Multi-Jurisdictional Concealed Asset Recovery: Managing the Risks

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Introduction

We live in an age where electronic funds transfers take milliseconds and the ability to communicate and gather information has changed the way we conduct ourselves, in both professional and personal contexts. It is no surprise that the experienced white collar criminal, or the recalcitrant debtor with assets to hide, use our border-diminished world to travel and move money with ease. As ethically challenged obligors seek to transfer and hide assets on a cross-border basis, international asset recovery experts have their work cut out in locating and recovering such assets in major developed and developing nations.

Investigators engaged in concealed asset recovery projects are primarily concerned with locating assets. What is needed is more: to define the manner of holding of an asset, and to gather facts attributing it to a wrongdoing or a wrongdoer are of central importance to recovery. Recovery also involves an entirely different though often overlapping set of disciplines. The recovery of concealed assets (whatever form those assets may take) can be a difficult, even exceedingly difficult, exercise. Time, effort and other people's money have been invested in obscuring the location and path of those assets. Although some cases may be easily resolved, an international asset tracing and recovery assignment is among the most challenging for financial experts, investigators and specialised legal counsel.

There are many investigative options and legal remedies that can assist a victim of fraud or a creditor facing a wealthy yet dishonourable debtor. The potential for recovery is directly proportional to the level of time and specialised skill invested into the effort. A successful recovery effort requires a multidisciplinary team typically involving investigative, financial, accounting and technology professionals and specialist lawyers. Recently, it will also include soft intelligence and human factor analysts who are fluent in the psychology of fraud and organisational psychodynamics. Their central roles include providing strategic insight into a high-value debtor's machinations, both apparent and veiled, and the architecture of personal and organisational relationships. The analysis of so called "shadow data" can identify leverageable pressure-points and vulnerabilities that can be used tactically against difficult defendants.

Time is a critical factor. In almost any investigation where assets have been moved, quick consideration must be given to recovery. The element of surprise and prompt action in asset recovery should not be underestimated. The plethora of asset protection mechanisms and the ease with which funds can be moved can frustrate even the most carefully planned recovery effort.

The cost of orchestrating significant asset location and recovery exercises in cases that can require extensive investigative and legal work is one of the main obstacles for even the most robust and well-capitalised victim. Other barriers faced when seeking recovery of assets include:

- A multi-jurisdictional complex of facts and legal problems.
- Disharmony in legal rules which purport to provide access to documentation and information reposed in the hands of third party capital market intermediaries who come to "handle" or unwittingly launder the suspect money.
- Bank and company secrecy laws which purport to frustrate attempts to access information leading to the discovery of the whereabouts of stolen wealth.
- The juxtaposition between apparently conflicting systems of law.
- The setting aside of the legal fiction, known as the "company" is often a prerequisite to gaining access to funds protected within that legal entity.
- The law of trusts and agency can be abused in an attempt to (at least) superficially distance the attribution of the suspect funds, or in an attempt to place the funds into a "legal cocoon".

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- The presumption that dealings with assets and money through "company", "contract", "trust", and other are all bona fide.
- Underestimating the ferocity, tenacity, or organisational agility of the adversary (or networks of adversaries) together with being inadequately prepared to respond to and address a raft of inscrutable, irrational, and seemingly unpredictable human factors.
- Time, or the lack of it.

Once it has been established that assets have been misappropriated, the next step in any asset recovery exercise will be to verify that there are, in fact, assets out there in a form capable of being recovered. In a case where assets have been badly invested or, worse, already spent, there may be little point in embarking on a process that may result in what amounts to at best a pyrrhic victory.

Having clarified that there are assets available to recover it will be necessary to ascertain exactly how and where they are held. The location of assets may be a determinative factor. If, for example, the cost of prosecuting proceedings in a particular jurisdiction is such that recovery will yield little net benefit, a victim may well elect to cut his losses, especially where there may also be a risk of an adverse costs award.

Regardless however of where assets are located, it is advisable where at all possible, to liaise with local law enforcement, as intelligence may be available that will obviate or at least minimise the necessity for expenditure on investigations. In some case, it may be possible to cooperate with local law enforcement and government agencies to secure a recovery without even the need to initiate proceedings, subject to the cautions outlined below in this regard.

Strategy for recovery

Developing a strategy for recovery at the outset is a crucial step in any asset recovery exercise. The formulation of any plan requires at first instance an answer to the question "what is to be achieved" and, secondly, a consideration of how that end might be achieved. This necessarily requires an evaluation of the considerations at play, whether they be environmental, political, economic or social in nature, or indeed a mixture of all four. The questions and considerations are no different in constructing a plan of asset recovery.

Embarking upon any plan of recovery necessarily commences with investigation. Success, whether advancing a plan of recovery or otherwise, requires a two-pronged approach out-of-the-gate: access to the right information tethered to sophisticated interpretation and analysis. Once identified and harvested, excellent intelligence—which typically comes in disjointed fragments—must be probed, understood and contextualised. The exercise could be likened to trying to complete a puzzle with an indeterminate number of pieces, no discernible guiding image, in near darkness, and in a moving tumbler.

These massive complexities in multi-jurisdictional cases frequently seem overwhelming to victims of economic crime. Indeed, the addition of this factor to the mix can often dissuade victims from seeking recovery, wary as they are of the likely cost of recovering money abroad. Negotiating this particular aspect of the asset location maze requires a sound knowledge of the customs and laws of the jurisdictions in question. In addition to the simple logistical difficulty presented by the involvement of multiple jurisdictions in the mix, the victim of fraud will undoubtedly also encounter jurisdictions in which bank secrecy is prized and information about misappropriated assets is difficult to obtain. Contrary to popular belief, some of the "best" secrecy jurisdictions are located within the United States itself, for example Delaware and Wyoming. The manner in which assets have been misappropriated will also play a deciding role in assessing what recovery options are available. For example, an action for breach of trust will present different challenges and litigation options from, say, a classic investment fraud or Ponzi scheme loss.

Information: Investigation, analysis, utility

Human factors

Information and interpretation are crucial to every asset location and recovery endeavour. Raw intelligence will usually be garnered by means of an investigation, which can vary in scale and complexity depending on the value of assets and the manner of holding involved. Any investigation should remain confidential as long as possible. Only those who need to know should be informed. If the target becomes aware that an investigation is being conducted, assets may be moved out of the jurisdiction to further impede the victim's recovery efforts for months or even years.

In some cases, information is scant or hard to reach. In others, the gateways are wide and yield an abundance. The common denominator in any intelligence-gathering exercise, irrespective of the technical skills or heavy lifting required to attain it, is interpreting and contextualising the relative, comparative, and stand-alone value of any parcel of information, and then converting it to a form such that it is strategically actionable.

Fraudsters are continually innovating and creatively adapting to new technologies and environments. Their nefarious enterprises involve ferreting out wily methods to opportunistically exploit shifts, loopholes, and inconsistencies in financial markets or instruments, sluggish or inadequate regulatory oversight or reform, investor greed and myopia, anxiety, or laxity and, above all else, the ever-present human propensity to be hoodwinked, bamboozled, or manipulated.

In this regard, in every aspect of their work, fraud recovery professionals routinely confront an array of complex issues involving human psychology. It is a patent disadvantage for them to rely on day-to-day life experience, or to view the terrain through the prism of the lay-person, when seeking to isolate strategically leverageable information.

Accordingly, psychological expertise is increasingly recognised as valuable in, for instance, understanding the ecosystem of human inter-relationships in fraud matters (beyond fraudster-victim). Specialised knowledge of human psychology—including mental architecture, behavioural drivers, irrationality, and response patterns, to list only a few—and group and organisational dynamics are additionally useful in rendering three-dimensional profiles of the fraudster, his network of affiliates, and their organisational operations. This knowledge is also particularly useful in advancing counter-offensive stratagems via soft intelligence analysis, and providing precision forecasts in complex settlement negotiations.

Such cutting-edge methodologies can be employed as sophisticated enhancements to, not a wholesale replacement of, established investigative profiling conventions, which remain potent and useful sources of information. In combination, the asset recovery and fraud litigation toolkit is exponentially expanded.

This is a condensed outline of certain standard point-of-entry profiling queries:

- Can we link the fraudster to the ultimate beneficiary owner (UBO) of the central operating entity (or entities) in the fraud?
- Where is the fraudster likely to be (primary and secondary residences; business HQ and affiliate offices; favoured vacation-spots)?
- What, if any personal and/or business connections does the fraudster have? In which domestic and/or foreign locations?
- Is there evidence to suggest the probable holding place(s) of stolen funds (or other fraudulently taken assets)? Might they be overseas? In what form(s) has stolen value been preserved or converted?
- What details of the fraudster's lifestyle (for example, a gambling habit, substance addiction, travel/purchasing preferences, personal peccadilloes) can be generated to offer clues about where s/he might disperse or hide assets?
- Are there individuals who worked with/know the fraudster who could provide information on a confidential basis?
- Are there any easy asset "hits" that can be recovered to fund a broader, more ambitious investigation?
- If assets are offshore and a judgment can be obtained in one jurisdiction, can it be enforced easily where the assets are located?
- How might a criminal proceeding influence the fraudster and the outcome?

Information gleaned as a result of such profiling exercise can be critically analysed from various perspectives, legal; psychological and tactical, such multidisciplinary focus will yield crucial insights that can be strategically employed to drive the recovery effort forward.

The following presents some of the key initial soft intelligence analytic approaches that can be employed:

- Implement additive fact gathering to more pointedly understand and take account of the matrix of human factors.
- Compile 3-D profiles of the relational ecosystems—links between people, not just trails of deeds, documents, and funds—to clarify who's connected to whom and apply such three-two-dimensional data analysis to render sophisticated forecasts regarding potential impact on over-the-horizon case management. Such profiles will invariably take account of:
  - Character;
  - Personality;
  - Behaviour;
  - Interests;
  - Personal circumstances;
  - Propensities;
  - Motivations;
  - Vulnerabilities and
  - Psychological history: known trauma, stressors, anxiety (or depression) precipitants, psychiatric conditions, fetishes, addictions, affairs etc.
- Create detailed link maps of relationships and inter-relationships of the principal protagonists and their associates, noting connections (established and/or presumed) between and among one another and all relevant institutions.
- Formulate organisational chart(s) of all relevant institutions—hierarchically ordered by priority position in the fraudster's network—with primary focus on senior team personnel.
- Scan and scrutinise organisational charts and profiles for under-the-surface intelligence—"shadow data"—and drivers, coupled to, as above, preliminary hypotheses and assumptions having probable bearing on asset recovery and litigation strategies or other aspects of case prosecution. Such drivers might include:
  - family system and/or senior-team dynamics;
  - secrets;
  - rivalries;

  - power-plays;
  - intra-institutional friction; and
  - conflicts, pressure-points, vulnerabilities etc.
- Develop in-depth analyses of key personnel, leadership and senior team dynamics and operations (mechanical, procedural, cultural) with particular focus on delineating categories and branches of individual and institutional strengths, vulnerabilities, weaknesses, patterned reactions etc, that can then be leveraged in marshalling strategic response forecasts.

Electronic/cyber-technology tools

Asset-related information is arguably more readily available in the United States than in any other place in the world. However, many jurisdictions, particularly in the context of the threat posed by economic crime and funding of terrorism, are now technologically advanced societies offering an unparalleled amount of information on individuals and businesses from government records and electronic databases.

A vast amount of information is available online, if you know where to look and how to interpret the data. Available information (depending on the jurisdiction) includes judgments, liens and bankruptcy filings; property records; business registrations (cross-referenced in various ways); oil and gas partnerships; motor vehicle and driver licence registrations; regulatory proceedings and filings; thoroughbred horse ownership; lists of all former addresses; property tax rolls; information relating to divorce proceedings; and details of boat or plane ownership.

Asset tracing of this kind usually reveals only the tip of the iceberg, however such information can lead to more valuable sources or uncover a previously obscured trail. Ultimately, more sophisticated methods will undoubtedly be required before a victim of fraud can have confidence that all possible assets held by or under the control of the fraudster have been identified.

As well as searching public records and databases, methods can be employed to develop intelligence for focusing the recovery effort. Interviews with friendly and unfriendly parties can be very useful. One ultimate strategy can sometimes break the case: a direct discussion with the suspect, if he or she is available. Such investigative technique will invariably involve a pretext-type operation or a "ruse" designed to gain the confidence of the fraudster and encourage him or her to part with seemingly innocuous but potentially valuable information. The objective is to obtain valuable clues as to the use and location of the misappropriated funds. Also, the results from investigations conducted prior to the meeting can provide significant leverage, if used properly.

Judicial tools

While investigation may be conducted on an unofficial basis, it will more often than not be necessary to avail of the assistance of a court in procuring the disclosure of information and indeed protecting the secrecy of the investigation. The traditional form of discovery relief in litigation is inter partes, or out in the open so to speak. However, the circumstances in which relief is sought against a fraudster are generally such as to warrant ex-parte or secret discovery designed to locate hidden wealth with a view to freezing same to frustrate any attempts to further hide it. Where available, any experienced professional will consider the use of sealing and gagging orders to prevent early disclosure to the target. The advantage of sealing and gagging orders is that they preclude any disclosure of either the fact of the court ordered investigation, or the information being disclosed, to the party in respect of whom the information is relevant.

As noted above, asset-related information is generally readily available in the United States. US federal law empowers courts to permit any interested party to obtain discovery for use in foreign proceedings from a person located in the district, even if this evidence could not be accessed under the rules of the foreign proceeding.[1] 28 U.S.C s.1782(a) does not impose a foreign discoverability requirement nor must the foreign proceeding actually be pending. Section 1782 requires only that the discovery be useful.

For litigants situated outside the United States it provides a quick, efficient and relatively inexpensive method of obtaining evidence within the United States. While most foreign countries provide for procedures enabling the gathering of evidence from foreign witnesses, or witnesses resident abroad, §1782 of Title 28 of the United States Code is designed to avail foreign litigants of the opportunity to obtain discovery in respect of documents or tangible evidence reposed in the United States. Effectively, all the foreign litigant needs to establish or demonstrate is that if the parties against whom discovery is sought were located within the foreign jurisdiction in which the underlying proceedings are situate, that the applicant could in fact seek the same discovery relief they seek in the United States District Court in that foreign jurisdiction, and that the only reason the applicant comes for relief to the US District Court is that the evidence sought is not otherwise available to the applicant in the foreign jurisdiction, physically speaking.

Under §1782, a court order for discovery may be made upon the application of any "interested person." There is no requirement in §1782 requiring an interested person first to seek discovery from the foreign or international tribunal. It does not require that judicial proceedings be pending at the time assistance is sought under §1782. The fact that an interested person is "contemplating" bringing proceedings abroad is sufficient for this purpose. §1782

[1] 28 U.S.C s.1782.

is accordingly sometimes referred to as pre-action discovery. The determination on whether to grant assistance under a §1782 application turns not on whether the proceeding is pending but on whether the requested discovery will likely be of use in a foreign judicial proceeding (or—whether it will likely lead to the discovery of admissible evidence).

§1782 of the United States Code provides a flexible procedure for the taking of depositions in aid of foreign proceedings. The section is supplemented by safeguards in the Federal Rules of Civil Procedure, and particularly rr.26–32, which are designed to prevent misuse of the section.

The procedure is relatively straightforward, involving an application made to the appropriate US District Court corresponding to the location of the residence of the party from whom the evidence is sought. This application is grounded on an affidavit of the applicant, who must be an interested person, that is, a party to the (anticipated) foreign litigation in question.

A person may not be compelled to give his or her testimony or statement or to produce documents or other items in violation of any legally applicable privilege. With regard to discoverability, if indeed that issue is raised within the §1782 application proceedings, the primary burden falls upon the applicant who has to make a showing that the information is discoverable under foreign law.[2]

Involvement of foreign courts

Where it is necessary to seek the assistance of a court in gaining access to information it is important first to ascertain whether the jurisdiction of that court can aid the claimant by making available ex-parte procedures designed to uncover information under seal. Not all jurisdictions are amenable to granting this type of relief, for example civil law jurisdictions (which include the designated secrecy locales of Belgium and Luxembourg) do not recognise such procedures. If the body of legislation in a particular jurisdiction does not specifically provide for the use of ex-parte procedure, recourse may—in general—be had to the rules of civil procedure.

Most common law based courts have jurisdiction to hear a variety of applications without notice, and in general one can appeal to the "inherent" jurisdiction of a court to do as it sees fit to ensure that the ends of justice are met. In general, it may be said the common law jurisdictions, including the United States, the United Kingdom, and Australia provide for broad relief in such context.[3] In contrast, civil law jurisdictions in general do not countenance such relief, in the intellectual property context Directive 2004/48[4] was meant to change that stance, but that Directive is now subject to review. The basics of the concept of the Norwich Pharmacal/Bankers Trust Orders[5] were to be implemented into the national law of the member states regardless of whether they belong to the common law or civil law systems. The standard of implementation however varies widely, for example the Directive was implemented in German law such that the Norwich Pharmacal/Bankers Trust concept is afforded recognition, however there is no provision made for sealing and gagging relief.[6] The fact that such a Directive has been issued however must at least be viewed as a step towards recognition of the utility of such procedures in locating and preserving property, albeit in this case intellectual property. Despite the introduction of the concept of such relief "via" the above Directive, regrettably the fact remains that obtaining such relief in civil law jurisdiction is an uphill struggle, plaintiffs are faced with judges who are unaccustomed to being asked to entertain such applications. Without a structure in place the costs of driving such an application increases exponentially. Given that a number of secrecy locales are civil law based this represents a significant consideration in conducting any asset recovery exercise.

Freezing assets in the United States

You have the information. You know where the assets are. Now you need to secure them. What options are available in the United States? A party seeking a temporary restraining order (TRO)—leading to a preliminary injunction, freezing assets pre-judgment, in the United States, must establish by the preponderance of evidence that he or she possesses certain and clearly ascertainable rights that need protection, that there is no adequate remedy at law, that irreparable injury will occur

[2] *Re application of Asta Medica SA* 981 F 2d 1.

[3] e.g. the US courts provide for broad ranging discovery powers and they also recognise an inherent power to seal a court's record, as the court in *Estate of Hearst* (1977) 67 Cal. App.3d 777 [136 Cal. Rptr. 821] stated "Clearly a court has inherent power to control its own records to protect rights of litigants before it, but 'where there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed'. [Citation] … [Countervailing] public policy might come into play as a result of events that tend to undermine individual security, personal liberty, or private property, or that injure the public or the public good".

[4] Directive 2004/48 on the enforcement of intellectual property rights [2004] OJ L195/16.

[5] An order that permits a wronged party to sue another for "full information" regarding not only the identity of the wrongdoer, but also other information to enable the wronged party to bring forward his claim. The jurisdiction to grant such relief is grounded in the facilitation—even innocent—by the party who comes under a duty to provide the information. Such orders are termed information orders in the UK.

[6] Directive 2004/48 has been implemented into UK law by the Intellectual Property (Enforcement, etc.) Regulations 2006 (SI 2006/1028). The Directive has been implemented into Dutch law and came into force on May 1, 2007 (Staatsblad 2007, 108). It has been implemented in France by the "décret 2008-624" of June 27, 2008— (Décret No.2008-624 du 27 juin 2008 pris pour l'application de la loi no 2007-1544 du 29 octobre 2007 de lutte contre la contrefaçon et portant modification du code de la propriété intellectuelle, NOR: ECEQ0803248D, June 29, 2008 Journal Officiel de la République Française, Texte 5 sur 64). The Swedish Parliament voted yes to implement the Directive on February 26, 2009, and it was implemented on April 1, 2009. (Swedish) Justitiedepartementet, Lagändringar angående civilrättsliga sanktioner på immaterialrättens område, regeringen.se, 2009-04-01. In Belgium, arts 871, 877 of the Civil Procedure Code allows the judge to order a party to disclose evidence it possesses (art.877 can also apply to third parties); art.19, 2nd alinea Civil Procedure Code allows the judge to order preliminary measures to investigate the case. Austria takes the view that the Enforcement Directive does not require amendments of Austrian law, however, it is not evident that this view is correct. At any rate, there are substantial doubts that Austrian law and the Enforcement Directive are congruent. In Hungary, it has been implemented in art.104(9) of Act XXXIII of 1995 on the Protection of Inventions by Patents. In Spain, it has been implemented by Law 29/ 2006, dated June 5, 2006.

without injunction, and that there is a reasonable likelihood of success on the merits of the case. The tests or requirements are roughly similar to the standard of review used in respect of the grant of Mareva injunctions, the relief in Commonwealth jurisdictions.

A preliminary injunction is an extraordinary remedy and to warrant issuance a party must clearly show a need to preserve the status quo in that such party would be susceptible to irreparable damage if the injunction does not issue.

Generally, pre-judgment injunctions freezing assets rest on the authority of courts of equity to restrain persons, within the limits of the courts' jurisdiction, from doing inequitable acts that wrong and injure others. The grant of a preliminary injunction is within the discretion of the court. Since a preliminary injunction is granted before a hearing is conducted on the merits of the case, justification for the issuance of an injunction can be found principally in the sufficiency of a complaint.

For there to be an adequate remedy at law, that remedy must be clear, complete, and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy. Once a party who seeks a preliminary injunction raises a fair question as to the existence of the right claimed, it may lead the court to believe that the plaintiff would be entitled to the relief prayed for and that it is advisable that the party's positions stay as they are until the case is considered on the merits. The equitable doctrine of balancing of equities or convenience may be applied and the trial court may determine whether the burden on the defendant, should an injunction issue, outweighs the benefit to the plaintiff. However, such a doctrine is inapplicable where the defendant's actions were done with full knowledge of the plaintiff's rights and with an understanding of the consequences that might ensue.

The defendant, by acting swiftly, cannot deprive the court of the right to compel restoration of the status quo by a preliminary injunction.

With reference to the question of whether a case is a proper one for equitable relief, it has been said that:

> "The existence of a remedy at law does not deprive equity of its power to grant injunctive relief unless the remedy is adequate: i.e. the remedy at law must be clear, complete, and practical and efficient to the ends of justice and its prompt administration as the equitable remedy … Thus, the fact that a plaintiff's ultimate relief may be a money judgment does not deprive a court of equity the power to grant a preliminary injunction."[7]

As a prerequisite to the grant of a preliminary injunction, the plaintiff is required to establish a probability of the ultimate success on the merits of the case, as well as the immediate need for the injunction to preserve the status quo and to prevent irreparable injury to its rights of property. Where no answer has been filed, the injunction may be issued based solely on the sufficiency of the complaint. Where an answer has been filed, both the answer and the complaint must be considered. If the answer contains denials of material allegations of the complaint, a hearing on those matters must be held before the injunction may issue.[8]

With respect to the grant of a preliminary injunction, to sustain a showing of irreparable injury justifying the same, the plaintiff does not need to show that injury is beyond repair or beyond compensation in damages rather, only that the transgressions are of a continuing nature.

For the purpose of determining whether a complaint specifies facts sufficient to warrant issuance of a preliminary injunction, the standard by which to measure the complaint is not the same as the standard to evaluate the case at the time of the final remedy. The purpose is not to determine contradicted rights. The plaintiff need only raise a fair question as to the existence of a right to the relief requested.

The June 17, 1999 decision of the Supreme Court of the United States in *Grupo Mexicano de Desarrollo SA v Alliance Bond Fund Inc*[9] has been widely misunderstood as having held that US district courts do not have the jurisdiction to grant *Mareva* injunction-type relief, freezing the assets of a defendant pre-emptorily, before judgment. The five-four majority opinion of Scalia J does not say this. What it says is that, if a plaintiff's claim is based on an in personam claim in debt or for damages, US district courts do not have the power to freeze the assets of defendants before judgment. However, where a plaintiff has a cognisable, in rem or equitable claim to specific assets of a defendant or seeks a remedy involving those assets such as may be asserted as arising from a fraud, a US district court has the power to invoke equity to preserve the status quo pending an adjudication on the merits where a remedy at law might prove inadequate and where the preliminary relief furthers the court's ability to grant the final relief sought. US district courts can also freeze assets before judgment if a specific state or federal statute relevant to a plaintiff's claim authorises the grant of such a provisional remedy (e.g. as in the instance of many state or federal consumer or securities fraud statutes).

In the post *Grupo Mexicano* case of *US ex rel Rahman v Oncology Associates*,[10] the court found that, where interim equitable relief is authorised and the public interest is involved, courts of equity may go much further both to give and withhold relief in furtherance of the public interest than when merely private interests are involved. This case also found that a constructive trust is an equitable remedy even though it might ultimately reach a fund of money. In this case, the District Court found that it had authority to issue a preliminary injunction

[7] See *KFK Corp v American Continental Homes Inc* (1975) 31 Ill. App. 3d 1017.
[8] See *Schlicksup Drug Co v Schlicksup* (1970) 120 Ill. App. 2d 181.
[9] *Grupo Mexicano de Desarrollo SA v Alliance Bond Fund Inc* (1999) 527 U.S. 308.
[10] *Grupo Mexicano* case of *US ex rel Rahman v Oncology Associates* 198 F.3d 489 (CA 4 (Md) 1999).

freezing assets of a doctor and related entities under its traditional equitable powers. Thus was so even though the Government also sought liquidated damages. This was an action alleging that the doctor and other defendants engaged in fraudulent billing schemes involving payments by Medicare and civilian health and medical programs, and seeking the imposition of a constructive trust on fraudulently obtained assets, and to avoid fraudulent transfers among entities. In these circumstances, an injunction was a reasonable measure to preserve the status quo in aid of the government's claims, and the restrictions imposed were designed to enable or aid the district court in giving the relief requested.

Alternative recovery frameworks

It will always be worth giving consideration to the utility of recovery frameworks that do not fit neatly into the "plaintiff v defendant" paradigm. Victims are increasingly seeking recourse through government managed or supervised processes, for example forfeiture regimes or liquidations initiated pursuant to investor protection legislative regimes.

Although relatively few jurisdictions allow for civil forfeiture there is a trend towards introducing legislation to enable stand-alone civil proceedings to recover the proceeds of fraud. Some examples include Antigua and Barbuda, some Canadian Provinces, Ireland, Italy, Slovenia, and the United Kingdom. The United States of course has arguably the most advanced civil forfeiture framework.

In civil forfeiture cases in the United States, the action is in rem, thus the agency sues the property, not the person. In contrast, criminal forfeiture is usually carried out in a sentence following a conviction and is a punitive act against the offender. Many of the criminal laws enforced by the Federal Bureau of Investigation (FBI) contain forfeiture provisions. The seizure of property by law enforcement authorities generally is permissible when the property is evidence of a crime or is subject to forfeiture. The proper method of seizure of property, for example in a civil forfeiture action, depends upon the methods permitted in the relevant statute, the location of the property, Department of Justice and FBI policy, and whether or not exigent circumstances are present. It is FBI policy to seize property for forfeiture pursuant to a seizure warrant.

The criminal forfeiture action is referred to as an in personam action, meaning that the action is against the person, and that, upon conviction, the punitive effect of forfeiture can be used against the convicted offender. As noted above the civil forfeiture action is referred to as an in rem action, meaning that the action is against the property. The two actions differ in many ways, including:

- the point in the proceeding, generally, at which the property may be seized;
- the burden of proof necessary to forfeit the property; and
- in some cases, the type of property interests that can be forfeited.

Non-conviction based asset forfeiture enables States to recover illegally obtained assets from an offender by means of a direct action against the stolen property without the requirement of a criminal conviction. The State only need prove its case on the balance of probabilities, as opposed to the higher criminal standard.

Recourse to civil forfeiture circumvents obstacles that may be present in a criminal case, such as the standard of proof, thus where a defendant has been acquitted in criminal proceeding a non-conviction based forfeiture proceeding would allow recovery, provided of course the requisite evidence is produced. This is not a "re-litigation" of the issues, as such a proceeding is not meant to establish the fraudster's culpability but the origin of the assets themselves.

There may also be cases where the defendant himself cannot be found within the jurisdiction however the proceedings are against the assets and not the person and thus this hurdle is overcome. There may also be cases where the identity of the owner (so called) of the assets is uncertain, in such cases non-conviction based forfeiture provides a means of recovery.

That is not to say however that civil forfeiture is a cure all. Taking the US regime as an example, it is clear that recovery is conditional upon certain formalities being adhered to. In US civil forfeitures, the statutory authority is less broadly stated than it is in its criminal counterpart. The Attorney General's authority to decide petitions for remission or mitigation does not extend to other "innocent persons".[11] The factual basis and legal theory underlying the forfeiture will determine the victims under 28 C.F.R. Pt 9: "The term victim means a person who has incurred a pecuniary loss as *a direct result of the commission of the offense underlying a forfeiture*."[12]

Losses that are not supported by documentary evidence[13] are excluded, as are losses that only "indirectly" resulted from the underlying or a related offence, such as "interest foregone or for collateral expenses incurred to recover lost property or to seek other recompense".[14]

Remission[15] to victims may also be denied:

- if determination of the pecuniary loss to be paid to individual victims is too difficult;
- if the amount to be paid to victims is small compared to the expense incurred by the government in deciding the victims' claims; or

[11] See, e.g. 18 U.S.C. § 981(d); 21 U.S.C. § 881(d).
[12] 28 C.F.R. § 9.2(v).
[13] See 28 C.F.R. § 9.8(a)(1) and (2).
[14] 28 C.F.R. § 9.8(b).
[15] The Attorney General or the seizing agency may return forfeited property to an owner or lienholder of the property, or to a victim of the crime underlying the forfeiture, if certain eligibility criteria are met. The federal regulations governing remission are at 28 C.F.R. § 9.

- if the total number of victims is large and the amount available for payment to victims is so small as to make granting payments to victims impractical.[16]

Where the loss has arisen as a result of a class investment fraud, varying government sponsored recovery options may be available, however the options available will depend very much on the answers to a series of questions, for example: Who invested? What was the investment ? Where? With whom? The answers to such questions dictate not just who can be sued but also who has standing to sue.

In the case of *Madoff* for example, the patterns of investment were different in the United States from those used in Europe. US investors invested mainly through money managers, feeder funds and other hedge funds, whereas outside the United States the common intermediaries were banks, using their networks to offer Madoff-linked products to retail customers.

Investment fraud is a criminal matter, first and foremost. In every US Attorney's Office there is a financial fraud enforcement coordinator with whom victims should make contact as a first port of call. In the United States, the Securities Investors Protection Corporation (SIPC) is the industry-financed organisation that provides limited cash advances to customers of failed brokerages, however indirect investors are not eligible for compensation through SIPC. Furthermore a SIPC appointed trustee stands in the shoes of the investment company and thus lacks standing to pursue certain claims on behalf of those actually defrauded. The United States Court of Appeals for the Second Circuit has held that the trustee appointed under the Securities Investor Protection Act (SIPA)[17] to oversee the liquidation of Bernard L. Madoff Investment Securities LLC (BLMIS) lacks standing to assert common law claims on behalf of Madoff's customers against financial institutions that the trustee alleges aided and abetted Madoff's fraud.

It should be borne in mind that the commencement of a SIPA liquidation proceeding operates as an automatic stay of:

> "the commencement or continuation … of a judicial, administrative, or other action or proceeding against the debtor" or "any act to obtain possession of … or to exercise control over property of the estate."[18]

Further matters that should be taken into account in assessing whether to pursue remedies through litigation in cases where a covered security is concerned is whether the investment is in fact a covered security at all. The US Supreme Court[19] has held that the US Securities Litigation Uniform Standards Act (SLUSA) does not preclude a state-law class action alleging a scheme of fraud that involves misrepresentations about transactions in SLUSA-covered securities. The question before the court concerned the scope of the Act's phrase "misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security."[20] The court concluded that a fraudulent misrepresentation or omission is not made "in connection with" such a "purchase or sale of a covered security" unless it is material to a decision by one or more individuals (other than the fraudster) to buy or to sell a "covered security."

In cases where actions have been taken by investors against feeder funds (given the lack of privity between the investors and the failed investment company) victims have faced dismissal of law suits on the basis of failure to show individualised injury. Causes of action that have been dismissed for failure to show individualised injury include actions for breach of fiduciary duty; breach of statutory fiduciary duty; breach of contract; and aiding and abetting breach of fiduciary duty.

A not-so-recent trend, but one of continuing significance, is the filing of one or more derivative actions in tandem with a securities class action lawsuit. These often are referred to as "follow-on" derivative suits. Plaintiff law firms may bring shareholder derivative lawsuits on behalf of a few institutional investors who would otherwise be passive members of the class in the securities class action lawsuit. However, filing a derivative action in tandem with a securities class action suit also can produce certain benefits for plaintiffs in pursuing the securities class action suit. For example, in securities class action suits, discovery is stayed until the court rules on defendants' motion to dismiss. The derivative lawsuit has no similar stay of discovery. Plaintiffs, therefore, may seek early discovery in the derivative lawsuit in order to help them obtain information they ordinarily would not have access to and use this information to defeat a motion to dismiss in the securities class action.

The above is not by any means any exhaustive discussion of the many options available to victims of fraud, a comprehensive discussion is beyond the reach of this paper, however the above should serve to identify the breadth of options available and also to highlight some of the issues stimulated by same.

While private recovery actions by victims would seem to overcome much of the statutory obstacles or hurdles inherent in state sponsored recovery actions, provided of course that a private action is permissible to run in parallel where state proceedings are underway, they are not

[16] 28 C.F.R. § 9.8(d).
[17] SIPA was enacted in 1970 "for the primary purpose of protecting customers from losses caused by the insolvency or financial instability of broker-dealers." In SIPA-governed bankruptcy proceedings, a fund of "customer property" is established—generally by pooling the debtor firm's securities and cash—for distribution among the debtor's customers, with each customer being entitled to share in this fund pro rata to the extent of his or her Net Equity. SIPA also created SIPC, which is charged with establishing and administering a SIPC fund to advance money to the SIPA trustee in order to promptly pay each customer to the extent that his or her Net Equity claim exceeds his or her ratable share of customer property, up to $500,000 per customer.
[18] 11 U.S.C. § 362(a)(1), (3); SIPA § 78fff(b).
[19] *Chadbourne & Parke LLP v Troice*; *Willis of Colorado Inc v Troice*; *Proskauer Rose LLP v Troice* (2014) Dkt. 571 U.S.
[20] §78bb(f)(1)(A).

necessarily better placed to assure a higher percentage recovery. It must be borne in mind that lawyers and sometimes litigation funders will generally take their share of the recovery—it being unlikely that costs will be recovered where there may not be enough assets to cover losses themselves. Private recovery actions do however have some advantages that go beyond the "how are the recoveries divided" question. For example, private recoveries are not so constrained by diplomatic or political considerations as a state action may be, a state regulatory agency or officer is less likely to pursue an action against another regulatory agency in either its own or a foreign jurisdiction. While such actions have inherent risks they are not non-starters. In some cases, locus may simply be lacking.

Most asset forfeiture schemes provide for victims' compensation, but they are slow. In a large scale fraud, which may take several years to come to trial, funds are locked up pending the outcome of that trial. However, many defrauded investors have invested life savings or their pensions in schemes that have left them wiped out, and not just financially. Victims understandably want—and often need—their money back as soon as possible.

Another disadvantage of the state action in a classic Ponzi scheme arrangement may result in the victims themselves being targeted by the state under the claw back provisions, albeit that a recent decision of the US Bankruptcy Court for the Southern District of New York puts the onus on the Trustee seeking claw back to adequately plead that the investors in question showed a lack of good faith. Rakoff J held that in a broker-dealer liquidation governed by SIPA, where a trustee seeks to recover funds paid to the defendant under Bankruptcy Code ss.548(a) and 550(a) (which impose liability for fraudulent conveyances where the defendant lacked good faith in receiving the funds):

- the defendant's good faith is evaluated under a subjective willful blindness standard; and
- to survive a motion to dismiss, the trustee bringing the fraudulent conveyance claims must plead facts sufficient to establish the defendant's lack of good faith.[21]

Private recovery actions also do not face the same potential problems with enforcement abroad in circumstances where an application by a state agency is seen as an attempt to enforce a penal or revenue law—generally speaking a public policy defence to any such enforcement in a foreign state.

Where a victim has chosen to pursue remedies *via* the insolvency route, the availability of relief to foreign appointed trustees or liquidators in the United States is a significant consideration. Chapter 15 of the United States Bankruptcy Code provides several advantages and can be a useful weapon for tracing and recovering the proceeds of fraud, such as foreign access to US courts, recognition of foreign proceedings, assistance to foreign representatives, and cross-border comity and cooperation between US courts and their foreign counterparts. Under Ch.15, a foreign insolvency representative is enabled in exercising greater control over the liquidation of a defendant's US assets, that is, a foreign representative can obtain immediate control over the debtor's property located in the United States.

Pursuant to Bankruptcy Code s.1520:

> "the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552."

Section 363 of the Bankruptcy Code provides that the power to lease, sell, or transfer the debtor's property (outside the ordinary course of business and subject to court approval) is limited to a trustee, however, the practice is that the company is most often the seller. Section 552 provides that pre-bankruptcy liens do not attach to property acquired by the estate following the bankruptcy court's recognition of the foreign proceeding. Thus upon recognition of a foreign main proceeding, only the foreign representative may lawfully transfer the debtor's assets outside of the ordinary course of business, and any proceeds acquired from the transfer are free from liens arising after the recognition of the foreign representative. Even in cases where the bankruptcy court determines that the foreign proceeding is a foreign non-main proceeding, the foreign representative may still obtain control over the debtor's US property pursuant to Bankruptcy Code s.1521 which provides that a US court may entrust "the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the US to the foreign representative …".

Once a US bankruptcy court recognises a foreign proceeding the foreign representative may initiate a bankruptcy case for relief under other chapters of the Bankruptcy Code. If the court determines the foreign proceeding is a foreign main proceeding, the foreign representative may file a voluntary petition seeking bankruptcy relief on behalf of the debtor's related entities located in the United States, however, if the court recognises the foreign proceeding as a foreign non-main proceeding, the foreign representative may only file an involuntary petition against the debtor and its related entities.

One of the most significant benefits of a Ch.15 proceedings is the automatic stay. Once a US bankruptcy court recognises a foreign proceeding, regardless of whether as a main or non-main proceeding, a stay of all proceedings automatically comes into effect.

[21] *In re Madoff Securities* 12-MC-115 (JSR) (S.D.N.Y. April 27, 2014).

Furthermore, as with many other insolvency laws, the US Bankruptcy Code provides that preferential transfers, transfers for insufficient value, and certain other unauthorised transfers may be set aside and the transferred assets or their value recovered for the benefit of creditors.

Section 1513 of the Code expressly provides that foreign creditors "have the same rights regarding the commencement of, and participation in, a [Ch.15] case … as domestic creditors" and prohibits a US court from assigning a lower priority to the claim of a foreign creditor than that of a general unsecured claim solely because the creditor is foreign. Chapter 15 also entitles foreign creditors to notice of a Ch.15 proceeding and all other actions taken during the proceeding, so that a creditor has a reasonable time to respond if required or desired.

Chapter 15 also allows a foreign representative to participate directly in a concurrent bankruptcy proceeding. Section 1512 states that:

> "upon recognition of a foreign proceeding, the foreign representative … is entitled to participate as a party in interest in a case regarding the debtor under this title".

In order to qualify for relief under Ch.15, a foreign proceeding must exist. "Foreign proceeding" is defined in s.101(23) as a:

> "collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation."

It will thus be apparent that not every insolvency proceeding pending in another jurisdiction constitutes a foreign proceeding, however where a foreign proceeding does so qualify the benefits of Ch.15 are undeniable.

It should be noted however that US bankruptcy and appellate courts retain discretion in respect of how a Ch.15 case proceeds and its outcome. As demonstrated by the 5th Circuit (Texas) bankruptcy court in *In re Vitro SAB de CV*,[22] the US bankruptcy court will not automatically recognise a plan of reorganisation of a foreign court, the US bankruptcy court retains discretion when reviewing a foreign representative's request.

Close co-operation between foreign and US Bankruptcy Courts is also possible, in the *Nortel Networks Inc*[23] case for example, the Third Circuit and the Court of Appeal in Ontario, Canada, agreed to a joint trial presided over by the US bankruptcy court and the Canadian Ontario Superior Court of Justice, supervising the allocation of the sale proceeds of the company's assets.

As an alternative to seeking to enforce foreign insolvency judgments in US bankruptcy courts, provided the prerequisites[24] for such assistance are met plaintiffs who identify assets in the United States may seek the appointment of a federal or state receiver. There are two basic types of receivers: a general (or liquidating) receiver, and a special receiver. The general receiver is analogous to a bankruptcy trustee in that the receiver controls all the assets and operates the businesses with the intent to either sell such assets as a going concern or liquidate the assets of the business. In a special or limited receivership, the receiver only takes possession of designated assets and/or businesses of the defendant debtor. Under the federal jurisdiction appointment of a receiver is ancillary relief requiring a pending federal court action asserting other substantive claims, the federal court in question must also have jurisdiction.[25]

As far as state jurisdiction is concerned, a majority of states have enacted statutes authorising the appointment of a receiver under various circumstances. These include waste or material injury to property of the debtor, insolvency, fraud or mismanagement of corporate assets. Many states also provide for appointment of a receiver on general equitable principles, whether the debtor is solvent or insolvent.

There are some arguably superior aspects to receivers' powers as compared to those of bankruptcy trustees. Receiverships tend to move more quickly and with fewer formalities, in addition receivers who pursue causes of action against directors and officers of a company are less likely to be prevented from doing so by courts that are willing to uphold defendants' in pari delicto defences. As the bankruptcy trustee is seen to 'stand in the shoes of' the company, bankruptcy courts have ruled that the company (through the trustee) cannot sue itself (by suing representatives of the company, such as Directors and Officers). Receivers, however, have been able to pursue directors and officers, and foreign-based administrators. Thus companies may elect to seek the appointment of a receiver to avoid the consequences of the in pari delicto defence. Another advantage is that a petitioning plaintiff can recommend an appropriate candidate to serve as a receiver, but not a bankruptcy trustee. However there are also disadvantages to pursuing this route, for example and most notably, there is not a well developed body of receivership law, while there is a well developed body of bankruptcy law. Another significant consideration, depending on which court has jurisdiction, is the ability or inability of a receiver to sell assets free and clear of liens, claims and encumbrances. As in any case, the circumstances will dictate the choice.

[22] *In re Vitro SAB de CV* (2012)701 F. 3rd 1031.
[23] *Nortel Networks Inc* 09-10138 (Bankr. D. Delaware).
[24] e.g. a federal and/or state court must have jurisdiction, the location of assets; debtor and creditor may play a decisive role.
[25] Appointment of a receiver is ancillary relief requiring a pending federal court action asserting other substantive claims. Creditors' rights claims are not typically based upon a federal question, diversity of citizenship and the minimum amount in controversy under 28 U.S.C. §1332 must exist in order to invoke federal court jurisdiction. See *Inland Empire Insurance Co v Freed* 239 F.2d 289, 290 (10th Cir. 1956).

Co-operation or complication

Private sector asset recovery professionals and state recovery agencies share the same goal in the short term: the recovery of assets. Asset recovery, whether private or state sponsored, is a costly and time consuming exercise. In both scenarios, experienced professional teams are required, including lawyers, financial advisors, forensic accountants, analysts, and investigators. In many cases, such professionals have acted successfully in tandem with law enforcement officials in tracing and recovering assets abroad, such as for example in the case of Ferdinand Marcos in the Philippines and in Nigeria against the estate of Sani Abacha. In some cases, however, the interests of two parties chasing assets may diverge. Take for example, the case of a smaller body of victims or creditors who petition a debtor into bankruptcy or insolvency and then discover that, separately, criminal proceedings are pending against the same wrongdoer in another jurisdiction and that those criminal proceedings involve the attempt by state agencies to forfeit assets of that defendant. Such a scenario brings into play not just issues of who has priority in the winding up but also issues such as which tribunal and or State has jurisdiction over the debtor and separately the property, and where there are separate proceedings, which proceeding shall trump the others.

The case of the fraudster Stanford shows how various interests can collide in practice. Stanford was indicted in Houston, Texas on fraud charges. Concurrently the SEC filed a fraud suit against Stanford and his cohorts. Meanwhile in Antigua, the centre of operations of SIB—the bank at the centre of the scandal—receivers were appointed over SIB, and ultimately SIB was placed into liquidation. However, in Dallas, the US District Court granted an order appointing a receiver providing that the US receiver be authorised to take and have complete control, possession and custody of the receivership estate of SIB. Thus in simple terms a conflict arose between the US receiver and the Antiguan liquidators, to say nothing of the disputes intra creditor in relation to the propriety of the Antiguan liquidators' conduct. Ultimately, a settlement agreement was concluded between the US receiver and the Antiguan liquidators but not before proceedings had been instituted in the United States, Antigua, Canada and the United Kingdom, inter alia, concerning who should be recognised, where and how.

This agreement provided that the US receiver and the Antiguan liquidators settle the pending litigation between them regarding SIB in the United States, Canada, the United Kingdom and Antigua. The Agreement also provided that the Antiguan liquidators would not oppose or interfere with the US receiver's status in the United States or Canada nor his efforts to take control of assets, and the proceeds of sale of assets, located in the United States and Canada, and the US receiver would not oppose or interfere with the Antiguan liquidators' status in Antigua or the United Kingdom nor their efforts to take control of assets, and the proceeds of sale of assets, located in Antigua and the United Kingdom.

In such cases, it is worth considering the utility of a Co-ordination or Co-operation Agreement. The purpose of a Co-ordination or Co-operation Agreement is to establish a framework for co-operation between parties. In the field of asset recovery and crime prevention, such agreements can be of considerable benefit, especially where parallel proceedings are in play, with the potential for duplication of effort and worse, frustration of the other party's efforts, that such may entail. Such agreements—if countenanced within a particular jurisdiction or by legislation—are an effective way to establish a protocol for any given investigation including the exchange of police information and the conduct of criminal analysis, the search for assets and suspects, the publication and circulation of information and access to the otherwise unavailable databases.

Once a broad consensus has been reached between parties to the effect that such a co-ordination agreement should be concluded between them, each party should designate a point of contact with a view to fine-tuning the negotiations and working out the important points and facts that should be included in such an agreement. Primarily, the purpose of such an agreement is the exchange of information, to the extent permissible by law. Such agreements however may also provide for co-ordinated efforts at obtaining discovery, and to the extent necessary instituting proceedings both domestically and abroad, for the purpose of obtaining such discovery. Such agreements will usually, although not always, provide for the sharing of proceeds of recovery, whether on a pro rata basis or upon some other basis agreed between the parties.

The main purposes of such agreements are to maximise recovery for the benefit of both parties to the agreement. Such agreements would generally cover cases where a fraud has been perpetrated upon a number of individuals such that a class action recovery suit has been initiated, or a company has been placed into liquidation for the benefit of its creditors, and at their request. In such cases, the interests of class action litigants, or the creditors, as the case may be, and the law enforcement authorities, must be reconciled. That will not always be possible, as there may be competing interests at play, it may well be the case that not all creditors or claimants have opted into a class proceeding for example.

Generally speaking the purposes of such Co-ordination Agreements will cover the following:

- Information sharing;
- Co-ordinating actions with a view to avoiding duplication of efforts and expense;
- Organising attendance at any relevant judicial or administrative hearings;
- Pursuing a plan of action designed to affix liability to defendants involved; and

- Providing support staff in respect of any of the tasks outlined above.

Co-operation Agreements may also be concluded between liquidators of a main proceeding and liquidators of secondary or satellite proceedings. Again, above all the goal is to maximise recovery and to avoid duplication of effort where at all possible. In particular, where there are a number of liquidations, or indeed proceedings concerning the same subject matter, it is in the interests of all involved that those proceedings be co-ordinated so that one does not operate to the detriment of the other, and that the judiciary involved can be confident that the liquidation as a whole is being managed effectively. In some cases, one of the parties will agree to stay proceedings in one jurisdiction pending an outcome in another with the aim of ensuring that the liquidation takes place in the most appropriate forum. While there is no power as such, that allows a court to instruct the liquidator of a secondary proceeding to conclude a Co-operation Agreement with the liquidator of a main proceeding, a court can certainly make its opinion known.

Once a Co-ordination or Co-operation Agreement has been signed, that agreement makes it incumbent on the parties to facilitate co-operation, co-ordination and the exchange of information. While there are many forms which such agreements can take, parties should aim to ensure that all possible eventualities are covered and that the agreement is exhaustive and particularly insures the protection of both parties equally insofar as possible.

Above all, office holders such as administrators, liquidators, receivers, trustees in bankruptcy and such other parties resident in different jurisdictions involved in a particular case, need to focus on business and judicial rationality when vying for cash or other assets that are the offspring of fraud. Applying a universal approach those parties can enhance meaningful recoveries for creditors and victims rather than squandering assets. In other words, one must avoid having these fiduciary officers engage in a myopic dash for the dripping roast at the cost of all concerned.

Conclusion

The United States is known as the land of opportunity. It is also a land in which massive scale fraud has been uncovered in recent years. Such frauds have had transnational effect, assets have been moved across boundaries, victims and or creditors are strewn across the globe. The comparatively broad access to information afforded to victims and creditors in the United States, a comprehensive statutory framework, and a well developed body of case law would all appear to suggest that recovery of assets situate there is an exact science, in contrast to the position in civil law jurisdictions for example. The above discussion should serve to illustrate the very many considerations that come into play in determining whether recovery of misappropriated assets is feasible or indeed realistic and if so how the recovery exercise should be executed. Economic considerations play a key role as creditors and claimants must realistically assess their financial wherewithal to pursue claims, whether that be in the United States or elsewhere. They may need to seek funding from third party lenders who may provide seed capital for litigation but also seek to gain a return on their investment following the completion and/or settlement of the litigation—including paying victims a measure of their losses—and after paying the legal and professionals involved, obtaining the reimbursement of the seed capital loans, and being paid for their investment of time.

Access to justice comes at a price. The cost of large scale, multi-jurisdictional litigation, and particularly the type of litigation involved where high value assets have been misappropriated and laundered, is perhaps the most determinative factor in creating a plan of recovery and study of feasibility. Where it is at all possible to take advantage of the fruits of an investigation sponsored by a government or to participate in a government sponsored recovery scheme, a victim would be well advised to consider such option carefully. In some cases, this may be the only option, whether due to cost related factors or indeed private recovery preclusion in the circumstances. Access to sound impartial advice that may involve swallowing some hard truths at the outset is surely preferable to bad news and little net recovery after a long and hard fought battle that has consumed valuable physical and psychological energy.