

## A toss up: Payment theory prevails but the rule of reason reigns

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On 31 October the 10th U.S. Circuit Court of Appeals overturned the U.S. District Court for the District of Utah's decision in *United States v. Kemp & Associates, et al.* that dismissed the government's indictment as time barred. *United States v. Kemp & Assoc. Inc.*, No. 17-4148 (10th Cir. 31 October 2018). While the 10th Circuit strongly urged the District Court to reconsider its order holding that the case be adjudicated under the rule of reason standard, the 10th Circuit found that the issue was not ripe for appeal. Despite the favorable ruling on the motion to dismiss, the government now faces a dilemma: proceed to trial under the rule of reason standard in contravention of long-standing Antitrust Division policy or dismiss the case.

In the District Court, Kemp & Associates moved to dismiss the government's indictment as time barred under the statute of limitations and asked the District Court to order that the case be adjudicated under the rule of reason. Surprisingly, the District Court granted both motions on 28 August 2017.

In its indictment, the government alleged that the defendant and its co-conspirators engaged in a horizontal, continuous agreement to allocate customers for heir-location services. In the past, courts have considered horizontal agreements to be illegal per se, meaning that once an agreement is reached there is no pro-competitive justification that can mitigate the agreement's harm. The *Kemp* District Court disagreed with this precedent, holding that the horizontal agreement to allocate customers alleged in the indictment was different for three reasons:

- the agreement had an "unusual manner of operation" *Id.* at 13-14
- the alleged agreement only affected "a small number of estates"
- the agreement occurred in a "relatively obscure industry"

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. *Id.* at 14. The rule of reason standard allows the defendant to argue that despite entering into an agreement with its competitors, it should not be found guilty because any harm to competition was outweighed by the pro-competitive benefits of the agreement.

The District Court did not stop there, but then dismissed the case as time barred under the statute of limitations period. The defense argued in the District Court that the indictment was untimely because Kemp & Associates' last agreement to allocate customers with its fellow heir-locators ended sometime before 30 July 2008. The District Court agreed with the defense, and held that a conspiracy ceased to exist once Kemp & Associates and its alleged co-conspirators stopped allocating customers. The District Court rejected the government's argument that the conspiracy continued so long as the defendants continued to benefit from some "economic enrichment" as a result of the agreement. The District Court held that the purpose of the conspiracy was to allocate customers, therefore, once Kemp & Associates stopped allocating customers, the conspiracy ended.

The government appealed both the Kemp District Court's order dismissing the indictment as well as its order to adjudicate under the rule of reason to the 10th Circuit. After oral argument on both issues, the 10th Circuit soundly rejected the District Court's statute of limitations analysis, but held that it could not rule on the District Court's order to adjudicate under the rule of reason.

The 10th Circuit overturned the District Court's decision that the conspiracy ceased in 2008, determining that the conspiracy continued so long as the firms received payments on the unlawfully obtained contracts. The court stated, "a Sherman Act conspiracy, such as the one alleged here, remains actionable 'until its purpose has been achieved or abandoned.'" *Id.* at 6. It went on to say that "the obvious reason that two firms would suppress and eliminate competition by agreeing to allocate customers would be to reap the economic benefits of such efficiency." The court found that the customer allocation was not "an end unto itself, but rather a means [for] reducing overhead and increasing profit." *Id.* at 9. Thus, the court held that payments made as a result of a prior agreement were enough to trip the statute of limitations. This decision reaffirmed payments theory, or the theory that receiving payments after the termination of an agreement as benefit resulting from that agreement is acting in furtherance of a conspiracy.

The 10th Circuit, however, also held that it did not have jurisdiction over the rule of reason analysis in this case. In criminal cases, the government may not appeal unless there is express statutory authority authorizing the government to do so. 18 U.S.C. 3731 provides the statutory authority for the government to appeal "from a decision, judgment, or order of a district court." The 10th Circuit determined that the government's appeal from an order granting adjudication under the rule of reason analysis is not an appeal from a final judgment, since the government may yet proceed to trial. The court also found that an interlocutory appeal and mandamus were inappropriate in light of the lack of finality in the decision.

Although the 10th Circuit ultimately determined that it did not have jurisdiction over the rule of reason determination, it went through a lengthy analysis of the per se and rule of reason frameworks. It stated that rather than analyzing the industry writ large, as done by the District Court, the court should focus on the restraint alleged in the indictment. The 10th Circuit went on to determine that the practice in this case was a horizontal agreement generally analyzed under the per se approach. The court stated that "it is undisputed that an agreement to allocate or divide customers between competitors constitutes a per se violation of §1 of the Sherman Act." The court further posited that the "indictment describes the conduct at issue to do just that."

The court was not persuaded by the defendants' arguments in support of the rule of reason analysis. It stated that "it is immaterial" whether a customer allocation agreement applies to new or existing customers, and that there is no rule that allocation agreements should be adjudicated under the per se analysis only if customers are allocated geographically. Further, the court stated that the size of the pool of potential customers is irrelevant to the per se analysis. The court pointed out that the deciding court's familiarity with the industry is also unimportant. Finally, the

court stated that net economic benefits are not a factor under U.S. Supreme Court precedent to determine eligibility for per se analysis. It summed the opinion by remanding to the lower court and instructing it to consider *Palmer*, *Topco*, *Reicher*, and *Maricopa*, (all per se analysis cases) stating that, "perhaps on remand the district court will reconsider its rule of reason order."

While this opinion returned court precedent of payments theory to norm, it is less evident what the outcome of the rule of reason remand will be, although the court laid the groundwork for the decision it wishes the District Court to reach. While it is possible Judge David Sam will reverse himself under the direction of the circuit court, he is not obligated to do so.

In that instance, the government will have no choice but to try a criminal antitrust case under the rule of reason analysis. The United States Attorney's Antitrust Manual explains that the Antitrust Division only prosecutes criminal per se cases. The Antitrust Division has never criminally prosecuted a case under the rule of reason analysis. In its briefing before the 10th Circuit, the government stated that it would adhere to its policy and dismiss the case versus trying it under a rule-of-reason framework. If the government follows through with its statements, Kemp & Associates will have lost the battle but won the war.

This opinion provides the following takeaways.

- Adds yet another case that holds payments are sufficient to extend the statute of limitations. Given the depth and breadth of case law supporting payments theory, it is unlikely that a defendant will prevail at trial arguing against the application of payments theory.
- Given the 10th Circuit's holding that a motion adjudicating the rule of reason cannot be appealed until after a final judgment, once the district court grants a motion to adjudicate under the rule of reason the government must proceed to trial applying that analysis. Given the Antitrust Division's policy statements, practically speaking it is unlikely that they would ever actually proceed to trial if they had to try the case under the rule of reason. Therefore, effectively, once a district court grants a motion to adjudicate under the rule of reason the Antitrust Division will most likely choose to dismiss the case.

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