NOTES

THE MISGUIDED APPLICATION OF THE SHERMAN ACT TO COLLEGES AND UNIVERSITIES IN THE CONTEXT OF SHARING FINANCIAL AID INFORMATION

The combination of an economic recession and high tuition rates at American colleges and universities has focused the attention of many high school students on financial aid.[1] For many of these students, a college education would be unaffordable without the packages of grants, loans and campus work opportunities that financial aid makes available.[2] In 1989, however, the United States Department of Justice revealed that it was investigating the possibility that several private colleges and universities had colluded to fix tuition prices and minimize financial aid awards.[3] On May 22, 1991, the Justice Department entered into a consent decree with the eight Ivy League colleges under which the schools agreed to disband the "Overlap Group," an association of colleges that had

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[1] *See* David P. Kreisler, *The Antitrust Laws and the Overlap Group: Were Colleges and Universities the Robber Barons of the 1980s?*, 42 SYRACUSE L. REV. 217, 217 (1991); Eric Scheske, *Financial Aid and Antitrust: Financial-Aid Packages Subject of Justice Department Probe*, 17 J.C. & U.L. 43, 43 (1990); Anthony Flint, *Tuition Hikes at Record Low: Spurred by Recession, Smaller Student Pools*, BOSTON GLOBE, Mar. 8, 1992, at 33.

[2] *See* Scheske, *supra* note 1, at 43 (discussing need for aid); Memorandum from Robert K. Durkee, Vice President for Public Affairs, Princeton University, and Peter Berek, Special Assistant to the President and Professor of English, Williams College 4 (Jan. 3, 1990) (on file with the *Boston College Law Review*) (describing financial aid packages).

[3] *See* Erika B. Smith, *Are Schools Violating the Sherman Act by Collaborating on Financial Aid Packages?*, 24 U.S.F. L. REV. 653, 653 (1990); Paul M. Barrett & Christopher J. Chipello, *U.S. Investigates Prestigious Universities, Colleges for Possible Antitrust Violations*, WALL ST. J., Aug. 10, 1989, at B2.

met each spring since 1954 to exchange financial aid information about students accepted at more than one of the member schools.[4] The consent decree was filed simultaneously with the federal government's civil lawsuit against the Ivy League schools and the Massachusetts Institute of Technology ("MIT").[5] The lawsuit alleges that the practice of meeting and sharing financial aid information constituted a violation of the Sherman Act.[6] MIT did not participate in the settlement and is currently awaiting trial.[7]

By the terms of the consent decree, the schools discontinued their practice of exchanging information but denied any wrongdoing.[8] For the Ivy League schools, the consent decree was the culmination of a two-year investigation by the Justice Department into the mechanisms by which the schools set their financial aid awards.[9] As part of the consent decree, the government agreed to drop the lawsuit.[10] In addition, the Justice Department notified twenty-five of the fifty-five colleges and universities originally targeted for inquiry that they were no longer under investigation.[11]

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[4] United States v. Brown Univ., No. 91–CIV–3274 at 1 (E.D. Pa. filed May 22, 1991) (order approving consent decree); Barrett & Chipello, *supra* note 3, at B2 (definition of "Overlap Group"); John W. Mashek & Anthony Flint, *Ivy Colleges Settle Price-fixing Charges*, BOSTON GLOBE, May 23, 1991, at 1 (discussion of consent decree). The eight Ivy League schools are Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, Princeton University, the University of Pennsylvania and Yale University. Mashek & Flint, *supra*, at 38. The other members of the Overlap Group were Amherst College, Barnard College, Bowdoin College, Bryn Mawr College, Colby College, Massachusetts Institute of Technology ("MIT"), Middlebury College, Mount Holyoke College, Smith College, Trinity College, Tufts University, Vassar College, Wellesley College, Wesleyan University and Williams College. Gary Putka, *Colleges Cancel Aid Meetings Under Scrutiny*, WALL ST. J., Mar. 12, 1991, at B5. A "consent decree" is an immediate settlement initiated by the target of an investigation under which the alleged wrongdoer ceases the questioned practice in exchange for the government's dismissal of the lawsuit. LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 243(b), at 758 (1977).

[5] *Brown Univ.*, No. 91–CIV–3274 at 1 (order approving consent decree); Mashek & Flint, *supra* note 4, at 38.

[6] Plaintiff's Complaint for Equitable Relief for Violation of 15 U.S.C. § 1, Sherman Antitrust Act at 1, 7–8, United States v. Brown Univ., No. 91–CIV–3274 (E.D. Pa. filed May 22, 1991). The Sherman Act states in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1989).

[7] Mashek & Flint, *supra* note 4, at 38.

[8] *Brown Univ.*, No. 91–CIV–3274 at 4–5 (order approving consent decree).

[9] Anthony DePalma, *Amid Inquiry, Ivy League To Stop Sharing Aid Data*, N.Y. TIMES, May 23, 1991, at A12. The Justice Department also investigated the processes by which the schools set tuition prices and faculty salaries. *Understanding the Antitrust Investigation*, AGB REP.: J. ASS'N GOVERNING BOARDS U. & C., Mar.-Apr. 1990, at 18–19.

[10] *Brown Univ.*, No. 91–CIV–3274 at 1–2 (order approving consent decree); Mashek & Flint, *supra* note 4, at 38.

[11] Scott Jaschik, *Six More Colleges Told They No Longer Face Federal Antitrust Investigations*,

Thus, twenty-three schools remain under investigation, the majority of which are Overlap Group members.[12]

According to the Justice Department, the sharing of students' financial information constituted a conspiracy to set financial aid awards at a fixed level for any given applicant, thereby depriving students of the benefits of price competition.[13] The schools countered that their goal was not to deprive students of financial aid but to apportion the limited funds available among the applicants in such a way that the maximum number of students would benefit.[14] To do otherwise, they argued, would result in a "bidding war" scenario that would divert resources from the truly needy by concentrating them on a few highly qualified students.[15] This heightened competition would require increased revenues to fund; moreover, it would contradict congressional policy espoused in the federal laws that control aid level determinations for the federal grants and loans that schools provide to students.[16] The ultimate

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CHRON. HIGHER EDUC., Feb. 5, 1992, at A34; *see also* Mashek & Flint, *supra* note 4, at 38. Although the Justice Department did not publish the names of the schools it targeted, the schools outside the Ivy League which have since acknowledged being under investigation are Agnes Scott College, Albion College, Amherst College, Antioch University, Barnard College, Bates College, Bennington College, Bowdoin College, Bryn Mawr College, Chatham College, Colby College, the College of Wooster, Connecticut College, Converse College, Denison University, DePauw University, Earlham College, Goucher College, Hamilton College, Hollins College, Hope College, Johns Hopkins University, Kalamazoo College, Kenyon College, Mary Baldwin College, MIT, Middlebury College, Mount Holyoke College, Northwestern University, Oberlin College, Ohio Wesleyan University, Randolph-Macon Woman's College, Sarah Lawrence College, Skidmore College, Smith College, Stanford University, Sweet Briar College, Trinity College, Tufts University, the University of Chicago, the University of Rochester, the University of Southern California, Vassar College, Wabash College, Wellesley College, Wells College, Wesleyan University, Wheaton College and Williams College. Jaschik, *supra*, at A34.

[12] *See* Jaschik, *supra* note 11, at A34. The schools still under investigation that were not Overlap Group members are Agnes Scott College, Bates College, Connecticut College, Hamilton College, Johns Hopkins University, Northwestern University, Stanford University, the University of Chicago and the University of Rochester. *Id.*

[13] Plaintiff's Complaint for Equitable Relief for Violation of 15 U.S.C. § 1, Sherman Antitrust Act at 6, 7–9, United States v. Brown Univ., No. 91–CIV–3274 (E.D. Pa. filed May 22, 1991).

[14] *See* Francis Oakley, *The Antitrust Inquiry and Higher Education*, WILLIAMS REP., Oct. 1989, at 4; Timothy H. Goldsmith, *Antitrust Laws Shouldn't Apply to College Aid*, N.Y. TIMES, June 8, 1991, at 22.

[15] Mashek & Flint, *supra* note 4, at 38 (bidding war); *see also* Oakley, *supra* note 14, at 5 (diverting resources).

[16] Oakley, *supra* note 14, at 4–5 (funding issues and federal policy); DePalma, *supra* note 9, at A12 (funding issues); *see also* Higher Education Act of 1965, 20 U.S.C. §§ 1087dd(b)(1), 1091(b) (1989). Colleges and universities refer to these laws as the "congressional methodology." Oakley, *supra* note 14, at 4.

effect of requiring colleges and universities to compete for students on this level, the schools argued, would likely be higher tuition prices for all students.[17] Tuition increases would be necessary to meet the added costs of using financial aid packages, based on criteria other than need, to bid for the top echelon of students.[18]

Roger Kingsepp, a student at Wesleyan University, compounded the issues presented by the Justice Department's investigation when he filed a class action lawsuit on behalf of all students against Wesleyan and eleven other colleges.[19] Characterizing students as consumers of a higher education product, Kingsepp alleged that the schools conspired to fix financial aid awards.[20] The *Kingsepp* case is currently awaiting trial in the United States District Court for the Southern District of New York.[21] Thus, two civil suits remain in federal district court which are likely to affect the legality of this type of information-sharing: the *Kingsepp* case and the government's suit against MIT.[22]

This note examines, in the context of the Sherman Act and federal policy prohibiting anticompetitive activity, the practice of sharing financial data that colleges and universities have acquired regarding students accepted at more than one school. Section I analyzes the judicial interpretations of the Sherman Act as it applies to nonprofit entities.[23] This section also discusses the legal framework that the Supreme Court has established to analyze alleged violations of the Sherman Act.[24] Section II examines the history and current status of the Justice Department's investigation, focusing on the investigative techniques employed, the formation and purpose of the Overlap Group, the consent decree and the position of those schools that remain as defendants in either the government

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[17] *See* Barbara Vobejda, *Antitrust Division Probing Top Colleges' Tuition and Aid*, WASH. POST, Aug. 9, 1989, at A3.

[18] *See id.*

[19] *See* Plaintiff's Complaint at 1, Kingsepp v. Wesleyan Univ., No. 89–CIV–6121 (S.D.N.Y. filed Sept. 15, 1989). The other colleges named in the lawsuit are Amherst College, Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, Princeton University, Stanford University, the University of Pennsylvania, Williams College and Yale University. *Id.*

[20] *Id.* at 3. Kingsepp also alleged a conspiracy to fix tuition prices. *Id.*

[21] *See* Putka, *supra* note 4, at B5.

[22] *See* Plaintiff's Complaint for Equitable Relief for Violation of 15 U.S.C. § 1, Sherman Antitrust Act at 1, United States v. Brown Univ., No. 91–CIV–3274 (E.D. Pa. filed May 22, 1991); Plaintiff's Complaint at 1; *Kingsepp*, No. 89–CIV–6121.

[23] *See infra* notes 28–132 and accompanying text.

[24] *See infra* notes 28–132 and accompanying text.

action or the private lawsuit.[25] Section III applies the Court's statutory constructs to the activities of the Overlap Group, concluding that, despite the Ivy League schools' agreement to refrain from sharing financial aid information in the future, the practice of doing so does not violate the Sherman Act.[26] Section IV discusses the possibility of legislative intervention on behalf of the schools in their effort to provide financial aid in the most equitable and efficient manner.[27] This section also analyzes the conflicting policy considerations underlying this issue. Finally, this section concludes that such information exchanges have socially beneficial effects and proposes that Congress address the issue by amending federal law to exempt the sharing of financial aid information from Sherman Act application, thereby furthering national education policy.

I. THE SHERMAN ACT AND THE DEVELOPMENT OF FEDERAL ANTITRUST LAW

A. *Entities Subject to Sherman Act Application*

In 1890, Congress passed the Sherman Act, which prohibited the anticompetitive practice of restraining interstate trade in the United States.[28] This nineteenth century legislation reflected the country's procompetitive posture.[29] Nevertheless, the law was written in broad language and did not define certain terms, including "combination," "restraint of trade" or "commerce."[30] Therefore, the statute required judicial interpretation to clarify its meaning.[31] The Supreme Court has interpreted section one of the Sherman Act to prohibit only "unreasonable" restraints of trade, but the statute does not distinguish explicitly among the types of activities to which it applies.[32] A line of Supreme Court cases, however, has determined which of these activities are within the scope of the statute.[33]

[25] *See infra* notes 133–85 and accompanying text.

[26] *See infra* notes 186–236 and accompanying text.

[27] *See infra* notes 237–48 and accompanying text.

[28] Sherman Act, 15 U.S.C. § 1 (1989). See *supra* note 6 for the text of section 1.

[29] *See* 15 U.S.C. § 1 (nineteenth century); EARL W. KINTNER, FEDERAL ANTITRUST LAW § 4.1, at 125–26 (1980); Douglas R. Richmond, *Private Colleges and Tuition Price-fixing: An Antitrust Primer*, 17 J.C. & U.L. 271, 274 (1991) (procompetitive posture).

[30] KINTNER, *supra* note 29, § 4.18, at 239; *see also* 15 U.S.C. § 1.

[31] KINTNER, *supra* note 29, § 4.18, at 239.

[32] National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 98 (1984) (court interpretation); *see also* 15 U.S.C. § 1 (terms undefined).

[33] *See generally* Goldfarb v. Virginia State Bar, 421 U.S. 773, 780, 793 (1975) (professional organization of lawyers subject to Sherman Act); Apex Hosiery Co. v. Leader, 310 U.S. 469,

In 1940, the United States Supreme Court held in *Apex Hosiery Co. v. Leader* that the Sherman Act did not apply to the actions of strikers in a labor dispute that prevented the employer from producing its goods.[34] The *Apex Hosiery* Court reasoned that by taking over the employer's factory for several weeks, the strikers did not intend to restrain competition for the employer's product, but merely intended to compel the employer to agree to the union's demands.[35] Therefore, the employees' self-imposed restraint on the sale of their services to the employer did not fall within the ambit of the Sherman Act and was not prohibited.[36]

The *Apex Hosiery* Court, stating that it lacked guidance elsewhere, reasoned that it was appropriate to interpret consistently the Sherman Act, its legislative history and the problems that gave rise to its enactment.[37] Justice Stone, writing for the majority, observed that the Sherman Act was passed in the day of "trusts" and "combinations" of businesses and capital that were organized for the purpose of controlling markets through monopolistic practices.[38] The Court noted that the Sherman Act sought to prevent the restraint of free competition in commercial transactions that would affect production, prices or otherwise control the market.[39] After examining the congressional debates prior to the bill's passage, the *Apex Hosiery* Court noted that "business competition," rather than individual labor disputes, was the issue under consideration by Congress and that the statute was intended to proscribe restraints of trade affecting "business competition."[40]

The United States Court of Appeals for the District of Columbia followed the *Apex Hosiery* interpretation of the Sherman Act's scope in 1970 in *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.*[41] In *Middle States*, the court held that the Sherman Act did not apply to a college accreditation association that refused to accredit institutions operating as

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512 (1940) (strikers in a labor dispute not subject to Sherman Act); Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schs., Inc., 432 F.2d 650, 653–54, 658 (D.C. Cir. 1970) (association of institutions of higher education not subject to Sherman Act), *cert. denied*, 400 U.S. 965 (1970).

[34] 310 U.S. at 512.

[35] *Id.* at 501–02.

[36] *Id.*

[37] *Id.* at 489.

[38] *Id.* at 480, 491–93.

[39] *Id.* at 493.

[40] *Id.* at 493 n.15.

[41] 432 F.2d 650, 653–54 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 965 (1970).

profit-making organizations.[42] The court reasoned that because accreditation is not within the "sphere of commerce," Congress did not intend for the Sherman Act to apply to it.[43] In broader terms, the court also held that the proscriptions of the Sherman Act do not apply to the "noncommercial aspects of the liberal arts and the learned professions."[44]

In 1975, however, the United States Supreme Court, in *Goldfarb v. Virginia State Bar*, questioned the validity of the view that certain organizations are beyond the scope of the Sherman Act.[45] In *Goldfarb*, the Court held that the Sherman Act applied to prohibit a minimum fee schedule propounded by the state bar for title examining services performed by its member attorneys.[46] The *Goldfarb* Court reasoned that the Sherman Act applied because lawyers play a role in commercial transactions, including title work in real estate financing.[47] Although the fee schedule was only advisory, none of the lawyers who responded to the plaintiff homebuyers' inquiries charged a lower fee and a state bar regulation provided that lawyers habitually charging below the schedule could be disciplined.[48] The Court concluded that such anticompetitive activities act as a restraint on commerce.[49]

Given the commercial nature of the attorneys' work in *Goldfarb*, the Court noted that a public service aspect to a profession such as lawyering does not exempt it from the Sherman Act.[50] Moreover, the Court generally stated that the nature of any occupation, by itself, will not exempt that occupation from Sherman Act application.[51] Therefore, one commentator has noted that the effect of the *Goldfarb* decision was to retreat from the *Apex Hosiery* view of the Sherman Act by broadening the statute's scope of inquiry to include

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[42] *Id.* at 652, 654–55.

[43] *Id.* at 655. The court did note that if a commercial motive could be attributed to a refusal of accreditation, antitrust law would presumably apply. *Id.* at 654–55. The court hypothesized a scenario where accreditation was denied a school that purchased textbooks from a supplier who had not agreed to provide discounts to members of the accreditation association. *Id.* at 655 n.21. The court suggested that this would qualify as a commercial motive. *Id.*

[44] *Id.* at 654.

[45] 421 U.S. 773, 792–93 (1975).

[46] *Id.* at 775, 776, 793.

[47] *Id.* at 787–88.

[48] *Id.* at 781, 782–83.

[49] *Id.* at 787–88.

[50] *Id.* at 787.

[51] *Id.*

business activities, professional services and, presumably, nonprofit organizations.[52]

B. *Legal Framework for Statutory Analysis*

The Supreme Court historically has judged alleged violations of the Sherman Act by one of two analytical methodologies: the per se rule or the rule of reason.[53] These statutory tests developed concurrently, with allegations of blatant horizontal price-fixing being analyzed using a per se analysis while other, less obvious allegations are analyzed using the rule of reason standard.[54] Per se rule application results in the condemnation of the challenged activity based upon the conclusive presumption that the activity constitutes an unreasonable restraint of trade.[55] A court making such an evaluation does not inquire into the purpose of the restraint or justifications for it.[56] A rule of reason analysis, in contrast, does inquire into the reasonableness of the challenged activity to determine whether a violation exists.[57] The Court has recently merged the two tests into a third test, the "*NCAA* approach," to be used when application of the per se rule appears necessary but the horizontal restraints on the market in question are deemed essential to the product's availability.[58] This development arose as a result of the Court's unwillingness merely to apply formalistic labels to alleged price-fixing arrangements.[59] The following discussion will an-

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[52] *See* Richmond, *supra* note 29, at 276–77; *see also* KINTNER, *supra* note 29, § 10.5, at 100.

[53] KINTNER, *supra* note 29, § 8.3, at 362–63.

[54] *Id.* at 368–69. Horizontal price-fixing refers to price-setting arrangements among similarly situated entities that compete to distribute goods and services. *Id.* § 10.3, at 74. A vertical arrangement would occur along one chain of distribution; that is, an arrangement among a manufacturer, wholesaler and retailer. *See id.* § 12.16, at 394–95. The practices of the Overlap Group, the Justice Department has argued, fall into the category of horizontal price-fixing because the sharing of financial information leads to standardized awards of financial aid from independent colleges competing to sell higher education to overlapping pools of students. *See* Plaintiff's Complaint for Equitable Relief for Violation of 15 U.S.C. § 1, Sherman Antitrust Act at 4, 6, United States v. Brown Univ., No. 91–CIV–3274 (E.D. Pa. filed May 22, 1991).

[55] KINTNER, *supra* note 29, § 8.3, at 362–63.

[56] Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 343–44 (1982).

[57] *Id.* at 343.

[58] *See* National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 100–01 (1984) (continued availability of a college football "product" was doubtful absent control of all television contracts by the National Collegiate Athletic Association); KINTNER, *supra* note 29, § 8.3, at 32 (Supp. 1992).

[59] *See* Broadcast Music, Inc. v. CBS, 441 U.S. 1, 9 (1979) (suggesting that courts must achieve a certain level of familiarity with a given business to be competent to make per se

alyze the development and application of the per se rule, the rule of reason and the *NCAA* approach.

In 1927, in *United States v. Trenton Potteries Co.*, the United States Supreme Court held that the defendant companies, which controlled eighty-two percent of the American vitreous pottery market and had combined to fix prices and limit sales, had violated the Sherman Act.[60] In the case, the Court reasoned that the inherent purpose of a price-fixing agreement is to eliminate price competition.[61] The Court observed that implicit in the power to fix a price is the power to control a market.[62] Even reasonable prices set by responsible actors, the Court continued, have the potential to become unreasonable over time as a result of changed market conditions.[63] Should that happen, the price is unlikely to be altered because the lack of competition affords no incentive to make a price adjustment.[64] Therefore, the Court noted, even reasonable price-fixing agreements automatically may be held to be unreasonable restraints of trade, and "minute inquiry" into the reasonableness of particular prices is unnecessary.[65] Although the *Trenton Potteries* Court did not use the phrase "per se" to describe its approach to evaluating such price-fixing arrangements, one commentator has noted that the reasoning supported later per se decisions.[66]

In 1940, in *United States v. Socony-Vacuum Oil Co.*, the Court confirmed its adherence to the per se approach by holding that a combination of oil companies that had established buying programs for distress gasoline had violated the Sherman Act.[67] In *Socony-Vacuum*, the Court considered whether the defendant companies' attempts to raise and maintain spot market prices by eliminating from competition the cheaper distress gasoline were an illegal restraint of trade.[68] The Court reasoned that such an arrangement

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evaluations); KINTNER, *supra* note 29, § 8.3, at 36 (Supp. 1992); Richmond, *supra* note 29, at 281.

[60] 273 U.S. 392, 394, 402 (1927).

[61] *Id.* at 397.

[62] *Id.*

[63] *Id.*

[64] *See id.*

[65] *Id.* at 397–98.

[66] *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 213–14 (1940) (citing *Trenton Potteries* for the proposition that reasonably set prices do not compel a finding of a reasonable restraint of trade); KINTNER, *supra* note 29, § 8.3, at 366; Richmond, *supra* note 29, at 282.

[67] 310 U.S. at 155, 216, 228. "Distress gasoline" is gasoline produced in such abundance that it cannot be stored and must be sold immediately, usually at a low price. *Id.* at 171.

[68] *Id.* at 216.

violated the Sherman Act because any combination formed with the purpose of "raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."[69] Moreover, the Court noted that under this analysis, proof of prior competitive abuses in an attempt to demonstrate beneficial, procompetitive effects is irrelevant.[70]

The Court applied the per se rule again in the 1982 case of *Arizona v. Maricopa County Medical Society*, which held that agreements among competing doctors setting maximum fees for certain services covered by specific insurance plans violate the Sherman Act.[71] Although the idea of a maximum price as opposed to a minimum price carried with it a connotation of social utility, the Court refused in its analysis to consider potential policy justifications other than to note that the price-fixing arrangements at issue were not "premised on public service or ethical norms."[72] The Court also rejected the argument that the physicians' agreement to set maximum fees had procompetitive aspects, reasoning that the anticompetitive potential and unlikelihood of significantly enhanced competition justified application of the per se rule.[73] The Court therefore held that the arrangement was illegal per se.[74] Addressing the policy issue, however, the Court observed that clear, unambiguous interpretations of the law enhance the likelihood that Congress will choose to intervene by amending a statute if it determines that a court has misinterpreted legislation.[75] It therefore noted that the medical society was free to direct its argument to Congress.[76]

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[69] *Id.* at 223.

[70] *Id.* at 218. For the majority, Justice Douglas wrote:

> Ruinous competition, financial disaster, evils of price-cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event, the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.

Id. at 221.

[71] 457 U.S. 332, 335–36, 357 (1982).

[72] *See id.* at 349.

[73] *Id.* at 351.

[74] *See id.* at 357.

[75] *Id.* at 354–55. Congress has exempted several types of business activities from Sherman Act application. *See, e.g.*, 15 U.S.C. § 17 (1989) (labor organizations); Webb-Pomerene Act, 15 U.S.C. § 62 (1989) (export trade associations); McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1989) (state law supersedes Sherman Act with respect to insurance).

[76] *Maricopa County*, 457 U.S. at 354–55.

One commentator contends that the per se rule is, in effect, an effort to achieve judicial economy.[77] To that extent, it is typically applied whenever it appears that a meaningful inquiry into the reasonableness of an alleged price-fixing arrangement will be too complicated, costly or unlikely to uncover useful facts.[78] Nevertheless, judicial concern for market efficiency and consumer well-being, the commentator notes, has made it more difficult for plaintiffs to obtain per se evaluations.[79] This is because the per se rule's administrative efficiency may come at the expense of potential consumer benefits that only a more thorough inquiry could reveal.[80] Therefore, the per se rule is often abandoned in favor of the rule of reason standard when the questioned activity results in beneficial effects.[81]

During the same period that the Supreme Court developed the per se rule, it developed the rule of reason standard.[82] In the 1911 case of *Standard Oil Co. v. United States*, the United States Supreme Court discussed the rule of reason, holding that the monopolistic practices of John Rockefeller's Standard Oil Company violated the Sherman Act.[83] The Court concluded that Standard Oil had violated the Sherman Act because it had acquired a monopoly over American oil in both its crude and refined states.[84] The Court reasoned that Congress intended the Sherman Act to make unlawful those anticompetitive conditions and enhancements of prices that were unreasonably restrictive.[85] The Court noted, however, that certain contracts or combinations could be formed with the legitimate purpose of reasonably pursuing business profits, and that the crux of the matter was the reasonableness of the pursuit.[86] The Court noted, therefore, that because the question is not whether a challenged

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[77] *See* KINTNER, *supra* note 29, § 8.3, at 363 (citing Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958)).

[78] *See id.* § 8.3, at 367.

[79] *See id.* § 8.3, at 363, 369–70.

[80] *See id.* § 8.3, at 369–70.

[81] *See id.*; National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 100–01 (1984) (per se rule inapplicable because horizontal market restraints were necessary to continued availability of product); Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19–20 (1979) (per se rule inapplicable because licensing arrangements were premised on considerations of practicality and economic efficiency).

[82] *See generally Broadcast Music*, 441 U.S. at 8; Board of Trade v. United States, 246 U.S. 231, 238 (1918); Standard Oil Co. v. United States, 221 U.S. 1, 66 (1911).

[83] *See* 221 U.S. 1, 66, 77 (1911).

[84] *Id.* at 77.

[85] *Id.* at 58.

[86] *Id.*

activity is a restraint of trade, but whether it is an unreasonable restraint of trade within the scope of the Sherman Act, the rule of reason is the appropriate standard to apply.[87] Moreover, the court will judge the reasonableness of the challenged activity based upon public policy and the activity's competitive effects.[88]

In 1918, in *Board of Trade v. United States*, the Supreme Court held that a rule established by the Chicago Board of Trade which set the price of a portion of the grain contracts traded when the Board was not open, did not violate the Sherman Act.[89] The Court reasoned that the established rule was not a violation because it affected only a small portion of the grain shipped to Chicago, it did not affect market prices in general and it resulted in several beneficial, procompetitive market effects.[90] Justice Brandeis, writing the unanimous opinion, noted that all agreements addressing trade issues restrain or regulate trade to some extent.[91] The important question, according to the Court, is whether such restraint is anticompetitive or whether its regulatory effects are actually procompetitive.[92]

The Supreme Court again applied the rule of reason standard in the 1979 case of *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* and held that licensing rights granted to Broadcast Music, Inc. ("BMI") and the American Society of Composers, Authors and Publishers ("ASCAP") did not constitute an anticompetitive practice in violation of the Sherman Act.[93] In *Broadcast Music,* the owners of copyrighted music granted to BMI and ASCAP the right to charge blanket percentages of revenues or flat dollar fees for use of their music.[94] The Court observed that the large number of users, the monitoring difficulties and the general impracticability in the music industry of negotiating each work on an individual

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[87] *Id.* at 66.

[88] *Id.*

[89] 246 U.S. 231, 237, 241 (1918).

[90] *See id.* at 240–41.

[91] *Id.* at 238.

[92] *Id.* Justice Brandeis also noted the factors relevant to this consideration:

> [T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id.

[93] 441 U.S. 1, 5, 24–25 (1979).

[94] *Id.* at 5.

basis created "unique market conditions" such that the blanket license system was not unreasonable.[95] The Court noted that determining whether the challenged activity would restrict competition and hamper productivity, or whether it would stimulate the market through increased competition, was of primary importance in this inquiry.[96]

One component of the *Broadcast Music* Court's analysis involved the similarity of the challenged activity to a provision of the Copyright Act.[97] The Copyright Act adopted a similar blanket licensing system for cable television transmission.[98] The Court analogized the Copyright Act to the practices of BMI and ASCAP, observing that the latter may have been conducting economically beneficial activities.[99] The Court thus established that economic considerations and other federal law are relevant factors in determining whether an activity should be upheld using the rule of reason.[100]

One commentator has noted that by 1984, the Supreme Court's dual approach to antitrust cases had grown somewhat confusing.[101] Justice White stated in *Broadcast Music* that absent the "plainly anticompetitive" nature of a challenged activity, and a court's "considerable experience" with the activity, the court should not apply the per se rule but should defer to the rule of reason standard.[102] The *Broadcast Music* Court further noted that market efficiency and procompetitive aspects of the activity were crucial factors in making a rule of reason determination.[103] In *Maricopa County*, however, the Court was presented with a situation where a group of physicians set a maximum fee as part of a physicians' medical society, thus benefiting patients through lower insurance premiums.[104] Nevertheless, Justice Stevens, who had dissented in *Broadcast Music*, stated in the majority opinion in *Maricopa County* that certain cases are not important enough for courts to waste time determining whether

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[95] *See id.* at 14–15, 24 (citing in part Memorandum for United States as *Amicus Curiae* on Pet. for Cert. at 10, K-91, Inc. v. Gershwin Publishing Corp., O.T. 1967, No. 147).

[96] *Id.* at 19–20.

[97] *See id.* at 15 (citing 17 U.S.C. app. § 111(d)(5)(A)).

[98] *Id.* (citing 17 U.S.C. app. § 111(d)(5)(A)).

[99] *Id.* at 15–16.

[100] *See id.*

[101] *See* Richmond, *supra* note 29, at 288.

[102] *See* 441 U.S. at 7–8, 9.

[103] *See id.* at 19 n.33, 19–20.

[104] Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 351–52, 357 (1982) (holding that the fee arrangement "fit squarely into the horizontal price-fixing mold" and was a violation of the Sherman Act).

procompetitive aspects outweigh anticompetitive aspects and therefore such cases warrant per se rule application.[105]

Justice Powell, dissenting in *Maricopa County*, noted that the Court had not cited any cases in which similar situations had been evaluated under the per se rule.[106] He further stated that the price-setting arrangement undertaken by the medical society was not plainly anticompetitive, and that therefore the per se rule ought not to apply.[107] According to one commentator, therefore, *Broadcast Music* and *Maricopa County* represent contrary interpretations of the standard under which alleged violations of the Sherman Act ought to be analyzed.[108]

The Supreme Court then held in 1984, in *National Collegiate Athletic Association v. Board of Regents*, that a National Collegiate Athletic Association ("NCAA") plan, which both limited the number of television appearances for its member schools and forbade them from selling any television rights outside the scope of the plan, violated the Sherman Act.[109] In effect, the NCAA plan established a minimum aggregate price which precluded the member schools from negotiating their own television deals.[110] The Court concluded that the NCAA's procompetitive interest in maintaining a competitive balance among college football teams did not outweigh the anticompetitive effects of the plan.[111] Thus, by balancing the restraints against the benefits, the Court rejected an application of the per se rule.[112]

One commentator has noted the significance of the *NCAA* Court's refusal to apply the per se rule.[113] Because the NCAA plan precluded the member schools from negotiating their own deals, and given that the member schools compete with one another, the *NCAA* Court concluded that this restriction constituted horizontal

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[105] *Maricopa County*, 457 U.S. at 344 n.16 (citing Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977)); *Broadcast Music*, 441 U.S. at 25 (Stevens, J., dissenting).

[106] 457 U.S. at 360 (Powell, J., dissenting).

[107] *Id.* at 363–64 (Powell, J., dissenting). Justice Powell noted: "It is settled law that once an arrangement has been labeled as 'price fixing' it is to be condemned *per se*. But it is equally well settled that this characterization is not to be applied as a talisman to every arrangement that involves a literal fixing of prices." *Id.* at 361–62 (Powell, J., dissenting).

[108] *See* CARLA A. HILLS, ANTITRUST ADVISER § 1.09, at 14 n.89, 14–16 (3d ed. 1985); Richmond, *supra* note 29, at 288.

[109] 468 U.S. 85, 94, 120 (1984).

[110] *Id.* at 99–100.

[111] *Id.* at 117.

[112] *See id.* at 100–01.

[113] *See* KINTNER, *supra* note 29, § 8.3, at 32 (Supp. 1992).

price-fixing.[114] Justice Stevens, writing for the majority, recognized that the probability of a horizontal price-fixing arrangement being anticompetitive is so strong that it would, under ordinary circumstances, be ruled illegal per se.[115]

NCAA presented circumstances, however, such that the Court found application of the per se rule to be inappropriate.[116] The Court observed that the NCAA was a nonprofit organization, and that the NCAA had played a role in fostering intercollegiate athletic competition for many years.[117] Nevertheless, these factors were not sufficient for the Court to abandon the per se rule.[118] Rather, the Court noted that horizontal restraints are required in the college football industry if there is to exist a college football "product," and that, for this reason, it should not apply the per se rule.[119] Analysis under a different standard, the Court therefore noted, was required to properly judge the anticompetitive nature of the NCAA plan.[120] The Court concluded that the ultimate criterion for proper analysis of alleged Sherman Act violations is the questioned activity's impact on competition.[121]

Commentators have had difficulty interpreting the *NCAA* decision.[122] One commentator has suggested that the *NCAA* decision restricts the application of the per se rule by instead applying the rule of reason to certain horizontal price-fixing arrangements.[123] This commentator further notes that the standard enunciated in *NCAA* differs from the rule of reason standard because it does not refer to market efficiency or other policy justifications, but permits further inquiry only if the availability of the "product" is in jeopardy.[124] In that sense, the commentator contends that the *NCAA* approach is an application of the rule of reason in narrow circumstances that traditionally would call for per se rule application.[125]

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[114] 468 U.S. at 99–100.

[115] *Id.* at 87, 100.

[116] *Id.* at 100.

[117] *Id.* at 100–01.

[118] *Id.*

[119] *Id.* at 100–01.

[120] *See id.* at 103.

[121] *Id.* at 104.

[122] *See* KINTNER, *supra* note 29, § 8.3, at 32 n.105a (Supp. 1992); Kreisler, *supra* note 1, at 227–28; Richmond, *supra* note 29, at 293–94.

[123] *See* Richmond, *supra* note 29, at 294.

[124] *See id.*

[125] *See id.* at 295. For the purposes of this note, therefore, the *NCAA* approach will be considered a third mode of interpretation in the Supreme Court's analytical framework for

Although *NCAA* can be interpreted as an attempt to bridge the gap between *Broadcast Music* and *Maricopa County*, one commentator has suggested that its effect on modern antitrust doctrine remains uncertain.[126] This commentator notes that although it is settled that many horizontal price-fixing arrangements will be subject to evaluation under the per se rule, it is not clear exactly which ones.[127] The Court has, however, established the following elements for consideration: first, a nonprofit entity is not necessarily shielded from Sherman Act application;[128] second, "good motives" alone will not exempt an activity that would otherwise be considered unlawful as a Sherman Act violation;[129] third, Congress is free to amend the Sherman Act to exclude from its ambit activities that, if challenged under the current modes of analysis, would be declared unlawful;[130] and fourth, the ultimate goals of both the per se rule and the rule of reason are to gauge the competitive effect of the challenged activity.[131] The difference between the rule of reason and the per se rule, according to the *Broadcast Music* Court, lies in the depth of the necessary inquiry.[132] With the previous discussion of the standards that the Supreme Court uses to weigh alleged antitrust violations as a background, the following section will recount the current Justice Department antitrust investigation of financial aid information-sharing and discuss the present status of both the government's suit against MIT and the *Kingsepp* class action.

II. The Overlap Group, the Justice Department Investigation and Pending Litigation

A. *The Overlap Group and the Concept of Need-Based Financial Aid Analysis*

On May 2, 1989, *The Wall Street Journal* ("*Journal*") reported that the financial aid officers of twenty-three colleges and univer-

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antitrust cases. *Cf.* Kreisler, *supra* note 1, at 227 (*NCAA* represents a "qualified per se" analysis); Richmond, *supra* note 29, at 295 (*NCAA* represents an "enhanced per se" analysis).

126 *See* Richmond, *supra* note 29, at 288, 295–96.

127 *Id.* at 295–96.

128 *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975). See *supra* text accompanying notes 46–52 for a discussion of *Goldfarb*.

129 National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 101 n.23 (1984). See *supra* text accompanying notes 109–21 for a discussion of *NCAA*.

130 Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 354–55 (1982). See *supra* text accompanying notes 71–76 for a discussion of *Maricopa County*.

131 *NCAA*, 468 U.S. at 103.

132 *See* Broadcast Music, Inc. v. CBS, 441 U.S. 1, 7–8 (1979). See *supra* text accompanying notes 93–100 for a discussion of *Broadcast Music*.

sities in the Northeast convened annually each spring in a group known as the Overlap Group.[133] The article is considered to have provided the impetus for the Justice Department's investigation.[134] The Overlap Group, however, was not a recent phenomenon.[135] It had been organized in the 1950s as an effort to devote financial aid resources to students who could demonstrate need rather than spending those resources on students of tremendous academic or athletic caliber.[136] The *Journal* questioned, however, whether these meetings constituted collusion.[137]

At their meetings, the members of the Overlap Group broke down into two contingents: the "Ivy Overlap Group" comprised of the eight Ivy League schools and MIT; and the "Pentagonal/Sisters Group" comprised of the remaining fourteen schools.[138] The *Journal* reported that the financial aid officers at the meeting would share financial data on financial aid applicants that had been admitted to more than one of the schools.[139] The result of this information exchange, the *Journal* stated, was uniform financial aid of-

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[133] Gary Putka, *Do Colleges Collude on Financial Aid?*, WALL ST. J., May 2, 1989, at B1.

[134] David Johnston, *Top Colleges' Scholarships Under Scrutiny*, N.Y. TIMES, Aug. 10, 1989, at A1.

[135] *See* Durkee & Berek, *supra* note 2, at 1.

[136] *Id.* at 1. This need to democratize and make the financial aid process consistent led to the formation in 1954 of the College Scholarship Service, which, through its standardized forms, now provides certain financial information about all students applying for financial aid to approximately 1,800 member schools. *Id.* at 2. The student authorizes the College Scholarship Service to release the relevant information to the schools to which the student applied. These forms allow the College Scholarship Service to conduct need-based analysis with two primary goals: determining the amount of money a student and the student's family are capable of contributing to education costs; and assuring that similarly situated students in terms of financial need receive similar amounts of aid. Oakley, *supra* note 14, at 4. The formulas used to make these determinations include variables such as income, savings, debt, pension plans, other family education obligations and extraordinary circumstances. *See id.* The ultimate award may take the form of a direct grant, a loan or a job on campus. Durkee & Berek, *supra* note 2, at 4. Grants and loans provided through financial aid may come from the college directly, a state program or the federal government. College Scholarship Service, *Financial Aid Form: School Year 1992–93*, at 1. The primary federal financial aid programs are called Pell Grants, Supplemental Educational Opportunity Grants, College Work-Study, Perkins Loans and Stafford Loans. *Id.*

[137] *See* Putka, *supra* note 133, at B1. The article describes the Overlap Group as "a price-fixing system that OPEC might envy." *Id.*

[138] *Id.* See *supra* note 4 and accompanying text for a list of all the colleges and universities represented in the Overlap Group.

[139] *See* Putka, *supra* note 133, at B1. The typical practice among the member schools of the Overlap Group is to make a determination on an applicant's admission status before considering the applicant's financial need. *See* Goldsmith, *supra* note 14, at 22; Oakley, *supra* note 14, at 3. Smith College, however, announced in 1990 that this would no longer be its policy. *Campus Life: Smith: Ability To Pay Becomes Factor in Admissions*, N.Y. TIMES, May 6, 1990, at § 1, part 2, at 51.

fers.[140] The author of the *Journal* article hypothesized a scenario where two Ivy League schools would share their data on a high school student admitted to both institutions.[141] In the example, one of the schools had preliminarily determined that the student's family was able to contribute $6,000; the other school had reached a figure of $7,000.[142] After sharing information, according to this example, both schools agreed that the student could contribute $7,000, thereby depriving the student of the $1,000 savings otherwise obtainable at one school.[143]

The schools characterize the mission of the Overlap Group quite differently.[144] First, they note that the existence of the Overlap Group and its activities have been publicized regularly over the years and that its meetings have not been secret.[145] Second, the sharing of financial information, they argue, fills in knowledge gaps resulting from the incomplete provision of information to some schools.[146] These exchanges could also result in a school raising its preliminary award if information obtained at the meeting demonstrated that a student's need was greater than previously estimated.[147] Third, the schools argue that the need-based evaluations undertaken by the Overlap Group are mandated by federal policy espoused in the congressional methodology that applies to schools awarding federal financial assistance.[148] Moreover, the schools contend that the meetings allow the schools' financial aid officers to discuss possible ways of determining realistic family contribution amounts in situations not covered by the congressional methodology, including the value of non-cash benefits and contributions of

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[140] *See* Putka, *supra* note 133, at B1.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *See generally* Durkee & Berek, *supra* note 2, at 3–4; Oakley, *supra* note 14, at 4–5.

[145] *See* Vobejda, *supra* note 18, at A3.

[146] *See* Putka, *supra* note 4, at B5.

[147] *Id.*

[148] Durkee & Berek, *supra* note 2, at 3; *see also* Higher Education Act of 1965, 20 U.S.C. §§ 1087dd(b)(1), 1091(b) (1989). Federal law provides the mechanism by which institutions of higher education must award various federal grants and loans administered by the schools. *See* 20 U.S.C. § 1087kk-vv (1989 & Supp. II 1990); Durkee & Berek, *supra* note 2, at 3. This mechanism is referred to as the congressional methodology. *See* Durkee & Berek, *supra* note 2, at 3. Its calculations are based upon the cost of attendance and a determined family contribution that is subtracted from the cost of attendance to determine a student's need. 20 U.S.C. § 1087ll-mm (1989) (aid award calculus). The formulas for determining the family contribution are based upon the income level and asset holdings of parents and students and are also mandated by law. *See generally* 20 U.S.C. § 1087nn-vv (1989 & Supp. II 1990).

non-custodial parents.[149] Fourth, the schools argue that need-based awards increase the diversity of the student body by maximizing the benefit to all concerned through an equitable cash allocation.[150] Finally, it has been argued that the Overlap Group's exchange of information was only an exchange, with the individual schools making the final financial aid awards.[151]

B. *The Justice Department Investigation*

In August of 1989, several Overlap Group members and other prestigious colleges and universities acknowledged that they were under investigation by the Justice Department for potential federal antitrust law violations in connection with such information-sharing meetings.[152] The schools became aware of the investigation in the summer of 1989 when they received documents from the Justice Department called civil investigative demands ("CIDs").[153] The Jus-

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[149] Durkee & Berek, *supra* note 2, at 3.

[150] *Id.* at 4–5.

[151] *Id.* at 4. Irving Scher, in his post as head of the American Bar Association's antitrust section, stated that the mere exchange of information is not necessarily illegal unless accompanied by evidence of uniform price-setting. Barrett & Chipello, *supra* note 3, at B2.

[152] *See generally* Vobejda, *supra* note 18, at A3. See *supra* note 11 for a list of the schools acknowledging their roles in the investigation. Both an article in the *Journal* regarding the financial aid meetings and spiraling tuition rates probably aroused the suspicion of the Justice Department. *See* Gary Putka, *Elite Private Colleges Routinely Share Plans for Raising Tuition*, WALL ST. J., Sept. 5, 1989, at A1 (tuition rates); Johnston, *supra* note 134, at A1 (*Journal* article instigates probe). A "confidential" document regarding tuition prices drafted by the Office of the Treasurer of Wesleyan University and released on March 4, 1988 drew special attention. *See* Putka, *supra*, at A1. Wesleyan made the document public to assist in countering the outcry that followed the school's announcement of a 7.5% increase in total student charges for the 1988–89 school year. *See id.* The document showed that Wesleyan's planned increase fell within the spectrum of planned cost increases at other prestigious northeastern schools by listing the percentage hikes that the other schools would undertake. *Id.* What aroused the greatest suspicion, however, was that most of the schools referred to had not yet announced their cost increases for the following school year. *Id.* Wesleyan did not disclose how it had acquired this information, and this lack of disclosure fueled the debate that had been growing over escalating tuition costs at private colleges and universities across the United States. *See id.* Between the 1971–72 school year and the 1989–90 school year, tuition at private four-year schools had risen fivefold. Paul M. Barrett, *U.S. Charges 8 Ivy League Universities and MIT with Fixing Financial Aid*, WALL ST. J., May 23, 1991, at A16. Over the same time span, however, the consumer price index had only increased threefold. *Id.* Additionally, in December, 1988, President George Bush held a meeting with ten college presidents at which former White House Chief of Staff John Sununu—with two of his eight children attending college at the time—lectured the college presidents for what he believed to be excessive tuition increases. Putka, *supra*, at A1.

[153] Vobejda, *supra* note 18, at A3. A CID is a noncriminal inquiry that mandates the production of documents or other information relevant to an investigation. *Understanding the Antitrust Investigation*, *supra* note 9, at 18–19.

tice Department requested that the schools produce memoranda, documented expense accounts, travel vouchers, telephone logs of certain employees and other background papers relating to the setting of financial aid awards.[154] The administrative costs of complying with these requests grew to be large.[155] For example, Dartmouth College alone spent $400,000 and submitted 20,000 pages of documents to the Justice Department to comply fully with the CID.[156] The high compliance costs led schools to complain in the media about the random, undefined nature of the Justice Department's requests.[157]

The central allegations arising from this investigation were that the Overlap Group, in violation of the Sherman Act, shared financial data on students with the intent of eliminating significant differences among preliminary awards.[158] As a result of this process, the Justice Department further alleged that individual family contributions would be similar at each of a student's potential schools of matriculation.[159] The Justice Department has implicitly asserted that these determinations should be based on "merit," defined as academic achievement, talent or contribution to diversity.[160]

In an attempt to cooperate with the investigation, the Overlap Group announced in March 1991 that it would not meet that year as a gesture of "good faith."[161] Later that month, the Overlap Group made a proposal offering to stop all allegedly collusive activity in exchange for the Justice Department's agreement to end the inves-

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[154] *Understanding the Antitrust Investigation*, *supra* note 9, at 18–19; Vobejda, *supra* note 18, at A3. The Justice Department also requested information pertaining to the setting of tuition and faculty salaries. *Understanding the Antitrust Investigation*, *supra* note 9, at 18–19. The Justice Department did not allege illegal sharing of these types of information in its lawsuit, however, and a full discussion of these topics is beyond the scope of this note. *See generally* Plaintiff's Complaint for Equitable Relief for Violation of 15 U.S.C. § 1, Sherman Antitrust Act at 5–6, United States v. Brown Univ., No. 91–CIV–3274 (E.D. Pa. filed May 22, 1991) (tuition and faculty salary setting not alleged).

[155] Mashek & Flint, *supra* note 4, at 38.

[156] *Id.* Following its recent receipt of notification that it is no longer under investigation, Ohio Wesleyan University President David L. Warren stated that compliance had cost that school approximately $200,000, an amount that he said is enough to increase tuition. Scott Jaschik, *Justice Department Ends Its Antitrust Inquiry at 19 Colleges; Their Leaders Express Relief*, CHRON. HIGHER EDUC., Jan. 29, 1992, at A27. See *supra* notes 11–12 and accompanying text for a discussion of the recent end of the Justice Department's inquiry concerning twenty-five of the colleges and universities.

[157] Mashek & Flint, *supra* note 4, at 38.

[158] Plaintiff's Complaint at 5–6, *Brown Univ.*, No. 91–CIV–3274.

[159] *Id.* at 6.

[160] *See id.* at 5.

[161] Putka, *supra* note 4, at B1.

tigation.[162] The government rejected this proposal, which led some experts to speculate that it had a strong case and was unwilling to settle for a mere prospective agreement to disband the Overlap Group.[163]

In fact, the Justice Department did formally file civil charges against the nine members of the "Ivy Overlap Group" on May 22, 1991, requesting equitable relief in the form of a ten-year injunction against such meetings and the mandatory creation of a comprehensive program to assure the schools' compliance.[164] Nevertheless, this civil suit was filed in conjunction with a consent decree formally settling the dispute concerning the eight Ivy League schools.[165] The consent decree effected a type of "immediate settlement" under which the schools, despite agreeing to refrain in the future from such meetings or financial aid information exchanges, denied all liability in exchange for the government's agreement to dismiss the suit.[166] The consent decree does not bar the schools from appealing to Congress, however, and officials from at least two of the Ivy League schools have stated publicly that they will pursue a legislative solution to the issue.[167] The schools view the Justice Department's

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[162] Gary Putka & Paul M. Barrett, *Justice Department Spurns a Proposal by Colleges to Settle Antitrust Inquiry*, WALL ST. J., Mar. 21, 1991, at A3. Barnard College and Yale University withdrew from the Overlap Group in 1990. Putka, *supra* note 4, at B1.

[163] Putka & Barrett, *supra* note 162, at A3.

[164] Plaintiff's Complaint for Equitable Relief for Violation of 15 U.S.C. § 1, Sherman Antitrust Act at 9–10, United States v. Brown Univ., No. 91–CIV–3274 (E.D. Pa. filed May 22, 1991). The members of the Ivy Overlap Group were Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, MIT, Princeton University, the University of Pennsylvania and Yale University. *See* Putka, *supra* note 133, at B1.

[165] *See* United States v. Brown Univ., No. 91–CIV–3274 at 1 (E.D. Pa. filed May 22, 1991) (order approving consent decree).

[166] *See Brown Univ.*, No. 91–CIV–3274 at 1–2, 4–5 (order approving consent decree); Mashek & Flint, *supra* note 4, at 38. The schools also agreed not to exchange information regarding tuition and faculty salaries, although these activities were not alleged in the government's complaint. Barrett, *supra* note 152, at A16.

[167] *Brown Univ.*, No. 91–CIV–3274 at 10 (order approving consent decree); DePalma, *supra* note 9, at A12 (Columbia University); Mashek & Flint, *supra* note 4, at 38 (Yale University). In fact, the Senate recently passed legislation reauthorizing the Higher Education Act for the next seven years. S. 1150, 102d Cong., 2d Sess. (1992); *see also* Thomas J. DeLoughry, *Senate Approves Massive Legislation for Higher Education*, CHRON. HIGHER EDUC., Mar. 4, 1992, at A27. Certain provisions of this legislation discuss the authority of colleges and universities to award need-based aid. S. 1150, 102d Cong., 2d Sess. § 499C (1992). The Senate version of the bill provides that schools may agree with other schools to award financial aid only on the basis of demonstrated need, provided that the formulas applied are adopted unilaterally. *Id.* § 499C(a)(1). The bill also provides that schools may continue to collect data from processors of financial aid information provided that they collect data only on their applicants and do not obtain the names of other schools to which the applicants have applied. *Id.* § 499C(a)(3). The bill specifically states that except for the allowance for agreements to

action as a threat to American public education policy because they contend that need-based analysis promotes diversity and the ideal of making education available to all students, regardless of wealth.[168]

C. *Pending Litigation*

MIT did not join the consent decree, and the school remains a defendant in the government's civil lawsuit.[169] Officials at MIT stated publicly at the time that the decision not to take part in the settlement was based on their firm belief that Overlap Group meetings did not violate federal antitrust law.[170] With the lawsuit continuing against MIT, therefore, the school filed its answer to the government's complaint on July 8, 1991.[171] It admitted that it had belonged to the Overlap Group since 1958 and that it had agreed with the other original defendants to award financial aid solely upon the basis of need.[172] It denied, however, that the members of the Overlap Group use an agreed-upon uniform formula to determine an applicant's financial aid award.[173] In fact, MIT asserted as affirmative defenses that the challenged activities did not constitute business competition as contemplated by the Sherman Act, and that, on the contrary, its dedication to providing financial aid based upon need is both consistent with and required by federal law.[174]

Following the publicity surrounding the acknowledged receipt of CIDs by members of the Overlap Group and other institutions, a Wesleyan student filed a separate lawsuit against the Ivy League schools, Stanford University, Amherst College, Wesleyan University and Williams College.[175] Roger Kingsepp filed the lawsuit in federal

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award need-based aid discussed above, nothing in the bill precludes the application of antitrust laws to colleges and universities. *Id.* § 499C(b). Moreover, nothing in the bill affects the terms of the consent decree entered into by the Ivy League schools. *See id.* The House of Representatives is considering a similar version of the bill. DeLoughry, *supra*, at A27, A30.

[168] Durkee & Berek, *supra* note 2, at 4–5; Oakley, *supra* note 14, at 5.

[169] Mashek & Flint, *supra* note 4, at 38.

[170] *See* DePalma, *supra* note 9, at A12.

[171] Paul E. Gray, *Measure Need, Not Money*, N.Y. TIMES, July 22, 1991, at A15. The government's lawsuit was scheduled to go to trial on June 25, 1992. United States v. Brown Univ., No. 91–CIV–3274 at 1 (E.D. Pa. filed April 24, 1992) (order setting trial date).

[172] Answer of Defendant Massachusetts Institute of Technology at 6, United States v. Brown Univ., No. 91–CIV–3274 (E.D. Pa. filed July 8, 1991).

[173] *Id.* (referring to Plaintiff's Complaint for Equitable Relief for Violation of 15 U.S.C. § 1, Sherman Antitrust Act at 6, United States v. Brown Univ., No. 91–CIV–3274 (E.D. Pa. filed May 22, 1991)).

[174] *See id.* at 8.

[175] Plaintiff's Complaint at 1, Kingsepp v. Wesleyan Univ., No. 89–CIV–6121 (S.D.N.Y. filed Sept. 15, 1989); Francis Oakley, *supra* note 14, at 1–2.

court in New York on September 15, 1989, alleging that the defendant colleges and universities had conspired to fix or inflate the price of tuition and financial aid.[176] In the complaint, the allegedly injured students are labeled "higher education shoppers."[177] Currently, the lawsuit is seeking class certification and is pending trial in the Southern District of New York.[178]

Kingsepp brought the lawsuit on behalf of himself and "all others similarly situated," a number that could exceed 150,000.[179] Potential plaintiffs in the class include present and former students at the colleges and universities that are defendants in this lawsuit.[180] The complaint requests total damages consisting of actual and compensatory damages, treble damages and a permanent injunction prohibiting tuition and financial aid collusion in the future.[181]

Pending the lawsuit, it remains unclear what, if any, impact the consent decree in the Justice Department's action will have on this lawsuit.[182] The consent decree's language specifies that it will "neither impair nor assist" related private litigation.[183] Moreover, federal law provides that consent decrees rendered before a court hears evidence shall not be used against a defendant in another action brought by a third party.[184] Nevertheless, Steven Kramer, the attorney representing Kingsepp, has suggested that the cancellation of 1991's Overlap Group meeting should be construed as a recognition that the schools were engaging in an illegal practice.[185]

III. An Analysis of the Overlap Group's Activities Within the Statutory Framework of the Sherman Act

To analyze the respective positions of the Justice Department and the Overlap Group, it is necessary to determine the competitive

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[176] Plaintiff's Complaint at 1, 2, *Kingsepp*, No. 89-CIV-6121.

[177] *Id.* at 3.

[178] *See id.* at 1; Barrett, *supra* note 152, at A16.

[179] *See* Plaintiff's Memorandum in Support of Motion for Class Certification at 5, Kingsepp v. Wesleyan Univ., No. 89-CIV-6121 (S.D.N.Y. filed Oct. 27, 1989); Plaintiff's Complaint at 1, *Kingsepp*, No. 89-CIV-6121.

[180] Plaintiff's Memorandum in Support of Motion for Class Certification at 1, *Kingsepp*, No. 89-CIV-6121.

[181] Plaintiff's Complaint at 5, *Kingsepp*, No. 89-CIV-6121.

[182] Mashek & Flint, *supra* note 4, at 38. The eight Ivy League schools were originally named as defendants in both actions. Plaintiff's Complaint for Equitable Relief for Violation of 15 U.S.C. § 1, Sherman Antitrust Act at 1, United States v. Brown Univ., No. 91-CIV-3274 (E.D. Pa. filed May 22, 1991); Plaintiff's Complaint at 1, *Kingsepp*, No. 89-CIV-6121.

[183] Barrett, *supra* note 152, at A16.

[184] 15 U.S.C. § 16 (1989).

[185] *See* Putka, *supra* note 4, at B5.

effect of the schools' practices.[186] Although it was successfully argued in *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.* that the Sherman Act was not intended to apply to nonprofit organizations or institutions of learning, the Supreme Court has since broadened the scope of the Sherman Act to include the activities of nonprofit organizations.[187] Thus, that argument alone is unlikely to protect the schools.[188]

Assuming the Sherman Act applies, the courts will have to decide which standard should be applied to the situation. As discussed in section I of this note, the threshold inquiry must be whether the Overlap Group's meetings constituted a horizontal price-fixing arrangement that was plainly anticompetitive such that the per se rule is applicable, or whether further inquiry under the rule of reason is necessary.[189] As noted previously, horizontal price-fixing occurs when similarly situated parties that compete in the distribution of a service or good make agreements that eliminate price as an element of that competition.[190] Taken in that context, the practices of the Overlap Group appear suspect. The private colleges and universities are competitors to the extent that they compete for the most qualified high school graduates.[191] It is reasonable, further, to regard the schools' provision of higher education as the distribution of a product.[192] Therefore, if it can be shown that the alleged standardization of financial aid awards constitutes an agreement to fix prices, a court may presume that the schools were engaged in horizontal price-fixing.[193]

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[186] *See* National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 103 (1984).

[187] *See NCAA*, 468 U.S. at 100, 120 (nonprofit association held in violation of Sherman Act). *But see* Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 n.15 (1940) ("business competition" was the problem contemplated by the statute); Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schs., Inc., 432 F.2d 650, 654 (D.C. Cir. 1970) (proscriptions of Sherman Act designed for business world rather than for noncommercial applications in the liberal arts or learned professions), *cert. denied*, 400 U.S. 965 (1970).

[188] *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 339, 357 (1982) (society of physicians held in violation of Sherman Act despite the society's nonprofit status).

[189] See *supra* notes 28–132 and accompanying text for a discussion of judicial interpretations of the Sherman Act.

[190] See *supra* note 54 for a discussion of horizontal price-fixing.

[191] *See* Richmond, *supra* note 29, at 276.

[192] *Id.*

[193] *See id.* While financial aid awards and tuition are understandably intertwined concepts from the perspective of a high school student, the processes by which they are determined are discrete within the schools. *See generally* Oakley, *supra* note 14, at 3. The Justice Department did not include in its civil action against the members of the Ivy Overlap Group any allegations pertaining to either tuition price-fixing or faculty salary-fixing. *See* Plaintiff's

The allegations in the government's lawsuit against MIT do not fit clearly into any one mode of analysis nor are they capable of simple resolution. It is uncontested that the members of the Overlap Group exchanged information for the purpose of awarding financial aid based on need rather than "merit" as defined by the Justice Department.[194] The federal courts hearing the *Kingsepp* case and the Justice Department's action will still have to decide, however, whether the Overlap Group members used an agreed-upon, uniform formula to standardize the award that an applicant admitted to more than one of the schools would receive.[195] MIT has denied this allegation.[196] Other schools have also suggested that although the meetings were for the purpose of sharing data, the individual schools' officials independently made the ultimate determinations.[197]

Even if the Overlap Group did make use of a uniform formula, it remains to be determined whether the practice of sharing information constitutes plainly anticompetitive price-fixing that warrants application of the per se rule.[198] To make this determination, a court must decide whether a financial aid award constitutes a "price" within the contemplation of federal antitrust law. While the financial aid award alone is not the price a student will pay for an education, it can be viewed as the discount from that price. Therefore, because it has a direct and easily calculated effect on the price, the financial

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Complaint for Equitable Relief for Violation of 15 U.S.C. § 1, Sherman Antitrust Act at 5–6, United States v. Brown Univ., No. 91–CIV–3274 (E.D. Pa. filed May 22, 1991). Why this omission existed given the scope of inquiry contained in the CIDs is not clear. Barrett, *supra* note 152, at A16. Nevertheless, the consent decree included a promise by the schools to refrain from such actions in the future and the topic has stirred interest in the press. *See id.*; DePalma, *supra* note 9, at A1.

In general, a college education at a private institution has become an extremely expensive undertaking in the past twenty years. *See* Barrett, *supra* note 152, at A16. Once higher education is deemed a product, there can be no more accurate representation of its "price" than tuition, even though it may represent a portion of a college's determination of the cost of that education, the remainder being offset by endowments or annual pledge drives. *Cf.* Oakley, *supra* note 14, at 2–3. Other elements of the total price of a college education, however, may include room and board and other fees. *See* Answer of Defendant Massachusetts Institute of Technology at 5, United States v. Brown Univ., No. 91–CIV–3274 (E.D. Pa. filed July 8, 1991).

[194] Answer of Defendant Massachusetts Institute of Technology at 6, *Brown Univ.*, No. 91–CIV–3274; Plaintiff's Complaint at 5, *Brown Univ.*, No. 91–CIV–3274.

[195] *See* Answer of Defendant Massachusetts Institute of Technology at 6, *Brown Univ.*, No. 91–CIV–3274; Plaintiff's Complaint at 5, *Brown Univ.*, No. 91–CIV–3274.

[196] Answer of Defendant Massachusetts Institute of Technology at 6, *Brown Univ.*, No. 91–CIV–3274.

[197] *See* Durkee & Berek, *supra* note 2, at 4.

[198] See *supra* notes 60–81 and accompanying text for a discussion of the per se rule.

aid award would probably be considered a price for the purposes of Sherman Act analysis.

It is not clear that the information exchange constitutes the fixing of that price, however. First, the schools may not be "locked in" to a price determination calculated at the meeting, and if any individual school so desired, it would be free to increase or decrease its award.[199] Second, the concept of information exchange has become commonplace through the 1,800-member College Scholarship Service and the data it provides.[200] In terms of the competitive effect of the challenged activity, the information exchange is analogous to that in *Board of Trade v. United States*, where a rule setting the price of certain grain contracts affected only a small portion of the market and had several beneficial market effects.[201] First, the schools' practice affects only a portion of the market because a student is free to attend another school that did not take part in such an information exchange. Second, the schools defend the practice with public policy arguments grounded in federal law requirements that they conduct need-based analysis in awarding federal financial aid to students.[202] Because the per se rule applies only when the challenged activity is a blatant example of horizontal price-fixing, these two justifications would probably lead a court to decline to apply the per se rule.[203]

Thus, because application of the per se rule would be problematic, a court would probably analyze financial aid information-sharing by applying the rule of reason standard.[204] In *Board of Trade*, Justice Brandeis noted that every agreement restrains trade to some degree.[205] The purpose of the rule of reason standard is to discover if the restraint is an unreasonable suppression of competition, or if it is either a mere check on competition or even a competition-promoting device.[206] Thus, it is appropriate for a court to consider

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[199] See *supra* notes 138–51 and accompanying text for a discussion of how the Overlap Group's meetings operated.

[200] *See* Durkee & Berek, *supra* note 2, at 2. See *supra* note 136 for a discussion of the College Scholarship Service.

[201] *See* Board of Trade v. United States, 246 U.S. 231, 240–41 (1918).

[202] See *supra* note 147 for a discussion of federal law requirements.

[203] See *supra* notes 59–79 and accompanying text for a discussion of the per se rule. *See also* Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19–20 (1979) (per se rule to be applied only when challenged activity "facially appears to be one that would always or almost always tend to restrict competition and decrease output").

[204] See *supra* notes 60–81 and accompanying text for a discussion of the per se rule; notes 82–108 and accompanying text for a discussion of the rule of reason.

[205] Board of Trade v. United States, 246 U.S. 231, 238 (1918).

[206] *Id.*

facts peculiar to the business, the nature of the restraint, the effect of the restraint, the history of the restraint, the evil the restraint was designed to alleviate, the reason for the particular method chosen and the restraint's purpose.[207] In *Broadcast Music*, the Supreme Court more recently confirmed that application of the rule of reason is appropriate unless the arrangement is plainly anticompetitive and lacks any redeeming virtue.[208] Given the schools' arguments concerning the purpose of the Overlap Group meetings, their actual mechanics and the beneficial effects of need-based analysis, a court will almost certainly evaluate this issue according to the rule of reason standard.[209]

If the schools' assertion that the meetings were simply an exchange of information with no concomitant standardizing of the financial aid awards is true, then the inquiry is probably complete and no violation has occurred. Considering the justifications for ensuring that schools have complete financial information, the practice may be viewed as merely a supplement to the College Scholarship Service. If the awards then are actually determined on an individual basis, any restraint on trade would be too remote and conjectural for condemnation under the Sherman Act.

The question becomes more difficult, however, if the Justice Department's allegation that the schools use an agreed-upon formula to standardize the awards following the exchange of information is true.[210] Viewed in isolation, the practice appears to be a traditional antitrust violation: competitors conspiring to remove price as an element of consideration for consumers in making their choice as to whose product is best for them. As *Board of Trade* suggests, however, the situation cannot be viewed in isolation.[211] The meetings of the Overlap Group must be viewed in the context of their history, purpose and effect. Only then can it be fairly determined whether the meetings are an unreasonable restraint of trade.

Solid arguments exist on both sides of the issue. The consistency of the Overlap Group's practices with federally mandated

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[207] *Id.*

[208] Broadcast Music, Inc. v. CBS, 441 U.S. 1, 7–8 (1979).

[209] See *supra* notes 144–51 and accompanying text for a discussion of the schools' perspective on the Overlap Group meetings.

[210] See *supra* text accompanying notes 158–60 for a discussion of the Justice Department's allegations.

[211] *See* Board of Trade v. United States, 246 U.S. 231, 238 (1918) ("The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.").

need-based analysis for the disbursement of federal funds will likely influence a court toward the schools' position, however.[212] The schools have argued that the Overlap Group has existed for over thirty-five years and that they have publicized its existence and purpose.[213] The schools have also suggested that the exchange of information is simply an effort to fill in gaps in knowledge.[214] While these facts demonstrate the good intentions of the schools, they do little to shield them from the Sherman Act.[215]

A primary defense of the Overlap Group has been that, through need-based analysis, it seeks to promote diversity on college campuses by maximizing the benefit to all financial aid applicants through a proper and informed allocation of limited resources.[216] This argument, however, will not excuse a violation of the Sherman Act because "good motives" by themselves will not protect a challenged activity from federal antitrust law.[217] Encouraging diversity has become an extremely important priority to most colleges and universities in this country, but promoting such goals in this context may require congressional authority.[218]

The schools have noted, however, that need-based evaluation is mandated by the federal policy espoused in the congressional methodology that applies to schools awarding federal financial aid.[219] They argue that the Overlap Group meetings both fulfill this obligation and further the goal by providing a forum in which to discuss financial questions not covered by the congressional methodology.[220] This is a persuasive argument for three reasons. First, because colleges and universities conduct need-based analysis as a matter of course in awarding federal aid money, it is simple to use the same analysis in determining their own aid packages. Second, information-sharing already takes place on a much wider scale than the Overlap Group through the College Scholarship Service. Third,

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[212] See *supra* note 148 for a discussion of the federal law applicable to the disbursement of federal loans and grants.

[213] *See supra* text accompanying note 145.

[214] *See supra* text accompanying note 146.

[215] *See* National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 101 n.23 (1984) ("[G]ood motives will not validate an otherwise anticompetitive practice.").

[216] *See supra* text accompanying note 150.

[217] *See NCAA*, 468 U.S. at 101 n.23 (1984).

[218] See *infra* notes 237–48 and accompanying text for a discussion of both the policy implications of a finding that the Overlap meetings constituted a violation of the Sherman Act and the potential for legislative intervention.

[219] See *supra* note 148 for a discussion of the congressional methodology.

[220] *See supra* text accompanying note 149.

the federal law mandate of need-based analysis for determining financial need with respect to federal financial aid indicates federal support for the need-based analysis mechanism in general.

The first argument is one of economic efficiency. As noted above, different colleges and universities may be given different financial information on the same students.[221] This may result from different financial questions posed or from different deadlines. Information-sharing therefore supplements the need determination because schools with outdated or incomplete data can form a more accurate assessment of the student's potential family contribution. Because need-based analysis is required for disbursement of federal money and because most schools make determinations based on need for the disbursement of their own funds as well, they can do so most efficiently if they base both sets of aid on the same analysis.[222] To attempt to conduct need-based analysis for federal aid and merit-based analysis for school aid would be redundant and probably ultimately a fictional distinction.

Second, since the 1950s, most colleges and universities have obtained their primary financial data on students through the College Scholarship Service's standardized forms.[223] The Higher Education Act of 1965 was passed after the College Scholarship Service was formed in 1954.[224] In effect, then, the information that schools initially use to compute the congressional methodology formulas is information that any number of the 1,800 member schools in the College Scholarship Service could share.[225] Because certain schools supplement the information gathered by the College Scholarship Service with their own financial aid forms, associations such as the Overlap Group merely provide a second level of information exchange. The Overlap Group should not be singled out because it is smaller and comprised of what are considered "elite" or "prestigious" schools.

Third, the policy behind granting financial aid based upon need rather than merit is to make a college education, even at a private school, affordable to more students so that students are not

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[221] *See supra* text accompanying note 146.

[222] See *supra* note 136 for a discussion of how colleges and universities allocate financial aid resources.

[223] See *supra* note 136 for a discussion of the College Scholarship Service.

[224] Higher Education Act of 1965, 20 U.S.C. § 1070 (1989); *see also* Durkee & Berek, *supra* note 2, at 2 (College Scholarship Service formation date).

[225] See *supra* note 136 for a discussion of the size of the College Scholarship Service's subscription base.

denied an education at the school of their choice for monetary reasons.[226] The provisions of the Higher Education Act discussed in section II of this note reflect the policy that need-based analysis is also the appropriate method for determining federal financial aid awards.[227] Thus, the information exchange conducted by the Overlap Group in furtherance of more accurate need-based analysis is entirely consistent with this policy and should be viewed favorably by the courts.[228]

A court that applies the rule of reason standard should find that the Overlap meetings were not an unreasonable restraint of trade considering the federal requirement of need-based analysis regarding federal funds, the Overlap Group's goal of furthering the policy underlying need-based analysis and the precedent for information-sharing set by the College Scholarship Service. These arguments are further supported by the nonprofit status of the schools, the public nature of the meetings and the socially progressive ends sought to be attained. Although it is true that none of these arguments alone would shield the schools from Sherman Act application, they are relevant when considered in conjunction with the federal policy underpinnings outlined above.[229]

Finally, the issue could also be analyzed using the *NCAA* approach.[230] Although at least one commentator found the *NCAA* Court's analysis confusing, it may apply to the Overlap Group's practice of sharing information.[231] The *NCAA* Court noted that it did not apply the per se rule because horizontal restraints were necessary to ensure the continued availability of the college football product.[232] Likewise, to the extent that the *NCAA* approach is an exception to the per se rule, a court considering whether to apply the per se rule to allegations of financial aid price-fixing might find the *NCAA* approach preferable because resources for financial aid are finite and their continued availability is therefore in question.[233] For the less wealthy schools under investigation, dollars spent in

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[226] *See* Oakley, *supra* note 14, at 5.

[227] See *supra* note 148 for a discussion of the required analysis under federal law.

[228] *Cf.* Broadcast Music, Inc. v. CBS, 441 U.S. 1, 15–16 (1979) (blanket licensing system found to be consistent with approach taken by federal copyright law).

[229] *See* Board of Trade v. United States, 246 U.S. 231, 238 (1918) (relevant factors to be considered). See *supra* note 92 for a list of these factors.

[230] See *supra* notes 109–33 and accompanying text for a discussion of the *NCAA* approach.

[231] *See* Richmond, *supra* note 29, at 293–94 (*NCAA* approach is "murky and confused").

[232] National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 100–01 (1984).

[233] See *supra* notes 60–81 and accompanying text for a discussion of the per se rule; notes 110–34 and accompanying text for a discussion of the *NCAA* approach.

excess of an individual student's need may be dollars that cannot go to another student.[234] To that extent, higher education may be unavailable to those who do not receive the financial aid discount they require to attend. Under the *NCAA* line of reasoning, therefore, the restraint on trade resulting from the information exchange may not violate the Sherman Act because the exchange is necessary for the product to be available to a segment of the community that financial aid is intended to benefit.[235]

This argument has some weaknesses, however. First, some schools may have greater resources than others, such that a dollar going to one student does not necessarily mean a dollar taken from another student. Second, only a portion of higher education consumers will be unable to purchase the product, that is, will be unable to attend the school in question. *NCAA* only declined to apply the per se rule because the restraints on individual television contracts were necessary if the product was to be available *at all*.[236]

Of the three approaches discussed, then, the rule of reason is the appropriate standard to apply and, under this standard, the Overlap Group's practices should be found not to violate the Sherman Act. The Overlap Group's practice furthered the policy of need-based analysis in a manner consistent with federal laws governing federal financial aid. Whether a court will find that the colleges and universities have not violated the Sherman Act remains uncertain, however, given the recent confusion surrounding the Supreme Court's interpretations of the statute. Therefore, regardless of whether a court finds the Overlap meetings to have violated the Sherman Act, the following section argues for statutory exemption from the law on policy grounds.

IV. Policy Considerations and Statutory Intervention

A fair assessment of any challenged activity under the rule of reason standard will look to the purpose behind the adoption of the activity.[237] In the case of the Overlap Group, its meetings were designed in part to allow the schools to construct an accurate picture of each applicant's financial condition so that an equitable allocation of financial aid would result.[238] Through an equitable allocation of

[234] *See* Durkee & Berek, *supra* note 2, at 5.

[235] *See* 468 U.S. at 101.

[236] *See id.*

[237] *See* Board of Trade v. United States, 246 U.S. 231, 238 (1918).

[238] See *supra* notes 144–51 and accompanying text for a discussion of the Overlap Group's purposes.

cash, the schools aim to diversify by making it possible for more lower income students to attend.[239] This policy simply fulfills the schools' "fundamental social responsibility" as nonprofit organizations to make higher education available to all students, regardless of wealth.[240]

Without the exchange of financial information, the "bidding war" scenario would ensue.[241] Schools would compete for the best students with increased financial aid packages to the detriment of other students who would receive less aid. The result would likely be greater homogeneity at all schools because those requiring the most aid would be denied the necessary amount at each school. In other words, the incentive would be for all the schools to offer the bulk of their financial aid resources to the most qualified candidates.

As discussed earlier, two of the Ivy League schools have suggested appealing to Congress.[242] Clearly this option remains open to the schools because the consent decree specifically permits pursuing a legislative solution.[243] The recently passed Senate bill, which would reauthorize the Higher Education Act, permits need-based analysis on an individual basis among colleges and universities, but does little more than recognize that the issue has become important as a result of the Justice Department investigation.[244] Although the bill ostensibly sanctions need-based analysis, it effectively prohibits information-sharing, which does nothing to prevent the type of bidding scenario that defeats the very purpose of need-based analysis.[245] In fact, the legislation specifically provides that antitrust law does apply to colleges and universities.[246] Thus, even under this bill, colleges and universities will still not have access to the complete financial information necessary to make a knowledgeable judgment of an individual student's need. The consequences that will result, including bidding for the best students with financial aid resources and de-emphasizing diversity goals, will jeopardize the future of private, liberal arts education in this country.

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[239] *See* Durkee & Berek, *supra* note 2, at 5.

[240] *See* Oakley, *supra* note 14, at 5.

[241] *See supra* text accompanying note 15.

[242] See *supra* note 167 and accompanying text for a discussion of suggested legislative intervention.

[243] *See* United States v. Brown Univ., No. 91–CIV–3274 at 10 (E.D. Pa. filed May 22, 1991) (order approving consent decree).

[244] See *supra* note 167 for a discussion of the Senate bill's provisions.

[245] *See* S. 1150, 102d Cong., 2d Sess. § 499C(a)(1) (1992) (reauthorizing the Higher Education Act).

[246] *See id.* § 499C(b).

Congress needs to address the issue of financial aid information-sharing directly. A legislative solution should take the form of an exemption from the Sherman Act, which would have explicit statutory precedent in the fields of insurance, export trade and collective bargaining.[247] Given the mission of American colleges and universities to provide opportunities for lower income students and foster campus diversity, Congress should specifically exempt the sharing of students' financial data by colleges and universities as a supplement to its own policy of promoting need-based analysis.[248] Although such a move may not be a political priority, Congress should move educational policy to the forefront of the legislative agenda. By passing this exemption from the Sherman Act, Congress thereby ensures for lower income students the continued accessibility of the teaching and resources at some of this country's finest institutions of higher education.

V. Conclusion

Given the economic recession and the high costs of a private college education, access to financial aid resources has become a priority for both students and administrators. The information-sharing practice of the Overlap Group, designed to aid in an equitable allocation of these resources, does not violate section one of the Sherman Act. This note has considered the three modes of interpretation that the Supreme Court has historically used to weigh activities challenged under the Sherman Act: the per se rule, the rule of reason and the more recent *NCAA* approach. The rule of reason standard is the least stringent of the three. It should be applied to exonerate the schools in both the Justice Department lawsuit and the *Kingsepp* class action. Through this mode of analysis, a court would discover that information-sharing has been commonplace in the industry through the College Scholarship Service for over thirty years, and that the Overlap Group has been holding its meetings publicly over a similar span of time. In addition, the Overlap meetings were intended merely to supplement financial

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[247] *See* 15 U.S.C. § 17 (1989) (labor); Webb-Pomerene Act, 15 U.S.C. § 62 (1989) (export trade); McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1989) (insurance). See *supra* note 75 and accompanying text for a discussion of existing exemptions from the Sherman Act. The Supreme Court has also implicitly exempted all labor disputes in general from the Sherman Act. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 512 (1940).

[248] See *supra* text accompanying note 168 for a discussion of the mission of higher education.

data so that equitable allocations of financial aid would result. Finally, the schools' policy of promoting need-based analysis is mandated by federal law with respect to federal aid and is entirely consistent with federal law with respect to an institution's own funds.

A court may not agree with this analysis, however, because the colleges and universities cannot show actual procompetitive justifications. Congress should therefore act to specifically exempt from the Sherman Act information-sharing conducted for the purpose of facilitating more accurate determinations of students' financial need. This is entirely consistent with previously existing federal policy. Moreover, it is clear that the sharing of financial data affirmatively promotes diversity on campuses and assists in making private higher education available to all students regardless of income. These schools are nonprofit organizations and this is a worthy goal. It would be inequitable for a statute introduced to alleviate ills caused by what Senator Sherman himself called the "concentration of capital into vast combinations to control production and trade and to break down competition"[249] to prevent schools from sharing data to foster more accurate need-based analysis. In sum, although no violation of the Sherman Act should be found in either the Justice Department or the *Kingsepp* lawsuit, Congress should specifically address the issue by exempting financial aid information-sharing from the Sherman Act.

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[249] 21 CONG. REC. 2,455, 2,460 (1890) (statement of Sen. Sherman).