

ACT 203

S.B. NO. 84

A Bill for an Act Relating to Drug Dealers.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Findings and purpose. The legislature finds that:

- (1) Every community in the country is impacted by the marketing and distribution of illegal drugs. A vast amount of state and local resources are expended in coping with the financial, physical, and emotional toll that results from the existence of the illegal drug market. Families, employers, insurers, and society in general bear the substantial costs of coping with the marketing of illegal drugs. Drug babies and parents, particularly those of adolescent illegal drug users, suffer significant noneconomic injury as well.
- (2) Although the criminal justice system is an important weapon against the illegal drug market, the civil justice system can and must also be used. The civil justice system can provide an avenue of compensation for those who have suffered harm as a result of the marketing and distribution of illegal drugs. The persons who have joined the illegal drug market should bear the cost of the harm caused by that market in the community.
- (3) The threat of liability under this Act serves as an additional deterrent to a recognizable segment of the illegal drug network. A person who has nondrug-related assets, who markets illegal drugs at the workplace, who encourages friends to become users, among others, is likely to decide that the added cost of entering the market is not worth the benefit. This is particularly true for a first-time casual dealer who has not yet made substantial profits. This Act provides a mechanism for the cost of the injury caused by illegal drug use to be borne by those who benefit from illegal drug dealing.
- (4) This Act imposes liability against all participants in the illegal drug market, including small dealers, particularly those in the workplace,

who are not usually the focus of criminal investigations. The small dealers increase the number of users and are the people who become large dealers. These small dealers are most likely to be deterred by the threat of liability.

- (5) A parent of an adolescent illegal drug user often expends considerable financial resources, typically in the tens of thousands of dollars, for the child's drug treatment. Local and state governments provide drug treatment and related medical services made necessary by the distribution of illegal drugs. The treatment of drug babies is a considerable cost to local and state governments. Insurers pay large sums for medical treatment relating to drug addiction and use. Employers suffer losses as a result of illegal drug use by employees due to lost productivity, employee drug-related workplace accidents, employer contributions to medical plans, and the need to establish and maintain employee assistance programs. Large employers, insurers, and local and state governments have existing legal staffs that can bring civil suits against those involved in the illegal drug market, in appropriate cases, if a clear legal mechanism for liability and recovery is established.
- (6) Drug babies, who are clearly the most innocent and vulnerable of those affected by illegal drug use, are often the most physically and mentally damaged due to the existence of an illegal drug market in a community. For many of these babies, the only possible hope is extensive medical and psychological treatment, physical therapy, and special education. All of these potential remedies are expensive. These babies, through their legal guardians and through court appointed guardians ad litem, should be able to recover from those in the community who have entered and participated in the marketing of the types of illegal drugs that have caused their injuries.
- (7) In theory, civil actions for damages for distribution of illegal drugs can be brought under existing law. They are not. Several barriers account for this. Under existing tort law, only those dealers in the actual chain of distribution to a particular user could be sued. Drug babies, parents of adolescent illegal drug users, and insurers are not likely to be able to identify the chain of distribution to a particular user. Furthermore, drug treatment experts largely agree that users are unlikely to identify and bring suit against their own dealers, even after they have recovered, given the present requirements for a civil action. Recovered users are similarly unlikely to bring suit against others in the chain of distribution, even if they are known to the user. A user is unlikely to know other dealers in the chain of distribution. Unlike the chain of distribution for legal products, in which records identifying the parties to each transaction in the chain are made and shared among the parties, the distribution of illegal drugs is clandestine. Its participants expend considerable effort to keep the chain of distribution secret.
- (8) Those involved in the illegal drug market in a community are necessarily interrelated and interdependent, even if their identity is unknown to one another. New dealers obtain the benefit of the existing illegal drug distribution system to make illegal drugs available to them. In addition, the existing market aids a new entrant by the prior development of people as users. Many experts on the illegal drug market agreed that each participant ultimately is likely to be indirectly related to each other. That is, beginning with any one dealer, given the theoretical ability to identify every person known by the dealer to be involved in illegal drug trafficking, and in turn each of such others known to them,

and so on, the illegal drug market in a community would ultimately be fully revealed.

- (9) Market liability has been created with respect to legitimate products by judicial decision in some states. It provides for civil recovery by plaintiffs who are unable to identify the particular manufacturer of the product that is claimed to have caused them harm, allowing recovery from all manufacturers of the product who participated in that particular market. The market liability theory has been shown to be destructive of market initiative and product development when applied to legitimate markets. Because of this potential for undermining markets, this Act expressly adopts a legislatively crafted form of liability for those who intentionally join the illegal drug market. The liability established by this Act grows out of but is distinct from existing judicially crafted market liability.
- (10) The prospect of a future suit for the costs of drug treatment may drive a wedge between prospective dealers and their customers by encouraging users to turn on their dealers. Therefore, liability for those costs, even to the user, is imposed under this Act as long as the user identifies and brings suit against the user's own dealers.
- (11) Allowing dealers who face a civil judgment for their illegal drug marketing to bring suit against their own sources for contribution may also drive a wedge into the relationships among some participants in the illegal drug distribution network.
- (12) While not all persons who have suffered losses as a result of the marketing of illegal drugs will pursue an action for damages, at least some individuals, guardians of drug babies, government agencies that provide treatment, insurance companies, and employers will find such an action worthwhile. These persons deserve the opportunity to recover their losses. Some new entrants to retain illegal drug dealing are likely to be deterred even if only a few of these suits are actually brought.

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

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER
DRUG DEALER LIABILITY**

§ -1 **Title.** This Act may be cited as the Drug Dealer Liability Act.

§ -2 **Definitions.** As used in this chapter:

“Illegal drug” means “dangerous drugs” or a “harmful drug” as defined in section 712-1240.

“Illegal drug market” means the support system of illegal drug related operations, from production to retail sales, through which an illegal drug reaches the user.

“Illegal drug market target community” is the area described under section -6.

“Individual drug user” means the individual whose illegal drug use is the basis of an action brought under this chapter.

“Level one offense” means the illegal possession of one-fourth ounce or more, but less than four ounces, or the illegal distribution of less than one ounce of an illegal drug.

“Level two offense” means the illegal possession of four ounces or more, but less than eight ounces, or the illegal distribution of one ounce or more, but less than two ounces, of an illegal drug.

“Level three offense” means the illegal possession of eight ounces or more, but less than sixteen ounces, or the illegal distribution of two ounces or more, but less than four ounces, of an illegal drug.

“Level four offense” means the illegal possession of sixteen ounces or more or the illegal distribution of four ounces or more of an illegal drug.

“Participate in the illegal drug market” means to illegally: distribute, possess with an intent to distribute, or commit an act intended to facilitate the marketing or distribution of an illegal drug, or conspire to commit any of the foregoing acts. “Participate in the illegal drug market” does not include the purchase or receipt of an illegal drug for personal use only and does not include a distribution of an illegal drug unless the distribution is for value.

“Period of illegal drug use” means, in relation to the individual drug user, the entire time of the individual’s illegal use of an illegal drug. In cases where the testimony of the individual drug user is unavailable, the period of illegal drug use is presumed to commence two years before the earliest known use by the individual drug user unless the defendant proves otherwise by clear and convincing evidence.

“Person” means the same as in section 1-19.

“Place of illegal drug activity” means, in relation to the individual drug user, the place in which the individual possesses or uses an illegal drug or in which the individual resides, attends school, or is employed during the period of the individual’s illegal drug use.

“Place of participation” means, in relation to a defendant in an action brought under this chapter, the place at which the person participates in the illegal drug market or at which the person resides, attends school, or is employed during the period of the person’s participation in the illegal drug market.

§ -3 Recovery of damages. (a) One or more of the following persons may bring an action to recover for damages caused by an individual’s use of an illegal drug:

- (1) A parent, legal guardian, child, spouse, or sibling of the individual drug user;
- (2) An individual who was exposed to an illegal drug in utero;
- (3) An employer of the individual drug user;
- (4) A medical facility, insurer, governmental entity, employer, or other entity that funds a drug treatment program or employee assistance program for the individual drug user or that otherwise expended money on behalf of the individual drug user; or
- (5) A person injured as a result of the intentional, knowing, reckless, or negligent actions of an individual drug user.

(b) A person entitled to bring an action under this section may seek damages from one or more of the following:

- (1) A person who knowingly distributed, or knowingly participated in the chain of distribution of, the illegal drug for value that was actually used by the individual drug user.
- (2) A person who knowingly participated in the illegal drug market but only if:
 - (A) The place of illegal drug activity by the individual drug user is within the illegal drug market target community of the defendant;
 - (B) The defendant's participation in the illegal drug market was involved with the same type of illegal drug used by the individual drug user; and
 - (C) The defendant participated in the illegal drug market at any time during the individual drug user's period of illegal drug use.

(c) A person entitled to bring an action under this section may recover all of the following damages:

- (1) Economic damages, 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 illegal drug use;
- (2) Noneconomic damages, including, but not limited to, physical and emotional pain, suffering, physical impairment, emotional distress, mental 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 drug;
- (3) Exemplary damages;
- (4) Reasonable attorney's fees; and
- (5) Costs of suit, including, but no limited to, reasonable expenses for expert testimony.

§ -4 Limited recovery of damages. (a) An individual drug user may not bring an action for damages caused by the use of an illegal drug, except as otherwise provided in this section. An individual drug user may bring an action for damages caused by that individual's use of an illegal drug only if all of the following conditions are met:

- (1) The individual has not used an illegal drug within the six months before filing the action; and
- (2) The individual continues to remain free of the use of an illegal drug throughout the pendency of the action.

(b) A person entitled to bring an action under this section may seek damages only from a person who distributed, or is in the chain of distribution of, the illegal drug for value that was actually used by the individual drug user.

(c) A person entitled to bring an action under this section may recover only the following damages:

- (1) Economic damages, including, but not limited to, the cost of treatment, rehabilitation, and medical expenses, loss of economic or educational potential, loss of productivity, absenteeism, accidents or injury, and any other pecuniary loss proximately caused by the person's illegal drug use;
- (2) Reasonable attorney's fees; and
- (3) Costs of suit, including, but not limited to, reasonable expenses for expert testimony.

(d) Twenty-five per cent of any actual recovery of damages by the plaintiff under this section, whether by settlement, execution on a judgment, or otherwise, shall be turned over to the State for deposit into the general fund.

§ -5 **Third party cases.** Notwithstanding any other law to the contrary, no person shall be liable under this chapter under civil principles of vicarious liability.

§ -6 **Illegal drug market target community.** A person whose participation in the illegal drug market constitutes the following level offense shall be considered to have the following illegal drug market target community:

- (1) For a level one offense, the area identified by the tax map section in which the defendant's place of participation is situated;
- (2) For a level two offense, the area identified by the tax map zone in which the defendant's place of participation is situated;
- (3) For a level three offense, the county, provided that in the case of Maui and Kauai counties the target community shall be any island in the respective county;
- (4) For a level four offense, the entire State.

§ -7 **Joinder of parties.** (a) Two or more persons may join in one action under this chapter as plaintiffs if their respective actions have at least one place of illegal drug activity in common and if any portion of the period of illegal drug use overlaps with the period of illegal drug use for every other plaintiff.

(b) Two or more persons may be joined in one action under this chapter as defendants if those persons are liable to at least one plaintiff.

(c) A plaintiff need not be interested in obtaining and a defendant need not be interested in defending against all the relief demanded. Judgment may be given for one or more plaintiffs according to their respective rights to relief and against one or more defendants according to their respective liabilities.

§ -8 **Comparative responsibility.** (a) An action by an individual drug user shall be governed by the principles of comparative responsibility. Comparative responsibility attributed to the plaintiff does not bar recovery but diminishes the award of compensatory damages proportionally, according to the measure of responsibility attributed to the plaintiff.

(b) The burden of proving the comparative responsibility of the plaintiff is on the defendant, which shall be shown by clear and convincing evidence.

(c) Comparative responsibility shall not be attributed to a plaintiff who is not an individual drug user.

§ -9 **Contribution among and recovery from multiple defendants.** Except as otherwise provided in this chapter, part II of chapter 663 shall apply to a cause of action established by this chapter.

§ -10 **Standard of proof; effect of criminal drug conviction.** (a) Proof of participation in the illegal drug market in an action brought under this chapter shall be shown by clear and convincing evidence. Except as otherwise provided in this chapter, other elements of the cause of action shall be shown by a preponderance of the evidence.

(b) A person against whom recovery is sought who has a final criminal conviction pursuant to section 712-1241, 1242, 1244, or 1245 or the Comprehensive Drug Abuse Prevention and Control Act of 1970, Public Law 91-513, 84 Stat. 1236 (21 U.S.C. §801 et seq.), arising out of an act or acts within the meaning of the term "participate in the illegal drug market" is estopped from denying participation in

the illegal drug market. Such a conviction creates a rebuttable presumption that the person participated in the illegal drug market during the two years preceding the date of an act giving rise to a conviction.

(c) The absence of a criminal drug conviction of a person against whom recovery is sought does not bar an action against that person under this chapter.

§ -11 **Defense.** It is a defense to any action brought pursuant to this chapter that the person who possessed, distributed, or facilitated the marketing or distribution of a dangerous or harmful drug did so under authority of law as a practitioner, as an ultimate user of the drug pursuant to a lawful prescription, or as a person otherwise authorized by law.

A law enforcement officer or agency, the State, or a person acting at the direction of a law enforcement officer or agency or the State is not liable for participating in the illegal drug market if the participation is in furtherance of an official investigation.

§ -12 **Statute of limitations.** (a) A claim under this chapter may not be brought against a person more than four years after an act of participation in the illegal drug market by that person.

(b) The limitation period provided for in this chapter is tolled during any time there is a criminal drug offense investigation being actively conducted against the defendant by a governmental agency or there is a criminal drug offense charge, information or indictment pending against the defendant.

§ -13 **Stay of action.** On motion by a governmental agency involved in a drug investigation or prosecution, an action brought under this chapter shall be stayed until the completion of the criminal investigation or prosecution that gave rise to the motion for a stay of the action.

§ -14 **Effect on existing laws.** This chapter is not intended to alter the law regarding intra-family tort immunity.’’

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 4. If any provision of this Act or the application of any provision to any person or circumstance is held invalid, the remainder of this Act and the application of such provision to any other person or circumstance shall not be affected by that invalidation.

SECTION 5. This Act shall take effect upon its approval and shall be repealed on June 30, 2003.

(Approved June 19, 1995.)