Foreword

A Message from the Editor-in-Chief

The Fifth Edition of ***Commercial Litigation in New York State Courts*** was published in 2020. Since then, the critical acclaim for this treatise has been extraordinary. More than 30 book reviews of the Fifth Edition have been published in legal newspapers, bar journals, and other publications throughout the State of New York.

Set forth below are excerpts from some of the book reviews of the Fifth Edition of this treatise. Following these excerpts are highlights of the 2024-2025 Supplements to the Fifth Edition.

Critical Acclaim for the Fifth Edition

The book review in the *Queens Bar Bulletin* states that the Fifth Edition "is perhaps the best NY law treatise of our time" and that "The sheer size and scope of the work is breathtaking." The review in the *Municipal Lawyer* states that "this treatise has been recognized as the most outstanding work of its kind, comprising a unique compilation of New York law as it is applied in the commercial context." The review in the Schenectady County Bar Association *Newsletter* states: "No other compilation that I have seen combines legal and practical analysis in such an organized and well-written fashion."

The book review in the *Westchester Lawyer* describes the Fifth Edition as "a comprehensive, outstanding treatise that remains the gold standard for commercial litigators in New York." The review in the Suffolk County Bar Association *Legal Brief* states that "this tome has provided immeasurable assistance to the Commercial Bench and Bar in this State (indeed, in this Country)" and that "this ever-growing treatise is worthy of the closest study by commercial litigators." The review in the Broome County *Bar Notes* states that the Fifth Edition is "an essential addition to every practitioner's library and every jurist's study." The review in the *Business Courts Blog* states that the Fifth Edition "is a *sine qua non* for any New York commercial litigator's library, and an excellent resource for those outside New York confronted with cases where New York law controls, or finding

themselves admitted *pro hac vice* in a New York state court."

The review in *NYLitigator* states that "having *Commercial Litigation in New York State Courts* by my side effectively gives me 256 additional partners and helps my firm give clients the best that we can and what they deserve." The review in the New York State Bar Association *Commercial and Federal Litigation Section Newsletter* concludes that the Fifth Edition "remains an indispensable guide" which "has immense value for both hardened veterans of the state court trenches and newcomers alike."

The review in *The Daily Record* in western New York concludes that this treatise "continues to be a trusted, valuable, and excellent resource for both new and more experienced litigators handling commercial cases in New York. With the extensive new ground covered in this Fifth Edition, this reference should be a staple of every litigation law library in New York." The review in the *St. John's Law Review* states that "if you were to subscribe to only a single set of practice-based books, this should be it."

The book review published by the Bronx County Bar Association states that the Fifth Edition "is arguably the most comprehensive repository of both substantive and procedural commercial law in New York" and that "this treatise is an essential resource to the commercial bar, its practitioners, and the judges who sit in the Commercial Division." In addition, the review in the New York State Bar Association *Torts, Insurance & Compensation Law Section Journal* states that this treatise "has long served as the foremost reference work for commercial litigators in New York" and that "A new and expanded fifth edition improves on this outstanding product."

The review in *Inside*, which is published by the Corporate Counsel Section of the New York State Bar Association, states that "the coverage of substantive law by this treatise is breathtaking" and that "It is hard to imagine anything that has been left out." The review concludes: "The value in this treatise stems not only from the knowledge and information that it conveys. It stems from the authors sharing their experience and wisdom from many years of practicing or adjudicating commercial matters in New York state courts. The benefits from that experience and wisdom cannot be obtained anywhere else."

Publication of the 2024-2025 Supplements

Although the authors of the Fifth Edition of ***Commercial Litigation in New York State Courts*** appreciate and enjoy the critics' enthusiasm for their work, they are not content to rest on their laurels. Instead, the authors are working hard to keep these volumes current, so that those confronted with the demands of litigation practice for expertise on a wide variety of substantive

and procedural issues will remain conversant with the law and practice as they evolve, day by day, case by case. These 2024-2025 Supplements reflect the ever-increasing and diverse activity that has taken place in commercial litigation during the year since the 2023-2024 Supplements were published. The hundreds of significant cases and legislative changes reported, analyzed, and synthesized into the fabric of this work, by the distinguished judges and litigators who are our authors, attest to the continuing importance of commercial litigation in New York State courts.

All 156 chapters of this set have been updated for this year's Supplements. The addition of hundreds of new cases in this year's Supplements to the many thousands of cases cited and discussed in the bound volumes keep this unique publication as useful and as up-to-date as it was on the day it was published. The 2024-2025 Supplements incorporate the most recent judicial decisions governing commercial litigation in New York State courts, as well as practical insights and advice by our authors.

Set forth below is a compilation of a number of the matters covered in the 2024-2025 Supplements to provide a brief summary of some of the important developments in this field during the past year. This convenient checklist enables attorneys to test their knowledge of the latest developments in commercial litigation in New York State courts.

Highlights of the 2024-2025 Supplements

- In *Mallory v. Norfolk Southern Railway*, on June 27, 2023, the United States Supreme Court upheld a Pennsylvania statute requiring out-of-state corporations to consent to general personal jurisdiction in Pennsylvania courts in order to register to do business there. The Court relied on a 1917 precedent, *Pennsylvania Fire Insurance Company of Philadelphia v. Gold Issue Mining & Milling Company*, which held that a Missouri statute required that a foreign corporation that consented to in-state suit as a condition of doing business in the state could be sued there. *Mallory*'s and *Pennsylvania Fire*'s holdings turn on specific statutes that require registrants to consent to suit in the state. As the Eastern District of New York noted on May 23, 2024 in *Christie v. Hyatt Corp.*, "New York currently lacks an analogue to the Pennsylvania statute," so "a foreign corporation does not consent to general personal jurisdiction in New York by merely registering to do business in the state and designating an in-state agent for service of process under BCL § 1301(a)." Although the New York legislature recently passed a bill that would have created consent by registration, the bill was vetoed by the Governor. Chapter 2, Jurisdiction, § 2:21.
- A new Commercial Division rule concerning "referees," Rule 9-b, adopted on February 14, 2024, directed counsel to be

aware that under the CPLR "any person" can, "on consent of the parties, and with the agreement of the Court," be "appointed by the Court to act in place of the assigned Supreme Court Justice, to determine any or all issues or to perform any act, with all the powers of the Supreme Court." A report of the Commercial Division Advisory Council which proposed adoption of this rule termed the use of such referees currently "underutilized," particularly in complex cases that may involve many issues and applications for emergency relief over an extended period of time, and said that such use of referees could help reduce delay and other potential difficulties in such cases. As such referees operate "within the court system," their rulings (unlike those of arbitrators) are subject to Appellate Division review. Because the use of such referees may thus provide an appealing blend of having a private decisionmaker who can give a case and the parties greater and more expeditious attention than is possible for judges with heavy caseloads, while nevertheless not foregoing opportunities for appellate review of rulings, parties should consider in their case evaluation whether such use of referees could help reduce costs and improve efficiencies, particularly in complex disputes. Chapter 6, Case Evaluation, § 6:37.50. See also the update to Chapter 74, Litigation Management by Judges, § 74:5, which describes new Rule 9-b as "another invaluable rule to add to a judge's case management arsenal."

- On May 29, 2024, in *Wells Fargo Bank, N.A. v St. Louis*, the Second Department instructed the lower courts on the proper use and application of general relief clauses. The phrase "for such other and further relief," noted the court, is not recognized in either the CPLR or in its pre-1962 predecessor, the Civil Practice Act. The clause, instead, appears to be an invention of the practicing bar to provide flexibility to courts in fashioning potential remedies. However, such a clause does not allow the motion court to unilaterally raise and decide issues that had not been put forward by the parties, where doing so would grant dispositive relief against a party. Significantly, the court did not negate the use of general relief clauses. Rather, motion courts may still rely upon a general prayer for "such other and further relief" in rendering non-dispositive orders on issues not specifically argued by parties but which fall within the family of relief contained in the notice of motion, or relief that is not unlike that which is actually sought and argued. On the other hand, motion courts may not rely upon general relief clauses in noticed motions—"for such other and further relief as the court deems just and proper"—to justify the sua sponte dismissal of complaints or other dispositive relief. Chapter 8, Responses to Complaints, § 8:31.

- New York applies the internal affairs doctrine with greater flexibility than Delaware. The Delaware Supreme Court has made it clear that the Commerce Clause and Due Process Clause underpin the internal affairs doctrine, and therefore in the Delaware Court of Chancery it is "well established that only the law of the state of incorporation governs and determines issues relating to a corporation's internal affairs." The law in New York is less unequivocal. On May 23, 2024, the New York Court of Appeals stated in *Eccles v. Shamrock Capital Advisors* that "the substantive law of a company's place of incorporation presumptively applies to causes of action arising from its internal affairs." However, it further stated that litigants can rebut this presumption and establish the applicability of New York law by demonstrating that "(1) the interest of the place of incorporation is minimal—i.e., that the company has virtually no contact with the place of incorporation other than the fact of its incorporation, and (2) New York has a dominant interest in applying its own substantive law." The New York Court of Appeals's recent articulation of this narrow exception to the internal affairs doctrine is consistent with New York courts departing from the internal affairs doctrine in, at most, only a "rare circumstance," and decades of precedent demonstrate a staunch commitment to the doctrine. Chapter 12, Comparison with Commercial Litigation in Delaware Courts, § 12:13.
- Litigation funding arrangements have recently come under scrutiny in the United Kingdom. In *R (on application of PACCAR Inc and others) (Appellants) v. Competition Appeal Tribunal and others (Respondents)* ("*PACCAR*"), the U.K. Supreme Court (by a majority) held that a litigation funding agreement where the funder was able to recover a percentage of the damages recovered constitutes a damages-based agreement ("DBA"). The agreement was unenforceable as the litigation funding agreement did not comply with the statutory provisions relating to DBAs. This led to other cases where similar funding agreements were challenged. Following *PACCAR*, U.K. litigation funders have reviewed and revised their litigation funding agreements to improve their chances of the agreement complying with the law. In several cases since *PACCAR*, the Competition Appeal Tribunal has held that a litigation funding agreement that calculates a funder's fee as a multiple of funding (capped by reference to the amount of the proceeds obtained in the action) was not a DBA, and so enforceable. The U.K. Government introduced a bill (Litigation Funding Agreements (Enforceability) Bill) to restore the position to that which existed before *PACCAR* which is currently going through the parliamentary process. However, the bill did not proceed through the parliamentary process before Parliament was dissolved on May 30, 2024, pending the Gen-

eral Election on July 4, 2024, so we will have to see whether the next government resurrects the bill. The Civil Justice Council will be undertaking a review of the third-party funding market and is due to publish a preliminary report in summer 2024 and a final report a year later. Chapter 13, Comparison with Commercial Litigation in Foreign Courts, § 13:8.

- In *Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, on February 20, 2024, the Court of Appeals decided a certified question from the United States Court of Appeals for the Second Circuit concerning a New York choice of law provision. The Court of Appeals held that despite the New York choice of law provision, a statutory exception provided that Venezuelan law would apply to the limited issue of whether bonds issued by Venezuela's state-owned oil company were valid. The Court of Appeals found that "[b]ecause the parties chose New York law, the documents are generally governed by New York's substantive law, except in the narrow category of cases that are subject to the statutory choice-of-law directives set forth in [General Obligations Law] § 5–1401(1)[.]" GOL § 5–1401(1) includes an exception to a contractual choice of law provision where the parties decide that New York choice of law "shall not apply . . . to the extent provided to the contrary in subsection (c) of section 1-301 of the uniform commercial code." UCC § 1-301 (c) (6) provides in turn that, if UCC § 8-110 otherwise "specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted." Because UCC § 8-110 (a) (1) includes a statutory requirement that the "local law of the [security] issuer's jurisdiction" governs the validity of securities, the Court of Appeals confirmed that under the New York choice of law provision, the limited exception applied, and the law of Venezuela, i.e., the "local law of the issuer," applied to plaintiff's bond invalidity contentions. Chapter 16, Enforcement of Choice of Law Clauses, § 16:9.
- On April 18, 2024, the New York Office of Court Administration relocated the rule empowering the Litigation Coordinating Panel concerning "Coordination of Related Actions Pending in More Than One Judicial District," which was created in 2002, from the Uniform Civil Rules for the Supreme Court and the County Court Section 202.69 to the Rules of the Chief Judge, Part 53 with the same title and identical text as the previous rule except that in sub-section (b)(4)(ii) after the words: "The order of the panel," the following text is added: "following consultation with the Chief Administrative Judge." Also, in sub-section (c)(1) after the word "thereof" in the last sentence, the following text is added: "and the appropriate Presiding Justice." Chapter 18, Coordination of Litigation Within New York and Between Federal and State Courts, § 18:1.

- Perhaps the paradigmatic scenario requiring a hearing on a motion for a preliminary injunction is where dueling experts have submitted conflicting affidavits. That is what happened in *East 54th Operating LLC v. Brevard Owners, Inc.*, a case in which the First Department held in 2024 that the trial court erred in granting plaintiff's motion for a preliminary injunction without holding a hearing. The defendant in that case leased garage space to the plaintiff. The defendant argued that it needed to enjoin the plaintiff from occupying the premises for a period of time while it remediated safety issues. The plaintiff objected and submitted an affidavit from an expert who stated that the remediation could be performed in phases and a total shut down was not necessary. The defendant's expert opined that a total shut-down was necessary to correct the problems. The Appellate Division held that the trial court "should have conducted a CPLR 6312(c) hearing to determine how best to reconcile plaintiff's lease obligation to provide access to the garage to the defendant with plaintiff's right to remain in the premises...." Chapter 20, Provisional Remedies, § 20:8.
- CPLR 2106 was amended effective January 1, 2024, to provide that an affirmation of truth by any person "may be used in an action in New York in lieu of and with the same force and effect as an affidavit." New York joins over 20 states as well as federal court practice in eliminating the notarization requirement in order to make civil litigation more accessible to everyone. Because a verification is by affidavit, it would appear the statute permits verification by affirmation. Although at least one court has accepted pleadings verified by affirmation, court guidance indicates "verifications must be sworn" pursuant to CPLR 3020. Chapter 26, Bills of Particulars, § 26:5; Chapter 88, Civil Justice Reform, § 88:3.
- On June 9, 2023, in *EXRP 14 Holdings LLC v. LS-14 Ave LLC*, Commercial Division Justice Crane took plaintiff to task for its lack of familiarity with the Commercial Division Rules and Appendix A ("Guidelines for Discovery of Electronically Stored Information from Nonparties"), including the fact that the reasonable production expenses of nonparties may include reimbursement of reasonable attorney's fees. After advising the court that the parties had resolved their discovery dispute, the plaintiff stated on the record that it was not required to pay any attorney's fees. In the decision, the court quoted from Appendix A and sent the parties off without resolving the issue. In fact, the court indicated that it "hopes the parties will work out this issue without further court involvement." As the authors have stressed throughout Chapter 30, often the wiser course of conduct is to resolve the discovery-related issues without court intervention because, if the court is required to

expend time on an issue it has indicated should be resolved by the parties, it is likely that no one will be happy with the outcome. On July 21, 2023, in *Barons Media, LLC v. Shapiro Legal Group, PLLC*, Commercial Division Justice Cohen cited his colleague's decision in *EXRP 14 Holdings LLC v. LS-14 Ave LLC* in support of his Order directing plaintiff to pay $47,514.60 in reasonable production expenses. The court also noted that this Order should not come as a surprise to the plaintiff given the fact that the plaintiff sought assignment to the Commercial Division and the subpoena recipient raised the issue of expenses, including attorney's fees, in his objections and at the hearing. Chapter 30, Document Discovery, § 30:6.

- The update to Chapter 39 discusses recent amendments to Commercial Division Rule 28, relating to "Pre-Marking of Exhibits" and effective July 5, 2023; Commercial Division Rule 29, relating to "Identification of Deposition Testimony" and effective August 31, 2023; and Commercial Division Rule 32, relating to "Scheduling of Witnesses" and effective August 31, 2023. Chapter 39, Practice Before the Commercial Division, § 39:20.
- On November 17, 2023, Governor Kathy Hochul signed into law amendments to New York's General Obligations Law § 5–336 which prohibit the use of certain terms in release agreements, particularly with regard to non-disclosure agreements in settlements involving claims of discrimination, harassment, or retaliation. Chapter 41, Settlements, § 41:39.
- Various entities, including universities, technology start-ups, and large, established companies, like Google, are developing methods to detect and mark deepfakes or other graphics and videos that have been modified with the use of artificial intelligence. However, the "arms race" between those who create technologies that can be used to generate deepfakes and those attempting to detect them continues, and there is no foolproof way to detect AI-created or altered images or videos. The Advisory Committee on Evidence Rules of the Judicial Conference of the United States has considered modifying certain of the Federal Rules of Evidence to give courts and litigants more tools regarding the authenticity and reliability of trial evidence generated or modified by artificial intelligence. The Committee has not yet reached a consensus on whether to modify the Rules of Evidence and, if so, how best to do so. Until new rules are instituted at the federal and state levels, the courts will have to use the tools they currently have to determine the authenticity and reliability of digital evidence. Chapter 49, Graphics and Other Demonstrative Evidence, § 49:14.
- As a remedy for unjust enrichment, restitution focuses not on the amount by which the defendant unjustly profited, but the amount of unjust loss to the plaintiff. Thus, on May

25, 2023, in *Syntel Sterling Best Shores Mauritius Limited v. The TriZetto Group*, an unjust enrichment case based on a defendant's misappropriation of trade secrets, the Second Circuit awarded $8.5 million in restitution damages even though the defendant had realized only $823,899 in unjust profits, on the basis that the defendant's unjust profits came "at the expense of [the plaintiff's] $8.5 million profit opportunity." Chapter 54, Compensatory Damages, § 54:16.

- Certain circumstances may warrant an award of punitive damages "in connection with an underlying claim for a breach of fiduciary duty" even without an award of compensatory damages depending "on the facts and evidence." In *Hall v. Middleton*, the trial court had awarded punitive damages without a showing of compensatory damages. In that case, Middleton breached his fiduciary duty of loyalty when he transferred patents from the company to himself for personal ownership. The plaintiff, however, failed to prove compensatory damages because there was no "evidence showing what a customary license fee would be" and the "post-trial brief, moreover, does not even suggest any other damages amount that would be appropriate." The court nonetheless awarded $1 million in punitive damages because when "trust is flagrantly violated," "there must be real, meaningful consequences to ensure that it doesn't happen again." The court noted "the significant amount of money implicated by Middleton's wrongdoing," explaining that the company's value plummeted from a high value to virtually nothing after Middleton purchased shares, issued tokens as unregistered securities, and misappropriated the patents. The court also explained that a lesser damages award "would be insufficient given that recovery belongs to the Company in which Middleton himself owns a very large stake." The punitive damages award was upheld on May 28, 2024 by the First Department, which found that the lower court's reasoning "appropriately included consideration of the harm done, the flagrancy of the conduct, and the impact on Middleton." Though Middleton's wealth was not considered as part of the punitive damages calculation, the First Department noted that the defendants "do not point to any evidence that was not considered and their request for a bifurcated trial was not raised below." Chapter 55, Punitive Damages, § 55:12.
- Until the United States Supreme Court's decision on June 27, 2024 in *Harrington v. Purdue Pharma L.P.*, there was a circuit split as to whether non-consensual third-party releases in Chapter 11 bankruptcy plans are valid and enforceable. A number of circuits strictly prohibited third-party releases on a non-consensual basis. Others followed by the Second Circuit, held that non-consensual third-party releases are valid under certain circumstances. In *Purdue*, the Supreme Court held that "[t]he bankruptcy code does

not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seek to discharge claims against a nondebtor without the consent of affected claimants." Now, in light of the Supreme Court's statement in *Purdue* that "[n]othing in what we have said should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan . . .," it seems the focus will be on what is "consent." Chapter 60, Effect of Bankruptcy Proceedings on Pending Litigation and Judgments, § 60:31.

- In *Syeed v. Bloomberg*, the Court of Appeals accepted a certification from the Second Circuit to answer whether a nonresident plaintiff not yet employed in New York City or State satisfies the impact requirement of the New York City or State Human Rights Laws if the plaintiff pleads and later proves that an employer deprived the plaintiff of a New York City- or State-based job opportunity on discriminatory grounds. On March 14, 2024, the Court of Appeals answered in the affirmative, concluding that the City and State Human Rights Laws protect a nonresident who "proactively sought" a New York City or State-based job. Chapter 65, Appeals to the Court of Appeals, § 65:8.
- On February 13, 2024, Part 160 of the Rules of the Chief Administrative Judge ("Part 160") was announced and became effective immediately. Under Part 160, New York state-funded courts must now refer all civil disputes to an appropriate ADR process at the earliest practicable time, unless an enumerated exception applies. These exceptions include: (i) when referral is prohibited by statute or local rule, (ii) when the court determines the parties cannot effectively participate in ADR, (iii) when justice would not be served by the referral, (iv) when a party opts out, or (v) when there are insufficient ADR resources available. In March 2024, shortly after Part 160's enactment, the Office of Court Administration created the Division of Alternative Dispute Resolution, which will work to expand the development and use of ADR programs and resources going forward. Each district must also develop local rules for the implementation of Part 160. Chapter 68, Mediation and Other Nonbinding ADR, § 68:10.
- While the available statistics do not break out commercial disputes as a separate subset, of the 2,472,802 cases filed in New York State courts in 2023, 1,030,781 of those filings were in civil matters, and of those civil cases, 326,461 filings were in the Supreme Court of New York State. That number is significantly higher than the 25,343 civil cases filed in the district courts in all four of New York's federal districts during the twelve month period ending December 31, 2023. Chapter 71, Litigation Avoidance and Prevention, § 71:4.
- There is a risk of public relations failures when spokespersons are prepared primarily by lawyers and become over-

lawyerly in their public communications in response to a crisis. The presidents of Harvard, the University of Pennsylvania, and M.I.T drew backlash from the public and the media when it was perceived that their responses to questions during a congressional hearing on antisemitism were legalistic at the expense of clarity. Chapter 72, Crisis Management, § 72:6.

- The update to Chapter 73 discusses a number of recent amendments to the Commercial Division Rules. For example, in April 2024, the Office of Court Administration requested comments from interested parties in relation to a proposal to add a preamble before Commercial Division Rules 25-33 relating to trial preparation and presentation. This proposal was approved in an Administrative Oder dated July 2, 2024. In addition, by Administrative Order effective February 14, 2024, Commercial Division Rule 202.70(b)(1) was amended to include "technology transactions and/or other matters involving or arising out of technology" as an example of a commercial case that the Commercial Division has jurisdiction over. In support of the Rule change, the Commercial Division Advisory Council noted that technology plays an increasingly important role in the operation of businesses of all sizes, and that many of the business courts in other states (e.g., Delaware, Maryland, Georgia, Iowa, Michigan, North Carolina, Tennessee, Utah, and West Virginia) have emphasized their jurisdiction over and experience with adjudicating technology disputes such as those relating to technology licensing agreements (e.g., software and biotechnology license agreements and other agreements involving the licensing of intellectual property rights), website development, pharmaceuticals, blockchain technology etc. As such, "[a]s one of the world's most sophisticated venues for the resolution of commercial disputes and located in the world's leading financial center and serving as technology hub, the Commercial Division Rules should communicate the Commercial Division's receptivity to, and familiarity with, resolving technology disputes." Chapter 73, Techniques for Expediting and Streamlining Litigation, §§ 73:6 and 73:8. In this connection, the update to Chapter 141 states: "IT Providers and IT Buyers should seriously consider taking advantage of the opportunity to have their respective cases heard before the experienced, sophisticated and efficient justices in the Commercial Division. This is particularly true if the respective party believes its case is particularly strong, requires immediate or swift relief, or believes it may be otherwise difficult to get technology-related discovery from the opposing party." Chapter 141, Information Technology Litigation, § 141:9.50.
- Since the COVID-19 pandemic, remote technology trends such as virtual filings, depositions, hearings, and trials,

have increased the emphasis on outsourced services. Traditionally, firms have outsourced various tasks to other professionals. However, with improvements in automated technologies and AI tools, lawyers are now able to accomplish lower priority tasks like scheduling reminders and remote deposition assistance with the use of these novel technologies. For example, RemoteDepo Pro™ is a product that is designed to provide tools for effective and flexible proceedings including exhibit sharing, annotation, storage and management tools. In addition, lawyers can address the reliability issues of generative AI through "prompt augmentation" or "prompt engineering." This involves including information that helps the AI model determine a correct answer when inputting a question. Lawyers can augment prompts by copying and pasting sections from relevant treatises or providing samples of documents they previously drafted. Lawyers should also be sure not to share any information with large language models that is subject to the attorney-client privilege. To mitigate the privacy and security risks of using AI like ChatGPT, several firms have developed proprietary generative AI chatbots. These chatbots enable their lawyers to experiment with generative AI technology without sending proprietary information back to Open AI. Chapter 76, Litigation Management by Law Firms, §§ 76:11 and 76:42.

- On April 11, 2024, with a subsequent revision on June 26, 2024, the New York City Bar Association's Committee on Professional Ethics issued a wide-ranging formal opinion, Formal Opinion 2024-2, on "Ethical Issues Arising from Advice to Clients on Client-Funder Litigation Funding Agreements." This opinion focused on funding arrangements in which the funding agreement is between the client and the funder, in which the funder receives a share of any proceeds the client obtains. The Committee referred to this as "client-directed funding" and distinguished it from "lawyer-directed funding," in which the lawyer contracts with the funder. The Opinion discusses whether the lawyer may refer the client to a funding company; conflicts of interest arising out of litigation finance arrangements; the issue of the funder's control of the litigation; whether a lawyer may give a funder confidential information which may be privileged or constitute work product; withdrawal by the lawyer from the engagement covered by the funding agreement; and advice by the lawyer to the client with respect to various aspects of such funding arrangements. Chapter 77, Third-Party Litigation Funding, §§ 77:19, 77:24, and 77:28.
- A number of courts and judges have issued orders or established rules relating to the use of AI, including requiring parties to disclose whether AI was used in preparing a filing, identify the generative AI program used, certify that the filing was not drafted using generative AI, or certify

that any language drafted or citations provided by generative AI were checked for accuracy. The update to Chapter 78 cites a number of public resources that track such rules and orders, including a number that have been issued by judges in New York state and federal courts. Chapter 78, Litigation Technology, § 78:2.

- There are many different ways that lawyers today are using artificial intelligence to improve productivity and provide better legal services to their clients. The update to Chapter 79 discusses several of the main examples. Many of these tools still utilize traditional, or predictive, AI, which operates by leveraging historical data to forecast future outcomes. While generative AI technologies boast many promising use cases, they have not yet been widely adopted. Based on a survey conducted by Thomson Reuters in 2024 on the adoption of AI technologies in the legal industry, only 12% of respondents said they are actively using legal generative AI tools; while 43% said they plan to do so within the next three years. Chapter 79, Artificial Intelligence, § 79:3.
- With the rapid development and use of artificial intelligence within the legal community, teaching litigation skills must embrace and incorporate these AI tools. Lawyers must not only understand the availability of these tools, but their strengths and weaknesses. The New York State Bar Association recently adopted the *Report and Recommendations of the New York State Bar Association Task Force on Artificial Intelligence* (April 2024). The *Report* offers best practices and guidance as to how lawyers can use artificial intelligence and remain ethically compliant. Use this to help teach the proper and best use of AI. The update to Chapter 81 provides specific guidance as to how AI can be appropriately used in brief writing and in preparation for depositions. Chapter 81, Teaching Litigation Skills, §§ 81:2, 81:10, and 81:16.
- Conservative organizations—such as the American Alliance for Equal Rights, which was formed by Edward Blum, the organizer of Students for Fair Admissions—have unleashed a wave of legal challenges directed at law firms' diversity, equity and inclusion programs and, in particular, diversity fellowship programs. In the year since the U.S. Supreme Court decided *Students for Fair Admissions*, the American Alliance for Equal Rights has brought suit against three national law firms challenging their diversity requirement initiatives. Republican senators, representatives, and state attorneys general have also taken aim at law firms and corporations with active diversity, equity, and inclusion programs. Indeed, U.S. Senator Tom Cotton of Arkansas invoked the *Students for Fair Admissions* decision in his letters to 51 law firm leaders, arguing the while "that case focused on colleges, the same principles and indeed the

plain text of federal law also cover private employers," and suggesting that, "[t]o the extent [the firms] continue to advise clients regarding DEI programs or operate one of [its] own, both [the firm] and those clients should take care to preserve relevant documents in anticipation of investigations and litigation." These recent challenges to diversity initiatives have not stopped at law firms. In recent months, scrutiny over such programs has turned its eye to judges' individual practices. For example, in January 2024, American First Legal filed a complaint with the U.S. Court of Appeals for the Seventh Circuit accusing three federal judges of discrimination. At issue are the judges' individual rules that encourage the participation of "newer, female, and minority attorneys" in court proceedings, a factor which, in turn, would be "strongly consider[ed]" when allotting time for oral argument. Chapter 83, Diversity and Inclusion, § 83:3.

- Generative AI ("GAI") has spawned ethical issues including those related to the duty to represent clients capably. Indeed, lawyers may be required to learn, and properly use, GAI systems in their legal practice in order to provide competent representation. The update to Chapter 85 discusses the potential consequences of GAI "hallucinations" (i.e., false or non-existent information which may seem real, but has no basis in truth). While no authoritative law or regulation has been published to deal with the use of GAI by lawyers, reports and opinions have been published to help lawyers navigate GAI use and legal ethical obligations, encouraging lawyers to further educate themselves on GAI technology. GAI raises broad confidentiality concerns since datasets sourced from the Internet, as well as prompts and information provided by users, may be used to train the GAI system, and can therefore be used to provide an answer to another user's query. Bar associations in other jurisdictions recommend a variety of approaches to lawyers using GAI, including using a zero data retention policy, informing clients of potential GAI use, and receiving client consent before GAI use. Chapter 85, Ethical Issues in Commercial Cases, §§ 85:15 and 85:23.
- The update to Chapter 94 notes that increasingly, letters of credit are used in contexts other than the international sale of goods. The update cites a number of state and federal cases decided in 2023 and 2024 indicating that letters of credit are often provided in lieu of traditional security deposits on commercial leases and are also used to secure future payments under contracts. The update also cites cases decided in 2023 indicating that letters of credit are different from a documents against payment collection process. Where parties opt for a documents against payment collection process, the banks serve as intermediaries for the buyer and seller of goods, but without making any

promise to pay the seller against the receipt of commercial documents related to the transaction. Unlike letters of credit, the banks involved in a document collection process do not guarantee payment or assume credit risks. Chapter 94, Letters of Credit, § 94:2.

- On April 23, 2024, the Federal Trade Commission ("FTC"), by a 3-2 vote, issued a final rule that would ban employment noncompete agreements nationwide, with limited exceptions. The rule goes into effect on September 4, 2024. As it stands, this rule represents a seismic shift in the enforceability of employment noncompetes in New York (and across the country). At least two lawsuits have already been filed seeking to invalidate the rule, including by arguing that: 1) the FTC had not been granted congressional authority to issue the rule; and 2) if the FTC had been granted such congressional authority, then this was an unconstitutional delegation of legislative authority by Congress to the FTC. Therefore, whether the rule will ultimately become law is an open question. Chapter 97, Employment Restrictive Covenants and Other Post-Employment Restrictions, § 97:7; see also Chapter 132, Misappropriation of Trade Secrets, § 132:20, which discusses proposed legislation in New York relating to noncompete agreements.
- If litigating an instrument's enforcement against a consumer, counsel should consult New York's "consumer credit fairness act" ("CCFA") enacted in 2021. A "consumer credit transaction" is one where credit has been extended to an individual and the money, property or services which is the subject of that transaction is primarily for personal, family or household purposes. The CCFA amended several existing procedural statutes (as well as created some new ones) with the aim to curb those debt collectors who seek to unfairly benefit from a consumer's unfamiliarity with the legal system and/or lack of resources, and thus reduce the number of unwarranted and inflated consumer judgments. These statutory changes include, among others, a statute of limitations shortened from six years to three years, detailed mandatory "additional notices" from a plaintiff to the consumer at the time the plaintiff files a complaint and again later if it moves for summary judgment, and heightened pleading requirements for a consumer credit complaint. In addition, pursuant to the Fair Consumer Judgment Interest Act, the statutory interest rate on consumer debt—both prospectively and retroactively with respect to unsatisfied judgments—dropped in 2022 from 9% to 2% per annum. Chapter 100, Bills and Notes, §§ 100:65 and 100:97.
- The update to Chapter 101 provides additional guidance with respect to Uniform Commercial Code Article 9 which is an extremely complex statute with very specific rules

and exceptions to those rules. A practitioner should always refer to the statute and the official comments to ensure that they are properly analyzing each of the nuances that might be present in a particular transaction. Further, it is important to consider whether a transaction may be subject to recharacterization under Article 9. It is possible that Article 9 may apply regardless of the intended form of a transaction. If the practitioner is not careful to ensure that the proper determination has been made, a transaction may be subject to recharacterization with the result being that perfection and priority may be lost. Chapter 101, Secured Transactions, § 101:15.

- An agency requires the consent of both the principal and the agent. Consent can be inferred from the surrounding circumstances. For example, as the Second Circuit decided on July 27, 2023 in *Soni v. Commissioner*, an agency relationship can be found between spouses for the purpose of preparing tax returns in the absence of a formal authorization, where the principal was generally aware of tax return filing requirements, never personally signed a return, and expected the agent spouse to handle all financial affairs. Chapter 102, Agency, § 102:9.
- Partners should not assume that an LLP registration will always shield them from personal liability for the obligations of their business entity or protect them from protracted litigation. Evaluating whether a partner in an LLP is entitled to the benefit of the personal liability shield often involves consideration of many facts and circumstances, precluding prompt pre-trial resolution of the matter on a motion to dismiss or for summary judgment. In *Hagans v. Dell*, in 2023, the Second Department affirmed the denial of a motion for summary judgment in an action for legal malpractice against a partner in a limited liability law firm partnership where the defendant claimed he was shielded from personal liability because he did not commit the allegedly wrongful act or supervise the person who committed the allegedly wrongful act. The Second Department concluded there was a triable issue of fact as to the defendant's potential liability based on documents showing that "attorneys at the law firm had consulted with [defendant] about strategies in responding to motions and seeking a default judgment," defendant had signed a stipulation of discontinuance as to certain defendants, and that defendant had "met with the plaintiff to discuss her case at an initial intake meeting, filled out a client fact sheet, and signed the retainer agreement." Chapter 103, Partnerships, § 103:9.
- On April 6, 2024, in *James River Holdings, Ltd. v. Fleming Intermediate Holdings LLC*, the New York Supreme Court granted a "preliminary" injunction requiring a defendant purchaser to close a $277 million acquisition within ten days of the court's decision. The purchaser had sought

unsuccessfully to avoid the transaction on the basis of alleged accounting issues, which the court rejected as an impermissible effort to renegotiate the purchase price. The court concluded that specific performance was necessary to avert "reputational harm" to the target, because termination of the transaction would "imply some flaw sufficient for [the buyer] to walk away from the deal." On April 18, 2024, the Appellate Division for the First Department denied defendant's motion for an order staying enforcement of the mandatory preliminary injunction. Chapter 110, Mergers and Acquisitions, § 110:42; see also Chapter 20, Provisional Remedies, § 20:5, and Chapter 56, Specific Performance, § 56:34.

- The New York State trial courts had split on whether the automatic stay of discovery imposed by the Private Securities Litigation Reform Act upon the filing of a dispositive motion applies in actions filed in state court. On November 2, 2023, in *Camelot Event Driven Fund v. Morgan Stanley & Co. LLC*, the Appellate Division for the First Department resolved the split in the New York County trial courts when it held that the PSLRA discovery stay "applies to any private action, whether brought in state or federal court." The First Department nevertheless concluded that the PSLRA discovery stay "does not apply to stay discovery pending appeals from denials of motions to dismiss." Chapter 112, Securities Litigation, §§ 112:3 and 112:12.90.
- Most securitization contracts contain "no-action" clauses that present obstacles to investors seeking relief directly, rather than through the trustee. However, in *Commerzbank AG v. U.S. Bank, N.A.*, the Second Circuit held on April 30, 2024 that "a plaintiff's failure to make pre-suit demands on parties other than trustees can be excused in certain circumstances where these parties are sufficiently conflicted." The court emphasized that that excuse depends on the pre-suit demand being futile, instructing district courts to "consider whether such requirements would entail potential conflicts of interest on the demanded party, and if so, whether the nature and extent of the conflicts would indicate that these parties would be sufficiently unlikely to bring claims if asked to do so, such that the demand would be futile." Chapter 113, Securitization and Structured Finance, § 113:39; see also Chapter 112, Securities Litigation, § 112:20.50.
- Investment advisors and fund managers generally control the management of investment funds, and their clients depend on them to protect their interests. Investment advisors and fund managers therefore owe a fiduciary duty to their clients. A U.S. Department of Labor rule has extended this duty to situations where the financial advisor is providing one-time investment advice. The Department of Labor's "Retirement Security Rule," effective September 23, 2024,

expanded who is considered an investment advice fiduciary under ERISA. Among other things, the new rule clarified that an advisor who provides one-time investment advice is a fiduciary if they meet the other definitions of the rule. This includes the provision of one-time advice regarding rolling over assets from a workplace retirement plan to an IRA. Chapter 117, Fiduciary Duty Litigation, § 117:22.

- The update to Chapter 118 notes that the New York Supreme Court has the power to issue orders and injunctions to maintain a not-for-profit corporation's activities. New York's Not-For-Profit Corporation Law § 1111 vests the court with the power to "make all such orders as it may deem proper in connection with preserving the property and carrying on the business of the corporation, including the appointment and removal of a receiver under article 12." The court may also grant injunctions against the corporation, its directors and officers, or its creditors pursuant to N-PCL § 1113. For example, on January 25, 2024, in *Owlkill Real Estate, LLC v. West Main St. Cambridge Sewage Disposal Ass'n, Inc.*, the Supreme Court appointed a temporary receiver to preserve the association's property and continue its business, and issued a preliminary injunction to maintain the status quo pending resolution of the issues outlined in the opinion. Chapter 118, Not-For-Profit Institution Litigation, § 118:31.
- In some cases, courts have recognized that accountants engaged to perform "reviews," rather than audits, cannot be held liable for failing to discover misstatements in the client's financial statements. But in *1650 Broadway Assocs v. Sturm*, the First Department held on April 4, 2024 that even accountants performing only compilation and tax preparation services may be subject to liability for failing to disclose defalcations. In that case, the accountants allegedly failed to alert the majority shareholder of a family-owned corporation that the minority/managing shareholder had taken unauthorized salary increases and loans from the business. The court held the allegations that the accountants had knowledge of the unauthorized transactions and a duty to disclose them to the majority owner to be sufficient to defeat a motion to dismiss despite the limited nature of the engagement. Chapter 121, Professional Liability, § 121:29.
- In February 2024, following an eleven-week bench trial, in a 92-page opinion Judge Arthur F. Engoron of the Supreme Court, New York County found Donald J. Trump, his business associates, and his sons Eric Trump and Donald Trump Jr. liable for falsifying business records, issuing false financial statements, and conspiracy to commit insurance fraud. Trump business associates Allen Weisselberg and Jeffrey McConney were also found liable for insurance fraud. The court ordered the defendants to pay approxi-

mately $450 million in penalties and interest; barred Weisselberg and McConney from serving in the financial control function of any business entity registered or licensed in New York; imposed a series of temporary bars on Donald Trump, certain business entities, and his sons; and extended oversight of the Trump Organization by an independent monitor for at least three years. Defendants' appeal is pending before the Appellate Division, First Department, and in March 2024 the appellate court reduced the bond that defendants were required to post to $175 million and stayed enforcement of the bars imposed on defendants by Judge Engoron. Chapter 125, White Collar Crime, § 125:2.

- In 2023, New York Attorney General Letitia James successfully secured a $200,000 penalty against a law firm for its failure to protect personal and healthcare information of New Yorkers. The law firm represents New York City area hospitals and maintains private personal information from clients' patients like dates of birth, social security numbers, healthcare insurance information, medical history, and treatment data. The law firm's data security measures violated state laws and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and made it vulnerable to a data breach that exposed the private personal information of approximately 114,000 patients, including 60,000 New Yorkers. The firm will also be required to update its data security protocols to better protect the personal and private information of its clients' patients. Chapter 137, Privacy and Security, § 137:2.
- The update to Chapter 141 contains a new section entitled "Trial testimony considerations," which begins by stating that "Eliciting clear and easily understandable witness testimony is particularly difficult in software and IT disputes, where the trier of fact may be completely unfamiliar with the relevant complex subject matters, such as software coding, configuration, integrations, and data migration." This new section provides detailed guidance for trial testimony by witnesses for both IP Providers and IP Buyers which will assist the trier of fact in understanding the parties' positions. Chapter 141, Information Technology Litigation, § 141:44.50.
- Historically, once the Tax Appeals Tribunal issued a decision, the taxpayer—and only the taxpayer—could appeal by commencing an Article 78 proceeding in the Appellate Division, Third Department, within four months of the date of the decision. However, in 2023, New York Tax Law § 2016(3) was amended to give the New York State Department of Taxation and Finance a limited avenue to appeal an adverse Tribunal decision to the extent that the decision is "premised on interpretation of the state or federal constitution, international law, federal law, the law of other states, or other legal matters that are beyond the purview of the state legislature." Chapter 144, Tax, § 144:48.

- Two forms of guaranty are commonly used in the commercial leasing context: the unconditional or universal guaranty and the "good guy guaranty." The unconditional guaranty is a full guaranty; if the tenant defaults, the guarantor is liable for all rent payments through the end of the lease term and must cure all other defaults. The good guy guaranty is not nearly as expansive. The good guy guaranty focuses on the point in time when the tenant vacates the premises. The good guy guarantor agrees to be liable for the tenant's rent and other monetary obligations for the period of time that the tenant remains in the premises. If the tenant gives timely written notice to the landlord of the date the premises will be vacated, pays all sums due when it vacates the premises, leaves the premises "broom clean" and returns the keys, the good guy guarantor is understood to be off the hook. This is the case even if, pursuant to the terms of the lease, the tenant's monetary and other obligations continue after the tenant vacates the premises. That has been the understanding for decades. The commercial leasing sector experienced a shockwave when the First Department in *122 East 42nd Street, LLC v. Scharf*, held that because the landlord had not accepted the tenant's surrender of premises in 2021, the good guy guarantors were on the hook for rent payments through the end of the lease term—June 30, 2032. Following the First Department's decision, the authors of an article that appeared in the National Law Review on March 7, 2024, wrote that "this decision will enormously impact commercial leasing in New York, especially for privately-owned restaurants, bars, nightclubs, and other, often smaller, businesses that typically have their leases backed by individual guarantors pursuant to a Good Guy Guaranty." Notably, the defendants/guarantors sought and were granted leave to appeal to the Court of Appeals. Oral argument was scheduled for September 10, 2024. However, on August 21, 2024, the appeal was withdrawn when the parties filed a stipulation of withdrawal with the Court. Thus, the First Department's decision stands. Chapter 148, Commercial Leasing, §§ 148:1 and 148:16.
- General Business Law Article 35-E (§§ 756 et seq.), commonly known as the "Prompt Payment Act," establishes payment obligations and remedies governing contracts for private construction projects where the aggregate cost of the project exceeds $150,000. In November 2023, § 756-a(2) of the Prompt Payment Act was amended to provide that "A contractor shall be entitled to submit a final invoice for payment in full *upon reaching substantial completion, as such term is defined in the contract or as it is contemplated by the terms of the contract*" (emphasis added). The amendment also revised § 756-c of the Prompt Payment Act to provide: "By mutual agreement of the relevant parties an

owner may retain no more than five per centum of the contract sum as retainage. A contractor or subcontractor may also retain no more than five per centum for retainage and in no case shall retainage exceed the actual percentage retained by the owner." Chapter 149, Construction Dispute Resolution, § 149:16.

- In their 2024 Strategic Plan, the Metropolitan Transportation Authority Construction and Development announced a slate of upcoming projects including constructing the Interborough Express Brooklyn and Queens, replacing outdated subway signaling systems, and continuing the extension of the Q line into East Harlem. $15 billion of the funding required for the newly announced capital projects was to come from the proceeds of congestion pricing, but in June of 2024, Governor Hochul delayed the implementation of the congestion pricing program indefinitely and did not yet announce an alternative source of funding. Chapter 150, Project Finance and Infrastructure, § 150:9.
- In June 2024, the Legislature passed an amendment to Title 2-a to Article 13 of the Racing, Pari-Mutuel Wagering and Breeding Law, accelerating the review and award process for the three downstate casino licenses authorized by the provision. The amendment "aims to address [ ] delays by setting fixed deadlines for each step of the licensing process." The revised legislation requires all license applications to be submitted by August 31, 2024. It also requires the New York Gaming Facility Location Board to make its recommendations for licensing up to three applicants prior to December 31, 2025, and the New York State Gaming Commission to award the licenses by March 31, 2026. Chapter 152, Gaming, § 152:24.
- The Climate Leadership and Community Protection Act (L. 2019, ch. 106) provides that "all state agencies, offices, authorities, and divisions" when "considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts" (a) "shall consider whether such decisions are inconsistent with or will interfere with the attainment of the [CLCPA's] statewide greenhouse gas emissions limits"; (b) "shall not disproportionately burden disadvantaged communities as identified pursuant to [the CLCPA]"; and (c) "shall … prioritize reductions of greenhouse gas emissions and co-pollutants in [such] disadvantaged communities." The New York Supreme Court has recently held that this statutory provision provided the New York Department of Environmental Conservation authority to deny an air permit for a natural gas fired electric generating station. In addition, the Appellate Division for the Third Department held on March 7, 2024 that these provisions could provide the Public Service Commission with authority to impose mitigation measures to reduce

greenhouse gas emissions and disproportionate effects on a disadvantaged community. Chapter 155, Environmental and Toxic Tort Litigation, § 155:6.

The Commercial Division

The First Edition of this treatise was published in 1995 within a few weeks of the day the Commercial Division of the Supreme Court of the State of New York opened its doors for business. This treatise and the Commercial Division have matured and prospered over the past 29 years. The success of this treatise is apparent from the numerous favorable book reviews of the Fifth Edition. The Commercial Division has also received rave reviews reflected both in the press and in the fact that more than 100,000 cases have been filed in the Commercial Division since its inception.

Conclusion

All royalties from the sale of this publication and its Supplements go to the New York County Lawyers Association. On behalf of NYCLA and the many readers and book reviewers who have been generous with their praise for this publication, I again thank the distinguished author team for its extraordinary efforts.

September 2024 **ROBERT L. HAIG**