US Sentencing Commission's Annual National Seminar
on the Federal Sentencing Guidelines

2018

National Seminar

Economic Crimes
Answers

ECONOMIC CRIMES SCENARIOS

Question 1

Defendant obtained 500 credit card numbers. She sent 250 of them to a co-defendant to reencode the stolen credit card information onto professional-looking counterfeit credit cards. **What is the loss amount?**

Answer: $500 x 500 cards. Even though Defendant only sent 250 cards for reencoding, she can be said to have intended a loss on 500 cards, since that's the number of cards she obtained fraudulently. *See* App. Note §3(A)(ii). The fact that she hasn't yet used the fraudulently obtained cards is immaterial. A special rule at §2B1.1 App. Note 3(F)(i) states that the loss for any counterfeit or unauthorized access device is not less than $500 per access device.

Question 2

Defendant obtained 100 credit cards or debit card numbers from abroad, encoding them onto blank cards to withdraw money from ATMs. She used only 10 of the cards and took out $40 on each of the 10 occasions. Defendant was arrested at home, where investigators recovered the other 90 cards but no money. At the time of sentencing the bank has not recovered any money from the fraudulent withdrawals.

What is the loss amount?

Answer: $500 x 100 cards. See answer to Question 1, as well as *U.S. v. Popovski*, 872 F.3d 553 (7th Cir. 2017) and *U.S. v. Moore*, 788 F.3d 693 (7th Cir. 2015).

What restitution is owed?

Answer: Only the amount that was actually taken from the victims - $400. The victim is entitled to cover their actual losses caused by the Defendant's count of conviction.

Question 3

Defendant robbed a bank of $4,237. On his way out, the dye pack inside the bag burst, staining at least half of the bills. Investigators recovered the bag and money at the scene. At sentencing the government maintained that the stained money was unusable.

What is the loss amount? What restitution is owed?

Answer: Loss under the robbery guideline at §2B1.1(b)(7) will be determined by what Defendant stole. But, as to restitution, we can't know the answer yet. On these facts, the government hasn't shown that

the dye-stained bills were "so badly damaged that they [could not] be replaced." *See U.S. v. Anderson*, 866 F.3d 761 (7th Cir. 2017).

Question 4

Defendant is convicted of Identity Theft. He stole the names, Social Security numbers and security clearance levels of roughly 400 members of his former Army unit, and sold the information of 98 of them to others so they could create false IDs for militia members in case they "ever wanted to disappear and become someone else." The defendant believed he was selling the information to Utah-based militia members, but in reality, they were undercover FBI agents.

Do any victim-related adjustments apply?

Answer: The answer could be yes, more than 10 victims, or maybe. §2B1.1 App. Note 4(E) says that a victim in an identity theft case includes "any individual whose means of identification was used unlawfully or without authority." The answer depends on whether the court concludes that Defendant "used" the information by selling 98 of the stolen identifiers. On these facts, Defendant knew the stolen identities would be used by others, but whether he himself "used" them when he sold them may be subject to debate, and ultimately will have to be decided by the court.

Question 5

Defendant is being sentenced for a fraud offense involving small business contracts. Defendant was working for his father in law's business and they were legitimately eligible for, and were awarded government contracts based on the father in law's veteran status. After his father in law died, defendant continued to apply for and receive government contracts. Defendant provided services for the Air Force and NASA, both of whom had no issue with the services defendant provided. Neither agency is seeking restitution.

Should the court discount from the loss amount the value of the services rendered?

Answer: It depends on the circuit. Courts have taken different approaches to this type of offense. In *United States v. Martin*, 796 F.3d 1101 (9th Cir. 2015) the court, relying on §2B1.1 App. Note 3(A)(v)(II), said that the loss amount should reflect the monetary loss that "the defendant truly caused". In this case, the contracts were performed. The *Martin* court said that in such a case, "it would be unjust to set the loss resulting from [the] fraud as the entire value of the contracts." In contrast, in *United States v. Giovenco*, 773 F.3d 866 (7th Cir. 2014), the court relied on §2B1.1 App. Note 3(F)(v) to conclude that "loss shall include the amount paid for the property, services, or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services." The Eleventh Circuit has also held that loss in these cases is "the entire value of the [] contracts that were diverted to the unintended recipient." *United States v. Maxwell*, 579 F.3d 1282 (11th Cir. 2009).

Who is the victim and what restitution should the court order?

Answer: The government received value since Defendant performed the contract to the agencies' satisfaction. On these facts, there's no actual loss.

Question 6

Defendant Walter was convicted of one count of conspiracy to commit health care fraud and one count of conspiracy to pay and receive health care kickbacks. For five years, Walter owned and operated a durable medical equipment company, through which she fraudulently billed Medicare and Medi-Cal for durable medical equipment (mainly motorized wheelchairs) provided to patients who did not need them. She paid kickbacks to recruiters who found patients and doctors who would be paid for prescriptions. During the five-year period, Walter submitted reimbursement claims to Medicare in the amount of $3,432,776. She was paid $1,866,261. During the same time period she billed Medi-Cal $89,011 and was paid $73,269. Walter's lawyer stated at sentencing that Walter was familiar with Medicaid and Medi-Cal rules for reimbursement, and that she expected to receive only the amount she did receive from those programs.

What is the loss amount?

Answer: $3,432,776 + $89,011 = the full amount billed to Medicaid and Medi-Cal. A special rule at §2B1.1 App. Note 3(F)(viii) says that in health care fraud offenses, the aggregate dollar amount of the bills submitted to the government health care program is sufficient to establish the amount of intended loss, unless rebutted. But, on these facts, Defendant did not rebut the presumption.

"Because [defendant] failed to provide any evidence that she did not intend for Medicare and Medi-Cal to reimburse her for the full 3.5 million [] the district court did not clearly err in relying upon the total amount billed to determine intended loss. Nor, should we add, do counsel's arguments, unsupported by any evidence at trial or sentencing, that [defendant] was familiar with Medicare's reimbursement practices or that she did not expect to recoup the full billed amount suffice to rebut this presumption." *U.S. v. Walter-Eze*, 869 F.3d 891 (9th Cir. 2017)

What is the restitution amount?

Answer: Only the amount actually paid.

Question 7

Defendant Tartar and his co-defendant Litos established a company to purchase, rehab, and sell homes. The two assisted buyers by providing them with down payments, however, they falsely claimed on loan applications that the buyers had the funds. They made other, material misrepresentations on the loan documents. Those misrepresentations included fictitious incomes, non-existent bank accounts, and

other false assets. The documents contained obvious errors and inconsistencies, and one buyer purchased six homes in a two-week period. Bank of America nonetheless approved the loans. Tartar attended closings posing as the seller's representative, and signed documents falsely affirming that no part of the down payment came from the seller or any third party. After closing Tartar provided the buyers funds to make two mortgage payments, after which, they defaulted on the loans. Intended loss was determined to be between $1.5 and 3.5 million. Bank of America suffered an actual loss of $900,000.

What restitution is owed to Bank of America?

Answer: None. *See U.S. v. Litos*, 847 F.3d 906 (7th Cir. 2017). Bank of America was not entitled to restitution where it "deliberately turned a blind eye to evidence that the applications were patently false."

What is the loss amount?

Answer: Between 1.5 and 3.5 million dollars. *See U.S. v. Tartareanu*, 884 F.3d 741 (7th Cir. 2018)

"It is true, as we explained in our first opinion in this case, that Bank of America did not have clean hands in this scheme and applying the label of 'victim' seems inappropriate. [] We have recently made clear, however, that such a characterization is not relevant to the intended loss calculation.

Our cases have explained that intended loss is the amount that the defendant placed at risk, and neither the text of the Guidelines nor the relevant case law requires the government or the court to identify who, or what entity was at risk."

Question 8

Sunmola was convicted of fraud involving an online dating scheme. He and his co-defendants created profiles on online dating platforms using fake names and giving the impression that they were successful businessmen. After gaining the women's trust, Sunmola and his co-defendants had the women send electronics purportedly in support of the U.S. military's efforts to defeat ISIS, and electronic money transfers. One victim was 55 and recently divorced from her husband of 20 years.

Over Sunmola's objection, the court applied the vulnerable victim enhancement found at §3A1.1(b)(2). **Was the court's ruling correct?**

Answer: Yes. Though there were additional women with other characteristics that arguably made them more vulnerable that the victim mentioned in the question, the court of appeals made fairly broad statements about application of the enhancement. *See U.S. v. Sunmola*, __ F.3d __ (7th Cir. April 16, 2018). "Many of these women had been divorced, abandoned, widowed, or ignored by the men in their lives. [] These women were seeking companionship through online dating, making them particularly susceptible to falling into the vicious strap of a man who deceitfully made them believe they were in

love. Their prior relationships left these women unusually vulnerable to falling for [defendants'] deceitful tactics."

Question 9

Defendants A and B are convicted of wire fraud (18 U.S.C. § 1343). Defendant A fraudulently obtained $810,000 from Victim 1 (his mother). The defendant told his mother he was terminally ill and was accepted to undergo a clinical trial to treat his illness. He created fraudulent documents to support the scheme, which he used to solicit his mother's financial support. Over a period of time, on several occasions, his mother wired to her son's bank account, the $810,000 from her trust account, rendering it insolvent.

Distraught for her son, the victim then contacted her sister (Victim 2) who began wiring money to her nephew from her trust account. Victim 2's bank became suspicious, and stopped all wire transfers. To continue with the payments, Victim 2 agreed to send payments to Defendant A via Western Union.

Defendant B (a friend of the defendant) agreed to receive every Western Union payment. On 22 occasions, Defendant B received the payments from Victim 2 totaling just over $22,000. Victim 2, however, transferred a total amount of $310,000 (including the Western Union transfers).

When calculating the guidelines for Defendant B, at §2B1.1, what is the amount of loss?

Answer: $22,000. Each defendant is entitled to their own determination of relevant conduct. The analysis as set forth in §1B1.3 turns on the scope of the individual defendant's agreement. Once scope is determined, next determine whether other participants took actions in furtherance of that agreement, and whether those actions were foreseeable. On these facts, Defendant B only agreed to receive certain payments – those payments that Victim 2 sent to Western Union. This was after Victim 2 had already sent Defendant A many payments through other means. Defendant B's relevant conduct is limited to $22,000.

Will Defendant B receive and enhancement for causing substantial financial hardship to the victim? Why or why not?

Answer: It's doubtful on these facts. Application of specific offense characteristics turns on the Defendant's relevant conduct. Once we establish that Defendant B is responsible for $22,000, yet we also know that Victim 2 sent a total of $310,000 to her nephew, it's hard to conclude that Victim 2's substantial financial hardship, if any, would be attributable to Defendant B's relevant conduct. Of course, this is a fact-intensive inquiry, and the court will have to make findings of fact.

Question 10

Myers ran a scheme to steal and resell motor homes. He did this by calling the owners posing as a Carfax employee to obtain the VIN numbers. He then forged titles using the VINs, applied for clone titles in states that did not verify the original title, and stole the homes using master keys he obtained online. Using the clone titles, he sold the homes to unsuspecting motor home dealers. Those dealers sold the home to other buyers. When the fraud was eventually discovered, the homes were returned to the original owners or to the owners' insurance company.

Who are the victims of Myers' offense?

Answer: In this case, there are many victims. *See U.S. v. Myers,* 854 F.3d 341 (6th Cir. 2017).

"When the thefts were revealed, the stolen motor homes were taken away from the secondary victims and returned to the original owners or their insurance companies. Myers therefore can be said to have intended those losses to the secondary victims."

What losses will be included in the §2B1.1 determination?

Answer: The court stated, "[w]hile []those secondary victims had a claim against the dealers who sold the motor homes to them, the claim may not be filed or filed successfully, and at least in one case had not been filed by the time of Myers sentencing. [] Because of these [sorts of complications that often accompany loss calculations] the Court need only make a reasonable estimate of the loss."

Who is owed restitution?

Answer: Every victim of the Myers' conduct of conviction. Restitution is this case will be complicated, but necessary.

If restitution is ordered, what kinds of damages might be included?

Answer: There are likely to be many forms of monetary damages flowing from a case such as this. Victims had their homes stolen. They may have had to make alternate living arrangements, which could have many costs associated. The court will have to make findings as to the losses proximately caused by Myers' offense of conviction.

Will any victim-related enhancements apply?

Answer: Perhaps. With the theft of a home, it's likely that at least some victims suffered a substantial financial hardship. It's possible that in talking to the victims, Myers became aware of circumstances making the some of the victims vulnerable and continued to target them for that reason.

Question 11

White and co-participants bought merchandise in retail stores with fake checks and then returned the merchandise for cash. Over four years, the group targeted 32 stores and caused actual losses of $627,000. White's plea agreement stated:

> Beginning no later than in or around the fall of 2009 and continuing until at least in or around the summer of 2013, in the Western District of Texas, and elsewhere . . . V. White, together with other individuals known and unknown to the Grand Jury, knowingly devised, intended to devise, and participated in a scheme to defraud and to obtain money by means of materially false and fraudulent pretenses, representations, and promises.

At sentencing, White objected to being held accountable for the entire $627,000 actual loss, because he was incarcerated for two years starting in September 2009, then again in August 2012.

The court overruled the objection because White pleaded guilty to the language above. The guideline range was 84-105 months, but the court varied downward and sentenced White to 59 months.

Was the court's ruling correct?

Answer: No. *See U.S. v. White*, 883 F.3d 983 (7th Cir. 2018). "White's guilty plea and his admission in the plea agreement are insufficient because they are too ambiguous on the key point. [] Our broad holdings about the evidentiary force of admissions in a plea agreement do not hold that a general admission in a plea agreement to a conspiracy or scheme spanning a certain time conclusively establishes individual participation during that entire time. [] He admitted that the scheme existed for four years and that he was part of the scheme. He did not admit that he was part of the scheme for the entire four years, and he was not asked whether he was."

See also, U.S. v. Metro, 882 F.3d 431 (3d Cir. 2018) (applying the principle to insider trading at USSG §2B1.4). When the scope of a defendant's involvement in a conspiracy is contested, a district court cannot rely solely on a defendant's guilty plea to the conspiracy charge.

Given the downward variance, will the appellate court care whether the ruling was correct or incorrect?

Answer: Yes. In *White*, the court said, "we have no signals that might support a finding that any error was harmless. The district court explained [] that White's sentence was below the calculated guideline range to give him credit for a state sentence [] and to account for §3553(a) factors, like his "tough life" and the non-violent nature of his rimes. The judge did not otherwise signal that the guideline loss calculation did not affect the final sentence."

Question 12

Hearns was convicted at trial of conspiracy to commit bank fraud. The indictment charged that from on or about June 11, 2008 through July 1, 2008, Hearns conspired to knowingly execute a scheme to defraud. She was a loan officer who made materially false statements on a loan application for a prospective buyer who did not qualify for the loan. The prospective buyer was able to obtain the loan to purchase a home (the Brownstone property) despite not having the money for a down payment. The buyer later defaulted and the bank foreclosed on the property.

At sentencing, the government argued that the other fraudulent loans making up the total loss amount of $865,940.18, were part of the same course of conduct. The probation officer agreed, providing the following support in the PSR: "The government has identified 10 properties (including the Brownstone property) that involved fraud in the mortgage loan process. . . . Government records reflect that Hearns and her co-conspirators were all involved in the scheme to defraud." The court held Hearns accountable for the total loss attributed to the conspiracy, finding that the loss was foreseeable to Hearns and therefore was relevant conduct.

Was the court's ruling correct?

Answer: No. *See U.S. v. Hearns*, 845 F.3d 641 5th Cir. 2017

"The district court did not use the term 'relevant conduct,' but it noted that the nine other transactions were 'foreseeable' to [defendant] as part of the conspiracy, a factor considered in a relevant conduct determination under §1B1.3(a)(B)(iii). [] But the district court 'must still make specific findings as to the scope of that conspiracy.' [] Although a PSR may be considered as evidence by the court when making sentencing determinations, bare assertions made therein are not evidence standing alone." (citations omitted).

Question 13

Defendant Sharp was named with a total of nine defendants charged with conspiracy to commit access device offenses and use of counterfeit access devices. After a lengthy investigation, authorities executed a search warrant at the home of Defendant Delman, a drug trafficker who also ran a scheme to manufacture and use fraudulent credit cards. At Delman's home, authorities found various equipment used to produce fraudulent credit cards, including a laptop computer an embossing machine, 210 pre-paid gift cards, 150 credit and debit cards, and text files with hundreds of stolen credit card numbers. In total there were 2,326 unique credit card and gift card numbers. Multiplied by $500, the total loss was $1,163,000.

Delman recruited Sharp to make purchases using the fraudulent cards. Nine cards were printed with Sharp's name, and video surveillance showed her making two purchases, one at Lowe's Hardware, and another at Kroger (groceries). The PSR assigned the total loss to each of the co-conspirators, stating "each co-conspirator knew the offense involved significantly more transactions than the ones he/she

was involved with and that there were others engaging in similar fraudulent transactions. Sharp knew that the leaders could not have afforded their expensive lifestyle based solely on the two fraudulent transactions she performed." The PSR gave Sharp a minimal participant reduction, however, because of her limited involvement.

Is the loss calculation correct as to Defendant Delman?

Answer: Yes, Delman is responsible for all of the conduct since he ran the scheme and directed the actions of others.

Is it correct as to Defendant Sharp?

Answer: No. This is a relevant conduct question. Sharp agreed to make purchases and nine cards were made in her name. She conducted two transactions. The scope of her agreement is not the same as the scope of the entire conspiracy. The fact that she knew that the others were doing is not the deciding factor. The analysis requires the court to determine the scope of her agreement, then look to the conduct of others that was in furtherance of her agreement and was reasonably foreseeable.

See U.S. v. Presendieu, 880 F.3d 1228 (11th Cir. 2018). "Once a district court makes 'individualized findings concerning the scope of criminal activity undertaken by a particular participant,' it [then] can determine foreseeability. [] Mere awareness that [the defendant is] part of a larger [] scheme is alone insufficient to show that [another defendant's] criminal activity is within the scope of [the defendant's] jointly undertaken criminal activity."

Should Sharp receive a mitigating role adjustment?

Answer: Maybe, on these facts, given her limited role. But, note that erroneously holding her accountable for the entire loss in the jointly undertaken criminal activity would result in the addition of 14 levels. The mitigating role adjustment could result in at most a four-level reduction. The importance of the relevant conduct analysis cannot be overstated!