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Practice Tips

Surveying Systemic Reform Litigation

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The term "systemic reform litigation" usually refers to lawsuits for prospective relief in which the clients seek to change the present and future behavior of a large private or governmental organization. Such lawsuits may also include damages relief to compensate the clients for past injuries. Often, however, such retrospective relief is not available, either because the injuries cannot be reduced to dollar amounts or because the tortfeasors enjoy special immunities. In such cases, prospective relief is the only remedy available.

First of all, it needs to be mentioned that the reports of the "death" of systemic reform litigation have been greatly exaggerated, although it is true that we no longer live in the heroic age of the Warren Court and *Brown v. Board of Education*.[1] Well before the current conservative supermajority, the U.S. Supreme Court appears to have put a target on systemic reform litigation by ruling in 2009 that institutional reform injunctions should not continue after a durable remedy has been achieved.[2] Despite these formidable headwinds, systemic injunctive relief remains available, and courts still enforce ongoing orders requiring reform of government institutions and, on occasion, even issue new orders for systemic reform.

For a recent example of continued enforcement of old orders, look at the successful litigation against family separations at the border. This litigation took the form of motions to enforce an existing systemic reform decree from 1997 in the U.S. District Court for the Central District of California before District Judge Dolly M. Gee.[3] The litigation challenged child detention policies under both the Obama and Trump administrations and led to several new systemic orders regarding the welfare of immigrant children at the border.

Examples of successful new systemic reform litigation abound in several subject matter areas. In the area of disability rights, systemic reform litigation is the method of choice for enforcing the integration mandate of the Americans with Disabilities Act (ADA).[4] The ADA's integration mandate prohibits unnecessary segregation of persons with disabilities into institutions.[5] An example in Southern California is the *Katie A. v. Bonta* litigation that resulted in new requirements for the Los Angeles County Department of Children and Family Services to provide individualized mental health services to children in foster care in family settings rather than institutions.[6]

In prisoner rights, new systemic cases are being brought around the country to challenge dangerous conditions such as lack of medical and mental health care. The San Diego County jail

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system is the subject of a new systemic remedy claim brought this year by the American Civil Liberties Union of San Diego and Imperial Counties as well as by three private law firms.[7]

One of the largest systemic reform cases ever concerns the situation of unhoused people in Los Angeles. *Los Angeles Alliance for Human Rights v. County of Los Angeles and City of Los Angeles*, seeks to overhaul the way the City of Los Angeles, as well as the County, responds to the proliferation of make-shift encampments in the City and especially in downtown Los Angeles.[8] United States District Judge David O. Carter issued a comprehensive injunction in 2021. The Ninth Circuit reversed Judge Carter's injunction, but in June 2022, the district court approved a settlement with the City that will require $3 billion in new programs over five years.[9]

Clients

The elements of a systemic reform case are not that different from the elements of any other plaintiff's litigation, i.e., clients, causes of action, stories, attorneys, experts, and remedies; however, without clients there is no case. Attorneys are not free-ranging reformers of institutions. Attorneys in systemic litigation are agents of their clients, just as in other litigation. The first step therefore in developing a systemic reform case is getting to know the people who are living with the systems at issue, asking them what needs to be fixed, and how they would fix it if they could. The clients know more than attorneys do about how government and corporate systems harm them and, therefore, about the likely remedies.

Most systemic reform litigation is brought in federal court, or is removed from state to federal court because of the federal causes of action or due to the Class Action Fairness Act.[10] As a consequence, in federal court clients must have standing under Article III of the Constitution to seek injunctive relief. That means that the clients' past interactions with the system are not enough to get them into court if they are no longer interacting with the system. Clients whose interactions with the system are over and not likely to recur may have claims for damages but not for injunction relief, either individual or systemic. There are some workarounds for this kind of standing. For example, California law allows taxpayer standing to challenge unlawful government expenditures. Taxpayer standing has been used to bring systemic reform litigation.[11] In wage and hour litigation, the California legislature in 2003 created a mechanism for individual employees to bring a representative action for civil penalties through the Private Attorney General Act, or PAGA.[12] This act provides a vehicle to reform the conduct of employers without going through the formalities of a class action.

Organizations can be clients in systemic reform litigation if they can show a sufficient stake in the outcome to meet modern standing requirements. Organizational standing can be direct or associational. Direct standing requires a showing that the organization itself is harmed by the challenged practices. For example, Black Lives Matter Los Angeles and other organizations sued on their own behalf, as well as that of members, for injunctive relief against excessive force by the Los Angeles Police Department (LAPD) during downtown protests in the Spring of 2020.[13] The organizations alleged that they were directly harmed when LAPD used force to terminate peaceful protests that they organized. Associational standing requires that at least one of the organization's members is being harmed.

Keeping in close contact with clients is critical not just when litigating the case but also when negotiating and enforcing any systemic remedies obtained. The clients remain in constant contact with the systems that they seek to reform. They are the best source of information about whether the defendant entities are complying with the remedy and whether the remedy is actually working.

Class action work is fraught with problems of agency, as the class representatives are sometimes seen as playing only a symbolic role. There are promising models of participatory litigation in which class representatives work directly with counsel in case development, strategy, settlement negotiations, monitoring, and enforcement. In short, class counsel strives to accompany the named plaintiffs and other class members in the process of systemic reform rather than simply leading them.[14] Counsel in these cases thus must budget for the necessary attorneys' time in addition to paralegal and support staff to handle and track client contacts as well as to stay in touch with clients for input and appropriate decision making.

Other Nonremedial Elements

Next in importance among case elements after clients are the causes of action, which assert any available state law causes of actions, in addition to the federal ones. Often in California, state causes of action are easier to establish than federal ones and provide more robust damages and attorneys' fees awards. Examples include causes of action for disability and employment discrimination. For instance, California's Government Code prohibits discrimination in state agency programs, as well as state-funded programs, enforceable by a civil action for equitable relief.[15]

Then, it is important to remember that policies and practices, even evil ones, never look that bad in the abstract. Thus, the need for change only emerges when people tell their personal stories regarding what happened when those policies and practices collided with their lives. Complaints, motions for injunctive relief, and oppositions to summary judgment should all tell the clients' individual stories, and show the harms that have resulted and will continue if the court does not stop the unlawful conduct being challenged.

Furthermore, crucial to clients' success are the teams of attorneys that are necessary to tackle large systemic cases. Most cases include attorneys from several organizations, often including a large firm, a nonprofit organization already working in the targeted area, and a small firm or solo practitioners with decades of civil rights experience.

The final nonremedial element in a case is the key role of experts. The factual questions in institutional reform cases are complex. The finder of fact is not trying to work out the details of a particular event. Instead, the court must make factual findings about the operation of large public and private systems over long periods of time, spanning multiple facilities and organization structures, and including the work of numerous professional specialties, such as medicine, psychiatry, social work and corrections.

Remedies

The whole point of these cases, ultimately, is to make changes in the way institutions work. Practitioners therefore should have clear ideas of what remedies are available and what remedies would help the clients. Remedies in systemic reform cases are generally either prohibitory or mandatory injunctions. Prohibitory injunctions require the defendants and those acting in concert with them to cease unlawful practices. Mandatory injunctions require the defendants to take affirmative steps to meet their legal obligations. There is nothing novel or suspect about mandatory injunctions. The Federal Rules of Civil

Procedure provide that a class of injured persons may bring a class action on the grounds that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[16] The "refused to act" grounds necessarily require a mandatory injunction.

Modern systemic remedies started a year after the Supreme Court held that segregated school systems violated the Equal Protection Clause of the Fourteenth Amendment. *Brown II*,[17] decided in 1955, grappled with how the district court should enforce desegregation. *Brown II* represents "the birth of modern institutional reform litigation."[18] The remedial process that the Court described in *Brown II* is not formulaic and does not lend itself to any predefined list of remedies: "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power."[19] The *Brown II* Court spoke of eliminating obstacles to constitutional compliance "in a systemic and effective manner."[20] The Court directed district courts to "retain jurisdiction of these cases" during the period of time necessary for the defendants to propose remedial plans and to implement them.[21] These basic principles from *Brown II*—flexibility in crafting remedies, evaluating plans proposed by defendants, and retaining jurisdiction over implementation have become the common features of post-liability stages of systemic reform litigation.

As the courts gained experience with systemic reform injunctions, they recognized that it was important that counsel for the plaintiffs take an active role in developing remedial plans and enforcing them. The Court in *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air* reviewed the history of post-judgment monitoring in systemic reform cases and recognized the economic reality that such monitoring "is a compensable activity for which counsel is entitled to a reasonable fee" to be paid by defendants under the Civil Rights Attorney's Fees Award Act of 1976.[22] Since then, it has become common for systemic reform injunctions and consent decrees to include a process for plaintiffs' counsel to submit claims for post-judgment monitoring fees and for disputes over such fees to be addressed by the court retaining jurisdiction over the implementation of the injunction or consent decree.[23] Such post-judgment monitoring requires substantial investments by plaintiffs' counsel to keep in contact with class members, respond to their inquiries, investigate violations, engage with defendants to remedy such violations, and when necessary bring disputes to the court.

Even when political winds have blown the strongest against systemic reform litigation, resulting in major restrictions on such litigation, there has remained a recognition that the enforcement of systemic remedies remains necessary in some cases. For example, in 1996, after a disastrous midterm election for the Clinton Administration, Congress pushed a "Contract with America" legislative package that included the Prison Litigation Reform Act (PLRA),[24] which President Clinton signed into law. The PLRA represents one of the harshest restrictions on systemic reform injunctions ever enacted. Even the PLRA, however, recognized that systemic reform injunctions are sometimes necessary and must be enforced. Thus, the PLRA, in the very act of restricting one of the least politically popular systemic remedies—prison population caps—shaped the restrictions in a manner that recognized courts must sometimes follow up on prior orders with new and more intrusive remedies. The PLRA provides that prison population caps are out of reach, unless, among other things, a court has "previously entered an order for less intrusive relief that has failed to remedy the deprivation," and the defendant has had "a reasonable amount of time to comply with the previous court orders."[25] In systemic litigation involving the California prison system, the Supreme Court has recognized that district courts cannot merely declare rights and remedies but must remain involved and issue more intrusive and specific relief when necessary until the federal violations are eliminated.[26]

The systemic reform injunction remains a viable way for advocates and litigators to secure the rights of their clients against large institutions that are resistant to change. Damages remedies sometimes will not spur a large institution to follow the law. In addition, damage remedies for federal law violations are being dialed back by the current Supreme Court.[27] Systemic injunctive relief remains available, for now, and deserves serious consideration by clients and their attorneys. ■

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[1] Brown v. Board of Educ., 348 U.S. 886 (1954).
[2] Horne v. Flores, 557 U.S. 433, 450 (2009).
[3] Flores v. Garland, No. CV 85-4544 DMG(AGRx), 2018 WL 10162328 (C.D. Cal. 2018).
[4] 42 U.S.C. §12132; 28 C.F.R. §35.130(d) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities").
[5] Olmstead v. L.C., 527 U.S. 581 (1999).
[6] Katie A. v. Bonta, No. 2:02-cv-05662 JAK-AJW (C.D. Cal.).
[7] Dunmore v. San Diego County Sheriff's Dep't, No. 20-CV-406-AJB-WVG (S.D. Cal.).
[8] L.A Alliance for Human Rights v. City of Los Angeles; County of Los Angeles et al., No. 2:20-cv-02291-DOC-KES (C.D. Cal. filed Mar. 10, 2020).
[9] L.A. Alliance for Human Rights v. County of Los Angeles, 14 F. 4th 947 (9th Cir. 2021); Fred Shuster, *City Officials Announce Settlement of LA Homelessness Lawsuit*, L.A. Sentinel, Apr. 7, 2022; Christopher Weber, *Judge OKs Los Angeles' Lawsuit Settlement on Homelessness*, U.S. News & World Rep., June 15, 2022.
[10] Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat 4.
[11] Farrell v. Tilton, No. RG03079344 (Cal. Super. Ct., Alameda County Dec. 2007), more information available at https://clearinghouse.net/doc/12812.
[12] Lab. Code §§2698 *et seq*., Stats. 2003, ch. 906, §2 (eff. Jan. 1, 2004); Arias v. Superior Ct., 46 Cal. 4th 969 (2009).
[13] Black Lives Matter Los Angeles et al. v. City of Los Angeles, et al., No. 2:20-cv-05027-CBM-AS (C.D. Cal. June 5, 2020). The case has resulted in a preliminary injunction restricting the use of "kinetic impact projectiles" as crowd control tools, after such weapons caused injuries during the 2020 demonstrations. https://clearinghouse.net/doc/111798.
[14] Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 Stan. L. Rev. 87, 160 (2022).
[15] Gov't Code §§11135, 11139.
[16] Fed. R. Civ. Proc. 23(b)(2).
[17] Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (1955).
[18] Robert E. Buckholtz, Jr., et al., Special Project, *The Remedial Process in Institutional Reform Litigation,* 78 Colum. L. Rev. 784, 788 n.9 (1978).
[19] Brown, 349 U.S. at 300.
[20] *Id.*
[21] *Id.*
[22] Pennsylvania v. Delaware Valley Citizen's Council for Clean Air, 478 U.S. 546, 559 (1986), citing 42 U.S.C. §1988; *see also* Keith v. Volpe, 833 F. 2d 850 (9th Cir. 1987); Earth Island Inst., Inc. v. S. Cal. Edison Co., 92 F. Supp. 2d 1060, 1066 (S.D. Cal. 2000).
[23] *See, e.g.*, Armstrong v. Brown, 805 F. Supp. 2d 918 (N.D. Cal. 2011).
[24] The PLRA was inserted into the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104–134, §§801-809, 110 Stat. 1321 (1996).
[25] 18 U.S.C. §3626(a)(2)(B)(A)(i), (ii); Brown v. Plata, 563 U.S. 493 (2011).
[26] Brown, 563 U.S. at 511.
[27] *See, e.g.*, Cummings v. Premier Rehab. Keller, P.L.L.C., 142 S. Ct. 1562 (April 28, 2022) (eliminating emotional distress damages under the Rehabilitation Act of 1974, and the Affordable Care Act's anti-discrimination provision, and arguably other spending clause litigation).