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# Tackling Complex Litigation

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## BOOK REVIEW

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### TACKLING COMPLEX LITIGATION

COMPLEX LITIGATION AND THE ADVERSARY SYSTEM. By Jay Tidmarsh & Roger H. Trangsrud. New York: Foundation Press, 1998. Pp. xci, 1466. \$57.00.

*Reviewed by Jack Friedenthal\**

#### I

What is “complex litigation”? The authors of *Complex Litigation and the Adversary System*<sup>1</sup> begin their contribution by providing a useful definition of the term. They define “complex litigation” as those cases in which the normal adversary process is impaired, and special rules, tailored to the specific litigation, must be devised if the cases are to be adjudicated and decided efficiently and fairly.<sup>2</sup> Although the authors distinguish “complicated” from “complex” cases pursuant to the above

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\* Freda H. Alverson Professor of Law, George Washington University Law School. The author wishes to note that co-author Roger H. Trangsrud is a colleague and a friend. The author is indebted to William L. Nash, a student at the George Washington University Law School, for his invaluable assistance on this Review.

1 JAY TIDMARSH & ROGER H. TRANGSRUD, *COMPLEX LITIGATION AND THE ADVERSARY SYSTEM* (1998).

2 This definition was first introduced by Jay Tidmarsh in *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1801 (1992). See TIDMARSH & TRANGSRUD, *supra* note 1, at 85–86. The special rules that arise when a case is “complex” are deemed necessary for rational and consistent adjudication. The authors suggest that the definition of complex cases should include those situations in which similarly situated litigants are confronted with different results as the “nature and quality of evidence, and consequently the substantive outcomes” vary from case to case. *Id.* at 86. There is also a concern that litigants who obtain early judgments will be able to collect from a defendant, whereas litigants who file subsequent cases will be precluded from obtaining relief because the defendant has become judgment proof.

definition,<sup>3</sup> much of their work necessarily deals with the former and, indeed, with the application of the basic rules of procedure regardless of the nature of the case. In effect then, and despite an altered focus, the book is similar in many respects to a textbook that would be used in a fundamental course on Civil Procedure.<sup>4</sup> This fact notwithstanding, there is substantial merit in working under a definition that provides an overall theme for delineating those areas that require in-depth exploration.

Since common law pleading was abolished,<sup>5</sup> procedural regulation and reform have tended to place primary emphasis on rules that operate uniformly, regardless of the nature of the case,<sup>6</sup> although there are important exceptions for class actions<sup>7</sup> and pretrial consolidations in the federal courts.<sup>8</sup> On the whole, flexibility has been viewed with skepticism. Consider, for example, the federal experiment allowing "local option" with regard to rules of discovery.<sup>9</sup> This "local option" has created such substantial tension that the proposed rule changes currently being circulated would eliminate the ability of individual federal courts to promulgate and retain their own unique sets of rules.<sup>10</sup> Uniformity, it seems, has substantial value. Still, one

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3 See *id.* at 88–89.

4 See *id.* at 262, 1127. For example, students who have completed basic courses in Civil Procedure will be familiar with a number of cases that appear in the book. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (requirements for obtaining personal jurisdiction); *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d. 1150 (7th Cir. 1984) (en banc) (limitations on discovery). Indeed, a discussion with students who recently completed Professor Trangsrud's Complex Litigation course referred to the textbook as one that took an in-depth look at the common issues of civil procedure.

5 For a discussion on the history and influence of common law pleading, see JOSEPH H. KOFFLER & ALISON REPPY, *HANDBOOK OF COMMON LAW PLEADING* (1969).

6 See, e.g., FED. R. CIV. P. 1. Closely identical rules have been adopted in nearly every jurisdiction.

7 See FED. R. CIV. P. 23 (class actions).

8 See 28 U.S.C. §1407 (1994) (consolidation of multi-district litigation in a single court for pretrial proceedings). Prior to the Supreme Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956 (1998), a federal court handling consolidated pretrial proceedings often transferred the individual cases to itself for the actual trials. In *Lexecon*, the Court held that this practice was improper under 28 U.S.C. § 1407 and ordered the federal courts handling consolidated pretrial proceedings to transfer the individual cases back to the original courts for trial. See *id.* at 964.

9 See, for example, FED. R. CIV. P. 26(a) which, while providing initial and pre-trial discovery disclosure procedures, also allows local jurisdictions to eliminate these procedures and replace them with local rules.

10 See Proposed FED. R. CIV. P. 26(a), in Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence 34–41, 47–50 (August 1998), reprinted in 181 F.R.D. 18, 57–64, 70–73.

can have uniformity among courts for like cases while still having unique sets of uniform rules for different types of actions.<sup>11</sup> However, until we are willing to find and accept a suitable definition for the type of cases that require special sets of procedural rules, especially those regulations that would provide for needed flexibility in their application, reform along these lines is unlikely. This is why the traditional "we know it when we see it" characterization of a complex case is not very helpful<sup>12</sup> and why Professors Tidmarsh and Trangsrud have moved us a step forward.

## II

The preparation of a casebook to explore the problems and methods of handling complex (and complicated) cases is a daunting one in a number of respects. To begin with, the authors must decide what topics to include. Naturally they would have studied the two other major casebooks in the field<sup>13</sup> in determining how a different emphasis would be useful to instructors who are deciding which book to assign. Then, within each section of the textbook, the authors must explore the relevant procedural rules and provide insight into their operation. This will have to be done for noncomplex cases prior to deciding whether and how these rules can be properly utilized in a complex case. This poses a problem of efficiency since almost all students will have studied some aspects of procedure in mandatory first-year courses and many will have encountered procedural issues in other courses as well. Thus, enough material must be available for those who have not touched on a particular subject but in a fashion that allows instructors to move quickly through it if it proves repetitive for their students. With respect to these matters, Professors Tidmarsh and Trangsrud have opted for inclusion, providing a large book of 1,466 pages. While the textbook cannot possibly be covered in the typical two- or three-hour course, the authors have provided a set of materials that will allow an instructor to select particular subjects for consideration, depending upon the background of the students and the instructor's belief concerning the best use of class time. One in-

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11 See, e.g., FED. R. CIV. P. 23 (class actions); FED. R. CIV. P. 23.1 (derivative actions by shareholders).

12 See Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463 (1987) (reviewing RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (1985), which suggests that "complex litigation" cannot be defined because it means different things to different people).

13 See RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (3d ed. 1998); LINDA S. MULLENIX, *MASS TORT LITIGATION: CASES AND MATERIALS* (1996).

teresting aspect of the book, which tends to distinguish it from textbooks generally, is that on numerous occasions it addresses the student directly, thus providing a sense that the student is an important participant in the discussion of complex litigation problems.

Chapter One, which is included prior to the beginning of Part One, is an ambitious attempt to explore fundamental concepts about the place and role of procedure in a system of adjudication, with some emphasis on the effect of procedural rules on substantive values. It does so by presenting a series of excerpts from a variety of sources, including a number of pieces regarding the operation of procedural systems around the world. This is interesting material that is appropriately included. A student who reads and digests the material will be exposed to the underlying philosophical and analytical views of various scholars regarding what a society might want and expect from a judicial system. The excerpts are arranged in a logical fashion, with thoughtful notes and questions. One can always quibble about what is or is not included, but generally speaking the choices here are excellent.<sup>14</sup>

Chapter One is written primarily for the scholar. It is unlikely that many students will have the time or patience to analyze this material in an in-depth manner on their own. It is equally unlikely that an instructor, faced with a large book containing so many substantive issues, will spend the class time required to guide students to a basic understanding, let alone a mastery, of this material. Thus, it would be troubling if it were true, as the authors state, that only with a firm grip on these fundamentals can one "finally understand the nature of complex litigation in our modern procedural system," and that "the subject cannot be understood without them."<sup>15</sup> These statements appear to overstate the case. To the extent an instructor believes that historical and philosophical bases of procedure are required for a full understanding of a particular concept, she can assign specific materials at that time. The authors might well consider a separate publication, consisting of an expanded version of this first chapter, to be used as an innovative tool for a seminar made up of sophisticated faculty and students who wish to explore fundamental issues of an adjudicatory legal system. By doing this, students will have a better appreciation of the benefits of studying the foundations of our current procedural system and the attributes of foreign procedural systems.

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14 Although it might have been useful to include a piece on noncourt systems of adjudication in our own country, such as administrative tribunals and various forms of private ordering, it was not necessary to do so.

15 TIDMARSH & TRANGSRUD, *supra* note 1, at 3.

At the outset of a course utilizing the Tidmarsh and Trangsrud casebook, an instructor could begin by assigning the short but excellent article at the beginning of Part One, which includes Chapters Two through Seven, entitled *Joinder Complexity*.<sup>16</sup> This article captures the essence of the need for special treatment in complex cases and provides a blueprint for the remainder of Part One of the book. Following the article is an analysis of how the rules of party joinder and claim and issue preclusion, as they exist, may fail to serve the interests of justice in cases involving large numbers of individuals each with an interest in a particular litigation.

Chapter Two melds concepts of party joinder with the principles of preclusion. It is well-conceived and executed, and the cases and excerpts from books and articles are nicely selected. A reader will find, however, that the unique value lies in the notes that raise fundamental questions as to the operation of our current rules and force a reader to consider ways in which rules should be changed or reinterpreted to handle matters in which large numbers of individuals are interested. On the one hand, the notes put us face-to-face with the conflict between court efficiency and the realistic resolution of disputes; on the other hand, they illustrate the constitutional requirements that dictate that every individual have a right to be formally represented in any action. Many students will have touched on these matters in courses on Civil Procedure and explored them in some depth in courses on Conflict of Laws, but the quality of this material makes repetition worthwhile.

Chapters Three and Four are devoted to matters of personal and federal subject matter jurisdiction, venue, and the interrelation between various courts. The section on the relationship between federal courts and between state and federal courts is particularly strong. The material is explained in substantial detail and covers the permutations involved in these areas in an integrated fashion. In the areas of personal and subject matter jurisdiction, many students will find substantial overlap with cases studied in courses such as Civil Procedure, Conflict of Laws, and Federal Jurisdiction.<sup>17</sup> These cases are allied, however, with less familiar cases, often involving mass torts, that seem to call for approaches quite different from those the student may be familiar with. Once again, traditional concepts of statutory construc-

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16 See *id.* at 87–90.

17 The overlap of subject matter is acknowledged by the authors when they state that readers of the textbook “can gain new perspectives on fields such as Civil Procedure, Federal Courts, Conflict of Laws, and Mass Torts” and that a course on complex litigation can “act as a bridge linking and synthesizing these fields . . .” TIDMARSH & TRANGSRUD, *supra* note 1, at vi.

tion and constitutional limitations conflict with requisites for efficient and arguably fair adjudication. Students are likely to come away from this reading with a heightened sense of the frustrations brought about by narrow interpretations of existing statutes and rules that seem unnecessary to the maintenance of an orderly procedural system. This is particularly true in those cases where policies are not driven by constitutional considerations, such as the area of venue in federal courts and the ability to transfer cases for a consolidated trial within a single court.

As one would expect in a book on complex litigation, there is extensive material on class action suits. The treatment of class actions in Chapter Five is thorough, well-organized, and provocatively addresses the areas in which there is debate concerning reforms to improve the processing of such cases. Chapter Six discusses the role bankruptcy plays in the resolution of complex cases. By handling the subject of bankruptcy in a comprehensive manner, the authors give it the attention it deserves and properly emphasize the fact that bankruptcy provides a means of solving complex cases that other procedural techniques cannot appropriately resolve. This attention is enhanced by the fact that the authors choose to discuss bankruptcy following the discussion of class actions and separate from the discussion of remedies. The last chapter in Part One, Chapter Seven, deals with choice of law issues. Like the study of choice of law generally, the material is pure fun. It provides few answers, allows considerable speculation as to what might be done in any particular case, and calls out for ways to resolve the uncertainties that have the potential to make multistate and multinational actions a nightmare for lawyers and the courts.

Part Two of the book, consisting of Chapters Eight and Nine, deals with pretrial issues. Chapter Eight begins with a discussion regarding the appointment of counsel and the designation of lead counsel when required. This is fundamental information in class action suits and other types of complex cases. The chapter goes on to cover the development of attorney conflicts of interest and withdrawal of representation. This topic is not specially germane to complex litigation and instructors may choose to skip this section and leave consideration of such issues to courses in Professional Responsibility. The authors then discuss the selection of judicial officers to manage the pretrial process. Much of the material concerns special masters and magistrates and when each might be used. This section would be enhanced by some discussion of the fact that litigants often disagree over which should be used because the parties must pay for special masters

at fairly high rates, whereas the services of magistrates, like those of the judge, are provided by the government.<sup>18</sup>

Chapter Nine deals with matters of pretrial procedure such as pleading, summary judgment, and discovery. This material is likely to be less interesting to students than previous material because, with limited exceptions, the issues involved are typically handled in Civil Procedure courses and the considerations are not drastically different from those existing in noncomplex actions. For this reason, instructors using the casebook may decide to move through this material rather quickly. This being said, the material on techniques for managing and limiting discovery and for obtaining information through modern technology is interesting and well-conceived.

Part Three of the book, consisting of chapters Ten and Eleven, deals with issues of trial complexity. Chapter Ten explores matters involving trial routine, the right to a jury trial, and jury selection. Except for some additional material on the right to object to the appointment of lead counsel, the materials, like those in Chapter Nine, tend to handle matters similar to those that appear in most Civil Procedure casebooks.

Chapter Eleven discusses a fascinating array of techniques by which litigants and judges attempt to arrange trials to permit juries to make meaningful decisions in complex cases. This includes, among other elements: the trying of separate issues in separate proceedings; trying a "sample" of claims and applying the results statistically to the claims not tried; placing time limits on the presentation of issues or the testimony of individual witnesses; allowing or requiring evidence to be presented in summary or narrative form; and permitting use of high-tech demonstrative evidence. Although particularly useful in complex suits, many of these techniques can be and have been employed in ordinary cases.<sup>19</sup> Invariably, questions arise as to whether the use of such innovative measures provide either side with a substantial tactical advantage and whether their use oversteps constitutional

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18 See FED. R. CIV. P. 53(a). Financial considerations, however, do not preclude the use of special masters entirely. The author is particularly thankful for this fact as he has served as a special master in a number of matters and is currently settling disputes between the National Football League and the National Football League Players Association in this capacity.

19 For example, testimony taken through the use of interactive video can save parties and witnesses the inconvenience and expense of traveling long distances whether the litigation is a simple slip-and-fall case or a class action asbestos suit. For an excellent discussion of the impact of technological innovation on civil procedure and the courtroom, see Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 COLUM. L. REV. 1516 (1998).



boundaries or contravenes statutes or rules of procedure. Perhaps more than any other, the study of this area will help students understand the meaning of “dysfunction” in complex cases and the frustrations that courts and litigants face in trying to resolve legal disputes fairly and expeditiously.<sup>20</sup>

Complex cases often require complex remedial action, and the final part of the book, Chapter Twelve, discusses these remedies and how they might be implemented. No book on complex litigation would be complete without inclusion of this material, and the authors have done an excellent job in compiling it.

### III

Looking at this casebook section by section is informative because it gives one a sense of the breadth and depth of the subject matter, as well as the skill of the authors in assembling the material. *Complex Litigation and the Adversary System* is as much a resource for attorneys involved in complex cases as it is a classroom text to initiate students into the “real world” of litigation. Such a review, however, is by no means complete because, as a whole, the book is greater than the sum of its parts. By studying procedural problems arising in the most difficult cases, we necessarily must dwell on the fundamentals of our adjudicatory system. Many of the issues arise in less complicated cases, but escape deep scrutiny because they do not have the impact that they do when an entire action may be unmanageable unless they are resolved. For example, the use of high-tech evidence, when objected to by an opposing party, may be prohibited in a simple trial merely because witnesses are available on all issues. The judge in such a situation has little incentive to address questions of fairness. In a complex case, however, the use of such high-tech evidence may save days or even weeks of trial time. This provides the court with a substantial reason to address fairness issues; specifically, whether the threat of prejudice is too great to permit the admissibility of such evidence. The latter determination could potentially have an impact on all future cases, simple as well as complex.

The material in this casebook helps students and instructors to consider all of the parts of our procedural system and to question the assumptions, often from yesteryear, that underlie current rules and regulations. Those of us who have been studying our procedural sys-

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20 The authors define “dysfunction” as “the inability of the lawyers, jury, or parties, to fulfill the responsibilities for rational adjudication assigned to them by the adversarial system.” TIDMARSH & TRANGSRUD, *supra* note 1, at 86 (quoting Tidmarsh, *supra* note 2, at 1801).

tem for years have tinkered with it to eliminate perceived faults, but have left it largely intact. As we move through the pages of this casebook, we are led to wonder whether in an era of increased litigation—especially litigation involving a great many parties, mounds of evidence, and persistent lawyers—the time has come to rethink the fundamentals of our system and to address the need for more than just incremental change.

To help in this endeavor, Tidmarsh and Trangsrud forcefully raise the question of whether the time has come to eliminate the right to jury trials in civil actions where the issues are so diffuse and complex that they appear beyond the grasp of ordinary citizens.<sup>21</sup> Indeed, complex technical issues may arise in cases that are otherwise simple; thus we need to consider the wisdom of finding other methods of fact-finding to “end run” constitutional requirements that were promulgated in a vastly different era. It is not the elimination of the jury that is troubling. After all, it has been virtually abolished in civil cases in England, the original source of our jury system.<sup>22</sup> What concerns us is finding an effective and fair substitute.

Another area of concern raised by Tidmarsh and Trangsrud is whether we should alter or abolish certain discovery rules, at least for complex cases, that have become increasingly convoluted and controversial. The modern-day discovery system has facilitated the rapid evolution of law in subject areas that were previously not explored because of the inability of litigants to gather evidence sufficient to support a lawsuit. Many of these “new” areas lead to lawsuits that fall within the definition of complex litigation, and it is in these very suits that the situation gets out of hand as one side or the other engages in the search for a “smoking gun.”<sup>23</sup>

Perhaps the time has come to free our courts from encrusted technicalities, especially in complex cases. One possibility is to convert the courts into alternative dispute resolution facilities with fewer

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21 See TIDMARSH & TRANGSRUD, *supra* note 1, at 1209–19, for an excerpt of *Ross v. Bernhard*, 396 U.S. 531 (1970), and a discussion of the debate surrounding the issue of whether the Seventh Amendment of the Constitution, which otherwise provides for jury trials, can be read to except complex litigation cases when they include matters deemed beyond the grasp of ordinary citizens.

22 See Joseph C. Wilkinson, Jr. et al., *A Bicentennial Transition: Modern Alternatives to Seventh Amendment Jury Trial in Complex Cases*, 37 U. KAN. L. REV. 61, 68–74 (1988). For a thorough comparison of the English and the American jury systems, see Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOUSTON L. REV. 377 (1996).

23 An alternative to our current system would be to adopt a procedure whereby an agent of the court is appointed to facilitate, and augment if necessary, the gathering of relevant evidence in complex cases.

rules and more leeway. By doing this, those who judge may be able to "do justice" at a price that is less expensive for litigants and for society. One can envision a new federal regime encompassing complex cases with minimal diversity and venue requirements,<sup>24</sup> nationwide service of process, special rules for removal of individual state actions that should be part of a unified federal complex litigation case, and an altered 28 U.S.C. § 1407 that permits cases to be sent to a single court not only for pretrial proceedings, but for trial as well. Pleadings, motions, and discovery in these cases could be handled by a unique set of flexible regulations. These and similar innovations may, upon further study, ultimately be shown to be unwise and may never come to fruition. Just looking at them seriously, however, builds confidence in the current system and helps to ensure that it is the best we can provide.

The concerns raised throughout *Complex Litigation and the Adversary System* push instructors and lawyers-to-be to consider the major issues facing our system of justice and to help shape the future of our adjudicatory system.

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24 Such flexibility is permitted in interpleader cases under 28 U.S.C. §§ 1335, 1397 (1994).