CONTENTS

Foreword .................................................................................................. ix
Preface ..................................................................................................... xi

Chapter I ........................................................................................................... 1
Introduction.................................................................................................. 1
A. The Text and Background of Section 1.................................................. 1
   1. Why Congress Determined That a Federal Statute Was
      Needed .................................................................................................. 1
   2. Legislative Background of Section 1.................................................. 3
   3. Common Law and the Content of Section 1...................................... 5
      a. Contracts in Restraint of Trade ................................................ 6
      b. Combinations in Restraint of Trade ......................................... 7
      c. Conspiracies in Restraint of Trade ........................................... 8
B. Early Decisions Interpreting Section 1.................................................. 9
C. Other Antitrust Statutes and Laws....................................................... 15

Chapter II ...................................................................................................... 19
What Constitutes a Conspiracy?............................................................... 19
A. What Is an Agreement? ........................................................................ 19
   1. Early Supreme Court Cases Defining Antitrust Agreements........ 21
   2. The Modern Standard: Monsanto v. Spray-Rite Service Corp .... 25
B. What Is a Conscious Commitment and a Common Scheme? .......... 26
   1. A Conscious Commitment............................................................. 26
      a. Criminal Enforcement of Section 1 ............................................ 26
      b. Civil Actions under Section 1 .................................................. 32
   2. Form of Agreement......................................................................... 34
      a. Express Agreements.............................................................. 34
      b. Tacit or Non-Express Agreements .......................................... 37
   3. Horizontal and Vertical Agreements .............................................. 42
      a. Horizontal Restraint Cases.................................................... 42
      b. Vertical Restraint Cases........................................................ 45
      c. Hybrid Horizontal and Vertical Restraint Cases .................... 47
C. Proof of Participation in a Conspiracy ............................................ 49
   1. Participation in an Existing Conspiracy ..................................... 49
      a. Voluntary vs. Coerced Participation ..................................... 49
      b. Is There a “Slight Evidence” Rule? ..................................... 51
   2. Unwitting Beneficiary of a Conspiracy ..................................... 53
   3. Withdrawing from an Existing Conspiracy ................................ 53
      a. Burden of Proof of Withdrawal ........................................... 54
      b. Elements of Proof of Withdrawal ....................................... 54
      c. What Constitutes the Affirmative Conduct Necessary to
         Withdraw? ........................................................................... 55
      d. Effect of Withdrawal on Statute of Limitations .................... 57
      e. Effect of Withdrawal on Damages ...................................... 58
      f. The Difficulty of Withdrawal ............................................ 59

Chapter III 61
Proof of the Existence of a Conspiracy ................................................... 61
A. Proving an Agreement .................................................................... 61
B. Using Direct Evidence to Prove an Agreement .............................. 62
C. Circumstantial Evidence Must “Tend to Exclude” the
   Possibility of Independent Action ................................................ 66
D. Examples of Plaintiffs Successfully Using Circumstantial
   Evidence to Prove the Existence of an Agreement ......................... 68
E. How Courts Evaluate Whether Defendants’ Conduct Raises a
   Permissible Inference of an Agreement ........................................ 71
   1. Plausibility ................................................................................. 71
   2. Conscious Parallelism ................................................................ 74
      a. Proof of Parallel Behavior .................................................. 74
      b. Proof That Parallel Behavior Was Conscious ....................... 77
      c. Proof of Consciously Parallel Behavior Is Not Sufficient .... 77
   3. Plus Factors ................................................................................ 82
      a. Actions Against the Defendant’s Independent Self-Interest . 83
      b. Motive to Conspire ............................................................ 88
      c. Opportunity to Conspire ..................................................... 90
      d. Market Concentration and Structure .................................... 92
      e. Pretextual Explanations for Anticompetitive Conduct ........ 94
      f. Coordinating Price Announcements ................................... 96
      g. Sharing of Price Information ............................................... 97
      h. Signaling ............................................................................ 103
      i. Involvement in Other Conspiracies ..................................... 105
      j. Criticism of the Current Plus-Factor Framework. ............... 106
Chapter IV 109
The Special Issues of Coconspirator Evidence and Parallel Government Enforcement .......................................................... 109
A. Statements by Coconspirators ................................................................. 109
   1. Bourjaily v. United States ................................................................. 110
      a. “A Statement by a Coconspirator of a Party” ...................... 112
      b. “During the Course” of the Conspiracy .............................. 115
      c. “In Furtherance of the Conspiracy” ................................. 115
B. Effect of Witness Invocation of Fifth Amendment Rights ........... 117
   1. Admissibility of Parties’ Invocation of Fifth Amendment in Civil Actions ............................................................................ 118
   2. Admissibility of Non-Parties’ Invocation of Fifth Amendment in Civil Actions ........................................................... 119
C. Effects of Participation in Leniency Programs and Plea Agreements ..................................................................................... 120
   1. Leniency Program Participants ................................................ 121
   2. Alleged Coconspirators of Leniency Program Participants .... 122
D. Effect of Parallel U.S. Government Actions ........................................ 123
   1. Collateral Estoppel ................................................................... 124
   2. Prima Facie Evidentiary Effects .............................................. 126
E. Effect of Parallel State Government Actions ..................................... 129

Chapter V 133
Forms of Joint Conduct and Collaboration ........................................... 133
A. Identifying Conspiracy Within Corporate Families ...................... 133
   1. A Company and Its Wholly Owned Subsidiary ....................... 134
   2. A Company and Its Employees ............................................... 135
   3. A Company and Its Multiple Wholly Owned Subsidiaries .... 137
   4. A Company and Its Partially-Owned Affiliate .................. 137
   5. A Company and Its Independent Dealers or Distributors .... 138
   6. Companies with Common or Overlapping Equity Holders .... 139
B. Identifying Conspiracy Within Particular Types of Ventures ...... 140
   1. Joint Ventures ........................................................................ 140
   2. Networks ................................................................................ 143
   3. Joint Buying, Selling or Marketing Arrangements .............. 147
   4. Standards Setting Organizations ............................................ 150
   5. Health-Care Collaboration ....................................................... 155
   6. Cooperative Research Agreements .......................................... 159
   7. Trade Associations .................................................................. 160
   8. State Actors ........................................................................... 163
9. Sports Leagues ................................................................. 167

Chapter VI ................................................................. 173
Initial Pleading ............................................................... 173
A. Historical Overview of Pleading in Federal Courts ........... 173
  1. Pleadings before the Federal Rules of Civil Procedure ... 173
  2. Pleading as Drafted under the Federal Rules of Civil Procedure ........................................ 174
B. The Supreme Court Sets the Standard for a Rule 8 Pleading ... 175
  1. Conley v. Gibson ......................................................... 176
  2. Conley v. Gibson as Applied in Antitrust Actions ....... 176
C. Twombly Interprets Rule 8(a) ............................................. 178
D. In the Wake of Twombly .................................................... 180
  1. Policy Rationales Motivating a Shift in the Pleading Standard ............................................. 180
    a. Costs to Defendants .................................................. 180
    b. Judicial Failure to Manage Cases ......................... 181
  2. Pleading an Antitrust Claim Post-Twombly .......... 182
    a. Direct Allegations of a Conspiracy ....................... 184
    b. Evidence of Parallel Conduct and Allegations of Complex and Historically Unprecedented Changes in Pricing Structures Made for No Other Discernible Reason 187
    c. Evidence of Parallel Conduct and Factual Allegations Placed in a Context That Raises a Suggestion of a Preceding Agreement ............................................. 188
E. Clarification of Twombly: Ashcroft v. Iqbal ...................... 189
  1. Overview of Iqbal ...................................................... 189
  2. Illuminating Twombly’s Two Working Principles ...... 190
F. Lower Court Trends ....................................................... 193
G. Implications for Current Pleading Practices ................. 196
  1. Filing Amended Complaints ..................................... 196
  2. Delaying the Race to the Courthouse ....................... 198
  3. State Antitrust Laws .................................................. 199

Chapter VII ................................................................. 201
Summary Judgment in Conspiracy Cases .......................... 201
A. Historical Context: from Poller to Matsushita ............. 201
B. Legal Considerations in Moving for Summary Judgment in Conspiracy Cases ......................... 205
  1. Direct Evidence of Conspiracy .................................. 206
  2. Circumstantial Evidence of a Conspiracy ................. 207
a. Parallel Behavior: Insufficient by Itself to Establish
Conspiracy ................................................................. 208
b. Other Forms of Circumstantial Evidence.................. 209
3. Plausibility of Conspiracy........................................ 211
C. How Courts Apply Matsushita: a Circuit-by-Circuit Summary ... 213
D. Further Considerations in Advocating for or Against Summary
Judgment................................................................. 213
1. Practical Barriers to Obtaining Summary Judgment ...... 224
2. Use of Experts........................................................ 225
   a. Experts on Circumstantial Evidence: The Rationality of
      Behavior............................................................... 226
   b. Expert Testimony on the Ultimate Issue: Admissibility of
      Legal Conclusions............................................... 227
   c. Summary Judgment as Gatekeeper of Expert Evidence ..... 228

Chapter VIII 231
Economic Expert Testimony........................................... 231
A. The Use of Economic Evidence to Support or Detract from an
   Inference of Conspiracy............................................. 231
B. The Distinction Between Tacit Collusion and Explicit Collusion 233
C. Economic Analysis of the Likelihood of Collusion............ 235
   1. The Central Problem for Successful Collusion............. 235
   2. Structural Conditions for Successful Collusion............ 236
   3. Susceptibility to Collusion..................................... 237
D. Economic Analysis of Market Outcomes May Be Used to
   Detect or Infer Collusive Behavior............................ 242
   1. Analysis of Data on Prices.................................... 243
   2. Analysis of Data on Output and Capacity.................. 246
   3. Analysis of Market Shares.................................... 246
   4. Analysis of the Economic Rationality of Alleged Collusion... 247
   5. Analysis of Disclosure and Exchange of Nonpublic
      Information......................................................... 248
   6. Analysis of Whether Observed Behavior Is Consistent with
      Unilateral Incentives............................................. 248
E. The Use of Econometrics to Infer Collusive Conduct and
   Estimate Its Impact............................................... 249
   1. Alternate Reduced Form Models.............................. 251
      a. “Before-and-After”........................................... 251
      b. Predictive Modeling.......................................... 253
      c. Benchmark Comparisons.................................. 255
d. Structural Breaks in the Relationship between Price and Cost 255

2. Reduced Form vs. Structural Models......................... 256
4. A Disconnect Between Bids and Costs............................. 258
5. Inexplicable Gap Between Winning and Losing Bids......... 260

F. The Standards for Admissibility of Expert Testimony in
   Antitrust Conspiracy Cases........................................... 260
   1. Qualifications.......................................................... 263
   2. Reliability............................................................... 264
   3. Fit....................................................................... 266

Chapter IX 269

Trying Conspiracy Cases ....................................................... 269

A. Pretrial Issues.............................................................. 269
   1. Jury Consultants....................................................... 269
   2. Pretrial Motions......................................................... 274

B. Special Considerations in Cases Involving Criminal Allegations 278

C. Juror Perceptions and Predispositions ............................. 280

D. Proving Knowing Participation in an Unlawful Agreement..... 288
   1. Direct Evidence vs. Circumstantial Evidence............... 289
   2. Types of Circumstantial Evidence: Competitor
      Communications and Pricing Practices ......................... 290
   3. The Problem of Parallel Conduct............................. 290
   4. Special Difficulties.................................................... 292
      a. Defending a Corporation........................................ 292
      b. Proving Knowing Participation in a Conspiracy........ 292
      c. Proving Withdrawal from a Conspiracy................. 293

E. Juror Comprehension of Economic Testimony.................. 295
   1. General Principles.................................................... 295
   2. Persuading the Jury Through Effective Direct Examination
      of an Economic Expert ............................................ 296
      a. Substance.......................................................... 296
      b. Style.................................................................. 300
   3. Persuading the Jury Through Effective Cross-Examination
      of an Economic Expert .......................................... 302
   4. Juror Reaction to Expert Testimony........................... 304

Table of Cases.................................................................... 306