

To Plead or Not to Plead?

Reviewing a Decade of Criminal Antitrust Trials

F. Joseph Warin, David P. Burns, and John W.F. Chesley

Over the last ten years, the success rate achieved by the U.S. Department of Justice (DOJ) in convicting criminal defendants at trial is staggeringly high—over 77 percent of those who elect to go to trial are found guilty.¹ In fraud trials, that number is even higher—nearly 80 percent. Given these odds, it is no wonder that most criminal defendants decide to cut their losses and plead guilty rather than to roll the dice and go to trial. And there can be no question that sentences imposed after trial are measurably higher than those imposed following a guilty plea in which a defendant, at a minimum, benefits from a sentencing reduction for acceptance of responsibility. So, with the deck stacked in favor of the government, and the consequences of losing so severe, why would any criminal defense lawyer counsel his client to challenge the government at trial?

The answer, of course, will depend on a number of factors, including the innocence of the client, the traditional analysis of the strength of the government's evidence, and the availability of viable defenses. But another important factor that must seriously be considered is the subject matter of the criminal charges. The antitrust arena is a notable exception to the government's dominance in criminal trials, with conviction rates in criminal antitrust trials consistently falling well short of overall success rates. Since 1996, not even half of all criminal antitrust defendants who have gone to trial have been convicted. Although the sample set from a statistical point of view is relatively small, the numbers over the years do provide an undeniable trend—despite dedicated and skillful prosecution by DOJ lawyers, defendants in criminal antitrust cases fare far better at trial than other criminal defendants.

In this article the authors address the disposition of criminal antitrust cases over the past decade and posit some potential reasons for the phenomenon of substantially lower antitrust trial conviction rates.

The Numbers

From Fiscal Year 1996 through Fiscal Year 2005, the DOJ prosecuted 367 persons and corporate entities for alleged violations of the Sherman Act.² The number of criminal antitrust cases filed by

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¹ All statistics discussed in this article come from one of two sources:

- (1) For Fiscal Years 1996 through 2003, the numbers have been compiled from the DOJ's Bureau of Justice Statistics' annual report, *Compendium on Federal Justice Statistics*, available at <http://www.ojp.usdoj.gov/bjs/pubalp2.htm>;
- (2) For Fiscal Years 2004 and 2005, the authors have compiled antitrust trial statistics directly from DOJ press releases, available at http://www.usdoj.gov/atr/public/press_releases/2006/index06.htm.

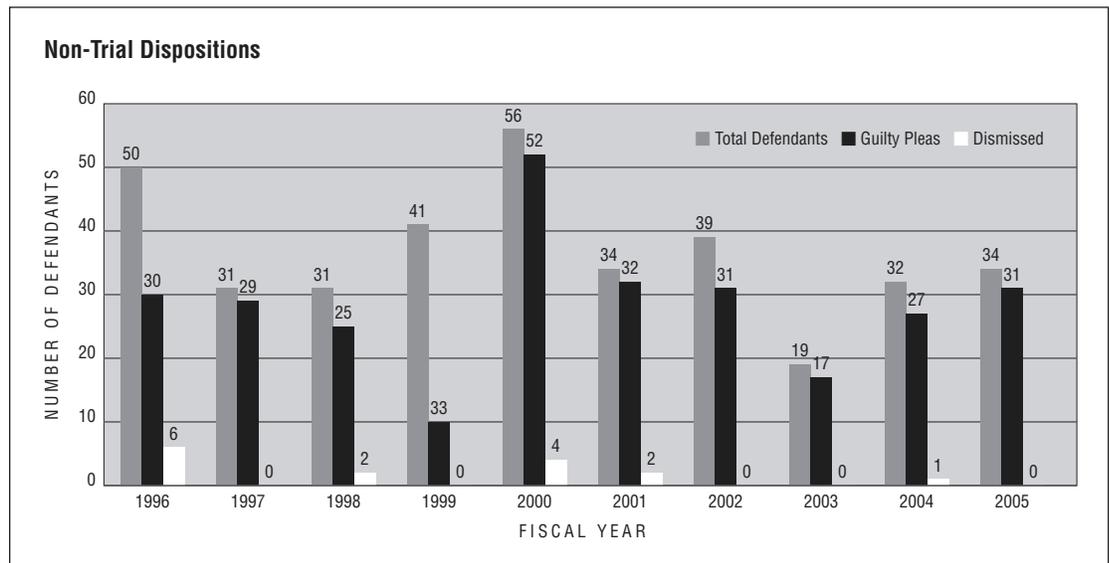
² Because the focus of this article is on the unique pitfalls inherent in putting together a successful criminal antitrust prosecution, the statistics discussed in this article reflect only those cases brought by the DOJ under the Sherman Act, 15 U.S.C. § 1 et seq. It should be noted, however, that the Antitrust Division has shown an increased willingness to bring Title 18 cases in recent years, especially when the criminal conduct subverts the Division's investigative process. See, e.g., Press Release, U.S. Dep't of Justice, Puerto Rico Attorney Charged with Obstruction of Justice (Jan. 11, 2006) (Statement of Scott D. Hammond, Deputy Ass't Att'y Gen.) ("This indictment underscores the commitment of the Antitrust Division to prosecute those who interfere with federal investigations."), available at http://www.usdoj.gov/atr/public/press_releases/2006/214082.htm; Press Release, U.S. Dep't of Justice, Former Chemical Company Sales Executive Charged with Filing False Tax Returns (Jun. 8, 2006), available at http://www.usdoj.gov/atr/public/press_releases/2006/216572.htm.

the DOJ remained relatively steady throughout the decade in review—notwithstanding outliers of 56 in 2000 and 19 in 2003—averaging nearly 37 per year.

Of the 367 defendants charged with antitrust offenses over the past ten years, the vast majority (307) pleaded guilty, 15 had their cases dismissed,³ and 45 took their cause all the way to the jury. Of the 45 brazen enough to roll the dice with 12 of their respective peers, 23 were “not convicted” of any of the charges for which they were on trial, for a modest conviction rate of just 49 percent.⁴

Notwithstanding the success of criminal antitrust defendants at trial, as a whole they are actually just as likely to plead guilty as their counterparts. Throughout the federal criminal justice system, 83 percent of criminal defendants plead guilty, including 87 percent of fraud defendants. Criminal antitrust defendants fall squarely within this range, pleading guilty at an 84 percent rate. Moreover, there appears to be a slight decline over this time period in the number of trials for defendants charged with antitrust offenses and a slight increase in the number of guilty pleas. So, in Fiscal Years 2003 through 2005, 88 percent of criminal antitrust defendants pleaded guilty, leading to only seven trials, involving nine defendants, of whom only four were convicted.⁵

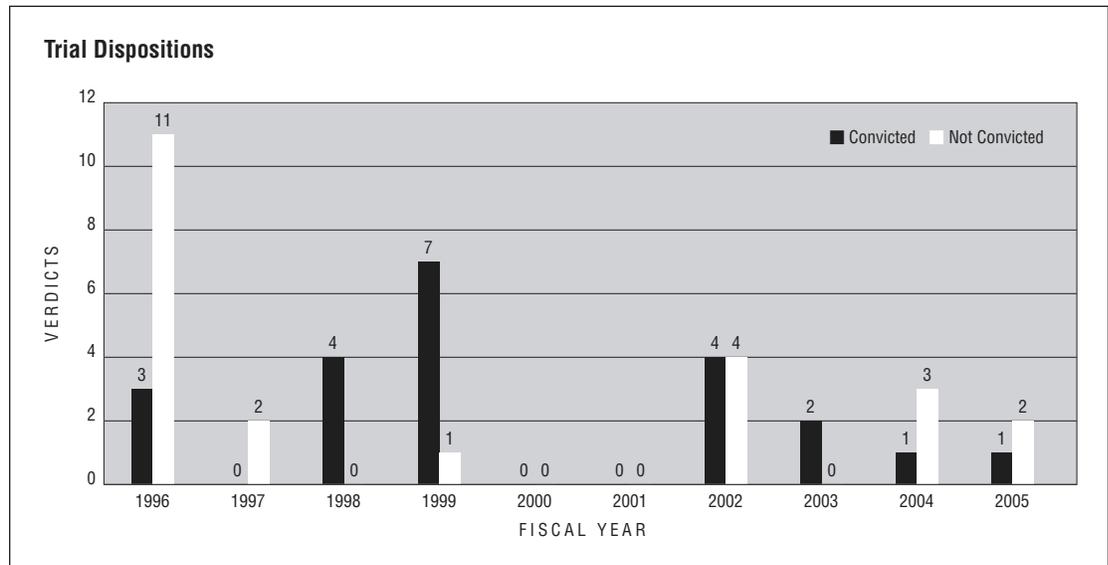
Of the 45 brazen enough to roll the dice with 12 of their respective peers, 23 were “not convicted” of any of the charges for which they were on trial, for a modest conviction rate of just 49 percent.



³ Anecdotally, it appears that in many instances the dismissal may have been part of an explicit or implicit quid pro quo for the guilty plea of another party. So, for example, in the 1996 Prairie Farms Dairy prosecution, the corporate defendant withdrew its not guilty plea and pleaded guilty to a superseding information eight days after the jury was empanelled to hear the case against it and three of its top executives. *United States v. Prairie Farms Dairy, Inc.*, Docket No. 1:95-cr-10034-JBM-1 (C.D. Ill. 1996). Coincident with the corporation’s guilty plea the indictment pending against the corporate officers was dismissed with prejudice on the government’s motion.

⁴ The *Compendium of Federal Justice Statistics*, *supra* note 1, includes mistrials in its “not convicted” compilation. There is no indication in the report as to how many of the 18 “non-convictions” included in the period covered by this report reflect acquittals and how many reflect mistrials. However, it is also important to note that “dismissals”—even those occurring after the commencement of trial—are not counted as trial losses in these statistics. For the sake of consistency, the authors have taken the same interpretative stance for Fiscal Years 2004 and 2005.

⁵ The authors acknowledge that the sample size is small and that statistical extrapolation must be examined carefully.



Potential Explanations

What the raw numbers do not explain, however, is why the government's conviction rate in antitrust trials has been lower in comparison to other criminal cases. Although each trial has unique facts and circumstances that determine the outcome, we believe that there are factors common to many antitrust trials that contribute to these results.

In Antitrust Cases, Companies Often Support Their Employees. Most companies under investigation in today's enforcement and regulatory environment are quick to throw their executives "under the bus" in order to show full cooperation with the government to avoid, or at least lessen, penalties. Indeed, many companies have "talk or walk" policies requiring employees to choose between cooperating with the government and losing their jobs.⁶ When an employee feels pressure from both the government and his employer, it can be difficult to weather the storm.

In antitrust cases, however, companies often support their executives because there is a unity of interest that flows from the future exposure for the company in follow-on civil litigation. Unlike other fraud cases, it is virtually inevitable that a company charged with a criminal antitrust offense will be sued for treble damages by private plaintiffs. This gives companies a substantial incentive to stand with their employees against the government in criminal antitrust prosecutions. As a result, rather than being abandoned by their employers and left to fend for themselves, many criminal antitrust defendants are given full access to company documents and resources that so many other individual criminal defendants lack. Moreover, most antitrust defendants' legal fees are advanced by their respective employers. Accordingly, the government is often confronted by a vigorous, well-financed defense, able to conduct an exhaustive investigation and engage in thorough trial preparation.

This is particularly true in cases in which the company and an employee are tried jointly. A good example of this type of united front at trial is a case brought in 2004 by the government against APAC-Missouri and its Vice President, Donald Mantle.⁷ In that case, the government alleged a

⁶ See, e.g., Charles Gasparino, *Merrill Fires Two Linked to Enron*, WALL ST. J., Sept. 19, 2002, at C1.

⁷ United States v. APAC-Missouri, Inc. and Donald Mantle, Docket Nos. 2:04-cr-04040-NKL-1; 2:04-cr-04040-NKL-2 (E.D. Mo.) (Judgments of Acquittal entered Nov. 1, 2004).

bid-rigging scheme in connection with a Missouri Department of Transportation contract. During the four-day trial held in the Western District of Missouri, APAC and its executive presented a united defense and the jury returned a not-guilty verdict as to both defendants within hours. Among other assertions, the defense argued that the defendants and the cooperating witnesses competed vigorously against each other and that the government singled out only one alleged instance of collusive bidding. Another recent example of a joint company/executive acquittal is the 2001 Martin News/Bennett Martin prosecution.⁸

Juries May View Antitrust Offenses as Less Contemptible than Other Crimes. Another reason for the lower conviction rate in antitrust trials may be that the general public, and by extension criminal juries, simply do not view antitrust offenses in the same way they view other crimes. While charges of “fraud,” “embezzlement,” “obstruction of justice,” and even “insider trading” conjure up images of greedy criminals or deviant wrongdoers, “bid rigging” and “price fixing” simply do not carry the same negative connotations. Indeed, it may be difficult for juries to conceptualize the harm caused by antitrust offenses or even to understand the schemes or their effects. In addition, for bid-rigging cases, defendants have a built-in natural defense that the company’s bid was constructed from its costs, profit applications, and corporate business goals, rather than collusive behavior with a competitor. Moreover, competitor contacts can often be explained by wholly legitimate activities, such as participation in industry trade associations or common interest legislation. In contrast, most defendants charged in fraud schemes struggle to avail themselves of a non-criminal explanation for their behavior.

Swindling a vulnerable retiree out of her savings in a “pump and dump” securities fraud scheme is something that everyone can understand and become enraged over. Securing a Department of Transportation contract because a competitor agreed to submit a higher, “complimentary” bid,⁹ may beg the question: What’s the harm and who cares? Notwithstanding the outreach efforts of the DOJ to publicize its criminal antitrust enforcement program, antitrust offenses have simply not yet become a part of the American vernacular. Most people have heard of Enron’s Kenneth Lay, WorldCom’s Bernard Ebbers, and even Tyco’s Dennis Kozlowski. But ask your average citizen to name someone convicted of an antitrust offense and chances are you won’t get a name.

Antitrust Defendants Are Often Sympathetic. While the motives of a criminal fraud defendant are often transparent, it is less clear that the motivation driving an antitrust defendant’s illicit behavior is directly linked to personal enrichment. Although antitrust offenders may derive some tangential personal benefits from their illicit conduct in the form of increased performance bonuses or simply the esteem in which they are held by their superiors, in many cases the anticompetitive behavior is primarily a function of a desire to obtain additional business for the company or to thwart the perceived damage from constant pressure to compete on price. And any gains for an individual are also gains for the company as a whole and for its shareholders. This type of benefit is more obscure than the direct and singular personal profit realized by someone engaged in insider trading, embezzlement, or other types of fraud.

Another reason for the lower conviction rate in antitrust trials may be that the general public, and by extension criminal juries, simply do not view antitrust offenses in the same way they view other crimes.

⁸ United States v. Martin News Agency, Inc. and Bennett Martin, Docket Nos. 3:00-cr-00400-1; 3:00-cr-00400-2 (N.D. Tex.) (Judgments of Acquittal entered Feb. 5, 2002).

⁹ See, e.g., APAC-Missouri, *supra* note 7, where the defendants demonstrated that the “complimentary” bidder would not even have submitted a bid had it not been for the alleged agreement with APAC-Missouri.

In addition, most antitrust defendants are well-educated and otherwise upstanding pillars of the community. So, their life history and actions are fundamentally inconsistent with a life of crime, at least as commonly perceived by the American public. At the extreme, some jurors may simply reason that it would not be just to send “this type of person” to prison.

These themes are particularly vivid when the government is using “outsider” cooperating witnesses against “home team” defendants. In one case, the government indicted a Kenosha, Wisconsin corporation and one of its senior executives in Boston, Massachusetts, charging them with an international price-fixing conspiracy reaching all the way to the Far East.¹⁰ The Massachusetts district court granted the defendants’ change of venue motion, transferring the case to Milwaukee. Accordingly, the government was forced to try the defendants in their “home” jurisdiction, where the corporation was a reputable company and substantial employer. The confluence of a prominent local corporation and foreign accuser provided fodder for a successful defense, which may ultimately have contributed to the acquittals.

The Government Often Relies on Witnesses Who Were Granted Amnesty. The DOJ’s antitrust Amnesty Program enables antitrust offenders to avoid prosecution altogether, as long as the offender is the “first in the door” to report the crime and otherwise meets the program’s requirements.¹¹ The Amnesty Program has been creative, innovative, and its recent refinements have tweaked it so that it is a powerful, effective law enforcement tool. That other countries have emulated the Amnesty Program stands as a compliment to the DOJ’s broad vision in combating illegal cartels.

However, despite the indisputably impressive results of this program, one side effect is that juries are often asked to convict an antitrust defendant based on the word of a principal co-conspirator who will receive no punishment for his or her own crimes. This arms defense counsel to argue that the jury’s sense of fair play and justice should be offended by the disparate treatment. It is not difficult to understand why juries simply do not like to rely on witnesses who have not had to accept responsibility for their own conduct and who have an obvious incentive to blame others in order to escape punishment.

Conclusion

Whatever the reasons, and despite the efforts of the talented and experienced lawyers in the DOJ, there can be no dispute that, over the years, a disproportionately low number of criminal antitrust defendants are convicted at trial as compared to defendants on trial for other criminal offenses. Antitrust defendants are just as likely to walk out the courtroom doors after a trial as they are to walk into a holding cell. Given the government’s recent stance of insisting on jail time even for those criminal antitrust defendants who plead guilty,¹² and the increased penalties under the revised U.S. Sentencing Guidelines,¹³ the best option for a criminal antitrust defendant might just be to go to trial. ●

¹⁰ United States v. Appleton Papers, Inc. and Jerry Wallace, Docket Nos. 2:96-cr-00083-JPS-1; 2:96-cr-00083-JPS-2 (E.D. Wis.) (Judgments of Acquittal entered Jan. 15, 1997).

¹¹ U.S. Dep’t of Justice Corporate Leniency Policy, available at <http://www.usdoj.gov/atr/public/guidelines/0091.htm>.

¹² “In FY2005, 18 individual defendants prosecuted by the Antitrust Division were sentenced to a total of 13,157 days in jail; the highest number of jail days in the Division’s history.” Scott D. Hammond, An Update of the Antitrust Division’s Criminal Enforcement Program, Remarks Before the ABA Section of Antitrust Law Fall Forum (Nov. 16, 2005), available at <http://www.usdoj.gov/atr/public/speeches/213247.htm>.

¹³ See U.S. SENTENCING GUIDELINES MANUAL § 2R1.1, Background Statement (“Under the [revised] guidelines, prison terms for [antitrust] offenders should be much more common, and usually somewhat longer, than typical under pre-guidelines practice.”).

Antitrust Sentencing Post-Booker: What We Know So Far

Jeffrey S. Jacobovitz and Brian J. Neff

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.

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 . . .

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

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.*

Book Review

The Many Lives of Thurman Arnold

Spencer Weber Waller

Thurman Arnold: A Biography

New York University Press • 2005

Reviewed by Wyatt Wells

No one since the Progressive Era influenced the enforcement of antitrust law more than Thurman Arnold. Although scholars have long recognized his importance, Spencer Weber Waller's volume is the first full-length biography of Arnold, and it represents a useful addition to our knowledge of the man and his time.

Arnold was the product of Laramie, Wyoming, where his father was a prominent lawyer. Although he spent most of his adult life elsewhere, Thurman Arnold always identified with Laramie and thought of himself as a Westerner. His education at Princeton and Harvard Law School, where he learned much but always felt like a country cousin, reinforced this feeling. Arnold's regional identification shaped his politics; in particular, he supported local business interests against what he saw as the centralizing tendencies of large companies operating from the East Coast or Midwest.

Arnold had a remarkably varied career. He practiced law briefly in Chicago, served in the Army in World War I, practiced law with his father in Laramie while serving in the state legislature and as mayor of Laramie, was dean of West Virginia's law school, taught law at Yale, led the Antitrust Division of the Justice Department, sat on the District of Columbia Court of Appeals, and founded a law firm that today ranks among Washington's largest and most prestigious.

Waller emphasizes three phases of Arnold's career that were undoubtedly the most important: Yale, the Antitrust Division, and his legal work after 1945. Waller's description of Arnold's work at Yale is perhaps the strongest part of the book. Arnold was a prominent legal realist, arguing that interpretations of the law reflected social conventions and economic interests rather than eternal legal truths. Such a view fit Arnold, a natural gadfly, well. But, as Waller points out, Arnold's non-conformity cut both ways. Although a perceptive observer of the law's inconsistencies, Arnold contended that these often served a purpose, allowing society to balancing conflicting interests and ideals. He recognized that rationalizing the law, as many legal realists advocated, could do more harm than good. The emperor might be naked, but it was not always best to say so.

During the 1930s, Arnold had many contacts among New Dealers, and in 1938 they secured his appointment as head of the Justice Department's Antitrust Division. It was an odd choice because Arnold had been a sharp critic of the antitrust laws, but in his new position he vastly expanded enforcement. He increased the Division's size and the number of cases it filed many times over, in particular targeting arrangements between companies that, he believed, restricted competition. This effort eventually bore fruit, securing court decisions that invalidated many common devices companies had used to regulate markets. For perhaps the first time, businesses had to pay careful, constant attention to antitrust regulation.

■
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For instance, Arnold launched a frontal attack on patent agreements, which often included provisions setting prices and limiting output, allowing them to function as de facto cartel accords. He not only asked courts to overturn such pacts as contrary to the antitrust laws but also lobbied Congress to rewrite the patent laws to require patent holders to license technology to all applicants. Congress ignored his plea, but the federal courts sharply restricted patent agreements, limiting them to the exchange of technology and licensing fees. This transformed industries like chemicals and electrical machinery, in which restrictive patent accords had regulated competition.

After a brief stint on the D.C. Court of Appeals, which he did not particularly enjoy, Arnold began a private practice with Abe Fortas and Paul Porter. The firm was very successful in attracting corporate clients, but its initial claim to fame was its willingness to defend those accused of “disloyalty” during the McCarthy era. The firm, and Arnold, undertook a tremendous number of these cases, often on a pro bono basis. Victory was the exception, but Arnold and his associates triumphed in a few key cases that limited the government’s authority to dismiss people without some sort of due process.

Arnold’s biographer, Waller, is a law professor, not a historian or economist, which is a mixed blessing. For instance, his discussion of Arnold’s legal scholarship is quite good, and alive to Arnold’s limitations as well as his strengths. At other points, however, Waller misses things that a professional historian probably would have noted or addressed. For instance, Arnold’s firm refused to defend admitted Communists during the McCarthy era, but it did represent Lillian Hellman, who had been a member of the Communist Party. No doubt Hellman lied to her lawyers about her Party membership as she did to everyone else, but the truth was well known. Waller misses this inconsistency.

In areas beyond his special knowledge, Waller too often accepts Arnold’s positions uncritically. This is particularly unfortunate in the case of business, about which Arnold knew less than he imagined. Like two generations of scholars, Waller accepts Arnold’s assertions, aired in 1942 after the Japanese had cut off the flow of natural rubber to the United States, that Standard Oil of New Jersey had suppressed the commercialization of synthetic rubber at the behest of I.G. Farben, the German chemical company. The evidence for this is very thin. The cost of producing synthetic rubber at this time was so high that, without government subsidies (which were not available before Pearl Harbor), it did not make economic sense. Arnold’s foray into the matter was either an exercise in demagoguery or a demonstration of ignorance.¹ Arnold was something of a loose cannon whose native intelligence covered a certain sloppiness. Waller correctly points this out in Arnold’s legal scholarship, but it pervaded his entire career.

Waller fails to mention Arnold’s interference with the War Production Board during the early years of World War II. The WPB hired many business executives, a practice that Arnold sought to prevent by leveling often flimsy charges against appointees—for instance, one worked for a company that had a German subsidiary or another led a firm that had licensed technology from Standard Oil. His actions drew an angry response from WPB chief Donald Nelson, a usually passive figure and, in the end, led to Arnold’s removal from the Antitrust Division.

Waller’s discussion of the end of Arnold’s career, when Arnold sometimes found himself on the conservative side of political issues, reflects a double standard. In the late 1960s, Arnold supported the Vietnam War and strongly opposed the tactics of civil disobedience used by some antiwar protestors. The author points out, correctly, that Arnold did not know much about foreign

¹ Waller does cite my own research on this matter in a footnote, but only to note that it casts Standard Oil in a somewhat better light.

policy—but the same could have been said about his comments on business earlier in his career. Waller also dismisses some acidic letters Arnold directed at the American Civil Liberties Union and Ralph Nader as “snide” (p. 194), a term not used to describe comparable broadsides against business in the 1930s and 1940.

Despite these reservations, Spencer Weber Waller has done a major service. Arnold is an important figure, and this biography is a valuable guide to his career. If it is sometimes too partial to its subject, that is an error common among biographies. Those interested in the evolution of antitrust law, legal thought, civil liberties, and the history of American liberalism will find this volume useful. ●

FTC Bureau of Consumer Protection Organization Chart and Photos

Editor's Note: *The growing importance of technology in day-to-day life presents consumers with ever-increasing challenges to their security and privacy.¹ As a result, our readers have expressed interest in seeing more articles and other information relating to consumer protection issues, including initiatives from the FTC Bureau of Consumer Protection. In this issue, The Antitrust Source, in conjunction with the Consumer Protection Committee² of the ABA Section of Antitrust Law, provide organization charts and selected photos for the leadership of the FTC Bureau of Consumer Protection, along with links to publicly available speeches and other resources, all found on the agency's Web site at www.ftc.gov.*

—MICHAEL BARNETT

Resources:

Speeches by the Director of the Bureau of Consumer Protection can be found at:

<http://www.ftc.gov/speeches/parnes.htm>

The Bureau of Consumer Protection is divided into divisions, each with its own areas of expertise:

- The Division of Advertising Practices: <http://www.ftc.gov/bcp/bcpap.htm>
- The Division of Consumer and Business Education: <http://www.ftc.gov/bcp/bcpocbe.htm>
- The Division of Enforcement: <http://www.ftc.gov/bcp/bcpenf.htm>
- The Division of Financial Practices: <http://www.ftc.gov/bcp/bcftp.htm>
- The Division of Marketing Practices: <http://www.ftc.gov/bcp/bcpmp.htm>
- The Division of Planning & Information: <http://www.ftc.gov/bcp/bcpp&i.htm>
- The Division of Privacy and Identity Protection: <http://www.ftc.gov/bcp/bcppip.htm>
- The International Division of Consumer Protection: <http://www.ftc.gov/bcp/bcpidcp.htm>

¹ <http://www.ftc.gov/speeches/parnes/060504ParnesComputersFreedomandPrivacy.pdf>.

² We particularly benefited from the assistance of Committee Chair John Villafranco and Committee Vice-Chair Lesley Fair.

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Paper Trail: Working Papers and Recent Scholarship

Editor's Note: In this installment, we offer comments on two recent discussion papers from the Antitrust Division: one on the single entity defense to claims under Section 1 of the Sherman Act; and the other on negotiating discounts off posted prices.

Send suggestions for papers to review to page@law.ufl.edu or jwoodbury@crai.com.

—WILLIAM H. PAGE AND JOHN R. WOODBURY

Recent Papers

Dean V. Williamson, Organization, Control and the Single Entity Defense in Antitrust,

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894461

[PDF available at <http://www.abanet.org/antitrust/at-source/pdf/references/WilliamsonSingleEntity.pdf>]

This Discussion Paper for the Antitrust Division's Economic Analysis Group attempts to rationalize the case law on the "single entity" defense. *Copperweld* held in 1984 that a parent and its wholly owned subsidiary constituted a single entity and therefore were "legally incapable of conspiring with each other."¹ Since then, the lower courts have struggled to formulate a test to identify which constellations of economic actors constitute single entities. Much of the focus of those cases has been on ownership and control. In this paper, Williamson argues that economics and organization theory do not tell us much about control, but they do say quite a bit about "control rights"—property or contract rights to control assets. This concept, he suggests, clarifies the relationship between ownership and control, and can provide guidelines for identifying what *Copperweld* called "independent centers of decision-making"² within purported single entities.

Williamson proposes that the multitude of tests for whether a single entity exists can be reduced to a "two-stage sequence of tests." The first stage asks whether control rights are sufficiently concentrated within the organization to amount to "economic unity." If they are, the organization is a single entity. If control rights are fragmented, then we go on to the second test, which asks whether the actors within the organization are "actual or potential competitors," or whether they provide complementary inputs in production. If the actors are actual or potential competitors, the organization is not a single entity.

Williamson suggests that this framework will resolve most, but not all issues involving purported single entities. Those that it does not resolve may require setting aside the single entity question in favor of a full rule of reason analysis. Williamson proposes four "governance scenarios" to illustrate the operation of the test:

- (1) An electricity generating company and an electricity marketer enter into a 20-year contract giving the marketer the right to demand electricity at any time and the right to veto modifications of the generating plant in return for a fixed monthly fee. Here the owner of the gen-

¹ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

² *Id.* at 768.

erating assets shares control rights over them with the marketer, while the marketer alone has complete control rights over its assets.

- (2) Separate generating companies form contracts like the one in the first scenario with the same marketer. Here a single marketer shares control rights over each generating asset separately with the asset's owner.
- (3) Hospitals form a network and create a new governing entity controlled by a board of directors selected by the member hospitals. The new entity does not own hospital assets, but can veto modifications of hospital facilities. It "aggregates profits" of the hospitals, using some for investment and returning the remainder. Here control rights are dispersed among the hospitals and the new entity.
- (4) A corporation creates a hierarchy of subsidiaries, and delegates various degrees of control rights within the hierarchy.

Williamson then turns to the role of control rights, as they are developed in the literature on long-term contracting and vertical integration. He notes that, in that literature, ownership carries with it "residual" control rights, that is, those that are not transferred to others by contract. He suggests that his economic unity test might be interpreted to require a showing that an actor controls all residual ownership rights. But a broader definition would consider all control rights, and the "nexuses of control" exercised by actors over various assets within an organization. Thus, the generating assets in the first scenario are controlled by a nexus consisting of the generator and the marketer, while the marketing assets are controlled exclusively by the marketer.

He hypothesizes six criteria for determining whether a configuration of nexuses of control over productive assets might constitute economic unity. The strongest form would be one that required all nexuses of control over all assets that are identical, that is, the same parties exercise control rights over each asset; the weaker forms would look to a variety of relationships among the nexuses within a productive enterprise. Under different criteria, each of the four scenarios might pass or fail the single entity test. For example, the first scenario would fail the first test, because the marketer controls its assets alone, while the marketer and the generator jointly control the generating assets; but it would pass any more forgiving test. Williamson then suggests a variety of ways the framework might be adjusted to account for different types of assets, property rights, control rights, and the roles of board participation and profit-sharing.

He then turns to his proposed single-entity test, which consists of two stages, each of which draws on a part of the case law.³ The economic unity stage of the test draws on case law that focuses on control within organizations. It focuses on whether control rights are concentrated within the organization. Delegation within the organization is consistent with concentrated control rights, so long as the delegations are within a vertical hierarchy. The "actual or potential competitors" stage draws on case law that focuses on efficiencies as a way of addressing hybrid arrangements that might fail any economic unity test. The cases distinguish between entities in which the parties are actual or potential competitors and entities in which the parties supply complements in a productive process. He discusses how these criteria might be applied to sports leagues, exclusive contracts by hospitals for anesthesia services, and intellectual property licensing. He argues, for example, that the exclusive contract arrangement between a hospital and an anesthesiology group would pass only the most lenient test of economic unity because the assets

³ He excludes from the discussion cases that consider whether the parties have a unity of interest, because all entities encompass actors with both similar and conflicting interests.

of the hospital and the anesthesia group have distinct nexuses of control. The arrangement would still have an argument for single entity status because, under a proper market definition, the parties supplied complementary inputs.

Whether the proposed tests add much to existing case law is not clear. The paper might be clarified by identifying the best criterion for “economic unity,” rather than offering a range of alternatives. More important, the paper should offer more analyses of cases and clearer conclusions about whether the cases were decided correctly or incorrectly under the proposed test. One candidate for analysis is the Supreme Court’s recent decision in *Dagher*.⁴ Although the Court held only that the per se rule should not apply to pricing within the joint venture, it suggested that “the pricing policy challenged here amounts to little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products.”⁵

—WHP

Alexander Raskovich, Competition or Collusion? Negotiating Discounts Off Posted Prices, U.S. Dep’t of Justice Antitrust Division (Economic Analysis Group Discussion Paper May 9, 2006) INT’L J. INDUS. ORG. (forthcoming)

Suppose in the course of a merger investigation, the agency looks at the behavior of posted prices and concludes that such prices are likely to be set at supracompetitive levels post merger. One standard defense to this conclusion is that posted prices don’t matter. The firms always negotiate discounts below posted prices (so the argument would go) and therefore the agency should look at transaction prices and not worry about what might happen to posted prices. And the extent of discounting itself indicates the highly competitive nature of the market in question. Then why post prices to begin with?

In this paper, Raskovich offers one answer that is a bit different from others offered before (e.g., to assist in collusive pricing coordination). He presents a model that highlights the relationship between the posted and transaction prices and, somewhat paradoxically, finds that if the fraction of bargain-hunting consumers is sufficiently large and if there is lots of discounting off of the posted prices, posted and discounted prices may actually be *higher* than otherwise. The story of how you get to that point is interesting even if one has trouble accepting the conclusion (which, at this point, is likely true for almost every reader, so read on). The paper is a nice illustration of how the elegant logic of game theory can provide insightful explanations of firm behavior.

In Raskovich’s model, firms initially can choose to post higher or lower prices for a homogeneous good that is valued equally by all consumers. After the prices are posted, consumers can choose to bargain with a higher posted-price firm or bargain with the lower-posted price firm. If the consumer bargains with the higher posted-price firm, the lowest price that that firm would accept depends on the likelihood that bargaining won’t break down, a likelihood that is exogenous to the model; if the bargaining doesn’t break down, the lowest price the firm would accept would be the counter offer made by the consumer in the next bargaining period. If the bargaining doesn’t break down, the supplier will be certain to make the sale. If the bargaining does break down,

⁴ *Texaco Inc. v. Dagher*, 126 S. Ct. 1276 (2006).

⁵ *Id.* at 1280.

the firm knows that the consumer will purchase the good from the lower posted-price firm. It is the likelihood of a bargaining breakdown leading to a complete loss of a sale that creates the incentive for the higher posted-price supplier to avoid a negotiation breakdown.

The highest price the consumer would be willing to pay this supplier depends on the likelihood of a bargaining breakdown, the counter offer the firm would make in the next bargaining round if the bargaining does not breakdown, and the price of the lower posted-price firms, which is the price the consumer would pay in the event of a bargaining breakdown. It is the option of being able to purchase the good from a lower posted-price supplier rather than the one the consumer is bargaining with that is the source of the bargain-hunter's bargaining power.

Roughly speaking, knowing the lowest price that the supplier will accept and the highest price the consumer is willing to offer is sufficient to determine the price that would be charged by the higher posted-price firm in this part of the game.

Bargaining with the *lower* posted-price firm will result in a negotiated price that is *higher* than that negotiated between the consumer and the higher posted-price firm. This is because the lower posted-price firm knows that if there is a negotiation breakdown when bargaining with a consumer, the consumer may still buy the good from it at the posted price, with a probability that depends on the number of firms offering the lower posted price. By contrast, if bargaining with the higher posted-price firm breaks down, that firm loses the sale completely (by assumption)—the consumer immediately purchases from one of the lower posted-price firms. Thus, in this model, the firm with the higher posted-price is vulnerable—it has less bargaining power than the firm with the lower posted price because it has no opportunity to make the sale in the event of a bargaining breakdown.

The natural question then is why charge a high posted price if some other firms have a low posted price. Why post a price that makes the firm susceptible to being 'exploited' by the consumer? The advantage of the higher posted price is that the vulnerability of the supplier to bargaining also makes the supplier an attractive candidate for a consumer to choose to bargain with. Thus, the higher posted prices will attract consumers seeking bargains. However, if there aren't enough such bargain-hunting consumers, then this benefit from a high posted price may be sufficiently small that price competition is the only equilibrium outcome.

As this discussion suggests, a critical value in the model is the proportion of consumers that are bargain-hunters (a proportion that too is exogenously determined). If that proportion is sufficiently high, then all firms "race to the top" in order to attract the bargain hunters—the posted price is set at the monopoly level and the discounted price will exceed the competitive level.

When the proportion of bargaining consumers is sufficiently high, Raskovich shows that a reduced likelihood of negotiation failure leads to a higher discounted price—suppliers are more certain than otherwise that they will be able to bargain in the next round and so (roughly speaking) they "harden" their bargaining positions. However, an increase in the number of firms overall heightens the bargaining power of the consumer—if negotiations with any supplier were to collapse, each supplier is less likely to get the sale and so has an incentive to offer a greater discount off the posted price.

The qualitative implications of a merger, then, are straightforward. Other things equal (e.g., assuming no *de novo* entry), a reduction in the number of firms will increase the likelihood that a lower posted-price firm will get the deal in the event of a bargaining breakdown. Because that reduces the bargaining power of consumers, the discounted prices will tend to be higher than the competitive (price = marginal cost) level. Raskovich shows that even when there is a high proportion of bargain hunters and when the probability of a negotiation breakdown is high, the dis-

counted price can substantially exceed the competitive price when the number of (identical) firms is relatively large.

One uncomfortable characterization is that consumers begin their bargain-hunting with those firms that charge the highest prices. It's not obvious that this is how consumers actually behave. On the one hand, the logic in the model is inescapable—those firms with the highest posted prices are the firms whose bargaining power is weakest. On the other hand, Raskovich notes that one key assumption is that in bargaining with a lower posted-price firm, the consumer can't threaten to bargain with another lower posted-price firm if the offered discounted price is too high—such a threat would be credible given product homogeneity. If multi-firm bargaining were possible, the lower posted-price firm would know with complete certainty that a negotiation breakdown would result in a sales loss, just as is the case in the event of a negotiation breakdown with the higher posted-price firm. All firms would then be equally vulnerable to “exploitation” by bargaining consumers. Permitting the consumer to threaten to purchase from another firm if the price is not lowered would result in a “normal” competitive price as suppliers reduce price to attract customers.

This paper is as interesting in what it does (i.e., to explore whether intense discounting off the posted price is necessarily a sign that the market is behaving competitively) as in how it does it, using (more or less) straightforward game theoretic tools. Moreover, Raskovich is in that (some might say small) subset of economists who consistently provide the intuition behind the results for the non-technical reader. Two thumbs up. ●

—JRW