

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

■
F. Joseph Warin is a Partner and Litigation Chair in the Washington, D.C. office of Gibson, Dunn & Crutcher LLP. **David P. Burns** is Of Counsel and **John W.F. Chesley** is an Associate with the Firm. Warin and Burns are both former Assistant U.S. Attorneys.

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.

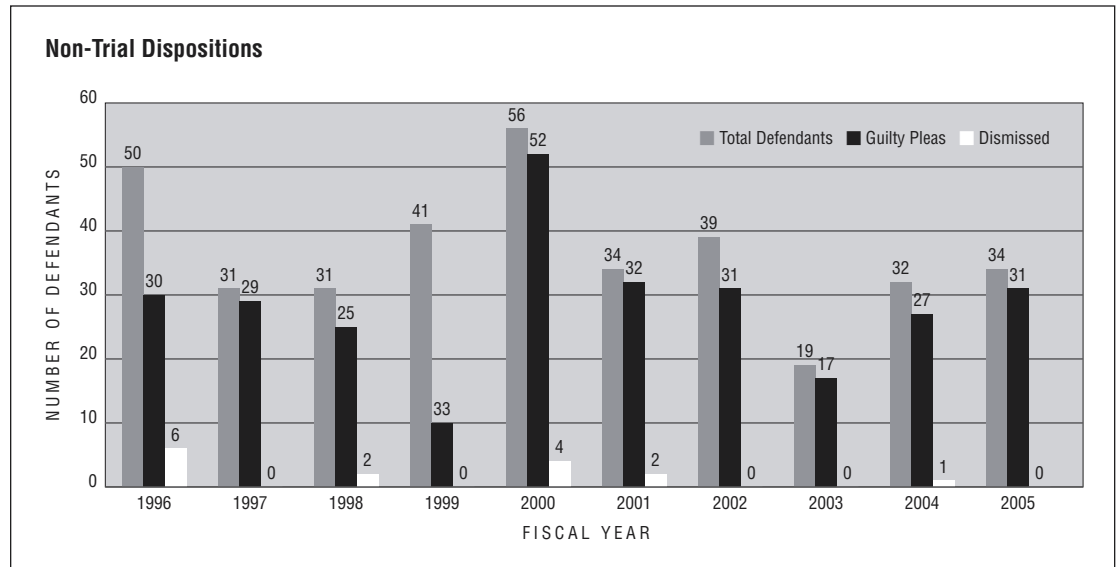
² Because the focus of this article is on the unique pitfalls inherent in putting together a successful criminal antitrust prosecution, the statistics discussed in this article reflect only those cases brought by the DOJ under the Sherman Act, 15 U.S.C. § 1 et seq. It should be noted, however, that the 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

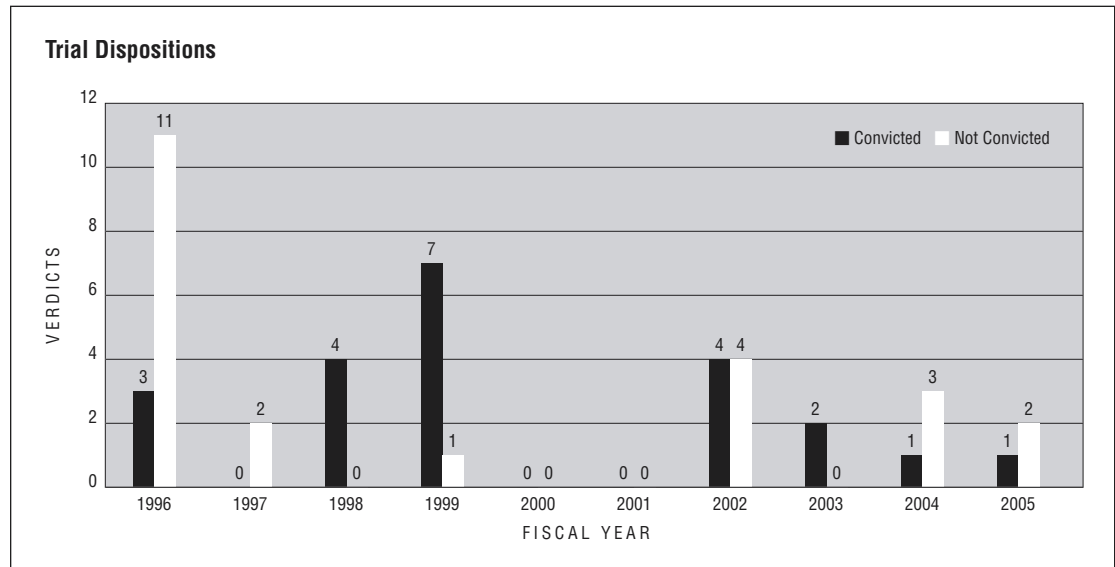
Of the 45 brazen enough to roll the dice with 12 of their respective peers, 23 were “not convicted” of any of the charges for which they were on trial, for a modest conviction rate of just 49 percent.



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.”).