Alert

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Third Circuit Rejects "Intended Loss" as Basis to Sentence Economic Crimes

On Tuesday, the Third Circuit issued a decision that will substantially impact the sentences imposed for federal fraud offenses. In *United States v. Banks*, the Court rejected the so-called "intended loss" rule in the Federal Sentencing Guidelines, holding that only "loss[es] the victim actually suffered" may be used in calculating the recommended sentencing range for fraud crimes.[1] This holding could revolutionize sentencing for fraud offenses, inasmuch as the calculation of loss amount is the single biggest factor driving the recommended ranges for offenses controlled by the Fraud Guideline.[2] Moreover, the rationale embraced by the Third Circuit, in this case, provides defendants powerful ammunition to push back against aggressive interpretations of the Sentencing Guidelines.

Before examining this decision, it is worth reviewing first how the loss amount plays into the calculation of a sentencing range under the Fraud Guideline and second the transformational analytical framework that the Third Circuit applied, which stems from the Supreme Court's 2019 decision in *Kisor v. Wilkie*.

Fraud Guideline

The Fraud Guideline prescribes advisory sentences for a wide range of economic crimes, including theft, embezzlement, and most forms of fraud. Under that Guideline, the economic loss caused by an offense is the primary driver of the severity of a sentence. For instance, the recommended sentencing range for a first-time offender convicted of wire fraud that resulted in losses of $10,000 would be zero to six months in prison. But if the same person caused $100,000 in losses, the recommended sentence would be 15 to 21 months, while a loss of $1,000,000 would lead to a recommended sentence of 33 to 41 months.

The United States Sentencing Commission, which promulgates the Guidelines, also adds commentary to guide courts' interpretation of the Guidelines. In its comments, the Commission provides a number of additional definitions to assist courts in calculating the amount of loss that resulted from an offense. One of the most important of these is the "intended loss" rule, in which the Commission stated that, when calculating loss amount, courts should use "the greater of actual or intended loss."[3] Thus, a person who *intended* his scheme to cause a million dollars of loss would be sentenced as if he actually had, even if his victims lost nothing at all.

While courts regularly applied commentary such as the intended loss rule for decades, that all changed in the wake of the Supreme Court's decision in *Kisor v. Wilkie*.[4]

The *Kisor* Sea Change

The Supreme Court's *Kisor* decision fundamentally altered the courts' treatment of non-binding guidance, like the Commission's commentary to its Sentencing Guidelines, that an agency gives as to the interpretation of its own rules. Prior to *Kisor*, courts would defer to an agency's interpretation of its rules unless that interpretation was plainly erroneous or inconsistent with the rule. In *Kisor*, however, the Supreme Court emphasized that courts must conduct their own independent analysis of the text of a rule and only consider the agency's interpretation if the rule is "genuinely ambiguous." Even then, deference is not automatic; only after a close examination of the "character and context" of an agency's interpretation will that interpretation control.

Since *Kisor*, the Third Circuit has definitively applied its framework to the Sentencing Commission's commentary to the Sentencing Guidelines and declined to follow comments

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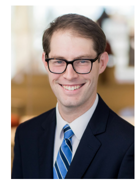

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interpreting Guidelines that the Court deemed unambiguous.[5] Only in this week's decision, however, did the Third Circuit confront whether the "intended loss" rule should still be followed in the wake of *Kisor*.

The *Banks* Decision

In *United States v. Banks*, a jury convicted the defendant of several counts of wire fraud and identity theft for a scheme involving phony trades on the foreign currency exchange market. Importantly, while the defendant attempted to withdraw a total of $264,000 as part of his scheme, none of those attempts were successful, and he did not receive a single dollar from his intended victim. The district court sentenced him on the basis of <u>intended</u> losses in excess of $250,000.

On appeal, the Third Circuit applied the *Kisor* framework and rejected the intended loss rule, concluding that "the loss-enhancement commentary improperly expands the Guideline."[6] It noted that the text of the Guideline only uses the word "loss," without making a distinction between actual and intended losses and that the ordinary, dictionary meaning of "loss" unambiguously meant only "the loss the victim actually suffered."[7] It, therefore, vacated the defendant's sentence and returned the case to the district court for resentencing based only on the losses he actually caused.

Takeaways

The impact of *Banks* is seismic for white-collar criminal defendants. Going forward, only actual losses will be a basis to sentence defendants under the Fraud Guideline in the Third Circuit. This decision also provides a powerful argument for defense counsel to deploy in courts in other circuits that have yet to adopt the Third Circuit's view. Consequently, a careful and thorough calculation of actual losses will prove crucial in the effective defense of white-collar prosecutions, and it will be important for defendants facing potential criminal exposure to retain counsel early to assist in identifying such losses, as well as framing those losses in as narrow and persuasive a way as possible.

More broadly, this decision highlights the new avenues for advocacy available to white-collar defendants at sentencing. The logic of *Banks* and *Kisor* provides powerful authority to resist expansive interpretations of the Sentencing Guidelines based on the commentary. Moreover, the *Kisor* decision applies to agencies across the Executive Branch. It could also be deployed against aggressive interpretations by regulatory enforcement agencies such as the SEC, CFTC, and CFPB.

[1] Nos. 19-3812, 20-2235, slip op. at 20 (3d Cir. Nov. 30, 2022).

[2] U.S.S.G. § 2B1.1

[3] U.S.S.G. § 2B1.1 cmt. 3(A).

[4] *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)

[5] *See United States v. Nasir*, 17 F.4th 459, 470-71 (3d Cir. 2021) (en banc).

[6] *Banks*, slip. op. at 9.

[7] *Id.* at 20.