# ASSET RECOVERY

## USA



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# Asset Recovery

Consulting editors

**Oren Warshavsky, Gonzalo Zeballos, Geoffrey North, Tatiana Markel, Michelle Usitalo**

*Baker & Hostetler LLP*

Quick reference guide enabling side-by-side comparison of local insights into civil asset recovery (including jurisdictional issues, procedure, and remedies and relief); criminal asset recovery (including legal framework, cross-border considerations, and private prosecutions); and recent trends.

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# Contributors

## USA




**Oren Warshavsky**
owarshavsky@bakerlaw.com
*Baker & Hostetler LLP*



**Gonzalo Zeballos**
gzeballos@bakerlaw.com
*Baker & Hostetler LLP*



**Geoffrey North**
gnorth@bakerlaw.com
*Baker & Hostetler LLP*



**Tatiana Markel**
tmarkel@bakerlaw.com
*Baker & Hostetler LLP*



**Michelle Usitalo**
musitalo@bakerlaw.com
*Baker & Hostetler LLP*



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## CIVIL ASSET RECOVERY – JURISDICTIONAL ISSUES

### 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 categorical restrictions precluding civil cases from advancing in parallel with or prior to criminal proceedings concerning the same subject matter. Nonetheless, civil cases may be judicially stayed or postponed in favour of criminal proceedings. As such, managing parallel civil and criminal proceedings may present certain challenges. In particular, a witness' assertion of Fifth Amendment privileges against self-incrimination can delay civil proceedings, especially before the resolution of criminal proceedings. In scenarios where simultaneous adjudication is impossible, civil proceedings would likely be delayed while criminal proceedings are resolved.

Nevertheless, civil litigants should neither delay commencing civil proceedings in anticipation of a possible stay nor rely on the outcome of the criminal case. Not only could such a delay result in the statute of limitations expiring, but even if the debtor is ordered to pay restitution in the criminal proceedings, there is no guarantee that victims will be fully compensated or receive as much as they would through their own civil litigation. Note that, given the differences in burden of proof, it is possible that a civil claim can succeed where a criminal prosecution has failed.

*Law stated - 15 July 2022*

### Forum

In which court should proceedings be brought?

The United States is a common law jurisdiction with a dual-court system of federal courts and state courts. Both federal and state courts offer an independent and skilled judiciary, broad discovery, and effective mechanisms for enforcing judgments. Asset-recovery-related claims can often be brought in more than one court, and determining which would be most favourable requires an analysis of each potential federal and state court in which the action may proceed. The common law governing fraud is generally a matter of state law, although it has been incorporated into many federal fraud statutes. Fraud claims are generally brought in state courts unless federal law conferring federal court jurisdiction applies or a party is able to and does invoke federal diversity jurisdiction.

As a result, the ultimate determination of the best forum will depend on a variety of factors, including:

- the state or states in which the defendant has assets (or, for a corporate defendant, its place of incorporation or operations);
- the state or states in which the activity at issue took place; and
- whether the claims arise under state or federal law (such as bankruptcy provisions) and, for state law claims, whether the facts justify or allow bringing a claim in federal court.

Additionally, the available causes of action and related remedies vary by state. The elements of a claim, the available defences, and even the statute of limitations may materially differ from state to state. As such, counsel should analyse the relevant laws of all potential jurisdictions before determining where to pursue asset recovery.

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## Limitation

### What are the time limits for starting civil court proceedings?

Time limitations for commencing civil court proceedings vary widely depending on the claim asserted and the jurisdiction where the action is brought. There are several potential claims, with fraud being the most common. Statutes of limitations for fraud claims vary from state to state. For example, New York state law requires a fraud claim to be commenced within six years of the event or within two years of its discovery ( NY CPLR, section 213(8) ). Florida law requires a fraud claim to be commenced within four years of when it was or reasonably could have been discovered and within twelve years of the commission of the fraud ( Florida statutes 95.11(3)(j) and 95.031(2)(a) ). Plaintiffs may also consider a claim under the Racketeer Influenced and Corrupt Organizations (RICO) Act ( 18 United States Code section 1962 ). The statute of limitations for civil RICO claims is generally four years from the date a claimant knew or should have known about the offence.

Although courts generally cannot extend a statute of limitations, under the doctrine of equitable tolling, a court may toll the commencement of the limitations period for certain reasons, including where the defendant's misconduct prevented the plaintiff from filing a suit.

Counsel should conduct a thorough statute of limitations analysis on applicable claims in the relevant jurisdictions.

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## Jurisdiction

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

In the United States, jurisdiction comprises two distinct concepts: personal jurisdiction over the defendant or defendants and subject matter jurisdiction over the action.

Personal jurisdiction in a civil case is determined by reference to a series of factors, including:

- the location of assets;
- the location of the transactions;
- the defendant's residence or citizenship, or both;
- the defendant's contacts with the jurisdiction;
- the subject matter of the action; and
- the contractual provisions concerning the jurisdiction for claims arising from or related to contracts.

Subject matter jurisdiction concerns the specific types of disputes that certain courts may hear. For example, in federal district courts (first instance courts), subject matter jurisdiction may be exercised in terms of diversity jurisdiction and federal question jurisdiction. Diversity jurisdiction requires that the amount in controversy must exceed US$75,000 and that there is 'complete diversity' – that no plaintiff shares a state of citizenship with any defendant. Federal question jurisdiction requires that the dispute arise under federal law.

Failure to raise an objection concerning the exercise of personal jurisdiction can result in a waiver of that defence. Subject matter jurisdiction objections can be raised at any time.

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## CIVIL ASSET RECOVERY – PROCEDURE

### Time frame

What is the usual time frame for a claim to reach trial?

The time frame to reach trial in a civil asset recovery case depends on a variety of factors, including the court before which the case is pending and the complexity of the claims. The overwhelming majority of civil cases never reach trial and are instead resolved by dispositive motion or through settlement. According to a 2021 report by the federal judiciary, the median time to trial for federal cases was 29.2 months. That study tracked 207,841 cases resolved that year, only 1,562 of which actually reached trial. Of the remainder:

- 52,653 were resolved without court action (median time: 5.7 months);
- 122,124 were resolved before discovery (median time: 8.5 months); and
- 31,502 were resolved after discovery commenced but before trial (median time: 18.6 months).

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### Admissibility of evidence

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

For actions in the US federal courts, litigants should consult the Federal Rules of Evidence and the Federal Rules of Civil Procedure (FRCP). For state court actions, litigants should consult the relevant jurisdiction's evidentiary and procedural rules. These rules vary from state to state, but many states closely follow the federal model, although the rules can have some important differences. Litigants should also review any relevant case law interpreting the applicable evidentiary and procedural rules, as rules that appear similar to one another may be interpreted differently from state to state.

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### Witnesses

What powers are available to compel witnesses to give evidence?

A litigant's ability to compel witnesses to testify depends on whether the case is pending in a state or federal court and whether the testimony would infringe on a witness's rights, most notably rights under the Fifth Amendment against self-incrimination. Assuming that Fifth Amendment rights are not implicated, the rules can vary somewhat from state to state. As such, litigants should consult the applicable procedural rules that govern procuring or compelling testimony and documents.

In matters in federal court, FRCP 30 allows a party to a civil action to depose any person, including a party to the litigation. FRCP 34 allows a civil party to request documents from any person or entity, including a party to the litigation. FRCP 45 allows a party to command a third party's attendance at a trial, hearing or deposition, or a third party's production of documents and other things. A party to litigation may be deposed in the federal district where the case is pending and may be ordered to appear at a trial or evidentiary hearing. Unless they consent, third parties may only be deposed or ordered to appear at trial within 100 miles of their residence or place of business.

A witness may object to producing documents or providing testimony on the grounds that his or her deposition testimony would not be relevant to any party's claim or defence or proportional to the needs of the case. If the objection cannot be resolved without judicial intervention, the party seeking the witness's documents or deposition


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may move to compel attendance at the deposition.

FRCP 37 governs most discovery disputes. A witness that fails to provide testimony or documents may be ordered to do so by a court. A disobedient witness may be forced to pay the requesting party's fees and may be subject to other sanctions, including monetary sanctions and contempt of court. If the disobedient witness is a party, party representative or employee, a lack of compliance can result in:

- the striking of pleadings, including individual claims or defences;
- a court making adverse inferences against the disobedient party;
- prohibiting the disobedient party from supporting his or her claims or defences;
- rendering a default judgment or dismissing the disobedient witness's claims; and
- the witness being held in contempt.

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## Publicly available information

### What sources of information about assets are publicly available?

Throughout the United States, there are various public offices and agencies that collect and maintain information concerning assets, and, in some instances, they make that information available to the public. Depending on the jurisdiction in which the asset is located and the type of asset at issue, there can be various public records available. It is often helpful to investigate the relevant federal and state agencies charged with regulating certain asset types and inquiring about their records. For example, publicly traded companies are required to make certain regulatory filings, including annual and quarterly accounting reports, which are available for review (sometimes for a fee). Publicly available records include real estate ownership and transfers, property tax records, lien filings, and filings for automobiles, boats and aircraft. Business entity filings, such as registrations, assumed names and trademarks, and corporate records are generally available although access may vary from state to state. Additionally, almost all court records are open, and most party filings and court decisions are publicly accessible electronically in federal cases, through the Public Access to Court Electronic Records (PACER) system. For state cases, electronically accessible systems similar to PACER are maintained on a state-by-state basis.

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## Cooperation with law enforcement agencies

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

Many litigants hope to use criminal investigative information. However, such information usually remains strictly confidential in the United States, even from the victim.

Under limited circumstances, a litigant can obtain evidence from law enforcement and regulatory agencies and use that evidence in civil proceedings. Evidence entered in criminal proceedings is often useful in civil proceedings. Once evidence is used at trial, it becomes public.

Litigants can use various discovery tools to seek information from regulatory agencies. The United States also has the Freedom of Information Act , which permits access to information in the federal government's possession under appropriate circumstances.

Certain governmental agencies (such as the Securities and Exchange Commission) maintain reporting requirements,


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including financial reporting. That information is obtainable through civil discovery.

Certain foreign officials and prosecutors can use mutual legal assistance treaties to obtain evidence in connection with foreign investigations.

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### Third-party disclosure

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

Under both federal and state legal systems, discovery from third parties is available by subpoena. Although the requirements vary between jurisdictions, the process tends to be quite similar. Under the Federal Rules, there are a few ways to obtain discovery from third parties. The main vehicle is FRCP 45, which governs discovery from non-parties. It also permits gathering documents, interrogatories, and taking testimony from non-parties. Subpoenas under FRCP 45 require the underlying substantive action to already be pending. There are some exceptions under the Federal Rules, notably FRCP 27 , which allows a party contemplating an action to depose a witness and obtain testimony under certain circumstances.

Certain states allow discovery by prospective plaintiffs before commencing an action. For example, in New York, pre-lawsuit discovery is allowed 'to aid in bringing an action, to preserve information or to aid in arbitration' but must be obtained by court order ( NY CPLR 3102(c) ). Although the requirements vary, many states have similar statutes that allow prospective plaintiffs to obtain varying degrees of information before bringing their claim. Most of these provisions, however, require the prospective plaintiff to make a showing (eg, that the plaintiff has a meritorious cause of action, and that the information sought is material and necessary to the actionable wrong) or obtain court approval before doing so, or both. The availability of such discovery and the process for obtaining it varies by state.

Finally, third-party discovery is permitted in aid of judgment enforcement. For example, FRCP 69 allows a judgment creditor to take discovery, including third-party discovery, in aid of judgment enforcement. This discovery is geared towards locating assets that could be executed against, or other information that could help lead to such assets. A judgment creditor may seek discovery from the judgment debtor or third parties such as banks, investment companies and business associates, including parents, subsidiaries and affiliates.

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## CIVIL ASSET RECOVERY – REMEDIES AND RELIEF

### 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?

Obtaining information from a litigant or a third party is available in connection with any civil action and, under certain circumstances, before an action is commenced.

Interim remedies also are available from state and federal courts. Generally speaking, state law provides for arrest, attachment, garnishment, replevin, sequestration and other remedies. Federal courts can grant the same remedies but must apply the law of the state in which the court is located, under the Federal Rules of Civil Procedure (FCRP) 64 . State laws are not uniform on the availability of, or requirements for, these remedies.

Both during and after litigation, any party can seek equitable relief to prevent the dissipation of assets. However, the party seeking such relief must make a substantial showing that:


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- it is likely to succeed on the merits;
- the judgment will be rendered ineffective without relief;
- its claims are greater than any potential counterclaims; and
- the public interest will be best served by the remedy.

Although a US court will not enforce worldwide freezing orders entered by a foreign court, it can grant broad-ranging injunctions covering parties subject to its jurisdiction and prevent those parties from moving any assets over which the party has custody or control, regardless of location. Such injunctions can be issued during litigation or at its conclusion.

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## Non-compliance with court orders

### How do courts punish failure to comply with court orders?

Failure to comply with a court order can result in the non-compliant party being held in contempt of the court. A contempt finding has consequences ranging from monetary fines to imprisonment. If the disobedient party is a party to the litigation, the court may fashion remedies that make the claimant whole, such as precluding evidence, allowing adverse inferences, and striking claims and defences.

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## Obtaining evidence from other jurisdictions

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

The main avenue for obtaining information through courts in other jurisdictions to assist in the civil proceeding is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention), to which 64 countries including the United States are contracting parties. The litigant will generally request that the court overseeing the plenary action issue a letter of request to the foreign court. The letter of request can seek documents or witness testimony, although whether such relief will be granted is dependent on the target jurisdiction's rules. All parties to the litigation will be made aware of the request and the request will usually be accessible on the public docket. Each Hague Evidence Convention member state has its own procedure for processing and implementing requests for information.

For jurisdictions not party to the Hague Evidence Convention, a litigant can avail itself of other international treaties, such as the Inter-American Convention on Letters Rogatory, or it can seek the aid of the court overseeing the underlying action for the issuance of letters rogatory directly to the foreign court, a process that will still be respected in a number of jurisdictions.

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## Assisting courts in other jurisdictions

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

A party seeking assistance in connection with civil asset recovery proceedings in other jurisdictions may petition the


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US federal district courts for discovery in aid of foreign litigation under 28 United States Code (USC) section 1782 . Notably, as of June 2022, the US Supreme Court has limited the scope of section 1782 discovery in the context of foreign arbitration, requiring a 'foreign or international tribunal' to be a governmental or intergovernmental body, not a private adjudicative body.

There are two ways to initiate a 28 USC section 1782 request. The first is by a letter rogatory issued by a non-US tribunal and delivered directly to the district court. The second is an application, without letter rogatory, by a party or other interested person, directly to the US federal district court. To obtain discovery under 28 USC section 1782, an applicant must satisfy the following threshold requirements:

- the target of the requested discovery is a person or entity 'found' in the federal judicial district;
- eligible proceedings exist (or are within reasonable contemplation) before a foreign tribunal and the applicant's discovery request is for use in aid of those proceedings; and
- the applicant is an 'interested person' with respect to those proceedings.

Provided these conditions are met, a district court is authorised – but not required – to order discovery. The decision whether to grant such discovery is in the discretion of the district court and is based on a balancing of certain public and private interests relating to the requested discovery. Eligible foreign legal proceedings include proceedings before foreign courts, including administrative proceedings and government investigations. Although the proceeding need not be 'pending or imminent', it must be within reasonable contemplation.

Discovery under 28 USC section 1782 includes the full scope of discovery available under the federal rules of civil procedure, such as deposition testimony and document production. If the application is granted, the applicant may serve subpoenas requesting such discovery. A federal district court may allow broad discovery. It is typically irrelevant that such discovery is broader than the discovery authorised by the foreign forum or that the foreign jurisdiction does not grant reciprocal discovery rights.

For a deposition request, a person's mere physical presence in the district can be sufficient to compel his or her deposition. For document discovery, there is a split of federal authority regarding whether courts are empowered to authorise discovery of documents outside the United States, even when the person from whom discovery is sought is located in the relevant federal judicial district. A business will likely be 'found' in a district for purposes of 28 USC section 1782 if the business would be subject to personal jurisdiction in that district by virtue of its systematic and continuous activities there, even if its headquarters or place of incorporation are located elsewhere. The Second Circuit (which includes New York, Connecticut and Vermont) reviews many 28 USC section 1782 applications and has recently extended the reach of the section to materials held outside the United States but controlled by a person in the district.

A foreign tribunal may also seek evidence by a letter rogatory made directly to the Department of State, pursuant to 28 USC section 1781. The Department of State will then send the request to the US-based tribunal, agency or officer from which the evidence is sought. The scope of the discovery under 28 USC section 1781 is the same as that under section 1782.

Parties that have obtained a foreign judgment also have other options in both state and federal courts. One option for such discovery (for both domestic and foreign actions) is Federal Rules of Civil Procedure (FRCP) 69. FRCP 69(2) allows parties possessing a valid money judgment (foreign or domestic) to take discovery from any person in aid of the judgment or execution. Additionally, many states have adopted a version of the Uniform Foreign-Country Money Judgments Recognition Act, which permits foreign money judgments to be enforced in domestic courts. If the foreign judgment is recognised, the claimant will be entitled to use the same enforcement mechanisms that are available for domestic judgments.

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## Causes of action

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

There are numerous causes of action for civil recovery within the United States. Those claims arise under both statute and common law.

### Fraud

This is one of the most common causes of action used in asset recovery. Fraud claims arise under both common law and, in some cases, statute. Under common law, fraud claims arise when a defendant intentionally makes a material misrepresentation or omission, on which the victim justifiably relies when choosing to act or refrain from acting. There are a number of federal and state statutes that create civil remedies for fraud in certain contexts, such as in connection with securities, real estate, banking and consumer finance, among others. Under federal and state law, fraud must be pleaded with particularity, although there is usually an exception that relaxes the particularity requirement for pleading facts that would be solely within the wrongdoer's knowledge, such as intent.

### Breach of contract

When a perpetrator breaches a contractual obligation to the victim, the victim can bring a breach of contract claim to seek recovery of assets impacted by the breach.

### Tort claims

If it can be established that the perpetrator owed the victim a duty of care, but that duty did not arise under contract – such as a fiduciary duty owed by one party holding money – then the victim can bring a claim for breach of that duty. The most common tort claims include breach of fiduciary duty, negligence and gross negligence.

### Aiding and abetting, and civil conspiracy

Most jurisdictions also allow victims to bring claims against those that knowingly assisted the perpetrator of fraud.

### Conversion, replevin and property-based claims

When a perpetrator wrongfully exercises dominion over property, a victim can bring a variety of claims, but the most common claims are conversion (which generally seeks recovery of the value of the property) and replevin (which seeks recovery of the specific property).

### Unjust enrichment, and money had and received

These are equitable claims available when a party has received and retained a benefit at the expense of a victim, and under principles of equity and good conscience, the benefit should be awarded to the victim.


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### Additional statutory claims

#### Fraudulent conveyance

Most states have adopted the Uniform Fraudulent Transfer Act and have incorporated its provisions into their local statutes. Fraudulent conveyance claims arise when a debtor transfers assets for insufficient value or in bad faith, typically to frustrate creditors. Under most states' fraudulent conveyance laws, creditors can bring claims against debtors and third-party transferees that received assets from a debtor.

### California Penal Code section 496

California Penal Code section 496(c) provides a private right of action for any person who has been injured by a wrongdoer's knowing receipt of stolen property. A prevailing plaintiff may recover up to three times the actual market value of the property, the costs of bringing suit and reasonable attorney's fees.

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## Remedies

What remedies are available in a civil recovery action?

Generally speaking, a claimant can recover actual damages (including, potentially, consequential damages) for any claim. For most common law tort claims, a claimant might be able to recover exemplary damages when the defendant's acts are deemed sufficiently egregious.

State and federal courts also have broad powers to award equitable remedies when money damages alone are insufficient or when assets are being wasted, or both. Such remedies include, without limitation:

- an accounting of assets;
- attachment, seizure, and turnover of assets, including property, accounts, etc;
- the creation of a constructive trust for the benefit of the claimant;
- rescission and reformation of a contract; and
- injunctions and other equitable relief to ensure the claimant's compensation.

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## Judgment without full trial

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

In both federal and state courts, a claimant can obtain a default judgment if the defendant has been properly served but either fails to appear or properly defend the case. Likewise, a court can grant a judgment on the pleadings if the defendant's answer concedes liability. A claimant can also seek summary judgment if, after discovery, the court finds that there is no genuine dispute of material fact and the claimant is entitled to judgment as a matter of law. In deciding such motions, the court construes every inference in favour of the non-moving party.

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## Post-judgment relief

### What post-judgment relief is available to successful claimants?

The post-judgment relief available to successful claimants in the United States varies according to jurisdiction and judgment type.

#### Disclosure

Successful claimants can seek post-judgment disclosure under state laws and FRCP 69. Such disclosure often includes post-judgment asset discovery, which is widely available against the defendant and any non-parties that have information concerning the defendant's assets.

#### Freezing orders and injunctions

US courts can issue freezing orders enjoining a defendant from transferring assets.

#### Receivers

Under both state and federal law, a successful claimant can seek the appointment of a receiver.

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## Enforcement

### What methods of enforcement are available?

Enforcement methods vary and depend on state law. Under FRCP 69, a US federal court will look to the recognition and enforcement laws of the state where the federal court is situated. Judgments issued in one state (whether issued by a state or federal court) can be enforced in other states.

The enforcement of money judgments typically begins with the court's issuance of a writ of execution. Once the writ is issued, the judgment creditor can use the writ with law enforcement, which is authorised to seize assets and dispose of those assets for the judgment creditor's benefit.

Most jurisdictions provide for both garnishment and attachment. Garnishment allows a judgment creditor to obtain existing and future payments owed to the judgment debtor. Once the court issues a writ of garnishment and it is served on relevant third parties, monies owed to the judgment debtor are paid instead to the claimant. A successful claimant can also seek a court order of attachment, which seizes specific property.

Most states have additional enforcement measures. In New York, for example, a judgment creditor can issue a restraining notice to third parties that may be in possession of a judgment debtor's assets, therefore preventing the transfer of those assets (NY CPLR section 5222). A claimant does not need court approval to issue the restraining notice. Likewise, many states such as New York permit the court to issue turnover orders (NY CPLR section 5225). A turnover order can require the judgment debtor to turn over assets, including assets owned or controlled by the judgment debtor outside of the jurisdiction. A turnover order can also require the turnover of a debtor's assets that are in the possession of another party.

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### 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?

A variety of arrangements can be tailored to the claimant's needs. Although many cases proceed based on traditional hourly fee arrangements, alternative fee arrangements (AFAs) have become much more prevalent. AFAs are generally based on success or fee caps.

The most common AFA is a contingency fee agreement, under which an attorney's compensation is derived, on a percentage basis, from the recovery, if any. AFAs can be fully contingent or partially contingent (eg, a client paying a smaller percentage of hourly fees and a portion of recoveries). Another common AFA is an estimate with a cap for each stage of the case.

Third-party litigation funding has become increasingly popular. Third-party funding can help an underfunded claimant bring a meritorious claim by paying at least a portion of counsel fees and expenses (such as experts, investigators and other vendors). Third-party litigation funding terms vary greatly from funder to funder and from state to state. In general, the third-party funder pays for a certain amount of costs and fees in exchange for a percentage of the recovery. Third-party funding and acceptance are still evolving, and some states restrict the practice.

Generally speaking, in the United States, each party must bear its own litigation costs, including counsel fees. If a statute or contract contains a fee-shifting clause, then a court will award reasonable fees as appropriate. US courts can also control costs by imposing reasonable limits on discovery, motion practice, and the length of hearings and trials. Such limits are designed to prevent undue burden and expense.

*Law stated - 15 July 2022*

## CRIMINAL ASSET RECOVERY – LEGAL FRAMEWORK

### Interim measures

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

There are a variety of statutes addressing interim remedies – which vary based on the type of criminal activity at issue – that provide the government broad interim measures upon suspicion of crime including, without limitation, restraining orders, injunctions and seizures.

Certain statutes authorise courts to grant restraining orders on an ex parte basis. For example, if the government demonstrates that notice will jeopardise the availability of the property for criminal forfeiture that would otherwise occur on a guilty verdict, the court can issue a restraining order against the disposition of the property (21 United States Code (USC) section 853). The same remedies can apply to civil forfeiture (18 USC section 981). Likewise, under the PATRIOT Act, the government can also obtain a restraining order to ensure that the property is available to satisfy a judgment (18 USC section 1956).

*Law stated - 15 July 2022*

### 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. The government has discretion as to whether and when to undertake asset tracing and freezing efforts. However, it


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is entirely possible that a civil action implicating criminal activity can trigger the interest of both state and federal prosecutors and result in the filing of parallel criminal action.

Investigations into the proceeds of crime can also be spurred on at the request of a victim (almost always through their counsel). Under some circumstances, a victim could also seek to trigger an investigation into the proceeds of crime by requesting a preliminary injunction with an asset freeze. Once asset forfeiture specialists are involved, they may coordinate further with the victim's counsel.

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## Confiscation – legal framework

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

Generally speaking, there are three types of asset forfeiture actions: administrative, civil and criminal.

Administrative forfeitures are uncontested, in rem processes that require no court proceedings. Once the property has been seized, the government provides notice of its intent to seek confiscation to all interested parties (18 USC section 983). If someone files a claim contesting the forfeiture, the government must return the property, commence a civil forfeiture action or include the property in a criminal indictment.

Civil forfeiture actions are in rem judicial proceedings commenced against the property derived from or used in connection with a criminal offence (18 USC section 983). As the action is against the property, a criminal conviction is not necessary. The property owner must make an affirmative challenge for which various grounds exist, including that the property owner is an 'innocent owner'. The property owner may also petition for a reduction in the amount of the property forfeited. There are a number of state and federal statutes that authorise civil forfeiture, including for money laundering and wire fraud, among others (18 USC section 981).

Criminal forfeiture is an in personam action requiring a criminal conviction (ie, the action is against the person, not the property), and is determined at the sentencing stage. As criminal forfeiture actions are against the defendant's property interest, third-party interests in the property must be resolved before the forfeiture order is issued. The criminal forfeiture process is governed by the Federal Rule of Criminal Procedure 32.2. Criminal forfeiture must be authorised by the statute governing the underlying offence. Various federal statutes authorise criminal forfeiture including, for example, for controlled substances (21 USC section 853), money laundering and other delineated financial crimes such as mail fraud and wire fraud (18 USC section 981), racketeering (18 USC section 1963), and terrorism (28 USC section 1963). In criminal proceedings, the court will calculate the value of the amount of the forfeiture based on the proof submitted by the government.

*Law stated - 15 July 2022*

## Confiscation procedure

Describe how confiscation works in practice.

The seizing agency commences the administrative forfeiture on its own initiative, or brings a claim in the appropriate state or federal court, to commence the civil or criminal forfeiture proceeding.

In a civil forfeiture proceeding, the government is only required to establish a connection between the property and a criminal offence by a preponderance of the evidence.

In criminal forfeiture actions, the government identifies the property in its charge. If the defendant is convicted and the court determines that the elements of forfeiture are satisfied, the defendant's property will be forfeited to the


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government during sentencing.

Prosecutors may convert a criminal forfeiture action into a civil forfeiture action.

Forfeited property may be transferred to third-party claimants that establish a valid ownership interest, restored to victims, or transferred to the Asset Forfeiture Fund or the government agencies that contributed to the forfeiture.

*Law stated - 15 July 2022*

### Agencies

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

There are a variety of federal, state and local agencies through which the governments can operate to trace and confiscate the proceeds of crime. Some of the major federal agencies supporting asset recovery are:

- the Department of Justice, including, without limitation:
  - the Criminal Division, Asset Forfeiture and Money Laundering Section;
  - the Office of International Affairs;
  - the Federal Bureau of Investigation; and
  - the Drug Enforcement Administration;
- the Department of Homeland Security;
- the Department of the Treasury, Financial Crimes Enforcement Network;
- the Internal Revenue Service;
- the Securities and Exchange Commission; and
- Customs and Border Protection.

*Law stated - 15 July 2022*

## CRIMINAL ASSET RECOVERY – CONFISCATION

### Secondary proceeds

Is confiscation of secondary proceeds possible?

Confiscation of secondary proceeds is possible in most instances, provided that it is authorised by the relevant statute. In general, where secondary proceeds are subject to forfeiture, the government must establish that the assets in question are traceable to or derived from the underlying claim (18 United States Code (USC) section 982 and 21 USC section 853). In such settings, challenges may arise when distinguishing tainted from non-tainted funds. Generally, the government must identify the proceeds of crime in the defendant's bank account and trace them to the property at issue. Certain statutes provide a broader basis for confiscation. For example, the government may confiscate virtually all assets of a person engaged in planning, perpetrating or concealing terrorism (18 USC section 981) and all property of any kind affording a defendant influence over a racketeering enterprise (18 USC section 1963).

*Law stated - 15 July 2022*

### Third-party ownership

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

Yes. Civil forfeiture proceedings are brought against the property. If third parties seek to prevent the forfeiture, they


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must file a claim to the property and answer the government's forfeiture complaint. The government will prevail unless the third party can establish that the property was not involved in the criminal conduct or that the third party is an 'innocent owner'. The innocent-owner defence requires the third party to show that either:

- it was a bona fide purchaser for value after the criminal conduct at issue; or
- when it owned the property or asset prior to the criminal conduct, it was unaware of the conduct or acted to halt it.

In criminal forfeiture proceedings, any claims by third parties are resolved in ancillary proceedings after the conviction and following the entry of a preliminary order of forfeiture (21 USC section 853). To prevent confiscation, the third party must similarly establish either:

- a superior interest in the forfeited property relative to that held by the defendant; or
- that it is a bona fide purchaser for value.

*Law stated - 15 July 2022*

## 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 Assets Forfeiture Fund (AFF), which receives the proceeds of forfeiture and aids in paying the costs associated with forfeitures. The AFF is managed by the Department of Justice and can be used to finance expenses in connection with the tracing and confiscation of assets. Investigative expenses are also recoverable by federal agencies that participate in the Treasury Department Forfeiture Fund (31 USC section 9703).

*Law stated - 15 July 2022*

## Value-based confiscation

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

Yes. US federal law empowers courts to order the confiscation of substitute assets that are equal in value to the original property (21 USC section 853(p) and 18 USC section 1963(m)). Circumstances allowing such substitution include if the property sought to be confiscated has been:

- dissipated;
- commingled with non-forfeitable property; or
- placed beyond the court's jurisdiction.

Substitution is also allowed when the property at issue cannot be found through reasonable due diligence. The government can obtain a money judgment enforceable against any of the defendant's assets. The government may also constructively seize and forfeit funds located in a foreign bank abroad by restraining, seizing and forfeiting an equivalent amount of funds from a corresponding or interbank account held in the United States (18 USC section 981(k)). Value assessments are typically made through expert testimony.

*Law stated - 15 July 2022*


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### 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 government bears the burden of proof in forfeiture proceedings. In civil forfeiture proceedings, the government must demonstrate by a preponderance of the evidence that the property is subject to forfeiture (18 USC section 983(c)). In criminal forfeiture proceedings, the government first bears the burden of proving beyond a reasonable doubt that the defendant committed the underlying crime. After conviction, the government bears the burden of proof of showing, by a preponderance of evidence, the nexus between the property and the offence.

*Law stated - 15 July 2022*

### 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, under 18 USC section 981(e) and 21 USC section 853(i). There are a variety of ways that a victim can apply for and receive confiscated assets (28 CFR part 9). Such compensation is used to offset the victim's losses and may not exceed the victim's share of the net proceeds associated with the forfeiture.

*Law stated - 15 July 2022*

### Confiscation of profits

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

Only some criminal statutes provide for forfeiture. In enforcing those statutes, the government may recover all proceeds of crime, including traceable property interests that arise out of, or are related to, the illegal activity. This can include appreciation, dividends and interest (18 USC section 981 (a)(1) to (a)(2)).

*Law stated - 15 July 2022*

### 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. Administrative forfeitures and civil forfeitures do not require a criminal conviction. In administrative forfeitures, the property has been seized and the government provides notice to all interested parties of its intent to seek confiscation (18 USC section 983). If someone files a claim contesting the forfeiture, the government must return the property, commence a civil forfeiture action or include the property in a criminal indictment.

Civil forfeiture actions are also in rem. The government is only required to establish a connection between the property and a criminal offence by a preponderance of the evidence. The property owner must affirmatively challenge. Various grounds exist for so doing, including that the property owner is an innocent owner. The property owner may also petition for a reduction in the amount of property forfeited. There are a number of state and federal statutes that


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authorise civil forfeiture, including for money laundering and wire fraud (18 USC section 981).

*Law stated - 15 July 2022*

### 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?

After assets are seized or confiscated by the Department of Justice, they are managed and disposed of by the US Marshals Service (28 CFR section 0.111). In the event that there are complex businesses or assets, a third-party expert – such as a monitor, custodian or trustee – may be appointed.

Generally speaking, seized property pending forfeiture may not be used by the government until a final order of forfeiture is issued. However, under certain circumstances, the seized assets may be used where such use is necessary to preserve the value of the asset, such as for a business or property (eg, a farm).

*Law stated - 15 July 2022*

## CRIMINAL ASSET RECOVERY – CROSS-BORDER ISSUES

### Making requests for foreign legal assistance

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

The United States is a signatory to mutual legal assistance treaties (MLATs) with over 70 other nations. Under these treaties, the United States and other jurisdictions may submit requests for assistance. The United States is also involved in the Camden Asset Recovery Inter-Agency Network, the Stolen Asset Recovery Initiative and the Asset Recovery Focal Point Initiative.

*Law stated - 15 July 2022*

### 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.

There are a variety of avenues through which foreign requests for legal assistance are handled. The United States responds to inquiries that come through MLATs and to certain letters of request that are made under 28 United States Code (USC) sections 1781 and 1782. The US government can also issue restraining orders to preserve assets (28 USC section 2467) and obtain orders necessary to assist foreign governments in criminal and asset recovery matters (18 USC section 3512). Incoming requests can be handled by the Money Laundering and Asset Recovery Section of the Department of Justice, which may involve the relevant law enforcement agencies, and can institute forfeiture and recovery actions.

*Law stated - 15 July 2022*


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### Treaties

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

The United States is a party to multiple conventions with provisions on asset recovery. The Department of State website keeps a list of all such conventions, including:

- the Inter-American Convention Against Corruption;
- the 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;
- the International Convention for the Suppression of the Financing of Terrorism;
- the Organisation for Economic Co-operation and Development Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions;
- the United Nations (UN) Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;
- the UN Convention Against Corruption; and
- the UN Convention Against Transnational Organized Crime.

*Law stated - 15 July 2022*

## CRIMINAL ASSET RECOVERY – PRIVATE PROSECUTIONS

### Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

Generally, criminal asset recovery powers cannot be used by private prosecutors. However, private victims can bring civil claims or may seek to recover forfeited property where the government exercises its remission or restoration authority (28 CFR part 9).

One exception is a qui tam action. A qui tam action is a type of whistle-blower lawsuit that allows a private person to prosecute a lawsuit for the government under the False Claims Act (31 United States Code sections 3729 to 3733). If the claim is successful, the whistle-blower is entitled to a reward.

*Law stated - 15 July 2022*

## UPDATE AND TRENDS

### Emerging trends

Are there any emerging trends or hot topics in civil and criminal asset recovery in your jurisdiction?

Section 1782 of the US Code provides broad discovery for participants in a proceeding before a 'foreign or international tribunal'. In ZF Automotive US, Inc v Luxshare, Ltd, 142 S Ct 2078 (2022), the US Supreme Court unanimously resolved a Circuit split holding that private adjudicative bodies, namely, private arbitrations, do not fall within the definition of 'foreign or international tribunal'. The decision looked to the US Congress's intent when creating the statute, as well as other canons of statutory construction, to explain that a foreign tribunal 'is a tribunal imbued with governmental authority by one nation' and an international tribunal 'is a tribunal imbued with governmental authority by multiple nations'. These definitions provided support for the Court's decision that section 1782 can only apply to proceedings


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before governmental and intergovernmental tribunals, effectively ending the use of section 1782 discovery for foreign commercial arbitrations and certain investor-state disputes. The Supreme Court left open the 'possibility that sovereigns might imbue an ad hoc arbitration panel with official authority'. It also did not address whether International Centre for Settlement of Investment Disputes arbitrations, which – unlike the ad hoc investor-state arbitration between Russia and Latvia governed by the United Nations Commission on International Trade Law Rules – are investor-state disputes brought within the self-contained legal framework of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. These open issues will likely be the subject of litigation going forward.

## Digital assets

The growth of digital assets ranging from cryptocurrency to non-fungible tokens (NFTs) has provided numerous opportunities for fraud in the United States. In 2021 alone, cryptocurrency crime had a record-breaking year with scammers receiving US$14 billion. Investor-related cryptocurrency fraud is a notable example. Fraudulent crypto-trading websites, particularly those claiming high guaranteed returns and riskless investments, are commonly used by hackers and scammers. Rather than provide the promised high returns or risk-free investments, those behind these fraudulent websites transfer investors' cryptocurrencies to new wallets, prevent the original owners from accessing them, and cut off contact with the investor. Hackers have also used social media to fraudulently convert investors' digital assets. For example, in April 2022, the Bored Ape Yacht Club's Instagram account was hacked, and hackers led followers to a link claiming that users could mint 'land'. The link compromised the digital wallets of users who clicked on it and hackers transferred at least 54 NFTs, totalling US$13.7 million, to new wallets. The current administration and US financial regulators and law enforcement have taken an interest in protecting consumers of digital assets from fraud. Because digital assets are decentralised and the internet is not strictly regulated, consumer protection and regulatory enforcement are challenging, and fraud involving digital assets will likely be addressed in both the civil and criminal context.

* The information in this chapter was accurate as at August 2022.

*Law stated - 15 July 2022*


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# Jurisdictions

| | |
|---|---|
| **Australia** | Clayton Utz |
| **Cyprus** | AG Erotocritou LLC |
| **Greece** | ANAGNOSTOPOULOS |
| **Italy** | Studio Legale Pisano |
| **Monaco** | Donald Manasse Law Offices |
| **Portugal** | Carlos Pinto de Abreu e Associados |
| **Singapore** | Eugene Thuraisingam LLP |
| **Switzerland** | LALIVE |
| **United Arab Emirates** | Clyde & Co LLP |
| **United Kingdom** | Stephenson Harwood LLP |
| **USA** | Baker & Hostetler LLP |


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