

# Loss Amount Is Shaping PPP Fraud Prosecution Sentencing

By **Sami Azhari and Michael Leonard** (March 25, 2021, 5:23 PM EDT)

Congress has approved \$659 billion in forgivable loans for businesses affected by the pandemic, with an additional \$248 billion for businesses to get a second round of relief.

The Paycheck Protection Program has already provided hundreds of billion dollars in funds to companies that experienced business interruption or other negative consequences arising out of the pandemic. Those PPP funds were expected to be used toward employee payment and retention, as well as business continuity. In certain circumstances, PPP loans can be eligible for loan forgiveness, making these funds an extremely valuable tool for businesses.

Given the relative ease of obtaining those funds, an opportunistic moment was created for deceit and fraud. The Small Business Administration is authorized to make rules and regulations.[1] One of those SBA-created PPP rules provides that, "If you knowingly use funds for unauthorized purposes, you will be subject to additional liability such as charges for fraud." [2]

While prosecutors have various options for pursuing PPP fraud, i.e., wire fraud, bank fraud, etc., ultimately one of the most important and determinative factors at sentencing for these types of PPP fraud cases will be the loss amount.

## Loss Amount

Broadly considered, the loss is the amount of money or property of which the alleged victim has been deprived. The U.S. Sentencing Commission's Guidelines Manual, or USSG, narrows the definition, drawing a distinction between the greater of actual loss or intended loss.[3]

A court has significant discretion in determining the loss amount. It is at liberty to choose among available methods of calculation and may consider a variety of factors.[4] Courts are not required to demonstrate absolute accuracy so long as their estimate of the loss amount is based on available information and within "the realm of permissible computations." [5]

Courts have routinely imposed the intended loss as part of a convicted defendant's sentence. The USSG defines intended loss as "pecuniary harm that the defendant purposely sought to inflict." [6] A recent amendment enables courts to consider a defendant's subjective intent as a relevant



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factor.[7] Courts may even consider a harm that would have been impossible or unlikely to occur. [8] In some cases, courts may also consider the magnitude of loss had the fraud never been discovered.

A 2015 U.S. Court of Appeals for the Eighth Circuit decision demonstrates a court's latitude with respect to the loss amount. In *U.S. v. Lemons*,[9] a case involving the fraudulent receipt of Social Security benefits, the Eighth Circuit upheld the district court's ruling that the defendant intended to collect disability benefits until she retired.

The *Lemons* court found that the defendant's statements made in reports to the Social Security Administration, in which she suggested the permanent nature of her alleged disability and attempted to deter further review, evidenced her intent.[10]

However, unlike in other types of fraud such as Ponzi schemes, the intent of a loan taker in a PPP fraud case may be far less clear. In some instances, a business owner may have taken out a loan with the intent of using it for legitimate business purposes, only to squander the entirety of the funds on personal expenses.

There will also be situations in which a business owner takes out a loan and uses a portion of it for business expenses and a portion of it to support a lavish lifestyle. The issue is how the loss amount should be calculated and, therefore, under which guideline range the defendant will fall.

Historically, as noted above, courts have normally punished as the loss amount, an amount that was the intended loss to the victim. Given that PPP fraud is a very new area of federal criminal prosecutions, many cases are still matriculating through the court process and have yet to reach the sentencing phase.

To date, there have been just four individuals who have been sentenced in federal district court for charges stemming from PPP fraud. In each of those cases, the loss amount was a significant factor in determining the defendant's guideline range and his sentence. However, the courts' sentences and analyses in those for cases were not particularly instructive as to how federal prosecutors and federal judges will address loss amounts pertaining to the context of PPP fraud.

In most traditional instances of fraud, there is an identifiable victim that is out money as a result of the fraudster. That victim rarely recovers the amount he or she lost. However as discussed below, in three out of the four recent PPP fraud sentencings, nearly the full value of the fraudulent loans was recovered. However, all of those cases dealt with situations in which the fraud arose from fictitious businesses with no employees and the loan money was not used on operating expenses.

It remains to be seen whether courts will apply an actual loss analysis instead of an intended loss analysis. The most recent case that might be instructive is a 2020 Eighth Circuit opinion that shifted slightly toward a greater consideration of actual loss. In *U.S. v. Karie*, the defendant was convicted in the U.S. District Court for the Western District of Missouri of conspiracy to commit theft of public funds, aggravated identity theft, money laundering and mail fraud.[11]

The case stemmed from the Child Care Development Fund, a federal program that provides money to states in order to ensure access to high-quality childcare for low-income families.[12] The defendant formed *Karie Day Care Center* in 2011. As a prerequisite for employment, the defendant required all employees to enroll their children in the day care program in an attempt artificially bump up the enrollment.[13]

The government began investigating the defendant's conduct after the defendant terminated an

employee whose child was in turn no longer eligible for Child Care Development Fund funds. an investigation began. At that point, the defendant shuttered the daycare and formed Tima Child Care Center.

The critical issue at trial was whether the attendance at the day care warranted the amount of money the defendant and the daycare and childcare center received. U.S. Probation's presentence report recommended a loss amount of \$536,833.75.[14] A government agent testified at trial that 46% of the daycare funds and 69% of the childcare center funds were legitimate and estimated a loss amount of \$165,208.27.

The district court, relying on estimates contained within the presentence report, confirmed a loss amount of more than \$500,000.[15]

On appeal, the Eighth Circuit held that the district court had not erred in calculating the loss amount.[16] The court relied on its 2012 U.S. v Miell decision. In Miell, the appellate court affirmed the U.S. District Court for the Northern District of Iowa's loss calculation because the transaction in that case was so tainted with fraud that it was impossible to tell which services were legitimate and which services were illegitimate.[17]

Exhibiting a shift in loss calculation methods, the Eighth Circuit in Miell opened the door to the consideration of evidence of legitimate services or billing — factors potentially mitigating the amount of loss.[18]

When a defendant's conduct is so fraudulent that it renders it impossible to discriminate between legitimate and illegitimate services, the burden shifts to the defendant to present evidence of legitimacy, as was the case in Karie.[19] Since the defendant failed to present any such evidence, the Eighth Circuit found that the district court's calculation of loss amount was appropriate.[20]

## **Sentencings in PPP Fraud Cases**

### ***Joseph Cherry — Eastern District of Virginia, Sentenced on March 11, 2021***

Joseph Cherry was charged in the U.S. District Court for the Eastern District of Virginia in a 10-count indictment, with wire fraud, theft of government property and making false statements to the SBA.

Cherry submitted multiple fraudulent applications to obtain PPP and Economic Injury Disaster Loans, or EIDLs, in which he provided false information regarding his income and employment. He obtained an EIDL loan of \$200,000, but other applications were halted once fraud was detected. Cherry spent all but \$57,303.29 of the funds he received.

The loss calculation in this case was straightforward, and the loss amount was simply an addition of the loan amounts he took out. He was sentenced to 51 months in prison.

### ***Tarik Jaafar — Eastern District of Virginia, Sentenced on Nov. 13, 2020***

The defendant Jaafar and his wife submitted 18 PPP loan applications for four businesses. The government argued that all of them were merely shell companies. The defendants submitted the loan applications to 12 different financial institutions. Of the roughly \$6.6 million the couple sought to obtain, they received \$1.4 million.

Additionally, they submitted two EIDL loan applications for which they received an additional \$10,000 from the SBA. Within five weeks of obtaining the funds, they were arrested. At the time

of their arrest, they had only been able to withdraw \$30,000 of the funds, which were recovered. While the intended loss was significant, the actual loss amounted to nothing.

Nonetheless, the court sentenced the defendant to 12 months for his role in the fraud. His background in the financial sector played a role in that sentence. Jaafar not only holds a Ph.D. in economics, but he has also been employed in banking at an elite level, having previously worked for Citibank, SunTrust Banks, and Lehman Brothers Holdings Inc., earning a salary of over \$200,000 when he was last employed.

### ***Nadine Consuelo Jackson – Southern District of Ohio, Sentenced on March 16, 2021***

The defendant Consuelo Jackson applied to First Home Bank for a PPP loan of \$1,315,491.12. In so doing, she falsely stated that she had 73 employees and a monthly payroll of \$529,196.45. The government alleged that, in her application, she also provided false wage and tax reports, a false Schedule C and a false personal income tax return. She followed up her first PPP loan with a second application, as well as an EIDL application.

The loss amount was discussed in the government's sentencing brief, which argued that she attempted to receive more than \$2.5 million in SBA loans. Much like in Jaafar, the loan funds were recovered, and the actual loss was zero. The defendant received a sentence of 24 months in prison.

### ***Ganell Tubbs – Eastern District of Arkansas, Sentenced on March 12, 2021***

The defendant Tubbs submitted a PPP application in which she falsely represented that her business, Suga Girl Customs, paid \$1,385,903 in wages and compensation during the first quarter of 2020.

She was approved for a loan of \$1,518,887, of which she immediately used \$8,000 on a personal student loan and another \$6,000 on online purchases. She submitted another PPP application on behalf of another one of her purported businesses, the Little Piglet Soap Company, and received an additional \$414,375.

She was charged with two counts of bank fraud as well as making a false statement on a loan application. She pled guilty and was sentenced to a period of 41 months in prison. Like Jackson and Jaafar, nearly all of the money Tubbs received was recovered by law enforcement, leaving a loss of \$14,000 that she used on personal expenses.

## **Conclusion**

In the cases cited above, the courts have provided little, if any, instruction as to what district courts will do in circumstances in which there is uncertainty regarding for what purpose the defendant intended to use the PPP loan proceeds. An inference can clearly be made that when someone applies for a PPP loan for a fictitious company that has no employees and squanders the money, the intended loss — all of it — will be easier to quantify.

While Karie did not deal with PPP fraud, it dealt with a case in which the court was unwilling to reduce the loss amount based upon the evidence presented. But the court left an opening to consider a reduction in the loss amount in situations in which evidence is presented to support the reduction.

If this case is instructive to other federal courts in the future, when calculating PPP loss amounts, courts can and should consider what funds, if any, were legitimately used before determining the

appropriate guideline range.

Lastly, there is a notion that the government is only targeting extreme cases of PPP fraud. While there is not much history based solely on PPP fraud prosecutions, one can get an indication from recent history of all fraud prosecutions.

In fiscal year 2019, all district courts applied the fraud guideline 5,845 times.[21] Of those, only 811 involved loss of more than \$1.5 million. This is particularly instructive, because the consensus among practitioners is that the government is only targeting the most serious and egregious cases of fraud.

It is important to note that the figures referenced in the USSG are all pre-pandemic and pre-PPP fraud claims. Even then, of the 5,845 times that the fraud guidelines were applied, in 3,203 instances, or 54% of the time, the loss amount at issue was \$250,000 or less.

And even more interesting, the highest number of fraud guidelines were applied to fraud cases of \$6,500 or less. Of the 5,845 times they were applied, 1,053 of those times involved fraud loss amounts of \$6,500 or less. That represented 18% of all fraud cases prosecuted by the federal government.

Loss amounts can add up quite a bit. Not only does recent history demonstrate that the government is not simply targeting the low-hanging fruit with its fraud prosecutions, but, as fact patterns get more complex with varying uses of the PPP funds, Karie opens the door ever so slightly to allow defendants an opportunity to lower the loss amount if they can demonstrate legitimate use of the money.

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[1] See 15 U.S.C. § 9012.

[2] See 85 Fed. Reg. 20,811, 20,814.

[3] See U.S. SENTENCING COMM'N, Guidelines Manual, §2B1.1 (Nov. 2018) [hereinafter USSG].

[4] [United States v. Sullivan](#) , 765 F.3d 712, 716 (7th Cir. 2014) (quoting [United States v. Jackson](#) , 25 F.3d 327, 330 (6th Cir. 1994)).

[5] Id.

[6] USSG §2B1.1, comment. (n.3(A)(ii)).

[7] USSG App. C, amend. 792 (effective Aug. 1, 2015).

[8] USSG §2B1.1, comment. (n.3(A)(ii)).

[9] 792 F.3d 941 (8th Cir. 2015) (court rejected defendant's argument for the use actual loss incurred).

[10] Id. at 950.

[11] *United States v. Karie* , 976 F.3d 800, 801 (2020)

[12] Id at 802.

[13] Id.

[14] Id. at 803.

[15] Id.

[16] Id. at 804.

[17] Id at 805, citing *United Staes v. Miell* , 661 F.3d 995, 1000-01 (8th Cir. 2011).

[18] Id. at 804 (following USSG recommended calculation of offense level requiring a district court to "make allowance for the legitimate, compensable services provided" by the defendant).

[19] Id. at 804.

[20] Id. at 805.

[21] See United States Sentencing Commission, *Use of Guidelines and Specific Offense Characteristics*, at 9–10, available at [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2019/Use\\_of\\_SOC\\_Guideline\\_Based.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2019/Use_of_SOC_Guideline_Based.pdf).