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# Domestic Asset Tracing and Recovery of Hidden Assets and the Spoils of Financial Crime

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## ARTICLE

# DOMESTIC ASSET TRACING AND RECOVERY OF HIDDEN ASSETS AND THE SPOILS OF FINANCIAL CRIME

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I.	Introduction.....	611
II.	The Role of Legal Counsel and the Asset Recovery Decision.....	613
III.	Conducting Asset Tracing .....	615
	A. Know the Parties Involved.....	616
	B. Social Media.....	617
	C. Occupation of Target.....	619
	D. Address History .....	619
	E. Business Entities .....	620
	F. Financial Institution Records .....	621
	G. Lexis-Nexis Reports .....	621
	H. Tax Returns.....	622

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610	ST. MARY'S LAW JOURNAL	[Vol. 49:609]
	I. Currency Transaction Reports (CTRs).....	622
	J. Court Records .....	622
	K. Uniform Commercial Code (UCC) Filings.....	623
	L. Real Property Records/Tax Liens.....	623
	M. Tying the Data Together .....	623
IV.	Asset Hiding Methods.....	624
	A. Dissolved or Dormant Corporations.....	625
	B. Limited Partnerships (LPs) and Family Limited Partnerships (FLPs).....	625
	C. Shell Companies and Shelf Companies .....	627
	D. Using LLCs As Shell Companies.....	631
	E. Trusts .....	632
	F. Collectibles.....	636
	G. Cash Stored at Home .....	636
	H. Prepaid, Stored Value, and Credit Cards.....	636
	I. Sweetheart Lawsuits (or Friendly Liens) .....	637
	J. Assets Placed in a Nominee's Name.....	638
	K. Intellectual Property .....	640
	L. Universal Life Insurance.....	640
	M. Domestic Nonprofits and Foundations .....	641
	N. Overseas or Offshore Accounts or Entities .....	642
	O. Other Techniques .....	642
V.	Asset Freezing .....	644
	A. Provisional Measures.....	646
	B. Prejudgment Writ of Attachment.....	653
	C. Prejudgment Writ of Replevin.....	654
	D. Garnishment.....	655
	E. Lis Pendens.....	657
	F. Temporary Restraining Orders (TROs) and Injunctions .....	658
	G. <i>Mareva by Letter</i> .....	661
VI.	Conclusion .....	663

## I. INTRODUCTION

The rate of recovery of hidden and stolen assets in fraud and divorce cases is very low. In one authoritative study, 58% of fraud victims in 2016 had not recovered any losses, compared with 49% in 2012, with only 12% making a full recovery.<sup>1</sup> With regard to stolen national patrimony, a conservative estimate is that less than 3% have recovered these assets from those who have purloined them.<sup>2</sup> Moreover, victims often recover only a tiny portion of their loss; for example, victims of the Allen Stanford fraud schemes recovered only a few cents on the dollar.<sup>3</sup> Fraud victims have “clamor[ed] to be made whole after losing billions of dollars” in accounting frauds and other scandals.<sup>4</sup> Much can be done to increase the rate of recovery of hidden and stolen assets. Asset identification and location (tracing) and asset freezing are two important techniques that can be utilized to improve asset recovery.

Academics, practitioners, and law enforcement agents have analyzed tens of thousands of fraud cases to comprehend how they work, what risk factors contributed to their occurrence, how they could have been detected, and how they could have been prevented.<sup>5</sup> Also, some research

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1. ASS'N OF CERTIFIED FRAUD EXAMINERS, REPORT TO THE NATIONS ON OCCUPATIONAL FRAUD AND ABUSE 77 (2016), <https://www.ace.com/rtnn2016/docs/2016-report-to-the-nations.pdf> [<https://perma.cc/9EPU-3ABY>] (referring to the recovery rate on all occupational frauds, including corruption, asset misappropriation, and financial statement fraud).

2. See Edward H. Davis, *Transnational Civil Asset Recovery of the Proceeds of Crime and Corruption: A Practical Approach*, in NON-STATE ACTORS IN ASSET RECOVERY 65–66 (Daniel Thelesklaf & Pedro Gomes Pereira eds., 2011) (presenting estimates for recovery of stolen national patrimony globally).

3. Jon Burstein, *Rothstein Investors Expect to Get All Their Money Back*, SUN SENTINEL (July 11, 2013), [http://articles.sun-sentinel.com/2013-07-11/news/fl-scott-rothstein-ponzi-bankruptcy-20130711\\_1\\_scott-rothstein-rothstein-investors-rra](http://articles.sun-sentinel.com/2013-07-11/news/fl-scott-rothstein-ponzi-bankruptcy-20130711_1_scott-rothstein-rothstein-investors-rra) [<https://perma.cc/N657-PQTL>].

4. See Courtney J. Linn, *What Asset Forfeiture Teaches Us About Providing Restitution in Fraud Cases*, 10 J. MONEY LAUNDERING CONTROL 215, 215 (2007) (quoting Ben White & Carrie Johnson, *Investor Paybacks Small and Slow: Distributing Money to Compensate Burned Buyers Requires Complex Calculations*, WASH. POST, May 15, 2004, at E01) (explaining how victims of the Wall Street scandals and other frauds have continually sought to recover billions in losses). A Tax Justice Network USA report from 2012 posits an estimated \$21–32 trillion of stolen and hidden wealth stashed globally. Stephen Lendman, *Trillions Stashed in Tax Havens*, RENSE.COM (Aug. 25, 2012), <http://www.veteranstoday.com/2012/08/25/trillions-stashed-in-tax-havens.com> [<https://perma.cc/NR5T-NP4Q>]. This measure is of financial wealth and does not include things that are difficult to quantify. *Id.*

5. See, e.g., Barbara Apostolou et al., *Horseplay in Dixon: Lessons Learned from the Rita Crundwell Fraud*, 7 J. FORENSIC & INVESTIGATIVE ACCOUNTING 275, 275–86 (2015) (analyzing the Rita Crundwell case). Rita Crundwell was the City Comptroller of Dixon, Illinois, from 1983 to 2012. *Id.* at 275. Crundwell was highly trusted by other municipal officials and the community. *Id.* at 276. In

has been conducted recently on psychological profiles and the characteristics associated with fraud offenders.<sup>6</sup> Less research attention and effort has been devoted to asset tracing, freezing, and other means to help fraud victims recoup losses. “The problem presented by asset concealment has serious repercussions not simply for the victims of primary fraud, but for confidence in the capital markets and the wellbeing of the world’s economy.”<sup>7</sup>

This Article will define the first two steps—asset tracing and asset freezing—of the domestic asset recovery process (offshore asset recovery is much more difficult and complex);<sup>8</sup> outline the factors to consider in deciding whether, where, and how to pursue asset recovery; detail the parties to whom to trace assets; discuss information-gathering techniques; explain places where assets may be hidden; and outline the means to freeze assets once located. The first two steps of the asset recovery process are the most significant as the remaining steps cannot occur without them.

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1991, Crundwell opened a fraudulent personal bank account into which she deposited embezzled municipal funds. *Id.* at 278. She created fictitious capital projects and fabricated 179 fake invoices for those projects. *Id.* She wrote checks from the fictitious account for personal expenses in excess of \$29 million from 2006 to 2012. *Id.* “[T]he total embezzlement exceeded \$53.7 million.” *Id.* at 279. Crundwell presumably used most of the funds to support her equestrian activities. *Id.* at 276. The City of Dixon lacked a segregation of duties and the fraud was discovered by accident. *Id.* at 283. See generally Johan Perols, *Financial Statement Fraud Detection: An Analysis of Statistical and Machine Learning Algorithms*, 30 AUDITING: J. PRAC. & THEORY 19 (2011) (presenting a statistical comparison of popular statistical and machine learning models used to detect financial statement fraud); Chad Simon, *Individual Auditors’ Identification of Relevant Fraud Schemes*, 31 AUDITING: J. PRAC. & THEORY 1 (2012) (discovering greater chances of success in identifying fraud schemes carried out by management, where auditors consider information in relation to client management’s goals).

6. See Eric N. Johnson et al., *Auditor Perceptions of Client Narcissism as a Fraud Attitude Risk Factor*, 32 AUDITING: J. PRAC. & THEORY 203, 203–04 (2013) (determining observable traits of narcissism have a positive correlation with increased fraud-attitude risk assessments of auditors); see also Gerhard Blickle et al., *Some Personality Correlates of Business White-Collar Crime*, 55 APPLIED PSYCHOL.: INT’L REV. 220, 221 (2006) (analyzing the correlation between personality and white-collar crime).

7. Martin S. Kenney, *Serious Fraud*, in ASSET TRACING & RECOVERY: THE FRAUDNET WORLD COMPENDIUM 19 (Bernd H. Klose ed., 2009). Taxes are rarely paid on these concealed assets, preventing large amounts of wealth from ever entering circulation into the bona fide global economy. See *id.* (“Assets concealed are assets upon which taxes are only rarely paid. Wealth concealed is effectively out of legitimate circulation.”).

8. The stolen or hidden asset recovery process involves five steps: (1) identifying and locating hidden and stolen assets, (2) securing or freezing the assets, (3) pursuing court processes, (4) enforcing orders, and (5) returning assets. See JEAN-PIERRE BRUN ET AL., ASSET RECOVERY HANDBOOK: A GUIDE FOR PRACTITIONERS 6 fig.1.1 (2011) (depicting the order of events in a typical asset recovery process).

Section II discusses the important role of legal counsel and the decision whether to proceed with the asset recovery process. Section III discusses techniques for asset tracing and Section IV discusses common ways assets are hidden. Section V describes methods for asset freezing. Section VI concludes the paper.

## II. THE ROLE OF LEGAL COUNSEL AND THE ASSET RECOVERY DECISION

An asset recovery effort typically starts when a victim of fraud or other unethical scheme requests that an attorney recover his or her assets (or their monetary value). If the lawyer considers the case worth pursuing, he or she often hires forensic accountants (FAs) for their expertise in identifying and locating assets in a wide range of circumstances, including multi-jurisdictional (involving different states) situations.<sup>9</sup>

Attorneys handling multi-jurisdictional proceedings must manage and harmonize each of the various proceedings to identify, locate, freeze, and recover concealed assets. In a pre-judgment scenario, multi-jurisdictional efforts or actions to recover concealed assets are usually launched in three waves: (1) pre-litigation investigative activities to identify and preserve confidential records (under gag orders); (2) legal activities to freeze or preserve assets; and (3) principal proceedings to obtain a final judgment capable of enforcement in each jurisdiction (state) where assets have been frozen.<sup>10</sup>

An attorney is a rich source of knowledge and legal advice for FAs. An attorney should ensure FAs do not undertake investigative activities that violate federal, state, local, or international laws. An attorney is also best suited to collect and preserve evidence for ongoing or future legal proceedings. Finally, an attorney is the key person to protect privileges (such as the *Kovel*<sup>11</sup> rule), including those applicable to FAs.

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9. *What Is a Forensic Accountant?*, FCPAS.ORG, <http://www.fcpas.org/about-us/what-is-a-forensic-accountant/> [<https://perma.cc/2V9E-M52F>] (describing a forensic accountant as a “bloodhound” that uses investigative skills to assist in verifying account systems and “recovering proceeds of crime . . . in relation to confiscation proceedings concerning actual or assumed proceeds of crime or money laundering” (quoting Dr. Larry Crumbley ed., J. FORENSIC ACCT.)).

10. Martin S. Kenney, *The Fundamentals of a Civil Asset Recovery Action*, in *ASSET TRACING & RECOVERY: THE FRAUDNET WORLD COMPENDIUM* 115–16 (Bernd H. Klose ed., 2009).

11. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). This landmark case extended the attorney-client privilege to communications between a client and a non-testifying accountant or other third party hired by an attorney to assist in providing legal services. *See id.* at 922 (stating where “an accountant [is] engaged by the lawyer, who is then to interpret [client accounting information] so that the lawyer may better give legal advice” such statements “ought fall within the privilege”).

Before pursuing asset tracing, a number of factors should be considered. First, the victim, attorney, and FA should conduct a cost-benefit analysis of tracing and recovery. The value of the loss should be compared to the estimated cost (including time spent by personnel and/or management) of tracing and securing recovery.<sup>12</sup> If it would cost more to achieve asset recovery than the value of the hidden or stolen assets, the victim might decide to forego tracing and recovery. Second, the victim and attorney should determine the impact of any available insurance coverage.<sup>13</sup> Third, the client needs to assess the likelihood of a successful recovery given the nature of the assets, their value, and their (presumably concealed) location. Fourth, the victim must understand assets often do not remain in the same place but may be transferred to other domestic or

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12. This estimated cost should be the net cost after-tax. Cf. Kenney, *supra* note 7, at 23 (“The cost of recovery is not a function of the measure of the value of the obligation sought to be enforced.”). Some taxpayers can deduct losses or reduce reported revenues as appropriate. See, e.g., John C. Zimmerman, *Deducting Losses for Defrauded Investors*, J. ACCOUNTANCY (June 18, 2009), <https://www.journalofaccountancy.com/news/2009/jun/defraudedinvestors.html> [<https://perma.cc/8JQ6-CY6U>] (“[T]heft losses are deductible in the year of discovery, not in the year the theft occurs[.]” but only if there is not “a reasonable prospect for discovery”). As Martin Kenney explains:

The recovery of concealed assets involves the need to manage risk. The process requires the investment of substantial financial and human capital. The risk is a function of the degree of complexity of concealment and how many layers of legal relationships and jurisdictions [i.e., states] are interposed between the *corpus* of value taken and the *corpus* concealed.

Kenney, *supra* note 7, at 23.

13. Business property insurance may not protect against the theft of cash and securities; however, a separate commercial crime policy typically will cover those types of losses. See Marianne Bonner, *Insuring Money and Securities*, BALANCE (Oct. 9, 2017), <https://www.thebalance.com/insuring-money-and-securities-462342> [<https://perma.cc/L75P-MWQN>] (illustrating how commercial property policies do not always protect against theft of cash or securities). Accordingly, insurance is of minimal value in collecting on a civil fraud judgment. Liability insurance is often unavailable to indemnify a defendant against liability for fraud. See, e.g., *What Does General Liability Insurance Cover?*, INSUREON, <https://www.insureon.com/products/general-liability-insurance#what-does-general-liability-insurance-cover> (indicating fraud is not covered by liability insurance) [<https://perma.cc/KRC4-DXHR>]. Director’s and officer’s “errors and omissions coverage” often excludes coverage for fraudulent conduct. See Fang Liu, *Applying the Fraud-Exclusion Provision Under D&O Insurance Policies: “Adjudication” or “In Fact”—Which is Better?*, 17 W. MICH. U. COOLEY J. PRACT. & CLINICAL L. 247, 248 (2016) (stating a common exclusion from director and officer liability insurance is a fraud exclusion for fraudulent acts of an insured). Fidelity bonds may provide some coverage for various kinds of dishonest acts by corporate employees. See Marie Huntington, *What Does Business Insurance Cover?*, CHRON, <http://smallbusiness.chron.com/business-insurance-cover-2950.html> [<https://perma.cc/TW5T-P5B7>] (commenting on fidelity insurance as a way to protect against “unauthorized activities on the part of employees” by “reimburs[ing] the business owner for damages caused by dishonest employees”).

offshore locations.<sup>14</sup> Fifth, because evidence of assets concealed in complex financial transactions may be found in accounting records, the victim should assess the FA's probability of accessing the records.<sup>15</sup>

The client must realize that recovery investigation is an iterative process. A single discovery may open further lines of inquiry or lead to other findings that increase the chances of recovery and consequently increase the cost. For example, if stolen assets have been transferred to an offshore location, they may be more difficult to recover. If the cost of recovery exceeds the value of the hidden assets, the client may decide against asset tracing and recovery.

### III. CONDUCTING ASSET TRACING

Analyzing fraud can be difficult due to sophisticated legal arrangements that can be established by fraudsters.<sup>16</sup> Still, it is essential an investigation provides evidence connecting the fraudster to the illegal activity and hidden/stolen assets.<sup>17</sup> In addition, this evidence must then be gathered and preserved following the protocol of a secure chain of custody.<sup>18</sup> This is important to ensure the evidence is not challenged with respect to admissibility in a civil or criminal proceeding.<sup>19</sup> This section discusses tools and methods that can be used to conduct asset tracing and procure evidence, linking the fraudster to the illegal activity and the hidden/stolen assets.

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14. See, e.g., Phyllis Atkinson, *Introduction*, in *TRACING STOLEN ASSETS: A PRACTITIONER'S HANDBOOK* 19–20 (2009) (speaking to the frequency with which criminal proceeds are transferred through financial centers to avoid identification and tracing by law enforcement).

15. See Martin Korte & Christian Muth, *The Involvement of Private Investigators in Asset Tracing Investigations*, in *TRACING STOLEN ASSETS: A PRACTITIONER'S HANDBOOK* 101–04 (2009) (discussing the role of investigators in recovering assets concealed in complex financial accounting records).

16. See Jeffrey Simser, *Money Laundering and Asset Cloaking Techniques*, 11 *J. MONEY LAUNDERING CONTROL* 15, 15 (2008) (“This paper explores the various typologies and methods used to cloak assets following the placement stage of money laundering.” (footnote omitted)).

17. See Tom Lasich, *The Investigative Process—A Practical Approach*, in *TRACING STOLEN ASSETS: A PRACTITIONER'S HANDBOOK* 49 (2009) (discussing the critical goal of connecting the assets to the illegal activity and a corrupt actor).

18. See Yara Esquivel, *The United Nations Convention Against Corruption and Asset Recovery: The Trail to Repatriation*, in *TRACING STOLEN ASSETS: A PRACTITIONER'S HANDBOOK* 120 (2009) (describing the time-consuming process of maintaining a chain of custody).

19. See Lasich, *supra* note 17, at 49 (“This evidence must be admissible in court proceedings.”).



### A. *Know the Parties Involved*

When analyzing a fraud scheme, it is imperative to gather as much intelligence as possible about potential targets or suspects. A suitable starting point is to interview any and all victims.<sup>20</sup> The following step is to interview other knowledgeable parties.<sup>21</sup> Once suspects have been identified, it is essential to ascertain if there are any related parties, including relatives, friends, neighbors, business associates, and competitors.<sup>22</sup> It may also be necessary to collect information from public records and databases, as it may not be possible to ascertain all relevant parties from interviews alone. Pertinent documentation should also be obtained to facilitate the interviewing process.

During this process, an FA should be careful not to alert a fraud suspect or associate that tracing activities are underway.<sup>23</sup> Because parties related to the target may also be involved in the fraud scheme, it may be advisable to avoid interviewing these parties and instead begin investigating the assets and liabilities of relatives, business associates, nominees, corporations, trusts, LLCs, LLPs, and foundations.<sup>24</sup>

After targets and relevant non-targets have been identified, it is important to begin planning the data retrieval or search process. A solid first measure is to obtain as many basic identifiers for each party as possible.<sup>25</sup> Basic identifiers include a person's full name, birthdate, Social Security number, marital status, dates and places of marriages or divorces, names of relatives, address history, email addresses, and phone numbers.<sup>26</sup> Many records may be accessed with these basic identifiers; for example,

20. Cf. W. STEVE ALBRECHT ET AL., FRAUD EXAMINATION 272 (3d ed. 2009) (explaining the importance of interviews in establishing the elements of a crime, leading to other evidence, and gaining cooperation from interviewees).

21. See *id.* (listing potential interviewees including informants, investigating police officers, coworkers, supervisors, friends, or "anyone who might be helpful in the investigation").

22. See BRUN ET AL., *supra* note 8, at 52–53 (reinforcing the importance of interviewing related parties to corroborate or clarify evidence).

23. See *id.* at 53–55 (explaining the importance of "avoid[ing] the destruction or disappearance of evidence" that might result if a target is tipped off and offering the example of an "account monitoring order" as one method for guarding against this possibility).

24. See *id.* at 52–53 (discussing the possibility of witnesses corroborating their stories before being interviewed or working to hide persons involved in the scheme).

25. See CYNTHIA HETHERINGTON, THE GUIDE TO ONLINE DUE DILIGENCE INVESTIGATIONS: THE PROFESSIONAL APPROACH ON HOW TO USE TRADITIONAL AND SOCIAL MEDIA INVESTIGATIONS 16 (2015) (establishing due diligence investigation as entailing collection of pertinent information on subjects through use of specific identifiers).

26. See, e.g., *id.* (presenting a non-inclusive list of several personal identifiers).

with a date of birth and correctly spelled name, it is possible to obtain driving, criminal, and military records.<sup>27</sup> It is possible to obtain this information from free and fee-based websites.<sup>28</sup>

When checking for records using a target's correct name, an investigator should also try misspellings, variations, aliases, and maiden names.<sup>29</sup> New legal names may be created by divorces, remarriages, changes in child custody, and legal name changes. It can also be helpful to search for relatives' names on websites such as Ancestry<sup>30</sup> and Intelius.<sup>31</sup> Obtaining the names of relatives is important because legal title to hidden/stolen assets may be in the names of the target's children or other family members.<sup>32</sup>

### B. *Social Media*

With the growth of social media, sites such as Facebook,<sup>33</sup> Twitter,<sup>34</sup> and LinkedIn<sup>35</sup> should be analyzed for important information.<sup>36</sup> The

27. MICHAEL SANKEY & CYNTHIA HETHERINGTON, *THE MANUAL TO ONLINE PUBLIC RECORDS: THE RESEARCHER'S TOOL TO ONLINE RESOURCES OF PUBLIC RECORDS AND PUBLIC INFORMATION* 62, 77, 79 (3d ed. 2013).

28. CASE BREAKERS, <https://www.casebreakers.com/> [<https://perma.cc/5EK6-MMPN>]; CRIMINALCHECK.COM, [www.criminalcheck.com/](http://www.criminalcheck.com/) [<https://perma.cc/7BYZ-KN6Y>]; ENFORMION, <https://www.enformion.com/EnformionContent/Default.aspx> [<https://perma.cc/C65T-M87D>]; MUGSHOTS.COM, <https://mugshots.com/> [<https://perma.cc/42XF-H4U4>]; PUBLICDATA.COM, <https://login.publicdata.com/> [<https://perma.cc/VUW7-7LYJ>]; US SEARCH, <https://www.ussearch.com> [<https://perma.cc/7LT4-DXAD>]; see also Nicole Forbes Stowell et al., *Wills, Asset Protection Trusts and Financial Crime*, 9 J. FORENSIC & INVESTIGATIVE ACCT. 585, 589 (2017) (listing more websites for obtaining a target's personal information). Many information sources exist that never make it to the Internet. For example, 32% of U.S. courts do not provide access to case files or the record index online. HETHERINGTON, *supra* note 25, at 41. Hence, some data may have to be hand-collected.

29. See THOMAS GOLDEN ET AL., *A GUIDE TO FORENSIC ACCOUNTING INVESTIGATION* 332 (2006) ("This information should include . . . additional names used by the subject—for instance."); MARY-JO KRANACHER ET AL., *FORENSIC ACCOUNTING AND FRAUD EXAMINATION* 216 (2011) (positing that wives make particularly good havens for hidden assets due to the legitimate history attached to their maiden name).

30. ANCESTRY, <https://www.ancestry.com/> [<https://perma.cc/EWJ6-PHED>].

31. INTELIUS, <https://www.intelius.com> [<https://perma.cc/SY2Q-U6D2>].

32. KRANACHER ET AL., *supra* note 29, at 216.

33. FACEBOOK, <https://www.facebook.com/> [<https://perma.cc/DT3E-YRQ7>].

34. TWITTER, <https://twitter.com/?lang=en> [<https://perma.cc/XB6L-MRC4>].

35. LINKEDIN, <https://www.linkedin.com/> [<https://perma.cc/YBJ9-USS3>].

36. See HETHERINGTON, *supra* note 25, at 22 (indicating the hundreds of millions of online service users make the media "treasure troves full of useful information"). One does not need an account on a social media site to search social media. For example, Queryfeed is a search engine that allows an investigator to access Twitter messages without a Twitter account. QUERYFEED,

question is: how easy is it to gain access to this information? More than one-third of adults on social media sites allow the public to view their profiles and do not hide their information.<sup>37</sup> These sites may also contain information confirming fraud or misrepresentations or impeaching testimony regarding loss, injury, or location of assets through incriminating blogs, photos, or posts.<sup>38</sup> Any information gathered is fair game for the investigator, since there is no expectation of privacy when content is available for public viewing.<sup>39</sup>

Numerous techniques are available for gleaning information from social media sites. One such method, screen scraping, involves copying the data on a target website.<sup>40</sup> Scraping tools include QuickCode,<sup>41</sup> Mozenda,<sup>42</sup> and Outwit.<sup>43</sup> Another valuable tool is the Wayback Machine (WM).<sup>44</sup> Since 1996, the WM has been archiving cached pages of websites onto a large cluster of Linux nodes.<sup>45</sup> The WM, often referred to as an archival index, permits users to see older versions of web pages, going “back in time” to see web pages that were deleted or modified years ago.<sup>46</sup> In conjunction, Adobe Acrobat allows one to copy an entire website to a portable digital format (PDF).<sup>47</sup> Another powerful tool, Jeffrey's Image

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<https://queryfeed.net/> [<https://perma.cc/7CA3-TLBF>]. Similar sources are available for Instagram photos, including Iconosquare and Websta. ICONOSQUARE, <https://pro.iconosquare.com> [<https://perma.cc/TQ8X-QMHH>]; WEBSTA, <https://websta.me> [<https://perma.cc/3JGT-CBPJ>]. *But see* HETHERINGTON, *supra* note 25, at 224 (illustrating how certain useful websites may require a subscription, although even these may be available at public libraries or academic libraries).

37. Stephen P. Laitinen & Hilary J. Loynes, *A New “Must Use” Tool in Litigation?*, FOR DEF., Aug. 2010, at 16, 18.

38. *See* Jacob Parks, *Using Social Networking Site Information in the Courtroom*, FRAUD MAG., Feb. 2011, [www.fraud-magazine.com/article.aspx?id=4294969047](http://www.fraud-magazine.com/article.aspx?id=4294969047) [<https://perma.cc/66YP-J8G4>] (“[Social networking sites] are full of subjects’ information that can be used in legal proceedings—either as direct evidence or as a means to contradict testimonies.”).

39. *Moreno v. Hartford Sentinel, Inc.*, 91 Cal. Rptr. 3d 858, 862–63 (App. 2009).

40. Mark Ward, *Screen Scraping: How to Profit from Your Rival's Data*, BBC NEWS (Sept. 30, 2013), <http://www.bbc.com/news/technology-23988890> [<https://perma.cc/3DZF-D2P4>].

41. QUICKCODE, <https://quickcode.io> [<https://perma.cc/G3Y4-BLDY>].

42. MOZENDA, <https://www.mozenda.com> [<https://perma.cc/ZHW8-2ERH>].

43. OUTWIT, [www.outwit.com](http://www.outwit.com) [<https://perma.cc/BSQ4-24PR>].

44. INTERNET ARCHIVE: WAYBACK MACHINE, [archive.org/web](http://archive.org/web) [<https://perma.cc/SK9E-82DS>].

45. *See id.* (“Explore more than 310 billion web pages saved over time[.]”).

46. *About the Internet Archive*, INTERNET ARCHIVE: WAYBACK MACHINE, <https://archive.org/about/> [<https://perma.cc/6E4U-YML6>].

47. *See generally* ADOBE, <https://www.adobe.com/#> [<https://perma.cc/LAGP-ZN3S>] (providing services to create and manage portable digital formats of online documents on a subscription-based fee schedule).

Metadata Tool, allows one to upload photos and view metadata indicating when and where the photos were taken.<sup>48</sup>

Using social media to uncover stolen/hidden assets or to solve crimes are two possible applications of “big data.” Big data posits the notion that cheaper storage, faster processing, and better algorithms will allow everything to be digitized and “datafied.” Large collections of unfiltered datasets can be used many times in many ways, including predictive analytics for finding fraud.<sup>49</sup> In fraud examination, predictive models exploit patterns found in transactional data to discover anomalies—a symptom of potential fraud.<sup>50</sup>

### C. *Occupation of Target*

In some cases, a target’s occupation may give an investigator a reasonable estimation of the target’s legal income. The present and prior occupation of a target and spouse may suggest potential locations where assets may be hidden. Additionally, occupations of known friends or associates may lead to assets a target is actively trying to conceal using their assistance. It is important an investigator draw reasonable inferences from current and past occupations and associations of a target when trying to ascertain legal income and asset locations.

### D. *Address History*

An address history can provide clues on where to search for assets or funds. An investigator can use address and phone search services online to discover current and former addresses. An investigator should seek not just personal addresses, but also addresses of employers and businesses the target has owned or for which the target has worked. An investigator should also pursue addresses of spouses, children, other relatives, business associates, and close friends.<sup>51</sup> If an investigator possesses a target’s

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48. JEFFERY’S IMAGE METADATA VIEWER, [exif.regex.info/exif.cgi](http://exif.regex.info/exif.cgi) [<https://perma.cc/UM3L-VQPP>].

49. Cf. VIKTOR MAYER-SCHÖNBERGER & KENNETH CUKIER, *BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK, AND THINK* 180–81 (2013) (expounding on government agency consultations with external algorithmists about utilizing metadata).

50. See *id.* at 26–27 (explaining how “detection of credit card fraud works by looking for anomalies” within data as a whole rather than mere samples).

51. See generally RONALD L. MENDELL, *HOW TO DO FINANCIAL ASSET INVESTIGATIONS: A PRACTICAL GUIDE FOR PRIVATE INVESTIGATORS, COLLECTIONS PERSONNEL AND ASSET RECOVERY SPECIALISTS* (4th ed. 2011) (covering processes and tactics for financial asset investigations).

Social Security number, they can employ detective agencies to find past jobs and relatives. Once found, addresses can be used to call or visit persons now living in the target's previous neighborhood, who may provide useful information.

#### E. *Business Entities*

Because business entities can be utilized in the holding or transferring of assets or funds, it is imperative to obtain any information about entities owned by or affiliated with the target. This information includes the following: a business's name and address, its location and date of establishment, its legal nature and characteristics, its tax identification number and registration, its annual revenues, its number of employees, the names of anyone associated with the entity (e.g., owners, members), the products or services provided to customers, and a description of the business. There are multiple ways to get this information including the Yellow Pages,<sup>52</sup> Better Business Bureau,<sup>53</sup> Chambers of Commerce,<sup>54</sup> and Hoovers.<sup>55</sup> Furthermore, checking business credit reports by Dun & Bradstreet,<sup>56</sup> Experian,<sup>57</sup> or Trans Union<sup>58</sup> can be very helpful. Local newspapers may even feature small businesses or their owners.

Data from government agencies can also assist with business asset searches. Websites such as BRB Publications<sup>59</sup> can be valuable resources.<sup>60</sup> Secretary of state databases and county office filings or records may also be useful sources of information.<sup>61</sup> Postal mailing permit information for business post office boxes is subject to request under the Freedom of Information Act.<sup>62</sup>

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52. YELLOWPAGES, <https://www.yellowpages.com/> [<https://perma.cc/Y9EZ-9TW5>].

53. BETTER BUS. BUREAU, <https://www.bbb.org/> [<https://perma.cc/6SHF-2ZQ4>].

54. *See, e.g.*, TEX. CHAMBER COM. EXECUTIVES, <http://www.tcce.org/memberbusiness-directory.html> [<https://perma.cc/4FU5-8ZL8>] (networking individual chambers of commerce throughout the State of Texas).

55. D&B HOOVERS, [www.hoovers.com/](http://www.hoovers.com/) [<http://perma.cc/K2XJ-3U53>].

56. DUN & BRADSTREET, [www.dnb.com/](http://www.dnb.com/) [<https://perma.cc/H3YD-LE33>].

57. EXPERIAN, <https://www.experian.com/> [<https://perma.cc/VT9R-QEQU>].

58. TRANSUNION, <https://www.transunion.com/> [<https://perma.cc/WD65-RD9A>].

59. BRB PUBLICATIONS, <https://www.brbpublications.com> [<https://perma.cc/X7EF-4GNF>].

60. *See* HETHERINGTON, *supra* note 25, at 92 (highlighting BRB Publications' offering free searching for business registrations and annual reports).

61. *See, e.g.*, *About the Office*, TEX. SECRETARY ST., <https://www.sos.state.tx.us/about/index.shtml> [<https://perma.cc/3GMS-8KFL>] (“[T]he Secretary of State . . . provides a repository for official and business and commercial records required to be filed with the Office.”).

62. Freedom of Information Act, 5 U.S.C. § 552 (2006); MENDELL, *supra* note 51, at 127.

#### F. *Financial Institution Records*

It is difficult, if not impossible, for a private investigator or FA to obtain a target's records from a financial institution. There are, however, useful provisions in the Gramm-Leach-Bliley Act (GLBA),<sup>63</sup> also known as the Financial Services Modernization Act, regarding privacy. Financial institutions are supposed to give consumers the opportunity to opt out of having their private data shared, though most consumers ignore this choice.<sup>64</sup> If obtained, financial records may permit an investigator to analyze flows of funds as a means to identify and locate hidden assets.

#### G. *Lexis-Nexis Reports*

Just as a driver's license number may open the door to vehicle registration records, similar information is available, for a fee, via the commercial version of Lexis-Nexis,<sup>65</sup> for asset ownership. Lexis generates search-based reports for real property, vehicles, aircraft, and watercraft compiled from publicly available sources and proprietary records.<sup>66</sup>

63. Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801–27 (2012).

64. *Id.* § 6802(b). Under the GLBA, the Financial Privacy Rule, which governs the collection and dissemination of consumers' personal financial information by financial institutions, requires consumers be provided with a privacy notice when the consumer relationship is established. *Id.* §§ 6802(a), 6803(a). If a consumer does not opt out, various types of consumer information can be shared, such as whether a consumer has a safe deposit box. *See id.* § 6802(b)(1) (providing a financial institution may disclose nonpublic personal information so long as the consumer was given the opportunity to opt out and an explanation on how to do so).

65. LEXISNEXIS, <https://risk.lexisnexis.com/> [<https://perma.cc/QN23-G2CX>].

66. *See Collections and Recovery*, LEXISNEXIS, <https://risk.lexisnexis.com/collections-and-recovery> [<https://perma.cc/RFZ4-AAAM>] (claiming to offer “[t]he most robust debt recovery solutions” for locating people and assets). This information can also be found through publicly available sources. For example, state departments of highway safety and motor vehicles typically allow for vehicle searches by VIN number. *See, e.g.*, FLA. DEPT HIGHWAY SAFETY & MOTOR VEHICLES, <https://services.flhsmv.gov/MVCheckWeb/> [<https://perma.cc/5D3K-AF28>] (maintaining title database for online searches). Boat ownership databases are usually housed by a state's boating regulation authority as well as the Coast Guard. *See, e.g., Vessel Documentation Search by Name*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://www.st.nmfs.noaa.gov/st1/CoastGuard/VesselByName.html> [<https://perma.cc/9TJH-9AH9>] (“You can access our copy of the United States Coast Guard's (USCG) vessel data base and extract vessel characteristic, documentation, and ownership data . . .”). Additionally, aircraft title searches can be done by owner name, N-number, serial number, and other criteria on a national FAA database. *See FAA Registry: N-Number Inquiry*, FED. AVIATION ADMIN., [http://registry.faa.gov/aircraftinquiry/NNum\\_Inquiry.aspx](http://registry.faa.gov/aircraftinquiry/NNum_Inquiry.aspx) [<https://perma.cc/6C97-BWC8>] (indexing aircraft by N-number and allowing online searches for public use); *see also* MENDELL, *supra* note 51, at 52–60, 209 (compiling several techniques and public search directories for asset detection purposes).

## H. *Tax Returns*

It is almost impossible for a private investigator to obtain tax returns on a person or business, except from a spouse, ex-spouse, or jilted lover. Business partners or associates might provide a copy of a business' tax return if they signed said return. In some cases, tax returns are also available to shareholders.<sup>67</sup> Access may also be possible in the case of bankruptcy estates,<sup>68</sup> debtors' tax returns to the bankruptcy trustee,<sup>69</sup> and beneficiaries of trusts.<sup>70</sup>

## I. *Currency Transaction Reports (CTRs)*

A CTR is a report financial institutions must file with the Financial Crimes Enforcement Network (FinCEN) for each deposit, withdrawal, exchange, or other payment or transfer by, through, or to the financial institution involving more than \$10,000 in currency.<sup>71</sup> When a transaction involving more than \$10,000 in cash is processed, most financial institutions have a system that automatically creates a CTR electronically.<sup>72</sup> CTRs are potential gold mines of information for fraud victims, their attorneys, and investigators; the reports typically include names of individuals or businesses conducting the transaction, and a description of said transaction.<sup>73</sup>

## J. *Court Records*

An investigator or attorney can use the Public Access to Court Electronic Records (PACER) database<sup>74</sup> to search federal appellate, district, and bankruptcy court records, as well as other public records. In bankruptcy cases, an attorney or investigator may consider using Rule 2004 of the Federal Rules of Bankruptcy Procedure (FRBP), which states that

67. *See*, 26 U.S.C. § 6103(e) (2012) (allowing disclosure of tax return information under some circumstances when there is a material interest in the filed tax return).

68. *Id.* § 6103(e)(5).

69. *Id.* § 6103(e)(4).

70. *Id.* § 6103(e)(1)(F)(ii).

71. *See* 31 U.S.C. § 5313(a) (2006) (providing the Secretary of Treasury may prescribe amounts and denominations for which reporting the transaction is required).

72. *E.g.*, *Solution: Currency Transaction Reporting (CTR)*, VERAFIN, <https://verafin.com/solution/ctrs/> [<https://perma.cc/X56L-6VFG>] (“Verafin scans all transactions in your core system to fully automate your CTR creation and submission process.”).

73. Alex C. Lakatos & Mark G. Hanchet, *Confidentiality of Suspicious Activity Reports*, 124 BANKING L.J. 794, 794–95 (2007).

74. PACER, <https://www.pacer.gov/> [<https://perma.cc/5EZ6-38AA>].

“[o]n motion of any party in interest, the court may order the examination of any entity.”<sup>75</sup> The scope of a Rule 2004 motion is quite broad, though a party’s motion must show sufficient cause.<sup>76</sup> In certain bankruptcy cases, Rule 2004 can be a powerful tool in locating hidden assets.

#### K. *Uniform Commercial Code (UCC) Filings*

UCC filings are financing statements (UCC-1) that record and protect a secured party’s interest in collateral offered by a debtor when securing a loan.<sup>77</sup> UCC filings typically include the name and address of any lender, the lien date, a description of the property, and the names of the persons signing the form.<sup>78</sup> Therefore, these filings can help an investigator determine the assets and liabilities of a target and perhaps when the assets were purchased. These filings can be found in the offices of county clerks and secretaries of state, as well as in online databases such as Lexis-Nexis.<sup>79</sup>

#### L. *Real Property Records/Tax Liens*

Real property records (grantor/grantee records) in counties where a target is suspected of having real estate should be searched using names of the target and their spouse (including maiden names and former married names), children, and other relatives.<sup>80</sup> In addition, local and state tax liens (some on real estate) may be found at county clerks’ offices while federal tax liens may be located at the offices of both the county clerk and secretary of state.<sup>81</sup>

#### M. *Tying the Data Together*

Once an investigator identifies as many parties (targets, suspects, and those related to them) to a fraud or hidden assets scheme as feasible, link analysis should be used. Link analysis is a data technique used to evaluate relationships or connections between nodes, such as organizations, people,

75. FED. R. BANKR. P. 2004(a).

76. *See id.* 2004(d) (“The court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates[.]”).

77. *See* MENDELL, *supra* note 51, at 53 (“The UCC filing helps to determine the outstanding liabilities of an individual and the secured assets that they may possess.”).

78. *Id.*

79. *Id.* at 54.

80. *See, e.g., id.* at 55–56 (discussing tips for conducting searches using real estate records).

81. *Id.* at 54.



and transactions.<sup>82</sup> The first step is to integrate myriad bits of data, “such as names of individuals and companies, addresses, phone numbers, birthdates, Internet domains, bank account data etc.,” compiled into a flowchart.<sup>83</sup> Link analysis can be performed to trace various assets to individuals and businesses trying to hide their ownership and identify links between entities and individuals.<sup>84</sup> Sentinel Visualizer is a software link analysis product used by law enforcement and fraud investigators.<sup>85</sup>

#### IV. ASSET HIDING METHODS

Assets are hidden for many reasons (some legitimate), but often to keep them out of the hands of creditors, fraud victims, or soon-to-be ex-spouses. Many asset hiders display cleverness and resourcefulness in where and how they hide funds. Asset hiding is facilitated through various methods of financial secrecy, such as domestic and offshore trusts, foundations, shell corporations, shelf corporations, international business companies (IBCs), and limited liability companies (LLCs).<sup>86</sup> In 2009, the Tax Justice Network (TJN) launched an online database that shows how the legal, judicial, and regulatory details of different jurisdictions contribute to the environment of financial secrecy.<sup>87</sup> A global ranking of financial secrecy, called the Financial Secrecy Index (FSI),<sup>88</sup> draws attention to the various aspects of financial secrecy noted above. The FSI reveals that traditional stereotypes of tax havens are inaccurate. The world's most significant providers of financial secrecy—the places harboring the most looted assets—are not small, palm-fringed islands, but instead include places such as Switzerland, the United States, Hong Kong, Singapore,

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82. Cf. Korte & Muth, *supra* note 15, at 103 (describing how link analysis involves analyzing pieces of information linked together in a “data web”).

83. *Id.*

84. *Id.*

85. SENTINEL VISUALIZER, [www.sentinelvisualizer.com](http://www.sentinelvisualizer.com) [<https://perma.cc/2AEK-B7HF>]. GenoPro 2016 is a related product that produces genograms; pictorial displays of personal relationships among parties. GENOPRO, <https://www.genopro.com> [<https://perma.cc/SW86-V5QB>].

86. See generally John Christensen, *The Hidden Trillions: Secrecy, Corruption, and the Offshore Interface*, 57 CRIME L. & SOC. CHANGE 325 (2012) (noting the various legal mechanisms in place that facilitate asset hiding).

87. See *id.* at 326 (“The index aims to highlight how financial market opaqueness encourages corrupt activities.”).

88. FIN. SECRECY INDEX, <https://www.financialsecrecyindex.com/> [<https://perma.cc/WZ8P-9TZ9>].

Germany, and Japan.<sup>89</sup> In the 2018 FSI, the United States ranked second in terms of providing financial secrecy.<sup>90</sup> This section discusses the numerous methods employed to hide assets.

#### A. *Dissolved or Dormant Corporations*

If the name of a corporate entity appears on a secretary of state's dead or dissolved list, the assets acquired while the corporation was active may have survived dissolution and be found under a dissolved entity's name. The legal status of a company is important because it provides circumstantial evidence that the business was not created as an operating company, but rather to insulate its officers and directors from liability. Fraudsters use these corporations to hide assets such as cash, real estate, vehicles, and aircrafts, hopeful that forensic accountants, attorneys, and investigators would not search for assets in a dissolved corporation. For example, a fraudster could claim to be insolvent yet buy real estate at auctions for cash under the name of a dissolved corporation in which he owned an interest or served as an officer or director.

#### B. *Limited Partnerships (LPs) and Family Limited Partnerships (FLPs)*

LPs and FLPs are superb places to hide assets.<sup>91</sup> In a typical scheme involving an LP, the fraudster (the general partner) provides trusted associates, friends, or family members assets to invest in the LP. These "investors" become limited partners with no liability for the business's debts and do not take an active role in its operation.<sup>92</sup> Another type of

89. *Financial Secrecy Index—2018 Results*, FIN. SECRECY INDEX, <https://www.financialsecrecyindex.com/introduction/fsi-2018-results> [https://perma.cc/2TPL-DR6F].

90. *Id.*

91. In some cases, conveyances to LPs can be set aside by a court. *See, e.g., Cox v. Hughes*, 781 So. 2d 197, 201 (Ala. 2000) (stating creditors may seek to set aside fraudulent transfers on the basis of actual or constructive fraud). Some states, however, have strict statutes of limitation. *See, e.g., In re Cochener*, 360 B.R. 542, 583 (Bankr. S.D. Tex. 2007) (recognizing Texas's four-year statute of limitations on filing fraudulent conveyance actions). In some cases, the time limit begins to run on a "knew" or "should have known" basis. *See, e.g., id.* (applying the knew-or-should-have-known standard).

92. *See* REVISED UNIF. LTD. P'SHIP ACT § 303(a) (1985) ("[A] limited partner is not liable for the obligations of a limited partnership unless he [or she] . . . participates in the control of the business."). Note, however, limited partner liability varies by jurisdiction. While a limited partner generally does not participate in the management of business operations, such participation will not impose liability for the obligations of the LP in states that enacted the 2001 version of the Unified Limited Partnership Act. UNIF. LTD. P'SHIP ACT § 303 (2001) ("A limited partner is not personally liable . . . even if the limited partner participates in the management and control of the limited

scheme involving an LP may occur where a fraudster conveys assets to an LP of which the fraudster is the sole partner, and then transfers the partnership interest to a trust of which the fraudster is sole trustee and beneficiary.

In an attempt to hide assets, an FLP might be arranged in which a married couple contributes all of their assets to the FLP.<sup>93</sup> In this structure, each spouse retains a 1% general partnership interest and 49% limited partnership interest.<sup>94</sup> General partners in an FLP have unlimited liability for the partnership's debts and obligations.<sup>95</sup> However, using this arrangement subjects only 2% of a couple's assets to unlimited liability.<sup>96</sup> If an FLP is structured correctly, creditors cannot directly reach the FLP assets, but are instead restricted to obtaining a charging order, which gives the creditor the right to receive any distributions made to the partner.<sup>97</sup> The creditor cannot force the FLP to make distributions to the partner.<sup>98</sup> There have been a few cases in which a court has ruled a partner's interest in an FLP can be foreclosed upon by a creditor.

An example of an unsuccessful scheme to hide assets using an FLP is found in *Firmani v. Firmani*.<sup>99</sup> In this case, the ex-husband received the house in a divorce in exchange for a promise to pay his ex-wife.<sup>100</sup> Shortly before final payment was due, the ex-husband transferred the residence to a family limited partnership controlled by him.<sup>101</sup> The limited partnership agreement gave Mr. Firmani a 1% interest as the general partner and a 94% interest as a limited partner.<sup>102</sup> Mr. Firmani's second wife, three children, and stepson owned the remaining 5% as limited partners in equal proportions.<sup>103</sup> The ex-wife sued to set aside the

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partnership." Practitioners are encouraged to check state statutes and case law concerning limited partnership liability in the pertinent jurisdiction. See, e.g., *Goodman v. Epstein*, 582 F.2d 388, 408 (7th Cir. 1978) (declaring the partnership act in effect at that time in Illinois precluded a limited partner from participating in the management of the LP).

93. ASS'N OF CERTIFIED FRAUD EXAMINERS, MONEY LAUNDERING: TRACING ILLICIT FUNDS 41 (2009).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Firmani v. Firmani*, 752 A.2d 854 (N.J. Super. Ct. App. Div. 2000).

100. *Id.* at 855.

101. *Id.*

102. *Id.*

103. *Id.*

conveyance claiming it was a fraudulent transfer.<sup>104</sup> Agreeing with the ex-wife, a New Jersey appellate court stated the conveyance had five of the eleven “badges of fraud” listed in the New Jersey fraudulent conveyance statute,<sup>105</sup> and the judgment vacating the property conveyance was upheld.<sup>106</sup>

### C. *Shell Companies and Shelf Companies*

Asset hiders may form various types of domestic and foreign entities such as domestic limited liability companies (LLCs), trusts, limited liability

104. *Id.* at 856.

105. N.J. REV. STAT. § 25:2-26 (2013). “N.J.S.A. 25:2-26 sets forth a non-exhaustive list of eleven factors, referred to as ‘badges of fraud,’ that a court may consider in determining whether a party has established an actual intent to hinder, delay, or defraud . . .” *Firmani*, 752 A.2d at 856. The appellate court stated there was no specific number of factors that must be found before finding a transaction is fraudulent. *Id.* at 857. However, where several badges of fraud accompany one transaction, a strong inference of fraud arises. *See id.* (declaring a “confluence of several [factors] in one transaction generally provides conclusive evidence of an actual intent to defraud”). The eleven badges of fraud are as follows:

- a. The transfer or obligation was to an insider;
- b. The debtor retained possession or control of the property transferred after the transfer;
- c. The transfer or obligation was disclosed or concealed;
- d. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- e. The transfer was of substantially all the debtor’s assets;
- f. The debtor absconded;
- g. The debtor removed or concealed assets;
- h. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- i. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- j. The transfer occurred shortly before or shortly after a substantial debt was incurred; and
- k. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

N.J. REV. STAT. § 25:2-26. Although these eleven badges of fraud come from a fraudulent conveyance statute, many could be applied to a fraud or hidden asset situation. In many of the badges listed, substituting the word “fraudster” for “debtor” makes this reasoning apparent.

106. *Firmani*, 752 A.2d at 859; *see also, e.g.*, *Crocker Nat’l Bank v. Perroton*, 255 Cal. Rptr. 794, 799 (Ct. App. 1989) (affirming an order for sale of a limited partner’s interest to satisfy a judgment creditor notwithstanding absence of fraud and holding “the partnership agreements could not divest the district court of its powers provided by statute to charge and sell an interest of a partner in a [limited] partnership” (quoting *Tupper v. Kroc*, 494 P.2d 1275, 1280 (Nev. 1972))).

partnerships (LLPs), foreign LLCs, international business companies (IBCs), and foundations to hold legal title to stolen or hidden assets. After an entity has been formed, asset hidiers can open and fund bank accounts in the name of the entity.

Criminals can use shell companies to commit crimes involving corruption, securities and financial fraud, money laundering, and tax evasion.<sup>107</sup> One example of the abuse of a shell corporation can be found in *United States v. Lake*.<sup>108</sup> Larry Lake operated VIP Finance, a car title loan business in Dallas.<sup>109</sup> In addition, he also owned Cash Auto Sales, an entity that managed “auto club” membership services for VIP Finance, and a drugstore, Grapevine Drug Mart.<sup>110</sup> On November 17, 2004, Lake filed for Chapter 13 bankruptcy while having multiple outstanding money judgments against him.<sup>111</sup> Then, prior to filing, Lake transferred \$2,763,000 to an E\*TRADE account in his and his wife’s name.<sup>112</sup> He then purchased a cashier’s check in the amount of \$348,000 made out to Air I.Q., a shell company exclusively in his wife’s name.<sup>113</sup> Because Lake failed to disclose the transactions during the bankruptcy proceedings, he was charged with bankruptcy fraud.<sup>114</sup> When searching Lake’s home, law enforcement officers found \$5,965,057 in cash and business records from Lake’s drugstore that post-dated Lake’s lies to his accountant claiming he had sold the business.<sup>115</sup>

*United States v. Beecroft*<sup>116</sup> is another case involving the use of shell corporations. From 2003 to 2008, Melissa Beecroft participated in a residential mortgage fraud scheme involving millions of dollars.<sup>117</sup> Beecroft and her co-conspirators recruited and paid straw purchasers (purchasers buying homes on behalf of undisclosed persons with no intent to retain the properties) to purchase homes at markedly inflated prices.<sup>118</sup>

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107. Dean Kalant, *Who's in Charge Here? Requiring More Transparency in Corporate America: Advancements in Beneficial Ownership for Privately Held Companies*, 42 J. MARSHALL L. REV. 1049, 1053–54 (2009).

108. *United States v. Lake*, 571 Fed. App'x 303 (5th Cir. 2014).

109. *Id.* at 305.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *United States v. Beecroft*, 825 F.3d 991 (9th Cir. 2016).

117. *Id.* at 994.

118. *Id.*

Once the loans were funded, they persuaded title and escrow companies to transfer the excess funds to shell corporations owned by the fraudster conspirators with the pretext of making repairs and improvements to the properties.<sup>119</sup> After each sale, straw purchasers would transfer title to the fraudsters' shell corporations.<sup>120</sup> "Altogether the scheme involved more than 400 straw-buyer transactions and 227 properties purchased for more than \$100 million."<sup>121</sup> Subsequently, the vast majority of these loans went into default.<sup>122</sup>

Shell companies are typically used to move assets, as the shell's name conceals the identity of the person or persons who has or have control over transactions.<sup>123</sup> Accordingly, shell bank accounts play an important role in money laundering schemes because they can be used to receive deposits and transfer funds. They are "the financial and deception vehicle of choice for some of the most corrupt, dangerous and ruthless individuals and entities in the world" such as weapons dealers, drug dealers, corrupt politicians, terrorists, and cybercriminals.<sup>124</sup>

In 2014, Hewlett-Packard A.O. (HP Russia) and other subsidiaries agreed to pay more than \$100 million in penalties for felony violations of the Foreign Corrupt Practices Act (FCPA).<sup>125</sup> According to the Russian HP executives' plea bargain, they created a secret slush fund to bribe officials within the Russian government.<sup>126</sup> Using an intricate web of

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. See Jason Sharman, *Shell Companies and Asset Recovery: Piercing the Corporate Veil*, in EMERGING TRENDS IN ASSET RECOVERY 67–69 (Gretta Fenner Zinkernagel et al. eds., 2013) (explaining how shell companies are used to separate legal personalities thus "obscure[ing] the name of the real person or people in control").

124. Ryan C. Hubbs, *Shell Games: Investigating Shell Companies and Understanding Their Roles in International Fraud*, FRAUD MAG., July/Aug. 2014, [www.fraud-magazine.com/article.aspx?id=4294983054](http://www.fraud-magazine.com/article.aspx?id=4294983054) [<https://perma.cc/2RD6-DKUE>].

125. Office of Pub. Affairs, *Hewlett-Packard Russia Pleads Guilty to and Sentenced for Bribery of Russian Government Officials*, U.S. DEP'T JUST. (Sept. 11, 2014) [hereinafter *HP Russia Pleads Guilty*], <https://www.justice.gov/opa/pr/hewlett-packard-russia-pleads-guilty-and-sentenced-bribery-russian-government-officials> [<https://perma.cc/Y7DY-AKL8>]; see 15 U.S.C. § 78dd-1 (2012) (codifying the Foreign Corrupt Practices Act); see also Criminal Division, *Foreign Corrupt Practices Act*, U.S. DEP'T JUST., <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act> [<https://perma.cc/PC8K-A9LG>] ("The Foreign Corrupt Practices Act of 1977 . . . was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.").

126. *HP Russia Pleads Guilty*, *supra* note 125.

shell companies and bank accounts to launder money, Hewlett-Packard subsidiaries created a slush fund for bribes.<sup>127</sup> The conspirators used two sets of books to conceal and keep track of corrupt payments.<sup>128</sup> The slush fund proceeds were then used for things such as travel, clothing and jewelry, home furnishings, and luxury vehicles.<sup>129</sup>

“There are literally hundreds of listed shell incorporators on the Internet and around the world.”<sup>130</sup> One example of a prominent incorporator is Wyoming Corporate Services, in Cheyenne, Wyoming.<sup>131</sup> Multiple shell companies created at this location were used to engage in international fraud or otherwise used in criminal activities.<sup>132</sup>

A mere twenty-eight nominee directors have established or are in control of more than 21,000 companies—many of which have been involved with criminal organizations and individuals.<sup>133</sup> This is achieved by the sham directors selling their names and addresses in obscure global locations for use on shell company documents.<sup>134</sup> These companies are frequently registered anonymously in various locations around the world.<sup>135</sup> In early 2014, the International Consortium of Investigative Journalists (ICIJ) published a graphical interface of the incorporation records of shell companies, directors, and addresses that were leaked to them on two shell incorporators.<sup>136</sup> Existing shell companies may also be used to perpetrate white-collar crime.<sup>137</sup>

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127. *See id.* (reporting on the “secret books and sham transactions” used by HP Russia’s subsidiaries “to hide millions of dollars in bribes”).

128. *Id.*

129. *Id.*

130. Hubbs, *supra* note 124.

131. *Id.*

132. Kelly Carr & Brian Grow, *Special Report: A Little House of Secrets on the Great Plains*, REUTERS (June 28, 2011), <https://www.reuters.com/article/us-usa-shell-companies-idUSTRE75R20Z20110628> [<https://perma.cc/QAP3-6ZZL>] (reporting that a Reuters investigation revealed several shell companies created via Wyoming Corporate Services which were subsequently used illegally).

133. *Cf.* James Ball, *Offshore Secrets: How Many Companies Do ‘Sham Directors’ Control?*, GUARDIAN (Nov. 26, 2012), <https://www.theguardian.com/uk/datablog/2012/nov/26/offshore-secrets-companies-sham-directors> [<https://perma.cc/AJ8S-VFWI>] (explaining that while some shell companies serve a legitimate purpose, many are used in sham operations).

134. *Id.*

135. *See id.* (discussing the problem of shell companies in the United Kingdom and how shell companies “are often registered anonymously offshore in the British Virgin Islands . . . Ireland, New Zealand, Belize and the UK itself”).

136. *Offshore Leaks Database*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS [hereinafter *Leaks Database*], <https://offshoreleaks.icij.org/> [<https://perma.cc/6TG5-DC5C>]; *see* Ball, *supra*

Ready-made, already-existing “shelf” corporations that may be used to open bank accounts and transfer funds can easily be purchased in many different countries. All the necessary corporate prerequisites in the appropriate jurisdiction (e.g., British Virgin Islands, Belize, Panama, or Wyoming) are in place at the time of purchase.<sup>138</sup> Shelf corporations (LLCs, IBCs) may even be purchased on the Internet for a few thousand U.S. dollars.<sup>139</sup>

#### D. *Using LLCs As Shell Companies*

An LLC can be used to defeat, or at least delay, the claims of creditors and other claimants.<sup>140</sup> LLCs are subject to abuse because they may be owned and managed anonymously, and transparency-of-ownership requirements vary by state.<sup>141</sup> To further conceal ownership, foreign entities may be used to manage a domestic (U.S.) LLC.<sup>142</sup> Even if a judgment creditor is able to obtain a charging order against a debtor’s interest, the creditor will simply not be able to compel the foreign manager

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note 133 (asserting the Guardian’s thorough investigation led to an extensive but not exhaustive list of companies finding more than twenty offshore companies). The database shows the extent of shell company networks and how many companies, individuals, and nominee directors are linked together. See *Leaks Database, supra* (“Find out who’s behind more than 785,000 offshore companies, foundations and trusts from the Panama Papers, the Offshore Leaks, the Bahamas Leaks and the Paradise Papers investigations.”).

137. E.g., *Shell Companies Helping Criminals Launder Money: Report*, TELESUR (Aug. 5, 2016), <https://www.telesurtv.net/english/news/Shell-Companies-Helping-Criminals-Launder-Money-Report-20160805-0005.html> [<https://perma.cc/ZD6U-KCFE>] (“Mexican organized crime group Los Zetas used shell companies to launder its dirty profits by purchasing racehorses.”).

138. Cf. Debra Cassens Weiss, *Wyoming Home Is a ‘Little Cayman Island’ for Shell Companies*, ABA J. (June 28, 2011, 4:09 PM), [http://www.abajournal.com/news/article/wyoming\\_home\\_is\\_a\\_little\\_cayman\\_island\\_for\\_shell\\_companies](http://www.abajournal.com/news/article/wyoming_home_is_a_little_cayman_island_for_shell_companies) [<https://perma.cc/37JJ-WPMY>] (“[C]ompanies are set up, and then sit on the ‘shelf’ for years. Later they are sold to new owners . . .”).

139. See OFFSHORE COMPANY, <https://www.offshorecompany.com/> [<https://perma.cc/3RS2-C93H>] (providing offshore services and related consultations); see also *Aged Shelf Companies—Corporations and LLCs*, COMPANIES INC., <https://companiesinc.com/shelf-company-llc/> [<https://perma.cc/WPB7-82XZ>] (“[N]ow, you can acquire an existing, older organization rather than a freshly established one. As such, you can get immediate corporate history, in a fast, easy and legal manner.”).

140. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-06-376, COMPANY FORMATIONS: MINIMAL OWNERSHIP INFORMATION IS COLLECTED AND AVAILABLE 1 (2006), <https://www.gao.gov/new.items/d06376.pdf> [<https://perma.cc/UM7R-LWCL>] (reporting shell companies can be used to hide and shield assets from creditors among other illicit purposes).

141. *Id.* at 6–7.

142. Cf. *id.* at 21 (discussing how an “alien affiliate” that is a foreign individual or entity can have ownership or control of a domestic company).



to make a distribution without extended litigation outside the United States.<sup>143</sup>

LLCs may also be established merely to act as shell corporations. A shell corporation has no substantial assets or liabilities. They are easy to form and can be interlocked and layered in many jurisdictions with other shell entities.<sup>144</sup> If they are established in a domestic jurisdiction with no regard for ownership transparency (e.g., Delaware, Nevada, and Wyoming), it can be virtually impossible to identify its beneficial owners.<sup>145</sup>

#### E. *Trusts*

Trusts are another means by which fraudsters and asset hidiers may abuse in attempting to conceal assets. The primary salient characteristic of trusts is that they provide a separation of beneficial and legal ownership.<sup>146</sup> Legal ownership is held by a trustee, who owns and manages assets for the benefit of beneficiaries pursuant to the trust agreement's terms.<sup>147</sup> A settlor or grantor establishing a trust can escape alienation, transfer, or attachment of the beneficiary's trust interest by using a spendthrift trust (also called an asset protection trust), or creating a spendthrift provision in the trust.<sup>148</sup> "When a trust includes a valid spendthrift provision, a beneficiary may not transfer his interest in the trust, and a creditor or assignee of the beneficiary may not reach any interest or distribution from the trust until the beneficiary receives the

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143. See generally Samuel P. Baumgartner, *Understanding the Obstacles to the Recognition and Enforcement of U.S. Judgments Abroad*, 45 N.Y.U. J. INT'L & POL. 965 (2013) (expounding on the complexities of enforcing judgments internationally).

144. See generally "Layering" Limited Liability Companies: Does It Enhance the Liability Shield?, DUNN CARNEY LLP (June 2007), <https://www.dunncarney.com/2007/06/layering-limited-liability-companies-does-it-enhance-the-liability-shield/> [<https://perma.cc/6LM4-9CQL>] ("Over the years[,] many business owners, intending to enhance their companies' liability shield, have created layers of corporations or limited liability companies (LLCs).").

145. See Sharman, *supra* note 123, at 69 (addressing the challenge of locating a shell company's real owner in jurisdictions without a requirement to file the identity of the beneficial owner). Domestic jurisdictions failing to regulate corporate service providers, while leaving company registries as merely passive archives, create a major vulnerability. *Id.* at 72. The United States is foremost among these jurisdictions. *Id.* "US shell companies are used more often in laundering the proceeds of grand corruption than those of any other country." *Id.*

146. See Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L.J. 287, 290 (2002) (depicting the distinction between beneficial ownership and legal ownership).

147. *Id.*

148. *E.g.*, TEX. PROP. CODE ANN. § 112.035 (West 2017) (codifying the use of spendthrift provisions in Texas).

interest or distribution.”<sup>149</sup> In practice, courts deem trusts to be self-settled, and thus not valid spendthrift trusts, if any of the following factors are found to exist: (1) the settlor is the sole beneficiary;<sup>150</sup> (2) the trust was established for the settlor’s own support;<sup>151</sup> (3) the settlor retains general appointment power;<sup>152</sup> or (4) the settlor retains control of the trust’s corpus.<sup>153</sup>

In a majority of jurisdictions, spendthrift trusts may be created by including a spendthrift provision or clause in the trust instrument.<sup>154</sup> The Uniform Trust Code authorizes the use of spendthrift trusts.<sup>155</sup> Most states do not allow settlors who are also beneficiaries to protect their assets or interest from the claims of creditors.<sup>156</sup> These self-settled spendthrift trusts (frequently mischaracterized as “asset protection trusts” due to their purported protection of settlors from creditors) are a “booming business for banks, trust companies, and estate planners, both [in the United States] and abroad. They [are] a multi-billion-dollar-a-year business.”<sup>157</sup> Many

149. *Miller v. Kresser*, 34 So. 3d 172, 175 (Fla. Dist. Ct. App. 2010) (citing FLA. STAT. § 736.0502(3) (2009)).

150. 3 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 15.4.3, at 964–65 (5th ed. 2007).

151. *Id.* at 965–66.

152. *Id.* § 15.4.1, at 956–58.

153. Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*, 47 RUTGERS L. REV. 11, 32 (1994).

154. *See, e.g.*, NEV. REV. STAT. ANN. § 166.050 (West 2017) (“No specific language is necessary for the creation of a spendthrift trust. It is sufficient if by the terms of the writing (construed in the light of this chapter if necessary) the creator manifests an intention to create such a trust.”). The origin of the spendthrift trust is frequently ascribed to *Nichols v. Eaton*. *See Nichols v. Eaton* 91 U.S. 716, 725–26, 730 (1875) (holding the terms of a will gave power of testamentary disposition not subject to assignee control). Although the operative language of the case enabling spendthrift trusts is dictum, state courts followed it in due time and established it as precedent. *See* Edward R. Becker, *In Praise of Footnotes*, 74 WASH. U. L.Q. 1, 6 (1996) (using *Ernst & Ernst v. Hochfelder*, a securities action, as an example of how dicta (here, a footnote) can “play an important role in our common law system by planting the seeds for major developments in legal principles”). One such notable case is *Broadway National Bank v. Adams*. *Broadway Nat’l Bank v. Adams*, 133 Mass. 170 (1882); *see* Kent D. Schenkel, *Exposing the Hocus Pocus of Trusts*, 45 AKRON L. REV. 63, 75 n.48 (2012).

155. UNIF. TRUST CODE § 502 (UNIF. LAW COMM’N 2000) (amended 2010), [http://www.uniformlaws.org/shared/docs/trust\\_code/utc\\_final\\_rev2010.pdf](http://www.uniformlaws.org/shared/docs/trust_code/utc_final_rev2010.pdf) [<https://perma.cc/EVU8-4ZCL>].

156. *See id.* §§ 505(a)(1)–(2) (“[A] revocable trust is subject to claims of the settlor’s creditors.”); *see also* Richard C. Ausness, *The Offshore Asset Protection Trust: A Prudent Financial Planning Device or the Last Refuge of a Scoundrel?*, 45 DUQ. L. REV. 147, 151 (2007) (using as an example a court refusing enforcement of a spendthrift provision in a self-settled trust).

157. Jeffrey A. Morse, *Nevada Self-Settled Spendthrift Trusts or Offshore Trusts?*, NEV. LAW., Mar. 2008, at 16, 16.

offshore promoters entice U.S. citizens with the promise of tax avoidance (distinguished from evasion) and asset protection through the use of trusts.<sup>158</sup> For this reason, trust abuses are similar to abuses of shell corporations—a primary example of which is revealed with the release of the Panama Papers.<sup>159</sup>

In large part, the popularity of these asset protection trusts is based on the increased privacy and autonomy beneficiaries enjoy compared to that provided by traditional business entities. Trusts have no central registries where settlor, beneficiary, and trustee names must be listed, and no registration requirements.<sup>160</sup>

Offshore asset protection trusts (OAPT) are a type of spendthrift trust established in a jurisdiction or nation outside the United States.<sup>161</sup> Contrary to a majority of U.S. jurisdictions, many offshore jurisdictions “recognize ‘self-settled’ spendthrift trusts, that is, trusts which are designed to protect the settlor” from domestic creditors’ claims.<sup>162</sup> “[E]stimates

158. *Id.*

159. “A massive leak of documents” from Mossack Fonseca, a Panamanian law firm, illuminated the “vast, murky world of shell companies, providing an extraordinary look at how the wealthy and powerful conceal their money.” Kevin G. Hall & Marisa Taylor, *Massive Leak Exposes How the Wealthy and Powerful Hide Their Money*, MCCLATCHY DC BUREAU (Apr. 3, 2016, 9:00 AM), <http://www.mcclatchydc.com/news/nation-world/national/article/69729112.html> [https://perma.cc/FHL7-7TVD].

Those exposed in the leak include the prime ministers of Iceland and Pakistan, an alleged bagman for Syrian President Bashar Assad, a close pal of Mexican President Enrique Peña Nieto and companies linked to the family of Chinese President Xi Jinping. Add to those the monarchs of Saudi Arabia and Morocco, enough Middle Eastern royalty to fill a palace, honchos in . . . FIFA that control[] international soccer and 29 billionaires features in Forbes Magazine’s list of the world’s 500 richest people.

....

The documents within the leak also expose how secretive offshore companies at times subvert U.S. foreign policy and mock U.S. regulators. When drug traffickers, money launderers or other crooks control companies, they undermine national security, and the trail of dark money flowing through them strips national treasuries everywhere of tax revenues.

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[P]lenty of criminals are [listed] in the documents, from drug traffickers to . . . fraudsters.

*Id.* Offshore asset protection trusts can be similarly abused and operated as shell companies.

160. Nicole Forbes Stowell et al., *The Use of Wills and Asset Protection Trusts in Fraud and Other Financial Crimes*, 65 DRAKE L. REV. 509, 527 (2017).

161. Ausness, *supra* note 156, at 149.

162. *Id.*

indicate that between \$1 and \$5 trillion [in assets] are located in [OAPTs].”<sup>163</sup> Jurisdictions permitting OAPTs include Anguilla, the Bahamas, Barbados, Belize, the British Virgin Islands, the Cayman Islands, the Cook Islands, Cyprus, Gibraltar, the Isle of Man, Saint Kitts and Nevis, and the Turks and Caicos Islands.<sup>164</sup>

A multitude of factors increase the difficulty of U.S. creditors accessing funds held in OAPTs. First, there is generally no requirement that a foreign jurisdiction recognize or give force or effect to U.S. state or federal court judgments.<sup>165</sup> Despite the ability of a domestic creditor to sue a trust’s settlor in the offshore jurisdiction, such a process is expensive, time-consuming, and burdensome.<sup>166</sup> Most offshore jurisdictions do not permit contingent fees, and local attorneys generally require fees be paid in advance.<sup>167</sup> Offshore jurisdictions frequently require higher standards of

163. Trent Maxwell, Comment, *Domestic Asset Protection Trusts: A Threat to Child Support?*, 2014 BYU L. REV. 477, 482.

164. See *id.* (listing a few of “over sixty foreign jurisdictions” in which trillions have been located in OAPTs).

165. See, e.g., Thomas M. Brinker, Jr. et al., *Demystifying Offshore Trusts: Capitalizing on a Valuable Asset Protection Tool*, J. INT’L TAX’N, Aug. 2004, at 30, 60 (“[M]ost offshore jurisdictions will not recognize the judgments of foreign courts.”). Moreover, money launderers and others are able to avail themselves of the layering and misdirection features of OAPTs. One example of these features is the Second Circuit case, *Brennan*. United States v. Brennan, 395 F.3d 59 (2d Cir. 2005). In this case, the Second Circuit upheld Robert Brennan’s conviction for bankruptcy fraud, based in part on money laundering using OAPTs. *Id.* at 61–62. The defendant owned and operated First Jersey Securities, a brokerage firm trading in penny stocks. *Id.* at 62. Brennan and FSJ were found guilty of securities fraud and ordered to pay or disgorge \$75 million to 500,000 customers. *Id.* (citing SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1456 (2d Cir. 1996)). Subsequently, FSJ and Brennan filed for bankruptcy. *Id.* Before the securities fraud litigation, Brennan created two OAPTs. *Id.* Brennan then agreed to a bankruptcy order freezing the OAPTs’ assets. *Id.* (citing SEC v. Brennan, 230 F.3d 65, 69 (2d Cir. 2000)). Before the end of his trial for securities fraud, Brennan made a third OAPT known as the Cardinal Trust. *Id.* (citing United States v. Brennan, 326 F.3d 176, 180–81 (3d Cir. 2003)). It was funded by \$4 million in bearer bonds. *Id.* Brennan did not disclose Cardinal’s assets in the bankruptcy action. *Id.* (citing *Brennan*, 326 F.3d at 181). Cardinal Trust’s assets grew to \$22 million by mid-1997. *Id.* (citing *Brennan*, 326 F.3d at 194). Brennan used \$12 million worth of assets from the three OAPTs to buy and refurbish the Palm Beach Princess, a gambling boat. *Id.* The Cardinal Trust’s situs was moved twice (via a flee or flight clause) to avoid detection. See *id.* at 63 (citing *Brennan*, 326 F.3d at 181) (adding Brennan “continued to list his interest in the Cardinal Trust as \$0”). Brennan was convicted of money laundering and other offenses and sentenced to over nine years in prison. *Id.* at 62 (citing *Brennan*, 230 F.3d at 68).

166. See Christopher M. Reimer, *International Trust Domestication: Migrating an Offshore Trust to a U.S. Jurisdiction*, 25 QUINNIPIAC PROB. L.J. 170, 179 (2012) (discussing creditors’ reluctance to sue abroad because of unfamiliar and sometimes hostile laws).

167. Susanna C. Brennan, Comment, *Changes in Climate: The Movement of Asset Protection Trusts from International to Domestic Shores and Its Effect on Creditors’ Rights*, 79 OR. L. REV. 755, 768 (2000).

proof (e.g., beyond a reasonable doubt) than that required in U.S. civil cases (i.e., preponderance of the evidence).<sup>168</sup> Further, statutes of limitations in many offshore jurisdictions begin to run at the time the assets were transferred and generally expire within one or two years.<sup>169</sup> Accordingly, the statute of limitations often will have expired by the time offshore assets or trusts are located by an attorney or forensic accountant.<sup>170</sup>

#### F. *Collectibles*

Collectibles (e.g., paintings, sculptures, drawings, etchings, brass works, ceramics, coins, baseball cards, stamps, and rare guns) are good places to hide stolen funds or assets. Collectibles themselves, however, may be hard to conceal: collections may be large, collectors often display their collections, and collectors may buy and sell using public websites (e.g., eBay).<sup>171</sup> A fraudster may also conceal collectibles by lending them to a museum. A fraud victim can report stolen goods and check whether property was stolen by using a site such as Trace.<sup>172</sup>

#### G. *Cash Stored at Home*

Rather than keep money in the banking system, fraudsters often store or hide cash in accessible locations in or near their homes. Cash may be stored in wall or floor safes. Some individuals store large sums of cash in trash bags and hide the bags in an attic, basement, air duct, hollowed-out staircase, or under floorboards. Cash can even be sealed in waterproof containers and buried underground.

#### H. *Prepaid, Stored Value, and Credit Cards*

Building up a significant credit balance on a credit card (some financial institutions have a policy of refunding credit balances after a certain period

168. Henry J. Lischer, Jr., *Professional Responsibility Issues Associated with Asset Protection Trusts*, 39 REAL PROP. PROB. & TR. J. 561, 568–69 (2004).

169. See Marty-Nelson, *supra* note 153, at 61 (stating the limitations period begins to run from when the cause of action accrues “or within one year of the transfer of assets”).

170. Eric Henzy, *Offshore and “Other” Shore Asset Protection Trusts*, 32 VAND. J. TRANSNAT’L L. 739, 741 (1999).

171. EBAY, <https://www.ebay.com> [<https://perma.cc/WF2B-JSUF>].

172. TRACE, <https://www.tracechecker.com> [<https://perma.cc/9T7T-KKMN>] (“Trace is the largest database of property reported stolen to [U.S.] law enforcement agencies.”). Citizens can reduce the chance of buying stolen goods by using this website. The database contains millions of serial numbers of stolen goods recovered by law enforcement agencies. *Id.*

of time) or purchasing prepaid cards are clever ways for fraudsters to hide cash. Prepaid cards consist of gift cards, payroll cards, flexible spending account cards, government benefit cards (e.g., food stamps), insurance claim cards, employee reward cards, travel cards, remittance payment cards, and transportation cards. Because these cards are portable, they can be used almost anywhere in the United States and its territories, and can store large amounts of money; they are excellent ways to hide funds.<sup>173</sup> Various techniques can be used to detect ill-gotten or illegitimate cash stored on prepaid, stored value, or credit cards, including surveillance, interviews, and anomaly detection.<sup>174</sup> But with the growing use of online banking and credit card accounts, printed evidence may not exist without password access or forensic analysis of a subject's laptop/tablet/smartphone.

#### I. *Sweetheart Lawsuits (or Friendly Liens)*

Sometimes an entrepreneur who has incurred substantial debt will have a relative, friend, or trusted associate sue or record a lien for a large sum of money under a pretext.<sup>175</sup> Sham loan documents (such as promissory notes, security agreements or other lien documents) are prepared and then the subject goes into default.<sup>176</sup> A judgment is obtained by the relative, friend, or trusted associate and a significant percentage of the proceeds of the liquidated assets then goes to this “creditor.”<sup>177</sup> Such sweetheart lawsuits can help insulate defendants from other creditors for years. If an investigator suspects a sweetheart lawsuit exists, a full litigation history on

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173. See MENDELL, *supra* note 51, at 109–10 (characterizing prepaid cards as “an excellent haven for hiding funds.”).

174. *Cf id.* at 110 (explaining one such technique involves “[t]rash surveillance for transaction receipts”). Fraudsters tend to exhibit different behavior than legitimate prepaid, stored value and credit cardholders. Financial fraud presents an ideal application for anomaly detection algorithms. Two researchers proposed and tested an advanced algorithm on automated bank teller machines and point-of-sale data that achieved a better detection rate than a standard algorithm. See Shelly Xionan Wu & Wolfgang Banzhaf, *Combating Financial Fraud: A Coevolutionary Anomaly Detection Approach*, 2008 GENETIC AND EVOLUTIONARY COMPUTATION CONF. PROC. 1673, 1678, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.219.6036&rep=rep1&type=pdf> [<https://perma.cc/59DH-ANHB>] (“[The] coevolutionary algorithm outperformed the standard evolutionary algorithm in terms of [detection rate].”).

175. MENDELL, *supra* note 51, at 115.

176. *Id.*

177. *Id.* at 115–16.

the subject or target should be compiled and a detailed search of previous lawsuits performed to look for a pattern of sham loans.<sup>178</sup>

J. *Assets Placed in a Nominee's Name*

Legal title to real estate may be placed in the name of a nominee who may not have been involved in any way in purchasing the property. "A nominee is one who holds bare legal title to property for the benefit of another."<sup>179</sup> Nominee status is determined by the degree to which a party exercises control over an entity and its assets.<sup>180</sup> A nominee can be a relative, friend, or trusted associate who holds legal title to an asset or funds while beneficial ownership (i.e., the use, control and enjoyment of the property) resides in the suspect or target. The use of a nominee illustrates the importance of asset searches using maiden names and names of relatives, friends, and business associates.

Nominees almost invariably have several common characteristics:

1. They are almost always real people, as opposed to just being an alias;
2. They pay inadequate or no consideration;
3. The properties are listed in the nominees' names in anticipation of a lawsuit/liability while the transferor retains control;
4. There exists a close relationship between the transferor and nominee;
5. The transferor enjoys the benefits of the transferred property or funds; and
6. The transferor retains possession of the property.<sup>181</sup>

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178. See *id.* at 116 (advising to investigate beyond lawsuits disclosed in a target's interrogatory responses to account for dishonesty).

179. *Scoville v. United States*, 250 F.3d 1198, 1202 (8th Cir. 2001) (citing *Nominee*, BLACK'S LAW DICTIONARY (7th ed. 1999)).

180. See, e.g., *LiButti v. United States*, 107 F.3d 110, 119 (2d Cir. 1997) (pronouncing ownership of an entity carries a presumption of ownership of its assets).

181. Such characteristics of a nominee are illustrated in *Spotts v. United States*, a Sixth Circuit decision involving a divorce. *Spotts v. United States*, 429 F.3d 248, 253 n.2 (6th Cir. 2005). "Peggy Spotts filed for divorce. Ray Spotts moved out of their home and consulted a divorce attorney who in turn advised Ray to consult a tax attorney concerning his 1994 through 1997 tax returns and the failure to report the funds sent offshore." *Id.* at 250. Ray did not pay reported increased liabilities for 1996 or 1997, amounting to \$375,598. *Id.* In 2002, the IRS filed a nominee tax lien and Peggy

The use of nominees to hide assets is quite common in the United States.<sup>182</sup> For example, in *SEC v. McGinn, Smith & Co.*,<sup>183</sup> Timothy McGinn and David Smith, former owners of an Albany, New York broker-dealer, were sentenced to fifteen years and ten years in federal prison, respectively.<sup>184</sup>

The facts in this case read like a script from a hyperlink cinema—a film genre known for interwoven storylines between multiple characters, plot twists, and a chronology that is not altogether linear. This case includes a cast of characters comprised of individuals whose audacity knows no bounds, and a recurring theme of insatiable greed.<sup>185</sup>

The defendants, McGinn and Smith, were convicted for “conspiracy to commit mail fraud, wire fraud, securities fraud, and filing false tax returns.”<sup>186</sup> The convictions stemmed from a Ponzi scheme that lasted over seven years and caused hundreds of investors to lose well in excess of \$80 million.<sup>187</sup> This is one of those rare cases where investors/fraud victims were able to get their funds returned. On March 30, 2015, a federal judge signed an order providing for the disgorgement of

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Spotts filed a quiet title action to remove the nominee federal tax lien for taxes owed by her former husband. *Id.*

In *United States v. Bell*, the IRS sought foreclosure on a nominee tax lien on real property titled in the name of a corporation. *United States v. Bell*, 27 F. Supp. 2d 1191, 1193 (E.D. Cal. 1998). The IRS contended Stark Management Company was the alter ego or nominee of Glenn and Jeannette Bell for a personal residence and a 30-acre ranch near Modesto, California. *Id.* The federal district court found in favor of the IRS. *Id.* at 1201.

In *Fourth Investment LP v. United States*, real property at issue was transferred by taxpayers Susanne and Don Ballantyne to Leeds and Fourth Investment Trusts, then to Susanne and Don’s children’s trusts through a series of complex transactions involving shell entities. *Fourth Inv. LP v. United States*, 720 F.3d 1058, 1061 (9th Cir. 2013). The Ninth Circuit found the district court properly evaluated nominee status in light of the six-factor test noted in *Spotts*. *Id.* at 1070. Both courts decided that a residence and commercial property in San Diego, California, were held by entities that served as nominees for the taxpayers (who owed the IRS over \$5 million). *Id.* at 1062.

182. Press Release, FBI, Founders of McGinn, Smith & Co., Inc. Sentenced (Aug. 8, 2013), <https://archives.fbi.gov/archives/albany/press-releases/2013/founders-of-mcginn-smith-co-inc.-sentenced> [<https://perma.cc/3RYS-DV8N>].

183. *SEC v. McGinn, Smith & Co.*, 98 F. Supp. 3d 506 (N.D.N.Y. 2015).

184. Press Release, *supra* note 182.

185. *McGinn, Smith & Co.*, 98 F. Supp. 3d at 512 (footnote omitted).

186. Press Release, *supra* note 182.

187. *See McGinn, Smith & Co.*, 98 F. Supp. 3d at 511–16 (recounting the facts of the Ponzi scheme and the assets subsequently purchased with the proceeds); *see also* Press Release, *supra* note 182 (noting “the longstanding personal enrichment plan defrauded 841 victims”).



\$87,433,218 and prejudgment interest of \$11,688,132.<sup>188</sup> A considerable portion of the assets subject to the disgorgement order were found in a stock account at RMR Wealth Management, LLC, in the name of Lynn Smith (wife of David Smith), a checking account (held since 2009 in her name only), assets held in a trust, and assets held by Nancy McGinn (wife of Timothy McGinn).<sup>189</sup>

#### K. *Intellectual Property*

Intellectual property—e.g., patents, trademarks, copyrights, service marks, and trade secrets—may be more valuable than physical or monetary assets. Stolen funds or hidden assets may be tied up in intellectual property. The U.S. Patent and Trademark Office (USPTO)<sup>190</sup> is the ultimate source for locating these assets. The U.S. Copyright Office<sup>191</sup> is the best source for identifying copyright ownership, transfers, publications, and derivative works.<sup>192</sup> European patents can also be checked if an investigator suspects that international intellectual property may hold stolen or hidden assets.<sup>193</sup>

#### L. *Universal Life Insurance*

Universal life insurance requires an initial investment by the insured to establish a fund to pay premiums.<sup>194</sup> Most of the subsequent premium

188. *McGinn, Smith & Co.*, 98 F. Supp. 3d at 529–30.

189. *See id.* at 512 (listing the assets relevant to the SEC's disgorgement request).

190. U.S. PAT. AND TRADEMARK OFF., <https://www.uspto.gov> [<https://perma.cc/7XNS-LCU7>].

191. U.S. COPYRIGHT OFF., <https://www.copyright.gov> [<https://perma.cc/3CRT-VIIX>].

192. *See Public Catalog*, U.S. COPYRIGHT OFF., <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First> [<https://perma.cc/D3NL-ARZS>] (allowing Boolean searches for intellectual property using the copyright catalog); *see also* HETHERINGTON, *supra* note 25, at 192 (“The Certificate of Registration indicates who originally registered the work. But just as important are Assignments which occur when copyright ownership is transferred.”).

193. *See, e.g., Espacenet Patent Search*, ESPACENET, <https://worldwide.espacenet.com> [<https://perma.cc/HJ2M-E4ML>] (providing access to information about inventions, patents, and technical developments around the world from 1836 to present).

194. *See Universal Life Insurance*, INVESTOPEDIA, <https://www.investopedia.com/terms/u/universallife.asp> [<https://perma.cc/VKB4-RKF4>] (describing a universal life insurance policy as remaining in effect so long as the cost of insurance is covered “either through paid premiums or cash value”); *see also* Mila Araujo, *Universal Life Insurance and How to Know if It's the Choice for You*, BALANCE (May 29, 2017), <https://www.thebalance.com/what-you-need-to-know-about-universal-life-insurance-2645831> [<https://perma.cc/4JQ3-WPGD>] (explaining that universal life insurance includes an investment savings option that will grow over time).

payments create cash surrender value.<sup>195</sup> Access to records for universal life policies may require a subpoena, unless supporting documentation (e.g., statements on account) can be obtained through other means.

#### M. *Domestic Nonprofits and Foundations*

Domestically, fraudsters may attempt to hide assets in nonprofits or foundations. Several free and paid resources are geared toward providing information on these entities.<sup>196</sup> If a nonprofit is tax-exempt,<sup>197</sup> it must make its exemption application available for public inspection.<sup>198</sup> A tax-exempt organization must also make available for public inspection and copying its annual return, including Form 990.<sup>199</sup> “[A]n organization [that] does not file [an annual return] as required for three consecutive years . . . automatically loses its tax-exempt status.”<sup>200</sup> Some nonprofits, such as clubs, associations, fraternal societies, trade organizations, and others, may not be tax exempt.<sup>201</sup> Fraudsters may attempt to conceal assets in either type of entity.

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195. See *Whole vs Universal Life Insurance. What Are the Key Similarities and Differences?*, GUARDIAN, <https://www.guardianlife.com/life-insurance/whole-life-vs-universal-life> [https://perma.cc/AM3B-JU4V] (stating a portion of each premium is payment that provides the cash value necessary to keep the policy funded).

196. See GUIDESTAR, <http://www.guidestar.org/Home.aspx> [https://perma.cc/7MBV-F9ZK] (“[T]he world’s largest source of information on nonprofit organizations.”); FOUND. CTR., [foundationcenter.org/about-us](http://foundationcenter.org/about-us) [https://perma.cc/6Z7U-2PDT] (sharing data and information about philanthropy to aid nonprofits in fulfilling their missions); NOZASEARCH, <https://www.nozasearch.com> [https://perma.cc/WH4C-8GUL] (“The world’s largest searchable database of charitable donations.”); see also HETHERINGTON, *supra* note 25, at 108 (listing sites “geared toward find[ing] information on non-profits, foundations, and the wealthy”).

197. See *Exemption Requirements – 501(c)(3) Organizations*, IRS, <https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-section-501-c-3-organizations> [https://perma.cc/3HVD-NAXQ] (prescribing requirements for tax-exempt organizations).

198. See *Exempt Organizations Public Disclosure and Availability Requirements*, IRS, <https://www.irs.gov/charities-non-profits/exempt-organization-public-disclosure-and-availability-requirements> [https://perma.cc/Y3CY-LSKR] (“Tax-exempt organizations must make annual returns and exemption applications filed with the IRS available for public inspection and copying upon request.”).

199. See *Form 990 Resources and Tools*, IRS, <https://www.irs.gov/charities-non-profits/form-990-resources-and-tools> [https://perma.cc/YRR8-T9RV] (mandating that tax-exempt organizations file a Form 990 as part of their annual information return).

200. *Annual Exempt Organization Information Returns*, IRS, <https://www.irs.gov/charities-non-profits/annual-exempt-organization-information-returns> [https://perma.cc/Q6AL-NX9Q].

201. See, e.g., *Fraternal Societies*, IRS, <https://www.irs.gov/charities-non-profits/other-non-profits/fraternal-societies> [https://perma.cc/MP8-KETA] (providing the requirements fraternal beneficiary societies and domestic fraternal societies must meet before qualifying for tax-exempt status).

N. *Overseas or Offshore Accounts or Entities*

Although this Article is focused on domestic asset tracing, some brief mention of offshore asset tracing is appropriate. One can obtain information about other countries and offshore financial institutions from the U.S. Department of Commerce.<sup>202</sup> Another quite valuable resource on offshore financial institutions is World Offshore Banks.<sup>203</sup> Investigative organizations like the National Association of Legal Investigators<sup>204</sup> and World Association of Detectives<sup>205</sup> specialize in searching for assets in offshore jurisdictions.<sup>206</sup>

O. *Other Techniques*

Bank statements usually disclose large purchases of money orders, cashier's checks, traveler's checks, or wire transfers; however, if a target makes these purchases from other sources, surveillance may be necessary (following the advice of counsel). Safe deposit boxes and storage units are almost impossible to access without a court order or the owner's consent.<sup>207</sup> Surveillance may reveal patterns of visits to bank safe deposit

202. See DEP'T COM., <https://www.commerce.gov> [<https://perma.cc/S2PH-7P38>] (maintaining a searchable database of expert reports).

203. WORLD OFFSHORE BANKS, <http://worldoffshorebanks.com/> [<https://perma.cc/S792-9GH8>]. There are legitimate reasons why individuals and businesses can benefit from having offshore international bank accounts; however, these accounts can also be used to hide proceeds from fraud schemes and stolen assets. A partial list of jurisdictions which offer international banking services include "Aruba, Andorra, Anguilla, Antigua and Barbuda, Austria, Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Dubai, Gibraltar, Isle of Man, Jersey, Liechtenstein, Malta, Panama, Singapore, St. Vincent, Switzerland, Turks and Caicos, [and] Vanuatu." *International and Offshore Banks*, WORLD OFFSHORE BANKS, <http://worldoffshorebanks.com/> [<https://perma.cc/S792-9GH8>].

204. NAT'L ASSOC. LEGAL INVESTIGATORS, <http://www.nalionline.org/> [<https://perma.cc/GC77-2A5G>].

205. WORLD ASSOC. DETECTIVES, <http://www.wad.net/> [<https://perma.cc/Y5B6-Q22A>].

206. MENDELL, *supra* note 51, at 114.

207. Under the GLBA, also known as the Financial Services Modernization Act of 1999, various types of information about consumers can be shared. See Gramm-Leach-Bliley Act, 15 U.S.C. § 6802 (2012) (prescribing the requirements a financial institution must satisfy to disclose consumer information to nonaffiliated third parties). There are private services that offer searches for safe deposit boxes. E.g., *Safe Deposit Box Search*, Asset Locator Servs., [http://www.assetlocatorservices.com/safe\\_deposit\\_search/index.html](http://www.assetlocatorservices.com/safe_deposit_search/index.html) [<https://perma.cc/6U4R-NX4J>] ("Search to see if someone has a [s]afe deposit box by state, or nationwide. Find out where a box is located."). The GLBA does contain some fairly important loopholes about providing consumers' personal information, such as those provided to outside firms to market a "financial institution's own products or services" or marketing such products or services jointly with another financial institution. 15 U.S.C. § 6802(b)(2). Due to these loopholes, some firms advertise Fair

boxes or storage units that correlate with a return from foreign travel, attending a collectibles event, or other suspicious activities.

Stolen funds may be parked in various investment vehicles through a stock brokerage account.<sup>208</sup> Surveillance may be required to at least reveal which brokerage firm is being used.<sup>209</sup> In rare cases, an investigator may be fortunate enough to find such statements in the trash. Another popular technique is prepayment of an owner-occupied or second home mortgage. If a copy of the mortgage payment history can be obtained, it may reveal whether the target made a large cash pay down.<sup>210</sup>

Fraudsters, business disputants, divorcing spouses, and others may use ongoing businesses to hide assets. Business owners can conceal cash by skimming it from the business, paying salaries to ghost employees and then voiding checks or direct deposits (e.g., after a divorce), or paying salaries to relatives or close friends for services never rendered and receiving the money back later. Custodial accounts may be created under a child's Social Security number to cloak liquid assets. Assets can then be transferred into various types of retirement plans, pension plans, and profit-sharing plans, which are generally exempt from creditors' claims.<sup>211</sup> Another good place to hide funds is with the IRS. One can overpay their estimated taxes and then refuse a refund, instead applying the amount to the next year's estimated taxes.<sup>212</sup>

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Credit Reporting Act (FCRA)/GLBA-compliant searches for brokerage, retirement, and stock accounts. *E.g.*, BEACON INVESTIGATIVE SOLUTIONS, <http://beaconintgroup.com/investigations-practice/asset-investigations> [<https://perma.cc/5XU6-8SLC>] (touting a success rate of over 80% in locating these types of accounts "in compliance with the [FCRA] and [GLBA] financial privacy laws").

208. *See* Joshua Kennon, *What Is a Brokerage Account?: How Brokerage Accounts Work and the Types of Investments They Can Hold*, BALANCE, <https://www.thebalance.com/what-is-a-brokerage-account-356076> [<https://perma.cc/DMX4-5PFR>] (last updated July 2, 2017) (describing a stock brokerage account as an account into which cash is deposited for purposes of future investments).

209. *See* MENDELL, *supra* note 51, at 109 ("Frequently, identifying the brokerage firm . . . will be the best you can do.").

210. *See id.* at 105 ("The Home Mortgage Paydown is a favorite tactic in states like Texas that have a strong homestead protection in their debt collection laws.").

211. *See, e.g.*, Paul DeLauro, *Creditor Protection in Retirement Accounts*, WEALTH MANAGEMENT.COM (Sept. 5, 2017), <http://www.wealthmanagement.com/retirement-planning/creditor-protection-retirement-accounts> [<https://perma.cc/C52A-X6FS>] (explaining that potential protection from creditor claims "differs depending on whether the account is a qualified retirement plan, a pension plan or an IRA").

212. MENDELL, *supra* note 51, at 115.

## V. ASSET FREEZING

Assets may be identified and located, but confiscation or recovery efforts are of minimal value if no assets are available. In many situations, protective or provisional measures must be taken at an early stage to prevent the target or suspect from moving or dissipating assets. When possible, such measures should secure or freeze assets until the completion of any legal proceedings. Such measures are referred to as *seizure*,<sup>213</sup> *restraint*,<sup>214</sup> *freezing*,<sup>215</sup> or *blocking*,<sup>216</sup> depending on the jurisdiction. For ease of discussion, this Article uses the term *freezing*. Unfortunately, “the American legal system falls short of fully protecting [fraud victims and other] plaintiffs” by failing to provide adequate freezing measures or remedies.<sup>217</sup>

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213. *E.g.*, Kansas *ex rel.* Topeka Police Dep't v. \$895.00 U.S. Currency, 133 P.3d 91, 102 (Kan. 2006) (referencing Kansas's Standard Asset Seizure and Forfeiture Act).

214. *E.g.*, Estate of Lott v. O'Neill, 165 A.3d 1099, 1104 (Vt. 2017) (discussing precedent involving “pretrial asset restraint” authorization).

215. *E.g.*, Norman v. Occupational Safety Ass'n of Ala. Workmen's Comp. Fund, 811 So. 2d 492, 500 n.9 (Ala. 2001) (restating the legal proposition that “where both equitable relief and money damages are sought, asset-freezing preliminary injunctions remain available if the injunction ‘is a reasonable measure to preserve the *status quo* in aid of the ultimate equitable relief claimed’” (quoting U.S. *ex rel.* Rahman v. Oncology Assocs., P.C., 198 F.3d 489, 497 (4th Cir. 1999))).

216. *E.g.*, Singer v. Yokohama Specie Bank, Ltd., 85 N.E.2d 894, 896 (N.Y. 1949) (reviewing an argument by the United States that recognition of the appellee's argument in the instant case would amount to contravention of federal freezing controls and “would effect a prohibited transfer of blocked assets”).

217. Carlos Fabano, Comment, *Maximizing Plaintiff Protection in the World of Asset Freezing and Bypassing the Due Process Requirement of Notice: The Mareva Injunction as an Alternative to the American Legal Remedies*, 9 ILSA J. INT'L & COMP. L. 131, 131 (2002). Although the preliminary injunction and prejudgment attachment provide some protection to fraud victims' interests, American provisional remedies are insufficient. “[P]rejudgment attachment suffers from its jurisdictional restraints.” Lars Johansson, Comment, *The Mareva Injunction: A Remedy in the Pursuit of the Errant Defendant*, 31 U.C. DAVIS L. REV. 1091, 1101 (1998). Also, a prejudgment attachment requires that a court have *in rem* jurisdiction. *Id.* at 1101. Thus, courts rarely attach foreign assets. *See id.* at 1100–03 (presenting a section titled, “*The Gap in American Prejudgment Attachment Laws*”). This jurisdictional restraint is significant in a world where financial mobility makes geographic borders nearly irrelevant. *Cf.* Manuel Dominguez, *Using Prejudgment Attachments in the European Community and the U.S.*, 5 J. TRANSNAT'L L. & POL'Y 41, 63 (1995) (declaring the jurisdictional issues attendant to attaching extraterritorial assets are the product of an “ethnocentric view expressed by the U.S. judiciary run[n]g counter to” the realities of a modern global market). Also, the scope of a preliminary injunction is narrow because it is only available if plaintiffs seek final remedies in equity. *See* Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*, 67 WASH. L. REV. 257, 262–63 (1992) (summarizing the legal maxim that courts will not intervene in equity where claimants have an adequate remedy at law). Defendants can relatively easily remove their assets beyond an American court's jurisdiction. *Cf.* Johansson, *supra*, at 1092 (“[C]ourts often cannot prevent defendants . . . from removing their assets from the courts' jurisdiction.”).

Any plans to seek a freezing order should consider property taken in the fraud or other scheme, the proceeds (i.e., assets or earnings obtained from the fraudulently taken or concealed assets), and the target's assets that may not be directly traceable to the fraud. Moreover, prior to seeking freezing orders, the attorney, victim, and FA must consider the jurisdictions (states) involved and whether they are favorable to asset recovery, as well as the form and characteristics of the misappropriated assets. Some types of assets are much more portable and/or liquid than others.<sup>218</sup>

Before pursuing provisional measures or efforts in asset freezing, the lawyer, victim, and FA should perform a cost-benefit analysis for all assets requiring special care or management. This special care or management may, over time, cost more than the value of the assets. Preservation of managed assets requires taking physical possession and making plans for safe seizure, storage, and transfer to storage facilities.

The precise timing of asset freezing is also important. If asset freezing is pursued too soon, a target or suspect may cease activities, making it more difficult to gather information and identify assets. If undertaken too late, the hidden or stolen assets may move or dissipate.<sup>219</sup> Investigation efforts of FAs and asset recovery plans should be coordinated by legal counsel.<sup>220</sup> A target or suspect may be tipped off when certain investigative techniques are employed such as a search of residences or businesses, interviews of suspects or witnesses, issuance of letters rogatory (to an offshore jurisdiction),<sup>221</sup> issuance of an MLA request<sup>222</sup> (to an

218. For example, the prepaid, stored value, and credit cards discussed *supra* at Section IV.H.

219. See BRUN ET AL., *supra* note 8, at 43 (warning that “where there is a risk that the target will be tipped off and subsequently dissipate or move assets, the implementations of provisional measures should be considered”).

220. See *id.* at 2 (highlighting the complexity of the “different legal systems and procedures” across jurisdictions).

221. This is a formal request by courts of one country to courts of another country requesting assistance of the foreign court. *Preparation of Letters Rogatory*, U.S. DEP'T ST.—BUREAU CONSULAR AFF., <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/international-judicial-asst/obtaining-evidence/Preparation-Letters-Rogatory.html> [https://perma.cc/K4KQ-JHXA]. The assistance may involve documents, testimony, asset freezing, etc. *Id.* The letter rogatory must be drafted following an exemplar provided by the U.S. Offices of International Affairs (OIA). Offices of the U.S. Attorney, *U.S. Attorneys' Manual: Criminal Resource Manual 275—Letters Rogatory*, U.S. DEP'T JUST. (1997), <https://www.justice.gov/usam/criminal-resource-manual-275-letters-rogatory> [https://perma.cc/6FKK-J4YR]. A letter rogatory must be signed by a judge and translated into the appropriate language if necessary. *Id.* The signed letter rogatory and translation is sent to the OIA for transmission through diplomatic channels to the appropriate foreign court, where the latter decides whether to act on the letter rogatory. *Id.*

offshore jurisdiction), or surveillance. Hence, it is vital that assets be secured before employing legal recovery techniques.<sup>223</sup>

#### A. *Provisional Measures*

A provisional measure or asset freezing is a legal device or process preventing a fraudster or schemer from dissipating assets beyond the jurisdiction of a court. In many nations, one of the most widely used and powerful freezing orders is known as a *Mareva* injunction (or *Mareva* order).<sup>224</sup> The name originates from *Mareva Compania Naviera SA v. International Bulkcarriers SA*.<sup>225</sup> A *Mareva* order freezes all of a party's assets on a pretrial basis in an ex parte hearing.<sup>226</sup> The claimant or victim requests a simultaneous court order (or "gag" order) that seals the proceedings to prevent information leaks.<sup>227</sup> A *Mareva* injunction will

222. A mutual legal assistance (MLA) request is a written request to a foreign government used to gather information, obtain provisional measures, and pursue enforcement of domestic court orders in foreign jurisdictions. See *Frequently Asked Questions*, MLAT, <https://mlat.info/faq> [<https://perma.cc/7BS2-DQQF>] (defining MLATs as "agreements between two or more countries, which create obligations under international law for governments to assist one another in criminal investigations and prosecutions"). MLA requests are not available to private parties. See *id.* ("In the vast majority of cases, MLATs are used by and on behalf of government investigators or prosecutors" and while "some MLATs . . . allow [them] for defendants . . . [t]he request must still be made by the government.").

223. See BRUN ET AL., *supra* note 8, at 5–7, (advising investigators to secure assets before utilizing court orders and processes).

224. See Masayuki Tamaruya, *The Anglo-American Perspective on Freezing Injunctions*, 29 CIV. JUST. Q. 350, 350 (2010) (positing freezing injunctions, formerly called *Mareva* injunctions, as an effective "remedy to combat attempts by recalcitrant debtors or fraudsters to frustrate potential money judgments"). If such an order is granted or issued by an appropriate court, the defendant/fraudster may be taken by surprise and thus unable to secure funds necessary to continue business operations, or may suffer irreparable harm to his reputation. *Id.* at 351.

225. *Mareva Compania Naviera SA v. Int'l Bulkcarriers SA (The Mareva)*, [1980] 1 All ER 213 (AC) (Eng. 1975). This case involved plaintiffs who had chartered their vessel, the *Mareva*, to the defendants, who in turn contracted with the Indian government to deliver phosphate. *Id.* at 213. After delivery of the phosphate, the Indian government deposited its payment to the defendants for the phosphate in a London account. *Id.* at 213–14. The defendant defaulted on its last payment for the ship to the plaintiffs and contended it did not have the money to satisfy the debt. *Id.* at 214. The plaintiff sought an ex parte order on June 20, 1975, to freeze the account because they feared removal of the \$30,800 owed. *Id.* The injunction or TRO was granted. *Id.* at 216.

226. See *Mareva Injunction*, DUHAIME'S LAW DICTIONARY, <http://www.duhaime.org/LegalDictionary/M/MarevaInjunction.aspx> [<https://perma.cc/Y6VV-AVHR>] ("A temporary injunction that freezes the assets of a party pending further order or final resolution by the Court.").

227. Martin S. Kenney, *The Bankrupt Empires—The Creditors Strike Back*, Presented to A Conference of the Insolvency, Restructuring and Creditors' Rights Section of the International Bar

usually issue only if a claimant can show there is a solid, arguable case that would succeed at trial, and that refusal to grant a freezing order would lead to a real risk of dissipation of the hidden or stolen assets.<sup>228</sup> The two main reasons for the issuance of a *Mareva* freezing order are fraudulent conduct or resistance by a recalcitrant debtor.<sup>229</sup> A *Mareva* order does not provide the claimant with a proprietary interest in the assets involved in the dispute.<sup>230</sup> It applies on an *in rem* basis (with respect to assets needing to be within a court's jurisdiction), but is ultimately an *in personam* order.<sup>231</sup> A defendant who violates a *Mareva* order is subject to fines, imprisonment, discovery sanctions, and even default judgment.<sup>232</sup> *Mareva* injunctions do, however, require a litigant to satisfy certain criteria<sup>233</sup> and are subject to certain guidelines.<sup>234</sup>

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Association 2 (May 1–3, 2005), <https://tinyurl.com/ydfydview> [<https://perma.cc/U2PV-RHUD>] (characterizing a *Mareva* injunction as a “document disclosure order” [“wrapped-with-a-gag”]).

228. See Johansson, *supra* note 217, at 1095 (stating a plaintiff seeking a *Mareva* injunction “must establish a good arguable case” and “show that defendants might remove their assets from the jurisdiction”). In *Derby & Co. v. Weldon*, Lord Justice Neill wrote that “assets, like the Cheshire cat, may disappear unexpectedly. It is also to be remembered that modern technology and the ingenuity of its beneficiaries may enable assets to depart at a speed which can make any feline powers of evanescence appear to be sluggish by comparison.” *Derby & Co. v. Weldon* (Nos. 3 & 4), [1989] ECC 322 (AC) at 350 (Eng. 1988).

229. See Tamaruya, *supra* note 224, at 350 (presenting a *Mareva* injunction as a civil remedy for combatting fraudsters or defiant debtors); see also D. Ross McGowan & David A. Crerar, *Mareva Injunctions Can Stop Fraudsters Cold*, DISP. RESOL., May 18, 2010, at 1, 1 (“Claimants are well advised to consider applying for such an order *before* they become immersed in litigation involving fraud or other dishonest conduct . . .” (emphasis added)).

230. *R. v. Consolidated Fastfrate Transport Inc.*, 24 O.R. 3d 564 (Can. Ont. C.A.) (“The granting of a *Mareva* injunction does not give the plaintiff property, nor does it give the plaintiff a lien on the defendant’s property.”).

231. Pépin Aslett, *Cross-Border Asset Protection: An Offshore Perspective*, 10 J. FIN. CRIME 229, 230 (2003). One of the reasons a *Mareva* or freezing order is so effective stems from its *in personam* classification, taking immediate effect on every asset of the defendant so long as the assets are specified, irrespective of being “tangible or intangible, personal or realty.” Fabano, *supra* note 217, at 139. Such orders will even bind defendants neither domiciled nor present in the jurisdiction. *Id.*

232. See Jeffrey L. Wilson, Comment, *Three If by Equity: Mareva Orders & the New British Invasion*, 19 ST. JOHN’S J. LEGAL COMMENT. 673, 678 (2005) (noting compliance with a *Mareva* order “is enforced on threat of contempt of court with sanctions ranging from fines, to debarment from defending the merits of the suit, to imprisonment”).

233. A plaintiff must generally prove four criteria to have a court issue a *Mareva* order. See David Capper, *The Need for Mareva Injunctions Reconsidered*, 73 FORDHAM L. REV. 2161, 2162–63 (2005) (enumerating the four prongs necessary to persuade a petitioned court). The first element is that the cause of action be under the jurisdiction of the court petitioned for relief. *Id.* at 2162. “[I]n the United Kingdom, this is more of an exception than a rule . . .” *Id.* The second requirement is that the applicant have “[a] good arguable case” on the merits of that cause of action.” *Id.* at 2163 (quoting *Ninemia Maritime Corp. v. Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen)*,



Courts use three ancillary orders that accompany the *Mareva* or freezing order. The first order, a straightforward disclosure order, mandates that the defendant disclose all of his or her global assets.<sup>235</sup> This implies the defendant was provided notice of the *Mareva* order, which is usually not

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[1984] 1 All ER 398 (AC) at 398 (Eng. 1983)). “Unsupported statements and mere expressions of fear have little weight.” *England—Civil Remedies*, in *ASSET TRACING & RECOVERY: THE FRAUDNET WORLD COMPENDIUM* 495 (Bernd H. Klose ed., 2009). Freezing order applications “must be supported by written evidence[.]” *Id.* at 495 (illustrating an affidavit requirement using U.K. Civil Procedure Rules and supplementary Practice Directions). The third requirement is that there is a tangible risk that a plaintiff’s judgment will go unsatisfied. Capper, *supra*, at 2163. Fourth, as an equity action, it must be just and fair to grant relief. *See id.* (“No authority need be cited here because the proposition is an elementary one. An injunction is an equitable remedy and subject to the discretion of the court.”).

234. Aside from the requirements for obtaining a *Mareva* order, presented *supra* note 233, numerous guidelines exist that factor into a court’s discretion when ruling on the petition. *See* C. Chatterjee & Anna Lefcovitch, *Guidelines for Enforcement of Worldwide Freezing Orders: An Analysis*, 8 J. BANKING REG. 244, 257–60 (2007) (listing eight guidelines a court will take into account when deciding whether to grant a worldwide freezing order). An English court of appeals set forth eight guidelines in *Dadourian Group International v. Simms*. *See generally* *Dadourian Grp. Int’l Inc. v. Simms & Ors*, [2006] EWCA (Civ) 399 (Eng.), <http://www.bailii.org/ew/cases/EWCA/Civ/2006/399.html> [<https://perma.cc/FV98-W8TM>] (ruling on an appeal from a chancery court decision and laying forth eight guidelines for ruling on freezing orders). The first guideline is that the court that grants permission for a global *Mareva* order “must control the proliferation of foreign proceedings to enforce the [order].” *Id.* at [28]. The second guideline is that a court must be able to articulate that “commencing proceedings abroad must be proportionate to the cost and inconvenience to the defendant of defending the foreign proceedings as well as the English proceedings.” *Id.* at [35]. Third, the applicant’s interests are balanced against the interests of other parties to the action. *Id.* at [37]. The fourth guideline is whether granting the order would allow the plaintiff access to a superior form of relief in the foreign jurisdiction than provided by the freezing order. *See id.* at [40] (explaining it may be necessary for plaintiffs “to provide evidence of the range of orders available” to allow “the court [to] make a properly informed choice as to whether to grant permission to seek a superior form of relief abroad”). The idea is that a plaintiff should not be able to use a freezing order (that does not grant a plaintiff any interest in assets) to gain priority over other creditors in foreign jurisdictions where such priority may be conferred under the foreign jurisdiction’s asset-freezing laws. *See id.* (“In principle[,] the permission given to the applicant should not enable him to obtain relief in the foreign proceedings unless it is equivalent to the relief obtained in the English proceedings, and no more.”). Fifth, the evidence in support of the petition for a *Mareva* order should contain all information necessary to permit the judge to make an informed decision. *Id.* at [41]. The sixth guideline is whether the petitioner shows a real prospect exists that the assets sought are located within the jurisdiction of the foreign court. *Id.* at [47]. To meet the seventh guideline, the petitioner must satisfy the court with evidence that a risk of asset dissipation exists in relation to which he or she wishes to bring an action in the foreign court. *Id.* at [48]. Finally, the eighth guideline permits courts to grant ex parte applications “where there is a real risk that the assets may be removed from the jurisdiction of the foreign court if notice is given.” *Id.* at [49]. If an ex parte order is issued, it should be served immediately on the defendant. *Id.*

235. Johansson, *supra* note 217, at 1096.

the case.<sup>236</sup> If a court is concerned about defendant non-compliance or concerned about someone tipping off the defendant, a court may issue a *Norwich* order.<sup>237</sup> Such an order requires third parties, such as financial institutions, to produce complete information about a defendant's assets to the suing party.<sup>238</sup> This ancillary order has evolved into what is known as a *Mareva by Letter*, which refers to a duty owed by a financial institution to an aggrieved third party (e.g., fraud victim) when the financial institution is placed on notice that its institution is being used to further fraudulent activities.<sup>239</sup> The law also recognizes liability under theories of constructive trust.<sup>240</sup> In the classic case of *Barnes v. Addy*,<sup>241</sup> the court set forth two bases for constructive trustee liability:

1. Knowing assistance (sometimes referred to as “dishonest assistance”); and

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236. See *id.* at 1097 (“*Mareva* orders do not necessarily put third parties on notice . . .”). The order is named after *Norwich Pharmacal*, a House of Lords decision rendered in 1973. *Norwich Pharmacal Co. v. Customs & Excise Comm’rs*, [1973] UKHL 6, [1974] AC (HL) 133.

237. A “*Norwich* order is a pre-action discovery mechanism that compels a third party to provide certain information in its possession.” *Norwich Order Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/n/norwich-order/> [<https://perma.cc/8UHC-H555>].

238. *Cf., e.g.*, *Ashworth Sec. Hosp. v. MGN Ltd.*, [2002] UKHL 29, [26] (explaining that a *Norwich* order compelling disclosure of information requires wrongdoing but that such wrongdoing is that of the targeted person and not the entity or person from which the information is sought); see also Samuel K. Alexander, III, *The Mareva Injunction and Related Orders*, By Dr. Mark S.W. Hoyle. *London: Lloyd’s of London Press (1997)*, 39 VA.J. INT’L L. 503, 511 (1999) (book review) (highlighting that “part of the *Mareva* application[is] to identify and determine exactly all of the defendant’s assets”).

239. Lincoln Caylor et al., *Emergence of the Mareva by Letter: Banks’ Liability to Non-Customer Victims of Fraud*, 12 BUS. L. INT’L 197, 197 (2011). It is now well-established, at least, in Canada, that a bank may owe a duty of care to third parties defrauded by customers of the bank. *Dupont Heating & Air Conditioning Ltd. v. Bank of Montreal*, 2009 CarswellOnt 451, ¶ 31 (Can. Ont. S.C.J.) (WL), [2009] O.J. No. 386, ¶ 31 (Can. Ont. S.C.J.) (QL). Such a duty is discharged by reporting the issue to authorities and, “in many cases, freezing the customer’s [defendant’s] account.” *Dynasty Furniture Mfg. Ltd. v. Toronto-Dominion Bank*, 2010 ONSC 436, ¶ 14 (Can. Ont. S.C.J.), 2010 CarswellOnt 1241, ¶ 14 (Can. Ont. S.C.J.) (WL).

Though US and English courts have been more reluctant to find the existence of a duty of care owed by banks to third party fraud victims than courts in Canada, . . . there are nonetheless an increasing number of English and American decisions that indicate a willingness to find bank liability to non-customers where a fraud is evident, known and preventable.

Caylor et al., *supra*, at 199.

240. Caylor et al., *supra* note 239, at 199.

241. *Barnes v. Addy*, (1874) 9 Ch App. 244 (Eng.).

2. Knowing receipt of trust property.<sup>242</sup>

U.K. courts have indicated that liability under the “dishonest assistance” approach rests on knowledge or suspicion accompanied by a conscious decision not to make inquiries: one cannot eschew liability by arguing he or she did not know the funds were held in trust.<sup>243</sup> Thus, only actual knowledge, willful blindness, or recklessness will lead a financial institution to be liable for breach of trust.<sup>244</sup> Receipt-based liability requires a claimant to prove:

1. Disposal of assets in breach of a fiduciary duty;
2. Beneficial receipt of the assets by the defendant, traceable as the plaintiff's assets; and
3. The defendant's knowledge that the assets received could be traced to a breach of fiduciary duty.<sup>245</sup>

The third ancillary order is known as an *Anton-Piller* order, after the English chancery court opinion, *Anton-Piller v. Manufacturing Processes Ltd.*<sup>246</sup> This order creates an injunction allowing a plaintiff's attorney to search a defendant's premises and seize items and documents that may be evidence in the legal action against the alleged defrauding or asset hiding defendant.<sup>247</sup> Unfortunately, *Mareva* freezing orders, per se, are not available for use within the United States; however, *Mareva*-style freezing orders may be available.

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242. See *id.* at 251–52 (holding that “unless . . . agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees” they will not be held as constructive trustees); see also *Barlow Clowes Int'l Ltd. & Anor v. Eurotrust Int'l Ltd. & Ors* [2005] UKPC 37, [28] (appeal taken from Eng.) (discussing the knowledge component of a defendant receiving money held in trust).

243. *Barlow Clowes Int'l*, UKPC 37, at [28]–[32] (overturning the intermediate appellate ruling that the defendant could not be liable for dishonest assistance unless he knew of the trust, and holding, “There was no evidence that [the defendant] had tried to seek any explanation whatever and . . . the judge was fully justified in concluding that this was the result of a deliberate and dishonest decision”).

244. Caylor et al., *supra* note 239, at 202–03.

245. *Billion Silver Dev. Ltd. v. All Wide Invs. Ltd.*, [1999] HCA 5046/1999, ¶ 12 (C.F.I. Apr. 30, 1999) (Legal Reference System) (H.K.).

246. *Anton-Piller KG v. Mfg. Processes Ltd.*, [1976] 1 Ch App. 55 (Eng.).

247. Mary A. Nation, Comment, *Granting a Preliminary Injunction Freezing Assets Not Part of the Pending Litigation: Abuse of Discretion or an Important Advance in Creditors' Rights?*, 7 TUL. J. INT'L & COMP. L. 367, 400 (1999). See generally STEVEN GEE, *MAREVA INJUNCTIONS AND ANTON PILLER RELIEF* (2d ed. 1990) (providing detailed exposition of *Anton-Piller* orders and *Mareva* injunctions).

In 1999, the U.S. Supreme Court held, in *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*,<sup>248</sup> that a federal court has no authority to grant a pre-judgment injunction to prevent defendants from dissipating their assets in a case where a plaintiff has made only legal claims, e.g., claims for money damages.<sup>249</sup> The majority opinion in *Grupo Mexicano* reasoned that federal courts were restricted with regard to available equitable remedies by the Judiciary Act of 1789, which limited equitable remedies to those which were “being administered by the English Court of Chancery at the time of the separation of the two countries.”<sup>250</sup>

After the *Grupo Mexicano* decision, lower federal courts distinguished the case and limited it to requests for preliminary injunctions where only legal claims for money damages were sought.<sup>251</sup> Lower federal courts have noted three exceptions to the *Grupo Mexicano* holding. One exception is that federal courts may issue a *Mareva*-style freezing order when done under the authority of a statute, such as to prevent violations of racketeering, securities laws, and healthcare and banking laws.<sup>252</sup> The

248. *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308 (1999).

249. *Id.* at 333.

250. *Id.* at 318 (quoting *Atlas Life Ins. Co. v. W.I. S., Inc.*, 306 U.S. 563, 568 (1939)). The *Grupo Mexicano* court, in a 5-4 decision, analyzed three prior Supreme Court decisions where relief similar to that requested in *Grupo Mexicano* had been at issue. *Id.* at 324–27.

In *Deckert v. Independence Shares Corp.*, an injunction to block disposal of assets was granted because the plaintiffs’ claims were without adequate legal remedy. See *Deckert v. Indep. Shares Corp.*, 311 U.S. 282, 290–91 (1940) (holding a temporary injunction appropriate to preserve the status quo because without recourse to the assets sought to be frozen legal remedy would prove inadequate). The case is distinguishable from *Grupo Mexicano*. See *Grupo Mexicano de Desarrollo*, 527 U.S. at 325 (distinguishing *Grupo Mexicano* from *Deckert* on the ground that *Deckert* involved a cause of action premised on equitable relief).

Equitable relief was also approved in *United States v. First National City Bank*, where an injunction was upheld against foreign taxpayers pursuant to statutory powers. *United States v. First Nat’l City Bank*, 379 U.S. 378, 385 (1965).

In *DeBeers Consolidated Mines Ltd. v. United States*, equitable relief was denied. *DeBeers Consol. Mines Ltd. v. United States*, 325 U.S. 212, 223 (1945). *DeBeers* was an antitrust case brought by the Department of Justice to prevent foreign corporations from removing assets from the jurisdiction (against which fines could be levied). *Id.* at 215.

251. *Fairview Mach. & Tool Co. v. Oakbrook Int’l, Inc.*, 77 F. Supp. 2d 199, 202 (D. Mass. 1999) (declaring *Grupo Mexicano*’s holding applicable only “to cases where a creditor plaintiff has no lien or equitable interest in [a] defendant[’]s assets”); *U.S. ex rel. Rahman v. Oncology Assocs., P.C.*, 198 F.3d 489, 496 (4th Cir. 1999) (interpreting the *Grupo Mexicano* decision as “providing specifically that the general equitable powers of the federal courts do not include the authority to issue preliminary injunctions in actions solely at law”).

252. See, e.g., *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988) (upholding an *in personam* freezing order—similar to a *Mareva* injunction—that precluded the defendants from dissipating assets not within the United States). Under 18 U.S.C. § 1345(a)(2), a

second exception transpires when a plaintiff seeks only equitable remedies as occurred in *Deckert*.<sup>253</sup> The third exception permits *Mareva*-style orders when a plaintiff asserts a combination of legal and equitable theories.<sup>254</sup>

Using skillful pleading, a plaintiff in a U.S. federal court may avoid the ruling in *Grupo Mexicano* and secure a *Mareva*-style remedy.<sup>255</sup> To avoid having *Grupo Mexicano* be a hollow ruling, avoidable with a mere assertion of some equitable remedy in a case based mostly on money damages, federal courts have employed existing substantive requirements for granting preliminary injunctions.<sup>256</sup>

Although *Mareva* injunctions are not available, per se, for use within U.S. courts despite the three exceptions to the *Grupo Mexicano* holding, courts

court may freeze, prior to trial, assets belonging to a defendant accused of violating federal health or banking laws, including: “(1) property ‘obtained as a result of’ the crime, (2) property ‘traceable’ to the crime, and (3) other ‘property of equivalent value.’” *Luis v. United States*, 136 S. Ct. 1083, 1087 (2016) (quoting 18 U.S.C. § 1345(a)(2) (2002)).

253. *Deckert*, 311 U.S. at 290–91.

254. *Compare* *Algonquin Power Corp. v. Trafalgar Power, Inc.*, No. CIVA5:00CV1246(NPM/D., 2000 WL 33963085, at \*17 (N.D.N.Y. Nov. 8, 2000) (applying a “primarily legal” (looking to the plaintiff’s claim based on a security interest) versus “primarily equitable” (finding a fraudulent transfer of assets) analysis in granting injunctive relief), *with* *Rahman*, 198 F.3d at 498–99 (limiting *Grupo Mexicano* to causes of action that present claims for exclusively money damages). *Grupo Mexicano* is applied if the remedy sought is “primarily legal.” *See* *Levy v. Young Adult Inst., Inc.*, No. 13–CV–2861 (JPO), 2015 WL 170442, at \*6 (S.D.N.Y. Jan. 13, 2015) (“Lower courts have generally interpreted *Grupo Mexicano* to bar preliminary injunctions in cases that seek primarily legal remedies.” (citing *JSC Foreign Econ. Ass’n Technostroyexport v. Int’l Dev. & Trade Servs., Inc.*, 295 F. Supp. 2d 366, 389 (S.D.N.Y. 2003))); *cf.* *Rahman*, 198 F.3d at 498 (“That money damages are claimed along with equitable relief does not defeat the district court’s equitable powers.”).

255. *See* *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 730 (9th Cir. 1999) (explaining that the injunction sought in the instant case merely restrained appellants from taking specific actions with regard to specific assets rather than the “complete freeze” sought in *Grupo Mexicano*); *see also* *Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 701, 708–09 (S.D. Tex. 2002) (holding *Grupo Mexicano* did not prevent the district court from considering prejudgment restraint on assets of the defendant but denying the injunction due to failure to fulfill the necessary requirements based on the record).

256. *See* *Newby*, 188 F. Supp. 2d at 701 (rejecting the defendants’ argument that *Grupo Mexicano* could be circumvented “merely by ‘sprinkling’ a bit of equity on a suit at law for money damages” because of existing substantive requirements (quoting *Rahman*, 198 F.3d at 495)). Two examples of this principle in practice are *Charlesbank Equity Fund* and *Technostroyexport*. *See* *Charlesbank Equity Fund II v. Blinds to Go, Inc.*, 370 F.3d 151, 163 (1st Cir. 2004) (denying preliminary injunction due to failure to show irreparable harm); *Technostroyexport*, 295 F. Supp. 2d at 390 (refusing a preliminary injunction where a plaintiff’s six-year delay in bringing suit undermined the argument of irreparable harm).

are not without other powerful tools.<sup>257</sup> U.S. federal and state courts rely on prejudgment writs of attachment, replevin, garnishment, *lis pendens*, injunctions (collectively known as “freezing orders”) and a *Mareva by Letter* to freeze stolen or hidden assets.

#### B. *Prejudgment Writ of Attachment*

Prejudgment writ of attachment state statutes permit a plaintiff (e.g., creditor or fraud victim) to attach both tangible and intangible property or funds before any rights have been legally established against the defendant.<sup>258</sup> A prejudgment writ of attachment is sought *ex parte* on the basis of a verified complaint or affidavit.<sup>259</sup> Although state attachment statutes vary, many provide that grounds for a prejudgment writ include a defendant that is absconding, secreting property, fraudulently disposing of property, or removing themselves or their property from the jurisdiction.<sup>260</sup> A plaintiff must post a bond to cover costs and damages a defendant incurs if it is later determined the prejudgment writ should not have been issued.<sup>261</sup>

If a prejudgment writ is approved, law enforcement can levy against any property located in the relevant jurisdiction, but not any properties located outside the court’s territorial jurisdiction.<sup>262</sup> A court must have *in rem* jurisdiction over the subject property.<sup>263</sup> Prejudgment attachments are limited to only those claims listed in the statute because they are controlled by state law.<sup>264</sup>

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257. See Wilson, *supra* note 232, at 726 (“[W]hile American courts have not embraced the ‘nuclear weapon’ of the *Mareva* injunction *per se*, they are not without other devastating devices in practice.”).

258. Wasserman, *supra* note 217, at 271.

259. *Id.* at 270.

260. See Ellen Harshman et al., *Micro- and Macro-Economic Effects: Secreting Assets to Evade Non-Business (Private) Obligations and Responsibilities*, 10 J. FIN’L CRIME 166, 170 (2002) (explaining exigent circumstances such as risk of defendant’s flight or fraudulent disposition may justify attachment).

The following are examples of state attachment statutes: ALA. CODE §§ 6-6-41 to 6-6-169 (1975); CONN. GEN. STAT. §§ 52-279 to 52-328 (2017); FLA. STAT. §§ 76.01–.32 (2017); KY. REV. STAT. ANN. §§ 425.301–.302, 425.306–.309, 425.316 (West 2017); MICH. COMP. LAWS ANN. § 691.1611 (West 2017); NEB. REV. STAT. §§ 25-1001 to 25-1010 (2015); NEV. REV. STAT. §§ 31.010–.235 (2015); OHIO REV. CODE ANN. § 2715.01–.52 (2003).

261. Davis, *supra* note 2, at 80.

262. Tamaruya, *supra* note 224, at 352.

263. Fabano, *supra* note 217, at 132.

264. Johansson, *supra* note 217, at 1099.

Law enforcement must be certain no third party has an interest in the property; otherwise they could be sued for wrongful attachment and conversion.<sup>265</sup> A defendant is entitled to a hearing immediately after any levy to challenge the writ.<sup>266</sup> If assets are located in several states, a claimant must pursue attachment in several courts simultaneously, making the process expensive and time-consuming.<sup>267</sup>

### C. *Prejudgment Writ of Replevin*

A prejudgment writ of replevin (a state statutory remedy) is a process involving an *ex parte* hearing in which a court orders seizure (by law enforcement) of allegedly illegally obtained or wrongfully detained personal property, to be held in court custody until a judicial resolution on who is entitled lawful possession.<sup>268</sup> Although state replevin statutes vary, replevin is a possessory legal action to obtain specific tangible personal property.<sup>269</sup> An action for replevin mandates the specific property be identifiable and deliverable.<sup>270</sup> Courts from many jurisdictions agree that

265. See Dean Gloster, Comment, *Abuse of Process and Attachment: Toward a Balance of Power*, 30 UCLA L. REV. 1218, 1226 (1983) (referencing the cause of action for wrongful attachment). See generally *Jones v. Preuit & Mauldin*, 763 F.2d 1250 (11th Cir. 1985) (hearing an appeal involving allegations of constitutional violations of the state's attachment procedures). Although a law enforcement officer is often cloaked with qualified immunity, the officer must show that he or she did not violate clearly established law of which he or she knew or should have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982). “Law is not clearly established when there is a ‘legitimate’ or ‘open’ question as to the legality of conduct.” *Watertown Equip. Co. v. Nw. Bank Watertown, N.A.*, 830 F.2d 1487, 1490 (8th Cir. 1987) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 533–36 (1985)).

266. Cf. *Harshman et al.*, *supra* note 260, at 170 (stating that a court must “make preliminary determinations regarding the merits of the underlying dispute” before granting a prejudgment writ of attachment). Federal and state courts have held the U.S. Constitution’s due process guarantees require “an immediate post-seizure hearing, at which the debtor has an opportunity to be heard and at which the creditor ‘would be required to prove at least probable cause’ for the attachment.” *Unique Caterers, Inc. v. Rudy’s Farm Co.*, 338 So. 2d 1067, 1070 (Fla. 1976) (citation omitted) (quoting *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975)).

267. *Harshman et al.*, *supra* note 260, at 170.

268. See, e.g., *Weil v. Macri*, No. CV020459617S, 2002 WL 467916, at \*2–3 (Conn. Super. Ct. Mar. 6, 2002) (summarizing Connecticut’s statutes governing issuances of writs of replevin).

269. *Arcadia State Bank v. Nelson*, 386 N.W.2d 451, 456 (Neb. 1986) (quoting *Clark v. Oldham*, 90 N.W.2d 329, 332 (Neb. 1958)).

The following are examples of state replevin statutes: KAN. STAT. ANN. § 60-1005 (2017); MINN. STAT. § 548.04 (2017); MO. REV. STAT. §§ 533.010–.250 (1982); N.J. STAT. ANN. § 2B:50-1 (West 2017); N.M. STAT. ANN. §§ 42-8-1 to 42-8-22 (1978); VT. STAT. ANN. tit. 12, §§ 5331–36, 5338, 5371, 5373, 5401, 5403–05 (2015); WIS. STAT. §§ 810.01–.03, 810.05–.15 (2005).

270. *Walther v. Cent. Tr. Co., N.A.*, 590 N.E.2d 375, 378–79 (Ohio Ct. App. 1990) (quoting *Lyons v. Shearman*, 62 N.W.2d 196, 197 (1954)).

unless money is marked or otherwise labeled for identification, it is not subject to replevin.<sup>271</sup> The reasoning behind this rule is that money can be intangible property, such as when it exists as data in a bank account.<sup>272</sup> Money that has been commingled with circulating currency, therefore, cannot be the subject of replevin.<sup>273</sup>

In a prejudgment situation, the claimant must file a verified complaint (or a complaint supported by an affidavit) and post a bond to compensate the defendant for any wrongful taking.<sup>274</sup> Prejudgment replevin is appropriate to prevent a defendant from hiding, transferring, or destroying personal property.<sup>275</sup> Prejudgment replevin is an *in rem* procedure, meaning it is not available for property outside the court's jurisdiction.<sup>276</sup> As with prejudgment attachment, if a claimant seeks property located in multiple states, this remedy becomes increasingly time-consuming and costly.

#### D. Garnishment

A prejudgment writ of garnishment is a process by which a court orders seizure or attachment of a defendant's property possessed or controlled by

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271. See, e.g., *id.* at 379 (citing 1967 Senior Class of Pekin High School v. Tharp, 154 N.W.2d 874, 876 (Iowa 1967); Eller v. Meyers, 294 N.W. 232, 233–34 (Iowa 1940)) (holding an action for replevin of money fails where not specifically segregated or identified); see also Williams Mgmt. Enters. v. Buonauro, 489 So. 2d 160, 164 (Fla. Dist. Ct. App. 1986) (concluding currency is personal property which must be capable of specific identification to be subject to replevin).

272. *Walther*, 590 N.E.2d at 378–79; *Buonauro*, 489 So. 2d at 164.

273. *Lovell v. Hammond Co.*, 34 A. 511, 513 (Conn. 1895) (citing 2 JOHN SIMCOE SAUNDERS, THE LAW OF PLEADING AND EVIDENCE IN CIVIL ACTIONS, ARRANGED ALPHABETICALLY: WITH PRACTICAL FORMS; AND THE PLEADING AND EVIDENCE TO SUPPORT THEM 760 (1844)).

274. *Doughty v. Sullivan*, 661 A.2d 1112, 1118 (Me. 1995).

275. Any claimant seeking a prejudgment writ of replevin must satisfy a five-part test to meet minimum due process standards: (1) the plaintiff must present verifiable facts indicating a right to the property; (2) any prejudgment writ must be signed by a judge; (3) the facts must show the necessity for replevin and a possibility of waste, concealment, or transfer of the property in its absence; (4) the plaintiff must post a bond; and (5) the defendant is entitled to an immediate hearing. See *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 604–06 (1974) (expounding on the typical requirements necessary to justify replevin); *Gazil, Inc. v. Super Food Servs., Inc.*, 356 So. 2d 312, 313 (Fla. 1978) (enumerating the five typical replevin requirements).

276. *Ctr. Capital Corp. v. Gulfstream Crane, LLC*, No. 09-61021-CIV, 2009 WL 4909430, at \*6 (S.D. Fla. Nov. 25, 2009) (reviewing case law and determining “intermediate Florida courts considering the nature of replevin appear to have uniformly concluded that replevin requires *in rem* jurisdiction over the subject matter” (citing *Prestige Rent-A-Car, Inc. v. Advantage Car Rental & Sales, Inc.*, 656 So. 2d 541, 544 (Fla. Dist. Ct. App. 1995)).



a third party (e.g., financial institution).<sup>277</sup> The third party is the *garnishee*. A classic example of a prejudgment garnishment is seizure of money held in a commercial bank or stock brokerage firm.<sup>278</sup> In a prejudgment garnishment, an ex parte hearing is held but the defendant must be given a prompt hearing after the garnishment.<sup>279</sup> State prejudgment garnishment statutes vary, but in nearly all states a plaintiff must file a verified petition or affidavit alleging specific facts, including the nature of the cause of action; the amount involved; and that the debt sued on “is just, due, and unpaid.”<sup>280</sup> A plaintiff must also post a bond to cover costs and damages incurred by the garnishee in the event the garnishment is deemed wrongful.<sup>281</sup>

Thus, if the garnishee transfers the funds to the debtor after the equitable lien attaches, he will still be liable to the creditor in the garnishment proceedings and is treated as still having the funds in his possession. The

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277. *Lakeshore Bank & Tr. Co. v. United Farm Bureau Mut. Ins. Co.*, 474 N.E.2d 1024, 1026–27 (Ind. Ct. App. 1985) (citing IND. CODE § 34-1-11-20 (1998) (current version at IND. CODE Ann. § 34-25-3-2 (West 2017))). See generally DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 37–48 (1991) (discussing the concept of *irreplaceability* concerning real, personal, and intangible property that would be necessary to justify garnishment).

278. In *Raines v. Impact Net Worth Solutions*, David Reber invested over \$66,000 “in what had been represented to him as an undivided fractional ownership interest in a hotel and condominium project being developed” in the Dominican Republic. See *Raines v. Impact Net Worth Sols.*, Nos. 2:08–CV–812–CW, 2:09–CV–905, 2009 WL 2190279, at \*1 (D. Utah July 21, 2009) (consolidating motions for garnishment and temporary restraining order). Mr. Reber filed for a prejudgment writ of garnishment when he learned that none of his monies went toward the development of the hotel/condominium project nor did he receive a deed showing his fractional interest in the project. *Id.* at \*2. The defendants were essentially operating a real estate Ponzi scheme. A federal court granted the writ of garnishment with the garnishee being Wells Fargo Bank. *Id.* at \*6.

279. E.g., *Maddalone v. C.D.C., Inc.*, 765 P.2d 1047, 1049 (Colo. App. 1988) (concluding a garnishee is entitled an evidentiary hearing in assessing the validity of a garnishment).

280. *Davis*, *supra* note 2, at 81.

The following are examples of state prejudgment garnishment statutes: ARIZ. REV. STAT. ANN. §§ 12-1570 to 12-1574, 12-1577 to 12-1585 (2018); CONN. GEN. STAT. § 52-278b (2017); FLA. STAT. §§ 77.031–083 (2017); MICH. COMP. LAWS §§ 600.4011–4012, 600.4025–4031, 600.4045–4065 (2015); MINN. STAT. §§ 571.93–932 (2017), OKLA. STAT. tit. 12, §§ 1171–1182 (2016); WASH. REV. CODE §§ 6.26.010–070 (1997); WYO. STAT. ANN. §§ 1-15-401 to 1-15-425 (2017).

281. Cf. *State ex rel. Walkley v. McCullough*, 85 Mo. App. 68, 70–71 (1900) (declaring a garnishee may maintain an action on the bond posted for attachment for damages incurred as garnishee).

court may order the garnishee to make a payment a second time, this time to the creditor.<sup>282</sup>

Garnishment of wages is different from other forms of attachment prior to judgment. Wages are a specialized type of property, and garnishment requires notice to the defendant to satisfy procedural due process rather than substantive due process requirements.<sup>283</sup> The nuts-and-bolts details on how to accomplish a prejudgment garnishment differ from state to state. The FA and client must rely on the experience and advice of a seasoned lawyer, especially in a multi-state context.

#### E. *Lis Pendens*

Another state statutory prejudgment device is a lis pendens. This is a written notice that a lawsuit concerning title to real estate (or an interest therein) has been filed.<sup>284</sup> One purpose of a lis pendens is to protect a party's interest in the property involved.<sup>285</sup> A notice of lis pendens also works to protect prospective third-party purchasers by putting them on notice of the existence of a lawsuit that may cloud title.<sup>286</sup> To support a lis pendens, a showing of substantial likelihood of success on the merits is not necessary; rather, a plaintiff must show a fair nexus or connection between the alleged legal or equitable property ownership and the instant dispute.<sup>287</sup> The filing of a notice of lis pendens is usually a bar to enforcement against the property of all interests and liens recorded at the time of filing, with few exceptions.<sup>288</sup> Some states require a bond be

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282. *Lakeshore Bank & Tr. Co.*, 474 N.E.2d at 1027 (citing *Union Bank & Tr. of Kokomo v. Vandervoort*, 101 N.E.2d 724, 728 (Ind. Ct. App. 1951)).

283. *See Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 342 (1969) (holding a prejudgment garnishment procedure without conferring notice and opportunity to be heard “violates the fundamental principles of due process”).

284. *High Mesa Gen. P’ship v. Patterson*, 242 P.3d 430, 432 (N.M. Ct. App. 2010); *see FCD Dev., LLC v. S. Fla. Sports Comm., Inc.*, 37 So. 3d 905, 909 (Fla. Dist. Ct. App. 2010) (conveying that a lis pendens acts as notice of a pending suit involving ownership rights in real property).

285. *Patterson*, 242 P.3d at 432–33 (explaining the purpose of a lis pendens notice is to “protect[] the party’s interest by binding a subsequent purchaser to the ‘proceedings taken after the recording of the notice to the same extent as if [the purchaser] were made a party to the [underlying] action’” (quoting N.M. STAT. ANN. § 38-1-14 (1978))).

286. *Id.* at 433 (citing *Paulson v. Lee*, 745 P.2d 359, 361 (1987)).

287. *Bergmann v. Slater*, 922 So. 2d 1110, 1112 (Fla. Dist. Ct. App. 2006) (per curiam) (quoting *Chiusolo v. Kennedy*, 614 So. 2d 491, 492 (Fla. 1993)).

288. *E.g.*, FLA. STAT. § 48.23(1)(d) (2017) (codifying the notion that the filing of a lis pendens acts to bar enforcement against property listed in the notice of any interest or lien not recorded at the time the lis pendens is filed).

posted to file a lis pendens.<sup>289</sup> Even if a state does not require posting a bond, a party can be held liable for damages and fees in certain cases.<sup>290</sup> State laws vary somewhat on the details of filing of a notice of lis pendens.<sup>291</sup> Also, federal courts look to state laws pertaining to lis pendens.<sup>292</sup>

#### F. *Temporary Restraining Orders (TROs) and Injunctions*

Injunctions are another type of freezing order used at the state level (and also in federal courts). This is a court order that prohibits a type of conduct or activity, or commands the performance of some act to undo a wrong or injury.<sup>293</sup> There are three types of injunctions: temporary restraining orders (TROs),<sup>294</sup> preliminary injunctions,<sup>295</sup> and permanent injunctions.<sup>296</sup>

289. *FCD Dev.*, 37 So. 3d at 909 (citing *Haven Ctr., Inc. v. Meruelo*, 995 So. 2d 1166, 1167 (Fla. Dist. Ct. App. 2008)).

290. *See Askari v. R&R Land Co.*, 225 Cal. Rptr. 285, 293 (Ct. App. 1986) (holding a purchaser may be entitled to consequential damages under lis pendens for appreciation of the property so long as he can prove its fair market value); *see also Woods v. S. Cal. Edison Co.*, No. EDCV 14-00110-VAP (Ex), 2014 WL 12586118, slip op. at \*7 (C.D. Cal. Feb. 27, 2014) (waiving a bond requirement and explaining it is “within the Court’s discretion to dispense with the filing of bond”).

291. The following are examples of state lis pendens statutes: GA. CODE ANN. §§ 44-14-610 to 44-14-613 (2017); IND. CODE §§ 32-30-11-1 to 31-30-11-10 (2017); MISS. CODE ANN. §§ 11-47-1 to 11-47-15 (2017); N.J. STAT. ANN. §§ 2A:15-6 to 2A:15-17 (West 2017); N.M. STAT. ANN. §§ 38-1-14 to 38-1-15 (1978); N.C. GEN. STAT. §§ 1-116 to 1-120.2 (2017); S.C. CODE ANN. §§ 15-11-10 to 15-11-50 (2017); WASH. REV. CODE §§ 4.28.320–.328 (2011).

292. 28 U.S.C. § 1964 (2012).

293. *See generally* RICHARD L. HASSEN, *EXAMPLES & EXPLANATIONS: REMEDIES* 6, 143–53 (3d ed. 2013) (summarizing the use and purpose of injunctions).

294. *Temporary Restraining Order*, BLACK’S LAW DICTIONARY (7th ed. 1999) (“A court order preserving the status quo until a litigant’s application for a preliminary or permanent injunction can be heard. A temporary restraining order may sometimes be granted without [notice] . . .”).

295. *Preliminary Injunction*, BLACK’S LAW DICTIONARY (7th ed. 1999) (defining an injunction as “issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case”).

296. *Permanent Injunction*, BLACK’S LAW DICTIONARY (7th ed. 1999) (“An injunction granted after a final hearing on the merits.”).

[T]he conventional economic wisdom appears to be that courts should prefer injunctions when transaction costs . . . are low and damages when transaction costs are high. When transaction costs are low, the parties will be expected to bargain to an efficient allocation of resources . . . .

Injunctions let the market, rather than the courts, set the price for violation of a legal right . . . .

HASSEN, *supra* note 293, at 147. Notably, it appears that once an injunction is issued, bargaining is rarely considered. *See generally* Ward Farnsworth, *Do Parties to Nuisance Cases Begin After Judgment? A*

A TRO is an ex parte remedy issued in exceptional circumstances to prevent destruction or dissipation of the subject matter and/or irreparable injury.<sup>297</sup> Federal Rule of Civil Procedure 65(b) provides a court may, under certain conditions, issue a TRO without written or oral notice to the adverse party or its attorney.<sup>298</sup> However, courts generally require a party seeking a TRO to at least attempt some kind of informal notice as a matter of constitutional imperative, absent a compelling reason for eschewing notice.<sup>299</sup> The standard for issuing a TRO is essentially the same as the standard for issuing a preliminary injunction.<sup>300</sup> A TRO issued without notice expires at a time set by the court (though never in excess of 14 days) unless, before expiration, the court grants an extension for the same amount of time (for good cause), or the adverse party consents to longer.<sup>301</sup>

Courts can also issue preliminary injunctions, which are an interlocutory procedural device “to preserve the status quo until the merits of the controversy can be fully and fairly adjudicated.”<sup>302</sup> Whether to grant or deny a preliminary injunction in federal court is reviewed under the

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*Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373 (1999) (analyzing twenty nuisance cases and discovering none showed bargaining after judgment).

297. BLACK’S, *supra* note 294; cf. RICHARD L. HASSEN, EXAMPLES & EXPLANATIONS: REMEDIES 218 (3d ed. 2013) (explaining the primary difference between a TRO and preliminary injunction is that the latter requires notice while the former does not).

298. See FED. R. CIV. P. 65(b)(1)(A)–(B) (restricting federal courts’ issuance of TROs to circumstances in which (1) “specific facts in an affidavit or verified complaint clearly show that immediate and irreparable injury, loss or damage will result” if notice is sought; and (2) “the movant’s attorney certifies in writing any efforts made to give notice and the reasons why it should not be required”).

299. See *Carroll v. President of Princess Anne*, 393 U.S. 175, 180 (1968) (setting aside an injunction where there was no attempt to serve to notify the affected party).

It seems as if the TRO, which can be seen as the harshest and most extreme order that can be issued against a defendant, defeats its own purpose, because in most cases it exhausts all possible avenues in order to give notice to the defendant, thus eliminating the element of surprise that one would hope and imagine it was designed to accomplish.

Fabano, *supra* note 217, at 136.

300. *Bieros v. Nicola*, 857 F. Supp. 445, 446 (E.D. Pa. 1994) (citing *Friedberg v. Burns*, No. CIV. A. 93-6626, 1993 WL 533361, at \*3 (E.D. Pa. Dec. 16, 1993)).

301. FED. R. CIV. P. 65(b)(2).

302. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001) (quoting *Ne. Fla. Chapter of Ass’n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1284 (11th Cir. 1990)).

auspices of federal law.<sup>303</sup> Federal Rule of Civil Procedure 65(a)(1) states that a court cannot issue a preliminary injunction without first giving notice to the adverse party.<sup>304</sup> Additionally, the seeking party bears the burden of establishing entitlement to the preliminary injunction.<sup>305</sup> Moreover, a party seeking a preliminary injunction must meet or address four criteria for such a drastic remedy.<sup>306</sup> Federal Rule 65(c) requires a successful applicant to post bond in an amount the district court deems proper for “costs and damages sustained by any party found to have been wrongfully enjoined or restrained.”<sup>307</sup> The injunction bond “provides a fund to use to compensate incorrectly enjoined defendants.”<sup>308</sup>

As discussed, each state has established its own statutory scheme providing authority for its state courts to issue prejudgment freezing orders. The ability of federal district courts to utilize the freezing remedies available in states in which they sit falls under Federal Rules 64 and 65.<sup>309</sup> Rule 64 makes explicit that state law applies in federal court cases in determining appropriate provisional remedies (excluding TROs and injunctions) and procedures that apply in a given state; however, “a federal

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303. *E.g.*, *Ferrero v. Assoc. Materials, Inc.*, 923 F.2d 1441, 1448 (11th Cir. 1991) (differentiating between state and federal requirements for issuing preliminary injunctions and holding that under *Erie* “federal courts are required to apply federal rules of civil procedure to the exclusion of any contrary state procedure as long as the rule is both constitutional and within the scope of the rules’ enabling act” (citing *Hanna v. Plumer*, 380 U.S. 460, 470–71 (1965))).

304. FED. R. CIV. P. 65(a)(1).

305. *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010) (citing *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1217 (11th Cir. 2009)).

306. In *Winter v. Natural Resources Defense Council*, the U.S. Supreme Court held that the factors a court must consider in determining whether to grant a preliminary injunction are: (1) whether the plaintiff shows probable success on the merits; (2) whether the plaintiff shows threat of irreparable injury; (3) that “the balance of equities” favors the plaintiff; and (4) that granting the injunction would serve public interests. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–12 (1982)). “[T]he relationship between success on the merits and irreparable harm [is] ‘a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.’” *Glob. Horizons, Inc. v. U.S. Dep’t of Labor*, 510 F.3d 1054, 1057–58 (9th Cir. 2007) (quoting *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th Cir. 2000)). The issue of how to apply these four factors in practice remains greatly unsettled among the judiciary. James Powers, *A Status Quo Bias: Behavioral Economics and the Federal Preliminary Injunction Standard*, 92 TEX. L. REV. 1027, 1027 (2014).

307. FED. R. CIV. P. 65(c).

308. *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 804 (3d Cir. 1989) (quoting OWEN M. FISS & DOUGLAS RENDLEMAN, *INJUNCTIONS* 383 (1984)).

309. FED. R. CIV. P. 64, 65.

statute governs to the extent it applies.”<sup>310</sup> Rule 65 applies to the issuance of TROs, preliminary injunctions, and permanent injunctions, and mandates federal law govern the issuance of these remedies, not state law.<sup>311</sup> Relief under Rule 64 is limited to property within the state in which the federal court sits.<sup>312</sup> A Rule 65 TRO or injunction can have effect beyond just one state.<sup>313</sup> Given the legal intricacies of using various prejudgment freezing orders and the complexities of state and federal court systems, the importance of an FA working together with an experienced and knowledgeable attorney cannot be overemphasized.

### G. Mareva by Letter

A *Mareva by Letter* places a third-party holder of assets, such as a financial institution, on notice that assets the holder was led to believe belonged to a real owner are in fact imposed with a constructive trust for someone else.<sup>314</sup> This is not only a useful tool for plaintiff fraud victims, but possibly critical for finding U.S. banks liable for investors’ losses due to fraud.<sup>315</sup>

Knowledge may prove to be the linchpin of a financial institution’s liability to non-customers.<sup>316</sup> In *Fine v. Sovereign Bank*,<sup>317</sup> the Massachusetts federal district court stated, “There is a continuum of states

310. FED. R. CIV. P. 64.

311. *Belcher v. Grand Reserve MGM, LLC*, NO. 2:15-cv-834-WKW, 2016 WL 920104, at \*2 (M.D. Ala. Feb. 24, 2016) (citing *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1448 (11th Cir. 1991)); *see also* FED. R. CIV. P. 65(e) (stating which laws are not modified by this rule without listing state law).

312. *See Paul H. Aschkar & Co. v. Curtis*, 327 F.2d 306, 309 (9th Cir. 1963) (declaring property may be attached “anywhere within the forum state—not merely within the . . . traditional jurisdictional limit of its district” (citing *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 467 (1945)); *cf. In re Curtina Int’l*, 15 B.R. 993, 998 (Bankr. S.D.N.Y. 1981) (holding that while jurisdiction for attachment exists anywhere within the forum state, a state statute not expressly extending such jurisdiction beyond its borders cannot attach property beyond its borders).

313. *United States v. First Nat’l City Bank*, 379 U.S. 378, 384 (1965) (reiterating that “[o]nce personal jurisdiction of a party is obtained, the District Court has authority to order it to ‘freeze’ property under its control, whether the property be within or without the United States” (citing *New Jersey v. City of New York*, 283 U.S. 473, 482 (1931))).

314. *Caylor et al.*, *supra* note 239, at 212.

315. *See id.* at 206 (describing the notice imparted by a *Mareva by Letter* as “perhaps the key piece of evidence used to hold American banks liable for investors’ losses in a fraudulent scheme”).

316. *See id.* (characterizing a bank’s knowledge via notice as “the crux” of its potential liability).

317. *Fine v. Sovereign Bank*, 634 F. Supp. 2d 126 (D. Mass. 2008).

of knowledge . . . from actual knowledge of embezzlement to constructive notice of component facts.”<sup>318</sup>

A *Mareva by Letter* operates by immediately freezing assets in which a third party claims an interest.<sup>319</sup> A freeze may be brought about by issuing a letter to the asset holder (e.g., commercial bank) apprising it of the “true origin or beneficial ownership” of the assets.<sup>320</sup> Adequate proof should accompany the letter.<sup>321</sup>

The main areas under which U.S. banks may be liable to non-customers are for breach of fiduciary duty,<sup>322</sup> negligence,<sup>323</sup> and aiding and abetting a fraud or a breach of fiduciary duty,<sup>324</sup> if such duties are held as owed to the non-customers.<sup>325</sup>

*Mareva by Letter* has not gained wide acceptance or approval yet in the

318. *Id.* at 133. In this case, Bradford Bleidt scammed tens of millions of dollars from his business and clients over the course of approximately twenty years. *Id.* at 128. Bleidt’s business was a Ponzi scheme in which he convinced investor clients to give him money under false pretenses (promises of a steady high return). *Id.* at 130. He also sent investor clients false earnings statements. *Id.* The fraud victims and receiver of Bleidt’s wholly-owned company had few options to target for recovery, thus, they targeted Sovereign Bank. *Id.* at 128. The plaintiffs asserted three legal theories against Sovereign: (1) aiding and abetting breaches of fiduciary duty Bleidt owed his firm and its investor clients; (2) “that the bank negligently permitted Bleidt to evade detection by the SEC”; and (3) conversion in “taking financial instruments with notice of Bleidt’s breaches of fiduciary duty.” *Id.* at 128–29. The district court found the plaintiffs raised a genuine issue of material fact as to the bank’s knowledge of Bleidt’s breach of fiduciary duty, thus avoiding summary judgment. *Id.* at 137.

319. Martin S. Kenney, *The Mareva by Letter: Destroying a Banker’s Defence of Good Faith*, INT’L L. OFF. (Aug. 15, 2005), <http://www.internationallawoffice.com/Newsletters/White-Collar-Crime/Ireland/Martin-Kenney-Co-Ltd/The-Mareva-by-Letter-Destroying-a-Bankers-Defence-of-Good-Faith> [<https://perma.cc/C3RA-M25V>].

320. *Id.*

321. *See* Caylor et al., *supra* note 239, at 212 (providing a well written *Mareva by Letter* “should disclose the basis for the belief . . . and the foundation for the claim” the bank has assets related to fraud and is a constructive trustee).

322. *See, e.g.*, *Bear Stearns & Co. v. Buehler*, 23 Fed. App’x 773, 776 (9th Cir. 2001) (upholding arbitrator decision finding a bank liable for breach of fiduciary duty owed to non-customer defendants).

323. *E.g.*, *Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 231–32 (5th Cir. 2010) (finding a duty owed by a bank to a non-customer where there was no risk of exposing the bank to unlimited liability and the non-customer insurance company was “well enough known to [the bank]”).

324. *E.g.*, *Wight v. Bankamerica Corp.*, 219 F.3d 79, 91 (2d Cir. 2000) (reviewing a claim for, among other things, aiding and abetting fraud and breaches of fiduciary duty).

325. *E.g.*, *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 286 (2d Cir. 2006) (“As a general matter, [b]anks do not owe non-customers a duty to protect them from the international torts of their customers.” (quoting *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 830 (S.D.N.Y. 2005))).

United States, but it does take away a bank's defense of good faith.<sup>326</sup> A fraud victim can use this device to better manage the expense and delay associated with obtaining a freezing order. It also obviates the need for posting asset-freezing indemnity bonds. Although relatively new, a *Mareva by Letter* is yet another tool for recovery of stolen/hidden assets.

## VI. CONCLUSION

Numerous sources indicate it is often difficult, if not impossible, to recover hidden or stolen assets. Accordingly, this paper focused on domestic asset tracing and freezing techniques that may assist academics, regulators, lawyers, forensic accountants, CPAs, and other interested parties in conducting asset tracing and recovery.

It is absolutely essential for an FA to work closely with the victim-client's attorney to ensure federal, state, local, and international laws are followed; evidence is correctly preserved for possible legal proceedings; and attorney-client privilege is protected.

Although assets may be hidden in many different ways and places, once hidden/stolen assets have been identified and located, the attorney and FA should take action to freeze such assets to ensure recovery. Before seeking freezing orders, it is important to understand the jurisdictions involved, to determine whether they are favorable to asset recovery, and in what form. Each jurisdiction has its own statutory scheme for providing state and federal courts (except injunctions under Federal Rule of Civil Procedure 65) with authority to issue freezing orders. Some of the most powerful U.S. legal devices by which to carry this out are attachment, replevin, garnishment, *lis pendens*, injunctions, and *Mareva Letters*. Once asset freezing commences, fraudsters may become aware of the investigation and take measures to delay, hinder, or frustrate it; therefore, counsel and the FA must carefully strategize to determine which actions will best secure asset recovery.

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326. Caylor et al., *supra* note 239, at 206–08 (noting that a *Mareva by Letter* can operate as a “red flag” of fraudulent or suspicious activity that may act as notice in assessing a bank's good faith).



