

Several Federal Courts of Appeals have affirmed sentences in odometer fraud cases where the sentences were based in part on findings of consumer loss that were \$4,000 per car or more. Several of these cases are "unpublished," but most of them are available on Westlaw. Some are also published in the Federal Reporter series, as indicated below. Numerous district courts have also made such loss findings. The first two cases reach \$4,000 by using 40% of retail value – using 40% adjusts for the value of the cars, and coincidentally led to \$4,000 in these two cases which are separated by many years.

United States v. Gary Lee Sutton, ___ F.3d ___, 2008 WL 879429 (10th Cir. 2008). The 10th Circuit affirmed the district court's sentencing findings. The district court found that odometer tampering caused consumer loss of 40% of the retail purchase price of the cars, which was \$4,000 per vehicle. This figure was used to determine fraud loss under the Sentencing Guidelines. On appeal Sutton attacked these findings, and advocated a valuation method that compares the "book values" of high- and low-mileage vehicles from used-car pricing guides. Defendants in odometer fraud cases regularly present analysis of this nature at sentencing because it would lead to a relatively small fraud loss estimate under the Guidelines.

The 10th Circuit affirmed the district court, finding that the government provided a reasonable basis for rejecting Sutton's "book value" analysis. In doing so the court discussed the declaration of Richard Diklich regarding 40% to 50% loss of value due to a "not actual mileage" branded title. The court also cited declarations from Patricia Erney from NADA and Charles Vogelheim from Kelley Blue Book regarding proper use of those mileage guides. The court said that this provided the district court a reasonable basis for the 40% of value loss finding.

The Court of Appeals rejected several arguments that defendants often make at sentencing. The court said that (1) considering both high mileage and unanticipated repair costs is not double counting; (2) the fact that the government learned the actual mileage of the vehicles through its investigation did not affect the loss calculation; (3) the "inherent value" of the vehicles as transportation for owners who drove their vehicles "into the ground" does not affect the fair market value of the vehicles; and (4) civil cases involving damage calculation are irrelevant to estimating loss under the guidelines. The court also cited and summarized, in this published opinion, a number of other cases that are otherwise "unpublished," including Alami, Fraaza, and Gaitin, which are described below.

United States v. Whitlow, 979 F.2d 1008 (5th Cir. 1992). The court affirmed a loss finding of \$4,000 per car. The district court had noted that the National Automobile Dealers Association guide for used car values stated that "High Mileage" deductions should not reduce the value of a vehicle by more than 40%. Accordingly, the district court calculated the loss per vehicle as 40% of the average \$10,000 retail purchase price of the cars. This resulted in a loss per car of \$4,000, which the Fifth Circuit said was plausible in light of the record as a whole. 979 F.2d at 1012.

United States v. Berndt, 86 F.3d 803, 811 (8th Cir. 1996). The defendant received a sentence of 37 months for clocking 80 - 100 cars. The loss finding of \$4,000/car was not contested, but is mentioned in opinion.

United States v. Jarrahi, et al., Nos. 97-4289, 4311 (4th Cir., May 11, 1998), 1998 WL 230825 . Defendants appealed sentencing guideline loss findings. Both defendants received 26-month jail

terms. The Fourth Circuit held that the district court did not commit clear error by holding the defendants responsible for rollbacks committed by others even though the defendants were in a rather "loose-knit" association in which they purchased vehicles for each other. The loss finding was just over \$4,800 per car on a total of 364 cars.

United States v. Carroll, et al., Nos. 97-4022, 4259 (November 19, 1998), 1998 WL 801880. Richard Carroll and Charles Granata were convicted after trial and sentenced to 46 and 38 months in prison, respectively. The court found that the ultimate consumer purchaser was the real victim of the crime, and that a loss estimate of \$6,000 per car was reasonable.

United States v. Alami, 1997 WL 570867 (4th Cir., September 16, 1997), the court upheld a loss finding under the Sentencing Guidelines of \$6,000 per car. That was the average difference between the price defendants paid for the cars, and the ultimate consumer purchase prices.

United States v. Fraaza, No. 97-3863 (7th Cir., March 12, 1998), 1998 WL 122159. Fraaza pled guilty to one count of making false odometer disclosure statements, and received a 10-month jail term. He had altered odometers on nine cars which were 9-13 years old, and sold at retail for a total of less than \$30,000. While the loss finding is relatively low on a per car basis, the Seventh Circuit upheld the district court's loss finding, which was based on 50% of consumer price or \$.06 per mile removed, which led to a loss of \$10,000 to \$20,000.

United States v. Gaitin, 185 F.3d 870 (9th Cir. 1999) (table), 1999 WL 459538, *1 (affirming loss estimate of \$4,000 per vehicle).

See United States v. Sprague, 35 F.3d 559 (5th Cir. 1994) (table) (affirming \$4,000 loss per vehicle estimate); United States v. David Allen Hatley, Crim. No. SA-96-CR-230 (W.D. Tex. December 13, 1996) (applying \$6,000 loss per vehicle); United States v. Hampton, No. SA CR 96-40-GLT (C.D. Cal. Oct. 16, 1996) (rejecting PSR recommendation of \$3,200 per vehicle loss estimate and holding that loss estimate should be \$4,000 per vehicle); United States v. Soltanifar, No. 2:95CR00268-001 (M.D.N.C. June 3, 1996); United States v. Sadeghi, No:95CR00267-001 (M.D.N.C. May 7, 1996) (finding loss to be \$4,000 per victim); United States v. Rossi, Cr. No. 94-506 (E.D. Pa. Aug. 1, 1995); see also United States v. Welch, Crim. No. 93-30004-F (D. Mass. October 19, 1993) (adopting PSR loss estimate using \$4,000/car figure); United States v. Cooper, Cr. No. HCR 92-0149 (N.D. Ind. March 3, 1993) (same); United States v. Coker, Cr. No. H-92-00089 (S.D. Tex. Aug. 7, 1992) (same).