

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

---

*Lead Facilitator: David F. Axelrod, Esq., Vorys, Sater, Seymour and Pease, L.L.P.  
Columbus, Ohio*

*Assistant Facilitators: Thomas E. Zeno, Esq., Executive Assistant U.S. Attorney*

*Marc Zwillinger, Esq., Kirkland and Ellis, Washington, DC*



## **LOSS BREAKOUT SESSION—GROUP SEVEN SUMMARY**

**Main Topic:** "How should 'loss' be defined in the case of inchoate or partially completed offenses?"

**Secondary Topics:** (1) "Should intended loss include impossible or highly improbable harms (like 'sting' operations)?"; (2) "Should a defendant's gain ever be used as a measurement of 'loss'? If so, when? Should 'gain' have independent significance, or should it be used only when 'loss' is difficult to determine?"; and (3) "Should the fact that a defendant had only a small or non-existent gain be the basis for an encouraged downward departure?"

The lead facilitator of the group was David Axelrod, a partner in the firm of Vorys, Sater, Seymour and Pease. Assistant facilitators included Tom Zeno, executive assistant U.S. attorney, and Marc Zwillinger from the firm of Kirkland and Ellis. To facilitate the discussion, Mr. Axelrod presented the group with a number of hypothetical fact patterns in which the loss was difficult or nearly impossible to determine.

### **Hypothetical #1**

- Defendant steals defective postage stamps from manufacturer
- Defective stamps sold to collector for \$100,000
- Stamps would have been destroyed by the manufacturer, had they not been stolen

The group first determined that, for guideline calculation purposes, loss serves as a "proxy" for harm. Having decided that, how would loss be determined in this case?

According to the definition of loss at section 2B1.1, Application note 2, "Loss is the value of the property taken, damaged, or destroyed." If loss equals the "actual" value of the stamps, would that be an accurate measure of the harm caused by the offense since the stamps are defective and therefore not worth the same amount as non-defective stamps? Is there a difference between guideline "loss" and "loss to the victims?" It could be argued in this case that there really is no loss to the victims because the stamps were defective and would have been destroyed. Is this a situation in which the defendant's gain (\$100,000) would be a better proxy for the harm caused by the offense? What about the idea that a downward departure might be warranted because the defendant actually saved the victim from having to spend the money necessary to destroy the stamps?

### **Hypothetical #2**

- Defendant uses false information to obtain FDA approval of consumer pharmaceuticals
- Pharmaceuticals sold to consumers for \$300,000
- Pharmaceuticals are as safe and effective as "name brands"

Once again, working from the assumption that "loss" is a proxy for measuring harm, what is the loss in this case and does it truly measure the harm?

Application note 11 to section 2F1.1 directs that in cases in which the loss amount determined does not fully capture the harmfulness of the conduct, an upward departure may be warranted. In this fact pattern, however, a dollar amount is not easily determined and thus it would seem that gain would be an

appropriate alternative to determining a loss amount. Gain is clearly a motive in this offense, but does it appropriately measure culpability?

Is it important to distinguish between those defendants who put ineffective or even dangerous drugs on the market and defendants such as the one in this fact pattern?

### **Hypothetical #3**

- Defendant steals proprietary information that cost victim company one million dollars to develop
- Defendant uses information to earn \$500,000 in the first year after theft
- Victim continues to possess and exploit the proprietary information, with competition from defendant

How is loss determined in this type of theft case? Is the value of the "property" taken one million dollars or would potential profits/royalty costs need to be included in that figure? On the other hand, what if the proprietary information ends up being useless even though it cost one million dollars to develop? Can the figure of one million dollars really be used as an accurate determination of loss?

Alternatively, does the defendant's gain of \$500,000 approximately measure the harm caused by the offense? Would a departure be appropriate?

### **Hypothetical #4**

- Defendant uses descrambler chip to steal "pay" television satellite signals
- Defendant retransmits to consumers and generates \$250,000 in the first year of his scheme
- Price defendant charges to his customers is substantially less than would have been charged by the actual owner of the transmission

It is reasonable to conclude that there is no dollar amount loss to the legitimate transmitter of the satellite signal as the inference is that the customers of the fraudulent activity would not have paid full price for the service. Such a conclusion would leave gain as the only proxy for harm in this offense. Such a conclusion also begs the question, "Can gain ever exceed loss?"

### **Hypothetical #5**

- Defendant induces school to purchase anti-drug materials at inflated prices
- Defendant receives gross revenues of one million dollars
- Defendant delivers only a small portion of that which is ordered and paid for, at a cost to the defendant of \$50,000
- Defendant has spent an additional \$50,000 on unshipped materials, plus overhead of an additional \$50,000

How is loss determined in this case? Is there truly a dollar amount that can be determined as loss or is the defendant's gain a better proxy for the harm caused by this offense? If so, should the amount be reduced by the cost of the materials that were actually delivered? What about the "overhead" costs that were paid out by the defendant?

To conclude, it seemed that the group's discussion only raised more questions than answers in determining loss amounts or looking to gain as an alternative measurement for loss. It seems that there is a difference between "intrinsic" loss and the total harm to the victims. In other words, looking at the value of the property taken damaged or destroyed oftentimes does not fully capture or measure the harm created by a particular offense. With that concept in mind, should the focus on determining loss be shifted to accounting for the total harm of offense, rather than trying to assign a dollar amount to the "loss?"

