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BOOK REVIEW

BOOK REVIEW: COMMERCIAL LITIGATION IN NEW YORK STATE COURTS (5TH ED.) EDITED BY ROBERT L. HAIG

KATHRYN C. COLE[†]

Every New York commercial litigator needs as an arrow in her quiver *Commercial Litigation in New York State Courts* (“Treatise”).¹ Now in its Fifth Edition, this renowned Treatise not only analyzes in-depth the procedural law and the substantive commercial law of New York, but it is replete with invaluable “nuggets of wisdom” and critical guidance for the “attainment of objectives” during a litigation for both plaintiffs and defendants.² What began as a three volume resource first published in 1995,³ the Treatise now boasts ten volumes, 156 chapters (28 of which have been added since the Fourth Edition),⁴ and has 256 authors (including 29 distinguished members of the Bench).⁵ Notably, the Treatise includes detailed, strategic guidance for each stage of a commercial case, from inception through appeal and judgment enforcement. And, importantly, the Treatise details the “ramifications and [potential] pitfalls of various actions and inactions” during a litigation.⁶

The Treatise is superior to other practice guidebooks in significant ways. For example, it focuses upon matters of relevance to commercial law—an area of practice that draws from countless sources including common law, statutes and codes. In fact, the Treatise strives to contain “a chapter on every subject

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¹ COMMERCIAL LITIGATION IN NEW YORK STATE COURTS (Robert L. Haig, 5th ed., 2020) [hereinafter COMMERCIAL LITIGATION].

² *Id.* at vi.

³ COMMERCIAL LITIGATION IN NEW YORK STATE COURTS (Robert L. Haig, 1st ed., 1995). Thereafter, three more editions were published in 2005, 2010, and 2015, respectively.

⁴ COMMERCIAL LITIGATION, *supra* note 1.

⁵ *Id.* at iv, v.

⁶ *Id.*

likely to be of interest to commercial litigators.”⁷ And disappoint it does not! Indeed, the treatise contains 64 substantive law chapters that cover the subjects most typically encountered in commercial cases. Chapters are devoted to topics such as Contracts; Business Torts; Intellectual Property; Sales of Goods; Antitrust; Valuing a Business; Partnerships; Secured Transactions; Joint Ventures; Misappropriation of Trade Secrets; and Bank Litigation, to name a few.⁸ What’s more, each Chapter provides a detailed compendium of the substantive area that serves as an invaluable starting point when new matters arise. In fact, my first step when researching issues involving matters of commercial litigation is always the Treatise.

Additionally, because commercial litigation has evolved so significantly since the Fourth Edition of the Treatise was published in 2015, 28 new chapters dedicated to subjects of increasing importance to commercial litigators have been added. The new Chapters cover topics such as Artificial Intelligence, Business Courts, Career and Practice Development, and Teaching Litigation Skills.⁹ The Treatise also includes topics relevant to civil litigators irrespective of one’s practice area including, for example, chapters devoted to Case Evaluation, Deposition, Motion Practice, Settlements, and Strategies to Improve Diversity and Inclusion.¹⁰ And, an incredibly useful component of the Fifth Edition is the Treatise’s discussion of the business of litigation—that is, litigation avoidance, litigation funding, career and business development, and marketing to potential clients—which is a must read for all who practice.

Notwithstanding the breadth of relevant topics covered by the Treatise, each Chapter—authored by either a distinguished jurist¹¹ or one of foremost commercial litigators practicing in the courts of this State—is penned with depth, care, and precision. Consider, Chapter 23, entitled “Cross Border Litigation,” which

⁷ *Id.* at iv.

⁸ *See id.* §§ 89; 133; 98; 124; 111; 101; 105; 132; 93.

⁹ *See id.* §§ 79; 14; 82; 81.

¹⁰ *See id.* §§ 6 (case evaluation); 29 (Depositions); 34 (motion practice); 41 (Settlements); 83(Diversity).

¹¹ Notably, 29 distinguished jurists contributed to the Treatise. The distinguished jurists include Chief Judge of the State of New York Janet DiFiore, Court of Appeals Judges Eugene M. Fahey, Victoria A. Graffeo, and Robert S. Smith. Additionally, it included Chief Administrative Judge Lawrence K. Marks, as well as Appellate Division Justices, Commercial Division Justices, United States District Court Judges, and United States Magistrate Judges Stewart D. Aaron and James M. Wicks.

is illustrative of the comprehensiveness of the Treatise.¹² That Chapter details the rise of cross border litigations generally, and in New York, specifically, due to, among other things, increasing globalization and New York's status as a key player in the global market.¹³ The Chapter then provides a framework for approaching complex cross-border issues arising in New York litigations.¹⁴ For example, the Chapter identifies and discusses preliminary strategic considerations that are pivotal such as service of process issues involving an understanding of the Hague Service Convention.¹⁵ The Chapter goes on to provide a step-by-step, "how to" guide to plan, commence or defend as the situation may be, and litigate effectively a complex cross-border litigation.¹⁶ The Chapter provides this "how to" guidance while pointing out potential issues along the way. For example, the "numerous challenges" presented by the discovery process in a cross-border litigation including, for example, foreign data privacy laws that are more restrictive than their U.S. counterparts and which may hinder the disclosure of electronically stored information notwithstanding New York's broad disclosure rules.¹⁷ Like other Chapters, the thorough explanation of the substantive law and relevant processes is a wonderful aide to those of us who practice in the area but also serves as a tremendous resource for those who may never litigate a cross-border action but aspire to understand the process.

Discussing a topic more relevant to the New York commercial litigator is Chapter 127, entitled "Deceptive and Misleading Business Practices."¹⁸ This Chapter—like others in the Treatise—comprehensively covers the subject matter providing particular attention to New York General Business Law ("GBL") section 349 and, to a lesser extent section 350, the state's frequently litigated consumer protection provisions.¹⁹ The Chapter focuses, among other things, on "strategic points litigants should consider in pursuing and defending" claims under the GBL, pleading requirements, the sections' limitations and defenses, and the legal

¹² Jeffrey A. Rosenthal, Carmine D. Boccuzzi, Jr. & Rahul Mukhi, *Chapter 23. Cross-Border Litigation*, in 3 COMMERCIAL LITIGATION (2020).

¹³ *Id.* § 23:1.

¹⁴ *Id.* § 23:2.

¹⁵ *Id.*

¹⁶ *See* §§ 23:2–23:32.

¹⁷ *Id.* § 23:23.

¹⁸ *See generally* § 127.

¹⁹ *Id.* § 127:1.

and equitable relief the sections authorize.²⁰ Of particular value is the Chapter's discussion of the New York Attorney General's authority under the relevant statutory provisions and the ways in which other laws—"including federal consumer protection statutes"—may be implicated by conduct that gives rise to GBL §§ 349 and 350 claims.²¹

In addition to substantive chapters steeped with strategic considerations in areas critical to commercial law, the Treatise includes special features that make a practicing litigator's life easier. For example, the Treatise contains procedural and practice checklists²² including for essential allegations and defenses;²³ it provides for relevant timelines and deadlines;²⁴ it includes template forms current to reflect recent developments in the law for litigation-specific documents like stipulations and pleadings;²⁵ and it offers a separate appendix that includes all laws, rules, and the over 30,000 unique and current cases. As such, the Treatise empowers a commercial litigator to locate in a single exercise essentially all of the answers to questions she may have. And, despite the breadth of the Fifth Edition, the Treatise is exceptionally easy to navigate. Unlike other treatises that cause one to lose time deciphering where among the volumes one's answer lies, the Treatise's table of contents are easily maneuvered to lead the reader expeditiously to the appropriate Chapter where subheadings allow one to focus further their inquiry or benefit more generally from the Chapter's "scope note," and "overview" sections.²⁶

Although each Chapter is worthy of discussion, Chapters 79, Artificial Intelligence,²⁷ and Chapter 78, Litigation Technology,²⁸ both welcomed new additions, require a special discussion. Indeed, all litigators are aware that electronically stored information ("ESI") and the corresponding discovery of that ESI is a necessary component of current day litigations. And, as e-data proliferates, attorneys are obligated to maintain a technological

²⁰ *Id.*

²¹ *Id.* § 127:30.

²² *See generally id.* §§ 2:56; 8:171–75; 10:45; 20:69–75.

²³ *Id.* §§ 89:42–43.

²⁴ *Id.* § 8:174.

²⁵ *Id.* §§ 8:180; 89:44–45.

²⁶ *See id.* § 3:1, for an example of a Chapter's "Scope note" section.

²⁷ *Id.* § 79.

²⁸ *Id.* § 78.

competence²⁹ regarding e-discovery. Notwithstanding this duty of competence, many lawyers remain unfamiliar with ESI, e-discovery, and the artificial intelligence (“AI”) technologies arising as a result. These Chapters discuss in detail topics like how to preserve, collect, and produce ESI, with an explanation of production formats; what AI is, its use as a practice aid by commercial litigators, and the case law concerning its use; inadvertent production, and claw back agreements. Critically, these Chapters also address a number of important issues—from admissibility issues to ethical implications—that arise as a result of using AI.³⁰ And so, these Chapters are invaluable in helping lawyers understand this increasingly popular and important area of law and empowers us to advise clients on relevant issues.

Even as COVID-19 caused law firms to shrink their footprints and embrace working remotely, every commercial litigator should find space in her home, her office, or her home office, to house this comprehensive, up-to-date, and very user-friendly collection. Indeed, if you were to subscribe to only a single set of practice-based books, this should be it. The practice aids, strategic considerations, checklists, and forms all make the Treatise a must for commercial litigators who practice in New York state courts.

As I hope this review makes plain, *Commercial Litigation in New York State Courts*, as updated and expanded in its Fifth Edition, will undoubtedly continue to be an indispensable resource for anyone who litigates commercial cases in New York.

²⁹ New York County Lawyers Association Professional Ethics Committee Formal Op. 749 (Feb. 21, 2017), for example, discusses the “ethical duty of technological competence with respect to the duty to protect a client’s confidential information from cybersecurity risk and handling e-discovery” in a litigation or government investigation.

³⁰ See §§ 14:13, 79:9.