

Federal Court Decision a Reminder Antitrust Laws Apply to Higher Education

The ruling by the U.S. District Court for the Northern District of Illinois is notable because it held that the “568 Exemption,” on which many universities’ financial aid systems are based, does not provide antitrust immunity unless all participating universities admit their students on a need-blind basis.

By Carl W. Hittinger and Tyson Y. Herrold

Seventeen of U.S. News & World Report’s top 25 universities in the nation recently lost their bid to dismiss allegations of an antitrust conspiracy to suppress student financial aid awards. The ruling by the U.S. District Court for the Northern District of Illinois is notable because it held that the “568 Exemption,” on which many universities’ financial aid systems are based, does not provide antitrust immunity unless all participating universities admit their students on a need-blind basis. More broadly, it is a reminder that the antitrust laws apply to higher education, even public universities, and highlights the risk in relying on narrow exemptions to the antitrust laws in reaching agreements with competitors.

The 568 Exemption to Antitrust Laws

The 568 Exemption dates back to 1989, when the Department of Justice filed a civil antitrust case against the “Ivy Overlap Group,” a group of universities alleged to have “collectively determined the amount of financial assistance to award to commonly admitted students” by “employing the same analysis to compute family contributions.” After a trip to the U.S. Court of Appeals for the Third Circuit, in 1991 the parties inked a 10-year consent decree in which the universities pledged, among other things, not to agree on “student financial aid,” including “how family or parental contribution will be calculated.”

The ink on the consent decree was barely dry when, in 1992, Congress passed what has become colloquially called the 568 Exemption. Modeled in part on concepts in the 1991 consent decree, the exemption provides that “institutions of higher education at which all students admitted are admitted on a need-blind basis” may agree on “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 with respect to individual applicants for such financial aid.” To paraphrase, as long as admissions decisions are need-blind, universities may collaborate on a financial aid framework.

‘Carbone v. Brown University’

The plaintiffs in *Carbone v. Brown University*, current and former college students, allege in their putative class action that the “568 Presidents Group” of universities “participated ... in a price-fixing cartel that is designed to reduce or eliminate financial aid as a locus of competition” by agreeing to a “Consensus approach, i.e., a set of common standards for determining a family’s ability to pay for college.” They also allege that the defendants are ineligible for the 568 Exemption because the “defendants have considered the financial circumstances of students or their families in deciding whether to admit students.” Accordingly, they allege the university defendants violated Section 1 of the Sherman Act.

In August, the district court denied a motion to dismiss by the university defendants, finding that the plaintiffs’ allegations sufficed at the pleading stage. In self-proclaimed dicta, the court rejected several interpretation arguments concerning the 568 Exemption. First, it agreed with the plaintiffs, at least at the pleading stage, that the phrase “without regard to the financial circumstances” means without regard to “any aspect of an applicant’s financial circumstances,” despite the universities’ position that this interpretation “would prohibit schools from considering an applicant’s financial hardship in a positive way” to “shape economically diverse classes.” “Whether a statute is bad policy, and thus ought to be modified,” the court emphasized, “is not for courts to decide.”

Second, the court rejected the argument that each individual defendant must be alleged to have considered financial need in admissions decisions. While rejecting such a pleading requirement as a matter of civil procedure, the court also went on to note, “even if this were not the case, the fact that at least one member of the conspiracy is plausibly alleged not to be, or not to have been, need-blind means that the plaintiffs have plausibly alleged that none of the schools are protected under the 568 Exemption.” In other words, all participants must admit on a need-blind basis or no one gets immunity. While the universities argued this

interpretation would require onerous policing of other schools' policies, the court concluded there is no "actual knowledge requirement" in the 568 Exemption and, again, that "bad policy" arguments are "better directed toward Congress, not the court."

Legal Takeaways

The *Carbone* decision offers several important takeaways:

First, educational institutions, even nonprofit ones, are generally subject to the antitrust laws, just like any other business entity. Public universities too are governed by the antitrust laws, and though "Parker Immunity" may apply where states see fit to exercise their regulatory authority, its application can be highly fact dependent and will be narrowly construed. In short, the Sherman Act is broad and its exemptions narrow, even in the realm of higher education.

Second, though the paradigmatic example of price fixing is agreement on a specific price, agreements on pricing formulas and pricing discounts can also violate the Sherman Act. As the Department of Justice's statement of interest in *Carbone* cautions: "Horizontal agreements on prices or discounts—including pricing or discount formulas—normally are per se unlawful under Section 1 of the Sherman Act." Even discussing pricing information, without reaching an agreement, invites antitrust scrutiny.

Third, pricing agreements between competitors are intrinsically or, in antitrust lingo, per se, illegal, regardless of any perceived benefits to customers specifically or the market generally. Thus, any analysis of antitrust immunity in the context of competitor agreements must also include an appreciation of the risk and consequences of per se liability, should immunity turn out to be narrower than anticipated or subject to an exception.

In the weeks since the *Carbone* decision, the parties have filed answers, precipitating what could be extensive discovery. While the court avoided some tough calls at the pleading stage, including the antitrust standard by which the 568 Presidents Group should be reviewed, these issues will likely come to a head at summary judgment. Stay tuned.

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