

Personal Jurisdiction: A New Battlefield in Corporate Criminal Cases

IN SHORT

The Situation: Actions by the Advisory Committee on Criminal Rules—and ultimately the U.S. Supreme Court—appear to be expanding the courts' ability to assert personal jurisdiction over foreign corporate defendants in criminal cases.

The Result: Companies with no physical presence in the United States may be subjected to prosecution.

Looking Ahead: Foreign corporate defendants with no U.S. presence that are served have options, but must make significant choices.

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The U.S. Supreme Court in recent years has been steadfast in cabining the authority of state courts to assert personal jurisdiction over corporate defendants in civil cases. But as jurisdiction over corporations in civil cases arguably contracts, what of jurisdiction over them in criminal cases? Paradoxically, that appears to be expanding.

Until recently, the question was academic because Federal Rule of Criminal Procedure 4 required prosecutors to mail a summons to a foreign corporation's U.S. address, meaning the corporation had a U.S. presence. But prosecutors succeeded in changing that in late 2016. And with evermore aggressive prosecutions, foreign corporations may face the prospect of being prosecuted in U.S. courts even if they have no U.S. presence. A corporation's most obvious weapon against such a prosecution—moving to dismiss for lack of personal jurisdiction—remains untested.

Background

Rule 4 required prosecutors to mail a summons to a corporation's last known U.S. address. That meant foreign corporations that were successfully served had some U.S. presence, and personal jurisdiction was not questioned.

In 2012, the U.S. Justice Department set out to change Rule 4, telling the Advisory Committee on Criminal Rules that amendments were "necessary to ensure that organizations that commit domestic offenses are not able to avoid liability through the simple expedients of declining to maintain an agent, place of business and mailing address within the United States." The Committee, and ultimately the Supreme Court, removed the mailing requirement from Rule 4 and permitted service of a foreign corporation through "any means that gives notice."



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The Issue

Amended Rule 4 raises the novel prospect of federal prosecutors' serving foreign corporations that have no presence in the United States. But the Advisory Committee did not confront how prosecutors' new ability could force to the fore an issue that has thus far remained unexamined: How and when does a court have personal jurisdiction over an absent foreign corporate criminal defendant?

That includes subsidiary issues, such as whether the jurisdictional test under the Due Process Clause that applies to state courts also applies to federal courts; whether a court could obtain jurisdiction over a foreign corporation through a U.S.-based subsidiary; and whether federal courts have national personal jurisdiction, and how such jurisdiction might be limited by, among other things, the Sixth Amendment.

Courts have been relatively silent on the issue that revised Rule 4 raises, having addressed it only a handful of times. Although one court opined that the civil minimum-contacts test does not apply, it ultimately held that, because the corporation had participated in the criminal proceedings (such as pleading not guilty), the court had jurisdiction under the age-old rule that courts have personal jurisdiction over defendants who are present in court.

What Foreign Corporations Can Do

Foreign corporate defendants who lack a U.S. presence but are served with a summons face two critical choices in contesting personal jurisdiction.

First is the method. Courts routinely permit civil defendants to contest personal jurisdiction either through a special appearance or through the defendant's first motion. This approach seems eminently reasonable in the criminal context. But there are hurdles. There is little evidence in the reported case law of criminal defendants attempting special appearances, and there is no criminal rule permitting "special appearances."

Nonetheless, criminal defendants who do not wish to run the risks of not responding to the summons have arguments to support a special appearance. For example, when revising Rule 4, the Advisory Committee explicitly assumed special appearances were possible, opining that "nothing in the proposed amendment addresses or limits any authority of the court to allow a special appearance to contest service on other grounds."

The second step is determining the defendants' arguments. The most aggressive argument would be to invoke an unspoken implication of the classic criminal personal-jurisdiction rule: If the defendant is *not* before the court, the court does not have jurisdiction (at least when that defendant also has no U.S. presence).

The more moderate argument is that the minimum-contacts test from the civil context should apply. Assuming it does, the subsidiary arguments become mostly factual. Since the corporation is foreign, the court will be looking only at specific jurisdiction, which depends on the affiliation between the forum and the underlying controversy (in criminal cases, that would be the alleged crime).

These constitutional questions could have been avoided—and maybe they should have. The mailing requirement of former Rule 4 provided a hedge against these thorny issues. The day is approaching when foreign corporations will have to fight this battle.

THREE KEY TAKEAWAYS

1. Changes to Federal Rule of Criminal Procedure 4 mean that prosecutors might prosecute foreign corporations that lack a U.S. presence.
2. Courts have been quiet on the issues raised by revised Rule 4.
3. Foreign corporations have arguments to contest personal jurisdiction.

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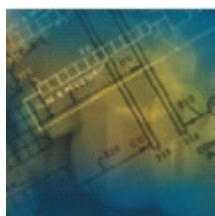
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