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Federal Judge Declares the Rule of Reason Will Apply in Criminal Antitrust Case and Dismisses the Case as Barred Under the Statute of Limitations

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On August 28, a Utah federal judge held in *United States v. Kemp & Associates, et al.* that he will apply the rule of reason standard in a criminal prosecution against an heir-locator company for allegedly colluding with its horizontal competitors to allocate customers. This ruling was a sharp departure from well-established precedent. It is unclear how this ruling would have played out in practice. On the same day the Court issued its order holding that the rule of reason applied, the Court also dismissed the Indictment, holding that the case was time-barred under the statute of limitations.

In *United States v. Kemp,* the Department of Justice (DOJ) filed a felony indictment in the U.S. District Court for the District of Utah against Salt Lake City-based heir-locator Kemp & Associates, Inc. (Kemp) and its co-owner and vice president, Daniel J. Mannix. The Indictment alleged that Defendants conspired with other heir-locator services to “suppress and eliminate competition by agreeing to allocate customers” from 1999 through 2014. Heir-locator companies like Kemp identify people who might be entitled to an inheritance from the estate of a relative who died without a will. For a contingency fee, these companies compile evidence to prove potential heirs’ claims to the inheritance in probate court. If the claim is successful, the heir-locator company receives its fee; however, because potential heirs can be identified from public court records, numerous competitors often contact them and compete by offering better contingency fee rates. According to the Indictment, Kemp and Mannix allegedly colluded with competitors to prevent heirs from shopping around for better rates by allocating customers and sharing contingency fees.

Violations of the Sherman Act can be adjudicated either under the rule of reason standard or the *per se* standard. The Department of Justice brings cases criminally only if the charged conduct falls squarely within the type of conduct that courts have held warrant adjudication under the *per se* standard. Courts typically analyze customer allocation agreements under the *per se* standard.

Defendants in *Kemp* filed a motion to adjudicate under the rule of reason. Defendants argued that the Court should look beyond the Indictment to analyze how the charged agreement was structured and whether the uniqueness of the industry justified treatment under the rule of reason. Defendants argued that the charged agreement was not a “garden-variety horizontal agreement” because prior courts have not analyzed a customer-allocation agreement that was similarly structured. Defendants also argued that the uniqueness of the industry justified treatment under the rule of reason. DOJ’s motions urged the court to look at the conduct charged in the Indictment and analyze the restraint of trade as defined by the Indictment to determine what standard should apply. DOJ argued that customer allocation agreements as charged in the Indictment have “long been held to be *per se* illegal because they are manifestly anticompetitive.”

In a surprising move, the Court granted Defendants' motion and departed from the vast majority of modern courts, which have held that a criminal case charging a customer allocation agreement should be tried under the *per se* standard. In reaching its conclusion, the Court looked beyond the Indictment and considered the industry and the effects of the alleged agreement. The Court found that the charged agreement differed from other customer allocation agreements because it "affected a small number of estates", "occurred in a relatively obscure industry", and had an "unusual manner of operation." For these reasons the Court held that it "cannot predict with any confidence" that the customer allocation agreement would "[operate] as a classic customer allocation," and therefore the agreement contained "efficiency-enhancing potential" and should be adjudicated under the rule of reason.

Despite the Court's holding, it is unclear how the charged customer allocation agreement functionally differed from the myriad of other customer allocation agreements to which courts have applied the *per se* standard. The Indictment charged a straightforward agreement "to allocate customers of Heir Location Services." Precedent generally dictates in criminal cases that if the alleged restraint falls under the exact type of conduct where courts have previously applied the *per se* standard, then it is not necessary to look beyond the charging documents to determine what standard applies. However, the Court in *Kemp* flipped this analysis and looked not at the alleged agreement in the Indictment, but at how the agreement was implemented in the industry to determine what standard applied.

As DOJ stated in its motions "[b]y exercising its prosecutorial discretion . . . to focus on the most serious and plain antitrust offenses, 'as opposed to the rule of reason or monopolization analyses,' the government provides 'clear, predictable boundaries for business' between what conduct is potentially subject to the severe sanctions that accompany criminal conviction and what conduct is subject only to civil equitable relief." By adjudicating a straightforward customer allocation agreement under the rule of reason, the Court blurred this distinction, potentially making it more difficult for companies to predict how future courts will analyze alleged restraints of trade.

The effect of the Court's holding on the trial is unknown, however, because on the same day it granted Defendants' rule of reason motion, the Court also granted Defendants' motion to dismiss. On March 31, Defendants filed a motion asking the court to dismiss the Indictment as time-barred under the statute of limitations and to apply the rule of reason. In dismissing the Indictment, the Judge rejected DOJ's argument that, for statute of limitations purposes, the conspiracy continued until the parties to the alleged agreement recovered monies for heirs and made payment to the firms themselves for clients allocated under the agreement. Rather, the Judge held that for statute of limitations purposes, the conspiracy ended when the actual customer allocation ended. The Court held "the purpose of the alleged conspiracy had been abandoned in July 2008 when the [agreement was] terminated and all that remained were administrative issues related to resolving the estates and payments resulting therefrom" and "[b]ecause of the length of time it may take to complete full administration of an estate, the theory that this extends the conspiracy into the statute of limitations period would create a significant arbitrariness regarding the length of the limitations period."

DOJ's argument - that the conspiracy continued until payments subject to the illicit agreement ceased - is also known as the "payments theory." This is at least the second time in recent years that courts have rejected the Antitrust Division's application of the payments theory. In *United States v. Grimm*, defendants were convicted of conspiring to rig the bidding process for guaranteed investment contracts (GIC). DOJ argued that the charged conduct occurred within the statute of limitations because interest payments made under the rigged GIC continued into the statute of limitations period. The Second Circuit rejected DOJ's theory and overturned the convictions, holding that the interest payments were a result of the conspiracy and not an act in furtherance of it. While neither case overrules the viability of payments theory, combined these cases illustrate the vulnerability of relying on only a payments theory to extend the statute of limitations.

The *United States v. Kemp* case offers the following takeaways:

- Courts may be willing to apply the rule of reason approach for particularly unique industries, even if the alleged agreement is a type of restraint to which courts have traditionally applied the *per se* standard. As a result, companies should consider filing a motion to adjudicate under the rule of reason when indicted. While rarely granted, these motions can result in either a dismissal of the indictment or a strategic advantage at trial.

- The government's reliance on a payments theory to bring an antitrust conspiracy within the statute of limitations may be insufficient. Recent courts have rejected the government's payment theory and have either dismissed the indictment or overturned the conviction.

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