

Implied Rights of Action

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Causes of action for private plaintiffs can arise from

- The common law
 - (as pronounced by the courts)
- A statute
 - (as passed by the legislature)
- Implication from a statute
 - (with the implication made by the legislature, but made explicit through the courts)

Not all statutes that proscribe some category of conduct provide a private right of action!

- Criminal statutes are generally enforceable only by government prosecutors
- Many statutes provide civil causes of action only for the government, such as a state attorney general or a certain federal agency, such as the FTC, FCC, OSHA, USDA, etc.

Examples: Causes of action from the common law

- Negligence
- Trespass
- Breach of contract
- Battery
- Assault

Examples: Causes of action from explicit statutes

- Wrongful death
- Survival actions
- Breach of contract for sale of goods
(under the Uniform Commercial Code)
- Misappropriation of trade secret
(under the Uniform Trade Secrets Act)
- Failure to pay minimum wage
(under the federal Fair Labor Standards Act)

Examples: Causes of action implied by statutes

- Recovery of profits from insider trading
(under Rule 10b-5)
- Gender discrimination in school sports
(under Title IX of the Civil Rights Act of 1964, as amended by the Education Amendments of 1972)

The law on implied causes of action

- There is a line of U.S. Supreme Court cases discussing when a private right of action may be found in a federal statute.
- States may have their own case law on when statutes are to be construed to create a cause of action.

Cort v. Ash, 422 U.S. 66 (1975)

- Is the plaintiff one of the class for whose especial benefit the statute was enacted?
- Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?
- Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?
- Is the cause of action one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law?

Touche Ross & Co. v. Redington, 442
U.S. 560 (1979)

- “our task is limited solely to determining whether Congress intended to create the private right of action”

Transamerica Mortg. Advisors, Inc. (TAMA) v.
Lewis, 444 U.S. 11, 15-16 (1979)

- “The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction. ^ While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, ^ what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear.”

General list of questions to ask:

- What was the legislature's intent?
 - Explicit?
 - Implicit?
- Is the plaintiff one of the class for whose especial benefit the statute was enacted?
- Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?