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WHITE-COLLAR CRIME

Expert Analysis

Waning Influence of Sentencing Guidelines in White-Collar Cases


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Although the federal sentencing guidelines continue to play a role in white-collar sentencing, this role has diminished significantly. The restoration of sentencing judges' discretion in the post-Booker era has rendered the guidelines—widely perceived as unduly punitive—less important in the white-collar context. Recent high-profile cases involving, for example, several ex-Madoff employees and Bob McDonnell, the former governor of Virginia, demonstrate how sentencing judges and even federal prosecutors increasingly are rejecting the harsh sentences called for by the guidelines.

The U.S. Sentencing Commission has responded to complaints about the guidelines' application by proposing a series of amendments to the guidelines governing economic crimes. Although they appear to be a step in the right direction, the revisions proposed by the commission do not go far enough to reform the white-collar sentencing scheme.

Guidelines' Focus on Loss

For 20 years after they were promulgated pursuant to the Sentencing Reform Act of 1984, the guidelines "exerted near total dominion over the field of federal sentencing."[1] Sentencing judges' discretion was sharply curtailed, and rigid application of the guidelines often resulted in excessively harsh punishments. The Supreme Court's 2005 decision in *United States v. Booker*,[2] ruling that the guidelines may only advise a trial court's individualized sentencing determination, was a watershed event in restoring reasonableness to the sentencing process. Although sentencing judges were to be guided by the analysis set forth in the guidelines, they were once again empowered to impose sentence based on the wider range of sentencing factors articulated in 18 U.S.C. §3553(a), the federal sentencing statute.

Since *Booker*, the percentage of federal sentences imposed below the guideline range doubled from 2007 to 2013.[3] In 2013, the most recent year for which statistics have been released, 14.6 percent of the 78,628 cases prosecuted in the United States received a below guideline range sentence pursuant to Booker and the factors set forth in Section 3553(a). The percentage was much higher in the U.S. Court of Appeals for the Second Circuit—the capital of complex business crime prosecutions—with 32.6 percent of all cases involving a below guideline sentence.[4]

The increase in below guideline range sentences in white-collar cases has been a response to the particularly severe sentences driven by the fraud loss table set forth in Section 2B1.1 of the guidelines.[5] Under the guidelines, loss currently is not defined simply as the amount of money the defendant made or the amount of money the victims lost, but rather "the greater of actual loss or intended loss."[6] Intended loss has been interpreted as the "reasonably foreseeable loss" resulting from the crime, which in many cases may be higher than either the actual loss incurred or the amount of loss a defendant knew could result from his scheme. The loss calculation can add up to 30 levels to a defendant's base offense level for the crime, which may result in an increase in the length of a sentence of up to 262 months,[7] without the consideration of additional sentencing enhancements.

The guidelines' undue focus on loss obscures the myriad other factors that impact a defendant's true culpability in an individual case. As articulated by Southern District of New York Judge Jed

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S. Rakoff, "[T]he…Sentencing Commission chose to focus largely on a single factor as the basis for enhanced punishment: the amount of monetary loss or gain occasioned by the offense. By making a Guidelines sentence turn, for all practical purposes, on this single factor, the Sentencing Commission effectively ignored the statutory requirement that federal sentencing take many factors into account, see 18 U.S.C. §3553(a), and by contrast effectively guaranteed that many such sentences would be irrational on their face."[8]

In one recent case, *United States v. Litvak*, District of Connecticut Judge Janet C. Hall noted the "overwhelming effect" of loss on the guidelines calculations. Litvak was a senior trader found guilty of 10 counts of securities fraud and related crimes for misleading highly sophisticated customers about what he had paid for certain asset-backed bonds he was selling to them. The case received significant attention, in part based on the view that the conduct for which Litvak was prosecuted "wasn't far from the norm on Wall Street or other high-pressure sales environments."[9] Prosecutors sought a sentence of nine years in accordance with the guideline calculations. In sentencing Litvak to 24 months in prison, Judge Hall stated,

> I'm not, in effect, saying I'm ignoring the guidelines. But I think to the extent that they have been driven to where they are by a loss table which is not based on empirical data and which overwhelms the rest of the guideline considerations such that it's almost without regard to the rest of the characteristics in this case, in my opinion, I need to really scrub through the nature and circumstances and decide what that informs my judgment to be as opposed to be taking a guideline number that's derived in princip[al] part by the sheer dollar amount….[10]

Real World Consideration

As recognition of the guidelines' disproportionate focus on loss amount has become more widespread, the trend of courts declining to sentence within their confines appears to have gained momentum. Some recent high-profile cases illustrate how even the prosecution has recognized the problem by proposing sentences below the guidelines range.

Madoff Employee Cases. In 2014, five former employees of Bernard Madoff's firm were convicted for knowingly assisting in Madoff's multibillion-dollar Ponzi scheme. The defendants, who have been variously described as low-level" and "ministerial" employees,[11] consistently have taken the position that Madoff deceived them into believing the business was legitimate.

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Guideline calculations called for each defendant to receive a life sentence in prison. Although federal prosecutors sought significant sentences for each of the defendants, they apparently appreciated that the defendants' roles did not justify the severe sentences recommended by the guidelines, proposing below-guideline sentences to the court. Southern District of New York Judge Laura Taylor Swain sentenced the defendants to terms of imprisonment ranging from two-and-a-half to 10 years, well below both the ranges calculated by the guidelines and the sentences sought by prosecutors.[12]

Prosecutors repeatedly urged Judge Swain to avoid issuing lesser sentences because of concerns about their precedential impact. "Judges will have to explain how small-time crooks in front of them were worse than the defendants in this case," argued Matthew Schwartz, an assistant U.S. attorney.[13] Defense lawyers argued that it was inappropriate for the court to consider how future defendants would rely on the case.

For her part, Judge Swain recognized that her decisions would be scrutinized, noting that "it was one reason she had been careful to describe her findings of law regarding the sentencing of each defendant."[14] Indeed, each sentencing lasted at least two hours. On Jan. 9, 2015, Justice Department prosecutors filed a notice of their intent to appeal the sentences to the Second Circuit.

McDonnell Case. In January 2015, former Virginia Governor Bob McDonnell was sentenced to two years in prison following his conviction on corruption charges resulting from his relationship with Virginia businessman, Jonnie R. Williams. The case against McDonnell was the subject of a great deal of attention and controversy, as defense lawyers insisted the government was stretching anticorruption laws to cover "routine political courtesies."[15]

Government prosecutors sought a sentence of 6½ years imprisonment, which was below the 10 to 13 years calculated by the Probation Department pursuant to the guidelines. Defense attorneys argued for no prison term, requesting a sentence of 6,000 hours of community service. In sentencing McDonnell, Judge James R. Spencer of the U.S. District Court provided a brief history of the sentencing guidelines and said, "Imagine if these guidelines were mandatory and the court had no choice but to sentence Governor McDonnell to seven or eight years in prison. That would be unfair. It would be ridiculous under these facts. But somebody somewhere thought that was fair. Maybe it is fair when it is somebody else's husband, or brother, or father. But it never seemed fair to me."[16]

Recently Proposed Changes

These cases make clear the general consensus among practitioners, prosecutors and judges that the recommended guideline sentences are unreasonable in white-collar cases. Sparked by criticism that the fraud guidelines were "fundamentally broken,"[17] the U.S. Sentencing Commission undertook a multi-year study, and on Jan. 9, 2015, published for comment proposed amendments including significant revisions to the loss guidelines governing economic crimes set forth in Section 2B1.1.

Perhaps the most significant proposed revision is the suggestion to change the definition of "intended loss" under the guidelines to be more reflective of a defendant's culpability and intent. The proposed revision changes the definition of "intended loss" under the guidelines from the "pecuniary harm that was intended to result from the offense" to that harm "that the defendant purposely sought to inflict." This amendment would insure that courts engage in a subjective inquiry into the loss amount intended by the defendant, rather than the supposedly objective analysis of the intended loss—an area on which courts currently are divided.[18]

Second, the commission proposes to change the victims' table to focus on the type of hardship suffered by victims rather than the sheer number of victims. Third, the commission has proposed amendments to the "sophisticated means" enhancement to consider an individual defendant's conduct and whether he or she used sophisticated means rather than the use of sophisticated means in the offense as a whole. Finally, in "fraud on the market" cases, the commission proposes to use gain, rather than loss, to calculate the harm attributable to a defendant and to include a threshold enhancement to the sentencing level related to gains.

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Although such changes might result in a lower sentencing range in some cases, the proposed changes do not go far enough in modifying a guideline scheme in which loss amount would remain the overwhelming driving factor, continuing to result in excessively punitive sentencing ranges.[19] Loss amount, or gain amount, no matter how calculated, cannot serve as a valid substitute for culpability. The guidelines as presently structured do not and cannot account adequately for the many other factors that may be of equal or greater importance in determining a just sentence in an individual case.

Conclusion

Time and again, the guidelines have proven to be excessively punitive in white-collar cases. As a result, they effectively have caused their own demise by pricing themselves out of the market—resulting in their widespread rejection by courts and occasionally even by prosecutors. The revisions proposed by the U.S. Sentencing Commission essentially acknowledge these problems, as do bipartisan congressional efforts for sentencing reform.[20] But the commission's current efforts do not go far enough.

The decline of the influence of the guidelines and the re-empowerment of sentencing judges has been a major step toward a more just system. Experience has taught that the only reliable way to effect justice in individual cases is to allow judges to continue to exercise their sound discretion.

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2. 543 U.S. 220 (2005).
3. Statistics from United States Sentencing Commission Sourcebooks available at http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks.
4. United States Sentencing Commission, 2013 Sourcebook, Table N-2.
5. See Robert J. Anello and Richard F. Albert, "Calls for Sanity in White-Collar Sentencing," NYLJ (Oct. 1, 2013).
6. USSG §2B1.1, comment. (n.3(A)).
7. USSG §2B1.1(b)(1).
8. *United States v. Gupta*, 904 F.Supp.2d 349, 351 (S.D.N.Y. 2012).
9. Sara Jerving, "Former Jeffries Trader Litvak Sentenced to Two Years," The Wall Street Journal (July 23, 2014).
10. Transcript of Sentencing Hearing, *United States v. Litvak*, 3:13cr19, District of Connecticut (July 23, 2014).
11. See Erik Larson, "Madoff Five Face September Sentencing U.S. Assails Denial," Bloomberg.com (July 25, 2014).
12. Nate Raymond, "Ex-Madoff Manager Sentenced to Six Years Prison for Fraud," Reuters (Dec. 15, 2014).
13. Reuters, "U.S. Prosecutors Seek Longer Sentences for Madoff Aides," The New York Times (Jan. 10, 2015).
14. Associated Press, "Prosecutor Criticizes Judge in Madoff Worker Case" (Dec. 10, 2014).
15. Jada F. Smith and Trip Gabriel, "Ex-Governor of Virginia and Wife Plead Not Guilty to Corruption," The New York Times (Jan. 24, 2014); see also Elkan Abramowitz and Jonathan Sack, "Are We Criminalizing Politics as Usual? Case Against Former Virginia Governor," NYLJ (March 5, 2014).
16. "Court Transcript: Judge James Spencer Explains His Sentencing of Bob McDonnell," Richmond Times-Dispatch (Jan. 7, 2015).
17. News Release, U.S. Sentencing Commission, "U.S. Sentencing Commission Seeks Comment on Revisions to Fraud Guidelines, Increase in Hydrocodone Sentences" (Jan. 9, 2015).
18. Federal Register Notice of Proposed 2015 Amendments to Federal Sentencing Guidelines, BAC 2210-40, United States Sentencing Commission (Jan. 14, 2015).
19. Douglas A. Berman, "Brief Account of What Proposed Fraud Guideline Changes Might Amount To," Sentencing Law and Policy Blog (Jan. 13, 2015).
20. Christina Mulka and Emily Long, "Durbin & Lee: According to CBO, Smarter Sentencing Bill Would Reduce Prison Costs by More than $4 Billion," Dick Durbin Press Release (Sept. 15, 2014).