Steptoe

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Introduction

This edition of Steptoe's Higher Education Newsletter covers several recent developments, including:

- The conviction of a former visiting scholar at Columbia University for acting as an agent of the Chinese government;
- The Tenth Circuit's reversal of the conviction of a former professor at the University of Kansas for making a false statement;
- Florida A&M's acceptance of a fraudulent $237 million donation, resulting in the departure of the university's president and multiple other high-level officers;
- Notre Dame's suspension of its men's swimming program following an investigation into the team's involvement in illicit gambling; and
- A federal court's approval of a settlement under which multiple elite universities agreed to pay $284 million to resolve allegations that they violated antitrust laws in making financial aid determinations.

Each of these developments offers important lessons for how to mitigate risk and address issues when they arise. We hope you find this edition of our newsletter interesting and helpful. If you have ideas for topics you would like us to cover, please let us know.

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Former Professor Convicted of Being a Chinese Spy

On August 6, 2024, Shejun Wang, a former professor at Qingdao College of Social Sciences and visiting scholar at Columbia University in New York, was convicted in federal court of secretly acting as an agent of the Chinese government.[1] After a seven-day trial, Wang was convicted on four counts: conspiracy to act as an agent of a foreign government without prior notification to the attorney general, acting as an agent of a foreign government without prior notification to the attorney general, criminal possession of identification, and making false statements to law enforcement.[2] Wang's sentencing is set for January 9, 2025.

The Department of Justice (DOJ)'s complaint alleged that Wang founded the Hu Yaobang and Zhao Ziyang Memorial Foundation, which was an organization dedicated to honoring former leaders of the People's Republic of China's (PRC) Communist Party (CCP) who promoted political and economic reforms in China and were eventually forced from power.[3] DOJ alleged that many of the Memorial Foundation's members were well-known pro-democracy dissidents that opposed the current Chinese government.[4] But according to DOJ, that was all a duplicitous front. DOJ's theory was that Wang used his position at the Memorial Foundation to collect information about U.S.-based dissidents and shared that information with the security apparatus of the PRC.[5]

DOJ alleged that Wang, as an "asset" of the CCP, worked with four Chinese Ministry of State Security (MSS) agents, feeding them information through in-person meetings in the PRC, written messages, and draft emails described as "diaries."[6] The government alleged that, through a series of directives, Wang was tasked with collecting information related to attendees at Memorial Foundation meetings, upcoming protests, and a dissident political figure from Hong Kong.[7]

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[1] Tara McKelvey and Jane Tang, *Historian. Activist. Spy?*, Radio Free Asia (May 9, 2024), https://www.rfa.org/english/news/special/china-accused-spy-shujun-wang/index.html; Press Release, Queens Resident Convicted of Acting as a Covert Chinese Agent, United States Attorney's Office, Eastern District of New York (Aug. 6, 2024), https://www.justice.gov/usao-edny/pr/queens-resident-convicted-acting-covert-chinese-agent.

[2] Verdict Sheet, United States v. Wang, No. 1:22-cr-00230-DC (Aug. 7, 2024), ECF No. 104.

[3] Compl. And Aff. in Support of Arrest Warrant, *United States v. Wang*, No. 1:22-cr-00230-DC at 4 (Mar. 8, 2022) ECF No. 1.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 6-7.

[7] *Id.* at 7-13.

The government also detailed that an undercover agent met with Wang and told Wang that he (the agent) was sent by the "headquarters" and that MSS agents suspected Wang was under investigation.[8] DOJ alleged that Wang asked the undercover agent to assist him with deleting the "diaries."[9]

To prove its conspiracy claim, DOJ had to prove that a conspiracy existed, that Wang knowingly and willfully became a member of the conspiracy, and that an overt act was committed in furtherance of the conspiracy. The overt alleged acts included, among others, Wang's recurring email "diaries" shared in correspondence with MSS agents and the information Wang sent to MSS agents related to Chinese pro-democracy movement members in the United States and other information regarding the Hong Kong dissident.[10]

To prove that Wang acted as an agent of a foreign government, DOJ had to establish that Wang acted as an agent of a foreign government or official, specifically the PRC; that he failed to notify the Attorney General that he would be acting as an agent of the PRC; that he acted knowingly and intentionally; and that he acted as an agent for China while in the United States.[11] The jury instructions noted that to prove he was an agent, the jury only needed to determine whether Wang acted pursuant to an agreement to operate at the direction or control of China, regardless if the information transmitted to China was a secret or not.[12]

To prove Wang possessed identification of another person with intent to commit a crime, DOJ was required to prove that Wang had an item that identified another person; that he possessed the identification; that he acted knowingly and with the intent to commit a crime, such as acting as a foreign agent; and that the defendant's conduct occurred in interstate or foreign commerce.[13] Means of identification includes any name or number that may be used to identify a specific individual, including any name, phone number, social security number, or birthdate, among others.

Finally, for the fourth count relating to making a false statement to US law enforcement, DOJ had to prove that Wang made a material and false statement; that he knew that the statement was false; that the statement was willfully made; and that the statement was related to a matter within the jurisdiction of the government of the United States.[14] DOJ alleged in its pleadings that Wang, among other things, denied to an FBI agent that he had contact with individuals from MSS or other PRC state security services and denied to the US Customs and Border Patrol agency that he had ever been approached by MSS.

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[8] *Id.* at 15-17.
[9] *Id.*
[10] Jury Charge, *United States v. Wang* at 23-29 No. 1:22-cr-00230-DC (Aug. 7, 2024), ECF No. 103.
[11] *Id.* at 31-37.
[12] *Id.* at 34-36.
[13] *Id.* at 38-43.
[14] *Id.* at 43-47.

The jury, after only one day of deliberations, found Wang guilty on all four counts. DOJ summed up its case as follows: "This defendant infiltrated a New York-based advocacy group by masquerading as a pro-democracy activist all while covertly collecting and reporting sensitive information about its members to the PRC's intelligence service…Today's verdict demonstrates that those who would seek to advance the Chinese government's agenda of transnational repression will be held accountable." [15]

Wang's conviction highlights that in some situations, visiting scholars (and others) might be required to register under the Foreign Agents Registration Act (FARA). FARA generally provides that a person is an "agent of a foreign principal" that must register under FARA if the person acts "in any…capacity at the order, request, or under the direction or control, of a foreign principal or of a person, any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal and who directly or through any other person," takes certain actions within the United States, including "engag[ing] in political activities for or in the interests of such foreign principal."[16] There is an "academic exemption," that applies to "Any person engaging or agreeing to engage only in activities in furtherance of bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts."[17] But the DOJ's FARA Unit has interpreted this exemption narrowly.[18] Universities should consider FARA as part of their compliance review, especially with visiting scholars from foreign universities. Universities should further consider providing regular compliance training.

[15] Press Release, Queens Resident Convicted of Acting as a Covert Chinese Agent, United States Attorney's Office, Eastern District of New York (Aug. 6, 2024), https://www.justice.gov/usao-edny/pr/queens-resident-convicted-acting-covert-chinese-agent.

[16] 22 U.S.C. § 611(c)(1).

[17] 22 U.S.C. § 613(e).

[18] For example, in a 2022 advisory opinion letter, DOJ explained that a Vice President of Government Relations of a private foreign university who would be based in the U.S. would need to register under FARA where the position would require them to, among other responsibilities, "conduct outreach and advocacy" to U.S. government officials "to promote [the foreign university's] mission, goals, and financial priorities." The FARA Unit concluded that "because your activities for [foreign university] would involve political activities by engaging with U.S. government officials to advocate for grant money from the U.S. government, such activities are not limited only to scholastic or academic matters, and thus you do not qualify for this exemption and are required to register under FARA. *See* Letter from Jennifer Kennedy Gellie, Chief, FARA Unit, (Jan. 12, 2022), available at https://www.justice.gov/nsd-fara/page/file/1469966/dl.

Federal Appellate Court Reverses Conviction of Former University of Kansas Professor Charged in Department of Justice's "China Initiative"

In July, the U.S. Court of Appeals for the Tenth Circuit reversed the conviction of Feng "Franklin" Tao, a former tenured associate professor at the University of Kansas's ("KU") departments of chemistry and chemical and petroleum engineering.

Steptoe attorneys Patrick F. Linehan and Ryan Poscablo represented another professor indicted as part of the China Initiative, Dr. Ming Xiao, a mathematics professor at Southern Illinois University Carbondale, obtaining acquittals on all grant-related charges brought against Dr. Xiao.

Following an investigation, "the FBI learned that Tao had potentially accepted a second full-time professorship at Fuzhou University in China and hid it from KU."[19] The DOJ indicted Tao in 2019 on ten counts as part of its "China Initiative": three counts of making false statements and seven counts of wire fraud. The false-statement counts "alleged that Tao concealed his relationship with Fuzhou University in certain documents, including, as relevant to this appeal, an annual institutional responsibilities form that he submitted to KU in September 2018."[20] The wire-fraud counts "alleged that by failing to disclose his relationship with Fuzhou University, Tao defrauded KU of his salary and the DOE and the NSF of federal grant funds."[21] Before trial, the DOJ dismissed one false-statement count and one wire-fraud count.

In March 2022, Tao went to trial on the eight remaining counts. The jury found him guilty on four counts – three wire-fraud counts and one false-statement count – and not guilty on the other four. Tao renewed an earlier motion for a judgment of acquittal after the jury returned its verdict. The district court granted the motion in part, acquitting Tao on the three wire-fraud counts. The district court held that "the government failed to prove Tao engaged in a fraudulent scheme to deprive KU, the NSF, or the DOE of money or property."[22] But the

[19] *United States v. Tao*, 107 F.4th 1179, 1181 (10th Cir. 2024).
[20] *Id.*
[21] *Id.*
[22] *Id.* at 1183.

district court concluded that there was enough evidence to support the false-statement conviction based on an institutional-responsibilities form that Tao had submitted to KU.
On appeal, the Tenth Circuit reversed Tao's conviction, and remanded the case for the district court to enter a judgment of acquittal.[23] Judge Nancy Moritz wrote the majority opinion, and was joined by Judge Timothy Tymkovich. Judge Mary Kathryn Beck Briscoe wrote a 38-page dissent.[24]

The Court confined its analysis to the fifth and final element of U.S.C. § 1001(a)(2): whether the false statement was material. The Court explained that a "false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decision[-]making body to which it was addressed.'"[25] The Court observed that "Tao correctly points out that neither the government nor the district court ever identified any decision that either the DOE or the NSF was 'trying to make.'"[26] The government, "attempting to meet its burden on appeal . . . now contends that the 'agencies were considering whether to fund or to continue funding Tao's research' and that Tao's false statement could have influenced these funding decisions."[27]

The Court disagreed, noting that "the government's argument critically overlooks that both agencies received and funded the proposals before Tao submitted his institutional responsibilities form to KU in September 2018," and "KU never applied for additional funding after he did so."[28] Therefore, "neither the DOE nor the NSF had any proposals pending before them when Tao made his statement or at any point since then," and "without evidence of an actual decision capable of being influenced by the statement, the government cannot establish materiality."[29]

KU fired Tao following his convictions,[30] and it remains to be seen if he will work in academia again. His family is running a GoFundMe to cover his legal expenses, which they say totaled $2.3 million and left the family with more than $1 million in debt.[31]

Tao's indictment, conviction, and acquittal offer important lessons for colleges and universities. Institutions should ensure that their policies directly address faculty and staff members' foreign work and interests, and require disclosure of any such involvement. Colleges and universities should provide regular, recurring training on these issues, even for visiting and part-time faculty members. When faculty members disclose foreign work, colleges and universities should have a system in place to ensure that the correct personnel are made aware of the foreign work and evaluate it for any institutional risks.

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[23] *Id*. at 1190.
[24] Judge Briscoe explained: "I would conclude that Tao's failure to disclose his conflict of time commitment related to his potential position at Fuzhou University was material to the DOE and the NSF. I further conclude that Tao's additional arguments in support of reversing his conviction or remanding for a new trial cannot succeed and, as such, would affirm Tao's conviction." *Id*. at 1209 (dissent).
[25] *Id*. at 1184.
[26] *Id*. at 1185.
[27] *Id*.
[28] *Id*. at 1185-86.
[29] *Id.* at 1186.
[30] *See* Jeffrey Mervis, *Court exonerates Kansas professor in China research fraud case*, Science (Jul. 12, 2024), available at https://www.science.org/content/article/court-exonerates-kansas-professor-china-research-fraud-case.
[31] https://www.gofundme.com/f/Legal-Defense-Fund-for-Franklin-Tao.

A Rushed and Conflicted Review Led to Florida A&M Accepting a Fraudulent $237M Donation

During commencement on May 4, 2024, officials at Florida A&M University announced that Gregory Gerami, a hemp farmer, had donated approximately $237 million of privately held stocks to the university via the Florida A&M University Foundation, Inc. ("Foundation").[32] But the festive mood quickly turned sour as people began questioning the legitimacy of the gift, Gerami's background, and the thoroughness of the donation vetting process. Amid the backlash, then-Florida A&M University President, Larry Robinson, announced the university was pausing the donation. The Florida A&M Board of Trustees hired a law firm to investigate the donation and the circumstances of its acceptance and prepared a written report ("investigation").[33] Even before the investigation concluded, both Larry Robinson and Dr. Shawnta Friday-Stroud, who was the Vice President for University Advancement, Executive Director of the Foundation, and Dean of the School of Business and Industry at the time, stepped down from their respective positions.

The investigation concluded that the gift was fraudulent and that Gerami's valuation of the gift, which Florida A&M had relied upon, was "baseless."[34] The investigation determined that four primary factors contributed to the improper handling of the donation:

- First, both Robinson and Friday-Stroud had direct involvement in, and oversight of, the donation vetting process. Robinson frequently told staff members "not to mess this up" and pushed staff members to accept the gift despite negative information about Gerami.[35] Friday-Stroud also supported the decision to accept the gift, which put further pressure on the staff. Because of the multiple roles she held, individuals did not have a "proper chain of command…to raise concerns or seek financial advice without appearing to undermine her authority."[36]
- Second, the vetting process occurred in a secretive environment that discouraged individuals from properly raising concerns or conducting necessary diligence.

[32] Michael T. Nietzel, *Florida A&M Receives Record $237 Million Gift During Commencement*, Forbes (updated May 10, 2024, 7:31AM EDT), https://www.forbes.com/sites/michaeltnietzel/2024/05/06/florida-am-receives-record-237-million-gift-during--commencement/.
[33] A Complete Investigation of the Major Gift from Gregory Gerami Batterson Farms Corporation The Isaac Batterson Family 7th Trust to the Florida A&M University Foundation, Inc., Final Report (Aug. 5, 2024), https://www.famu.edu/about-famu/leadership/board-of-trustees/pdf/Major%20Gift%20Investigation%20Final%20Report_FAMU_Buchanan%20Ingersoll%20Rooney.pdf.
[34] *Id.* at 1.
[35] *Id.* at 2.
[36] *Id.*

Robinson did not believe that neither the university's senior leadership team nor the board of trustees could maintain confidentiality, and deliberately withheld information from them. Staff members who participated in discussions regarding the donation were required to sign a confidentiality agreement. Those signatories "believed it was impermissible to seek advice of experts from the University Board of Trustees or the Foundation Board of Directors."[37]

- Third, Robinson and Friday-Stroud expedited the review process to meet their goal of announcing the donation at commencement. Florida A&M employees overlooked and ignored red flags in their rush to meet that deadline.
- Fourth, Florida A&M officials did not conduct an independent valuation of the donation and instead relied solely on Gerami's representations. Florida A&M staff also assumed that Friday-Stroud, as Dean of the School of Business and Industry, had the necessary financial expertise to oversee the donation, which "discouraged those less knowledgeable in business matters from questioning the process."[38]

The investigation also recommended that the Vice President for Advancement and Executive Director of the Foundation roles be separated, so that the same person does not hold both roles in the future.

Ultimately, the Board of Trustees and the Foundation's Board of Directors did not have adequate information about the donation. The lack of transparency prevented both groups from fulfilling their oversight duties. The investigation recommended that Florida A&M revise its policies to require timely and adequate disclosure of high-dollar financial matters to the Board of Trustees, and it also recommended placing decision-making authority for accepting high value donations with the Foundation Board of Directors.

Many colleges and universities face serious financial pressures today, and the prospect of a major gift can be alluring. However, institutions should ensure that such an exciting prospect does not cause the institution to skip its due diligence process. Colleges and universities should have a due diligence process in place for all gifts, and should follow said processes, no matter how large the potential gift is. This might include involving third parties in the valuation process (particularly for gifts in kind) and ensuring that appropriate stakeholders are involved in the evaluation and decision-making process. (As one example, there have been numerous recent examples of institutions accepting gifts with conditions that the faculty believe infringe on academic freedom.) For particularly large gifts, institutions should consider involving the Office of General Counsel. Colleges and universities should also maintain an appropriate transactional distance from donors, namely by refraining from giving financial or legal advice relating to the gift, and by avoiding over-involvement in the will-drafting process when dealing with bequests. If there are red flags at any point during a college or university's evaluation of a potential gift, the institution should take proactive

[37] *Id.*
[38] *Id.* at 3.

steps to address those red flags, whether they concern the donor's background, source of wealth, ability to make the gift, conditions of the gift, or other issues.

University of Notre Dame Suspends Men's Swimming Program for Gambling Violations

On August 15, 2024, the University of Notre Dame suspended its men's swimming program for "at least" one academic year because of a widespread, "deeply embedded team culture" that included extensive violations of the NCAA rules prohibiting gambling on athletic competitions, including intercollegiate swimming.[39] Only a "small number" of team members did not participate in the gambling activities.[40] Through its press release, Notre Dame explained that "[w]hile individual conduct varied, the overwhelming cultural dynamic on the team necessitates a full suspension."[41] Notre Dame reached this decision after a law firm investigated the program following reports of potential misconduct.

Collegiate gambling problems are not isolated to Notre Dame. The rise of sports gambling since the Supreme Court's 2018 decision in *Murphy v. NCAA* has caused problems for many collegiate programs and athletes.[42] A recent article reported that the NCAA had found 175 sports-betting violations between 2018 and 2023.[43] Many recent gambling violations have been particularly sensational. For example, in 2023, according to an NCAA enforcement document, the head baseball coach at the University of Alabama asked an accomplice to place a bet on a game in which Alabama's starting pitcher was unable to play — a fact unknown to the general public.[44] His accomplice attempted to bet $100,000.[45] That same year, state investigators discovered that dozens of college athletes from the University of Iowa and Iowa State University had illegally gambled on games, including their own.[46]

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[39] Press Release, Pete Bevacqua, University of Notre Dame Vice President and James E. Rohr Director of Athletics, Men's Swimming Program Suspended for a Minimum of One Academic Year (Aug. 15, 2024), https://fightingirish.com/mens-swimming-program-suspended-for-a-minimum-of-one-academic-year/.
[40] *Id.*
[41] *Id.*
[42] 584 U.S. 453 (2018).
[43] Associated Press, *Letter shows NCAA has found 175 sports-betting violations since 2018*, ESPN (Jul. 12, 2023, 8:01 PM ET), https://www.espn.com/college-sports/story/_/id/38002295/letter-shows-ncaa-found-175-sports-betting-violations-2018.
[44] NCAA Committee on Infractions Panel, Negotiated Resolution, University of Alabama, Case No. 020262 1, 2 (Feb. 1, 2024), https://ncaaorg.s3.amazonaws.com/infractions/decisions/Feb2024D1INF_AlabamaPublicNR.pdf.
[45] *Id.* at 2.
[46] Paula Lavigne and Adam Rittenberg, *Inside the historic Iowa athlete sports betting prosecution*, ESPN (Jul. 18, 2024, 8:43 AM ET), https://www.espn.com/college-sports/story/_/id/40575467/inside-iowa-iowa-state-ncaa-gambling-investigation.

Collegiate gambling problems may also appear in more minor ways that are still problematic. For example, on August 22, 2024, when asked about his team's upcoming game against Florida Atlantic University, Michigan State University's quarterback twice told reporters, per ESPN, "If you bet, take the over."[47] This potentially innocuous declaration of confidence influenced the gambling market — ESPN reported that prior to the quarterback's comments, approximately 71% of the money wagered on that game was placed on the under, per one gambling website. A day after the quarterback's remarks, 64% of the money was placed on the over.[48] It remains to be seen if the quarterback's comments will lead to any sort of investigation, lawsuit, or policy changes.

This problem is not limited to college athletics — one needs to look no further than the scandals involving the illegal gambling activities of Ippei Mizuhara, the former interpreter of noted MLB slugger, Shohei Ohtani, who stole money from Ohtani to fuel Mizuhara's gambling addiction.[49] Similarly, Toronto Raptors basketball player Jontay Porter placed bets on his on-court performance (where he intentionally underperformed), and has since received a lifelong ban from the NBA.[50]

Because gambling-related problems are not going away, colleges and universities should take measures to prevent potential issues. Such measures may include:

- Assigning a specific compliance officer to be responsible for preventing gambling violations;
- Establishing monitoring protocols, including regular compliance surveys of the coaches, staff, and athletes;
- Providing frequent and recurring training on anti-gambling rules;
- Providing frequent and recurring training on proper disclosure of inside-the-program information that could be misused by bettors;
- Placing summaries of the anti-gambling rules in a visible place in a location where players are most likely to place bets;
- Establishing a clear process for coaches, staff, and athletes to report possible misconduct, including guidance on when to initiate a report;
- Creating technological safeguards, such as by prohibiting the use of gambling websites on university WiFi, especially in athletics facilities; and
- Creating a culture of compliance.

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[47] David Purdum, *Michigan State QB says 'take the over,' and many bettors do*, ESPN (Aug. 23, 2024, 3:49 PM ET), https://www.espn.com/college-football/story/_/id/40966557/michigan-state-qb-says-take-total-opener-rises

[48] *Id.*

[49] David K. Li, *Shohei Ohtani's former interpreter pleads guilty to gambling-related theft charges*, NBC News (June 4, 2024, 12:27 PM CDT), https://www.nbcnews.com/news/us-news/shohei-ohtanis-former-interpreter-pleads-guilty-gambling-related-theft-rcna155434.

[50] David Purdum, *NBA bans Raptor's Jontay Porter for gambling violations*, ESPN (Apr. 17, 2024, 12:26 PM ET), https://www.espn.com/nba/story/_/id/39962406/nba-bans-raptors-jontay-porter-gambling-violations.

Notre Dame's situation demonstrates the importance of implementing cautionary measures. For instance, Notre Dame reported that it had provided "clear and recurrent" anti-gambling training to its athletes. Despite this training, the athletes engaged in gambling activities, and made "concerted efforts" to hide their activities from the coaches and staff. When the coaches and staff became aware of the situation, "they treated the [incidents] seriously and professionally." The university employees were a crucial backstop against the misconduct.

Measures like those identified above cannot guarantee compliance with NCAA rules or deter all misconduct. However, when implemented together, they can deter *some* misconduct and help identify violations early. Furthermore, such measures can potentially mitigate the severity of penalties issued by the NCAA or others, in the event that misconduct does occur.

Elite Universities Settle Financial Aid Antitrust Claims

On July 19, 2024, the Honorable Matthew F. Kennelly of the Northern District of Illinois approved a settlement between a class of undergraduate students and a group of elite universities, of which the latter group was alleged to have engaged in a price-fixing scheme designed to "reduce or eliminate financial aid…and artificially inflate[] the net price of attendance for students receiving financial aid."[51] The settling defendants include Brown University, University of Chicago, Columbia University, Dartmouth College, Duke University, Emory University, Northwestern University, Rice University, Vanderbilt University, and Yale University. The universities agreed to pay the settlement class plaintiffs a combined $284 million.[52] The full settlement amounts are as follows:

Institution	Settlement Amount
Chicago	$13.5 million
Emory	$18.5 million
Yale	$18.5 million
Brown	$19.5 million
Columbia	$24 million
Duke	$24 million
Dartmouth	$33.75 million
Rice	$33.75 million
Northwestern	$43.5 million
Vanderbilt	$55 million

The court also awarded class plaintiffs' attorneys $94.67 million in attorneys' fees, which are to be paid out of the $284 million settlement.[53]

Several universities remain in the lawsuit, including University of Pennsylvania, Georgetown University, Cornell University, the University of Notre Dame, the Massachusetts Institute of Technology, the California Institute of Technology, and Johns Hopkins University.

In the lawsuit, the plaintiffs alleged that the defendant institutions violated Section 1 of the Sherman Act by participating in a price-fixing cartel to inflate the cost of attendance and

[51] Amended Class Action Complaint at 2, *Henry v. Brown University*, No. 1:22-cv-00125 (N.D. Ill. Feb. 15, 2022), ECF No. 106.
[52] Order Granting Final J., *Henry v. Brown University*, No. 1:22-cv-00125 (N.D. Ill. July 20, 2024), ECF No. 726.
[53] Id. at 11.

reduce or eliminate financial aid packages.[54] Section 1 prohibits, among other things, conspiracies "in restraint of trade or commerce among the several States."[55] In their complaint, the plaintiffs sought class certification, a permanent injunction barring the defendant universities from "continuing to illegally conspire regarding their pricing and financial-aid policies," and damages.[56]

The plaintiffs alleged that the defendant universities were each members of the "568 Presidents Group," which is an affiliation of colleges and universities that work in a concerted effort to maintain need-based financial aid.[57] The plaintiffs assert that the "Consensus Approach" adopted by the 568 Presidents Group for determining a family's ability to pay for college has reduced or eliminated price competition among the 568 Presidents Group members.[58]

The defendant universities argued that they are immune from antitrust liability under the "568 Exemption," which provided that agreements between two or more colleges or universities that admitted all students on a need-blind basis are exempted from antitrust liability.[59] But the plaintiffs asserted that the exemption was inapplicable because the defendant universities do not admit all of their students on a need-blind basis.[60] The court, in a 2022 order denying the defendant universities' motions to dismiss, concluded that the plaintiffs adequately alleged that the 568 Exemption was not applicable to the defendant universities because the universities did, in fact, consider financial need when admitting transfer students and waitlisted students, and that several of the universities favored children of past or potential future donors in their admissions decisions.[61] Importantly, the court held that even if the plaintiffs failed to plead specific allegations as to each of the defendant universities, the Section 568 exemption applies only when *all* the schools in agreement admit *all* students on a need-blind basis, and thus if a defendant university had an agreement with another university that did consider financial need, the 568 Exemption would not apply.[62]

The court also concluded that the plaintiffs had adequately alleged that the defendant universities' agreement had an anticompetitive effect on a given market within a given geographic area; namely, that the market included "Elite, Private Universities" for "undergraduate education at private national universities with an average ranking of 25 or

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[54] Amended Class Action Complaint at 2, 68, *Henry v. Brown University*, No. 1:22-cv-00125 (N.D. Ill. Feb. 15, 2022), ECF No. 106.
[55] 15 U.S.C. § 1.
[56] *Id*. at 70.
[57] Memorandum Opinion and Order at 3, *Henry v. Brown University*, No. 1:22-cv-00125 (N.D. Ill. Aug. 15, 2022), ECF No. 185.
[58] Amended Class Action Complaint at 3-4.
[59] Pub. L. No. 103-382, title V, § 568, 108 Stat. 3518, 4060 (1994); *see also* Memorandum in Support of Defendants' Motion to Dismiss, *Henry v. Brown University*, No. 1:22-cv-00125 at 11-12 (N.D. Ill. Apr. 15, 2022) ECF No. 147.
[60] *See* Amended Class Action Complaint at 29-46.
[61] Memorandum Opinion and Order at 9-10.
[62] *Id.* at 12.

higher in the *U.S. News & World Report* rankings from 2003 through 2021."[63] The court accordingly declined to dismiss the claims against the defendant universities, and the lawsuit entered the discovery phase. In January and February 2024, following two years of litigation, the settling defendant universities announced that they had reached a settlement that required the court's approval. The court approved the settlement over one class-member's objection.[64] The settlements and accompanying order fully and finally resolved the plaintiffs' claims against the settling defendant universities.

Notably, just over one month after the court's order on the motions to dismiss, the 568 Exemption expired.[65] Higher education institutions should now be doubly careful, if they want to avoid similar antitrust scrutiny, not to coordinate with other institutions on their methodology pertaining to financial aid or admissions, if such coordination could be viewed as having an anticompetitive effect. These settlement figures make clear that even allegations of anticompetitive conduct can be very expensive.

[63] *Id.* at 15-16.
[64] Order Granting Final J. at 6.
[65] Public L. No. 114-44, § 568, 129 Stat. 472 (2015) (to be codified at 15 U.S.C. § 1 note) (sunsetting the 568 Exemption in 2022).

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