
RECOVERING THE PROCEEDS OF FRAUD



Association of Certified Fraud Examiners

GLOBAL HEADQUARTERS • THE GREGOR BUILDING
716 WEST AVE • AUSTIN, TX 78701-2727 • USA

TABLE OF CONTENTS

PART ONE: THE LAW IN A FRAUD RECOVERY CASE

I. LEGAL CAUSES OF ACTION IN GENERAL

Bringing Multiple Claims in a Single Legal Action 1
State Versus Federal Offenses 2
Civil Wrongs Versus Crimes 3
Essential Elements of a Cause of Action 4
Vicarious Liability 5
Criminal Conspiracy 6
Review Questions 8

II. STATE COMMON LAW AND STATUTORY OFFENSES APPLICABLE TO FRAUD

Misrepresentation Fraud 9
 Essential Elements 9
 Facts, Not Opinions 10
 Concealment of Material Facts 11
 Negligent Misrepresentation 12
False and Fraudulent Statements 13
Breach of Fiduciary Duty (Constructive Fraud) 13
 Duty of Loyalty 14
 Duty of Care 15
Bribery and Corruption Schemes 16
 Corruption 16
 Bribery 16
 Illegal Gratuity 19
 Conflict of Interest 19
 Federal Corruption Statutes 20
Economic Extortion 22
Theft of Money and Property 22
 Conversion 23
 Larceny 23
 Larceny by Trick and False Pretenses 24
 Embezzlement 24
 Misappropriation of Trade Secrets 25
Forgery 28
 Forgery 28
 Uttering a Forged Instrument 29
 Uniform Commercial Code Articles Relating to Forged and Altered Checks 29
Civil Negligence 31

**II. STATE COMMON LAW AND STATUTORY OFFENSES APPLICABLE TO FRAUD
(CONT.)**

Defenses to Negligence.....31
Remedies in Negligence Cases32
Breach of Contract34
 General Remedies for Breach of Contract.....36
 Quasi-Contract (Assumpsit)37
Other State Statutory Actions38
Review Questions39

III. FEDERAL OFFENSES APPLICABLE IN A FRAUD RECOVERY CASE

Mail Fraud and Wire Fraud41
 Mail Fraud (18 U.S.C. § 1341)41
 Wire Fraud (18 U.S.C. § 1343)42
“Honest Services” Fraud (18 U.S.C. § 1346)43
Interstate Transportation of Stolen Property (18 U.S.C. § 2314)44
Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1961 et seq.)45
 RICO Violations Under Section 1962(c).....45
 Civil RICO Actions47
Federal Securities Laws48
 Private Right of Action48
 Jurisdiction49
 Liability49
 The Intent Requirement.....49
 Federal Securities Law Provisions with a Private Right of Action50
False Claims and Statements52
 Federal Statutes Relating to False Claims and Statements52
 No Private Right of Action55
 Common Actions That Violate Federal False Claim Statutes55
Other Federal Statutes.....55
 The Clayton Antitrust Act (15 U.S.C. §§ 12–27, 52–53).....56
 The Lanham Act (15 U.S.C. § 1125(a)).....56
 Fraudulent Use of Credit Cards (15 U.S.C. § 1644).....56
 Electronic Funds Transfer Act (15 U.S.C. § 1693n).....56
 Theft, Embezzlement, and Misapplication of Bank Funds (18 U.S.C. §§ 656, 657).....57
 Theft or Embezzlement in Connection with Health Care (18 U.S.C. § 669)58
 Computer Fraud (18 U.S.C. § 1030(a)(4))58
 Defend Trade Secrets Act (18 U.S.C. § 1836 et seq.)58
Review Questions59

PART TWO: REMEDIES IN A FRAUD RECOVERY CASE

IV. REMEDIES TO PREVENT UNJUST ENRICHMENT

Introduction to Remedies.....61

 Legal Versus Equitable Remedies.....61

 Availability of Litigation-Related Remedies61

 Types of Civil Remedies.....62

 Chapter Overview62

Rescission.....63

 Fraudulent Inducement.....64

 Mutual Mistake65

 Duress.....66

 Undue Influence.....66

 Failure of Consideration66

 Unlawful Contract.....67

 Other Grounds for Rescission.....67

Restitution.....67

 Restitution in Civil Law.....67

 Restitution in Criminal Law.....68

Constructive Trusts69

Equitable Liens.....70

Replevin.....72

Preliminary Injunctions and Temporary Restraining Orders.....72

Review Questions74

V. REMEDIES IN CIVIL LITIGATION FOR THE RECOVERY OF COMPENSATORY DAMAGES

Introduction.....77

 Two Kinds of Damages77

 The Law Varies Among Jurisdictions77

Fair Market Value Used to Measure Compensatory Damages78

General Compensatory Damages for Conversion and Fraud.....79

 Benefit of the Bargain Damages80

 Out-of-Pocket Damages80

 Damages for Emotional Distress81

Special (Consequential Damages) for Conversion or Fraud81

General Compensatory Damages for Breach of Contract.....82

Special or Consequential Damages for Breach of Contract83

Standard Measure of Damages for Breach of Quasi-Contractual Duty.....83

Standard Measure of Damages for Negligence84

Duty to Mitigate.....84

Damages Under Statutorily Created Causes of Action85

V. REMEDIES IN CIVIL LITIGATION FOR THE RECOVERY OF COMPENSATORY DAMAGES (CONT.)

Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1961 et seq.).....85
Securities Statutes.....86
Deceptive Advertising and Unfair Competition Statutes.....88
Clayton Antitrust Act (15 U.S.C. §§ 12–27 and 29 U.S.C. §§ 52–53).....89
Qui Tam Action Under the Civil False Claims Act (31 U.S.C. §§ 3729–3731)89
Defend Trade Secrets Act (18 U.S.C. § 1836 et seq.)90
Whistleblower Statutes90
Uniform Commercial Code Articles Relating to Forged and Altered Checks.....92
Review Questions94

VI. REMEDIES IN CIVIL LITIGATION FOR THE RECOVERY OF PUNITIVE DAMAGES

Introduction.....97
Punitive Damages in Tort Cases.....97
 Proving the Defendant’s Mental State98
 Standard of Proof.....99
 Vicarious Liability for Punitive Damages99
 Punitive Liability Insurance 100
Additional Statutory Punitive Damages Provisions..... 100
 Racketeer Influenced and Corrupt Organizations Act..... 100
 Deceptive Advertising and Unfair Competition Statutes..... 101
 Clayton Antitrust Act (15 U.S.C. § 13(c), (d))..... 101
 Defend Trade Secrets Act (18 U.S.C. § 1836 et seq.) 101
 Securities Statutes..... 101
Review Questions 102

VII. REMEDIES TO RESTRAIN OR MANDATE CONDUCT: EQUITABLE REMEDIES

Equitable Remedies 103
 Injunctions 103
 Provisional Remedies..... 104
Injunctions and Temporary Restraining Orders Under Statutorily Created Causes of Action..... 105
 Racketeer Influenced and Corrupt Organizations Act..... 106
 Securities Statutes..... 106
 Deceptive Advertising and Unfair Competition Statutes..... 106
 Trade Secret Legislation..... 107
Review Questions 108

VIII. REMEDIES ARISING FROM CRIMINAL PROSECUTIONS

Introduction..... 109
Criminal Restitution Orders 109

VII. REMEDIES ARISING FROM CRIMINAL PROSECUTIONS (CONT.)

Criminal Restitution as a Condition of Probation.....	110
Direct Restitution Orders in Criminal Cases	110
Sentencing Guidelines	112
Recovery from Victim’s Compensation Funds	112
Recovery Under Forfeiture Statutes.....	112
Criminal Forfeiture	113
Civil Forfeiture	115
Seven Questions to Answer Before Initiating a Forfeiture Action	118
Review Questions	121

IX. RECOVERING DAMAGES WITHOUT LITIGATION

Insurance Policies	123
Fidelity Insurance.....	123
Liability Insurance.....	125
The Federal Trade Commission	126
Negotiated Agreements or Settlements	127
Consent Judgments.....	129
Default Judgments.....	129
Foreclosures on Security Interests.....	130
Real Property	131
Personal Property.....	131
Review Questions	133

PART THREE: PLANNING AND PROCEDURES IN A FRAUD RECOVERY CASE

X. STRATEGIC CONSIDERATIONS FOR PLANNING A FRAUD RECOVERY CASE

How Has the Victim Been Injured?	135
What Is the Recovery Goal?.....	138
What Conduct Can You Prove and Against Whom?	139
What Damages Can Be Proven?.....	141
What Damages Can Be Recovered?.....	141
Can the Target Defendants Satisfy a Judgment?	141
Can You Recover Costs of Litigation?	142
Is the Action Barred by the Statute of Limitations?	145
Where Should the Case Be Pursued?	146
Choosing Between Criminal and Civil Court.....	147
Choosing Between Federal or State Court.....	151
Choosing Between Courts of Different States	155
Choosing Between Courts of the Same State	156
Review Questions	159

XI. ENFORCING THE JUDGMENT: THE SEARCH FOR PROPERTY OR PROCEEDS

Start Enforcement Efforts Early 162

Look for Hidden and Unhidden Assets and Property 162

Trace and Locate Property and Assets 164

Suspect’s Privacy Rights and Legal Limits of the Investigation..... 178

 Common Law Rights..... 179

 Constitutional Rights 181

 Federal Statutes 183

Use Court Powers to Compel Production of Information..... 186

 Time for Making Use of Court Processes 187

 Limitations on the Scope of Discovery 188

 Jurisdictional Limitations 189

Review Questions 191

XII. ENFORCING THE JUDGMENT: ENSURING THAT PROCEEDS, PROPERTY, AND ASSETS WILL BE THERE TO TO SATISFY A JUDGMENT

Securing Property Through Prejudgment Attachment 193

 Legal Actions in Which Prejudgment Attachment Is Available..... 194

 Property Subject to Prejudgment Attachment..... 195

 Procedures for Obtaining a Prejudgment Attachment..... 196

 Seeking Prejudgment Attachment Against Out-of-State Defendants or Property 197

 Procedures for Levying on Property Pursuant to a Writ of Attachment 198

 Termination of the Attachment Lien 200

 Protecting the Interests of Third Parties 201

 Disposition of Attached Property After Judgment..... 202

Securing Possession of Property with a Prejudgment Writ of Possession (Replevin)..... 202

Securing Property with a Creditor’s Suit Against Third Parties 203

Preventing Transfers of Property with Temporary Restraining Orders and Preliminary Injunctions 203

Protecting Claims to Real Property with a Notice of Lis Pendens..... 204

Voiding Fraudulent Transfers Made to Protect Assets from Creditors 205

 Common Law Remedies for Fraudulent Transfers 206

 Uniform Fraudulent Conveyance Act..... 208

 Uniform Fraudulent Transfer Act 209

 The Bankruptcy Code..... 209

Avoiding the Wrongdoer’s Discharge in Bankruptcy..... 210

Reaching a Defendant’s Property Behind the Corporate Veil 212

 Corporations 212

 Limited Partnerships..... 212

 Limited Liability Companies..... 213

**XII. ENFORCING THE JUDGMENT: ENSURING THAT PROCEEDS, PROPERTY,
AND ASSETS WILL BE THERE TO SATISFY A JUDGMENT (CONT.)**

Piercing the Veil 213
Review Questions 215

**XIII. ENFORCING THE JUDGMENT: EXECUTING AND LEVYING AGAINST
PROPERTY IN SATISFACTION OF THE JUDGMENT**

Enforcement of Money Judgments by Writ of Execution 218
 Determining What Is Leivable Property..... 219
 Property That Is Subject to Enforcement of Judgment..... 219
 Property of a Spouse Who Is Not a Judgment Debtor..... 220
 Property That Is Exempt from Enforcement by Law..... 220
 Methods of Levying on Property with a Writ of Execution..... 221
Enforcement of Money Judgments by Judgment Liens 224
Enforcement of Money Judgments Using Miscellaneous Remedies 226
Enforcement of Non-Money Judgments 226
 Writs for the Possession or Sale of Real Property 226
 Writs of Possession or Sale of Personal Property 227
Enforcement of Judgments Involving Out-of-State Property 227
Renewing Judgments 228
Supersedeas (Appeal) Bonds 228
Review Questions 229

XIV. CONCLUSION 231

XV. PRACTICAL EXERCISE..... 233

XVI. SOLUTIONS TO REVIEW QUESTIONS

I. Legal Causes of Action in General 239
II. State Common Law and Statutory Offenses Applicable to Fraud 242
III. Federal Offenses Applicable in a Fraud Recovery Case 245
IV. Remedies to Prevent Unjust Enrichment 248
V. Remedies in Civil Litigation for the Recovery of Compensatory Damages 252
VI. Remedies in Civil Litigation for the Recovery of Punitive Damages..... 255
VII. Remedies to Restrain or Mandate Conduct: Equitable Remedies 257
VIII. Remedies Arising from Criminal Prosecutions 259
IX. Recovering Damages Without Litigation 261
X. Strategic Considerations for Planning a Fraud Recovery Case 263
XI. Enforcing the Judgment: The Search for Property or Proceeds 266

XVI. SOLUTIONS TO REVIEW QUESTIONS (CONT.)

XII. Enforcing the Judgment: Ensuring That Proceeds, Property, and Assets Will Be There to Satisfy a Judgment..... 270

XIII. Enforcing the Judgment: Executing and Levying Against Property in Satisfaction of the Judgment..... 272

XVII. SOLUTIONS TO PRACTICAL EXERCISE 275

XVIII. RECOVERING THE PROCEEDS OF FRAUD FINAL EXAMINATION..... E-1

XIX. INDEXI-1