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Federal Civil Rules In The Fourth Circuit.

BOOK REVIEW

FEDERAL CIVIL RULES IN THE FOURTH CIRCUIT. By John V. Hunter, III.[1] Charlottesville, Virginia: The Michie Company. 1975. Two volumes; pp. xi, 506. $75.00

This book is so seriously and fundamentally flawed that it is nearly worthless. For a book on the Federal Rules of Civil Procedure to justify its cost, it must either do a better job of Rule analysis than the existing books, or it must provide something that they do not. John V. Hunter concedes that his book does not analyze the Rules (p. v). More importantly, his attempt to provide something else—"a book mentioning every published [Fourth Circuit] decision" (p. v)—has fallen woefully short of its goal. The book's sole virtue is its ease of use: the list of Fourth Circuit citations, which is admittedly out of date (p. vii) and demonstrably incomplete,[2] does not have to be culled from footnotes that also cite other circuit's decisions.

Hunter tries to justify his thin Rule analysis by admitting that his volumes are "not designed as a complete substitute for one of the standard works on federal practice" (p. v.). That could be a reasonable position; every book on the Civil Rules does not have to duplicate *Moore's*. Hunter's book, however, is not only not "a complete substitute," it is so lacking in analysis that it cannot be used safely without a standard federal practice source. If you have a standard work, you do not need Hunter; if you have Hunter, you still need a standard work.

The easiest way to see the book's limitations is to look at how it is set up physically. The Rules impose an easy organization; Hunter wisely follows it. He gives the full text of a rule and follows that with an abbreviated history of its amendments, synopses of the Supreme Court cases bearing on it, and textual material to expose the cases that discuss the rule. All of this is helpful, but not novel. Every trial lawyer already has a copy of the Rules and the significant amendments on his desk. The synopses are a more unusual feature, but Hunter does not necessarily discuss all relevant Supreme Court cases.[3]

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[1] Member of the North Carolina bar.

[2] *See* text accompanying notes 7 and 8 *infra*.

[3] For example, in discussing whether a state or a federal test should be used in diversity cases to determine whether there was sufficient evidence to avoid a directed verdict, Hunter does not mention Brady v. Southern Ry., 320 U.S. 476 (1943), which discusses the federal standard (at least in F.E.L.A. cases), nor Dick v. New York Life Ins. Co., 359 U.S. 437 (1959), and Mercer v. Theriot, 377 U.S. 152 (1964), where the

Hunter's major shortcoming, however, is his textual material. In most cases he has simply distilled headnotes and arranged them under the appropriate rule.[4] That helps the reader find Fourth Circuit cases, but it does not help him understand the Rules. Understanding the Rules as a coherent body involves more than reading a series of Fourth Circuit cases: the Rules themselves are law, and they are interpreted authoritatively outside the Fourth Circuit. Hunter's approach leaves his readers particularly vulnerable where subtleties, ambiguities and interrelationships in the language of the Rules are not discussed in Fourth Circuit cases. Where there are no Fourth Circuit decisions on point, a lawyer relying on Hunter might overlook a subtle problem or be oblivious to an existing solution of a complex problem of rule construction.[5] Unless the lawyer cross-refers to a standard work, he may not know that there is an answer to his problem, he may not know that his answer has been rejected in other circuits,[6] or, worst of all, he may not even be aware that there is a problem.

Contrast with this approach, for example, *Moore's.* There all of these problems, including those already solved by amendment or decision, are discussed and analyzed. The reader knows what the rule means when the interpretation is settled, he knows the possible meanings where interpretation is unsettled, and he has the benefit of intelligent analysis where the problems have not been addressed judicially. Only where the problems are not yet perceived is he left in the dark.

Even if Hunter's book did nothing more than provide an up-to-date list of Fourth Circuit cases arranged by rule, however, it might

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Court declined to decide the issue. On the standard of review in the courts of appeals of denials of motions for a directed verdict Hunter did not mention, *e.g.,* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); Rogers v. Missouri P.R.R., 352 U.S. 500 (1957); Webb v. Illinois Central R.R., 352 U.S. 512 (1957); Wilkerson v. McCarthy, 336 U.S. 53 (1949).

[4] *E.g.,* Hunter's mention of third-party civil rights practice in § 14-6(b) on page 163 essentially tracks the language from headnote eight of the one case cited. Hunter's textual comment even carries over the archaic "colored person" from the 1939 case.

[5] *E.g.,* where the plaintiff in his complaint demands a jury on less than all of the issues, a literal application of Rule 38(c) would force a defendant to file a jury demand on all other issues on which a jury trial was desired before the time for filing an answer had run. Hunter does not discuss the problem.

[6] *E.g.,* the problem of whether to use a state or a federal test of sufficiency alluded to in note 3, *supra,* has not been authoritatively resolved by the Supreme Court, and the circuits are in conflict. Though the chances of an *en banc* reversal of the Fourth Circuit decision selecting the federal test, Wratchford v. S.J. Groves & Sons Co., 405 F.2d 1061 (4th Cir. 1969), is admittedly slight, reference to other circuits would at least allow the attorney to find and evaluate the arguments for such a reversal.

still be worth buying. Unfortunately, the book falls far short of even that limited objective. Hunter used an unusual, and potentially effective, research technique. He canvassed all of the federal reporting materials starting with the then current volumes and went back to the first volume. Though it must have been a laborious task, it was probably the only technique that would work. After picking the right technique, however, Hunter made two serious mistakes. The first is blatant and inexcusable: for no apparent reason his research stops short in 1969—six years before the book was published. (p. vii). Although he admits this incredible omission, there are no present plans to remedy it.[7]

The book lacks more than just a pocket part, however. Despite a promise to provide all the Fourth Circuit decisions humanly possible,[8] Hunter's research has serious gaps. In what I assumed would be a demonstration of the superiority of Hunter's Fourth Circuit coverage, I arbitrarily elected to compare his treatment of Rule 14 with *Moore's*. I made a list of all of the Fourth Circuit decisions that Hunter cited. I did not check to see if they were legitimately cited; if Hunter cited a case, it went on the list. Then I cross-checked with *Moore's* using the same method (except that I eliminated *Moore's* post-1969 cases). Hunter listed 52 separate cases; *Moore's* listed 46, or about 15 percent fewer. Hunter listed 11 cases that *Moore's* did not but, incredibly, *Moore's* listed six cases that Hunter's research should have picked up but did not. There may well be other decisions that neither *Moore's,* nor Hunter, cites. What all of this means is that Hunter does not begin to give all of the Fourth Circuit cases. In fact, you are just about as likely to miss a case with Hunter as you are with *Moore's*.

Where neither case finding speed nor accurate analysis nor exhaustive research is desired, Hunter's book holds a definite advantage over the others. One needs merely to skim the text and pick up the noted cases to find something on point. The disadvantages of quick, as contrasted with reliable and complete, research tools, however, are too obvious to require comment.

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[7] Telephone call with Richard F. Thiele of the Michie Company, March 16, 1977. Mr. Thiele acknowledged the desirability of a supplement but said there were no firm plans for one at this time.

[8] Mr. Hunter hedges his bets here: he describes the exhaustiveness of his research effort but then notes that perfection is impossible in any human venture. Missing six cases that are by no means obscure seems like more than normal human frailty. Even if it is not, the conclusion that one is no more sure of finding all of the cases with Hunter than with *Moore's* remains.

The lawyer who would buy this set of books must balance the speed with which he will be able to find some Fourth Circuit authority against the inexplicable exclusion of recent cases, the reality of omitted cases, and the limited analytical utility of the book. I would save my money.

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