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The American Law Institute

Report

(March 31, 1987)

PRELIMINARY STUDY OF COMPLEX LITIGATION

Subjects Covered:

- Chapter I. Introduction
- Chapter II. Definition and Analysis of the Complex Litigation Problem
- Chapter III. Objectives in Handling Complex Litigation
- Chapter IV. Existing Mechanisms for Processing Complex Litigation
- Chapter V. Gathering for Common Adjudication: Actions Dispersed Among Federal Courts
- Chapter VI. Intersystem Gathering
- Chapter VII. Application of a Single Governing Law
- Chapter VIII. Former Adjudication
- Chapter IX. Federal Omnibus Complex Litigation Legislation
- Conclusions and Recommendations

Submitted by the Council to the Members of The American Law Institute for Discussion at the Sixty-fourth Annual Meeting on May 19, 20, 21, and 22, 1987

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Preliminary Study of Complex Litigation

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Foreword

The study herein, formidable though it is, is a preliminary study. Before undertaking any Restatement or model legislation project, the Institute does some sort of preliminary inquiry to determine the significance, scope, and complexity of a proposed subject. These preliminary studies sometimes are informal memoranda; in other instances they are substantial works in their own right. The study herein is clearly in the latter category.

Because the study is a Preliminary Study, it does not represent an Institute viewpoint, except the Institute's recognition of the importance of the subject and the probable value of a plenary project addressing it. At the same time, because this study is a substantial work in its own right, it merits consideration beyond that ordinarily given such a preliminary inquiry. It therefore is being presented to the Institute's Annual Meeting for discussion by the membership and is being published for general distribution.

We express our appreciation and admiration for the work of the Reporter, Professor Arthur Miller, and the team that worked with him, and our thanks to the Advisory Committee, which reviewed two intermediate drafts.

GEOFFREY C. HAZARD, JR.
Director
The American Law Institute

February 27, 1987

Preface

This Study of Complex Litigation was commissioned by the American Law Institute in the spring of 1985. Its purpose was to examine the contemporary "complex litigation" phenomenon and to make recommendations to the Institute as to whether a larger-scale exploration of the problem should be undertaken and, if so, along what lines. Arthur R. Miller, Bruce D. Bromley Professor of Law at the Harvard Law School, Cambridge, Massachusetts was asked to serve as Reporter for the study.

A distinguished Advisory Committee of judges, lawyers, and academics was appointed under the chairmanship of the Honorable Herbert P. Wilkins, Justice of the Massachusetts Supreme Judicial Court, Boston, Massachusetts to study complex litigation. The other members of the committee were: Thomas D. Barr, Esq., New York, New York; Emmet J. Bondurant II, Esq., Atlanta, Georgia; Bennett Boskey, Esq., Washington, D.C.; Edward H. Cooper, Professor of Law, University of Michigan Law School, Ann Arbor, Michigan; Ruth Bader Ginsburg, Judge, United States Circuit Court of Appeals for the District of Columbia Circuit, Washington, D.C.; Pierre N. Leval, Judge, United States District Court for the Southern District of New York, New York, New York; A. Leo Levin, Director, Federal Judicial Center, Washington, D.C.; Donald W. Madole, Esq., Washington, D.C.; Stephen L. Morris, Esq., Las Vegas, Nevada; Samuel W. Murphy, Jr., Esq., New York, New York; J. Vernon Patrick, Jr., Esq., Birmingham, Alabama; William R. Peterson, Circuit Judge, Wexford County Courthouse, Cadillac, Michigan; Samuel C. Pointer, Jr., Judge, United States District Court for the Northern District of Alabama, Birmingham, Alabama; Thomas D.

Rowe, Jr., Professor of Law, Duke University School of Law, Durham, North Carolina; William W. Schwarzer, Judge, United States District Court for the Northern District of California, San Francisco, California; and H. Blair White, Esq., Chicago, Illinois. Roswell B. Perkins, President of the American Law Institute, and Geoffrey C. Hazard, Jr., Director of the American Law Institute, were members ex officio.

The Advisory Committee met to consider a discussion outline of this Report on March 14 and 15, 1986, in Cambridge, Massachusetts. On the basis of that meeting and further research, a Draft Report was prepared for a second meeting of the Committee that took place on September 19 and 20, 1986, also in Cambridge, Massachusetts. This final draft was then prepared for submission to the Council in December, 1986, incorporating suggestions made at the September, 1986 Committee meeting.

The Reporter and the Advisory Committee are deeply indebted to Edward B. Chansky, Thomas R. Holland, and Bennett W. Lasko, third year students at the Harvard Law School, for their invaluable assistance in the preparation of the successive drafts of this Report. Richard K. Milin, a second year student at the Harvard Law School, provided extensive editorial and substantive suggestions.

Acknowledgements also are due to Donna J. Andon for her administrative assistance, to Marie A. Grilo, to the word processing staff at Harvard Law School, and to the many students who prepared working papers for this study in connection with two seminars on complex litigation conducted by Professor Miller.

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CHAPTER I
INTRODUCTION

A. The Complex Litigation Problem

Over the past quarter century, courts in the United States have witnessed an explosion of what loosely has been labelled "complex litigation." Complex disputes may involve hundreds or thousands of parties litigating related disputes, in dozens or hundreds of forums, all arising from a single event or series of closely related, substantially similar events. As Judge Williams of the Northern District of California has observed,

[i]n a complex society such as ours, the phenomenon of numerous persons suffering the same or similar injuries as a result of a single pattern of misconduct on the part of a defendant is becoming increasingly frequent.¹

The most common and widely publicized examples of complex litigation are "mass tort" actions. These cases may arise from a single catastrophic accident such as an explosion² or the gas plant disaster in Bhopal, India.³ The victims of a mass tort may be residents of many different states, as has been the case in a number of aircraft disasters⁴ and in the Kansas City hotel skywalk collapse.⁵

¹ In re Northern District of California "Dalkon Shield" IUD Product Liability Litigation, 526 F. Supp. 887, 892 (N.D. Cal. 1981) (Williams, J.), vacated, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983).

² See, e.g., In re Bomb Disaster at Roseville, California on April 23, 1973, 399 F. Supp. 1400 (J.P.M.D.L. 1975); Rando v. Luckenbach S.S. Co., 155 F.Supp. 220 (E.D.N.Y. 1957).

³ In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984, Slip Op., MDL No. 626, Misc. No. 21-38 All cases (S.D.N.Y., May 12, 1986).

⁴ See, e.g., In re Air Crash Disaster at Denver, Colorado on November 16, 1976, 486 F. Supp. 241 (J.P.M.D.L. 1980); In re Air Crash Disaster near Chicago, Illinois on May 25, 1979, 476 F. Supp. 445 (J.P.M.D.L. 1979); In re Air Crash Disaster at Tenerife, Canary Islands on March 27, 1977, 435 F. Supp. 927 (J.P.M.D.L. 1977); In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975, 407 F. Supp. 244 (J.P.M.D.L. 1976); Causey v. Pan American World Airways, Inc.,

When this is true, lawsuits arising from the incident are likely to be instituted in dozens of courts across the country, and may be lodged in both the federal and the state judicial systems. Multiple-forum lawsuits are even more likely when a mass tort results from a series of similar incidents that occur in different locales, often involving a toxic substance or defective product. The asbestos controversies,⁶ Agent Orange,⁷ MER/29,⁸ and the Dalkon Shield litigation⁹ are prominent examples.¹⁰

Furthermore, new related lawsuits may be filed long after the first claims arising from the same mass tort "controversy" have been adjudicated, as in the well-known DES cases.¹¹ As a result, a single mass accident or product

66 F.R.D. 392 (E.D.Va. 1975).

⁵ See In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), cert. denied, 459 U.S. 988 (1982).

⁶ See, e.g., In re Asbestos & Asbestos Insulation Material Products Liability Litigation, 431 F. Supp. 906 (J.P.M.D.L. 1977). See generally Institute for Civil Justice, Asbestos in the Courts: The Challenge of Mass Toxic Torts (1985).

⁷ In re "Agent Orange" Product Liability Litigation, 565 F. Supp. 1263 (E.D.N.Y. 1983).

⁸ See, e.g., Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967); Rheingold, The MER/29 Story -- An Instance of Successful Mass Disaster Litigation, 56 Calif. L. Rev. 116 (1968).

⁹ See, e.g., In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F. Supp. 887 (N.D. Cal. 1981), vacated, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983).

¹⁰ See also In re Rely Tampon Products Liability Litigation, 533 F. Supp. 969 (J.P.M.D.L. 1982); In re Multi-Piece Rim Product Liability Litigation, 464 F. Supp. 969 (J.P.M.D.L. 1979); In re Swine Flu Immunization Product Liability Litigation, 446 F. Supp. 244 (J.P.M.D.L. 1978).

¹¹ See, e.g., Payton v. Abbott Labs, 512 F. Supp. 1031 (D. Mass. 1981); Bichler v. Eli Lilly & Co., 79 A.D.2d 317, 436 N.Y.S. 2d 625 (1st Dep't 1981), affirmed, 55 N.Y.2d 571, 450 N.Y.S. 2d 776, 436 N.E.2d 182 (1982); Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924, cert. denied, 449 U.S. 912 (1980) Mink v. University of Chicago, 460 F.Supp. 713 (N.D.Ill. 1978).

defect may lead to repeated litigation of the same or substantially similar issues in multiple forums over many years.

In addition to mass torts, complex litigation also arises under the antitrust laws, as was seen in the electrical equipment price fixing litigation of the late 1960's¹² -- perhaps the first piece of modern complex litigation -- and, more recently, in the folding carton¹³ fine paper,¹⁴ and plywood¹⁵ cases. Complex cases also can emerge from incidents of consumer fraud,¹⁶ violations of the securities laws,¹⁷ and controversies over civil rights.¹⁸

Regardless of the substantive area in which these unwieldy cases arise, they frequently bog down in procedural imbroglios:

¹² See generally, Application of California, 195 F. Supp. 37 (E.D. Pa. 1961). See also C. Bane, The Electrical Equipment Conspiracies: The Treble Damage Actions, Fed. Legal Publications, 1975.

¹³ In re Folding Carton Antitrust Litigation, 744 F.2d 1252 (7th Cir. 1984).

¹⁴ In re Fine Paper Antitrust Litigation, 98 F.R.D. 48 (E.D. Pa. 1983), affirmed in part and reversed in part, 751 F.2d 562 (3d Cir. 1984). See also In re Hotel Telephone Overcharges, 500 F.2d 86 (9th Cir. 1974) (allegations of antitrust violations and common law fraud).

¹⁵ In re Plywood Antitrust Litigation, 655 F.2d 627 (5th Cir. 1981), cert. denied, 462 U.S. 1125.

¹⁶ See, e.g., Miner v. Gillette Co., 87 Ill.2d 7, 428 N.E.2d 478 (1981), cert. granted, 456 U.S. 914, cert. dismissed, 459 U.S. 86 (1982); Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), affirmed 405 U.S. 191 (1972). See also City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971).

¹⁷ See, e.g., Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976); In re Caesars Palace Securities Litigation, 360 F. Supp. 366 (S.D.N.Y. 1973).

¹⁸ See, e.g., Paxton v. Union National Bank, 688 F.2d 552 (8th Cir.), cert. denied, 460 U.S. 1083 (1982); Manning v. International Union, 466 F.2d 812 (6th Cir.), cert. denied, 410 U.S. 946 (1972).

The judicial system's response to such repetitive litigation has often been blind adherence to the common law's traditional notion of civil litigation as necessarily private dispute resolution . . . [T]his traditional mode of litigation threatens to leave large numbers of people without a speedy and practical means of redress and simultaneously threatens to expose defendants to continuing punishment for the same wrongful acts.¹⁹

There is no formally accepted definition of complex litigation. Arguably, these cases do not differ significantly from other lawsuits, but merely are larger. Indeed, many of the problems associated with complex litigation are to some degree symptomatic of all litigation. It should not be surprising then, that the Manual for Complex Litigation does not attempt to define complex litigation. Instead it describes types of "potentially complex cases," focusing either on the nature of claim made, such as antitrust, patent, or mass tort, or on the procedural characteristics of the litigation, such as whether the cases involve multiple parties, or are class or derivative actions.²⁰

For the purposes of this Preliminary Study, however, the defining characteristic of complex cases is their multiparty, multiforum nature. The incidents from which these cases arise may involve anywhere from several hundred to several hundred thousand actual and potential claimants. Frequently, there are also multiple defendants, perhaps comprising an entire industry,²¹ or including members of several industries connected to the enterprise from which the controversy arises.²² Individual claimants typically

¹⁹ In re Northern District of California "Dalkon Shield" IUD Product Liability Litigation, 526 F. Supp. 887, 892 (N.D. Cal. 1981) (Williams, J.), vacated, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983).

²⁰ Manual for Complex Litigation (5th ed.) [hereinafter cited as Manual], § 0.22; Manual for Complex Litigation, Second [hereinafter cited as Manual 2d], § 20.11.

²¹ See, e.g., Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924, cert. denied, 449 U.S. 912 (1980).

²² See, e.g., Glaser v. Cincinnati Milacron, Inc., Civ. Action No. 82-0064 (W.D. Pa. 1985), reversed on other grounds, ___ F.2d ___ (3d Cir. 1987).

file lawsuits against some or all of the possible defendants in the claimants' preferred forums, resulting in a scattering of related actions throughout both the state and federal court systems.

Processing multiparty, multiforum litigation frequently has proven a nightmarish task. Repeated relitigation of identical or substantially similar issues can consume an enormous amount of scarce dispute-resolution resources. The mass filing of hundreds or thousands of actions adds to the often intolerable backlogs in both the state and federal courts. Also, backlogs and delay are compounded further by extensive and often repeated threshold litigation of such questions as personal and subject matter jurisdiction, venue, transfer, consolidation, party joinder, class certification, and discovery matters.

To make matters worse, complex cases often reflect badly on the judicial system because their outcomes are not perceived as just. Actions may not be resolved -- either by adjudication or by settlement -- for up to a decade after being instituted. Different actions between similarly situated parties often conclude with disparate substantive results or with widely divergent damage awards. Moreover, the frequently astronomical costs of processing complex litigation in many cases do not seem justified by the relatively modest amounts eventually awarded to claimants, let alone the even smaller sums left to them after their legal expenses have been paid.

This Preliminary Study is inspired by the intuition that the common transaction, series of transactions, or course of conduct from which these complex cases arise should provide a basis for some form of consolidated or coordinated treatment of all of the resulting litigation. Complex litigation, it must be recognized, is now a well-entrenched feature of our civil justice system. In fact, as society grows increasingly dependent upon mass enterprises and potentially dangerous technologies and products, the incidence of highly complex lawsuits is likely to continue to increase and thereby pose an even greater threat to the viability of our system. Currently existing mechanisms for consolidating, coordinating, and resolving related actions were designed in a different age, and for much simpler litigation; they simply are not adequate for many of today's problems. The development of effective procedures for handling complex litigation therefore may be necessary if a crisis in the courts is to be averted.

B. Purpose and Scope of the Study

The purpose of this Preliminary Study of Complex Litigation is to develop a working definition of the subject, to identify its elements, and to present a tentative analysis of potentially fruitful options for mitigating the problems it poses. These options then could be explored in more detail by a later, more comprehensive study by the American Law Institute. It should be emphasized that this Preliminary Study does not advocate particular solutions to the complex litigation problem; it attempts only to identify options that merit the Institute's further consideration.

This Preliminary Study is limited in scope to judicial dispute resolution and matters of procedure. Obviously, the substantive law in each of the areas in which complex litigation arises also plays a significant role in shaping the phenomenon. There are many problems associated with complex litigation that ultimately might be addressed best by recognizing new causes of action or forms of relief, or by developing administrative or social insurance models for delivering compensation. However, it simply would be too large a task for this Study, restricted as it is both in goals and lifespan, to attempt to deal comprehensively with substantive law in addition to the many procedural aspects of the complex litigation problem. The specific substantive issues implicated vary from one context to the next, and therefore would be addressed most profitably by experts in each relevant field of substantive law.²³

This Preliminary Study also attempts to avoid duplicative analysis of matters that have been or are being

²³ In February, 1986 the Institute approved a Project on Enterprise Liability for Personal Injuries, which will study principles of law and institutional structures for dealing with personal physical injuries caused by enterprise activities through tort law and other systems of compensation, liability, and deterrence. The Chief Reporter for the Project, which is tentatively scheduled for completion in May 1991, is Professor Richard Stewart of the Harvard Law School. See Revised Memorandum to the ALI Council from Geoffrey Hazard, April 9, 1986. See also American Bar Association Special Committee on Law and Science, An Analysis of Proposed Changes In Substantive and Procedural Law In Response to Perceived Difficulties in Establishing Whether or Not Causation Exists in Mass Toxic Tort Litigation (1986).

addressed elsewhere. For example, a number of case management problems often associated with complex litigation are discussed at length in the Manual for Complex Litigation and in the recently published Second Edition of the Manual.²⁴ These problems include the scope and management of discovery;²⁵ organization of counsel in multiparty actions;²⁶ trial scheduling, preparation, and management;²⁷ and the administration of certain "complex" forms of relief.²⁸ The scope and management of discovery in particular has been cited as a major component of the complex litigation problem. These matters, however, have been under constant review by the Advisory Committee on Civil Rules of the Judicial Conference of the United States for two decades, and probably would be best left to that Committee's expertise.

Case management difficulties, although certainly "complexities" in the litigation process, are elements of a phenomenon more global than multiparty, multiforum lawsuits -- the problem of protracted litigation. Although complex litigation often involves elements of protraction, protraction is by no means limited to this category of cases. Some of the most notorious protracted cases have been structurally simple two-party lawsuits.²⁹ The Manual for Complex Litigation sets forth techniques for managing protracted litigation that have been used successfully in the past and currently are available to federal judges. These devices have been reinforced by the 1983 amendments to Federal Rules 7, 11, 16, and 26. Accordingly, it may not be advisable to pursue further reforms aimed at protracted

24 This is discussed throughout the Manual. See also Manual 2d, § 21.4.

25 Manual, §§ 1.90, 1.91, 1.92, 1.93; Manual 2d, § 20.2.

26 See generally Manual, §§ 1-4; Manual 2d, §§ 21.6, 22.

27 Manual, § 4.70; Manual 2d, §§ 23.1, 23.2.

28 See C. Wright, A. Miller & M. Kane, 7B Federal Practice and Procedure: Civil 2d § 1784 (1986).

29 Examples of this are the recently concluded United States v. International Business Machines Corp., No. 69 Civ. 200 (DNE) (S.D.N.Y.) and American Telephone & Telegraph Co. v. MCI Telecommunications Corp. cases. See American Telephone & Telegraph Co. v. MCI Communications Co., 748 F.2d 799 (7th Cir. 1984).

litigation at this time. Rather, continued improvement in this area might be obtained as the Manual and the new Federal Rules gain wider acceptance, and as further experimentation with their techniques is undertaken.

Although the Institute's 1969 Study of the Division of Jurisdiction Between State and Federal Courts touched upon complex litigation, it did not focus on the problem as such. That Study was written before the complex litigation phenomenon as it exists today had developed, and before its significance and dimensions were appreciated. Rather than taking the fair and efficient treatment of complex litigation as its goal, the objective of the 1969 Study was to identify "basic principles of federalism," and to assign cases to the state or federal judicial systems in accordance with those principles.³⁰

The 1969 Study, however, did include a proposal to create new federal subject matter jurisdiction over multiparty, multiforum litigation that Congress never enacted.³¹ The present Study, in some respects, takes up where the 1969 Study left off, attempting to lay the groundwork for the development of new, more comprehensive proposals for processing multiparty, multiforum cases more efficiently that might fare better in the political arena.

It also must be recognized that some aspects of the law that affect complex litigation may not be feasible targets for reform. A good example is the oft-repeated call to scale back or eliminate diversity jurisdiction. One of the reasons why the proposals advanced in the Institute's 1969 Study failed was the heated political controversy touched off by its proposed repeal of general diversity jurisdiction. This issue continues to be debated, often acrimoniously, by various segments of the bar. The success of any proposals developed in a full-scale Institute study of complex litigation probably should not be tied to the

³⁰ American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, p. 1 (Official Draft 1969).

³¹ In an attempt to provide a single forum for a cause of action in which all the defendants necessary for a just adjudication are not amenable to the jurisdiction of any one state court, but some diversity of citizenship among the adverse parties exists, the Institute proposed the adoption of a minimal diversity requirement coupled with nationwide federal service of process.

outcome of that debate. Rather, the diversity issue best might be left for separate resolution in the political arena.

Another source of controversy in the complex litigation context is the right to trial by jury. A number of observers have argued forcefully that some extraordinarily complex lawsuits present factual issues that are beyond the competency of lay juries to decide.³² Nevertheless, the largely immutable and constitutional nature of the right to trial by jury, together with the political volatility of any attempt to alter it, suggest that the Institute would accomplish little by advocating any broad changes in the role played by juries in complex cases.

Finally, every attempt has been made to ensure that the options recommended by this Preliminary Study for further consideration are consistent with three overriding concerns. First, basic principles of federalism and their implications as to the respective roles of state and federal courts must be respected. Second, it must be recognized that new business should not be added to federal court dockets without a demonstrated need for doing so. The federal courts already are overburdened, and their limited resources should be reserved as much as possible for uniquely federal problems. Third, and perhaps most importantly, the fundamental procedural rights of litigants must not be compromised. These concerns and their importance to this Study are disussed further in Chapter III.

³² See generally Devlin, Equity, Due Process and the Seventh Amendment: A Commentary on the Zenith Case, 81 Mich. L. Rev. 1571 (1983); Kane, Suing Foreign Sovereigns, 34 Stan. L. Rev. 385 (1982); Lempert, Civil Juries and Complex Cases: Let's Not Rush to Judgment, 80 Mich. L. Rev. 68 (1981). See also Zenith Radio Corp. v. Matsushita Elec. Indus. Co. (In re Japanese Elec. Prods. Antitrust Litigation), 478 F.Supp. 889 (E.D. Pa. 1979), vacated, 631 F.2d 1069 (3d Cir. 1980) (The district court refused to strike the jury demand despite the fact that "the trial would last a full year" and that 9 years of discovery had produced "millions of documents and over 100,000 pages of depositions." The Third Circuit vacated and held that the case was too complex for a jury trial.); In re U.S. Financial Sec. Litigation, 75 F.R.D. 702 (S.D. Cal. 1977), reversed, 609 F.2d 411 (9th Cir. 1979), cert. denied, 446 U.S. 929 (1980) (The district court struck jury demands on the grounds that the case was too complex. The Ninth Circuit reversed, holding that there is no complexity exception to the Seventh Amendment.).

Even with these concerns in mind, reform nevertheless seems necessary. Courts and litigants alike are losers in the current situation. There is a great deal to be gained on all sides if more efficient means of processing complex litigation can be devised and implemented. It may take a great deal of fortitude, imagination, and effort to achieve significant improvement, but the magnitude of the problem suggests that the project is well worth pursuing.

C. Organization of the Study

The first four Chapters of this Preliminary Study provide essential background material on the problem of complex litigation. This Chapter has set out the contours of the complex litigation phenomenon and discussed the purpose and scope of this Preliminary Study. Chapter Two defines the complex litigation problem as it is addressed in this Preliminary Study, explains the Study's orientation, and analyzes the features and causes of complex litigation. Chapter Three then outlines the basic objectives of any solution to the complex litigation problem, and explores the tension between maximizing efficiency in the handling of complex cases and preserving the due process rights of parties. Chapter Four provides a context for the discussion of potentially valuable procedural reforms in later chapters by examining the strengths and weaknesses of existing mechanisms for dealing with complex litigation.

Chapters Five through Nine explore a wide variety of procedural mechanisms that could be used to ameliorate the complex litigation problem. Chapter Five discusses ways in which cases that are dispersed only within the federal court system could be processed more efficiently, and Chapter Six examines the more difficult problem of gathering cases for common adjudication when they are lodged in both the state and federal courts. Chapters Seven and Eight then discuss ways in which current choice of law and former adjudication rules could be modified to improve the handling of complex litigation. Finally, Chapter Nine discusses an alternative method of ameliorating the complex litigation problem that is at once the most radical and perhaps also the most useful: the adoption of a comprehensive federal complex litigation statute that could implement all of the procedural changes necessary to simplify the processing of complex cases. A properly drawn statute could tailor those changes narrowly so that they applied only to those cases for which current procedural rules were inadequate.

This Study attempts throughout to examine the broadest range of possible procedural reforms that might merit further study by the Institute. The options range from minor "tinkering" with existing mechanisms, to the comprehensive statutory reform mentioned above. Not all of these options are of equal promise, only further study will be able to distinguish the wheat from the chaff effectively. In order to emphasize the range of options available to the Institute, this Study attempts wherever possible to discuss three different ways of designing each procedural mechanism considered: Each device (1) could operate wholly by the parties' voluntary choice, or (2) could be coupled with incentives to encourage its use, or (3) could function coercively to compel consolidated adjudication when the court system's needs were important enough to outweigh individual litigants' preferences for "going it alone."