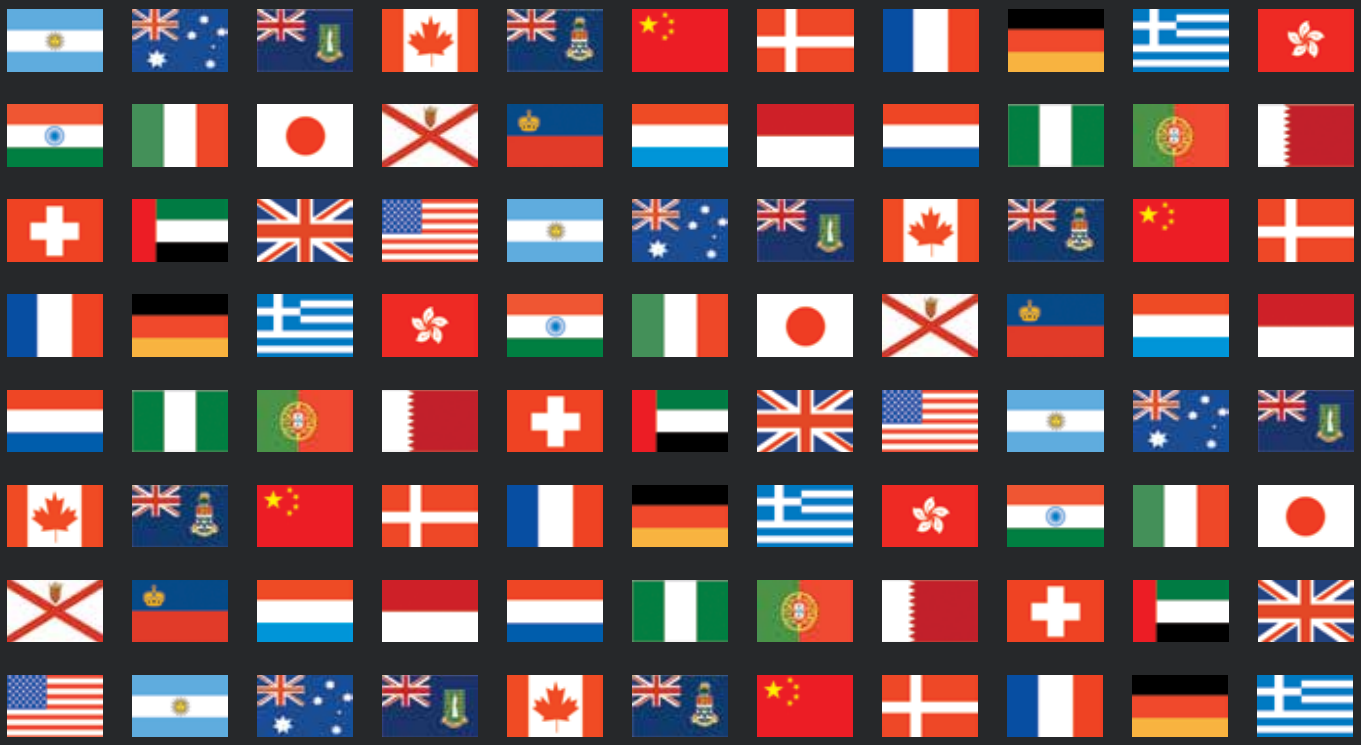
Asset Recovery

In 26 jurisdictions worldwide

Contributing editors
Jonathan Tickner and Sarah Gabriel



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GETTING THE DEAL THROUGH

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Asset Recovery 2015

Contributing editors

Jonathan Tickner and Sarah Gabriel

Peters & Peters Solicitors LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
George Ingledew
george.ingledew@lbresearch.com

Alan Lee
alan.lee@lbresearch.com

Dan White
dan.white@lbresearch.com

Law Business Research

Published by
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87 Lancaster Road
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Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

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United States

Michael S Kim and Carrie A Tendler

Kobre & Kim

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 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: 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 rule 10(b)(5) of the Securities Exchange Act of 1934.

The US also affords victims of organised crime civil action under federal and state Racketeering Influenced Corrupt Organization (RICO) Acts. 18 United States Code (USC) section 1962 lays out requirements for violations under the federal RICO statute and also lays out the serious crimes that qualify as 'racketeering activity'.

Foreign plaintiffs confronting complex, cross-border fraud with a significant US aspect may also want to avail themselves of chapter 15 of the US Bankruptcy Code, promulgated under 11 USC sections 101–1532, which can be a useful tool for tracing and recovering assets in crimes involving commercial entities.

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 resolution of 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 the relevant state court(s) and federal district court(s) in bringing an action. The decision of 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 state(s) in which the defendant has assets and where the activity took place; and
- if the defendant is a business entity, counsel should determine the jurisdiction under which the entity was formed.

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 universe of potential actions is vast, only a survey of two types of common federal actions is 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 relevant securities actions).

Plaintiffs may also consider filing a civil action under RICO, codified under 18 USC section 1962. The statute of limitations for civil RICO claims is generally four years. See *Agency Holding Corporation v Malley-Duff and Associates*, 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 US 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 defendant(s); nationality or citizenship of the defendant(s); the relationship of the defendant(s) 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 be raised (or, at the very least, preserved) at the outset of an action.

6 Admissibility of evidence

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

For US federal actions, litigants should consult the rules promulgated under the Federal Rules of Evidence (and, to a lesser extent, the Federal Rules of Civil Procedure), which govern evidence submission across the US federal court system. If an action is brought under the laws of a particular state, litigants should consult the applicable rules of evidence in the particular 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 asset type, 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;
- credit reference agencies: Dunn & Bradstreet; and
- public records asset locators: KnowX, Westlaw Asset Locator.

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.

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. 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, among others) 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. 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. See *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 immediately above, 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 may also be a useful tool for civil litigants fearing the dissipation of assets before judgment. Potential 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 an injunction:

- 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 of securing and ultimately recovering assets.

11 Right to silence

Do defendants in civil proceedings have a right to silence?

Yes, the US Fifth Amendment privilege does apply broadly 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, however, 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.

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 US has over 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 US, as well as in a long list of other jurisdictions that includes (among others) the Cayman Islands, 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 (section 1782) and letters rogatory to the US Department of State (DoS) in conjunction with 28 USC section 1781 (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 US.

Generally speaking, three requirements must be met in order 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 Federal Circuit courts has 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.

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, above. Because section 1781 requires that the request be made directly by the tribunal, 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 is an enormous number of causes of action for civil recovery within the US. 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.

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. In order 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 that 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, but are not limited to 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'.

Similarly, default judgments are allowed if the party against whom a judgment for affirmative relief is sought fails to plead or otherwise defend. 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 US varies according to the subject matter of the case, the language of the 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.

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 that are 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. 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.

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, among others, 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, pursuant to whose laws 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 thoroughly to analyse the applicable rules of professional conduct and pertinent privilege laws in the relevant jurisdiction.

Costs of litigation in the US tend to be higher than those in other jurisdictions. For example, the default rule in the US 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' pursuant to a particular litigation outcome.

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, than 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. See 18 USC section 1956(b)(3). This also includes orders directed at criminal defendants to cause property worldwide to be brought into the US 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 US has an array of criminal statutes covering transactions involving the proceeds of crime or that are structured to prevent such transactions from being discovered. Complementing these laws, the US has imposed a series of reporting requirements on institutions in an effort to identify potentially criminal transactions. These requirements are central to the US' 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 and instrumentalities of crime.

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* (New York, Juris 2007).

The government succeeds in its civil forfeiture action if it establishes a nexus 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. See 21 USC 853(n). Third-party rights are further discussed in 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. See rule 32.2(b) of the Federal Rules of Criminal Procedure; see also *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).

24 Confiscation procedure

Describe how confiscation works in practice.

In the US, confiscation procedure is applicable in criminal and non-conviction based confiscation. 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 US as part of the sentence. In non-conviction based confiscations (civil forfeitures), the action is taken against the property, not the criminal defendant. In pursuing the confiscation, the US 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. 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 DoJ 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. See, for example, 21 USC section 853(p); 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 actions brought under any civil forfeiture of any property is for the government to establish, by preponderance of the evidence, that the property is subject to forfeiture. See 18 USC section 983(c)(1). Similar burdens apply to private claimants seeking to recover such proceeds under civil fraud theories.

Under criminal forfeiture, the crime must be proven beyond a reasonable doubt. The forfeiture of the property only requires showing 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. See 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. See 28 Code of Federal Regulations (CFR) section 9.4.

32 Confiscation of profits

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

As discussed above, 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 over 200 applicable criminal offences that includes fraud, bribery, embezzlement

Update and trends

New York has long been an important jurisdiction in which to pursue the restraint and recovery of assets based on a money judgment, forfeiture order or other obligation. The general attractiveness of this jurisdiction to creditors is due to a combination of factors, including the presence in New York of many of the world's financial institutions, as well as certain substantive and procedural features of law. For example, New York law permits a judgment creditor, through counsel, to issue restraining notices and levies. These have the effect of court orders freezing a debtor's assets held or received in the future (up to one year) by any party (a garnishee) that is subject to New York jurisdiction. Such notices and levies enable a garnishee to transfer a debtor's assets directly to a creditor. New York law also permits a judgment creditor to obtain, by summary proceeding, turnover orders against debtors and garnishees that require the debtors and garnishees to deliver to the creditor the assets of the debtor. This includes any debts that are coming due to the benefit of the debtor, which may be captured through court-ordered periodic payments to the creditor. If the debtor fails to make the court-ordered payments, then he or she may be subject to a finding of contempt or the appointment of a receiver, or both.

A hot topic in New York's enforcement regime, over which the courts have been sharply divided (and in which debtors, creditors and international financial institutions are keenly interested), is what, if any, continuing effect does the common law 'separate entity rule' have on the applicability of New York's enforcement devices to debtors' 'foreign' bank accounts. The separate entity rule is a vestige of the common law pursuant to which branches of a single bank are treated as separate legal entities for certain purposes. Traditionally, the rule limited the effect of any pre-judgment attachment in rem to those accounts that were maintained at the specific branch of the bank on which the writ of attachment was served. The rule arose prior to the advent of modern computer systems, at a time when it would have been impractical for a bank to constantly report to all of its branches the status of an account that was held at one branch. This type of reporting would, of course, have been necessary to make a restraint that was issued to one branch of the bank effective against an account that was maintained at another branch.

Over time, some courts elasticised the separate entity rule and interpreted it to place all out-of-state bank accounts beyond the reach of any New York attachment or garnishment. In some cases, courts even concluded that out-of-state bank accounts could not be reached by in personam injunctions against banks that were before the court in adversary proceedings.

Then came *Koehler v Bank of Bermuda Ltd*, 12 NY3d 533, 539, 911 NE2d 825, 829 (2009). *Koehler* involved a judgment creditor's petition for the turnover of certificates evidencing to shares of stock that the judgment debtor held in a Bermuda corporation. The stock certificates were physically located in Bermuda, within the possession of the Bank of Bermuda Limited (BBL) (to which the judgment debtor had pledged the shares as collateral for a loan). The judgment creditor served his petition upon an officer of a wholly owned subsidiary that BBL operated in New York. Ultimately, the trial court dismissed the petition because, in its view, 'a New York court cannot attach property that is not within the state' (*Koehler*, 12 NY3d at 537; 911 NE2d at 828).

The New York Court of Appeals reversed. In so doing, it confirmed the general principle that if a debtor or garnishee is subject to personal jurisdiction in New York, then New York courts may rely on New York's post-judgment execution devices to order that debtor or garnishee to turn over any target asset, regardless of where the asset is physically located. The Court of Appeals based this ruling on article 52 of New York's Civil Practice Law and Rules, which does not contain any 'express territorial limitation barring the entry of a turnover order that requires a garnishee to transfer money or property into New York from another state or country'.

A faithful application of *Koehler* would therefore appear to support the conclusion that the separate entity rule is no longer good law in the post-judgment context. Indeed, if a New York court has personal jurisdiction over a branch of a 'foreign' bank that is located in New York, then under *Koehler*, the court may order that bank to turn over whichever of the judgment debtor's assets it possesses (regardless of whether the assets are located in New York).

The analysis, however, is not so simple. In fact, *Koehler* does not even mention – much less specifically purport to abrogate – the separate entity rule. Presumably, this is because the record did not squarely implicate it: after all, BBL ultimately consented to personal jurisdiction in New York, thereby conferring upon the court the power to order BBL to turn over the stock certificates that it possessed in Bermuda (*Koehler*, 12 NY3d at 536; 911 NE2d at 827).

Koehler has thus yielded an ever-deepening split of authority regarding the continued viability of the separate entity rule in the post-judgment context. See, eg, *Motorola Credit Corp v Uzan*, 978 FSupp2d 205, 211 (SDNY 2013) ('[V]arious state and federal courts have taken up the question of whether the separate entity rule continues to apply to post-judgment enforcement, only to reach differing conclusions'); *Tiffany (NJ) LLC v Dong*, No. 11 Civ 2183(GBD)(FM), 2013 WL 4046380, at *11 (SDNY 9 August 2013) ('There is a split of authority as to whether *Koehler* abrogates the separate entity rule when a judgment creditor seeks to compel a garnishee in New York to turn over assets of the judgment debtor outside New York's territorial boundaries'). Compare also, eg, *JW Oilfield Equip LLC v Commerzbank AG*, 764 FSupp2d 587, 593 (SDNY 2011) ('New York courts will not apply the separate entity rule in post-judgment execution proceedings'), with, eg, *Parbulk II AS v Heritage Maritime SA*, 35 Misc3d 235, 239 n.1, 935 NYS2d 829, 832 n.1 (NY Sup Ct 2011) ('In declining to apply the separate entity rule, the court in *JW Oilfield Equip* stated that "*Koehler* indicates that New York courts will not apply the separate entity rule in post-judgment execution proceedings". This court disagrees.'). Most recently, the United States Court of Appeals for the Second Circuit certified to the New York Court of Appeals two questions that underscore the scope and persistence of this uncertainty:

- whether the separate entity rule 'precludes a judgment creditor from ordering a garnishee bank operating branches in New York to turn over a debtor's assets held in foreign branches of the bank'; and
- whether the separate entity rule 'precludes a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a debtor's assets held in foreign branches of the bank'.

See *Tire Eng'g and Distrib LLC v Bank of China Ltd*, 740 F3d 108, 118 (2d Cir 2014). Although the certification of the first question was subsequently withdrawn based on a stipulation of dismissal between the parties, the certification of the second question remains ripe for resolution by the New York Court of Appeals.

Whether a creditor can reach overseas assets through financial institutions that are present in New York is an issue of substantial importance for debtors, creditors and the international banks. If the separate entity rule offers no shield, and if banks desire to benefit from operating in New York without subjecting their account holders' assets to US enforcement, then the banks would need to at least cede their New York activity to a truly separate affiliate. The New York Court of Appeals confirmed this option just last year in *Commonwealth of the Northern Mariana Islands v Canadian Imperial Bank of Commerce*, 2013 WL 1798585 (NY 30 April 2013). There, the Court of Appeals held that turnover orders are not necessarily effective against assets over which a garnishee may only have constructive – but not actual – possession or control. The case did not, however, address whether the separate entity doctrine operates as some sort of special territorial limitation on New York's post-judgment regime that is only available to banks.

Notwithstanding the uncertainty spawned by *Koehler*, one thing is clear: because of the question certified by the Second Circuit, the depth of the split of authority, the volume of pertinent litigation, and the significance of the interests at stake, it is likely that the New York Court of Appeals will bring clarity to at least some of these issues soon. When it does, we expect that it will hold that to the extent that the separate entity doctrine remains viable at all in the post-judgment context:

- it operates only to limit the effect of service of clerk or creditor-issued restraining notices or writs of attachment or garnishment to accounts that are 'located' in New York; but
- it in no way limits the courts' authority with respect to in personam orders against banks in noticed adversary proceedings (including on applications for turnover orders seeking the delivery of assets that are held at a bank's overseas branches).

Until then, the unsettled ground between *Koehler* and the separate entity rule will remain a source of both significant risk and opportunity for parties and practitioners.

and theft (among others). Statutes regarding drug enforcement, money laundering, RICO and terrorism further augment the 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 US. 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 where the use of equipment under seizure is necessary to maintain the property if the property is a seized business or ranch.

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 US is signatory to over 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 section 1781, as well as relevant MLATs. The US responds to MLAT requests pursuant to 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. See, for example, 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 US 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 US. 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. See 28 CFR part 9 (governing remission or mitigation of civil and criminal forfeitures).

KOBRE & KIM LLP
THE GLOBAL LITIGATION BOUTIQUE

Michael S Kim **michael.kim@kobrekim.com**
Carrie A Tendler **carrie.tendler@kobrekim.com**

800 Third Avenue
New York
New York 10022
United States

Tel: +1 212 488 1200
Fax: +1 212 488 1220
www.kobrekim.com

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