

Judge Says Top Universities Must Face Financial Aid Suit

By **Kelly Lienhard**

Law360 (August 15, 2022, 5:15 PM EDT) -- An Illinois federal judge allowed a suit accusing over a dozen top private universities of conspiring to limit financial aid to move forward despite claims from the schools that their actions were permitted under an exemption to antitrust law.

Judge Matthew Kennelly denied the private universities' motion to dismiss Monday, finding that the former students challenging the schools reasonably alleged that the universities considered students' financial situation during admission decisions, disqualifying the schools from the exemption in Section 568 of 1994's Improving America's Schools Act.

The 17 private schools accused of antitrust violations, including Brown, Duke, Northwestern and Yale, had argued that the suit should be thrown out because of the 568 exemption, which allows for universities that do not consider students' financial standings in admissions decisions to qualify for an antitrust exemption that allows for the schools to collaborate on financial aid offerings.

However, the former students suing the private schools said that the financial circumstances of students and their families were considered when admitting waitlisted and transfer students, specifically favoring the children from past or potential donors.

Several of the schools use a secretive admissions process known as "enrollment management" to show preference to richer applicants, according to the students.

The universities argued that the evidence put forward by the students is "too general" or "too old" to support claims that students were admitted on a need-aware basis.

However, the schools added, even if the students' claims were possible, they were irrelevant to proving that the schools admit students based on their need for financial aid because admitting children of wealthy donors is based on the increased chances that the school will receive a donation, not the decreased chances that the student will need financial aid.

The schools also said that the need-blind requirement in the exemption does not apply to waitlisted students, an argument that both the students and court rejected, as the 568 exemption states that "all" students must be admitted on a need-blind basis.

Judge Kennelly found that the universities' arguments were not enough to support dismissing the suit, as the students reasonably alleged that finances were considered as part of the admissions process.

"Taking all of the [students'] allegations together, there is more than enough to plausibly allege that the various enrollment management strategies described in the amended complaint violate the requirements of the 568 Exemption," Judge Kennelly stated.

The schools also argued that the students were outside the four-year statute of limitations for antitrust claims, but Judge Kennelly found that the schools could have attempted to conceal their scheme, making it unreasonable to expect the students to have known about the schools' actions any earlier.

Robert D. Gilbert, managing partner of Gilbert Litigators & Counselors and lead firm for the plaintiffs,

agreed with Judge Kennelly's ruling and outlined the next steps in the case in comments to Law360.

"We look forward to winning substantial restitution for the 200,000 students who have been harmed by the collusion of these 17 elite universities and to ending their unlawful practices," Gilbert said. "In order to do so, in this next phase of the case, we also look forward to taking the depositions under oath of the decisionmakers at each university who participated in this antitrust conspiracy which has inflicted harm on so many middle-class and working-class families."

Another attorney for the students, Edward Normand, partner at Roche Freedman LLP, told Law360 that he was pleased with the court's ruling.

"We look forward to vindicating the rights of students under the antitrust laws going forward in the rest of this important case," Normand said.

However, a representative for Brown University, one of the schools included in the suit, told Law 360 that it is confident the university will win the case.

"We maintain that Brown University's financial aid is set without any specific knowledge or regard for how other colleges are setting their financial aid, and we will demonstrate this through the legal process," a Brown representative stated.

Yale also disagreed with the court's decision, telling Law360 that the lawsuit is both factually and legally baseless. The school added that it has one of the most generous financial aid programs in the country, as it doesn't require parents earning less than \$75,000 annually to make any contributions to their child's tuition.

The **former students initially filed the suit** in January, claiming that 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.

The schools fought back, **submitting the motion to dismiss the case in April**, claiming that they can work together on certain aspects of financial aid offerings as long as they don't use a student's financial need when making admission decisions.

The universities claimed that only five of the schools — Brown, Columbia, Duke, Georgetown and MIT — favor applicants related to potential donors, though it asserts those claims are "legally irrelevant," and said that even if some of the schools did lose the exemption because of the "need-blind" requirement, that doesn't mean all the schools named in the complaint lose the exception too.

The U.S. Department of Justice threw its weight behind the students, and urged the court in a statement of interest filed in early July to not dismiss the suit, as the 568 exemption does not cover agreements that include schools considering financial aid.

In its statement of interest, the DOJ said the exemption only applies when each school that is part of the agreement admits all students on a need-blind basis.

"An agreement either qualifies for the exemption or it does not," the DOJ said. "The 568 Exemption contains no language suggesting immunity depends on whether a need-blind school knows the agreement it has entered into is non-exempt."

Representatives for Columbia, Dartmouth, Emory, Northwestern and Rice declined to comment Monday. Representatives for the other schools and the DOJ did not immediately respond to a request for comment.

The students are represented by Kyle W. Roche, Edward Normand, Eric Rosen and Peter Bach-y-Rita

of Roche Freedman 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. CalTech is represented by Cooley LLP. 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. 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 Matthew Perlman. Editing by Patrick Reagan.

Update: This story was updated to include comment from Brown University and Yale University and to reflect that Columbia University declined to comment.