Asset Recovery

Contributing editors
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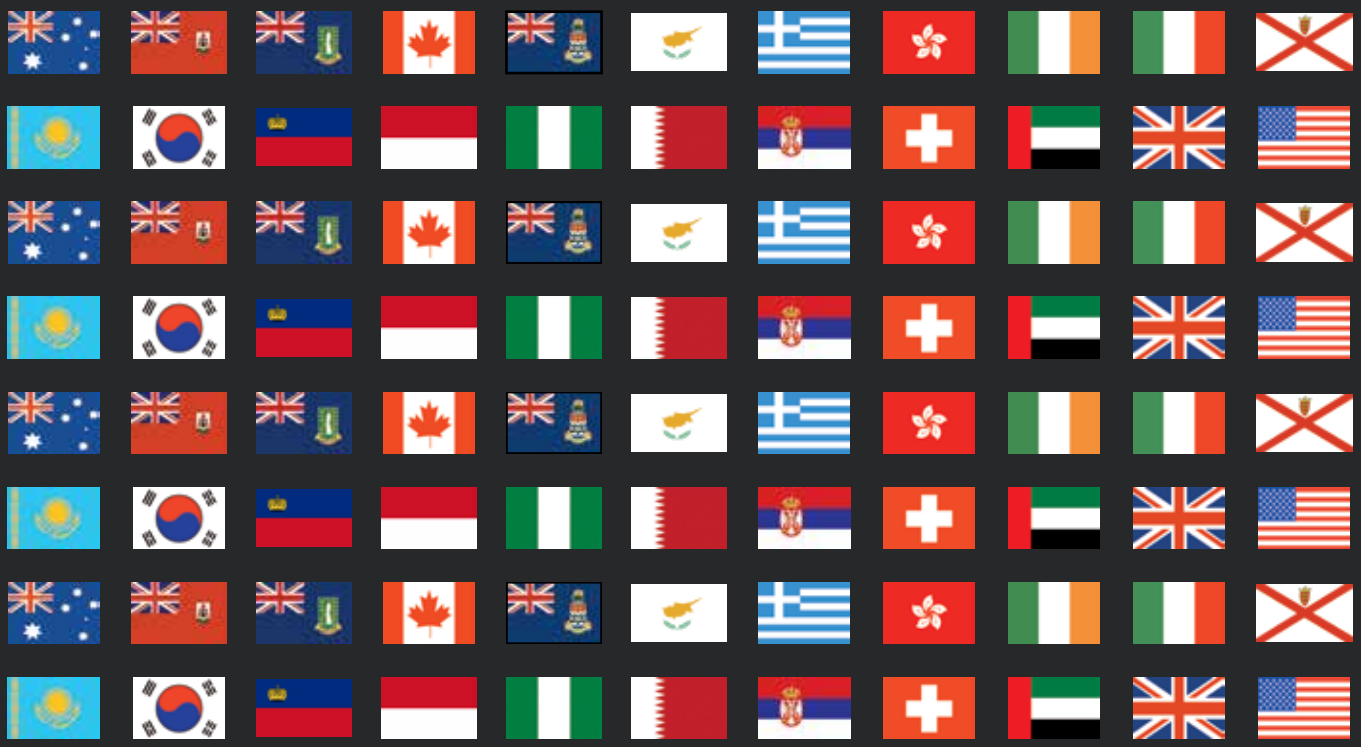

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GETTING THE DEAL THROUGH

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Asset Recovery 2018

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United States

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Civil asset recovery

1 Legislation

What are the key pieces of legislation in your jurisdiction to consider in a private investigation?

The United States is an amalgamated federal constitutional republic comprising 50 states plus the District of Columbia and various territories, each with separate and distinct legislation relevant to asset recovery. In the absence of a unified corpus of statutes, there are a few major categories of federal US legislation to consider when pursuing a civil recovery action in the US (ie, federal securities laws, racketeering laws and insolvency laws).

There are four principal provisions of US federal securities law under which most plaintiffs file when alleging fraud regarding the sale or purchase of securities (sections 11, 12(1) and 12(2) of the Securities Act of 1934 and section 10(b) of the Securities Exchange Act of 1934 (along with the related SEC Rule 10b-5)).

The US also affords victims of organised crime a private right of action under federal and state racketeering laws that focus on ongoing criminal enterprises. The federal Racketeering Influenced Corrupt Organization (RICO) Act is codified at 18 United States Code (USC) sections 1961 to 1968 and specifies various serious crimes that qualify as 'racketeering activity'. A person who has committed at least two such acts within a 10-year period can be found civilly liable for racketeering if it can be shown that the underlying wrongdoing was related to an enterprise.

Foreign plaintiffs confronting complex, cross-border fraud with a significant US component (or involving US-based assets) may also want to avail themselves of chapter 15 of the US Bankruptcy Code (11 USC section 1501, et seq), which can be a useful tool for tracing and recovering assets in situations involving insolvent commercial entities due to the availability of discovery in the bankruptcy process that is not otherwise available.

2 Parallel proceedings

Is there any restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter?

There are no blanket restrictions on civil cases proceeding in parallel with criminal cases. The management of parallel civil and criminal proceedings, however, can bring challenges. In particular, the assertion of Fifth Amendment privileges against self-incrimination can slow down civil proceedings, especially if deponents are examined before the resolution of criminal proceedings. Additionally, civil litigants should be aware that the Speedy Trial Act may give the criminal proceeding priority in resolving the action, if simultaneous adjudication is not practicable.

Because of these challenges, prosecutors sometimes seek a stay of private civil litigation pending the conclusion of criminal proceedings, asserting that the government's interests in punishing and deterring crime outweigh those of private parties. Nevertheless, civil litigants normally should not delay in bringing the civil proceeding in anticipation of such a stay, nor should civil litigants rely on the outcome of the criminal case to bring them relief. Not only could such a delay potentially cause the statute of limitations for any claim to expire, but even if the sentence imposed on the debtor in the criminal case includes an order for restitution to be paid to the victims, these orders can sometimes cap the amount lower than what could be claimed in a civil case, and can also sometimes limit victims from pursuing higher amounts through civil litigation.

3 Forum

In which court should proceedings be brought?

Generally speaking, counsel should consider all the relevant state and federal courts in which a particular action may potentially be brought. Often, more than one court may be available and the decision on where to file depends on many factors. A few considerations should guide counsel in making the determination of the particular forum:

- counsel should determine whether the facts of the case justify a federal action;
- counsel should determine the states in which the defendant has assets and where the activity at issue took place; and
- if the defendant is a business entity, counsel should determine the jurisdiction under which the entity was formed and where its principal operations are located.

Counsel should also consider whether filing in a particular court affords advantages not available elsewhere. For example, potential causes of action and related remedies vary by state. Because material differences can exist among jurisdictions, counsel should analyse the pertinent laws of the considered jurisdictions in determining where to pursue asset recovery.

4 Limitation

What are the time limits for starting civil court proceedings?

Time limitations on initiating civil court proceedings vary widely depending on the type of action sought as well as the jurisdiction in which the action is brought. Because the number of potential actions is significant, only two types of common federal actions are considered here. Counsel should conduct a thorough statutes-of-limitations analysis on applicable causes of action in the relevant jurisdiction as soon as practicable in anticipation of litigation.

Time restraints on bringing actions for securities fraud in federal court typically bar cases brought more than one year after the victim had actual or constructive notice of the fraud and more than three years after the date the securities were offered to the public or otherwise sold, regardless of when the fraud was discovered (see generally 15 USC section 77(m) (governing the limitations of securities actions)).

Plaintiffs may also consider filing a civil action under the federal RICO statute (18 USC section 1962). The statute of limitations for civil RICO claims is generally four years from the date a plaintiff knew or should have known of his or her injury (*Rotella v Wood*, 528 US 549 (2000); *Agency Holding Corporation v Malley-Duff & Associates, Inc*, 483 US 143 (1987)).

5 Jurisdiction

In what circumstances does the civil court have jurisdiction? How can a defendant challenge jurisdiction?

Jurisdiction questions in the United States can be broken down into three elements:

- whether the court has jurisdiction over the person;
- whether the court has jurisdiction over the subject matter; and
- whether the court has the jurisdiction to render the decision sought.

Jurisdiction in a civil case is determined by considering a series of factors from the main elements above, including:

- the location of the at-issue assets, transactions or defendants;
- nationality or citizenship of the defendants;
- the relationship of the defendants to the particular jurisdiction;
- whether the law or contract under which the action was brought stipulates venue; and
- the subject matter of the action.

Defendants may challenge jurisdiction by calling into question the factors that were considered in making the jurisdiction determination. Such objections are most typically raised (or, at the very least, preserved) at the outset of an action. Failure to do so can result in a waiver of any challenge to jurisdiction and counsel should make sure to avoid this result where jurisdictional issues may be present.

6 Admissibility of evidence

What rules apply to the admissibility of evidence in civil proceedings?

For actions in US federal courts, litigants should consult the Federal Rules of Evidence (and, to a lesser extent, the Federal Rules of Civil Procedure). If an action is brought in state court, litigants should consult the applicable rules of evidence in the particular jurisdiction, although the evidentiary rules of many states closely follow the Federal Rules of Evidence. Litigants should also review any relevant case law to understand how the applicable evidentiary rules have been interpreted by courts in the relevant jurisdiction.

7 Publicly available information

What sources of information about assets are publicly available?

In the US, various public offices and agencies collect information on assets and, in some cases, make that information available to the public. Depending on the jurisdiction in which the asset is located and the type of asset at issue, there can be various public records available. Examples of public records include: lien filings, real estate records, property tax records, automobile filings, aircraft filings and business registration filings.

Generally speaking, counsel should investigate the relevant federal and state agencies charged with regulating certain asset types and work from there. It is worth noting that there is no shortage of databases and investigative agencies available to assist counsel in identifying assets. Some major firms and sources are listed below:

- annual and quarterly accounting reports for publicly traded companies;
- business libraries;
- government databases;
- court records and other public filings with national and local public agencies;
- online databases: Datastream, Infocheck, etc;
- company search agencies: Jordan's, Infocheck, ICC and Bloomberg Law;
- credit reference agencies: Dunn & Bradstreet, Hoovers, Factiva; and
- public records asset locators: LexisNexis KnowX, Westlaw Asset Locators (including PeopleMap and Accurint).

In addition, statements and photographs published by defendants on social media platforms may provide clues as to the existence and location of potentially recoverable assets that may provide counsel with a starting point for further investigation.

8 Cooperation with law enforcement agencies

Can information and evidence be obtained from law enforcement and regulatory agencies for use in civil proceedings?

Yes, but to a limited extent and only by use of specific victims' rights laws. Generally speaking, information collected in the course of a criminal investigation is confidential, even from the victim of the crime. There are limited exceptions that permit a lawyer for a crime victim to access certain types of information in the possession of the government. Asset recovery practitioners should leverage criminal proceedings and law enforcement resources when possible, as this may provide fruitful avenues for recovery while minimising the considerable expense involved in civil litigation. Evidence entered in criminal proceedings may also be useful for civil proceedings, and litigants should utilise discovery mechanisms to gather related information, where possible. Legislation such as the Freedom of Information Act (that provides access to information possessed by the federal government) should also be considered.

US financial reporting requirements also provide valuable documentation that may become available to an asset recovery practitioner. These requirements implement rigorous record-keeping from the moment the account is opened until years after the account is closed, preserving an accurate and effective asset tracing tool. Civil litigants can attempt to secure relevant information by US discovery mechanisms (eg, subpoenas). Three major types of required reports from financial institutions that may be of use to asset recovery practitioners are suspicious activity reports, currency transaction reports and 'know your customer' requirements.

9 Third-party disclosure

How can information be obtained from third parties not suspected of wrongdoing?

Rule 45 of the Federal Rules of Civil Procedure governs discovery, including gathering documents or taking testimony from non-parties to a US federal action. It bears noting that a plenary or substantive action must already be pending before a US district court before employing Rule 45.

This is not, however, necessarily the case in state court. Certain US states (including New York and Texas) have adopted pre-suit discovery mechanisms that permit prospective plaintiffs to obtain varying degrees of information before initiating a plenary action, provided that the prospective plaintiff can make the requisite showing (which can vary by state). In Connecticut, for example, a plaintiff may commence an independent equitable action to obtain discovery for use in another case, regardless of whether that case is already pending (*Berger v Cuomo*, 644 A2d 333, 337 (Conn 1994)).

In addition, litigants can try to leverage discovery mechanisms to pursue government-required financial institution reports, as discussed above.

10 Interim relief

What interim relief is available pre-judgment to prevent the dissipation of assets by, and to obtain information from, those suspected of involvement in the fraud?

As discussed in question 9, Rule 45 of the Federal Rules of Civil Procedure allows subpoenas for testimony and documents to be served upon third parties, well in advance of any judgment.

A temporary restraining order or preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure may also be a useful tool for civil litigants fearing the dissipation of assets before judgment. Litigants should, however, be aware of the relatively high requirements for obtaining such relief, especially if it is sought ex parte. Generally speaking, courts consider the following four elements in granting a preliminary injunction or temporary restraining order:

- whether the plaintiff will be irreparably harmed if the injunction is not issued;
- whether the defendant will be harmed if the injunction is issued;
- whether public interests will be served by the injunction; and
- whether the plaintiff is likely to prevail on the merits.

Notably, some US state jurisdictions, such as Connecticut, have a much lower threshold for prejudgment relief.

It bears noting that civil proceedings should not be viewed as an alternative to criminal proceedings when issues of criminal law are involved. Coordinating with federal prosecutors and local law enforcement agencies, who may also seize or freeze assets, can provide a fruitful avenue for efforts to secure and ultimately recover assets.

11 Right to silence

Do defendants in civil proceedings have a right to silence?

Yes. The prohibition against compelled self-incrimination under the Fifth Amendment to the US Constitution generally applies in the civil context, but only if the party reasonably believes that answers could be used in a criminal prosecution or could lead to other evidence that may be so used. Unlike in criminal proceedings, a party who exercises his or her Fifth Amendment privilege in the course of a civil proceeding may be subject to the adverse inference that the withheld answer would not have contradicted the opposing party's evidence. A decision on whether to invoke the Fifth Amendment in civil proceedings should therefore be weighed carefully.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

Failure to comply with court orders can result in the non-compliant party being held in contempt of the court. A contempt finding may have consequences that range from monetary fines to imprisonment.

13 Obtaining evidence from other jurisdictions

How can information be obtained through courts in other jurisdictions to assist in the civil proceedings?

Two major channels for obtaining evidence from foreign jurisdictions include forfeiture-related bilateral treaties or multilateral treaties and letters of request under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention).

The United States has more than 70 mutual legal assistance treaties (MLATs) with foreign nations that concern the sharing of evidence. MLATs are typically employed by the US to pursue its own law enforcement interests and are not directly available to private litigants. Nevertheless, coordination with US authorities can be used in pursuit of information. If the government does make such a request, then private litigants can utilise US discovery mechanisms to attempt to obtain information after information is produced in response to the MLAT request.

The Hague Evidence Convention is also in force in the United States, as well as in a long list of other jurisdictions that includes China, Hong Kong and the United Kingdom. The Convention allows private litigants to seek, by letter of request, evidence from another participating jurisdiction for use at judicial proceedings.

14 Assisting courts in other jurisdictions

What assistance will the civil court give in connection with civil asset recovery proceedings in other jurisdictions?

The US has a variety of channels open to foreign requests for legal assistance in both the civil and criminal contexts. In the civil context, common means include utilising 28 USC section 1782 and letters rogatory to the US Department of State (DOS) in conjunction with 28 USC section 1781.

Section 1782 allows non-US tribunals, interested parties and litigants to apply for assistance from a US district court to gather documents or testimony from individuals and companies located in that district. Under the statute, an interested party can make an application (or a foreign proceeding may issue a letter rogatory). If successful, the breadth of discovery allowed under section 1782 is comparable to regular civil discovery in the United States.

In general, applicants must meet three statutory requirements to qualify for assistance under section 1782:

- the entity from which the documents or testimony is sought must be located within the district of the court to which the request was made;
- the documents or testimony sought must be for use in a foreign tribunal (which an increasing number of US circuit courts and the US Court of Appeals for the Federal Circuit have found to include foreign arbitrations, although the US Supreme Court has yet to formally resolve the issue); and
- the documents or testimony must be requested by the tribunal itself, a litigant to the proceeding, or another interested party.

In addition to the statutory factors, the US Supreme Court has articulated additional factors for a court to consider in deciding whether to grant a section 1782 request:

- whether the material sought could be accessed through the foreign tribunal's jurisdiction absent section 1782;
- the nature of the foreign tribunal, the character of the proceedings and the receptivity of the tribunal to US assistance;
- whether section 1782 is being used to circumvent restrictions or policies of the foreign tribunal or of the United States; and
- whether the subpoena contains unduly intrusive or burdensome requests.

A less common means by which foreign tribunals may seek evidence is by a letter rogatory pursuant to section 1781. The request must be made directly by the tribunal to the DOS, which in turn sends the request to the tribunal, agency or officer from which the evidence is sought (within the US). The scope of available evidence is the same as that under section 1782. However, because section 1781 requires that the request be made directly by the tribunal, generally a better option for an interested party would be to utilise section 1782.

15 Causes of action

What are the main causes of action in civil asset recovery cases, and do they include proprietary claims?

There are a large number of causes of action for civil recovery within the United States. A few common causes of action (eg, fraud, conversion and conspiracy) are touched on below. Owing to the various jurisdictions under the US federal system and their peculiar laws and statutes, however, counsel must analyse the particular causes of action available within the relevant jurisdiction before initiating any legal action.

Fraud is a cause of action based on the misrepresentation of facts. Although there may be jurisdiction-specific nuances, a prima facie case of fraud in most US jurisdictions requires five elements:

- a false representation or omission of a material fact;
- scienter;
- intention to induce the party claiming fraud to act or refrain from acting;
- justifiable reliance; and
- damages.

Most US states have also adopted a version of the Uniform Fraudulent Transfer Act (UFTA), which provides a cause of action for creditors (even those with contingent or unmatured claims) against debtors and transferees that have received assets from a debtor. A purpose of the act is to prevent debtors from dissipating assets while claims are pending or in anticipation of future claims, or to recover assets that were previously transferred. The UFTA typically requires a showing of:

- intent to hinder, delay or defraud a creditor; or
- that the debtor was insolvent when it made the transfer.

Conversion is a common law tort action for the wrongful possession or dispossession of another's property, or simply the control of property that seriously interferes with the owner's use of it. Relief available for conversion is damages. To prove conversion, the plaintiff must typically demonstrate that:

- he or she had an ownership interest in the property before the conversion;
- the defendant's use of the property was unauthorised and interfered with the plaintiff's use of the property;
- the defendant's act was contrary to the plaintiff's right of possession; and
- the plaintiff was harmed because of the defendant's act.

Various US jurisdictions allow for civil conspiracy claims based on vicarious liability based on an independent, underlying tort. These

claims are similar to 'aiding and abetting' claims in the criminal context. According to the formulation set forth in section 876 of the Restatement (Second) of Torts (which has been adopted as the law in some courts), one is subject to liability for harm that is caused to a third person by the tortious conduct of another if he or she:

- commits a tortious act in concert with the tortfeasor, or pursuant to a common design with him or her;
- knows that the tortfeasor's conduct constituted a breach of duty and substantially assists or encourages it; or
- gives substantial assistance to the tortfeasor in accomplishing the tortious result and, in so doing, independently breaches a duty that he or she owes to the third person.

Some of the other potential causes of action include fraudulent transfer claims, civil theft claims and statutory civil racketeering claims.

16 Remedies

What remedies are available in a civil recovery action?

US law allows various remedies in civil recovery actions, depending on the type of action initiated and the jurisdiction in which the action was commenced. For instance, under a conversion action, the plaintiff is typically entitled only to damages. In a fraud action, however, there is a host of potential remedies, including:

- damages;
- recovery of property by detinue and replevin; and
- the potential equitable remedies of reformation, constructive trust, accounting, rescission and injunction.

Common types of remedies in civil actions are listed below. Because the list of available remedies may differ materially between jurisdictions, counsel should investigate the potential remedies in each pertinent jurisdiction before bringing an action:

- accounting;
- attachment;
- constructive trust;
- damages;
- injunction;
- punitive damages;
- recovery of consideration;
- recovery of property;
- rescission; and
- reformation.

17 Judgment without full trial

Can a victim obtain a judgment without the need for a full trial?

In some circumstances, a victim in a civil action can obtain a judgment without a full trial. Under federal and state law, summary judgments are not uncommon, especially in the realm of contractual disputes between debtors and creditors. Under Rule 56 of the Federal Rules of Civil Procedure, a 'court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law'. Note that when a motion for summary judgment is made, the evidence is viewed in a light most favourable to the non-moving party and all inferences will likewise be made against the party making the motion.

Pretrial default judgments are allowed if the party against whom a judgment for affirmative relief is sought fails to plead, answer or otherwise defend the case. See Rule 55 of the Federal Rules of Civil Procedure.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

Post-judgment relief in the United States varies according to the subject matter of the case, the language of the relevant statute and the jurisdiction in which the underlying action was brought. Depending on these factors, there may be a wide variety of options available for post-judgment relief.

One option may be the appointment of a receiver, which is not uncommon in federal or state courts. Rule 66 of the Federal Rules of Civil Procedure, for instance, allows the appointment of a receiver when it accords with the historical practice in federal courts or a local rule.

Similarly, post-judgment disclosure may be available under Rule 69 of the Federal Rules of Civil Procedure, which allows the judgment debtor or successor in interest to obtain post-judgment discovery from the judgment debtor in aid of execution, under the rules of procedure of the state where the court is located. The scope of post-judgment discovery is broad, permitting a judgment creditor to obtain evidence about any assets in which the debtor has any interest and information that may lead to such evidence or assist in the execution of the judgment worldwide. In some cases, judgment creditors are also entitled to post-judgement discovery in relation to a judgment debtor's alleged alter egos or transferees.

19 Enforcement

What methods of enforcement are available?

Asset recovery laws and procedures vary greatly from state to state within the US, and the precise rules differ depending on whether the party that is attempting to recover the assets is a government authority or private litigant. In private actions brought in federal courts, the enforcement of money judgments typically draws upon the particular asset recovery laws of the state in which the particular federal court is located. See Rule 69 of the Federal Rules of Civil Procedure. The enforcement of money judgments typically begins with the court's issuance of a writ of execution. Generally speaking, most jurisdictions also allow for attachment and garnishment.

Certain US jurisdictions, such as New York, provide for generous enforcement mechanisms. For instance, New York state courts allow creditors to issue restraining notices to third parties that may be in possession of a debtor's assets without prior court approval. New York courts have also allowed for turnover orders essentially requiring debtors subject to personal jurisdiction to bring property located abroad into the US, or face risk of sanctions if they do not comply. Other states allow for a variety of other enforcement mechanisms, and litigants should consult the applicable rules in the particular jurisdiction.

20 Funding and costs

What funding arrangements are available to parties contemplating or involved in litigation and do the courts have any powers to manage the overall cost of that litigation?

Parties to litigation in the US have historically been able to rely on alternate fee arrangements to pay the legal expenses and fees associated with bringing civil litigation. On the plaintiff's side, contingency fee agreements (whereby the plaintiff's attorney's compensation is derived from a percentage of the damages award or settlement (if any) instead of an hourly or task-based rate) are commonplace in civil fraud cases, particularly in those involving racketeering or federal securities laws violations affecting a large number of victims who often join together in a single 'class' with joint legal representation. Moreover, companies that might be subject to civil litigation often purchase liability insurance, such as directors and officers (D&O) insurance, that can help pay for the legal expenses of defending against litigation (as well as any resulting settlement or judgment).

More recently, large-scale third-party litigation financing (TPLF), in which an outside investor with no other interest in the dispute funds the litigation in exchange for a percentage of the recovery, has become increasingly popular in certain jurisdictions (including Florida) as an alternate funding mechanism for litigation that is likely to be particularly lengthy, complex or otherwise too expensive even for major law firms to fund on a contingency basis. Notably, however, certain states still subscribe to traditional notions of champerty, maintenance and barratry, and prohibit TPLF on that basis (including, most notably, Delaware, where many US corporations are organised and registered). Still others take a blended approach that permits the practice subject to varying degrees of oversight (such as Maine and Ohio). Importantly, even in those jurisdictions that permit TPLF, the practice may implicate ethical considerations and affect the scope and availability of otherwise applicable privileges and protections. Accordingly, counsel should

always take care to thoroughly analyse the applicable rules of professional conduct and pertinent privilege laws in the relevant jurisdiction.

Litigation costs in the United States tend to be higher than those in other jurisdictions and the default rule in the United States is that, regardless of whether a party wins or loses, it is responsible for paying its own attorney's fees unless a specific authority (ie, contract or statute) 'shifts' those fees to the adversary. Although a fair number of federal and state statutes fall within this exception and entitle the 'prevailing' party to recover reasonable attorney's fees from its adversary, it is not always clear which, if any, party has 'prevailed' in a particular litigation, and fee shifting may be unavailable on that basis.

Additionally, at the beginning of the litigation, the court on its own initiative may impose reasonable limits on discovery and motion practice, including a requirement that attorneys submit an estimate of the hours that they anticipate the case will require. If the attorneys expend more time than the estimate, then the court may presume that the overage is unreasonable and seek to exclude it from any shifting of fees.

Criminal asset recovery

21 Interim measures

Describe the legal framework in relation to interim measures in your jurisdiction.

Depending on the subject matter of the criminal activity and related statutes, the government is allowed very broad interim measures upon suspicion of crime. As discussed in more depth below, forfeiture proceedings provide the government broad discretion in seizing assets as well as proceeds of crime.

Interim measures are especially powerful under the provisions of money laundering and anti-terrorism statutes. Under the US Patriot Act, for instance, the US has the ability to also issue a 'pre-trial restraining order or take any other action necessary' to ensure the property is available to satisfy a judgment (18 USC section 1956(b)(3)). This also includes orders directed at criminal defendants to cause property worldwide to be brought into the United States for preservation pending the resolution of legal proceedings.

22 Proceeds of serious crime

Is an investigation to identify, trace and freeze proceeds automatically initiated when certain serious crimes are detected? If not, what triggers an investigation?

No. Typically, the asset forfeiture specialists in the appropriate prosecutor's office have to be staffed on the matter, and that usually happens as a result of insistence by the victim's private attorneys. Once adequate personnel resources are allocated, the process can work very well, as there is substantial legal infrastructure to support asset freeze and recovery efforts that run in parallel with criminal prosecutions. The United States has an array of criminal statutes covering transactions involving the proceeds of crime or transactions that are structured to prevent such proceeds from being discovered. Complementing these laws, the United States has imposed a series of reporting requirements on institutions in an effort to identify potentially criminal transactions. These requirements are central to the United States' enforcement activities and prompt enforcement actions. Victims of crime can also coordinate with relevant authorities to spur investigation.

23 Confiscation – legal framework

Describe the legal framework in relation to confiscation of the proceeds of crime, including how the benefit figure is calculated.

There are three types of asset confiscation (or forfeiture) procedures available to the government under federal US law: administrative, civil and criminal. In terms of prevalence, administrative forfeitures are by far the most common, followed by civil, then criminal.

Administrative forfeitures are executed by government agencies and apply only to uncontested cases, which require no prosecutor or court. Once the property has been seized, the seizing agency commences the proceeding by sending notice of its intent to anyone with a potential interest in the property. This notice is typically distributed by publishing a notice in a newspaper. If no one contests the forfeiture by filing a claim within the specified time period, then the agency enters a declaration of forfeiture, which in practice has the same effect as a judicial order. If someone files a claim, the government may choose to pursue a civil or criminal forfeiture.

In civil forfeitures, the action is taken in rem against property that was derived from committing, or was used to commit, a criminal offence. Because the action is against the property itself, the owner's culpability is irrelevant to the decision of whether it is forfeitable, and the action may be filed before, after, or even if there is no indictment filed at all. The owner, or any other third party, must affirmatively intervene to protect his or her interest in the property.

Civil forfeiture actions are procedurally akin to other civil cases, with the government filing a verified complaint alleging that the at-issue property is subject to forfeiture pursuant to the relevant statute, and claimants are required to file claims within a certain period of time. The civil forfeiture procedure is governed by 18 USC section 983 and Supplemental Rule G of the Federal Rules of Civil Procedure. The process is also described in detail in chapters 3 to 14 of Stefan D Cassella, *Asset Forfeiture Law in the United States*, second edition (New York, Juris 2012).

The government succeeds in its civil forfeiture action if it establishes a connection between the property and a criminal offence by a preponderance of the evidence. Importantly, the government may seek civil forfeiture actions concurrently with criminal forfeiture actions, and no criminal conviction is necessary to support a civil forfeiture. Moreover, prosecutors may change their criminal forfeiture action into a civil forfeiture action.

Unlike civil forfeiture, criminal forfeiture proceeds from a sentence in a criminal case. Accordingly, it may be conceptualised as an action taken in personam against a defendant (rather than in rem against the property itself). The specific criminal statute pursuant to which the action is brought determines which types of forfeiture are available in a given case.

Notably, because it is an in personam proceeding, criminal forfeiture only applies to the defendant's interest in a particular piece of property. If third parties have an interest in that property, then those rights will be considered in an ancillary proceeding that follows the entry of the forfeiture order against the defendant's interest (21 USC section 853(n)). Third-party rights are further discussed in response to question 27.

Procedurally, at the underlying criminal trial, no mention is made of the forfeiture until and unless the defendant is convicted. If the defendant is convicted and the forfeiture is contested, then the court will hear additional evidence and argument before instructing the jury on how to determine whether the government sufficiently has proven the facts upon which the forfeiture claim is predicated. To prevail, the government must establish by a preponderance of the evidence the requisite nexus between the property and the crime (Rule 32.2(b) of the Federal Rules of Criminal Procedure and *United States v Treacy*, 639 F3d 32, 48 (2d Cir 2011) (reiterating that because criminal forfeiture is part of the sentencing phase, the government need only prove the forfeiture allegations by a preponderance of the evidence)).

How the amount of forfeiture is determined depends on the specific crime involved. In a securities fraud situation, for example, the criminal proceeds will be determined by assessing the difference between the price at which the stock actually traded and the price at which it would have traded absent the misrepresentations at issue.

24 Confiscation procedure

Describe how confiscation works in practice.

In criminal confiscation, following conviction a defendant's interest in a property (either the proceeds of an offence or the property used in commission of the offence) is forfeited to the United States as part of the sentence. Often, the government will require the defendant to transfer the applicable funds in full to a government account shortly after conviction, or pursuant to a payment plan agreed to by the government and defence counsel. In civil forfeiture scenarios, the action is taken against the property itself, not a particular defendant. In pursuing the confiscation, the United States does not need a criminal conviction. If the government succeeds in its forfeiture action, then the underlying property is typically either returned to claimants with ownership interest in the property or preserved until the rightful owners claim the property.

25 Agencies

What agencies are responsible for tracing and confiscating the proceeds of crime in your jurisdiction?

The US has many agencies, on the federal, state and local levels, through which it operates to trace and confiscate the proceeds of crime. Below are some major federal agencies supporting asset recovery:

- the Department of Justice (DOJ), Criminal Division, Asset Forfeiture and Money Laundering Section;
- the DOJ, Criminal Division, Office of International Affairs (OIA);
- the Department of Homeland Security, Immigration and Customs Enforcement (ICE), Homeland Security Investigations;
- the DOJ, Federal Bureau of Investigation (FBI);
- the Department of the Treasury, Financial Crimes Enforcement Network;
- the US Internal Revenue Service; and
- the US Securities and Exchange Commission.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

This is possible in most instances. The government must consult the applicable criminal statute to determine what, if anything, is subject to forfeiture. There are federal statutes that do not provide for forfeiture of secondary proceeds, but others sweep more broadly. For example, 18 USC section 981(a)(1)(G) permits the government to confiscate virtually all assets of a person who is engaged in planning, perpetrating or concealing any terrorism, and 18 USC section 1963(a)(2)(D) permits the government to confiscate 'all property or contractual right[s] of any kind affording [a RICO defendant] a source of influence over' the racketeering enterprise.

27 Third-party ownership

Is it possible to confiscate property acquired by a third party or close relatives?

This depends on the circumstances of the third party's ownership interest and the nature of the property at issue. In general, forfeiture of third-party interests is limited to situations involving property that was fraudulently transferred, is illegal to possess (ie, contraband) or is tainted by the criminal conduct (for example, property that constitutes proceeds of the criminal activity, that is derived from such proceeds, that was used in the commission of the crime, or that was otherwise used to facilitate the criminal activity).

Third parties may have defences to such confiscation attempts. Such defences ordinarily turn on whether the third parties were on adequate notice of the cloud on title (or of other facts that would render the property forfeitable); whether they received the property in exchange for the provision of adequate consideration (ie, fair value); and whether the otherwise forfeitable interest pertains to a primary residence.

28 Expenses

Can the costs of tracing and confiscating assets be recovered by a relevant state agency?

Yes. The Comprehensive Crime Control Act of 1984 established the Department of Justice Assets Forfeiture Fund, which receives the proceeds of forfeiture and aids in paying the costs associated with such forfeitures.

The DOJ may also pay amounts to other agencies for assistance in forfeiture cases. Equitable sharing payments reflect the degree of direct participation in law enforcement efforts resulting in forfeiture.

29 Value-based confiscation

Is value-based confiscation allowed? If yes, how is the value assessment made?

Yes. If the forfeitable property has been dissipated, has been commingled with non-forfeitable property from which it cannot be severed, has been placed beyond the court's jurisdiction, or cannot be found through the exercise of due diligence, then US federal law empowers the court to order the forfeiture of substitute assets of the defendant that are equal in value to the original property (eg, 21 USC section 853(p) and 18 USC section 1963(m)). Value assessments are typically made via expert testimony.

30 Burden of proof

On whom is the burden of proof in a procedure to confiscate the proceeds of crime? Can the burden be reversed?

The burden of proof in civil forfeiture actions is on the government and requires a showing that the property is subject to forfeiture by a preponderance of the evidence (18 USC section 983(c)(1)). Similar burdens apply to private claimants seeking to recover such proceeds under civil fraud theories.

In criminal forfeiture actions, the underlying crime must first be proven by the government beyond a reasonable doubt. The related forfeiture action only requires a showing that the relevant property is subject to forfeiture by a preponderance of the evidence. Once established, the burden shifts to the defendant to prove otherwise.

31 Using confiscated property to settle claims

May confiscated property be used in satisfaction of civil claims for damages or compensation from a claim arising from the conviction?

Yes, this is routinely done. In criminal cases, much time and effort is expended to ensure that the wrongdoer's assets are preserved pending trial, so that they remain available for civil claimants (18 USC section 981(e)(6) and 21 USC section 853(i) (authorising the government to retain or transfer forfeited property as restoration, in civil and criminal forfeiture cases, to the victims of the underlying crime)).

US remission and restoration procedures provide a compensatory mechanism to victims of crime through which to access proceeds of forfeitures in order to cover or offset losses incurred as a result of the crime (28 Code of Federal Regulations (CFR) section 9.4).

32 Confiscation of profits

Is it possible to recover the financial advantage or profit obtained though the commission of criminal offences?

A prosecutor looking into forfeiture options needs to consult the applicable statute and the options for forfeiture associated with it. Some criminal statutes do not provide for any forfeiture, while others allow for the forfeiture of proceeds or the instrumentalities (ie, property that facilitated the commission of the crime).

One of the most often-used statutes for forfeiture of proceeds of crime is 18 USC section 981(a)(1)(C), which lays out a broad list of applicable criminal offences that includes fraud, bribery, embezzlement and theft. Statutes regarding drug enforcement, money laundering, RICO and terrorism further augment the government's forfeiture authority.

33 Non-conviction based forfeiture

Can the proceeds of crime be confiscated without a conviction? Describe how the system works and any legal challenges to in rem confiscation.

Yes. See questions 23 and 29.

34 Management of assets

After the seizure of the assets, how are they managed, and by whom? How does the managing authority deal with the hidden cost of management of the assets? Can the assets be utilised by the managing authority or a government agency as their own?

The US Marshals Service (the USMS) is the primary authority over management and disposal of seized assets in the United States. The authority of the US attorney general to dispose of forfeited real property and warrant title was delegated to the USMS pursuant to 28 CFR section 0.111(i).

Generally speaking, DOJ personnel may not use or allow others to use property following seizure and pending forfeiture, except in circumstances in which the use of equipment under seizure is necessary to maintain the property if the property is a seized business or ranch.

Update and trends

The evolving concept of general personal jurisdiction

In the United States, a court must have personal jurisdiction to exercise power over an individual or company, for instance to allow legal claims to be brought against that person or entity, to order that person or entity to comply with discovery demands, or to order that person or entity to turn over assets of a judgment debtor. Personal jurisdiction is generally derived from a defendant's contacts or presence in the forum.

The US Supreme Court's decision in *Daimler AG v Bauman*, 134 S Ct 746 (2014) sharply limited the circumstances in which a court can exercise one of two types of personal jurisdiction, known as general personal jurisdiction, over a corporation. General jurisdiction allows a court to hear a case even when the defendant's contacts or presence in the jurisdiction are unrelated to the claim pursued.

In *Daimler*, the Supreme Court held that general personal jurisdiction is permissible only when 'that corporation's affiliations with the State are so continuous and systematic as to render it essentially *at home* in the forum state' (*Daimler*, 134 S Ct at 761 (citation omitted) (emphasis added)). Although the previous test for general jurisdiction was relatively flexible and generous, the *Daimler* court cabined future cases to two bases of general jurisdiction:

- the corporation's place of incorporation; or
- the corporation's principal place of business. It all but eliminated general personal jurisdiction over a corporation short of either of those conditions being met.

Following *Daimler*, the courts have reached different conclusions on the reach of an important exception to the rule: jurisdiction by consent. A number of state and federal courts in New York have found that consent to jurisdiction (eg, by a company's registration to do business in a particular state) survives *Daimler* as a basis for general jurisdiction (eg, *Fallman v Hotel Insider, Ltd*, 2016 WL 316378, at *2 (SDNY 15 January 2016) ('It is well-settled that registering one's corporation with the New York Department of State and designating an agent to receive process in New York constitutes consent to general jurisdiction in New York courts.'); *Serov v Kerzner Intern. Resorts, Inc*, 52 Misc 3d 1214(A) (Sup Ct 26 July 2016) (similar)). The US Court of Appeals for the Second Circuit offered mixed guidance in *Brown v Lockheed Martin Corp*, 814 F 3d 619 (2d Cir 2016), in which it held that defendant Lockheed Martin did not consent to jurisdiction in Connecticut solely by registering to conduct business and appointing an agent for service of process in the state. That decision, however, was specific to Connecticut's business registration statute and expressly left open the possibility that registration statutes in other states (including New York) might very well confer jurisdiction over companies registered to do business in those states. The Delaware Supreme Court, another important jurisdiction for judgment enforcement purposes, came out firmly against registration as a form of consent to general jurisdiction. In *Genuine Parts Co. v Cepec*, 137 A 3d 123 (Del 2016), the Delaware Supreme Court held that corporations not incorporated in Delaware that register to do business in that state are not subject to the general jurisdiction of the Delaware courts.

In light of these and other decisions, the law in the United States is currently not uniform, nor fully settled, on whether a foreign company's registration to do business in a particular US state constitutes consent to general personal jurisdiction in that state. Absent a binding ruling that is directly to the contrary, judgment creditors can still attempt to rely on decisions such as *Fallman*, for example when seeking to compel a foreign company to comply with asset discovery requests or to turnover assets of a judgment debtor. Further, where the foreign company's presence or activity in the United States is at issue in the proceeding, the company may also be subject to a court's specific personal jurisdiction, which is the other type of personal jurisdiction that the *Daimler* decision did not address.

Discovery requests from the US: overcoming blocking statutes

The discovery process in the United States may be used to request information or documents located abroad. Provided the court has personal jurisdiction over the discovery target, the target can be compelled to produce material that is within its possession, custody or control: even if it is located outside the United States. Some foreign jurisdictions, however, have data privacy laws, bank secrecy laws or 'blocking statutes' (laws that prohibit litigants from providing information for use in a US judicial proceeding) that might seem on their face to thwart such discovery efforts. But courts in the United States have shown a willingness to ignore or discount such foreign laws in certain circumstances, such that a litigant based in the US might succeed in having a court compel production of information or documents from foreign jurisdictions where those laws apply.

Blocking statutes increasingly come up in US litigation when, for example, a private party or the Internal Revenue Service seeks to enforce a subpoena requesting bank records or other documents from entities accused of tax malfeasance in the US or abroad. Those entities may have relevant bank accounts in jurisdictions such as the British Virgin Islands, China, France, Israel, Singapore and Switzerland, where there are strong national banking laws that prevent disclosure of certain information sought by the US or private parties.

The US Supreme Court has stated that 'American courts are not required to adhere blindly to the directions' of blocking statutes (*Societe Nationale Industrielle Aerospatiale v US Dist Court for S Dist of Iowa*, 482 US 522 (1987)). Consequently, lower courts have sometimes refused to give any deference to such laws (eg, *Chevron Corp v Donziger,* 296 FRD 168, 198 (SDNY 2013) ('[T]he [trial] court may impose discovery under the Federal Rules of Civil Procedure when it has personal jurisdiction over the foreign party, notwithstanding provisions of foreign law that would prohibit production.'); In *Re Activision Blizzard, Inc*, 86 A 3d 531, 549 (Del Ch 2014) ('[T]he Blocking Statute is expansively broad. . . . It does not focus on a specific kind of material, nor does it identify a specific French sovereign interest.')). Other courts have considered the stated purpose of the blocking statute and how expansive it is in deciding whether it should be heeded and will excuse production of the information requested. Applying that analysis, a New York court has held that deference was owed to the Swiss blocking statute but not the French equivalent (*Motorola Credit Corp v Uza*n, 73 F Supp 3d 397 (SDNY 2014)).

Thus, based on current case law, the existence of data privacy laws, bank secrecy laws and blocking statutes in a foreign jurisdiction where relevant information or documents are located will not necessary prevent a litigant from obtaining production of that material through the US discovery process.

In addition, DOJ employees are generally prohibited from purchasing or using any property forfeited to the government, even if the property was purchased by a spouse or a minor.

In some circumstances, in order to minimise storage and management costs, the DOJ may ask state and local agencies to serve as substitute custodians of the property, pending forfeiture. This is typical in the context of motor vehicles. Alternatively, the DOJ may enter storage or maintenance agreements with local agencies for the storage, security and maintenance of the assets in custody.

35 Making requests for foreign legal assistance

Describe your jurisdiction's legal framework and procedure to request international legal assistance concerning provisional measures in relation to the recovery of assets.

The United States is signatory to more than 70 MLATs with other nations, providing a wide breadth of foreign legal assistance, and can also seek evidence by submitting a letter rogatory with a foreign court with specific countries. The OIA within the DOJ is the central US authority for MLAT requests and coordinates all international evidence-gathering.

36 Complying with requests for foreign legal assistance

Describe your jurisdiction's legal framework and procedure to meet foreign requests for legal assistance concerning provisional measures in relation to the recovery of assets.

The US has a variety of channels open to foreign requests for legal assistance under letters of request and letters rogatory under 28 USC section 1781, as well as relevant MLATs. The United States responds to MLAT requests pursuant to 28 USC section 1782 and 18 USC section 3512, even in cases where there is no existing treaty relationship. The legal requirements for assistance are laid out within the applicable bilateral or multilateral treaty, as well as the grounds for refusals of assistance (eg, article 46 of the Merida Convention; article 7 of the Vienna Convention; and article 18 of the Palermo Convention).

The OIA executes MLAT requests through law enforcement authorities including US attorneys' offices, ICE, the US Secret Service, the FBI, the USMS, the DOJ and Interpol.

Common provisional measures of enforcement of foreign requests for freezing, seizing and restraint orders are all covered by 28 USC section 2467.

37 Treaties

To which international conventions with provisions on asset recovery is your state a signatory?

The United States is able to provide broad support in response to requests from foreign authorities regarding asset recovery under relevant treaties. These treaties provide a potentially quick mechanism for exchanging information regarding suspects subject to criminal investigations. The DOS regularly publishes a full list of treaties in force, which can be found on the DOS website.

The major treaties regarding asset recovery are as follows:

- the Merida Convention;
- the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the Inter-American Convention against Corruption and Inter-American Convention on Mutual Assistance in Criminal Matters;
- the Inter-American Convention Against Terrorism and Inter-American Convention on Letters Rogatory as well as Additional Protocol to the Convention; and
- the Vienna, Palermo and Financing of Terrorism Conventions.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

Private practitioners cannot directly use criminal asset recovery powers in the United States. However, US victims' rights legislation allows for broad cooperation and coordination between private practitioners and relevant authorities in obtaining compensation for crime victims. Remission and restoration proceedings, by which funds seized by the sovereign for its own account under asset forfeiture laws are given back to private victims, are examples of how civil practitioners can reap the fruits of criminal recovery efforts (28 CFR part 9 (governing remission or mitigation of civil and criminal forfeitures)).

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