

Antitrust Sentencing Post-*Booker*: What We Know So Far

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In a series of sentencing decisions—beginning with *Apprendi v. New Jersey*¹ and *Blakely v. Washington*,² and culminating in *United States v. Booker*³—the U.S. Supreme Court prescribed fundamental changes to the legal framework governing sentencing decisions. Although the significance of these decisions is undeniable, what has been less clear is the extent to which the new approach mandated by the Court would effect the length or type of sentences imposed on antitrust defendants. Now that more than a year has passed since *Booker*, and we have the benefit of some sentencing data from the United States Sentencing Commission, this is an appropriate time to assess what we know so far regarding *Booker*'s impact on antitrust sentencing and offer a few thoughts on where we might be headed.

How We Got Here

In *Apprendi* and *Blakely*, the Supreme Court undertook an aggressive defense of the Sixth Amendment right to trial by jury, declaring invalid state sentencing provisions that impinged on that right by vesting judges with the authority to make factual determinations that increased a defendant's sentencing exposure beyond the statutory maximum.⁴ The decisions left many wondering whether the federal Sentencing Guidelines⁵ might be the next victim of the Court's Sixth Amendment jurisprudence. In January 2005, the Court gave its answer. In *Booker* and a consolidated case, *United States v. Fanfan*,⁶ it declared that the federal system of mandatory Guidelines violated a defendant's right to trial by jury.⁷ The Court did not reject the Guidelines outright but, in a separate majority opinion on the question of remedy, it excised the statutory provision that rendered the Guidelines binding on sentencing judges.⁸ Explaining the effect of that change, the Court stated: "So modified, the Federal Sentencing Act . . . makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp. 2004)."⁹ The *Booker* Court held that sentences imposed under this new regime would be subject to appellate review under a standard of "unreasonableness."¹⁰

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¹ 530 U.S. 466 (2000).

² 542 U.S. 296 (2004).

³ 543 U.S. 220 (2005).

⁴ *Apprendi*, 530 U.S. at 490, 491–97; *Blakely*, 542 U.S. at 303–06.

⁵ The *U.S. Sentencing Guidelines Manual* is available at the U.S. Sentencing Commission's Web site, <http://www.ussc.gov/guidelines.htm>. See also Federal Sentencing Act, 18 U.S.C. § 3551 et seq., 28 U.S.C. § 991 et seq.

⁶ Docket No. 04-105.

⁷ *Booker*, 543 U.S. at 244.

⁸ *Id.* at 259.

⁹ *Id.* at 245–46 (citation omitted).

¹⁰ *Id.* at 261.

The Potential Implications for Antitrust Defendants

By directing the sentencing court to take into account the full list of factors set out in 18 U.S.C. § 3553, the *Booker* decision significantly broadened the range of considerations in a sentencing decision. In particular, Section 3553(a) directs that the sentencing court look beyond the offense itself and consider “the history and characteristics of the defendant.”¹¹ In this respect, *Booker* might seem to provide antitrust defendants with an important opportunity. Almost all antitrust defendants are first offenders and most are able to present the sentencing court with an impressive list of accomplishments, community activities, and attestations to their good character and strong family ties. Many of these defendants will suffer public humiliation and loss of their careers as a result of conviction. With these considerations in mind, one could argue that a sentence within the Guidelines range is unjustly harsh.¹²

Predictably, judges and prosecutors continue to take their cues from a system of sentencing rules that has shaped sentencing decisions for the last two decades.

However, antitrust defendants would be well advised to consider some countervailing factors. First, in an effort to give effect to Congress’s desire to avoid excessive sentencing disparities, the *Booker* Court indicated that the Guidelines, although no longer mandatory, should be taken into account in sentencing.¹³ Picking up on that point, the Antitrust Division of the Department of Justice quickly signaled that it would press for sentences within the range contemplated by the Guidelines:

Post-*Booker*, much of our practice will remain the same. Our prosecutors will continue to seek Guideline sentences because they have promoted consistence, fairness, and transparency in sentencing. Thus, we will continue to oppose Guidelines adjustments and departures not supported by the facts or law, and we will appeal sentences that are below the Guidelines range and fail to reflect the purposes of sentencing.

Just as the Guidelines promoted consistency in the almost two decades of Guidelines experience pre-*Booker*, they can continue to do so in the post-*Booker* world. . . .¹⁴

The courts for the most part have agreed with this approach,¹⁵ and predictably, judges and prosecutors continue to take their cues from a system of sentencing rules that has shaped sentencing decisions for the last two decades.¹⁶

¹¹ 18 U.S.C. § 3553(a)(1).

¹² Under the antitrust guideline in effect prior to a November 1, 2005 amendment, a first offender convicted of an offense that affected \$20 million in commerce would, without further guideline adjustments, be subject to a sentence in the range of 18–24 months. U.S. SENTENCING GUIDELINES MANUAL § 2R.1.1 (2004).

¹³ *Booker*, 543 U.S. at 264.

¹⁴ Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, Antitrust Sentencing in the Post-*Booker* Era: Risks Remain High for Non-Cooperating Defendants 6 (Mar. 30, 2005), available at <http://www.usdoj.gov/atr/public/speeches/208354.htm>.

¹⁵ See generally *Written Statement of the United States Sentencing Commission Before the Antitrust Modernization Commission—Hearing on Consideration of Antitrust Criminal Remedies* 8 (Nov. 3, 2005) (“Case law also suggests that the Federal sentencing guidelines are to be afforded substantial weight in the sentencing process. The Sentencing Commission wholeheartedly agrees with this approach and believes that it is consistent with the remedial holding in *Booker*.”), available at http://www.amc.gov/commission_hearings/criminal_remedies.htm. See *infra* discussion of *United States v. Rattoballi*, No. 05-1562-cr, 2006 WL 1699460 (2d Cir. Jun. 21, 2006).

¹⁶ See Hon. James G. Carr, *Some Thoughts on Sentencing Post-Booker*, 17 FED. SENTENCING RPTR. 295, 295 (2005) (“Even those [district court judges] whose federal judicial experience predates the Guidelines have become accustomed . . . to the presence of the Guidelines and appear generally to accept the Guidelines’ role in their daily judicial lives.”).

Second, judges might justifiably fear that leniency in sentencing will prompt Congress to enact new laws largely divesting the courts of the discretion granted under *Booker*.¹⁷ The *Booker* Court recognized the possibility of a legislative response,¹⁸ and there were immediate calls for a legislative “fix” for the Court’s decision.¹⁹ In March 2006, the Chairman of the House Committee on the Judiciary lamented that the data on post-*Booker* sentencing “shows that unrestrained judicial discretion has undermined the very purposes of the Sentencing Reform Act,” and declared that “the Judiciary Committee intends to pursue legislative solutions to restore America’s confidence in a fair and equal federal criminal justice system.”²⁰ Widespread leniency, or even a handful of decisions seen to be soft on defendants, could jump-start these legislative efforts.

Finally, in the area of white collar crime, courts might be sensitive to the charge that leniency in sentencing gives effect to hidden biases and runs counter to the historical trend toward bringing white collar sentences in line with those imposed on other defendants. In the past, white collar defendants generally received more lenient sentences than those imposed on other defendants.²¹ The perceived unfairness of that disparity led to tougher sentences for white collar offenders, including antitrust defendants. Over the last decade, prison terms in antitrust cases have increased,²² and with the enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA), Congress increased the maximum Sherman Act jail term to ten years.²³

Booker’s First Year—The Sentencing Commission Data

In order to assess *Booker*’s impact, the Sentencing Commission collected sentencing data and, after issuing a number of periodic reports, in March 2006 released its *Final Report on the Impact of United States v. Booker on Federal Sentencing*.²⁴ The Final Report summarizes and analyzes data from 67,564 cases during the one-year period following the *Booker* decision and concludes

¹⁷ Alan Ellis, *Representing White Collar Clients in a Post-Booker World*, CHAMPION, Sept./Oct. 2005, at 12, 13, available at <http://www.nacdl.org/public.nsf/freeform/championmag?OpenDocument> (noting that some judges have urged their colleagues to adopt a Guidelines-focused approach “to demonstrate their adherence to the guideline process . . . in an effort to persuade Congress not to tinker with law as it exists post-*Booker*.”).

¹⁸ 543 U.S. at 265 (“Ours, of course, is not the last word: The ball now lies in Congress’ court.”).

¹⁹ Douglas A. Berman, *Assessing Federal Sentencing After Booker*, 17 FED. SENTENCING RPTR. 291, 292–93 (2005) (discussing legislative proposal and call by Attorney General Gonzalez to restrict judicial discretion afforded by *Booker*).

²⁰ Press Release, Congressman F. James Sensenbrenner, Jr., Sensenbrenner Expresses Concern Over Federal Sentencing Practices Detailed in New Report (Mar. 14, 2006), available at <http://judiciary.house.gov/PressRoom.aspx>.

²¹ See generally Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After Booker*, 47 WM. & MARY L. REV. 721, 723 (2005) (“Traditionally, penalties for white-collar crimes such as fraud, embezzlement, and insider trading were significantly lower than penalties for violent, drug, or even physical property crimes. White-collar offenders were much more likely to receive probation than thieves who stole equivalent amounts, and when white-collar offenders did go to prison their sentences were substantially shorter.”).

²² See Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *An Update of the Antitrust Division’s Criminal Enforcement Program 2* (Nov. 16, 2005), available at <http://www.usdoj.gov/atr/public/speeches/213247.pdf> (“The trend toward more frequently imposed and longer average prison terms for antitrust offenders has resulted in an average jail sentence over the past three years of approximately 19 months—more than two times the average jail sentence in the 1990’s.”).

²³ Pub. L. No. 108-237 (2004), codified at 15 U.S.C. § 1. In response to the ACPERA, the Sentencing Commission increased the base offense level for antitrust offenses to level 12 and modified the adjustments to the base offense level for the volume of commerce affected. U.S. SENTENCING GUIDELINES MANUAL § 2R.1.1.

²⁴ U.S. SENTENCING COMMISSION, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (2006) (FINAL REPORT). The periodic post-*Booker* sentencing updates and the *Final Report* are available at <http://www.ussc.gov/bf.htm>.

that, thus far, *Booker*'s impact on sentencing overall has not been dramatic. Rather, "[t]he majority of federal cases continue to be sentenced in conformance with the sentencing guidelines."²⁵ Similarly, the severity of the sentences imposed did not change substantially.²⁶ This held true for first offenders: the proportion of those receiving prison sentences, and the average length of the sentences imposed, remained essentially constant.²⁷ Changes noted in the *Final Report* included a slight increase (to 23.7 percent) in the rate of government-sponsored below-range sentences. Substantial assistance cases accounted for 14.4 percent of these cases.²⁸

Only a small number of antitrust cases were included in the *Final Report*: a table of sentences imposed on first offenders contains data for 14 post-*Booker* antitrust sentences.²⁹ Thus, although the *Final Report* cannot provide definitive conclusions about changes in antitrust sentencing since *Booker*, it does provide useful information about these post-*Booker* sentences.

The *Final Report*'s data on sentences for first offenders indicate that the sentences imposed on antitrust offenders deviated from the Guidelines much more frequently than those imposed on other first offenders. The percentage of antitrust first offenders sentenced within the Guidelines range was 14.3 percent (2 of 14), as compared to 60.1 percent of all first offenders. The *Final Report* did not attribute this low percentage of Guideline antitrust sentences to the *Booker* decision. Rather, almost all (11) of the 12 sentences below the Guidelines range were government-sponsored.³⁰ For the antitrust first offenders, the government sponsored a downward departure in 78.6 percent of the cases, a much higher rate than the percentage of government-sponsored downward departures for all first offenders (23.6 percent).³¹ Of the 11 government-sponsored downward departures for the antitrust first offenders, 10 were substantial assistance cases.³² In these 10 substantial assistance cases, the median sentence imposed was 5 months.³³

Has the government always been so generous with substantial assistance departures in antitrust cases or is this a new, possibly *Booker*-related, phenomenon? The Sentencing Commission's data from 2001, 2002, and 2003 indicate that substantial assistance departures in antitrust cases, though common, were not as frequent during those years: 42.1 percent of all antitrust cases

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²⁵ *Id.* at vi. See also Interview of Hon. Ricardo H. Hinojosa (S.D. Tex. and Chair, U.S. Sentencing Comm'n), *Sentencing Commission Feels the Effect of Booker and Blakely*, 37 THIRD BRANCH, Issue 12 at 3 (2005), available at <http://www.uscourts.gov/ttb/dec05ttb/interview/index.html> ("The sentencing trends for the post-*Booker* data have remained relatively stable.").

²⁶ FINAL REPORT, *supra* note 24, at vi.

²⁷ *Id.* at x.

²⁸ *Id.* at vi.

²⁹ *Id.* App. E at E-18. Given that it is rare to see repeat offenders in this area, it seems unlikely there were a large number of additional antitrust sentences during the time period covered by the *Final Report*. The *Final Report*'s listing of the number of times each guideline was applied indicates that Guideline 2R1.1 ("Bid-Rigging, Price-Fixing and Market-Allocation Agreements Among Competitors") was applied as the primary guideline in 18 cases. *Id.* App. D at D-7.

³⁰ The *Final Report* defines a "Government Sponsored" sentence below the Range as one involving a departure under 5K1.1 (Substantial Assistance), under 5K3.1 (Early Disposition Program), or other cases "indicating that the prosecution initiates, proposes, or stipulates to a sentence outside of the guideline range, either pursuant to a plea agreement or as part of a non-plea negotiation with the defendant." *Id.* at 62.

³¹ *Id.* App. E at E-18.

³² *Id.* App. D at D-22.

³³ *Id.*

in 2001; 56.3 percent in 2002; and 25 percent in 2003.³⁴ Thus, it may be that *Booker* is having some impact. The decision may be motivating prosecutors towards greater generosity in recognition of the risk that the court may depart from the Guidelines under the discretion granted by *Booker*.³⁵ More information is needed before any definitive conclusions can be reached.

The Second Circuit's Ruling in *United States v. Rattoballi*

In a recent antitrust sentencing decision, the Court of Appeals for the Second Circuit set forth its views regarding the parameters of the discretion afforded under *Booker*. In *United States v. Rattoballi*,³⁶ the defendant pled guilty to charges stemming from a bid-rigging scheme. District Judge Griesa concluded that the Guidelines called for a sentence in the range of 27 to 33 months' imprisonment.³⁷ Nevertheless, citing the defendant's decision to plead guilty, the actual and potential damage to defendant's business, and the defendant's lesser culpability as compared to another participant in the scheme, the court imposed a sentence of one year of home confinement and five years' probation.³⁸

In an opinion authored by Chief Judge Walker, the Second Circuit reversed the district court's departure from the Guideline sentence. According to the Second Circuit, the district court improperly relied on considerations that are common to all defendants: "Every convicted felon suffers the indignity and ill-repute associated with a criminal conviction."³⁹ Of particular concern for antitrust defendants, the Second Circuit commented that the original sentence "fails to take into account the [Sentencing] Commission's view `that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders.'"⁴⁰ According to the Court, "[a] non-Guidelines sentence that a district court imposes in reliance on factors incompatible with the Commission's policy statements may be deemed substantively unreasonable in the absence of persuasive explanation as to why the sentence actually comports with the § 3553(a) factors."⁴¹

The *Rattoballi* decision is clearly a set-back for an antitrust defendant hoping to persuade a sentencing court that *Booker* affords broad discretion to depart from the Guidelines and impose a non-custodial sentence. On the other hand, the impact of the decision is likely to be less acute where the defendant seeks only a reduced term of confinement, which would not run afoul of the

³⁴ U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS FOR 2001, 2002 AND 2003, Tables 27, 27A, available at <http://www.ussc.gov/annrpts.htm>. There may be a slight apples and oranges problem here in that these numbers refer to all antitrust offenders, not just first offenders.

³⁵ See Bibas, *supra* note 21, at 732 (footnote omitted):

Now, because prosecutors' threats of post-trial harshness are somewhat less credible, and there is more than one way around that fate, defendants may be more likely to roll the dice by risking trial. The cooperation rate will probably go down somewhat. The 6% trial rate will go up unless, as seems likely, prosecutors offer even more generous plea bargains to compensate, driving sentences down.

³⁶ No. 05-1562-cr, 2006 WL 1699460 (2d Cir. Jun. 21, 2006).

³⁷ *Id.* at *3.

³⁸ *Id.* at *3-4. The court also directed the defendant to pay \$155,000 in restitution. *Id.* at *4.

³⁹ *Id.* at *7.

⁴⁰ *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 2R.1.1, cmt. n.5).

⁴¹ *Id.* at *6. The Second Circuit also concluded the record did not support the district court's finding that defendant's business would be ruined if defendant were imprisoned, found that the court double-counted the credit given to defendant for his cooperation with the government, and rejected the suggestion that defendant's lesser culpability supported a non-custodial sentence, noting that the more culpable participant in the scheme received a 70-month prison sentence. *Id.* at *8.

Commission's statements regarding the need for imprisonment. Also, a defendant who can demonstrate significant cooperation with the government may have a basis for distinguishing the decision by pointing to the Second Circuit's finding that the defendant withheld information in an effort to minimize the kickback scheme.⁴²

Where Are We Headed?

Although it appears *Booker*'s impact on antitrust sentences in the aggregate has thus far been modest, it seems likely that the effects of the decision will be felt to a greater degree as judges become comfortable with their new-found discretion and talk of a Congressional response subsides. For antitrust defendants, *Booker* may provide some added leverage in plea negotiations and will continue to present opportunities to argue for sentences below the Guidelines range. Nevertheless, decisions like *Rattoballi* suggest that defendants convicted of antitrust violations will rarely succeed in opposing requests for custodial sentences, and there is little reason to believe that *Booker* will substantially impede the trend towards tougher sentences for antitrust offenders. Moreover, defendants who are subject to the enhanced penalties enacted pursuant to the ACPERA will face some increased risk if a judge is not bound by the Guidelines and the government argues for a sentence above the advisory Guidelines range. ●

⁴² *Id.*