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Note

***315** FROM SINDELL TO STREET PUSHERS: IMPOSING MARKET SHARE TORT LIABILITY ON ILLEGAL DRUG DEALERS

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I. INTRODUCTION

Public opinion polls conducted during the past twenty-five years have consistently shown that Americans view the sale and use of illegal drugs as one of the most serious social problems afflicting the United States. [FN1] Our political leaders at both the national and state level have responded to this strong opposition to illegal drugs by enacting and enforcing increasingly stringent and occasionally novel criminal punishment against individuals who sell and use illegal drugs. Within the last fifteen years, for example, the United States Congress has passed four bills treating drug control issues comprehensively: the Comprehensive Crime Control Act of 1984, [FN2] the Anti-Drug Abuse Act of 1986, [FN3] the Anti-Drug Abuse Act of 1988, [FN4] and the Crime Control Act of 1990. [FN5] Likewise, government ***316** spending to combat drug abuse has increased dramatically during these years. Appropriations by the federal government alone to wage the "War on Drugs" have increased five-fold since 1985, totaling more than $15 billion in Fiscal Year 1997. [FN6]

There has also been increased emphasis in the last several years to protect victims of crime. At the national level, Congress in 1990 passed the Victims' Rights and Restitution Act, [FN7] and many states have followed suit by enacting their own victims' rights laws. [FN8]

Interestingly, no state legislatures until recently had enacted provisions to aid plaintiffs in civil suits against drug dealers for harm the dealers' illegal activities inflict, despite the strong opposition to illegal drugs and the increased emphasis on victims' rights--plus the trend to expand through statute plaintiffs' rights in tort cases. [FN9] Without such legislation, family members of ***317** adolescent drug users, for example, seeking to sue their child's drug dealer have been required to rely only upon common law tort principles. These common law tort principles have prevented recovery because plaintiffs cannot successfully present all essential elements of the tort. Additionally, defendant drug dealers often have succeeded in relying on common law tort defenses of contributory negligence and assumption of risk. [FN10]

The American public became most notably aware of the limitations of the common law tort system in the context of drug-related injury in 1995 when actor Carroll O'Connor's son Hugh committed suicide following a long struggle with drug addiction. [FN11] O'Connor alleged that his son's drug dealer had enticed the younger O'Connor to use drugs even as Hugh attempted to end his drug addiction. O'Connor criticized a legal system which would not allow him to recover from the drug dealer the costs of raising his now-orphaned grandson. [FN12]

In the wake of this national publicity, numerous state legislatures reviewed the common law on this issue, found it insufficient to provide plaintiffs with much prospect of success against drug dealers, and passed a version of the Drug Dealer Liability Act to allow certain individuals and entities to sue drug dealers in civil actions for damages. [FN13] In a few states, statutory law now allows a drug user's family, third parties injured by a drug user, and sometimes even the drug user himself to sue the particular dealer who sold drugs to the user. [FN14] Such statutes are similar to so-***318** called "Dram Shop" laws, [FN15] which hold sellers of intoxicating beverages strictly liable for harm to third parties caused by the buyer's intoxication. [FN16]

Most states enacting a version of the Drug Dealer Liability Act, however, have adopted an additional highly debated provision: market share tort liability of defendants. Market share liability, first developed by the California Supreme Court in 1980, [FN17] relaxes common-law causation requirements by allowing plaintiffs to recover from parties involved in certain tortious activities--usually involving fungible [FN18] products--even though the particular party being sued may not have

caused the plaintiff's harm. [FN19] The policy justifications for imposing market share liability are two-fold. First, "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury." [FN20] Second, where numerous entities provide an identical product, it may be impossible to determine which tortfeasor actually caused the harm. [FN21]

Market share liability provides that the plaintiff should be allowed to sue any entity engaged in a substantial share of the activity which caused the plaintiff's harm. [FN22] In determining ***319** damages, the court will assess against the defendant only that percentage of the total damages equal to the defendant's "market share" of the given activity. [FN23] This theory of recovery is deemed fair because the "law of large numbers" provides that the costs of the harm will be distributed fairly among all defendants as more suits are tried, since other producers and distributors of the product will become liable for damages in those cases. [FN24]

The purpose of this Note is to assess the constitutionality of this novel approach of employing market share tort liability to combat the "War on Drugs." [FN25] Part II briefly explains why common-law tort principles have not provided a satisfactory civil remedy against drug dealers. Part III discusses the rise of the Drug Dealer Liability Act and discusses its provisions, as now enacted in eleven states [FN26] and considered in another seventeen states. [FN27] Part IV analyzes whether these statutes can survive constitutional scrutiny, based upon the two objections most likely to be asserted: violation of procedural rights under the Due Process Clause of the Fourteenth Amendment and violation of the prohibition against double jeopardy as provided in the Fifth Amendment.

This Note concludes that all states which have enacted the Drug Dealer Liability Act likely can withstand a constitutional challenge based upon either procedural due process or the prohibition against double jeopardy. Before the United States Supreme Court's ***320** December 1997 decision in Hudson v. United States, [FN28] no state's version of the Drug Dealer Liability Act could have withstood a constitutional challenge in those cases where the state government itself brought the suit, such as cases to seek reimbursement for state government health costs resulting from patients' illegal drug use. Such suits by state governments themselves would likely have violated the Supreme Court's prohibition against second suits of a punitive nature, regardless of whether the suit is styled as a civil or criminal action. While much interpretation of the Hudson case remains to be fleshed out by the courts, the Supreme Court clearly stated that its prior methods for determining the existence of double jeopardy were unworkable and that all civil penalties possess some punitive effect. [FN29] Under the new test established in Hudson, suits brought under the Drug Dealer Liability Act, whether by private individuals or government entities, likely would be upheld as constitutional.

II. THE INADEQUACY OF COMMON-LAW TORT PRINCIPLES TO ASSIST PLAINTIFFS IN SUITS AGAINST DRUG DEALERS

No constitutional, statutory, or common law prohibitions exist under United States law or any state law to forbid a plaintiff from suing a drug dealer for damages caused by a drug user whom the dealer supplied. [FN30] In fact, some state courts in the late 1800s and early 1900s granted limited recovery to plaintiffs whose spouses or children were sold habit-forming drugs. [FN31] The Restatement ***321** (Second) of Torts has relied on these turn-of-the-century cases to state that one who provides drugs to another is liable to that person's unconsenting spouse or parent for loss of services and medical expenses caused by the drug use. [FN32]

Despite these aged cases and the Restatement's support of them, no similar suits have been brought in the intervening years. [FN33] Moreover, the age- old cases can be distinguished on their facts from an action that would be brought today against a dealer of illegal drugs. First, all the cases allowing recovery involved sales by pharmacists, who were not regulated by states or the federal government in the late 1800s and early 1900s. [FN34] The courts may, therefore, have allowed the common-law tort system to fill this regulatory void because of the dangers of both legal and illegal drugs when used without proper directions. [FN35] Then, as state regulation of pharmaceuticals and the pharmacy profession increased, reliance on the tort system became less necessary. [FN36]

***322** Second, courts typically have held pharmacists to a higher standard of care as professionals than they likely would hold illegal drug dealers. [FN37] Third, while no laws in the late 1800s and early 1900s prohibited purchase of habit-forming narcotics like heroin and opium, [FN38] today the purchase of these narcotics and many other drugs is clearly illegal when dispensed by non-licensed individuals, such as drug dealers. [FN39] This distinction is important because breach of a criminal controlled substances statute by the drug user would likely serve as per se evidence of contributory negligence in purchasing the drug. [FN40] Thus the value of the cases from the late 1800s and early 1900s providing plaintiffs a cause of

action against pharmacists is questionable in general, particularly suspect in cases brought by family members where the drug purchase is illegal, and inapplicable where recovery is sought by either a drug user himself or third parties who are not family members. [FN41]

***323** Instead, a plaintiff seeking recovery against a drug dealer for damages caused by or to a drug user whom the dealer supplied will likely be required to bring the action under general principles of tort law. Under such law, a plaintiff possesses three possible tort theories of recovery against a drug dealer: (1) negligence in selling illegal drugs; (2) strict liability for engaging in an abnormally dangerous activity; and (3) strict products liability. Furthermore, three groups of potential plaintiffs exist: (1) drug users themselves could sue a drug dealer for harm suffered because the dealer sold them drugs; (2) families of drug users could sue a drug dealer for harm suffered because of the user's addiction perpetuated by the dealer; and (3) parties could sue a drug dealer for harm caused by a drug user whose addiction was perpetuated by the dealer. None of these approaches, however, is likely to result in recovery for plaintiffs allegedly harmed by drug dealers. [FN42]

In a negligence action, plaintiffs must prove the four traditional elements of duty, breach, cause, and harm. Additionally, plaintiffs must overcome the two affirmative defenses of contributory negligence and assumption of risk. [FN43] A plaintiff suing a drug dealer for harm caused by a user whom the dealer supplied could satisfy the elements of duty, breach, and harm without much difficulty. The duty required of a drug dealer is that level of care which would be exercised by a reasonable prudent person in similar circumstances. [FN44] This standard of conduct is an objective one based upon society's concept of reasonableness, and not a subjective standard based upon the defendant's own personal morality. [FN45] ***324** Therefore, a dealer's assertion that all drugs are safe and should be legalized would be irrelevant; the risk attributed to engaging in such activity depends upon its social value. [FN46]

Our society, through its elected legislators, has decided that the value of dealing drugs is so low that it has rendered such conduct illegal. [FN47] Thus, dealing in illegal drugs necessarily constitutes a breach of the reasonable prudent person standard. [FN48] Indeed, courts have long held that violation of a statute, such as the prohibition against sale of illegal drugs, provides conclusive evidence that one has breached his duty owed. [FN49] Such activity has been termed statutory negligence, or negligence per se. [FN50] Even ***325** where the defendant's actions are clearly negligent, however, the plaintiff cannot prevail upon a simple claim that there was "negligence in the air." [FN51] The plaintiff must also show that he was injured by the defendant's actions. [FN52] A plaintiff suing a drug dealer could prove this injury by showing damage to a proprietary interest of his, including damage to his body, [FN53] damage to personal property such as an automobile, [FN54] or damage to real property such as a house. [FN55]

While a plaintiff suing a drug dealer can typically prove the elements of duty, breach, and harm just discussed, the plaintiff will have much greater difficulty proving the element of causation. Tort law typically requires the plaintiff to show that the defendant's ***326** actions caused the harm, [FN56] a burden the plaintiff can meet by showing that the defendant's actions comprised a substantial factor [FN57] in causing the plaintiff's harm. [FN58] To meet this test, the plaintiff typically must identify the tortfeasor who caused his harm. [FN59] Even drug users themselves, however, may not know dealers in their particular chain of distribution other than their immediate supplier, who might be a small-time dealer with few attachable assets. Thus, because many plaintiffs--especially third parties not involved in the drug trade themselves--cannot identify any drug dealer within the chain of distribution which eventually harmed them, much less a "deep pocket" [FN60] against whom suit might be worthwhile, they are foreclosed from recovery for tortious harm they have suffered.

***327** Even if the plaintiff can identify the drug dealer, the principle of proximate cause nevertheless will likely bar the plaintiff from recovery. [FN61] Proximate cause depends on foreseeability of injury [FN62] to the particular class of persons to which the plaintiff belongs. [FN63] In other words, a court will not allow a defendant to be found liable unless the defendant reasonably could have foreseen that his actions would harm the particular plaintiff or someone in a similar position. [FN64] A review of case law analogous to these drug cases, however, indicates that some courts would likely find that the harm caused by drug users to plaintiffs was not foreseeable to the dealers. [FN65] Furthermore, foreseeability of harm in such cases would possibly depend upon the common effects of the type of drug involved. [FN66]

Even where a court did find such harm foreseeable, however, plaintiffs would still likely be denied recovery from drug dealers under the doctrine of superseding cause. The Restatement (Second) of Torts defines a superseding cause as "an act of a third person or other force which by its intervention prevents the actor from being ***328** liable for harm to another which his antecedent negligence is a substantial factor in bringing about." [FN67] Cases at common law involving bar owners' liability for negligent acts committed by their patrons provide a useful, and closely related, illustration of why a drug user's acts would thus likely be considered a superseding cause of harm and would foreclose the possibility of judgment against the drug dealer

who supplied drugs to that user.

At common law, a seller of alcoholic beverages was not liable for damages sustained by third persons as a result of a patron's drunkenness [FN68] because the consumption, rather than the sale, of alcohol was viewed as the sole proximate cause of the third party's injury. [FN69] Only after state legislatures passed Dram Shop Acts to place liability on bar owners in such situations did plaintiffs achieve any right of recovery against providers of alcohol. [FN70] Like Dram Shop Acts, the Drug Dealer Liability Act statutorily abrogates common-law proximate cause rules to enable plaintiffs to recover against a seller. Without such abrogation, all of the possible plaintiffs--the drug user, the drug user's family, and third parties--would likely be foreclosed from judgment against a dealer under the doctrine of superseding cause and their claims dismissed by the trial court as a matter of law. [FN71]

***329** Additionally, even if the plaintiff somehow met all four elements required in a negligence action, a further problem would confront those plaintiffs who were drug users themselves. Defendant drug dealers could successfully assert the defenses of contributory negligence [FN72] and assumption of risk [FN73] against these plaintiffs, which would bar judgment for plaintiff drug users, [FN74] or at least limit the damages recoverable. [FN75] Most courts deciding cases under common law doctrine would likely hold that a plaintiff drug dealer impliedly assumed the risk that using the drugs would harm him. While assumption of risk involves determining that a particular plaintiff actually knew of the risk--and not simply whether a reasonable person would know of it [FN76]--few juries would likely believe that a plaintiff did not realize the dangers of illegal ***330** drugs. [FN77] Even if the plaintiff did not assume the risk, he would still be found contributorily negligent per se because possession of illegal drugs is prohibited by law. [FN78] Thus, a plaintiff drug user would be barred from recovery even where recovery might be available to other plaintiffs in an identical case.

The second theory of recovery under which a plaintiff might bring a tort cause of action against a drug dealer is that of strict liability for engaging in an abnormally dangerous activity. The policy rationale underlying strict liability is that some activities are so inherently dangerous that one who engages in them should be responsible for any resulting harm, even if he exercises the utmost care. [FN79] Courts look to six factors to determine whether an activity is "abnormally dangerous": (1) the existence of a high degree of risk of some harm to the person, land, or chattels of others; (2) the likelihood that the harm that results from it will be great; (3) the inability to eliminate the risk by exercise of reasonable care; (4) the extent to which the activity is not a matter of common usage; (5) the inappropriateness of the activity to the place where it is carried on; and (6) the extent to which the activity's value to the community is outweighed by its dangerous attributes. [FN80] In considering these elements, courts have been reluctant to extend strict liability beyond a few activities [FN81] and typically require the harm to have occurred in close proximity to the abnormally dangerous activity. [FN82]

Based upon the above factors, courts would not likely impose strict liability on a seller of illegal drugs. At least one court has held that administering experimental drugs to a patient is not an abnormally dangerous activity, [FN83] and a court would be unlikely to ***331** hold that the mere sale of a drug is more dangerous than administering it. Analogously, another court has held that the sale of alcohol, which like illegal drugs impairs cognitive and motor functions, is not considered abnormally dangerous, even where the defendant's advertising encouraged consumption. [FN84] Furthermore, drug use typically occurs in a different location than the place of sale and, therefore, would not likely meet the proximity requirement of strict liability. Even if a court did extend strict liability to include illegal drug sales, a drug user would likely still be foreclosed from recovery under the doctrine of assumption of risk. [FN85]

A third theory of recovery could be asserted by those plaintiffs who were drug users themselves: [FN86] strict products liability. According to the theory of strict products liability, a seller of any defective product which is unreasonably dangerous may be found strictly liable for the product's harm to the ultimate user or consumer. [FN87] Recovery, however, would be no more likely under this theory than under the others already discussed. Despite the fact that most laypersons would view illegal drugs as unreasonably dangerous, the comments to section 402A of the Restatement (Second) of Torts indicate that an unreasonably dangerous product is one that is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge to the community as to its characteristics." [FN88] The reasonably prudent person presently knows that illegal drugs are dangerous and would not use them at all. [FN89] Thus, a claim brought by a drug user under strict products liability would likely fail.

***332** In short, plaintiffs seeking to assert a claim against drug dealers for their harmful acts cannot successfully do so under the common law theory of negligence, strict liability for engaging in an abnormally dangerous activity, or strict products liability. As a result of the shortcomings of the common law in dealing with the problem of the inadequate remedy in traditional tort law, states have begun to provide statutory assistance to plaintiffs through the Drug Dealer Liability Act.

III. PROVISIONS OF THE DRUG DEALER LIABILITY ACT

Eleven states have enacted a version of the Drug Dealer Liability Act: Arkansas, [FN90] California, [FN91] Florida, [FN92] Georgia, [FN93] Hawaii, [FN94] Illinois, [FN95] Indiana, [FN96] Louisiana, [FN97] Michigan, [FN98] Oklahoma, [FN99] and Utah. [FN100] Another seventeen states have considered passing a variation of the law. [FN101] While some variations exist, most of the ***333** statutes include substantially similar provisions. First, a person may recover under the Act from one who knowingly participates in the illegal drug market and causes harm to that person. [FN102] Second, potential plaintiffs under the Act include parents and legal guardians of drug users; children of drug users (including "drug babies" exposed in utero to illegal drugs); spouses of drug users; employers of drug users; and any entities funding drug treatment programs or otherwise spending money on behalf of individual drug users, including medical facilities, insurers, and government entities. [FN103] Some states even allow drug users themselves to recover under the Act--but only from the particular individual who sold them drugs or other dealers within that distribution chain--if ***334** they disclose to narcotics agents all information that they know about the drug trade six months before filing the action, have not used drugs for six months before filing the action, and remain free from drug use throughout the course of the action. [FN104]

Third, a plaintiff under the Act must prove that the defendant is a drug dealer by clear and convincing evidence, [FN105] although a prior criminal drug conviction estops the defendant from denying participation in the illegal drug market. [FN106] A prior criminal drug conviction is not required, however, to sue a drug dealer under this statute. [FN107] It merely aids the plaintiff in meeting the clear and convincing evidence standard of proof.

Once the plaintiff has proven by clear and convincing evidence that the defendant is a drug dealer, the plaintiff must then prove three other elements by a preponderance of the evidence unless he can prove that the defendant was the dealer who actually sold drugs to him. [FN108] First, the plaintiff must prove that the user's ***335** illegal drug activity occurred within the market community of the dealer, [FN109] which the Act defines according to location of proven dealer sales. [FN110] In most states, the market community is defined by four levels of liability.

TABLE

market Area	possession of Drugs Other Than Marijuana	distribution of Drugs Other Than Marijuana	possession of Marijuana	distribution of Marijuana
level One	County of participation	0.25 oz. < x < 4 oz.	x < 1 oz. or 1 lb. or 25 plants < x < 4 lbs. or 50 plants	x < 1 lb.
level Two	County of participation plus contiguous	4 oz. < x < 8 oz.	1 oz. < x < 2 oz. or 4 lbs. or 50 plants < x < 8 lbs. or 75 plants	1 lb. < x < 5 lbs.

	counties				
level Three	County of participation plus counties contiguous to Level Two	8 oz. < x < 16 oz.	2 oz. < x < 4 oz.	8 lbs. or 75 plants < x < 16 lbs. or 100 plants	5 lbs. < x < 10 lbs.
level Four	Statewide	x > 16 oz.	x > 4 oz.	x > 16 lbs. or 100 plants	x > 10 lbs.

***336** Second, the plaintiff must prove that the defendant deals in the type of drug consumed by the user. [FN111] Third, the plaintiff must prove that the defendant participated in the given illegal market at any time when the user was consuming that market community's drugs. [FN112] Thus, in addition to presenting clear and convincing evidence that the defendant is a drug dealer, the plaintiff must prove by a preponderance of the evidence the elements of place, type, and time. Accomplishment of these requirements establishes a prima facie case for the plaintiff.

Most states allow the defendant to show comparative fault in suits brought by the drug user himself and, in some states, in suits brought by individuals who provided the user with money to purchase drugs. [FN113] The defendant must prove such comparative fault by clear and convincing evidence. [FN114]

Successful plaintiffs in suits brought under the Act may recover economic damages, noneconomic damages, punitive damages, reasonable attorneys' fees, and other costs of the suit, including expert witness costs. [FN115] In states where drug users may bring an ***337** action, they may recover only economic damages and costs of the suit. [FN116] Most states allow ex parte pre- judgment attachment of the dealer's assets, [FN117] and some states have even included a provision that no property is statutorily exempt from attachment. [FN118] Property in possession of the government under criminal forfeiture laws may be attached, but may not be collected unless released by the government. [FN119] Although a court judgment or settlement cannot be paid by a liable defendant's insurance company, [FN120] the defendant may seek contribution from other drug dealers in the market community. [FN121]

Despite the Drug Dealer Liability Act's employment of market share liability in determining which individuals can be sued, in all states except California and Louisiana [FN122] damages are not ***338** allocated based upon market share. Thus, a defendant found liable under the Drug Dealer Liability Act must pay the total amount of damages assessed by the court. This result differs from traditional market share theory where, for example, a defendant found to hold twenty percent of the market share in a given activity must pay twenty percent of the damages, and not the entire amount of damages assessed.

Only one court thus far has been provided an opportunity to apply the provisions of the Drug Dealer Liability Act. In Michigan, a sheriff and the estate of a baby born addicted to crack and later beaten to death by her mother sued two local drug dealers. [FN123] The dealers failed to respond to the suit, however, and the state court entered a default judgment for $8.7 million. [FN124] The plaintiffs in that case have not yet collected any money on the judgment. [FN125] If subsequent cases are filed in Michigan or other states, the principal argument asserted by the defendants likely will be that the law is unconstitutional.

IV. THE CONSTITUTIONALITY OF THE DRUG DEALER LIABILITY ACT

The first section of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." [FN126] This amendment was ratified in 1868 partially in response to post-Civil War attempts by states to limit the rights of former slaves, [FN127] who had been emancipated by the Thirteenth Amendment three years earlier. [FN128] The drafters of the Fourteenth Amendment deemed necessary this constitutional limitation on state action because the United States Supreme Court had ruled previously that the Due Process Clause of the Fifth ***339** Amendment does not apply to actions by state governments, but only to the national government's activities. [FN129]

The Due Process Clause of the Fourteenth Amendment [FN130] has since been interpreted to comprise two components: procedural due process and substantive due process. [FN131] As the name implies, procedural due process involves an inquiry into whether the procedures authorized by legislation meet constitutional requirements, [FN132] such as providing the affected parties notice of the action and an opportunity to be heard. [FN133] Substantive due process, on the other hand, involves an inquiry into the fairness of the ultimate decision to deprive life, liberty, or property. [FN134] Any constitutional challenge to the Drug Dealer Liability Act will likely rest upon arguments that its provisions violate both procedural due process and a substantive due process right--the prohibition against double jeopardy as protected by the Fifth Amendment. [FN135]

At the outset, although one could argue that the due process protections of the Fourteenth Amendment do not apply to private tort actions brought under the Drug Dealer Liability Act because such suits do not implicate state action, such an argument would not likely succeed. While it is undisputed that the Fourteenth Amendment applies only to state action, [FN136] the meaning of "state ***340** action" is widely debated, and the subject matter within its purview has expanded markedly over the last century. [FN137] In recent years, for example, the Supreme Court has expanded the meaning of state action to include even situations where a state only encourages actions by private individuals. [FN138] While most of the cases on this issue have involved equal protection challenges based upon racially discriminatory practices, [FN139] the holdings of these equal protection cases regarding the presence of state action apply with equal force to cases involving due process under the Fourteenth Amendment.

In Lugar v. Edmondson Oil Co., [FN140] the United States Supreme Court found state action in a case involving a due process issue because a creditor acquired a state-sanctioned prejudgment writ of attachment to secure his rights to the debtor's property. [FN141] In so holding, the Court applied a two- part test to determine whether a particular deprivation of life, liberty, or property constitutes state action. First, the Court asked whether the deprivation "has resulted from the exercise of a right or privilege having its source in state authority." [FN142] Second, the Court asked whether the party causing the deprivation was appropriately characterized as a "state actor." [FN143] Applying this test, the Court found that because state legislation conveyed the attachment right to the creditor, the relevant right or privilege had its source in state authority. [FN144] Furthermore, because the creditor employed the assistance of the local sheriff in securing the writ, the Court found that the party causing the deprivation was a state actor. [FN145]

***341** A party challenging a suit brought under the Drug Dealer Liability Act could likely meet this two-part test and establish the presence of state action. Because the right to sue under the Drug Dealer Liability Act clearly has been created by state legislatures in response to the inadequacy of common law tort principles, the right involved has its source in state authority. [FN146] Additionally, because the Drug Dealer Liability Act, as enacted in most states, allows prejudgment attachment, [FN147] which will be employed by most plaintiffs, the party causing a deprivation will be a state actor in most cases.

Furthermore, Ficano v. Clemens, [FN148] the only suit brought under the Act thus far, indicates that joint actions with government entities may comprise most suits brought under the Act [FN149] and, as the Court noted in Lugar, suits filed jointly with state government entities also constitute state action. [FN150] Thus a challenge to the Drug Dealer Liability Act under the Fourteenth Amendment would typically meet the threshold criteria of state action. The more difficult question remains, however, whether such a challenge would succeed on grounds that the Drug Dealer Liability Act violates procedural or substantive protections of the Due Process Clause.

A. PROCEDURAL DUE PROCESS

As discussed above, the Due Process Clause of the Fourteenth Amendment forbids state governments from depriving any person of life, liberty, or property without due process of law, [FN151] and the United States Supreme Court has devised a two-part test to determine whether a litigant's procedural due process rights have been violated. First, the Court asks whether

the state has deprived ***342** the individual of life, liberty, or property. [FN152] If the Court determines that an individual has been deprived of these rights, it next asks what process is required before the deprivation of such rights satisfies due process standards and whether adequate process occurred. [FN153] To decide what process is necessary, the Court balances three factors: (1) the private interest affected and (2) the risk of erroneous deprivation, compared with other procedural alternatives, versus (3) the burdens which would result from additional procedural requirements. [FN154]

A judgment acquired by a plaintiff under the Drug Dealer Liability Act would unquestionably deprive the defendant of property, for purposes of the Fourteenth Amendment. In Board of Regents v. Roth [FN155] the Court explained its test for determining whether property deprivation has occurred by noting that the Fourteenth Amendment provides a "safeguard of the security of interests that a person has already acquired." [FN156] Real and personal property in one's possession meets this "already acquired" standard. As one scholar has noted, "There has never been doubt that the government must provide due process before it deprives a person of real or personal property." [FN157]

The more difficult next step is to determine whether the Drug Dealer Liability Act provides defendants with adequate procedural protections before they are deprived of their property rights. Procedural due process requirements can be roughly divided into four categories, [FN158] each of which is balanced under the three-part test for adequate process: (1) Was notice provided?; [FN159] (2) Was a hearing provided, and, if so, what type of hearing?; [FN160] (3) Was ***343** there an impartial decisionmaker?; [FN161] and (4) What presumptions exist? [FN162] The first three prongs would not raise a procedural due process question in a suit brought under the Drug Dealer Liability Act because (1) the drug dealer would receive notice of the suit through service of process; (2) the drug dealer is entitled to a trial on the issues, satisfying the hearing requirement; and (3) the outcome would be decided by an impartial judge or jury. A challenger to the Drug Dealer Liability Act's constitutionality, however, would likely argue that the Act places unconstitutional presumptions on defendants.

Three provisions in the Drug Dealer Liability Act regarding presumptions could possibly subject it to a Due Process challenge. First, challengers could argue that the abrogation of common-law tort principles of proximate cause creates an unconstitutional presumption that the drug dealer is responsible for superseding acts of a user he supplied. Second, challengers could argue that the provision estopping a convicted drug dealer from denying that he is in fact a drug dealer deprives the defendant of the right to argue that he was not dealing drugs at the time the user was purchasing drugs. Third, challengers could assert that market share liability imposes a burden on defendants who did not participate in the chain of distribution which resulted in the plaintiff's harm.

In addressing these arguments, the Court would employ a minimal level of scrutiny to determine whether a rational relationship exists between the presumption employed and the ultimate fact at issue. [FN163] Where the presumption is arbitrary or irrational, however, the Court will find a Due Process violation. [FN164] The Court will use its three-part balancing formula to resolve this question. [FN165]

***344** Challenges based upon the first two arguments would almost definitely fail. The first argument is logically no different from similar arguments previously made that Dram Shop Acts are unconstitutional. The constitutionality of abrogating proximate cause requirements through Dram Shop Acts has been upheld, [FN166] and there is no reason to presume that courts will view this provision of the Drug Dealer Liability Act any differently.

The second argument involves issue preclusion or collateral estoppel. In a suit brought under the Drug Dealer Liability Act, a criminal prosecution for a drug offense precludes a defendant from denying that he has been a drug dealer. The Restatement (Second) of Judgments provides that a criminal prosecution is preclusive in favor of a third party who later brings a civil action against the defendant, [FN167] and no constitutional prohibitions exist to prevent issue preclusion. [FN168] Furthermore, this preclusion is not arbitrary or irrational because a plaintiff must also prove three other elements in order to recover. The plaintiff must prove that (1) the defendant was dealing at the same time that the drug user was purchasing drugs; (2) the defendant was dealing in the same community as defined by statute; and (3) the defendant was selling the same type of drugs as the user was using. [FN169] These requirements provide heightened protection to defendants by ensuring that a prior conviction alone will not create liability for them.

The third argument challengers could assert is that market share liability places a presumption on defendants that they caused a particular plaintiff's harm even when no proof is shown to connect them to that plaintiff's injury. The United States Supreme Court, however, has consistently denied certiorari to cases challenging market share liability. [FN170] Challengers could nevertheless argue ***345** that even if market share liability is constitutional as a general rule, the Drug Dealer Liability Act modifies market share liability in a manner which makes it unconstitutional. Indeed, the California Supreme Court's

reasons for rejecting a due process attack in Sindell would provide some ammunition to the challengers. There the California court noted that the plaintiffs had sued a "substantial share" of the producers of the harmful drug, which meant that there was a "corresponding likelihood that this comparative handful of producers manufactured the DES which caused plaintiff's injuries." [FN171]

In contrast, the Drug Dealer Liability Act does not require a plaintiff to sue a substantial share of those persons or organizations engaged in the negligent activity for that community. While this modification is the most constitutionally troubling provision within the entire Drug Dealer Liability Act, [FN172] it nevertheless would likely survive scrutiny under procedural due process analysis. The policy justifications for imposing market share liability in actions against illegal drug dealers are that (1) drug dealers' activities are necessarily negligent, even dangerous, and (2) the underground nature of the drug trade effectively bars most plaintiffs from determining which dealer sold the drugs that caused their harm. While a plaintiff suing a large pharmaceutical company can acquire through discovery information about other companies which produced the same drug, most illegal drug dealers are not likely to worry about violating court-imposed discovery rules. Thus, in applying the Mathews v. Eldridge balancing test, the Court would likely hold that this presumption is neither arbitrary nor irrational. [FN173] If additional defendants should be brought into court, it should be done by defendants already named, who possess greater knowledge of the local drug trade and who ***346** have been specifically provided the tools of impleader and contribution by the Drug Dealer Liability Act. [FN174]

In short, challenges to the Drug Dealer Liability Act on grounds that it violates procedural due process will likely fail. [FN175] Even though the Act creates three presumptions which benefit plaintiffs, these presumptions can meet the rational relation test based upon minimal scrutiny. Moreover, these presumptions are necessary to allow plaintiffs any opportunity to file suits against drug dealers for harm they inflict. The burdens which would be placed upon plaintiffs without the Drug Dealer Liability Act's presumptions greatly outweigh the defendant's protective interests and the risk of an erroneous decision created by the act's presumptions.

B. THE PROHIBITION AGAINST DOUBLE JEOPARDY

Although the Drug Dealer Liability Act may easily clear procedural due process hurdles, until recently the provisions of the Act allowing suits by government entities in their own right would likely have hit a substantive due process wall--specifically the constitutional prohibition of double jeopardy.

The U.S. Supreme Court recently reversed its landmark case regarding criminal penalties followed by civil fines for the same offense. The Court's recent decision opens the door for governments, as well as private individuals and entities, to sue drug dealers under the Act without running afoul of the prohibition against double jeopardy.

The Fifth Amendment prohibits that "any person be subject for the same offence to be twice put in jeopardy of life or limb." [FN176] For years after the ratification of the Fourteenth Amendment, the United States Supreme Court held that the double jeopardy prohibition in the Fifth Amendment did not apply to state proceedings. [FN177] The Court, however, has since retreated from this view, and today the prohibition against double jeopardy constitutes a ***347** fundamental right which, under the Fourteenth Amendment's Due Process Clause, states cannot abrogate. [FN178] Significant to this analysis, one component of double jeopardy is that a person may not be exposed by the government to multiple punishments for the same offense. [FN179]

In 1989, the United States Supreme Court in the landmark case United States v. Halper [FN180] extended the double jeopardy prohibition to include situations where one of the punishments is exacted through civil rather than criminal sanctions. [FN181] In Halper, the defendant, a manager for a company which provided medical services to Medicare recipients, submitted sixty-five false claims for government reimbursement, was convicted for these activities under the federal False Claims Act, sentenced to prison for two years, and fined $5000. [FN182] The False Claims Act also provides that those violating the Act must pay a civil penalty of $2000 for each false claim filed, and the federal government filed a subsequent civil action to collect this civil fine. [FN183] Although this civil penalty was purportedly a remedial provision, the Court noted that the civil fines would total $130,000, while the costs in investigating and prosecuting the case had likely totaled only $16,000. [FN184]

The Court held that "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." [FN185] While the Court noted that it would be difficult, if not impossible,

to ascertain an exact price which could be termed remedial in a given case, the Court announced a standard of "rough justice" and intimated that it would overrule only those civil sanctions which were "overwhelmingly ***348** disproportionate" to the damages caused by the defendant. [FN186]

Five years later in Department of Revenue v. Kurth Ranch, [FN187] the Supreme Court clarified the impact of Halper and listed factors for determining whether it would consider a subsequent civil action by the government after criminal prosecution to be remedial or punitive. In Kurth Ranch, the Court struck down Montana's drug tax, [FN188] which required persons possessing dangerous drugs to pay a tax to the state equal to the greater of ten percent of the drug's fair market value or $100 per ounce for marijuana and $250 per ounce for hashish. [FN189] The six defendants in the case were arrested for running the largest marijuana operation in Montana and pled guilty to the charges. [FN190] The state then brought a civil action to collect the state drug tax on the seized drugs, which totaled $894,940.99. [FN191]

While the Court noted that Kurth Ranch could be distinguished from Halper because Kurth Ranch imposed taxation, rather than a civil penalty, and taxes are typically motivated by revenue-raising rather than punitive purposes, the Court nevertheless declared that at some point taxation approaches punishment. [FN192] The Court went on to provide three factors for determining whether a subsequent civil sanction can be classified as remedial or punitive. First, the Court noted that the tax was conditioned on the commission of a crime. [FN193] Second, the Court noted that the state exacted the tax only after the taxpayer had been arrested for the precise conduct leading to the tax obligation. [FN194] Third, the Court observed that the tax was exacted on property which the taxpayer no longer owned or possessed when the tax was levied. [FN195] The Court ***349** concluded by explaining that Montana had not presented any evidence to show that the costs of investigating, apprehending, and prosecuting the Kurths had remotely approximated the $890,000 tax levy. [FN196] Based on these facts, the tax, though nominally a civil penalty, amounted to an unconstitutional exercise of double jeopardy.

The Supreme Court's holdings in Halper and Kurth Ranch thus raised serious questions regarding the constitutionality of the Drug Dealer Liability Act where suits are brought by government entities in their own right. The Drug Dealer Liability Act clearly allows recovery of punitive damages, even for state government entities. [FN197] Most states also do not base damages upon market share, but rather assess total damages to the defendant, so some defendants will be levied monetary damages far in excess of their corresponding market share. Furthermore, some states have included legislative findings within the text of their statute. These legislative findings typically include a statement that one purpose of the Drug Dealer Liability Act is to deter individuals from entering the drug market. [FN198] The Supreme Court in Halper and Kurth Ranch, however, clearly forbade punitive or deterrent purposes or effects in subsequent civil sanctions. Additionally, cases brought under the Drug Dealer Liability Act will, in most cases, be conditioned on a crime, because plaintiffs will typically sue an individual previously convicted of a drug crime. For these reasons, the Drug Dealer Liability Act under the Halper and Kurth Ranch decisions could not likely have withstood constitutional scrutiny in cases where the suit is brought by state government entities for their own benefit.

Suits under the Drug Dealer Liability Act filed by private individuals and entities, however, would not have been invalidated by the Supreme Court under the Halper and Kurth Ranch decisions as violating the Double Jeopardy Clause. [FN199] The Court in Halper specifically noted as follows:
***350** [N]othing in today's opinion precludes a private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment. The protections of the Double Jeopardy Clause are not triggered by litigation between private parties. In other words, the only proscription established by our ruling is that 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. [FN200]

Thus the outcome of a challenge to the Drug Dealer Liability Act before the Supreme Court's 1997 term would likely have been that suits by private individuals and entities are allowed but suits by governments violate the prohibition against double jeopardy. The Supreme Court in its most recent term, however, revisited and ultimately disavowed the Halper decision in Hudson v. United States. [FN201] The Supreme Court's decision in that case quite likely means that suits by government entities under the Drug Dealer Liability Act do not constitute double jeopardy.

In Hudson, three bank officers were fined for violating federal banking statutes and later indicted under criminal statutes for the same offense. The Supreme Court noted the many novel challenges to double jeopardy which had arisen since its Halper decision in 1989 and decided to disavow the Halper opinion and return to the regime which had previously existed. [FN202] According to the Court, the prohibition against double jeopardy only protects against multiple criminal punishments for the

same offense and not civil punishment plus criminal punishment. [FN203] While the Court provided numerous factors for determining whether it should ***351** consider a statute civil or criminal, the Court noted that it would typically defer to the enacting legislature's characterization. [FN204] Indeed, the Court said that "only the clearest proof" suffices to disregard a legislature's characterization of one of its enactments. [FN205] Under this rationale, a suit brought by a government under the Drug Dealer Liability Act would not likely constitute double jeopardy because the statute in most states mentions that its principal purpose is to provide a civil remedy to those who have been harmed by drug dealers' illegal activities.

V. CONCLUSION

The Drug Dealer Liability Act responds to the public's desire for greater accountability by those who engage in criminal activities. [FN206] The question remains, however, whether the political leaders of eleven states have responded in a manner which does not frustrate the intent of our nation's Constitution. The Drug Dealer Liability Act likely can withstand scrutiny based upon procedural due process challenges and challenges based upon the prohibition against double jeopardy.

Of course, the Act's constitutionality has not yet been challenged. Therefore, these constitutional questions remain unanswered until the Act is finally challenged. Only then will we learn whether the courts regard the Drug Dealer Liability Act as constitutional.

[FN1]. In 1994, Gallup Poll respondents considered drug abuse to be the fourth most serious noneconomic problem facing American society, with eight percent of respondents considering drug abuse the nation's most serious problem. GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1994, at 28 (1995). This statistic is in line with statistics from most previous years' Gallup polls. See, e.g., GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1990, at 149 (1991) (showing drug abuse to be considered nation's second most serious noneconomic problem--with eight percent labeling it most serious problem); GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1986, at 179-180 (1987) (showing drug abuse to be considered nation's fourth most serious problem in 1986--with eight percent of respondents labeling it most serious problem).

[FN2]. Pub. L. No. 98-473, 98 Stat. 1976 (1986) (codified as amended in scattered sections of 5, 18, 19, 26, 28, 29, 41 & 42 U.S.C.) (increasing drug penalties, expanding forfeiture of assets in drug crimes, and stiffening bail requirements for serious drug offenders).

[FN3]. Pub. L. No. 99-570, 100 Stat. 3207 (1989) (codified as amended in scattered sections of 16, 19, 20, 21 & 48 U.S.C.) (restoring mandatory prison sentences for large-scale marijuana distributors and adding penalties for "designer drugs").

[FN4]. Pub. L. No. 100-690, 102 Stat. 4181 (1990) (codified as amended in scattered sections of 5, 10, 21, 26, 42 & 49 U.S.C.) (increasing drug trafficking penalties and creating new drug offenses).

[FN5]. Pub. L. No. 101-647, 104 Stat. 4789 (1991) (codified as amended in scattered sections of 18, 21 & 42 U.S.C.) (providing additional seizure and forfeiture provisions); see also OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ-133652, DRUGS, CRIME, AND THE JUSTICE SYSTEM 83-87 (1992) (explaining federal drug control strategies implemented between 1976 and 1990).

[FN6]. OFFICE OF NATIONAL DRUG CONTROL POLICY, THE NATIONAL DRUG CONTROL STRATEGY, 1997: BUDGET SUMMARY 5 (1997). Policymakers estimate that state and local governments spend an additional $15 billion each year to combat drug abuse. See Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997: Hearings on H.R. 3756 Before the Subcomm. on Treasury, Postal Serv. & Gen. Gov't of the Senate Comm. on Appropriations, 104th Cong. 567 (1996) (statement of Barry McCaffrey, Director, Office of National Drug Control Policy (ONDCP)) (explaining that drug control and treatment expenditures from federal, state, and local sources total $30 billion).

[FN7]. Pub. L. No. 101-647, 104 Stat. 4820 (codified as amended at 42 U.S.C. §§ 10601-10607 (1994)).

[FN8]. E.g., Victims' Bill of Rights, Del. Code Ann. tit. 11, §§ 9401- 9419 (1995); Crime Victims' Bill of Rights, O.C.G.A. §§ 17-17-1 to - 15 (1997); Rights of Victims of Crime Law, Ohio Rev. Code Ann. § 2930 (Banks-Baldwin 1997); Victims' Rights, Tenn. Code Ann. §§ 40-38-101 to - 108 (1997); Victim and Witness Bill of Rights, Wyo. Stat. Ann. §§ 1-40- 201 to -210 (Michie 1997). A few states have even added victims' rights provisions to their state constitutions. See, e.g., Ariz. Const. art. II, § 2.1 (providing for notification to victims and families of legal process involving accused).

[FN9]. See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 3, § 67, at 471-74, § 68, at 495-96, § 81, at 580-82 (5th ed. 1984) (stating generally in § 1 that "new and nameless torts are being recognized constantly"; discussing in § 67 statutory "surge" of comparative negligence in 1970's and early 1980's, which unlike contributory negligence does not foreclose recovery to negligent plaintiff; stating in § 68 that assumption of risk has been "disliked by friends of the plaintiff" and that several comparative negligence statutes have abolished defense by merging it into comparative fault; and explaining in § 81 expansion of strict liability into new fields, often by statute). But see, e.g., Colo. Rev. Stat. § 13-21- 102 (1997) (limiting amount of punitive damages recoverable in most tort cases to amount of actual damages); Tex. Civ. Prac. & Rem. Code Ann. § 41.008 (West 1997) (limiting punitive damages to greater of $200,000 or two times actual damages plus amount equal to noneconomic damages not to exceed $750,000); Va. Code Ann. § 8.01-38.1 (Michie 1992 & Supp. 1997) (limiting punitive damages to $350,000).

[FN10]. See infra Part II (discussing why common-law tort principles likely prevent successful civil actions against drug dealers by drug users, their families, and those injured by drug users).

[FN11]. James Rainey, Suspected Pusher Held After Appeal by Grieving Actor; Addiction: Carroll O'Connor Says the Man Supplied Drugs to His Son, Who Was Apparently Driven to Suicide, L.A. TIMES, Mar. 30, 1995, at A1.

[FN12]. See id. (noting that visits by alleged drug dealer "tormented" family and that Hugh O'Connor "'went to three drug rehabilitation places, and could not face going to another one for perhaps six months or a year'"); Rivera Live (CNBC television broadcast, Sept. 24, 1996) ("I ought to have the right to sue this guy for the support of, of my son's son, my grandson. I'm supporting him at the moment, but why shouldn't this sleazy pusher reimburse me?").

[FN13]. See infra Part III (explaining recent statutes aiding plaintiffs in civil actions against drug dealers).

[FN14]. Florida passed such a law in 1997. Hugh O'Connor Memorial Act, 1997 Fla. Laws ch. 97-80 (codified at Fla. Stat. Ann. § 772.12 (West 1997)). Most other states which have passed a Drug Dealer Liability Act do not require the plaintiff to name as the defendant the actual dealer who sold drugs which actually harmed the drug user, unless the drug user himself is bringing the suit. E.g., Cal. Health & Safety Code § 11706(a) (West Supp. 1997).

[FN15]. A dram shop is a drinking establishment, such as a bar or saloon, where liquors are sold for consumption on the premises. BLACK'S LAW DICTIONARY 494 (6th ed. 1990).

[FN16]. See KEETON, supra note 9, § 81, at 581 (explaining purpose of "Dram Shop" laws). At least one commentator has termed these new laws against drug dealers "Gram Shop" liability. Michael E. Bronfin, "Gram Shop" Liability: Holding Drug Dealers Civilly Liable for Injuries to Third Parties and Underage Purchasers, 1994 U. CHI. LEGAL F. 345, 345 (1994).

[FN17]. See Sindell v. Abbott Lab., 607 P.2d 924, 936 (Cal. 1980) (adopting market share tort liability).

[FN18]. The Uniform Commercial Code defines "fungible" as follows: "'Fungible' with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit." U.C.C. § 1-201(17) (Supp. 1997).

[FN19]. See Sindell, 607 P.2d at 936-37 (allowing plaintiffs in class action to recover from defendants despite inability to prove that any defendants before court produced particular diethylstilbesterol (DES) administered to patients' mothers).

[FN20]. Id. at 936 (citing Summers v. Tice, 199 P.2d 1, 4 (Cal. 1948)).

[FN21]. Id. ("In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine ... or to fashion remedies to meet these changing needs.").

[FN22]. See id. at 937 (requiring that defendants comprise substantial share of appropriate market to be haled before court).

[FN23]. For example, a defendant producing and distributing 25% of the asbestos sold in a given area, which is typically determined by the court, must only pay 25% of the total damages awarded to the plaintiff by the court. It should be noted that while the Sindell decision failed to state clearly that joint and several liability should not be applied, the California Supreme

Court later held that each defendant is liable only for its market share. Brown v. Superior Court, 751 P.2d 470, 485-87 (Cal. 1988).

[FN24]. The "law of large numbers" simply provides that the greater the sample size, the more accurate the results will be. See 1 WILLIAM FELLER, AN INTRODUCTION TO PROBABILITY THEORY AND ITS APPLICATIONS 152-53 (3d ed. 1968) (stating that with increase in sample size, results tend towards probable outcome).

[FN25]. This Note addresses only the constitutionality of the Drug Dealer Liability Act under the United States Constitution. This Note does not attempt to address the constitutionality of each state's Drug Dealer Liability Act under its state constitution.

[FN26]. Arkansas, California, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Michigan, Oklahoma, and Utah.

[FN27]. Alabama, Colorado, Connecticut, Idaho, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Tennessee, and Wisconsin; see infra note 101 (citing individual state bills).

[FN28]. 118 S. Ct. 488 (1997).

[FN29]. Id. at 494.

[FN30]. See Prete v. Laudano, No. 33 79 66, 1993 WL 21417, at *1 (Conn. Super. Ct. Jan. 25, 1993) (noting that although Connecticut courts have yet to extend strict liability to sale of illegal drugs, such possibility has never been foreclosed).

[FN31]. See, e.g., Tidd v. Skinner, 122 N.E. 247, 251-52 (N.Y. 1919) (allowing parent to recover for loss of child's services--but not other compensatory or punitive damages--during time of child's addiction to heroin); Holleman v. Harward, 25 S.E. 972, 974 (N.C. 1896) (allowing cause of action against druggist who continued to sell plaintiff's wife large quantities of laudanum despite plaintiff's protests that his wife had become an "opium eater"); Flandermeyer v. Cooper, 98 N.E. 102, 104 (Ohio 1912) (allowing cause of action against druggist who continued to sell plaintiff's wife large quantities of morphine despite plaintiff's objection). See generally Joseph R. Roark, Note, Torts--Domestic Relations--Common Law Right of Action by Spouse or Parent Against Vendor of Habit-Forming Drugs to Other Spouse or Minor Child, 14 S. CAL. L. REV. 91 (1941) (reviewing prior case law and noting that common law liability exists for sale of habit-forming drugs).

[FN32]. restatement (Second) of Torts §§ 696, 697, 705 (1977).

[FN33]. The notes to §§ 696, 697 and 705 of the Restatement list only eight cases which have cited these sections. Five of these cases involved attempts to extend the Restatement's language to intoxicating liquors, and the other three cases involved attempts by plaintiffs to extend the Restatement's language by analogy to train wrecks, runaway children, and employer negligence. None of the cases involved habit-forming drugs.

[FN34]. See J. TYRONE GIBSON, MEDICATION LAW AND BEHAVIOR 13 (1976) (explaining lack of significant drug legislation prior to early 1900s). While the U.S. Food and Drug Administration was created by the Pure Food and Drug Act of 1906, the agency did not acquire substantial enforcement power until passage of the Food, Drugs, and Cosmetic Act of 1938. See HENRY G. GRABOWSKI & JOHN M. VERNON, THE REGULATION OF PHARMACEUTICALS: BALANCING THE BENEFITS AND RISKS 2 (1983) (providing history of federal food and drug legislative enactments).

[FN35]. Cf. Holleman, 25 S.E. at 975 ("But suppose we had no statute on the subject of liquor selling to minors, would the law permit with impunity a dealer or other person to sell liquor to a man's child, without his knowledge or consent, in such quantities as to produce habitual intoxication, or to render him unfit for employment?"). See generally PDR GUIDE TO DRUG INTERACTIONS, SIDE EFFECTS, INDICATIONS, CONTRAINDICATIONS (Mukesh Mehta ed., 1997) (providing information for more than 2,900 drug products).

[FN36]. For evidence supporting this argument, see supra note 33 and accompanying text (noting lack of similar cases filed since adoption of Restatement). Government standards for legal drugs and their distribution promulgated by the U.S. Food and Drug Administration and state agencies may also have created greater difficulties for plaintiffs in suits where defendants could show compliance with such standards. See KEETON, supra note 9, § 36, at 233 (explaining that while compliance with

statutory standard typically does not conclusively show due care, it does provide evidence of due care, and court may rule as matter of law for actor where no special circumstances are involved). But see Peter Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 COLUM. L. REV. 277, 335 (1985) ("Requiring--or at least strongly encouraging--the courts to respect the comparative risk choices made by competent, expert agencies would inject a first, small measure of rationality into a judicial regulatory system that currently runs quite wild.").

[FN37]. See, e.g., Lasley v. Shrake's Country Club Pharmacy, Inc., 880 P.2d 1129, 1132-33 (Ariz. Ct. App. 1994) ("Health care providers and other professionals, however, are held to a higher standard of care than that of the ordinary prudent person when the alleged negligence involves the defendant's area of expertise.... We impose this higher standard of care upon pharmacists because they are professionals in the health care area.").

[FN38]. See GIBSON, supra note 34, at 13 (explaining that until passage of Harrison Narcotic Drug Act in 1914, such drugs as heroin and opium could be readily purchased at neighborhood pharmacies).

[FN39]. See, e.g., O.C.G.A. §§ 16-13-30(b), -35(a) (1996) (prohibiting purchase of controlled substances except from person or entity registered with State Board of Pharmacy).

[FN40]. Cf. restatement (Second) of Torts § 469 (1965) ("The plaintiff's unexcused violation of a legislative enactment or an administrative regulation which defines a standard of conduct for his own protection is contributory negligence in itself if it is a legally contributing cause of the harm.").

[FN41]. In the one case where a drug user sued a licensed pharmacist, he was denied recovery. Pysz v. Henry's Drug Store, 457 So. 2d 561, 562 (Fla. Dist. Ct. App. 1984) (denying recovery against licensed pharmacist who provided plaintiff with Quaaludes pursuant to physician's prescription although pharmacist possibly knew of plaintiff's dependency). While no state supreme court has endorsed the right of a third party to sue a drug dealer for damages to the plaintiff caused by a drug user supplied by that dealer, at least one trial court has refused to foreclose the possibility of such an action. Prete v. Laudano, No. 337966, 1993 WL 21417, at *1 (Conn. Super. Ct. Jan. 25, 1993) (refusing to dismiss cause of action against drug dealer for injuries caused to plaintiff by non-family-member user).

[FN42]. See 740 ILL. COMP. STAT. ANN. 57/10(7) (West Supp. 1997) (reporting legislative findings that existing tort law prevents successful actions against drug dealers for harm they cause).

[FN43]. See KEETON, supra note 9, § 30, at 164-65, § 65, at 451 (explaining four required elements of action in negligence and two common-law defenses to such claims).

[FN44]. See, e.g., Conway v. O'Brien, 111 F.2d 611, 612 ("The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk."); Blyth v. Birmingham Waterworks Co., 156 Eng. Rep. 1047, 1049 (Ex. 1856) (providing that prior similar circumstances can be admissible to show reasonableness); Vaughan v. Menlove, 132 Eng. Rep. 490, 493 (C.P. 1837) ("[W]e ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.").

[FN45]. See, e.g., McNeely v. M & M Supermarkets, Inc., 269 S.E. 483, 484 (Ga. App. 1980) ("The whole theory of negligence presupposes some uniform standard of behavior.").

[FN46]. See restatement (Second) of Torts §§ 291, 292 (1965) (stating in § 291 that risk is unreasonable and act is therefore negligent if risk outweighs social utility of act or manner in which it is accomplished, and listing in § 292 factors for determining whether action is unreasonable under § 291, including "social value which the law attaches to the interest which is to be advanced or protected by the conduct").

[FN47]. See, e.g., O.C.G.A. § 16-13-30(b) (1996) (providing that sale of controlled substances is illegal).

[FN48]. See restatement (Second) of Torts § 288B (1965) ("The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.").

[FN49]. See, e.g., Osborne v. McMasters, 41 N.W. 543, 544 (Minn. 1889) ("[T]he violation of the statute constitutes conclusive evidence of negligence or, in other words, negligence per se.")

[FN50]. Id. In determining negligence per se, the court must determine whether the statute applies to the conduct at issue. The Restatement provides the following criteria:
The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
(a) to protect a class of persons which includes the one whose interest is invaded, and
(b) to protect that particular interest which is invaded, and
(c) to protect that interest against the kind of harm which has resulted, and
(d) to protect that interest against the particular hazard from which the harm results.
restatement (Second) of Torts § 286 (1965). While the applicability of a given statute involves some level of interpretation, especially where legislative history is meager or unobtainable, violation of a statute forbidding the sale of drugs would likely meet the four requirements of statutory negligence.
Every state except New Hampshire and Vermont has adopted some version of the Uniform Controlled Substances Act. The Prefatory Note to the 1990 revision states that the purpose of the Act is to impede the illegitimate flow of drugs in order to promote free movement of legitimate, beneficial drugs between states. Legitimate use of controlled substances is essential to public health and safety. Thus, the Uniform Act attempts to provide protection to all people who might need beneficial drugs--a very broad class of citizens indeed. UNIF. CONTROLLED SUBSTANCES ACT General Notes, Prefatory Note (1990), 9 U.L.A. 1-13 (1997).

[FN51]. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99 (N.Y. 1928).

[FN52]. Cf. Hall v. Cornet, 240 P.2d 231, 235 (calling damage "gravamen" of negligence action involving personal injury).

[FN53]. Cf., e.g., Robinson v. Lindsay, 598 P.2d 392, 392 (Wash. 1979) (allowing new trial where 11-year-old girl lost full use of thumb in snowmobile accident). Included within this rubric are cases allowing recovery for negligent infliction of emotional distress, sometimes even absent some physical injury or impact. See, e.g., Dillon v. Legg, 441 P.2d 912, 925 (Cal. 1968) (allowing recovery for traumatic mental distress to persons who contemporaneously perceive physical injury to close relative, even absent physical injury to person bringing action).

[FN54]. See, e.g., Delair v. McAdoo, 188 A. 181, 184 (Pa. 1936) (allowing recovery for property damages sustained in automobile collision with defendant).

[FN55]. See, e.g., Vaughan v. Menlove, 132 Eng. Rep. 490, 490 (C.P. 1837) (allowing recovery where fire destroyed plaintiff's cottages). It should be noted that, absent the provisions of the Drug Dealer Liability Act, an employer of a drug user or a government entity which has expended drug treatment funds might not meet the element of harm. For example, an employer could likely prove it suffered an injury where a drug-using employee defaced its property, but the employer might not be allowed to recover for lost productivity caused by the employee's drug use. Such possible prohibition would follow from courts' longstanding view that pure economic loss is not an actionable harm. See, e.g., Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 309 (1927) (denying recovery of lost profits), cited with approval in Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1022 (5th Cir. 1985) (en banc) (denying recovery for pure economic loss as pragmatic limitation on foreseeability). This view, however, has been subjected to increasingly fervent criticism. See M/V Testbank, 752 F.2d at 1039 (Wisdom, J., dissenting) ("This rule, however, has been expanded now to bar recovery by plaintiffs who would be allowed to recover if judged under conventional principles of foreseeability and proximate cause."); Robert L. Rabin, Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment, 37 STAN. L. REV. 1513, 1514 (1985) ("It should be said at the outset that the reluctance to allow recovery in cases of negligent infliction of economic loss has come to be regarded as an aberration, if not an oddity in many quarters.").

[FN56]. See restatement (Second) of Torts § 430 (1965) ("In order that a negligent actor shall be liable for another's harm, it is necessary not only that the actor's conduct be negligent toward the other, but also that the negligence of the actor be a legal cause of the other's harm."); keeton, supra note 9, § 41, at 263 ("An essential element of the plaintiff's cause of action for negligence ... is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.").

[FN57]. According to the Restatement, the following considerations are important in determining whether the defendant's

conduct constitutes a substantial factor in bringing about the plaintiff's harm:
(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
(b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;
(c) lapse of time.
restatement (Second) of Torts § 433 (1965).

[FN58]. See Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., 179 N.W. 45, 47 (Minn. 1920) (creating "substantial-factor" test).

[FN59]. See Smith v. Eli Lilly & Co., 560 N.E.2d 324, 328 (Ill. 1990) ("A fundamental principle of tort law is that the plaintiff has the burden of proving by a preponderance of the evidence that the defendant caused the complained-of harm or injury; mere conjecture or speculation is insufficient proof."). The exceptions to this rule are the so-called alternative liability cases in which each negligent actor must prove he did not cause the harm, see, e.g., Summers v. Tice, 199 P.2d 1 (Cal. 1948) and the cases involving market share liability, see, e.g., Sindell v. Abbott Lab., 607 P.2d 924 (Cal. 1980). Courts, however, have allowed these exceptions only in limited circumstances. The Drug Dealer Liability Act statutorily expands the market share liability exception to illegal drugs. See infra notes 108-112 (discussing use of market share liability under Drug Dealer Liability Act).

[FN60]. A "deep pocket" is a person or corporation of substantial wealth and resources from which a claim or judgment may be made. BLACK'S LAW DICTIONARY 415 (6th ed. 1990).

[FN61]. A proximate cause is one "which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred." BLACK'S LAW DICTIONARY 1225 (6th ed. 1990). It has been noted that proximate cause "is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established." KEETON, supra note 9, § 42, at 273.

[FN62]. See, e.g., Overseas Tankship (U.K.) Ltd. v. Miller S.S. Co. ("Wagon Mound No. 2") 1 App. Cas. 617, 618 (P.C. 1966) (holding that foreseeable risk of type of harm satisfies requirements of proximate cause).

[FN63]. See, e.g., Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928) ("Negligence, like risk, is thus a term of relation."). Without the judicial limitation of proximate cause, liability for one's acts could be "limitless and unknowable." Atlantic Coast Line Ry. Co. v. Daniels, 70 S.E. 203, 205 (Ga. Ct. App. 1911) ("[F]or a reduction ad absurdum may be promptly established by calling to mind that, if the injured person had never been born, the injury would not have happened."). But see KEETON, supra note 9, § 42, at 293-97 (discussing minority view that proximate cause should be based upon direct consequences rather than foreseeability).

[FN64]. Cf. KEETON, supra note 9, § 42, at 272-73 (noting that cause-in-fact must be shown before inquiry into proximate cause).

[FN65]. Cf. Fagan v. McRae, 169 N.Y.S. 577, 578 (App. Div., 1918) (holding that incorrect prescription was not proximate cause of plaintiff's injuries); El Chico Corp. v. Poole, 732 S.W. 306, 309 (Tex. 1987) (noting that, at common law, injury to third person from sale of alcohol was considered unforeseeable).

[FN66]. Cf. Harris v. Groth, 645 P.2d 1104, 1109 (Wash. Ct. App. 1982) (noting that incorrectly prescribed drug would not have different effect on patient than correctly prescribed drug).

[FN67]. restatement (Second) of Torts § 440 (1965).

[FN68]. 48A C.J.S. Intoxicating Liquors § 428 (1981).

[FN69]. See, e.g., Belding v. Johnson, 12 S.E. 304, 305 (Ga. 1890) (holding that damages were too remote to hold bartender liable where intoxicated patron killed husband and noting that any changes to law should be made by legislature); El Chico Corp., 732 S.W.2d at 309 (noting common-law rule).

[FN70]. A review of state law in 1985 revealed that 14 states had adopted a Dram Shop Act, another 22 states had adopted its presumptions judicially, and 14 states either continued to follow the common-law rule or had not ruled on the issue. Ling v. Jan's Liquors, 703 P.2d 731, 739-42 (Kan. 1985). Most of the states which judicially abrogated the common-law rule did so following the passage of legislation in other states. See generally Richard J. Leighton, Note, Beyond the Dram Shop Act: Imposition of Common-Law Liability on Purveyors of Liquor, 63 IOWA L. REV. 1282, 1282 (1978) (noting judicial abrogation of common-law rule in years following "Dram Shop" legislation). It is, of course, an open question whether courts would have abrogated the common-law rule had not legislatures in numerous other states already questioned its underlying policies. Now that states have enacted the Drug Dealer Liability Act, the same question likely will remain unanswered in the illegal drug context. Interestingly, no correlation appears to exist between states which had previously adopted Dram Shop Acts and those states which have adopted the Drug Dealer Liability Act.

[FN71]. See Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99-100 (N.Y. 1928) (emphasizing proximate cause as issue of duty, thus making it question of law and allowing more judicial control).

[FN72]. "Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm." restatement (Second) of Torts § 463 (1965).

[FN73]. There exist two types of assumption of risk: express assumption of risk and implied assumption of risk. A plaintiff expressly assumes the risk of the defendant's negligence through an express agreement between the parties. Id. § 496B cmt. a. Implied assumption of risk occurs when a plaintiff fully understands the risk of harm and voluntarily manifests his willingness to accept that risk. Id. § 496C.

[FN74]. Regarding assumption of risk, see restatement (Second) of Torts § 496A (1965): "A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm." Even where the defendant has violated a statute, the plaintiff's recovery will be barred if the plaintiff assumed the risk, unless such result would violate a policy of the statute to place the entire responsibility upon the defendant. Id. § 496F. Regarding contributory negligence, the common-law rule was that any negligence on the part of the plaintiff completely barred any recovery. See, e.g., Butterfield v. Forrester, 103 Eng. Rep. 926, 927 (K.B. 1809) (denying, in what is considered the first case regarding contributory negligence, recovery to plaintiff who ran into pole while riding too fast).

[FN75]. Many states have modified the common-law rule of contributory negligence to one of "comparative negligence," where a plaintiff's negligence may only lessen recovery instead of barring it completely. KEETON, supra note 9, § 67, at 469. Some states have also merged the doctrine of assumption of risk into comparative negligence, thus allowing plaintiffs to recover lesser damages in cases where they assumed the risk. See generally John L. Diamond, Assumption of Risk After Comparative Negligence: Integrating Contract Theory into Tort Doctrine, 52 OHIO ST. L.J. 717, 717 (1991) (explaining movement to merge assumption of risk into comparative negligence).

[FN76]. See KEETON, supra note 9, § 68, at 487 ("The standard to be applied is, in theory at least, a subjective one, geared to the particular plaintiff and his situation, rather than that of the reasonable person of ordinary prudence who appears in contributory negligence.").

[FN77]. A February 5, 1998, search of the Westlaw database containing newspapers, magazines, and news services retrieved 500 articles with the phrase "drugs are dangerous."

[FN78]. See, e.g., O.C.G.A. § 16-13-30(a) (1996) (prohibiting possession of drugs not obtained from licensed person); restatement (Second) of Torts § 469A (noting that statutory violation by plaintiff is contributory negligence).

[FN79]. restatement (Second) of Torts § 519 (1977).

[FN80]. Id. § 520 (1977).

[FN81]. See, e.g., Doe v. Johnson, 817 F. Supp. 1382, 1397-99 (W.D. Mich. 1993) (holding, in case where woman sued basketball star Earvin "Magic" Johnson for transmitting AIDS, that sex is not an abnormally dangerous activity).

[FN82]. See generally restatement (Second) of Torts § 520 cmt. j (1977) (explaining locality element).

[FN83]. Gaston v. Hunter, 588 P.2d 326, 341-42 (Ariz. App. 1978).

[FN84]. Maguire v. Pabst Brewing Co., 387 N.W.2d 565 (Iowa 1986).

[FN85]. See restatement (Second) of Torts § 523 (1977) ("The plaintiff's assumption of risk of harm from an abnormally dangerous activity bars his recovery for the harm."); supra notes 73-77 and accompanying text (describing assumption of risk defense). Contributory negligence, however, is not a defense to strict liability. restatement (Second) of Torts § 524 (1977).

[FN86]. Drug users are the only plaintiffs who could base a claim on strict products liability because such claims are limited to the ultimate user or consumer of the product. restatement (Second) of Torts § 402A (1965).

[FN87]. Id.

[FN88]. Id. at cmt. i.

[FN89]. See supra note 77 (noting quantity of information disseminated explaining that "drugs are dangerous"). Cf. Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189, 1192 (E.D. Tenn. 1985) ("Knowledge that cigarette smoking is harmful to health is widespread and can be considered part of the common knowledge of the community.").

[FN90]. Drug Dealer Liability Act, 1995 Ark. Acts No. 896 (codified at Ark. Code Ann. §§ 16-124-101 to -112 (Michie Supp. 1997)).

[FN91]. Drug Dealer Liability Act, 1996 Cal. Legis. Serv. 3792 (West) (codified at Cal. Health & Safety Code §§ 11700 to 11717 (West Supp. 1998)).

[FN92]. Hugh O'Connor Memorial Act, 1997 Fla. Laws ch. 97-80 (codified at Fla. Stat. Ann. § 772.12 (West Supp. 1997)).

[FN93]. Drug Dealer Liability Act, 1997 Ga. Laws 387 (codified at O.C.G.A. § 51-1-46 (Supp. 1998)).

[FN94]. Drug Dealer Liability Act, 1995 Haw. Sess. Laws ch. 203 (codified at Haw. Rev. Stat. Ann. § 663D (Michie Supp. 1997)).

[FN95]. Drug Dealer Liability Act, 1995 Ill. Leg. Serv. 89-293 (West) (codified at 740 ILL. COMP. STAT. ANN. 57/1-25 (West Supp. 1997)).

[FN96]. Drug Dealer Liability Act, 1997 Ind. Acts 2924 (codified at Ind. Code Ann. § 34-1-70 (Michie Supp. 1998) (repealed by 1998 Ind. Acts. 8 (effective July 1, 1998)).

[FN97]. Louisiana Drug Dealer Liability Act, 1997 La. Sess. Law Serv. 719 (West) (codified at La. Rev. Stat. Ann. §§ 9:2800.61-.76 (West Supp. 1998)).

[FN98]. Drug Dealer Liability Act, 1994 Mich. Legis. Serv. 27 (West) (codified at Mich. Comp. Laws Ann. §§ 691.1601-.1619 (West Supp. 1998)).

[FN99]. Drug Dealer Liability Act, 1994 Okla. Sess. Law Serv. ch. 179 (West) (codified at Okla. Stat. Ann. tit. 63, §§ 2-421 to -435 (West 1997)).

[FN100]. Drug Dealer's Liability Act, 1997 Utah Laws 1991 (codified at Utah Code Ann. §§ 58-37e-1 to -14 (Supp. 1998)).

[FN101]. As noted in note 27, supra, the other states which have considered whether to enact the Drug Dealer Liability Act are Alabama, Colorado, Connecticut, Idaho, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Tennessee, and Wisconsin. H.R. 1390, 155th Gen. Ct., 2nd Reg. Sess. (N.H. 1998); S. 859, 112th Gen. Assem., 2nd Reg. Sess. (S.C. 1998); S. 2273, 100th Gen. Assem., 2nd Reg. Sess. (Tenn. 1998); H.R. 2433, 100th Gen. Assem., 2nd Reg. Sess. (Tenn. 1998); H.R. 52, 1997 Reg. Sess. (Ala. 1997); H.R. 1002, 61st Gen. Assem., 1st Reg. Sess. (Colo. 1997); S. 409, 1997 Reg. Sess. (Conn. 1997); S. 1004, 44th Leg., 1st Reg. Sess. (Idaho 1997); S. 16, 1997 Reg. Sess. (Md. 1997); S. 41, 1997 Reg. Sess. (Md. 1997); S. 131, 1997 Reg. Sess. (Mass. 1997); S. 2324, 1997 Reg. Sess. (Miss. 1997); H.R. 598, 89th Gen. Assem., 1st Reg. Sess. (Mo. 1997); H.R. 1566, 89th Gen.

Assem., 1st Reg. Sess. (Mo. 1997); L. 268, 95th Leg., 1st Reg. Sess. (Neb. 1997); A. 1580, 208th Leg. (N.J. 1998); S. 2338, 207th Leg. (N.J. 1997); S. 2971, 220th Ann. Leg. Sess. (N.Y. 1997); A. 6273, 220th Ann. Leg. Sess. (N.Y. 1997); S. 175, 122nd Gen. Assem., 1997-98 Reg. Sess. (Ohio 1997); H.R. 775, 181st Gen. Assem., 1997 Reg. Sess. (Pa. 1997); S. 150, 100th Gen. Assem., 1st Reg. Sess. (Tenn. 1997); S. 1030, 100th Gen. Assem., 1st Reg. Sess. (Tenn. 1997); H.R. 1288, 100th Gen. Assem., 1st Reg. Sess. (Tenn. 1997); A. 135, 1997 Reg. Sess. (Wis. 1997).

[FN102]. Ark. Code Ann. § 16-124-103 (Michie Supp. 1997); Cal. Health & Safety Code § 11704(a) (West Supp. 1998); O.C.G.A. § 51-1- 46(d)(1) (Supp. 1998); Haw. Rev. Stat. § 663D-3(b) (Supp. 1997); 740 Ill. Comp. Stat. Ann. 57/20(a) (West Supp. 1997); Ind. Code Ann. § 34-24-4- 1(a) (Michie 1998); La. Rev. Stat. Ann. § 9:2800.63.B (West Supp. 1998); Okla. Stat. Ann. tit. 63, § 2-423.A (West 1997); Utah Code Ann. § 58-37e- 3(1) (1998). Michigan's statute requires only participation in the drug trade, not "knowing" participation. Mich. Comp. Laws Ann. § 691.1607(1) (West. Supp. 1998). An exception is provided for law enforcement officers in furtherance of their duties. Ark. Code. Ann. § 16-124-103(c)(1); Cal. Health & Safety Code § 11704(b); O.C.G.A. § 51-1-46(i)(3) (Supp. 1998); Haw. Rev. Stat. § 663D-11; 740 Ill. Comp. Stat. Ann. 57/20(b); Ind. Code Ann. § 34-24-4-1(c); La. Rev. Stat. Ann. § 9:2800.71.B; Mich. Comp. Laws Ann. § 691.1613(3); Okla. Stat. Ann. tit. 63, § 2-423.B; Utah Code Ann. § 58-37e-3(2).

[FN103]. Ark. Code. Ann. §§ 16-124-104(a)(1), (3)-(4); Cal. Health & Safety Code §§ 11705(a)(1)-(4); O.C.G.A. § 51-1-46(d)(2) (Supp. 1998); Haw. Rev. Stat. § 663D-3(a); 740 Ill. Comp. Stat. Ann. 57/25(a); Ind. Code Ann. § 34-24-4-2(a); La. Rev. Stat. Ann. § 9:2800.63.A; Mich. Comp. Laws Ann. § 691.1607(2); Okla. Stat. Ann. tit. 63, § 2-424.A; Utah Code Ann. § 58-37e-4(1). As to suits by government entities, California allows only public health agencies to file suit. Other government agencies do not possess a right of action, even if they spend agency money to assist a drug user. Cal. Health & Safety Code § 11705(a)(4). Indiana expands the list by allowing suits by duly registered neighborhood associations. Ind. Code Ann. § 34-24-4-2(6).

[FN104]. Ark. Code Ann. § 16-124-105(a)(2); Cal. Health & Safety Code § 11706(a); Haw. Rev. Stat. § 663D-4; 740 Ill. Comp. Stat. Ann. 57/30; Ind. Code Ann. § 34-24-4-5(b); La. Rev. Stat. Ann. § 9:2800.64.A; Mich. Comp. Laws Ann. § 691.1606; Okla. Stat. Ann. tit. 63, § 2-425.A; Utah Code Ann. § 58-37e-5(1). Georgia, however, does not allow drug users to benefit from the Drug Dealer Liability Act's provisions. O.C.G.A. § 51-1- 46(d)(2). The policy justification proffered by states which do allow drug users to recover is that allowing such recovery provides incentives for users to identify drug dealers and seek treatment for their addiction. See, e.g., Cal. Health & Safety Code § 11701 (stating that one purpose of California Drug Dealer Liability Act is to "establish an incentive for users of illegal drugs to identify and seek payment for their own treatment from ... dealers"). But even in those states which do allow drug dealers to recover, limitations exist on the damages recoverable. See infra note 116 and accompanying text (explaining limitations on damages recoverable to drug users).

[FN105]. Ark. Code Ann. § 16-124-108(a)(1); Cal. Health & Safety Code § 11712(a); O.C.G.A. § 51-1-46(d)(1); Haw. Rev. Stat. § 663D-10(a); 740 Ill. Comp. Stat. Ann. 57/60(a); Ind. Code Ann. § 34-24-4-10(a); La. Rev. Stat. Ann. § 9:2800.70.A; Mich. Comp. Laws Ann. § 691.1607(1); Okla. Stat. Ann. tit. 63, § 2-431.A; Utah Code Ann. § 58-37e-11(1).

[FN106]. Ark. Code Ann. § 16-124-108(b)(1); Cal. Health & Safety Code § 11712(b)(1); O.C.G.A. § 51-1-46(f)(1); Haw. Rev. Stat. § 663D-10(b); 740 Ill. Comp. Stat. Ann. 57/60(b); Ind. Code Ann. § 34-24-4-10(b); La. Rev. Stat. Ann. § 9:2800.70.B(1); Mich. Comp. Laws Ann. § 691.1609(1); Okla. Stat. Ann. tit. 63, § 2-431.B; Utah Code Ann. § 58- 37e-11(2) (1998).

[FN107]. Ark. Code Ann. § 16-124-108(c); Cal. Health & Safety Code § 11712(c); O.C.G.A. § 51-1-46(f)(1); Haw. Rev. Stat. § 663D-10(c); 740 Ill. Comp. Stat. Ann. 57/60(c); Ind. Code Ann. § 34-24-4-10(d); La. Rev. Stat. Ann. § 9:2800.70.C; Okla. Stat. Ann. tit. 63, § 2-431.C; Utah Code Ann. § 58-37e-11(3).

[FN108]. This requirement does not apply to suits by drug users. In states where such suits are allowed, the drug user can sue only his actual dealer or others within the distribution chain of drugs he received. See supra note 104 and accompanying text (setting forth requirements for drug users to recover under Act).

[FN109]. Ark. Code Ann. § 16-124-104(b)(2)(A); Cal. Health & Safety Code § 11705(b)(2)(A); O.C.G.A. § 51-1-46(e)(1)(A); Haw. Rev. Stat. § 663D-3(b)(2)(A); 740 Ill. Comp. Stat. Ann. 57/25(b)(2)(A); Ind. Code Ann. § 34-24-4-3(2)(A); La. Rev. Stat. Ann. § 9:2800.63.B(2)(a); Mich. Comp. Laws Ann. § 691.1608(1)(a); Okla. Stat. Ann. tit. 63, § 2-424.B.2.a; Utah Code Ann. § 58-37e-4(2)(b)(i).

[FN110]. Ark. Code Ann. §§ 16-124-102(5)-(8), -109; Okla. Stat. Ann. tit. 63, §§ 2-422.5-8, 2-427; Utah Code Ann. §§ 58-37e-2(8)-(9), - 7. Slight variations on this model exist in other states. Cal. Health & Safety Code § 11705(b)(2)(A) (stating that market area is county only); O.C.G.A. §§ 51-1-46(c)(3)-(6), -(e)(2) (using grams as units of measurement); Haw. Rev. Stat. § 663D-2, -6 (using slightly different drug quantities and using tax map areas and islands to define market area); 740 Ill. Comp. Stat. Ann. 57/40 (using state representative districts); La. Rev. Stat. Ann. §§ 9:2800.62(4)-(7), .63.B(2)(a) (using slightly different drug quantities and limiting market area to parish); Mich. Comp. Laws Ann. §§ 691.1603(3)-(6), . 1608(2) (using grams as units of measurement).

[FN111]. Ark. Code Ann. § 16-124-104(b)(2)(B); Cal. Health & Safety Code § 11705(b)(2)(B); O.C.G.A. § 51-1-46(e)(1); Haw. Rev. Stat. § 663D- 3(b)(2)(B); 740 Ill. Comp. Stat. Ann. 57/25(b)(2)(B); Ind. Code Ann. § 34-24-4-3(2)(B); La. Rev. Stat. Ann. § 9:2800.63.B(2)(b); Mich. Comp. Laws Ann. § 691.1608(1)(a); Okla. Stat. Ann. tit. 63, § 2-424.B.2.b; Utah Code Ann. § 58-37e-4(2)(b)(ii).

[FN112]. Ark. Code Ann. § 16-124-104(b)(2)(C); Cal. Health & Safety Code § 11705(b)(2)(C); O.C.G.A. § 51-1-46 (e)(1)(A); Haw. Rev. Stat. 663D-3(b)(2)(C); 740 Ill. Comp. Stat. Ann. 57/25(b)(2)(C); Ind. Code Ann. § 34-24-4-3(2)(C); La. Rev. Stat. Ann. § 9:2800.63.B(2)(c); Mich. Comp. Laws Ann. § 691.1608(1)(a); Okla. Stat. Ann. tit. 63, § 424.B.2.c; Utah Code Ann. § 58-37e-4(2)(b)(iii).

[FN113]. Cal. Health & Safety Code § 11710 (allowing defense of comparative fault against drug users and also those providing money to user); Haw. Rev. Stat. § 663D-8 (allowing defense against drug users only); 740 Ill. Comp. Stat. Ann. 57/50 (allowing defense against drug users only); Ind. Code Ann. § 34-24-4-8 (allowing defense against drug users only); La. Rev Stat. Ann. § 9:2800.68 (allowing defense against drug users and those providing money to user); Okla. Stat. Ann. tit. 63, § 2-429 (allowing defense against drug users only); Utah Code Ann. § 58-37e-9 (allowing defense against drug users only). Arkansas, Georgia, and Michigan do not explicitly provide defendants any defenses.

[FN114]. Cal. Health & Safety Code § 11710; Haw. Rev. Stat. § 663D-8; 740 Ill. Comp. Stat. Ann. 57/50(b); Ind. Code Ann. § 34-24-4-8(b)(2); La. Rev Stat. Ann. § 9:2800.68.B; Okla. Stat. Ann. tit. 63, § 2-429.B; Utah Code Ann. § 58-37e-9.

[FN115]. Ark. Code Ann. § 16-124-104(c); Cal. Health & Safety Code § 11705(d); O.C.G.A. § 51-1-46(g)(1); Haw. Rev. Stat. § 663D-3(c); 740 Ill. Comp. Stat. Ann. 57/25(c); Ind. Code Ann. § 34-24-4-4; La. Rev. Stat. Ann. § 9:2800.63.D; Mich. Comp. Laws Ann. § 691.1610(1); Okla. Stat. Ann. tit. 63, § 2-424.C; Utah Code Ann. § 58-37e-4(3).

[FN116]. Ark. Code Ann. § 16-124-105(c); Cal. Health & Safety Code § 11706(c); Haw. Rev. Stat. § 663D-4(c); 740 Ill. Comp. Stat. Ann. 57/30(c); Ind. Code Ann. § 34-24-4-5(d); La. Rev. Stat. Ann. § 9:2800.64.B; Mich. Comp. Stat. Ann. 691.1610(1); Okla. Stat. Ann. tit. 63, § 2-425.C; Utah Code Ann. § 58-37e-5(3). In addition, Hawaii requires that a percentage of the recovery be turned over to the state's general fund. Haw. Rev. Stat. § 663D-4(d) (Supp. 1997).

[FN117]. Ark. Code Ann. § 16-124-110(a); Cal. Health & Safety Code § 11713; 740 Ill. Comp. Stat. Ann. 57/65(a); Ind. Code Ann. § 34-24-4- 11(a); La. Rev. Stat. Ann. § 9:2800.72; Mich. Comp. Stat. Ann. § 691.1611(1); Okla. Stat. Ann. tit. 63, § 2-432.A; Utah Code Ann. § 58- 37e-12(1). Georgia and Hawaii do not explicitly sanction pre-judgment attachment.

[FN118]. Ark. Code Ann. § 16-124-110(b); 740 Ill. Comp. Stat. Ann. 57/65(b); Ind. Code Ann. § 34-24-4-1(b); Okla. Stat. Ann. tit. 63, § 2- 432.B; Utah Code Ann. § 58-37e-12(2). One commentator has noted that such a provision is critical in Arkansas, where the homestead exemption is unlimited in value. Bryan W. Riley, Survey of Legislation: 1995 Arkansas General Assembly, 18 U. Ark. Little Rock L.J. 365, 373 n.88 (1996).

[FN119]. Ark. Code Ann. § 16-124-110(c); 740 Ill. Comp. Stat. Ann. 57/65(c); Ind. Code Ann. § 34-24-4-11(c); La. Rev. Stat. Ann. § 9:2800.72; Mich. Comp. Laws Ann. § 691-1611(3); Okla. Stat. Ann. tit. 63, § 2-432.C; Utah Code Ann. § 58-37e-12(3).

[FN120]. Ark. Code Ann. § 16-124-103(c)(2); Cal. Health & Safety Code § 11707(a); O.C.G.A. § 51-1-46(g)(2); Ind. Code Ann. § 34-24-4-6; La. Rev. Stat. Ann. § 9:2800.65; Mich. Comp. Laws Ann. § 691.1610(2); Okla. Stat. Ann. tit 63, § 2-426; Utah Code Ann. § 58-37e-6. Hawaii's and Illinois's statutes do not forbid payment of damages or settlement by third- party insurers or indemnifiers.

[FN121]. Ark. Code Ann. § 16-124-107; Cal. Health & Safety Code § 11711; Haw. Rev. Stat. § 663D-9; 740 Ill. Comp. Stat.

Ann. 57/55; Ind. Code Ann. § 34-24-4-9; La. Rev. Stat. Ann. § 9:2800.69; Okla. Stat. Ann. tit. 63, § 4-230; Utah Code Ann. § 58-37e-10. While Georgia and Michigan do not specifically allow contribution, Georgia does allow joinder of third- party defendants in the original action. O.C.G.A. § 51-1-46(j)(2).

[FN122]. In California and Louisiana, damages are apportioned in four levels based upon the defendant dealer's sales, as proven by clear and convincing evidence by the plaintiff. These levels may be rebutted by the defendant. Cal Health & Safety Code § 11708; La. Rev. Stat. § 9:2800.66.

[FN123]. Ficano v. Clemens, No. 95-512918 (Mich. Cir. Ct. Wayne Co. 1995).

[FN124]. Arnold Ceballos, New State Laws Let People Sue Drug Dealers, WALL ST. J., July 16, 1996, at B1.

[FN125]. Id.

[FN126]. U.S. Const. amend. XIV, § 1.

[FN127]. See, e.g., ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED JOURNEY, 1863-1877, at 257 ("Clearly, [by enacting the Fourteenth Amendment,] Republicans proposed to abrogate the Black Codes and eliminate any doubts as to the constitutionality of the Civil Rights Act [of 1866].").

[FN128]. U.S. Const. amend. XIII.

[FN129]. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247-48 (1833) (Marshall, C.J.).

[FN130]. The same requirements exist under the Due Process Clause of the Fifth Amendment as exist under the Due Process Clause of the Fourteenth Amendment. See 2 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 14.6, at 12 (1986). This Note, however, refers only to the Due Process Clause of the Fourteenth Amendment because the Drug Dealer Liability Act has been enacted only by states thus far and not by the federal government.

[FN131]. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 7.1, at 419-20 (1997) (explaining procedural versus substantive due process).

[FN132]. Id.

[FN133]. See id. § 7.1, at 419 (explaining types of procedural issues courts inquire into when analyzing due process).

[FN134]. See ROTUNDA, supra note 130, § 14.6, at 12 (noting that due process review involves either "review of the general fairness of a procedure" or "review of the fairness of a decision in an individual case").

[FN135]. See, e.g., Donald C. Dilworth, States Impose Liability on Drug Dealers, TRIAL, Mar. 1996, at 82, 83 (noting possible challenge based upon double jeopardy); Mark Hansen, Just Say "See You in Court", A.B.A. J., Dec. 1996, at 30 (noting possible constitutional challenges to Drug Dealer Liability Act based upon double jeopardy and due process).

[FN136]. The amendment's language clearly limits its application to activities by state governments alone, and the Supreme Court has interpreted the amendment consistently with its plain meaning. U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."); The Civil Rights Cases, 109 U.S. 3, 11 (1883) ("[It] is State action of a particular character that is prohibited [by the first section of the Fourteenth Amendment]. Individual invasion of individual rights is not the subject-matter of the amendment.").

[FN137]. See, e.g., Shelley v. Kraemer, 334 U.S. 1, 14 (1948) (holding that judicial enforcement of private individual's discriminatory practices would violate Fourteenth Amendment).

[FN138]. See, e.g., Reitman v. Mulkey, 387 U.S. 369, 369 (1967) (finding state action where voters amended state constitution to prohibit government interference with private individuals' right to discriminate in sale or lease of real property).

[FN139]. E.g., Lombard v. Louisiana, 373 U.S. 267, 267 (1963); Peterson v. Greenville, 373 U.S. 244, 244 (1963).

[FN140]. 457 U.S. 922 (1982).

[FN141]. Id. at 926-27.

[FN142]. Id. at 939.

[FN143]. Id.

[FN144]. Id. at 941 ("[T]he procedural scheme created by the statute obviously is the product of state action.").

[FN145]. Id.

[FN146]. See supra notes 90-100 (explaining that Drug Dealer Liability Act has been enacted in 11 states).

[FN147]. See supra note 117 and accompanying text (explaining prejudgment attachment provisions of Drug Dealer Liability Act).

[FN148]. No. 95-512918 (Mich. Cir. Ct. Wayne Co. 1995); see supra notes 123- 125 and accompanying text (explaining disposition of Ficano v. Clemens).

[FN149]. See supra note 123 and accompanying text (explaining that government and private individuals brought joint action in only Drug Dealer Liability Act case filed to date).

[FN150]. 457 U.S. 922, 927 n.6 (1982).

[FN151]. U.S. Const. amend. XIV, § 1.

[FN152]. See, e.g., Board of Regents v. Roth, 408 U.S. 564, 578 (1972) (holding that one-year teaching position did not constitute property).

[FN153]. See, e.g., ROTUNDA, supra note 130, § 17.8, at 249-268 (explaining procedures typically required where party claims deprivation of life, liberty, or property).

[FN154]. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

[FN155]. 408 U.S. 564 (1972).

[FN156]. Id. at 576.

[FN157]. CHEMERINSKY, supra note 131, § 7.3.2, at 431.

[FN158]. Id. § 7.4.3, at 452-53.

[FN159]. See, e.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 306 (1950) (discussing notice as due process requirement).

[FN160]. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 254 (1970) (requiring hearing before termination of welfare benefits).

[FN161]. See, e.g., Gibson v. Berryhill, 411 U.S. 564, 579 (1973) (requiring impartial decisionmaker to satisfy due process).

[FN162]. See Mullaney v. Wilbur, 421 U.S. 684, 684 (1975) (requiring that each element in criminal case be proven beyond a reasonable doubt).

[FN163]. See, e.g., Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 28 (1976) ("That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law ... it is only essential that there shall be some

rational connection between the fact proved and the ultimate fact presumed ...." (quoting Mobile J. & K.C.R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910))); Dale A. Nance, Civility and the Burden of Proof, 17 HARV. J.L. & PUB. POL'Y 647, 673 n.81 (1994) (discussing minimal scrutiny standard).

[FN164]. Cf., Usery, 428 U.S. at 28 ("[T]he inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.").

[FN165]. ROTUNDA, supra note 130, § 17.8, at 266.

[FN166]. Pierce v. Albanese, 355 U.S. 15, 15 (1957) (dismissing appeal that Connecticut Dram Shop Act is unconstitutional).

[FN167]. restatement (Second) of Judgments § 85 (1982). See generally David L. Shapiro, Should a Guilty Plea Have Preclusive Effect?, 70 iowa L.R. 27, 27 (1984) (discussing issue preclusion of guilty pleas in subsequent actions).

[FN168]. Cf. Haring v. Prosise, 462 U.S. 306, 313-14 (1983) (failing to question issue preclusion in its entirety, but only in its application in § 1983 cases).

[FN169]. See supra notes 108-112 and accompanying text (explaining three requirements).

[FN170]. Sindell v. Abbot Labs., 607 P.2d 924 (Cal.), cert. denied, 449 U.S. 912 (1980); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y.), cert. denied, 493 U.S. 944 (1989); Collins v. Eli Lilly & Co., 342 N.W.2d 37 (Wis.), cert. denied, 469 U.S. 826 (1984).

[FN171]. Sindell, 607 P.2d at 937.

[FN172]. Cf. infra Part IV.B. (explaining that failure to provide market approximation of damages will likely render Drug Dealer Liability Act partially unconstitutional).

[FN173]. See Nance, supra note 163, at 673 n.81 ("Most commentators thus consider the only remaining due process restriction to be the rational relation test applied in minimal scrutiny, substantive due process cases, and reject even this as unsound to the extent it is construed as requiring a probabilistic basis for the presumption, rather than merely a plausible policy preference.").

[FN174]. See, e.g., supra note 121 and accompanying text (noting contribution provisions).

[FN175]. For an opposing view, see Wendy Stasell, "Shopping" for Defendants: Market Liability Under the Illinois Drug Dealer Liability Act, 27 LOY. U. CHI. L.J. 1023, 1047-52 (1996) (concluding that Illinois' Drug Dealer Liability Act violates due process).

[FN176]. U.S. Const. amend. V.

[FN177]. See, e.g., Palko v. Connecticut, 302 U.S. 319, 319 (1937) (holding that double jeopardy prohibition does not apply to states).

[FN178]. The prohibition against double jeopardy was incorporated into the Fourteenth Amendment's protections against state action in Benton v. Maryland, 395 U.S. 784 (1969).

[FN179]. See, e.g., North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (stating that double jeopardy prohibition protects against second prosecutions for same offense after acquittal or conviction and against multiple punishments for same offense).

[FN180]. 490 U.S. 435 (1989).

[FN181]. Id. at 448.

[FN182]. Id. at 437-38.

[FN183]. Id. at 438.

[FN184]. Id. at 438-39.

[FN185]. Id. at 448-49.

[FN186]. Id. at 449.

[FN187]. 511 U.S. 767 (1994).

[FN188]. Id. at 784.

[FN189]. Christian D. Stewart, Note, Double Jeopardy--State Drug Tax Statutes Go up in Smoke: Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994), 74 NEB. L. REV. 221, 237 (1995).

[FN190]. Id.

[FN191]. Id. at 238.

[FN192]. Kurth Ranch, 511 U.S. at 779-80.

[FN193]. Id. at 781.

[FN194]. Id.

[FN195]. Id. at 783.

[FN196]. Id. at 784.

[FN197]. See supra note 115 and accompanying text (noting allowance of punitive damages).

[FN198]. See, e.g., 740 ILL. COMP. STAT. ANN. 57/5 (West Supp. 1997) (stating deterrent purpose).

[FN199]. It should be noted that the Drug Dealer Liability Act includes a severability provision, so that constitutional invalidation of part of the Act will not necessarily invalidate the entire Act. See, e.g., Cal. Health & Safety Code § 11717 (West Supp. 1997).

[FN200]. United States v. Halper, 490 U.S. 435, 450 (1989).

[FN201]. 118 S. Ct. 488 (1997).

[FN202]. Id. at 493 n.4 (noting, inter alia, challenges to sex offender notification, SEC debarments, and eviction from federally subsidized housing for possession of drug paraphernalia).

[FN203]. Id.

[FN204]. Id.

[FN205]. Id.

[FN206]. See Nancy Armour, Plan Would Allow Drug Dealers to Be Sued: Attorney General Candidate Stresses Accountability, THE COURIER-JOURNAL (Louisville, Kentucky), Aug. 20, 1996, at B1 (noting support of Drug Dealer Liability Act by Indiana Attorney General candidate Jeff Modisett).

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