


[About Us](#)
[Attorneys](#)
[Practices](#)
[News & Publications](#)
[Blogs](#)
[Events](#)
[Careers](#)


## Second Circuit Extends Apprendi to Require Jury Determination of Facts Supporting Increased Criminal Fines Under Alternative Fines Act

9/27/2010

On August 27, 2010, a panel of the U.S. Court of Appeals for the Second Circuit issued a decision that could have broad implications on the government's ability to extract massive fines for criminal violations in fraud and other cases involving a measurable pecuniary loss by the victim or gain by the defendant. Joining the Seventh Circuit's decision in *United States v. LaGrou Distribution Sys., Inc.*, 466 F.3d 585, 594 (7th Cir. 2006), the Second Circuit, in *United States v. Pfaff*, No. 09-1702, held that it is a violation of the Sixth Amendment for the district court to make findings of fact, based on a preponderance of the evidence, which could permit the imposition of a criminal fine beyond the otherwise applicable statutory maximum. Instead, the jury must make all such findings beyond a reasonable doubt.

In *Pfaff*, which grew out of the government's investigation of KPMG relating to abusive tax shelters, the defendant was convicted of a dozen counts of tax evasion stemming from the design, implementation, and marketing of fraudulent tax shelters. Under the general fines statute codified at 18 U.S.C. § 3571(b)(3), the maximum statutory fine is \$250,000 per count, or \$3 million. The district court, however, imposed a fine of \$6 million, relying on the Alternative Fines Act (the "AFA"). The AFA applies whenever a defendant "derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant." 18 U.S.C. § 3571(d). It permits the court to impose a fine of "the greater of twice the gross gain or twice the gross loss." *Id.* In *Pfaff*, the district court found that the defendant's fraudulent tax shelters "had caused a 'gross pecuniary loss [in] exce[ss] [of] \$100 million and that the maximum fine therefore exceeds . . . \$200 million.'" Slip Op. at 4. Importantly, "the jury made no findings regarding the amount of pecuniary loss caused, or gain derived." *Id.*

In a *per curiam* decision by Chief Judge Jacobs and senior judges Winter and McLaughlin, the Second Circuit upheld the defendant's conviction, but vacated the district court's fine imposition. The court held that, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), the jury must make all findings of fact which increase the permitted fine above the statutory maximum—including the degree of pecuniary loss caused or gain derived. In particular, the court found that even though the AFA specifically provided a statutory vehicle for the increased fines through § 3571(d), "the fact remains that, absent a pecuniary gain or loss finding, a district court may not impose a fine greater than that provided for in subsections (b), (c), or (e), whichever is applicable." Slip Op. at 8.

The court specifically distinguished its previous cases permitting judge-based findings of fact in calculating criminal restitution and forfeiture because those are "indeterminate schemes without statutory maximums." *Id.* at 7. By contrast, but for a particularized finding of loss or gain, § 3571 provides specific statutory maximums for criminal fines.

The Supreme Court has not specifically addressed whether *Apprendi* applies to restrict the district court's ability to make factual determinations for purposes of the AFA.<sup>1</sup> And the Second Circuit recently granted the government an extension of time in *Pfaff*, as the government no doubt considers whether to file a petition for a rehearing *en banc*. Should the panel's decision stand, however, it will require the government to include in all indictments where pecuniary loss or gain is at issue a specific allegation as to the loss or gain alleged. It will also require the jury to make a particularized finding before the AFA may be used to calculate the criminal fine. Perhaps most importantly, it will end the government's reliance on the lower preponderance standard used for court-based factual determinations of pecuniary loss at sentencing. The government will have to prove the pecuniary loss or gain beyond a reasonable doubt—frequently a difficult standard to meet

[Press Releases ▶](#)
[In the News ▶](#)
[Legal Updates ▶](#)
[Articles ▶](#)
[Law of Series ▶](#)
[News Home ▶](#)


---

### Other Legal Updates

- [Advertising](#)
- [Agribusiness](#)
- [Antitrust](#)
- [Climate Change](#)
- [Construction and Design](#)
- [Corporate](#)
- [Employee Benefits](#)
- [Endangered Species Act](#)
- [Energy](#)
- [Environmental](#)
- [Estate Planning](#)
- [Food Liability](#)
- [Forest Industry](#)
- [Health Care](#)
- [Insurance Coverage](#)
- [Intellectual Property](#)
- [Labor and Employment](#)
- [Litigation](#)
- [Natural Resources](#)
- [Nutritional Law](#)
- [Patent](#)
- [Real Estate](#)
- [Stimulus](#)
- [Taxation](#)
- [Telecommunications](#)
- [Treaty Rights](#)
- [Winery and Vineyard](#)
- [Workout and Restructuring Services](#)

---

### Related Practice Areas

If the *Pfaff* decision holds, one should expect to see a noticeable uptick in litigation surrounding the loss calculation, both in pre-trial motions designed to limit evidence of loss by the victim or gain by the defendant, and in Rule 29 and post-trial motions surrounding the sufficiency of the government's evidence of pecuniary loss or gain.

The full decision can be read here.

If you have any questions about this update, please contact:

Per A. Ramfjord at (503) 294-9257 or paramfjord@stoel.com

Jamie S. Kilberg at (503) 294-9274 or jskilberg@stoel.com

<sup>1</sup> Recently, the Court approvingly noted that trial courts frequently determine "facts about the nature of the offense or the character of the defendant" in determining, *inter alia*, "the imposition of statutorily prescribed fines." *Oregon v. Ice*, 129 S. Ct. 711, 719 (2009). That case, however, dealt solely with whether *Apprendi* applied to the determination of whether to impose consecutive or concurrent sentences. See also *United States v. BP Products N. Am., Inc.*, 610 F. Supp. 2d 655, 684-87 (S.D. Tex. 2009) (noting uncertainty over whether *Apprendi* would apply to criminal fines in assessing appropriateness of agreed-to \$50 million fine).

Securities Litigation

Subscribe

Receive our Alerts by email.

[Sign up now](#)

Search Alerts

Established in 1907, Stoel Rives counsels U.S. and international clients on virtually all aspects of their business law and litigation needs.



Copyright 2010 Stoel Rives LLP