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PERSPECTIVES

WHAT BUSINESSES NEED TO KNOW ABOUT CIVIL FRAUD

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Fraud is an ever-present feature of commercial life. Every industry in every jurisdiction must grapple with fraud in one way or another – whether it is rooting out fraud within a company or remedying fraud inflicted on the company.

Yet civil fraud – versus its criminal counterpart – attracts comparatively little attention. Part of the problem is that discussing ‘fraud’ as a unitary subject is daunting. Even within the US alone, there are scores of different types of civil fraud with varying legal elements and remedies.

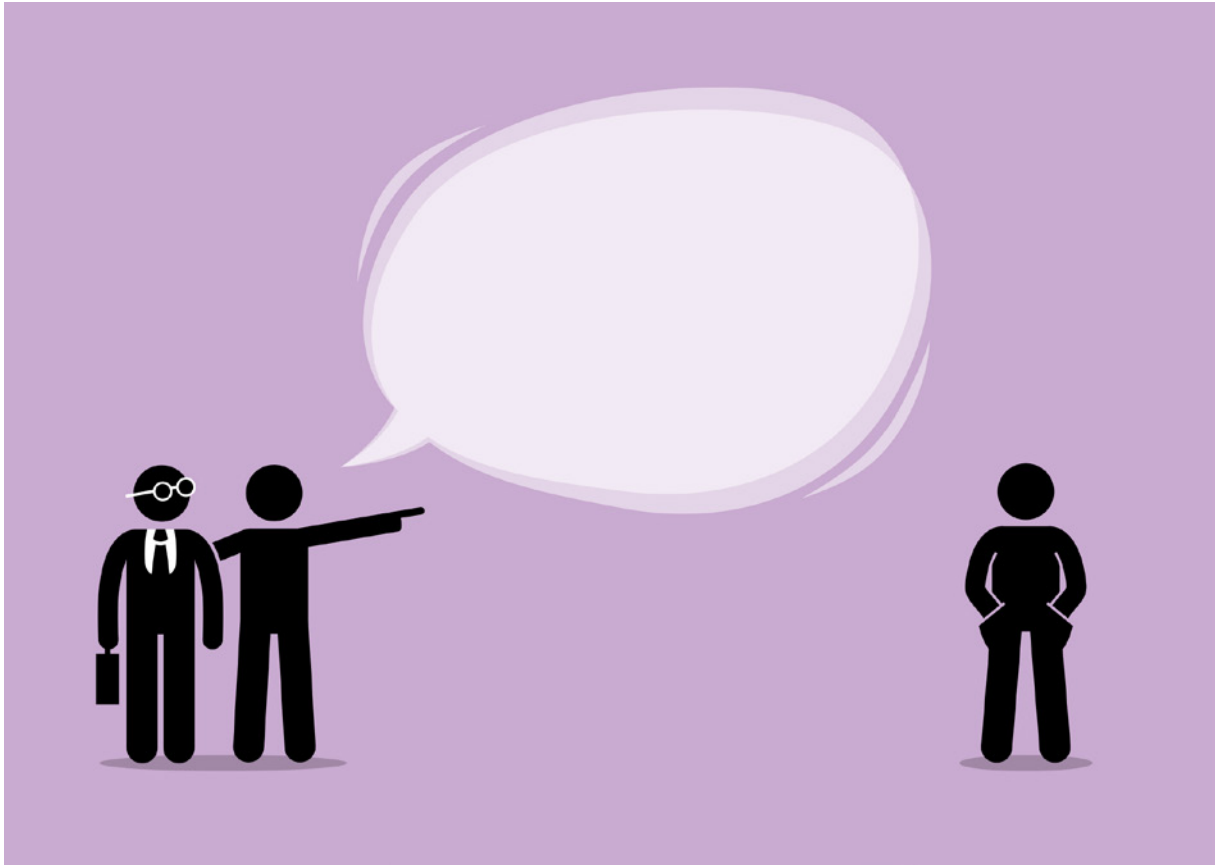
Businesses need to take civil fraud seriously. Every year, companies pay billions of dollars to resolve civil

fraud allegations, without accounting for the costs of investigating and defending against the allegations.

And what begins as a civil fraud case can quickly turn into a criminal fraud case, as prosecutors sometimes file criminal charges even years after a civil case is resolved. At the same time, businesses victimised by fraud can use often the same laws to recover losses.

Civil fraud

‘Fraud’ is notoriously difficult to define. Any definition will be subject to exceptions and qualifications. But at a high level, ‘fraud’ means



a knowing misrepresentation or other deception made to induce someone else to act to his or her detriment.

Civil and criminal fraud share more similarities than differences. In fact, the same facts can and sometimes do lead to separate civil and criminal fraud cases. The primary differences are procedural.

Only the government can pursue a criminal case, which must be proved beyond a reasonable doubt. By contrast, private plaintiffs can obtain monetary damages in civil fraud cases by meeting a lower

standard of proof – typically a preponderance of the evidence standard.

Civil fraud has many variations. Each US state typically recognises one or more common law causes of action that allow plaintiffs to recover damages for fraud. These causes of action are sometimes called simply common law fraud and sometimes have other names like ‘deceit’, ‘false pretences’ or ‘fraudulent inducement’.

State and federal statutes also recognise a variety of fraud causes of action. For example, federal (31

USC section 3730), California (Cal. Gov't Code section 12651) and New York law (NY State Finance Law section 90) all allow private plaintiffs to bring qui tam suits against any person who makes a false claim for payment to the relevant state or federal government.

Federal law and that of most states also create civil causes of action to remedy fraud in a host of specific contexts, such as consumer fraud, financial institution fraud, unfair business practices and more.

Why businesses need to take civil fraud seriously

The many potential causes of action for fraud exemplify the variety of fraud risks business face. Some statutes, such as the Illinois Consumer Fraud and Deceptive Business Practices Act, expose defendants to enhanced penalties like treble damages, attorneys' fees and costs. Others, like 18 USC section 45, authorise government agencies to impose substantial civil penalties.

For example, Amazon recently paid \$2.5bn to the Federal Trade Commission to resolve consumer fraud allegations. Not all civil fraud cases involve such eye-popping figures, but merely defending against cases involving lesser sums can prove expensive and time consuming for businesses.

Mere allegations can affect stock prices and erode goodwill.

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The spectre of civil fraud has loomed particularly large since the US Department of Justice (DOJ) announced plans to pursue novel theories under the federal False Claims Act (FCA). Under the new 'Civil Rights Fraud Initiative', for example, the DOJ pledged to target diversity, equity and inclusion (DEI) programmes.

Though short on details, the memorandum announcing the initiative argued that any government contractor that certifies compliance with federal civil rights laws (as they must to win government contracts) but has a DEI programme has made a “false statement” and thus may be liable under the FCA for treble damages and other penalties.

Time will tell if the government's new theories are viable. But in the meantime, businesses in the crosshairs face potentially massive liability as they navigate expensive investigations.

Worse, what starts as a civil case can quickly turn into a criminal one. Criminal laws typically have longer statutes of limitations than civil causes of action. The federal criminal bank fraud statute (18 USC section 1344) has a 10-year limitations period while most civil fraud causes of action in Illinois, for example, have a five-year limitations period.

That extra time allows prosecutors a chance to use the civil case to build their criminal case. For example, Qualcomm sued a former executive for civil fraud in California back in 2017. Nearly five years later, the government indicted the former executive, who was not sentenced until October 2025.

At the same time, civil fraud offers nearly as many opportunities for businesses. Businesses are increasingly frequent targets for fraud by competitors, third parties, employees and even a business's own customers. Businesses can and should consider using civil fraud to remedy those injuries.

Practical tips for businesses

Civil fraud is a sprawling, complex subject. But businesses must not be complacent. Outlined below are specific steps every business can take to prevent, mitigate and remedy fraud.

Instil a culture of compliance. Prevention is always more effective than treatment. And the best way to prevent fraud allegations is to create an environment of integrity. That means more than just implementing formal compliance programmes. It also requires executives to lead by example in their day to day conduct. Regular training on how to spot fraud can help too by equipping employees on how to identify external threats and by showing the business takes fraud seriously.

Act quickly. Whether investigating, defending against or contemplating bringing a civil fraud case, time is of the essence. Some civil fraud causes of action have statutes of limitations that begin as soon as a business knew or should have known of its injury. Businesses considering bringing civil fraud cases therefore must act quickly. So must businesses that are facing fraud allegations. By promptly investigating allegations, preserving documents and notifying insurers as relevant, businesses can make more informed decisions on how to proceed. Understanding the full factual and legal picture makes it easier to resolve a dispute through pre-litigation mediation, potentially saving time and money.

Look out for jurisdictional quirks. Fraud law is anything but uniform. Jurisdictions often have their own quirks. Failing to account for those jurisdiction-specific requirements can be dispositive. Many jurisdictions, for example, prevent plaintiffs from

pursuing both breach of contract and fraud claims unless each is supported by a separate injury. Some jurisdictions require fraud claims to be verified, meaning that the client must sign a statement swearing to the allegations' accuracy.

Never forget criminal risk. Every civil fraud case can quickly turn into a criminal case. How a company handles the civil case can either ensure it remains civil or all but guarantee an indictment. For that reason, companies should strongly consider retaining outside counsel with experience with both types of fraud.

Think about damages early. Both plaintiffs and defendants must quickly determine what types of damages are available. Different causes of action authorise different types of damages, such as punitive damages, treble damages or attorneys' fees. Some jurisdictions limit a plaintiff asserting fraud or fraud-related claims to reliance (or 'out of pocket') damages, and do not permit the recovery of lost profits or business opportunities – this can significantly reduce the potential recoveries, with significant implications for both plaintiffs and defendants.

Another hurdle for fraud claims is that a plaintiff asserting fraud often must assert 'loss causation' – that the defendant's fraud actually caused the plaintiff a monetary loss. An accurate damages assessment will influence all future decisions.

Conclusion

Fraud is not going away anytime soon. Businesses must understand and implement effective policies to address it. Doing so is critical not just to mitigate liability but also to remedy fraud against businesses.

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