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## DOJ Prosecution of Heir Location Service Providers Dismissed on Statute of Limitations Grounds

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On August 28, 2017, the US District Court for the District of Utah issued two rulings in *United States v. Kemp & Assoc., Inc. (Kemp)* of note for future defendants facing allegations of conspiracy to violate § 1 of the Sherman Act. First, the court granted defendants' motion that the case be subject to the rule of reason rather than the stricter *per se* standard that DOJ had argued for. Second, the court dismissed the case on statute of limitations grounds, finding that the conspiracy alleged by the DOJ had been fully abandoned in July 2008, with no further conduct in support having occurred after that date.

*Kemp* is the third case stemming the DOJ Antitrust Division's investigation of the so-called "heir location service" industry. Two individuals and one business previously pled guilty to participating in the conspiracy. As described [in the indictment](#) of Kemp and its executive Daniel Mannix, these businesses "identify heirs to estates of intestate decedents and, in exchange for a contingency fee, develop evidence and prove heirs' claims to an inheritance in probate court." DOJ alleged that the defendants and competitors developed and implemented a set of written guidelines that governed how the participants would allocate heirs (*i.e.*, potential customers) that had been contacted by multiple competitors. These guidelines were not concealed.

In its first August 28, 2017, ruling, the court distinguished the defendants' guidelines agreement from standard customer-allocation arrangements recognized as *per se* unlawful in prior cases. Importantly, the court noted that no case had been identified with a restraint resembling the one utilized by the heir location service competitors. Unlike geographic or existing customer allocations, the guidelines "applied only where two firms had already invested significant resources investigating the same estate," creating "potential for increased efficiency" in how the estates were administered and thereby, according to the court, supporting application of the rule of reason. Arguments against *per se* treatment in Sherman Act criminal prosecutions are typically rejected; for example, in *United States v. Nusbaum*, the US District Court for the District of Maryland rejected an argument that because conspirators alleged to be engaged in a conspiracy to collude on auction bidding for tax liens were part of a "joint venture," the *per se* rule should not apply. There the court held that "[a] bid-rigging cartel may well constitute a joint venture under state law but that does not mean that the venture constitutes a single entity so as to provide a defense to a bid-rigging charge under federal antitrust law. . . ." The *Kemp* court's repeated description of the heir location services industry as "unusual" suggests that this part of the ruling may be confined to its facts.

In its second ruling, the court clarified the scope of conduct in furtherance of an antitrust conspiracy in the context of the statute of limitations. In sum, the alleged purpose of the conspiracy is critical as to whether continued receipt of conspiracy-linked revenue will operate to extend the limitations period. Given that the guidelines that governed the conspiracy had been abandoned in July 2008, the court found that after that time there was no additional conduct in furtherance of the conspiracy, as no customers were alleged to have been wrongfully allocated after the abandonment of the guidelines. While DOJ argued that the defendants continued to profit from the alleged wrongful conduct well into the limitations period, the court rejected this theory, differentiating the purpose of the conspiracy charged here (allocation of customers) from conspiracies where the purpose was "economic enrichment." While the defendants here may have continued to earn revenue tied to their alleged conspiracy during the limitations period, the court held that DOJ's theory "confuses the results of a conspiracy

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Article By [Emre N. Iltis](#)  
[Stefan M. Meisner](#) [McDermott Will & Emery](#)  
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with actual conduct in furtherance of it. A conspiracy's statute of limitations should not be extended indefinitely beyond the period when the unique threats to society posed by a conspiracy are present." As the "unique threat" posed by this alleged conspiracy was the customer allocation that ended in July 2008, the continued revenue earned by defendants was incidental to the customer allocation conspiracy actually charged in the indictment. This differentiates *Kemp* from conspiracy cases such as *United States v. Salmonese*, where the conspiracy's purpose is "economic enrichment" and therefore the scheme "continues through the conspirators' receipt of their anticipated economic benefits."

The court further noted that DOJ's theory would create "significant arbitrariness regarding the length of the limitations period" as a result of the variations in how long a full administration of any given estate can take to complete. Such arbitrariness "is not consistent with the very reasons limitations periods exist in criminal cases."

The court's ruling with respect to the limitations issue is similar to the US Court of Appeals for the Second Circuit's ruling in [United States v. Grimm](#), wherein the court reversed the conviction of three defendants on limitations grounds, finding that, for purposes of the statute of limitations, a continuing economic benefit from a completed conspiracy is not an action that can prolong the life of a completed conspiracy. As with *Kemp*, the interest payments received during the limitations period by the *Grimm* defendants were incidental to the purposes of the conspiracy charged, which were to induce agreements at depressed rates and to impede the government's collection of revenue from municipal issuers.

### **Practice Notes:**

The Utah federal court's double-whammy August rulings presented the Antitrust Division with two unusual losses on *per se* vs. rule of reason conduct and on statute of limitations issues. The defendants in *Kemp* succeeded in explaining the unique attributes of their industry *vis-à-vis* limitations issues and in using the scope and language of the DOJ's Indictment to their advantage with respect to both the rule of reason and limitations arguments. While this is a fact-specific ruling, it presents authority in support of Sherman Act defendants charged with arrangements that do not fit neatly into prototypical customer or market allocation agreements, and where the alleged purpose of the conspiracy was not economic enrichment. The apparent divergence in the case law on the topic of whether continuing sales stemming from an antitrust conspiracy constitute additional acts of the conspiracy that restart the limitations period is an issue that may warrant further development in the appellate courts, or even the US Supreme Court.

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