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Commentary: Revised innocent seller statute protects resident defendants

BY BRIAN JACKSON, JOHN LYONS AND HENRY ADAMS

Plaintiffs, particularly in product liability actions, seek to litigate claims in state courts for a number of real and/or perceived advantages over non-resident manufacturers. One classic strategy plaintiffs use to prevent manufacturers from removing cases to federal court is to join a Missouri-based retailer as an additional defendant. The local party destroys complete diversity and prevents removal, notwithstanding the Missouri retailer usually only sold the product in the chain of commerce and the real target is the non-resident manufacturer. The tactic has long placed an unnecessary burden on local Missouri businesses, forcing them to incur litigation costs in suits they had no real interest in. Missouri's legislature recognized this burden, and in 1987, the state enacted an "innocent seller statute" to protect local businesses. Mo. Rev. Stat. § 537.762; *Dorsey v. Sekisui American Corp.*, 79 F. Supp. 2d 1089, 1091 (E.D. Mo. 1999).

Many states adopted innocent seller statutes to protect local retailers from product liability lawsuits. See Robert A. Sachs, *Product Liability Reform and Seller Liability: A Proposal for Change*, 55 Baylor L. Rev. 1031 (2003). The statutes help local businesses avoid litigation. After a suit is filed, the non-resident manufacturer can remove the action to federal court and ask the court to dismiss the local business for being fraudulently joined. Federal courts will dismiss the retailer if there is no reasonable probability of recovery against them in light of the innocent seller statute's immunity.

In a broader sense, innocent seller statutes protect local businesses by deterring procedural gamesmanship at their expense. If a local party is ultimately going to be dismissed for fraudulent joinder, joining them to begin with becomes frivolous. But Missouri's pre-2019 innocent seller statute was different.

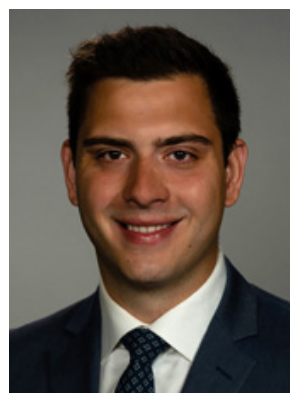
The intent of the Missouri innocent seller statute is to protect local businesses that are named as defendants solely because they sold an allegedly defective product manufactured by another defendant. Mo. Rev. Stat. § 537.762; *Gramex Corp. v. Green Supply, Inc.*, 89 S.W.3d 432, 445-46 (Mo. 2002). The statute allows for the dismissal of claims against such retailers if the product manufacturer "from whom total recovery may be had" is properly before the court. *Id.* Rather than deterring procedural gamesmanship, one subsection of Missouri's pre-2019 innocent seller statute actually incentivized filing claims against local Missouri retailers, contrary to the statute's protective intent.

The innocent seller statute included a provision stating that "no order of dismissal under this section shall operate to divest a court of venue or jurisdiction otherwise proper at the time the action was commenced. A defendant dismissed pursuant to this section shall be considered to remain a party to such action only for such purposes." Mo. Rev. Stat. § 537.762(6) (the "local party provision"). Using the local party provision, plaintiffs routinely named local sellers at the onset of product liability cases to fight the non-resident manufacturer's attempts to remove the case to federal court. When manufacturers sought removal based on diversity and fraudulent joinder, plaintiffs argued that the local party provision forced the federal court to consider the local retailer as a party for the purposes of diversity jurisdiction, despite their immunity.

Federal courts struggled to interpret the provision. Several courts agreed with the plaintiffs, concluding the provision forced them to view the local retailer as a party for jurisdiction. See *e.g.*, *Draper v. Johnson & Johnson Vision Care, Inc.*, 2009 WL 10671677, at *2 (W.D. Mo. Sept. 22, 2009); *Fahy v. Taser Int'l, Inc.*, 2010 WL 559249, at *2 (E.D. Mo. Feb. 10, 2010); *Baron v. Ford Motor Co.*, 2012 WL 1898780, at *4 (W.D. Mo. May 23, 2012); *Dorsey v. Sekisui Am. Corp.*, 79 F. Supp. 2d 1089, 1092 (E.D. Mo. 1999); *Pender v. Bell Asbestos Mines, Ltd.*, 46 F. Supp. 2d 937, 940 (E.D. Mo. 1999).

Other federal courts allowed removal, finding the retailer was fraudulently joined and therefore not a party for jurisdiction purposes despite the provision. See *e.g.*, *Wichmann v. Proctor & Gamble Mfg. Co.*, 2006 WL 3626904, at *2 n.3 (E.D. Mo. Dec. 11, 2006); *Reeb v. Wal-Mart Stores, Inc.*, 902 F. Supp. 185, 186 (E.D. Mo. 1995); *Thomas v. Brown & Williamson Tobacco Corp.*, 2006 WL 1194873 (W.D. Mo. Apr. 28, 2006).

The mixed interpretations are not surprising, given the provision's questionable constitutionality and federalism implications. See *The Missouri Innocent Seller Statute A Substantive Means into Federal Court*, 65 J. Mo. Bar 128 (2009). The 8th U.S. Circuit Court of Appeals never addressed the issue. But in dicta, the circuit endorsed the view that Missouri's local party provision destroyed diversity jurisdiction. See *Block v. Toyota Motor Corp.*, 665 F.3d 944, 949 (8th Cir. 2011).



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In *Block*, the 8th Circuit answered whether Minnesota's innocent seller statute precluded a federal district court from dismissing a local retailer for fraudulent joinder. 665 F.3d at 944. In ruling Minnesota's statute had no preclusive effect, the circuit noted the opposite would be true under Missouri's innocent seller statute: "the Missouri statute . . . provides that a [local] defendant dismissed under it remains a party for jurisdiction purposes." *Id.* (citing the local party provision, Mo. Rev. Stat. § 537.762(6)).

2019 Revision

In 2019, Missouri's legislature overhauled the state's judicial venue rules, and while doing so, it revised the innocent seller statute to remove the local party provision. The provision was omitted and former subsection (7) moved up to fill its place. Mo. Rev. Stat. § 537.762(6) (as amended). The revision aligned Missouri's innocent seller statute with the Minnesota statute considered by the 8th Circuit in *Block*. With that amendment, it appeared that non-resident manufacturers could now remove cases from Missouri state court when the only resident defendant is a local retailer.

The impact of the amendment was not tested in a reported decision until the end of 2020. The first judge to address the new version of the statute was Chief U.S. District Judge Rodney Sippel of Missouri's Eastern District. See *Andrews v. R.J. Reynolds Tobacco Co.*, et al., No. 4:20-cv-1583-RWS, ECF No. 28 (E.D. Mo. Dec. 18, 2020).

In *Andrews*, Sippel was asked to dismiss a local Missouri retailer from a products liability lawsuit based on the doctrine of fraudulent joinder and to retain jurisdiction over the Missouri plaintiff's product liability claim against a non-resident manufacturer. *Id.* Sippel boiled the issue down to whether Missouri's innocent seller statute "can be used as the basis for a finding of fraudulent joinder and whether the 2019 amendment impacts this analysis." *Id.* at 9. Sippel considered the answer to both clear:

"*Block* answers both of these questions in the affirmative. The Minnesota statute at issue in *Block* is similar to the Missouri statute in that they both act as defenses to strict products liability claims if the innocent seller meets certain statutory requirements . . . In *Block*, the Eighth Circuit held that the Minnesota statute could be the basis for a finding of fraudulent joinder. The Court only distinguished the Missouri statute based on the language that was removed by the 2019 amendment. Therefore, under *Block*, the [revised] Mo. Rev. Stat. § 537.762 does not preclude a finding of fraudulent joinder."

Id. at 9-10 (citing Mo. Rev. Stat. §537.763 and Minn. Stat. § 544.41). Three other federal judges have come to the same conclusion, citing the order in *Andrews* when dismissing local parties and exercising diversity jurisdiction over product liability cases removed to federal court. *Baum v. R.J. Reynolds Tobacco Co.*, 2020 WL 7695403 (E.D. Mo. Dec. 28, 2020) (Fleissig, J.); *Perkins v. R.J. Reynolds Tobacco Co.*, 2021 WL 270461 (E.D. Mo. Jan. 27, 2021) (Sippel, Chief J.); *Ford v. R.J. Reynolds Tobacco Co.*, 2021 WL 270454, at *3 (E.D. Mo. Jan. 27, 2021) (Autrey, J.).

The 2019 amendment to Missouri's innocent seller statute remedied many issues the local party provision caused. With the provision removed, non-resident manufacturers will face less uncertainty, local retailers will face less litigation and Missouri state courts will no longer be forced to accommodate litigation with no real local interest. Missouri's revised innocent seller statute now protects resident defendants as originally contemplated.

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