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**SENTENCING****UPDATE****The Best to Be Done in a Bad Situation: *Southern Union* on Remand**

BY DAVID DEBOLD AND MATTHEW BENJAMIN

In September 2004, a group of children broke into a brick building in Rhode Island and spilled mercury that Southern Union Co. had unlawfully stored on the premises. More than nine years later, on Nov. 5, U.S. District Judge William E. Smith sentenced Southern Union to a community service obligation of \$500,000 for this violation of the Resources Conservation and Recovery Act (RCRA). That lengthy delay was

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due, in part, to a detour to the U.S. Supreme Court, where a majority of justices ruled that the Sixth Amendment's jury-trial guarantee extends to criminal fines. The resulting resentencing of Southern Union on Nov. 5 likely brings to a close this important case, but some of the issues with which Judge Smith wrestled are likely to endure.

As we previewed one year ago, the resentencing proceedings on remand raised several important questions about the impact of the Supreme Court's ruling. See David Debolt and Matthew Benjamin, "In the Wake of the Supreme Court's Ruling, What's Next for Southern Union?" (92 CrL 141, 10/31/12) Judge Smith's answers to those questions, set forth in an extensive memorandum, reinforce the import of the Supreme Court's ruling and seek to prevent a government end-run around the application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to corporate prosecutions.

**A Brief Review**

Southern Union was convicted after being charged with unlawfully storing hazardous waste "from on or about September 19, 2002 until on or about October 19, 2004"—a period of 762 days. Neither party requested a special interrogatory or revised verdict form to determine the precise duration of the violation. Because RCRA violations are punishable by "a fine of not more than \$50,000 for each day of violation," the probation office calculated a maximum fine of \$38.1 million: \$50,000 for each day of the 762-day period alleged in the indictment and mentioned on the verdict form.

Southern Union objected, arguing that the jury had not necessarily determined the number of days of violation and that the verdict thus authorized a maximum fine of only \$50,000, a single-day penalty; imposition of any fine greater than \$50,000 would, in Southern Union's view, have required impermissible judicial fact-finding in violation of *Apprendi*. The government agreed with Southern Union that the jury had not determined the precise duration of the violation, but it de-

fended the categorical position that *Apprendi* is inapplicable to criminal fines; thus, the sentencing judge could find the number of days of violation and impose a fine up to \$38.1 million.

At the initial sentencing, Judge Smith agreed with Southern Union that *Apprendi* likely applied to the imposition of criminal fines, but he parted company with the parties in deeming the verdict form specific enough to contain a jury finding of proof beyond a reasonable doubt that Southern Union violated the statute for 762 days. Having concluded that the jury's verdict alone authorized a maximum fine of \$38.1 million, Judge Smith then imposed a fine of \$6 million and a "community service obligation" of \$12 million. Of the community service obligation, \$11 million was to endow a fund that would be managed by the Rhode Island Foundation "for grants in the field of environmental education, environmental remediation, conservation and children's health issues related as much as possible to exposure to toxins, hazardous waste, and heavy metal hazardous waste"; the other \$1 million was to be allotted between the Rhode Island Chapter of the American Red Cross, the Rhode Island Department of Environmental Management Environmental Response Fund, Hasbro Children's Hospital, Distressed Communities Recreation and Acquisition Fund and the Pawtucket Fire Department.

On appeal, the U.S. Court of Appeals for the First Circuit concluded that the jury's verdict did not necessarily find more than a single-day violation, but it proceeded to affirm the sentence after holding that *Apprendi* did not apply to criminal fines at all. The Supreme Court granted certiorari and, for reasons we described in the Sept. 26, 2012, issue of *Criminal Law Reporter*, reversed: 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. See David Debolt and Matthew Benjamin, "A Demise Greatly Exaggerated—*Apprendi* Is Extended to Criminal Fines" (91 CrL 797, 9/26/12).

In July 2012, the First Circuit "vacate[d] the fine" imposed by the district court and remanded for resentencing consistent with the Supreme Court's opinion. Those proceedings on remand presented significant questions that will shape the contours of the constitutional right articulated in *Southern Union*.

## No Second Jury

Because the government had previously conceded (and the First Circuit had agreed) that the jury's verdict necessarily established only a single-day violation, the government asked the district court to empanel a new jury to determine the precise duration of Southern Union's crime. The government observed that state and federal courts have authorized the empanelment of juries on remand to remedy certain *Apprendi* errors. Southern Union strenuously objected, arguing that the government had waived its opportunity to request such a remedy on numerous occasions: first, during the charge conference, when it failed to request a special interrogatory or jury instruction that would have allowed the jury to determine the precise number of days of violation; and second, during post-verdict proceedings, when it specifically elected to seek only a \$500,000 alternative fine should the district court conclude that *Apprendi* applied to criminal fines. Southern Union also

argued that the empanelment of a new jury to determine the duration of violation would subject it to a second trial on the same elements and evidence considered by the first jury and, therefore, violate the Double Jeopardy Clause of the Fifth Amendment.

Judge Smith denied the government's request to empanel a new jury. The court noted that, at the time of the October 2008 jury charge, the government's "official position" was that *Apprendi* did, in fact, apply to criminal fines. Specifically, in a December 2005 brief submitted in consultation with the Office of the Solicitor General in *United States v. LaGrou Distribution Sys. Inc.*, 466 F.3d 585 (7th Cir. 2006), the government had conceded that "any fact increasing the maximum fine above the prescribed statutory maximum must be proven beyond a reasonable doubt."

Although the government reversed course after the Supreme Court's January 2009 decision in *Oregon v. Ice*, 555 U.S. 160 (2009), Judge Smith determined that at the time the jury was charged in *Southern Union*, the government had spoken "with one voice" in conceding that *Apprendi* applies to criminal fines; that concession effectively bound every U.S. Attorney's Office in the nation.\* Thus, by failing to request revised jury instructions or a special interrogatory with the knowledge that *Apprendi* applied to criminal fines, the government had intentionally waived its right to request a second jury finding on the precise duration of violation. Consideration of Southern Union's double jeopardy argument was unnecessary.

As we noted in our Oct. 31, 2012, article, this set of facts is unlikely to recur: The government now knows the consequences of failing to obtain jury findings regarding the facts on which fines are based. Judge Smith's resolution of this issue does, however, underscore the potentially dramatic consequences of the government's concession, in any particular case, of the applicability of a constitutional protection. Once the concession is made, knowledge of it can be imputed to all federal prosecutors.

## Community Service Obligation Subject to *Apprendi*

In *Southern Union*, the Supreme Court confirmed that a defendant's maximum authorized fine must be based solely on facts admitted by the defendant or found by a jury beyond a reasonable doubt. Given that the jury's verdict had necessarily authorized a maximum fine of only \$50,000, a single-day penalty, Judge Smith's fine of \$6 million was clearly invalid. But what of the \$12 million "community service obligation"? Was that other monetary component of the sentence—not imposed as a "fine" per se—also within the reach of *Apprendi* and *Southern Union*?

Once again, the parties vigorously disagreed. The government argued that the community service obliga-

\* During oral argument, the government conceded that it "speaks with one voice when it comes to making concessions. That certainly is the case. And a concession made by the Government in consultation with the solicitor general's office is one that the Government attorneys should be following nationwide." Dec. 12, 2012 Tr. (Doc. No. 169) at 6:22-7:7. As a "practical reality," Judge Smith suggested, the government "did not know of the position taken in *LaGrou*; and had it known that then, it would have probably asked for the interrogatory. I think that's all pretty clear." Id. at 39:9-39:13.

tion was imposed as a condition of Southern Union's probation under 18 U.S.C. § 3563(b), not under the \$50,000-per-day RCRA fine provision, and was, therefore, not subject to any statutory maximum. Rather, the community service obligation, as an uncapped term of probation, is "akin to restitution": ostensibly indeterminate, remedial in nature and payable not to the U.S. Treasury (like a fine) but to the public. Because no statutory maximum exists, according to the government, imposition of the \$12 million community service obligation would not require any impermissible judicial factfinding and would not violate *Apprendi*.

Southern Union reasonably characterized the government's position as an "end-run" around the Supreme Court's holding and the *Apprendi* rule. Relying on U.S. District Judge John Rainey's recent opinion in *United States v. Citgo Petroleum Corp.*, 2012 BL 245815, S.D. Tex., No. C-06-00563, 9/18/13, Southern Union argued that "under no circumstances can the total monetary penalty imposed exceed the maximum fine provided by Congress and supported by the jury's verdict." The company also suggested that the government's analogies to restitution were inapposite, given that the court had specifically stated that restitution was not "a factor at all in this case."

Once again, Judge Smith endorsed Southern Union's position, though this issue was a closer call. Describing the government's argument that probationary conditions are not subject to statutory maximums as "powerful" and his conclusion as "not free from doubt," Judge Smith ultimately deferred to the majority view in the case law that "the combination of the fine imposed under the statute setting forth the offense and any conditions of probation cannot exceed the statutory maximum penalty." Judge Smith noted that this approach is consistent with his initial sentencing, where he determined that the RCRA permitted a maximum authorized fine of \$38.1 million and then stated that he had no intention of imposing a penalty—including the community service obligation—that exceeded that amount. The court also rejected the government's attempt to characterize the \$12 million community service obligation as restitution, observing that "no victims suffered any loss as a result of Southern Union's crime" because the company had remediated any damage and conducted all necessary testing at its own expense.

The consequences of this holding are significant. By rejecting the government's Probation Statute end-run, Judge Smith reinforced Southern Union's central holding: Any fact increasing the defendant's maximum authorized penalty must be admitted by the defendant or found by a jury beyond a reasonable doubt. Though a sentencing court may impose discretionary conditions of probation under Section 3563(b), including the imposition of monetary penalties, Judge Smith's reasoning means that those conditions are effectively capped by the maximum authorized statutory penalty. A sentencing court may not use Section 3563(b) to impose a heavier financial responsibility than is authorized by the jury's verdict.

## Alternative Fine Statute Applies

Finally, Judge Smith determined that no additional factfinding was needed to authorize a maximum fine of \$500,000 under the alternative fine statute, 18 U.S.C. § 3571(c). Under Section 3571(c), an organization that has been convicted of a felony may be fined the greater of \$500,000 or the amount specified in the applicable criminal statute. Southern Union argued that the alternative fine statute was inapplicable because all RCRA violations, theoretically, may last indefinitely and the "aggregate maximum potential fine" under RCRA is, therefore, limitless. Judge Smith decisively rejected this argument, which was unsupported by any case law and inconsistent with the statute's plain language, which mentions not the maximum "potential" fine but the actual fine specified in any particular case. Because the jury's verdict could support a maximum RCRA fine of only \$50,000, Section 3571(c) authorized the greater statutory penalty of \$500,000.

## Bad Facts, Good Law

In conclusion, a noticeably frustrated Judge Smith described this outcome as "manifestly unsatisfactory and even unjust." Observing that Southern Union had committed its crime "for the bulk of a 762-day period," Judge Smith noted that a penalty of only \$500,000, for a company with more than \$9.9 billion in total assets, would not serve the twin statutory goals of adequate punishment and deterrence. Going forward, "a sentence comprised of primarily 'community service,' in that term's broadest connotation, is the best I can do in a bad situation to craft an appropriate sentence." Judge Smith invited the parties and the greater environmental community to suggest appropriate community service obligations that he could impose, the aggregate dollar value of which could not exceed \$500,000.

Both parties and numerous public policy organizations submitted such suggestions. For its part, Southern Union maintained that, as a result of "significant corporate changes since the date of conviction," imposition of the earlier probation conditions requiring a "corporate-wide environmental compliance plan and environmental audit would no longer be meaningful." The government disagreed, arguing that notwithstanding any corporate reorganization, the company's prior disregard "for the welfare of its own employees, the community, and public responders . . . should not be swept under the rug," and that an environmental audit still would be warranted. On Nov. 5, Judge Smith aligned with the government, imposing a community service obligation of \$500,000 and a two-year probation term requiring a comprehensive environmental audit. Specifically, Judge Smith directed Southern Union to make community service payments to the Department of Environmental Management of Rhode Island (\$375,000), the Clean Water Fund (\$100,000), and the City of Pawtucket (\$25,000).

Though the magnitude of the penalty imposed on Southern Union may be unsatisfactory to some given the company's misconduct, Judge Smith's principled holdings on remand will buttress the force of Southern Union's jury-trial guarantee at sentencing.