

PREFACE

At its broadest level of generality, Section 1 of the Sherman Act—the mainstay of federal antitrust laws governing agreements—prohibits unreasonable contracts, combinations, and conspiracies in restraint of trade. Since its passage in 1890, courts, government enforcers, and private parties have struggled with Section 1’s sparse language but broad mandate, and a rich and varied precedent defining the antitrust treatment of agreements has accumulated over time.

This book focuses upon part of that mosaic: How the courts handle the issue of proving an agreement. That issue is step one. Without an agreement, there is no violation of Section 1.

In the antitrust context, however, the concept of agreement is not necessarily straightforward. Agreements may be express or implied, formal or informal, highly specified or not, simple or complex, written, spoken, or even entered into by a “wink of an eye”—so long as there is clear evidence of a conscious commitment to a common scheme.

This book is intended to be a guide to the current state of federal antitrust law on proof of agreement. Chapter I begins by examining the congressional intent behind Section 1 and how early Supreme Court decisions interpreted the statute in order to identify the types of agreements the law was meant to regulate. Chapter II addresses the fundamental definitional question of what constitutes an agreement—or, as the Supreme Court has termed it, a “conscious commitment to a common scheme.” It examines how the definition may be affected by either the horizontal or vertical relationships of parties to an agreement and analyzes issues of proof related to a party’s participation in or withdrawal from a conspiracy. Chapter III examines basic issues in proving an agreement, either through direct evidence or circumstantial evidence, such as consciously parallel behavior coupled with “plus” factors. Chapter IV discusses recurring and important issues of proof, including how the Federal Rules of Evidence address statements and actions of alleged co-conspirators, including an alleged co-conspirator’s invocation of its Fifth Amendment right against self-incrimination, participation in the U.S. Justice Department’s Antitrust leniency program or guilty plea. Chapter V

addresses proof relating to specific types of agreements, including intra-firm agreements—which the Supreme Court has generally held are not the type of agreements regulated by Section 1—and a myriad of forms of collaborative ventures.

The second half of the book delves into federal procedure and trial practice. Chapters VI and VII analyze two critical procedural junctures in antitrust cases: motions to dismiss and for summary judgment. Chapter VI discusses the effect on pleading standards of the Supreme Court’s 2007 opinion in *Bell Atlantic Corp. v. Twombly*,¹ and how *Twombly* has been interpreted and applied by the lower courts. Chapter VII turns to summary judgment, evaluating the different standards courts have applied, and setting forth practical issues in arguing for and against summary judgment, including the critical issue of the use of economists. Chapter VIII examines more generally how economic expert evidence may be used in proving an agreement. It details the approaches and tools that economists use in conspiracy cases, including explaining basic statistical methods and tests. The chapter concludes with a brief discussion of the legal standards for admission of expert economic testimony. Finally, Chapter IX takes a practical look at a trial of an antitrust conspiracy case.

Books like these are the result of the hard work and dedication of numerous lawyers and economists who devote their precious and limited time to advance the profession and its understanding of the law. It is a great honor to be able to work with such dedicated professionals.

This is the second edition of the handbook. The original edition reflected the hard work of Brandon L. Bigelow, Thomas J. Collin, Lynda K. Marshall, Rosa M. Abrantes-Metz, Dina Older Aguilar, Donald Amlin, Carrie M. Anderson, Joseph W. Bell, Sofia E. Biller, Daniel Birk, Vadim M. Brusser, Melissa Colangelo, Jason S. Dubner, John J. Eklund, Nathan P. Eimer, Mark Frankena, Kostis Hatzitaskos, Merril J. Hirsh, Heather Lamberg Kafele, Jeffrey B. Korn, Dominic Kouffman, Timothy Longman, Jason M. Lindner, Irene Liu, Niall E. Lynch, Daniel Ferrel McInnis, S. Martin, Mario M. Meeks, James A. Morsch, David K. Park, Mitchell J. Rapp, Paula W. Render, Eric A. Sacks, Kristina A. Sadlak, David Scheffman, Katie Shannon, Andrew D. Shapiro, Alexandra J. Shepard, Ian Simmons, John K. Theis, Shaun M. Van Horn, Stephen Weissman, and Angela Thaler Wilks, Daniel Z. Dorfman, Jeffrey B. Korn and Jennifer A. Carmassi.

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1. 550 U.S. 544 (2007).

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