



Appeals Court Limits Scope of 'Intended Loss' in Sentencing Guidelines

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The U.S. Court of Appeals for the 10th Circuit recently considered what type of proof is required for a sentence enhancement based on “intended loss” under the U.S. Sentencing Guidelines. [The court held that a loss enhancement applies only to losses the defendant purposely sought to inflict](#), not losses the defendant merely knew would occur or possible losses the defendant may have contemplated.

To most people, that distinction would be academic. Not so for defendant Afuhia Masiu Manatau, who was convicted of identity theft and bank fraud and later challenged the sentence imposed on him in the U.S. District Court in Utah.

In 2009, a grand jury charged Manatau in a 14-count indictment, including charges of bank fraud, possession of stolen mail, possession of unauthorized access devices, possession and use of counterfeit currency, and aggravated identity theft. During his 15-month crime spree, Manatau was involved in five separate incidents, all of which led law enforcement to stashes of stolen credit cards, credit card convenience checks, and identity documents. Police also recovered counterfeit currency and notebooks into which someone had transcribed the personal information of dozens of people, including names, addresses, maiden names, parents' names, account numbers, and personal identification numbers. Manatau opted against a trial and agreed instead to plead guilty to bank fraud and aggravated identity theft.

The Probation Office prepared the Presentence Report (PSR), which recommended a total sentence of 3 ½ to four years. The PSR recommended 18 to 24 months on the bank fraud count based, in part, on a six-level increase for intended losses between \$30,000 and \$70,000. The PSR also added a two-year mandatory sentence for aggravated identity theft, which the court was required to impose consecutively. The district court adopted the recommendations and sentenced Manatau at the low end of the Guidelines range.

On appeal, Manatau argued that the 18-month sentence for bank fraud was based on a misapplication of the Guidelines. Specifically, Manatau argued that the “intended loss” enhancement should have been limited to losses that the government could prove to a virtual certainty that he purposely intended to inflict. Had this more stringent test been used, the court would have imposed only a four-level enhancement for intended losses between \$10,000 and \$30,000.



The prosecution countered that the sentencing judge was required only to make a reasonable estimate of loss given the available information. And in cases where intended loss exceeds actual loss, the related sentencing enhancement is to be based on the total amount the defendant placed at risk. According to the prosecution, “intended loss” includes losses the defendant knew would result from the crime as well as losses he might have possibly and potentially contemplated.

The Tenth Circuit rejected both arguments, and held that “intended loss” includes only amounts the defendant intended, not amounts that he knew, foresaw or contemplated. The court identified several grounds for its decision. Among the reasons: The plain language of the guideline defined “intended loss” to mean “pecuniary harm that was intended,” implying the normal meaning of “intended” as “done on purpose.”

The court also noted that the Sentencing Commission’s use of the word “intended,” both in the “intended loss” guideline and the Guidelines generally, demonstrate that the Commission chose its words carefully. Moreover, the court reasoned that its interpretation fit with background legal norms, which attach criminal liability only if a deliberate choice to do wrong is present. The court concluded by noting that it perceived no ambiguity in the guideline. Even if it did, though, the rule of lenity would require the court to resolve any doubt in the defendant’s favor.

Accordingly, the Tenth Circuit remanded the case to the District Court for resentencing, finding that the error was not harmless and a correctly calculated Guidelines range could yield a lower sentence. On remand, the trial court was instructed to include only those losses that Manatau actually intended.

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