3rd Circ. 'Loss' Definition Is A Win For White Collar Defendants

By **Bill Mateja, Kate Rumsey and Jason Hoggan** (December 5, 2022)

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On Nov. 30, the U.S. Court of Appeals for the Third Circuit published a potential watershed decision in U.S. v. Banks,[1] holding for the first time that the definition of "loss" in fraud cases does not include "intended" loss under the sentencing guidelines.

Thus, the government may only use evidence of "actual" loss to establish an appropriate punishment for fraudulent conduct — a huge win for defendants that could have massive ramifications in white collar cases going forward.

Prosecutors exploit "intended loss" in order to manufacture higher sentences in white collar matters, a tool that has been greatly questioned and diminished. The Banks decision is a fatal blow to this unwieldy analysis, which may result in fewer white collar matters and smaller sentences.

Understanding how the Third Circuit arrived at this important decision requires significant context. In all federal cases, a district judge must calculate a defendant's guidelines for purposes of sentencing.

Calculating the guidelines produces a range of punishment that the district judge may consider when imposing a sentence. In fraud cases, Section 2B1.1 of the guidelines dictates that a higher loss amount increases a defendant's guidelines range — and thus their potential prison term.

Notably, the guidelines do not define loss, much less specify that intended loss factors into that definition. Instead, the guidelines' commentary section states that loss can be the greater of actual or intended loss.

Prosecutors often rely on this commentary to increase a potential sentence using intended loss figures, especially in conspiracy cases where the fraud may not have been completed.

While Congress reviews and approves the guidelines and its amendments, it has no power or authority over the commentary notes, which merely reflect the U.S. Sentencing Commission's interpretation of the guidelines.

In 1993, the Supreme Court held in Stinson v. United States that an application note "that interprets or explains a guideline is authoritative unless it ... is inconsistent with, or a plainly erroneous reading of, that guideline."[2]

According to the U.S. Court of Appeals for the Ninth Circuit's 2019 decision in U.S. v. Prien-Printo, courts "ascribe somewhat less legal weight to the Application Notes than to the Guidelines proper: if the Guideline and Application Note are inconsistent, the Guideline prevails."[3]

But the Supreme Court still gave deference to the commentary, viewing it like an agency's interpretation of its own regulation — a concept now known as Auer deference.[4]

Recently, the Supreme Court narrowed the circumstances in which Auer deference could apply. Specifically, in Kisor v. Willkie, the Supreme Court set forth a multifactor test in 2019 that an agency's interpretation of its own regulation had to pass before it could receive a court's deference.[5]

First, the court required that the regulation in question be "genuinely ambiguous" — a determination that could only be made after a court exhausted all its "'traditional tools' of construction," including the "text, structure, history and purpose of the regulation."[6]

Further, the agency's interpretation must fall within the zone of ambiguity that the court identified.[7] However, the decision in Kisor did not explicitly apply to the guidelines, but has been seen as an avenue to limit the application of guidelines commentary.

Indeed, there has been much criticism regarding guidelines commentary and, in particular, the use of intended loss within that commentary.

Courts have often expressed their unease with how guidelines commentary notes have been used to expand guideline provisions without congressional approval.

For example, the Ninth Circuit stated in U.S. v. Crum in 2019 that it was "troubled that the Sentencing Commission has exercised its interpretive authority" to expand certain guidelines definitions.[8]

Other courts have also restricted the use of intended loss, especially when there is little to no harm to a victim.

In U.S. v. Kirschner last year, the Third Circuit questioned whether intended loss applied for purposes of loss calculation, but required district courts conduct a deeper analysis of intended loss than merely calculating "maximum potential loss."[9] Some legal scholars have even expressed how "fatally flawed" the intended loss analysis is as a proxy for culpability.[10]

Given that landscape, it is not surprising that courts seized an opportunity to limit the use of intended loss by applying Kisor to the guidelines.

Last year, the U.S. Court of Appeals for the Sixth Circuit applied the Kisor analysis to evaluate the definition of "loss" used in Section 2B1.1.[11] In U.S. v. Riccardi, the Sixth Circuit declined to apply a bright-line rule about loss found exclusively in the guidelines' commentary — namely, that a minimum loss amount of $500 must apply for every gift card stolen by a defendant, regardless of the actual harm or amount on the card.[12]

The Sixth Circuit reasoned that, even if 2B1.1's use of "loss" was genuinely ambiguous, the $500 minimum loss rule was unreasonable because it fell outside any potential zone of ambiguity for that term.[13]

Now, applying Kisor and Riccardi, the Third Circuit in Banks held that "the loss enhancement in the Guideline's application notes impermissibly expand[ed] the word 'loss' to include both intended loss and actual loss," and that intended loss should not apply under 2B1.1.[14]

After citing various dictionary definitions and judicial interpretations of the term, the Third Circuit found that 2B1.1's use of "loss" was not genuinely ambiguous, holding that "in the context of a sentence enhancement for basic economic offenses, the ordinary meaning of

the word 'loss' is the loss the victim actually suffered."[15]

The impact of this decision cannot be understated. In Banks, the defendant caused no actual loss, as the entity into which he made $324,000 of fraudulent deposits refused to process any of his attempted withdrawals.

However, the U.S. District Court for the Western District of Pennsylvania found that the "intended" loss amount was greater than $250,000, triggering a 12-point increase in his guidelines offense level — from seven to 19 — and ultimately sentenced him to 104 months imprisonment.[16]

The Third Circuit remanded the case for resentencing without the 12-point enhancement, which will likely result in a much less significant sentence.

There will undoubtedly be a circuit split on this issue, especially given that from the outset other courts of appeals have declined to apply the Kisor analysis to the guidelines commentary.

For example, in January, the U.S. Court of Appeals for the Fourth Circuit in U.S. v. Moses did not agree with analogizing the Sentencing Commission to an agency interpreting its own regulations, stating that doing so "would negate much of the Commission's efforts in providing commentary to fulfill its congressionally designated mission."[17]

The Fourth Circuit underscored the importance of applying Kisor to the guidelines, which would "impose such a burden on the use of commentary that, in many cases, district judges would be unable to consult it."[18]

Ultimately, the Fourth Circuit decided that the guidelines commentary was authoritative and binding, regardless of whether the relevant guideline is ambiguous and that the original Stinson analysis applied. Therefore, we can anticipate that the Fourth Circuit would not interpret Section 2B1.1 the same as the Third and Sixth Circuits.

Similarly, the U.S. Court of Appeals for the Fifth Circuit in U.S. v. Vargas declined to apply Kisor to the career offender guideline in May.[19] Like in Moses, the Fifth Circuit noted that Kisor did not discuss the Guidelines and held that it still would give deference to the guidelines commentary under Stinson.

Yet, the Fifth Circuit granted a petition for rehearing en banc in that case. How that en banc panel decides the issue will undoubtedly have an impact on whether the loss amount analysis includes intended loss.

At least in the Third Circuit and likely Sixth Circuit, the government must prove actual loss and not the loss amount a defendant intended.

This will likely lead to not only a circuit split regarding the applicability of the commentary given Kisor, but also disparities in white collar sentences. For instance, there will likely be smaller sentences in the Third Circuit where there are fraud schemes with little actual loss.

Assuming other courts adopt the Third Circuit's reasoning, there will be numerous other substantial effects on sentencing. Undoubtedly, federal prosecutors have discretion as to which cases they accept, and such discretion in fraud cases is influenced by the potential loss amount and sentence.

If the loss amounts are substantially reduced — potentially even to zero because there was little to no actual loss — then there may be no incentive for the federal prosecutor to bring that case.

Further, many fraud cases have a conspiracy count, which enables the government to assert the broadest amount of intended loss for the conspiracy time period under "relevant conduct" in Section 1B1.3.

If loss is only defined by actual loss, then conspiracy counts may not be the heavy hammer it has historically been. Therefore, prosecutors may have more incentive to assert counts that carry a mandatory minimum, which would bind the court's sentencing decision regardless of the guidelines.

A quick glance at recent U.S. Department of Justice cases conveys how often prosecutors rely on intended loss.[20]

This is especially true in health care fraud cases where an individual or entity billed an insurance company for a certain amount, the intended loss, but those claims were not actually paid, the actual loss.[21]

Without such a tool in the government's arsenal, there may be fewer white collar cases where the government intervened before loss occurred, or sentences may be substantially less.

Without knowing how the Supreme Court may rule on this potential circuit split or whether Congress will approve an amendment to the guidelines on the definition of "loss," a Banks type argument should be preserved at every white collar sentencing.

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[1] United States v. Banks, No. 19-3812, 2022 WL 17333797 (3d Cir. Nov. 30, 2022).

[2] Stinson v. United States, 508 U.S. 36, 38 (1993).

[3] United States v. Prien-Printo, 917 F.3d 1155, 1157 (9th Cir. 2019).

[4] See Auer v. Robbins, 519 U.S. 452 (1997).

[5] Kisor v. Wilkie, 204 L. Ed. 2d 841, 139 S. Ct. 2400, 2414-15 (2019).

[6] Id. at 2414.

[7] Id. The Court enumerated additional requirements that related to—among other things—the character and context of the agency's interpretation, the authority of those who issued the interpretation, and the level of fairness and judgment that it reflects.

[8] United States v. Crum, 934 F.3d 963, 966 (9th Cir. 2019).

[9] United States v. Kirschner, 995 F.3d 327, 336-37 (3d Cir. 2021).

[10] See Daniel S. Guarnera, A Fatally Flawed Proxy:The Role of "Intended Loss" in the U.S. Sentencing Guidelines

for Fraud, 81 MO. L. REV. (2016).

[11] United States v. Riccardi, 989 F.3d 476, 485-86 (6th Cir. 2021).

[12] Id. at 479-480.

[13] Id.

[14] See Banks, 2022 WL 17333797 at *1.

[15] Id. at *5-7.

[16] Id. at *3.

[17] United States v. Moses, 23 F.4th 347, 357 (4th Cir. 2022).

[18] Id.

[19] United States v. Vargas, 35 F.4th 936, 939 (5th Cir.), reh'g en banc granted, opinion vacated, 45 F.4th 1083 (5th Cir. 2022).

[20] See, e.g., DOJ Press Release, "Nigerian Man Sentenced to Over 11 Years in Federal Prison for Conspiring to Launder Tens of Millions of Dollars from Online Scam," available at https://www.justice.gov/usao-cdca/pr/nigerian-man-sentenced-over-11-years-federal-prison-conspiring-launder-tens-millions (last visited Dec. 1, 2022); DOJ Press Release, "Woman Pleads Guilty to Multimillion-Dollar COVID-19 Loan Fraud Conspiracy, available at https://www.justice.gov/usao-edva/pr/woman-pleads-guilty-multimillion-dollar-covid-19-loan-fraud-conspiracy (last visited Dec. 1, 2022).

[21] DOJ Press Release, National Health Care Fraud Enforcement Action Results in Charges of Over $308 Million in Intended Loss Against 52 Defendants in the Southern District of Florida, available at https://www.justice.gov/usao-sdfl/pr/national-health-care-fraud-enforcement-action-results-charges-over-308-million-intended (last visited Dec. 1, 2022).