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'Intended Loss' Means ... Intended Loss

Law360, New York (November 07, 2011, 12:39 PM ET) -- General George S. Patton is generally credited with the immortal lesson: "Say what you mean and mean what you say." Recently, the Tenth Circuit embraced Patton's advice and applied it to the U.S. Sentencing Guidelines definition of loss amount for economic crimes.

In United States v. Manatau, the Tenth Circuit held that in determining loss under § 2B1.1, which defines "loss" as "the greater of actual loss or intended loss" (U.S.S.G. § 2B1.1, comment (n.3)), "intended loss" means ... wait for it ... the loss the defendant actually intended. 647 F.3d 1048 (10th Cir. 2011).

If that seems patently intuitive to you, rest assured, it should. What is surprising however, is that the government was advocating a far more expansive definition, one that would include any loss that could possibly have resulted from the crime, regardless of the defendant's subjective intent.

As much as zealous defense counsel might like to accuse the government of being out on a limb here, the government's approach actually appears to be supported by decisions from the First and Seventh Circuits that require an objective, rather than subjective, inquiry. See United States v. Innarelli, 524 F.3d 286, 291 (1st Cir. 2008) ("we focus our loss inquiry for purposes of determining a defendant's offense level on the objectively reasonable expectation of a person in his position at the time he perpetrated the fraud, not on his subjective intentions or hopes"); United States v. Lane, 323 F.3d 568, 590 (7th Cir. 2003) ("The determination of intended loss under the Sentencing Guidelines therefore focuses on the conduct of the defendant and the objective financial risk to victims caused by that conduct").

Fortunately for defendant Manatua, the Tenth Circuit adopted a more common-sense approach in line with decisions from other circuits, including the Second, Third and Fifth Circuits. See United States v. Confredo, 528 F.3d 143, 152 (2d Cir. 2008) (remanding for consideration of whether defendant had "proven a subjective intent to cause a loss of less than the aggregate amount" of fraudulent loans); United States v. Kopp, 951 F.2d 521 (3d Cir. 1991) (holding that intended loss is the loss the defendant subjectively intended to inflict on the victim); United States v. Sanders, 343 F.3d 511, 527 (5th Cir. 2003) ("our case law requires the government prove by a preponderance of the evidence that the defendant had the subjective intent to cause the loss that is used to calculate his offense level").

Defendant Manatau was "in the business of stealing identities." 647 F.3d at 1048. After being caught by the police on at least five occasions, he was finally indicted by the federal government for, and pleaded guilty to, bank fraud and aggravated identity theft. Id. at 1048-49. As part of Manatau's scheme, he stole so-called "convenience checks" issued by credit card companies to cardholders who likely never asked for them (Note to self: Rip up junk mail.).

On one occasion, the police found him with two stolen blank convenience checks and a credit card statement revealing that their credit limit exceeded $30,000. Id. at 1049. On yet another of the five occasions, Manatau stole two convenience checks, forged the cardholder's signature and cashed them for about $1800. Seemingly unbeknownst to Manatau, the credit limit on those checks exceeded $10,000. Id.

The parties did not dispute that the "actual" loss caused by Manatau's scheme was about $1,800. But the question of his "intended" loss was hotly contested. The government took the position that the district court should calculate Manatau's "intended loss" by "simply tot[ing] up the credit limits of the stolen convenience checks," arguing that "[w]hether or not Mr. Manatua ever intended to reach those credit limits ... was neither here nor there" so long as "a loss up to the credit limits [was] 'both possible and potentially contemplated by the defendant's scheme.'" Id. The government thus sought a six-level sentencing enhancement based on an "intended loss" of more than $60,000.

Manatua objected to this calculation, arguing that his personal mens rea must be considered in determining his "intended loss." Regarding the two checks he actually cashed, Manatau argued that he could not possibly have intended a loss up to the full $10,000 credit limit since, inter alia, he had already cashed those checks for $1,800 and had no ability to write any further checks on that account.

Manatau thus urged that his intended loss on that transaction should be capped at about $1,800, and that his total intended loss, for all five transactions, should amount to between $10,000 and $30,000. This would result in a four-level enhancement, thereby shaving six to 12 months off the sententencing guidelines range sought by the government. Id. at 1049-50.

The district court accepted the government's calculation of the loss amount, applied the six-level enhancement and imposed a within-guidelines sentence. The Tenth Circuit reversed, holding that "'intended loss' means a loss the defendant purposely sought to inflict" and cannot — "except perhaps in an Opposite Day game" — include "things he never contemplated." Id. at 1050, 1053. In its lengthy opinion, the Tenth Circuit analyzed the following seven separate factors that it said compelled its decision:

1) Plain Language

The court reasoned that the U.S. Sentencing Commission's decision to twice use the word "intended" in its definition of "intended loss" demonstrated the commission's desire for courts to apply the ordinary meaning of the word. Citing several dictionaries, the court found that in contemporary usage, "[s]omething is intended if it is done on purpose — not merely known, foreseen, or just possible or potentially contemplated." Id. at 1050. The court further analyzed various provisions of the Model Penal Code that plainly distinguish "knowledge" from the higher mens rea standard of intent. Id. at 1050-52.

2) Context

While nowhere does U.S.S.G. § 2B1.1 mention knowledge or any other lower mens rea standard in its definition of "intended loss," the court recognized that the sentencing guidelines do, "just a few lines later," define "actual loss" to include the "harm that the defendant knew ... was a potential result of the offense." Id. at 1051 (citing U.S.S.G. § 2B1.1 cmt. n.3 (A)(iv)). According to the court, this demonstrates that the Sentencing Commission knew how, but deliberately chose not to, include the lesser "knowledge" mens rea in its definition of "intended loss." Id.

3) Other Guidelines Provisions

The court took note of several additional sentencing guidelines provisions, like § 5K2.5 regarding "property damage or loss," that explicitly authorize sentencing enhancements based on both knowledge and intent. Id. at 1052.

4) Background Legal Norms

The court cited numerous instances in the criminal law where liability is distinguished on the basis of knowledge versus intent, such as the laws of inchoate offenses and accessory liability, and found it "hardly surprising that the sentencing commission might wish to mimic in sentencing law what has long held true in substantive American criminal law." Id. at 1053.

5) The Implausible Nature of the Government's Proposed Definition

The court not only found that the government's definition of "intent" would bizarrely permit the court to find that "an individual's intentions include things he never contemplated," but also would ignore the fact that the guidelines "expressly define intended loss 'to include [] intended pecuniary harm that would have been impossible or unlikely to occur.'" Id. at 1053.

Moreover, the court reasoned that the government's definition would render futile the guidelines note that loss should be interpreted as the greater of actual or intended loss, for, if "intended loss" were to encompass all possible loss, it would always be at least equal to, if not greater than, the actual loss and there would be no reason to determine which was "greater" for the purpose of sentencing. Id.

6) Case Law

The court determined that its holding was supported by Tenth Circuit precedent and that the government failed to identify any inconsistent extra-circuit authority. The court handily dismissed as dicta any references to an objective standard of intent in other circuit decisions. Id. at 1055.

7) The Rule of Lenity

The court observed that, even if the term "intended loss" were ambiguous, pursuant to the rule of lenity, any ambiguity should be resolved in favor of "avoid[ing] an increase in the penalty prescribed for the offense." Id. at 1055.

Given the district court's failure, at the urging of the government, to make any inquiry into the amount of loss defendant Manatau "intended (had the purpose to) cause," and its subsequent imposition of a within-guidelines sentence, the Tenth Circuit vacated the sentence and remanded.

In instructing the district court to examine Manatau's intent, the Tenth Circuit noted that the lower court was "free ... to make reasonable inferences about the defendant's mental state from the available facts." Id. at 1056. So while Manatau may have won the battle, he may yet lose the war.

Despite the fact that the weight of circuit court authority now appears to clearly favor a subjective approach to determining a defendant's "intended loss," contrary decisions applying an objective test, like Innarelli and Lane, likely stand as binding precedent within their circuits (even if the Tenth Circuit was not persuaded to follow them).

Absent future guidance from the U.S. Supreme Court or some clarification from the Sentencing Commission itself, we should expect that the government will continue to advocate the use of an objective standard that measures the total possible loss that could have resulted from the crime, irrespective of the defendant's subjective intent. Frustrating? Perhaps. But to quote General Patton once again: "Nobody ever defended anything successfully; there is only attack and attack and attack some more."

--By Michelle J. Shapiro and Kim Kalmanson, SNR Denton

Michelle Shapiro *is a partner, and Kim Kalmanson is a managing associate, in the New York office of SNR Denton.*