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UPDATE

In the Wake of the Supreme Court's Ruling, What's Next for *Southern Union*?

BY DAVID DEBOLD AND MATTHEW BENJAMIN

In an article published in the Sept. 26 issue of *Criminal Law Reporter*, we outlined the implications of the U.S. Supreme Court's decision in *Southern Union Co. v. United States*.[1] See David Debold and Matthew Benjamin, *A Demise Greatly Exaggerated—Apprendi Is Extended to Criminal Fines*.[2] The court in *Southern Union* extended the Sixth Amendment's jury-trial guarantee, as interpreted in *Apprendi v. New Jersey*,[3] to the imposition of criminal fines. It held that any fact increasing a defendant's maximum authorized fine must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt.

The proceedings on remand in *Southern Union* give us the opportunity not only to correct a small error in our article but also to update readers on the ways in which that case could have lasting implications for federal criminal practitioners. On remand, U.S. District Judge William E. Smith of the District of Rhode Island will be dealing with at least three weighty issues raised by the Supreme Court's ruling.

First, the district court will consider whether to empanel a new jury to determine the duration of Southern Union's statutory violation. The government had previously conceded, and the First Circuit agreed, that the jury's verdict established only a single day of violation, which by statute authorizes a maximum fine of $50,000. The government is now seeking to empanel a new jury for sentencing purposes, but the defendant objects on the ground that it would violate the Double Jeopardy Clause of the Fifth Amendment. Although this legal issue is interesting, it presumably is unlikely to recur now that the government knows the consequences of not obtaining sentencing-related findings from the jury that determines guilt or innocence.

Second, and more important, the district court must determine whether it has the power to order Southern Union to pay a ''community service obligation'' in an amount that exceeds the statutory maximum fine. Our article reported that the district court had imposed a fine of $38.1 million—the maximum for the 762 days of violation alleged by the government. In fact, the district court found that the maximum authorized fine was

[1] 132 S. Ct. 2344, 91 CrL 415 (U.S. 2012).

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[2] 91 CrL 797.

[3] 530 U.S. 466, 67 CrL 459 (2000).

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$38.1 million, but it actually imposed a fine of $6 million and a ''community service obligation'' of $12 million. If the maximum fine on remand is $50,000 (for a single-day violation) or even some greater amount (as discussed below), a $12 million ''community service obligation'' would exceed it. Thus, the district court must determine whether that monetary component of the sentence—even though not imposed as a *fine*—is within, or instead beyond, the reach of *Apprendi* and *Southern Union*. In *United States v. Citgo Petroleum Corp.*,[4] for example, U.S. District Judge John Rainey recently held that a community service obligation *is* subject to *Apprendi* and *Southern Union* and thus may not exceed the maximum amount authorized for a fine. We expect this question to arise even when the government seeks more traditional ''work in community service''—not a direct payment to a third party—because defendants are likely to object if the cost of carrying out that service, when monetized, would exceed the statutory maximum for a fine.

Third, the district court will need to consider whether Southern Union may be sentenced under the alternative fine statute, 18 U.S.C. § 3571(c), to a maximum fine of $500,000 without any additional jury factfinding. As we noted, the relevant maximum authorized fine was initially calculated according to the duration of the company's violation; Resource Conservation and Recovery Act violations are punishable by ''a fine of not more than $50,000 for each day of violation.'' The question is whether Section 3571(c) may apply to a RCRA violation, which, theoretically, may last indefinitely and thus potentially exceed $500,000.

One final development of note since we finalized our article is the sentencing in *United States v. AU Optronics Corp.*[5] In that case in the Northern District of California, the Justice Department secured several high-profile price-fixing convictions and proved to the jury, beyond a reasonable doubt, that the defendants' gain derived from their anti-competitive conduct exceeded $500 million. We noted this case as an instance in which the government had satisfied the Sixth Amendment's requirement of a jury finding—three months before the Supreme Court's holding in *Southern Union* that it must do so. Under the applicable alternative-fine provision, 18 U.S.C. § 3571(d), the jury's factual determination authorized a potential maximum fine of twice the gain derived from the offense, or $1 billion. U.S. District Judge Susan Illston has sentenced the company to pay $500 million—less than the government requested, but still equal to the highest criminal fine ever paid by a company, the Swiss pharmaceutical company F. Hoffmann-La Roche Ltd.

[4] 2012 U.S. Dist. LEXIS 133103, at *13-14 (S.D. Tex. Sept. 18, 2012).

[5] No. 3:09-cr-00110 (N.D. Cal., sentencing Sept. 20, 2012).

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