

**COMMERCIAL LITIGATION  
IN  
NEW YORK STATE COURTS**

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**Fifth Edition**

**Volume 2**

**ROBERT L. HAIG**  
*Editor-in-Chief*

**Chapters 1 to 10**

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# Foreword

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This Foreword provides an opportunity to salute and to thank the 256 principal authors of the Fifth Edition of this treatise. Their expertise and qualifications are outlined in the “About the Authors” section following this Foreword. I would like to give readers at least some sense of the time and thought our authors have expended. Although it is difficult to quantify their efforts, one statistic may be helpful. We conservatively estimate that our authors and their law firms have invested more than 60 million dollars of their own billable time, calculated at their regular hourly billing rates, in working on the First, Second, Third, Fourth, and Fifth Editions of this treatise and its annual Pocket Parts. I believe that readers will agree that our authors’ efforts are reflected in the comprehensiveness and quality of the Fifth Edition.

I invite readers to consider one additional factor in evaluating the Fifth Edition. As noted below, the authors began work on the Fifth Edition during the fall of 2019 and the Fifth Edition is now being published in October 2020. The authors’ work on the Fifth Edition has coincided with the coronavirus pandemic, the most serious public health crisis in the history of our country. Did the pandemic distract or divert our authors from their work on the Fifth Edition and therefore diminish its quality in comparison to earlier editions? In fact, the impact of the pandemic was exactly the opposite. Because most court operations in New York State were suspended during much of the period our authors were working on their chapters, they had more time to devote to their chapters and their chapters reflect that additional time. I am profoundly grateful for the fact that our authors have been willing to devote their extra time to making what was already a superb treatise even better.

## **The First, Second, Third, and Fourth Editions**

The First, Second, Third, and Fourth Editions of this treatise, which were published in 1995, 2005, 2010, and 2015, respectively, have been widely recognized as unique and invaluable resources and became the definitive works in their field. The first four editions received an enthusiastic reception from the legal press, reflected in more than 100 favorable book reviews in legal

newspapers and bar journals throughout the State of New York.

Pocket Parts for all chapters in the Fourth Edition have been published each year since 2015. Due to the many changes over the past five years in New York procedural and substantive law relating to commercial litigation, it became clear that a new, fifth edition of the treatise was in order. In addition, as a result of the authors' careful and comprehensive annual updating of their chapters, the 2019 Pocket Parts totaled 1,942 pages of text (more than 15 pages of text per chapter) and the treatise was becoming unwieldy and inefficient to use.

Accordingly, the authors began work on the Fifth Edition of the treatise during the fall of 2019.

### **The Fifth Edition**

Twenty-eight new chapters have been added in the Fifth Edition to the chapters in the Fourth Edition. In addition, the chapters carried forward from the Fourth Edition have been substantially expanded. As a result, the Fifth Edition is 10 volumes (there were three volumes in the First Edition, five volumes in the Second Edition, six volumes in the Third Edition, and eight volumes in the Fourth Edition) and contains 13,076 pages of text (2,888 more pages of text than the Fourth Edition). The Fifth Edition also features a separate appendix that contains an Index as well as tables of all laws, rules, and the more than 30,000 unique cases cited in the Fifth Edition. The appendix will be replaced annually, making it easy for readers to find precisely what they are looking for in one place.

In 2015, while we were working on the Fourth Edition, I thought that we had included a chapter on every subject likely to be of interest to commercial litigators. Commercial litigation in New York State courts has evolved over the past five years and we have added 28 new chapters in the Fifth Edition to address new subjects that are important to commercial litigators today. The following list of new chapter titles in the Fifth Edition includes a number of subjects whose importance has dramatically increased in recent years: Artificial Intelligence; Attorney Discipline; Business Courts; Career and Practice Development; Civil Justice Reform; Commercial Cases in New York County for Less than \$500,000; Comparison with Commercial Litigation in Delaware Courts; Comparison with Commercial Litigation in Foreign Courts; Cross-Border Litigation; Deceptive and Misleading Business Practices; Declaratory Judgments; Diversity and Inclusion; Fashion and Retail; Fiduciary Duty Litigation; Fraud; Fraudulent Transfer; Gaming; Joint Ventures; Limited Liability Companies; Litigation Management by Judges; Marketing to Potential Business Clients; Negligence; Personal Injury; Private Equity; Teaching Litigation Skills; Third-Party Litigation Funding; Valu-

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ation of a Business; and Valuation of Real Property.

The authors of these 28 new chapters have obviously devoted substantial time and effort to the Fifth Edition. Less obvious, but no less important, are the new contributions to the Fifth Edition by the authors of the chapters carried forward from the Fourth Edition. The 2019 Pocket Parts for some of the chapters in the Fourth Edition were more than 50 pages. The tasks of integrating and synthesizing lengthy Pocket Parts into even lengthier chapters to create completely current and seamless new chapters required extensive efforts by our authors. Even more crucial was the expertise and judgment they exercised to determine what needed to be added, and what should be eliminated, to create new chapters that provide comprehensive and up to date guidance without extraneous or obsolete material that wastes readers' time. I welcome readers' assessments of the results.

### **Our Authors**

The Fifth Edition of this publication contains the work of 256 principal authors, including 29 distinguished judges and the cream of the commercial litigation bar, the best lawyers practicing in the courts of this State. The generosity of these renowned authors, in sharing their experience and insights, backed up by the resources of many of the finest law firms in New York State, has enabled this unprecedented work.

I thank all of our 256 principal authors for both the quality and the quantity of their efforts and for the enthusiasm and commitment that characterized their participation. I particularly thank the 29 distinguished judges who graciously shared their valuable time and insights with us, including Chief Judge of the State of New York Janet DiFiore; Court of Appeals Judges Eugene M. Fahey, Victoria A. Graffeo, and Robert S. Smith; Chief Administrative Judge Lawrence K. Marks; Appellate Division Justices Sharon A.M. Aarons, Richard T. Andrias, James M. Catterson, Cheryl E. Chambers, John M. Curran, Helen E. Freedman, Judith J. Gische, Joseph J. Maltese, Karla Moskowitz, Saliann Scarpulla, and Alan D. Scheinkman; Commercial Division Justices Timothy S. Driscoll, Elizabeth Hazlitt Emerson, Linda S. Jamieson, Orin R. Kitzes, Andrea Masley, Martin E. Ritholtz, and Gretchen Walsh; Justice Debra A. James; United States District Judges Brian M. Cogan, Katherine B. Forrest, Barbara S. Jones, and William F. Kuntz, II; and United States Magistrate Judge Stewart D. Aaron.

The late Chief Judge Judith S. Kaye and former Chief Judge Jonathan Lippman wrote Chapter 1 in the First, Second, Third, and Fourth Editions. Chief Judge Janet DiFiore, who succeeded Judge Lippman as Chief Judge of the State of New York in 2016, has also succeeded him as the author of Chapter 1. I am grateful

to Chief Judges Kaye, Lippman, and DiFiore both for their contributions to this treatise and for their extraordinary contributions to commercial litigation in New York which I discuss later in this Foreword.

### **Scope and Focus**

This publication is unique in the legal literature. There is no other book on commercial litigation in New York State courts. There is also no other book that combines in depth treatment of New York civil procedure with substantive law in the areas most commonly encountered by commercial litigators. Even more unique, however, is that again and again throughout this work, our authors have pointed out the interplay between the rules of procedure and substantive law. They have painstakingly outlined strategies for the representation of plaintiff and defendant. They have given thoughtful consideration to the delineation and attainment of objectives and to the advantages as well as ramifications and pitfalls of various actions and inactions on the part of the commercial litigator throughout the entire course of a lawsuit. This is not only a law book that is valuable as a research tool and a source of legal knowledge and citations, it is an idea book filled with nuggets of wisdom and perspective that could only have been gained by years of experience in handling cases from the most simple to the most complex.

The Fifth Edition of this treatise is a step-by-step practice guide that covers every aspect of a commercial case, from the investigation and assessment that take place at the inception, through pleadings, discovery, motions, trial, appeal, and enforcement of judgment. Great emphasis is placed on strategic considerations specific to commercial cases. The Fifth Edition also contains 64 substantive law chapters that cover the subjects most commonly encountered in commercial cases, including contracts, insurance, sale of goods, banking, securities, antitrust, intellectual property, professional liability, business torts, franchising, and many other commercial law topics. Covered as well are compensatory and punitive damages and other remedies. Alternative dispute resolution is also addressed in separate chapters on settlements, negotiations, mediation and other nonbinding ADR, arbitration, and international arbitration.

In addition, the Fifth Edition contains a number of chapters on subjects that might not be covered in a conventional litigation treatise but nevertheless are important to commercial litigators. These additional chapters address the “business” of litigation practice (for example, our chapters on Marketing to Potential Business Clients; Third-Party Litigation Funding; Litigation Management by Law Firms; Litigation Management by Corporations; and Litigation Avoidance and Prevention) as well as the

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professional growth and development of commercial litigators (for example, our chapters on Career and Practice Development; Teaching Litigation Skills; Pro Bono; and Diversity and Inclusion).

### **Special Features**

The special features and categories of information in the Fifth Edition of this treatise include in-depth text on law and procedure, strategies and client counseling sections, procedural and practice checklists, checklists of essential allegations and defenses, checklists of sources of proof of allegations and defenses, hundreds of pages of essential litigation forms and jury charges, and numerous cross-references which facilitate efficient navigation within each chapter and throughout the entire treatise. These features were designed to provide the reader with everything needed to handle every aspect of a commercial litigation. The format makes this wealth of information equally accessible and useful for the commercial litigator when he needs an immediate answer for the client on the telephone or during a five minute deposition recess or when he has several hours to read, learn, and (hopefully) enjoy at leisure.

To facilitate further legal research, many chapters in the Fifth Edition contain research references to other treatises.

### **The New York County Lawyers Association**

This publication is the result of a highly successful joint venture between Thomson Reuters and the New York County Lawyers Association. This was the first time that a commercial publisher and a major bar association in New York have undertaken a joint project of this nature. All royalties from sales of this treatise and its annual Pocket Parts go to NYCLA. The amount of those royalties has been substantial.

I would like to thank NYCLA for the support it has provided for this publication over the past 25 years. I am particularly grateful to NYCLA's incomparable Executive Director, Sophia Gianacoplos, for her thoughtful advice and assistance.

### **The Commercial Division**

When the First Edition of this treatise was published in 1995, commercial litigation in New York was at a critical juncture. The increasing volume of litigation and the increasing complexity of many commercial cases had placed an insupportable burden on the court system that threatened timely and thoughtful resolution of disputes. As a result, many businesses were turning to the federal courts with their vastly greater resources as well as to the courts of other states such as Delaware and to private dispute resolution. In order to remain the commercial, financial, and

banking capital of the world, New York had to have a viable public court system. Anything less would have been an impediment to the prompt and cost effective resolution of business disputes.

In February 1995, Chief Judge Judith S. Kaye and Chief Administrative Judge E. Leo Milonas established a Commercial Courts Task Force to create and develop a Commercial Division of the State Supreme Court. I had the honor of co-chairing that Task Force with Judge Milonas.

This new dimension to commercial litigation was an exciting challenge to commercial litigators as they turned with increasing frequency to reap the benefits of this enhancement of the court system. This publication was intended to assist in maximizing the benefits of litigating in State court.

The rest is history. The Commercial Division has not only been an enormous success in New York: it has also led a national and international trend toward creation of business courts.

The Commercial Division began in 1995 with five judges in two counties. Twenty-five years later, there are 28 Commercial Division judges in nine counties as well as in the Seventh and Eighth Judicial Districts. During the past 25 years, the Commercial Division has dramatically changed the way in which the business community in New York State perceives the court system and the judicial process. Twenty-five years ago, the business community did its best to avoid the New York courts, perceiving them as inefficient, unproductive, unpredictable, and unfair. The same business community is now united in its unqualified and enthusiastic support for the Commercial Division. In fact, when our business leaders are seeking to attract businesses to New York, they mention the existence of the Commercial Division as one of the attractive features of doing business here.

Despite the potential for opposition to any change affecting the New York courts, the Commercial Division is remarkably popular with all relevant constituencies. There is broad recognition that the Commercial Division has been good for the entire court system in New York.

Despite the critical acclaim for the Commercial Division, it has not been content to rest on its laurels. Instead, extraordinary efforts have been made during the past few years to further enhance the capabilities and performance of the Commercial Division. In January 2012, Chief Judge Lippman created the Task Force on Commercial Litigation in the 21st Century to take a fresh look at how the Commercial Division can continue to serve as an efficient and effective forum for resolving business disputes. In June 2012, the Task Force delivered a comprehensive report on how the Commercial Division can better serve the litigation needs of the business community and New York State's economy. One of the key recommendations of the Task Force was

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that the Chief Judge appoint a statewide Advisory Council on the Commercial Division. Thereafter Chief Judge Lippman created a permanent Commercial Division Advisory Council to advise him on an ongoing basis about all matters involving and surrounding the Commercial Division. I am honored and grateful that Chief Judge Lippman appointed me as the Chair of the Advisory Council which consists of lawyers, current and former members of the judiciary, and in-house counsel from around New York State. I am also honored and grateful that Chief Judge DiFiore, who became Chief Judge in 2016, has allowed me to continue to serve as Chair of the Advisory Council. During the past seven years, the Advisory Council has recommended numerous improvements to the Commercial Division's rules, procedures, and operations that have been designed to be responsive to the needs and concerns of the business community. The ultimate goal of these changes is to make the business litigation process in New York more cost-effective, predictable, and expeditious, and to thereby provide a more hospitable and attractive environment for business litigation in New York State. The success of these improvements has been widely recognized both in the United States and in other countries.

Although I could say much more about the Commercial Division and what it means to New York, I will conclude this Foreword with two other observations. Twenty-five years ago, the prevailing attitude within the New York courts was that there were too many cases and not enough money and that nothing could be done about the many intractable problems which permeate the court system. Twenty-five years later, there are still too many cases and not enough money. Nevertheless, the culture and attitude of the judges and non-judicial personnel throughout our State have changed. The people who work in the New York State courts are aware that we now have a business court that many lawyers and business people perceive as the best forum for the resolution of business disputes anywhere available.

Accordingly, it now appears to those who work in the New York courts that if you work hard enough and do the right thing, there is no aspect of our courts that cannot be substantially improved. The magnitude of that change in attitude is almost incomprehensible to those who have not witnessed it personally. The benefits to New York are enormous. I believe that this treatise will enhance those benefits.

In addition, there has been increasing recognition during the past few years of the fact that the Commercial Division helps New York State to attract and retain businesses and therefore to generate tax revenues and provide jobs. The value and importance of these benefits is confirmed in the Proclamation relating to the Commercial Division which the New York City Council issued at

its Stated Meeting on December 20, 2018. In its Proclamation, the City Council concludes that “New York owes much of its world-class status as an economic engine to its world-class court: the Commercial Division of the New York Supreme Court.” The Proclamation also states:

WHEREAS: The Commercial Division is uniquely qualified to increase taxable revenue for the City of New York while stimulating job growth. It strengthens New York City’s ability to attract and retain businesses, which add jobs, fuel demand for real property, and increase tax revenue. The tax revenues from local businesses also provide financial support for the New York State judicial system;

### **Conclusion**

I feel privileged to serve as Editor-in-Chief of this publication. In that role I reviewed and commented on the chapters in all five editions as well as the annual Pocket Parts each year since 1995. Throughout I have been impressed by the creativity of this magnificent team of volunteer litigators and judges. Their accumulated wisdom has made this an educational experience for me far beyond what I could have hoped for. In the best traditions of our profession, our authors have created, and then refined and improved, a significant work that has become a lasting credit to the New York County Lawyers’ Association and to the bar and the judiciary in New York State. I am grateful for the opportunity to participate.

ROBERT L. HAIG

October 2020

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