Legal Backgrounder

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LIBERTY AT RISK: COURT MUST PRESERVE TRADITIONAL RULES OF CIVIL JUSTICE SYSTEM

by

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Our country's legal system is the first and last line of defense of liberty. The rule of law – and just as importantly, the *belief* that the rule of law prevails – protects an array of freedoms that are the envy of the world. Yes, the system does require an independent judiciary that will enforce the law, regardless of the parties before them. It also requires, however, public faith that the law will govern the outcome, rather than fame, political power, or money.

At the birth of our nation, the Founders described the judiciary as the "least dangerous branch" of government. It was not given the power to make law or appropriate money. Nor did it have control of the police. Instead, it had to rely on the other branches of government for enforcement of its rulings. At the end of the day it was the people's belief in the system that gave the judiciary the power to mediate legal disputes.

Our reliance on the rule of law is so pervasive that it hardly gets any thought. Of course we understand the importance of the constitution and "due process" when we have an encounter with the police or need government permission to build a house or run our business. But our reliance on the legal system runs much deeper.

Consider the idea of a contract, the free agreement between two people for a commercial transaction. It does not matter if the contract is for the sale of a multi-billion dollar business or for a household necessity. We rely on our ability to structure and enter into these agreements every day. The reason we can put so much reliance into those agreements is because we *know* that the courts will enforce the deal so long as we have followed all of the legal rules. We like to say that justice is blind – it does not care who the parties to the dispute may be, it only cares about the law.

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When we do have to enforce our rights in court, we take it as an article of faith that certain rules will be followed. Everyone will have a chance to be heard, the court will treat all parties according to legal standards that apply to everyone, and once the judgment has been rendered and the last appeal completed, the case is over. This last point is important. We need to be able to rely on the finality of legal rulings just as much as we need to be able to rely on the fairness of those rulings. It is understood that whether we have won or lost, we have had our day in court.

The system generally works – something quite surprising since it relies on human agency. There are a lot of good people who devote their careers to making sure that we do have equal justice for all. But any system that relies on the work of people is subject to error. Simple mistakes happen – and sometimes those mistakes can lead down a road that will injure not only the parties before the court, but the entire system of justice.

More and more, it seems, you can hear the refrain that some people get "more justice" than others. Whether it is based on celebrity or wealth, there is a suspicion that some get a special break when it comes to the law.

We can see obvious signs of this when a celebrity shows up in court flanked by what appears to be an army of briefcase toting attorneys. Whether such extravagant spending on lawyers (and I can assure you, it is quite expensive to hire a team of attorneys to go with you to court) results in a better decision for the celebrity deserves study. Yet, there is little we can do to change that situation. We certainly cannot afford to hire a team of attorneys for everybody involved in every case, nor should we limit how many attorneys (or which attorneys) you are allowed to hire to represent your interests.

A more insidious problem, however, is what happens when someone tries to win a favorable ruling by trying to change the rules. Consider for example what happens when a party to a legal proceeding refuses to take no for an answer. After losing in one court, they simply go to another court in another state and reargue their claim.

If allowed to happen, there is a real danger that the public will lose its faith in the legal system. The public might be able to understand that some people can afford to hire better or more attorneys than someone else. But how do we explain it when some parties are allowed to file multiple lawsuits in different states raising essentially the same claims? After all, once a case is over it cannot be re-litigated somewhere else – right?

The fact that big money is at stake should not change the rules we have all agreed to for our legal system. If we allow some litigants to change the rules of the game just because they are chasing after huge amounts of money, we risk shaking the confidence of the public in the legal system. That would be a dire result for a system that depends so heavily on the public's belief that the system is fair. This is a real danger exemplified by two recent cases – one of which is still going on today.

Take for instance a class-action lawsuit against Compaq computers that was recently settled. Lawsuits had been filed in Texas, Oklahoma, and California all arguing that a flaw in some of the computers sold by Compaq could result in the loss of computer data. Each of the lawsuits that were filed sought to win a ruling certifying the case as a "nationwide class action." This means that the plaintiffs in that one case would represent the interests of every person in the country who may have purchased one of those computers.

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Class action litigation allows the court to consolidate many small claims into one case. Each individual claimant is not required to file their own litigation or show up in court. Instead, the class representative (and the class action attorneys) represents the interests of everyone with a similar claim.

Businesses fear class actions since they carry the potential of converting small, individual claims into one very large claim. Class action attorneys like class actions because they offer the potential for the attorneys to win millions of dollars in attorney fees for cases where the individual damages for class members may be less than $1,000.

In the Compaq case, there was only one problem with the strategy to make the case a nationwide class action. Each case depended on the particulars of state law. If the law of each individual state were to apply, there would be no basis to consolidate all of the cases into a single, nationwide class action. Thus, it fell to the plaintiffs' attorneys in each case to argue that all of the cases had to be judged by the law of a single state. Since Compaq was headquartered in Texas, the argument was that Texas consumer laws should apply.

Unfortunately for the plaintiffs, however, the Texas Supreme Court rejected that argument.[1]

That should have been the end of it right? No nationwide class action can be premised on the idea that Texas consumer law applies to all of the claims (and it would have been hard to sell the idea that California law should apply to computers from a Texas company sold in Oklahoma).

The problem, however, is that there is a lot of money to be made in nationwide class actions. Not for the people who actually purchased the defective computers mind you. But these cases can be a gold-mine for the attorneys.

So, instead of taking no for an answer from the Texas Supreme Court – the final arbiter of Texas law, the class action attorneys convinced an Oklahoma court to rule that the case should be a nationwide class action, and that class action status could be premised on the idea that Texas consumer law applied to all of the claims. Ignoring the ruling of the Texas Supreme Court, the Oklahoma courts agreed with this argument and certified the case as a nationwide class action.[2]

Unfortunately for all of us, the United States Supreme Court declined to review the case[3] – and so public faith in the legal system took another beating. Of course the ruling also cost the computer company a bundle of cash. The case was settled with computer purchasers getting vouchers for either $100 or $175 and another piece of computer hardware. The attorneys' fees in the settlement totaled 40 million dollars.[4]

But the cost to the computer company pales in comparison to the cost of the dwindling confidence of the public in the American legal system. If an Oklahoma court can override the Texas Supreme Court on an issue of Texas law, what is the point of the state legal system? Are we really prepared to accept a rule that

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[1] *Compaq Computer Corp. v. Lapray*, 135 SW3d 657, 681 (Tex. 2004).

[2] *Grider v. Compaq Computer Corp*., 2004 WL 526946 (Okla. Dist. Ct. 2004).

[3] *Compaq Computer Corp. v. Grider*, 128 S. Ct. 378 (2007).

[4] Settlement in *Grider v. Compaq Computer Corp*., posted at http://www.barrettgrider-v-hpcompaq.com/pdfs/Settlement%20Agreement%20and%20Release.pdf.

says a final decision does not matter if there is enough money at stake?

Sadly, this scenario is playing itself out again now as the U.S. Court of Appeals for the Ninth Circuit contemplates whether a Bankruptcy Court in California can override the decision of a Texas Probate Court. And again, the motivation behind the multiple legal actions is a large pot of money.

Texas millionaire J. Howard Marshall II died in 1995, leaving a detailed estate plan for the disposition of his fortune. Left out of that estate plan was his young wife of 14 months. Instead, Marshall had decided before his death to provide for his wife in other ways – purchasing homes, cars, and jewelry for her valued at several million dollars.

After Mr. Marshall's death, Mrs. Vickie Lynn Marshall (also known as Anna Nicole Smith) decided to exercise her right under Texas law to challenge the estate plan in court. Over the course of five-month long trial, the probate court heard testimony of over 40 witnesses and reviewed literally hundreds of items of evidence. Mrs. Marshall herself testified for six days. Ultimately, the court ruled against Mrs. Marshall and upheld the estate plan.

Taking a page out of the class-action lawyer playbook, Mrs. Marshall decided that the Texas courts ought not to be the final word on Texas law. She came to California and challenged the legality of the estate plan in bankruptcy court. That court ruled in favor of Mrs. Marshall and the case has gone from a Texas probate court to a California bankruptcy court, the Ninth Circuit Court – all the way to the Supreme Court for review – only to be sent back to the Ninth Circuit on the question of whether Mrs. Marshall was entitled to re-litigate her case in California after losing in Texas.[5]

This attempt to relitigate the Texas probate court decision in a California Bankruptcy Court in the hopes of a more favorable outcome is a real danger to judicial process and rule of law. We all hope that our wishes, as expressed in our will, will control how our property is distributed to family members after our deaths. This case raises questions beyond the safety of our estate plans, however.

The decision should be instructive. Will we continue on a path that will end in a total loss of public faith and confidence in the judicial system? If so, what will that mean for the liberties that we cherish? We rely on that judicial system for protection of liberty against the other branches of government. If the public loses faith in that system, however, we ultimately lose that liberty.

[5]The history of the case is recounted by the Supreme Court in *Marshall v. Marshall*, 547 U.S. 293, 300-05 (2006).

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