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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.

The author draws on over 25 years of experience defending companies throughout the US in almost every conceivable type of commercial litigation. He applies 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, the author begins 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. But the author breaks 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, *Avoiding and Managing 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.

Acknowledgements

Too many cooks in the kitchen spoil the broth, it is said. But that adage does not apply to this work. If the reader receives any benefits from what this book serves up, credit goes to a number of contributors who, through their critiques, commentary, and encouragement, have made this work possible.

The genesis of the idea and framework for this book, including the alliteration of the litigation risks, is a series of CEO roundtable discussions. Ric Franzi, business partner with Renaissance Executive Forums, Orange County, California asked me to speak to his executive peer group in 2013. Over many breakfast meetings, we talked about the intersection between litigation avoidance and management decisions – how senior management could better understand and systematically approach nagging concerns over their next costly lawsuit. These conversations were a catalyst for developing a workable litigation avoidance model and framework. Even more pertinent to this final product, Ric was the first one to encourage me to repurpose those discussions and write what materialized into this book.

The audacious idea of taking on such a project, while managing a busy legal practice, received initial support from Dorsey & Whitney LLP management, beginning with Richard Silberberg, then head of the firm's trial group. At a memorable breakfast meeting in 2014, he enthusiastically encouraged me to charge up this hill. His successor, Mike Keyes, continued to support the effort in more recent years. Along the way, Pat Courtemanche and Gillian Brennan heartily cheered on the work, paving the way for obtaining necessary resources and support from others. Three of my partners, Sarah Robertson, Bonnie Paskvan and Jon Herman, read some of the concepts in early drafts and the structure of the book, and provided feedback in those nascent stages.

The content and subject matter is reflective of my career, the entirety of which I have been fortunate to spend at Dorsey. The firm has given me the best of all worlds – an international law firm platform with a smaller office in California, a place that is not only filled with beauty, but has the added bonus of being the most litigious and over-regulated jurisdiction in the

world. From this litigation and regulatory epicenter, I have benefited from opportunities to collaborate with colleagues around the world on diverse matters, learning from their deep knowledge and subject matter expertise. Many of these colleagues have carved time out of their busy practices to provide candid feedback and substantive comments. For their dedication and care, I am in their debt:

The discussion on corporate governance and shareholder litigation in chapters two to three was enhanced by the comments of two transactional lawyers, Kimberly Anderson and Terry Kelly. Drawing on his experience as a seasoned trial lawyer on shareholder litigation, securities litigation, and related matters, J Jackson provided that additional perspective to these chapters.

Mark Sullivan and Skip Durocher, two partners and friends whose friendship with me was forged in litigation trenches over many years, reviewed and commented on the materials on contract risks, including chapters four to six.

For consumer class action liability, FTC regulations and Lanham Act, I sought and obtained sage input and feedback from Sandra Edelman and Tiffany Shimada.

Data privacy is perhaps the most daunting of the litigation risks companies currently face. Jamie Nafziger and Robert Cattanach, who have been tracking this evolving and emerging area of the law for many years, were kind enough to enhance chapter 11 with several helpful comments.

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The material on employment litigation and compliance matters in chapter 13 was reviewed and substantially improved by Jessica Linehan, my go-to expert for all things labor and employment for almost 20 years.

The last section of the book – chapters 14 through 16 on litigation management – is truly a culmination of working with the best and brightest. They are far too numerous to name, not only colleagues but also in-house counsel, co-counsel on major matters, and even a few opposing counsel whose tricks of the trade I have noted and adopted.

At the top of the list of Dorsey partners who have had the greatest impact on my approach to litigation is the late Roger Magnuson, a mentor and friend for the first 14 years of my legal career. I was honored to carry his brief-

case – both literally and figuratively – in courtrooms from Los Angeles to Manhattan until his untimely passing in 2013. Never one to paint by numbers, his creative approach to litigation was ever present in the perfect metaphor or analogy in oral arguments. The indelible mark he left on my career lives on in these pages. In addition to the lawyers noted above, many of which I count as mentors, I am indebted to other senior litigation partners who have encouraged, corrected, and taught me along the way. In addition to Roger Magnuson, J Jackson, Mark Sullivan, and Skip Durocher each listed above, I have been mentored by Jim Langdon, Jeff Peterson, Helene Freeman, Creighton Magid, Curt Hineline, Kathlene Lowe, Juan Basombrio, and Jeff Sikkema.

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My son, Reagan Schmidt, bookended his first semester of law school with a review of the manuscript, including an invaluable final edit that resulted in several enhancements.

I owe a huge debt of gratitude to Maria Santos, my faithful and attentive legal assistant for well over 19 years. In the past year, her successor, Melanie Gomez, has courageously stepped into that role and is a constant source of encouragement and support. Carmen Ramson-Herzing, Amelia Irvine and Jeri Longtin-Kloss, Dorsey's business development professionals, have been a terrific support along the way.

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Writing is difficult and any author owes a debt of gratitude to those who are closest to them during the long ordeal. To my wife, Jennifer Schmidt, thanks for your love, support, and encouragement in all areas of life, not the least of which is this project. To our three children and their spouses, Meredith and Brendan McLaughlin, Reagan and Gabby Schmidt, and Andy and Madison Richardson, thanks for cheering me on in this work. Finally, I

want to thank my parents, Ken and Beverly Schmidt, for their love, support, and encouragement, and for giving me a good typewriter in my adolescent years and encouraging me to write.

Perhaps there is no better time to push a manuscript over the finish line than during a worldwide pandemic as I did with the first edition. With all of the surreal challenges of 2020 and the years that have followed, writing and reflecting on these topics has reminded me of the debts I owe to these and other partners, colleagues, family, and friends. Swim safely.

Kent Schmidt
Mission Viejo, California
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Introduction

This book is written based on a sobering truth: one of the most formidable barriers to launching and leading a successful company in the US is the ever-present risk of business litigation. Many savvy entrepreneurs watch in dismay each year as their otherwise successful enterprise is damaged or even destroyed due to unforeseen litigation.

Lawsuits plague not just nascent start-ups and "mom-and-pop" businesses. Fortune 500 companies and mid-size businesses allocate increasing chunks of their operating budgets to managing and settling a variety of claims brought by plaintiffs. The sources of these claims range from disgruntled employees to disappointed consumers, vigilant shareholders and litigious competitors. Companies operating in other jurisdictions that choose to expand to US markets quickly learn that the threat of US litigation is much greater than that presented from markets in Europe, Asia or even Canada – the jurisdiction most similar to the US.

Sometimes the lawsuit comes out of the blue, like an unexpected tornado, leveling the company in dramatic fashion, sending it into bankruptcy or dissolution. Other companies face a series of smaller recurring claims such as employment lawsuits that, while less sensational and dramatic, hit the bottom line each month, pilfering away profits from stakeholders.

Litigation costs can be astronomical. Besides the litigation expense that most people immediately think of – battalions of trial lawyers performing never-ending tasks at handsome hourly rates – there are hidden costs. The ongoing distraction of litigation diverts the time and focus of executives and members of the management team whose attention should be on more profitable endeavors. Instead of concentrating on a strategic plan for the next quarter of growth and expansion, key employees are forced to spend time preparing for a deposition or reviewing emails and other voluminous documents for production to an adversary, perhaps the company's chief competitor.

There are further intangible costs of business litigation. The first conflict can breed secondary crises. As the instinct of self-preservation takes over,

employees and jilted ex-employees point fingers at one another. The ranks can be divided, and company morale damaged as the blame game ensues. Accusations are often made about who is responsible for the issue that led to the astronomically expensive lawsuit. The ripple effects of either quiet or noisy departures can continue for months, or even years.

And then there is the bad press, which may be even more devastating than the lawsuit itself. Customers, competitors, and the general public may read, tweet and re-tweet stories detailing sensational charges and claims about the product, service, or executive. When the truth is revealed months later after the company is vindicated by the lawsuit's dismissal, no one knows or cares how the story ended.

Commercial litigation avoidance

For over 25 years, my commercial litigation practice has provided the opportunity to defend hundreds of companies against a diverse array of lawsuits. This front row seat has afforded me insight into some of the calamities and travails that come with defending against lawsuits and how those clients may have avoided litigation in the first place, or at least had an easier path through the ordeal.

It is not uncommon for facts to emerge during litigation revealing an unforced error that led to the claim. Sometimes this mistake is readily apparent. But in other cases, understanding why the lawsuit was filed and how it could have been avoided requires a great deal of thought and analysis. It takes even more insight and understanding to thoughtfully turn from the retrospective to the prospective; considering what practical steps or safeguards might be implemented to avoid similar claims in the future, or what would make defense of similar claims infinitely easier.

In counselling clients and speaking on this topic to in-house lawyers, it has been striking how few companies adequately undertake a sustained and thoughtful approach to litigation avoidance. Besides providing sexual harassment training to management, an overview of corporate governance guidelines, or perhaps a visit from an insurance representative or a workplace safety consultant, many companies do little more than whistle past the graveyard of litigation risks.

Given the costs of civil litigation in the US, it is remarkable that the legal profession is not more proactive in developing litigation-avoidance strategies through comprehensive litigation-risk checklists. Other sectors of business continually devote time and resources to the avoidance of adverse results,

studying bad outcomes for the express purpose of implementing avoidance systems. The concept of strategizing to avoid an undesired result is well-known in the corporate world. Charlie Munger popularized the concept of "inversion thinking" – making a list of failure scenarios to figure out how to avoid ending up there.[1] Murphy's Law, originating in the aerospace industry, is widely understood by the simple statement: "Whatever can go wrong will go wrong."

To the extent companies do address litigation avoidance with the assistance of outside law firms, the discussion usually focuses on emerging trends and recent laws and regulations. What are the new labor and employment regulations coming online next year and do we need to change our practices because of AI or some other phenomenon? While it is critical to keep abreast of changes in the law and new technologies, those far more ordinary litigation risks that lurk in the shadows are often overlooked: risks arising from an ordinary vendor agreement, a social media campaign a marketing consultant is launching, or a new consumer product package being released. How does a company engage in a comprehensive litigation risk assessment that addresses not only the new and emerging liabilities everyone is discussing, but also those risks far less apparent, yet more prevalent?

As daunting as this endeavor may seem given the varied risks from hundreds of types of claims, litigation risk management is achievable through strategic planning and consideration of how claims frequently arise.

The concept is relatively straightforward. Litigation risk management converges two spheres of knowledge and information: (1) how the ever-evolving legal and regulatory landscape triggers a variety of claims and lawsuits; and (2) the day-to-day realities of the business plan. The company's management team presumably has the second component covered. My objective in this book is to provide insights relating to the first.

The starting point in this process is an assessment of the enterprise's litigation vulnerabilities. What litigation risks are inherent in your business model? How can you – whether an owner or stakeholder, in-house counsel, outside counsel, or another loss prevention professional – proactively identify and avoid these risks? What types of claims are being asserted against competitors or similarly situated players in your industry?

While some readers may find it useful to read each chapter in order, there are portions that will be more applicable to particular types of businesses than others. The section on proactive product liability prevention will not apply to financial institutions and real estate developers. Other chapters –

such as chapter four, on how to understand breach of contract lawsuits – relate to virtually all businesses because almost every company enters contracts on a near-daily basis, triggering the possibility if not probability of a breach of contract claim at some point.

For those sections applicable to your business model, understand that what is summarized in the pages that follow is only the beginning. Consider these ideas as merely a prompt to prime the pump for further analysis and strategic thinking. Space does not permit an exhaustive discussion of every consumer protection statute and other source of litigation. As preventive medicine cannot be summarized in a single book or 20-minute visit with your healthcare provider, a serious effort to minimize and eliminate litigation risks requires a long-term commitment to the concept, lots of thought and reflection, and ultimately the dedication of sufficient time and resources.

Effective management of business litigation

To further extend the healthcare analogy, it is an unfortunate reality that even those who go to their physicians for routine check-ups, exercise regularly, and choose healthy foods are occasionally stricken with an illness. Similarly, all the litigation risk management measures in the world will not ensure that your company will not see the inside of a courtroom. For many companies, litigation is inevitable given the number of employees on the payroll, the volume and complexity of their business model, and whether they sell to consumers.

For those who have never experienced this ordeal first-hand, the world of litigation is filled with unknowns and mysteries. Movies and television dramas are poor guideposts for navigating the strange and intimidating world of high-stakes litigation. The unexpected hassles, burdens, and intrusions are reflected in familiar refrains I hear from clients daily:

"They really can't get those documents, can they?"
"We don't have to give them the last known contact information for that ex-employee we fired last year, do we?"
"The trial is really going to take that many days and involve this incredible number of witnesses?"

Whether you routinely manage a bevy of litigation and other legal claims brought against your business, or have enjoyed the good fortune of avoiding courthouses and arbitration venues, managing litigation after an action has

been filed presents a daunting challenge. The second part of this book provides a realistic and practical guide equipping you to deal with the unique challenges that litigation brings.

Topics explored in this section include:

- The basic sequencing of litigation, from when the lawsuit is filed through to its conclusion at settlement, trial, or arbitration;
- The lawyers: your own counsel and opposing counsel, who may seem equally demanding and intrusive throughout the ordeal;
- The adverse parties causing these headaches (former partners, shareholders, competitors, suppliers, employees or customers);
- The mediators who will attempt to negotiate a settlement and may be viewed as unreasonable by urging you to pay an exorbitant sum to dispose of a frivolous claim; and
- The judges, juries, and arbitrators who will resolve the dispute.

The objective in this section is to answer several questions typically asked by those in the trenches managing and overseeing litigation – often a CFO or other executive with no formal legal training:

- What are the most important things to think about early in the litigation process?
- How can we make this entire process less expensive and onerous, particularly for the business units and key personnel on whose performance we are depending to make next quarter's projections?
- What can we expect in terms of key decisions, time commitments and other resources?
- How can we make sure the depositions are not disasters that increase the likelihood of an adverse result for the company?
- What are we going to do about that disgruntled ex-employee who was deeply involved in the customer dispute and will now be the star witness in this litigation?

A business owner or other executive's ability to make informed decisions about litigation, anticipating and preparing for the financial and time commitments called for in the ordeal, can save hundreds of thousands of dollars from the time the lawsuit is filed until it is resolved. Informed decisions made by management early in the process may even determine whether the company weathers the storm. These concepts are covered in the second part of the book.

Foreign companies facing US litigation

Companies outside the US experience a culture shock when being exposed for the first time to the US litigation process. A foreign corporation that has only dealt with complex civil litigation in its own jurisdiction will find the process in the US significantly more distressing and onerous. The frequency with which commercial litigation claims arise is also an unpleasant surprise to those companies outside the US accustomed to only rare filings of civil disputes.

One of the most significant differences in facing litigation in the US is that, with few exceptions, contingency fee arrangements are not permitted outside the US. The US litigation system encourages plaintiff lawyers to bring claims by providing an economic incentive to do so. US rules governing the attorney–client relationship broadly permit contingency fee arrangements, where the plaintiff's lawyer obtains a percentage of the total recovery at settlement or trial. The permissibility of contingency fee arrangements encourages lawyers to make pre-lawsuit demands and invest in the litigation, much like any other entrepreneur invests in an ordinary business venture. Hourly rates for defending lawsuits in the US are significantly higher than in other jurisdictions, and the costs incurred by defendants forced to take a case to trial can be astronomical.

Much of the expenses of US litigation relate to the prolonged nature of discovery. The discovery process in foreign jurisdictions is typically much more focused. The standard for discoverability – what parties are entitled to, including categories of documents and e-discovery, is broad. Essentially anything that might lead to the discovery of admissible evidence is likely fair game.

Another significant difference between US style-litigation and foreign litigation is depositions. US litigation invariably includes taking party and non-party witness depositions. Generally, this practice is not permitted outside the US.

When the case finally gets to trial in the US, a foreign company may be shocked to learn that the factfinder in their complex business dispute is not a trained judge but a civil jury, comprised of laypersons with varying levels of education and backgrounds. Jury trials in civil cases are guaranteed by the US Constitution, as well as many State constitutional provisions. If that is not terrifying on its own, juries are often asked to award punitive damages, not allowed in many jurisdictions. Punitive damages are assessed on top of compensatory damages, sometimes as a multiplier of the other categories

and damages, in order to discourage the defendant and those similarly situated from engaging in similar egregious and fraudulent conduct in the future.

For companies outside the US contemplating expanding into the market but knowledgeable of the enhanced unpleasantness of US litigation, it is imperative to thoroughly explore every conceivable way to mitigate the risks of a US lawsuit.

A California emphasis

Although this book is written for businesses all over the world, there is an apparent emphasis on California statutes, cases and practices. There are a few reasons for this, the first of which is rooted in a practical reality – I have practiced in this state for most of my legal career and California law is a familiar reference point. Besides my own familiarity with commercial litigation in the Golden State, it is one of the most popular locations for businesses in the world. With a $3.944 trillion gross state product,[2] California is the fifth largest economy in the world, ranking just below the US, China, Germany and Japan, and above India, the United Kingdom and France.[3] A company engaged in international commerce will almost inevitably enter some type of transaction with a connection to California, and with that contact, face exposure to California litigation.

The reach of California litigation is correspondingly significant. The most populous state has the largest market of consumers who buy products and services from all over the world. Even for those companies that have no physical presence here, it is not uncommon to face litigation originating in California. Well over 70 percent of my litigation work spanning over 25 years has been defending international or out-of-state clients sued in California on matters ranging from small customer disputes, to class action lawsuits and breakups with joint venture partners.

In-house lawyers who track their litigation expenses often discover that, while California may represent a portion of their company's sales, it comprises a disproportionate allocation of the annual litigation costs budget. It is difficult to avoid California litigation once a company sells products or services to businesses and consumers in the state. As the Eagles sang of that mythical destination, Hotel California, "You can check out any time you like, but you can never leave".

The sheer size of the market makes it almost impossible to operate a significant business or other enterprise insulated from California laws and

regulations. At the same time, its consumer- and employee-friendly laws increase the likelihood that a business will be sued in California. With few exceptions, California statutes, regulations, and case law are more favorable to consumers, employees and shareholders than those of almost any other US state or territory. In almost every category, the pro-business US Chamber of Commerce ranks California one of the worst states for a company to be named in a lawsuit.[4] Out of the 50 US states, California ranks 48 on its overall state liability system, proportional discovery, trial judgments, impartiality, competence, and quality of appellate review, ranks 49 on overall treatment of tort and contract litigation, treatment of class actions suits, and consolidation lawsuits, and ranks 50 for damages and for juries' fairness. In summary, it turns out that this state is a great place to visit but a horrific place for a company to face complex commercial litigation.

For each of these reasons, it is a prudent approach to consider the liabilities arising from California as a benchmark of best practices in litigation avoidance. It is an oversimplification to say that, if your business practices conform to California law, compliance is achieved in the other 49 states and international jurisdictions. Regardless, being aware of litigation risks lurking in the Golden State is a good starting point.

A litigator's unique perspective

In the pages that follow, we will touch on dozens of topics of substantive law, ranging from corporate transactions to intellectual property. I seek to address these areas not from the perspective of a transactional or regulatory lawyer delving into the intricacies of codes and technical requirements, but instead approaching each topic with insights gained from experience in the trenches as a commercial litigator.

That litigation perspective focuses largely on how a plaintiff's attorney views these substantive areas of the law as an opportunity for a significant settlement or verdict. In short, the plaintiff's lawyer's opportunity is the company's risk of a loss. As Sun Tzu teaches: "If you know your enemy and know yourself, you need not fear the result of a hundred battles."[5] If I have accomplished my objectives in this book, the reader will have a better understanding of how these issues emerge in lawsuits and this insight will spur the thought processes that lead to effective loss-prevention measures.

Given the vast breadth of the ever-evolving legal landscape, no one person can be the authority on every topic discussed within these pages. Fortunately, my law firm colleagues' specialties and skillsets supplement my own knowl-

edge. Their collective expertise ranges from knowing how to patent a new drug to understanding the labyrinth of SEC regulations, how to take a company public or navigate the complexities of cryptocurrency transactions and AI.

That experience in being exposed to diverse practice areas is reflected in this work. I am grateful to those colleagues at my law firm who made this book possible by providing their expertise in reviewing. Several have provided input on selected chapters applicable to their respective practices. Their names and areas of expertise are stated in the acknowledgments.

Assumptions and audiences

Albert Einstein purportedly said something along the lines of, "Everything should be made as simple as possible, but no simpler".[6] The legal landscape in general and commercial litigation in particular is becoming more complex each day. Regulations are cumbersome, e-discovery multiplies complexities, and rules designed to streamline the process sometimes seem to do the opposite.

These complexities are unpacked in this work for a diverse audience with varying levels of sophistication and knowledge of business litigation. The potential audience and uses include:

- A CFO of a small private corporation tasked with managing litigation who would like to focus more on preventing litigation than approving litigation counsel's invoices and authorizing an endless stream of claim settlements.
- An entrepreneur or one in the venture capital space will find these concepts relevant in considering a new business or acquisition of an existing business and ensuring that entities, affiliates and investors are insulated to the extent possible from potential liabilities.
- Attorneys acting in an in-house role and those in private practice are accustomed to the role of issue spotting. They may find it useful to supplement their understanding of risk mitigation by thinking through some of the new and emerging liabilities and how risks are assessed and categorized in this work.

Because readers have varying degrees of familiarity with the legal concepts discussed, parts of the book may seem either too technical or too rudimentary. To the extent possible, I attempt to break down complex concepts into concise explanations understandable to a layperson, supplemented by illus-

trations and metaphors. For the seasoned lawyer seeking to take a deeper dive into a particular subject, citations to regulations, statutes, cases and other authorities are provided in the endnotes.

* * *

I am fond of saying that, like morticians, commercial litigators are only called on for their expertise and skill in the wake of the most unpleasant circumstances. In contrast to many lawyers, such as transactional counsel, whose work often results in popping champagne corks to celebrate the closing of a game-changing acquisition, a calamity of some kind has invariably occurred in the days or weeks before a client's urgent call to a trial lawyer. A key business relationship has soured, an employee has bolted with valuable trade secrets, a summons and complaint have been served, or some other crisis is afoot.

Although I enjoy the challenge and comradery that comes from working with clients to assess the damage and attempt to find a solution to the problem, there is a special fulfillment in advising clients on how they might avoid these problems in the first instance. This book is written to provide thoughts and a few modest nuggets of wisdom to perhaps prevent a catastrophe, or, if that fails, help you weather the storm so you can get back to doing what you do best – run a successful business.

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