

Nobody Looks Good In An Orange Jumpsuit: What You Should Know About Sentencing For Criminal Antitrust Violations

Over the past several years, we have grown accustomed to seeing the latest corporate executive convicted of malfeasance being led away by federal marshals to begin serving a prison sentence. While many of these corporate scandals have focused on accounting irregularities that resulted in

**GERALD G. SALTARELLI
STEVEN A. BLOCK**

grossly overstated profits, the Department of Justice's criminal enforcement of the antitrust laws is also in full swing. Recent Supreme

Court decisions related to the enforceability of the federal sentencing guidelines – coupled with the passage of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 – have raised questions regarding what penalties individuals and corporations convicted of, or pleading guilty to, antitrust violations may face.

Although no corporate counsel wishes to think he will ever need to be conversant in criminal sentencing laws, the government's aggressive prosecution of price fixing and bid rigging in a variety of industries, from asphalt to vitamins, has shown that corporate counsel must be aware of the potential consequences of a criminal antitrust investigation. Knowledge of the potential penalties will assist counsel by enabling them to stress to executives the importance of corporate antitrust compliance programs, as well as helping counsel make informed decisions regarding whether and when to participate in amnesty and leniency programs offered by the government.

Antitrust Criminal Penalty Enhancement and Reform Act of 2004

For many years, the potential criminal penalties individuals and corporations faced upon conviction of an antitrust violation were relatively light. Until last year, the maximum prison sentence for an individual convicted of violating the Sherman Act was three years, and the maximum fine was \$350,000. Corporations faced a maximum fine of

\$10 million. In response to the growing list of corporate scandals making headlines, Congress passed the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. The Act significantly increased penalties applicable to violations of the criminal antitrust laws. Individuals now face prison sentences of up to ten years, and fines of up to \$1 million per offense. Corporations face fines of up to \$100 million per offense. By any standard, these new sentencing maximums are stern enough to make employees and executives take notice – obviously the result, in part, that Congress intended.

The Federal Sentencing Guidelines

From 1987 until this year, federal judges were required to impose sentences pursuant to the United States Sentencing Guidelines. The Guidelines – drafted by the United States Sentencing Commission, a part of the judicial branch – established mandatory fine and prison ranges within the minimum and maximum penalties provided for by statute. The Guidelines established certain factors that judges were required to take into account for purposes of determining where a defendant would be sentenced within the sentencing range. For example, for antitrust offenses, judges were required to take into account, among other factors, to what extent the defendant's conduct had impacted interstate commerce, the defendant's role in the crime, whether the defendant had cooperated with antitrust investigators, and whether the defendant had accepted responsibility. Under the Guidelines, each of these factors would either add or subtract points from a base offense level. The sentencing judge was then required to sentence the offender to the term of imprisonment and fine that corresponded to the number of points ultimately deemed applicable.

The Guidelines were designed to bring consistency and certainty to sentencing across the federal judicial system. While often criticized because they took away the discretion of judges to apply their experience and knowledge to

determine appropriate sentences, the Guidelines did achieve their intended. Earlier this year, however, this system came crashing down in dramatic fashion as a result of two landmark Supreme Court decisions.

Supreme Court Strikes Down Federal Sentencing Guidelines

In *Blakely v. Washington*, the Supreme Court was faced with a state sentencing statute similar to the federal Sentencing Guidelines. In *Blakely*, the defendant pleaded guilty to a class B felony. Under the state sentencing guidelines, based on the facts contained in *Blakely*'s guilty plea, *Blakely* could be sentenced to a maximum of 53 months in prison. However, the state guidelines allowed the judge to enhance the sentence if he found that certain aggravating factors were present. The sentencing judge found that the defendant had acted with "deliberate cruelty," and therefore sentenced *Blakely* to 90 months. In June 2004, the Supreme Court held that the state's sentencing scheme was unconstitutional because any factor used to enhance a sentence beyond the statutory maximum had to be reflected in the jury verdict or admitted by the defendant as part of a plea.

The Court's decision in *Blakely* obviously raised questions regarding the constitutionality of the federal Sentencing Guidelines. After a short but intense period of uncertainty and confusion among criminal defendants, attorneys, and federal judges, the Supreme Court struck down the Sentencing Guidelines. In *United States v. Booker*, the Court held that the mandatory Guidelines violated the Sixth Amendment right to jury trial. The Court also held, however, that the Guidelines were still to be used in an advisory capacity and considered by federal judges, but sentencing pursuant to the Guidelines would no longer be mandatory.

Antitrust Sentencing Post-Booker

The application of the new enhanced antitrust sentencing laws in the post-*Booker* world is sure to create uncertainty in sentencing for antitrust offenses. However, corporate counsel can count on several things with a fair amount of certainty. First, sentences for both individual and corporate antitrust offenders are likely to be higher than they have been in the past. Though antitrust crimes do not have minimum penalties, the 2004 antitrust sentencing enhancements that substantially raised the maxi-

mum penalties give the government the ability to seek more severe penalties than were available in the past. In a recent public speech, a senior government antitrust official expressed approval of the increased sentences as a means to "ensure that antitrust fines better reflect the massive volumes of commerce and concomitant harm caused of today's international cartels." It appears likely, therefore, that the government plans to make use of the new increased sentences available.

In addition, counsel can be reasonably certain that although *Booker* now puts a greater burden on the government when it seeks higher sentences and fines, the incentives for individual and corporate defendants to cooperate remain high. *Booker* still requires courts to consider the Sentencing Guidelines when imposing sentence. Anything individuals or corporations can do to lower the points assessed under the Guidelines must be considered and weighed against the likelihood of an eventual acquittal if the decision is made to proceed to trial. The Sentencing Guidelines applicable to antitrust offenses specifically give corporations credit for pleading early, thereby aiding the government's broader investigation of the alleged conspiracy. Even though the Guidelines are no longer mandatory, corporations still face an important decision regarding whether or not to plead guilty to antitrust offenses. If anything can be learned, therefore, in this period of sentencing uncertainty is the importance of being proactive when it comes to criminal antitrust investigations. At the first hint of trouble, it is essential that corporate counsel – with the assistance of experienced antitrust counsel – undertake an internal investigation and develop a game plan that takes into account the potential severe criminal penalties corporations now face. Time is of the essence regardless of whether the ultimate decision is to plead in exchange for leniency or to fight the charges through trial.

Gerald G. Saltarelli is a partner and Steven A. Block is an associate with Butler Rubin Saltarelli & Boyd LLP, a Chicago litigation boutique. They specialize in complex commercial litigation, including competition law counseling and disputes. The views expressed are personal to the authors.



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