Recovering Assets After an Embezzlement

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To Catch a Thief

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Contrary to popular belief, notifying law enforcement and terminating employees may not always be the proper responses when an embezzlement case is discovered in your company.

Workplace embezzlement is an increasingly common occurrence: according to the most recent U.S. Department of Justice statistics, embezzlement increased by 39% between 1990 and 2000. (And in the current economic environment this trend will likely accelerate.) But despite its frequency, an embezzlement, when uncovered, still prompts feelings of rage, betrayal and embarrassment. And before the emotional reaction subsides, companies generally take immediate, reflexively punitive steps against the employee-suspect: on-the-spot termination, hasty escort from the premises, restricted access to the company’s electronic network and prompt notification of local law enforcement. While these steps may assuage the emotional wounds inflicted by the theft, a different approach may ultimately better serve a company’s financial interests.

If a company’s primary objective is asset recovery, that company should not initially adopt the above procedures. This admonition may seem counterintuitive. Why not immediately call the police when an employee has looted a corporate bank account? Doesn’t one usually call the police if a home is burglarized or a car stolen? And why not immediately terminate a disloyal employee?

The two-pronged answer is simple. First, life rarely replicates *Law & Order*. Burglary, car theft and other street crimes are most often committed by strangers whom the victim usually cannot identify and the police therefore cannot find and arrest. By contrast, an employer will almost always be able to identify an embezzler, if not immediately then certainly after a thorough investigation.

Second, and most importantly, law enforcement objectives and business interests frequently diverge. The criminal justice system is linear: police arrest, prosecutors take cases to trial, juries usually convict and judges sentence. And although “restitution” is frequently a component of modern sentences, during the time between embezzlement and sentencing, the embezzler’s ill-gotten gains have often been depleted by legal fees and/or “personal expenses.”

Corporate interests under these circumstances are often quite different from those of law enforcement. Most companies want their capital returned, perhaps followed by a firing squad at dawn for the miscreant as an example to other employees. The decision to bring charges against an embezzler, however, is generally secondary to a company’s financial concerns. In fact, and not surprisingly, the chief executive of a corporation may not want an embezzlement made public at all, in the interest of avoiding disclosures to angry shareholders, second-guessing board members and intrusive reporters with embarrassing questions. Given such competing interests, the following is a tried-and-true asset recovery methodology a company should follow upon the discovery that the till has been looted.
Investigation: The Critical First Step

The mere suspicion of an embezzlement should trigger an immediate, thorough investigation. Since circumstances and/or pre-existing relationships often render it awkward for general counsel or others to interrogate high-level executives without real or imagined issues of conflict arising, outside counsel should be retained expeditiously. Time is nearly always of the essence in these circumstances.

Additionally, depending on the specific facts of each case, counsel (on behalf of the company) may wish to retain a forensic accountant and a technology expert, the former to trace and illuminate the financial scheme, the latter to pursue the electronic trail. In the technology age, rarely is anything accomplished in an office without e-mail.

As soon as practicable, the suspect employee should be interviewed. (In some instances the facts may already point to the likely suspect.) And again, the company should have outside counsel conduct these interviews, preferably counsel experienced in white-collar criminal law and/or internal investigations. Criminal law practitioners will quickly develop a comprehensive understanding of the fraud and will often obtain a written or oral statement from the suspect containing an admission of culpability. It is well-known in police and prosecutorial circles that most people who engage in criminal conduct of this nature provide a statement rather quickly when proper, lawful interrogation techniques are employed.

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But the scheme extended over two years and there was still approximately $200,000 missing. It is likely the police would have shrugged at the loss, because the case was “solved.” (And because the court would have issued a typically meaningless restitution order.) We asked the perpetrator’s fiancé to come in for a chat, during which we asked the youthful real estate developer how he thought his secretary bearing whether you have finally been caught. You have. We know what you have done, your employer knows, and we will determine what should happen now. This will be your chance to demonstrate that you are a good person who did something out of character. This will be your only chance. Tell me what happened from beginning to end.”

The perpetrator voluntarily gave an oral confession that resulted in a 19-page statement that she signed before a notary. The confession outlined the acquisition of a BMW, expensive jewelry, a fur coat, exotic vacations with her fiancé and expensive artwork—including a Picasso—for her condominium. The confession provided a map to the recovery of a treasure trove of physical assets.
Annoyed CEOs are likely to opine that potential embezzlements are why insurance premiums exist, so why pay legal fees to investigate the matter? The first sentiment is quite true, but one can rest assured that the insurance company will pay neither easily nor quickly. And the insurer will use any perceived shortcomings in corporate procedures to determine future coverage with higher premiums. Finally, the “bind” between insured and insurer becomes that much tighter—insurance companies always need responsible customers—when the insured engages in self-help.

The End Game
It now must be determined how much has been embezzled, how much remains of what was taken and the total amount of the suspected employee’s unencumbered assets. The company’s records will indicate whether the perpetrator can repay the embezzled funds from employee assets still held by the company, such as 401(k) funds and/or pensions, vacation pay and the like. (Federal and state statutes will control to what extent asset sources are available for restitution purposes.) Also potentially relevant are the assets of parents, relatives, spouses or significant others—anyone who may have an interest in avoiding the ignominy of seeing a relative exposed as a thief on the front page of the local paper. The sources of potential restitution are infinite, so counsel should leave no stone unturned in restitution possibilities.

Armed with a full confession and knowledge of a perpetrator’s ability to make his or her employer whole, a company is then in a position to negotiate with the perpetrator for the return of its stolen assets. One must proceed with caution, however, since state statutes differ on how to handle such a situation. In many jurisdictions there is a very thin line between lawful attempts to obtain stolen property and extortion. Skillful counsel should be able to navigate these legal niceties effortlessly. When this has been accomplished, one can then debate contacting local authorities. Alas, there may be instances wherein the investigatory process is for little or naught. In those instances, police notification becomes imperative for a company to resort to “old reliable”—their insurance carrier.

In short, immediately terminating an employee and summoning law enforcement may not best serve a company’s financial interests. Retaining experienced outside counsel and conducting a thorough internal investigation may not only prove financially rewarding for the company in the long run, but such measures will also allow the company to avoid both internal scrutiny and unwanted publicity—both which have devastating effects on employee morale and a company’s reputation.