Have I Been Served? The Ninth Circuit Agrees to Clarify Process of Service for International Entities in USA v. The Public Warehousing Company, KSC

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Introduction

Foreign corporations sometimes assume that they cannot be served unless the plaintiff goes through the steps required by the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents. For foreign corporations facing suit in California’s federal courts, case law has made that assumption risky, if not wrong. Courts have allowed plaintiffs to perfect service on foreign parent corporations by serving their domestic subsidiaries under the theory that the subsidiary qualifies as the foreign parent’s “general manager.” But courts have struggled to come up with a uniform method for explaining which subsidiaries qualify as a “general manager,” leaving foreign corporations guessing as to whether they have been properly brought into a case. That uncertainty will likely (and hopefully) soon go away.

In USA v. The Public Warehousing Company, KSC, No. 14-80157, the United States Court of Appeals for the Ninth Circuit recently agreed to hear an appeal raising the question of how international companies can be successfully served with lawsuits through domestic subsidiaries. This decision could alter the landscape of process service for international companies facing suit in California’s federal courts, providing clear guidance to foreign corporations wondering whether or not service on their California subsidiary perfected service on them.

Background: California Law Allows Service on a General Manager to Qualify as Service on the Parent Corporation

Federal Rule of Civil Procedure 4 provides the foundation for service of process in federal courts. Under the federal rules, a plaintiff can serve an organization or corporation by delivering a copy of a complaint and summons to an agent authorized to receive process of service. Fed. R. Civ. P. 4(h). The federal rules also explicitly provide plaintiffs an avenue to serve a foreign entity. Fed. R. Civ. P. 4(f). Despite this, a reading of the rule does not provide a foreign corporation a complete understanding of when and how it can be served properly. To understand how process of service works for international parent companies, the analysis begins with the material referenced within the rule. For service of international companies, the subsection of Rule 4 that governs, subsection (h), “Serving a Corporation, Partnership, or Association,” cross-references both Rule 4(f), “Serving an Individual in a
Foreign Country” (which does address service under the Hague Convention), and Rule 4(e)(1), which
dees service perfected “following state law for serving a summons in an action brought in courts of
general jurisdiction in the state where the district court is located or where service is made[.]” It is the
latter cross-reference to state law that exposes foreign corporations facing suit in California to broader
means of service.

Under California law, an international corporation can be served through the domestic “general
manager” of an international corporation. California Civil Procedure Code § 416.10 provides that “a
summons may be served on a corporation by delivering a copy of the summons and the complaint to a . . .
general manager.” California state courts have, at times, given “general manager” a broad
reading. In Yamaha Motor Comp., Ltd. v. Superior Court, 174 Cal. App. 4th 264 (2009), for example,
the Court of Appeal explained that in response to a writ petition it had issued an order to show cause,
because the writ presented a question of “public importance that has not yet been squarely faced by a
California state court, in a published opinion.” Id. at 267. Namely, “[t]he question of whether a
Japanese manufacturer can be served under California law simply by serving the Japanese
manufacturer’s American subsidiary.” The Court of Appeal expressed its skepticism, explaining that it
had initially thought the “method just seemed too easy a way to get around the Hague Service
Convention.” Id. But on a full review, the Court held that “yes, it really is that easy.” Id.

The Yamaha Court noted that the United States Supreme Court, in Volkswagenwerk Aktiengesellschaft
v. Schlunk, 486 U.S. 694 (1988), confirmed that service of a foreign corporation through lawful state-
law means was valid, even if that included service on a domestic subsidiary. Yamaha, 174 Cal. App.
4th at 267. And the Yamaha Court explained that a California Supreme Court case, Cosper v. Smith &
Wesson Arms Co., 53 Cal.2d 77 (1959), had already held that “service on the California representative
of a foreign parent [is] valid—that is, valid as to the foreign parent—under California law” so long as
the representative qualifies as the parent’s “general manager.” Yamaha, 174 Cal. App. 4th at 267,
273-75, n.9.

While Yamaha broadly interpreted section 416.10, there is still some confusion over how to determine
whether a foreign subsidiary qualifies as a “general manager” sufficient to expose the foreign parent
to domestic service.

For example, in Khachatryan v. Toyota Motor Sales, U.S.A, Inc., 578 F. Supp. 2d 1224 (C.D.
Cal. 2008), Toyota Motor Company (“Toyota Japan”) moved to dismiss plaintiff’s complaint for
insufficient process of service, arguing that the service was ineffective under California law and that
Toyota Japan must be served under the Hague Convention. Id. at 1226. Plaintiff had served the
chairman of Toyota Motor Sales, U.S.A (“Toyota America”) at Toyota’s American address in California.
Id. Plaintiff argued that the Toyota America was a “general manager” under California law. Id.
The California district court denied Toyota Japan’s motion to dismiss, concluding that Toyota America
was a “general manager” for Toyota Japan under § 416.10. Id. at 1227. The district court stated that
a general manager is “any agent of the corporation of sufficient character and rank to make it
reasonably certain that the defendant will be apprised of the service made.” Id. at 1226 (citations
omitted).

The court in Khachatryan went on to say that a domestic subsidiary may qualify as a “general
manager” if the domestic subsidiary provides the international company with “substantially the
business advantages that it would have enjoyed if it conducted its business through its own offices or
paid agents in the state.” Khachatryan, 578 F. Supp. 2d at 1227 (citations omitted). The court found
that because Toyota America distributed Toyota cars in California, as well as marketing materials,
Toyota Japan’s relationship with Toyota America gave it “substantially the business advantages that it would have enjoyed if it conducted business” in California. The court did note, however, that if Toyota America did not have any connection with the foreign business, that subsidiary might not be considered a general manager. *Id.* at 1228 n.1.

Likewise, in *Brighton Collectibles, Inc. v. Winston Brands, Inc.*, No. 11cv2191-GPC (WMC), 2013 WL 394060 (S.D. Cal. Jan. 30 2013), Urban Trend (HK) moved to dismiss plaintiff’s first amended complaint for insufficient service. *Id.* at *1. The plaintiff had served Urban Trend (HK), a Hong Kong based company, through service on Urban Trend, LLC, the domestic entity’s registered agent. *Id.* Urban Trend (HK) argued that plaintiff had not properly served it under Rule 4, as Urban Trend, LLC did not create a channel for continual flow of business into California. *Id.* at *5. The district court found that the service was proper through Urban Trend, LLC as a general manager. *Id.* at *7. The district court stated that to determine if a subsidiary is a general manager “the essential factor is that [the subsidiary] was performing services for the [parent] and providing it with the opportunity for regular contact with its customers and a channel for a continuous flow of business into the state.” *Id.* at *6 (citations omitted).

Some of the confusion stems, in part, from a question of involvement—whether the “general manager” analysis requires consideration of the underlying harm alleged and whether the domestic subsidiary must be the general manager with respect to conduct related to that harm. The Court in *Brighton* did not look to the underlying harm, finding that the parent’s and the subsidiary’s businesses related enough that service on the latter would apprise the former of the suit. See *Brighton Collectibles*, 2013 WL 394060, at *7.¹ But in *Tang v. CS Clean Sys. AG*, No. D052943, 2008 WL 5352253 (Cal. Ct. App. Dec. 23, 2008), a California court of appeal found that the subsidiary’s lack of involvement in the case at issue was relevant in determining whether the subsidiary was a general manager for purpose of service. In *Tang*, plaintiff appealed the trial court’s order granting CSAG’s motion to quash service, finding that CSAG was improperly served through its subsidiary in California, CS Clean Systems, Inc. (“CSI”). *Id.* at *1. The court of appeal held that CSI was not a general manager of CSAG because CSI did not have management responsibilities regarding the operations at issue in plaintiff’s lawsuit. *Id.* at 5.

The Court of Appeals affirmed the trial court’s ruling that CSAG was not properly served through CSI. *Id.* at *8.

While the trend line in California federal courts has been away from *Tang* and towards a broader reading of “general manager,” see, e.g., *Rockwell Automation, Inc. v. Kontron Modular Computers*, 12CV566-WQH WMC, 2012 WL 5197934, at *6 (S.D. Cal. Oct. 19, 2012),² the Ninth Circuit has agreed to hear an interlocutory appeal on this issue and may give greater clarity on when service on a domestic subsidiary will qualify as service upon the foreign parent.

**The Ninth Circuit Has Agreed to Decide Whether Service on a Subsidiary that Is Not Alleged to Have Participated in the Harm Qualifies as Proper Service Under the “General Manager” Doctrine**

The case is *USA v. The Public Warehousing Company, KSC*, No. 14-80157 (9th Cir. Feb. 27, 2015), Dkt. 3 (granting interlocutory appeal).

In *Public Warehousing Company*, a former employee of the Public Warehousing Company (“PWC”) brought a False Claims Act suit in the United States District Court for the Central District of California against a PWC, a Kuwaiti contractor with no physical presence in the United States. *USA v. The Public
The employee alleged that PWC submitted false claims under government contracts. Id. at 1.
Important for purposes here, the employee sought to serve PWC through its U.S. subsidiary, Agility Logistics. Id. at 6-7. PWC moved to dismiss the employee’s claim arguing that service was deficient. Id. PWC explained that service had not been properly made under Rule 4 or California services provision and that actual notice of the complaint was not enough. Id. at 8. The employee countered by arguing that service on Agility should be deemed service on PWC because Agility provides a channel for the continuous flow of PWC’s business into the state and because by serving Agility it was reasonably certain that PWC would be apprised of the action. Id.

The District Court agreed with the employee, finding that the employee had sufficiently served PWC by properly serving its subsidiary, Agility. Public Warehousing Company, KSC, No. SACV 10-0526 AG (MLGx) (C.D. Cal. Sep. 17, 2014), Dkt. No 69 at 10. The court reasoned that Agility qualified as PWC’s “general manager” under California law. Id. Specifically, the court found that Agility provided a “channel for the continuous flow of PWC’s business in California” and that Agility Logistics “was reasonably certain to apprise PWC of the action.” Id.

Nevertheless, recognizing that the issue was important, the District Court stayed its denial of PWC’s motion to dismiss to allow PWC to seek an interlocutory appeal. USA v. The Public Warehousing Company, KSC, No. SACV 10-0526 AG (MLGx) (C.D. Cal. Oct. 23, 2014).

On February 27 2015, the Ninth Circuit issued an order agreeing to hear the appeal. The Public Warehousing Company KSC v. USA, No. 14-80157 (9th Cir. Feb. 27, 2015).

Conclusion: The Ninth Circuit’s Decision in Public Warehousing May Bring Greater Clarity to the Question of Whether Service on a Domestic Subsidiary Properly Effectuates Service on its Foreign Parent Under the “General Manager” Doctrine

For foreign corporations with domestic subsidiaries in California, Public Warehousing is a case worth watching. The Ninth Circuit may offer a definitive answer to the question of when and how in a California federal court service on a domestic subsidiary qualifies as service on the foreign parent. Stay tuned and we will keep you updated once the Ninth Circuit rules.
If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings San Francisco lawyers:

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1 "Although Urban Trend, LLC may not sell the product at issue, Urban Trend, LLC’s relationship with Urban Trend (HK) would make it reasonably certain that Urban Trend, (HK) would be apprised of the service of process made."

2 "Kontron Modular’s distinction is appealing but not compelling because the dispositive fact is the presence of a channel for the regular flow of business and not the actual flow of business.”