

BOOK REVIEW: COMMERCIAL LITIGATION IN NEW YORK
STATE COURTS, THIRD EDITION (ROBERT L. HAIG, EDITOR-
IN-CHIEF)

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In *Husain v. Springer*,¹ Chief Judge Dennis G. Jacobs of the United States Court of Appeals for the Second Circuit famously began a dissent with the frank concession that he had not read the majority's opinion. He acknowledged that this was unusual and explained why.² In the interest of candor, I must begin my review of the Third Edition of *Commercial Litigation in New York State Courts* ("*Commercial Litigation*")³ with a similar confession: I have not read the entire book. I too shall explain why.

Now, before the reader protests that I am not a suitable reviewer for this highly regarded treatise on commercial litigation in the New York state courts, I must point out that few, if any, individuals have read all 8,400 pages of this six-volume collection – other than perhaps the indefatigable Robert L. Haig, the distinguished Editor-in-Chief of *Commercial Litigation*, and some overly ambitious big-firm associates. More fundamentally, *Commercial Litigation* simply is not the type of work that is intended to be consumed from cover to cover. Rather, it is an encyclopedic collection of 106 chapters written by 144 well-respected principal authors, including twenty judges of the federal and state courts, as well as a who's who of New York's commercial litigation bar.⁴

Building on the first two editions, published in 1995 and 2005 respectively, the Third Edition adds 19 new chapters and substantially expands the materials from prior editions. The

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¹ 494 F.3d 108, 135-136 (2d Cir. 2007), *cert. denied* 552 U.S. 1258 (2008) (Jacobs, J., concurring in part and dissenting in part).

² *Id.*

³ COMMERCIAL LITIGATION IN NEW YORK STATE COURTS (Robert L. Haig, et al., eds., 3rd ed. 2010) (West's New York Practice Series Vols. 2-4C) (hereinafter COMMERCIAL LITIGATION). The treatise has a list price of \$665.

⁴ 2 *id.* at xii-xiii.

product of more than \$25 million in attorney time over the last fifteen years, *Commercial Litigation* represents a massive accumulation of intellectual capital.⁵ Fortunately, the editors and authors of *Commercial Litigation* have all volunteered their time and effort to this worthwhile endeavor, and, through a unique joint venture between West Publishing and the New York County Lawyers' Association, all royalties from the sale of *Commercial Litigation* flow to the bar association.⁶

Commercial Litigation provides an in-depth treatment of practice and procedure in the New York state courts as well as the most frequently encountered substantive areas of our state's well-developed body of commercial law. In addition to a comprehensive and well-organized examination of the rules of substance and procedure governing commercial cases in New York, the treatise links these rules to the strategic considerations necessary to effectively represent commercial clients. The chapters integrate step-by-step practice guides, checklists, and sample forms, resulting in a compendium of doctrine, strategy and practical advice covering every aspect of a commercial case—from investigation and assessment through pleading, discovery, motion practice, trial, appeal, and post-judgment proceedings.

I suspect that my own uses of *Commercial Litigation* are not uncommon. In presiding over Albany County's Commercial Division—a specialized part of Supreme Court intended to ensure the quality and efficient adjudication of commercial disputes—I hear many cases involving contracts, insurance, banking, restrictive covenants, and corporate and partnership law. Upon my assignment to the Commercial Division more than five years ago, my predecessor handed off to me his well-worn copy of the Second Edition—a mere five volumes consisting of only 5,800 pages. Over the years, that edition has served me well as a valuable reference source when confronted with thorny procedural questions or forays into unfamiliar areas of substantive law.

As useful and informative as I have found *Commercial Litigation*, practitioners will find it even more valuable. As a judge, the issues that come before me necessarily are framed by the pleadings, motions, evidentiary record, and arguments of counsel. Through its unique emphasis on the strategic and tactical considerations associated with commercial litigation, this treatise will assist

⁵ *Id.* at xi.

⁶ *See id.* at xv.

practitioners in putting more effective and persuasive submissions before the court.

Commercial Litigation opens with an introductory chapter by Chief Judge Jonathan Lippman tracing the long history of commercial litigation in New York from Dutch colonial times to the present.⁷ The historical materials draw heavily from the work of former Chief Judge Judith S. Kaye, who authored the introductory chapters of prior editions⁸ and was a driving force behind the establishment of our Commercial Division.⁹

The treatise naturally places a special emphasis on the Commercial Division, with an entire chapter dedicated to its rules of practice.¹⁰ The authors of this chapter also identify the strategic considerations associated with choosing to litigate in the Commercial Division.¹¹ In addition, practice pointers for litigating in the Commercial Division are well integrated throughout the entire work, including an outstanding discussion of motion practice authored by the Hon. Timothy S. Driscoll, a Commercial Division Justice in Nassau County.

The first three volumes of *Commercial Litigation* focus on the procedural aspects of commercial litigation, beginning with a review of the nuts and bolts of subject matter jurisdiction, personal jurisdiction, and venue. Although the discussion is framed in terms of commercial cases, the comprehensive and insightful discussion of civil practice by highly knowledgeable authors—including the Hon. Robert S. Smith, who, like former Chief Judge Kaye, was an accomplished commercial litigator before joining the Court of Appeals—makes *Commercial Litigation* a useful resource for anyone who litigates in the New York state courts.

Shifting gears, Chapter 4 focuses on the need for counsel to conduct a thorough pre-suit investigation. In addition to marshaling the provisions of the Civil Practice Law and Rules (“CPLR”) and court rules that require due diligence,¹² the authors make a strong case for the strategic and efficiency benefits associated with informal, pre-commencement fact gathering.¹³ A

⁷ See *id.* §§ 1.1–5.

⁸ *Id.* § 1.1 fn *.

⁹ *Id.* § 1.15.

¹⁰ 3 *id.* § 33.

¹¹ *Id.* §§ 33.2–7. Further comparisons between Commercial Division and federal practice are set forth in several other chapters (see e.g., 2 *id.* §§ 10.9–11 [removal to federal court]; *id.* § 11 [comparison with commercial litigation in federal court]).

¹² 2 *Id.* § 4.8.

¹³ *Id.* §§ 4.2–7.

useful discussion of the attorney-client privilege in the context of internal investigations and investigations by government regulators also is included.¹⁴ Chapter 5 addresses the related topic of case evaluation, which wisely emphasizes the need to objectively evaluate a case using analytical tools, such as decision trees and modeling, at all stages of the litigation process.¹⁵

The next three chapters focus on the strategic and tactical issues associated with the preparation of pleadings, the cornerstone of any litigation. Notably, Chapter 8 includes a long list of strategic issues that lawyers should consider before reflexively joining a potentially responsible third party.¹⁶

Chapter 11 lays out some of the key differences between state and federal practice that may inform the choice of forum, including the availability of expert depositions, the need for out-of-state discovery, the “plausibility” standard governing motions to dismiss in federal court, the differing standards for the admissibility of expert testimony, and the availability of interlocutory appeals.¹⁷ I note, however, that this chapter does not address the differing initial burdens on motions for summary judgment. Time and again, I see federal practitioners move for summary judgment in state court by pointing to gaps in their adversary’s proof.¹⁸ As such, this may be an area worthy of emphasis in the future. Chapters 12 and 13 go on to address New York’s substantive and procedural law governing forum selection clauses, arbitration clauses, and choice of law clauses—common elements of most commercial agreements.

Joinder, consolidation, and severance are the subject of Chapter 14. While most litigators are familiar with these procedural devices, a new chapter focuses on the coordination of similar cases pending throughout the state. The author, the Hon. Helen E. Freedman, presides over the New York State Litigation Coordinating Panel (“LCP”), an administrative body comprised of one justice from each of the State’s judicial departments.¹⁹ Modeled on the United States Panel on Multi-District Litigation,²⁰ the LCP

¹⁴ *Id.* §§ 4.9–12.

¹⁵ *Id.* §§ 5.22–67.

¹⁶ *Id.* §§ 8.3–8.12.

¹⁷ *Id.* § 11.

¹⁸ *See Yun Tung Chow v. Reckitt & Colman, Inc.*, 950 N.E.2d 113, 118 (N.Y. 2011) (Smith, J., concurring) (explaining differing initial burdens).

¹⁹ 2 COMMERCIAL LITIGATION, *supra* note 4, § 15.03. Justice Freedman’s service on the Litigation Coordinating Panel is, of course, in addition to her day job as an Associate Justice of the Appellate Division, First Department.

²⁰ 28 U.S.C. § 407 (2011).

provides a formal mechanism by which related cases pending throughout the state court system may be coordinated by a single judge for pre-trial purposes. In addition to discussing the rules and procedures governing coordination, practitioners will enjoy the insights and perspectives of the LCP's Presiding Justice. And as a judge who recently received a coordination assignment from the LCP, I can state from firsthand experience that the sample forms and orders are very useful.²¹ Chapter 15 also provides some interesting examples of informal coordination between related federal and state actions.²²

The march through New York's rules of practice and procedure continues with a thorough discussion of issue and claim preclusion, provisional remedies, the addition and substitution of parties, litigation involving foreign corporations, and class action lawsuits. The topics of motion practice, summary judgment, motions *in limine*, calendar practice, and other pre-trial issues also receive detailed treatment. All of these chapters maintain the treatise's emphasis on the identification of strategic considerations and are replete with well-considered practice tips and comprehensive checklists.

At meetings of the Commercial and Federal Section of the New York State Bar Association, in-house counsel and commercial litigators consistently emphasize that there is no issue of greater concern to their corporate clients than the expense, delay, disruption, and uncertainty associated with discovery in commercial actions. Chapter 22 provides a sound overview of the disclosure process, with an appropriate emphasis on the development of discovery plans tailored to both the client's litigation and business requirements.²³ A series of chapters then delves into each of the available disclosure devices, including bills of particulars,²⁴ document discovery,²⁵ interrogatories,²⁶ depositions,²⁷ and requests for admission,²⁸ as well as New York's rules and procedures for expert disclosure and the sealing of court records.²⁹ Of particular

²¹ See <http://www.nycourts.gov/supctmanh/lcp/Comp%20Risk%20Mgrs%201.pdf> (last visited September 1, 2011).

²² 2 COMMERCIAL LITIGATION, *supra* note 4, §§ 15.9–15.

²³ 3 *id.* §§ 22.6–11.

²⁴ *Id.* § 21.

²⁵ *Id.* § 25.

²⁶ *Id.* § 26.

²⁷ *Id.* § 24.

²⁸ *Id.* § 27.

²⁹ *Id.* § 23.

importance is the chapter on document discovery, which covers a number of critical and emerging issues, such as the discovery and preservation of electronic business records and cost-shifting.³⁰

The next nine chapters of the treatise focus on the conduct of commercial trials.³¹ These chapters represent a continuing testament to the intellect and insight of their original author, Stephen Rackow Kaye. In honor of Mr. Kaye's memory as one of the nation's preeminent commercial litigators and in furtherance of his legacy of giving back to the profession he loved, the members of his former law firm, Proskauer Rose, LLP, have updated these chapters for the Third Edition. It is impossible to do justice to the almost 700 pages of accumulated wisdom of Mr. Kaye and Proskauer's litigators in this short review, other than to say that if *Commercial Litigation* consisted of these chapters alone, it would still represent a worthwhile investment.

Rounding out the treatise's discussion of civil procedure are chapters on monetary damages,³² court-awarded attorney's fees,³³ costs and disbursements,³⁴ sanctions,³⁵ post-trial motions and proceedings,³⁶ appeals,³⁷ and judgment enforcement,³⁸ written by distinguished authors such as the Hon. Stewart Hancock and Hon. George Bundy Smith, both respected litigators and former Judges of our Court of Appeals. *Commercial Litigation* also includes a useful chapter regarding the interplay between bankruptcy proceedings and civil actions,³⁹ a review of Surrogate's Court and the procedures necessitated by the death of a litigant,⁴⁰ and the important topic of alternative dispute resolution.⁴¹

Straddling the boundaries of procedural and substantive law is a series of chapters focused on the management of commercial litigation. Respected practitioners offer client-focused insights on such varied and important topics as avoiding and preventing litigation,⁴² techniques for streamlining and expediting litigation,⁴³

³⁰ *Id.* §§ 25.21–29; *id.* §§ 25.31–33; *id.* §§ 25.36–44.

³¹ 4 *id.* §§ 37–45.

³² *Id.* §§ 46–47.

³³ *Id.* § 52.

³⁴ 4A *id.* § 53.

³⁵ *Id.* § 54.

³⁶ 4 *id.* § 49.

³⁷ 4A *id.* § 55–56.

³⁸ *Id.* § 57.

³⁹ 4 *id.* § 51.

⁴⁰ 4C *id.* § 106.

⁴¹ 4 *id.* § 48.

⁴² 4A *id.* § 58.

crisis management for litigators,⁴⁴ litigation management by corporations and law firms,⁴⁵ and the availability and use of litigation technology.⁴⁶

Commercial Litigation also provides a unique emphasis on the ethical issues associated with commercial litigation,⁴⁷ including a new chapter on civility co-authored by the Hon. Ann T. Pfau, the former Chief Administrative Judge.⁴⁸ Not content to rest upon court rules that require civility and cooperation among counsel, the authors argue persuasively that civility and professionalism are matters of enlightened self-interest and tools for facilitating the timely and cost effective resolution of disputes.⁴⁹ Having seen firsthand many of the situations described by the co-authors, I wholeheartedly concur. This chapter appropriately directs attention to the Standards of Civility promulgated by the state court system in 1997,⁵⁰ of which many practitioners (and judges) are unaware.

The second half of *Commercial Litigation* focuses on the areas of New York substantive law most frequently encountered by commercial practitioners. This portion of the treatise opens with contracts,⁵¹ insurance and banking litigation,⁵² and includes other core commercial issues such as: letters of credit,⁵³ collections,⁵⁴ service contracts,⁵⁵ the sale of goods,⁵⁶ warranties,⁵⁷ bills and notes,⁵⁸ and secured transactions.⁵⁹ Of particular note is a new chapter on restrictive covenants in employment litigation⁶⁰—a frequent source of Commercial Division litigation in Albany County. The author does a solid job of discussing and analyzing the different types of restrictive covenants, identifying the types of employer

⁴³ *Id.* § 60, at 411-468.

⁴⁴ *Id.* § 59.

⁴⁵ *Id.* §§ 61-62.

⁴⁶ *Id.* § 63.

⁴⁷ *Id.* § 64.

⁴⁸ *Id.* § 65.

⁴⁹ *Id.* § 65.1.

⁵⁰ *Id.* § 65.1; *id.* §§ 65.24- 65.26 (*citing* 22 NYCRR § 1200, app. A).

⁵¹ *Id.* § 66.

⁵² *Id.* §§ 67-68.

⁵³ *Id.* § 69.

⁵⁴ *Id.* § 70.

⁵⁵ *Id.* § 71.

⁵⁶ 4B *id.* § 73.

⁵⁷ *Id.* § 74.

⁵⁸ *Id.* § 75.

⁵⁹ *Id.* § 76.

⁶⁰ 4A *id.* § 72.

interests that the covenants serve to protect, and providing a thorough discussion of the numerous common-law rules governing their validity and enforceability. The chapter also includes useful guidance for lawyers who are called upon to counsel clients who seek to impose or enforce restrictive covenants or who wish to hire an employee subject to a restrictive covenant.

Issues pertaining to the organization and operation of business entities, including agency,⁶¹ partnership,⁶² mergers and acquisitions,⁶³ securities litigation,⁶⁴ shareholder derivative actions,⁶⁵ and director and officer liability⁶⁶ are covered, as well as an interesting new chapter that reviews New York's substantial body of law governing not-for-profit institutions.⁶⁷ My only criticism of this portion of the treatise concerns the absence of materials on limited liability corporations and "business divorces," given the prevalence of these case types within the Commercial Division. But I am sure that Editor-in-Chief Robert Haig already is hard at work plotting out a bigger and better Fourth Edition.

Additional areas of substantive law covered in *Commercial Litigation* include products liability,⁶⁸ health care,⁶⁹ broker-dealer litigation,⁷⁰ professional liability,⁷¹ franchising,⁷² antitrust under New York's Donnelly Act,⁷³ commercial real estate,⁷⁴ construction,⁷⁵ and environmental and toxic tort litigation.⁷⁶ White collar crime and the interplay between commercial litigation and criminal proceedings,⁷⁷ a topic of increasing importance in recent years, also receive a thorough treatment. And, an impressive series of ten chapters reviews New York's law of intellectual property and technology litigation.⁷⁸

⁶¹ 4B *id.* § 77.

⁶² *Id.* § 78.

⁶³ *Id.* § 80.

⁶⁴ *Id.* § 81.

⁶⁵ *Id.* § 82.

⁶⁶ *Id.* § 83.

⁶⁷ *Id.* § 84.

⁶⁸ *Id.* § 79.

⁶⁹ *Id.* § 85.

⁷⁰ *Id.* § 86.

⁷¹ *Id.* § 87.

⁷² *Id.* § 88.

⁷³ *Id.* § 89.

⁷⁴ 4C *id.* § 103.

⁷⁵ *Id.* § 104.

⁷⁶ *Id.* § 105.

⁷⁷ *Id.* § 90–91.

⁷⁸ *Id.* § 92–100.

Commercial disputes involving governmental entities and the workings of the New York State Court of Claims are the subject of Chapter 101. And a new chapter authored by Judge Victoria Graffeo of the Court of Appeals provides a concise and well-articulated guide to CPLR Article 78, the mechanism by which governmental decision-making may be challenged. Commercial practitioners will find this chapter of assistance in identifying the types of governmental action subject to Article 78 review, the proper parties to such a proceeding (which, importantly, may include non-governmental entities), the twin requirements of finality and exhaustion, and the interplay between Article 78 and other types of proceedings. Given the harsh consequences of failing to timely and properly commence an Article 78 proceeding, this chapter should be required reading for commercial practitioners whose clients may be affected by the actions of state and local government.

My only regret in writing this review is that I am unable to speak in any detail to so much of the informative and useful content of this outstanding work.⁷⁹ This brings me back to my opening admission: that I have not read *Commercial Litigation*, at least not in its entirety. I hope the reader is by now persuaded that it was perfectly reasonable and proper to undertake this review without having read all 8,400 pages of the 106 chapters in this 6-volume set. Suffice to say, the Third Edition of *Commercial Litigation* is the definitive reference work in its field. With its detailed analysis and discussion of civil procedure and substantive law, the host of well-integrated practice tools and its balanced focus, *Commercial Litigation* is, at its heart, the transmittal of hard-earned wisdom and perspective from a generation of our nation's best commercial litigators and judges.

I highly recommend *Commercial Litigation* for lawyers who practice commercial law in the New York courts or who are called upon to litigate issues of New York law, in-house counsel, judges who preside over commercial cases, civil procedure buffs, and any other lawyers or students who seek an advanced education in commercial litigation.

⁷⁹ See e.g. Hon. Joseph P. Sullivan, *Book Review: Commercial Litigation in New York Courts*, 16 PACE L. REV. 511 (1996) (comprehensive review of the insurance law chapter of the First Edition of *Commercial Litigation*).