International defendants sued in the U.S. should not overlook Rule 4(m)

(February 28, 2019) - Steven Perlstein, Melanie L. Oxhorn and Brad H. Samuels of Kobre & Kim analyze a recent federal trial court's ruling that dismissed a foreign defendant from litigation under Federal Rule of Civil Procedure 4(m).

A recent ruling by U.S. District Judge Andrew L. Carter Jr. of the Southern District of New York in *In re Veon Ltd. Securities Litigation*, No. 15-cv-8672, 2018 WL 4168958 (S.D.N.Y. Aug. 30, 2018), demonstrates that foreign individuals who are sued in the United States may be able to avail themselves of Rule 4(m) of the Federal Rules of Civil Procedure to gain an early favorable outcome.

Rule 4(m) sets a time limit for a plaintiff's service of a summons following the filing of a complaint and it states on its face that it is inapplicable to service in a foreign country.

For international defendants, Rule 4(m) could be an applicable procedural mechanism to secure early case dismissal.

This article aims to accomplish two things: First, it lays out the general scope and applicability of Rule 4(m), and second, it shows how events in the *Veon* case ultimately led to a ruling in favor of an individual who was not timely served.

Rule 4(m)'s 90-day time limit

The general rule

Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied.

Rule 4 governs the content, issuance and service of a summons in a federal court action. Rule 4(m) provides that "if a defendant is not served with a summons within 90 days after the complaint is filed," the action must be dismissed against that defendant without prejudice or the court must order that service be made within a specified time, unless the plaintiff shows "good cause for the failure." [1]

Rule 4(m) explicitly instructs the district court to provide additional time for service if there is good cause for a plaintiff's failure to effect service within the prescribed period. The burden is on the plaintiff to establish good cause.

Good cause is likely, but not always, to be found when: the plaintiff's failure to complete service in a timely fashion is a result of the conduct of a third person (typically the process server); the defendant has evaded service of the process or engaged in misleading conduct; the plaintiff has acted diligently in trying to effect service; or there are understandable mitigating circumstances.

In addition, district courts can exercise their discretion to extend the time period for service even in the absence of good cause.

Courts typically apply a two-step test when deciding whether to grant an extension of time to complete service. First, upon a showing of good cause, the court must extend the time period for service; and second, if no good cause is found, the court should decide whether to exercise its discretion to extend the time or instead dismiss the case without prejudice.

Several courts have identified factors to consider when determining whether to grant a discretionary extension of time instead of a dismissal. Of these factors, courts have placed emphasis on whether the statute of limitations would bar refiling of the action if it is dismissed.

At the same time, however, many courts (including the district court in *Veon*, as discussed below) have recognized that a plaintiff's lack of diligence in attempting service can counsel heavily against extending the service period. It could also far outweigh other factors — including the bar likely posed by the relevant statute of limitations — that otherwise might justify an extension, courts have said.

The foreign country exception

Notably, Rule 4(m) states that its 90-day time limit for service does not apply to service on an individual in a foreign country under Rule 4(f). Rule 4(f) allows for service "by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents."

The exception to Rule 4(m)'s time limit likewise applies to service on a foreign corporation under Rule 4(h)(2) and service on a foreign state under Rule 4(j)(1).

The rationale for excluding international service of process from the 90-day time limit imposed by Rule 4(m) is that such international service of process generally requires compliance with the recognized methods of international service. The foreign country exception thus reflects the reality that the timeliness of foreign service is often out of the plaintiff's control, rendering the Rule 4(m) time limit too burdensome.

Although Rule 4(m)'s deadline for serving process within 90 days does not apply to service in a foreign country, that does not mean there is no time limit for such service.

When the foreign country exception to Rule 4(m)'s time limit applies, courts generally use a flexible due diligence standard to determine whether service of process was timely. The plaintiff bears the burden of proving that it exercised due diligence in attempting to serve the defendant.

In this analysis, the court assesses the reasonableness of the plaintiff's efforts and the prejudice incurred by defendants from any delay. Courts have observed that the "due diligence" standard under the foreign country exception and the "good cause" standard for delay in service of process under Rule 4(m) are practically the same.

Most circuit courts and district courts addressing the foreign country exception to Rule 4(m)'s time limit have recognized that under some circumstances, a court is entitled to dismiss a case if the plaintiff has failed to take reasonable steps to effectuate service on a foreign defendant.

However, there has been some disagreement over the legal basis for such a dismissal and the extent to which Rule 4(m)'s time limit is relevant in evaluating a plaintiff's good cause for failing to serve the defendant in a timely manner or its diligence in attempting to serve process in a foreign country.

For example, the 2nd U.S. Circuit Court of Appeals, in addition to district courts in the 3rd Circuit, 4th Circuit and 10th Circuit, have all addressed the exemption. [2]

They have held that the exemption from Rule 4(m)'s time limit for service in a foreign country does not apply when a plaintiff has made no attempt to begin the process of serving a foreign defendant in an authorized manner within the requisite time period.

In finding the foreign country exception to be inapplicable in such a case, these courts have reasoned that it would be illogical to allow a plaintiff who does not even attempt to serve a defendant for more than 90 days after the filing of the complaint to avoid dismissal under Rule 4(m) by eventually attempting service in a foreign country pursuant to Rule 4(m).

According to the courts, while Rule 4(m) provides an exception for international service on a foreign individual or corporation under Rule 4(f) or (h)(2), those subdivisions do not apply where the plaintiff has not attempted such service in a foreign country and the exception therefore may not be invoked.

By contrast, a number of other courts outside of the Second Circuit have taken the position that the foreign country exception to Rule 4(m)'s 90-day time limit applies even where the plaintiff has made no effort to serve the defendant in a foreign country during that period.

Nevertheless, these courts have recognized that Rule 4(m)'s time limit can be instructive in evaluating the timeliness of foreign service under a flexible due diligence standard. A plaintiff's failure to begin the process of foreign service within the 90-day period may constitute a lack of due diligence and warrant a dismissal for failure to prosecute under Rule 41(b), some courts have said.

As these cases have indicated, a plaintiff serving a foreign defendant is obligated to, at the least, use diligence in effecting such service.

Furthermore, a plaintiff's failure to even try to serve a foreign defendant within the standard 90-day time period gives the court a basis for dismissing the complaint, although the courts are divided on the issue of whether such a failure prevents the plaintiff from relying upon the foreign country exception to Rule 4(m)'s time requirement.

The *Veon* decision

A district court recently addressed the foreign country exception in *Veon*, a case in which Kobre & Kim succeeded in having a class-action complaint against a defendant in Sweden dismissed on the basis of Rule 4(m)'s time limit for serving the complaint, among other reasons.

The court's Aug. 30, 2018, ruling shows that foreign officers and directors who are being sued in cross-border cases may be able to invoke this procedural mechanism to obtain a dismissal and secure an early, favorable result.

In *Veon*, shareholders of multinational telecommunications giant Veon Ltd. brought a class action against various defendants, including the company's former CEO. On behalf of all class members, the lead plaintiff alleged that the former CEO had committed various securities law violations.

Representing the former CEO, Kobre & Kim filed a motion to dismiss all claims against him for improper service of process. It argued, among other things, that the plaintiff had failed to serve the former CEO within the time period required by Rule 4(m) (which was 120 days when the complaint was filed before the rule was subsequently changed to provide for 90 days) and that the statute of repose applicable to the underlying claims had expired by the time that the plaintiff served the former CEO.

The court agreed that dismissal was warranted under Rule 4(m) and that the claims against the former CEO were time-barred as a result of the plaintiff's undue delay in completing service. [3]

The court rejected the plaintiff's argument that the filing of a consolidated class-action complaint some months after the original complaint was filed reset the time for service under Rule 4(m).

It acknowledged that in the context of a securities class action, a lead plaintiff (and counsel) may not be selected within the time allotted under Rule 4(m), but nonetheless concluded that the filing of a consolidated or amended complaint after selection of a lead plaintiff does not remedy defects in service or restart the clock under Rule 4(m). The time period would have expired even if it were deemed to run from the date that lead counsel was appointed, the court noted.

The court next turned to the issue of whether the foreign country exception to Rule 4(m)'s time limit applied.

Citing prior 2nd Circuit decisions, the court concluded that because the plaintiff had failed to even attempt service on the defendant in Sweden for more than a year after the complaint was filed, that exception did not apply and the plaintiff was therefore subject to Rule 4(m)'s time limit.

Accordingly, service would be timely only if the plaintiff could show good cause or the court exercised its discretion to extend the time period.

In evaluating whether the plaintiff had demonstrated "good cause" or "excusable neglect" for its failure to effect timely service on the former CEO, the court looked for evidence of "exceptional circumstances," where the insufficiency of service results from circumstances beyond the plaintiff's control.

The court concluded that the plaintiff had not shown reasonable efforts and diligence in serving the former CEO. It did not even attempt service on him until more than 300 days after the lead plaintiff was appointed.

Further, it did not complete service until nearly 800 days after the original complaint was filed and more than 600 days after the lead plaintiff's appointment, the court said.

The court further noted that the plaintiff had never requested an extension of time and that their service attempts were deficient because it sought to serve the former CEO at Veon's London office even though it knew he had resigned from Veon years earlier and resided in Sweden.

Having found a lack of diligence in attempting to complete service in a timely manner, the court then rejected the plaintiff's argument that there was no prejudice to the former CEO because he had actual notice of the complaint and the case was still at an early stage.

It said that unless the plaintiff has diligently attempted to complete service, neither actual notice nor absence of prejudice excuses noncompliance with Rule 4(m).

Since the plaintiff had not diligently attempted service, there was no good cause for its failure to properly serve the former CEO even if there was no prejudice and he was aware of the case.

The court also declined to exercise its discretion to grant an extension of time to serve the defendant even without a showing of good cause because the plaintiff was not diligent in attempting service and did not allege that the former CEO concealed a defect in service.

An extension of time was not warranted even though the statute of limitations on the underlying claims would bar any refiling following dismissal because the limitations period — which is effectively tolled during the 90 days after the filing of the complaint — begins to run again if service is not completed within the time allotted under Rule 4(m).

After finding that the claims asserted against the former CEO were time-barred as a result of the plaintiff's undue delay in effecting service, the court refused to equitably toll the limitations period beyond the period for service because the plaintiff failed to show diligence in completing service.

Finally, the court held that as a matter of law, equitable tolling was not available on any claims subject to a statute of repose. Unlike statutes of limitations, statutes of repose are not a limitation of a plaintiff's remedy. Instead, they define the right involved in terms of the time allowed to sue, the court said.

Conclusion

The *Veon* decision illustrates how defendants who reside overseas may use Rule 4(m)'s procedure to achieve an early dismissal of claims asserted against them in cross-border litigation.

In particular, *Veon* confirms that in a case where the plaintiff has been dilatory in serving a foreign defendant, the court may decline to exercise its discretion to extend the service period even if the limitations period has expired and the case cannot be refiled.

Because plaintiffs often do not file complaints until the eve of the limitations period's expiration, there will likely be many cases in which a refiling will be time-barred in the event of a dismissal for improper service.

Accordingly, foreign officers and directors of public companies should consider the possibility of making a Rule 4(m) argument similar to the one successfully asserted in *Veon*.

Notes

1 Effective Dec. 1, 2015, Rule 4(m) was amended to reduce the time for serving a defendant from 120 days to 90 days.

2 *USHA (India) Ltd. v. Honeywell Int'l*, 421 F.3d 129, 134 (2d Cir. 2005); *Allstate Ins. Co. v. Funai Corp.*, 249 F.R.D. 157, 161-62 (M.D. Pa. 2008); *A Love of Food I LLC v. Maoz Vegetarian USA*, No. 10-cv-2352, 2011 WL 4102084, at *4, *7 (D. Md. Sept. 13, 2011); *Cole v. Salt Creek*, No. 08-cv-928, 2012 WL 5331235, at *1 (D. Utah. Oct. 29, 2012).

3 The court also went on to address the merits of the claims against the former CEO and concluded that they were legally insufficient because the plaintiff had failed to adequately plead his knowledge. However, for purposes of this article, we focus only on the decision to dismiss those claims on procedural grounds under Rule 4(m) while also recognizing that the claims could not be refiled because they were time-barred.

By Steven Perlstein, Esq., Melanie L. Oxhorn, Esq., and Brad H. Samuels, Esq., Kobre & Kim

Steven Perlstein, a trial lawyer at **Kobre & Kim** in New York, practices in the area of complex civil litigation, focusing on litigation related to complex commercial transactions such as collateralized debt obligation and mortgage-backed securities transactions, business breakup disputes and securities-related litigation. **Melanie L. Oxhorn** is also based in New York and focuses her practice on complex commercial litigation, including financial products and services, internal investigations, asset forfeiture and recovery, and intellectual property litigation. **Brad H. Samuels** represents financial services companies in complex civil litigation and government enforcement matters out of the firm's Washington office. Kobre & Kim represented defendant Veon Ltd. in the litigation discussed in the article.

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