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DRUG DEALER LIABILITY

Senate Bill 229 (Substitute H-7)
First Analysis (2-1-94)

Sponsor: Senator Jack Welborn
Senate Committee: Family Law, Criminal
Law, and Corrections
House Committee: Judiciary

THE APPARENT PROBLEM:

Drug trafficking is the scourge of many communities, creating public health problems, increasing violent crime, and decreasing property values in drug-plagued neighborhoods. One way to combat drug trafficking, say many, would be to make drug dealers civilly liable for the harm they cause. Under the "market liability" concept, a drug dealer may be held responsible for drug-related damages in the dealer's market area; parties who suffer harm as a result of drug dealing in an area can seek damages from anyone marketing drugs in that area, not just a particular dealer. Direct links from a specific dealer to a specific user to specific harm caused by that user would not have to be proven. The idea is that market liability can be used to make drug dealers compensate the community for the harm they cause, eliminate the profits of drug-dealing, and deter small-time would-be dealers from entering the market. Many have urged that Michigan's efforts to curtail drug trafficking include a law to provide for market liability of drug dealers.

THE CONTENT OF THE BILL:

The bill would create the "Drug Dealer Liability Act," providing for civil actions for damages against people who participate in illegally marketing controlled substances (participation could take the form of manufacturing, delivering, possessing with the intent to manufacture or deliver, or attempting or conspiring to commit any of these offenses). The act's purpose would be to compensate people harmed by illegal marketing of controlled substances, assess the cost of illegal marketing of controlled substances against those who profit from that market, and provide an incentive for individual abusers to identify their drug sources and seek payment for substance abuse treatment. Individual abusers and people (including business, corporate, and governmental entities) harmed by individual

abusers could bring actions under various circumstances. The bill would take effect April 1, 1994, and would apply to actions arising on and after that date. Further details follow.

Direct liability: non-abusers. A person injured by an individual abuser could sue someone who manufactured or sold the controlled substance actually used by the abuser. If the plaintiff proved that the dealer participated in marketing the drug actually used by the abuser, the dealer would be presumed to have acted willfully and wantonly.

Direct liability: abusers. An individual abuser who made full disclosures to police and had stopped abusing a drug for at least six months could seek and obtain damages from someone who participated in marketing the drug actually used by the abuser.

Market liability. A person injured by an individual abuser could sue a dealer for damages based on the dealer's participation in a drug's market area. Actions under this portion of the bill would be limited to situations involving cocaine, opiates, amphetamines, and marihuana. Participation in illegal marketing would have to be proven by clear and convincing evidence. The dealer would be presumed to have acted willfully and wantonly if the plaintiff was one of the following: a parent, guardian, child, spouse, or sibling of the abuser; a child whose mother was an abuser while the child was in utero; the abuser's employer; a medical facility, insurer, governmental entity, or other legal entity that funded a drug treatment or other assistance program or that otherwise spent money or provided unreimbursed services to the abuser.

A defendant's participation in a market area could be proven by proving both of the following: that he or she was participating in the market at the time

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the abuser obtained or used the drug, and that the abuser obtained or used the drug, or caused the injury, within the defendant's market area.

drugs that the defendant was linked with, the larger the market area would be. Four sizes of market area would be established, as shown on the following chart.

A "market area" would depend on the level of participation established. The larger the quantity of

| Level of Participation | Market Area |
|--|---|
| Level 4: Less than 50 grams of mixture; or between 1 and 4 lbs. of marijuana; or between 25 and 50 plants of marijuana | Each county in which the person participated in illegal marketing |
| Level 3: Between 50 and 225 grams; between 4 and 8 lbs. of marijuana; between 50 and 75 plants of marijuana | Each county for level 4 plus all counties with borders contiguous to those counties |
| Level 2: Between 225 and 650 grams; between 8 and 16 lbs of marijuana; between 75 and 100 plants of marijuana | Each county for level 3 plus all contiguous counties |
| Level 1: Over 650 grams; 16 or more lbs. of marijuana; 100 or more plants | The state |

Presumptions. A defendant's criminal conviction for drug manufacture or delivery would create a conclusive presumption that the defendant had participated in illegal marketing. If a defendant was proven or presumed to have participated in illegal marketing, he or she would be presumed to have participated during the two years before and the two years after the date of participation or conviction, unless the defendant proved otherwise by clear and convincing evidence. In addition to each county in which a defendant was proven to have participated in marketing, the defendant would be presumed to have participated in each county in which he or she resided, attended school, was employed, or did business during the period of participation. An individual abuser would similarly be presumed to have obtained or used a substance in each county in which he or she resided, attended school, or was employed during the period of the individual's abuse, unless the defendant proved otherwise by clear and convincing evidence.

Recoverable damages. A person other than an abuser could recover economic, noneconomic (pain and suffering), and exemplary damages, plus reasonable attorney fees and costs, including reasonable expenses for expert testimony. An abuser could recover economic damages and reasonable attorney fees and costs, including reasonable expenses for expert testimony. A third party would be prohibited from paying damages

awarded under the bill, or from providing a defense under a contract of insurance or indemnification.

Attachment of assets. After commencing an action under the bill, a plaintiff could seek to have the defendant's assets attached by following procedures prescribed by the bill. The defendant would be entitled to a hearing, and attachment could be lifted if the defendant posted bond or showed that the assets would be available for a potential award. Generally, assets could not be exempted from the bill, and a judgment under the bill could not be discharged by bankruptcy. Police drug forfeiture actions would take precedence over attachments under the bill.

Cause of action. A cause of action generally would accrue when a plaintiff had reason to know of the harm and drug use that was the basis of the action. The statute of limitations would be tolled (suspended) during the time that a plaintiff abuser was incapacitated by drug use.

Prosecutors, police. A prosecuting attorney could represent the state or a political subdivision in an action brought under the bill. At the request of a governmental agency involved in a criminal investigation or prosecution, an action brought under the bill would be stayed until the completion of the investigation or prosecution. An action could not be brought against a police officer or agency for

drug market participation that was part of an official investigation.

HOUSE COMMITTEE ACTION:

The House Judiciary Committee adopted a substitute that restructured the bill and omitted a series of legislative findings that were articulated in the Senate-passed version.

FISCAL IMPLICATIONS:

There is no fiscal information at present. (1-31-94)

ARGUMENTS:

For:

By introducing the market liability concept to drug enforcement, the bill would give society another weapon in the war against illegal drugs. If drug traffickers had to face broad civil liability as well as criminal prosecution, they would find their profits cut and would be less likely to stay in business. Reduced profit margins also would discourage some from entering the illegal drug trade in the first place. The bill would do more than make drug dealing less attractive; perhaps most importantly, it would enable people, businesses, and agencies harmed by drug use to recover their losses from drug dealers. Even though drug forfeiture law actions would take precedence over recoveries under the bill, plaintiffs under the bill should be able to recover damages in many situations where assets remain after forfeiture; plaintiff efforts would be aided by the bill's authorization to attach assets before judgment.

Against:

An individual should not be held liable for something that he or she did not cause. To hold one drug dealer responsible for harm that was actually caused by another dealer may be attractive to those frustrated by their inability to get certain dealers, but it is fundamentally unfair.

Against:

The bill is unlikely to be effective. Many dealers, at least the ones that society can catch, have little in the way of assets, and certainly little left after governmental forfeiture actions have been completed. Moreover, the bill assumes that entry into the drug market is a rational decision made

after a thorough consideration of relative risks and benefits, and that by increasing the risks and reducing the benefits, would-be dealers would be deterred from entering the market. However, the bill would not change various basic elements of the drug market: the prospect of quick cash coupled with low probability of apprehension; the lack of viable employment alternatives for many who enter the drug trade, and the fact that the drug culture and imprisonment have become a familiar part of life for many of the poor of our society.

Response:

Whether the bill would fulfill the rosiest hopes of its proponents is to a degree beside the point. The bill would at least provide the option for and the possibility of civil recovery of damages in various situations.

Against:

The bill offers no definition of what constitutes a marihuana plant. Would a "plant" be any seedling? Something that had matured and flowered? Something that weighed a certain amount by dry weight? Although the bill concerns civil liability and not the more serious matter of criminal sanctions, it should nonetheless be clear in what it is meant to address.

POSITIONS:

The Department of State Police supports the bill. (1-16-94)

The Prosecuting Attorneys Association of Michigan supports the bill. (1-31-94)

The American Civil Liberties Union of Michigan opposes the bill. (1-25-94)

The Michigan Council on Crime and Delinquency opposes the bill. (1-26-94)