CLIENT ALERT

Conflicting Court Decisions Highlight Difficulty of Prosecuting Foreign Corporations for Economic Espionage and Trade Secrets Theft

Apr.11.2013

The Obama administration has made the protection of U.S. intellectual property a priority, as we have reported in prior alerts. But achieving that goal is rife with challenges, including the practical barriers to criminal prosecution of foreign corporations for economic espionage and trade secrets theft. Among those barriers is Rule 4 of the Federal Rules of Criminal Procedure, which specifies how jurisdiction over a foreign corporate defendant may be achieved through service of process. Courts are only now beginning to struggle with the intersection of trans-national corporate crime in the internet age and Rule 4, which is woefully out-dated. Two recent conflicting court decisions highlight this disconnect.

In February, a judge in the U.S. District Court for the Eastern District of Virginia issued a lengthy memorandum opinion analyzing the application of Rule 4 to the government's attempts to serve an indictment and summons on the corporate defendant in *United States v. Kolon Industries, Inc.* The indictment charges Kolon with trade secrets theft and obstruction of justice. (Those criminal charges followed a civil trade secrets theft trial in which Crowell & Moring represented the plaintiff, resulting in a $920 million jury award.) A key question addressed by the court is whether the so-called "mailing requirement" in Rule 4 must be satisfied to effect service of process and thereby obtain jurisdiction over a corporate defendant.

Resolution of this question is critical because Rule 4's mailing requirement provides that a summons must be "mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States." But if a foreign corporate defendant that, for example, obtained trade secrets through a cyber intrusion, never had an address or place of business in the United States, then pursuant to Rule 4 that defendant could ***never*** be subject to the jurisdiction of U.S. courts. In other words, foreign corporations could steal American trade secrets (and violate other federal criminal laws) with impunity.

Recognizing the absurdity of that result, the court in *U.S. v. Kolon* determined that satisfaction of the mailing requirement was ***not*** necessary to effect service and obtain jurisdiction over the corporate defendant. The court engaged in a detailed analysis and based its decision both on the plain text of Rule 4, and the fact that a contrary reading would "impose an obligation that could not possibly be satisfied[.]" The court thus declined "to follow a course that produces and absurd result and that would impute to Congress the intent to produce a nonsensical consequence."

Despite the convincing reasoning of the *Kolon* court, a recent opinion issued by the U.S. District Court for the Northern District of California reached the opposite conclusion. In *United States v. Pangang Group*, a Chinese state-owned entity and its affiliates were charged with economic espionage and trade secrets theft. (We commented on the significance of the *Pangang* prosecution in a prior alert.) The *Pangang* court explicitly rejected the ruling in *Kolon*, finding that because the text of Rule 4's mailing requirement contains the word "must" it is "a mandatory requirement, rather than a hortatory or precatory requirement." The court therefore concluded that "the drafters intended the mailing requirement to be a mandatory component of effective service." The court did not address the *Kolon* court's reasoning regarding "absurd results" and congressional intent.

Even before the *Kolon* and *Pangang* decisions, the Department of Justice was well aware of the enormous impediment that Rule 4 presents to such prosecutions. In October 2012, then-Assistant Attorney General Lanny Breuer sent a letter to the Chair of the Advisory Committee on Criminal Rules recommending amendments to Rule 4 "to permit effective service of a summons on a foreign organization that has no agent or principal place of business within the United States." But the rules amendment process is lengthy, and in the meantime the government may be stymied in prosecuting foreign corporations with no U.S. presence to the extent other courts follow the reasoning of *Pangang* rather than *Kolon.* At the least, the government may have to make careful venue choices.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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