

Scope Of The Jury Trial Right In Civil FIRREA Actions

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In recent years, the U.S. Department of Justice has stepped up its use of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 to pursue civil enforcement actions against financial institutions and their employees. Most notably, the department used FIRREA to extract multibillion dollar settlements from major domestic banks as a result of their sale of residential mortgage-backed securities. The Justice Department’s focus has since turned to subprime auto lenders.[1]



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Section 951 of FIRREA authorizes the attorney general to bring a civil enforcement action against anyone who violates certain federal criminal statutes, or who violates other specified federal criminal statutes in a way that “affect[s]” a federally insured financial institution,[2] and to seek a civil monetary penalty for the violation “in an amount assessed by the court.”[3] Specifically, that section states that “[w]hoever violates” the identified criminal statute “shall be subject to a civil penalty” of up to \$1 million,[4] or up to \$5 million if the violation “continu[es]” for five days or more,[5] or up to the amount of “pecuniary gain” the defendant “derives ... from the violation” or “pecuniary loss” that “results ... to a person other than the violator.”[6]



Sharon Cohen Levin

Courts have, for the most part, assumed that defendants in FIRREA actions have no right to a jury determination of any factual issues requisite to a FIRREA penalty above the base level of \$1 million. This is almost certainly incorrect. The U.S. Supreme Court has held that, under the Seventh Amendment, a defendant in a civil government enforcement action seeking monetary penalties in federal court is entitled to a jury trial on the issue of “liability” for such penalties.[7] For purposes of a FIRREA action, this means that the jury trial right extends to all facts that set the statutory maximum penalty to which the defendant is exposed under the act.[8] More specifically, it means that a defendant in a FIRREA action has a constitutional right to a jury determination of the number of violations, the number of days (up to five) that any such violation lasted, whether any violation caused a gain or loss, and the amount of any such gain or loss. Absent jury findings of this type, a defendant is subject to nothing more than the base level penalty amount of \$1 million.[9]



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Right to Jury Trial in Government Enforcement Actions Seeking Penalties

The Seventh Amendment to the United States Constitution provides that, “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”[10] In *Tull v. United States*,[11] the Supreme Court held unanimously that this jury trial right extends to the finding of “liability” requisite to the imposition of a monetary penalty in a civil government enforcement action.[12] As the *Tull* court put it, the defendant has “a constitutional right to a jury trial to determine his liability on the legal claims.”[13]

The Tull court then turned to the question of whether the defendant “additionally has a Seventh Amendment right to a jury assessment of the civil penalties.”[14] The court noted that, while the Clean Water Act (under which the defendant in that case had been sued) “did not explicitly state whether juries or trial judges were to fix the civil penalties,” the legislative history showed “that Congress intended that trial judges perform the highly discretionary calculations necessary to award civil penalties after liability is found.”[15] The court observed that “[t]he Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability.”[16] Accordingly, the court concluded that “Congress’ assignment of the determination of the amount of civil penalties to trial judges ... does not infringe on the constitutional right to a jury trial.”[17] In other words, the court held that “a determination of a civil penalty is not an essential function of a jury trial, and ... the Seventh Amendment does not require a jury trial for that purpose in a civil action.”[18]

A decade later, the Supreme Court explained that this disparate treatment of the liability determination and the penalty amount for Seventh Amendment purposes was founded, at least in part, on the ground that “the awarding of civil penalties to the Government could be viewed as analogous to sentencing in a criminal proceeding,” where the Sixth Amendment governs the role of the jury.[19] Constitutional scholars have observed that an examination of the history, text and structure of the Sixth and Seventh Amendment jury trial guarantees suggests that the intended role of civil and criminal juries are similar, namely the resolution of factual disputes.[20] Accordingly, to understand the scope of the Seventh Amendment jury trial right recognized in Tull as applied to civil enforcement actions seeking monetary penalties, it is useful to look to the jurisprudence interpreting the scope of the Sixth Amendment jury trial right in criminal actions.

Right to a Jury Trial as to Penalty Enhancements in Criminal Cases

The Sixth Amendment provides that those accused of a crime have the right to a trial on those accusations by an impartial jury.[21] In *Apprendi v. New Jersey*,[22] the Supreme Court interpreted this Sixth Amendment jury trial right to mean that, “[o]ther than the fact of a prior conviction, 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.”[23]

The court held that this principle applies regardless of whether the fact is identified in the statutory regime as an “element” of the offense or as a “sentencing factor.”[24] The court “dismissed the possibility that a State could circumvent the protections of [the Constitution] merely by ‘redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.’”[25] However, the *Apprendi* court was careful to note that it was in no way “suggest[ing] that it [was] impermissible for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment within the range prescribed by statute.”[26] To the contrary, the court observed that “judges in this country have long exercised discretion of this nature in imposing sentences within statutory limits in the individual case.”[27]

Nearly a decade later, in *Southern Union Co. v. United States*,[28] the Supreme Court held that the principle articulated in *Apprendi* also applies to the imposition of criminal fines. The government argued that *Apprendi* applies only to the elements of the offense, not to sentencing factors, such as how long the violation lasted or how much money the defendant

gained (or the victim lost) from the violation.[29] The court rejected this argument, noting that those facts can, in a given statutory scheme, set the maximum penalty that the district court can impose.[30] For example, the court noted that the maximum fine that may be imposed under many statutory schemes turns on such things as “the duration of a statutory violation” or “the defendant’s gain or the victim’s loss.”[31] Such facts, the court held, are precisely of the sort that the Sixth Amendment, as interpreted by *Apprendi* and its progeny, requires a jury to find to the extent they increase the statutory maximum fine to which a defendant is exposed.[32]

Required Jury Findings in FIRREA Enforcement Actions Seeking Monetary Penalties

As explained above, under *Tull*, the defendant has a Seventh Amendment jury trial right on the question of “liability” in a civil government enforcement action seeking monetary penalties. It is clear that, under *Tull*, a defendant in a civil FIRREA enforcement action is entitled to a jury finding on the elements of the substantive violation with which the defendant is charged. And it is also clear that the defendant is entitled to a jury finding that, as for certain specified offenses, they “affect[ed]” a federally insured financial institution.

But is a defendant in a civil FIRREA enforcement action also entitled to a jury finding as to all the facts that set the statutory maximum penalty the court may impose for an underlying violation? Specifically, must the jury (rather than the judge) find (a) the number of violations, (b) the duration of a particular violation, (c) the causal connection between the violation and any pecuniary gains or losses,[33] and (d) the amount of any pecuniary gains or losses? We believe that, under *Tull*, the answer is yes to all of these questions.

The question of liability cannot be assessed apart from the maximum sanction to which one is exposed. Indeed, the very definition of liability is “the state of being legally responsible for something ... (such as the payment of money).”[34] Factual findings on questions like the duration of the violation or the gain or loss therefrom are necessary to establish a defendant’s potential liability for a particular maximum penalty because, absent a finding of these facts, the defendant would not be liable for a penalty up to that particular maximum. Because the finding of these facts determines the maximum penalty for which the defendant could be liable, the defendant’s Seventh Amendment jury trial right extends to these additional facts. On the other hand, once the jury has determined the facts that expose the defendant to a particular maximum penalty, the judge is then free to hear evidence on the factors that inform his or her exercise of discretion to set the penalty up to that maximum.[35] Accordingly, a defendant’s right to a jury finding on the question of “liability” necessarily entails a right to a jury trial on those factual questions that set the maximum monetary penalty to which the defendant is exposed.

This reading of *Tull* is confirmed by the Supreme Court’s more recent jurisprudence interpreting the Sixth Amendment’s jury trial right in *Apprendi* and its progeny, including *Southern Union*. In *Apprendi* and its progeny, the Supreme Court held that the defendant is entitled to a jury finding as to each fact that increase the statutory maximum sentence, while the judge may then determine the appropriate sentence up to that maximum. Given the similar text, history and purposes behind the Sixth and Seventh Amendment jury trial rights, it makes sense that they would be interpreted as both extending to factual findings needed to set the statutory maximum penalty or sentence to which the defendant is subject.

Conclusion

In the nearly three decades since the Congress passed FIRREA and the Supreme Court decided Tull, litigants and lower courts have paid little attention to the application of the Seventh Amendment jury trial right to facts that increase the maximum penalty to which a defendant is exposed in a civil FIRREA proceeding. In the meantime, the court has explained that the Sixth Amendment ensures a criminal defendant the right to a jury trial as to all facts that increase the maximum sentence to which the defendant is exposed. We think an analogous principle exists under the Seventh Amendment as interpreted in Tull.

As applied to FIRREA, this means that a defendant is entitled to a jury finding as to all facts that increase the maximum penalty to which the defendant is exposed under that statute. In any given case, a defendant may conclude that, for strategic reasons, a determination by a judge rather than a jury is preferable. But for those defendants who prefer a jury trial on the factual issues bearing on the maximum penalty to which they can be subjected, the Seventh Amendment guarantees them that right.

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[1] Peter J. Henning, U.S. Finds Fresh Use for Seldom-Used Statute in Subprime Cases, N.Y. Times (Aug. 11, 2014), http://dealbook.nytimes.com/2014/08/11/u-s-finds-fresh-use-for-seldom-used-statute-in-subprime-cases/?_r=0.

[2] 12 U.S.C. § 1833a(c)(2).

[3] Id. § 1833a(a).

[4] *Id.* § 1833a(a)-(b)(1). The statutory maximum penalty amount of \$1 million was inflation-adjusted by regulation to \$1.1 million in September 1999. See 28 U.S.C. § 2461 note; 28 C.F.R. § 85.3(a)(6). On Aug. 1, 2016, this amount was increased to \$1,893,610 for violations committed after Nov. 1, 2015. See U.S. Dep’t of Justice, Civil Monetary Penalties Inflation Adjustment, 81 Fed. Reg. 42,491 (proposed June 30, 2016) (to be codified at 28 C.F.R. § 85.3(a)(6)).

[5] 12 U.S.C. § 1833a(b)(2). The statutory maximum penalty amount of \$5 million was inflation-adjusted by regulation to \$5.5 million in September 1999. See 28 U.S.C. § 2461 note; 28 C.F.R. § 85.3(a)(7). On Aug. 1, 2016, this amount was increased to \$9,468,050 for violations committed after Nov. 1, 2015. See U.S. Dep’t of Justice, Civil Monetary Penalties Inflation Adjustment, 81 Fed. Reg. 42,491 (proposed June 30, 2016) (to be codified at 28 C.F.R. § 85.3(a)(7)).

[6] 12 U.S.C. § 1833a(b)(3)(A).

[7] *Tull v. United States*, 481 U.S. 412, 425 (1987).

[8] A more comprehensive explanation of this argument in support of a similar conclusion with respect to SEC enforcement actions seeking monetary penalties can be found at Matthew T. Martens & Troy A. Paredes, *The Scope of the Jury Trial Right in SEC Enforcement Actions*, 71 N.Y.U. Ann. Surv. of Am. L. 147 (2016).

[9] Of course, a defendant in a FIRREA action can waive the right to a jury trial on the statute’s penalty-enhancing elements. See *Royal Am. Managers Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1018 (2d Cir. 1989) (holding that “a failure to object and an acquiescence in nonjury proceedings constitutes a waiver of the right to a jury trial”).

[10] U.S. Const. amend. VII.

[11] 481 U.S. 412 (1987).

[12] *Id.* at 427; *id.* at 427 (Scalia, J., concurring in part and dissenting in part) (joining majority opinion on defendant’s right to jury trial for liability).

[13] *Id.* at 425 (emphasis added).

[14] *Id.*

[15] *Id.*

[16] *Id.* at 425-26.

[17] *Id.* at 426-27 (emphasis added).

[18] *Id.* at 427. On this last point, Justices Antonin Scalia and John Paul Stevens dissented. They would have gone further than the majority and recognized a right to a jury trial not only on the question of the defendant’s “liability,” but also on the amount of the civil money penalty to be imposed. *Id.* at 427-28 (Scalia, J., concurring in part and dissenting in part).

[19] *Feltner v. Columbia Pictures Television Inc.*, 523 U.S. 340, 355 (1998). The *Feltner* court also raised the prospect that its conclusion in *Tull* that a judge can determine the amount of the penalty once the jury has determined liability for the penalty was dicta. *Id.* at 354 n.8. We assume for purposes of this article that the distinction drawn in *Tull* between liability and penalty amount is the law. If that is not the case, it may be that the defendant is entitled to a jury finding not only as to the facts that set the statutory maximum penalty to which the defendant is exposed, but also the precise penalty amount to be imposed within that range. See Grant R. Mainland, Note, *A Civil Jury in Criminal Sentencing: Blakely, Financial Penalties, and the Public Right Exception to the Seventh Amendment*, 106 *Colum. L. Rev.* 1330, 1350 (2006) (arguing that “even though *Tull* is factually distinguishable from *Blakely* — the latter deals only with the Sixth Amendment, not the Seventh — it would make little sense to continue to apply an outdated, and possibly unconstitutional, liability/penalty dichotomy to the Seventh Amendment”).

[20] Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 *Geo. Wash. L. Rev.* 723, 729, 745 (1993).

[21] U.S. Const. amend. VI.

[22] 530 U.S. 466 (2000).

[23] *Id.* at 490.

[24] *Id.* at 478, 492–94 (stating that the label of “element” or “sentencing factor” is irrelevant, and the “relevant inquiry is one not of form, but of effect — does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?”).

[25] *Id.* at 485 (quoting *Mulvaney v. Wilbur*, 421 U.S. 684, 698 (1975)).

[26] *Id.* at 481.

[27] *Id.*

[28] 132 S. Ct. 2344 (2012).

[29] *Id.* at 2356.

[30] *Id.*

[31] *Id.* at 2350-51.

[32] *Id.* at 2351. The alternative fine statute at issue in *Southern Union* was enacted as part of FIRREA.

[33] Penalties based on gain or loss amounts requires proof that the gain was “derived from” the violation or that the losses “resulted” from the violation. 12 U.S.C. § 1833a(b)(3)(A). This language sounds in both reliance and loss causation. See *Derive*, Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/derive> (last visited Sept. 1, 2016) (defining verb, “derive”, as “hav[ing] something as a source”); *Erica P. John Fund Inc. v. Halliburton Co.*, 563 U.S. 804, 814-15 (2011) (explaining that “resulted in the losses” language refers to loss causation); *Dura Pharm. Inc. v. Broudo*, 544 U.S. 336, 344 (2005) (explaining that “as a result” language is causation language).

[34] *Liability*, Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/liability> (last visited Sept. 1, 2016); see also *Black’s Law Dictionary* 914 (6th ed. 1990) (defining “liability” as the “condition of being responsible for a possible or actual loss, penalty, evil, expense, or burden”).

[35] A court, in exercising its discretion to select the appropriate penalty to impose up to the statutory maximum, relies on a number of factors. Specifically, the court in *United States ex rel. O’Donnell v. Countrywide Home Loans Inc.*, 33 F. Supp. 3d 494 (S.D.N.Y. 2014), *rev’d on other grounds*, 822 F.3d 650 (2d Cir. 2016), outlined five factors that judges should consider when determining the amount of the civil penalty to assess under FIRREA. These factors include: “(1) the good or bad faith of the defendant and the degree of his scienter; (2) the injury to the public, and whether the defendant’s conduct created substantial loss or the risk of substantial loss to other persons; (3) the egregiousness of the violation; (4) the isolated or repeated nature of the violation; and (5) the defendant’s financial condition and ability to pay.” *Id.* at 497.