

## An Executive Summary of “Toward a More Just Justice System” A New Paper by the Lawyers’ Committee for Civil Rights Under Law

### Introduction

This report addresses the question of the openness of U.S. courts to social justice litigation, also known as strategic litigation, impact litigation, or advocacy through the courts. These litigation cases are pursued on behalf of vulnerable and disadvantaged populations in order to root out policies and change institutions that systematically exclude or disadvantage them.

The Lawyers’ Committee for Civil Rights Under Law (the “Lawyers’ Committee”) was formed in 1963 to mobilize the private bar to combat issues of racial discrimination. Impact litigation has been a core component of the Lawyers’ Committee’s work since its inception. The authors of this report—the Chief Counsel and four litigating Project Directors—collectively have more than 150 years of complex litigation experience, have participated in some of the most significant social justice litigation in recent decades, and have argued cases in various courts, including the Supreme Court. The report pulls from the authors’ experiences and an expansive review of relevant cases, articles, and studies.

### Findings

#### *Recent Context*

Over the past several decades, the federal courts—following the lead of the U.S. Supreme Court—have become increasingly more conservative and less inclined to favor social justice. Piece by piece, they have issued numerous procedural and substantive decisions that have negatively affected social justice litigation. Despite these impediments, the courts mostly have remained open to social justice claims, which have made it possible for social justice advocates to circumvent these barriers in some instances, minimize their effect in other instances, as well as find ways to ultimately strike them down.

#### *Factors Favoring Social Justice Litigation*

Several factors may move courts to favor social justice litigation. Courts may be more inclined to act when the problem creating the need for litigation is large and persistent. Advances in science and social science, at times, have played a key role in persuading courts to rule in favor of social justice litigants and can be useful in showing the size and durability of the problem being litigated. There have been cases—particularly on very significant issues—where public opinion may have influenced the ultimate outcome of the case. The preexisting judicial or political philosophy of judges is more outcome determinative than public opinion. Consequently, social justice advocates need to tailor their arguments based on who is hearing those arguments.

#### *Key Strategies for Social Justice Litigation*

Any strategy for achieving a favorable outcome in social justice litigation must take several considerations into account. The importance of the facts in the case cannot be understated, particularly the significance of identifying a sympathetic plaintiff or plaintiffs. Consideration must also be given to any negative court precedent and how to overrule, distinguish, or narrow it. Where there are several cases challenging the same precedent, coordination is important in choosing the best positioned case or cases. There are times, however, after an unfavorable ruling when the best course of action is to terminate a case instead of pressing forward.

Before filing a case, litigators must conduct sufficient due diligence so an organization's limited resources are directed towards the best cases, and they must think ahead to possible remedies that can be imposed by a court. Identifying experts to introduce scientific and technical evidence and provide opinions on that evidence is often essential in social justice cases.

Another important consideration is where to file a case, which could involve a choice of state or federal court, as well as which state or federal court. Relevant considerations include which forum has the most favorable substantive law, the most favorable trial court and appellate court judges, the most favorable jury pools, if the case involves a jury trial, and the most favorable procedural rules.

Finally, social justice litigation tends to be resource-intensive, requiring lawyers, paralegals, experts, monitors, discovery costs, and travel expenses. While there are statutes that enable plaintiffs to recover attorneys' fees if they prevail on certain claims, judicial decisions have had a negative impact on the availability and amount of fees awarded. Private firms can serve as an important resource, often by donating their services and paying for out-of-pocket expenses. But there are limitations on what firms can, and are willing, to do.

### *Obstacles Hindering Social Justice Litigation*

- **Pleading requirements and arbitration agreements:** Supreme Court cases have raised the requirement for what plaintiffs have to allege in their complaint (the first document plaintiffs file with the court describing the facts and law supporting their claim) from providing "notice" to setting forth a "plausible" claim. Research shows that the plausibility standard impacts social justice litigants disproportionately. The Supreme Court's interpretation of the Federal Arbitration Act in several cases has foreclosed litigation where contracts between the plaintiff and defendants included an arbitration clause. These decisions have had a particular significance in employment and consumer protection cases.
- **Standing, mootness, and exhaustion of administrative remedies:** Barriers to accessing the court often are erected through court doctrine. For example, in order to bring a case, a plaintiff must have "standing," which generally means the plaintiff must demonstrate how the conduct of the defendant caused the plaintiff harm. In cases through the 1970s, the Supreme Court has generally adopted a permissive view of standing, but more recent Court decisions have narrowed the doctrine. Another doctrine that can serve as a barrier is mootness, which comes into play when a court no longer has a case or controversy before it. Defendants in social justice litigation sometimes seek to moot out cases by changing the challenged policy. An additional challenge is exhaustion of remedies, which requires plaintiffs to exhaust administrative remedies before proceeding to litigation. This barrier applies to Title VII employment, disability, and prisoner abuse cases.
- **Class certification:** Class actions, cases brought on behalf of a group of individuals, have been an important vehicle in ensuring that the scope and remedy of a case has broad effect. Courts, however, have become less receptive to certifying classes. A prime recent example was the Supreme Court's recent decision in *Wal-mart v. Dukes*, where the Court heightened the standard for plaintiffs to satisfy "commonality," which is a requirement for class certification.
- **Summary judgment:** Summary judgment is a pretrial determination by the court that one of the parties has not set forth sufficient facts to prove or disprove a claim. Recent Supreme Court cases

have made summary judgment more available to defendants in social justice cases, particularly in employment discrimination cases.

- **Substantive law:** Substantive law challenges to social justice litigation also impose a major barrier to these impact cases. The Supreme Court's treatment of the Equal Protection Clause of the Constitution, a key provision for social justice litigators, is illustrative. The Supreme Court has been reluctant to view racially neutral laws as violative of the Equal Protection Clause, even if they have a disparate impact on minorities. Moreover, a majority of the Court has treated as presumptively unconstitutional governmental efforts that on their face are designed to assist disadvantaged racial groups that have suffered discrimination. Many social justice cases involve the issues of discriminatory purpose or disparate impact. Courts are hesitant to find that defendants acted with discriminatory intent, and the Supreme Court has made it more difficult to prove disparate impact claims under various civil rights statutes, including housing, employment, education, and voting statutes.

Even though these numerous obstacles persist, the courts remain open to social justice litigation to a significant degree; but, because of these obstacles, successful social litigation is heavily dependent on careful planning and strategizing, persistence and patience, and sufficient resources.

## Recommendations

### *Recommendations for Litigators*

There are a number of key strategic implications for litigators and advocates who engage in social justice litigation. They include:

- A social justice litigation strategy requires both caution and willingness to take risks. Litigators who do not think through all of the options and obstacles do so at their own peril. Conversely, litigators waiting for the foolproof social justice case will probably never file one.
- Litigators should be willing to commit to a long-term timeframe. Individual cases can take years to resolve and often start with baby steps. Some remedies require lengthy post-litigation monitoring. Trying to create widespread or long-standing change can take a decade or more.
- Litigators need to consider all significant procedural and substantive opportunities and obstacles before proceeding; they need to identify and distinguish outright barriers from high impediments and develop strategies for reaching both shorter- and longer-term goals.
- Litigators need to make sure that they have adequate resources to be successful, including an appropriate legal team, qualified experts, and sufficient funds.
- On cutting-edge issues, litigators need to consider whether a particular case is the right vehicle. Issues such as the judicial forum (examining both the controlling case law and the judges likely to hear the case) and the factual context (looking at the strength of the facts and the persuasiveness of clients and key witnesses) should be considered. In this regard, coordination between and among different organizations with common goals is essential.

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- Case presentation should be crafted with attention to the judges or justices that will hear the case. If the case has significant potential to get to the Supreme Court, litigators should seek to narrow the case if possible so that a loss does not have catastrophic effects on potential future cases.

### *Recommendations for Funders*

- Social justice litigation takes time. Impact cases typically take several years; accordingly, funding them requires long-term investment;
- Social justice litigation is expensive. In addition to staffing the cases for the number of years required to litigate, most of the more complex cases have significant out-of-pocket costs including those for investigation, depositions, experts, other discovery costs, and communications.
- As discussed above, successful social justice litigation requires litigators who carefully think through all of the contingencies and potential obstacles. Funders should think through carefully which organizations to fund and should ask questions of potential grantees about their litigation strategies.
- Social justice litigation entails high risk and high reward, and progress on cutting-edge issues often has fits and starts. The first case or cases on a particular issue may be unsuccessful.

Like litigators and advocates, funders of social justice litigation need to be patient and persistent because progress usually takes time and occurs in increments.

### **Conclusion**

Despite a difficult judicial environment and numerous other challenges, social justice litigation has made a substantial, positive difference for the disadvantaged. Absent a significantly more hostile judiciary, progress will continue. Indeed, given the number of 5-4 Supreme Court decisions that have created procedural and substantive obstacles, the change of one justice, perhaps the successor to the recently-deceased Justice Scalia, may result in courts that are more receptive to social justice claims. Critical to any sustained success will be the maintenance and enhancement of collaboration and investment by clients, advocates, litigators, and funders.