

## **Antitrust Suit Against Elite Universities Graduates to Discovery**

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. Following the denial of defendants' motions to dismiss by Judge Matthew F. Kennelly of the U.S. District Court for the Northern District of Illinois, the case moves to the discovery phase.

### **Freshman Orientation**

Plaintiffs are current and former students enrolled in elite private universities that paid a portion of their tuition, room, and board. Defendants are private universities ranked by *U.S. News & World Report* in the top 25 nationally. According to 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 plaintiffs' estimation, 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, plaintiffs are seeking a permanent injunction to stop the challenged conduct.

### **College Presidents**

All of the defendants were, at some point, members of the 568 Presidents Group, an affiliation of universities that use a standardized methodology to calculate an applicant's expected family contribution to tuition, room, and board. According to plaintiffs, defendants developed a "consensus approach" to determine an applicant's ability to pay. Plaintiffs alleged 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, defendants argued that they were exempt from antitrust liability under Section 568 of the Improving America's Schools Act of 1994 (the 568 Exemption). 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, 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, plaintiffs' allegations were enough to survive the motion to dismiss.

### **Capitol Hill Meets the Ivory Tower**

On August 22, 2022, Senators Marco Rubio and Mike Lee penned a letter to Assistant Attorney General Jonathan Kanter of the U.S. Department of Justice (DOJ), 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 the rule of reason standard. The court did not address which applied here, as it determined that under either standard, 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 anticompetitive effect, whereas the per se standard has no such requirement. Here, plaintiffs alleged an anticompetitive 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. Defendants argued that 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 grounds 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 plaintiffs 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 are construed narrowly.** According to the U.S. Supreme Court, statutory and implied antitrust immunities must be "strictly construed." Further, "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 *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 is 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.
- **DOJ, Antitrust Division continues amicus winning streak.** Although not a party to this litigation, the Antitrust Division filed an amicus brief arguing that the 538 Exemption does not immunize agreements between schools that fail to admit "all students" on a need-blind basis, exemptions should be construed narrowly, and plaintiffs sufficiently alleged a Sherman Act violation under either the per se or rule of reason standard. As discussed above, 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 September 30, 2022, the 568 Exemption will exist only in the history books. This will have a major impact on how universities go about doling out financial aid, including whether they work together in doing so.

Per Judge Kennelly's case management order entered on September 9, 2022, the parties will have until January 31, 2024, to conduct fact discovery and until September 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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