

High Court Makes Steep Criminal Fines Harder To Come By

By **Ian Thoms**

Law360, New York (June 21, 2012, 7:39 PM ET) -- The U.S. Supreme Court on Thursday made it more difficult for prosecutors to win big penalties against corporations and criminal defendants by establishing that its "Apprendi rule" and the Sixth Amendment require juries, not judges, to determine facts that enhance maximum criminal fines, experts say.

In a 6-3 decision, the high court overturned a First Circuit ruling that upheld an \$18 million fine against natural gas company Southern Union Co., which was convicted of a felony charge of illegally storing mercury in 2009.

According to the high court, the First Circuit had wrongly ruled that the Supreme Court's decision in *Apprendi v. New Jersey*, which held that nearly all facts used to increase a maximum punishment must be proven to a jury beyond a reasonable doubt, applied only to terms of imprisonment and the death penalty, and not to criminal fines.

"In stating Apprendi's rule, we have never distinguished one form of punishment from another," Justice Sonya Sotomayor wrote in the court's opinion. "Apprendi's 'core concern' is to reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense.' That concern applies whether the sentence is a criminal fine or imprisonment or death."

The Supreme Court's decision marks a significant victory for all criminal defendants and especially corporations, as they cannot go to prison and as such only fear expensive criminal fines, which just became harder for the government to get, attorneys said. Judges now have less discretion in determining sentences and prosecutors must prove at trial factors they believe should enhance criminal fines.

"It's a good day for corporate America and the Sixth Amendment," Carter G. Phillips of Sidley Austin LLP, who represents Southern Union, said. "Having the Sixth Amendment apply to criminal fines is hugely important for corporations because that's the method by which they're sentenced."

Under the Supreme Court's ruling, the government must include facts that could enhance a criminal fine, other than the fact of a prior conviction, in its charging documents and prove them beyond a reasonable doubt to juries during trials. The First Circuit, in breaking with the Second, Sixth and Seventh circuits, had said judges could determine facts used to raise criminal fines based on a preponderance of the evidence.

Under the high court's standard, the government will find it tougher to boost criminal fines, diminishing its hand in negotiating plea deals, attorneys said.

"Most companies will still settle, but they'll have more leverage when they sit down to negotiate," said Paul F. Enzina of Brown Rudnick LLP.

In its case against Southern Union, the government won a massive increase in the potential maximum fine for the company's crime — from \$50,000 to \$38.1 million — based on facts the defense argued the jury had never determined.

The district court sided with the government, finding the jury had more or less endorsed the government's contention that Southern Union had violated the Resource Conservation and Recovery Act for 762 straight days. The court imposed an \$18 million fine.

The First Circuit disagreed that the jury had accepted the government's contention — the government's indictment only said the company had illegally stored mercury from on or about Sept. 19, 2002, until on or about Oct. 19, 2004 — but the appeals court said that didn't matter. Because Apprendi didn't apply, the judge was within his discretion to determine based on the preponderance of the evidence that the company had violated the law for some 762 days and merited the stiffer penalty, the First Circuit found.

Supreme Court Justices Stephen G. Breyer, Anthony M. Kennedy and Samuel Alito Jr. agreed with the First Circuit finding.

"Where a criminal fine is at issue, I believe the Sixth Amendment permits a sentencing judge to determine sentencing facts — facts that are not elements of the crime but are relevant only to the amount of the fine the judge will impose," Breyer wrote in a dissenting opinion.

Breyer dissented, attorneys suspect, because he is a firm believer in the sentencing structure and guidelines that he helped set up in the 1970s and 1980s. In his dissent, he said the majority's decision would impede judges' ability to maintain fairness in the application of criminal penalties.

The Southern Union case, along with Apprendi and its progeny, did not split the Supreme Court justices along their traditional conservative and liberal lines. Staunch conservatives like Justices Clarence Thomas and Antonin Scalia joined their liberal colleagues like Justices Sotomayor and Elena Kagan in the majority, while Alito sided with the more liberal-leaning Breyer on the dissent, attorneys noted.

"This is a split that you see in this line of cases. It's not a typical left-right split," said Phillip C. Zane of Baker Donelson Bearman Caldwell & Berkowitz PC.

Before Thursday's decision, court watchers were interested to see whether the newer justices would maintain the split seen in Apprendi and similar cases — a split that mostly favored defendants and hinged on Justice Ruth Bader Ginsburg. Thursday's decision widened the divide in favor of defendants.

"You've now got a slight shift that favors the defendants," said Dan Himmelfarb of Mayer Brown LLP. "It looks like you can count on five votes in these cases and you don't have to count on Ginsberg."

--Editing by Elizabeth Bowen and Katherine Rautenberg.