

## Remote Investigations May Streamline Path To Asset Recovery

By **Daniel Pascucci and Joseph Dunn** (May 18, 2020, 2:23 PM EDT)

In jurisdictions around the world, dispute resolution has all but ground to a halt. Months after the initial coronavirus outbreak, many courts remain closed or deeply restricted. In-person depositions and witness interviews, if at all possible, are challenging. Hearings, when available, are typically virtual, and backlogged dockets promise further delays once courts reopen. Advancing the ball in most phases of civil litigation is more challenging than ever.

While the strong headwinds in court have wide-reaching implications and will affect some strategies deployed to enforce judgments and arbitration awards across borders, many of the tactics involved in complex asset investigation and recovery efforts operate independently of court intervention and are continuing fruitfully during ongoing shutdowns.

Indeed, the global shift to virtual engagement has opened up opportunities that are distinctly supportive of such initiatives, and hold the potential to streamline the path to recovery in ways previously unavailable to creditors.

In this article, we highlight opportunities the current global climate presents in each of three categories of initiatives often deployed to trace and recover assets: investigation, litigation and external pressure tactics.

### Investigation in an Age of Virtual Engagement

The mention of private investigators conjures images of undercover operatives, long-range lenses and in-person surveillance. While in-person tactics still play a role, even before the COVID-19 pandemic, most asset investigations had evolved to a mix of human and electronic data gathering tactics.

Typical best practices to enforce judgments and awards across borders involve collaboration between counsel and investigators with access to financial, personal, realty and commerce-related databases. Data analytics and deep electronic research form the backbone of most successful recovery efforts. Even



Daniel Pascucci



Joseph Dunn

with ongoing shutdowns, these tools can be deployed as effectively as ever and can help paint an initial picture of relationships between debtors and potentially related parties, location of assets and streams of trade.

Of course, electronic research alone rarely paints a complete picture. The key insights that could ultimately crack the case more often emerge from the synergistic combination of data and intelligence gathered through personal contact — including witness interviews, visits to a debtor's trade partners and conversations with government regulators. The personal contacts typically play a critical role in understanding how assets move, where they may be located and anticipating future transactions.

Undoubtedly, the circumstances of the pandemic pose a challenge to gathering such intelligence, but in the initial weeks a countertrend began to emerge. As businesses, government offices and individuals adjusted to the new reality and face-to-face meetings became rare, the video call quickly became a norm. Many sectors of the global economy have since become increasingly comfortable conducting business, which historically would have required personal visits, over video.

In our practice, we regularly engage investigators, lobbyists and other agents to help gather intelligence through in-person meetings. In the initial days after U.S. cities went into shutdown, these efforts largely stalled. Since then, however, the efficacy of conducting such inquiries virtually has been at least equal to, and in many cases has exceeded, that of in-person meetings.

Whether an investigation calls for interviewing a fact witness, gaining insight from a government regulator into approval processes for a foreign regulated industry or petitioning elected officials, the communications necessary to support such efforts — historically relegated to in-person meetings — have largely migrated to phone and video connections and are progressing as robustly as before.

In many instances, the move to virtual contact is highly advantageous to recovery efforts. Consider an investigator charged with gathering intelligence from a dozen sources in three different countries. Before the pandemic, that could mean a dozen in-person meetings — each taking days to set up — with international travel between meetings.

Today, with travel delays eliminated, interviews in different cities or even countries can happen hours apart. Often, interviewees — freed of commute time and, in some case, working reduced hours — have more availability than before, further accelerating the process.

To be sure, these opportunities also present challenges. Creditors deploying asset recovery efforts will need to be more vigilant, proactive and creative to identify and capitalize on such opportunities.

Building witness rapport is still critical and, where a witness is uncomfortable with video communications he or she may require more attention than a comparable in-person meeting. But such efforts will likely be outweighed by the time saved by not traveling and the potential for breakthrough insights when a witness opens up from the comfort of their home, in what feels like a nonbusiness setting.

## **Tuning Litigation Tactics to Support Asset Recovery**

While many creditors do not turn their attention to enforcement until after a judgment or award is in hand, doing so leaves the debtor unfettered in efforts to move assets to shelter jurisdictions or related entities. More proactive litigants commence their recovery efforts while litigation is pending, creating robust opportunities for recovery counsel to coordinate with trial counsel to maximize the end result. These collaboration opportunities often bear valuable fruit as the investigative insights are used to shape discovery requests and the results are used to fuel further investigation.

With courts shut down or slowed around the globe, motion practice and trials are seeing significant delays. In some cases, this pause in active litigation may be used by dishonest counterparties to move assets away from the reach of their potential judgment creditors. However, proactive litigants can and should still make considerable progress during this time to protect their recovery against potential asset-sheltering schemes.

In U.S. jurisdictions, discovery is typically conducted by parties without court supervision — other than discovery enforcement motions. Honing discovery with input from asset investigations often will identify evidence that fuels later enforcement efforts. Likewise, the best evidence may be in the custody of third-parties who will respect a subpoena or preservation letter.

Whether through third-party subpoenas or independent asset investigation, obtaining specific insights into a defendant's assets or suspicious transactions often results in more pointed discovery, more insightful preservation demands and/or better settlement leverage. In courts that are prioritizing emergency motions, evidence of potential movement of assets in an effort to thwart the ultimate judgment can be just the linchpin needed to get a court's attention and support a freeze or attachment order on an expedited or even ex parte basis.

## **Prelitigation Investigation Focused on Pressure Points**

Finally, for forward-thinking creditors, the current limitations on access to the courts present an opportunity to conduct a more extensive prelitigation investigation targeted at identifying potential additional judgment debtors from whom the creditor can more easily collect. Many creditors will wait until the judgment or award is in hand before turning their sights on third parties who could be held liable under alter ego or veil piercing theories, including principals, affiliates and other insiders of the debtor, or who have benefitted from fraudulent conveyances of assets and self-dealing.

Prelitigation investigation can be utilized to identify these potential targets in advance of commencing suit and allow the creditor to formulate a litigation strategy ultimately designed to reach the deepest pockets. In some instance, there may be significant leverage to be gained by joining those third parties to the primary suit in the first instance, in addition to avoiding the expense of litigating successive suits, potentially in multiple jurisdictions.

## Conclusion

While the global pandemic has temporarily altered and in many cases lengthened the path of normal civil litigation, asset recovery efforts and investigations in support of enforcement have continued largely uninterrupted and, in some ways, have benefited from a widespread shift in business norms. The movement to remote business has led to unique opportunities in intelligence gathering, and limitations on access to the courts provides creditors additional time to focus their efforts on the end game: a full recovery.

---

*Daniel T. Pascucci and Joseph R. Dunn are members and co-chairs of the cross-border asset recovery practice at Mintz Levin Cohn Ferris Glovsky and Popeo PC.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*