Brooklyn Journal of Corporate, Financial & Commercial Law

Volume 5 | Issue 2 Article 6

2011

A Proposal for Calculating Reimbursed Victims of Financial Identity Theft Under the Federal Sentencing Guidelines

Roy Michael Anderson

NOTES

A PROPOSAL FOR CALCULATING REIMBURSED VICTIMS OF FINANCIAL IDENTITY THEFT UNDER THE FEDERAL SENTENCING GUIDELINES

INTRODUCTION

On April 18, 2005, the United States Court of Appeals for the Sixth Circuit issued an opinion in *United States v. Yagar* interpreting the "victims" calculation table of Title 18, Section 2B1.1 of the United States Federal Sentencing Guidelines (Section 2B1.1).[1] At issue was whether an individual bank account holder who was fully reimbursed for financial losses incurred as a result of financial identity theft should be counted as a "victim" at sentencing under Section 2B1.1(b)(2).[2] This scenario was not explicitly addressed in Section 2B1.1[3] when *Yagar* was decided and the Sixth Circuit was the first Court of Appeals to address the issue.[4] The *Yagar* Court held that "victim," as defined by Application Note 1 of Section 2B1.1[5] (Application Note 1), did not contemplate a person who was "fully reimbursed for their temporary financial losses" and "suffered no adverse effect" as a result of the crime.[6] Six months later, in *United States v. Lee*, the Eleventh Circuit rejected the Sixth Circuit's reading of Application Note 1, and held that individual account holders *are* counted as "victims" under Section 2B1.1(b)(2), regardless of whether they have been reimbursed for their losses.[7]

Over the next four years, *Yagar* and *Lee* were established as seminal decisions representing the majority and minority viewpoints of an ever-widening circuit split.[8] Despite the split, and the serious implications of the interpretation of this section,[9] the Supreme Court declined to address the

1. United States v. Yagar, 404 F.3d 967, 970 (6th Cir. 2005).
2. *Id.* at 969. For the purposes of this note, "financial identity theft" will refer to any form of financial fraud covered by Section 2B1.1 that involves the access or use of an individual's bank account without his or her knowledge or consent.
3. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2004).
4. *See Yagar*, 404 F.3d at 971.
5. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.1 (2004).
6. *Yagar*, 404 F.3d at 971.
7. United States v. Lee, 427 F.3d 881, 895 (11th Cir. 2005).
8. *See* Jacqueline Harrington, Comment, *"Once Victim, Always Victim": Compensated Individuals Under the Amended Sentencing Guidelines on Fraud*, 108 MICH. L. REV. 445, 449–50 nn.22–23 (2009). *See also* United States v. Stepanian, 570 F.3d 51 (1st Cir. 2009); United States v. Orr, 567 F.3d 610 (10th Cir. 2009); United States v. Kennedy, 554 F.3d 415 (3d Cir. 2009); United States v. Armstead, 552 F.3d 769 (9th Cir. 2008); United States v. Abiodun, 536 F.3d 162 (2d Cir. 2008); United States v. Conner, 537 F.3d 480 (5th Cir. 2008); United States v. Icaza, 492 F.3d 967 (8th Cir. 2007).
9. For a discussion of hypothetical scenarios that demonstrate the importance of resolving the reimbursed issue circuit split, see, e.g., Harrington, *supra* note 8, at 451–55; Ryan N. Parsons,

reimbursed victims issue[10] and the Federal Sentencing Commission (Commission) ultimately resolved it pursuant to its statutory authority.[11]

The Federal Sentencing Commission is required to "review and revise" provisions of the Federal Sentencing Guidelines (Guidelines) periodically in response to the "observations, comments, or questions" of various federal agencies.[12] In order to address the circuit disagreements over the proper interpretation of "victim" in Section 2B1.1—and after making a request for public comment[13]—the Commission published a proposed amendment to Application Note 1 on May 8, 2009.[14] The proposed amendment provided that "for purposes of the victims table in subsection [2B1.1](b)(2), an individual whose means of identification was used unlawfully or without authority is considered a 'victim' . . . [but this amendment] cover[s] only those individuals whose means of identification are actually used."[15] Congress had until November 1, 2009 to reject this proposed amendment, but declined to do so, rendering it immediately effective.[16]

The Commission's amendment is reflected in the Guidelines as Amendment 726 of Title 18, Appendix C (Amendment 726).[17] Significantly, by mandating that reimbursed account holders whose means of identification were used to perpetuate a fraud be included in the Section 2B1.1(b)(2) "victims" calculation,[18] Amendment 726 implicitly adopted *Lee*'s minority viewpoint and definitively settled the circuit split.[19]

Note, *Temporary Victims: Interpreting the Federal Fraud and Theft Sentencing Guideline*, 93 MARQ. L. REV. 845, 852–53 (2009).

10. *See, e.g.*, Adjei v. U.S., No.07-2295, 2009 WL 405680 (3d Cir. Feb. 19, 2009), *cert. denied*, 129 S. Ct. 2070 (2009); Wyman v. United States, 427 F.3d 881 (8th Cir. 2006), *cert. denied*, 546 U.S. 1221 (2006).

11. *See* Notice of the Submission of Amendments to the Sentencing Guidelines for United States Courts, 74 Fed. Reg. 21,750, 21,751 (May 8, 2009).

12. 28 U.S.C. § 994(o) (2006).

13. *See* Notice of Proposed Amendments to Sentencing Guidelines for United States Courts, 74 Fed. Reg. 4,802, 4,806 (Jan. 27, 2009) (requesting "comment regarding whether § 2B1.1 adequately accounts for a case in which an individual suffers pecuniary harm, but the pecuniary harm is immediately reimbursed by a third party"); *see also* United States v. Stepanian, 570 F.3d 51, 58 n.12 (1st Cir. 2009).

14. *See* Notice of the Submission of Amendments to the Sentencing Guidelines for United States Courts, 74 Fed. Reg. at 21,751.

15. *Id.*

16. *See* 28 U.S.C. § 994(p) (2006); U.S. SENTENCING GUIDELINES MANUAL supp. app. C, Amend. 726 (2010).

17. U.S. SENTENCING GUIDELINES MANUAL supp. app. C, Amend. 726 (2010).

18. *See* Harrington, *supra* note 8, at 448.

19. Every account holder who has been reimbursed for their losses due to financial identity theft will inherently have had their means of identification used unlawfully or without authority. *See id.* Therefore, consistent with *Lee*, they will always be counted as a "victim" under Section 2B1.1. *See id.* at 450, 450 n.23; *see also* Shawn P. Ayotte, Comment, *Balancing Proportionality and Deterrence: The First Circuit's Definition of "Victims" of Identity Theft in* United States v. Stepanian, 45 NEW ENG. L. REV. 245, 264 (2010) (noting that the outcomes of *Lee* and Amendment 726 "are essentially the same: both treat individual cardholders as 'victims' of identity theft").

This note will discuss the opinions issued during the four-year circuit split and argue that Amendment 726 is an improper resolution of the reimbursed victims issue for three reasons: (1) it will work contrary to the Federal Sentencing Guidelines' stated goal of proportional sentencing by employing an overbroad presumption that all reimbursed account holders suffer harm through time lost seeking reimbursement for financial identity theft;[20] (2) it fails to provide a mechanism for calculating time lost seeking reimbursement as a "pecuniary harm," which, at sentencing, results in a calculation of "victims" under Section 2B1.1(2) before a calculation of "actual loss" under Section 2B1.1(1);[21] and (3) it allows for the possibility of "double-counting" the financial losses suffered by "victims" of financial identity theft.

Part I of this note will discuss the legislative intent behind the Federal Sentencing Guidelines, their operating structure, and the effect that the Supreme Court's decision *United States v. Booker*[22] had on their application. Part II will provide an overview of various forms of financial identity theft that can implicate the reimbursed victims issue. Part III will explain how "actual loss" and the number of "victims" of financial crimes are tallied under Section 2B1.1(b), and how determining whether to include reimbursed account holders frustrates these calculations. Part IV will examine the cases that defined the circuit split and demonstrate how Amendment 726 falls short of resolving the issues raised. Part V will propose a solution to the reimbursed victims issue in the form of an alternative amendment that does not count reimbursed account holders as "victims"—based on *Yagar*'s reasoning that reimbursed account holders do not always suffer an "adverse effect"—but utilizes an upward departure application to account for the harm that some account holders suffer through time lost seeking reimbursement for financial identity theft. This proposed amendment will promote the Federal Sentencing Guidelines' goal of proportional sentencing as well as remedy the erroneous operation of the 2B1.1(1) "actual loss" calculations and the risk of "double-counting" the financial losses of "victims" of financial identity theft that exist under Amendment 726.[23]

---

20. *See Public Hearing Before the United States Sentencing Commission* 37 (2009) (statement of Jennifer Coffin, National Sentencing Resource Counsel, Federal Public and Community Defenders), *available at* http://ftp.ussc.gov/agendas/20090317/transcript.pdf [hereinafter *Public Hearings*].

21. *See* discussion *infra* Part IV.B.2.

22. United States v. Booker, 543 U.S. 220 (2005). *Booker* is a landmark Supreme Court decision that held that mandatory application of the Federal Sentencing Guidelines is unconstitutional. *Id.* at 250. As discussed in Part I *infra*, since *Booker* was decided, the Federal Sentencing Guidelines are only considered in an advisory capacity.

23. *But cf.* Harrington, *supra* note 8, at 451 (arguing that retribution for financial identity theft is "best satisfied by treating only compensated individuals as victims"); Parsons, *supra* note 9, at 864 (arguing that account holders who spent time seeking reimbursement should be counted as "victims" and their lost time should be included in the "actual loss" calculation).

I. THE FEDERAL SENTENCING GUIDELINES POST-*BOOKER*

The Federal Sentencing Guidelines are a creation of the United States Sentencing Commission, an independent judicial agency charged with "establish[ing] sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes."[24] Under the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984, the Commission was granted broad authority to develop federal sentencing guidelines that would "further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation."[25]

The Commission submitted the Federal Sentencing Guidelines to Congress on April 13, 1987[26] and they became effective November 1, 1987 after a period of mandatory Congressional review.[27] As originally enacted, the Guidelines contained *mandatory* sentencing provisions under which a defendant's term of imprisonment was calculated through a cross-reference of 43 "Offense Levels" and 6 "Criminal History Points." Each Level and Point is reflected in the X- and Y-axes of the Guidelines' Sentencing Table, respectively.[28] Thus, the Sentencing Table considers the severity of a crime in the context of the defendant's criminal history.[29]

Parsons advocates for an amendment that adopts the reasoning of the Second Circuit in United States v. Abiodun, 536 F.3d 162 (2d Cir. 2008). Parsons, *supra* note 9, at 869. *Abiodun* held that a reimbursed account holder is a "victim" under 2B1.1 "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." *Abiodun*, 536 F.3d at 168−69. Parsons asserts that in articulating the "*Abiodun* test," the Second Circuit "clearly went beyond *Yagar*'s holding" because *Yagar* did not speculate as to what situations would qualify a reimbursed account holder as a "victim," whereas *Abiodun* states that "*any time*" a reimbursed account holder suffers an "adverse effect measurable in monetary terms" they are a "victim" under 2B1.1. Parsons, *supra* note 9, at 863. This contention is erroneous. In fact, as stated by the Second Circuit, *Abiodun* is entirely consistent with *Yagar*. *See Abiodun*, 536 F.3d at 168. The *Abiodun* test was not novel and did not construct a new "test" of any sort. Rather, it was merely a concise articulation of how "victims" are calculated under Section 2B1.1(b)(2). Namely, an individual is a "victim" if they suffer "loss" (adverse effect), and "loss" is defined as "pecuniary harm," which is harm that is readily measurable in money (can be measured in monetary terms). U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(A) (2010); *see also* discussion *infra* Part IV.B.2. Moreover, *Yagar* explicitly found that the reimbursed account holders at issue in that case had "suffered no adverse effect" because their "monetary loss was short-lived and immediately covered by a third-party." United States v. Yagar, 404 F.3d 967, 971 (6th Cir. 2005). Thus, *Yagar* had no cause to speculate on examples of what situations would qualify a reimbursed account holder as a "victim." Further, such speculation would have been ill-advised—the methods employed to commit financial identity theft, the harms they cause, and the relative amounts of time required to rectify them, are too numerous and varied for speculation.

24. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2010).
25. *Id.* § 1A1.2.
26. *Id.*
27. *Id*.
28. *See id.* § 5A Sentencing Table (2010).
29. *See id.* § 1B1.1.

The relative assignment of sentence ranges to Levels was developed using empirical data from numerous relevant sources, including the United States Parole Commission's guidelines and statistics, 10,000 presentence investigations, and the elements of various substantive criminal statutes.[30] This methodology is intended to limit the parole board's power in determining the actual length of an offender's prison term, promote a uniform system where like crimes receive like sentences, and maintain proportionality between the severity of a crime and the sentence imposed.[31] However, deviation from the Sentencing Table is permitted when a court finds that a recommended sentence range does not adequately reflect the crime committed. In such instances a court may adjust the recommended sentence through an upward or downward "departure."[32]

Departures are principally permitted when the sentencing court "finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[33] The Guidelines delineate two forms of departures: (1) departures pursuant to "specific guidance . . . by analogy or by other numerical or non-numerical suggestions"; and (2) "unguided" departures—which include "grounds [for departure] not mentioned in the guidelines."[34] Significantly, of the two forms of departure, the Commission "expects that most departures will reflect the suggestions" and unguided departures are to remain "highly infrequent."[35]

While the Guidelines continue to use this methodology—with an eye towards the same legislative goals—their authority "changed dramatically" after the 2005 *Booker* decision.[36] In *Booker*, the Supreme Court held that, under the Sixth Amendment, only facts admitted to the jury or proved beyond a reasonable doubt can be considered for sentence calculations, and therefore the mandatory sentencing provisions of the Guidelines were unconstitutional.[37] As a result, *Booker* "changed the federal sentencing

30. *Id.* § 1A1.3.

31. *Id.* Amendment 726 fails to promote the Guidelines' goal of proportionality in sentencing for financial identity theft crimes because it equates the harm suffered by account holders who were immediately reimbursed for their losses to those who spent great time and effort seeking reimbursement. *See* discussion *infra* Part IV.B.1.

32. *See* 18 U.S.C. § 3553(b)(1) (2006).

33. *Id.* Application Note 19(A)(vi) of Section 2B1.1 provides a non-exhaustive list of factors for sentencing courts to consider as warranting "Departures" from the Sentencing Table in cases involving unlawful use of means of identification. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.19(A)(vi) (2010). It does not list time lost seeking reimbursement as a factor justifying an upward departure. *Id.*

34. U.S. SENTENCING GUIDELINES MANUAL § 1A1.4(b) (2010).

35. *Id.*

36. Andrew Nash, Note, *Victims By Definition*, 85 WASH. U. L. REV. 1419, 1434 (2008).

37. United States v. Booker, 543 U.S. 220, 250–52 (2005).

guidelines from mandates to advice"[38] and judges are no longer bound to follow them; however, "the Commission believe[s] sentencing courts should still be giving 'substantial weight to the Federal Sentencing Guidelines in determining the appropriate sentence to impose.'"[39] Accordingly, "post-*Booker* sentencing [is not very] different from pre-*Booker* sentencing," and federal judges routinely abide by the sentencing structure of the Guidelines.[40] Thus, whether mandatory or advisory, the Guidelines steer the hand of sentencing judges, and the significance of their construction in securing (or failing to secure) proportional sentencing remains as critical as it was pre-*Booker*.

II. FINANCIAL IDENTITY THEFT AND THE EFFECTS OF REIMBURSEMENT

Financial identity theft crimes can be perpetrated in various ways, but traditionally "the most common ways to become the victim of identity theft are through the loss or theft of a purse or wallet, mail theft, and fraudulent address changes."[41] These methods give perpetrators of financial fraud crimes access to their victims' personal information, such as "checkbook[s] bearing account numbers, Social Security Numbers . . . and business records."[42]

> [After] the perpetrator has obtained personal information, that person will open a bank account in the victim's name (or access a current account). The perpetrator will then begin depositing fraudulent, worthless or counterfeit checks into the account. Most deposits are carried out via automated teller machines (ATMs). Before checks are cleared, the perpetrator will withdraw cash on the account via ATMs. . . . In some instances, the fraudster will deposit empty envelopes, with a dollar amount annotated, into an ATM.[43]

More recently, fraudsters have begun perpetrating financial identity theft by "skimming" account information and PIN numbers—often directly from electronic payment terminals or ATM machines.[44] A common method employed to skim ATM machines is

---

38. Douglas A. Berman, *Assessing Federal Sentencing After Booker*, 17 FED. SENT. R. 291, 291 (2005).

39. *Id.* (quoting *Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the Comm. on the Judiciary*, 110th Cong. 18 (2005) (statement of Honorable Ricardo Hinojosa, Chairman, U.S. Sentencing Commission)). *See also Booker*, 543 U.S. at 259; Harrington, *supra* note 8, at 446 n.5.

40. Berman, *supra* note 38, at 292.

41. THE SAR ACTIVITY REVIEW: TRENDS TIPS & ISSUES: ISSUE 2, at 15 (2001), *available at* http://www.fincen.gov/news_room/rp/files/sar_tti_02.pdf#page=17.

42. *Id.*

43. *Id.*

44. Yudhijit Bhattacharjee, *Automated Theft Machines*, TIME, Jan. 17, 2011, at 53, 54.

> using plaster or clay to make a molding of the front of an ATM. Then they build a plastic facade, 'sanded down and spray-painted to match the machine so that it is virtually undetectable,' . . .
>
> The facade is used to hide a magnetic-card reader, which can be purchased online. Typically, a video camera is concealed in a light fixture or brochure holder overlooking the keypad, although occasionally the device used to capture the PINs is not a camera but a fake key panel overlaid on the real pad.[45]

Due to the prevalence of such criminal practices, financial institutions frequently absorb financial losses from unauthorized transactions.[46] Accordingly, for the purposes of calculating "victims" under Section 2B1.1(b)(2), banks and other financial institutions that have reimbursed their clients for these losses are considered to be individual "persons" at sentencing.[47] Since they bear the ultimate pecuniary loss for such crimes, counting these financial institutions as "victims" is a logical calculation. This logic, however, does not transfer as easily when counting reimbursed individuals as "victims" under Section 2B1.1(b)(2).

III. ARE REIMBURSED ACCOUNT HOLDERS "VICTIMS"?

Section 2B1.1 governs sentencing for financial identity theft and other financial crimes such as larceny, embezzlement, fraud, and various counterfeit offenses,[48] and "recommends heavier sentences when larger numbers of victims suffer a pecuniary loss as a result of the offender's criminal conduct."[49] This method seems, and is intended, to provide a consistent and comprehensive blueprint for judges at the time of sentencing. However, determining who qualifies as a "victim" under Section 2B1.1(b)(2) has complicated this foundational premise.[50]

Prior to the adoption of Amendment 726, "victim" was defined by Application Note 1 as "(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."[51] Under Section 2B1.1(b)(2), a defendant's recommended sentence is increased relative to the number of "victims" affected by her crime. A two-Level increase is

---

45. *Id.* (quoting Kim DeLeo, FBI Supervisory Special Agent).

46. One study estimated the cost of such losses to be $11 billion in 2009. *See* LEXISNEXIS, 2009 LEXISNEXIS TRUE COST OF FRAUD STUDY 6, 19 (2009), http://www.riskfinance.com/RFL/Merchant_Card_Fraud_files/LexisNexisTotalCostFraud_09.pdf.

47. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.1 (2010) ("'Person' includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.").

48. *Id.* § 2B1.1.

49. Nash, *supra* note 36, at 1436 (citing U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(2) (2007)).

50. *See, e.g.*, Harrington, *supra* note 8, at 447–48.

51. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.1 (2010).

triggered by a crime involving 10 or more victims;[52] a four-Level increase is triggered by a crime involving 50 or more victims;[53] and a six-Level increase is triggered by a crime involving 250 or more victims.[54] "This sliding scale of enhanced punitive liability is one of the 'key compromises' of the Guidelines, under which an offender's recommended sentence increases with the magnitude of the crime but not in direct proportion to it."[55]

A defendant's recommended sentence is also enhanced relative to the amount of "actual loss" incurred by the "victims" of her crime.[56] Section 2B1.1(b)(1) defines sixteen categories of summed "actual loss" and recommends relative sentence enhancements[57] ranging from no recommended increase in sentencing for "actual loss" of $5,000 or less[58] to a thirty-Level increase for "actual loss" totaling more than $400,000,000.[59] The definition of "actual loss" was not altered by Amendment 726 and is defined as "the reasonably foreseeable pecuniary harm that resulted from the offense."[60] "'Pecuniary harm' means harm that is monetary or that otherwise is readily measurable in money."[61] "'[R]easonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense."[62] In sum, under Section 2B1.1, "a person is the victim of a crime if he or she suffers 'actual loss,' which is in turn defined as 'pecuniary [harm].'"[63]

Identifying "victims" under Section 2B1.1(2) and the "actual loss" ascribed to them under Section 2B1.1(1) is problematic in the case of reimbursed account holders because an injury sustained as a result of financial identity theft is often wholly alleviated when they are reimbursed by a bank or other financial institution. Often banks are able to detect such offenses and reimburse account holders before they are even aware of their losses.[64] In these instances, it may be argued that because the account holder does not suffer a quantifiable harm, he should not be included in the

52. *Id.* § 2B1.1(b)(2)(A)(i).
53. *Id.* § 2B1.1(b)(2)(B).
54. *Id.* § 2B1.1(b)(2)(C).
55. Nash, *supra* note 36, at 1436 (citation omitted).
56. Critical to this calculation is that the "actual loss" be incurred by a "victim" of the crime. *See infra* Part IV.B.2 (discussing how Amendment 726 violates this constructional mandate).
57. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2010).
58. *Id.* § 2B1.1(b)(1)(A).
59. *Id.* § 2B1.1(b)(1)(P).
60. *Id.* § 2B1.1 cmt. n.3(A)(i).
61. *Id.* § 2B1.1 cmt. n.3(A)(iii).
62. *Id.* § 2B1.1 cmt. n.3(A)(iv).
63. Nash, *supra* note 36, at 1439. This note argues that time lost seeking reimbursement is not readily measurable in dollar amount, therefore it is not a "pecuniary harm," and should not be reflected in the 2B1.1B(b)(1) "actual loss" calculations.
64. *See, e.g.*, United States v. Kennedy, 554 F.3d 415, 419 (3d Cir. 2009).

"victims" calculation.[65] However, in other instances, the dollar amount stolen and subsequently reimbursed is not representative of the crime's injurious effects because financial identity theft imparts not only monetarily quantitative, but qualitative harm as well.[66] Victims of identity theft may endure intense emotional impacts of victimization such as rage, betrayal, powerlessness, frustration, or even fear for their physical safety.[67]

While the Federal Sentencing Commission affirmatively excluded consideration of emotional impact as a pecuniary harm under Section 2B1.1,[68] noticeably absent from Application Note 1, or any of the application notes supplementing Section 2B1.1 prior to Amendment 726's implementation,[69] was whether fully reimbursed account holders have suffered an "actual loss" and should therefore be included in the "victims" calculation.[70] Without this elucidation, federal judges were left without proper guidance as to what constitutes pecuniary harm for a financial identity theft offense and whether a reimbursed account holder should be counted as a "victim" under 2B1.1(b)(2).[71] This led to differing interpretations of "victimhood" among judges and "inconsistent adjudications of similar fact patterns."[72] As a result, criminal defendants charged with financial identity theft under Section 2B1.1 could receive significantly different sentences depending upon the circuit in which they were charged, an outcome in direct conflict with the Guidelines' goals of uniformity and proportionality in sentencing.[73]

The Commission sought a remedy to this shortcoming during a Public Hearing on Proposed Amendments held in 2009.[74] Eric Handy, a

---

65. *See, e.g.*, Parsons, *supra* note 9 (suggesting that reimbursed account holders who suffer no adverse affect should not be included in the "victims" calculation).

An argument can be made that once an account holder's financial information has been unlawfully disseminated, due to the insidious nature of financial identity theft crimes, they are at risk of suffering a future harm that will not be taken into account at sentencing and they should therefore be included in the "victims" calculation. However, the inclusion of a victim who has not yet suffered any harm in a sentencing calculation is both contrary to the Guidelines' goals of proportional sentencing and is a constructional error under Section 2B1.1. *See infra* Part IV.B.1–2.

66. *See* IDENTITY THEFT RESOURCE CENTER, IDENTITY THEFT: THE AFTERMATH 2008, at 18 (2008), http://www.idtheftcenter.org/artman2/uploads/1/Aftermath_2008_20090520.pdf.

67. *See id.* at 32–33 tbl.22. This is often directly related to the many months or years they spend repairing the harm they have suffered as a result of financial identity theft. *See id.* at 19 tbl.10; *see also Public Hearings*, *supra* note 20, at 90 (statement of Eric Handy, Mid Atlantic Coast Representative, Identity Theft Resource Center).

68. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(A)(iii) (2010) ("'Pecuniary harm' means harm that is monetary or that otherwise is readily measureable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation or other non-economic harm.").

69. *See id.* § 2B1.1 cmt. nn.1–4.

70. Harrington, *supra* note 8, at 451.

71. Nash, *supra* note 36, at 1439.

72. *Id.* at 1438.

73. *See supra* note 9 and accompanying text.

74. *See Public Hearings*, *supra* note 20, at 12–13 (statement of Michael Dubose, Chief, Comp. Crime & Intel. Prop. Sec., Criminal Div., U.S. Dep't. of Justice).

representative for the Identity Theft Resource Center, advocated for the categorical inclusion of reimbursed account holders in the "victims" calculation[75] and testified to the hardships endured by people attempting to restore their identities once their accounts have been compromised by financial identity theft.[76] Jennifer Coffin, staff attorney for the National Sentencing Resource Council of the Federal Public and Community Defenders, argued in favor of implementing a departure application—as opposed to a Guidelines amendment—to address the reimbursed victims issue.[77] The Commission found Handy's testimony persuasive and, in May 2009, submitted a proposed amendment (ultimately Amendment 726) to Section 2B1.1 embracing his argument.

Amendment 726 is intended to account for the lost time that reimbursed account holders suffer attempting to repair the damage done to their identities,[78] and to cure future inconsistencies in "victims" calculations among the federal circuits.[79] It provides that:

> The Commentary to § 2B1.1 captioned "Application Notes" is amended in Note 4 by adding at the end the following:
>
> > "(E) Cases Involving Means of Identification.—For purposes of subsection (b)(2), in a case involving means of identification 'victim' means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority."[80]

In conjunction with these changes, Amendment 726 "move[d] the definition[] of 'means of identification' . . . to Application Note 1"[81] so it is now in close proximity to the definition of "victim."[82] "'Means of identification' has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual . . . ."[83] Title 18 Section 1028(d)(7)(D) includes "access device (as defined in section 1029(e))" as a definition of "means of identification."[84]

75. *See id.* at 26 (statement of Eric Handy, Mid Atlantic Coast Representative, Identity Theft Resource Center).
76. *Id.* at 23–26.
77. *Id.* at 65 (statement of Jennifer Coffin, National Sentencing Resource Counsel, Federal Public & Community Defenders).
78. *See id.* at 88–90 (statement of Eric Handy, Mid Atlantic Coast Representative, Identity Theft Resource Center) (testifying to studies conducted by the Identity Theft Resource Center that demonstrate that account holders often spend great amounts of time repairing their identities).
79. *See* U.S. SENTENCING GUIDELINES MANUAL supp. app. C, Amend. 726, at 309–10 (2010).
80. *Id.* at 307.
81. *Id.* at 310.
82. *See id.* § 2B1.1 cmt. n.1 (2010).
83. *Id.*
84. 18 U.S.C. § 1028(d)(7) (2006). "Access device" is defined as:

The Commission's effort to remedy the reimbursed victims issue through Amendment 726 effectively cured future *inconsistencies* in "victims" calculations, but 2B1.1 still suffers from an inherent lack of proportionality in sentencing.[85] Instead of having their "victims" calculation depend upon the federal circuit in which they are brought to trial, defendants now face the possibility of disproportionate sentencing due to an overbroad presumption that the account holders affected by their crime spent significant amounts of time seeking reimbursement for their financial losses.[86] This approach creates inequitable disparities, as revealed by the issues that arose during the four year circuit split.

IV. THE CIRCUIT SPLIT

Because the Federal Sentencing Guidelines had not contemplated the reimbursed victims issue, the omission of consideration of reimbursed account holders in Section 2B1.1 and the shifting curative ability of reimbursement proved to frustrate the sentencing calculations of judges who were attempting to determine what qualifies for "victimhood" under Section 2B1.1.[87] Prior to the ratification of Amendment 726 in November 2009, at least nine federal Courts of Appeal had issued opinions on the proper interpretation of Application Note 1 and the reimbursed victims issue.[88] Although *Yagar* and *Lee* established what were to become the majority and minority viewpoints of the debate,[89] the depth of the inquiry expanded in subsequent opinions and no clear standard evolved among the circuits prior to the adoption of Amendment 726 for defining who is a "victim" of financial identity theft. While the reasoning among the circuits was divergent and appeared to suggest disproportional sentencing for financial identity theft crimes, in reality, judges were reaching decisions that resulted in proportional sentencing.[90]

> any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument).

18 U.S.C. § 1029(e)(1) (2006).

85. *See* Parsons, *supra* note 9, at 864.

86. *See Public Hearings*, *supra* note 20, at 37 (statement of Jennifer Coffin, National Sentencing Resource Counsel, Federal Public and Community Defenders) (stating that, "by adopting [Amendment 726], the Commission would create a wholesale presumption [that reimbursed account holders spend significant amounts of time seeking reimbursement]").

87. *See* Nash, *supra* note 36, at 1441.

88. *See* cases cited *supra* note 8.

89. *See* Harrington, *supra* note 8, at 449–50.

90. *See, e.g.*, United States v. Stepanian, 570 F.3d 51, 56 (1st Cir. 2009) (account holders were counted as "victims" and there was evidence that many had been significantly inconvenienced due to temporary loss of funds); United States v. Orr, 567 F.3d 610, 615 (10th Cir. 2009) (account

Generally, each Court of Appeals addressing the issue considered whether or not the individual account holders had spent significant time or effort seeking reimbursement and ultimately reached a sentencing decision that proportionally reflected the harm they had suffered.[91] Notably, in *United States v. Kennedy*, the Third Circuit proclaimed that it did not believe a circuit split even existed on the reimbursed victims issue.[92] While this assertion was erroneous,[93] it is telling of the reality that the federal circuits were assigning "victims" Level enhancements that were in proportion to the harm suffered by reimbursed account holders, despite inconsistencies in their reasoning.[94] Such an equitable outcome is now precluded by the overbroad presumption mandated by Amendment 726,[95] but would remain possible with an amendment that adopts *Yagar*'s reasoning coupled with an upward departure application that contemplates time lost seeking reimbursement in lieu of counting reimbursed account holders as "victims."

In *Yagar*, the Sixth Circuit held that reimbursed account holders whose losses were short-lived were not to be counted as "victims" under 2B1.1(b)(2), but included a "qualifying explanation,"[96] which contemplated that a "victims" calculation was ultimately a fact sensitive determination dependent upon whether or not the individual account holders had actually suffered any "adverse effect."[97]

---

holders were not counted as "victims" and the government had failed to prove they had sustained any loss); United States v. Kennedy, 554 F.3d 414, 419 (3d Cir. 2009) (account holders were not counted as "victims" and the government had failed to prove that they even knew their funds had been stolen before they were completely reimbursed); United States v. Pham, 545 F.3d 712, 719 (9th Cir. 2008) (account holders were not counted as "victims" and the government did not prove that their losses were not "short-lived"); United States v. Abiodun, 536 F.3d 162, 166 (2d Cir. 2008) (account holders were counted as "victims" and it had been shown that they spent an "appreciable amount of time securing reimbursement"); United States v. Conner, 537 F.3d 480, 491 (5th Cir. 2008) (account holders were not counted as "victims" and they had been quickly reimbursed for the improper charges on their accounts); United States v. Lee, 427 F.3d 811, 895 (11th Cir. 2005) (account holders were counted as "victims" and they had "suffered considerably more than a small out-of-pocket loss and were not immediately reimbursed by any third party"); United States v. Yagar, 404 F.3d 967, 971 (6th Cir. 2005) (account holders were not counted as "victims" and their monetary loss was short-lived and immediately covered by a third party).

91. *See supra* note 90 and accompanying text.

92. *Kennedy*, 554 F.3d at 421.

93. The Third Circuit's commentary in *Kennedy* on the reimbursed victims issue reveals that it failed to address the fundamental distinction of the Eleventh Circuit's analysis in *Lee*: reading the Credits Against Loss provision to be an inherent acknowledgement of an initial loss to the individual account holder. *See Lee*, 427 F.3d at 895. The Third Circuit equated the Eleventh Circuit's recognition of distinguishing facts between *Yagar* and *Lee* to be tantamount to an acceptance of *Yagar*'s analysis, when, in fact, the Eleventh Circuit unequivocally opposed *Yagar* on this issue. *See* Parsons, *supra* note 9, at 856 n.96.

94. *See* Parsons, *supra* note 9, at 854–55.

95. *See* discussion *infra* Part IV.B.1.

96. United States v. Abiodun, 536 F.3d 162, 168 (2d Cir. 2008).

97. *See* United States v. Yagar, 404 F.3d 967, 971 (6th Cir. 2005). In contrast, the First and Eleventh Circuits read the Credits Against Loss provision to contain an implicit recognition that

The effect Amendment 726 would have on the reasoning employed by the Circuits in cases that addressed the reimbursed victims issue will be discussed next. This should reveal the inadequacies of Amendment 726 for promoting sentencing proportionality, and the intrinsic errors mandated by its construction. Amendment 726 will not promote sentencing proportionality because time lost seeking reimbursement will be equated for every account holder whose means of identification was used as a result of financial identity theft, regardless of whether they actually lost any. Amendment 726's constructional errors arise because it counts the "victims" of a financial identity theft crime under Section 2B1.1(b)(2) before conducting an "actual loss" calculation under Section 2B1.1(b)(1), and because it allows for the possibility of double-counting financial losses.

A. The Starting Point: *Yagar & Lee*

The circuit split on the reimbursed victims issue first arose in the 2005 *Yagar* and *Lee* opinions.[98] *Yagar*, the first circuit court opinion to address the reimbursed victims issue[99]—and the resultant majority viewpoint[100]—held that reimbursed account holders are not necessarily *always* "victims" under the definition of Section 2B1.1(b)(2);[101] conversely, *Lee*,[102]—which became the minority position[103]—declined to adopt *Yagar*'s reasoning and held that reimbursed account holders are categorically "victims."[104] At its core, this dispute effectively concerned the question of *when* a court should calculate the number of "victims" for a crime under Section 2B1.1.[105] The *Yagar* court calculated the number of "victims" based on their relative position at the time of trial,[106] whereas the *Lee* court calculated the number of "victims" at the instant the crime was committed.[107] This is a simplified, yet critical, distinction. A court calculating "victims" based on their relative position at trial is able to consider the curative effects of reimbursement, whereas a court calculating "victims" at the moment a financial identity

---

reimbursed account holders are always "victims." *See Lee*, 427 F.3d at 895; United States v. Stepanian, 570 F.3d 51, 56 (1st Cir. 2009).

98. *See supra* Introduction.

99. *Yagar*, 404 F.3d at 971.

100. *See* Harrington, *supra* note 8, at 449, 449 n.22.

101. *Yagar*, 404 F.3d at 971.

102. *Lee*, 427 F.3d at 894.

103. *See* Harrington, *supra* note 8, at 450 n.23.

104. *Lee*, 427 F.3d at 895.

105. *Compare Yagar*, 404 F.3d at 971 (holding that account holders are not considered "victims" when their monetary loss is short-lived and immediately covered by a third party, rather than defining them as "victims" the moment the crime is committed), *with Lee*, 427 F.3d at 895 (holding that the Credits Against Loss provision of Section 2B1.1 inherently recognizes that reimbursed account holders are "victims" because they have suffered a loss at the moment the crime is committed). *See also* Nash, *supra* note 36, at 1441.

106. *See Yagar*, 404 F.3d at 971.

107. *See Lee*, 427 F.3d at 895.

theft crime is perpetrated will automatically include each account holder in the "victims" calculation, regardless of whether they have spent any significant time or effort seeking reimbursement.[108]

In *Yagar*, the defendant had been convicted of a bank fraud scheme in which she used stolen checks from thirteen different bank accounts and stolen information from over fifty individuals' bank accounts to steal almost $90,000.[109] At sentencing in district court, the defendant received a two-Level enhancement under Section 2B1.1(b)(2)(A) for a crime involving more than ten "victims."[110] On appeal, both the United States and the defendant argued that this was an improper calculation of the number of "victims" involved in the crime. The government's position was that a four-Level enhancement was appropriate under Section 2B1.1(b)(2)(B) (fifty or more "victims") because even though they were later reimbursed, more than sixty different individuals temporarily lost money as a result of the defendant's conduct.[111] Conversely, Yagar argued that the five banks who reimbursed the account holders were the only entities that suffered "actual loss" and, therefore, none of the reimbursed account holders should be counted as "victims."[112] The Sixth Circuit found for the defendant on the reimbursed victims issue, holding that the individual account holders affected were not to be counted as "victims" at sentencing, and rejected the government's position that "'[t]here is no limitation as to when the actual loss must exist'" under the Guidelines.[113] The *Yagar* court reasoned that the account holders had not suffered any "adverse effect" because their losses were "short-lived and immediately covered by a third-party." Therefore, they had not suffered any "actual loss" or "pecuniary harm," and thus were not "victims."[114] Yet, the *Yagar* court recognized that there could be situations in which reimbursed account holders do suffer an "adverse effect," and the qualifying explanation reflects this.

Although the account holders at issue in *Yagar* were not found to be "victims," the *Yagar* qualifying explanation stated that "there may be situations in which a person could be considered a 'victim' under the Guidelines even though he or she is ultimately reimbursed."[115] The *Yagar* line of reasoning thus left open the possibility for another court to find reimbursed account holders to be "victims" under 2B1.1(b)(2) without conflicting with the Sixth Circuit's analysis. It is this distinction that allowed *Yagar*'s reasoning to ensure uniform sentencing proportionality

108. *See id*.
109. *Yagar*, 404 F.3d at 968.
110. *Id.* at 967 (counting as "victims" the five banks and six account holders who had to purchase new checks because of defendant's scheme).
111. *Id.* at 970.
112. *Id.*
113. *Id.* at 971.
114. *Id.*
115. *Id.*

that would not be possible under *Lee*, and is not now possible under Amendment 726. Neither *Lee* nor Amendment 726 allow a sentencing judge to consider whether a reimbursed account holder has suffered any adverse effect as a result of the time they lose seeking reimbursement.

In *Lee*, defendants Lee and Wyman were prosecuted for cashing "more than one million dollars' worth of personal checks drawn upon closed bank accounts" in a private offset exchanges scheme[116] that attempted to draw upon money held by the United States Treasury.[117] The *Lee* court held that the account holders at issue had suffered harm seeking reimbursement for their losses, and factually distinguished the account holders from those in *Yagar*, because the account holders in *Lee* had spent considerable time pursuing legal remedies for their losses and there were no third parties readily available to reimburse them.[118] The *Lee* court also took direct issue with *Yagar*'s reading of Section 2B1.1, holding that it was erroneous not to read the "Actual Loss" provision of Application Note 3(A)(i)[119] with the "Credits Against Loss" provision of Application Note 3(E)(i).[120] Under *Lee*'s reading of these provisions, reimbursed account holders are always counted as "victims" due to the "initial loss" they suffer when their identities are stolen.[121]

The Credits Against Loss provision states that "loss" should "be reduced" by "[t]he money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the *victim* before the offense was detected."[122] The *Lee* court reasoned that the inclusion of the word "victim" in the Credits Against Loss provision was an "inherent . . . acknowledgement that there was in fact an initial loss, even though it was subsequently remedied by recovery of collateral or return of goods."[123]

---

116. Private offset exchange schemes arise out of a

> commercially unrecognized system rooted in the notion that the United States Treasury amasses moneys rightfully belonging to individuals. Private offset exchanges were claimed mechanisms for individuals to access this Treasury-held money. Using closed checking accounts, an individual would write a check to obtain a good or service. As these checks were written on closed accounts, the account on which the check was drawn could not provide the funds to pay for the goods. Instead, these offset checks were theoretically to be presented to the Treasury by the drawee bank or payee for reimbursement with the stockpiled funds.

United States v. Lee, 427 F.3d 881, 884 (11th Cir. 2005).

117. *Id.*

118. *Id.* at 895.

119. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(A)(i) (2010).

120. *Id.* § 2B1.1 cmt. n.3(E)(i).

121. *Lee*, 427 F.3d at 895.

122. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(E)(i) (2010) (emphasis added).

123. *Lee*, 427 F.3d at 895. *See also* United States v. Stepanian, 570 F.3d 51, 56–57 (1st Cir. 2009) (citing United States v. Cornelius, Nos. 06-10727 & 06-10763, 2006 U.S. App. LEXIS 26975, at *4 (11th Cir. Oct. 30, 2006)).

Lee's reasoning thus nullified the effect that reimbursement can have upon the "victims" calculation, and automatically counted each account holder who had been affected by the crime. Thus, for the purposes of promoting sentencing proportionality, *Yagar*'s reasoning is superior to that of *Lee* because the *Yagar* qualifying explanation allowed a sentencing court to consider whether or not an account holder had suffered a pecuniary harm seeking reimbursement,[124] whereas the *Lee* court's reasoning allowed for no such inquiry and categorically defined reimbursed account holders as "victims."[125]

Had the *Yagar* court been confronted with the facts of *Lee*, it likely would have included the reimbursed account holders in the "victims" calculation, despite applying a different interpretation of Section 2B1.1(b)(2). As noted by the *Lee* court, "the monetary losses suffered by these parties were neither short-lived nor immediately covered by third parties" and "unlike the individual account holders in *Yagar*, [*Lee*'s] victims suffered considerably more than a small out-of-pocket loss and were not immediately reimbursed by any third party."[126] Thus, this would logically place *Lee*'s "victims" within the circumstances alluded to in the *Yagar* qualifying explanation where "a person could be considered a 'victim' under the Guidelines even though he or she is ultimately reimbursed."[127] However, the reverse is not true. Based on *Lee*, had the Eleventh Circuit been presented with the facts of *Yagar*, it would have reached an opposite conclusion on the reimbursed victims issue than did the Sixth Circuit. The *Lee* court's reading of the Credits Against Loss provision categorically defines reimbursed account holders as "victims" under 2B1.1(b)(2), irrespective of whether or not their losses were short-lived or did not cause any "pecuniary harm."[128] Thus, the 2B1.1(b)(2) "victims" calculation under *Lee* was prone to disproportionate outcomes because it could not take into account whether an account holder had actually suffered any "pecuniary harm" despite being reimbursed. By adopting *Lee*'s minority viewpoint in Amendment 726,[129] so too has the Federal Sentencing Commission perpetuated outcomes that are in conflict with the Guidelines' goal of promoting sentencing proportionality. This is further demonstrated by the circuit opinions that followed *Yagar* and *Lee*.

---

124. United States v. Yagar, 404 F.3d 967, 971 (6th Cir. 2005). *See also* United States v. Abiodun, 536 F.3d 162, 168 (2d Cir. 2008).

125. *See Lee*, 427 F.3d at 895.

126. *Id.*

127. *Yagar*, 404 F.3d at 971.

128. *See Lee*, 427 F.3d at 895.

129. Amendment 726 makes no mention of the proper reading of the Credits Against Loss provision, but the practical effect of the Amendment is identical because an account holder will be counted as a victim under 2B1.1(b)(2) regardless of whether or not they have suffered any pecuniary harm. *See* U.S. SENTENCING GUIDELINES MANUAL supp. app. C, Amend. 726 (2010). *See also supra* note 19 and accompanying text.

B. *YAGAR* AND *LEE* APPLIED

Circuit opinions on the reimbursed victims issue generally adopted either the position of *Yagar* or *Lee.*[130] The majority of these opinions were consistent with *Yagar*, whether or not they held that the reimbursed account holders at issue were "victims."[131] The *Yagar* line of opinions held that account holders who were quickly reimbursed and did not suffer any "pecuniary harm" or "actual loss" were not "victims," but employed reasoning that would count as "victims" those account holders who were not quickly reimbursed and suffered "pecuniary harm" as a result.[132] In contrast, the *Lee* line of opinions held that reimbursed account holders are always "victims," notwithstanding the effects of any reimbursement.[133]

As previously discussed, Amendment 726 has implicitly adopted *Lee*'s reasoning. The folly of this is three-fold: (1) *Lee*'s reasoning allows for the possibility of disproportionate sentencing by equivocating the harm suffered by account holders who lost time seeking reimbursement to those who did not; (2) *Lee*'s reasoning includes account holders in the "victims" calculation based on the harm they suffer seeking reimbursement without providing a mechanism for including this harm in the "actual loss" calculation; and (3) *Lee*'s reasoning allows for the possibility of double-counting financial losses caused by financial identity theft.

1. Proportional Sentencing

Of the courts that found that the reimbursed account holders at issue were not "victims," most reasoned that they did not suffer any "actual loss" or "pecuniary harm" when their monetary loss was "short-lived and immediately covered by a third party." This argument, first articulated in *Yagar*,[134] was embraced by the Fifth,[135] Ninth,[136] and Tenth[137] Circuits. As demonstrated by the account holders at issue in these opinions, victims of financial identity theft do not necessarily spend any significant amount of time seeking reimbursement for their losses.[138]

---

130. *See* Nash, *supra* note 36, at 1439–41. *But see* Parsons, *supra* note 9, at 853 (asserting that there were three distinct lines of opinions within the reimbursed victims issue circuit split).

131. *See* Harrington, *supra* note 8, at 449.

132. *See supra* Part IV.B.1.

133. *See supra* Part IV.B.1.

134. United States v. Yagar, 404 F.3d 967, 971 (6th Cir. 2005).

135. *See* United States v. Conner, 537 F.3d 480, 491 (5th Cir. 2008).

> Here, the account holders were reimbursed by third parties (as in *Yagar*), and the Government does not point to evidence that any account holder had to spend money or an extended length of time seeking reimbursement. We do not have to reach the issue of whether the parties counted as "victims" under our rule.

Id.

136. United States v. Armstead, 552 F.3d 769, 782 (9th Cir. 2008).

137. United States v. Orr, 567 F.3d 610, 616 (10th Cir. 2009).

138. Amendment 726 therefore creates an erroneous presumption in light of these cases.

The Fifth Circuit followed *Yagar*'s reasoning in *United States v. Conner*.[139] In that case, defendant Whately had purchased goods at Home Depot stores and charged them to the accounts of multiple companies without authorization.[140] In the district court, Whately's base offense was increased four Levels under Section 2B1.1(b)(2)(B) because he had unlawfully charged his purchases to the accounts of between 50 and 250 different companies.[141] On appeal, the *Conner* Court cited *Yagar*[142] and reversed the 2B1.1(b)(2)(B) enhancement[143] because the affected account holders had been fully and quickly reimbursed for the unauthorized charges on their accounts,[144] and thus had not suffered any "pecuniary harm."[145] In reaching this decision, the *Conner* Court stressed that "pecuniary harm" is harm that *resulted from* the offense and stated that it did not see any reason why the court should "'stop the clock' immediately after the credit accounts were used, as opposed to measuring pecuniary harm following the events that actually took place, including the crediting of the accounts by the issuers of credit."[146]

In *United States v. Pham*, the Ninth Circuit joined the Fifth in adopting *Yagar*'s reasoning and remanded a case involving a scheme where the defendant had "created fraudulent driver's licenses and other identifying documents and orchestrated counterfeit check cashing activities, the proceeds of which were then deposited in his bank account or the account of another scheme leader's girlfriend."[147] The *Pham* court held that the individual account holders were not "victims" and stated that "[i]f the account holders victimized by Pham were fully reimbursed as soon as they notified their banks of the fraudulent activity, then they cannot reasonably be said to have suffered or 'sustained' the losses that were only temporarily and fleetingly reflected in their accounts."[148] The *Pham* Court also distinguished its account holders from those in *Lee*, because in *Lee* the account holders were not reimbursed by their banks and recovered their losses "from the defendants themselves."[149]

The Third Circuit's first opinion on the reimbursed victims issue was decided in *United States v. Kennedy* in early 2009.[150] Defendant Kennedy was a "representative payee liaison" of a non-profit corporation that assisted

---

139. *See Conner*, 537 F.3d at 491.
140. *Id.* at 483.
141. *Id.* at 488.
142. *Id.* at 489.
143. *Id.* at 492.
144. The *Conner* court declined to address whether these account holders would have properly been counted as "victims" if they had spent time and effort seeking reimbursement. *Id.* at 491.
145. *Id.* at 489, 491.
146. *Id.* at 490.
147. United States v. Pham, 545 F.3d 712, 715 (9th Cir. 2008).
148. *Id.* at 719.
149. *Id.* at 720.
150. *See* United States v. Kennedy, 554 F.3d 415 (3d Cir. 2009).

elderly people in managing their finances.[151] She utilized her access to her client's financial accounts to write fraudulent checks and steal over $50,000 from thirty-four individual account holders[152]—all of whom were reimbursed before they were aware that their funds had even been stolen.[153] The *Kennedy* court, adopting *Yagar*'s reasoning, held that because the affected account holders were reimbursed by Kennedy's employer and its insurer, they had not sustained any part of the "actual loss" and thus were not "victims" as defined by Section 2B1.1(b)(2).[154]

The Tenth Circuit addressed the reimbursed victims issue in May 2009 and sided with *Yagar* and its progeny in *United States v. Orr*.[155] Defendant Orr had compromised the credit card numbers of over seven hundred individual accounts by "'min[ing]' credit card data 'through the use of skimming devices,' 'download[ing]' the credit card data 'into a computer to create fraudulent credit cards,' and then us[ing] the fraudulent credit cards 'at retail stores to purchase high end items.'"[156] When it addressed the reimbursed victims issue, the *Orr* court found that the government had failed to carry its evidentiary burden of proving that the account holders affected by Orr's scheme had not been fully reimbursed, and it was thus error to include them in the "victims" calculation at sentencing.[157]

In contrast to *Yagar*, *Pham*, *Conner*, and *Orr*—where the account holders at issue did not expend significant time or energy seeking reimbursement for their losses—the Third,[158] Second,[159] and First[160] Circuit Courts of Appeal addressed the reimbursed victims issue while presented with account holders who had not been immediately reimbursed for their losses and suffered an adverse effect as a result. As in *Lee*, the Courts of Appeals in each case held that time lost seeking reimbursement was a "reasonably foreseeable pecuniary harm" and therefore those account holders were to be included in the "victims" calculation. Thus, inclusion of these "victims" at sentencing was in proportion to the harm caused by the crime. However, as demonstrated below, in contrast to the First Circuit,[161] the Third and Second Circuits reached conclusions that are compatible with the *Yagar* decision because they did not hold that *all* reimbursed account

151. *Id.* at 417.
152. *Id.* at 417–18.
153. *Id.* at 419.
154. *Id.*
155. United States v. Orr, 567 F.3d 610 (10th Cir. 2009).
156. *Id.* at 612.
157. *Id.* at 615. The *Orr* court also stated that an individual credit card holder who is "fully and timely reimbursed" has not suffered any "actual loss." *Id.* at 616. This holding demonstrates the constructional error of both the *Lee* line of reasoning and, subsequently, Amendment 726. *See* discussion Part IV.B.2 *infra*.
158. *See* United States v. Adjei, No. 07-2295, 2009 WL 405680, at *3 (3d Cir. Feb. 19, 2009).
159. *See* United States v. Abiodun, 536 F.3d 162, 166 (2d Cir. 2008).
160. *See* United States v. Lee, 427 F.3d 811, 895 (11th Cir. 2005).
161. *See* United States v. Stepanian, 570 F.3d 51, 56 (1st Cir. 2009).

holders are counted as "victims." Instead, the courts ruled only that the account holders at issue in each case had suffered harm despite being reimbursed; therefore, they could each fall within the circumstances suggested by the *Yagar* qualifying explanation.

In *United States v. Abiodun*, defendant Abiodun had purchased roughly four to five hundred stolen credit reports downloaded from the internet by a third party, and committed credit card and access device fraud using stolen credit card information obtained from the reports.[162] The Second Circuit held that the individual account holders affected by the crime were properly considered "victims" because there was evidence that they had to spend "an appreciable amount of time securing reimbursement for their financial losses from their banks or credit card companies"[163]—but it did not hold that the Credits Against Loss provision mandated such a result.

In *United States v. Adjei*, the Third Circuit was faced with a defendant who had been convicted of "fil[ing] 175 false tax returns with the Internal Revenue Service . . . using stolen information from hospital patients,"[164] and, as a result of his conduct, "individual hospital patients had to engage in a long, drawn-out process to regain their identities and obtain proper tax returns."[165] The Third Circuit held that the individuals the defendant defrauded who "spent time or money seeking reimbursement" could qualify as "victims" as defined by Section 2B1.1(b)(2)—but, as in *Abiodun*, it did not hold that the Credits Against Loss provision mandated such a result.[166]

Neither *Adjei* nor *Abiodun* held that reimbursed account holders categorically were, or were not, to be counted as "victims," only that the account holders in these cases were to be counted as "victims" because they had suffered harm seeking reimbursement.[167] Thus, both *Adjei* and *Abiodun* are not inconsistent with the *Yagar* qualifying explanation, despite counting reimbursed account holders as "victims" under 2B1.1(b)(2). However, in the 2009 opinion *United States v. Stepanian*, the First Circuit directly rejected *Yagar*'s reasoning in favor of *Lee*'s.[168]

Defendant Stepanian had been convicted in a scheme whereby he and three co-conspirators secretly replaced payment terminals in Stop & Shop grocery stores with "altered terminals [that] were equipped with devices that recorded, or 'skimmed,' debit card numbers, PIN codes, and credit card numbers whenever customers swiped their cards to make purchases."[169] In

162. *Abiodun*, 536 F.3d at 163.
163. *Id.* at 166.
164. United States v. Adjei, No. 07-2295, 2009 WL 405680, at *1 (3d Cir. Feb. 19, 2009).
165. *Id* at *2.
166. *Adjei*, 2009 WL 405680, at *3. This decision supplemented the decision in *Kennedy*, where the court previously declined to rule on the reimbursed victims issue. *See* United States v. Kennedy, 554 F.3d 415, 442 (3d Cir. 2009).
167. *See Adjei*, 2009 WL 405680, at *2–4; *Abiodun*, 536 F.3d at 167–69.
168. United States v. Stepanian, 570 F.3d 51, 56 (1st Cir. 2009).
169. *Id.* at 53; *see also* United States v. Ter-Esayan, 570 F.3d 46, 47–48 (1st Cir. 2009).

ruling that the account holders affected by his scheme were "victims," the court placed great weight on the "declaration of victim losses"[170] statements that had been filed in district court to conclude that they had suffered real economic loss during the period in which they were unable to access their funds,[171] and held that such losses were within the "reasonably foreseeable pecuniary harm" intended by Section 2B1.1(b)(2).[172] Significantly, *Stepanian* was the only circuit court decision in four years to directly reject *Yagar* in favor of *Lee*, holding that reimbursed account holders are necessarily counted as "victims" because the Credits Against Loss provision contemplates the existence of an initial loss despite any subsequent reimbursement.[173] In *Stepanian*, counting the affected account holders as "victims" proportionately reflected the harm caused by the defendant's conduct. However, in adopting *Lee*'s reasoning (which is now reflected by Amendment 726), *Stepanian* foreclosed the future possibility of excluding account holders that had not suffered harm through time lost seeking reimbursement from the "victims" calculation.

Yagar, *Conner*, *Orr*, *Pham*, and *Kennedy* demonstrate the folly of such reasoning. In each of these cases the account holders at issue were found to have been rapidly reimbursed for their losses and thus had not suffered any "pecuniary harm" or "actual loss."[174] Despite this, Amendment 726 would now presuppose that these account holders had suffered harm seeking reimbursement and mandate that they be included in the 2B1.1(b)(2) "victims" calculation. While the *Conner* court did not see a justification for "stopping the clock," Amendment 726 has no clock. Rather, it is constructed with an overbroad presumption that every victim of financial identity theft spends a significant amount of time seeking reimbursement.[175] Had Amendment 726 governed the cases of the defendants at issue in *Yagar*, *Conner*, *Orr*, *Kennedy*, and *Pham*, they would each have received upward sentencing enhancements that counted, as "victims," account holders who were viewed by the sentencing court *not* to have suffered any significant adverse effect as a result of their crimes. Such a result is not in proportion to the harm suffered by those account holders and is contrary to the intended goals of the Guidelines. As evidenced by the opinions of the

---

170. *Stepanian*, 570 F.3d at 56.

171. *Id.*

> The declarations reveal[ed] that one victim [who] was traveling abroad could not pay her travel expenses during the period of the theft. Another victim described how he and his family had no money for food and gas for a period of time because of the theft, and how their card was denied when they tried to use it to pay for their son's birthday party.

Id.

172. *Id.* at 55–56.

173. *Stepanian*, 570 F.3d at 56; *see also Ter-Esayan*, 570 F.3d at 51.

174. *See* discussion *supra* Part IV.B.1.

175. *See Public Hearings*, *supra* note 20, at 37.

Third, Second, and First Circuits—which found that account holders *had* suffered harm as a result of time lost seeking reimbursement—it is *Yagar*'s reasoning, not *Lee*'s or Amendment 726, that provides the proper rubric for determining whether time lost seeking reimbursement should be a factor that leads to an increase in a defendant's recommended sentence.[176]

2. Constructional Errors

Amendment 726 contains two inherent constructional errors that are inconsistent with the proper operation of Section 2B1.1. The first is that Amendment 726 fails to address the "double-counting" that occurs when a reimbursed account holder *and* the financial institution that reimburses it are each included in the "victims" calculation—viz. the singular financial loss is ascribed to two separate "victims" and, thus, is counted twice in the "actual loss" calculation.[177] This error is plain and has been adequately addressed by previous scholarship,[178] so it will not be further expounded by this note.

The second error relates to the relationship between the calculation of "actual loss" and "victims" under Section 2B1.1. For the purposes of Section 2B1.1(b)(1), where there is no "actual loss" there can be no "victim," because under Section 2B1.1 calculation of "actual loss" and the identification of "victims" are two distinct and interdependent concepts.[179] If an individual has not suffered an "actual loss," he is not a "victim," and must not be counted as such under 2B1.1(b)(2). Despite this, *Lee* reasoned that, read in conjunction with the Credits Against Loss provision, the Actual Loss provision inherently recognizes that all reimbursed account holders suffer an initial loss, and should therefore be included in the "victims" calculation.[180] This reasoning—adopted by the First Circuit in *Stepanian*, and implicitly adopted by Amendment 726—is, as articulated in *Conner*, *Orr*, and *Armstead*, patently unsound because it allows inclusion of account holders in the "victims" calculation without requiring that they be included in the "actual loss" calculation.

This error was identified by the Ninth Circuit in *Armstead*, which held that it is wrong to count individuals who were fully reimbursed as "victims" "without regard to whether their losses were included in the loss

176. This Note advocates for an Amendment that adopts *Yagar*'s reasoning but employs a departure application to account for the harm suffered by reimbursed account holders, rather than automatically counting them as "victims." *See* discussion Part V *infra*.

177. Amendment 726 automatically includes reimbursed account holders in the "victims" calculation, regardless of whether or not they have suffered any harm, and thus is prone to double-counting the reimbursed financial losses. *E.g.*, Harrington, *supra* note 8, at 448; Parsons, *supra* note 9, at 852.

178. *See, e.g.*, Harrington, *supra* note 8, at 450–51, 456–57.

179. *E.g.*, United States v. Orr, 567 F.3d 610, 616 (10th Cir. 2009); United States v. Armstead, 552 F.3d 769, 783 (9th Cir. 2008); United States v. Conner, 537 F.3d 480, 489 (5th Cir. 2008).

180. *See* United States v. Lee, 427 F.3d 881, 895 (11th Cir. 2005).

calculation."[181] The *Armstead* court stated that although "persons who are reimbursed may suffer pecuniary harm," the *Lee* court had conducted a backwards calculation by identifying "victims" before calculating "loss."[182] *Armstead* held instead that "[a] court should analyze and quantify pecuniary harm when making the loss calculation, not when determining the number of victims."[183] Hence, "[o]nce a loss amount is included in the loss calculation, then the person associated with that loss should also be included in the victim calculation."[184]

The Fifth and Tenth Circuits also recognized this error. In *Conner*, the Firth Circuit rejected *Lee*'s reading of the Actual Loss Provision and denied that it should be read in conjunction with the Credits Against Loss provision, holding instead that individual account holders do not suffer "pecuniary harm at the moment the purchases [are] charged to their accounts. . . . [and] [i]t is a strained reading of [the Actual Loss provision] to say that the account holders suffered 'pecuniary harm that resulted from the offense'" despite being fully reimbursed.[185] The *Conner* court further stated that *Lee*'s "interpretation of the definition of 'actual loss' is not compatible with its plain meaning"[186] because where account holders have been made pecuniarily whole by their reimbursements, they have not suffered an "actual loss."[187] Moreover, the *Conner* court found this reasoning to be improper because courts:

> should not look to a separate provision of the Application Notes to create an ambiguity . . . [because] there is no indication that use of the word "victim" [in the Credits Against Loss provision] was intended to modify the definition of the term as used in § 2B1.1(b)(2). . . . [and,][f]inally, [the Credits Against Loss provision] is about how to count "loss," which is a related but distinct concept from "actual loss"—how the Application Notes instruct us to identity "victims."[188]

In *Orr*, the Tenth Circuit also rejected *Lee*'s reading of the Credits Against Loss provision in favor of *Connor*'s reading because "[the Credits Against Loss provision], by its own express terms, 'applies to the determination of loss under subsection (b)(1),'" and calculating "loss" and identifying "victims" are "distinct concepts" for the purposes of Section 2B1.1.[189] *Orr* further rejected that there is a separate "initial loss" that can

---

181. *Armstead*, 552 F.3d. at 782.
182. *Id.* at 783.
183. *Id.*
184. *Id.*
185. United States v. Conner, 537 F.3d 480, 490 (5th Cir. 2008).
186. *Id.*
187. *Id.*
188. *Id.* at 491 n.38 (citation omitted).
189. United States v. Orr, 567 F.3d. 610, 616 (10th Cir. 2009) (quoting U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3 (2010)).

be considered as opposed to the "actual loss" if the victim has been fully reimbursed.[190]

Connor, *Orr*, and *Armstead* demonstrate that, as in *Lee*, Amendment 726 will inherently violate the constructional design of the 2B1.1(b)(1) "actual loss" calculations by mandating that all reimbursed account holders be counted as "victims." In addition, Amendment 726 fails to resolve Section 2B1.1's "double-counting" issue for financial identity theft crimes. The solution proposed by this note will attempt to remedy these errors.

V. THE PROPOSED SOLUTION

As is made clear through the progression of the four-year circuit split, while the Federal Sentencing Commission has achieved greater sentencing consistency through adoption of Amendment 726, it has done so at the expense of sentencing proportionality and the proper operation of the 2B1.1(b)(1) "actual loss" calculations, and has failed to remedy the risk of double-counting financial losses incurred as a result of financial identity theft. A superior resolution to the reimbursed victims issue is to implement: (1) an amendment to Section 2B1.1 specifically excluding reimbursed account holders from the definition of "victims" under 2B1.1 and specifically stating that time lost seeking reimbursement is not a "pecuniary harm"; and (2) a guided upward departure application modeled after the *Yagar* line of reasoning that takes into account time lost seeking reimbursement.

The guided departure application should be incorporated into Application Note 19(A)(vi) of Section 2B1.1, which governs specific upward departure considerations for cases "involving access devices or unlawfully produced or unlawfully obtained means of identification."[191] It should be a fourth factor that a court may consider in deciding whether to apply an upward departure, and should read: "*The offense caused a reimbursed account holder to spend a significant amount of time or effort seeking reimbursement for financial losses, or while repairing harm suffered as a result of the unauthorized dissemination of their means of identification.*" This proposed departure application mirrors *Yagar*'s qualifying explanation in recognizing that reimbursed account holders do not necessarily suffer an "adverse effect" when their financial losses are short-lived, and explicitly provides for the inclusion of time or effort lost seeking reimbursement as harms that may be appropriately considered as sentencing enhancement factors. Notably, the term "account holder" should be used, as opposed to "victim," because under this proposed amendment reimbursed account holders are not to be counted as "victims" under 2B1.1(b)(2).

---

190. *Id.* at 616.
191. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.19(A)(vi) (2010).

At the outset, it is important to note that departure applications are designed to govern exceptional circumstances,[192] and in the case of financial identity theft crimes, the reimbursed victims issue is a nearly ever-present norm, hardly the exception. At first blush, therefore, implementing a departure application to rectify the reimbursed victims issue might appear inappropriate. However, the benefits of implementing this guided departure application[193]—promoting sentencing proportionality for financial identity theft crimes, ensuring the proper operation of 2B1.1 "victims" and "actual loss" calculations, and remedying the risk of double-counting financial losses—far outweigh this slight constructional anomaly.

This proposed solution will promote the Commission's primary motivation in amending the definition of "victim" in Section 2B1.1(b)(2) to include individuals who have been fully reimbursed for their financial identity theft losses. Namely, 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*."[194] The proposed solution is necessary to attain this goal because Amendment 726 does not adequately account for such lost time. Applied to either the case of an account holder who is immediately reimbursed, or to one who spends a significant amount of time seeking reimbursement, Amendment 726 produces inherently erroneous outcomes. Under Amendment 726, the harm suffered by an account holder who has lost large amounts of time seeking reimbursement is equated to that of an account holder who was immediately reimbursed and may not even have been aware of his financial loss.[195] Thus, Amendment 726 suffers from an inherent lack of proportionality—a critical element of the Guidelines' statutory intent—and the proposed amendments will remedy this.

This proposal would also eliminate Amendment 726's constructional errors. The risk of double-counting financial losses is eliminated because the proposed solution would mandate that reimbursed account holders *not* be counted as "victims" at sentencing. Thus, the financial losses incurred will only be ascribed to the entities that reimbursed the individual account holders. The proposed amendments will also restore the proper operation of the "actual loss" and "victims" calculations. Amendment 726 mandates that

192. *See* 18 U.S.C. § 3553(b)(1) (2006) (allowing departures when the sentencing court "finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described").

193. Guided departures are designed to be employed more frequently than unguided departures. *See* discussion *supra* Part I; *see also* U.S. SENTENCING GUIDELINES MANUAL § 1A1.4(b) (2010).

194. U.S. SENTENCING GUIDELINES MANUAL supp. app. C, Amend. 726, at 310 (2010) (emphasis added).

195. *See id.* (listing no distinction between account holders who suffered harm due to the use of their means of identification and those who did not).

an account holder whose means of identification is used unlawfully be included in the 2B1.1(b)(2) "victims" calculation, but gives no guidance as to how such lost time should be accounted for, if at all, in the 2B1.1(b)(1) "actual loss" calculation. As articulated by the Ninth Circuit in *Armstead*, "in order to be counted as a victim, a person must have sustained a loss that is 'monetary or that otherwise is readily measurable in money' *and* that loss must be included in the loss calculation."[196] Yet, Amendment 726 presupposes that every reimbursed account holder has incurred such losses without providing a rubric for defining these losses in monetary terms. The proposal outlined here eliminates this quandary entirely. Under the proposed amendments, time lost seeking reimbursement need not be quantified and included in the "actual loss" calculation because the reimbursed account holders are not to be included in the "victims" calculation; yet, if they have suffered an adverse effect through time lost seeking reimbursement this harm will be reflected via the proposed departure application.[197]

Roy Michael Anderson[*]

196. United States v. Armstead, 552 F.3d 769, 780–81 (9th Cir. 2008).

197. *Cf.* Parsons, *supra* note 9, at 864–68 (proposing a solution to the reimbursed victims issue that includes time lost seeking reimbursement in the "actual loss" calculations based on the proposition that—employing an "opportunity cost" theory—time lost seeking reimbursement is readily measurable in money).

[*] B.S. Fordham University, College of Business Administration, 2006; J.D. candidate, Brooklyn Law School, 2011. I would like to thank Professor Bentele for her early commentary and the staff of the Brooklyn Journal of Corporate, Financial & Commercial Law. Special thanks also to Robert Marko and Steven Bentsianov, whose tireless dedication made this note possible. Most importantly, I would like to thank my family for their limitless love and support.