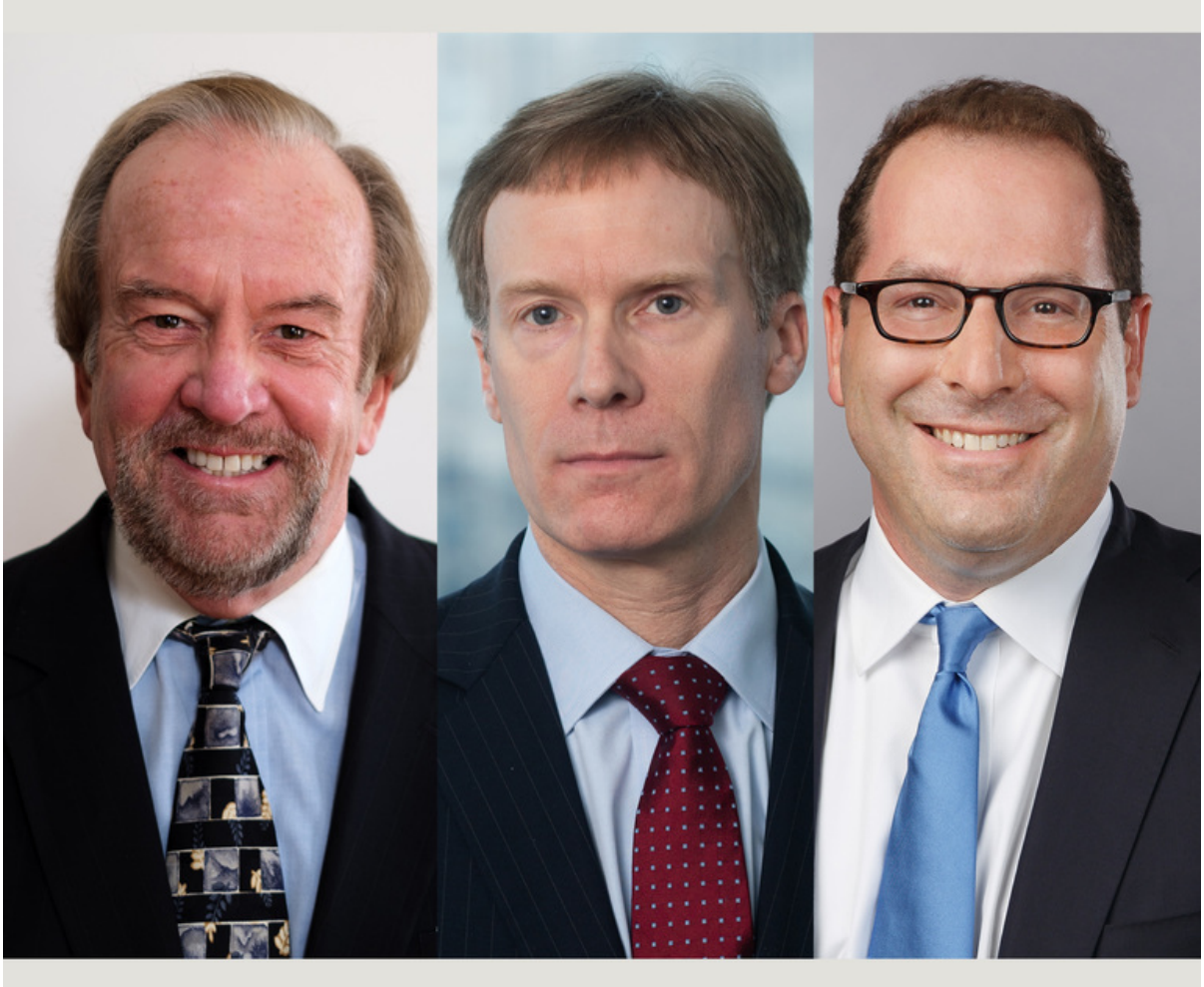
March 8, 2024
The Litigation Daily Publication of the American Lawyer Magazine



Litigators of the Week: $284M and Counting From Elite Universities Accused of Price-Fixing

Our Litigators of the Week are **Bob Gilbert** of **Gilbert Litigators & Counselors**, **Ted Normand** of **Freedman Normand Friedland**, and **Eric Cramer** of **Berger Montague** who have been pursuing price-fixing claims against 17 elite universities accused of conspiring to limit financial aid awards and inflating tuition.

Last week U.S. District Judge Matthew Kennelly in Chicago gave preliminary approval to three more settlements—with Dartmouth agreeing to pay $33.75 million, Northwestern $43.5 million, and Vanderbilt $55 million. Those settlements raise the number of schools that have settled to 10 and the total amount of the settlements to $284 million.

Litigation Daily: How would you characterize what's at stake in this litigation, especially on the public policy front?

Ted Normand: Access to higher education, and how much it costs, are at stake. The litigation is about whether the defendants would have given out more financial aid if they had been aggressively competing with each other over how to calculate financial aid and the appropriate principles to apply in awarding it. The case alleges that in full competition, with their substantial and increasing financial resources, the defendants would have awarded more financial aid to those who received aid.

Who is on the plaintiffs' team and how have you divided the work?

Bob Gilbert: Each firm has focused on a few of the defendants. Overall, with overlap on many topics, Freedman Normand Friedland has spent relatively more time analyzing the law applied to the facts, Gilbert Litigators on developing critical facts, and Berger Montague on economic analysis. Ted, Eric, and I lead the team. We are fortunate to have such highly talented colleagues. The team at FNF includes **Vel Freedman**, **Joseph Delich**, **Richard Cipolla**, **Ivy Ngo**, **Peter Bach-y-Rita**, **Stephen Lagos**, **Thomas Trabue** and **Bianca Nachmani**. The team at Gilbert Litigators includes **Elpidio "PD" Villareal**, **Robert Raymar**, **David Copeland**, **Steven Magnusson**, **Natasha Zaslove**, **Sarah Schuster** and **Alexis Marquez**. The team at Berger Montague includes **Robert Litan**, **Ellen Noteware**, **Daniel Walker**, **David Langer**, **Richard Schwartz**, **Hope Brinn** and **Jeremy Gradwohl**.

The universities claim that their policies are "need blind." You contend they are not. What's your argument on that point?

Gilbert: The 568 statute applied to agreements between "2 or more institutions of higher education at which *all* students are admitted on a need-blind basis" and defined need-blind as "without regard to the *financial circumstances* of the student involved or the student's family." The plain meaning of the statute is that for a university to be need-blind, it may not consider the "financial circumstances of the student . . . or the student's family"—including the family's wealth or its donation history or its capacity to make substantial donations. Wealth is a "financial circumstance."

What is the Section 568 antitrust exemption, and why has the judge found the universities are not entitled to it in this case?

Normand: The court did agree with our interpretation of the 568 exemption in denying defendants' motion to dismiss, but whether any defendant is entitled to rely on the exemption has not been finally resolved. The exemption allowed schools to discuss and agree in certain respects on the appropriate principles to apply in awarding financial aid, but only if all of the schools admit all of their applicants without regard to the financial circumstances of the applicants and their families. Since we allege and intend to prove that most (if not all) of the defendants considered such circumstances in admissions during the class period, none of the schools is entitled to claim the exemption.

How is this case different from the prior price-fixing case that the Department of Justice brought against the Ivies and MIT in the early 1990s?

Cramer: The Department of Justice brought the so-called Ivy Overlap case against the Ivy League schools and MIT in the 1990s for conspiring to fix individual student aid awards, which the DOJ argued had artificially stabilized and increased the net prices students paid to attend these schools. The current case alleges that 17 elite universities (including six Ivies, MIT, and 10 other elite national universities) agreed to common principles and methods for determining financial aid, as well as sharing sensitive information about those principles and methods, with the goal of fixing and/or stabilizing aid awards across the schools and with the effect of inflating the net prices class member students paid to attend. We further allege that the defendants failed to qualify for the 568 exemption and thus acted without any purported statutory immunity.

The Department of Justice filed a statement of interest in this case last year while the defendants' motion to dismiss was pending. What position did the DOJ take?

Normand: The DOJ explained that (1) the 568 exemption "does not extend antitrust immunity to agreements that include schools that do not admit all students on a need-blind basis"—such that if any defendant did not meet the terms of the exemption, then none of the defendants was covered; and (2) "Defendants' 'actual knowledge' of their co-conspirators' admissions policies is not relevant to whether the 568 Exemption applies."

What benefit will class members get from the $284 million in settlements reached so far? And are class members who attended non-settling defendant universities in line to get anything from the settlements reached thus far?

Cramer: The case alleges that all 17 university defendants conspired to reduce financial aid to students at each and every defendant school, and thus that each of the 17 defendants is liable to all of the students attending all of the schools during certain relevant time periods. The court provisionally certified, for settlement purposes, a class including students from all 17 defendant schools. Under the 10 settlements to date, all members of the proposed class—no matter which of the 17 defendant schools they attend or attended—are eligible to share in the settlements achieved to date. The class notice approved by the court estimates that claimants to the settlement fund from all 17 defendant schools will receive an average award of $2,000 from these settlements. Should there be more settlements or an award at trial, the average award to all class members would increase.

What comes next? Where do things stand procedurally with the remaining defendants? And who are they?

Gilbert: The seven remaining defendants are CalTech, Cornell, Johns Hopkins, Georgetown, MIT, Notre Dame and Penn. The period for fact discovery is ending in the next few weeks, and over the spring and summer the parties will present their expert reports and the plaintiffs will move to certify the proposed class.

What will you remember most about getting to this point of the litigation?

Normand: I'll mainly recall how our allegations have resonated with students and families, our work on how best to assess the harm we allege the class has suffered, and the strength and breadth of opposing counsel.

Gilbert: All of us will carry lifelong memories of hearing the gratitude of innumerable people who tell us their stories, and know our cause is just. We will always remember their heartfelt expressions of appreciation for our hard work that is righting past wrongs, and creating more opportunity for talented working-class and middle-class students to achieve their dreams.

Cramer: The back-and-forth in negotiating the settlements we've achieved is rewarding and challenging, especially when it involves talented mediators, strong opposing counsel, meaningful claims, and truly deserving and injured clients and class members. We've been gratified with the results achieved thus far, and look

forward to increasing the benefits to the class members through additional settlements, trial, or both.
