DIFFERENT FORMULAS FOR DETERMINING LOSS IN WHITE COLLAR AND FRAUD CASES

In United States v. Ebbers, 458 F.3d 110 (2nd Cir. 2006), despite lengthy arguments concerning (1) planned, sharp reductions in capital expenditures, (2) lay-offs affecting 70,000 employees, (3) the abandonment of non-core businesses, and (4) the deferral or elimination of dividends, the court was not swayed to depart as to an expert's estimation that these factors might have been responsible for 35 percent or more of the stock's decline and that should reduce the loss.

1. REASONS FOR LOSS FACTORS

a. Company's performance analysis as contributing factor.

b. The loss must be the result of the fraud.

c. United States v. Olis, 429 F.3d 540, 547 (5th Cir. 2005). This case explains numerous factors, not just the defendant's fraud that contributed to the stock price decline that may have affected the way the loss is calculated.

2. GAIN VERSUS LOSS

This surrounds the personal gain by the person, party, or corporation from the fraudulent conduct. The pump and dump schemes are associated with this analysis. *See*

United States v. Munoz, 430 F.3d 1357, 1371 (11th Cir. 2005) (*cert. denied*, 126 U.S. 2305 (2006). The sentencing Court would be justified in using a defendant's gain to assess loss where it was arguably difficult to determine the customers' loss in a misbranding case. *See also* United States v. Yeager, 331 F.3d 1216, 1225-26 (11th Cir. 2003). The court was unable to reasonably estimate the loss and, as such, used the defendant's profit as an analysis for guideline purposes.

3. FAIR MARKET VALUE: TIME OF THE FRAUD VERSUS ECONOMIC CHANGES (MORTGAGE FRAUD CASES)

United States v. Confredo, 528 F.3d 143 (2nd Cir. 2008) - Loss causation where the intent was an "expectation of repayment." *See also* United States v. Kopp, 951 F.2d 521 (3rd Cir. 1992) where the Third Circuit disagreed with the Second Circuit analysis siding instead with the Seventh Circuit (United States v. Schneider, 930 F.2d 555 (7th Cir. 1991))in finding that it was simple but irrational to treat all frauds as equivalent to thefts.

In some mortgage fraud cases you are going to find the mortgage fraud occurred as a result of over-inflation of the actual value of a particular property resulting in front load money being received but the value of the property not reaching the level of the loan. Therefore, the actual value versus what the inflated value was as a result of the fraud is the loss. The downturn in economic circumstances and other factors that relate to real estate declines over time not associated with factors foreseeable or controllable by the defendant should be raised to decrease the loss. (Foreclosure sale, averages to actual mortgage obtained).

4. CORPORATE ASSETS – EQUITIES SECURITIES – RECEIVABLES TO REDUCE FRAUD VALUES (GENERALLY ACCEPTED ACCOUNTING PRINCIPLES (GAAP)

Even when fraud occurs in a company that results in a decline of that company there are still assets of the company that can be liquidated that give value to what the losses may initially show. There are also buyouts that may offset the value of a corporate loss, bailouts are now significant, and the differential between what the stock was inflated to and what the stocks' real value is can fluctuate between the time of the fraud and the time the case is ready for trial and sentencing. Stocks often rebound even after a fraud has been identified. Some delay in the criminal conduct and the sentencing is helpful in these types of situations. You have bailouts, buyouts, and then you have recovery interests that might be valuable in analyzing loss. See Endura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 343 (2005) referencing Ebbers, 458 F.3d at 127. Ebbers discusses the market capitalization loss analysis.

5. SCOPE AND DURATION OF THE OFFENSE: REVENUES OR LOSSES GENERATED BY SIMILAR OPERATIONS

This offers an opportunity to compare other corporations in terms of their average financial circumstances during the same period of time of the fraud as well as the recovery period to determine if the loss is limited in time and substance. There is the market capitalization that we've already discussed on stock value when the fraud scheme occurred versus when the scheme was exposed, and whether or not the fluctuation of the stock can render the loss less potent.

Another case that has a good analysis concerning when the fraud was disclosed versus some market effects that created a greater loss than what might have been evidenced from the fraud is United States v. Rutkoske, 506 F.3d 170 (2nd Cir. 2007) and also Emergent Capital Investment Management, LLC v. Stone Path Group, Inc., 343 F.3d 189 (2nd Cir. 2003). These cases discuss intervening events that affect how far reaching the fraud conduct itself can be on the substantive loss analysis.

6. NUMBER OF VICTIMS CAN BE OFFSET BASED ON THE TIME OF THE FRAUD VERSUS MARKET CHANGES AND REIMBURSEMENTS AS WELL AS THE SOPHISTICATION OF THE VICTIM IN THE STOCK MARKET.

One of the best cases on this is United States v. Mount, 966 F.2d 262, 265 (7th Cir. 1992). This is an older case but it still has teeth in that the guidelines themselves offer consideration for overstatement of loss in certain circumstances where you can identify the type of distinctions that are mentioned here.

OTHER LOSS VALUATION

1. Market Capitalization

   - WorldCom – United States v. Ebbers, 458 F.3d 110 (2d Cir. 2006)
   - Adelphia – USA v. Rigas & Rigas, 1:02-cr-01236 (S.D.N.Y. July 11, 2008)

2. Actual Loss v. Intended loss

   - United States v. Olis, 429 F.3d 540 (5th Cir. 2005).

3. Gain

   - USA v. Nacchio, 1:05-cr-00545 (D. Colo. July 30, 2007) – insider trading
   - United States v. Munoz, 430 F.3d 1357 (11th Cir. 2005)

4. Profit

- United States v. Yeager, 331 F.3d 1216 (11th Cir. 2003)

5. Kickbacks are another way to address loss

6. Economic Impact can be a loss issue or mitigation

7. Fair Market Value (mortgage fraud)

- United States v. Confredo, 528 F.3d 143 (2d Cir. 2008)

9. Specific Victim Impact

- Credit against loss if the money is returned before getting caught

  - United States v. Jones, 475 F.3d 701 (5th Cir. 2007) and United States v. Ekpo, 2008 LEXIS 3998 (11th Cir. 2008)

10. Interest – bargained for

- No longer considered

11. Stock Value before and after the fraud; economic conditions affecting the stock value can be used in mitigation of the loss value.

12. Stock Price

- United States v. Leonard, 529 F.3d 83 (2d Cir. June 11, 2008)

13. Corporate Assets

- Endura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336 (2005)

14. Bailout Loans

- Endura

All of these cases can be used to address loss factors in White Collar fraud cases. Understanding these issues in the early stages of a fraud case can help mitigate the outcome at trial, sentencing or on appeal.