



An Invaluable Reference for Commercial Litigators in the Federal Courts

Business and Commercial Litigation in Federal Courts

2d. Ed. 2005

Robert L. Haig, Editor in Chief

Reviewed by Robert L. Byer

Because I started practicing law several years before the advent of Lexis® and Westlaw®, I learned the methods of legal research using books. Therefore, I still feel more comfortable using books, particularly treatises, encyclopedias and other texts, even though I also feel comfortable using Lexis and Westlaw for certain discrete tasks, usually involving retrieval of a specific case or statute.

Using the books, and particularly the Key Number Digest approach to legal research, instilled a discipline of working from general to specific, which is how lawyers and judges solve problems. Unfortunately, while Lexis and Westlaw are valuable and powerful tools, they tempt users to skip the general and move right to the specific, overlooking much of potential value in the process. There is a great value to using an encyclopedia or treatise in order to gain a basic understanding of the general contours of an unfamiliar legal subject before attempting to find specific statutes or precedents.

Screenshots on Lexis and Westlaw do not compare with browsing through a general discussion in a good book when it comes to understanding a point of law and appreciating how it may be applied to a factual context, not only directly but also by analogy. And pinpoint retrieval on Lexis and Westlaw does little if anything to educate lawyers with respect to the practical application of the research results to an actual case in litigation.

I recently discovered a set of books that I consider to be invaluable in providing the general background essential for lawyers to know *before* conducting specific legal research and as a practical tool for helpful information and ideas for those who litigate commercial cases in the federal courts. The American Bar Association, Section of Litigation, in partnership with Thomson West, has produced an extremely valuable, eight-volume set, *Business and Commercial Litigation in Federal Courts* (2d. Ed. 2005), with Robert L. Haig as editor in chief.

This eight-volume set consists of 96 chapters and provides not only the types of information one would find in a legal encyclopedia on various topics of interest to lawyers who handle business and commercial cases in the federal courts but also discussions of strategy and tactics as well as practical advice in handling the various problems in each of these subject areas.

The authors of these chapters are impressive for their experience and wisdom. This is not a set where the writers are recent law school graduates working for a publishing house, which too often is the case with various encyclopedias and other sets today. For example, Chapter 74, “Patents,” is co-authored by Randall R. Rader, incoming chief judge of the U.S. Court of Appeals for the Federal Circuit, and professor Martin J. Adelman, an experienced and highly regarded law professor at George Washington University Law School. Other chapters are authored

by some of the leading lawyers and federal judges in the United States. The editor in chief, Robert L. Haig, is a partner in a major New York firm and is well known as a civil litigator, author and teacher; his years of experience and his dedication to this work are reflected throughout the set.

Pennsylvania lawyers will recognize many of their own among the authors. The list of Pennsylvania judges and lawyers who are co-authors of this set itself speaks volumes with respect to expertise and experience levels. In the order in which they appear: Laura E. Ellsworth (Chapter 12, “Multidistrict Litigation”); H. Robert Fiebach and James E. Brown (Chapter 13, “Issue and Claim Preclusion”); James D. Pagliaro (Chapter 16, “Class Actions”); Judge Paul S. Diamond and Mathieu J. Shapiro (Chapter 63, “Director and Officer Liability”); Judge Michael M. Baylson, Kelly D. Eckel and Sandra A. Jeskie (Chapter 68, “Contracts”); Judge Petrese B. Tucker and Abbe F. Fletman (Chapter 92, “Government Entity Litigation”).

The set is organized in a logical manner. The earlier chapters concern the procedural aspects of litigation, starting with subject matter jurisdiction, then moving to such topics as pleadings and discovery and continuing through trial and appeal, followed by discussions of various substantive areas of litigation. The work also includes chapters on trial practice, including opening statements, case presentation, cross-examination and final arguments,

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encompassing both the strategy and the legal standards governing these areas of trial practice.

The individual chapters are also well-organized and provide the reader with a basic understanding of substance, procedure and strategy, including useful checklists on both the elements of claims and the available defenses. For example, Chapter 13, "Issue and Claim Preclusion," contains a useful summary of the law governing *res judicata*, collateral estoppel and related topics such as judicial estoppel and compulsory joinder rules. The chapter also discusses important points such as conflict of laws and full faith and credit, as well as the effect of class action judgments. From a procedural standpoint, the chapter discusses the manner of asserting the preclusion defense as well as how to document, authenticate and prove a judgment. Finally, the chapter includes a practice checklist and several forms, including examples of interrogatories.

The work does not eliminate the need for follow-up and in-depth research in the areas of coverage. Just to choose a few convenient examples, Chapter 51, "Appeals," contains a discussion of circumstances under which a district court may waive requirements relating to supersedeas bonds, and while the authors cite cases from the 7th Circuit in support of their suggestions, they do not cite the several cases decided in the Eastern District of Pennsylvania that impose more stringent requirements on obtaining such a waiver. Similarly, Chapter 34, "Patents," contains a general discussion of the elements of obviousness, as a challenge to patent validity, but there is no discussion of the more nuanced approach that the courts take with respect to chemical patents, where the analysis focuses on the selection of a lead compound.

However, these examples do not indicate shortcomings. Instead, they indicate that this set is the beginning point, and not the end point, for legal research. That is why each chapter contains research references to West's Key Numbers as well as to legal encyclopedias, law review articles and other reference sources such as

American Law Reports annotations. Many of the chapters also include references to practical aids such as form publications and *American Jurisprudence*® *Proof of Facts*.

The best use of this set (and it is a valuable use) is for a lawyer to review the area of law and get some ideas with respect to procedure and strategy before embarking upon research to uncover all the governing authority in a particular circuit or district. When used at the beginning of the process, the subsequent research becomes more efficient because the researcher is markedly better informed. In addition, this set is also valuable for use when a quick reference is needed by lawyers in the thick of litigation.

In the foreword to the set, Editor in Chief Robert L. Haig writes:

This publication is unique in legal literature. There is no other book on commercial litigation in federal courts. There is also no other book that combines in depth treatment of federal civil procedure with substantive law in the areas most commonly encountered by commercial litigators. Even more unique, however, is that again and again throughout this work, our authors have pointed out the interplay between the rules of procedure and substantive law. They have painstakingly outlined strategies for the representation of plaintiff and defendant. They have given thoughtful consideration to the delineation and attainment of objectives and to the advantages as well as ramifica-

tions and pitfalls of various actions and inactions on the part of the commercial litigator throughout the entire course of a lawsuit. This is not only a law book that is valuable as a research tool and a source of legal knowledge and citations, it is an idea book filled with nuggets of wisdom and perspective that could only have been gained by years of experience in handling cases from the most simple to the most complex.

In my opinion, having reviewed the eight volumes and 96 chapters of this impressive work, the set fulfills the promise of its foreword.

This set should be part of the essential library of any lawyer who regularly litigates commercial disputes in federal courts. Young lawyers need not fear — the work is available on Westlaw. However, I still prefer and recommend reading or even just browsing through the hard copy. ♦



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