

The Misunderstood Background Check



Component

Civil Litigation Histories

We're all aware of the critically important components of background checks – convictions, driving histories, credit reports, references, drug tests – in profiling suspected fraudsters. But we should explore a component that's often misunderstood: civil litigation histories. It's tough to discover them, but here's how to do it.

By Thomas C. Lawson, CFE, CII

Urbena Louisa Marie Husenfarfel (of the Des Moines Husenfarfels) came to my office one sunny Newport Beach day and advised that she had “met the most *handsome* man” the previous night at her country club. Fortunately, Urbena (not her real name, of course) was relatively savvy – developed over 47 years of marriage to a man who at the time of his passing left her just shy of \$8 billion (yes, billion with a “b”). Urbena was also a woman who prided herself on maintaining her good looks, and so, after seven cosmetic “procedures” at age 76, striking a magnificent post-er-girl pose, she could easily pass for 75. Needless to say, Urbena was in the market for a Man. And she found one, but as with many of my clients over the years, she was wise to want to learn more about her beaux.

So I proceeded with basic subject identification and pursued the usual lien/judgment report. I checked the civil litigation indices in identifiable jurisdictions so I could identify the subject's activities, both personal and business.

After completing an index search in nearby Los Angeles County, I immediately identified 29 lawsuits naming the subject over a seven-year period with plaintiff names from the society register. After reviewing 10 of the cases (I figured 10 would be enough to convince my client that *this was a*

A Short History of Civil Litigation Checks

The decision to investigate civil litigation histories, shortly after the stock market crash in 1929, originated with banking institutions that wanted to know if a prospective borrower was litigious thus exposing the monies lent to potential risk of attachment by an opposing party to the borrower. Attorneys also found that this research was necessary when determining the “litigation posture” of either a prospective client or an opponent and, even more importantly, if a conflict of interest existed, which precluded that attorney from providing legal services to a prospective client (still the most common use of litigation histories by attorneys these days).

The concept has become an effective tool in performing due diligence in business-related matters including acquisition, sale of a business, public-debt financing, taking an entity public, and screening employment candidates. In a fraud examination, it’s a most effective tool to uncover the modus operandi of a particular suspect especially if that person has a history of defendant actions involving fraud or other crime-based money claims.

Subject identification has always been a researcher’s greatest test because of the lack of available identifiers in civil litigation files. In such cases, it’s the fraud examiner’s challenge to explain to the client why a particular lawsuit can’t be positively related to a particular suspect. This lack of identifiers contributes to increased cost and confusion especially in lawsuits bearing an exact name or one similar to a suspect. Today’s strict privacy legislation – the Fair Credit Reporting Act, Gramm-Leach Bliley Act, the Fair and Accurate Credit Transactions Act, and numerous state-level privacy statutes – has compounded the problem by requiring jurisdictions to remove the few identifiers that existed in public records – all the more reason for fraud examiners to bring their expertise and insights to clients conducting investigations.

bad guy) the plot was always the same: the subject gained the confidence of the victim, and offered her the rare opportunity to invest (“only a few units left”) in a Haitian oil and gas exploration opportunity. So I called my wonderful longtime client and advised her of my initial findings, and to my surprise she says, “It *can’t possibly* be him; he drives a yellow Corniche, and he is so *handsome* and I *love* him!”

Two weeks to the day after that conversation, she was in my office, multi-hued hair swept into a bun, facial scars exposed, and flaming mad. “Get me my money back from that SOB, Tom!” she instructed. It seems that she wrote him a check for the last four “options” available, at \$1.6 million, drawn on her investment management account – fortunately a registered charitable remainder trust, which made it a federal crime. We eventually recovered the full amount, because, as luck would have it, *his* bank placed a hold on the funds, and voila, Urbena got her \$1.6 million back.

As Certified Fraud Examiners, we’re all aware of the critically important components of background checks – convictions, driving histories, credit reports, references, drug tests – that are primary in profiling suspected fraudsters. Yet we should explore a component that’s often misunderstood: civil litigation histories. Unlike the other items, these histories comprise civil lawsuits that might involve fraudster identification that can sometimes be extremely hard to discover because of the lack of standard identifiers such as birth date, address, Social Security number, and physical description. However, you can now find valuable civil litigation information with cross-referencing services available through Lexis-Nexis, Merlin Information Systems, ChoicePoint, and Acxiom, among others. And you can work with research companies that understand all the details in searching for and retrieving civil cases. Companies that are members of the National Public Record Research Association (www.nppra.org) and/or Public Record Retriever Network (www.brpub.com/prrn/) are usually qualified to conduct this more sophisticated type of research.

Let’s take a moment to look at the process. As CFEs examining subjects, we travel down many avenues to build our basic files. We use a reputable research firm, or dependable index service to get an indication of what’s potentially out there under a given specific “name style,” with no variations. Often in the first look, I can’t tell if the identified cases involve my subject. Usually, when my subject has a common name, I review the information with the client to narrow the discovery. I can’t tell you how many times I’ve looked at an index and couldn’t put my subject in the case. But when I run it by the client, he or she confirms that one of the associated names was either a brother-in-law, an ex-wife, or some other related name. Then I can go deeper to determine the nature, depth, and breadth of the case and it’s applicability to the client’s concern.

WHAT IS A CIVIL LAWSUIT?

A civil lawsuit is basically a matter between two parties in which one party alleges wrongdoing against another. These disputes range from dog bites to car accidents to evictions to wrongful death claims. (Wrongful death claims have been useful in locating undisclosed/undiscovered murder convictions and in instances in which

fraud was involved.) One obvious benefit from litigation searches (also called suit searches) involves the discovery of money claims resulting from criminal acts, which are at the core of the background screening business and thus warrant the required effort to pursue them. In my 28 years in this field, about 85 percent of the litigation-based money claims I've reviewed between non-institutional parties result from some type of fraud.

Because these disputes are between specific parties and not matters involving public policy or the public interest, they're kept among the parties involved (even though they're in the public record). Often, not all the papers I need are in the public record or clerk's file. Files sometimes are partially sealed to protect witnesses or underage persons. Or information might not be in the files simply because the court is trying to limit the volume of paper.

THE RESEARCHER'S JOB

It's critical to understand how much time a researcher needs to gather data in a civil litigation check. An index search, which identifies all suits attributable to a name, is usually fast because it's available at the clerk's counter in the jurisdiction, on the Internet, or through the researcher's proprietary methods and sources. Note: Always get an index date from the researcher to know how current the search is. Private databases rarely provide this because, for the most part, the information is outdated and not as current as information available at the clerk's counter. A "hand search" (defined as a person physically traveling to a clerk's counter in a jurisdiction to identify and review any attributable cases), as with an index search, usually takes one to two days, depending on the location and limitations of the jurisdiction.

The retrieval/review process takes more time. It authorizes a researcher to look at the file to determine if it applies to the suspect and to copy the salient items in the file that describe the case, the parties, and the status or outcome. The industry term for this phase is known as pulling "cover, prayer, docket and dispo(sition)." This process can't be automated and has to be completed by hand, often by a public employee clerk, who probably has little interest in meeting the researcher's time demands.

If a case is archived, the retrieval can take up to two weeks. If it's not archived, the speed will depend on if the file is in the ready section of the clerk's office or scheduled to go to archives, which will delay it up to one week. Then it's a matter of how fast the researcher can review the case, copy the necessary parts, or determine the applicability to the suspect. Most researchers are very adept at determining if a case applies to the suspect. Good researchers copy more, rather than fewer, cases that appear related to your suspect to err on the side of caution. However, with common names, the task sometimes is overwhelming, and the researcher will notify you that there are too many cases to check or might ask you to join in the work. Cell phones have advanced this component dramatically. A researcher leafing through a case file can now immediately report information on the phone instead of copying the file and transmitting it to the user.

Costs

The index search is usually billed on a per-unit basis. The file re-

view/retrieval is usually billed on either a per-unit basis (in which the jurisdiction's prospective copy costs are predictable) or, as in the case of many of the major metropolitan jurisdictions, on an hourly basis because of the researcher's obvious lack of control in identifying the case, the need to request the clerk to locate the case, the time spent waiting for the retrieval of the case, and the time spent reviewing the case – each of which can be substantial. For example, in the federal archives system, a researcher usually makes a minimum of two visits: first, to make an appointment with the records clerk to obtain a case's accession number and start the file retrieval process, and second (sometimes up to two weeks later), to actually see the file. Obviously, researchers charge time costs to the client.

WORKING WITH THE CLIENT

Civil litigation checks provide a wonderful window into the litigation experiences of a prospective fraudster. The effective use of them depends on the client understanding many factors:

- The client must be willing to do what's necessary to thoroughly identify if a case attributes to the suspect. Searches involving common names or multiple jurisdictions can get expensive.
- Delays are commonplace in determining the ultimate civil litigation history of the suspect. A true and thorough search of civil litigation histories can add substantially to the cost of the examination.
- Not all matters litigated have a bearing on a suspect's position in the examination at hand, and even the use of a discovered and validated civil case could subject the CFE to potentially embarrassing scrutiny, more so than the use of a conviction history, or other tools. If a CFE misapplies an invalidated civil file to a case, an unnecessary bias might be formed against the subject. This is why many fraud examiners advise their clients against the procurement and use of civil histories unless they can provide enough money in the budget to thoroughly determine those cases that actually apply to the suspect. Sometimes, there's no ultimate way to determine applicability of a particular case, and the fraud examiner must re-interview the suspect to positively connect the cases to the suspect.

FRAUD EXAMINER'S RISK IN DATA ANALYSIS

Civil cases pose a multitude of potential risks for a fraud examiner, not the least of which involves making a wrong decision based on case information not actually attributable to the suspect especially where three factors come into play:

- The subject isn't *positively* identified.
- The breadth and heinousness of an applicable case re-directs the examiner's investigative efforts and resources – sometimes to little or no avail – leaving the fraud examiner with egg on his or her face and no benefit to the client.
- The fraud examiner looks only at the index data, which is *not* necessarily a determinant of a suspect's litigation history; it's simply a list of same or similar names involved in matters brought before that court.

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Workers' compensation claims rejected by an insurer also present information we can use. You might gain insight into a prospective fraudster's level of confidence in his game of attempting to defraud all, even the courts. Most times, the case pleadings will reveal the plaintiff's intended course of action and if the case was filed to bolster the attempt to defraud or to assert a valid claim.

Let's say you found that an individual who was rejected once by an insurer had brought a lawsuit against an employer for workers' compensation claims. That single lawsuit shouldn't make you suspicious. However, if you found that he had filed numerous lawsuits against previous employers and their insurance carriers, then, of course, you could suspect that he had intended to defraud. As with any workers' compensation history, research each case thoroughly, and interview the candidate several times to determine if he's a potential troublemaker or he just had legitimate claims that were mishandled. Workers' compensation fraud is blatant and is an easy place for you to see if you've got the right suspect.

GETTING THE MOST FROM A LITIGATION HISTORY

All of your skills, particularly your gut feelings, come into play when evaluating and using civil histories. Positively identified civil actions are clear windows into the souls of suspects; you can use them to weed out or confirm suspects because they identify past activities that are germane to the allegations. These histories are important investigation tools when, for instance, you're investigating an employee who has a history of stealing corporate assets for personal gain, but his company never filed a criminal complaint against him.

Your skills and knowledge in uncovering civil litigation histories can help clients determine a suspect's propensity to commit fraud and thus avoid trouble down the road. Happy hunting! 🔍

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