

## Environmental Criminal Enforcement ADVISORY

June 25, 2012

### Supreme Court Opinion in *Southern Union* Changes Burden of Proof for Imposition of Criminal Fines

On Thursday, the Supreme Court issued its decision in the case *Southern Union Co. v. United States*, 567 U.S. \_\_ (2012), holding that the Sixth Amendment right to a jury trial requires juries—not judges—to decide the facts warranting a fine that exceeds a statutory maximum of any crime for which a defendant is convicted. This case has significant implications for corporations charged with white collar crimes, as many such crimes include statutory provisions similar to the one at issue in *Southern Union* that allowed for fines based “per day of violation.” The holding will also implicate fines imposed under the Alternative Fines Act (AFA), which allows fines above the statutory maximum in amounts equal to twice the economic gain or loss of the offense of conviction. 18 U.S.C. § 3571(d). Under either of these provisions, a corporation can be subject to millions—if not billions—of dollars in fines, even though the statute under which it was convicted may be capped at \$1 million or less.

Before Thursday’s Supreme Court ruling, prosecutors were free to ask courts to impose criminal fines above the statutory maximum without ever having to present the facts supporting the fine to a jury. Generally, as long as a sentencing court found that those facts existed by a preponderance of the evidence,<sup>1</sup> it could exceed the statutory maximum based on the AFA or other provisions. Now, however, the government will have to present the facts supporting the enhanced fine amounts to a jury, which must be convinced beyond a reasonable doubt before any enhanced fines can be imposed by a court. This heightened standard is likely to help level the playing field for corporate defendants, as the government will have a harder time threatening the specter of enhanced fines if its proof is lacking. The decision is also likely to increase the use of special verdict forms that will require juries to make specific findings of fact to support an enhanced fine.

#### Case Background and Procedural History

*Southern Union*, a First Circuit case from the District of Rhode Island, involves the illegal storage of mercury in violation of the Resource Conservation and Recovery Act (RCRA). A subsidiary of

---

<sup>1</sup> The U.S. Federal Sentencing Guidelines do not state the applicable standard of proof for a court to follow in determining factual issues under the Guidelines. Most circuits have held that the standard of proof is a preponderance of the evidence. However, if the fact may have an extreme impact on sentencing, the standard of proof may be higher. See, e.g., *United States v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990); *United States v. Jordan*, 256 F.3d 922, 937 (9th Cir. 2001).

Southern Union Company stored liquid mercury in its Pawtucket, Rhode Island, facility. In September 2004, children broke into the facility and spread the mercury around the facility and a neighboring apartment complex. Liquid mercury is a hazardous substance.

After conducting an investigation, a grand jury returned an indictment in 2007 against Southern Union, charging it with the illegal storage of hazardous waste at its Pawtucket facility. Unique to this prosecution was an over-two-year (762-day) timeframe for a single storage count. The pre-sentencing report stated that mercury was stored from September 19, 2002, to October 19, 2004, which, at a maximum criminal fine of \$50,000 per day, totaled over \$38 million.

A jury found Southern Union guilty on the one storage count. Notably, the jury verdict form on which the conviction was based did not require the jury to identify on which dates within the time frame the violation had occurred. The form listed the violation's alleged start day in approximate terms — "on or about" — and the jury was only required to agree that the illegal storage had taken place on at least one day within the time frame specified.

Although the jury verdict only represented an agreement that a single violation happened at some point during the date range, Southern Union was fined for multiple days of violation. District Court Judge William E. Smith imposed \$18 million in penalties — a \$6 million criminal fine and \$12 million in payments to community interests. In its appeal, Southern Union Co. argued that it should have only been fined \$50,000, not \$6 million, for a single incident of illegally storing mercury on its property — all the jury was required to find. Further, the company argued that any amount in excess of \$50,000 should have been put before the jury, which would require the government to present proof beyond a reasonable doubt as to each date the per-day violation provision applied. Although the U.S. Court of Appeals upheld the conviction and fines, the Supreme Court agreed that any facts warranting a fine in excess of \$50,000 should have been put before the jury.

In its petition for a writ of certiorari, Southern Union Co. contended that the criminal fine imposed ran afoul of the Sixth Amendment, as interpreted in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Specifically, it argued that "any fact," other than 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."

### **Supreme Court Decision**

In its opinion, written by Justice Sotomayor, the Court held that the rule of *Apprendi* — that the "Sixth Amendment reserves to juries the determination of any fact, other than the fact of prior conviction, that increases a criminal defendant's maximum potential sentence" above the statutorily prescribed limit — applies to sentences of criminal fines. 567 U.S. \_\_\_, 1. Although the Court had previously applied *Apprendi* to cases with punishments of imprisonment or death, the Court saw "no principled basis under *Apprendi* for treating criminal fines differently." *Id.* at 4. Now, according to the Court's decision, a judge may only sentence above the statutory maximum if the jury found the facts that warrant a fine in excess of the statutory maximum.

The *Southern Union* decision applies to more than just criminal fines involving per-day fines; it applies to all facts that may increase a fine above the statutory maximum. As the Court stated, the *Southern Union* fact pattern is merely “exemplary.” *Id.* at 7.

“Sometimes, as here, the fact is the duration of a statutory violation; under other statutes it is the amount of the defendant’s gain or the victim’s loss, or some other factor. *Id.* at 5.

Any fact that increases a defendant’s maximum criminal fine above the statutory limit must be found by the jury. *Id.* Going forward, corporations under investigation or charged with crimes that carry per-day violations or that are subject to the AFA will be wise to carefully scrutinize the evidence supporting the government’s fine demand. The government’s evidence on this issue is no longer subject to the lower preponderance of the evidence standard, but must now be supported by proof beyond a reasonable doubt and the government should be asked to account for this new standard.

If you would like to receive future *Environmental Criminal Enforcement Alerts* electronically, please forward your contact information, including e-mail address, to [EnvironmentalAdvisory@alston.com](mailto:EnvironmentalAdvisory@alston.com). Be sure to put “**subscribe**” in the subject line.

Alston & Bird’s Environmental Criminal Defense Team provides literal “coast to coast” coverage with attorneys in Atlanta, California, and Washington, D.C. Team members include a former assistant chief of the U.S. Department of Justice, Environmental Crimes Section; the former director of the California Department of Toxic Substances Control; and a former EPA deputy regional administrator (Region 4). The team has represented both companies and individuals in environmental criminal matters in more than 20 states.

## Environmental Criminal Defense Team

Douglas S. Arnold  
404.881.7637  
[doug.arnold@alston.com](mailto:doug.arnold@alston.com)

Ward L. Benshoof  
213.576.1108  
[ward.benshoof@alston.com](mailto:ward.benshoof@alston.com)

Meaghan Goodwin Boyd  
404.881.7245  
[meaghan.boyd@alston.com](mailto:meaghan.boyd@alston.com)

Charles W. Cohen  
805.230.2301  
[chuck.cohen@alston.com](mailto:chuck.cohen@alston.com)

Lee A. DeHihns, III  
404.881.7151  
[lee.dehnhns@alston.com](mailto:lee.dehnhns@alston.com)

Maureen F. Gorsen  
916.498.3305  
[maureen.gorsen@alston.com](mailto:maureen.gorsen@alston.com)

Megan K. Hey  
213.576.1043  
[megan.hey@alston.com](mailto:megan.hey@alston.com)

Peter A. Nyquist  
213.576.1142  
[pete.nyquist@alston.com](mailto:pete.nyquist@alston.com)

Elise N. Paeffgen  
202.239.3939  
[elise.paeffgen@alston.com](mailto:elise.paeffgen@alston.com)

Bruce Pasfield  
202.239.3585  
[bruce.pasfield@alston.com](mailto:bruce.pasfield@alston.com)

Jody Rhodes  
404.881.7956  
[jody.rhodes@alston.com](mailto:jody.rhodes@alston.com)

Sharon F. Rubalcava  
213.576.1105  
[sharon.rubalcava@alston.com](mailto:sharon.rubalcava@alston.com)

Beverlee E. Silva  
404.881.4625  
[beverlee.silva@alston.com](mailto:beverlee.silva@alston.com)

Jocelyn Thompson  
213.576.1104  
[jocelyn.thompson@alston.com](mailto:jocelyn.thompson@alston.com)

Kurt Weissmuller  
213.576.1003  
[kurt.weissmuller@alston.com](mailto:kurt.weissmuller@alston.com)

Jonathan E. Wells  
404.881.7472  
[jonathan.wells@alston.com](mailto:jonathan.wells@alston.com)

David M. (Max) Williamson  
202.239.3223  
[max.williamson@alston.com](mailto:max.williamson@alston.com)

### ATLANTA

One Atlantic Center  
1201 West Peachtree Street  
Atlanta, GA 30309-3424  
404.881.7000

### BRUSSELS

Level 20 Bastion Tower  
Place du Champ de Mars  
B-1050 Brussels, BE  
Phone: +32 2 550 3700

### CHARLOTTE

Bank of America Plaza  
Suite 4000  
101 South Tryon Street  
Charlotte, NC 28280-4000  
704.444.1000

### DALLAS

2828 N. Harwood St.  
Suite 1800  
Dallas, TX 75201  
214.922.3400

### LOS ANGELES

333 South Hope Street  
16th Floor  
Los Angeles, CA 90071-3004  
213.576.1000

### NEW YORK

90 Park Avenue  
New York, NY 10016-1387  
212.210.9400

### RESEARCH TRIANGLE

4721 Emperor Boulevard  
Suite 400  
Durham, NC 27703-8580  
919.862.2200

### SILICON VALLEY

275 Middlefield Road  
Suite 150  
Menlo Park, CA 94025-4004  
650.838.2000

### VENTURA COUNTY

Suite 215  
2801 Townsgate Road  
Westlake Village, CA 91361  
805.497.9474

### WASHINGTON, D.C.

The Atlantic Building  
950 F Street, NW  
Washington, DC 20004-1404  
202.239.3300

**[www.alston.com](http://www.alston.com)**

© Alston & Bird LLP 2012