Day One—Revising the Definition of Loss

Group Breakout Session Three

Lead Facilitator: **Joshua R. Hochberg, Esq.**, *Chief, Fraud Section, U.S. Department of Justice*

Assistant Facilitators: **James E. Felman, Esq.**, *Kynes, Markman & Felman, P.A. Co-Chair, Practitioners' Advisory Group*

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LOSS BREAKOUT SESSION—GROUP THREE SUMMARY

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

Secondary Topics: (1) "Particular crediting problems in regulatory offenses where, for example, the defendant falsely represented that a product was approved by the regulatory agency or fraudulently obtained approval?" (2) "How should crediting be handled in cases involving diversion of government program benefits?"

The lead facilitator for Group Three was Joshua R. Hochberg, chief of the Fraud Section of the U.S. Department of Justice. Assistant facilitators were James E. Felman of Kynes, Markman, and Felman in Tampa, Florida, and Gregory T. Wallance of Kaye, Scholer, Fierman, Hays, and Handler in New York City. The audience of approximately 20 persons consisted of circuit judges, district judges, government attorneys, defense attorneys, and probation officers.

Loss in Regulatory Offenses

Mr. Hochberg began the discussion with the observation that in regulatory offenses, such as those in which an offending company succeeds in obtaining approval of the Food and Drug Administration to market a drug by somehow circumventing the FDA process, there may not be any actual economic loss. He spoke of cases such as *U.S. v. Chatterji*, 46 F.3d 1336 (4th Cir. 1995), and *U.S. v. Haas*, 171 F.3d 259 (5th Cir. 1999), in which the drugs that reached consumers were equally therapeutic as those that FDA had approved. The question that naturally arises in this situation is whether the "loss" calculation has any legitimate role in setting the offender's penalty. If the consumers suffered no actual harm, is the government itself the victim of the offense and, if so, how can we properly account for the injury to the government?

Mr. Hochberg opined that the Department of Justice believes that "gain" is an appropriate surrogate for "loss" in regulatory fraud cases in which there is no actual harm to consumers. He stated that this approach is a reasonable way to quantify the risk of harm to consumers that usually results from the circumvention of the regulatory process.

Both Mr. Felman and Mr. Wallance thought that section 2F1.1 in its current form is a reasonable tool to calculate regulatory offense sentences. They did not agree that "gain" was a reasonable proxy for "loss" in cases that result in no actual harm to consumers. To the extent that such cases pose a risk of harm to consumers, Messrs. Felman and Wallance agreed that judges could be relied upon to quantify such additional culpability incident to the encouraged departure for risking "reasonably foreseeable, substantial non-monetary harm" at section 2F1.1, App. N. 11(a).

Various members of the audience opined that section 2F1.1 is being used to prosecute too many disparate types of cases and, as a result, it is a "poor fit" for many of the regulatory frauds that are directed to it by Appendix A of the U.S. sentencing guidelines. No fewer than three members of the audience expressed the opinion that regulatory offenses should be sentenced under a discrete guideline with a base offense level higher than that found in section 2F1.1 to better address the omnipresent "risk of harm" in these cases. There seemed to be considerable support for the proposition that using "loss" to calculate regulatory sentences was what one audience member described as "a stretch and a fiction." Still, others did comment that no better determinant of sentence severity exists.

Loss in Diversion of Government Program Benefits Cases

The discussion in this area was confined mainly to food stamp and medicare cases. Mr. Hochberg pointed out that it can be very problematic to try to "net out" the appropriate credits in the sentencing of such cases. More specifically, the worth of the food stamps actually utilized by "intended recipients" for "intended uses," or the value of medical procedures performed upon "intended recipients" of medicare benefits can involve very difficult and protracted fact-finding. Still, Mr. Wallance maintained that in some instances it is necessary to engage in such fact-finding. Mr. Wallance observed that courts routinely engage in complicated fact-finding in civil cases to set damages. To do less in determining how long an individual is to be deprived of his liberty cannot be justified in the opinion of Messrs. Wallance and Felman. The general reaction from the audience seemed to support the notion that, assuming loss is an appropriate determinant of sentence length, we must at times go through a problematic fact-finding process to assure that it is calculated with reasonable accuracy.

Despite the fact that members of the audience spoke of situations in which "diversion" cases produced little or no loss (*e.g.*, situations in which non-qualifying contractors fraudulently obtain government contracts and satisfactorily perform), there was no suggestion from any member of the audience that section 2F1.1 was a "poor fit" for "diversion" cases. Still, it is obvious that such cases potentially produce little or no economic "loss" while victimizing the government and frustrating the policy behind a government program. Thus, the same logic which would support a discrete guideline for "regulatory" offenses can be applied with equal force to "diversion" offenses.

Overall Conclusion

At no point in the discussion did anyone even suggest that the determination of "loss" can be made without consideration of "credits" to which the defendant may be entitled. There was total accord that the determination of the extent of such "credits" can be a daunting and time-consuming task. It must be reiterated that some in the audience spoke in favor of a new guideline for "regulatory" offenses and that the same logic might support funneling "diversion" cases to that new guideline. The common denominator holding these two types of cases together is the fact that both often involve frustration of government policies which cannot be neatly converted into an offense level by means of a "loss" table.