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WHITE-COLLAR LAW

The 6th Amendment Flexes Its Muscles: *Change May Be Coming to Corporations' Fed. Sentencing*

BY PETER D. HARDY AND ABRAHAM REIN
Special to the Legal

The Supreme Court is poised to issue an opinion that — if the defewnse prevails — could significantly alter the landscape surrounding the prosecution and sentencing of corporations. On March 19, the court heard arguments in *Southern Union Co. v. United States*, No. 11-94, which addresses whether a sentencing judge, rather than a jury, may make factual determinations that result in a criminal fine being increased beyond the statutory fine maximum justified by the jury's verdict alone.

The case turns on whether the Supreme Court's landmark holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) — which found that, under the Sixth Amendment to the Constitution, "any fact [other than a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" — should apply to criminal fines just as it does to imprisonment.

THE CURRENT CRIMINAL FINE REGIME

Even though the specific environmental crime statute at issue in *Southern Union* is rarely employed, the broader implications of the case are great. Under the federal statute setting the general "default" amounts for criminal fines, 18 U.S.C. 3571, the sentencing court in a case involving a pecuniary loss or gain may impose a fine equal to an amount of twice the gross gain to the defendant or gross loss to the victim, under the "alternative" fine provision of Section 3571(d). This alternative fine provision applies even if the specific offense statute explicitly provides for a lower maximum fine, but does not expressly exempt itself from Section 3571's regime — as the vast majority of statutes do not.

The alternative fine provision clearly can produce enormous criminal fines on the basis of a single conviction. Although Section 3571(d) can apply to any type of case, the government has employed this powerful tool with particular effect when prosecuting corporations, for which a criminal fine by necessity is the primary and sometimes only vehicle of punishment. Moreover, and as a practical matter, corporations are often more capable than individuals of creating large losses or gains through their alleged offenses, and also are often more capable of paying the significant fines that can result.

HARDY

REIN

PETER D. HARDY *(phardy@postschell.com)* and **ABRAHAM REIN** *(arein@postschell.com) are attorneys in the Philadelphia office of the law firm of Post & Schell, and are part of the firm's white-collar defense, internal investigations and corporate compliance practice, as well as its data protection group.*

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Although most criminal convictions result from guilty pleas, and many corporate guilty pleas set forth stipulated loss and fine amounts, courts currently use Section 3571(d) to establish a contested criminal fine — or a fine when the court rejects the parties' stipulation — based upon the court's own calculation of the gain or loss, independent of any fact-finding from a jury. Perhaps more importantly, the very existence of Section 3571(d) shapes the negotiating positions of the parties during the investigation or pretrial stage, and puts pressure on defendants to not only plead but also agree to a substantial fine.

However, if the Supreme Court decides *Southern Union* in favor of the defendant company, the ability of the government to insist upon or obtain enormous criminal fines will be curbed. If *Apprendi* indeed applies to criminal fines, then the facts supporting higher, "alternative" fines must be proven to a jury beyond a reasonable doubt, presumably with the jury's specific findings reflected on a special verdict form, or be admitted by the defendant. Another option, again less favorable to the government than the current regime, would be to charge and convict a defendant at trial of sufficiently numerous offenses so that the general maximum fine amounts for each conviction can be "stacked" at sentencing in order to allow for the imposition of a larger total fine.

Thus, if the government wanted to extract a $100 million fine from a defendant, it would have to either: 1) convince the defendant to agree to specific facts that would justify such a sum; 2) charge and prove beyond a reasonable doubt, as reflected on a special verdict form, that the defendant created at least $50 million losses or gains from the offense; or 3) charge and convict the defendant at trial, for example, of at least 200 felony offenses that each carry a maximum fine of $500,000 (the default maximum fine amount for corporations). By contrast, under the current regime, a $100 million fine can be obtained by convincing a sentencing judge by a preponderance of the evidence that the offense created at least $50 million in losses or gains.

All of these scenarios present new legal and logistical challenges for the government. The prospect of having to prove specific losses beyond a reasonable doubt to a jury in difficult cases involving technical issues is precisely one of the outcomes feared by the government after the decision in *Apprendi* and before the decision in *United States v. Booker, 543 U.S. 220 (2005)*, which rendered the once-mandatory U.S. Sentencing Guidelines "advisory," and therefore subject to judicial fact-finding under a preponderance of the evidence standard. Although a defense victory in the *Southern Union* case is unlikely to produce a sea-change in the number of companies willing to go to trial in federal criminal cases, a defense victory almost surely will reduce the criminal fine amounts appearing in some plea agreements, in light of the alteration in the parties' respective bargaining positions.

A PUNISHMENT OF $6 MILLION OR MORE VERSUS $50,000 OR LESS

The facts and the procedure of the *Southern Union* case itself illustrate the clear practical significance of the question of whether *Apprendi* applies to fines. According to the opinion by the U.S. Court of Appeals for the First Circuit in *Southern Union*, 630 F.3d 17 (1st Cir. 2010), the defendant company had stored toxic mercury without a state permit in a poorly maintained building. Three people broke into the building, found the mercury, and spilled portions of it in the building and around the neighborhood. The investigation into the break-in led to the company being charged with criminal violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(d), based on the alleged storage of hazardous waste without a permit. In addition to a prison term, violating the RCRA by knowingly storing hazardous waste without a permit can result in a fine of up to $50,000 "for each day of violation."

After a four-week trial, the jury returned a guilty verdict on a single RCRA count. The jury was not asked how many days it found that *Southern Union* violated the law. Thus, the guilty verdict could demonstrate conclusively only that the jury had found a RCRA violation for at least one day.

The district court found that it could impose a fine of $50,000 for each of the 762 days of illegal storage alleged in the indictment — producing a total potential fine exposure of $38.1 million. (See 643 F. Supp. 2d 201 (D.R.I. 2009).) The district court sentenced the company to pay a $6 million fine and a $12 million, ill-defined "community service obligation." The district court rejected the argument that, under *Apprendi,* the fine could not exceed $50,000, the statutory maximum for a single day's violation.

The company appealed and argued that, by finding that the violation had continued for the entire period referenced in the indictment, the sentencing court had engaged in judicial fact-finding that resulted in an increased statutory maximum, the very conduct prohibited by *Apprendi*. The First Circuit, however, held that the *Apprendi* principle does not apply in the context of fines and affirmed. In order to reach this conclusion, the First Circuit split with the Second and Seventh circuits, both of which have held that *Apprendi* does apply to and limit the imposition of criminal fines. (See *United States v. Pfaff*, 619 F.3d 172 (2d Cir. 2010); *United States v. LaGrou Distribution Sys.*, 466 F.3d 585 (7th Cir. 2006).)

THE SUPREME COURT TAKES UP THE DISPUTE

Arguing the case before the Supreme Court on March 12, the government made three main arguments. First, the concerns implicated by fines differ from those implicated by imprisonment, and do not merit the same protection. Second, the *Apprendi* decision arose out of a historical analysis of the sentencing judge's role in imposing incarceration, and a similar analysis reflected that a judge traditionally received essentially unfettered discretion in setting fines. Third, the court's prior language in *Oregon v. Ice*, 555 U.S. 160 (2009), suggested that the *Apprendi* doctrine should not apply to fines.

The government stressed that the *Ice* opinion — which limited *Apprendi's* application and held that judges could find the facts necessary to impose consecutive, rather than concurrent, sentences for multiple convictions — stated that "trial judges often find facts about the nature of the offense or the character of the defendant in determining, for example ... the imposition of statutorily prescribed fines and orders of restitution."

"Intruding *Apprendi's* rule into these decisions on sentencing choices or accoutrements," the *Ice* court continued, "surely would cut the rule loose from its moorings."

Southern Union countered that the language cited from *Ice* was both dictum and misinterpreted by the government. Further, the company urged that the plain language of *Apprendi's* holding — that any fact other than a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" — does not allow any meaningful distinction between fines and imprisonment. Finally, Southern Union argued that the history of the drafting of the Fifth and Sixth amendments revealed that judges did not traditionally receive unfettered discretion in setting fines when the maximum fine was limited by statute.

As always, making predictions about votes is a precarious business. Four of the justices on the current court were not involved in the *Apprendi* decision, and two were not involved in the *Ice* decision. The justices' questioning at oral argument was mixed. Justice Antonin Scalia was openly, and perhaps not surprisingly, hostile to the government's claim that *Apprendi's* plain language and historical analysis should not apply in the context of fines. On the other hand, Justice Stephen Breyer, who dissented in *Apprendi* and has remained wary of expanding its reach, expressed his opinion that the majority got its historical analysis wrong in *Apprendi* and that, similarly, Southern Union had the wrong side of the historical argument. Justice Sonia Sotomayor, a potential swing vote, stated that the history was "ambiguous" and pressed the government to explain why fines are different from imprisonment under *Apprendi*.

Interestingly, Justice Ruth Bader Ginsburg, who was in the majority in *Apprendi* but who authored the *Ice* opinion containing the dictum on which the government relied, expressed doubt about the government's interpretation of *Ice's* key passage: "I think [*Ice's* suggestion that *Apprendi* may not apply to 'the imposition of statutorily prescribed fines'] was a fleeting reference to fines and it could have meant that the judge has discretion to set fines up to the maximum in the statute. That's one possible meaning."

Perhaps foreshadowing some of the changes that will occur if *Apprendi* is held to apply to fines, Breyer expressed concern regarding the practical implications of a decision in favor of the defense: If a jury must make complex mathematical determinations regarding the amount of gain or loss beyond a reasonable doubt, rather than trained jurists making such determinations by a preponderance of the evidence, will trials get bogged down in litigation over technical facts? Company counsel responded that "the jury trial right doesn't necessarily make for the most efficient criminal proceeding." That is, a Sixth Amendment right cannot succumb to administrative convenience. Whether the Sixth Amendment is construed so as to demand that *Apprendi* applies to fines soon will be revealed. •