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## PRODUCTS LIABILITY Illegal Acts Doctrine

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**I**N PRODUCTS LIABILITY cases in most states, a plaintiff's conduct that contributes to his or her harm does not bar his or her claim, but instead may be considered by the jury in weighing the comparative fault of the parties. But should a case even have to go to a jury when the very harm that the plaintiff is suing for resulted from the plaintiff's own criminal misconduct?

Increasingly, courts are saying no. For example, the Mississippi Supreme Court recently affirmed a trial court's grant of summary judgment to the manufacturer of OxyContin on strict liability, negligence, fraud and other claims that were based on the plaintiff's own illegal abuse of the drug. *Price v. Purdue Pharma Co.*, 2006 WL 241083 (Miss. Feb. 2, 2006). The court held that it "will not lend its aid to a party whose cause of action directly results from an immoral or illegal act committed by that party." Id. at \*5.

OxyContin is a controlled substance: a Schedule II narcotic pain medication that is illegal to acquire by fraud or dishonesty. The plaintiff, having been diagnosed with sickle cell anemia, undoubtedly had severe pain. And he had violated criminal statutes by obtaining multiple prescriptions from different doctors concurrently. He even had signed various forms stating that he understood the danger of dependency on drugs like OxyContin. Id. at \*2.

Nevertheless, the plaintiff sued various manufacturers, doctors and pharmacies, claiming that the drug was addictive and had caused him personal injury.

### Venerable 'illegal acts' doctrine is still in use

The trial court relied on an old equitable doctrine, the "illegal acts" doctrine, to

grant summary judgment on the personal injury claims. That doctrine, attributed to Lord Mansfield in 1775, is "ex dolo malo non oritur actio," which means that the court will not aid one who founds his action on an immoral or illegal act. Id. at \*3.

The Mississippi court was not the first court to rely on the doctrine to dismiss products liability claims against OxyContin. A federal court had granted summary judgment on eight plaintiffs' claims against the drug's manufacturer because the plaintiffs "must inevitably rely on their illegal actions to establish their claims." *Foister v. Purdue Pharma L.P.*, 295 F. Supp. 2d 693, 705 (E.D. Ky. 2003).

Although the illegal acts doctrine is old, it is still commonly applied in contract and fraud claims. See, e.g., *Brandaid Marketing Corp. v. Biss*, 2005 WL 2904968 (S.D.N.Y. Aug. 31, 2005). And it recently was applied to unjust enrichment claims. See *Goodwin v. Anheuser-Busch Cos. Inc.*, 2005 WL 280330 (Los Angeles Co., Calif., Super. Ct. Jan. 28, 2005) (dismissing such a claim because plaintiffs "seek restitution for money they allegedly spent illegally buying defendants' alcoholic beverages, which [they] admit they consumed as minors").

As one court explained the doctrine: "For almost 160 years, Texas law has consistently disallowed parties from using the courts to recover damages from illegal transactions. This is true whether those claims are based in contract or in tort and it is true whether the claims have been lodged against someone involved in the illegal transaction or against a party unconnected to the illegal contract." *Esparza-Rico v. Flores*, 405 F. Supp. 2d 746 (S.D. Texas 2005).

The application of the illegal acts doctrine to products liability claims, however, has drawn academic criticism. See, e.g., Joseph H. King Jr., "Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law," 43 Wm. & Mary L. Rev. 1011 (2002). According to its critics, the illegal acts doctrine "inhibits what should be the paramount ends of tort law, namely the loss-spreading and loss-allocation goals." And it "requires the court to evaluate the plaintiff's conduct through a moral prism trained on an ever-changing social landscape and climate, and therefore can be applied selectively and arbitrarily." Id. at 1061, 1076. Instead, critics argue, "the conduct of the plaintiff should seldom justify the court deciding to bar the claimant as a matter of law, especially in jurisdictions adhering to a pure form of comparative fault." Id. at 1067.

Nevertheless, the illegal acts doctrine retains vitality in a number of American jurisdictions and appears to be here to stay. In *Orzel v. Scott Drug Co.*, 449 Mich. 550 (1995), the Supreme Court of Michigan explained the policy reasons why it was unacceptable for courts to lend their aid to tort actions based on the plaintiff's own illegal acts: "First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct. Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third...the public would view the legal system as a mockery of justice. Fourth and finally, wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties." Id. at 559-60.

*Orzel* had presented a situation much like the one in *Price*: A man had abused the Schedule 2 methamphetamine Desox-

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yn, a controlled substance, obtaining it illegally from co-workers and getting multiple prescriptions through fraud. His wife brought suit both as guardian for her husband and for her own loss of companionship, suing several defendants for negligently supplying the drug to the husband. The court held that the claims of both the wife and husband were barred by what it termed the “wrongful conduct rule,” which it derived both from the illegal acts doctrine and the corollary “in pari delicto” doctrine, which holds that as between parties who are both equally involved in illegal activity, the court will not grant relief to one over the other, but instead will leave them as it finds them.

The in pari delicto doctrine also is commonly applied today in the fraud and contracts context. See, e.g., *Brandaid*, 2005 WL 2094968, at \*8 (explaining that courts will not be the “paymaster of the wages of crime, or referee between thieves”). But unlike the illegal acts doctrine, the in pari delicto doctrine would appear to invite some comparison between the culpability of criminal co-conspirators.

Courts applying the illegal acts doctrine to products liability claims have articulated some standards to ensure that it does not become an unfair bar to tort recovery for every person who happens to violate a statute. For example, in *Price*, the Mississippi Supreme Court explained that the mere fact that the plaintiff was a lawbreaker at the time of injury was not enough to invoke the doctrine. Rather, “the injury must be traceable to his own breach of the law and such breach must be an integral and essential part of his case. Where the violation of law is merely a condition and not a contributing cause of the injury, a recovery may be permitted.” 2006 WL 241083, at \*4 (citation omitted).

In a professional negligence action against a doctor and some pharmacies for negligently providing drugs to which the plaintiff’s husband became addicted, the Supreme Court of Iowa affirmed the application of the illegal conduct doctrine to bar the plaintiff’s claim, but noted the distinc-

tion between conduct that merely violates laws regulating lawful activities and conduct that is entirely prohibited by law. *Pappas v. Clark*, 494 N.W.2d 245, 247-48 (Iowa 1992). When a plaintiff has engaged in activities that are prohibited—as opposed to merely regulated—by law, “the courts will not entertain the suit if the plaintiff’s conduct constituted a serious violation of the law and the injuries for which he seeks recovery were the direct result of that violation.” Id. at 248 (quoting *Barker v. Kallash*, 479 N.Y.S.2d 201 (N.Y. 1984)).

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In *Oden v. Pepsi Cola Bottling Co. of Decatur Inc.*, 621 So. 2d 953 (Ala. 1993), the Alabama Supreme Court articulated a “moral turpitude” requirement. There, a minor had been killed when a vending machine fell and crushed him while he was tipping it in an attempt to steal from it. The plaintiff argued that the machine was defective because it carried no warning, had no anti-theft device and had no anchor to prevent tipping. The court affirmed the grant of summary judgment, holding that

the claim was barred because it was “based on injuries that were a direct result of the injured party’s knowing and intentional participation in a crime involving moral turpitude.” Id. at 955.

## Court in ‘Orzel’ looked to nature of wrongful conduct

In *Orzel*, the Michigan Supreme Court took a different approach, looking to the nature of the wrongful conduct, the causal nexus between the misconduct and the plaintiff’s injury, and articulating an exception to the doctrine when there are significantly different degrees of culpability between the plaintiff and the defendant. Only conduct that is “prohibited or almost entirely prohibited” will support application of the doctrine in Michigan. 449 Mich. at 561-62 (looking also at the degree of harm and punishment attributable to the criminal violations, as well as the number of violations). And when the defendant had “undue influence” over the plaintiff, the doctrine would not apply. However, even despite the plaintiff’s addiction to Desoxyn, the court found no such undue influence and affirmed application of the doctrine.

Subsequent to the court’s decision in *Orzel*, the Michigan Legislature codified the doctrine for felonies, requiring one who sues for injuries arising from his commission of a felony to pay the defendant’s attorney fees and costs. Mich. Consol. Laws § 600.2955b. This statute has been held to complement—and not displace—the common law “wrongful conduct” rule in Michigan. See *Barth v. Goal Tender Sports Pub and Grill*, 2005 WL 2327075 (Mich. App. Sept. 22, 2005).

Despite the general applicability of comparative-fault rules, when the plaintiff’s products liability claim is squarely based on illegal conduct, courts increasingly are applying the long-standing equitable principles embodied in the illegal acts doctrine to dismiss or grant summary judgment on the claim in order to protect the integrity of the court and prevent recovery for criminal activity.