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GLOBALIZATION AS AN ADVANTAGE IN RESOLVING CROSS-BORDER FRAUD LITIGATION

The authors outline steps plaintiffs may take to put pressure on deep-pocket foreign defendants to settle with defrauded investors. They discuss: gaining control over the defendant entity; obtaining documents and information; contempt orders and Interpol; negative publicity; and involuntary bankruptcy.

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Globalization, and the increase in cross-border transactions, raises several challenges to practitioners seeking to pursue litigation fraud claims that touch multiple countries. Professionals, however, may use aspects of globalization as an advantage and employ certain strategic, non-traditional approaches in extraterritorial litigation – especially actions involving fraud and deep-pocket defendants. Traditionally, cross-border fraud litigation includes tracing the deep-pocket defendant’s assets and filing enforcement actions, potentially in many jurisdictions, to recover those assets. These approaches, however, are often costly and frustrating. Alternatives to the traditional approaches may help resolve these cross-border fraud cases more quickly and efficiently. This article focuses on finding the right pressure points deployed against deep-pocket defendants in cross-border fraud cases and using those pressure points to procure a resolution, often in conjunction with, and in addition to, the more traditional litigation approaches. The strategies described below may not work in isolation – layering multiple methods is sometimes more effective to procuring a settlement with the deep-pocket defendant.

CONTROL

In cross-border litigation, gaining control over the defendant entity in its various global locations can provide a huge strategic advantage. When the defendant company has several foreign subsidiaries and a parent entity in the United States, many States’ laws allow for the appointment of a receiver if the defendant U.S. company violates a court order.¹ For example, if a group of investors has requested the company’s books and records, which most State laws allow investors to do,² and the company has refused to provide the books and records or has ignored the request altogether, the investors can petition the court for a turnover of the books and records, and when the company fails to comply, the investors can request that a receiver be appointed over the company.

¹ See, e.g., 8 Del. C. § 322.

² See, e.g., 8 Del. C. § 220(b); IL ST CH 805 § 105/107.75; KS ST 17-6510; NY BSC § 624.

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