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September 29, 2005

Andrew J. Heimert, Esq.
Executive Director & General Counsel
Antitrust Modernization Commission
1120 G Street, NW
Suite 810
Washington, D.C. 20005

VIA ELECTRONIC MAIL

Re: Public Comment Regarding Criminal Remedies

Dear Mr. Heimert:

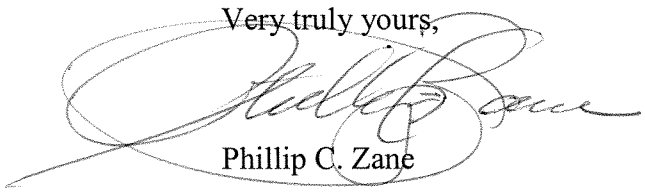
I write with respect to Item 2 of the AMC's Request for Public Comment published on August 10, 2005, at 70 Fed. Reg. 46,474. The questions under Item 2 assume the continuing viability of 18 U.S.C § 3571(d). As I have demonstrated in the attached article, the Supreme Court's recent Sixth Amendment jurisprudence, culminating in *Booker v. United States*, 125 S. Ct. 738 (2005), has vitiated that provision. *Booker* held, of course, that any fact necessary for determining the statutory maximum fine for an offense must be proven to a jury beyond a reasonable doubt or admitted by the defendant. *Booker* requires, therefore, that to determine the maximum fine of an offense covered by Section 3571(d), the prosecution must prove the amount of gain or loss beyond a reasonable doubt. The problem for major antitrust offenses (and other major financial crimes) is that determining gain or loss depends on the opinion testimony of expert economists. An economic analysis of gain or loss will rely on estimates and proxies, and produce conclusions within confidence intervals. Testimony about such analysis could well establish that gain or loss is more likely than not above some amount, as it often does in civil antitrust cases, but opinion testimony alone cannot establish facts beyond a reasonable doubt especially if the defendant introduces the contrary opinion of his or her own economist. As I explain more fully in the attached article, to impose a fine appropriate to the massive harm that the biggest antitrust crimes cause, Section 3571(d) must be reformed.

I offer one way to fix Section 3571(d) in the attached article, but surely there are others. If the Commission is to make recommendations with respect to the calculation of the statutory maximum fine in antitrust cases, as Item 2 suggests it is considering doing, I would urge the Commission to consider

also recommending fixing Section 3571(d), at least with respect to antitrust offenses. If Congress fails to fix Section 3571(d), the Commission's work with respect to maximum fines for antitrust offenses could be in vain.

Please let me know if Commission members or staff would like to discuss the ideas in my article.

Very truly yours,



Phillip C. Zane

PCZ:sam

Enclosure

Booker Unbound: How the New Sixth Amendment Jurisprudence Affects Deterring and Punishing Major Financial Crimes and What to Do About It

PHILLIP C. ZANE

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He gratefully acknowledges the thoughtful comments and challenges of James Backstrom, Douglas Berman, David Boling, Donald Klawiter, Robert Lande, Nathan Muyskens, and Ellen Podgor. Any errors that remain are, of course, the responsibility of the author.

Sentences for federal offenses have many components: incarceration, fine, restitution, special assessment, and supervised release. Much of the analysis of *United States v. Booker*[1] and the Sixth Amendment cases that led up to it focuses on incarceration because it is the most onerous and, for most crimes, the most important component of federal sentences. But for financial crimes, such as price-fixing, securities fraud, and defrauding the government, the second component, the fine, may be the most important, especially where the defendant is a corporation or other legal organization, which cannot, of course, be incarcerated. The recent Sixth Amendment jurisprudence that culminated in *Booker* will have an effect on the determination of a fine, just as it affects length of incarceration, and, because of the statutory method for determining the maximum fine, this could undermine punishment of the worst financial crimes and thereby undermine general deterrence.

I. Background on the Reach of the Sixth Amendment

At stake in the all of the constitutional cases that culminated in *Booker*[2] was the length of the defendant's incarceration or the imposition of a death sentence. The Supreme Court concluded that the Sixth Amendment right to a jury trial requires that facts necessary to establish the maximum penalty be found by a jury or admitted by the defendant. The Court did not address whether the rule was limited to incarceration and execution or also applied to fines and restitution.

Under federal law, the maximum fine for each federal offense is set out in the substantive provisions governing the offense or, for offenses whose substantive provisions do not specify a fine, in the general fine provisions of Title 18. Sections 3571(b) and 3571(c) of Title 18 set the maximum fine at $250,000 for individuals and $500,000 for organizations unless the relevant substantive provision sets a different maximum. An alternative maximum fine for offenses that cause pecuniary gain or loss appears in a separate provision, Section 3571(d) of Title 18. Section 3571(d) sets the statutory maximum fine for federal offenses at twice the gain the defendant obtained from the illegal activity or twice the loss the victims suffered if that amount is greater than the statutory maximum otherwise set for the offense. Consequently, the maximum fines in big cases depend on a determination of gain or loss, although this section does not apply if calculating gain or loss "would unduly complicate or prolong the sentencing process,"[3] or if the substantive provision governing the offense specifies that the section does not apply.[4] Under the Sentencing Guidelines, the particular fine imposed in any case is determined by applying the relevant guidelines, § 5E1.2 for individuals and § 8C2 for organizations, subject, of course, to the statutory maximums, which cannot be exceeded.

Courts have interpreted the Sixth Amendment jury trial right to apply only where a defendant is accused of "serious" crimes, not "petty" offenses. Determining whether an offense is petty traditionally focused on the term of imprisonment. Courts consider offenses whose maximum penalty is incarceration for six months or less to be presumptively petty and thus not to require trial by jury.[5] Congress has defined "petty offense" as a misdemeanor whose maximum term of incarceration is six months or an infraction that carries a maximum fine of $5,000 for an individual or $10,000 for an organization.[6]

By using the neutral term "the accused" to indicate the holder of the right to a jury trial, the Sixth Amendment readily permits extension of the right to non-natural persons. A corporation or other legal entity that is subject to criminal prosecution is plainly "the accused" even though it is not a natural person. And courts have stated that to deny a corporation the right to a jury trial for a serious offense is to "ignore[ ] the fundamental principle that corporations enjoy the same rights as individuals to trial by jury."[7] Indeed, other provisions of the Bill of Rights, including both those that refer to "persons" and those that do not, have been held to apply equally to natural persons and legal entities.[8] Because the Sixth Amendment applies to organizations, there is no reason the holdings of *Booker* and its predecessors should not also apply to organizations.

A distinct question concerns whether *Booker* should apply to fines. On this issue, it is significant that *Jones, Apprendi, Blakely,* and *Booker* contain sweeping language: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[9] *Booker,* which

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decided the applicability of the Sixth Amendment to the federal sentencing scheme, emphatically reaffirmed this rule, originally articulated in *Apprendi,* a state case where a defendant received a longer period of incarceration because the sentencing judge found that the defendant, who had been convicted of assault, violated a hate-crime statute that provided for enhanced sentences. Because the focus of the earlier cases was on elements of offenses that led to increased terms of incarceration, the application of the *Apprendi* rule to fines is perhaps not settled. But the broad language of the Court's recent Sixth Amendment jurisprudence suggests the rule has a broad reach.

II. Determining the Statutory Maximum and Calculating the Sentence

Although *Booker* explicitly invalidated only two sections of the Sentencing Reform Act, the holding of the merits majority and the Court's recent Sixth Amendment jurisprudence as a whole call into question the validity of at least one other provision of the criminal law, namely 18 U.S.C. § 3571(d). The new Sixth Amendment jurisprudence could have the unintended consequence of severely decreasing the statutory maximum fines for major white-collar crimes and could therefore limit deterrence of the worst offenses. The sentencing scheme of the Sentencing Reform Act depends on judicial fact-finding by a preponderance of the evidence to impose the huge fines appropriate in cases of major fraud, securities fraud causing catastrophic losses, international price-fixing cartels, and other major financial crimes. But because *Booker* leaves no doubt that facts necessary to determine the statutory maximum sentence for an offense must be proven beyond a reasonable doubt, juries will have to find facts that usually cannot be determined with such certainty. As a result, fines imposed against individuals and corporations for the worst financial crimes will be severely limited and may be too low to punish the wrongdoer adequately for the particular offense and too low to provide meaningful general deterrence.

An example in the antitrust context shows how the Supreme Court has vitiated Section 3571(d). The Sherman Act (as amended) forbids, among other things, price-fixing and bid-rigging and specifies that the penalty for a violation by an organization is not more than $100 million.[10] The alternative maximum penalty specified in Section 3571(d) is twice the gain the defendant received from the criminal activity or twice the loss the victims suffered, here twice the amount that customers overpaid as a result of the price-fixing conspiracy. Antitrust fines for corporations are governed by § 2R1.1 and Chapter 8C. Section 2R1.1(d)(1) specifies that an organization's base fine is 20 percent of the volume of commerce affected by the criminal activity, which is, generally speaking, the total value of the goods and services whose prices were illegally fixed.[11]

Determining the fine range requires application of the various provisions of Chapter 8C of the Guidelines. Suppose a defendant sold $500 million worth of goods whose prices were fixed. The base fine would be 20 percent of $500 million, which is $100 million. Applying § 8C2.5, the defendant would easily get a culpability score of 10, assuming it had at least 5,000 employees and tolerated the criminal activity at high levels in the organization, both of which are typical in successful prosecutions of large, international cartels. Under § 8C2.6, a culpability score of 10 results in multipliers of 2 and 4, the numbers by which the base fine is multiplied to determine the fine range. This leads to a fine range of $200 to $400 million. Even the low end of the Guidelines range is significantly higher than the statutory maximum fine in the Sherman Act; such a fine therefore can only be lawful if it is allowed by Section 3571(d). This example is not fanciful; many of the prosecutions of international cartels in recent years involved volumes of commerce in excess of $100 million and fines in the hundreds of millions of dollars.[12]

Regardless of whether the Guidelines are advisory or mandatory, because the fine exceeds the maximum specified in the substantive provision in Title 15, a fine at this level is lawful only if the government can prove the defendant's gains or the victims' losses were at least half of the recommended or required fine. Before the Court's new Sixth Amendment jurisprudence, the government needed to make that proof only by a preponderance of the evidence, and to the judge alone. An econometrician's regression analysis (or other means of estimating the causes of changes in prices and costs) can satisfy this standard because a judge can evaluate the opinion testimony of expert economists, even competing expert economists, and conclude that, on balance, it is more likely than not that the loss to the victims was, in our example, at least $100 million. We allow juries to evaluate such testimony when they determine damages in civil cases, but in those cases the jury must use that testimony to reach an estimate of damages that is more likely than not to be the best estimate of damages.

Determining gain or loss in the criminal context, however, is now very different. As the last paragraph of Justice Stevens's opinion for the Court in *Booker* made clear when it restated the rule in *Apprendi,* "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[13] Thus, the government will have to prove gain or loss beyond a reasonable doubt. Showing gain or loss in an antitrust case requires expert testimony about prices and costs, econometric analysis full of assumptions and proxies, and conclusions within confidence intervals. The best guess of gain or loss offered by such expert testimony is unlikely to satisfy the rigors of proof beyond a reasonable doubt because that guess is merely an opinion based on a model that can, at best, only approximate gain or loss. It is difficult to see how such an opinion can be sufficiently certain to satisfy the constitutional requirement of proof beyond a reasonable doubt, especially where the

defendant presents an expert economist who testifies that in his or her opinion the loss or gain was not enough to support the fine the government is seeking. A consequence of the Supreme Court's recent Sixth Amendment jurisprudence, therefore, is that the maximum fine in the biggest antitrust cases is no more than the $100 million maximum specified in Section 1 of Title 15 as that section was amended in June of 2004, or only $10 million for offenses completed before the effective date of that amendment.

This problem is worse where the specified maximum fine is lower than in the antitrust laws. Apart from Section 3571(d)'s open-ended maximum, the maximum fines for federal offenses are only $250,000 for individuals and $500,000 for organizations except where the relevant substantive provisions include another maximum.[14] Thus, the maximum fine for securities fraud, which specifies no maximum of its own, is $250,000 for individuals and $500,000 for organizations.[15] The same is true for conspiracies to defraud the United States,[16] counterfeiting and forgery,[17] most offenses relating to embezzlement,[18] false statements,[19] and health care fraud.[20] Some significant frauds have even lower limits; fines for kickbacks and false statements relating to federal health care programs are limited to $25,000,[21] and fines for offenses relating to marketing of pharmaceutical drugs are limited to $1,000.[22] Other offenses relating to fraud and theft specify that the maximum fine is $1,000,000. These include major fraud against the United States government,[23] mail fraud,[24] wire fraud,[25] and bank fraud.[26] New provisions set higher maximums for violations of laws and regulations governing the issuance of securities, including a maximum of $25,000,000 ($5,000,000 for individuals) for certain willful violations and false and misleading statements,[27] and a maximum of $2,000,000 for violations relating to certain foreign trade practices.[28] But none of these limits is high enough to allow a $100 million fine.

Applying the Sentencing Guidelines to major violations of these provisions easily results in sentences that exceed the statutory maximum absent Section 3571(d). Consider, for example, a major securities fraud resulting in catastrophic losses. An individual who commits a major securities fraud can only be fined $250,000, the maximum under Section 3571(b) for a violation of 18 U.S.C. § 1348, or perhaps as high as $5,000,000 if the case can be brought under 15 U.S.C. § 78ff(a). The Guidelines would allow a higher fine to reflect the harm or loss to the victim or the gain to the defendant, § 5E1.2(d)(1), but this is impossible absent a statutory authorization of a higher fine. Restitution could, of course, be ordered under § 5E1.1 and 18 U.S.C. § 3663A, but not in cases where the number of identifiable victims is so large that restitution is impracticable or where the determination of complex issues would overly burden the sentencing process.[29] In any event, the possibility of being forced to pay only a modest fine and restitution of ill-gotten gains provides little deterrence.

A corporation found guilty of a major securities fraud in violation of 18 U.S.C. § 1348 or 15 U.S.C. § 78ff will face a fine that seems too low to serve as an adequate deterrent. For a large corporation whose top managers were involved in the offense, and whose stock lost at least $500 million in value because of the conduct, the Guidelines suggest a fine of at least $115 million to $230 million.[30] The low end of this range is more than 200 times the maximum fine a district court could impose under Section 1348 and more than four times the maximum under Section 78ff if gain or loss cannot be proved beyond a reasonable doubt. The "loss" suffered by the victims is not necessarily simply the difference between the value of the shares before and after the fraud is discovered because some victims might have sold shares soon after the fraud was disclosed, while others might have held on until the shares became valueless or perhaps until the company recovered after restructuring. Perhaps the loss that resulted from the fraud is the difference between the price paid for the shares and what the value of the shares would have been at the time each purchaser acquired the shares had fraudulent statements not been made. Any measure of loss requires estimates and even guesses and will be based on experts' testimony about their opinions of the value of the securities and price trends in the market as a whole. Once again, opinion testimony is unlikely to be sufficient to prove much beyond a reasonable doubt.

Although the number of federal criminal cases that result in fines in the hundreds, or even tens, of millions of dollars is small, these are the headliners, the cases that receive the most attention and therefore the ones that may be most important to general deterrence. To be an effective deterrent, moreover, the fine imposed must surely be significantly more than the illicit gain a defendant obtained from the crime.[31] From 1996 through 2001, there were at least thirty criminal antitrust cases in which defendants paid more than $10 million in fines, which was then the Sherman Act maximum; five of these fines exceeded even the new Sherman Act maximum of $100 million.[32] Fraud investigations of recent years have also netted fines in excess of $100 million.[33] Many of these might not hold up under *Booker* if the government had to rely on expert testimony to show gain or loss.

Orders of restitution, which could theoretically help to ensure that a criminal penalty in some measure reflects the severity of a financial crime if 3571(d) were not available, may have similar problems of proof.[34] It is not yet clear whether the rule in *Apprendi* applies to restitution orders.[35] The rule in *Apprendi* might well apply to any determination of restitution: the loss suffered by the victims might have to be admitted by the defendant or proven beyond a reasonable doubt before restitution can be ordered.[36] Some courts have held that restitution is not criminal punishment and that the rule in *Apprendi* therefore does not apply to restitution orders.[37] Other courts have held that *Apprendi* and *Booker* do not apply to restitution orders because the relevant statute has no

maximum.[38] This reasoning could perhaps be applied to Section 3571(d), but that would require a tortured reading of the merits holding in *Booker:* if the maximum penalty depends on proof of something, namely gain or loss, that gain or loss must be proven by some standard. *Booker* says the standard is proof beyond a reasonable doubt. Whether *Booker* applies to orders of restitution remains an open question, but even if *Booker* does not apply, restitution offers little deterrence and less punishment in cases involving major financial crimes with a multitude of victims whose losses are not readily proven.

The demise of Section 3571(d) could even have an effect on civil cases brought to recover actual and punitive damages for mass torts, which also serve as deterrents to unlawful and reckless behavior. Criminal penalties that could be imposed for conduct similar to that which gave rise to the tort serve as an "indicium of excessiveness" in evaluating whether a jury's award of punitive damages violates the Fourteenth Amendment's due process clause.[39] In a recent case, for example, a court held that a punitive damages award of $5 billion was not excessive because criminal fines that could have been imposed under Section 3571(d) for the same conduct could have been as high as that amount.[40] Without 3571(d), or if the rule in *Apprendi* vitiates that provision, the maximum fines for each of the counts would have been measured in tens or hundreds of thousands of dollars; such fine levels would have suggested that the punitive damages award was indeed excessive.

III. A Proposal to Solve the Problem

The drafters of Section 3571(d) recognized that proof of gain or loss can be difficult. The statute itself specifies that it does not apply if the determination of gain or loss would unduly complicate or prolong the sentencing process. Perhaps this, too, becomes a jury question under *Booker:* to impose a fine above that specified in the substantive provision relating to the offense or that specified in Section 3571(b) or 3571(c), a jury must find first that determining gain or loss will not be too complicated or take too long, and then must find gain or loss beyond a reasonable doubt. All this suggests that Section 3571(d) as written is unequal to the task of ensuring that fines can be large enough to punish and deter the worst economic offenses.

One way to fix the statute is to specify a very high maximum as Congress recently did when it amended the Sherman Act. There are several problems with such a solution. First, any number chosen will be eroded by inflation. Second, a number that seems sufficiently high today might look much too small after the discovery of even more massive financial crimes than those that emerged in the last ten years. Indeed, even the $100 million maximum adopted for antitrust offenses in 2004 is less than the fines in five cases prosecuted before the act was passed. Third, a fixed number would have to be accompanied by specific directions to the U.S. Sentencing Commission so that an intended increase in maximum fines to be imposed against the worst offenders does not unfairly increase fines against defendants whose crimes were relatively minor.[41]

Another alternative is one modeled on the civil damages provision of the False Claims Act, which prescribes civil penalties of up to $10,000 for each fraudulent claim or invoice submitted to the government.[42] This could allow a very substantial fine in price-fixing cases if the maximum fine depended on the total number of sales made according to invoices submitted to customers. This solution would not work well, however, in a bid-rigging case involving a single, substantial government contract, which might be a single sale even if it concerned hundreds of millions of dollars in work. A similar problem emerges in the context of securities fraud: if the maximum were tied to the number of sales of securities, a large fine might be supported, but proof of the number of affected sales might be complicated where a single, false statement that amounted to fraud on the market caused many buyers to pay too much for shares purchased from many different sellers. Tailoring a per-transaction rule to the many offenses to which the alternative maximum fine applies seems to be a daunting task.

The problem of limited maximum fines could be avoided in some cases if the government charged multiple counts where it now usually charges only one, an option that is sometimes open to prosecutors. This would not work, for example, in bid-rigging cases involving a single $100 million contract, or in securities frauds involving only one or a few false and misleading statements, but nonetheless resulting in massive damages. Even in cases where this solution theoretically works, it runs the risk of overly complicating the decision of the jury, which might be asked to decide guilt with respect to dozens or hundreds of counts.

The best approach is one sufficiently flexible to account for the size of the offender while allowing the nominal value of the maximum fine to increase as the real value of the dollar decreases. One model is the European Commission's rule setting the maximum fine for organizations found to have committed serious violations of competition laws.[43] The European Commission can impose an administrative fine of up to 10 percent of an undertaking's worldwide turnover. Modifying this language for use in our own legal system where the relevant offenses are criminal rather than administrative, the maximum fine could be a percentage of an organization's worldwide sales, or an individual's gross income. Such numbers should be readily obtainable from public disclosures, tax returns, loan applications, and similar documents. No experts will therefore be needed to offer an opinion about what the gain or loss was, and juries should have little trouble discerning sales or income beyond a reasonable doubt.

A revised Section 3571(d) might look something like this:

(d) Alternative fine in cases involving gain or loss.—

(i) Individuals. If an individual derives pecuniary gain from the offense, the individual may be fined not more than ten percent of his or her gross income (as that term is defined in 26 U.S.C. § 61) for the calendar year immediately preceding sentencing.

(ii) Organizations. If any organization derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than ten percent of its worldwide gross sales, including sales of its subsidiaries but excluding sales of its parent or sister companies, for the calendar year immediately preceding sentencing.

Unless Congress redrafts Section 3571(d), prosecutors will find it difficult, if not impossible, to prove the gain or loss necessary to support large fines in cases involving the most egregious financial crimes. Defendants will be unlikely to accept plea agreements that impose fines that would rely on proving gain or loss. Juries will be burdened with longer trials and longer deliberations as they struggle to determine whether an argument based on econometrics proves gain or loss beyond a reasonable doubt. The alternative maximum fine of Section 3571(d) might have worked well in an era when crucial facts relating to sentences were determined by a judge by a mere preponderance of the evidence. But when facts relating to the determination of a statutory maximum must be found by a jury beyond a reasonable doubt, the usefulness of Section 3571(d) becomes quite limited. The Supreme Court's recent Sixth Amendment jurisprudence has changed much about criminal litigation and sentencing, often in unexpected ways. Many statutory provisions will have to be changed to accommodate that new jurisprudence. Section 3571(d) is one of them.

Notes

1 125 S. Ct. 738 (2005).

2 *Blakely v. Washington,* 124 S. Ct. 2531 (2004); *Ring v. Arizona,* 536 U.S. 584 (2002); *Apprendi v. New Jersey,* 530 U.S. 466 (2000); *Jones v. United States,* 526 U.S. 227 (1999).

3 18 U.S.C. § 3571(d).

4 18 U.S.C. § 3571(e).

5 *See, e.g., Lewis. v. United States,* 518 U.S. 322, 326 (1996) (maximum penalty of six months' imprisonment presumptively puts offense in "petty" category); *United States v. Nachtigal,* 507 U.S. 1, 3–4 (1993) (courts look first to maximum incarceration for offense for determination of whether offense is presumptively petty; defendant can overcome presumption by showing that additional penalties, such as fines, are so severe that legislature clearly intended offense to be serious).

6 18 U.S.C. § 19, 18 U.S.C. § 3559, & 18 U.S.C. § 3571(b) & (c). An earlier definition, which appeared in 18 U.S.C. § 1(3), and was adopted in 1948, Act of June 25, 1948, c. 645, 62 Stat. 684, was repealed by the Sentencing Reform Act of 1984, Pub. L. 98-473, Title II, § 218(a)(1), 98 Stat. 1987, 2027. Both the term of imprisonment and the amount of the fine are important to determining the application of the jury trial right. In one case, where individual defendants were accused of an offense whose maximum incarceration was only six months but whose maximum fine was $10,000, the district court concluded defendants were entitled to a jury trial. *United States v. Lucero,* 895 F. Supp. 1419, 1420 (D. Kan. 1995).

7 *United States v. R. L. Polk & Co.,* 438 F.2d 377, 379 (6th Cir. 1971).

8 *Standard Oil Co. of Calif. v. Arizona,* 738 F.2d 1021, 1028–30 (9th Cir. 1984) (summarizing cases and commentary and holding that plaintiff states are entitled to jury trial of civil antitrust action under Seventh Amendment).

9 *Apprendi,* 530 U.S. at 490; *see also Jones,* 526 U.S. at 243 n.6.

10 15 U.S.C. § 1. Pub. L. 108-237, Title II, § 215, 118 Stat. 661 (June 22, 2004), increased the maximum fine from $10 million to $100 million for organizations, and from $350,000 to $1,000,000 for individuals.

11 *United States v. Andreas,* 216 F.3d 645, 677–79 (7th Cir. 2000); *United States v. SKW Metals & Alloys, Inc.,* 195 F.3d 83, 91–93 (2d Cir. 1999).

12 Donald C. Klawiter, *After the Deluge: The Powerful Effect of Substantial Criminal Fines, Imprisonment, and Other Penalties in the Age of International Cartel Enforcement,* 69 Geo. Wash. L. Rev. 745, 765 (2001). The largest fine to date in an antitrust case is $500 million.

13 *United States v. Booker,* 125 S. Ct. at 756 (Stevens, J., opinion for the "merits majority").

14 18 U.S.C. § 3571(b) & (c).

15 18 U.S.C. § 1348.

16 18 U.S.C. § 371.

17 18 U.S.C §§ 470–514.

18 18 U.S.C. §§ 641 & 642, 655, & 658–669 state no specific maximum; 18 U.S.C. §§ 643–44, 646–50, & 653–55 allow fines up to the amount embezzled; 18 U.S.C. §§ 645 (court officers) & 651–52 (disbursing officers) allow fines up to double the value of the money embezzled; 18 U.S.C. §§ 656–57 (by bank officer or employee) allow fines up to $1,000,000.

19 18 U.S.C. § 1001.

20 18 U.S.C. § 1347.

21 18 U.S.C. § 1320a-7b.

22 21 U.S.C. 333.

23 18 U.S.C. § 1031. This section provides for a maximum of $5,000,000 per count if the offense involved a threat of personal injury (18 U.S.C. § 1031(b)) but limits the total fine for a single prosecution regardless of the number of counts to $10,000,000 (18 U.S.C. § 1031(c)).

24 18 U.S.C. § 1041.

25 18 U.S.C. § 1043.

26 18 U.S.C. § 1044.

27 15 U.S.C. § 78ff(a).

28 15 U.S.C. § 78ff(c)(1)(A) (pertaining to violations of 15 U.S.C. § 78dd—1(a) or (g)).

29 18 U.S.C. § 3663(a)(1)(B)(ii) (with respect to permissive restitution for certain offenses under Titles 18, 21, and 49); 18 U.S.C. § 3663A(c)(3) (with respect to otherwise mandatory restitution for crimes of violence, offenses against property, including frauds, under Title 18, and offenses relating to tampering with consumer products).

30 The determination of the organization's fine starts with § 8C2.3, which directs us to the applicable guideline of Chapter 2, in this case, § 2B1.1. The base offense level for an individual would be 7 (because the maximum prison term for an individual who violates Section 1348 is 25 years), which we increase by 30 levels because we assume the total market value of now valueless shares had been at least $500,000,000 prior to the catastrophic collapse. With the

base offense level for an individual determined, we turn back to Chapter 8, and, under § 8C2.4, we obtain a base fine of the greatest of $57,500,000 (applying the table in 8C2.4(d)) or the pecuniary gain to the organization or loss caused by the organization if it was caused intentionally, knowingly, or recklessly (§ 8C2.4(a)). Because of the size of our hypothetical defendant, say at least 5,000 employees, and tolerance of the illegal activity at the highest level of management, we easily find a culpability score of 10 (§§ 8C2.5(a) & (b)), which results in multipliers of 2 and 4 (§ 8C2.6), and therefore a fine range of at least $115,000,000 to $230,000,000.

[31] *See, e.g.,* Scott Hammond (Dep. Ass't Att'y Gen'l), Cornerstones of an Effective Leniency Program (Nov. 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206611.htm.

[32] *See* Klawiter, *supra* note 12.

[33] For example: TAP Pharmaceuticals pleaded guilty and agreed to pay $290 million in fines for violating the Prescription Drug Marketing Act, 21 U.S.C. 331 (see U.S. Department of Justice, Press Release, Oct. 3, 2001, *available at* http://www.usdoj.gov/opa/pr/2001/October/513civ.htm); C G Nutritionals paid a fine of $200 million for obstructing justice in investigation of kickbacks and health care fraud (*see* U.S. Attorney's Office, ACE Updates, August 2003, *available at* http://www.usdoj.gov/usao/ils/otherlinks/ACE/AceNewsletters/acenewsletter.AUG%2020031.pdf; HCA agreed to plead guilty and pay a fine of $95 million for several offenses relating to health care fraud and kickbacks (see U.S. Department of Justice, Press Release, Dec. 14, 2000, *available at* http://www.usdoj.gov/opa/pr/2000/December/696civcrm.htm.

[34] Brian Kleinhaus, *Note, Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment,* 73 Fordham L. Rev. 2711, 2755–60 (forthcoming 2005); Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16 Fed. Sent. Rep. 316, 317 (2004).

[35] *United States v. McDaniels,* No. 03-1940, slip op. at 11 n.12 (6th Cir. Feb. 17, 2005).

[36] *United States v. West,* 2005 WL 180930 (S.D.N.Y. Jan. 27, 2005).

[37] *United States v. George,* No. 04-3099, slip op. at 4 (7th Cir. Apr. 4, 2005); *United States v. Garcia-Castillo,* No. 03-2166, slip op. at 11–13 (10th Cir. Feb. 11 2005).

[38] *United States v. Syme,* 276 F.3d 131, 158–59 (3d Cir.), *cert. denied,* 537 U.S. 1050 (2002); *United States v. Wooten,* 377 F.3d 1134, 1144, & n.1 (10th Cir.), *cert. denied,* 125 S. Ct. 510 (2004).

[39] *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 583–85 (1996); *State Farm Mutual Automobile Insurance Co. v. Campbell,* 538 U.S. 408, 428–29 (2003).

[40] In consolidated lawsuits arising out of the oil spill of the *Exxon Valdez,* the court examined the excessiveness of the jury's award of $5 billion in punitive damages. The court noted that the defendants had been charged with five separate criminal counts alleging violations of various acts relating to environmental protection and safe shipping and transport. The court reasoned that under Section 3571(d) each of these counts could have supported a fine of more than $1 billion because the economic loss was shown in the civil cases to exceed $500 million. A punitive damages award of $5 billion was therefore not excessive. In re the Exxon Valdez, 296 F. Supp. 2d 1071, 1106–09 (D. Alaska 2004).

[41] The Sentencing Commission's proposed amendments to the Guidelines to reflect the increase in the Sherman Act maximum illustrate this problem. Instead of extending the top end of sentences to allow longer prison terms and higher fines for the worst offenders, the Commission's amendments to § 2R1.1 shifted all sentences for antitrust offenses upward, increasing the base offense level by two levels. Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2005, 70 Fed. Reg. 24,852–24,856 (May 11, 2005). Simply increasing a maximum can result in more severe penalties for all offenders, not just more severe penalties for the worst offenders.

[42] 31 U.S.C. § 3729. The penalty for each claim or invoice is in addition to treble damages.

[43] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1.