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Drug Dealer Liability: A Potential Avenue of Recovery for Victims of Illegal Drug Use

James N. Fincher

I. INTRODUCTION

“[D]rug use is on the rise in America today.”¹ As the use of drugs escalates, the number of people harmed by its effects increases as well.² The threat of criminal penalties has not convinced many sellers to give up their unlawful business.³ Law enforcement does not have the requisite resources to find and prosecute all illegal drug activity.⁴

The legislature intensified the war on drugs with the Drug Dealer Liability Act by allowing victims to recover damages directly from the dealers, in the hopes of deterring drug sales.⁵ Under current California law, a drug dealer is not responsible to third parties for damages caused by the dealer’s drug sales.⁶ The Drug Dealer Liability Act is a reaction to this deficiency in California tort law.⁷ With this act, the legislature created a statutory cause of action against drug dealers for monetary, noneconomic losses that users of controlled substances inflict upon their victims.⁸

1. Frank E. Lockwood, *Drug Foes Brainstorm War Plans During Treasure Valley Summit*, IDAHO STATESMAN, Apr. 4, 1996, at 1B (quoting U.S. Attorney Monte Stiles as saying “drug use is on the rise in America”); see Gary Heinlein, *The Drug Scourge*, INDIANAPOLIS STAR, Aug. 25, 1996, at D02 (revealing that a “National Household Survey on Drug Abuse . . . by the Department of Health and Human Services found that drug use among 12- to 17-year-olds doubled from 1992 to 1995” and that the recent trend is disturbing because the country appears to have lost all that was gained in drug use reduction that occurred during the Reagan and Bush administrations).

2. See *Bills Signed*, CITY NEWS SERVICE OF L.A., Sept. 24, 1996, available in LEXIS, News Library, Curmws File (copy on file with the *Pacific Law Journal*) (stating that in the neonatal unit at Glendale Adventist Medical Center, a drug-addicted baby is born every ten days and the baby’s care costs approximately \$200,000).

3. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 1754, at 2 (June 4, 1996).

4. *Id.*

5. *Id.*; see CAL. HEALTH & SAFETY CODE §§ 11700-11717 (enacted by Chapter 867) (allowing victims of drug abuse to recover damages from the dealers of drugs).

6. See Michael Bronfin, “*Dram shop*” *Liability: Holding Drug Dealers Civilly Liable for Injuries to Third Parties and Underage Purchasers*, 1994 U. CHI. LEGAL F. 345, 346 (explaining that common law does not allow third parties to recover damages from a drug dealer); see also CAL. CIV. CODE § 1714 (West Supp. 1997) (requiring proximate cause to affix liability).

7. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1754, at 1-2 (June 17, 1996) (explaining that existing law does not create a cause of action, but the legislature has created one by statute).

8. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 1754, at 2 (June 11, 1996).

The Uniform Controlled Substance Act makes it unlawful to sell or distribute specified controlled substances.⁹ Despite the fact that drugs are illegal, there are no provisions within California's Health and Safety Code or Penal Code that address the victims of drug abuse.¹⁰ Current California law holds every person civilly liable for injuries that are proximately caused by that person's negligence or willful acts.¹¹ The law prior to the enactment of this statute left only drug users liable for damages, and they typically lacked the economic means to provide for adequate recovery, leaving the innocent victim to bear the cost of the injuries.¹²

The model legislation for the Drug Dealer Liability Act is the product of Daniel Bent, a former U.S. Attorney from Hawaii.¹³ Mr. Bent, who studied the sociology of drug use as well as negligence law and various market share theories, drafted the statute after working with several other U.S. Attorneys on the prevention of drug use.¹⁴ In 1992, the American Legislative Exchange Council adopted Mr. Bent's proposal as one of its model laws.¹⁵

II. THE CHANGE IN CALIFORNIA LAW

At common law, a drug dealer would not be held liable for damages suffered by the drug user.¹⁶ The drug dealer would also not be liable to third parties at common law.¹⁷ Statutory law regarding the relationship between an alcohol server and a

9. CAL. HEALTH & SAFETY CODE § 11000 (West Supp. 1997); see SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 1754, at 1 (June 11, 1996) (asserting that the Uniform Controlled Substance Act makes the sale of the listed drugs illegal).

10. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 1754, at 2 (June 4, 1996).

11. CAL. CIV. CODE § 1714 (West Supp. 1997).

12. Bronfin, *supra* note 6, at 352; see *id.* (stating that victims would more likely be able to recover under a dealer liability act).

13. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1754, at 2 (Aug. 8, 1996); see *id.* (explaining the origins of Chapter 867 in the Drug Dealer Liability Act authored in 1992 by a former U.S. Attorney from Hawaii); see also *Illinois Permits Suits Against Drug Dealers*, NAT'L L.J., Aug. 28, 1995, at A8 [hereinafter *Suits Against Drug Dealers*] (discussing the origins of the Illinois statute and its similarities to the Michigan law).

14. *Suits Against Drug Dealers*, *supra* note 13, at A8.

15. *Id.*

16. See Bronfin, *supra* note 6, at 350-51 (stating that a user would not be able to recover at common law because a court would probably not view the sale of the drugs as the proximate cause of the injury, but rather the consumption of the drugs as the proximate cause of the injury, and that the dealer/user relationship is similar to the relationship between servers of alcohol, "dram shops," and their patrons, where the server of alcohol was not held liable for injuries to the patron); cf. *King v. Henkie*, 80 Ala. 505, 510 (1876) (holding that the death of the deceased was not caused by the wrongful acts of the defendants in selling the whiskey, but by the plaintiff's act in drinking the whiskey after it was sold to him); *Brigance v. Velvet Dove Restaurant, Inc.*, 725 P.2d 300, 302 (Okla. 1986) (holding that the death was not caused by the sale of alcohol); *El Chico Corp. v. Poole*, 732 S.W.2d 306, 309 (Tex. 1987) (stating that tavern owners were not liable for injuries suffered by their patrons, but that the consumption of alcohol was the sole proximate cause of the injuries, and not the sale or service of the alcohol).

17. See Bronfin, *supra* note 6, at 351 (explaining that under common law "dram shop" liability, third parties injured by intoxicated patrons cannot recover from the tavern owner so it is unlikely that a third party would be able to collect from a drug dealer because the court would likely see the injury as too unpredictable for the drug dealer to foresee).

patron, which is similar to the relationship between a drug server or dealer and a drug user, has generally abrogated the liability imposed on bar or social hosts for furnishing alcoholic beverages to their guests.¹⁸

California case law, in *Sindell v. Abbott Laboratories*,¹⁹ holds that, under certain circumstances, a producer of a fungible product may be held civilly liable for damages caused by that product sold by the producer on the basis of its portion of the market share of that product.²⁰ In *Sindell*, the California Supreme Court held that manufacturers of the drug diethylstilbesterol (DES) could be held liable on a proportionate basis, based on their market share, without proving that the defendant's product was the direct cause of the plaintiff's injuries.²¹ Under this rule, a pharmaceutical manufacturer who sold thirty percent of the DES in that manufacturer's territory could be held liable for thirty percent of the plaintiff's damages based on that drug maker's market share.²² This rule has been narrowly applied, and has not been used against a manufacturer of an illegal controlled substance.

Chapter 867 enacts the Drug Dealer Liability Act which creates three distinct causes of action.²³ First, it allows a claim by the individual drug user against the person who directly furnished the controlled substance to the plaintiff, provided that the plaintiff personally discloses all of the information known regarding the sources of illegal controlled substances to narcotics enforcement authorities.²⁴ Second,

18. See *id.* (comparing the liability of drug dealers to servers of alcohol); see also CAL. BUS. & PROF. CODE § 25602(b) (West 1985) (stating that servers of alcoholic beverages are not liable for injuries suffered as a result of its consumption); *id.* § 25602(c) (West 1985) (explaining that the consumption of alcohol is the proximate cause of the injury, not the service of alcohol).

19. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

20. See *Sindell*, 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144 (explaining the rule as applied in this case in which the product that was produced, DES, was identical to all other DES and due to no fault of the plaintiff, the court is unable to determine who may have produced the product); see also U.C.C. § 1-201(17) (1991) (defining "fungible goods" as goods of which any unit is by nature or usage of trade the equivalent of any other unit).

21. *Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

22. See SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 1754, at 2 (June 11, 1996) (giving an example of how *Sindell's* ruling is applied).

23. See CAL. HEALTH & SAFETY CODE § 11705(b) (enacted by Chapter 867) (creating a cause of action against the seller or the market participant); see *id.* § 11706 (enacted by Chapter 867) (creating a cause of action for the individual user); see also SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1754, at 2 (June 17, 1996) (explaining the causes of action allowed).

24. See CAL. HEALTH & SAFETY CODE § 11705(a)(1) (enacted by Chapter 867) (creating a cause of action for "[a] parent, legal guardian, child, spouse, or sibling of the individual controlled substance user"); *id.* § 11705(a)(2) (enacted by Chapter 867) (creating a cause of action for a person exposed to an illegal controlled substance in utero); *id.* § 11706(a)(2) (enacted by Chapter 867) (requiring that the individual bringing the cause of action has not used an illegal controlled substance within 30 days prior to the filing of the action); *id.* § 11706(a)(3) (enacted by Chapter 867) (requiring the individual to remain free from "use of an illegal controlled substance throughout the pendency of the action"); see also *id.* § 11703(l) (enacted by Chapter 867) (defining "specified controlled substance" as cocaine, phencyclidine, heroin, methamphetamine, or any other illegal controlled substance that the manufacture, cultivation, importation into this state, transportation, possession for sale, sale, furnishing, administering, or giving away is a violation of California Health and Safety Code §§ 11351, 11352, 11358, 11359, 11360, 11378.5, 11379.5, or 11383).

Chapter 867 permits a suit by a person or entity who has suffered any economic or noneconomic damages against the party who directly furnished the illegal controlled substance to the individual causing the injury.²⁵ Third, it allows an action by a person or an entity suffering an injury against a person who knowingly participated in the marketing of illegal controlled substance if all of the following three criteria are met.²⁶ The first requirement is that the defendant's place of participation in the illegal drug market must be in the same city, county, or unincorporated area of the county as the drug user's place of illegal activity.²⁷ The second condition is that the defendant must have been convicted of an offense for the same type of specified controlled substance used by the person causing the injury.²⁸ The final requirement is that the defendant must have knowingly participated in the marketing of illegal drugs at any time during the period the individual user illegally used the controlled substance.²⁹

The market liability under Chapter 867 is much broader than *Sindell*, where the liability was a true market share, while under Chapter 867 it is placed according to four brackets of liability which may have no true correlation to one's market share.³⁰ A defendant's participation in the marketing of illegal controlled substances will be rebuttably presumed responsible for the following amounts: twenty-five percent of the damages for a level one offense,³¹ fifty percent of the damages for a level two

25. *Id.* § 11705(a)(3) (enacted by Chapter 867); *see id.* (creating a cause of action for employers of individual users of a controlled substance); *id.* § 11705(a)(4) (enacted by Chapter 867) (establishing a cause of action for a medical facility, insurer, or any entity that funds a drug treatment program or employee assistance program for the individual user or that otherwise expends money on behalf of the individual user of an illegal controlled substance); *id.* (excluding all public agencies other than a public agency medical center from the entities that have a cause of action under this division); *id.* § 11705(a)(5) (enacted by Chapter 867) (establishing a cause of action for a person injured as a result of the willful, reckless, or negligent actions of an illegal controlled substance user).

26. *Id.* § 11705(b)(2) (enacted by Chapter 867); *see id.* (setting forth "knowingly participated in the marketing of illegal controlled substance" as grounds for a conviction for transporting, importing into the state, selling, possessing with intent to sell, furnishing, administering, giving away, or offering to transport or import into this state a specified controlled substance or a quantity of marijuana specified in California Health and Safety Code § 11703(e)-(h)).

27. *Id.* § 11705(b)(2)(A) (enacted by Chapter 867).

28. *Id.* § 11705(b)(2)(B) (enacted by Chapter 867).

29. *Id.* § 11705(b)(2)(C) (enacted by Chapter 867).

30. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 1754, at 5 (June 4, 1996); *see id.* (discussing the differences between *Sindell*'s "market share liability" and the "market liability" under Chapter 867).

31. CAL. HEALTH & SAFETY CODE § 11703(c) (enacted by Chapter 867) (defining a "level one offense" as "the possession for sale of less than four ounces or the sale or furnishing of less than one ounce of a specified illegal controlled substance," or the cultivation of at least 25, but not more than 50 marijuana plants, or the furnishing of more than 28 ½ grams of marijuana, or the possession for sale of up to four pounds of marijuana).

offense,³² seventy-five percent of the damages for a level three offense,³³ one hundred percent of the damages for a level four offense.³⁴

Under Chapter 867, a defendant who has a criminal conviction pursuant to state laws prohibiting the illegal sale of controlled substances or the Comprehensive Drug and Abuse Prevention and Control Act of 1970³⁵ is estopped from denying participation in the illegal market for controlled substances.³⁶ Such a conviction is also prima facie evidence of the person's participation in the marketing of a drug where the conviction was for the same type of illegal substance as that used by the individual user.³⁷ A drug dealer subject to liability has a right to contribution from other people subject to liability under this division because of their drug activity.³⁸ A person entitled to bring suit under Chapter 867 may recover economic damages, noneconomic damages, exemplary damages, reasonable attorney fees, and the cost of the suit.³⁹ An individual user is entitled to recover economic damages, reasonable attorney fees, and the cost of the suit, although the user is subject to the principles of

32. *See id.* § 11703(d) (enacted by Chapter 867) (defining a "level two offense" as "the possession for sale of four ounces or more but less than eight ounces of . . . a specified illegal controlled substance;" "the sale or furnishing of one ounce or more but less than two ounces of a specified illegal controlled substance;" "the cultivation of at least 50 but less than 75 [marijuana] plants[;] the possession for sale of four pounds or more but less than eight pounds . . . of marijuana;" or "the sale or furnishing of more than one pound but less than five pound[s] of marijuana").

33. *See id.* § 11703(d) (enacted by Chapter 867) (defining a "level three offense" as "the possession for sale of eight ounces or more but less than 16 ounces of . . . a specified illegal controlled substance," "the sale or furnishing of two ounces or more but less than four ounces of . . . a specified illegal controlled substance, . . . the cultivation of at least 75 but less than 100 [marijuana] plants, the possession for sale of eight pounds or more but less than 16 pounds . . . of marijuana," or "the sale or furnishing of more than five pounds but less than ten pounds, of marijuana").

34. *Id.* § 11708 (enacted by Chapter 967); *see id.* § 11703(f) (enacted by Chapter 867) (defining a "level four offense" as "the possession for sale of 16 ounces or more . . . of a specified illegal controlled substance," "the sale or furnishing of four ounces or more of a specified illegal controlled substance," "the cultivation of 100 [marijuana] plants or more," or "the possession for sale of 16 pounds of [marijuana], or the sale of more than 10 pounds of [marijuana]").

35. Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified at various sections of 21 U.S.C.) (enacting the Comprehensive Drug and Abuse Prevention and Control Act of 1970).

36. CAL. HEALTH & SAFETY CODE § 11712(b)(1) (enacted by Chapter 867).

37. *Id.* § 11712(c) (enacted by Chapter 867); *see id.* (stating that the absence of a criminal conviction does not bar an action against that person in an action pursuant to California Health and Safety Code § 11705(1)(b) or § 11706).

38. *Id.* § 11711 (enacted by Chapter 867); *see id.* (stating that contribution may be enforced in the original action or by a separate action brought for that purpose).

39. *Id.* § 11705(d)(1) (enacted by Chapter 867); *see id.* (defining "economic damages" as "including, but not limited to, the cost of treatment and rehabilitation, medical expenses, loss of economic or educational potential, loss of productivity, absenteeism, support expenses, accidents or injury, and any other pecuniary loss proximately caused by the use of an illegal controlled substance"); *id.* § 11705(d)(2) (enacted by Chapter 867) (defining "noneconomic damages" as "including, but not limited to, physical and emotional pain, suffering, physical impairment, emotional distress, medical anguish, disfigurement, loss of enjoyment, loss of companionship, services, and consortium; and other nonpecuniary losses proximately caused by an individual's use of an illegal controlled substance"); *id.* § 11705(d)(5) (enacted by Chapter 867) (defining "cost of the suit" as "including, but not limited to, reasonable expenses for expert testimony").

comparative fault.⁴⁰ A plaintiff may request an ex parte prejudgment order from the court against all assets of a defendant sufficient to satisfy any potential award.⁴¹ An action must be brought within one year of the defendant furnishing the specified illegal controlled substance.⁴²

III. PURPOSE OF THE NEW LAW

The primary purpose of this new legislation is to provide a civil remedy to those who are injured, economically or physically, as a result of the use of a controlled substance and to enable them to recover damages from those individuals in the community who have participated in the marketing of illegal drugs.⁴³ An additional goal of this legislation is to shift the cost of the damage caused by the illegal controlled substance market to those in the community who have profited from that drug market.⁴⁴ Furthermore, the legislature attempted to create a deterrent to those who may consider entering the illegal drug market by establishing the potential of a substantial monetary loss.⁴⁵ Finally, this act is also designed to create an incentive for the users of controlled substances to identify their dealers who supplied the drugs and to go after them for their own treatment.⁴⁶

IV. SIMILAR LAWS IN OTHER STATES

Michigan enacted a similar law in 1994, also called the Drug Dealer Liability Act.⁴⁷ The first judgment handed down under the statute was an \$8 million default

40. *Id.* § 11706(c) (enacted by Chapter 867) (setting forth a drug user's entitled recoveries); *id.* § 11710 (enacted by Chapter 867) (stating that recovery is not barred by comparative fault, but diminishes the award of compensatory damages proportionally according to the percent of fault attributed to the plaintiff, and noting that the burden of proof is on the defendant, which shall be shown by clear and convincing evidence).

41. *Id.* § 11713(a) (enacted by Chapter 867); *see id.* § 11713(b) (enacted by Chapter 867) (stating that Chapter 5 of Title 6.5 of Part 2 of the California Code of Civil Procedure shall apply to any requests under this subdivision).

42. *See id.* § 11714(a) (enacted by Chapter 867) (stating that "[a] cause of action accrues . . . when a person who may recover has reason to know of the harm from use of an illegal controlled substance that is the basis for the cause of action and has reason to know that the use of an illegal controlled substance [was] the cause of the harm"); *id.* § 11714(b) (enacted by Chapter 867) (stating that for a defendant, the statute of limitations does not expire until one year after the potential defendant is convicted of a criminal offense involving an illegal controlled substance).

43. *Id.* § 11701 (enacted by Chapter 867); SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1754, at 6 (June 17, 1996).

44. CAL. HEALTH & SAFETY CODE § 11701 (enacted by Chapter 867).

45. *Id.*

46. *Id.*

47. MICH. COMP. LAWS ANN. §§ 691.1601-.1619 (West Supp. 1994); *see id.* § 691.1608 (West Supp. 1994) (stating that a plaintiff does not have to prove that the dealers being sued caused the drug related injuries, but rather only needs to have a showing that the dealer merely marketed illegal drugs in the community).

judgment entered in Wayne County by Judge Michael Talbot.⁴⁸ The plaintiff in this case was the personal representative of the estate of Felicia Brown, a deceased minor exposed to cocaine in utero who suffered from intrauterine growth retardation and remained underdeveloped for the duration of her life.⁴⁹ Felicia Brown died after suffering a massive brain hemorrhage from a blow to the head allegedly caused by her mother, a recovering cocaine user.⁵⁰ There were four defendants in the case; two are currently in prison, and the other two defendants failed to appear resulting in default judgments against them.⁵¹ The Wayne County Sheriffs Department maintains that the two defendants who failed to appear, have sufficient assets to pay the judgment.⁵²

Several other states also enacted similar drug dealer liability acts in 1995, including Arkansas, Hawaii, Illinois, and Oklahoma.⁵³ Bills modeled on this act have been introduced in Florida, New Mexico, New York, Pennsylvania, and Utah.⁵⁴

V. POTENTIAL CHALLENGES TO THE NEW LAW

Opponents of this bill, relying upon *United States v. Halper*,⁵⁵ argue that the civil forfeiture aspect of Chapter 867 is a violation of the Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution because a drug dealer can be punished criminally and civilly for essentially the same drug transaction.⁵⁶ The Supreme Court, in *Halper*, held that the government's imposition of a civil sanction and a criminal fine in separate proceedings is a violation of the Double Jeopardy Clause.⁵⁷ Chapter

48. Traci Gentilozzi, *First Judgment Under Michigan's Drug Dealer Liability Act Is over \$8 Million*, MICH. LAW. WKLY., Aug. 7, 1995, at 6.

49. *Id.*

50. *Id.*; *see id.* (reporting that Felicia Brown's mother is in the Wayne County jail awaiting trial on murder charges).

51. Gary Heinlein, *Drug Sellers Deal Blow to Seizures*, DET. NEWS, Sept. 18, 1995, available in LEXIS, News Library, Curnws File (copy on file with the *Pacific Law Journal*).

52. *Id.*; *see id.* (asserting that, for example, one of the defendants owns two or three houses and a business); *see also id.* (noting that the two defendants have appealed the judgment).

53. ARK. CODE ANN. § 16-24-103 (Michie 1995); HAW. REV. STAT. § 663D (Supp. 1995); 740 ILL. COMP. STAT. ANN. 57/1-85 (West Supp. 1996); OKLA. STAT. ANN. tit. 63, § 2-421 (West Supp. 1995).

54. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1754, at 2 (Aug. 8, 1996).

55. 490 U.S. 435 (1989).

56. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 1754, at 10 (June 4, 1996); *see id.* (stating that opponents argue that *Halper* bars recovery, by the government, of both a criminal and a civil penalty in separate proceedings); *see also* Anthony M. Sileo, Note, *Fifth and Fourteenth Amendments—Double Jeopardy Clause—Imposition of Montana Drug Penalty Tax Constitutes Double Jeopardy—Montana Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994), 5 SETON HALL CONST. L.J. 1231, 1232 (1995) (stating that it is well settled that the Double Jeopardy Clause is a constitutional protection against a criminal defendant being subjected to successive prosecutions by the government for the same offense after an acquittal or conviction).

57. *See Halper*, 490 U.S. at 448-49 (reasoning that the statutorily authorized recovery bore no rational relationship to the government's actual loss which made the imposition of the full statutory amount a second punishment).

867, on the other hand, does not give any government agencies standing to sue, except for a public agency medical facility, so the Double Jeopardy Clause does not apply to the majority of the statute.⁵⁸ The damages that are payable to government medical agencies are only for the medical treatment of drug victims.⁵⁹

In a recent United States Supreme Court decision, *United States v. Ursery*,⁶⁰ the Court held that in rem civil forfeitures are neither punishment nor are they criminal within the contemplation of the Double Jeopardy Clause.⁶¹ In *Ursery*, the Supreme Court applied the test from *United States v. One Assortment of 89 Firearms*,⁶² to determine whether the civil penalties qualify as punishment.⁶³ In applying the same test to Chapter 867, it is likely that a court will find that the California Legislature intended the forfeiture to be civil as is clearly stated in the law's purpose, and that the law is not so punitive in nature as to negate the legislature's intent.⁶⁴

It is also likely that Chapter 867 will be attacked on due process grounds.⁶⁵ The Due Process Clause of the Fourteenth Amendment mandates that state governments create a fair adjudicatory process before interfering with a person's "life, liberty, or property."⁶⁶ The Due Process Clause prevents state legislatures from enacting laws that are procedurally unfair.⁶⁷ The clause restricts a state legislature's ability to make a statutory presumption.⁶⁸ The Court requires a rational relationship between the fact proved and the ultimate fact presumed.⁶⁹ In *Whalen v. Roe*,⁷⁰ the Supreme Court ruled that state legislation could be struck down if it was arbitrary, capricious, or unreasonable.⁷¹ The Drug Dealer Liability Act allows liability to be placed upon a known drug dealer, without actual proof that the person was the legal or proximate cause of the harm and without proof that the dealer was the dealer that provided the

58. See CAL. HEALTH & SAFETY CODE § 11705(a)(1)-(5) (enacted by Chapter 867) (explaining who may bring actions).

59. *Id.* § 11705(a)(4) (enacted by Chapter 867).

60. 116 S. Ct. 2135 (1996).

61. *Ursery*, 116 S.Ct. at 2149.

62. 465 U.S. 354 (1984).

63. See *Ursery*, 116 S. Ct. at 2142 (defining the two-part test as: (1) Whether Congress intends for the forfeiture to be criminal or civil, and (2) if the scheme is so punitive in purpose or effect as to negate Congress's intent).

64. See *supra* notes 43-46 and accompanying text (stating the legislature's purpose for enacting Chapter 867).

65. See generally *Drug Dealers' Victims Can Get Damages Under New Law*, MICH. LAW. WKLY., Oct. 24, 1994, at 1 (predicting that the model statute will be challenged on due process grounds).

66. Wendy Stasell, Comment, "Shopping" for Defendants: Market Liability Under Illinois Drug Dealer Liability Act, 27 LOY. U. CHI. L.J. 1023, 1037 (Summer 1996); see U.S. CONST. amend. XIV, § 1 ("... nor shall any State deprive any person of life, liberty, or property, without due process of law").

67. Stasell, *supra* note 66, at 1037.

68. *Id.*; see *id.* (explaining "statutory presumption" as using proof of one fact as evidence of the existence of an ultimate fact sought to be proven at trial).

69. *Ursery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 29 (1975).

70. 429 U.S. 589 (1977).

71. *Whalen*, 429 U.S. at 597.

drugs to the user who caused the harm.⁷² The United States Supreme Court has not ruled on the constitutionality of market share liability; so it is unclear if it will be upheld.⁷³

It is also likely that the courts will find a rational relationship between dealing drugs and holding a drug dealer responsible for injuries from an illegal drug. The relationship is rationally related because the sale of drugs does cause harm and people who sell drugs contribute to the potential danger to the public. Because of the illegal nature of the drug market and the fact that the sellers attempt to hide their activity to avoid being caught, it would be difficult for a plaintiff to prove that a particular defendant caused the plaintiff's harm. The California Supreme Court in *Sindell* found the plaintiff in a similar situation, where she would have difficulty proving causation due to no fault of her own, and still placed liability upon the defendants.⁷⁴

It is probable that the Court will take issue at the percentages of liability imposed by Chapter 867. The percentages of fault in Chapter 867 are statutorily created and in no way relate to a defendant's actual market share percentages.⁷⁵ For example, a person convicted of selling ten pounds of marijuana would be held 100% liable under Chapter 867 regardless of whether the ten pounds was an actual representation of 100% of the market share in that county. In a rural county, a sale of ten pounds could be a large percentage of the market share, but in a large county, such as Los Angeles County, this would be a small percentage of the total marijuana sold. The four levels of liability under Chapter 867 appear to be completely arbitrary. The California Supreme Court in *Sindell* allowed liability to be placed because each manufacturer's liability would be approximately equivalent to the damages caused by the DES it manufactured; thus it found no due process violation.⁷⁶ One could argue that the four levels are necessary because of the difficulty in computing market shares for illegal sales; however, counties do have records of total drug sales arrests and seizures that could be used to get a rough idea of market share.

One could argue the levels of liability under Chapter 867 are necessary for administrative convenience. The courts will have a bright line rule to follow without the need to find individual levels of fault on a case by case basis. There are valid points on both sides of the debate over market share liability under Chapter 867. Therefore the court could rule either way on the market share liability, but it is possible that it will be found to violate the Due Process Clause.

72. CAL. HEALTH & SAFETY CODE § 11704 (enacted by Chapter 867).

73. Stasell, *supra* note 66, at 1031.

74. See *supra* notes 20-22 and accompanying text (discussing *Sindell*).

75. See *supra* notes 31-34 and accompanying text (identifying the percentages of fault).

76. *Sindell v. Abbott Lab.*, 26 Cal. 3d 588, 611, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144 (1980).

VI. CONCLUSION

California law prior to Chapter 867 failed to hold drug dealers fully responsible for the damage they caused through their illegal drug transactions.⁷⁷ The enactment of the Drug Dealer Liability Act marks a significant change in the tort law of California by holding the drug dealer responsible whether the dealer legally caused the harm or not.⁷⁸ The new statute will give relief to victims of drug abuse;⁷⁹ however, it is unclear if it will have a substantial deterrent effect on the drug problem of today.

APPENDIX

Code Sections Affected

Health and Safety Code §§ 11700, 11701, 11702, 11703, 11704, 11705, 11706, 11707, 11708, 11709, 11710, 11711, 11712, 11713, 11714, 11715, 11716, 11717 (new).

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77. See Bronfin, *supra* note 6, at 365 (proposing a statute to solve this unaddressed area in the law).

78. See SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1754, at 1 (June 17, 1996) (discussing that the liability is fixed based upon a market share and not based on proof of actual causation).

79. See *Bills Signed*, *supra* note 2 (asserting that people harmed may now sue the person who caused the harm).