

2017  
National  
Seminar

## Economic Crime: Selected Cases Addressing §2B1.1

**Selected Case Law Related to Economic Crimes.** The Courts of Appeals have issued a number of opinions relating to sentencing and the guidelines, including cases on the amount of loss, sophisticated means, victims and relevant conduct, identification, and fraud and tax.

### Amount of Loss

*U.S. v. Free*, 839 F.3d 308 (3d Cir. 2016) The district court incorrectly determined the amount of loss in a bankruptcy fraud case. The district court relied primarily on the notion that Free harmed the judicial system by concealing assets to determine loss under §2B1.1. However, that rationale was inconsistent with the Guidelines and incompatible with prior case law. The concept of “loss” under the Guidelines is not broad enough to cover injuries like abstract harm to the judiciary: “In our view, ‘loss’ has a narrower meaning—i.e., pecuniary harm suffered by or intended to be suffered by victims.” The court remanded to allow the district court to determine what, if any, loss to creditors the defendant intended, or the gain he sought by committing the crime. The district court could always consider an upward departure or variance based on the harm to the judiciary.

*U.S. v. Harris*, 821 F.3d 589 (5th Cir. 2016) The mere fact that a government contract furthers some public policy objective apart from the government's procurement needs is not enough to transform the contract into a “government benefit” akin to a grant or an entitlement program payment. We accordingly hold that procurement frauds involving contracts awarded under the 8(a) set-aside program, like procurement frauds generally, should be treated under the general rule for loss calculation, not the government benefits rule.

*U.S. v. Minor*, 831 F.3d 601 (5th Cir. 2016) Reasonable for the district court to calculate intended loss by determining the average actual loss of each account holder whose account Minor successfully breached and then multiplying that average by the total number of accounts Minor intended to access.

*U.S. v. Aden*, 830 F.3d 812 (8th Cir. 2016) The district court properly calculated loss in a food stamp fraud case when it conducted a comparative statistical analysis comparing transactions from the defendant's store with transactions from comparable stores.

*U.S. v. Carpenter*, 841 F.3d 1057 (8th Cir. 2016) In a case involving futures contract fraud, the district court's use of one-day high price method for calculating loss was not an abuse of discretion.

*U.S. v. Frisch*, 704 F.3d 541 (8th Cir. 2013) District court did not procedurally err in accepting government's intended loss calculation during sentencing for defendant convicted of concealment from Social Security Administration (SSA), where court accepted government's reasoning that defendant (age 63) would have continued receiving benefits to which he was not legally entitled until retirement age (age 66) if he had not been caught, and defendant's intent to cease defrauding SSA did not arise until authorities interdicted the offense. Thus, Frisch would have received \$38,610 in addition to the \$86,160 already received, for a total intended amount of \$124,770.

*U.S. v. Miller*, 588 F.3d 560 (8th Cir. 2009) District court's determination that there was no actual loss attributable to defendant convicted of conspiracy to commit wire fraud and aiding and abetting wire fraud was reasonable; court presided over ten-day jury trial followed by extensive sentencing hearing and found that government offered no proof of actual loss, even though it could have been determined.

*U.S. v. Thomas*, 841 F.3d 760 (8th Cir. 2016) In a matter of first impression, the Eighth Circuit held that it was appropriate to include \$500 minimum loss amount for each unused unauthorized access device the defendant and coconspirators possessed.

*U.S. v. Walker*, 818 F.3d 416 (8th Cir. 2016) “The §2B1.1 net loss analysis asks whether ‘the offender ... transfer[red] something of value to the victim,’ not whether the victims' total losses were affected by ‘legitimate market factors,’ such as market conditions that may have caused the failure of Bixby's corn-stove business.”



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*U.S. v. Grovo*, 826 F.3d 1207 (9th Cir. 2016) “Under Galan, that failure to disaggregate losses caused by the initial abuse was an abuse of discretion, and we must vacate and remand for recalculation of the victim's general losses. We emphasize, however, that the district court's method of apportioning that loss between the defendants here was sound under Paroline. After the court properly disaggregates the victim's general losses, it is therefore permitted to reapply that method in reaching the individual restitution amount.”

*U.S. v. Tadios*, 822 F.3d 501 (9th Cir. 2016) “It was thus not clear error for the district court to include the estimated value of the time that Tadios should have reported as annual leave in calculating the total losses Tadios inflicted on the Tribe. By failing to claim or deduct annual leave for the dates when she visited her husband and told her board she was traveling for work, Tadios harmed the Clinic twice over: first, by getting the Clinic to pay for travel expenses it had no obligation to cover, and again by getting the Clinic to pay her salary for time she was supposed to be working but was not.”

*U.S. v. Cobb*, 842 F.3d 1213 (11th Cir. 2016) District court did not clearly err in finding that the government proved by a preponderance of the evidence that the intended loss was more than \$2,500,000. The Government provided reliable and specific evidence of the loss calculation and the district court made a reasonable estimate after reviewing the spreadsheet prepared by the special agent and his testimony at the sentencing hearing. The hot spot device recovered from defendant's residence was dynamic, meaning that it generated a new IP address each time it disconnected from the internet. “In other words, the fact that the IP address could only be linked to 60 or 70 tax returns does not mean that the device was not used to file other tax returns.”

*U.S. v. Slaton*, 801 F.3d 1308 (11th Cir. 2015) “The sentencing guidelines' net loss approach addresses how loss is to be calculated when the [defendant's] fraud or deceit involves a Government Benefits program. Because worker's compensation is a government benefit, the guidelines' net loss approach governs the loss calculation in a fraud case involving worker's compensation.”

*U.S. v. Zitron*, 810 F.3d 1253 (11th Cir. 2016) The district court could use the full amount of the check cashing scheme, and not just the amount of money that was deposited in the bank accounts.

### Sophisticated Means Specific Offense Characteristic

*U.S. v. Simmerman*, 850 F.3d 829 (6th Cir. 2017) Sophisticated means SOC applied based on concealment of embezzled funds. While the embezzlement itself was not sophisticated, the system of manipulating the computer system and creating a dormant account to hide the stolen money, and other methods employed to evade detection, were sophisticated.

*U.S. v. Laws*, 819 F.3d 388 (8th Cir. 2016) Court correctly applied the sophisticated means SOC. “In combination, the multiple bank accounts, the use of multiple P.O. boxes, the filing of returns with no preparer listed, and the filing of returns listing false addresses demonstrates a carefully-considered attempt to conceal the nature of the scheme, to make identifying its multiple perpetrators more difficult, and to partially obscure the identity of the victims. This, combined with the fact that at least six people were involved in executing the scheme and collectively managed to file more than 200 fraudulent returns claiming over \$1.7 million in refunds, makes the offense conduct in this case ‘notably more intricate’ than the garden-variety conspiracy to defraud the United States or false claim to the IRS.”

*U.S. v. Feaster*, 798 F.3d 1374 (11th Cir. 2015) Sophisticated means SOC (§2B1.1(b)(10)) applied based on the defendant's using her inside position at the VA, the steps she took to conceal the offense after stealing money, and her repeated criminal actions.

*U.S. v. Sosa*, 777 F.3d 1279 (11th Cir. 2015) Sophisticated means SOC (§2B1.1(b)(10)) applied, as patients were paid in a “surreptitious manner” to receive fraudulent “treatments.” Additionally, the defendant injected HIV-positive patients with inexpensive products such as vitamins, then billed Medicare for expensive injections and infusions.

### Victims and Relevant Conduct

*U.S. v. Moreno*, 809 F.3d 766 (3d Cir. 2016). “Actual loss, in turn, is defined as ‘the reasonably foreseeable pecuniary harm that resulted from the offense.’” (quoting U.S.S.G. § 2B1.1 cmt. n. 3(A)(i)). “Pecuniary harm is monetary harm or harm that is otherwise measurable in money. The bar is not high. For example, in the bank fraud context, monetary harm can include even ‘the expenditure of time and money to regain misappropriated funds and replace compromised bank accounts.’ The reason for this is that ‘an account holder who must spend time and resources to dispute fraudulent activity, recoup stolen funds, and repair his or her credit and financial security has suffered a monetizable loss that is a reasonably foreseeable and direct consequence of the defendant's theft or fraud.’ The District Court noted that evidence had been

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introduced at trial that Moreno was responsible for over 110 fraudulent appraisals and that the presentence report indicated that the number was closer to 250 fraudulent appraisals.”

*U.S. v. Brandriet*, 840 F.3d 558 (8th Cir. 2016) District Court did not commit clear error in determining that defendant's mail fraud crime, in which he acted as victim's insurance adjuster and stole insurance proceeds arising from accident in which van struck her house, resulted in substantial financial hardship to victim, and in applying the two-level enhancement for substantial financial hardship; defendant stole money earmarked for living expenses, rent and other living expenses are time sensitive, defendant withheld a check for four months and then only passed on roughly half the amount, and ultimate theft was of approximately \$30,000.

*U.S. v. Sammour*, 816 F.3d 1328 (11th Cir. 2016) The district court correctly determined the number of victims SOC in an identity theft scheme. “Sammour's victims qualify as ‘victims’ under the guidelines because, although the defendants never ‘used’ their identifications to cash the Treasury checks, Sammour's cohorts ‘used’ their identifications to obtain the Treasury checks in the first place. Under §2B1.1, Sammour is responsible for all ‘relevant conduct,’ including the ‘reasonably foreseeable acts’ of his cohorts that occurred ‘in furtherance of’ the tax-fraud scheme and ‘in preparation for’ his crimes.”

### Identification

*U.S. v. Kleiner*, 765 F.3d 155 (2d Cir. 2014) Defendant used another person's name and address to create a counterfeit driver's license, which he then presented as his own to the bank victim of his fraud. The two-level sentencing enhancement for unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification was warranted. The counterfeit driver's license, and not simply the number it displayed, was a “means of identification” within meaning of the enhancement.

*U.S. v. Suchowolski*, 838 F.3d 530 (5th Cir. 2016) After almost a quarter-century's unlawful receipt of social-security benefits in the guise of a person who died in 1990, Ivan Suchowolski pleaded guilty to theft of government property. The plain meaning of the phrase “actual individual,” as used in sentencing enhancement for unauthorized means of identification to obtain another means of identification, does not distinguish between living and deceased persons. As the PSR explained, Suchowolski used Stolzenback's name and social-security number to create additional means of identification, through the credit union and bank accounts.

*U.S. v. Taylor*, 818 F.3d 671 (11th Cir. 2016) District courts may apply the §2B1.1(b)(1)(B)(i) enhancement to a defendant's sentence—even when that defendant has also been convicted of violating § 1028A—if the government demonstrates, by a preponderance of the evidence, that defendant's relevant conduct included the “‘production’” of an unauthorized access device.” Taylor not only used ‘a means of identification’ (a stolen identity) to get access to another means of identification/unauthorized access devices (a credit card)—he [also] had the bank add him to the account and create a new credit card with his name on it.” Thus, the defendant “willfully caused” or “induced” the production of the unauthorized access devices. The 2-level enhancement was warranted.

### Fraud and Tax

*United States v. Doxie*, 813 F.3d 1340 (11th Cir. 2016) Following the majority of circuits, the court held that the district court did not err when it refused to group fraud counts and tax offense counts under §3D1.2. The offenses involved not only different victims but distinct offense behavior.

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The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines provide structure for the courts' sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.