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Let the Drug Dealer Beware: Market-Share Liability in Michigan for the Injuries Caused by the Illegal Drug Market

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Notes

LET THE DRUG DEALER BEWARE: MARKET-SHARE LIABILITY IN MICHIGAN FOR THE INJURIES CAUSED BY THE ILLEGAL DRUG MARKET

It has taken lives, wrecked careers, broken homes, invaded schools, incited crimes, tainted businesses, toppled heroes, corrupted policemen and politicians, bled billions from the economy and in some measure infected every corner of our public and private lives. It is a national scandal . . . . We are the most drug-ridden society in the industrial world.[1]

I. INTRODUCTION

A tiny baby girl in the Detroit area, like many other babies across the country, suffered from intrauterine growth retardation as a result of exposure to cocaine while *in utero*.[2] She and her five siblings were removed from their mother's home because of neglect and abuse.[3] However, the little girl eventually returned to her mother's home, but without the protection of her older siblings who were not allowed to return home on that day.[4] The baby girl's mother, a recovering cocaine addict, discovered her little girl playing in a toilet, and beat the little girl with a shoe until she crushed the baby's skull.[5]

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1. Richard M. Smith, *The Plague Among Us: The Drug Crisis*, NEWSWEEK, June 16, 1986, at 15 (referring to the national drug problem).

2. Traci Gentilozzi, *First Judgment Under Michigan's Drug Dealer Liability Act Is Over $8 Million*, MICH. LAW. WKLY., Aug. 7, 1995, at 6. In 1991, the National Institute on Drug Abuse estimated that 500,000 - 700,000 newborn babies annually are exposed to illicit drugs while *in utero*. Ira J. Chasnoff, *Adoption of Drug-Exposed Infants and Children*, PERINATAL ADDICTION RES. & EDUC. UPDATE, June 1992, at 5. A study at Hutzel Hospital, located in the inner city of Detroit, indicated that an astonishing 42.7 percent of its newborn babies were exposed to drugs while *in utero*. Paul A. Logli, *Drugs in the Womb: The Newest Battlefield in the War on Drugs*, CRIM. JUST. ETHICS, Winter/Spring 1990, at 24.

3. *Drug Dealer Liability To Be Tested In Detroit: Case Officials Say the Dealers Indirectly Caused a Mother to Kill Her Child*, THE GRAND RAPIDS PRESS, May 4, 1995, at C3 [hereinafter *Tested in Detroit*]. Approximately one-half of mothers who are drug addicts and are not in a drug treatment program will lose custody of their child within a year of birth. Janet R. Fink, *Effects of Crack and Cocaine Upon Infants: A Brief Review of the Literature*, CHILDREN'S LEGAL RTS. J., Fall 1989, at 7.

4. *Tested In Detroit*, *supra* note 3, at C3.

5. *Id.* *See also* Gentilozzi, *supra* note 2, at 6.

The helpless baby died two hours later of a massive brain hemorrhage at the age of twenty months.[6]

Under Michigan's Drug Dealer Liability Act,[7] Wayne County Neighborhood Legal Services' Children's Law Center, along with the Wayne County Sheriff's Department, brought a civil action on behalf of the baby girl's siblings against four convicted drug dealers who allegedly participated in the cocaine market during the time that the children's mother purchased and used cocaine.[8] In July 1995, the trial court entered a default judgment for the plaintiffs of $8.7 million against two of the drug dealers, despite the absence of a causal link between the drug dealers and the plaintiffs.[9]

Daniel Bent, a former United States Attorney in Hawaii, originally authored the Model Drug Dealer Liability Act (DDLA).[10] In 1992, the American

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6. *Tested In Detroit*, *supra* note 3, at C3.

7. MICH. COMP. LAWS ANN. § 691.1601 - 691.1619 (West 1996). The Drug Dealer Liability Act went into effect in Michigan in April, 1994. *Id.* § 691.1601.

8. Ficano v. Clemens, No. 95-512918 (Cir. Ct. Wayne County Mich. 1995). Two of the defendants were serving prison sentences at the time the lawsuit was filed. Gentilozzi, *supra* note 2, at 6. Judgment was entered by the court against the two dealers who were not in prison, after they failed to appear in court. *Id.* At the signing of California's version of the Drug Dealer Liability Act, Governor Pete Wilson was quoted as saying: "[A]n individual [who would] sell crack to a pregnant woman . . . has no heart, and even less conscience." *Cal. Gets Drug Dealer Liability Law*, UPI, Sept. 24, 1996, *available in* LEXIS, Nexis Library, UPI File.

9. Arnold Ceballos, *New State Laws Let People Sue Drug Dealers*, THE WALL ST. J., July 16, 1996, at B1. One million dollars was supposed to go to the Wayne County Children's Law Center as representative of the little girl's siblings, and the remainder went to the Wayne County Sheriff's Department so far, the sheriff has only seized $25,000. *Id.* The alleged drug dealers reportedly owned at least four homes and a restaurant. Corey Williams, *Ficano Seeks Assets of Drug Dealers in Beating Death of Child: Wayne County Sheriff Has Filed Suit Against One for Selling Crack to Recovering Addict Mother*, THE DETROIT NEWS, May 9, 1995, at B4. After collecting the money for the estate of the little girl, the plan is to use the rest of the money for drug enforcement activities. *Illinois Permits Suits Against Drug Dealers*, THE NAT'L L.J., Aug. 28, 1995, at A8 [hereinafter *Illinois Permits*]. So far, Sheriff Ficano has seized only $25,000 from one of the drug dealers under a civil forfeiture proceeding. Ceballos, *supra*, at B1. Under an agreement between Sheriff Ficano and the Wayne County Neighborhood Legal Services' Childrens' Law Center, half of the $25,000 from the forfeiture proceedings will go into a trust fund for the siblings of the deceased little girl. *Id.*

10. James L. Dam, *Injured Party Can Sue Any Drug Dealer*, LAW. WKLY., Sept. 11, 1995, at 10. Mr. Bent, who is now in private practice in Honolulu, Hawaii, devised the DDLA after working with other U.S. attorneys on illegal drug prevention, meeting individuals who had suffered from the illegal drug market, studying the sociology of illegal drug abuse, and studying negligence and market-share liability law. It occurred to Mr. Bent that "law enforcement alone was not going to solve America's drug problem." *Illinois Permits*, *supra* note 9, at A8. Additionally, the author wishes to personally thank Mr. Bent for assisting him in the beginning phases of his research by helping him to understand the intricacies of the Drug Dealer Liability Act.

Legislative Exchange Council adopted it as model legislation.[11] The DDLA is based on two central principles that represent a paradigm shift in the way American courts have begun to address situations where the identity of the true tortfeasor cannot be determined. The first principle is that a potential defendant's liability is based on entering the illegal drug market in any capacity, not just on making a sale to a particular person.[12] The second principle is that the focus of the DDLA is on the ultimate harm to society caused by the illegal drug market, whether to innocent people or even drug users themselves, and not on the determination of how the harm was caused.[13]

The DDLA has three primary goals. First, it seeks to allow all persons, businesses and government organizations injured by the illegal drug market to bring suit for damages against all persons who are a part of the illicit drug market within a designated market.[14] Second, it seeks to deter individuals from entering the illegal drug market by imposing liability where there would have been none.[15] Finally, it attempts to encourage illegal drug users to seek treatment and to encourage companies to provide treatment with the knowledge that reimbursement may be obtained from illegal drug dealers within a target market.[16]

Undoubtedly, the illegal drug market has had a significant impact on America's economy.[17] Among the most traumatically affected victims are the

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11. *Illinois Permits, supra* note 9, at A8. The American Legislative Exchange Council is a bipartisan, nationwide law reform organization made up of over 2,500 state legislative members. The DDLA has also been featured on Larry King Live, Primetime Live, Rivera Live, and Talk Back Live. *See Larry King Live* (CNN television broadcast, May 26, 1992); *Primetime Live* (ABC television broadcast, July 3, 1996); *Rivera Live* (CNBC television broadcast, Sept. 24, 1996); *Talk Back Live* (CNN television broadcast, June 10, 1996).

12. Daniel Bent & Sharon Takeuchi, *The Drug Dealer Liability Act: Imposing Products Liability for Illegal Drugs* 1 (Sept. 21, 1996) (unpublished manuscript, on file with the *Valparaiso University Law Review*).

13. *Id.*

14. *Id.* The Drug Dealer Liability Act wisely insulates a law enforcement officer or agency, as well as persons acting in good faith at the direction of a law enforcement officer or agency, from being named as a defendant for their participation in the illegal drug marketing if the participation was in furtherance of an official investigation. MICH. COMP. LAWS ANN. § 691.1613 (Mich. 1996).

15. Bent & Takeuchi, *supra* note 11, at 1. California's legislative findings indicate that one of the primary focuses of the Act is aimed at deterring workplace dealers. CAL. HEALTH & SAFETY CODE § 11702(c) (West 1997). This is because workplace dealers are not usually the subject of criminal investigations by law enforcement. *Id.* Also, small dealers increase the number of users and thereby become larger dealers. *Id.* Therefore, a goal of the Act is to deter these small drug dealers who are most likely to be deterred by the threat of civil liability. *Id.*

16. Bent & Takeuchi, *supra* note 11, at 1.

17. Approximately $27 billion was spent by state and federal governments on the war on drugs during fiscal year 1991. U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FACT SHEET: DRUG DATA SUMMARY 5 (July 1996). William F. Buckley, Jr., in an address to the New York Bar

so called "drug babies."[18] In fact, the Glendale Adventist Medical Center in California spends between $200,000 and $250,000 to treat and care for each drug-addicted baby that is born in the hospital.[19] Estimated long-term care for drug babies in the United States is well over $1 billion because the evidence suggests that they will need substantial assistance throughout the duration of their lives.[20] The illegal drug market burdens American taxpayers with an

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Association, commented that:

> We are speaking of a plague [illegal drug distribution and abuse] that consumes an estimated $75 billion per year of public money, exacts an estimated $70 billion a year from consumers, is responsible for nearly 50 percent of the million Americans who are today in jail, occupies an estimated 50 percent of the trial time of our judiciary, and
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> takes the time of 400,000 policemen—yet a plague for which no cure is at hand, nor in prospect.

William F. Buckley, Jr., Address to the Panel of the New York Bar Association Considering the War on Drugs (Summer 1995), *in* NAT'L REV., Feb. 12, 1996, at 35. Just over ten years ago, the total expenditure on the drug war for state, local, and federal governments was $5 billion. Robert W. Sweet, *The War on Drugs is Lost*, NAT'L REV., Feb. 12, 1996, at 47. In 1996, the federal government's proposed budget on the war on drugs exceeded $17 billion. *Id.* In 1994, addictions of all kinds cost New York City $20 billion. *Substance Abuse: Pricing the Fix*, ECONOMIST, Mar. 23, 1996, at 25-26 (stating that this $20 billion figure may be underestimated by up to 15%).

18. "Drug babies . . . are often the most physically and mentally damaged [individuals] due to the . . . illegal drug market . . . . [Their] only hope is extensive medical and psychological treatment, physical therapy, and special education. All of these potential remedies are expensive." MODEL DRUG DEALER LIABILITY ACT § 3(f) (copy on file with the *Valparaiso University Law Review*). In fact, it is not hard for the cost to exceed $1 million for each drug-addicted baby. Roger D. Thompson, *Illicit Drug Use Can Drag Down Whole Cities*, CHATTANOOGA FREE PRESS, Jan. 19, 1997, at B5. *See also supra* note 2. For a thorough analysis of the harms that drug-addicted babies suffer, see Janet W. Steverson, *Stopping Fetal Abuse With No-Pregnancy and Drug Treatment Probation Conditions*, 34 SANTA CLARA L. REV. 295 (1994). Other victims of the illegal drug market include those who are exposed to crime and violence associated with drug use. Norbert Gilmore, *Drug Use and Human Rights: Privacy, Vulnerability, Disability, and Human Rights Infringements*, 12 J. CONTEMP. HEALTH L. & POL'Y 355, 374-75 (1996). Taxpayers also are harmed indirectly when taxes are used to support health care, social services, and drug users on welfare. *Id.* at 375. Further harms are incurred by employers due to drug-related absences and lost productivity in the workplace. *Id.* Additionally, the American Bar Association is currently seeking to establish a nationwide network of assistance programs for the ten to fifteen percent of lawyers who are impaired by drugs, alcohol, or other problems. Hope Viner Samborn, *Help For Impaired Lawyers*, A.B.A. J., May, 1996, at 107.

19. *Wilson Signs Bill to Allow Suits Against Drug Dealers*, L.A. TIMES, Sept. 25, 1996, at A17. A drug-addicted baby is delivered approximately every ten days at the hospital. *Id.* In fact, annual drug-related costs to all state and local governments are $13 billion a year for babies addicted to drugs. Elyssa Getreu, *Drug Dealers Bill*, CITY NEWS SERVICE, June 6, 1996.

20. Thompson, *supra* note 18, at B5 (noting that the illegal drug market is a "budget-buster" on health care, increases gang presence, and has an adverse effect on economic development). "Violent crime, much of it drug-related, drives businesses away and creates dead zones where the criminal element rules." *Id.*

estimated $75 billion in law enforcement, medical, and other per year costs.[21] At the same time, the illegal drug market's sales are estimated at $50 to $100 billion per year, all tax-free.[22]

Although the criminal justice system addresses the illegal drug market through incarceration and criminal forfeiture proceedings, the civil justice system has not been successful in addressing the illegal drug problem because it has rarely been utilized.[23] In contrast, the civil justice system has been utilized successfully in holding legitimate businesses liable for the injuries resulting from its products.[24] For example, dram shop[25] statutes[26] have had a significant impact on the way restaurants and bars serve alcohol.[27] Arguably,

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21. *See* Buckley, *supra* note 17, at 35. Illegal drug abuse plays a significant role in perpetuating epidemic violence such as domestic abuse and child abuse by causing the user to lose inhibitions which can lead to fights. Raymond E. Gangarosa, et al., *Suits By Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused By Tobacco and Alcohol*, 22 FORDHAM URB. L.J. 81, 98 (1994). It also leads to mental illness, gang warfare, and even more drug dealing. *Id.*

22. Chi Chi Sileo, *Addiction to Change; Supporters of Drug-Law Reform Split on Method*, WASH. TIMES, Dec. 16, 1994, at A7. Indeed the illegal drug market is the "most widespread and lucrative organized crime activity in the United States." PRESIDENT'S COMMISSION ON ORGANIZED CRIME, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING AND ORGANIZED CRIME 6 (March 1986). However, many states have attempted to tax the illegal drug trade in an attempt to shift the financial burden of the illegal drug market onto the illegal drug dealers. See James M. Curley, Case Comment, *Expanding Double Jeopardy*: Department of Revenue v. Kurth Ranch, 75 B.U. L. REV. 505 (1995), for a more thorough analysis of illegal drug tax statutes. These statutes have been limited after the Supreme Court's decision in *Department of Revenue v. Kurth Ranch*, 114 S.Ct. 1937 (1994); see *infra* notes 159-163 and accompanying text for a more thorough discussion of *Kurth Ranch*.

23. California's legislative findings declare that "[a]lthough the criminal justice system is an important weapon against the marketing of illegal controlled substances, the civil justice system can and must also be used." CAL. HEALTH & SAFETY CODE § 11702(a) (West 1997). Some would argue that the criminal justice system is not tough enough on illegal drug dealers and that other alternatives should be explored. Sally D. Swartz, *Candidate Proposes Law to Sue Drug Dealers*, PALM BEACH POST, Aug. 30, 1996, at 1B. In 1983, Congress, in expanding civil forfeiture provisions, recognized that "the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs . . . ." Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 3182, 3374.

24. *See, e.g.*, Greenman v. Yuba Power Prod., 377 P.2d 897 (Cal. 1963).

25. A dram shop is "[a] drinking establishment where liquors are sold to be drunk on the premises; a bar or saloon." BLACK'S LAW DICTIONARY 494 (6th ed. 1990).

26. Dram shop acts "impose liability on the seller of intoxicating liquors . . . when a third party is injured as a result of the intoxication of the buyer where the sale has caused or contributed to such intoxication." *Id.*

27. In fact, the DDLA has frequently been compared to dram shop acts. It has been stated that "dealers will have the same kind of civil liability as bartenders, who can be sued for serving excessive alcohol to a drunken customer who then is harmed, or who harms someone else, while driving." *Governor Signs Drug Dealer Liability Law*, UPI, Sept. 24, 1996, *available in* LEXIS, Nexis Library, UPI File; *see also* Kelly v. Gwinnell, 476 A.2d 1219 (N.J. 1984).

an illegal "business" should be held to at least the same, if not a higher, standard of liability as a legal business.[28]

Due to the clandestine nature of the illegal drug market, it is highly unlikely that an injured party can identify the specific drug dealers in the chain of causation.[29] However, a few creative courts have used a concept known as market-share liability to compensate an injured party when the defendant is part of a group of common wrongdoers.[30] Market-share liability consists of two basic elements: the creation of a defendant's market, and the establishment of a defendant's market-share.[31] Market-share liability has been an effective tool to force legal businesses to put safe products on the market.[32] However, in some cases market-share liability, or the threat of its application, has had a

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28. As the legislative findings in California's version of the DDLA point out, the civil justice system can provide a means of compensation for individuals who have suffered injury as a result of the illegal marketing and distribution of illegal drugs. CAL. HEALTH & SAFETY CODE § 11702(a) (West 1997). Using the dram shop statutes as an example, the supplier of alcohol may be liable to an injured party when a drunk driver, to whom the supplier served alcohol, subsequently causes an accident. Similarly, the supplier of illicit drugs should be held liable to the victims when the user subsequently causes an auto accident because he was driving under the influence of illicit drugs. *See, e.g.*, Terrigino v. Zaleski, 544 N.Y.S.2d 283 (N.Y. Sup. Ct. 1989) (denying the defendant's motion for summary judgment where the defendant supplied marijuana to a person who subsequently caused an auto accident involving the plaintiff).

29. Bent & Takeuchi, *supra* note 12, at 3. *See also* United States v. Navarro, 90 F.3d 1245, 1261 (7th Cir. 1996) (quoting United States v. Nobles, 69 F.3d 172, 183 (7th Cir. 1995)) ("the clandestine nature of narcotics trafficking is likely to be outside the knowledge of the average layman"). Based on the misconception that drug dealers are known by their victims, Sheila Suess Kennedy, executive director of the Indiana Civil Liberties Union, calls the DDLA the winner of the fictional "Kennedy Kudos Trophy for Loopey Legislation." Sheila Suess Kennedy, *New Sue-Happy Drug Law Gone 'Loopy'*, THE INDIANAPOLIS STAR, June 23, 1997 at A5. Such reasoning is unrealistic. The DDLA overcomes the failure of the civil system to provide a remedy for the victims of the illegal drug market. In a unique criminal case where the "dealer" could easily be identified, a mother was prosecuted for "delivering" a controlled substance, just moments after delivery, to her newborn baby via the umbilical cord. People v. Hardy, 469 N.W.2d 50, 51-52 (Mich. Ct. App. 1991). The prosecution was not allowed to stand. *Id.* at 52.

30. *See, e.g.*, McElhaney v. Eli Lilly & Co., 564 F. Supp. 265 (D. S.D. 1983), *aff'd on other grounds*, 739 F.2d 340 (8th Cir. 1984); Brown v. Superior Court, 751 P.2d 470 (Cal. 1988); Sindell v. Abbott Labs, 607 P.2d 924 (Cal. 1980); Conley v. Boyle Drug Co., 570 So. 2d 275 (Fla. 1990); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. Ct. App. 1989); Martin v. Abbott Labs., 689 P.2d 368 (Wash. 1984); Collins v. Eli Lilly & Co., 342 N.W.2d 37 (Wis. 1984).

31. *See infra* notes 343-97 and accompanying text.

32. At Michigan's bill signing ceremony, Governor John Engler stated, "With respect to legal businesses, lawsuits raise the cost of doing business, raise prices to consumers, and even force companies out of business altogether. That's exactly what we want to do to the drug dealers of Michigan—put them out of business for good." *New Law Encourages Civil Suits Against Dealers; Michigan Law Allowing Suits Against Drug Dealers*, THE ADDICTION LETTER, April 1994, at 2 [hereinafter *New Law*]. At California's bill signing ceremony, Governor Pete Wilson proclaimed: "[W]e're going to hit them where it hurts—in their wallets." *Governor Signs Drug Dealer Liability Law*, UPI, Sept. 24, 1996, *available in* LEXIS, NEXIS Library, UPI File.

damaging effect on an industry.[33] While a negative impact on a legal industry may be a good reason not to utilize market-share liability, in theory it should be used to hold illegal drug dealers liable for the injuries that result from their involvement in the illegal drug market and thereby have a damaging effect on the illegal drug market.[34]

In the oft-quoted language of former United States Supreme Court Justice Louis Brandeis, Michigan has become a "laboratory" of democracy by implementing its Drug Dealer Liability Act.[35] Despite Justice Brandeis' vision of states implementing novel ideas and learning from one another, other states have quickly followed Michigan's lead, without waiting to observe what effect the law will have in its original laboratory.[36] This rush to the legislature has

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33. The New Jersey Supreme Court declined to impose market-share liability on the DPT vaccine industry because of the crippling effect the potential liability had on the industry. Shackil v. Lederle Labs., 561 A.2d 511 (N.J. 1989) (noting that the DPT industry had been diminished to one supplier). The federal government was forced to intervene to establish a fund to deal with liability claims. *See* The National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 to 300aa-34 (1988). *See also* Payton v. Abbott Labs., 437 N.E.2d 171, 190 (Mass. 1982) ("Imposition of such broad liability could have a deleterious effect on the development of new drugs"); Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 247 (Mo. 1984) (market-share liability could "discourage desired pharmaceutical research and development while adding little incentive to production of safe products"); David A. Fischer, *Products Liability—An Analysis of Market-share Liability*, 34 VAND. L. REV. 1623, 1654 (1981) (adoption of a market-share theory will dramatically increase potential liability thereby discouraging new product development).

34. Contrary to popular opinion, about 40% of drug dealers have wages and assets that could be garnished to provide relief to the victims of the illegal drug market. *Drug Dealers' Victims Can Get Damages Under New Law*, MICH. LAW. WKLY., Oct. 24, 1994, at 1 [hereinafter *Drug Dealers' Victims*]. Additionally, one study said that the average legitimate income of a drug dealer is $40,000 per year. *New Law*, *supra* note 32, at 2. In upholding the constitutionality of strict criminal liability for manufacturers and distributors of certain controlled substances when death results from its ingestion, the New Jersey Supreme Court stated:

> "Drug distribution puts the entire society at risk. . . . [T]he defendant can and should be held to the knowledge of the dangerousness of his activity, can and should be held to the knowledge that death may result, can and should be held to the knowledge that the law will impose severe punishment . . . ."

State v. Maldonado, 645 A.2d 1165, 1174 (N.J. 1994). Similarly, we should hold drug dealers accountable for their actions in the civil arena as well.

35. "It is one of the happy incidents of the federal system that a single courageous state may, if the citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebemann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

36. Prior to 1997, Arkansas, California, Hawaii, Illinois, and Oklahoma all passed a version of the DDLA. For the most part, all of the versions of the DDLA are substantially similar. During the process of writing this note, the DDLA was proposed in Indiana by Jeff Modisett, a former Marion County (Indiana) Prosecutor who serves as chairman of the Governor's Commission for a Drug-Free Indiana and recently became Indiana Attorney General. Nancy Armour, *Plan Would Allow Drug Dealers to Be Sued: Attorney General Candidate Stresses Accountability*, THE COURIER J., Aug. 20, 1996, at O1B. The DDLA was sponsored in Indiana by Representative Vern Tincher

resulted in the proliferation of a number of potential constitutional and public policy problems that are inherent in the Drug Dealer Liability Act.[37] For example, the DDLA provides an adult drug abuser with a cause of action against an illegal drug dealer, despite the fact that the drug abuser was himself committing a crime, and thereby subject to criminal sanctions, through the purchase and use of illicit drugs.[38] Unfortunately, these problems have not been fully addressed by present versions of the Model DDLA.

This Note urges all states to adopt an amended form of the Drug Dealer Liability Act as a means to compensate innocent victims of the illegal drug market and to serve as another tool in the so-called "war on drugs."[39] However, this Note also proposes changes to the present statutes, and specifically to Michigan's version of the DDLA, to alleviate constitutional and public policy concerns raised by the present statutes.[40] Section II of this Note outlines the limitations of the common law, as well as current restitution statutes, as a basis to hold illegal drug dealers accountable for the costs of the

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of Terre Haute. Emily Swiatek, *Criminal Defense Lawyers Attack Drug Bill: Modisett Says Legislation Would Tarket Casual Dealer*, THE IND. LAW., Feb. 19, 1997, at 1. In 1997, the DDLA was introduced in the following state legislatures: Alabama (H.B. 52, 1997 Reg. Sess. (Ala. 1997)); Colorado (H.B. 1002, 61st Gen. Assembly, 1st Reg. Sess. (Colo. 1997)); Connecticut (S.B. 409, 1997 Reg. Sess. (Conn. 1997)); Florida (S.B. 764, 1997 Reg. Sess. (Fla. 1997)); Georgia (S.B. 80, 144th Gen. Assembly, 1997-98 Reg. Sess. (Ga. 1997)); Idaho (S.B. 1219, 54th Legislature, 1st Reg. Sess. (Idaho 1997)); Indiana (H.B. 1814, 110th Gen. Assembly, 1st Reg. Sess. (Ind. 1997)); Louisiana (H.B. 226, 1997 Reg. Sess. (La. 1997)); Maryland (S.B. 16, 1997 Reg. Sess. (Md. 1997)); Mississippi (S.B. 2342, 1997 Reg. Sess. (Miss. 1997)); Missouri (H.B. 598, 89th Gen. Assembly, 1st Reg. Sess. (Mo. 1997)); Nebraska (Legislature B. 268, 95th Legislature, 1st Reg. Sess. (Neb. 1997)); New York (S.B. 2971, 220th Legislative Sess. (N.Y. 1997)); Pennsylvania (H.B. 775, 181st Gen. Assembly (Pa. 1997)); Tennesse (H.B. 1288, 100th Gen. Assembly (Tenn. 1997)); and Utah (S.B. 54, 52nd Legislature (Utah 1997)). In addition to Michigan, see ARK. CODE ANN. § 16-124-101 to 16-124-112 (Michie Supp. 1995); CAL. HEALTH & SAFETY CODE § 11700 - 11730 (WEST 1997); HAW. REV. STAT. ANN. § 4-36-663D-1 (Michie 1995); 740 ILL. COMP. STAT. ANN. § 57/25(b) (West Supp. 1996); OKLA. STAT. ANN. tit. 36, § 2-421 to 2-435 (West 1996). Indiana's DDLA was signed into law on May 13, 1997 and became effective on July 1, 1997. IND. CODE § 34-1-70-1 *et seq.* (1997). The author wishes to thank Mr. Modisett for inviting him to the Bill Signing Ceremony held on May 19, 1997, in Indianapolis. Due to a prior committment, the author was unable to attend. Additionally, Florida, Georgia, Louisiana, and Utah all passed a version of the DDLA in 1997. *See* FLA. STAT. ANN. § 772.12 (West 1997); GA. CODE ANN. § 51-1-46 (1997); LA. REV. STAT. ANN. § 2800.61 *et seq.* (West 1997); UTAH CODE ANN. § 58-37e-1 to 58-37e-14 (1997). In Florida, it is known as the Hugh O'Connor Memorial Act in memory of actor Carroll O'Connor's son. FLA. STAT. ANN. § 772.12 (West 1997). Mr. O'Connor has been an active advocate of the DDLA, and the author admires his courageousness, effort, and resolve.

37. *See infra* notes 216-20 and accompanying text.

38. *See infra* notes 238-92 and accompanying text.

39. Daniel Bent, the author of the Model DDLA, has stated that, although the DDLA is "not a silver bullet," it is another tool that can be utilized because it "reaches where the present weapons don't reach." Ceballos, *supra* note 9, at B1.

40. *See infra* section VI.

illegal drug market.[41] Then, Section III examines the emergence of market-share liability in the courts and the legislatures as a means of imposing liability for harmful products despite a lack of direct causation.[42] Next, Section IV addresses the constitutional protections of double jeopardy, excessive fines, and substantive due process as they relate to a defendant's situation when there is state action involved in a lawsuit for damages.[43] Section V discusses specific provisions of the current form of Michigan's DDLA.[44] Finally, Section VI proposes a number of amendments to this Act to ensure its overall fairness to plaintiffs and defendants, and to uphold the social policy of deterring individuals from entering the illegal drug market either as a seller or as a buyer.[45]

II. HISTORY OF STATE LAW BEFORE THE EMERGENCE OF MARKET-SHARE LIABILITY AS IT RELATES TO A SUIT AGAINST A DRUG DEALER

This Section addresses the failure of the common law to provide an adequate mechanism to shift the costs of the illegal drug market onto the illegal drug dealers. This Section will first address the limits of the common law, as well as attempts to provide a statutory remedy, with emphasis placed upon the unique nature of the illegal drug market.[46] The second Subsection analyzes attempts to use criminal restitution statutes as a means to compensate victims of the illegal drug market.[47]

A. The Failure of the States to Provide an Adequate Civil Remedy to Parties Injured by the Effects of the Illegal Drug Market

The broad purpose of the DDLA is to provide a civil remedy for persons who have been injured by the illegal drug market, against persons who participate in the illegal marketing of controlled substances.[48] This broad purpose encompasses three fundamental aims of the DDLA. First, the DDLA seeks to compensate individuals who have been injured by the illegal drug

41. *See infra* notes 48-77 and accompanying text.

42. *See infra* notes 78-117 and accompanying text. Because the U.S. Supreme Court has consistently denied certiorari in market-share liability cases, its constitutionality is beyond the scope of this note. *See, e.g.*, Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912; Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989), *cert. denied*, 493 U.S. 944; Collins v. Eli Lilly & Co., 342 N.W.2d 37 (Wis. 1984), *cert. denied sub nom.*, E.R. Squibb & Sons, Inc. v. Collins, 469 U.S. 826.

43. *See infra* notes 118-219 and accompanying text.

44. *See infra* notes 220-397 and accompanying text.

45. *See infra* notes 398-425 and accompanying text.

46. *See infra* notes 48-63 and accompanying text.

47. *See infra* notes 64-77 and accompanying text.

48. MICH. COMP. LAWS ANN. § 691.1601(2) (West 1996).

market.[49] Second, it aspires to shift the cost of illegal drug-related injuries from society onto those who profit from the illegal drug market.[50] Finally, it aims to provide an incentive for illegal drug users to identify their illegal drug dealers by allowing drug users to seek payment for their own rehabilitation costs.[51]

Although an innocent victim of the illegal drug market could theoretically recover compensation for her injuries in a tort suit against the drug user who injured her, the user frequently has insufficient resources to bring a successful suit, and, as a result, the injured party must bear the burden of her injuries.[52] Some practitioners and scholars may wonder whether it was necessary for the legislature to enact a statute that provides a cause of action against an illegal drug dealer when three common law doctrines appear to provide recovery. The problem with tort actions is that they are limited by several common law doctrines: (1) strict liability for an abnormally dangerous activity;[53] (2) strict

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49. *Id.* § 691.1601(2)(a).

50. *Id.* § 691.1601(2)(b).

51. *Id.* § 691.1601(2)(c). The Model DDLA states that:

> The purpose of this Act is to provide a civil remedy for damages to persons in a community injured as a result of illegal drug use. These persons include parents, employers, insurers, governmental entities, and others who pay for drug treatment or employee assistance programs, as well as infants injured as a result of exposure to drugs in utero ("drug babies"). The Act will enable them to recover damages from those persons in the community who have joined the illegal drug market. A further purpose of this Act is to shift, to the extent possible, the cost of the damage caused by the existence of the illegal drug market in a community to those who illegally profit from that market. The further purpose of this Act is to establish the prospect of substantial monetary loss as a deterrent to those who have not yet entered into the illegal drug distribution market. The further purpose is to establish an incentive for drug users to identify and seek payment for their own drug treatment from those dealers who have sold drugs to the user in the past.

MODEL DRUG DEALER LIABILITY ACT § 2.

52. Michael E. Bronfin, Comment, *"Gram Shop" Liability: Holding Drug Dealers Civilly Liable for Injuries to Third Parties and Underage Purchasers*, 1994 U. CHI. LEGAL F. 345, 353 (1994).

53. The general rule in torts is that one who carries on an abnormally dangerous activity will be held strictly liable for the harm that is inflicted by the activity. RESTATEMENT (SECOND) OF TORTS § 519(1) (1977). According to the Restatement (Second) of Torts, six factors are used to determine whether an activity is abnormally dangerous:

> (a) [the] existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) [the] likelihood that the harm that results from it will be great;
> (c) [an] inability to eliminate the risk by the exercise of reasonable care;
> (d) [the] extent to which the activity is not a matter of common usage;
> (e) [the] inappropriateness of the activity to the place where it is carried on; and
> (f) [the] extent to which its value to the community is outweighed by its dangerous attributes.

Id. § 520. Courts would generally be against extending the reach of strict liability for an abnormally dangerous activity beyond blasting and the storage of explosives. Bronfin, *supra* note 52, at 348.

products liability;[54] and (3) negligence liability.[55] Each of these contains loopholes that allow the drug dealer to escape liability because plaintiffs generally fail to prove all of the elements needed to win the lawsuit.[56]

However, in addition to these traditional torts, the Restatement (Second) of Torts provides one spouse with a cause of action against a person who unlawfully sells or supplies a habit-forming drug to the other spouse with the knowledge that the drug will be used in a way that will cause harm to a legally protected marital interest.[57] Similarly, parents have a legal cause of action

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But see Prete v. Laudano, No. 337966, 1993 WL 21417 (Conn. Super. Ct. Jan. 25, 1993) (allowing a third-party victim to proceed against an illegal drug dealer under the theory of strict liability for an abnormally dangerous activity).

54. The Restatement (Second) of Torts defines strict products liability as:

> One who sells any products in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm thereby caused to the ultimate user or consumer, . . . if:
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

RESTATEMENT (SECOND) OF TORTS § 402(A)(1) (1977). Thus, only if the drug sold was "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it" would the drug be considered unreasonably dangerous. Bronfin, *supra* note 52, at 350. Also, a court would be extremely hesitant to enforce an illegal transaction based upon an imperfection in an illegal good. *Id.*

55. The Restatement (Second) of Torts defines negligence as the invasion of the interest of another, if:

> (a) the interest invaded is protected against unintentional invasion, and
>
> (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and
>
> (c) the actor's conduct is a legal cause of the invasion, and
>
> (d) the other has not so conducted himself as to disable himself from bringing an action for such invasion.

Id. § 281.

56. Bronfin, *supra* note 52, at 346. *See also* Wendy Stasell, *"Shopping" for Defendants: Market Liability Under the Illinois Drug Dealer Liability Act*, 27 LOY. U. CHI. L.J. 1023, 1026 (1996).

57. A defendant is liable if he "unlawfully sells or otherwise supplies to one spouse a habit-forming drug with knowledge that it will be used in a way that will cause harm to any of the legally protected marital interests of the other spouse." RESTATEMENT (SECOND) OF TORTS § 696 (1977). *See also* Pratt v. Daly, 104 P.2d 147 (Ariz. 1940) (suit brought by husband for wife's addiction to intoxicating liquors); Jack Morris v. Owen, 115 S.E.2d 604 (Ga. Ct. App. 1960) (suit brought by husband for his wife's addiction to the legal drug chloral, supplied by a pharmacist); Hoard v. Peck. 56 Barb 202 (N.Y. 1863) (suit brought by husband for wife's addiction to laudanum); Holleman v. Harward, 25 S.E. 972 (N.C. 1896) (suit brought by husband for his wife's addiction to the legal drug laudanum, supplied by a pharmacist); Flandermeyer v. Cooper, 98 N.E. 102 (Ohio 1912) (suit brought by wife for her husband's addiction to morphine, supplied by a pharmacist); Swanson v. Ball, 290 N.W. 482 (S.D. 1940) (suit brought by wife for husband's addiction to intoxicating liquors); Moberg v. Scott, 175 N.W. 559 (S.D. 1919) (suit brought by wife for her husband's addiction to opium, supplied by a pharmacist).

against any individual who sells a habit-forming drug to the parent's minor child.[58] Specifically, the State of Washington expanded this theory of recovery by enacting a statute that allows a parent a cause of action for damages resulting from the sale or transfer of a controlled substance to that parent's minor child.[59] South Dakota took this concept even further and created a statute that allows a lawsuit by an injured party against the individual who supplied the controlled substance to the individual who inflicted the injury.[60] Unfortunately, to date, not a single reported case has been brought under either the Washington statute or the South Dakota statute.

For a victim of the illegal drug market, all of these common law and statutory actions, including a standard negligence action, are impractical because, for various reasons, the identity of the illegal drug dealer is difficult to discover. These reasons include: (1) the user of the illegal drug may be unwilling or unable to identify the person(s) who sold the user the drugs; (2) drug dealers are often known only by their first names; (3) individuals may be unwilling to identify known illegal drug dealers for fear of retaliation; (4) individuals may be unwilling to identify suspected illegal drug dealers for fear of making a mistake; and (5) a parent or a spouse may experience difficulty in convincing his child or spouse to identify the source of illegal drugs.[61] Thus, a person may be willing to bring an action against an illegal drug dealer, but unable to identify the drug dealer(s) responsible for the injury.[62] The consequence of the inability to identify the drug dealer is that the members of

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58. RESTATEMENT (SECOND) OF TORTS § 705 (1977). *See also* Tidd v. Skinner, 122 N.E. 247 (N.Y. 1919) (suit brought by mother for her child's addiction to heroin, supplied by a pharmacist). According to the Restatement, the defendant is liable to "the parent who is under a legal duty to furnish medical expenses reasonably incurred or likely to be incurred for the child's treatment during its minority." RESTATEMENT (SECOND) OF TORTS § 705(b) (1977).

59. The code provides that:

> The parent or legal guardian of any minor to whom a controlled substance . . . is sold or transferred, shall have a cause of action against the person who sold or transferred the controlled substance for all damages to the minor or his or her parent or legal guardian caused by such sale or transfer.

WASH. REV. CODE ANN. § 69.50.414 (West 1996).

60. The code provides that:

> Any person who is injured in person, property or means of support, by any other person because such other person was, when such injury occurred, experiencing the pharmacological effects of a controlled drug or substance, and was deprived of the normal use of his mental or physical facilities, thereby, shall have a right of action against any person who, by unlawfully distributing or dispensing a controlled drug or substance to such other person, caused or contributed to his experiencing such effects.

S.D. CODIFIED LAWS § 34-20B-50 (Michie 1996).

61. Bent & Takeuchi, *supra* note 12, at 4.

62. *Id.*

the illegal drug market are insulated from accountability.[63] Not only are the drug dealers difficult to find, but the victims of the illegal drug market are also difficult to identify under restitution statutes.

B. The Failure of Criminal Restitution Statutes to Provide an Adequate Remedy to Parties Injured by the Effects of the Illegal Drug Market

In contrast to the failures of the common law and statutory civil remedies, attempts to use criminal restitution statutes fail to provide an adequate remedy because the specific victims of an illegal drug dealer can be as impossible to identify as the drug dealers are in a civil action.[64] For example, in *United States v. Casamento*,[65] a federal district court ordered a number of illegal drug dealers to pay restitution to a fund that would be used to pay for the medical costs of persons injured by addiction to controlled substances.[66] The Second Circuit vacated the restitution order, finding that the district court had not

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63. "These industries [alcohol, tobacco, firearms, and illicit drugs] are often insulated from accountability for health care costs by shifting blame to the consumer, by clandestine trade, or by a combination of both." Gangarosa et al., *supra* note 21, at 81-82.

64. *Id.* at 98. *But see Recent Legislation, Tort Law—Civil Liability for Criminal Acts—Illinois Expands Civil Liability for Drug Traffickers*, 109 HARV. L. REV. 699, 704 (1996) (arguing that if compensation is the goal of the DDLA, a more sensible legislative solution would be to impose mandatory restitution on drug dealers). *See also* Stasell, *supra* note 56, at 1064-65 ("Existing restitution statutes could also be employed to provide compensation for persons injured by the illegal drug market."). However, just as it is difficult to identify the actual drug dealer in the illegal drug market, it is just as difficult to identify potential victims. Therefore, a restitution approach would not work for individual plaintiffs because it would be difficult to identify which persons were injured from the drug sales of a particular drug dealer. Additionally, personal injuries are not compensable under the Racketeer Influenced and Corrupt Organizations Act (RICO). Oscar v. University Students Coop. Ass'n, 965 F.2d 783, 785-86 (9th Cir. 1992).

65. 887 F.2d 1141 (2d Cir. 1989).

66. *Id.* at 1177 (stating that payment shall be made "to a fund which shall be utilized for the medical treatment, rehabilitation and restitution of persons injured by addiction to narcotics in the 1980s"). The judge asserted that he was acting pursuant to 18 U.S.C. § 3579(b)(2) (1982) (enacted as part of the Victim and Witness Protection Act of 1982) (redesignated § 3663, effective November 1, 1987) which provides that a restitution order may require a defendant:

> [I]n the case of an offense resulting in bodily injury to a victim—(A) [to] pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment; (B) [to] pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and (C) [to] reimburse the victim for income lost by such victim as a result of such offense.

Id.

identified any individual victims who had suffered an injury that could be attributed to the drug dealers' illegal activities.[67]

However, some courts have interpreted restitution statutes to allow the government to be considered a "victim," and, therefore, a proper beneficiary of restitution.[68] In such cases, the government does not need to be a direct victim; rather, it may be sufficient that the government is merely an indirect victim.[69] In fact, restitution is permissible to any victim who suffered an actual loss that flows from the charged offense.[70] For instance, restitution provisions have been upheld where a court ordered a defendant to pay restitution to an automobile accident victim's insurer.[71] Additionally, when taxpayers have been victimized, the government "stands in the shoes" of taxpayers and may be capable of receiving restitution.[72]

Like the forfeiture provisions that have been somewhat successfully used by the government to help fund its war on drugs,[73] the government may wish

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67. *Casamento*, 887 F.2d at 1178. Further, the court noted: "[w]hile the effect of our reversal of the . . . restitution order will deprive unidentified drug users of a modicum of care which they might otherwise receive, Congress has enacted no law authorizing such an order . . . ." *Id.* In support, the legislative history of 18 U.S.C. § 3579 states that "[t]he premise of [§ 3579] is that the court in devising just sanctions for adjudicated offenders, should insure that the wrongdoer make [good] to the degree possible, the harm he has caused his victim." *See* Victim and Witness Protection Act of 1982, S.Rep. No. 352, 97th Cong., 2d Sess. 30, 96 Stat. 2515, 2536. Thus, Congress "clearly evinced no intent to authorize the district court to compel a defendant to pay for other losses suffered by the defendant's victim, and, a fortiori, for losses suffered by individuals with whom the defendant had no provable connection." *Casamento*, 887 F.2d at 1178. *See also* People v. Lopez, 162 A.2d 621, 623 (1990); People v. Lopez, 557 N.Y.S. 2d 93, 94 (N.Y. App. Div. 1990) ("While undoubtedly well-intentioned, the court's novel method of calculating the [$2 million] sentence of restitution [for a heroin dealer was] unauthorized.").

68. *See e.g.*, Ratliff v. United States, 999 F.2d 1023, 1027 (6th Cir. 1993); United States v. Clark, 957 F.2d 248, 253 (6th Cir. 1992) (finding restitution available to the FBI where the defendant stole or attempted to steal two of its automobiles); United States v. Smith, 944 F.2d 618, 621-22 (9th Cir. 1991); United States v. Lynch, 699 F.2d 839, 845 (7th Cir. 1982) (interpreting 18 U.S.C. § 3651 as permitting the government to be the beneficiary of restitution even though the statute is silent regarding the potential for restitution by the government). For a more complete listing of cases, see generally *Construction of Clause of Federal Probation Act* (18 U.S.C. § 3651) *That, in Placing Defendant on Probation upon Terms and Conditions, Defendant May Be Required to Make Restitution*, ANNOTATION, 97 A.L.R.2d 798, 799-800.

69. People v. Narron, 192 Cal. App. 3d 724, 732 (1987) (county may be considered a victim of the defendant's criminal activity within the meaning of the restitution statutes, despite not being a direct victim). In *Narron*, the county government was victimized by the defendant's narcotic violations when it had to hire a professional chemical disposal company to remove drugs that were too dangerous to store. *Id.* at 729.

70. People v. Baker, 39 Cal. App. 3d 550, 559 (1974).

71. People v. Calhoun, 145 Cal. App. 3d 568 (1983).

72. United States v. Ruffin, 780 F.2d 1493, 1496 (9th Cir. 1986) (quoting United States v. Lynch, 669 F.2d 839, 845 (7th Cir. 1989)).

73. *See infra* note 334 and accompanying text.

to have an illegal drug dealer pay restitution to the government for the expense it incurred during its investigation of the defendant. However, this compensation scheme has generally failed.[74] It has failed because courts look at investigative costs, not as losses, but as voluntary expenditures by the government in order to obtain evidence against a criminal defendant.[75] Additionally, the public's money is spent in order to solve crimes and is part of law enforcement's normal operating costs such that the government cannot be considered a victim for purposes of restitution.[76]

Thus, because traditional common law doctrines and restitution statutes have failed to provide an adequate remedy for victims and for the societal costs of the illegal drug market, primarily due to the inability to identify either the tortfeasor or the victim, legislation based on market-share liability needed to be drafted to provide an adequate remedy.[77] While the common law failed to provide an adequate remedy to victims of the illegal drug market, market-share liability began to receive recognition to solve just the kind of problems associated with a failure to identify the tortfeasor that hobbled the common law.

III. THE EMERGENCE OF MARKET-SHARE LIABILITY

This Section analyzes the foundation and historical roots of market-share liability in order to lay a framework for understanding its application to illegal drug dealers. The first Subsection examines the emergence of market-share liability in the courts as a means to compensate innocent victims of a particular market.[78] The second Subsection analyzes the plea for a legislative

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74. United States v. Meacham, 27 F.3d 214, 218 (6th Cir. 1994); United States v. Gibbens, 25 F.3d 28 (1st Cir. 1994); Gall v. United States, 21 F.3d 107, 111-12 (6th Cir. 1994); Ratliff v. United States, 999 F.2d 1023, 1026 (6th Cir. 1993); United States v. Salcedo-Lopez, 907 F.2d 97, 98 (9th Cir. 1990); Evans v. Garrison, 657 F.2d 64, 66-67 (4th Cir. 1981); People v. Chaney, 544 N.E.2d 90, 91 (Ill. App. Ct. 1989); State v. Evans, 512 N.W.2d 259, 261 (Wis. Ct. App. 1994); Igbinovia v. Nevada, 895 P.2d 1304, 1307 (Nev. 1995). *But see* State v. Pettit, 698 P.2d 1049, 1050-51 (Or. Ct. App. 1985) (police department could be a victim under state restitution statute).

75. One court has stated:

> [S]uch investigative costs are not losses, but voluntary expenditures by the government for the procurement of evidence. . . . [W]here . . . a restitution award is based solely on the costs of the government's investigation and prosecution of the defendant, it is not a direct loss resulting from [the] defendant's illegal conduct for which restitution may be awarded . . . .

Gall, 21 F.3d at 112.

76. *Chaney*, 544 N.E.2d at 91.

77. *See* Bent & Takeuchi, *supra* note 12, at 5 (stating that the clandestine nature of the drug market makes it necessary to hold illegal drug dealers civilly liable by means of legislation). *See also* United States v. Casamento, 887 F.2d 1141, 1178 (2d Cir. 1989) (stating that "the district court could not have been expected to identify any individual victims who suffered loss as a result of the offenses committed by these [defendants]").

78. *See infra* notes 80-103 and accompanying text.

determination of the use of market-share liability within the framework that a legislative body is the correct manner for states to adopt, utilize, and apply market-share liability.[79]

A. *The Emergence of Market-Share Liability in the Courts*

Before a legislature could enact a statute that provided a remedy where the true tortfeasor could not be identified, California's Supreme Court created a new legal doctrine called market-share[80] liability in the landmark case *Sindell v. Abbott Laboratories*.[81] In *Sindell*, the plaintiff represented a class of thousands of women who had been exposed to the pharmaceutical drug diethylstilbesterol (DES) when their mothers had taken the drug during pregnancy to prevent a miscarriage.[82] The defendants had all manufactured DES during the time that the plaintiffs were exposed to the drug.[83] However, the drug was manufactured and marketed by the different defendants in a generic and identical manner.[84] Therefore, it was technically impossible for the plaintiff to establish causation, a fundamental element needed to establish a negligence claim.[85] Furthermore, under traditional tort doctrine, a mere

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79. *See infra* notes 104-17 and accompanying text.

80. Market-share is defined as "[t]he percentage of a market that is controlled by a [business]." BLACK'S LAW DICTIONARY 971 (6th ed. 1990).

81. 607 P.2d 924 (Cal. 1980). Market-share liability must be distinguished from "enterprise liability." Enterprise liability is utilized to hold all manufacturers in a specific industry, which jointly controls the risk by adopting industry-wide standards, liable where the individual manufacturer whose product injured a plaintiff cannot be identified. Hall v. E.I. DuPont de Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972) (potential liability under enterprise liability theory where six manufacturers produced all of the dynamite caps, but none were labeled, and the practice of the enterprise was followed). Enterprise liability, also known as "industry-wide liability," is often used broadly to mean that the losses caused by an enterprise should be borne by it. Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 COLO. L. REV. 153, 158 (1976).

82. *Sindell*, 607 P.2d at 925. DES was found to have caused a cancer known as adenocarcinoma, which has a minimum latency period of 10-12 years. *Id.* For a history of the development and marketing of DES, see David J. Murray, Note, *The DES Causation Conundrum: A Functional Analysis*, 32 N.Y.L. SCH. L. REV. 939 (1987). *See also* Comment, *Market-Share Liability: A New Method of Recovery for DES Litigants*, 30 CATH. U. L. REV. 551 (1981).

83. *Sindell*, 607 P.2d at 925.

84. *Id.*

85. "An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41, at 236 (4th ed. 1971). The Court recognized this problem and stated that: "[s]hould we require that plaintiff identify the manufacturer which supplied the DES used by her mother or that all DES manufacturers be joined in the action, she would effectively be precluded from any recovery." *Sindell*, 607 P.2d at 936. In fact, the failure to prove a causal connection between the defendant's conduct and the plaintiff's injury was fatal in earlier actions brought against DES manufacturers by plaintiffs who were similarly situated as those in *Sindell*. *See, e.g.*,

possibility of causation is insufficient to impose liability on a defendant.[86]

However, the *Sindell* court fashioned a new theory of recovery known as market-share liability, that is applicable where the plaintiff cannot identify the true tortfeasor.[87] Three policy reasons motivated the decision. First, as between an innocent plaintiff and negligent defendants, the defendants should bear the cost of the injury.[88] Second, the defendants are in a better position to shoulder the burden of the costs of injuries that result from the manufacture of defective products.[89] Third, the manufacturer of defective products is in the best position to discover and guard against defects in its products and warn of harmful effects.[90] Therefore, by holding the manufacturer liable for defects in its products and for failure to warn of subsequent harmful effects, market-share liability provides an incentive to the manufacturer to produce safe products.[91]

In order to utilize a market-share liability theory under current case law, a plaintiff must generally meet four requirements: (1) the injury or illness must be occasioned by a fungible product[92] made by all of the defendants joined in the lawsuit; (2) the injury or illness must be due to a design hazard, with each defendant having sold the same type of product in a manner that made it unreasonably dangerous; (3) the plaintiff must be unable to identify the specific manufacturer of the product or products that brought about the plaintiff's injury

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Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978); McCreery v. Eli Lilly & Co., 87 Cal.App.3d 77, 82, (1978).

86. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the defendant's conduct was a substantial factor in bringing about the result. A mere possibility of causation is not enough. When the issue remains one of speculation or conjecture, or the probabilities are at best evenly balanced, it warrants a directed verdict for the defendant. PROSSER, *supra* note 84, at § 41, at 241.

87. The Court utilized an approach suggested in a law review article. *See* Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978). The plaintiffs in the DES cases could not identify which company manufactured the DES which injured her because of the fact that all DES is of an identical chemical composition; therefore, pharmacists filled prescriptions from whatever source was handy. Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1072 (N.Y. 1989). Additionally, the long latency period of the cancer caused by the DES hampered the identification dilemma because records were lost or destroyed and memories had faded. *Id.*

88. Sindell v. Abbott Labs., 607 P.2d 924, 936 (Cal. 1980).

89. *Id.* (quoting Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J. concurring) ("The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business")). *See also* RESTATEMENT (SECOND) OF TORTS § 402A, cmt. c., p. 350.

90. *Sindell*, 607 P.2d at 936.

91. *Id.*

92. A "fungible product" is a "good . . . of which any unit is, by nature or usage of trade, the equivalent of any other unit." U.C.C. § 201(17) (1991).

or illness; and (4) the plaintiff must join enough of the manufacturers of the fungible or identical product to represent a substantial share of the market.[93] If the plaintiff can establish a duty, breach of duty, causation by the product sold by the defendant, and damages, a defendant may be held liable for the proportion of the judgment represented by its share of the market. In order to escape liability, the defendant must demonstrate that it could not have manufactured the product that caused the plaintiff's injuries.[94] Notice, however, that under the market-share liability theory in DES cases the only causation the plaintiffs are required to prove is the connection between exposure to the drug and the subsequent injury.[95] A market-share theory only allows the case to get to a jury; the causal connection between the product and the injury is still an issue for the trier of fact.[96]

The acceptance of market-share liability in other DES cases has varied. Some courts accepted a modified version of the theory,[97] other courts rejected market-share liability,[98] and still another court attempted to avoid market-share

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93. W. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 103, at 714 (5th ed. 1984). *See also Sindell*, 607 P.2d at 937.

94. Sindell v. Abbott Labs., 607 P.2d 924, 937 (Cal. 1980).

95. DOBBS, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 749 (2d ed. 1993).

96. *Id.*

97. *See, e.g.*, McCormack v. Abbott Labs., 617 F. Supp. 1521 (D. Mass. 1985); Brown v. Superior Court, 751 P.2d 470 (Cal. 1988) (holding that the defendants would be held severally liable); Conley v. Boyle Drug Co., 570 So. 2d 275 (Fla. 1990) (the plaintiff must first show due diligence in trying to identify the true tortfeasor and then may use market-share if the true tortfeasor cannot be discovered); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989) (the defendant cannot exculpate itself); *In re* N.Y. County DES Litig., 615 N.Y.S.2d 882 (N.Y. App. Div. 1994); Martin v. Abbott Labs., 689 P.2d 368 (Wash. 1984) (unexculpated defendants are rebuttably presumed to have an equal market-share and are therefore proportionally liable); Collins v. Eli Lilly & Co., 342 N.W.2d 37 (Wis. 1984) (plaintiff may initiate claim against one defendant, and the defendant may implead other potentially liable defendants). Only one court has adopted market-share liability in the same framework as *Sindell*. *See*, McElhaney v. Eli Lilly & Co., 564 F. Supp. 265 (D. S.D. 1983), *aff'd on other grounds*, 739 F.2d 340 (8th Cir. 1984); Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd in part*, 681 F.2d 334 (5th Cir. 1982).

98. *See, e.g.*, Wood v. Eli Lilly & Co., 38 F.3d 510 (10th Cir. 1994); Tidler v. Eli Lilly & Co., 851 F.2d 418 (D.C. Cir. 1988); Braune v. Abbott Labs., 895 F. Supp. 530 (E.D. N.Y. 1995) (market-share not recognized under Georgia law); Morton v. Abbott Labs., 538 F. Supp. 593 (M.D. Fla. 1982); Pipon v. Burroughs-Wellcome Co., 532 F. Supp. 637 (D. N.J. 1982), *aff'd*, 696 F.2d 984 (3d Cir.); Mizell v. Eli Lilly & Co., 526 F. Supp. 589 (D. S.C. 1981); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D. S.C. 1981); Smith v. Eli Lilly & Co., 560 N.E.2d 324 (Ill. 1990) (rejecting the market-share approach because the plaintiff's burden of proving causation is a fundamental principle of tort law); Millar-Mintz v. Abbott Labs., 645 N.E.2d 278 (Ill. App. 1994) (market-share "unworkable" under Illinois law); Mulcahey v. Eli Lilly & Co., 386 N.W.2d 67 (Iowa 1986); Payton v. Abbott Labs., 437 N.E.2d 171 (Mass. 1982) (rejecting a market-share approach because of the possibility that the true tortfeasor was not among the defendants); Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984) (*en banc*); Gorman v. Abbott Labs., 599 A.2d 1364

liability by stretching alternative liability.[99] Similarly, the acceptance of a market-share theory in contexts other than DES cases has been diverse.[100]

(R.I. 1991) (refusing to accept market-share as an option).

99. *See, e.g.*, Abel v. Eli Lilly & Co., 343 N.W.2d 164 (Mich. 1984) (rejecting market-share by attempting to stretch the doctrine of alternative liability found in *Summers v. Tice*, 199 P.2d 1 (Cal. 1948)). Therefore, this approach would require the plaintiff to join in the action all of the potential defendants who were wrongdoers.

100. For cases rejecting a market-share liability theory in regard to products other than DES, see Bly v. Tri-Continental Indus., 663 A.2d 1232 (D.C. Cir. 1995) (gasoline); Claytor v. Owens-Corning Fiberglass Corp., 662 A.2d 1374 (D.C. Cir. 1995) (asbestos); Perrin v. Acands, 68 F.3d 1122 (8th Cir. 1995) (asbestos); Miller v. Wyeth Labs., 43 F.3d 1483 (10th Cir. 1994) (vaccine); City of Philadelphia v. Lead Indus. Assoc., 994 F.2d 112 (3d Cir. 1993) (lead paint); Chapman v. American Cyanimid Co., 861 F.2d 1515 (11th Cir. 1988) (DPT vaccine); Bateman v. Johns-Manville Sales Corp., 781 F.2d 1132 (5th Cir. 1986) (asbestos); Thompson v. Johns-Manville Sales Corp., 714 F.2d 581 (5th Cir. 1983) (asbestos); Kraus v. Celotex Corp., 1996 WL 263250 (E.D. Mo. 1996) (asbestos); Santarelli v. America, 913 F. Supp. 324 (M.D. Pa. 1996) (toxin-infected salmon); Harris v. AC & S,'Inc., 915 F. Supp. 1420 (S.D. Ind. 1995) (asbestos); Santiago v. Sherwin-Williams Co., 794 F.Supp. 29 (D. Mass. 1992), *aff'd*, 3 F.3d 546 (1st Cir. 1993) (lead paint); Hurt v. Philadelphia Hous. Auth., 806 F. Supp. 515 (E.D. Pa. 1992); Lee v. Baxter Healthcare Corp., 721 F. Supp. 89 (D. Md. 1989) (breast implants); Poole v. Alpha Therapeutic Corp., 696 F. Supp. 351 (N.D. Ill. 1988) (a blood products case denying the use of market-share liability, but allowing the plaintiff to proceed under an alternate liability claim); Marshall v. Celotex Corp., 651 F. Supp. 389 (E.D. Mich. 1987) (asbestos); Griffin v. Tenneco-Resins, Inc., 648 F. Supp. 964 (W.D. N.C. 1986) (industrial dyes); Mason v. Spiegel, Inc., 610 F. Supp. 401 (D. Minn. 1985) (clothing); Bradley v. Firestone Tire & Rubber Corp., 590 F. Supp. 1177 (D. S.D. 1984) (tire rims); Hannon v. Waterman S.S. Corp., 567 F. Supp. 90 (E.D. La. 1983) (asbestos); *In re* Related Asbestos Cases, 543 F. Supp. 1142 (N.D. Cal. 1982) (asbestos); Starling v. Seaboard Coasts Line R.R., 533 F. Supp. 183 (S.D. Ga. 1982) (asbestos); Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd in part on other grounds*, 681 F.2d 334 (5th Cir. 1982); Kennedy v. Baxter Healthcare Corp., 50 Cal. Rptr. 2d 736 (Cal. Ct. App. 1996) (latex gloves); Mullen v. Armstrong World Indus., 200 Cal.App.3d 250 (1988) (asbestos); Sheffield v. Eli Lilly & Co., 192 Cal. Rptr. 870 (Cal. Ct. App. 1983) (polio vaccine); Celotex Corp. v. Copeland, 471 So. 2d 533 (Fla. 1985) (asbestos); York v. Lunkes, 545 N.E.2d 478 (Ill. App. Ct. 1989); Cousineau v. Ford Motor Co., 363 N.W.2d 721 (Mich. Ct. App. 1985) (tire rims); Bixler v. Avondale Mills, 405 N.W.2d 428 (Minn. Ct. App. 1987) (cotton flannelette); Becker v. Baron Bros., 649 A.2d 613 (N.J. 1994) (asbestos); Shackil v. Lederle Labs., 561 A.2d 511 (N.J. 1989) (DPT vaccine); McLaughlin v. Acme Pallet Co., 658 A.2d 1314 (Sup. N.J. 1995) (pallets); *In re* Matter of New York Silicone Breast Implants Litig., 631 N.Y.S.2d 491 (N.Y. Sup. Ct. 1995) (breast implants); Catherwood v. American Sterilizer Co., 532 N.Y.S.2d 216 (N.Y. App. Div. 1988) (industrial gas); Goldman v. Johns-Manville Sales Corp., 514 N.E.2d 691 (Ohio 1987) (asbestos); Senn v. Merrell-Dow Pharm., Inc., 751 P.2d 215 (Or. 1988) (DPT vaccine); Skipworth v. Lead Indus. Assoc., 665 A.2d 1288 (Pa. Sup. Ct. 1995) (lead paint); Cummins v. Firestone Tire & Rubber Corp., 495 A.2d 963 (Pa. 1985) (multipiece tire and rim assemblies); Mellon v. Barre-Nat'l Drug Co., 636 A.2d 187 (Pa. Sup. Ct. 1993) (ipecac syrup); Pennfield Corp. v. Meadow Valley Elec., Inc., 604 A.2d 1082 (Pa. Super. Ct. 1992) (electrical cable).

For cases accepting a market-share theory for products other than DES, see Joint E. & S. Dist. Asbestos Litig. v. Falise, 878 F. Supp. 473 (E. & S.D. N.Y. 1995) (asbestos); Ray C. Cutter Labs., 754 F. Supp. 193 (M.D. Fla. 1991) (blood products); Morris v. Parke, Davis & Co., 667 F. Supp. 1332 (C.D. Cal. 1987) (DPT vaccine); Richie v. Bridgestone/Firestone, Inc., 27 Cal.Rptr.2d 418 (Cal. Ct. App. 1994) (asbestos in brake pads); Wheeler v. Raybestos-Manhattan, 11 Cal.Rptr.2d 109

Also, market-share liability has not been accepted in Michigan courts in any context.[101] Further, some courts have expressly rejected the use of the market-share liability theory in the absence of legislative guidance [102] Therefore, the suggestion from the courts appears to be that they will only adopt market-share liability based upon a legislative mandate that causation requirements should be relaxed under certain circumstances.[103]

B. The Emergence of Market-Share Liability in the Legislatures

In 1994, Florida passed its Medicaid Third-Party Liability Act in an attempt to recover Medicaid costs incurred as a result of the actions of a third-party, such as the tobacco industry.[104] One year later, the Florida legislature voted

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(Cal. Ct. App. 1992) (asbestos); Smith v. Cutter Biological, Inc., 823 P.2d 717 (Haw. 1991) (blood products); City of N.Y. v. Lead Indus. Ass'n, 597 N.Y.S.2d 698 (N.Y. App. Div. 1993) (lead paint); Jackson v. Glidden Co., 647 N.E.2d 879 (Ohio App. 1995) (lead paint). However, it should be noted that the precedent of *Morris* is limited due to the passage of the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-1 to 300aa-34 (1988).

101. *See, e.g.*, Marshall v. Celotex Corp., 651 F. Supp. 389, 393 (E.D. Mich. 1987) (asbestos); Abel v. Eli Lilly & Co., 343 N.W.2d 164 (Mich. 1984) (DES); Cousineau v. Ford Motor Co., 363 N.W.2d 721 (Mich. Ct. App. 1985) (tire rims).

102. *See, e.g.*, Tidler v. Eli Lilly & Co., 851 F.2d 418, 424 (D.C. Cir. 1988) ("Absent some authoritative signal from [Maryland's] legislature . . . we see no basis for even considering the pros and cons of innovative theories"); Starling v. Seaboard Coast Line R.R. Co., 533 F. Supp. 183, 190 (S.D. Ga. 1982) ("[t]he flexibility to fashion remedies . . . that take into account economic and social ramifications is found in the legislature"); *In re* Asbestos Litigation, 509 A.2d 1116, 1118 (Del. Super. Ct. 1986) ("the establishment of market-share liability . . . [is] a change in Delaware tort law which if desired this Court believes is best left to the legislature"); Smith v. Eli Lilly & Co., 560 N.E.2d 324, 342 (Ill. 1990) ("this change is most appropriate for the legislature to develop, with its added ability to hold hearings and determine public policy"); Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67, 76 (Iowa 1986) (the departure from traditional tort law and causation principles to hold a potentially innocent defendant liable lies "more appropriately within the legislative domain"); Zaaft v. Eli Lilly & Co., 676 S.W.2d 241, 247 (Mo. 1984) (en banc) (any relaxation of causation requirements should come from the legislature). *See also* Sindell v. Abbott Labs., 607 P.2d 924, 943 (Cal. 1980) (Richardon, J. dissenting) ("Given the grave and sweeping economic, social, and medical effects of 'market-share' liability, the policy decision to introduce and define it should not rest with [the Court], but with the Legislature . . . the [DES] problem invites a legislative rather than an attempted judicial solution"). *See also* Cynthia L. Chase, Note, *Market-Share Liability: A Plea for Legislative Alternatives*, 1982 U. ILL. L. REV. 1003.

103. *See supra* note 101 and accompanying text. Thus, the DDLA would circumvent this criticism of judicial activism by providing a legislative solution to the inability to identify the individual drug dealer. Bent & Takeuchi, *supra* note 12, at 25-26.

104. FLA. STAT. ANN. § 409.910 (West 1994). The statute states, in pertinent part:

> In any action . . . wherein a third party is liable due to its manufacture, sale, or distribution of a product, the agency shall be allowed to proceed under a market-share theory, provided that the products involved are substantially interchangeable among brands, and that substantially similar factual or legal issues would be involved in seeking recovery against each liable third-party individually.

Id. § 409.910(9)(b). In interpreting the statutory text, the Florida statute is not limited to the

affirmatively to repeal the Act.[105] However, Governor Lawton Chiles vetoed the legislature's repeal.[106] As a result, the Act's constitutionality,[107] as well as its legislative wisdom,[108] have been challenged.

The Third-Party Liability Act incorporates a market-share liability theory as a means of apportioning liability among defendants.[109] Additionally, it provides that the State's cause of action is independent of any rights or causes of action of the Medicaid recipient.[110] It also provides the State with an automatic subrogation of a Medicaid recipient's right to sue, once the recipient receives Medicaid assistance.[111]

After Governor Chiles ordered the Florida Attorney General to pursue recovery of Medicaid expenditures against the tobacco industry, the affected industries challenged the Third-Party Liability Act on its face and sought a declaratory judgment.[112] The industries asserted, among other things, that the legislature could not constitutionally create a statute incorporating market-share liability.[113] However, the Florida Supreme Court, in *Agency For Health Care Administration v. Associated Industries of Florida, Inc.*,[114] stated that it could find no constitutional basis that would prohibit a legislature from approving the use of market-share liability as a means of apportioning liability under the

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tobacco industry. In theory, Florida would not have to pass the DDLA to gain recovery of Medicaid payments it has made due to the illegal drug market. However, it would need to pass the DDLA in order to provide recovery to innocent victims of the illegal drug market. In contrast, Massachusetts passed an enabling statute that allows it to sue only the tobacco industry. *See* 1994 MASS. ACTS ch. 60, 276.

105. FLA. SB 42 (1995); *see also* Hwang, *Florida Legislature Moves to Cripple Tobacco Lawsuit*, THE WALL ST. J., May 9, 1995, at B5.

106. FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1995 REGULAR SESSION, HISTORY OF SENATE BILLS at 36, SB 42. *See also Florida Governor Vetoes Tobacco Liability Repeal*, GREENSBORO NEWS & REC., June 17, 1995, at B6.

107. William W. Van Alstyne, *Denying Due Process in the Florida Courts: A Commentary on the 1994 Medicaid Third-Party Liability Act of Florida*, 46 FLA. L. REV. 563, 564-65, 583-87 (1994).

108. Richard N. Pearson, *The Florida Medicaid Third-Party Liability Act*, 46 FLA. L. REV. 609, 611 (1994) ("The Act is very confusing, and shows all the earmarks of the last-minute, inadequately considered legislation that it is.").

109. FLA. STAT. ANN. § 409.910(9)(b) (West 1994).

110. *Id.* § 409.910(6)(a).

111. *Id.* § 409.910(6)(b).

112. Agency for Health Care Admin. v. Associated Indus. of Fla., Inc., 678 So. 2d 1239, 1246 (Fla. 1996), *cert. denied*, 117 S. Ct. 1245 (1997).

113. *Id.* at 1255. *See also Philip Morris Statement on Florida Medicaid Ruling*, PR NEWSWIRE, June 19, 1995, § Financial News.

114. 678 So. 2d 1239 (Fla. 1996).

Medicaid Third-Party Liability Act.[115] Therefore, this case stands for the proposition that legislatures have the power to create a cause of action that utilizes market-share liability.[116] However, a statute, like the DDLA, that provides the government with a unique, civil cause of action against a defendant, who has already been criminally convicted, raises several constitutional issues.[117]

IV. CONSTITUTIONAL IMPLICATIONS OF THE DDLA

This Section addresses the broad constitutional implications of the DDLA. The first Subsection examines the constitutional protection against double jeopardy.[118] Particular focus is given to the recent Supreme Court decisions

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115. *Id.* at 1255. *See also* Elizabeth A. Frohlich, *Statutes Aiding States' Recovery of Medicaid Costs from Tobacco Companies: A Better Strategy for Redressing an Identifiable Harm?*, 21 AM. J. L. & MED. 445, 463 (1995) (stating that "the provisions of the Florida Act should survive due process challenges because they are rationally related to the legitimate state interest of holding third parties accountable for Medicaid costs they have forced the state to incur").

116. However, other attempts to create market-share liability in a legislature have failed. A bill similar to Florida's Third Party Liability Act was introduced in the United States Senate that would have allowed the United States Attorney General to pursue reimbursement, from only tobacco companies, of federal health care expenditures necessitated by the medical costs associated with tobacco products. *See* S. 2245, 103d Cong. (1994). This federal bill would have allowed for a market-share theory of recovery as well. S. 2245, 103d Cong. §d (1994). The relevant portion of the bill stated:

> In any action . . . in which a third party is liable due to its manufacture, sale, or distribution of a tobacco product, the Attorney General shall be allowed to proceed under a market-share theory, if the products involved are substantially interchangeable and substantially similar factual or legal issues would be involved in seeking recovery against each liable third-party individually.

Id. Similarly, Massachusetts considered legislation that would have allowed recovery of injuries, due to exposure to lead paint, under a market-share liability theory. Joe Maty, *Massachusetts Lead Bill Draws Fire: Industry Mounts Attack as Vote Is Sought on Liability Measure*, AM. PAINT & COATINGS J., Nov. 22, 1993, at 9. The Massachusetts House of Representatives approved the bill as a measure to help abate the lead paint problem. *Mass. House Approves Market-Share Lead Measure*, AM. PAINT & COATINGS J., Jan. 3, 1994, at 9. However, it was eventually defeated in a House procedural vote. Jim Sell, *Clean Air: The Year Ends with Success, but the New Year Promises Additional Challenges*, AM. PAINT & COATINGS J., Jan. 2, 1995, at 39. Interestingly, in the early 1980's, a products liability bill was introduced in the federal House of Representatives that contained a clause that would have outlawed market-share liability; however, it was eventually dropped. *Issues that Kasten's Bill Would—and Would not—Address*, THE NAT'L J., April 9, 1983, at 749.

117. Under Michigan's version of the DDLA, a potential defendant need not be a convicted drug dealer before being named as a defendant. MICH. COMP. LAWS ANN. § 691.1608(1) (West 1996). In contrast, in California, in the absence of a causal link between the illegal drug user who caused the injury to a third party, and the alleged drug dealer, the drug dealer must have a criminal conviction for the selling the type of drug that the user was on when he caused the injury. CAL. HEALTH & SAFETY CODE § 11705(5)(b) (West 1997).

118. *See infra* notes 123-71 and accompanying text.

in *United States v. Halper*,[119] and *Department of Revenue v. Kurth Ranch*.[120]

The second Subsection analyzes the constitutional protection against the imposition of excessive fines.[121] Finally, the third Subsection examines the issue of substantive due process.[122]

A. Challenging the DDLA As a Violation of Double Jeopardy

When the government brings a civil suit against a convicted drug dealer, a double jeopardy problem may arise.[123] The United States Supreme Court has stated that the Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after an acquittal; (2) a second prosecution for the same offense after a conviction; and (3) multiple punishments for the same offense.[124]

An early Supreme Court case stated that a defendant may not be punished more than once for the same offense.[125] The theory was that the government, with all of its resources and power, should not be allowed to make repeated attempts to punish an individual for the same offense, thereby subjecting the individual to heightened embarrassment, expense, anxiety and insecurity.[126] The right not to be placed in jeopardy more than once for the same offense is

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119. 490 U.S. 435 (1989). *See infra* notes 141-60 and accompanying text.

120. 114 S. Ct. 1937 (1994). *See infra* notes 161-65 and accompanying text.

121. *See infra* notes 172-92 and accompanying text.

122. *See infra* notes 193-220 and accompanying text.

123. The Double Jeopardy Clause provides, in relevant part, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Double Jeopardy Clause was made applicable to the States through the Fourteenth Amendment's Due Process Clause because the Fifth Amendment guarantee "represents a fundamental ideal in our constitutional heritage." Benton v. Maryland, 395 U.S. 784 (1969) (overruling Palko v. Connecticut, 302 U.S. 319 (1937)).

124. United States v. Halper, 490 U.S. 435, 440 (1989). This statement fails to include the double jeopardy protections against reprosecution for the same offense after a mistrial, reprosecution for the same offense after a dismissal, and the application of collateral estoppel to double jeopardy. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 431 (1991).

125. *Ex parte* Lange, 18 Wall. 163, 168, 21 L.Ed. 872 (1874) ("[i]f there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense"). Although the text of the Fifth Amendment only mentions harms to life or limb, this case stands for the proposition that it covers imprisonments and monetary penalties. The Supreme Court has since interpreted the multiple punishment approach to reflect two principles. First, the Double Jeopardy Clause prohibits a court from imposing a greater sentence on a criminal defendant than a legislature intended. Missouri v. Hunter, 459 U.S. 359, 366 (1983). Second, it protects against additions to a sentence in a subsequent proceeding that upsets a defendant's legitimate expectation of finality. Jones v. Thomas, 491 U.S. 376, 385 (1989).

126. Green v. United States, 355 U.S. 184, 187 (1957) (stating that the government should not be allowed to subject the defendant "to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity").

an important safeguard in American society.[127] Therefore, the preservation of the finality of a criminal judgment is the primary interest of the Double Jeopardy Clause.[128]

However, the Double Jeopardy Clause generally does not apply to civil proceedings, because neither life nor limb are in jeopardy.[129] Therefore, a legislature may impose both a criminal and a civil sanction for the same act because the Double Jeopardy Clause only prohibits the criminal punishment of a defendant twice for the same act or omission.[130] Until *United States v. Halper*,[131] it was commonly understood that the Double Jeopardy Clause applied only to criminal prosecutions, or those proceedings that, although labeled civil by the government, are deemed to be criminal in nature and therefore require the safety of the constitutional provisions provided to criminal defendants.[132]

The pertinent inquiry is whether the civil proceeding is intended to be civil and remedial, or if by its nature the proceeding is necessarily criminal and punitive.[133] In order to resolve this question, courts utilize the two-part test

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127. *Id.* at 198. Indeed, the right is "one that was dearly won and one that should continue to be highly valued." *Id.* The statutory roots of the Double Jeopardy Clause are unclear because neither the Magna Carta nor the English Bill of Rights of 1689 mention protection from double jeopardy, although both contain many elements that the United States adopted into its Constitution. The English Common Law did include the pleas of *autrefois convict* and *autrefois acquit*, which barred a second trial after a verdict. JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 4, 20 (1969). Lord Blackstone in his works applied the term "jeopardy" only to prior verdicts of guilt or acquittal. *Id.* at 20. By the eighteenth century, double jeopardy applied primarily to capital crimes, in which life and limb were in jeopardy since most punishments for these crimes involved maiming and mutilation. *Id.* at 4-5. As early as 1641, the Colony of Massachusetts in its Body of Liberties stated: "No man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse." AMERICAN HISTORICAL DOCUMENTS 1000-1904, 43 HARVARD CLASSICS 77 (Charles W. Elliot ed. 1910). Other colonies adopted this version of double jeopardy, but its broad protection of including civil cases was short-lived. SIGLER, *supra*, at 22. When drafting the initial version of what came to be the Double Jeopardy Clause, James Madison wrote: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 Annals of Congress 434, 753, 767 (1789).

128. Crist v. Bretz, 437 U.S. 28, 33 (1978).

129. A criminal defendant is not in jeopardy in a jury trial until the jury is impaneled and sworn. *Id.* at 36. Jeopardy attaches in a criminal bench trial when the first witness is sworn. Serfass v. United States, 420 U.S. 377, 378 (1975).

130. Helvering v. Mitchell, 303 U.S. 391, 399 (1938).

131. 490 U.S. 435 (1989).

132. "[T]he risk the Double Jeopardy Clause refers is not present in proceedings that are not essentially criminal." *Helvering*, 303 U.S. at 399. "In the constitutional sense, jeopardy describes the risk that traditionally associated with a criminal prosecution." Breed v. Jones, 421 U.S. 519, 528 (1975).

133. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362 (1984) (applying the analysis to an *in rem* civil forfeiture proceeding).

enunciated in *United States v. One Assortment of 89 Firearms*.[134] First, a court must determine whether the legislative body expressly or impliedly indicated a preference for one label, either civil or criminal, when the statute was enacted.[135] Second, a court must determine whether the statutory scheme is so punitive, either in purpose or effect, as to negate the government's intention to establish merely a civil penalty.[136] This test prevents the government from making an end-run around the meaning of punishment under the Double Jeopardy Clause.[137] However, only the clearest proof that the purpose and effect of the civil proceeding is punitive will suffice to override the government's express or implied intention to create a civil sanction.[138] The Supreme Court has provided a list of considerations to assist in making this determination.[139] For example, a government-imposed fine is criminal in nature if it does not roughly approximate the government's actual damages.[140]

The United States Supreme Court, in *United States v. Halper*,[141] considered whether, and under what circumstances, a civil penalty could be considered "punishment" for the purposes of a double jeopardy analysis.[142] In *Halper*, the defendant worked as a manager at a medical laboratory that provided benefits to patients eligible under Medicare.[143] The defendant submitted sixty-five separate false claims to Blue Cross and Blue Shield for reimbursement for services rendered in which he overcharged by nine dollars

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134. 465 U.S. 354 (1984).

135. *Id.* at 362.

136. *Id.* at 362-63.

137. *Id.*

138. United States v. Ward, 448 U.S. 242, 249 (1980) (quoting Flemming v. Nestor, 363 U.S. 603, 617 (1960)).

139. In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), the Supreme Court enumerated "the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character." *Id.* at 168. The test involves:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment--retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Id. at 168-69. These are all relevant to the inquiry and may often point in different directions. *Id.* at 169. However, this list is "neither exhaustive nor dispositive." *Ward*, 448 U.S. at 249.

140. United States v. Halper, 490 U.S. 435, 451 (1989) ("[The] Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole.").

141. 490 U.S. 435 (1989).

142. *Id.* at 436.

143. *Id.* at 437.

per claim.[144] This cost was passed along to the federal government after Blue Cross had overpaid the laboratory by $585.[145] The defendant was convicted of sixty-five counts of violating the criminal False-Claims Act,[146] as well as sixteen counts of mail fraud.[147] He was also sentenced to two years imprisonment and fined $5000.[148]

The government then brought an action under the civil False-Claims Act,[149] and its motion for summary judgment was granted on the issue of liability.[150] The remedial provision of the Act stated that a person found to be in violation of the Act is liable to the government for a civil penalty of $2000, an amount equal to twice the amount of damages suffered by the government, and the costs of the civil action.[151] Thus, the defendant appeared to be subject to a statutory penalty of more than $130,000, despite defrauding the government of only $585.[152]

After appearing to go through the *89 Firearms* analysis,[153] the Supreme Court held that the defendant's statutory liability of more than $130,000 was sufficiently disproportionate to the Government's approximate expense of $16,000 to constitute a second punishment in violation of the Double Jeopardy Clause.[154] The Court remanded the case to the district court to tailor the defendant's liability to a non-punitive level.[155] However, in its narrow holding regarding double jeopardy, the Court stated that a defendant who has been criminally punished may not be subjected to a subsequent civil sanction that cannot be characterized as solely remedial in nature.[156] The Court noted that this rule applied to the rare case where the defendant is subject to a sanction that is overwhelmingly disproportionate to the damages he has caused.[157]

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144. *Id.*
145. *Id.*
146. 18 U.S.C. § 287 (1982).
147. United States v. Halper, 490 U.S. 435, 437 (1989).
148. *Id.*
149. 31 U.S.C. §§ 3729-31 (1982).
150. *Halper*, 490 U.S. at 438.
151. 31 U.S.C. § 3739 (1982).
152. *Halper*, 490 U.S. at 437-38.
153. *See supra* notes 134-36 and accompanying text.
154. United States v. Halper, 490 U.S. 435, 452 (1989).
155. *Id.*
156. *Id.* at 448-49 ("We therefore hold under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not be fairly characterized as remedial, but only as a deterrent or retribution.").
157. *Id.* at 450. The Court stated that this is a "rule of reason." Where the defendant has previously sustained a criminal penalty, and the civil penalty subsequently sought bears no rational relation to the goal of compensating the government for its loss, but instead appears to qualify as

However, dicta in *Halper* appeared to open the door to its application to other civil sanctions.[158] This dicta gave the Double Jeopardy Clause breadth that it never had before, and lower courts began to apply it to other civil sanctions, primarily civil forfeitures.[159] Therefore, under *Halper*, the government may not criminally prosecute a defendant, impose a criminal penalty, and then bring a separate civil action based upon the same criminal conduct and receive a judgment that is not rationally related to the goal of making the government whole.[160]

Similarly, the Court, in *Department of Revenue v. Kurth Ranch*,[161] found a violation of the Double Jeopardy Clause when Montana attempted to impose a tax on the possession of illegal drugs, pursuant to its new Dangerous Drug

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"punishment," the defendant is entitled to an accounting of the government's damages and costs to determine if the penalty sought in fact constituted a second punishment in violation of the Double Jeopardy Clause. *Id.* at 449-50.

158. *Id.* at 448 ("[A] civil sanction that cannot be said solely to serve a remedial purpose, but rather can only be explained as also serving retributive or deterrent purposes, is punishment as we have come to understand the term.").

159. *See, e.g.*, United States v. Ursery, 59 F.3d 568 (6th Cir. 1995); United States v. $405,089.23 in U.S. Currency, 33. F.3d 1210 (9th Cir. 1994). However, these cases were appealed to the Supreme Court where the Court held that *in rem* civil forfeitures are not punishment nor criminal for purposes of the Double Jeopardy Clause. United States v. Ursery, 116 S. Ct. 2135, 2149 (1996). The Court noted:

> Civil forfeitures, in contrast to criminal penalties, are designed to do no more than simply compensate the Government. Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct. Though it may be possible to quantify the value of the property forfeited, it is virtually impossible to quantify, even approximately, the nonpunitive purposes served by a particular civil forfeiture. . . . Quite simply, the case-by-case balancing set forth in *Halper*, in which a court must compare the harm suffered by the Government against the size of the penalty imposed, is inapplicable to civil forfeiture.

Id. at 2145. In essence, civil forfeitures cannot be analyzed in the same way as a civil penalty (such as the civil penalty in *Halper* which was designed to compensate the government), or a civil tax (such as the one in *Kurth Ranch* which was designed as a revenue-raising measure), because of forfeiture's broad remedial aims. These broad remedial aims include encouragement of property owners to take care in managing their property to ensure that it is not used for illegal purposes. Bennis v. Michigan, 116 S. Ct. 994, 1000 (1996). A second remedial aim is the imposition of an economic penalty to render illegal behavior unprofitable. *Id.* A third remedial aim is the abatement of a nuisance. *Id.* A fourth remedial aim is the prevention of further illegal uses of the property. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1984). A final remedial aim is the removal of contraband from the stream of commerce. One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972).

160. United States v. Halper, 490 U.S. 435, 449 (1989).

161. 114 S. Ct. 1937 (1994).

Tax Act,[162] after the State had already imposed a criminal penalty for the same conduct.[163] The Court noted that the tax was unusual because it was conditioned on the commission of a crime, which signified a penal and prohibitory intent rather than an intent to gather revenue.[164] Further, the Court noted that the tax was the functional equivalent of a successive criminal prosecution that placed the defendants in jeopardy a second time for the same offense.[165]

Therefore, if and when a state entity institutes a lawsuit under the DDLA against a drug dealer whom the government has already convicted of illegal drug dealing,[166] and whose property may have been forfeited, a double jeopardy claim may arise where the damages sought by the government under the DDLA are more punitive than remedial.[167] Only if the government provided a rough accounting of the damages that the individual defendant has legally caused would the suit not implicate the Double Jeopardy Clause.[168] However, because the government would rely on the market-share liability scheme of the DDLA, it is unlikely that it could provide an accounting of damages caused by an individual defendant.[169] Although the intent of the legislature is to create a civil remedy, in practice the present version of the DDLA could be used by governments to be punitive in purpose or effect.[170] Therefore, the goal of the DDLA should be to create a statute that is rationally related to making the government whole when it is a victim of the illegal drug market, while at the same time providing a mechanism that can roughly apportion liability in a fair manner.[171] However, in addition to the double jeopardy issues, the government must also make sure that the judgment under the DDLA does not constitute an excessive fine.

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162. MONT. CODE ANN. §§ 15-25-101 to 15-25-123 (1987). The Act imposes a tax on the possession and storage of dangerous drugs and expressly provides that the tax is to be collected only after any state or federal fines or forfeitures have been satisfied.

163. *Kurth Ranch*, 114 S. Ct. at 1948.

164. *Id.* at 1947.

165. *Id.* at 1948.

166. A criminal conviction for illegal marketing of a controlled substance under either state or federal law establishes a conclusive presumption that the defendant was in the illegal drug market. MICH. COMP. LAWS ANN. § 691.1609(1) (West 1996).

167. The Double Jeopardy Clause is not implicated where there has been no state action. *See, e.g.*, United States v. Halper, 490 U.S. 435, 451 (1989) ("The protections of the Double Jeopardy Clause are not triggered by litigation between private parties.").

168. In *Halper*, the Supreme Court remanded the case back to the district court to allow the government to present an accounting of its actual damages arising from the defendant's fraud to determine if there had been a violation of double jeopardy. *Id.* at 452.

169. This is because market-share liability is used when, among other things, the true tortfeasor cannot be identified. *See supra* notes 80-103 and accompanying text.

170. *See supra* note 136 and accompanying text.

171. *See infra* Section VI.

B. Challenging the DDLA As a Violation of the Excessive Fines Clause

When the government is allowed to impose both a criminal punishment and a civil sanction, a problem under the Eighth Amendment's Excessive Fines Clause[172] may arise. The Excessive Fines Clause, unlike other constitutional provisions, is not expressly limited to criminal proceedings.[173] The purpose of the Eighth Amendment is to limit the government's power to punish a defendant.[174] The Eighth Amendment limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense.[175] The legislature, therefore, must design civil penalties as a rough form of liquidated damages for the harms suffered by the government as a result of a defendant's conduct.[176]

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172. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed . . . ." U.S. CONST. amend. VIII. The language of the Eighth Amendment has its roots in § 10 of the English Bill of Rights of 1689 which stated that: "[E]xcessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." SOURCES OF OUR LIBERTIES 247 (Richard Petty, ed., Amer. Bar Found. 1959). Although the Eighth Amendment has never officially been made applicable to the States, Justice O'Connor has stated that there is "no reason to distinguish one Clause of the Eighth Amendment from another . . . and would hold that the Excessive Fines Clause also applies to the States." Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 284 (1989) (O'Connor, J., concurring in part and dissenting in part). However, because the Excessive Fines Clause seems logically intertwined with the other clauses of the Eighth Amendment, it may have already been made impliedly applicable to the states. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 341-42 (5th ed. 1995).

The DDLA has also been questioned as an unconstitutional violation of the Eighth Amendment's protection against cruel and unusual punishments. Mark Kappelhoff, the legislative counsel of the American Civil Liberties Union in Washington D.C., feels that adding a civil judgment under the DDLA to a criminal prosecution for drug trafficking, as well as a civil forfeiture, could amount to an unconstitutional cruel and unusual punishment, stating: "When is enough enough?" Ceballos, *supra* note 9, at B1. However, the cruel and unusual punishment analysis is beyond the scope of this note.

173. For example, the Self-Incrimination Clause of the Fifth Amendment does not apply to civil proceedings because its language provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Additionally, the notion of punishment cuts across the division generally made between criminal law and civil law. United States v. Halper, 490 U.S. 435, 447-48 (1989).

174. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 266-67 (1989). Until *Browning-Ferris Indus.*, the Supreme Court had never considered an application of the Excessive Fines Clause. *Id.* at 262. It had, however, considered the Eighth Amendment as a whole. *Id.*

175. *Id.* at 265. *See also Halper*, 490 U.S. at 447 (1989) ("civil proceedings may advance punitive and remedial goals"). *See also* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring).

176. Rex Trailer Co. v. United States, 350 U.S. 148, 153-54 (1956). The Excessive Fines Clause does not limit the award of punitive damages to a private party in a civil suit where the government neither has prosecuted the action nor has any right to receive a share of the damages. *Browning-Ferris Indus.*, 492 U.S. at 264.

In *Austin v. United States*,[177] the United States Supreme Court considered whether a civil forfeiture could violate the Excessive Fines Clause. In *Austin*, an undercover police officer met the defendant at the defendant's auto body shop where the defendant agreed to sell cocaine to the undercover officer.[178] The defendant left the shop, went to his mobile home, and returned with two grams of cocaine which he sold to the undercover officer.[179] The police subsequently searched the body shop and the mobile home, pursuant to a search warrant, and law enforcement personnel discovered small amounts of marijuana, cocaine, a gun, drug paraphernalia, and approximately $4700 in cash.[180]

The defendant pled guilty to one count of possession of cocaine with the intent to distribute and was sentenced to seven years in prison.[181] The government then initiated a civil forfeiture proceeding against the defendant's mobile home and auto body shop.[182] The defendant argued that this civil forfeiture violated the Excessive Fines Clause.[183] However, the district court and the court of appeals reluctantly disagreed.[184]

In *Austin*, the Supreme Court held for the first time that the Excessive Fines Clause was not limited to criminal proceedings.[185] Further, because a civil forfeiture constitutes payment to a sovereign as punishment for some offense, it cannot be concluded that forfeiture serves solely a remedial purpose.[186] The *Austin* Court did not decide whether the forfeiture was excessive; rather, the Court remanded the case for a determination of that issue.[187] However, the Court failed to provide guidelines, or a list of factors, for the lower court to use

177. 509 U.S. 602 (1993).

178. *Id.* at 605.

179. *Id.*

180. *Id.*

181. *Id.* at 604.

182. *Id.*

183. Austin v. United States, 509 U.S. 602, 605 (1993).

184. United States v. One Parcel of Property, 964 F.2d 814, 817 (8th Cir. 1992). The Eighth Circuit felt that "the principle of proportionality should be applied in civil actions that result in harsh penalties" and that the government was "exacting too high a penalty in relation to the offense committed." *Id.* at 818. The court felt constrained from holding the forfeiture unconstitutional because of a prior Supreme Court case that held that the guilt or innocence of a property's owner is constitutionally irrelevant. *Id.* at 817. Thus, the court reasoned: "[i]f the constitution allows *in rem* forfeiture to be visited upon innocent owners . . . the constitution hardly requires proportionality review of forfeitures." *Id.*

185. *Austin*, 509 U.S. at 607-08.

186. *Id.* at 622.

187. *Id.*

in order to determine if a civil remedy was excessive.[188]

Thus, when the government decides to initiate a lawsuit against a convicted drug dealer under the DDLA, it is likely that the Excessive Fines Clause will be implicated because of the market-share liability approach upon which the government is forced to rely.[189] Because of the secretive nature of the illegal drug market, it will be highly improbable that the government will be asking for a damage award that is remedial in nature.[190] The government's best guess as to the damages caused by a single defendant will be an approximation, due to market-share liability, and based upon statistics culled from the law enforcement community.[191] Therefore, the defendant could argue that the damages the government is seeking are excessive if the DDLA can be viewed as a civil penalty for the offense of illegal drug dealing.[192] The goal of the DDLA should be to narrowly tailor the statute so that the DDLA can rationally be viewed as reasonable and remedial, rather than punitive. In addition to the double jeopardy and excessive fines challenges, the defendant could argue that the unique nature of the DDLA amounts to a violation of substantive due process because it imposes liability in the absence of direct causation.

C. *Challenging the DDLA As a Violation of Substantive Due Process*

The DDLA has also been attacked on substantive due process grounds.[193]

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188. The lower courts are currently developing guidelines for excessiveness in regard to forfeiture proceedings, which are admittedly different than the DDLA. *See, e.g.*, United States v. Real Property Located in El Dorado County at 6380 Little Canyon Road, 59 F.3d 974 (9th Cir. 1995); United States v. Milbrand, 58 F.3d 841 (2d Cir. 1995); United States v. Alexander, 32 F.3d 1231 (8th Cir. 1994); United States v. Chandler, 36 F.3d 358 (4th Cir. 1994). Interestingly, one of the factors to determine excessiveness is the criminal sentence imposed on the defendant. *Alexander*, 32 F.3d at 1237. Lurking behind this sentence-imposed factor is a dual attack on the civil sanction on double jeopardy grounds. *See supra* notes 122-68 and accompanying text.

189. The Excessive Fines Clause is not implicated when there is no state action. *See, e.g.*, Austin v. United States, 509 U.S. 602, 605 (1993).

190. *See supra* note 29 and accompanying text.

191. *See supra* note 17.

192. *See supra* notes 174-76 and accompanying text.

193. *See* Stasell, *supra* note 56, at 1036-39, 1047-51. According to one critic of the DDLA, criminal defense lawyer David Smith of Alexandria, Virginia, this denial of substantive due process is the strongest constitutional argument against the DDLA. Mark Hansen, *Just Say 'See You in Court : Drug Users Can Seek Dealers' Cash Under New Liability Laws*, A.B.A. J., Dec. 1996, at 30. Smith states that: "[i]f ever a case was made for this kind of argument, this is it. It's just an irrational piece of legislation in that it imposes unlimited liability on every alleged drug dealer." *Id.* Generally, the test for a violation of substantive due process is whether the law "shocks the conscience." Dam, *supra* note 10, at 14. Smith, who has also written a forfeiture treatise, thinks that the DDLA meets this test because, in his opinion, the law is "stupid" and "outrageous." *Id.* Smith further states that if the DDLA does not violate substantive due process, then states could make muggers liable for all damages caused by muggers, and shoplifters liable for all damages

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property without due process of law."[194] The Due Process Clause was intended to secure individuals from the arbitrary exercise of the powers of government.[195] Substantive due process also ensures fundamental fairness to defendants before any deprivation of life, liberty, or property may occur.[196]

Admittedly, the substantive due process doctrine is ambiguous and subject to broad, varying interpretations.[197] However, the Supreme Court has applied a substantive due process analysis to economic regulations.[198] In order to satisfy traditional substantive due process requirements, economic legislation

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caused by shoplifting. *Id.* In his opinion, the DDLA "is just so crazy it's obviously unconstitutional." *Id.*

194. U.S. CONST. amend. XIV, § 1. This Amendment derives its language from the Magna Carta and the Statute of Edward III which stated that "[n]o man of what state or condition he be, shall be put out of his lands or tenements, not taken, nor imprisoned, nor disinherited, nor put to death, without he be brought to answer by due process of law." The Fifth Amendment Due Process Clause, which restricts the actions of the federal government, provides that: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

195. Daniels v. Williams, 474 U.S. 327, 331 (1986) (quoting Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819)). *See also* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("the Due Process Clause . . . bars certain arbitrary, wrongful government actions"); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) ("[t]he question . . . is whether . . . the defendant acted arbitrarily"); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 85 (1980) ("[The] guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious"); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (a substantive due process violation could be established if the government action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).

196. TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993).

197. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 309 (1993) (stating that the "concept of substantive due process introduces further tensions, ambiguities, and ambivalence). *See also* Moore v. East Cleveland, 431 U.S. 494 (1977), stating that:

> Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.

Id. at 501 (citing Poe v. Ullman, 367 U.S. 497, 542-43 (1961)); Note, *The Supreme Court-Leading Cases*, 106 HARV. L. REV. 163, 211 (1992) (stating that "the Court has neither adhered in practice to its formal framework for analyzing substantive due process claims nor applied a coherent standard of scrutiny in its departures").

198. *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group Inc., 438 U.S. 59 (1978) (noting that substantive due process places limitations on the legislature by prohibiting it from passing arbitrary and capricious statutes that unduly interfere with an individual's rights); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (invalidating economic legislation found to be unduly restrictive of liberty interests).

must be rationally related to further a legitimate government interest.[199] The rational basis test may be satisfied with purely hypothetical facts and reasons, which the court assumes the legislature relied upon when enacting the statute, to uphold the economic legislation.[200] All economic legislation is presumed to be constitutional, and the burden is on the one complaining of a due process violation to establish that the legislature acted in an arbitrary or irrational manner. This burden of proof has never been met since the *Lochner*[201] era.[202]

Further, the mere novelty of a state law is not a constitutional objection.[203] Thus, opponents of the DDLA could not attack it purely because of its uniqueness. Under the federalist form of government, each state has a legislative body that is empowered with the authority to change the law as society's needs change.[204] It is presumed that the legislators, having been

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199. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984); Schweiker v. Wilson, 450 U.S. 221, 234 (1981) (stating that the pertinent question is whether the challenged provision advances legitimate legislative goals in a rational manner); United States v. Carolene Prod. Co., 304 U.S. 144 (1938).

200. Williamson v. Lee Optical Inc., 348 U.S. 483 (1955).

201. Lochner v. New York, 198 U.S. 45 (1905). Perhaps foreshadowing the Supreme Court's subsequent change of mind in regard to striking down state economic policy under the Substantive Due Process Clause, the first Justice Harlan noted that "[whether] or not this be wise legislation, it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation." *Id.* at 69. *Lochner* stands as a "symbol of unrestrained judicial activism" where the Court made the mistake of becoming involved in the formation of policy rather than the interpretation of the law. THE OXFORD COMPANION TO THE SUPREME COURT 511 (Kermit Hall ed. 1992).

202. Rosalie B. Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance out of Substantive Due Process*, 16 U. DAYTON L. REV. 313, 321 (1991) ("the Supreme Court has not invalidated a statute on substantive due process grounds where only economic rights are implicated since the Lochnerean period"). The *Lochner* era essentially ran from the Court's decision in *Lochner*, to *Nebbia v. New York*, 291 U.S. 502 (1934), when it frequently substituted its judgment for that of the Congress and of the state legislatures. WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 359 (7th ed. 1991). The Court has not struck down economic legislation under the Substantive Due Process Clause since 1937. *Id.* at 359. *See* Thompson v. Consolidated Gas Utils. Corp., 300 U.S. 55 (1937). Indeed, the "Lochner era" is somewhat of a misnomer since the Supreme Court, despite invalidating an estimated 197 state or federal statutes, upheld an even larger number of statutes during the same era in cases that were challenged on due process or equal protection grounds. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8.2, at 435, n.2 (1995).

203. Arizona Copper Co. v. Hammer, 250 U.S. 400, 419 (1919) (examining a workers' compensation statute).

204. *Id.* Woodrow Wilson noted that:

> [I]t would be folly to apply uniform rules of development to all parts of the country, that our strength has been the elasticity of our institutions, in the almost infinite adaptability of our laws, that our vitality has consisted largely in the dispersion of political authority, in the necessity that communities should take care if themselves and work out their own order and progress.

elected by the people, understand and appreciate the needs of society.[205] Thus, traditional laws are not beyond legislative alteration in the public interest.[206] No person has a vested interest in any law such that it shall remain unchanged for his benefit.[207] Additionally, the states have a broad range of legislative discretion, and courts generally cannot review the propriety of legislative acts unless the legislation is arbitrary and unreasonable.[208]

Regarding the DDLA, the government certainly has a legitimate interest in recovering the money it has paid for medical treatment and rehabilitation costs when a third party is responsible for the harm that gave rise to the expenditures.[209] However, the means of achieving the legitimate state interest may not be rationally related to the governmental purpose if the statute potentially imposes liability upon illegal drug dealers in an arbitrary or illogical manner.[210] The purpose of market-share liability is to impose liability on a defendant even where the defendant is not the legal cause of the plaintiff's injury.[211] This approach is inconsistent with fundamental tort principles.[212]

WOODROW WILSON, POLITICAL THOUGHT 130-31 (1925).

205. *Hammer*, 250 U.S. at 419. *See also* Lawton v. Steele, 152 U.S. 133, 136 (1894) ("[L]arge discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.").

206. New York Cent. R.R. Co. v. White, 243 U.S. 188, 198 (1917) (upholding a workers' compensation statute). *See also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting) ("There must be power in the States . . . to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.").

207. *White*, 243 U.S. at 198.

208. Arizona Copper Co. v. Hammer, 250 U.S. 400, 419 (1919). *Accord* Alan E. Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 CONST. COMMENT. 7 (1996). Brownstein has argued that:

> Judicial decisions applying constitutional principles displace the people's judgment regarding the laws that govern society. The laws enacted by democratic representatives may not be wise. Indeed, they may be egregiously unfair and hurtful. Nonetheless, the appropriate response to such legislation should be political accountability, not judicial usurpation of the legislature's prerogatives.

Id. at 46

209. *See* Phillips v. Trame, 252 F. Supp. 948, 951 (E.D. Ill. 1966) (opining that the purpose of providing recovery of medical costs paid by the government from negligent third parties is clearly legitimate such that the constitutionality of the Federal Medical Care Recovery Act is "hardly open to question.").

210. *See supra* notes 199-201 and accompanying text.

211. The ACLU has argued in a statement that the DDLA is simply "drug asset forfeiture by another name." In the view of the ACLU, the DDLA is too broadly drafted and wrongly imposes liability "without any causal connection . . . between the defendant and the injured party." *Senate Passes Bill on Suing of Drug Dealers*, L.A. TIMES, June 25, 1996, at B8. Thus, even one minimally involved in the drug market could be held liable for harm.

Nevertheless, it can be argued that the group of potential defendants, who are proven to be illegal drug dealers, are all wrongdoers to society. Each contributes to the risk that harm will result from the illegal drug market. Therefore, it should follow that they should pay for the damages their products cause to society. Because some courts have been unwilling to adopt market-share liability in the absence of legislative guidance,[213] it should follow that the DDLA should pass constitutional muster if the market, and the market-share, are legislatively designed in a manner that is fair and reasonable to defendants, while at the same time achieving its stated purpose of providing compensation to parties injured by the illegal drug market.[214]

However, problems arise when legislatures pass statutes without considering the due process rights of all individuals who may be affected. States are pushing drug dealer liability acts through the legislative process with great enthusiasm because of their potential impact, without fully considering the due process rights of drug dealers.[215] Normally, legislation takes months, if not years, to pass because of the battle among special interest groups.[216] No such battle has been waged against the DDLA because illegal drug dealers, as far as can be determined, have no organized interest group to protect their rights.[217] Therefore, drug dealers' sole protection is the Constitution.[218] Additionally, the DDLA helps legislators take a "tough on crime" stance that may help their

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212. *See supra* notes 94-95 and accompanying text. *See also* W.L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41, at 237 (4th ed. 1971) ("legal responsibility must be limited to those cases which are so closely connected with the result and of such significance that the law is justified in imposing liability").

213. *See supra* note 102 and accompanying text.

214. *See supra* note 14 and accompanying text.

215. Mr. Bent has stated that "[t]here has been no serious opposition" to the DDLA in the state legislatures. Letter from Daniel A. Bent, Attorney, Carlsmith, Ball, Wichman, Case & Ichiki, to Joel Baar, Associate Editor, *Valparaiso University Law Review* 4 (Sept. 21, 1996) (copy on file with the *Valparaiso University Law Review*).

216. Legislation is "usually arrived at in highly pressurized environments, in which numerous groups compete for the protection or advancement of different and opposing interests." ABNER MIKVA & ERIC LANE, LEGISLATIVE PROCESS 5 (1995).

217. The author is not suggesting that illegal drug dealers should form a special interest group in order to attempt to gain influence over legislators. Although the notorious Gangster Disciple Gang has a political arm known as 21st Century VOTE, community support for the group has diminished. Gary Marx & Matt O'Connor, *As Hoover Trial Nears, Gang Unity Starts to Unravel*, THE CHICAGO TRIBUNE, March 18, 1997, at A1, A11. The Gangster Disciples have drug sales that are estimated at $100 million annually. *Id.* The political arm of the Gangster Disciples supported aldermanic candidates in Chicago. *Id.*

218. Specifically, the constitutional protections against double jeopardy and excessive fines, as well as the right to substantive due process, provide the drug dealers with protection. *See supra* notes 118-218 and accompanying text.

reelection efforts.[219] Such legislative motives, and a thwarted legislative process, may lead to specific provisions in a statute that are unconstitutional or against public policy.

As it stands, the DDLA is subject to numerous constitutional challenges. As a means to further punish a convicted drug dealer, the DDLA may violate the Double Jeopardy Clause. Additionally, the amount of the damages the government may pursue under the DDLA is subject to the Excessive Fines Clause. Finally, the DDLA's circumvention of direct causation may be susceptible to a substantive due process challenge, although it is likely that the courts will give deference to the legislature. These challenges are raised by specific provisions of the DDLA that are reviewed in the next Section.

V. CONTROVERSIAL ASPECTS OF THE DDLA

This Section addresses specific provisions and attributes of the DDLA that raise specific constitutional or public policy issues. The first Subsection analyzes the provision of Michigan's version of the DDLA that allows the government to bring an action against drug dealers.[220] The second Subsection closely scrutinizes the provision that allows an illegal drug abuser to bring a lawsuit against drug dealers.[221] The third Subsection evaluates the procedure that allows a plaintiff to get a prejudgment *ex parte* attachment order against a defendant.[222] The final Subsection examines the structure of the illegal drug dealer's presumed market, as well as the determination of a defendant's potential liability.[223]

A. The Government as Plaintiff

The DDLA allows the government to institute an action for damages against a drug dealer.[224] California has recognized the constitutional problems that

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219. Hansen, *supra* note 193, at 30. Upon proposing the DDLA in Michigan, Governor John Engler facetiously stated: "You think members [of the Legislature] are going to be opposed to [the DDLA]? They're going to be supporting it." Rick Pluta, *Engler Proposes Suing Drug Dealers*, UPI, April 29, 1992, *available in* LEXIS, NEXIS Library Wires, UPI File. Additionally, Jeff Modisett promoted his support of the DDLA as he ran for Attorney General of Indiana. Armour, *supra* note 36, at O1B.

220. *See infra* notes 225-37 and accompanying text.

221. *See infra* notes 238-92 and accompanying text.

222. *See infra* notes 293-342 and accompanying text.

223. *See infra* notes 343-97 and accompanying text.

224. MICH. COMP. LAWS ANN. § 691.1613(1) (West 1996) (providing that "[a] prosecuting attorney may represent the state or a political subdivision of the state in an action brought under this act.").

would follow if the government brings an action under the DDLA.[225] However, while California prohibits the government from bringing an action under the DDLA, it does make an exception under its version of the DDLA to allow a publicly funded medical facility to bring an action against illegal drug dealers.[226]

In theory, the DDLA allows state governments to attempt to recover the costs they have incurred as a result of the illegal drug market. This attempt would be very similar to current state actions against the tobacco companies to recover the Medicaid costs that states have incurred as a result of the tobacco industry.[227] Similar to the tobacco industry, the illegal drug market causes states to suffer an independent harm due to the increase in Medicaid expenditures.[228] In addition, just as attempts to utilize the common law and restitution statutes have failed to provide a remedy to victims of the illegal drug market,[229] attempts to regulate the tobacco industry have failed to require the tobacco industry to take responsibility for the harm its products allegedly cause.[230] In contrast to the tobacco cases, the defendants named in any DDLA action would most likely have already been convicted of the criminal offense of

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225. Ceballos, *supra* note 9, at B1. However, a bill is currently pending in the California Senate which would add a governmental agency to the list of entities that may bring a cause of action under the DDLA. S.B. 290, 1997-98 Reg. Sess. (Cal. 1997).

226. The California statute provides a cause of action to:

> A medical facility, insurer, employer, or other nongovernmental entity that funds a drug treatment program or employee assistance program for the individual user of an illegal controlled substance or that otherwise expended [sic] money on behalf of the individual user of an illegal controlled substance. No public agency other than a public agency medical facility shall have a cause of action under this division.

CAL HEALTH & SAFETY CODE § 11705(a)(4) (West 1997). *See also* Ceballos, *supra* note 9, at B1. Interestingly, the California statute provides the exception for the publicly funded hospitals, yet it fails to provide an exception where the government as employer expends money for the drug rehabilitation of a governmental employee and the loss of that employee's work hours. Perhaps the California government realizes that to allow both the hospital and the government to bring an action would create situations where the damages overlap. However, a bill is currently pending in the California Senate which would delete the prohibition against a public agency, other than a publicly funded medical facility, from bringing a cause of action under the DDLA. S.B. 290, 1997-98 Reg. Sess. (Cal. 1997).

227. Mark Hansen, *Capitol Offensives*, A.B.A. J., Jan. 1997, at 50. Currently, 18 states have filed suit against the tobacco companies attempting to recover Medicaid costs. *Id.* at 52. *See also* Karen E. Meade, *Breaking Through the Tobacco Industry's Smoke Screen: State Lawsuits for Reimbursement of Medical Expenses*, 17 J. Legal Med. 113 (1996) (analyzing the history of tobacco litigation). *But see* Recent Legislation, *supra* note 64, at 730 ("Ultimately, a reimbursement strategy cannot eliminate the huge health care costs of tobacco consumption: legislators must attack the roots of tobacco addiction and consumption . . . .").

228. *See* Frohlich, *supra* note 115, at 445-46 (stating that states suffer an independent harm from the victims of the tobacco industry).

229. *See supra* notes 48-77 and accompanying text.

230. Frohlich, *supra* note 115, at 450.

distribution of an illegal substance.[231]

Another asserted government interest in the DDLA is to recover law enforcement costs, such as the costs of investigation.[232] However, under restitution statutes, the government cannot be considered a victim for the voluntary acts of its agents.[233] Also, civil forfeiture provisions already allow the government to recover a substantial amount of money which is often used to finance law enforcement costs.[234] Therefore, allowing the government to maintain another civil cause of action may implicate the Double Jeopardy and the Excessive Fines Clauses when the asserted government interest is not clearly identified as making the government whole when it has been a victim of the illegal drug market.[235]

However, allowing the state government to stand in the shoes of taxpayers may provide publicly-funded treatment centers with an incentive to provide services to indigent patients, knowing that the costs of treatment may be recovered under the DDLA. This incentive is consistent with the National Criminal Justice Commission's recommendation that drug treatment facilities must be made available so that all addicts who wish to overcome their habits will have the opportunity to seek treatment and live drug-free lives.[236] The government is not the only troublesome plaintiff under the DDLA. The DDLA should not allow adult drug users a cause of action to recover their treatment costs.

B. The Drug User as Plaintiff

The DDLA allows an individual drug abuser to maintain an action against an illegal drug dealer if the user can meet certain criteria.[237] First, to have an opportunity to file an action under the DDLA, an illegal drug user must disclose information pertaining to the user's purchase of illegal drugs to law

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231. This is because a criminal conviction for illegal trafficking of a controlled substance creates a conclusive presumption that the illegal drug dealer was a market participant. MICH. COMP. LAWS ANN. § 691.1609(1) (West 1996).

232. *See supra* notes 48-50 and accompanying text.

233. *See supra* notes 74-76 and accompanying text.

234. *See infra* note 334.

235. *See supra* notes 123-92 and accompanying text.

236. THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 201 (Steven R. Donziger ed., 1996).

237. MICH. COMP. LAWS ANN. § 691.1606(2) (West 1996) (providing that "[a]n individual abuser shall not recover damages under this section unless the individual abuser meets all of the following conditions.").

enforcement officers six months before filing the action.[238] Second, the individual drug user must not use illicit drugs during the six months prior to filing the lawsuit under the DDLA.[239] Finally, the individual abuser must not use illicit drugs during the pendency of the lawsuit.[240] These requirements are not placed on an individual who has been injured by an individual abuser, even if the injured party is a convicted drug dealer who may have inside knowledge of the illegal drug market.[241] The purpose behind allowing an individual drug abuser to maintain an action against illegal drug dealers is to provide an incentive for individual abusers to seek payment for their rehabilitation costs incurred during treatment.[242] However, the individual drug abuser can only recover economic damages, reasonable attorney fees, and reasonable expenses for expert testimony.[243] Conversely, a plaintiff who is not an illegal drug abuser can recover those damages, as well as noneconomic and exemplary damages.[244]

Even with the limited recovery, this portion of the DDLA essentially rewards individual drug abusers, individuals who have themselves committed a crime by purchasing and using illegal drugs. When a plaintiff bases her claim,

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238. Section 691.1606 states that: "Not less than 6 months before filing the action, the individual [must] personally disclose[] to law enforcement authorities all of the information the individual knows regarding his or her source of illegally marketed controlled substances." *Id.* Presumably this means all transactions or sources, not merely the most recent purchase.

239. Section 691.1606 states that: "The individual [must not use] an illegally marketed controlled substance within the 6 months before filing the action." *Id.*

240. Section 691.1602(c) states that: "The individual [must not use] an illegally marketed controlled substance during the pendency of the action." *Id.* Interestingly, the Model DDLA allows an individual drug user to recover damages only from "a person who distributed, or is in the chain of distribution of, an illegal drug that was actually used by the individual drug user." MODEL DRUG DEALER LIABILITY ACT § 7(b).

241. MICH. COMP. LAWS ANN. § 691.1607 (West 1996).

242. Section 691.1601(2)(c) provides that: "The purpose of this act is to . . . provide an incentive for individual abusers to identify persons from whom the abusers have acquired illegally marketed controlled substances and to seek payment for the abusers' own treatment." *Id.*

243. Section 691.1610(1) provides that: "An individual abuser entitled to recovery under this act may recover economic damages and reasonable attorney fees and costs, including, but not limited to, reasonable expenses for expert testimony." *Id.*

The Model DDLA defines economic costs as "including, but not limited to, the cost of treatment, rehabilitation, and medical expenses, loss of economic or educational potential, loss of productivity, absenteeism, accidents or injury, and any other pecuniary loss proximately caused by the person's illegal drug use." MODEL DRUG DEALER LIABILITY ACT § 7(c)(1). Further, Hawaii's version of the DDLA requires a plaintiff who was a drug user to forfeit 25% of the damages they recover from the illegal drug dealer, so that it can be deposited in a general fund for the State. HAW. REV. STAT. § 4-36-663D-3 (1995).

244. Section 691.1610(1) of the Michigan code provides that: "A person other than an individual abuser who is entitled to recovery under this act may recover economic, noneconomic, and exemplary damages and reasonable attorney fees and costs, including, but not limited to, reasonable expenses for expert testimony." MICH. COMP. LAWS ANN. § 691.1610(1) (West 1996).

in whole or in part, on her own illegal conduct, the fundamental common law doctrine of *volenti non fit injuria*[245] generally acts as a bar to the plaintiff's claim.[246] Similarly, when a plaintiff bases her claim upon her own illegal conduct, and the defendant participated equally in the illegal activity, the common law doctrine of *in pari delicto* generally will apply to bar the plaintiff's claim.[247] These common law maxims are collectively referred to in Michigan as the "wrongful conduct rule."[248]

In *Orzel v. Scott Drug Company*,[249] the Michigan Supreme Court applied the wrongful conduct rule to a plaintiff who sought recovery from a pharmacy that the plaintiff alleged had negligently sold him Desoxyn.[250] The plaintiff and his relatives alleged that the defendant filled Desoxyn prescriptions without asking for identification and without allowing an adequate time interval between the filling of prescriptions.[251] However, the plaintiff illegally and surreptitiously obtained Desoxyn from other sources, and also made misrepresentations to physicians who would then write prescriptions for Desoxyn.[252] Each prescription that the plaintiff had presented to the defendant had been signed by a licensed physician based upon a fraudulent misrepresentation.[253]

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245. *Volenti non fit injuria* means that "if one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from recovery for an injury resulting therefrom." BLACK'S LAW DICTIONARY 1575 (6th ed. 1990).

246. "[A] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party, or to maintain a claim for damages based on his own wrong or caused by his own neglect, . . . or where he must base his cause of action, in whole or in part, on a violation by himself of the criminal or penal laws . . . ." 1A C.J.S. *Actions* § 29 (1992). *See also* 1 AM. JUR. 2D *Actions* § 45 (1994). *See also* Pappas v. Clark, 494 N.W.2d 245 (Iowa Ct. App. 1992) (holding that the husband's illegal conduct of fraudulently obtaining prescription drugs and using illegal drugs, which caused his death, barred his wife's cause of action).

247. "[A]s between parties *in pari delicto*, that is equally in the wrong, the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them." 1A C.J.S. *Actions* § 29 (1992). *See also* 1 AM. JUR. 2D *Actions* § 46 (1994).

248. *See, e.g.*, Orzel v. Scott Drug Co., 537 N.W.2d 208, 213 (Mich. 1995). Similarly, under the "noninnocent party doctrine," public policy should not allow a plaintiff, who has actively participated in the drug abuse of the drug user who subsequently caused an injury to the plaintiff, a cause of action. *See, e.g.*, Larrow v. Miller, 548 N.W.2d 704, 706-07 (Mich. Ct. App. 1996) (denying the plaintiff a cause of action under Michigan's Dram Shop Act because the plaintiff supplied the injurer with illicit drugs).

249. 537 N.W.2d 208 (Mich. 1995).

250. Desoxyn is the trade name for the chemical methamphetamine and is a schedule 2 controlled substance, which can only lawfully be obtained with a valid prescription. *Id.* at 210.

251. *Id.*

252. *Id.* at 211.

253. *Id.*

The Michigan Supreme Court noted that the plaintiff had engaged in illegal conduct when he repeatedly violated provisions of the Controlled Substances Act by obtaining, possessing, and using Desoxyn without a valid prescription.[254] The court held that the plaintiff's claim was barred because it was based in part upon his own illegal conduct.[255] Likewise, the claims of his relatives were also based upon his illegal conduct and thus barred by the wrongful conduct rule.[256] In a similar case, another Michigan appellate court held that a pharmacy and its pharmacists owed no legal duty to monitor a customer's drug usage, discover his addicted status, or refuse to sell a drug to him.[257]

In general, the rationale that Michigan courts have used to support the wrongful conduct rule is rooted in the public policy that courts should not lend aid to a plaintiff whose injury derives from his own illegal conduct.[258] If courts choose to give aid in such situations, several unacceptable and undesirable consequences would result. First, by allowing potential relief for wrongdoers, courts in effect would appear to condone and encourage illegal conduct.[259] Second, some wrongdoers would be able to profit[260] or be compensated[261] as a result of their illegal actions. A third and related consequence is that the

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254. *Id.* at 214.

255. Orzel v. Scott Drug Co., 537 N.W.2d 208, 221 (Mich. 1995).

256. *Id.*

257. Kintigh v. Abbott Pharm., 503 N.W.2d 657, 658 (Mich. Ct. App. 1993). In *Kintigh*, the plaintiff alleged that the defendants repeatedly sold him a codeine-based cough syrup which perpetuated his substance abuse problem. *Id.* The Michigan Court of Appeals deemed the claim "clearly unenforceable as a matter of law." *Id.*

258. *Orzel*, 537 N.W.2d at 213 (citing Manning v. Bishop of Marquette, 76 N.W.2d 75, 78 (Mich. 1956)); Glazier v. Lee, 429 N.W.2d 857, 859 (Mich. Ct. App. 1988). *See also* 1A C.J.S. *Actions* § 29 (1992); 1 AM. JUR. 2D *Actions* § 45 (1994).

259. *Orzel*, 537 N.W.2d at 213 (citing Miller v. Radikopf, 228 N.W.2d 386, 388 (Mich. 1975)).

260. For example, Michigan courts have barred a claim by a plaintiff who had murdered his wife and subsequently sought the proceeds of an insurance policy in which he had been named beneficiary. *See* Budwit v. Herr, 63 N.W.2d 841 (Mich. 1954). *See also* Garwols v. Bankers Trust Co., 232 N.W. 239 (Mich. 1930). Similarly, the wrongful conduct rule has been applied where a convicted arsonist sought proceeds from a fire insurance policy. Imperial Kosher Catering Inc., v. Travelers Indem. Co., 252 N.W.2d 509 (Mich. Ct. App. 1977).

261. In Michigan, the principle that one may not profit from his own wrong has been extended to tort actions where the plaintiff seeks compensation for injuries resulting from his own illegal activities. Orzel v. Scott Drug Co., 537 N.W.2d 208, 213, n.9 (Mich. 1995). *See also* Piechowiak v. Bissell, 9 N.W.2d 685 (Mich. 1943) (the court applied the wrongful conduct rule even though it was clear that the plaintiff could not and did not seek to profit from his crime); Glazier v. Lee, 429 N.W.2d 857 (Mich. Ct. App. 1988) (the court of appeals applied the wrongful conduct rule even though the plaintiff sought damages that could be characterized as compensation rather than a profit).

public would likely view the legal system as a mockery of justice.[262] Fourth, wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties, resulting in the loss of individual accountability.[263] When the plaintiff engaged in illegal conduct, it should be the plaintiff's own criminal responsibility that is determinative of any recovery.[264]

However, the wrongful conduct rule, like all general rules, has limitations and exceptions. The mere fact that a plaintiff engaged in illegal activity at the time of injury does not automatically mean that the claim is barred by the wrongful conduct rule.[265] For example, where the plaintiff's illegal conduct amounts to only a violation of a safety statute, the plaintiff's act, although illegal, does not rise to the level of serious misconduct sufficient to trigger the application of the wrongful conduct rule.[266] In order to trigger the application of the wrongful conduct rule, the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute.[267]

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262. The Michigan Court of Appeals has said that:

> To permit recovery . . . [would] be illogical, would discredit the administration of justice, defy public policy and shock the most unenlightened conscience. To sustain such a judgment would be to encourage and give support to the current thoughtless and carping criticisms of legal procedure, and to justify the gibe that the administration of the law is the only remaining legalized lottery.

Imperial Kosher Catering, 252 N.W.2d at 509. (quoting Eagle, Star & British Dominions Ins. Co., v. Heller, 140 S.E. 314, 323 (Va. 1927)).

263. *Orzel*, 537 N.W.2d at 213.

264. Glazier v. Lee, 429 N.W.2d 857, 862 (Mich. Ct. App. 1988). In cases in which both the plaintiff and the defendant have equally participated in the illegal activity, courts have generally refrained from affording relief to one wrongdoer against another to endorse the view that it is better to "leave the parties where [the court] finds them." Pantely v. Garris, Garris & Garris, 447 N.W.2d 864, 867 (Mich. Ct. App. 1989). A lawsuit is not barred because the defendant is right, but rather because the plaintiff, being equally wrong, has forfeited any claim to the aid of the court. *See, e.g.*, Jones v. Chennault, 35 N.W.2d 256 (Mich. 1948). *Accord* 1A C.J.S. *Actions* § 29 (1992); 1 AM. JUR. 2D *Actions* § 46 (1993).

265. *See infra* note 267 and accompanying text.

266. *See* Klanseck v. Anderson Sales & Service, Inc., 393 N.W.2d 356 (Mich. 1986) (plaintiff violated motorcycle licensing statute); Longstreth v. Gensel, 377 N.W.2d 804 (Mich. 1985) (minor plaintiff violated statute prohibiting driving under the influence of alcohol); Hardy v. Monsanto Enviro-Chem Sys., Inc., 323 N.W.2d 270 (Mich. 1982) (plaintiff violated labor safety statute); Massey v. Scripter, 258 N.W.2d 44 (Mich. 1977) (plaintiff violated bicycle safety statute); Zeni v. Anderson, 243 N.W.2d 270 (Mich. 1976) (plaintiff violated statute pertaining to pedestrian sidewalk use). *Accord* PROSSER & KEETON, TORTS, § 36, p. 232 (5th ed. 1984).

267. *Orzel*, 537 N.W.2d at 214 (applying the wrongful conduct rule to a situation where the plaintiff became addicted to Desoxyn which he obtained from a pharmacy by violating the controlled substances act when he obtained, possessed, and used invalid prescriptions). Other cases in which the wrongful conduct rule has been applied include: Miller v. Radikopf, 228 N.W.2d 386 (Mich. 1975) (illegal lottery); Manning v. Bishop of Marquette, 76 N.W.2d 75 (Mich. 1956) (trespass and gambling); Cook v. Wolverine Stockyards Co., 73 N.W.2d 902 (Mich. 1955) (illegal contract); Budwit v. Herr, 63 N.W.2d 841 (Mich. 1954) (murder); Piechowiak v. Bissell, 9 N.W.2d 685 (Mich. 1943) (embezzlement); Ohio State Life Ins. Co. v. Barron, 263 N.W. 786 (Mich. 1935)

A second limitation under Michigan's wrongful conduct rule involves causation. In order for the wrongful conduct rule to apply, a sufficient causal connection must exist between the plaintiff's illegal conduct and the plaintiff's damages.[268] Therefore, an action may be maintained where the illegal act of the plaintiff is merely incidentally or collaterally related to the cause of action.[269] The plaintiff must be able to establish his cause of action without showing, or having to rely on, his illegal act, although it may be useful to explain other facts.[270]

Another exception to Michigan's wrongful conduct rule may apply where, although both the plaintiff and the defendant engaged in illegal conduct, the parties do not stand *in pari delicto*.[271] In other words, a plaintiff may still seek recovery against a defendant, despite engaging in serious illegal activity that proximately caused the plaintiff's injuries, if the defendant's culpability is greater than the plaintiff's culpability for the injuries. For example, recovery may be granted where the plaintiff has acted under circumstances of oppression, imposition, hardship, undue influence, or great inequality of age.[272]

The inequality-of-age argument is particularly compelling in the illegal drug market. This market can be compared to other illicit markets such as the sale of alcohol to minors.[273] Alcohol sales to minors are prohibited because

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(murder); Garwols v. Bankers Trust Co., 232 N.W. 239 (Mich. 1930) (murder); McDonald v. Hall, 159 N.W. 358 (Mich. 1916) (illegal contract); Pantely v. Garris, Garris & Garris, 447 N.W.2d 864 (Mich. Ct. App. 1989) (perjury); Glazier v. Lee, 429 N.W.2d 857 (Mich. Ct. App. 1988) (murder); Imperial Kosher Catering v. Travelers Indem. Co., 252 N.W.2d 509 (Mich. Ct. App. 1977) (arson).

268. Orzel v. Scott Drug Co., 537 N.W.2d 208, 216 (Mich. 1995). It is not necessary to show that a party's conduct was the proximate cause, but rather merely showing that the party's conduct was a proximate cause of the injuries is sufficient. Dedes v. Asch, 521 N.W.2d 488, 495 (Mich. 1994).

269. 1A C.J.S. *Actions* § 30 (1985).

270. *Id.* In one case, the Michigan Supreme Court stated that:

> [The plaintiff's] injury must have been suffered while and as a proximate result of committing an illegal act. The unlawful act must be at once the source of both his criminal responsibility and his civil right. The injury must be traceable to his own breach of the law and such breach must be an integral and essential part of his case. Where the violation of law is merely a condition and not a contributing cause of the injury, a recovery may be permitted.

Manning v. Bishop of Marquette, 76 N.W.2d 75, 78 (Mich. 1956) (quoting Meador v. Hotel Grover, 9 So.2d 782, 785 (Miss. 1942)).

271. *Orzel*, 537 N.W.2d at 217. *See also* Flandermeyer v. Cooper, 98 N.E. 102, 106 (Ohio 1912) (recognizing that there comes a time in a drug addict's crisis where the addict is "no longer capable of controlling his own conduct and capable of exercising an independent judgment in reference to the use of [the morphine] . . . .").

272. Pantely v. Garris, Garris & Garris, 447 N.W.2d 864, 868 (Mich. Ct. App. 1989) (quoting 1 JOSEPH STORY, EQUITY JURISPRUDENCE § 423, at 399-400 (14th ed.)). *See also* 1A C.J.S. *Actions* § 29 (1997).

273. *See infra* notes 275-77 and accompanying text.

legislatures recognize minors as a susceptible class lacking the maturity to realize the dangers of alcohol.[274] Such laws are not only meant to benefit the minors, but also to protect the members of the general public.[275] Therefore, as between the seller and the minor, it is the seller who should bear the responsibility of the transaction, and the minor should not be barred from having a cause of action against the seller.[276]

A final exception to Michigan's wrongful conduct rule exists when the statute that the defendant allegedly violated allows the plaintiff to recover for injuries sustained because of the violation.[277] In fact, the *Orzel* court specifically noted that a legislature has the authority to institute a policy that would allow an illegal drug user to sue his illegal drug supplier for negligence.[278] Further, the reasons given for allowing individual users to recover from illegal drug dealers are all legitimate: (1) it may drive a "wedge" in the dealer-user relationship;[279] (2) suits by individual drug users would result in the disclosure of dealers who could then be sued, once they have been identified, by non-users who have been injured by the drug market;[280] (3) such suits encourage individual drug users to take responsibility for the costs of their own treatment by identifying their illegal drug dealers;[281] and (4) such suits are important because, arguably, the dealer who introduces the drug may be

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274. Davis v. Billy's Con-Teena, Inc., 587 P.2d 75, 77-78 (Or. 1978) (quoting Rappaport v. Nichols, 156 A.2d 1, 8 (N.J. 1959)) ("The Legislature has . . . prohibited [alcohol] sales to minors as a class because it recognizes their very special susceptibilities and the intensification of the otherwise inherent dangers when persons lacking in maturity and responsibility partake of alcoholic beverages . . . .").

275. *Davis*, 587 P.2d at 78. Indeed, teenage drug use has more than doubled since 1992. Stuart Ugelow, WALL ST. J., Aug. 21, 1996, at A4. Nearly 11% of twelve to seventeen year-olds used drugs on a monthly basis in 1995. *Id.* However, these statistics have been questioned. *See* Michael Moss, *Does Annual Survey of U.S. Drug Use Give Straight Dope?*, WALL ST. J., Sept. 18, 1996, at A1.

276. Morris v. Farley Enterprises, Inc., 661 P.2d 167, 171 (Alaska 1983) ("It would run counter to the purpose . . . [of] the statute . . . to hold that a minor is barred from maintaining an action by his own illegal role in the liquor's acquisition. As between the seller and the minor, it is the seller who is the responsible party . . . ."). *See also* J.A. Bryant, Jr., Annotation, *Giving, Selling, or Prescribing Dangerous Drugs as Contributing to the Delinquency of a Minor*, 36 A.L.R.3d 1292 (1971) (listing cases discussing whether the giving, selling, or prescribing of illegal drugs to a minor constitutes the offense of contributing to the delinquency of a minor).

277. Orzel v. Scott Drug Co., 537 N.E.2d 208, 218 (Mich. 1996).

278. *Id.* at 220. The DDLA does not go this far because it provides only limited damages for individual drug users. *See supra* note 244 and accompanying text.

279. Bent & Takeuchi, *supra* note 12, at 16. This "wedge" would likely occur because every dealer would be aware, theoretically, that every customer is a potential plaintiff if the customer ends up in drug treatment, stays clean, and informs law enforcement agencies of their knowledge of the illegal drug market. *Id.*

280. *Id.* Bent & Takeuchi further state that this " . . . will facilitate recovery of damages by truly innocent victims of drugs." *Id.*

281. *Id.*

more responsible than the person who tries it for the first time.[282]

Under Michigan's Controlled Substances Act,[283] transactions involving controlled substances are almost entirely prohibited. Improper use of a controlled substance on just one occasion can have a significantly detrimental, possibly even permanent, effect on the health of the user.[284] Illegal possession and the use of controlled substances can also produce widespread societal loss, and may even lead to further criminal acts.[285] The law should not encourage adults to try an illegal drug even once. A law imposing market-share liability has the potential of creating an incentive to use illegal drugs, because adults would know that they could recover treatment and rehabilitation costs from an illegal drug dealer should the adult become addicted upon their first exposure to the drugs.[286]

Also, under the Model DDLA, the principles of comparative responsibility apply.[287] Thus, it is likely that a lawsuit will be unfruitful for an individual drug user.[288] However, even if the individual drug user decides to bring suit, he will have to fight his own addiction for an extended period of time and disclose information to the law enforcement community regarding his knowledge of his drug transactions.[289] Even if the individual drug user falters during the pendency of the suit and takes illicit drugs, the government still has attained the illegal drug market information it desires.[290] Therefore, the incentive to help individuals seek compensation for their rehabilitation costs may be sacrificed in order to get information regarding the scope of the illegal drug community

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282. *Id.* at 17. This argument is based on the premise that most illegal drug users do not actively seek out illegal drugs the first time one is used; rather, it is introduced to him or her by an illegal drug dealer. *Id.*

283. MICH. COMP. LAWS ANN. § 333.7101 *et seq.* (West 1996).

284. Gilmore, *supra* note 18, at 373-74 (describing the harmful effects to drug users from the use of illegal drugs).

285. *See supra* notes 17-21 and accompanying text.

286. *But see Professor: Victims of Illegal Acts Should Be Able to Sue*, UNITED PRESS INT'L, April 25, 1989 (quoting Professor Shaheen Borna of Ball State University ("Consumers of illegal products are completely ignored. They are not protected by any consumer-oriented regulations.")).

287. The Model DDLA provides that comparative responsibility will not bar recovery, but will diminish the award of compensatory damages according to the measure of responsibility attributed to the plaintiff by the trier of fear. MODEL DRUG DEALER LIABILITY ACT § 11(a). Further, the burden of proving comparative fault rests on the defendant who must show it by clear and convincing evidence. *Id.* § 11(b). Further, comparative fault can only be attributed to a plaintiff who is an individual abuser, it cannot be attributed to a plaintiff who is not a user. *Id.* § 11(c).

288. The lawsuit would likely be pointless because a jury would likely find an adult plaintiff to be responsible for his own actions.

289. MICH. COMP. LAWS ANN. § 691.1606 (West 1997).

290. *See supra* note 239 and accompanying text.

within a city, county, or state.[291] In addition to challenges created by provisions of the DDLA that allow certain classes of plaintiffs to recover for their injuries, problems arise due to the means of recovery available under the DDLA.

C. *The Possibility of Prejudgment Attachment and Procedural Due Process*

Commentators have also argued that the section of the DDLA that allows a plaintiff to get an *ex parte* prejudgment attachment[292] order against the defendant's assets violates procedural due process.[293] In order to seek a writ of attachment, the plaintiff must file an *ex parte* motion supported by an affidavit which must indicate: (1) the nature of the injury and a statement of a good faith belief that the defendant is liable to the plaintiff in a stated amount;[294] (2) that the defendant is subject to the judicial jurisdiction of the state;[295] and (3) that the plaintiff cannot serve the defendant with process, despite a diligent effort.[296] If the court authorizes attachment, the defendant is entitled to an immediate post-deprivation hearing.[297] The writ of attachment may be removed if the defendant can demonstrate that assets will be available to satisfy a potential award, or if the defendant posts a sufficient bond to satisfy a potential award.[298]

In order to survive a procedural due process challenge, a prejudgment attachment procedure must survive the three-part test enunciated in *Mathews v.*

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291. Although the DDLA permits individual drug users to get compensation for their rehabilitation costs when the State otherwise would not have allowed compensation under the common law doctrines of *in pari delicto* and *volenti non fit injuria*, it could be argued that the requirement of disclosing information to the government regarding illicit drug activity is an undue burden that is not rationally related to the legitimate government interest of providing compensation.

292. Attachment is:

> The legal process of seizing another's property in accordance with a writ or judicial order for the purpose of securing satisfaction of a judgment yet to be rendered. The act or process of taking, apprehending, or seizing persons or property, by virtue of a writ, summons, or other judicial order, and bringing the same into the custody of the court for purpose of securing satisfaction of the judgment ultimately to be entered in the action. While formerly the main objective of attachment was to coerce the defendant debtor to appear in court by seizure of his property, today the writ of attachment is used primarily to seize the debtor's property in order to secure the debt or claim of the creditor in the event that a judgment is rendered.

BLACK'S LAW DICTIONARY 126 (6th ed. 1990).

293. Mary Cheh, a law professor at George Washington University, has said that this portion of the DDLA "won't survive." Dam, *supra* note 10, at 14.

294. MICH. COMP. LAWS ANN. § 691.1611(1)(a) (West 1996).

295. *Id.* § 691.1611(1)(b).

296. *Id.* § 691.1611(1)(c).

297. *Id.* § 691.1611(2).

298. *Id.*

Eldridge.[299] A court will look at the private interest that will be affected by the official action; the risk of an erroneous deprivation of the interest through the procedures utilized and the probable value, if any, of additional or substitute procedural safeguards; and the government interest involved, including the function involved and the burdens that the additional or substitute procedural requirements would entail.[300]

Prejudgment remedy statutes, such as those that allow attachment, meet the state action requirement necessary to invoke due process considerations, despite being essentially a remedy for private party disputes that minimally involve the government.[301] Thus, the burden of avoiding additional safeguards falls on the party seeking the attachment, rather than on the government.[302] Therefore, when two private interests are at odds, a modified *Mathews* test must be applied.[303] Similar to the *Mathews* test, the private interest affected and the risk of an erroneous deprivation under the procedures under attack will be considered, as well as the potential value of additional or alternative safeguards.[304] In contrast to *Mathews*, principal attention will be given to the party seeking the prejudgment remedy, with due regard given to the ancillary interests the government may have in providing additional or alternative procedures, or foregoing the added burden of providing greater protections.[305]

A party whose rights are to be affected has a right to notice and is entitled to be heard.[306] The right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.[307] Traditionally,

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299. 424 U.S. 319 (1976). A two-step inquiry is involved when determining if a procedural due process claim exists: (1) does the individual have liberty or a property interest; and (2) if so, what process is due? JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 453-83 (3d ed. 1986) (examining this two-step process). Once the liberty or property interest is identified, the *Mathews* test is then used.

300. *Mathews*, 424 U.S. at 335.

301. Connecticut v. Doehr, 501 U.S. 1, 10-11 (1991). In *Doehr*, the issue before the Court was "what process must be afforded by a state statute enabling an individual to enlist the aid of the State to deprive another of his or her property by means of the prejudgment attachment or similar procedure." *Id.* at 9. Prejudgment remedies are designed for the plaintiff to make use of state procedures that require "overt, significant assistance of state officials" sufficient to implicate due process. *Id.* at 11 (quoting Tulsa Prof'l Collection Serv., Inc. v. Pope, 485 U.S. 478, 486 (1988)).

302. *Doehr*, 501 U.S. at 11.

303. *Id.*

304. *Id.*

305. *Id.*

306. Fuentes v. Shevin, 407 U.S. 67, 80 (1972). "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . . [And no] better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring).

307. *Fuentes*, 407 U.S. at 80.

the Supreme Court has required that an opportunity for a hearing must be provided before the deprivation occurs.[308] Only in a few extraordinary, unusual situations has the Supreme Court accepted the justification to delay notice and an opportunity to be heard until after the deprivation. However, in each of these cases, the seizure was necessary to secure an important governmental or public interest, a special need for prompt action existed, and a government official initiated and determined that immediate seizure was necessary and justified in that instance.[309]

A more recently developed exception exists when a defendant is, supposedly, about to transfer, encumber, or take any action during the pendency of a suit that would render the property unavailable to satisfy a judgment. A properly supported allegation would be an exigent circumstance that would permit the absence of predeprivation notice and an opportunity to be heard until after the attachment is effectuated.[310] The plaintiff's interest in attaining a prejudgment attachment does not justify burdening the defendant's property, absent an allegation of exigent circumstances, without a hearing to determine the likelihood of recovery.[311] Therefore, in the absence of exigent circumstances, due process requires notice and an opportunity to be heard.[312]

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308. *See, e.g.*, Bell v. Burson, 402 U.S. 535, 542 (1971). The ordinary costs of a predeprivation hearing in time, effort, and expense cannot outweigh the constitutional rights of notice and an opportunity to be heard. *Id.* at 540-41.

309. *See, e.g.*, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (need to protect public from misbranded drugs); Fahey v. Mallonee, 332 U.S. 245 (1947) (need to protect against the economic disaster of a bank failure); Phillips v. Commissioner, 283 U.S. 589 (1931) (need of the government to promptly secure its revenues); United States v. Pfitsch, 256 U.S. 547 (1921) (need to meet the needs of the national war effort); North America Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (need to protect public from contaminated food).

310. Connecticut v. Doehr, 501 U.S. 1, 16 (1991); Mitchell v. W.T. Grant Co., 416 U.S. 600, 609 (1974); Fuentes v. Shevin, 407 U.S. 67, 90-92 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969). In *Doehr*, the Supreme Court provided an appendix which charted the states' various prejudgment attachment statutes. *Id.*, 501 U.S. at 24. According to the appendix, Michigan only allows prejudgment attachment when exigent circumstances are present; a plaintiff's bond is not required, and no prejudgment hearing is required, but a postattachment hearing is required. *Id.* at 25.

311. *Id.* at 16. Additionally, a plurality of the *Doehr* Court addressed the issue of whether due process also requires the plaintiff to post a bond or other security, in addition to the showing of some exigent circumstance. *Id.* at 18. The plurality found that a bond was especially necessary in tort actions between private parties because it provides an extra layer of protection against the danger of wrongful attachment. *Id.* at 19-20. *But see* Shaumyan v. O Neill, 987 F.2d 122, 129 (2d Cir. 1993) (holding that the failure of a prejudgment attachment statute to require the plaintiff to post a security bond did not violate due process).

312. *See, e.g.*, United States v. James Daniel Good Real Property, 510 U.S. 43, 62 (1993) (requiring notice and an opportunity to be heard before property is seized subject to a civil forfeiture action). Exigent circumstances can also include situations where a showing has been made by the plaintiff that the defendant is hiding himself in order to avoid service, or that the defendant will remove himself from the state. *See, e.g.*, CONN. GEN. STAT. § 52-278e (1991).

Although a defendant may be an alleged drug dealer, he still has a strong interest in retaining control over his property.[313] In contrast, the government has a strong interest in ensuring that money or property will be available to satisfy a potential judgment for injuries caused by the defendant's illegal enterprise.[314] Arguably, the burden placed on innocent victims of the illegal drug market justifies an assurance that adequate assets will be available to satisfy a potential judgment.[315] Also, an attachment is only a temporary remedy, not a permanent deprivation of the defendant's property.[316] However, the Supreme Court has noted that even the temporary impairments of property rights that attachments entail are sufficient to merit due process protection.[317]

In balancing the risk of erroneous deprivation of a defendant's property, the court will look at the ultimate goal of the attachment.[318] Under the DDLA, the goal of prejudgment attachment is clearly to secure an award for the plaintiff that the defendant may not otherwise satisfy after an adverse judgment.[319] Therefore, the court must look at the plaintiff's likelihood of success on the merits of the case to determine the potential for the risk of error in the absence of other procedural safeguards.[320] This determination requires the judge to base the attachment decision on the one-sided, self-serving, and conclusory submissions in the plaintiff's affidavit, which further aggravates the risk of an erroneous deprivation.[321]

Under the DDLA, a plaintiff only needs a good-faith belief that the defendant is liable for the plaintiff's damages.[322] However, an increased risk

313. *See, e.g., Doehr*, 501 U.S. at 11 ("[T]he prejudgment attachment proceeding] clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause.").

314. "The state also has an interest in protecting its judicial process and resources by insuring that sufficient funds are available to satisfy adjudicated claims." Linda Beale, Connecticut v. Doehr *and Procedural Due Process Values: The* Sniadach *Tetrad Revisited*, 79 CORNELL L. REV. 1603, 1606 (1994).

315. Bent & Takeuchi, *supra* note 12, at 34 ("the serious repercussions of the drug problem for the individuals involved and society at large justifies ensuring that sufficient assets are available to satisfy judgments").

316. If the plaintiff is successful in the underlying claim, the asset that has been attached is liquidated in order to pay the judgment. THOMAS D. CRANDALL ET AL., DEBTOR-CREDITOR LAW MANUAL § 6.04[1] (1985).

317. Connecticut v. Doehr, 501 U.S. 1, 12 (1991).

318. *Id.*

319. Bent & Takeuchi, *supra* note 12, at 34-35.

320. *Doehr*, 501 U.S. at 13.

321. *Id.* at 14.

322. MICH. COMP. LAWS. ANN. § 691.1611(1)(a) (West 1996).

of an erroneous deprivation exists in a tort action between two private parties.[323] Thus, a mere "good faith belief" that the defendant is liable to the plaintiff would be sufficient under the DDLA to get a prejudgment attachment, despite the potential inability of the plaintiff to convince a jury that the defendant is liable to the plaintiff.[324]

Other considerations used to determine the risk of an erroneous deprivation of the defendant's property include: (1) provision of adequate security; (2) evaluation of the attachment request by a neutral court officer; (3) grounding of the request in adequate facts; (4) establishment of the need to prevent removal or dissipation of the assets to satisfy the underlying claim; (5) provision for a prompt post-deprivation judicial hearing; (6) requirement of a probable cause standard at the hearing; and (7) opportunity for the owner to dissolve the attachment by posting bond.[325] Additionally, the courts appear to place considerable emphasis on whether the plaintiff has a pre-existing interest in the property sought to be attached.[326] Absent such a pre-existing interest in the property sought to be attached ancillary to a tort claim in order to ensure the availability of assets to satisfy a potential judgment, a court is likely to view the plaintiff's interest in the attachment as *de minimis*.[327] To find otherwise would go against both the historical application of attachment,[328] as well as the current trend of providing heightened protection to the defendant whose property

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323. Connecticut v. Doehr, 501 U.S. 1, 13-14 (1991). *Accord* Union Trust Co. v. Heggelund, 594 A.2d 464, 466 n.3 (Conn. 1991) ("this is not a tort suit, but a suit on a debt, and disputes between debtors and creditors more readily lend themselves to accurate *ex parte* assessments of the merits").

324. *Doehr*, 501 U.S. at 13-14. The *Doehr* Court stated:

> Permitting a court to authorize attachment merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would permit the deprivation of the defendant's property when the claim would fail to convince a jury, when it rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute, or in the case of a mere good-faith standard, even when the complaint failed to state a claim upon which relief could be granted."

Id.

325. North Georgia Finishing, Inc. v. Di-Chem., Inc., 419 U.S. 601, 611-13 (1975) (Powell, J., concurring).

326. *Doehr*, 501 U.S. at 16.

327. *Id.*

328. *Id.* The *Doehr* Court noted that the origins of attachment proceedings could be traced to the mayor's and sheriff's offices of London, England. There, the plaintiffs were only entitled to utilize attachment proceedings when the defendant's actions threatened the satisfaction of a potential award. *Id.* at 16-17 (citing CHARLES D. DRAKE, A TREATISE ON THE LAW OF SUITS BY ATTACHMENTS IN THE UNITED STATES §§ 40-82 (1866)); 1 ROSWELL SHINN, A TREATISE ON THE AMERICAN LAW OF ATTACHMENT AND GARNISHMENT § 86 (1896).

is sought to be attached.[329]

Nevertheless, the inability of plaintiffs to collect a judgment has been a major criticism of the DDLA.[330] One reason is that the DDLA exempts third parties, such as insurance companies, from having to pay damages for the defendant.[331] Another reason is that an asset cannot be used to satisfy a judgment if it has been named in a forfeiture action, or if it has been seized by a federal or state agency.[332] In fact, forfeiture actions are an immense source of income for law enforcement agencies.[333] Therefore, any assets that a convicted drug dealer may have are likely to be seized and forfeited in a criminal or civil forfeiture proceeding.[334] Thus, the government receives compensation through forfeiture actions, but innocent victims of the illegal drug

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329. The *Doehr* Court noted that "nearly every State requires either a preattachment hearing, a showing of some exigent circumstance, or both, before permitting an attachment to take place." Connecticut v. Doehr, 501 U.S. 1, 17 (1991).

330. Dam, *supra* note 10, at 14. In fact, Jeffrey Nutt, an attorney with the Wayne County Neighborhood Legal Services Children's Law Center who represented Felicia Brown's siblings, acknowledged that "[w]e knew in advance it would be hard to collect." Ceballos, *supra* note 9, at B1. *See also* Bryan W. Riley, *Survey of Legislation 1995 Arkansas General Assembly*, 18 U. ARK. LITTLE ROCK L.J. 365, 374 (1996) (stating that the "patent difficulty inherent in [Arkansas' version of the DDLA] will be the ability to collect judgments . . . .").

331. "A third party shall not pay damages awarded under this act, or provide a defense or money for a defense, on behalf of an insured under a contract of insurance or indemnification." MICH. COMP. LAWS ANN. § 691.1610(2) (West 1996).

332. The Michigan statute provides that: "[a]n asset shall not be used to satisfy a judgment . . . if [it] is named in or has been seized for a forfeiture action by a state or federal agency before a plaintiff commences an action . . . unless the asset is released after the forfeiture action or is released by the agency that seized [it]." *Id.* at § 691.161(4). After a forfeiture proceedings, "the odds are small that anything will be left over." Dam, *supra* note 10, at 14 (quoting David Kessler).

333. Between 1985 and 1993, the U.S. Department of Justice seized assets worth $3.2 billion. *Government s Grand Seizures*, THE DETROIT NEWS, March 13, 1996, at A8. In 1994 alone, the net amount deposited in the Assets Forfeiture Fund totaled approximately $549.5 million. Michael Zeldin, *Innocent 3d Parties & Forfeitures: What Are Your Rights?*, 2 No. 6 BUS. CRIMES BULL.: COMPLIANCE & LITIG. 4 (1996). However, this must be compared to the approximately $27 billion that was spent by state and federal governments on the war on drugs during fiscal year 1991. U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FACT SHEET: DRUG DATA SUMMARY 5 (April 1994). Additionally, evidence exists that shows illegal drug dealers are getting better at hiding their assets so that the assets cannot be easily connected to their drug dealing. *See* Gary Heinlein, *supra* note 9, at C1.

334. Hansen, *supra* note 193, at 30. Jerry Summers, former chair of the criminal law section of the American Trial Lawyers Association, has stated that: "You could get a million-dollar verdict every day and never collect a penny." *Id.* One commentator questioned why anyone would want to sue a drug dealer in the first place because such defendants "are more incline[d] to direct—and somewhat more primitive—action" and flippantly referred to the DDLA as the "Bomb in My Mailbox Act." Opinion, *Sue? You Bet Your Life*, PALM BEACH POST, March 27, 1995, at 12A. However, the ability to collect a damage award is presumably a problem in many kinds of civil litigation.

market do not receive any compensation.[335] Evidence exists, however, that many drug dealers have legitimate incomes, not subject to forfeiture, that could be used to satisfy a debt.[336] For example, one of the aims of the DDLA is to deter convenience drug dealers that can be found in the workplace.[337]

However, the need for the prejudgment attachment remedy, in order to ensure the ability to pay a judgment, must be seriously questioned because the DDLA also provides that any judgment is not dischargeable under bankruptcy laws.[338] Therefore, the judgment follows the defendant wherever he or she travels. Also, the plaintiff would appear to be protected under Michigan's version of the Uniform Fraudulent Conveyances Act.[339] Additionally, the DDLA allows a plaintiff to seek an attachment despite the lack of evidence demonstrating exigent circumstances, such as when the defendant threatens to sell the property, burn it, or otherwise decrease its value.[340] Finally, under the current version of the DDLA, in the absence of an identifiable preexisting interest in the property, prejudgment attachment can occur despite the fact that it is simply a civil action against two private parties.[341] Having reviewed the potential parties to the statute and the use of prejudgment attachment to secure satisfaction of a judgment, the next Section turns to an evaluation of the system for assigning liability to the defendant's under the present version of the DDLA.

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335. However, in the only case under the DDLA, there was an agreement between law enforcement and the representatives for the plaintiffs that the forfeiture proceeds would be divided. Ceballos, *supra* note 9, at B1.

336. About 40% of drug dealers have wages and assets that could be garnished to provide relief to the victims of the illegal drug market. *Drug Dealers' Victims*, *supra* note 34, at 1. Additionally, one study said that the average legitimate income of a drug dealer is $40,000 per year. *New Law*, *supra* note 32, at 2. Further, 95% of asset forfeitures involve cash, while an illegal drug dealer may have other valuable assets, such as real estate, that a lawyer could identify. *Id.*

337. Swiatek, *supra* note 36, at 1. *See also* Lawrence J. Wadshack, Note, *The Plain Touch Doctrine and Confusion Following* United States v. Dickerson: *The* Terry *Frisk Needs an Expansion*, 39 ST. LOUIS U. L.J. 1053, 1093-94 (1995) (noting the prevalence of drugs in the workplace).

338. MICH. COMP. LAWS. ANN. § 691.1611(3) (West 1996). Unless the jury finds otherwise, the liable defendant's actions are willful and malicious, so that the judgment is not dischargeable under federal bankruptcy laws provided in 11 U.S.C. § 523 (1996).

339. MICH. COMP. LAWS. ANN. § 566.17 (West 1996). The statute provides that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." *Id.* For example, a party who had a tort claim against an owner of an automobile was determined to be a creditor and therefore entitled to set aside the auto owner s fraudulent release of a liability insurer. Iden v. Huber, 242 N.W. 818 (Mich. 1932).

340. *See supra* notes 311-13 and accompanying text.

341. *See supra* notes 327-28 and accompanying text.

D. *Examination of the Structure of the Market and the Defendant's Market-Share*

In the DES market-share liability cases,[342] courts had a difficult time in deciding the size of the market that would be used. In *Sindell v. Abbott Laboratories*,[343] the California Supreme Court failed to address how the market would be defined.[344] Eventually, in a subsequent case, the court decided on the establishment of a national market.[345] The rationale used for the national market was that liability should be apportioned according to the overall culpability of the defendant, as measured by the risk each defendant created for the public, rather than for a particular plaintiff.[346] In contrast, other courts have opted for the narrowest possible market.[347] The use of a narrow market makes a particular defendant's potential liability proportional to the probability that he caused the plaintiff s injury.[348]

Michigan's version of the DDLA breaks down the illegal drug market into counties based upon how much of a given controlled substance the defendant is proven to have sold.[349] "Level 1 participation" means participating in the illegal marketing of 650 or more grams of a mixture containing a specified controlled substance, or of sixteen or more pounds or 100 or more plants of marijuana.[350] For Level 1 participation, the defendant's market area is determined to be the entire state.[351] "Level 2 participation" means participating in the illegal marketing of between 225 and 650 grams of a mixture containing a specified controlled substance, or of eight or more pounds or seventy-five or more plants, but less than sixteen pounds or 100 plants, of

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342. *See supra* notes 81-99 and accompanying text.

343. 607 P.2d 924 (Cal. 1980).

344. *Id.* at 937-38.

345. Brown v. Superior Court, 751 P.2d 470 (Cal. 1988). *See also* Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1077 (N.Y. 1989). For blood products, a national market was deemed most appropriate. Smith v. Cutter Biological, Inc., 823 P.2d 717, 728 (Haw. 1991).

346. *Hymowitz*, 539 N.E.2d at 1078.

347. George v. Parke-Davis, 733 P.2d 507, 512 (Wash. 1987) ("the relevant market for determining liability should be as narrow as possible"); Martin v. Abbott Labs., 689 P.2d 368, 382 (Wash. 1984). *See also* Conley v. Boyle Drug Co., 570 So. 2d 275 (Fla. 1990) (a narrow market advances the overall goal of market-share liability).

348. *Martin*, 689 P.2d at 382.

349. Similarly, both Arkansas and Oklahoma determine the illegal drug market based upon a breakdown by counties. *See* ARK. CODE ANN. § 16-124-109 (Michie Supp. 1995); OKLA. STAT. ANN. tit. 63, § 2-427 (West Supp. 1996). In contrast, the Model DDLA determines the illegal drug market based upon state house legislative districts. Model DDLA § 9. *See also* HAW. REV. STAT. § 663D-6 (1996) (market area defined by a tax map section); 740 ILL. COMP. STAT. ANN. 57/40 (West Supp. 1997) (defined by representative district).

350. MICH. COMP. LAWS ANN. § 691.1603(3) (West 1996).

351. *Id.* § 691.1608(2)(d).

marijuana.[352] For Level 2 participation, the defendant's market area is determined to be each county in which the defendant participated in the illegal marketing, and each county with a border contiguous to those counties.[353] "Level 3 participation" means participating in the illegal marketing of between fifty and 225 grams of a mixture containing a specified controlled substance, or of four or more pounds or fifty or more plants, but less than eight pounds or seventy-five plants, of marijuana.[354] For Level 3 participation, the defendant's market area is determined to be each county in which the defendant participated in the illegal marketing of a controlled substance, as well as each county with a border contiguous to the Level 2 counties.[355] "Level 4 participation" means participating in the illegal marketing of less than fifty grams of a mixture containing a controlled substance, or of one or more pounds or twenty-five or more plants, but less than four pounds or fifty plants, of marijuana.[356] For Level 4 participation, the defendant's market area is determined to be each county the defendant participated in the illegal marketing of a controlled substance.[357] Defendants can only be held liable in each of their determined market areas for the injuries caused by the specific illegal drug they are proven to have sold.[358]

In contrast to Michigan's version of the DDLA, California's DDLA created a rebuttable presumption for a defendant's market-share liability.[359] For a Level 1 offense,[360] the defendant is potentially liable for 25% of the damages.[361] A Level 2 offense[362] results in potential liability for 50% of the damages.[363] For a Level 3 offense,[364] the defendant is potentially liable for

352. *Id.* § 691.1603(4).
353. *Id.* § 691.1608(2)(c).
354. *Id.* § 691.1603(5).
355. *Id.* § 691.1608(2)(b).
356. MICH. COMP. LAWS ANN. § 691.1603(6) (West 1996).
357. *Id.* § 691.1608(2)(a).
358. *Id.* § 691.1608(1).
359. CAL HEALTH & SAFETY CODE § 11708(a) (West 1997).
360. California defines its offenses similarly to Michigan, but in an opposite order. In Michigan, a Level 1 offender is the highest level illegal drug dealer, whereas in California a Level 1 offender is the lowest level dealer potentially liable under the DDLA. Likewise, a Level 4 offender in Michigan is the lowest level dealer, whereas in California a Level 4 offender is the highest level illegal drug dealer. CAL. HEALTH & SAFETY CODE § 11703(c). This section is substantially similar to MICH. COMP. LAWS ANN. § 691.1603(6). *See supra* text accompanying note 357.
361. CAL. HEALTH & SAFETY CODE § 11708(a).
362. *Id.* § 11703(d). This section is substantially similar to MICH. COMP. LAWS ANN. § 691.1603(5) (West 1996). *See supra* text accompanying note 355.
363. CAL. HEALTH & SAFETY CODE § 11708(b).
364. *Id.* § 11703(e). This section is substantially similar to MICH. COMP. LAWS ANN. § 691.1603(4). *See supra* text accompanying note 353.

75% of the damages.[365] Finally, for a Level 4 offense,[366] a defendant is rebuttably presumed to be liable for 100% of the damages.[367]

The shortcoming of Michigan's version of the DDLA is that it fails to define a market-share, but instead holds the defendant responsible for the full amount of damages.[368] In contrast, the shortcoming of California's version of the DDLA is that it fails to define a market.[369] When dealing with a low volume drug dealer, it makes sense to identify the smallest market that would make a defendant's potential liability proportional to the risk the defendant created by joining the illegal drug market.[370] Further, it makes sense to hold the larger volume drug dealers liable in a larger market because their impact in the illegal drug market is presumably larger. However, once the market has been established, the legislature must create a mechanism that identifies the limits of a defendant's potential liability in the market.[371]

Under Michigan's version of the DDLA, once the defendant's participation in the illegal drug market has been established by clear and convincing evidence,[372] there appears to be no limit as to the amount of damages that could be assessed against an individual defendant, because the DDLA only establishes a market.[373] Thus, if a plaintiff decided to sue an individual who has a criminal conviction for illegal drug trafficking that indicates that the defendant was a Level 4 participant in Michigan,[374] that defendant, despite being a small-time dealer, could be held liable for all of the damages the plaintiff incurred as a result of the illegal drug market.[375] Although such an occurrence is unlikely (because a defendant could implead other persons convicted of trafficking the same illegal drug in the same market), it is still possible.[376]

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365. CAL. HEALTH & SAFETY CODE § 11708(c) (West 1997).

366. *Id.* § 11703(f). This section is substantially similar to MICH. COMP. LAWS ANN. § 691.1603(3) (West 1996). *See supra* text accompanying note 351.

367. CAL. HEALTH & SAFETY CODE § 11708(d).

368. *See supra* notes 350-59 and accompanying text.

369. *See supra* notes 360-68 and accompanying text.

370. Presumably, a Level 1 defendant in Michigan would not have much impact outside of the county where they were convicted of illegal drug marketing.

371. Likewise, it is rational to presume that the larger manufacturers and distributors will have larger impact in the illegal drug market, not only in the county where they were caught, but beyond those borders as well.

372. MICH. COMP. LAWS ANN. § 691.1607(1) (West 1996).

373. *See supra* notes 350-59 and accompanying text.

374. *See supra* note 358 and accompanying text.

375. This is the precise reason why both a market and a market-share must be identified.

376. *See* Collins v. Eli Lilly & Co., 342 N.W.2d 37 (Wis. 1984). *Collins* requires that the plaintiff need only sue one defendant, but that it is in the plaintiffs best interests to join several defendants because the plaintiff has a better chance of gaining a full recovery. *Id.* at 50.

The theories of market-share liability and joint and several liability are fundamentally incompatible.[377] Although legislatures are not prohibited from establishing market-share liability,[378] the two theories cannot be used together because to do so would violate due process.[379] Thus, under no situation should it be possible under the DDLA that a single defendant could be liable for all of the plaintiff's damages. However, the defendant may still be inclined to join other defendants, even with the knowledge that liability would be several only, or at least based upon a legislatively-established market-share, because their ultimate liability may be further reduced.[380]

Not only is the defendant liable to the plaintiff in an uncertain amount because Michigan's DDLA only defines the market and not the market-share, it appears that the DDLA is not based upon the market-share liability approach it purports to adopt. Allowing complete recovery against one defendant is inconsistent with a market-share liability theory.[381] Additionally, if the plaintiff is one of a number of potential plaintiffs associated with the individual abuser who sought drug treatment, the defendant is presumed to have injured the plaintiff and to have acted willfully and wantonly toward that plaintiff.[382] This presumption appears to go against the fundamental application of market-share

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Additionally, defendants can decrease their ultimate liability by impleading other DES manufacturers. *Id.*

377. Agency for Healthcare Admin. v. Associated Indus. of Fla., Inc., 678 So. 2d 1239, 1256 (Fla. 1996).

378. *See supra* notes 104-16 and accompanying text.

379. *Agency for Healthcare Admin.*, 678 So. 2d at 1256.

380. In *Brown v. Superior Court*, the court stated three reasons why a defendant would be inclined to join other defendants, despite a holding of several liability:

> [A] defendant might desire to show that another producer made the DES that caused the injury; the presence in the action of additional defendants might assist in providing a more complete picture of the relevant market, thereby possibly diluting a defendant's ultimate liability; or the addition of another defendant could assist with the burden of defending the action.

751 P.2d 470, 486 (Cal. 1988).

381. *See supra* notes 373-80 and accompanying text.

382. The Michigan statute provides that:

> If the plaintiff . . . proves a defendant's participation in illegal marketing of a market area controlled substance and the plaintiff is 1 of the following, the defendant is presumed to have injured the plaintiff and to have acted willfully and wantonly:
>
> (a) A parent, legal guardian, child, spouse, or sibling of the individual abuser.
>
> (b) A child whose mother was an individual abuser while the child was in utero.
>
> (c) The individual abuser's employer.
>
> (d) A medical facility, insurer, governmental entity, or other legal entity that financially supports a drug treatment or other assistance program for, or that otherwise expends money or provides unreimbursed service on behalf of, the individual abuser.

MICH. COMP. LAWS ANN. § 691.1607(2) (West 1996).

liability in that its best use is as a mechanism to spread compensation among all possible plaintiffs, and liability among all possible injurers.[383] The market-share approach is only a means of holding defendants liable for their respective contribution to the risk of injuries in an established market.[384] Therefore, the connection between the plaintiff's injury and the illegal drug market should still be a strict question for the trier of fact, without assistance from a legislative presumption.[385]

For example, suppose an individual drug user's employer sues an illegal drug dealer for the monetary loss of employee-hours associated with the drug user's frequent absences from work. It is quite possible that the drug user missed days of work due to reasons not related to the drug problem. Therefore, the plaintiff/employer should have to prove the causal connection between the missed days of work and the employee's drug problem, without assistance from a presumption that puts the burden of proof on the defendant to rebut the presumption.[386]

Similarly, under Michigan's DDLA, a plaintiff who is injured by an individual who was a drug abuser only needs to show that the defendant participated in the illegal marketing of the drug used by the drug abuser.[387] Then, a legislative presumption is triggered so that the defendant is presumed to have injured the plaintiff and to have acted willfully and wantonly.[388] Again, this presumption appears to go against the market-share concept in that the plaintiff should still be required to prove that it was the illegal drug market that caused her injuries, and not the mere fact that the drug abuser had drugs in her system.[389] However, the presumption that a defendant was a participant in the illegal drug market because of a prior criminal conviction for illegal drug

383. DOBBS, *supra* note 95, at 749.

384. *Id.*

385. *Id.* ("The connection between exposure [to DES] and subsequent injury remains an issue of fact.").

386. Presumptive language that functions in an arbitrary or capricious manner and has no rational connection between the fact proved and the ultimate fact presumed, violates the Due Process Clause. *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 28 (1976); Leary v. United States, 395 U.S. 6 (1969) (finding unconstitutional a presumption that a possessor of marijuana knows of its unlawful importation); United States v. Romano, 382 U.S. 136 (1965) (finding unconstitutional a presumption that the defendant's presence at an illegal still site is evidence of the defendant's possession, custody, or control of the still); Tot v. United States, 319 U.S. 463 (1943) (finding unconstitutional a presumption that possession occurred through an interstate transaction).

387. MICH. COMP. LAWS ANN. § 691.1605(2) (West 1996).

388. *Id.*

389. *See supra* notes 364-66 and accompanying text.

marketing would be valid.[390]

A few commentators have argued that traditional causation principles should be inserted into the DDLA and that the market-share liability approach is unconstitutional because it holds the defendant liable for injuries that the defendant may not have caused.[391] However, it is inherently difficult to identify the true tortfeasor in the illegal drug market.[392] This situation is apparent when evaluating the lack of success of South Dakota's statute that incorporates causation.[393] Therefore, to reinsert causation back into the picture effectively eliminates a plaintiff's potential cause of action.[394] The use of market-share liability should be an all-or-nothing approach because it could subject some defendants to heightened liability, while others would not have to contribute as much to a damage award.[395]

For example, if an innocent plaintiff could identify 'Drug Dealer A' as the one who sold the drugs to the drug user who caused the injury, that drug dealer would be liable for 100% of the damages if the plaintiff could prove the case by a preponderance of evidence. In contrast, suppose a second innocent plaintiff could join a number of drug dealers, including 'Drug Dealer A,' in her lawsuit for injuries sustained from the illegal market and utilize a market-share liability theory. The same defendant who incurred the entire brunt of the first judgment would also be liable in the second action for his proportional market-share in the illegal drug market. Thus, that defendant would incur "double liability" in a mixed system where one plaintiff could identify the true tortfeasor, and another plaintiff derived the benefits of the market-share approach where the liability can be distributed among the defendants.[396] Therefore, it is inherently unfair to the defendant to allow individual causation to creep back into the system once a legislature adopts a market-share approach. Such a result would subject some defendants to heightened liability while other potential defendants would get away with lesser liability. Although this concern is not as great with drug

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390. MICH. COMP. LAWS ANN. § 691.1609 (West 1996). Similarly, California estops defendants from denying participation in the illegal drug market if they have prior criminal convictions for illegal drug marketing. CAL. HEALTH & SAFETY CODE § 11712 (b)(1) (West 1997).

391. Bronfin, *supra* note 52, at 353; Stassell, *supra* note 56, at 1061.

392. *See supra* note 61 and accompanying text.

393. *See supra* note 60 and accompanying text.

394. *See supra* note 85.

395. In the DES litigation, it has been recognized that certain manufacturers may be exposed "to double liability, one to the plaintiffs who can identify them as the causal party, and once again to plaintiffs who cannot." Randy S. Parlee, Comment, *Overcoming the Identification Burden in DES Litigation: The Market Share Liability Theory*, 65 MARQ. L. REV. 609, 633 (1982).

396. "Double liability refers to the possibility that manufacturers who are liable to certain DES daughters under traditional tort principles, and who are also liable to other DES daughters under market-share liability, may incur more than their market-share of liability in cases arising from DES." Smith v. Eli Lilly & Co., 560 N.E.2d 324, 349 (1990) (Clark, J., dissenting).

dealers acting criminally as it is with DES manufacturers who simply create a dangerous product through legitimate means, it should still be a concern because an unfair judicial process undermines its legitimacy.

Therefore, because of the problems that may arise when the government is the plaintiff, the DDLA must be amended to narrowly tailor its cause of action. Also, a drug user's cause of action must be abrogated, except when the drug user became an addict while he was a minor. Further, the problems with the prejudgment attachment remedy must be addressed by amended legislation. Finally, the problems with DDLA's mechanism of imposing liability must be addressed to closely apportion damages to the damages that may have actually been caused by the drug dealer. To effectively accomplish its purposes, the DDLA must be amended to correct these problems.

VI. PROPOSED AMENDMENTS TO THE DDLA

The DDLA should not allow an adult drug user to recover any damages because the drug user is an equal wrongdoer in the eyes of the law.[397] It should, however, provide a remedy for drug users who became addicted while they were still minors.[398] The young are uniquely prone to experiment with drugs due to their inability, or refusal, to comprehend the dangers of illegal drugs.[399] As with alcohol and tobacco, public policy favors protecting the health and welfare of minors.[400] Thus, public policy suggests that minors should be protected by providing a disincentive for drug dealers to tap into the market for illegal drugs among minors.[401]

The DDLA should force a plaintiff to prove that the illegal drug market actually caused her injuries before a legislative presumption of liability is created.[402] Although Michigan's current version of the DDLA identifies the presumed market of the illegal drug dealer,[403] it fails to identify the illegal

397. *See supra* notes 238-92 and accompanying text.

398. The age of majority differs from state to state. For example, in Michigan, the age of majority is 18. MICH. COMP. LAWS ANN. § 722.52 (West 1996).

399. "The result [of the illegal drug market] is especially troubling when drug trafficking preys upon people, especially the young, prone to experiment with drugs though unaware of, unprepared for, or unable to prevent or minimize the risks associated with drug use." Gilmore, *supra* note 18, 424-25. In the drug market, the drug dealer is in a better position than the child to know whether the drug could cause injury.

400. *See supra* notes 274-76 and accompanying text.

401. *See supra* notes 272-79 and accompanying text.

402. *See supra* notes 382-90 and accompanying text.

403. *See supra* notes 350-59 and accompanying text.

drug dealer's market-share in that presumed market.[404] The DDLA should identify the drug dealer's relevant market and also create a rebuttable presumption of a drug dealer's market-share.[405] Further, the higher volume drug dealers should be exposed to greater liability than the lower volume drug dealers.[406] Although the current version of the DDLA attempts to achieve this result by making the higher volume drug dealers liable across a larger market, each market must be broken down into a market-share.[407] The Act creates four differently-sized markets, and therefore a similar mathematical scheme should follow to apportion liability. For example, a Level 1 drug dealer should be liable for 40% of the damages in his legislatively-created market; a Level 2 dealer 30%; a Level 3 dealer 20%; and a Level 4 dealer 10%.[408] This would correctly, albeit approximately, impose greater liability on the larger volume drug dealers while not subjecting a small volume drug dealer to unlimited liability within a particular market. Further, as has been recognized, larger volume dealers have larger markets in which they may be held liable.[409] Thus, the percentage of liability for a large volume dealer would be four times greater than the smallest dealer in the smallest volume dealer's market. However, in the overall picture, the higher volume drug dealer's liability would be substantially greater because of his significant impact on the illegal drug market.[410] Thus, a Level 1 drug dealer could be liable for 40% of the damages in the entire state, whereas a Level 4 drug dealer could be liable for

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404. California was concerned about this problem and wrote into its version of the DDLA that a person who is proven to be in the illegal drug market shall be rebuttably presumed to be liable for the following percentage of damages: for a level 1 offense, 25% of the damages; for a level 2 offense, 50% of the damages; for a level 3 offense, 75% of the damages; for a level 4 offense, 100% of the damages. CAL. HEALTH & SAFETY CODES 11708 (West 1997). *See supra* notes 360-68 and accompanying text.

405. Therefore, the failure of California's version of the DDLA is that it does not define the market, which is the opposite of the other versions of the DDLA which do define the market, but not the market-share. *See supra* notes 350-59 and accompanying text.

406. Again, the larger level drug dealers presumably should be held accountable for a larger share of the market because their market and market-share are likely to be greater than a low level drug dealer.

407. Markets must be broken into market-shares to avoid the injustice of potentially holding a low level drug dealer, who happens to have substantial assets, to full liability for all of the injuries in that dealer's market.

408. Therefore, if a plaintiff were to identify 10 Level 4 drug dealers in the market where she was injured, she could recover 100% of her damages. If a plaintiff fails to name enough defendants to reach 100% of her damages, she can not then ask the court to increase the defendant's market-share to recover full damages. Also, the liability caps should be rebuttable presumptions that could be lowered if the plaintiff names, or if the defendant impleads other defendants, so that each defendant may not be liable for the entire 40% for a Level 1 dealer in Michigan.

409. *See, e.g.*, California's liability scheme, *supra* notes 360-68 and accompanying text.

410. For example, two Level 4 dealers in two separate counties will only be liable for up to 10% of the damages in only one county, whereas a Level 1 dealer will be liable for up to 40% of the damages in both counties, as well as every county in the state.

just 10% of the damages in a single county.

Due to the nature of the illegal drug market,[411] the legislature should adopt a strict application of market-share liability. Although situations may arise where an innocent plaintiff could identify the true tortfeasor, it is more likely that a plaintiff will be unable to prove traditional negligence in court, or even identify the drug dealer in the first place.[412] Therefore, the court should allow a plaintiff to sue only under a market-share theory.[413] The only way a defendant could exculpate himself from liability is if he proved that he was not in the illegal drug market both at the time of the injury and at the time when the drugs were purchased by the user.[414] Even if a plaintiff knows the true drug dealer, under the pure market-share approach, the defendant would be allowed to implead other drug dealers in the relevant market.[415] Theoretically, each defendant would then be liable for the legislatively determined market-share in the legislatively determined market. This approach would be fair to defendants who would then know the potential liability they face when they enter the illegal drug market. Drug dealers could then attempt to internalize their potential liability as a cost of doing business. Therefore, the cost of buying drugs would increase, and theoretically the demand would decrease.[416] Moreover, such an approach would also serve the goal of compensating innocent victims of the

411. *See supra* notes 29, 61 and accompanying text.

412. *See supra* text accompanying notes 61-62.

413. Because market-share liability "is based on the over-all risk produced, and not causation in a single case," a defendant who was part of the market cannot escape liability merely because the defendant can show that its product could not have caused the plaintiff's injuries. Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1078 (N.Y. Ct. App. 1989) (applying market-share liability to DES). Therefore, liability is apportioned based upon the "over-all culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large"). *Id.*

414. *Hymowitz*, 539 N.E.2d at 1078 n.2 (a defendant can escape liability by showing that it was not a member of the market of DES marketed for pregnancy, by showing that its DES was not suitable for use during pregnancy, or that its product was not marketed for pregancy use). Alternatively, a defendant in the DES cases could escape liability if the defendant could prove that it did not manufacture DES at the time the plaintiff's mother used the drug. Sindell v. Abbott Labs., 607 P.2d 924, 926 n.4 (Cal. 1980).

415. *See, e.g.*, Collins v. Eli Lilly & Co., 342 N.W.2d 37 (Wis. 1984) (allowing the plaintiff to sue only one DES manufacture who can then implead other DES manufacturers in an attempt to reduce potential liability). An additional, attractive byproduct of adopting a pure market-share approach and allowing the defendant to implead other drug dealers is that law enforcement officials may be able to target and identify illegal drug dealers of whom they had not been aware.

416. Generally, the use of any product will fluctuate depending upon its price. For illegal drug users, the costs of buying the drugs increases when the price goes up due to cost internalization. Gilmore, *supra* note 18, at 424. However, for society, an unfortunate byproduct of the increased cost of illegal drugs is that some addicts resort to more violent or increased crime in order to finance their habit. Editorial, *Bring Drugs Within the Law*, THE ECONOMIST, May 15, 1993, at 13.

illegal drug market.[417]

Additionally, the government's cause of action against an illegal drug dealer should be limited, especially when the defendant has already been convicted of a criminal offense and subject to forfeiture laws, so that the action is clearly to make the government whole.[418] However, to recognize that the government is a victim of the illegal drug market, the government should be allowed to utilize the DDLA for the damages caused during a fiscal year within the statute of limitations, as a means to recover the costs it incurred as a result of the illegal drug market.[419] This solution would negate double jeopardy and excessive fines claims because the government's action could clearly be seen as remedial as the government would be attempting to recover actual financial losses incurred because of the illegal drug market.[420] This policy would also encourage public hospitals to give treatment to indigent patients, knowing that the government could eventually seek recovery from the members of the illegal drug market.[421]

Finally, the section of the DDLA that allows for a prejudgment *ex parte* attachment proceeding should be amended to include an exigent circumstances requirement. Absent exigent circumstances, due process requires that a defendant be afforded a minimum level of notice and an opportunity to be heard before the state may deprive the defendant of a property interest.[422] This requirement would allow plaintiffs to attach property when serious doubts arise as to whether the defendant would satisfy a judgment, or where the plaintiffs have a preexisting interest in the property.[423] Therefore, the following amendments to Michigan's DDLA are proposed to alleviate constitutional and public policy concerns raised by the present version of the Michigan Drug Dealer Liability Act.

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417. Indeed, this is the goal that must be kept in mind, to provide an avenue of relief for those who have been victimized by the illegal drug market. The difficulty in doing it is to provide a means of compensation that comports with due process. *See supra* notes 194-220 and accompanying text.

418. *See supra* Sections IV.A. & IV.B. *See also* United States v. Halper, 490 U.S. 435, 446 (1989) ("[T]he Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, . . . without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis.").

419. Theoretically, market-share liability is most equitably applied in a class-action context. Therefore, an attack on substantive due process, excessive fines, and double jeopardy grounds would likely fail. *See supra* Section IV. Clearly, such an approach would be seen as making the government whole for its losses.

420. *See supra* notes 123-92 and accompanying text.

421. Rather than turn indigent drug abusers away at the door, even private hospitals would be encouraged to accept such patients under the DDLA.

422. *See supra* notes 293-342 and accompanying text.

423. *See supra* notes 311-13, 327-28 and accompanying text.

THE STATE OF MICHIGAN LEGISLATIVE BILL[424]

Bill Synopsis: A bill to amend the Drug Dealer Liability Act.
The People of the State of Michigan enact:

SECTION ONE. Michigan Compiled Laws Annotated §§ 691.1604 & 691.1605 are amended as follows:

691.1604. Definitions

(4) "Person" means an individual, ~~governmental entity~~, sole proprietorship, corporation, limited liability company, firm, trust, partnership, or incorporated or unincorporated association, existing under or authorized by the laws of this state, another state, or a foreign country.

Commentary: Deleting "governmental entity" from the definition of person in this section has the effect of removing a governmental entity from those persons who may have a cause of action under the DDLA. This is needed because the government's cause of action is of a different nature and should be distinct from the existing cause of action.

691.1605. Persons injured by individual abusers; actions against persons participating in illegal marketing of controlled substances; presumption; *government entity*

(2) If a plaintiff in an action under this section proves, *by the preponderance of the evidence, an injury caused by the illegal drug market, and* that the defendant participated in illegal marketing of the controlled substance actually used by the individual abuser who injured the plaintiff, the defendant is presumed to have injured the plaintiff and to have acted willfully and wantonly.

(3) Under this Act, the State Government, represented by the State Attorney General, shall have one civil cause of action against members of the illegal drug market for each fiscal year, for economic injuries the government incurred as a result of the illegal drug market.

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424. Language that is stricken is language that exists in the present statute but should be deleted. Language that is italicized is new language that should be added. Language in regular text is existing language. Commentary is provided in regular text at the end of each section.

(4) In an action by the State under subsection (3) of this section, the government must prove by a preponderance of the evidence that the injuries it incurred resulted from the illegal drug market, and that the defendants participated in that market. Upon such a showing, the defendant shall be liable based upon their level of participation as defined in section 691.1603.

(a) In the following sections, X indicates the number of defendants that the government proves belong to a respective level offense category, denoted in subscript. Y indicates the Government's total damages from the illegal drug market from the prior year.
(b) For a Level 1 offense, each Level 1 defendant shall be liable for the amount that derives from the use of the following equation:

Y times ten percent(10%), divided by X_1.

(c) For a Level 2 offense, each Level 1 and Level 2 defendant shall be liable for the amount that derives from the use of the following equation, in addition to any liability from the previous subsection:

Y times twenty percent (20%), divided by $(X_1 + X_2)$.

(d) For a Level 3 offense, each Level 1, Level 2, and Level 3 defendant shall be liable for the amount that derives from the use of the following equation, in addition to any liability from the previous subsections:

Y times thirty percent (30%), divided by $(X_1 + X_2 + X_3)$.

(e) For a Level 4 offense, each Level 1, Level 2, Level 3, and Level 4 defendant shall be liable for the amount that derives from the use of the following equation, in addition to any liability from the previous subsections:

Y times forty percent (40%), divided by $(X_1 + X_2 + X_3 + X_4)$.

(5) In an action by the State under subsection (3) of this section, the defendant shall have the right to implead other members of the illegal drug market in an effort to reduce their liability.

Commentary: This section establishes the nature of the Government's cause of action. Under the formula to be utilized, assuming an equal number of defendants in each level, Level 1 dealers will ultimately be liable for 40% of the injuries; Level 2 dealers 30%; Level 3 dealers 20%; and Level 1 dealers 10%. Under no circumstances will a lower volume drug dealer be held liable for more damages than a larger

volume drug dealer. The section also requires each plaintiff to prove an injury caused by the illegal drug market by a preponderance of the evidence.

SECTION TWO. Michigan Compiled Laws Annotated § 691.1606 is amended by deleting the following subsection, and further amended to read:

691.1606. Individual abusers; actions against persons participating in illegal marketing of controlled substances; conditions for recovery of damages

Sec. 6. (1) Subject to subsection (2), an individual abuser may bring an action under this act for damages against a person who participated in illegal marketing of the controlled substance actually used by the individual abuser.

(2) An individual abuser shall not recover damages under this section unless the individual abuser meets all of the following conditions:
~~(a) Not less than 6 months before filing the action, the individual personally discloses to law enforcement authorities all of the information the individual knows regarding his or her source of illegally marketed controlled substances.~~
~~(b)~~ *(a)* The individual has not used an illegally marketed controlled substances within the 6 months before filing the action.
~~(c)~~ *(b)* The individual does not actually use an illegally marketed controlled substance during the pendency of the action.
(c) The individual is a minor, or was a minor, when he or she became addicted to an illegally marketed controlled substance.

Commentary: This section abrogates subsection (a) because it is not rationally related to the legislative intent of providing a means of recovery to a drug user. Subsection (c) is added to limit the drug users that may be plaintiffs to minors, or those who became addicted while they were minors. This is necessary because minors are particularly vulnerable and susceptible to the evils of the illegal drug market.

SECTION THREE. Michigan Compiled Laws Annotated § 691.1607 is amended as follows:

691.1607. Persons injured by individual abusers; actions against persons who participated in illegal marketing of the market area controlled substance; proof; presumptions

(2) If a plaintiff in an action under this section proves, *by the preponderance of the evidence, an injury resulting from the illegal drug market, and* a defendant's participation in illegal marketing of a market area controlled substance and the plaintiff is one of the following, the defendant is presumed to have injured the plaintiff and to have acted willfully and wantonly.

Commentary: This section makes it a requirement for the plaintiff to prove by a preponderance of the evidence an injury that was caused by the illegal drug market.

SECTION FOUR. Michigan Compiled Laws Annotated § 691.1608 is amended by the following additions to read:

691.1608. Participation in illegal marketing of the market area controlled substance; proof; market area descriptions; *proportion of liability*

(3) A person whose participation in the illegal marketing of a market area controlled substances, constituting the following level offense as defined in § 691.1603, shall be rebuttably presumed to be responsible in the following amounts:
(a) For a Level 1 participant, forty percent (40%) of the damages.
(b) For a Level 2 participant, thirty percent (30%) of the damages.
(c) For a Level 3 participant, twenty percent (20%) of the damages.
(d) For a Level 4 participant, ten percent (10%) of the damages.

(4) A defendant may implead other defendants in an effort to reduce their potential liability.

Commentary: This section establishes a market-share for each volume drug dealer to complement the market that has already been created by the Drug Dealer Liability Act. The establishment of a market-share is necessary to ensure that larger volume drug dealers will bear more of the liability burden than smaller volume drug dealers. This presumption is rebuttable, and a defendant may implead other alleged drug dealers in an effort to reduce ultimate liability.

SECTION FIVE. Michigan Compiled Laws Annotated § 691.1611 is amended as follows:

691.1611. Attachment, procedure; judgments, assets available for satisfaction, effect of bankruptcy

(a) A description of the injury claimed and a statement that the affiant in good faith believes that the defendant is liable to the plaintiff in a stated amount.
(b) The defendant is subject to the judicial jurisdiction of the state.
(c) After diligent effort, the plaintiff cannot serve the defendant with process.
(d) The plaintiff must show that exigent circumstances exist that require immediate attachment of the property.
(e) If the plaintiff has a preexisting interest in the property, the requirements of subsection (d) of this section need not be met.
Commentary: This section amends the prejudgment attachment procedure to comport with procedural due process.

VII. CONCLUSION

The Drug Dealer Liability Act is a creative tool that could be used to positively affect, and hopefully destroy, the illegal drug market. However, it must be amended so that it comports with contemporary notions of fairness to defendants. Although it may be unpopular to allow illegal drug dealers substantive and procedural rights, limits must be placed upon what the states can do with their powers to enact law. Adopting a market-share liability approach is certainly a sensible and innovative manner to address the secretive nature of the illegal drug market, but such an approach must be carefully analyzed and implemented so that it comports with the basic assumptions upon which market-share liability is founded. The DDLA is best understood as another important weapon that can be utilized in the drug war. We should constantly be looking for new and innovative ways to fight the scourge of drug dealers. The DDLA can and will help with the effort of lawyers courageous enough to take on drug dealers in the civil arena.

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