

## WHEN TO ACT AGAINST DIVERTERS

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One of the most frustrating aspects of any antidiversion effort is lack of complete and timely information. Rarely -- if ever -- will a company faced with diversion have all the information it needs to interdict diverted goods the first time such diversion occurs. Often, companies will be told that some of their products have been detained at a port or are en route to a final destination, but simply lack the evidence to take appropriate legal action. This situation is further complicated by two factors:

1. Diverters act very rapidly to get "their" goods to consumers. Failure to act quickly and decisively almost always results in the goods being sold, and thus out of reach of the legitimate owner (the manufacturing company).
2. Almost always, the initial information received by a company whose goods are being diverted will be fragmentary, and often misleading. It is uncommon for full and accurate information to be available at the start of an antidiversion campaign.

In most cases, it is not wise to act immediately upon receiving a mere hint that your goods have been diverted. Unless armed with a substantial amount of accurate information, legal efforts can be expensive and fruitless. This is not to suggest that nothing should be done; merely that prudence in timing is essential for a successful antidiversion campaign.

If you have some evidence of diversion, you should immediately start a thorough investigation of the facts, including a background check on all of the parties suspected in the diversion. In many cases, the investigation can be conducted by corporate security departments; in others, it might be prudent to retain the services of a private investigator, working with your counsel. You do not need to have evidence that would survive a court challenge to take the next step if your investigation leads you to believe that a customer has been involved with a diversion scheme: you can simply refuse to fill any further orders for that customer (after consulting with counsel). Later, after you have gathered substantial evidence, you can take appropriate legal steps either to recover goods or to seek compensation from the diverter.

After having identified a likely diverter, you should immediately check to see if there are any goods "in the pipeline" destined for that company or individual. If the goods have not yet been shipped, you should consider cancelling the shipment. Alternatively, some companies take extra precautions to be able to identify the goods later on, some going so far as to install electronic monitors in some of the products to facilitate their tracking. If the goods have already been sent to the suspected diverter, immediately notify your security staff, private investigator and specialized counsel. It is often possible for the goods to be interdicted upon their return to the

United States. The likelihood of this happening, however, decreases with each hour of delay in gathering intelligence. You should have a contingency plan prepared in advance so that your security people and counsel can act quickly. In this respect, it is always prudent to have fully briefed your counsel, investigators and security people about your products and marketing procedures so that they are familiar with these before a crisis occurs.

"Shooting too early" to prevent diversion is tempting, but rarely successful. Do your homework, including reference to data bases such as the Electronic Diversion Database International (EDDI) before you pull the trigger.

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