

*United States v. Gary Lee Sutton*, \_\_\_ F.3d \_\_\_, 2008 WL 879429 (10<sup>TH</sup> Cir. 2008). On April 3, 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 The court also cited and summarized, in this published opinion, a number of other cases that are otherwise "unpublished."

A copy of the opinion is at [this link](#).