ECONOMIC CRIMES SCENARIOS

Question 1

The defendant was convicted of health care fraud. In this case, the defendant recruited seven patients from March 2016 to May 2017 to be "fake patients" at a local chiropractor's office. The loss sustained as a result of these 7 patients was $200,000. However, the government believes the defendant is responsible for the entire loss of the conspiracy ($1.8 million) which spanned from January 2015 through May 2017.

What is the loss amount?

Answer: The loss amount is $200,000. You need to evaluate §1B1.3(a)(1)(B) - scope, furtherance, and reasonable foreseeability – and it appears defendant is only responsible for 7 patients he recruited - and loss of $200,000. In addition, the defendant cannot be held responsible for conduct prior to his joining the conspiracy - see §1B1.3(B)(3).

Question 2

A and B were convicted of Conspiracy to Defraud the United States with Respect to Claims - §2B1.1. A stole personal identifying information from a local business and shared them with B. B filed the vast majority of the false tax returns listing her address for the refunds. She collected over $500,000. A filed a handful of tax return and collected $20,000.

What amount of loss should Defendant A be held accountable for?

Answer: ($520,000). You need to do a relevant conduct analysis at §1B1.3(a)(1)(B) – was it within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity? It would appear so in this case. They worked in concert with one another.

Question 3

The defendant was convicted of stealing money from an ATM via jack potting (installing malware and bypassing regular codes and in essence, stealing money from the ATM). The defendant was charged by indictment in Utah. However, during the presentence investigation, the USPO also learned the defendant orchestrated the same scheme in his home state of Colorado as well as in Washington state.

Can the USPO use the loss from those states as well or are there jurisdictional issues?

Answer: It is a relevant conduct issue and since §2B1.1 is on included list at §3D1.2, you can use same course of conduct, common scheme or plan when trying to determine the loss for those additional states. See also §1B1.(a)(2) and App. Note 5(B).

Question 4

Defendant committed health care fraud from 2010 - 2014. She was sentenced for that offense in June 2016 and placed on home detention for one year as a condition of probation, plus 5 years of probation.

However, the defendant never stopped committing health care fraud. She again pleaded guilty in August 2017 to health care fraud that occurred from 2015 - 2017. She committed that offense while on release, so an increase under §3C1.3 applies.

Is the initial fraud (2010 - 2014) relevant conduct or criminal history?

Answer: See application note 5(C) at §1B1.3, conduct associated with a sentence imposed prior to the acts or omissions constituting the instant federal offense are not the same course of conduct, or common scheme or plan.

In this case, the sentence was NOT imposed prior to the acts or omissions constituting the instant federal offense. She was sentenced DURING the instant federal offense. So, therefore, the application note does not apply to her and the first fraud could be relevant conduct and not get criminal history points.

Question 5

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. In total, Cictim 2, however, transferred $310,000 (including the Western Union transfers) to her nephew.

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

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

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

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

Question 6

Defendants are convicted of bank fraud and aggravated identity theft. The organizer of the scheme talked an ex-girlfriend into stealing checks from UPS, where she worked. She stole the checks, gave him the checks, and in exchange, he paid for home renovations and other expenses. He then made fake checks and used 4 other women, as runners, to try to cash the fake checks. Two of the women went on two trips with the organizer. The Probation Officer says it does not appear the women knew each other nor were they conspiring together. It appeared that they acted individually with the organizer and each woman received a portion of any check she cashed. The USPO has concluded that the relevant conduct of each woman is only the checks they cashed. The government is objecting to the PSR, indicating that it is reasonably foreseeable that the four women knew what each was doing and is trying to hit the women with the entire loss.

Is the government correct in that the total amount of loss will be the same for each defendant?

Answer: No. You cannot apply the relevant conduct standard since the mere knowledge of the other women cashing checks is not enough to "determine the scope of the specific conduct and objectives embraced by the defendant's agreement..." as noted in §1B1.3. A.N.#2.

Question 7

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

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

Was the court's ruling correct?

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

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

Question 8

Smith owned a convenience store that also cashed checks for customers. In addition, Smith provided illicit check-cashing services to Johnson and Williams. Each had brought hundreds of checks, many of them US Treasury or government checks, especially around tax season. Over the course of two years, the store owner (Smith) cashed checks totaling $1.5 million, which is his loss amount. Johnson's portion of the loss was $1 million, and Williams' was $500,000. However, at sentencing, the Judge ruled that each defendant was responsible for the total amount of loss because of the relevant conduct provisions of §1B1.3. Williams indicated he never worked with Johnson and although he knew other people were cashing checks at Smith's business, he never did so with Johnson. While it was true that they both used Smith's store to cash checks in much the same manner, they never split the proceeds with one another, nor did it appear the men knew each other.

Was the court's ruling correct in that each defendant was responsible for the entire loss amount?

Answer: The defendant's "mere awareness that she was part of a larger check-cashing scheme" did not demonstrate that the acts of others were within the scope of her jointly undertaken criminal activity. What was the scope of the jointly undertaken activity? It appears Johnson and Williams were not in it together, but independent of one another. As a result, Williams will not be held responsible for any of Johnson's loss.

See United States v. Presendieu, 880 F.3d 1228 (11th Cir. 2018). The court erred when it attributed to the defendant losses caused by a co-conspirator. The defendant's "mere awareness that she was part of a larger check-cashing scheme" did not demonstrate that the acts of others were within the scope of her jointly undertaken criminal activity.

Question 9

From September 2009 through June 2013, White and his co-schemers bought merchandise in retail stores with fake checks and then returned the merchandise for cash. Over about four years, the group targeted 32 stores and inflicted actual losses of approximately $627,000. White was in prison from September 2009 until August 2011. He was then incarcerated again on another state charge in August 2012, where he remained until his federal arrest in June 2013. The court agreed with the government and held the defendant responsible for the full amount of loss, $548,000. It is unclear when the defendant entered the conspiracy, but the government contends he signed a plea agreement indicating he was part of the conspiracy from September 2009 through June 2013, cashing checks at various businesses.

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

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

Was the court's ruling correct?

Answer: No, without a more specific and supported finding on when White's participation in the scheme began, we cannot assume that his participation began any earlier than the September 13, 2011 arrest.

See United States v. White, 883 F.3d 983 (7th Cir. 2018). The court erred when it held the defendant responsible for the loss amount from the entire conspiracy, rather than conducting an individualized relevant conduct analysis based on the defendant's criminal undertaking. The defendant's admission in a plea agreement that he was part of a wire fraud scheme that existed for four years did not establish that he was part of that scheme for its entire four-year term, particularly when he was in state custody for one of those years.

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

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

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

Question 10

Defendant deposited five counterfeit and/or stolen checks, equaling $108,600. He successfully withdrew $27,800. Is the loss amount the intended loss of $108,600 - $27,800, which is $80,800 or the actual loss of $27,800?

Answer: The intended loss amount of $108,600 should be used. Loss is defined in §2B1.1 as the greater of actual or intended loss. Based on the defendant's action of depositing all of the checks, it is reasonable to conclude that he intended to withdraw the entire amount at some point.

Question 11

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

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

Was the court's ruling correct?

Answer: Yes. Though there were additional women with other characteristics that arguably made them more vulnerable that the victim mentioned in the question, the court of appeals made fairly broad statements about application of the enhancement. *See U.S. v. Sunmola*, 887 F.3d 830 (7th Cir. 2018). "Many of these women had been divorced, abandoned, widowed, or ignored by the men in their lives. [] These women were seeking companionship through online dating, making them particularly susceptible to falling into the vicious trap of a man who deceitfully made them believe they were in love. Their prior relationships left these women unusually vulnerable to falling for [defendants'] deceitful tactics."