

## Introduction

*“A check is better than a judgment!”*

Early in my career, after successfully obtaining summary judgment as a plaintiff in a collection lawsuit, one of my Firm’s paralegals made the aforementioned statement to me, which at that time I failed to fully understand and appreciate. Today, I recognize what that individual was saying, and perhaps more importantly, I understand how to turn a judgment into a check. In large part due to the success that my Firm had on behalf of New World TMT Limited (“New World”) in the lawsuit entitled *New World TMT Limited v. PrediWave Corporation*, Santa Clara County, California Superior Court Case No. 104 CV020369, where we obtained a \$2.87 billion judgment, I have learned the ins and outs of successfully enforcing a judgment throughout the United States and internationally, in those countries where the defendants and judgment debtors choose to hide their assets. Using our *New World* enforcement proceedings as a “case study,” this Practitioner’s Guide to Recovery will educate counsel in the procedures, tactics, and strategies available to enforce a judgment globally.

First and foremost, all practitioners must know how to bring their lawsuits to a place where they can obtain a judgment in their favor. Historic rules such as the “one final judgment rule” play an important role in ensuring that a claim is liquidated to a specific amount and gives the obtaining party (i.e., the “judgment creditor”) a right to enforce that claim against the assets of the judgment debtor. The manner in which the judgment is obtained—e.g., by motion for summary judgment, default judgment, or upon the verdict of a judge or jury after trial—can significantly impact its recognition by various jurisdictions across the world. The items included in the judgment can also be a factor with respect to enforcement. For example, some foreign jurisdictions do not recognize punitive damages, and if the judgment has punitive damages as a component, the judgment may not be recognized by or may be limited in certain foreign jurisdictions. Likewise, a party’s right to attorneys’ fees and the award thereof as part of a judgment may also be limited in foreign jurisdictions.

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Perhaps the most significant analysis that a practitioner must conduct is determining the point at which a judgment becomes “final.” Only final judgments are enforced by courts in other states or in foreign countries. Therefore, assuring that the appellate process has run its course before seeking to enforce a judgment is critical to a party’s right to enforce that judgment not just in the state where the judgment was obtained, but also in sister states and foreign countries. Ultimately, having a final judgment that may be levied against property across the world requires the skillful satisfaction of many procedural hurdles and strategic decisions that can significantly affect a party’s right to recovery if not handled competently.

“But, can you collect?” This is a question that almost always follows a practitioner’s statement that he or she has obtained a judgment in his or her client’s favor. If the practitioner considers this issue at the end of the lawsuit, and not at the beginning, it may be too late. Several jurisdictions have provisional remedies that can help ensure that a party has assets against which a judgment may be enforced at the conclusion of a lawsuit. In the United States in particular, a party may seek a writ of attachment, a writ of possession, or other prohibitive and/or mandatory injunctive relief upon the proper showing. For example, in California, a party that can show a likelihood of success on a claim based on a contract related to a liquidated sum may obtain a writ of attachment against specific property held by the defendant in the lawsuit. In the *New World* litigation, we obtained a \$117 million writ of attachment against the bank accounts of our adversary. Further, the court instituted a preliminary injunction that required our adversary to notify us of any transfers outside of the normal course of business in excess of \$50,000. Specifically, the Court precluded such transfers for forty-five hours. This was a significant amount of time, and afforded us adequate opportunity to seek the court’s assistance in the event we deemed the proposed transfer to be inappropriate. As a result, when we obtained our judgment, there was nearly \$300 million in our adversary’s bank accounts against which we could readily collect.

Although the United States Supreme Court rejected the institution of worldwide injunctions that would allow a party to freeze assets in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), many foreign jurisdictions, most notably the United Kingdom and Singapore, allow for Mareva injunctions (also known as Mareva orders or freezing orders) to freeze assets of defendants and judgment debtors across the world. Each jurisdiction that allows for Mareva injunctions has specific procedures for obtaining such orders, but if granted, many foreign jurisdictions would honor Mareva

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injunctions from an issuing country and freeze assets that can later be used to satisfy a foreign judgment. The Mareva injunction, which at its initial appearance in 1975 was considered a powerful, extreme tool, unique to English law, has now become commonplace, and is sought as a matter of standard procedure in most common civil law countries. At the outset of any case where asset enforcement might be an issue, all practitioners should consider the availability of a Mareva injunction against the assets of their adversary.

Certain foreign jurisdictions may have even more aggressive provisional remedies than Mareva injunctions or the provisional remedies available in the United States. For example, in Japan, a party may seek a provisional attachment on an *ex parte* basis, without notice to its adversary, that would allow it to attach certain personal and real property. Thereafter, the party can file an enforcement of judgment proceeding seeking to forfeit the property already attached. Filing fees and the undertakings necessary to pursue such remedies may be significant, but they are negligible in comparison to the effect of having a hollow judgment at the end of the case.

Most judgments will have to be amended if judgment enforcement becomes complicated. Such is the case because many adroit debtors and defendants hide assets in or with alter ego corporations, entities, and individuals. As a party discovers these asset holders and related fraudulent transfers, it should move swiftly to amend its judgment in the jurisdiction of issuance to add the newly discovered alter egos, so that they may be attached in other jurisdictions. This often is easier said than done, however. First, the showing necessary to establish that a corporation, entity, and/or individual is an alter ego of a judgment debtor is fact intensive and may not be easily accomplished depending on the level of care the debtor has taken to make any transfers appear legitimate. Second, as a final judgment is amended, this can create additional opportunities for a judgment to be challenged at an appellate level by the new debtor, thereby eviscerating the finality of the prior judgment. Strategy decisions and procedural hurdles abound when a practitioner weighs if and when to amend a judgment to include a new judgment debtor. This is no easy task to be certain.

Once a judgment has been obtained, the mechanical aspects of levying against bank accounts, personal property, and real property are controlled by statute for the most part in the United States. But what about levying on intellectual property and other tangible items such as stock certificates? There are different statutory schemes and, at times, unique decisional authority, that apply to different types of property. The practitioner must consider and closely navigate these

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requirements in order to effectively acquire the property at issue. Too often, items of value are left unattached by a judgment creditor due to the misconception that those items cannot be enforced against. The *New World* litigation provides a clear illustration of this point. In that case, we enforced against a related company of the primary defendant and ended up acquiring that company's intellectual property rights to certain technology and patents. Subsequently, New World used and continued to develop that intellectual property, and eventually New World entered into a related profitable joint venture with a technology company. Of course, making sure that our judgment was capable of delivering clean ownership and title to the intellectual property was critical to the success of that joint venture. Navigating those issues called for an intense understanding of the statutory scheme and procedures related to enforcing judgments. These matters will be discussed herein.

“What’s in your wallet?” More than a company slogan, this is perhaps the first question that should be asked to any judgment debtor that appears for a debtor’s examination. But, the trail to finding and locating assets that have been hidden by a judgment debtor is a path that must be meticulously traversed. Obtaining the “road map” for that journey through post-judgment discovery is critical to a practitioner’s success with respect to enforcing a judgment. In addition to taking the depositions of the judgment debtor directly, third party discovery is allowed in most jurisdictions. With proper use of these tools, a knowledgeable practitioner can trace assets from a judgment debtor to a hidden location. Case in point, in the *New World* litigation we took multiple “debtor’ examinations” of people that were not debtors at all. We did not restrict the geographic scope of our efforts, opting to depose these individuals in California and Massachusetts. These post-judgment discovery efforts enabled us to uncover and recover assets in Tokyo, Japan totaling in excess of \$100 million. Information is of paramount importance for the practitioner seeking to enforce his or her client’s judgment. Often, the judgment debtor has had years to hide assets, and thus a practitioner must use every tool available to uncover and unearth assets that may be used to satisfy the judgment. Subpoenas *duces tecum* and debtor examinations, including requests for the production of documents, can be an important tool for the practitioner trying to enforce a judgment.

Any practitioner seeking to enforce a judgment against a debtor that has taken elicited steps to hide assets will face the challenge of determining what steps he or she may take to combat the fraudulent actions of the debtor they are pursuing. That practitioner must resolve himself to operate solely within the confines of the law in seeking

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information on the location of hidden assets. The practitioner must control any retained investigators and consultants who are assisting him or her. Those individuals must respect the privacy rights of all those that are entitled to such protection, which often includes the judgment debtor himself. To make sure that no unethical line is crossed, the practitioner must know where the line is drawn. Case law does not offer concrete guidance in this regard. Hence, a practitioner must develop an approach using legitimate and legal means to acquire information, such that investigators and others under his or her charge do not take control of the investigation and lead the practitioner into murky waters. The worst thing that could happen to a practitioner pursuing a judgment debtor who has used criminal tactics to hide assets, is for that practitioner to lose focus and cross the line into criminal behavior himself to defeat the judgment debtor's improper actions.

Following the enactment of the Foreign Account Tax Compliance Act (FATCA) in 2014, use of offshore banking accounts in other jurisdictions to hide assets has diminished significantly. Nevertheless, all practitioners must know how to enforce any judgment in those jurisdictions that have traditionally been safe havens for debtors seeking to place assets out of reach of their creditors. In the *New World* litigation, we took steps to enforce our judgment in the Cayman Islands, Switzerland, Canada, Singapore, and Japan. Each of these foreign jurisdictions has their own rules and procedures for doing so. Understanding those rules, and the vagaries therein, is an important part of the process for understanding jurisdictions that are likely to be used by a judgment debtor to evade enforcement.

Of the \$2.87 billion judgment obtained in our *New World* case, \$2.2 billion of that related to punitive damages, attorneys' fees, and prejudgment interest. In other words, the amount of money *New World* actually sought to recover was closer to \$600 million. As a result of our efforts, despite the fact that the judgment debtors had nearly six years to hide assets before our judgment was obtained, we were able to recover approximately \$400 million in assets to satisfy our judgment. These efforts took a decade, and continue as of the first publication of this Practitioner's Guide. Therefore, the information that follows consists of the tried and true methods utilized by our team for more than ten years as we chased an incredibly knowledgeable fugitive from the Silicon Valley, to Massachusetts, to Tokyo, to Singapore, and to Taiwan and Mainland China. Each step of the way our dogged determination and knowledge of the particular enforcement mechanism of the jurisdiction we were in led us to recover information and assets that resulted in the nearly two-thirds recovery of the compensatory

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component of our judgment. Yes, indeed, the checks that were written over that ten year period to satisfy our judgment were much better than the judgment itself.

Dennis S. Ellis, Esq.

Paul Hastings LLP Partner, Litigation Department—Global Chair of Complex Litigation and Arbitration Practice Group