Day One—Revising the Definition of Loss

Group Breakout Session Six

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LOSS BREAKOUT SESSION—GROUP SIX SUMMARY

Main Topic: "How should 'loss' be defined in the case of inchoate or partially completed offenses?"

Secondary Topics: (1) "Should 'intended loss' be discounted in some way because it never really happened?" and (2) "How should intended loss be factored into the overall determination of loss? For example, should loss be based on the greater of actual and intended loss, or should it be based on the sum of actual loss plus intended loss that did not occur?"

Group Six was led by the Honorable Julie E. Carnes, United States District Court Judge, Northern District of Georgia. She was assisted by Tom Hutchinson, attorney for the Federal Defender Training Group and Jonathan Wroblewski, acting director, Policy and Legislation, U.S. Department of Justice. The group consisted of numerous members of the defense bar, probation officers, government attorneys, professors, corporate representatives and members of the judiciary, including Judge David Hansen, United States Court of Appeals, Eighth Circuit, and Judge Deanell Tacha, United States Court of Appeals, Tenth Circuit.

General Overview of Current Loss Issues

Judge Carnes began the session with an opening statement outlining the issues for discussion. Generally, the discussion revolved around the ramifications of intended versus actual loss, particularly as loss applied to punishment for inchoate offenses. Judge Carnes initiated the discussion with some preliminary observations. First, she noted that attempts are generally sentenced less severely than completed offenses, except for drugs cases where attempts are treated the same as completed offenses. Second, she observed that loss in completed offenses (versus inchoate offenses) should be punished based on the notion of blameworthiness. And third, she noted that punishment should be based on harm. As has been said, "No harm, no foul." The discussion that followed covered three main issues.

Should Intended Loss Be Punished as Severely as Actual Loss?

Utilizing the following hypothetical, the group discussed how, from a practical standpoint, intended loss versus actual loss presents problems.

> *Defendant deposits a $50,000 counterfeit check and withdraws $10,000. Shortly thereafter, the defendant attempts to deposit a second $50,000 counterfeit check when he is caught and apprehended.*

The defense bar argued that punishment should be victim oriented, which in the case of inchoate offenses, would result in less punishment. In other words, punishment should not be measured by the loss the defendant intended to inflict, but the loss the victim sustained. Although the defense bar conceded that a defendant's motive in most cases is to get everything possible, they argued that courts must look beyond motive and intent or all cases would result in a sentence at the high end of the guidelines.

The prosecution countered that the law sanctions not only the act, but the intent. Intent makes the difference in determining culpability. Ultimately there must be a connection between intended loss and

culpability. However, that begs the empirical question, "Does amount have anything to do with culpability?" And, how do you determine intent?

In reference to the hypothetical, it was observed that the defendant would have continued his crime until he got caught. As it was the group consensus that the defendant would have continued the scheme, withdrawing as much as possible, as well as depositing additional counterfeit checks, it was questioned whether there could be ever be a way of calculating intended loss.

However, it was noted that lack of clarity of intention is a matter for litigation and sentencing discretion, not the guidelines. The sentencing court should determine the intended loss. There needs to be room to sanction someone for intentional harm, whether completed or not. As is required by law, it is the government's burden to provide evidence to ascertain the intent: both the intent to do the crime and the intent to obtain a specific amount.

The problems arise when placing a figure on the fraud. In the hypothetical, there is a possibility for disparity in sentencing. If the defendant only takes the $10,000, should he be held accountable for the $50,000 counterfeit check he deposited or even the $100,000 that would include the second $50,000 counterfeit check he was about to deposit. Is the defendant who takes more or has the opportunity to take more, more culpable? Should the fortuitous timing of capture proscribe that a defendant caught one minute before withdrawing a second $10,000 be treated less severely than the defendant caught as he is handed the second $10,000? Should a judge have full discretion to consider what the appropriate amount of loss is for sentencing purposes or would that promote disparity? Should the amount of loss be the primary proxy for determining punishment? Or, is the concentration on amount of loss misplaced? The court should consider other factors such as the deceitfulness of the defendant's actions or the sophistication of the crime.

Judge Tacha pointed out that the sophistication of the crime as well as other factors are sentencing considerations, but loss must be a proxy for the harm.

Attempts Versus Completed Offenses and the Application of §2X1.1

Currently, the sentencing guidelines permit a three-level reduction from the offense level for attempts pursuant to U.S.S.C. §2X1.1, which holds in pertinent part—

> (b)(1) If an attempt, decrease by 3 levels, unless the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control.

It was noted that very few of the participants in the breakout group were familiar with section 2X1.1. Thus, its usefulness and application was questioned. It was argued that section 2X1.1 is inconsistent with the theory of intended loss in cases in which a defendant might receive a lower sentence under a completed crime where the actual loss is less than the intended loss minus three levels in the attempt to commit that same crime. As an alternative to section 2X1.1, it was suggested that specific offense characteristics be built into the specific offense guideline, which would permit a reduction for incomplete crimes.

Economic Reality Doctrine

Finally, the group discussed how intended loss should be measured in cases where loss is impossible or where there is no likelihood of success, resulting in little or no actual loss.
Facts from two reported cases were presented to the group by way of example.

In *U.S. v. Santiago*, 997 F2d 517 (10th Cir. 1993), the defendant made a false claim to his insurance company for $11,000 for an allegedly stolen car with a $4,800 blue book value. The insurance company immediately picked up the discrepancy. Under the facts of the case, the group discussed how loss should be measured. It was agreed that intended loss would be much greater than any possible loss. The majority of the group agreed that if intended loss defined loss, there should be a departure for situations where the defendant's acts were so dim-witted that he should not be held accountable in the same way as a defendant whose crime was possible. In response, some in the group questioned whether the guideline's definition of loss could distinguish between the professional con-man and the dim-witted, wanna-be opportunist.

A different set of factors presented themselves in the *U.S. v. Sung*, 51 F3d 92 (7th Cir. 1995), where the defendant ordered enough containers for counterfeit pharmaceuticals that had he sold all the containers, he would have earned $1,000,000. However, at the time he was caught, the defendant had sold only $70,000 worth of counterfeit pharmaceuticals. The district court applied section 2X1.1, finding there was no "reasonable expectation" of being able to sell $1,000,000 and determined loss to be $70,000. Although the Seventh Circuit ruled that the loss must be the realistic, other circuits have ruled otherwise, finding that the amount of loss does not have to be realistic.

The group questioned whether these cases fell outside the heartland of cases such that loss could be discounted. But it also discussed the issue of motive and the crime's effect on victims. Should courts, even when considering punishments for impossible crimes, consider the premeditated motive against the victims? Despite an extensive discussion, no consensus was reached.

The group unanimously agreed that in cases involving government sting operations, where the actual loss is always zero and the intended loss is determined, for all practical purposes, by the government, that, like drug stings, loss should be based on the amount negotiated, without discounts for impossibility. However, the group did recognize that in some cases, courts should be permitted to depart downward in the same way as is permitted in drug stings.

Concluding Thoughts

In closing, the group discussed two distinct methods of measuring loss, and in particular, each method's impact on inchoate offenses. On the one hand, Professor Frank Bowman's concept of intended loss would account for all harms and ensure that inchoate crimes are not underpunished. According to Professor Bowman "factual impossibility or improbability of success of a criminal plan should, in general, be no defense." Therefore, a defendant should be accountable "for losses he intended," so long as they "might reasonably have occurred if the facts were as the defendant believed them to be." Conversely, John Cline's application of loss, described as "Economic Reality Doctrine," would eliminate the use of intended loss to determine loss. Loss would equal actual loss or the amount actually "put at risk." This would severely reduce the exposure to defendants involved in inchoate offenses, resulting in no loss in sting operations or false insurance claim cases.

The only consensus regarding the measure of loss in inchoate offenses was that there could be no consensus.