*Day One—Revising the Definition of Loss*

# Group Breakout Session Five

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## LOSS BREAKOUT SESSION — GROUP FIVE SUMMARY

**Main Topic:** "Is 'loss' a gross or net concept, and if net, what crediting rules should be adopted?"

**Secondary Topics:** (1) "The problem of timing—when to measure both the value of the property of which the victim was originally deprived, collateral pledged, and the property returned by the defendant to the victim" and (2) "How to handle the valuation and crediting of unlicensed professional services."

The lead facilitator for Group Five was Miriam Krinsky, an assistant U.S. attorney in the Central District of California. Serving as co-facilitators were Barry Boss of the Washington, D.C. firm of Asbill, Junkin, Moffitt & Boss and Catharine Goodwin, an assistant general counsel for the Administrative Office of the U.S. Courts. Audience participants consisted of a small group that included members of the private defense bar, probation officers, and corporate representatives.

**General Overview of Existing Law**

Ms. Goodwin began with a general overview of the law on net and gross loss issues. She opined that the current guidelines and commentary were fragmented because they were promulgated over time as the Commission responded to particular issues and problems. The Commission had made an effort to harmonize the theft and fraud guidelines so that disparities arising from the choice of guideline would be eliminated or minimized. She reminded participants that one had to continually remember the distinction between "loss" for purposes of setting an offense level and "loss" for purposes of restitution.

Ms. Goodwin then discussed the basic operation of the section 2B1.1 definition of "loss." She noted that the definition was consistent with common law concepts and for simple thefts, like of a car or bank robbery, the definition did not utilize a "net" concept. For example, a person convicted of stealing a car would be sentenced commensurate with the value of the vehicle at the time of the offense just as the bank robber's sentence would be based on the amount of money stolen. This would be the case notwithstanding that either the car or the bank money was fully recovered.

Moving away from simple thefts, however, the guidelines do start to utilize net concepts. For example, when the theft is in the form of a fraudulent loan application, the commentary directs the sentencer to the fraud guideline of section 2F1.1. Here, some net concepts are utilized. For example, if the defendant made some payments to the defrauded creditor prior to the discovery of the offense, the loss amount for sentencing purposes would be the amount of the loan less the amounts repaid.

Credit cards, Ms. Goodwin, noted, represent a return to gross loss concepts. The commentary to section 2B1.1 states that losses include "any unauthorized charges made with stolen credit cards." Thus, at least one circuit court has held that the total value of the unauthorized charges is the loss amount for sentencing purposes notwithstanding that the defendant may have returned merchandise for credit on the misappropriated account. *See United States v. Bald*, 132 F.3d 1414 (11th Cir. 1998).

In contrast, Ms. Goodwin reported, under section 2F1.1 the guidelines use a net approach. Using the example of a stock purchase where the defendant fraudulently overvalues its worth but returns some of the money to the victim prior to discovery, the loss for sentencing purposes would be the amount invested net any amounts returned prior to the discovery. Yet, Ms. Goodwin argued, one could rationalize the loss

as being the full amount invested by the victim, even though the victim recovered some of her funds. Reminding participants that "loss" is a measure of seriousness and not restitution, Ms. Goodwin argued that the seriousness of this crime could be calculated as the full amount invested.

Likewise, a fraudulent loan application case would measure its loss for sentencing purposes as the amount of the loan net the value of the collateral and any payments made prior to the discovery of the fraud. There was an issue whether this was a "correct" result as it could be the case that the lender would not have loaned any of the principal had no fraud been committed.

Ms. Goodwin closed by noting that in some circumstances a different result could be reached depending on whether section 2B1.1 or section 2F1.1 is applied. Returning to the *Bald* case, the court there chose to apply the theft guideline 2B1.1 even though the credit cards at issue were not stolen, but misused by an employee of the account's owner. Ms. Goodwin believes that the Commission's recent efforts in its Economic Crimes Package is to develop a universal rule so that the mere choice of guideline does not result in disparate results.

**Disparities Between Theft and Fraud**

Some audience participants opined that to avoid disparity between fraudulent loan and theft defendants, the amount of loss for sentencing purposes in a theft case should be offset by the value of the property recovered intact just as the loss in the loan case is offset by the pledged collateral and pre-discovery payments made by the loan defendant. Others pointed out that in most theft cases, the property was returned after discovery of the crime and this was consistent with not crediting post-discovery payments in fraudulent loan cases. Others responded, however, that even if in a simple theft case the thief returned the property prior to discovery and was nonetheless prosecuted, the guidelines required the loss calculation to be the gross value of the item stolen.

**Loss Without Economic Harm**

The group then turned to a general discussion of the efficacy of using loss as a measure of the seriousness of the crime when the victim has suffered no economic harm. On the one hand, using the value of the stolen (but fully recovered property) as a measure of harm seems to be a non-arbitrary and objective manner of assigning a level of "seriousness"—that level being set by the object the thief has chosen to steal rather than a subjective evaluation of the seriousness of car theft in general. The gist of the conversation can be described using the following example: All other things being equal, can it really be said that the theft of a Porsche is more "serious" than the theft of a Chevy sedan? Some would argue "yes," because the Porsche thief stole a more valuable item and hence caused a greater risk of loss than the Chevy thief. Assume the Porsche thief knew he was stealing the car from a wealthy person with more than one vehicle while the Chevy was stolen from a single-vehicle, middle class family? Under such circumstances, is stealing the Porsche a more serious crime than the theft of the Chevy simply because the Porsche has more monetary value?

**Three General Categories of Possible Crediting and a Proposed Uniform Rule**

Ms. Krinsky then theorized that crediting issues fall into three broad categories of cases: (1) collateral cases, where the defendant pledges some form of collateral at the time of the transaction with the victim (*e.g.*, overvalued property for a loan); (2) repayment cases where the defendant makes some form of payment to the victim prior to the discovery of the offense (*e.g.*, fraudulently obtained loan but the

defendant makes some loan payments); and (3) recovery cases where the victim's property is fully recovered after discovery (*e.g.*, car recovered after it was stolen). Ms. Krinsky proposed that the Commission ought to adopt the following crediting rules: credit the value of the property pledged in the collateral cases, and do not credit at all in repayment or recovery cases.

When questioned about the case where the defendant has a true "change of heart" and makes some form of pre-discovery repayment, Ms. Krinsky stated that a downward departure would be appropriate in what she believed would be these "rare cases" where the defendant acts from a "pure motive" to undo the crime. Some in the audience responded, however, that relying on departures disadvantaged the defendant because a judge's refusal to depart (a refusal not based on a mistaken belief that the power to depart was lacking) was unappealable, and that programming for specific departures injected disparity back into the system.

**Loss as a Surrogate for Harm**

Members of the audience again raised the issue of how to measure harm in cases where the item stolen (*e.g.*, a car) is fully recovered after the defendant's apprehension. Is the value of the car an accurate measure of the seriousness of the crime? Does it adequately measure the victim's harm (*e.g.*, loss of use of the car, inconvenience and, perhaps, mental anxiety)? Further, some in the audience suggested the example of two car thieves who steal similar cars from similarly situated victims. One defendant stole the car for a "chop shop" operation, but the other stole the car because she needed transportation. Should the guidelines sentence both defendants (assuming the same criminal history category) identically? Some in the audience professed discomfort with such a result. Regardless of how one answered these questions, all members of the group agreed that these questions focus on the problems with using a monetary value of "loss" as a surrogate for harm.

**Harm Inflicted Versus Harm Intended**

In a digression from economic crimes, one audience member postulated the following shooting example: Consider two shooters, one misses and the other hits his victim. Assuming murder and attempted murder were not an issue, should both shooters receive the same sentence? Should they go to jail for the same time (the group agreed to assume that murder and attempted murder were not an issue here)? Under a "harm inflicted" theory, the shooter with the bad aim should get a lesser sentence than the shooter with better aim. Under a "harm intended" theory, both shooters would get the same sentence (assuming all else equal). Thus, it should be the same with the guidelines and economic crimes. If the guidelines want to measure the seriousness of the offense by the monetary harm to the victim, then if all the property is fully returned to the victim after the offense, the loss should be zero.

Keeping with the theme of harm inflicted versus harm intended, the group then examined the consequences of Ms. Krinsky's proposed uniform crediting rule. It was noted that two $300,000 fraudulent loan defendants (one who acts with bad intent and the other who acts out of desperation and manages to repay half the loan prior to discovery) would be sentenced the same. This lead to the discussion of what the guidelines were intending to punish: the culpability of the defendant or the harm caused by her conduct? Downward departures, as noted earlier in the discussion, were not a viable solution because of the lack of appellate review when a judge refuses to depart. Even if such review were available, some audience members noted that most contemporary plea agreements contain a provision requiring the defendant to

waive all rights of appeal. Thus, the Commission should be aware that the review mechanism set in place by statute and upon which the Commission may have relied upon as being in place is not effective.

**Harm Inflicted as One Sentencing Consideration**

The participants generally believed that a guidelines loss model should not be a model which looks solely to the harm caused to the victim. Any guideline concept of loss as a basis for computing a sentence should look to the intent of the defendant, a concept separate and apart from the harm to the victim. Loss in the sense of harm to the victim should continue to play a role, but should be only one factor. The guidelines, most participants agreed, should do more to focus on the defendant's intent (with the intent proved by "provable conduct").

Mr. Boss noted that an emphasis on intent proved with "provable conduct" results in recidivists receiving high sentences—a desirable goal. He stated that a sentencing system based on loss or harm to the victim may ignore this goal and sometimes punishes a first-time offender harshly depending on the amount of loss.

**Other Proposed Crediting Rules**

Ms. Krinsky then asked the participants to imagine the "ideal" guideline system and what such a system would take into account in terms of crediting rules. In the pledged collateral cases, the general consensus was that the guidelines should credit for the value of the collateral pledged.

In repayment cases (excluding ponzi schemes where repayment was just a method of continuing the fraud), a large majority of the participants believed that the guidelines should credit for pre-discovery payments, while three participants believed that the guidelines should credit for pre- or post-discovery payments. A small minority believed that the guidelines should not credit for any repayments except by way of departure.

In recovery cases, a slim majority believed that the guidelines should never credit for the value of the property recovered. A minority believed that the guidelines should credit for property recovered either in theft or fraud cases.

Mr. Boss raised the idea whether the Commission should consider amending the guidelines in such a way as to encourage disgorgement by the defendant even post-discovery. Such an amendment could take the form of a reduction in the offense level if the defendant returns the property stolen or obtained by fraud. Such an incentive would help the victim in cases in which the defendant has the property (or access to it) but is willing to spend the time in prison and enjoy the property upon release. An objection was raised, however, that a poor defendant who acts from desperation and then consumes the property could not benefit from such an incentive. The result being that the richer defendant could "buy" a reduction in his sentence. Mr. Boss recognized this result, but asserted that some victims would rather have their property returned than have the satisfaction of knowing that all defendants got equal time in jail.

The issue then became whether the present guidelines should be revised to re-invest in the sentencing authority the ability to take into account factors such as a defendant's intent and repayments rather than being primarily "loss" driven? Most of the participants so agreed. The participants also generally agreed that the present loss tables should be simplified by reducing the number of categories.

**Questions of Timing—When to Value Collateral**

The discussion then turned to the issue of timing, that is, when to value the property given by the defendant to the victim. Mr. Boss summarized the present state of the law as the majority of circuits look to the time of detection as the operative time. Two circuits each, he noted, looked to the time of the completion of the offense or the time of sentencing. Mr. Boss also pointed out that in the pledged collateral cases, the guidelines specifically provided for measuring the value of the collateral either at the time of sentencing or the time the victim liquidated the property. He also noted that the Commission's past proposals in this area would have directed courts to look at the time of detection. This raised questions, however, such as detection by whom and how does one define detection.

The group then turned to the hypothetical situation of a defendant who fraudulently obtains a loan and pledges her house as collateral. In one instance the house is worth more than the loan, but as the real estate market falters, the loan becomes under-secured. It is worth less than the loan at the time of discovery and even less at the time of sentencing. In another instance, however, the house is worth less than the loan at the time the loan is fraudulently obtained, but increases in value with time. At the time of discovery, the house is worth half the loan, but at the time of sentencing, it is equal in value to the loan and is sold by the defrauded creditor who now recoups his losses. In these circumstances, when should the value of the collateral be fixed?

Mr. Boss suggested that the answers might be different if the goal was to use loss as a proxy for harm to the victim or as a proxy for the severity of the offense. If the former, than measuring the value of collateral at the time of discovery or sentencing may be appropriate. If the latter, than perhaps the time of the offense is more appropriate.

A slim majority of the participants believed that the value of the collateral should be measured at the time of the transaction so that post-offense market fluctuations have no affect on the sentence (which the participants carefully remembered was not the amount of restitution). A large minority thought that the value of the collateral should be measured at the time of discovery.

**Unlicensed Professional Services Competently Performed**

The group then turned to cases involving unlicensed professionals and whether the guidelines should credit for the value of competently performed (albeit unlicensed) services (*e.g.*, an unlicensed "attorney" drafting a valid will). The overall consensus seemed to be that such crediting should not occur, and that the Commission should consider an encouraged upward departure to account for non-monetary harms like damage to the integrity of the profession, loss of societal faith, and the need for deterrence to prevent future risks to future victims.

**Overall Conclusion**

In the end, there was general agreement that a loss-based guideline system does not account for all harms and that the Commission should consider additional specific offense characteristics in 2F1.1 guideline to account for non-monetary harms.