



Prevention of Corporate Liability

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Life After the *Booker/Fanfan* Decisions—Where Are We?

BY WIN SWENSON*

The corporate compliance and ethics field is trying to figure out what to make of the U.S. Supreme Court's recent decision in *United States v. Booker* and a companion case, *United States v. Fanfan*, that held the federal sentencing guidelines unconstitutional. Practitioners are especially concerned about where the decision leaves the organizational guidelines' definition of "an effective compliance and ethics program"—a standard that has provided the foundation for compliance/ethics programs for years.

The following questions and answers are offered to help sort out the confusion.

Why Did This Happen? Why Now?

The organizational guidelines are part of a broader set of sentencing rules contained in the "Federal Sentencing Guidelines Manual." Most of the manual governs the sentencing of *individuals*—for example, for federal drug trafficking, fraud, child pornography and bank robbery offenses. Only one chapter, Chapter Eight, is devoted to the sentencing of organizations.

The U.S. Sentencing Commission promulgated the individual sentenc-

ing guidelines in 1987—four years before the organizational sentencing guidelines—and they immediately generated a firestorm of controversy. Unused to having their sentencing discretion limited, federal judges from around the country held the individual guidelines unconstitutional relying on several constitutional grounds. In 1989, in *Mistretta v. United States*, the Supreme Court considered, and dismissed, these various constitutional attacks, and by an 8-to-1 vote held the guidelines constitutionally valid.

At the time, *Mistretta* seemed to have resolved all constitutional doubt about the guidelines. In hindsight, however, *Mistretta* had an inherent weakness: It was heavily focused on relatively theoretical issues about such things as separation of powers and delegation of congressional authority and not on the actual application of the guidelines to real cases.

Since *Mistretta*, however, the application of the guidelines and other sentence-setting schemes that legislatures have been developing (e.g., sentence enhancements for "hate crimes") have drawn increased attention, with some arguing that these schemes lead to disturbing results.

A particularly dramatic example of the kind of outcome that has troubled observers is visible in the companion case the Supreme Court

heard in tandem with *Booker*. In *Fanfan*, the jury found that the defendant was involved in a drug conspiracy that, based on the amount of drugs proved at trial, made the defendant eligible for a five- to six-year prison sentence. However, the sentencing guidelines required that the judge consider what the guidelines call "relevant conduct"; when the judge did, the applicable sentencing range jumped to 15 to 16 years—almost a threefold increase that was based on facts the jury never heard.

In *Booker* and *Fanfan*, the Supreme Court ruled that this kind of guideline-required and judge-imposed increase in the sentence violates the defendant's Sixth Amendment jury trial right. In effect, the court said, the guidelines system is impermissibly requiring judges—using a lower standard of proof (preponderance of the evidence) than a jury must (beyond a reasonable doubt)—to usurp a core jury function: finding facts that are "essential to [a defendant's] punishment."

It took 15 years, but the court at last found a fatal constitutional flaw in the sentencing guidelines system that the original *Mistretta* decision had not much considered.

What Did the Court Actually Say?

Confusingly, there are actually two separate *Booker/Fanfan* opin-

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ions. This is because the case required the Supreme Court to resolve two distinct questions, and two almost entirely different sets of justices formed majorities to resolve these two questions.

The first opinion, written by Justice John Paul Stevens, announces the Supreme Court's holding that the guidelines are, in their current form, unconstitutional. The second opinion, written by Justice Stephen Breyer (a former member of the U.S. Sentencing Commission), announces what the first opinion means in practice.

In the second opinion, Breyer explains that the finding that the guidelines are unconstitutional actually leaves most of the statutory framework that defines the overall guideline system—the Sentencing Reform Act—intact. What the finding of unconstitutionality does require is that the provision of the SRA that made the guidelines mandatory be “severed and excised” from the SRA. The net effect is that instead of requiring that sentencing courts *impose* a guideline sentence (except in unusual circumstances), the SRA now requires that sentencing courts *consider* the applicable guideline sentence in deciding what sentence to impose. Sentences are still appealable, as in the pre-*Booker* era, but the SRA provision governing sentencing appeals is also “excised.” The new standard for appeals supplied by the Breyer majority is whether the sentence that has been imposed is “reasonable”—a standard we will consider a bit more below.

Are Organizations Affected?

Because *all* the debate and analysis leading up to the *Booker/Fanfan* decisions focused on the individual guidelines, an interesting question is: Do these rulings even apply to the organizational guidelines?

The answer is that while there may be room for a grain or two of doubt, practitioners should assume the *Booker/Fanfan* rulings do apply to the organizational guidelines. The linchpin of *Booker/Fanfan*'s reasoning is that the guidelines system deprives defendants of their right to a jury trial. In the 1908 case of *Armour Packing Co. v. United States*, the Supreme Court held that a criminally charged corporate defendant could be considered an “accused” under the Sixth Amendment. This old and seldom-analyzed case seems to indicate that the *Booker/Fanfan* analysis

would render the organizational guidelines unconstitutional, too.

Will Congress Intervene?

In recent years, Congress has played an increasingly active role in establishing sentencing policy, and the *Booker/Fanfan* rulings have created a ripe opportunity for Congress to intervene. Indeed, Breyer wrote for the court, “The ball now lies in Congress’ court . . . to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best”

The argument for congressional intervention is simple: The new rulings, by making the guidelines advisory, have reintroduced judicial discretion into the system and Congress should move to reduce this discretion, as it originally did in the SRA. Members of Congress have not been nearly as concerned about discretion used to impose high sentences, however. What has consistently motivated Congress to act in recent years is a desire to reduce discretion to ensure that sentences are not, in Congress’s eyes, too low. Congress’s historical exuberance for “mandatory minimums” and other “tough on crime” sentencing laws make it certain that there will be serious efforts to respond legislatively to the recent Supreme Court rulings.

On the other hand, sentencing experts agree that the task of “fixing” the guidelines system in the wake of *Booker/Fanfan*—at least doing so in an intelligent, reasoned manner—is not so simple. On Feb. 10 at a hearing before the House of Representatives subcommittee with oversight of the guidelines, these two competing values—go slow to get it right versus act promptly to prevent lenient decisions by “soft” judges—were on display as members and witnesses debated the issues.

A key player to watch in predicting what Congress will do is the Department of Justice. What DOJ advocates is likely to prevail. At the hearing, the assistant attorney general for the criminal division testified that Congress should act to reduce discretion but stopped short of endorsing a particular plan, perhaps because the brand new attorney general, Alberto Gonzales, had not had time to review possible recommendations. A former DOJ official, however, endorsed immediate adoption of a so-called “topless guideline” plan that would allow sentences to be unbounded above existing guideline ranges up to current

statutory maxima—in effect removing the top of all current ranges—but make the bottom of current guideline ranges a mandatory floor. The constitutional reasoning in support of this idea is complex; its political appeal in ensuring “tough” sentences is clear. As a result, this proposal may well advance in the House.

Indications in the Senate, however, are that Senators may want to wait some months to see how the current, Supreme Court-created system of advisory guidelines and appeals based on whether a sentence is “reasonable” actually works. Business groups such as the Chamber of Commerce, as well as the Ethics Officers Association, have sided with the go-slow-and-get-it-right philosophy.

A middle ground Congress might well adopt in the short-term would be to pass legislation targeting specific concerns, such as whether the *Booker/Fanfan* standard for sentence appeals is too vague. DOJ indicated in its House testimony that it thinks an appellate review standard that ties “reasonableness” to how closely the sentence follows the guideline range is desirable. In other words, a sentence that deviates from the guidelines would, on appeal, carry a presumption of not being reasonable.

So What Is the Bottom Line?

For a host of reasons, companies should act as though the organizational guidelines—and specifically the criteria for “an effective compliance and ethics program”—are in full force. Here is why.

First, despite the “tough on crime” cries for congressional action, the system in the wake of *Booker/Fanfan* is not all that different from the old “mandatory” guideline system. Courts will still have to compute guideline ranges, and sentences will be appealable. How appellate courts will interpret the “reasonableness” standard is not clear, but it is clear that the prescribed guideline sentence will be a key reference point in making that determination. Corporate cases will go on being largely resolved by plea bargains and, just as it has been, the facts and sentences agreed to by the parties are unlikely to be questioned by judges who must approve them.

Second, judges have little incentive not to follow the organizational guidelines. Unlike the individual guidelines, which have been controversial, the organizational guidelines have gained wide acceptance. Their

compliance/ethics program standards are widely followed by companies and other enforcement schemes (e.g., Health and Human Services, Office of Inspector General guidances). Corporate cases are already complicated enough. Federal judges will not be inclined to complicate them further searching for new standards to apply. Moreover, early data since *Booker/Fanfan* show that judges are overwhelmingly still imposing sentences within the prescribed guideline range even in the case of *individuals*.

Third, DOJ is taking the position in all federal criminal cases that the guidelines should be applied by the sentencing judge. This will have an impact since a judge's deviation from the guidelines may invite a DOJ appeal asserting the sentence is not reasonable. U.S. Attorney Mary Beth Buchanan, one of the leading experts on the organizational guidelines among U.S. attorneys and the director of the Executive Office of U.S. Attorneys, has advised me that this approach will be taken just as much in

corporate cases as in individual cases. Relatedly, and importantly, DOJ has been applying the guidelines compliance/ethics program standards in making decisions under the "Thompson Memo" on whether to charge companies with crimes when prosecutors have discretion to do so.

Finally, if Congress does act, it will almost certainly be to strengthen the guidelines by lessening the ability of judges to depart from them.