

reference.

A. Loss Calculation

The Court finds that there is a causal connection between the misrepresentations of the Defendants and the continued payment of premiums to World Life and correspondingly to Alan Teale and the Defendants themselves. The total loss caused Defendants is \$3,164,882. The Court reaches this conclusion based on the following facts:

- The Defendants entered into an agreement to defraud both World Life and its policyholders no later than August 30, 1990. By this date, all three of the Defendants had taken overt steps to further the conspiracy, including the removal of restrictive legends from Ecotech stock, the unlawful transfer of restricted stock from Jensen to Rennert, and the offering of shares of various stocks to the Teale Network. The Court of Appeals clearly held that the Defendants are responsible for the acts of all others involved in the scheme, including Alan Teale, that occurred after they committed to the scheme. The date that the Defendants entered into actual leasing agreements with Teale is irrelevant.

- During the course of the conspiracy the Defendants leased fraudulently inflated stocks to the network of reinsurance companies referred to as the Teale Network.

- The Teale Network represented these inflated stocks as assets. These representations were made to independent auditors, Network Administrators, and were repeated to World Life.

- The contracts between World Life and the Teale Network's reinsurers would terminate if the reinsurers became insolvent.

- The fraudulently inflated value of the stocks provided by the Defendants permitted the Teale Network reinsurers to remain solvent.

- From August 30, 1990, until liquidation of World Life by the Pennsylvania Department of Insurance, the Teale Network continued to maintain that its reinsurance companies were solvent. During this time, these companies continued to collect premiums in accordance with the reinsurance contracts.

- Had the true value of the Defendants' stocks been known, at the very least, the Pennsylvania Department of Insurance would have stopped the payment of premiums to the Teale Network.

- In addition, because World Life was insolvent, had the reinsurance contracts been terminated the company would have been liquidated much sooner than it was, and the policyholders would have never made those premium payments at all.

- From August 30, 1990 until the end of March 1991, the Teale Network collected approximately 9.5 million dollars in premiums.

- During that time the Teale Network paid approximately 6.3

million dollars in claims to World Life policyholders.

- The \$3,164,882 difference between the premiums received and the claims paid represents a loss by the policyholders of World Life that was directly caused by the Defendants' misrepresentations.

- In making the finding that there is a causal connection between the Defendant's fraud and the payment of premiums to World Life, the Court rejects the Government's contention that the proper measure of loss in this case is the amount of unpaid claims that resulted from World Life's insolvency. The Court finds that the record does not support the conclusion that World Life would have been able to pay these claims even if it had not contracted with the Teale Network. Because it was insolvent, World Life could not have paid these claims without reinsurance, and the Court cannot conclude that World Life would have been able to obtain reinsurance from other sources sufficient to cover these claims.

- The Court also rejects the Defendants' argument regarding the use of gain to measure relevant conduct in this case. The Defendants argued that gain in this case would be the amount of net gain that each individual Defendant received. In making this argument the Defendants ask this Court to disregard the clear statement from the Court of Appeals that the Defendants are responsible for the acts of coconspirator Alan Teale. The

proper measure of gain in this case would be the total gain of the conspiracy. In fact, the Court of Appeals explicitly stated that the gain would be "an amount equal to the minimum actual loss we have held appropriate, i.e., . . . the premiums received by Teale after [the Defendants] joinder, less any claims paid in order to maintain the scheme." Accordingly, the Court finds that if it had decided to use gain as a measure of relevant conduct, that gain would be \$3,164,882.

B. Substantially Jeopardized the Safety and Soundness of a Financial Institution.

- The Court finds that an enhancement for conduct that substantially jeopardizes the safety and soundness of a financial institution should not be applied in this case. Although the Court of Appeals concluded differently, it strains this Court's comprehension that it is apparently possible to conclude that the Defendant's fraud jeopardized the soundness of a financial institution that was clearly insolvent before the fraud occurred. Nonetheless, the Court of Appeals asked this Court to determine whether the Defendants' fraud either 1) caused World Life to substantially reduce benefits to its insureds, or 2) placed World Life in a position such that it was unable to refund premiums. The Court does not find evidence that the Defendants caused either of these two conditions. First, there is no evidence that

World Life could have provided any more benefits to its insureds even if the reinsurance contract with the Teale network had not been made. As stated above, World Life could not have provided benefits to its insureds without reinsurance and there is no evidence that they could have obtained other reinsurance. Moreover, considering the drastically indebted financial situation of World Life, the Court finds there is not sufficient evidence to conclude that World Life would have been in a better position financially to refund any premiums even without the Defendants fraud.

- The Court is aware of the Fifth Circuit's decision in United States v. McDermot, 102 F.3d 1379 (5th Cir. 1996), and adds that this case is both factually and legally distinguishable. First, the Defendants in McDermot were the CEO and director of the defunct insurance company. Their direct control over the company makes it easier to establish a causal connection between the fraud and the soundness of the financial institution. Secondly, unlike this case, the loss in McDermot was made up partially of unpaid claims. A finding that a defendant's conduct causes claims to go unpaid clearly shows a reduction in benefits going to the insureds. In the case currently before the Court, the Defendants' conduct did not cause any claims to be unpaid that would have been paid if the reinsurance contracts were never formed.

- Even if the Court were to conclude that the Defendants' conduct substantially jeopardized the safety and soundness of a financial institution, it would find that a downward departure of four levels for all Defendants would be warranted. The Court finds that the factual circumstances of this case remove it from the heartland of what the commission intended when adopting this enhancement. This enhancement was clearly meant to be imposed when the fraud seriously degrades an otherwise sound institution. If the enhancement could linguistically apply, the actual effect on the financial institution differs from the norm to the extent that this case would be deemed atypical. U.S.S.G. Chap. 1, Part A(4)(b)(1991)

C. More than Minimal Planning

- As concluded in the earlier sentencing hearing, the Defendants' fraud required more than minimal planning. Therefore, a two-point upward adjustment is warranted under Sentencing Guideline § 2F1.1(b)(2)(A). No Defendant appealed this adjustment, and therefore it will be reimposed as to all three Defendants.

D. Upward Departure for Loss of Confidence in an Important Institution

- The Defendants' fraud caused a loss of confidence in

the stock market. Specifically, as illustrated in a letter to this Court on January 14, 1998, from William R. McLucas, former Director of the Enforcement Division of the SEC, the Defendants' conduct affects the reliability, integrity, and transparency of our security markets. Based on this letter I conclude that a one-level upward departure for all three Defendants is appropriate.

E. Downward Departure Because the Guideline Range Overstates the Defendants' Offense

- This Court recognizes that it has the authority to depart downward from the sentencing guidelines if the guideline ranges provided seriously overstate the Defendants' illegal conduct. The Court concludes, however, that the facts of this case do not warrant such a departure. The Court finds that contrary to the Defendant's arguments, the losses incurred by the victims of this fraud were reasonably foreseeable to all of the Defendants. The record supports a finding that the Defendants were aware of Teale's scheme and its operation. They were further aware that they pledged securities fraudulently valued at over "five million dollars" that were supposed to be available to satisfy World Life's policyholders' claims. They also knew that these securities were almost worthless and attempts to liquidate them would be fruitless. Although the Court concludes

that there is not a sufficient causal link to hold the Defendants responsible for the unpaid claims, it is clear that by pledging the five million dollars of worthless stock, they could have foreseen losses up to that amount. Considering the magnitude of the scheme the Defendants knowingly forwarded, this Court finds that the Sentencing Guidelines adequately measure the Defendants' offense.

F. Downward Departure Based on Victim's Misconduct

- This Court recognizes that it may depart from the guideline range in a non-violent case based on the victim's misconduct under § 5K2.10. Such a departure, however, is warranted only in unusual circumstances where the victim misconduct is substantial.

- The Court does not find such circumstances in this case. The Defendants base their argument on the faulty assertion that the only victim in this case is World Life. The real victims to this fraud, however, were World Life's policyholders. These policyholder's were guilty of no misconduct at all. Accordingly, a downward departure on this ground is not warranted.

APPROPRIATE ORDERS FOLLOW THESE FINDINGS.

Clarence C. Newcomer, S.J.