

Table of Contents

CHAPTER 1. SUBJECT MATTER JURISDICTION

III. FEDERAL QUESTION JURISDICTION

B. THE STATUTORY SCOPE OF “ARISING UNDER” JURISDICTION

§ 1:15 Introduction to the statutory scope of “arising under” jurisdiction

V. SUPPLEMENTAL JURISDICTION

§ 1:38 Introduction

§ 1:42 Limitations on supplemental jurisdiction

VI. CONSTITUTIONAL LIMITATIONS ON JURISDICTION

A. JUSTICIABILITY

§ 1:49 Standing

CHAPTER 2. PERSONAL JURISDICTION AND SERVICE

IV. CONSTITUTIONAL DUE PROCESS REQUIREMENTS

§ 2:21 Minimum contacts

§ 2:23 Specific jurisdiction

V. TRADITIONAL BASES FOR PERSONAL JURISDICTION

§ 2:34 Designation of an agent for service of process

VI. APPLICATION OF DUE PROCESS TO SPECIFIC BUSINESS/COMMERCIAL PERSONS

§ 2:40 Agents/attorneys

VII. DUE PROCESS ANALYSIS FOR PARTICULAR COMMERCIAL ACTIVITIES

§ 2:50 Internet

CHAPTER 3. VENUE, FORUM SELECTION, AND TRANSFER

II. STRATEGY CONSIDERATIONS FOR FORUM SELECTION

§ 3:2 Role of venue requirement

III. LEGAL PRINCIPLES FOR FORUM SELECTION

A. GENERAL VENUE STATUTE

§ 3:15 Substantial part of events or omissions under 28 U.S.C.A. § 1391(b)(2)

B. SPECIAL VENUE STATUTES

2. Particular Claims

§ 3:21 Arbitration

C. FORUM SELECTION CLAUSES

§ 3:30 General principles

§ 3:31 Enforcing or challenging forum selection clauses

IV. CHALLENGES TO VENUE

§ 3:42 Dismissal or transfer of action based on improper venue or lack of personal jurisdiction

§ 3:43 Transfer or dismissal of action for convenience of venue and 28 U.S.C.A. § 1404(a)

§ 3:47 Forum non conveniens

CHAPTER 4. INVESTIGATION OF THE CASE

I. INTRODUCTION

§ 4:2 Why conduct investigations?

§ 4:3 The decision to hire an investigator

II. INVESTIGATIONS AT PARTICULAR STAGES

§ 4:4 Prefiling investigations

§ 4:8 Alternative dispute resolution

III. RETENTION OF INVESTIGATORS

§ 4:11 Ethics

TABLE OF CONTENTS

- § 4:12 Accountability and responsibility
- § 4:13 The retainer agreement
- § 4:14 Professional licenses and insurance
- § 4:17 Availability and subcontractors
- § 4:19 Billing and costs

IV. PLANNING THE INVESTIGATION

- § 4:24 Communication and teamwork

V. INVESTIGATIVE GOALS AND APPROACHES

- § 4:25 Investigative goals

VI. TOOLS AVAILABLE IN AN INVESTIGATION

B. PUBLIC INFORMATION

- § 4:34 The Internet
- § 4:35 Commercial databases

C. PEOPLE AS SOURCES

- § 4:42 Interviews of witnesses—Tape recording
- § 4:44 Interviews of witnesses—Demands for payment and other requests
- § 4:45 Hiring former employees of an adversary

D. SURVEILLANCE AND FORENSICS

- § 4:46 Surveillance
- § 4:49 Forensics—Enhancing video and audio recordings
- § 4:51 Forensics—Electronic data
- § 4:53 Forensics—Stings
- § 4:54 Forensics—Polygraphs

VII. ADDITIONAL LEGAL CONSIDERATIONS; PRIVILEGES

- § 4:58 Statutory restrictions—The Bank Secrecy Act
- § 4:59 Statutory restrictions—Telephone records

VIII. ASSET SEARCHES

- § 4:69 Steps to be taken in an asset search—Public records searches

IX. PRACTICE AIDS

- § 4:72 Forms—Model investigative firm retainer agreement

CHAPTER 5. INTERNAL INVESTIGATIONS

I. INTRODUCTION

- § 5:1 Scope note

II. OBJECTIVES AND OTHER PRELIMINARY CONSIDERATIONS

- § 5:2 Goals and potential pitfalls
- § 5:3 Internal investigation triggers
- § 5:4 Common allegations where an investigation may be appropriate

III. LEGAL FRAMEWORK—EXPECTATION OF COOPERATION

A. OVERVIEW

- § 5:5 Expectation of cooperation
- § 5:6 U.S. Sentencing Guidelines for Organizations
- § 5:7 Principles of Federal Prosecution of Business Organizations
- § 5:8 DOJ actions highlighting cooperation and deferred prosecution agreements

F. DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (“DODD-FRANK”)

- § 5:25 Risks of reporting out before reporting up

IV. WHO SHOULD CONDUCT AN INVESTIGATION?

- § 5:27 In-house counsel
- § 5:28 Outside counsel
- § 5:29 Use of auditors and other advisors

V. PLANNING AN INVESTIGATION

- § 5:31 Scope and purpose
- § 5:32 Identity of client
- § 5:34 Indemnification and advancement rights

VI. CONDUCTING THE INVESTIGATION

- § 5:39 Managing documents—Locating documents
- § 5:40 Managing documents—Collection and review of documents
- § 5:42 Witness interviews—Mechanics of interview
- § 5:44 Witness interviews—Corporate *Miranda*/*Upjohn* warnings
- § 5:46 Witness interviews—Joint representation
- § 5:48 Witness interviews—Maintaining record of investigation

VII. POST-INVESTIGATION ACTION

- § 5:49 Overview

A. REPORTING THE RESULTS OF THE INVESTIGATION

- § 5:50 Written or oral report

TABLE OF CONTENTS

VIII. PRACTICE AIDS

A. CHECKLISTS

§ 5:59 Checklist—Conducting an internal investigation

B. FORMS

§ 5:60 Forms—Sample SEC formal order review request

CHAPTER 6. CONGRESSIONAL INVESTIGATIONS

IV. LIMITS ON CONGRESS' INVESTIGATIVE AUTHORITY

C. COMMON LAW PRIVILEGES AND CONFIDENTIALITY

§ 6:18 Attorney-client privilege

V. ENFORCING AND PROTECTING CONGRESSIONAL INVESTIGATIVE AUTHORITY

B. OTHER CRIMINAL LAW PROVISIONS

§ 6:26 Perjury, false statements, and obstruction of Congress prosecutions

CHAPTER 7. CASE EVALUATION

I. INTRODUCTION

§ 7:2 Strategy, objectives, and preliminary considerations

VIII. QUANTITATIVE TECHNIQUES FOR CASE EVALUATION AND THEIR LIMITATIONS

§ 7:28 Typical quantitative approaches in litigation analysis and its benefits

§ 7:31 Limitations of quantitative approaches—Inability to appreciate the significance of probability assessments

§ 7:35 Limitations of quantitative approaches—Does the quantitative approach capture how cases are tried or how juries think?

IX. CASE EVALUATIONS IN SPECIFIC CONTEXTS

§ 7:37 Settlement

§ 7:38 Sarbanes-Oxley; internal investigations; compromised privileges

CHAPTER 8. THE COMPLAINT

II. STRATEGY, OBJECTIVES AND PRELIMINARY CONCERNS IN DRAFTING THE COMPLAINT

A. IN GENERAL

§ 8:7 Early judicial scrutiny of the complaint

C. STRATEGIC CONCERNS FAVORING FACTUALLY DETAILED PLEADINGS

§ 8:33 Factors favoring factually detailed complaints—Certain allegations subject to heightened pleading standards by rule or common-law

III. LAW AND PROCEDURE

A. *TWOMBLY* AND *IQBAL*

§ 8:51 Technical pleading requirements under *Twombly* and *Iqbal*—Particularly relevant decisions interpreting the *Twombly* and *Iqbal* standard

B. PLEADING REQUIREMENTS UNDER THE FEDERAL RULES

§ 8:57 Heightened pleading standards—Particularity required in alleging fraud or mistake under Fed. R. Civ. P. 9(b)

§ 8:58 Heightened pleading standards—Defamation suits

§ 8:60 Heightened pleading standards—Application of the PSLRA to securities fraud cases

§ 8:71 Other pleading Rules—Reasonable inquiry pursuant to Fed. R. Civ. P. 11

§ 8:72 Other pleading Rules—Amending or supplementing the complaint pursuant to Fed. R. Civ. P. 15

§ 8:77 Other pleading Rules—Pleading considerations under Sarbanes-Oxley

CHAPTER 9. RESPONSES TO COMPLAINTS

II. PRELIMINARY CONSIDERATIONS

§ 9:6 Overview of Fed. R. Civ. P. 12

III. SERVICE OF RESPONSE

§ 9:8 Mechanics of service

§ 9:9 Mechanics of service—Multiple defendants

§ 9:10 Calculating the time to respond

§ 9:12 Calculating the time to respond—Extensions of time in which to respond

TABLE OF CONTENTS

IV. MOTIONS TO DISMISS

A. IN GENERAL

§ 9:15 Timing of motion to dismiss

B. DEFENSES: FED. R. CIV. P. 12(b)(1) TO 12(b)(5)

§ 9:18 Lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2)

§ 9:20 Insufficient process and/or service of process under Fed. R. Civ. P. 12(b)(4) and (5)

C. DEFENSES: FED. R. CIV. P. 12(b)(6)

§ 9:21 Failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6), generally

§ 9:23 Common strategies for Fed. R. Civ. P. 12(b)(6) motions—Seeking dismissal based on *Twombly/Iqbal*

§ 9:24 Common strategies for Fed. R. Civ. P. 12(b)(6) motions—Distinguishing between factual allegations and legal conclusions under *Twombly/Iqbal*

§ 9:25 Common strategies for Fed. R. Civ. P. 12(b)(6) motions—Determining whether a claim for relief is “plausible” under *Twombly/Iqbal*

§ 9:26 Common strategies for Fed. R. Civ. P. 12(b)(6) motions—Rule 9 and other special pleading standards

§ 9:30 Conversion into summary judgment motion

E. DEFENSES: MOTION TO COMPEL ARBITRATION

§ 9:33 Motion to compel arbitration under Fed. R. Civ. P. 12(b)

V. OTHER PROVISIONS OF RULE 12

§ 9:35 Motion for a more definite statement under Fed. R. Civ. P. 12(e)

§ 9:38 Motion to strike under Fed. R. Civ. P. 12(f)

VII. AFFIRMATIVE DEFENSES

A. IN GENERAL

§ 9:52 Pleading requirements for affirmative defenses

B. RULE 8(c) AFFIRMATIVE DEFENSES

§ 9:56 Accord and satisfaction

§ 9:63 Estoppel—Judicial estoppel

§ 9:69 Laches

§ 9:75 Statute of limitations

VIII. COUNTERCLAIMS

§ 9:83 Jurisdictional limitations

CHAPTER 10. THIRD-PARTY PRACTICE

I. INTRODUCTION

§ 10:1 Scope note

III. PROCEDURE FOR THIRD-PARTY ACTIONS

A. BRINGING THIRD-PARTY ACTIONS

§ 10:7 Timing and nature of motion

§ 10:8 Claims that may be brought as third-party actions

§ 10:10 Claims that may be brought as third-party actions—
Limitations on third-party claims

§ 10:13 Discretion of court

B. DEFENDING AGAINST THIRD-PARTY ACTIONS

§ 10:18 Counterclaims, crossclaims, and claims against other parties

IV. SITUATIONS IN WHICH A THIRD PARTY IS NAMED

§ 10:24 Claims by or against insurers

§ 10:26 Commercial contract claims

§ 10:31 Admiralty claims

V. PRACTICE MATERIALS

A. PROCEDURAL CHECKLISTS

§ 10:33 Checklists—Defending against a third-party complaint

Table of Contents

CHAPTER 11. COMPARISON WITH COMMERCIAL LITIGATION IN STATE COURTS

II. LAW AND PROCEDURE

- § 11:4 Perceived quality and tendencies of judiciary—What segment of the judiciary should be evaluated?
- § 11:5 Perceived quality and tendencies of judiciary—Variables affecting perceptions of judicial quality
- § 11:9 Precedent on key case issues

B. PRETRIAL CONSIDERATIONS

- § 11:18 Speed of disposition of cases

CHAPTER 12. COMPARISON WITH BUSINESS AND COMMERCIAL LITIGATION IN NEW YORK STATE COURTS

II. COMMENCING AN ACTION

- § 12:3 Forms of action
- § 12:6 Venue

IV. DISPOSITIVE MOTIONS

- § 12:15 Motion to dismiss
- § 12:17 Stay of discovery pending dispositive motions

V. DISCOVERY

- § 12:19 Electronic discovery

CHAPTER 13. COMPARISON WITH BUSINESS AND COMMERCIAL LITIGATION IN DELAWARE COURTS

- § 13:3 Trial court jurisdiction and composition—Chancery Court subject matter jurisdiction
- § 13:5 Trial court jurisdiction and composition—Jurisdiction and forum selection clause

- § 13:19 Expedited litigation in trial courts—Standard for expedition—
“Sufficiently colorable claim”
- § 13:27 Discovery practice—Stays of discovery pending motions to
dismiss.
- § 13:54 Dispositive motions and pre/post-trial briefing—Dispositive
motions—Motions to dismiss; motions for judgment on the
pleadings
- § 13:55 Dispositive motions and pre/post-trial briefing—Dispositive
motions—Motions to dismiss under Rule 23.1
- § 13:57 Dispositive motions and pre/post-trial briefing—Pre/post-trial
briefing
- § 13:81 Fiduciary duties—Indemnification of directors, officers, and
owners
- § 13:84 Contracts—Remedies—Expectation damages

CHAPTER 14. COMPARISON WITH BUSINESS AND COMMERCIAL LITIGATION IN CANADA

- § 14:10 Court structure—The United States federal court system—
Federal jurisdiction
- § 14:14 Role of lawyers and the judiciary
- § 14:16 Personal jurisdiction and venue—United States
- § 14:20 Personal jurisdiction and venue—Forum defenses—Forum
non conveniens
- § 14:21 Provisional remedies
- § 14:22 Pre-litigation considerations
- § 14:27 Economic torts—Commercial defamation and
disparagement
- § 14:30.50 Contractual interpretation in Canada and the U.S. *[New]*
- § 14:31 Contractual limitations on liability
- § 14:34 Excuse doctrines—Impossibility
- § 14:35 Excuse doctrines—Impracticability
- § 14:36 Excuse doctrines—Frustration of purpose
- § 14:37 Excuse doctrines—Force majeure
- § 14:37.50 Excuse doctrines—Material adverse effect covenants and
other similar clauses *[New]*
- § 14:40 Legal remedies (monetary)
- § 14:43 Class actions and other types of group claims—Class
certification and the predominance requirement
- § 14:48 Discovery—Initial disclosures
- § 14:50 Discovery—Discovery tools
- § 14:65 Arbitration—Defenses
- § 14:67 Trials
- § 14:81 Appeals—Leave to appeal

TABLE OF CONTENTS

**CHAPTER 15. COMPARISON WITH
BUSINESS AND COMMERCIAL
LITIGATION IN MEXICO**

**II. PRELIMINARY AND STRATEGIC
CONSIDERATIONS**

- § 15:3 Judicial system
- § 15:7 Civil law not common law
- § 15:12 Injunctions, provisional measures, and pre-filing actions

III. LITIGATION PROCEDURES

- § 15:16 Defendant's responsive pleading
- § 15:24 Evidentiary stage—Documentary evidence
- § 15:28 Evidentiary stage—Expert opinions
- § 15:29 Evidentiary stage—Privileges

CHAPTER 16. CIVIL JUSTICE REFORM

I. INTRODUCTION

- § 16:2 The evolution of the Federal Rules of Civil Procedure
- § 16:3 Is civil justice reform needed?

III. CURRENT CIVIL JUSTICE REFORM EFFORTS

- § 16:10 The 2015 Amendments to the Federal Rules of Civil Procedure

IV. PRACTICAL GUIDANCE

- § 16:32 Civil justice reform during 2020

**CHAPTER 17. REMOVAL TO FEDERAL
COURT**

III. REMOVAL JURISDICTION

A. IN GENERAL

- § 17:5 Historical background and reasons for removal jurisdiction
- § 17:6 Differences between original and removal jurisdiction

B. FEDERAL QUESTION JURISDICTION

- § 17:9 “Federal-question” and the well-pleaded complaint rule—
Complete preemption doctrine

**C. DIVERSITY OF CITIZENSHIP
JURISDICTION**

- § 17:13 Snap removal

E. SPECIAL CONSIDERATIONS FOR CLASS ACTIONS

§ 17:19 Removal of class actions

IV. AMOUNT IN CONTROVERSY

§ 17:25 Factors to be considered—Punitive damages

V. VENUE AND TRANSFER

§ 17:32 Potential for transfer

VI. REMOVAL PROCEDURE

§ 17:33 Special removal procedures, generally

§ 17:34 Who may seek removal

§ 17:35 Who may seek removal—Disregard of nominal, unserved, or fraudulently joined parties permitted

§ 17:37 Time for seeking removal

§ 17:45 Notice of removal—Explanation of grounds for removal

VII. REMAND

§ 17:54 Grounds for remand—Nonjurisdictional defects

§ 17:59 Process of remand—Joinder of additional defendants

VIII. REVIEW OF ORDERS RELATING TO REMAND

§ 17:67 Review of orders granting remand is generally prohibited—Nonstatutory exceptions to the general rule

IX. REVIEW OF ORDERS RELATING TO REMAND

§ 17:70 Appeal or mandamus

CHAPTER 18. JOINDER, SEVERANCE, AND CONSOLIDATION

III. JOINDER OF PARTIES

A. REQUIRED AND INDISPENSABLE PARTIES: FED. R. CIV. P. 19

§ 18:12 Joinder of parties generally and the three-step test

§ 18:13 The roles of state and federal law

§ 18:14 Determining who is a “required party” generally.

§ 18:16 Does the absent party have an interest that should be protected?

§ 18:17 Would existing parties face the risk of inconsistent obligations?

§ 18:18 Joinder by court order

TABLE OF CONTENTS

§ 18:20 Is the absent party “indispensable” so that the entire action must be dismissed?

§ 18:21 First factor: prejudice to the absent party or those already parties

B. PERMISSIVE JOINDER OF PARTIES: FED. R. CIV. P. 20

§ 18:27 Permissive joinder of parties: Rule 20

§ 18:28 The requirements for permissive joinder

IV. SEVERANCE OF PARTIES AND CLAIMS: FED. R. CIV. P. 21

§ 18:33 Grounds for severing parties or claims

§ 18:34 Severance creates a separate action

V. CONSOLIDATION OF ACTIONS: FED. R. CIV. P. 42(b)

§ 18:36 Consolidation under Rule 42(a)

CHAPTER 19. MULTIDISTRICT LITIGATION

I. INTRODUCTION

§ 19:2 Overview of the MDL process

II. STRATEGY AND PRELIMINARY CONSIDERATIONS

§ 19:8 Strategic options—Advantages and disadvantages to plaintiffs of MDL

§ 19:14 Sources of authority

§ 19:15 Composition of the Panel

III. INITIATION OF MDL PROCEEDINGS

§ 19:17 Initiation of MDL by motion

IV. APPEARING BEFORE THE PANEL

§ 19:23 Factors impacting the decision on transfer

§ 19:24 Selection of transferee court and judge

§ 19:27 Powers of transferor and transferee courts

V. CASE ADMINISTRATION FOLLOWING TRANSFER

§ 19:34 Counsel arrangements—Compensation and trust accounts

§ 19:41 Transferee court retention of case for trial

VIII. PRACTICE AIDS

C. RELEVANT CASES

- § 19:70 Common disaster
- § 19:71 Product liability
- § 19:73 Antitrust
- § 19:75 Employment practices
- § 19:76 Patent
- § 19:79 Customer data security breach
- § 19:80 Miscellaneous

CHAPTER 20. LITIGATION MANAGEMENT BY JUDGES

- § 20:1 Scope note
- § 20:3 Q & A: Viewpoints and tips regarding the judge's role in managing litigation
- § 20:5 Potential early case resolution
- § 20:17 Multidistrict litigation
- § 20:19 Discovery—"Proportionality" limitations on discovery
- § 20:30 Judicial litigation management approaches in the wake of COVID-19

CHAPTER 21. COORDINATION OF LITIGATION IN STATE AND FEDERAL COURTS

- § 21:2 Brief history of coordination of state and federal litigation
- § 21:4 Preliminary and strategic considerations—Types of coordination
- § 21:5 Preliminary and strategic considerations—Advantages and disadvantages of coordination
- § 21:6 Preliminary and strategic considerations—Factors affecting coordination
- § 21:8 Preliminary and strategic considerations—Initiation of coordination
- § 21:10 Legal bases for coordination—Authority to coordinate litigation
- § 21:11 Legal bases for coordination—Authority to coordinate litigation—Consent
- § 21:12 Legal bases for coordination—Authority to coordinate litigation—Administrative power of courts
- § 21:14 Legal bases for coordination—Authority to coordinate litigation—Stays
- § 21:15 Legal bases for coordination—Authority to coordinate litigation—Injunctions in aid of jurisdiction
- § 21:20 Obtaining and disseminating information about related actions
- § 21:22 Coordination of discovery—Coordinated scheduling
- § 21:23 Coordination of discovery—Coordinated discovery plans
- § 21:24 Coordination of discovery—Common discovery masters
- § 21:26 Coordination of discovery—Joint depositions

TABLE OF CONTENTS

§ 21:27 Coordination of discovery—Common document depository

**CHAPTER 22. CLAIM AND ISSUE
PRECLUSION**

V. CLAIM PRECLUSION

§ 22:16 The elements of claim preclusion—Final judgment on the merits

VII. JUDICIAL ESTOPPEL

§ 22:27 Judicial estoppel

§ 22:28 Judicial estoppel—Elements and application

VIII. FULL FAITH AND CREDIT

§ 22:30 The elements and application of full faith and credit

IX. CRIMINAL CASES

§ 22:31 Criminal convictions and guilty pleas in subsequent federal civil actions

XI. SETTLEMENTS

§ 22:37 The effect of settlements on subsequent claims

CHAPTER 23. PROVISIONAL REMEDIES

II. PRELIMINARY INJUNCTIONS

**C. STATUTORY FRAMEWORK AND
PROCEDURAL REQUIREMENTS**

§ 23:12 Evidence in support of or in opposition to a preliminary injunction

§ 23:17 Order

**D. GROUNDS FOR THE GRANT OR DENIAL OF
PRELIMINARY INJUNCTIONS**

§ 23:23 Irreparable harm

**E. PRELIMINARY INJUNCTION IN
PARTICULAR AREAS OF LAW**

§ 23:33 Intellectual property

§ 23:35 Internet

§ 23:36 Foreign Injunctions

III. TEMPORARY RESTRAINING ORDER

A. STRATEGY

§ 23:39 The pleadings

B. PROCEDURES FOR OBTAINING A TRO

§ 23:51 Security

§ 23:56 Appealability

C. LEGAL PRINCIPLES APPLICABLE TO THE GRANT OR DENIAL OF A TRO

§ 23:57 Substantive law

IV. PREJUDGMENT SEIZURE

§ 23:63 Limitations imposed on prejudgment seizure by the United States Constitution

V. RECEIVERSHIP

C. TYPES OF RECEIVERSHIP

§ 23:80 Primary and ancillary receiverships

VI. LIS PENDENS

§ 23:98 Persons acquiring interest before filing of lis pendens

Table of Contents

CHAPTER 24. PARTIES

III. REAL PARTY IN INTEREST

- § 24:9 Party must possess substantive right
- § 24:15 Effect of assignment or subrogation of claim—Valid subrogation shifts real party in interest status
- § 24:19 Challenges to real party in interest status—Opportunity to cure defect

IV. CAPACITY TO SUE AND BE SUED

- § 24:25 Applicability—Individuals
- § 24:33 Applicability—Limited liability companies

V. INTERPLEADER

- § 24:38 Two forms of interpleader: rule interpleader and statutory interpleader
- § 24:43 Statutory interpleader
- § 24:45 Form of trial

VI. INTERVENTION

- § 24:53 Intervention as of right—Applicant’s ability to protect interest will be impaired or impeded
- § 24:54 Intervention as of right—Applicant’s interest must be inadequately represented
- § 24:56 Permissive intervention—Federal statutory basis

VII. SUBSTITUTION OF PARTIES

- § 24:67 Death
- § 24:71 Death—Effect of substitution
- § 24:76 Transfer of interest during litigation—Within court’s discretion

CHAPTER 25. CLASS ACTIONS

III. THE REQUIREMENTS OF FED. R. CIV. P. 23

A. FED. R. CIV. P. 23(a)

- § 25:8 General requirements of Fed. R. Civ. P. 23(a)
- § 25:9 “Numerosity”—Joinder impracticable

B. FED. R. CIV. P. 23(b)

- § 25:22 Court must make findings, based on evidence in record—
Predominance: common questions predominate

H. SETTLEMENT OF CLASS ACTIONS, FED. R. CIV. P. 23(e)

- § 25:43 Substantive factors governing court approval of settlement

K. ATTORNEYS' FEES AND COSTS: FED. R. CIV. P. 23(h)

- § 25:48 The procedure for seeking attorneys' fees

V. BASIC DUE PROCESS ISSUES IN CLASS ACTION LITIGATION

- § 25:62 Personal jurisdiction

VI. SUBJECT MATTER JURISDICTION IN CLASS ACTIONS

- § 25:65 Subject matter jurisdiction over claims in class actions—In federal court

X. ARBITRATION AND CLASS ACTION WAIVERS

- § 25:77 Arbitration and enforceability of class action waivers

CHAPTER 26. DERIVATIVE ACTIONS BY STOCKHOLDERS

I. INTRODUCTION

- § 26:3 Derivative vs. direct claims
§ 26:6 The business judgment rule and the demand requirement—The demand requirement

II. INITIATING AND RESPONDING TO THE DERIVATIVE CLAIM

- § 26:10 Initiating the derivative claim—Thorough factual investigation
§ 26:16 Asserting a derivative claim—Where to file and choice of law issues

IV. OTHER ISSUES

- § 26:35.50 Special-purpose acquisition companies *[New]*

TABLE OF CONTENTS

**CHAPTER 27. LITIGATING
INTERNATIONAL DISPUTES IN
FEDERAL COURTS**

III. LAW AND PROCEDURE

A. SERVICE OF PROCESS

- § 27:10 Fed. R. Civ. P. 4—Fed. R. Civ. P. 4(f)
- § 27:11 Hague Service Convention
- § 27:12 Methods of service

B. JURISDICTION

1. Personal Jurisdiction

- § 27:19 Personal jurisdiction, generally
- § 27:20 Constitutional considerations
- § 27:21 Constitutional considerations—Practical considerations
- § 27:24 Constitutional considerations—Personal jurisdiction based on presence of subsidiary—Alter ego

2. Subject Matter Jurisdiction

- § 27:29 International comity as a limitation on the extraterritorial application of U.S. law *[Retitled]*

**C. EXTRATERRITORIAL APPLICATION OF
UNITED STATES LAW**

- § 27:32 Overview
- § 27:35 Limitations on the extraterritorial application of RICO

E. VENUE AND FORUM NON CONVENIENS

- § 27:46 Forum non conveniens—Elements of doctrine of forum non conveniens—Adequate alternative forum

F. SOVEREIGN IMMUNITY

- § 27:50 Background
- § 27:53 Exceptions to immunity—Commercial activity
- § 27:54 Exceptions to immunity—Tort exception
- § 27:56 Exceptions to immunity—Waiver of immunity
- § 27:57 Exceptions to immunity—Arbitration exception
- § 27:58 Exceptions to immunity—Expropriation exception
- § 27:60 Service of process
- § 27:61 Personal jurisdiction
- § 27:62 Due process requirements
- § 27:64 Venue
- § 27:65 Counterclaims
- § 27:67 Attachment of sovereign property
- § 27:68 Standards of proof

§ 27:70 Conflict of laws

G. ACT OF STATE DOCTRINE

§ 27:76 General principles—Requirement that the outcome of the case “turn upon” the effect of the act in question

H. DISCOVERY

§ 27:89 The Hague Evidence Convention

§ 27:90 The Inter-American Convention on Letters Rogatory

I. SPECIAL ISSUES IN TRIAL OF INTERNATIONAL DISPUTES

§ 27:106 Proof of foreign law—Courts’ ability to consider “any relevant material or source”

J. ENFORCEMENT OF UNITED STATES JUDGMENTS ABROAD

§ 27:109 Enforcement of judgments abroad, generally

K. USE OF FEDERAL COURTS TO ASSIST FOREIGN PROCEEDINGS

§ 27:113 Obtaining information located in the United States for use in foreign or international proceedings (28 U.S.C.A. § 1782)—Request may be made by a “foreign or international tribunal” or upon application by an “interested person”

CHAPTER 28. CROSS-BORDER LITIGATION

II. STRATEGY, OBJECTIVES AND PRELIMINARY CONSIDERATIONS

§ 28:4 Types of cross-border litigation—Bankruptcy proceedings

III. CHOOSING A FORUM AND AVOIDING PARALLEL PROCEEDINGS

§ 28:11 Strategic advantages and disadvantages of particular international business venues—Singapore

§ 28:13 Strategic advantages and disadvantages of particular international business venues—Arbitral tribunals

IV. MANAGING DISCOVERY IN CROSS BORDER LITIGATION

§ 28:18 Discovery considerations—Taking foreign evidence—Oversight by foreign courts

TABLE OF CONTENTS

**V. STRATEGIES TO AVOID OR DEFEND AGAINST
CROSS BORDER LITIGATION**

§ 28:21 Anti-suit injunctions

CHAPTER 29. DISCOVERY STRATEGY

III. LAW AND PROCEDURE

§ 29:7 Preserving your client's documents for discovery—Strategy for locating, preserving, and collecting electronically stored information

§ 29:12 Joint defense agreements and common interest doctrine

A. FACT DISCOVERY

§ 29:25 Discovery related motion practice—Motion for sanctions (Fed. R. Civ. P. 37(b))

B. EXPERTS

§ 29:33 Motions in limine

§ 29:34 Motions in limine—Motions in limine and experts

CHAPTER 30. PRIVILEGES

§ 30:7 Attorney-client privilege—Purpose and definition—Communication for the purpose of obtaining legal advice

§ 30:9 Attorney-client privilege—Exceptions—Crime-fraud

§ 30:27 Attorney-client privilege in the corporate context—Internal investigations

§ 30:37 Preparation of privilege logs

§ 30:38 Clawback of produced privileged material *[Retitled]*

CHAPTER 31. DEPOSITIONS

II. TYPES OF DEPOSITIONS

§ 31:3 Depositions upon oral examination

III. DEPOSITION PROCEDURE

§ 31:6 Noticing depositions

§ 31:9 Noticing depositions—Place of deposition

§ 31:13 Deposition by remote means

§ 31:14 Method of recording

§ 31:17 Method of recording—Video recording

**IV. COORDINATION OF DEPOSITIONS WITH
OTHER DISCOVERY**

§ 31:26 Guidelines for planning deposition discovery—Exhibit predesignation

V. PARTY AND NON-PARTY DEPOSITIONS

- § 31:27 Compelling and using “party depositions”
- § 31:28 Officer, director or managing agent
- § 31:30 Fed. R. Civ. P. 30(b)(6) depositions—Effect of Fed. R. Civ. P. 30(b)(6) testimony
- § 31:31 Fed. R. Civ. P. 30(b)(6) depositions—Designation of subject matter
- § 31:33 Fed. R. Civ. P. 30(b)(6) depositions—Designation of witness
- § 31:34 Fed. R. Civ. P. 30(b)(6) depositions—Preparing designated witness
- § 31:37 Former employees
- § 31:38 Third-party deponents

VI. LIMITATIONS ON DEPOSITION DISCOVERY

- § 31:42 One-deposition rule
- § 31:44 Duration/scope
- § 31:46 Executives and other key employees

VII. WITNESS PREPARATION

- § 31:50 Deposition defender’s preparation—Clarification of privileges

VIII. CONDUCT OF DEPOSITION

- § 31:58 Attendance by persons other than witness and counsel
- § 31:59 Reservation of right to correct
- § 31:60 Sequence and scope of examination
- § 31:62 Instructing witness not to answer question
- § 31:63 Recesses

IX. USE OF DEPOSITION TESTIMONY

- § 31:68 Use of depositions for motions and other proceedings prior to trial
- § 31:74 Use of depositions where live testimony is taken—Presentation of deposition testimony

X. MOTIONS FOR PROTECTIVE ORDER OR TO COMPEL

- § 31:75 Suspension of deposition

Table of Contents

CHAPTER 32. DOCUMENT DISCOVERY

I. INTRODUCTION

§ 32:1 Scope note

II. PRELIMINARY CONSIDERATIONS

A. INTERPLAY OF RULES GOVERNING DOCUMENT DISCOVERY

§ 32:2 Overview

§ 32:3 Federal Rules of Civil Procedure

§ 32:5 Local rules

B. INFORMAL MECHANISMS FOR OBTAINING DOCUMENTS

§ 32:7 Documents in public domain

III. LAW AND PROCEDURE

A. INTRODUCTION TO FORMAL DOCUMENT DISCOVERY AND INITIAL DISCLOSURES

§ 32:19 Basis for document discovery

§ 32:21 Initial disclosure obligations

§ 32:26 Initial disclosure obligations—Obligation to conduct reasonable inquiry

§ 32:29 Sanctions for noncompliance—“Automatic” sanctions

B. DOCUMENT DISCOVERY BETWEEN PARTIES UNDER FED. R. CIV. P. 34

1. Scope of Discovery

§ 32:32 Fed. R. Civ. P. 34(a)

§ 32:33 Fed. R. Civ. P. 34(a)—Applicability in corporate context

2. Requesting Documents

§ 32:35 Degree of particularity required

§ 32:36 Time, place, and manner of inspection

3. Responding to Document Requests

§ 32:41 Considerations in drafting responses

§ 32:43 Waiver of objections

**C. ADDITIONAL METHODS FOR DOCUMENT
DISCOVERY BETWEEN PARTIES; FED. R.
CIV. P. 30, 33 AND 45**

§ 32:49 Obtaining documents in connection with depositions

§ 32:51 Producing documents in response to interrogatory requests

**D. DOCUMENT DISCOVERY WITH
NONPARTIES; FED. R. CIV. P. 45
SUBPOENAS**

§ 32:56 Issuance and service requirements

§ 32:57 Responding to subpoenas

§ 32:58 Modifying and quashing subpoenas

§ 32:60 Strategic considerations

**CHAPTER 33. DISCOVERY OF
ELECTRONICALLY STORED
INFORMATION**

**II. STRATEGY, OBJECTIVES, AND PRELIMINARY
CONSIDERATIONS**

§ 33:14 Early conferences and discussions of electronic discovery
issues

**III. FEDERAL RULES PROVISIONS APPLICABLE
TO DISCOVERY OF ESI**

§ 33:17 Rule 26(b)(1): Scope of discovery—Relevance and
proportionality

§ 33:18 Rule 26(b)(2): Limitation on scope

§ 33:19 Rule 34(b): Responses and objections; form of production

§ 33:20 Rule 26(b)(2)(B) and Rule 26(c): Protective orders

§ 33:21 Rule 37: Motions to compel sanctions for failure to comply
with an order, and remedies for loss of ESI

§ 33:22 Unintentional productions

§ 33:23 Rule 45: Nonparty discovery

§ 33:24 Awareness of local rules regarding electronic discovery

IV. THE DUTY TO PRESERVE ESI

§ 33:25 Duty to preserve, generally

§ 33:26 When does the duty apply?

§ 33:27 Scope of the duty

§ 33:28 Backup tapes and media: application of the reasonableness
standard

§ 33:29 Counsel's obligation to advise

§ 33:30 Compliance in general

TABLE OF CONTENTS

- § 33:31 Compliance in general—Issuance of a legal hold notice
- § 33:32 Compliance in general—Content of the legal hold notice
- § 33:33 Compliance in general—Scope of distribution of the legal hold notice and due diligence
- § 33:34 Compliance in general—Monitoring compliance with legal holds

V. PRESERVATION ORDERS FOR ESI

- § 33:35 “First day” orders vs. permanent preservation orders
- § 33:36 Motions for preservation orders
- § 33:37 Motions for preservation orders—Addressing the onerous order

VI. DISCLOSURE AND PRODUCTION OF ESI

- § 33:39 Responding to discovery and description of ESI sources
- § 33:40 Protective orders
- § 33:41 Protective orders—Data security
- § 33:44 Discovery from sources outside the U.S.
- § 33:46 Types of ESI
- § 33:48 Distinctive aspects of ESI
- § 33:49 Distinctive aspects of ESI—Embedded data and metadata
- § 33:55 Document sharing/management systems and collaborative platforms

VII. COST-SHARING AND COST-SHIFTING

- § 33:61 Cost sharing and cost shifting
- § 33:62 Taxation of costs

VIII. DISCOVERY DISPUTES AND CLAIMS OF SPOILIATION

- § 33:63 Potential types of electronic discovery disputes
- § 33:64 Legal standards for spoliation and doctrine
- § 33:65 Inherent authority may still be invoked by courts
- § 33:66 Pre-2015 spoliation standard
- § 33:67 Documentation of diligence and “reasonable steps”
- § 33:68 Range of sanctions and remedies

IX. PRACTICE AIDS

A. CHECKLISTS

- § 33:74 Checklists—Investigating electronic communication systems

B. FORMS

- § 33:75 Forms—Sampling order
- § 33:76 Forms—Case management order provisions governing production of privileged materials
- § 33:77 Forms—Case management order provisions governing production issues *[Deleted]*

CHAPTER 34. INTERROGATORIES

III. THE PLACE OF INTERROGATORIES IN AN EFFECTIVE DISCOVERY PROGRAM

§ 34:11 Contention interrogatories

IV. LAW AND PROCEDURE

A. IN GENERAL

§ 34:16 Number

§ 34:17 Effect of local rules

B. ANSWERING INTERROGATORIES

§ 34:18 Who answers

§ 34:20 Verification of interrogatories

§ 34:32 Sanctions for failing to properly respond to interrogatories

CHAPTER 35. REQUESTS FOR ADMISSIONS

II. STRATEGIC CONSIDERATIONS

§ 35:4 Discovery tools

III. PROCEDURE FOR MAKING AND RESPONDING TO REQUESTS FOR ADMISSIONS

B. RESPONSES

§ 35:12 Objections—Undue burden

§ 35:13 Objections—Relevance

§ 35:14 Objections—Vagueness

IV. CONSEQUENCES OF ADMISSIONS

§ 35:20 Using admissions

§ 35:21 Withdrawing admissions

CHAPTER 36. SELECTION OF EXPERTS, EXPERT DISCLOSURE AND THE PRETRIAL EXCLUSION OF EXPERT TESTIMONY

§ 36:15 Pretrial exclusion of expert testimony—Timeliness of disclosures

§ 36:16 Pretrial exclusion of expert testimony—Reliability of expert testimony

TABLE OF CONTENTS

- § 36:17 Pretrial exclusion of expert testimony—Reliability of expert testimony—*Daubert*, *Kumho*, and Fed. R. Evid. 702
- § 36:18 Pretrial exclusion of expert testimony—Reliability of expert testimony—Illustrative case law on admissibility

CHAPTER 37. MOTION PRACTICE

III. STRATEGIC CONSIDERATIONS FOR PARTICULAR MOTIONS

- § 37:10 Relationship to other planned or potential motions
- § 37:15 Ethics

V. MOTION PROCEDURE

- § 37:30 Form of motion papers
- § 37:31 Service and filing of motion papers
- § 37:42 Reply papers
- § 37:44 Hearing

CHAPTER 38. SUMMARY JUDGMENT

II. SUMMARY JUDGMENT UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

- § 38:5 Applicable standard
- § 38:10 Motion and opposition papers and supporting materials
- § 38:11 Genuine disputes of material fact
- § 38:12 Judgment as a matter of law
- § 38:15 Judgment as a matter of law—Intellectual property cases

CHAPTER 39. DECLARATORY JUDGMENTS

II. BASIS OF THE REMEDY

- § 39:2 Historical underpinning and essence of the remedy
- § 39:4 Functionality and applicable uses

III. FACTORS GOVERNING ISSUANCE

- § 39:6 Discretionary jurisdiction
- § 39:7 Actual live dispute
- § 39:8 Parties with adverse interests
- § 39:10 Availability of other remedies
- § 39:11 Pendency of other action
- § 39:12 Anticipatory suit; first-filed rule

CHAPTER 40. MAGISTRATE JUDGES AND SPECIAL MASTERS

III. THE AUTHORITY, ROLES, RESPONSIBILITIES, AND UTILIZATION OF MAGISTRATE JUDGES

- § 40:9 Parties' consent
- § 40:10 Vacating a consensual reference to a magistrate judge
- § 40:12 Procedure on pretrial matters
- § 40:13 Procedure on pretrial matters—Objection to order or report and recommendation
- § 40:21 Tenure and removal of magistrate judges
- § 40:24 Types of cases handled by magistrates—Civil pretrial matters handled by U.S. magistrate judges under 28 U.S.C.A. § 636(b) during the 12-month period ending September, 2021 as of November 18, 2021 *[Retitled]*
- § 40:25 Types of cases handled by magistrates—Reports and recommendations issued by U.S. magistrate judges under 28 U.S.C.A. § 636(b) during the 12-month period ending September, 2021 as of November 18, 2021 *[Retitled]*
- § 40:26 Types of cases handled by magistrates—Evidentiary proceedings conducted by U.S. magistrate judges under 28 U.S.C.A. § 636(b) during the 12-month period ending September, 2021 as of November 18, 2021 *[Retitled]*
- § 40:27 Types of cases handled by magistrates—Civil consent cases terminated by U.S. magistrate judges under 28 U.S.C.A. § 636(b) during the 12-month period ending September, 2021 as of November 18, 2021 *[Retitled]*
- § 40:28 Types of cases handled by magistrates—Matters disposed of by U.S. magistrate judges for the 10-Year Period Ended September 30, 2021 *[Retitled]*

CHAPTER 41. SCHEDULING AND PRETRIAL CONFERENCES AND ORDERS

II. COURT MANAGEMENT AND COUNSEL PRACTICE NOTES

- § 41:4 Counsel practice notes

III. SCHEDULING CONFERENCES AND ORDERS

B. THE COMPLEX CASE

- § 41:15 Identifying the complex case

IV. FINAL PRETRIAL CONFERENCES AND ORDERS

- § 41:25 Final pretrial conference—Attendance at the final pretrial conference

CHAPTER 42. SETTLEMENTS

IV. ACHIEVING SETTLEMENT

B. TECHNIQUES

- § 42:50 Offers of judgment under Fed. R. Civ. P. 68
- § 42:51 Offers of judgment under Fed. R. Civ. P. 68—Cost-shifting where plaintiff rejects the offer and fails to obtain a more favorable judgment

V. DOCUMENTING SETTLEMENT

A. IN GENERAL

- § 42:55 Avoiding “buyer’s remorse”

B. DRAFTING WRITTEN SETTLEMENT AGREEMENT

3. Drafting Conditions, Consideration, and Dismissal

- § 42:61 Conditions precedent
- § 42:62 Consideration; money

4. Drafting Release

- § 42:64 Preliminary considerations
- § 42:65 General release
- § 42:66 Releases limited to specific claims

7. Confidentiality

- § 42:98 Private confidentiality agreements

8. Nonsettling Persons

- § 42:102 Effect on contribution among defendants

9. Settlement Enforcement and Challenges

- § 42:112 Showing required to set aside agreement—Duress

CHAPTER 43. JURY SELECTION

II. THE COMPOSITION OF THE VENIRE

- § 43:4 The Jury Selection and Service Act of 1968—The venire selection plan
- § 43:8 Challenges to adherence to the Act or a venire selection plan
- § 43:15 Pandemic-related restrictions and corresponding modifications to summoning jurors

III. THE COURT’S ADMINISTRATION OF VOIR DIRE

- § 43:16 In general
- § 43:17 The court’s discretion
- § 43:20 Juror questionnaires
- § 43:21 Preparation for voir dire by court
- § 43:22 Content of voir dire by court

IV. LIMITATIONS ON VOIR DIRE BY JUDGES AND ATTORNEYS

- § 43:26 Prohibited areas of examination

VII. THE SIZE OF THE JURY

- § 43:42 In general

X. EXERCISING CHALLENGES FOR CAUSE AND PEREMPTORY STRIKES

- § 43:57 Exercising strikes under the “struck jury” method

XI. RESTRICTIONS ON THE USE OF PEREMPTORY STRIKES

A. *BATSON* AND ITS SCOPE

- § 43:73 Status of peremptory challenges

C. LEGAL STANDARDS FOR JUDGING *BATSON* CHALLENGES

- § 43:82 Relationship to or affiliation with a party or witness
- § 43:83 Prior dealings with subject matter

CHAPTER 44. USE OF JURY CONSULTANTS

- § 44:4 Strategic advantages—Comparative advantage in social-science research
- § 44:8 Strategic considerations—Protecting confidentiality

CHAPTER 45. MOTIONS IN LIMINE

II. STRATEGIC CONSIDERATIONS

- § 45:3 Determining whether to file motion in limine

III. USES OF MOTIONS IN LIMINE

B. IN CONJUNCTION WITH FEDERAL RULES OF EVIDENCE

TABLE OF CONTENTS

- § 45:7 Relevance issues under Rules 401 to 404
- § 45:12 Expert testimony under Rule 702
- § 45:13 Lay opinion testimony under Rule 701
- § 45:14 Hearsay issues under Rules 801 to 806
- § 45:15 Demonstrative and summary exhibits

C. TO ADDRESS NONEVIDENTIARY ISSUES

- § 45:19 Statute of limitations
- § 45:21 Choice of law
- § 45:24 Exclusion of claims and defenses
- § 45:26 Availability of punitive damages
- § 45:29 Motions in limine which seek resolution of substantive issues

IV. APPELLATE ISSUES RELATING TO MOTION IN LIMINE PRACTICE

- § 45:31 Requirement of contemporaneous trial objection

Table of Contents

CHAPTER 46. TRIAL STRATEGY AND ADVOCACY

III. STRATEGY, OBJECTIVES, AND PRELIMINARY CONSIDERATIONS

- § 46:12 Telling a story—Developing a theme
- § 46:20 Trial consequences of pretrial conferences and submissions—
Exclusion of evidence not included in pretrial submissions
- § 46:24 Voir dire

IV. LAW AND PROCEDURE

- § 46:27 Who decides issues of law and fact and application of law to
fact
- § 46:29 Presumptions

V. CONDUCTING THE TRIAL

- § 46:31 In general
- § 46:32 Less is more
- § 46:33 Believe in your story and show it
- § 46:38 Witnesses
- § 46:40 Making a record
- § 46:42 Closing arguments
- § 46:43 COVID-19 and remote trials

CHAPTER 47. EFFECTIVE TRIAL PERFORMANCE

- § 47:14 COVID-19 and similar future emergencies

CHAPTER 48. OPENING STATEMENTS

II. LAW AND PROCEDURE

- § 48:8 Structure and scope of opening statement
- § 48:9 Structure and scope of opening statement—Ethical limitations

III. PRESENTATION OF THE OPENING STATEMENT

- § 48:19 Addressing weaknesses

CHAPTER 49. PRESENTATION OF THE CASE IN CHIEF

II. STRATEGIC CONSIDERATIONS

- § 49:4 The impact of multiple parties on the ordering of the trial
- § 49:5 Time limits imposed on the case in chief

VII. PREPARATION OF WITNESSES FOR TRIAL

- § 49:31 An important caution to be observed

VIII. DOCUMENTARY EXHIBITS AT TRIAL

- § 49:33 The impact of technology on the case in chief

X. REMOTE PROCEEDINGS

- § 49:36 Overview

CHAPTER 50. CROSS-EXAMINATION

I. INTRODUCTION

- § 50:2 The basic rules: scope of cross-examination, accepted objections and limitations

V. TEN RULES FOR CROSS-EXAMINING EXPERTS

- § 50:24 Attack the assumptions when the witness testifies “based on the record”
- § 50:27 Recommended cross when the expert testifies based upon the witness’ own perceptions—Cross-examination issues under *Daubert* and *Kumho*
- § 50:28 Do not expand the report by a cross that invites additional opinions

CHAPTER 51. EXPERT WITNESSES

III. LAW AND PROCEDURE

A. QUALIFICATION OF EXPERT WITNESSES

2. In General

- § 51:14 Rule 702 requires that the witness be qualified as an expert
- § 51:15 Bases on which a witness may be qualified as an expert
- § 51:17 Bases on which a witness may be qualified as an expert—Skill
- § 51:20 Bases on which a witness may be qualified as an expert—Education
- § 51:21 Scope of expert qualifications
- § 51:22 Scope of expert qualifications—Application of the approach to qualification

TABLE OF CONTENTS

- § 51:23 Scope of expert qualifications—The “fit” between the expertise and the case issue
- § 51:24 Scope of expert qualifications—Questions of credibility are for the factfinder
- § 51:25 Scope of expert qualifications—Expert’s relationships with the parties as a basis for disqualification
- § 51:26 Procedural issues concerning expert witness qualification
- § 51:27 Procedural issues concerning expert witness qualification—Proffering an expert
- § 51:28 Appellate review of expert witness qualification

B. REQUIREMENT THAT WITNESS HAVE SPECIALIZED KNOWLEDGE WHICH WILL ASSIST TRIER OF FACT

- § 51:31 The reliability of specialized knowledge—“Scientific” knowledge
- § 51:32 The reliability of specialized knowledge—“Technical, or other specialized knowledge”
- § 51:36 The specialized knowledge must assist the trier of fact—Supreme Court’s review of the *Joiner* case

C. REQUIREMENT THAT EXPERT TESTIMONY BE BASED ON RELIABLE DATA

- § 51:39 Sources for the expert’s opinion—Facts perceived by the expert
- § 51:44 Bases for expert’s opinion—Reasonableness of bases relied on by experts

D. EXPERT OPINION AS TO ULTIMATE ISSUE OF FACT

- § 51:48 Appellate review of the admission of expert testimony on ultimate issues

E. REQUIREMENT THAT EXPERT TESTIMONY NOT BE CONFUSING OR PREJUDICIAL

- § 51:50 The expert testimony must not be confusing or prejudicial under Rule 403
- § 51:54 Application of Rule 403 to exclude expert evidence—Eyewitness testimony
- § 51:55 Application of Rule 403 to exclude expert evidence—Improper comparisons

G. PRESENTATION OF EXPERT TESTIMONY

2. Cross-Examination

- § 51:62 Designated expert witness called by opposing party
- § 51:63 Scope of cross-examination of opposing expert
- § 51:64 Scope of cross-examination of opposing expert—Cross-examination for bias or prejudice

IV. PRACTICE AIDS

B. JURY INSTRUCTIONS

§ 51:69 Jury instructions—Limiting instruction under Rule 105

§ 51:70 Jury instructions—Opinion testimony—Experts

CHAPTER 52. EVIDENCE

II. TRIAL PREPARATION

§ 52:3 Performing admissibility review

§ 52:4 Knowing the judge

§ 52:7 Demonstrative exhibits and illustrative aids

III. LEGAL PRINCIPLES

A. IN GENERAL

§ 52:12 Foundation

§ 52:13 Foundation—Foundation requirements for specific forms of evidence

B. HEARSAY

§ 52:17 Nonhearsay communications—Party admissions and prior inconsistent testimony of nonparty witnesses

§ 52:19 Nonhearsay communications—“Statements not offered for the truth”—Conduct and state of mind

§ 52:22 Nonhearsay communications—Using a writing to refresh memory

§ 52:30 Other hearsay exceptions—Residual exception

CHAPTER 53. FINAL ARGUMENTS IN JURY AND BENCH TRIALS

I. INTRODUCTION

§ 53:1 Scope note

II. STRATEGY AND OBJECTIVES

§ 53:3 Analyzing your case

§ 53:5 Practice tips

III. LAW AND PROCEDURE

§ 53:6 General rules governing closing arguments

§ 53:9 Prohibited conduct—Vouching for witnesses

§ 53:10 Prohibited conduct—Stating personal beliefs

§ 53:11 Prohibited conduct—Giving improper instructions on law

§ 53:12 Prohibited conduct—Attacking judge’s ruling on evidence

TABLE OF CONTENTS

§ 53:13 Prohibited conduct—Using improper language that excites
prejudice or passion

§ 53:14 Prohibited conduct—Invoking the “Golden Rule”

**VI. UTILIZING VISUAL, GRAPHIC, AND OTHER
SUPPORTING AIDS IN CLOSING ARGUMENT**

§ 53:28 Exhibits

§ 53:31 Technology in the courtroom

VIII. OTHER MATTERS FOR CONSIDERATION

§ 53:39 Explaining burden of proof

§ 53:44 Objections to argument

§ 53:47 Bench trials

**CHAPTER 54. JURY CONDUCT,
INSTRUCTIONS, AND VERDICTS**

**II. THE BASICS OF A JURY TRIAL FROM THE
JURORS’ PERSPECTIVE**

C. QUESTIONS

§ 54:7 Questions from the jurors

§ 54:8 Questions from the jurors—Strategy considerations

III. JURY INSTRUCTIONS

§ 54:12 Purpose of jury instructions

§ 54:13 Drafting guidelines

§ 54:15 Practice tips

**IV. JURORS’ CONDUCT DURING AND AFTER
DELIBERATIONS**

§ 54:18 Use of materials during deliberations

§ 54:19 Use of materials during deliberations—Materials or
information outside the record

§ 54:21 Questions to the court

CHAPTER 55. COMPENSATORY DAMAGES

**II. STRATEGY, OBJECTIVES, AND PRELIMINARY
CONSIDERATIONS**

A. PLAINTIFF’S STRATEGY AND ANALYSIS

§ 55:3 Pleading compensatory damages

§ 55:4 Proving compensatory damages

B. DEFENDANT’S STRATEGY AND ANALYSIS

§ 55:11 Sufficient and persuasive data and support

III. BASIC LEGAL RULES AND REQUIREMENTS

A. COMPENSATORY DAMAGES IN GENERAL

§ 55:15 Contract and business tort damages

B. FACT OF INJURY, CAUSATION, AND THE AMOUNT OF DAMAGES

§ 55:21 Causation—Proximate cause or foreseeability of injury

C. OTHER LIMITATIONS ON RECOVERY

§ 55:26 Statutory caps on damages

E. BURDEN OF PROOF IN GENERAL

§ 55:32 What the defendant must prove

F. TRIAL AND POST-TRIAL CONSIDERATIONS

§ 55:33 Bifurcated trial

§ 55:35 Additur

IV. TYPES OF COMPENSABLE DAMAGES

§ 55:39 Lost value

§ 55:41 Lost profits—New business or new products

§ 55:45 Lost opportunities

§ 55:48 Unjust enrichment

§ 55:52 Nominal damages

V. PRACTICE AIDS AND OTHER MATERIALS

C. JURY INSTRUCTIONS AND VERDICT FORMS

§ 55:63 Verdict forms

§ 55:65 Damages in arbitration

CHAPTER 56. PUNITIVE DAMAGES

II. STRATEGIC ISSUES IN PUNITIVE DAMAGES LITIGATION

§ 56:3 Choice of law

§ 56:5 The answer

§ 56:10 Procedural motions—Bifurcation or trifurcation of trial

§ 56:12 Procedural motions—Standard of proof

§ 56:27 Developing a punitive damages defense—Other judgments, settlements, and lawsuits

TABLE OF CONTENTS

III. PUNITIVE DAMAGES CASE LAW

- § 56:54 The reprehensibility guidepost in the lower courts
- § 56:55 The ratio guidepost in the lower courts
- § 56:56 The comparative fines guidepost in the lower courts
- § 56:58 The role of corporate financial condition in the lower courts

CHAPTER 57. SPECIFIC PERFORMANCE

I. INTRODUCTION

- § 57:1 Scope note
- § 57:2 Form of equitable relief
- § 57:3 Relationship between specific performance and injunctive relief

II. STRATEGIC CONSIDERATIONS

- § 57:4 Obtaining an order of specific performance
- § 57:6 Seeking preliminary injunctive relief in a claim for specific performance

III. CLAIM FOR SPECIFIC PERFORMANCE

- § 57:10 Elements of claim—Existence of a valid, binding contract
- § 57:11 Elements of claim—Failure to perform under the contract
- § 57:12 Elements of claim—Plaintiff has performed or willing to do so
- § 57:13 Elements of claim—Inadequate remedy at law

IV. DEFENSES TO CLAIM FOR SPECIFIC PERFORMANCE

- § 57:14 Failure to establish necessary elements
- § 57:21 Laches
- § 57:22 Balancing of harms
- § 57:23 Inadequacy of consideration

V. ISSUES REGARDING SPECIFIC SUBJECT-MATTER CONTRACTS

- § 57:25 Real property
- § 57:27 Loan agreements
- § 57:28 Personal services contracts
- § 57:29 Mergers and acquisitions

VI. PROCEDURAL ISSUES

- § 57:32 Amount in controversy
- § 57:36 The form of a specific performance remedy
- § 57:38 Enforcement issues—Compelling performance pursuant to Fed. R. Civ. P. 70
- § 57:39 A decree of specific performance order and an award of damages
- § 57:39.50 Appellate considerations *[New]*

CHAPTER 58. RESCISSION

- § 58:1 Scope note
- § 58:2 Rescission requirements
- § 58:3 Factors to consider in deciding to seek rescission
- § 58:15 Grounds for rescission—Fraud and misrepresentation
- § 58:20 Grounds for rescission—Impossibility or frustration of purpose

Table of Contents

CHAPTER 59. NEGOTIATIONS

II. THE ART OF NEGOTIATING

§ 59:2 Negotiation theories

§ 59:3 Negotiation theories—Practical application of in litigation

IX. ETHICAL CONSIDERATIONS IN NEGOTIATIONS

§ 59:43 Ethical duties—To opposing parties—Representations and omissions

CHAPTER 60. MEDIATION

I. INTRODUCTION

§ 60:1 Scope note

II. STRATEGY, OBJECTIVES, AND PRELIMINARY CONSIDERATIONS

B. PRACTICAL CONSIDERATIONS

§ 60:9 The Rise in Virtual Mediation

CHAPTER 61. ARBITRATION

II. THE FEDERAL ARBITRATION ACT: SCOPE AND APPLICATION

§ 61:3 Generally

§ 61:6 Exceptions

III. PROCEDURES FOR ENFORCING ARBITRATION AGREEMENTS

§ 61:7 Compelling arbitration

§ 61:9 Federal law governs scope of arbitration

§ 61:10 Separability of arbitration clauses

IV. DEFENSES TO ENFORCEABILITY OF ARBITRATION AGREEMENTS

- § 61:12 Lack of agreement
- § 61:14 Duress; undue influence
- § 61:15 Unconscionability
- § 61:16 Waiver and related defenses

V. DOMESTIC COMMERCIAL ARBITRATION

- § 61:19 Appointment of arbitrators
- § 61:21 Provisional relief
- § 61:23 Discovery and subpoenas

VI. ARBITRATION AWARDS IN THE COURTS: PROCEDURES FOR CONFIRMATION, VACATUR, AND MODIFICATION

- § 61:27 Subject matter jurisdiction

VIII. VACATING THE AWARD: FAA § 10

- § 61:43 Manifest disregard of the law

CHAPTER 62. INTERNATIONAL ARBITRATION

III. INTERNATIONAL ARBITRATION ASSOCIATIONS

- § 62:6 Capabilities of international arbitration associations

V. INVESTOR-STATE ARBITRATION

- § 62:13 Law and procedure

VI. DRAFTING AN INTERNATIONAL ARBITRATION CLAUSE

- § 62:16 Examples of standard arbitration clauses
- § 62:23 Mediation

IX. PARTIES TO AN ARBITRATION AGREEMENT

- § 62:42 Multiple parties

XI. SELECTING THE ARBITRATORS

- § 62:45 Independence and impartiality of the arbitrators

XII. ICC PRACTICE: THE TERMS OF REFERENCE

- § 62:48 Overview

TABLE OF CONTENTS

XIV. DISCOVERY

§ 62:58 Law applicable to the taking of evidence

XV. ETHICAL CONDUCT IN ARBITRATION

§ 62:59 Introduction

XVIII. THE HEARING

§ 62:72 Witness testimony

§ 62:73 Expert testimony

XIX. THE AWARD

§ 62:76 Form of award

XX. THE INTERNATIONAL FAA: SCOPE AND APPLICATION

§ 62:84 History and purpose of the IAC

CHAPTER 63. TRIAL AND POST-TRIAL MOTIONS

I. INTRODUCTION

§ 63:1 Scope note

II. TRIAL MOTIONS

§ 63:4 Motion during trial for judgment as a matter of law—Legal standard

§ 63:5 Motion during trial for judgment as a matter of law—Timing of the motion

§ 63:9 Motion during trial for judgment as a matter of law—Strategic considerations—Timing

§ 63:10 Motion during trial for judgment as a matter of law—Strategic considerations—Final thoughts

§ 63:12 Motion to exclude witnesses—Legal standard

§ 63:13 Motion to exclude witnesses—Timing of the motion

§ 63:17 Motion to conform pleadings—Legal standard

§ 63:19 Motion for a mistrial

§ 63:20 Motion for a mistrial—Legal standard

§ 63:21 Motion for a mistrial—Timing of the motion

§ 63:22 Motion for a mistrial—Strategic considerations

CHAPTER 64. JUDGMENTS

II. OBJECTIVES, STRATEGIES, AND TACTICAL CONSIDERATIONS

§ 64:5 Setting aside default judgments

§ 64:6 Consent judgments

III. NATURE AND ESSENTIAL REQUIREMENTS FOR A JUDGMENT

§ 64:8 Nature of judgment

IV. DEFAULT JUDGMENTS

§ 64:12 Entry of default—Effect of entry

§ 64:15 Obtaining a default judgment—Establishing damages

§ 64:18 Preclusive effects of default judgments

§ 64:19 Relief from default judgment

V. CONSENT JUDGMENTS

§ 64:20 Consent judgments, generally

§ 64:23 Judgment on multiple claims or involving multiple parties

VI. JUDGMENT AFTER TRIAL

§ 64:24 Form of judgment

§ 64:25 Findings of fact and conclusions of law

VII. ALTERATION OR AMENDMENT OF JUDGMENTS

§ 64:32 Overview of Rule 59(e), Rule 60(a), and Rule 60(b)—Grounds for alteration or amendment of a judgment under Fed. R. Civ. P. 59(e)

§ 64:34 Overview of Rule 59(e), Rule 60(a), and Rule 60(b)—Effect of motion to amend or alter judgment under Fed. R. Civ. P. 59(e)

VIII. RELIEF FROM JUDGMENT UNDER FED. R. CIV. P. 60

§ 64:36 Correction of clerical errors: Fed. R. Civ. P. 60(a)

§ 64:37 Obtaining relief under Fed. R. Civ. P. 60(b)

§ 64:38 Obtaining relief under Fed. R. Civ. P. 60(b)—Relief for mistake, inadvertence, surprise or excusable neglect: Fed. R. Civ. P. 60(b)(1)

§ 64:40 Obtaining relief under Fed. R. Civ. P. 60(b)—Fraud, misrepresentation, and other misconduct of adverse party: Fed. R. Civ. P. 60(b)(3)

§ 64:41 Obtaining relief under Fed. R. Civ. P. 60(b)—Void judgments: Fed. R. Civ. P. 60(b)(4)

§ 64:42 Obtaining relief under Fed. R. Civ. P. 60(b)—Judgment satisfied or no longer equitable: Fed. R. Civ. P. 60(b)(5)

§ 64:43 Obtaining relief under Fed. R. Civ. P. 60(b)—Other reasons justifying relief: Fed. R. Civ. P. 60(b)(6)

IX. POST-JUDGMENT PROCEDURAL ISSUES

§ 64:50 Prejudgment interest

TABLE OF CONTENTS

**CHAPTER 65. BANKRUPTCY CODE IMPACT
ON CIVIL LITIGATION IN THE
FEDERAL COURTS**

**II. THE BANKRUPTCY CODE AND BANKRUPTCY
JURISDICTION**

D. SCOPE OF THE AUTOMATIC STAY

- § 65:9 Limitations and exceptions to application of the automatic stay
- § 65:15 Guarantors, nonbankrupt codebtors, and other nondebtor third parties: the § 105 injunction

**E. POST-CONFIRMATION INJUNCTIONS,
RELEASES, AND EXCULPATION
PROVISIONS**

- § 65:19 Non-debtor Releases

**CHAPTER 66. COURT-AWARDED
ATTORNEY'S FEES**

II. STRATEGY OVERVIEW

- § 66:5 Posttrial and settlement strategy

**III. SUBSTANTIVE ENTITLEMENT TO COURT-
AWARDED ATTORNEY'S FEES**

- § 66:6 General lack of entitlement to attorney's fees—The American rule
- § 66:12 Exceptions to the American rule—Sanctionable conduct/bad faith awards—Rationale

**CHAPTER 67. COSTS AND
DISBURSEMENTS**

II. LAW AND PROCEDURE

**A. BASIC PRINCIPLES IN SEEKING
RECOVERY OF COSTS AND
DISBURSEMENTS**

- § 67:3 Applicable statutory and rule provisions
- § 67:4 Prevailing party

**C. COSTS FOR WHICH RECOVERY MAY BE
SOUGHT**

- § 67:13 Types of costs—Demonstrative evidence
- § 67:19 Types of costs—Photocopies
- § 67:25 Types of costs—Other costs

D. COURT AWARDING OF COSTS

- § 67:26 Procedure for filing verified bill of costs

E. COSTS ON APPEAL

- § 67:34 Proceedings in courts of appeals
- § 67:36 Proceedings in courts of appeals—Costs to be taxed in federal district court
- § 67:37 Proceedings in courts of appeals—Supersedeas bond and letter of credit

CHAPTER 68. SANCTIONS

III. LAW AND PROCEDURE

A. SANCTIONS UNDER Fed. R. Civ. P. 11

- § 68:5 Persons subject to sanctions under Fed. R. Civ. P. 11—Attorneys and law firms
- § 68:9 Conduct subject to sanctions under Fed. R. Civ. P. 11—Making frivolous legal contentions
- § 68:10 Conduct subject to sanctions under Fed. R. Civ. P. 11—Making factual contentions without evidentiary support
- § 68:17 Procedural considerations for sanctions initiated by motion—Safe harbor provision

B. DISCOVERY SANCTIONS

- § 68:23 Fed. R. Civ. P. 30(d)(2): deposition misconduct
- § 68:29 Fed. R. Civ. P. 37—Rule 37(d): failure to attend deposition, answer interrogatories, or respond to request to inspect

C. OTHER SANCTIONS UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

- § 68:32 Fed. R. Civ. P. 16(f): failure to obey pretrial orders or attend pretrial conferences

Table of Contents

CHAPTER 69. APPEALS TO THE COURTS OF APPEALS

II. APPELLATE REVIEW

§ 69:5 Threshold requirements for appealing—Appellate court jurisdiction—Final judgment rule

V. STEPS AND PROCEDURES IN THE APPELLATE PROCESS

§ 69:52 Initiating the appellate process—Commencing an appeal from a district court judgment or order—Commencing an appeal taken as a matter of right

CHAPTER 70. APPEALS TO THE SUPREME COURT

I. INTRODUCTION

§ 70:1 Scope note

II. PRELIMINARY CONSIDERATIONS

§ 70:2 The unique role of the Supreme Court and its consequences for business and commercial litigation

§ 70:6 The mechanics of Supreme Court practice

III. THE COURT'S JURISDICTION TO REVIEW DECISIONS OF FEDERAL AND STATE COURTS

§ 70:7 Jurisdiction to review decisions of the courts of appeals, district courts, and other federal courts

§ 70:9 Jurisdiction to review decisions of state courts—The requirement of finality

§ 70:11 Jurisdiction to review decisions of state courts—The requirement of a substantial federal question

IV. PRACTICE AND PROCEDURE ON PETITION FOR A WRIT OF CERTIORARI

§ 70:14 Factors guiding the Court in the exercise of its certiorari jurisdiction—Conflict in the lower courts over the question presented

§ 70:17 Timing at the petition stage

- § 70:18 Content of the petition
- § 70:19 Opposing certiorari review
- § 70:20 Reply, supplemental, and amicus briefs
- § 70:21 Disposition of the petition

V. PRACTICE AND PROCEDURE AT THE MERITS STAGE

- § 70:23 Timing and form of merits briefs
- § 70:26 Timing and form of merits briefs—Argument section
- § 70:27 Timing and form of merits briefs—Supplemental and amicus briefs
- § 70:28 Joint appendix
- § 70:29 Oral argument
- § 70:30 Oral argument—Preparation
- § 70:31 Oral argument—Procedure and etiquette

VI. PETITIONS FOR REHEARING, MOTIONS, AND APPLICATIONS

- § 70:34 Motions and applications

CHAPTER 71. ENFORCEMENT OF JUDGMENTS

II. LAW AND PROCEDURE

A. IN GENERAL

- § 71:6 State law procedures govern, generally
- § 71:10 Jurisdictional bases for enforcement actions

B. ADDRESSING SPECIAL PROBLEMS IN THE ENFORCEMENT OF JUDGMENTS

- § 71:12 Establishing successor liability to enforce a judgment against a third party
- § 71:15 Resisting enforcement of a judgment

C. DISCOVERY ATTENDANT TO A WRIT OF EXECUTION

- § 71:19 Scope of permissible discovery

D. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

- § 71:21 Overview
- § 71:22 Federal common law regarding recognition and enforcement of foreign judgments

TABLE OF CONTENTS

- § 71:27 Applicable state law relating to the enforcement and recognition of foreign judgments—Bases for nonrecognition of foreign judgments—Jurisdiction
- § 71:29 Applicable state law relating to the enforcement and recognition of foreign judgments—Bases for nonrecognition of foreign judgments—Personal jurisdiction
- § 71:32 Applicable state law relating to the enforcement and recognition of foreign judgments—Bases for nonrecognition of foreign judgments—Public policy

CHAPTER 72. LITIGATION AVOIDANCE AND PREVENTION

I. INTRODUCTION

- § 72:3 Trends in business and commercial litigation in the federal courts

II. FUNDAMENTAL STRATEGIES

A. MANAGING YOUR OWN BUSINESS CONDUCT

- § 72:7 Communicate truthfully and effectively

B. ORGANIZING YOUR BUSINESS

- § 72:10 Keep adequate records and have a meaningful document retention policy

C. AVOIDING DISPUTES ARISING FROM AGREEMENTS

- § 72:16 Importance of a writing
- § 72:17 Include provisions designed to avoid or limit litigation

III. SPECIFIC APPLICATIONS

- § 72:24 Americans with Disabilities Act
- § 72:29 Securities issues

CHAPTER 73. CRISIS MANAGEMENT

II. THE NATURE OF LEGAL CRISES

- § 73:5 Case studies and examples—Product liability cases
- § 73:7 Case studies and examples—Data security breaches
- § 73:10 Case studies and examples—Crises associated with war zones

III. MANAGING LEGAL CRISES

- § 73:13 Assembling the legal team

§ 73:24 Communications and public relations—Managing public statements

CHAPTER 74. TECHNIQUES FOR EXPEDITING AND STREAMLINING LITIGATION

I. INTRODUCTION

§ 74:1 Scope note

II. PRE-FILING CONSIDERATIONS

§ 74:3 Sources of resistance to expediting and streamlining litigation

§ 74:9 Cost-effective staffing

III. SCHEDULING AND PRE-TRIAL MOTIONS

§ 74:13 Multidistrict litigation

§ 74:21 Case management—Expert discovery and *Daubert* challenges

IV. DISCOVERY AND DISCOVERY DISPUTES

§ 74:24 Depositions

CHAPTER 75. COORDINATING COUNSEL

II. STRATEGY, OBJECTIVES AND PRELIMINARY CONSIDERATIONS

§ 75:3 Common issues to avoid

CHAPTER 76. BUDGETING AND CONTROLLING COSTS

§ 76:2 The importance of budgeting and cost controls in federal court litigation

§ 76:21 Preparing a litigation budget—Discovery—ESI protocols

CHAPTER 77. FEE ARRANGEMENTS

II. PRELIMINARY CONSIDERATIONS

§ 77:3 Practical requirements of fee arrangements

III. TYPES OF FEE ARRANGEMENTS

§ 77:6 Hourly

§ 77:19.50 Switching fee arrangements [*New*]

TABLE OF CONTENTS

**CHAPTER 78. THIRD-PARTY LITIGATION
FUNDING**

VIII. LEGAL CHALLENGES

§ 78:31 Disclosure of relationship

CHAPTER 79. LITIGATION TECHNOLOGY

I. INTRODUCTION

§ 79:2 Strategic considerations

§ 79:3 Technology in federal courts

§ 79:4 Technology and COVID-19

§ 79:5 Cybersecurity

II. PRETRIAL PHASE

§ 79:10 Service through electronic means

§ 79:11 Document strategy

§ 79:12 Document strategy—Choosing a document support firm

§ 79:17 Electronic discovery amendments to Federal Rules of Civil
Procedure

III. TRIAL PHASE

§ 79:32 Courtroom devices

V. GENERAL CONSIDERATIONS

§ 79:38 Technology assisting attorneys with disabilities

§ 79:39 Ethical considerations

CHAPTER 80. ARTIFICIAL INTELLIGENCE

§ 80:5 Preliminary considerations, analysis, and strategy—
Algorithmic bias—Seeking disclosure of the algorithm

§ 80:6 Expert considerations

§ 80:8 Connected machines—Product liability

§ 80:9 Connected machines—Misrepresentation

§ 80:10 eDiscovery

§ 80:11 Litigation analysis

§ 80:12 Legal research

§ 80:14 Professional conduct rules—Duty of competence

§ 80:17 Professional conduct rules—Unauthorized practice of law

§ 80:18 Professional conduct rules—Other ethical rules

CHAPTER 81. SOCIAL MEDIA

§ 81:3 Discovery—The social media sought must be relevant

CHAPTER 82. MARKETING TO POTENTIAL BUSINESS CLIENTS

II. STRATEGY, OBJECTIVES AND PRELIMINARY CONSIDERATIONS

§ 82:2 The marketplace

III. SPECIFIC VISIBILITY STRATEGIES

§ 82:6 Writing

§ 82:7 Speaking and teaching

VI. LEGAL CONSIDERATIONS

§ 82:52 Legal issues presented by marketing—Advertising

CHAPTER 83. TEACHING LITIGATION SKILLS

§ 83:7 Teaching oral advocacy—Cicero’s third and fourth canons: style and delivery

CHAPTER 84. PRO BONO

I. INTRODUCTION

§ 84:2 Why pro bono

§ 84:3 Bar association policies for pro bono

§ 84:4 Common areas for pro bono representation

II. STARTING A PRO BONO CASE

§ 84:5 Case selection and legal services providers

§ 84:6 Client screening

§ 84:9 Engagement and disengagement letters

III. PRACTICE POINTS IN PRO BONO CASES

§ 84:12 Case management—Costs

§ 84:14 Case management—Professional and ethical considerations

§ 84:16 Discovery in pro bono cases

§ 84:17 Settlement in pro bono cases

§ 84:18 Settlement in pro bono cases—Implications of settlement for client’s public benefits

§ 84:19 Costs and fee awards

IV. PRACTICE AIDS

§ 84:20 Practice checklist

§ 84:21 Forms—Engagement letter

§ 84:23 Forms—Co-counsel agreement

TABLE OF CONTENTS

**CHAPTER 85. ETHICAL ISSUES IN
COMMERCIAL CASES**

VI. TRIAL

§ 85:37 Trial publicity

CHAPTER 86. CIVILITY

I. INTRODUCTION

§ 86:2 Strategy, objectives, and preliminary considerations

§ 86:3 Formal reactions to incivility

**II. ADDRESSING UNCIVIL BEHAVIOR IN
SPECIFIC CONTEXTS**

§ 86:4 General incivility

§ 86:5 General incivility—Acquiescing to others' misconduct

§ 86:7 General incivility—Overly aggressive arguments

§ 86:8 Incivility throughout discovery

Table of Contents

CHAPTER 87. ANTITRUST

III. THE ELEMENTS OF A FEDERAL ANTITRUST VIOLATION

A. PROCEDURAL ELEMENTS

§ 87:16 Direct purchaser doctrine

B. SUBSTANTIVE ELEMENTS OF THE ANTITRUST CLAIM

§ 87:23 Section 1 of the Sherman Act

§ 87:26 Section 1 of the Sherman Act—Unreasonable restraint of trade

§ 87:29 Section 2 of the Sherman Act—Monopolization—Monopoly power

VII. DEFENSES AND EXEMPTIONS

B. EXEMPTIONS AND IMMUNITIES

§ 87:62 State action exemption

§ 87:65 Comity

CHAPTER 88. SECURITIES

III. LAW AND PROCEDURE

§ 88:16 Misstatements and omissions

§ 88:17 Materiality

§ 88:20 Reliance—Omissions and duties to disclose

§ 88:22 Reliance as a limiting doctrine—*Stoneridge*

§ 88:34 Manipulation

§ 88:35 Short-swing profits and insider trading

§ 88:36 Proxy litigation

§ 88:38 State law and the Securities Litigation Uniform Standards Act of 1998

IV. TRIAL AND PRETRIAL PROCEDURE

§ 88:42 The complaint—Pleading a misrepresentation

§ 88:44 The complaint—Pleading a misrepresentation—Forward-looking statements

- § 88:46 The complaint—Pleading scienter—The Supreme Court’s decisions in *Tellabs* and *Matrixx*
- § 88:49 Motions to dismiss
- § 88:50 Motions to dismiss—Legal theories

V. SPECIAL CONSIDERATIONS IN LITIGATION INVOLVING INVESTMENT COMPANIES AND INVESTMENT ADVISERS

- § 88:60 Special considerations
- § 88:63 Other implied rights of action

CHAPTER 89. CORPORATE LITIGATION REPORTING OBLIGATIONS

- § 89:7 Reporting to the SEC—Annual reporting—Accrual for loss contingencies
- § 89:10 Reporting to the SEC—Extraordinary SEC reporting on Forms 8-K and 6-K
- § 89:13 Reporting to private parties—Disclosure to auditors
- § 89:24 Sources of exposure—Private litigation exposure
- § 89:26 Sources of exposure—Private litigation exposure—New civil suits arising out of disclosures

CHAPTER 90. SECURITIZATION AND STRUCTURED FINANCE

II. OVERVIEW OF STRUCTURED FINANCE AND THE MECHANICS OF SECURITIZATION TRANSACTIONS

- § 90:8 The participants in a typical securitization transaction—Trustees
- § 90:12 The participants in a typical securitization transaction—Monoline insurers
- § 90:14 Key securitization documents—Loan purchase agreements
- § 90:15 Key securitization documents—Pooling and servicing agreements
- § 90:16 Key securitization documents—Servicing agreements
- § 90:17 Key securitization documents—Offering documents
- § 90:18 Key securitization documents—Insurance and indemnity agreements
- § 90:20 Collateralized debt obligations

III. LOAN REPURCHASE (“PUT-BACK”) LITIGATION

- § 90:22 Special considerations for put-back litigation—Standing
- § 90:23 Special considerations for put-back litigation—Proper defendant
- § 90:28 Special considerations for put-back litigation—Attorneys’ fees
- § 90:29 Remedies

TABLE OF CONTENTS

IV. CLAIMS AGAINST RMBS ISSUERS

- § 90:32 Investor claims against RMBS issuers—Claims under Section 11 of the Securities Act
- § 90:34 Investor claims against RMBS issuers—RMBS issuers' common defenses to federal securities law claims
- § 90:35 Investor claims against RMBS issuers—Class certification issues in investor claims against RMBS issuers
- § 90:36 Monoline insurer claims against RMBS issuers

V. INVESTOR CLAIMS AGAINST CREDIT RATING AGENCIES

- § 90:37 Overview

VI. CLAIMS AGAINST RMBS TRUSTEES

- § 90:39 Federal jurisdiction over claims against RMBS trustees
- § 90:40 Contract claims against RMBS trustees
- § 90:41 Tort claims against RMBS trustees
- § 90:42 Claims against RMBS trustees under the Trust Indenture Act

VII. CDO LITIGATION

- § 90:43 Overview
- § 90:44 Investor claims against the CDO issuer
- § 90:45 Claims among CDO investors
- § 90:46 Claims against CDO collateral managers

VIII. SPECIAL CONSIDERATIONS RELATED TO DISCOVERY IN STRUCTURED FINANCE LITIGATION

- § 90:47 Fact discovery
- § 90:48 Fact discovery—Limitations on scope
- § 90:51 Expert discovery—Issues related to sampling of loan files

IX. PRACTICE AIDS

- § 90:53 Checklists—Pre-suit requirements for loan-repurchase claims

CHAPTER 91. REGULATORY LITIGATION

II. PRE-LITIGATION DEALINGS WITH REGULATORS

- § 91:5 The CFTC Cooperation Advisory
- § 91:6 The CFTC Cooperation Advisory—Cooperation during the investigation

V. DEFENDING CIVIL LITIGATION AND ENFORCEMENT ACTIONS

- § 91:18 Standard of review

§ 91:20 Administrative enforcement proceedings

§ 91:21 Judicial enforcement proceedings

VI. REMEDIES

§ 91:22 Remedies, generally

§ 91:23 Agency enforcement and penalty guidelines

VII. PARALLEL PROCEEDINGS

§ 91:24 Parallel proceedings, generally

§ 91:25 Civil and criminal proceedings

§ 91:26 Multiple agencies

§ 91:27 Typical issues

VIII. NEGOTIATED RESOLUTIONS

§ 91:28 Negotiated resolutions, generally

§ 91:29 Court approval

§ 91:30 Effect on parallel proceedings

IX. DISCOVERY AND DISCLOSURE DISPUTES IN AGENCY LITIGATION

§ 91:37 Overbreadth and burdensomeness

CHAPTER 92. REGULATORY LITIGATION WITH THE SEC

II. LITIGATION WITH THE SECURITIES AND EXCHANGE COMMISSION

A. INTRODUCTION

§ 92:6.50 Recent issues *[New]*

CHAPTER 93. MONITORSHIPS

I. INTRODUCTION

§ 93:2 Strategy, objectives, and preliminary considerations

IV. POTENTIAL LITIGATION ISSUES REGARDING MONITORSHIPS

§ 93:13 Litigation surrounding inability to complete compliance obligations during term of monitorship

TABLE OF CONTENTS

CHAPTER 94. DERIVATIVES

II. LITIGATION STRATEGY

§ 94:3 Types of disputes

III. BACKGROUND

§ 94:17 Purpose and components of the ISDA Master Agreement

§ 94:18 Key provisions of the ISDA Master Agreement

**IV. THRESHOLD PROCEDURAL
CONSIDERATIONS**

§ 94:39 Dispute resolution and arbitration clauses

V. TYPICAL CLAIMS AND DEFENSES

§ 94:41 Claims to enforce derivatives contracts—Breach of contract

§ 94:51 Claims based on alleged inadequate disclosures—State and
federal law fraud claims

§ 94:58 Bankruptcy litigation and derivatives—Status of parties

**CHAPTER 95. COMMODITIES AND
FUTURES**

**III. OVERVIEW OF COMMODITIES AND FUTURES
MARKETS**

§ 95:7 Types of contracts

V. PROCEDURAL MECHANISMS

A. STRATEGIC CONSIDERATIONS

§ 95:46 Class actions

**CHAPTER 96. DIRECTOR AND OFFICER
LIABILITY**

**II. SUBSTANCE OF DIRECTOR AND OFFICER
ACTIONS**

§ 96:5 Duty of care

§ 96:6 Duty of loyalty

§ 96:8 Business judgment rule

**III. PROCEDURAL AND RELATED
CONSIDERATIONS**

§ 96:20 Books and records actions

§ 96:22 Forum selection provisions

V. INSURANCE

§ 96:29 Exclusions

CHAPTER 97. SHAREHOLDER ACTIVISM

§ 97:2 Preliminary considerations

§ 97:5 Accumulating a stake in a company—Sections 13(d) and 13(g) of the Exchange Act *[Retitled]*

§ 97:6 Accumulating a stake in a company—Hart-Scott-Rodino Act

§ 97:9 Initiating a proxy contest—Director elections

§ 97:10 Initiating a proxy contest—Strategic transactions

§ 97:12 Shareholder proposals

§ 97:14 Other Rule 14a-9 claims

CHAPTER 98. CORPORATE SUSTAINABILITY AND ESG

I. INTRODUCTION

§ 98:7 ESG metrics; corporate disclosure obligations; litigation risk

II. PRINCIPAL AREAS OF FEDERAL COURT ESG LITIGATION

A. PRIVATE FEDERAL COURT LITIGATION RELATED TO ESG DISCLOSURE

§ 98:9 Consumer protection, unfair business practices, and unfair competition

§ 98:10 Securities fraud

§ 98:11 Common-law and state-law ESG disclosure claims in federal court

B. PRIVATE FEDERAL COURT LITIGATION RELATED TO ESG PERFORMANCE

§ 98:12 Labor, workforce, and supply chain related ESG litigation

§ 98:13 ESG-related climate litigation

§ 98:14 ESG-related negligence and other tort claims

C. PUBLIC FEDERAL LITIGATION RELATED TO CORPORATE ESG ACTIVITIES

§ 98:15 SEC rulemaking, regulations and enforcement

§ 98:16 FTC ESG enforcement

§ 98:17 DOL ESG rules and potential enforcement

D. BOARDS OF DIRECTORS AND CORPORATE GOVERNANCE

TABLE OF CONTENTS

§ 98:18 Breach of fiduciary duty litigation—Boards of directors

Table of Contents

CHAPTER 99. MERGERS AND ACQUISITIONS

III. JURISDICTION AND VENUE

§ 99:10 Jurisdiction and venue—Venue issues

V. PARTICULAR FEDERAL LAW CLAIMS

§ 99:23 Claims under § 14(a) of the Exchange Act—Distinctive liability issues

VI. STATE LAW CLAIMS

§ 99:42 State law claims—“Poison pills”

CHAPTER 100. VALUATION OF A BUSINESS

III. TYPES OF FEDERAL COURT CASES RAISING BUSINESS VALUATION ISSUES

§ 100:9 State law claims

§ 100:10 Bankruptcy

V. VALUATION ISSUES

§ 100:17 Valuation methods—Discounted cash flow

§ 100:18 Valuation methods—Discounted cash flow—Cash flow projections

§ 100:20 Valuation methods—Discounted cash flow—Discount rate

§ 100:21 Valuation methods—Comparable companies

§ 100:24 Valuation methods—Market-based evidence of value

VI. CHOOSING BETWEEN VALUATION METHODS

§ 100:25 Use of multiple methods and reconciling the results

§ 100:28 Company where reliable projections exist (or not)

CHAPTER 101. BROKER-DEALER ARBITRATION

§ 101:9 Types of FINRA disputes—Customer

§ 101:23 Arbitration proceeding—Award

CHAPTER 102. PROFESSIONAL LIABILITY

IV. SOURCES OF LIABILITY

§ 102:29 Statutory claims—Securities law

§ 102:31 Statutory claims—RICO

V. DEFENSES

§ 102:35 Imputation of client knowledge and client conduct

CHAPTER 103. MEDICAL MALPRACTICE

III. SUBSTANTIVE LAW ISSUES

§ 103:19 Causation—Lost chance/increased risk

§ 103:21 Damages—Increased risk

§ 103:32 Tort reform—Damages caps

VI. EVIDENCE AND TRIALS

§ 103:68 Hearsay evidence—Embedded expert opinion

VII. PRACTICE MATERIALS

§ 103:96 Charts—Certificate of merit state statutes

§ 103:97 Charts—Noneconomic damages definitions and limits

CHAPTER 104. HEALTH CARE INSTITUTIONS

II. FEDERAL ADMINISTRATIVE LITIGATION

A. LITIGATION BEFORE THE DEPARTMENT OF HEALTH AND HUMAN SERVICES DEPARTMENTAL APPEALS BOARD

§ 104:3 Medicare certification and conditions of participation litigation

§ 104:4 Medicare certification and conditions of participation
litigation—ALJ review

§ 104:5 Medicare certification and conditions of participation
litigation—DAB review

§ 104:7 Provider enrollment and termination litigation

§ 104:8 Provider enrollment and termination litigation—CMS and ALJ
review

B. RECOVERY AUDIT CONTRACTOR (RAC) ADMINISTRATIVE APPEALS AND LITIGATION

§ 104:11 Overview

§ 104:13 Qualified independent contractor review

TABLE OF CONTENTS

- § 104:14 Hearing before an ALJ
- § 104:17 Hearing before an ALJ—Hearing participation by CMS or its contractors
- § 104:18 Hearing before an ALJ—Availability of discovery
- § 104:20 Hearing before an ALJ—ALJ decision and the escalation option
- § 104:21 DAB review
- § 104:22 Judicial review

C. RATE-SETTING AND OTHER REIMBURSEMENT LITIGATION

- § 104:24 Institutional reimbursement appeals
- § 104:25 Medicare Part A and B reimbursement appeals

III. FEDERAL BUSINESS LITIGATION

A. MANAGED CARE AND PAYOR-PROVIDER LITIGATION

- § 104:31 Preliminary procedural considerations—Preemption—Complete preemption
- § 104:32 Preliminary procedural considerations—Preemption—Express preemption
- § 104:33 Preliminary procedural considerations—Preemption—Venue and forum selection clauses
- § 104:34 Preliminary procedural considerations—Provider standing and assignments of benefits
- § 104:35 Preliminary procedural considerations—Provider standing and assignments of benefits—Validity of assignments
- § 104:36 Preliminary procedural considerations—Provider standing and assignments of benefits—Anti-assignment clauses
- § 104:38 Preliminary procedural considerations—Pleading specificity
- § 104:42 Potential claims—Provider ERISA claims—Benefits due under a plan
- § 104:45 Potential claims—Provider ERISA claims—Failure to provide requested information
- § 104:46 Potential claims—Provider ERISA claims—“Catch-all” claims
- § 104:49 Potential claims—Payor claims—ERISA claims
- § 104:52 Other managed care litigation

B. EMTALA LITIGATION

- § 104:53 Overview
- § 104:54 Government enforcement
- § 104:56 Elements of an EMTALA claim
- § 104:57 Elements of an EMTALA claim—Proof that plaintiff “came to the emergency department”
- § 104:58 Elements of an EMTALA claim—Failure to perform an appropriate screening
- § 104:59 Elements of an EMTALA claim—Failure to stabilize

C. MEDICAL STAFF AND PEER REVIEW

LITIGATION

- § 104:62 Discoverability of peer review materials in federal court litigation

D. PRIVATE ANTITRUST LITIGATION

- § 104:65 No-poach agreements

IV. GOVERNMENT ENFORCEMENT LITIGATION

A. FRAUD-RELATED LITIGATION

- § 104:82 Overview
§ 104:89 The False Claims Act—Types of claims—Reverse claims
§ 104:90 The False Claims Act—State false claims statutes
§ 104:92 The Physician Self-Referral Law or Stark Law—Key issues in Stark Law compliance litigation
§ 104:94 The Medicare Anti-Kickback Statute
§ 104:95 The Medicare Anti-Kickback Statute—Strategies to avoid or reduce Anti-Kickback Statute liability
§ 104:96 The HHS-OIG self-disclosure protocol

B. GOVERNMENT ANTITRUST LITIGATION

- § 104:102 No-poach and wage fixing agreements

CHAPTER 105. ADMIRALTY AND MARITIME LAW

II. MARITIME JURISDICTION

- § 105:4 Constitutional and statutory basis—Maritime tort jurisdiction
§ 105:5 Constitutional and statutory basis—Maritime contract jurisdiction
§ 105:7 Constitutional and statutory basis—OCSLA jurisdiction

III. MARITIME ACTIONS

- § 105:14 Negligence and breach of contract for vessel passengers and maritime workers
§ 105:16 Special maritime remedies—Actions in rem

IV. TRANSPORTATION OF GOODS AND SERVICES

- § 105:21 Salvage
§ 105:23 Limitation of liability
§ 105:32 The Oil Pollution Act of 1990—Civil actions for contribution, jurisdiction and venue

TABLE OF CONTENTS

CHAPTER 106. CONTRACTS

I. INTRODUCTION

§ 106:1 Scope note

CHAPTER 107. INSURANCE

I. INTRODUCTION

§ 107:3 Role of federal courts in coverage litigation—Explosion of coverage litigation

§ 107:6 Winning tactics and strategies

V. COVERAGE DISPUTES IN SELECTED AREAS

§ 107:36 First-party insurance—Scope of coverage

§ 107:42 Insurance coverage for cyber risks

§ 107:44 Insurance coverage for opioids cases

X. OTHER ISSUES

§ 107:81 Rights of successors

CHAPTER 108. REINSURANCE

II. REINSURANCE DISPUTES IN FEDERAL COURT: JURISDICTION AND OTHER THRESHOLD CONSIDERATIONS

A. SUBJECT MATTER JURISDICTION OVER A REINSURANCE DISPUTE

§ 108:6 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards

III. FEDERAL COURT ADJUDICATION OF REINSURANCE DISPUTES ORIGINATING IN ARBITRATION

§ 108:13 Motions to compel arbitration of reinsurance disputes

IV. FEDERAL COURT ADJUDICATION OF SUBSTANTIVE AREAS OF REINSURANCE LITIGATION

§ 108:16 Follow the fortunes clause

§ 108:18 Limits of liability

§ 108:19 Honorable engagement clause

§ 108:20 The duty of utmost good faith and fair dealing

§ 108:25 Reinsurer's liability to parties other than the cedent

Table of Contents

CHAPTER 109. BANKING

II. JURISDICTION OVER BANKS AND BANKING TRANSACTIONS

A. OVERVIEW

§ 109:4 Subject matter jurisdiction and personal jurisdiction, generally

B. SUBJECT MATTER JURISDICTION

§ 109:5 Diversity jurisdiction

§ 109:6 Federal question jurisdiction

§ 109:7 Edge Act

C. PERSONAL JURISDICTION

§ 109:10 Jurisdiction by consent

§ 109:11 The exercise of general jurisdiction

§ 109:12 The exercise of specific jurisdiction

III. LITIGATION BETWEEN BANKS AND BORROWERS: ISSUES OF LENDER LIABILITY

A. STRATEGIC CONSIDERATIONS INVOLVED IN LENDER LIABILITY CLAIMS

§ 109:14 Lender liability claims, generally

B. CONTRACT-BASED LIABILITY

§ 109:17 Developments in contract law during the COVID-19 pandemic

§ 109:21 Damages

C. STATUTORY BASES FOR LIABILITY

§ 109:22 CARES Act

D. LIMITATIONS ON THE LENDER'S RIGHT TO CUT OFF CREDIT

§ 109:26 Foreclosure

E. LIABILITY ARISING FROM THE LENDER'S

CONDUCT IN ITS RELATIONSHIP WITH THE BORROWER

- § 109:32 Deepening insolvency
- § 109:33 Borrower class actions and government settlements from the financial crisis
- § 109:34 COVID-19 developments: Loan prioritization litigation

IV. INTERNATIONAL BANKING

- § 109:39 Discovery of foreign records and in aid of foreign proceedings

V. LITIGATION ARISING FROM REGULATORY SCHEMES AND DEVELOPING TECHNOLOGY

- § 109:40 Anti-money laundering (“AML”), cybersecurity and the rise of FinTech

VI. ATTACHMENTS AND PREJUDGMENT RESTRAINTS

- § 109:41 Pre-judgment and post-judgment process concerning bank accounts
- § 109:42 Attachments arising from regulatory action

VII. THE BANK’S DUTY OF CONFIDENTIALITY

- § 109:44 Duty owed to borrowers
- § 109:46 Duty owed to depositors
- § 109:48 Duty owed to depositors—Federal law

VIII. LITIGATION ARISING OUT OF BROKER- DEALER ACTIVITY

- § 109:56 Antitrust issues—Debt and derivative instruments

CHAPTER 110. LETTERS OF CREDIT

I. INTRODUCTION

- § 110:1 Scope note

II. PRELIMINARY CONSIDERATIONS

- § 110:15 The contractual relationships involved—Issuer and beneficiary
- § 110:24 Typical letter of credit provisions—Assignment and transferability

III. SUBSTANTIVE ISSUES IN LETTER OF CREDIT LITIGATION: WRONGFUL HONOR OR WRONGFUL DISHONOR

- § 110:26 Independence principle

TABLE OF CONTENTS

- § 110:28 The issuer's review of presentment documents—The issuer's obligations
- § 110:32 The issuer's review of presentment documents—Construction of issuer's duty depending on which party is asserting the claim

IV. PROCEDURAL AND STRATEGIC ISSUES IN LETTER OF CREDIT LITIGATION

- § 110:41 Personal jurisdiction over the defendants
- § 110:44 Statute of limitations

CHAPTER 111. VIRTUAL CURRENCIES

III. U.S. REGULATION OF VIRTUAL CURRENCIES

- § 111:6 The DAO Report
- § 111:7 Other SEC guidance
- § 111:8 Legislative
- § 111:9 Consent orders and settlements
- § 111:11 Enforcement
- § 111:13 FinCEN regulation
- § 111:14 Criminal enforcement

IV. CIVIL LITIGATION INVOLVING VIRTUAL CURRENCIES

A. COMMONLY ASSERTED CLAIMS

- § 111:16 Allegations
- § 111:17 Parties
- § 111:18 Recent examples
- § 111:19 Damages
- § 111:20 Settlement
- § 111:21 Jury selection

B. COMMONLY ASSERTED DEFENSES

- § 111:23 Jurisdictional defenses—Improper service
- § 111:24 Jurisdictional defenses—Lack of personal jurisdiction
- § 111:25 Jurisdictional defenses—Lack of subject matter jurisdiction
- § 111:26 Jurisdictional defenses—Extraterritorial application of U.S. securities laws
- § 111:28 Statutory defenses—Statute of limitations
- § 111:29 Statutory defenses—Section 12: Statutory seller
- § 111:30 Statutory defenses—Private cause of action
- § 111:32 Contractual defenses—Forum selection clauses
- § 111:33 Contractual defenses—Arbitration clauses

C. DISCOVERY AND EVIDENTIARY ISSUES

- § 111:35 De-anonymizing users
- § 111:39 General Data Protection Regulation

§ 111:40 Admissibility of blockchain records

V. PRACTICE AIDS

§ 111:42 Checklist of essential allegations and defenses

§ 111:43 Checklist of sources of proof of essential allegations and defenses

CHAPTER 112. COLLECTIONS

II. BEGINNING THE COLLECTION PROCESS

§ 112:3 Evaluating the likely return for the client—Identifying the debtor

§ 112:4 Evaluating the likely return for the client—Finding the debtor

IV. FILING SUIT IN FEDERAL COURT

§ 112:26 Identifying the proper parties—Veil piercing

V. THE FAIR DEBT COLLECTION PRACTICES ACT

§ 112:33 In general

§ 112:34 Article III Standing

§ 112:35 The provisions of the Fair Debt Collection Practices Act

§ 112:37 The provisions of the Fair Debt Collection Practices Act—False or misleading statements

§ 112:38 The provisions of the Fair Debt Collection Practices Act—Validation notice requirements

§ 112:41 Liability for violation of the Fair Debt Collection Practices Act—Defenses to alleged violations

CHAPTER 113. CONSUMER PROTECTION

II. STRATEGIC AND OTHER PRACTICE CONSIDERATIONS

§ 113:11 The answer

§ 113:16 Motions to dismiss and other threshold motions—Other options

§ 113:22 Class certification—Common arguments—Predominance under Rule 23(b)(3)

§ 113:23 Class certification—Common arguments—Ascertainability

§ 113:25 Settlement

III. FTC ENFORCEMENT OF CONSUMER PROTECTION STATUTES IN FEDERAL COURT

A. THE FEDERAL TRADE COMMISSION ACT

§ 113:28 Deceptive practices

§ 113:32 Unfair practices

§ 113:33 Individual and corporate liability

TABLE OF CONTENTS

B. THE FTC ENFORCEMENT PROCESS

§ 113:36 Consumer redress

C. THE FTC'S REGULATION OF MARKETING AND ADVERTISING

§ 113:38 Recent enforcement actions involving food

§ 113:39 Recent enforcement actions involving consumer products

§ 113:42 Health, safety, and efficacy—Requiring FDA approval

IV. ENFORCEMENT OF CONSUMER PROTECTION STATUTES BY THE CONSUMER FINANCIAL PROTECTION BUREAU

A. CFPB ENFORCEMENT

§ 113:44 Creation of the CFPB

§ 113:45 Office of Enforcement

§ 113:46 Office of Supervision Examinations

B. FEDERAL STATUTES ENFORCED BY THE CFPB

§ 113:54 Equal Credit Opportunity Act

§ 113:55 Fair Debt Collection Practices Act

V. ENFORCEMENT OF THE FINANCIAL INSTITUTIONS REFORM, RECOVERY, AND ENFORCEMENT ACT OF 1989

§ 113:57 Financial Institutions Reform, Recovery, and Enforcement Act of 1989

VI. FEDERAL CONSUMER PROTECTION STATUTES: PRIVATE CAUSES OF ACTION

§ 113:59 Real Estate Settlement Procedures Act

§ 113:60 Real Estate Settlement Procedures Act—Private right of action under RESPA § 6 for transfer disclosures and certain obligations of the servicer

§ 113:62 Real Estate Settlement Procedures Act—Prohibition against kickbacks and unearned fees

§ 113:63 Real Estate Settlement Procedures Act—Advance deposits in escrow accounts

§ 113:64 Real Estate Settlement Procedures Act—Prohibition on certain fees

CHAPTER 114. TELEPHONE CONSUMER PROTECTION ACT

I. INTRODUCTION

§ 114:1 Scope note

II. OVERVIEW OF THE TELEPHONE CONSUMER PROTECTION ACT

§ 114:4 The regulatory framework

III. NATIONAL AND COMPANY-SPECIFIC “DO NOT CALL” LISTS

§ 114:5 Overview

IV. PROHIBITION ON CALLS TO CELLULAR PHONES

§ 114:20 Reassigned Number Database

VI. FACSIMILE PROHIBITIONS

§ 114:27 What is a “telephone facsimile machine”?

VIII. PRIVATE AND FCC ENFORCEMENT ACTIONS UNDER THE TCPA

§ 114:41 FCC enforcement actions

IX. OTHER LAWS GOVERNING OUTBOUND DIALING AND TEXTING

§ 114:42 The Telemarketing Sales Rule

§ 114:43 State laws

CHAPTER 115. COMMUNICATIONS

II. STRATEGY

§ 115:3 Background of communications regulation

§ 115:4 Judicial review of FCC decisions

§ 115:5 Other communications-related litigation in federal court

III. JUDICIAL REVIEW OF FCC DECISIONS

§ 115:8 Threshold prerequisites—Standing

§ 115:9 Threshold prerequisites—Standing—Constitutional standing

§ 115:10 Threshold prerequisites—Standing—“Zone-of-interests”

§ 115:11 Threshold prerequisites—Standing—Hobbs Act standing

TABLE OF CONTENTS

IV. CHALLENGES TO STATE AND LOCAL COMMUNICATIONS-RELATED RESTRICTIONS

- § 115:32 Substantive provisions that limit state and local authority—
Section 332(c)(3)(A) of the Communications Act
- § 115:33 Substantive provisions that limit state and local authority—
Section 253 of the Communications Act
- § 115:34 Substantive provisions that limit state and local authority—
Section 332(c)(7) of the Communications Act

V. COMMUNICATIONS LITIGATION INVOLVING ENTITIES SUBJECT TO THE FCC’S JURISDICTION

- § 115:46 Authority of the district courts to enforce the
Communications Act and FCC orders—Enforcement of
FCC orders other than for the payment of money
- § 115:52 Class action litigation involving communications companies
- § 115:59 Special provisions—Section 222: customer proprietary
network information
- § 115:60 Special provisions—Section 225: telecommunications relay
services
- § 115:61 Special provisions—Section 227: The Telephone Consumer
Protection Act
- § 115:62 Special provisions—Section 228: pay-per-call services
- § 115:63 Special provisions—Section 255: readily accessible equipment

VI. KEY TOPICS OF INTEREST IN COMMUNICATIONS LITIGATION

- § 115:68 Net neutrality
- § 115:69 Section 230: blocking and screening of offensive material

VII. FREQUENTLY RAISED CONSTITUTIONAL AND STATUTORY ISSUES IN COMMUNICATIONS-RELATED LITIGATION

- § 115:72 First Amendment
- § 115:74 Unconstitutional takings
- § 115:76 Arbitration

CHAPTER 116. PATENTS

III. DISTRICT COURT INFRINGEMENT LITIGATION

B. JURISDICTION, STANDING, AND VENUE

- § 116:12 Venue

IV. DECLARATORY JUDGMENT ACTIONS

B. JURISDICTION AND STANDING

§ 116:16 Declaratory judgment personal jurisdiction and venue

§ 116:17 Declaratory judgment standing

V. INITIAL PLEADINGS AND EARLY MOTIONS PRACTICE

§ 116:19 Motions to dismiss on the pleadings

§ 116:22 Motion to change venue

VII. CLAIM CONSTRUCTION AND SUMMARY JUDGMENT

§ 116:27 Claim construction

VIII. PATENT INFRINGEMENT

§ 116:32 Inducement of infringement

IX. DEFENSES TO INFRINGEMENT

C. PATENTABLE SUBJECT MATTER

§ 116:43 Patent eligible subject matter

D. PATENT INVALIDITY

§ 116:48 Public use and on sale bars

§ 116:50 Written description

§ 116:51 Indefiniteness

§ 116:53.50 Assignor estoppel *[New]*

F. OTHER DEFENSES

§ 116:56 Time based defenses: statute of limitations, laches, and prosecution laches

§ 116:58 Estoppel by PTO proceedings

X. PROCEDURAL ISSUES

§ 116:63 The use of experts

§ 116:65.50 Recusal motions *[New]*

XI. REMEDIES

§ 116:66 Monetary damages

TABLE OF CONTENTS

CHAPTER 117. TRADEMARK

II. PRELIMINARY CONSIDERATIONS

A. STRATEGY AND OBJECTIVES

§ 117:2 Overview

B. THE INVESTIGATION

§ 117:8 Use of the mark in commerce

III. THE COMPLAINT

A. TRADEMARK INFRINGEMENT CLAIMS

§ 117:15 Type and timing of confusion

C. REMEDIES UNDER THE LANHAM ACT

§ 117:28 Generally

IV. DEFENSES AND COUNTERCLAIMS

§ 117:35 Defenses—Prior use

§ 117:40 Defenses—Other trademark defenses

§ 117:42 Defenses—Equitable defenses—Laches

§ 117:47 Counterclaims—Functionality

§ 117:51 Third-party practice

V. PRELIMINARY INJUNCTIONS

§ 117:54 Standards

Table of Contents

CHAPTER 118. COPYRIGHT

II. PRACTICAL LITIGATION CONSIDERATIONS

§ 118:14 Motion practice and preliminary relief—Summary judgment

III. NATURE AND SCOPE OF COPYRIGHT PROTECTION

§ 118:46 Exclusive rights protected by copyright—Display

§ 118:50 Copyright ownership—Authors

§ 118:54 Copyright ownership—Works made for hire

§ 118:55 Copyright ownership—Transfers and licenses

IV. ELEMENTS OF A COPYRIGHT INFRINGEMENT CLAIM

§ 118:58 Direct infringement—Copying

§ 118:59 Direct infringement—Registration or preregistration

V. LIMITATIONS AND DEFENSES

§ 118:69 Fair use

VII. SUBJECT-MATTER SPECIFIC CONSIDERATIONS AND THE CONCEPT OF “THICK” AND “THIN” COPYRIGHT PROTECTION

§ 118:93 Musical works

CHAPTER 119. LICENSING

I. INTRODUCTION

§ 119:1 Scope note

III. PRELIMINARY DETERMINATIONS

§ 119:11 Relevant contract law—The license recipient

§ 119:15 Relevant contract law—Best efforts clauses

CHAPTER 120. LABOR LAW

III. INJUNCTIONS IN SUPPORT OF ARBITRATION

§ 120:8 *Boys Markets* injunctions against strike activity in violation of collective bargaining agreements—Guidelines for when a *Boys Markets* injunction may issue

VII. ACTIONS FOR DAMAGES UNDER SECTION 301

§ 120:48 Hybrid Section 301 claims—Defenses—Statute of limitations

CHAPTER 121. OCCUPATIONAL SAFETY AND HEALTH CLAIMS

I. INTRODUCTION

§ 121:1 Scope note

III. LAW AND PROCEDURE; REGULATORY STRUCTURE

A. OCCUPATIONAL SAFETY AND HEALTH ACT

§ 121:9 Authorized state programs

B. CHALLENGING OSHA'S RULES IN FEDERAL COURT

§ 121:10.50 Challenging rules upon promulgation—Vaccine mandates for employers [*New*]

C. DEFENDING OSHA ENFORCEMENT AND MAKING YOUR RECORD

§ 121:60 Whistleblowers—Administrative procedures and actions in federal courts—OSHA response to initial whistleblower complaint

CHAPTER 122. EMPLOYMENT DISCRIMINATION

II. DISCRIMINATION ISSUES IN EMPLOYMENT RELATIONSHIPS

§ 122:3 Applications and interviews

§ 122:6 Accommodations

§ 122:10 Work assignments

§ 122:18 Diversity and inclusion programs

TABLE OF CONTENTS

III. SUBSTANTIVE LAW

A. TITLE VII

- § 122:19 Purpose/scope
- § 122:20 Race and color discrimination
- § 122:22 Religion and religious accommodation discrimination
- § 122:23 Sex and pregnancy discrimination
- § 122:24 Exceptions and defenses

B. ADEA

- § 122:26 Acts prohibited

C. ADA

- § 122:33 Covered disabilities—Impairments substantially limiting one or more major life activities
- § 122:35 Covered disabilities—Regarded as having a disability
- § 122:36 Acts prohibited
- § 122:38 Acts prohibited—Testing and examinations
- § 122:39 Reasonable accommodations

D. EPA

- § 122:42 Acts prohibited

F. USERRA

- § 122:47 Purpose/scope
- § 122:48 Acts prohibited

G. § 1981

- § 122:52 Exceptions and defenses

H. WHISTLEBLOWER LAWS

- § 122:53 Purpose/scope and acts prohibited
- § 122:55 Elements of a whistleblower claim
- § 122:55.50 Whistleblower incentives *[New]*

I. RETALIATION

- § 122:57 Acts prohibited

IV. LITIGATION ISSUES

B. TYPES OF LIABILITY

- § 122:60 Direct, vicarious, cat's paw, and individual liability

C. THEORIES OF LIABILITY

- § 122:63 Disparate treatment—Direct evidence

CHAPTER 123. IMMIGRATION

I. INTRODUCTION

§ 123:2 Preliminary considerations

II. STATUTORY AUTHORITY

§ 123:4 The Mandamus Act, 28 U.S.C.A. § 1361

III. JUDICIAL REVIEW

§ 123:7 Judicial review of immigration decisions

§ 123:10 Review of discretionary decisions

§ 123:11 Review of constitutional claims and questions of law

IV. ADMINISTRATIVE DEFERENCE AND STANDARDS OF REVIEW

§ 123:12 Arbitrary and capricious, de novo, and substantial evidence review

§ 123:17 *Brand X*

VI. MECHANICS

§ 123:29 Proper parties

§ 123:30 Venue

CHAPTER 124. ERISA

III. JURISDICTION AND PARTIES

§ 124:14 Standing to sue

VI. CLAIMS FOR BENEFITS AND DEFENSES

§ 124:27 Defenses to claims for benefits—Exhaustion of administrative remedies

XIII. COMPLEX ERISA LITIGATION

§ 124:56 Challenges to fees

§ 124:58 Corporate control and ESOPs

CHAPTER 125. EXECUTIVE COMPENSATION

III. STATE LAW CHALLENGES TO EXECUTIVE COMPENSATION

§ 125:7 Breach of fiduciary duty of care

§ 125:12 Breach of fiduciary duty of care—Waste

§ 125:14 Breach of fiduciary duty of loyalty

TABLE OF CONTENTS

§ 125:18 Specific cases—Spring-loaded options

Table of Contents

CHAPTER 126. RICO

V. STANDING UNDER § 1962(c)

§ 126:37 Causation—“By reason of”

CHAPTER 127. PRODUCTS LIABILITY

II. INITIAL RESPONSIBILITIES

§ 127:5 Attorneys representing plaintiffs—Prelitigation discovery and research

§ 127:8 Attorneys representing defendants—The initial interview

III. SELECTION OF PARTIES AND FORUM

§ 127:13 Selection of parties—Defendant

§ 127:15 Selection of parties—Defendant—Designers

§ 127:16 Selection of parties—Defendant—Manufacturer of component part

§ 127:20 Selection of parties—Defendant—Product endorsers, testers, certifiers, and trade associations

X. CAUSES OF ACTION

§ 127:54 Negligence—Manufacture

§ 127:56 Negligence—Failure to warn

§ 127:61 Strict liability—Design defect

§ 127:69 Misrepresentation

§ 127:74 Causation

XI. RESPONSIVE PLEADINGS

§ 127:76 Federal preemption

§ 127:77 Statute of limitations

§ 127:78 Statute of repose

§ 127:81 Misuse of the product

§ 127:85 “State-of-the-art”

XII. DAMAGES

§ 127:89 Punitive damages

CHAPTER 128. MASS TORTS

II. KEY CONSIDERATIONS AND STRATEGIES IN MASS TORT LITIGATION

- § 128:4 Methods of coordinating or consolidating mass torts—
Procedural joinder or consolidation of parties and claims
- § 128:5 Methods of coordinating or consolidating mass torts—
Multidistrict litigation
- § 128:6 Methods of coordinating or consolidating mass torts—Class
actions
- § 128:9 Initial case management orders and discovery plans
- § 128:12 Expert discovery and motions to exclude expert opinions

III. BACKGROUND AND TURNING POINTS IN THE DEVELOPMENT OF MASS TORT LAW

- § 128:21 Evolution in mass tort litigation—Expansion in number and
types of claims
- § 128:23 Evolution in mass tort litigation—Mass tort reform issues

CHAPTER 129. AVIATION

IV. REGULATORY AND STATUTORY FRAMEWORK

- § 129:50 International flights/international treaties—Montreal
Convention of 1999
- § 129:52 Montreal Convention—Is it an accident?

CHAPTER 130. SPACE LAW

- § 130:3 Who determines space law
- § 130:5 Principal sources of space law
- § 130:7 Principal sources of space law—The Rescue and Return
Agreement
- § 130:8 Principal sources of space law—The Liability Convention
- § 130:10.50 Mining asteroids and the moon [*New*]
- § 130:11 Other issues of interest

CHAPTER 131. FOOD AND DRUG

II. PHARMACEUTICAL LITIGATION

A. OVERVIEW

- § 131:3 Regulatory framework

B. APPLICABLE LAW

- § 131:9 Key defenses—Failure to adduce reliable expert proof on
causation
- § 131:10 Key defenses—No liability for branded drug makers when
the plaintiff has taken a generic version of the drug

TABLE OF CONTENTS

- § 131:11 Key defenses—Federal preemption
- § 131:12 Key defenses—State-sponsored preemption of liability against manufacturers of FDA-approved products

C. PREPARING FOR A PHARMACEUTICAL CASE

- § 131:17 Managing the case

III. THIRD-PARTY PAYOR LITIGATION

C. COMMON LAW FRAUD AND MISREPRESENTATION

- § 131:31 No actionable misrepresentation
- § 131:32 Justifiable reliance and causation

D. STATUTORY FRAUD AND DECEPTIVE TRADE PRACTICES CLAIMS

- § 131:35 Not a “consumer” or “purchaser”

E. CIVIL RICO CLAIMS

- § 131:44 Causation and reliance in RICO litigation

IV. FOOD AND BEVERAGE LITIGATION

C. FALSE ADVERTISING CLAIMS

- § 131:61 False advertising claims generally
- § 131:62 State law unfair competition claims
- § 131:64 Retaining experts
- § 131:65 Choice of forum
- § 131:67 Preclusion and the FDCA’s impact on Lanham Act suits
- § 131:69 Primary jurisdiction doctrine in false advertising cases—“Natural” cases
- § 131:71 Health and functional benefit claims
- § 131:73 Class certification strategy—Threshold issues of standing
- § 131:74 Class certification strategy—Ascertainability
- § 131:75 Class certification strategy—Establishing reliance and materiality
- § 131:76 Class certification strategy—Demonstrating classwide damages

D. FOODBORNE ILLNESS CLAIMS

- § 131:77 Outbreak scenarios
- § 131:81 FDA intervention

CHAPTER 132. AGENCY

II. PRELIMINARY CONSIDERATIONS

§ 132:10 Jurisdictional issues

IV. AUTHORITY OF AGENT

§ 132:21 Apparent authority

§ 132:24 Ratification

CHAPTER 133. PARTNERSHIPS

I. INTRODUCTION

§ 133:2 Partnership definition

§ 133:6 Sources of partnership law

§ 133:7 Organizations with similarities to general partnerships

II. STRATEGIC CONSIDERATIONS

B. STRATEGIC CONSIDERATIONS WHEN YOUR CLIENT IS A PARTNERSHIP

§ 133:11 Identifying decision-making process and authority

D. STRATEGIC CONSIDERATIONS WHEN A PARTNERSHIP IS YOUR ADVERSARY

§ 133:17 Suing a partnership

F. THE ATTORNEY-CLIENT RELATIONSHIP

§ 133:21 Preserving the attorney-client privilege

III. SUBSTANTIVE LAW OF PARTNERSHIPS

A. CREATION OF PARTNERSHIPS

§ 133:23 Objective test for existence of a partnership

B. PARTNERSHIP RESPONSIBILITY FOR PARTNER CONDUCT

1. Authority of Partners to Act for the Partnership

§ 133:32 Authority of a partner to bind the partnership—Actual authority, ratification, and estoppel

2. Partnership Liability for Wrongful Acts of a Partner

§ 133:36 Fraud, breach of trust, and other business-related torts

TABLE OF CONTENTS

3. Partner Liability For Internal Partnership
Disputes

§ 133:39 Fiduciary duties

**IV. PROCEDURAL ISSUES AND CONSIDERATIONS
WHEN ASSERTING AND DEFENDING
PARTNERSHIP CLAIMS**

**C. ASSERTION OF CLAIMS AGAINST THE
PARTNERSHIP**

§ 133:49 Who must be sued on claims against a partnership?

D. DISCOVERY ISSUES

§ 133:55 Preservation obligations

V. LIMITED PARTNERSHIPS

A. STRUCTURE

§ 133:59 Applicable laws

§ 133:60 Common characteristics of limited partnerships

**C. ASSERTING LIMITED PARTNERSHIP
CLAIMS**

§ 133:67 General partner in conflict with limited partnership

VI. LIMITED LIABILITY PARTNERSHIPS

§ 133:74 Generally

VII. PRACTICE AIDS

C. JURY INSTRUCTIONS

1. Partnership

§ 133:100 Jury instructions—Effect of terminology used by parties in
partnership

CHAPTER 134. JOINT VENTURES

I. INTRODUCTION

§ 134:3 No existing codification of rules of joint venture law

§ 134:5 The role other business organizations play in joint ventures

IV. LIABILITY OF THE JOINT VENTURE AND PARENT ENTITIES TO THIRD PARTIES

§ 134:25 Corporation vs. partnership

V. SPECIAL CONSIDERATIONS IN LITIGATION

§ 134:42 Antitrust liability of a joint venture

CHAPTER 135. TRADE ASSOCIATIONS

II. STRATEGIC CONSIDERATIONS

§ 135:6 Representing trade associations as plaintiffs

§ 135:7 Representing trade associations as defendants

III. LAW AND PROCEDURE

§ 135:16 Trade association standing—Organizational standing

§ 135:17 Trade association standing—Associational standing

§ 135:19 Attorney-client relationships—Members' relationship with trade association's attorney

CHAPTER 136. FIDUCIARY DUTY LITIGATION

II. TYPES OF FIDUCIARIES

§ 136:4 Types of fiduciaries

§ 136:5 Types of fiduciaries—Professionals

§ 136:11 Types of fiduciaries—ERISA/ESOPs

III. CLAIMS AND REMEDIES

§ 136:19 Remedies—Equitable remedies

IV. COMMENCING A FIDUCIARY DUTY CLAIM

§ 136:28 Forum—Arbitration under the Federal Arbitration Act

CHAPTER 137. WARRANTIES

I. INTRODUCTION

§ 137:1 Scope note

II. PRELIMINARY CONSIDERATIONS

§ 137:2 Assessing claims and meeting with the client

III. JURISDICTION AND FORUM SELECTION

§ 137:3 Personal jurisdiction

TABLE OF CONTENTS

§ 137:5 Venue

IV. PARTIES

§ 137:6 Privity
§ 137:9 Privity—Common-law exceptions
§ 137:10 Privity—Policy considerations
§ 137:11 Vouching in
§ 137:12 Vouching in—By buyer

V. PLEADINGS

§ 137:14 Pleadings
§ 137:15 Conditions precedent, including notice of breach
§ 137:16 Factual allegations sounding in rejection and/or revocation
§ 137:17 Damages
§ 137:19 Statute of limitations
§ 137:20 Disclaimers
§ 137:21 Buyer's conduct gave rise to damages *[Retitled]*

VI. ASSERTING A CLAIM: THE ELEMENTS

§ 137:22 Existence and breach of express warranties
§ 137:25 Causation

VII. DISCOVERY AND EVIDENCE COLLECTION

§ 137:32 Spoliation

IX. ALTERNATIVE DISPUTE RESOLUTION

§ 137:39 Arbitration procedures, pursuant to a mechanism or an agreement

Table of Contents

CHAPTER 138. THEFT OR LOSS OF BUSINESS OPPORTUNITIES

II. THEFT OF BUSINESS OPPORTUNITIES

A. LITIGATION STRATEGY AND PRACTICE TIPS

- § 138:4 Choice of forum—Federal supplemental jurisdiction
- § 138:5 Choice of forum—Strategic and tactical issues
- § 138:6 Choice of law
- § 138:7 Availability of jury trial

B. ELEMENTS OF CORPORATE OPPORTUNITY CLAIM

- § 138:12 Opportunity belongs to the corporation—Opportunity is in corporation's line of business
- § 138:13 Opportunity belongs to the corporation—Use of corporate assets

C. DEFENSES

- § 138:14 Corporation unable or declines to take advantage of opportunity
- § 138:15 Opportunity presented to defendant in individual capacity
- § 138:16 Reasonable expectations of defendant and corporation

III. TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIPS

B. LITIGATION STRATEGY AND PRACTICE TIPS

- § 138:26 Choice of substantive law

C. ELEMENTS OF TORTIOUS INTERFERENCE WITH A CONTRACT

- § 138:30 Intent

D. ELEMENTS OF TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP WHERE THERE IS NO CONTRACT

§ 138:33 Existence of a business relationship or opportunity

F. AFFIRMATIVE DEFENSES

§ 138:39 Competition

CHAPTER 139. SALE OF GOODS

III. OVERVIEW OF ARTICLE 2

§ 139:8 Scope of U.C.C. Article 2

§ 139:12 Statute of frauds

V. ACTION FOR BREACH OF CONTRACT

§ 139:26 Establishing liability

VIII. SPECIAL PROBLEMS CONCERNING DAMAGES

§ 139:45 Failure of essential purpose of exclusive remedy

CHAPTER 140. NEGOTIABLE INSTRUMENTS

II. LAW AND PROCEDURE

B. ESTABLISHING RIGHT TO RECOVER

1. In General

§ 140:10 Prima facie case on a negotiable instrument—Right of plaintiff to recover

2. Plaintiff's Status As Holder in Due Course

§ 140:15 Elements to establish negotiability—Signature of party

§ 140:20 Elements to establish status as holder in due course

C. DEFENSES

§ 140:33 Defenses against holder in due course—Statute of limitations

III. TRIAL ISSUES

§ 140:44 Signature

CHAPTER 141. TORTS OF COMPETITION

§ 141:9 Unfair competition—The doctrine

§ 141:11 Unfair competition—Related claims

§ 141:13 Unfair competition—Defenses

§ 141:14 Unfair competition—Remedies

TABLE OF CONTENTS

- § 141:19 Unfair and deceptive trade practice statutes—Elements of a claim under state UDAP statutes

CHAPTER 142. MISAPPROPRIATION OF TRADE SECRETS

- § 142:1 Scope note
- § 142:3 Strategic considerations for plaintiff
- § 142:5 Defend Trade Secrets Act and state law
- § 142:8 Defend Trade Secrets Act claims—DTSA versus state law
- § 142:9 Defend Trade Secrets Act claims—Elements
- § 142:10 Defend Trade Secrets Act claims—Elements—Existence and ownership of trade secret
- § 142:17 State law claims—Elements—Existence of a trade secret
- § 142:20 State law claims—Defenses and counterclaims
- § 142:21 State law claims—Remedies

CHAPTER 143. PRIVACY AND SECURITY

I. INTRODUCTION

- § 143:2 Strategy, objectives, and preliminary considerations

II. PRIVACY AS A LIMITATION ON DISCOVERY

- § 143:18 Children and privacy

III. DATA SECURITY IN COMMERCIAL LITIGATION

- § 143:25 Potential causes of action for information security incidents—
Statutes relevant to information security incidents

IV. LITIGATION OF PRIVACY AND SECURITY CASES

- § 143:28 Standing to assert privacy and data security harms
- § 143:30 Federal class action considerations in privacy and data security cases

CHAPTER 144. COMMERCIAL DEFAMATION AND DISPARAGEMENT

- § 144:2 Common scenarios
- § 144:5 Strategic considerations for plaintiff—Venue
- § 144:6 Strategic considerations for plaintiff—Related claims
- § 144:7 Strategic considerations for plaintiff—Protective order
- § 144:13 Strategic considerations for defendant—Insurance
- § 144:15 Defamation and disparagement in common types of contracts—Separation agreements
- § 144:16 Defamation and disparagement in common types of contracts—Settlement agreements
- § 144:20 Unique litigation issues—Personal jurisdiction

- § 144:25 Common law defamation—Elements—Proving that the statement concerned the plaintiff
- § 144:26 Common law defamation—Elements—Falsity
- § 144:27 Common law defamation—Elements—Proving that the statement was defamatory
- § 144:28 Common law defamation—Elements—Publication
- § 144:29 Common law defamation—Elements—Fault
- § 144:31 Common law defamation—Defenses
- § 144:33 Commercial disparagement—Distinguished from commercial defamation
- § 144:35 Commercial disparagement—Elements—False statement of fact
- § 144:37 Commercial disparagement—Elements—“Of and concerning” the plaintiff’s goods or services
- § 144:40 Commercial disparagement—Elements—Special damages
- § 144:42 Breach of a non-disparagement clause
- § 144:44 Breach of a non-disparagement clause—Elements—Agreement
- § 144:45 Breach of a non-disparagement clause—Elements—Breach
- § 144:46 Breach of a non-disparagement clause—Elements—Damages
- § 144:47 Breach of a non-disparagement clause—Defenses

CHAPTER 145. ADVERTISING

II. PRELIMINARY CONSIDERATIONS

- § 145:5 Strategic considerations—Impact of the availability of injunctive relief

III. ELEMENTS OF A LANHAM ACT CLAIM AND DEFENSES

- § 145:7 Standing to bring claims under the Lanham Act
- § 145:8 Elements of false advertising and product disparagement claims under the Lanham Act
- § 145:13 Elements of false advertising and product disparagement claims under the Lanham Act—Puffery defense
- § 145:14 Elements of false advertising and product disparagement claims under the Lanham Act—Materiality of false or misleading statements
- § 145:16 Use of survey evidence
- § 145:18 Relief under Section 43(a) of the Lanham Act—Injunctive relief

IV. FTC ENFORCEMENT ACTIONS

- § 145:21 Federal Trade Commission Act Section 5(a)—Deceptiveness
- § 145:22 Federal Trade Commission Act Section 5(a)—Materiality
- § 145:23 Federal Trade Commission Act Section 5(a)—No scienter or reliance requirements
- § 145:24 Remedies available to the FTC

TABLE OF CONTENTS

**V. CONSUMER CLASS ACTIONS INVOLVING
FALSE ADVERTISING CLAIMS**

§ 145:26 Consumer class actions—Motions to dismiss false advertising
class actions

**CHAPTER 146. PRIOR RESTRAINT ON
SPEECH**

II. CURRENT DOCTRINE

§ 146:4 Types of prior restraints

**IV. GROUNDS FOR INVALIDATING PRIOR
RESTRAINTS**

§ 146:20 Defamation

§ 146:22 Commercial speech

CHAPTER 147. MEDIA AND PUBLISHING

II. STRATEGIC CONSIDERATIONS

§ 147:2 Case evaluation

§ 147:4 Issues to raise with clients

III. SUBSTANTIVE LAW

§ 147:7 Application of anti-SLAPP statutes

§ 147:9 Invasion of privacy claims—Unauthorized Internet tracking

§ 147:10 Invasion of privacy claims—Unauthorized use of biometric
information

§ 147:12 Invasion of privacy claims—Unauthorized sharing of users'
personal information

§ 147:13 Right of publicity claims

§ 147:14 Copyright claims

V. LIABILITY, DEFENSES AND DAMAGES

§ 147:18 Communications Decency Act

**CHAPTER 148. COMMERCIAL REAL
ESTATE**

**II. LITIGATION STRATEGY AND PRELIMINARY
CONSIDERATIONS**

§ 148:3 Jurisdiction and venue—Diversity jurisdiction

§ 148:5 Choice of law

III. TYPES OF REAL ESTATE CASES IN FEDERAL COURTS

- § 148:6 Foreclosure actions
- § 148:7 Zoning disputes
- § 148:8 Zoning disputes—Substantive due process claims
- § 148:9 Zoning disputes—Takings claims
- § 148:13 Brokerage disputes—Breach of contract/implicit contract
- § 148:16 Landlord/tenant disputes—Breach of contract/ breach of implied covenants
- § 148:17 Landlord/tenant disputes—Force majeure, impracticability, impossibility and frustration of purpose defenses
- § 148:18 Landlord/tenant disputes—Fraud/negligent misrepresentation
- § 148:21 Partnership disputes

IV. PROVISIONAL REMEDIES

- § 148:25 Lis pendens
- § 148:26 Preliminary injunctions
- § 148:27 Receiverships
- § 148:28 Special masters
- § 148:29 Appraisers

V. ENFORCEMENT OF JUDGMENT

- § 148:30 Judicial sale
- § 148:31 Writs of assistance/engagement of U.S. marshal

VI. COVID-19 RELATED ISSUES

- § 148:32 Impact of the global pandemic on the commercial real estate market

VII. PRACTICE AIDS

A. CHECKLISTS

- § 148:49 Checklists—COVID-19 related issues

CHAPTER 149. FEDERAL CLAIMS BASED ON LAND USE REGULATION

II. JURISDICTIONAL CONSIDERATIONS

A. DIVERSITY JURISDICTION

- § 149:2 Diversity jurisdiction

B. FEDERAL QUESTION JURISDICTION

- § 149:11 Federal constitutional claims—Interference by United States government officials (*Bivens* actions)

TABLE OF CONTENTS

- § 149:12 Federal constitutional claims—Interference by United States government

III. UNITED STATES CONSTITUTION AND THE RIGHT TO PROPERTY

A. FIFTH AMENDMENT TAKINGS CLAUSE

- § 149:22 Judicial takings
- § 149:23 What is a “taking”?
- § 149:24 What is a “taking”?—Per se regulatory takings: “permanent physical invasion”
- § 149:25 What is a “taking”?—Per se regulatory takings: deprivation of “*all* economically beneficial uses”
- § 149:26 What is a “taking”?—*Penn Central* factors
- § 149:28 Eminent domain and the Public Use Clause
- § 149:29 Exactions
- § 149:30 Bringing a takings claim—Ripeness
- § 149:31 Bringing a takings claim—Inverse condemnation

B. DUE PROCESS

- § 149:35 Basics—Substantive due process
- § 149:36 Property interests
- § 149:37 Finality, ripeness and exhaustion

IV. ZONING AND RELIGIOUS INSTITUTIONS

- § 149:41 Free Exercise Clause
- § 149:44 RLUIPA—Strict scrutiny for “substantial burdens”
- § 149:45 RLUIPA—Prohibitions on “discrimination and exclusion”

V. LAND USE REGULATION AND COMMERCIAL SPEECH

- § 149:48 Regulation of outdoor advertising—Levels of regulation
- § 149:49 Regulation of outdoor advertising—*Metromedia* and its progeny
- § 149:53 Regulation of adult entertainment businesses—Zoning

VI. WIRELESS FACILITIES: TELECOMMUNICATIONS ACT OF 1996

- § 149:55 Introduction
- § 149:56 Section 332(c)(7)—Substantive limitations
- § 149:57 Section 332(c)(7)—Procedural limitations
- § 149:58 Section 253(a)—Substantive limitations

VII. DISABLED INDIVIDUALS AND ARCHITECTURAL BARRIERS: TITLE III OF THE AMERICANS WITH DISABILITIES ACT OF 1990

- § 149:62 Title III requirements

BUSINESS AND COMMERCIAL LITIGATION 5TH

- § 149:65 Title III requirements—What constitutes discrimination:
design and construction of new buildings
- § 149:66 Title III requirements—What constitutes discrimination:
removal of barriers
- § 149:67 Who may sue: enforcing Title III

Table of Contents

CHAPTER 150. FRANCHISING

II. LITIGATION STRATEGY GENERALLY

- § 150:6 Choice of law
- § 150:7 Forum selection clause
- § 150:9 Arbitration

V. LITIGATION BY FRANCHISEES AGAINST FRANCHISORS—CLAIMS OF TERMINATION OR NONRENEWAL, INTERFERENCE WITH PERFORMANCE, OR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

- § 150:38 Claims for breach of the implied covenant of good faith and fair dealing—Encroachment

VI. LITIGATION BY FRANCHISEES AGAINST FRANCHISORS—ANTITRUST CLAIMS

- § 150:56 Restrictions on franchisee hiring

VII. LITIGATION BY FRANCHISEES AGAINST FRANCHISORS—MISCELLANEOUS CLAIMS

- § 150:59 Civil rights—Statutes of limitations
- § 150:60 Fair Labor Standards Act

VIII. PETROLEUM MARKETING PRACTICES ACT

- § 150:63 Elements of a claim and remedies

IX. AUTOMOBILE DEALERS DAY IN COURT ACT

- § 150:64 Elements of a claim and remedies

XI. LITIGATION BY FRANCHISORS AGAINST FRANCHISEES—CLAIMS AFTER THE FRANCHISE RELATIONSHIP

- § 150:74 Breach of noncompetition covenant

CHAPTER 151. FRAUD

I. INTRODUCTION

- § 151:5 Fraud and federal preemption
- § 151:6 Venue
- § 151:7 Pleading requirements
- § 151:8 When to file a Rule 12 motion

II. THE FRAUD CAUSE OF ACTION

- § 151:9 The elements
- § 151:10 Direct and indirect representations
- § 151:11 Representations of fact v. opinion
- § 151:12 Representation of present facts v. future events
- § 151:13 Materiality
- § 151:15 Knowledge of falsity
- § 151:16 Intent to induce action or inaction
- § 151:17 Justifiable reliance
- § 151:18 Loss
- § 151:19 Fraud by nondisclosure
- § 151:20 Fraudulent inducement to contract

III. FEDERAL LAWS

- § 151:21 Federal statutes, generally
- § 151:22 Securities Exchange Act of 1934
- § 151:23 Racketeer Influenced and Corrupt Organizations Act
- § 151:24 Bankruptcy Code (11 U.S.C.A. § 548)

IV. REMEDIES

- § 151:25 Measure of damages—“Benefit-of-the-bargain” and “out-of-pocket”
- § 151:26 Equitable remedies
- § 151:29 Fraudulent transfers

V. DEFENSES

- § 151:30 Statutes of limitation/accrual
- § 151:33 Waiver and ratification
- § 151:34 Contract clauses
- § 151:36 Pleading the Fifth Amendment

CHAPTER 152. FRAUDULENT TRANSFER

VI. REMEDIES

- § 152:23 Remedies outside bankruptcy—Injunctions

VIII. PROCEDURAL ISSUES

- § 152:52 Timeliness

TABLE OF CONTENTS

XI. SPECIAL CASES

- § 152:73 Governmental plaintiffs—*Nullum tempus*
- § 152:75 Governmental plaintiffs—Federal Debt Collection Procedures Act

CHAPTER 153. WHITE COLLAR CRIME

II. WHO INVESTIGATES FEDERAL CRIMES

- § 153:4 U.S. Attorneys—Southern District of New York
- § 153:5 U.S. Attorneys—Other districts
- § 153:6 Agencies with enforcement powers—Securities and Exchange Commission
- § 153:7 Agencies with enforcement powers—Department of Health & Human Services
- § 153:8 Agencies with enforcement powers—PCAOB
- § 153:17 Practicalities of interacting with federal authorities—Voluntary disclosure by corporations

III. FEDERAL CRIMINAL PROCEDURE

- § 153:29 Immunity—Cooperation initiatives for corporations
- § 153:30 Whistleblowers

IV. FEDERAL WHITE COLLAR CRIMES

- § 153:33 Insider trading—Legal standard
- § 153:34 Insider trading—Recent cases
- § 153:35 Foreign Corrupt Practices Act
- § 153:38 Mail and wire fraud—Honest services cases
- § 153:39 Securities fraud
- § 153:40 Health care fraud (Medicare and Medicaid)
- § 153:41 Antitrust
- § 153:42 Antitrust—Price-fixing
- § 153:43 Antitrust—Anti-cartel enforcement
- § 153:45 Crimes under the Bank Secrecy Act
- § 153:46 Criminal sanctions violations
- § 153:47 Investigations and prosecutions under the Foreign Agents Registration Act
- § 153:51 Tax fraud
- § 153:52 Environmental crimes
- § 153:53 Intellectual property crimes
- § 153:54 Computer crimes
- § 153:56 Racketeer Influenced and Corrupt Organizations

V. ORGANIZATIONAL LIABILITY FOR CRIMES

- § 153:60 Corporate criminal liability—Standards for corporate criminal liability

VII. DISPOSITION OF CRIMINAL CASES

- § 153:73 Corporate sentencing under federal law—Use of Non-Prosecution Agreements/Deferred Prosecution Agreements
- § 153:74 Corporate sentencing under federal law—Corporate monitors

CHAPTER 154. INTERPLAY BETWEEN COMMERCIAL LITIGATION AND CRIMINAL PROCEEDINGS

- § 154:2 Privileges
- § 154:3 Privileges—Corporate incentives to disclose information learned in internal investigations
- § 154:15 Discovery in parallel proceedings—Attempting to lift automatic stays in parallel securities class actions
- § 154:17 Discovery in parallel proceedings—Stays of civil proceedings and discovery
- § 154:19 Discovery in parallel proceedings—Defendant's access to exculpatory materials
- § 154:20 Collateral estoppel
- § 154:27 Double jeopardy

CHAPTER 155. MONEY LAUNDERING

I. INTRODUCTION

- § 155:2 Strategic considerations

II. FEDERAL MONEY LAUNDERING STATUTES

A. 18 U.S.C.A. § 1956: LAUNDERING OF MONETARY INSTRUMENTS

- § 155:6 Transaction money laundering—Specified unlawful activity
- § 155:7 Transaction money laundering—Proceeds
- § 155:8 Transaction money laundering—Knowledge
- § 155:10 Transaction money laundering—Intent—Promotion money laundering
- § 155:12 Transaction money laundering—Intent—Concealment
- § 155:13 Transaction money laundering—Intent—Avoiding a reporting requirement
- § 155:14 International money laundering
- § 155:17 International money laundering—Into or out of the U.S.
- § 155:19 International money laundering—Intent—Promotion
- § 155:20 International money laundering—Intent—Concealment
- § 155:21 International money laundering—Intent—Avoiding a reporting requirement
- § 155:22 International money laundering—Extraterritorial applicability

B. 18 U.S.C.A. § 1957: ENGAGING IN MONETARY TRANSACTIONS IN PROPERTY

TABLE OF CONTENTS

DERIVED FROM SPECIFIED UNLAWFUL ACTIVITY

- § 155:26 The spending statute—Monetary transaction involving
criminally derived property of more than \$10,000
- § 155:27 The spending statute—Derived from specified unlawful
activity
- § 155:28 The spending statute—Attorney’s fees

III. CIVIL MONEY LAUNDERING ACTIONS

- § 155:29 Civil money laundering actions

IV. UNLICENSED MONEY TRANSMITTERS

- § 155:30 Unlicensed money transmitter

V. PENALTIES

- § 155:35 U.S. Sentencing Guidelines

VII. THE BANK SECRECY ACT—ANTI-MONEY LAUNDERING PROGRAM REQUIREMENTS

- § 155:41 The Bank Secrecy Act—Multi-agency resolutions

VIII. MONEY LAUNDERING THROUGH VIRTUAL CURRENCY

- § 155:47 Virtual currency—Recent criminal and regulatory actions
- § 155:49 Virtual currency—Recent criminal and regulatory actions—
DOJ actions against virtual currency businesses
- § 155:50 Virtual currency—Recent criminal and regulatory actions—
DOJ actions against mixers and tumblers
- § 155:51 Virtual currency—Recent criminal and regulatory actions—
DOJ civil forfeiture actions

CHAPTER 156. THE FOREIGN CORRUPT PRACTICES ACT

- § 156:10 The anti-bribery provisions—“Anything of value”
- § 156:12 The anti-bribery provisions—To a “foreign official”—Various
types of “foreign officials”
- § 156:13 The anti-bribery provisions—To a “foreign official”—
Employees of government owned enterprises
- § 156:23 The accounting provisions—Potential liability—Knowingly
circumventing or failing to implement a system of internal
controls or knowingly falsifying books and records
- § 156:29 Enforcement of the FCPA—Penalties and sanctions
- § 156:31 Enforcement of the FCPA—The level of enforcement activity
- § 156:33 Enforcement of the FCPA—Criminal procedures—Internal
investigations
- § 156:34 Enforcement of the FCPA—Criminal procedures—Deferred
prosecution agreements

- § 156:35 Enforcement of the FCPA—Criminal procedures—The appointment of a monitor
- § 156:39 The FCPA in the context of mergers and acquisitions—Post-acquisition review
- § 156:42 The internationalization of anti-corruption enforcement—Increased enforcement activity outside of the United States

CHAPTER 157. EXPORT CONTROLS

I. INTRODUCTION

- § 157:1 Scope note

II. STRATEGIC CONSIDERATIONS

- § 157:2 Compliance challenges
- § 157:3 Strategies for addressing compliance challenges

III. LAWS AND REGULATIONS

A. INTRODUCTION TO EXPORT CONTROL LAWS AND REGULATIONS

- § 157:5 Export control statutes
- § 157:8 Export control statutes—The International Emergency Economic Powers Act and Trading with the Enemy Act

B. THE DEPARTMENT OF COMMERCE AND EXPORT CONTROLS

- § 157:10 The Export Administration Regulations

C. DEPARTMENT OF STATE

- § 157:12 International Traffic in Arms Regulations
- § 157:13 International Traffic in Arms Regulations—Registration and licensing requirements under the ITAR

D. DEPARTMENT OF THE TREASURY

- § 157:15 OFAC sanctions programs
- § 157:16 Extraterritorial application of U.S. sanctions

IV. EXPORT CONTROL ENFORCEMENT—DEPARTMENT OF COMMERCE

- § 157:19 Office of Export Enforcement
- § 157:32 Settlement

V. EXPORT CONTROL ENFORCEMENT—DEPARTMENT OF STATE

- § 157:33 Violations of the International Traffic in Arms Regulations

TABLE OF CONTENTS

**VI. EXPORT CONTROL ENFORCEMENT—
DEPARTMENT OF TREASURY**

§ 157:41 Administrative subpoena

**VII. PENALTIES AND ADMINISTRATIVE
SANCTIONS FOR EXPORT CONTROL
VIOLATIONS**

A. BUREAU OF INDUSTRY AND SECURITY

§ 157:49 Administrative and criminal penalties

**B. DIRECTORATE OF DEFENSE TRADE
CONTROLS**

§ 157:50 Administrative and criminal penalties

C. OFFICE OF FOREIGN ASSETS CONTROL

§ 157:51 Administrative and criminal penalties

D. ENFORCEMENT GUIDELINES

§ 157:52 BIS enforcement guidelines

§ 157:53 OFAC economic sanctions enforcement guidelines

E. CRIMINAL ENFORCEMENT PROCEEDINGS

§ 157:54 Potential for criminal prosecutions has increased

§ 157:55 Settlement and enforcement trends

§ 157:57 Recent cases—Unlawful export of U.S. military equipment
and technology

§ 157:58 Recent cases—Unlawful exports to Iran

§ 157:59 Recent cases—Unlawful exports to China

§ 157:60 Recent cases—Enforcement of other export control and
sanctions programs

CHAPTER 158. INTERNATIONAL TRADE

**III. PROCEEDINGS BEFORE THE ITC AND
COMMERCE**

§ 158:7 Overview

§ 158:12 Circumvention and scope proceedings

§ 158:13 Other AD/CVD proceedings

**IV. LITIGATION AT THE CIT AND FEDERAL
CIRCUIT**

A. U.S. COURT OF INTERNATIONAL TRADE

§ 158:16 Rules of practice and procedure

§ 158:17 Life of a case at the CIT

**B. U.S. COURT OF APPEALS FOR THE
FEDERAL CIRCUIT**

§ 158:23 U.S. Court of Appeals for the Federal Circuit, generally

VI. POTENTIAL FEDERAL CLAIMS

A. FALSE CLAIMS ACT

§ 158:43 False Claims Act, generally

Table of Contents

CHAPTER 159. ALIEN TORT STATUTE AND TORTURE VICTIM PROTECTION ACT

II. ALIEN TORT STATUTE

B. *SOSA*: NARROWING THE SCOPE OF ATS CLAIMS

- § 159:4 The ATS as a jurisdictional statute
- § 159:5 *Sosa*'s "universally recognized norms"

C. *KIOBEL II*: FURTHER NARROWING THE SCOPE OF ATS CLAIMS

- § 159:8 *Kiobel II*: Application of the presumption to the ATS

F. WHAT REMAINS OF THE ATS

- § 159:13 Generally
- § 159:15 Well-established international law violations—War crimes
- § 159:16 Well-established international law violations—Crimes against humanity
- § 159:19 Well-established international law violations—Involuntary medical experimentation
- § 159:20 Rejected claims of international law violations
- § 159:25 Emerging and disputed claims—Cruel, inhuman, or degrading treatment
- § 159:27 Emerging and disputed claims—*Non-refoulement*
- § 159:29 Alien status
- § 159:33 Indirect theories of corporate liability—Vicarious liability and agency
- § 159:36 The touch and concern test after *Kiobel II* and *Nestle*

G. RELATIONSHIP OF THE ATS WITH OTHER STATUTES

- § 159:42.50 State law as a vehicle for avoiding limits by the Supreme Court on ATS litigation [*New*]

III. TORTURE VICTIM PROTECTION ACT

- § 159:48 Appropriate TVPA plaintiffs—Legal representatives and wrongful death claimants
- § 159:51 Appropriate TVPA defendants—Corporate liability
- § 159:53 Appropriate TVPA defendants—Liability of foreign officials

- § 159:54 Appropriate TVPA defendants—Indirect liability
- § 159:56 Fundamental elements of a TVPA claim—State action
- § 159:58 Fundamental elements of a TVPA claim—Extrajudicial killing

IV. RELATIONSHIP BETWEEN THE TVPA AND THE ATS

- § 159:59 Does the TVPA “occupy the field” of torture and extrajudicial killing claims?

V. PRACTICAL CONSIDERATIONS IN ATS AND TVPA LITIGATION

A. DEFENSES

- § 159:61 Statute of limitations

E. PRACTICE MATERIALS

- § 159:76 Sample jury instructions

CHAPTER 160. THE FALSE CLAIMS ACT

I. INTRODUCTION

- § 160:1 Scope note

II. STRATEGIC CONSIDERATIONS IN LITIGATING A FALSE CLAIMS ACT CASE

- § 160:4 Pre-intervention stage strategies
- § 160:5 Pre-intervention stage strategies—Granston Memorandum
- § 160:6 Pre-intervention stage strategies—Relator considerations

III. LIABILITY AND DAMAGES UNDER THE FALSE CLAIMS ACT

- § 160:17 The definition of “false or fraudulent” claim—Legal falsity
- § 160:24 Damages and penalties—Constitutional issues

IV. THE QUI TAM PROVISION

- § 160:31 The public disclosure bar
- § 160:33 The “first-to-file” rule

V. PRACTICE AND PROCEDURE UNDER THE FALSE CLAIMS ACT

- § 160:39 Yates memorandum

TABLE OF CONTENTS

**CHAPTER 161. ADMINISTRATIVE
AGENCIES**

**II. AGENCY POWERS, ORGANIZATION AND
PURPOSE**

- § 161:3 Agency powers
- § 161:4 Agency organization and purpose

VI. SCOPE OF JUDICIAL REVIEW

- § 161:30 Standards of judicial review—The arbitrary and capricious
standard
- § 161:32 Standards of judicial review—Issues of law and the *Chevron*
doctrine

VII. TIMING OF JUDICIAL REVIEW

- § 161:34 The requirement of final agency action
- § 161:37 Mootness

VIII. STANDING, FORUM, AND VENUE

- § 161:40 Standing

**CHAPTER 162. GOVERNMENT ENTITY
LITIGATION**

III. THRESHOLD CONSIDERATIONS

- § 162:16 Sovereign immunity—State
- § 162:19 Sovereign immunity—Eleventh Amendment—Waiver

**CHAPTER 163. CONSTITUTIONAL
LITIGATION**

- § 163:10 Formulating, raising, and preserving constitutional issues—
Case study: Substantive due process and same-sex
marriage
- § 163:18 Barriers to suing certain defendants for constitutional
violations—State and local government employees and
some private persons
- § 163:19 Barriers to suing certain defendants for constitutional
violations—Federal government employees
- § 163:38 Constitutional limitations on government action—Takings
Clause—What constitutes a taking
- § 163:44 Constitutional limitations on government action—Legislative
limitations—Nondelegation

CHAPTER 164. POLITICAL LAW

- § 164:9 Interesting cases of note

CHAPTER 165. CIVIL RIGHTS

III. ELEMENTS OF A SECTION 1983 ACTION

B. SCOPE OF THE PROTECTED RIGHTS

§ 165:4 “rights . . . secured by the Constitution”

C. “UNDER COLOR OF” LAW

§ 165:10 “under color of” law—Private individuals and businesses—
Contractual relationship

CHAPTER 166. GOVERNMENT CONTRACTS

II. CLAIMS AGAINST THE GOVERNMENT IN THE COURT OF FEDERAL CLAIMS

§ 166:6 Litigating commercial claims against the government before the Court of Federal Claims

§ 166:8 Bid protests—Procedures at the Court of Federal Claims

§ 166:9 Bid protests—Pre-award challenges

§ 166:10 Bid protests—Post-award challenges

§ 166:12 Claims under the Contract Disputes Act—Initiating a claim

§ 166:13 Types of Contract Disputes Act claims litigated before the Court of Federal Claims

§ 166:17 Suits regarding the government’s termination rights—
Terminations for convenience

§ 166:18 Suits regarding the government’s termination rights—
Terminations for default

IV. CLAIMS AGAINST THE GOVERNMENT IN FEDERAL DISTRICT COURTS

§ 166:23 Claims under the Freedom of Information Act—Reverse FOIA cases

§ 166:24 Suspension and debarment

CHAPTER 167. PUBLIC UTILITY

II. REGULATORY CONTEXT

§ 167:3 Background of public utility regulation

§ 167:4 Background of public utility regulation—Electricity

§ 167:5 Background of public utility regulation—Natural gas

III. JUDICIAL REVIEW OF FERC DECISIONS

§ 167:7 Scope of judicial review of FERC decisions

§ 167:8 Venue

§ 167:11 Threshold prerequisites—Standing—Constitutional standing

§ 167:12 Threshold prerequisites—Standing—Statutory standing

TABLE OF CONTENTS

- § 167:14 Threshold prerequisites—Mootness
- § 167:15 Threshold prerequisites—Exhaustion

IV. THE BOUNDARIES OF FEDERAL V. STATE AUTHORITY

- § 167:21 Preemption—Overview

V. FEDERAL COURT JURISDICTION AND THE EXERCISE OF THAT JURISDICTION

- § 167:26 Abstention
- § 167:28 Primary jurisdiction
- § 167:29 Filed-rate doctrine
- § 167:32 Filed-rate doctrine—Antitrust claims
- § 167:33 Removal and remand
- § 167:34 The Johnson Act
- § 167:37 Authority of the district court to enforce the FPA, NGA, and NGPA—Review of FERC civil penalties
- § 167:41 Procedural matters—Venue
- § 167:42 Procedural matters—Statute of limitations

VI. SUBSTANTIVE LITIGATION

- § 167:46 Antitrust—State action immunity
- § 167:49 Unconstitutional takings
- § 167:50 Unconstitutional takings—Rates
- § 167:53 Commerce Clause

CHAPTER 168. TAX

I. INTRODUCTION

- § 168:5 Three general categories of tax issues to be litigated

II. CHOICE OF COURT

- § 168:10 Burden of proof

III. UNITED STATES TAX COURT

- § 168:12 Overview
- § 168:22 Legal precedent in tax disputes involve regulatory and administrative authorities
- § 168:23 Bench trial—No right to a jury

V. UNITED STATES COURT OF FEDERAL CLAIMS

- § 168:45 Article I court open to all taxpayers' refund suits

CHAPTER 169. CONSTRUCTION

II. OVERVIEW OF THE CONSTRUCTION PROCESS

- § 169:12 Participants in construction projects—Sureties
- § 169:13 Participants in construction projects—Insurers
- § 169:21 The regulatory environment

III. STRATEGIC CONSIDERATIONS

- § 169:25 Arbitration

VI. CAUSES OF ACTION AND DEFENSES

- § 169:47 By owners—Against design professionals, construction managers, and consultants

CHAPTER 170. PROJECT FINANCE AND INFRASTRUCTURE

II. STRATEGY, OBJECTIVES AND PRELIMINARY CONSIDERATIONS

A. PARTIES TO A PROJECT FINANCE TRANSACTION

- § 170:13 Role of governmental entities

III. NATURE OF DISPUTES ARISING OUT OF PROJECT FINANCE TRANSACTIONS

B. DISPUTES INVOLVING PROJECT SUPPLIERS

- § 170:39 *Force majeure* disputes

C. DISPUTES INVOLVING PROJECT OUTPUT PURCHASERS

- § 170:43 Potential federal preemption of pricing disputes involving the sale of power

I. OTHER ISSUES

- § 170:57 Governmental and regulatory claims and issues

TABLE OF CONTENTS

**IV. PROCEDURAL AND STRATEGIC
CONSIDERATIONS RELATING TO FEDERAL
COURT LITIGATION OF PROJECT FINANCE
DISPUTES**

- § 170:63 Federal subject matter jurisdiction—Diversity and alienage jurisdiction
- § 170:67 Federal question jurisdiction—Preemption by federal energy law and regulation
- § 170:68 Federal question jurisdiction—Edge Act
- § 170:70 Federal question jurisdiction—Intellectual property disputes
- § 170:71 Federal question jurisdiction—Federal constitutional claims
- § 170:72 Federal question jurisdiction—Bankruptcy-related jurisdiction
- § 170:74 Personal jurisdiction
- § 170:82 Arbitrability issues

Table of Contents

CHAPTER 171. SPORTS

III. INTELLECTUAL PROPERTY

- § 171:14 Player IP rights—Player publicity rights in the context of amateur sports
- § 171:15 Club and league IP rights—Trademark rights and protection; licensing agreements

IV. ANTITRUST

- § 171:22 Exemptions—Professional baseball exemption
- § 171:31 Section 1 (contract, combination or conspiracy)—Restraints on players
- § 171:32 Section 1 (contract, combination or conspiracy)—Restraints on teams
- § 171:34 Section 1 (contract, combination or conspiracy)—Restraints in the amateur context

V. LABOR

- § 171:40 Collective bargaining—Strikes, lockouts, and the occasional union
- § 171:44 Labor arbitration—Drug-testing and grievances
- § 171:45 Fair Labor Standards Act

VI. OTHER SPORTS DISPUTES

- § 171:49 NHL concussion litigation
- § 171:50 New Jersey gambling litigation
- § 171:51 Daily fantasy sports

CHAPTER 172. ENTERTAINMENT

III. ORAL AGREEMENTS IN THE ENTERTAINMENT INDUSTRY

- § 172:11 Overview
- § 172:12 Basic principles of oral contract law
- § 172:14 Enforceability of agreements to negotiate
- § 172:15 The enforcement of preliminary agreements in New York
- § 172:16 Statute of frauds

IV. CONTRACTUAL BEST EFFORTS, AND GOOD FAITH AND FAIR DEALING

§ 172:19 The implied covenant of good faith

V. FORCE MAJEURE AND RELATED COMMON LAW DOCTRINES

- § 172:25 Common force majeure events
- § 172:26 Relationship between force majeure clauses and common law doctrines
- § 172:27 Impossibility of performance
- § 172:28 Frustration of purpose
- § 172:29 Supervening illegality
- § 172:30 Recent judicial application of force majeure and related common law doctrines to the COVID-19 pandemic

VII. PROTECTING CELEBRITY—RIGHTS OF PUBLICITY AND PRIVACY

- § 172:38 Overview
- § 172:39 First steps and considerations
- § 172:40 Framing the claim
- § 172:41 Choice of law
- § 172:42 Defenses
- § 172:43 Proving damages, and unique aspects of celebrity valuation
- § 172:45 Celebrity impersonation and anonymous Internet postings

VIII. PROTECTING CELEBRITY—DEFAMATION

- § 172:46 Overview
- § 172:47 The “actual malice” requirement
- § 172:49 Defamation claims against the tabloids
- § 172:50 Defamation claims based on Internet activities
- § 172:51 Protections afforded the right to express an opinion

XI. EMPLOYMENT LAW-RELATED DISPUTES

- § 172:71 Casting choices—Sex, age, national origin, and race discrimination
- § 172:72 Hostile work environment
- § 172:73 The “Me Too” movement’s impact on hostile workplace claims
- § 172:76 Discrimination in the making of contracts
- § 172:78 Restrictive covenants and anti-employee poaching

CHAPTER 173. FASHION AND RETAIL

- § 173:6 Intellectual property disputes—Using patents, copyrights, and trademarks to protect fashion designs and products
- § 173:11 Americans With Disabilities Act compliance—Online experiences
- § 173:13 Deceptive advertising, marketing and labeling litigation—Made in the USA labeling

TABLE OF CONTENTS

- § 173:14 Deceptive advertising, marketing, and labeling litigation—
Deceptive pricing
- § 173:20 Privacy—Fair and Accurate Credit Transactions Act
- § 173:22 Privacy—Data breach and customer notification
- § 173:28 Employment and labor issues—Fair Labor Standards Act—
Independent contractors
- § 173:29 Employment and labor issues—Joint employer issues
- § 173:30 Employment and labor issues—Unions
- § 173:31 Employment and labor issues—Predictive scheduling
- § 173:35 Arbitration—Express and implied assent
- § 173:37 Arbitration—Clickwrap clauses
- § 173:38 Arbitration—Browsewrap clauses
- § 173:39 Arbitration—Unconscionability
- § 173:40 Arbitration—California *McGill* Rule
- § 173:42 Bankruptcy—Retail leases
- § 173:43 Bankruptcy—Retail leases—“Shopping center” leases
- § 173:49 Bankruptcy—Reclamation claims
- § 173:50 Bankruptcy—503(b)(9) claims

CHAPTER 174. ART LAW

- § 174:8 Stolen artwork
- § 174:9 Stolen artwork—Potential claims
- § 174:13 Art contracts—Consignment
- § 174:15 RICO, fraud, and bankruptcy
- § 174:16 Licensing and copyright
- § 174:19 Licensing and copyright—Trademark disputes

CHAPTER 175. ANIMAL LAW

I. INTRODUCTION

- § 175:1 Scope note

III. FEDERAL QUESTION SUBJECT MATTER JURISDICTION

- § 175:8 Federal question jurisdiction
- § 175:19 Americans with Disabilities Act and Fair Housing Act
- § 175:26 Regulatory issues—Federal preemption

V. PRACTICE AIDS

- § 175:41 List of federal statutes
- § 175:49 Sample motions [*New*]

CHAPTER 176. ENERGY

III. ISSUES IN ENERGY LITIGATION

A. LITIGATION OBSTACLES TO ENERGY DEVELOPMENT AND PRODUCTION

§ 176:12 State common law claims based on alleged air emissions

**B. NEPA CHALLENGES TO ENERGY
DEVELOPMENT ON PUBLIC LANDS**

§ 176:20 Requirement of an EIS

**C. EMERGING LITIGATION ISSUES RELATED
TO PUBLIC LAND AGENCY APPROVALS**

§ 176:28 Presidential authority

**IV. TYPICAL OIL AND GAS LITIGATION
DISPUTES**

§ 176:60 Royalty owner claims relating to postproduction cost
deductions

CHAPTER 177. ENVIRONMENTAL CLAIMS

III. LAW AND PROCEDURE

A. CLAIMS UNDER CERCLA

**2. Responsible Persons: Who is Liable Under
CERCLA?**

§ 177:10 Responsible persons: Who is liable?—Operators

§ 177:11 Responsible persons: Who is liable?—Parents

§ 177:13 Responsible persons: Who is liable?—“Arranged for”—Intent

3. Other Elements of CERCLA Liability

§ 177:16 Facility

§ 177:17 Release or threat of release of hazardous substances

§ 177:18 Necessary response costs

§ 177:19 Consistency with NCP

5. Joint and Several Liability

§ 177:21 Determining whether liability is joint and several

**6. Defenses to and Exemptions from CERCLA
Liability**

§ 177:23 Additional statutory defenses for property owners

§ 177:29 Statute of limitations

7. Recoverable Costs Under CERCLA

§ 177:30 Common categories of costs

§ 177:31 Allocation of costs among responsible persons

**B. CLAIMS BROUGHT UNDER OTHER
ENVIRONMENTAL STATUTES**

TABLE OF CONTENTS

- § 177:42 Resource Conservation and Recovery Act—Notice and essential elements
- § 177:43 Oil Pollution Act
- § 177:44 Clean Water Act
- § 177:45 Clean Air Act
- § 177:46 National Environmental Policy Act

C. COMMON LAW CLAIMS IN ENVIRONMENTAL LITIGATION

- § 177:48 Advantages to bringing common law claims
- § 177:50 Types of common law claims—Nuisance

D. IMPLICATIONS OF ENVIRONMENTAL CRIMINAL ENFORCEMENT

- § 177:54 Potential for criminal prosecutions
- § 177:56 Assessment of potential criminal exposure—Types of charges that may be brought

CHAPTER 178. CLIMATE CHANGE

- § 178:4 The first and second waves of litigation
- § 178:7 Disclosure issues
- § 178:10.50 The Inflation Reduction Act of 2022 *[New]*

CHAPTER 179. E-COMMERCE

I. INTRODUCTION

- § 179:1 Scope note

CHAPTER 180. INFORMATION TECHNOLOGY

II. THRESHOLD ISSUES IN IT LITIGATION

- § 180:3 Governing law (goods v. services)
- § 180:5 Tolling agreements

III. COMMON CONTRACTUAL DISPUTES IN IT LITIGATION

- § 180:10 Delay
- § 180:11 Multi-party agreements and claims against third-parties

V. COMMON DEFENSES

- § 180:19 Unconscionability (contracts of adhesion)
- § 180:19.50 Inadequate assent *[New]*