

*Day One—Revising the Definition of Loss*  
**Group Breakout Session Two**

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**The Honorable J. Phil Gilbert**, Chief Judge, U.S. District Court, S.D. IL



**LOSS BREAKOUT SESSION — GROUP TWO SUMMARY**

**Main Topic:** "Should the core definition of 'loss' be based on principles of causation?"

**Secondary Topic:** "Does multiple causation need to be addressed and, if so, how?"

The panel began with Mr. Cline identifying three possible theories of causation in the context of determining loss: (1) "but for," (2) "proximate cause," and (3) a combination of "but for" causation and a "foreseeable or intentional" causation standard. According to Mr. Cline, the Ninth Circuit Court of Appeals recently articulated this last theory in *United States v. Hicks*, 217 F.3d 1038, 1048 (9<sup>th</sup> Cir. 2000).

The lead facilitator for Group Two was John Cline, a member of the law firm, Freedman Boyd Daniels Hollander Goldberg & Cline. Co-facilitators were Vicki Portney, an attorney in the Criminal Division, Department of Justice, and Chief U.S. District Court Judge J. Phil Gilbert of the Southern District of Illinois.

The panel then moved to a discussion of the motivation for revising the definition of loss. According to Ms. Portney, the chief goal of "overhauling" the loss definition is to increase simplicity in its application. Ms. Portney recognized, however, that completely supplanting the current definitions of loss could cause unintended consequences and add to litigation. As a result, the question becomes, "What is the net consequence of adopting a new definition of loss?" Still, any core definition of loss cannot be expected to satisfy simplicity in all cases, especially those concerning multiple causation and intervening causes. To exemplify these issues, Ms. Portney pointed out that the same test of "reasonable foreseeability" can produce different results depending upon the way the question regarding its applicability is phrased in a given case. For example, echoing the factual issues outlined in *Hicks*, she asked, "Is it reasonably foreseeable that collateral pledged for a loan may not protect a bank against losses?" A positive answer to this question is likely. However, a different answer would probably result in the same case if the question posed were, "Is the criminal conduct of a bank's agent selling the collateral a reasonably foreseeable occurrence?"

Ms. Portney then returned to the issue of what is to be gained or lost by adopting a core definition of causation within the context of determining loss. She noted that a variety of approaches should be considered before deciding whether a core definition would assist in eliminating circuit conflicts and internal inconsistencies within the federal sentencing guidelines.

Judge Gilbert began by noting that there simply is no definition of loss and asked whether one even should be developed. Indeed, Judge Gilbert wondered whether if one is developed, it should be cause-based, and not based on a standard of reasonable foreseeability. In all events, most appear to be against change; the status quo is satisfactory.

Judge Gilbert acknowledged, however, that change often can be good. According to Judge Gilbert, developing a definition of loss that would apply both to fraud and theft, for example, would be a good change. Of course, fact-finding would still be required, but no definition of loss is perfect. The point is that adopting any definition of loss should be done with an eye toward simplifying the loss determination process for judges, practitioners, and the government.

At this point, a poll of the audience was taken on the issue of whether there should be a cause-based definition of loss. By a show of hands, a majority believed there should be. The panelists as a whole then noted that the courts generally have adopted a cause-based definition of loss. As a result, the U.S. Sentencing Commission merely would be codifying this practice if it decided to adopt such a definition of loss. The audience found the third theory proposed by Mr. Cline—"but for" combined with a "foreseeable or intentional" standard—to be the most promising. Judge Gilbert proposed a cause-based and reasonable foreseeability definition. The consensus was, however, that whatever the Commission comes up with would be better than the current state of affairs.

A member of the audience voiced an "ideological" concern and asked, "Why do we need an objective measure of loss, as opposed to a subjective one?" Judge Gilbert responded that a subjective standard would be too hard to prove by the government. The audience member replied, "We should not choose a standard merely because of ease and familiarity." Rather, the audience member noted, proportionality should be the main focus. Judge Gilbert then noted that the problem with a strict ideological approach is that it is impractical. The audience member stated that sentencing decisions always are decided from an ideological perspective, and that she is troubled by sentencing policies based upon mixed ideologies. Furthermore, she noted her concern about the use of economists in the drafting of the organizational sentencing guidelines. The audience member closed her remarks by stating the following: "Why do we punish people? We punish for actions of reasonable foreseeability, so it is natural to choose this definition for the definition of loss. We need a philosophical basis."

Ms. Portney then articulated three possible ways for determining loss amounts: (1) property taken, damaged, or destroyed; (2) consequential damages, such as in product substitution and procurement fraud cases; and (3) reasonable costs of correcting the harm, such as in cases involving computer fraud where a company is required to re-write its security software. As an overall consideration with respect to these possible ways of determining loss amounts, Ms. Portney pointed out that any causation standard would have to account for relevant conduct situations where there is more than one defendant involved. She asked, however, whether the same general rule would apply to all categories of, say, fraud in cases involving multiple frauds of varying types.

By way of answering Ms. Portney's question, an audience member noted the tension between pragmatic considerations and political considerations: "We need to try to find something that is intellectually honest." At this point, Mr. Cline noted that reasonably foreseeable loss and intended loss often are meshed together and are inferred from the circumstances. Indeed, Mr. Cline pointed out that some courts actually have equated reasonably foreseeable loss and intended loss, but he stated that doing so was a mistake. Rather, as distinguishing the two concepts of loss are "often murky," Mr. Cline suggested that the objectively reasonable person standard be used as a vehicle for making the inference under either conception of loss. Judge Gilbert responded, however, that reasonable foreseeability is a subjective concept dependent on the offender's state of mind. He noted that an offender with a diminished mental capacity must be subjected to a different "reasonable person" standard than someone with a Ph.D. Indeed, he stated that it his practice to individualize, or tailor, the "reasonable person" standard to the offender's mental capacity when confronted with this sentencing issue. Mr. Cline agreed that this is an acceptable approach and noted that such individualization occurs in tort cases.

An audience member stated that "the message really is" that a rough determination of loss amount must adequately reflect both the harm done by the offense and culpability of the offender. The audience member queried, "What is the problem we fix by adding a reasonably foreseeable standard?" Ms. Portney

responded by noting some of the problems computer crimes are posing for determinations of loss in terms of the magnitude of such crimes. Ms. Portney asked, "How much is all this being driven by factual patterns? Is it possible to make a rule that will work overall?" Judge Gilbert responded that reasonable foreseeability gives a more accurate estimate of the overall harm.

The discussion then turned to *United States v. Needle*, 72 F.3d 1104 (3<sup>rd</sup> Cir. 1996), in the context of multiple causation. In 1987, the defendant had started an insurance company in the Virgin Islands selling hurricane damage insurance. The defendant had falsely certified that he had the required \$700,000 in capital in order to obtain an insurance brokerage license. After obtaining the license, and otherwise complying with the regulations, the defendant sold hurricane damage insurance to numerous persons. In 1989, Hurricane Hugo caused the defendant's clients to suffer approximately \$24 million in damages of which the defendant only could cover four million dollars of the resulting claims. The question presented for discussion was whether the loss should be \$700,000 or \$20 million (which was the amount of loss determined in the actual case).

From a policy perspective, an audience member stated that the \$20 million would be the appropriate amount of loss because it was foreseeable and the offender was experienced and knowledgeable about the occurrence of hurricanes in the region. Under a "but for" test, however, it would not be clear how to assess the \$700,000 if the defendant in fact had the \$700,000 in capital.

The discussion then moved to another multiple causation example based upon the *Hicks* case. The facilitators presented the following scenario: some developers working on a condominium project find a bank that has agreed to provide prospective condominium buyers with loans. Because the bank is eager to get the business, the bank decides to bend some of its rules regarding loan-to-value ratios. The developers take advantage of the situation by fabricating some parts of the buyers' loan applications. The buyers succeed in obtaining the loans, but subsequently default. Furthermore, once the condominiums go into foreclosure, the bottom has fallen out of the condominium market. The question is: "How should the loss be calculated and what should it be?"

Three issues were posed. First, how should the difference between any unpaid loan amount and the amount the bank was able to recover be considered? Second, through a causation analysis, what factors should be considered? Should the bank's own negligence in bending its own rules be considered? Should the fact that the buyers who knew they were engaging in loan fraud also be a factor for consideration. Finally, how should the collapse of the condominium market be factored in?

Ms. Portney stated that the only factor that was of particular significance was the fact that the bank had decided to go along with the loan scheme. Mr. Cline then asked what standard of causation should be required: "but for," "reasonable foreseeability," or "but for plus intent?" Furthermore, Mr. Cline wondered what rule should be used to consider multiple causation? Judge Gilbert asked whether reasonable foreseeability would take care of the multiple causation issue. An audience member then asked whether a proximate cause standard also would take care of the multiple causation issue. It was pointed out, however, that a reasonable foreseeability standard might not capture as much loss as a proximate cause standard if it were assumed that the developers were unaware that the bank had relaxed its standards.

Toward the end of the discussion, there appeared to be a consensus that the reasonably foreseeable standard is the standard now being used by the courts. No one, however, advocated adopting a strict "but for" analysis.