Business and Commercial Litigation in Federal Courts

Third Edition

Robert L. Haig, Editor-in-Chief

Reviewed by Stephen B. Higgins

For many years, Business and Commercial Litigation in Federal Courts has been the definitive treatise on litigating in federal courts. It has now been released in its Third Edition and, like its predecessors, it is a step-by-step guide to virtually every aspect of a commercial case, placing substantial emphasis on strategic considerations as well as to the most commonly encountered areas of substantive law. In my review on the earlier edition of this series [Precedent, Winter 2007], I characterized it as a mini-library of procedure, trial advocacy, substantive law, and strategic and tactical advice. It remains such, but in its Third Edition it has expanded from eight to 11 volumes with 130 full chapters (34 more than the second edition) covering all phases of federal litigation from case assessment to the enforcement of judgments. Prominent litigator, author and lecturer Robert L. Haig remains the editor-in-chief of this outstanding series and everyone who practices in the federal courts owes him and the authors of this edition a debt of professional gratitude.

THE AUTHORS

Haig has again recruited a panel of distinguished federal practitioners and judges in the field of commercial litigation to present the essential considerations of law, procedure, and tactical and strategic planning for both plaintiffs’ and defense counsel. The 251 authors include 22 federal judges, numerous members of the American College of Trial Lawyers, heads of the litigation departments or practice groups in the country’s leading law firms, and some of the most distinguished and high-profile members of our nation’s business litigation bar: David Boies (Ch. 61, Litigation Technology), who served as Special Trial Counsel for the United States Department of Justice in its antitrust suit against Microsoft; Benjamin Civiletti, former United States Attorney General (Ch. 44, Compensatory Damages); Mary Jo White, chair of the Securities and Exchange Commission and former United States Attorney for the S.D.N.Y. (Chapter 115, The Foreign Corrupt Practices Act); Ted Wells (Chapter 113, Interplay Between Commercial Litigation and Criminal Proceedings); and Drew S. Days, III, Solicitor General from 1993 to 1996 (Ch. 12, Arbitration vs. Litigation).

Many of the chapters providing valuable judicial perspective and insight are authored by United States District and Circuit Court judges. See, for example, Chapter 30, Summary Judgment (The Hon. Solomon Oliver, Jr.); Chapter 32, Scheduling and Pretrial Conferences and Orders (The Hon. William C. Lee); Chapter 34, Jury Selection (The Hon. David Hittner); Chapter 43, Jury Conduct, Instructions, and Verdicts (The Hon. Susan P. Graber, The Hon. M. Margaret McKeown, and The Hon. Jeffrey T. Miller); Chapter 78, Contracts (The Hon. Michael Baylyson); and Chapter 86, Patents (The Hon. Timothy B. Dyk).

As did its predecessor, each chapter in the Third Edition of this series addresses the preliminary and strategic considerations for that topic and offers an explanation of how lawyering skills and techniques can be used, offensively and defensively, in a variety of situations. For example, the 110-page Chapter 11, Removal to Federal Court (The Hon. David W. McKeague and Brock A. Swartzle), not only lays out the legal and procedural bases for removal, but explores in depth the strategic and other considerations underlying the decision to remove, or to not remove, a state-filed case. Haig’s masterful editing and compilation of each of the chapters creates a treatise that is logically sequenced and substantively interrelated.

THE CONTENT

Business and Commercial Litigation in Federal Courts is not an academic work that simply tracks the federal
rules, referencing cases interpreting those rules. Instead, it is a strategic, chronological guide through each stage of a federal case written by and for federal court litigators. Particularly helpful in each chapter are the in-depth analyses of strategy. Moreover, each chapter includes comprehensive citations to controlling legal authority, and concludes with useful practice aids (checklists, forms and/or jury instructions). The Third Edition includes a CD-ROM in Rich Text Format (rtf) that contains the checklists, forms and jury instructions included in the printed 11-volume set, all of which can be copied and customized for the practitioner’s particular needs.

Procedural Law Chapters

The first five volumes cover federal trial court procedure. Volume 1 begins with an overview of federal jurisdiction, service, joinder and venue. Its chapters comprehensively explain the scope and limitations of federal court subject matter and diversity jurisdiction and provide, among other things, an accessible analysis of abstention, immunity and statutory limitations. Chapter 3, for example, addresses not only the enforceability of forum selection clauses but explores strategy considerations for challenges to venue.

Volume 2 addresses multi-district and class action litigation. Particularly impressive in its breadth, scope and detail is Chapter 19, the 259-page chapter on Class Actions containing 16 subparts. Not only does this chapter address specific defense and prosecution strategies in particular types of actions (e.g., antitrust, securities, mass tort, consumer fraud, patent, copyright and trademark, employment and ERISA), it analyzes the uniquely sensitive ethical issues presented by settlement negotiations. The practice aids for this chapter include numerous checklists and forms used in class action litigation, including a sample notice of certification of litigation class and exclusion form.

Volume 3 provides the practitioner a comprehensive analytical overview of virtually every strategic or procedural issue to arise in discovery, privileges, depositions, requests for admissions and interrogatories, experts, and motion practice. In Chapter 25, Discovery of Electronically Stored Information, for example, authors Judge Shira A. Scheindlin and Jonathan M. Redgrave tackle the evolving and critical area of electronic discovery, examining current legal doctrine, the application of procedural rules and the practical and strategic considerations implicated by E-discovery. Particularly helpful are the checklists at the conclusion of the chapter.

Chapters 34 through 49 (Volumes 3 and 4) focus on trial issues, such as Jury Selection (Chapter 34), Cross Examination (Chapter 39), Expert Witnesses (Chapter 40), Final Arguments in Jury and Bench Trials (Chapter 42), and Trial and Post-Trial Motions (Chapter 49).

Volume 5 begins with a chapter on Judgments and moves to chapters on appeals and enforcement. See, for example, Chapter 55, Appeals to the Courts of Appeals, and Chapter 56, Appeals to the Supreme Court. This chapter also deals with the management aspects of litigation and includes chapters that are certain to be of interest to in-house counsel, including Litigation Avoidance and Prevention, Techniques for Expediting and Streamlining Litigation, Litigation Technology, Litigation Management by Law Firms, and Litigation Management by Corporations.

Volume 6 addresses issues generally implicated by litigation in the federal courts, including Pro Bono practice (Chapter 64), Ethical Issues in Commercial Cases (Chapter 65) and Professional Liability (Chapter 75).

Substantive Law Chapters

The final four volumes (7-11) contain 53 chapters, each of which covers a specific area of substantive law commonly encountered by the federal court commercial litigator. Those topics include Contracts, Insurance, Banking, Trademark, Copyright, Torts of Competition, Construction, and Commercial Real Estate.

The chapters on White Collar Crime (Chapter 112) and the Interplay Between Commercial Litigation and Criminal Proceedings (Chapter 113) total 260 pages and 115 subsections. New to the Third Edition, these chapters are especially comprehensive and insightful, with extensive case citations, practical advice and useful templates for various events in a typical white collar representation. The internal investigations considerations checklist, for example, provides the practitioner with particularly useful and practical advice.

What’s New

Because commercial litigation in the federal courts has changed and evolved since the publication of the Second Edition, the scope of the treatise has expanded. Among the 34 new chapters are ones addressing subjects whose importance has increased in recent years, including: Internal Investigations; International
CONCLUSION

Mr. Haig’s treatise is a comprehensive, practice-oriented summary of and guide to the applicable substantive law and procedural implications of business and commercial litigation in the federal courts, complete with practice forms and checklists. In his Foreword, Haig describes Business and Commercial Litigation in Federal Courts – Third Edition as “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.” I heartily agree. Mr. Haig’s treatise is a comprehensive, extremely user-friendly and authoritative reference manual for the seasoned federal court litigator as well as a practical guide for the inexperienced lawyer. It is hard to imagine a single more useful reference source for anyone engaged in commercial litigation in the federal courts.

ENDNOTE

1 To facilitate further legal research, many chapters in the Third Edition contain research references to West’s Key Number Digest, the A.L.R. Library, legal encyclopedias such as Am. Jur. 2d and C.J.S., other treatises, compilations of forms, and numerous law reviews.

Stephen B. Higgins is a commercial litigation partner at St. Louis-based Thompson Coburn L.L.P., where he served for many years as the chair of its Business Litigation Practice group and a member of the firm’s management and executive committees. His practice is devoted to the litigation of complex business and commercial disputes, corporate compliance and white collar defense and class action litigation. He served as United States Attorney for the Eastern District of Missouri from 1990 through 1993 and previously as an Assistant United States Attorney in that district.

Benefits of Bar Membership

mobar@mobar.org

Substantive Law:
- CLE Programs
- CLE Publications
- Journal of The Missouri Bar
- Courts Bulletin
- Legislative Digest
- ESQ
- Fastcase

Practice Management & Development
- Client Keeper
- Durable Power of Attorney
- Fee Dispute Resolution
- Law Practice Management Assistance
- Law Practice Management Lending Library

Career/Personal Development
- Bar Meetings/Conferences
- Committee Membership
- Law-Related Education
- Lawyer Placement Service
- Leadership Academy
- Mentoring Program
- Missouri Bar Foundation
- Missouri Lawyers’ Assistance Program (MOLAP)
- Pro Bono Services
- Young Lawyers’ Section
- Vacation and Travel

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