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Antitrust Suit Could Shake Up Schools' Financial Aid Policies

By **Henry Hauser, Hannah Parman and Mason Ji** (September 26, 2022, 5:05 PM EDT)

As schools across the country welcome students back for the 2022-23 academic year, several prestigious universities are grappling with a civil antitrust suit that could have major ramifications for how they allocate and award financial aid.

Henry Hauser

Following the **denial of the defendants' motions to dismiss** by Judge Matthew F. Kennelly of the U.S. District Court for the Northern District of Illinois, the Henry v. Brown University case has made the grade to the next phase.

Freshman Orientation

The plaintiffs are current and former students enrolled in elite private universities that paid a portion of their tuition, room and board. The defendants have been described by the court as "private universities that have been consistently ranked by the U.S. News & World Report as among the top twenty-five of such schools in the nation."

Hannah Parman

According to the plaintiffs, the defendants worked together for years to determine an applicant's ability to pay using a shared formula, which inflated the price of attending these schools for students receiving financial aid.

By the plaintiffs' estimation, the defendants' conduct resulted in overcharging more than 200,000 students to the tune of hundreds of millions of dollars.

In addition to class certification and damages, the plaintiffs are seeking a permanent injunction to stop the challenged conduct.

Mason Ji

College Presidents

All the defendants were at some point members of the 568 Presidents Group, which is an affiliation of universities that use a standardized methodology to calculate an applicant's expected family contribution to tuition, room and board.

According to the plaintiffs, the defendants developed a consensus approach that they used to determine an applicant's ability to pay. The plaintiffs allege that this effectively eliminated price competition among 568 Presidents Group members, increased the net price of attendance, and favored "children of wealthy past or potential future donors in their admissions decisions."

No Hall Passes

In their joint motion to dismiss, the defendants argued that they were exempt from antitrust liability under Section 568 of the Improving America's Schools Act, passed in 1994.

This exemption allows institutions of higher education that admit all students on a "need-blind" basis

to "use common principles of analysis for determining the need" of students if the agreement "does not restrict financial aid officers at such institutions in their exercising independent professional judgment."

However, the plaintiffs argued that the 568 exemption could not apply, because defendants did in fact consider financial aid in making admission decisions. According to the court, the plaintiffs' allegations were enough to survive the motion to dismiss.

Capitol Hill Meets the Ivory Tower

On Aug. 22, Sens. Marco Rubio, R-Fla., and Mike Lee, R-Utah, penned a letter to Assistant Attorney General Jonathan Kanter of the U.S. Department of Justice's Antitrust Division, voicing concerns about the 568 exemption.

The senators opined that the exception allows private universities to coordinate on financial aid awards in a manner that artificially inflates costs of higher education, results in higher student debt and distorts access in favor of wealthy families. The letter argued that schools regularly consider a student's family's ability to make large donations to the university and other factors that are proxies for socioeconomic status.

Core Curriculum

Conduct can violate Section 1 of the Sherman Antitrust Act under either the per se or rule of reason standard. The court did not address which applied here, as it determined that under either standard, the plaintiffs sufficiently pled their claim at this stage of the litigation. This will be a key issue as the case unfolds.

The rule of reason requires a plaintiff to show an anti-competitive effect, whereas the per se standard has no such requirement. Here, the plaintiffs alleged an anti-competitive effect in the market for undergraduate education at private national universities with an average U.S. News & World Report ranking of 25 or higher since 2003.

The defendants argued this was not a plausible market, but the court was not persuaded. Because market definition is a heavily fact-driven inquiry, it is generally difficult for a defendant to prevail on this issue before fact discovery is complete.

No College Dropouts

Several of the defendants moved to dismiss on the ground that the Sherman Act's four-year statute of limitations had expired. Specifically, these defendants claimed that they withdrew from the 568 Presidents Group between 2012 and 2014.

Rejecting this argument, the court stated that defendant did not allege that they (1) informed their putative co-conspirators of their withdrawal or (2) disavowed the objectives of the alleged conspiracy.

Review Session

Antitrust Exemptions Construed Narrowly

According to the U.S. Supreme Court's 1973 decision in FMC v. Seatrain Lines Inc., statutory and implied antitrust immunities must be "strictly construed."

Further, as the court found in U.S. v. Philadelphia National Bank in 1963, "repeals of the antitrust laws by implication from a regulatory statute ... have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."

Some courts — including the U.S. Court of Appeals for the Second Circuit, in its 1987 opinion in Niagara Frontier Tariff Bureau Inc. v. U.S. — have gone so far as to describe immunities as "strongly disfavored." This means that defendants hoping to avoid liability based on antitrust immunities must make compelling arguments grounded narrowly in the text and history of the exemption.

For the defendants in this lawsuit, that could present an uphill battle.

Withdrawal Defense Difficult to Establish

A defendant bears the burden of proving withdrawal — and simply cutting off communications with alleged co-conspirators is likely not enough. An affirmative action to disavow or defeat the purpose of the conspiracy is often required.

Antitrust Division Continues Amicus Winning Streak

Although not a party to this litigation, the Antitrust Division filed an amicus brief arguing that: (1) the 568 exemption does not immunize agreements between schools that fail to admit all students on a need-blind basis; (2) exemptions should be construed narrowly; and (3) plaintiffs sufficiently alleged a Sherman Act violation under either the per se or rule of reason standard. As discussed above, the plaintiffs prevailed on each of these issues.

The Antitrust Division has been very active in filing amicus briefs across an array of industries, from fast food franchises to app distribution and payment platforms. This strategy has been paying huge dividends.

Notably, joining a case as an amicus enables enforcers to influence a larger number of issues, without expending the significant resources that litigating parties face.

568 Exemption to Expire

As of Sept. 30, the 568 exemption will exist only in the history books. This will have a major impact on how universities dole out financial aid going forward — including whether they work together in doing so.

Next Semester

Per Judge Kennelly's case management order entered on Sept. 9, the parties will have until Jan. 31, 2024, to conduct fact discovery, and until Sept. 13, 2024, for expert discovery. The parties now face months of negotiations over document search methodologies, custodians and depositions.

Although no trial date has been set, the summary judgment briefing deadlines indicate a trial likely would not take place until late 2025. In the meantime, it will be interesting to track how colleges and universities across the country respond to the expiration of the 568 exemption — including whether elite schools' financial aid awards diverge more in the next admissions cycle.

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Perkins Coie counsel Caroline Gizem Tunca contributed to this article.