BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS

Fifth Edition

Volume 1

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Chapters 1 to 10

2022-2023 Supplement
Issued in November 2022

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FOREWORD

The Fifth Edition of ***Business and Commercial Litigation in Federal Courts*** was published in December 2021. Since then, 22 book reviews of the Fifth Edition have been published in legal newspapers, bar journals, and other publications throughout the United States. The critical acclaim has been extraordinary. We hope that your reactions to the Fifth Edition are as positive as those of the reviewers.

Set forth below are excerpts from book reviews of the Fifth Edition of this treatise. Following these excerpts are highlights of the 2022-2023 Supplements to the Fifth Edition.

Critical Acclaim for the Fifth Edition

The book review in the *Journal* of the American College of Trial Lawyers begins by stating: "To behold the new revised treatise *Business and Commercial Litigation*, published by the American Bar Association (2021), is like sitting on a high mountain top, looking down at many beautiful sites, then going to visit, study, and learn about each one more closely. This superb treatise . . .is truly the encyclopedia of commercial litigation, and more." The review also states: "While readers of this work have much to absorb, they will have the benefit of receiving excellent guidance for providing effective representation of clients on the many topics and types of litigation included in this valuable resource. The writing is clear and comprehensive. Each chapter presents guidelines, forms, and checklists for discovery and trial. While the treatise focuses on commercial litigation, it has value for all types of cases." In addition, the review states: "This work is invaluable for new lawyers and seasoned practitioners as well. It really does provide answers to almost any question one can ask about the nuances of every topic discussed relating to litigating commercial cases and beyond." The review concludes: "Truly, poet John Keats' statement, 'A thing of beauty is a joy forever,' applies to this grand accomplishment . . .."

The review in *The Journal of the Delaware State Bar Association* begins by stating: "In 2017, I had the pleasure of reviewing the Fourth Edition of *Business and Commercial Litigation in Federal Courts*, a then 14-volume treatise co-produced by

Thomson Reuters and the American Bar Association's Section of Litigation. I said at the time that the treatise was 'the most impressive treatise I have ever seen.' Well, the now 16-volume Fifth Edition of the treatise moves into first place." The review concludes: "I wrote with regard to the Fourth Edition: 'From a Delaware litigator's perspective, the guidance provided by Business and Commercial Litigation in Federal Courts can be invaluable, whether the litigator is finding herself in federal or state court, in administrative proceedings, or in mediation or arbitration.' The Fifth Edition importantly and helpfully builds on that guidance. I again heartily commend the treatise to you and your colleagues."

The review in the *New York Law Journal* begins by stating: "Where do you go when you need quick, yet detailed, practical guidance on a difficult federal civil procedure or substantive issue in business litigation? The Fifth Edition . . . is your best source, bar none" and "is your 'go to' source for federal practice." The review also states: "The treatise is much more than an encyclopedia of information. It analyzes substantive federal areas of practice in the context of procedure and addresses in detail the pros and cons, as well as the ramifications, of actions—and in some cases inaction—relating to various strategies that a litigator can pursue. These analyses are provided by some of the most well-known and experienced litigators and judges in the country, so one can feel particularly confident when advising a client on strategies addressed in the treatise. The strategies are not cursorily covered; they go beyond simplistic recommendations and provide readers with the details of how, and when, particular approaches should be adopted." The review concludes: "We are confident that the treatise can replace the various practice books in your physical or digital library, as it is the most detailed and comprehensive set of books covering federal practice strategy available to practitioners."

The review in the *Los Angeles Daily Journal* bears the headline "The $100 Million Treatise" and states that the Fifth Edition "is immensely valuable. One might say *invaluable*." The review begins by stating that "Since 1998, 'Business and Commercial Litigation' has been the gold standard in legal treatises, and for that matter, in instruction on how to be a successful commercial litigator." The review continues: "If you are looking to learn about a substantive area of the law, whatever it might be, that you might encounter in federal court, look no further than the Fifth Edition. 'Business and Commercial Litigation' also contains virtually everything one needs to know about federal court procedure . . .." The review concludes: "When we published

our review of the Fourth Edition in the Daily Journal in 2017, we were hard-pressed to identify any areas for improvement. But somehow, the Fifth Edition is even better. However one might value a legal treatise, the Fifth Edition of 'Business and Commercial Litigation in Federal Courts' is sure to make its readers more skilled and knowledgeable lawyers, better able to obtain outstanding results for their clients. Who can put a value on that?"

The review in *The Texas Lawbook* notes that "The fifth edition has 26 entirely new chapters on new topics" and describes these new chapters as "the subjects of the highest stakes litigation in the years to come," "an even bigger part of the next wave of tech litigation," "fertile grounds for future litigation," "incredibly useful," "deep guidance," and "of immense practical importance in successfully conducting and managing business and commercial litigation in the federal courts."

The review in the *Maine Bar Journal* states that "The breadth of subjects covered in the treatise is extensive, but its greatest strength is that each chapter is a self-contained, A to Z guide to the subject matter." The review concludes that "The Fifth Edition is a must-have for every commercial litigator in Maine."

The review in the *Vermont Bar Journal* states that "the fifth edition is expanded, updated, improved and even more useful" and "is all backed by thorough and comprehensive research." The review concludes that "I can hardly conceive of any litigation where there will not be some chapters that will be of great use to the practitioner."

The review in *The Iowa Lawyer* concludes that the Fifth Edition is "a valuable resource for any lawyer with an active practice involving commercial law." The review also states that "it is difficult to imagine a form needed in any area that cannot be found in the Fifth Edition."

The review in the *Michigan Bar Journal* states that the Fifth Edition "is an exhaustive, in-depth guide to litigating in the federal courts, much of which can also be helpful for state court practice. Indeed, this edition contains chapters on almost everything you would expect to be covered in a definitive treatise on this subject – and even more." The review also states: "The chapters are well-researched and contain abundant footnotes. They are easy to navigate and include thousands of cross-references to other sections. They are comprehensive, practical, and well organized . . . the volumes of material, analyses, case citations, and strategic considerations are prodigious." The review

concludes: "Whether your focus is business litigation in federal or state courts, this treatise is very valuable and well done. Its case citations alone are impressive, but its analyses, practical tips, and forms make it a definitive treatise on business and commercial litigation in federal courts."

The author of the review in *The Advocate*, "the official publication of the Idaho State Bar," states that he "was impressed with the treatise's breadth of information and the practical tools that follow each chapter. These checklists, strategy pointers, proposed orders, sample discovery requests, and model jury instructions make it easy for the reader to apply the substantive knowledge in the chapter to his or her practice." The review also states: "the authors added dozens of chapters for the Fifth Edition, which is comprised of 180 chapters over 16 volumes. In addition to chapters covering substantive legal topics, this edition covers the 'business' of litigation, with chapters including *Marketing to Potential Clients*, *Third-Party Litigation Funding*, and *Litigation Avoidance and Prevention*. These chapters will help the reader manage his or her firm and understand our profession from the client's perspective."

The review in the *CBA Record*, published by the Chicago Bar Association, concludes: "This Fifth Edition is an amazingly comprehensive, step-by-step guide for the practitioner who litigates commercial cases in federal courts. From jurisdictional and procedural issues to substantive considerations, it covers all aspects of practice in the federal courts. Lawyers new to federal court practice—as well as seasoned practitioners—will find much guidance and useful information in this 16-volume set. Indeed, anyone practicing commercial litigation in the federal courts should have this set readily accessible to assist them in their practice."

The review in the *Philadelphia Bar Reporter* begins by stating that: "The breath and scope of [the Fifth Edition's] content has greatly expanded, further upgrading an already invaluable resource for trial lawyers." The review also states: "In closing, the Fifth Edition is a valuable tool for any trial lawyer – offering a simple, yet comprehensive and current, introduction to those areas of procedural and substantive law that commercial litigators are likely to encounter in their practices." The review concludes that "the Fifth Edition is worth every penny in our view" and that lawyers should "not miss the opportunity to get this valuable resource."

The review in the *Cleveland Metropolitan Bar Journal* begins by stating: " 'Business and Commercial Litigation in Federal

Courts' has established itself as the definitive treatise for commercial litigators in federal court since 1998. Rather than rest on its laurels, the recently issued Fifth Edition continues to expand on the exhaustive work of its predecessors, adding 26 new chapters and substantially expanding and updating its existing chapters, further securing the treatise's position as an indispensable resource on virtually every aspect of practice in federal court." The review concludes that the " . . . goal with this publication was to provide commercial litigators with enough information that they can do almost everything without any further guidance from anyone else. It is fair to say this goal has been more than accomplished with the Fifth Edition. This monumental work covers virtually every imaginable topic in federal litigation while remaining remarkably easy to navigate. The practical guidance, strategic considerations, and practice aids are also invaluable tools. This exhaustive and immensely practical treatise would be a tremendous addition to the toolkit for any litigator who is or will be practicing in federal court."

The review in *NYLitigator* states: "In my own practice, I have found that when I am asked to litigate a case in an unfamiliar area, I can simply read the applicable chapter in *Business and Commercial Litigation in Federal Courts*, and then find that I am quickly brought up to speed—such that I can discuss issues with a client, co-counsel and even an experienced opposing counsel with both confidence and from a place of being informed that allows me to comfortably expand my practice. What a gift that is in today's world, where so many new areas of laws are developing and representation of a longstanding client can quickly take the practitioner into unfamiliar territory. Having *Business and Commercial Litigation in Federal Courts* at my side gives me comfort that I can advise my client and/or coordinate with local counsel in ways that will add value to my client and bring to bear my understanding of the client's needs with the challenges posed by a new area of the law." The review concludes: "The fifth edition of *Business and Commercial Litigation in Federal Courts* is exactly the guide (actually, there are 373 author/guides) that the modern litigator requires. I make sure the lawyers in my firm have ready access to *Business and Commercial Litigation in Federal Courts*, and I believe that lawyers at firms throughout the nation can best serve their clients by doing the same."

The review in the *Queens Bar Bulletin* states that the Fifth Edition "is every bit as good as the 4th Edition, and then some . . .. These volumes are a must-read for anyone with a case in the U.S. District Court. The topics covered are breathtaking in scope, including virtually every legal topic that could be raised in

a U.S. District Court." The review concludes that this "monumental work, Business and Commercial Litigation in Federal Courts, 5th Edition, is well worth reading on a regular basis. We should all have a copy in our offices, both print and digital."

The review in the *Bulletin* of the Bar Association of Erie County in Buffalo, New York states: "The treatise is written for actual practitioners, rather than for 'legal scholars.' In other words, it is extremely user-friendly. It provides practical advice to be used in real cases." The review concludes: "This is my thirty-sixth year practicing law, and I still have much to learn. Business and Commercial Litigation in Federal Courts is an invaluable resource, one that I will keep close."

The review in *The Suffolk Lawyer* states that "it is difficult to be anything other than deeply impressed with the latest edition (the Fifth) of Business and Commercial Litigation in Federal Courts. Already the seminal treatise for Federal practice and procedure, the latest version added 26 new chapters, covering a vast array of legal concepts which have recently risen to prominence." The review concludes that "Business and Commercial Litigation in Federal Courts is an absolutely indispensable asset for counsel who engage in federal practice."

The review in the *Nassau Lawyer* states that the authors of the Fifth Edition are "373 of the nation's top federal judges and practitioners" and that readers of the Fifth Edition "have access to the accumulated judgment and wisdom of an outstanding array of authors." The review concludes: "In sum, the expanded and updated Fifth Edition of *Business and Commercial Litigation in Federal Courts* will serve as an invaluable resource for anyone practicing business and commercial litigation in federal court."

The review in the Albany County Bar Association *BarNews* states that the Fifth Edition "contains 180 chapters written by some of the country's leading commercial practitioners and jurists . . .. These authors often have a practice concentrating heavily in the subject matter they cover, enabling them to provide practical insights gleaned from years of experience." The review also states: "Even frequent litigators in federal court only occasionally delve into the weeds of procedural issues like complete diversity, supplemental jurisdiction, removal, and coordination of state and federal litigation where related actions are commenced. The treatise provides good coverage of these issues, enabling the practitioner to get up to speed quickly in areas they may not have handled recently."

The review in the Northern District of New York Federal Court Bar Association *Newsletter* describes the Fifth Edition as

"amazingly comprehensive" and "definitive." The review also states: "Although the Fourth Edition was published in 2016, this new edition adds a stunning 26 new chapters. It reflects the rapid pace at which commercial law, business litigation and the practice of law has changed." In addition, the review states that "The extensive cross-references facilitate efficient navigation within each chapter and throughout the entire treatise" and that "the treatise is designed for quick and easy access to address urgently presented questions, while providing in-depth analyses to be read when time permits." The review concludes: "If you handle business litigation, this is a welcome addition to your library."

The review in the *Managing Attorneys and Clerks Association Newsletter* states that the Fifth Edition contains "the work of some of the most well-known commercial litigators and judges, who willingly impart their wisdom and insight based on years of experience litigating commercial disputes in federal court." The review also notes that "This most recent edition truly encompasses everything a commercial litigator needs to know in order to successfully navigate the complexities of litigating in federal court." The review concludes that the Fifth Edition "provides insightful analysis and practice tips from many of the best-known commercial litigators and judges, which makes it a 'must have' for any lawyer practicing in federal court."

The review in *Law Lines*, the newsletter of the Law Library Association of Greater New York, states that "It is worthwhile to note that the focus of this edition, as with the previous editions, is very much centered on practice and on practical applications – a true 'practitioner's toolkit,' so to speak." The review also states: "I conclude this review by noting that in this era of the increasing prevalence of the digital library shelf over the physical library shelf, it can be, at times, difficult to know what is where and what is quality. This can be equally true for law librarians as it can be for legal practitioners . . .. Thus, it is well worth taking some time to familiarize yourself with the general contents and supplementary materials of this new Fifth Edition of *Business and Commercial Litigation in Federal Courts*. Not only are the volumes themselves an excellent investment from a collections development perspective, but familiarity with the contents of this series likewise is valuable investment. You as well as your library's patrons will benefit both from having the Fifth Edition in your collections and from your [being] generally familiar with its helpful and thorough contents."

Publication of the 2022-2023 Supplements

Although the authors of the Fifth Edition of ***Business and Commercial Litigation in Federal 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 2022-2023 Supplements reflect the ever-increasing and diverse activity that has taken place in business and commercial litigation during the year since the Fifth Edition was 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 business and commercial litigation in federal courts.

All 180 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 2022-2023 Supplements incorporate the most recent judicial decisions governing business and commercial litigation in federal courts, as well as practical insights and advice by our authors.

Set forth below is a compilation of a few of the matters covered in the 2022-2023 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 business and commercial litigation in federal courts.

Highlights of the 2022-2023 Supplements

- In 2022, the United States Supreme Court denied certiorari in two cases that would have allowed the Supreme Court to resolve the split among circuit courts as to whether federal claims under statutes that do not provide nationwide service of process (such as the Fair Labor Standards Act) allow for specific jurisdiction over non-resident plaintiffs' claims under the Supreme Court's decision in 2017 in *Bristol-Myers Squibb Co. v. Superior Court of California*. Specifically, the Supreme Court declined to review a First Circuit decision holding that *Bristol-Myers* does not bar jurisdiction over non-resident opt-in claims in FLSA class actions.

The Supreme Court also let stand a decision in which the Sixth Circuit, like the Eighth Circuit, held that where nonresident plaintiffs opt into a putative class action under FLSA, a court may not exercise specific personal jurisdiction over claims unrelated to the defendant's conduct in the forum state. Chapter 2, Personal Jurisdiction and Service, § 2:23.

- Practitioners should keep in mind that, in the course of exercising its oversight function, members of Congress can take the extraordinary step of referring conduct it deems less than forthcoming for investigation by the Department of Justice. For example, in March 2022, a bipartisan group of five House Judiciary Committee members sent a letter to Attorney General Merrick Garland requesting an investigation of Amazon for potential criminal obstruction of Congress based on what the Committee members described as "a pattern and practice of misleading conduct." The 24-page letter asserted that Amazon's conduct appeared designed "to influence, obstruct, or impede" the Committee's extensive investigation into competition in digital markets. Chapter 6, Congressional Investigations, § 6:26.
- Some concepts taken for granted in federal court might not be followed at all in state court. One recent example of this is the rule of party presentment. In *United States v. Sineneng-Smith*, the United States Supreme Court reversed and remanded a case that was on appeal from the Ninth Circuit, because the court resolved the case based on arguments made not by the parties themselves, but by amici. Courts are tasked with deciding the issues before them, not shaping the litigation. The Ninth Circuit's ruling therefore "departed so drastically from the principle of party presentation as to constitute an abuse of discretion." The principle that the court must take the case as the parties frame it is now widely accepted in federal courts. However, the role of the courts as "neutral arbiter of matters that the parties present" is followed to greater and lesser degrees by various state courts. The impact of the willingness of a given court to consider issues not raised by the parties to a case reduces predictability, and could create additional litigation risk for a client depending on the circumstances. Chapter 11, Comparison with Commercial Litigation in State Courts, § 11:9.
- On September 23, 2021, the Supreme Court of Delaware adopted a three-part "universal test" for demand futility. This test combines elements from and displaces two prior tests for demand futility. When conducting a demand futility analysis, Delaware courts now ask: (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand; (ii) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the

litigation demand; and (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand. "If the answer to any of the questions is 'yes' for at least half of the members of the demand board, then demand is excused as futile." Chapter 13, Comparison with Business and Commercial Litigation in Delaware Courts, § 13:55.

- In an opinion dated June 23, 2022, in *Berger v. North Carolina State Conference of the NAACP*, the Supreme Court addressed the power of duly authorized state officials to intervene on behalf of their states under Fed. R. Civ. P. 24(a)(2). *Berger* involved North Carolina elected officials' attempted intervention in litigation over the constitutionality of a state election law. The Supreme Court held that the officials were entitled to intervene, and, in so holding, stated that "federal courts should rarely question that a State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state law." Chapter 24, Parties, § 24:53.
- The Supreme Court most recently addressed the issue of standing in class action cases in *TransUnion LLC v. Ramirez*. In *Ramirez*, a lawsuit brought under the Fair Credit Reporting Act, the Court held on June 25, 2021 that standing is a prerequisite for each class member and requires a showing of a "concrete injury." The Court listed "physical harms and monetary harms" as "readily qualify-[ing] as concrete injuries under Article III," as well as "[v]arious intangible harms," such as "reputational harms, disclosure of private information, and intrusion upon seclusion." Lower courts have begun to grapple with the implications of *Ramirez*. Chapter 25, Class Actions, § 25:22.
- Special-purpose acquisition companies (SPAC), also referred to as "blank check companies," are entities with no commercial operations that raise capital through an initial public offering to ultimately acquire or merge with an existing private company, taking it public. SPAC-related transactions became increasingly popular in 2021, which was followed by an increase in SPAC-related litigation, particularly in Delaware. In *In re MultiPlan Corporation Stockholders Litigation*, the Delaware Court of Chancery issued its first ruling regarding the intersection between SPACs and "well-worn fiduciary principles." In this case, the plaintiffs argued that the SPAC director defendants had breached their duties to stockholders by issuing misleading statements about the proposed merger, which impaired the stockholders' ability to make informed decisions about whether to exercise a contractual right to redeem their shares prior to

closing of the proposed transaction. The court denied the defendants' motion to dismiss, holding that defendants had fiduciary duties to the SPAC stockholders, and that in this particular instance, the entire fairness standard of review applied because certain features of the SPAC's structure created a "misalignment of interests" between the SPAC stockholders and the director defendants. Delaware law regarding these and other issues involving SPACs continues to develop. Chapter 26, Derivative Actions by Stockholders, § 26:35.50.

- Attempts to claim privilege over communications serving both legal and non-legal purposes (often colloquially referred to as "dual-purpose" communications) are frequently challenged. Many jurisdictions find that for the privilege to attach, the communication must be for the "primary purpose" of securing legal advice. Under the primary purpose test, "when a document is prepared for simultaneous review by non-legal as well as legal personnel, it is not considered to have been prepared primarily to seek legal advice and the attorney-client privilege does not apply." In 2022, in *In re Grand Jury*, the Ninth Circuit noted, in adopting the primary purpose test, that "most, if not all, of our sister circuits" have also done so. By contrast, other courts including the D.C. Circuit have adopted the somewhat less stringent "significant purpose" test, under which the communication is privileged as long as "one of the significant purposes" is obtaining or providing legal advice. Chapter 30, Privileges, § 30:7.
- The amount of confidential sensitive data changing hands during discovery continues to increase. Recent cases cited in this update illustrate that protective orders can do much more than just dictate who can access what documents and the terms that apply to access. Protective orders also can provide important cybersecurity protections, and counsel should consider safeguards to ensure the security of produced electronically stored information (ESI). Protective provisions can include incorporating password protections or other encryption for highly sensitive data or imposing certain viewing restrictions. That should also include specific rules governing the retention, destruction, and return of confidential ESI. Protective orders may set forth specific damages for noncompliance with security requirements. Chapter 33, Discovery of Electronically Stored Information, § 33:41.
- In *Burton v. Schamp*, decided on February 10, 2022, the Third Circuit analyzed whether a litigant's post-judgment consent to a magistrate judge's entry of a final order should apply retroactively. The *Burton* court noted that, in the Supreme Court's decision in *Roell v. Withrow*, the majority found that Congress intended to accept implied consent from the parties' conduct during the litigation but declined

to address "whether express postjudgment consent would be sufficient in a case where there was no prior consent, either express or implied." The *Burton* court ruled that the defendants' post-judgment consent could not satisfy the requirements of 28 U.S.C.A. § 636(c)(1), because the "importance of the timing of consent is implicit in the fact that a non-Article III judicial officer does not have decision-making authority *until* the parties consent" and because "post-judgment consent suggests that a non-Article III officer exercises a core Article III power *before* he has obtained the authority to do so." Chapter 40, Magistrate Judges and Special Masters, § 40:9.

- The COVID pandemic gave rise to the issue of whether a court may properly summon a panel comprised only of jurors who have received the COVID vaccine. Various courts adopted such a practice, on the basis that the presence of unvaccinated panelists was in those courts' view likely to disrupt proceedings. Other courts adopted testing protocols to apply to summoned jurors. Chapter 43, Jury Selection, § 43:15.
- The protection of confidential information has become more complicated post-pandemic. In response to restrictions on public gatherings, many jury consultants experimented with conducting virtual exercises using videoconferencing technology. While this may have been the only option available when in-person exercises were not available, the virtual exercises significantly increase the risk that participants might disseminate confidential material without authorization. Any documents distributed to participants electronically are susceptible to copying and distribution, for example, and remote jury exercises raise the prospect that participants could record video proceedings that include attorney work product. The decision to conduct jury exercises always involves weighing the strategic advantages against the risks of unwanted public disclosure of confidential information. Lawyers and consultants should account for how a virtual format might affect this calculation. Chapter 44, Use of Jury Consultants, § 44:8.
- On June 7, 2022, the Judicial Conference of the United States' Committee on Rules of Practice and Procedure voted unanimously to approve proposed amendments to Federal Rule of Evidence 702 to: (1) expressly require that the proponent of expert testimony show the proposed testimony satisfies the requirements of the rule by a preponderance of the evidence; and (2) provide that the expert's opinion must be based upon a reliable methodology that fits the facts of the case. Though these changes are not intended to change existing law, the changes do reaffirm the role of the court as the gatekeeper for expert testimony under Rule 702. Chapter 45, Motions in Limine, § 45:12.

- For documents located in the United States, some United States courts had interpreted 28 U.S.C.A. § 1782 to allow courts in the United States to provide assistance in connection with international arbitrations, including, for example, ordering the production of documents held by third parties in the United States. However, the Supreme Court of the United States has now foreclosed this option, ruling in June 2022 that the statute does not apply to foreign arbitrations. *In ZF Automotive US, Inc. v. Luxshare, Ltd.*, the Court found that "tribunal" in the context of the statute is limited to foreign governmental or intergovernmental adjudicative bodies. Ad-hoc tribunals, even ones created under bilateral investment treaties and other investment treaties where a foreign State is a party, are not considered foreign tribunals under § 1782. Chapter 62, International Arbitration, § 62:58.
- In 2022, the Supreme Court proposed to amend Supreme Court Rule 37.4 expressly to provide for the filing of amicus briefs in support of or in opposition to an application directed to an individual Justice under Rule 22. The Clerk's comments explaining the rules change state that Rule 37.4 discourages amicus briefs in support of applications but provides guidance in the circumstances where such briefs may be of assistance to the Court. Under the new proposed Rule, an amicus brief should be filed as promptly as possible, considering the nature of the relief sought, and should be filed only if it presents relevant matter not already presented by the parties that would be of material assistance to the Court. The brief may not exceed 25 pages. However, as of October 14, 2022, the Court has not yet adopted this rules change. Counsel seeking to file an amicus curiae brief in support of or in opposition to an application should consult the most recent version of the Court's Rules. Chapter 70, Appeals to the Supreme Court, § 70:34.
- On occasion, a post-engagement change in circumstances may prompt counsel or client to desire a switch in the type or structure of the fee arrangement they have. As discussed by the Delaware Court of Chancery in its decision on August 25, 2022 in *The Williams Cos., Inc. v. Energy Transfer LP*, a new general counsel might, for example, "suggest switching from an hourly arrangement to a contingent arrangement" to "align" client and counsel. Counsel must take care to assure that the new arrangement "and the circumstances of its formation were fair and reasonable to the client." Chapter 77, Fee Arrangements, § 77:19.50.
- Despite the effectiveness of technology in the courtroom, the 2021 ABA TechReport survey states that only 67% of respondents received any form of training in courtroom technology, and of those the majority were from large firms (99% of respondents from firms of 100+ lawyers indicated they received some form of training). These numbers, while

perhaps smaller than expected, represent an improvement over prior years: 59% in 2020, 60% in 2019 and 57% in 2018. Chapter 79, Litigation Technology, § 79:3.

- One case in 2022 involving business development and marketing is particularly noteworthy. A partner at a Maryland law firm was admitted to the District of Columbia Bar. The lawyer was not licensed to practice in Maryland despite maintaining her office through her firm in Maryland. The lawyer signed two documents filed in Maryland state courts concerning uncontested divorce cases. With these exceptions, the lawyer limited her practice to matters in the District of Columbia. She otherwise performed a variety of administrative tasks for her Maryland law firm. The lawyer failed to indicate on her Maryland firm's letterhead that she was not licensed in Maryland, but only in the District of Columbia. She also failed to note any jurisdictional limitations on her business cards, e-mail signature and firm website for a two-year period after which she corrected these failures. The Maryland Attorney Grievance Commission was notified of the lawyer's conduct and commenced proceedings against her for engaging in the unauthorized practice of law. The Maryland Court of Appeals concluded that the lawyer's signature on two Maryland state court filings and her practicing in a Maryland office without being licensed to practice there were violations of Maryland's Rules of Professional Responsibility. The court also concluded that the lawyer's failure to place jurisdictional limitations on her firm letterhead, business cards, e-mail signature and firm website were violations, but those had been corrected for a number of years before the disciplinary hearings began. Because the lawyer had no prior disciplinary history and due to other mitigating factors, no disciplinary action was taken. Chapter 82, Marketing to Potential Business Clients, § 82:52.
- The Fourth Circuit held in 2021 that municipalities acting pursuant to a clearly articulated state policy to displace competition with "monopoly" did not need to establish that their actions were "actively supervised" in order for the state action exemption from federal antitrust liability to apply. In *Western Star Hosp. Auth., Inc. v. City of Richmond, VA*, the Fourth Circuit held that decisions by the City of Richmond to grant a monopoly on local emergency services to a private company were immune from antitrust challenge pursuant to the state action exemption because those decisions were made pursuant to a state law that clearly contemplated that municipalities could grant exclusivity to emergency providers. Chapter 87, Antitrust, § 87:62.
- On May 24, 2022, the Delaware Court of Chancery refused to apply the business judgment rule for the benefit of directors who granted financial rewards to the CEO that exceeded the limits of the company's equity compensation

plan. The court explained that the business judgment rule applies only when directors make a judgment that "falls within the scope of their authority." The court further explained that a violation of a plain and unambiguous restriction on the fiduciary's authority, such as granting an award in excess of the limits set forth in the plan, constitutes a breach of the duty of loyalty sufficient to rebut the protections of the business judgment rule. The court held that the complaint stated a cause of action not only against the members of the compensation plan committee, but also against all members of the board for their conscious inaction when they received a demand letter notifying them that the proposed award violated the compensation plan. Chapter 96, Director and Officer Liability, § 96:8.

- The Emergency Medical Treatment & Labor Act (EMTALA)'s enforcement mechanisms include the potential for an inflation-adjusted civil monetary penalty, up to $112,916 per violation as of November 15, 2021, which can be levied against both a hospital and a physician found to have negligently violated EMTALA requirements. This penalty is subject to annual inflation adjustments pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, which requires agencies to: (i) adjust the level of applicable civil monetary penalties with an initial "catch-up" adjustment, and (ii) make subsequent annual adjustments for inflation. Chapter 104, Health Care Institutions, § 104:54.
- In response to growing concerns over the risk of misuse of individuals' biometric data, including fingerprints, voiceprints, retina, and facial geometry, and to growing privacy concerns, certain jurisdictions have enacted laws to protect biometric information. These laws impose penalties for noncompliance and grant individuals the right to sue under those laws. In 2018, the Illinois legislature, for example, passed the Biometric Information Privacy Act (BIPA), 740 ILCS 14/15, which places various limitations on an organization's ability to retain, collect, disclose and destroy biometric information. The update to this chapter discusses a decision by the Illinois Supreme Court on May 20, 2021 as well as subsequent federal court decisions relating to insurance coverage for claims against businesses under BIPA. Chapter 107, Insurance, § 107:3.
- In *FTC v. SPM Thermo-Shield, Inc.*, the Federal Trade Commission claimed that defendants marketed their Thermo-Shield roof and wall coatings using deceptive energy savings claims. The complaint alleged that the representations regarding the strength of the insulation in the coatings were false, as the coatings did not provide the claimed energy savings. On March 21, 2022, the United States District Court for the Middle District of Florida granted summary judgment in favor of the FTC, holding

that while the coatings may provide energy savings, any such savings would vary widely based on several factors and, since defendants failed to include such qualifiers in their advertising, the advertising was deceptive and misleading under Section 5 of the Federal Trade Commission Act. Chapter 113, Consumer Protection, § 113:39.

- On November 5, 2021, the U.S. Secretary of Labor, acting through the Occupational Health and Safety Administration (OHSA), issued an emergency standard mandating that all employers with at least 100 employees require their employees to obtain vaccinations against the COVID-19 virus or, in the alternative, to take a weekly COVID-19 test at their own expense. Many States, businesses, and nonprofit organizations challenged OSHA's rule in courts of appeals across the country. Various parties then filed applications in the Supreme Court requesting that it stay OSHA's emergency standard, arguing that OSHA's mandate exceeds its statutory authority and is otherwise unlawful. The Supreme Court consolidated two of those applications, heard expedited argument on January 7, 2022, and granted the applications for stays on January 13, 2022, stating that "[a]pplicants are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate." The Court's per curiam opinion concludes: "Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category." Chapter 121, Occupational Safety and Health Claims, § 121:10.50.
- In 2022, the Supreme Court weighed in on challenges to fees for investment offerings in retirement plans. Current and former employees brought an action under ERISA against administrators of defined-contribution employee retirement plans, alleging that they breached their fiduciary duty of prudence by offering a range of investment options that was too broad, causing participant confusion and poor investment decisions, by failing to monitor and control recordkeeping fees, and by offering mutual funds and annuities in form of retail share classes that carried higher fees than those charged by otherwise identical institutional share classes. The United States District Court for the Northern District of Illinois granted defendants' motion to dismiss for failure to state a claim, and the United States Court of Appeals for the Seventh Circuit affirmed. The Supreme Court vacated and remanded, holding that the mere fact that the plans offered some mutual funds and annuities with lower fees did not preclude plaintiffs' claims for breach of duty of prudence. The Supreme Court noted

that a plan fiduciary is responsible for "monitor[ing] all plan investments and remov[ing] any imprudent" investment options from a plan. Accordingly, the Supreme Court directed the court of appeals on remand to conduct a review of whether an investment is "imprudent," as determining whether a fiduciary breached its obligations under a plan involves a context-specific analysis. Additionally, and importantly for all plan fiduciaries, the Supreme Court noted that such an analysis involves reviewing the circumstances prevailing at the time and the "range of reasonable judgments" the fiduciary could make based on "experience and expertise." Chapter 124, ERISA, § 124:56.

- In recent years, an increasing number of courts have permitted consumers of generic medication to pursue claims against a brand-name manufacturer (a theory of recovery often referred to as "innovator liability"). However, in a recent decision from the multi-district litigation involving the heartburn drug Zantac and its generic forms, the court dismissed plaintiffs' innovator claims under the laws of 35 states while recognizing that California and Massachusetts recognize this theory of liability. The court nevertheless dismissed the California and Massachusetts claims for lack of personal jurisdiction on the ground that the defendants were not "at home" in California or Massachusetts (for purposes of general jurisdiction), and the relevant labeling decisions did not occur in either state (for purposes of specific jurisdiction). Chapter 131, Food and Drug, § 131:10.
- In *Scalin v. Societe Nationale*, the Seventh Circuit heard claims brought by successors in interest to Holocaust victims seeking compensation for the alleged theft of victims' belongings during World War II by railroad workers for the French national railroad. The Seventh Circuit interpreted the Supreme Court's decision in *Nestle USA, Inc. v. Doe* as "reiterat[ing]" the proposition from its earlier decision in *Kiobel v. Royal Dutch Petroleum Co.* that "the ATS [Alien Tort Statute] does not provide a remedy for triple-foreign events" in which plaintiffs allege that nationals of another country were injured by a foreign entity in a foreign nation, which "lack a domestic link." Further, the Seventh Circuit explained that *Nestle* "add[ed] that this rule" could not be "sidestepped by asserting that a company in the United States aided and abetted foreign wrongs. . .[or] by transferring to a U.S. citizen a foreign national's claim against a foreign entity for injury suffered abroad." Therefore, on August 6, 2021, the Seventh Circuit affirmed the district court's dismissal of the plaintiffs' complaint. Chapter 159, Alien Tort Statute and Torture Victim Protection Act, § 159:36.
- On December 29, 2021, in *Yates v. Pinellas Hematology & Oncology, P.A.*, the Eleventh Circuit held that the Excessive Fines Clause of the Eighth Amendment also applies to False

Claims Act penalties in cases where the government does not intervene. The qui tam relator argued that the Eighth Amendment was inapplicable because the United States was not a party in non-intervened cases, and thus no excessive fine was imposed by it. The court held that whether or not the government intervenes, the Eighth Amendment applies because a qui tam relator is a government actor seeking to vindicate the government's rights, predicated on an injury to the government, not an injury to the relator. Chapter 160, The False Claims Act, § 160:24.

- Identifying the right legal question, finding the right vehicle for presenting it, and winning on the merits may not settle the issue for all time. The Supreme Court can and occasionally does reverse course, abandoning an earlier decision or line of decisions. That happened most recently on June 24, 2022, in *Dobbs v. Jackson Women's Health Organization*, where the Court overruled *Roe v. Wade* and later decisions recognizing a constitutional right to abortion. Although the majority opinion was limited to that question, both a concurring opinion and a dissenting opinion raised the possibility that *Dobbs* could be used to undermine any rights premised on the doctrine of substantive due process. What will ultimately happen to substantive due process and the rights that depend on it is difficult to predict; all that can be said with confidence for now is that *Dobbs* has invited more litigation to address ground that most observers had thought settled. Chapter 163, Constitutional Litigation, § 163:10.
- On January 10, 2022, former minor leaguer Daniel Concepcion filed a class action under the antitrust laws and the Fair Labor Standards Act against Major League Baseball, commissioner Rob Manfred, former commissioner Bud Selig, and all thirty clubs, seeking to represent classes alleging violations of antitrust law, the FLSA, and Puerto Rico wage-and-hour law. Specifically, Concepcion alleges that minor league players make an unlawfully low salary as a result of MLB's reserve clause, which gives franchises exclusive rights to a player's services for seven seasons and which Concepcion alleges is anticompetitive. On May 23, 2022, MLB filed a motion to dismiss on several grounds, predominantly arguing that Concepcion's claims are barred by both the statute of limitations and MLB's antitrust exemption. The motion remained pending as of October 14, 2022. Chapter 171, Sports, § 171:31.
- In 2021, the Federal Trade Commission finalized a rule relating to "Made in the USA" and other U.S.-origin claims on labels, codifying the FTC's enforcement policy and ability to seek remedies including damages, penalties, and other relief. Although the rule does not impose any new requirements, it codifies the FTC's prior enforcement policy and enables the FTC to seek civil penalties of up to $43,280

per violation of the rule, perhaps indicating that the FTC intends to increase enforcement actions in the year to come. The FTC has already brought its first action under this rule against Lithionics Battery LLC, alleging that the lithium ion cells Lithionics used were made in China, not the U.S. The case was settled for $105,319.56 in civil penalties, and a stipulated order was entered prohibiting Lithionics from making "Made in the USA" and other unsupported origin misrepresentations going forward. Chapter 173, Fashion and Retail, § 173:13.

- Before the Biden Administration could adopt new regulations, the U.S. Supreme Court elected to address the scope of the Environmental Protection Agency's authority to regulate carbon dioxide emissions from existing power plants, agreeing to hear challenges to the Obama Administration's Clean Power Plan even though the regulations implementing the Plan had never gone into effect. On June 30, 2022, in *West Virginia v. Environmental Protection Agency*, the Court ruled that EPA does not have the authority to regulate carbon dioxide emissions from existing coal- and gas-fired power plants using the "generation shifting" approach of the Clean Power Plan whereby states were encouraged to require power plants to shift to cleaner sources of energy. The Court determined that EPA's authority to adopt this type of regulation, which would significantly impact the economy on a nationwide scale, presents a "major question" and requires a "clear congressional authorization." The Court held that Section 111(d) of the Clean Air Act does not provide such clear authorization and that the Clean Power Plan approach therefore is not permitted. However, the Court did not decide whether EPA may *only* adopt measures applied at the individual source of carbon dioxide emissions—the basis for the Trump Administration's Affordable Clean Energy Rule. Chapter 177, Environmental Claims, § 177:45.
- On August 16, 2022, President Biden signed the Inflation Reduction Act of 2022 into law. The legislation addresses an extremely broad range of issues from prescription drug prices, alternative minimum taxes and Internal Revenue Service Funding among others. A key component of the bill relates, however, to climate related issues. Through a combination of direct subsidies and tax credits the bill will promote a substantial move towards decarbonization via transitions to clean and alternative energy and more rapid adoption of electric vehicles. Although preliminary, assessments of the legislation's impact suggest that it will materially assist progress towards meeting the nation's goals for greenhouse gas reductions in conformity with the Paris Accords. Chapter 178, Climate Change, § 178:10.50.

Conclusion

All royalties from the sale of this publication and its Supplements go to the Section of Litigation of the American Bar Association. On behalf of the Section 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.

November 2022

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