FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

U.S JUSTICE DEPARTMENT INVESTIGATES MAJOR UNIVERSITIES FOR ANTITRUST VIOLATIONS

By: Donald I. Baker
Sutherland, Asbill, & Brennan, Washington

Federal antitrust enforcement is back on the front pages of major U.S. newspapers, as the result of a novel Justice Department investigation into tuition and scholarship practices at over 40 of America's most prestigious colleges and universities. The image of Harvard, the University of Chicago, and Wesleyan quaking at the bar of antitrust justice amuses some, pleases others, horrifies the academic community, and rather surprises the general public.

What are these worthy institutions suspected of doing? Some might call it "price-fixing." What some schools have apparently done— quite openly— was set up a procedure to avoid "bidding wars" on scholarship students. This so-called Overlap Group, composed of financial aid officers, has met each spring to compare need determinations as to particular candidates and to eliminate substantial differences in costs borne by the family among institutions selected by a candidate. But this may not be the whole story. At least some of the institutions receiving the Justice Department's Civil Investigative Demands (CIDs) insist that they were not participants in the Overlap Group meetings[1], and the *Wall Street Journal* reports of regular private communications among some of the colleges prior to annual tuition increases.[2] This suggests that the Justice Department may suspect a general covert "agreement" or "understanding" on tuition levels.

Needless to say, the whole scene is rather far removed from anything that Senator Sherman and his Congressional colleagues contemplated— let alone intended— a century ago; and yet this situation is not necessarily as preposterous as it might seem at first blush. Since at least 1940, the *Sherman Act* has been treated by the Supreme Court as "the *Magna Carta* of free enterprise" and its jurisdictional reach has been expanded as the Court repeatedly widened the definition of "interstate commerce" on which antitrust and so much other modern federal jurisdiction rests. Thus, the concept of "commerce," which in the late nineteenth century was largely based on production, manufacture, transportation and distribution of tangible products, has since the 1930s been gradually broadened to reach all sorts of personal services. Insurers, banks, and stockbrokers were the first to be brought in.[3] In the 1970s, lawyers, doctors and professional engineers were firmly caught in the net when they unsuccessfully disputed several claims with pleas for exemption on the grounds that these were "learned professions" or performed functions which would be undermined by full competition.[4] Even local governments have come within the definition of "commerce" when they engage in an activity which appears commercial, such as distributing gas or electricity.[5]

Are private, non-profit colleges and universities somehow different, or can they too be brought into the bulging *Sherman Act* net? If so, are they just subject to the same rules as business corporations? Is "price-fixing" just "price-fixing" and as such, *per se* illegal— and possibly felonious— regardless of who does it and why?[6] These are no doubt the questions being asked around the quadrangles in Cambridge, Palo Alto, and Princeton— and in lawyers' offices in New York, Washington and Boston.

The questions are serious ones. Private college tuitions have continued to rise quite rapidly— and hence visibly— during the period of comparative price stability throughout the 1980s. Tuition is definitely a "big ticket" item for any college student and his/her family. Some commentators have

suggested that prestigious colleges have preferred to compete in quality rather than in price— and have been too willing to let tuitions rise in order to provide higher faculty salaries, along with better programs and facilities.[7] In any event, tuitions have varied only slightly among groups of colleges which are generally perceived as close substitutes for each other.[8]

It seems quite clear that institutions of higher learning are not exempt from the antitrust laws just because they are not-for-profit corporations. Over the years there has emerged a substantial body of antitrust law relating to non-profit trade associations, standard-setting organizations, and the like,[9] all of which are normally made up of profit-seeking individuals and enterprises. Of course, private colleges are different from trade groups for they are tax-exempt charities and are generally heavily dependent on alumni and other contributions to balance their budgets.

Yet this does not add up to instant antitrust immunity for any action they take. This seems quite clear from the second most visible antitrust landmark of the past decade: a 1984 Supreme Court decision invalidating the colleges' collective effort to control and limit the telecasting of college football games.[10] The colleges' creature, the National Collegiate Athletic Association (NCAA), had required that NCAA receive all the television rights to every member's football games and barred NCAA-accredited schools from competing with non-accredited schools. NCAA then used its exclusive broadcast rights to contract with a television network (subsequently two networks) to broadcast a limited number of games in return for revenues which were only partially returned to the schools whose games were actually televised. This scheme was ultimately challenged by two football powerhouses (the Universities of Oklahoma and Georgia) which wanted more television exposure and more revenues. These perhaps unlikely private plaintiffs won a 7-2 Supreme Court decision holding that the restrictive NCAA scheme was subject to antitrust scrutiny and invalid under the rule of reason. Justice White (a former All America football player at the University of Colorado) strongly dissented that this was an "educational activity" which ought to be exempt.

In fact, college football at the big time football schools is a "business" in every practical sense— and a major source of revenues to support other athletic programs. It is therefore not particularly offensive to economics or common sense to treat the sale of college football television rights as "commerce." (One has to swallow the irony that professional baseball is not treated as "commerce" under an ancient aberration authored by Justice Holmes,[11] while college football telecasting is squarely within the net!)

Yet, to bring college football telecasting within the "commerce" net hardly dictates that awarding college scholarships based on need also must be treated as "commerce." The colleges are likely to respond that "public service" and "education" cannot be instantly equated with "commerce" just because dollars (or debts) change hands in the process. Moreover, they will stress that any application of *per se* "price-fixing" concepts to their activities would be bizarre. Both points have obvious merit— but perhaps not enough to shut off all reasonable inquiry.

The scholarship coordination issue is no doubt easier to defend against antitrust jurisdiction and charges than would be a broader agreement on tuition levels if the government were to find one.

Most of the schools necessarily have limited scholarship budgets and they award scholarship grants and loans based on "financial need" as they perceive it. Absent their alleged coordination agreements, the individual schools might make determinations of "need" more on the basis of academic and personal qualities rather than financial need as a banker would define it— with the result that the distribution of the same scholarship budget might be skewed somewhat differently than it is today. Applying a *per se* antitrust prohibition to such an activity would seem blunt-edged at best.

By contrast, any proven agreement to raise tuitions at "competing" schools would have more of the characteristics of a classic price-fixing agreement: it would increase aggregate costs to consumers and would increase rents received by suppliers for their services. Do the facts that the "consumers" are students (and their parents), the "suppliers" are non-profit universities, and the "service" is education make such a difference as to exempt the colleges altogether? One lonely 1970 D.C. Circuit Court of Appeals decision suggests that it does.[12]

The growing controversy triggered by the Justice Department investigation is likely to have important implications for other public service providers—most notably, non-profit hospitals. As with college education, hospital fees represent a "big ticket" item which has been rising much more rapidly than inflation in the 1980s. And like private universities, many hospitals are tax-exempt charities which depend on private (or church) financing to balance their books. Unlike universities, however, hospitals in many local areas compete with for-profit hospitals run by major hospital service corporations. This fact alone may make all hospital services seem more like "commerce," and yet the idea of having the Justice Department apply the *Sherman Act* felony rules to a "conspiracy" of nuns running several competing religious hospitals in a city seems somewhat anomalous at best.

The antitrust investigation of prestigious schools happens to coincide with the arrival of the Bush administration's new antitrust chieftains at both the Justice Department and the Federal Trade Commission. In fact, the CIDs were apparently issued less than two months after Jim Rill's arrival as Assistant Attorney General in charge of the Justice Department's Antitrust Division. This time is so short as to suggest that these CIDs should not be treated as some dramatic new Bush administration antitrust initiative—but rather, as follow-through on staff work begun under the last administration. On the other hand, they do suggest that the new administration's antitrust team at the Justice Department is not afraid to make waves.[13] After the comparative quiet of President Reagan's second term, this in itself may be news.

Notes

1. See letter, dated August 18, 1989, from President Thomas Medley Reynolds of Bates College (in Lewiston Maine) to Bates students, parents, faculty, and staff.

2. "Elite Private Colleges Routinely Share Plans for Raising Tuition," *Wall St. J.*, September 5, 1989, at 1 (hereinafter "Elite Private Colleges").

3. *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963).

4. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *National Society of Prof. Engineers* v. *United States*, 435 U.S. 679 (1978); *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982).

5. See *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

6. The Federal Trade Commission (the other U.S. antitrust enforcement agency) is arguing just that in an unusual case scheduled to be heard by the Supreme Court in October. *Federal Trade Commission* v. *Superior Court Trial Lawyers Ass'n*, No. 88-1198. This is a challenge to a "strike" by a small group of lawyers as part of a political campaign to persuade a local city council to increase the statutory rate of reimbursement for lawyers representing indigent criminals. The Court of Appeals had held that the political speech element required that the strikers' agreement had to be subjected to full rule of reason inquiry, rather than the *per se* rule urged by the FTC. *Superior Court Trial Lawyers Ass'n* v. *F.T.C.*, 856 F. 2d 226 (D.C. Cir. 1988). The FTC now seeks reversal of that ruling (and the strikers seek outright antitrust exemption).

7. See "Colleges and Costs—Price-Fixing Inquiry Turns Spotlight on the Ethical Issues in Financial Aid," *N.Y. Times*, August 11, 1989, at A10.

8. The *Wall Street Journal* reports that tuitions vary at the seven wholly-private "Ivy League" schools from $19,207 (at Princeton) to $19,510 (at Brown). The eighth Ivy League school (Cornell) has a unique state affiliation and part tuition is slightly lower at $18,670. See "Elite Private Colleges," *supra* note 2.

9. See, e.g., *Hydrolevel Corp.* v. *American Soc'y of Mechanical Engineers*, 456 U.S. 989 (1982).

10. *National Collegiate Athletic Ass'n* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984).

11. *Federal Baseball Club* v. *National League of Prof. Baseball Clubs*, 259 U.S. 200 (1922).

12. *Marjory Webster Junior College, Inc.* v. *Middle States Ass'n of Colleges & Secondary Schools, Inc.*, 432 F. 2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1975).

13. President Bush and Assistant Attorney General Rill are enthusiastic alumni of Yale and Dartmouth respectively. Neither's alma mater apparently received a CID in the first round in August. See "Elite Private Colleges", *supra* note 2. Dartmouth has announced that it was served in September "College Price-Fixing Probe Appears to be Expanding," *Wall St. J.*, Sept. 12, 1989, at C9. Yale is also rumored to have received a CID in September. (Incidentally, Attorney General Richard Thornburgh is also a Yale alumnus and came to his present office from an academic appointment at Harvard.)