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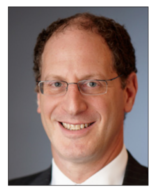
WHITE-COLLAR CRIME

Expert Analysis

Calls for Sanity In White-Collar Sentencing



By **Robert J. Anello**

And **Richard F. Albert**

Criminal justice policymakers have begun to recognize that, with respect to business offenses, too often the harsh penalties called for by the U.S. Sentencing Guidelines do not fit the crime. The relationship between increasingly high white-collar sentences and the guidelines' focus on "loss" as the key factor in calculating an appropriate sentence is at the center of the discussion. Recent calls for sentence reform and more measured sentences compete with increased public demand for a stronger government response to the latest financial crisis. While Congress ponders the issue, courts, including recently the U.S. Court of Appeals for the Second Circuit, are beginning to act.

The U.S. Sentencing Commission also apparently recognizes that something needs to be done to the white-collar crime guidelines. The commission has announced that the potential amendment of guidelines for economic crimes, including securities, health care, mortgage, and other fraud offenses, is a priority.[1] Just last month, it conducted a two-day fact-gathering meeting in New York to hear from prosecutors, defense lawyers, and judges on the issue of white-collar sentencing. Critics of the current guidelines, including the American Bar Association and defense attorneys, argue that the structure overemphasizes the loss or "intended loss" of an offense, dwarfing other relevant factors such as the defendant's intent or the degree of harm caused to victims.[2]

Some federal prosecutors disagree. Appearing at the symposium on white collar sentencing in New York, U.S. Attorney for the Northern District of California Melinda Haag asserted that the unbalanced impact of the loss calculation has only been an issue in a handful of high-profile cases, while the majority of economic crime cases involve lower loss amounts where the guidelines assist in the calculation of "tough but fair sentences."[3] Although the commission has not issued a statement about how it will use the information gathered last month, any proposed guidelines amendments are likely to be submitted to Congress in May 2014, in keeping with the commission's typical schedule.

Meanwhile, circuit and district courts struggle with how to evaluate the reasonableness and thus, validity, of loss calculations and sentences imposed in white collar criminal cases. A thoughtful and pointed concurrence in the Second Circuit's recent decision in *United States v. Corsey*,[4] written by U.S. District Court Judge for the District of Connecticut Stefan R. Underhill, sitting by designation, tackles these issues head on.

The defendants in *Corsey* were sentenced to the statutory maximum of 20 years imprisonment after being found guilty of engaging in a scheme variously described by the court as "absurd," "ridiculous," and "clumsy, almost comical" to procure funding for an imaginary oil pipeline they proposed to build across the Russian tundra in Siberia. Although the scheme did not come to fruition, the defendants' sentences were driven upward because their "intended loss" was equal to the $3 billion of funding they sought.

Underhill concurred with the majority's conclusion that the 20-year sentences were procedurally unreasonable, but took issue with the court's failure to consider the substantive reasonableness of the sentences in a case in which "the conduct underlying these convictions is more farcical than dangerous."[5] His opinion takes issue with the majority for passing on the opportunity to give meaningful guidance to sentencing courts, specifically on the issue of what he perceives as the "fundamentally flawed" loss guidelines, and the court's resistance to consider the substantive reasonableness of the sentences—a resistance evidenced by the fact that the Second Circuit has held that a sentence is substantively unreasonable on only a couple of occasions.[6]

Majority Opinion in 'Corsey'

The four defendants in *Corsey* were caught when they attempted to sell their pipeline deal to an FBI informant, Thomas Re, who worked as a networker for a small brokerage firm that matched companies looking for

ROBERT J. ANELLO *and* RICHARD F. ALBERT *are partners at Morvillo Abramowitz Grand Iason & Anello.* GRETCHAN R. OHLIG, *an attorney, assisted in the preparation of this article.*

financing with potential lenders. Re began working for the FBI when he was arrested for selling fake vending machine routes to snack food companies in his previous job. To lighten his sentence, Re agreed to serve as an FBI informant.

The defendants, purporting to represent the central bank for scores of Native American governments including the long-extinct Yamasee Indian tribe, approached Re in his new position at the brokerage firm. They told him they were seeking to borrow $3 billion to build the Siberian pipeline and offered $5 billion in Treasury notes as collateral for the loan. Although Re quickly came to the conclusion that the defendants' plan was a farce, at the FBI's request he pretended to obtain financing for the deal in order to gather incriminating information about the defendants. Re recorded the defendants' "escalating series of lies" and shared emails and crudely doctored documents purporting to authenticate the supposed collateral: Treasury notes that the defendants claimed, for safe keeping, were hidden in Austria. Ultimately, the defendants were arrested and brought to trial. After being found guilty, all the defendants were sentenced, in separate proceedings, to the statutory maximum of 20 years in jail.

The defendants appealed both the convictions and the sentences. One defendant's appeal was severed, and a panel of the Second Circuit consisting of Chief Circuit Judge Robert Katzmann, Circuit Judge Richard C. Wesley, and Judge Underhill heard the appeal of the remaining three defendants.

The defendants argued that their convictions were unsupported by the evidence because the underlying misrepresentations were so far-fetched as to be immaterial and, therefore, insufficient to support a finding of fraud. The Second Circuit rejected this argument, holding that a reasonable jury could find that the misrepresentations were material, "regardless of whether [potential investors] should have heeded them or not." Indeed, the defendants' representations initially led Re to take the deal to his colleagues, who, after conducting a brief Internet search, concluded it was ridiculous. Because the initial misrepresentations were found to be material, the court did not reach the broader question of whether a defendant could be liable for an objectively absurd lie if a subjectively sophisticated victim would never believe it.

The defendants also argued that their sentences were procedurally and substantially unreasonable. Examining whether the sentencing court had committed any procedural error, the court noted that a procedurally reasonable sentence begins with a correct calculation of the applicable guidelines range and follows with a consideration of the factors listed in 18 U.S.C. §3553(a). In *Corsey*, each defendant's base offense level of 7 was increased by a whopping 30 points because of the intended loss of $3 billion. In addition, the government asserted a number of enhancements that further increased the offense level.

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At sentencing each defendant argued that the loss amount grossly overstated the seriousness of the offense warranting a downward departure and that some of the additional enhancements were inappropriate. The district court failed to address the defendants' arguments about the intended loss, however, and further dismissed technical arguments about each enhancement, summarily calculating the guidelines range enough to know that the sentence would exceed 20 years, thereby triggering the 20-year statutory maximum, which it was required to impose pursuant to Section 5G1.1 of the guidelines.[7]

The Second Circuit held that the district court's approach was valid and that it was "free to prioritize efficiency over an exercise in futility." According to the Second Circuit, procedural error may occur where a sentencing court fails to calculate the guidelines range because it intends to depart or impose a non-guidelines sentence, but not where a court "bypasses a minefield of tricky determinations and still arrives at the correct guidelines recommended sentencing range." Thus, the sentencing court fulfilled its duty by calculating the guidelines range sufficiently to conclude that the recommended period of incarceration would be the 20-year statutory maximum.

The Second Circuit then turned to the question of whether the district court sufficiently weighed the factors in §3553(a), which mandates consideration of the nature and circumstances of the offense, the history and characteristics of the defendant, and the need for the sentence imposed, among other factors. In fact, the district court made no specific mention of the §3553(a) factors at any of the three sentencing hearings, with the exception of a passing reference, on one occasion, to the deterrent effect of the sentence. Although a sentencing court need not utter "robotic incantations" about each factor, it must explain enough about the sentence for a reviewing court to be assured that the principles enunciated in the statute were considered.[8]

Here, the Second Circuit held that although the 20-year maximum sentences had "an air of inevitability," the record was unclear about whether the district court incorrectly assumed that imposing the statutory maximum sentence was per se reasonable. According to the court, it would be procedural error if the district court treated 240 months as the only reasonable sentence (because the statutory maximum prohibited imposition of a true guidelines sentence closer to life), rather than choosing to impose the maximum sentence after a full consideration of the factors set forth in §3553(a). Because the ambiguous record did not lend itself to either conclusion, the Second Circuit vacated the sentences and remanded for the district court to clarify its decision.[9]

Judge Underhill's Opinion

Although Underhill's "concurrence" agrees with the majority's conclusion that the sentences should be vacated and remanded for procedural error, the opinion strongly criticizes the majority's failure to reach the question of the substantive reasonableness. Procedural review looks at whether the sentencing court took the appropriate factors into consideration at sentencing. Substantive review focuses on the sufficiency of the factors the sentencing court considered.[10] Because sentencing determinations are accorded a great deal of discretion, a sentence will only be found to be substantively unreasonable in those "exceptional" cases where the sentence imposed is "shockingly high, shockingly low, or otherwise unsupportable as a matter of law."[11]

Substantive review of sentences provides a means for addressing "systemic problems" with the sentencing guidelines. But, as Underhill noted: "[i]f substantive review of sentences actually exists other than in theory, it must be undertaken at least occasionally."

In Underhill's view, such an approach in this case would have allowed the court to weigh in on the merits of what he characterized as the "fundamentally flawed" guidelines, the substance of which "are magnified where…the entire loss consists of intended loss."[12] Because of these flaws, "sentences in high-loss cases…remain wildly divergent as some district judges apply the loss guidelines unquestioningly while others essentially ignore it."[13] Turning to the case at hand, Underhill noted that although the intended loss amount was the single factor driving the guidelines range, the conspiracy itself, which he described as "a comedic plot outline for a 'Three Stooges' episode," involved no actual loss, no probable loss, and no victim. Opining that "none of the section 3553(a) factors, singly or in combination, can justify these shockingly high punishments, which are far greater than necessary to punish or deter appellants' conduct," Underhill argued that the sentences should have been reversed on the merits.

Flawed Loss Guidelines

Underhill pointed out that the guidelines' methodology of treating intended loss as a "proxy for the seriousness of the crime" was fundamentally flawed. As applied in *Corsey*, use of the $3 billion loss amount resulted in the mistreatment of "this pathetic crime as a multi-billion dollar fraud—that is, one of the most serious frauds in the history of the federal courts."[14] This point served to buttress Underhill's general complaint that the loss guidelines have become divorced from the objectives of §3553(a) and fail to guide district courts.

The opinion traces the history of the fraud guidelines and notes that since their incarnation, Congress has directed an increase in offense level calculations in the fraud guidelines on three separate occasions, resulting in the multiple additions of offense level points for high-dollar-value crimes. Congressional action in this regard typically has been taken in response to a financial crisis or market collapse, "without the benefit of empirical study of actual fraud sentences by the Sentencing Commission."

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Further, Underhill criticized the underlying assumption of the loss guidelines that all loss is the same. "A fraud that results in the loss of even a few thousand dollars by an elderly or sick person who, as a result of the loss, becomes unable to afford the necessities of life or medical care is much more serious than a fraud that results in ten or hundred times that loss by a large corporation able to absorb the financial consequences without a need to close plants, fire employees, or even declare the loss as material in public finance reports. Simply put, contrary to the assumption underlying the loss guideline, not all dollars of loss are fungible."[15]

Conclusion

Underhill does not stand alone among federal judges who have spoken out forcefully about the serious flaws in sentencing guidelines. Like Second Circuit Judge Barrington D. Parker Jr.'s opinion addressing the child pornography guideline in *Dorvee*, U.S. District Court for the Eastern District of New York Judge John Gleeson's opinion in *Ovid*, and Southern District of New York Judge Jed S. Rakoff's opinion in *Adelson*,[16] Judge Underhill's concurrence shines a well-needed light on guidelines that result in unreasonably punitive sentences.

The facts of *Corsey* provide a vivid illustration of how the seriousness of a defendant's criminal conduct does not always turn on the amount of such loss "any more than would the seriousness of a scheme to sell the Brooklyn Bridge turn on whether the sale price was set at three thousand dollars, three million dollars, or three billion dollars." Unlike the proverbial sale of the Brooklyn Bridge, the need for reform in white-collar sentencing is real. The work of the Sentencing Commission in this regard is timely and important.

1. News Release, United States Sentencing Commission, "U.S. Sentencing Commission Selects Policy Priorities for 2013-2014 Guidelines Amendment Cycle" (Aug. 15, 2013).
2. Nate Raymond, "U.S. Commission Reviews White-Collar Sentences," Reuters (Sept. 17, 2013).
3. Nate Raymond, "U.S. Prosecutor Cautions Against White-Collar Sentencing Revamp," Reuters (Sept. 18, 2013).
4. *United States v. Corsey*, 723 F.3d 366 (2d Cir. 2013).
5. Id. at 377.
6. See *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010); *United States v. Trupin*, 475 F.3d 71 (2d Cir. 2007).
7. Section 5G1.1(a) states: "Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence."
8. 723 F.3d at 374 (citing *Rita v. United States*, 551 U.S. 338, 357 (2007).
9. The court further held that remand was appropriate because the sentencing court failed to resolve "significant arguments" regarding the intended loss calculations raised by the defendants and wrongly incorporated by reference comments made during one defendant's sentencing hearing into another defendant's sentencing.
10. *United States v. Gall*, 128 S.Ct. 586, 597 (2007).
11. 723 F.3d at 378 (citing *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009)).
12. The impact of the guidelines' reliance on intended loss is especially significant in economic crimes cases such as securities fraud. The Second Circuit recently reiterated its position that in a criminal securities fraud case, the government need not prove reliance by a victim on a defendant's alleged misrepresentation. *United States v. Vilar*, __F.3d__, 2013 WL 4608948 (2d Cir. Aug. 30, 2013). Thus, a defendant might be convicted of securities fraud—despite the fact that no one relied on his alleged misrepresentations—and end up spending multiple years in jail because the loss amounts potentially attributable to that ineffectual misrepresentation—"intended" loss amounts, not actually inflicted—were high: an absurd result that does not serve the purposes of the criminal justice system.
13. 723 F.3d at 378.
14. Id. at 379.
15. Id. at 381.
16. *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010); *United States v. Ovid*, 2010 WL 3940724 (E.D.N.Y. Oct. 1, 2010); *United States v. Adelson*, 441 F.Supp.2d 506 (S.D.N.Y. 2006).