



## 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 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?

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.”

### Key takeaways:

- Be alert for the possibility that a statute can be a source of a cause of action, even when one is not express.
- Once precedent is established for a particular implied right of action, suing on that basis is straightforward.
- Getting courts to recognize an implied right of action in the first place is much harder.