

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

*Lead Facilitator: **Professor Frank O. Bowman, III**, Associate Professor,
Indiana University School of Law, Indianapolis, IN*

*Assistant Facilitators: **Judy Goldstein Smith, Esq.**, Assistant U.S. Attorney, E.D. PA*

***Justin A. Thornton, Esq.**, Washington, DC*

LOSS BREAKOUT SESSION—GROUP ONE SUMMARY

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

Secondary Topics: (1) "The special problem of interest" and (2) "Should costs of investigation and prosecution of the government and victims be excluded from loss, even if reasonably foreseeable?"

Professor Frank Bowman of Indiana University School of Law–Indianapolis, Assistant U.S. Attorney Judy Goldstein Smith of the Eastern District of Pennsylvania, and Mr. Justin Thornton, a white collar criminal defense attorney, led the dialogue about these issues.

Introduction of the Issues

Professor Bowman introduced the issue by describing how the "loss" calculation is one of the most frequently litigated issues in federal sentencing law. He argued that no coherent definition of "loss" can be found anywhere in the guidelines or the commentary. In his view, what can be found is a collection of ill-fitting and inconsistent statements scattered haphazardly throughout the guidelines and commentary concerning theft and fraud, sections 2B1.1 (Theft) and 2F1.1 (Fraud). The commentary to section 2F1.1 mentions that the loss in a fraud case will frequently be the same as that in a theft case; however, there is no guidance as to when or why the loss might be measured differently. Professor Bowman asserted that there is no good reason to define "loss" differently in the theft and fraud guidelines.

However, in his view, even after a consolidation of the theft and fraud guidelines, no coherent or workable definition of "loss" would exist due to two basic categories of defects in the current guidelines. First, several issues critical to determining the amount of loss are not addressed at all. For example, the guidelines do not define exactly who the victim is, when the loss should be measured, or if the loss should be determined as a net or gross amount. Second, many of the issues that are addressed are often treated in ways that are unhelpful or contradictory. According to Professor Bowman, the confused state of the current guidelines' rules on "loss" is illustrated by the numerous circuit splits on various aspects of the loss definition.

Professor Bowman then turned to the question of how to fix the problem. This inquiry led back to the basic questions of how and why economic crimes are punished and what role the "loss" measurement really serves. In Professor Bowman's view, the guidelines are an effort to ensure just punishment by setting penalty levels that are consistent with the objectives of criminal law by treating similarly situated criminals similarly and differently situated criminals differently. Second, offense level gradations are an attempt to measure and contrast offense seriousness and defendant culpability. The two customary measures of offense seriousness are the harm inflicted by the defendant and the defendant's culpable mental state.

According to Professor Bowman, in economic crimes, the harm can be found in the amount stolen or in the amount of the loss to the victim, which makes the amount of harm relatively easy to

quantify in monetary units. However, the culpable mental state is always essentially the same in all economic crimes—the intent to permanently deprive. Professor Bowman concluded that the loss or economic damage is not only a direct measurement of harm to victims, but a decent, if imperfect, proxy for the culpable mental state. In his view, in essence, it is more evil to steal a greater amount than a smaller amount, and stealing more usually requires more planning and deliberation. Accordingly, he argues that loss is actually a fairly decent measure of offense seriousness, at least in the abstract. He also argues, however, that questions of what "loss" really means and how should it be measured remain unanswered.

Using Professor Bowman's reasoning, these questions led to the issue of causation, which includes two components. The first is "cause-in-fact," which refers to whether the defendant's conduct set a chain of events in motion that ultimately produced harm. The second is "legal cause," which is an attempt to determine which of the harms caused in fact by the defendant's conduct he should be held responsible for in the end. It is through the idea of legal cause that the defendant's state of mind comes back into consideration. Generally, the law has deemed it fair to hold people responsible for harm they intended, or that which was reasonably foreseeable. In fact, the idea of imposing sentences based on foreseeable harms is already found throughout the law. Specifically, the Supreme Court approved of this idea in the death penalty case of *Payne v. Tennessee*, and this concept can also be seen in the *Pinkerton* rule of conspiratorial liability and the felony murder rule. In addition, the guidelines already use the idea of foreseeability, as for example in the relevant conduct rules (section 1B1.3).

Professor Bowman argues, therefore, the current proposal is that "loss" be defined as the value of pecuniary harm that was caused in the "but-for" sense by the defendant's conduct *and* was reasonably foreseeable to the defendant at the time of the commission of the crime. He sees this proposal as providing a basic rule that is consistent, easily understood and applied by judges and lawyers who are used to the concept, and just, in that it holds defendants accountable for the right class of harms. Equally important, the basic definition in the proposal also provides a solid framework for developing the inevitably necessary special rules of measurement for calculating loss.

This proposal and the related ideas surrounding the calculation of "loss" highlighted three questions for the group. First, should "loss" continue as a primary determinant of sentence length? Second, if so, should the current "loss" definition be reformed? Finally, if the definition should be reformed, should the basic definition be based on principles of causation?

Discussion of the "loss" issue by the conference participants

Mr. Justin Thornton expressed his agreement with the need for simplicity in the guidelines' definition of "loss" and noted that looking at causation issues may be a good way to improve the problems associated with loss. AUSA Judy Goldstein Smith pointed out that examining loss alone may obscure other distinguishing factors in economic crimes, such as the difference between career criminals and one-time cheaters. She believed that such factors are important to keep in mind during an analysis of how to improve the definition of "loss" in the guidelines.

One participant in the conference who had taken part in the original drafting of the loss provisions in the guidelines explained that one reason for the difference in the treatment of direct and consequential damages in the calculation of loss is the fact that the government cannot protect itself against fraud while individuals can and should be encouraged to do so. He also pointed out that there is a problem with making the relevant conduct too broad because loss should not be measured the same way for all crimes, and

distinctions like those Ms. Smith mentioned should be relevant. He suggested that trying to include culpability in the definition of "loss" is a mistake, and culpability should be used in the specific offense characteristics.

Another participant, a judge, proposed that a variety of contexts of loss should be identified for use in the guidelines, which would first allow one to decide which type of loss is involved. First, he suggested that the basic concept of loss be captured under a general rule for economic crimes. Then specific variables could be identified for appropriate cases, leaving the judge to make an upward or downward adjustment according to the individual factors in the case. Otherwise, if loss is not considered a useful reflector of culpability, he explained that judges could start the sentencing analysis from a basic level and then examine other factors, such as the sophistication of the plan and the role of the defendant.

A participant suggested that the problems surrounding the definition of "loss" in the guidelines may be overstated and that one should keep in mind that revamping the guidelines could make the problem of "loss" more complicated instead of more clear.

The conference attendees then discussed a specific problem involving fraud committed by a real estate speculator in acquiring land to turn into a resort condominium development. The developer lied to acquire a fraudulent title and insurance policy, and the owners of the condos suffered a near complete loss in the equity of their real estate. The question posed in the seminar was how to determine the amount of loss in this case.

One participant suggested that the amount of loss was the amount that was required to clear title to the property because it was the title company that was defrauded. However, he noted that the amount of loss could be contingent on the offenses charged in the indictment. If the indictment included the fraud against the title company, the amount of loss would be one amount, but if the indictment included the fraud on the buyers, the loss may be a different amount because the choice of the original charge defines how to view the loss in the case.

The participants then discussed whether the loss resulting from a decline in the value of the collateral that the bank suffered would be considered a loss under the guidelines, even if that loss was only a result of a change in the market. The attendees debated whether this loss would be considered a consequential damage and whether the cause of the loss would or should be examined by the court. One participant thought that if one used the idea of relevant conduct, this loss should be included because it was a result of the same course of conduct as the fraud charged in the case. Professor Bowman then explained how the case was actually decided and how the court included the decline in the collateral in its assessment of the loss.

Professor Bowman also stated how a complex calculation was eased by changing the definition of "loss" from the value of the thing taken to the reasonably foreseeable harm resulting from the defendant's conduct. He contended that, although issues involving the amount of the loss and what was reasonably foreseeable will still be litigated, these types of problems are much easier to solve under the proposed caused-based definition of "loss."

The group then examined a second problem in which a telemarketing team sold fraudulent stock and securities to customers, promising guaranteed returns or a full reimbursement. This problem introduced the question of how to use the concept of reasonable foreseeability in certain cases. For instance, the

participants had posed to them the question of whether one customer's death would be compensable if she died from a stroke after immediately learning that she was the victim of this fraud scheme. In particular, the conference attendants debated whether the status of her health was reasonably foreseeable and exactly what kind of harm the definition of "loss" includes. Several participants were of the opinion that some collateral harms can be included in the calculation of loss because the concept of reasonable foreseeability allows some variables to be included, but that in this case, the customer's death was not one of those variables.

Professor Bowman then posed the question of interest and whether the time value of money, which is always reasonably foreseeable, should be included in the value of the loss. The group discussed this problem along with the question of whether the cost of prosecution should be included in the calculation of the loss. The apparent consensus of the group was that neither interest nor the costs of prosecution should be included in "loss."