

If you have questions or would like additional information on the material covered in this Alert, please contact one of the authors:

Efrem M. Grail

Partner, Pittsburgh
+1 412 288 4586
egrail@reedsmith.com

Kyle R. Bahr

Associate, Pittsburgh
+1 412 288 4219
kbahr@reedsmith.com

...or the Reed Smith lawyer with whom you regularly work.

Supreme Court Rules That Juries – Not Judges – Must Determine Facts Supporting Large Criminal Fines

Criminal fines in white collar, antitrust, environmental, health care, and other cases can balloon into the millions – or even hundreds of millions – of dollars if certain facts are found. An individual or corporation convicted of violating a federal fraud statute, for example, can be fined twice the gross financial gain or loss from the offense under the Alternative Fines Act, 18 U.S.C. § 3571(d), but only if the government presents convincing facts supporting that higher amount. In confronting the question of who – a judge or a jury – should ultimately determine the existence of such aggravating facts, the U.S. Supreme Court recently came down on the side of defendants in these high-stakes actions.

In *Southern Union Co. v. United States*, 567 U.S. ___, 2012 WL 2344465 (June 21, 2012), the Court held by a 6-3 vote that any fact a District Court uses to increase a criminal fine beyond the statutory maximum¹ must be found by a jury beyond a reasonable doubt, rather than by a judge applying the preponderance-of-the-evidence standard at sentencing. This means that before special criminal fines, like the Alternative Fines Act's "twice the gross gain or ... loss" provision, can be imposed, the government must present evidence to a jury on just how much was gained or lost.

The ruling extends to the context of criminal fines the holding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in which the Court found that the Sixth Amendment requires juries to determine any fact, other than the fact of a prior conviction, that could increase a criminal defendant's maximum prison sentence. The *Southern Union* majority saw "no principled basis under *Apprendi* for treating criminal fines differently," because like long prison sentences, large criminal fines "are penalties inflicted by the sovereign for the commission of offenses."

In *Southern Union*, a jury's verdict found that the Resource Conservation and Recovery Act of 1976 ("RCRA"), a federal criminal environmental statute, had been violated. The RCRA provides that violations are punishable by a criminal fine "of not more than \$50,000 for each day of the violation." Importantly, the jury's verdict form stated that the violation had occurred "on or about" a range of dates, parroting the language of the indictment. At sentencing, the defense argued that it was subject to just one day's worth of criminal fines under the RCRA – a maximum of \$50,000 – because the jury verdict form's vague "on or about" language did not definitively establish a violation of more than one day. The probation office, however, recommended a \$38.1 million maximum fine, based on the indictment's alleged violation spanning 762 days. The District Court concluded that the jury had found a 762-day violation, and imposed a \$6 million criminal fine and a \$12 million community service obligation. The First Circuit affirmed the sentence, finding that *Apprendi* did not apply to criminal fines.

The Supreme Court reversed and remanded. In an opinion by Justice Sotomayor, the majority found that the jury verdict form did not support the fine imposed, and that the District Court had made factual findings increasing the criminal fine beyond the RCRA's statutory maximum. This, wrote the Court, was "exactly what *Apprendi* guards against: judicial factfinding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow." Dusting off the history books, the majority explained that since colonial times, the American jury has been "a bulwark between the State and the accused at the trial for an alleged offense," with the jury tasked with the "determination of facts that warrant punishment for a specific statutory offense." Recognizing that a fine's amount is often calculated by reference to particular facts – such as the duration of the offense, the amount of the gain or loss, or some other factor – the Court found that the *Apprendi* rule "requir[es] juries to find beyond a reasonable doubt facts that determine the fine's maximum amount."

The Court, however, set a floor to this Sixth Amendment right, stating that *Apprendi* is not triggered "[w]here a fine is so insubstantial that the underlying offense is considered 'petty.'" The majority tasked the lower courts with determining the contours of a "substantial" criminal fine, but hinted that the analysis should include comparing the fine against the defendant's means: the Court contrasted a \$10,000 fine against a labor union with a \$400 million fine imposed on a company under the Alternative Fines Act for an antitrust violation. Only the latter, said the Court, was "substantial." For individuals, the majority recognized that "a large fine may engender a significant infringement of personal freedom," akin to a prison sentence, which would elevate the offense beyond the realm of the "petty." The Court also observed that where no maximum fine is prescribed by statute, no *Apprendi* violation could occur, and thus *Southern Union* would not apply.

The dissenting opinion, written by Justice Breyer and joined by Justices Kennedy and Alito, disagreed with the majority's interpretation of history, arguing that judges have long determined "sentencing facts," defined as "facts that are not elements of the crime but are relevant only to the amount of the fine the judge will impose." Justice Breyer had previously expressed the same historical viewpoint in his dissents to *Apprendi* and its other progeny.

The Court's ruling in *Southern Union* imposes a greater burden on the government in obtaining larger fines in criminal cases. This will impact not only sentencing – where judicial discretion in imposing substantial fines is now curtailed – but all stages of high-stakes criminal cases as well. Criminal investigations will emphasize the gathering of evidence that conclusively establishes the duration and amount of an offense. In turn, disclosures under *Brady v. Maryland* – in which the government provides exonerating evidence to the criminal defendant regarding guilt or punishment – will include materials exposing infirmities in the government's proof. In plea bargain negotiations, defendants will attempt to leverage gaps in the government's evidence for more favorable agreements on fine amounts. And criminal trials will feature new jury instructions and increased requests that juries complete special verdict forms on facts that could enhance a criminal fine.

The *Southern Union* case also opens questions about *Apprendi's* application in two areas closely related to criminal fines: restitution and forfeiture. Furthermore, the Court might one day address whether *Southern Union* applies to the substantial civil penalties – which are nevertheless punitive in nature – sought by the SEC, EPA, and other regulatory agencies in civil enforcement actions.

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1. Under 18 U.S.C. § 3571, for instance, all major federal crimes carry a maximum fine of \$250,000 for individual defendants and \$500,000 for organizational defendants, unless otherwise provided.