

## Book Review

# ***Business and Commercial Litigation in Federal Courts, 5th Edition***

Reviewed by Ted G. Semaya

Faster than a speeding bullet! More powerful than a locomotive! Regular readers of this journal may detect the familiar sound of a reviewer (obviously of a certain vintage) grasping for ever greater superlatives to describe one of a pair of monumental treatises whose high quality and sweeping scope are matched by their accessibility and usefulness to lawyers of all kinds. The occasion this time is the publication late last year of the fifth edition of *Business and Commercial Litigation in Federal Courts*.

The driving force behind the set since the publication of the first edition in 1998 is its editor-in-chief, Robert L. Haig, a true giant of the New York bar with positions and honors too numerous to list, who can be said also to be the business lawyer's best friend, having helped to create business courts in 21 states, including New York, and eight foreign countries. The fifth edition, having spotted its sibling, *Commercial Litigation in New York State Courts*, a three-year head start, now surpasses it in size. The judges and leading practitioners who comprise its 373 principal authors have produced a work weighing in at 19,866 pages of text in 16 volumes.

For those familiar with the treatise, the fifth edition adds 26 new chapters, keeping pace with the development of business, itself, including coverage on artificial intelligence, climate change, corporate sustainability, and ESG. What makes it the “go-to” resource for a first stop in understanding an area unfamiliar or insufficiently familiar to a practitioner, however, has not changed. That is its unique integration of “how-to” treatment of procedure, including checklists and forms for litigators, with substantive law. And its inclusion of discussions, as if with an expert colleague, of strategy and practical tips with real-world scenarios that are understandable and indispensable to business lawyers working with their clients and lead litigators.

Its utility is due also to the multifarious ways it gets you quickly to what you are looking for and then ensures that you are made aware of things you would not know to look for. Having all the information needed to handle or manage litigation is useless if the information cannot be accessed when needed, which may have to be within minutes when on a call with a client or colleague. Wherever you start your research, whether you drill down section headings, use the index, or word search, the chapter heading structure and ex-

tensive hyperlinked cross-references will provide the benefit of an expert in the field to refer you to related points.

The consistent structure notwithstanding, one cannot lose sight of the fact that this is a collection of mini-treatises with different authors for each chapter. The sheer scope, particularly of the substantive law chapters discussed below, necessitates they be broad overviews. Areas of detail, therefore, vary by author. For example, many chapters address intellectual property aspects or, in the case of statutory claims, extraterritorial application. But not all chapters addressing subjects with aspects in common with others address those aspects, and those that do each have their own approach.

This does not mean that each chapter does not provide a lot of useful detail. The RICO chapter, for example, tackles a subject that occupies entire treatises and law reporters and can be intimidatingly complex. It provides a very understandable general discussion of RICO's main aspects, strategic considerations and practical tips with detailed practice advice, including helpful background on the development of the law and differences among the circuits, checklists, and a wealth of references for more in-depth information.

The heart of the work for litigators is its first 71 chapters, which comprise a description of rules and procedure, practice tips, and strategy, with step-by-step guidance and explanations, for the life of a case from investigation and planning through judgment enforcement. This part is useful to non-litigators, as well, such as in-house counsel charged with overseeing litigation by outside counsel. It is more useful that way than one might expect because the work contains litigation management chapters not usually found in a commercial litigation treatise, such as “Budgeting and Controlling Costs,” “Fee Arrangements,” “Third-Party Litigation Funding,” and “Litigation Avoidance and Prevention.”

Salted throughout this first part are chapters that do not really fit, such as new ones: “Congressional Investigations,” “Litigation Management by Judges,” and “Civil Justice Reform,” as well as some that may be relevant to charting litigation strategy, such as comparisons with business and commercial litigation in New York and Delaware state courts and in Canada and Mexico. But there are also chapters that address areas too often neglected until (too) late in a case, such as compensatory damages. There is coverage also in this part

of alternative dispute resolution subjects, including mediation, arbitration, and international arbitration.

The greatest value of the set to a business lawyer lies in the 93 substantive law chapters (out of a total of 180) that cover the subjects most commonly encountered in commercial cases, including securities, antitrust, banking, contracts, insurance, sale of goods, professional liability, and franchising. But there are also such industry-specific topics such as energy, sports, entertainment, fashion and retail, and health care institutions, with new ones, in addition to those listed above, for animal law, art law, space law and virtual currencies.

Taking another substantive chapter as an example, the “Foreign Corrupt Practices Act” chapter takes a workman-like approach, describing as to the anti-bribery and accounting provisions first the all-important “who” aspect of the statute, since its broad reach continues to be underappreciated. The chapter then addresses the “what,” outlining all the elements of each set of provisions with many examples, again, important to understanding the breadth of seemingly ordinary business activities covered by the FCPA.

In addition to addressing liability and enforcement, the chapter provides general guidance in the M&A context and an international view of anti-corruption enforcement including specific discussion of enforcement in the U.K., France, Brazil and China. While not a stand-alone compliance guide for in-house counsel or practice manual for litigators defending a DOJ or SEC action, the chapter will help the in-house lawyer to consider if there is exposure requiring compliance assistance and the litigator to identify issues and needed resources.

The international sections of the FCPA chapter are characteristic of many chapters that provide, to varying degrees, international aspects of their subjects important in the now clichéd, but still true, ever-increasing international dimension of business disputes. There are also chapters devoted entirely to international practice, with titles like “Litigating International Disputes in Federal Courts,” “Cross-Border Litigation,” “International Arbitration,” and “Comparison with Business Litigation in Canada and Mexico”; not to forget substantive chapters on export controls, international trade, and the Alien Tort Statute and Torture Victim Protection Act.

Interestingly, this treatise compares business litigation in federal courts only with two foreign countries. Canada and Mexico, whereas the sibling *New York State Courts* treatise covers England and Wales, Australia, France, Germany, and Russia. To be fair, the “Cross-Border” chapter has summary sections for international business venues such as London, Paris, Hong Kong, Singapore and Switzerland. While no substitute for resources dedicated to international practice, these foreign jurisdiction guides are a boon to initial consideration of choices among jurisdictions. It is to be hoped this help will continue to be expanded in inevitable future editions.

The fifth edition, published by Thomson Reuters in a unique joint venture with the ABA Section of Litigation, is available hardbound and as a ProView eBook and digitally on the Westlaw online legal research platform.

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