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Antitrust attorneys grapple with impact of 'Booker'

Despite change in role of guidelines, DOJ declares 'business as usual.'

By James L. McGinnis
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THE U.S. SUPREME Court's decision in *U.S. v. Booker*, 125 S. Ct. 738 (2005), has as much importance for criminal antitrust practitioners as it does for other federal criminal lawyers. *Booker*'s holding that the Federal Sentencing Guidelines cannot be mandatory, in fact, has unique significance for criminal antitrust cases. The pre-*Booker* antitrust sentencing scheme relied heavily on a presumption that such crimes always result in a 20% overcharge. Now the critical question of the amount of overcharge, or "impact," is wide open, and the antitrust bar and courts must work out the implications of this change for future cases.

The Federal Sentencing Guidelines' base fine for a corporation begins with a calculation of "20% of the volume of affected commerce." See U.S.S.G. § 2R1.1(d)(1). The alternative fine provided in 18 U.S.C. 3571(d) is "the greater of twice the gross gain or twice the gross loss." Until the Supreme Court's decision in *U.S. v. Apprendi*, 530 U.S. 466 (2000), the U.S. Department of Justice (DOJ) and the private bar assumed that these calculations would be made by a judge at the time of sentencing based on a preponderance-of-evidence standard. In practice, this figure—even after trial—has been determined by negotiation. *Apprendi*, however, held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490.

Since the size of markets involved in antitrust violations often results in a fine calculation greater than the statutory maximum, *Apprendi* squarely raised the issue, if not the certainty, that the amount of an illegal overcharge could no longer be determined by a judge under a preponderance standard. The reasoning of the Supreme Court's later decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), not only re-emphasized that conclusion, but also raised the distinct possibility that the U.S. Sentencing Guidelines—including the presumptive 20% overcharge in § 2R1.1(d)(1)—were unconstitutional. Id.

Criminal antitrust practitioners, then, awaited the Supreme Court's decision in *Booker* with the same degree of anticipation as other federal criminal lawyers. Could DOJ still use the guidelines' 20% overcharge presumption? Could the "twice the gain or loss" alternative fine in § 3571(d) be applied without presenting the question to a jury under a reasonable-doubt standard? Could the alternative fine provisions survive a constitutional challenge after the Supreme Court's guidelines ruling?

Antitrust Division will use leverage to void bargaining points.

In *Booker*, the Supreme Court answered the first two questions clearly in the negative. The court did not speak directly to the constitutionality of § 3571(d), but the opinion arguably provided more ammunition for those who would contend that the section is unconstitutional. All in all, a major victory for the criminal defense bar? Not necessarily. The DOJ's Antitrust Division has declared "business as usual" in all of its public comments since the *Booker* decision. See Scott Hammond, "Antitrust Sentencing In The Post-*Booker* Era: Risk Remains High For Non-Cooperating Defendants," address before the American Bar Association Section of Antitrust Law (March 30, 2005), available at www.usdoj.gov/atr/public/speeches/208354.htm.

Is that possible? The answers are both "no" and "yes." One answer must be "no" because the Supreme Court has ruled that a critical and typically complex sentencing calculation—the amount of overcharge—must be proved beyond a reasonable doubt to a jury. There can no longer be an assumption that the overcharge was 20%. Moreover, economists rarely opine to any conclusion beyond a reasonable doubt, let alone the amount of an overcharge. That calculation usually is the subject of complex econometric analysis. The answer can also be "yes" because the Antitrust Division has made clear that it will use all of its considerable plea leverage to eliminate the bargaining points that these dramatic changes in the law might otherwise have afforded antitrust defendants.

A question of impact

On its face, *Booker* suggests that analysis of impact, or the amount of overcharge, should be an important area of inquiry and advocacy for antitrust defendants. After all, if the base fine calculation begins at a number lower than 20%, the resulting fine will be proportionately less. Of course, the kind of economic analysis needed for this exercise is time-consuming and expensive both for DOJ and defendants.

But time is a commodity that may be in very short supply for grand jury targets. DOJ has announced not only that it will seek guidelines sentences but also that targets wishing to litigate the amount of impact will go to the end of the line in plea negotiations. All of the opportunities for favorable consideration will disappear as other targets make earlier, better deals. More bluntly, "[t]he Division will not engage in plea negotiations with a company that desires to litigate gain or loss." Hammond address, at 6.

In short, the Supreme Court has opened an avenue of defense, but DOJ has raised the stakes for going down this road. In doing so, DOJ also has re-emphasized its long-held view that gain or loss refers to the overcharge of the entire conspiracy, not just the sales of the defendant. See Hammond address, at 5; Gary R. Spratling, "The Trend Towards Higher Corporate Fines: It's A Whole New Ball Game," address before The Eleventh Annual National Institute On White Collar Crime (March 7, 1997), at 6, available at www.usdoj.gov/atr/public/ speeches/4011.htm. The difference between sales of the defendant and sales in the entire market, of course, is likely to be huge. Whether § 3571(d) refers to the defendant only or the entire market is a critical issue.

For that reason, it is surprising that the answer is not more clear. There is no case directly on point. The Antitrust Division's view is that § 3571(d)'s use of the term "gross" gain or loss must mean that of the whole conspiracy. It also points to the contrast

James L. McGinnis is a partner in the antitrust and white collar groups of Sheppard, Mullin, Richter & Hampton, based in its San Francisco office. He is a former assistant U.S. attorney whose practice focuses on civil and criminal antitrust litigation. He can be reached at JMcGinnis@sheppardmullin.com.

between the "gross" gain or loss language in § 3571(d) and the guidelines' explicit limitation of the 20% overcharge presumption to "the volume of affected commerce attributable to an individual participant in a conspiracy." U.S.S.G. § 2R1.1(b)(2). In other words, "gross" gain or loss must mean something different and broader than the language of § 2R1.1(b)(2). Spratling address, at 6.

Proponents of the other side of the argument draw precisely the opposite conclusion from the same comparison. It is not difficult to specify whether the statute refers to the entire market, and the word "gross" is not what we would expect to see on this important point. "Gross" typically means, and could mean here, that no deductions or adjustments can be made to the overcharge figure. Webster's defines "gross" as "overall total, as of income, before deductions are taken." Webster's New World Dictionary 1022 (3d ed. 1988). The maximum fine, according to this argument, simply is the gross overcharge, not the net overcharge.

Moreover, if the statute can fairly be characterized as at least ambiguous, the Supreme Court has ruled that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." See, e.g., *Lewis v. U.S.*, 401 U.S. 808, 812 (1971). For this issue, that would mean choosing the defendant-only interpretation.

Legislative history

Reference to the legislative history does not make the interpretation of § 3571(d) very much clearer. See *U.S. v. Andreas*, No. 96-CR-762, 1999 U.S. Dist. Lexis 2462, at *10 (N.D. Ill. 1999) ("[Section] 3571(d) is a catch-all fine provision applied to all criminal statutes. Neither the statutory text nor legislative history defines gain or loss."). Put differently, the legislative history of § 3571(d) is a dead end.

To make anything of the legislative history requires digging deeper. The legislative-history argument begins with the observation that § 3571(d) has just one change from its predecessor, 18 U.S.C. 3263(c)(1). The alternative fine provision of § 3263(c)(1) was directed to "the defendant" deriving pecuniary gain whereas § 3571(d) is directed to "any person."

The legislative history of § 3263(c) is more enlightening than the silence that accompanied the enactment of § 3571(d). The House of Representatives' report explained that § 3263(c) authorized the judge to propose a fine of "up to twice the pecuniary gain derived by the defendant." The report also noted that the law was patterned after Model Penal Code § 6.03(5) and the recommendation of the National Commission on Reform of Federal Criminal Law. H.R. Rep. No. 98-906, at 17 (1984). Both of these latter sources spoke of gain from the offense by the offender, not the entire conspiracy. See Model Penal Code § 6.03(5) (1962); Nat'l Comm'n on Reform of Fed. Crim. Laws, Final Report § 3301(2), at 295 (1971).

DOJ, for its part, might draw a contrary conclusion from the legislative history. Perhaps the change from "defendant" in § 3263(c) to "person" in § 3571(d) is meaningful in this context. DOJ also could point to the connection between § 3571(d) and § 3572 as support for its position. Section 3572 describes factors, many of them focused on the defendant, to be considered by the court in determining the amount of a fine. It follows, according to this argument, that § 3571(d) establishes a ceiling of twice the gain or loss. That calculation must then be adjusted by following the factors of § 3572 in order to reach a fine amount. Put another way, if § 3571(d) were limited to individual gain or loss, there would be no reason for many of the provisions of § 3572.

Companies should improve compliance programs.

So does "gross" simply foreclose a defendant from arguing for a net overcharge figure, or does it mean the defendant is responsible for damages stemming from the whole conspiracy? Whatever the answer may be, DOJ's position is that defendants who might want to argue these points seriously must be willing to go to the end of the line in plea negotiations or defend the charge to a judgment.

A constitutional question

Adding to this already high-stakes legal point-counterpoint is the issue of § 3571(d)'s constitutionality. This question, of course, is critically important in cases for which the maximum penalty under the Sherman Act is $10 million. Effective on June 22, 2004, the maximum penalty increased from $10 million to $100 million. See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 661 (2004).

DOJ's view is that § 3571(d) remains solid as bedrock. Most recently, DOJ has argued that the reasoning of the 9th U.S. Circuit Court of Appeals in *U.S. v. Buckland*, 289 F.3d 558 (9th Cir. 1992), demonstrates that § 3571(d) is constitutional. Hammond address, at 5. In *Buckland*, the defendant challenged 21 U.S.C. 841, arguing that its provisions for increasing sentences for drug crimes based on drug quantities were unconstitutional following the *Apprendi* decision. Jet Buckland argued that Congress intended for judges to make the drug-quantity findings and to do so under a preponderance standard. Therefore, Buckland reasoned, the statute must be unconstitutional because *Apprendi* held that such a determination must be made by a jury beyond a reasonable doubt. The 9th Circuit, however, upheld the statute's constitutionality, ruling that any infirmity could be cured by charging drug quantities in the indictment and proving them to a jury beyond a reasonable doubt. *Buckland*, 289 F.3d at 568.

As was the case with § 841 in *Buckland*, § 3571(d) does not specify whether the judge or jury should make the finding. Under *Buckland*, the cure for a challenge to § 3571(d) would be to rule that the determination of gain or loss must be charged in the indictment and proved to a jury beyond a reasonable doubt. Id.

No one doubts that § 3571(d) would have to be so construed. But that construction does not speak to the *Booker*-based challenge. In *Booker*, the court ruled that the guidelines' enhancement factors would have to be assessed by a jury. *Booker*, 125 S. Ct. at 756. Yet Congress' intention clearly was otherwise. Id. at 750. Therefore, the only way to save the guidelines was to render them advisory. Id. The determination of gain or loss arguably is far more complex and far less suited for a jury determination. It is well known that the analysis of overcharges centers on complex economic and econometric analyses. Could Congress have intended that calculation to be undertaken by a jury pursuant to a reasonable-doubt standard?

Section 3571(d) does contain an escape valve of sorts, however. The alternative fine calculation may be undertaken "unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." Does this provision save § 3571(d) from a *Booker* challenge by foreclosing the alternative fines when the analysis is "unduly complicated"? Could this provision reflect a congressional intent that the gain or loss calculation be made by a jury unless the judge finds that it would be too complex or take too much time? No doubt this is yet another high-stakes and unanswered legal question.

While there is plenty of room for argument on these issues, no one would disagree that the best course would be to avoid them altogether. Companies that do not have compliance programs should institute them. Companies that already have compliance programs should make sure that they are effective.

Indeed, DOJ recently obtained fines of $84 million in the rubber chemicals cases and $185 million in the memory chip investigation. See *U.S. v. DuPont Dow Elastomers LLC*, No. 05-0036 (N.D. Calif. March 29, 2005), plea agreement at 5, www.usdoj.gov/atr/cases/f209200/ 209230.htm; and *U.S. v. Hynix Semiconductor Inc.*, No. 05-249 (N.D. Calif. April 20, 2005), plea agreement at 5, www.-usdoj.gov/atr/cases/f209200/209231.htm. Those fines suggest that at least in the early going after *Booker*, "business as usual" does prevail at the Antitrust Division. NLJ

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