

Let Money Talk, Former Students Say In Elite Schools Row

By **Bryan Koenig**

Law360 (January 26, 2023, 8:31 PM EST) -- Former students want to put the massive donations that helped wealthy children get into "need-blind" schools front and center in an antitrust case accusing top private universities of conspiring to limit financial aid, as they blasted a subset of institutions Wednesday for trying to hide those details.

Out of the 17 defendants, Brown, Columbia, Dartmouth, Northwestern, Notre Dame and Yale have all sworn off claiming immunity from the suit under Section 568 of the Improving America's Schools Act of 1994, which conveys antitrust immunity for schools coordinating admissions, provided all students are admitted on a "need-blind basis" without considering finances.

But the former students **argued Wednesday** this should not enable some of "the most culpable members" of the alleged price-fixing cartel to deny evidence "proving defendants' wealth favoritism, allocation of admissions slots to donor-favored applicants and admissions decisions prejudicial to scholarship applicants."

U.S. District Judge Matthew Kennelly for now rejected assertions of immunity in an August decision **refusing to dismiss the suit**. The plaintiffs argued Wednesday that the six schools cannot prevent discovery into admissions and fundraising with a sought protective order. They asserted in part that even though the six schools have sworn off the defense, the material is still relevant for the broader conspiracy in which 11 other defendants are still claiming that immunity.

"The contested discovery bears directly on how, when and how often defendants attempted to conceal their wrongdoing and the injuries by hiding behind a publicly stated but inapplicable 'need blind' exemption for which they each annually certified that they qualified, while actually practicing wealth favoritism," the plaintiffs said.

An attorney for the former students, Robert D. Gilbert of Gilbert Litigators & Counselors PC, has receipts of that alleged favoritism, pointing in an accompanying declaration, among other things, to former Sony Pictures CEO Michael Lynton's \$1 million check that allegedly secured his daughter admission to Brown, to a job liaising between Dartmouth's admissions and fundraising that "certainly suggests a pervasive use of wealth favoritism by Dartmouth," and to Russian oligarchs who have allegedly bought their children's way into Yale.

Counsel for the plaintiffs declined to comment. Counsel for the schools did not immediately respond Thursday to press inquiries.

The suit alleges the private universities worked together to eliminate financial aid as a point of competition between the schools, effectively fixing the total price of attendance for some 170,000 students over the past two decades.

The suit names Brown University, California Institute of Technology, Columbia University, Cornell University, Dartmouth College, Duke University, Emory University, Georgetown University, Massachusetts Institute of Technology, Northwestern University, University of Chicago, University of Notre Dame, University of Pennsylvania, Vanderbilt University, William Marsh Rice University and Yale University. An amended complaint in February added Johns Hopkins University.

At the center of the case and much of the overlapping discovery disputes is Section 568 and the

alleged price-fixing cartel that the former students say the schools formed with a 568 Presidents Group under which they agreed to implement a common approach to evaluating an applicant's ability to pay for school and for using that calculation when making admission decisions.

On Wednesday, the plaintiffs argued that regardless of the six schools' declaration that they would not use the 568 defense, Judge Kennelly has already "unequivocally ruled" that "the culpability of any one of the conspirators is evidence against all 17 conspirators." And they asserted the judge has made clear he "would not tolerate any obstructive gamesmanship from defendants," including efforts to resist showing evidence of admissions tied to donations.

The battle over discovery **goes both ways**. Among other things, the defendants are pushing to subpoena the students' families, fighting a sought protective order by arguing in a Jan. 20 brief that parents "are intimately involved in their children's undergraduate application process, including applications for financial aid."

The students, on their part, continued Wednesday to fight discovery into things such as the schools they considered and were admitted to, the financial aid they received, the loans they took out and their satisfaction with the institutions they attended.

In a separate filing, they argued that the schools' "public admissions that they engage in need-aware admissions and that the 568 Cartel's goal was to 'reduce variance' in pricing and to charge the 'maximum' amount that families can afford to pay" had made out a plainly illegal antitrust conspiracy. That makes the case now "largely about damages," according to the brief, which blasted the schools for seeking discovery on "irrelevant matters."

"On the issue of who helped plaintiffs pay for college, for example, defendants argue that whether a student suffered injury depends on whether anyone helped her pay tuition. This is plainly wrong," they said. "In a horizontal price-fixing case, it is irrelevant whether the purchasers paid using their own money, borrowed money, or gifted money. This is because as a direct purchaser, the consumer suffers harm at the moment of purchase."

Wednesday also saw the schools file individual answers to the lawsuit, including affirmative defenses that, in addition to 568 immunity, contend the collaboration had "procompetitive benefits" — which would only be at issue if the schools can get the case judged on the rule of reason, which is harder to prove than cases based on per se or automatic illegality — benefits like "a more efficient allocation of aid" that reduces costs and increases financial aid awards.

Other defenses include assertions that the lawsuit is too old and that the students failed to "mitigate damages" because they could have gone to other schools that did not participate in the 568 group.

"If plaintiffs had attended such schools, they might not have incurred any alleged price increase caused by the challenged conduct at the defendant schools they chose to attend, while still receiving a reasonably comparable education," Duke University said. "In addition, plaintiffs may not have exhausted all available sources of grants or other tuition relief that could have offset any alleged price increase."

The students are represented by Edward Normand, Eric Rosen and Peter Bach-y-Rita of Freedman Normand Friedland LLP, Robert D. Gilbert and Elpidio Villarreal of Gilbert Litigators & Counselors PC, Eric L. Cramer, Caitlin Coslett, Robert E. Litan and Daniel J. Walker of Berger Montague PC, and Elizabeth A. Fegan of Fegan Scott LLC.

Brown is represented by Morgan Lewis & Bockius LLP. Cooley LLP represents CalTech. The University of Chicago is represented by Arnold & Porter. Columbia is represented by Skadden Arps Slate Meagher & Flom LLP. Cornell and Rice are represented by King & Spalding LLP. Dartmouth is represented by Jenner & Block LLP. Duke is represented by Covington & Burling LLP, Gibson Dunn & Crutcher LLP and Saul Ewing Arnstein & Lehr LLP. Emory is represented by Jones Day. Georgetown is represented by Mayer Brown LLP. Johns Hopkins is represented by Ropes & Gray LLP. MIT is represented by Freshfields Bruckhaus Deringer LLP and Goldman Ismail Tomaselli Brennan & Baum LLP. Sidley Austin LLP represents Northwestern. Notre Dame is represented by Williams & Connolly LLP and Michael Best & Friedrich LLP. The University of Pennsylvania is represented by WilmerHale and Miller Shakman Levine & Feldman LLP. Vanderbilt is represented by White & Case LLP. Yale is

represented by Hogan Lovells US LLP and Novack & Macey LLP.

The case is Henry et al. v. Brown University et al., case number 1:22-cv-00125, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Kelly Lienhard and Matthew Perlman. Editing by Vaqas Asghar.