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Are You Being Served?: Appellate Courts Consider Whether the Federal Rules of Criminal Procedure Authorize Service on Foreign Defendants Through Domestic Subsidiaries, But Larger Question Looms

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On April 1, 2015, the U.S. Court of Appeals for the Seventh Circuit heard oral argument in *United States v. Sinovel Wind Group Co., Ltd.*, Nos. 14-3013 & 14-3105, the first-ever appellate case to raise the issue of whether the U.S. government can rely on an "alter ego" theory to serve a federal criminal summons on a foreign defendant by way of its U.S.-based subsidiary. Assuming that the court finds appellate jurisdiction or agrees to entertain a mandamus action—which is uncertain—it will become the first court of appeals to squarely decide whether the "alter ego" theory of service is viable under the current Federal Rules of Criminal Procedure.

Likewise, in late February, the Ninth Circuit agreed to hear an interlocutory appeal in *United States v. The Public Warehousing Co. KSC*, No. 14-80157. The issue there is whether service may be perfected on a foreign parent corporation through a domestic subsidiary, provided such subsidiary constitutes a "general manager" of the overseas parent. Although *Public Warehousing* is a civil case, the Ninth Circuit's analysis concerning the service requirements in the parent-subsidiary situation may have implications in the criminal context as well.

These cases may clarify the conditions under which the U.S. government may serve foreign companies through a domestic subsidiary. However, there remains no appellate guidance on the threshold question—barring the application of an alter ego, general manager, or other agency theory, do the Federal Rules of Criminal Procedure (the "Criminal Rules") permit the U.S. government to summon a foreign organizational defendant from abroad? Although a few district courts have addressed this question, their decisions turned primarily on an alter ego theory of service.

Given its interest in prosecuting alleged criminal conduct perpetrated by foreign companies, the United States Department of Justice ("DOJ") has been paying increasing attention to this issue. In October 2012, the DOJ's Criminal Division proposed that the Judicial Conference's Advisory Committee on the Federal Rules of Criminal Procedure (the "Advisory Committee") amend the Criminal Rules "to permit the effective service of a summons on a foreign organization that has no agent or

principal place of business within the United States." Arguing that the proposed amendments were "necessary in order to effectively prosecute foreign organizations that engage in violations of domestic criminal law," the DOJ requested an amendment of the rules "to allow service of a summons outside the United States" and to eliminate language that appears to restrict service of a criminal summons to entities that have "an agent or postbox in the United States."

The Advisory Committee is currently considering the proposed amendments, which, if adopted, will not take effect until December 2016 at the earliest. Until that time—and, potentially, afterwards as well—the Seventh Circuit's decision in *Sinovel* and the Ninth Circuit's anticipated decision in *Public Warehousing* could provide important guidance to foreign corporate criminal defendants, particularly those with domestic subsidiaries.

Background

Criminal Rule 9 governs service of a summons on an indictment, and requires compliance with Criminal Rule 4 when serving the summons on a criminal defendant. Fed. R. Crim. P. 9(c)(1)(A). Criminal Rule 4, however, appears to restrict the scope of extraterritorial service in significant respects.

First, Criminal Rule 4(c)(2) provides that a "warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest." Fed. R. Crim. P. 4(c)(2). The plain language of Criminal Rule 4(c)(2), therefore, appears to limit service of a summons to the territorial jurisdiction of the United States, absent a "federal statute authoriz[ing] an arrest [abroad]."[1]

Criminal Rule 4 contains additional requirements to perfect service upon organizational defendants. The U.S. government must (i) deliver the criminal summons "to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process" (the "Delivery Requirement"), and (ii) it "must also" mail a copy of the summons to the corporation's "last known address within the district or to its principal place of business elsewhere in the United States" (the "Mailing Requirement"). Fed. R. Crim. P. 4(c)(3)(C).

Compliance with Criminal Rule 4 is critical because, without it, a defendant may argue that personal jurisdiction does not attach, that service of the summons should be quashed, and even that the indictment should be dismissed.

District Court Authority

Only a handful of district courts have examined the question of whether service of a criminal summons can be effected on a foreign defendant consistent with Criminal Rule 4. Primarily, these decisions turn on an application of the alter ego doctrine, where the government has argued that the Delivery and Mailing Requirements have been satisfied through service on a domestic subsidiary.[2]

Much of this litigation has revolved around whether the Mailing Requirement is, in fact, a jurisdictional prerequisite or an additional notice provision. In other words, because a foreign company may not have a "last known address" within the judicial district in which the indictment was filed or a "principal place of business elsewhere in the United States," the U.S. government has argued that a domestic mailing is not a mandatory component of service. Generally, courts have enforced the rule in accordance with its plain terms and have quashed service where the government failed to comply with the Mailing Requirement.[3] Thus, in *United States v. Pangang Group Co.*, No. 3:11-cr-00573-JSW

(N.D. Cal. Apr. 8, 2013) (Order on Defendants' Second Motion to Quash Service of Summons at 6) ("*Pangang II*"), the court seized on the "must also" language of the rule, concluding that it "connotes a mandatory requirement, rather than a hortatory or precatory requirement." *Id.* at 9. The *Pangang II* court then ruled that the "United States must be able to show that it has complied with the mailing requirement to effect service on [the Chinese defendant]." *Id.* at 10.

On the other hand, while it quashed service on other grounds, including the rejection of service on a domestic subsidiary under the alter ego theory, at least one court—*United States v. Kolon Indus., Inc.*, No. 3:12-cr-137 (E.D. Va. Feb. 22, 2013) (Memorandum Opinion on Defendant's Motion to Quash Service and to Dismiss Indictment at 12)—has ruled that the Mailing Requirement is not a mandatory component of service.[4] The court reasoned that a textual reading of Criminal Rule 4(c)(3)(C) in its entirety teaches that service under the rule is to be accomplished through the Delivery Requirement, and that the Mailing Requirement merely provides for an additional means of notifying a defendant of a pending criminal matter. The *Kolon* court also argued that a literal interpretation of the Mailing Requirement would produce an absurd result if a prosecution were thwarted by the failure to execute a domestic mailing.[5]

Ninth Circuit's Review of *Public Warehousing*

Of the handful of district court cases regarding Criminal Rule 4, only two have been accepted by appellate courts. On February 27, 2015, the Ninth Circuit agreed to hear an interlocutory appeal in *Public Warehousing*, a case in which a former employee brought a False Claims Act lawsuit in federal court against a Kuwaiti contractor with no physical presence in the United States. The court's decision in this appeal is likely to provide guidance to foreign organizational defendants in connection with whether the defendants may be served with a criminal summons through a domestic subsidiary, to the extent such subsidiary qualifies as a "general manager" under state law. Subject to the Ninth Circuit's guidance, that analysis requires a consideration of the underlying harm alleged and whether the subsidiary was involved in the harm for purposes of service.

Seventh Circuit's Consideration of the *Sinovel* Appeal

In *Sinovel*, a trade secrets matter involving a Chinese wind turbine manufacturer, the U.S. government claimed to have served the Chinese parent through its alleged alter ego, an affiliated entity in the U.S. The district court accepted the government's alter ego theory based on the factual record and Sinovel sought mandamus relief in the Seventh Circuit (which was consolidated with its merits appeal). Sinovel argued that the alter ego theory, which was developed in the civil personal jurisdiction cases, has no applicability in the context of serving a summons under the Criminal Rules. And even if such theory were permissible, Sinovel argued that the facts of the case did not justify piercing the corporate veil between the foreign company and its U.S.-based subsidiary.

On April 1, 2015, the Seventh Circuit heard oral argument on the appeal. The appellate panel consisted of Chief Judge Wood, Judge Flaum, and U.S. District Judge Kennelly, sitting by designation. To a significant extent, the argument focused on whether the court had appellate jurisdiction under the collateral order doctrine, or whether it could only award Sinovel relief via mandamus, where relief is discretionary and defendant must meet a heightened standard before such relief can be granted. Therefore, the Seventh Circuit may refuse to consider the merits of the case at this juncture, holding instead that the proper time for the foreign defendant to present its objections to the propriety of service is on a final appeal after the trial and sentencing. If it reaches the merits, the court of appeals would have to decide whether the alter ego theory could be the basis for the service of a criminal summons under Criminal Rule 4. As the U.S. Government observed at the argument, the alter ego

theory or a similar general agency theory is the Government's main method for serving foreign corporations. Even if the Seventh Circuit adopts the alter ego theory, however, Chief Judge Wood's questions suggested that the court is likely to craft its opinion narrowly, authorizing such service only in narrow fact-specific circumstances, possibly (over the U.S. Government's opposition) only where the piercing of a corporate veil is justified.

Actions of the Advisory Committee on the Federal Rules of Criminal Procedure

In view of its increased enforcement efforts, particularly involving overseas companies, the DOJ has petitioned the Judicial Conference's Advisory Committee to amend Criminal Rule 4 to summon foreign organizational defendants from abroad. Both the Advisory Committee and the DOJ have labeled the current version of Criminal Rule 4 as an "obstacle" to the prosecution of foreign organizations that have no last known address or principal place of business in the U.S.

Following the DOJ's proposal in October 2012, the Advisory Committee determined that further study was warranted. Afterwards, in August 2014, the Advisory Committee published its proposed amendments for public comment. The proposal would amend Criminal Rule 4 to: (i) authorize service outside a judicial district of the United States; (ii) limit Criminal Rule 4(c)(3)(C)'s Mailing Requirement to service on an organization within the United States, where the organization is served through a particular type of statutory agent; and (iii) provide for methods of service for a foreign corporation outside the United States.

The Advisory Committee held public hearings on the proposed amendments, and received a variety of comments by the set February 17, 2015 deadline. The proposed amendments, if approved, would become effective on December 1, 2016.

Conclusion

As noted above, it is likely that the Seventh and Ninth Circuits will soon provide guidance regarding whether foreign organizations may be summoned to the U.S. by way of a domestic subsidiary (through an alter ego theory or otherwise). Aside from that guidance, there remains an open issue whether current Criminal Rule 4(c)(2) authorizes service on a foreign organization in the first instance. That question, of course, may not be resolved until further action, if any, is taken by the Advisory Committee, the Supreme Court, and Congress with respect to the proposed amendments to Criminal Rule 4. In the meantime, foreign companies facing potential service of criminal summonses should consider carefully the evolving case law on when such service is proper under the current Criminal Rules.

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[1] This provision was added in 2002 to accommodate the then-recently enacted Military Extraterritorial Jurisdiction Act, which made certain criminal laws applicable to U.S. military personnel and contractors abroad and explicitly authorized overseas arrests for violations thereof. *See* Fed. R. Crim. P. 4, Adv. Comm. Notes (2002); 18 U.S.C. §§ 3661 & 3262(a).

[2] *See, e.g., United States v. Johnson Matthey Plc*, No. 2:06-cr-169, 2007 U.S. Dist. LEXIS 56510, at *6-7 (D. Utah Aug. 2, 2007) (turning on "alter ego" assessment); *United States v. Chitron Elecs. Co.*, 668 F. Supp. 2d 298, 304 (D. Mass. 2009) (same); *United States v. Alfred L. Wolff GMBH*, No. 08-CR-417, 2011 WL 4471383, at *4 (N.D. Ill. Sep. 26, 2011) (same).

[3] See*, e.g., United States v. Pangang Group Co.*, 879 F. Supp. 2d 1052, 1063 (N.D. Cal. 2012) ("*Pangang I*"); *United States v. Pangang Group Co.*, No. 3:11-cr-00573-JSW (N.D. Cal. April 8, 2013) ("*Pangang II*"); *Johnson Matthey Plc*, No. 2:06-cr-169, 2007 U.S. Dist. LEXIS 56510, at *6-7. *See also United States v. Dotcom*, No. 1:12-cr-3, 2012 WL 4788433, at *1 (E.D. Va. Oct. 5, 2012) (affirming that Criminal Rule 4 "unambiguously requires a mailing").

[4] Paul Hastings LLP, including authors of this article, represents Kolon in this proceeding, which remains pending.

[5] Ultimately, the *Kolon* court determined that, apart from the requirements of Criminal Rules 4 and 9, extraterritorial service of the summons was authorized by the U.S.-Korean Mutual Legal Assistance Treaty. *Kolon*, No. 3:12-cr-137 (E.D. Va. Dec. 23, 2014) (Order on Mot. to Quash Service of Summonses at 2-9). The U.S. Court of Appeals, without providing reasons, denied a petition for mandamus.