Economic Crimes – Victims, Loss, and Restitution

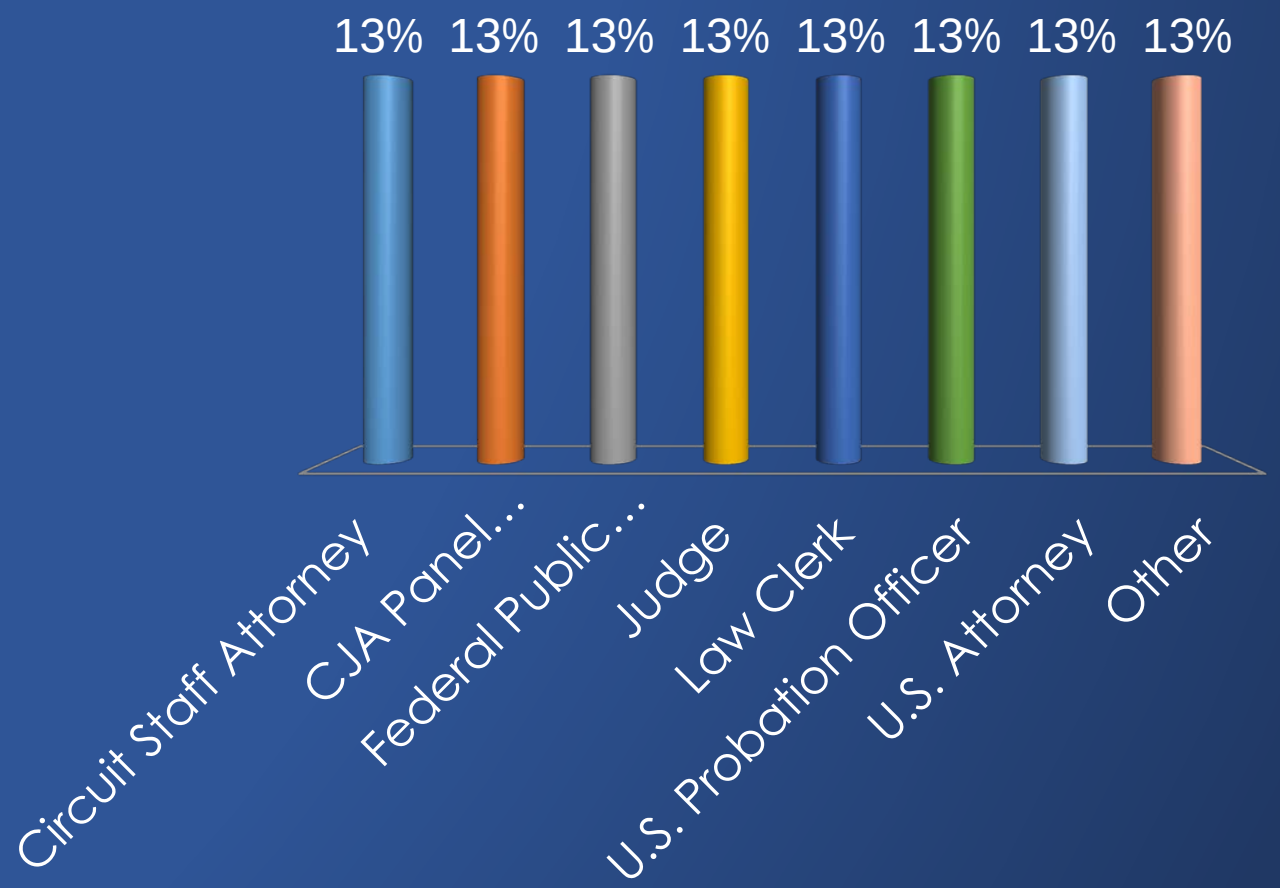
2018 National Seminar

Raquel Wilson

Director, Office of Education, USSC

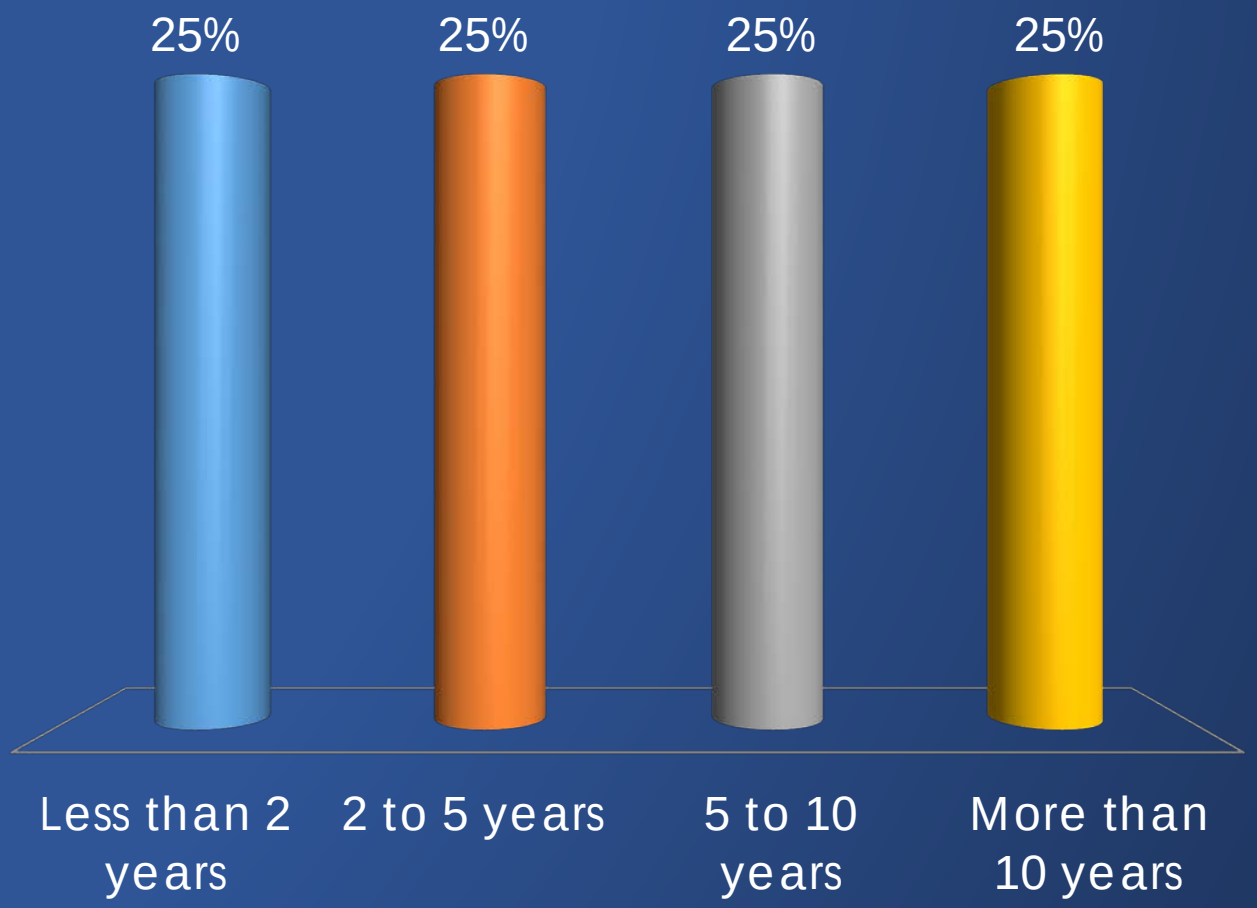
Who's in the audience?

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

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

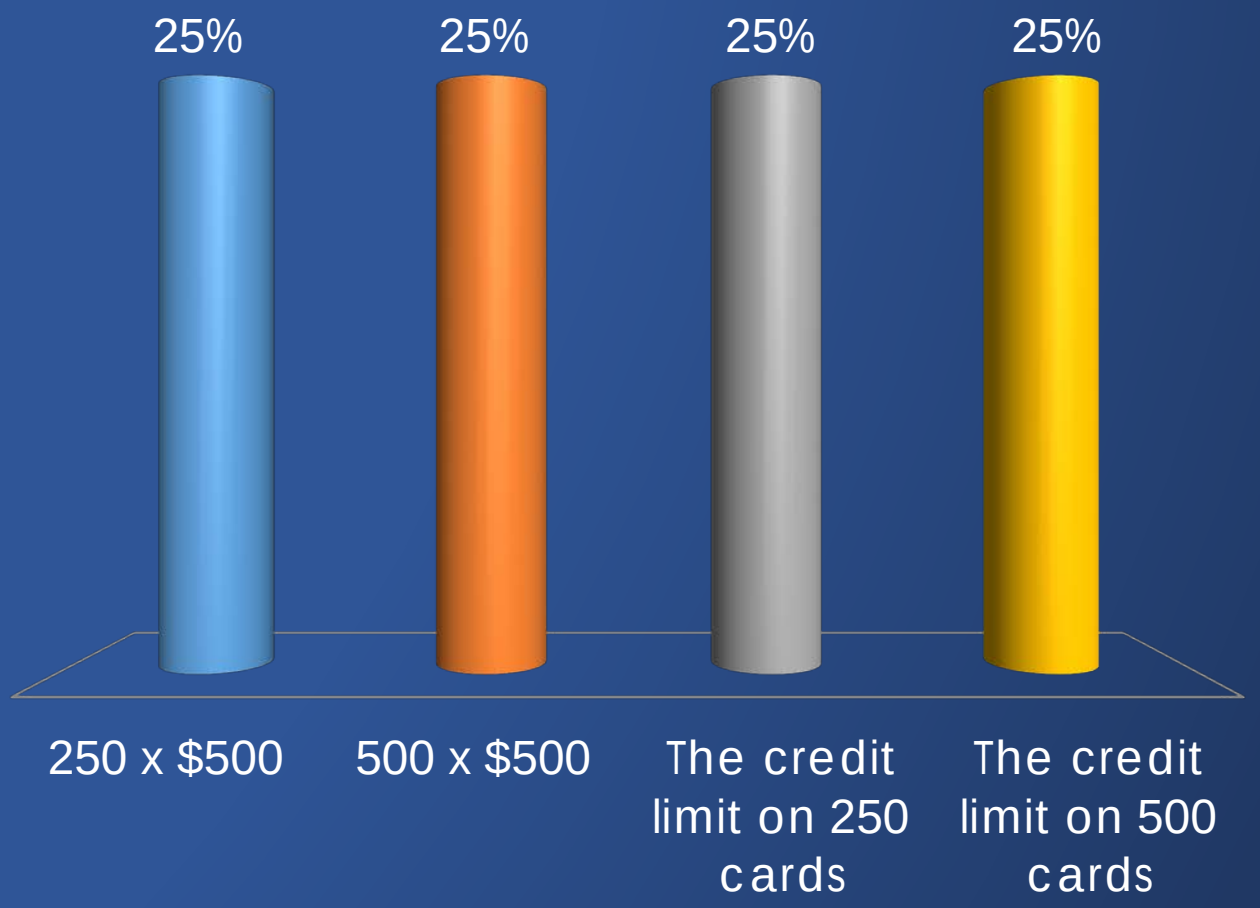
Application Note 3

- 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 x $500
B. 500 x $500
C. The credit limit on 250 cards
D. The credit limit on 500 cards



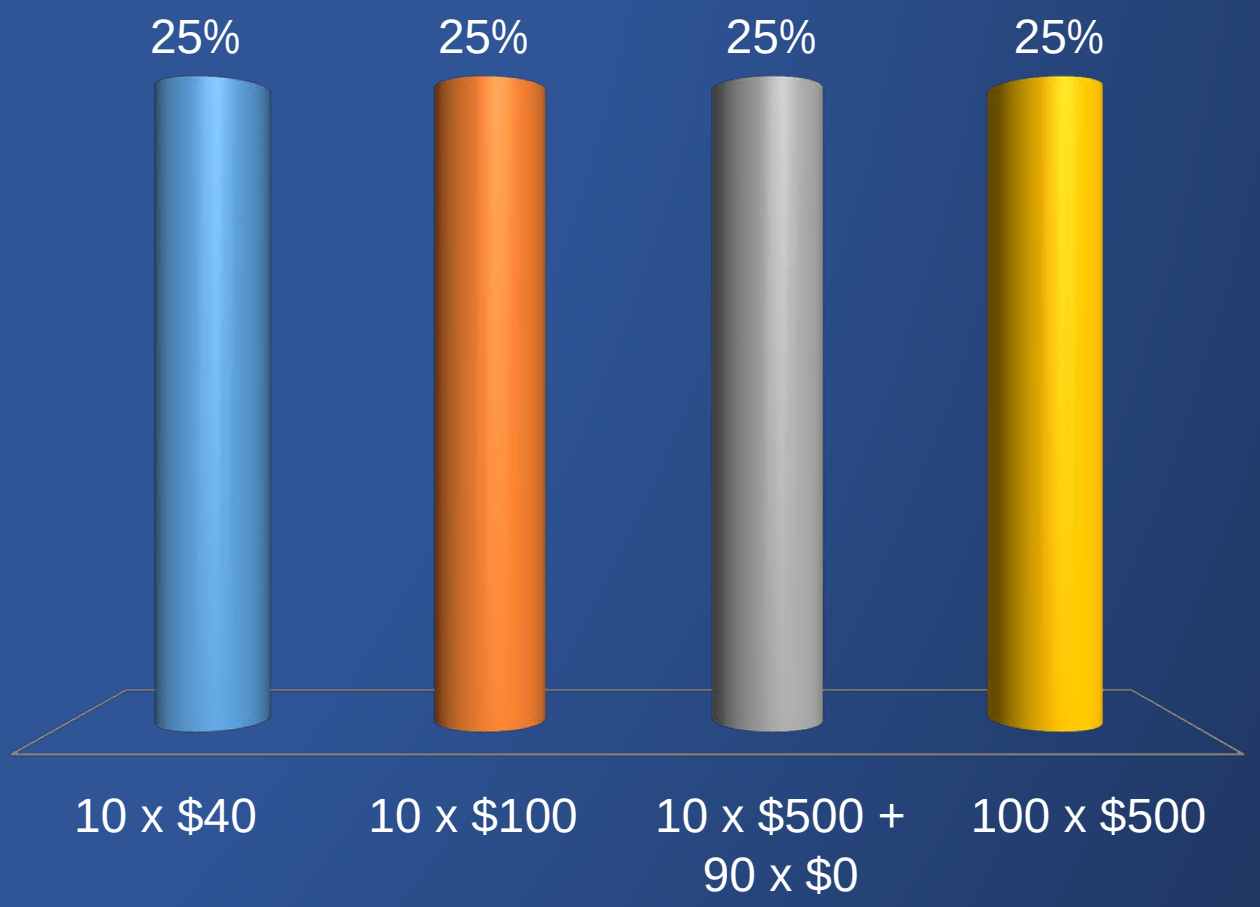
Special Rules in the Determination of Loss

Sample of Rules; Application Note 3(F)

- 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 x $40
B. 10 x $100
C. 10 x $500 + 90 x $0
D. 100 x $500

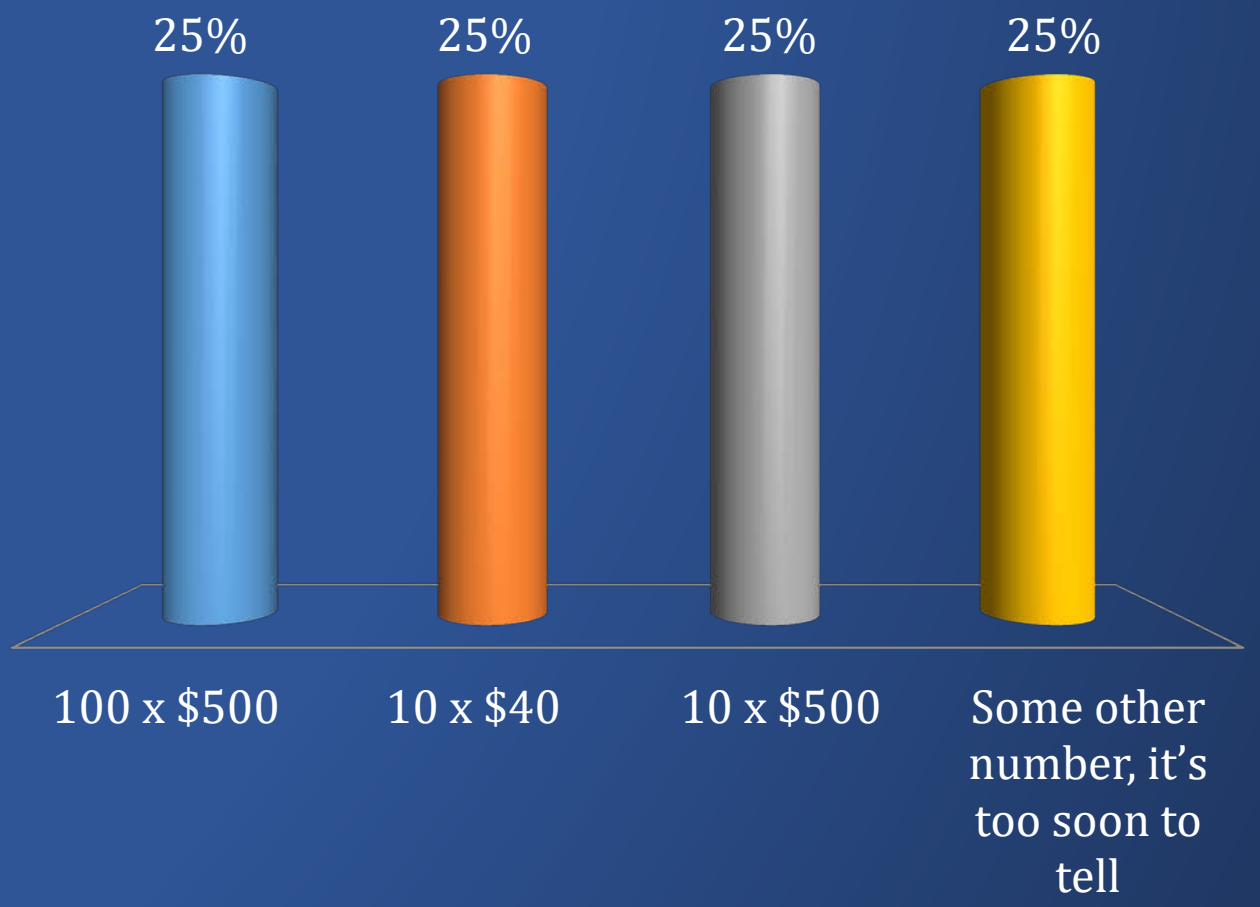


Access Devices

- *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)

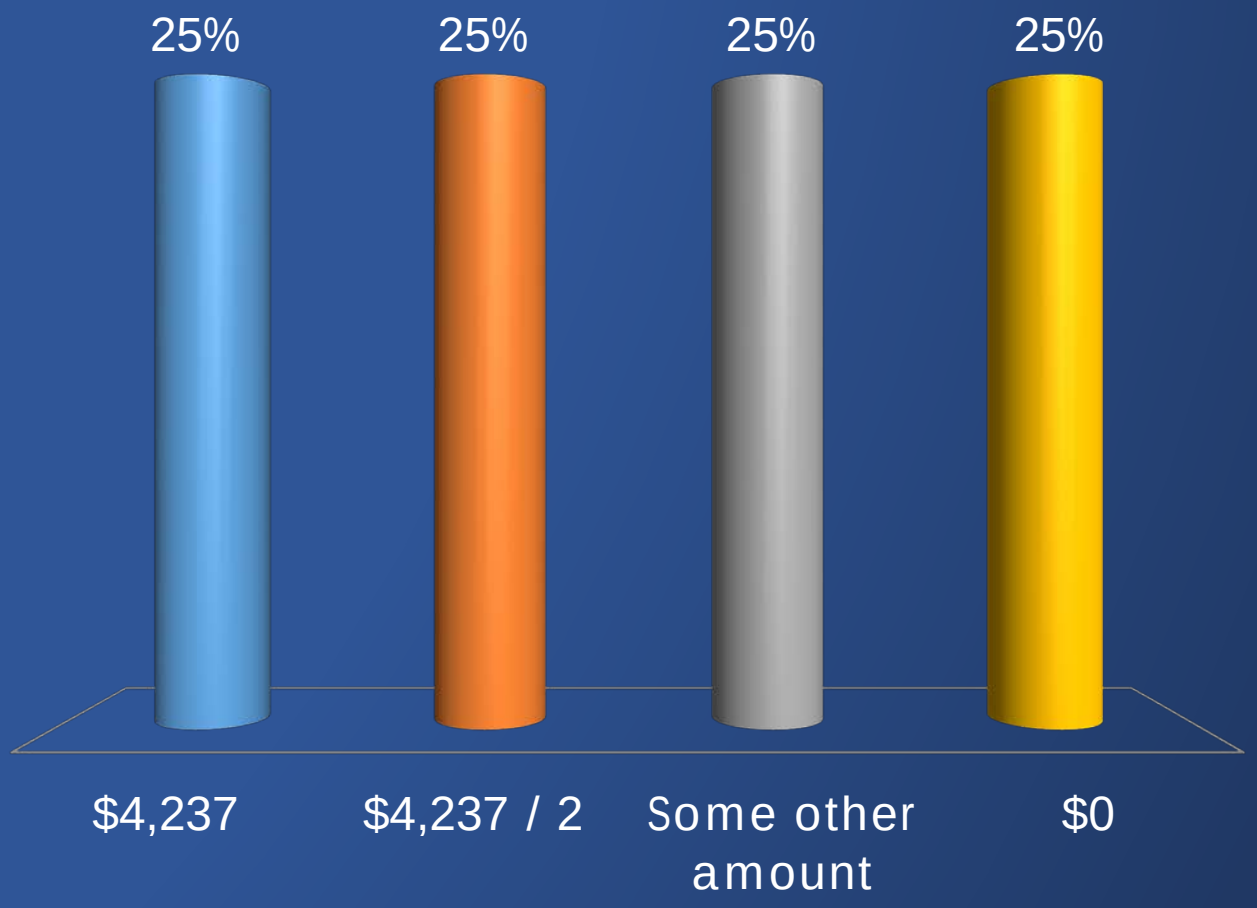
2B. What is the restitution amount?

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."

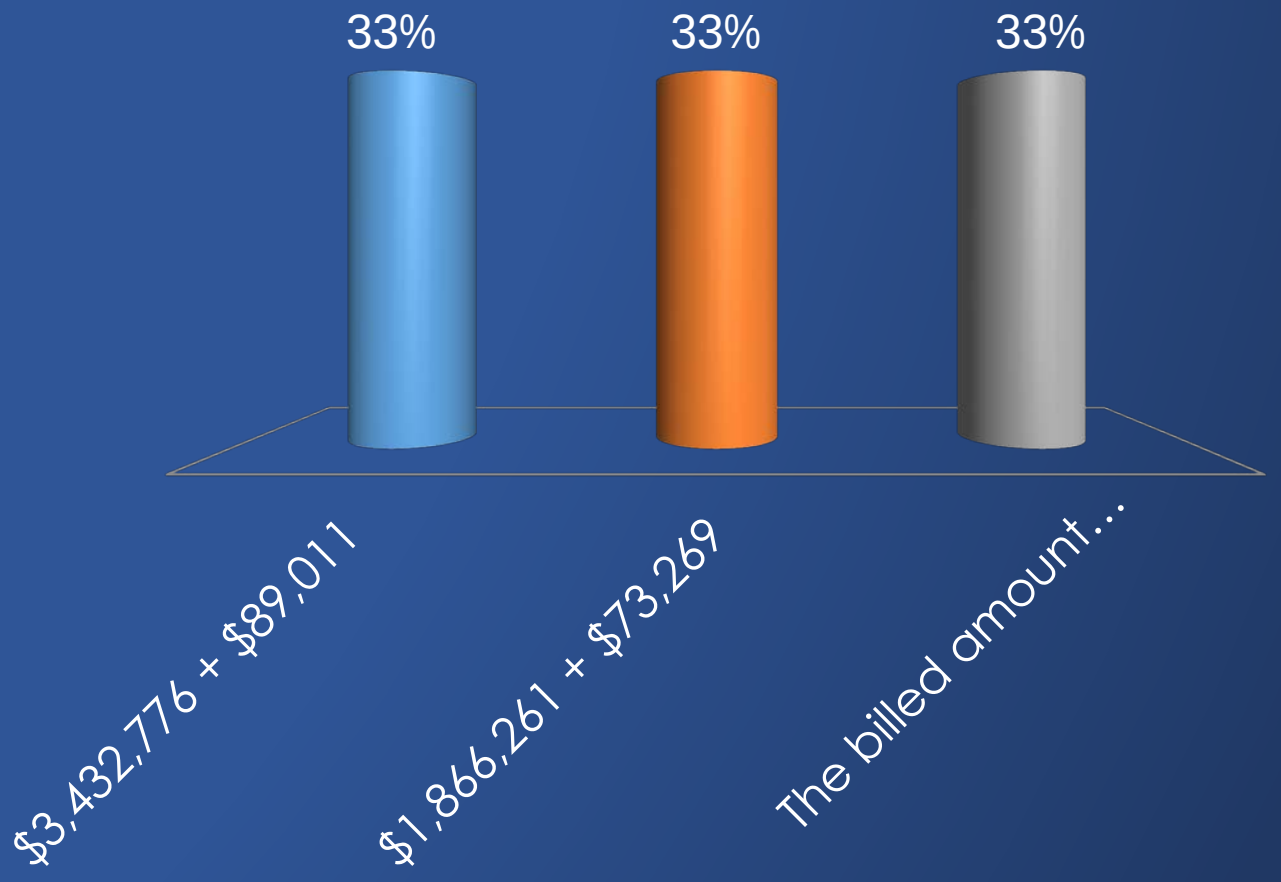
Special Rules in the Determination of Loss (cont.)

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

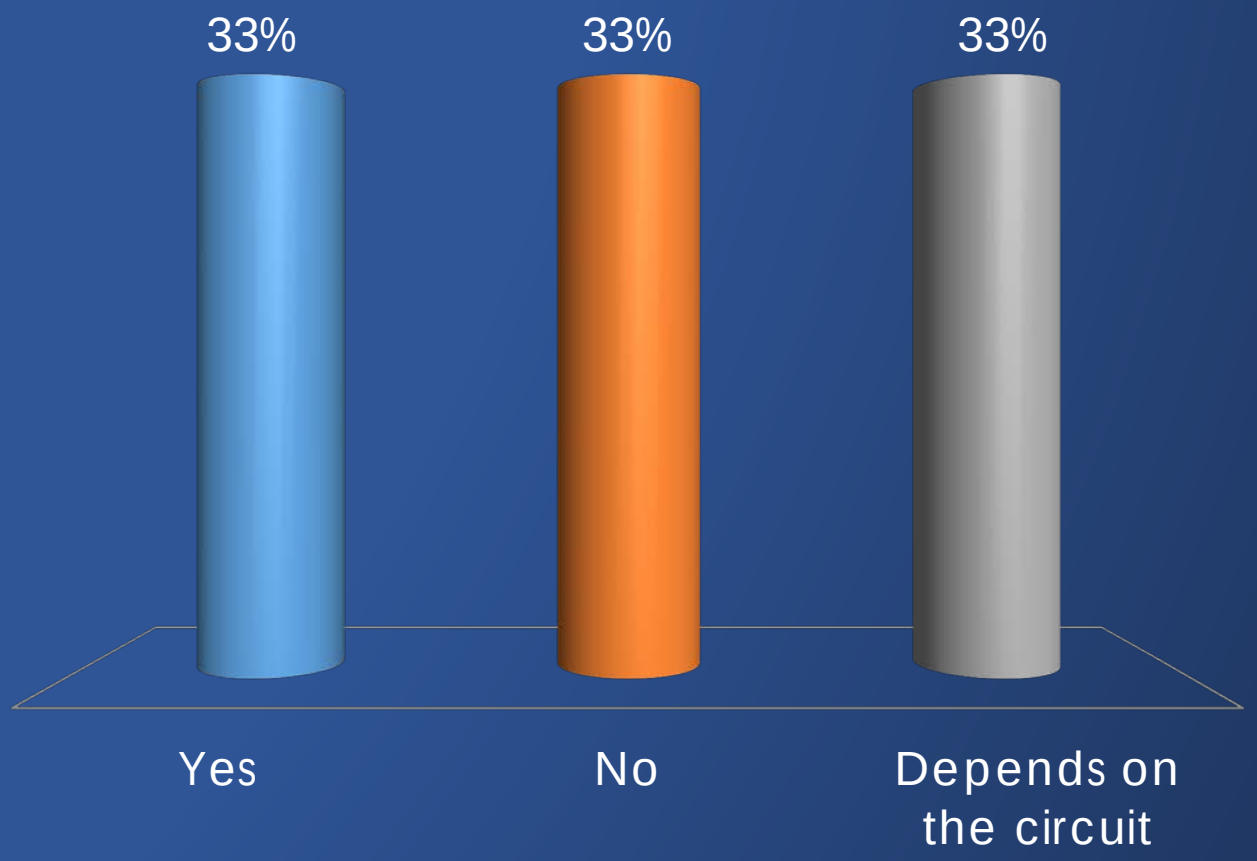
- "Because [defendant] failed to provide any evidence that she did not intend for Medicare and Medi-Cal to reimburse her for the full 3.5 million [] the district court did not clearly err in relying upon the total amount billed to determine intended loss

- 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

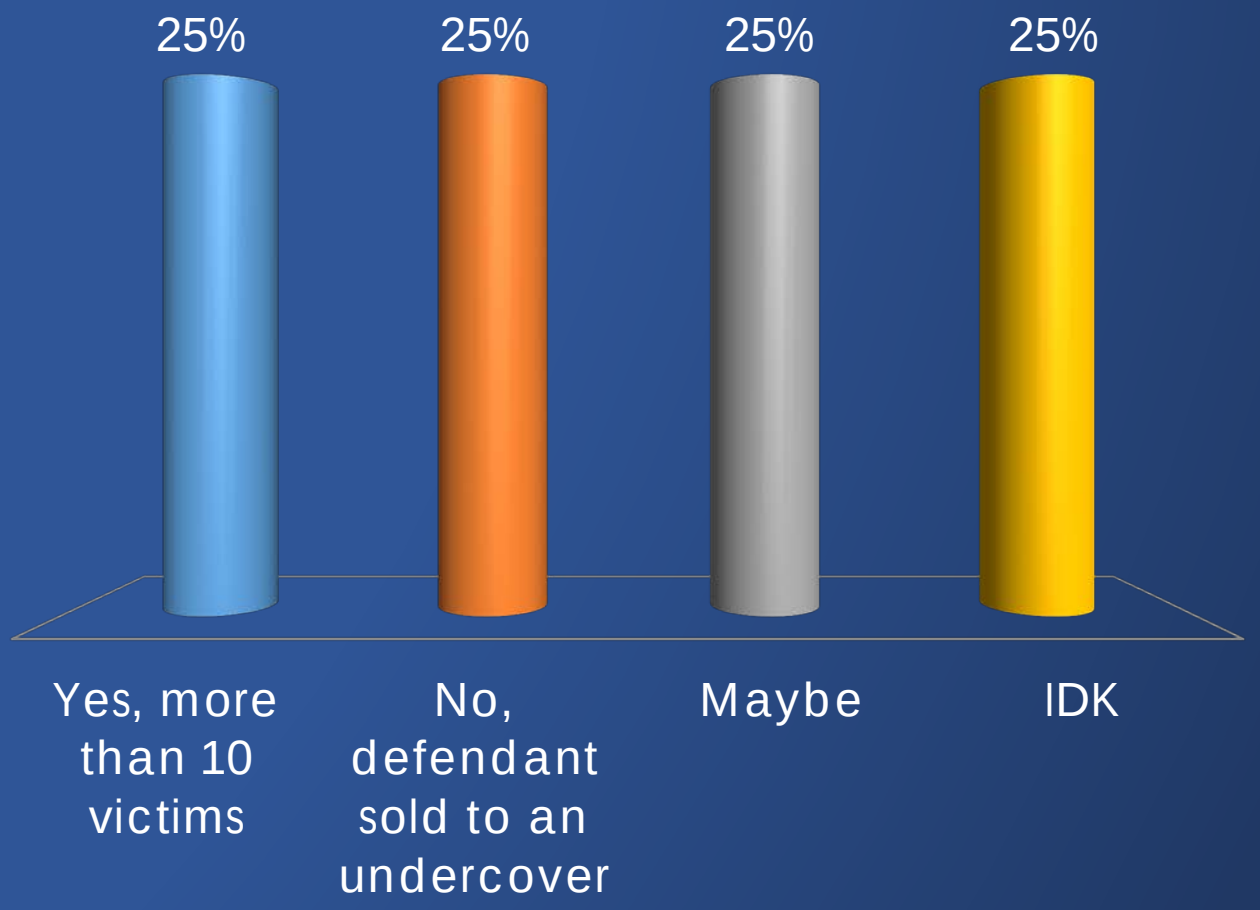
"Substantial Financial Hardship"

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

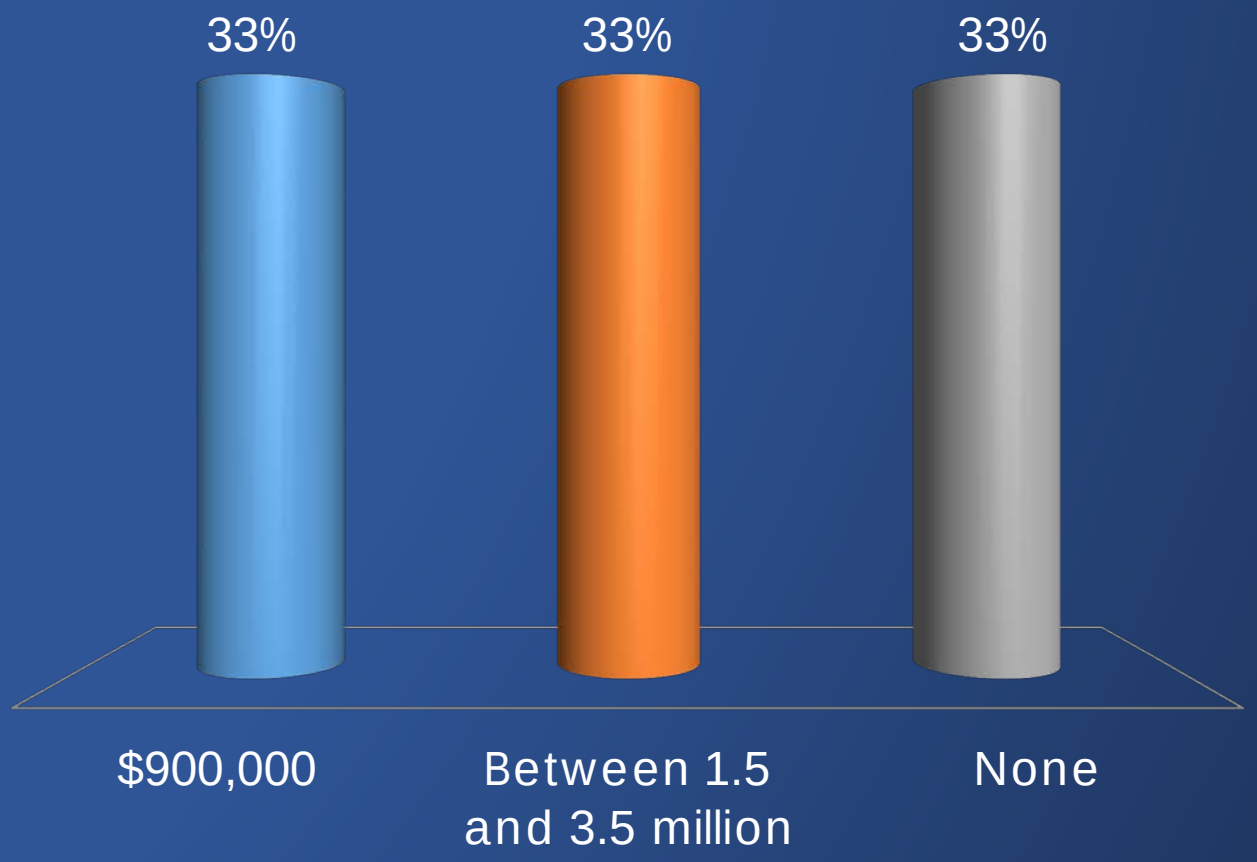
4. Do any victim-related adjustments apply?

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

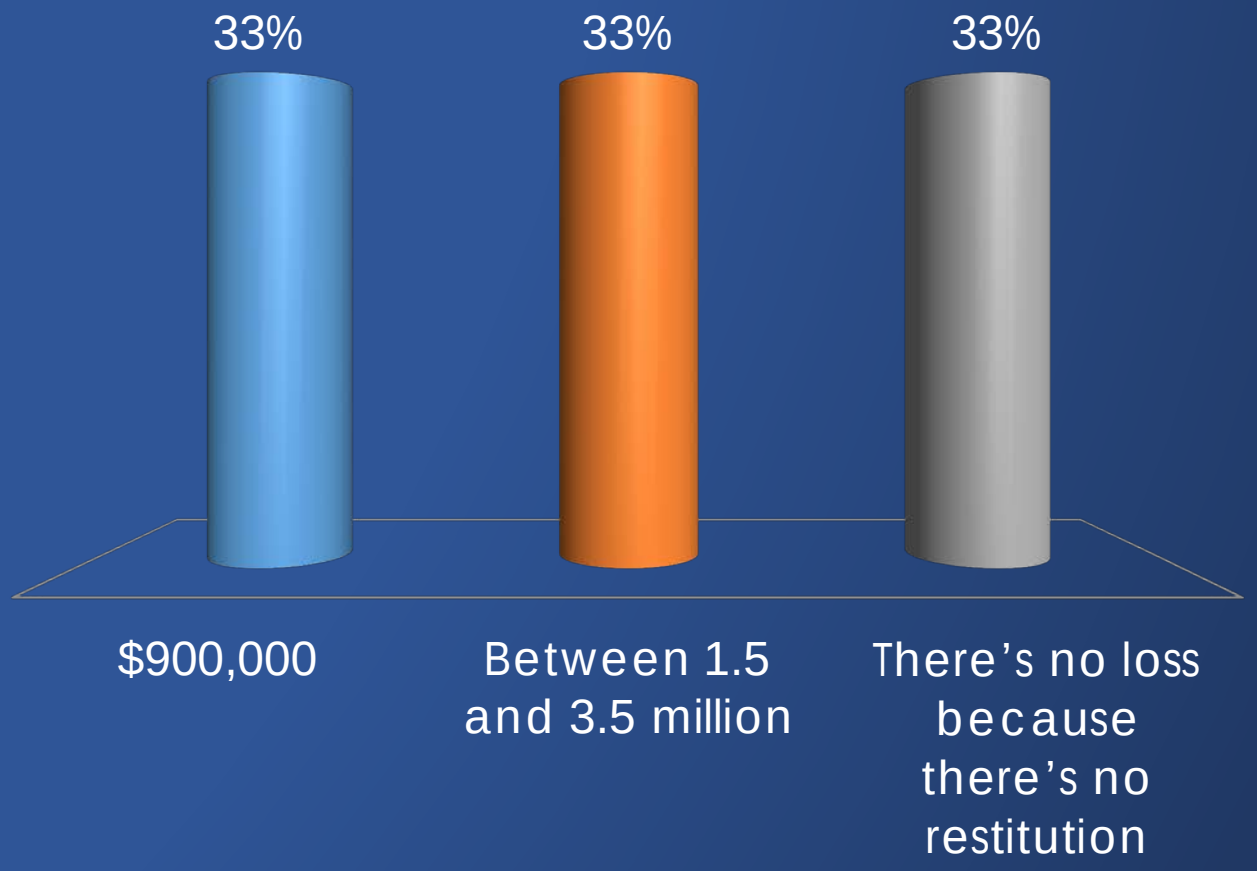


Question 7
Case Law

- *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



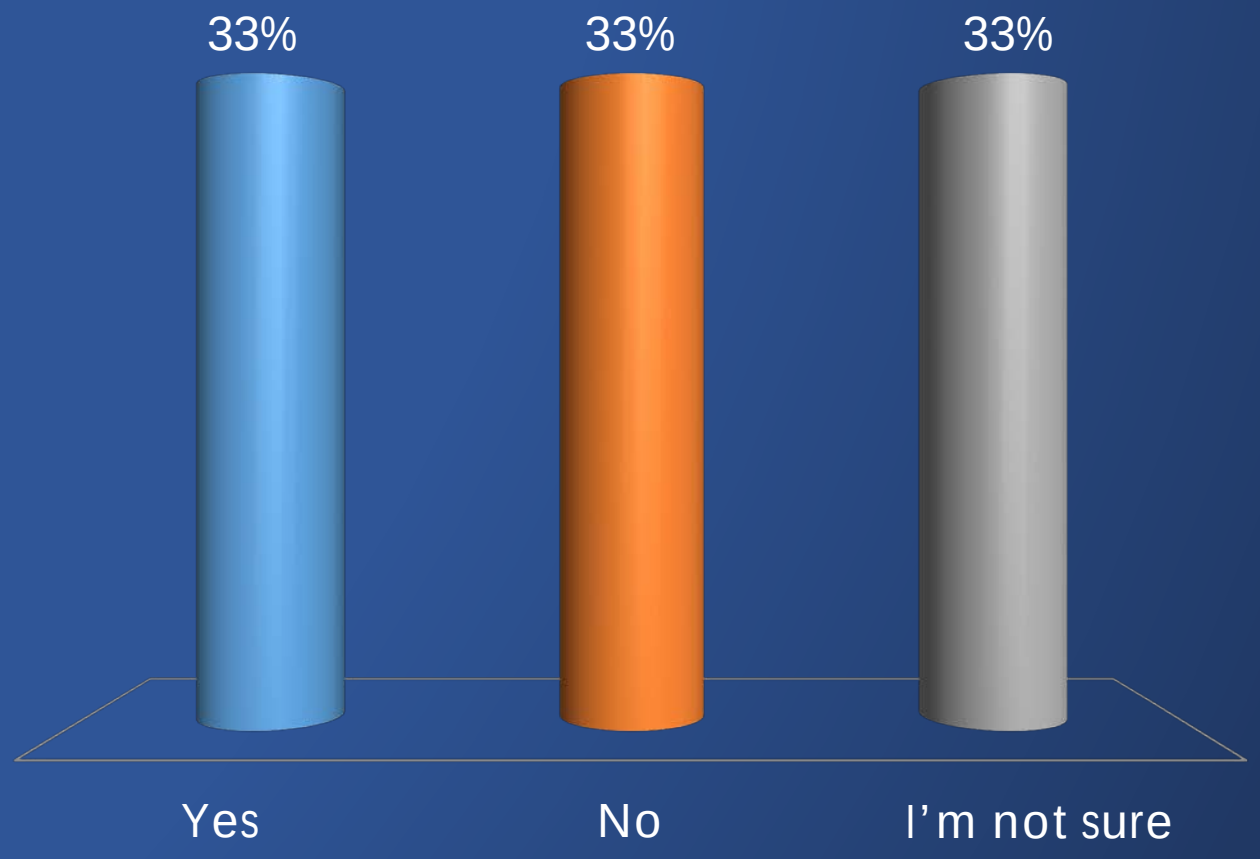
Question 7
Case Law

- "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



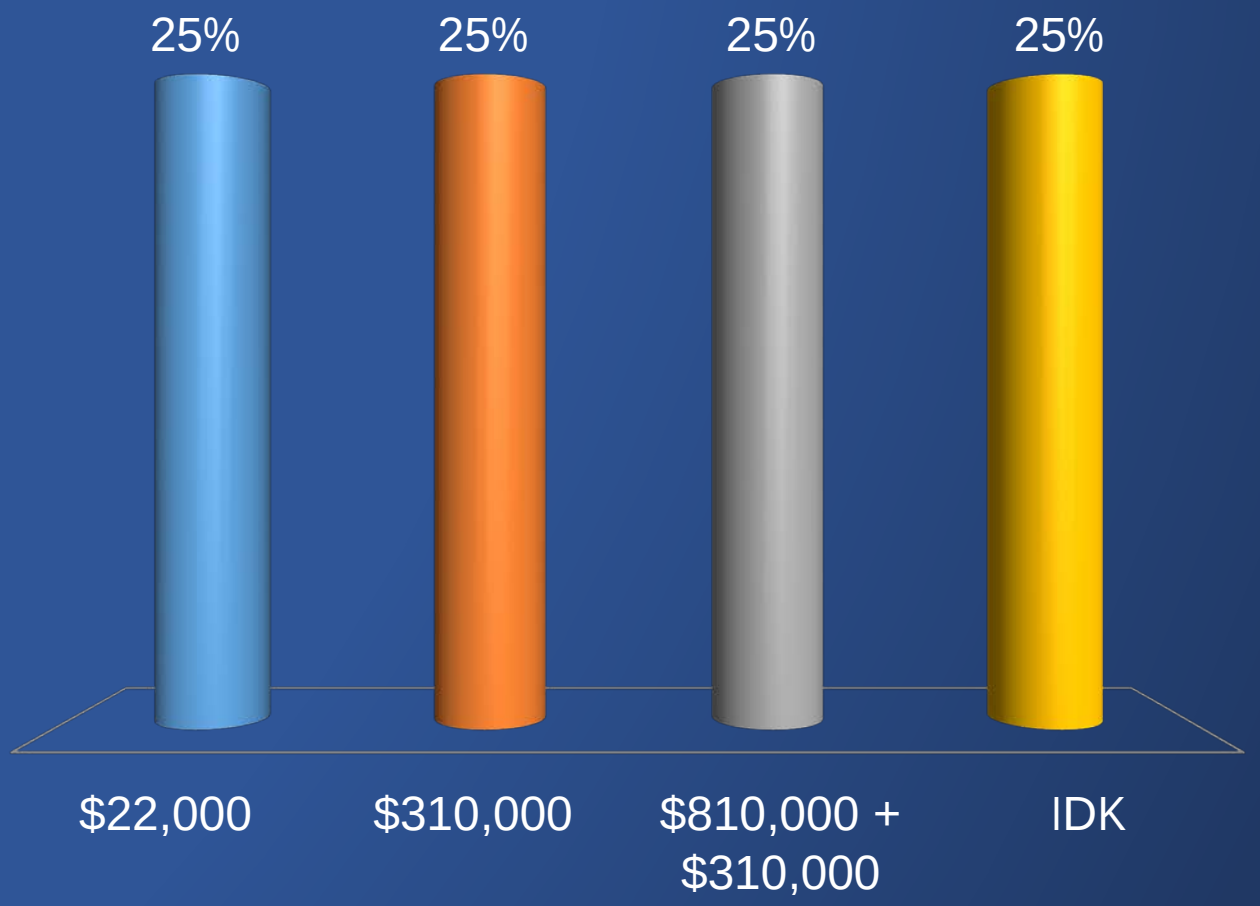
Vulnerable Victim

- "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 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."

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

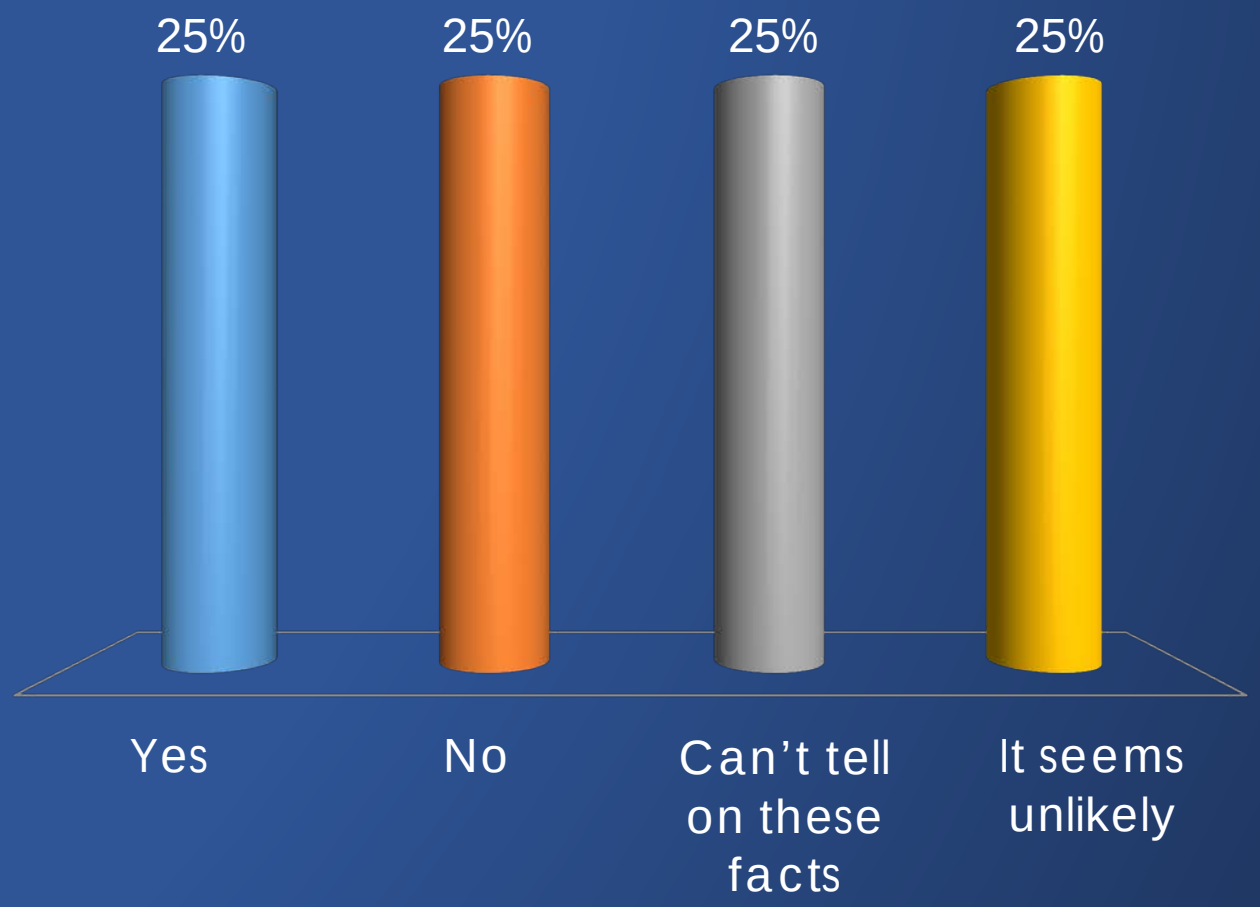
9. What is the loss amount for Defendant B?

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



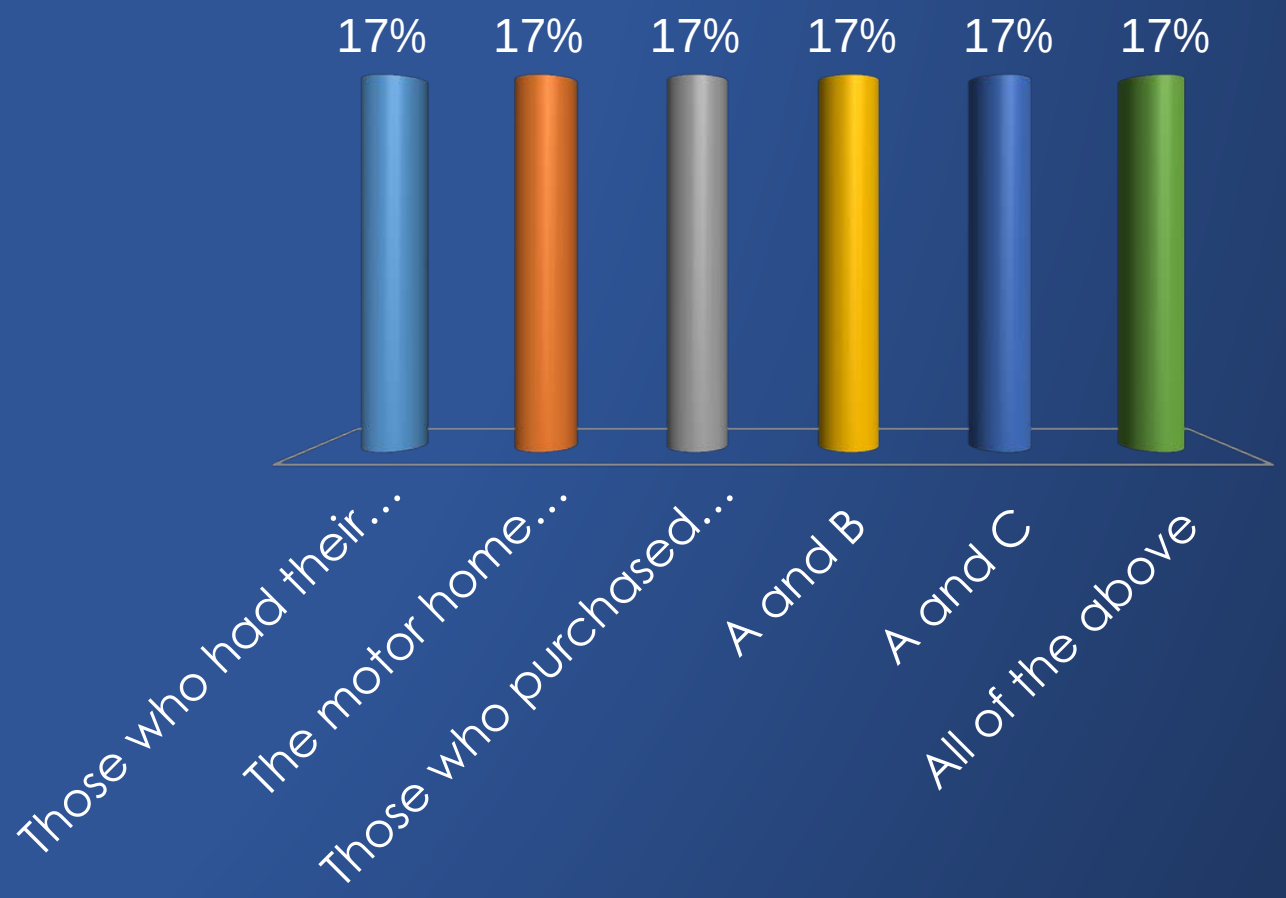
9B. Will Defendant B get an enhancement for causing substantial financial hardship?

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

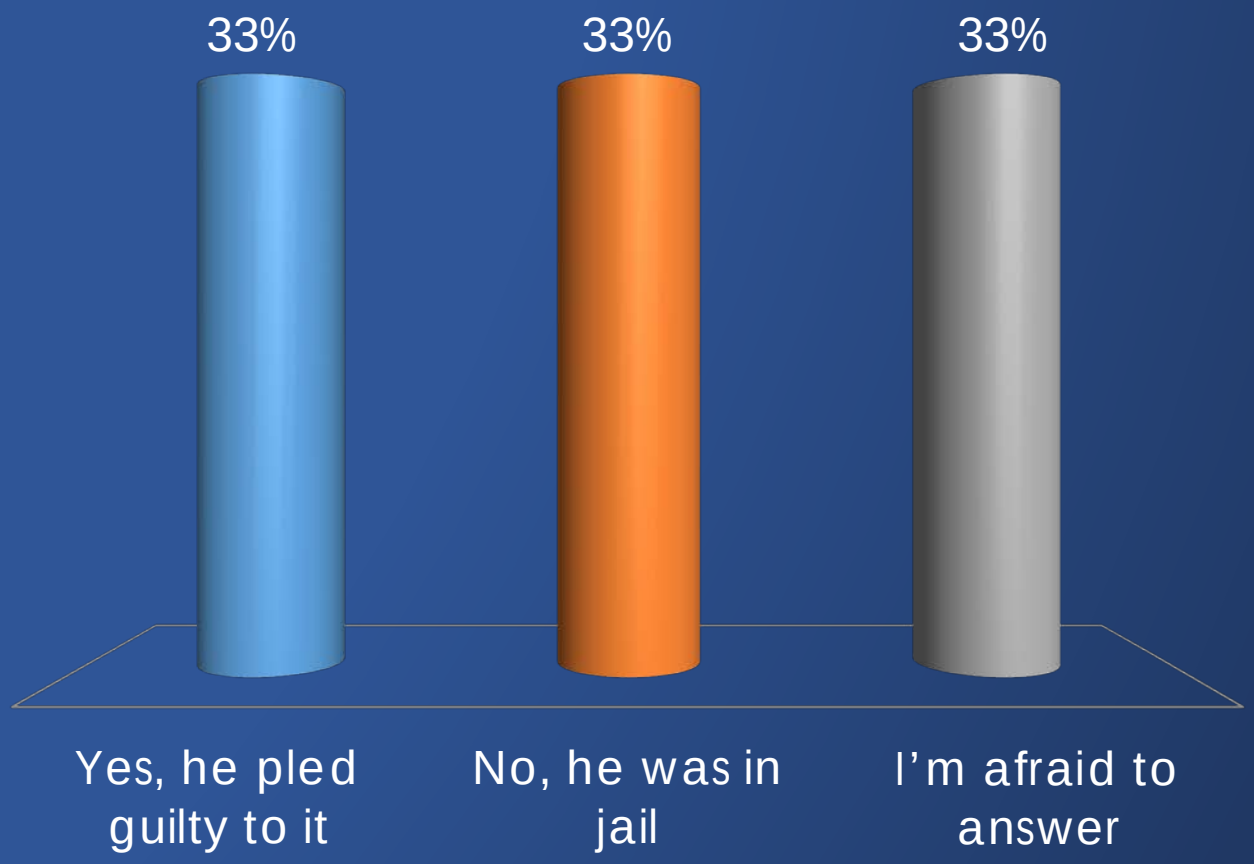
- "When the thefts were revealed, the stolen motor homes were taken away from the secondary victims and returned to the original owners or their insurance companies. Myers therefore can be said to have intended those losses to the secondary victims."

- "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 rimes. 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.

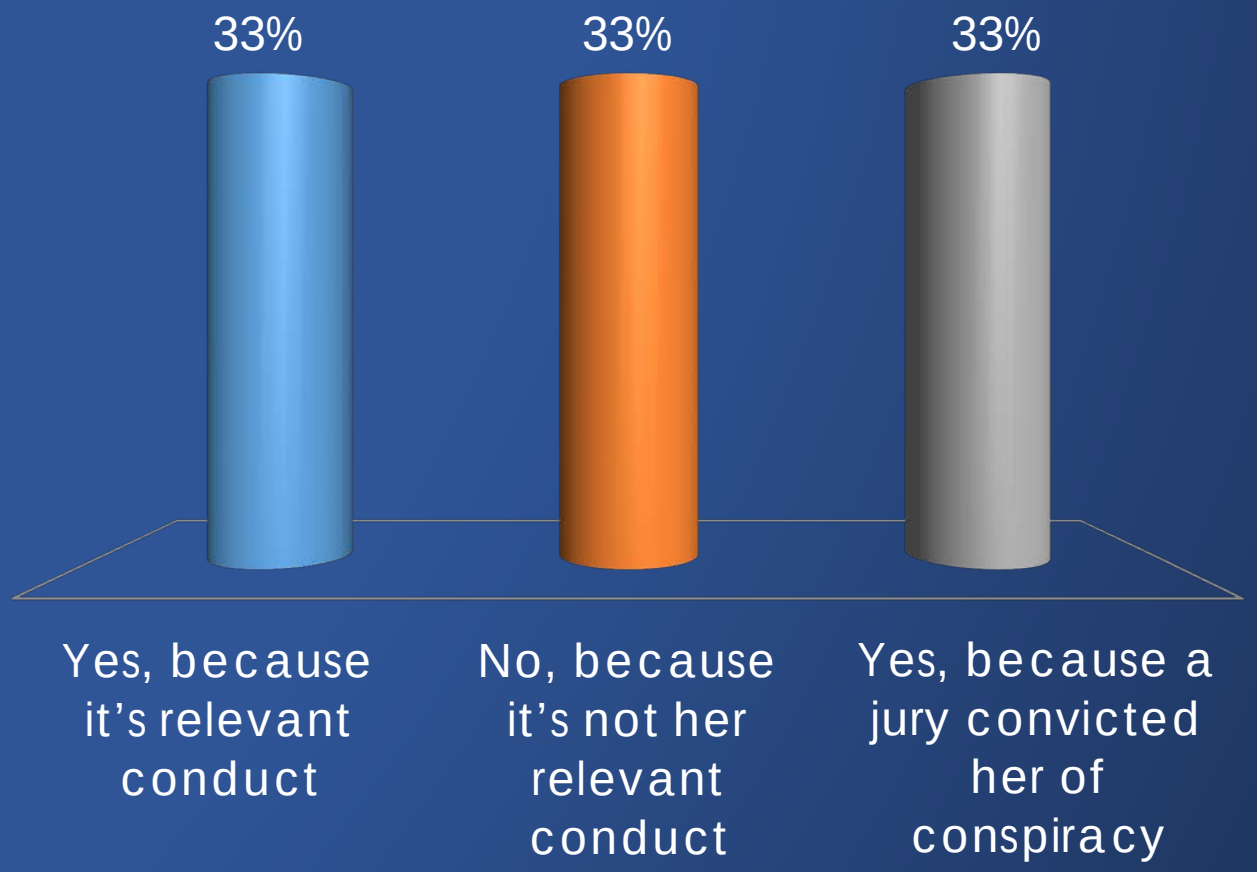
- *U.S. v. Metro*, 882 F.3d 431 (3d Cir. 2018) (applying the principle to insider trading at USSG §2B1.4)

12. Is Hearns 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.’”

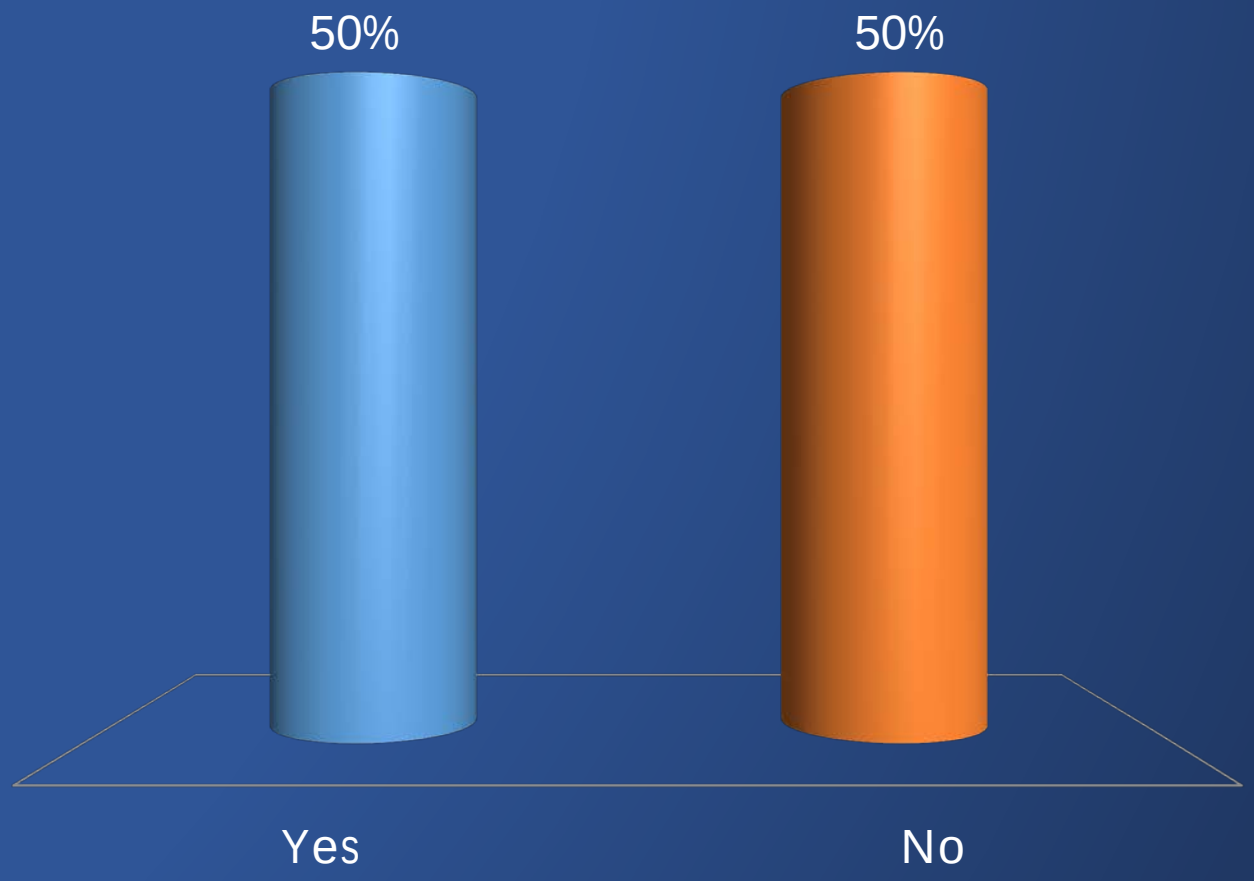
- “Although a PSR may be considered as evidence by the court when making sentencing determinations, bare assertions made therein are not evidence standing alone.”

- U.S. v. Hearns, 845 F.3d 641 5th Cir. 2017

13. Is the loss calculation correct as to Delman?

A. Yes

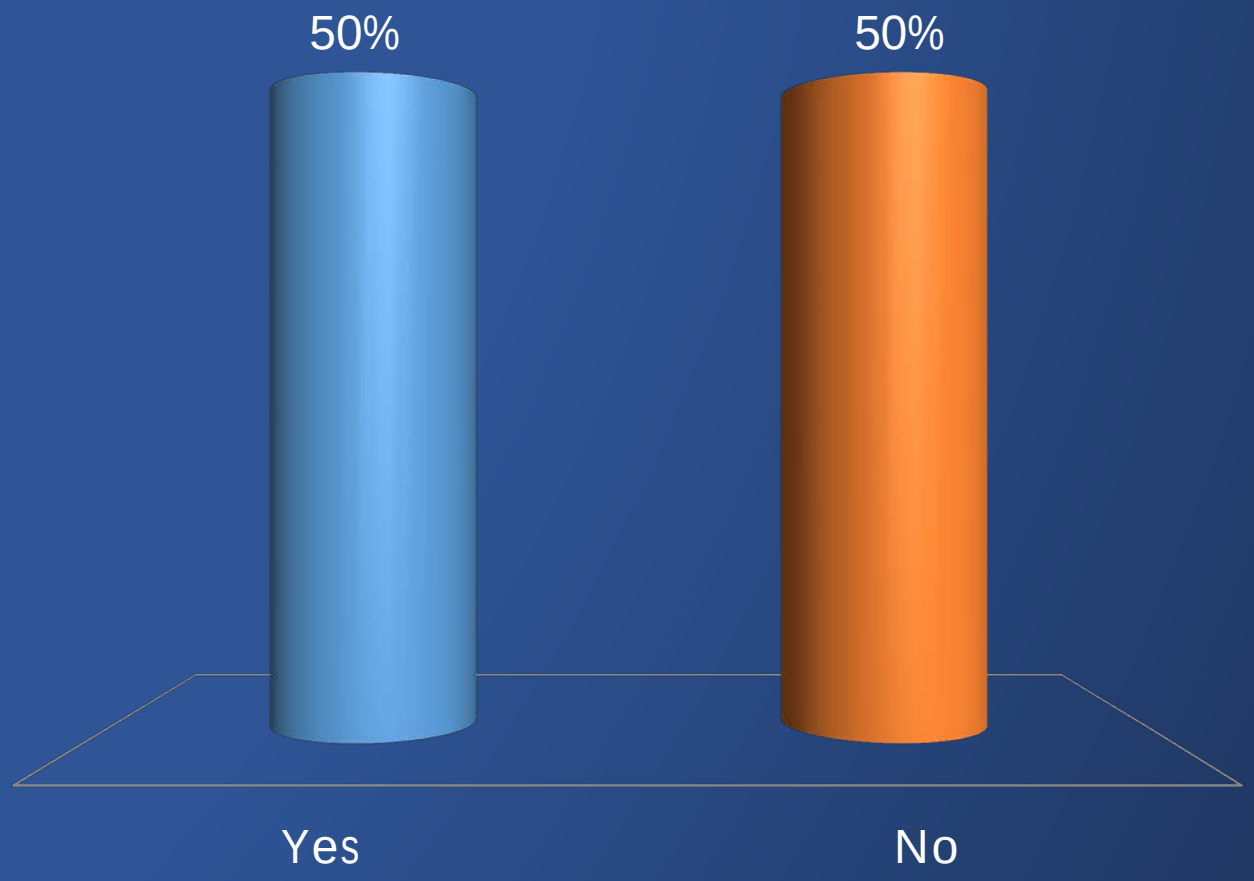
B. No



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?

www.ussc.gov (202) 502-4545 @theusscgov pubaffairs@ussc.gov

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?

_____
_____
_____

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?

_____
_____
_____

What restitution is owed?

_____
_____
_____

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?

_____
_____
_____
_____
_____
_____

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?

_____
_____
_____

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?

_____
_____
_____

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

_____
_____
_____

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?

_____
_____
_____

What is the restitution amount?

_____
_____
_____

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 is the loss amount?

_____
_____
_____

What restitution is owed to Bank of America?

_____
_____
_____

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?

_____
_____
_____

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?

_____
_____
_____

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

_____
_____
_____

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?

_____
_____
_____

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

_____
_____
_____

Who is owed restitution?

_____
_____
_____

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

_____
_____
_____

Will any victim-related enhancements apply?

_____
_____
_____

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?

_____
_____
_____

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

_____
_____
_____

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?

_____
_____
_____

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?

_____
_____
_____

Is it correct as to Defendant Sharp?

_____
_____
_____

Should Sharp receive a mitigating role adjustment?

_____
_____
_____

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.

Economic Crimes:
2018 Annual National Seminar

2018 National Seminar

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

To receive updates on future events and other Commission activities, visit us on Twitter @TheUSSCgov, or subscribe to e-mail updates through our website at www.ussc.gov. For guidelines questions, call our Helpline at 202.502.4545, and to request training, email us at training@ussc.gov.

PRIMER

ECONOMIC CRIME VICTIMS §2B1.1(b)(2)

April 2017

Prepared by the Office of General Counsel, U.S. Sentencing Commission

TABLE OF CONTENTS

I. INTRODUCTION

This primer provides a general overview of selected guideline issues related to victims in offenses sentenced under §2B1.1 ("Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud or Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States"). Although the primer identifies some of the relevant cases and concepts, it is not intended as a comprehensive compilation of the cases or analysis related to these issues.

II. GUIDELINE ENHANCEMENT FOR VICTIMS

Effective November 1, 2015, the Commission revised §2B1.1(b)(2) to incorporate substantial financial hardship to victims as a sentencing factor.[1] Specifically, §2B1.1(b)(2) provides:

> (2) (Apply the greatest) If the offense—
>
> (A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;
>
> (B) resulted in substantial financial hardship to five or more victims, increase by 4 levels; or
>
> (C) resulted in substantial financial hardship to 25 or more victims, increase by 6 levels.

The 2015 amendment also added at Application Note 4(F) a non-exhaustive list of factors for courts to consider in determining whether the offense caused substantial financial hardship. These factors include: 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; or suffering substantial harm to the victim's ability to obtain credit.

Prior to November 1, 2015, the victims table at §2B1.1(b)(2) provided for an enhancement based only on the number of victims (and mass marketing):

[1] USSG App. C, Supp., amend. 792 (eff. Nov. 1, 2015). As a conforming change, the special rule in Application Note 4(C)(ii)(I), pertaining to theft of undelivered mail, was also revised to refer to 10 rather than 50 victims.

(2) (Apply the greatest) If the offense—

(A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by 2 levels;

(B) involved 50 or more victims, increase by 4 levels; or

(C) involved 250 or more victims, increase by 6 levels.[2]

A. DEFINITION OF VICTIM UNDER §2B1.1

1. *General Definition*

The application notes to §2B1.1 generally define "victim" to include any person who sustained "actual loss" in the form of "reasonably foreseeable pecuniary harm" as well as any individual who sustained bodily injury.[3] Because most case law under §2B1.1 involves pecuniary harm, this primer does not cover bodily injury.

For purposes of this enhancement, "actual loss" means the "reasonably foreseeable pecuniary harm that resulted from the offense."[4] "Pecuniary harm" is "harm that is monetary or that otherwise is readily measurable in money,"[5] and therefore does not include emotional distress, harm to reputation, or other non-economic harm.[6] "Reasonably foreseeable pecuniary harm" is "pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense."[7] "Person" as used in the definition of victim includes "individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies."[8] A victim may also be a government or government agency.[9]

[2] §2B1.1 (eff. Nov. 1, 2012).

[3] §2B1.1, comment. (n.1) (defining "victim" to mean "(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.").

[4] §2B1.1, comment. (n.3(A)(i)); *see also, e.g.*, United States v. Massam, 751 F.3d 1229, 1233 (11th Cir. 2014) (emphasizing that "victims" are implicated only if there is an actual loss and that, conversely, if only intended loss is at issue, there is no "victim" for purposes of the enhancement). For case law discussing loss in more detail, *see* the Commission's primer on *Loss Calculations under §2B1.1(b)(1)* at http://www.ussc.gov/training/primers.

[5] §2B1.1, comment. (n.3(A)(iii)).

[6] *Id.*

[7] §2B1.1, comment. (n.3(A)(iii)).

[8] *Id.*

[9] United States v. Cunningham, 593 F.3d 726, 732 (8th Cir. 2010).

A special definition of "victim" applies in offenses involving identity theft and theft of undelivered U.S. mail, each of which is discussed below.

2. *IDENTITY THEFT CASES*

Effective November 1, 2009, the Commission amended the commentary to §2B1.1(b)(2) to expand the definition of victim in cases involving a means of identification.[10] In such cases, a victim includes "any individual whose means of identification was used unlawfully or without authority," regardless of whether the individual sustained a pecuniary loss.[11] The guidelines incorporate the statutory definition of "means of identification" from 18 U.S.C. § 1028(d)(7) but require that "such means of identification shall be of an actual (*i.e.*, not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)." [12]

"Means of identification" is defined in 18 U.S.C. § 1028(d)(7) as

> any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any–
>
> (A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;
>
> (B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
>
> (C) unique electronic identification number, address, or routing code; or
>
> (D) telecommunication identifying information or access device (as defined in [18 U.S.C. § 1029])[.]

[10] §2B1.1, comment. (n.4(E)). The change was part of a multi-part amendment promulgated in response to a directive in the Identity Theft Enforcement and Restitution Act of 2008 to review guidelines applying to crimes involving identity theft. USSG App. C, amend. 726 (eff. Nov. 1, 2009).

[11] §2B1.1, comment. (n.4(E)); *see also* United States v. Ford, 784 F.3d 1386, 1397 (11th Cir. 2015) (holding that an enhancement for number of victims is appropriate even when indictment charges aggravated identity theft, so long as the enhancement based on number of victims is applied to counts other than the identity theft offenses).

[12] §2B1.1, comment. (n.1.).

Various decisions provide additional examples of "means of identification": mortgage loan numbers[13]; a company name that includes the victim's true name[14]; forged signatures on fraudulent checks[15]; personal telephone numbers[16]; leases[17]; bank account numbers[18]; forged documents created with correct information[19]; police badges[20]; credit card numbers[21]; emails including personal information[22]; and e-Bay accounts.[23] However, courts have found that the production of fraudulent tax returns does not constitute other means of identification.[24]

In addition to determining what constitutes a "means of identification" in the context of identity theft cases, courts have also considered the scope of the definition of "victim" provided in Application Note 4(E)(ii) to §2B1.1. More specifically, courts have considered what is required for a defendant to have *used* the means of identification.[25] The mere acquisition and possession of a means of identification does not qualify as using that means of identification for the purposes of §2B1.1.[26] A defendant only "uses" another

[13] United States v. Cooks, 589 F.3d 173, 185-86 (5th Cir. 2009); United States v. Macias, 345 F. App'x 272, 273 (9th Cir. 2009).

[14] United States v. Johnson, 261 F. App'x 611, 613-14 (4th Cir. 2008).

[15] *Id.*; *see also* United States v. Blixt, 548 F.3d 882, 886 (9th Cir. 2008) (holding that forging another's signature constitutes use of that person's name and qualifies as a means of identification under statute).

[16] United States v. Geeslin, 236 F. App'x 885, 886-87 (5th Cir. 2007).

[17] United States v. Samet, 200 F. App'x 15, 23 (2d Cir. 2006).

[18] United States v. Norton, 176 F. App'x 992, 995-96 (11th Cir. 2006)*;* United States v. Suchowolski, 838 F.3d 530, 532 (5th Cir. 2016)*; cf.* United States v. Hawes, 523 F.3d 245, 253 (3d Cir. 2008) (finding that names and addresses on brokerage accounts were not "means of identification" in context of particular case because customers were primarily identified by account number rather than name and address).

[19] United States v. Newsome, 439 F.3d 181, 184-85 (3d Cir. 2006).

[20] United States v. Sash, 396 F.3d 515, 523-24 (2d Cir. 2005).

[21] United States v. Oates, 427 F.3d 1086, 1089-90 (8th Cir. 2005); United States v. Craig, 343 F. App'x 766, 770 (3d Cir. 2009).

[22] United States v. Yummi, 408 F. App'x 537, 540 (3d Cir. 2010).

[23] *Craig*, 343 F. App'x at 769-70.

[24] See United States v. Thomsen, 830 F.3d 1049, 1072 (9th Cir. 2016); *see also* United States v. White, 571 F. App'x. 20, 26 (2d Cir. 2014) (summary order) (holding that, where the defendant was convicted using others' identifications to file false tax returns and to receive refunds, the district court did not find that using others' identifications to file a false return and receive a refund involved obtaining *another* means of identification within the meaning of §2B1.1(b)(11)(C)(I)).

[25] §2B1.1, comment. (n.4(E)(ii)); *see also* USSG App. C, amend. 726 (eff. Nov. 1, 2009) ("This new category of 'victim' for purposes of subsection (b)(2) is appropriately limited, however, to cover only those individuals whose means of identification are actually used.").

[26] *See* United States v. Cardenas, 598 F. App'x. 264,268 (5th Cir. 2015).

person's means of identification if the defendant "actively employ[s]" that person's identification in the furtherance of some "criminal goal."[27]

The Eleventh Circuit held that a district court erred in applying a 4-level enhancement pursuant to §2B1.1(b)(2)(B) based on the fact that the defendant, a doctor's office assistant, obtained and sold patients' means of identification to a coconspirator. The district court held that the unlawful or unauthorized transfer or sale of the patients' identifying information, without more, qualified as "use." Accordingly, it applied the enhancement based on all 141 patients even though the government had only presented evidence that 12 patients' information had been used to obtain fraudulent credit card accounts. The Eleventh Circuit reversed, holding that Application Note 4 did not permit application of the enhancement based on mere transfer:

> The purpose of the conspiracy in this case was to obtain cash advances and purchase items by using fraudulent credit cards. [The defendant]'s sale of the unauthorized identifying information to her co-conspirators did not implement the purpose of the conspiracy. [The defendant]'s mere transfer of the personal identifying information, without more action, did not employ that information for the purpose for which the conspiracy was intended—the procurement of fraudulent credit cards and cash advances. The personal identifying information was not used, as that term is ordinarily understood, until [the defendant]'s co-conspirators secured the fraudulent credit cards. At that point, the 12 individuals whose personal information was compromised became victims for the §2B1.1(b)(2) enhancement.[28]

3. UNDELIVERED UNITED STATES MAIL

The guidelines also include a special definition of victim applicable when "undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail."[29] In such a case, victim

[27] United States v. Minor, 831, F.3d 601,605 (5th Cir. 2016) (quoting United States v. Cardenas, 598 F. App'x. 264,269 (5th Cir. 2015)).

[28] United States v. Hall, 704 F.3d 1317, 1322 (11th Cir. 2013); *see also* United States v. Adejumo, 772 F.3d 513, 527-28 (8th Cir. 2014) (affirming use of enhancement when government presented evidence that more than 500 individuals' "identifying information had been used to create fraudulent driver's licenses, open fraudulent bank accounts, or withdraw funds from those accounts"); United States v. Lopez, 549 F. App'x 909, 911-12 (11th Cir. 2013) (applying *Hall*; holding that "mere theft or possession of" personal information is not sufficient to "make someone a victim," if that information is not "used").

[29] §2B1.1, comment. (n.4(C)(i)(I)). As a conforming change, the special rule in Application Note 4(C)(ii)(I), pertaining to theft of undelivered mail, was also revised effective November 1, 2015, to refer to 10 rather than 50 victims. *See* USSG App. C, Supp., amend. 792 (eff. Nov. 1, 2015).

means "(I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail."[30]

B. SUBSTANTIAL FINANCIAL HARDSHIP

Given the recency of the amendment, there have been few written opinions applying the financial hardship framework. The Seventh Circuit has provided the most extensive discussion of the enhancement thus far.[31] In *United States v. Minhas*, the court held that the fact that the hardship must be "substantial" introduces a relativity requirement as "the same dollar harm to one victim may result in a substantial financial hardship, while for another it may be only a minor hiccup."[32]

While noting that simply dividing loss amount by number of victims would not be sufficiently individualized, the court did not go so far as to require specific evidence as to the loss and circumstance of each victim.[33] Rather, the court held that a district court could draw reasonable inferences about the substantiality of a loss for individuals "by virtue of [their] membership in a particular group . . . so long as a district court has reason to believe that the victims are in similar economic circumstances."[34]

The issue of causation has also been the subject of disputes. The causation question has concerned both the level of evidence needed to establish causation[35] and how direct the causation must be.[36]

[30] *Id*. The Ninth Circuit rejected a claim that this definition was inconsistent with §2B1.1 overall and declined to construe "victim" in this context to require pecuniary loss. United States v. Gonzalez-Becerra, 784 F.3d 514, 519 (9th Cir. 2015) (summarizing case law on this issue); *see also* United States v. Alcantara, 436 F. App'x 105, 109-10 (3d Cir. 2011) (finding that all individuals whose mail was taken qualified as victims); United States v. Valdez, 392 F. App'x 662, 664-65 (10th Cir. 2010) (holding that enhancement was properly applied based on testimony and other evidence regarding conduct by postal employee); United States v. Bradford, 480 F. App'x. 214, 215 (4th Cir. 2012) (holding that the term victim includes individuals who were deprived of their mail as a result of the defendant's actions even if the defendant did not steal the mail). *Senders* of stolen mail, though, do not generally qualify as victims under this provision. United States v. Leach, 417 F.3d 1099, 1106-07 (10th Cir. 2005) (holding that donors whose checks were stolen but not cashed were not victims under §2B1.1 without evidence of replacement costs to donors to resend checks).

[31] *See generally United States v. Minhas*, 850 F.3d 873 (7th Cir. 2017).

[32] *Id.* at 877-78.

[33] *Id.* at 878.

[34] *Id.*

[35] *See United States v. Brandriet*, 840 F.3d 558 (8th Cir. 2016) (considering whether court clearly erred in finding sufficient evidence established fraud as cause of victim's inability to afford living expenses).

[36] *United States v. Davis*, No. 15-CR-0247(1) (PJS/SER), 2017 U.S. Dist. LEXIS 61325 (D. Minn. Apr. 21, 2017) (holding that enhancement did not apply where evidence did not establish fraud as "direct" cause of company's hardships).

III. ESTIMATING THE NUMBER OF VICTIMS

If the government seeks a sentencing enhancement based on the number of victims, it must prove the number by a preponderance of the evidence.[37] There is no specific manner in which a district court must make this determination.[38] However, "[t]he Guidelines do not . . . allow a district court to estimate the number of victims to enhance a sentence under §2B1.1(b)(2)."[39]

For example, in a case involving a conspiracy to commit fraud through a false charity, the Seventh Circuit required some proof that the donations attributable to the appealing defendant could be traced to over 50 victims.[40] The Court noted that, while the overarching offense involved $17 million worth of donations from over 17,000 donors, there was insufficient evidence to demonstrate that at least 50 donors contributed the amount attributed to the defendant.[41] Similarly, the Ninth Circuit remanded for resentencing a case in which the sentencing enhancement was not supported by evidence showing that 50 or more persons suffered actual loss in the form of pecuniary harm.[42] In contrast, the District of Columbia Circuit found that a district court properly applied an enhancement for 250 or more victims in a foreign aid fraud based on reports of interviews with Liberian town leaders.[43] Each interview "contained references to more than 100 people who performed work but did not receive food."[44] This was sufficient to establish the requisite numbers for the enhancement.[45] Some circuits courts have held that a married couple holding an investment jointly may be counted as two individual victims.[46]

---

[37] *See, e.g.*, United States v. Arnaout, 431 F.3d 994, 999 (7th Cir. 2005).

[38] *See, e.g.*, United States v. Norman, 776 F.3d 67, 80-81 (2d Cir. 2015) (concluding that district court properly imposed enhancement for involvement of at least fifty victims based on defendant's "explicit testimony at trial").

[39] United States v. Showalter, 569 F.3d 1150, 1160 (9th Cir. 2009) (citation, internal punctuation omitted). *But see* United States v. Naranjo, 634 F.3d 1198, 1214 (11th Cir. 2011) (affirming district court's calculation of a reasonable estimate of victims based on bank records).

[40] *See Arnaout*, 431 F.3d at 999; *but see* United States v. Gonzales, 647 F.3d 41, 63 (2d Cir. 2011) (distinguishing *Arnaout* and stating that there is no suggestion in the guidelines that victims must be linked with specific losses).

[41] *Arnaout*, 431 F.3d at 999.

[42] United States v. Pham, 545 F.3d 712, 720-21 (9th Cir. 2008).

[43] United States v. Fahnbullah, 752 F.3d 470 (D.D.C. 2014).

[44] *Id.* at 481.

[45] *Id.* at 482.

[46] *See*, *e.g.*, United States v. Ryan, 806 F.3d 691 (2d Cir. 2015); United States v. Harris, 718 F.3d 698 (7th Cir. 2013); United States v. Densmore, 210 F. App'x 965 (11th Cir. 2006) (unpub).

Undelivered United States mail is subject to a "special rule" that potentially affects the number of persons who will qualify as victims. Pursuant to the pre-November 1, 2015, version of this rule, a case that involves "a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 50 victims."[47] The amendments promulgated in 2015 change the special rule to create a presumption of the involvement of "at least 10 victims" rather than 50 victims.[48] In a case involving "a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle."[49] In such cases, the government must still offer proof supporting the enhancement, but it need not prove the victims' identities. Additionally, the enhancement will apply unless the defendant rebuts the presumption with specific proof.[50] Although the construction will not change, the amendments promulgated in 2015 change the language in the enhancement

IV. REIMBURSEMENT AND VICTIMS

Several circuits have addressed whether the victim enhancement applies in cases in which the victim of a fraud scheme has been reimbursed by a bank, insurer or other third party. Because the circuits are split on this issue, whether an individual has sustained an actual loss and met the guideline definition of victim depends on the circuit and the specific facts of each case.

In 2009, the Commission partially resolved the circuit conflict on reimbursement, discussed *infra*, by expanding the definition of victim in identity theft cases.[51] Specifically, the Commission determined that an individual who has been reimbursed in an identity theft case "should be considered a 'victim' for purposes of subsection (b)(2) because such an individual, even if fully reimbursed, must often spend significant time resolving credit

[47] §2B1.1, comment. (n.4(C)(ii)(I)); *see* United States v. Moore, 733 F.3d 161, 167 (5th Cir. 2013) (holding that application note 4(C)(ii)(I) permits only a single presumption of 50 or more victims, even if mail is stolen from more than one qualifying receptacle); United States v. Akinsuroju, 166 F. App'x 748, 751 (5th Cir. 2006) (upholding victim enhancement based on theft from a United States Postal Service delivery vehicle); United States v. Armour, 154 F. App'x 830, 832 (11th Cir. 2005) (same).

[48] USSG App. C, Supp., amend. 792 (eff. Nov. 1, 2015).

[49] §2B1.1, comment. (n.4(C)(ii)(II)); *see also* United States v. Niewald, 185 F. App'x 839, 840-41 (11th Cir. 2006) (applying the presumption in note 4(C)(ii)(II) regarding the number of actual residents served by a "housing unit cluster box" to support determination that offense involved 250 or more victims).

[50] *See Niewald*, 185 F. App'x at 841; United States v. Telles, 272 F. App'x 415, 418 (5th Cir. 2008).

[51] §2B1.1, comment. (n.4); USSG App. C, amend. 726 (eff. Nov. 1, 2009).

problems and related issues, and such lost time may not be adequately accounted for in the loss calculations under the guidelines."[52]

The issue of reimbursement was first considered by the Sixth Circuit in *United States v. Yagar*, which held that the victim enhancement does not apply when individuals are reimbursed.[53] The defendant in *Yagar* stole checks and bank account information from unsuspecting individuals, deposited the checks in various accounts, and then withdrew portions of the deposited funds for her own use.[54] The owners of the stolen checks only temporarily lost funds and were ultimately reimbursed by their banks.[55] The Sixth Circuit determined that the reimbursed account holders were not victims under the guidelines because they were fully reimbursed for their temporary financial losses.[56] The court stated that "the monetary loss [was] short-lived and immediately covered by a third-party [and thus there has not] been 'actual loss' or 'pecuniary harm.'"[57] The court additionally explained, "the account holders here suffered no adverse effect as a practical matter from [the defendant's] conduct."[58] *Yagar*'s holding has been followed by the Third, Fifth, and Eighth Circuits.[59]

Notably, *Yagar* left open the possibility that, in some situations, a person who is ultimately reimbursed could nonetheless be a victim. The court did not speculate on what facts might qualify.[60] In the wake of *Yagar*, various other courts have addressed this issue. For example, in 2014, the Third Circuit explicitly adopted and clarified the so-called *Yagar*

[52] *Id.* The significance of this change is illustrated by the fact that courts have found *ex post facto* violations when the revised definition of "victim" was applied to conduct occurring before the amendment. *See, e.g.*, *United States v. Myers*, 772 F.3d 213, 219-20 (5th Cir. 2014) (finding *ex post facto* violation when defendant received six-level enhancement for using identities of nursing home residents to file fraudulent tax returns and receive refunds; explaining that, pre-amendment, individuals would not have qualified as "victims" because they suffered no pecuniary harm).

[53] 404 F.3d 967 (6th Cir. 2005).

[54] *Id*. at 968.

[55] *Id*. at 971.

[56] *Id*.

[57] *Id.*

[58] *Id.*

[59] *See* United States v. Kennedy, 554 F.3d 415, 419-23 (3d Cir. 2009) (holding that, because account holders were reimbursed and the government offered no proof that they even knew their funds had been stolen, account holders did not qualify as victims); United States v. Norman, 465 F. App'x 110, 121 (3d Cir. 2012) (citing *Kennedy*); United States v. Conner, 537 F.3d 480 (5th Cir. 2008) (holding, based on a "a plain reading" of the Application Notes, that credit account holders whose account numbers were used to make fraudulent purchases but who were promptly reimbursed for charges by credit card companies were not victims); United States v. Icaza, 492 F.3d 967. 970 (8th Cir. 2007) (holding that when corporate parent "sustained the actual loss," it was improper to count as a victim each of the 407 retail stores from which the defendants had stolen).

[60] *Yagar*, 404 F.3d at 971.

carve-out and held that "one example of cognizable pecuniary harm is the expenditure of time and money to regain misappropriated funds and replace compromised bank accounts."[61] It explained that "[t]his interpretation of 'actual loss' and 'victim' comports with both the Guidelines and the conclusions of coordinate appellate courts, not to mention the common sense proposition 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 is a reasonably foreseeable and direct consequence of the defendant's theft or fraud."[62] Accordingly, even though the time itself could not qualify as an "actual loss," the "account holders suffered monetizable harm in their efforts to regain the funds taken from their accounts, efforts that necessarily included reporting the fraud to their respective banks and disputing the unauthorized activity in the first instance."[63] The court specifically concluded that *Yagar*'s reasoning did not require "appreciable or substantial" expenditures of time or money to qualify as an "actual loss."[64]

Other jurisdictions, however, have rejected *Yagar*'s approach altogether. In *United States v. Lee*,[65] the Eleventh Circuit disagreed with the Sixth Circuit's reasoning and distinguished *Yagar* on its facts. The *Lee* court suggested that the Sixth Circuit had failed to read the "actual loss" provision in §2B1.1, Application Note 3(A)(I), together with Application Note 3(E), which discusses credits against loss.[66] According to the Eleventh Circuit, Application Note 3(E) inherently acknowledges that, in such situations, "there was in fact an initial loss, even though it was subsequently remedied by recovery of collateral or return of goods."[67] Thus, the court held that individuals who "suffered considerably more than a small out-of-pocket loss and were not immediately reimbursed by any third party" were victims under the guidelines.[68] The First, Second, Seventh, and Ninth Circuits joined the Eleventh in this interpretation of §2B1.1(b)(2).[69] Even among these courts, however,

[61] United States v. Smith, 751 F.3d 107, 118 (3d Cir. 2014).

[62] *Id.*

[63] *Id.* at 120.

[64] *Id.* at 121.

[65] 427 F.3d 881 (11th Cir. 2005).

[66] *Id.* at 895.

[67] *Id.*

[68] *Id.*; *see also* United States v. Andrulonis, 476 F. App'x 379, 383 (11th Cir. 2012).

[69] *See* United States v. Stepanian, 570 F.3d 51, 55-56 (1st Cir. 2009) (holding that "the most natural reading of the phrase 'sustain any part of' in the application notes' definition of 'victim' does not have a temporal limit or otherwise indicate that losses must be permanent"; finding defrauded card holders to be victims even though their losses were reimbursed); United States v. Abiodun, 536 F.3d 162 (2d Cir. 2008) (stating that both *Yagar* and *Lee* held "that individuals who are ultimately reimbursed by their banks or credit card companies can be considered 'victims' of a theft or fraud offense for purposes of U.S.S.G. § 2B1.1(b)(2) if—as a practical matter—they suffered (1) an adverse effect (2) as a result of the defendant's conduct that (3) can be measured in monetary terms"; finding that government failed to establish that credit card holders in question were "victims"); United States v. Panice, 598 F.3d 426, 433 (7th Cir. 2010) (declining to follow and distinguishing *Yagar* because the definition of victim in § 2B1.1 "contains no temporal restriction; nor does it

there appears to be some tension as to whether an "immediate" reimbursement by a third party would prevent a party from being considered a "victim," as a recent Seventh Circuit decision acknowledges.[70]

V. COURT'S LOSS CALCULATION AND VICTIMS

In cases involving the general definition of victim, not only must an individual sustain actual loss (*i.e.*, reasonably foreseeable pecuniary harm) in order to be considered a victim, but that loss must also have been included in the court's loss calculation under the guidelines.[71] For example, in a mail fraud case in which checks made out to a charitable organization were stolen (but not cashed), the Tenth Circuit held that, although "the cost of sending in replacement checks was a reasonably foreseeable pecuniary harm of Defendant's conduct," the individual donors who wrote the checks were nonetheless not victims because "this harm was not included as part of the actual loss 'determined [by the court] under subsection (b)(1).'"[72] Similarly, the Ninth Circuit has held that "financial costs to bank account holders that are incurred in the course of resolving damage done to those accounts by a fraud scheme may be included in the calculation of actual loss under § 2B1.1(b)(1) and may qualify the individuals who incurred those costs as 'victims' of the offense under § 2B1.1(b)(2)."[73]

However, where such losses are not included in part of the actual loss amount determined under §2B1.1(b)(1), the individual account holders cannot be considered

state that the loss must be permanent," and "the fact that the victims were eventually reimbursed does not negate their victim status"); United States v. Pham, 545 F.3d 712, 718 (9th Cir. 2008) (holding that "where a bank fraud offense results in initial losses by bank account holders of the funds in their accounts and a more permanent loss of those same funds by banks or other financial institutions when those institutions reimburse the account holders, both the account holders and the banks have suffered harms that are 'pecuniary' and 'reasonably foreseeable' for purposes of the Guidelines' definition of 'actual loss'").

[70] *Compare* United States v. Loffredi, 718 F.3d 991, 993 (7th Cir. 2013) (holding that Application Note 1's reference to losses that are "sustained" does not imply that a party must suffer the loss for "some definite duration" to become a victim), *with* United States v. Armstead, 552 F.3d 769, 782 (9th Cir. 2008) ("[A] loss that is reimbursed immediately does not amount to a pecuniary harm because the loss cannot be measured in monetary terms.").

[71] *See, e.g.*, United States v. Brown, 771 F.3d 1149, 1162 (9th Cir. 2014) (reversing application of enhancement for more than 250 victims when 148 alleged victims were "not included in the loss calculation").

[72] *Leach*, 417 F.3d at 1106-07; *see also* United States v. Skys, 637 F.3d 146, 155 (2d Cir. 2011) (emphasizing district court's lack of findings; stating that trial court could estimate losses but could not similarly estimate victims); *Abiodun*, 536 F.3d at 169 (finding error when trial court considered lost time in counting victims but did not include monetary cost of such time in loss calculation); United States v. Armstead, 552 F.3d 769, 783 (9th Cir. 2008) (finding error when trial court counted fifty victims for purpose of enhancement but only considered losses of sixteen of those individuals in loss determination).

[73] *Pham*, 545 F.3d at 721.

victims.[74] It follows that if the total loss calculation is zero, there are no victims for purposes of applying the enhancement at §2B1.1(b)(2).[75]

In considering this issue, however, courts have held that the guidelines do not require that victims come forward to claim restitution to be counted under §2B1.1(b)(2) as the guideline enhancements serve different purposes than does the restitution statute.[76]

VI. CORPORATE LOSSES, AGGREGATED FUNDS, AND JOINT ACCOUNT HOLDERS

Once actual loss has been established, the number of victims may still be at issue in the case of corporate or organizational losses or jointly held funds. For example, in *United States v. Icaza*,[77] the Eighth Circuit rejected the government's argument that, when a defendant steals from multiple retail stores in the same chain, each store is a victim for purposes of §2B1.1(b)(2).[78] A company representative testified that, even though the thefts took place at individual Walgreens store locations, the corporation sustained the actual loss because the Walgreens' corporate structure did not give individual stores ownership of a pro rata share of corporate assets.[79] Thus, the court concluded, the corporation was the only victim under §2B1.1(b)(2).[80] In so holding, the court addressed an unpublished Eleventh Circuit opinion holding that individual members of an employee benefit plan could each be counted as victims.[81] That case was distinguishable, the Eight Circuit determined, because each member of the benefit plan "owned a *pro rata* share of the plan assets and held them jointly and severally."[82]

In terms of jointly held accounts, courts have held that when a husband and wife are co-owners of a bank account, they each may be counted separately as victims "because

[74] *Id*. at 722.

[75] *See, e.g.,* United States v. Miller, 588 F.3d 560, 567-68 (8th Cir. 2009) ("We have already determined that the district court did not clearly err in determining that the government failed to prove any actual loss in this case. It necessarily follows that there were no "victims" within the meaning of §2B1.1(b)(2)(A)(I).").

[76] *See* United States v. Bernadel, 490 F. App'x. 22, 29 (9th Cir. 2012); *see also* United States v. Rodriguez, 751 F.3d 1244, 1258 (11th Cir. 2014) (rejecting argument that number of victims for purposes of enhancement should have been limited to lenders that were to receive restitution); United States v. Binkholder, 832 F3d 923 (8th Cir. 2016) (holding that "the CVRA is intended to protect the rights of crime victims and ensure that they receive proper restitution for their injuries, the Guidelines are meant to assess the culpability of the defendant.").

[77] 492 F.3d 967 (8th Cir. 2007).

[78] *Id*. at 969; *see also* United States v. Stubblefield, 682 F.3d 502, 511-13 (6th Cir. 2012) (finding that theft from multiple Walmart stores was ultimately passed to the corporation).

[79] *Icaza*, 492 F.2d at 970.

[80] *Id.*

[81] *Id.* (citing United States v. Longo, 184 F. App'x 910 (11th Cir. 2006)).

[82] *Id.* (quoting *Longo*, 184 F. App'x at 912).

both sustain a 'part of the actual loss.'"[83] Likewise, where money belonging to multiple individuals has been aggregated but each individual maintains his or her interest, each individual may be counted as a victim. Thus, in a case where thousands of parents and students each paid money for tickets to a sham Christmas pageant, it did not matter that the schools had aggregated the money; each child or parent who had paid was a victim.[84] Finally, in at least one case, a court has held that a bank may be counted as a victim more than once if it is harmed both in its own capacity and in its role as a trustee for another.[85]

VII. LATE-COMING CONSPIRATORS AND VICTIMS

In general, an offender is only responsible for harm to individuals who become victims after the conspirator joined the conspiracy. In the case of a Ponzi scheme, however, an individual who invested in the scheme before a conspirator joined the scheme, and then reinvested after, may be counted as a victim in determining the late-coming conspirator's sentence.[86]

[83] United States v. Densmore, 210 F. App'x 965, 971 (11th Cir. 2006) (quoting §2B1.1, comment. (n.1)).

[84] United States v. Ellisor, 522 F.3d 1255, 1275 (11th Cir. 2008); *see also* United States v. Iovino, 777 F.3d 578, 581 (2d Cir. 2015) (counting each member of a defrauded condominium association as a "victim" because each member had to pay higher common charges to make up association losses).

[85] United States v. Beacham, 774 F.3d 267, 276-77 (5th Cir. 2014).

[86] *See* United States v. Setser, 568 F.3d 482, 497 (5th Cir. 2009).

PRIMER

LOSS CALCULATIONS UNDER §2B1.1(b)(1)

April 2017

Prepared by the Office of General Counsel, U.S. Sentencing Commission

TABLE OF CONTENTS

I. INTRODUCTION

This primer discusses issues often raised about economic loss and loss calculation under §2B1.1.[1] Effective November 1, 2001, the Commission consolidated the theft and fraud guidelines into §2B1.1. As a part of this amendment, which is known as the Economic Crime Package, the Commission also modified the definition of loss such that it would be based on reasonably foreseeable pecuniary harm and would include intended loss. This primer focuses on some applicable cases and concepts relating to this definition of loss but is not intended as a comprehensive compilation of all case law addressing these issues.

II. THE DEFINITION OF "LOSS" UNDER §2B1.1

The sentencing guidelines define "loss" as "the greater of actual loss or intended loss,"[2] and provide that the sentencing judge "need only make a reasonable estimate of the loss."[3] When calculating the intended loss, absolute accuracy is not required as long as the calculation is not "outside the realm of permissible computations."[4] The estimate should be based on available information, and the court may consider a variety of different factors.[5] In making the loss calculation, the court may also choose from competing methods of calculating loss. Restitution and loss are separate issues, and there need not be "symmetry" between the two.[6]

Loss includes all relevant conduct, including charged, uncharged, and acquitted conduct and is not limited to losses directly attributable to the defendant.[7] For example, in *United States v. Hoffman-Vaile*, the defendant was convicted of defrauding Medicare and, at sentencing, the district court included the losses not only to the Medicare program but to private insurers and patients.[8] The appellate court affirmed, holding that the private

---

1 *See* United States Sentencing Commission, *Guidelines Manual*, §2B1.1 (Nov. 2012) [hereinafter USSG].

2 USSG §2B1.1, comment. (n.3(A)).

3 USSG §2B1.1, comment. (n.3(C)).

4 United States v. Sullivan, 765 F.3d 712, 716 (7th Cir. 2014) (quoting United States v. Jackson, 25 F.3d 327, 330 (6th Cir. 1994)).

5 *Id.*

6 United States v. Kuhrt, 788 F.3d 403, 423 (5th Cir. 2015) (rejecting defendants argument that the government's inability to calculate restitution demonstrates that total loss also can't be determined because they are "wholly distinct questions"); United States v. Patterson, 595 F.3d 1324, 1327–28 (11th Cir. 2010); *see also* United States v. Certified Envmt'l Serv., 753 F.3d 72, 103 (2d Cir. 2014) (reversing, *inter alia*, because district court conflated loss and restitution; emphasizing distinctions between these concepts); United States v. Riddell, 328 F. App'x 328, 329 (6th Cir. 2009) (per curiam) (holding that a district court may look to intended loss in calculating total loss for the purposes of §2B1.1, but must base its order of restitution on actual losses).

7 United States v. Cavallo, 790 F.3d 1202, 1232–35 (11th Cir. 2015) (district court did not err in mortgage fraud conspiracy case by including in its loss calculation properties for which defendant was not charged and properties named in counts on which the defendant was acquitted).

8 568 F.3d 1335, 1343–44 (11th Cir. 2009).

insurers and patients were victims of the same fraud scheme and, although not charged, those acts constituted relevant conduct for the purposes of loss calculation.[9] Losses caused by the acts of co-conspirators that were reasonably foreseeable to the defendant should also be included in the loss calculation.[10] The sentencing court should, however, limit the defendant's liability to those acts of co-conspirators that were reasonably foreseeable and part of the criminal activity that the defendant "agreed to jointly undertake."[11] A sentencing court may be reversed if there are insufficient findings on this point.[12]

A. Actual Loss

Actual loss, which is often referred to as "but for" loss, is defined in the guideline application notes as "the reasonably foreseeable pecuniary harm that resulted from the

[9] *Id.*

[10] USSG §1B1.3(a)(1)(B) (defining relevant conduct for jointly undertaken activity). Numerous cases have addressed this issue. *See, e.g.*, United States v. Abdulla, 632 F. App'x 98, 101 (4th Cir. 2015) (proper for district court to hold both defendants responsible for full loss rather than split the loss between them); United States v. Moran, 778 F.3d 942, 973–75 (11th Cir. 2015); United States v. Robinson, 603 F.3d 230, 234 (3d Cir. 2010); United States v. Treadwell, 593 F.3d 990, 1002–05 (9th Cir. 2010); United States v. Jenkins-Watts, 574 F.3d 950, 961 (8th Cir. 2009); United States v. Nash, 338 F. App'x 96, 98–99 (2d Cir. 2009); United States v. Mauskar, 557 F.3d 219, 233 (5th Cir. 2009); United States v. Wilkins, 308 F. App'x 920, 929 (6th Cir. 2009); United States v. Codarcea, 505 F.3d 68, 72 (1st Cir. 2007); United States v. Catalfo, 64 F.3d 1070, 1082–83 (7th Cir. 1995); *see also* United States v. Offill, 666 F.3d 168, 180 (4th Cir. 2011) (applying same principle to financial gain imputed to defendant in conspiracy).

[11] *See, e.g.*, Johnston, 620 F. App'x 839, 854–56 (11th Cir. 2015) (district court did not err in attributing to defendants the actions of conspiracy participants operating in separate, out-of-state office where defendants had an important role in furthering income tax fraud scheme, recruited participants, and shared information between branches); United States v. Lloyd, 807 F.3d 1128, 1145 (9th Cir. 2015) (in securities fraud case, reversing judgment attributing loss from California telemarketing boiler room to defendant managing Florida boiler room because defendant did not design overall scheme, did not pool resources, and was compensated from commissions from only his operation); (United States v. Rodriguez, 751 F.3d 1244, 1256–57 (11th Cir. 2014) (holding that defendant in mortgage scheme was properly attributed with losses associated with fraudulent use of her post office box because she "participated in the conspiracy and did not withdraw from it" and moreover because "rerouting the mail was essential to the success of the fraudulent scheme"); United States v. Arojojoye, 753 F.3d 729, 737–39 (7th Cir. 2014) (holding that defendant was properly attributed with losses caused by co-defendants when he created fraudulent documents and false address used in scheme; emphasizing that the district court properly considered supporting evidence "in context and cumulation"); *see also* United States v. Sykes, 774 F.3d 1145, 1150–52 (7th Cir. 2014) (analyzing concept of foreseeability in detail).

[12] *See, e.g.*, United States v. Goodheart, 345 F. App'x 523, 525 (11th Cir. 2009) (finding that the sentencing judge "made no required individualized findings" about when the defendant actually joined the conspiracy for the purposes of establishing loss) (per curiam); United States v. McClatchey, 316 F.3d 1122, 1128 (10th Cir. 2003) (emphasizing distinction between involvement in conspiracy and scope of jointly undertaken activity); *Treadwell*, 593 F.3d at 1002 ("[A] district court may not automatically hold an individual defendant responsible for losses attributable to the entire conspiracy, but rather must identify the loss that fell within the scope of the defendant's agreement with his co-conspirators and was reasonably foreseeable to the defendant."). Findings may not, however, be required when a defendant's involvement in the conspiracy from the outset is apparent from the record. *See, e.g.*, United States v. Ortiz, 560 F. App'x 894, 897 (11th Cir. 2014) (distinguishing *Goodheart* on this basis).

offense."[13] A loss enhancement may apply even where a defendant personally received no pecuniary gain.[14] As further explained by the application notes, pecuniary harm is reasonably foreseeable if it is "harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense."[15] All reasonably foreseeable losses that flow directly, or indirectly, from a defendant's conduct should be included in the loss calculation. For example, in *United States v. Needle*, a defendant committed fraud in obtaining a Virgin Islands license to write property and casualty insurance. The actual loss for which he was held accountable at sentencing included millions in losses of his insureds who suffered catastrophic damages caused by a hurricane and were unable to recover from the defendant's insurance company.[16]

In considering the actual loss in a particular case, one of the most commonly litigated issues is whether the harm was, in fact, "reasonably foreseeable." In determining whether loss is reasonably foreseeable, courts have found that the actual loss must have a causal link to the defendant's conduct.[17] For example, in *United States v. Whiting*, the defendant was convicted of converting funds from employees' paychecks that were intended for medical benefits and making false statements related to those employees' health benefits.[18] The "actual loss" was calculated using the total amount of unpaid medical claims made by the employees.[19] However, the Seventh Circuit reversed because the trial court stated on the record that there was no "causal link" between the defendant's misstatements about benefits and the losses caused by the medical claims in the case.[20] Similarly, in *United States v. Rothwell*, the Sixth Circuit found that there was no reasonable link between the fraud committed by the defendant during the construction of a building and the subsequent default on the construction loan.[21] Accordingly, the loan losses could not properly be attributed to the defendant at sentencing.[22]

---

13 USSG §2B1.1, comment. (n.3(A)(i)).

14 *See, e.g.*, United States v. Ledee, 772 F.3d 21, 38 (1st Cir. 2015).

15 USSG §2B1.1, comment. (n.3(A)(iv)); *see also, e.g.*, United States v. Domnenko, 763 F.3d 768, 775–76 (7th Cir. 2014) (rejecting enhancement for loss that lender sustained on sale of home because district court had not made a finding that it was a "reasonably foreseeable" consequence of defendants' own fraud, as they were not aware that the purchaser was "fictional" and remanding for further explanation).

16 72 F.3d 1104, 1108 (3d Cir. 1995), *amended by* 79 F.3d 14 (3d Cir. 1996).

17 *See, e.g.*, United States v. Whiting, 471 F.3d 792, 802 (7th Cir. 2006); United States v. Rothwell, 387 F.3d 579, 584 (6th Cir. 2004).

18 471 F.3d at 793.

19 *Id.* at 802.

20 *Id.*

21 *Rothwell*, 387 F.3d at 584.

22 *Id.*; *see also* United States v. Isaacson, 752 F.3d 1291, 1305–06 (11th Cir. 2014) (remanding because government failed to establish that fraudulent valuations caused losing investment; to the contrary, "Morgan Stanley was going to make this investment, and had made its own internal decision that despite significant risk factors, it was going to invest, because it thought it was a good deal, and it was willing to overlook certain red flags, like the audited financial statements . . . being late"); United States v. Stein, 846 F.3d 1135, 1154 (11th Cir. 2017) (remanding because government failed to prove that investors relied upon fraudulent

In recent years, this issue has received particular attention in the context of mortgage fraud. For example, the Eighth Circuit has rejected arguments that defendants could not have "reasonably foreseen" the downturn in the housing market.[23] In one frequently cited case, the defendant obtained numerous mortgage loans through applications overstating the named purchaser's net worth and income, leading to default and subsequent foreclosure.[24] The district court calculated the actual loss as the difference between the unpaid principal balance of the twelve mortgages and the subsequent sales price of the properties.[25] Although the defendant argued that the government failed to prove that the loss amount was fully attributable to him, as opposed to normal market conditions,[26] the Eighth Circuit held that the appropriate test is not whether market factors affected the loss amount but whether "the market factors and the resulting loss were reasonably foreseeable."[27] The majority of Circuits have also rejected arguments that a defendant's loss amount should be reduced because the downturn in the housing market was unforeseeable, but have instead held that the foreseeability analysis applies only to the calculation of loss and not to the future value of collateral.[28]

The Eighth Circuit similarly refused to reduce actual losses by "legitimate market factors and business expenses" in a case involving investment losses. In *United States v. Walker*, the court explained that the net-loss analysis required by §2B1.1. inquires whether

information)*;* Harrington v. United States, 489 F. App'x 50, 57 (6th Cir. 2012) ("*Rothwell* stands for the uncontested proposition that a sentencing court applying § 2B1.1 must make a reasonable estimate of loss using proximate cause as its measure."). *But cf.* United States v. Curran, 525 F.3d 74, 81 (1st Cir. 2008) (finding that the government need not prove "client by client" the loss amount attributable to a specific misrepresentation, when it was established that all the defendant's actions were part of a fraudulent scheme in which he pretended to be a medical doctor).

[23] United States v. Mshihiri, 816 F.3d 997, 1011 (8th Cir. 2016) ("[W]e have recognized that it was reasonably foreseeable that a scheme premised on false loan applications and inflated real estate prices would unravel, and that market conditions could exacerbate the losses." (quoting United States v. Engelmann, 720 F.3d 1005, 1013 (8th Cir. 2013) (quotation marks and alteration omitted))).

[24] United States v. McKanry, 628 F.3d 1010, 1014–15 (8th Cir. 2011).

[25] *Id.* at 1019.

[26] *Id.*

[27] *Id*.

[28] *See, e.g. Cavallo*, 790 F.3d at 1235–36 (11th Cir. 2015) ("The sentencing guidelines, therefore, require foreseeability of the loss of the unpaid principal, but do not require foreseeability with respect to the future value of the collateral." (quoting United States v. Wendlandt, 714 F.3d 388, 394 (6th Cir. 2013) (quotation marks omitted))); United States v. Rosenbaum, 628 F. App'x 923, 934–35 (6th Cir. 2015) ("When a defendant commits mortgage fraud, the amount of foreseeable loss is the loan amount less the recovery by the victim."); United States v. Morris, 744 F.3d 1373, 1375 & n.1 (9th Cir. 2014); United States v. Crowe, 735 F.3d 1229 (10th Cir. 2013) (adopting the *McKanry* and *Turk* rule); United States v. Mallory, 461 F. App'x 352, 361 (4th Cir. 2012) (per curiam); United States v. Turk, 626 F.3d 743, 749–51 (2d Cir. 2010); *accord* United States v. Foley, 783 F.3d 7 n.14 (1st Cir. 2015) (noting in passing that other circuits do not apply a foreseeability analysis to the calculation of credits against loss). *But cf.* United States v. Evans, 744 F.3d 1192, 1197 (10th Cir. 2014) (distinguishing the scenario in which victims were sold real estate securities "whose value necessarily fluctuated" as opposed to being "simply promised loan payments"). *See infra* Section VI.B (discussing collateral in context of mortgage and loan losses).

the defendant transferred something of value to the victim, not whether the victim's total losses were affected by market forces.[29] The Eighth Circuit held that the district court did not commit clear error in estimating the losses resulting from defendant's fraud offenses by calculating the total amounts lost by all investors who submitted Victim Impact Statements.[30]

B. INTENDED LOSS

1. Generally

Intended loss is defined in the guidelines as "pecuniary harm that the defendant purposely sought to inflict."[31] The Commission recently amended this definition to clarify that the defendant's subjective intent is relevant to the intended loss inquiry.[32] Prior to the amendment, courts had differed as to whether the intended loss amount is based on the defendant's subjective intent or on an objective standard.[33]

The guideline includes pecuniary harm that would have been impossible or unlikely to occur."[34] For example, intended loss would include pecuniary harm that a defendant intended, but could not have actually caused, in a case involving a government sting operation or in a case where the offense involved insurance fraud in which the claim

[29] 818 F.3d 416, 422–23 (8th Cir. 2016).

[30] *Id.* at 23.

[31] USSG §2B1.1, comment. (n.3(A)(ii)).

[32] USSG App. C, amend. 792 (effect. Aug. 1, 2015).

[33] *Compare* United States v. Iwuala, 789 F.3d 1, 14 (1st Cir. 2015) ("The test for intent is based primarily on the defendant's objectively reasonable expectations at the time of the fraud. Even so, the defendant's subjective intent plays a role in the analysis.") (internal citations omitted), United States v. Killen, 761 F.3d 945, 949–50 (8th Cir. 2014) (applying subjective standard but agreeing that district court properly concluded that defendant intended to obtain fraudulent SSI benefits until she reached 65 and thus was properly attributed with full amount of intended loss), United States v. Diallo, 710 F.3d 147, 151 (3d Cir. 2013) ("To make this determination, we look to the defendant's subjective expectation, not to the risk of loss to which he may have exposed his victims."), United States v. Mantau, 647 F.3d 1048, 1050 (10th Cir. 2011) (intended loss requires subjective analysis and must be the object of the defendant's purpose), United States v. John, 597 F.3d 263, 279–80 (5th Cir. 2010) ("In ascertaining the intended loss, the district court must determine the defendant's actual intent."), United States v. Confredo, 528 F.3d 143, 152 (2d Cir. 2008) (remanding for consideration of whether defendant had "proven a subjective intent to cause a loss of less than the aggregate amount" of fraudulent loans), *and* United States v. Kopp, 951 F.2d 521 (3d Cir. 1991) (holding that intended loss is the loss the defendant subjectively intended to inflict on the victim) *with* United States v. Innarelli, 524 F.3d 286, 291 (1st Cir. 2008) ("[W]e focus our loss inquiry for purposes of determining a defendant's offense level on the objectively reasonable expectation of a person in his position at the time he perpetrated the fraud, not on his subjective intentions or hopes."); United States v. Lane, 323 F.3d 568, 590 (7th Cir. 2003) ("The determination of intended loss under the Sentencing Guidelines therefore focuses on the conduct of the defendant and the objective financial risk to victims caused by that conduct."), *and* United States v. Durham, 766 F.3d 672, 688 (7th Cir. 2015) (rejecting defendant's argument that district court improperly failed to consider subjective intent; noting that the appropriate question is the "amount placed at risk by the scheme").

[34] USSG §2B1.1, comment. (n.3(A)(ii)).

exceeded the insured value.[35] In determining loss for purposes of the guidelines, there is no requirement that the court calculate actual loss before relying on intended loss; indeed, in some cases, it may be easier "as a matter of proof" to show intended loss.[36] However, actual losses, or losses actually completed before discovery, are to be included in any calculation of intended loss.[37] That is, the categories are not mutually exclusive and may be combined to calculate an overall intended loss.[38]

"When calculating intended loss, the appropriate inquiry is what the loss would have been if the defendant had not been caught."[39] For example, in *United States v. Lemons*,[40] a case related to government disability benefits, the Eighth Circuit held that the district court's calculation of loss based on finding that defendant intended to collect disability benefits through the age of 62, the age she would qualify for retirement, was not clearly erroneous. The Eighth Circuit first noted that loss is the greater of actual or intended loss and that "a district court may reasonably conclude that the defendant intended continued receipt of illegal benefits until retirement without additional *mens rea* evidence."[41]

2. Specific Factual Settings

Determining intended loss is often a fact-specific inquiry, and courts have adapted their analysis depending on the particular case.[42] A court's determination of whether it is appropriate to calculate intended loss at the full face value of the property at issue or some lesser amount often turns on whether the defendant intended to jeopardize or in fact

[35] *Id.*; *see also* United States v. Alphas, 785F.3d 775, 780–84 (1st Cir. 2015) (discussing intended loss in context of inflated insurance claims).

[36] United States v. Thurston, 358 F.3d 51, 68 (1st Cir. 2004), *vacated on other grounds,* 543 U.S. 1097 (2005).

[37] *See* United States v. Ware, 334 F. App'x 49 (8th Cir. 2009).

[38] *Id.* at 50.

[39] United States v. Frisch, 704 F.3d 541, 544 (8th Cir. 2013).

[40] 792 F.3d 941 (8th Cir. 2015) (rejecting defendant's argument that court should use actual loss incurred).

[41] *Id.* at 950 (finding, however, that there was additional evidence to support the court's finding that the defendant intended to continue receiving benefits through retirement, including statements in reports filed with the Social Security Administration and three appeals of cessation of benefits); *see also* United States v. Rettenberger, 344 F.3d 702, 708 (7th Cir. 2003). *But see* United States v. Peel, 595 F.3d 763, 772 (7th Cir. 2010) (noting that if a defendant "present[ed] credible evidence for discounting a stream of future payments to [a lower future] value, the district court must consider [that evidence]").

[42] *See* United States v. Middlebrook, 553 F.3d 572, 579 (7th Cir. 2009) (holding that where an owner signs a promissory note to his corporation, a district court may reasonably find that failure to list that note in the corporate bankruptcy's asset disclosure statement represents intended loss in the amount of the note if the owner had the assets to pay back the value of the note); United States v. Neal, 294 F. App'x 96, 103 (5th Cir. 2008) (holding that although the actual loss was calculated at $150,000, inclusion of the intended loss of $11 million was "proper" under § 2B1.1, particularly in view of the nature of the scheme which sought to leave thousands of workers without worker's compensation coverage).

recklessly jeopardized the full amount.[43] Thus, for example, in *United States v. Moran*, the Eleventh Circuit agreed that intended loss amounts varied in health care fraud cases depending on whether specific defendants were aware of reimbursement details: for those defendants with such awareness, the intended loss was the lower reimbursable amount; for the defendant *without* such knowledge, the intended loss was a higher, billed rate.[44] While the analysis is fact-specific, certain schemes and claims are particularly common, and some of these situations are discussed below.

The potential scope of the intended loss definition is demonstrated in cases relating to theft of credit cards. In a case in which a defendant sold stolen credit cards to others, the sentencing judge fixed the intended loss at the total credit limits of all of the credit cards.[45] In upholding the sentencing court's decision, the First Circuit concluded that the defendant could reasonably expect such a loss as "the natural and probable consequences of his or her actions."[46] In another case, the defendant fraudulently opened credit accounts at local businesses in the names of victims and the court calculated intended loss by totaling up the credit limits of all open accounts even though the defendant had not used all of the available credit.[47] In fact, circuits have also concluded that simply obtaining information regarding a credit account creates an intended loss presumption that must be rebutted by the defendant.[48] Conversely, at least one circuit has held that where the defendant did not know the credit limit, the burden remains with the government to demonstrate what portion of the credit limit the defendant intended to use.[49]

Similarly, in cases involving fraudulent or forged checks, the face value of the instruments are often used to calculate the intended loss figure.[50] In such cases, courts

---

[43] *See, e.g.*, United States v. Harris, 597 F.3d 242, 256–59 (5th Cir. 2010) (defendant recklessly jeopardized by selling to third parties).

[44] 778 F.3d at 974–75.

[45] United States v. Alli, 444 F.3d 34, 38–39 (1st Cir. 2006); *see also Harris*, 597 F.3d at 252–53 (looking to whether the defendant "recklessly jeopardized" the full credit card limits by selling the card numbers to a third party).

[46] *Alli*, 444 F.3d at 38–39.

[47] United States v. Wilfong, 475 F.3d 1214 (10th Cir. 2007).

[48] *John*, 597 F.3d at 281; *see also* United States v. Edmondson, 349 F. App'x 511, 517 (11th Cir. 2009) (placing the burden on the defendant to show her intent was not to use the entire credit limit); United States v. Thomas, 841 F.3d 760, 764 (8th Cir. 2016) ("the $500 minimum in USSG § 2B1.1 cmt. n.3(F)(i) may be applied to fraudulent cards which have been merely possessed rather than used.").

[49] *Diallo*, 710 F.3d at 153–54; *see also Manatau*, 647 F.3d at 1048 (construing loss and intended loss in this context).

[50] *See, e.g.*, United States v. Grant, 431 F.3d 760 (11th Cir. 2005) ("The other circuits to address this issue have held a district court does not clearly err when it uses the full face value of check to calculate intended loss."); *cf.* United States v. Chappell, 6 F.3d 1095, 1101 (5th Cir. 1993) (district court did not err in calculating loss by assigning each seized counterfeit blank check the average value of checks actually forged and cashed). *But see* United States v. Vysniauskas, 593 F. App'x 518, 524–25 (6th Cir. 2015) (comparing non-circular and circular check-kiting schemes and explaining that where defendant used overdraft and insufficient funds

have held that the sentencing judge may treat the face amount of the checks as *prima facie* evidence of the defendant's intent but must still allow the defendant to offer evidence to rebut that figure.[51] If the defendant does not provide "persuasive evidence" to rebut intent, the courts are "free to accept the loss figure" taken from the face value of the instruments.[52] Further, some courts have held that the "intended loss" in a fraudulent check scheme can include the value of counterfeit checks turned over by the defendant at the time of his or her voluntary surrender even if those checks were never used.[53] Similarly, in a case where the defendant unsuccessfully attempted to obtain cash advances from stolen credit cards, the court held that the total amount the defendant attempted to withdraw was the appropriate intended loss figure, even where it exceeded the cash advance limits.[54]

The question of intended loss has also been addressed in the context of various government programs and benefits. For example, in *United States v. Willis*, the defendant submitted at least 20 fraudulent applications for FEMA relief.[55] For some such applications, she had only received a portion of funds available which were automatically disbursed by FEMA, but, for other applications, she had taken more steps to obtain additional funds.[56] The Eleventh Circuit held that the sentencing judge did not clearly err by considering the full value of all the applications filed even though the defendant had not attempted to obtain all available funds from each application.[57] Similarly, in *United States v. Kosth*, the intended loss was the full amount of loan commitments the defendant secured from the

checks to maintain trading activity, loss was properly calculated as the value of the overdraft fees rather than face value of all checks).

51 United States v. Dullum, 560 F.3d 133, 138 (3d Cir. 2009); United States v. Santos, 527 F.3d 1003, 1008 (9th Cir. 2008) (agreeing with the Third and the Eleventh Circuits that the face value of the stolen checks is "probative" of the defendants' intended loss but holding that court must also consider any evidence tending to show that defendant did not intend to produce counterfeit checks up to the full face value of the stolen checks).

52 United States v. Khorozian, 333 F.3d 498, 509 (3d Cir. 2003) (quoting United States v. Geevers, 226 F.3d 186, 194 (3d Cir. 2000)); *see also* United States v. Adejumo, 772 F.3d 513, 527 (8th Cir. 2014) (basing intended loss on face value of stolen checks, even though many were photocopies that could not be negotiated, when defendant "presented no contrary evidence that he did not intend to use the full face value of the checks").

53 United States v. Kushner, 305 F.3d 194, 198 (3d Cir. 2002).

54 United States v. Ravelo, 370 F.3d 266, 273 (2d Cir. 2004); *see also* United States v. Powell, 320 F. App'x 842, 844–45 (10th Cir. 2009) (holding that a defendant engaging in an "empty envelope" scheme was liable for the total value of the fraudulent deposit to the victim bank even though she only withdrew a portion of the amount before she destroyed the account's ATM card and the bank discovered the fraud).

55 560 F.3d 1246, 1250 (11th Cir. 2009).

56 *Id.*

57 *Id.* at 1250–51 (reasoning that because the defendant exhibited a pattern of applying for funds beyond FEMA's automatic disbursement on some applications, it was reasonable to infer intent to pursue additional funds on the remaining applications).

Small Business Administration because, although the defendant did not receive the full amount, that sum was diverted from the intended recipients.[58]

However, in the context of insurance, the Fifth Circuit concluded that the trial court erred in calculating intended loss based on the face value of fraudulently obtained life insurance policies.[59] The court compared life insurance policies to loans, explaining that in the context of insurance, the amount put at risk by the defendant is not the full amount of the life insurance policy because, if the insurance policy lapses, the insurer can retain the premiums and withhold benefits. In contrast, the risk to a lender with respect to a loan is non-payment of the full amount.[60]

In the case of real property, unless the defendant was "so 'consciously indifferent or reckless' about the repayment of the loans as to impute to him the intention that the lenders should not recoup their loans," intended loss will not likely be the appropriate measure of loss since the real property serves as collateral and will be recoverable should the owner default.[61] However, at least one Circuit has suggested that a defendant's disguising the identity of the actual owners (through straw purchase) along with false statements regarding encumbrances makes foreclosure by the victim banks more difficult and adds to the intended loss figure.[62]

3. No "Economic Reality Principle" Under the Guidelines

Before the November 2001 amendments to the sentencing guidelines, some courts did not calculate intended loss in cases involving schemes that were obviously doomed to fail and that caused little or no economic loss.[63] The current definition of intended loss, however, instructs courts to include harm that would have been "impossible or unlikely to occur."[64]

---

58 United States v. Kosth, 257 F.3d 712, 722 (7th Cir. 2001); *see also* United States v. Conroy, 567 F.3d 174, 179–80 (5th Cir. 2009) (holding that where the defendant only asked for $70,000 in a fraudulent grant application, but was approved for $100,000, the appropriate intended loss was the higher value). *See infra* Section IV.C.2.

59 United States v. Bazemore, 608 F. App'x 207, 213–16 (5th Cir. 2015) (remanding to determine loss because there was no dispute that defendant accurately represented age and health status of applicants and government had burden of establishing that misrepresentations regarding applicants' financial status and financing arrangement "posed a risk of financial harm to the insurers that would not have existed if the information in applications was true").

60 *Id.* at 214.

61 United States v. Goss, 549 F.3d 1013, 1018 (5th Cir. 2008) (quoting United States v. Morrow, 177 F.3d 272, 301 (5th Cir. 1999)); *see infra* Section VI.B.

62 United States v. Stathakis, 320 F. App'x 74, 77–78 (2d Cir. 2009).

63 *See, e.g.*, United States v. Fleming, 128 F.3d 285, 288 (6th Cir. 1997).

64 USSG §2B1.1, comment. (n.3(A)(ii)).

It is, of course, still possible that the sentencing judge might consider these same factors as a basis for a downward departure, or, as noted below, an "impossible" loss amount might bear on the reasonableness of the sentence. For example, in *United States v. McBride*, the court ruled that impossible losses are to be included in the loss figure, but remanded the case for the sentencing judge to consider a departure based on "economic reality."[65]

C. Loss Calculations Post-*Booker*

At least one circuit has explored the application of the 18 U.S.C. § 3553(a) factors to the calculation of loss in conjunction with the application of upward variances based on loss.[66] In *United States v. Hilgers*, the presentence report first suggested an "intended loss" based on the down payments and fees that lenders would have required but for the defendant's fraud.[67] The sentencing judge agreed with the defendant's argument that the PSR's calculation was "too speculative," and found a guideline loss of zero.[68] The court then stated, however, that "I have set the guidelines aside because we are outside the heartland" and sentenced the defendant to five years—an upward variance of over three years above the applicable guideline range.[69] On appeal, the Ninth Circuit emphasized that "the district court's consideration of the large potential loss that could result from Hilger's action was not unreasonable" and that "the potential loss to victims" was an important § 3553(a) factor.[70] Other courts have also suggested that a proper review of the § 3553(a) factors includes consideration of the loss caused by the defendant's action.[71]

---

65 United States v. McBride, 362 F.3d 360, 374, 376 (6th Cir. 2004) ("[T]here is surely some point at which a perpetrator's misperception of the facts may become so irrational that the words 'intended loss' can no longer reasonably apply."); *see also Johnston*, 620 F. App'x at 857 (affirming district court's use of higher intended loss, rather than actual loss, but noting that where intended loss amount is impossible or unlikely to occur, it may impact the substantive reasonableness of a sentence).

66 560 F.3d 944, 947–48 (9th Cir. 2009).

67 *Id.* at 945.

68 *Id.* at 946.

69 *Id*.

70 *Id*. at 947–48.

71 *See, e.g.*, United States v. Corsey, 723 F.3d 366 (2d Cir. 2013) (remanding case with a very large intended loss amount, but "low risk that any actual loss would result"; commenting that the district court may have been overly influenced by the guidelines range in imposing lengthy sentence); United States v. Edwards, 595 F.3d 1004, 1010, 1018 (9th Cir. 2010) (upholding a probationary sentence far below the guideline range as substantively reasonable in a fraud case where the sentencing judge stated that the guideline range calculated using intended loss "overstated the circumstances" of the defendant's case); United States v. Livesay, 587 F.3d 1274, 1278–79 (11th Cir. 2009) ("[A] sentence of probation for a high-ranking officer in a corporation where over a billion dollars of fraud was perpetrated . . . is not reasonable" under the factors listed in § 3553(a)); *see also* United States v. Carroll, 691 F. Supp. 2d 672, 676 (W.D. Va. 2010) (varying upwards by almost 25% over the calculated guideline range when additional loss amounts attributable to unidentified victims could not "be determined precisely enough" to apply the guidelines; finding the evidence sufficient to "consider a greater loss in judging the seriousness of the defendant's conduct").

While courts may consider loss in determining whether a variance is appropriate, at least one circuit has held that simply rejecting the government's loss evidence without a sufficient explanation constitutes reversible procedural error.[72] In *United States v. Wilkinson*, the sentencing judge stated on the record that the government's loss expert was knowledgeable and credible. The court nonetheless rejected the expert's calculations and found zero loss, without providing any explanation.[73] Given the absence of a record explaining the trial court's decision, the Fourth Circuit held that the sentence was procedurally unreasonable.[74]

In contrast, when procedural errors in loss calculation do not affect the sentence, there is no clear error.[75] The government bears the burden of showing an error was harmless by demonstrating beyond a reasonable doubt that the error did not contribute to the sentence the defendant received.[76]

Although the guidelines are now advisory, a sentencing judge must still make factual findings as to the amount of loss and a "reasonable estimate" of loss to satisfy the evidentiary requirements. A court's failure to do so will render a loss calculation invalid.[77]

III. GAIN AS ALTERNATIVE MEASURE

The sentencing guidelines instruct the sentencing court to "use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it

[72] 590 F.3d 259, 269–70 (4th Cir. 2010).

[73] *Id.* at 270.

[74] *Id.*

[75] *See, e.g.*, United States v. Hussein, 664 F.3d 155, 160–61 (7th Cir. 2011) (finding incomplete loss calculation to be harmless error where it would not have changed the applicable offense level enhancement); United States v. Griffith, 584 F.3d 1004, 1017 (10th Cir. 2009) (finding the inclusion of $28,130 in extra loss to be harmless despite its effect of increasing the offense level enhancement because the district court stated on the record it would have sentenced defendant to same term of imprisonment notwithstanding a lower loss amount).

[76] *E.g.*, United States v. Olis, 429 F.3d 540, 544 (5th Cir. 2005).

[77] United States v. Medina, 485 F.3d 1291, 1304–5 (11th Cir. 2007); United States v. Ali, 508 F.3d 136, 144–45 (3d Cir. 2007); United States v. Burns, 843 F.3d 679 (7th Cir. 2016); *cf.* United States v. Johnson, 270 F. App'x 839, 844 (11th Cir. 2008) (finding total disbursements to be a reasonable estimate of loss where defendant commingled those proceeds with his personal funds precluding any mitigating proof of lawful usage).

reasonably cannot be determined."[78] However, the guidelines previously noted,[79] and courts have continued to hold, that substituting the gain for the loss is not the preferred method as it "ordinarily underestimates the loss."[80] Sentencing judges are cautioned against "abandoning a loss calculation in favor of a gain amount where a reasonable estimate of the victims' loss . . . is feasible."[81] Courts cannot use gain "as a proxy for each defendant's culpability" and must properly calculate loss when possible to do so.[82] A sentencing court cannot sentence based on gain if it has previously determined that there is "no loss" as opposed to an incalculable loss.[83]

IV. ESTIMATING LOSS

A. GENERALLY

As discussed above, the sentencing court "need only make a reasonable estimate of the loss."[84] This estimate may be made using available information to determine the value and the sentencing judge is "entitled to appropriate deference" because of the court's

[78] USSG §2B1.1, comment. (n.3(B)). *See, e.g.*, United States v. Randock, 330 F. App'x 628, 629–30 (9th Cir. 2009) (holding that where the loss to victims in a fraudulent academic credential scheme could not reasonably be determined, gain was a reasonable alternative); United States v. Munoz, 430 F.3d 1357, 1369–71 (11th Cir. 2005) (using gain as an alternate calculation of loss where it was highly impractical to identify and contact the victims because many were elderly and spoke only Spanish); *see also* United States v. McMillan, 600 F.3d 434, 458–59 (5th Cir. 2010) (holding that where a trial court could not reasonably calculate the loss for a company that was already struggling financially before the fraud, the court was justified in calculating the loss based on the defendant's salaries).

[79] *See* USSG §2F1.1, comment. (n.8) (effect. Nov. 1, 1991).

[80] United States v. Triana, 468 F.3d 308, 323 (6th Cir. 2006) (citing United States v. Snyder, 291 F.3d 1291, 1295 (11th Cir. 2002)).

[81] *Munoz*, 430 F.3d at 1371 (quoting United States v. Bracciale, 374 F.3d 998, 1004 (11th Cir. 2004)).

[82] United States v. Gallant, 537 F.3d 1202, 1240 (10th Cir. 2008); *see also* United States v. Vrdolyak, 593 F.3d 676, 681 (7th Cir. 2010) (finding that a sentencing judge's refusal to consider gain as an alternative measure in a case where a "probable" but difficult to calculate loss exists is reversible error); United States v. Armstead, 552 F.3d 769, 778 (9th Cir. 2008) (holding that gain can be "used as a proxy for a portion of the total loss where some, but not all, of the loss can be determined").

[83] USSG §2B1.1, comment. (n.3(B)). As part of the Economic Crime Package, Note 3(B) resolved a circuit split between those courts that permitted use of gain as a reasonable estimate of loss even where no actual or intended loss occurred and those that required a demonstration only where loss did occur, but was incalculable. *Compare* United States v. Haas, 171 F.3d 259, 270 (5th Cir. 1999) ("[I]f the loss is either incalculable or zero, the district court must determine [loss] by estimating the gain to the defendant as a result of his fraud."), *with* United States v. Andersen, 45 F.3d 217, 221 (7th Cir. 1995) (while gain is usually appropriate to estimate an incalculable loss, it cannot be a "reasonable estimate" of loss if there is no evidence that the victims suffered any loss), *and* United States v. Chatterji, 46 F.3d 1336, 1342 (4th Cir. 1995) (holding that gain is not an appropriate measure of loss where there is "no actual, monetary loss attributable to the regulatory fraud").

[84] USSG §2B1.1, comment. (n.3(C)); *see, e.g.*, United States v. Moran, 778 F.3d 942, 973 (11th Cir. 2015); United States v. Gordon, 495 F.3d 427, 431 (7th Cir. 2007); United States v. Bennett, 252 F.3d 559, 565 (2d Cir. 2001).

unique position to assess the evidence.[85] The government must prove the loss attributable to the defendant by a preponderance of the evidence and the factual findings supporting a sentencing judge's loss calculation are reviewed by the appellate courts under a clear error standard.[86] The loss-calculation method, however, is reviewed *de novo*.[87] Courts have held that a sentencing court does not commit "clear error" when a loss calculation is supported by the presumptively reasonable facts from the presentence report, and the defendant fails to rebut those facts.[88] The Ninth Circuit, however, requires the government to establish facts that have a " 'disproportionate effect on the sentence relative to the offense of conviction' " by clear and convincing evidence.[89]

In keeping with these principles, a wide range of approaches have been approved in various factual settings. For example, the sentencing court properly considered the value of assets concealed in a bankruptcy fraud as relevant evidence in determining intended loss.[90] In another case in which defendants induced homeowners to refinance their homes to pay for renovations that the defendants did not perform, the district court appropriately estimated loss by totaling the gross income from the refinance jobs above a certain price level and deducting labor and material costs.[91] Similarly, in a health care fraud, the district court properly based loss on the amounts billed to Medicare even though "some beneficial therapy" may have taken place: the difficulty of analyzing individual claims and the defendant's failure to provide evidence supporting his contention that some therapy was legitimate justified the court's conclusion that " 'for the most part, [the organization overall] was a fraud, and the relevant amount is the entire scheme.' "[92]

---

[85] USSG §2B1.1, comment. (n.3(C)); *Moran*, 778 F.3d at 973–74; United States v. Brooks, 681 F.3d 678, 713–14 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 839 (2013); United States v. Parish, 565 F.3d 528, 534 (8th Cir. 2009).

[86] *E.g.*, *Cavallo*, 790 F.3d 1202, 1232 (11th Cir. 2015); *Moran*, 778 F.3d at 973; *McKanry*, 628 F.3d at 1019; *see also Harris*, 597 F.3d at 250 (5th Cir. 2010) (noting, however, that the method of calculating loss chosen by the district court is reviewed *de novo*).

[87] *Iwuala*, 789 F.3d at 12; United States v. Valdez, 726 F.3d 684, 696 (5th Cir. 2013).

[88] United States v. Villa, 589 F. App'x 532 (11th Cir. 2015) ("When a defendant challenges the loss amount provided in his PSI, the government bears the burden of establishing the loss by a preponderance of the evidence, and the district court must make factual findings sufficient to support the attributed amount. However, when a defendant does not object, a court may properly rely on undisputed statements of loss in the PSI, even when those statements are conclusory."); United States v. Ross, 502 F.3d 521, 531 (6th Cir. 2007) ("[I]f the defendant raises a dispute to the presentence report, the court may not merely summarily adopt the factual findings in the presentence report or simply declare that the facts are supported by a preponderance of the evidence." (quotations and citation omitted)).

[89] United States v. Hymas, 780 F.3d 1285, 1290 (9th Cir. 2015) (quoting United States v. Mezas de Jesus, 217 F.3d 638, 642 (9th Cir. 2000); clarifying six-factor test for "disproportionate effect" analysis).

[90] United States v. Holthaus, 486 F.3d 451, 456–57 (8th Cir. 2007); *cf.* United States v. Kimoto, 588 F.3d 464, 495–96 (7th Cir. 2009) (affirming decision to base actual loss on amount gained in telemarketing debit card scam because a speculative calculation of intended loss based on number of targets and a 0.5% conversion rate yielded an almost identical loss figure).

[91] United States v. Sullivan, 765 F.3d 712, 716 (7th Cir. 2014).

[92] United States v. Rojo, 610 F. App'x 878, 881 (11th Cir. 2015).

The evidence the sentencing judge uses to calculate loss can also include a wide variety of sources. For example,

- In *United States v. Flores-Seda*, the sentencing judge relied on the hearsay testimony of the victim's attorney to estimate loss.[93]
- In *United States v. Humphrey*, the sentencing judge utilized the defendants' personal journal which detailed the names of their victims and amounts collected in a loan fraud scheme.[94] On appeal, the court agreed that such material provided "sufficient indicia of reliability" to be used to calculate an estimated loss.[95]
- In *United States v. Hahn*, the sentencing judge relied on the cash deposits made into the defendant's account to determine the loss from multiple cash thefts.[96]
- In *United States v. Norman*, the trial court properly considered the defendant's own trial testimony in evaluating loss.[97]

A defendant who challenges a district court's loss calculation carries a heavy burden and must show that the calculation was not just inaccurate, but "outside the realm of permissible computation."[98] The sentencing judge also may choose the method to calculate loss that he or she prefers, even if there is a viable competing method.[99]

The sentencing judge, however, cannot assign a loss figure "arbitrarily" or with no findings, and the court must develop some evidence to support the loss figure.[100] For

[93] 423 F.3d 17, 21 (1st Cir. 2005); *see also* United States v. Sliman, 449 F.3d 797, 802 (7th Cir. 2006) (same).

[94] 104 F.3d 65, 71 (5th Cir. 1997).

[95] *Id.*

[96] 551 F.3d 977, 980–81 (10th Cir. 2008).

[97] 776 F.3d 67, 80 (2d Cir. 2015).

[98] United States v. Wheeler, 540 F.3d 683, 693 (7th Cir. 2008); United States v. Ameri, 412 F.3d 893, 901 (8th Cir. 2005); *see also* United States v. Sullivan, 765 F.3d 712, 715 (7th Cir. 2014) ("To succeed on appeal, a defendant must show that the court's loss calculation was not only inaccurate but outside the realm of permissible computations" (citations, internal punctuation omitted)); United States v. Lewis, 594 F.3d 1270, 1289 (10th Cir. 2010) (holding that a defendant must provide "substantial ground for rejecting the district court's determination that the evidence used by the government was reliable").

[99] United States v. King, 257 F.3d 1013, 1025 (9th Cir. 2001); *see also* United States. v. Campbell, 765 F.3d 1291, 1304 (11th Cir. 2014) (rejecting defendant's argument that court was required to examine itemized proof of individualized fraudulent transactions; emphasizing fact-specific nature of proof); United States v. McMillan, 600 F.3d 434, 458–59 (5th Cir. 2010) (holding that when the sentencing court has contradictory and "hotly contested" testimony and evidence regarding loss, the appellate court cannot conclude that the sentencing court committed clear error in selecting one or the other theory).

[100] *See, e.g.*, United States v. Warshak, 631 F.3d 266, 329–30 (6th Cir. 2010) (remanding where the district court's explanation of its loss determination was inadequate); United States v. Hall, 610 F.3d 727, 745 (D.C. Cir. 2010) (remanding for resentencing where the district court provided no reason for finding loss in excess of one million dollars); United States v. Drayer, 364 F. App'x 716, 720–21 (2d Cir. 2010) (remanding for

example, in one case, the sentencing judge's adoption of a loss figure taken from a co-defendant's plea (without fact-finding in the defendant's case) was held to be unreasonable.[101] Neither can a sentencing judge ignore a defendant's offer of proof to rebut loss calculation.[102] Further, it is not the defendant's burden to disprove loss amounts; the government must generally prove loss by a preponderance of the evidence.[103] If a defendant fails to rebut evidence as to loss, he or she cannot expect the sentencing judge to draw favorable inferences.[104]

Courts have taken different approaches with respect to stipulated loss amounts. Some circuits allow a sentencing judge to consider the stipulated loss figure so long as the court also considers loss evidence that is presented by the parties, and "the record clearly demonstrates that the defendant fully understood the potential consequences of his [stipulation]."[105] The Seventh and Tenth Circuits, however, have determined that stipulated facts waive any challenge by the defendant at sentencing.[106] In another notable case, the defendant reserved his right to argue that there was "no loss" while contemporaneously stipulating in the plea agreement to a specific loss figure should a loss be found.[107] Despite the defendant's reservation of the argument, the Fifth Circuit determined that, if the sentencing judge found that there was a loss, the defendant had no further grounds to challenge the stipulated figure even if there was "no evidence" to support that amount.[108]

resentencing where the application of the guidelines was heavily dependent on factual findings and "the absence of a developed record afford[ed] no basis for meaningful review"); United States v. Gupta, 572 F.3d 878, 889 (11th Cir. 2009) (reversing loss calculation where the sentencing judge "pick[ed] a figure . . . about halfway in between" two competing estimates without giving any non-arbitrary reason therefor); United States v. Higgins, 270 F.3d 1070, 1075–76 (7th Cir. 2001) (holding that trial court made insufficient findings regarding loss); United States v. Oseby, 148 F.3d 1016, 1025–1027 (8th Cir. 1998) (same).

101 United States v. Liveoak, 377 F.3d 859, 866–67 (8th Cir. 2004); *see also* United States v. Pierce, 409 F.3d 228, 234–35 (4th Cir. 2005) (ruling that the court is not bound by the loss figure in the co-defendant's sentencing).

102 United States v. Newson, 351 F. App'x 986, 988–89 (6th Cir. 2009) (holding that it was clear error for the sentencing judge to ignore the defendant's offer of proof that she had refused to accept an automobile after she filled out a fraudulent loan application).

103 United States. v. Campbell, 765 F.3d 1291, 1304 (11th Cir. 2014); United States v. Ary, 518 F.3d 775, 787 (10th Cir. 2008); *see also* United States v. Markert, 774 F.3d 922 (8th Cir. 2014) (reversing sentence when government failed to prove that nominee loans used to conceal customer overdraft resulted in pecuniary loss; finding that burden to disprove loss had improperly been shifted to defendant).

104 United States v. Ravelo, 370 F.3d 266, 272–73 (2d Cir. 2004).

105 United States v. Granik, 386 F.3d 404, 413 (2d Cir. 2004) (brackets in original); *see also* United States v. Camacho, 348 F.3d 696, 699–700 (8th Cir. 2003).

106 United States v. Sloan, 492 F.3d 884, 893 (7th Cir. 2007); United States v. Jackson, 459 F. App'x 747, at *6 (10th Cir. 2012); *see also* United States v. Mahbub, 818 F.3d 213, 232 (6th Cir. 2016) (district court's reliance on stipulated loss amounts not clear error).

107 United States v. Elashyi, 554 F.3d 480, 509 (5th Cir. 2008).

108 *Id.*

B. RELEVANT FACTORS

As noted above, the estimate of the loss must be based on available information, taking into account various factors that are appropriate and practicable under the circumstances. The sentencing judge's estimated loss can consider general factors, such as the scope and duration of the offense and the revenues that have been generated by similar operations.[109] Various specific factors are also set forth in the guidelines, some of which are discussed below.

1. Fair Market Value

The first factor that courts may consider is "[t]he fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property."[110] "Fair market value" can be determined by the court through comparison or replacement cost to the victim.

A number of cases have discussed how "fair market value" is determined. "Fair market value" of certain services, such as insurance coverage, can be determined by their cost or premium value.[111] "Fair market value" of items that have a wholesale or retail value are typically determined on a case by case basis. For example, in *United States v. Hardy*, the court determined that the loss should be the wholesale value of the stolen items, because the true owner intended to sell the items at such prices.[112] In contrast, when the items in question were taken from retailers, the courts have reasoned that "the price at which the retailers would have sold that merchandise serves as a reasonable estimate of loss."[113] Courts must determine the intended victims and the market in which the goods would be sold to determine whether it is appropriate to measure loss using wholesale value or retail value.[114]

The court can assess the "fair market value" of a loss even if the replacement cost or production costs are lower than the determined market value.[115] For instance, in *United States v. Bae*, a lottery retailer generated $525,586 in lottery tickets with a winning

[109] USSG §2B1.1, comment. (n.3(C)(vi)).

[110] USSG §2B1.1, comment. (n.3(C)(i)).

[111] United States v. Simpson, 538 F.3d 459, 463 (6th Cir. 2008).

[112] United States v. Hardy, 289 F.3d 608, 613–14 (9th Cir. 2002) (quoting United States v. Warshawsky, 20 F.3d 204, 213 (6th Cir. 1994)).

[113] United States v. Wasz, 450 F.3d 720, 727 (7th Cir. 2006) (collecting cases from different circuits).

[114] United States v. Qazah, 810 F.3d 879, 889–90 (4th Cir. 2015) (vacating and remanding sentence based on loss amount calculated at retail value because district court did not adequately gather facts to determine, for example, whether intended victim was only a large cigarette wholesaler or also included retailers); United States v. Lige, 635 F.3d 668, 671–72 (5th Cir. 2011).

[115] *See, e.g.*, United States v. Bae, 250 F.3d 774, 775–76 (D.C. Cir. 2001).

redemption value of $296,153 and argued that the losing tickets had no "fair market value."[116] The district court reasoned that the value of the tickets at the time they were purchased (their sale value of $525,586) was the appropriate fair market value.[117]

When loss may fluctuate, the sentencing judge should determine "fair market value" on the date the fraud ceased.[118] There is "no error in selecting the end of the conspiracy as an appropriate date from which to calculate loss."[119] In a case involving the fair market value of real property that has not been recently sold (at foreclosure or otherwise), however, the defendant may rebut the government's proposed value or the basis on which that value was calculated.[120] When a current market value for real property is not available, the court need not use the most recent valuation if more than one prior valuation exists.[121]

As noted above, replacement costs can also be used to make a loss estimate where "fair market value is impracticable to determine or inadequately measures the harm."[122] For example, in *United States v. Shugart*, the court determined that actual cash value was inadequate to measure the harm caused by burning down a church, relying on replacement cost as the "only effective way to return to the victims the fair equivalent of what they lost."[123]

2. Development Costs

Alternatively, in the case of theft of trade secrets or other proprietary information, it is often difficult to estimate fair market value, in which case the cost of developing that information may be used.[124] But, the government still must prove that the development

116 *Id. at* 776; *see also* United States v. Onyiego, 286 F.3d 249, 253, 256 (5th Cir. 2002) (holding that face value accurately determines "loss" with respect to stolen airline tickets).

117 *Bae*, 250 F.3d at 776.

118 United States v. Hart, 273 F.3d 363, 374 (3d Cir. 2001) (upholding decision not to calculate loss at the time of sentencing where defendant argued the victims could have mitigated losses by selling at a later date).

119 *Id.*

120 United States v. Siciliano, 601 F. Supp. 2d 623, 633 (E.D. Pa. 2009).

121 *See* United States v. Nathan, 318 F. App'x 273, 275–76 (5th Cir. 2009) (upholding the district court's decision to rely on a 1998 purchase price rather than a 2000 bank appraisal); *see also* United States v. Plato, 593 F. App'x 364, 382 (5th Cir. 2015) (district court did not abuse its discretion in crediting production-value report as evidence of loss rather than tax appraisal valuation; though defendant objected that appraisal is a more credible measure because production had dropped as a result of his arrest and conviction, defendant did not provide sufficient evidence).

122 United States v. Lige, 635 F.3d 668, 672 (5th Cir. 2011) (quoting USSG §2B1.1 comment. (n.3(C)(i)).

123 United States v. Shugart, 176 F.3d 1373, 1375 (11th Cir. 1999).

124 USSG §2B1.1, comment. (n.3(C)(ii)); *cf.* United States v. Howley, 707 F.3d 575, 582–83 (6th Cir. 2013) (holding it was clear error for the sentencing court to find the value of stolen trade secrets was zero, when it cost $520,000 to develop those secrets).

costs are either an appropriate measure of actual loss[125] or that the defendant intended that amount of loss.[126]

3. Cost of Repairs

The cost of repairing property can also be used to estimate loss as long as the cost does not exceed the property's fair market value. For example, in *United States v. Cedeno*, the Eleventh Circuit remanded for resentencing, because the sentencing judge included both the original fair market value of damaged watches and the costs to repair the watches in the loss calculation.[127] The circuit court noted that "there is no damage that can be done beyond total destruction."[128] Courts cannot "double count" fair market value and repair costs.[129]

Improvements of property *can* be included in loss if they are necessary to repair the damage caused by the defendant. In *United States v. Lindsley*, for example, the court concluded that improvements made to a victim company's computer system after a hacker broke in could be attributed to the loss figure as necessary repair costs.[130]

Some estimated repair costs are specific to certain offenses. For example, in *United States v. Shumway*, the court had to apply special provisions relating to the Archaeological Resources Protection Act to determine "repair costs" to damaged Native American sites on federal lands.[131]

4. Number of Victims Multiplied by Loss

It is appropriate for the sentencing judge to take an average loss per victim and multiply it across an approximate number of victims to generate a total loss figure in cases

[125] *See* United States v. Snowden, 806 F.3d 1030, 1033–34 (10th Cir. 2015) (explaining that it is inappropriate to use costs of development as actual loss where evidence in the record indicated that the company suffered no business losses, but affirming as harmless error).

[126] United States v. Pu, 814 F.3d 818, 824–27 (7th Cir. 2016) (clear error to base loss amount on development costs where there was no evidence in record of whether defendant intended any loss).

[127] 471 F.3d 1193, 1196 (11th Cir. 2006).

[128] *Id.* at 1195.

[129] *Id.* at 1196.

[130] 254 F.3d 71, at *3–4 (5th Cir. 2001) (per curiam) (noting that the security improvements "were the only means available to prevent continued intrusion into [the victim's] computer systems caused by the defendants' activities").

[131] 112 F.3d 1413, 1424–26 (10th Cir. 1997); *see also* United States v. Christianson, 586 F.3d 532, 535–37 (7th Cir. 2009) (holding that loss was properly calculated as the cost of replacing a government experiment that defendants destroyed by cutting down trees that were experiments' subjects).

where specific losses for individual victims are not easily calculated.[132] In *United States v. Mei*, a credit card fraud case, the sentencing judge estimated intended loss based on the average credit card limit multiplied by the number of cards used.[133] Further, such an estimation can include victims who are not aware they have been defrauded or even those who "relay[] their satisfaction with [the] fraudulent treatment."[134]

5. Reduction in Value of Securities

The guidelines state that the reduction in value of securities and other corporate assets due to the defendant's conduct may be considered in the estimate of loss.[135] "Determining the extent to which a defendant's fraud, as distinguished from market or other forces, caused shareholders' losses inevitably cannot be an exact science. The guidelines' allowance of a 'reasonable estimate' of loss remains pertinent."[136] Such determinations must still be made on the evidence when available.[137]

Before November 2012, the guidelines did not expressly provide for any particular method of loss calculation in the context of securities or commodities cases.[138] Courts employed several varying methods of loss calculation when sentencing securities fraud offenders, including the rescissory method,[139] the modified rescissory method,[140] the

[132] USSG §2B1.1, comment. (n.3(C)(iv)); United States v. Barnes, 375 F. App'x 678, 680 (9th Cir. 2010); United States v. Showalter, 569 F.3d 1150, 1161 (9th Cir. 2009); United States v. Abiodun, 536 F.3d 162, 167–68 (2d Cir. 2008).

[133] 315 F.3d 788, 792 (7th Cir. 2003).

[134] United States v. Curran, 525 F.3d 74, 80 (1st Cir. 2008). *But see* United States v. Sutton, 582 F.3d 781, 785–86 (7th Cir. 2009) (distinguishing *Curran* by omitting fraud victims who did not suffer a pecuniary loss).

[135] USSG §2B1.1, comment. (n.3(C)(v)).

[136] United States v. Rutkoske, 506 F.3d 170, 179 (2d Cir. 2007) (citation omitted).

[137] United States v. Zolp, 479 F.3d 715, 720–21 (9th Cir. 2007) (holding that the sentencing court's determination that the stock was "worthless" was erroneous when the stock continued to have residual value, even if the value is close to zero; "close to zero is not zero").

[138] *See*, *e.g.*, United States v. Berger, 587 F.3d 1038, 1045 (9th Cir. 2009) (noting that courts may employ various methodologies to determine loss in a criminal securities fraud case and that loss need not be established with precision).

[139] *See* United States v. Grabske, 260 F. Supp. 2d 866, 872–74 (N.D. Cal. 2002). The rescissory method calculates loss based upon the price that the victim paid for the security and the price of the security as it existed after the fraud was disclosed. This method does not require the court to consider any other variable (related to the individual stock or the larger market) that might have had an effect on the stock during the period of the fraud.

[140] *See* United States v. Brown, 595 F.3d 498, 523–27 (3d Cir. 2010); United States v. Snyder, 291 F.3d 1291, 1296 n.6 (11th Cir. 2002); United States v. Bakhit, 218 F. Supp. 2d 1232, 1240–42 (C.D. Cal. 2002). The modified rescissory method looks at the difference between the average price of the stock during the period that the fraud occurred and the average stock price during a set period after the fraud was disclosed; the difference between these two average prices is the loss. By averaging the stock price during these periods, the modified rescissory method takes into account factors other than the fraud, such as overall growth or decline in the price of the stock.

market capitalization method,[141] and standards of loss causation established in civil fraud cases.[142]

Effective November 1, 2012, the Commission adopted the modified rescissory method to calculate actual loss in securities and commodities fraud cases.[143] Specifically, the guidelines instruct the court to calculate the difference between the average price of the security during the period that the fraud occurred and the average price of the security during the 90-day period after the fraud was disclosed to market, then multiply that difference by the number of shares outstanding. There is a rebuttable presumption that this calculation yields the actual loss attributable to the fraud.[144] In determining whether the amount is a reasonable estimate of the actual loss, the court may consider, among other factors, the extent to which the calculation includes significant changes in value not resulting from the offenses.[145] Examples of changes that might affect share prices include changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events.[146]

In newly promulgated amendments, the Commission eliminated language establishing the rebuttable presumption that the modified rescissory rule offered the best method of calculating loss in such cases. Instead, the guideline now provides that courts should use whatever method is "appropriate and practicable" under the circumstances and the modified rescissory rule is included as one specific method that may be used.[147]

---

141 *See* United States v. Peppel, 707 F.3d 627, 643 (6th Cir. 2013); United States v. Moskowitz, 215 F.3d 265, 272 (2d Cir. 2000). The market capitalization method determines loss based upon the change in the price of the stock during the very short period of time immediately before and after the disclosure of the misrepresentation.

142 *See* United States v. Olis, 429 F.3d 540, 545–46 (5th Cir. 2005); *accord* United States v. Nacchio, 573 F.3d 1062, 1078–79 (10th Cir. 2009); United States v. Rutkoske, 506 F.3d 170, 179 (2d Cir. 2007). This method relies on the civil loss causation standard enunciated in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), and excludes from the loss amount any decline in the price of a security caused by factors other than the fraud. *But cf.* United States v. Georgiou, 777 F.3d 125, 146 (3d Cir. 2015) (rejecting argument that trial court erred by failing to apply *Dura* standards); United States v. Berger, 587 F.3d 1038, 1043 (9th Cir. 2009) (declining to apply *Dura Pharmaceutical*'s "strict loss causation standard" and instead endorsing "a more general loss causation principle permitting a district court to impose sentencing enhancements only for losses that 'resulted from' the defendant's fraud").

143 *See* USSG, App. C, amend. 761 (effect. Nov 1, 2012).

144 USSG §2B1.1, comment. (n.3(F)(ix)).

145 *Id.*

146 *Id.*

147 USSG App. C, amend. 792 (effect. Nov. 1, 2015).

C. Special Rules

1. Stolen or Counterfeit Credit Cards and Access Devices

"In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than $500 per access device."[148] If, however, the unauthorized access device is a means of telecommunications access, through telecommunication access codes, the loss assessed shall not be less than $100.[149] A defendant in possession of credit card numbers, whether they are actually on cards or simply on a list, having been used or not, will be responsible for each one as a separate "access device."[150] Further, a majority of circuits have held that the $500 per unauthorized access device applies to all devices seized in a case, even if the device was not used or usable.[151] However, this amount is a floor, not a ceiling. For example, in *United States v. Alli*, the court used the higher intended loss amount — the total amount of the credit limit of all stolen credit cards — rather than the amount reached by applying the credit card provision because the defendant had "a reasonable expectation, if not knowledge, that the cards would be used to the fullest extent possible."[152] That is, the $500 figure is effectively the *minimum* amount applicable; in situations in which the sentencing judge can determine that there is a higher intended loss, that figure should be used.[153]

2. Government Benefits

In cases involving government benefits (*i.e.*, grants, loans, entitlement program payments), loss should not be less than the amount of benefits obtained by unintended beneficiaries or the amount diverted to unintended uses.[154] A sentencing judge should not calculate loss based on the total amount of benefits received if a portion of those benefits

148 USSG §2B1.1, comment. (n.3(F)(i)).

149 *Id.* ("[I]f the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall not be less than $100 per unused means.").

150 United States v. Jones, 332 F. App'x 801, 807 (3d Cir. 2009).

151 *See* United States v. Moon, 808 F.3d 1085, 1091–92 (6th Cir. 2015) (holding that the $500 minimum applies to each device regardless of whether the device was in fact used or useable, and collecting cases for the same). *But see* United States v. Onyesoh, 674 F.3d 1157, 1159 (9th Cir. 2012) (holding that the $500 minimum applies only to unauthorized devices that are "usable."

152 444 F.3d 34, 38–39 (1st Cir. 2006). *But see* United States v. Diallo, 710 F.3d at 153–54 (finding that a sentencing court should not assume a defendant found guilty of credit card fraud intended loss up to credit limit, absent some showing that he intended to exhaust that limit). For further discussion regarding calculation of a defendant's intended loss in credit card fraud cases, *see supra* Section II.B.

153 *See id.* at 38–39.

154 USSG §2B1.1, comment. (n.3(F)(ii)).

would have been received absent the fraud.[155] For example, in *United States v. Tupone*, the court reasoned that the loss derived by the defendant's fraudulent receipt of worker's compensation benefits was "the difference between the amount of benefits actually obtained . . . and the amount the government intended him to receive during the relevant period."[156] However, where the government shows the fraud to be "so extensive and pervasive that separating legitimate benefits from fraudulent ones is not reasonably practicable, the burden shifts to the defendant" to identify which benefits were legitimate.[157] Absent such a showing by the defendant, the district court may reasonably treat the entire claim as intended loss.[158]

Courts have disagreed about whether to apply this special rule where defendants have improperly received benefits pursuant to a set-aside or similar program. A number of courts have held that because the purpose of the programs is to benefit minority-owned or small businesses, they are effectively "benefits" and loss cannot be reduced by the value of services actually rendered.[159] More recently, the Fifth and Ninth Circuits disagreed, concluding that procurement fraud involving set-aside programs should be treated under the general rules for loss calculation like any other procurement fraud.[160] For example, in *United States v. Harris*, the Fifth Circuit explained that "[t]he 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 of entitlement program."[161] Similarly, the Ninth Circuit contrasted fraudulent procurement of set-aside contracts with benefits that unilaterally benefit the recipient, like food stamps, explaining that loss to the government should not be the full value of the contracts where

155 United States v. Harms, 442 F.3d 367, 380 (5th Cir. 2006).

156 442 F.3d 145, 154 (3d Cir. 2006); *see also* United States v. Catone, 769 F.3d 866, 876 (4th Cir. 2014) (construing application note 3(F)(ii) to require courts to distinguish between legitimate and illegitimate benefits in calculating loss; remanding because trial court failed to identify what, if any, portion of unemployment benefits could have been legitimately obtained). *But see* United States v. Palmquist, 712 F.3d 640, 648 & n.7 (1st Cir. 2013) (refusing to provide such a credit when the defendant had never actually claimed the legitimate benefits until after being caught, for the "obvious" reason that doing so would have revealed his larger fraudulent scheme).

157 United States v. Hebron, 684 F.3d 554, 563 (5th Cir. 2012).

158 *Id.*

159 *See, e.g.*, United States v. Maxwell, 579 F.3d 1282, 1306 (11th Cir. 2009) (appropriate amount of loss is entire value of contracts that were diverted from the intended recipient); United States v. Leahy, 464 F.3d 773, 790 (7th Cir. 2006) (holding a municipal minority contracting program was a "government benefits" program under §2F1.1, §2B1.1's predecessor); United States v. Bros. Constr. Co. of Ohio, 219 F.3d 300, 317–18 (4th Cir. 2000) (holding that fraudulent receipt of Disadvantaged Business Enterprise funds involved the diversion of "government benefits"); United States v. White, 2012 WL 4513489, at *3 (S.D.N.Y. Oct. 2, 2012) (noting that the Second Circuit has not ruled on the issue and applying government benefits rule where defendants fraudulently obtained contracts set aside for veterans).

160 United States v. Harris, 821 F.3d 589(5th Cir. 2016); United States v. Martin, 796 F.3d 1101 (9th Cir. 2015). *But see* United States v. Singh, 195F. Supp. 3d 25(D.D.C. June 17, 2016) (disagreeing with *Harris* and *Martin* and noting that Small Business Jobs Act included a presumption of loss based on total amount of contract).

161 *Harris*, 821 F.3d at 604.

those contracts were fully or partially performed.[162] In contrast, the Third Circuit held that regardless of whether loss is calculated under typical loss rules or under the government benefit rules, the appropriate measure of loss is the value of the contracts less the fair market value of the services rendered under those contracts.[163] In explaining its ruling, the Court determined that where the government benefits rule applied, it was not inconsistent to also apply Application Note 3(E)(i), which requires that the fair market value of the property returned and services rendered be credited against the loss.[164]

3. Davis-Bacon Act Violations

The loss involving a violation of 40 U.S.C. § 3142, as prosecuted under 18 U.S.C. § 1001, will be no less than the difference between the legally required wages and the wages that were actually paid by the defendant.[165]

4. Ponzi and Other Fraudulent Schemes

"In a case involving a fraudulent investment scheme, . . . loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment."[166] In other words, in Ponzi scheme cases where payments are routinely made to some or all of the victims, the defendant will receive no credit for payments made to "any individual investor in the scheme in excess of that investor's principal investment."[167]

---

[162] *Martin*, 796 F.3d at 1109–12 (remanding and suggesting possible methods to consider loss, including potential premium paid by the government above what it would have paid in competitive bidding process, non-pecuniary harm to the integrity of the program, and harm to legitimate contractors that might otherwise have been awarded the contract).

[163] United States v. Nagle, 803 F.3d 167, 179–83 (3rd Cir. 2015).

[164] *Id.* The Seventh Circuit is the only circuit to apply Note 3(F)(v) in this context. *See infra* Section IV.C.5 (citing United States v. Giovenco, 773 F.3d 866, 870–71 (7th Cir. 2014)).

[165] USSG §2B1.1, comment. (n.3(F)(iii)); *see also, e.g.*, United States v. Clark, 787 F.3d 451, 463 (7th Cir. 2015) (finding that district court properly applied loss enhancement because defendant "caused" actual loss to employees by false statements regarding wages; explaining that government's ability to stop payments to subcontractors meant that defendant's lies caused "loss" within the meaning of the guidelines).

[166] USSG §2B1.1, comment. (n.3(F)(iv)).

[167] *See id.*; United States v. Snelling, 768 F.3d 509, 512–13 (6th Cir. 2014) (remanding case where district court failed to credit against loss amounts repaid that were *not* in excess of amounts invested); United States v. Craiglow, 432 F.3d 816, 818 n.3 (8th Cir. 2005) (upholding loss calculation performed by taking total money invested by each investor and subtracting any money the defendant repaid to that investor); *see also* United States v. Hartstein, 500 F.3d 790, 797–800 (8th Cir. 2007) (holding that it is the government's burden to provide evidence of the "defendant's intent as to any particular victim or group of victims" before it can be proved that any scheme was intended to be a "Ponzi scheme," and thus apply the provisions of application note 3(F)(iv) to §2B1.1). More recently, the Eighth Circuit explained that the government "need not present direct evidence about the circumstances of each alleged victim" when a defendant "never contended that he accepted money for any purpose other than his fraudulent scheme." United States v. Hatchett, 622 F.3d 984, 987 (8th Cir. 2010).

As discussed in Section V.A, losses from a fraud offense, whether actual or intended, "shall not include . . . [i]nterest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs."[168] In the context of a Ponzi scheme, however, courts have recognized a distinction between the prohibition on interest and earnings reinvested by victims of a Ponzi scheme. In *United States v. Hsu*, the Second Circuit joined the Eighth Circuit in holding that "a federal sentencing court can include as part of its 'intended loss' determination those earnings that victims reinvested in a Ponzi scheme, even though those 'earnings' were invented as part of the scheme itself."[169] The court noted that "[w]hen an investor in a Ponzi scheme faces the choice either to withdraw or to reinvest, the choice to reinvest — an act frequently necessary to maintain the scheme itself — transforms promised interest into realized gain that can be used in the computation of loss for the purposes of federal sentencing."[170] The court further stated, that, "[i]n such a case, only the most recent promised or reported interest gains are excluded from sentencing consideration as per the guidelines' exclusion of interest or rates of return from the loss calculation."[171]

5. Certain Other Unlawful Misrepresentation Schemes

When defendants pose as licensed professionals, represent that products are approved by the government when they are not, fail properly to obtain approval for regulated goods, or fraudulently obtain approval for goods from the government, 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."[172] Thus, a defendant will receive no credit in such cases where products are misbranded or falsely represented as being approved by a government agency regardless of the actual fitness or performance of those products.[173] In *United States v. Millstein*, for example, the defendant received no credit for the value of the misbranded prescription drugs sold to victims even though there was no evidence that the drugs that were delivered did not perform as promised.[174] Nor will a defendant receive credit for legal services rendered where he or she falsely claimed to be a licensed attorney.[175] Similarly, the Seventh Circuit has also held

168 USSG §2B1.1, comment. (n.3(D)(i)).

169 669 F.3d 112, 120–21(2d Cir. 2012) (citing United States v. Alfonso, 479 F.3d 570 (8th Cir. 2007) and *Hartstein*, 500 F.3d at 800).

170 *Id.* at 121.

171 *Id.*

172 USSG §2B1.1, comment. (n.3(F)(v)).

173 *Id.*

174 401 F.3d 53, 74 (2d Cir. 2005).

175 *See, e.g.*, United States v. Kieffer, 621 F.3d 825, 834 (8th Cir. 2010).

that this application note applies to some circumstances in which defendants falsely claim qualifications to participate in set-aside programs.[176]

6. Value of Controlled Substances

The loss in a case involving controlled substances is the estimated street value of those items.[177]

7. Value of Cultural Heritage Resources or Paleontological Resources

The value of a "cultural heritage resource" shall include the archaeological value, the commercial value, or the cost of restoration.[178] The court "need only make a reasonable estimate" of the loss to a cultural heritage resource based on available information.[179]

8. Federal Health Care Offenses Involving Government Health Care Programs

Effective November 1, 2011, the Commission promulgated an amendment to the guidelines regarding the definition of "intended loss" in cases involving "Federal health care offenses relating to Government health care programs." More specifically, in response to directives set forth in the Patient Protection and Affordable Care Act of 2010,[180] the amendment added two provisions to §2B1.1, both of which apply to cases in which "the defendant was convicted of a Federal health care offense involving a Government health care program." The revisions first provided for tiered enhancements at particular loss amounts: 2-levels if the loss is more than $1,000,000, 3-levels if the loss is more than $7,000,000, and 4-levels if the loss is more than $20,000,000. [181] Second, the Commission added a special rule to Application Note 3(F) providing that "the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, *i.e.*, is evidence sufficient to establish the amount of the intended loss, if not rebutted."[182] The special rule includes language

[176] *See, e.g.*, United States v. Giovenco, 773 F.3d 866, 870–71 (7th Cir. 2014) (relying on application note 3(F)(v); counting as loss entire amount improperly paid under contract without credit for services provided when defendants obtained contract based on false claims that they were a minority-owned business).

[177] USSG §2B1.1, comment. (n.3(F)(vi)).

[178] USSG §2B1.1, comment. (n.3(F)(vii)); USSG §2B1.5, comment. (n.2(A)); United States v. Shumway, 112 F.3d 1413, 1424–26 (10th Cir. 1997).

[179] USSG §2B1.5, comment. (n.2(B)); *see also* United States v. McCarty, 628 F.3d 284, 290–91 (6th Cir. 2010) (discussing commentary regarding the value of a cultural heritage resource in the context of stolen antique books).

[180] Pub. L. 111–148.

[181] USSG §2B1.1(b)(7).

[182] USSG §2B1.1, comment. (n.3(F)(viii)). Most courts had adopted this position even before the special rule was promulgated. *See*, *e.g.*, *Iwuala*, 789 F.3d at 13–14 (applying this principle under the 2008 guidelines); United States v. Isiwele, 635 F.3d 196, 202 (5th Cir. 2011) (remanding to district court because evidence in record demonstrated that the defendant may have intended to receive a capped amount); United States v.

confirming that the government's proof of intended loss may be rebutted by the defendant.[183] However, objections to the loss amount alone do not constitute competent rebuttal evidence.[184] A defendant must instead put forth evidence of legitimate services rendered[185] or other specific evidence that a lower loss amount was intended.[186]

V. EXCLUSIONS FROM LOSS

A. INTEREST, FINANCE CHARGES, LATE FEES, PENALTIES AND SIMILAR COSTS

The application notes to §2B1.1 of the sentencing guidelines exclude from loss any interest, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or similar costs.[187] In *United States v. Morgan*, for example, the court concluded that the sentencing judge erred by including interest and finance charges in the amount of loss determined.[188]

Martinez, 588 F.3d 301, 326–27 (6th Cir. 2009) (holding that, in cases of Medicare or Medicaid fraud the intended loss is the billed figure even when the defendant receives a much smaller payment); United States v. Mikos, 539 F.3d 706, 714 (7th Cir. 2008) (holding that $1.8 million in fraudulent Medicare bills represent the intended loss because though defendant may have provided some legitimate services, none of the services provided were Medicaid reimbursable); United States v. Singh, 390 F.3d 168, 194 (2d Cir. 2004) (vacating and remanding loss amount because defendant's trial testimony indicated that he had an intimate knowledge of Medicare's fixed billing practices but he never specifically testified regarding what he expected to receive); United States v. Miller, 316 F.3d 495, 504 (4th Cir. 2003) (district court may rely on bill as prima facie evidence but parties may introduce additional evidence demonstrating that the bill either exaggerates or understates the intended loss). Following the amendment, the Ninth Circuit joined these other courts. United States v. Popov, 742 F.3d 911, 915–16 (9th Cir. 2014) ("In light of the express instructions in the current Guidelines and the way in which the burden shifting framework has been applied by our sister circuits, we now join those courts.").

183 USSG §2B1.1, comment. (n.3(F)(viii)).

184 *See, e.g.*, *Iwuala*, 789 F.3d at 14–15 ("[T]here is no evidence in this record that would have compelled the district court to find that the defendant knew that the amount billed was more than the scheduled amounts that Medicare routinely paid."); United States v. Ohia, 618 F. App'x 225, 226 (5th Oct. 6, 2015) (per curiam).

185 *See* United States v. Age, 614 F. App'x 141, 144 (5th Cir. 2015) (district court did not err in calculating loss as total amount billed to Medicare because defendant failed to present any evidence of legitimate services); *cf.* United States v. Adebimple, ___ F. App'x ___, 2016 WL 1696911, at *2 (9th Cir. Apr. 28, 2016) ("In calculating the amount of the intended loss, the district court was not required to discount the value of any wheelchairs that happened to be medically necessary, because the medical examinations mandated to determine medical necessity were not performed.").

186 *Compare* United States v. Valdez, 726 F.3d 684–696 (5th Cir. 2013) (district court committed error in failing to consider audiotape demonstrating that defendant anticipated being paid far less than what he billed to Medicaid), *with* United States v. Elliot, 600 F. App'x 225, 228–30 (5th Cir. Jan. 27, 2015) (district court did not err in calculating loss at full amount billed where it considered but did not find credible defendant's evidence that he intended to a lower loss amount).

187 USSG §2B1.1, comment. (n.3(D)(i)).

188 376 F.3d 1002, 1014 (9th Cir. 2004); *see also* United States v. Dunn, 300 F. App'x 336, 338–39 (6th Cir. 2008) (holding that the sentencing court improperly included interest in its loss calculations for sentencing purposes). *But see* Cooper v. United States, No. 13-CV-3769, 2015 WL 9450625, at *9 (S.D.N.Y. 2015) (district

B. COSTS TO THE GOVERNMENT AND COSTS INCURRED BY VICTIMS

The costs to the government and the costs to the victims to aid in the prosecution of the defendant are not included in any loss calculation.[189] By contrast, costs incurred by a bank for investigating its own employee (the defendant) may be considered under §2B1.1, Application Note 3(D), because the investigation was an "immediate response" to the defendant's conduct and was not conducted primarily to aid the government in prosecution.[190]

VI. CREDITS AGAINST LOSS

A. MONEY AND PROPERTY RETURNED/SERVICES RENDERED

Loss shall be reduced by money and property returned, as well as the fair market value of services rendered, by the defendant (or those acting jointly with the defendant) to the victim *before* the offense was detected.[191] For example, in *United States v. Anders*, the court determined that, although a construction contractor committed fraud in the bidding process to secure a contract, the contractor was to be credited the value of services rendered before the customer cancelled the contract.[192] Failure to credit such value may constitute reversible error.[193] However, where the fraud is so pervasive that it is not

court was correct not to credit broker fees paid by victims of fraud as these are a major component of victim's direct losses rather than exclusions under §3(D)(i)).

189 USSG §2B1.1, comment. (n.3(D)(ii)); United States v. Schuster, 467 F.3d 614, 618–20 (7th Cir. 2006) (reversing loss figure that included such costs).

190 United States v. DeRosier, 501 F.3d 888, 895 (8th Cir. 2007).

191 USSG §2B1.1, comment. (n.3(E)(i)).

192 333 F. App'x 950, 954–55 (6th Cir. 2009); *see also Campbell*, 765 F.3d at 1305 (noting that, although court may be justified in treating all money transfers as loss when conduct is "permeated" with fraud, "value may be rendered even amid fraudulent conduct" and defendant appropriately received credit for such value (internal citation, punctuation omitted)); United States v. Klein, 543 F.3d 206, 214–15 (5th Cir. 2008) (holding that district court erred by failing to offset loss to insurers by value of drugs that patients actually needed); United States v. Sharma, 703 F.3d 318, 325–26 (5th Cir. 2012).

193 *See, e.g.*, *Alphas*, 785 F.3d at 784 (remanding case to allow determination as to amounts, if any, that would have legitimately been paid for insurance claims that were artificially inflated but may have contained genuine claims; holding that "void-for-fraud" clauses in insurance policy did not change analysis and "intended loss"); United States v. Prange, 771 F.3d 17 (1st Cir. 2014) (remanding when district court failed to offset loss by the value of shares provided to purported hedge fund managers in sting operation; emphasizing that parties agreed that the shares in question had some value and, given small dollar amounts at issue in case, even a valuation of $2,000 could have a sentencing effect).

reasonably practicable to separate legitimate from fraudulent conduct, the burden shifts to the defendant to prove the legitimate amount.[194]

The time of detection is the earliest of: (1) the time the offense was discovered by the victim or the government; *or* (2) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.[195] Property returned after detection will not be credited against the loss figure. For example, in *United States v. Swanson*, the sentencing judge declined to subtract the value of money returned after discovery of the offense reasoning that "the fact that a victim has recovered part of its loss after discovery of a fraud does not diminish a defendant's culpability for purposes of sentencing."[196] Restitution paid before sentencing but subsequent to detection, whether voluntarily or not, will not be subtracted from the loss amount.[197] Similarly, property that is forfeited by the defendant in the same or related proceeding will not be credited to the defendant's loss figure.[198]

The value of any property returned before discovery is set at the time the property is returned, not at the time of sentencing. For example, in *United States v. Holbrook*,[199] the defendant sold non-existent accounts to another entity; the purchaser eventually learned of the scheme and acquired all defendant's corporate assets, including a software company. At the time of transfer, the software company was not profitable, but the purchaser invested $10 million in the entity.[200] Although the defendant agreed that the value of the software company was "either entirely or almost entirely" due to the purchaser's post-acquisition investment, he argued that a "literal interpretation" of Note 3(E)(ii) required that the court reduce loss amounts attributable to him by the $10 million valuation placed on the company at the time of sentencing.[201] The court rejected this argument and valued the software company at the time of the transfer, stating that allowing the victim's investment in property to count as a reduction in the victim's loss would "create an absurd result."[202]

194 *See, e.g.*, United States v. St. John, 625 F. App'x, 661 (5th Cir. 2015) (holding that the fraud was so pervasive that district court did not err in subtracting any amount for legitimate services rendered from actual loss amount); *Alphas*, 785 F.3d at 784.

195 USSG §2B1.1, comment. (n.3(E)(i); *see also, e.g.*, United States v. Stennis-Williams, 557 F.3d 927, 929–30 (8th Cir. 2009) (rejecting defendant's request to credit money returned in the context of a civil settlement six months before criminal indictment).

196 360 F.3d 1155, 1168–69 (10th Cir. 2004) (quoting United States v. Nichols, 229 F.3d 975, 979 (10th Cir. 2000)).

197 United States v. Akin, 62 F.3d 700, 702 (5th Cir. 1995).

198 United States v. Cacho-Bonilla, 404 F.3d 84, 92 (1st Cir. 2005).

199 499 F.3d 466 (5th Cir. 2007).

200 *Id.* at 468.

201 *Id.* at 469.

202 *Id.* at 469 n.2.

Timing is not the only consideration when determining whether a credit applies against the loss figure. In *United States v. Hausmann*, a personal injury lawyer who directed kickbacks from a chiropractor to whom he referred clients, argued at sentencing that the loss figure should be reduced by the "valuable free services" and legal fee reductions he provided the victim clients.[203] The court declined to adopt this approach since these services were routinely provided to all of the lawyer's clients, not just those defrauded, and the "net detriment" to those victims was not lessened relative to the other clients.[204]

Courts have found a defendant is not entitled to credit when the defendant's objective in repaying is the perpetuate ongoing fraud. In *United States v. Calloway*,[205] the Eighth Circuit agreed with the district court that the defendant should receive no credit for amounts he had returned to the victim. This defendant's first cousin had sought assistance in investing funds that her disabled sister had received in an abuse and neglect suit against a nursing home. The defendant encouraged his cousin to allow him to invest the money in an organization that would supposedly provide substantial yields with little risks. In fact, he appropriated the funds for his own use. Over several years, he returned about one-third of the money, but "only when repeatedly confronted with [the victim's] desperate medical needs or threats of legal action by third parties, either of which could have foreseeably led to discovery of the scheme."[206] Under the circumstances, the court concluded that the defendant should receive no credit because he had effectively intended to defraud his relatives of the entire amount invested.

Additionally, even if property is returned or services are rendered before discovery, it may not qualify the defendant for a credit against loss if the beneficiaries of the property or service were not eligible to receive them. Various cases have addressed different permutations of this situation. For example, in *United States v. Ekpo*, the defendant did not return any of the monies received from the government to provide wheelchairs to Medicare participants and failed to present evidence that the beneficiaries would have been medically eligible to receive the wheelchairs provided. Accordingly, the court did not allow a credit for the wheelchairs' value.[207] However, in *United States v. Mahmood,* where the defendant was convicted of defrauding Medicare, the Fifth Circuit found that, "Medicare is not a patient; as such, it never receives 'value' as does a patient… ." Where the evidence indicated that Medicare beneficiaries at the defendant's hospitals received legitimate services, the services only became illegitimate when the defendant fraudulently billed them to Medicare, and the defendant was entitled to a credit against loss.[208] Conversely, a

[203] 345 F.3d 952, 959–60 (7th Cir. 2003).

[204] *Id.* at 960.

[205] 762 F.3d 754 (8th Cir. 2014).

[206] *Id.* at 759–60 (payments to victim were "necessary to give [defendant's scheme a veneer of legitimacy").

[207] 266 F. App'x 830, 834 (11th Cir. 2008) (per curiam); *see also* United States v. Phipps, 595 F.3d 243, 248 (5th Cir. 2010) (holding that without evidence provided by the defendant as to the value of property provided the court "ha[s] no reason to consider such a reduction" in loss).

[208] United States v. Mahmood, 820 F.3d 177, 195 (5th Cir. 2016).

defendant who intentionally defrauded Social Security by collecting disallowed disability payments could not seek a credit against loss based on unintentional overpayment of Social Security taxes on unrelated income.[209] In *United States v. Warner*, the defendant's employer matched employee donations to charities with five times the donated amount.[210] The defendant organized a scheme with a charity whereby he would receive a kickback of a portion of these funds after he fraudulently informed his employer that he and other employees with money fronted by the defendant had made such donations.[211] The Third Circuit declined to credit him with amounts contributed by his employer that went to the charities, explaining that, "but for" the defendant's fraud, the employer would not have donated any money to the charity.[212] Similarly, in *United States v. Crawley*, the sentencing judge determined that the intended loss constituted the defendant's salary and pension for a five-year period when the defendant committed fraud to obtain the position of union president.[213] On appeal, the circuit court concluded that the sentencing judge's reasonable estimate of the intended loss was not "clearly erroneous."[214] The defendant had also argued that any loss figure should be reduced by the amount of "legitimate services" he provided the union, but the sentencing judge determined that there were no "legitimate services" provided because he procured the position by fraud.[215]

Additionally, a defendant's loss calculation is not reduced by costs incurred in defrauding victims. Thus, when a defendant engages in fraud to raise money for his business operation the portion of those funds used for business expenses cannot be credited against any loss because nothing of value is conferred on the victims.[216] For example, in *United States v. Pelle*, the defendant marketed and sold internet kiosks by deliberately and fraudulently fabricating the value of these items and their profit potential to investors.[217] The court refused to reduce the loss amount by the value of the kiosks because that value was a cost incurred in defrauding victims.[218]

---

209 United States v. Cline, 332 F. App'x 905, 911 (4th Cir. 2009) (per curiam).

210 338 F. App'x 245, 246 (3d Cir. 2009).

211 *Id.*

212 *Id.* at 248.

213 United States v. Crawley, 533 F.3d 349, 355–56 (5th Cir. 2008) (noting that although the defendant was arrested midway through his term as union president, he intended to continue serving and thus, continue the criminal scheme).

214 *Id.* at 356–57.

215 *Id.* at 356–58.

216 United States v. Byors, 586 F.3d 222, 225–26 (2d Cir. 2009).

217 263 F. App'x 833, 835 (11th Cir. 2008).

218 *Id.* at 840; *see also* United States v. Craiglow, 432 F.3d 816, 820–21 (8th Cir. 2005) (rejecting the claim "that one who commits a fraud is entitled to his business expenses" incurred in perpetrating that fraud).

B. COLLATERAL

In a case involving collateral pledged or provided by defendant, the loss should be reduced by the amount the victim has recovered by the time of sentencing.[219] More specifically, the guidelines provide that loss will be reduced by, "[i]n a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing."[220] Effective November 1, 2012, the Commission amended the guidelines to provide that, in cases involving a mortgage loan where the property has not been disposed of by the time of sentencing, there is a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of fair market value.[221] However, where the property has been disposed, the loss amount remains the difference between the unpaid principal balance and the subsequent sale price of the property.[222]

In determining whether to issue a credit against loss, a sentencing judge should examine whether a defendant intended for the collateral to go back to the victim.[223] For example, in *United States v. McCormac*, the court stated that a sentencing judge "must also consider whether a defendant planned to return the collateral or anticipated that such collateral would be repossessed or foreclosed on by the lending institution."[224] In *United States v. Lane*, the intended loss in a bank fraud was reduced by the value of real property used to collateralize the fraudulently obtained loan.[225] It is important to note, however, that in the case of an asset with a value "either entirely or almost entirely" due to the victim's investment subsequent to seizure by the victim, the defendant shall not receive credit for the value of the asset at the time of sentencing.[226]

---

219 USSG §2B1.1, comment. (n.3(E)(ii)).

220 *Id.*; *see also Cavallo*, 790 F.3d 1202, 1232–45 (district court correctly used property value at the time of sentencing, rather than value of property years earlier when the defendant claimed, without substantiation, that he withdrew from mortgage fraud conspiracy).

221 USSG §2B1.1, comment. (n.3(E)(iii)).

222 United States v. Alexander, 679 F.3d 721, 729–30 (8th Cir. 2012) (affirming the sentencing court's use of the foreclosure sale amount of $50,000 rather than the alleged fair market value of at least $143,460); *see also* United States v. Foley, 783 F.3d 7, 22 (1st Cir. 2015) (stating that, in mortgage fraud cases, the actual loss is "'always the difference between the original loan amount and the final foreclosure price (less any principal repayments)'"; accordingly, "'actual loss usually can be calculated by subtracting the value of the collateral—or, if the lender has foreclosed on and sold the collateral, the amount of the sales price—from the amount of the outstanding balance on the loan'" (quoting United States v. Appolon, 695 F.3d 44, 67 (1st Cir. 2012)).

223 309 F.3d 623, 629 (9th Cir. 2002).

224 *Id.*; *see also* United States v. Lacey, 699 F.3d 710, 720 (2d Cir. 2012) (allowing the sentencing court to draw an inference, where supported by appropriate evidence, that the intended loss in case of a loan secured by real property should include an offset for the value of the property).

225 323 F.3d 568, 590 (7th Cir. 2003); *see also* United States v. Downs, 123 F.3d 637, 642–44 (7th Cir. 1997) (holding that value of collateral must be deducted from loan amount to determine loss).

226 *Holbrook*, 499 F.3d at 468.

At least one circuit has construed §2B1.1 (n.3(E)(ii)) to mean that the "pledge" of such collateral must, like money and property returned, be done before discovery of the offense.[227] For example, in *United States v. Austin*, the court reasoned that allowing collateral to be "pledged" as late as sentencing "would be totally at odds with the principles embodied in subsection (i) and would alter the long-standing, well-recognized rule that post-detection repayments or pledges of collateral do not reduce loss."[228]

In mortgage fraud cases, courts are often met with the question of how to calculate actual loss where the defendant fraudulently obtained a loan from one lender who then sold the mortgage to a second lender. The key distinction in such cases is whether the transfer from the original lender to the successor lender was foreseeable to the defendant at the time he or she fraudulently obtained a loan.[229] In recent cases, courts seem inclined to find that mortgage reselling was reasonably foreseeable, and thus, the composite loss[230] is the proper measure of actual loss.[231]

Most Circuits have held that Application Note 3 applies the concept of reasonable foreseeability only to its calculation of "actual loss," and not to the calculation of "credits against loss."[232] These courts therefore rejected arguments that mortgage fraud defendants should receive credits against loss because they could not reasonably have foreseen the economic downturn that led the properties they purchased to be worth less than they expected. Instead, could only receive credit for the actual value of the collateral to the

[227] 479 F.3d 363, 369 (5th Cir. 2007).

[228] *Id.*; *see also* United States v. Brown, 877 F. Supp. 2d 736, 749–50 (D. Minn. 2012) (defendant not entitled to a reduction in loss because condominium and note not pledged to the victim until after discovery of the fraud).

[229] *Compare* United States v. James, 592 F.3d 1109, 1115 (10th Cir. 2010) (holding that, because successor lender victims were not foreseeable to the defendant, the proper loss amount was initial loan minus transfer price between initial lender and successor lender), *with* United States v. Smith, 705 F.3d 1268, 1276 (10th Cir. 2013) (holding that, because successor lender victims were foreseeable victims to the defendant, the proper measure of loss was initial loan minus foreclosure sale price). In both cases, the Tenth Circuit applied the rule that the inclusion of a loss sustained by a successor lender depends on the foreseeability of the loan's transfer to a successor lender. *See also* United States v. Howard, 784 F.3d 745, 748 (10th Cir. 2015) (reiterating that total loss may include both original and downstream loans); United States v. Crowe, 735 F.3d 1229, 1242 (10th Cir. 2013) ("[W]here losses to both original and successor lenders is foreseeable, a district court can calculate loss simply by subtracting the foreclosure sales price from the amount of the outstanding balance on the loan.").

[230] "Composite loss" means the foreclosure proceeds subtracted from original loan amount, adjusted for principal repayments and foreclosure expenses.

[231] *See, e.g.*, *Howard*, 784 F.3d at 748–49; *Hymas*, 780 F.3d 1285, 1293; *Smith*, 705 F.3d at 1276; United *Appolon*, 695 at 67–68; *see also* United States v. Washington, 634 F.3d 1180, 1184–85 (10th Cir. 2011) (finding resale foreseeable because of the defendant's experience in the real estate industry).

[232] *Cavallo*, 790 F.3d 1202 at 1235; United States v. Morris, 744 F.3d 1373, 1375 & n.1 (9th Cir. 2014); United States v. Wendlandt, 714 F.3d 388, 393-94 (6th Cir. 2013); *Crowe*, 735 F.3d at 1236–37; *Turk*, 626 F.3d 743 (2d Cir. 2010); *accord* United States v. Mallory, 461 F. App'x 352, 361 (4th Cir. 2012).

lenders. These courts are explicitly at odds with the Eighth Circuit, which has held that the concept of reasonable foreseeability applies to credits against loss as well as actual loss.[233]

Additionally, at least one circuit has adopted a rule where an intentional loss figure cannot be reduced by the return of property, even before discovery, if no property was pledged before or during the actual fraud. In *United States v. Severson*,[234] the defendant secured a fraudulent loan with collateral four months after originally receiving the loan proceeds but before discovery of the fraud.[235] The court declined to credit the defendant for the value of the collateral when calculating intended loss, because at the time he received the loan, the defendant had no intention of repaying any part of it.[236]

VII. CONCLUSION

Section §2B1.1 covers a wide range of possible loss scenarios, from a clearly defined theft or embezzlement case to complex securities frauds.[237] A sentencing judge can apply case-specific facts within the guideline framework to determine loss in even the most complex case and may make discretionary decisions regarding competing methods of calculation. The court may be called on to review or make an estimate of loss based on available evidence, and the court's decision will be reviewed for reasonableness and fair application of the facts presented by the government and the defendant. While there are rules for exclusions, credits, and special application for loss calculation, the guidelines and reviewing courts recognize the sentencing judge's "unique position" to assess the evidence.

[233] United States v. Parish, 565 F.3d 528, 535 (8th Cir. 2009); *see also Morris*, 744 F.3d at 1375 n.1 ("[W]e join the Second Circuit in rejecting" *Parish*); *Crowe*, 735 F.3d at 1241 & n.5 (same).

[234] 569 F.3d 683, 689–90 (7th Cir. 2009).

[235] *Id.* at 687.

[236] *Id.* at 690.

[237] *See, e.g.,* United States v. Olis, 429 F.3d 540 (5th Cir. 2005).