

Foreword

This Foreword provides an opportunity to salute and to thank the 373 principal authors of the Fifth Edition of this treatise. Their expertise and qualifications are outlined in the “About the Authors” section following this Foreword. I would like to give readers at least some sense of the time and thought our authors have expended. Although it is difficult to quantify their efforts, one statistic may be helpful. We conservatively estimate that our authors and their law firms have invested more than 100 million dollars of their own billable time, calculated at their regular hourly billing rates, in working on the First, Second, Third, Fourth, and Fifth Editions of this treatise and its annual Pocket Parts. I believe that readers will agree that our authors’ efforts are reflected in the comprehensiveness and quality of the Fifth Edition.

The First, Second, Third, and Fourth Editions

The First, Second, Third, and Fourth Editions of this treatise, which were published in 1998, 2005, 2011, and 2016, respectively, have been widely recognized as unique and invaluable resources and became the definitive works in their field. The first four editions received an enthusiastic reception from the legal press, reflected in more than 380 favorable book reviews in legal newspapers, bar journals, and other publications throughout the United States which confirm the value of this legendary treatise.

Pocket Parts for all chapters in the Fourth Edition have been published each year since 2016. Due to the many changes over the past five years in federal procedural and substantive law relating to business and commercial litigation, it became clear that a new, fifth edition of the treatise was in order. In addition, as a result of the authors’ careful and comprehensive annual updating of their chapters, the 2020 Pocket Parts totaled 2,481 pages of text (on average, more than 16 pages of text per chapter) and the treatise was becoming unwieldy and inefficient to use.

Accordingly, the authors began work on the Fifth Edition of the treatise during the fall of 2020.

The Fifth Edition

Twenty-six new chapters have been added in the Fifth Edition to the chapters in the Fourth Edition. In addition, the chapters carried forward from the Fourth Edition have been substantially expanded. As a result, the Fifth Edition is sixteen volumes (there were six volumes in the First Edition, eight volumes in the Second Edition, eleven volumes in the Third Edition, and fourteen volumes in the Fourth Edition) and contains 19,866 pages of text (2,724 more pages of text than the Fourth Edition). The Fifth Edition also features a separate appendix that contains an Index as well as tables of all laws, rules, and the more than 50,000 unique cases cited in the Fifth Edition. The appendix makes it easy for readers to find precisely what they are looking for in one place.

In 2016, while we were working on the Fourth Edition, I thought that we had included a chapter on every subject likely to be of interest to commercial litigators. Commercial litigation in federal courts has evolved over the past five years and we have added 26 new chapters in the Fifth Edition to address new subjects that are important to commercial litigators today. The following list of new chapter titles in the Fifth Edition includes a number of subjects whose importance has dramatically increased in recent years: Animal Law; Art Law; Artificial Intelligence; Budgeting and Controlling Costs; Climate Change; Comparison with Business and Commercial Litigation in Delaware Courts; Comparison with Business and Commercial Litigation in New York Courts; Comparison with Business and Commercial Litigation in Canada; Comparison with Business and Commercial Litigation in Mexico; Congressional Investigations; Constitutional Litigation; Coordinating Counsel; Corporate Litigation Reporting Obligations; Corporate Sustainability and ESG; Fee Arrangements; Fraudulent Transfer; Litigation Management by Judges; Monitorships; Political Law; Shareholder Activism; Space Law; Third-Party Litigation Funding; Trade Associations; Use of Jury Consultants; Valuation of a Business; and Virtual Currencies.

The authors of these 26 new chapters have obviously devoted substantial time and effort to the Fifth Edition. Less obvious, but no less important, are the new contributions to the Fifth Edition by the authors of the chapters carried forward from the Fourth Edition. The 2020 Pocket Parts for some of the chapters in the Fourth Edition were more than 50 pages. The tasks of integrating and synthesizing lengthy Pocket Parts into even lengthier chapters to create completely current and seamless new chapters

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required extensive efforts by our authors. Even more crucial was the expertise and judgment they exercised to determine what needed to be added, and what should be eliminated, to create new chapters that provide comprehensive and up to date guidance without extraneous or obsolete material that wastes readers' time. I welcome readers' assessments of the results.

Our Authors

The Fifth Edition of this publication contains the work of 373 principal authors, including 32 distinguished judges and the cream of the commercial litigation bar, the best lawyers practicing in the federal courts of this nation. The generosity of these renowned authors, in sharing their experience and insights, backed up by the resources of many of the finest law firms in the United States, has enabled this unprecedented work.

I thank all of our 373 principal authors for both the quality and the quantity of their efforts and for the enthusiasm and commitment that characterized their participation. I particularly thank the 32 distinguished judges who graciously shared their valuable time and insights with us, including United States Circuit Judges Timothy B. Dyk, David W. McKeague, M. Margaret McKeown, Jane R. Roth, and Richard J. Sullivan; United States District Judges Lynn S. Adelman, Edmond E. Chang, Brian M. Cogan, Paul A. Crotty, Paul S. Diamond, Katherine B. Forrest, George C. Hanks, Jr., David Hittner, Barbara S. Jones, William F. Kuntz, II, William C. Lee, Lewis J. Liman, Barbara M.G. Lynn, Solomon Oliver, Jr., George A. O'Toole, Jr., Benita Y. Pearson, Douglas L. Rayes, Christina Reiss, Shira A. Scheindlin, Michael H. Simon, Raag Singhal, Ursula Ungaro, and Reggie B. Walton; United States Bankruptcy Judge Donald R. Cassling; and state court Judges Barry R. Ostrager, Brock A. Swartzle, and Daniel H. Weinstein.

Scope and Focus

This publication is unique in the legal literature. There is no other book on commercial litigation in federal courts. There is also no other book that combines in depth treatment of federal civil procedure with substantive law in the areas most commonly encountered by commercial litigators. Even more unique, however, is that again and again throughout this work, our authors have pointed out the interplay between the rules of procedure and substantive law. They have painstakingly outlined strategies for the representation of plaintiff and defendant. They have given thoughtful consideration to the delineation and at-

tainment of objectives and to the advantages as well as ramifications and pitfalls of various actions and inactions on the part of the commercial litigator throughout the entire course of a lawsuit. This is not only a law book that is valuable as a research tool and a source of legal knowledge and citations, it is an idea book filled with nuggets of wisdom and perspective that could only have been gained by years of experience in handling cases from the most simple to the most complex. This book tells readers not only what the law is but how to use the law to achieve their clients' objectives.

The Fifth Edition of this treatise is a step-by-step practice guide that covers every aspect of a commercial case, from the investigation and assessment that take place at the inception, through pleadings, discovery, motions, trial, appeal, and enforcement of judgment. Great emphasis is placed on strategic considerations specific to commercial cases. The Fifth Edition also contains 93 substantive law chapters that cover the subjects most commonly encountered in commercial cases, including securities, antitrust, banking, contracts, insurance, sale of goods, intellectual property, professional liability, business torts, franchising, and many other business and commercial law topics. Covered as well are compensatory and punitive damages and other remedies such as specific performance, rescission, and declaratory judgments. Alternative dispute resolution is also addressed in separate chapters on settlements, negotiations, mediation, arbitration, and international arbitration.

In addition, the Fifth Edition contains a number of chapters on subjects that might not be covered in a conventional litigation treatise but nevertheless are important to commercial litigators. These additional chapters address the "business" of litigation practice (for example, our chapters on Budgeting and Controlling Costs; Fee Arrangements; Marketing to Potential Business Clients; Third-Party Litigation Funding; Coordinating Counsel; Crisis Management; and Litigation Avoidance and Prevention) as well as the professional growth and development of commercial litigators (for example, our chapters on Teaching Litigation Skills and Pro Bono).

Special Features

The special features and categories of information in the Fifth Edition of this treatise include in-depth text on law and procedure, strategies and client counseling sections, procedural and practice checklists, checklists of essential allegations and defenses, checklists of sources of proof of allegations and defenses, hundreds of pages of essential litigation forms and jury charges, and numerous cross-references which facilitate efficient naviga-

tion within each chapter and throughout the entire treatise. These features were designed to provide the reader with everything needed to handle every aspect of a commercial litigation. The format makes this wealth of information equally accessible and useful for the commercial litigator when she needs an immediate answer for the client on the telephone or during a five minute deposition recess or when he has several hours to read, learn, and (hopefully) enjoy at leisure.

To facilitate further legal research, many chapters in the Fifth Edition contain research references to other treatises.

Accessibility and Efficient Delivery of Relevant Practical Guidance

One of the most important and pervasive objectives of this treatise is not only to answer all of readers' litigation questions but also to do so quickly and efficiently so readers can serve their clients cost-effectively throughout the litigation process. We have also sought to facilitate reader understanding and to make this treatise "come alive" for the reader. We have used a number of strategies to pursue these goals.

The chapters in this treatise are permeated with examples, illustrations, and practical and strategic advice. The authors have told readers exactly when and how the issues presented by the subject matter of their chapter arise in business and commercial litigation and how litigators should resolve those issues.

Our authors have recognized that very few lawyers are as experienced or sophisticated about the subject matter of their chapters as the authors. In order to help these less knowledgeable readers, our authors have gone beyond general recommendations and have provided readers with the details of how they should implement the authors' advice under various specific circumstances.

It is our intention that this publication serve as a blueprint for implementation by the reader. One of our goals is to provide commercial litigators with enough information so they can do almost everything they need to without any further guidance from anyone else. To achieve this goal, our authors have provided examples, both real and hypothetical, to illustrate their recommendations. They have described specific applications. They have also included alternative strategies, and the factors that would dictate the utilization of alternative strategies. For contrast, they have given examples of failed approaches and have explained the problems and pitfalls.

Many legal treatises contain language that is probably readily understandable to lawyers who have substantial experience with the subject matter of the treatise but that may be difficult to

penetrate for a litigator who is not familiar with such matters. To avoid this problem, our authors have put the concepts they discuss in their commercial context and have provided examples and illustrations of the concepts and principles they are discussing. Our goal is to make this treatise invaluable to all readers, not just lawyers who are already knowledgeable about the subjects covered in this treatise.

Each chapter in this treatise provides a substantial amount of guidance to any reader who reads the chapter from beginning to end. However, we recognize that many readers will not read entire chapters in this treatise from beginning to end but instead will use the Index to this treatise and/or the table of sections of the beginning of each chapter to turn immediately to the particular section or sections that they think will answer their question. Such readers may not know what the authors have discussed in their chapter before or after the particular section they are reading and often need guidance in finding other topics that the authors have discussed. As a result, we have devoted substantial efforts throughout this treatise to assist readers in navigating each chapter efficiently and in finding what they are looking for quickly. There are two particular vehicles in this treatise which enable efficient navigation and which have been implemented comprehensively throughout each chapter.

First, we have inserted literally thousands of cross-references to other sections of each chapter and to other chapters of this treatise to enable readers to find and obtain access to what they need quickly and efficiently. These cross-references also enable hyperlinking on Westlaw. In addition, these cross-references have assisted authors in focusing their chapter on its specific subject matter and have obviated any need for them to provide detailed descriptions of other types and aspects of litigation which may overlap with other chapters.

Second, the format of the numbered section headings in each chapter enables readers to understand the structure and contents of each chapter with one quick glance at the table of sections of the beginning of each chapter. The format of the numbered section headings also enables readers to understand the contents of each section of each chapter with one quick glance at the heading of each section, as well as the relationship of that section to the other sections in that chapter. This format is designed to facilitate efficient use of each chapter as well as to make the contents of this treatise readily accessible to readers.

Under many of the principal sections in each chapter are subordinate sections and sub-subordinate sections. Each subordinate section addresses one particular aspect of the principal section to which the subordinate section relates and each sub-subordinate section addresses one particular aspect of the subordinate section

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to which the sub-subordinate section relates. To implement this section heading format throughout each chapter, each subordinate section heading is preceded by the principal section heading for the principal section to which the subordinate section relates and each sub-subordinate section heading is preceded by first the principal section heading and then the subordinate section heading to which the sub-subordinate section relates. In addition, internal cross-references in footnotes enable readers to hyperlink instantaneously to other topics in each chapter as well as to other chapters of this treatise.

We believe that these additional features of this treatise maximize the accessibility and efficient delivery of the information in each chapter.

The ABA Section of Litigation

This publication is the result of a highly successful joint venture between Thomson Reuters and the American Bar Association Section of Litigation. All royalties from sales of this treatise and its annual Pocket Parts go to the ABA Section of Litigation. The amount of those royalties has been substantial.

I would like to thank the ABA Section of Litigation for the support it has provided for this publication over the past 23 years. I am particularly grateful to the Chairs of the Section of Litigation during that period for their thoughtful advice and assistance.

Conclusion

I feel privileged to serve as Editor-in-Chief of this publication. In that role I reviewed and commented on the chapters in all five editions as well as the annual Pocket Parts each year since 1998. Throughout I have been impressed by the creativity of this magnificent team of volunteer litigators and judges. Their accumulated wisdom has made this an educational experience for me far beyond what I could have hoped for. In the best traditions of our profession, our authors have created, and then refined and improved, a significant work that has become a lasting credit to the ABA Section of Litigation and to the bar and the judiciary in this country. I am grateful for the opportunity to participate.

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