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Institutional Reform Litigation

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I. INTRODUCTION

Institutional litigation involving class actions against the city of New York essentially began in the 1970s and has grown to be a significant part of the workload in the General Litigation Division of the New York City Law Department. However, the methods currently being used to resolve these cases are not efficient. The city typically enters into detailed consent decrees. Consent decrees are agreements where the parties in a dispute acquiesce to injunctive relief.[1] These agreements provide for an extended period of time for the city to comply with the terms of the decree. Complying with these consent decrees is very costly and time consuming for the city and often results in continuing litigation.

This article will focus on litigation concerning the city's detention facilities and the homeless because they present the best case studies for discussing how the Law Department handles institutional litigation. I will then suggest alternative methods to resolve institutional litigation that will be more cost effective and reduce the strain on the city's valuable resources.

II. DETENTION FACILITIES CASES

In 1970, an action was commenced against the city on behalf of un-convicted detainees housed in the Manhattan House of Detention, popularly known as "the Tombs."[2] In 1974, the district court found a number of institutional violations, and, as a result, ordered the city to submit a plan for remedying the conditions at the Tombs.[3] By July 1974 the city had not even provided a timetable as to when the required work would commence.[4] As a result of the city's delays in submitting the comprehensive plan, the court ordered the Tombs closed within 30 days.[5] The city appealed and the Second Circuit remanded for the district court to reconsider its closing order.[6]

After the remand, the city closed the Tombs and transferred all of the detainees to the House of Detention for Men, a facility on Rikers Island.[7] The city then argued that the transferred detainees were in a new facility and would not be entitled to the improvement of the conditions ordered by the judge in the Tombs case.[8] The city asked for discovery and a trial. The court rejected this request, which was affirmed by the Second Circuit.[9]

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1. *See* Harold Baer, Jr. & Arminda Bepko, *A Necessary and Proper Role for Federal Courts in Prison Reform: The* Benjamin v. Malcolm *Consent Decrees*, 52 N.Y.L. Sch. L. Rev. 3 (2007).
2. Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y. 1974).
3. *Id.*
4. Rhem v. Malcolm, 377 F. Supp. 995 (S.D.N.Y. 1974).
5. *Id.* at 996.
6. Rhem v. Malcolm, 507 F.2d 333, 336 (2d Cir. 1974).
7. Rhem v. Malcolm, 389 F. Supp. 964, 966 (S.D.N.Y. 1975).
8. *Id.* at 966–67.
9. Rhem v. Malcolm, 527 F.2d 1041 (2d Cir. 1975).

In 1975, an action was brought challenging the conditions at the House of Detention for Men.[10] A trial was held in 1976, and post-trial memorandums were submitted in 1977. During this period, there were also challenges to the conditions at other detention facilities on Rikers Island and facilities in the Bronx, Brooklyn, and Queens.[11]

Ed Koch became New York City's mayor on January 1, 1978. Mayor Koch directed Allen Schwartz, the new Corporation Counsel, to attempt to settle all of the detention cases.[12] The first settlement agreement was entered in November 1978.[13] It was an extremely detailed, fifty-page document, covering every aspect of the operation of the Rikers Island detention facility.[14] The agreement covered thirty-one subjects, including punitive segregation, dayroom access, environmental health, laundry, cell searches, and recreation.[15] The Deputy Mayor's Office for Criminal Justice was directly involved in the negotiations and the decree was signed by the Corporation Counsel.

Similar consent decrees were entered for all of the facilities involved in litigation.[16] The consent decrees contemplated an extended time period for compliance.[17] They resulted in an enormous increase in capital and expense funds for the Department of Correction.[18] Despite these expenditures, the litigation continued.

Since 1980, every Corporation Counsel has dealt with the provisions of the consent decrees. Some of the cases included: a complaint alleging overcrowding at the House of Detention for Men;[19] a motion to join the state of New York as defendant to enable the city to comply with consent decrees;[20] an application for an order to modify previous orders imposing a population cap on the House of Detention for Men;[21] a motion to punish the city Department of Correction for contempt;[22] another motion to modify an order;[23] a motion to terminate a consent decree under the Prison

10. Benjamin v. Malcolm, 495 F. Supp. 1357 (S.D.N.Y. 1980).

11. *See, e.g.*, Forts v. Malcolm, 426 F. Supp. 464 (S.D.N.Y. 1977); Ambrose v. Malcolm, 414 F. Supp. 485 (S.D.N.Y. 1976); Detainees v. Malcolm, 421 F. Supp. 832 (E.D.N.Y. 1976).

12. *See* Baer & Bepko, *supra* note 1, at 23.

13. Benjamin v. Malcolm, 803 F.2d 46, 48 (2d Cir. 1986).

14. *See* Ted S. Storey, *When Intervention Works: Judge Morris E. Lasker and New York City Jails*, *in* Courts, Corrections, and the Constitution: The Impact of Judicial Intervention on Prisons and Jails 138, 154 (John J. Dilulio, Jr. ed., 1990).

15. *Id*.

16. *See Benjamin*, 803 F.2d at 48.

17. *But see* Storey, *supra* note 14, at 156.

18. *Id.* at 156–57.

19. Benjamin v. Malcolm, 495 F. Supp. 1357, 1360 (S.D.N.Y. 1980).

20. Benjamin v. Malcolm, 88 F.R.D. 333, 334 (S.D.N.Y. 1980).

21. Benjamin v. Malcolm, 646 F. Supp. 1550, 1551 (S.D.N.Y. 1986).

22. Benjamin v. Malcolm, 752 F. Supp. 140, 141–42 (S.D.N.Y. 1990).

23. Benjamin v. Malcolm, 884 F. Supp. 122, 123 (S.D.N.Y. 1995).

Litigation Reform Act;[24] and a motion to terminate an order regarding extreme temperature conditions in the facilities.[25]

The prison consent decrees, however, did not contain provisions that would limit the duration of the consent decree, known as sunset provisions. However, in view of the fact that the Prison Litigation Reform Act of 1996 (which encourages the termination of prisoners lawsuits) did not result in the conclusion of the New York City detention cases, it is doubtful whether a sunset provision would have been implemented by the court to end the litigation.

III. HOMELESS FACILITIES CASES

The homeless litigation is instructive because it involves cases that ended in consent decrees and matters that have been fully litigated.

In *Callahan v. Carey*, a case that took place in 1979, the plaintiffs were homeless men living in New York City. They brought an action against the city and state of New York alleging that the city had failed to provide adequate shelter facilities in violation of their statutory and constitutional rights.[26] In 1981, the city and state entered into a detailed consent decree that constituted the final judgment in the case.[27] The consent decree set forth shelter standards including the width of beds, clean sheets, capacity limits, recreation, and use of telephones.[28] The consent decree did not contain a sunset provision.[29]

In *Eldridge v. Koch*, the appellate division applied the men's consent decree to women's shelters as required under the federal and state constitutions.[30]

In *McCain v. Koch*, homeless individuals with children commenced an action seeking to require the city to place families who required assistance in emergency housing facilities that satisfied health, safety, and other residential regulation standards.[31] In 1986, the appellate division held that the homeless plaintiffs' families were entitled to emergency shelter.[32] The finding was based on statutory rights and on the federal and state constitutions.[33]

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24. Benjamin v. Jacobson, 935 F. Supp. 332, 336 (S.D.N.Y. 1996).

25. Benjamin v. Horn, No. 75 Civ. 3073 (S.D.N.Y. 2006).

26. Callahan v. Carey, N.Y. L.J., Dec. 11, 1979 (Sup. Ct. N.Y. County Dec. 5, 1979).

27. The *Callahan* Consent Decree, Callahan v. Carey, No. 79/42582 (Sup. Ct. N.Y. County Dec. 5, 1979), *available at* http://www.escr-net.org/usr_doc/callahanconsentdecree.pdf.

28. *Id.*

29. *Id.*

30. 469 N.Y.S.2d 744, 745 (1st Dep't 1983).

31. 484 N.Y.S.2d 985, 986–87 (Sup. Ct. N.Y. County 1984).

32. McCain v. Koch, 502 N.Y.S.2d 720, 727–28 (1st Dep't 1986).

33. *Id.* at 728–30.

Since the decision, every Corporation Counsel has been actively involved in the *McCain* case. The matter went to the appellate division four times[34] and the New York Court of Appeals twice before a final judgment was rendered.[35] On September 17, 2008, Judge Jacqueline Silberman of the Supreme Court, New York County, issued a final judgment regarding the *McCain* litigation, which included the following party stipulations: (1) that all motions and claims for relief be dismissed with prejudice; (2) that all orders be vacated; and (3) that all aspects of the *McCain* litigation be closed and that no further proceedings or motions be brought.

Both the consent order in *Callahan* and the litigated orders in *McCain* have resulted in a substantial increase in the funding for homeless services.[36] Some of the litigated orders in *McCain* are as detailed as the consent order in *Callahan*.[37] After a period of time, when the issue of capacity generated substantial litigation, *Callahan* became relatively quiet. *McCain*, however, had, up until its resolution, been much more contentious, involving many appearances before the court, two different mediators, and over fifty court orders.[38]

IV. OTHER INSTITUTIONAL LITIGATION CASES

Two other major cases commenced in the 1970s ended in detailed consent decrees without sunset provisions. *Jose P.* challenged the appropriateness of instruction and related educational services for students with disabilities.[39] This case ended with a consent decree in 1979.[40] The city now spends approximately two billion dollars on special education services, yet there are still disputes about whether the city is meeting its obligations under the decree.

Wilder v. Bernstein challenged the procedures for the placement of children in foster care.[41] The consent decree was a very detailed forty-six pages.[42]

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34. McCain v. Giuliani, 676 N.Y.S.2d 151 (1st Dep't 1998); McCain v. Giuliani, 653 N.Y.S.2d 556 (1st Dep't 1997); McCain v. Dinkins, 301 N.Y.S.2d 271 (1st Dep't 1993); McCain v. Koch, 523 N.Y.S.2d 112 (1st Dep't 1988).

35. McCain v. Giuliani, 93 N.Y.2d 848 (1999); McCain v. Dinkins, 84 N.Y.2d 216 (1994).

36. *Cf.* Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 Fordham Urb. L.J. 1215, 1231–32 (2003) (noting that the *Callahan* consent decree required New York City to provide substantial new services for homeless men and "set forth basic standards for the shelters," which would naturally have to result in increased funding for such services).

37. *See, e.g.*, McCain v. Koch, 70 N.Y.2d 109, 115 (1987) (describing the standards set forth in the *McCain v. Koch* injunction of June 27, 1984); McCain v. Koch, 502 N.Y.S.2d 720, 725–27 (1st Dep't 1986) (describing several of the orders resulting from the litigation).

38. *See McCain*, 93 N.Y.2d 848; *McCain*, 84 N.Y.2d 216; *McCain*, 676 N.Y.S.2d 151; *McCain*, 653 N.Y.S.2d 556; *McCain*, 301 N.Y.S.2d 271; *McCain*, 523 N.Y.S.2d 112.

39. Jose P. v. Ambach, 699 F.2d 865 (2d Cir. 1982).

40. *Id.* at 870.

41. 499 F. Supp. 980 (S.D.N.Y. 1980).

42. *See* Wilder v. Bernstein, 645 F. Supp. 1292, 1298–1307 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988).

The *Wilder* consent decree became inextricably linked to another litigation: *Marisol A. v. Giuliani*, commenced in 1995.[43] *Marisol* challenged the entire foster case system and the Administration for Children's Services' ("ACS") treatment of children in their custody who would be at risk of neglect or abuse if not in ACS's custody.[44] An advisory panel was established to review the reform plan prepared by the city.[45] The parties agreed to dismiss the *Marisol* case and also terminate the *Wilder* proceeding in a court approved consent agreement.[46] However, the advisory panel would retain jurisdiction to study the ACS's operation and make recommendations.[47]

V. PROPOSED SOLUTIONS

Institutional reform litigation, if successful, necessarily impacts the city's ability to manage a particular institution. To avoid this problem, courts should be receptive to ending a case when the litigation has achieved realistic goals. If the courts reward the city for committing substantial funds and resources to solving institutional problems by allowing the city to terminate the litigation, the city will be more likely to try to settle cases, which could be in the best interests of all parties.

There are several alternatives to the methods the city typically employs to resolve institutional reform cases, all of which will aid the city in achieving the necessary reforms, while preventing a long and costly litigation process. Sunset provisions in consent decrees, private settlement agreements, and pre-litigation demand letters are such alternatives.

A. Sunset Provisions

Since *Marisol*, the city has routinely inserted a sunset provision in consent decrees. For example, in *Sheppard v. Phoenix*, the plaintiffs challenged the treatment of prisoners in the Central Punitive Segregation Unit, a correctional facility on Rikers Island.[48] The detailed agreement provided that the decree would terminate upon defendant's motion, within two years of the date of the stipulation, unless the court makes new, written findings that additional relief is necessary.[49] In 2002, the district court terminated the litigation, noting that the city had followed the recommendations of the experts.[50]

43. Marisol A. v. Giuliani, 185 F.R.D. 152, 156 (S.D.N.Y. 1999).

44. *Id.*

45. *Id.* at 157–58.

46. *Id.* at 158.

47. *Id.*

48. 210 F. Supp. 450, 451 (S.D.N.Y. 2002) (providing background about the complaint brought by the plaintiffs).

49. Michael A. Cardozo, *The Use of ADR Involving Local Governments: The Perspective of the New York City Corporation Counsel*, 34 Fordham Urb. L.J. 797, 807 (2007).

50. *Sheppard*, 210 F. Supp. at 451–52; *see also* Cardozo, *supra* note 49, at 807.

The *Sheppard* case is in sharp contrast from the detention facilities cases discussed above. In those cases, litigation with respect to the consent decrees persisted for over twenty years. In *Sheppard*, the case concluded in a mere four years. The fact that there was a sunset provision attached to the consent decree in the *Sheppard* case may be very well responsible for the distinction.

However, it is possible that the history of the detention facilities cases might not have been different if there were sunset provisions in the consent decrees. In light of the history in the case, it is unclear whether the plaintiffs' attorney would have accepted a sunset provision. Moreover, if there were a sunset provision, it is not likely that it would have been implemented because the city was not in compliance with a significant part of the decree. Furthermore, in the event the city decided to litigate the detention facilities cases to conclusion, it is likely that the trial judge would have entered a very detailed judgment involving the same areas touched upon in the consent decree.

Regardless of what the result would have been in the detention facilities cases, the presence of the sunset provision encourages the parties to intensively focus on the substantive provisions during the sunset period. A time-limited decree encourages the city to comply with the court-ordered obligations as quickly as possible so as to end the litigation by the sunset date.

B. Private Settlement Agreements

In addition to sunset provisions in consent decrees as a mechanism for swift resolution to institutional litigation reform, the city has entered into private settlement agreements to resolve cases. *Ingles v. Toro* involved allegations of excessive force against inmates in the facilities operated by the Department of Correction.[51] The parties entered into a written agreement that terminated the case. The agreement also provided that if the plaintiff was unhappy with the performance of the agreement, he could either return to court and seek reinstatement of the litigation, or seek specific performance in state court.[52]

C. Pre-litigation Demand Letters

The city of New York should also continue to encourage pre-litigation demand letters—letters that identify the issues which are to be the subject of the institutional litigation. There have been a number of cases where the city has avoided litigation through corrective action as a result of these letters. A good example is when the city revoked Section 8 housing subsidies for a number of families. In response to a pre-litigation letter from the plaintiffs, the city agreed to reinstate the subsidies and invoke a different process to review the Section 8 authorizations.

Even if corrective action is not possible, the city officials or its attorneys, in consultation with representatives of the putative plaintiffs, could establish a process

51. 438 F. Supp. 2d 203, 206 (S.D.N.Y. 2006).

52. *Id.* at 207–10.

including the use of independent experts, which could lead to a resolution of the problem. This demonstration of good faith might lead to a remedy which would give the city managers more flexibility than an order by a court.

VI. CONCLUSION

If the city continues to implement the above recommended alternatives, costly and lengthy litigation can be avoided. If these alternatives continue to be used, we will be much more likely to see litigation resolved in a similar fashion to cases like *Sheppard* and *Ingles*, as opposed to the detention facilities cases, the *McCain* litigation, and the *Callahan* litigation. The city will therefore be able save valuable time and resources.