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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Dropping Immunity Claim Can't Stop Elite Schools Discovery

By **Bryan Koenig**

Law360 (February 9, 2023, 7:12 PM EST) -- An Illinois federal judge has refused to spare a subset of top private universities accused of conspiring to limit financial aid from discovery into whether donations helped wealthy children get into "need-blind" schools, finding that liability for one school can be applied to them all.

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.

In the face of assertions from former students suing the schools that those six are some of "the most culpable members" of the alleged price-fixing cartel, U.S. District Judge Matthew F. Kennelly said from the bench Wednesday that based on the way he's already addressed the alleged conspiracy here in rejecting assertions of immunity in an August decision **refusing to dismiss the suit**, liability for one covers the rest. That's because, according to a rough transcript of the hearing, everyone within the 568 group needed to comply with the need-blind requirement to take advantage of its protections.

"Now, you might openly convince me that that's not right. But as of right now, that's the operative complaint and what it says and at least part of the basis on which I sustained it," Judge Kennelly told an attorney for the schools, according to the rough transcript. "So the proposition that by some but not all defendants withdrawing the defense, you've essentially removed yourselves from the need to provide discovery on these points really is not accurate."

That order, refusing to grant a protective order for the six schools blocking **discovery into admissions and fundraising**, was one of several discovery decisions Judge Kennelly made from the bench Wednesday and enshrined in a brief minute order.

In pushing for discovery even from those six schools, the plaintiffs had argued the material is relevant for the broader conspiracy in which 11 other defendants are still claiming that immunity. The material, Robert D. Gilbert of Gilbert Litigators & Counselors PC said for the plaintiffs during Wednesday's hearing, shows wealth favoritism and thus belies assertions that the schools practiced need-blind admissions that merit immunity.

Gilbert has receipts of the alleged favoritism, pointing in court documents, 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.

Gilbert welcomed Wednesday's ruling in a statement.

"The plaintiffs are very pleased that the court denied the motion of six defendants for a protective order and will allow the plaintiffs to develop the evidence to prove our case," he said.

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 among 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, Rice University and Yale University. An amended complaint in February 2022 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.

The students contend that the schools have already all but admitted liability in public admissions that the 568 group was meant to reduce differences in prices and maximize how much families could afford to pay, making the case now "largely about damages."

Last month, 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."

The judge agreed Wednesday. However, he did block "for now" discovery requiring searches of the schools' presidents' and fundraising offices, promising to revisit the students' bid for that discovery — to show the alleged influence of donations on admissions — in the coming months depending on the discovery that comes in from other avenues, especially the school admissions offices. But the judge did facilitate the depositions of six key witnesses, including Northwestern's president.

Judge Kennelly also refused to grant the former students a protective order that would have barred discovery of their families, which they sought as the schools try to contend that the way the plaintiffs paid for and picked their institutions undermines the case.

The judge did, however, impose limitations on discovery from the parents and the students themselves. He blocked as a "fishing expedition" discovery into documents used to fill out financial aid forms, but allowed discovery of the actual forms. He also refused material on tuition and other payments, while allowing the schools to demand details of other potential financial aid the students applied for or received. In addition, Judge Kennelly allowed discovery into how the students compared schools, while rejecting as overreaching discovery into students' "satisfaction" with their schools and their social media presence.

In his minute order, the judge also refused to block discovery into schools that have withdrawn from the 568 group. "The court agrees with plaintiffs' contentions regarding the relevance of this material and does not find the request(s) for it to be disproportionate," he said.

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. Northwestern is represented by Sidley Austin LLP. 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 John C. Davenport.
