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WILL RECENT SUPREME COURT SENTENCING DECISIONS HELP OR HURT ANTITRUST DEFENDANTS?

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In two decisions handed down last year, the Supreme Court addressed the question of how much weight a district court should accord the United States Sentencing Guidelines, which the Court made advisory rather than mandatory in its 2005 decision *United States v. Booker*. This article examines the effect of those decisions on antitrust defendants.

In *Rita v. United States*, the Supreme Court held that an appellate court may apply a presumption of reasonableness to sentences that are within the sentencing range set forth in the Guidelines. In *Gall v. United States*, the Court held that the standard of review for sentences that are outside the Guidelines range is “deferential abuse of discretion.” Because *Gall* concerned sentences that fall outside the Guidelines range, it is likely to have more effect on antitrust sentences than *Rita*.

Antitrust Sentences Since Booker

There is scant evidence of the view of circuit courts on antitrust sentencing since *Booker*. A notable exception is the Second Circuit’s decision in *United States v. Rattoballi*. There, the Second Circuit reversed a sentence of home confinement for a defendant convicted of conspiracy to rig bids, in violation of Section 1 of the Sherman Act, and conspiracy to commit mail fraud. The Guidelines range was 27-33 months of imprisonment, and a minimum fine of \$20,000. The district court sentenced the defendant to one year of home confinement followed by five years of probation, \$155,000 in restitution, and no fine. The Second Circuit, citing the Guidelines policy favoring imprisonment along with substantial monetary penalties for antitrust offenders, vacated the sentence as unreasonable.

While the number of antitrust sentences since the *Booker* decision is too small to reach definitive conclusions, courts have tended to depart from the Guidelines more frequently in antitrust cases than in other types of cases. Overall, courts have sentenced within the Guidelines 61.4% of the time since *Booker*. For antitrust defendants, the number is much smaller. Of the 38 antitrust sentences since *Booker*, only 6, or 15.9%, were within the Guidelines range. The other 32 were all below the range, the vast majority as a result of government-sponsored motions, primarily for downward departure based upon the defendant’s substantial assistance to the government. In fact, the frequency of downward departures for substantial assistance in antitrust cases has increased since *Booker*.

Prior to *Rita and Gall*, the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits held that a sentence is presumed reasonable if it falls within the Guidelines sentencing range. Those courts held that when a sentence varies from the Guidelines range, the district court must articulate a justification related in degree to the extent of the variance. The First, Second, Third, and Eleventh Circuits, on the other hand, declined to adopt a presumption of reasonableness to Guidelines sentences, instead considering the Guidelines range as just one of a number of factors, albeit an important one, in the sentencing decision.

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The Supreme Court Takes Up Rita and Gall

In *Rita*, the defendant was convicted by a jury of perjury, obstruction of justice, and making false statements to a grand jury regarding his purchase of a machine gun kit. Because the underlying crime was a violation of the gun registration laws, the Guidelines treated Rita as an accessory after-the-fact to that crime, resulting in a jump in the Guidelines range to 33 to 41 months of imprisonment. The district court sentenced him to 33 months.

On appeal, the Fourth Circuit affirmed in an unpublished *per curiam* opinion, holding that a sentence imposed within the properly calculated Guidelines range is presumptively reasonable. The Supreme Court affirmed in an 8-1 decision. In an opinion authored by Justice Breyer, the Court held that an appellate court may apply a presumption of reasonableness to a sentence that reflects a proper application of the Guidelines. The Court's rationale was that such a presumption is not binding on the sentencing court and does not offend the Sixth Amendment right to a jury trial.

The defendant in *Gall* joined a conspiracy to distribute MDMA, or "ecstasy," as a college student. Despite a Guidelines range of 30-37 months of imprisonment, the district court sentenced Gall to 36 months of probation, citing the defendant's withdrawal from the conspiracy almost four years before the indictment, his post-offense conduct, the support of his family and friends, his lack of criminal history, and his age at the time of the offense. The Eighth Circuit reversed and remanded, holding that a sentence outside the Guidelines range must be supported by a justification that "is proportional to the extent of the difference between the advisory range and the sentence imposed."

The Supreme Court reversed, 7-2. In an opinion authored by Justice Stevens, the Court stated that *Booker* had made clear that appellate review of sentences was limited to determining whether they were "reasonable," and that the standard of review is "deferential abuse of discretion." Although "a major departure should be supported by a more significant justification than a minor one," the Court rejected both an appellate rule that requires "extraordinary" circumstances to justify an outside-range sentence, and the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a sentence. Such approaches, the Court held, "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." The Court upheld the probationary sentence as reasonable under all the circumstances laid out by the district court.

Conclusion

In *Rita*, the Court reaffirmed the centrality of the Guidelines by approving a presumption of reasonableness to within-Guidelines sentences. But in *Gall*, the Court approved district courts' discretion to impose outside-Guidelines sentences and rejected a rigid proportionality rule for such sentences. For antitrust defendants like Rattoballi, *Gall* may result in more outside-Guidelines sentences being affirmed rather than reversed.



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