

# Victim Primer (§2B1.1(b)(2))



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U.S. Sentencing Commission**

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## Introduction

This primer discusses some common issues regarding who may be counted as a victim under USSG §2B1.1 (“Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, and Offenses Involving Fraud or Deceit”). 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.<sup>1</sup>

### 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.”<sup>2</sup> Because most case law addresses the first part of this definition, this primer focuses on that part, and 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.”<sup>3</sup> A victim may be a government or government agency.<sup>4</sup>

The guidelines also define “actual loss” as the term is used in the victim definition. Actual loss means “the reasonably foreseeable pecuniary harm that resulted from the offense.”<sup>5</sup> “Pecuniary harm” is “harm that is monetary or that otherwise is readily measurable in money.

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<sup>1</sup> United States Sentencing Commission, *Guidelines Manual*, §2B1.1 (Nov. 2009).

<sup>2</sup> USSG §2B1.1, comment. (n. 1).

<sup>3</sup> *Id.*

<sup>4</sup> *United States v. Cunningham*, 593 F.3d 726 (8th Cir. 2010).

<sup>5</sup> USSG §2B1.1, comment. (n. 3(A)(i)). For relevant case law discussing issues regarding loss in more detail, see Loss Primer (§2B1.1(b)(1)) dated April 2010.

Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.”<sup>6</sup>

## 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.<sup>7</sup> 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.<sup>8</sup> 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).”<sup>9</sup>

“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 . . . .” Case law interpreting this term both in the context of aggravated identity theft convictions and under the guidelines provide examples of items that qualify as a means of identification. As might be expected, Social Security numbers, real names and dates of birth qualify as a means of identification.<sup>10</sup> Various circuit decisions provide additional examples: mortgage loan numbers;<sup>11</sup> a company name that includes the victim’s true name;<sup>12</sup> signatories on fraudulent checks;<sup>13</sup> personal telephone numbers;<sup>14</sup> leases;<sup>15</sup> bank account numbers;<sup>16</sup> forged

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<sup>6</sup> USSG §2B1.1, comment. (n.3(A)(iii)).

<sup>7</sup> USSG §2B1.1, comment. (n.4(E)); *see also* USSG, App. C, amend. 726.

<sup>8</sup> USSG §2B1.1, comment. (n.4(E)).

<sup>9</sup> USSG §2B1.1, comment. (n.1).

<sup>10</sup> *United States v. Armenta*, 2010 WL 1439674 (5th Cir. 2010) (unpub.) (Social Security card); *United States v. Simpson*, 283 F. App’x 747 (11th Cir. 2008) (names and Social Security numbers); *United States v. Jimenez*, 507 F.3d 13 (1st Cir. 2007) (names, dates of birth and Social Security numbers); *United States v. Lyle*, 239 F. App’x 529 (11th Cir. 2007) (names and Social Security numbers); *United States v. Scott*, 448 F.3d 1040 (8th Cir. 2006) (identification cards and Social Security cards); *United States v. Melendrez*, 389 F.3d 829 (9th Cir. 2004) (Social Security numbers).

<sup>11</sup> *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009); *United States v. Macias*, 345 F. App’x 272 (9th Cir. 2009).

<sup>12</sup> *United States v. Johnson*, 261 F. App’x 611 (4th Cir. 2008).

<sup>13</sup> *Id.* *See also United States v. Blixt*, 548 F.3d 882 (9th Cir. 2008) (forging another’s signature constitutes use of that person’s name and qualifies as a means of identification).

<sup>14</sup> *United States v. Geeslin*, 236 F. App’x 885 (5th Cir. 2007).

<sup>15</sup> *United States v. Samet*, 200 F. App’x 15 (2d Cir. 2006).

<sup>16</sup> *United States v. Norton*, 176 F. App’x 992 (11th Cir. 2006).

documents created with correct information;<sup>17</sup> police badges;<sup>18</sup> and credit card numbers;<sup>19</sup> and e-Bay accounts.<sup>20</sup>

### 3. *Undelivered United States Mail*

The guidelines include a special definition of victim applicable “in a case in which 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.”<sup>21</sup> 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.”<sup>22</sup> When mail containing checks to charities is stolen, but the checks are not cashed, the charity-recipients are counted as victims, but the donors are not.<sup>23</sup>

### B. Estimating Number of Victims

If the government seeks a sentencing enhancement based on number of victims, the government must prove the number by a preponderance of the evidence.<sup>24</sup> In a case where 17 million dollars was received by a fraudulent charity from over 17,000 donors, the court required some proof that the 300,000 dollars of loss attributable to a single defendant could be traced to over fifty victims.<sup>25</sup> The Ninth Circuit remanded for resentencing in a case where the sentencing enhancement was not supported by evidence showing the 50 or more persons suffered actual loss in the form of pecuniary harm.<sup>26</sup>

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 special rule, a case that involved “[a] United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 50 victims.”<sup>27</sup> In a case involving “[a] housing unit cluster box or any similar receptacle that contains multiple

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<sup>17</sup> *United States v. Newsome*, 439 F.3d 181 (3d Cir. 2006).

<sup>18</sup> *United States v. Sash*, 396 F.3d 515 (2d Cir. 2005).

<sup>19</sup> *United States v. Oates*, 427 F.3d 1086 (8th Cir. 2005); *United States v. Craig*, 343 F. App’x 766 (3d Cir. 2009).

<sup>20</sup> *Craig*, 343 F. App’x 766, 769.

<sup>21</sup> USSG §2B1.1, comment. (n. 4(C)(i)).

<sup>22</sup> *Id.* Effective November 1, 2001, this application note replaced a guidelines enhancement of six levels if undelivered mail was taken, without regard to the number of recipients. See USSG App. C, amend. 617.

<sup>23</sup> *United States v. Leach*, 417 F.3d 1099, 1106 (10th Cir. 2005). Note, however, that if the loss calculation includes donors’ costs of purchasing replacement checks, buying postage to send replacement checks, or other such collateral expenses, then the donors may be counted as victims. *Id.*

<sup>24</sup> *United States v. Arnaout*, 431 F.3d 994 (7th Cir. 2005).

<sup>25</sup> *Id.*

<sup>26</sup> *United States v. Pham*, 545 F.3d 712 (9th Cir. 2008).

<sup>27</sup> USSG §2B1.1, comment. (n. 4(C)(ii)(I)); see *United States v. Akinsuroju*, 166 F. App’x 748 (5th Cir. 2006) (upholding victim enhancement in case where court applied presumption for theft from a United States Postal Service delivery vehicle); *United States v. Armour*, 154 F. App’x 830 (11th Cir. 2005) (same.) .

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.”<sup>28</sup> The government must still offer proof supporting the enhancement, but need not prove the identity of the victims. If the defendant fails to rebut the presumption, the enhancement will apply.<sup>29</sup>

### C. Reimbursement

Before the 2009 amendment 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.<sup>30</sup> 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 on whether such individuals have sustained an “actual loss,” thus meeting the guideline definition of “victim.” In such cases, where the ultimate financial loss falls on the institution and not the individuals, circuit courts have reached different conclusions regarding the applicability of this specific offense characteristic.

The issue was first considered by the Sixth Circuit in a case in which the defendant used stolen checks to deposit funds into bank accounts using stolen bank account information, and then withdrew portions of the deposited funds.<sup>31</sup> Thus, the scheme involved taking money from the accounts of the owners of the stolen checks. The owners of the stolen checks were reimbursed for the lost funds by the banks.<sup>32</sup> The Sixth Circuit held that the reimbursed account holders were not victims under the guidelines, since “the monetary loss is short-lived and immediately covered by a third-party [and thus there has not] been ‘actual loss’ or ‘pecuniary harm.’”<sup>33</sup> “In sum,” the court opined, “the account holders here suffered no adverse effect as a practical matter from Yager’s conduct.”<sup>34</sup> The court left open the possibility that in another situation a person who is ultimately reimbursed could nonetheless be a victim, but did not describe how the facts in such a case might look.<sup>35</sup>

The Fifth Circuit cited and followed *Yager*, holding 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

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<sup>28</sup> USSG §2B1.1, comment. (n. 4(C)(ii)(II)); see *United States v. Niewald*, 185 F. App’x 839 (11th Cir. June 6, 2006) (applying presumption to support determination that offense involved 250 or more victims).

<sup>29</sup> *United States v. Adams*, 2009 WL 260578 (5th Cir. 2009).

<sup>30</sup> As previously noted, the 2009 amendment broadens the definition of victim to include any individual whose means of identification was used unlawfully or without authority .

<sup>31</sup> *United States v. Yager*, 404 F.3d 967, 968 (6th Cir. 2005).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 971.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

victims.<sup>36</sup> The Fifth Circuit wrote that “a plain reading” of the Application Notes dictated this result.<sup>37</sup>

The Third Circuit reached the same conclusion in a mail fraud and false statement case, citing both *Yagar* and *Conner*.<sup>38</sup> The defendant worked as a representative payee liaison for a non-profit corporation that managed funds payable to beneficiaries of the Social Security Administration, the Department of Veterans Affairs, and the Railroad Retirement Board who were unable to manage their own financial affairs. In this capacity, the corporation received benefit payments, held funds in trust, and made disbursements to cover beneficiaries' expenses, such as rent, utilities, and food. The defendant's fraud scheme involved writing checks, mostly payable to cash, from the accounts of 34 beneficiaries. The corporation and its insurer fully replenished the accounts that the defendant looted.<sup>39</sup> The Third Circuit concluded that because these 34 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.<sup>40</sup>

In a case before the Ninth Circuit, the government argued that even if bank account holders who had been reimbursed by their banks for fraudulent withdrawals did not ultimately bear the financial loss, that they had nonetheless “suffered actual loss in the form of making phone calls . . . to their banks, taking off work, driving to their banks, and borrowing money to make ends meet.”<sup>41</sup> The court agreed, holding that both the bank and the account holders had suffered harm that was both pecuniary and reasonably foreseeable under the guidelines, and that the individuals did qualify as victims. The court did, however, remand for resentencing because the government's proof failed to show that 50 or more victims had suffered this type of actual harm.<sup>42</sup>

The Eleventh Circuit expressly disagreed with the Sixth Circuit and those that had followed *Yager*. The Eleventh Circuit 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), discussing credits against loss.<sup>43</sup> 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.” Thus, the Eleventh Circuit

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<sup>36</sup> *United States v. Conner*, 537 F.3d 480, 489 (5th Cir. 2008). This case was decided before the Commission promulgated Amendment 726 expanding the definition of victim for purposes of identity theft cases. Under the current version of the *Guidelines Manual*, the credit account holders discussed in *Conner* would meet the guideline definition of victim for purposes of this enhancement.

<sup>37</sup> *Id.* at 489.

<sup>38</sup> *United States v. Kennedy*, 554 F.3d 415 (3d Cir. 2009).

<sup>39</sup> *Id.* at 417-18.

<sup>40</sup> *Id.* at 419. It is not clear from the recitation of the facts in *Kennedy* whether the expanded victim definition could have applied.

<sup>41</sup> *United States v. Pham*, 545 F.3d 712, 716 (9th Cir. 2008).

<sup>42</sup> *Id.* at 722-23.

<sup>43</sup> *United States v. Lee*, 427 F.3d 881, 895 (11th Cir. 2005).

held that individuals who “suffered considerably more than a small out-of-pocket loss and were not immediately reimbursed” were victims under the guidelines.<sup>44</sup>

The First Circuit joined the Eleventh, noting 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.”<sup>45</sup> In that case, defendants fraudulently obtained debit card numbers and PINs, then used those numbers to make purchases and ATM withdrawals. Banks reimbursed the card holders for the purchases and withdrawals. Noting that the situation is different from a situation in which unauthorized credit card charges are reversed before the card holder pays, the circuit court held that “even where losses are reimbursed, unauthorized withdrawals from bank accounts cause real economic harm.”<sup>46</sup>

The Second Circuit attempted to reconcile the *Yager* and *Lee* split 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.”<sup>47</sup> The court held that credit card holders who were reimbursed for fraudulent charges could be victims because the time the individuals had to spend to secure reimbursement “could be measured in monetary terms.”<sup>48</sup>

By contrast, in a case where a defendant charged Medicaid for services that had not actually been provided, using individuals’ Medicaid account numbers, the Seventh Circuit held that Medicaid account holders were not victims. Because none of the individuals paid for a service they did not receive and none were denied services because of the defendant’s exhaustion of their benefits, the government failed to demonstrate that these individuals suffered any pecuniary harm.<sup>49</sup>

As noted above, in 2009, the Commission partially resolved this circuit split for identity theft cases. Amendment 726 amended the commentary to §2B1.1(b)(2) to expand the definition of victim in cases involving a means of identification to include any individual whose means of identification was used unlawfully or without authority,<sup>50</sup> regardless of whether any pecuniary harm was incurred. 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 that apply to crimes involving identity theft.<sup>51</sup> In expanding the definition of victim in identity theft cases,<sup>52</sup> the Commission noted that it had “determined that such an individual should be

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<sup>44</sup> *Id.*

<sup>45</sup> *United States v. Stepanian*, 570 F.3d 51, 55 (1st Cir. 2009).

<sup>46</sup> *Id.* at 56.

<sup>47</sup> *United States v. Abiodun*, 536 F.3d 162, 168-69 (2d Cir. 2008).

<sup>48</sup> *Id.* The court concluded, however, that those individuals could not be counted as victims in this case because the monetary measurement of their loss had not been included in the loss calculation. Accordingly, the court vacated the sentence and remanded for resentencing.

<sup>49</sup> *United States v. Sutton*, 582 F.3d 781 (7th Cir. 2009).

<sup>50</sup> USSG §2B1.1, comment. (n. 4); USSG Supp. to App. C, amend. 726.

<sup>51</sup> USSG Supp. to App. C, amend. 726.

<sup>52</sup> *Id.*

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.”<sup>53</sup>

#### D. Loss Must Be Part of Loss Calculation

In cases involving the general definition of victim, not only must an individual sustain actual pecuniary loss in order to be considered a victim, but that loss must also have been included in the guidelines loss calculation. Thus, in a mail fraud case where checks made out to a charity 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,” those individuals were nonetheless not victims because “this harm was not included as part of the actual loss ‘determined under subsection (b)(1).’”<sup>54</sup> It follows then, that if the total loss calculation is zero, then there can be no victims.<sup>55</sup> Other courts have also suggested that such incidental costs could be considered loss, and thus may qualify individuals who suffered no other actual loss as victims for guidelines calculation purposes.<sup>56</sup>

#### E. Aggregated funds, joint account holders, and individual retail outlets

Once actual loss has been established, the number of victims may still be at issue in the case of jointly held funds or corporations. The government made, and the Eighth Circuit rejected, the argument that where a defendant stole from multiple stores in the same chain, each store should be considered a victim for purposes of §2B1.1(b)(2).<sup>57</sup> A company representative testified that it was the corporation that sustained the actual loss of the thefts.<sup>58</sup> Thus, the court concluded, the corporation was the only victim under §2B1.1(b)(2).<sup>59</sup> In so holding, the court distinguished the case from an unpublished Eleventh Circuit case cited by the government in which that court held that individual members of an employee benefit plan could each be counted as victims, rather than counting the plan as a single victim.<sup>60</sup> That case was distinguishable, the Eighth Circuit noted, because there each member “owned a *pro rata* share of the plan assets and held them jointly and severally.”<sup>61</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> *United States v. Leach*, 417 F.3d 1099, 1106 (10th Cir. 2005). *See also United States v. Abiodun*, 536 F.3d 162, 168-69 (2d Cir. 2008); *United States v. Armstead*, 552 F.3d 769, 783 (9th Cir. 2008).

<sup>55</sup> *United States v. Miller*, 588 F.3d 560 (8th Cir. 2009).

<sup>56</sup> *See United States v. Pham*, 545 F.3d 712 (9<sup>th</sup> Cir. 2008) (value of time taken off work to resolve account problems, collection agency fees, replacement checks, ink and paper to write letters, *inter alia*, were part of reasonably foreseeable loss, and qualified individuals as victims).

<sup>57</sup> *United States v. Icaza*, 492 F.3d 967 (8th Cir. 2007).

<sup>58</sup> *Id.* at 969.

<sup>59</sup> *Id.* at 970.

<sup>60</sup> *Id.*, citing *United States v. Longo*, 184 F. App’x 910 (11th Cir. 2006).

<sup>61</sup> *Id.*



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.’”<sup>62</sup> 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.<sup>63</sup> Thus, in a case where thousands of parents and students each paid money, which was collected by schools to pay 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 money was a victim.<sup>64</sup>

F. Late-coming Conspirators

In general, an offender is only responsible for individuals who became 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 later-coming conspirator’s sentence.<sup>65</sup>

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<sup>62</sup> *United States v. Densmore*, 210 F. App’x 965 (11th Cir. 2006).

<sup>63</sup> *United States v. Longo*, 184 F. App’x 910 (11th Cir. 2006).

<sup>64</sup> *United States v. Ellisor*, 522 F.3d 1255, 1275 (11th Cir. 2008).

<sup>65</sup> *United States v. Setser*, 568 F.3d 482 (5th Cir. 2009).