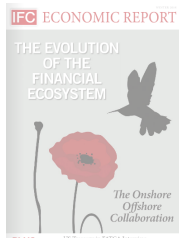




Home News Publications Authors Directory Jobs Events

Publications

IFC Review



“Published annually, the IFC Review provides the world’s leading international wealth management professionals with the most detailed, authoritative and comprehensive analysis on developments within the Tax, Trust, Banking and Investment sectors across the ...world’s leading international Financial Centres”

0

Due Diligence For Asset Recovery

By L Burke Files, CDDP, President, Financial Examinations & Evaluations, Inc (01/12/2014)

Due diligence investigations into the assets of a fraud feisor is delicate work. Even proposing to do some research into a potential fraud feisor to see what can be done to recover assets, that is if there are any, has many risks. In the due diligence process you risk tipping off the fraud feisor, possibly compromising your claim during the investigation, and even altering law enforcement or the media who can damage the quality of the claim either through criminal proceedings, blocking your recovery work, or media coverage, driving the fraud feisor to additional depths of secrecy. But, to understand the risks and there are many, you must make an intelligent assessment of the viability of the claim and the target before proceeding.

Assessing the claim qualitatively and quantitatively requires some very basic questions to be asked and answered;

- What is the nature of the claim?
- What were the misrepresentations to induce the investor to part with money?
- Where were those representations made; in person, online, over the phone, via email, via s-mail?
- In what countries did these representations occur?
- What are the dates of the first representation, the investment, and the last contact / communication about the investment that may or may not have contained additional mis-representations?
- Were there “introducers” to the claims, such as middlemen or commissioned sales agents, or other investors?
- Are there 3<sup>rd</sup> parties to the claim that possess an inchoate liability for assisting or failing to stop the fraud feisor?
- How much was invested, directly or indirectly and how much was paid out in ponzi payments?

Asking these questions, one often come upon some fatal flaws. A fatal flaw is a flaw, but for its existence, the claim could move forward through the additional due diligence steps of assessing the claim. Some fatal flaws that are all too common are claims that bump up against or are past the statutes of limitation to file a claim, a stale judgment that has not been renewed, law enforcement involvement and even conflicting statues of limitation on the commencement of a claim. Depending upon the jurisdiction and the nature of the claim statutes can run out in from one to seven years tolling dating from the date of investment or the date of the last material misrepresentation.

Problems arise when the victim is not so much of a victim. We, in the last few months, interviewed a potential client who had a professed claim of some £200,000 against a fraud feisor. Upon a closer investigation we found that the “man who would not be a client” (emphasis added) had invested £150,000, received £250,000 back, but based upon the promises of the fraudster, he should have received an additional £200,000. This man was an earlier investor in a ponzi scheme. His success is more likely to make him a defendant as opposed to a plaintiff. At best, if litigation begins a receiver would demand to claw back every payment made to this man.

So what might be the total value of the claim? What can realistically be recovered from

Three Month Free Trial and other subscriptions

Login expand

Archive

search

Jurisdictions

- Antigua
- Austria
- Bahamas
- Barbados
- Belize
- Bermuda
- British Virgin Islands
- Cayman Islands
- Curacao
- Cyprus
- Gibraltar
- Guernsey
- Hong Kong
- Ireland
- Isle of Man
- Jersey
- Labuan
- Liechtenstein
- Luxembourg
- Madeira
- Malta
- Marshall Islands
- Mauritius
- Netherlands
- Nevis
- New Zealand
- Panama
- Samoa
- Seychelles
- Singapore
- St Vincent & The Grenadines
- Switzerland
- United Arab Emirates

**Hassans**  
International Lawyers  
www.gibraltarlaw.com  
Tel: (+350) 200 79000 · Fax: (+350) 200 71966  
57/63 Line Wall Road, PO Box 199, Gibraltar

**Marine Services**

GLOBAL TRANSFER PRICING

19 - 20 October 2015  
Hilton Dusseldorf, Germany

Residence & Domicile under the New Government  
25 September 2015

CLICK FOR 15% DISCOUNT

STEP LATAM CONFERENCE.COM

International Trusts & Private Client Forum:  
Isle of Man  
CLICK FOR 10% DISCOUNT  
15 Sept 2015

**Technical Articles**

Comment  
 Latest Articles  
 Trusts & Estate Planning  
 Asset Protection  
 Citizenship and Residency  
 Due Diligence  
 International Tax Planning  
 Tax Treaties  
 Banking  
 Foundations  
 Funds  
 Hedge Funds and Alternative Investments  
 Insurance  
 Islamic Finance  
 Philanthropy  
 Regulation  
 Technology  
 United Kingdom  
 United States of America  
 Asia  
 Europe  
 South America

the fraud feisor without 3<sup>rd</sup> party liability and minus the estimate costs of collection?

What is the size of the claim looking at all of the investors in the scheme, minus payouts. US\$50 Million invested, minus US\$30 Million in payouts is not a US\$50 Million case for recovery but a US\$20 Million. Subtracting an estimate of the cost and duration of the fraud feisor's life style and the recovery may lose another US\$7 million – leaving an estimated recovery from the fraud feisor of US\$13 million.

Is the case to be litigated in a court of a competent jurisdiction where the costs of litigation are low or high, slow or fast? The costs of a thorough initial investigation and litigation to freeze assets must be estimated. Does the fact pattern support asset freezing exercises that be undertaken quickly in multiple jurisdictions to freeze those known assets? What is the size of this asset pool? Overlook substantial pockets of the fraud feisor's assets and they will mount a well funded defense and the recovery litigation costs will soar.

Can the victims afford, or are they willing to afford, the estimated costs of a proper recovery? If unable or unwilling will the victims entertain and bear the costs of third party litigation funding? While many litigation teams can and do participate on a percentage of recovery, not all of their fees will be contingent or wait the one to three years it takes recover and distribute assets.

The team must understand how information has been sought, harvested and intended to be used. One must be able to parse the difference between, information, intelligence, and evidence. All may be valuable but only some can be used in court. The defining cull, intelligence versus evidence, has much to do with how that information was discovered and harvested. One may possess fruit from a poisoned tree, and if one does it is best not to deliver your poisoned fruit into the hands of the opposition in front of a judge.

*Here you go My Lord, the fruit might look a bit dodgy, but I assure you it is easy to swallow.*

It might be surprising to many that the fraud feisor may not play by the rules, no Marquess of Queensberry rules in this fight. When given an opening they will not only punch below the belt, but accuse you of standing too tall and manipulating the position of the belt. Any error in your facts, any error in your investigation and evidence gathering, and of the most microscopic of your case's short comings and the opposition will hit at the blemish until it is an opening and festering wound.

Have other efforts of recovery been initiated? Sincere but incompetent recovery efforts can burden a subsequent competent recovery team with legacy issues that often add additional layers of complexity that would not have otherwise existed.

If a judgment has been obtained, what was the nature of the litigation? Will the nature of the litigation allow the judgment to be domesticated in other jurisdictions? Dealing on the surface of the requirements of Common Law, Civil Code, Sharia Law and the many blends of law and local customs one can see where procedure in one jurisdiction is sufficient to obtain a judgment becomes insufficient in another for domestication of that judgment. For example, even between common law jurisdictions – if the defendant was served but chose not to mount a defence and the plaintiff obtained a default judgment – the fact that the defendant chose not to litigate may bar the domestication of the judgment in other jurisdictions.

They are so many variables and so many imponderables in asset recovery. Even after a careful and thoughtful assessment much, may arise that is new. In one case, a news story on the fraudster, obviously a criminal, triggered the state's forfeiture department into action. The state determined that the funds she had amassed were the result of a fraud and the state moved in and has seized the assets we had identified and recovered as the proceeds of a crime, and denied the pool of victims a recovery. They were twice victimised.

The due diligence research required in asset recovery is real, significant, and short cuts and assumptive leaps will lead to error and the wasting of time and money. Authentic asset recovery is not easy, it is very hard, it is not for every attorney or receiver, as the profession becomes ever more specialised.

**You need to be logged in to view this article**

You are currently not logged in; to log in please enter your username and password in the login

**IFC Review**

Register now to receive the  
**Free IFC Review Email Services**

Register now to receive a free trial and any of our regular email services including;  
 monthly e-journal,  
 weekly news mailer,  
 industry events update and  
 workinwealth- our soon to be launched industry Job board.

You are currently not logged in, to log in please enter your username and password in the login section of this page. If you are already logged in and see this message, please go to Account Settings and purchase a new subscription. Articles which are displayed free for a limited time still require login for print functionality to work

**Subscribe now or try our free online trial for three months**

To get access to this article, and receive a subscription to our yearly article go to our [secure signup page](#).

To receive a **three month free subscription** to the online site, [sign up here](#).