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JAY TIDMARSH
ROGER H. TRANGSRUD

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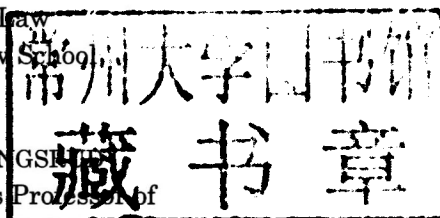
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To Jan

— J.T.

To Lisa, Amy, and David

— R.H.T.

PREFACE

This book is the successor edition to our casebook, *Complex Litigation and the Adversary System*, written in 1998. In the intervening twelve years, much has changed in the field of complex litigation and in the way that we view the field. As a result, rather than merely updating our prior book, we completely revised it. Although still following the same general structure — proceeding from issues of aggregation to issues of pretrial, trial, and remedy — this book is thoroughly reorganized and thoroughly up to date. Sixty-three principal cases (out of a total of 143) that we use in this book were decided since we published our prior edition. We have likewise included hundreds of post-1998 cases and dozens of post-1998 law-review articles, books, and other secondary literature. The notes have been revamped and significantly shortened. Because of our emphasis on currency and our new organization, we decided to signal the break from the past by giving this edition a new title: *Modern Complex Litigation*.

Despite these many changes, the basic goals for this casebook remain the same as they were for the last one: to serve as an educational tool for students learning about complex civil litigation for the first time; to provide a resource for judges, lawyers, and academics struggling with the intractable problems these cases create; and to defend a thesis about the proper roles of — and limitations on — judges, lawyers, and parties involved in large-scale adjudication in our democratic society. We meet none of these goals perfectly. But we hope that we convey to each of you the great enthusiasm and respect that we have for this most difficult and important subject.

I

Briefly stated, our perspective is this: Complex litigation tests the limits of the adversarial system. In complex litigation, the adversarial process functions poorly, if at all; there are so many parties, documents, facts, and/or issues that the lawyers, the litigants, and the jury are simply incapable of performing the tasks which the adversarial process has traditionally assigned to them. To overcome this dysfunction and to

preserve the opportunity for rational adjudication, the judge must of necessity step in. The shift toward increased judicial power, however, has at least two untoward effects. First, the judge handling complex litigation adopts a role foreign to adversarial theory and to the notions of party autonomy which underlie that theory. Second, as long as the traditional judicial role remains unchanged in routine litigation, the judge handling complex litigation creates a conflict with one of the bedrock principles of modern procedure: the like procedural treatment of all lawsuits. It is no exaggeration to say that complex litigation presents the critical test for the continued viability of the adversarial system and the modern American procedural system set up around adversarial norms.

In consequence, the critical questions of complex litigation, and the questions which this book seeks to address, are: (1) How important are adversarial process and party autonomy? (2) How important is the like procedural treatment of cases? and (3) Under what circumstances is it desirable or even essential to depart from adversarial and equalitarian procedure? Although we are on record in our other writings as answering (1) "Important," (2) "Important," and (3) "Not many," we let the materials shape the questions, rather than force the readers to accept our conclusions.

We also believe that by framing the issues in these terms, readers can gain new perspectives on fields such as Civil Procedure, Federal Courts, Conflict of Laws, and Mass Torts. A course in complex litigation can act as a bridge linking and synthesizing these fields, and our materials are intended to show the interconnection of procedure and substance in several specific categories of modern civil litigation.

II

A word of caution is in order regarding our editing of cases. First, we deleted most citations to other cases, to secondary materials, and to the record. When we deleted such citations, we did not signify that fact with ellipses. We did, however, mark with ellipses any deletions of textual material, including on occasion some significant arguments that were less central to the reasons that we chose the case or were edited out for space considerations. Second, we used brackets to signify the addition of language not found in the original source. Third, in the excerpts we used, we tended to "correct" citation forms to conform to the *Bluebook* style, even when the source used another citation form. In some instances, we used brackets to indicate what we added or omitted, but as a rule we did not. Third, in order to maintain a consistent style throughout the book, we tended to delete some italics found in the opinions or to insert others. Finally, on very rare occasions, and only when absolutely necessary for comprehension of the edited material, we blended two or more paragraphs into one. In short, readers should not assume that the cases in the book are a verbatim reproduction of the language, citation style, or the full range of the arguments in the sources themselves; readers should always go to the original source to obtain precise text. We took great care in the editing

process, however, to ensure that each selection, as nearly as possible, retained its original flavor and style.

We also tried to use gender-inclusive language wherever possible. Sometimes this proved awkward, so we tended to use “she” to refer to the hypothetical judge, “he” to refer to the hypothetical lawyer, and either pronoun to refer to hypothetical parties.

III

A word about your authors is also in order. Both of us have experience as practicing lawyers in complex litigation. You should know that one of authors was lead counsel for the United States for a period of time in the *Agent Orange* and *Triana DDT* litigation, and the other author worked as an associate in the *MGM Grand Hotel Fire* litigation and was involved in aspects of the *Ortiz* litigation as a consultant. One of us has also been involved in a federally funded study that examined a number of mass-tort class actions (including *Amchem*, *Ortiz*, and *Silicone Gel Breast Implants*). All these cases are discussed at various points in the book.

IV

We tried to make the book as current as possible. Some developments as recent as March, 2010 are captured in the book. But we have no illusions: In a field evolving as rapidly as complex civil litigation, the book will be out of date before it arrives in the bookstores. Should you ever wish to share with us any recent developments, or should you wish to share any questions or thoughts about the materials in this book, please feel free to contact us.

Notre Dame, Indiana
Washington, D.C.
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