



REGULATION VIA LITIGATION

The judicial system is well suited for settling disputes between parties; it is not well suited to establishing and enforcing standards for businesses. As a means of regulating the state's businesses, it is not only a blunt instrument, it is also an extraordinarily unpredictable and expensive instrument. Nevertheless, in New Jersey, litigation has come to operate as the enforcement mechanism for a number of substantive laws.

Putting responsibility for enforcing a regulatory mandate in the hands of the courts ensures that more time and money will be spent resolving the dispute than if an agency were tasked with enforcement. The parties will have to hire lawyers, conduct discovery to gather evidence admissible in court, wait for the case to make its way through the over-burdened state court system, and have a decision made by a judge that is not specifically trained to handle such matters. Despite the added expenses and inefficiencies, the right to sue is increasingly being added to bills targeting a variety of relatively narrow substantive issues.

The right to sue is becoming so ingrained New Jersey's regulatory statutes that the courts have read an implied cause of action into statutes that do not expressly forbid litigation. This is true even in cases where the legislature has included a schedule of fees or other agency-controlled remedy in the text of the statute. The courts reason that if the legislature did not want allegedly injured parties to be able sue, it would explicitly state that in the statute.

In the vast majority of these regulatory based cases, the time and money spent pursuing the claim will far exceed the alleged damages. The legislature has recognized this, but instead of moving these cases out of the court system, it has written one-sided fee-shifting provisions into the regulatory statutes. These provisions, which allow prevailing plaintiffs to recover attorney's fees and court costs, encourage frivolous litigation, discourage settlement, and drive up the cost of lawsuits.

The legislature should be wary of continuing this trend of creating new ways to sue businesses and incentivizing litigation over more efficient means of dispute resolution for two reasons:

- **Increased litigation is inversely related to economic growth.** A state's litigation climate is one of the top factors business leaders consider when deciding where to locate their business or whether to expand. States with predictable legal systems that discourage abuse allow businesses to more accurately project what future legal expenses will be, allowing them to free up capital for business expansion and job creation. According to the U.S. Chamber's 2012 State Liability Systems Ranking Study, of our surrounding states, only Pennsylvania is viewed as having a worse legal climate than New Jersey.
- **Judicial lawmaking threatens the separation of powers.** The continued flow of legislative power out of the representative branches and into the courts makes our system of government less responsive to the will of the people, and erodes public support of the rule of law. The legislature should work to ensure that the courts remain the branch of government that says what the law is, not what the law should be.

The New Jersey Civil Justice Institute therefore believes that the legislature should draft legislation that takes regulatory disputes out of the court system. In addition, fee-shifting provisions should be authorized only in situations where litigation is necessary to resolve a dispute and compensate an injured party.