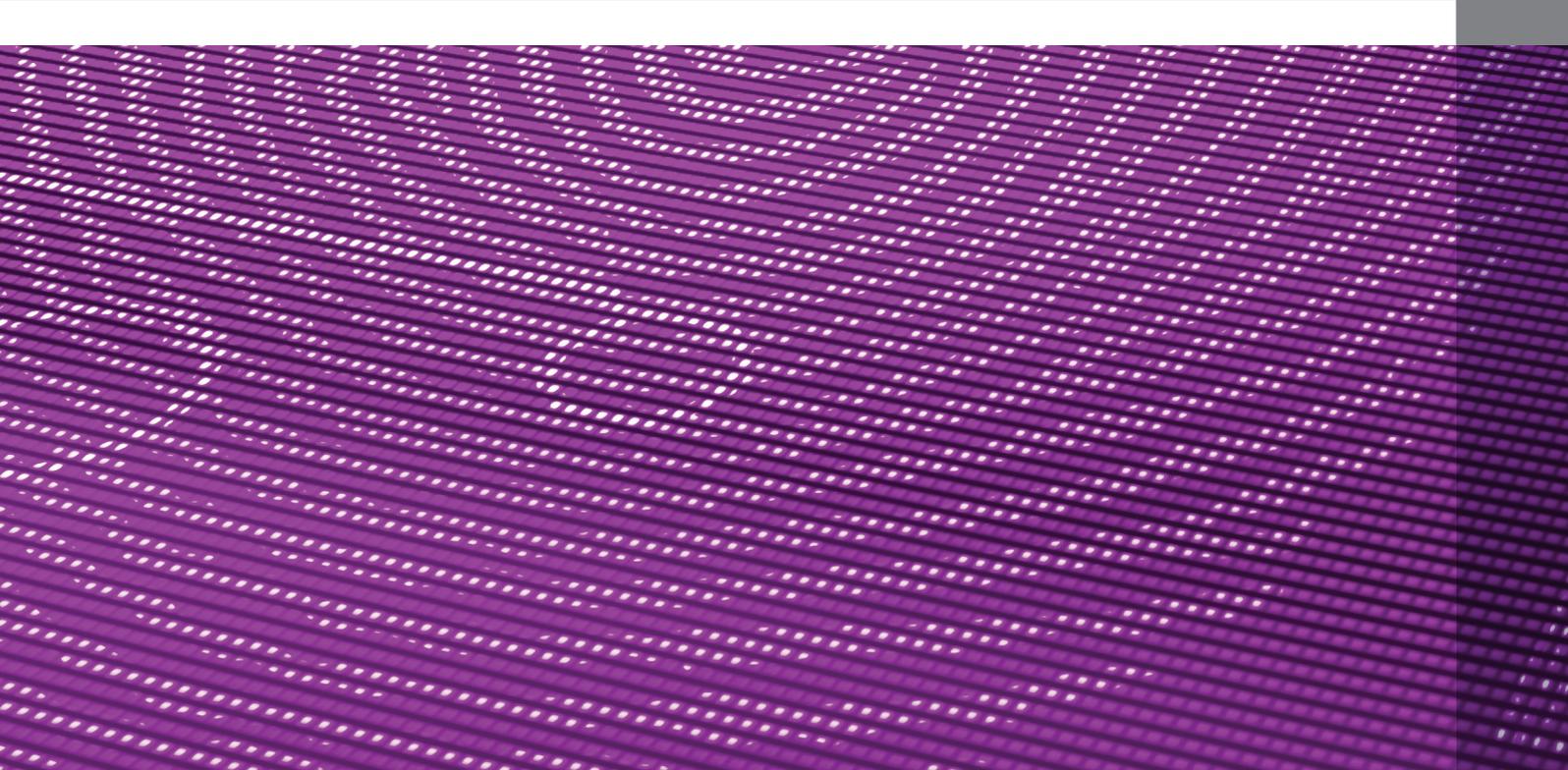


Obtaining redress and improving outcomes for the victims of fraud



Helping fraud victims recover their
money through alternatives to the
criminal justice system

Civil justice initiative

The Fraud Advisory Panel's civil justice initiative aims to encourage fraud victims (especially individuals and smaller businesses) to make more use of the civil courts in England and Wales when trying to get their money back, especially where a criminal investigation and prosecution is unlikely.

The initiative forms part of the national counter fraud strategy, Fighting Fraud Together, which is a partnership between the UK's public, private and voluntary sectors.

This publication is one of a series examining the current justice landscape and the options available to victims of fraud seeking to obtain redress and recover money.

The Fraud Advisory Panel is a registered charity and membership organisation which acts as the independent voice and leader of the counter-fraud community. It works to raise awareness of fraud and financial crime, and to help individuals and organisations prevent fraud for themselves.

www.fraudadvisorypanel.org

Introduction

For many fraud victims, it is very important to recover their losses. Some will try to do this as part of a police investigation and any subsequent criminal prosecution. But not all fraud cases result in a prosecution, and not all successful prosecutions lead to compensation. However, there are a number of less well-known routes to redress which can be used by fraud victims as an alternative to, or in combination with, criminal proceedings.

The purpose of this paper is to:

- provide a brief outline of the main non-criminal options that may be available to individuals and small and medium-sized businesses ('smaller businesses') as they try to recover their money;
- highlight some of the main advantages and disadvantages of the civil courts as a means of redress;
- examine the extent to which victims are aware of their options and of alternative sources of help; and
- improve understanding of the interaction between the civil and criminal legal processes.

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Civil litigation and asset recovery

When individuals and businesses become victims of fraud, they (the claimant) can choose to seek compensation and recover assets by suing the fraudster (the defendant) in the civil courts. Commonly, this will be for breach of contract or the tort of deceit. Depending on the circumstances of the case, victims can use a variety of civil tools to help them recover their losses and enforce judgments of one kind or another.

In comparison to criminal proceedings, civil court actions offer speed, control, flexibility, a lower standard of proof, and a real focus on obtaining redress for the victim. Collective actions (or class actions) are available to groups of claimants with a common grievance, though case co-ordination can be cumbersome.

Many lawsuits result in out-of-court settlements. Those cases that do go to trial are dealt with by the County Court or High Court, where they are allocated to an appropriate 'track' (small claims, fast track, multi-track) according to their value and complexity (see table 1). For lower value claims individuals can represent themselves, as a 'litigant in person'. More complex cases may require a team of professionals, including solicitors, forensic accountants and fraud investigators.

A wide range of factors can influence a victim's prospects of recovering his or her losses: whether the money, or the fraudster, is located overseas; the total number of claimants; the availability of the fraudster's assets; the size of the total loss; and the willingness of law enforcement agencies to cooperate and share information with the claimant (particularly when a criminal case has already been pursued).

Cost (mostly legal fees and investigation expenses) is often cited as the biggest single barrier to civil action. Other obstacles include: unfamiliarity with the process in general; the risk of counter claims by the defendant; and the reluctance of the police to share information. Low value frauds, as well as crimes committed by 'men of straw', are seldom thought worth the effort of pursuit through the civil courts.

Table 1: Summary of civil court processes

Court	Track	Types of claim
County Court	Small claims track ¹	Less than £5,000
County Court	Fast track	More than £5,000, but less than £25,000
High Court	Multi-track	More than £25,000

Who pays?

In civil proceedings, victims must often meet their own legal fees, investigation costs and out-of-pocket expenses (disbursements). But other funding options are sometimes available.

- **Solicitors and other professionals:** some professionals will act on a conditional fee basis (commonly ‘no win, no fee’), expecting to be paid only if the case is won, at which point they receive their standard fee plus a percentage as a success fee. The client is expected to pay for any disbursements, whatever the outcome.
- **Legal expenses insurance:** some of a claimant’s legal expenses may be covered by an existing policy (called ‘before the event’ insurance). Otherwise, it may be possible to buy ‘after the event’ insurance, with the premium paid up-front, before proceedings commence.
- **Third-party funders:** these are sometimes called litigation funders. They may be prepared to underwrite a victim’s legal costs on the understanding that they are paid either a percentage of the money recovered, or a multiple of the money they’ve advanced.
- **Legal aid:** in very limited circumstances, legal aid may be available for victims who cannot themselves afford to pay for legal advice.
- **Other victims:** a group of victims might agree to share costs by acting collectively, in a class action (see box 1).

The Jackson reforms² – possibly changing the extent to which claimants can recover costs from defendants – may mean that in future fewer cases will make economic sense for the claimant. However, the precise impact is not yet clear.

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¹ Based upon informal research by the Federation of Small Businesses 24/7 legal advice line, the small claims track in the County Court is used more often by its members than any other means of resolving litigation. See Federation of Small Businesses (2011) *FSB response to consultation on proposals for reform of civil litigation funding and costs in England and Wales*.

² Jackson, R (2010). *Review of civil litigation costs: final report*. Insolvency practitioners have a two year postponement on the introduction of these rules.

Box 1: class actions

Frauds often have not one victim, but many. An investment fraud involving shares or property would be a good example. Losses to any one individual might well be too small to justify a legal case costing more than it could possibly recover — especially if the victim was defrauded by a company now insolvent.

But if the same fraud was committed against many victims, then it is possible for them to band together and collectively bring what is known as a group, multi-party or class action.

How does such a group form in the first place? Commonly, the internet is instrumental. Groups form when victims investigating their own claim discover others who have suffered a loss in similar circumstances. Victim blogs and forums attract fellow victims, encouraging them to share their stories, and so the group begins to coalesce. (A word of caution: fraudsters do try to infiltrate these forums to attempt to divert victims from pursuing their claims.)

Once a number of victims have come together they can build a fighting fund and instruct lawyers to investigate their claim. If the prospects of success are good, and the fraudsters have assets to which the victims might lay claim, then the group may be able to obtain the support of a third-party organisation willing to fund the litigation in exchange for a share of whatever is recovered. Thus, importantly, losses otherwise unrecoverable by an individual, on grounds of expense, can still be pursued by a group action of this kind.

The key features of civil litigation and asset recovery are:

legal professional (solicitor) and victim (claimant)	County Court (less serious) or High Court (more serious, complex or important)	no jury
victim usually pays for proceedings, although funding options may exist	focus on victim redress, such as a payment of money or transfer of assets	standard of proof: 'balance of probabilities'
very powerful civil remedies include: without-notice freezing orders, search and disclosure orders, and damages	no criminal conviction	

Bankruptcy and insolvency

In certain circumstances fraud victims can recover some, or all, of their losses through bankruptcy (for an individual) or insolvency (company) proceedings, but only if the fraudster still has sufficient money or assets against which to make a claim.

Where a fraudster has been ruled personally bankrupt, or made the subject of an insolvency order, victims must 'prove' as creditors. This means they must rely entirely on the liquidation/bankruptcy as their route to recompense, and can no longer start (or persist with) any other legal proceedings against the insolvent fraudster. Exceptions to this rule do exist, but they are governed by statutory limits to what can be claimed.

Once an insolvency order is made, creditors must formally register their claims in writing with the Official Receiver (or the insolvency practitioner acting as trustee or liquidator), enclosing whatever evidence is required. A 'pecking order' means that secured creditors (such as financial institutions) have first claim on any assets, often leaving little or nothing for unsecured creditors, including some victims.

In 2012, a survey by R3 (the trade body for insolvency practitioners in the UK) found that over the previous twelve months 24% of its members had been asked by a creditor to use insolvency proceedings against a fraudster. Frauds regularly encountered by insolvency practitioners include: land banking, Ponzi schemes, diversion fraud, mortgage fraud, 'fresh air' invoicing, and the misappropriation and misapplication of company funds by directors.³

Creditors may be expected to fund insolvency proceedings themselves. In which case, the same civil litigation and asset recovery funding options are available, with the sole exception of legal aid.

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The key features of insolvency are:

legal professional (solicitor) and victim (claimant)	County Court (less serious) or High Court (more serious, complex or important)	no jury
victims may be required to pay for proceedings (unless commenced by the Insolvency Service)	focus on (secured) creditor compensation	can deal with a large number of claimants
standard of proof: 'balance of probabilities'	no criminal conviction (unless subsequent investigations prove criminality)	

³ R3 (2012) R3 membership survey, conducted by Comres.

Alternative dispute resolution

Alternative dispute resolution (ADR), and in particular mediation, can be used to reach an out-of-court compensation agreement with a fraudster. Mediation can be used at any time before or during a civil trial (up to judgment), and for claims of any value.⁴ Both parties must agree in advance to participate.

The Civil Procedure Rules encourage the use of mediation, though not specifically for fraud cases. For low-value claims (ie, less than £5,000), it can be a cost-effective and expedient way for individuals and smaller businesses to recover their losses. It has been shown to deliver higher levels of satisfaction for participants, particularly when resolving workplace conflicts.

Some 8,000 cases undergo civil and commercial mediation each year. More than two-thirds are settled within a day, though complex cases can take much longer. Fees vary, depending on practitioner experience and the scale of the financial risk.

When there is a pre-existing relationship between the parties (eg, employer/employee, business partner, friend, relative, etc.), mediation may be an appropriate mechanism for dealing with fraud.

Interestingly, an important objective of civil justice reformers and modernisers (including Woolf⁵ and Jackson⁶) has been to promote and encourage a much more widespread awareness, and use, of ADR (especially mediation). Nonetheless, it remains undersubscribed, underexplored and, all too often, overlooked. Many professionals who were consulted in the course of this project do not consider mediation a suitable route to redress for fraud victims ('you cannot negotiate with fraudsters').

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The key features of mediation are:

a voluntary and non-adversarial approach to resolving disputes without going to court	a neutral, independent, third-party (a mediator) who helps both sides come to a mutual settlement	the parties can be accompanied by a colleague or expert (such as a legal representative or fraud investigator), who provides specific background or technical knowledge
discussions are confidential and 'without prejudice' (ie, they cannot be admitted or disclosed to a court or tribunal)	it is less formal than civil litigation, and can be faster and more flexible	court proceedings remain an option if the parties are unable to reach agreement

⁴ ADR does not currently play a role in criminal proceedings.

⁵ Woolf, H (1996). *Access to justice: the final report to the Lord Chancellor on the civil justice system in England and Wales*.

⁶ Jackson, R (2010). *Review of civil litigation costs: final report*.

Other options for redress

Other options may be available to individual and smaller business victims seeking to recover their money, but only in specific circumstances. Some are summarised briefly below.

Insurance claims

Individuals and smaller businesses can insure themselves against fraud, theft and/or dishonesty. Sometimes the cover is part of a wider insurance product. If things go wrong, the victim lodges a claim with their insurance company; if the claim is accepted, they are compensated for their loss, usually up to a maximum amount for any one claim or any one item. Types of insurance include:

- **Businesses:** theft, money and employee dishonesty/infidelity, legal expenses; and
- **Individuals:** card protection, home contents, travel, legal expenses.

Insurance can also be purchased after a fraud has taken place. This is sometimes called 'after the event' insurance. A policy of this kind might be needed to help fund the costs of civil litigation, asset recovery and/or insolvency. Such policies do not really provide insurance against fraud loss, but against the high cost of trying to recover those losses through legal proceedings of one sort or another.

Action taken by regulatory and/or professional bodies

In some circumstances, fraud victims may be awarded compensation through steps taken by a regulatory or professional body. The Financial Services Authority (FSA), for example, takes action against the larger unauthorised investment businesses in an attempt to recover consumer losses. It may also require authorised firms to sign up to packages of compensation for the consumer victims of mis-selling and other acts of malpractice. Since 2011, the FSA closed down 25 unauthorised investment schemes. They included share frauds, land banking and 'get rich quick' schemes, which together had taken £330m from their victims. The FSA recovered £33m (10%) by way of consumer compensation.

Compensation schemes

For the majority of individuals and smaller businesses who have lost money or assets to fraud there are no established, state-funded compensation schemes, except in some very limited circumstances.

Consumer Credit Act

Victims defrauded by means of a credit card payment might be able to recover their losses from the card provider. Purchases between £100 and £30,000, made wholly or partially with a credit card, are protected by Section 75 of the Consumer Credit Act 1974. This makes the card provider and the retailer jointly liable if something goes wrong. The cardholder is liable for only the first £50 of any unauthorised withdrawals or purchases.

Awareness of options for redress

When it comes to getting their money back fraud victims are often unaware of their options and have little idea who to go to for information and professional advice. Research consistently reveals a clear and identifiable need for simple, practical, independent and impartial information about the available options.

Some victims rely on friends and family for help. Others obtain formal advice from myriad sources: including solicitors, advice agencies (such as Citizens Advice), local councils (including Trading Standards), trade or professional bodies, financial institutions (ie, the

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victim’s own bank), and the police. But far too many deal with the matter entirely alone, or decide to take no action at all.

Looking at wider civil issues, the recent survey by the English and Welsh Civil and Social Justice Panel found that, of the one-third of respondents who had experienced a civil justice problem in the preceding 18 months, 35% had no understanding of their rights at the time.

- Almost half of the problems (45.7%) were dealt with by people entirely on their own; formal advice was obtained by just 29.3%, informal help by 14.5%. The remainder (10.4%) took no action at all to resolve their problem (see table 2).
- The most common sources of formal advice were: lawyers (25.6%), advice agencies (22.1%), local councils (16.2%), trade unions or professional bodies (9.5%) and the police (8.2%). Only 2.7% contacted their insurance company’s legal advice service. Most were satisfied with the first adviser they used.
- Those who sought advice were more likely to see their problem concluded through a formal process. Very few consumer and money-related problems were concluded through the courts or a tribunal, most being resolved by agreement between the parties.

Comparable research into the behaviour of smaller businesses is planned. In the meantime, it is believed that smaller businesses (particularly micro-businesses) are likely to rely upon similar sources of advice and information. For employment-related problems (including employee misconduct), there is some evidence for a degree of reliance on so-called ‘complete support packages’, such as the legal advice lines provided by the Federation of Small Businesses and the providers of legal insurance. Where private professionals (such as solicitors, mediators or fraud investigators) are used, this is usually on the recommendation of a business contact, friend or trade body. However, there is a risk that smaller business victims are more likely to approach a high street law firm with little or no fraud experience or expertise.

Clearly, much more could be done to educate individuals and smaller businesses about the options for redress available to them in the event of a fraud.

Table 2: The response to consumer and money civil justice problems⁷

Problem type ⁸	Response to problems			
	Did nothing	Handled alone	Handled with informal help	Obtained advice
Consumer	3.8%	60.1%	21.9%	14.2%
Money	7.6%	59.0%	10.5%	22.9%

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⁷ Pleasence, P., Balmer, N., Patel, A., Cleary, A., Huskinson, T. and Cotton, T (2011) *Civil justice in England and Wales*.

⁸ Consumer and money problem categories contain issues that relate to fraud and dishonesty.

