TESTIMONY OF THE VICTIMS ADVISORY GROUP

Susan Howley, Chair

BEFORE THE UNITED STATES SENTENCING COMMISSION

Proposed Amendments to the Federal Sentencing Guidelines
Dodd-Frank Act/Fraud Offenses

Wednesday, March 14, 2012

The Victims Advisory Group (VAG) offers the following comments regarding proposed amendments to Guideline §2B1.1, as those proposed amendments relate to victims of crime. The VAG continues to be concerned that making a dollar figure regarding the victim's loss or defendant's gain the principle focus of sentencing fails to capture the true impact and culpability of the offender, particularly when considering fraud committed against individuals.

We address two sections of the Commission's proposal, the sections relating to mortgage fraud and the impact of loss and victim tables.

I. Mortgage Fraud

The changes regarding mortgage fraud (Commentary (3)(A)(v)(IV) and (3)(E)(ii) appear to contemplate only those forms of the crime where the "victim" is a bank or lending institution. However, mortgage fraud can cause significant harm to individuals, through such schemes as foreclosure rescue, which take advantage of desperate people facing the loss of their home; reverse mortgages, which often target seniors who want to remain in their homes but are in need of cash assistance; and identity theft involving mortgages, which can strip people of their homes or equity with no involvement of the victim.

The reasonably foreseeable harm in such cases should include the loss of the victim's home, damage to the victim's credit record, time lost by the victim in repairing their credit, trying to prevent the loss of their home, or in looking for new housing. It could also include reasonably foreseeable costs in storage for personal belongings, costs associated with moving, or similar expenses.

But mere focus on dollar loss is insufficient to capture the harm caused by the act. In too many fraud cases, the amount of money lost by an individual victim in a mortgage fraud case may look insignificant to an outside observer, especially when compared to the amount that may have been lost by the mortgage company. But the impact of the loss of one's home on the victim is devastating and reasonably foreseeable.

Recent research reveals that losing one's home has a significant mental health impact. For example, the University of Pennsylvania School of Medicine recently studied people in the Philadelphia area who were undergoing foreclosure. The study revealed that nearly half of the respondents reported depressive symptoms, and 37 percent met screening criteria for major depression. The financial distress of the foreclosure had other effects as well: many respondents also reported that they were unable to afford prescription drugs, and that they had skipped meals.[1]

The recent case against Charles Donaldson in U.S. District Court in Baltimore provides an example of the impact of mortgage fraud on individual victims. There, homeowners in distress were persuaded to participate in a foreclosure "rescue" plan. Donaldson said that he would find "investors" to purchase the homes—who were really friends and family members of the defendant. After the purchase, homeowners were told, they would be able to remain in their homes and pay rent to those "investors." Meanwhile, he told the homeowners, the "investors" would pay the mortgage and receive a small portion of the equity in the home. The remainder of the equity was to be transferred to Donaldson, who said he would hold it in escrow and give the homeowners a chance to buy back their property after 12 to 18 months, during which time they would be able to repair their credit and build up their finances.

Donaldson and his co-conspirator then obtained new mortgage loans on the properties in the names of the "investors" with higher monthly mortgage payments, and, generally, higher interest rates than those the homeowners had previously been paying. The homeowners were forced to use their personal savings and credit cards to make rent payments until they were no longer able to do so. The loans then went into default, which led to foreclosure. The homeowners had lost control of their homes, could not afford the new mortgage loans with higher payments and interest, and could not qualify for a refinance.[2]

Basing a sentence on the amount of money loaned by the banks to the defendant under this scheme ($4.7 million) or total loss of equity sustained by the homeowners as a group ($1.2 million) does not adequately capture the harm to the individual homeowners in such a situation: homeowners who were already in financial distress have not only lost their equity, but their homes and much of their remaining assets in an attempt to save their home. Such victims will also have suffered further damage to their credit and have increased difficulty in paying for a down payment or security deposit on a new residence.

[1] Craig Evan Pollack and Julia Lynch . Health Status of People Undergoing Foreclosure in the Philadelphia Region. American Journal of Public Health: October 2009, Vol. 99, No. 10, pp. 1833-1839.

[2] Press Release, U.S. Attorney's Office, District of Baltimore, Loan Officer Sentenced in Fraudulent Mortgate "Rescue" Scheme Resulting in Losses of over $1.2 million to Homeowners in Financial Distress. (March 8, 2012) available online at http://www.justice.gov/usao/md/Public-Affairs/press_releases/Press12/LoanOfficerSentencedinFraudulentMortgageRescueSchemeResultinginLossesof1.2Million.html (accessed March 13, 2012).

In the case of mortgage fraud, the guidelines should include consideration of whether any victims lost their homes as a result of the fraud or otherwise sustained serious harm.

II. Impact of Loss and Victims Tables in Certain Cases

The Commission has asked whether the impact of the loss table or victims table might overstate the culpability of defendants. Our concern is that the impact of these tables in many cases understates the defendant's culpability by limiting consideration to monetary loss or numbers of victims rather than considering the full scope of harm to the victim.

The Commission also asked whether it should limit the impact of the loss table if the defendant had relatively little gain. The VAG believes such an approach minimizes the culpability of the defendant and is bad public policy. The loss to the victim may have a significant impact regardless of the defendant's gain. For example, many victims of fraud are elderly, and past their working years.[3] Therefore, the victims are unlikely to be able to recover from a monetary loss of any significance. The loss of assets often has a direct effect on their quality of life. Many perpetrators of fraud know their victims and well understand the likely impact of the fraud. Even for those who do not personally know their victims, the impact of the fraud on the victims is reasonably foreseeable.

The Commission has asked whether it should amend the victims' table to limit the impact of the table if no victims were substantially harmed by the offense, particularly if the offense did not substantially endanger the solvency of financial security of at least one victim. The VAG urges the Commission NOT to make this change. Identity theft cases provide an illustration of the need to preserve the ability to consider the number of victims separately from the financial loss from the crime. A 2010 report by the Bureau of Justice Statistics (BJS) found that only 16% of all victims of identity theft lost more than $1, with a median out-of-pocket loss of $300. However, approximately 20 percent of identity theft victims spent more than a month trying to clear up problems relating to the crime. The study also revealed that approximately 11 percent of victims of credit card misuse and about 30 percent of victims who experienced the fraudulent misuse of their personal information described their experience as "severely distressing."[4] Thus, the harm from identity theft is not trivial but may appear insignificant if the only focus is on the dollar amount lost.

[3] Many victims of securities fraud are elderly, largely because, as a group, they hold the most assets and thus are targeted most frequently. Brian K. Bucks, Arthur B. Kennickell, Traci L. Mach, and Kevin B. Moore, "Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances," Federal Reserve Bulletin (February 2009): A19, Table 6. Family holdings of financial assets, by selected characteristics of families and type of asset, 2004 and 2007 surveys.

[4] Lynn Langton and Michael Planty, "National Crime Victimization Survey Supplement: Victims of Identity Theft, 2008" Bureau of Justice Statistics: Washington, DC (2010).

We urge the Commission to ensure that courts can consider the greater of the victim's loss or defendant's gain, the number of victims harmed, and other reasonably foreseeable harm in sentencing offenders.

We appreciate the opportunity to share these concerns with the Commission, and stand ready to offer our assistance as you work to refine the proposed amendments regarding fraud cases.