BOOK REVIEW: BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS, THIRD EDITION (ROBERT L. HAIG, EDITOR-IN-CHIEF)

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Federal court practice, particularly commercial and intellectual property litigation, has inauspiciously acquired an aura of mystique causing too many practitioners to tread only if they dare. Over the years, the federal bench and bar have come to rely extensively upon several notable legal treatises, such as, for example, *Moore's Federal Practice*[1] and those by Wright & Miller,[2] to guide them through their respective apprehensive federal experiences. Generally speaking, they have often been the "go to" treatises attempting to ameliorate the mystery surrounding the practice of law in federal court. But, after thirteen years in publication and rapidly gaining greater stature and legal prominence, the highly regarded *Business and Commercial Litigation in Federal Courts* ("*Federal Commercial Litigation*")[3] has been touted as a comprehensive federal law compendium supplanting Moore's and Wright's stronghold on this market.

As a collaborative effort by West Publishing Company and the Litigation Section of the American Bar Association, this is the third iteration of an essential and exquisite commercial and legal treatise that has crested to towering dimensions. The First and Second Editions of *Federal Commercial Litigation* were published in 1998 and 2005, respectively, and the treatise has bloomed from its original six volumes in breadth and compilation to now eleven volumes, 130 chapters, thirty-four of which are new additions, and a staggering 12,742 pages, written by 229 prominent practitioners

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[1] JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE (3d ed. 2012).

[2] CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE (3d. ed. 2012).

[3] BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS (Robert L. Haig et al. eds., 3d ed. 2011) [hereinafter FEDERAL COMMERCIAL LITIGATION].

and twenty-two distinguished federal judges. *Federal Commercial Litigation* is the consummate commercial and federal practice legal cornucopia.

Having reviewed—even frequently referred to—several federal treatises, I can attest, without reservation, that *Federal Commercial Litigation* provides the most in-depth treatment of federal substantive and procedural law currently in existence. It is as comprehensive as any practitioner or scholar would ever expect, and even the breadth of the table of contents, as a reference tool, is bedazzling. The formatting is linear and logical as a step-by-step practice guide through the thickets of federal procedural and substantive law, commencing at the very inception or formulation of a case to its ultimate conclusion. The first five volumes are dedicated to the pretrial and trial stage: how to conduct a thorough investigation, understanding the limited jurisdiction of federal courts, analyzing or evaluating the dimensions of a case, appreciating the nuances of federal pleading requirements, realizing the broad expanse and liberality of federal discovery and the rigidity of federal motion practice, developing an intricate discernment of all aspects of trial and appellate practice, and being well-informed on post-judgment mechanisms. Concomitantly, the treatise contains an assiduous analysis of federal substantive law. There are sixty-three chapters covering federal commercial substantive law such as securities,[4] antitrust,[5] banking,[6] contracts,[7] insurance,[8] intellectual property,[9] business torts,[10] franchises,[11] admiralty,[12] labor,[13] tax,[14] e-commerce,[15] and governmental and administrative agencies,[16] and that's just naming a few.

I merely skimmed the surface of this vast reservoir of procedural and substantive topics and themes, because there are just too many to explore within this book review. Everything a lawyer would need in order to competently handle commercial litigation in federal

[4] *Id.* §§ 68:1–68:126.
[5] *Id.* §§ 67:1–68:113.
[6] *Id.* §§ 81:1–81:89.
[7] *Id.* §§ 78:1–78:65.
[8] *Id.* §§ 79:1–79:76.
[9] *Id.* §§ 86:1–89:46.
[10] *Id.* §§ 105:1–105:100.
[11] *Id.* §§ 111:1–111:92.
[12] *Id.* §§ 77:1–77:31.
[13] *Id.* §§ 90:1–90:70.
[14] *Id.* §§ 122:1–122:60.
[15] *Id.* §§ 129:1–129:21.
[16] *Id.* §§ 119:1–119:56.

court, or could conceivably imagine relevant at some point in their litigation practice, is fully incorporated and integrated into this treatise. The treatise is so sweeping in its scope and there are so many various legal matters encompassed within the eleven volumes that even specific volumes elude categorization. Several volumes cover substantive legal areas peculiar to federal practice, like commodities and futures, mergers and acquisitions, derivatives, export controls, the Alien Tort Statute and Torture Victim Protection Act, sports and entertainment law, e-commerce, white collar crimes, money laundering and information technology, to name only a few. The series did not forget to discuss, at length, the very important topics of pro bono work, ethical considerations, and civility. No subject matter is neglected, making this a definitive and momentous research and reference tool.

Although *Federal Commercial Litigation* is an exhaustive discussion of substantive and civil procedural law, its most notable element is the weighing of strategic or factual considerations associated with every phase of a commercial case. Within each chapter, a reader will find checklists and forms of every nature: procedural and practice checklists, tactical and strategic checklists, checklists concerning pleading allegations and motion considerations, proposed language and terms for pleadings as well as motions, and other corresponding litigation forms and jury instructions. The series is designed to make available to both the most skilled and experienced and novice litigators a readily accessible, easily searchable, structural format to obtain immediate answers from the most banal to the most esoteric federal legal issues confronting a practitioner. Additionally, the Compendium comes equipped with a CD-ROM containing all of the forms and checklists, in Word format, that are included within the printed volumes. My only disappointment with the CD-ROM is that it could have been made more user-friendly by labeling the folders—presently noted by the letter C and a number, i.e., C5—with corresponding references to either the respective forms exhibited in the hardbound volumes or the related chapters.[17]

Obviously, it would be a yeoman's task to read each volume—nearly 13,000 pages—and quite frankly, who has that wealth of

[17] The Compendium also notes that many of the pleading forms are available in Microsoft® Word-compatible or WordPerfect® formats on the United States Courts website. *Illustrative Civil Rules Forms*, USCOURTS.GOV, http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulesAndForms/IllustrativeCivilRulesForms.aspx (last visited Dec. 22, 2012).

time?[18] Yet there were several chapters that piqued my interest as to how the subject matter would be presented and what may be the proposed strategic trends. For example, the chapter that analyzed and proposed a strategy for drafting commercial pleadings—since the Supreme Court's fundamental alteration of the standard of review for a motion to dismiss—was of particular and heightened concern for me. In 2007 and 2009, *Bell Atlantic v. Twombly*[19] and *Ashcroft v. Iqbal*[20] substantially altered the pleading landscape from the long-held and widely understood principles announced in *Conley v. Gibson*.[21] Both *Twombly* and *Iqbal* abrogated *Conley*'s well-established rule: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,"[22] and instead imposes a new "plausibility" standard.[23] The Supreme Court's departure from the notice pleading standard that stood the test of time for approximately fifty-one years raised significant confusion and consternation among the federal courts as those precedents appeared to be in conflict with Federal Rules of Civil Procedure ("FRCP") 8, 10, and 84[24] and its corresponding Appendix Forms. It was equally unclear how this "plausibility standard" would be implemented with any uniformity among the courts.[25]

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[18] In this respect, I must acknowledge Robert L. Haig, the Editor-in-Chief, for his unflagging and exhaustive scouring of all three editions, as well as a companion series entitled COMMERCIAL LITIGATION IN NEW YORK STATE COURTS (Robert L. Haig, et al. eds., 3d ed. 2010–2013).

[19] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[20] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[21] Conley v. Gibson, 355 U.S. 41 (1957).

[22] *Id*. at 45–46.

[23] Now a motion to dismiss in all civil actions, pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6), may not be granted so long as the plaintiff's complaint has plausibility, that is, when it "pleads factual content that allows the court to draw reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The plausibility standard requires more than "sheer possibility that a defendant has acted unlawfully." *Id.* In essence, the complaint must "[be] nudged . . . across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. This is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. *Iqbal*, 556 U.S. at 679.

[24] FRCP 84 states that "[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." FED. R. CIV. P. 84.

[25] The tension between the plausibility standard enunciated in *Twombly* and *Iqbal* and FRCP 84 was aptly explored by the Honorable Judge Jeremiah J. McCarthy, United States Magistrate Judge, who concluded that this new standard creates a disarray within the court and has generated a debate over whether it complies with FRCP 8 and the Rules Enabling Act. Jeremiah J. McCarthy and Matthew D. Yusick, Twombly *and* Iqbal*: Has the Court "Messed Up the Federal Rules"*?, 4 FED. CTS. L. REV. 1, 3 (2010).

Because of the alarm amongst federal judges as to the impact of this new standard, in

The treatise provides an overall critique of the change in the pleading standard, provides a cogent overview of *Twombly* and *Iqbal*, identifies how the federal courts are still in flux as they continue to interpret and debate these two precedents, and, in light of the uncertainty, strongly urges attorneys to "take a conservative approach to pleading," by pleading more non-conclusory, detailed facts than may be their instinct or preference, which is excellent advice.[26] In support of this proposition, the treatise juxtaposes, at length, what would be required under the former notice pleading standard, as well as its utilities and pitfalls, with the current plausibility standard's benefits and dangers.[27] Furthermore, the chapter adequately examines the implication of other technical pleading rules, the heightened pleading requirements under FRCP 9,[28] and even touches on amending complaints under FRCP 15,[29] although I would have preferred a more in-depth analysis of the relation back doctrine that, notwithstanding the clear language of the statute, still confuses some litigators. Chapter 8 provides a similar efficacious scrutiny of responding to complaints, whether by a motion pursuant to FRCP 12 or by an answer.[30] As essential ingredients to the doctrinal and legal discussions, both chapters furnish synergistic tools such as lists of strategic objectives, practical aids, proposed form complaints for various commercial causes of action, and answers with an assortment of affirmative and case specific defenses.

As a United States Magistrate Judge, I am principally concerned with the procedural aspects of any federal litigation. For most magistrate judges, there are no more vexing procedural issues in litigation than maintaining a reasonable flow of the pretrial litigation stage of a case, akin to keeping the trains on schedule, as well as discovery, especially in the realm of electronically stored

particular, concerns regarding different results, confusion among the members of the bar, and a conceivably greater number of motions to dismiss being granted, the Federal Judicial Center ("FJC") embarked upon an assessment of *Twombly* and *Iqbal*. Although the study did not address all of the concerns, it satisfactorily established that the new pleading standard has had a significant effect on motion practice and complaints are now twice more likely to be dismissed, a marked departure from past practices. Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study on Motion to Dismiss*, 6 FED. CTS. L. REV. 1, 1 (2012).

[26] 1 FEDERAL COMMERCIAL LITIGATION, *supra* note 3, §§ 7:44–7:50.

[27] *Id.* § 7:45.

[28] *Id.* §§ 7:30, 7:53–7:61.

[29] *Id.* § 7:69.

[30] *Id.* §§ 8:1–8:99.

information.[31] So I was curious, to say the least, as to how well this treatise would explain the nuances and intricacies of federal discovery. One-half of Volume Three is devoted to every conceivable aspect of discovery,[32] and let me assure the reader that no stone is left unturned. There is a detailed discussion as to the operative statutes,[33] the corresponding common law analysis of these statutes, and the bedeviling intersection between disclosure and a sundry of statutory and common law privileges, as well as the work product doctrine.[34] A detailed discourse on each discovery vehicle, i.e., depositions,[35] interrogatories,[36] requests for admissions,[37] is prevalent throughout. Upon review of these illuminating chapters, a practitioner would become infinitely apprised of this procedural arena. The volume's well researched elaboration on the omnifarious electronically stored information discovery, supported by multiple citations and references, is one of the most comprehensive digests on the subject I have read in some time.[38] Even the chapter's suggestions regarding sampling,[39] the use of third-party vendors,[40] the employment of special masters,[41] and the importance of clawback agreements[42] and protective orders are prescient.[43] It

[31] FED. R. CIV. P. 26–45.

[32] 3 FEDERAL COMMERCIAL LITIGATION, *supra* note 3, §§ 22:1–27:22.

[33] *See infra* note 38 and accompanying text.

[34] 3 FEDERAL COMMERCIAL LITIGATION, *supra* note 3, § 22:36.

[35] *Id.* §§ 23:1–23:89.

[36] *Id.* §§ 26:1–26:35.

[37] *Id.* §§ 27:1–27:34.

[38] Chapter 25, which addresses discovery of electronically stored information, is a particular delight insofar as the esteemed and Honorable Shira A. Scheindlin, United States District Judge for the Southern District of New York, and Jonathan M. Redgrave, are the principal authors. 3 BUSINESS AND COMMERCIAL LITIGATION, *supra* note 3, §§ 25:1–25:77. Universally, Judge Scheindlin is recognized as a unique jurist who has risen to become an expert in the e-discovery arena, especially in light of her several groundbreaking and authoritative decisions addressing electronic discovery that arose in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). Mr. Redgrave served as chair of the famous Sedona Conference electronic discovery project that ultimately issued THE SEDONA PRINCIPLES: *Best Practices Recommendations & Principles for Addressing Electronic Document Production* (Jonathan M. Redgrave et al., 2d ed. 2007). He has written extensively in this arena and has addressed, for example, modern discovery protocol issues involving e-discovery production and privileges with a workable solution. *See, e.g.*, Hon. John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19 (2009) ("[T]he majority of cases should reject the traditional document-by-document privilege log in favor of a new approach that is premised on counsel's cooperation supervised by early, careful, and rigorous judicial involvement.\.")

[39] 3 BUSINESS AND COMMERCIAL LITIGATION, *supra* note 3, § 25:59.

[40] *Id.* § 25:61.

[41] *Id.* § 25:66.

[42] *Id.* § 25:67.

[43] *Id.* § 25:57.

would be beyond cavil to suggest that this discourse would adequately render the reader competent on all of the permutations that e-discovery presents.

However, litigation cannot live on discovery alone. The corollary to discovery is a cost efficient investigation as revealed in an extensive chapter dedicated to this proposition.[44] To that end, practitioners should find this chapter to be especially helpful. There are investigatory techniques revealed that are not normally contemplated by lawyers. There are practical hints as to who should conduct certain aspects of an investigation[45] and how to interview witnesses—friendly and hostile, employee and employers[46]—securing documents and information that may be beyond the grasp of the client,[47] identifying differences between external and internal investigation techniques and considerations,[48] how to conduct effective asset searches,[49] and setting investigation goals.[50] In this data-driven world, the chapter furnishes insightful tips as to how to use different approaches to search databases and the Internet, and what databases and websites may be helpful in any investigatory endeavor.[51] Aside from the matters that litigators often confront daily, the treatise also fully addresses uncommon topics such as whether you should compensate a witness,[52] or the importance of realizing the pitfalls of entering into a joint defense agreement,[53] or understanding the implications that other statutory restrictions may have on performing particular types of commercial investigation.[54] This chapter was so informative that even I learned some new tricks of the trade.

Two chapters I hope readers would not overlook are "Techniques for Expediting and Streamlining Litigation"[55] and "Litigation Technology."[56] The former chapter is replete with commonsensical

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[44] 1 *id.* §§ 4:1–4:73.
[45] *Id.* § 4.40.
[46] *Id.* §§ 4:39–4.44.
[47] *Id.* §§ 4:1; 4:33–4.36; 4:46–4.56.
[48] *Id.* §§ 4:26–4.29; 5:39–5.51.
[49] *Id.* § 4:62–4:70.
[50] *Id.* § 4:25–4:29.
[51] *Id.* § 4:34.
[52] *Id.* § 4:44.
[53] *Id.* § 4:23.
[54] *Id.* §§ 4:57–4:60.
[55] 5 *id.* §§ 60:1–60:46. This chapter was authored by attorneys Stephen D. Susman and Barry Barnett, managing partners in the litigation firm Susman Godfrey L.L.P.
[56] *Id.* §§ 61:1–61:38. This chapter was authored by über-lawyer David Boies, and Stephen Zack, the first Hispanic American lawyer to assume the American Bar Association presidency.

and practical approaches to litigation.[57] Reflecting upon the complex litigation that has come before me, I have observed litigators twist themselves into knots with superfluous litigation machinations and strategies, and extravagant, unnecessary and, of course, expensive litigation approaches. These litigators and litigants forget or ignore the cardinal aspiration of litigation within the federal system: litigants should "secure the just, speedy, and inexpensive determination of every action and proceeding."[58] With well-considered, clear, concise, and cogent advice, these authors drive this very point home.[59] Constrained by space and time, I cannot mine for you all of the abundant and invaluable nuggets of experience set forth in this chapter, but here is one to consider. Something that I constantly urge battling litigators when hearing obstreperous disagreements over sweeping discovery demands is succinctly and aphoristically stated by these two authors: when "reduc[ing] expense without sacrificing . . . success,"[60] less discovery is better than more because excess discovery is often counterproductive, primarily because most complex cases generally involve only several hundred documents rather than thousands or millions. But, when it comes to disclosing documents, caution urges more production than parsimoniousness and recalcitrance.[61] On another note, it is grueling for federal judges to convince parties to eschew deposing the world of witnesses on every detail or minutiae. Our authors plainly tell us that "[y]ou don't need to look under every stone. You just need to know where the boulders are."[62] Or, that there is "no such thing as a bad witness—only one who has been ill-prepared."[63] What advice could be more simply stated, yet be incredibly indispensable, than this? This chapter should be a required text for any law school's practical skills courses, because, right now, our law graduates, as many law firms exclaim, are devoid of such litigation insights and thus unprepared for the world of litigation.

When we consider the technological advances in the past three decades, much like the world, they have overrun the practice of law, especially as it relates to litigation. Without some appreciation of

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[57] *See* 5 *id.* §§ 60:1–60:46.
[58] FED. R. CIV. P. 1.
[59] 5 FEDERAL COMMERCIAL LITIGATION, *supra* note 3, §§ 60:1–60:46.
[60] *Id.* § 60:8.
[61] *Id.* § 60:11.
[62] *Id.* § 60:13.
[63] *Id.*

technology and how it can assist a litigator in managing and presenting a complex commercial case, that litigator has entered the race with both his arms tied and his legs shackled. The pitfalls and potentials are numerous and this point could not be evinced any better than the discussion in "Litigation Technology."[64]

This chapter is neither a clinical nor a forensic review of the emerging technology. Rather, it is intelligent discourse on the evolving face of modern litigation and how technology is essential to acquiring, reviewing, categorizing, analyzing, and then presenting a staggering amount of data.[65] Since federal courts, and some state courts, have embraced the use of technology with electronic filing and electronically equipped courts, Boies and Zack painstakingly guide the reader through the current and future benefits of electronic court filing and the employment of technology.[66] Nowhere has this new era of technological impact been greater than in the area of discovery, and our authors note that e-discovery is the most susceptible to dramatic and increasing volatility that is created by technological advances. Here, for example, the authors discuss the effectiveness of computerized document management systems, from A to Z, the various types of software and search techniques—Boolean, fuzzy, conceptual, metadata, optical character, recognition, cloud computing, and predictive coding—and the latest software advances for depositions.[67] However, the chapter's most fascinating discussion delves into the effect of technology on the trial phase.[68] In engrossing detail, the chapter expostulates such advances as the use of computer-generated animations, graphics, and simulations as enhanced visual aids invaluable in persuasively presenting facts,[69] without excluding a meaningful dialogue on their admissibility challenges.[70] A related discourse entails the organizational benefits of CD-ROM presentations over hard copy documents. There is a conversation on how technology can be employed at the appellate level;[71] read-only CD-ROM briefs may actually be cheaper than

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[64] *Id.* §§ 61:1–61:38.

[65] *Id.* § 61:2 ("Modern commercial litigation can be an enormous and complex undertaking, requiring lawyers to obtain, review, categorize, analyze, and present staggering amounts of documents, pleadings, court decisions, transcripts, and other forms of information. The proper and effective use of technology is essential to these tasks.").

[66] *See id.* §§ 61:1–61:38.

[67] *Id.* §§ 61:8–61:11.

[68] *Id.* §§ 61:15–61:30.

[69] *Id.* §§ 61:15–61:21.

[70] *Id.*

[71] *Id.* §§ 61:31–61:35.

printed briefs.[72] Considering the breadth of the treatment of technology, this is an exceptionally informative chapter.

The editors and authors should be lauded for this industrious and collaborative enterprise. *Federal Commercial Litigation* should be every commercial litigator's litigation bible and should have a reigning presence in every commercial law firm's library. It is the most inexpensive and efficacious mechanism to acquire such all-encompassing and cogent instruction on procedural and substantive law from the experts while gaining sage advice and insights as to how to litigate from the best and brightest who have toiled in this arena.

[72] *Id.* § 61:35.