PUBLIC POLICY BRIEF

Private Attorneys General:
Incentivizing the Protection of Liberty

LIBERTAS INSTITUTE

SUMMARY

State and federal constitutions were designed by their authors to protect our rights against violation by the government. The enforcement of these protections often requires litigation and court orders—and thus a watchful guardian to protect the public's rights.

While many believe that the Attorney General serves this function, this is not so. In a constitutional dispute between an individual and the government, the Attorney General's primary duty is to defend the government—even when wrong. As such, the public interest requires watchful guardians who are independent of the government to challenge it in court when it is in violation of the public's constitutional rights.

When victorious, it seems inappropriate to lay the legal costs at the feet of a few. The private attorney general doctrine resolves this inequity by allowing the court to award attorney's fees to the prevailing party, incentivizing watchful guardians to jealously protect our God-given, constitutionally protected rights.

Taxpayers pay the Attorney General to defend the law, but when a law violates our rights, they should reimburse private citizens who successfully overturn it.

The common law "American rule" holds that litigants pay for their own attorney's fees and the costs associated with litigation. This is in contrast to the "English rule," where the losing party pays the attorney's fees of the prevailing party. This latter procedure is followed by nearly every major western democratic nation, with the exception of the United States. The rationale for the English rule is rooted in the idea that someone who is sued, but ultimately prevails, should not be left with the expense of defending against the suit. However, the English rule also limits the award of damages to compensation and does not include any punitive or multiplier effects that damage awards in the United States might.

Utah is the only state that statutorily prohibits the private attorney general doctrine.

The rationale for the American rule is to avoid creating a negative incentive that might cause "the poor [to] be unjustly discouraged from instituting actions to vindicate their rights."[1] If a poor individual were to sue under the English rule and lose, they would be saddled with the defendant's fees despite having a legitimate dispute and claim. The American rule solves this problem. However, the American rule still may result in compensating a prevailing party for attorney's fees indirectly through multipliers of actual damages.

The American rule functions well to ensure that the court system does not become bogged down with disputes over fees. Courts are concerned that the time, expense, and difficulties of proof involved in resolving claims for fee awards in every case would pose substantial burdens for judicial administration.

Exceptions to the Rule

While courts in the United States do occasionally award attorney's fees to one party or the other, this is due to an exception created by statute or through contract between the parties involved.

Courts have also deviated from this rule to award fees in cases with no contractual or statutory basis for fee awards when there is bad faith conduct by one party, in the creation of a common fund, or when litigation is necessitated by the wrongful acts of a defendant.[2] Another major exception to the rule is the "private attorney general" doctrine.

Private Attorney General

The private attorney general doctrine is a common law rule that recognizes special circumstances when a particular interest or right that impacts the public at large is vindicated by a specific case with specific plaintiffs. As explained by Arizona's Supreme Court, "The purpose of the doctrine is to promote vindication of important public rights."[3] In cases where the doctrine is invoked the prevailing plaintiffs would, without compensation, be incurring a financial burden to litigate an issue that benefits many more people than the plaintiffs alone. This doctrine recognizes that such plaintiffs act in the public interest as a sort of private attorney general and allows the award of attorney's fees accordingly.

Many jurisdictions apply the doctrine in cases where "the government, for some reason, fail[s] to properly enforce interests which [are] significant to its citizens."[4] This rule incentivizes plaintiffs who would otherwise have no means or opportunity to litigate for the public good.

Because this doctrine is typically articulated in precedential decisions, instead of statute, the specific standard varies from state to state. However, courts generally consider three factors in awarding fees:

1. "the strength or societal importance of the public policy vindicated by the litigation";
2. "the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff"; and
3. "the number of people standing to benefit from the decision."[5]

The application of this doctrine is not unlike the "common fund" doctrine where "courts with equity jurisdiction have the right and the power to require those benefited to share in the costs of the litigation which benefited them."[6]

While the common fund doctrine typically involves benefits specific to the plaintiffs, the underlying reasoning is equally controlling for the private attorney general doctrine—that individual plaintiffs should not be required to bear the costs of protecting fundamental rights enjoyed by every citizen.

Duties of an Attorney General

Under the Utah Constitution, the Attorney General "shall be the legal advisor of State officers" and "shall perform such other duties as provided by the law."[7] Thus, the Attorney General has a direct constitutional obligation to represent the executive officers of the state in their official capacity.

Under further legislative direction, the Attorney General has been given broader authority to act as the State's chief legal officer representing state agencies. Utah law states that the Attorney General shall "prosecute or defend all causes to which the state, or any officer, board, or commission of the state in an official capacity is a party; and take charge, as attorney, of all civil legal matters in which the state is interested."[8]

Additionally, insofar as it does not conflict with constitutional and statutory obligations, the Attorney General retains common law authority to file actions that may advance the public interest.[9] This is a broad collection of duties and may give rise to a conflict of interest for the Attorney General. Attorneys are generally prohibited by their professional ethics and the Rules of Professional Conduct from representing a client whose interests are in conflict with those of either the attorney's current or former clients.

For this reason, the Rules of Professional Conduct for attorneys acknowledge that "under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships… [Government lawyers] also may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority."[10]

This played out in an Alabama case where the state's Supreme Court concluded that the Attorney General may intervene on behalf of the public interest in matters where he has no personal interest, even where such intervention runs counter to the direction of client state agencies.[11]

Thus, Utah's Attorney General could, theoretically, choose to litigate for the public interest by filing an action against a state agency. While he would also be obligated by law to represent that agency under his duty to defend the state and its officers, he would be allowed the discretion to choose which master to serve—the public interest or the state. However, the duty to the state is rooted directly in the state constitution whereas the public interest duty is discretionary. It is likely in a case like this that the Attorney General would decline to litigate on behalf of the public interest against the interests of the state or its agencies.

Typically, the Attorney General will outsource cases to other agencies when he perceives a significant conflict. It is for this reason that the private attorney general doctrine is even more critical to protecting the public interest, especially from government action.

The Doctrine in Utah

Senate Bill 53, passed and signed into law in the 2009 general session, statutorily prohibited the court from awarding attorney's fees under the private attorney general doctrine. Legislators supporting this bill argued that the awarding of attorney's fees is a "public policy" decision that should be left up to the legislature instead of the court. Because "American rule" exceptions are typically confined to statutory provisions, contract, or bad faith, the use of this doctrine by the court was seen by some legislators as a form of judicial activism.

This bill came in response to a recent set of cases[12] where the Utah Supreme Court held that the plaintiffs were entitled to attorney's fees under the doctrine. Specifically, the Utah Association of Counties, which lobbies

on behalf of county governments in Utah, pushed for the bill after some of their member counties lost cases in which they were required to pay such fees.[13]

In *Utahns For Better Dental Health—Davis, Inc. v. Davis County Clerk*, a group of citizens sued to stop an initiative in Davis County that was illegally placed on the ballot by the county, arguing that it was actually a referendum and should have followed a different process. Of the initiative decision made by Davis County, the court ruled it was a "misuse [of] the people's direct legislative power granted in article VI, section 1 of the Utah Constitution and would thwart the will of a majority of Davis County voters." The court went on to note that "the public ha[s] a real and substantial interest in ensuring that the laws of initiative and referenda are scrupulously followed and the election process adheres to the rule of law."[14]

Because the citizen group was successful in preventing the illegally placed ballot initiative, it acted on behalf of all Davis County citizens in vindicating an important public right—namely ensuring that the very laws governing lawmaking via initiative and referenda are followed. For this reason, the suit was not primarily in the benefit of the citizen group that brought suit, but all citizens in the county. Accordingly, upon request by the plaintiffs, the court approved an award of attorney's fees under the private attorney general doctrine.

The request to the county for attorney's fees in the Davis County case amounted to $145,000—a sum that covered legal work spanning five years, including significant appellate work.[15] Prior to appeals by the county challenging the request for attorney's fees, the plaintiffs had only sought $45,000. While a hefty sum, it was a cost that the county could absorb. By way of comparison, Davis County pays nearly $100,000 per year for its membership in the Utah Association of Counties—the same group that lobbied for the bill eliminating attorney fee awards under this doctrine. *Culbertson v. Board of County Commissioners*, another Utah case in which the private attorney general doctrine was invoked, resulted in Salt Lake County—who pays over $400,000 annually to the Association—being liable for attorney's fees.

Because these local government entities have a direct financial interest in stopping the award of attorney's fees in these types of cases, it makes sense that their association would take up the issue at the legislature. However, the general public in these counties is harmed by misguided government actions that are ultimately found by the court to have been illegal or wrong. These people are then left without recourse if they have to take an issue to court that vindicates public rights for everyone at their own personal and private expense. Because these issues are, by definition under the doctrine, not issues of pecuniary interest to the individual plaintiffs, it is usually unlikely that such suits will even be brought at all. This eliminates an important check on government power by the people because of the high legal costs of bringing suit.

Awards— a "Policy Issue"?

During the legislative debate on this issue, some legislators argued that because the court in the Davis County case called it a "public policy" issue, the court had no business awarding attorney's fees. However, what the court really said is that "in private attorney general cases, the threshold issue is a rather transcendent, large picture question of public policy,

namely, whether an important right affecting the public interest has been vindicated."[16]

Legislators used this phrase to argue that the decision to award attorney's fees was itself the "public policy" that should be left to the legislature and that the court was usurping legislative authority by using their equitable powers to award attorney's fees under this doctrine. However, the actual statement from the court makes clear that the policy decision was not about whether to award attorney's fees or not, but rather whether the plaintiffs were vindicating an important public right.

In this way, the court was well within its rights to ensure that court decisions and outcomes are consistent with the law and fair. The court cannot and should not rule in ways that undermine the law or the policies created by law. It is not judicial activism to ensure that justice is done in accordance with the law. Moreover, the court has an important role to play in the equity of legal outcomes.

Equitable Powers

Under the British legal system, upon which the American system was based, there were two parallel courts—courts of law and courts of equity. The purpose of the courts of equity was to issue decisions based on general principles of fairness in situations where rigid application of common-law rules would have brought about injustice. As the American system evolved, the framers of the Constitution granted the federal courts jurisdiction over both common-law actions and suits in equity. Today, courts in nearly every state, including Utah, follow this example and retain broad equitable powers.

The significant financial cost required to hold the government accountable in court is a very strong disincentive that can be fairly and reasonably resolved with the private attorney general doctrine.

The New Jersey court wrote that "it has been stated that the power of equity is the power possessed by judges—and even the duty resting upon them—to decide every case according to the high standard of morality and abstract right; that is the power and duty of a judge to do justice. It involves the obedience to dictates of morality and conscience. It may not disregard statutory law and it looks to the intent rather than the form."[17] Without this power, courts would become legal automatons disjointed from justice and the real consequences of their decisions. This is the reason wise individuals are selected through a significant vetting process before being placed on the bench.

The use of this equitable power in the award of attorney's fees has been recognized by the Supreme Court of the United States. "Indeed, the power to award such fees 'is part of the original authority of the chancellor to do equity in a particular situation,' and federal courts do not hesitate to exercise this inherent equitable power whenever 'overriding considerations indicate the need for such a recovery.'"[18]

These inherent equitable powers have been recognized and asserted by Utah courts for decades. The Utah Supreme Court cited this very U.S. Supreme Court decision when it first used its equitable powers to award attorney's fees under the private attorney general doctrine. The Utah court wrote: "however, in the absence of a statutory or contractual authorization, a court has inherent equitable power to award reasonable attorney fees when it deems it appropriate in the interest of justice and equity."[19] In that case, the court noted that the private attorney general doctrine applied because of the "exceptional nature" of the case and that "any future award of attorney fees under this doctrine will take an equally extraordinary case." Thus, this use of equitable powers to award attorney's fees as an exception to the American rule, and without a specific statutory or contractual basis, is an extraordinary exception. Such an exception is an important and just check on government power.

Why Utah Should Reverse

The private attorney general doctrine is a way of equalizing the power of the people with the enormous power of government officers who, at times, may act in ways that violate the law or the rights of the public. This doctrine only kicks in when the public wins and broad rights are vindicated. Foreclosing this venue for attorney's fees disincentivizes people from trying

to fight improper government action when it is not profitable for them to do so directly. In turn, this reduces accountability in government.

Government entities can marshal the resources of the public treasury to its ends. This gives the government immense resources to act and defend its actions against challenge. In the rare case when it is found by the state supreme court to have acted improperly, to the detriment of public rights, it is appropriate for the court to award attorney's fees to those plaintiffs that vindicate such rights at their own expense. For government to seek to foreclose such an equitable remedy is such an affront to justice and the rule of law that it should have been rejected by the legislature without further thought.

The legislature's own power is reduced if its statutes are not followed by an agency that applies authority to the detriment of the public in contravention of the law. When this occurs and goes unnoticed by the court, the legislature itself is rendered impotent.

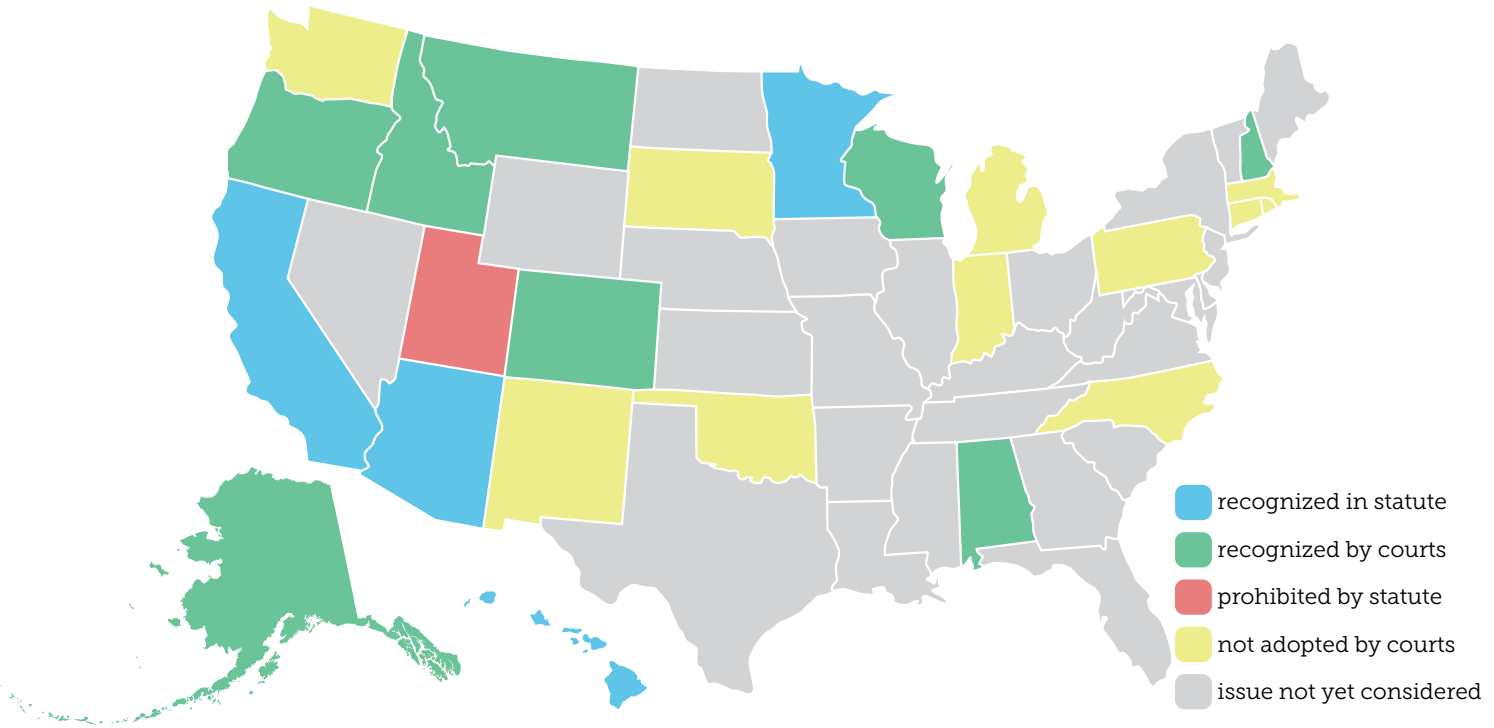
Utah is the only state that has statutorily prohibited the application of the private attorney general doctrine by the courts. The legislative stripping of the equitable powers of the court for this narrow—yet important—exception is the wrong approach and tips the balance of power from the people to unelected bureaucrats. To place the burden of vindicating rights from government bureaucrats on the public at large is to hold liberty ransom.

Conclusion

Utahns should be concerned when agents of government are entrusted with the responsibility for executing the laws faithfully and fail to do so—whether inadvertently or intentionally. The potential for this occurrence is enough to ensure systems are in place to discourage it.

Litigation between two private entities comes with natural incentives toward resolution, as both parties feel the direct pressure of legal fees. In public litigation, when a private party is pitted against a government entity, the agents for the government do not feel this pressure in the absence of a law, or court ruling, making clear that the violation of an important right may result in a financial consequence.

Status of the Private Attorney General Doctrine



A REPEAL TO RE-ESTABLISH PRIVATE ATTORNEYS GENERAL

~~**78B-5-825.5 Attorney fees -- Private attorney general doctrine disavowed.**~~

~~A court may not award attorney fees under the private attorney general doctrine in any action filed after May 12, 2009.~~

Endnotes

1. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967)
2. Florida courts, for example, have permitted awards of attorneys' fees without a contractual or statutory basis in cases involving bad faith litigation conduct, *Moakley v. Smallwood*, 826 So. 2d 221, 223-24 (Fla. 2002); creation of a common fund, *Tenney v. City of Miami Beach*, 11 So.2d 188, 190 (Fla. 1942); litigation necessitated by the wrongful act of the defendant, *Martha A. Gottfried, Inc. v. Amster*, 511 So. 2d 595, 598 (Fla. 4th DCA 1987); and partnership accountings, *Larmoyeux v. Montgomery*, 963 So. 2d 813, 818-22 (Fla. 4th DCA 2007).
3. *Arnold v. Ariz. Dep't of Health Servs.*, 775 P.2d 521, 537 (Ariz. 1989)
4. *Montanans for Responsible Use of Sch. Trust v. State ex rel. Bd. of Land Comm'rs*, 989 P.2d 800, 811 (Mont. 1999); *Brown v. State*, 565 So. 2d 585, 592 (Ala. 1990); *Halloran v. State Div. of Elections*, 115 P.3d 547, 554 n.29 (Alaska 2005); *Arnold v. Ariz. Dep't of Health Servs.*, 775 P.2d 521, 537 (Ariz. 1989); *Serrano v. Priest*, 569 P.2d 1303, 1315 (Cal. 1977); *In re Water Use Permit Applications*, 25 P.3d 802, 804 (Haw. 2001); *Hellar v. Cenarrusa*, 682 P.2d 524, 531 (Idaho 1984); *Montanans for the Responsible Use of the Sch. Trust v. State ex rel. Bd. of Land Comm'rs*, 989 P.2d 800, 812 (Mont. 1999); *Claremont Sch. Dist. v. Governor*, 761 A.2d 389, 394–95 (N.H. 1999); *Guerrero v. Commonwealth Dep't of Pub. Safety*, No. 2012-30, 2013 WL 6997105, at *7 (N. Mar. I. Dec. 19, 2013); *Stewart v. Utah Publ. Serv. Comm'n*, 885 P.2d 759, 783 (Utah 1994).
5. *Serrano v. Priest*, 569 P.2d 1303, 1314 (Cal. 1977)
6. *Truman J. Costello*, 693 So. 2d at 50.
7. UTAH CONST. Art. VII, § 16.
8. Utah Code Ann. § 67-5-1 (Supp. 1995). See also Utah Code Ann. § 67-5-3 (1993) (the Attorney General may render legal assistance to any state agency, division, board, etc.); Utah Code Ann. § 67-5-5 (1993) (absent constitutional or statutory authority, no agency shall hire outside counsel).
9. Utah Code Ann. § 68-3-1 (1993); *State v. Robertson*, 886 P.2d 85, 89-90 (Utah App. 1994); *Hansen v. Utah State Retirement Board*, 652 P.2d 1332, 1336-38 (Utah 1982); *Hanson v. Barlow*, 456 P.2d 177, 178-80 (Utah 1969).
10. See also A.B.A. Model Rules of Professional Conduct, Scope (1991).
11. *Ex parte Weaver*, 570 So. 2d 675, 680-84 (Ala. 1990); *Feeney v. Commonwealth*, 366 N.E.2d 1262 (Mass. 1977); *Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Information Comm'n*, 387 A.2d 533 (Conn. 1978); *Allain v. Mississippi* P.S.C., 418 So. 2d 779 (Miss. 1982); *Martin v. Thornburg*, 359 S.E.2d 472 (N.C. 1987); *P.U.C. of Texas v. Cofer*, 754 S.W.2d 121 (Tex. 1988).
12. *Utahns For Better Dental Health- Davis, Inc. v. Davis County Clerk*, 2007 UT 97, 175 P. 3d 1036; and *Culbertson v. Board of County Commissioners*, 2008 UT App 22, 177 P. 3d 621
13. "Bill would discourage citizen-led lawsuits," *Salt Lake Tribune*, February 19, 2009.
14. *Utahns For Better Dental Health- Davis, Inc. v. Davis County Clerk.*
15. "Davis County must pay flouridation suit fees," *The Davis Clipper*, December 26, 2007.
16. *Utahns For Better Dental Health- Davis, Inc. v. Davis County Clerk.*
17. *In re Quinlan*, 348 A.2d 801, 816 (N.J. Super. Ct. Ch. Div. 1975) (quoting 1 POMEROY, EQUITY JURISPRUDENCE § 43, at 57 (5th ed. 1941))
18. *Hall v. Cole*, 412 U.S. 1, 5, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973) (quoting Sprague v. Ticonic National Bank, 307 U.S. 161, 166, 59 S.Ct. 777 [780], 83 L.Ed. 1184 (1939))
19. *Stewart v. Utah Public Service Com'n*, 885 P. 2d 759, 782 (Utah 1994)

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FREQUENT RECURRENCE TO FUNDAMENTAL PRINCIPLES IS ESSENTIAL TO THE SECURITY OF INDIVIDUAL RIGHTS

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