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USA: Law & Practice

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USA: Trends & Developments

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USA

Law and Practice

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MoloLamken LLP focuses exclusively on representing clients in complex disputes. It handles civil, criminal and regulatory matters, as well as appeals, across the United States. Its clients span the globe, and MoloLamken is involved in some of the most significant disputes of the day. The firm's founding partners, Steven Molo and Jeffrey Lamken, developed national reputations based on their courtroom successes while partners at large full-service firms, where they held leadership positions. With an abiding belief that complex disputes are most effectively handled by smaller teams comprised of smart, highly experienced lawyers focused on results rather than process, they formed MoloLamken. The firm provides experienced advocacy – for claimants as well as defendants – before judges, juries, arbitral forums and courts of appeals, including the US Supreme Court. It also represents clients in regulatory and criminal investigations, and conducts internal investigations.

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1. Fraud Claims

1.1 General Characteristics of Fraud Claims

In the United States, fraud claims can be brought under federal or state law, by federal or state prosecutors when criminal in nature, or by private litigants when civil in nature. Although there are similarities between federal and state law, there is no uniform law governing fraud claims, and no single entity is responsible for enforcement. Generally, both federal and state law allow a private litigant to pursue fraud claims when one party deliberately deceives another party for some financial advantage or benefit, causing harm to the other party in the process.

Elements of Fraud

Generally, a civil fraud claim brought pursuant to US federal or state law must allege:

- a false statement or omission of material fact;
- the intent to deceive;
- justifiable reliance by the victim on the false statement or omission; and
- harm or injury to the victim as a result.

The specific elements of a fraud claim may vary by jurisdiction and by the specific type of fraud alleged.

In general, fraud claims are subject to a heightened pleading standard, meaning that the specific allegations of fraud – who, what, where and when – must be described "with particularity" in the civil complaint that initiates a private lawsuit.

Who May Bring a Fraud Claim

Criminal

Federal prosecutors with the US Department of Justice (DOJ) and state and local prosecutors bring criminal charges against defendants who engage in fraud. Federal prosecutors commonly charge defendants in a variety of financial fraud schemes, including bank fraud, government contracting fraud, healthcare fraud, mortgage fraud, tax fraud, embezzlement and misappropriation, bribery, and corrupt payments to foreign officials.

Private litigants cannot directly prosecute criminal charges but may help initiate criminal investigations by reporting fraud to law enforcement. Private litigants who act as whistle-blowers and bring certain information regarding fraud and corruption to the attention of law enforcement may also recover a percentage of any settlement or financial penalty resulting from the investigation or prosecution.

Civil

Federal prosecutors in the DOJ are also responsible for investigating and litigating civil fraud claims brought on behalf of the federal government. State and local prosecutors also pursue civil fraud claims on behalf of their local governments and citizens.

Private litigants may also bring civil fraud claims in lawsuits filed in federal or state court, depending on the circumstances, and allege fraud based on federal or state law. Some of the specific types of fraud claims are addressed more fully below.

Fraudulent Misrepresentation/False Statements

Fraudulent misrepresentation – fraud arising from a false statement – is the offence commonly understood to be a claim for fraud. To state a claim for fraudulent misrepresentation, and using New York law as an example, a plaintiff must allege that:

- the defendant made a false statement of material fact;
- the defendant knew the statement was false;
- the false statement was made for the purpose of inducing the plaintiff to rely on it;
- the plaintiff was reasonable in relying on the false statement; and
- the plaintiff was injured as a result of relying on the false statement.

A plaintiff must also have taken reasonable steps to protect itself against reliance on false statements. In other words, a plaintiff must exercise due diligence in discovering the fraud. Only where the plaintiff is justified in relying on the false statement can it succeed in such a claim.

False Claims

Another form of fraud arises under the False Claims Act (31 USC Sections 3729–3733) (FCA), which is a federal statute that is often invoked in the context of government contractor fraud. The FCA provides that any person who knowingly submits a false claim for payment to the government is liable for double the government's damages plus a penalty for each false claim. While the FCA allows the US government to institute actions alleging such claims, it also allows private whistle-blowers to bring lawsuits on the government's behalf against those who have defrauded the government. These are called "qui tam" suits. The whistle-blower may receive a percentage of any funds recovered.

Corrupt Payments

The Foreign Corrupt Practices Act of 1977 (15 USC Sections 78dd-1, et seq) (FCPA) makes it unlawful for certain people and entities to make payments to foreign officials in order to obtain or retain business. While the FCPA is widely known for its criminal provisions, it also provides for civil enforcement actions.

Only the DOJ has authority to pursue criminal actions under the FCPA, but both the DOJ and the US Securities and Exchange Commission (SEC) have civil enforcement authority. The DOJ and SEC routinely co-operate in parallel criminal and civil investigations of FCPA violations. The DOJ and SEC also bring civil lawsuits for violations of the FCPA against companies and individuals who aided and abetted or recklessly provided substantial assistance to an FCPA violator.

In most US jurisdictions, there is no express private cause of action for giving or receiving corrupt payments. Nonetheless, allegations that an individual or entity received or provided corrupt payments may help to establish fraudulent intent in a civil lawsuit.

Conspiracy to Commit Fraud

Under both federal and state law, a conspiracy is an agreement between two or more people to commit an illegal act. To prove a conspiracy to commit fraud under federal law, a party must establish the elements of conspiracy and its underlying fraudulent purpose.

The typical elements of a conspiracy to commit fraud are:

- an agreement between two or more people to commit a fraudulent act;
- an overt act in furtherance of the conspiracy; and
- damages or injury resulting from the overt act.

A victim of a conspiracy may sue and recover damages from each participant involved in the conspiracy, regardless of the participant's level of participation. A civil conspiracy claim allows a victim to pursue participants in the conspiracy who may have more funds or higher insurance

policy limits, even if those participants played a minor role in the conspiracy.

Misappropriation

Misappropriation is the intentional use of another person's funds for unauthorised purposes. Misappropriation most commonly refers to situations in which the defendant was in a position of trust or a fiduciary, such as a trustee of a trust or an administrator of an estate.

1.2 Causes of Action After Receipt of a Bribe

If a party comes to the unfortunate realisation that its agent has accepted a bribe, it may pursue certain civil claims against its agent as the recipient of the bribe, as well as the payor of the bribe.

For example, if a US corporation learns that its CEO has accepted bribes from a vendor in exchange for steering contracts to that vendor, it may file suit against its CEO and the vendor. It could allege claims for fraud or fraudulent misrepresentation, conspiracy to commit fraud, breach of fiduciary duty, or inducement to breach fiduciary duty, among others.

Civil Causes of Action: State

While there is no express private right of action under most federal and state anti-bribery statutes, many states recognise a civil cause of action for fraud based on bribery-related allegations.

Civil Causes of Action: Federal

Federal law does not establish a general private right of action for bribery. Private litigants may file suit under the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (18 USC Section 1964) (RICO) if the bribe payments were made as part of a pattern of "racketeering activity". If the bribery was part of a scheme to induce anti-competitive conduct such as price-fixing, a private litigant may sue under the Clayton Act (15 USC Section 13(c)). RICO and the Clayton Act provide for treble damages and attorney's fees to successful plaintiffs. Most often, however, businesses injured by bribery sue for damages using common law fraud claims.

1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts

Under most state laws, facilitating or assisting the commission of fraud gives rise to an independent cause of action for aiding and abetting fraud. The typical elements of a claim for aiding and abetting fraud are:

- an underlying fraud;
- the defendant's knowledge of that fraud; and
- the defendant's substantial assistance in the achievement of the fraud.

Actual Knowledge

Allegations that the defendant should have known about the fraud are not enough. Instead, state law typically requires the plaintiff to show actual knowledge of the fraud.

Substantial Assistance

To succeed with an aiding and abetting claim, the plaintiff must also show that the defendant provided substantial assistance. Substantial assistance exists where the defendant takes an affirmative action that allows the fraud to proceed, and that action proximately causes the harm alleged. Providing routine business services for an alleged fraudster ordinarily does not constitute substantial assistance.

Examples

In one case, the plaintiff, a business investor, sued a bank that allowed its customer to deposit USD750,000 he stole from the plaintiff. The customer defrauded the plaintiff in a scheme involving the deposit of funds into an escrow account at the bank, which the customer claimed would be used to secure loans from other banking institutions and underwriters. The bank's vice-president allowed the customer to name the account an escrow account even though the procedures for setting up an escrow account were not followed. The vice-president wrote a letter on the bank's letterhead, falsely inflating the account balance. The customer also paid the vice-president USD100,000 for his assistance. Under these facts, the court found that the bank's inaction was sufficient to show "substantial assistance" to state a claim for aiding and abetting fraud because banks have a duty to safeguard deposited funds when confronted with clear evidence that those funds are being mishandled.

In another instance, a court found that the plaintiff failed to state a claim for aiding and abetting fraud where a bank allowed its customer, the perpetrator of a Ponzi scheme, to transfer funds between various accounts. The court held that allowing a customer to transfer funds was a routine business service and not "substantial assistance".

1.4 Limitation Periods

Each state in the United States has its own statute of limitations for fraud, ranging anywhere from two to six years. Under New York law, an action for fraud must be commenced either within six years of the date of the alleged fraud, or within two years of the date the plaintiff discovered the fraud or could with reasonable diligence have discovered it.

Federal law also imposes limitation periods that vary by statute. For example, the Securities Exchange Act of 1934 (15 USC Sections 78a et seq) requires that an action be brought two years after the discovery of the fraud, or five years after the fraud occurred, whichever is earlier.

1.5 Proprietary Claims Against Property

In general, a plaintiff who obtains a judgment for fraud against a defendant is on par with other unsecured creditors and does not have any special priority over the defendant's assets. In addition, a plaintiff in a civil action normally cannot recover proceeds of fraud beyond the damages it suffered. Where the government has instituted a civil or criminal action for fraud, a defendant may be required to disgorge the proceeds of the alleged fraud. Those funds may be used as restitution to compensate victims.

Where the entity or individual alleged to have engaged in fraud is insolvent, different rules govern. For example, dozens of states have enacted the Uniform Fraudulent Transfer Act (UFTA), now known as the Uniform Voidable Transactions Act (UVTA), which permits creditors to void a debtor's transaction when the debtor engaged in a transaction with the intent to defraud a creditor, or when the debtor made a transfer without receiving "reasonably equivalent value" in certain circumstances. The US Bankruptcy Code also provides recourse to creditors seeking to avoid fraudulent transfers.

Under those laws, a victim of fraud may, in some instances, take priority over other creditors seeking to recover from the fraudulent actor. For example, under federal bankruptcy law, a trustee may avoid a transfer of a debtor made with the intention to defraud a creditor so long as the transfer occurred within the two years prior to the debtor's bankruptcy filing. Either the

trustee or an individual creditor may bring an action seeking to avoid the fraudulent transfer. If a fraudulent conveyance is shown, the creditor will be able to claw back the portion of the fraudulent transaction that satisfies its individual claim.

The preference or priority of a fraud victim may depend on whether the property it seeks to claw back is traceable or identifiable. In many instances, the victim of fraud does not take priority over other creditors.

A victim of fraud may also bring other claims arising out of the fraud to recoup lost property or damages. Those claims include unjust enrichment or conversion, for example.

Unjust Enrichment

An action for unjust enrichment allows a plaintiff to try to recoup a benefit that was wrongfully retained by a fraudulent party. Although the elements differ slightly from jurisdiction to jurisdiction, in general a plaintiff must prove that:

- there was a benefit conferred on the defendant;
- the defendant was aware of the benefit; and
- acceptance or retention by the defendant of the benefit would be inequitable under the circumstances.

A claim for unjust enrichment sounds in equity. An essential question is whether it is against equity to allow the defendant to retain what is sought to be recovered.

Conversion

Where a fraudster has intentionally and without authority taken personal property belonging to someone else, the owner may allege a claim for conversion to have the property returned. The plaintiff must allege that:

- the property taken is a specific, identifiable thing;
- the plaintiff owned, possessed or had control over the property before it was taken; and
- the defendant now has unauthorised control over the property.

Although exceptions exist, generally an action for conversion can only proceed where the property taken is tangible – for example, a bond, promissory note, check, deed or manuscript. In some instances, an action for conversion of money may be brought where it relates to specifically identified funds.

1.6 Rules of Pre-action Conduct

No specific rules of pre-action conduct apply in relation to fraud claims. Certain related claims, such as conversion, require the plaintiff to make a demand on the defendant for the return of the property. In general, however, there are no set requirements of pre-action conduct prior to the filing of a claim for fraud.

1.7 Prevention of Defendants Dissipating or Secreting Assets

A victim of fraud has several options to prevent a defendant from dissipating or secreting assets prior to a judgment. Depending on the underlying cause of action, a fraud victim may be able to obtain a preliminary injunction or restraining order preventing the pre-judgment dissipation of assets. A plaintiff may also be able to obtain a pre-judgment attachment order under state law.

Fees for filing such motions vary from jurisdiction to jurisdiction. In addition, the plaintiff must often post security when seeking to restrain assets prior to judgment. The amount of security is typi-

cally within the discretion of the court and may vary with the amount restrained.

Federal Relief

Under Rule 65 of the Federal Rules of Civil Procedure, a plaintiff may move for a preliminary injunction or temporary restraining order to restrain a fraudster from dissipating assets. These are in personam remedies that operate against the defendant and, in some circumstances, third parties acting in concert with the defendant.

Where the plaintiff seeks only a general award of money damages, neither a preliminary injunction nor a temporary restraining order is available. The US Supreme Court has held that a federal court may not issue a preliminary injunction preventing defendants from disposing of their assets pending adjudication of a claim for money damages. By contrast, where a plaintiff seeks equitable relief such as the return of specifically identified property, those pre-judgment restraints may be available.

A plaintiff seeking a preliminary injunction or temporary restraining order may make a motion ex parte against the defendant, but faces a high bar in doing so. A party seeking a preliminary injunction or temporary restraining order must show:

- the likelihood of success on the merits of the underlying action;
- that there would be irreparable harm without the injunction; and
- a balance of interests that favours the movant.

Federal courts have found preliminary injunctions appropriate where the defendant intends to frustrate the judgment by transferring assets out of the jurisdiction.

State Relief

Different states provide different mechanisms to prevent the dissipation of assets. Most states provide procedures for pre-judgment attachment. Under New York law, for example, an order of attachment may be granted in certain circumstances where the plaintiff shows it is entitled to a money judgment and the defendant has taken steps to dispose of or secrete property to frustrate the judgment. Attachment orders may operate either in personam or in rem, depending on the circumstances.

Mere allegations of fraud do not justify pre-judgment attachment. Instead, the plaintiff must present evidence of intent to defraud.

Failure to Abide by Injunction or Attachment

If a defendant fails to abide by a preliminary injunction, temporary restraining order or pre-judgment attachment, the plaintiff may move for an order holding the defendant in contempt. A contempt order may include a requirement for the defendant to pay a fine for failing to abide by the court's prior order.

2. Procedures and Trials

2.1 Disclosure of Defendants' Assets

Federal Rule of Civil Procedure 26 allows parties to obtain discovery "regarding any matter, not privileged, that is relevant to the claim or defence of any party." The US Supreme Court has liberally construed this standard to encompass any matter that could reasonably bear on any issue that is or may be in the case. To the extent a party's financial information relates to specific elements of a claim or defence, a defendant may

be required to disclose their assets. A plaintiff may seek discovery through both the production of documents and the provision of testimony at a deposition.

Ordinarily, a party seeks asset discovery from the defendant or from third parties once the court has entered judgment on the claim. In those circumstances, the plaintiff has broad rights to seek discovery without any prior approval from the court, and may even seek discovery of assets located in other jurisdictions.

Courts also have discretion to permit asset discovery even before judgment. Typically, a plaintiff seeking pre-judgment asset discovery has filed a motion for preliminary injunction or sought pre-judgment attachment and is seeking asset discovery in aid of that motion. Discovery seeking asset disclosure ordinarily does not require an undertaking by the claimant.

If the defendant fails to respond to discovery demands, the plaintiff must first attempt to resolve the issue by conferring with the defendant. It may then file a motion to compel under Federal Rule of Civil Procedure 37(a). If the court grants the motion to compel but the defendant still refuses to produce the discovery, the plaintiff may then seek sanctions, which may include significant daily fines until the defendant complies.

2.2 Preserving Evidence

Under US law, the duty to preserve evidence exists independent of a court order directing such preservation. Federal Rule of Civil Procedure 37(e) imposes a duty on a party to preserve evidence from the time litigation can reasonably be anticipated. Often, once litigation is reasonably anticipated, a party will issue what is known as a “litigation hold” to custodians who may have relevant documents.

If a party fears that evidence may be destroyed or suppressed despite the obligation to preserve it, the party may move for a preservation order. It must demonstrate that the order is necessary and not unduly burdensome. First, the movant must show that without a court order there is a risk that relevant evidence will be lost or destroyed. This is often shown by demonstrating that the opposing party has previously destroyed evidence or has inadequate retention policies. Second, the movant must also show that the proposed preservation steps will be effective but not overly broad.

In general, courts are not inclined to wade into discovery disputes between parties. However, where necessary and upon the requisite showing, courts will order relief.

Courts in the United States are not likely to allow a physical search of an opposing party’s documents by another party. Generally, parties and their attorneys are responsible for collecting and disclosing relevant documents. If there is a dispute as to whether certain documents are relevant and required to be disclosed, a court may order that they be reviewed in camera by the court.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

Subject to certain requirements, a party may serve a subpoena upon a non-party commanding the production of documents or the provision of testimony at a deposition. Courts are sensitive to non-party discovery and seek to balance the burden placed on non-parties with the need for the requested documents or testimony. Courts will quash or modify a subpoena to a non-party if it imposes an undue burden or expense.

Whether a subpoena imposes an undue burden is decided on a case-by-case basis and involves a number of factors, including:

- the relevance of the requested information;
- the requesting party's need for the documents;
- the breadth of the request;
- the time period covered by the request;
- the particularity with which the documents are described;
- the burden imposed; and
- the recipient's status as a non-party.

Although the court considers all of these factors in determining whether a subpoena is overly burdensome, successful challenges to a subpoena often focus on the breadth of the request. In requesting documents from a third party, it is therefore advisable to narrowly tailor the request so it is not quashed or modified on grounds of overbreadth.

In many cases, a protective order will govern how documents may be used and with whom they may be shared. Typically, those orders limit the use of documents to the litigation at issue, although they may also permit use of the documents in related foreign proceedings.

Pre-litigation Discovery

Under Federal Rule of Civil Procedure 27, before an action is filed, a party may petition the court to "perpetuate testimony about any matter." The petition must show:

- that the petitioner expects to be a party to litigation but cannot presently bring such an action;
- that the court in which the petition is filed has jurisdiction over the possible action;
- the facts the petitioner hopes to establish by the proposed testimony and the reasons to perpetuate it;
- the names and addresses of whom the petitioner expects to be adverse parties; and
- the name, address and expected substance of the testimony of each deponent.

Because the primary purpose of Rule 27 is to preserve evidence that is otherwise likely to be lost, most courts have not permitted Rule 27 to be used as a fact-finding tool.

Many states also have pre-litigation discovery rules, some of which are broader or narrower than the federal rule. In New York, CPLR Rule 3102(c) provides that, before an action is commenced, disclosure to aid in bringing an action or to preserve information may be obtained by court order. Despite the seemingly broad language, courts in New York have interpreted the rule narrowly to allow for discovery only where a putative plaintiff needs to obtain the identity of a necessary party or where pre-litigation discovery is needed to preserve evidence. New York courts have rejected pre-litigation discovery where it was sought to uncover proof of an intended cause of action or to determine if that cause of action might exist.

2.4 Procedural Orders

In general, motions made without notice to an adverse party are disfavoured, and are appropriate only in a narrow set of circumstances. These include instances of urgency, such as where immediate and irreparable loss will result before the adverse party can be heard to oppose a motion, or where there is a danger that notice to an adverse party will result in that party's flight, the destruction of evidence or the secretion of assets.

Certain types of motions, such as preliminary injunctions or temporary restraining orders, better lend themselves to being filed ex parte, as the relief requested may concern an opposing party's destruction of evidence or secretion of assets. Nevertheless, in filing a motion ex parte, counsel should be aware of the additional hurdles necessary to justify granting relief without notice to the opposing party.

2.5 Criminal Redress

In the United States, the DOJ and state prosecutors are responsible for prosecuting criminal cases. While victims of fraud may inform the relevant investigating bodies – such as the FBI or state investigators – of possible fraud, there is no formal method for victims to commence a criminal action.

Parallel proceedings may occur if the government has instituted criminal proceedings at the same time as a civil proceeding, or vice versa. Civil and criminal litigation have different discovery rules, leading to questions about what kind of discovery can be used in which matter. A court may also stay one action until the conclusion of the other. Because of the rules governing criminal prosecutions, it is extremely unlikely that a criminal case would be paused to allow for the continuance of a civil case, so stays in parallel proceedings generally concern civil cases.

Whether a stay of civil proceedings is appropriate turns on the particular circumstances of the case. A civil case may be stayed where continuing would result in undue prejudice or a substantial interference with a defendant's constitutional rights. The mere existence of a criminal case will not automatically stay a civil proceeding; the civil case will only be stayed if there are unreasonable conflicts between the parallel proceedings.

2.6 Judgment Without Trial

Where a defendant fails to appear within the required time or fails to answer a complaint, a plaintiff may seek a default judgment, which is a binding judgment in favour of the plaintiff and does not require a trial. The default judgment may be set aside by the court in limited circumstances, such as where the defendant was not given proper notice of the proceeding.

A plaintiff may move for summary judgment prior to trial. If the plaintiff can show there is no genuine dispute as to any material fact and the plaintiff is entitled to judgment as a matter of law, the court will grant summary judgment in favour of the plaintiff without a trial. A motion for summary judgment may ordinarily be filed at any time until 30 days after the close of discovery.

2.7 Rules for Pleading Fraud

As discussed in **1.1 General Characteristics of Fraud Claims**, claims sounding in fraud are subject to a heightened pleading standard. Federal Rule of Civil Procedure 9(b) requires allegations of fraud to "state with particularity the circumstances constituting" the fraud. State rules generally impose a similar heightened pleading requirement.

Fraud claims therefore require more detail than other types of claims. Merely alleging that some type of fraud took place is not enough – the allegations must be supported by particular details describing the fraud.

2.8 Claims Against "Unknown" Fraudsters

A plaintiff can sue "John Doe" or "Jane Doe" defendants for fraud. These fictitious defendants are persons that cannot be identified by the plaintiff before a lawsuit is filed. Given that the statute of limitations for fraud can be short,

a litigant is under a certain amount of pressure to file a claim, even if all the alleged fraudsters are not known at the time of filing.

Generally, filing a claim against a fictitious defendant tolls the statute of limitations. The plaintiff may later substitute the name of the true defendant for the fictitious defendant once that information is known. Once the complaint is filed, however, a plaintiff must work quickly to determine the true identity of the fraudsters. If the plaintiff's delay in doing so is unreasonable, the court may not allow amendment of the complaint, and any claim may become barred by the statute of limitations.

2.9 Compelling Witnesses to Give Evidence

A party may serve a subpoena on a non-party, compelling them to testify or produce documents or other evidence, either before or at trial. If a witness defies the subpoena, including by refusing to give testimony or produce documents, they can be held in contempt.

3. Corporate Entities, Ultimate Beneficial Owners and Shareholders

3.1 Imposing Liability for Fraud on to a Corporate Entity

Under US law, corporations that commit fraud may be held liable in the same manner as an individual who committed fraud. The doctrine of respondeat superior is applicable to corporations, so a corporation can be held criminally and civilly liable for actions taken by its employees or agents – including its officers or directors – as long as the action occurs within the scope of the employee's employment and is for the benefit of the corporation. This rule reflects the basic idea that a corporation can only act through its employees and agents.

A corporation is not liable, however, for fraudulent acts of an officer, agent or employee taken outside the scope of the person's employment, unless they were ratified by the corporation. Likewise, if a fraudulent action was taken solely to benefit the individual and not the corporation, the corporation ordinarily will not be held liable.

3.2 Claims Against Ultimate Beneficial Owners

A fundamental tenet of US corporate law is that a company – which includes not only corporations, but also limited liability companies and limited liability partnerships – is separate and distinct from its owners. The corporate form was created to allow shareholders and owners to invest without incurring personal liability for actions taken by the corporate entity.

In certain instances, however, courts may exercise the equitable doctrine known as "piercing the corporate veil" to disregard the separation between entity and individual, and hold the owners liable for the actions of the company. The doctrine of piercing the corporate veil is rarely invoked and applies only in exceptional circumstances, including cases where the corporate form was abused to effect fraud or injustice.

Claims seeking to pierce the corporate veil and hold individuals liable for the actions of the company are generally governed by the law of the state of incorporation. Most jurisdictions have recognised multi-factor tests that must be met to determine if veil-piercing is appropriate.

Under New York law, a plaintiff seeking to pierce the corporate veil must show that the owners exercised complete domination over the corpo-

ration with respect to the complained-of transaction or action, and that such domination was used to commit a fraud or wrong against the plaintiff that resulted in injury. The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene.

3.3 Shareholders' Claims Against Fraudulent Directors

A shareholder derivative action is a lawsuit brought by a shareholder, or group of shareholders, on behalf of a corporation. Shareholder derivative actions allow individual shareholders to bring a lawsuit to enforce a corporate cause of action against officers, directors or third parties. Generally, a shareholder can only bring a suit on behalf of a corporation when the corporation itself has refused to bring a valid cause of action, unless the shareholder can show adequate grounds for not demanding action from the corporation first. This most frequently occurs when the defendants are corporate directors or officers. If a derivative action is successful, any damages or proceeds go to the corporation and not directly to the shareholder who brought the lawsuit.

4. Overseas Parties in Fraud Claims

4.1 Joining Overseas Parties to Fraud Claims

The Federal Rules of Civil Procedure allow for flexibility in pursuing fraud claims against multiple parties, including those outside the United States, as long as jurisdictional requirements are met and the party is properly served. Indeed, where an absent party holds a significant interest in the case, joinder of the party may be required.

Jurisdiction

A US court may exercise jurisdiction over a person or company located outside the relevant state only if it has personal jurisdiction over that person. State statutes known as "long-arm" statutes prescribe the circumstances where a court may exercise jurisdiction over a foreign person or company. For example, New York's statute permits jurisdiction where:

- the claim arises out of the defendant's transaction of business in the state or a contract to supply goods or services in the state;
- the defendant commits a fraud or other tort within the state;
- the defendant commits a fraud or other tort outside the state that harms someone in the state, and other requirements are met; or
- the claim arises out of the defendant's real property in the state.

Federal courts may exercise personal jurisdiction when authorised by the applicable state long-arm statute and in certain other cases.

In addition to satisfying statutory requirements, the plaintiff must show that exercising jurisdiction is consistent with constitutional due process. The Due Process Clause generally requires that the defendant have certain minimum contacts with the state relating to the underlying controversy, and that exercising jurisdiction would not offend the traditional notions of fair play and substantial justice.

Service

Plaintiffs seeking to join overseas parties must comply with the service of process requirements. Federal Rule of Civil Procedure 4(f) provides for

service upon an individual outside the United States pursuant to the Hague Service Convention or another internationally agreed means of service. Where there is no such service treaty between the United States and the foreign country, Rule 4(f) requires that service be "reasonably calculated to give notice" of the suit by one of the following means.

- As the foreign country's law prescribes.
- As the foreign authority directs in response to a letter rogatory.
- Unless prohibited by the foreign country's law, by:
  - (a) personal delivery;
  - (b) mail sent by the court clerk, return receipt; or
  - (c) other means ordered by the court.

If a party maintains a presence in multiple countries, it may make sense to choose the country in which to effect service based on the ease of satisfying the applicable service requirements for that country.

Permissive Joinder

Rule 20 of the Federal Rules of Civil Procedure allows for the joinder of additional parties after the litigation has begun, as long as the claims relating to the party arose from the same transaction or occurrence and involve common questions of law or fact. Under Rule 14, a defendant may implead an absent third party who may be liable to the defendant for the plaintiff's claim. Finally, other interested parties may intervene in the action under Rule 24.

Required Joinder

Federal Rule of Civil Procedure 19 may require the joinder of other parties to the case. That rule serves to protect the interests of absent parties, and also protects the parties from being sued in multiple jurisdictions.

Courts consider a number of factors in determining whether an absent party should be joined in the action, and the effects of not joining the party if doing so is impossible or impractical. For example, a court considers:

- whether the party's absence would prevent complete relief among the existing parties;
- whether the party claims an interest relating to the subject of the lawsuit and is situated in a way that the party's absence would prevent that party from protecting that interest; and
- whether failure to join the party may expose another party to multiple or inconsistent obligations.

If the court is unable to join a foreign required party – for example, because it lacks jurisdiction – it might be required to dismiss the action.

5. Enforcement

5.1 Methods of Enforcement

Once the plaintiff obtains a judgment in a fraud action, the plaintiff may seek to execute the judgment against the defendant's assets in several ways. Execution procedures vary from state to state. Federal courts follow the state law procedures of the state where they are located.

In New York, for example, a party with a judgment may serve restraining notices on the defendant or other parties with custody of the defendant's assets. Those notices have the effect of freezing assets while the plaintiff pursues further execution procedures. Parties may serve those notices without any prior approval from the court.

A plaintiff then executes against the assets by arranging for the marshal or sheriff to serve a writ of execution on the party with custody of the assets. The same process may be used to collect a debt that a third party owes to the judgment-debtor in satisfaction of the judgment. If the custodian refuses to turn over the property, the plaintiff may file a "turnover" action asking the court to order the custodian to comply.

In New York, a plaintiff may file a turnover action against a third-party custodian of property even if the property itself is located outside the United States. Because a turnover proceeding is an in personam proceeding against the custodian, New York requires only that the custodian itself be subject to the court's jurisdiction. Other states are divided on whether they permit extraterritorial turnover actions.

As noted in **2.1 Disclosure of Defendants' Assets**, after the plaintiff obtains a judgment, US law permits liberal discovery into the judgment-debtor's assets, even those located overseas. Asset discovery is therefore a major component of most post-judgment collection efforts.

Enforcement of Foreign Judgments

Where a plaintiff holds a foreign judgment against a defendant, the plaintiff must obtain recognition of the judgment in the United States before seeking to execute it. Unlike with arbitral awards, the United States is not a party to any international treaty governing the recognition of foreign judgments, and there is no general federal law that applies. Recognition of foreign judgments is therefore almost entirely a matter of state law.

Each state has its own statutes or principles governing the recognition of foreign judgments. Most states, however, have adopted some version of the Uniform Foreign-Country Money Judgments Recognition Act, a model law that provides uniform standards and procedures for courts to follow. The Uniform Act generally prohibits courts from re-examining the merits of a foreign judgment. Nonetheless, courts may decline to recognise a foreign judgment, for example, where:

- the foreign court lacked jurisdiction;
- the defendant did not have proper notice of the proceedings; or
- enforcing the judgment would violate US public policy.

New York state courts are often a good forum for seeking recognition of foreign judgments. New York has narrow grounds for non-enforcement, and has expedited procedures for obtaining summary judgment in a recognition action. It takes a broad view of post-judgment asset discovery and execution, and many financial institutions and commercial counterparties with custody of a defendant's assets are located there. Once a plaintiff obtains recognition of a foreign judgment in one US state, it is relatively easy to have that judgment recognised in other US states as well.

6. Privileges

6.1 Invoking the Privilege Against Self-incrimination

The Fifth Amendment to the US Constitution provides individuals with a privilege against compelled self-incrimination. Individuals cannot be forced to give testimony, in the form of answering questions or providing information, that could implicate them in a crime. Invoking that right is often referred to as "taking the Fifth".

Invoking the Fifth Amendment

An individual may invoke the Fifth Amendment if the following three conditions are met:

- the communication is testimonial – the act of producing documents may be considered testimonial if the act of production is incriminating in itself, because it establishes the existence of the documents, the producer's possession of the documents or the authenticity of the documents;
- the testimony is compelled – for example, information or documents sought by a subpoena or court order would be considered compelled testimony, and compelled testimony also encompasses responding to questions during an investigation, at a deposition or at trial; and
- the testimony is self-incriminating – in other words, the testimony would supply evidence, or lead to the discovery of evidence, that could be used to prosecute the individual for a crime.

The self-incrimination requirement means that individuals who have received immunity or a pardon for a crime, or who have already been convicted and sentenced, may not invoke the Fifth Amendment to avoid giving testimony. Such testimony could not be used to prosecute the individual, and thus is not incriminating.

Consequences of Invoking the Fifth Amendment

The consequences of invoking the Fifth Amendment differ in criminal and civil cases.

In a criminal case, a defendant's silence or refusal to testify on Fifth Amendment grounds cannot be used as evidence. A prosecutor cannot make the argument that the defendant's silence implies guilt.

In a civil case, however, the judge or jury can draw an adverse inference from a party's invocation of the Fifth Amendment. The individual's silence can be interpreted to support liability.

As discussed in **2.5 Criminal Redress**, that different treatment is a complicating factor in the case of parallel civil and criminal proceedings. It may lead to a stay in the civil case until the criminal case is resolved.

Complications in the Corporate Context

The Fifth Amendment's self-incrimination clause does not apply to corporations. As a result, a corporation may not refuse to comply with a discovery obligation or to answer questions on Fifth Amendment grounds, and can be compelled to provide testimony against itself. When a subpoena requests corporate records, those records must be produced, even if the corporate representative who is facilitating the response would be personally incriminated by that information.

A corporate representative can invoke the Fifth Amendment personally, and their silence cannot be used against them in a criminal matter. An employee may invoke the Fifth Amendment in response to a subpoena for oral testimony, even in their capacity as an employee of the corporation.

In both cases, however, the silence can lead to an adverse inference to support the liability of the corporation.

6.2 Undermining the Privilege Over Communications Exempt From Discovery or Disclosure

Despite the broad discovery procedures available in civil litigation in the United States, a foundational principle of the legal system is that

the attorney-client privilege protects from disclosure of confidential communications between attorneys and clients made for the purpose of seeking or providing legal advice. This privilege promotes open and honest communication between attorneys and their clients.

Attorney work product – documents containing an attorney's thoughts, impressions, opinions and legal conclusions – is also protected from discovery in most situations, although to a lesser extent than an attorney-client communication. The work product doctrine also provides protection for materials prepared by or for a party in anticipation of litigation.

The Crime-Fraud Exception

The attorney-client privilege does not apply to communications between the lawyer or client made for the purpose of committing or continuing a crime or fraud. This is known as the "crime-fraud exception", and it prevents the abuse of the attorney-client privilege that would otherwise undermine the administration of justice. The same exception applies, in most respects, to the work product doctrine as well.

Courts construe the crime-fraud exception narrowly. The party invoking it must show two elements:

- the existence of a future crime or fraud; and
- that the communication or work product was made to further or induce that future crime or fraud.

To determine the existence of a future crime or fraud, courts consider factors including:

- whether the client was planning a criminal or fraudulent act when they sought the legal advice;
- whether the client committed or attempted to commit a crime or fraud after receiving the advice;
- whether the lawyer who provided the advice also engaged in misconduct in connection with the topic of the advice; and
- whether the evidence shows the elements of a crime or fraud that was ongoing or imminent at the time of the communication.

The second element – whether the communication was made to further or induce the illegal act – often turns on the client's intent in communicating with their attorney. The crime-fraud exception applies even if the attorney had no knowledge of the client's intent when the communication was made. With respect to work product protection, the exception applies where the work product was created in aid or furtherance of criminal or fraudulent activity.

The crime-fraud exception may apply within the context of the litigation itself. For example, if a party to litigation represented through counsel that it could not find documents that had been requested in discovery, and that statement is revealed to be a misrepresentation, the opposing party may seek discovery into matters that would otherwise be protected from disclosure. In that scenario, a court may find waiver of the attorney-client privilege with respect to the party's communications with counsel regarding the preservation, destruction or location of the documents.

7. Special Rules and Laws

7.1 Rules for Claiming Punitive or Exemplary Damages

Punitive or exemplary damages may be available in a civil fraud action in the United States, provided that additional requirements are met.

In New York, for example, courts may allow the recovery of punitive or exemplary damages where the defendant's conduct was malicious, gross, wilful or wanton, or evinced a high degree of moral turpitude. Some decisions also indicate that the fraud must have been aimed at the general public, not just at the plaintiff alone. Federal due process principles generally require the amount of punitive damages to bear a reasonable relationship to the compensatory award.

As described in **1.2 Causes of Action After Receipt of a Bribe**, federal civil RICO claims and antitrust claims allow for treble damages and attorney's fees. While such damages are not explicitly punitive, many courts and legal scholars have noted that they are at least partly punitive in nature.

7.2 Laws to Protect "Banking Secrecy"

In the United States, there is no general protection from disclosure for communications between banks and their clients; banks and other financial institutions are subject to the same discovery mechanisms as any other party. As discussed in **2.3 Obtaining Disclosure of Documents and Evidence From Third Parties**, third-party financial institutions may be subject to subpoenas.

Nonetheless, certain laws aimed at protecting consumers govern the disclosure of financial information. Under the Gramm-Leach-Bliley Act, parties may be required to redact certain personal, non-public information such as account numbers and Social Security numbers before disclosing documents in discovery. Parties to litigation also often agree to a protective order limiting the use or disclosure of such information.

The federal Bank Secrecy Act protects from disclosure certain documents that banks generate when reporting suspicious or fraudulent activities to the government. Courts have also recognised a "bank examiner privilege" that protects certain communications between banks and their regulators from disclosure. The Right to Financial Privacy Act similarly limits the government's ability to access customers' financial records without the customer's consent or through a subpoena, search warrant or other formal written government request. Organisations such as the Federal Trade Commission and the Financial Industry Regulatory Authority also regulate the disclosure of financial information in certain situations, require financial institutions to implement privacy policies, and fine banks for violating privacy laws.

7.3 Crypto-assets

Crypto-assets, commonly known as digital assets, cryptocurrency, virtual currency or digital currency, are digital representations of value that serve, at least theoretically, as a substitute for traditional currency. Crypto-assets can generally be traded for traditional currencies or other digital assets. They are subject to taxation, freezing and regulation.

A comprehensive regulatory regime for crypto-assets is still emerging in the United States. At the federal level, Congress has not passed extensive legislation governing the sale, accounting or treatment of digital assets. Certain laws, how-

ever, have been passed affecting crypto-asset reporting requirements.

The Infrastructure Investment and Jobs Act of 2021, for example, created new reporting requirements for certain crypto-related transactions. The Act expanded the definition of a "broker" subject to IRS reporting requirements to include those who help effectuate transfers of digital assets. It also expanded the definition of "digital assets" to include virtual currencies that are "recorded on a cryptographically secured distributed ledger or any similar technology". Additionally, the Act expanded IRS rules requiring businesses to report cash transactions over USD10,000 to cover digital assets.

Federal regulators have taken concrete action to address crypto-assets. In March 2022, President Biden signed an executive order calling for policy recommendations with respect to digital assets from a variety of federal agencies. That order directed federal regulators, including the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC), to evaluate how they can use their enforcement tools to protect against fraud and abuse, address anti-money laundering and terrorism financing, and protect digital asset investors and markets.

Consistent with those executive directives, federal regulators, including the SEC, CFTC, Internal Revenue Service (IRS) and Financial Crimes Enforcement Network (FinCEN), have issued overlapping regulations that subject issuers, owners and traders of crypto-assets to different requirements depending on the circumstances at issue. For example, the SEC has taken an increasingly broad view of whether cryptocurrencies constitute "securities" subject to the disclosure and anti-fraud requirements of the federal securities laws. It has repeatedly found that offers and sales of digital assets, such as "Initial Coin Offerings" and "Token Sales", are subject to those laws. The CFTC similarly defines "commodity" to include virtual currencies subject to its regulation. The IRS classifies virtual currency as property for the purposes of federal income tax laws, while FinCEN regulates businesses involved in the exchange of digital assets as "money" exchangers.

Individual states also have their own laws and regulations applicable to crypto-assets, but these provisions differ greatly from state to state. Many states regulate cryptocurrency under the existing rules applicable to money transmitter businesses, requiring companies dealing with digital assets to apply for a money transmitter licence. Some states also apply state-specific securities laws, often called Blue Sky laws, to digital asset companies. Still other states have developed crypto-specific regimes that overlay additional requirements on top of existing laws. In New York, for example, digital asset companies must obtain a crypto-specific "BitLicense" for most digital asset transactions. Conversely, in certain states, regulators have clarified that crypto-related businesses need not even obtain the traditional money transmitter licence to perform certain digital asset transactions.

Questions will undoubtedly continue to emerge regarding the regulation of crypto-assets. How regulators will expand their purview of crypto-asset regulation and co-ordinate remains to be seen. However, an aggressive focus on enforcement efforts targeting misuse of crypto-assets is likely to continue.

Trends and Developments

Contributed by:
Steven Molo, Robert Kry, Megan Cunniff Church and Walter Hawes
MoloLamken LLP

MoloLamken LLP focuses exclusively on representing clients in complex disputes. It handles civil, criminal and regulatory matters, as well as appeals, across the United States. Its clients span the globe, and MoloLamken is involved in some of the most significant disputes of the day. The firm's founding partners, Steven Molo and Jeffrey Lamken, developed national reputations based on their courtroom successes while partners at large full-service firms, where they held leadership positions. With an abiding belief that complex disputes are most effectively handled by smaller teams comprised of smart, highly experienced lawyers focused on results rather than process, they formed MoloLamken. The firm provides experienced advocacy – for claimants as well as defendants – before judges, juries, arbitral forums and courts of appeals, including the US Supreme Court. It also represents clients in regulatory and criminal investigations, and conducts internal investigations.

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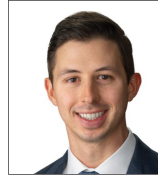

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Recent Trends in US Enforcement of Crypto Offences

In 2023, US prosecutors and regulators will likely continue to expand their enforcement efforts involving digital assets or cryptocurrency. While Congress and federal agencies will continue to weigh new legislation and regulations specifically targeting cryptocurrency, the primary focus is likely to remain on using the existing arsenal of laws and regulations to combat fraud in this area.

Federal prosecutions to date exemplify that approach. In the prosecution of FTX founder Sam Bankman-Fried, for example, prosecutors invoked the same fraud and money laundering offences that they commonly use to prosecute garden-variety fraud schemes. Additional resources will likely be directed towards those enforcement efforts over the coming year. However, authorities will continue to face challenges in recovering crypto-assets for victims.

Existing Laws and Regulations

Digital assets, also commonly known as cryptocurrency, virtual currency or digital currency, are digital representations of value that can serve as a substitute for traditional currency issued by governments and central banks. To date, the US government has not issued its own crypto-assets, although certain non-US governments and monetary authorities have considered doing so. In this evolving landscape, wrongdoers have perpetrated a variety of fraud schemes against investors. Prosecutors and regulators are catching up to those schemes and aggressively prosecuting crypto fraud with existing laws and regulations.

Long before crypto-assets came into existence, prosecutors used general anti-fraud statutes to prosecute conventional fraudsters. Mail, wire and bank fraud statutes allowed prosecutors to charge a near-limitless array of schemes that affected interstate commerce. Similarly, regulators including the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) worked to ensure fair markets for the sale of securities and commodities by bringing civil enforcement actions for market manipulation and deceptive practices.

Crypto-assets and crypto exchanges are relative newcomers. They have existed for less than 15 years, yet have provided fraudsters with a new means to perpetrate massive schemes to defraud victims of billions of dollars. The longstanding statutes used to prosecute fraud did not contemplate modern digital assets when they were enacted. Recent prosecutions and enforcement actions, however, show that those statutes readily apply to crypto fraud.

Recent Prosecutions and Enforcement Actions

Since 2022, criminal and civil actions involving cryptocurrency have become frequent. While the subject matter is relatively new, the nature of the fraud schemes and the charges brought are familiar. The types of defendants are also familiar – typically CEOs, founders, traders, executives or promoters.

FTX – Fraud

Federal prosecutors in the US Attorney's Office for the Southern District of New York used traditional fraud and money laundering statutes to prosecute Sam Bankman-Fried, the founder of FTX, a now bankrupt cryptocurrency exchange, in what prosecutors claim to be one of the largest financial frauds in US history. Prosecutors charged Bankman-Fried with wire fraud, com-

modities fraud, securities fraud, and conspiracy, among other offences.

The core allegations against Bankman-Fried are not unique: prosecutors allege that he stole customer deposits and used them to support FTX and an associated hedge fund, Alameda Research, to make charitable and political contributions, and to enrich himself. Prosecutors also claim that he tried to bribe Chinese officials to unfreeze accounts holding more than USD1 billion of cryptocurrency. Despite the involvement of cryptocurrency, little distinguishes those allegations from traditional fraud and embezzlement schemes.

BitConnect – Ponzi scheme

In 2022, prosecutors with the US Department of Justice's Market Integrity and Major Frauds Unit charged BitConnect founder Satish Kumbahni and more than a dozen other defendants with perpetrating a cryptocurrency Ponzi scheme involving more than USD2.1 billion. The allegations included claims of false misrepresentations to prospective investors and embezzlement of investor funds. According to the indictment, BitConnect guaranteed returns by falsely claiming that its proprietary "Trading Bot" would yield substantial profits by trading on the volatility of global cryptocurrency markets. In reality, according to the indictment, BitConnect and its founder paid earlier investors with money from later investors. As a result, prosecutors charged Kumbahni and the other defendants with charges common for such Ponzi schemes, including wire fraud, money laundering, securities fraud and conspiracy.

Coinbase – Insider trading

Prosecutors in the US Attorney's Office for the Southern District of New York brought the first cryptocurrency insider trading case against Ishan Wahi, a former employee of Coinbase Global, Inc, in July 2022. As a product manager for Coinbase, one of the largest cryptocurrency exchanges in the world, Wahi had access to highly confidential information about the crypto-assets Coinbase intended to list. Because listing a cryptocurrency on an exchange tends to dramatically increase the asset's price, Wahi and others were able to profit from the information. Wahi pleaded guilty to two counts of conspiracy to commit wire fraud, admitting that he provided tips to others regarding Coinbase's planned listings so they could trade the cryptocurrencies for a profit.

Civil enforcement actions

The SEC and CFTC have pursued crypto enforcement actions both independently and in parallel with criminal actions. The SEC has pursued enforcement actions involving fraudulent or unregistered crypto offerings, including by targeting initial coin offerings. The CFTC has brought actions for fraud, manipulation and failing to register. Those actions are likely to continue, especially with the increased resources that these regulators are receiving to target crypto fraud and manipulation.

Proposed Changes in Crypto-Asset Enforcement

The successes of crypto prosecutions and enforcement actions under existing laws have not stopped US lawmakers from looking to expand and bolster those efforts. In December 2022, for example, Senators Elizabeth Warren and Roger Marshall introduced legislation that would expand the Bank Secrecy Act to apply to digital asset wallet providers and cryptocurrency miners, along with other digital asset service providers. That expansion would extend the Bank Secrecy Act's anti-money laundering and know-your-customer requirements to those compa-

nies, which so far have been largely excluded. The proposed legislation would also strengthen efforts to combat money laundering and terrorism financing by requiring the SEC and CFTC to establish compliance examination procedures for regulated entities, and would expand reporting and customer verification requirements in the digital asset space. Were Congress to enact the legislation, it would not only offer new enforcement mechanisms, but would also increase the number of companies and individuals subject to federal regulation and reporting requirements.

Increased Enforcement and Regulation

The Executive Branch has also taken significant action on digital assets. In March 2022, President Biden issued an executive order calling for federal agencies to make recommendations on digital assets, including recommendations to protect investors and markets. The resulting reports, released in September 2022, call for "aggressively pursu[ing] investigations and enforcement actions against unlawful practices in the digital assets space." They also highlight potential risks, including that digital assets will be used for money laundering and fraud. The reports seek, among other legislative changes, a doubling of the statute of limitations for digital asset offences and an increase to the maximum prison sentence for unlicensed money transmission, an offence commonly used to target crypto fraud. The reports also urged the United States to support global regulatory standards for cryptocurrency and engage in co-operation with foreign jurisdictions.

As the executive action to date suggests, digital asset enforcement remains a key priority. Federal agencies are marshalling their resources to continue their robust civil and criminal enforcement efforts. The Department of Justice named the first director of the National Cryptocurrency Enforcement Team in 2022. That team works with the FBI's Virtual Asset Exploitation Unit, among other agencies, to identify, investigate and prosecute the criminal misuse of digital assets. Those efforts have led to the prosecution of numerous individuals and companies for a wide variety of fraud, insider trading, money laundering and other offences.

In May 2022, the SEC nearly doubled the size of its Crypto Assets and Cyber Unit enforcement team. As recently as 29 March 2023, the SEC's chairman requested an additional USD2.4 billion from Congress to bolster its crypto investigation and enforcement efforts. The SEC's enforcement division and its counterparts at the CFTC and the Financial Crimes Enforcement Network have brought numerous cases alleging insider trading, failure to register, and violations of reporting requirements against digital asset companies and their associated individuals. The funding requests are a clear signal that this enforcement activity is likely to increase.

Recovery of Digital Assets

Digital assets provide a new means of perpetrating fraud schemes. The recovery of funds involved in such schemes, however, is more difficult than in ordinary frauds, and many victims never recover their losses. For instance, although enforcement officials have obtained court orders to restrain or freeze digital assets, successfully freezing such assets can prove challenging in practice. Digital assets are often difficult to locate because they are typically held in encrypted digital wallets rather than in bank or brokerage accounts. In addition, digital assets may be put through several layers of "mixing" or other treatment designed to anonymise the assets' source and ownership. Assets may also be held overseas or instantly transferred offshore, complicating recovery efforts.

To address these difficulties, regulators have attempted to freeze virtual assets as they are transferred through digital "exchanges" or online platforms. However, this approach often relies on co-operation from non-regulated exchanges, which may be lacking or inconsistent, and is generally unable to recover assets that have already passed into overseas accounts. While regulators and law enforcement continue to develop new means to trace, isolate and recover crypto-assets, further technological developments may impede these efforts. For example, the US Department of Justice's Market Integrity and Major Frauds Unit charged cryptocurrency fraud involving more than USD2.1 billion in the BitConnect scheme, but has only recovered approximately USD56 million thus far. That amount may be a meaningful recovery for victims, but it pales in comparison to the overall losses.

Although prosecutors and regulators have had limited success in recovering crypto-assets, their efforts are ongoing. The increased focus on these offences will likely yield additional prosecutions and enforcement actions that will recover more assets for victims and deter fraudsters from perpetrating such schemes in the first place.

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