

The Business of Sentencing: Facing the Facts After *Blakely*, *Booker*, and *Fanfan*

Tara L. Reinhart, Nathan J. Muyskens and Christopher E. Tierney

Looking back, 2004 was a year of significant and intriguing antitrust decisions. The Supreme Court showed a renewed interest in antitrust in both *Trinko*¹ and *Empagran*.² The Department of Justice's *Oracle*³ case and the Federal Trade Commission's *Arch Coal*⁴ case also brought new issues to the forefront at the trial court level. The most profound and unexpected changes, however, occurred in the context of criminal antitrust sentencing. First, on June 22, 2004, the President signed the Antitrust Criminal Penalty Enhancement and Reform Act of 2004,⁵ which raised Sherman Act penalties for corporations from \$10 million to \$100 million maximum fines, and penalties for individuals from \$350,000 to \$1 million fines and from three years to ten years imprisonment. Ordinarily, such legislation would be the year's highlight, but just two days later, the Supreme Court turned all federal sentencing on its head in *Blakely v. Washington*,⁶ a case involving Washington State's sentencing guidelines that left open the question whether the opinion, while applicable only to state law, would be extended to federal sentencing. On January 12, 2005, the Supreme Court answered with a resounding "yes."⁷ What remains to be seen is how criminal antitrust sentencing will be affected as a result.

Blakely, *Booker*, and *Fanfan*

In *Blakely*, the Court found Washington's sentencing guidelines unconstitutional to the extent they allow a judge to sentence a defendant beyond the Guidelines' base offense level or range without specified factual findings made by a jury beyond a reasonable doubt or admitted by the defendant in a plea agreement.⁸ The *Blakely* opinion extended the Court's holding in *Apprendi v. New Jersey*⁹ (another state sentencing case), and held that only those facts found by a jury or admitted by a defendant may give the court a basis to increase the defendant's sentence.

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¹ Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 298 (2004).

² F. Hoffman-LaRoche, Ltd. v. Empagran S.A., 124 S. Ct. 2359 (2004).

³ United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

⁴ FTC v. Arch Coal, Inc., No. 04-5291, No. 04-7120, 2004 WL 2066879 (D.C. Cir. Sept. 15, 2004).

⁵ Pub. L. No. 108-237, 118 Stat. 661 (2004). The legislative history accompanying the statute strongly encouraged the U.S. Sentencing Commission to raise the applicable U.S. Sentencing Guidelines (USSG) to bring antitrust offenses in line with other white collar offenses and ensure that antitrust offenders face real jail time.

⁶ 124 S. Ct. 2531 (2004).

⁷ See United States v. Booker, Nos. 04-104, 04-105, 2005 WL 50108 (U.S. Jan. 12, 2005).

⁸ The defendant in *Blakely* pleaded guilty to second degree kidnapping. The statutory maximum sentence was 10 years in prison. The state's sentencing guidelines allowed the court to depart upward from the standard range and impose a sentence up to the statutory maximum if it found substantial and compelling reasons warranting the departure. *Blakely's* standard sentencing range was 49 to 53 months, but the court found that *Blakely* acted with deliberate cruelty and departed upward, sentencing him to 90 months in prison. The Supreme Court found the sentence improper to the extent the upward departure was based upon facts not admitted by the defendant in his plea agreement.

⁹ 530 U.S. 466 (2000).

Even though *Blakely* applied only to the State of Washington's sentencing guidelines, federal trial courts and the U.S. Department of Justice recognized the case's potential impact on the U.S. Sentencing Guidelines (USSG) because the USSG allow judges to increase sentences much like the Washington guidelines. Within days, federal judges were finding the USSG to be unconstitutional. The U.S. Department of Justice reacted almost overnight with instructions to prosecutors to secure "Blakely waivers" as part of every guilty plea,¹⁰ to request sentencing juries when possible, and to require lengthy plea agreements stating all facts needed for sentencing.¹¹ Dockets backed up as judges struggled to impose sentences consistent with the anticipated extension of the *Blakely* principles to the USSG.

Within weeks the Supreme Court granted expedited treatment to two cases, *United States v. Booker* and *United States v. Fanfan*, on the issue of whether *Blakely* applies to the USSG.¹² The Court has now handed down a pair of opinions in the consolidated *Booker/Fanfan* case that dramatically changes the sentencing landscape. In the first opinion, authored by Justice Stevens, and joined in by Justices Scalia, Souter, Thomas, and Ginsburg, the Court reaffirmed its holding in *Apprendi* and extended *Blakely* to the USSG. Specifically, the Court held that any fact, other than a defendant's prior conviction, used to increase one's sentence must be admitted by the defendant or found beyond a reasonable doubt by a jury. In the second opinion, authored by Justice Breyer, and joined in by Justices O'Connor, Kennedy, Ginsburg, and Chief Justice Rehnquist, the Court held that the USSG, while still functional despite certain provisions violating the Sixth Amendment right to a jury trial, can now be used only on an advisory rather than on a mandatory basis.

The effects of *Booker/Fanfan* will be felt immediately in criminal trials. In the antitrust context, the effect is clear, however, because defendants tend to negotiate plea agreements and are sentenced in uncontested hearings. In the past decade, the Antitrust Division has successfully negotiated huge fines from corporations without having to involve a jury. The question remaining for antitrust practitioners is: Will *Booker/Fanfan* disrupt the Antitrust Division's string of successes? Or will it be business as usual?

Sentencing Under the USSG Is Complex

To understand the significance of extending *Blakely* to federal antitrust sentencing, it is important to understand how federal sentencing has worked prior to *Booker/Fanfan*. All federal sentencing has been done pursuant to the USSG.¹³ The USSG calculates sentences by assigning a number to each offense then adding or subtracting from that number based on findings relating to the offender and offense conduct present in the case, including aggravating and mitigating factors,

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¹⁰ A "Blakely waiver" requires a defendant to agree not to challenge a sentence based on an argument that the sentence resulted from facts not included in his plea agreement. Available at <http://ussguide.com/members/BulletinBoard/Blakely/BlakelyWaiver.html>.

¹¹ See James Comey, Departmental Legal Positions and Policies in Light of *Blakely v. Washington* 4 (July 2, 2004), available at <http://www.ussguide.com/members/BulletinBoard/Blakely/DOJMemo.pdf>; see also Christopher A. Wray, Guidance Regarding the Application of *Blakely v. Washington* to Pending Cases, 2004 WL 1402697 (June 24, 2004).

¹² See *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), cert. granted, 125 S. Ct. 11 (2004), aff'd, Nos. 04-104, 04-105, 2005 WL 50108 (U.S. Jan. 12, 2005); *United States v. Fanfan*, 2004 WL 1723114 (D. Me. June 28, 2004), cert. granted before judgment, 125 S. Ct. 12 (2004), vacated sub nom. *United States v. Booker*, Nos. 04-104, 04-105, 2005 WL 50108 (U.S. Jan. 12, 2005).

¹³ In 1984, Congress passed the Sentencing Reform Act, ending most judicial discretion in sentencing. See 18 U.S.C. § 355 et seq. This was an attempt to create uniformity.

such as the defendant's criminal history and role in the offense. After a jury verdict or guilty plea, the sentencing court is required to review a series of these factors, including evidence that may or may not have been presented to the jury at trial or admitted by the defendant in the plea. The court compiles the numbers assigned to the factors and then calculates the defendant's offense level. After all of these calculations, the resulting offense level corresponds to a fine range or, for individuals, a range of months of jail time and/or a fine range set forth in a grid in the USSG. The sentencing court then selects a point within this range to set the final sentence. This calculus is complicated in most cases, but it is especially so in antitrust cases.

Antitrust Sentencing Involves the Added Complexity of the Volume of Commerce Affected

Typically, corporate antitrust defendants plead guilty. And, typically, plea negotiations result in "C" plea agreements under Fed. R. Crim. P. (c)(1)(C), which allows a defendant to withdraw a plea if the sentencing court refuses to enter a sentence consistent with the agreement's terms. The alternative is a "B" plea under Fed. R. Crim. P. 11 (c)(1)(B), in which the Antitrust Division recommends a sentence, but a defendant has no recourse if a court refuses to enter it. The use of "C" pleas is of paramount importance to the Antitrust Division's success in obtaining guilty pleas, and in furthering its policy objectives. Without the security of a "C" plea, defendants would be less likely to negotiate. Because of the importance of plea agreements to the Antitrust Division's mission, antitrust cases tend to result in plea agreements and rarely reach the point at which the issues raised in *Blakely* come into play.

Under the USSG, antitrust sentences are calculated like sentences for other crimes. But, unlike most other crimes, the most important sentencing factor is the volume of commerce affected by the crime. Significantly for *Booker/Fanfan* analysis, the volume of commerce is not a factor that is proved to a jury or admitted in a plea agreement. Instead, it is determined before the judge at the time of sentencing. Once the volume of affected commerce is defined, a judge uses one of two methods to determine the punishment faced by the defendant: either the USSG method or an alternative statutory method, the "twice-the-gain or twice-the-loss" provision of 18 U.S.C. Section 3571(d).¹⁴ After the base fine is determined, the judge makes a complex set of calculations involving factors such as the number of employees working at the company, the involvement of high-level employees in the crime, and lack of an effective compliance program, to arrive at the offense level and fine.

Under the USSG method, punishment is based on the affected volume of commerce attributable to the defendant being sentenced.¹⁵ Rather than require an actual determination of the effects attributable to the defendant, the USSG uses a proxy of 20 percent of the volume of commerce as a base fine. Comments to the USSG explain:

It is estimated that the average gain from price fixing is 10 percent of the selling price. The loss from price fixing exceeds the gain, because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices. Because the loss from price fixing

¹⁴ 18 U.S.C. § 3571(d) states:

If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

¹⁵ See U.S.S.G. § 2R1.1(b)(2).

exceeds the gain, subsection (d)(l) provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under Section 8C2.4(a)(3). The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the Court to determine the actual gain or loss.¹⁶

Using the 20 percent proxy, the USSG method of calculating a fine is fairly simple. In a number of cases before the 2004 amendments to the Sherman Act, however, the calculation resulted in a USSG fine range that as a whole exceeded the Sherman Act maximum.¹⁷ When a USSG fine range exceeds the Sherman Act statutory maximum, the Antitrust Division must turn to the alternative statutory sentencing mechanism, the “twice-the-gain or twice-the-loss” provision, and calculate a maximum that justifies the fine amount in the plea agreement. The “twice-the-gain or twice-the-loss” provision requires calculating a different measure of volume of commerce than the one used to calculate the USSG fine range. Under Section 3571(d), the volume of commerce equals the total volume affected by the conspiracy, not the volume attributable solely to the defendant.¹⁸ The gain to defendants or loss to consumers is, in theory, calculated from the latter number, then doubled. In practice, for a corporate defendant the Antitrust Division offers little more than a stipulation, which the Probation Office adopts, that the volume of commerce totals “X” amount of dollars, together with a calculated assumption that consumers were harmed in an amount of at least 5 percent of that commerce. For example, in the graphite electrodes case, the Antitrust Division wrote in its sentencing memorandum supporting SGL Carbon AG’s \$135 million fine:

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The parties have not calculated the amount of the overcharge to the customers. However, the total volume of affected commerce for the charged conspiracy period from all conspirators is close to \$1.7 billion. Even a nominal overcharge to customers of as little as 5% would, when doubled, provide for a maximum fine under the alternative sentencing provision of approaching \$170 million.¹⁹

Courts typically accept the plea agreements. For practical purposes, their hands are tied, constrained by the reality of “C” pleas that can be nullified if the judge disagrees with the agreed-upon fine and the daunting task of delving into the volume of commerce numbers offered by the Antitrust Division. In some instances, agreed-upon fines are so steep that sending the parties home to renegotiate a fine within the USSG range could bankrupt a company. Indeed, more than once during the 1990s, courts accepted pleas below USSG ranges after finding that a defendant did not have the “ability to pay” anything higher. Moreover, requiring the Antitrust Division to do more than assume a percentage rate of harm and double it under Section 3571(d) would involve significant government resources and time and might not be possible.

Joel Klein, the former Assistant Attorney General, acknowledged during a Senate hearing in 1998 that calculating a fine under the alternative statutory mechanism of Section 3571(d) might be too burdensome to be practical.²⁰ Arguing for an increase in the statutory maximum, Klein stat-

¹⁶ U.S.S.G. § 2R1.1, comment (n.3).

¹⁷ Some of the calculated ranges, if calculated today, would exceed the recently enacted higher maximums.

¹⁸ See 18 U.S.C. § 3571(d).

¹⁹ United States v. SGL Carbon, Crim. No. 99-244, Government’s Sentencing Memorandum (E.D. Pa. filed June 11, 1999).

²⁰ See *Hearings Before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Business Rights and Competition Concerning Antitrust Division Oversight*, reprinted at 1998 WL 8994049 (Feb. 26, 1998) (Testimony of Joel Klein, Assistant U.S. Attorney General), available at <http://www.usdoj.gov/atr/public/testimony/1581.htm>.

ed that, in an increasing number of cases involving high volumes of commerce, the USSG mechanism intended to deter the conduct was “thwarted” by the then-\$10 million cap:

In such cases [involving high volume commerce], the only alternative . . . is for the offending corporation to be sentenced under the “twice-the-gain or twice-the-loss” alternative sentencing provision. . . . Unfortunately, proving actual gain to the conspirators or loss to the victims from an antitrust offense is extremely difficult. On six occasions, we have had to settle for the \$10 million statutory maximum when the Sentencing Commission rationale may have justified a greater fine.²¹

To determine an actual “twice-the-gain or twice-the-loss” would require an analysis of copious amounts of data that the Antitrust Division routinely avoids collecting from defendants, the engagement of economists to separate the effects of market events from the effects of the illegal conduct, and a battle with defendants’ own expert economists who might see the analysis differently. By its terms, the alternative statutory mechanism may not be used if its application would unduly prolong or complicate the sentencing process.²²

Still, in at least one case a judge refused to accept an agreed-upon fine that fell far below the low end of the USSG range but above the then-\$10 million statutory maximum. That case arose out of the Antitrust Division’s investigation into graphite electrodes. Showa Denko Carbon Inc., one of the lead co-conspirators, agreed to plead guilty and pay a \$29 million fine. The court rejected this “C” plea agreement, finding that the agreed-upon USSG Section 5K1 downward departure for cooperation was too generous. The parties renegotiated the agreement to include a fine range of \$29 million to \$32.5 million and sought sentencing again. Assistant Attorney General Joel Klein participated in the sentencing colloquy to emphasize the importance of the plea agreement process to the Antitrust Division:

International cartel cases are probably as important as anything we do in the Antitrust Division and as complex. They are important because these are cases in which U.S. companies and U.S. consumers are being significantly harmed by international agreements and conspiracies involving compan[ies] that often more than not . . . don’t inhabit in the United States. . . The problem we face in these cases, your Honor, is that ninety percent of the putative defendants are not accessible to jurisdiction in the United States and so, we have to play a very different enforcement game. . . [I]f the defendant doesn’t have a certain level of confidence in the United States’ ability to actually secure the fine proposed, we’re afraid, your Honor, that they will not come forward and cooperate and subject themselves to jurisdiction in the United States. I think we have had, probably, nine to ten cases right now of significant fines, C-type fines in international cases and those fines were accepted by the court.²³

The court accepted the revised plea agreement and imposed a \$32.5 million fine on Showa Denko.²⁴

The Showa Denko experience is not the norm. Most judges employ a bare-bones colloquy confirming the maximum statutory sentence and do not require prosecutors to offer a factual basis for the volume of commerce or agreed-upon fine, beyond a detailed description of the defendant’s cooperation that warrants a downward departure from the USSG range.

²¹ *Id.*

²² 18 U.S.C. § 3571(d).

²³ *United States v. Showa Denko Carbon Inc.*, Crim. No. 98-CR-85-1, Transcript of Arraignment and Sentencing Hearing 74–75 (E.D. Pa. Sept. 8, 1998).

²⁴ *Id.* at 86.

The same can be said for individual pleas. Commentary to the USSG explains that “[t]he Commission believes that the most effective method to deter individuals from committing this crime is through the imposition of shorter sentences coupled with large fines.”²⁵ As a policy matter and to deter illegal conduct, the Antitrust Division excludes the most culpable executives from corporate plea agreements, leaving them vulnerable to prosecution.²⁶ Typically, these executives negotiate pleas of their own. Under the USSG, individuals face a fine in the amount of 1–5 percent of the affected volume of commerce. Also, as a policy matter, and absent extraordinary circumstances, the Antitrust Division requires individuals to agree to serve jail time.²⁷ Circumstances justifying a rare no-jail deal include, for example, unique cooperation potential from a non-U.S. citizen who otherwise refuses to travel to the United States and, therefore, remains beyond the reach of the Antitrust Division.

The USSG sets six to twelve months as a base incarceration range.²⁸ Jail time is increased by various factors, such as playing a leadership role in the offense, using a special skill, abusing a position of trust, or engaging in bid rigging. The volume of commerce attributable to the individual’s employer is factored in to determine a final offense level.

Why Not Try the Case?

A variety of circumstances and factors provide corporations with incentives to plead guilty rather than try a criminal antitrust case before a jury. Attorney’s fees can soar into the millions. Quite often, the Antitrust Division has a cooperating witness in the form of an amnesty candidate who provides damaging testimony and documents. The investigation frequently unearths explicit, detailed documentation of price fixing, often penned in an executive’s own hand. Protracted litigation disrupts business operations, inflicting significant hard and soft costs. Plaintiffs no longer wait for the resolution of the criminal investigations to file their treble damages complaints. Companies now often litigate and/or settle civil treble damages claims before a grand jury acts.

Moreover, the Antitrust Division offers explicit incentives for defendants to plead guilty.²⁹ Ironically, the few who have risked it all for a jury verdict have received comparatively moderate sentences, specifically because no one knows how to establish an appropriate fine under Section 3571(d).

For instance, while not involving corporate defendants, the *Lysine* case demonstrates how some of this sentencing calculus has worked at trial. In 1998, Archer Daniels Midland (ADM) executives Mick Andreas and Terry Wilson rolled the dice with a jury and were found guilty. They faced potential sentences of the then-statutory maximum three years in jail and fines of \$350,000, unless the government could establish “twice-the-gain or twice-the-loss.” The Antitrust Division recom-

²⁵ USSG § 2R1.1, comment. (n.7).

²⁶ See, e.g., U.S. Dep’t of Justice Press Release, Former Bayer AG Executive Agrees to Plead Guilty to International Rubber Chemicals Price Fixing Conspiracy (Nov. 23, 2004), available at http://www.usdoj.gov/atr/public/press_releases/2004/206481.htm.

²⁷ See generally Makan Delrahim, Deputy Assistant Att’y Gen., Antitrust Div., The Basics of a Successful Anti-Cartel Enforcement Program (Apr. 20, 2004), available at <http://www.usdoj.gov/atr/public/speeches/203626.htm>; see also Scott D. Hammond, Dir. of Criminal Enforcement, Antitrust Div., A Summary Overview of the Antitrust Division’s Criminal Enforcement Program (Jan. 23, 2003), available at http://www.usdoj.gov/atr/public/speeches/200686.htm#N_1_.

²⁸ U.S.S.G. § 2R1.1.

²⁹ For instance, it may agree to forgo prosecution of price fixing of other products or ancillary charges, such as obstruction of justice and fraud, to cover most or all executives under the agreement, and to assist implicated non-U.S. citizens in retaining their rights to travel freely to and from the United States.

mended a sentence of \$25 million for Andreas, and an unspecified fine over \$350,000 for the less-culpable Wilson. The trial judge initially rebuffed Andreas's challenge to the applicability of Section 3571(d), noting that the provision "is a procedural catch-all intended to increase fines where the current form of the relevant statute provides inadequate punitive fines compared to the magnitude of the crime."³⁰

The Antitrust Division offered an expert who calculated "twice-the-loss" to consumers by showing the price of lysine was higher than it would have been "but for" the conspiracy. After Andreas sought and failed to obtain discovery from foreign lysine producers to rebut the government's expert opinion, the court granted his renewed motion to prevent the application of Section 3571(d). Andreas was ultimately fined the statutory maximum \$350,000.

In the corporate setting, in 2000, Mitsubishi put the government to its burden of proof on charges of aiding and abetting the graphite electrode producers' price-fixing conspiracy, and was convicted. It faced a huge fine in an investigation that already had resulted in one of the Antitrust Division's record-breaking fines (\$110 million plea from UCAR International) and a \$135 million plea from SGL Carbon AG. (Although higher than UCAR's fine, the plea was no longer a record breaker at the time it was entered.) After conviction, Mitsubishi and the Antitrust Division negotiated and jointly recommended the court enter a fine of \$134 million. The court sentenced Mitsubishi accordingly.³¹

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So What's All the Fuss?

In many federal cases, courts find and apply facts that increase a defendant's sentence up to the applicable statutory maximum set by Congress.³² Post-*Blakely* and its progeny, to insure maximum sentences prosecutors must allege such facts in their indictments and plea agreements and must be prepared to prove them beyond a reasonable doubt to guarantee the possibility of enhanced sentences. The problem is not limited to cases that go to trial. For example, the *Blakely* case involved a "B" plea and a judge who believed the crime warranted more punishment than the agreed-upon jail sentence. Until *Booker/Fanfan*, courts had the obligation to apply sentencing factors to increase a sentence within a USSG range and, in rare cases, depart upward from that range to the statutory maximum. *Booker/Fanfan* nullify that obligation. Prosecutors now must consider in the first instance whether to allege sufficient facts and put on sufficient evidence to support the upward enhancements and departures to guarantee these factors are considered during sentencing.

With the new \$100 million corporate statutory maximum and \$1 million-10 years individual statutory maximum, in most criminal matters the Antitrust Division has greater leverage to negotiate fines more commensurate with the economic scope of the crime. Still, because they are based on the volume of commerce affected, fines sought by the Antitrust Division, especially in the context of hard-core, global cartel investigations, may exceed the Sherman Act statutory

³⁰ See *United States v. Andreas*, No. 96-CR-762, slip op. at 5 (N.D. Ill. Feb. 19, 1999).

³¹ See U.S. Dep't of Justice Press Release, *Mitsubishi Corporation Fined \$134 Million for Its Role in International Price-Fixing Cartel*, available at http://www.usdoj.gov/atr/public/press_releases/2001/8186.htm.

³² However, according to the U.S. Sentencing Commission, in testimony about *Blakely* before the U.S. Senate Judiciary Committee, "a majority of the cases sentenced under the federal guidelines do not receive sentencing enhancements that could potentially implicate *Blakely*." See *Blakely v. Washington and the Future of the Federal Sentencing Guidelines*, Senate Comm. on the Judiciary, 109th Cong. (July 13, 2004) (Joint Testimony of Commissioner John R. Steer and Judge William K. Sessions, III), available at http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=3665.

maximum. Before *Booker/Fanfan*, the sort of upward departure at issue in *Blakely* was unlikely because, in the complex but businesslike world of antitrust pleas, USSG calculations were rendered meaningless by agreed-upon fines. A deal was struck, and the Section 3571(d) alternative statutory maximum was sized to accommodate it. Defendants may be able to argue that *Booker/Fanfan* will burden prosecutors with pleading and proving the alternative statutory maximum beyond a reasonable doubt. This potential additional burden on prosecutors, however, may not be enough to encourage defendants to quit pleading and roll the dice.

Nothing about *Booker/Fanfan* alters the Antitrust Division's incentives to seek fines commensurate with the crime, as defined by the volume of commerce used to set the USSG fine. With the high stakes for corporate defendants, combined with the Division's commitment to prosecuting hard-core cartels, the Antitrust Division will continue to succeed in convincing companies to admit the types of facts that warrant large fines.

Nevertheless, the Antitrust Division's track record in providing "twice-the-loss" under Section 3571(d) may tempt some defendants to risk trial. The government may now be required to plead and prove beyond a reasonable doubt all of the sentencing factors, including "twice-the-gain or twice-the-loss," that it wants considered. Creating reasonable doubt regarding the econometrics and other damages calculations that prosecutors must rely on may prove easier for a defendant than challenging actual culpability. Defendants could try to take advantage of the prosecutors' burden. They may argue that it is now appropriate to offer defense evidence of lack of a conspiracy's effect on prices, a back-door means of arguing for acquittal. If the government's experts rely on evidence of defendants' conduct to establish an effect on prices for purposes of sentencing, judges must allow defendants to rebut that evidence.

The danger for defendants is that the government's expert could convince a jury that defendants' conduct caused a huge rate of loss to consumers. After all, the same economic experts retained by the government routinely perform these analyses in treble damages actions and help secure huge civil settlements. They can be very persuasive.

A Legislative Fix Could Cause Far More Change than *Blakely*

In Justice Breyer's opinion in *Booker/Fanfan*, the Court recommends the use of an advisory system under which judges utilize all of the facts that they believe to be relevant and reach a final sentence by using the actual USSG as a guide. The USSG would not be binding, but would help lower court judges reach consistent sentences for like behavior. The sentence would then be reviewable under a "reasonableness" standard instead of the current "de novo" standard. However, it is almost certain that this advisory system will be short lived.

In all likelihood, however, Congress will act quickly to preserve as much of the sentencing scheme intended by the USSG as possible. In fact, Justice Breyer invited Congress to act when he wrote: "The bill now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice."³³ The Department of Justice, through a statement of Assistant Attorney General Christopher A. Wray, communicated its intention to work on "this critical issue" with Congress.³⁴

³³ United States v. Booker, Nos. 04-104, 04-105, 2005 WL 50108 (U.S. Jan. 12, 2005).

³⁴ Christopher A. Wray, Assistant Att'y Gen., Crim. Div., Prepared Remarks in Response to *Booker/Fanfan*, (Jan. 12, 2005), available at <http://www.usdoj.gov/criminal/pressRelease/WraySentencingGuidelinesfinalformatted.pdf>.

The Final Analysis

The ultimate effect of *Booker/Fanfan* on antitrust sentencing will not be felt until Congress reacts with legislation. In the meantime, the Antitrust Division's dogged determination to detect and prosecute hard-core price fixing continues to drive its willingness to accept guilty pleas. The uncertain outcome of an attempt to establish "twice-the-gain or twice-the-loss" before a jury beyond a reasonable doubt will ensure the Antitrust Division continues to agree to fines that advance its policy but are palatable to, and payable by, defendants. The "C" pleas will continue to flow. Defendants that plead guilty do so to minimize the disruption of business operations, attorneys fees, and the size of civil settlements. It is a business decision, and business between the Antitrust Division and offenders likely will continue as usual, until Congress accepts the Court's invitation to rewrite the USSG. ●