brought to judgment.

Moreover, the Taihua Group is a functioning and operational company and there is no evidence before the Court that it is unable to satisfy the judgment. Instead, the problem here is the Plaintiff's inability to collect the judgment, which is not an enumerated basis upon which to reinstate a certifying defendant. Because the manufacturer has waived objection to personal jurisdiction, and exists, and can purportedly satisfy the judgment, there is no basis under section 2-621(b)(3) or (4) to reinstate China Vitamins as a defendant.

The Plaintiff's reliance on Chraca v. U.S. Battery, 2014 IL App (1st) 132325 is misplaced. There, the certifying defendant was reinstated because there was no basis to assert personal jurisdiction over the manufacturer. Chraca, at P13. However, in the instant

case, as set forth above, as the Taihua Group filed a general appearance and an answer to the complaint, it waived any objection to personal jurisdiction.

Further, the plaintiff there also argued that reinstatement of the Defendant should be based on the *inability* to collect the judgment. However, the Chraca court distinguished between being *unable to satisfy a judgment* with being *unable to collect a judgment*, noting that the inability to *satisfy* a judgment suggests that the company is nonexistent or bankrupt. Id., at P24-25.

Finally, there is an issue with regard to the propriety of a finding by this court pursuant to Supreme Court Rule 304(a). Under normal circumstances, the entry of an order of dismissal of a certifying defendant is a non-final order, which would not be immediately appealable, since there is an automatic contemplation that there may be some future action against the certifying defendant is certain circumstances arise in the future of the lawsuit. However, it appears to this Court that the Plaintiff will be unable to satisfy any of the reinstatement criteria contained in 2-621(b), in order to effectuate a reinstatement of China Vitamins as a party to this case. Therefore, the denial of the Plaintiff's Motion To Reinstate China Vitamins, LLC is with prejudice, and as such, the Court will enter a finding pursuant to Supreme Court Rule 304(a), so that these arguments could be immediately appealed under Supreme Court Rule 304(a).

Here, there is no evidence that the Taihua Group is nonexistent or bankrupt, or cannot satisfy the judgment, and in fact, the evidence is to the contrary. Accordingly, the Court

finds that the Plaintiff has failed to demonstrate that any of the situations enumerated under section 2-621(b) apply to support the reinstatement of China Vitamins as a defendant.

Based on the foregoing, the Court orders as follows:

1. The Motion of the Plaintiff To Reconsider the court order of December 14, 2015, is granted and said order is vacated and held for naught;

2. The Motion of the Defendant, China Vitamins, LLC, To Strike Plaintiff's Amended Motion For Reconsideration is granted;

3. The Motion of the Plaintiff, Martin Cassidy, To Reinstate Defendant, China Vitamins, LLC, pursuant to 735 ILCS 5/2-621(b) is denied, and China Vitamins, LLC, shall remain as a party dismissed pursuant to 735 ILCS 5/2-621(b);

4. Pursuant to Supreme Court Rule 304(a), this order is final and appealable, and there is no just cause for delaying enforcement and/or appeal thereof;

5. The case remains pending against the remaining Defendant, Zhejang Nhu Company.

ENTER: ENTER

MAR 14 2016

KATHY M. FLANAGAN #267

JUDGE NO.

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Docket No. 122873

IN THE ILLINOIS SUPREME COURT

MARTIN CASSIDY, Plaintiff-Appellee, v. CHINA VITAMINS, LLC, Defendant-Appellant, and TAIHUA GROUP SHANGHAI TAIWEI TRADING COMPANY LIMITED and ZHEJIANG NHU COMPANY, LTD., Defendants.	On Appeal From The Illinois Appellate Court, First Judicial District Docket No. 1-16-0933 There Heard On Appeal From The Circuit Court of Cook County, Illinois County Department, Law Division No. 07-L-13276 The Honorable Kathy M. Flanagan, Judge Presiding

NOTICE OF FILING

TO: Michael Carter
Horwitz, Horwitz & Associates, Ltd.
25 East Washington Street, Suite 900
Chicago, IL 60602
michael@horwitzlaw.com; sung@horwitzlaw.com

PLEASE BE ADVISED that on this 22nd day of February, 2018, we caused to be electronically filed with the Clerk of the Illinois Supreme Court, the defendant-appellant's additional brief and appendix on behalf of China Vitamins, LLC, a copy of which, along with this notice of filing with affidavit of service, is herewith served upon all attorneys of record.

Respectfully submitted,

By: /s/ Michael Resis
Attorneys for Defendant-Appellant
CHINA VITAMINS, LLC

Michael Resis
SmithAmundsen LLC
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Chicago, Illinois 60601
(312) 894-3200
mresis@salawus.com

E-FILED
2/22/2018 12:09 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT OF SERVICE

I, Jacqueline Y. Smith, a non-attorney, on oath state that I served this notice via electronic mail to the attorneys listed above at their email address prior to 5:00 p.m. on February 22, 2018.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Jacqueline Y. Smith
SMITHAMUNDSEN LLC

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2/22/2018 12:09 PM
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