



Private Enforcement Actions

An overview of the perils of using private enforcement actions in public policy.

In legislation, a “private enforcement action” allows individuals to bring a lawsuit if they believe they have been injured by an activity that violated a state or federal statute. A private enforcement action may also be invoked by a person or non-governmental organization to compel a governmental agency to enforce existing law or to seek judicial review of a governmental agency’s implementation of law.

For many reasons, lawmakers should proceed with caution when considering whether to include a private enforcement action in legislation.

1. Private rights of action tend to erode the constitutional separation of powers.

By inviting the Judicial Branch to make policy (a responsibility of the Legislative Branch) and to pass judgment on how that policy is implemented (a responsibility of the Executive Branch), private rights of action turn the separation of powers upside down.

When enforcement of a statute is left to the Executive, the administration is both accountable to the Legislature and can work with the Legislature to make statutory refinements when necessary. However, when the Legislature opens the door for enforcement by private attorneys, the state no longer controls the means of enforcement, cannot exercise prosecutorial discretion, and cannot prioritize the most outrageous behavior or ensure consistent application of the law.

2. Private rights of action too easily shift the focus away from enforcement of law and redirect it toward a search for cases that are profitable for contingent-fee lawyers.

When government gives enforcement power to a private entity, they are allowing unaccountable plaintiffs lawyers to act on behalf of government.

“In these cases, attorneys – rather than the aggrieved client – tend to control the litigation,” states former Interior Secretary Gale Norton, who served two terms as Colorado Attorney General.

Moreover, while contingency-fee attorneys must consider the merits of a case, they also consider its potential payoff. Perhaps the most egregious abuses of private rights of action – sometimes referred to as “private attorney general” provisions – were contingency-fee attorneys who represented the states in tobacco litigation and

pocketed literally *billions* in contingency fees. While it's hard to feel sorry for tobacco companies, another excellent example of such abuse is asbestos litigation.

In the asbestos cases, contingency fee attorneys paid for advertising to identify people with health conditions that could be blamed on exposure to asbestos – often people who experienced no genuine exposure. These “victims” were then referred to doctors who were paid for each diagnosis. So many dubious or fraudulent asbestos claims were paid that the trust funds set aside to compensate victims is running short of money to help legitimate victims. Yet contingency-fee attorneys continue to run pervasive television commercials and pay as much as \$391 per click for internet advertising to generate more clients.

However, high-dollar cases aren't the only opportunity for abuse by opportunistic plaintiffs lawyers. A skilled contingency-fee lawyer who specializes in claims enforcing a relatively obscure statute can certainly generate a nice income stream from a series of verdicts or settlements that yield even \$25,000 or \$50,000 in damages. (Contingency-fee contracts generally stipulate that the attorney receives 33% or 40% of damages awarded to the plaintiff.) That's because the cost, time and nuisance that a business owner or individual faces in defending one of these cases is daunting.

3. Private rights of action allow private attorneys to use the force of government against business or individual defendants.

Private enforcement isn't limited to ensuring that government agencies enforce the law. Private rights of action often allow individuals or special-interest groups to file a lawsuit against an individual or business which is alleged to have violated the law. When statutes authorize a private enforcement action, they often tilt the legal playing field in favor of the plaintiff by limiting the arguments or evidence that the defense can present to prove their innocence. Another tactic is to require a losing defendant to pay the plaintiff's legal fees – but not to hold a losing plaintiff harmless.

Summary

While private enforcement clauses may occasionally serve a useful purpose, they are tools that can easily be abused by plaintiffs' lawyers and special-interest groups. When drafting legislation, lawmakers should be cautious of using private enforcement because it may:

1. Erode the separation of powers.
2. Shift the focus away from enforcement of law and toward exploitation of cases that appear “profitable.”
3. Allow private attorneys to use the force of government against business or individual defendants.

When government goes to court, it should be the citizens that benefit – not plaintiffs' lawyers.