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Business and Commercial Litigation in Federal Courts, Fifth Edition

—Robert L. Haig, Editor-In-Chief, American Bar Association Section of Litigation & Thomson Reuters, 2022. 19,866 pages.

If you want to know everything there is to know about commercial litigation in federal courts – from pre-suit analysis and litigation avoidance, to commencing, prosecuting and defending specific types of claims, to post-judgment enforcement mechanisms and appeals – then the Fifth Edition of *Business and Commercial Litigation in Federal Courts*, an extensive treatise edited by Robert L. Haig, is a must-have resource. The sixteen-volume set, which is also available online as an eBook through Thomson Reuters, includes comprehensive coverage of every possible issue you might face in litigating a commercial matter in federal court and contains digital access to hundreds of useful forms associated with each of the topics covered in the treatise.

The last edition, published in 2016, consisted of fourteen volumes covering every topic one could imagine encountering in federal court litigation. The new Fifth Edition updates the existing chapters with the latest information and adds to this remarkable coverage with 26 new chapters covering such timely and forward-looking topics as Artificial Intelligence, Climate Change, Virtual Currencies, Corporate Sustainability and Environmental, Social, and Governance (ESG) criteria and Shareholder Activism. The Fifth Edition also incorporates new chapters on the business of running an effective litigation practice, including such topics as Fee Arrangements, Budgeting and Controlling Costs and Third-Party Litigation Funding. A few of these newly incorporated chapters are the focus of this review.

Chapter 80: Artificial Intelligence. In 2022, the EEOC cautioned employers on potential biases and discrimination in the use of artificial intelligence, or “AI,” in hiring deci-

sions, and the City of New York enacted legislation penalizing employers where bias was found in the use of AI in hiring. Product liability claims involving AI, from self-driving car accidents to security breaches in personal devices like cell phones, are on the rise and will become a regular part of litigation practice for many firms.

Chapter 80 of the Fifth Edition starts with background explaining what AI is and where and how it is used before setting out detailed information about the types of claims a litigator might encounter which involve AI. Cross-references and links in the eBook version to related substantive areas of the law, such as class actions and product liability claims in federal court, allow the reader to move seamlessly through the Fifth Edition to obtain a full understanding of potential claims. A checklist section provides examples of protective order language where disclosure of a party's trade secret algorithm will be necessary in discovery.

In addition to federal claims that might be litigated over the use of AI, the chapter also addresses the surge in the use of AI by lawyers and law firms, for instance, to conduct "technology assisted review" or "TAR" of electronically stored information. The chapter provides tips on how to effectively utilize TAR in litigation and avoid problems with quality control over results. The chapter also provides insight into ethical issues associated with use of AI for conducting legal research and litigation analysis.

Chapter 98: Corporate Sustainability and ESG. With the SEC mandating that public corporations disclose certain environmental, social and governance (ESG) information, the Fifth Edition now includes an entire chapter on new litigation stemming from enforcement of these new regulations, as well as on investor and shareholder responses to ESG disclosures (or lack of disclosures).

While the role of ESG in corporate governance may, by itself, trigger volumes of discussion on a controversial topic, this chapter focuses on providing a tool for navigating the

new world of social responsibility in the corporate context. Beginning with a comprehensive discussion on the growing trend toward implementing ESG requirements, the chapter sets out in detail the potential arenas in which ESG litigation will take place, including application of consumer protection and unfair competition laws, labor disputes, board governance, fiduciary duty and shareholder actions, and various tort theories that might come into play. Sections also focus on SEC and DOL enforcement actions that are likely to increase over the next decade as ESG becomes a standard part of corporate litigation. The chapter also addresses the interplay between ESG litigation and climate litigation, which also is a new chapter in the Fifth Edition (*see below*).

Lastly, the chapter contains excellent “practice aids,” including an ESG checklist to help advise your publicly traded corporate clients on ESG compliance before litigation commences. As with other sections, the chapter also includes sample forms and jury instructions, just in case.

Chapter 111: *Virtual Currency*. The bankruptcy filing and federal investigation of the cryptocurrency exchange, FTX Trading Ltd., continues to fill the news headlines, and the litigation fallout will likely continue for the foreseeable future. But because the concept of cryptocurrency is so new, the landscape of litigation in the field is still very much in the infancy stages. Chapter 111 of the Fifth Edition centers entirely on what a litigator needs to know to be proficient in the field, from an overview of the blockchain technology behind cryptocurrencies and non-fungible tokens (“NFTs”), to federal regulation and enforcement actions regarding such currencies, to the fundamentals of civil litigation of claims over the sale and use of those currencies and related “smart contracts.”

Are cryptocurrencies, NFTs, or related contracts subject to federal regulations under the Securities Act of 1933 and the Securities and Exchange Act of 1934? Your answers are in this section. The Fifth Edition synthesizes this new area

of the law into useful sub-topics, cross-references existing substantive areas of the law that intersect with novel issues involving cryptocurrency claims, analyzes the existing case law in the field, and provides checklists to assist in litigating virtual currency claims.

Each section under “Civil Litigation Involving Virtual Currencies” includes not only insightful practice tips associated specifically with cases involving virtual currencies, but also links directly to other areas of substantive law within the treatise that have been utilized in existing cases to address the new legal area of virtual currencies. Of particular interest, the chapter includes everything you need to know to assert or defend virtual currency claims for violations of federal securities or trade secret laws and trademark infringement.

We found the eBook edition to be particularly useful in allowing the reader to toggle between sections of the treatise, as well as articles and cases on Westlaw, for a complete overview of relevant topics. The “Discovery and Evidentiary Issues” section includes a useful practice guide to navigating the typically anonymous world of cryptocurrency and blockchain transactions, including the importance of utilizing forensics and the swiftly evolving evidentiary rules for authenticating records stored in blockchain.

Chapter 174: Art Law. As this chapter aptly begins, “[a]rt litigation is on the rise.” From contract and ownership disputes, to claims of forgery and fraud, to infringement claims and, more recently, to the intersection and use of art in the virtual currency world of NFTs, global litigation in the art world has turned significantly complex in the last decade. This chapter provides the springboard for understanding this area of the law, reviewing how courts have addressed art-related claims, and providing a framework to formulate claims and defenses on behalf of your own clients.

The chapter provides useful practice tips, beginning with how and why to avoid public litigation altogether to prevent

potentially impacting the value of a work of art. This section dovetails well with Chapter 72 in the treatise on *Litigation Avoidance and Prevention*.

Key concepts around meeting the federal amount-in-controversy are discussed with references to standards applied to date, mostly in the Second Circuit, for ascertaining whether a work of art meets the \$75,000 threshold. Naturally, determining the value of a work of art requires an understanding of such factors as authenticity of the work. A substantial portion of this chapter is devoted to issues and disputes involving authenticity and provenance. In addition to standard advice on the importance of expert testimony, the chapter focuses on navigating the various legal standards that have developed in art-related cases.

Choice of law issues also frequently arise in disputes regarding ownership of artwork. For instance, in addition to existing federal and state trademark, copyright, RICO and UCC laws already utilized in art-related cases, the United States has enacted numerous statutory schemes to address claims regarding stolen, copied or destroyed artwork, including the Holocaust Expropriated Art Recovery Act, the Visual Artists Rights Act and the Architectural Works Copyright Protection Act, often making litigation in a United States federal court more attractive to litigants. This chapter homes in on how best to formulate claims and convince courts to apply these protective laws to art-related claims. And, as with other chapters in this treatise, links are provided to existing and related substantive areas of the law which might apply in an art-related case.

Chapter 178: *Climate Change*. Along with the new chapter on Corporate Sustainability and ESG, the Fifth Edition includes a new chapter devoted to litigation regarding climate change in general. The political shift in presidential administrations, and whether the United States remains in or out of the Paris Agreement on climate change, also impacts the direction and frequency of lawsuits raising global

warming and climate change claims. While this field of law remains in the very early stages, litigation in this space is on the rise, particularly as private plaintiffs seek ways to assert claims against entities in the energy and manufacturing sectors.

Much of this chapter involves speculation. Regulatory, corporate governance and ESG reporting issues (*see above*) certainly will lead to claims. But as the chapter predicts, litigation also is likely to grow in such areas as common law torts and climate-related provisions in commercial and insurance contracts. The links to cases already addressing climate change litigation are a good starting place for any research on the issue.

Of course, the Fifth Edition also includes updated analysis and reference of topics already in the treatise, providing an excellent starting point for those who are new to litigating in federal courts as well as for experienced practitioners who seek an in-depth discussion of complex procedural issues. For instance, the treatise provides well researched and comprehensive discussions about complex topics such as RICO litigation, including addressing arguments that can be made in support of the claims and to defeat the claims. It provides comprehensive guidance about class actions and multidistrict litigation, including insight from dozens of accomplished practitioners on virtually every issue or complication likely to arise in the course of litigating such matters.

All the chapters are well researched and address the topics in a sophisticated and comprehensive manner with hundreds of links to relevant case law, statutes, secondary sources and practice aids. After reading each chapter, the practitioner is left with a sense of command over the subject matter and confidence in how to address contested issues. Everything is geared to the practitioner and designed to provide the practitioner with the tools needed to litigate in the federal courts at a high level.

The Fifth Edition is so comprehensive that we found ourselves considering all the headaches we could have avoided

in dealing with complex or unique federal practice questions if we had started by reviewing chapters in the treatise. For instance, in a recent matter, a plaintiff attempted, under Fed. R. Civ. P. 41, to voluntarily withdraw a federal court complaint against our client without prejudice. The same plaintiff had previously withdrawn a similar case against the client in state court which, under Rule 41, raised the question of whether we could respond that the second dismissal in federal court had to be *with prejudice*. Instead of searching for cases addressing this unique situation, separately researching whether a *with prejudice* dismissal had res judicata effect and, all the while risking swift entry of a dismissal by the Court, we could have started with Chapter 22 of the treatise which quickly answers all of our questions. In a single section (Section 22:38, for those who are interested), we found everything we needed to know on the topic, which would have allowed us to strategize and file responsive pleadings almost instantaneously.

In short, rather than simply explaining each issue that might arise in federal litigation, the treatise provides analysis on the interplay between theories and rules, providing a meaningful tool for thinking strategically about such issues. The Fifth Edition, particularly the electronic eBook version, should be a go-to resource for any litigator practicing in federal court.

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