

Civil recovery: a summary of key measures

Civil recovery should form part of any organisation's fraud risk management strategy. It can be an effective way to recover some or all of the losses incurred as a result of being defrauded and can act as an important deterrent to would-be fraudsters. This factsheet outlines some of the key civil recovery measures available to businesses.

Introduction

This factsheet is a quick reference guide for companies and unincorporated businesses that become the victim of fraud or other criminal acts causing financial loss. It sets out the actions that a business can consider to recover losses through civil (as opposed to criminal) measures.

Civil recovery should form an essential part of an organisation's complete fraud risk management strategy and not be seen as an add-on. Taking direct action against anyone who defrauds your business can serve as an effective deterrent to would-be fraudsters and can help to minimise the losses suffered.

Professional legal and accountancy advice should be sought to maximise the prospects of successful recovery actions.

Fraud is a criminal act. Why should my business consider a civil course of action to recover fraud losses?

Businesses should always consider reporting instances of suspected fraud to law enforcement. This will usually be to Action Fraud – the UK's national fraud reporting centre. Careful consideration should be given to the timing of any such report as the involvement of a law enforcement agency can impact on your ability to recover your losses through the civil courts.

Businesses should note that only a minority of fraud and forgery reports made to the police receive active police attention. This is because:

- Authorities may collate information received and may only take investigative action at a later date if a sufficient number of allegations or reports are also made by other victims.
- The fraud reported by your business may be a small part of a wider matter requiring coordinated assistance from other law enforcement agencies.
- Authorities may not have the available resources to respond at all or in a timely manner to the allegation of fraud made by your business.
- Law enforcement agencies focus on gaining a criminal conviction as a punishment and deterrent. Gaining financial redress for your business is not a focus of law enforcement agencies.

In these situations, civil recovery may be the only way that your business can seek to recover fraud losses.

Why civil recovery?

Civil recovery proceedings can help to maximise the opportunities of restitution without relying on the final and often lengthy outcome of a criminal prosecution. Conducted in the right way, some evidence obtained during the course of a civil investigation can be used in subsequent or parallel criminal investigations. See our separate factsheet *An Overview of Parallel Sanctions* for more information.

Civil recovery methods are increasingly varied as a result of closer cooperation between international jurisdictions and the appetite of businesses to ensure recovery forms an integral part of their fraud risk management strategies.

Civil recovery measures

Businesses should consider a range of civil recovery measures when appraising their options to recover their loss. Some of the key civil recovery tools are:

- claim against perpetrator(s)
- claim against party in possession, use or control of misappropriated assets
- claim against party with a duty of care
- insolvency proceedings
- freezing orders
- injunctions.

These tools are not mutually exclusive, and it may be advisable to consider more than one of the civil recovery tools available.

Claim against perpetrator(s)

When sufficient evidence has been obtained a claim can be brought directly against the suspected perpetrator(s).

The claim may be as simple as a request for repayment or a claim filed in the civil courts seeking the return of monies paid on the basis of misrepresentation and/or obtained by unjust enrichment.

Claim against party in possession, use or control of misappropriated assets

The perpetrator may have attempted to cover their wrongdoing by placing assets in the names of close and trusted individuals or by transferring assets into the ownership of companies and trusts. For this reason it may be necessary to commence proceedings against a party other than the suspected perpetrator(s).

Claim against party with a duty of care

It is possible that a party other than the perpetrator of a fraud or loss may be held responsible for that fraud or loss, as set out in the examples given below:

- When actual or suspected director malfeasance occurs it may be pertinent to establish whether a director breached their duty to the company of which they are a director. This may allow a claim to be brought against the director's personal estate.
- Where professional advisers have handled the proceeds of a fraudulent activity it may be possible to target them for breach of their professional or other duties, for example solicitors and bankers have duties in relation to their handling of monies.

Many frauds occur when a company is in financial difficulty. A director may have engaged in fraudulent or wrongful trading. Many such cases are typified by 'phoenix companies' in which a director places one company into liquidation to avoid making payments to creditors. The director then continues to operate substantially the same business using a newly incorporated company to which assets of the former company have been transferred at an undervalue. This deprives genuine creditors of the first company, leaving them out of pocket for goods or services they have supplied.

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Registered Charity No. 1108863

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Insolvency proceedings

Corporate

Where a business has been defrauded by another company, a method of recovering an amount owed is by taking steps to put the company into liquidation. In some cases a provisional liquidator can be appointed to take immediate control of the defrauding company without notice in order to preserve assets or evidence ahead of the company being placed into liquidation. A proportionate investigation can then be conducted to establish the extent of any wrongdoing and the assets available to satisfy any claim.

Individual

Where a business has been defrauded by an individual, consideration should be given to the extent and willingness of that individual to cooperate with an investigation and, where necessary, bankruptcy proceedings could be commenced against an individual or group of individuals.

In urgent cases where assets can be shown to be at risk of dissipation the official receiver or an individual acting as an interim receiver can be appointed by the court without notice to the individual(s) to take control of the perpetrator's assets after presentation of the bankruptcy petition but before the order is made. An investigation can then be conducted to establish the extent of any wrongdoing and the assets available to satisfy any claim.

Freezing orders

In certain circumstances, freezing orders can be obtained over specific assets to prevent the dissipation of funds which are, or appear to be, under the control of the perpetrators. The timing of a freezing order may be crucial in preventing the potential dissipation of assets.

Injunctions

Information obtained during an investigation may reveal that certain transactions are being planned by the suspected perpetrators of a fraud. Injunctions can be obtained to help prevent these transactions from being effected.

Further information

See our separate fraud factsheets on *Civil Recovery: A Glossary of Common Terms*, *An Introduction to Civil Recovery* and *An Overview of Parallel Sanctions* as well as *Recovering Your Money: A Guide to Civil Recovery* for more information.

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www.fraudadvisorypanel.org

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The Fraud Advisory Panel gratefully acknowledges the contribution of Matt Hall (Forensic Accounting Consultant) and Zimba Moore (Ernst & Young LLP) in the preparation of this Fraud Facts.

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