

LITIGATION LUNACY

By Lawrence J. McQuillan

Anna Nicole Smith's life was a tabloid's dream. Even though she passed away almost one year ago, her saga lives on in the media through battles ranging from paternity disputes to prescription drug abuse to disputed legal fees. As the 9th Circuit gets ready to take up her case again, her true legacy comes to light — undermining both federalism and America's legal system.

Some history must be provided in order to understand the whole story. Smith, legally Vickie Lynn Marshall, attracted the fancy of oil tycoon J. Howard Marshall when he visited her strip club in Texas. They married in 1994 and he died the following year — initiating a torrent of litigation.

Although Marshall showered Smith with gifts while he was alive, he made neither a bequest nor a trust to provide for her after his death.

So Smith sued, claiming that Marshall promised her half of his estate. Smith's case came under Texas probate law. The jury sorted through the conflicting factual claims and ruled for E. Pierce Marshall, Marshall's son and beneficiary.

That should have ended the matter. However, when Smith's legal team realized they were losing the Texas probate case, they looked for a more favorable venue to hear her claim. While the Texas probate case was ongoing, Smith filed for bankruptcy in federal court in California.

It was a dubious filing, but her alleged financial straits allowed her to effectively sue Pierce Marshall again for "her inheritance," only this time in a completely different jurisdiction and court.

The Texas jury trial ran 95 days. The jurors denied her claim.

"He said, she said" cases are notoriously difficult to judge, which is why we employ juries. A jury made up of people with contrasting experiences provides the best filter through which to decide such a dispute.

But Smith turned out to have a trump card — the bankruptcy case. The bankruptcy judge in California decided to accept all of Smith's allegations in response to a dispute over pre-trial discovery and he awarded Smith \$475 million.

Although Smith succeeded on her fourth time at bat, the 9th Circuit Court of Appeals in San Francisco reversed the bankruptcy judge. Under the probate exception, federal courts are supposed to defer to state courts in this area, which meant the Texas probate court decision controlled.

The case made its way to the U.S. Supreme Court, which reversed the reversal, instructing the appellate judges to use a narrower definition of probate exception. Currently, the case is pending before the 9th Circuit, where the panel can take it up any day. Smith may still lose, but the litigation grinds on.

And it grinds on despite both litigants having passed away.

The system desperately needs reform. The ambiguity in laws allows litigants to game the system by allowing them to venue-shop for a favorable outcome. Problems inevitably arise when federal courts try to interpret state law.

The federalist system prizes state sovereignty. Even where federal courts have jurisdiction over a state matter, such as in a case of diversity (when litigants reside in different states), the issue must be decided based on state law. State law is best interpreted by state judges, who are entrusted with the

duty of enforcing it every day.

Certainty serves everyone. Litigants need only fight a case once. Taxpayers need only pay judges to hear a case once. Those affected by the result need only suffer through the uncertainty caused by a case once.

Finality is particularly important for our economic system to operate efficiently. If you are unsure that a court fight is over, you will not be able to plan for the future, whether the issue is a negligence lawsuit or a contract dispute.

Certainty is particularly important for inheritance law. People need clear rules to plan their estates. Recipients need to know when they can safely spend their money. Foundations need to know which contributions they can count. Moreover, endless litigation can cost more than the bequest is worth, except in cases with the largest prizes.

Smith's claim, however, was for one of those large prizes, so she was willing to do as much — and spend as much — as necessary to win a favorable verdict.

Smith is a tragic figure. The media attention accorded her tortured life demonstrates the emptiness of America's celebrity-driven culture. But the continuing litigation over her inheritance claim is more serious. It reflects federal bankruptcy overreach that must be remedied. As long as bankruptcy remains a place to remedy any inconvenient problem, the rest of us will remain hostages to those trying to game the system.

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Mediation Could Be Key to Improving U.S.-Chinese Business Relations

By Thomas J. Stipanowich

The emergence of China as a leading trading partner of the United States has prompted serious discussions about how to resolve disputes between Western companies and their Chinese business associates. Fearful of ending up in court, businesses usually agree to submit controversies to private arbitrators for a binding decision if negotiations fail. But binding arbitration can be risky and, like court, it takes control of the dispute away from the parties. The deficiencies of these alternatives have spurred recent efforts to promote mediated negotiation as an alternative for resolving U.S.-Chinese business disputes.

In the United States, concerns about the cost, length and risks of going to court have led many companies to seek the help of mediators in negotiating disputes out of court. Besides saving costs and reducing the time to resolve a business

dispute, mediation often produces more creative and effective solutions. More importantly, mediation leaves control of the dispute in the hands of the parties. The final solution, if any, is theirs alone. A decade ago, a Price Waterhouse survey found that almost nine in 10 Fortune 1,000 companies had used mediation in the preceding year; there are indications that mediation is even more widely used today.

Southern California may rightly claim to be the epicenter of mediation. In no other region of the United States are so many court cases resolved early and informally with the help of mediators. Increasingly, mediation occurs pursuant to provisions in business contracts that call for a mediator to step in and facilitate negotiations even before the filing of a complaint.

As more and more American companies have established relationships with Chinese partners, some thoughtful legal counsel have wondered whether it might be pos-

sible to employ mediation to resolve conflicts in those relationships. China, interested in promoting itself favorably as a trading partner, has encouraged discussions about business mediation — which, after all, is seemingly resonant with its own ancient traditions.

Indeed, while American-style mediation is essentially a creature of the last three decades, in China mediation, or "conciliation," has a rich and venerable history dating back more than two millennia. Submitting disputes to a "wise counselor" — a village elder or authority figure — for the purpose of promoting or restoring harmony was consistent with Confucian precepts, and the practice remains an important mechanism for maintaining the social order in modern China.

Today, conciliation programs operate in thousands of communities and urban neighborhoods throughout China. In addition, Chinese judges often act as conciliators prior to adjudicating a case. The rules of leading Chinese institutions sponsoring private arbitration likewise provide that arbitrators may try to informally resolve the dispute prior to rendering a decision on the merits.

None of the existing Chinese structures, however, is the functional equivalent of business mediation as most U.S. and Western companies have come to understand it. The community and neighborhood conciliation programs may be suitable for local business disputes among Chinese parties, but are wholly unsuitable for international commercial controversies.

American lawyers tend to be strongly resistant to the idea of having a judge or arbitrator try to mediate a dispute before judging it; in our culture, unlike China's,

the two functions are often viewed as incompatible, because mediation involves confidential one-on-one communications with each party about the dispute-activities that are inimical to our notions of due process in adjudication. Moreover, Westerners accustomed to relatively rigorous protection of party autonomy may be fearful that a mediator who will ultimately judge the dispute will exert too strong an influence over any mediated settlement.

These concerns underlie efforts to develop a framework for mediation that exists independently of local neighborhood programs, courts or arbitration. One government agency, the China Council for Promotion of International Trade, has sought to establish partnerships with dispute-resolution organizations in other countries for the purpose of developing joint mediation procedures for the resolution of international disputes.

In 2002, CCPIT approached me in my then-current role as president of the New York-based International Institute for Conflict Prevention & Resolution about such a joint venture. The result was the U.S.-China Business Mediation Center, a venue for mediation of business disputes between U.S. companies and Chinese entities. We developed rules, trained mediators, published promotional materials and held conferences in the United States and China — but the response so far has been disappointing. Among other things, this may be because mediation outside the traditional institutional settings lacked a proven track record in China.

Recently, the Beijing Arbitration Commission, one of the most

prominent dispute resolution institutions in China, has announced its intention to sponsor a mediation program. In recent years, the BAC has taken steps to promote itself as an important international venue for dispute resolution, and the addition of a mediation program conducted independent of arbitration processes (and in this sense akin to U.S. and Western models) is a major step in this direction. The BAC is developing mediation rules similar in many respects to its Western counterparts, and it will soon train a cadre of Western and Chinese mediators.

Will mediation become a prominent feature of the landscape of dispute resolution for U.S. businesses in China? It is too soon to tell. The BAC's efforts are a very important step in this direction, but many questions remain. We know, for example, that, at present, parties to commercial contracts may benefit from the informal "mediation" of a third party that they trust and respect, such as a person that helped arrange financing for the transaction or a local official. Whether they will be able to make the transition to a structured process involving the appointment of another third party as a mediator — perhaps an individual unconnected to either party or to the transaction — remains to be seen.

Once in mediation, moreover, Western and Chinese parties may have very different expectations of the mediator, and how actively and directly they expect the mediator to press for a resolution. Stories of successful resolutions through mediation will be critical to broad acceptance of the mechanism in this cross-cultural context.

Other questions remain regarding the interface between private

mediation and the Chinese courts. In the United States, for example, courts tend to recognize and protect mediator privileges and enforce other rules that preserve the confidentiality of statements made in mediation, since the expectation of confidentiality is regarded as critical to the process. In China, however, it is unclear whether courts will accord similar treatment to mediators and to communications in mediation.

In addition, U.S. courts are accustomed to enforcing settlement agreements that were obtained with the assistance of a mediator. There is no guarantee, by contrast, that Chinese courts will grant enforcement to mediated settlement agreements. For this reason, the new BAC Mediation Rules will contemplate the possibility of allowing parties to submit their mediated settlement agreement to an expedited arbitration process for the purpose of converting it into an arbitration award. In this way, the result would be enforceable by Chinese or other courts in accordance with the International Convention on Recognition and Enforcement of Arbitration Awards.

At bottom, mediation comes with no guarantees. If it fails to resolve a dispute, parties are left to binding arbitration, or to the courts. But its long history in China and the United States' recent, but transformative, experience with mediation are powerful incentives to look for mutually satisfactory modes of mediation to resolve our conflicts.

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