2018 National Seminar

Economic Crimes:
2018 Annual National Seminar

Economic crimes often require accurate determinations about victims (who they are and how they were harmed), loss (actual vs. intended loss, application of special rules) and restitution (who is a victim of the offense of conviction, and what loss did the defendant cause). Here are just a few pointers to help you make these determinations.

How are Loss and Restitution Similar?

- Bare assertions in the PSR, without more, are insufficient evidence to prove loss or restitution.
- The causation requirement for loss calculations, and for determining restitution, requires that the court take into account intervening events contributing to the loss, unless those events were reasonably foreseeable.
- In a conspiracy case, the defendant is not responsible for loss caused before the defendant joined.

How are Loss and Restitution Different?

Loss Determination

- Loss is the greater of actual or intended loss.
- Loss under §2B1.1 does not require more than an estimate – it is a measure of the defendant's culpability.
- Special rules govern specific types of fraud offenses, for example, loss in federal procurement cases.

Restitution Determination

- Intended loss cannot be used.
- Restitution must be exact. Its purpose is to make the victim whole, not to confer a windfall on the victim.
- Calculation of restitution is consistent across case types – making the victim whole is the driving principle.

Who is a Victim?

Guidelines

- **§2B1.1, App. Note 1** – Victim means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. Person includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.
- **§2B1.1, App Note 4(E)** - Cases Involving Means of Identification. – For purposes of subsection (b)(2), in a case involving means of identification, "victim" means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority.

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Restitution

- A victim is a person proximately harmed as a result of the commission of the offense.

General Principles and Special Rules Governing Loss

Principles

- Loss includes acts in the same course of conduct, common scheme or plan as the offense(s) of conviction. Those other acts will be included in the loss determination.
- Intended loss means the pecuniary harm that the defendant purposefully sought to inflict and includes intended pecuniary harm that would have been impossible or unlikely to occur. §2B1.1 App. Note 3.
- For multiple counts sentenced under §2B1.1, do one single application of the guideline based on all relevant conduct.
- Loss can include uncharged and acquitted conduct.
- A reasonable estimate of loss can include such factors as the fair market value of the property unlawfully taken or destroyed, the cost of repairs, and the approximate number of victims multiplied by the average loss to each victim, among other factors.
- Loss does not include emotional distress, harm to reputation, other non-economic harms, costs to the government or victims for investigation and prosecution, or interest. § 2B1.1 App. Note 3(D).
- Credits against loss – loss may be reduced by certain benefits transferred or collateral pledged to the victim before the offense was detected. §2B1.1 App. Note 3(E).

Special Rules for Loss Determinations

- Mortgage Fraud – There is a rebuttable presumption that, if the property is not disposed of by the time of sentencing, the most recent tax assessment at the time of the plea is the fair market value. §2B1.1, App. Note 3(E)(iii).
- Federal Health Care Offenses Involving Government Health Care Programs – The aggregate amount of fraudulent bills submitted to the government health care program is *prima facie* evidence of the amount of intended loss, if not rebutted. §2B1.1 App. Note 3(F)(viii).

Other Special Rules

- Stolen/counterfeit credit cards – $500 per counterfeit or unauthorized access device
- Government Benefits – not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses
- See §2B1.1, App. Note 3(F) for more special rules