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Commentary: Missouri's innocent seller statute: total recovery requirement

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MISSOURI RETAILERS are often named as defendants in lawsuits solely because they sold the product that a plaintiff alleges caused injury. Retailers and their counsel often rely on Missouri's Innocent Seller Statute, Mo. Rev. Stat. § 537.762, to obtain early dismissal from these suits, provided they meet two requirements: (1) the retailer is an "innocent seller" that is only named because of its "status as a seller in the stream of commerce," and (2) "another defendant, including the manufacturer, is properly before the court and from whom total recovery may be had ...." *Id.*. Satisfying this test and obtaining dismissal may seem straightforward, but recent cases indicate that defendants often overlook the second requirement, which some courts have interpreted as requiring "specific evidence" demonstrating "total recovery" can be had from "another defendant, including the manufacturer." *Justice v. Rural King Holdings, LLP,* 2022 WL 2904141, at *3 (E.D. Mo. July 22, 2022). This can be a costly mistake, especially if a request to dismiss a local retailer is made in conjunction with the removal of the lawsuit to federal court based on a fraudulent joinder argument. In such circumstances, a failure to satisfy the requirements of the Innocent Seller Statute can result in remand. See, *e.g., Thompson v. R.J. Reynolds Tobacco Co.*, 2020 WL 5594072, at *3–4 (E.D. Mo. Sept. 18, 2020).

Although straightforward, the "total recovery" requirement often catches defendants off-guard — likely because product manufacturers are often large, multi-national companies whose ability to satisfy a judgment seems self-evident. The statute is silent on how retailers can show that "total recovery" may be established against a manufacturer, and there is no legislative history to otherwise inform litigants on how to meet this requirement. Consequently, defendants should be cognizant of recent court decisions analyzing this issue.

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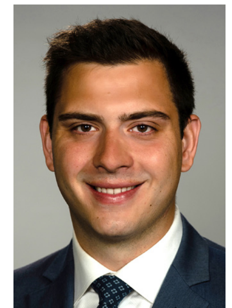
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Missouri appellate courts have interpreted the "total recovery" language as requiring the innocent seller prove the "solvency of the manufacturer of the defective product." *Malone v. Schapun, Inc.*, 965 S.W.2d 177, 182 (Mo. Ct. App. 1997). Solvency "must be established through specific evidence like [] insurance policies or 'evidence of other assets.'" *Thompson*, 2020 WL 5594072 at *3. But the exact burden is somewhat nebulous because, as one Missouri appellate court recognized, the Statute "does not establish a standard of proof." *Malone*, 965 S.W.2d at 182 n.4. In *Malone*, the appellate court applied a summary judgement standard — i.e., that dismissal would only be proper if there was no "genuine issue of fact" as to the manufacturer's solvency. *Id.* Other courts have taken a more lenient approach and have found the "total recovery" requirement satisfied where it "appears" a plaintiff can "conceivably recover" against the manufacturer. *Draper v. Johnson & Johnson Vision Care, Inc.*, 2009 WL 10671677, at *2 (W.D. Mo. Sept. 22, 2009).

In recent cases, retailers invoking Missouri's Innocent Seller statute have had success by attaching a manufacturer's insurance declaration page or an affidavit setting

forth the manufacturer's financial details. See, e.g., *Scofield v. WSTR Holdings, Inc.*, 2021 WL 1176390, at *4 (E.D. Mo. Mar. 29, 2021) (insurance page); *Ford v. R.J. Reynolds Tobacco Co.*, 2021 WL 270454, at *3 (E.D. Mo. Jan. 27, 2021) (financial affidavit); *Anderson v. R.J. Reynolds Tobacco Co.*, 549 F. Supp. 3d 979, 984 (E.D. Mo. 2021) (same); *Wallace v. R.J. Reynolds Tobacco Co.*, 2010 WL 11579047, at *5 (W.D. Mo. Aug. 12, 2010) (same). This is the best practice for a party seeking dismissal under Missouri's Innocent Seller Statute, especially if dismissal is sought early in a case before discovery.

In contrast, courts have repeatedly denied innocent sellers dismissal when the court is provided only "bare assurance" that the manufacturer is solvent. *Rardon v. Falcon Safety Prod., Inc.*, 2021 WL 2008923, at *14 (W.D. Mo. May 4, 2021). As one district court recently warned, the requirement to provide "specific evidence" of a manufacturer's solvency is "not a trifling one that is easily waved away." *Thompson*, 2020 WL 5594072 at *3. This is in accord with the vast majority of federal decisions in the last decade that have found dismissal improper if no evidence of the manufacturer's solvency is submitted, even if solvency appears obvious given the manufacturer's size or sophistication. *E.g., Miravalle v. One World Techs., Inc.*, 2018 WL 3643722, at *2 (E.D. Mo. Aug. 1, 2018) (denying dismissal because the manufacturer's affidavit did "not aver that [the company] is financially able to fully compensate" the plaintiff); *Ellebracht v. Walmart Inc.*, 2020 WL 8270523, at *3 (W.D. Mo. July 1, 2020) (denying dismissal noting "the Court has no information that indicates the manufacturer has the resources to provide Plaintiff with a total recovery"); *McMahon v. Robert Bosch Tool Corp*, 2018 WL 3036455, at *3 (E.D. Mo. June 19, 2018) (denying dismissal because the innocent-seller "offer[ed] no evidence to establish, and does not even assert, that [the manufacturer] is financially able to fully compensate plaintiff for his claims"); *Hoffmann v. Empire Mach. & Tools Ltd.*, 2011 WL 3355886, at *3 (W.D. Mo. Aug. 3, 2011) (denying dismissal where a party "offer[ed] no evidence" but "summarily stated" total recovery could be had); but see *Spears v. Bayer Corp.*, 2004 WL 7081940, at *3 (W.D. Mo. Mar. 29, 2004) (finding, *sue sponte*, "total recovery" may be had "given the size of Bayer").

Relatedly, courts have found proof of solvency insufficient if the evidence does not show the manufacturer's ability to pay the specific amount the plaintiff "requests and might reasonably obtain" in a judgment. *Gramex Corp. v. Green Supply, Inc.*, 89 S.W.3d 432, 445 (Mo. 2002). In *Gramex*, the Missouri Supreme Court found that a manufacturer's $4 million insurance policy did not meet the "total recovery" requirement because "there was a substantial likelihood that a verdict [between $6 and $10 million] might have been recovered." *Id.* at 445-46. And even where insurance is adequate, courts have nevertheless denied dismissal where other circumstances call solvency into question, such as if the party (1) "engaged in bankruptcy proceedings, and as a result, may not be able to pay its insurance premiums," *Harrell v. Clarke Power Prod., Inc.*, 2011 WL 749681, at *6–7 (E.D. Mo. Feb. 24, 2011), or (2) is facing bet-the-company litigation in other lawsuits. *Riffle v. Frontera Produce Ltd.*, 2014 WL 5810201, at *4-5 (W.D. Mo. Nov. 7, 2014). That said, a mere "theoretical possibility" of future insolvency will not prevent dismissal. *Carleton v. R.J. Reynolds Tobacco Co.*, No. 4:06-CV-395-GAF, at *10 (W.D. Mo. Nov. 15, 2006) (slip opinion)

In sum, obtaining dismissal under Missouri's Innocent Seller Statute requires actual evidence of the remaining party's solvency — such as an insurance declaration page or financial affidavit — that demonstrates a plaintiff can obtain "total recovery" for the amount they "request[] and might reasonably obtain." *Gramex*, 89 S.W.3d 432 at 445. Retailers named as defendants in Missouri cases should therefore reach out to co-defendant manufacturers and distributors at the early stages of litigation if they are contemplating using Missouri's Innocent Seller Statute as a basis for dismissal. A good working relationship between the defendants is necessary to ensure that the proper evidence accompanies a request for dismissal and minimize the possibility that a court denies dismissal for failing to meet the statute's "total recovery" requirement.

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