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Downton Abbey Meets Antitrust—and DOJ Comes up Empty-Handed

Jenna Greene, The Litigation Daily

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The beauty (or the terror, depending on your perspective) of the Justice Department's Antitrust Division is that you never know where it'll strike.

One minute the feds are taking down multi-billion dollar [international cartels](#). The next, they're busting players in an industry that sounds more like a Downton Abbey plot device: heir location services. That is, companies that specialize in scouring legal notices for intestate estates, then tracking down the long-lost heirs—for a cut of their inheritance.



Until now, I didn't even know that was a thing. It's making me question my career choices.

The government's criminal antitrust case against one of the leaders in the field collapsed this week when a federal judge in Utah tossed the case, handing a win to Ballard Spahr and Morvillo Abramowitz Grand Iason & Anello.

The decision comes after an alleged co-conspirator pleaded guilty last year to allocating heir location customers in a bid to eliminate competition. Richard Blake Jr. is awaiting sentencing, and agreed to assist the government with its investigation against others in the industry.

At the time, then-Antitrust Division head Bill Baer said in a [news release](#) that "the death of a relative was used by heir location service firms to line their

pockets at the expense of their clients. This announcement is another step in bringing to justice those who conspired to cheat heirs of those who died without a will.”

Whoa there, not so fast.

Seven months after Baer’s announcement, the feds in August 2016 indicted another heir location provider, Kemp & Associates, Inc., and its vice-president and part-owner Daniel J. Mannix , on a single-count conspiracy to violate the Sherman Act.

The government said Kemp and Mannix made a deal with Blake “to suppress and eliminate competition by agreeing to allocate customers.” According to the government, if both companies found a promising estate, the one that contacted the long-lost heir first would be allocated certain remaining heirs, but then the other company would get a share of the fees.

It’s worth detouring for a moment to the [FAQ section](#) of Kemp’s website, which explains how the whole heir location process works.

How do they find the heirs? “We rely largely on genealogical research and the expertise of our research staff (including many professional genealogists around the world) to optimize our ability to locate potential heirs. Frequently, our searches date back to the 1800s.”

Why didn’t the estate administrator find the heirs? “Most states allow administrators to simply post a notice in the legal section of a local newspaper to inform any missing heirs of the decedent’s passing and announce a limited time span in which claims to the estate can be made. Of course, few people read the legal section in newspapers. In the majority of our cases, the heirs do not have much (or any) knowledge of the person that died.”

(This isn’t on the website, but in inheritance law, these people are called [“laughing heirs.”](#) You can probably guess why.)

Who is the dead relative? “Kemp & Associates will disclose the name of the deceased family member after all heirs sign the Assignment and we begin work on your behalf. This protects our proprietary information and ensures that we will be compensated for the time and cost of our endeavors.”

There are no out-of-pocket expenses for the heirs—the whole thing is done on contingency, though the rate does not appear to be disclosed on the website.

To DOJ, the various heir locators should be competing against each other to see who can offer the best contingency deal. If the providers allocate customers, that's an unreasonable restraint of trade, the government said.

But Senior U.S. District Judge David Sam of the District of Utah didn't see it that way.

Kemp, represented by a Ballard Spahr team led by James Mitchell, and Mannix, represented by Morvillo's Richard Albert and Devin Cain, argued that the case was time-barred and that the alleged misconduct was not a per se violation of the Sherman Act, but rather should be evaluated under the rule of reason.

They won on both arguments. Sam found the conduct at issue ended more than eight years before the indictment and dismissed the case. Yes, some of the estates were still being administered within the statute of limitations, but he noted that the supposedly illegal conduct—how the companies got the business in the first place—happened outside the statute of limitations.

Of more interest to antitrust nerds (stand proud!) is the per se/rule of reason question.

DOJ's policy is only to bring criminal charges for per se violations—things like price fixing or bid rigging that are never OK.

Rule of reason, a civil violation, is far more nuanced. Here, Sam found it was the appropriate standard of review.

Kemp and Blake had agreed to written "guidelines" about overlapping customers, but perhaps given the oddness of the industry, their deal didn't look like other customer allocation agreements that have been reviewed by the courts.

The guidelines "were structured in an unusual way, affected a small number of estates, and occurred in a relatively obscure industry (heir location services) with an unusual manner of operation," Sam wrote. "The government has not identified, and the court is not aware of, any case addressing the particular kind of restraint at issue here, or otherwise closely resembling this one. ... The court therefore cannot predict with any confidence, and does not believe, that the guidelines operated as a classic customer allocation."

The guidelines only came into play when both companies had already invested significant time doing research to find the heirs of the same estate and

“provided for the firms to integrate their efforts going forward, specifically in administering the probate process of the estate, which needed to be done only once,” the judge wrote.

Which means the agreement was also about promoting increased efficiency—a legitimate goal—and that put it in the rule of reason camp.

“The government imagines dire consequences to its prosecution regime from the court’s ruling. That rhetoric is overblown,” the Ballard Spahr and Morvillo lawyers wrote in court papers after DOJ unsuccessfully asked Sam to reconsider his initial decision. “The court, in correctly finding that the rule of reason governs, made a legal determination that applies only to the specific, unusual circumstances of this case.”

In an interview, Matthews of Ballard Spahr said “We are very pleased with the court’s well-reasoned decision, and our client looks forward to continuing to provide the valuable services it has for the last 50 years.”

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