

## **BOOK REVIEW**

### ***BUSINESS COMMERCIAL LITIGATION IN FEDERAL COURTS, FIFTH EDITION,*** **ROBERT L. HAIG, EDITOR**

**BY NICHOLAS M. VENTO**

“Business and Commercial Litigation in Federal Courts” has established itself as the definitive treatise for commercial litigators in federal court since 1998.

Rather than rest on its laurels, the recently issued Fifth Edition continues to expand on the exhaustive work of its predecessors, adding 26 new chapters and substantially expanding and updating its existing chapters, further securing the treatise’s position as an indispensable resource on virtually every aspect of practice in federal court.

The treatise now boasts 373 principal authors (including 32 distinguished judges), all renowned as experts in their fields of litigation. Among the authors are several Ohio lawyers and judges including Judge Bonita Y. Pearson of the Northern District of Ohio; Judge Solomon Oliver, Jr. of the Northern District of Ohio; Thomas Collin and Matthew Ridings of Thompson Hine; and Gregory Parker Rogers of Taft Stettinius & Hollister.

The Fifth Edition is now comprised of 16 main volumes. The treatise remains available in hard copy and occupies about three feet of shelf space. While more expansive than ever, the hard-copy treatise is still remarkably easy to navigate. The treatise begins with a seven-page Summary of Contents. Prefacing each volume, the Summary of Contents lists all 180 chapters in order, from procedural litigation issues (set out from pre-litigation through final appeal) to more substantive legal topics, which are grouped in logically related groups. In navigating each chapter, the numbered section headings format allows the reader to quickly understand the chapter’s structure and contents by reviewing the table of sections at the beginning of each chapter. The treatise also comes with a 278-page Index, which is a separate softbound supplement that provides a detailed roadmap of all the treatise’s contents. Also included is a separate volume of Table of Cases with citations and cross-references to all the

cases the treatise references. These features truly maximize the accessibility and efficient delivery of what is such a large volume of information contained in the treatise.

Practitioners can also access the treatise electronically through a Westlaw subscription. There are some obvious advantages to using the treatise through Westlaw. The Westlaw version is obviously far more portable than the 18-volume hard copy. The Westlaw version further contains hyperlinks, not only to internal cross-references, but also to resources outside the treatise as well. This includes the full version of every case and statute cited, as well as links to many of the scholarly works and third-party resources referenced by the authors.

This treatise is a valuable resource to all practitioners, irrespective of experience level, because of its depth of analysis and practical guidance on virtually any issue that may arise for the practitioner through all phases of commercial litigation in the federal courts, from pre-litigation through appeal, and beyond. The presence of “practice aids,” such as procedure checklists, checklists for planning discovery, and key forms, makes this treatise an invaluable resource. What I also found notable about this treatise is the depth of guidance it provides on subjects beyond the traditional topics of substantive or procedural law, but which are still important in a practical sense to successfully manage a business and commercial litigation practice in federal court.

Illustrative of the treatise’s practical utility is Chapter 76 on Budgeting and Controlling Costs, which is a new chapter. With the costs of federal litigation skyrocketing over the last several decades, clients increasingly require attorneys to provide litigation budgets to better predict and control those costs. This new chapter offers a detailed step-by-step guide on effectively budgeting and controlling costs in federal court litigation. In doing so, the authors assess the fees and costs with each strategic possibility at

every step during a federal lawsuit — from the initial pleading stage through discovery, trial, and appeal. Additionally, the authors effectively discuss the relevant rules of federal procedure governing the fees and costs that an attorney may charge a client and how these rules form the basis for creating an accurate and ethical budget. The authors also examine key considerations that impact the overall budgeting and cost control process, including tailoring a litigation budget based on the purpose for which it is being prepared (pitch versus retention), use of technology to control costs, and the importance of determining insurance coverage. For example, with respect to determining insurance coverage, the authors note that insurance companies often have strict guidelines as to what can be billed (routinely limiting the number of lawyers that can bill for a wide array of charges or the implementation of certain case strategies — such as filing certain motions or the number of depositions). A practitioner must be mindful of these limitations and adjust their budgets accordingly. The chapter concludes with several practice aids in the form of sample budget templates covering different scenarios.

Another new chapter of practical importance is Chapter 78 on third-party litigation funding. Over the past decade, litigation funding has become an increasingly mainstream resource (the authors state that it is estimated that litigation funding in the U.S. exceeds \$5 billion annually) for attorneys and clients to mitigate the costs and risks involved in pursuing or defending litigation. Thus, a working knowledge of this growing field can benefit practitioners and the clients they represent. This chapter provides an overall explanation of what litigation funding is and how it works. The authors effectively discuss when to consider litigation funding and cover important preliminary factors to consider in weighing its risks and benefits. There is also a thorough discussion of the different types of litigation funding and how litigation funding

differs from other methods of commercial financing. For example, the most common third-party funding arrangements involve a direct, non-recourse arrangement between a client and a funder to finance a single case. Alternatively, some funding arrangements are between the lawyer (or law firm) and the funder. While these arrangements can cover a single case, a scenario that is becoming more common is when the funder and lawyer reach an agreement to fund a portfolio of cases or class actions involving different clients.

The authors also effectively discuss the nuts and bolts of funding agreements, including provisions to which practitioners should pay careful attention. For example, a funder may seek written assurances from the client that the information provided during the due diligence period is “true and accurate.” However, making such guarantees at an early stage of litigation could put your client at risk, where facts and information often evolve (for better or worse) through the discovery process. The chapter closes with an important discussion about ethical issues that may arise from the use of third-party litigation funding, as well as several practice aids.

Chapter 174 on Art Law is an interesting new substantive addition to the treatise. In recent years, the market value of art, the willingness to trade, and the number of participants have all grown exponentially. Furthermore, the new means of creation and consumption of art through digital and social media, such as

NFTs (non-fungible tokens), has led to new frontiers in this area of law. This now growing and fast-changing market has led to more frequent and high-stakes disputes, arising in varied contexts, and resulting in numerous, diverse claims. This chapter offers a clear guide for navigating the types of disputes that arise relating to art such as: fraud and RICO claims that can arise from the sale of forged art; contract disputes involving the purchase and sale or consignment of art; copyright disputes involving alleged infringement of an original image; and disputes seeking the recovery of stolen art.

The authors also do a great job outlining the special considerations practitioners should be aware of when considering pursuing litigation involving art. Specifically, the market value of artwork is highly subjective and volatile. This can result in unpredictable outcomes of even straightforward cases. Practitioners must be cognizant of the effect litigation may have on a disputed artwork or on the parties from a reputational and market perspective. Often victory or loss in court is not determinative of the success of the litigation, but rather the publicity attendant to litigation and its effect on the work’s or parties’ reputation is the most important factor to consider when deciding how to proceed. The authors provide an illustrative example in a dispute where plaintiffs filed suit for fraud, claiming defendants sold them a forged piece of art. Defendants ultimately prevailed, with the court

finding the art was “more likely than not” an original. However, the damage was done, and the defendants were unable to sell the piece for twenty years after the litigation concluded. With this in mind, practitioners must carefully consider their litigation position and procedure or risk severely damaging the asset they were hired to protect.

In the foreword, editor-in-chief, Robert L. Haig states his goal with this publication was to provide commercial litigators with enough information that they can do almost everything without any further guidance from anyone else. It is fair to say this goal has been more than accomplished with the Fifth Edition. This monumental work covers virtually every imaginable topic in federal litigation while remaining remarkably easy to navigate. The practical guidance, strategic considerations, and practice aids are also invaluable tools. This exhaustive and immensely practical treatise would be a tremendous addition to the toolkit for any litigator who is or will be practicing in federal court.



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