

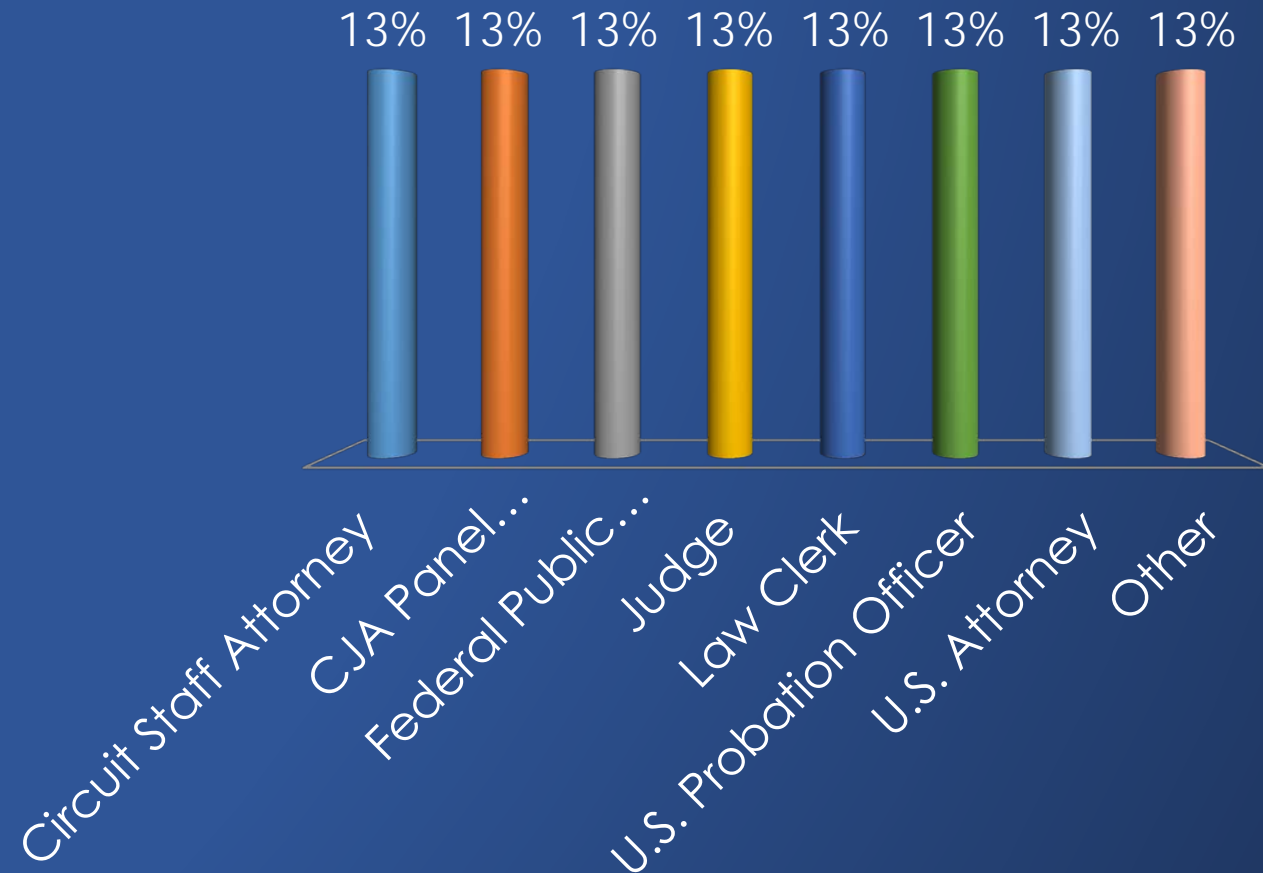


ECONOMIC CRIMES – VICTIMS, LOSS, AND RESTITUTION 2018 NATIONAL SEMINAR

Raquel Wilson
Director, Office of Education, USSC

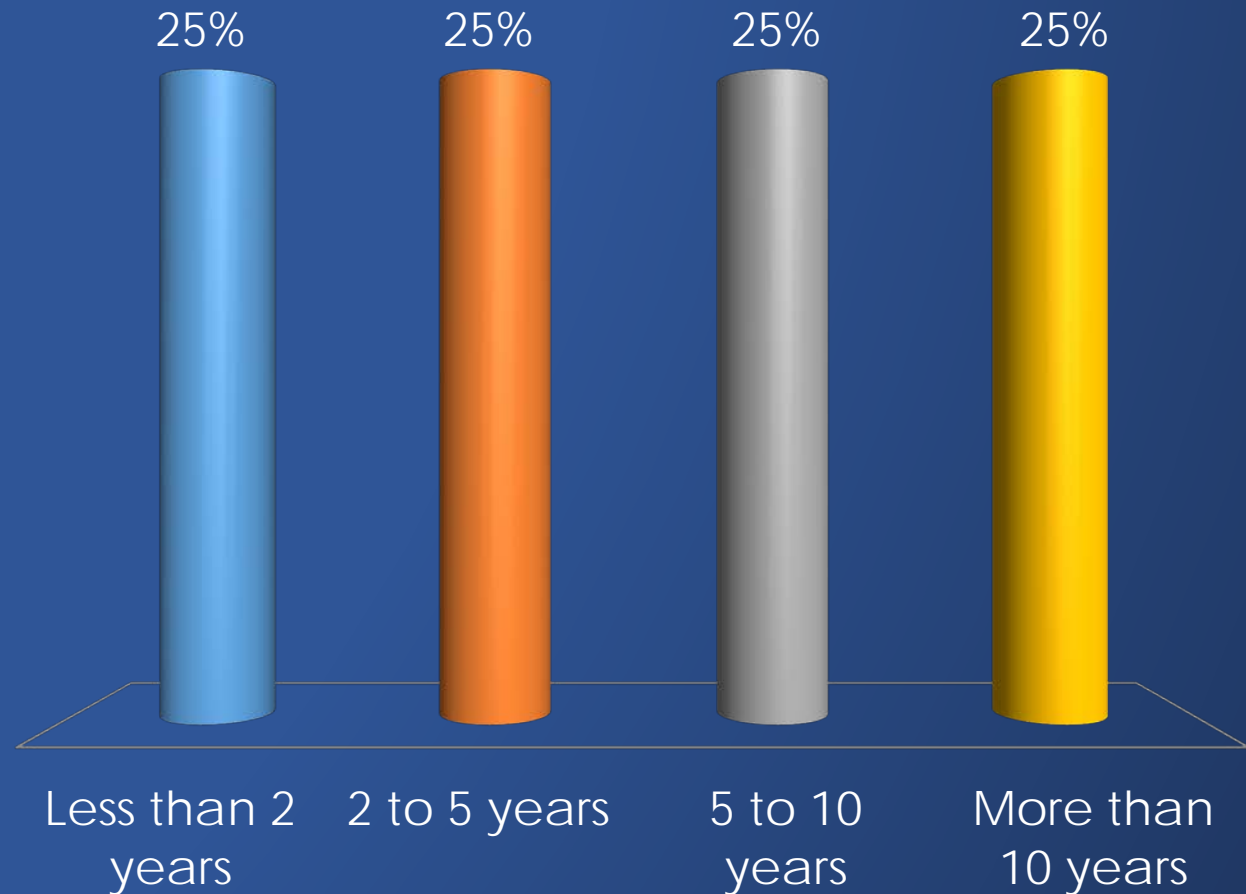
Who's in the audience?

1. Circuit Staff Attorney
2. CJA Panel Attorney/Private Defense Attorney
3. Federal Public Defender
4. Judge
5. Law Clerk
6. U.S. Probation Officer
7. U.S. Attorney
8. Other



Years of experience with federal sentencing?

1. Less than 2 years
2. 2 to 5 years
3. 5 to 10 years
4. More than 10 years





§2B1.1

Larceny, Embezzlement, Theft;
Stolen Property; Fraud; Forgery



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Fraud Quick Notes

- The guideline is driven largely by “loss” – which includes “actual loss” and “intended loss”
- Special rules for certain types of offenses (e.g., credit card fraud)
- Determinations as to who qualifies as a “victim”
- Guideline “loss” and restitution “loss” are distinct



Relevant Conduct & Multiple Counts

§ § 2B1.1 & 1B1.3(a)(2) & 3D1.2(d)

- Acts in the same course of conduct, common scheme or plan as the offense(s) of conviction will be included
- There will only be a single application of the multiple counts of §2B1.1, based on all relevant conduct
- Loss also includes uncharged and acquitted conduct



"Loss"

Application Note 3(A)

Use greater of:

"actual" or "intended" loss



“Actual Loss”

Application Note 3(A)(i)

Reasonably foreseeable pecuniary harm that resulted from the offense

Causation standard:

“but for” and “reasonably foreseeable”



Definition of Intended Loss

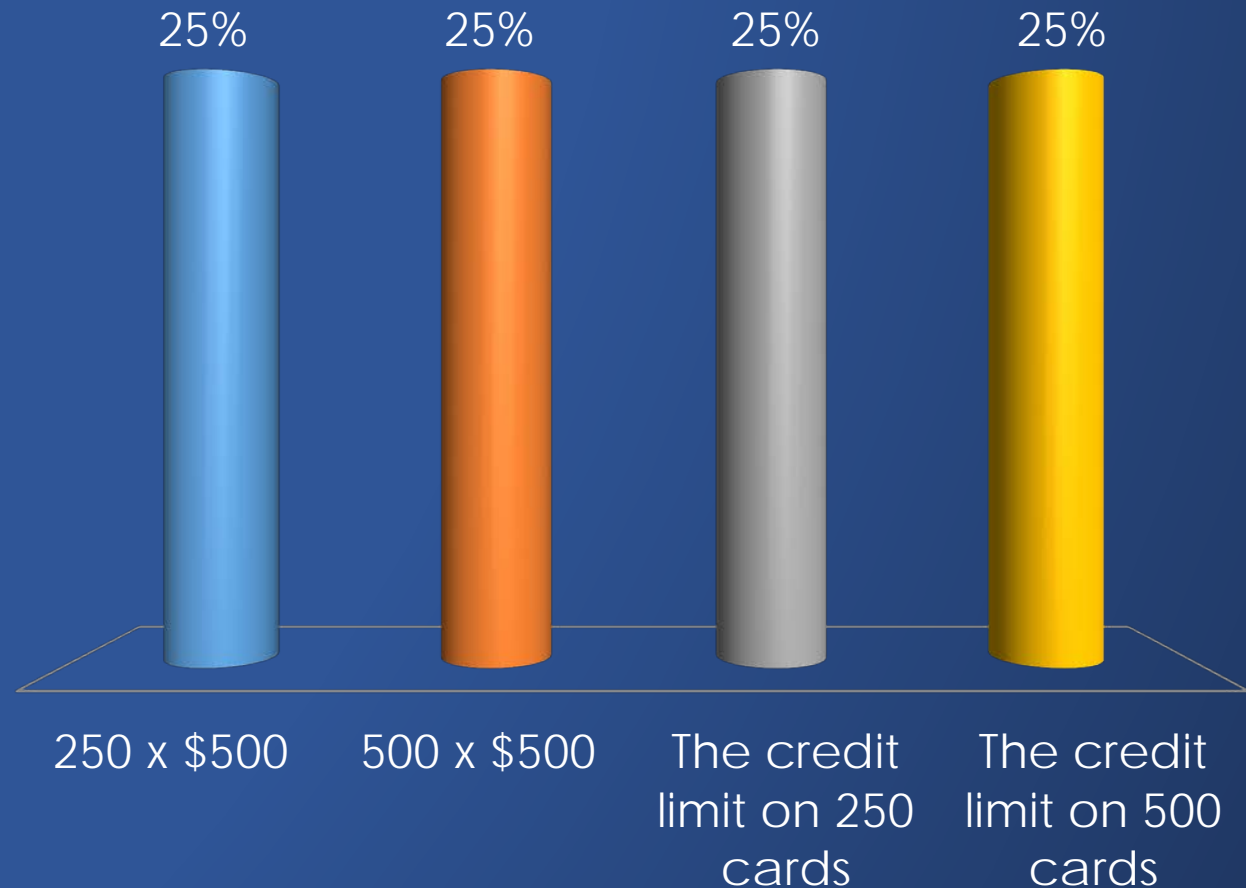
Application Note 3

- Amended the definition to better reflect a defendant's culpability in 2015
 - “ (I) means the pecuniary harm that **the defendant purposefully sought to inflict** and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur”



1. What is the loss amount?

- A. $250 \times \$500$
- B. $500 \times \$500$
- C. The credit limit on 250 cards
- D. The credit limit on 500 cards

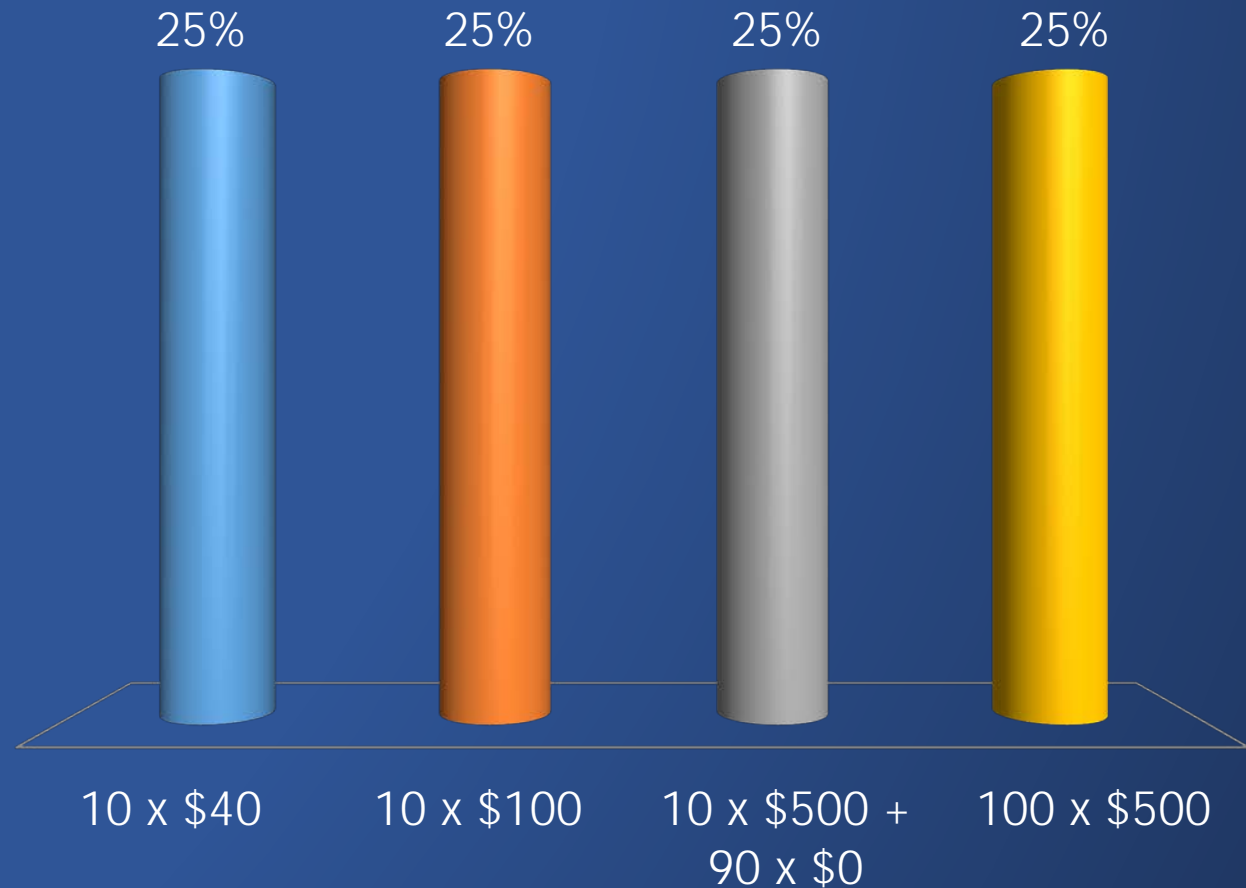


- Stolen/counterfeit credit cards
- Government benefits fraud
- Investment schemes (e.g., Ponzi schemes)
- Federal health care offenses



2. What is the loss amount?

- A. $10 \times \$40$
- B. $10 \times \$100$
- C. $10 \times \$500 + 90 \times \0
- D. $100 \times \$500$



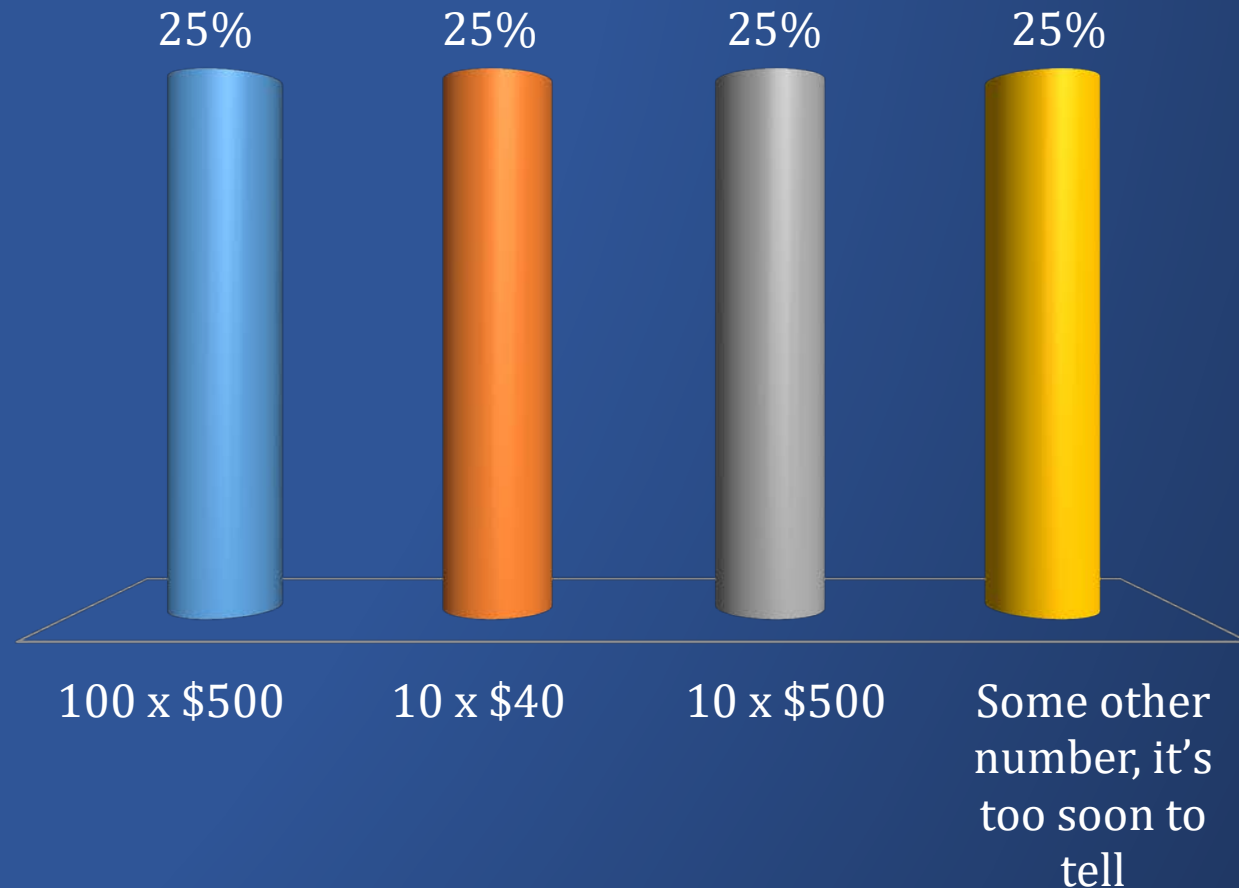
Access Devices

- *U.S. v. Popovski*, 872 F.3d 553 (7th Cir. 2017)
 - The court correctly counted every card reprogrammed with a stolen number for use in an ATM as access device under §2B1.1, Application Note 3(F). Cards with cancelled numbers, or no available funds, still count as a \$500 loss per card.
- See *U.S. v. Moore*, 788 F.3d 693 (7th Cir. 2015)



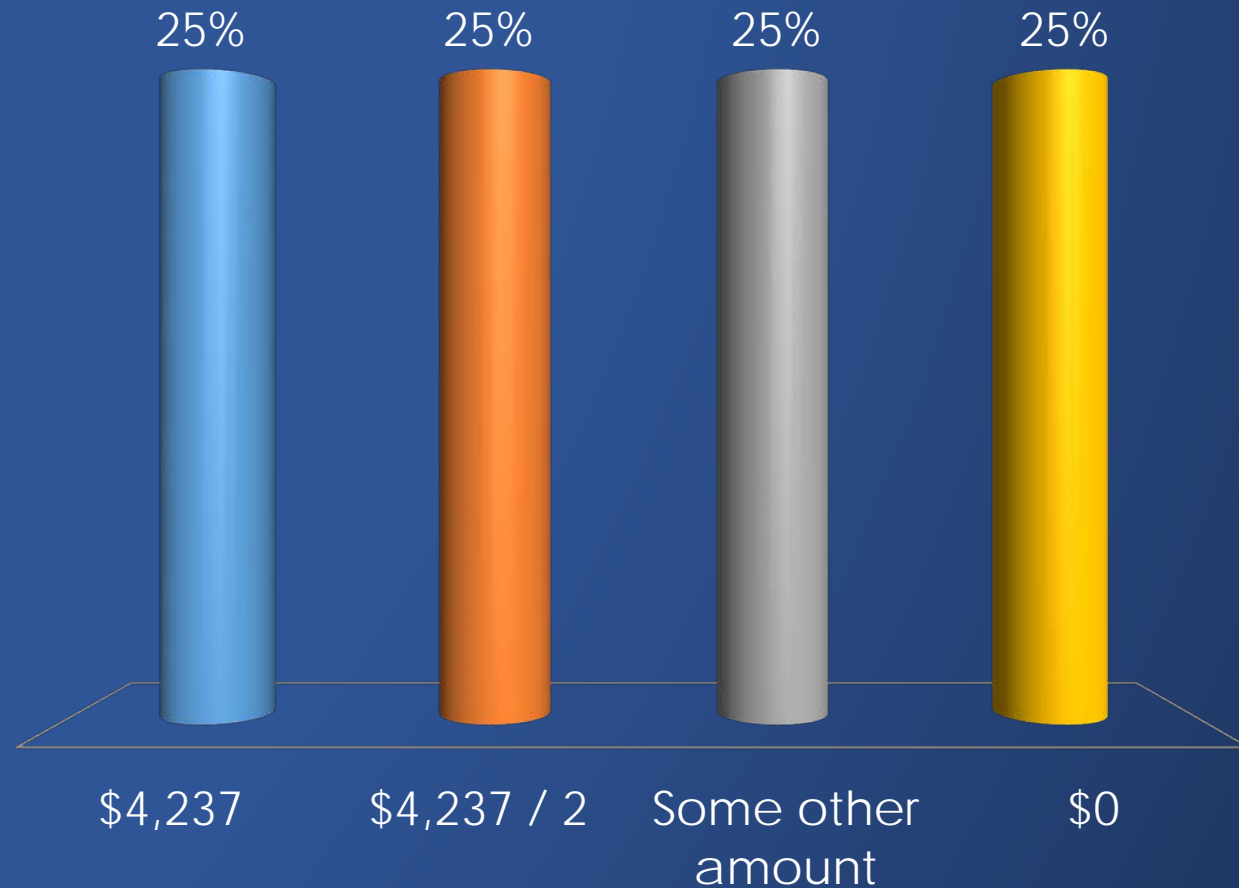
2B. What is the restitution amount?

- A. 100 x \$500
- B. 10 x \$40
- C. 10 x \$500
- D. Some other number, it's too soon to tell



What is the restitution amount?

- A. \$4,237
- B. $\$4,237 / 2$
- C. Some other amount
- D. \$0



Restitution

- *U.S. v. Anderson*, 866 F.3d 761 (7th Cir. 2017)
 - District court's restitution order remanded because the government did not prove that the dye-stained bills recovered from a bank robbery were so "badly damaged that they [could not] be replaced."



Special Rules in the Determination of Loss (cont.)

Application Note 3(F)(viii)

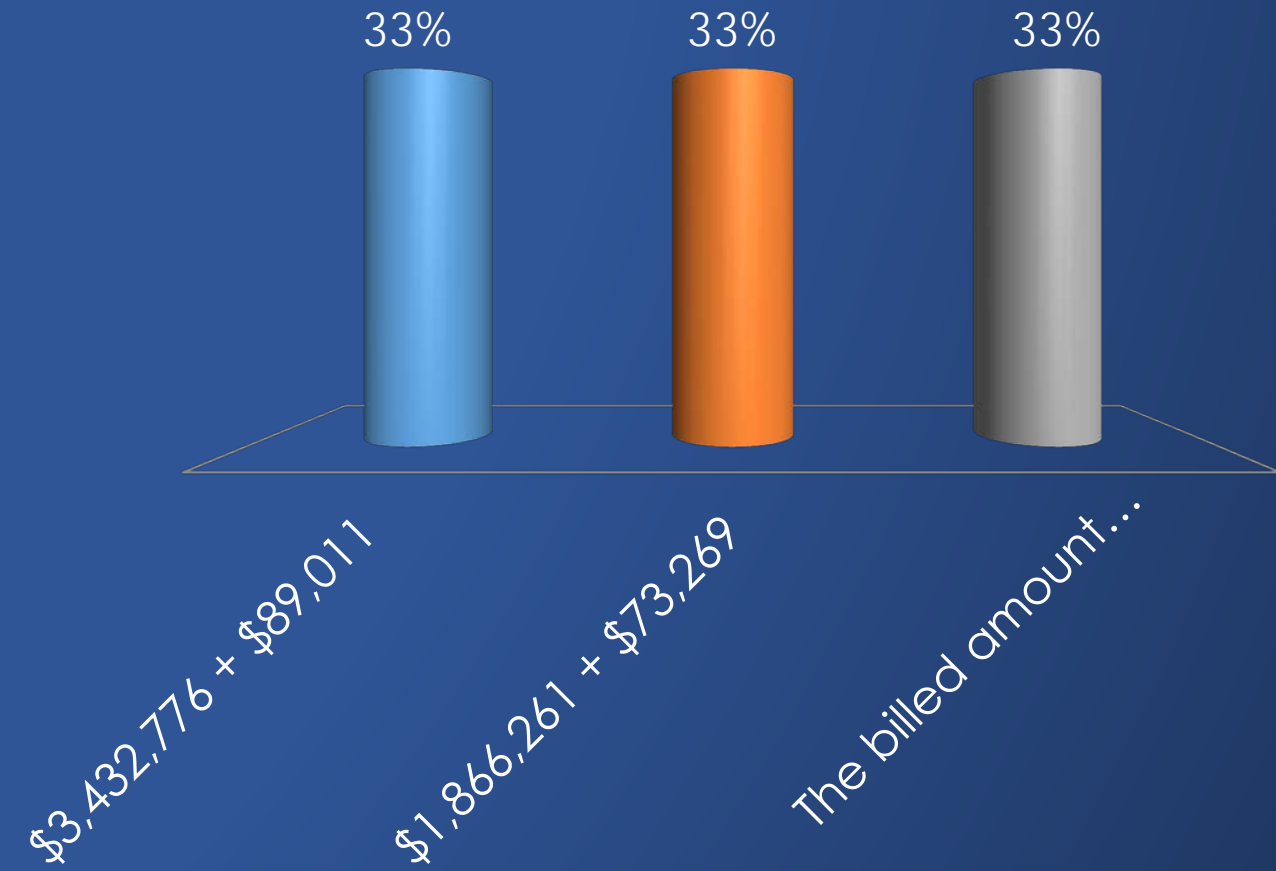


- Federal Health Care Offenses Involving Government Health Care Programs:
 - The aggregate amount of fraudulent bills submitted to the government health care program is prima facie evidence of the amount of intended loss, if not rebutted



What is the loss amount?

- A. $\$3,432,776 + \$89,011$
- B. $\$1,866,261 + \$73,269$
- C. The billed amount minus the standard Medicaid/Medi-Cal deduction



Question 6

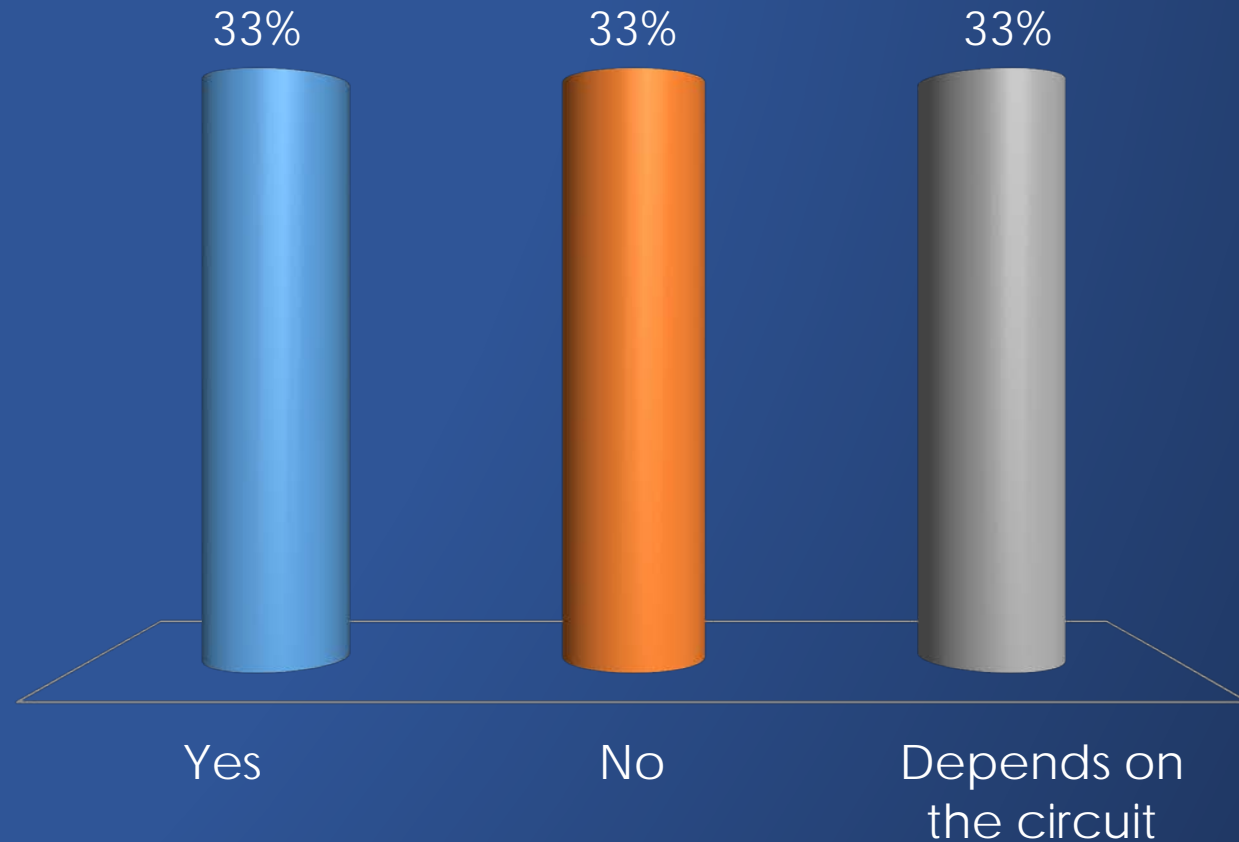
Case Law

- “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)



5. Should the Court discount from the loss amount the value of the services?

- A. Yes
- B. No
- C. Depends on the circuit



Question 5

Case Law

- U.S.S.G. § 2B1.1 cmt. n.3(A)(v)(II). The application note's example of "fraud affecting a defense contract award" is a close fit for the circumstances here. Moreover, the procurement fraud's rule placement within application note 3(A), rather than in note 3(F) with the special rules, indicates that procurement fraud cases fall under the general rule for calculating actual and intended loss. **We have said that district courts should "take a realistic, economic approach to determine what losses the defendant truly caused or intended to cause, rather than the use of some approach which does not reflect the monetary loss."**
- *United States v. Martin*, 796 F.3d 1101 (9th Cir. 2015)



Question 5

Case Law

- “We have also said that ‘district courts should give credit for any legitimate services rendered to the victims.’ Applying the general rule in this and similar cases lets district courts do just that. Applying the special rules, which apply notwithstanding application note 3(A), would not. **By fully performing all of the contracts, Martin gave the government considerable value. It would be unjust to set the loss resulting from her fraud as the entire value of the contracts, as the district court itself recognized.**”

United States v. Martin, 796 F.3d 1101 (9th Cir. 2015)



Question 5

Case Law

- Application Note 3(F)(v) of § 2B1.1 appears to contemplate the scheme here. Application Note 3(F)(v) provides that where regulatory approval by a government agency is obtained by fraud, the “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.”

United States v. Giovenco, 773 F.3d 866 (7th Cir. 2014)



Question 5

Case Law

- The Government requested a loss amount of \$7,974,674, representing the total amount of CSBE and DBE funds awarded to FLP under the six MIA contracts. The district court, however, determined that the appropriate loss amount was only \$474,000, a calculation that represented only six percent of the \$7,974,674 actually paid on those contracts [the average profit margin].

United States v. Maxwell, 579 F.3d 1282 (11th Cir. 2009)



Question 5

Case Law

- “Unlike standard construction contracts, these contracts focus mainly on who is doing the work. We are persuaded by the well-reasoned opinions of our sister circuits and conclude that both the CSBE and DBE programs are Government Benefits Programs under § 2B1.1 of the Sentencing Guidelines. Thus, **the appropriate amount of loss here should have been the entire value of the CSBE and DBE contracts** that were diverted to the unintended recipient.”

United States v. Maxwell, 579 F.3d 1282, 1306 (11th Cir. 2009)



2015 Amendment to §2B1.1

Victims Table

- §2B1.1(b)(2)
 - a) 10 or more victims; mass-marketing; **or resulted in substantial financial hardship to one or more victims** +2
 - b) **Resulted in substantial financial hardship to five or more victims** +4
 - c) **Resulted in substantial financial hardship to 25 or more victims** +6



2015 Amendment to §2B1.1

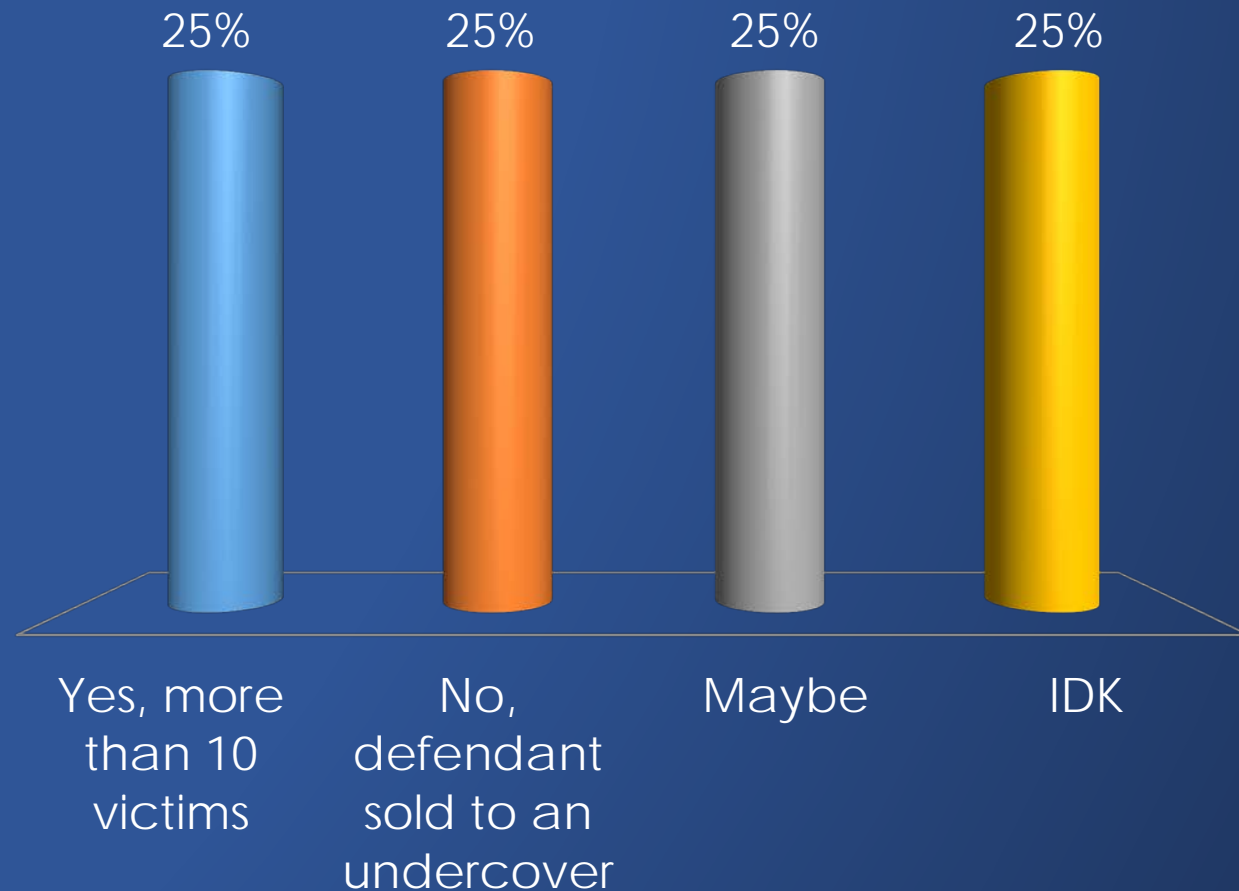
“Substantial Financial Hardship” Application Note 4(F)

- The court shall consider whether the offense resulted in the victim:
 - Becoming insolvent
 - Filing for bankruptcy
 - Suffering substantial loss of a retirement, education, or other savings or investment fund
 - Making substantial changes to employment
 - Making substantial changes to living arrangements
 - Suffering substantial harm to their ability to obtain credit



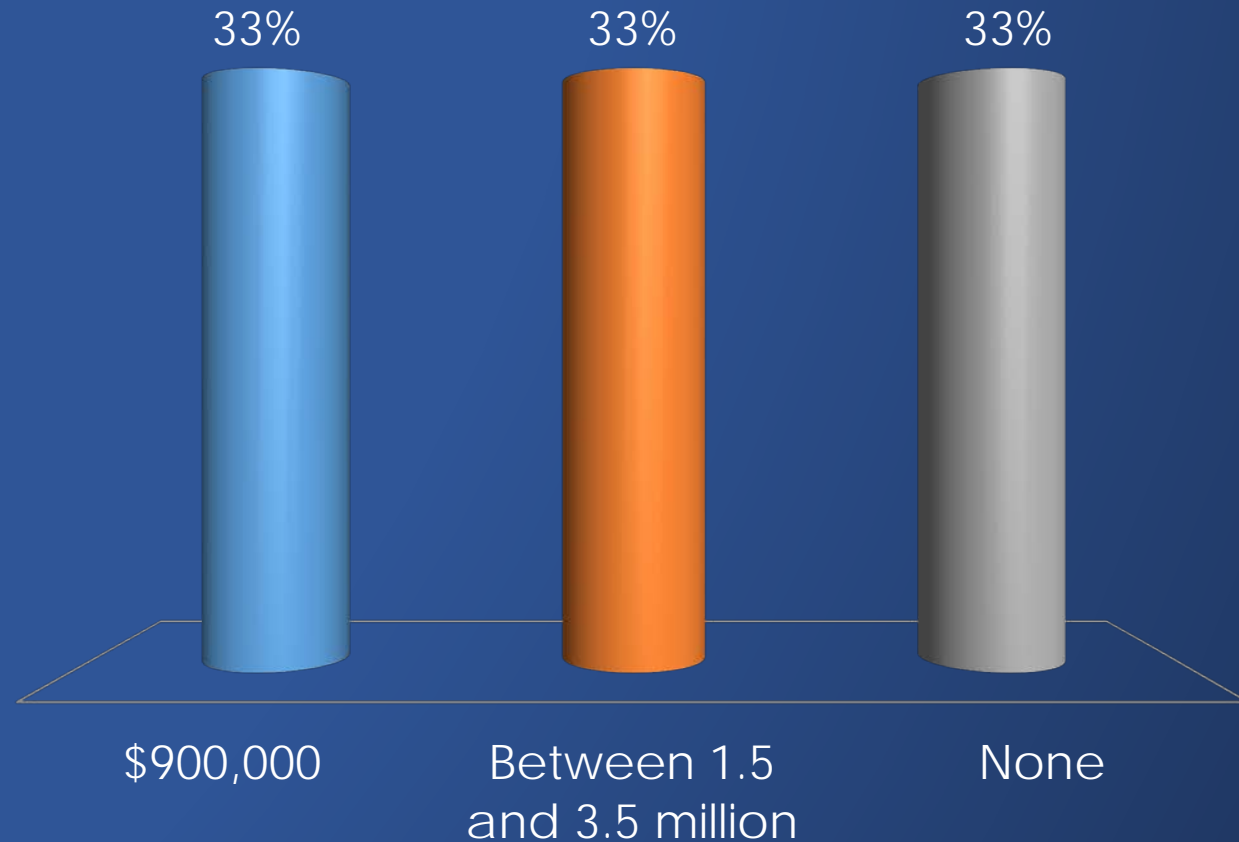
4. Do any victim-related adjustments apply?

- A. Yes, more than 10 victims
- B. No, defendant sold to an undercover
- C. Maybe
- D. IDK



7. What restitution is owed to BoA?

- A. \$900,000
- B. Between 1.5 and 3.5 million
- C. None



Question 7

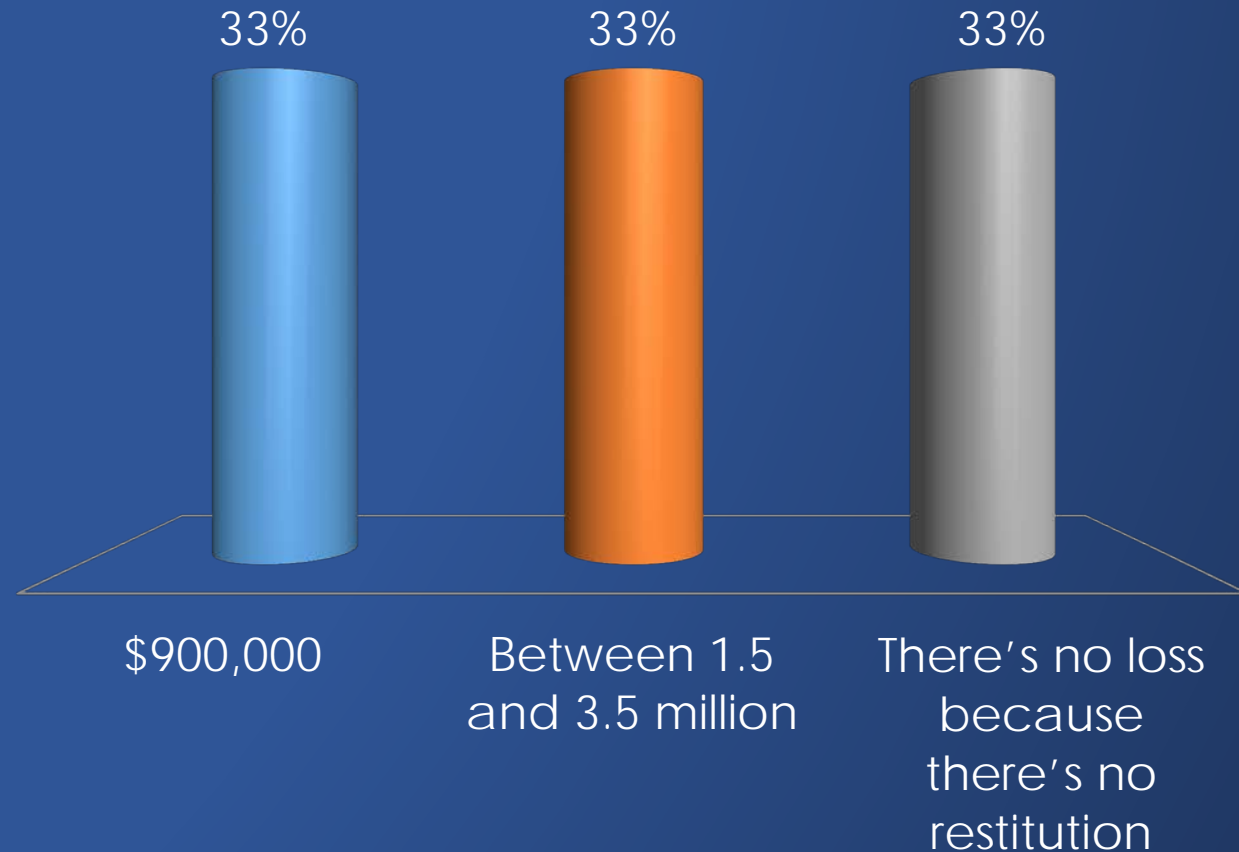
Case Law

- *U.S. v. Litos*, 847 F.3d 906 (7th Cir. 2017)
 - Bank of America was not entitled to restitution in a mortgage fraud case where it took no steps to verify the information in the applications and deliberately turned a blind eye to evidence that the applications were patently false. Ignoring the defendant's appellate waiver, the court held that the bank's recklessness ("knowing involvement in potentially harmful activity") made it ineligible for restitution.



7B. What is the loss amount?

- A. \$900,000
- B. Between 1.5 and 3.5 million
- C. There's no loss because there's no restitution



Question 7

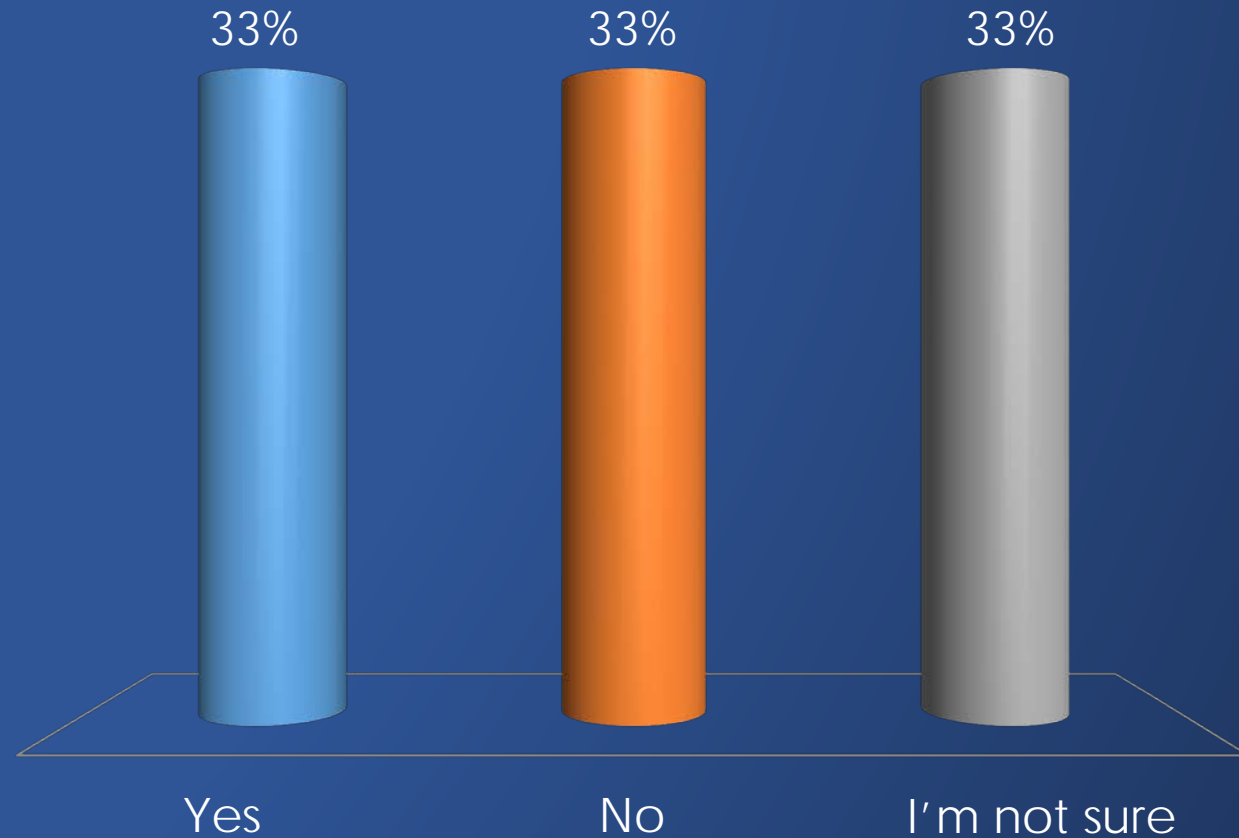
Case Law

- “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.”
- *U.S. v. Tartareanu*, 884 F.3d 741 (7th Cir. 2018)



8. Should the vulnerable victim enhancement apply?

- A. Yes
- B. No
- C. I'm not sure



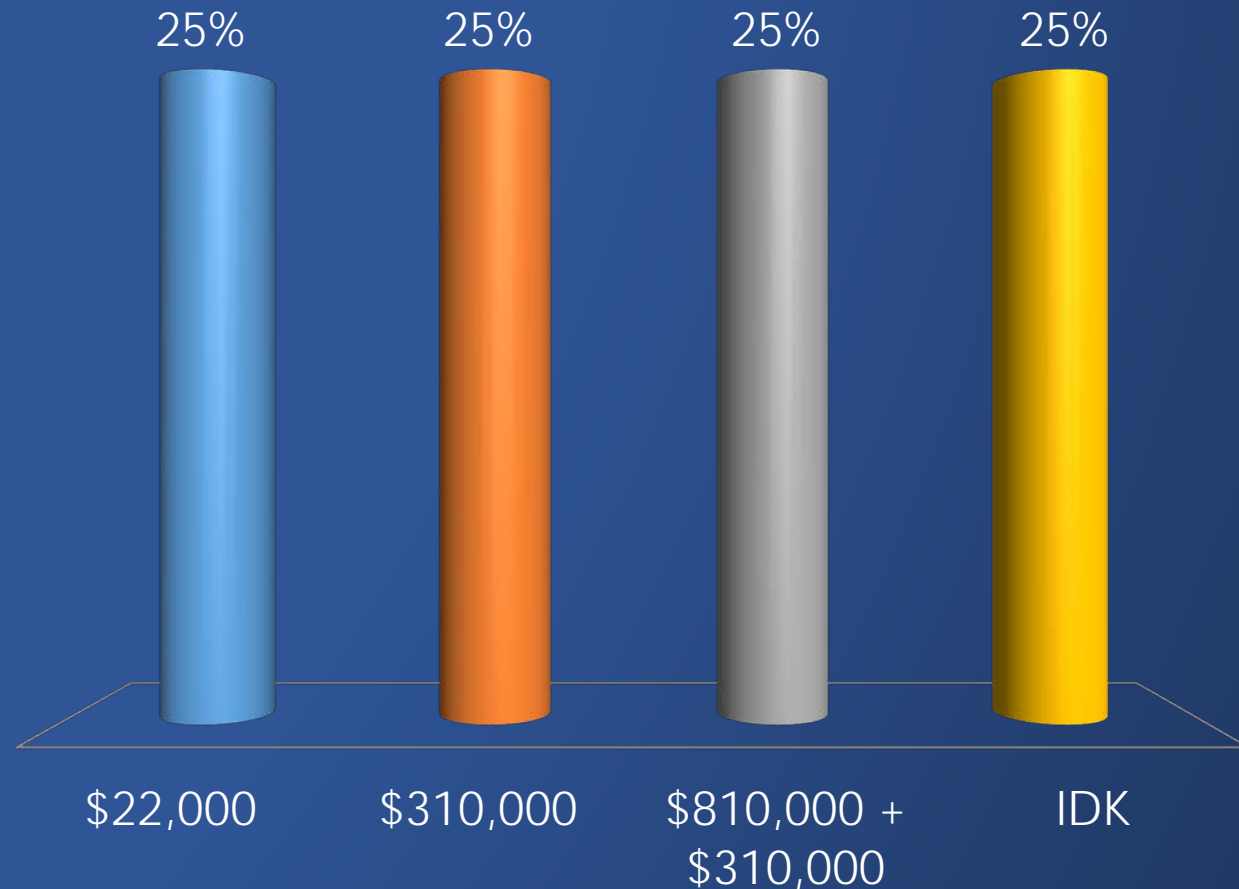
Vulnerable Victim

- “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 trap 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.”**
- *U.S. v. Sunmola*, __ F.3d __ (7th Cir. April 16, 2018)



9. What is the loss amount for Defendant B?

- A. \$22,000
- B. \$310,000
- C. \$810,000 + \$310,000
- D. IDK



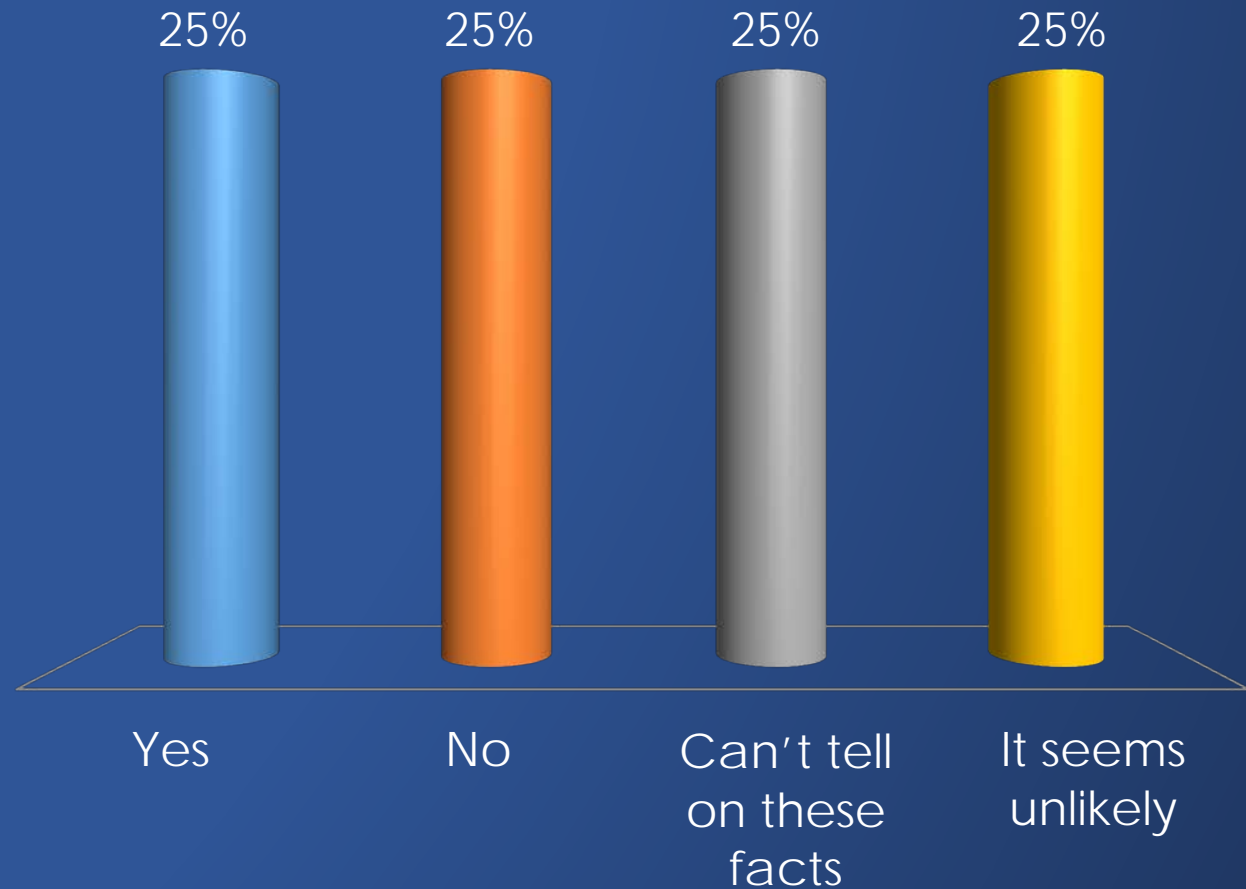
9B. Will Defendant B get an enhancement for causing substantial financial hardship?

A. Yes

B. No

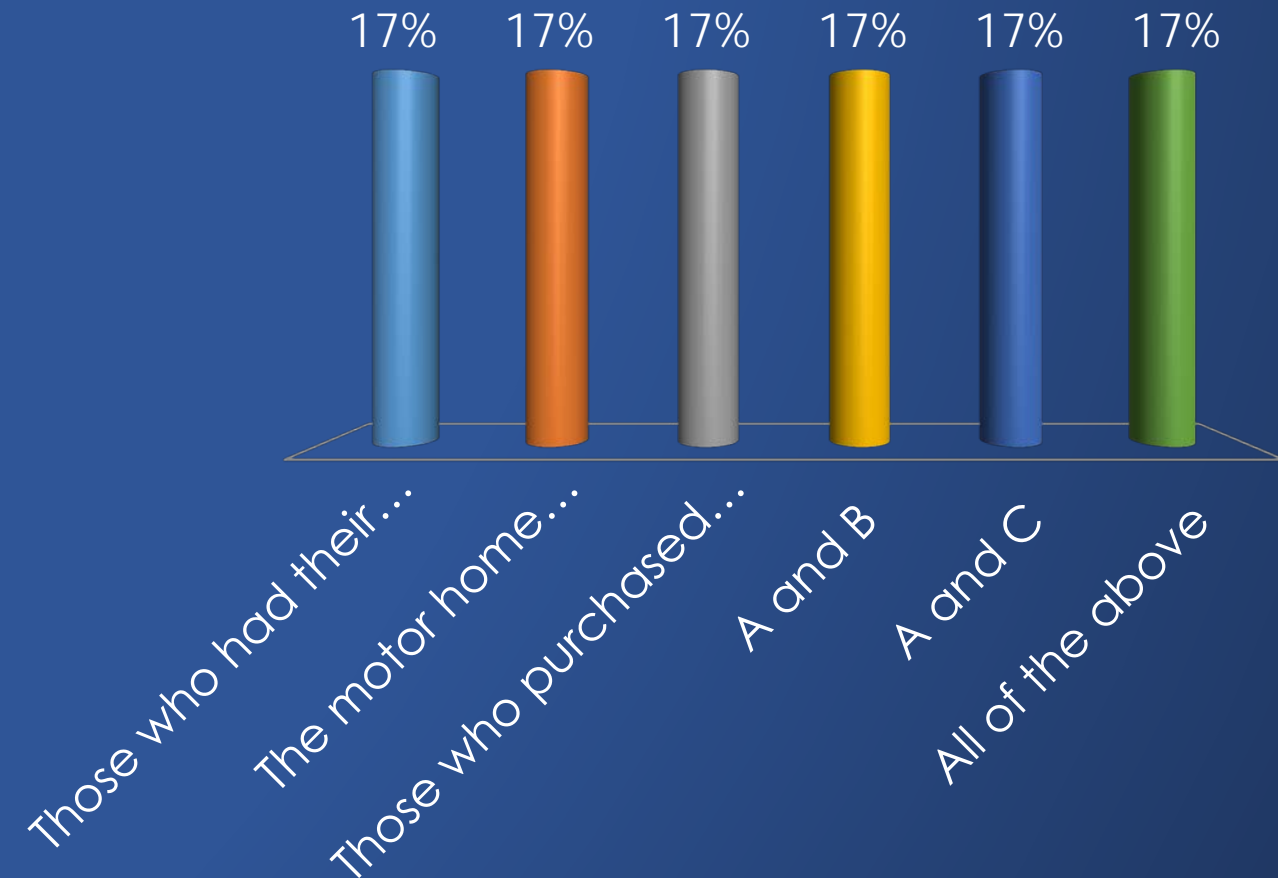
C. Can't tell on these facts

D. It seems unlikely



10. Who are the victims?

- A. Those who had their homes stolen
- B. The motor home dealers
- C. Those who purchased the stolen homes
- D. A and B
- E. A and C
- F. All of the above



Question 10

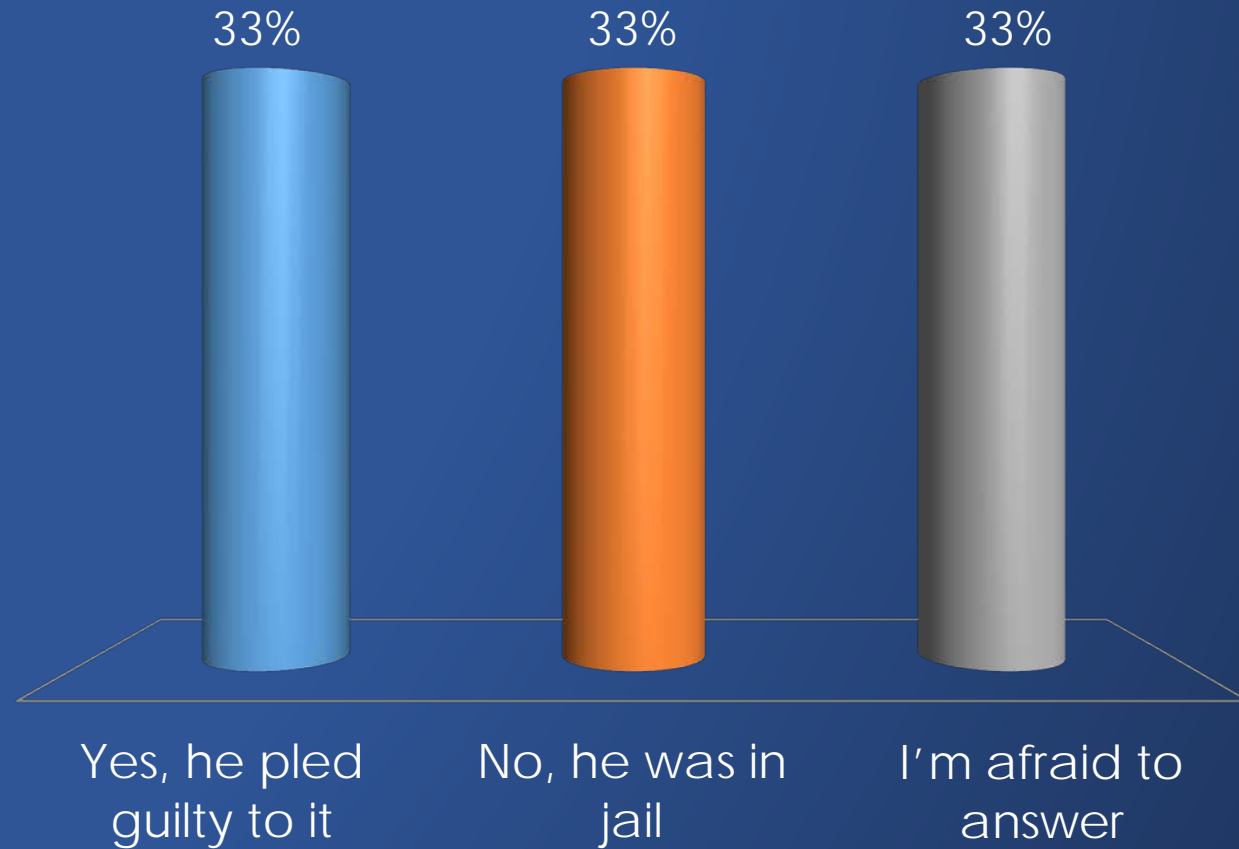
Case Law

- “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.”
- “While []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.”
- *U.S. v. Myers*, 854 F.3d 341 (6th Cir. 2017)



11. Is White responsible for the entire loss over four years?

- A. Yes, he pled guilty to it
- B. No, he was in jail
- C. I'm afraid to answer



Question 11

Case Law

- “The district court calculated [defendant’s] Sentencing Guidelines range based on the amount of loss caused by the entire scheme over four years. During most of that time, though, White was in prison. We conclude that White’s guilty plea did not admit his involvement from the outset of the scheme.”
- *U.S. v. White*, 883 F.3d 983 (7th Cir. 2018)



Question 11

Case Law

- 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."
- *U.S. v. White*, 883 F.3d 983 (7th Cir. 2018)



Question 11

Case Law

- “In this case, 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 crimes. The judge did not otherwise signal that the guideline loss calculation did not affect the final sentence.”
- *U.S. v. White*, 883 F.3d 983 (7th Cir. 2018)



Question 11

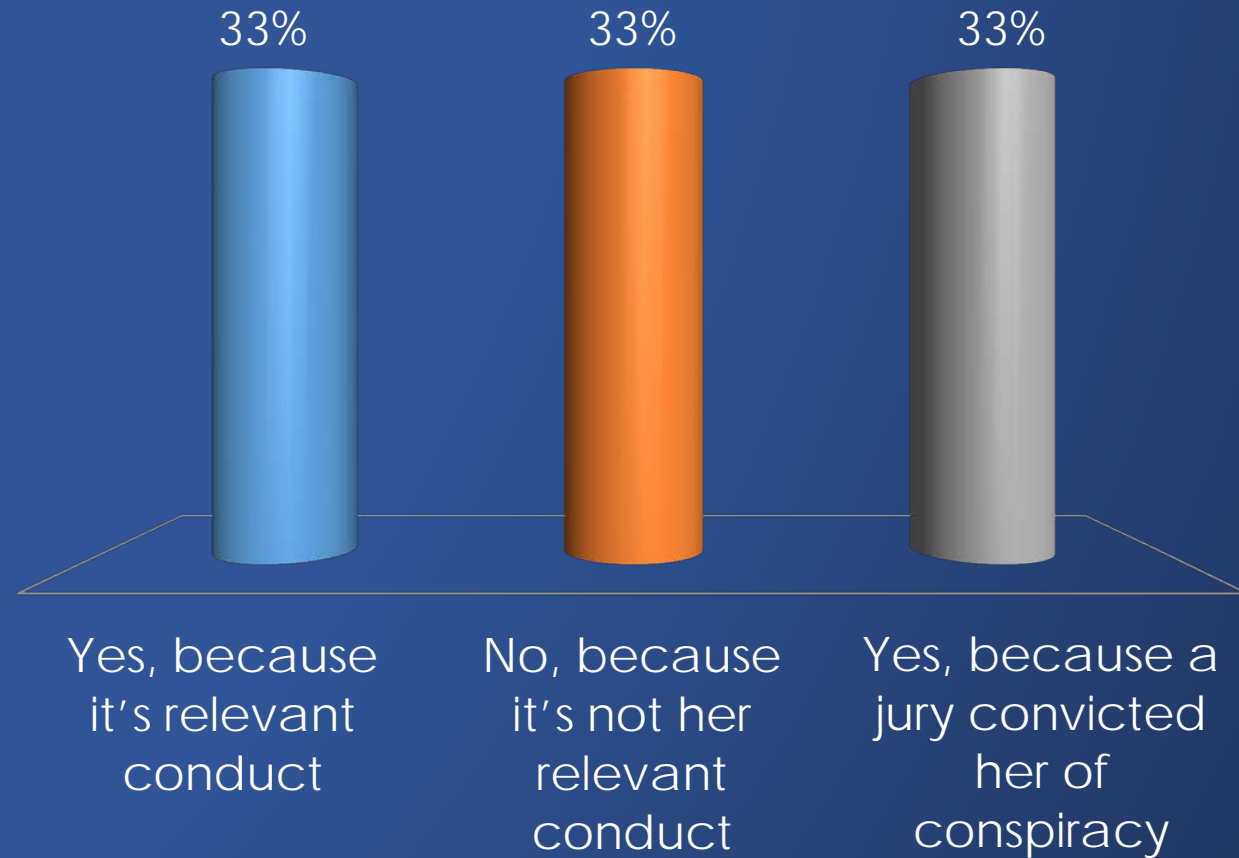
Case Law

- 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.
- *U.S. v. Metro*, 882 F.3d 431 (3d Cir. 2018) (applying the principle to insider trading at USSG §2B1.4)



12. Is Hearn responsible for the entire \$865,940.18?

- A. Yes, because it's relevant conduct
- B. No, because it's not her relevant conduct
- C. Yes, because a jury convicted her of conspiracy



Question 12

Case Law

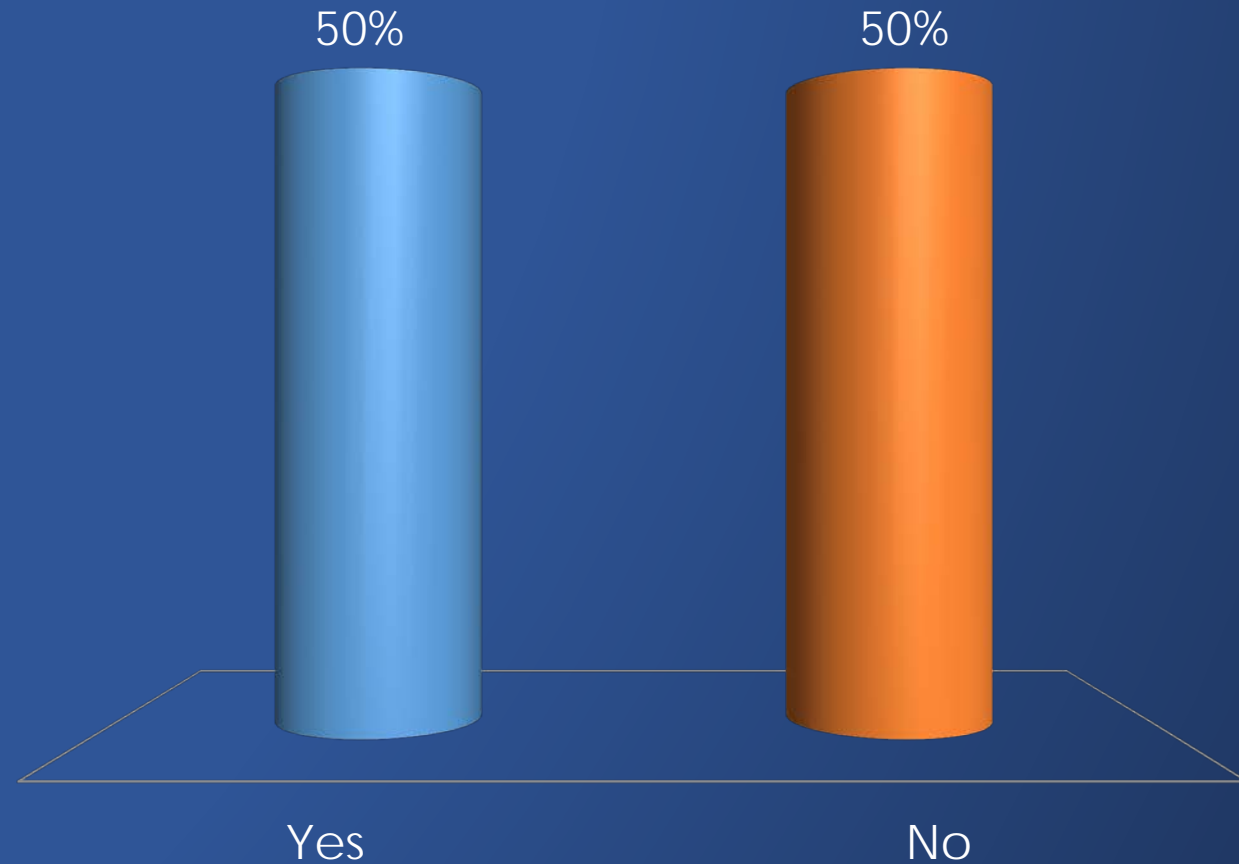
- “The district court did not use the term “relevant conduct,” but it noted that the nine other transactions were ‘foreseeable’ to [defendant] as part of the conspiracy, a factor considered in a relevant conduct determination under §1B1.3(a)(B)(iii). [] But the district court ‘must still make specific 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.”
- U.S. v. Hearn, 845 F.3d 641 5th Cir. 2017



13. Is the loss calculation correct as to Delman?

A. Yes

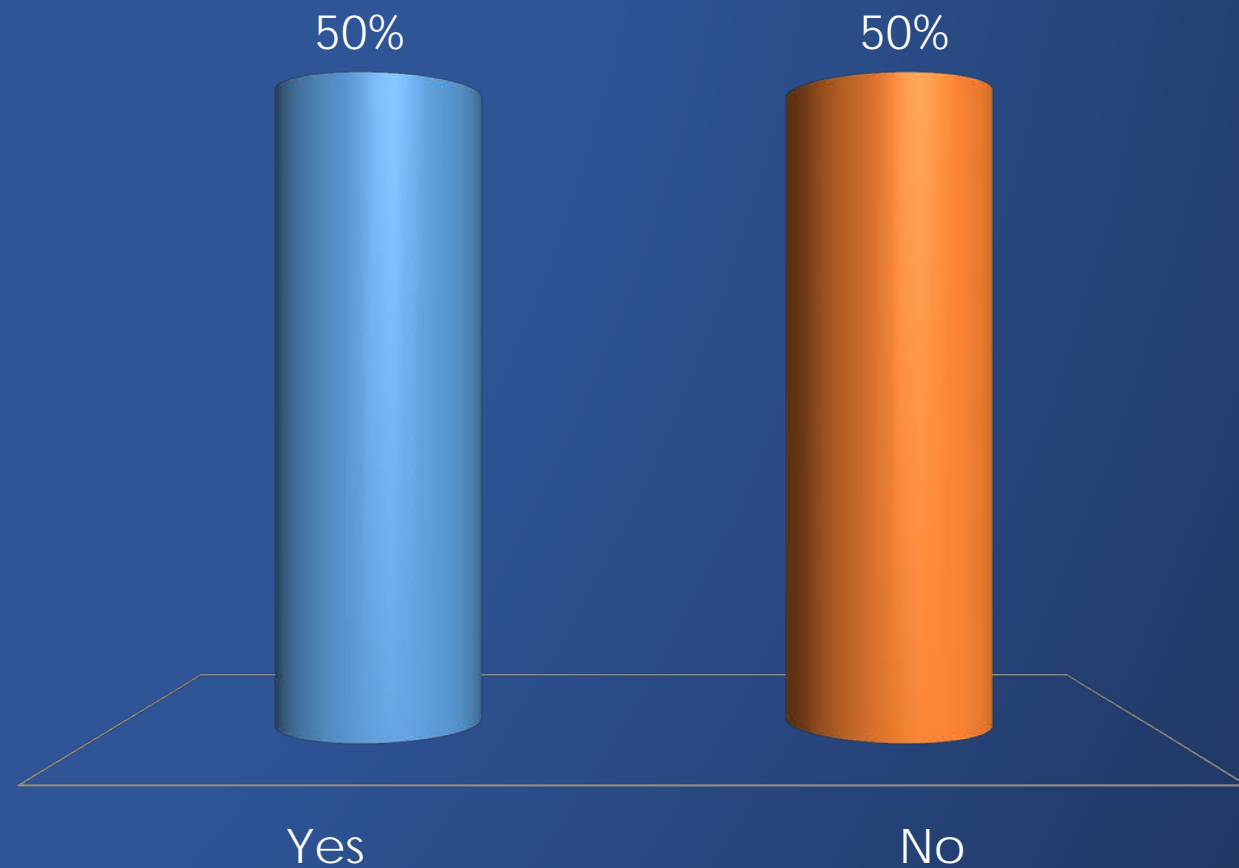
B. No



13. Is the loss calculation correct as to Sharp?

A. Yes

B. No



Question 13

Case Law

- “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.”
- *U.S. v. Presendieu*, 880 F.3d 1228 (11th Cir. 2018)





Thank you!



Questions?



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