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**REJECTION OF THE ANTITRUST DIVISION'S
POSITION ON THE RUNNING OF THE
STATUTE OF LIMITATIONS
UNTIL THE LAST PAYMENT**

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The Antitrust Division of the Department of Justice claims the statute of limitations for a criminal antitrust violation¹ does not begin to run until the last payment is collected by a conspirator on a sale that was the subject of collusion. Recent decisions show this sweeps too broadly. Whether collaborative conduct extends into the limitations period requires greater attention.

I. INTRODUCTION²

In *United States v. Grimm*,³ the Second Circuit squarely rejected the last payment received approach to the statute of limitations in prosecuting a conspiracy to fix interest rates paid to municipalities. Instead, reversing the convictions as barred by the applicable statutes of limitations, the court held that the serial payments, albeit advantageous to the conspirators, did not constitute overt acts in furtherance of the conspiracy.

This year, another decision from the Northern District of California similarly applied a statute of limitations bar.⁴ The court found no alleged acts in furtherance of an allegation of conspiracy to drive down wages despite the payment of wages extending into the limitations period.

This paper explores some of the potential effects of this approach and how it contrasts with that of the Antitrust Division. After providing a quick review of some precedents, this paper examines the implications for prior convictions, current investigations and future Antitrust Division investigations. While every case presents its own unique facts that would need to be examined, it becomes clear that more serious attention will need to be paid in the future to the difference between payoffs to conspirators and ordinary course payments that may, or may not, reflect an overcharge.

The Department of Justice position is premised on the concept of a payoff. It seems obvious that in a conspiratorial scheme if one conspirator pays a conspirator to participate in the scheme the payoff is an act in furtherance of the

¹ The criminal statute of limitations for a Sherman Act antitrust offense is five years. 18 U.S.C. § 3282(a).

² This paper has been updated from “Rejection of the Antitrust Division’s Position on the Statute of Limitations: *U.S. v. Grimm*, prepared for the 2014 International Cartel Workshop, Feb. 19-21, 2014.

³ *United States v. Peter S. Grimm, et al.*, Nos. 12-4310-CR, 12-4365-CR, 12-4371-CR, 2013 WL 6403072 (2d Cir. Dec. 9, 2013) (majority opinion by Judges Jacobs and Straub; Kearse, J., dissenting).

⁴ *In Re Animation Workers Antitrust Litigation*, No. 14-04062, Docket #75 (N.D. CA, April 3, 2015).

conspiracy. Similarly, in a scheme to defraud inducing the receipt of the ill-gotten gains would be an act in furtherance of the conspiracy. Also, conspirators distributing the ill-gotten gains among themselves would appear to be an act in furtherance of the conspiracy. But the question raised by the *Grimm* decision is when the passive receipt of funds from several transactions themselves legitimate, albeit advantageous to the conspirators, will be viewed as an act in furtherance of the conspiracy for the purpose of the application of the antitrust statute of limitations.

In practice, the Antitrust Division has been conservative and circumspect in charging cases to avoid considerations of the statute of limitations. As a prudent prosecutor, the Antitrust Division recognizes that disputes over the statute of limitations would divert resources that could otherwise be devoted more substantively. Thus, in practice relatively few issues regarding the statute of limitations are litigated. Nonetheless, the Antitrust Division sometimes does not have the luxury of merely adjusting its schedule to try to avoid statute of limitations problems. On occasion, issues are brought to their attention at a time that of necessity may trigger a more aggressive approach to the statute of limitations. It is only in these instances that the Division has relied upon a statute of limitations interpretation that includes the mere receipt of funds from an infected sale. In this time of limited Antitrust Division resources a clear understanding of the statute of limitations is more important than ever.

II. UNITED STATES V. GRIMM

On appeal from judgments of conviction against three individuals who were tried and convicted of violating the general federal conspiracy statute, the majority of a three judge panel of the Second Circuit reversed on the ground that the indictment was barred by the applicable statute of limitations. The conspiracy at issue was a multi-year scheme to fix below-market rates on interest paid by General Electric (“GE”) to municipalities. In the context of tax-exempt bond issues, municipalities invest the proceeds with GE and others until the underlying capital projects require the funding. Internal Revenue Code and Treasury Regulations require the municipalities to use competitive bidding to guarantee a market rate of interest on these investments and to pay back to Treasury any amount of interest received over the municipal bond rate. The three defendants had been employees of GE, and along with brokers, entered into a conspiracy that depressed the interest rate on the guaranteed investment contracts, and the court accepted in the opinion that each instance did defraud either the municipalities or the Treasury or both.

The government asserted and the lower court found that the statute of limitations continued to run during the period when GE paid the depressed interest to the municipalities because those interest payments constituted overt acts in furtherance of the conspiracy. The Second Circuit reversed, finding the opposite: "[T]hose payments do not constitute overt acts in furtherance of the conspiracy." *Grimm*, 2013 WL 6403072, at *1. The court found that: "[t]he government's position must be that a conspiracy continues so long as a stream of anticipated payments contains an element of profit. But that proves too much." *Id.* at *4.

The interest payments present a more complicated scenario than payments pursuant to a typical sale agreement. Applicable tax regulations relating to the municipal bond financing stem from the fact that qualifying municipal bond interest payments are exempt from federal income tax. The municipal issuers financed projects through these bonds and used the funds generated as needed over the course of the years that the project may take to construct. The municipal issuers invest the funds during the waiting period before disbursement to generate additional revenue. These investment contracts have a fixed maturity date, but the issuer usually can draw down the principal at any time. Meanwhile, periodic interest payments are made. To solicit closed bids for these contracts the issuers hire third-party brokers and choose the winning bidder from among three interest rate offers. The winning bidder certifies that it had no prior opportunity to review the bids of other providers.

In the scheme at issue regarding the convictions, brokers worked with the three defendants who paid kickbacks to brokers and, in return, the brokers rigged the bidding process in several ways. This would sometimes involve the submission of intentionally losing bids by keeping competitive bidders off the bid list or otherwise manipulating the bidding process to allow lower interest payments than would have otherwise won the competition.

The relevant indictment charged six counts of a conspiracy in violation of 18 U.S.C. § 371 and substantive wire fraud in violation of 18 U.S.C. § 1343. The lower court dismissed the wire fraud charge because of the failure to allege any activity within the applicable five years limitations period related to the substance of wire fraud. The district court further held that the alleged conspiracies continued as long as unindicted conspirators (the corporate interest payors) made interest payments.⁵ After a three-week trial, three days of deliberations, and jury convictions against each of the three defendants on some of the conspiracy

⁵ *United States v. Carollo*, No. 10-CR-654 (HB), 2013 WL 3875322, at *1 nn. 2-3 (S.D.N.Y. Aug. 25, 2011).

counts, the lower court in denying post-verdict motions reiterated that "conspiracy lasts . . . so long as the conspirators obtain an economic benefit through artificially suppressed payments."⁶ The only acts in the relevant time frame to satisfy the statute of limitations were the periodic interest payments made to the municipalities.

The fundamental Supreme Court instructions on how to determine whether the statute of limitations has run in the context of a conspiratorial agreement are firmly in place. These fundamental premises guided both the majority opinion in the Second Circuit and the dissent. In *Grunewald v. United States*, the Court instructed that "the crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy."⁷ Moreover acts by one conspirator in furtherance of the conspiracy are attributed to all conspirators for whom they would be reasonably foreseeable.⁸ In addition, the Supreme Court in *Fiswick v. United States*,⁹ distinguished between the result of a conspiracy and its continuation: "[t]hrough the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuing one. Continuity of action to produce the unlawful result, or . . . 'continuous cooperation of the conspirators to keep it up' is necessary."¹⁰

The majority in *Grimm* determined "when anticipated economic benefit continues, in a regular and ordinary course, well beyond the period 'when the unique threats to society posed by a conspiracy are present,' the advantageous interest payment is the result of a completed conspiracy, and is not in furtherance of one that is ongoing." 2013 WL 6403072, at * 4-5 (citation omitted).

The majority explicitly distinguished *United States v. Salmonese*.¹¹ There the Second Circuit had held that the receipt of anticipated profits constituted overt acts within the statute of limitations. The sales at issue in *Salmonese* were of stripped warrants completed within 10 weeks of a public offering. The *Salmonese*

⁶ Transcript of Sentence Hearing at 11, *United States v. Carollo*, No. 10-CR-654 (HB) (S.D.N.Y. Oct. 18, 2012), ECF No. 285. We note that the conspiracy charges at issue required not only an agreement to commit fraud but also an overt act by at least one of the participants in furtherance of that agreement. See 18 U.S.C. § 371. This contrasts with the Sherman Act, which does not have any overt act requirement.

⁷ 353 U.S. 391, 397 (1957).

⁸ See, e.g., *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946).

⁹ 329 U.S. 211, 216 (1946).

¹⁰ *Id.* at 216 (quoting *United States v. Kissel*, 218 U.S. 601, 607 (1910)).

¹¹ 352 F.3d 608 (2d Cir. 2003).

court stated "where a conspiracy's purpose is economic enrichment, the jointly undertaken scheme continues through the conspirators' receipt of 'their anticipated economic benefits.'"¹² The *Grimm* majority and dissent both paid attention to the language by the court in *Salmonese* that then explained that a conspiracy would not continue notwithstanding the receipt of anticipated profits when "the payoff merely consists of a lengthy, indefinite series of ordinary, typically noncriminal, unilateral actions . . . and there is no evidence that any concerted activity posing the special societal dangers of conspiracy is still taking place."¹³ The majority in *Grimm* reversed *Salmonese* as adopting the analysis for the First Circuit in *United States v. Doherty*.¹⁴ In *Doherty*, the First Circuit rejected that the receipt of salary payments that continued for years and were increased by means of fraud constituted overt acts in furtherance of the conspiracy. Thus, the continuing receipt of the ill-gotten salaries did not re-start the limitations period.

The majority in *Grimm* distinguished the result of *Salmonese* primarily on the basis that the sales warrants improperly stripped from a public offering in a manner to defraud through their later, inflated price sale by conspirators were not indefinite in number or lengthy in duration. The *Grimm* majority provided from the *Doherty* and *Salmonese* opinions a non-exhaustive list of various features to help determine whether affected serial payments constitute overt acts in furtherance of a conspiracy or whether they are the results of a conspiracy. These include whether the acts were "lengthy, indefinite, ordinary, typically noncriminal and unilateral." *Grimm*, 2013 WL 6403072, at *4. The court noted that overt acts had ended when the conspiracy has completed its influence on the otherwise legitimate course of common dealing that remains ongoing for a prolonged time. *Id.* The court also noted that continuing measures for concealment adjustment or other corrupt intervention by any conspirators could potentially change that evaluation. *Id.* The court further noted that "indefinite" could mean that payments were either undetermined in number or prolonged beyond the near future. *Id.* The court held that the municipal bond interest payments were indefinite in both senses. *Id.*

Judge Kearse, dissenting, took a more simplistic view: "that where a conspiracy is specifically designed to enable some of the coconspirators to win contracts that will provide them with economic gains repeatedly over the life of the contract by allowing them to make periodic interest payments at artificially low rates, the conspiracy ordinarily does not and – and each of the conspiracies at

¹² *Id.* at 615 (citations omitted); see also *Grimm*, 2013 WL 6403072, at *3, *6.

¹³ 352 F.3d at 616 (citation omitted) (emphasis in original).

¹⁴ 867 F.2d 47 (1st Cir. 1989).

issue here did not end – before the contracting coconspirator’s last payment pursuant to the contract.” *Grimm*, 2013 WL 6403072, at *11. The dissent argued that both on the law and facts the majority is in error. On the law, Judge Kearsaw saw the language of *Salmonese* as controlling. He did not view *Salmonese* as adopting the First Circuit’s *Doherty* approach, but, in any event, found it inapplicable on the facts. On the facts, Judge Kearsaw saw the interest payments as the payoff to a conspirator, rejecting the nuanced approach of the majority.

III. IN RE ANIMATION WORKERS ANTITRUST LITIGATION

In *Animation Workers*, Judge Koh dismissed on the basis of the statute of limitations a civil antitrust lawsuit accusing Hollywood studios of driving down wages for animators through an agreement not to poach each other’s employees. The case is not a criminal prosecution and thus will be subject to claims accrual rules different from the criminal context, but in applying Fed. R. Civil Rule 12(b)(6) plausibility rules to dismiss the claims, the court rejected the plaintiffs’ allegations that each time they received price-fixed compensation such conduct constituted a new overt act that restarted the limitations period.

The court found the allegations deficient even if a price-fixed compensation theory were viable because no facts were pled “showing that Defendants continued to engage in the wrongful conduct which would have resulted in ‘artificially depressed compensation’ on or after [the trigger date of the statute of limitations].” The court reinforced the importance of alleging “some ‘new and independent act’” by a defendant within the limitations period because “‘parties may continue indefinitely to receive some benefit as a result of an illegal act performed in the distant past.’”¹⁵

IV. A SMATTERING OF THE EARLIER PRECEDENTS

Many of the cases relied upon by the government for its position that the statute does not begin to run on an antitrust conspiracy until the last payment on an affected sale are part of the broader group of cases related to conspiracies for economic gain. Like *Grimm*, these cases may not involve antitrust violations but other economic crimes related to fraud. These precedents involved a conspiracy where the illegal purpose was to defraud. In contrast, the illegal purpose of a Sherman Act antitrust conspiracy is unreasonably to affect the competitive process. The illegality does not stem from economic gain to the conspirators;

¹⁵ *Animation Workers*, *supra*, note 4, quoting *Aurora Enterprises v. Nat’l Broadcasting Co.*, 688 F.2d 689, 694 (9th Cir. 1982). Further developments may be expected in *Animation Workers* as the court granted plaintiffs leave to amend.

rather, the illegality is driven by the interference with the competitive process. In the context of determining whether payments for affected transactions are in furtherance of the conspiracy, this difference of illegal purpose counsels even greater caution in extending the statute of limitations in antitrust cases than in other cases where the illegal purpose is to defraud.

Salmonese

Ultimately, in the nuanced approach of whether serial payments that might otherwise be considered ordinary, unilateral and typically noncriminal constitute a “payoff” the overall features of *Salmonese* appear to weigh strongly to characterizing the sale of the warrants as a payoff. Many details of the conspiracy in *Salmonese* reflect how the sale of the warrants was integral to the overall conspiracy to defraud and involved particular measures of concealment deemed necessary by the conspirators to effectuate the overall scheme. For example, the relevant sale of the warrants during the limitations period was made in the name of the girlfriend of the defendant to avoid implicating the defendant. The conspirators had agreed not to sell the warrants until a specific time that would be designated. It was only through the sale of the warrants that the conspirators effectuated the scheme to defraud. The receipt and sale of the stripped warrants was a critical purpose of the conspiracy and the very act that made the conspiracy illegal. But the focus of the *Grimm* majority in distinguishing *Salmonese* was that the warrants sales were completed within 10 weeks of the public offering and were neither indefinite in number or due to lengthy duration.

The opinion in *Salmonese* does not foreshadow the opinion of the Second Circuit in *Grimm*. Instead, the *Salmonese* opinion uses broad language: “[t]his court has consistently ruled that where a conspiracy's purpose is economic enrichment, the jointly undertaken scheme continues through the conspirators’ receipt of their anticipated economic benefits.” 352 F.3d at 615. The court in *Salmonese* summarized its decision stating that “receipt of anticipated profits is an overt act in furtherance of an economically-motivated conspiracy.” *Id.* at 616. The court then went further to address whether the passive receipt of proceeds can constitute an overt act in furtherance of the conspiracy when the receipt is knowing and intentional and found in the affirmative. The court flatly rejected the defense position that the charged conspiracy had ended when the conspirators received their shares of the stripped warrants, stopped manipulating the securities, and closed their office – the indictment and evidence established that the conspiracy extended through the conspirators’ receipt of profits from sales of the stripped warrants.

Arguably the precedent related to application of the statute of limitations in the context of the general federal conspiracy statute, 18 U.S.C. § 371, is far broader than the application in the context of an antitrust violation. While both statutes may be viewed as dealing with conspiracies for economic gain, only the general federal conspiracy statute necessarily requires as an objective such economic gain. Indeed, an antitrust violation need not have as its objective the economic gain of the conspirators. The charged object of the Sherman Act conspiracy is the elimination of competition – the elimination of a competitor, the submission of rigged bids, the allocation of the market, depriving a purchaser of its right to benefit from competition. The antitrust context presents a slight twist to the classic concepts related to overcharges and payoffs because a Sherman Act Section 1 price-fixing violation does not require any evaluation of whether the alleged agreement created an overcharge.¹⁶ The crime is complete upon the formation of the agreement. As long as the agreement itself constitutes an unreasonable restraint of trade it can be prosecuted, and it does not matter if the parties carried through with the agreement.

United States v. Kissel¹⁷

The law is well-established that the statute of limitations will continue to run where there is continuing cooperation among antitrust conspirators to accomplish the objectives of an agreement that tends to suppress or restrained trade. In *Kissel*, the Supreme Court held in 1910 that for purposes of the application of the limitations period, a conspiracy prohibited by the Sherman Act can continue beyond its initial formation. The Court rejected the argument that the subsequent acts could not extend the limitations period because the conspiracy was a completed crime upon formation. Instead, the Court focused on the efforts of “continuous cooperation” among conspirators that, if continued, continues the conspiracy until “abandonment or success.”¹⁸

United States v. Inryco

*United States v. Inryco, Inc.*¹⁹ was one of the earlier cases addressing the statute of limitations in the context of modern prosecutions under the Sherman Act. In that case the bid-rigging conspiracy charged involved a payoff via a subcontract award by the winning bidder to its coconspirator in exchange for that

¹⁶ The issue of whether the government must prove the unreasonable nature of a price-fixing agreement or can rely upon an irrebuttable presumption of *per se* unreasonableness has not been decided by the Supreme Court.

¹⁷ *United States v. Kissel*, 218 U.S. 601, 607-10 (1910).

¹⁸ *Id.* at 607-08; *see also* Criminal Antitrust Litigation Handbook at 320-26 (2nd ed. 2006).

¹⁹ 642 F.2d 290 (9th Cir. 1981).

conspirators assistance in rigging the initial bid. The government argued that the meetings of the two conspirators for the purpose of determining the share of the payoff subcontract work continued the conspiracy into the applicable limitations period. The initial bids that were rigged were all submitted prior to the running of the limitations. The court found that the quid pro quo payments were to be paid only after the winning contractor received the contracts and that the purpose and effect of the conspiracy could reasonably be inferred to include the anti-competitive effects naturally generated by the subcontract awards themselves as the awarding of the subcontract work was integral to the illegal bid-rigging conspiracy.²⁰

A subsequent Ninth Circuit decision characterized *Inryco* as holding that “any act in furtherance of the agreement that tended to suppress or restrain trade would extend the time period”.²¹ In the *Walker* case, the jury acquitted the defendant on the Sherman Act count and the only relevant issues related to the general conspiracy statute. In *Walker*, the Ninth Circuit examined whether a material element of the agreement with a conspirator would have been breached if the conduct within the statute of limitations had not occurred. The division of profits among conspirators was found to fulfill the requisite need for overt acts during the limitations.

A key to the *Inryco* result lies in the factual context that the subcontract negotiations were between conspirators and effectuated the payoff between the conspirators. Like *Kissel* and *Walker*, the acts involved continuing cooperation among the conspirators.

V. IMPLICATIONS

The antitrust implications of the *Grimm* decision in the Second Circuit may affect prior convictions, current investigations, and future investigations. There is no question that the decision flies in the face of the current Antitrust Division position with regard to the application of the statute of limitations in antitrust cases. On the other hand, a variety of factors may limit how extensively the decision will affect antitrust enforcement. In many cases it will have limited relevance, and attentive and timely prosecution efforts can generally avoid coming close to the line on statutes of limitation. Moreover, the statute of

²⁰ See also *U.S. v. Dynalectric Co.*, 859 F.2d 1559, 1163-64 (11th Cir. 1988) (payment and subsequent profit sharing among conspirators occurred within the statutory period); *U.S. v. A-A-A Electrical Co.*, 788 F.2d 242, 244-45 (4th Cir. 1986) (payment and making of payoffs within the statutory period).

²¹ *U.S. v. Walker*, 653 F.2d 1343, 1350 (9th Cir. 1991).

limitations analysis in any particular case requires the scrutiny of individual fact patterns. But there is a substantive difference between a payoff to coconspirators and ordinary course payments for affected sales and that difference should affect prosecutorial efforts as well as potentially change the posture of specific cases.

Prior Convictions

There is no reason to believe there will be a rush of habeas corpus petitions or other challenges to prior antitrust convictions. As noted earlier, the Antitrust Division traditionally has taken a very conservative approach to avoid wandering into gray areas of the application of the statute of limitations. When able to avoid that thicket, the Antitrust Division usually has made efforts to do so. Most often, indictments have been returned within five years of the defendants having contacts and communications among conspirators directly related to accomplishing an agreement that has the purpose to suppress or restrained trade. Often the Antitrust Division will look for the last e-mails between the conspirators that relate to setting prices in the context of a price-fixing agreement. The extraordinary waste of resources from a mistake is well exemplified by the *Grimm* case. Both prosecutors and the defense well understand the amount of work that goes into a three-week trial presenting such complicated issues that the jury needed three days to deliberate.

Moreover, most prior convictions under the antitrust laws have been through plea agreements. As part of those agreements the convicted defendants waive any right to later assert violations of the statutes of limitations. Thus, relatively few convictions would be subject to challenge. Of those convictions not based on a plea, it is relatively unlikely that any statute of limitations defense in the context of the contested antitrust violation has not already been asserted or waived, and few are likely to fall within the category where the only overt acts in furtherance of the conspiracy that occurred within the statute of limitations period constituted passive payments on an affected sale.

Current And Future Investigations

The *Grimm* approach is likely to put pressure on the Antitrust Division even more closely to husband its resources and direct them most efficiently. The *Grimm* case itself stands as a stark reminder of the potential consequences of the failure diligently and swiftly to pursue investigative leads of non-ongoing conspiracies. Given the Division's limited resources, this may result in some difficult choices. Leads into ongoing investigations also often require immediate attention to secure the best possible evidence. The choice between working on an ongoing investigation or a new lead is not a simple one.

What is important is that many of the current investigations involve precisely the type of serial payments that are described in *Grimm* as not constituting overt acts. For example, in the context of the auto parts investigation contracts that may be the subject of collusion may involve sales over a long and indefinite time frame (e.g., life of a particular car model) with ordinary course value given and received, which payments themselves are not criminal and flow automatically from the sale of goods. Moreover, the Antitrust Division takes the position that it is not required to show that such sales resulted in overcharges to secure a conviction. The only time when the Division typically would offer evidence of overcharges would be in the context of an indictment when the Division was seeking a sentence above the Sherman Act \$100 million maximum fine for a corporation or \$10 million maximum fine for an individual. In that instance, the Division may proceed under the Alternative Fines statute to try to seek a higher fine and would be required to prove an overcharge to meet the requirements of that statute.²²

VI. CONCLUSION

The Second Circuit decision in *Grimm* removes a safety net for the Division as it allocates its resources in current and future investigations. While the decision may well have limited effect as the Antitrust Division rarely attempts to rely upon its position that a conspiracy continues until the last payment on an affected sale, on those relatively rare occasions, the Division should consider this decision before deciding whether to continue efforts that may well be barred by the statute of limitations. The receipt of proceeds from the sale of an item that was the subject of price fixing does not require the continuous cooperation of the conspirators, nor do such payments typically fall within a material element of the agreement of the conspirators. As the Division would readily argue, the failure of a purchaser to buy a price-fixed product would not in any way negate the conspiracy. The emerging caselaw clarifies that such serial payments, when made over a lengthy time and indeterminate in amount, are not criminal in themselves and made in a regular and ordinary course. Such payments would be the result of the antitrust conspiracy, not an act in furtherance of it, and would not re-start the statute of limitations.

²² 18 U.S.C. § 3571.