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## Book Review – *Business and Commercial Litigation in Federal Courts* (3rd Edition)

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Litigation today doesn't just burden companies. Increasingly, it engulfs them. Revelations of financial improprieties, defective or unsafe products, data breaches, and other similar problems can result in an onslaught of private damages claims, along with formal inquiries by federal and state regulators and parallel criminal investigations. The epicenter of the ensuing battles is often located in the federal courts.

Witness General Motors' recent crisis with ignition switches. GM's lawyers had barely launched a full-scale internal investigation before the company's new CEO, Mary T. Barra, was hauled before an angry Congressional committee demanding explanations. Every answer she gave in that forum held the potential to become a harmful admission in the waves of federal class actions and other lawsuits that are bound to ensue. Federal regulators, in "damage control" themselves, have already leaped into action. At least one thing is certain: GM's in-house and outside counsel will be busy in federal courts on these matters for years to come.

Against this backdrop, the monumental Third Edition of *Business and Commercial Litigation in Federal Courts*, published by Thomson Reuters and the ABA Section of Litigation, reflects an ambitious project to provide a comprehensive treatise that keeps pace with the transformative changes reshaping the landscape of federal litigation. With 34 new chapters, the Third Edition

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general chapter on "Administrative Agencies" (Ch. 119) and detailed introductions to topics such as "Regulatory Litigation with the SEC" (Ch. 69), "Consumer Protection" (Ch. 84), "Occupational Safety and Health Claims" (Ch. 91), "Food and Drug" (Ch. 98) and "Export Controls" (Ch. 116). The addition of in-depth chapters on "White Collar Crime" (Ch. 112) and "Internal Investigations" (Ch. 5) responds to the upsurge in federal prosecution of business crimes and the risks it poses to businesses.

The Third Edition contains a "one-stop shop" for both inside and outside counsel seeking expert guidance on virtually any aspect of federal court litigation and applicable substantive law. The backbone of the Third Edition remains its comprehensive chapters on all of the fundamental aspects of federal business and commercial litigation, from filing a claim to enforcing a judgment. Each chapter provides practical checklists on key topics and useful document forms. The Third Edition comes in an 11-volume hard-copy set, together with annual pocket-part supplements, and it can also be accessed online.

In an era of instantaneous "research" with Google and other search engines, lawyers at all levels of experience can lose sight of the fact that such tools don't have dependable filters for quality or reliability. All too often, peer-reviewed articles turn up side by side with out-of-date blogs, biased commentary and other Internet detritus. Even on subscription legal databases, the ever-expanding universe of instantly available material can leave lawyers overwhelmed and unsure about what to trust and where to turn first.

This is where the Third Edition proves its ongoing value and relevance as a resource. The 251 authors represented in the Third Edition comprise an illustrious who's who of leading practitioners and judges. The Third Edition does not just provide a chapter on electronic discovery; it gives you a comprehensive, practical treatment of that subject

updates the in-depth treatment of previous editions and incorporates extensive new material.

The Third Edition's 11 volumes, up from eight in the previous edition, map the growing interdependence of federal litigation with proceedings in other forums and guide litigators through this challenging terrain. For example, new chapters on the "Interplay Between Commercial Litigation and Criminal Proceedings" (Ch. 113) and "Coordination of Litigation in State and Federal Courts" (Ch. 15) contain a wealth of practical and strategic insight on navigating the maze of multiple concurrent proceedings. A new chapter on "Crisis Management" (Ch. 59) captures the increasing urgency and multidimensional complexity of federal business litigation.

A number of other new chapters in the Third Edition highlight the growing importance of specialized litigation involving federal regulatory agencies, including a

by Judge Shira Scheindlin, the author of the *Zubulake* decisions and other seminal opinions on e-discovery. Co-authors on various other chapters include Mary Jo White on the FCPA; David Boies on litigation technology; and Ted Wells on the interplay between commercial and criminal proceedings. The names of innumerable other contributors will be no less recognizable to federal court practitioners.

Edited by Robert Haig (who also edited previous editions and the same publisher's six-volume companion treatise, *Commercial Litigation in New York State Courts*), the Third Edition contains a trove of material that is of particular relevance to in-house counsel charged with resolving disputes and managing their companies' litigation. There are multiple chapters on dispute avoidance and resolution as well as valuable guidance on litigation management when some disputes inevitably become lawsuits.

Many in-house counsel pride themselves on resolving disputes before a complaint even lands on their general counsel's desk. Chapters on "Investigation of the Case" (Ch. 4) and "Case Evaluation" (Ch. 6) outline critical exercises that should be undertaken for all significant disputes well before a lawsuit is filed. Those preliminary steps can facilitate "Litigation Avoidance and Prevention" (Ch. 58) and can enable the parties, through mediation and other forms of ADR (Ch. 47), to achieve "Settlements" (Ch. 33) early on, before a lawsuit takes on a life of its own and costs threaten to spin out of control. The checklists appended to each chapter provide practical, commonsense guidance for inside and outside counsel alike.

When reason and compromise don't prevail and lawsuits happen, the Third Edition offers a wealth of additional material and guidance as inside and outside counsel collaborate on case evaluation, strategy, preparation and execution. Both in-house litigation managers and their outside legal teams would benefit, and be sensitized to each other's issues and concerns, by reading and sharing their thoughts about "Litigation Management" by law firms (Ch. 62) and by corporations (Ch. 63). A separate chapter on "Techniques for Expediting and Streamlining Litigation" (Ch. 60) provides strategies for overcoming your adversaries' obstructionist tactics and resistance to efficient dispute resolution.

After issue is joined, discovery looms. For in-house counsel, controlling the scope of discovery and its costs represents a huge and often frustrating challenge. Document production, seemingly endless exchanges

of mind-numbing interrogatories (drafted to yield as little as possible to opposing counsel), depositions and privilege logs are expensive, time consuming, distracting and aggravating. That is especially true for a company's non-legal personnel, who must devote countless hours away from their regular business and often find these activities confusing if not pointless.

Chapters 22 through 24 – "Discovery Strategy and Privileges," "Depositions" and "Document Discovery" – will guide counsel through the traditional discovery mechanisms. But before you undertake any discovery and begin to image your employees' computers and collect their emails, the discussions of "Privacy as a Limitation on Discovery" and "Data Security in Commercial Litigation" in Chapter 106 ("Privacy and Security") are must-reads. Privacy issues will continue to proliferate and present particular risks when discovery crosses national borders. Be forewarned, be informed of other countries' privacy requirements and penalties for privacy violations – and be very careful!

In the past 20 years or so, discovery of electronically stored documents has become the bane of inside counsel's existence and has increasingly strained corporate litigation budgets. The Third Edition's sections on electronic discovery provide an invaluable and up-to-date overview of current law and techniques for taming these demands.

It is hard to imagine two authors more qualified for this subject than Judge Scheindlin and Jonathan Redgrave, who is active with the renowned Sedona Conference on electronic discovery. Their chapter provides a comprehensive and practical guide, including a series of invaluable checklists, to help in-house lawyers, litigators and other business counsel brave the challenges of e-discovery.

Pre-litigation planning is crucial. The authors describe, step by step, what a business must do to be prepared when litigation strikes. These efforts require close cooperation among in-house business unit leaders, lawyers and paralegals, records management personnel, and information technologists, as well as outside counsel, to preserve and collect a company's electronic data and avoid spoliation claims when data are lost and cannot be accounted for. Outside counsel must work hand in hand with in-house litigation managers and technology groups to preserve, assemble and review the many gigabytes of data that even smaller cases entail.

The chapter recognizes that "sampling"

has emerged as a cost-saving and expediting means for e-document review (also addressed in "Litigation Technology" (Ch. 61)). This method uses complex algorithms based on "predictive coding" and "linguistic modeling" techniques derived from a small set of documents, which are then applied to a company's universe of electronically stored information to produce responsive documents. As these techniques are refined by parties and vetted by the courts, they will surely have an impact on issues of cost sharing and cost shifting, also addressed in this chapter.

There is a single but important modification to a company's data management processes which the authors' superb treatment does not mention but which, we suggest, could streamline electronic discovery immeasurably: elimination of e-mail's "Reply All" feature!

In addition to the advice about dispute resolution and litigation strategies, there are a number of substantive chapters that can help both a company's litigators and its other lawyers to face the challenges and minimize the pitfalls of running a business every day: FCPA (Ch. 115); Securities (Ch. 68), Antitrust (Ch. 67), and Torts of Competition (Ch. 105); Employment Discrimination (Ch. 92); Insurance (Ch. 79); ERISA (Ch. 94) and Executive Compensation (Ch. 95); and much more.

These in-depth discussions of U.S. substantive law, together with the authors' many insights into American litigation culture and practice, may have particular value to companies with numerous lawyers spread across the globe. As litigation problems increasingly cross national borders and involve company personnel in multiple jurisdictions, foreign in-house lawyers trained outside the U.S. need quick and reliable introductions to key aspects of U.S. law and practice. The Third Edition's online accessibility means that a company's entire law department can make full use of it no matter where its personnel are located.

The imposing Third Edition will occupy a large shelf in your bricks-and-mortar library. But the treatise's online accessibility and its leading-edge content also make it a nimble and invaluable companion for subscribers. Even smaller in-house law departments and law firms will find ample value in this heavyweight recent edition.

**To obtain a copy of the Third Edition of Business and Commercial Litigation in Federal Courts, please visit <http://legalsolutions.thomsonreuters.com/law-products/Treatises/Business-and-Commercial-Litigation-in-Federal-Courts-3d/p/100025518>.**