

Victim Primer (§2B1.1(b)(2))



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Introduction

This primer discusses some common issues regarding who may be counted as a victim under USSG §2B1.1 (“Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud or Deceit; Forgery; offenses Involving Altered or counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States”). Although the primer identifies some applicable cases and concepts, it is not intended as a comprehensive compilation of all case law addressing relevant issues that arise in cases involving victims.

The victim table, found at §2B1.1(b)(2), provides for an offense level enhancement for offenses involving ten or more victims. Subsection (b)(2) provides as follows:

- (2) (Apply the greatest) If the offense—
- (A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by 2 levels;
 - (B) involved 50 or more victims, increase by 4 levels; or
 - (C) involved 250 or more victims, increase by 6 levels.¹

A. Definition of Victim Under §2B1.1

1. General Definition

The guidelines define “victim” in the application notes to §2B1.1. With two notable exceptions, the term “victim” means either: “(A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense.”² Because most case law addresses the first part of this definition, this primer does not address individuals who may be victims under §2B1.1 as a result of sustaining bodily injury.

“Person” as used in the definition of victim includes “individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.”³ A victim may also be a government or government agency.⁴

¹ United States Sentencing Commission, *Guidelines Manual*, §2B1.1 (Nov. 2011).

² USSG §2B1.1, comment. (n.1.)

³ *Id.*

⁴ *United States v. Cunningham*, 593 F.3d 726, 732 (8th Cir. 2010).

The guidelines also define “actual loss” as the term is used in the definition of victim. Actual loss means the “reasonably foreseeable pecuniary harm that resulted from the offense.”⁵ “Pecuniary harm” is “harm that is monetary or that otherwise is readily measurable in money.”⁶ Pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.⁷

2. *Identity Theft Cases*

Effective November 1, 2009, the Commission amended the commentary to §2B1.1(b)(2) to expand the definition of victim in cases involving a means of identification.⁸ In such cases, a victim also includes “any individual whose means of identification was used unlawfully or without authority,” regardless of whether the individual sustained an actual loss, as that term is defined in the guidelines.⁹ The guidelines incorporate the statutory definition of “means of identification” from 18 U.S.C. § 1028(d)(7), but require that “such means of identification shall be of an actual (*i.e.*, not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).”¹⁰

“Means of identification” is defined in 18 U.S.C. § 1028(d)(7) as

any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any--

(A) name, social security number, date of birth, official State or government issued driver’s license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(C) unique electronic identification number, address, or routing code; or

(D) telecommunication identifying information or access device (as defined in [18 U.S.C. § 1029]);

⁵ USSG §2B1.1, comment. (n.3(A)(i)). For case law discussing loss in more detail, *see* Loss Primer (§2B1.1(b)(1)) dated April 2012.

⁶ USSG §2B1.1, comment. (n.3(A)(iii)).

⁷ *Id.*

⁸ USSG §2B1.1, comment. (n.4(E)); *see also* USSG, App. C, amend. 726.

⁹ USSG §2B1.1, comment. (n.4(E)).

¹⁰ USSG §2B1.1, comment. (n.1.)

Various circuit decisions provide additional examples: mortgage loan numbers;¹¹ a company name that includes the victim's true name;¹² forged signatures on fraudulent checks;¹³ personal telephone numbers;¹⁴ department store clientele books;¹⁵ leases;¹⁶ bank account numbers;¹⁷ forged documents created with correct information;¹⁸ police badges;¹⁹ credit card numbers;²⁰ emails including personal information,²¹ and e-Bay accounts.²²

3. *Undelivered United States Mail*

The guidelines include a special definition of victim applicable when “undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail.”²³ In such a case, victim means “(I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.”²⁴

B. **Estimating the Number of Victims**

If the government seeks a sentencing enhancement based on the number of victims, it must prove the number by a preponderance of the evidence.²⁵ “The Guidelines do not . . . allow a district court to estimate the number of victims to enhance a sentence under §2B1.1(b)(2).”²⁶ In a case where 17 million dollars was received from over 17,000 donors by a charity committing fraud, the Seventh Circuit required some proof that the 300,000 dollars of loss attributable to a

¹¹ *United States v. Cooks*, 589 F.3d 173, 185-86 (5th Cir. 2009); *United States v. Macias*, 345 F. App'x 272, 273 (9th Cir. 2009).

¹² *United States v. Johnson*, 261 F. App'x 611, 613-14 (4th Cir. 2008).

¹³ *Id.*; see also *United States v. Blixt*, 548 F.3d 882, 886 (9th Cir. 2008) (holding that forging another's signature constitutes use of that person's name and qualifies as a means of identification under statute).

¹⁴ *United States v. Geeslin*, 236 F. App'x 885, 886-87 (5th Cir. 2007).

¹⁵ *United States v. Sandoval*, — F.3d —, 2011 WL 6762659 (7th Cir. 2011).

¹⁶ *United States v. Samet*, 200 F. App'x 15, 23 (2d Cir. 2006).

¹⁷ *United States v. Norton*, 176 F. App'x 992, 995-96 (11th Cir. 2006).

¹⁸ *United States v. Newsome*, 439 F.3d 181, 184-85 (3d Cir. 2006).

¹⁹ *United States v. Sash*, 396 F.3d 515, 523-24 (2d Cir. 2005).

²⁰ *United States v. Oates*, 427 F.3d 1086, 1089-90 (8th Cir. 2005); *United States v. Craig*, 343 F. App'x 766, 770 (3d Cir. 2009).

²¹ *United States v. Yummi*, 408 F. App'x 537, 540 (3d Cir. 2010).

²² *Craig*, 343 F. App'x at 770.

²³ USSG §2B1.1, comment. (n.4(C)(i)).

²⁴ *Id.*; see also *United States v. Alcantara*, 436 F. App'x 105, 109-10 (3d Cir. 2011); *United States v. Valdez*, 392 F. App'x 662, 664 (10th Cir. 2010). *But see United States v. Leach*, 417 F.3d 1099, 1106-07 (10th Cir. 2005) (holding that donors whose checks were stolen but not cashed were not victims under §2B1.1 without evidence of replacement costs to donors to resend checks).

²⁵ *United States v. Arnaout*, 431 F.3d 994, 999 (7th Cir. 2005).

²⁶ *United States v. Showalter*, 569 F.3d 1150, 1160 (9th Cir. 2009) (internal quotation marks omitted); *but see United States v. Naranjo*, 634 F.3d 1198, 1214 (11th Cir. 2011).

single defendant could be traced to over 50 victims.²⁷ The Ninth Circuit remanded for resentencing in a case in which the sentencing enhancement was not supported by evidence showing the 50 or more persons suffered actual loss in the form of pecuniary harm.²⁸

Undelivered United States mail is subject to a “special rule” that potentially impacts the number of persons who will qualify as victims under the referenced definition. Pursuant to this rule, a case that involves “a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 50 victims.”²⁹ In a case involving “a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.”³⁰ The government must still offer proof supporting the enhancement, but need not prove the identity of the victims. The enhancement will apply unless the defendant rebuts the presumption with specific proof.³¹

C. Reimbursement and Victims

Before the 2009 amendments to the victim definition took effect, for purposes of the enhancement at §2B1.1(b)(2), a victim had to sustain either actual loss or bodily injury.³² The applicability of the enhancement is often litigated in cases involving multiple individuals victimized by the fraud scheme, but who ultimately suffer no out-of-pocket loss because they are reimbursed by a bank, insurer, or other third party. Courts have differed as to whether such individuals have sustained an actual loss, thus meeting the guideline definition of victim. Accordingly, the applicability of the victim enhancement depends on the specific facts of the case and the circuit in which the case is brought.

The issue was first considered by the Sixth Circuit in *United States v. Yagar*, which held that the victim enhancement does not apply when individuals are reimbursed.³³ The defendant in *Yagar* stole checks and bank account information from unsuspecting individuals, deposited the checks in various accounts, and then withdrew portions of the deposited funds for her own use.³⁴ The owners of the stolen checks only temporarily lost funds and were ultimately reimbursed by

²⁷ See *Arnaout*, 431 F.3d at 999; but see *United States v. Gonzales*, 647 F.3d 41, 63 (2d Cir. 2011) (distinguishing *Arnaout* and stating that there is no suggestion in the guidelines that victims must be linked with specific losses).

²⁸ See *United States v. Pham*, 545 F.3d 712, 720-21 (9th Cir. 2008).

²⁹ USSG §2B1.1, comment. (n.4(C)(ii)(I)); see *United States v. Akinsuroju*, 166 F. App’x 748, 751 (5th Cir. 2006) (upholding victim enhancement based on theft from a United States Postal Service delivery vehicle); *United States v. Armour*, 154 F. App’x 830, 832 (11th Cir. 2005) (same).

³⁰ USSG §2B1.1, comment. (n.4(C)(ii)(II)); see *United States v. Niewald*, 185 F. App’x 839, 840-41 (11th Cir. 2006) (applying presumption to support determination that offense involved 250 or more victims).

³¹ See *Niewald*, 185 F. App’x at 841; *United States v. Telles*, 272 F. App’x 415, 418 (5th Cir. 2008).

³² As previously noted, the 2009 amendment broadened the definition of victim to include any individual whose means of identification was used unlawfully or without authority. See Part A(2), *supra*.

³³ 404 F.3d 967 (6th Cir. 2005).

³⁴ *Id.* at 968.

their banks.³⁵ The Sixth Circuit determined that the reimbursed account holders were not victims under the guidelines because they were fully reimbursed for their temporary financial losses.³⁶ The court stated that “the monetary loss [was] short-lived and immediately covered by a third-party [and thus there has not] been ‘actual loss’ or ‘pecuniary harm.’”³⁷ The court additionally opined, “the account holders here suffered no adverse effect as a practical matter from [the defendant’s] conduct.”³⁸ The court left open the possibility that in another situation a person who is ultimately reimbursed could nonetheless be a victim; however, the court did not describe the facts of such a case.³⁹ The reasoning of *Yager*, that fully-reimbursed individuals only temporarily subjected to financial losses are not victims under §2B1.1(b)(2), has been followed by the Third, Fifth, and Eighth Circuits.⁴⁰

In *United States v. Lee*,⁴¹ the Eleventh Circuit both disagreed with the Sixth Circuit’s reasoning and distinguished *Yager* on its facts. The *Lee* court suggested that the Sixth Circuit had failed to read the “actual loss” provision in §2B1.1, Application Note 3(A)(I), together with Application Note 3(E), which discusses credits against loss.⁴² The latter provision, the Eleventh Circuit noted, contains an inherent acknowledgment “that there was in fact an initial loss, even though it was subsequently remedied by recovery of collateral or return of goods.”⁴³ Thus, the court held that individuals who “suffered considerably more than a small out-of-pocket loss and were not immediately reimbursed by any third party” were victims under the guidelines.⁴⁴ The First, Second, Seventh, and Ninth Circuits joined the Eleventh in its interpretation of §2B1.1(b)(2).⁴⁵

³⁵ *Id.* at 971.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See *United States v. Kennedy*, 554 F.3d 415 (3d Cir. 2009) (holding that because account holders were reimbursed and the government offered no proof that they even knew their funds had been stolen, the account holders did not qualify as victims because they did not sustain any part of the actual loss); *United States v. Conner*, 537 F.3d 480 (5th Cir. 2008) (based on a “a plain reading” of the Application Notes, court held that credit account holders whose account numbers were used to make fraudulent purchases, and who were promptly reimbursed for the charges by the credit card companies, did not suffer any pecuniary harm and thus were not victims); *United States v. Icaza*, 492 F.3d 967 (8th Cir. 2007) (holding that when corporate parent only “sustained the actual loss,” it was improper to count as a victim each of the 407 retail stores from which the defendants had stolen).

⁴¹ 427 F.3d 881 (11th Cir. 2005).

⁴² *Id.* at 895.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See *United States v. Stepanian*, 570 F.3d 51 (1st Cir. 2009) (court noted that “the most natural reading of the phrase ‘sustain any part of’ in the application notes’ definition of ‘victim’ does not have a temporal limit or otherwise indicate that losses must be permanent”; therefore, defrauded card holders were victims even though their losses were reimbursed); *United States v. Abiodun*, 536 F.3d 162 (2d Cir. 2008) (although ultimately not finding the government had established credit card holders were victims, the court attempted to reconcile *Yager* and *Lee* by noting that both cases held “that individuals who are ultimately reimbursed by their banks or credit card companies can be considered ‘victims’ of a theft or fraud offense for purposes of U.S.S.G. § 2B1.1(b)(2) if—as a practical matter—they suffered (1) an adverse effect (2) as a result of the defendant’s conduct that (3) can be measured in monetary terms”); *United States v. Panice*, 598 F.3d 426 (7th Cir. 2010) (declining to follow and distinguishing

As noted above, in 2009, the Commission partially resolved this circuit conflict for identity theft cases. Amendment 726 amended the commentary to §2B1.1(b)(2) to expand the definition of victim in cases involving identity theft to include any individual whose means of identification was used unlawfully or without authority, regardless of whether any pecuniary harm was incurred.⁴⁶ The change was part of a multi-part amendment promulgated in response to a directive in the Identity Theft Enforcement and Restitution Act of 2008 to review guidelines applying to crimes involving identity theft.⁴⁷ In expanding the definition of victim in identity theft cases, the Commission noted that it had “determined that such an individual should be considered a ‘victim’ for purposes of subsection (b)(2) because such an individual, even if fully reimbursed, must often spend significant time resolving credit problems and related issues, and such lost time may not be adequately accounted for in the loss calculations under the guidelines.”⁴⁸

D. Court’s Loss Calculation and Victims

In cases involving the general definition of victim, not only must an individual sustain actual loss (*i.e.*, reasonably foreseeable pecuniary harm) in order to be considered a victim, but that loss must also have been included in the court’s loss calculation under the guidelines. For example, in a mail fraud case in which checks made out to a charitable organization were stolen (but not cashed), the Tenth Circuit held that while “the cost of sending in replacement checks was a reasonably foreseeable pecuniary harm of Defendant’s conduct,” the individual donors who wrote the checks were nonetheless not victims because “this harm was not included as part of the actual loss ‘determined [by the court] under subsection (b)(1).’”⁴⁹ Similarly, the Ninth Circuit has held that “financial costs to bank account holders that are incurred in the course of resolving damage done to those accounts by a fraud scheme may be included in the calculation of actual loss under § 2B1.1(b)(1) and may qualify the individuals who incurred those costs as ‘victims’ of the offense under § 2B1.1(b)(2).”⁵⁰ However, where such losses are not included in part of the actual loss amount determined under § 2B1.1(b)(1), the individual account holders

Yager because the definition of victim in § 2B1.1 “contains no temporal restriction; nor does it state that the loss must be permanent,” and “the fact that the victims were eventually reimbursed does not negate their victim status”); *United States v. Pham*, 545 F.3d 712 (9th Cir. 2008) (holding that “where a bank fraud offense results in initial losses by bank account holders of the funds in their accounts and a more permanent loss of those same funds by banks or other financial institutions when those institutions reimburse the account holders, both the account holders and the banks have suffered harms that are ‘pecuniary’ and ‘reasonably foreseeable’ for purposes of the Guidelines’ definition of ‘actual loss’”).

⁴⁶ USSG §2B1.1, comment. (n.4); USSG Supp. to App. C, amend. 726.

⁴⁷ USSG Supp. to App. C, amend. 726.

⁴⁸ *Id.*

⁴⁹ *Leach*, 417 F.3d at 1106-07. *See also United States v. Skys*, 637 F.3d 146, 155 (2d Cir. 2011); *Abiodun*, 536 F.3d at 169; *United States v. Armstead*, 552 F.3d 769, 783 (9th Cir. 2008).

⁵⁰ *Pham*, 545 F.3d at 721.

cannot be considered victims.⁵¹ It follows then, that if the total loss calculation is zero, there are no victims for purposes of applying the enhancement at §2B1.1(b)(2).⁵²

E. Corporate Losses, Aggregated Funds, and Joint Account Holders

Once actual loss has been established, the number of victims may still be at issue in the case of corporate losses or jointly held funds. In *United States v. Icaza*, the Eighth Circuit rejected the government’s argument that when a defendant steals from multiple retail stores in the same chain, each store is a victim for purposes of §2B1.1(b)(2).⁵³ A company representative testified that despite thefts occurring at individual Walgreens store locations, the corporation sustained the actual loss caused by the thefts because the Walgreens’ corporate structure does not give individual stores ownership of a pro rata share of corporate assets.⁵⁴ Thus, the court concluded, the corporation was the only victim under §2B1.1(b)(2).⁵⁵ In so holding, the court distinguished the case from an unpublished Eleventh Circuit opinion holding that individual members of an employee benefit plan could each be counted as victims.⁵⁶ That case was distinguishable, the Eighth Circuit determined, because each member of the benefit plan “‘owned a *pro rata* share of the plan assets and held them jointly and severally.’”⁵⁷

When a husband and wife are co-owners of a bank account, they each may be counted separately as victims “because both sustain a ‘part of the actual loss.’”⁵⁸ Likewise, where money belonging to multiple individuals has been aggregated but each individual maintains his or her interest, each individual may be counted as a victim. Thus, in a case where thousands of parents and students each paid money for tickets to a sham Christmas pageant, it did not matter that the schools had aggregated the money; each child or parent who had paid was a victim.⁵⁹

F. Late-coming Conspirators and Victims

In general, an offender is only responsible for harm to individuals who become victims after the conspirator joined the conspiracy. In the case of a Ponzi scheme, an individual who invested in the scheme before a conspirator joined the scheme, and then reinvested after, may be counted as a victim in determining the late-coming conspirator’s sentence.⁶⁰

⁵¹ *Id.* at 722.

⁵² *See e.g., United States v. Miller*, 588 F.3d 560, 567-68 (8th Cir. 2009) (“We have already determined that the district court did not clearly err in determining that the government failed to prove any actual loss in this case. It necessarily follows that there were no “victims” within the meaning of USSG § 2B1.1(b)(2)(A)(i).”).

⁵³ 492 F.3d at 969.

⁵⁴ *Id.* at 970.

⁵⁵ *Id.*

⁵⁶ *Id.* (citing *United States v. Longo*, 184 F. App’x 910 (11th Cir. 2006)).

⁵⁷ *Id.* (quoting *Long*, 184 F. App’x at 912).

⁵⁸ *See United States v. Densmore*, 210 F. App’x 965, 971 (11th Cir. 2006) (quoting USSG §2B1.1, comment. (n.1)).

⁵⁹ *See United States v. Ellisor*, 522 F.3d 1255, 1275 (11th Cir. 2008).

⁶⁰ *See United States v. Setser*, 568 F.3d 482, 497 (5th Cir. 2009).