

White Collar Defense and Investigations Client Alert

Supreme Court Rules in Southern Union v. United States that Jury Must Find Facts That Increase Maximum Fines in Criminal Cases

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In a 6-3 opinion by Justice Sonia Sotomayor, the Supreme Court held yesterday that the *Apprendi* rule extends to facts that increase the maximum fines in criminal cases. *Apprendi* held that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum,” other than a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In so ruling, the Court rejected the government’s argument that *Apprendi* does not apply to criminal fines because they do not implicate *Apprendi*’s “core concerns,” namely the deprivation of life and liberty.

The Court held that there is “no principled basis” for treating criminal fines differently than other criminal punishments, and emphasized that *Apprendi*’s “core concern” is more basic — to “reserve to the jury the determination of facts that warrant punishment for a specific statutory offense.” That principle, the Court held, “applies in full” whenever a criminal fine is “substantial enough to trigger” the Sixth Amendment’s jury trial guarantee. Applying that principle, the Court reversed a decision by the First Circuit that upheld the imposition of an \$18 million penalty against the Southern Union Company which was determined, in part, on the basis of factual findings by a district judge, not a jury, that increased the maximum fine amount.

Factual Background

In *Southern Union*, the defendant was convicted after a jury trial of having knowingly stored liquid mercury without a permit in violation of the Resource Conservation and Recovery Act (“RCRA”). Violations of RCRA are punishable by fines of up to \$50,000 per day of violation. At sentencing, the probation office calculated a maximum fine of \$38.1 million, based on its conclusion that Southern Union illegally stored mercury from September 19, 2002, through October 19, 2004. Southern Union objected that the maximum fine should be \$50,000, as the jury had not made any findings as to the duration of the RCRA violation, although it necessarily found in returning a guilty verdict that Southern Union violated the law for at least one day. The district court rejected this argument and imposed a fine of \$6 million and a “community service obligation” of \$12 million.

Analysis

In *Apprendi*, the Supreme Court held that any fact, other than the fact of 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. Over the past 12 years, *Apprendi* and its progeny have been applied in numerous cases where the

punishment at issue was imprisonment or death. The question before the Court in *Southern Union* was whether *Apprendi* also applies to the imposition of criminal fines. In a 6-3 opinion, the Court held that it does.

The key to the Court's conclusion in *Southern Union* rests in the "significance of the fine from the perspective of the Sixth Amendment's jury trial guarantee." The government argued that fines categorically do not implicate the "primary concerns" of *Apprendi* because fines are "less onerous than incarceration and the death sentence." The Court disagreed, observing, "not all fines are insubstantial, and not all offenses punishable by fines are petty." It noted that only serious or "significant" fines trigger the right to trial by jury. But when that right is triggered, the Sixth Amendment, as construed by *Apprendi*, "applies in full." Thus, the Court held, in cases involving criminal fines, as in others, judges cannot, through their own fact finding, "enlarge the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow."

The Supreme Court found that in *Southern Union*'s case, the district court did just that. The Court noted that the trial court "made factual findings that increased both the 'potential and

actual' fine" that the court imposed, which is "exactly what *Apprendi* guards against." The Court acknowledged that, under its precedents, "the scope of the constitutional jury right must be informed by the historical role of the jury at common law." But, the Court noted, while judges historically have had ample discretion to set fines *within* a statutory range, they have not had free rein to determine facts that govern a fine's maximum amount. Such fact-finding, the Court held, must be reserved for the jury.

Conclusion

Southern Union represents a significant victory for criminal defendants. Moreover, unlike many of the Court's criminal cases, it is highly relevant to corporate defendants, for which fines are the most common criminal penalty. Although few corporations charged with crimes go to trial, and therefore few will face a situation in which a jury will make findings relevant to sentencing, the Court's holding in *Southern Union* likely will diminish the government's leverage in negotiating plea bargains. It remains to be seen whether criminal fines, which have reached record levels in some areas in recent years, will become more moderate in the future.

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