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Executive summary

Why are companies so frequently sued in the United States, and how might these business litigation liabilities be avoided through preventive measures and more effectively managed? This book answers those two weighty questions. The central premise of the work is that many costly and protracted lawsuits in the US are traceable to unforced errors companies make time and again. By better understanding the sources of commercial litigation, preventive steps can be implemented, reducing these risks.

In this book, I draw on over 25 years of experience defending companies throughout the US in almost every conceivable type of commercial litigation. I apply a “lessons-learned” approach from these experiences, to examine how corporate defendants can avoid claims by developing and enhancing their litigation risk profile. Each company’s litigation profile must be tailored to its business model, which involves spotting particular vulnerabilities. To assist the reader in accomplishing this task, I begin the book with a framework for identifying the primary litigation risks – the “Five Cs” of commercial litigation.

These lawsuits include claims by shareholders, partners, and LLC members, collectively referred to as the “constituents” of the business. The legal doctrines that underlie corporate governance lawsuits are explained – how courts apply the concept of fiduciary duties, how direct and derivative suits proceed, and circumstances in which a court will allow claimants to pierce the corporate veil. That discussion is then followed by a practical list of ten sources of corporate governance claims and a discussion of how these lawsuits can be reduced.

Contract claims are the most common type of commercial litigation and overlap with other categories of claims. The book discusses how common contractual terms play out in litigation, how courts interpret and enforce provisions, or set aside contract terms because of public policy and other considerations. A chapter explains the six questions addressed in every commercial contract claim followed by a chapter outlining strategies to address risks of litigation from a contracting counterparty.

Customers – both commercial counterparties and consumers – present a broad range of potential lawsuits. Businesses that sell products or provide services to consumers are vulnerable to class actions, which aggregate small damage claims, creating a multi-million-dollar liability. Business-to-business transactions can spawn breach of warranty claims. Customers sustaining injuries to property or persons bring product liability lawsuits. Several checklists and strategies are outlined to address these litigation risks from customers.

The book next discusses the eight distinct categories of claims brought by competitors, those with a pecuniary motivation to bog the company down in protracted litigation. Competitor lawsuits – whether for interference, misappropriation of trade secrets, or unfair competition – present heightened risks, including the possibility that proprietary information will be disclosed to a competitor in the litigation.

The fifth and final of the five Cs is the most common – lawsuits brought by the “crewmembers” – the employees in the company. These plaintiffs benefit from robust statutory protections and legal doctrines that expand each year. This chapter lists 22 of the most common employee claims and provides practical ideas on how to reduce the number of lawsuits filed by employees as well as claims for renegade employees who engage in tortious and other wrongful conducted imputing liability to the company.

The scope of these litigation risks is broad and some of the underlying legal concepts are complex. I break down each topic with an accessible discussion of the legal principles using standard jury instructions, accessible language, and colorful case studies, all illustrating how these issues play out in US courts.

At the conclusion of each topic covered, the reader will have an understanding of how the legal theory is traceable to some failure or malfeasance that invited the claim. By the conclusion of the survey of the five Cs of litigation risks, the reader will gain valuable insights for developing checklists of potential claims, re-examining compliance efforts, scrutinizing key contract provisions, and developing other policies and strategies to reduce litigation claims.

The final three chapters of the book pivot from litigation avoidance to litigation management. After a lawsuit is filed, the company must engage in several steps to control costs, manage outside counsel, and prepare for discovery, mediation, and eventually a trial or arbitration. Understanding the litigation process is essential to surviving the ordeal by defeating the claim or resolving it through settlement.

The premise here is that, just as litigation risks are overlooked, corporate defendants often compound the problems of litigation by not understanding and managing the litigation process. Litigation mismanagement results in cases that should be settled being tried and cases that should be tried being settled on unfavorable terms. This part of the book de-mystifies the litigation process and provides a user-friendly guide for those facing this foreboding ordeal.

The book is written for a diverse audience. The primary intended audience is attorneys who may find it useful as a desk-reference for quickly accessing relevant information and issue-spotting for their clients. But the book will also interest any person – lawyer or non-lawyer – whose responsibilities include managing US litigation risks. These persons include those in venture capital, CFOs and other members of management, risk management and compliance professionals, and entrepreneurs seeking to implement best practices as they launch a start-up.

Whether as an initial overview of the subject matter or a useful desk-reference, *US Business Litigation Risks* is an invaluable resource for individuals tasked with addressing this challenging topic.

About the author

Kent Schmidt is a partner at the international law firm of Dorsey & Whitney LLP, and is based in California. His practice includes virtually all types of business litigation, with an emphasis on unfair business practices, trade secret litigation, consumer class actions, product liability, securities litigation and enforcement, commercial disputes, and environmental claims. Having spent his entire legal career at Dorsey, Kent often collaborates with partners in other offices throughout the US and around the world. Besides his commercial litigation practice, Kent speaks to and advises companies on how to avoid litigation claims, develop compliance policies and strategies, and conduct internal investigations.