



# Collecting your products-liability award from an offshore defendant

*You can win, but can you collect?*

BY DAVID COOK

U.S. consumers face a tidal wave of potentially dangerous products manufactured offshore. Offshore manufacturers peddle defective scooters, asbestos,<sup>1</sup> shoddy drywall<sup>2</sup>, food and candy products that maim and sicken, if not kill, Americans.<sup>3</sup> The judgments in these products liability cases can hurdle past the \$10 million mark.<sup>4</sup> In attempting to domesticate the judgment in the offshore domicile of the defendant, the American creditor often confronts local law that is inhospitable to any enforcement.<sup>5</sup>

Offshore immunity to enforcement replaces insurance, whose usual purpose is to protect the assets of the insured. If the offshore local law immunizes the assets from enforcement, no purpose is served by spending millions on insurance or quality and safety controls when the assets are truly judgment proof.

American trial counsel is at a quandary. Chasing the offshore debtor is expensive, difficult and complex.<sup>6</sup> At worst, enforcement overseas of U.S. judgments can be completely inaccessible.<sup>7</sup>

## Is there a thread to unwind?

Most likely, the defendant manufacturer continues to peddle its product line in the U.S. If so, the judgment creditor can collect the judgment through the continuous stream of accounts receivable accruing to the manufacturer or other potential cash repositories.<sup>8</sup> Whether the manufacturer continues to sell, or have some type of business transaction in the U.S., should be a significant consideration for the plaintiff attorney in deciding whether or not to accept the case in the first place. Stated succinctly, if the

manufacturer is continuing to sell in the U.S. market, U.S. obligors are obligated to make payment, and therefore subject to garnishment and potential collection.

If the manufacturer is continuing to hire lawyers and pay settlements to resolve other claims, monies held by the lawyers or the revenue stream in favor of the manufacturer is subject to assignment orders or garnishments. If the manufacturer is paid through U.S. financial institutions or foreign institutions with a U.S. presence, the funds might be accessible to enforcement. The funds paid to other attorneys, and the funds in the hand of counsel to finance settlements are potential assets and points of great vulnerability.

## Knowledge is power

Post-judgment discovery offers the judgment creditor the power of a subpoena or examination order, among other remedies.<sup>9</sup> If however, the judgment debtor defaulted in responding to the lawsuit, the judgment debtor is not going to answer questions revealing assets and local customers.<sup>10</sup>

Common sense dictates continuous sales by the debtor for the simple reason that the debtor is reaping enormous profits without the burden of liability insurance and other expenses mandated by U.S. and local law.<sup>11</sup> These product sales generate accounts receivable subject to enforcement under the money judgment due the judgment creditors, in which the obligors are subject to discovery.

Finding information that discloses the customers is the first step. The judgment debtor ships its product line into the U.S. market via an oceangoing carrier ("shipping lines"), truck, or train.<sup>12</sup> The shipping companies issue bills of lading subject to Division 7 of the Uniform

Commercial Code.<sup>13</sup> The bills of lading evidence the consignor<sup>14</sup> who is the person placing products in the possession of the shipper, and the consignee<sup>15</sup> who is the person receiving the product. Absent the unusual or transaction through layers of parties, the consignor is the seller, exporter, distributor or manufacturer of the goods, and the consignee is the buyer (or recipient) of the goods and obligated to make payment.<sup>16</sup> With the identity of the consignees at hand, the judgment creditor can levy on the consignees, or compel their appearance in court to testify as to any outstanding obligation which might be due. Shippers are subject to subpoena and will produce the bills of lading.

Aside from consumer-direct sales through the manufacturer's Web site, the manufacturer's primary customers might be importers, wholesalers or distributors who specialize in the type of products. Trade magazines (both paper and online) might reveal wholesale buyers of the product.

## Seizing the accounts receivable or other liquid assets

With the garnishee in its sights, the judgment creditor levies upon the obligation (payment for the product) due the judgment debtor (the consignor), and owed by its customer, now called the garnishee under a garnishment (the consignee). Be aware, however, that the consignor (the manufacturer) and consignee (the buyer) might connive to evade the levy by payment through alternative means, refusing to respond to the levy, or engaging in a complete fraud.<sup>17</sup> This is a known risk.<sup>18</sup>

If the manufacturer defends lawsuits, payments due the attorneys and settlements are subject to enforcement through



a series of assignment order, levies and restraints. This is a time-consuming, tedious and detailed process of tying up the manufacturers' entire cash flow and reaching downstream any funds that flow to the U.S. based attorneys for their fees and funds available to other U.S. claimants for settlements.

### Supplemental remedies available

Aside from a garnishment, the creditor can seek an assignment order authorized by the California Code of Civil Procedure section 708.510(a).<sup>19</sup> These assignment orders reach the accounts due the judgment debtor and redirect them to the judgment creditor. Assignment orders reach out of state, which was the outcome in *UMG Records v. BCD Music Group, Inc.*, 2009 WL 2213678 (C.D.Cal.). In that case, the court ordered a broad-based assignment against record wholesalers and distributors purchasing product from the judgment debtor. In that case, BCD (the judgment debtor and obligee) was located in Texas and the obligors were nationwide. (See also, *Global Money Management v. McDonnold*, 2009 WL 3352574 (S.D.Cal.).)

### Payment through U.S. financial institutions

Routinely offshore manufacturers accept American Express as payment on the grounds that Amex provides valuable points to the card holder, who is usually the principal of the corporate buyer. Large purchases in the \$100,000 range produce a potpourri of points allowing the corporate principal to purchase airline tickets for worldwide travel free of charge and, given the informality of the transaction, free of taxes.<sup>20</sup> The manufacturer might accept PayPal, Google Wallet, or other forms of nontraditional payment vehicles. Nearly all of the financial institutions are subject to levy upon their agent for service of process which is usually CT Corporate Systems in Los Angeles or CSC in Sacramento. Of course, the majority of payments are still done by way of letters of credit and wire transfers.

### Conclusion

Products liability litigation accrues enormous expense, effort and risk, and cases can span over years. Service through the Hague Convention can cost thousands. The prospect of an actual recovery is paramount in gauging whether that expense and personal investment is a worthwhile investment. Nobody likes to tilt at windmills. In evaluating whether to accept the case, or pass, the criteria is whether the debtor continues to do business, directly or indirectly, in the U.S. If the debtor sells products in the U.S., does business with U.S. lawyers, pays settlements to other U.S. claimants, or in some way has a presence which creates an obligation due the obligor, the underlying claimant has some prospect of recovery and may render the accrual of the expense, effort and time on behalf of the client worthwhile.



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### Endnotes

<sup>1</sup> *Hamilton vs. Asbestos Corporation Ltd.* (2000) 22 Cal.4th 1127

<sup>2</sup> See, e.g., Wyckoff, John S., Martin, Robert, *Chinese Drywall Liability* (2009) 21(4) Environmental Claims Journal 272-284

<sup>3</sup> This author represents victims who have suffered at the hands of offshore manufacturers, parties and others.

<sup>4</sup> Punitive damages still exist, despite their deflation at the hands of *Campbell vs. State Farm Insurance etc.* (2003) 538 U.S. 408

<sup>5</sup> For example, Taiwan bars recognition of default judgments. See C.V. CHEN AND REBECCA HSIA, Taiwan's Court's Attitude to Recognition and Enforcement of Foreign Money Judgments, IBA Legal Practice Division, Asia Pacific Forum News (Oct. 2005).

<sup>6</sup> If the offshore manufacturer declined settlement upon service of the summons and complaint, plaintiff can expect that the offshore manufacturer will continue to resist or ignore all process.

<sup>7</sup> See ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK - COMMITTEE ON FOREIGN AND COMPARATIVE LAW, *Survey On Foreign Recognition Of U.S. Money Judgments* (2001).

<sup>8</sup> For sake of brevity, this article presumes that the consumer prosecuted the action in federal and not state court. While post judgment discovery rules might differ between state and federal courts, many states have domesticated the federal rules of civil procedure as their own state rules. See Fed R. Civ. Pro. 69(a) (2) that permits the judgment creditor to pursue federal or state authorized discovery. All references are to the federal rules for purpose of clarity. However, the federal court follows the supplemental laws of the state under Rule 69(a)(1)

<sup>9</sup> Under Fed R. Civ. Pro. 69(a)(2), Fed R. Civ. Pro. 26-37 authorizes service of the entire panoply of federal discovery. California Code of Civil Procedure sections 708.010-708.030 permit service of post judgment interrogatories and document requests.

<sup>10</sup> A default in discovery enhances the judgment creditor's request for more exotic remedies because the judgment debtor defaulted and curtailed the creditor's access to information. A default in post-judgment constitutes ultimately a violation of a court order, authorizes disentanglement should the judgment debtor file an appeal or continue to fend off enforcement. See *Empire Blue Cross & Blue Shield vs. Finkelstein*, 111 F.3d 278 (2d Cir. 1977). See *TMS vs Aihra* (1999) 71 Cal App.4th 377; *Polanski vs. Superior Court* (2009) 180 Cal.App.4th 507; *Hoffer v. Hoffer* (2012) - Cal App.4th —, 2012 WL 3286084. *Say & Say v. Castellano* (1994) 22 Cal.App.4th 88, 94; *MacPherson v. MacPherson* (1939) 13 Cal.2d 271; *Alioto Fish Co. v. Alioto* (1994) 27 Cal.App.4th 1669; *In re Kamelia S.* (2000) 82 Cal.App.4th 1224; *Guardianship of Melissa W.* (2002) 96 Cal.App.4th 1293; *Goya Foods, Inc. v. Unanue-Casal* (1st Cir. 2001) 275 F.3d 124.

<sup>11</sup> Dangerous products, products that lead to a string of lawsuits, or anything which is "toxic" rarely finds a home in the hands of an American retailer who might get stuck holding the bag.

<sup>12</sup> Telephone calls to competitors of the judgment debtor are highly productive as importers, wholesalers, and retailers carry lines of competing products and might reveal the "lay of the land." If the information enables the judgment creditor reach the judgment debtor's receivable and damage its market share, competitor might divulge substantial market information.

<sup>13</sup> Bills of lading cover any negotiable or non-negotiable instruments that authorize the transportation, shipment, storage, drayage, warehouse or possession of products.

<sup>14</sup> Commercial Code section 7102(a)(4): "Consignor" means a person named in a bill of lading as the person from which the goods have been received for shipment. Business experience suggests that the person who originates the goods is usually, but not always, the seller.

<sup>15</sup> Commercial Code Section 7102(a)(3) "(3) "Consignee" means a person named in a bill of lading to which or to whose order the bill promises delivery. Likewise the recipient is usually the buyer.

<sup>16</sup> Reaching the products in the hands of the common carrier is very tough. See Commercial Code section 7602: Unless a document of title was originally issued upon delivery of the goods by a person that did not have power to dispose of them, a lien does not attach by virtue of any judicial process to goods in the possession of a bailee for which a negotiable document of title is outstanding unless possession or control of the document is first surrendered to the bailee or the document's negotiation is enjoined. The bailee may not be compelled to deliver the goods pursuant to process until possession or control of the document is surrendered to the bailee or to the court. A purchaser of the document for value without notice of the process or injunction takes free of the lien imposed by judicial process. This is a very dry area of the law, but very unforgiving.



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<sup>17</sup> Subject to Division 5 of the Uniform Commercial Code and the Uniform Customs and Practice for Documentary Credits. Letters of credit are highly precise. *Board of Trade of San Francisco vs. Swiss Credit Bank* (9th Cir. 1979) 597 F.2d 146, 148-149 [Trial issue of material fact whether "bills of lading" meant "air bill"].

<sup>18</sup> Letters of Credit, SWIFT, or IBAN expedite payment due from the buyer to the seller. Wire transfers are now routine means of

payment, and preferred in most large dollar international transactions in light of the delays and risks inherent in the mails. [Sophisticated thieves steal checks out of the mail, "wash them," and insert new payees and amounts. Most business people demand payment through wire transfer for any transaction from unstable regions.]

<sup>19</sup> California Code of Civil Procedure section 708.510(a) "Except as otherwise provided by law, upon application of the judgment

creditor on noticed motion, the court may order the judgment debtor to assign to the judgment creditor or to a receiver appointed pursuant to Article 7 (commencing with Section 708.610 seq.) all or part of a right to payment due or to become due, whether or not the right is conditioned on future developments, including but not limited to the following type of payments . . .  
<sup>20</sup> A very large six-figure purchase assures free airline tickets to the cardholder.