

RCRA and the Sixth Amendment: Who decides the criminal fine—judge or jury?

BY DEBORAH K. TELLIER

Federal environmental enforcement is a hot topic in the U.S. Supreme Court this Term, with the Court taking up several significant cases including *Southern Union Co. v. United States*, No. 11-94. The case involves a seemingly mundane regulatory dispute between Southern Union and the U.S. Environmental Protection Agency (EPA) regarding EPA's enforcement of Resource Conservation and Recovery Act (RCRA) regulations in Rhode Island, a RCRA-authorized state. But the heart of the dispute is a constitutional one—whether the principles of the Fifth and Sixth Amendments established under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) apply to the imposition of criminal fines in this RCRA enforcement case. The fundamental question before the Court is who must decide on the imposition and amount of a criminal fine when a corporation is charged: the judge, using a preponderance of the evidence standard, or the jury, showing proof beyond a reasonable doubt?

In 2001, a natural gas utility subsidiary of Southern Union (the Company) proactively established a program to remove mercury-sealed gas regulators (MSRs) from customers' homes and replace them with mercury-free devices. Initially these MSRs were recycled by an environmental contractor, but later the Company stored the MSRs and other liquid mercury at an unused building in Pawtucket, Rhode Island, with a history of break-in attempts and vandalism. MSRs were stored in doubled plastic bags placed in plastic "kiddie pools" inside the building. Other liquid mercury was stored in various containers kept in an unmarked, locked cabinet.

In September 2004, vandals broke into the locked cabinet, found the mercury and spilled it in and around the building, and at a nearby apartment complex. Approximately 150 residents were evacuated for two months during the remediation. Southern Union incurred more than \$6 million in clean-up costs.

In 2007, the government pursued criminal sanctions against Southern Union for RCRA violations including illegal storage of hazardous waste without a permit. At trial, Southern Union vigorously argued that the recovered mercury was intended for recycling and thus was not a waste. The jury nonetheless convicted Southern Union of violating RCRA by storing hazardous waste (mercury) without a permit. The district court judge, soliciting no input from the jury on the specific number of days the Company was in violation, made a formulaic calculation of \$50,000 (the maximum daily penalty) times 762 days (the duration of the alleged illegal storage), for a total potential fine of \$38.1 million.

Ultimately, the judge sentenced the Company to pay a fine of \$6 million, plus a \$12 million "community service fee."

On appeal, Southern Union argued that the jury had only returned a single count, a RCRA violation with a statutory maximum of \$50,000. Thus, the district judge's imposition of a multi-million dollar criminal fine violated the *Apprendi* rule that "... any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." 530 U.S. at 490. The First Circuit was not persuaded by *Apprendi*, and relied instead on dicta in *Oregon v. Ice*, 333 U.S. 160 (2009). Applying *Ice's* reasoning, the First Circuit took a historical perspective, finding that judges often assessed criminal fines without any input from the jury, and thus affirmed the district court's ruling. *United States v. Southern Union Co.*, 630 F.3d 17 (1st Cir. 2010). The First Circuit's decision created a split in the circuits with the Second, Sixth, and Seventh Circuits (aligned with *Apprendi*), making it ripe for Supreme Court review.

The U.S. Chamber of Commerce and the National Association of Criminal Defense Lawyers filed a joint *amici curiae* brief urging the court to apply *Apprendi* to the *Southern Union* case. These *amici* view the imposition of criminal fines (like incarceration) as a core aspect of the U.S. criminal justice system that should be entitled to equal constitutional scrutiny.

In its brief supporting the First Circuit's decision, the Solicitor General relied heavily upon the *Ice* decision to assert that criminal fines "lie outside the jury's traditional domain."

The Supreme Court heard oral argument on March 19, 2012. The questions of the Justices and the tone of the argument suggest that the Court may in fact overturn the \$6 million fine and apply *Apprendi* to criminal fines. Justice Scalia tartly asked: "Why should we adopt the strange rule that the jury has to find the fact if you go to jail for two weeks, but doesn't have to find the fact if the amount of fines multiplied by number of days . . . will make a pauper of you?" A decision is anticipated before the end of the Court's current Term in late June 2012.

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