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ANTITRUST LAW A Practice Focus

Harder to Prosecute?

A recent Supreme Court decision could nullify enhanced antitrust penalties.

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Last December, we wrote that if Congress elects to raise the maximum fine under the Sherman Act, it should concurrently reform the U.S. Sentencing Guidelines to avoid the unintended and unfortunate consequence of discouraging cooperation in price-fixing investigations ["Finding the Right Price," *Legal Times,* Dec. 15, 2003, Page 32]. On June 22, President George W. Bush signed into law the Antitrust Criminal Penalty Enhancement Act, which, inter alia, raised the Sherman Act's maximum fine from $10 million to $100 million, but did not include broader sentencing reforms. The new law lifted the spirits—and aggressiveness—of the federal antitrust enforcers.

But their celebration lasted only two days.

On June 24, the Supreme Court did more than just reform the federal sentencing guidelines; it may very well have obliterated them with its bombshell decision in *Blakely v. Washington.* That decision overturned a criminal plea based on judicial, rather than jury, fact-finding of the elements underlying a sentence determined through a guidelines system similar to the federal guidelines.

Already, a number of judges and white collar criminal law experts have declared that *Blakely* renders the federal sentencing guidelines "unconstitutional" or "dead on arrival." Under the same reasoning, 18 U.S.C. §3571—permitting fines of twice the loss or gain resulting from any offense, unless such a determination would "unduly prolong or complicate the sentencing process"—may also be in jeopardy. If so, the Justice Department's Antitrust Division will lose its primary tool of intimidation for securing the huge fines that have kept it in the money and in the headlines.

BIG MONEY

To understand why *Blakely* appears to have changed antitrust sentencing practice requires a review of how antitrust fines have been calculated up to now. First, the "volume of commerce," defined as all goods or services subject to the conspiracy sold *by the defendant* during the alleged cartel period, is calculated. That figure is multiplied by 20 percent, twice the *presumed* 10 percent conspiratorial overcharge, to arrive at a base fine.

A "culpability score" is then calculated using various factors, including the size of the culpable organizational unit, the behavior of the company and its senior management during the conspiracy, and the company's cooperation with the criminal investigation. The culpability score dictates minimum and maximum multipliers to apply to the base fine to arrive at a fine range. At sentencing, judges have typically imposed a fine within this range.

In larger conspiracies, however, fines calculated using this method usually surpassed the old Sherman Act maximum of $10 million. So the Antitrust Division turned to §3571 to boost the ceiling of the permissible fine. The division took the position that §3571 allowed it to bypass the ordinary Sherman Act maximum and pursue a new maximum fine of "twice the gross gain or twice the gross loss" caused *by the cartel as a whole.*

In the past, many defendants (particularly foreign-based companies), fearful of American juries and chastened by the prospect of billion-dollar-plus fines resulting from "whole conspiracy" damages, regularly pleaded guilty and paid fines well over the Sherman Act maximum. (The record is a $500 million fine secured against F. Hoffmann-La Roche Ltd.) But despite this history of successful §3571-based *settlements,* the Antitrust Division still wanted to increase the statutory maximum, precisely because it was fearful of having actually to *litigate* a §3571 hearing.

The division's fears were real. A §3571 hearing would essentially be the equivalent of a civil antitrust damages trial. Antitrust damage cases are amongst the most lengthy and complicated of all civil proceedings, involving multiple defendants and wide-ranging data, often located abroad, which must be analyzed and explained by industry-knowledgeable witnesses and economic and econometric experts. Given such inherent complexity and the necessarily extensive evidence from customers and competitors required to prove the "gain or loss" caused by a cartel, it would seem that many judges would shut down a §3571 hearing before it begins, relying on the "unduly complicate or prolong the sentencing process" exception to §3571.

This is why the Antitrust Criminal Penalty Enhancement Act was so important. With the increase of the Sherman Act maximum, the Antitrust Division believed that it would now need only to use §3571 if the guidelines-determined fine range exceeded $100 million—instead of a mere $10 million. Thanks to Congress, other than for huge, worldwide conspiracies, the division thought the threat of a §3571 hearing would be rare. Thus the division's celebration.

The Ground Shifts

Blakely made the back-slapping short-lived for several reasons. First, for any §3571 hearings that do occur, *Blakely* will likely require the Antitrust Division to prove the elements of §3571 "beyond a reasonable doubt," rather than by a "preponderance of the evidence," *and* before a jury, not a judge. Second, *Blakely* may very well keep the division out of the alternative fine game completely, absent new sentencing legislation. And most strikingly, in reasoning formally adopted by the Justice Department itself, some courts have already applied *Blakely* to declare the federal sentencing guidelines unconstitutional, as applied in certain circumstances.

In *Blakely,* the defendant pleaded guilty to second-degree kidnapping in Washington state court, a crime carrying a maximum sentence of 10 years. However, the Washington Sentencing Reform Act specified a "standard range" of 49 to 53 months for the crime, unless a judge found "substantial and compelling reasons justifying an exceptional sentence." The prosecution recommended a sentence within the standard range. But the judge rejected the recommendation and "enhanced" the sentence to 90 months by using facts not included in the plea agreement to find that Ralph Blakely Jr. acted with "deliberate cruelty," a statutory ground for upward departure.

The case required the Supreme Court to apply *Apprendi v. New Jersey* (2000), in which the Court held that "[o]ther than the fact of a prior conviction, 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." The state argued that *Apprendi* was not implicated because the total sentence imposed by the judge did not exceed the statutory 10-year maximum for second-degree kidnapping, a Class B felony.

The Supreme Court disagreed. In a decision written by Justice Antonin Scalia, the Court ruled that the enhancement of Blakely's sentence beyond the standard range, without jury findings to support the bases of the enhancement, violated Blakely's Sixth Amendment right to a trial by jury. Scalia wrote that the applicable statutory maximum for *Apprendi* purposes was not the 10-year statutory maximum for Class B felonies; instead, the "statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" (emphasis in original). Since Blakely received an enhanced sentence based on facts found not in a jury verdict or a plea agreement but by the judge, the sentence could not stand.

Thus sentencing regimes that rely on judicial fact finding to enhance sentences beyond statutory maximums—as that term is now defined by the Supreme Court—may be unconstitutional. The Court, however, was careful to note that it was not finding "determinate sentencing schemes" unconstitutional. "[T]he Federal Guidelines are not before us," Scalia wrote. Nonetheless, Justices Sandra Day O'Connor and Stephen Breyer, in vigorous dissents, argued that, at the very least, the differences between the Washington and federal schemes do not appear to be constitutionally significant.

If the federal sentencing guidelines are unconstitutional—and, at a minimum, their constitutionality is in doubt—*Blakely* will affect the manner in which criminal antitrust fines are calculated and imposed. Consider, for example, the concept of the culpability score. As explained, this score is based on a variety of factors—e.g., the willful ignorance of a high-level executive. Such "facts" are typically "found" by the sentencing judge (based heavily on input by the Justice Department and the Probation Office), *not* at trial by a jury, *not* necessarily upon admissible evidence, and *not* beyond a reasonable doubt.

Are They Unconstitutional?

Already, at least four federal courts have used *Blakely* to alter sentences premised on guideline enhancement factors. In the D.C. tractor man case, for example, Judge Thomas Penfield Jackson on June 23 sentenced the defendant to six years in prison, based in part on his guideline-mandated findings. On June 29, Judge Jackson reconsidered the sentence in light of *Blakely* and reduced it to 16 months, stating that the six-year sentence was "plainly illegal" under *Blakely.*

Similarly, in *United States v. Croxford,* Judge Paul Cassell of Utah held that the federal sentencing guidelines, as applied to Brent Croxford, were "unconstitutional" under *Blakely.* Croxford had pleaded guilty to one count of sexual exploitation of a minor. The plea agreement contemplated that the sentence would fall within a range of 121-151 months. However, the sentencing calculation failed to reflect that, before trial, Croxford fled the charging jurisdiction, conduct worthy of a two-level upward adjustment. The plea agreement also did not reflect alleged victimization of a second child. This "relevant conduct" was considered by the probation officer and resulted in a recommended sentence of 151-188 months. Based on *Blakely,* Judge Cassell "reluctantly agreed" with the defense that the enhanced sentence was unconstitutional.

Cassell explored various "go-forward" options. He considered convening a "sentencing jury" to determine whether the relevant conduct that would justify an enhanced sentence could be proved by the government. He thought about whether he could hold the sentencing hearing himself, apply the guideline sections not implicated by *Blakely* (for instance, those that allow for downward departures), and restrict himself to facts pleaded to in the plea agreement. Rejecting both those options, the judge decided to declare the federal sentencing guidelines unconstitutional in their entirety, as applied, and to sentence the defendant between the nonguidelines statutory maximum and minimum.

In analyzing these various options, Cassell provided reasoning that may also render the conventional antitrust sentencing methodologies unconstitutional, or, at least, impractical for the Antitrust Division. To the *Croxford* court, the first option—convening a sentencing jury—constituted an illegal judicial rewrite of the sentencing statutes and the implementing provisions. The sentencing guidelines contemplate a system where the probation office gathers facts subject to the parties' objection and presents them to a judge, not a jury. According to Judge Cassell, and the Justice Department in an internal July 2 memorandum to all prosecutors, transferring these duties to a jury would upset Congress' sentencing scheme and was, therefore, not permissible.

The second option—a judicial sentencing hearing—Judge Cassell held, and the Justice Department no doubt agrees, is "unfair" to the government and inconsistent with the guidelines.

The Future of Fines

While other courts have and will continue to apply *Blakely* to the federal sentencing guidelines and reach different conclusions, in our view the problems with asking the jury to don the judge's robes in an antitrust sentencing hearing are even more palpable than in other contexts. It seems inevitable that asking the jury, rather than a judge, to make findings regarding the volume of commerce affected, the defendants' share of that volume, the involvement (or "willful ignorance") of uncharged senior executives, and the gain achieved or losses caused by the conspiracy, would unquestionably upset the congressional sentencing regime, including §3571 and the sentencing guidelines. Even if permissible, it would "unduly complicate and prolong" the sentencing process. That being the case, by the terms of the statute and §3571's legislative history, a sentencing jury cannot seemingly be convened under §3571.

Another concept mentioned in *Croxford,* and a strategy espoused in the Justice Department's July 2 memo, would convert antitrust sentencing factors into elements of the crime. But pleading them in an indictment, and thereafter proving them to a jury, is not only impractical (think of telephone book-like indictments), it also raises substantive criminal procedure and due process concerns.

The upshot? As it stands today, there may not be an alternative fine provision for the Antitrust Division to turn to if fines are sought above the Sherman Act statutory maximum. If true, the maximum fine under the Sherman Act for offenses preceding the new penalty enhancement act is not one penny over $10 million. For future crimes, the maximum is $100 million.

Can the problem be avoided for the Antitrust Division by defendants just waiving their sentencing rights under *Blakely,* just as they waive their right to a jury trial on the issue of liability for the offense? In theory, yes. The *Blakely* Court clearly stated that *Apprendi* rights may be freely waived.

But the practical issue is whether the plea admissions must contain the factual predicates for the sentence to be imposed. In the case of a §3571 fine, that might well include an admission of an actual effect sufficient to support the sentence. Pre-*Blakely* plea agreements did not contain such admissions. That was because the Antitrust Division often agreed to plea agreement language designed by the defendant to try to limit civil damages.

After *Blakely,* the division may not be feeling so generous, and may have to require more specific gain-or-loss admissions. But that is something few defendants may be willing to make given the inevitable private treble-damages suits that follow on the heels of every Antitrust Division investigation. Many defendants simply cannot afford to make "bulls-eye" liability and damages admissions in plea agreements that could result in civil damages that would simply dwarf the criminal fine.

The logic of *Blakely* and subsequent decisions to date clearly provide increased incentives for defendants to litigate both liability for, and sentencing as to, alleged antitrust violations. There are now, more than ever, real questions as to the constitutionality of the federal sentencing guidelines, as well as the §3571 hammer for extracting larger fines.

Clearly, the antitrust sentencing regime is in great flux and much remains to be seen. But one truth does emerge, whether found by a judge or a jury, by a preponderance of the evidence or beyond a reasonable doubt: The lives of the Antitrust Division's criminal enforcers have become more difficult, notwithstanding their recent success in getting the statutory maximum increased to $100 million. Could the enforcers have won the battle, but lost the war?

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